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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

FRANCIS L. GILL,
Plaintiff-Appellant,

v.

**WILLIAM C. BISCHOFF aka BILL BISCHOFF,
ROGER S. MORAN and BOTTOMLESS PIT, L.L.C.,
and DOES ONE (1) through TEN (10) INCLUSIVE**
Defendants-Appellees.

Supreme Court Case No. CVA11-004
Superior Court Case No. CV0333-07

OPINION

Cite as: 2011 Guam 25

Appeal from the Superior Court of Guam
Argued and submitted July 14, 2011
Hagåtña, Guam

Appearing for Plaintiff-Appellant:
Curtis C. Van de veld, *Esq.*
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Appearing for Defendants-Appellees:
William C. Bischoff, *Esq.*
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ORIGINAL

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Petitioner-Appellant Francis L. Gill appealed the trial court’s dismissal of his action against Defendants-Appellees William C. Bischoff, Roger S. Moran, Bottomless Pit, L.L.C., and Does One through Ten (collectively referred to as “Bischoff, et al.”). For the reasons set forth, we affirm the trial court’s dismissal of the entire case that Gill brought against Bischoff, et al.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] This case stems from a prior lawsuit by Francis Gill, a shareholder of Coral Pit, Inc. (“CPI”), on behalf of CPI and himself, against Jeffrey Siegel, Roger Moran, and Richard Cruz, who were all represented by Attorney William Bischoff. After dismissing Gill’s claims against Siegel, Cruz, and Moran, the trial court awarded Moran roughly \$433,000.00 (“Moran Judgment”) pursuant to the CPI shareholders’ buyout agreement. Siegel obtained a similar judgment against CPI (“Siegel Judgment”) in a California federal court. Siegel then filed an abstract of this judgment at the Department of Land Management, giving Siegel priority in executing on any of CPI’s real property assets.¹

[3] Siegel and Bischoff then entered into an agreement (“the Agreement”), wherein Siegel transferred his thirty CPI shares and assigned the Siegel Judgment to Bischoff. Bischoff agreed to pay Siegel “50% of any consideration obtained as a result of his ownership of the Shares of Coral Pit, Inc. and/or his ownership of the Judgment and lien.” Appellant’s Excerpts of Record (“ER”) at 333 (The Agreement, Feb. 5, 2002). The Agreement was to be “binding upon and

¹ Importantly, CPI claims rights to a parcel of real property on Guam. These were and are currently being litigated in *Cristobal v. Siegel*, Superior Court of Guam Civil Case No. CV0442-88 (“Cristobal litigation”). Bischoff represents Siegel and CPI in the Cristobal litigation.

inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each party hereto.” *Id.* at 334. The Agreement further states that, as long as he maintains an active practice of law, Bischoff shall represent Siegel in any legal matter Siegel may be involved in Guam without further legal fees. *Id.*

[4] After the Agreement had been executed, Siegel filed for bankruptcy in Kansas. Siegel’s rights in the Agreement became part of the bankruptcy estate, and Robert Baer (“Trustee”) was appointed as the Siegel Bankruptcy Trustee. The Trustee thereafter exchanged correspondence with Bischoff regarding the prospects of receiving money in the Cristobal litigation, in which the bankrupt Siegel was a named defendant. The Trustee also notified Bischoff that he considered the Agreement to be a contingency fee attorney-client relationship. Bischoff subsequently acquired the competing junior Moran Judgment for Bottomless Pit, L.L.C., a Guam corporation substantially owned by Bischoff, and executed on CPI’s assets under the Moran Judgment, including the parcel of property at issue in the Cristobal litigation. Thereafter, the Trustee obtained an order to sell the bankruptcy estate’s interest in the Agreement by public bid. Gill bid \$5,100.00 and acquired:

[T]he [Siegel bankruptcy] estate’s interest in the Siegel/Bischoff agreement and, to the extent of the estates [sic] interests, if any, in Coral Pit, Inc. stock, judgment in favor of Siegel in *Siegel v. Coral Pit* . . . any lien arising therefrom in the territory of Guam . . . and the right to avoid transfer to Bischoff pursuant to the Siegel/Bischoff agreement, to the extend [sic] that such right is assignable

ER at 42 (Order, Jan. 7, 2005).

