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

WILLIAM PARKINSON, ET. AL.,	:	March 2005
Plaintiff,	:	
v.	:	No. 0506
KITTERIDGE, DONLEY, ELSON,	:	
FULLEM & EMBICK, LLP, ET. AL.,	:	COMMERCE PROGRAM
Defendants	:	
	:	Control Number 050370

ORDER

AND NOW, this 10th day of July 2006, upon consideration of Defendants Kitteridge, Donley, Elson, Fullem & Embick, LLP, Patrick W. Kittridge, Joseph M. Donley and Michael S. Soule's Motion for Summary, Plaintiffs' response in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion to be filed of record, it hereby is **ORDERED** that said Motion is **Granted** and Plaintiffs' complaint is dismissed.

BY THE COURT,

_____
HOWLAND W. ABRAMSON, J.

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

WILLIAM PARKINSON, ET. AL., Plaintiff,	:	March 2005
v.	:	No. 0506
KITTERIDGE, DONLEY, ELSON, FULLEM & EMBICK, LLP, ET. AL., Defendants	:	COMMERCE PROGRAM
	:	Control Number 050370

MEMORANDUM OPINION

ABRAMSON, J.

This is a legal malpractice action instituted by William Parkinson, Rosalie Parkinson and Classic Travel, Inc. ("Plaintiffs") against Kittredge, Donley, Elson, Fullem & Embick, LLP, Patrick W. Kittridge, Joseph M. Donley and Michael S. Soule ("Defendants"). Defendants have now filed a motion for summary judgment. For the reasons discussed below, defendants' motion is granted and plaintiffs' complaint is dismissed.

Background

Plaintiffs William and Rosalie Parkinson ("Plaintiffs") owned Classic Travel, Inc., a charter vacation business. In or about 1992 through 1994, a series of events allegedly transpired which gave rise to a legal cause of action by plaintiffs against Lehigh Valley Bank and its successor in interest Corestates Bank, later succeeded by First Union Bank. This action was commenced by writ of summons on May 6, 1996 in the Court of Common Pleas of Bucks County, Pennsylvania in an action captioned Classic Travel, Inc., et. al. v. Corestates Bank, N.A., CCP Bucks County No. 96-3414-20-2 ("Bucks County Action"). At the time suit was instituted, plaintiffs were represented by William

T. Renz, Esquire of Power, Bowen & Valimont, LLP, Doylestown, Pennsylvania. After the action was filed the firm of Power, Bowen & Valimont, LLP merged with Fox Rothschild, O'Brien & Frankel. As a result of the merger, a conflict of interest resulted and Renz could no longer represent plaintiffs in the Bucks County action. The law firm of Kitteridge, Donley, Elson, Fullem & Embick, LLP ("K&D") was retained to pursue the litigation.

In the Spring of April 2002, K&D determined that plaintiffs did not have sufficient evidence to support their claims in the Bucks County action. (Exhibit "B" to Dfts. Mt. for SJ). On April 16, 2002, K&D notified plaintiffs that if they did not agree to accept defendants' settlement offer in the Bucks County action, they would exercise their right to withdraw representation in accordance with their October 5, 1999 retainer agreement. (Id.). Plaintiffs allegedly refused to accept the offer and on May 24, 2002, K&D informed plaintiffs to find new counsel.

On August 30, 2002, the Bucks County Court of Common Pleas purportedly mailed a notice of termination to K&D notifying them that the Bucks County action would be terminated within thirty (30) days if defendants did not respond to the notice. After receiving no response to the notice, the case was marked terminated on October 31, 2002 by the court.

On November 4, 2002, K&D filed a Petition to Withdraw as counsel. On January 28, 2003, the Petition to Withdraw was granted. On February 25, 2003, K&D allegedly learned from a third party that the Bucks County action was administratively terminated by the Bucks County Court and wrote to plaintiffs to advise them of same. The letter

further advised plaintiffs to obtain new counsel. Plaintiffs did not respond to the letter and the Bucks County action has not been reinstated.

