

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

MAIN LINE ELDER CARE ASSOCIATES, INC.

Plaintiff

v.

**DONALD LLOYD HARJES, MARY BETH DIZON,
HARJES AGENCY, INC., PROFESSIONAL LIABILITY
SOLUTIONS, INC. AND FOUNDERS PROFESSIONAL,
LLC**

Defendants

: January Term, 2009
:
: Case No. 02860
:
:
:
: Commerce Program
:
:
: Control Nos. 10102400,
: 10102303

OPINION

MARK I. BERNSTEIN, J.

The two Motions for Summary Judgment and Joinder Motion for Summary Judgment require this court to determine whether Plaintiff has met its burden to prove damages as a result of Defendants' alleged breach of fiduciary duty. For the reasons below, Plaintiff has not proven damages and may not maintain the claims of breach of fiduciary duty.

Background

Plaintiff, Main Line Elder Care Associates, Inc. ("Main Line,") is an inactive S-corporation based in Pennsylvania. When it was engaged in business, Main Line offered health-care management, financial, guardianship and legal advisory services to the elderly. Main Line, a start-up business in early 2006,¹ ceased operations in December 2008. Defendant Harjes Agency, Inc. (the "Harjes Agency,") is a New Jersey corporation licensed to sell insurance policies in Pennsylvania. Individual Defendants

¹ Deposition of Brenda Hanna on behalf of Main Line, Exhibit J to the Motion for Summary Judgment of the Harjes Defendants, p. 65.

Donald Lloyd Harjes (“Donald Harjes,”) is an insurance broker employed by the Harjes Agency. Individual defendant Mary Beth Dizon (“Dizon,”) is an insurance broker employed by the Harjes Agency. The Harjes Agency, Donald Harjes and Dizon, are collectively described herein as the “Harjes Defendants.” Defendants Professional Liability Solutions, Inc. (“PLS,”) and Founder Professionals, LLC (“FP,”) are insurance brokerage firms. PLS and FP are respectively a Florida-based corporation and a Florida-based limited liability company. PF owns PLS.

On July 13, 2006, Main Line contacted the Harjes Agency to obtain insurance coverage. In turn, the Harjes Agency contacted insurance broker PLS, Defendant herein, to obtain insurance coverage for Main Line. PLS supplied the Harjes Agency with an application to be filled-in by Main Line.² On July 14, 2006, the Harjes Agency sent the application to Main Line via e-mail. The e-mail stated:

[We] have done some research regarding what insurance might be appropriate for Main Line. [We] have described your services to my contact ... and they (*sic*) appear to have a product that might work for us. [We] suggest that you print out the attached application and complete it as best you can.³

Main Line completed and signed the application, and returned it to the Harjes Agency.

On July 18, 2006, PLS inquired with an insurance company, United National Group (“UNG”), whether UNG could insure Main Line. On July 26, 2006, UNG declined to insure Main Line because the business of Main Line was “geared” mainly toward legal and financial services which could not be insured.⁴ Two days later, July 28, 2006, an employee of PLS solicited via e-mail another offer of insurance from UNG.

The e-mail stated:

I know in the past, our underwriters have just specifically

² Deposition of Donald Harjes, of the Harjes Agency, Exhibit B to the Second Amended Complaint, pp. 30-32.

³ E-mail from the Harjes Agency to Main Line, Exhibit A to the Second Amended Complaint.

⁴ E-mail from United National Group to PLS, Exhibit E to the Second Amended Complaint.

spelled out in their quote that the financial and legal services would not be covered and it hasn't been a problem.... Is it possible for us to take that route here?⁵

On the same day, July 28, 2006, UNG replied to PLS with two e-mails. The first e-mail provided a form containing a "Lawyers' Professional Liability Exclusion" and an "Investment Advise (*sic*) Exclusion." The second e-mail stated:

We would need to have exclusions for Lawyers and Investment Advice attached to the policy and verification of coverage elsewhere for these exposures. Do you still want to proceed?⁶

On the same day, July 28, 2006, PLS forwarded a UNG quotation to the Harjes Agency. Page 3 of the quotation contained a section titled "Terms & Conditions." The Terms & Conditions section stated:

Please note, coverage and premium terms are subject to change or withdrawal pending review and underwriting approval of this additional information:

1. Proof of coverage elsewhere for the Lawyers and Investment Advice operations....⁷

On August 1, 2006, the Harjes Agency forwarded to Main Line an incomplete version of the quotation. The quotation was incomplete because it omitted the section requiring separate proof of coverage for the "Lawyers and Investment Advice Operations."⁸

On August 9, 2006, the Harjes Agency sent an e-mail to PLS, and informed PLS that Main Line "has accepted the quote and would like coverage to begin effectively 8/1/06."⁹ On the same day, PLS replied to the Harjes Agency and stated: "the quote is

⁵ E-mail from PLS to United National Group, Exhibit F to the Second Amended Complaint.

⁶ E-mail from UNG to PLS dated July 28, 2006, Exhibit E to the Second Amended Complaint.

⁷ United National Group Quotation, dated July 28, 2006, Exhibit G to the Second Amended Complaint.

⁸ Admission of Mary Beth Dizon, insurance broker affiliated with the Harjes Agency, Deposition dated November 18, 2009, Exhibit I to the Second Amended Complaint, p. 24.

⁹ E-mail dated August 9, 2006, from the Harjes Agency to PLS, Exhibit J to the Second Amended Complaint.

conditioned upon receipt of proof of coverage elsewhere for the legal and financial services [of Main Line.]”¹⁰

On the same day, August 9, 2006, the Harjes Agency sent to Main Line a “Premium Finance Agreement Disclosure Statement and Security Agreement” issued by an insurance company named AICCO, Inc. The Agreement was accompanied by an e-mail which stated:

attached [is] the finance agreement for your professional/general liability policy premium in the amount of \$2,693.00 Please return the signed agreement along with your deposit in the amount of \$550.60 to us. In the meantime, we have United National provide us with a binder of insurance effective 8/1/06.¹¹

Main Line signed the agreement and returned to the Harjes Agency with a deposit.

There is a dispute as to whether the Harjes Agency ever received or cashed the deposit.

On October 6, 2006, the Harjes Agency sent Main Line a temporary Insurance Binder issued by an entity named United National Specialty Insurance Company. The Binder gave Main Line temporary insurance coverage for the period beginning August 16, 2006 and ending August 16 2007.¹² Main Line asserts that it made regular payments under the binder policy. The Harjes Defendants deny receiving or cashing-in such payments.

On April 23, 2007, Main Line sent a letter to the Harjes Agency. The letter stated:

This is a demand letter for your agency to produce the policy and binder within 24 hours concerning ... proof of insurance.

* * *

[Main Line] has paid in full for this coverage as per your

¹⁰ E-mail dated August 9, 2006, from PLS to the Harjes Agency, Exhibit K to the Second Amended Complaint.

¹¹ Email from the Harjes Agency to main Line dated August 9, 2006, Exhibit M to the Second Amended Complaint.

¹² Insurance Binder issued by United National Specialty Insurance Company. Exhibit C to the Answer in Opposition to the Motion for Summary Judgment of the Harjes Defendants

Premium Finance Agreement Disclosure Statement and Security Agreement. Also, you have repeatedly assured [Main Line] that we are covered, BUT you continually refuse to send us the policy of binder that is necessary and mandated by law.¹³

On April 23, 2007, the Harjes Agency informed Main Line that there was no insurance policy.¹⁴ The Following day, April 24, 2007, Main Line filed a complaint with the Pennsylvania Department of Insurance against the Harjes Agency. The Pennsylvania Department of Insurance forwarded a questionnaire to the Harjes Agency, and the Harjes Agency sent its response. In the response, the Harjes Agency acknowledged it had “no records ... that a policy had actually been issued,” but admitted that his office had “issued a binder of insurance dated October 5, 2006.”¹⁵

In January 2009, Plaintiff commenced the instant action. Plaintiff’s Second Amended Complaint asserts Breach-of-Fiduciary-Duty claims against the Harjes Defendants, PLS and FP. Plaintiff’s Second Amended Complaint states:

After being informed of the lack of insurance coverage, Plaintiff was forced to cancel many necessary contracts as a result of not being able to provide proof of insurance coverage, this resulted in Plaintiff losing most, if not all, of its client base.... [A]s a proximate result and direct consequence of [Defendants’] wrongful conduct, Plaintiff has suffered ... destruction of Plaintiff’s business, loss of revenue, loss of clientele, and loss of business goodwill.¹⁶

During discovery, depositions were taken of Main Line’s principals, Helen Hopkinson and Brenda Hanna. Brenda Hanna, a co-founder of Main Line, testified as follows:

Q. Now, as we sit here today, can you tell me how much

¹³ Letter dated April 23, 2007 from Main Line to the Harjes Agency, Exhibit HH to the Answer in Opposition to the Motion for Summary Judgment of the Harjes Defendants.

¹⁴ Admission of Defendant Donald Harjes, Exhibit E to the Answer in Opposition to the Motion for Summary Judgment of the Harjes Defendants, pp. 132-133.

¹⁵ Response of the Harjes Agency to the Pennsylvania Department of Insurance, File # 07-265-35841, Exhibit CC to the Answer in Opposition to the Motion for Summary Judgment of the Harjes Defendants.

¹⁶ Second Amended Complaint, ¶¶ 102, 116, 128.

Main Line ... has lost as a result of the alleged breach ... by the Harjes Defendants?

* * *

A. No.¹⁷

In addition, Helen Hopkinson, Main Line's president and co-founder, testified as follows:

Q. Can you tell me in a dollar amount ... the amount of money that Main Line has lost as a result of the alleged breach ... by the Harjes Defendants?

* * *

A. I would say millions.

Q. What is that based on?

A. It's based on our reputation in the community, our political support with Governor Rendell and with Connie Williams, our senator in the region. It's built on our reputation and standard with the University of Pennsylvania as a selective company. It is based on the needs of the community. And it is based on our expertise and our credential.¹⁸

In the course of discovery, Plaintiff submitted the affidavit of Mr. Edward DuCoin ("DuCoin,") an individual who purportedly had manifested an intent to invest in Main Line. The affidavit of DuCoin states:

3. In early 2008, I attended an Investors' Conference sponsored by the Entrepreneurs Network where Helen Hopkinson made a presentation to a group of investors ... regarding Main Line....

4. After the presentation, I had an interest in potentially investing in Main Line....

* * *

6. Upon my review, I had some general concerns common to any start up Company.

¹⁷ Deposition of Brenda Hanna, Exhibit J to the Motion for Summary Judgment of the Harjes Defendants, 146:22-147:5.

¹⁸ Deposition of Helen Hopkinson, Exhibit L to the Motion for Summary Judgment of the Harjes Defendants, 93:20-94:13.

7. The main concern was the lack of liability coverage from the start of the company in August 2006 through May 2007.

8. This lack of Liability insurance was a deal breaker.

9. I was willing to invest approximately \$100,000 in Main Line ... in early 2008 had this lack of insurance coverage ... not been a problem.¹⁹

Following submission of this affidavit, the Harjes Defendants deposed DuCoin.

He testified as follows:

Q. ... Can you tell me how you were able to have a specific recollection as to investing in Main Line as opposed to your recollection as to any other of those other companies that you ever were going to potentially invest in?

A. Because with Main Line it quickly became more of a Let me see what I can do to help these entrepreneurs....

* * *

... But I never viewed them as potential clients in any way, shape or form. It was just being nice.

Q. ... Let me direct your attention to paragraph nine [of your affidavit.] Number nine says I was willing to invest approximately \$100,000 in Main Line in early 2008 had this lack of insurance coverage ... not been a problem. We've already established at some point in time you were contacted in some way or another by somebody in connection with this affidavit. So, when you received that initial contact, what was your recollection of paragraph nine based on?

A. ... You know, the focus of the conversation regarding the business of Main Line ... is the fact that, Oh, we just can't go on because we have this problem with the insurance. To me it was an easy out.... So the insurance became an easy out. But I think ... I had some general concerns common to any start-up.... There was really a lack of focus, there was a lack of commitment, there was partnership concerns (*sic*), there was lack of entrepreneurial expertise ... or experience, lack of partnership continuity.... And you know, I want to be completely straight. I don't have a lot of recollection on some things because I honestly didn't take it seriously.²⁰

¹⁹ Affidavit of Edward DuCoin, Exhibit L to the Plaintiff's Answer in Opposition to the Harjes Defendants' Motion for Summary Judgment.

