

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

HARVEY Z. ITSKOWITZ, M.D.,	:	May Term, 2003
Plaintiff,	:	
v.	:	No. 002926
WHITE AND WILLIAMS, LLP,	:	
STEPHEN C. ZIVITZ, ESQUIRE, JOSEPH	:	Commerce Program
DOMINGUEZ, ESQUIRE, BRUCE A.	:	
BELL, ESQUIRE, RYAN J. UDELL,	:	Control Number 050287
ESQUIRE,	:	
Defendants.	:	

ORDER

AND NOW, this 25TH day of June, 2004, upon consideration of the Preliminary Objections of Defendants White and Williams, LLP, Stephen C. Zivitz, Esquire, Joseph Dominguez, Esquire, Bruce A. Bell, Esquire and Ryan J. Udell, Esquire to Plaintiff's Complaint, all responses in opposition, Memoranda, all matters of record, in accord with the contemporaneous Memorandum Opinion filed of record and after oral argument, it hereby is **ORDERED** and **DECREED** that Defendants' Preliminary Objections are **Overruled** in part and **Sustained** in part as follows:

1. Defendants' Preliminary Objections to Counts I (breach of fiduciary duty), II (legal malpractice), III (intentional interference with contractual relations), IV (fraudulent misrepresentation and nondisclosure), and V (breach of contract) are **OVERRULED**.
2. Defendants' Preliminary Objection to Count VI (intentional infliction of emotional distress) and VII (negligent infliction of emotional distress) are **SUSTAINED**.
3. All other Preliminary Objections are **OVERRULED**.

Defendants are directed to file an answer to the remaining averments of Plaintiff's Complaint within twenty days of this Order.

BY THE COURT,

GENE D. COHEN, J.

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BELL, ESQUIRE, RYAN J. UDELL,	:	Control Number 050287
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Defendants.	:	

MEMORANDUM OPINION

Cohen, J......

This action arises from the legal advice rendered by defendants which allegedly caused plaintiff to be expelled from a partnership. Presently before the court are the Preliminary Objections of Defendants White and Williams, LLP, Stephen C. Zivitz, Esquire, Joseph Dominguez, Esquire, Bruce A. Bell, Esquire and Ryan J. Udell, Esquire (“Defendants”) to Plaintiff’s complaint. For the reasons that follow, the court will overrule in part and sustain in part defendants’ preliminary objections.

BACKGROUND

Plaintiff, Harvey Z. Itskowitz, M.D., (“Plaintiff”) a physician licensed to practice medicine in Pennsylvania, was a partner in Medical Psychiatric Associates of Delaware Valley, LLP. (“MPADV”). (Plaintiff’s Complaint ¶ 2). Prior to 2001, MPADV was a general partnership organized under the laws of Pennsylvania. (Id. ¶ 15). Defendants rendered professional legal services to MPADV and its individual partners, including plaintiff. (Id. ¶ 10, 14).

In 1999, MPADV and its partners, including plaintiff, were notified that the Health Care Financing Administration (“HCFA”) would conduct an audit of the

Medicare Part B claims billed by MPADV, its partners and employees and paid by Medicare to MPADV. (Id. ¶ 17). As a result, in 2000, MPADV and its partners including plaintiff contracted defendants for representation and counsel in connection with the Medicare Audit (the “Audit”). (Id. ¶ 18). The representation was allegedly undertaken without disclosing conflicts and without obtaining a waiver of those conflicts from the individual partners or MPADV. (Id. ¶ 21).

On September 22, 2000, preliminary results of the Audit were communicated to the partners and to MPADV indicating that a potential overpayment existed. (Id. ¶ 19). These results allegedly had a significant actual and potential adverse legal and financial impact not only on the partnership of MPADV but also its partners individually, including plaintiff. (Id. ¶ 20).

Unknown to plaintiff, in May 2001, during the Audit, Dr. Gittleman, a partner in MPADV and his wife, advised and discussed with defendants his strategy to expel plaintiff from MPADV. Defendants allegedly kept these facts hidden from plaintiff. (Id. ¶ 26-28). Following these discussions with Dr. Gittleman, defendants’ began to actively counsel, assist and aid Dr. and Mrs. Gittleman in devising a strategy to expel him from MPADV. (Id. ¶ 29).