On March 9, 2003, plaintiffs instituted suit against defendants sounding in legal malpractice. The complaint alleges claims for breach of contract (Count I), professional negligence (Count II), detrimental reliance (Count III) and fraud (Count IV).[1] Defendants filed an answer with new matter and counterclaims to the complaint. On June 17, 2005, the court issued a Case Management Order. Pursuant to the order, plaintiffs were required to submit an expert report on or before April 3, 2006. Plaintiffs have not identified an expert nor produced an expert report. K&D now files the instant motion for summary judgment.

DISCUSSION

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. Civ. P. 1035.2. "Pennsylvania law provides that summary 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).

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. McCarthy v. Dan Lepore & Sons, 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

[1] The court sustained preliminary objections to Count IV of plaintiffs' complaint alleging fraud.

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.

In the case *sub judice*, plaintiffs filed the instant legal malpractice claim sounding in negligence and contract. In Pennsylvania, an individual who has taken part in an attorney-client relationship may sue his attorney for malpractice under either a trespass (negligence) or assumpsit (contract) theory. *See* Guy v. Liederbach, 501 Pa. 47, 55, 459 A.2d 744, 748 (1983).

In a trespass action, the plaintiff must establish three elements in order to recover: (1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that the attorney's failure to exercise the requisite level of skill and knowledge was the proximate cause of damage to the plaintiff. Bailey v. Tucker, 533 Pa. 237, 246, 621 A.2d 108, 112 (1993). An attorney will be deemed "negligent" if he or she fails to possess and exercise that degree of knowledge, skill and care which would normally be exercised by members of the profession under the same or similar circumstances. Collas v. Garnick, 425 Pa. Super. 8, 13, 624 A.2d 117, 120, *appeal denied*, 535 Pa. 672, 636 A.2d 631 (1993).[2]

In an assumpsit action, the claim is based on an attorney's breach of an attorney-client agreement when the attorney agrees to provide his or her best efforts and fails to do so. Bailey v. Tucker, 533 Pa. 237, 251, 621 A.2d 108, 115 (1993). "An attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with

[2] In essence, a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a "case within a case"). Kituskie v. Corbman, 552 Pa. 275, 281, 714 A.2d 1027 (1998).

professional services consistent with those expected of the profession at large." Id. at 251-52, 621 A.2d at 115.[3]

Expert testimony is generally required in legal malpractice cases, unless the issue is so simple or the lack of skill or want of care is so obvious as to be within the range of an ordinary layperson's experience and comprehension. See Rizzo v. Haines, 520 Pa. 484, 502, 555 A.2d 58, 67, n. 10 (1989) ("Whether proof of negligence . . . is beyond the comprehension of laypersons and requires expert testimony depends on the particular facts and circumstances of the case."); Storm v. Golden, 371 Pa. Super. 368, 376, 538 A.2d 61, 64 (1988) ("Expert testimony becomes necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary person.").

In this case, the court believes that expert testimony regarding the attorney defendants' duty of care, particularly with respect to preserving plaintiffs cause of action, would be helpful to the jury. *See* Gorski v. Smith, 2002 Pa. Super 334, 812 A.2d 683, 694-6 (Pa. Super. 2002) (court relied heavily on expert testimony that "supported the jury's conclusion that [the attorney] failed to fulfill his contractual duty to represent [plaintiffs] in a manner which comported with the standards of the profession at large"); Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. 1997) (court relied heavily on testimony of plaintiff's expert which "was sufficient, if believed by the fact finder, to prove that [the attorneys] failed to exercise the ordinary skill and knowledge expected of

[3] Plaintiffs argue that their contract claim does not require expert testimony. The court does not agree. Plaintiffs' breach of contract count does not allege that plaintiffs failed to follow a specific instruction nor that a breach of a specific provision of the contract occurred. Rather, the contract claim sounds in negligence. Plaintiffs allege that defendants failed to fulfill their duty as attorneys when they failed to preserve the action in a timely manner. (Complaint ¶¶ 58-59). A legal malpractice action that alleges breach of contract requires expert testimony when the assumpsit claims are not true contract causes of action but sound in negligence by alleging an attorney failed to exercise the appropriate standard of care. *See* Storm v. Golden, 371 Pa. Super. 368, 538 A.2d 61 (1988).

a lawyer . . ." and therefore that that the attorneys could be held liable in both tort and contract).

