SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

REGINA RANDOLPH, ET AL.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 06 CA 4932 Calendar 4
ING LIFE INSURANCE AND ANNUITY COMPANY,	:	
Defendant.	:	

ORDER

This matter is before the court on the Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint, pursuant to Super. Ct. Civ. R. 12(b)(1), 12(b)(6). Plaintiffs are seven current or retired District of Columbia employees. On June 27, 2006, they filed their original complaint in Superior Court, alleging two counts of invasion of privacy, one count of negligence, and one count of gross negligence. All claims arise out of the theft of a computer in an otherwise routine residential burglary. The computer belonged to an employee of Defendant ING Life Insurance and Annuity Company ("ING"), and it allegedly contained within its memory personal and financial records of Plaintiffs and thousands of other District of Columbia employees, who are participants in a deferred compensation program to which ING provides administrative services, record keeping, and investment advice. Plaintiffs alleged in their original Complaint that the theft of this

computer containing their personal information has exposed them to a heightened risk of identity theft and that ING's negligence or gross negligence in allowing this information to be stored on an employee's computer and removed from otherwise secure facilities invaded their privacy and proximately caused them damages for which they seek compensation and injunctive relief.

Defendant removed the complaint to the United States District Court and promptly filed a motion to dismiss based on lack of standing, failure to state a claim, and mootness. On February 20, 2007, in a thorough and well-reasoned opinion, District Judge Coleen Kollar-Kotelly concluded that Plaintiffs had failed to establish Article III standing and, without reaching Defendant's alternative grounds for dismissal, denied Defendant's motion to dismiss without prejudice and remanded the case to the Superior Court, pursuant to 28 U.S.C. § 1447(c). Thereafter, Plaintiffs filed their First Amended Complaint, which alleged no new facts, but added claims of breach of fiduciary duty or confidential relationship and what purport to be statutory causes of action. Defendant has renewed its motion to dismiss, this time directed at the First Amended Complaint.

STANDARD OF REVIEW

A trial court considering a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure must construe the complaint "in the light most favorable to the plaintiff" and must accept as true all allegations of fact set forth in the complaint. *Larijani v. Georgetown University*, 791 A.2d 41, 43 (D.C. 2002) (quoting *McBryde v. Amoco Oil Co.,* 404 A.2d 200, 202 (D.C. 1979)). The court may grant a Rule 12(b)(6) motion to dismiss only where it appears "beyond doubt" that the

plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Id.*; *Owens v. Tiber Island Condo. Ass'n.*, 373 A.2d 890, 893 (D.C. 1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). A Rule 12(b)(1) motion addressed solely to the allegations of the complaint and challenging subject matter jurisdiction based on lack of standing is judged by essentially the same standard. *See Heard v. Johnson*, 810 A.2d 871, 877-78 (D.C. 2002); *see also Bible Way Church v. Beards*, 680 A.2d 419, 426 n. 4 (D.C. 1996).

THE DISTRICT COURT RULING AND LAW OF THE CASE

Defendant invites this court not to address the merits of its standing argument, but to grant its motion based solely on Judge Kotelly's ruling. According to Defendant, the court should accept that ruling as its own under principles derived from the law of removal or should treat the ruling as the "law of the case" and adhere to it for that reason. As tempting as it is to take the short route to the decision, the court declines to accept Defendant's invitation for two reasons. First, although Judge Kotelly acknowledged Defendant's position that she should grant Defendant's motion to dismiss for lack of standing, rather than remand, on the ground that the District of Columbia local courts would apply the same principles of standing as the Article III federal courts, she expressly declined to dismiss the complaint and remanded for this court to decide the question of standing under local law.[1] Second, Defendant's motion in the District

[1] Defendant argues that Judge Kotelly remanded, rather than dismissed, not because she had reservations about whether Plaintiffs could establish standing to sue in the Superior Court, but because she felt that the removal statute gave her no other option. Regardless of her reasons, however, the fact remains that Judge Kotelly did not decide whether Plaintiffs have standing to sue in the Article I courts of the District of Columbia.

Court was directed at Plaintiffs' original Complaint, not their First Amended Complaint that is now before this court. Defendant relies in part on Judge Kotelly's statement that her ruling would not change even if Plaintiffs had pled in their Complaint the claims of breach of fiduciary duty or confidential relationship and the statutory claims that they have now included in their amended Complaint, but those comments were not necessary to her decision and, even if not pure *dicta*, do not have the requisite degree of finality to bind this court under the law of the case doctrine or cause it to treat the ruling as its own under principles derived from the law of removal.

