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

I & S ASSOCIATES TRUST,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 99-4956
	:	
v.	:	
	:	
LaSALLE NATIONAL BANK, et al	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

YOHN, J. SEPTEMBER ___, 2001

Plaintiff I & S Associates ["I & S"] brought this action against defendants, LaSalle National Bank ["LaSalle"] and GMAC Commercial Mortgage Corporation ["GMAC"], alleging breach of contract, negligence, negligent misrepresentation, violation of 21 P.S. § 681, 682 *et. seq.* and breach of a fiduciary duty and the duty of good faith and fair dealing. GMAC then joined Brown, Rudnik, Freed & Gesmer, P.C. ("Brown Rudnik") as a third-party defendant to the litigation. Subsequently, I & S amended its complaint adding Count VIII against Brown Rudnik, alleging negligence. This court hears this case through its diversity jurisdiction.[1]

Presently before the court are Brown Rudnik's motion for summary judgment on plaintiff's amended complaint (Doc. 150) and Brown Rudnik's supplemental motion for summary judgment or in the alternative partial summary judgment to limit the damages available

[1] This court will apply Pennsylvania law. Brown Rudnik asserts that Pennsylvania law is applicable and I & S does not dispute this fact. As the property that forms the basis of this action is located in Pennsylvania, I also find no reason to dispute the application of Pennsylvania law.

to I & S (Doc. 158).

Brown Rudnik was retained to represent GMAC, the servicing agent for LaSalle, with respect to I & S's assumption of the North Queen Street Limited Partnership (North Queen") loan obligation to LaSalle. Prior to finalizing the assumption, Brown Rudnik sent counsel for I & S copies of the underlying loan documents, including a promissory note that did not impose a penalty for early payment of the loan principal. This promissory note, however, was not the note that governed the terms of theNorth Queen/ LaSalle loan obligation. The operative note provided for a prepayment penalty. Because I & S has demonstrated a genuine issue of material fact as to whether it justifiably relied on the representations of Brown Rudnik as to the absence of a prepayment penalty when purchasing the property and assuming the loan obligation, I will deny Brown Rudnik's motion for summary judgment on Count VIII of plaintiff's amended complaint. In addition, because a reasonable person could find that I & S may have been reasonable in not mitigating its damages by paying the $1.2 million dollar penalty imposed by LaSalle, I will deny Brown Rudnik's motion for partial summary judgment to limit damages available to I & S.

BACKGROUND

On August 7, 1997, Granite Investment I Corp ("Granite") and North Queen borrowed $8,250,000 from Boston Capital Mortgage Company Limited Partnership ("Boston Capital"). Am. Compl. [Doc. No. 127] ¶ 1. They secured this loan by a Mortgage and Security Agreement encumbering certain property located in Lancaster, Pennsylvania. *Id.* A promissory note dated August 8, 1997 ("Note I") memorialized the obligations of Granite and North Queen to repay Boston Capital. Am. Compl. Ex. B. The terms of Note I do not include a clause requiring

payment of a penalty or premium for early payment of the principal amount due on the note. *Id.*

After Note I was executed, Granite and North Queen realized that the note mistakenly omitted the agreed upon prepayment penalty clause. Doc. No. 110, Ex. A, Greene Dep. at 154-55. Instead, the prepayment penalty clause had been included in North Queen's mezzanine note. Doc. No. 98, Ex. B, Greene Dep. at 82. In order to remedy this mistake, the parties modified Note I by issuing a second promissory note ("Note II"), dated August 8, 1997 and executed on September 3, 1997, which included the prepayment penalty clause. Doc. No. 96, Ex. C.

On June 30, 1998, Granite conveyed its interest in the property and assigned its obligations under Note I to North Queen. Am. Compl. ¶ 10. On July 13, 1998, plaintiff, I &S bought the property from North Queen and assumed North Queen's obligations on the mortgage, including the "promissory note." Am. Compl. Ex. E. Additionally, sometime prior to closing on the property, Boston Capital assigned all of its rights and interests in the loan to LaSalle. Am. Compl. ¶ 13. Accordingly, on July 13, 1998, I & S owed an obligation to repay the loan to LaSalle. GMAC was the servicing agent for the lender at all relevant times. *Id.* ¶ 14.

At some point before I & S and North Queen agreed to the property sale, counsel for GMAC, Brown Rudnik, mistakenly sent counsel for I & S a copy of Note I, instead of the operative Note II. Am. Compl. ¶ 15. I & S claims to have relied on the terms of Note I, in particular the absence of a prepayment penalty clause, when it decided to purchase the property from North Queen. Id. ¶ 17.

On March 16, 1999, counsel for I & S wrote to GMAC, requesting confirmation that I & S would not be required to pay a penalty if it prepaid any of the outstanding principal balance on the note. Id., Ex. F. In a letter dated March 24, 1999, GMAC responded that it would impose a

prepayment premium in accordance with the provisions of Note II. Id., Ex. G. At that point a dispute arose between LaSalle and I & S as to which promissory note provided the terms of their loan arrangement.

