

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

DOMINGO RAMOS	:	
	:	CIVIL TRIAL DIVISION
Appellants,	:	
	:	MARCH TERM, 2006
v.	:	No. 1196
	:	
I. MICHAEL LUBER, ESQUIRE	:	
I. MICHAEL LUBER, P.C.	:	Superior Court Docket No.
	:	1762 EDA 2006
Appellees	:	
	:	

OPINION

Tereshko, J.

PROCEDURAL HISTORY

Plaintiff Domingo Ramos, appeals from the Order of June 10, 2006 wherein the trial Court sustained defendants' preliminary objections and dismissed the plaintiff's Complaint without prejudice.

FACTUAL BACKGROUND

Plaintiff alleged that the facts that gave rise to underlying cause of action were that on October 23, 1999, he was involved in a motor vehicle accident. (Complaint, ¶6). He states that he was hit by a vehicle driven by Mark Besdan, who disregarded a stop sign, while attempting to flee members of the Philadelphia Police Department. (Complaint, ¶6). After calling 911 to request police to the accident scene, plaintiff states that he was approached by two plain clothed officers, who proceeded to assault, batter and subject him to excessive and unwarranted force. (Complaint, ¶8). Plaintiff alleged injuries to left shoulder, back and ribs as a result of the alleged assault.

Sometime thereafter, plaintiff obtained the legal services of Mr. Lubber to represent him in his civil rights claim against the City of Philadelphia. (Complaint, ¶10-11).

Plaintiff asserts that Mr. Lubber did not conduct proper discovery and pre-suit investigation, and did not timely amend the state court Complaint to include the individual names of the John Doe police officers who allegedly assaulted the plaintiff. (Complaint, ¶12-16). According to plaintiff these omission caused the individual police officers and the City of Philadelphia to be dismissed from the underlying lawsuit. (Complaint, ¶12-16). It is averred that as a result of Mr. Lubber's omissions that plaintiff was forced to accept a settlement with only the negligent motorist, Mark Besdan. (Complaint, ¶14-15).

As a result of these allegations, plaintiff commenced an action on April 6, 2006 against I. Michael Lubber and his law firm, I. Michael Lubber, P.C. for legal malpractice. Defendants, subsequently filed their preliminary objections and motion to determine preliminary objections, which were sustained by the Court. The plaintiff then filed their Notice of Appeal and submitted their 1925(b) statement accordingly.

The issues to determine on appeal are:

- 1) Whether the trial Court abused its discretion or committed an error of law in sustaining the defendants' preliminary objections.
- 2) Whether the trial Court did not allow plaintiff to amend their Complaint.

LEGAL ANALYSIS

On appeal from an Order sustaining preliminary objections the appellate Court accepts as true all well-pleaded material facts set forth in the complaint as well as all inferences reasonably deducible there from. *Dercoli v. Penn. Nat'l Mutual Ins. Co.*, 520 Pa. 471, 476, 554 A.2d 906, 908 (1989). However, a Court is precluded from considering any conclusions of law or inferences that are not supported by the factual allegations in the Complaint. *Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542, 553 (1994), *aff'd*, 544 Pa. 315, 676 A.2d 222 (1996). Thus, a plaintiff cannot maintain a cause of action for negligence by merely stating "conclusions of law, ... argumentative allegations, and expressions of opinion." *Neill v. Eberly*, 153 Pa. Commw. 181; 620 A.2d 673, 675 (1983). The court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Martin v. Commonwealth*, 124 Pa. Commw. 625, 556 A.2d 969 (1989).

In order to establish a claim of legal malpractice, a plaintiff/aggrieved client must demonstrate three basic elements: 1) employment of the attorney or other basis for a duty; 2) the failure of the attorney to exercise ordinary skill and knowledge; and 3) that such negligence was the proximate cause of damage to the plaintiff. *Rizzo v. Haines*, 520 Pa. 484, 499, 555 A.2d 58, 65 (1989). An essential element to this 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. *Rizzo*, 520 Pa. at 504-505, 555 A.2d at 68. Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages. *Id.*

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"). *Kituskie v. Corbman*, 552 Pa. 275, 281 714 A.2d 1027, 1030 (1998).

All of plaintiff's claims depend on the existence of economic loss, which according to him would not have occurred except for the alleged breach by defendants. Where the alleged loss relates to the underlying litigation, plaintiffs must establish they would have been the successful litigants in the underlying litigation. *Id.* at 1027.

