

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HAYMOND : CIVIL ACTION
: :
v. : :
: :
MARVIN LUNDY : No. 99-5015

MARVIN LUNDY : CIVIL ACTION
: :
v. : :
: :
ROBERT HOCHBERG, : :
JOHN HAYMOND, : :
JOHN HAYMOND, P.C. T/A HAYMOND & LUNDY, : :
SCOTT E. DIAMOND, & : :
HAYMOND NAPOLI DIAMOND, P.C. : No. 99-5048

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

June 22, 2000

The partnership of the now defunct Philadelphia law firm Haymond and Lundy, LLP, was dissolved in October, 1999. On October 12, 1999, Messrs. John Haymond ("Haymond") and Marvin Lundy ("Lundy") brought civil actions asserting claims under federal and state law against, inter alia, each other. Cross motions for preliminary injunctions and temporary restraining orders were denied on October 15, 1999. On November 9, 1999, with the consent of the parties, a Special Master was appointed to administer the dissolution of Haymond and Lundy, LLP. Each

party filed an amended complaint and moved to dismiss; the motions to dismiss will be granted in part and denied in part.

In considering a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989); see also Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957).

I. Motion to Dismiss Lundy's Complaint

Lundy's first amended complaint alleges three counts of civil RICO violations (Counts I, II, and III), three counts of fraud (Counts IV, V, and VI), negligent misrepresentation (Count VII), breach of fiduciary duty (Count VIII), breach of partnership agreement (Count IX), and unauthorized practice of law (Count X). Robert Hochberg, John Haymond, John Haymond, P.C., t/a Haymond & Lundy, Scott Diamond, and Haymond Napoli

Diamond, P.C. ("Hochberg parties") move to dismiss Counts I-VIII and Count X.

A. RICO Claims (Counts I, II, III) -- Facts¹

As alleged in the First Amended Complaint and the November 3, 1999 RICO Case Statement of Marvin Lundy, the scheme by the Hochberg parties to defraud Lundy was as follows.

1. Robert Hochberg's Illegal Conduct

Beginning in 1992, Haymond and Robert Hochberg ("Hochberg") were practicing attorneys and sole shareholders in the law offices of John Haymond, P.C. in Hartford, Connecticut. The law firm provided legal services in Connecticut and Massachusetts. Hochberg had licenses to practice law in Massachusetts and Connecticut. On May 7, 1996, Hochberg was indicted by the grand jury in the United States District Court for the District of Massachusetts, and charged with felony criminal offenses involving schemes to defraud financial institutions. On August 1, 1997, Hochberg pled guilty to the charges in the indictment; sentencing was scheduled for November 17, 1997. Haymond had full knowledge of Hochberg's criminal proceedings.

In seeking leniency for Hochberg, and to prevent Hochberg's incarceration, on November 5, 1997, Haymond averred to the Federal District Court in Massachusetts, that his firm, John

¹ These serve as the facts for the entire discussion of the motion to dismiss Lundy's first amended complaint. Facts are derived from Lundy's first amended complaint and RICO case statement.

Haymond P.C., had recently merged with a Philadelphia firm and that any sentence jeopardizing Hochberg's Connecticut license would seriously impair the ability of the new Pennsylvania partnership to operate. On November 17, 1997, Hochberg was fined, required to make restitution, and sentenced to three years probation; he was not incarcerated. On November 18, 1997, Hochberg was disbarred in Massachusetts. In April, 1998, Hochberg was suspended from the practice of law by the Connecticut Supreme Court at least until the expiration of his criminal sentence.

2. Haymond and Hochberg's Merger with Lundy

In the summer of 1997, Marvin Lundy's former law firm, Manchel, Lundy & Lessin ("ML&L"), had dissolved. Proceedings involving the dissolution of ML&L temporarily compromised the cash available to Lundy for his continuing law practice. In early 1997, Haymond and Hochberg, aware of the dissolution of ML&L, proposed forming a Pennsylvania law partnership with Lundy. From late winter to mid-autumn, 1997, Haymond and Hochberg and Lundy negotiated between their offices in Hartford and Philadelphia. Throughout the negotiations, and at all times thereafter, neither Haymond nor Hochberg ever informed Lundy personally of Hochberg's felony conviction, sentencing, or disbarment in Massachusetts and suspension in Connecticut. In April, 1997, Lundy's counsel, Robert Fiebach, Esquire ("Fiebach")

had discovered the pending Massachusetts indictment against Hochberg. See RICO Case Statement at 5. At a meeting in April, 1997, after Fiebach confronted Hochberg about the pending indictment, Hochberg and Haymond assured Fiebach that the indictment was technical, that Hochberg's counsel had assured them it would be speedily resolved with no consequence to Hochberg of any substance, and that there would be no effect upon Hochberg's Massachusetts or Connecticut licenses to practice law. See id.

Lundy claims Haymond and Hochberg were motivated to enter a partnership with Lundy to take advantage of his reputation, usurp the revenues from cases obtained by Lundy, find a place for Hochberg to practice law illicitly, and engage in the predicate racketeering acts of mail, wire, and bank fraud.

