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

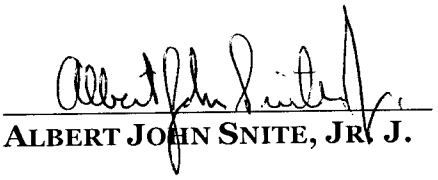
CD REALTY ADVISORS, INC.	:	December Term, 2010
and	:	
CD REALTY ENTERPRISE DRIVE ASSOC., LLC	:	
and	:	
SILVER LAKE OFFICE PLAZA, LLC	:	Case No. 02508
	:	DOCKETED
Plaintiffs	:	OCT 16 2013
	:	
v.	:	C. HART
	:	CIVIL ADMINISTRATION
RILEY, RIPER, HOLLIN & COLAGRECO. PC	:	
and	:	
JEANETTE N. SIMONE, ESQUIRE	:	Commerce Program
and	:	
BERGER HARRIS, LLC	:	
and	:	
BENJAMIN J. BERGER, ESQUIRE	:	
and	:	
JOHN G. HARRIS, ESQUIRE	:	
and	:	Control No. 13063074
BRETT M. MCCARTNEY, ESQUIRE	:	
	:	
Defendants	:	

ORDER

AND NOW, this 16th day of October, 2013, upon consideration of the motion for reconsideration of defendants Riley, Riper, Hollings & Colagreco, P.C., Jeanette N. Simone, Esquire and Brett M. McCartney, Esquire, the response in opposition of plaintiffs CD Realty Advisors, Inc., CD Realty Enterprise Drive Associates, L.L.C. and Silver Lake Office Plaza, L.L.C., the reply in further support of the motion for reconsideration, and oral argument concluded on September 27, 2013, it is **ORDERED** that the motion is **GRANTED** and summary judgment is entered in favor of Riley, Riper, Hollings & Colagreco, P.C., Jeanette N. Simone, Esquire and Brett M. McCartney,

Esquire, Berger, Harris, L.L.C., Benjamin J. Berger, Esquire and John G. Harris, Esquire.

By The Court,



ALBERT JOHN SNITE, JR. J.

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and	:	Control No. 13063074
BRETT M. MCCARTNEY, ESQUIRE	:	
	:	
Defendants	:	

OPINION

The instant motion for reconsideration requires this court to determine whether plaintiffs may maintain a cause of action for attorney malpractice, where plaintiffs have produced no evidence of loss suffered. For the reasons below, the motion for reconsideration is granted and all claims asserted against all defendants are dismissed.

Background

Plaintiffs Silver Lake Office Plaza, LLC ("Silver Lake"), and CD Realty Enterprise Drive Associates, ("Enterprise"), are Delaware entities that own commercial real estate in Delaware.

Plaintiff, CD Realty Advisors, Inc., ("CD Realty"), a New Jersey corporation, is the managing member of Silver Lake and Enterprise. CD Realty, Silver Lake and Enterprise, (collectively "Plaintiffs" or "CD Realty"), all share the same New Jersey address. Defendant, Riper, Riley, Hollin & Colagreco, P.C. (the "Riley Law Firm"), is a Pennsylvania company. Individual defendants Benjamin J. Berger, Esquire ("Berger"), John G. Harris, Esquire ("Harris"), Jeanette N. Simone, Esquire ("Simone"), and Brett M. McCartney, Esquire ("McCartney"), were or are employees of the Riley Law Firm. On September 30, 2009, individual defendants Berger and Harris left the Riley Law Firm and established Berger-Harris, LLC, a Delaware law firm and defendant herein, (the "Berger—Harris Law Firm"). Whenever required hereinafter, the Berger—Harris Law Firm and individual defendants Berger and Harris shall be identified collectively as the "Berger Defendants."

