

DISTRICT OF MAINE

MURRAY KEATINGE,)
)
 Plaintiff)
)
 v.) **Docket No. 99-321-P-H**
)
 ELIZABETH E. BIDDLE, et al.,)
)
 Defendants)

**RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

The defendants, Elizabeth Biddle and Strout & Payson, P.A., a law firm, move for summary judgment on all counts of the first amended complaint. I recommend that the court grant the motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317,

325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The parties’ statements of material facts include the following relevant facts that are properly supported in the summary judgment record. In or about 1986, the plaintiff and his wife, Elisabeth, purchased real estate in Camden, Maine commonly referred to as *Greyrocks*. Defendants’ Statement of Material Facts as to Which There is No Genuine Issue to Be Tried, etc. (“Defendants’ SMF”) (Docket No. 21) ¶ 1; Plaintiff’s Rule 56 Opposing Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 27) ¶ 1. At about the same time, the plaintiff and his wife purchased the Norumbega Inn, a bed and breakfast located in Camden. *Id.* ¶ 2. On December 4, 1990 the plaintiff and his wife created the Keatinge Revocable Trust. *Id.* ¶ 3. On December 6, 1990 the plaintiff’s wife died; her will named the plaintiff as executor and their son, Kent Keatinge, as a beneficiary. *Id.* ¶¶ 3-4. Between 1986 and 1993, Kent was active in the family’s business affairs and lived and worked at both *Greyrocks* and the Norumbega Inn. *Id.* ¶ 8.

In 1992 Arthur Strout, an attorney with the defendant law firm, represented the plaintiff in proceedings before the Camden Board of Zoning Appeals in connection with a dispute with neighbors of the Norumbega Inn. *Id.* ¶ 5.

In February 1996 the plaintiff transferred all of his wife's interest in *Greyrocks* to himself as trustee of "the Marital Trust, a trust set up under the Revocable Trust." *Id.* ¶ 10. Also in 1996 Kent retained California counsel to protect his interests in the Revocable Trust. *Id.* ¶ 9. In 1997 the plaintiff began to experience serious health problems; in June 1997 he had a heart attack. *Id.* ¶ 11. While hospitalized for a cardiac bypass procedure, he sustained an infection and became comatose for several weeks. *Id.* As a result of the plaintiff's failing health, Kent sought appointment in the summer of 1997 as the plaintiff's conservator and guardian. *Id.* ¶ 13. He retained the defendant law firm to represent him in a conservatorship proceeding. *Id.* Biddle drafted the petition for appointment of Kent as conservator and the conservatorship plan. Separate Additional Facts ("Plaintiff's SMF"), included in Plaintiff's SMF at 4-9, ¶ 3; Response to Plaintiff's Opposing Statement of Material Facts ("Defendants' Responsive SMF") (Docket No. 31) ¶ 3. The defendant law firm prepared a list of the plaintiff's assets that was included in the petition. *Id.* ¶ 4. The plaintiff, through his fiancée, retained Elizabeth McCandless of McCandless & Hunt to represent him in contesting the conservatorship. Defendants' SMF ¶ 13; Plaintiff's Responsive SMF ¶ 13. Following resolution of the conservatorship proceeding, the plaintiff, in November 1997, executed a durable power of attorney, drafted by Biddle, allowing Kent to act on his behalf. *Id.* ¶ 14; Plaintiff's SMF ¶ 8; Defendants' Responsive SMF ¶ 8. In the late fall of 1997 the defendant law firm began to represent Kent on management issues concerning Kent's work at the Norumbega Inn. Plaintiff's SMF ¶ 7; Defendants' Responsive SMF ¶ 7. Biddle would also help Joanne Reuillard, a manager of the Norumbega Inn, negotiate management issues there. *Id.* ¶¶ 20-21.