On May 25, 2001, while defendants still acted as plaintiff’s attorney in regard to the Audit, defendants forwarded a letter to MPADV’s requesting the following:

In connection therewith, we would like to have a “rough” estimate of the market value of MPADV, to ascertain the amount that the partnership may have to pay to such expelled partner if MPADV were to proceed with the expulsion. As Steve [defendant Zivitz] also mentioned, this information is strictly confidential and should not be shared with anyone at MPADV. (Id. ¶ 30, 32).

Additionally, defendants allegedly took the following actions toward devising a plan to expel plaintiff from MPADV: (1) on June 7, 2001, defendants discussed the

appraisal of MPADV with MPADV's accountant and continued to devise a strategy regarding an initial offer to plaintiff for withdrawing from MPADV, (Id. ¶ 35); (2) on June 11, 2001, defendants conducted a conference concerning "partnership restructuring" issues, (Id. ¶ 36); (3) on June 12, 2001, defendants conducted a conference and discussed tentative changes to partnership structure whereby plaintiff would remain in the partnership, but have a diminished managerial role therein, (Id. ¶ 37); (4) defendants obtained various financial appraisals for MPADV from the accountant designed to provide plaintiff with lower levels of financial interest in the practice, (Id. ¶ 38); and (5), on June 13, 2001, defendants drafted a revised LLP agreement with plaintiff staying under reduced economic interest and managerial responsibility. (Id. ¶ 39). Defendant's actions were allegedly all done without the knowledge and consent of plaintiff.

On June 21, 2001, defendants again spoke with Dr. Gittleman regarding his desire to expel plaintiff from the partnership. (Id. ¶ 40). Following this discussion, defendants prepared various documents for Dr. Gittleman to use at a secret meeting of the other MPADV partners to discuss the expulsion of plaintiff which included discussion points, valuation of goodwill in the MPADV practice, the calculation of payoff prices, and strategies and alternatives designed to maximize the financial interest of other MPADV partners and to decrease plaintiff's financial interest in MPADV. (Id. ¶ 41-43).

After obtaining the above information, the Gittleman's conducted a secret meeting of the MPADV partners without plaintiff present at which time Gittleman demanded the expulsion of plaintiff from the partnership. (Id. ¶ 44). As a result, plaintiff was expelled from MPADV.

Plaintiff instituted this lawsuit against defendants alleging breach of fiduciary duty (Count I), legal malpractice (Count II), intentional interference with contractual

relations (Count III), fraudulent misrepresentation and nondisclosure (Count IV), breach of contract (Count V), intentional infliction of emotional distress (Count VI) and negligent infliction of emotional distress (Count VII).¹ Plaintiff also seeks punitive damages. Defendants have now filed preliminary objections to plaintiff's complaint seeking dismissal of the entire action.

DISCUSSION

A. Defendants' Demurrer to the Claims in Plaintiffs' Complaint Are Overruled In Part and Sustained In Part.

Defendants maintain that plaintiff's complaint must be dismissed in its entirety since there are no allegations that defendants mislead plaintiff regarding the terms of the Partnership Agreement. In support thereof, defendants attach a copy of the Partnership Agreement to their memorandum.

It is well-settled that in Pennsylvania civil practice, preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings. Thus, no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by a demurrer. Cardella v. Public School Employees' Retirement Bd., 827 A.2d 1277, 1282 (Pa. Cmwlth. 2003). In order to sustain a demurrer, it is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit a recovery. Mellon Bank, NA v. Fabinyi, 437 Pa. Super. 559, 650 A.2d 895, 899 (Pa. Super. 1994). Here, the Partnership Agreement was not attached or mentioned in the complaint. As such the Agreement is clearly outside the face of the complaint and therefore may not be considered at this stage

¹ Plaintiff also commenced an action against MPADV and its partners in the American Arbitration Association on December 26, 2001 arising from his expulsion. The arbitration is currently pending.

of the litigation. Accordingly, defendants' demur to Counts I – VII on the basis of the Partnership Agreement is Overruled.

Additionally, defendants demur to plaintiff's claims for intentional interference with contractual relations (Count III), fraudulent misrepresentation and non disclosure (Count IV), intentional infliction of emotional distress (Count VI) and negligent infliction of emotional distress (Count VII). Each of these will be discussed below.

