IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DESTEFANO & ASSOCIATES, INC. and RICHARD DESTEFANO	:	COMMERCE PROGRAM
	:	JUNE TERM 2000
v.	:	
	:	NO. 2775
ROY S. COHEN; COHEN, SEGLIAS, PALLAS & GREENHALL, P.C.; ROBERT GENDELMAN; and BOB GENDELMAN & CO., INC.	:	**Control No. 121396**

ORDER

AND NOW, this 9th day of April 2001, upon consideration of the preliminary objections of defendants Roy Cohen and Cohen, Seglias, Pallas & Greenhall and plaintiffs' response, and in accordance with the court's contemporaneously-filed memorandum opinion, IT IS HEREBY ORDERED that

(1) The preliminary objections are SUSTAINED IN PART.

(2) The claims of plaintiff DeStefano & Associates against defendants Roy Cohen and Cohen, Seglias, Pallas & Greenhall are DISMISSED.

(3) Paragraph 32 of the complaint is STRICKEN.

(4) The remaining preliminary objections are OVERRULED.

(5) Defendants Roy Cohen and Cohen, Seglias, Pallas & Greenhall shall answer the complaint within twenty (20) days of the entry of this order.

BY THE COURT:

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JOHN W. HERRON, J.

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OPINION

In this case the plaintiffs allege that they bought a business that turned out to be a lemon. At issue are the preliminary objections of defendants Roy Cohen and Cohen, Seglias, Pallas & Greenhall to the complaint. The court sustains the objections in part.

FACTS

Plaintiff Richard DeStefano wanted to buy defendant Bob Gendelman & Co., Inc. ("BGC") from its owner, Bob Gendelman. BGC was an electrical contracting company. DeStefano, Gendelman and BGC hired defendants Roy Cohen and his law firm, Cohen, Seglias, Pallas & Greenhall, (together, "Cohen") to represent both sides in the transaction. In February 1999, DeStefano hired independent counsel, Rothberg & Federman, to represent him in the deal.

DeStefano formed defendant DeStefano & Associates, Inc. ("DAI") to buy BGC's assets. On March 3, 1999, DeStefano, DAI, Gendelman and BGC signed an asset purchase agreement. In the

agreement, Gendelman and BGC warranted that there were no pending disputes, no undisclosed liabilities and that BGC had accurately disclosed its financial condition. Asset Purchase Agreement ¶¶ 4.5(a), 4.6, 4.7, 8.4.

When the plaintiffs took control of BGC's assets, they found out that BGC was not in as good of shape as they hoped. Plaintiffs allege that Gendelman, BGC and Cohen (1) intentionally or negligently concealed information including $112,000 in labor cost overruns at the Pennsylvania House job and a dispute between BGC and the general contractor, Jeffrey M. Brown & Associates, and (2) intentionally or negligently misrepresented the percentage completion of and the anticipated profit on the Pennsylvania House job.

In September 1999, Cohen represented the plaintiffs in a dispute between DAI and a labor union. The plaintiffs allege that Cohen and the local union business manager had a close personal relationship that compromised Cohen's loyalty to DAI during that dispute. Plaintiffs allege that Cohen now represents five other companies in debt collection disputes against DAI.

On June 22, 2000, plaintiffs began this action by filing a praecipe for writ of summons. On that same day, DAI filed a petition for Chapter 7 bankruptcy. In re DeStefano Assocs., No. 00-17881 (Bankr.E.D.Pa.). On November 9, 2000, plaintiffs filed the complaint. The complaint alleges (1) fraud against all defendants, (2) breach of fiduciary duty and negligence against Cohen, and (3) breach of contract and unjust enrichment against Gendelman and BGC. The complaint also asks for an injunction against Cohen to bar him from representing the five companies against the plaintiffs.

Cohen filed preliminary objections arguing that the bankruptcy petition stayed this action, that DAI lacks standing because its claims now belong to the bankruptcy estate, and that Counts I and II

are legally insufficient.

DISCUSSION

I. DAI'S BANKRUPTCY PETITION DOES NOT STAY THIS ACTION.

Cohen argues that DAI's bankruptcy petition stays this action. The court disagrees. The automatic stay applies only to actions against the debtor. 11 U.S.C. § 362(a)(1). The stay does not apply to actions by the debtor. Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir. 1992); In re Northwood Flavors, Inc., 202 B.R. 63, 66 (Bankr.W.D.Pa. 1996). The court overrules this preliminary objection.

