

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Christopher Roller,

Court File No. 27-CV-09-22812

Plaintiff,

v.

Wagner, Falconer, & Judd, Ltd.

Defendant.

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED AND
INSUFFICIENT SERVICE OF
PROCESS**

This matter is before the court on November 5, 2009 on Defendant Wagner, Falconer, & Judd, Ltd.'s ("Defendant") Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Insufficient Service of Process, for its Motion Defendant states as follows:

STANDARD OF PROOF

On a motion to dismiss for failure to state a claim upon which relief may be granted, the court is generally confined to the facts alleged in the pleadings. Minn. R. Civ. Pro. 12.02. The question before the court is whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). The court should consider only the facts alleged in the complaint, accepting those facts as true and construing all reasonable inferences in favor of the nonmoving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). However, the court should not accept as true bare assertions and conclusions of law in a complaint. *Zion Evangelical Lutheran Church of Detroit Lakes v. City of Detroit Lakes*, 21 N.W.2d 203, 204 (Minn. 1945).

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant

to Rule 12.02(e) of the Minnesota Rules of Civil Procedure serves a very limited function. *Northern States Power Company v. Franklin*, 122 N.W.2d 26, 27 (Minn. 1963). Unlike a motion for summary judgment where matters outside the pleadings are presented, a motion to dismiss will be granted only if it appears to a certainty from the pleadings as a whole that no facts exist which could be introduced consistent with the pleadings to support granting the relief demanded. *Id.* If matters outside the pleadings are submitted to the district court for consideration and not excluded, the court should convert the motion to a summary judgment motion. *Northern States Power Co. v. Minnesota Metropolitan Council*, 684 N.W.2d 485, 490 (Minn. 2004). However a court may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment. *Id.* To withstand a motion for judgment on the pleadings, the non-moving party must state facts that, if proven, would support a colorable claim and entitle it to relief. *Midwest Pipe Insulation, Inc. v. MD Mechanical, Inc.*, 771 N.W.2d 28, 31 (Minn. 2009) (citing *Northern States Power Co.* 122 N.W.2d at 29).

ANALYSIS

Motions to dismiss on the pleadings are evaluated by the courts on a case by case basis, where the court's function is to ascertain whether actual or potential underlying facts can be tied to any cognizable cause of action. *See e.g. Barton*, 558 N.W.2d at 749; *Bodah*, 663 N.W.2d at 550; *Northern States Power Company*, 122 N.W.2d at 26.

For example, in *Bodah*, employees brought an action against an employer for the employer's dissemination by fax of a list of 204 employee names and social security numbers to sixteen associated or related terminal managers in six states. 663 N.W.2d at 550. Thus, the Minnesota Supreme Court took the underlying facts as true, and examined those facts to see if they gave rise to a cause of action upon which relief could be granted under the theory of

invasion of privacy. *Id.* The court concluded that the dissemination by fax did not constitute publication to the public or to so large a number of persons that the matter must be regarded as substantially certain to become “public,” as required to support an invasion of privacy claim. *Id.* at 557. Likewise, Plaintiff in the case at hand fails to articulate facts that support a claim upon which relief can be granted.

a. DEFENDANT IS NOT REQUIRED TO REPRESENT PLAINTIFF, AND REFUSAL TO DO SO DOES NOT RESULT IN A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED

In the instant case, Plaintiff asserts that Defendant’s refusal to accept a legal case on a pro-bono basis and a conflict of interest between Plaintiff and Defendant entitle Plaintiff to relief. Complaint pg. 1-2. Defendant’s refusal to accept a legal case on a pro-bono basis is a factual assertion. Plaintiff’s allegation that a conflict of interest exists is a legal conclusion. Thus, Plaintiff’s assertions regarding Defendant’s refusal to take a pro-bono case must be taken as true for the purposes of this motion. *Bodah*, 663 N.W.2d at 553. No cognizable theory under law exists for an alleged refusal to accept a legal case (pro-bono or otherwise) which gives Plaintiff a claim upon which relief can be granted. No statute or rule states that lawyers are required to take pro-bono cases.

