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

HOWARD VOGEL	:	July Term, 2008
and	:	No. 02109
MARK FRIED	:	
Plaintiffs	:	
v.	:	Commerce Program
ALEX J. MURLAND, ESQUIRE	:	
and	:	
MURLAND, GOLDSTEIN & NATHAN, P.C.	:	Control No. 10052086
Defendants	:	

MEMORANDUM OPINION

Defendants' Motion for Summary Judgment requires this Court to decide whether Plaintiffs may maintain an attorney-malpractice lawsuit against Defendants. For the reasons below, Plaintiffs may not maintain the lawsuit.

Background

Human Resources Option, Inc. ("HRO,") was a firm engaged in the business of hiring personnel and leasing their services for a fee. HRO ceased to exist after the sale of its assets and business. Plaintiffs Howard Vogel ("Vogel,") and Mark Fried ("Fried,") were officers and shareholders of HRO. Defendants Alex Murland, Esquire ("Murland,") and the law firm of Murland, Goldstein & Nathan, P.C. ("MG&N,") provided legal representation to HRO, Vogel and Fried in various matters, including litigation underlying this action.

On 12 May 2000, Vogel and Fried entered into a Purchase Agreement (the "Agreement,") with ProLease Atlantic Corporation ("ProLease,") a company based in Maryland, whereby ProLease agreed to buy, and Vogel and Fried agreed to sell, the assets and business of HRO. The Agreement was "governed by and construed and enforced in accordance with the laws of the State of Maryland."[1] The Agreement also provided for payment of attorneys' fees in the event of litigation. The provision stated: "The prevailing party in any legal proceeding between the parties in this Agreement shall be entitled to its attorney's fees and costs."[2]

Pursuant to the Agreement, ProLease agreed to pay a purchase price of $1,250 multiplied by the number of employees listed "on Seller's payroll ... as of the date of closing."[3] Employees not listed on payroll upon closing, but effectively listed therein "post-closing," within a specified number of days, were also included in the calculation of the purchase price. The Agreement contained a "look-back" provision which entitled ProLease to adjust the purchase price upon a final count of all effective employees. At closing, Vogel and Fried represented that HRO had 3,307 employees, and the purchase price was fixed in the amount of $4,133,750. ProLease immediately paid 50% of the purchase price in cash, and provided Vogel and Fried with a promissory note for the balance in the amount of $2,066,875. This balance was payable in rates.

After closing, ProLease contended that Vogel and Fried had inflated the purchase price by greatly overstating the number of employees on payroll. ProLease calculated that the balance on the note should be significantly reduced,

[1] Purchase Agreement, Exhibit C to Defendants' Motion for Summary Judgment, ¶ 16.
[2] Purchase Agreement, Exhibit C to Defendants' Motion for Summary Judgment, ¶ 28.
[3] Purchase Agreement, Exhibit C to Defendants' Motion for Summary Judgment, ¶ 2(a).

paid the first installment on the note, and halted all subsequent payments thereto. By letter dated 16 March 2001, Vogel and Fried declared ProLease in default.[4]

On 17 May 2001, Defendants Murland and MG&N filed a federal lawsuit against ProLease to recover the full amount of the promissory note on behalf of HRO, Vogel and Fried. Subsequently, Murland and MG&N filed First and Second Amended Complaints. Under Count I of the Second Amended Complaint, HRO, Vogel and Fried sought an account of all employees transferred to ProLease.[5] HRO, Vogel and Fried also asserted other claims, including breach-of-promissory note and fraud. ProLease counterclaimed asserting breach of the Purchase Agreement, fraud, and negligent misrepresentation.

