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

DESTEFANO & ASSOCIATES, INC. and RICHARD DESTEFANO,	:	June Term, 2000
Plaintiffs,	:	No. 2775
v.	:	
ROY S. COHEN; COHEN, SEGLIAS, PALLAS, & GREENHALL, P.C.; ROBERT GENDELMAN, and BOB GENDELMAN & CO., INC,	:	Commerce Program
Defendants,	:	Control Nos. 040165, 040208
v.	:	
KENNETH FEDERMAN, ESQUIRE	:	
Additional Defendant.	:	

ORDER

AND NOW, this 23rd day of May, 2002, upon the consideration of the Motion for Summary Judgment of Defendants Roy S. Cohen and Cohen, Seglias, Pallas, & Greenhall (collectively "Cohen") to the Complaint of Plaintiffs DeStefano & Associates, Inc. ("DAI") and Richard DeStefano ("DeStefano"), the responses thereto, the Motion for Summary Judgment of Additional Defendant Kenneth Federman, Esquire ("Federman") to the Joinder Complaint of Cohen, and in accordance with the court's contemporaneously-filed opinion, it is hereby ORDERED and DECREED that Cohen's Motion for Summary is Judgment is GRANTED. Plaintiffs claims against Cohen in Counts I, II and IV are hereby dismissed. Furthermore, Federman's Motion for Summary Judgement is GRANTED and Cohen's claims against Federman are dismissed.

BY THE COURT:

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JOHN W. HERRON, J.

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	:	Control Nos. 040165, 040208
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OPINION

Defendants Roy S. Cohen and Cohen, Seglias, Pallas, & Greenhall (collectively "Cohen") filed this Motion for Summary Judgment against the Complaint of plaintiffs DeSetfano & Associates, Inc. ("DAI") and Richard DeStefano ("DeStefano"). Additional Defendant Kenneth Federman, Esquire ("Federman") also filed a Motion for Summary Judgment against the Joinder Complaint of Cohen. For the reasons discussed below, both motions for summary judgment are granted in their entirety.

BACKGROUND

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 Cohen to represent both sides in the transaction. In February 1999, Destefano hired independent counsel, Kenneth Federman ("Federman"), of Rotherberg & Federman, to represent him in the deal. Destefano formed DAI to buy BGC's assets and 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 plaintiffs took control of BGC's assets, they found out that BGC was not in as good of shape as they had hoped. Plaintiffs allege that Gendelman, BGC and Cohen (1) intentionally and 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 plaintiffs in a dispute between DAI and a labor union. Plaintiffs allege that Cohen and the local union business manager had a close personal relationship that compromised Cohen's loyalty to DAI during the 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 Assoc., No. 00-17881 (Bankr.E.D.Pa.2000). 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 prevent them from representing the five companies against the plaintiffs. On June 26, 2001, Cohen joined Federman as an additional defendant.

On April 9, 2001, this court ruled upon the defendants' preliminary objections holding that the

claims of DAI against Cohen were dismissed but the remaining preliminary objections were overruled. On April 1, 2002, Cohen filed this motion for summary judgment against plaintiffs and Federman filed his own motion for summary judgment against Cohen's joinder complaint.[1]

DISCUSSION

I. Legal Standard

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95, 100 (Pa. Super Ct. 2001). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the non-moving party, "summary judgment is improper if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory [he] has pled." Id. However, "[s]ummary judgment is proper when the pleadings, depositions,

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[1] Plaintiffs filed a response to Cohen's motion for summary judgment five days after the 5/1/02 deadline. Although plaintiffs did not file a Petition for Extraordinary Relief seeking an extension of time, as is required by the Commerce Program, notice of their untimely filing was submitted to the court on 5/3/02, two days after the deadline had already passed. Cohen then filed a formal objection and Response to Petition for Extraordinary Relief requesting that this court not consider the plaintiffs' untimely brief.

