

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

HARRY Z. ITSKOWITZ, M.D.,	:	May Term 2003
Plaintiff,	:	
v.	:	No. 2926
WHITE and WILLIAMS, LLP, STEPHEN	:	
C. ZIVITZ, ESQUIRE,	:	COMMERCE PROGRAM
JOSEPH DOMINGUEZ, ESQUIRE,	:	
BRUCE A. BELL, ESQUIRE and RYAN J.	:	Control Number 071153
UDELL, ESQUIRE,	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 10<sup>TH</sup> day of November 2005 upon consideration of the Motion for Summary Judgment filed by Defendants White and Williams, LLP, Stephen C. Zivitz, Esquire, Joseph Dominguez, Esquire, Bruce A. Bell, Esquire and Ryan J. Udell, Esquire, responses in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memoranda Opinion to be filed forthwith, it hereby is **ORDERED** and **DECREED** that Defendants' Motion is **Granted in part** and **Denied in part** as follows:

1. Defendants Motion for Summary Judgment as to Counts III (intentional interference with contractual relations) and IV (fraudulent misrepresentation and nondisclosure) is **granted** and said counts are dismissed against all defendants.
2. All claims of punitive damages are stricken.
3. Defendants' Motion for Summary Judgment as to Counts I (breach of fiduciary duty), II (legal malpractice) and V (breach of contract) is **denied**.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**

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**OPINION**

***ABRAMSON, J.***

The matter arises from an action sounding in legal malpractice filed by Plaintiff Harry Z. Itskowitz, M.D. (“Itskowitz”) against Defendants White and Williams, LLP (“WW”), Stephen C. Zivitz, Esquire (“Zivitz”), Joseph Dominguez, Esquire (“Dominguez”) and Ryan J. Udell, Esquire (“Udell”). Pending before the court is Defendants Motion for Summary Judgment. For the reasons discussed below, the Motion is Granted in part and denied in part.

**BACKGROUND**

The factual history of this case is set forth in Itskowitz v. White and Williams et. al., 2004 Phila. Ct. Com. Pl. LEXIS 34 (2004) which the court adopts and incorporates herein.

Procedurally, Plaintiff filed the instant action against Defendants alleging breach of fiduciary duty (Count I), legal malpractice (Count II), intentional interference with contractual relations (Count III), fraudulent misrepresentation and nondisclosure (Count IV), breach of contract (Count V), intentional infliction of emotional distress (Count VI)

and negligent infliction of emotional distress (Count VII). After the filing of preliminary objections the court dismissed Counts VI and VII. Defendants have now filed a motion for summary judgment.

## **DISCUSSION**

### **I. STANDARD OF REVIEW**

The law pertaining to motions for summary judgment is well settled. Once the relevant pleadings have closed, any party may move for summary judgment. Pa. R.C.P. 1035.2. "Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." Rausch v. Mike-Mayer, 783 A.2d 815, 821 (Pa. Super. 2001). Furthermore, "A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the jury." McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. 1998). The moving party bears the burden of proving that no genuine issues of material fact exist. Rausch, 783 A.2d at 821. The trial court then must view the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. *See id.* "Only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment." Id.

### **II. A question of fact exists as to whether an attorney client relationship ever existed between Itskowitz and Defendants.**

Count II of plaintiff's complaint purports to state a claim for legal malpractice. Defendants maintain that plaintiff does not have standing to pursue such a claim since an

attorney client relationship did not exist between the parties and therefore no duty was owed. Specifically, defendants maintain that at all times they represented only the partnership as an entity and not the partners who compose it.

A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence. In the case *sub judice*, the record fails to evidence the existence of a written contract between defendants and plaintiff and indeed the plaintiff concedes in his papers that no express contract existed establishing an attorney client relationship.

