IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

SYNNESTVEDT & LECHNER, LLP.	:	JANUARY TERM, 2006
	:	
vs.	:	
	:	
GREEN MACHINE CORP, ET AL.	:	NO. 208

VAUGHAN DUFFY & CONNORS, LLP	:	JANUARY TERM, 2006
	:	
vs.	:	
	:	
SYNNESTVEDT & LECHNER, LLP	:	NO. 763

OPINION

Before the Court is a Motion for Summary Judgment filed by Defendant and Counterclaimant Zuzelo deriving from the settlement by written Settlement Agreement of a legal malpractice case captioned Green Machine v. Synnestvedt and Lechner, LLP, July Term, 1998, No. 3264. That legal malpractice action was filed in Philadelphia County in 1998. In April 2004, a settlement conference was conducted prior to trial. As a result of that conference, that Philadelphia County case settled. A confidential Settlement Agreement was signed by all parties on June 15, 2004. In that document the parties also agreed to settle a lawsuit which had been filed by Writ of Summons in Montgomery County captioned Cardinal, GMC and Zuzelo v. Logan, Johns & Blasko, Ferrill & Logan, Blasko, Ferrill Johns, John W. Logan & Associates and Synnestvedt & Lechner, LLP at No. 99-08181.

While the Philadelphia Case was pending but before settlement had been agreed upon a Writ of Execution against Green Machine Corp. (plaintiff in the Philadelphia action) had been filed on a previously obtained $1.5 Million Dollar judgment by Chiuminatta Concreate Concepts. All parties were aware of that Writ of Execution throughout settlement negotiations. All parties were also aware that Edward Zuzelo, a principal in the Green Machine Corporation and one of three plaintiffs in the Montgomery County action had no judgment against him personally. Accordingly, when the settlement agreement was written it very specifically, carefully, and intentionally avoided any payment to the Green Machine Corporation. All payments in settlement were to be made to Zuzelo individually.

The Settlement Agreement even specifically refers to the Judgment by Chiuminatta Concrete Concepts.[1] The Settlement Agreement specifically noted that the judgment creditor had filed its judgment and had begun execution in Philadelphia and Montgomery County. The agreement required that the judgment creditor be notified of the settlement no later than June 15, 2004.[2]

The Settlement Agreement clearly and unambiguously says:

"On June 23, 2004, Synnestvedt & Lechner, LLP, through its professional liability insurer, Westport Insurance Company, agrees to pay a total….eighty percent (80%), or One Hundred Thirty-Four Thousand Dollars ($_____ to be paid to Zuzelo and twenty (20%), or _____Dollars ($_____to be paid to Vaughan Duffy & Connors, LLP, counsel for GREEN MACHINE in the Patent Infringement Action, the Legal Malpractice Action and the Montgomery County Action."[3]

[1] Although the Settlement Agreement also specifically says: "Whereas, on April 22, 2004 while the Motions in Limine were pending in the legal malpractice action, at a settlement conference, the parties hereto agreed to settle their controversies based upon the following terms, and there upon placed their understandings upon the record before the Honorable Sandra Mazer Moss, a Judge of the Court of Common Pleas of Philadelphia." No such record has been produced to this Court by any party.
[2] Paragraph 15 "Mutual General Release and Confidentiality Agreement."
[3] Paragraph 1, "Mutual General Release and Confidentiality Agreement."

Thus the Settlement Agreement specifically and unambiguously directs that payment of $134,000.00 be paid to Edward Zuzelo on a date certain, June 23, 2004. The Settlement Agreement contained no conditions whatsoever limiting S&L's or Westport Insurance Company's obligation to pay the agreed upon sums on June 23, 2004. Neither is there any provision allowing S&L, or their professional liability insurer, Westport Insurance Company to withhold payment or interplead the sums owing to Mr. Zuzelo into Court pending any further agreement or any other Judicial determination.

All facts precedent to the agreement embodied in the settlement agreement and specifically the pending writ of execution, were known, discussed, and the subject of negotiation before any settlement agreement was signed. All facts precedent to settlement were also specifically referenced in the seventeen introductory "Whereas" clauses contained in the written Settlement Agreement.

Even the possibility that S&L or Westport Insurance Company might eventually be required to pay both Zuzelo and the judgment creditor Chiuminatta Concrete Concepts became the subject of negotiation. Because the judgment creditor had a claim upon any sums which might be paid to Green Machine, Zuzelo insisted that no settlement would be agreed upon unless payment was made to him personally.[4] Accordingly, the parties inserted a specific and unconditional indemnification provision into the settlement agreement at paragraph 15a which reads:

> "Should Chiuminatta or any assignee thereof make any claim to the disbursement of the proceeds of this settlement to Zuzelo, GREEN MACHINE, including Zuzelo, agree that defense of those claims shall be their sole responsibility and they shall hold S&L and its attorneys and its insurer harmless against Zuzelo proceeds plus any loss and expense, including attorneys fees, which may be incurred in connection with the assertion of any claim by Chiuminatta or any assignee thereof."

[4] Zuzelo was a party and counterclaimant in the Philadelphia lawsuit and a party plaintiff in the Montgomery County Action.

By that clause Mr. Zuzelo agreed to indemnify Synnestvedt & Lechner and Westport Insurance Company.