On April 26, 2005, CD Realty, on behalf of Silver Lake and Enterprise, entered into two "Exclusive Agency Agreements" with Colliers, Lanard & Axilbund, LLC ("Colliers"), a Pennsylvania and Delaware real estate brokerage firm. Both Exclusive Agency Agreements were executed on behalf of Colliers by its senior vice-president, Robert Steinhart ("Steinhart"). Steinhart is not a licensed broker in the State of Delaware, and was not a licensed broker at the time the agreements were executed. Pursuant to the Exclusive Agency Agreements, Colliers agreed to act as the exclusive real estate agent for the commercial properties owned respectively by Silver Lake and Enterprise in Delaware.[1] The two Exclusive Agency Agreements contained the following language:

> [CD Realty] hereby appoints [Colliers] as the sole agent for, and thereby grants [Colliers] the sole and exclusive right to lease the Premises ....

[1] Exclusive Agency Agreements, Exhibits B and C to the motion for summary judgment of defendant the Berger—Harris Law Firm.

> Upon the happening of an event of lease ... whether by or through [Colliers, CD Realty,] or any other agent broker, or other person or entity ... [CD Realty] agrees to pay [Colliers] a commission....[2]

Certain existing leases between CD Realty as landlord, and the State of Delaware as tenant, were renewed while Colliers was acting as the real estate agent on behalf of CD Realty. After the existing leases were renewed, Colliers demanded payment of commissions earned. A contention arose between CD Realty and Colliers on the matter of commissions, and the parties engaged in settlement discussions. In the course of these discussions, CD Realty offered to settle the contention by paying Colliers a "six-figure sum."[3] However, the parties reached no settlement.

On September 21, 2007, Colliers initiated a civil action against CD Realty, Silver Lake and Enterprise, in the Court of Common Pleas, Philadelphia County (the "Underlying Action.")[4] The complaint in the Underlying Action asserted *inter alia* the claims of breach-of-contract against CD Realty, Silver Lake and Enterprise, for failure to pay commissions earned by Colliers. CD Realty, Silver Lake and Enterprise hired the Riley Law Firm to provide legal representation in the Underlying Action. The parties in this action have provided no copy of the agreement between CD Realty and the Riley Law Firm.

A bench trial in the Underlying Action was held on March 9, 2009. At trial, the Riley Law Firm argued on behalf of CD Realty that the Exclusive Agency Agreements between Colliers and CD Realty were unenforceable. The Riley Law Firm argued that under Delaware statutory law as applicable at the time, a corporation could act as a real estate broker only if its

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[2] Id. ¶¶ 1, 3.
[3] Deposition of Craig Frater, vice president of CD Realty, Exhibit H to the response in opposition to the motion for summary judgment of defendants the Riley Law Firm, Jeanette N. Simone, Esquire, and Brett M. McCartney, Esquire, pp. 57-59.
[4] Colliers Lanard & Axilbund, LLC v. CD Realty Advisors, Inc., CD Realty Enterprise Drive Associates, LLC, and Silver Lake Office Plaza, LLC, September Term 2007, case no. 02445.

officers actually involved in negotiating the listing, sale, purchase, or lease of any real property were licensed as brokers or salespeople in Delaware. The Riley Law Firm asserted that Steinhart was not a licensed broker or salesperson in Delaware at the time he signed the two Exclusive Agency Agreements on behalf of Colliers. The Riley Law Firm argued that the Exclusive Agency Agreements were unenforceable because they had been executed by a person lacking a brokering license in Delaware. The Riley Law Firm thus asserted that since the Exclusive Agency Agreements were unenforceable, Colliers was not entitled to collect any commissions thereunder.[5] In addition to this argument, the Riley Law Firm asserted that under the "procuring cause" doctrine, Colliers was not entitled to collect any commissions originating from renewal of leases that had predated the execution of the Exclusive Agency Agreements.

At the close of trial in the Underlying Action, the parties filed their respective Findings-of-Fact and Conclusions-of-Law. After the Riley Law Firm filed its proposed Findings-of-Fact and Conclusions-of-Law, attorneys Berger and Harris terminated their employment with the Riley Law Firm and founded the Berger—Harris Law Firm. The Berger—Harris Law Firm took over representation of CD Realty in the Underlying Action.