Haymond and Hochberg used Scott E. Diamond ("Diamond"), an attorney working with Lundy at ML&L in whom Lundy placed great trust, to act as their confidant and agent in their attempt to take over Haymond and Lundy, LLP. See RICO Case Statement at 5. Hochberg told Diamond the facts of his indictment and, as they occurred, his guilty plea, sentence, Massachusetts disbarment, and Connecticut suspension, with requests that he not disclose that knowledge to any other person. Haymond and Hochberg also disclosed to Diamond their plan to take over Lundy's practice, the income generated by his cases, and his good name and

reputation, and to obtain "cover" for Hochberg's unlawful practice of law. Haymond and Hochberg promised Diamond a partnership interest in the firm they would create as a reward to Diamond for his silence and participation. Haymond and Hochberg also rewarded Diamond during the Haymond & Lundy partnership by placing Diamond in charge of the New Jersey Office of Haymond and Lundy, LLP.

Lundy alleges he agreed to enter a partnership with Haymond and Hochberg, in justifiable reliance on the misrepresentations and fraudulent omissions of Haymond, Hochberg, and Diamond. Under the October 13, 1997 Partnership Agreement, Haymond and Hochberg together owned 50% (Haymond 40% and Hochberg 10%) of Haymond and Lundy, LLP, a Pennsylvania law firm. Hochberg was to serve as managing partner, supervising day to day business and administration; Haymond was to supervise marketing; and Lundy was to devote his time to practicing law. Lundy would initially contribute his law practice; the new cases generated would provide business and revenue to the Pennsylvania law firm. Haymond and Hochberg would advance cash to cover initial working capital needs until the new cases generated revenue. Lundy also agreed to allow the name "Haymond and Lundy" to be used by Haymond in his offices in Connecticut and New York. Haymond and Hochberg were given effective control over the Pennsylvania law firm.

Although the Haymond and Lundy partnership began operating on October 13, 1997, Haymond and Hochberg did not sign the Partnership Agreement until November 17, 1997, the day Hochberg was sentenced in Massachusetts, and the day before he was disbarred. Neither the criminal proceedings, guilty plea, sentence, disbarment, nor suspension were disclosed² to Lundy personally or to the former associates of ML&L, who became associates of Haymond and Lundy, LLP, except for Diamond.

3. Post-Merger Activity of Haymond and Lundy, LLP

Haymond and Lundy, LLP opened offices at 1600 Market Street, 33rd Floor, in Philadelphia; the firm moved to 1635 Market Street, 19th Floor, in 1999. Hochberg was listed on the door as a practicing attorney, and saw clients despite his disbarment and suspension from every jurisdiction in which he was formerly licensed to practice law. Hochberg has never been admitted to practice law in Pennsylvania; Haymond was licensed to practice law in Pennsylvania. Hochberg, as managing partner and with Haymond's approval, had stationery printed for the Philadelphia and New Jersey offices of Haymond and Lundy, LLP that stated Hochberg was licensed to practice law in Connecticut. The Connecticut and New York offices did not list Hochberg as an attorney.

² Fiebach knew or had reason to know of Hochberg's criminal proceedings and potential future punishment. Lundy is attributed his lawyer's knowledge attained while acting as Lundy's agent in partnership negotiations. See 88 C.J.S. Attorney and Client § 182 (1980).

Hochberg never disclosed that he had been indicted, convicted, and sentenced for committing federal felony offenses, nor that he had been disbarred and suspended from the practice of law in connection with: 1) applications to obtain or extend financing from CoreStates Bank N.A. and its successor First Union National Bank; 2) negotiations of the lease for their offices at 1635 Market Street; and 3) dealings with other persons and entities to whom the knowledge of Hochberg's indictment, conviction, sentencing, disbarment, and suspension was material. Neither did Haymond disclose this information. Lundy avers he would never have sought, obtained, or guaranteed any financing for Haymond and Lundy, LLP, had he known of Hochberg's disbarment and suspension. The information and the proceeds from the lending institutions and the leases and lease payments, were sent through the United States mails.

Hochberg listed himself in a Pennsylvania Legal Directory as an attorney and Managing Partner of Haymond and Lundy, LLP. The Legal Directory listings were sent through the United States mails. Hochberg obtained the stationery for Haymond and Lundy, LLP listing him as an attorney licensed to practice law in Connecticut. The stationery for the Hartford firm of John Haymond, P.C. did not list Hochberg as an attorney. Haymond and Diamond were aware of and/or authorized the listings and identifications of Hochberg, his practice of law and solicitation

of clients.

Haymond and Hochberg referred twelve new cases to Haymond and Lundy, LLP between October, 1997 and October, 1999. Lundy developed and supervised all of the cases of Haymond and Lundy, LLP in Philadelphia and New Jersey; cases brought to the firm by Lundy generated \$7 million in fees. Hochberg and Haymond allegedly received all money to which they were entitled under the Partnership Agreement of Haymond and Lundy, LLP, but Lundy received no money from John Haymond, P.C., or any satellite offices, despite their use of the name Haymond and Lundy, LLP, and Lundy's advertising on their behalf.

The alleged overall scheme of the Hochberg parties was to take over Haymond and Lundy, LLP, and to allow Hochberg to practice law illegally in Pennsylvania.

In late summer, 1999, Haymond, Hochberg, and Lundy disagreed about firm marketing expenditures. As the disagreement escalated, Haymond and Hochberg began to solicit and meet with clients, dispense legal advice, and provide representation to clients of Haymond and Lundy, LLP in Philadelphia in an attempt to take the clients of Haymond and Lundy, LLP and start a new firm without Lundy. Lundy suspected Haymond and Hochberg of attempting to: 1) deprive Lundy of his rights under the Partnership Agreement; 2) commandeer monies attributable to the files of Lundy; and 3) entice lawyers at the Philadelphia offices

of Haymond and Lundy, LLP to join a new firm excluding Lundy. Lundy commenced investigations revealing the federal felony conviction, sentence, disbarment, and suspension of Hochberg. On October 8, 1999, Lundy dissolved Haymond and Lundy, LLP pursuant to the Partnership Agreement.

