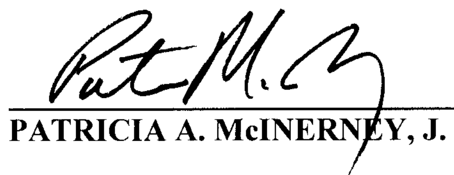
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

COMMUNICATIONS NETWORK INTERNATIONAL, LTD,	:	DECEMBER TERM, 2014
	:	NO. 01519
Plaintiff,	:	COMMERCE PROGRAM
v.	:	Control Nos.: 16122168, 16122274
WILLIAM MARK MULLINEAUX, ESQUIRE, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 1st day of June, 2016, upon consideration of the remaining defendants Flamm Walton, PC's, Astor Weiss Kaplan and Mandel, LLP's, and William Mark Mullineaux, Esquire's Motions for Summary Judgment, the responses thereto, and all other matters of record, after oral argument on the Motions, and in accord with the Opinion issued simultaneously, it is **ORDERED** that the Motions for Summary Judgment are **GRANTED** and **JUDGMENT** is **ENTERED** in favor of Flamm Walton PC, William Mark Mullineaux, Esquire, and Astor Weiss Kaplan and Mandel, LLP and against plaintiff on all plaintiff's claims.

BY THE COURT



PATRICIA A. McINERNEY, J.

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COMMERCE PROGRAM

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OPINION

In this legal malpractice action, it appears plaintiff's former attorney may have violated the standard of care on multiple occasions. However, plaintiff did not file this action until after the applicable statutes of limitations had run upon its malpractice claims.

On December 9, 2014, plaintiff Communications Network International, Ltd. ("CNI") filed this action against its former attorney, defendant William Mark Mullineaux, Esquire, and three different law firms at which Mr. Mullineaux worked while he represented CNI in federal court litigation that spanned from 2001 until 2013.

Ratner & Prestia, P.C. ("R&P"), the first of the law firms at which Mr. Mullineaux worked while representing CNI from 2001 and 2003, filed a Motion for Judgment on the Pleadings based on the running of the statute of limitations. This court previously granted R&P's motion and entered judgment for R&P.

Defendant Flamm Walton, PC ("Flamm Walton"), at which Mr. Mullineaux worked from 2003 through 2008, subsequently filed a Motion for Summary Judgment. Mr. Mullineaux and defendant Astor Weiss Kaplan and Mandel, LLP, where Mr. Mullineaux worked beginning

August, 2008 through the present, have also filed a Motion for Summary Judgment. Those Motions are presently before this court.

The court recited many of the operative facts in its Opinion in support of its entry of judgment in favor of R&P. Since then, however, the focus of CNI's claims for malpractice appears to have shifted, as witnessed by its several responses to the Motions for Summary Judgment.

Since most of Mr. Mullineaux's alleged malfeasance requires proof by way of expert testimony, the court will look to CNI's liability expert report, authored by Samuel Stretton, to delineate CNI's current claims for malpractice. The relevant facts concerning the underlying litigation, and the claims based upon those facts, are as follows.

In February, 2001, MCI WorldCom Communications, Inc. ("WorldCom") sued CNI for breach of contract in the United States District Court for the Eastern District of Pennsylvania.[1] In March, 2001, CNI hired Mr. Mullineaux to represent CNI in the litigation with WorldCom.[2] Mr. Mullineaux was at that time employed by R&P.[3]

In April, 2001, Mr. Mullineaux filed an Answer and Counterclaims on behalf of CNI in the WorldCom litigation. He asserted a breach of contract claim for "slamming,"[4] as well as several other state law claims for fraudulent misrepresentation and nondisclosure, breach of contract, and defamation.[5] Mr. Stretton opines that Mr. Mullineaux erred at that time, in April,

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[1] Third Amended Complaint, ¶ 38.

[2] *Id.*, ¶ 39.

[3] *See id.*, Ex. 1.

[4] "Slamming" is basically the theft of telephone customers. *See* Flamm Walton's Motion for Summary Judgment ("SJM"), Ex. N, pp. 11-12.

