

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

RECEIVED

MARTY FEIERSTEIN p/k/a MARTY
FEIER a/k/a SLINKY RECORDS,

Plaintiff,

v.

OSCAR S. SCHERMER, ESQUIRE;
OSCAR S. SCHERMER & ASSOCIATES;
STEVEN J. SCHATZ; JONATHAN H.
KAPLAN, ESQUIRE; JONATHAN H.
KAPLAN, P.C.; STEVEN R. GRAYSON,
ESQUIRE; L. KENNETH CHOTINER;
BERNARD M. RESNICK, ESQUIRE;
BERNARD M. RESNICK, ESQUIRE, P.C.,

Defendants,

v.

LAUREN H. KANE, ESQUIRE,

Add'l Defendant.

JANUARY TERM, 2011

NO. 03716

COMMERCE PROGRAM

Control Nos.: 13022719, 13032661,
13032877, 13032879, 13032887

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CIVIL ADMINISTRATION

ORDER

AND NOW, this 21nd day of May, 2013, upon consideration of the Motions for Summary Judgment of defendants and additional defendant, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. Defendants Kaplan's and Schatz's Motions are **GRANTED in part** and plaintiff's recoverable damages are limited to the loan repayment amount and plaintiff's legal fees and other expenses.
2. The remainder of defendants Kaplan's and Schatz's Motions are **DENIED**.

Feierstein Vs Oscar S. -ORDOP



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3. Defendant Chotiner's Motion is **GRANTED** and all claims against Kenneth Chotiner are **DISMISSED** with plaintiff's consent.
4. Defendant Resnick's Motion is **GRANTED** and judgment is entered in favor of Bernard M. Resnick, Esquire and Bernard M. Resnick, Esquire, P.C. on all of plaintiff's claims against them.
5. Additional Defendant Kane's Motion is **GRANTED** and defendants Kaplan's and Schatz's joinder claims against Lauren H. Kane, Esquire are **DISMISSED**.

It is further **ORDERED** that this action is transferred to the court's Arbitration Program and given a hearing date of July 8, 2013, at 9:30 am.

BY THE COURT:



GLAZER, J.

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

MARTY FEIERSTEIN p/k/a MARTY FEIER a/k/a SLINKY RECORDS,	:	JANUARY TERM, 2011
	:	
	:	NO. 03716
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control Nos.: 13022719, 13032661, 13032877, 13032879, 13032887
OSCAR S. SCHERMER, ESQUIRE;	:	
OSCAR S. SCHERMER & ASSOCIATES;	:	
STEVEN J. SCHATZ; JONATHAN H.	:	
KAPLAN, ESQUIRE; JONATHAN H.	:	
KAPLAN, P.C.; STEVEN R. GRAYSON,	:	
ESQUIRE; L. KENNETH CHOTINER;	:	
BERNARD M. RESNICK, ESQUIRE;	:	
BERNARD M. RESNICK, ESQUIRE, P.C.,	:	
	:	
Defendants,	:	
	:	
v.	:	
	:	
LAUREN H. KANE, ESQUIRE,	:	
	:	
Add'l Defendant.	:	

OPINION

This legal malpractice action arises out of a underlying breach of contract case brought by plaintiff Marty Feirstein against Link Wray, Oliver Wray and Olive Wray (the “Underlying Action”).¹ In the Underlying Action, Mr. Feirstein was represented by defendant Oscar Schermer & Associates, which was initially comprised of defendants Oscar Schermer and his associate Stephen Schatz, and later by defendants Steven Grayson and Jonathan Kaplan. The

¹ Feirstein v. Wray, May Term, 2005, No. 03690 (Phila. Co.)

representation in the Underlying Action was apparently undertaken on a contingency fee basis,² but Mr. Feirstein claims to have paid a retainer of \$10,000 to Oscar Schermer & Associates.³