Instead, plaintiff alleges that an implied attorney client relationship existed between the parties. Absence of an express agreement does not resolve the issue of whether an attorney client relationship existed. An implied attorney-client relationship will be found if the following are shown: (1) the purported client sought advice or assistance from the attorney; (2) the advice sought was within the attorney's professional competence; (3) the attorney expressly or impliedly agreed to render such assistance; and (4) it was reasonable for the putative client to believe the attorneys were representing him. *See Atkinson v. Haug*, 424 Pa. Super. 406, 411-12, 622 A.2d 983, 986 (1993).

In analyzing whether an attorney client relationship existed between plaintiff and defendants, the court is cognizant of Rule of Professional Conduct 1.13 which applies equally to unincorporated associations such as partnerships. See Comment to RPC 1.13. Rule of Professional Conduct 1.13(a) states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This makes it clear that an attorney representing an unincorporated association generally represents the association and not the association's constituents. *See Del Borrello v. Del*

Borrello, 62 Pa. D. & C.4th 417, 439-440 (2001). Maintaining such a distinction between an entity and its members can be difficult. See Willig, Williams & Davidson v. Walters, 1993 U. S. Dist. LEXIS 8448 (E.D. Pa. 1993).

In First Republic Bank v. Brand, 51 Pa. D. & C. 4<sup>th</sup> 167 (2001)(Herron, J.), the court was faced with a similar situation except that the entity at issue was a closely held corporation. The court utilized ten factors to determine whether an attorney-client relationship had been formed between a close corporation's attorney and one of the corporation's shareholders. The ten factors are: (1) Whether the shareholder was separately represented by other counsel when the corporation was created or in connection with its affairs; (2) Whether the shareholder sought advice on and whether the attorney represented the shareholder in particularized or individual matters, including matters arising prior to the attorney's representation of the corporation; (3) Whether the attorney had access to shareholder's confidential or secret information that was unavailable to other parties; (4) Whether the attorney's services were billed to and paid by the corporation or the shareholder; (5) Whether the corporation is closely held; (6) Whether the shareholder could reasonably have believed that the attorney was acting as his individual attorney rather than as the corporation's attorney; (7) Whether the attorney affirmatively assumed a duty of representation to the shareholder by either express agreement or implication; (8) Whether the matters on which the attorney gave advice are within his or her professional competence; (9) Whether the attorney entered into a fee arrangement; and (10) Whether there was evidence of reliance by the shareholder on the attorney as his or her separate counsel or of the shareholder's expectation of personal representation. See Brand; see also Del Borello v. Del Borello, 62 Pa. D. & C. 4<sup>th</sup>417,

441 (2001). The court believes that these 10 factors which incorporate the standard set forth in Atkinson v. Haug, supra are also relevant in analyzing the relationship between the parties here.

Applying the foregoing to the facts at hand, the court is unable to conclude at this time if an implied attorney client relationship existed between plaintiff and defendants. In an affidavit attached to his response to the motion for summary judgment Itskowitz states that plaintiff was individually represented by White and Williams. Specifically, plaintiff avers that (1) upon formation of the partnership Itskowitz consulted with Steven Zivitz, Esquire regarding his individual rights, obligations and duties under the partnership; (2) Itskowitz relied upon the advice of White and Williams regarding his rights duties and obligations under the amended partnership agreements; (3) Itskowitz sought advice from White and Williams repeatedly about many issues relating to his individual legal obligations and duties; (4) Itskowitz discussed with White and Williams the Medicare audit, the facts underlying the audit, his role in those facts, possible strategies to pursue and ramifications for the audit; (5) Itskowitz throughout the course of the audit sought the advice and received the advice of White and Williams and its lawyers, cooperated fully and disclosed confidential information; (6) White and Williams counseled Itskowitz as to the risks and benefits as to selecting one of three options provided by the Medicare audit administrator; (7) White and Williams required Itskowitz to execute a written agreement individually consenting to the selection of Option 2 offered by the administrator; (9) Itskowitz sought, received and relied upon the advice of White and Williams regarding the legal impact of personally executing a Guaranty and Surety Agreement which contained a provision for confession of judgment; and (10) White and Williams never

told Itskowitz either orally or in writing that their position as the partnership's counsel precluded them from meeting with or representing Itskowitz or that there was a conflict of interest. (Exhibit "B" to Pelts. Response to Dots. Mt. for SJ.).

