

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

CROWN CORK & SEAL CO., INC,	:	DECEMBER TERM 2002
	:	
Plaintiff,	:	No. 03185
	:	
v.	:	
	:	
MONTGOMERY, McCRACKEN,	:	
WALKER & RHODES, LLP,	:	
	:	
Defendant.	:	

CROWN, CORK & SEAL CO., INC.,	:	DECEMBER TERM, 2002
	:	
Plaintiff,	:	No. 03192
	:	
v.	:	Control No. 111980
	:	
NINA SEGRE, ESQ., KAREN SENSER,	:	
ESQ., and SEGRE & SENSER, P.C.,	:	
	:	
Defendants/Third	:	
Party Plaintiffs.	:	

ORDER AND MEMORANDUM

AND NOW, this 25th day of May, 2005, upon consideration of the Third Motion for Summary Judgment of defendants, Karen Senser, Esq. and Segre & Senser, P.C., plaintiff's response thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the Memorandum Opinion issued contemporaneously herewith, it is hereby **ORDERED** that said Motion is **GRANTED** in part and the decisions rendered by the trial court in the underlying California action are not admissible as evidence of defendants' alleged malpractice.

The remainder of the motion is **DENIED**.

BY THE COURT:

C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

This malpractice action, brought by plaintiff Crown, Cork & Seal (“CC&S”) against its attorneys, defendants Karen Senser, Esquire and her law firm, Segre & Senser, P.C. (collectively “S&S”), flows from litigation brought against CC&S in California (the “California Action”) by its lessee, Universal Warehouses (“Universal”). The issue presented in this motion is what use CC&S may make of the trial court’s rulings in the California Action.

CC&S was the owner of certain real property in California (the “Property”), which it leased to Universal pursuant to a lease that was negotiated and drafted on behalf of CC&S by S&S (the “Lease”). At the time that CC&S was negotiating with Universal to lease the Property,

CC&S was apparently also attempting to sell the Property, and it had found a prospective buyer, Home Depot. As a result, S&S negotiated on behalf of CC&S an Addendum to the Lease which contains the following cancellation language:

At any time prior to November 1, 1996, Lessor may cancel this Lease in order to sell the subject property [to] Home Depot or an affiliate or nominee thereof, their successors and assigns.

Defendants' Exhibits, Ex. 27, Lease Addendum, p. 1 (the "Cancellation Provision").

After entering into an agreement of sale with Home Depot, CC&S exercised this option to cancel the Lease. Universal then commenced the California Action claiming that the cancellation was improper because the sale to Home Depot had not been completed prior to November 1, 1996. The trial court disagreed with Universal's interpretation of the Cancellation Provision, and Universal took an appeal from that decision. *See* CC&S Appendix II, Ex. 9.

While the appeal was pending, CC&S, allegedly acting upon S&S' advice, allowed Home Depot to assign its purchase rights under the agreement of sale to an unrelated third party, the Dunn Family Trust. CC&S then sold the Property to the Dunn Family Trust. The California appellate court affirmed the trial court's reading of the date restriction in the Cancellation Provision, but remanded the case to the trial court for further proceedings in light of the change in purchasers of the Property. *See* CC&S Appendix II, Ex. 19.

The trial court subsequently found that the Cancellation Provision was ambiguous regarding whether the Property could be sold to an entity unrelated to Home Depot. *See id.*, Ex. 20. The trial court ultimately found that the sale to the Dunn Family Trust was a breach of the Cancellation provision. *See* CC&S Appendix I(b), Ex. U. CC&S opted not to pursue an appeal of the trial court's decision and settled with Universal for \$4 million.

CC&S then commenced this litigation claiming that S&S committed malpractice in negotiating and drafting the Lease and other documents relating to the sale of the Property and in advising CC&S that it could consent to the assignment of the right to purchase from Home Depot to the Dunn Family Trust.¹ S&S now asks the court to preclude CC&S from offering the trial court's opinions in the California Action into evidence in this action to prove that S&S committed malpractice.

The question presented to the trier of fact in this action is whether, in light of "well settled principles of law and the rules of practice which are of frequent application in the ordinary business of the profession," S&S failed to represent CC&S "in a manner that comported with the standards of the profession at large," in drafting, and subsequently interpreting, the cancellation provision of the Lease and other related documents. *See Gorski v. Smith*, 812 A.2d 683, 696 (Pa. Super. 2002); *Fiorentino v. Rapoport*, 693 A.2d 208 (Pa. Super. 1997). This question was not before the trial court in the California Action, and, therefore, its opinions are not relevant to this enquiry.²

Just because a court finds a contract provision to be ambiguous does not mean that the attorney who drafted it committed professional malpractice. In some such cases, the circumstances that render a contract term ambiguous arose after the contract was entered into and were unanticipated by the parties at the time of entering into a contract; the question then is whether the drafting attorney should have anticipated and provided for those circumstances. In

¹ In the Complaint, CC&S appeared to claim that S&S committed malpractice by testifying poorly at trial in the California Action, but CC&S is not pursuing such a claim. *See* CC&S' Response to Motion for Summary Judgment, p. 25. In addition, CC&S claims that S&S breached its fiduciary duty to CC&S by failing to inform CC&S of S&S' malpractice. That claim is dealt with in the Court's Order and Memorandum Opinion concerning Montgomery McCracken Walker & Rhodes' Motion for Summary Judgment.

² Since the California trial court's opinions are not relevant to this issue, they are not admissible at trial as evidence of S&S' malpractice. *See* Pa. R. Evid. 402. However, they may still be admissible for some other purpose.

this case, the enquiry is whether S&S should have anticipated that CC&S would sell the Property to an entity other than Home Depot, and, if so whether S&S properly provided for that contingency.

Of course, in hindsight and in light of the trial court's decision in the California Action, it would appear that S&S did not properly provide for the sale of the Property to an entity other than Home Depot. However, S&S were not privy to the California trial court's opinions at the time S&S was drafting and interpreting the Lease and related documents. In fairness to S&S, it can only be charged with knowledge of the law and legal practice that existed at the time it committed the professional acts that CC&S now claims were improper. If California contract law or real estate practices required S&S to do something at that time in order to protect its client's interests, and S&S failed to do it, then S&S may have committed professional malpractice.

In order to prove that S&S committed malpractice in drafting and interpreting the Lease and related documents, CC&S offers the expert testimony of Charles A. Hansen, Esquire. *See* CC&S Appendix II, Ex. 39. Mr. Hansen is a California attorney who claims familiarity with relevant California real estate law and practice. Based on this knowledge, he opines that S&S breached its professional duties to CC&S in several respects.³ *See id.* Of course, a determination as to his credibility will have to await trial, but his opinion serves as sufficient evidence of S&S' alleged malpractice for CC&S' claims to survive a motion for summary judgment.

³ Given this court's ruling that the court's opinions in the California Action are not admissible to prove that S&S committed malpractice, CC&S' expert may not use them to bolster his opinion. Upon review of his written opinion, it does not appear that his opinion will be undermined or compromised by omission of the references to the California trial court's findings. The fact that the expert's opinion is identical to the California trial court's in several respects does not render the expert's opinion invalid.

CONCLUSION

For all the foregoing reasons, defendants' Third Motion for Summary Judgment is granted in part and denied in part.

BY THE COURT:

C. DARNELL JONES, II, J.