On October 27, 2009, the Honorable Idee C. Fox of the Court of Common Pleas, Philadelphia County, issued an Order-and-Opinion which included Findings-of-Fact and Conclusions-of-Law. Judge Fox found that Colliers was a "fully licensed corporate brokerage firm in Delaware" because its employees who had performed actual work in the formation of the two Exclusive Agency Agreements with CD Realty were respectively a real estate broker and two salespeople properly licensed in the State of Delaware.[6] Judge Fox explained that Steinhart's lack of a broker's license did not frustrate Collier's entitlement to collect brokering

[5] Trial Transcript, pp. 15-17, Exhibit I to the motion for summary judgment of defendant The Ripley Law Firm.
[6] Opinion and Order issued by the Honorable Judge Idee C. Fox. Case No. 0709-02445, p. 10.

fees because his work in negotiating and signing the two Exclusive Agency Agreements did not constitute real estate brokering work.[7] Judge Fox also ruled that the "clear and unambiguous language" contained in the two Exclusive Agency Agreements entitled Colliers to collect commissions even for minimal work performed in securing new leases or renewing leases already in existence.[8] Finally, Judge Fox ruled that CD Realty, Silver Lake and Enterprise had breached the Exclusive Agency Agreements with Colliers; consequently, she awarded damages to Colliers in the amount of $421,933.12, inclusive of interest and counsel fees. Judge Fox's judgment was entered on October 30, 2009, and post-trial motions in the underlying Action were due, if any, on November 9, 2009.

Although the deadline for post-trial motions fell on November 9, 2009, neither the Riley Law Firm nor the Berger—Harris Law Firm filed any post-trial motions on behalf of CD Realty. However, the Berger—Harris Law Firm did file an appeal. While the appeal was pending, a bond was posted on behalf of CD Realty to stay collection by Colliers. The bond was posted with funds supplied by Silver Lake Office Holdings, L.L.C., a non-party in the instant action. Subsequently, the Superior Court of Pennsylvania quashed the appeal because no post-trial motions had been filed, and judgment in the Underlying Action was satisfied.

In December 2010, CD Realty, Silver Lake and Enterprise filed the instant action against the Riley Law Firm, individual defendants Brett M. McCartney, Esquire, and Jeanette N. Simone, Esquire, and all the Berger—Harris Defendants. The Amended Complaint filed by CD Realty, Silver and Enterprise, styled as a civil action for "Legal Malpractice,"[9] asserts the claims of breach-of-contract against all defendants, professional negligence against all individual defendants, and vicarious liability against the Riley Law Firm and the Berger—Harris Law Firm.

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[7] Id.
[8] Id.
[9] Amended Complaint, p. 3.

On the deadline for the filing of dispositive motions in the instant action, December 17, 2012, the Riley Law Firm filed a motion for summary judgment asking this court to enter judgment in favor of the Riley Law Firm, Jeanette N. Simone, Esquire, and Brett M. McCartney, Esquire. Subsequently, on December 28, 2012, the Berger—Harris Law Firm filed its motion for summary judgment asking this court to dismiss all claims asserted against the Berger—Harris Defendants.[10] Plaintiffs timely filed their responses in opposition to the two motions for summary judgment. On May 30, 2013, this court issued an Order denying the motions for summary judgment on grounds that the court perceived the existence of issues of fact as to whether Defendants had apprised Plaintiffs about the merits of certain defenses in the Underlying Action, and whether Defendants had explored the possibility of settlement in light of such potentially weak defenses. On June 25, 2013, the Riley Law Firm filed the instant motion for reconsideration, and CD Realty timely filed it response in opposition. On September 27, 2012, a pre-trial conference was scheduled before this court. The court heard oral arguments on the motion for reconsideration and The Riley Law Firm and CD Realty argued their respective positions thereon. The motion for reconsideration is now ripe for a decision.