B. RICO Claims -- Discussion

Lundy claims RICO violations of 18 U.S.C. § 1962(c)³ (Count I), 18 U.S.C. § 1962(a)-(c)⁴ (Count II), and 18 U.S.C. § 1962(d)⁵ (Count III).

A RICO claim requires the allegation and proof of racketeering activity, defined as "no more and no less than the

³ 18 U.S.C. § 1962(c) states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

⁴ 18 U.S.C. § 1962(a) states:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

18 U.S.C. § 1962(b) states:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

⁵ 18 U.S.C. § 1962(d) states "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

commission of a predicate act." Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495 (1985). Lundy alleged the predicate racketeering acts of mail fraud, 18 U.S.C. § 1341; wire fraud, 18 U.S.C. § 1343; and fraud against a financial institution, 18 U.S.C. § 1344. Breach of contract, tortious interference with contract, or state law crimes not enumerated in 18 U.S.C. § 1961(1) are not predicate acts of racketeering activity under federal RICO. See Annulli v. Panikkar, 200 F.3d 189, 191 (3d Cir. 1999).

To prove the predicate offenses of mail and wire fraud, the scheme must be "reasonably calculated to deceive persons of ordinary prudence and comprehension." Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 528 (3d Cir. 1998). The Hochberg parties argue that Lundy could not have been deceived about Hochberg's conviction and sanctions because they were matters of public record and were discovered by Fiebach, Lundy's counsel, during partnership negotiations. See also Walters v. First Nat'l Bank, N.A., 855 F.2d 267 (6th Cir. 1988), cert. denied, 489 U.S. 1067 (1989). Fraud occurs only when a person of ordinary prudence and comprehension would rely on the misrepresentations. See Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 5612 (7th Cir. 1991) (finding no fraud where challenged statements were mere "puffery," could readily be checked by reference to publicly

available information, and were contradicted by documents that unambiguously refuted oral statements).

Fiebach, Lundy's counsel during the partnership negotiations, was aware of Hochberg's pending indictment. See RICO Case Statement at 5; see also 10/14/99 Transcript from TRO Hearing, at 59. Fiebach served as Lundy's agent; the knowledge gained by Fiebach during his representation of Lundy is reasonably attributed to Lundy. See 88 C.J.S. Attorney and Client § 182 (1980). Whether or not Lundy ever knew personally of Hochberg's indictment and eventual disbarment and suspension, a person (and of course, a lawyer) of ordinary prudence and comprehension such as Lundy or Fiebach could not rely on Hochberg's representations that "it would be speedily resolved, and with no consequence to Mr. Hochberg of any substance." RICO Case Statement at 5. Haymond and Hochberg's alleged scheme could not have been reasonably calculated to deceive persons of ordinary prudence and comprehension; no person of ordinary prudence would have relied on assurances that a pending indictment would have no effect on Hochberg's future ability to practice law. Information covering Hochberg's indictment, sentencing, and suspension/disbarment was available in accessible publications: the Wall Street Journal, the PR Wire Service, and the Boston Herald. Lundy (through Fiebach) could have and should

have known about these occurrences. Lundy has not stated a claim for the predicate acts of mail or wire fraud.

In addition to the predicate acts of mail and wire fraud, Lundy has alleged a scheme to defraud a financial institution under 18 U.S.C. § 1344. The alleged scheme involves documents submitted to CoreStates/First Union in connection with Promissory Notes obtained by and for Haymond & Lundy, LLP. A "common thread" throughout § 1962 is that an injured party must demonstrate the defendant was engaged in a pattern of racketeering activity. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987); Tabas v. Tabas, 47 F.3d 1280, 1289 (3d Cir. 1995). A "pattern" is established upon a showing of "continuity" and "relatedness" between at least two acts, the last of which occurred within ten years after the commission of a prior act of racketeering activity. See H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989). The single alleged fraud against CoreStates/First Union does not constitute a scheme; it is only one instance.⁶ At least two acts are required to establish a pattern to state a civil RICO claim.

A person "may not bring suit under § 1964(c) predicated on a violation of § 1962(d) for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the

⁶ Neither is Lundy a financial institution; he did not suffer any recoverable damages from the alleged scheme to defraud a financial institution.

statute." See Beck v. Prupis, -- U.S. --, 120 S.Ct. 1608, 1617 (2000). Lundy's claims under 18 U.S.C. § 1962(a), (b), (c), and (d) (Counts I, II, and III) will be dismissed.

C. Fraud Claims (Counts IV, V, and VI)

Lundy claims fraud and fraud in the inducement (Count IV), conspiracy to commit fraud (Count V), and aiding and abetting fraud (Count VI). Lundy claims the Hochberg parties misrepresented that Haymond and Hochberg were both attorneys in good standing, qualified and licensed to practice law, and qualified to be members of a Pennsylvania law partnership. Lundy claims: 1) Haymond and Hochberg failed to disclose Hochberg's indictment, conviction, disbarment, and suspension, constituting fraud; 2) the Hochberg parties conspired to commit fraud based on nondisclosure of the indictment, conviction, disbarment, and suspension; and 3) the Hochberg parties aided and abetted their fraud against Lundy. Lundy claims resulting damage to his reputation.

To prove fraud, a tort, a complainant must demonstrate: 1) a representation; 2) 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) injury, proximately caused. See Gruenwald v. Advanced Computer Apps., Inc., 730 A.2d 1004 (Pa.

