

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

DAVID BARNES STILL,	:	July Term 2007
	:	
Plaintiff,	:	
	:	
v.	:	No. 3737
	:	
SAUL EWING, LLP,	:	
	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	Control Number 09042252

ORDER

AND NOW, this 10th day of September 2009, upon consideration of Defendant Saul Ewing, LLP's Motion for Summary Judgment, Plaintiff's response in opposition and in accord with the attached Opinion, it hereby is **ORDERED** that Defendant's Motion for Summary Judgment is **Granted**.

BY THE COURT,

MARK I. BERNSTEIN, J.

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

DAVID BARNES STILL,	:	July Term 2007
Plaintiff,	:	
v.	:	No. 3737
SAUL EWING, LLP,	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	Control Number 09042252

OPINION

In this legal malpractice action, plaintiff David Barnes Still (hereinafter “Still”) alleges that defendant Saul Ewing, LLP, abandoned its representation of Still in a federal civil action against his former employer Regulus causing him to suffer damages exceeding \$136,000,000. Regulus Group LLC (“Regulus”) is a Delaware limited liability company. Plaintiff David Still (“Still”) is the former president, CEO and board chairman of Regulus. During Still’s tenure with Regulus, he was the holder of non-controlling blocks of Class B, Class C and Class D shares. Defendant Saul Ewing, LLP (hereinafter “Saul Ewing”) is a law firm that represented Still in the federal court action against Regulus.

On December 10, 1998, Regulus loaned Still \$300,000.00. The loan was memorialized in a Promissory Note and secured and collateralized by Still’s shares in Regulus. Still’s equity interest in Regulus consisted of 725,000 Class B shares, 95,000 Class C shares and 102,000 Class D shares.¹ In the event of default, the release of the shares to Regulus was governed by an Escrow Agreement. The Escrow Agreement contained a valuation formula to determine the fair market value of Still’s shares. If application of the formula resulted in a fair market value for Still’s shares less than the amount of Still’s indebtedness on the Loan, the Escrow Agreement

¹Still also signed blank assignments of his shares to serve as collateral.

allowed Regulus to retain Still's shares and to pursue Still for any deficiency. The Escrow Holder was designated as Blank Rome Comisky & McCauley, LLP.

In or about April 2000, Still's relationship with Regulus began to deteriorate. As a result on April 28, 2000 Still engaged and retained the law firm of Saul Ewing.

On August 1, 2000, Regulus terminated Still's employment. On August 3, 2000, Regulus demanded that Still repay the principal amount of the loan plus the accrued interest, \$341,643.84, within thirty days and gave notice that the total principal and interest was due and owing by September 4, 2000. Still did not repay the loan. In December 2000, the Regulus Board of Directors agreed to cancel Still's shares. On December 29, 2000, Jeffrey Theisen, Regulus' Chief Financial Officer, (hereinafter "Theisen") instructed Blank Rome to deliver the Share Certificates with the Assignments to him. On January 3, 2001, Blank Rome delivered the Share Certificates and the Assignments to Theisen, despite Still and Saul Ewing's objections.

Upon receipt of the Share Certificates and the Assignments from Blank Rome on January 3, 2001, Theisen calculated the fair market value of Still's shares using the valuation formula contained in the Escrow Agreement. This calculation determined that the fair market value of Still's shares was less than \$0 dollars. Theisen also wrote "cancelled" across the face of the Share Certificates. Although Theisen wrote cancelled across the face of the Share Certificates, the cancellation was never recorded on Regulus' books and records as required by Regulus' Operating Agreement.

On November 29, 2000, Saul Ewing on behalf of Still commenced an action in the United States District Court for the Eastern District of Pennsylvania against Regulus and eleven other defendants. During this time, Still submitted to Saul Ewing a proposed alternative partial contingent fee arrangement. Saul Ewing informed Still that the time was not right for his

proposal. On January 2, 2001, Saul Ewing filed an amended complaint alleging the defendants attempted to cancel Still's Class B, C and D interests. Saul Ewing never obtained discovery from Regulus or the other defendants to determine the status of Still's shares and whether Still's shares had in fact been cancelled.

On January 6, 2001, Miles Shore, Esquire, lead counsel for Still advised Saul Ewing's Management that Still's share interests in Regulus were forfeited for non payment of the loan. On January 25, 2001, counsel for Regulus advised Shore that Still was no longer a member of Regulus or a holder of Regulus Class A, B and C shares. Saul Ewing failed to conduct any discovery to determine the status of Still's shares.

