

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

SEGAL, WOLF, BERK, GAINES & LISS, P.A.	:	DECEMBER TERM, 2008
	:	
Plaintiff,	:	No. 4597
v.	:	
	:	(Commerce Program)
ARLEEN WOLF, <i>et al.</i>	:	
	:	Control Number 09060426
Defendants.	:	
	:	

ORDER

AND NOW, this 25th day of August 2009, upon consideration of the Motion *In Limine* seeking a determination to apply the Dead Man’s Statute to the current matter filed by defendants, Arleen Wolf and James Schwartzman, Executors of the Estate of Edward Wolf, and the response in opposition of the other defendants, Michael Wolf, Deborah Wolf, BEM Enterprises, Inc., Hauteur Resources, LLC and Wolf Equities, Inc.’s, the further response in opposition of plaintiff, Segal, Wolf, Berk, Gaines & Liss, P.A., all matters of record, and in accord with the contemporaneously filed Opinion, it is **ORDERED** that defendants’ Motion *in Limine* seeking a determination that the Dead Man’s Statute applies to the current matter is **Granted** as it pertains to Segal, Wolf, Berk, Gaines & Liss, P.A., and **Denied** as it pertains to Michael Wolf, Deborah Wolf, BEM Enterprises, Inc., Hauteur Resources, LLC and Wolf Equities, Inc.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J

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OPINION

Albert W. Sheppard, Jr., J. August 25, 2009

Presently, defendants, Arleen Wolf and James Schwartzman, Executors of the Estate of Edward Wolf (collectively “Executors”), ask this court to determine if the Dead Man’s Statute should be applied to the current matter, thereby barring plaintiff, Segal, Wolf, Berk, Gaines & Liss, P.A. (“Segal”), and co-defendants, Michael Wolf, Deborah Wolf, BEM Enterprises, Inc., Hauteur Resources, LLC and Wolf Equities, Inc. (collectively “Michael Wolf”) from introducing testimony regarding the alleged Partnership Agreement between the Segal firm and the deceased, Edward Wolf.

This action was brought following the death of Edward Wolf, formerly a partner at the Segal law firm.¹

¹ Executors Memorandum in Support of Motion *in Limine*, p. 1.

Edward Wolf joined the Segal law firm in 1981 as a shareholder, and continued in that capacity until his death on October 4, 2006.² The Segal firm insists that Edward Wolf was bound by an oral Partnership Agreement (“Agreement”) which stipulated that in return for the compensation and employment provided by the Segal firm, all income related to the practice of law, generated by any lawyer employed at the firm, belonged to the firm.³ The Segal firm claims that the fees received by its employees for referring cases to outside lawyers are subject to this Agreement.⁴

Following Edward Wolf’s death, a dispute arose among the beneficiaries of his estate, and more specifically, between the deceased’s wife, Arleen, and the deceased’s son, Michael.⁵ As a result of this dispute, which resulted in litigation (“Estate litigation”),⁶ the Segal firm discovered that Edward Wolf, and his son Michael, allegedly diverted two referral fees for their own personal benefit rather than paying them over to the Segal firm.⁷ The two referral fees totaled \$446,666.66.⁸

On December 29, 2008, Segal filed a Complaint against the Executors and Michael Wolf to recover the allegedly converted referral fees.⁹ Since that time, Segal has submitted Discovery requests to the Executors and Michael Wolf in an effort to learn

² Segal Memorandum in Opposition to Motion *in Limine*, p. 2.

³ *Id.*

⁴ Executors Memorandum in Support of Motion *in Limine*, p. 1.

⁵ Segal Memorandum in Opposition to Motion *in Limine*, p. 3

⁶ Schwartzman v. Wolf, Phila. C.C.P. No. 0803-0881.

⁷ Segal Memorandum in Opposition to Motion *in Limine*, pp. 3-4.

⁸ *Id.*

⁹ *Id.* at pp. 1-2. The Complaint was amended on February 27, 2009. *Id.*

more about the missing referral fees.¹⁰ The Executors dispute the existence of the Agreement, and argue that the Segal firm is not entitled to the legal fees in question.¹¹ On June 2, 2009, the Executors filed the instant Motion *in Limine* seeking a determination that the Dead Man's Statute precludes Segal from introducing testimony about the existence and/or terms of the alleged Agreement.¹² Since that time, both the Segal firm and Michael Wolf have submitted Memoranda in Opposition to the Motion *in Limine*.

In pertinent part, the Dead Man's Statute provides that

in any civil action or proceeding, where any party to a thing or contract in action is dead . . . and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased . . . shall be a competent witness to any matter occurring before the death of said party.¹³

In order to successfully challenge the competency of a witness under the Dead Man's Statute, a party must show: "(1) the deceased must have had an interest in the matter at issue, i.e., an interest in the immediate result of the suit; (2) the interest of the witness must be adverse; and, (3) a right of the deceased must have passed to a party of record who represents the deceased's interest."¹⁴ The protections of the Dead Man's Statute will

¹⁰ *Id.* at p. 4.