²⁰ Deposition of Edward A. DuCoin, Exhibit I, Part 2, attached to the Harjes Defendants' Motion for Summary Judgment, 102:21-103:16, 111:19—111:25, 112:2-112:6, 112:19-112-25, 113:9-113:16, 113:20-113:22, 114:3-114:4.

As part of its case, Main Line also submitted an expert report. The report, prepared by Mr. Stephen J. Scherf (“Scherf,”) a Certified Public Accountant, is titled “Fair Market Value Calculation.” This report purports to offer the fair market value of Plaintiff’s business, if the business had been able to survive.

At the close of discovery, the Harjes Defendants and Defendants FP and PLS filed their respective Motions for Summary Judgment. Defendants FP and PLS also filed a Joinder Motion for Summary Judgment to the motion filed by the Harjes Defendants. The motions are ripe for a decision.

Discussion

In Pennsylvania,

Summary 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, ‘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 of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense.’

In summary judgment cases, review of the record must be conducted in the light most favorable to the non-moving party, and all doubts regarding the existence of a genuine issue of material fact must be resolved against the moving party. Failure of a non-moving party to 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 in its favor establishes the entitlement of the moving party to judgment as a matter of law.²¹

I. Plaintiff has provided no evidence of damages.

In the Motion for Summary Judgment, the Harjes Defendants assert that Main Line, “through its answers to discovery, document production and deposition

²¹ Young v. DOT, 560 Pa. 373, 375-376; 744 A.2d 1276, 1277 (Pa. 2000).

testimony[,] has failed to establish that it suffered any recoverable damages for the Harjes Defendants' alleged breach of fiduciary duty."²² Specifically, the Harjes Defendants note that Main Line "does not know how much [it] lost in damages as a result of the conduct of the Harjes Defendants."²³ The Harjes Defendants conclude that summary judgment should be granted in their favor because Main Line's failure to show any damages "is fatal to its claim."²⁴ Opposing the motion, Main Line states that although it is "not able to articulate a dollar amount," the "whole company was damaged."²⁵

In Pennsylvania,

when a motion for summary judgment is based on insufficient evidence to support the factual basis for the cause of action ... the non-moving party must come forward with sufficient evidence essential to preserve the cause of action.... The evidence adduced by the non-moving party must be of such a quality that a jury could return a favorable verdict to the non-moving party.... Allowing non-moving parties to avoid summary judgment where they have no evidence to support an issue on which they bear the burden of proof runs contrary to the spirit of the Pennsylvania Rules of Civil Procedure.²⁶

In this case, Main Line has shown no evidence that it lost contracts, business and investment opportunities, clients or goodwill, and no evidence of any damages suffered as a result of the conduct of the Harjes Defendants. Instead of supplying evidence of any damages, Main Line merely speculates that it lost millions of dollars. This speculation is based upon what Main Line perceives as the potential need for health care services in the community, Main Line's reputation and expertise in the management of

²² Motion for Summary Judgment of the Harjes Defendants, ¶ 27.

²³ Motion for Summary Judgment of the Harjes Defendants, ¶ 54.

²⁴ Motion for Summary Judgment of the Harjes Defendants, ¶ 217.

²⁵ Response in Opposition to the Motion for Summary Judgment of the Harjes Defendants, ¶ 54.

²⁶ InfoSAGE, Inc. v. Mellon Ventures, L.P., Pa. Super. 68, P18; 896 A.2d 616, 625 (Pa. Super. 2006).

health care, and its alleged ties to state and local politicians. Rather than showing evidence of actual damages, Main Line offers in evidence an economic report prepared by its expert, Stephen J. Scherf, a Certified Public Accountant. The expert report states:

The purpose of ... this report is to express our preliminary calculation of the fair market value of [Main Line] as of March 31, 2007, and to compute the total damages due to Main Line ... **assuming** liability on the part of the defendants.