While Pa.R.C.P. 1035.5 allows the court to enter a summary judgment against a party who does not respond, it does not discuss whether judgment against a party may be entered for an untimely response. Although this court does not condone the actions of plaintiffs, it will take into consideration the untimely response filed by plaintiffs since there appears to be no prejudice to any party in doing so.

answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954, 955 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id. (citations omitted).

II. Cohen's Motion For Summary Judgment As To Count I of the Complaint is Granted Because Plaintiffs Have Failed To Produce Sufficient Evidence of Facts Essential To Their Cause Of Action[2]

In Count I of their Complaint, plaintiffs assert claims against Cohen for fraud/fraudulent inducement as well as negligent misrepresentation. In Pennsylvania, to maintain a cause of action for fraud, the plaintiff must allege the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citations omitted). Further, to succeed on a claim of negligent misrepresentation, a plaintiff must show "(1) a misrepresentation of a material fact; (2) made

[2] Although defendants do not raise this issue, plaintiffs' Complaint also fails to conform to Pa.R.C.P. 1020(a) which reads that although "[t]he plaintiff may state in the complaint more than one cause of action against the same defendant... [e]ach cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Here, Count II of the Complaint is titled "Legal Malpractice/Breach of Fiduciary Duty/Negligence." Although similar elements need to be proven to succeed on these causes of action, they are in fact separate and distinct causes of action, and therefore, need to be stated in separate counts. Pa.R.C.P. 1020(a). Further, Count III of the Complaint is titled "Breach of Contract/Unjust Enrichment." Although a claim for a breach of contract may be pleaded in the alternative, these causes of action should be pleaded in separate counts. Pa.R.C.P. 1020(c),(d)(1).

under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.... Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another." Bortz, 556 Pa. at 500, 729 A.2d at 561.

Here, as Cohen correctly argues, "[w]hile the Plaintiff's Complaint may have alleged facts sufficient to withstand Defendants' preliminary objections, the unsupported allegations in the Complaint, in and of themselves, are insufficient to withstand Cohen's Summary Judgment Motion." Defs' Mem. of Law at 9. Besides the pleadings, nowhere in this record can this court find, nor do the plaintiffs offer, any deposition testimony, affidavits, or other evidence, to support any of the plaintiffs' allegations of fraud and negligent misrepresentation. In fact, plaintiffs themselves concede that "[they] have not conducted any discovery." Pls' Reply Mem. of Law at 4. As discussed above, courts in Pennsylvania require that in a motion for summary judgment, the non-moving party adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Basile, 777 A.2d at 100. Given the stark record before this Court, there is simply no factual evidence of any sufficiency to support their allegations. Therefore, the motion for summary judgment is granted.

Plaintiffs counter and strangely suggest to this Court that their Complaint alone can provide a sufficient factual record to support their allegations and thus survive a motion for summary judgement. Pls' Reply at 3. Specifically, plaintiffs attempt to argue that their Complaint can magically serve the dual role of not only functioning as a means of commencing an action, but also serve as an affidavit, since both require verification pursuant to Pa.R.C.P. 76. Id at 6. However, if the court were to agree with

this preposterous contention, and it does not, then a party would be able to commence an action in Pennsylvania simply by filing an affidavit. This, of course, is not allowed as Pa.R.C.P. 1007 reads that "[a]n action may be commenced by filing... (1) a praecipe for a writ of summons, or (2) a complaint." Therefore, the court grants the motion for summary judgment as to Count I of the Complaint.[3]

III. Cohen's Motion For Summary Judgment As To Count II of the Complaint is Granted Because Plaintiffs Have Failed To Produce Sufficient Evidence of Facts Essential To Their Cause Of Action

Count II of the Complaint alleges claims of legal malpractice, breach of fiduciary duty, and negligence. To begin with, in Pennsylvania, to succeed "[i]n a malpractice action based on an attorney's representation in a civil matter, a plaintiff must establish three elements in order to recover: 1. The employment of the attorney or other basis for duty; 2. The failure of the attorney to exercise ordinary skill and knowledge; and 3. That such failure was the proximate cause of damage to the plaintiff."