Discussion

In Pennsylvania,

> [s]ummary judgment is properly granted when an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action ... which in a jury trial would require the issues to be submitted to a jury....The explanatory comment to Rule 1035 clarifies this language, stating that the essence of the revision set forth in new Rule 1035.2 is that the motion for summary judgment encompasses two concepts: (1) the absence of a dispute as to any material fact and (2) the absence

[10] Although this motion was filed after expiration of the deadline, the court avails itself of its prerogative to "liberally" construe the Pennsylvania Rules of Civil Procedure "to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable." Pa. R.C.P. 126.

> of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense.[11]
>
> [A] trial court has the inherent power to reconsider its own rulings.... The statute which limits the time for reconsideration of orders to 30 days is applicable only to final orders. When considering an interlocutory order ... the trial court is not bound by the 30 day limitation. An order is interlocutory and not final if it does not effectively place the litigant out of court or otherwise end the lawsuit.[12]

I. Plaintiff could not have succeeded on appeal in the underlying action.[13]

a) Plaintiffs could not have proven that the Exclusive Agency Agreements were illegal and void.

During trial in the Underlying Action, Plaintiffs argued that the Exclusive Agency Agreements between CD Realty and Colliers were illegal and void pursuant to Delaware statutory law. Plaintiffs asserted that the Exclusive Agency Agreements were illegal and void because Colliers was not a licensed commercial real estate broker as required under 24 Del. C. § 2910, a Delaware statute regulating real estate brokering practices at the time the Exclusive Agency Agreements were executed. The pertinent section of that statute recited:

> ... nothing in this chapter shall prevent a corporation or partnership from acting as a real estate broker provided that every officer of any corporation and every member of any partnership actually negotiating ... the listing, sale, purchase, rental exchange or lease of any real property ... shall be licensed as a broker or salesperson. All officers of any corporation or all members of any partnership, acting as a broker or salesperson, shall be deemed in violation of this chapter unless there be full compliance with these provisions.[14]

After the Underlying Trial ended, Judge Fox determined in her Findings-of-Fact and

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[11] Young v. Dot, 560 Pa 373, 375-376; 744 A.2d 1276, 1277 (Pa. 2000).
[12] Key Automotive Equipment Specialists, Inc. v. Abernethy, 636 A.2d 1126, 1128 (Pa. Super. 1994).
[13] As there is no theory upon which Plaintiffs could have recovered on appeal, there is no need to determine which defendant was responsible for the failure to file post-trial motions.
[14] 24 Del C. § 2910 as cited by defendants Berger and Harris in their motion for summary judgment, ¶ 53, and as admitted by Plaintiffs in their response in opposition thereto, ¶ 53.

Conclusions-of-Law that Colliers was a fully licensed corporate brokerage firm because its employees, who had worked on the formation of the Exclusive Agency Agreements with CD Realty, were respectively a real estate broker and two salespeople properly licensed in the State of Delaware.

In Pennsylvania, "statutory interpretation ... is a pure question of law" to be determined by the courts.[15] After a careful reading of the statutory provisions above, this court can only conclude and agree with Judge Fox that the Exclusive Agency Agreements were not illegal and void pursuant to the controlling statutory provisions; consequently, Plaintiffs would not have succeeded on appeal under the argument that the Exclusive Agency Agreements were illegal and void under Delaware law.[16]

b) Plaintiff could not have overturned Judge Fox's decision that the procuring cause doctrine was inapplicable to the Underlying Action.

At the underlying trial, Plaintiffs argued that under the procuring cause doctrine, Colliers was not entitled to collect certain commissions. According to Plaintiffs, Colliers had not been the procuring cause in the renewal of existing leases, and could not collect commissions therefrom. The Exclusive Agency Agreements controlling payment of commissions stated in pertinent part:

> Upon the happening of an event of lease specified in Paragraph 3, whether by or through Agent, Owner, or any other agent, broker, other person or entity ... Owner agrees to pay Agent a commission as set forth below....