The Complaint in the Underlying Action was allegedly drafted by Mr. Schermer and Mr. Schatz. In it, Mr. Feirstein claimed the Wrays breached a “Contract for Recording and Audio Manufacturing” (the “Agreement”). Pursuant to the terms of this Agreement, Mr. Feirstein loaned Link Wray \$5,000⁴ and provided Mr. Wray with recording equipment.⁵ In exchange, Link Wray promised “to compose at least 40 original songs for an upcoming full length cd to be released and manufactured by Marty Feir[stein]’s Slinky label.”⁶ The Agreement further provided that, if Mr. Wray failed to perform the agreement, Mr. Feirstein was entitled to recover \$9,000, which was the agreed upon repayment amount for the \$5,000 loan, plus other amounts “for recovery of recording equipment, phone bills and legal expenses incurred to recover any unpaid amounts.”⁷

In the Underlying Action, Mr. Feirstein obtained a default judgment against the Wrays and the court ordered a hearing on damages.⁸ Mr. Schermer retained defendant Bernard Resnick, an entertainment attorney, as a damages expert, who opined that, as a result of Link Wray’s failure to perform the contract, Mr. Feirstein lost over \$600,000 as follows:

² Third Amended Complaint, ¶ 80.

³ *Id.* ¶ 10.

⁴ Mr. Feirstein, his wife Lauren Kane and the Wrays also entered into a separate Agreement for Payment of Loan, which was attached to the Complaint in the Underlying Action as Exhibit C.

⁵ Agreement, pp. 1-2, Ex. B to Complaint in the Underlying Action.

⁶ *Id.* at p. 1.

⁷ *Id.* at p. 2.

⁸ The hearing was apparently delayed due to the death of Mr. Wray.

Net Sales of 3 CDs	\$375,000.00
Synchronization Licenses	\$ 37,500.00
Session Musician Fees	\$ 15,000.00
Record Producer Fees	\$ 45,000.00
Music Publishing Fees	\$163,800.00
Unpaid Loan	\$ 9,000.00
Expense Reimbursement	<u>\$ 4,247.98</u>
Total	\$649,547.98

Mr. Schermer retired from the practice of law while the Underlying Action was pending, so Mr. Kaplan represented Mr. Feirstein with respect to the damages hearing. Mr. Kaplan apparently chose to rely almost exclusively on Mr. Resnick’s testimony and did not put Mr. Feirstein on as a witness nor introduce documentary evidence to support Mr. Resnick’s assertions as to damages. The court concluded that “[p]laintiff failed to submit credible evidence sufficient to establish damages under the contract or for lost profits,” and refused to award any damages.⁹

Mr. Feirstein alleges in this action that Mr. Schatz committed malpractice in connection with the drafting of the Complaint in the Underlying Action by failing to plead claims with respect to repayment of the loan, the return of the equipment, and the payment of expenses. Mr. Feirstein also alleges that Mr. Kaplan and Mr. Resnick committed malpractice by failing to amend the Complaint to include such claims and by failing to obtain the approximately \$650,000 in damages about which Mr. Resnick opined at the hearing. All three defendants have moved for summary judgment on these claims.¹⁰

Mr. Schatz and Mr. Kaplan filed joinder complaints against Mr. Feirstein’s wife, Lauren Kane, who is an attorney, and who, they claim, represented her husband in the Underlying

⁹ Findings of Fact and Conclusions of Law in the Underlying Action (“Findings”), ¶¶ 97 and 98.

¹⁰ Plaintiff also asserted malpractice claims against Oscar Schermer & Associates, Oscar Schermer, and Steven Grayson, but none of these defendants entered an appearance in this matter. In addition, plaintiff asserted malpractice claims against L. Kenneth Chotiner, but plaintiff has agreed to dismiss the claims against him.

Action and drafted the Agreement with the Wrays. Ms. Kane has moved for summary judgment on the joinder claims against her.

In order to prevail in this legal malpractice action, plaintiff must prove what is colloquially called “the case within the case.”¹¹ Specifically, Mr. Feirstein must show that, but for the defendants’ failure to properly plead and prove his claims in the Underlying Action, Mr. Feirstein would have recovered the damages he sought in that action. With respect to most of the damages he claims, he cannot prove his case within the case.

The Agreement between Mr. Feirstein and the Wrays simply does not support a claim that Mr. Feirstein is entitled to recover any of the following damages about which Mr. Resnick testified: net sales for 3 CDs, synchronization licenses, session musician fees, record producer fees, and music publishing fees. At most, the Agreement supports a claim for the agreed upon loan repayment amount (\$9,000.00), Mr. Feirstein’s expenses (\$4,247.98), and his legal fees incurred in the underlying action (\$10,000.00), which total less than \$25,000.