A bench trial was held on 3 November 2003. On 4 March 2004 the District Court entered an Order simultaneously with its Findings-of-Fact and Conclusions-of-Law.[6] The District-Court found that the number of eligible employees transferred to ProLease was not 3,307, as represented by Vogel and Fried, but 1,853.[7] The District Court ruled that ProLease was entitled to various set-offs which considerably decreased ProLease's obligation under the promissory note. The District-Court also ruled that HRO, Vogel and Fried had fraudulently and negligently misrepresented the number of employees to ProLease. Finally, the District Court ruled that ProLease was entitled to attorneys' fees and costs because

[4] Letter of Default dated 8 February 2001, Exhibit G to Defendants' Motion for Summary Judgment.
[5] Mash Enterprises, Inc. f/k/a/ HRO, Inc. v. ProLease Atlantic Corporation et al. United States District Court for the Eastern District of Pennsylvania, Civil Action No. 01-2437, Exhibit F to Defendants' Motion for Summary Judgment.
[6] Findings-of-Fact and Conclusions-of-Law, Exhibit H to Defendants' Motion for Summary Judgment.
[7] Findings-of-Fact and Conclusions-of-Law, Exhibit H to Defendants' Motion for Summary Judgment, pp. 12-18.

it was the prevailing party in the litigation.[8] In a subsequent Order and Memorandum Opinion issued on 19 July 2004, the District Court fixed the amount of attorney's fees at $306,330.50.[9]

HRO, Vogel and Fried appealed, and the United States Court of Appeals for the Third Circuit reversed in part and affirmed in part. The Court of Appeals affirmed the finding of negligent misrepresentation, reversed the finding of fraud, and ruled that the District Court had undercounted the number of eligible employees by 268. The Court remanded with instructions to recalculate the balance of the promissory note as to reflect the improperly excluded 268 employees. Finally, the Court of Appeals agreed with the District Court that ProLease was the prevailing party because "ProLease ... succeeded in having the balance of the promissory note reduced substantially as a result of this litigation," whereas HRO was "largely unsuccessful in its claims against ProLease."[10]

On remand, The District Court recalculated the balance on the promissory note to reflect the improperly excluded employees, and increased the balance owed to Vogel and Fried. The District Court noted that the recalculated balance had resulted in a 20% decrease in the set-off originally obtained by ProLease. Consequently, the District Court reduced the attorneys' fees by 20%, from $306,330.50 to 245,064.40.[11]

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[8] Findings-of-Fact and Conclusions-of-Law, Exhibit H to Defendants' Motion for Summary Judgment, pp. 22-35; Order issued therewith.

[9] Mash Enterprises, Inc. f/k/a/HRO, Inc. v. ProLease Atlantic Corporation *et* al., Civil Action No. 01-2437 Order and Memorandum Opinion dated 19 July 2004, Exhibit I to Defendants' Motion for Summary Judgment.

[10] Mash Enterprises, Inc. f/k/a/ HRO, Inc. v. ProLease *et* al., No. 04-1821/3422 Appeal from the United States District Court for the Eastern District of Pennsylvania, Exhibit J to Defendants' Motion for Summary Judgment, pp. 16-17

[11] Order and Memorandum Opinion, United States District Court for the Eastern District of Pennsylvania Civil Action No. 01-2437, Exhibit L to Defendants' Motion fro Summary Judgment.

On 8 August 2008, Vogel and Fried filed the instant Complaint naming Murland and the law firm of MG&N as Defendants. The Complaint asserts a legal malpractice action through the claims of breach of contract and negligence. Specifically, the Complaint states:

> Had the Complaint which [Murland and MG&N] filed [against ProLease] demanded only an accounting and then judgment for such sums as the accounting revealed to be due, Plaintiffs would have been the prevailing parties, and instead of having to pay $245,064.40 in attorneys' fees to ProLease, Plaintiffs would have been entitled to an award for their own attorneys' fees, in the amount of $773,476.
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> * * *
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> Alternatively ... [Murland and MG&N] negligently failed to:
> a. Frame their litigation against ProLease on behalf of Plaintiffs with an awareness that ... Maryland law determined the "prevailing party" ... [to be] the party who prevailed on the greater part of its claims ... and
> b. failing to simply ask the court for an accounting.[12]

Discussion

> Summary judgment is properly granted when an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action ... which in a jury trial would require the issues to be submitted to a jury. The explanatory comment to Rule 1035 clarifies this language, stating, that ... the motion for summary judgment encompasses ... the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense.[13]