II. BECAUSE DAI'S CLAIMS AGAINST COHEN ARE PROPERTY OF THE BANKRUPTCY ESTATE, DAI LACKS STANDING TO SUE COHEN.

Cohen argues that, when DAI filed its bankruptcy petition, DAI's claims became property of the trustee and DAI lost standing to sue on those claims. The court agrees.

When a debtor files a bankruptcy petition, all of the debtor's property, including causes of action that have accrued as of that time, becomes property of the bankruptcy estate. 11 U.S.C. § 541(a)(1); In re Kollar, 176 F.3d 175, 178 (3d Cir. 1999); In re Swift, 129 F.3d 792, 795 (5th Cir. 1997); see also 11 U.S.C. § 323(b) (stating that bankruptcy trustee has capacity to sue). Therefore, upon filing a petition for bankruptcy, a debtor loses standing to pursue any claims that have accrued as of that time. Rashid v. Kite, 934 F.Supp. 144, 146 (E.D.Pa. 1996); John L. Motley Assocs. v. Rumbaugh, 97 B.R. 182, 185 (E.D.Pa. 1989); Carlock v. Pillsbury Co., 719 F.Supp. 791, 856

(D.Minn.1989). See also 2 Daniel R. Cowans, Bankruptcy Law & Practice § 9.2(h), at 355 (7th ed. 1998). Only if the bankruptcy trustee formally abandons a claim does that claim revest in the debtor such that the debtor may bring suit in his own name. Rashid, 934 F.Supp. at 146. See also 11 U.S.C. § 554 and Fed.R.Bankr.P. 6007 (providing for abandonment of property by way of motion by trustee or by party in interest). Where the filing of the bankruptcy petition has deprived a debtor of standing to bring claims, the trial court may dismiss those claims. Rashid, 934 F.Supp. at 147 (dismissing plaintiff's fraud claims where plaintiff had filed bankruptcy petition and trustee had not abandoned claims).

The plaintiffs began this action by filing a praecipe for writ of summons on June 22, 2000. In his preliminary objections, Cohen averred that DAI filed for bankruptcy on June 22, 2000. Preliminary Objections ¶ 6. The plaintiffs admitted this averment. Answer ¶ 6. Therefore, DAI's claims against Cohen must have accrued before DAI filed its bankruptcy petition, and the claims are property of the estate unless the trustee has abandoned them. Kollar, 176 F.3d at 178; Swift, 139 F.3d at 795; Rashid, 934 F.Supp. at 146. The trustee could not have formally abandoned DAI's claims before the plaintiffs filed this action, because the plaintiffs filed the bankruptcy petition and the praecipe on the same day. Therefore, DAI did not have standing on the day it filed suit.

There is precedent, however, that a party can cure lack of standing after filing suit. For instance, an unregistered foreign corporation may comply with Pennsylvania's registration statute after filing suit, and thus cure its lack of capacity to sue. International Inventors, Inc., East v. Berger, 242 Pa.Super. 265, 363 A.2d 1262, 1263 (1976). And many federal courts have held that an assignment of a patent to the plaintiff after the plaintiff files a suit for infringement of that patent cures the plaintiff's initial lack of standing. See e.g., Valmet Paper Machinery Corp. v. Beloit Corp., 868 F.Supp. 1085,

1089 (W.D.Wis. 1994) and Ciba-Geigy Corp. v. Alza Corp., 804 F.Supp. 614, 637 (D.N.J. 1992) (same). But see Switzer Bros., Inc. v. Byrne, 242 F.2d 909, 913 (6th Cir. 1957) (holding that a party must have standing on the day it files suit, and the subsequent assignment of a patent to the plaintiff in a patent infringement action does *not* cure that lack of standing) and Afros S.p.A. v. Krauss-Maffei Corp., 671 F.Supp. 1402, 1446 (D.Del.1987) (same). But DAI has not cured its lack of standing. In their answer to the petition, the plaintiffs do not allege that the trustee abandoned DAI's claims. The plaintiffs aver only that

> it has been agreed the claim of DeStefano & Associates, Inc. will be prosecuted by the undersigned law firm and counsel and all interested parties are in the process of obtaining the bankruptcy court's approval of the same.