1. Intentional Interference of Contractual Relations (Count III).

In Count III of the complaint, plaintiff alleges that defendants acted without a privilege or license [to] wrongfully interfere with his contractual relations with the other MPADV partners and with his then existing and prospective patients. (Plaintiff's Complaint ¶ 67). Under Pennsylvania law, "[o]ne who intentionally and improperly interferes with the performance of a contract...between [plaintiff] and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability for the pecuniary loss resulting to the [plaintiff] from the failure of the third person to perform the contract." Desimone, Inc. v. Philadelphia Authority For Industrial Development, 2003 WL 21390632, *2 (Pa. Com. Pl. 2003) (J. Cohen) (quoting Restatement (Second) Torts § 766; Alder, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 429-31, 393 A.2d 1175, 1181-83 (1978)). The elements of a cause of action for interference with contractual relations are as follows: (1) the existence of a contractual relation between the complainant and the third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. Strickland v. Univ. of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

Defendants contend that the complaint is insufficient because it fails to aver that the alleged interference, attorneys' advice regarding the mechanism to expel a partner in a partnership, was improper. Section 767 of the Restatement (Second) of Torts provides:

“Privilege to Interfere or Interference not Improper. Unlike other intentional torts such as intentional injury to person or property, or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in §§ 766, 766A or 766 B. Because of this fact, this Section is expressed in terms of whether the interference is improper or not rather than in terms of a specific privilege to act in the manner specified.”

Supra at 433 n. 17. The factors to be considered in determining whether interference is improper have been identified at Section 767 of the Restatement (Second) of Torts as follows:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

The averments of the complaint in this case are that defendants acted without a privilege or license to interfere wrongfully with plaintiff's contractual relationship with the other MPADV partners and with his then existing or prospective patients. At issue is the conduct of the attorneys and whether their advice to the other members of the partnership was privileged (proper) under the circumstances. Giving plaintiff all reasonable inferences deducible from the complaint, the court finds that the averments of the complaint are sufficient to state a cause of action for intentional interference of contractual relations. Accordingly, defendants demur to Count III is overruled.

2. Fraudulent Misrepresentation and Nondisclosure (Count IV)

Plaintiff also alleges a claim for fraudulent misrepresentation and nondisclosure. To establish a cause of action for fraudulent misrepresentation, the plaintiff must allege the following elements: 1) a representation, 2) which is material to the transaction at hand, 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intent of misleading another into relying on it; 5) justifiable reliance on the misrepresentation; and 6) the resulting injury was proximately caused by the reliance.

Levin v. Gauthier, 2002 WL 372949, *3 (Pa. Com. Pl. 2002)(J. Sheppard)(citing Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (Pa. 1999)). Further “the tort of intentional nondisclosure has the same elements as intentional misrepresentation ‘except in the case of intentional non disclosure, the party intentionally conceals a material fact rather than making an affirmative misrepresentation.’” Id. In addition, “[a] misrepresentation is material if it is of such character that had it not been made, or...had it been made, the transaction would not have been consummated.” Id. (quoting Sevin v. Kelshaw, 417 Pa. Super. 1, 9, 611 A.2d 1232, 1237 (Pa. Super.1992)).

In the case at bar, defendants argue that plaintiff fails to allege the nature or substance of the misrepresentation or non disclosure or the manner in which plaintiff was allegedly misled. A review of the complaint, however, demonstrates that plaintiff does allege the nature and substance of the misrepresentation. Plaintiff alleges that defendants indicated to plaintiff that defendants could and would act in the best interest of plaintiff and MPADV with undivided loyalty in a manner which would preserve plaintiff’s

confidences. (Plaintiff's complaint ¶ 72). Based on the foregoing, defendants' preliminary objection to Count IV is overruled.^{2,3}

3. Intentional Infliction of Emotional Distress (Count VI) and Negligent Infliction of Emotional Distress (Count VII).

In Counts VI and VII of the complaint, plaintiff respectively alleges a cause of action for intentional infliction of emotional distress and negligent infliction of emotional distress. Although there is much controversy over whether Pennsylvania jurisprudence recognizes the tort of intentional infliction of emotional distress, it is clear that to state a claim for intentional infliction of emotional distress, the plaintiff must allege physical injury. Rolla v. Westmoreland Health System, 651 A.2d 160, 163 (Pa. Super. 1994) (quoting Hart v. O'Malley, 436 Pa. Super. 174, 647 A.2d at 553). Pennsylvania case law similarly establishes that a claimant may not recover for negligent infliction of emotional distress in the absence of physical injury. Id. The court finds that the complaint fails to allege any physical injury to plaintiff. Rather, the complaint alleges forms of emotional distress with transitory physical phenomena. See Restatement (Second) Torts § 436 A. Such allegations are insufficient to state a claim for intentional infliction of emotional distress and negligent infliction of emotional distress. Accordingly, the demurrers to Counts VI and VII are Sustained.