Super. 1999).

There is no fraud for the reasons previously stated; there could be no reasonable reliance on the Hochberg parties' relevant assertions. But the claims are also barred by the parol evidence rule. Lundy claims fraud in the inducement to contract; in Pennsylvania, "the intent of the parties to a written contract is to be regarded as being embodied in the writing itself." Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982). "[T]he law declares the writing to be not only the best, but the only evidence" of the parties' agreement. Gianni v. Russell & Co., Inc., 126 A. 791, 792 (Pa. 1924); see Lenihan v. Howe, 674 A.2d 273, 275 (Pa. Super. 1996). "All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract" Union Storage Co. v. Speck, 45 A. 48, 49 (Pa. 1899); see HCB Contractors v. Liberty Place Hotel Assoc., 652 A.2d 1278, 1279 (Pa. 1995).

The parol evidence rule bars evidence of a prior representation in a fully integrated written agreement. See 1726 Cherry Street Part. v. Bell Atlantic, 653 A.2d 663 (Pa. Super. 1995). Parol evidence is admissible only to show fraud in the execution of a contract, not to vary the terms of the contract based on fraud in the inducement, see HCB Contractors v. Liberty Place Hotel Assoc., 539 Pa. 395, 652 A.2d 1278 (1995), unless it is averred that the representations were omitted from the

complete written contract by fraud, accident or mistake, see Horizon Unlimited, Inc. v. Silva, No. 97-7430, 1998 U.S. Dist. LEXIS 2223 (E.D. Pa. Feb. 26, 1998).

The Haymond and Lundy, LLP Partnership Agreement is fully integrated; the agreement states:

11.08 Entire Agreement. This agreement contains the entire understanding among the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, except as herein contained. The express terms hereof control and supersede any course of performance and/or usage of the trade inconsistent with any of the terms hereof. This Agreement may not be modified or amended other than by an agreement in writing.

November, 1997 Partnership Agreement, p.14.

The integration clause is clear and unambiguous, restricting the agreement to the four corners of the Partnership Agreement. Fiebach knew Hochberg was facing indictment during the partnership negotiations; Fiebach "confronted Mr. Hochberg with the fact of his pending indictment" in April, 1997, months before the Partnership Agreement was signed. See RICO Case Statement at 5. Fiebach was assured that the indictment was "technical," and that it would be "speedily resolved, and with no consequence to Mr. Hochberg of any substance; furthermore, that there would be no effect upon either Mr. Hochberg's Massachusetts or Connecticut license." Id. If Lundy (through Fiebach) relied on what he now contends was a centrally important representation conveyed by Haymond and Hochberg in the course of their partnership

negotiations, Lundy "should have insisted that the representation be set forth in their integrated written agreement." 1726 Cherry Street, 653 A.2d at 670.

Lundy is barred from using parol evidence that he was fraudulently induced into entering the partnership. See id. Lundy entered the partnership with Haymond and Hochberg with at least imputed knowledge of Hochberg's indictment, his guilty plea, and the attendant possibility of disbarment or suspension in Massachusetts and/or Connecticut. The Partnership Agreement is silent as to these facts specifically and as to attorney good standing generally. The parol evidence rule bars evidence of alleged prior fraudulent misrepresentations or omissions; Lundy's fraud in the inducement and associated fraud claims cannot proceed as a matter of law because there was no actionable fraud as a matter of law. Counts IV, V, and VI will be dismissed.

D. Negligent Misrepresentation (Count VII)

A claim of negligent misrepresentation requires: 1) misrepresentation of a material fact; 2) that the representor either knew of the misrepresentation, made the misrepresentation without knowledge as to its truth or falsity, or made the representation under circumstances in which he ought to have known of its falsity; 3) that the representor intended the representation to induce another to act on it; and 4) that injury resulted to the party acting in justifiable reliance on the

misrepresentation. See Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994). There is no negligent misrepresentation for the reasons previously stated; there could be no reasonable reliance on the Hochberg parties' assertions. Though negligent misrepresentation is distinct from fraud, Lundy cannot state a claim for either because he could not have reasonably relied on the Hochberg parties' assertions. Count VII will be dismissed.

E. Breach of Fiduciary Duty (Count VIII)

The Hochberg parties argue that the breach of fiduciary duty claim (Count VIII) sounds in tort, and is precluded by the breach of Partnership Agreement claim (Count IX)⁷ unless the wrong of the defendant is the "gist of the action," and the contract is collateral. Under Pennsylvania law, when the tort involves actions arising from a contractual relationship, the plaintiff is limited to an action under the contract; there is conflicting law in Pennsylvania on when contract and tort claims can coexist in the same action. See, e.g., Grode v. Mutual Fire, Marine, And Inland Ins. Co., 623 A.2d 933, 936 (Pa. Cmwlth. 1993); Horizon Unlimited, Inc. v. Silva, No. 97-7430, 1998 U.S. Dist. LEXIS 2223, at *13 (E.D. Pa. Feb. 26, 1998); Allied Fire & Safety Equipment Co., Inc. v. Dick Enterprises, Inc., 972 F. Supp. 922, 936-37 (E.D. Pa. 1997). If rights are specified by a contract, one cannot ordinarily recover in contract for breach and in tort

⁷ The Hochberg parties do not move to dismiss Count IX.

arising from the same performance or non performance under the contract. See People Mortg. Co., Inc. v. Federal National Mortg. Ass'n., 856 F. Supp. 910 (E.D. Pa. 1994).

