IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

JAN RUBIN ASSOCIATES, INC., *et al.*,	:	June Term 2007
Plaintiff,	:	No. 0916
v.	:	
NIXON PEABODY, LLP,	:	(Commerce Program)
Defendant.	:	
	:	Control Number 030488
	:	

ORDER

AND NOW, this 31st day of July 2008, upon consideration of defendant Nixon Peabody, LLP's Motion for Judgment on the Pleadings, plaintiffs' response in opposition, the respective Memoranda, all matters of record, after oral argument and in accord with the contemporaneous Opinion being filed of record, it is **ORDERED** that the Motion is **Denied**.

BY THE COURT,

____

ALBERT W. SHEPPARD, JR. J.

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

JAN RUBIN ASSOCIATES, INC., *et al.*,	:	June Term 2007
Plaintiff,	:	No. 0916
v.	:	
NIXON PEABODY, LLP,	:	(Commerce Program)
Defendant.	:	
	:	Control Number 030488

…………………………………………………………………………………………

<u>**O P I N I O N**</u>

Albert W. Sheppard, Jr., J. ……………………………..………………… July 31, 2008

This action arises from defendant Nixon Peabody, LLP's, ("Nixon Peabody") representation of plaintiffs, Jan Rubin Associates, Inc. and Jan Rubin d/b/a Jan Rubin Associates (collectively "Rubin" or "plaintiffs") in a prior action brought in the United States District Court for the Eastern District of Kentucky by Rubin against the Housing Authority of Newport, Kentucky ("HAN") and Mark H. Brown, the housing director of HAN. In that Kentucky action, Rubin alleged claims for breach of contract, promissory estoppel, violation of Equal Protection Rights and violation of Due Process Rights. The HAN defendants filed a counterclaim.

On March 30, 2007, the Kentucky court granted summary judgment in favor of the HAN defendants, dismissing all four counts against them. Thereafter, a settlement was reached whereby the HAN defendants agreed to dismiss their counterclaims and Rubin agreed not to appeal the summary judgment order.

In June 2007, Rubin instituted this legal malpractice action against Nixon Peabody based on that firm's representation in the Kentucky action. Presently before the court is Nixon Peabody's Motion for Judgment on the Pleadings. Specifically, Nixon Peabody claims that the Rubin's claim fails as a matter of law for two reasons: (a) the Rubin's claim is barred as a matter of Pennsylvania law because a client who enters into a settlement agreement may not then institute a malpractice suit against the attorney representing him or her in the underlying action, and (b) the Rubins have failed to allege a prima facie case of legal malpractice because the Rubins signed a certification stating that no discrimination claims existed and that no evidence of discrimination existed in the underlying action.

For the reasons discussed, the Motion for Judgment on the Pleadings is denied.

DISCUSSION

I. Standard of Review

Pa.R.C.P. 1034 permits any party to move for judgment on the pleadings after the pleadings are closed and authorizes the court to enter such judgment or order as shall be appropriate on the pleadings.[1] A motion for judgment on the pleadings is similar to a demurrer and may be entered only where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law.[2] In ruling on such a motion, the court may consider only the pleadings and any documents properly attached thereto.[3]

---

[1] Pa. R. Civ. R. 1034.

[2] Kosor v. Harleysville Mutual Insurance Company, 407 Pa. Super. 68, 71, 595 A.2d 128, 129 (1991).

[3] Mellon Bank N.A. v. National Union Insurance Company of Pittsburgh, 768 A.2d 865, 870 (Pa. Super. 2001).

II. Plaintiffs' settlement of the underlying action does not preclude the instant claim against defendant.

Nixon Peabody relies upon the case of Muhammad v. Strassburger[4], in support of its claim that the Rubins should not be able to bring suit. In Muhammad, plaintiffs in a medical malpractice action agreed to accept a monetary settlement from defendants in exchange for dismissing their lawsuit. After they agreed to the settlement, plaintiffs changed their minds and decided that the settlement amount was insufficient. Plaintiffs sued their attorneys for legal malpractice because plaintiffs were dissatisfied with the monetary settlement. The Pennsylvania Supreme Court held that a client cannot sue his attorney for legal malpractice when the client is simply dissatisfied with the terms of the settlement, unless the client can show that he was fraudulently induced to enter into that settlement.