In February 1998 the plaintiff traveled to California, where it was determined that he needed a heart transplant. Defendants' SMF ¶ 16; Plaintiff's Responsive SMF ¶ 16. In March 1998 James Elliot, Esq., of Harmon, Jones, Sanford and Elliot in Camden, Maine, drafted a second power of attorney which was executed by the plaintiff. *Id.* ¶ 17. The plaintiff received his new heart in July 1998 and was released from the hospital in September 1998. *Id.* ¶ 16. In the spring of 1998 defendant Biddle began discussions with Gardiner Savings Institute about a line of credit for the Norumbega. *Id.* ¶ 18. Biddle understood at this time that the plaintiff had an ownership interest in the Norumbega Inn. Plaintiff's SMF ¶ 12; Defendants' Responsive SMF ¶ 12. Biddle also believed that Kent had an equitable interest in the Norumbega Inn at this time. *Id.* ¶ 13.

During the summer of 1998 Kent and the plaintiff decided to sell *Greyrocks*. Defendants' SMF ¶ 19; Plaintiff's Responsive SMF ¶ 19. *Greyrocks* was sold on or about September 1, 1998. *Id.* ¶ 21. Strout reviewed the title for *Greyrocks* and the defendants drafted a deed of conveyance joining the Revocable Trust, the Family Trust, the Marital Trust, and the plaintiff individually. *Id.* ¶¶ 22-23. Strout advised Biddle to include all of these entities on the deed to resolve what he saw as a possible ambiguity in the title. *Id.* The defendant law firm also drafted the real estate closing documents on behalf of Kent. *Id.* ¶ 23. In August 1998 Biddle sent the plaintiff the closing documents. *Id.* ¶ 28.

The mortgage on *Greyrocks* was cross-collateralized with that on the Norumbega Inn. *Id.* ¶ 20. The defendants negotiated an escrow agreement on behalf of Kent with the mortgage holder, Gardiner Savings Bank, to ensure that the closing would go forward as planned. *Id.* ¶ 24. Biddle advised a representative of Gardiner Savings Institution that the plaintiff had to anticipate capital gains tax from the sale of *Greyrocks* and that he needed the proceeds of the sale to support his retirement. Plaintiff's SMF ¶¶ 25-26; Defendants' Responsive SMF ¶¶ 25-26. Biddle signed the *Greyrocks* closing statement as the plaintiff's attorney-in-fact. *Id.* ¶ 28. Kent authorized Biddle to execute the

documents necessary to complete the transaction at the closing because he was unable to attend. Defendants' SMF ¶ 25; Plaintiff's Responsive SMF ¶ 25. During the course of the *Greyrocks* transaction, neither defendant ever represented to the plaintiff that they were serving as his legal counsel. *Id.* ¶ 26.

In July 1998 Biddle handled the creation of a Subchapter S corporation called E. B. Hammond, Inc., of which Kent and the plaintiff were shareholders. Plaintiff's SMF ¶¶ 15-17; Defendants' Responsive SMF ¶¶ 15-17. Biddle intended that the plaintiff would transfer his ownership interest in the business of the Norumbega Inn to this corporation by August 1998 and that the business would thereafter be owned by this corporation. *Id.* ¶¶ 18-19.

Between 1992 and September 1, 1998 the plaintiff had no contact with any attorney at the defendant law firm. Defendants' SMF ¶ 29; Plaintiff's Responsive SMF ¶ 29.

In October 1998 Kent brought suit against the plaintiff, challenging the management and funding of the trust established by his mother. *Id.* ¶ 32. The parties entered into a settlement agreement in connection with that lawsuit which resolved all claims between the parties, including claims brought by the plaintiff regarding the sale of *Greyrocks*, any funds that were escrowed, and the transfer of the Norumbega Inn. *Id.* ¶ 33.