B. The Allegations in the Complaint Are Sufficient to Provide A Basis For Punitive Damages.

Defendant argues that the allegations contained in the complaint fail to provide a basis for an award of punitive damages. Punitive damages may only be awarded under

² Defendants also argue that plaintiff's fraudulent misrepresentation and nondisclosure claim (Count IV) is insufficiently specific to allow defendants to properly formulate a defense. The court finds that plaintiff's fraud claim is sufficiently pled to withstand the instant preliminary objection.

³ The court questions whether plaintiff's fraudulent misrepresentation and nondisclosure claim (Count V) is barred by the gist of the action doctrine. Since the parties did not raise the issue, the court did not consider the applicability of said doctrine.

limited conditions. Pennsylvania has adopted Section 908 (2) of the Restatement (Second) of Torts regarding the imposition of punitive damages and permits punitive damages only for conduct that is “outrageous because of the defendant’s evil motives or his reckless indifference to the rights of others.” Arbor Associates, Inc. v. Aetna U.S. Healthcare, 2003 WL 1847497 *2 (Pa. Com. Pl. 2003)(quoting Restatement (Second) Torts section 908 (2)). A court may award punitive damages only if the described conduct was “malicious, wanton, reckless, willful, or oppressive.” Id. The proper focus is on “the act itself together with all the circumstances including the motive of the wrongdoer and the relations between the parties. Id.

Based on the averments of the complaint and giving plaintiff all reasonable inferences deducible from the well pleaded material facts of the complaint, this court finds that plaintiff has sufficiently alleged facts which would warrant the imposition of punitive damages in this case. Accordingly, defendants’ preliminary objections are overruled.

C. Plaintiff’s allegations of Violations of the Code of Professional Responsibility by the Defendants Should Not Be Stricken.

Defendants next argue that paragraph 48 of plaintiff’s complaint which lists the Pennsylvania Rules of Professional Conduct allegedly violated by defendants should be stricken as impertinent pursuant to Pa. R. Civ. P. 1028 (a)(2). Under Pennsylvania Rule of Civil Procedure 1028 (a)(2), a party may object to a pleading’s inclusion of “scandalous and impertinent matter.” Scandalous and impertinent matter is defined as allegations ...immaterial and inappropriate to the proof of the cause of action. Legion Ins. Co. v. Doeff, 2001 WL 1807931, * 5 (Pa. Com. Pl. 2001) (J. Sheppard). “[T]here is some authority for the proposition that, even if the pleading of damages was impertinent matter, that matter need not be stricken but may be treated as “mere surplusage” and ignored. Furthermore, the right of a court to strike impertinent matter should be sparingly

exercised and only when a party can affirmatively show prejudice. Id (quoting Com. Dept. of Envl. Resources v. Hartford Accident & Indem. Co., 40 Pa. Comwlth. 133, 137-138, 396 A.2d 885, 888 (1979)).

Defendants argue that paragraph 48 impugns the professional integrity of the defendants without having any evidentiary bearing upon the negligence claim made by plaintiff. To the extent that the violations set forth in paragraph 48 which defendants consider impertinent are not relevant to plaintiff's claim, the court will ignore and consider it "mere surplusage". Therefore, this preliminary objection is overruled.

CONCLUSION

For the above-stated reasons, Defendants Preliminary Objections are sustained in part and overruled in part as follows:

1. Defendants' Preliminary Objections to Counts I, II, III, IV, and V are **OVERRULED**.
2. Defendants' Preliminary Objection to Count VI and VII are **SUSTAINED**.
3. All other Preliminary Objections are **OVERRULED**.

Defendants are directed to file an answer to the remaining averments of Plaintiff's complaint within twenty days of this Order.

An Order contemporaneous with this Opinion will be filed of record.

BY THE COURT,

GENE D. COHEN, J.