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[3] Plaintiffs also make the argument that this Court's April 9, 2001 Order overruling Cohen's preliminary objections as to Counts I and II of the Complaint are "res judicata of the instant motion." Pls' Mem. of Law at 4. Specifically, they argue that since this Court held that plaintiffs had pled sufficient facts to state causes of action against the defendants at the preliminary objection stage, based on the same amount of facts, the court can deny the instant motion for summary judgment. Id. However, such a contention absolutely ignores the applicable standards of these two entirely different procedural stages.

In ruling on preliminary objections, the focus of the inquiry is the pleadings as a court must sustain preliminary objections only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000) (citations omitted). In contrast, a court's review of a motion for summary judgment goes beyond just the pleadings and is based on the entire record as a "[s]ummary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954, 955 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Therefore, by relying solely on the pleadings for this motion of summary judgment, the plaintiffs have not provided this court with sufficient evidence to support their causes of action.

Bailey v. Tucker, 533 Pa. 237, 245, 621 A.2d 108, 112 (1993) (citations omitted). To succeed on a breach of fiduciary duty claim a plaintiff must first show that a fiduciary relationship exists in that "one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Commonwealth Dept. of Transp. v. E-Z Parks, Inc., 153 Pa.Commw. 258, 267, 620 A.2d 712, 717 (1993) (citations omitted). Then, the plaintiff must show that a fiduciary duty exists and a subsequent breach occurred. Id (holding that a fiduciary duty is "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of any duty implied by law."). Finally, to succeed on a claim of negligence, a plaintiff must establish a duty on the defendant, a breach of that duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. Petrongola v. Comcast Spectator, L.P., 789 A.2d 204, 209 (Pa.Super. 2001).

As with Count I, Count II lacks any sufficient evidence of facts on the record to support plaintiffs' claims of legal malpractice, breach of fiduciary duty and negligence claims. Specifically, other than the allegations contained in paragraphs 26 and 27 of the Complaint, plaintiffs fail to present any evidence that in assisting with the purchase of BGC, Cohen failed to disclose information to the plaintiffs regarding the cost overruns and lack of profit on the Pennsylvania House job. Moreover, plaintiffs' allegations of defendants' "betrayal or lack of loyalty" is completely unsupported by any evidence on the record. Pls' Mem. of Law at 8. Although plaintiffs do attach to their untimely response an excerpt from DeStefano's testimony regarding the defendants' legal representation of him during the BGC purchase, this limited deposition testimony, however, is not in the record here in Philadelphia but rather

part of the record of an unrelated action in Montgomery County. Id. (citing Summit Bank v. Richard DeStefano and Suzanne DeStefano, Montgomery County Court of Common Pleas, no. 00-25167). Further, this single excerpt of deposition testimony hardly meets the "sufficient" amount of evidence standard contemplated by the court in Basile. Therefore, this court grants the motion for summary judgment as to Count II.[4]

IV. Cohen's Motion For Summary Judgment As To Count IV of the Complaint is Granted Because Plaintiffs Have Failed To Produce Sufficient Evidence of Facts Essential To Their Cause Of Action

Count IV of the Complaint seeks injunctive relief against Cohen to stop them from representing

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[4] In addition to the sufficiency of evidence issue, Cohen also argues that plaintiffs' legal malpractice claim cannot be proven without expert testimony. Defs' Mem. of Law at 12. This court agrees. In support of their argument, Cohen directs this court to Lentino v. Fringe Employees Plans, Inc. 611 F.2d 474, 480 (3d Cir. 1979). In Lentino, the court held that

> [T]he determination of legal malpractice, like determinations of malpractice in other professions, requires an evaluation of professional skill and judgment, as well as a standard of care which is related to common professional practice. The expert witness in professional malpractice is necessary to establish the specific standard of care and to assist the jury in its determination of defendant's conformity to the relevant standard...[W]e conclude that the trial judge was correct in holding that expert testimony is required in bench trials of legal malpractice claims except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons.