[5] Gill filed suit against Bischoff, et al. in the Superior Court of Guam, seeking to enforce the Agreement. In his Third Amended Complaint, Gill delineated seventeen counts, including two acts of fraud, an act of conspiracy to commit fraud, involuntary trust, three acts of deceptive trade practices, an act of conspiracy to commit deceptive trade practices, an act of deception, an

act of conspiracy to engage in deception, an act of aiding and abetting deception, an alleged act of order of restoration, an act of breach of contract, and an act of breach of the implied covenant of good faith and fair dealing. Bischoff filed a Rule 12(b)(6) Motion to Dismiss or, in the alternative, a Rule 12(c) Motion for Judgment on the Pleadings. Gill filed an opposition or, in the alternative, a motion for summary judgment and a cross-motion for partial summary judgment on Count One for Rescission. The trial court issued a Decision and Order dismissing the counts which allege or are dependent on any alleged contractual duty of Bischoff to convert the Siegel Judgment and also for lack of jurisdiction over any rights of the Siegel Bankruptcy Trustee.

[6] Bischoff thereafter filed a Rule 56 Motion for Summary Judgment on the remaining counts, claiming that he sufficiently refuted Gill's assertions that Bischoff led the Trustee to believe that Bischoff was acting as his attorney and was willing to act as counsel to any successor in interest under the Agreement. The trial court denied Bischoff's motion for being untimely filed. Bischoff then filed a second Rule 56 motion, or in the alternative, dismissal under Rules 9(a), 12(b) and 12(h) of the Guam Rules of Civil Procedure. Gill filed an opposition and a countermotion for partial summary judgment, asking the court to order Bischoff to provide Gill with legal services as Siegel's successor in interest. The trial court dismissed all remaining counts on the grounds that Gill could not point to direct evidence that the Trustee harbored a belief that an attorney-client relationship existed between him and Bischoff, and further that Bischoff did not lead the Trustee or any third party to believe that he would be their attorney.

After Gill filed a Rule 60(b) Motion for Reconsideration, the trial court issued a Decision and Order denying the motion and affirming its prior dismissals.² This appeal followed.

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-54 (2011)); 7 GCA § 3107(b) (2005); and 7 GCA § 3108(a) (2005).

III. STANDARD OF REVIEW

[8] A dismissal pursuant to Rule 12(b)(6) of the Guam Rules of Civil Procedure (“GRCP”), for failure to state a claim upon which relief can be granted, is reviewed *de novo*. *Core Tech Int’l Corp. v. Hanil Eng’g & Constr. Co., Ltd.*, 2010 Guam 13 ¶ 16. “Pursuant to this court’s power on appeal to convert a Rule 12(b)(6) motion to dismiss into a summary judgment motion, the appropriate standard to review the grant of a motion for summary judgment is also *de novo*.” *Id.*

[9] The trial court did not dispose of any counts under Rule 12(c), having already disposed of the counts under Rule 12(b)(6). *See* Record on Appeal (“RA”), tab 39 at 3-9 (Dec. & Order, Nov. 25, 2008).

[10] A trial court’s decision to grant a motion for summary judgment is reviewed *de novo*. *Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3 ¶ 8. Summary judgment is only

² The trial court rejected Gill’s Motion for Reconsideration on December 28, 2010. Gill alleges that the trial court committed error in a few of its decisions, including one on December 20, 2010. *See* Statement of Issues Presented on Appeal (Feb. 14, 2011). However, the trial court did not issue a Decision and Order on December 20, 2010. Even if we were to give Gill the benefit of the doubt that he was referring to the trial court’s December 28, 2010 Decision and Order, we need not address whether the trial court erred in denying Gill’s Motion for Reconsideration, as Gill failed to address this matter in his brief to the court. Under Rule 13 of the Guam Rules of Appellate Procedure, the failure to adequately brief an issue may be treated as a waiver of the issue on appeal. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 7 n.3; *see also Rinehart v. Rinehart*, 2000 Guam 14 ¶ 23 (“[I]f a party mentions a matter but then fails to make a complete legal argument on the issue, then we will refuse to analyze the matter.”).

proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Guam R. Civ. P. 56(c).