These facts however stand in contrast to White and Williams billing and payment records which suggest that the firm solely represented the partnership and that any representations made to plaintiff were derivative from their representation of the partnership since individual members in an entity share the same interest vis-à-vis a third party in a particular matter or transaction, i.e. the Medicare audit.

Since the court is presented with conflicting evidence regarding the nature of the relationship between plaintiff and defendants, the court is unable to resolve the issue at this time. Accordingly, defendants' motion for summary judgment is denied.<sup>1</sup>

### **III. Plaintiff Has Alleged Sufficient Facts to Allege a Breach of Contract Claim.**

Count V of plaintiff's complaint purports to state a claim for breach of contract. Specifically plaintiff alleges that defendants impliedly promised Itskowitz that they would act in his best interests with undivided loyalty, in a manner which preserved confidential information and in a manner to avoid engaging in conflicts of interest or potential conflicts of interest. Complaint p. 78. Defendants maintain that said claim should be dismissed since the complaint fails to allege that defendants failed to follow a specific instruction of a client. The court does not agree.

Our Superior Court has recently held that a client may maintain a breach of contract claim against its attorney for "failure to fulfill his or her contractual duty to provide the

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<sup>1</sup> Since the determination of whether an attorney client relationship existed between plaintiff and defendants is also central to plaintiff's claim for breach of fiduciary duty and breach of contract, defendants' motion for summary judgment is also denied as to those claims.

agreed upon services in a manner consistent with the profession at large,” and the client need not allege the attorney failed to follow a specific instruction. Gorski v. Smith, 812 A.2d 683, 695 (Pa. Super. 2002). As a result, plaintiff need not prove that defendants failed to follow a specific instruction in order to recover on a breach of contract claim. *See id.* (citing Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. 1997)). Accordingly, defendants’ motion for summary judgment is denied.<sup>2</sup>

#### **IV. Plaintiff’s Fraud Claim is Barred by the Gist of the Action Doctrine.**

Count IV of plaintiff’s complaint purports to state a claim for fraudulent misrepresentation and nondisclosure. Specifically plaintiff alleges that defendants by their conduct, misrepresentations and material omissions indicated to Itskowitz that they would act in the best interests of Itskowitz and the partnership with undivided loyalty and avoid engaging in conflict of interests or potential conflict of interests. Complaint p. 72. After reviewing the record evidence the court finds that plaintiff’s fraud claim is barred by the gist of the action doctrine.

Pennsylvania’s gist of the action doctrine bars tort claims that: (1) arise solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract. eToll, Inc. v. Elais/Savion Adver., Inc., 811 A.2d 10, 19 (Pa. Super. 2002).

The court finds that the allegations within Count IV are nothing more than a repetition of the negligence and contract counts. A careful review of these counts reveals

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<sup>2</sup> Of course if the court determines at trial that an attorney client relationship does not exist between plaintiff and defendants then the claim for breach of contract fails.

that the entire basis of plaintiff's fraud claim stems from the defendants' alleged failure to act within the best interests of the plaintiff with undivided loyalty, to avoid engaging in conflicts of interest and defendants' failure to disclose to Itskowitz that its was representing competing and conflicting interests. These failures on the part of defendants allegedly constituted negligence and contractual breaches. The complaint is devoid of any allegations that would distinguish the negligence and breach of contract claims from the fraud claim. Although plaintiffs attempt to expand upon the allegations of the complaint in their motion to allege a claim of fraudulent inducement<sup>3</sup>, the court finds that the record does not support such a claim. Accordingly, Count IV alleging fraud is barred by the gist of the action doctrine.