No amount of artful pleading or testimony, nor any deluge of documentary evidence, could overcome the fact that Mr. Feirstein had no legal entitlement to the vast majority of the damages he sought to obtain in the Underlying Action.¹² The judge in the Underlying Action reached the same conclusion regarding the limited damages recoverable under the Agreement.¹³

¹¹ See, e.g., Kituskie v. Corbman, 552 Pa. 275, 281, 714 A.2d 1027, 1030 (1998) (“In essence, 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’.”)

¹² The Wrays’ default simply establishes that the facts plaintiff pled in the Complaint are true; the plaintiff’s erroneous legal conclusions need not be accepted as true. See Pa. R. Civ. P. 1029 (effect of failure to deny averments of fact).

¹³ Findings, ¶¶ 14, 45-50, 62-66, 75, 79, 92-94.

She then concluded that even those limited damages, for the loan plus expenses, had not been sufficiently pleaded and proved.¹⁴

For these reasons, plaintiff's claims in this action are limited to recovery of the loan amount plus expenses. Since such damages total far less than \$50,000, what remains of this case will be remanded to the court's mandatory Arbitration Program for resolution.¹⁵

Since no expert witness was needed in the Underlying Action to establish such limited damages, summary judgment will be entered on all of plaintiff's claims against Mr. Resnick acting in his capacity as an expert.¹⁶ Since plaintiff has proffered no evidence that Mr. Resnick acted as anything other than an expert in the Underlying Action, summary judgment will be entered as to all of plaintiff's claims against him as a purported attorney as well.¹⁷

Plaintiff has proffered evidence that Mr. Schatz drafted the Complaint in the Underlying Action¹⁸ and thereby omitted the claim against the Wrays for failure to repay the loan plus expenses, so the court cannot enter summary judgment on plaintiff's claims against Mr. Schatz. Similarly, plaintiff has proffered evidence that Mr. Kaplan neglected to amend the Complaint and failed to offer proof of the loan amount and expenses recoverable in the Underlying Action,

¹⁴ *Id.* ¶ 19, 48-49.

¹⁵ The court cannot determine from the record before it whether such limited damages have already been collected by Mr. Feirstein from the Wrays or would have been uncollectible from them. If either is shown to be true, then plaintiff may not be able to prevail on its remaining claims.

¹⁶ Mr. Resnick's failure to convince the court in the Underlying Action to award lost profits under the Agreement was not malpractice since, as set forth above, the Agreement gave plaintiff no legal basis for claiming such lost profits.

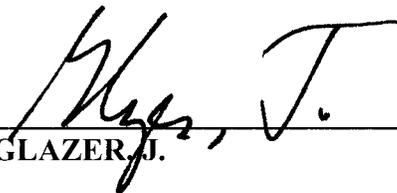
¹⁷ For instance, there is no evidence that Mr. Resnick drafted the Complaint in the Underlying Action. Furthermore, Mr. Resnick's Expert Witness Fee Agreement is not evidence that he assumed a duty to represent Mr. Feirstein as trial counsel; it simply shows that Mr. Resnick agreed to act as an expert witness.

¹⁸ Plaintiff's expert report is deficient with respect to Mr. Schatz. However, plaintiff offers testimony and documents showing that Mr. Schatz drafted the Complaint. That evidence coupled with a review of the Complaint and the court's Findings in the Underlying Action may be sufficient to establish Mr. Schatz's liability. See Rizzo v. Haines, 520 Pa. 484, 502, 555 A.2d 58, 66 (1989) ("Where the issue is simple, and the lack of skill obvious, the ordinary experience and comprehension of lay persons can establish the standard of care.")

so Mr. Kaplan's motion for summary judgment will also be denied. There is no evidence that Ms. Kane drafted the allegedly deficient Complaint, so her motion for summary judgment will be granted.

For all of the foregoing reasons, Mr. Kaplan's and Mr. Schatz's Motions for Summary Judgment are granted in part and denied in part, and Mr. Chotiner's, Mr. Resnick's, and Ms. Kane's Motions are granted.

BY THE COURT:



GLAZER, J.