IV. ANALYSIS

A. Dismissal of the Counts Based on Rescission and Breach of Contract

[11] Gill asserts that the trial court erred in dismissing Counts One (rescission), Sixteen (breach of contract), and Seventeen (breach of implied covenant of good faith and fair dealing).

1. The Rescission Claim

[12] Count One seeks confirmation of Gill’s attempted rescission of the Agreement. Though the trial court dismissed Count One on the grounds that Bischoff had no duty to execute on the Siegel Judgment, Gill claims that he had the right to rescind the Agreement because Bischoff failed to undertake his obligations under the Agreement by refusing to represent Gill pursuant to the legal services clause. Gill’s argument stems from his belief that he acquired any right Siegel had under the Agreement through his purchase of “the Estate’s interest in the Siegel/Bischoff agreement.” Appellant’s Br. at 14 (Apr. 18, 2011). In response, Bischoff argues that he had no duty to execute on the Siegel Judgment and further contends that any attorney-client relationship was not assignable.

[13] We turn first to the trial court’s holding that Bischoff had no duty to execute on the Siegel Judgment. The trial court found that any duty of Bischoff to execute on the judgment was governed by the plain meaning of the contract, specifically finding that the Agreement lacked:

[A]ny language describing, discussing, or identifying a Bischoff duty to execute or convert the judgment or other property interest, conveyed to him, into some other form of consideration. Absent the contract specifying such a duty the court is not persuaded that it should re-write the contract by implying one. The absence of a specifically identified duty to act does not create an ambiguity rather it

evinces an intention that such a duty not be imposed. *In analyzing the contract the court finds that the other consideration provided in the form of legal services and the absence of a specified duty contravenes any argument that a duty to act should be implied or was necessary to its terms.*

RA, tab 39 at 6 (Dec. & Order, Nov. 25, 2008) (emphasis added).

[14] The Agreement provides, “Bischoff agrees to pay Siegel 50% of any consideration obtained as a result of his ownership of the Shares of Coral Pit, Inc. and/or his ownership of the judgment and lien,” including “any consideration received, whether by settlement, loan, sale, hypothecation, foreclosure, recovery, execution, etc. of the shares or Judgment.” ER at 333 (The Agreement). This is the only language that pertains to any duty of Bischoff regarding the Siegel Judgment. Based on this language, we agree with the trial court that Bischoff had no duty to execute on the judgment. In the absence of such a duty, there was no basis to rescind the contract.

[15] There was also no basis for rescission on the grounds that Bischoff refused to provide legal services to Gill under the Agreement. Gill’s argument that he purchased the right to Bischoff’s legal services when he purchased the Siegel Bankruptcy Estate’s interest in the Agreement implies that the sale of the bankruptcy asset operates as an assignment of the executory contract to the purchaser. However, under 11 U.S.C. § 365(c), the assignment of an executory contract must precede the sale, as the executory contract is not a part of the bankruptcy estate until assigned and assumed. *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 498 (3d Cir. 1998); *In re Qintex Entm’t, Inc.*, 950 F.2d 1492, 1495 (9th Cir. 1991).

[16] Bischoff argues that his agreement to provide legal services to Siegel was not assignable at the outset. An attorney’s agreement to represent a client is a personal services contract that cannot be assigned without the consent of both parties to the contract. *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 90 (9th Cir. 1976). “In fact, the relationship cannot be

formed without the consent of the attorney and the individual seeking representation.” *In re Olson*, 21 B.R. 123, 126 (Bankr. D. Neb. 1982). Further, the California Court of Appeals commented:

‘The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to the most conscientious fidelity . . .’ Thus, not only does the attorney owe the duty to use skill, prudence and diligence in the performance of the tasks he undertakes for his client but owes undivided loyalty to the interests professionally entrusted to him. *Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to only the parties involved.*

Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 86 (Ct. App. 1976) (emphasis added) (internal citations omitted).