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[15] Holland v. Marcy, 883 A.2d 449, 450-451 (Pa. 2005).

[16] In the Amended Complaint, Plaintiffs aver that defendants failed to present adequate and compelling evidence that Colliers was not properly licensed under the law of Delaware. Specifically, the Amended Complaint avers that defendants "failed to adequately research the issues related to Delaware licensing requirements and failed to provide the Court with relevant case and statutory law." Amended Complaint, ¶42. However, in the response in opposition to the motions for summary judgment, Plaintiffs have pointed to no evidence showing what steps defendants should have taken to adequately argue the issue relating to Delaware licensing requirements, and no evidence of what relevant case law should have been brought to the attention of the Court, in the Underlying Action, in an effort to bolster the defense based on improper licensing in Delaware.

> As used below, Existing Tenants shall mean ones whose leases are in place on April 1, 2005....[17]
>
> Owner agrees that each lease made pursuant to this Agency shall provide that ... Agent is the procuring broker and entitled to a commission....[18]

In Pennsylvania, "[t]he task of interpreting a contract is generally performed by a court rather than by a jury.... Where ... the language of the contract is clear and unambiguous, a court is required to give effect to that language."[19]

In this case, the Exclusive Agency Agreements do not explain the term "event of lease" contained in Paragraphs 3 therein. However, a careful reading of the Exclusive Agency Agreements convinces this court that the term "event of lease" clearly and unambiguously means "contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration."[20] Furthermore, Judge Fox stated in her Findings-of-Fact and Conclusions-of-Law that no "procuring cause" language was inserted in any of the leases by [CD Realty], and that such leases

> were negotiated over a long period of time between sophisticated business people with a vast experience in real estate. Both sides were well aware of the bargaining terms. As a result, the terms of the Agreements were clear and unambiguous and do not require further evidence to determine the intent of the parties.[21]

Based on the contractual language in the Exclusive Agency Agreements, and in light of Judge Fox's determinations, this court can only conclude that the leases executed while Colliers acted as real estate agents of Plaintiffs did not contain any procuring cause provision, and did not

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[17] Exclusive Agency Agreements, ¶ 3, Exhibits B, C to the motion for summary judgment of defendants Berger and Harris.
[18] Id. at ¶ 8.
[19] Madison Construction Co. v. Harleysville Mutual Insurance Co., 735 A.2d 102, 106 (Pa. 1999).
[20] Black's Law Dictionary 898 (7th ed. 1999).
[21] Opinion and Order issued by the Honorable Judge Idee C. Fox. Case No. 0709-02445, p. 12. It would have been a simple matter for CD Realty to have inserted words into the agreements to the effect that renewal of leases which originally commenced prior to April 1, 2005, would not constitute an "event of lease."

preclude Colliers from collecting fees upon the renewal of leases already in existence as of April 1, 2005. Consequently, Plaintiffs would not have succeeded on appeal in the Underlying Action under the "procuring cause" argument.[22]

II. Plaintiffs have failed to show that they suffered actual losses as a result of defendants' alleged failure to investigate settlement options and to communicate them to plaintiffs.

According to defendants' motions for summary judgment, plaintiffs may not recover under a theory of attorney malpractice because there is no evidence showing that Colliers would have settled for an amount lower than the judgment of $421,933.12 as handed down by Judge Fox.[23] Defendants point to the testimony of Douglas Sayer, president of Colliers, who testified that he would not have settled the Underlying Acton for any amount below $700,000. Plaintiffs rebut this argument by asserting that they have put forth sufficient evidence demonstrating actual loss stemming from defendants' alleged wrongdoings.[24]

In Pennsylvania,

> When it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action ... is proof of actual loss.[25]

> An essential element to [a] cause of action [asserting legal malpractice] is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm.... Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to

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[22] In the Amended Complaint, Plaintiffs aver that defendants failed to properly and adequately assert the defense of "procuring cause" in the Underlying Action. Amended Complaint, ¶ 38. However, Plaintiffs have not pointed to any evidence showing what steps defendants should have taken to properly assert the procuring cause defense, other than stating that defendants failed to ensure testimony of Plaintiff's expert in the Underlying Action.