From December 2001 to January 2002, Still submitted contingent fee proposals to Saul Ewing. Lead counsel at Saul Ewing was aware that Still was unable to pay for the fees incurred in the litigation. Beginning in January 2002, members of Saul Ewing's management directed that the firm and the attorneys assigned to represent Still limit their representation and refrain from spending otherwise necessary time on the file. At the time, Saul Ewing claimed they were owed \$400,000 by Still and the lead attorneys were trying to convert the matter into a contingency fee matter.

On January 14, 2002, lead counsel submitted a request to open a litigation file on a contingency fee basis to the chair of the Saul Ewing Management. On March 1, 2002, lead counsel informed Still that the Contingent Fee Committee declined his alternative fee proposal of January 16, 2002 but would review and consider the new proposal contained in Still's February 2002 letter. Counsel also informed Still that if a satisfactory arrangement could not be made, Saul Ewing intended to withdraw from representing him and refer the case to other counsel.

On April 9, 2002, lead counsel for Still filed a second amended complaint seeking indemnification for attorney fees and a Motion to Require Indemnification and Advancement of Litigation Expenses and for Declaratory Judgment. The Second Amended Complaint failed to allege a claim under the UCC. On May 29, 2002, the District Court denied Saul Ewing's Motion for Indemnification.

On June 17, 2002, Saul Ewing decided not to continue representing Still due to the claimed failure to pay for legal services and offered assistance in attempting to locate new counsel. On July 12, 2002, Saul Ewing filed a Motion for Leave to Withdraw Appearance as well as a request for a sixty day stay to provide Still time to engage new counsel. After hearing argument on Saul Ewing's Motion to Withdraw, the District Court entered an order denying Saul Ewing's Motion to Withdraw and for extensions of time.

On November 21, 2002, Regulus filed a motion for summary judgment with supporting exhibits in the Federal Court Action. The exhibits included an affidavit of its Chief Financial Officer, Theisen, which stated that Still's shares were cancelled. This was allegedly the first time that Saul Ewing learned that Still's shares were cancelled. The motion for summary judgment was denied and the Federal Court Action was tried before a jury from February 3, 2003 to February 21, 2003.

During the trial, Still introduced testimony and other evidence concerning the promissory note, Escrow Agreement, the formula used to calculate the value of the pledged shares, the cancellation of the pledged shares and the value of the pledged shares, Regulus' failure to set vesting targets and benchmarks for the Class B and C shares, Regulus' breach of the Operating Agreement as well as a devaluation of the shares.

Still also sought leave of court to amend the complaint a third time to assert a statutory claim under the UCC for the value of the shares. The trial judge granted Still leave to amend.

Prior to the submission of the case to the jury, the court dismissed a majority of Still's claims on a motion for directed verdict. The claims for Title VII and Pennsylvania Human Relations Act were submitted to the jury along with claims for breach of employment contract and wrongful seizure of stock. The jury was given a special interrogatory verdict form. The special verdict form included directions after each question instructing the jury as to the next question. Question Number 8 on the special verdict form stated:

Do you find that Regulus was lawfully justified in its calling of the Demand Note and retention of Mr. Still's shares because of agreements signed by Mr. Still and Regulus?

The direction after Question No. 8 instructed the jury not to answer Question Numbers 9 through 12 if it found that Regulus was justified in calling the loan and taking possession of Still's shares. Question Numbers 9 through 12 concerned the manifest reasonableness of the formula used to value Still's shares and the commercial reasonableness in disposing of Still's shares. The jury answered "yes" to Question Number 8 and ultimately returned a verdict in favor of Regulus.

After the jury's verdict, Regulus discovered that Still's shares had never been properly cancelled. On March 8, 2002, Regulus issued its "Consolidated Financial Statements" for the years ending December 31, 2001 and 2000 through its auditors Arthur Anderson. The 2001 year end financials contained a spreadsheet entitled "Consolidated Statements of Members' Deficit", which documented changes to Regulus shares during 2000 and 2001.