[17] Gill argues that Bischoff intended for his services as a lawyer to be fully assignable, pointing to language in the Agreement stating that Bischoff shall represent Siegel in any legal matter Siegel may be involved in Guam without further legal fees, as long as Bischoff maintains an active practice of law. Gill then points to the clause that states: “This Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each party hereto.” ER at 334 (The Agreement). However, Gill fails to mention that the latter clause immediately precedes the former clause, indicating that Bischoff did not intend for the assignment language to apply to the provision for legal services. Clearly, Bischoff only intended to represent Siegel and did not consent to represent anyone but Siegel.

[18] Aside from the plain reading of the contract, there are other indicators suggesting Bischoff did not intend for his legal services to be assigned to anyone who purchased Siegel’s interest in the Agreement, particularly Gill. Under Rule 1.7(a) of the Guam Rules of Professional Conduct, “a lawyer shall not represent a client if the representation involves a

concurrent conflict of interest.” Guam R. Prof'l Conduct 1.7(a). A concurrent conflict of interest exists if “the representation of one client will be directly adverse to another client” or “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” *Id.* Therefore, Bischoff is prohibited from representing Gill because the representation would violate his duty of loyalty to his clients, Moran and Cruz, who were adverse parties to Gill in the Cristobal litigation. If Bischoff were to represent Gill, Moran and Cruz would be adversely affected, and Bischoff would be in violation of Guam’s code for attorney conduct. Thus, Bischoff had no duty to represent anyone other than Siegel under the Agreement.

[19] We agree with other jurisdictions that have held that it is generally inappropriate for an attorney-client relationship to be assignable without the consent of both the attorney and the client. The policy reasons for limiting the assignability of the attorney-client relationship are aptly summarized by the *Goodley* court, which stated: “It is the unique quality of legal services, the personal nature of the attorney’s duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion” *Goodley*, 133 Cal. Rptr. at 87. Although *Goodley* involved the assignment of malpractice claims, the same reasoning holds true for the assignment of an attorney-client relationship in general. An attorney has a personal and unique relationship with each client, and an attorney has the right to decline representing a client, unless he is ordered to do so by the court. Accordingly, a lawyer’s client does not have the right to assign to a third party any claim he has to a lawyer’s services. Thus, we reject Gill’s argument that the attorney-client relationship is assignable, and we hold that the trial court correctly dismissed Count One of the complaint.

2. The Breach of Contract Claims

[20] Count Sixteen alleges a breach of contract based on duties allegedly owed by Bischoff to the Siegel Bankruptcy Estate, the Bankruptcy Trustee, and Gill, including the duty to provide legal services and execute on the Siegel Judgment. The trial court dismissed Count Sixteen on the grounds that Bischoff had no duty to execute on the judgment and that the trial court lacked subject matter jurisdiction over claims relating to the Bankruptcy Trustee. RA, tab 39 at 9 (Dec. & Order, Nov. 25, 2008). Because we have already established that the Agreement did not impose a duty on Bischoff to represent anyone but Siegel or a duty to execute on the Siegel Judgment, there was no breach of contract. Moreover, the trial court properly determined that it did not have subject matter jurisdiction over the claim as it relates to the Bankruptcy Trustee, which is discussed *infra*. Thus, we uphold the trial court's dismissal of Count Sixteen.

[21] We find that Count Seventeen was also properly dismissed by the trial court. Count Seventeen alleges that Bischoff breached the implied covenant of good faith and fair dealing owed to the Siegel Bankruptcy Estate, the Bankruptcy Trustee, and Gill, because Bischoff "knew he did not intend to perform part or all of the obligations required of and from him under the terms of the Agreement," referring to both Bischoff representing any assignee of the Agreement and failing to execute on the Siegel Judgment. RA, tab 25 at 33-34 (Third Am. Compl., Aug. 31, 2007). The trial court dismissed Count Seventeen on the grounds that it lacked subject matter jurisdiction over claims relating to the Bankruptcy Trustee. RA, tab 39 at 9 (Dec. & Order, Nov. 25, 2008). We find that the trial court properly determined that it did not have subject matter jurisdiction over the claim as it relates to the Bankruptcy Trustee, which is discussed *infra*. Moreover, given our determination that Bischoff had no duty to provide representation to Gill,

we cannot find that Bischoff breached the implied covenant of good faith and fair dealing to Gill, at least with respect to the free legal services clause.

