

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

412 NORTH FRONT STREET ASSOCIATES, L.P., ET. AL.,	:	March Term 2014
	:	
Plaintiffs,	:	No. 4495
	:	
v.	:	
SPECTOR GADON & ROSEN, P.C., ET. AL.,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Number 15070357
	:	
	:	

OPINION

Defendants/Counterclaim Plaintiffs filed the instant motion for summary judgment seeking judgment on plaintiffs’ sole remaining claim for breach of contract for “overbilling” and “error in billing” and for their counterclaims for breach of contract and legal services. In 2005, Plaintiff 412 North Front Street Associates, L.P. (“Partnership”) borrowed \$5.9 million from Abington Bank (“Bank”). The loan was guaranteed by Todd A. Newman, Esquire, Mark J. Brownstein, Esquire and Beezer Family Real Estate LLC as well as non-party Beatrice Zitomer. Over time, the principal balance of the loan increased to \$7,125,000.00. In early 2009, the Partnership recognized it was unable to pay the loan and hired defendants, the law firm of Spector Gadon & Rosen (“SGR”) and David Giles, Esquire (“Giles”), to negotiate and restructure the debt and related matters. Giles forwarded to all plaintiffs a letter setting forth the terms of representation. Plaintiffs signed the letter of representation and returned same to Giles.

On May 18, 2009, the Bank confessed judgment against plaintiffs in the amount of \$8,250,458.75 after Giles and the Bank were unsuccessful in reaching an agreement regarding the debt. Plaintiffs were represented by SGR in the confession of judgment action and they filed



petitions to strike the judgments of confession against the personal guarantors. SGR, however, did not seek to open or strike the judgments confessed against the Partnership.

On October 6, 2009, the Partnership property was sold to the Bank at Sheriff's sale. On April 1, 2010, the Bank filed a petition to determine the fair market value of the property it purchased, naming plaintiffs as respondents. After paper submissions and a hearing, the court found a deficiency of \$1,304,811.96. After an appeal and motions for reargument were filed on behalf of plaintiffs, the finding of a deficiency judgment was determined to be excessive and was remanded for further proceedings. Plaintiffs obtained new counsel and ultimately, the matter settled for \$87,500.00.

Pursuant to the retainer agreement between plaintiffs and defendants, plaintiffs were charged an hourly fee for the legal services SGR performed plus the cost of all out of pocket expenses. SGR submitted monthly invoices to plaintiffs for payment. The invoices included the hourly rate, the amount due, a description of the work performed by SGR, the identities of the attorneys and staff who performed the billable work, the amount of time to complete the work and the monetary fee for the legal work and expenses.

On April 29, 2011, David Giles, Esquire of SGR emailed the following to plaintiffs Newman and Brownstein:

“As we advised you, as of March 1, 2011, you owe our firm approximately \$91,000.00 in legal fees regarding our defending you from the actions brought by Abington Bank to collect on a Loan in the amount of \$6,390,000.00 made by Abington Bank to 412 North Front Street LP which was guaranteed by the both of you as well as Beatrice Zitomer and Beezer Family Real Estate, LLC (“Beezer”). I am confirming our agreement wherein you have agreed to the following:

1. Payment of \$20,000.00 by the close of business today.
2. Commencing on June 1, 2011 and on the first day of each month thereafter, you will pay \$10,000.00 per month until all legal fees incurred in this matter have been paid in full.

3. As we previously agreed, you are entitled to a courtesy discount of 10% of the legal fees incurred and as soon as the amount due in legal fees has been reduced to the amount of the discount that you are entitled to then such fees shall applied to the satisfaction of the discount.
4. We will be drafting a Petition for Reconsideration of the Court Order which improperly violated the Deficiency Judgment Act by entering a judgment against the both of you without even an action being filed against you by Abington Bank under your Guaranty Agreements. We will not be representing Beatrice Zitomer or Beezer in the Petition for Reconsideration.
5. We will be filing an appeal on the amount of the deficiency determined by the Court. We will not be filing an appeal of this Order on behalf of Beatrice Zitomer or Beezer.
6. We will also be representing the both of you regarding any actions filed by Abington Bank against you (under the Guaranty Agreements executed by you) to collect the “deficiency”. We will not be representing Beatrice Zitomer or Beezer with respect to any actions filed against them by Abington Bank.
7. You are confirming that you owe the legal fees set forth above and that it is your intention to pay all such fees pursuant to the terms of this email.