For the foregoing reasons, the court feels constrained to reach the merits of Defendant's motion and to rule *ab initio* on the issues presented. ING contends that the court lacks subject matter jurisdiction and should dismiss the First Amended Complaint because Plaintiffs lack standing to sue. According to ING, Plaintiffs have failed to allege that they have suffered or will suffer an injury-in-fact, and their fear that they may suffer an injury from theft of their identity in the future is not a sufficient basis on which to claim standing to bring this action. As an alternative, and only if the court declines to dismiss for lack of standing, ING asserts that Plaintiffs have also failed to state a claim on which relief can be granted (again because of no injury) and that any such claim would be moot in any event because ING voluntarily offered all of the relief to which Plaintiffs would be entitled even if the injury they were alleging were sufficiently real to confer standing and to state a claim on which relief could be granted. Because the court

agrees with Defendant that the complaint must be dismissed for lack of standing, it does not reach Defendant's alternative grounds for dismissal.[2]

STANDING

The local courts of the District of Columbia are not established under Article III of the Constitution. Nonetheless they, like their Article III counterparts, exercise jurisdiction only over actual cases and controversies and insist on the prudential prerequisites of standing. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002); *Lee v. District of Columbia Bd. of Appeals and Review*, 423 A.2d 210, 216-17 (D.C. 1980). To have standing, the Plaintiff "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, …and (b) actual or imminent, not conjectural or hypothetical." *Friends of Tilden Park*, 806 A.2d at 1207 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Community Credit Union Services, Inc. v. Federal Express Services Corp.*, 534 A.2d 331, 333 (D.C. 1987). Moreover, to the extent Plaintiffs purport to be bringing this action on behalf of others similarly situated, "before one may sue for damages on behalf of others – whether the 'others' are members of an organization or a class of consumers – he must show injury to himself." *Consumer Federation of America v. UpJohn Co.*, 346 A.2d 725, 729 n.11 (D.C. 1975); *see also*

[2] The court notes that in a case like this, standing and failure to state a claim are first cousins. Without a cognizable injury-in-fact, Plaintiffs lack standing to sue and, for the same reason, have arguably not stated a claim for relief under any of the various tort theories alleged in the First Amended Complaint. Defendant's mootness argument appears to depend, to some degree, on facts that are outside the pleadings, some of which may be disputed. Although the court is permitted to resolve factual disputes on a "factual attack" under Rule 12(b)(1) without converting the motion into a Rule 56 motion for summary judgment, it is unnecessary to do so in this case because Plaintiffs so plainly lack standing to bring the action whether or not their claims would all be moot.

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976); *O'Shea v. Littleton*, 414 U.S.488, 494 (1974).

Plaintiffs allege, in the light most favorable to them, that they are more vulnerable to identity theft now that their personal data has fallen into the hands of the thief of the computer or one who receives it from the thief, and the Plaintiffs who are police officers allege that their home addresses may be compromised, subjecting them to possible threats or violence.[3] No Plaintiff alleges that his or her identity has in fact been stolen or used, and no police officer Plaintiff alleges that his or her residence has been revealed or threatened in any way. The most Plaintiffs can claim is that they are worried that these harmful events may occur and that they "have incurred or will incur actual damages" to protect their credit or to repair any damage if it occurs.

These allegations are insufficient to confer standing. Fear of future harm, even if reasonable, is simply not the kind of concrete and particularized injury, or imminent future injury, courts will recognize as a basis on which to bring an action for compensatory or injunctive relief.[4] The claim that Plaintiffs "have incurred or will incur" certain expenses is vague and indefinite, but even if it were more specific and accepted as true, it does not suffice to confer standing. On this point, the court agrees with Judge Kotelly's analysis in her remand order:

> …[E]ven if individual Plaintiffs have purchased and paid for credit monitoring services, the 'lost data' cases cited by ING clearly reject

[3] The heightened concern of the police officer Plaintiffs appears to be something of a makeweight, and the real thrust of the Complaint seems to be the risk of identity theft as it relates to accounts and financial credit.

[4] It should be noted that for all anyone knows at this time, there has not been **any** exposure of Plaintiffs' personal information. Even if the information was not password protected, as Plaintiffs allege, it is at least possible that the thief kept the computer or passed it to someone who erased its hard drive and memory to make it more pristine for resale. Unless and until any of the stored information is actually used, it is impossible to know whether Plaintiffs will ever suffer any real, as opposed to imagined, injury.

> the theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit. [citations omitted] As [one] court explained, an argument that the time and money spent monitoring a plaintiff's credit suffices to establish an injury 'overlook[s] the fact that their expenditure of time and money was not the result of any present injury, but rather the anticipation of future injury that has not materialized.' [citation omitted]

Randolph v. ING Life Insurance and Annuity Co., No. 06-1228, 2007 U.S. Dist. LEXIS 11523, at *19-20 (D.D.C. Feb. 20, 2007).