[5] Astor Weiss' Motion for Summary Judgment ("SJM"), Ex. K; CNI's Praecipe to Supplement Response to Summary Judgment Motion ("Praecipe"), Ex. 10.

2001, by not properly pleading the slamming claim and by failing to understand that the other claims he pled would be barred by the Filed Rate Doctrine.[6] Shortly thereafter, WorldCom moved to dismiss CNI's counterclaims.[7]

In July 2002, WorldCom filed for bankruptcy protection in the Southern District of New York, and the dispute between WorldCom and CNI was subsequently adjudicated in that bankruptcy court.[8] In April, 2003, Mullineaux ceased to be employed by R&P and instead became a partner at Flamm Walton.[9]

On March 13, 2006, the bankruptcy court denied CNI's Motion for Judgment on the Pleadings, granted in part WorldCom's Motion for Judgment on the Pleadings, and dismissed all of CNI's claims. The court expressly held as follows:

> In sum, CNI's contract claims and tort claims based on WorldCom's alleged misrepresentations are within the ambit of the Tariffs and therefore precluded by the filed-rate doctrine.
>
> * * *
>
> CNI, however, has merely stated that WorldCom engaged in slamming practices without alleging supporting facts. WorldCom's settlement with the FCC does not prove WorldCom's actual practices toward CNI. Mere conclusory allegations fail to state a claim and must therefore be dismissed.
>
> * * *
>
> CNI's defamation claim is time-barred.[10]

At his deposition in this action, CNI's CFO, Mr. Cooke, admitted he received a copy of the bankruptcy court's Opinion from Mr. Mullineaux, in 2006, shortly after it was issued, but

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[6] CNI's Praecipe, Ex. 14, p. 5.

[7] Third Amended Complaint, ¶ 50.

[8] *Id.*, ¶ 56.

[9] *Id.*, Ftnt 5.

[10] CNI's Praecipe, Ex. 9, pp. 15-21.

Mr. Cooke claims he merely glanced at it.[11] He further testified that Mr. Mullineaux told him "that the entire case, which includes slamming, fraud, everything, was - was being negated by the filed rate doctrine and that the judge had made a mistake. . . . And the higher Court would correct that."[12] Mr. Stretton opines that in doing so, Mr. Mullineaux failed to properly inform, and he even misled, his client, in 2006, as to the slamming claim and the Filed Rate Doctrine.[13]

In 2008, Mr. Mullineaux left Flamm Walton.[14] He subsequently commenced employment with Astor Weiss in August, 2008.[15] In September, 2008, he filed on CNI's behalf an appeal from the bankruptcy court's decision to the United States District Court for the Southern District of New York.[16] Mr. Stretton opines that, in 2008, Mr. Mullineaux failed to write an appropriate appellate brief because he did not address the slamming claim in it.[17]

Approximately two years later, on September 13, 2010, the district court affirmed all the bankruptcy court's rulings including the holding that the Filed-Rate Doctrine barred most of CNI's claims. The district court also found:

> The second part of [CNI's] claim dealt with CNI's allegation that WorldCom slammed CNI by taking CNI customers without permission. The Bankruptcy Court dismissed the matter for being conclusory and failing to allege supporting facts. Under Fed. R. Civ. P. 8, a cause of action requires, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). . . . CNI states that "WorldCom breached the Contract and committed torts when it intentionally damaged CNI's property interest in its book of business, with intentional conduct to drive away CNI's customers, taking CNI customers and attempted taking of the business which caused more lost

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[11] Flamm Walton's SJM, Ex. L, pp. 587-590.

[12] *Id.,* Ex. L, pp. 643-644.

[13] CNI's Praecipe, Ex. 14, p. 5.

[14] Third Amended Complaint, Ftnt. 5.

[15] *Id.*

[16] CNI's Praecipe, Ex. 11.

[17] *Id.*, Ex. 14, p. 5.