Please confirm your agreement to the terms set forth above.

Best Regards

David Giles”¹

On May 2, 2011, Giles acknowledged receipt of \$20,000 from plaintiffs and requested confirmation of the parties’ Agreement: “Please let me know if you agree to these terms. I received the payment, I just want to make sure that we are all in agreement with the email I sent on Friday which is set forth below.” On May 3, 2011, Brownstein responded: “Agreed, however, we reserve the right to review all submissions for payment. I want you to take Stern on and get this turned around.” In addition to the \$20,000 immediate payment, plaintiffs made several monthly payments including a \$10,000 payment in July 2011, a \$4,000 payment in August 2011, a \$20,000 payment in December 2011, and a \$10,000 payment on January 2012. No further payments were made. Presently, SGR alleges that it is owed

¹ Exhibit “3” to Defendants/Counterclaim Plaintiffs’ Motion for Summary Judgment.

\$78,511.94 for legal services rendered and out of pocket expenses incurred, exclusive of interest, as set forth in the most recent unpaid invoice dated May 3, 2013.²

On April 8, 2014, plaintiffs filed their original complaint against SGR, Giles and Griffin. On May 21, 2014, certificates of merit were filed. Defendants filed preliminary objections and an amended complaint was filed on June 30, 2014. The amended complaint added a new party defendant without leave of court and without the filing of a certificate of merit. Defendants filed preliminary objections which the court granted with leave to plead again, and the claim for punitive damages was stricken. Plaintiffs filed a second amended complaint purporting to allege two counts of malpractice. Defendants filed new preliminary objections. On October 23, 2014, the Honorable Judge Pamela Pryor Dembe sustained the preliminary objections and dismissed with prejudice the negligence and contract based legal malpractice claims.³ Presently before the court is SGR's motion for summary judgment seeking to dismiss plaintiffs' sole remaining claim for breach of contract alleging "billing errors" and "overbilling". SGR also seeks judgment on its counterclaims at Count 1 (breach of contract) and Count 2 (unpaid legal fees).

DISCUSSION

Summary judgment is appropriate only where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.⁴ A proper grant of summary judgment depends upon an evidentiary record that either (1)

² Exhibit "4" to Defendants/Counterclaim Plaintiffs' Motion for Summary Judgment.

³ The Honorable Judge Pamela Pryor Dembe retired in July 2015 and her inventory was reassigned to the undersigned Judge.

⁴ *Barnish v. KWI Bldg. Co.*, 602 Pa. 402, 420, 980 A.2d 535, 546 (2009) citing Pa. R. Civ. P. 1035.2.

shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense.⁵ Where a motion for summary judgment is based upon insufficient evidence to make out a *prima facie* cause of action or defense, the non-moving party must prove the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense.⁶ As with all summary judgment cases, the court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party as to the existence of a triable issue.

Here, plaintiffs' remaining claim is breach of contract based on SGR's alleged "overbilling" and "billing errors".⁷ The only evidence produced by plaintiffs to support their claim for "overbilling" and "error in billing" are copies of SGR's invoices with boxes drawn around certain entries and another document with notations of "overbilling" or "error in billing" noted beside each entry.⁸ No evidence, including expert witness reports, exists explaining why these bracketed entries constitute "overbilling" or "errors in billing" or what should have been the proper amount of time for the work entries complained of.

In an attempt to fill the void left by a lack of expert opinion, plaintiffs rely upon the deposition testimony of Todd Newman, Esquire.⁹ However, Mr. Newman is not a specialist in

⁵Pa.R.C.P. 1035.2 *Note*.

⁶ *Id.*

⁷ Plaintiffs' breach of contract claim against individual Defendant attorneys Griffin and Galucci is dismissed since these Defendants did not enter into a contract with Plaintiffs on an individual basis. See, *Viso v. Werner*, 471 Pa. 42, 369 A.2d 1185 (1977)(It is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract). Accordingly, Defendants/Counterclaim Plaintiffs' motion for summary judgment is granted in this regard.

⁸ Newman testified that the boxes were drawn years after the work was done. (Exhibit "5" p. 72-74).