The gist of the action determines the essential nature of the claims; contract and tort actions are distinguished on the basis of the source of the duties allegedly breached. If the complaint essentially alleges a breach of duties flowing from an agreement between the parties, the action is contractual in nature; if the duties allegedly breached were of a type imposed on members of society as a matter of social policy, the action is essentially tort-based. See Phico Ins. Co. v. Presbyterian Medical Serv. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995); American Guarantee And Liability Insurance Company V. Fojanini, 90 F. Supp. 2d -- (E.D. Pa. 2000). To proceed in tort, the wrong ascribed to the defendant must be the gist of the action, and the contract collateral. See Redevelopment Authority of Cambria v. Int'l Insurance Co., 685 A.2d 581, 590 (Pa. Super. 1996). Caution must be exercised in dismissing a tort action on a motion to dismiss because whether tort and contract claims are separate and distinct can be a factually intensive inquiry. See Grode v. Mutual Fire Ins. Co., 623 A.2d 933 (Pa. Cmwltth. 1993); Martin v. Hale Prods., Inc., 699 A.2d 1283 (Pa. Super. 1997).

Lundy's tort claim alleges that before and after the Partnership Agreement was in effect, the Hochberg parties

attempted to solicit and take away Lundy's associates and cases, and to take over Haymond and Lundy, LLP. Lundy's contract claim alleges the same conduct during the time the Partnership Agreement was in existence. The only difference between the tort and contract claims is temporal, not substantive. Lundy's claims, in the light most favorable to their viability, do not sound primarily in tort and collaterally in contract. The gist of the action is a breach of contract, not anything else. Count VIII will be dismissed.

F. Unauthorized Practice of Law (Count X)

Lundy alleges Hochberg engaged in the unauthorized practice of law in Pennsylvania, and that Haymond and Diamond aided, abetted, and conspired to assist Hochberg to engage in the unauthorized practice of law (Count X). Lundy seeks an injunction against: 1) Hochberg's alleged unauthorized practice of law; and 2) Haymond and Diamond's related assistance. It is criminal to convey the impression that one who is not an attorney at law is a practitioner of the law of any jurisdiction. See 42 Pa. C.S.A. § 2524(a). 42 Pa. C.S.A. § 2524(c) appears to create a private right of action; it states:

In addition to criminal prosecution, unauthorized practice of law may be enjoined in any county court of common pleas having personal jurisdiction over the defendant. The party obtaining such an injunction may be awarded costs and expenses incurred, including reasonable attorney fees, against the enjoined party. A violation of subsection (a) is also a violation of . . . the Unfair Trade Practices and Consumer Protection Law. (Emphasis added).

The statute contemplates a private action to enjoin the unauthorized practice of law. A private right of action may be implied from the text of the statute. Count X will not be dismissed; Lundy will be allowed discovery into the nature and extent of Hochberg's alleged unauthorized practice of law, as well as the Haymond and Diamond involvement, if any.

II. Lundy's Motion to Dismiss the Complaint of Haymond and Haymond Napoli Diamond, P.C.

Haymond and Haymond Napoli Diamond, P.C. ("HND") filed a complaint the same day as Lundy, and later filed an amended complaint. Haymond claims Anticipatory Breach of Contract (Count I), Injunctive Relief (Claim II), and Breach of Fiduciary Duty (Count VI). HND claims violations of the Lanham Act (Count III), Unfair Competition (Count IV), and Tortious Interference (Count

V).⁸ Lundy moved to dismiss and/or for summary judgment.⁹ The facts as pled in the First Amended Complaint are as follows.

On or about November, 1997, Haymond, Hochberg, and Lundy entered into a written Partnership Agreement to form the Pennsylvania law firm of Haymond and Lundy, LLP. The Partnership Agreement permitted Hochberg to assign, and Hochberg did assign, his partnership interest to Haymond. Hochberg became firm administrator for Haymond and Lundy, LLP.

By letter dated October 8, 1999, Lundy dissolved the partnership pursuant to Article 9.01(c) of the Partnership

⁸ A foreign business corporation must procure from the Department of State a certificate of authority to do business before it can do business in Pennsylvania or bring an action in Pennsylvania courts. See 15 Pa. C.S.A. § 4121(a), 4141(a). Lundy argues that HND, a Connecticut Professional Corporation doing business in Pennsylvania at least since October 15, 1999, see HND Amended complaint at ¶ 18, neither sought nor obtained authorization to do business in Pennsylvania; therefore, HND cannot bring any claims in a Pennsylvania court, especially state law claims of unfair competition and tortious interference. See 15 Pa. C.S.A. § 4141(a). HND responds that on November 29, 1999 (after this action was filed) it registered to do business in Pennsylvania under 15 Pa. C.S.A. § 4124, so that Lundy's argument is moot.

Pennsylvania law cannot deny a complainant a federal law cause of action; Count III survives. But see Aberle Hosiery Co. v. American Arbitration Ass'n, 337 F. Supp. 90 (E.D. Pa. 1972) (provision of former section stating foreign corporation transacting business within Commonwealth without certificate of authority may not maintain action in any court of the Commonwealth, precluded such corporation from maintaining an action in federal as well as state court). Regardless, HND's filing of an application for a Certificate of Authority allows it to proceed in this court on all counts. No Pennsylvania statute or Supreme Court case requires this court to dismiss an action by a party that complies with 15 Pa. C.S.A. § 4141(a) before a dispositive ruling is made. See, e.g., International Inventors Inc., East v. Berger, 363 A.2d 1262, 1264 (Pa. Super. 1976). Counts III, IV, and V will be considered on their merits.