Lawyers are required to decline representation where representation will result in a violation of the Rules of Professional Conduct or other law. Minn. R. Pro. Resp. 1.16(a). Lawyers, and unrepresented parties, are under an obligation to certify that the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Minn. R. Civ. Pro. 11.02(b). Plaintiff states that Defendant refused to represent Plaintiff. Complaint at pg. 2. Plaintiff asserts that he has started lawsuits against, among other unnamed individuals, General Electric and David Copperfield. *Id.* In these suits, Plaintiff attempted “to

get compensated for the use of godly powers and magic shows which produce solutions that some would say defy explanation.” *Id.* at pg. 1. Obtaining compensation for the improper use of “godly powers” is not a valid claim. Even if such a claim did entitle Plaintiff to some form of relief, the court would have no jurisdiction over the use of “godly powers.” As such, no claim or action could be commenced to recover for the same. Even if Plaintiff’s factual contentions are taken as true, which they must be for the purposes of this motion, Defendant could not represent **Plaintiff in attempting to be compensated for “the use of godly powers”** as such contentions are not warranted by existing law or by a non-frivolous argument. Notwithstanding the fact that a law firm is under no legal obligation to accept any case, representation in pursuing such contentions would be a violation of Minnesota Rules of Professional Responsibility and would likely subject the firm to sanctions.

b. PLAINTIFF HAS NO COGNIZABLE CLAIM FOR A “CONFLICT OF INTEREST” FOR WHICH RELIEF CAN BE GRANTED

With regard to Plaintiff’s legal conclusion that a conflict of interest of interest existed between Plaintiff and Defendant and therefore Plaintiff should be monetarily compensated, Plaintiff admits that Defendant was never retained by Plaintiff. Complaint at pg. 2. A conflict of interest prevents representation, *See* Minn. R. Prof. Resp. 1.7(1). However, no cause of action exists for a conflict of interest where there has been no representation. There is no cause of action for an alleged “conflict of interest with me in general...” as Plaintiff argues. There are no statutes or rules imposing any fiduciary duties applicable to the facts referenced in the Complaint.

Further, Defendant’s refusal to represent Plaintiff did not prevent Plaintiff from suing

General Electric and David Copperfield in Federal District Court.¹ In each of these suits the court dismissed Plaintiff's claims for failure to state a cause of action upon which relief could be granted or upon Defendant's motion for summary judgment.

c. DEFENDANT PRESENTS MERE ALLEGATIONS OF FRAUD AND DISCRIMINATION, WITHOUT ANY FACTUAL OR LEGAL BASIS FOR THOSE CLAIMS

Plaintiff asserts in his last sentence that he is suing Defendant "for \$1 million for fraud and discrimination." Complaint pg. 3. For the purpose of testing the sufficiency of a pleading, a motion to dismiss does not take as true bare conclusions or assertions of law. *Zion Evangelical Lutheran Church of Detroit Lakes v. City of Detroit Lakes*, 21 N.W.2d 203, 204 (Minn. 1945). Fraud must be plead with particularity. Minn. R. Civ. P. 9.02; *Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 400 (Minn. 1996). The requirements for a plea of fraud are satisfied when the ultimate facts are alleged. *In re Estate of Williams*, 254 Minn. 272, 283, 95 N.W.2d 91, 100 (Minn. 1959). In this case, Plaintiff has failed to allege any facts to support his allegation of fraud. Regarding the allegation of discrimination, Plaintiff contends that Defendant advised him he did not have a claim for which Defendant was willing to represent him. Complaint pg. 2. Plaintiff further contends that at least one other law firm would also not represent Plaintiff in legal proceedings. *Id.* Both the allegations regarding fraud and discrimination in the Complaint are bare assertions and conclusions of law, with no underlying facts to support those allegations. As such, those claims should be dismissed. For these reasons, Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted.

¹ Defendant respectfully urges the court to examine the Complaints in the suits Plaintiff complaints defendant did not agree to represent Plaintiff, case numbers: 05-CV-01297-MJD-AJB, 05-CV-00446-JRT-FLN, and 07-CV-01182-JNE-JJG, the first two of which are attached hereto as Exhibits A & B respectively to the Affidavit of Matthew D. Resch.

d. DEFENDANT HAS FAILED TO PROPERLY SERVE PLAINTIFF WITH THE COMPLAINT

Defendant requests that the court rule on and dismiss the Complaint substantively for failure to state a claim upon which relief can be granted. However, so as to be considered waived, as of the date of this Motion, Defendant has not been properly served with Complaint and no pleading or affidavit establishes that Defendant was served with process. As such, under Minn. R. Civ. P. 12.02(d), dismissal for insufficiency of service of process is appropriate.

CONCLUSION

Defendant Wagner, Falconer, & Judd, Ltd. respectfully requests that the Complaint be dismissed with prejudice for failure to state a claim upon which relief can be granted and for insufficiency of service of process.

Dated: October 5, 2009

WAGNER, FALCONER & JUDD, LTD.



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