This holding was later narrowed in McMahon v. Shea[5]. In McMahon, the court noted that Muhammad was based on Pennsylvania's public policy of encouraging the settlement of disputes and preventing "Monday morning quarterback suits."[6] In limiting Muhammad to the specific facts of that case, the McMahon court concluded that the plaintiff's allegations that his attorney failed to advise him of a contract's controlling law constituted grounds for a permissible claim for negligence. McMahon limited Muhammad to cases involving similar facts.

[4] 526 Pa. 541, 587 A.2d 1346 (1991).

[5] 547 Pa. 124, 700 A.2d 1329 (1997).

[6] 547 Pa. at 130, 700 A.2d at 1182.

In Banks v. Jerome Taylor & Associates,[7] the Superior Court reconciled the Muhammad and McMahon decision as follows:

> "In cases wherein a dissatisfied litigant merely wishes to second-guess his or her decision to settle due to speculation that he or she may have been able to secure a larger amount of money, i.e. 'get a better deal' the Muhammad rule applies so as to bar that litigant from suing his counsel for negligence. If, however, a settlement agreement is legally deficient or if an attorney fails to explain the effect of a legal document, the client may seek redress from counsel by filing a malpractice action sounding in negligence."[8]

In the case at bar, the allegations are more similar to the facts in McMahon than in Muhammad. The Rubins alleges that Nixon Peabody, early in its representation of plaintiffs, failed to file one of the claims sought to be prosecuted by plaintiffs within the applicable statute of limitations. Plaintiffs further allege that Nixon Peabody continued to prosecute the claims in the Kentucky federal court suit and caused plaintiffs to expend one million dollars in litigation expenses. Plaintiffs allege that if Nixon Peabody had been honest and forthcoming during the Kentucky representation and Nixon Peabody would have explained to plaintiffs that the statute of limitations had expired on this claim and explained the shortcomings, plaintiffs would have made a decision as to whether they should continue with the claim. Unlike the plaintiffs in Muhammad, the Rubins did not change their minds about the settlement. Rather, they complain about Nixon Peabody's failure to advise them regarding the controlling law applicable to Rubin's claim, i.e. application of the statute of limitations and its ramifications.

---

[7] 700 A.2d 1329 (Pa. Super. 1997).

[8] 700 A.2d at 1332.

In summary, this situation does **not** involve a plaintiff who becomes unhappy with his settlement. The defendant's Motion for Judgment on the Pleadings is denied.[9]

III. Plaintiffs' second amended complaint states a claim upon which relief could be granted.

Nixon Peabody argues that plaintiffs' claims fail to state a claim upon which relief could be granted. A review of the pleadings demonstrates that at this stage in the litigation disputed issues of fact exist whether Nixon Peabody pursued a claim without educating plaintiffs of the potential consequences. A judgment on the pleadings would be inappropriate here.

CONCLUSION

For the foregoing reasons, defendant's motion for judgment on the pleadings is denied. An Order consistent with this Opinion will be contemporaneously entered.

BY THE COURT,

____

ALBERT W. SHEPPARD, JR., J.

[9] The parties entered into a contract in which Nixon Peabody agreed to provide legal services to the Rubins and bill for those services in accordance with the provisions set forth in the Nixon Peabody's Standard Terms and Conditions of Engagement. The Standard Terms and Conditions of Engagement state that the applicable laws are the laws of the District of Colombia which will govern the agreement, including all rules or codes of ethics which apply to the provision of services by Nixon Peabody. The parties agree that the standard of care in a legal malpractice action is identical in Pennsylvania and District of Colombia. However, the law is not clear whether <u>Muhammad's</u> holding has been adopted in the District of Colombia.