III. Discussion

The amended complaint alleges legal malpractice (Count I), intentional infliction of emotional distress (Count II), negligent infliction of emotional distress (Count III) and conversion (Count IV). Count II has been dismissed. Order on Motions (Docket No. 12) at 3. The defendants contend that they are entitled to summary judgment on the remaining counts because the plaintiff was not their client, and they owed him no duty; the plaintiff's release of his claims against Kent in the settlement of their lawsuit also releases the defendants; the plaintiff may not as a matter of law take the position in

this action that the defendants were his attorneys as a result of the power of attorney he gave to Kent when he took the position in the earlier lawsuit that he never signed the power of attorney; and no conversion occurred as a matter of law. The defendants do not discuss Count III in their memoranda, apparently believing that success in their arguments concerning the existence of an attorney-client relationship and any duty running from the defendants to the plaintiff will require the court to enter summary judgment in their favor on that count as well as Count I. *See Barnes v. McGough*, 623 A.2d 144, 146 (Me. 1993) (attorneys who owe no duty to plaintiffs cannot be liable to them on negligence claim). They offer no independent reason why they might be entitled to summary judgment on Count III and, accordingly, that count will not be considered separately.

A. The Attorney-Client Relationship

I begin with the basic observation that the question whether the plaintiff and the defendant had an attorney-client relationship at any relevant time is governed by Maine law. Neither the defendants nor the plaintiff explicitly acknowledge this standard in their respective memoranda, and both cite extensively to case law from other states. While the Maine Law Court has not issued a reported opinion on all fours with the facts in this case, the dispute must be resolved, if at all possible, by the application of Maine law rather than by reference to the decisions of courts in other jurisdictions.

The threshold issue for a claim of attorney malpractice is whether an attorney-client relationship existed. Under Maine law, “the plaintiff must establish that the defendant had a duty to the plaintiff to conform to a certain standard of conduct and that a breach of that duty proximately caused injury to the plaintiff.” *Fisherman’s Wharf Assocs. II v. Verrill & Dana*, 645 A.2d 1133, 1136 (Me. 1994). No duty exists, with exceptions not relevant here, if there is no attorney-client relationship. In this case, there is no evidence that the plaintiff explicitly retained the defendants, but “an attorney-client relationship does not require the payment of a fee or formal retainer but may be implied from the

conduct of the parties.” *Board of Overseers of the Bar v. Dineen*, 500 A.2d 262, 264-65 (Me. 1985) (internal punctuation and citation omitted). The term “client” “includes one who is either rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.” *Id.* at 264; M.R.Evid. 502(a)(1). A reasonable inference may be drawn from the evidence in the summary judgment record that the defendants rendered professional legal services to the plaintiff. *See generally Larochelle v. Hodsdon*, 690 A.2d 986, 987, 989 (Me. 1997). The defendants are not entitled to summary judgment on this ground.

The defendants next contend that the release between the plaintiff and Kent in the earlier action brought by Kent bars this action because the plaintiff’s release of his claims against Kent also released them, as Kent’s attorneys and agents, as a matter of law. Defendants’ Motion and Incorporated Memorandum of Law For Summary Judgment, etc. (“Motion”) (Docket No. 22) 17; Reply Memorandum of Law in Support of Defendants’ Motion for Summary Judgment (“Reply Memorandum”) (Docket No. 32) at 1, 5-7. The plaintiff points out that he specifically reserved his right to proceed against the defendants in the release: “the parties agree that Murray is not releasing or discharging the law firm of Strout & Payson.” Mutual Release, Exh. C to Defendants’ SMF, at 2. Such a purported reservation would not be effective if the release of Kent served to release the defendants as well as a matter of law. Assuming *arguendo* that the defendants were agents only of Kent and not of the plaintiff at any relevant time, the release would not bar any claims brought by the plaintiff against the defendants that are based on a different injury from that alleged in the earlier action to have been caused by Kent or that results from their own negligence, as distinct from that of Kent. *Andrews v. Davis*, 128 Me. 464, 148 A. 684, 685-87 (1930). While the parties have agreed, through their respective statements of material facts, that Kent’s lawsuit against the plaintiff “challeng[ed] the management and funding of the trust established by [Kent’s] mother,” and included