[23] Memorandum of law in support of the motion for summary judgment of defendants the Ripley Law Firm, Jeanette N. Simone, Esquire, and Brett M. McCartney, Esquire, p. 21.

[24] Memoranda of law in support of plaintiffs' response to the motions for summary judgment of defendants, p. 27 (motion control no. 12512836,) p. 25 (control no. 12123061).

[25] Duke & Co. v. Anderson, 275 Pa. Super. 65, 73, 74; 418 A.2d 613, 617 (Pa. Super. 1980).

precisely calculate the amount or value of damages.[26]

To determine whether plaintiffs have suffered any actual loss, this court examined the testimony of Douglas Sayer, president of Colliers, and the only person entitled to settle on behalf of that company. The court also examined the evidentiary record to determine whether plaintiffs provided proof of actual damages stemming from the alleged wrongdoing of defendants.

Douglas Sayer, president of Colliers, made the following statements under oath:

> Q. And during the course of the litigation, did you have an idea in your mind of how much you would have been willing to settle the case for a release during the course of that litigation?
> A. Yes.
> Q. And what was your thought about that?
> A. I believe approximately 850,000.
> * * *
> Q. Okay. And we had a sort of a gradation of certainty. Is there any number below which you know you would have never gone? You said you doubt you would have gone below 800,000. Is there a number that's less than 800,000 that you could say for certain you would never have gone below?
> A. Maybe 700,000. However, as this case proceeded and continued to consume more and more time, that in fact caused the concept of negotiating a lesser settlement more unlikely from my perspective.
> Q. Right. So are you saying that it might have gone as low a $700,000, but then it might have been edged back up again as the litigation—
> A. Exactly.
> Q. — litigation continued?
> A. Continued, right.[27]

This testimony shows that Colliers might have settled in the earlier stages of the Underlying Action for a figure as low as $700,000. This testimony also shows that Colliers was likely to raise its settlement floor of $700,000 if the Underlying Action continued to consume more of its time and resources. By contrast, examination of the record shows no evidence

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[26] Kituskie v. Corbman, 552 Pa. 275, 281; 714 A.2d 1027, 1030 (Pa. 1998).
[27] Deposition of Douglas Sayer, president of Colliers, dated April 11, 2012, pp. 15:15—24, 15:1—14; 17:2—20, Exhibit H to the motion for summary judgment of defendants Riley, Riper, Hollin & Colagreco, P.C. and Jeanette N. Simone, Esquire and Brett M. McCartney, Esquire.

offered by plaintiffs to establish that Colliers and CD Realty would have settled the Underlying Action for an amount below Judge Fox's judgment of $421,933.12.[28] Instead, CD Realty merely reiterated that it would have settled the Underlying Action if Defendants had investigated a reasonable settlement demand made by Colliers in the early stages of the litigation. CD Realty cites the statements of Brett McCartney, Esquire, an attorney working on behalf CD Realty in the Underlying Action, for the proposition that Defendants failed in their duty to investigate possible settlement options, and failed to communicate such options to CD Realty. The statements of Brett McCartney, Esquire, read as follows:

> I ... recall a single telephone conversation I had with Don Berg [President of CD Realty] during which I informed Berg that Colliers' counsel indicated that settlement of the [Underlying Action] may be possible if plaintiffs [CD Realty], who were the underlying action defendants, were to make an offer within the $150,000 to $200,000 range. Berg replied that he was not interested in settling the case for anything close to that amount and indicated that he did not believe Colliers was entitled to any money.[29]