Answer ¶¶ 9, 14, 15. This is not an averment that the trustee has formally abandoned DAI's claims against Cohen. At best, this averment creates an issue of fact as to whether abandonment is pending. Since plaintiffs have not alleged that the trustee has abandoned DAI's claims against Cohen, DAI does not have standing to sue. The court sustains Cohen's preliminary objection based on lack of standing.[1] The court will dismiss those claims without prejudice to the trustee to assert the claims on behalf of the bankruptcy estate and without prejudice to DAI to assert the claims on its own behalf should the trustee abandon them.

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[1] In light of this holding, DAI would seem not to have standing to sue Gendelman and BGC either. But Gendelman and BGC filed their preliminary objections late with motion court, and the court overruled those objections in accordance with Phila.Civ.R. *1028(B). Since standing is not an issue of subject matter jurisdiction, the court cannot raise it sua sponte. Hertzberg v. Zoning Bd. of Adjustment, 554 Pa. 249, 721 A.2d 43, 46 n.6 (1998)(stating that court may not raise standing sua sponte), citing Jones Mem'l Baptist Church v. Brackeen, 416 Pa. 599, 207 A.2d 861, 863 (1965). Therefore, DAI's claims against Gendelman and BGC remain.

III. DAI IS NOT AN INDISPENSABLE PARTY TO THE CLAIMS AGAINST COHEN.

Cohen argues that, if the court dismisses DAI's claims against Cohen, it must dismiss DeStefano's claims because DAI is an indispensable party to those claims. The court disagrees. A party is indispensable when its rights are so connected with the claims of the litigants that no order can be made without impairing those rights. CRY, Inc. v. Mill Serv., Inc., 536 Pa. 462, 640 A.2d 372, 375 (1994); Mechanicsburg Area Sch. Dist. v. Kline, 494 Pa. 476, 431 A.2d 953, 956 (1981). Consideration of whether a party is indispensable involves four factors:

> (1) Do absent parties have a right or interest related to the claim?
> (2) If so, what is the nature of that right or interest?
> (3) Is that right or interest essential to the merits of the issue?
> (4) Can justice be afforded without violating the due process rights of absent parties?

Mechanicsburg Area Sch. Dist., 640 A.2d at 956, quoted in CRY, Inc., 640 A.2d at 375;

Under these factors, DAI is not an indispensable party because it lost its rights and interests related to the claims when it filed its bankruptcy petition. Those rights and interest now belong to the bankruptcy estate.

Though the estate now has rights related to DeStefano's claims, the estate is not indispensable. The nature of the estate's right is a claim against Cohen for fraud and breach fiduciary duty. Resolution of that claim is not essential to the merits of DeStefano's claims. Cohen's single-sentence indispensability argument does not allege how an award of damages or an injunction to DeStefano would affect the estate's due process rights. Nor does Cohen argue that the estates has only a joint interest in DeStefano's tort and contract claims. Compare Pa.R.C.P. 2227(a) and 3 Std. Pa. Practice § 14:173 (stating that a person having only a joint interest in the subject matter of the action is

indispensable and must be joined).

DAI and the bankruptcy trustee are not indispensable parties, and DeStefano may pursue his claims against Cohen without them.

IV. THE COURT OVERRULES THE DEMURRER TO COUNT I.[2]

Count I alleges fraud against Cohen based on misrepresentation and concealment of information material to the purchase of BGC's assets. Cohen argues that Count I is legally insufficient because a "misrepresentation or omission is actionable as fraud only when there is an independent duty to disclose, such as where a party is in an fiduciary relationship to the party seeking disclosure." Cohen brief at 6. Cohen argues that it had no duty to disclose because the attorney client relationship between plaintiffs and Cohen ended before any fraud occurred. The court disagrees with this argument.

