

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

GENERAL FOOD SERVICES, LLC,	:	October Term 2017
Plaintiff,	:	
v.	:	No. 1738
LOUIS I. LIPSKY, ESQUIRE, ET. AL.,	:	
Defendants.	:	Commerce Program
	:	Control Number 19013058
	:	
	:	

DOCKETED

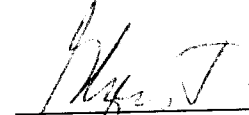
MAR 29 2019

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 27 day of March 2019, upon consideration of defendants Louis I. Lipsky, Esquire, Ashley H. Kazman, and Victor Lipsky, P.C. d/b/a Lipsky & Brandt's Motion for Summary Judgment and plaintiff's response in opposition, it hereby is **ORDERED** that the Motion for Summary Judgment is **Granted**. Judgement is entered in favor of defendants Louis I. Lipsky, Esquire, Ashley H. Kazman and Victor Lipsky, P.C. d/b/a Lipsky & Brandt and against plaintiff on all counts within the complaint.

BY THE COURT,



GLAZER, J.

General Food Services, -ORDOP



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OPINION

GLAZER, J.

March 29, 2019

This is a legal malpractice action. Plaintiff General Foods, Inc. (“General Foods”) alleges defendant attorneys Louis I. Lipsky, Esquire, Ashley H. Kazman, Esquire and Victor Lipsky, P.C. d/b/a Lipsky and Brandt (collectively the “Lipsky defendants”) failed to assert five defenses in a Petition to Open or Strike a confessed judgment for possession in *North City Development, Co. v. General Foods Services, LLC*, Philadelphia Court of Common Pleas, 1309-3382 which, if presented, would have caused the judgment to be opened and/or stricken. Presently pending before the court is the Lipsky defendants’ motion for summary judgment. For the reasons discussed below, the motion for summary judgment is granted.

North City Development Co. (“North City”) owned the Holmesburg Shopping Center located on Frankford Avenue in Philadelphia, PA. From the time North City was formed until 2007, Avram Woidislawsky (“Woidislawsky”) was North City’s sole shareholder. General Foods, a limited liability company, owned the building located on a pad site in the shopping center. The building was leased to another company which operated a diner, the Liberty Bell. Woidislawsky was the sole member of General Foods. North City leased the pad site to General Foods.

The North City – General Foods lease provided for minimum rent of \$15,000 per year, and \$1,250 per month, subject to a 3% increase each year. Additionally, the Lease provided for the payment by General Foods of a Common Area Maintenance (“CAM”) charge, a Real Estate Charge, Insurance, a management fee of 3.9% of gross rental and a late charge of 10% of unpaid charges. The Lease further provided that the monthly base rent was due to North City in advance on the first day of each calendar month without set off, counter claim or prior demand thereof. The Lease contained a warrant of attorney and a right to confess judgment for rent and for possession.

North City hired Woidislawsky as the property manager for the Shopping Center. He held this position until April 2013. As the property manager, Woidislawsky collected rents and CAM charges from North City tenants at the Shopping Center including General Foods. During the time that Woidislawsky owned both North City and General Foods and while Woidislawsky served as property manager for the Shopping Center, Woidislawsky was responsible for preparing CAM reconciliation statements and delivering them to all tenants.

In May 2007, Woidislawsky sold 89% of North City to Kyun Duk Seo and Myung Kyu Seo. The Seo family retained Woidislawsky as property manager of the Shopping Center after the sale. In April 2013, Woidislawsky sold his remaining shares of North City to the Seo Family and the Seo Family became the 100% owner of the Shopping Center and North City. After the sale, Woidislawsky was replaced as the property manager by Square Root Real Estate Management, LLC (“Square Root”).

