

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

JEFFREY D. SERVIN, ESQUIRE, et al.,	:	DECEMBER TERM, 2016	
	:		
Plaintiffs,	:	NO. 02825	
	:		
v.	:	COMMERCE PROGRAM	
	:		
DUANE MORRIS LLP,	:	1543 EDA 2017	
	:		
Defendant.	:		

APPEAL OPINION

Plaintiffs Jeffrey D. Servin and Osage Corp d/b/a First City Communications, Inc. (“FCC”) appeal from this court’s Order dated April 18, 2017, in which the court sustained defendant Duane Morris LP’s Preliminary Objections to plaintiffs’ First Amended Complaint and dismissed all the claims asserted therein.¹

In this action, Mr. Servin and FCC asserted malpractice and misrepresentation claims against Duane Morris arising out of Duane Morris’ brief representation of FCC and non-party Leonard Berwick² with respect to an appeal from the dismissal of their tort claims in an underlying federal court action (the “Underlying Action”).³ Duane Morris did not draft plaintiffs’ claims in the Underlying Action, and those claims were dismissed for lack of standing by both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit.

¹ Plaintiffs also appeals from this court’s Order entered on May 1, 2017, in which the court denied reconsideration of its April 18th Order.

² Duane Morris apparently did not represent Mr. Servin in the appeal. *See* First Amended Complaint, ¶ 19. Instead, Mr. Servin filed an appellate brief on his own behalf. *See id.*, ¶ 44.

³ Jeffrey D. Servin, Leonard J. Berwick, Osage Corp. d/b/a First City Communications, Inc. v. New World Network International, Ltd., New World USA, Inc., Columbus Communications, Ltd, and Barclays Bank PLC, 1:06 CV 02641 (S.D.N.Y.).

Servin Vs Duane Morris-OPFLD



Since Mr. Servin and FCC had no standing to assert their claims in the Underlying Action, they have no damages to assert in this action, *i.e.*, they cannot show that they would have prevailed on the merits in the underlying appeal but for Duane Morris' alleged tortious acts. Since such damages are an essential element of each of plaintiffs' causes of action against Duane Morris, this court properly dismissed all their claims.

The District Court nicely summarized the complicated claims asserted in the Underlying Action in its Opinion dismissing those claims:

Two business partners, Leonard Berwick and Jeffrey Servin, brought this diversity tort action against Columbus Communications, Ltd. ("Columbus"), and various other defendants, after Columbus allegedly made untruthful statements in connection with its bid to acquire a fiber optic communications company that the plaintiffs had sought to purchase.

The individual plaintiffs, through their company First City Communications, Inc. ("FCC"), allegedly formed a business arrangement with owners of a Jamaican company, Jamaica Fibre Optic Cable Co. Ltd. ("JFOC"), through which the plaintiffs acquired rights to a government license allowing them to conduct certain fiber optics business in Jamaica. The plaintiffs then sought to obtain financing to acquire New World Network USA, Inc. ("NWN USA"), a company with an existing fiber optics ring connecting South Florida to various locations in the Caribbean.

The plaintiffs allege that Columbus tortiously interfered with their business opportunity by claiming that it [Columbus] held an exclusive license to operate a fiber optics network in Jamaica, creating the impression among potential investors and the investment bank handling the sale that the plaintiffs had lied about their own rights as holders of a Jamaican license. The plaintiffs assert a series of tort claims, all stemming from this alleged misrepresentation by the competing bidder which they allege was republished among the various defendants.

The plaintiffs' claims include: (1) interference with their prospective contractual relations by the alleged competing bidder Columbus; (2) slander of the individual plaintiffs by all defendants; (3) slander per se of the individual plaintiffs by all defendants; (4) libel of the individual plaintiffs by all defendants; (5) defamation of the individual plaintiffs by all defendants; (6) "false light" invasion of the individual plaintiffs' privacy by all defendants; (7) commercial disparagement of [FCC] by all defendants; (8) injurious falsehood by all defendants harming all of the plaintiffs; and (9) civil conspiracy by all defendants harming all of the plaintiffs. The plaintiffs allege damages in the amount of \$1.25 billion.⁴

⁴ District Court's Opinion, pp. 1-2, 06 Civ. 2641 (S.D.N.Y.).

For purposes of the present appeal, it is important to note that all of the claims asserted in the Underlying Action were based on the same wrongful conduct, *i.e.*, Columbus stating that it held an exclusive license when it allegedly did not. Furthermore, all of Mr. Berwick's claims were identical to Mr. Servin's, and FCC's claims were the same as those of both individuals, except for FCC's single claim for commercial disparagement, which was simply the corporate equivalent of the individual plaintiffs' claims for libel, slander, and defamation.

The District Court in the Underlying Action dismissed⁵ all of Mr. Servin's, Mr. Berwick's, and FCC's claims for the identical reason, specifically that none of them had standing to bring those claims. While those plaintiffs claimed that Columbus' assertion of an exclusive license disparaged their own license, the District Court noted that their license was owned by a non-party, Jamaican company, JFOC. Mr. Servin, Mr. Berwick, and/or FCC claimed in the Underlying Action to have either purchased an interest in JFOC, or entered into a Joint Venture with JFOC, and thereby acquired some interest in the license.⁶ The District Court held that JFOC or the joint venture, as the only two possible owners of the license that was allegedly disparaged, were the only ones with standing to bring suit against Columbus and the other defendants for allegedly harming that license.⁷ Neither JFOC nor the Joint Venture was a party to the Underlying Action. Therefore, plaintiffs' claims were dismissed for lack of standing.