¹¹ Executors Memorandum in Support of Motion *in Limine*, p. 2.

¹² *Id.*

¹³ 42 Pa.C.S. § 5930 (2009).

¹⁴ In re Estate of Rider, 409 A.2d 397, 399 (Pa. 1979).

be waived if “decendent before he died or a decendent's representative has required an adverse party to be deposed or to answer interrogatories.”¹⁵

The purpose of this statute is “to prevent the injustice that might flow from permitting a surviving, adverse party to give testimony that is favorable to himself and unfavorable to the decendent's interest, but which the decendent's representative is in no position to rebut.”¹⁶ The statute further protects against injustice by ensuring that the surviving party is not permitted to testify “since he could lie and attempt to testify favorably to himself and adversely to the deceased party, knowing the other party is incapable of contradicting the fallacious testimony.”¹⁷

Instantly, Executors argue that all three elements needed to designate a witness incompetent pursuant to the Dead Man’s Statute are present. Specifically, the Executors claim that the employees of Segal have a pecuniary interest in the current matter, and this interest is directly adverse to the deceased, Edward Wolf.¹⁸ The Executors further argue the decendent’s interest in the referral fees have since passed to the Executors, thereby meeting the final prong of the competency test.¹⁹ Also, the Executors insist that application of the Dead Man’s Statute has not been waived because the Executors have neither deposed nor submitted interrogatories to Segal “or any other witness who would otherwise be precluded from testifying by the Dead Man’s Statute.”²⁰ These arguments,

¹⁵ Schroeder v. Jaquiss, 861 A.2d 885, 889 (Pa. 2004).

¹⁶ *Id.*

¹⁷ Punxsutawney Mun. Airport Auth. v. Lellock, 745 A.2d 666, 670 (Pa. Super. 2000).

¹⁸ Executors Memorandum in Support of Motion in Limine, p. 3.

¹⁹ *Id.*

²⁰ *Id.* at pp. 4-5.

and the Dead Man's Statute as it relates to Segal, should be applied. However, it cannot be applied to the detriment of Michael Wolf.

Segal is precluded from introducing testimony pertaining to the alleged Agreement because the Executors have sufficiently demonstrated the requisite proofs to disqualify witnesses under the Dead Man's Statute. First, the deceased, Edward Wolf, clearly would have an interest in the outcome of the present litigation if he were still living. Second, the interest of the Segal firm is directly adverse to that of the deceased.²¹ Lastly, Edward Wolf's rights in the instant matter have passed on to the executors of his estate, thereby meeting the final prong of the test under the Dead Man's Statute.

Segal attempts to show the Executors have waived the protections of the Dead Man's Statute, but that argument must fail. In support of this claim, Segal references Brennan v. Bell²² and Jacquiss,²³ cases which stand for the proposition that the Dead Man's Statute is waived where a party has required an adverse party to be deposed or answer interrogatories. Here, Segal points to the Executors deposing Michael Wolf in the Estate litigation, and specifically inquiring about referral fees, and the Agreement generally.²⁴ The Executors' discovery efforts in separate litigation that did not include Segal should not serve as a waiver in the instant matter.

²¹ Notwithstanding Segal's argument the instant Motion is overly broad in its efforts to prevent all Segal employees from testifying, it is clear to this Court that the Segal employees would financially benefit from a verdict in their favor. Therefore, Segal employees' interests are adverse, and they do not qualify as competent witnesses.

²² 37 Pa. D. & C.2d 707 (York Cty. C.C.P. 1965).

²³ See *supra* note 15.

²⁴ Segal Memorandum in Opposition to Motion in Limine, p. 13.

In Brennan, the Court determined the Dead Man’s Statute had been waived because the party invoking its protections had conducted discovery in an identical action, against identical parties, in a different jurisdiction.²⁵ The crux of the decision in Brennan was to achieve, among other things, “fairness of procedure.”²⁶ The Brennan court determined that it would be fundamentally unfair to allow a decedent’s estate “to discover all relevant facts from his adversary, and then at trial to seal his opponent’s lips by the Dead Man’s Rule.”²⁷ Unlike the facts of Brennan, where the parties in both actions at issue were identical, Segal was not a party to the prior litigation and was not subject to the Executors’ discovery requests. As such, the Executors have not waived the protections of the Dead Man’s Statute as it pertains to Segal.

Conversely, because the Executors deposed the Michael Wolf defendants in the Estate litigation regarding the referral fees and the Agreement, it would be inherently unfair to seal their lips when they try to defend themselves against the claims of Segal. Therefore, Michael Wolf will not be precluded from testifying regarding the referral fees and alleged Agreement in the current action.

²⁵ Brennan, 37 Pa. D. & C.2d at 711-12.

²⁶ *Id.* at 711.

²⁷ *Id.*

CONCLUSION

For these reasons, defendants, Arleen Wolf and James Schwartzman, Executors of the Estate of Edward Wolf's Motion *in Limine* seeking to apply the Dead Man's Statute is granted in part and denied in part.

An Order consistent with this Opinion will be issued.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.