On April 24, 2012, Paul Seo sent CAM reconciliations fee notices to General Foods. The CAM reconciliation statements were prepared by Woidislawsky’s accountant who re-calculated and reduced the amount of CAM reconciliation amounts attributable to General Foods for 2007,

2008, 2009, and 2010. General Foods never paid the CAM reconciliations. General Foods also did not pay the May, June, July and September 2013 rent on time. General Foods received all the late notice demand letters sent by Square Foot on behalf of North City. Square Foot took a strict approach with respect to rent being paid on time since the Seo Family was pushing hard for payments. Woidislisky, on the other hand, believed that while he was the property manager, General Foods could pay rent to North City at any time. He also knew that when the Seo Family took 100% ownership of North City and retained a new property manager, his old practice of paying rent did not apply.

On September 9, 2013, Square Foot sent a letter to Liberty Bell, the diner, stating that it was in breach of the lease agreement for nonpayment of rent. Square Foot informed Liberty Bell that it had ten days from the date of the letter to pay rent or eviction proceedings would begin if payment was not received by September 19, 2013. The letter further stated “We will file for eviction when these 10 days are up if we do not hear from you! Please call our office at 215-332-7044.” On September 27, 2013, North City confessed judgment against General Foods for possession and money in the amount of \$17,615.85 in the Philadelphia Court of Common Pleas. The complaint alleged the following:

“16. Defendant had failed to pay the rent timely for May 2013, June 2013, July 2013, and September 2013 making one lump sum payment on or about July 05, 2013 which payment represented monthly rental payments for May 2013 and June 2013, Defendant did not include any rental payments for the month of July. On or about July 30, 2013, Defendant made two separate payments by check to Plaintiff which represented rental payment for July 2013, and August 2013. These checks did not include late fees pursuant to the lease terms.

17. Accordingly, Defendant is in default under the Lease because common area maintenance charges, taxes, management expenses, late fees and related charges established by the Lease for the years of 2007-2010 and 2012-2013 as well as late fees on the balance from May 2013 forward have not been paid...”¹

¹ Complaint in confession of judgment.

Woidislawsky, on behalf of General Foods, retained the Lipsky defendants to represent General Foods in the confession of judgment action. The Lipsky defendants directed General Foods to pay the amount outstanding under protest and asked North City to withdraw the complaint in confession of judgment. The confession of judgment complaint was not withdrawn.

On October 25, 2013, the Lipsky defendants filed a Petition to Strike or Open Confessed Judgment for General Foods. The Petition raised three bases to strike the confessed judgment which consisted of: 1) North City's failure to specifically allege that it gave written notice of default; 2) North City's failure to attach a verification to its complaint in accordance with Pa. R. Civ. P. 1024; and 3) the money judgment was grossly excessive. The Petition also raised three specific grounds to open the confessed judgments: 1) North City failed to allege that written notice was provided to General Foods prior to confessing judgment and failed to attach the written notice; 2) a question of fact existed regarding whether the amount confessed was grossly excessive; and 3) the warrant of attorney did not satisfy the requirements of a confession of judgment and a question of fact regarding whether defendant was waiving its rights under the warrant attorney existed.

On November 18, 2013, North City filed an answer to the petition, and included as an exhibit a copy of the 10-day default notice provided to General Foods along with proof of delivery, thereby eliminating General Foods's claim that North City did not provide notice of default or opportunity to cure. On November 21, 2013, the Lipsky defendants filed General Foods' Reply to North City's Answer, arguing that the failure to attach the notice to complaint in confession of judgment was grounds to strike the judgment. Additionally, General Foods argued that notwithstanding North City's failure to include the notice letter in the complaint, General

Foods contacted North City in response to the notice letters, as was requested by the notice letters and substantially complied with the Lease.²

On January 14, 2014, the Honorable Ellen Ceisler entered an order granting the parties leave to take discovery on disputed issues of fact, directing the parties to submit notes of testimony, documentation, supplemental memorandum and a spreadsheet and/or sequential timeline identifying the date and nature of defendant's alleged default under the lease, when and how the notice of each default was made and the steps taken by North City and General Foods to cure the default. Judge Ceisler also scheduled the matter for a hearing on March 27, 2014.

In compliance with the court's order, the parties conducted discovery and submitted supplemental memoranda. The Lipsky defendants presented evidence and arguments that proper notice was not given to General Foods and that an event of default did not exist. Moreover, General Foods disputed the amount North City claimed was due and presented evidence that the CAM reconciliation fees and other fees were not correct. Finally, General Foods contended that a credit was due for the overpayment of the monthly CAM charges and substantial performance under the lease should avoid forfeiture.