⁹ No motion for summary judgment is timely until completion of discovery, which has been stayed. The court cannot consider a motion for summary judgment at this time. In considering Lundy's motion to dismiss under Rule 12(b)(6), the court will take all the well pleaded allegations as true, construe the complaint in the light most favorable to the HND plaintiffs, and determine whether, under any reasonable reading of the pleadings, the plaintiffs may be entitled to relief.

Agreement.¹⁰ In the October 8, 1999 letter, Lundy asserted that any entitlements Haymond had under the Partnership Agreement were void. Haymond denies the Partnership Agreement is void, and that he remains willing to perform his duties and responsibilities thereunder.

On October 15, 1999 Lundy was notified in writing that George Szymanski, Scott Diamond, David Berman, Andrew Napoli, Robert Pollan, and Jack Bernstein, all attorneys associated with Haymond and Lundy, LLP, had accepted employment with Haymond. Also on or about October 15, 1999, John Haymond, P.C., also known then as Haymond and Lundy, P.C., a Connecticut professional corporation, changed its name to Haymond Napoli Diamond, P.C. ("HND").

After October 15, 1999, Lundy distributed writings in interstate commerce that Messrs. Szymanski, Diamond, Berman, Napoli, Pollan, and Bernstein were still partners or associates in Marvin Lundy & Associates, LLP. On more than one instance, including on or about August 23, 1999, Lundy, without the consent of Haymond, caused a Haymond and Lundy, LLP check to be issued to a non-lawyer solely as payment for a client referral. After October 8, 1999, Lundy communicated to clients of the former Haymond and Lundy, LLP that he had been handling their cases,

¹⁰ Article 9.01 of the Partnership Agreement permits Haymond or Lundy to dissolve the partnership at any time. Upon a decision to dissolve, Article 9 contains extensive provisions about how partnership affairs are to be concluded and assets distributed.

when those cases or claims had been handled by other Haymond and Lundy, LLP attorneys, including Messrs. Szymanski, Diamond, Berman, Napoli, Pollan, and Bernstein.

A. Lanham Act (Count III) and Unfair Competition (Count IV)

HND claims Lundy's use of the names of Messrs. Szymanski, Diamond, Berman, Napoli, Pollan, and Bernstein in interstate commerce was likely to cause confusion and mistake as to the affiliation of those persons, in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A). HND further claims Lundy misrepresented the nature, qualities, and geographic origin of his services in commercial advertising and promotion, in violation of 15 U.S.C. § 1125(a)(1)(B).

15 U.S.C. § 1125(a)(1)(A) and (B) state:

Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

To succeed on a 15 U.S.C. § 1125(a)(1)(A) claim, HND must prove that: 1) Lundy used a false designation of origin, as defined in the Act; 2) such use of a false designation occurred in interstate commerce in connection with goods and services; 3) such false designation is likely to cause confusion, mistake or deception as to the origin, sponsorship, or approval of Lundy's goods or services by another person; and 4) HND is likely to be damaged. See AT&T Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1428 (3d Cir. 1994).

A false designation of origin is one likely "to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person. . . ." 15 U.S.C. § 1125(a)(1). HND alleged that:

Notwithstanding the written notification to him on October 15, 1999, defendant Lundy has misrepresented in writing in interstate commerce that Messrs. Szymanski, diamond, Berman, Napoli, Pollan and Bernstein are partners in or associates of Marvin Lundy & Associates, LLP.

Haymond and HND First Amended Complaint ¶ 19.

¶ 19 adequately alleges Lundy's use of a false designation of origin in interstate commerce related to provision of legal services.

HND pleads that Lundy's alleged false designation is likely to cause confusion, mistake, or deception as to the origin of the

legal services of Marvin Lundy & Associates, LLP. HND alleged that:

In connection with his legal services, defendant Lundy has used the names of Messrs. Szymanski, diamond, Berman, Napoli, Pollan and Bernstein in interstate commerce in a manner which is likely to cause, and on information and belief, has caused, confusion and mistake as to the affiliation of those persons

Haymond and HND First Amended Complaint ¶ 32.

¶ 32 adequately satisfies the requirement that the false designation is likely to cause confusion, mistake, or deception as to the origin of the legal services. Lundy argues that counsel for HND could only produce one letter in support of its Lanham Act claim, a letter dated October 16, 1999, addressed to Paoli Surgery Center and signed by Kim Morrissey, then a Lundy case manager: the letter listed Messrs. Szymanski, Diamond, Berman, Napoli, Pollan and Bernstein on Marvin Lundy & Associates, LLP stationery. Lundy claims this one letter cannot support the Lanham Act claim because: 1) it was not sent by Lundy, but by his case manager (who eventually was employed by HND); and 2) the letter was not sent to a client to solicit business, but to a surgery center to obtain evidence for a Haymond and Lundy, LLP case.

At the motion to dismiss stage, the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may

be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). Discovery has been stayed and may produce some evidence in support of HND's allegation of public confusion.

HND pleads that it has been or likely will be damaged. HND alleges:

As a result of defendant Lundy's unlawful conduct, plaintiff HND has been injured in an amount as yet undetermined, but believed to be in the hundreds of thousands of dollars.

Haymond and HND First Amended Complaint ¶ 32.

¶ 32 satisfies the 15 U.S.C. § 1125(a)(1)(A) requirement that HND is likely to be damaged.