Several courts have been presented with claims of lost data similar to those in Plaintiffs' complaint, and all have found that the plaintiffs lacked the requisite injury to establish standing to sue or to state a legally sufficient claim for relief. *See Bell v. Acxiom Corp.*, No. 4:06CV00485-WRW, 2006 U.S. Dist. LEXIS 72477, at *8-10 (E.D. Ark. Oct. 3, 2006) (lack of standing); *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 688-89 (S.D. Ohio 2006) (lack of standing); *Giordano v. Wachovia Sec.*, LLC, No. 06-476(JBS), 2006 U.S. Dist. LEXIS 52266, at *12 (D.N.J. July 31, 2006) (lack of standing); s*ee also Kahle v. Litton Loan Servicing LP,* No. 1:05cv756, 2007 U.S. Dist. LEXIS 35845, at *19-21 (S.D. Ohio May 16, 2007) (summary judgment based on no injury-in-fact); *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) (same); *Guin v. Brazos Higher Education Service Corp. Inc.*, No. 05-668(RHK/JSM), 2006 U.S. Dist. LEXIS 4846, *15-16 (D. Minn. Feb. 7, 2006) (same); *Stollenwerk v. Tri-West Healthcare Alliance*, No. 03-0185-PHX-SRB, 2005 U.S. Dist. LEXIS 41054, *14 (D. Ariz. Sept. 8, 2005), *appeal docketed*, No. 05-16990 (9th Cir. Oct. 19, 2005) (same; distinguishing toxic exposure cases). Plaintiffs have cited no case to the contrary, and the court has found none. Although the decided cases are from federal courts and are based on principles of Article III standing, they are no less authoritative given the doctrine that our local Article I courts will accept jurisdiction only over actual cases and controversies and

insist on the same prudential prerequisites of standing as the Article III courts. *Friends of Tilden Park*, 806 A.2d at 1206.

For the reasons previously noted, the court does not consider itself bound by Judge Kotelly's ruling. Nonetheless, the court agrees with the Judge Kotelly's reasoning in concluding that Plaintiffs lack standing with respect to the claims stated in their original Complaint. The only remaining question is whether the outcome changes now that Plaintiffs have pled in their amended Complaint (as opposed to merely arguing in their briefs) claims of breach of fiduciary duty or confidential relationship and what purport to be statutory causes of action. The First Amended Complaint pleads no new facts. It simply supplements its list of grievances with additional tort theories. The claimed injuries remain the same – fear of future identity theft and the costs and inconvenience associated with it if it should occur. As such, Plaintiffs' standing to bring their added claims rests on the same inadequate foundation as their standing with respect to their original claims.

Assuming, without deciding, that ING acted as a fiduciary with respect to these Plaintiffs in its role as administrator of the § 457 deferred compensation plan for thousands of District of Columbia employees, which is by no means certain based on the Complaint, the tort of breach of fiduciary duty requires not only proof of the fiduciary relationship and its breach, but also proof of a legally cognizable injury, which Plaintiffs have not alleged. *See Beckman v. Farmer*, 579 A.2d 618, 651 (D.C. 1990). Plaintiffs' lack of standing is not cured simply by renaming the tort theory under which they are suing. Plaintiffs' inability to plead a "concrete and particularized" injury and one that is

"actual or imminent" is as fatal to their claims of breach of fiduciary duty or breach of a confidential relationship as it is to their original claims.[5]

Finally, the First Amended Complaint attempts to locate the court's subject matter jurisdiction (and Plaintiffs' standing to invoke it) by purporting to plead claims under two statutes, neither one of which has anything to do with the claims in this case. The first, D.C. Code §1-626.13, relates to the duties and liabilities of the Trustee of the Trust established pursuant to D.C. Code § 1-626.11, which holds the funds contributed by the District as part of the defined contribution plan set up under D.C. Code § 1-626.05(3). *See also* D.C. Code § 1-626.04(7) (definition of "Trust").[6] Yet, the complaint itself identifies the Plaintiffs as participants in the § 457 deferred compensation plan set