The “Consolidated Statement of Members’ Deficit” contained in the 2001 Year-End Financials reflected the cancellation of only 100,000 Class B shares, 80,000 Class C shares, and 85,000 Class D shares during 2001. As of March 8, 2002, Regulus’ financial statements did not reflect the cancellation of Still’s 725,000 Class B shares, 95,000 Class C shares and 102,000, Class D shares. Regulus reported the cancellation for the first time in its 2002 audited financial statements issued on March 7, 2003.

Still filed post trial motions seeking a new trial on his UCC claim on the ground that the direction following Question No. 8 was erroneous in instructing the jury not to answer Questions Numbers 9-12 if it found that Regulus was justified in calling the loan and taking possession of Still’s shares. The trial judge granted Still’s post trial motion and ordered a new trial, finding that the accompanying direction following Question Number 8 prohibited the jury from deciding issues pertaining to the disposition and valuation of Still’s shares, particularly the issues of commercial reasonableness of the shares disposition and the manifest unreasonableness of the standards in the valuation formula in the Escrow Agreement.

Regulus moved for reconsideration, which was granted. The trial judge vacated its order granting Still a new trial and denied Still’s post trial motion for new trial on his UCC claim. Still filed an appeal with the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the judgment in favor of Regulus and denied Still’s request for rehearing on March 17, 2005.

On July 29, 2004, while that case was on appeal and while Still was represented by other counsel, Still filed a legal malpractice action against his trial counsel in the Federal Court Action. After entering into a tolling agreement, the action styled Still v. Saul Ewing LLP, July Term No. 4073 was voluntarily dismissed by Still.

On March 30, 2005, Still filed an action against Regulus alleging a claim under Article 9 of the Pennsylvania Uniform Commercial Code section 9-504 (“UCC”) (Count I), breach of the Operating Agreement (Counts II and III) and devaluation of stock (Count IV). Summary judgment was granted in favor of Regulus and against Still. After summary judgment was entered, Still and Regulus reached a confidential settlement of the action before any appeal was filed.

In July 2007, Still reinstated the instant action against Saul Ewing for legal malpractice relating to the UCC claim and breach of fiduciary duty alleging a conflict of interest. Still seeks lost punitive damages from the Federal Court action and punitive damages in this action. Defendant Saul Ewing filed a counterclaim for nonpayment of fees. Presently before the court is defendant’s motion for summary judgment.

DISCUSSION

At the center of Still’s claim against Saul Ewing is whether the cancellation of Still’s Class B, C and D shares in Regulus violated the Pennsylvania Uniform Commercial Code. According to Still, Saul Ewing foreclosed jury consideration of this issue when it refused to conduct discovery and failed to timely research and plead any claims under the UCC for Regulus’ alleged unlawful disposition of the shares in violation of section 9-504 of the UCC. Still argues that as a result, the federal court found that Saul Ewing waived any right to a jury trial on Still’s UCC claims by failing to plead those claims in an appropriate and timely manner. This conduct or lack thereof according to Still constitutes legal malpractice and a breach of fiduciary duty. However, Regulus did not properly cancel Still’s shares until after the jury’s verdict in the underlying action and after Saul Ewing’s representation of Still had ceased

entirely. Accordingly, Still cannot assert a claim for malpractice or breach of fiduciary duty against Saul Ewing.

Regulus, a Delaware limited liability company, is governed by Delaware's Limited Liability Company Act which is codified at 6 Del. C. Ch. 18. "The basic approach of the Delaware Act is to provide members with broad discretion in drafting the [Operating] Agreement and to furnish default provisions when the members' agreement is silent." "Once members exercise their contractual freedom in their limited liability company agreement, they can be virtually certain that the agreement will be enforced in accordance with its terms."²

Any transfer of shares including cancellations is governed by the Share Certificate and Regulus' Operating Agreement. These documents suggest that in order for a cancellation to be effective cancellation is required to be recorded on the books and records of the company.

The legend printed on the Share Certificates provides as follows:

...This certificate, or the interest it represents, may not be negotiated, sold, transferred, assigned, hypothecated, pledged, encumbered or otherwise disposed of in any manner whatsoever except in compliance with all applicable securities laws. In addition, the Interests are subject to substantial restrictions on their transfer under the Limited Liability Company Operating Agreement and may not be transferred except as provided therein. **The Limited Liability Company Interest is transferable only on the books of the Limited Liability Company.** (emphasis added).