In the case *sub judicie* plaintiff did not allege facts sufficient to establish an actionable claim against Mr. Lubber and his law firm. Nor did plaintiff state that the conduct by Mr. Lubber and his law firm was the proximate cause of the damages alleged by plaintiff. Thus plaintiff did not establish that he sustained an actual loss attributable to conduct by defendants city police officers and City of Philadelphia.

Plaintiff has also not set forth or differentiated the alleged damages caused by the police officers and the City of Philadelphia as opposed to those caused by defendant Mark Besdan in the automobile accident for which he has recovered. The plaintiff has the burden of presenting sufficient evidence by which damages can be determined on some rational basis and other than by pure speculation or conjecture. *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa.Super. 90, 464 A.2d 1243 (1983). To allow such speculation of damages in this case would result in double recovery for plaintiff in both the automobile accident and in the legal malpractice claim. Plaintiff provided the Court with no particulars of the state and federal civil rights case, nor any copies of the

Complaints filed in these cases to indicate separate injuries sustained as a result of the alleged conduct of the police officers and the City of Philadelphia. As such, plaintiff has failed to specify or distinguish injuries which were allegedly the proximate cause of conduct of the police officers and the City of Philadelphia, as opposed to those from the automobile accident caused by the negligence of Mark Besdan for which he recovered. These speculative damages are precisely the type highlighted by our Supreme Court in *Rizzo*, which must be avoided.

Plaintiff had failed to allege sufficient facts to prove that defendants' conduct by the police officers and the City of Philadelphia caused him to sustain any injuries different than those alleged to have been caused by the automobile accident and negligence of Mark Besdan. Plaintiff has failed to allege sufficient facts, which would prove that he was entitled to recover in the underlying civil rights case. The failure of plaintiff to prove a "case within a case" is required in order for him to proceed with the legal malpractice action against Mr. Luber and his law firm. Therefore, the claim for legal malpractice cannot be sustained in this case.

Next, the Court will also address the issue of whether plaintiff was prohibited from amending the Complaint in this case. Generally, a party may at any time, either with the consent of his opponent or by leave of court, amend his pleading. *Carringer v. Taylor*, 402 Pa. Super. 197, 206-207, 586 A.2d 928, 932-933 (1990), See also *Pa.R.C.P. 1033*. Permission to allow amendment is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Ecksel v. Orleans Const. Co.*, 360 Pa. Super. 119, 519 A.2d 1021 (1987); *Gallo v. Yamaha Motor Corp. U.S.A.*, 335 Pa. Super. 311, 484 A.2d 148 (1984). Such a motion may be granted while a motion

for judgment on the pleadings is pending, after judgment, or after an award has been made or an appeal has been filed. *Ecksel*, 519 A.2d at 1027. However, amendment must not be for a new cause of action or surprise or prejudice the opposing party. *Id.*

In reviewing the Court's Order of June 1, 2006, along with the applicable docket entry, it is clear that the Court permitted plaintiff to file an Amended Complaint in the event that the applicable statute of limitations was not expired. The Order of Court specifically states "And Now this 1st day of June, 2006, it is hereby Ordered the preliminary objections of defendants are Sustained and the complaint is dismissed."

Although the defendants proposed Order that was signed by the Court also requested that the Complaint be dismissed "with prejudice," the Court specifically crossed-out this language indicating that plaintiff could amend their Complaint pursuant to his responsive pleading. (See Plaintiff's Response to Preliminary Objections of Defendants I. Michael Luber, Esq. and I. Michael Luber, P.C.). The docket entry also verifies this position. The docket makes no mention of dismissal "with prejudice."

Due to plaintiff's vagueness in his Complaint the Court was also unable to determine whether the applicable statute of limitations had expired so as to affect his right to amend without leave of court. The Complaint is devoid of such information as when the parties entered into the contingent fee agreement (Complaint ¶10), when the Complaint was filed, or when the civil rights case(s) were dismissed (Complaint, ¶10-15). The plaintiff also had an opportunity to amend his Complaint in response to defendants' preliminary objections pursuant to Pa.R.C.P. 1028(c)(1) and failed to do so as well. As a result, this Court believes that it did not deprive, in any way, plaintiff's rights to amend his Complaint.

CONCLUSION

In light of the foregoing analysis, this Court believes that it properly sustained defendants' Preliminary Objections, and should be affirmed by the Court above.

BY THE COURT:

Date

ALLAN L. TERESHKO, J.

cc: Alan E. Denenberg, for Appellant
Jeffrey B. McCarron, for Appellee