[22] Regarding Bischoff's obligation to execute on the Siegel Judgment, the next question raised is whether Bischoff acted inappropriately in failing to execute on the Siegel Judgment, while at the same time executing on the Moran Judgment. According to Gill:

While providing the Trustee with legal advice, and urging him to delay a sale of the Bankruptcy Estate's interests in the Bischoff Agreement, Bischoff acquired the competing junior Moran Judgment for his personal account and began executing on the Moran Judgment in September 2003. Meanwhile he did nothing to enforce the Siegel Judgment.

Appellant's Br. at 12-13. We have already established that Bischoff had no duty to execute on the Siegel Judgment. Moreover, although the Agreement commands Bischoff to pay fifty percent of any consideration he receives as a result of his ownership of the Siegel Judgment, it does not impose a duty on Bischoff to execute on the judgment at a given time. *See* ER at 333 (The Agreement). For all these reasons, we affirm the trial court's dismissal of Count Seventeen.

B. Dismissal of the Counts Based on Fraud and Deceit

1. The Fraud-Based Claims

[23] There are four fraud-based claims that the trial court dismissed—Counts Two, Three, Four, and Five. The trial court dismissed these counts on the grounds that it lacked subject matter jurisdiction over claims related to the Bankruptcy Trustee. RA, tab 39 at 9 (Dec. & Order, Nov. 25, 2008).

[24] Count Two alleges that Bischoff, et al. committed fraud by undertaking actions "to defraud the Bankruptcy Estate and the Bankruptcy Trustee of the benefits of the Agreement and

to reduce the value of said Agreement.”³ RA, tab 25 at 17 (Third Am. Compl.). Additionally, Gill claims:

To perpetrate the fraud alleged herein Bischoff led the Siegel Bankruptcy to believe Bischoff was acting as the Bankruptcy Trustee’s attorney and provided him with legal advice and led him to believe that Bischoff was protecting the interest of the Siegel Bankruptcy Estate in the Agreement, when he in fact did not intend to do so

Id. at 18.

[25] Title 11 is the primary source of bankruptcy law in the United States Code. Title 11 U.S.C. § 548 deals exclusively with fraudulent transfers and obligations that occur in bankruptcy cases, while 28 U.S.C. § 1334 confers subject matter jurisdiction over bankruptcy cases. 11 U.S.C.A. § 548 (West 2011); 28 U.S.C.A. § 1334 (West 2011). In its decision to dismiss the counts brought on behalf of the Bankruptcy Trustee, the trial court relied on an Illinois bankruptcy case which stated:

The subject matter jurisdiction of United States District Courts over bankruptcy matters is set forth in 28 U.S.C. § 1334. This section provides that the district court has exclusive jurisdiction over all cases under Title 11, and nonexclusive jurisdiction over all proceedings arising under Title 11, arising in a case under Title 11, or “related to” a case under Title 11.

In re Churchfield Mgmt. & Inv. Corp., 122 B.R. 76, 79 (Bankr. N.D. Ill. 1990) (internal footnote omitted).⁴ Moreover, 28 U.S.C. § 157(a) provides: “Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.” 28 U.S.C.A. § 157(a) (West 2011). Regarding its jurisdiction, the trial court stated:

³ The value of the Agreement to the Bankruptcy Estate is \$5,100.00. ER at 45 (Trustee’s Report of Sale Number 1).

⁴ The non-exclusivity language permits state courts to litigate state claims and allows district courts other than the one in which the title 11 case is filed to adjudicate bankruptcy actions. *Directory Int’l, Inc. v. Bates Mfg. Co.*, 91 B.R. 738, 740 (Bankr. N.D. Tex. 1988).

Section 1424(b) of Title 48 of the United States Code vests upon the Guam Federal District Court the exclusive jurisdiction of the United States Bankruptcy Courts. 48 USC § 1424. . . . *This court is therefore without any jurisdiction to consider any action raised on behalf of the Siegel Bankruptcy Trustee.*

RA, tab 39 at 8 (Dec. & Order, Nov. 25, 2008) (emphasis added). We agree with the trial court that it did not have jurisdiction to consider any action regarding the Bankruptcy Estate that was raised on behalf of the Siegel Bankruptcy Trustee.