15 U.S.C. § 1125(a)(1)(B) protects against unfair competition through misrepresentations in commercial advertising or promotion in interstate commerce. HND pleads:

Subsequent to October 8, 1999, in an effort to induce clients of Haymond and Lundy, LLP to retain defendant Lundy and his new firm Marvin Lundy & Associates, LLP, defendant Lundy has knowingly misrepresented to those clients that he had personally been handling their cases or claims, when in fact those cases and claims had been and are being handled by other attorneys at Haymond and Lundy, LLP, including Messrs. Szymanski, Diamond, Berman, Napoli, Pollan and Bernstein. See Haymond and HND First Amended Complaint ¶ 20.

In connection with his legal services, defendant Lundy has, in commercial advertising and promotion, misrepresented the nature, qualities and geographic origin of his services See Haymond and HND First Amended Complaint ¶ 33.

In the case of clients in New Jersey, defendants [sic] Lundy's representation was further knowingly and intentionally false because defendant Lundy is not admitted to the practice of law in New Jersey and neither he or [sic]

Marvin Lundy & Associates, LLP maintained a bona fide office in New Jersey. See Haymond and HND First Amended Complaint ¶ 21.

Read in the light most favorable to HND, HND has stated a claim of misrepresentation in commercial advertising or promotion. Lundy refers to specific letters in support of an argument that HND has insufficient evidence to support its claim. But factual arguments and theories of motive and intent are not appropriate on a motion to dismiss. HND's pleadings are sufficient to survive such a motion because if HND's factual allegations are proved, it may obtain judgment on its claim under 15 U.S.C. § 11254(a)(1)(B). The motion to dismiss Count III will be denied.

Count IV asserts a claim of unfair competition. The elements of a cause of action for unfair competition under Pennsylvania common law "are identical to those for a claim under [15 U.S.C. § 1125(a)(1)] of the Lanham Act, with the exception that the goods need not have traveled in interstate commerce. . . ." Guardian Life Insur. Co. of America v. American Guardian Life Assur. Co., 943 F. Supp. 509, 525 (E.D. Pa. 1996). Since the motion to dismiss the Lanham Act claim will be denied, the motion to dismiss Count IV will also be denied.

B. Tortious Interference (Count V)

Pennsylvania recognizes both interference with existing and prospective contractual relations as torts. See Brokerage

Concepts, Inc. v. U.S. Healthcare, 140 F.3d 494, 529 (3d Cir. 1998). To prevail on a claim for intentional interference with existing or prospective contractual relations, plaintiff must prove:

- 1) . . . existence of a contractual, or prospective contractual relation between itself and a third party;
- 2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent the prospective relation from occurring;
- 3) . . . absence of a privilege or justification on the part of the defendant;
- 4) . . . actual legal damage as a result of the defendants' conduct; and
- 5) . . . a reasonable likelihood that [an alleged prospective contract] would have [been consummated] but for the interference of the defendant.

Id. at 530 (citing Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979); Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. 1988)). A motion to dismiss cannot be granted if there is a set of facts upon which plaintiff could prevail on its claim. See Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). HND did have prospective contractual relationships with at least one third of the clients of the former Haymond and Lundy, LLP (excluding those clients of Manchel, Lessin & Lundy) under the Partnership Agreement. See Partnership Agreement § 9.02(e). HND argues Lundy mailed solicitation letters to all clients of Haymond and Lundy, LLP to retain them as clients, and that this action, read in the light most favorable to HND, was purposefully

intended to prevent HND from obtaining any prospective clients from the former firm of Haymond and Lundy, LLP. For purposes of the motion to dismiss, Lundy had no privilege or justification, and HND claims actual damages resulted.

Anything that is prospective in nature is necessarily uncertain; "[w]e are not here dealing with certainties, but with reasonable likelihood or probability." Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471-72 (Pa. 1979) (expectation that year-to-year lease would be renewed is too uncertain to state a claim). A prospective contractual relationship "is something less than a contractual right, something more than a mere hope." Id.; compare KBT Corp., Inc. v. Ceridian Corp., 966 F.Supp. 369, 376 (E.D. Pa. 1997) (existence of a mechanism that would bring in new business on a regular basis is sufficient to withstand motion to dismiss), with Ebeling & Reuss, Ltd. v. Swarovski Int'l Trading Corp., No. 88-4878, 1992 WL 211554, *7 (E.D. Pa. Aug. 24, 1992) (a single letter mailed to retailers that allegedly caused a drop in sales several months later was not sufficient to sustain a claim). HND pled that there was a reasonable probability that it would be retained in some cases, presumptively one third of the former Haymond and Lundy, LLP cases, and that the probability substantially increased when Messrs. Szymanski, Diamond, Berman, Napoli, Pollan, and Bernstein chose to practice with HND. See Haymond and HND First Amended

Complaint ¶ 18. A set of facts exists upon which HND may succeed on its claim; Count V will not be dismissed, without prejudice to a motion for summary judgment or for dismissal at trial.

C. Anticipatory Breach of Contract (Count I) & Claim for Injunctive Relief (Count II)

Lundy argues that Haymond's failure to join Haymond and Lundy, LLP as a necessary party requires dismissal of Counts I and II.¹¹

Federal Rule of Civil Procedure 19 provides for compulsory joinder of parties. See HB General Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1190 (3d Cir. 1996). A court must first determine whether the person should be joined under Rule 19(a); if 19(a) is satisfied but joinder is not feasible, the court applies Rule 19(b) to determine whether "in equity and good conscience," the party is "indispensable." See id.

Fed. R. Civ. Proc. 19(a) provides:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

¹¹ Lundy makes the same argument as to Counts V (Tortious Interference) and VI (Breach of Fiduciary Duty).

