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

EDELSTEIN & DIAMOND, L.L.P, Plaintiff,	:	January Term 2004
v.	:	No. 1310
DEAN I. ORLOFF, ESQUIRE, Defendant.	:	Commerce Program
	:	Control Number 120187

ORDER and OPINION

AND NOW, this 29th day of June 2005, upon consideration of the Motion for Summary Judgment of Dean I. Orloff, Esquire, Plaintiff's response in opposition, the parties respective Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion filed of record, it hereby is **ORDERED** and **DECREED** that Defendant's Motion for Summary Judgment is **Granted** as to Count III (breach of fiduciary duty) and **Denied** as to Count II (unjust enrichment).

It is further Ordered that the parties appear for a scheduling conference/settlement conference on At in courtroom 676 City Hall.

BY THE COURT,

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C. DARNELL JONES, II, J.

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DEAN I. ORLOFF, ESQUIRE, Defendant.	:	Commerce Program
	:	Control Number 120187

OPINION

JONES, II, J.

This action arises from a failed employer/employee relationship between a law firm and associate. Presently before the court is the Motion for Summary Judgment of Defendant Dean I. Orloff, Esquire. For the reasons discussed below, Orloff's Motion for Summary Judgment is Granted as to Count III (breach of fiduciary duty) and Denied as to Count II (unjust enrichment).

BACKGROUND

Dean L. Orloff, Esquire ("Orloff") was hired by the law firm of Edelstein, Levine, German and Diamond [1]as an associate in February 2003 to work on the firm's plaintiff files and on occasion to work on the defense files. The firm's plaintiff department consisted of approximately two hundred to three hundred files. Orloff was required to evaluate the files, determine the status of the files, perform legal services on the files and determine whether the firm needed to hire a paralegal to work in the department. Thereafter, Orloff was to discuss his recommendations with respect to the department

[1] At some point during Orloff's employment with the firm, the firm of Edelstein, Levine, German & Diamond dissolved and a new entity Edelstein, Levine and Diamond L.L.P. was formed. Presently, the firm is Edelstein & Diamond L.L.P.

with Edelstein or Cataldi and to receive their approval to implement any changes in the department.

In exchange, Orloff was to be paid a salary of $75,000.00 annually plus health benefits, payment of parking fees and use of the firm's offices and administrative services. An oral agreement allegedly existed with respect to the sharing of fees generated on cases originated by Orloff as well as files originated by Richard Cataldi, Esquire, another associate attorney in the law firm.[2]

Shortly into the employment relationship, Jay Edelstein, Esquire, a principal of the firm, became dissatisfied with Orloff's performance. Specifically, there was a concern that Orloff's work habits were not satisfactory, that Orloff failed to adequately manage the plaintiff's department and that sufficient fee monies were not being generated in said department.

On or about October 1, 2003, Edelstein informed Orloff that the employment relationship was not working out and that the parties would need to discuss Orloff's future with the firm. On October 2, 2003, a similar discussion ensued. Thereafter, Plaintiff alleges that Orloff failed to report to work the following day and for weeks thereafter and failed to communicate with Plaintiff as to his whereabouts, the status of the files he was handling and his intent to return to the office to transition files and remove his personal property.

[2] The oral agreement allegedly provides that fees on cases generated by Orloff would be shared on a 60%-40% basis with the firm receiving 60% and Orloff receiving 40%. Any fees obtained on any cases generated by Richard Cataldi, Esquire would be shared on a 90%-10% basis with the firm receiving 90% of the net fees and Orloff receiving 10% of the net fees. Orloff was also required to reimburse Plaintiff for all costs that Plaintiff paid on Orloff's files.

Plaintiff contends that as a result of Orloff's failure to perform his obligations pursuant to an at will employment relationship, plaintiff sustained damages including but not limited to percentage of fees and costs that Plaintiff was entitled to be paid in accordance with the oral agreement. On January 12, 2004, the firm instituted suit against Orloff alleging breach of contract (Count I), fraud (Count II), unjust enrichment (Count III) and breach of fiduciary duty (Count IV). In addition to the above, the firm also seeks an accounting.

On April 6, 2004, the court overruled in part and sustained in part Preliminary Objections filed by Orloff dismissing the claims for breach of contract and fraud and granting Plaintiff leave to amend as it pertained to the breach of contract claim. Orloff subsequently filed a motion for reconsideration requesting that the court reconsider its decision to overrule the preliminary objections in part which the court denied. On April 26, 2004, Plaintiff filed an amended complaint. Orloff once again filed Preliminary Objections which the court overruled in part and sustained in part.