[26] Additionally, Gill is unable to bring an action on behalf of the Trustee before any court. “If a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim.” *Nat’l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999); *see also In re Teknek, LLC*, 563 F.3d 639, 646 (7th Cir. 2009) (“[T]he [bankruptcy] trustee has the sole right and responsibility to bring claims on behalf of the estate”), *cert. denied*, 130 S. Ct. 417 (2009). Accordingly, the trial court correctly dismissed Count Two, as it lacked subject matter jurisdiction over the claim, and Gill lacks standing to bring the claim on behalf of the Bankruptcy Trustee.

[27] The same analysis applies to Counts Three (second fraud), Four (conspiracy to defraud), and Five (involuntary trust) because any such causes of action are part of the Siegel Bankruptcy Estate, are related to title 11, and fall under the jurisdiction of a United States District Court or United States Bankruptcy Court. Moreover, Gill lacks standing to bring these claims on behalf of the Bankruptcy Trustee. Thus, we uphold the trial court’s dismissal of Counts Two, Three, Four, and Five.

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2. The Deceit-Based Claims

[28] Next, this court must determine whether the trial court erred in dismissing the deceit-based claims against Bischoff, et al., which are Counts Five, Eleven, Thirteen, and Thirteen*.⁵

[29] The trial court's dismissal of Count Five is addressed above and need not be discussed further, as it was properly dismissed. The trial court dismissed Count Eleven, Thirteen, and Thirteen* on the grounds that it did not have jurisdiction to hear the matters that pertain to the Bankruptcy Trustee's powers of avoidance. RA, tab 39 at 9 (Dec. & Order, Nov. 25, 2008).

[30] Count Eleven accuses Bischoff of engaging "in a deception against the Bankruptcy Trustee and the Siegel Bankruptcy Estate and Plaintiff in violation of 18 G.C.A. § 90103." RA, tab 25 at 29 (Third Am. Compl.). Gill is incorrect in his assertion that Bischoff violated 18 GCA § 90103, as that section simply provides the definition of "deceit" under Guam law.⁶ 18 GCA § 90103 (2005). Regardless, Gill does not have standing to bring a claim of alleged deception against the Bankruptcy Trustee and the Siegel Bankruptcy Estate,⁷ which can only be heard by a

⁵ In the Third Amended Complaint, Gill has two counts labeled "Thirteen." To avoid confusion, the second count labeled "Thirteen" is renumbered "Thirteen*."

⁶ The section reads in its entirety:

§ 90103. What is Deceit.

A deceit, within the meaning of this section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing it.

18 GCA § 90103 (2005).

⁷ Under Count Eleven, Gill alleges that "Bischoff engaged in a deception against the Bankruptcy Trustee and the Siegel Bankruptcy Estate and Plaintiff . . . Defendants' actions have proximately caused actual and

United States District Court or United States Bankruptcy Court. Thus, the trial court properly dismissed Count Eleven.

[31] For the same reasons, we also uphold the trial court's dismissals of Counts Thirteen (conspiracy to engage in a deception) and Thirteen* (aiding and abetting a deception).

C. Dismissal of the Deceptive Trade Practices-Consumer Protection Act Claims

[32] The first claim that the trial court dismissed under the Deceptive Trade Practices-Consumer Protection Act ("CPA") is Count Six. Count Six alleges that "Bischoff led the Siegel Bankruptcy Trustee to believe that [the Trustee] was a consumer of Bischoff's legal services under the terms of the Agreement and therefore the Siegel Bankruptcy Trustee was a consumer of legal services from Bischoff." RA, tab 25 at 22-23 (Third Am. Compl.). However, as discussed earlier, the trial court lacked subject matter jurisdiction over any claim relating to the Bankruptcy Trustee. Additionally, Gill does not have standing to bring a claim on behalf of the Trustee. Thus, we uphold the dismissal of Count Six.

[33] The trial court also dismissed Count Eight, which alleges:

Bischoff led the Bankruptcy Trustee to believe that the Agreement was assignable and that he did not intend to oppose said assignment . . . and that Bischoff was ready willing and able to perform according to its terms, and intentionally failed and refused to inform the Bankruptcy Trustee that Bischoff would oppose said assignment after a sale . . . thus [deceiving] the Bankruptcy Trustee.