Lundy argues that Haymond and Lundy, LLP is a necessary and indispensable party because: 1) In Counts I and II, Haymond claims Lundy must comply with the terms and conditions of the Haymond and Lundy, LLP Partnership Agreement, particularly Article 9 (concerning dissolution of the partnership); 2) in Count V, HND's allegation of tortious interference is based on Lundy's alleged interference with contracts of Haymond and Lundy, LLP; and 3) in Count VI, HND's allegation of breach of Lundy's fiduciary duty arises from payment of referral fees to non-lawyers with respect to Haymond and Lundy, LLP cases.

Haymond and Lundy, LLP has an interest in this action; the allegations that Lundy committed an anticipatory breach of the Partnership Agreement and breached his fiduciary duty by paying referral fees implicate the former partnership's interests.¹² But Haymond and Lundy, LLP would not be prejudiced by being excluded from this action. "A partnership's interests as an entity consist of an aggregation of those interests of each of the individual partners that are relevant to the purpose of the partnership. . . . [I]t is possible that a partnership's interests can be effectively represented in litigation by participation of its partners." HB General Corp., 95 F.3d at 1193.

¹² As discussed above, the tortious interference claim does not involve the interest of Haymond and Lundy, LLP.

When this action was filed, there were two partners in Haymond and Lundy, LLP, Lundy and Haymond, both of whom are parties to this litigation. Lundy has failed to establish that Haymond and Lundy, LLP has any interest different from the interest of the partners. To the extent either partner acted against the interest of Haymond and Lundy, LLP, the adversary party will advance the interests of Haymond and Lundy, LLP as a matter of course.

Haymond and Lundy, LLP was dissolved in October, 1999. It is not a necessary party under Fed. R. Civ. Proc. 19. Counts I and II will not be dismissed.

D. Breach of Fiduciary Duty (Count VI)

Haymond and Lundy, LLP was a registered Pennsylvania limited liability partnership. The general partner of a limited partnership owes the partnership and his partners the fiduciary duty of loyalty. See Clement v. Clement, 260 A.2d 728, 729 (Pa. 1970). "[P]artners owe a fiduciary duty one to another. . . . One should not have to deal with his partner as though he were the opposite party in an arms-length transaction. One should be allowed to trust his partner, to expect that he is pursuing a common goal and not working at cross-purposes." Id.

The fiduciary duty between partners has limits; the existence of a partnership does not transform every interaction among partners into a specific fiduciary duty. For purposes of

the motion to dismiss, it is fact that: 1) Lundy used the assets of Haymond and Lundy, LLP to pay non-lawyers to forward cases to Lundy; and 2) such payments are unethical under Pennsylvania Rule of Professional Conduct 7.2(c). Haymond has not stated a legal claim for breach of fiduciary duty. Haymond's pleading does not implicate the generally accepted duties of good faith, fairness, and loyalty that Lundy owed to Haymond. To the extent Lundy's referral fees produced greatly increased value for Haymond and Lundy, LLP by way of increased profits per partner, Haymond can not establish a claim for damages from Lundy's conduct. See, e.g., Greenan v. Ernst, 184 A.2d 570, 578 (Pa. 1962). Count VI will be dismissed.

III. Jurisdiction

The court has federal question jurisdiction over Haymond and HND's Lanham Act claims against Marvin Lundy. See 28 U.S.C. § 1331. The court will entertain supplemental jurisdiction over the remaining claims of Haymond, HND, and Marvin Lundy. See 28 U.S.C. § 1367.

CONCLUSION

Lundy's claims of breach of partnership agreement (Count IX) and unauthorized practice of law (Count X) will proceed. Haymond and Haymond Napoli Diamond, P.C.'s claims of anticipatory breach of contract (Count I), injunctive relief (Count II), Lanham Act

violations (Count III), unfair competition (Count IV), and tortious interference (Count V) will proceed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HAYMOND : CIVIL ACTION
 :
 v. :
 :
 MARVIN LUNDY : No. 99-5015

MARVIN LUNDY : CIVIL ACTION
 :
 v. :
 :
 ROBERT HOCHBERG, :
 JOHN HAYMOND, :
 JOHN HAYMOND, P.C. T/A HAYMOND & LUNDY, :
 SCOTT E. DIAMOND, & :
 HAYMOND NAPOLI DIAMOND, P.C. : No. 99-5048

ORDER

AND NOW, this 22nd day of June, 2000, in consideration of the Motion to Dismiss Counts I Through VIII and X of First Amended Complaint of Marvin Lundy, Marvin Lundy's Response thereto, the Motion of Marvin Lundy to Dismiss and/or for Summary Judgment Dismissing First Amended Complaint, the Memorandum in Opposition to Motion of Marvin Lundy to Dismiss First Amended Complaint, and the Reply Memorandum of Marvin Lundy In Support of His Motion to Dismiss, and after a hearing at which all parties were heard,

It is **ORDERED** that:

1. The Motion to Dismiss Counts I through VIII and X of Marvin Lundy's First Amended Complaint is **GRANTED IN PART** and **DENIED IN PART**. Counts I-VIII are **DISMISSED**. The action will proceed on Counts IX and X.

2. The Motion of Marvin Lundy to Dismiss and/or for Summary Judgment Dismissing First Amended Complaint is **GRANTED IN PART** and **DENIED IN PART**. Count VI is **DISMISSED**. The action will proceed on Counts I-V.

3. All claims against John Haymond, P.C. and Haymond Napoli Diamond, P.C. are dismissed; they are dismissed as parties.

4. A hearing will be scheduled to set a discovery schedule.

S.J.