Regulus' Operating Agreement requires that share transfers be recorded on the "books and records of the Company". The Agreement provides as follows:

11.3.2 The Company and the Board shall be entitled to treat the record owner of any Share as the absolute owner thereof, and shall incur no liability for distributions of cash or other property made in good faith to such owner until such time as a written assignment of such Share, which assignment is permitted pursuant to the terms and conditions of Section 11.1 hereof, has been received and accepted by the Board and **recorded on the books of the Company.**

² Elf Atochem North America, Inc. v. Jaffari, 727 A.2d 286, 291 (1999).

11.3.3 Upon the admission of a substituted Member, Schedule A attached hereto shall be amended to reflect the name, address and Shares of such Substituted Member and to eliminate the name and address of and other information relating to the assigning Member with regard to the assigned Shares.

The Operating agreement defines “Transfers” as “the sale, assignment, transfer, disposition, mortgage, charge or encumbrance or contract to do or permit any of the foregoing, whether voluntarily or by operation of law.” Section 11.2 of the Operating Agreement enforced compliance with this contractual provision by rendering void and ineffectual non compliant transfers. Section 11.2 provides as follows:

11.2 Void Assignment. Any sale, exchange or other transfer by any Member or any Shares in contravention of this Agreement shall be void and ineffectual, and shall not bind or be recognized by the Company or any other party. No purported assignee shall have any right to any profits, losses or distributions of the Company.

Based on the foregoing record evidence, it is clear that the cancellation of Still’s shares was not effective as a matter of law until it was recorded in the books and records of the company. Regulus failed to reflect the cancellation of Still’s shares at the time. Although Theisen marked cancelled across the Share Certificates, the cancellation was not recorded until March 7, 2003 after the trial in the federal action.

To succeed with a legal malpractice claim against Saul Ewing, Still must prove that he had a viable cause of action against Regulus and that the attorney he hired was negligent in prosecuting or defending that underlying case.³ In the context of legal malpractice action, such proof of actual loss is often referred to as proving "the case within the case."⁴

In the case at bar, Still did not have any viable cause of action against Regulus at any

³ See, Poole v. W.C.A.B. (Warehouse Club, Inc.), 570 Pa. 495, 499-500, 810 A.2d 1182, 1184 (2002).

⁴ Poole, 570 Pa. at 500, 810 A.2d at 1184; Brubacher Excavating, Inc. v. WCAB (Bridges), 575 Pa. 168, 174 n. 2, 835 A.2d 1273, 1277 n. 2 (2003).

time he was represented by defendant. Still has not and cannot produce any evidence that his shares were actually cancelled during Saul Ewing's representation of him in the federal court action. Still, however, argues that Saul Ewing judicially admitted the fact of cancellation in the federal court action.⁵ An advocate's presentation of evidence and argument in support of the client's cause may be a binding, personal attestation and verification of the truthfulness and accuracy of those assertions but it cannot change reality and be the basis for a later filed malpractice action. Legal conclusions are not appropriate matters for admissions.⁶ "Judicial admissions" cannot create a claim where no claim exists.

Still's shares were not legally cancelled until after the jury's verdict and after Saul's Ewing's representation terminated. He could not have had damages for a claim which factually did not exist. Still did not have any cause of action under the UCC at any time he was represented by Saul Ewing. Saul Ewing's motion for summary judgment is granted as to the claims sounding in legal malpractice.⁷

⁵ Still also relies upon a Stock Ledger of Regulus Group, LLC (Exhibit "H") to demonstrate that the cancellation was recorded on Regulus' books and records. However, this is inadequate as a matter of law. Exhibit "H" does not contain any dates of origination and only contains a notation across the top that "All certificates were cancelled at the time of reorganization in March 2003".

⁶ Id.

⁷ Still also alleges that Saul Ewing breached its fiduciary duty by considering the payment of fees above that of their clients. According to Still, Saul Ewing abandoned him and falsely assured and reassured him that he would not be prejudiced. It is beyond question that an attorney owes his client a fiduciary duty which demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest. Maritrans GP, Inc. v. Pepper, Hamilton & Sheetz, 538 Pa. 241, 253, 602 A.2d 1277, 1283 (Pa. 1992). However, since the shares were never legally cancelled during Saul Ewing's representation. There is no claim for breach of fiduciary duty.

CONCLUSION

For the foregoing reasons, Saul Ewing's motion for summary judgment is granted as to all claims.

BY THE COURT,

MARK I. BERNSTEIN, J.