On April 30, 2014, after a hearing, the court denied the petition to strike or open the judgment for possession, denied the petition to strike the judgment for money and granted the petition to open the judgment for money to determine the correct amount due General Foods from North City. On May 7, 2014, the Lipsky defendants filed a notice of appeal to the Superior Court. On September 9, 2014 Judge Ceisler issued an opinion setting forth her findings of fact and conclusions of law in support of her April 30, 2014 order. On November 5, 2015, the Superior Court affirmed Judge Ceisler's opinion in a non-precedential opinion. In addressing the

² General Foods admits that these defenses were raised for the first time in the reply to the response filed by North City to the Petition to Open/Strike filed by General Foods. Complaint, ¶ 26.

issue whether the trial court erred in denying the petition to open the judgment for possession, the Superior Court held that since General Foods failed to initially assert in its petition to open the defenses that it complied with the ten day notice or substantially performed under the terms of the lease, the arguments were deemed waived on appeal.³ The Lipsky defendants filed a petition for appeal to the Pennsylvania Supreme Court which was denied on August 17, 2016. Thereafter, the parties settled the money judgment aspect of the case and General Foods was evicted from the ground lease.

In October 2017, General Foods filed this action against attorney defendants alleging legal malpractice sounding in negligence and breach of contract.⁴ General Foods alleges that the Lipsky defendants failed to allege that “General Foods complied with the 10-day notice provision and had substantially performed under the lease which would have been a significant and persuasive basis for opening the confessed judgment.”⁵ General Foods further alleges it would have been successful in opening the confessed judgment if the defenses had been properly raised in the Petition.⁶ Presently before the court is the Lipsky defendants’ motion for summary judgment.

DISCUSSION

I. The legal malpractice claim based on negligence fails as a matter of law because General Foods is unable to prove that it would have been successful in opening the judgment for possession with the defenses omitted from the petition.

³ The Superior Court relied upon Pa. R. Civ. P. 2959 (c) which states “A party waives all defenses and objections which are not included in the petition or answer”. Additionally, General Foods acknowledged that it did not raise these issues in its petition to open.

⁴ The complaint also alleges legal malpractice against defendants Walter Weir, Jr. Esquire and Weir & Partners LLP. This motion was only filed on behalf of the Lipsky defendants.

⁵ Complaint ¶ 19.

⁶ Id. ¶ 34.

The Supreme Court of Pennsylvania has described the unique nature of legal malpractice claims as follows:

[A] legal malpractice action is distinctly different from any other type of lawsuit brought in the Commonwealth. A legal malpractice action is different because ... a plaintiff must prove a case within a case since he 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 the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend 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 the plaintiff from being properly compensated for his loss.⁷

Here, to successfully prove the “case within the case”, General Foods has the burden to prove that the trial court in the underlying confession of judgment action would have opened the judgment for possession. The trial court shall open a confessed judgment if the petitioner produces evidence which in a jury trial would require the issues to be submitted to the jury.⁸ As is evident from the trial court’s opinion in the underlying action, General Foods is unable to meet this burden.

There is no dispute that the following defenses: 1) General Foods complied with the 10-day default notices it received from North City, 2) General Foods substantially performed under the Lease; 3) an established course of conduct between General Foods and North City justified General Foods’ nonpayment of CAM reconciliation fees and excused General Foods’ repeated late-payment of rents; 4) General Foods paid all rents due and owing to North City and the sums due to North City were disputed; and/or 5) North City presented incorrect CAM reconciliation fee requests to General Foods, which amounted to North City’s own breach (es) of the Lease and

⁷ *Kituskie v. Corbman*, 552 Pa. 275, 714 A.2d 1027, 1030 (1998).