* * *

Main Line issued its first invoices to clients in December 2006 and generated an average of \$31,000 per month in January and February [2007] ... having invoiced only three clients. In March, however, the client having generated the majority of revenues throughout the previous two months passed away.... **As a result**, although [Main Line] was still in its beginning stages of growth, the best indication of normal operating results would be those results achieved in January and February [2007]. Although a two month period is not an ideal proxy to determine normalized operations ... we have determined that **but for** the lack of insurance coverage Main Line would have been able to achieve on average, at least the operating results seen in January and February [2007] on a monthly basis going forward.

* * *

Based upon the foregoing, our preliminary calculation ... is that the fair market value of Main Line as of March 31, 2007 is \$256,000. In addition, we understand that Main Line's Owners had out of pocket costs ... of approximately \$40,000. As a result, total damages due main Line ... are \$296,000.²⁷

This expert has undoubtedly employed an acceptable method to calculate the damages allegedly suffered by Main Line. However, the conclusions reached by this expert are not acceptable because they are based on facts not found in the record. Under Pennsylvania law, "there must be some factual predicate for the opinion identified on the record."²⁸ "It is well-settled law ... that an expert may not express his opinion upon facts which are not warranted in the record, regardless of the expert's skill

²⁷ Main Line Elder Care Associates, Inc. Fair Market Value Calculation as of March 31, 2007, Exhibit I to the Response in Opposition to the Motion for Summary Judgment of the Harjes Defendants, pp. 1, 10, 14 (emphasis supplied).

²⁸ Starr v. Veneziano, 560 Pa. 650, 663 n. 10; 747 A.2d 867, 874 n. 10 (Pa. 2000)

and experience."²⁹ "Where an expert's opinion is based on an assumption that is contrary to the established facts of record, that opinion is worthless."³⁰ In Commonwealth v. Rounds, 518 Pa. 204, 209; 542 A.2d 997, 999 (Pa. 2005), the Pennsylvania Supreme Court explained the reasons why the conclusions of an expert must be based upon facts found in the record. The Court stated:

expert opinion testimony is proper if the facts upon which it is based are of record.... An expert's function is to assist the jury in understanding the problem so that the jury can make the ultimate determination. If a jury disbelieves the facts upon which the opinion is based, the jury undoubtedly will disregard the expert's opinion. Likewise, if a jury accepts the veracity of the facts which the expert relies upon, it is more likely that the jury will accept the expert's opinion. At the heart of any analysis is the veracity of the facts upon which the conclusion is based. Without the facts, a jury cannot make any determination as to validity of the expert's opinion. To hold otherwise would result in a total and complete usurpation of the jury's function in our system of justice.³¹

In this case, Main Line's expert assumes Defendants' liability, and employs the language of legal causation to state that "**As a result**" of Main Line's start-up status, the best indication of normal operating results would be those achieved in the first two months of operations, January and February 2007. The expert further uses the language of legal causation to state that "**but for** the lack of insurance coverage," Main Line would have posted in March 2007 at least the same earnings posted in January and February 2007, and would have had a fair market value of \$296,000 as of March 31, 2007.³² However, the expert has identified no facts in the record showing any causal connection between lack of insurance coverage and any damages allegedly suffered by

²⁹ Jones v. Wilt, 2005 Pa. Super. 97, P9; 871 A.2d 210, 215 (Pa. Super. 2005).

³⁰ Taylor v. Workers' Comp. App. Bd., 883 A.2d 710, 713 (Pa. Commw. 2005).

³¹ Commonwealth v. Rounds, 518 Pa. 204, 209; 542 A.2d 997, 999 (Pa. 1988).

³² "In order to recover for damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss." Logan v. Mirror Printing Co., 410 Pa. Super. 446, 448; 600 A.2d 225, 226 (Pa. Super. Ct. 1991)

Main Line. Instead, the expert openly “assumes” that Defendants are liable to Main Line, and concludes that Main Line’s damages amount to \$296,000. The expert report has no foundation in fact, Main Line has failed to articulate any damages, and the Motions and Joinder Motion for Summary Judgment are granted.

By The Court,

Mark I. Bernstein, J.

Dated: September 30, 2011