RA, tab 25 at 26-27 (Third Am. Compl.). We hold that dismissal was proper, as issues related to title 11 do not fall within the subject matter jurisdiction of the trial court, and Gill does not have standing to bring a claim on behalf of the Bankruptcy Trustee. For the same reasons, Count Nine, alleging conspiracy to commit deceptive trade practices, was also properly dismissed.

consequential damages to Plaintiff. Defendants actions have been wicked, willful, wanton and unconscionable warranting the award of exemplary damages." RA, tab 25 at 28-29 (Third. Am. Compl.). Gill does not further explain what actions Bischoff, et al. engaged in that were deceitful.

[34] The trial court granted summary judgment in favor of Bischoff, et al., dismissing all remaining counts, including Counts Seven, Ten, and Fourteen, all relating to deceptive trade practices. RA, tab 64 at 2-7 (Dec. & Order, Nov. 9, 2009). The trial court noted that the primary and common issue in the remaining counts is whether an attorney-client relationship existed between Bischoff and the Trustee. *Id.* at 5. In Count Seven, Gill stated that “Plaintiff and or his predecessors in interest were consumers of legal services from Bischoff by virtue of the provisions of the Agreement.” RA, tab 25 at 24 (Third Am. Compl.). Counts Ten (aiding and abetting deceptive trade practices) and Fourteen (order of restoration) are also premised on this assertion that there is an attorney-client relationship between Bischoff and the Trustee.

[35] The majority of federal circuits have adopted similar tests for determining whether an attorney-client relationship exists, all premised upon the client’s reasonable belief that he is consulting with an attorney for the manifest purpose of obtaining legal advice. *See, e.g., United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009); *United States v. Stiger*, 413 F.3d 1185, 1196 (10th Cir. 2005); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1281-82 (11th Cir. 2004); *United States v. Evans*, 113 F.3d 1457, 1465 (7th Cir. 1997). After reviewing the correspondence between the Trustee and Bischoff, the trial court determined that Gill had failed to assert that the Trustee harbored a belief that he was consulting with Bischoff for the purpose of maintaining legal advice. Further, the trial court did not believe, even in the light most favorable to Gill, that Bischoff acted as an attorney for the Trustee or represented to third parties that he would act as their attorney. The trial court went on to find that the “correspondence between Bischoff and the Trustee amounts to nothing more than Bischoff’s keeping the [T]rustee informed of Bischoff’s efforts to recover Coral Pit property and even when viewing the evidence in the light most favorable to the Plaintiffs, it cannot be construed as evidence of an attorney-

client relationship.” RA, tab 64 at 6 (Dec. & Order, Nov. 9, 2009). We have reviewed the documents in question and agree with the trial court that no attorney-client relationship existed between Bischoff and the Trustee. Thus, summary judgment was proper.

[36] Summary judgment on Counts Ten and Fourteen is also appropriate for other reasons. In light of our determination that the counts alleging deception were appropriately dismissed, it follows that Count Ten, alleging that others aided and abetted Bischoff in committing deceptive trade practices, was also appropriately dismissed.⁸ Because the counts alleging fraud and deception were appropriately dismissed, an order of restoration, as requested in Count Fourteen, is not warranted. Thus, the trial court did not err in granting summary judgment in favor of Bischoff, et al. and dismissing Counts Seven, Ten, and Fourteen.

III. CONCLUSION

[37] In sum, we find that the trial court appropriately dismissed all of the claims contained in Gill’s Third Amended Complaint. Accordingly, the judgment of the trial court is **AFFIRMED**.

Original Signed: Robert J. Torres
By

ROBERT J. TORRES
Associate Justice

Original Signed: Katherine A. Maraman
By

KATHERINE A. MARAMAN
Associate Justice

Original Signed: F. Phillip Carbullido
By

F. PHILIP CARBULLIDO
Chief Justice

⁸ See, e.g., *United States v. Mann*, stating, “Without a determination that the underlying crime was committed, the aiding and abetting conviction must be reversed.” *United States v. Mann*, 811 F.2d 495, 498 (9th Cir. 1987).