> customers." CNI's Counterclaim at ¶ 39. 47 U.S.C. § 258, which is the relevant statute in a slamming case, states that a telecommunications carrier may not "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the [Federal Communications] Commission shall prescribe." CNI's claim is nothing more than a customized and conclusory recital of 47 U.S.C. § 258. Consequently, it fails to reach the "above the speculative level" threshold, which the factual allegations of a claim must meet in order to survive a motion for judgment on the pleadings. For this reason, the Bankruptcy Court's dismissal of the claim is affirmed.[18]

Mr. Mullineaux failed to see the district court's Order until sometime in October, 2010. He sent the Order and Opinion to Mr. Cooke at CNI on October 28, 2010.[19] By that time, the thirty day appeal period on the September 13th Order had already run. Mr. Mullineaux obtained leave from the district court to file CNI's appeal *nunc pro tunc*, but on January 24, 2013, the United States Court of Appeals for the Second Circuit dismissed CNI's appeal as untimely filed.[20] As Mr. Stretton points out, "Mr. Mullineaux was neglectful in failing to meet a deadline, resulting in the case being dismissed."[21]

CNI filed this action on December 9, 2014, asserting claims for legal malpractice against Mr. Mullineaux, Flamm Walton, and Astor Weiss, including claims for breach of contract, breach of fiduciary duty, and negligence.[22] CNI claims that, because Mr. Mullineaux improperly pled the slamming claims, CNI was unable to recover its damages from WorldCom in the federal

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[18] Flamm Walton SJM, Ex. N, pp. 11-12.

[19] *Id.*, Ex. O.

[20] *Id.*, Ex. P.

[21] CNI's Praecipe, Ex. 14, p. 6. This claim of malpractice may not require an expert's testimony, since a layperson should be able to understand the significance of failing to file on time. *See* Storm v. Golden, 371 Pa. Super. 368, 377, 538 A.2d 61, 65 (1988) ("Generally, the determination of whether expert evidence is required or not will turn on whether the issue of negligence in the particular case is one which is sufficiently clear so as to be determinable by laypersons or concluded as a matter of law, or whether the alleged breach of duty involves too complex a legal issue so as to warrant explication by expert evidence.")

[22] CNI also asserts a claim for unjust enrichment based on its payment of attorneys' fees and costs to the various defendants. Third Amended Complaint, Count XI.

action.[23] CNI claims that "[a]s a result of the slamming activity by WorldCom in 1999, CNI lost significant revenues and profits, which result[ed] in the ultimate failure of [CNI's] business."[24] CNI's Valuation Expert opines "that the loss in net income to CNI approximates $16,967,937 (through June 2009). . . . [and] the annual loss in net income for each additional year considered would be $3,882,000."[25] CNI also claims as damages the legal fees and costs it paid to Mr. Mullineaux, Flamm Walton, and Astor Weiss during the course of the federal litigation.[26]

In their Motions for Summary Judgment, the remaining defendants ask the court to dismiss the malpractice claims asserted against them based on the running of the four year contract statute of limitations, as well as the two year tort statute of limitations.[27]

> As a matter of general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period. Thus, the statute of limitations begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations, even though a person may not discover his injury until it is too late to take advantage of the appropriate remedy, this is incident to a law arbitrarily making legal remedies contingent on mere lapse of time. Once the prescribed statutory period has expired, the party is barred from bringing suit unless it is established that an exception to the general rule applies which acts to toll the running of the statute.[28]

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[23] Not only should Mr. Mullineaux properly have pled the claims, if possible, he would also have had to prove them at trial in the underlying action before any damages caused thereby could be recovered by CNI. After oral argument in this action, it is not at all clear that plaintiff will be able to sustain its burden at trial of proving the case within the case, *i.e.*, that WorldCom wrongfully took CNI's customers and thereby caused the failure of CNI's business and more than $16 million in damages.

[24] CNI's Praecipe, Ex. 3, p. 2.

[25] *Id.*, Ex. 3, p. 5.

[26] Third Amended Complaint, ¶ 110(a), Count XI.

[27] Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565, 571 (Pa. Super. 2007) ("[I]t is undisputed that the two-year limitations period applies to the negligence claim and the four-year limitations period applies to the breach of contract claim.")

[28] Pocono Intern. Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84-5, 468 A.2d 468, 471 (1983).