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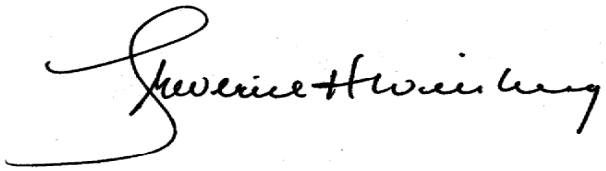
[5] It is not entirely clear that the First Amended Complaint includes a claim of breach of a confidential relationship that is separate from the claim of breach of fiduciary duty. This jurisdiction recognizes the tort of breach of a confidential relationship, but it has been discussed only in a few cases and its precise contours have not been fully articulated. *See Suesbury v. Caceres*, 840 A.2d 1285, 1287 (D.C. 2004); *Doe v. Medlantic Health Care Group, Inc.*, 814 A.2d 939, 950-51 (D.C. 2003); *Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc.,* 492 A.2d 580, 591(D.C. 1985). At a minimum, such a claim requires proof of **an injury** caused by an unconsented, unprivileged disclosure to a third person of information the disclosing party has learned within a confidential relationship. *Vasssiliades*, 492 A.2d at 591. The cases that have recognized the claim in this jurisdiction have done so solely in the context of physician-patient or hospital-patient relationships. Therefore, it is doubtful that the relationship between ING and these Plaintiffs satisfies the requirement of a confidential relationship for purposes of this particular narrowly-defined tort. Moreover, the data ING allegedly failed to protect, while undoubtedly personal, is not the same kind of intimate and private medical information that was disclosed in the confidential relationship cases. Unlike private medical information, the kind of information at issue in this case is routinely disclosed by most people on an almost daily basis, and it becomes a matter of concern only if it falls into the hands of a thief. Finally, ING did not disclose **any** private information. If there has been any "disclosure" in this case – and there may not have been – it was accomplished only through the intervening criminal act of at least one other person. The First Amended Complaint, like the original Complaint, alleges that Defendant ING "disclosed" Plaintiffs' personal data by, *inter alia*, allowing its own employee to download the data into his computer. However, as a matter of law, if any trusted employee of ING has a confidential relationship with Plaintiffs, all do. Sharing of Plaintiffs' data by and between ING employees is a necessary part of the services ING provided to the plan, which would not be actionable as a prohibited disclosure even if there were a confidential relationship. In any event, Plaintiffs cannot establish standing without an actual or imminent concrete injury, and the kind of inchoate "disclosure" to outsiders alleged in the complaint does not establish standing for the tort of breach of a confidential relationship any more than it does for the other torts Plaintiffs have alleged.

[6] Plaintiffs' opposition brief argues that the statutory definition of "Trust" is not relevant to their claims because the definitions in D.C. Code § 1-626.04 are "For the purpose of §§ 1-626.05 through 1-626.12," and they are proceeding under D.C. Code §§ 1-626.13 and 1-626.14. However, Plaintiffs' effort to parse

up under D.C. Code § 1-626.05(2), for which Defendant ING served as the administrator. Likewise, the second statute, D.C. Code § 1-741, relates to the retirement Funds for District of Columbia police, firefighters, teachers, and judges established under D.C. Code §§ 1-712 – 1-714, not to the deferred compensation plan at issue in this case. *See also* D.C. Code § 1-702(10) (definition of "Fund") and D.C. Code § 1-702(20) (definition of "fiduciary"). [7]

For all of the foregoing reasons, it is this 13th day of June, 2007,

ORDERED that Defendant's motion to dismiss the First Amended Complaint for lack of standing, pursuant to Super. Ct. Civ. R. 12(b)(1), be, and it hereby is, granted.



JUDGE FREDERICK H. WEISBERG

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the statutory scheme to suit their present purposes is unavailing. There is only one Trust, and the references to "the Trust" in sections 1-626.13 and 1-626.14 can only refer to the Trust established pursuant to section 1-626.11, for which ING was not the Trustee.

[7] Plaintiffs' opposition brief appears to argue that the statutes pertaining to the District's defined contribution plan and to the retirement Funds for police, firefighters, teachers, and judges are somehow relevant to the standing issue because each of the Plaintiffs is also a participant in one or the other of these retirement programs in addition to their participation in the § 457 deferred compensation plan. However, the Complaint is based solely on Plaintiffs' participation in the deferred compensation plan and, more importantly, the data in the stolen computer was entrusted to ING in connection with its role as administrator of the deferred compensation plan, not some other retirement program in which Plaintiffs may also be participants. Moreover, even if Plaintiffs' reliance on these statutes were not misplaced, the result would be the same. The private rights of action for breach of fiduciary duty authorized by D.C. Code § 1-626.14 and D.C. Code § 1-742, respectively, require an injury-in-fact to invoke the jurisdiction of the court no less than Plaintiffs' common law causes of action. There is nothing in the two statutory schemes to suggest that the Council intended to legislate away the time-honored principles of standing as they apply to claims of individuals under these statutes, whether alone or as representatives of a putative class. *See Hakki v. Zima Co.*, No. 03-9183, 2006 WL 852126, at *2 n.1 (D.C. Super. Ct. Mar. 28, 2006) (Weisberg, J.); *see also Newman v. District of Columbia*, 518 A.2d 698, 703 (D.C. 1986). Thus, even if the two statutory provisions on which Plaintiffs purport to rely were applicable to their claims, Plaintiffs' allegations that they face a heightened risk of identity theft and that they "have incurred or will incur" unspecified damages to prevent identity theft or to repair stolen credit do not plead the kind of actual or imminent injuries that will confer standing to sue, whether the cause of action finds its source in a statute or is a creature of common law.

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