Cohen's statement of the law regarding misrepresentation, concealment and non-disclosure is incorrect. Count I asserts claims for intentional misrepresentations and intentional concealment. Complaint ¶¶ 14-22. To state a cause of action for intentional misrepresentation and intentional concealment calculated to deceive, DeStefano need not demonstrate the existence of an independent duty to disclose. See Bortz v. Noon, 566 Pa. 489, 729 A.2d 555, 560 (1999) (stating that fraud may be based on affirmative misrepresentation or an intentional non-disclosure and listing elements of those claims claim and listing elements of fraud, none of which is an independent duty to disclose). Therefore, Cohen may be liable for his intentional misrepresentations and intentional concealment even if those

[2] Because the court dismisses DAI's claims for lack of standing, the court need consider the remaining preliminary objections only as they relate to DeStefano's claims.

actions occurred when Cohen was not DeStefano's attorney. See Smith v. Griffiths, 327 Pa.Super. 418, 476 A.2d 22, 26-27 (1984)(stating that an attorney may be liable for intentional torts committed against a third party in the representation of his client).

Count I also asserts claims for negligent misrepresentation and negligent non-disclosure. Unlike the claims based on intentional misrepresentation and concealment, these claims require that DeStefano demonstrate that Cohen owed DeStefano an independent duty. See Bortz, 729 A.2d at 561 (stating that defendant may be liable for negligent misrepresentation only if he owed a duty to the plaintiff); Sewak v. Lockhart, 699 A.2d 755, 759 (Pa.Super.Ct. 1997) (stating that mere silence, in the absence of a duty to speak, is not actionable); Smith v. Renaut, 387 Pa.Super. 299, 564 A.2d 188, 192 (1989)(same). See also Joseph v. Zambelli, 392 Pa. 24, 139 A.2d 644, 647 (1958) (listing "non-privileged failure to disclose" as a kind of fraud). The complaint alleges sufficient facts from which the court reasonably infers that Cohen was DeStefano's attorney when some or all of the negligent misrepresentations and non-disclosures occurred, such that Cohen owed DeStefano an independent duty at that time. See Complaint ¶¶ 8, 9,10, 28.

The court overrules Cohen's demurrer to Count I.

V. THE COURT OVERRULES THE DEMURRER TO COUNT II, BUT STRIKES THE ALLEGATION IN COUNT II THAT COHEN VIOLATED THE RULES OF PROFESSIONAL CONDUCT.

Count II alleges legal malpractice, breach of fiduciary duty and negligence against Cohen. DeStefano bases these claims on (1) misrepresentations and omissions in connection with the acquisition of BGC, and (2) breach of duties of loyalty and duty of care to DeStefano in connection

with Cohen's representing DeStefano against a labor union. In support of this claim, DeStefano alleges that Cohen's acts were breaches of several Rules of Professional Conduct. Complaint ¶ 32.

Cohen objects on three grounds. First, Cohen argues that Count II is legally insufficient because there was no attorney client relationship between Cohen and DeStefano when any breaches occurred. The court disagrees. Count II alleges sufficient facts from which the court infers that Cohen was DeStefano's attorney when some or all of the breaches occurred.

Second, Cohen argues that an alleged violation of the Rules of Professional Conduct, alone, does not support a claim for professional conduct. Cohen is correct. The Rules of Professional Conduct do not impose tort duties on attorneys. Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277, 1284 (1992); Pa.R.P.C, Scope (stating that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis for civil liability."). Therefore, the court will sustain this aspect of the preliminary objection by striking paragraph 32 of the complaint. DeStefano may, however, bring a tort action against Cohen for acts constituting breach of fiduciary duty and negligence, however, even though those acts may also be violations of the Rule of Professional Conduct. Maritrans GP, 602 A.2d at 1285.

Third, Cohen argues that DeStefano have failed to allege sufficient facts to support the claim for punitive damages in Count II. A plaintiff may recover punitive damages where the defendant's conduct was intentional, reckless, or malicious. Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58, 69 (1989). An attorney's "breaches of fiduciary duty, intentional withholding of critical information and fraudulent misrepresentation [are] sufficient to justify [a] punitive damage award." Id. DeStefano alleges that

Cohen committed such acts and that he dis so intentionally. Therefore, the court overrules the specificity objection.

CONCLUSION

The court will enter a contemporaneous order consistent with this opinion dismissing the claims of DAI's against Cohen and striking paragraph 32 of the complaint.

BY THE COURT:

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JOHN W. HERRON, J

DATE: April 9, 2001