The written Settlement Agreement is unambiguous and clear. Counsel for settling defendant Synnestvedt & Lechner in the underlying case agreed at deposition taken on October 17, 2006:[5]

"Q: All of these concerns that you have mentioned and you've mentioned several times today you knew before your client signed off on the settlement agreement. Correct?
A: Yes.
Q: Is there anything in the settlement agreement that you or your client or the carrier claims renders the settlement agreement ambiguous in its terms?
A: I--as to the issue that brings us here today, I do not believe there is ambiguity.

S& L did not pay Mr. Zuzelo on June 23rd. Instead, on June 24th Counsel for S& L wrote plaintiffs a letter stating:

"As you know from the letter from counsel for Chiuminatta, they are objecting to the payment of any funds to you or your client without documentary evidence. While we have copies of your invoices which we will provide to counsel, unless you or your client is claiming privilege, we do not have copies of the actual UCC filings made by Mr. Zuzelo which allegedly protect his interests in the settlement funds.
Until I receive that documentation, and until counsel for Chiuminatta is satisified, we will hold the settlement funds when received."

Nine days after signing the settlement agreement and one day after payment was due pursuant to that signed settlement agreement, Synnestvedt & Lechner and their insurance company unilaterally imposed additional conditions for payment and refused to pay. Subsequent thereto the sums due to Zuzelo were pled into Court.

At deposition, counsel for S&L in the underlying action made clear that there had never been any intent to comply with the unambiguous terms of the Settlement Agreement. Counsel stated[6]:

[5] N.T. Albert Deposition, October 17, 2006, page 134, Line 8.

"We understood that in terms of consummating the payment required under the settlement. We had the dilemma of complying with the law or facing Mr. Zuzelo being unhappy, understandably, that he wasn't the recipient of those funds. And I wish it were easy and it was just a matter of, Well, we satisfied this party or that party. But that's not the issue that was presented to us, and we had to decide based upon what the legal requirements were and I had decide as an attorney based upon what the professional responsibility requirements were. And the consequences being what they were, we just had to take the consequences. It was not a decision that we anticipated having to make or in any way desired to make.

Q: But ultimately the decision that was made was, We can't make payment to Mr. Zuzelo; that would violate the law?

A: That's right.

Q: Okay. So, the settlement agreement is illegal and unenforceable. Is that the position?

A: No. The agreement was subject to--under and subject to the laws of Commonwealth of Pennsylvania. It doesn't make it illegal.

Q: Payment can't be made to Mr. Zuzelo unless a court determines it. Is that the position of S&L in the underlying litigation?

A: The position was that we could not make that given the existence of the writ of attachment.

Q: Which was known before the settlement agreement was signed?

A: And it was known when we started all of this and discussed with the other side what the problem was and we were trying to deal with that. Yes, sir."

Clearly, rather than negotiating to conclusion the issues about the pending attachment, S&L and Westport Insurance Company made the decision to avoid trial by pretense of settlement, signing the Settlement Agreement without any intention of making the payments as required unless Chiuminattta approved. A condition requiring Chiuminatta's agreement could not be included in the settlement agreement because Zuzelo would never agree to that condition. Therefore any condition requiring Chiuminatta agreement had been intentionally excluded and an indemnification provision

[6] N.T. Albert Deposition, October 17, 2006, Page 149, Line 16.

inserted instead. To avoid trial S&L and Westport signed a "settlement" they never intended to fulfill. When Chiuminatta objected, S&L refused to pay, unilaterally ignoring the obligations they had voluntarily accepted in writing just nine days before in order to avoid trial.

Counsel testified:[7]

Q.: Mr. Albert, I understand that, but that's not my question. The intent of your client, your carrier and your firm was to comply with the laws of Pennsylvania. Is that fair?

A. Yes.

Q: Okay. Am I correct that the only way you and your client and your carrier would have been satisfied that the laws of the Commonwealth of Pennsylvania were satisfied and you would have made payment to Mr. Zuzelo is if one of two things occurred: Chiuminatta/Soff-Cut did not object to the payment or a judicial decision came down between the time the settlement agreement was signed and June 23rd, 2004, indicating that Mr. Zuzelo had a right to receive the proceeds?

A.: Or the parties had agreed to resolve it. So, I mean--

Q.: What parties?

A.: Zuzelo and Chiuminatta.

Q.: You knew well before this settlement agreement was signed that that never was going to happen; I think you've testified to that. Is that a fair assertion?

A.: I knew they wouldn't want to do it--

Q.: Right.

A.: --by reason of a tremendous history."

This position was reiterated:[8]

Q.: Okay. I'll back up, then, and say with the caveat of what you just said, there were three things--one of three things that had to happen or your client, your carrier and your firm had no intention of paying Mr. Zuzelo. Is that a fair assertion based on your testimony?

[7] N.T. Albert Deposition, October 17, 2006, Pg. 143, Line 3.
[8] N.T. Albert Deposition, October 17, 2006, Pg. 146, Line 10.

A.: Yes. We intended to pay assuming that those things would happen.

Q.: But one of those three things had to happen before June 23rd or you weren't going to make payment?

A.: That's right. And we assumed that they--one of them would happen."

The settlement agreement unconditionally requires payment. S&L and Westport never had any intention to pay unless other unwritten conditions which had been specifically rejected in negotiation were met.

Accordingly, Summary Judgment is granted in favor of Defendant and Counterclaimant Edward Zuzelo. The Motion for Summary Judgment of Synnestvedt & Lechner is DENIED.

BY THE COURT

March 9, 2007

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MARK I. BERNSTEIN, J.