

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

BONNIE CRUICKSHANK-WALLACE,	:	AUGUST TERM, 2009
	:	
Plaintiff,	:	NO. 3546
	:	
vs.	:	COMMERCE PROGRAM
	:	
KLEHR HARRISON HARVEY BRANZBURG & ELLERS, LLP,	:	
	:	
Defendant,	:	
	:	
vs.	:	SUPERIOR COURT OF
	:	
BONNIE CRUICKSHANK-WALLACE,	:	PENNSYLVANIA
	:	
Counterclaim Defendant.	:	NO. 2018 EDA 2013

OPINION

BY: Patricia A. McInerney, J.

November 7, 2013

I. BACKGROUND

On August 28, 2009, Bonnie Cruickshank-Wallace ("Plaintiff") commenced the instant action by filing a complaint against Klehr Harrison Harvey Branzburg & Ellers, LLP ("Klehr Harrison") related to its representation of her in a suit she filed against a bank for abuse of process and wrongful use of civil proceedings. In her complaint, Plaintiff asserted Klehr Harrison (1) failed to properly plead and prosecute her claims in the underlying litigation and (2) developed and then failed to disclose to Plaintiff a conflict of interest that arose during the course of its representation of her in the underlying litigation. Based on these assertions, Plaintiff brought causes of action against Klehr Harrison for: breach of fiduciary duty (Count I); fraud

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(Count II); legal malpractice (Count III); and breach of contract (Count IV). Subsequently, Klehr Harrison answered the complaint and asserted counterclaims against Plaintiff for unpaid legal fees and expenses.

On May 16, 2011, Klehr Harrison moved for summary judgment on all of the causes of action Plaintiff asserted in her complaint. On December 21, 2011, this court granted summary judgment on the legal malpractice claim, Count III. The court also limited the damages available to Plaintiff for the other causes of action (assuming a finding of liability) to the attorneys' fees she paid to Klehr Harrison for representing her in the underlying action.

Following a three-day bench trial in June 2011, this court issued comprehensive findings of fact and conclusions of law on December 31, 2012. The court found in favor of Klehr Harrison and against Plaintiff on Plaintiff's remaining causes of action; breach of fiduciary duty (Count I), fraud (Count II), and breach of contract (Count IV). The court also found in favor of Klehr Harrison and against Plaintiff on Klehr Harrison's counterclaim for breach of contract in the amount of \$46,661.31, plus post-judgment interest at the statutory rate of six percent.

On January 11, 2013, Plaintiff filed a motion for post-trial relief. Following briefing by both parties, this court denied Plaintiff's motion by order dated May 9, 2013. On May 14, 2013, Klehr Harrison praeciped to have judgment entered against Plaintiff on her claims as well as its counterclaim.

On June 7, 2013, Plaintiff filed a notice of appeal to the Superior Court of Pennsylvania from this court's May 9, 2013 order. That same day, June 7, 2013, this court issued an order directing Plaintiff to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement. The order was entered on the docket on June 10, 2013 and gave Plaintiff until July 1, 2013 to file her statement. The order also specified that, "[a]ny issue not properly included in the Statement

timely filed and served pursuant to Rule 1925(b) shall be deemed waived.” (Trial Ct. Order, June 7, 2013.) This appeal was docketed at Superior Court Docket Number 1787 EDA 2013.

On June 21, 2013, Klehr Harrison filed a cross-appeal to the Superior Court, which was docketed at Superior Court Docket Number 2018 EDA 2013. Klehr Harrison appealed from the December 20, 2011 order denying in part its motion for summary judgment and the June 19, 2012 trial ruling precluding impeachment evidence related to the testimony of Plaintiff’s expert, Neil Jokelson, Esquire. On June 28, 2013, this court entered an order directing Klehr Harrison to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement by July 22, 2013, which it did asserting “the judgment of [this court] should be affirmed, but in the event that the Superior Court is inclined to order a new trial, [it] intends to assert [two] errors pursuant to its June 21, 2013...[c]ross [a]ppeal....” (Def.’s 1925(b) Statement pp. 1-2.) Klehr Harrison then proceeded to delineate its two complaints of error.

First, Klehr Harrison complained this court “erred by denying in part Klehr Harrison’s request for summary judgment.” (Def.’s 1925(b) Statement ¶ 1.) According to Klehr Harrison, by this court’s December 20, 2012 order and opinion ruling on summary judgment, it found Plaintiff had failed to present evidence of causation and, therefore, granted summary judgment on Plaintiff’s legal malpractice claim for failure of proof on an element of the cause of action. Klehr Harrison, however, asserted notwithstanding this failure of proof, this court denied summary judgment on Plaintiff’s claims for breach of fiduciary duty, fraud, and breach of contract, “which likewise required proof of causation as an essential element[,]” and had this court properly granted summary judgment on all of Plaintiff’s claims, “the case would not have proceeded to trial.” (Def.’s 1925(b) Statement ¶ 1.)

Next, Klehr Harrison complained this court “erred in precluding evidence of prior disciplinary and legal malpractice actions filed against Plaintiff’s expert, Neil Jokelson, Esq.” (Def.’s 1925(b) Statement ¶ 2.) According to Klehr Harrison, preclusion of this evidence was error because it “was directly relevant to both Mr. Jokelson’s credibility and qualifications as an expert testifying on professional ethics applicable to the practice of law.” (Def.’s 1925(b) Statement ¶ 2.)