Defendants' Motion for Summary Judgment asserts that Plaintiffs' malpractice lawsuit cannot succeed because Plaintiffs cannot establish proximate

[12] Howard Vogel and Mark Fried v. Alex J. Murland and Murland, Goldstein & Nathan, P.C., No. 0807-2019, Exhibit A to Defendants' Motion for Summary Judgment, Counts I, II.
[13] Young v. DOT, 744 A.2d 1276, 1277 (Pa. 2000).

causation. According to Defendants, Plaintiffs cannot show that they would have prevailed in the underlying action, even if that action had been framed exclusively as a demand for accounting.[14]

To maintain a claim of legal malpractice, plaintiff must demonstrate "employment of the attorney or other basis for a duty; the failure of the attorney to exercise ordinary skill and knowledge; and that such negligence was the proximate cause of damage to the plaintiff .... 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.'")[15]

In this case, Plaintiffs assert that they would have been the prevailing parties in the underlying litigation, if Defendants had framed that litigation exclusively as a demand for accounting. This conclusion implies that ProLease would not or could not exercise its right to counterclaim against Plaintiffs in the underlying action, regardless of whether or not the action had been framed exclusively as a demand for accounting. Plaintiffs' conclusion is unwarranted.

Under Maryland law, "A party may assert as a counterclaim any claim that party has against any opposing party."[16] The right to assert a counterclaim is virtually unlimited.[17]

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[14] Defendants' Motion for Summary Judgment, ¶¶ 83-85.
[15] Myers v. Robert Lewis Seigle, P.C., 751 A.2d 1182, 1184 (Pa. Super. 2000) (citing Kituskie v. Corbman, 714 A.2d 1027, 1029 (Pa. 1998).
[16] Md. R.C.P. 2-331. The standard is substantially similar in Pennsylvania: "The defendant may set forth in the answer under the heading 'Counterclaim' any cause of action cognizable in a civil action which the defendant has against the plaintiff at the time of filing the answer." Pa. R.C.P. 1031(a).
[17] Edmunds v. Lupton, 252 A.2d 71 (Md. 1969).

Here, Vogel and Fried represented erroneously that HRO was staffed with 3,307 employees. ProLease relied on this representation, acquired HRO from Vogel and Fried, and subsequently determined that the business was staffed with significantly fewer employees. Accordingly, ProLease adjusted the purchase price by reducing the balance on the promissory note. In response to the adjustment, Vogel and Fried declared ProLease in default and filed the underlying federal action asserting various claims, including a demand for accounting. As a defendant, ProLease counterclaimed and asserted a breach-of-contract claim because it disagreed with the count of 3,307 employees, as reiterated by Vogel and Fried in their underlying action.[18] No evidence has been produced to suggest that ProLease would not or could not assert its counterclaim if the underlying action had been framed exclusively as a demand for accounting. To the contrary, the record shows that in the underlying action, ProLease filed a counterclaim against Plaintiffs and emerged as the prevailing party because it won the greater part of its claims, whereas Plaintiffs lost the greater part of theirs. Plaintiffs cannot prove that Defendants negligently prosecuted the underlying litigation because they cannot show that they would have been the prevailing parties, regardless of how the underlying action had been framed.

Finally, ProLease would have emerged as the prevailing party even if the underlying action had been framed exclusively as a demand for accounting, whether or not ProLease had filed its counterclaim. The underlying action would have shown anyhow that the purchase price paid by ProLease had been

[18] Mash Enterprises, Inc. f/k/a/HRO, Inc. v. ProLease Atlantic Corporation *et* al., Exhibit F to Defendants' Motion for Summary Judgment, ¶ 47.

substantially inflated due to a significantly overstated number of employees. ProLease would have prevailed because adjustment of the overstated number of employees would have resulted in a substantial reduction of the balance under the note. By contrast, HRO could not have prevailed in the underlying action because it could not recover a substantial portion of its claimed balance.

Plaintiffs cannot establish proximate causation and may not maintain the claim of breach of contract and negligence against Defendants.

BY THE COURT,

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***ARNOLD L. NEW*, J.**