“claims brought by Murray Keatinge regarding the sale of *Greyrocks* and any funds that were escrowed and the transfer of *Norumbega*,” Defendants’ SMF ¶¶ 32-33, Plaintiff’s Responsive SMF ¶¶ 32-33, these statements and the release do not establish that the claims raised in that action necessarily included the claims asserted against the defendants in this action. The amended complaint in this action clearly alleges direct negligence by the defendants. *E.g.*, Amended Complaint ¶¶ 42-43, 50-51. Under these circumstances, I cannot conclude that the plaintiff’s claims against the defendants are barred by the release. Accordingly, they are not entitled to summary judgment on this basis.

Finally, the defendants contend that this action is barred by the doctrine of judicial estoppel because the plaintiff’s claim is based on the power of attorney given by him to Kent, and the plaintiff in the earlier action “unequivocally stated . . . that he ‘vehemently contest[ed]’ the ‘authenticity’ of the power of attorney, ‘strongly doubt[ed] whether such document[] w[as] ever executed’ by him, and that he ‘had no intention of executing . . . a Power of Attorney authorizing [his] son to act on [his] behalf.’” Reply Memorandum at 2. There are several problems with this argument. First, the plaintiff’s claim is not based solely on the power of attorney, although one of his arguments certainly is that the defendants were hired by Kent as his subagents through Kent’s authority under the power of attorney. Second, the defendants fail to include in their statement of material facts any factual statements supporting the position taken by the plaintiff in the earlier litigation, and accordingly the court may not consider it.¹ Finally, the doctrine of judicial estoppel, which “should be employed when a litigant is

¹ The defendants do request, in a footnote to their statement of material facts, that the court “take judicial notice of the Affidavits . . . from *Keatinge v. Keatinge*, Civ. A. No 98-398-P-C, a prior action in this Court that is related to the instant action.” Defendants’ SMF at 1 n.1. Even if such an incorporation reference to an earlier case in this court were an appropriate way to present evidence for consideration by the court in connection with a motion for summary judgment in this action, the statement of material facts does not specify in one or more numbered paragraphs what fact or facts from those affidavits the court is being asked to consider in connection with the motion and does not cite to specific pages or paragraphs of the affidavits as required by local rule. *See* Local Rule 56(b) and (e). As this court has repeatedly stated, it will not comb through documents searching for facts when a motion for summary judgment is presented. “The parties are bound by their . . . Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.” *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995).

‘playing fast and loose with the courts’ and when ‘intentional self-contradiction is being used as a means of obtaining unfair advantage,’” *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (citation omitted), may generally be applied only when a party has “succeeded previously with a position directly inconsistent with the one it currently espouses,” *Franco v. Selective Ins. Co.*, 184 F.3d 4, 9 (1st Cir. 1999), quoting *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 12 (1st Cir. 1999). Here, the previous action ended in a settlement that, for all that appears, was not presented to the court for approval; the plaintiff cannot be said to have “succeeded” in his assertion that the power of attorney was invalid. *See UNUM Corp v. United States*, 886 F. Supp. 150, 158 (D. Me. 1995) (party made no bargain with court in order to obtain a benefit in the prior proceeding). *See also Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988) (“When an ordinary civil case is settled, there is no ‘judicial acceptance’ of anyone’s position and thus there can be no judicial estoppel in a later proceeding.”).

The defendants are not entitled to summary judgment on Counts I and III on the showing made.

A. Conversion

The defendants contend that the plaintiff in Count IV of the amended complaint seeks to recover proceeds from the sale of *Greyrocks*, the distribution of which “has been resolved through settlement in the underlying litigation,” that from those proceeds they recovered only their legal fees, and that the plaintiff fails to allege that he made a demand for those monies. Motion at 18. The plaintiff responds that it is precisely those legal fees that he contends were wrongfully converted. Plaintiff Murray Keatinge’s Opposition to Defendants’ Motion and Incorporated Memorandum of Law for Summary Judgment (Docket No. 25) at 14. In summary fashion, he argues that, if the defendants contend that their right to those fees “stem[s] from some relationship with Kent,” *id.*, that is an issue of fact for trial; that he made a demand for return of the fees “in a sense” when he “called Elizabeth Biddle after

receiving the closing statement and told her he was puzzled by the fee charged;” and that a demand was not necessary because it would have been useless, *id.* at 15.