⁵ One of the defendants had previously filed for bankruptcy, so the claims against that defendant were stayed rather than dismissed by the District Court.

⁶ See Complaint in Underlying Action ¶¶ 6, 8, 30-32; District Court's Opinion, p. 11.

⁷ District Court's Opinion, p. 21. Even if JFOC or the joint venture had asserted claims in the Underlying Action, they would have been dismissed by the District Court because that court held that Columbus' statement of exclusivity was not defamatory. *Id.*, pp. 32-33. In addition, the District Court held that it lacked personal jurisdiction over Columbus in the Underlying Action. *Id.*, p. 25.

After the claims were dismissed, trial counsel for Mr. Servin, Mr. Berwick, and FCC withdrew from representing them in the Underlying Action.⁸ Subsequently, Duane Morris undertook the representation of Mr. Berwick and FCC with respect to the appeal from the District Court's dismissal.⁹ Mr. Servin represented himself on appeal.¹⁰ Mr. Servin filed an appellate brief on behalf of himself, but Duane Morris did not file anything on behalf Mr. Berwick and FCC, apparently because Duane Morris began to have doubts as to the validity of the Jamaican deal in which Mr. Berwick, Mr. Servin and/or FCC claimed to have obtained some right or interest in JFOC's license.¹¹ Mr. Berwick's and FCC's claims were dismissed by the Second Circuit on procedural grounds.¹² The Second Circuit "considered all of Mr. Servin's arguments and [found] them to be without merit [and therefore affirmed] for substantially the reasons stated in the District Court's thorough and comprehensive opinion below."¹³

Mr. Servin then filed this action against Duane Morris in which he asserted claims for professional negligence and breach of contract, as well as misrepresentation, on behalf of both himself and FCC. He claimed that Duane Morris *de facto* represented him in the appeal because he owns a 50% interest in FCC. He also claimed that Duane Morris promised to file an appellate brief on behalf of FCC and Mr. Berwick, and "[b]ut for the failure to file an appellate brief, [Mr.] Servin's individual claims would have prevailed on appeal and he would have won as his

⁸ See First Amended Complaint, ¶ 17.

⁹ *Id.*, ¶¶ 14, 19, 21.

¹⁰ See Court of Appeals' Order dated April 26, 2016, in Case No. 15-1630cv (2nd Cir.)

¹¹ See First Amended Complaint, ¶¶ 36-37.

¹² See Court of Appeals' Order.

¹³ *Id.*

individual claims are supported by Pennsylvania law and evidence.”¹⁴ He also alleged that “based on the evidence in the FCC’s possession, [FCC] would have prevailed in the underlying case,” if Duane Morris had filed an appellate brief on FCC’s behalf.¹⁵

Mr. Servin filed his own appellate brief in support of his appeal in the Underlying Action, in which he argued the validity of his individual claims, which were the same as Mr. Berger’s and FCC’s claims. The Second Circuit ruled on the merits of his claims and affirmed the District Court’s ruling that Mr. Servin, as well as FCC and Mr. Berger, had no standing to bring such claims because they did not directly own the license that was allegedly disparaged.

As a matter of law, Mr. Servin and FCC would never have prevailed on appeal in the Underlying Action, no matter how many briefs Duane Morris filed, because they lacked, and continue to lack, standing to assert the claims they raised in the Underlying Action. As a result, Mr. Servin cannot now claim that Duane Morris’ alleged misconduct damaged him and FCC in any respect.

[A] legal malpractice action in Pennsylvania requires the plaintiff to prove that [he] had a viable cause of action against the party [he] wished to sue in the underlying case and that the attorney [he] hired was negligent in prosecuting or defending that underlying case (often referred to as proving a ‘case within a case’). . . . [T]he plaintiff must initially establish by a preponderance of the evidence that [he] would have recovered a judgment in the underlying action. It is only after the plaintiff proves [he] would have recovered a judgment in the underlying action that [he] can then proceed with proof that the attorney [he] engaged to prosecute the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff’s loss since it prevented [him] from being properly compensated for [his] loss. . . . [T]he plaintiff’s damage must be an actual loss rather than nominal damages, speculative harm or the threat of future harm.¹⁶

¹⁴ First Amended Complaint, ¶ 104.

¹⁵ *Id.*, ¶ 115.

¹⁶ Sokolsky v. Eidelman, 93 A.3d 858, 862–63 (Pa. Super. 2014).

Likewise, with respect to Mr. Servin's and FCC's misrepresentation claims, they must be able to show that they were damaged by Duane Morris' alleged false statements.

The elements of intentional misrepresentation are as follows:

- (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.¹⁷

Since Mr. Servin and FCC had no standing to assert the defamation and related claims against Columbus and others in the Underlying Action, they could never have prevailed in the Underlying Action. Since FCC and Mr. Servin could never have obtained a judgment in the Underlying Action, Duane Morris' failure to file a brief on behalf of FCC and Mr. Berger in the Underlying Action caused FCC and Mr. Servin no legally compensable injury. Since FCC and

¹⁷ Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

Mr. Servin have no damages to assert against Duane Morris, this court properly dismissed their complaint against Duane Morris for failure to state any claims upon which relief may be granted.

CONCLUSION

For all the foregoing reasons, the court respectfully requests that its April 18th Order sustaining Duane Morris' Preliminary Objections to Mr. Servin's and FCC's First Amended Complaint be affirmed on appeal.

Dated: August 23, 2017

BY THE COURT,


PATRICIA A. McINERNEY, J.