Id at 480. Plaintiffs counter and baldly claim that the fact finder could easily understand the allegations of betrayal, disloyalty and failure to advise without the need of an expert witness. However, based on these facts, where the legal malpractice claim raises the issue of a conflict of interest, an expert witness is necessary to prove its claim. See Beech Tree Run, Inc v. Kates, 2000 U.S. Dist. Lexis 12805 (E.D. Pa. 2000) (holding that an alleged legal malpractice claim based on a conflict of interest requires expert testimony); see also, Rizzo v. Haines, 520 Pa. 484, 502 n. 10 (1989) ("Whether proof of negligence arising from pretrial or trial settlement strategy is beyond the comprehension of laypersons and requires expert testimony depends on the particular facts and circumstances of the case. (citing Applegate v. Dobrovir, Oakes & Gebhardt, 628 F.Supp. 378 (D.D.C.1985), aff'd, 809 F.2d 930 (D.C.Cir.1987); Pongonis v. Saab, 396 Mass. 1005, 486 N.E.2d 28 (1985)).

other contractors who allegedly have debts owed to the plaintiffs. A plaintiff seeking a permanent injunction must establish that he has a clear right to relief, and that irreparable harm will occur if relief is not granted. Roman Cath. Congregation of St. Elizabeth Church v. Wuerl, 22 Pa. D. & C. 4th 391, 396 (C.P.Wash.1994) (citing Carringer v. Taylor, 402 Pa.Super. 197, 586 A.2d 928 (1990), and State Ethics Comm'n v. Landauer, 91 Pa. Commw. 70, 496 A.2d 862 (1985); see also Kimmel v. Lower Paxton Twp., 159 Pa. Commw. 475, 481, 633 A.2d 1271, 1274 (1993) (A trial court may grant a permanent injunction "only where the rights of the plaintiff were clear and free from doubt and the harm which the plaintiff sought to be remedied is great and irreparable."); Cf. Soja v. Factoryville Sportsmen's Club, 361 Pa.Super. 473, 478-79, 522 A.2d 1129, 1131-32 (1987) (comparing preliminary and permanent injunctions). Irreparable harm may include "the unbridled threat of the continuation of the violation, and incumbent disruption of the employer's customer relationships." West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 299 (Pa.Super.Ct.1999) (quoting John G. Bryant Co. v. Sling Testing & Repair, 471 Pa. 1, 8, 369 A.2d 1164, 1167 (1977)).

Having already granted the motions for summary judgment as to Counts I and II, this court necessarily concludes that the rights of plaintiffs are not clear and free from doubt. In fact, as discussed at length above, nowhere in the record is there any evidence to support the plaintiffs causes of action and their right to relief. Similarly, besides the allegations contained in the pleadings, there is no evidence to support that the allegations of harm in Cohen's representation of the alleged debtor contractors is great and irreparable. Since plaintiffs are unable to meet their burden of proof for this court to issue a permanent injunction, the motion for summary judgment as to Count IV is granted.

V. Federman's Motion for Summary Judgment to Cohen's Joinder Complaint is

Granted Because the Plaintiffs' Claims Against Cohen are Dismissed

Cohen filed a joinder complaint against Federman arguing that "[i]f the allegations of plaintiffs' Complaint are judicially determined to be accurate..." then the injuries alleged were caused by Federman. Joinder Complaint ¶¶8,9,10. However, Cohen concedes that "if Plaintiffs' claims against Cohen are dismissed,... [Cohen's] additional claims against Federman must also be dismissed." Defs' Response to Federman's Mem. of Law at 6. Since this court has granted Cohen's motion for summary judgment in its entirety, and dismissed all of plaintiffs' claims against Cohen, no material issue of fact remains for trial. Therefore, Federman's motion for summary judgment is granted in its entirety and Cohen's claims against Federman are dismissed.

CONCLUSION

For the reasons discussed above, Cohen's motion for summary judgment is granted in its entirety and therefore, plaintiffs' claims against Cohen are dismissed. Furthermore, Federman's motion for summary judgment is granted in its entirety, and Cohen's claims against Federman are dismissed.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: May 23, 2002