

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

KENRICH ATHLETIC CLUB and	:	
HARD INVESTMENT FINANCES, LLC	:	
Plaintiffs	:	APRIL TERM, 2012
	:	
vs.	:	NO. 3573
	:	
DONALD M. MOSER, ESQUIRE	:	
Defendant	:	

ORDER

And Now, this *15th* day of February, 2013, after considering the Preliminary Objections filed by Defendant Donald M. Moser, Esquire to Plaintiffs Third Amended Complaint per Rule 1028(a)(4), and for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that the Preliminary Objections are **OVERRULED in Part and SUSTAINED and Dismissed in Part.**

Defendant shall file an Answer to the Third Amended Complaint within twenty (20) days from the date this Order is docketed.

DOCKETED

FEB 15 2013

R. POSTELL
DAY FORWARD

BY THE COURT:

Frederica A. Massiah-Jackson

 FREDERICA A. MASSIAH-JACKSON, J.

Kenrich Athletic Club Etal Vs Moser-ORDER



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MEMORANDUM IN SUPPORT OF ORDER OVERRULING IN PART
AND SUSTAINING IN PART DEFENDANT'S PRELIMINARY
OBJECTIONS IN THE NATURE OF A DEMURRER

MASSIAH-JACKSON, J.

February 15th, 2013

A. Introduction

Plaintiffs Kenrich Athletic Club and Hard Investment Finances, LLC filed their Third Amended Complaint alleging that the negligence of Attorney Donald M. Moser entitles them to more than Two Million Dollars and to the return of fees paid for legal services. Defendant-Moser has filed Preliminary Objections pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

When considering Preliminary Objections in the nature of a demurrer, this Court considers that all material facts set forth in the Complaint as well as all inferences reasonably deducible therefrom are admitted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Any doubt should be resolved in favor of overruling the demurrer. e.g. State Farm Mutual Ins. Co. v. Ware's Van Storage, 953 A.2d 568 (Pa. Superior Ct. 2008); Sullivan v. Chartwell Investment Partners, LP, 873 A.2d 710 (Pa. Superior Ct. 2005); Werner v. J. Plater-Zyberk, 799 A.2d 776 (Pa. Superior Ct. 2002).

Legal malpractice actions are “distinctly different” from any other type of lawsuit brought in the Commonwealth of Pennsylvania. Our Supreme Court explained in Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998) that in order to meet their burden of proof these Plaintiffs must prove that they would have recovered a judgment in the underlying action. 714 A.2d at 1030. Thus, in the case at bar the Kenrich Athletic Club and Hard Investment Finances, LLC must demonstrate:

- (1) Employment of the attorney or the basis for a duty;

(2) Failure of the attorney to exercise ordinary skill and knowledge; and

(3) That such negligence was the proximate cause of damage/harm to the plaintiffs.

Additionally, the Supreme Court in Kituskie v. Corbman, *supra*, 714 A.2d at 1030, held that an essential element to a legal malpractice cause of action is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm. The Plaintiffs herein bear the burden of proving actual loss. See generally, Gorski v. Smith, 812 A.2d 683 (Pa. Superior Ct. 2002); Myers v. Robert Lewis Seigle, PC, 751 A.2d 1182 (Pa. Superior Ct. 2000); Veneri v. Pappano, 622 A.2d 977 (Pa. Superior Ct. 1993); Brock v. Owens, 532 A.2d 1168 (Pa. Superior Ct. 1987).

Honorable Thomas O'Neill of the United States District Court for the Eastern District of Pennsylvania set forth a comprehensive overview of the appropriate state court standard for proving actual loss. In Astech International, LLC v. Husick, 676 F.Supp.2d 389 (E.D. Pa. 2009), Judge O'Neill noted at 402:

“. . . Pennsylvania courts have been very clear that plaintiffs in all malpractice actions must prove actual loss. To do so, they must prove that the underlying legal representation would have achieved whatever the plaintiffs hoped to achieve. If the underlying case, transaction or patent prosecution would have failed regardless of the defendant's professional negligence, then the plaintiffs have not suffered actual loss. As the *Hackers, Inc.* Court stated:

in a matter involving litigation, a plaintiff must prove that, but for his attorney's negligence, a different result would have occurred in the litigation. In a transactional legal matter, the proximate cause prong can be satisfied by showing that, but for this breach of professional duty, client would not have suffered an actual loss.

*Hackers, Inc., 79 Pa. D. & C.4th 485, 2006 WL 4091390, at *490.*"

With this in mind, this Court concludes that the Preliminary Objections to Plaintiffs' Third Amended Complaint will be Overruled in Part and Sustained in Part.

B. Failure to Provide Notice for Suspension

Paragraph 16 of the Third Amended Complaint does aver facts which, if true, would have enabled the plaintiffs to keep their business open pending the appeal. To that extent only, the Preliminary Objections to this allegation of negligence is **Overruled**. The Defendant suggests at page 5, that this averment reflects "nominal damages". The Court is required to Overrule a demurrer unless there is a certainty that no recovery is possible.

The Plaintiffs have not asserted a viable malpractice cause of action relating to any substantive matters which could have been considered in the Court of Common Pleas and those Preliminary Objections are **Sustained**.

**C. Failure to File Timely Liquor License Renewal 2011
Failure to File Liquor License Renewal 2011 Brief
Failure to Respond to Motion to Quash**

Paragraph 25 is a conclusory assertion of speculative harm. There are no facts presented which, if true, could establish that these plaintiffs would have prevailed in the underlying litigation -- specifically the 2011 Renewal of the Liquor License.

Preliminary Objections to these allegations of negligence are **Sustained**.

D. Failure to Appear at Multiple Citation Hearings

Paragraph 30 is a conclusory assertion of speculative harm. There are no facts presented which, if true, could establish that these plaintiffs would have prevailed in the underlying litigation -- specifically the citation hearings. See, Veneri v. Pappano, 622 A.2d 977 (Pa. Superior Ct. 1993).

Preliminary Objections to these allegations of negligence are **Sustained**.

E. The Failure to State a Cause of Action

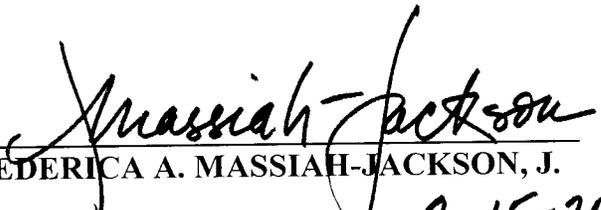
Finally, Paragraphs 31-34 of the Third Amended Complaint are broad legal conclusions and extraordinary demands for monetary relief. In Hart v. O'Malley, 647 A.2d 542 (Pa. Superior Ct. 1994), the Appellate Court commented that when considering a demurrer, this Court is precluded from considering conclusions of law or inferences which are not supported by factual allegations contained in the Complaint. "This includes argumentative allegations or expressions of opinion." 647 A.2d at 553 and cases cited. It is

apparent that on the record presented herein these Plaintiffs have alleged nothing more than speculative harm and conjecture, which do not suffice to create a cause of action for legal malpractice. Rashak v. Barsh, 450 A.2d 67 (Pa. Superior Ct. 1982).

F. Conclusion

For all of the reasons set forth above, the Preliminary Objections filed pursuant to Rule 1028(a)(4) in the nature of demurrer are Overruled in Part and Sustained and Dismissed in Part.

BY THE COURT:


FREDERICA A. MASSIAH-JACKSON, J.
2-15-2013