**V. Plaintiff's claim for Punitive Damages is Stricken.**

Plaintiff also is not entitled to punitive damages. Pennsylvania allows an award of punitive damages only under limited conditions: This Court has adopted Section 908(2) of the Restatement (Second) of Torts regarding the imposition of punitive damages. That provision permits punitive damages for conduct that is "outrageous because of the defendant's evil motives or his reckless indifference to the rights of others." *Restatement (Second) of Torts* § 908(2) (1977). See Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984); Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (1963). A court may award punitive damages only if the conduct was malicious, wanton, reckless, willful, or oppressive. Chambers, 411 Pa. at 344-45, 192 A.2d at 358. The proper focus is on "the act itself together with all the circumstances including the motive of the wrongdoer and the relations between the parties . . . ." Id. at 345, 192 A.2d at 358. In addition, the actor's

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<sup>3</sup> The gist of the action doctrine only bars claims of fraud in the performance. Claims of fraud in the inducement are not barred. See eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 19 (Pa. Super. 2002).

state of mind is relevant. The act or omission must be intentional, reckless, or malicious. Rizzo v. Haines, 520 Pa. 484, 507, 555 A.2d 58, 69 (1989).

To support their argument that plaintiff acted recklessly, Plaintiff maintains that since it has asserted a cause of action for breach of fiduciary duty and legal malpractice punitive damages are recoverable. Although plaintiff is correct that punitive damages are available to a plaintiff who alleges such claims, mere pleading of these causes of action does not entitle plaintiff to punitive damages. Rather plaintiff must present evidence that defendants' actions were malicious, wanton, reckless, willful or oppressive. Since the record is devoid of any such evidence, the court finds that plaintiff has failed to satisfy his burden of proof regarding punitive damages. Accordingly, the claim for punitive damages is stricken.

**VI. Plaintiff's Claim for Intentional Interference with Contractual Relations is Dismissed.**

Count III of the complaint purports to state a claim for intentional interference with contractual relations. Specifically plaintiff alleges that defendants acted without privilege or license, wrongfully interfered with plaintiff's contractual relations with the other partners and with his then existing and prospective clients. For the reasons discussed below, plaintiff has failed to adduce sufficient evidence to make such a claim.

"The tort of interference with contract is defined in terms of unprivileged interference with a contract with a third party. Essential to the right of recovery on this theory is the existence of a contractual relationship between the plaintiff and a party other than the defendant." Nix v. Temple University of Commw. System of Higher Educ., 408 Pa. Super. 369, 378-9, 596 A.2d 1132, 1137 (1991). An agent cannot tortiously interfere with its principal's contract when acting within the scope of his agency. *See id.* (corporate

agents were not liable for tortiously interfering with corporation's contract with plaintiff.)  
*See also* Rutherford v. Presbyterian-University Hospital, 417 Pa. Super. 316, 612 A.2d 500 (1992) (same); Daniel Adams Assoc., Inc. v. Rimbach Pub., Inc., 360 Pa. Super. 72, 519 A.2d 997 (1987) (same).

The facts of record demonstrate that defendants were the attorneys for the partnership, so therefore they were the partnership's agent. As the partnership's agents, defendants could not tortiously interfere with the partners contract. In essence, plaintiff is alleging that defendants interfered with his own contract, i.e., breached it, for which plaintiff causes of action have already been alleged, i.e. legal malpractice, breach of contract. Since defendants are not third parties to the contract between plaintiff and the partners, they cannot be liable for tortiously interfering with them. Accordingly, defendants' motion for summary judgment is granted and Count III is dismissed.

### **CONCLUSION**

For the foregoing, Defendants' Motion for Summary Judgment is granted in part and Counts III (intentional interference with contractual relations) and IV (fraudulent misrepresentation and nondisclosure) are dismissed as well as plaintiff's claim for punitive damages. Defendants' motion is denied in all other respects.

An order consistent with this opinion will follow.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**