On July 3, 2013, Klehr Harrison filed a motion in the Superior Court to dismiss Plaintiff’s appeal at 1787 EDA 2013 based on Plaintiff’s failure to file a 1925(b) statement as this court directed her to do by its order of June 10, 2013. On July 9, 2013, having been alerted of the failure to timely file and serve a 1925(b) statement by the filing and service of Klehr Harrison’s motion to dismiss her appeal, Plaintiff filed a motion with this court for leave to file a 1925(b) statement nunc pro tunc. In her motion, Plaintiff asserted the June 10, 2013 order directing her to file a 1925(b) statement “was not calendared [by Plaintiff’s counsel] in the normal course due to staff malfunction which [Plaintiff’s counsel] should have, but did not, catch.” (Pl.’s Mot. ¶ 5.) Plaintiff then argued there was no prejudice to others from the delay, “but denial [would] cause irreparable harm to Plaintiff.” (Pl.’s Mot. ¶¶ 4-5.)

On July 23, 2013, Klehr Harrison filed a response to Plaintiff’s motion to file a 1925(b) statement nunc pro tunc. Therein, Klehr Harrison argued *Pennsylvania Rule of Appellate Procedure* 1925(b)(2) only allows for the granting of a motion to file a statement nunc pro tunc after a showing of extraordinary circumstances and Plaintiff’s alleged excuse did not rise to the level of an extraordinary circumstance. Klehr Harrison further argued Plaintiff’s purported excuse was not properly before the court because Plaintiff, other than admitting counsels’

negligence in failing to catch it, did not elaborate as to the nature of the “malfunction,” nor attach any supporting affidavit to substantiate this assertion which was outside the record.

On July 17, 2013, Plaintiff filed a response in Superior Court to Klehr Harrison’s motion seeking dismissal of her appeal. According to Klehr Harrison, Plaintiff’s response basically restated the argument set forth in her motion with this court seeking leave to file a 1925(b) statement nunc pro tunc. On July 23, 2013, this court signed an order denying Plaintiff’s motion for leave. On August 8, 2013, the Superior Court granted Klehr Harrison’s motion and dismissed Plaintiff’s appeal at 1787 EDA 2013.

Plaintiff, however, then proceeded to file an appeal to the Superior Court on August 23, 2013 from this court’s July 24th order denying her motion for leave to file a 1925(b) statement nunc pro tunc. This appeal was docketed at Superior Court Docket Number 2648 EDA 2013. On September 4, 2013, this court again ordered Plaintiff to file a 1925(b) statement. The September 4, 2013 order directed Plaintiff to file the statement by September 27, 2013 and, like the June 10, 2013 order, also specified that “[a]ny issue not properly included in the Statement timely filed and served pursuant to Rule 1925(b) shall be deemed waived.” (Trial Ct. Order, September 4, 2013.)

With Plaintiff having again failed to file a 1925(b) statement as of October 4, 2013, Klehr Harrison filed a motion with the Superior Court to have Plaintiff’s appeal at 2648 EDA 2013 dismissed. Plaintiff did not file an answer opposing the requested relief and on November 4, 2013, the Superior Court granted the motion to dismiss Plaintiff’s appeal at 2648 EDA 2013, noting: “[t]he trial court docket indicates that the trial court entered an order directing [Plaintiff] to file a statement of errors complained of on appeal...on September 4, 2013[;]” “[t]he order directed [Plaintiff] to file the statement by September 27, 2013[;]” and “[Plaintiff] has not yet

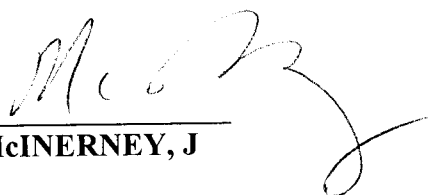
filed her Rule 1925(b) statement in accordance with the trial court's directive." (Superior Ct. Order, November 4, 2013.)

II. DISCUSSION

Following this somewhat tortured procedural history, Klehr Harrison's cross-appeal at Superior Court Docket Number 2018 EDA 2013 is the only appeal that remains pending in this case. In its 1925(b) statement, Klehr Harrison asserted that the judgment of this court should be affirmed, and it was only in the event that the Superior Court ordered a new trial that it intended to assert its two complaints of error pursuant to its June 21, 2013 cross-appeal. In the opinion of this court, Klehr Harrison's cross-appeal should be dismissed because it is now moot.

"Generally, an actual claim or controversy must be present at all stages of the judicial process for the case to be actionable or reviewable." *In re Estate of Border*, 68 A.3d 946, 953 (Pa. Super. Ct. 2013). "If events occur to eliminate the claim or controversy at any stage in the process, the case becomes moot." *Id.* With the dismissal of Plaintiff's two appeals, the Superior Court will not be ordering a new trial in this case. Thus, events have occurred to eliminate Klehr Harrison's issues and its cross-appeal is now moot and should be dismissed.

BY THE COURT:



McINERNEY, J