This testimony, when read in conjunction with the testimony of Douglas Sayer, president of Colliers, reinforces the court's conviction that Plaintiffs have failed to show proof of loss and have only offered speculation that the Underlying Action would have settled if Defendants had somehow apprised them of "reasonable settlement options." Since there is no evidence of a

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[28] Rather than producing evidence of an actual offer to settle below $421,933.12, CD Realty relied, on paper as well as orally at the pre-trial hearing of September 27, 2013, on Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (Pa. 1988), to insist on the point that if defendants had clearly communicated to CD Realty any settlement options, then CD Realty would have settled with Colliers for an amount lower than the amount of judgment. See Memorandum of law in support of Plaintiffs' response to the motion for summary judgment of Defendants, the Ripley Law Firm, Jeanette N. Simone, Esquire, and Brett M. McCartney, Esquire, p. 28. CD Realty's reliance on Rizzo is inappropriate. In Rizzo, the Court found that counsel for plaintiff had breached his duty by failing to inform the client about an express offer to settle, the terms of which were perfectly in line with the expectations of his client. Rizzo v. Haines, 520 Pa. at 498, 502. In this case, there is no evidence on record that Colliers offered to settle the Underlying Action for an amount below Judge Fox's judgment, and reliance on Rizzo is inappropriate.

[29] Answers and objections of defendant Brett M. McCartney, Esquire, to plaintiffs' first set of interrogatories, no. 31, Exhibit E to the response of plaintiffs to the motion for summary judgment of defendants the Ripley Law Firm, Jeanette N. Simone, Esquire and Brett M. McCartney, Esquire.

reasonable settlement option, there cannot be a showing of actual loss.[30]

III. Defendants have suffered no damages as a result of the underlying litigation.

The motion for summary judgment of the Berger—Harris Law Firm asserts that Plaintiffs did not pay or contribute any money to satisfy the judgment entered in favor of Colliers in the Underlying Action, nor are Plaintiffs under any obligation to make such payments or contributions.[31] Evidence developed during discovery shows that an entity named Silver Lake Office Holdings, L.L.C., a non-party in the instant action, paid the judgment amount in the Underlying Action. In the response in opposition, Plaintiffs admit that they paid or contributed no funds to satisfy the judgment in the Underlying Action, and are under no obligation to do so.[32] The Berger—Harris Law Firm concludes that all of the claims in the Amended Complaint should be dismissed because the Plaintiffs herein have not suffered any actual loss in the Underlying Action. The Berger—Harris Law Firm supports its argument by relying on General Nutrition Corp. v. Gardere Wynne Sewell, LLP, 727 F. Supp.2d 377 (W.D. Pa. 2010).

In General Nutrition, plaintiff General Nutrition Corporation (the "Corporation,") entered into a number of contracts with a publishing house for the production, advertising and targeted delivery of two magazines. Subsequently, the Corporation determined that its advertising dollars were not efficiently used under its arrangement with the publisher. The Corporation hired a law firm to determine whether there was any basis for terminating the contracts, and the law firm advised the Corporation that such contracts involved exclusively the sale of goods. Therefore,

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[30] It is important to note again that Douglas Sayer, president of Colliers, would not have agreed to settle for an amount below $700,000. Thus, the cited statement of Brett M. McCartney, Esquire, cannot be used to competently prove that Sayer would have settled for an amount below $421,933.12, let alone for an even lower amount ranging between $150,000 and $200,000. It is also important to note that Berg, president of CD Realty, was an attorney and a sophisticated real estate dealer who negotiated and approved on behalf of CD Realty the terms of the Exclusive Agency Agreements with Colliers. As such, he was not a helpless client who relied solely upon his attorney's advice.

[31] Motion for summary judgment of the Berger—Harris Law Firm, ¶¶ 83—85.