⁸ Pa. R. Civ. P. 2959 (e).

excused General Foods' failure to pay past due CAM reconciliation fees,⁹ were not included in the petition to open or strike the judgments by confession filed by General Foods. There is no dispute that General Foods never filed a motion to amend the petition to open and strike to include these defenses. There is no dispute that the Superior Court deemed these defenses waived since they were not included in the petition. However, notwithstanding these facts, each of these defenses were considered by the trial court in the underlying action and were not successful in opening the confessed judgment for possession.

Judge Ceisler found that Mr. Woidislawsky did not cure the default before the confessed judgment was filed. In reaching this conclusion, Judge Ceisler considered Woidislawsky's testimony that he paid the rent on time but North City did not pick up the rent on time, that he owned North City and General Foods which gave him license to do anything he wanted, that while managing the building there was never a problem and in his opinion there is no ten day requirement and he could do anything he wants at any time.¹⁰ Nevertheless, Judge Ceisler held "This Court is more than satisfied that North City gave proper notice under Section 16 (a) of the Lease¹¹ and that General Foods defaulted under that section."¹² Additionally, Judge Ceisler also held that giving notice to cure was not dispositive, since General Foods also defaulted under

⁹ The court notes that General Foods in its response to the motion for summary judgment refers to the five defenses identified above as well as "other arguments". These "other arguments" are not discussed nor identified and as a result are not a proper basis to defend against the imposition of summary judgment.

¹⁰ Judge Ceisler's Opinion dated September 8, 2014, pp.3-5 fn 1.

¹¹ Paragraph 16 (a) of the Lease provides, "Failure of Tenant to pay when due any installment of rent hereunder or any other sum herein required to be paid by Tenant, if such failure continues for 10 days after written notice thereof by Lessor is received by Tenant."

¹² Judge Ceisler's Opinion dated September 8, 2014 p. 16.

Section 16 (g)¹³ of the Lease which did not contain a cure period. In reaching this conclusion, Judge Ceisler stated “there is no dispute that the rent checks were not delivered to North City by the first of May, June, July or September of 2013”.¹⁴ Hence, these defenses were not successful in opening the confessed judgment for possession at the time raised. Moreover, the cure defense became insignificant since the trial court in the underlying action found General Foods breached a provision within the Lease which did not contain a cure period.

Interrelated with the defense of failing to give General Foods an opportunity to cure is the defense of substantial performance. With respect to this defense, Judge Ceisler found that “there is no genuine dispute that General Foods breached the Lease by failing to pay the CAM reconciliation for the years 2007, 2008, 2009, 2010, 2012, and 2013, nor a genuine dispute regarding whether it breached the Lease by paying its rent late for May, June, July and September of 2013.”¹⁵ In support of this conclusion, Judge Ceisler cited the testimony of Mr. Woidslawsky who admitted that he did not pay the CAM charges because he believed that he did not owe them and that he was waiting to talk to Paul Seo or his father and he thought he could pay the rent whenever he wanted. He also felt and that he only tried to pay the CAM amounts after North City obtained the confessed judgment, even though he knew the charges existed in early 2011. Judge Ceisler held “Such action cannot be considered substantial performance with

¹³ Paragraph 16 (g) of the Lease provides, “Repetition or continuation of any failure to timely pay any rent or other sums herein required to be paid by Tenant where such failure shall continue or be repeated for two (2) months in any period of twelve (12) consecutive months.”

¹⁴ Judge Ceisler Opinion dated September 8, 2014 p. 16. The trial court considered the evidence of Ms. Amey, Woidslawsky’s secretary but did not find this testimony to be “clear, direct, precise and believable” especially in light of the sequence of the check numbers which did not support her testimony. See p. 16 of the Opinion.

¹⁵ Id. at 17.

the Lease.”¹⁶ Additionally, she held “[t]herefore, this Court found that General Foods did not present evidence that would require the issues of whether North City provided proper notice under section 16 (a) of the Lease, whether General Foods defaulted under Section 16 (g) of the Lease or whether General Foods substantially performed under the Lease to be submitted to a jury. Thus, this Court properly denied the Petition to Open the judgment on this ground.”¹⁷ Based on the foregoing, it is clear that the defenses were considered and were not successful in opening the judgment.