In this case the statute began to run when the bankruptcy court ruled against CNI in 2006, more than 8 years before this case was filed. At that time, CNI's right to institute and maintain a suit against Mr. Mullineaux arose. "Pennsylvania has never adopted the approach of tolling the statute of limitations in a legal malpractice claim until the appeals of the underlying claim have been exhausted."[29]

CNI argues that the statute should be tolled due to Mr. Mullineaux's alleged concealment of the Bankruptcy Court's 2006 holding that he inadequately pled CNI's slamming claim and failed to fully understand the Filed Rate Doctrine. In an exercise "of all reasonable diligence," CNI's principals should have read the 2006 Bankruptcy Opinion that dismissed the slamming claim as improperly pled.[30] The fact that Mr. Mullineaux continued to represent them on appeal from that adverse decision does not toll the statute of limitations.[31]

Even if CNI's principals were somehow misled by Mr. Mullineaux as to the contents of the 2006 Opinion, they knew or should have known by October 28, 2010, when they received the district court's Order and Opinion from Mr. Mullineaux, that CNI had been injured. In fact, Mr.

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[29] Robbins & Seventko Orthopedic Surgeons, Inc. v. Geisenberger, 674 A.2d 244, 247 (Pa. Super. 1996).

[30] *See* Fine v. Checcio, 582 Pa. 253, 267, 870 A.2d 850, 858 (2005) ("The question in any given case is not what did the plaintiff know of the injury done him? But, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him? While reasonable diligence is an objective test, it is sufficiently flexible to take into account the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question. Under this test, a party's actions are evaluated to determine whether he exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest and the interest of others.")

[31] *See* Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565, 574 (Pa. Super. 2007) ("We recognize [plaintiff's] public policy arguments, including their argument that, if the statute of limitations is to accrue upon the breach of a duty, a plaintiff in a legal malpractice action would be forced to take competing positions while defending the underlying claim and prosecuting their own legal malpractice action premised on that underlying claim. Although we recognize this potential dilemma, the overriding public policy concern is that not commencing legal malpractice actions in a timely fashion results in stale claims: the purpose of the statute would not be served if an attorney is kept in a state of breathless apprehension while a former client pursues appeals from the trial court, to the Court of Appeal, to the Supreme Court and then, if the client has the money and energy, to the United States Supreme Court, during which time memories fade, witnesses disappear or die, and evidence is lost.")

Mullineaux pointed out to them in his attempted termination letter that two judges had ruled against CNI:

> This firm would not be interested in taking an appeal on a contingency agreement. I still think the decision by the court is incorrect but two judges now disagree and I have invested a large amount of lawyers [sic] time with no return. I cannot make further investments with this case.[32]

At that point, in an exercise of reasonable diligence, they could have, and should have, discovered their right to institute and maintain a suit against Mr. Mullineaux, despite any protestations he may have made to the contrary.[33]

By 2010, CNI alleges it had lost almost $20 million dollars, which is a hefty incentive for the exercise of attention, knowledge, intelligence and judgment by corporate officers with their own fiduciary duties to the corporation. Reasonable diligence requires that they should have at least read the courts' Opinions denying CNI's claims from which they would have learned that Mr. Mullineaux's failure properly to plead the slamming claims was the reason the claims were dismissed.

This action was filed four years and forty-two days after CNI received the district court's 2010 Opinion, so both CNI's tort and contract claims based on the failure to properly plead the

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[32] Flamm Walton SJM, Ex. O.

[33] In the affidavit of Mr. Cooke prepared for the purposes of responding to the Motions for Summary Judgment, he claims that Mr. Mullineaux again misled him as to the basis for the 2010 Opinion. *See* February 10, 2017 Affidavit of Curtis Cooke, ¶ 9 ("In 2010, when the federal court denied CNI's appeal, Mullineaux again called me. Again Mullineaux told me the court had applied the Filed Rate Doctrine to bar all of CNI's claims, including the slamming claims. At no point did he tell me that he did not plead any facts to support the slamming claims and that that was the reason the slamming claims were dismissed.") Furthermore, CNI argues in its Sur-Reply that "Defendants have not produced a single shred of documentary evidence that [Mr.] Mullineaux ever told [CNI] that it was his own negligence that had gotten the slamming claim dismissed." Plaintiff's Omnibus Sur-Reply in Opposition to Defendants' Motions for Summary Judgment, p. 3. However, both the Bankruptcy Court and the District Court made it clear in their Opinions that the slamming claim was dismissed for failure properly to plead it, and the only person originally responsible for pleading it was Mr. Mullineaux. No further documentary evidence of his alleged negligence is needed.