⁹ Mr. Newman testified in his deposition that Mr. Giles took too long in responding to the Bank's letter, that Mr. Doherty took too long to prepare for oral argument on the deficiency hearing and that Giles utilized other attorneys to handle matters he should have handled himself. (Exhibit "5"- Defendants/Counterclaim Plaintiffs' Motion for

banking or lender litigation, confessions of judgment or deficiency proceedings. He also testified at deposition that he does not get paid by the hour for his legal work and has no experience keeping time records.¹⁰ Where a party fails to produce expert testimony relating to actual facts at issue, and no other evidence exists supporting a cause of action, summary judgment is required.¹¹

SGR's motion for summary judgment is therefore granted in favor of Defendants Spector Gadon & Rosen, P.C. on Plaintiffs' direct claim for breach of contract. Additionally, since Plaintiffs have failed to present any evidence sufficient to prove their affirmative defense of "overbilling" and "error in billing", Spector Gadon & Rosen P.C.'s motion for summary judgment on their counterclaim for breach of contract is granted. Judgment shall be entered in favor of Spector Gadon & Rosen, P.C. and against Plaintiffs 412 North Front Street Associates L.P. et al in the amount of \$78,511.94 in prejudgment judgment interest of \$13,148.03 from May 3, 2013 to February 1, 2016, the date of this Order.¹²

Spector Gadon & Rosen also seeks an award through counterclaim for \$27,000 plus prejudgment interest for legal services performed on behalf of the Beezer Family Real Estate LLC. However, SGR does not direct the court to evidence within the record which substantiates that the Beezer Family Real Estate LLC owes this money for legal work performed. The billing invoices produced as exhibits in this matter do not separately describe work performed for

Summary Judgment pp. 80-83). Plaintiffs' also argue that SGR's failure to open the confessed judgment for the plaintiff entity is evidence of "overbilling" and "error in billing". This claim constitutes a legal malpractice claim that was previously dismissed by the court when the legal and contractual based malpractice claims were dismissed.

¹⁰ Id. pp 13-15, 80-81, 83, 118-19.

¹¹ *Masgai v. Franklin*, 787 A.2d 982, 985 (2001).

¹² Counterclaim Plaintiffs are entitled to prejudgment interest at the statutory rate of 6% *per annum*. See *Cresci Const. Services, Inc. v. Martin*, 64 A.2d 254 (Pa. Super. 2013).

Beezer Family Real Estate LLC as a separate group and therefore there is no evidence to prove that this sum is due and owing by Beezer Family Real Estate, LLC. Hence, the counterclaim pertaining to the Beezer Family Real Estate LLC is denied, and the claim is dismissed.

CONCLUSION

For the foregoing reasons, Defendants/Counterclaim Plaintiffs Spector Gadon & Rosen, P.C., David M. Giles, Esquire, Oliver D. Griffin, Esquire and Richard D. Gallucci, Jr. Esquire's Motion for Summary Judgment is granted in part and denied in part as follows:

5. Defendants' Motion for Summary Judgment against Plaintiffs' remaining breach of contract claim for "overbilling" and "error in billing" is GRANTED in favor of Defendant Spector Gadon & Rosen and Defendants Oliver D. Griffin, Esquire and Richard D. Gallucci, Esquire and against 412 N. Front Street LP, Todd Newman, Esquire and Mark Brownstein, Esq.
6. Spector Gadon & Rosen P.C. Motion for Summary Judgment in the amount of \$27,000 by counterclaim regarding Beezer Family Trust Real Estate ,LLC is DENIED.
7. Judgment is GRANTED in favor of Spector Gadon & Rosen, P.C. in their counterclaim against Plaintiffs 412 North Front Street Associates LP, Todd Newman, Esquire and Mark Brownstein, Esquire in the principal amount of \$78,511.94 plus prejudgment interest of \$13,148.30 from May 3, 2013 to February 1, 2016, the date of this Order.

8. Spector Gadon & Rosen, P.C.'s' motion for summary judgment as to its counterclaim for accounting of unpaid legal fees is **Denied as Moot**.¹³

BY THE COURT

2/11/16



RAMY I. DJERASSI, J.

¹³ The claim for account stated is redundant of the breach of contract claim and therefore is not addressed by the court.