Whether an attorney failed to exercise a reasonable degree of care and skill possessed and employed by practitioners or failed to implement services that are consistent with those expected by the profession at large is a question of fact outside the normal range of the ordinary experience of laypersons. Without expert testimony to guide it a jury is not able to determine whether an attorney has deviated from the standard of care required and would be constrained to make its decision based on speculation and conjecture. As such, plaintiffs' reliance upon the doctrine of *res ipsa loquitur* is misplaced. This court finds that a jury does not possess a sufficient fund of common knowledge concerning the practice of law to justify an inference of negligence from defendants failure to preserve plaintiffs' cause of action.

In the alternative, plaintiffs request an additional time to conduct discovery and to submit an expert report.[4] The Case Management Order issued in this matter required the parties to complete discovery by April 3, 2006. It also required plaintiffs to submit an expert report by the same date. On May 3, 2006, defendants filed the instant motion for summary judgment and plaintiffs responded to same on June 1, 2006. At no time prior to the discovery deadline did plaintiffs file any motions seeking to compel discovery responses from defendants or file a Petition for Extraordinary Relief with the court seeking to extend the deadline. Although parties must be given reasonable time to

[4] In support thereof plaintiffs rely upon Pa. R. Civ. P. 1035.3 (b). Pa. R. Civ. P. 1035.3(b) provides "an adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence." In this case, plaintiffs did not supplement the record with an expert report, did not set forth any reasons why they could not present evidence essential to justify opposition to the motion nor did they propose any action to be taken by the party to present such evidence.

complete discovery before any motion for summary judgment is considered by the court, the party seeking discovery is under an obligation to seek discovery in a timely fashion. Kerns v. Methodist Hosp., 393 Pa. Super. 533, 574 A.2d 1068, 1074 (Pa. Super. 1990). Where ample time for discovery has passed, the party seeking discovery (and opposing summary judgment) is under an obligation to show that the information sought was material to their case and that they proceeded with due diligence in their attempt to extend the discovery period. Id**.,** 574 A.2d at 1074.

Here, plaintiffs do not indicate in their response the efforts taken, if any, to obtain the information sought from defendants. Instead, plaintiffs argue that they were somehow precluded from conducting discovery when they were dismissed as defendants in the federal court action instituted by defendants herein against its insurance company. This however is not sufficient to justify extending discovery at this point in the case.

The federal court action is a declaratory judgment action filed by defendants herein against its insurance company seeking coverage for this action. Initially, defendants instituted the action against its insurance company in this court. As such, plaintiffs were indispensable parties to the declaratory judgment action since Pennsylvania courts have consistently held that plaintiff-claimants who sue an insured are indispensable parties to any declaratory judgment action brought to determine the scope of an insurer's coverage of that insured. Vale Chemical Co. v. Hartford Acc. and Indem. Co., 512 Pa. 290, 516 A.2d 684 (Pa. 1986). Once the action was removed to Federal Court by the insurance company, plaintiffs were dismissed as defendants since the federal rules do not maintain a similar requirement.[5] Plaintiffs were merely nominal defendants

[5] Plaintiffs filed a motion to stay the instant proceedings due to the pendency of the federal court action. Plaintiffs' motion was denied.

sued to satisfy a jurisdictional requirement of this court. Therefore, plaintiffs request for an extension of discovery at this time is denied.

The Case Management Order entered in this matter allotted plaintiffs almost one year to conduct discovery. If this allotted time was not sufficient, Plaintiffs could have attempted to seek additional time to conduct discovery or produce expert reports. Plaintiffs failed to do so. Moreover, if defendants were engaging in "gamesmanship" as alleged by plaintiffs, plaintiffs could have easily filed a motion to compel discovery. The docket however fails to evidence the filing of any such motions by plaintiffs.[6] Therefore, since plaintiffs failed to produce any expert testimony as to the standard of care under which defendants should have conducted themselves and as to any deviation from that standard of care, as a matter of law plaintiffs failed to establish a *prima facie* case warranting a grant of summary judgment.

CONCLUSION

For the foregoing reasons, Defendants motion for summary judgment is granted and plaintiffs' complaint is dismissed. An order consistent with this Opinion will follow.

BY THE COURT,

_____

HOWLAND W. ABRAMSON, J.

[6]The docket does reflect an order compelling plaintiffs to respond to discovery including answers to expert interrogatories propounded by defendants.