On April 25, 2005, the court denied Orloff's motion for judgment on the pleadings. Presently before the court is Orloff's Motion for Summary Judgment.

DISCUSSION

A. 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.

B. Plaintiff Has Failed to Make Out a Prima Facie Claim for Breach of Fiduciary Duty.

Count III of the Amended Complaint purports to state a claim for breach of fiduciary duty. "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts § 874, cmt. a (1979). A relationship of blood, business, friendship or association may give rise to a fiduciary relationship.

Here, Plaintiff alleges that Orloff owed the firm a fiduciary duty to properly manage, in accordance with the rules of Professional Conduct, the plaintiff's department of the law firm and to handle the files for which he was responsible in a diligent, competent and professional matter. (Amended Complaint ¶ 34, 36).

At this stage in the litigation, Plaintiff may not rest upon the mere allegations or denials of the pleadings but must file a response identifying one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the

evidence or that the evidence in the record establishes the facts essential to the cause of action which the motion cites as not having been produced. The court finds that Plaintiff has failed to establish the facts essential to state a claim for breach of fiduciary duty.

In support of its claim that Orloff breached his fiduciary duty to Plaintiff, Plaintiff relies upon one fact to support its claim, namely that Orloff was hired to run the plaintiff's department of the law firm. Edelstein deposition pp. 11-12, 51. This fact alone is insufficient to establish a claim for breach of fiduciary duty. Rather, the critical question is whether the relationship goes beyond mere reliance on superior skill, and into a relationship characterized by "overmastering influence" on one side or "weakness, dependence, or trust, justifiably reposed" on the other side. *See* eToll, Inc. v. Elias/Savion Adver. Inc., 811 A.2d 10, 23 (Pa. Super. 2002). A confidential relationship is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power. Id.

The relationship between Plaintiff and Orloff does not constitute one of "overmastering influence" or "weakness, dependence or trust justifiably reposed". The facts of record establish that even though Orloff's duties were to manage the plaintiff's department, his "management" was subject to the approval from Mr. Cataldi and/or Jay L. Edelstein. (Plaintiff's Memo. Of Law p. 2, e-mails dated July 29, 2003(pltf cases), July 29, 2003 (what's going on), July 29, 2003 (pltf files), July 30, 2003 (plts. policies and procedures)). Even the acceptance of settlement offers on plaintiff's cases was subject to the approval of Edelstein. (e-mail dated August 8, 2003 (Settlement Offers for Plaintiff cases). The record also fails to evidence that Orloff had the ability to actually

bind Plaintiff or alter it's legal relations with third parties. Hence, the court finds that Plaintiff has failed to set forth sufficient facts demonstrating the requisite confidential or fiduciary relationship necessary to prove a claim for breach of fiduciary duty. Accordingly, Orloff's Motion for Summary Judgment is Granted and Count III is dismissed.[3]

C. Unjust Enrichment

Count II of Plaintiff's complaint purports to state a claim for unjust enrichment. The elements for a claim for unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention under such circumstances that would be inequitable for [the] defendant to retain the benefit without payment of value." Weinik v. PHH U.S. Mortage Corp., 736 A.2d 616, 622 (Pa. Super. 1999). After considering the record evidence, the court reaches no conclusion as to whether a claim for unjust enrichment exists under the circumstances. Although, evidence exists in the record that an agreement was reached concerning the splitting of fees on cases originated by Orloff during his employment with Plaintiff, genuine issues of fact exist as to whether the same existed upon termination of the relationship between the parties. See e.g. E-mails dated October 1, 2003. Based on the foregoing Orloff's Motion for Smmary Judgment is denied as to Count II.

[3] In response to the motion for summary judgment, Plaintiff argues that Defendant's argument regarding a breach of fiduciary duty is barred by the rule of coordinate jurisdiction. The court finds Plaintiff's reliance upon the rule of coordinate jurisdiction misplaced. The coordinate jurisdiction rule prohibits a judge from overruling the decision of another judge of the same court, under most circumstances. There are, however, situations when the rule does not apply such as "where the motions differ in kind, as preliminary objections differ from . . . motions for summary judgment, a judge ruling on a later motion is not precluded from granting relief although an earlier judge has denied an earlier motion." Ryan v. Berman, 813 A.2d 792 (Pa. 2002).

CONCLUSION

For the foregoing reasons, Defendant Orloff's Motion for Summary Judgment is Granted as to Count III (breach of fiduciary duty) and Denied as to Count II (unjust enrichment). An Order consistent with this Opinion will follow.

BY THE COURT,

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C. DARNELL JONES, II, J.