[32] Response of CD Realty to the motion for summary judgment of the Riley Law Firm, ¶¶83—85.

the law firm gave advise that even if termination of the contracts constituted a breach, the Corporation could expect to lose no more than $1—3 million therefrom. The Corporation could expect to lose no more than $1—3 million because under the Uniform Commercial Code governing the sale of goods, no recovery would be allowed for consequential damages. The Corporation determined that it could bear a $1—3 million loss and issued a notice of termination to the publisher. The publisher sued. At summary judgment, the Federal District Court of Ohio ruled that the contracts between the Corporation and the publisher involved the sale of services rather than the sale of goods. Consequently, the Corporation became exposed to the risk of losing consequential damages well beyond the expected loss of $1-3 million. As a result, the Corporation fired the ineffectual counsel, hired another law firm, and settled with the publisher in the amount of $12 million. However, the Corporation did not pay the settlement amount: General Nutrition Incorporated, a separate entity affiliated with the Corporation, but neither involved in the underlying litigation, nor in any contractual relationship with the publisher, acted as "banker" on behalf of the Corporation and paid the settlement.

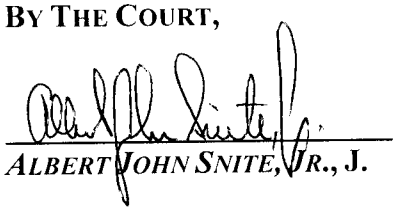
After the settlement, the Corporation filed a lawsuit in the U.S. District Court for the Western District of Pennsylvania. The complaint thereof asserted the claim of professional malpractice against the law firm that had given an optimistic but inadequate assessment of damages attributable to the Corporation in the underlying action. At summary judgment, the law firm argued that the Corporation had suffered no economic loss because a separate entity with no involvement in the underlying contracts with the publisher, paid the settlement amount thereof.

Ruling upon the motion for summary judgment, the District Court found that the Corporation "ha[d] not suffered any actual monetary loss" because it had "not paid anything to any entity or person as a result of, or related to, [the law firm's] advice regarding the ...

contracts."[33] Consequently, the District Court held that any loss claimed by the Corporation was "non-existent or purely speculative."[34] The District Court further stated that the Corporation's effort to recover losses incurred by another entity amounted to an attempt to "disregard the corporate formalities," and that "courts will disregard the corporate entity only in limited circumstances when [such an entity is] used to defeat public convenience, justify wrong, protect fraud or defend crime."[35] The District Court concluded that the Corporation had not itself suffered any loss and, under Pennsylvania law, could "not pursue a legal malpractice claim for actual loss incurred by a separate and distinct corporate entity."[36]

In this case, CD Realty admits that it did not contribute any money to satisfy the judgment entered in favor of Colliers in the Underlying Action, and is not obligated to repay the funds used to satisfy that judgment.[37] This court finds the reasoning in General Nutrition persuasive and the motion for reconsideration is granted. Since CD Realty has not proven damages stemming from the actions of its counsel in the Underlying Action, it may not maintain the instant lawsuit against any defendants therein. [38]

BY THE COURT,



ALBERT JOHN SNITE, JR., J.

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[33] General Nutrition Corporation v. Gardere Wynne Sewell, LLP, 727 F.Supp.2d 377, 383-384 (W.D. 2010).
[34] Id. at 385.
[35] Id. at 385.
[36] Id. at 387.
[37] Motion for summary judgment of the Berger—Harris Law Firm, ¶¶ 83-85. Response in opposition to the motion for summary judgment of the Berger—Harris Law Firm, ¶¶ 83-85. See also, Responses of Plaintiff CD Realty Advisors, Inc. to Requests for Admissions of Defendants Riley, Riper Hollin, Colagreco, P.C. Jeanette N. Simone, Esq. and Brett M. McCartney, Esq. ¶¶ 2-6
[38] To successfully maintain a cause of action for breach of contract the plaintiff must establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages. Hart v. Arnold, 2005 PA Super 328, 884 A.2d 316, 332 (Pa. Super. 2005).