slamming claims are time-barred. As a result, CNI's damages claims for millions of dollars in alleged lost net income are also time-barred.

With respect to CNI's claims for some of their attorneys' fees and costs, the statutes of limitation may have been tolled by Mr. Mullineaux's failure to inform CNI of the untimeliness of the appeal to the Second Circuit. In his October 28, 2010, email to CNI enclosing the district court's Opinion, Mr. Mullineaux informed CNI that:

> You can take an appeal to the Court of Appeals of the Second Circuit under Rule 4 of the Rules of Appellate Procedure within 30 days of the entry of the order. In this case you would have until November 27, 2010 (which is a Saturday so you could file on the Monday, although I would use Friday November 26, 2010 as the deadline to play it safe).[34]

By November 5, 2010, Mr. Mullineaux had apparently realized his mistake regarding the time for taking an appeal, and he urged CNI to take its appeal as soon as possible.[35] He subsequently filed a Motion to Reopen the Time to File an Appeal on behalf of CNI, which was granted by the district court, but ultimately reversed by the Second Circuit Court of Appeals.[36]

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[34] Flamm Walton SJM, Ex. O.

[35] Astor Weiss SJM, Ex. S.

[36] Third Amended Complaint, ¶¶ 92-93. In its rather lengthy Opinion, the Second Circuit Court of Appeals held:

> Thus, CNI's failure to receive notice was due entirely to Mr. Mullineaux's violation of the 'clear dictates of a court ru l e,' as the clerk's office properly transmitted notice of the entry of judgment to the email address in Mr. Mullineaux's profile, and it was plainly Mr. Mullineaux's sole obligation to keep that profile updated. Updating his profile would have taken exceedingly minimal diligence on Mr. Mullineaux's part, and he had every reason to be aware of any problem. It is remarkable that Mr. Mullineaux could fail to take these most basic steps to receive proper notifications, while at the same time relying entirely on such notifications to ensure that he filed a timely notice of appeal. In these particular circumstances, we conclude that it was not within the district court's discretion to provide relief. CNI's failure to receive Civil Rule 77(d) notice was entirely and indefensibly a problem of its counsel's making, and Rule 4(a)(6) was not designed to reward such negligence.

Astor Weiss SJM, Ex. T.

It is not clear from the record before this court when CNI first learned that the appeal was untimely filed; CNI may have been put on notice in early November, 2010,[37] or CNI may not have known until January 24, 2013, when the Second Circuit issued its Order and Opinion. If the former, then CNI's appellate attorneys' fees and costs claims would also be time barred. If the latter, then such claims might not be time barred. However, CNI has not provided any evidence of the fees and costs, if any, it paid to Mr. Mullineaux and Astor Weiss to pursue the futile appeal to the Second Circuit. Therefore, its claims for such damages must also be dismissed.[38]

CONCLUSION

For all the foregoing reasons, the remaining defendants' Motions for Summary Judgment are granted and judgment is entered in favor of defendants and against plaintiff on all plaintiff's claims.

BY THE COURT

PATRICIA A. McINERNEY, J.

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[37] In his November 5, 2010, email to his client, Mr. Mullineaux says: "For the reasons stated in my letter to you of yesterday (a copy of which is attached) and as I said in my telephone message of today, it is in CNI's best interest to file an appeal now." Astor Weiss SJM, Ex. S. A copy of the November 4th letter was not included with that Exhibit.

[38] *Compare* Astor Weiss SJM, ¶ 40 *with* CNI Response to Astor Weiss SJM, ¶¶ 39-41.