Under Maine law, a plaintiff alleging conversion must establish invasion of his possession of the goods, a property interest in the goods, the right to their possession at the time of the alleged conversion, and, “when the holder has acquired possession rightfully,” a demand by the plaintiff and a refusal by the holder to surrender the goods. *Chiappetta v. LeBlond*, 505 A.2d 783, 785 (Me. 1986). The plaintiff does not contend that the defendants did not acquire possession of the funds at issue rightfully.

The amended complaint alleges that the defendants converted “\$14,680 in legal fees charged, \$10,933.10 in accounting fees charged, \$110,000 ‘invested’ in the Norumbega Inn and monies escrowed with Gardiner Savings Institution.” Amended Complaint ¶ 53. How the defendants could be deemed to be “holders” of funds held in escrow by a bank is unclear.² In any event, the plaintiff in his memorandum of law appears to concede that only the attorney fees are at issue.

The defendants’ statement of material facts does not mention the attorney fees. The plaintiff’s statement of material facts does not establish that the defendants took payment of their fees from the proceeds of the sale of *Greyrocks*. Accordingly, it is not possible to determine, on the basis of the summary judgment record, whether the issue of distribution of the proceeds of that sale would have included payment of the defendants’ fees. The release does not identify the distribution of funds from the sale of *Greyrocks* as one of the issues resolved. The defendants are not entitled to summary judgment on Count IV on this ground.

² The parties refer to Gardiner Savings Bank, *e.g.*, Defendants’ SMF ¶ 24; Plaintiff’s Responsive SMF ¶ 24, and Gardiner Savings Institution, *e.g.*, Amended Complaint ¶ 53, and Gardiner Savings Institute, Defendants’ SMF ¶ 18; Plaintiffs’ Responsive SMF ¶ 18. It is unclear whether these are all references to the same financial institution, but resolution of this question is not critical to a disposition of the issues before the court.

Why the fact that the funds taken by the defendants were only for legal fees should bar a claim for conversion of those funds is not explained by the defendants and not apparent to me. In the absence of developed argument, this contention cannot prevail.

On the issue of the lack of a demand, the outcome is different. A party may not avoid entry of summary judgment merely by contending that its claim raises a question of fact to be decided at trial. It is the nonmoving party's burden to show that there is a disputed issue of material fact, and the plaintiff here has made no attempt to identify such an issue. Similarly, the plaintiff's conclusory assertion that a demand for return of the funds would have been "useless," while correctly invoking *Withers v. Hackett*, 714 A.2d 798, 800 (Me. 1998), in which the Law Court discusses this legal standard, is unsupported by any factual assertion in his statement of material facts that could be interpreted to show the likely futility of such a demand. Finally, the plaintiff's assertion that he told Biddle that he was "puzzled by the fee charged" by the defendants is not included in either statement of material facts.³ Even if that factual assertion could be said to have been fairly presented in the summary judgment record, it cannot be reasonably interpreted to be a demand for the return of the amount paid to the defendants for their fee or any part of that payment.

Accordingly, based on the summary judgment record, the defendants are entitled to summary judgment on Count IV due to the lack of evidence of a demand by the plaintiff for the return of the allegedly converted funds.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED** as to Count IV of the amended complaint and otherwise **DENIED**.

³ Paragraph 30 of the defendants' statement of material facts, which was admitted in the plaintiff's responsive statement, includes the assertion that the plaintiff, in a telephone conversation with Biddle, "enquire[d] about certain charges on the bill" after he received the closing statement on the sale of *Greyrocks*.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 14th day of June, 2000.

David M. Cohen
United States Magistrate Judge