As it pertains to the remaining three defenses, course of conduct between General Foods and North City, payment, and whether North City breached the Lease by presenting incorrect CAM reconciliation requests, these defenses were also considered by the trial court in the underlying action and were unsuccessful in opening the judgment. Judge Ciesler considered the defense of the parties’ course of conduct and that General Foods paid all the rents allegedly due. The trial court considered the testimony of Mr. Woidislawksy and Ms. Amey in regard to the course of conduct and found that their testimony was not clear, direct, precise and *believable*, such that the issue would be required to be submitted to a jury.¹⁸ The trial court held “there is no doubt that General Foods breached the Lease.”¹⁹ As such, the defense that the rent was paid or that the CAM charges were not due, was considered and dismissed as a basis for opening judgment. The trial court did open the money judgment to determine the correct amount due. However, the trial court determined that the Lease was breached and judgment for possession

¹⁶ Judge Ciesler Opinion dated September 8, 2014 p.17.

¹⁷ Id.

¹⁸ Id. at 17.

¹⁹ Id at 20.

was warranted. In reaching its decision, the underlying trial court made credibility determinations which this court will not revisit and is bound to accept. Moreover, this court had an opportunity to observe Mr. Woidislawsky, in a proceeding involving a disqualification of counsel in this matter, and is in agreement with Judge Ceisler's credibility determinations. Based on the foregoing, General Foods is unable to show that it would have been successful in opening the judgment for possession since the five defenses it claims were omitted from the petition were considered by the trial court in the underlying action and were found to be without merit. Hence, General Foods is unable to satisfy its burden of proving the case within the case and summary judgment is granted in favor of defendants and against plaintiff on all counts.

II. The claim for breach of contract also fails since the gist of the action is based in tort and not in contract.

In addition to the legal malpractice claim based in tort, General Foods also alleges a claim for legal malpractice based in contract as an alternative cause of action. The Lipsky defendants argue that the claim should be dismissed since the gist of the action is based in tort and not contract. This court agrees. While an action for legal malpractice may be brought in either contract or tort²⁰, as it pertains to this particular matter it is clear that the contract between these parties is collateral to the alleged wrongful conduct of the Lipsky defendants, i.e. the failure to include or amend the petition to assert certain defenses. Here, the alleged wrong is not dictated by the terms of the retainer agreement but by the social policies in the law of torts.²¹

Recently, the Superior Court in *Seidner v. Finkelman*, 2018 WL 4178147 (Pa. Super. 2018), applied the gist of the action in a legal malpractice action. This court recognizes the non-precedential nature of this opinion and merely cites this opinion as persuasive. The Superior

²⁰ *Garcia v. Community Legal Servs. Corp.*, 362 Pa.Super. 484, 524 A.2d 980, 982 (1987).

²¹ See *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014).

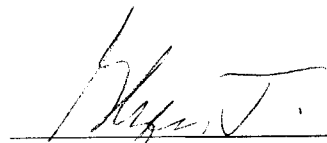
Court found that the gist of the legal malpractice action was negligence and not contract. In reaching this conclusion the court analyzed the allegations within complaint, the testimony at trial as well as the expert report to conclude that the gist of the action was tort. The court found that since plaintiff challenged the manner in which the objectives for which defendants were hired were achieved and whether the advice given was within the standard of care, the gist of the action was tort and not contact.

Here, General Foods alleges that it retained the Lipsky defendants to represent them in the confession of judgment action, and that the Lipsky defendants breached this agreement when it failed to include certain defenses in the drafting, preparing, filing and arguing of petition to open and strike the confessed judgment.²² The expert report submitted by General Foods solely provides opinions on the negligence claim concluding that the Lipsky defendants conduct fell below the standard of care of attorneys practicing in the Pennsylvania. Here, the gist of the action is in tort and the contact is collateral to the claim. Based on the foregoing, the claim breach of contract is dismissed and this court finds in favor of defendants and against plaintiff on the breach of contract claim.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted and judgment is entered in favor of defendants against plaintiff on all claims.

BY THE COURT,



GLAZER, J.

²² Id. at ¶¶ 41 and 42.