On October 6, 1999, I & S filed a five count complaint against LaSalle and GMAC. On March 12, 2001, I & S filed an amended complaint, adding two claims against LaSalle and GMAC and a claim against Brown Rudnik, alleging negligence.[2]

STANDARD OF REVIEW

Either party to a lawsuit may file a motion for summary judgment, and it will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "'Facts that could alter the outcome are "material", and disputes are "genuine" if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, "all justifiable inferences are to be drawn in [the non-movant's] favor." *Id.* However, "'[s]ummary judgment may not be granted . . . if there is a disagreement

[2] The complaint alleges negligence. Brown Rudnik has interpreted this as a claim for negligence, negligent misrepresentation and professional negligence and plaintiff has responded in kind. Thus, the court will analyze the claim as one of negligence, negligent misrepresentation and professional negligence.

over what inferences can be reasonably drawn from the facts even if the facts are undisputed.'" *Ideal Dairy*, 90 F.3d at 744 (citation omitted). At the same time, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

DISCUSSION

I. Negligence, Negligent Misrepresentation & Professional Negligence

A. Economic Loss Doctrine

I & S alleges that Brown Rudnik was negligent in sending I & S the wrong promissory note and in representing that this note governed the loan being assumed. Am.Compl. ¶ 81. I & S seeks to recover under negligence for its economic losses, particularly debt service damages, loss of market value, and rental loss damage. In Pennsylvania, however, the economic loss doctrine bars a plaintiff from bringing a negligence action solely for economic losses absent physical injury or property damage. *Ellenbogen v. PNC Bank*, 731 A.2d 175, 188 (Pa. Super. Ct. 1999).[3]

[3] Defendant raises the economic loss doctrine as a bar to I & S's pure negligence claim. I & S apparently concedes that a negligence claim against Brown Rudnik can not be maintained, as I & S offers no argument as to why the economic loss doctrine should not bar its claim of pure negligence.

Neither party raises the economic loss doctrine with regard to the claim of professional

Recently, federal courts applying Pennsylvania law have extended the economic loss doctrine to cases involving negligent misrepresentation. *North American Roofing & Sheet Metal Co., Inc v. Bldg. & Constr. Trades Council of Philadelphia & Vicinity*, CIV. A. 99-2050, 2000 WL 230214 (E.D.Pa. Feb. 29, 2000). In negligent misrepresentation cases the economic loss doctrine does not apply in two instances: (1) when the misrepresentation is intentionally false and (2) when the defendant is "in the business of supplying information for the guidance of others." *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp 1269, 1274 (M.D.Pa. 1990).
Courts have noted that attorneys are considered to be in such a business. *Auger v. The Stouffer Corp.*, No. 9302529, 1993 WL 364622 (E.D.Pa. Aug. 31, 1993).; *Palco Linings*, 755 F. Supp. at 1274 (noting that attorneys are included within the category of people who fit within the second exception to the economic loss doctrine).

The facts here are not disputed. Brown Rudnik, acting as attorney for LaSalle and GMAC, supplied information regarding the underlying loan obligation, including the incorrect promissory note, to I & S. I & S claims to have been guided by these documents when assuming the North Queen loan obligation although this issue is in serious dispute. Brown Rudnik's alleged negligence occurred when supplying information for the guidance of I & S, thereby invoking the second exception to the application of the economic loss doctrine. Thus, unlike I & S's straight negligence claim against Brown Rudnik, the economic loss doctrine is not an absolute bar to I & S's negligent misrepresentation claim against Brown Rudnik.[4]

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negligence. Therefore, I will not consider whether the economic loss doctrine has applicability to a claim of professional negligence.

[4] Although plaintiff bases its negligent misrepresentation claim on § 552 of the Restatement (second) of Torts, neither party considers whether § 552B is applicable, and if so,

B. Privity Requirement

Brown Rudnik asserts that I & S's claim of negligent misrepresentation cannot be maintained because such a claim requires there to be privity between plaintiff and defendant, and no such privity exists between I & S and Brown Rudnik. Doc. 135 at 8. I & S counters that, under Pennsylvania law, privity is not required to maintain an action of negligent misrepresentation against an attorney. Doc. 140 at 3. Section 552 of the Restatement (second) of Torts, adopted by Pennsylvania, stipulates that a negligent misrepresentation defendant be either a person who is in the business of supplying information for the guidance of others or one who negligently supplies false information in a transaction in which he has a pecuniary interest.[5] *First Options of Chicago, Inc. v. Wallenstein*, CIV. A. 92-5770, 1994 WL 229554 at * 4 (E.D.Pa. May 26, 1994; *see also Rempel v, Nationwide Life Ins.*, 370 A.2d 366, 367-69 (Pa. 1977) (adopting Restatement (second) of Torts). In Eisenberg v. Gagnon, the Third Circuit, held that when a defendant has a pecuniary interest in a transaction, privity is not required to bring a negligent misrepresentation action. 766 F.2d 770, 779-80 (3d Cir. 1985). In reaching this conclusion, the court discussed both possible scenarios for imposing negligent misrepresentation liability and

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the result therefrom. Section 552B limits the damages recoverable to a plaintiff for negligent misrepresentation.

[5] Section 552 provides as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> Restatement (Second) Torts § 552.

gave no indication that privity is required when a negligent misrepresentation defendant is in the business of supplying of information for the guidance of others. As a result, I see no reason to require privity when a negligent misrepresentation claim is based on the first scenario, as it is in the present action. Therefore, the lack of privity between I & S and Brown Rudnik is not fatal to I & S's negligent misrepresentation claim.

However, in order for I & S to maintain its professional negligence claim against Brown Rudnik, privity, or at least a substantial undertaking on I & S's behalf, is required. Pennsylvania courts are cautious about abandoning the traditional requirement that a defendant must be in privity with an attorney in order to maintain an action for professional negligence. It is feared that a complete elimination of the privity requirement would expand an attorney's liability for professional negligence to an indeterminate class of potential plaintiffs. *Mil-Mar, Inc. v. Statham*, 420 A.2d 548, 551 (Pa. Super. Ct. 1980). Nonetheless, there are some special circumstances in which the absence of strict privity does not bar a third party from bringing a tort action against an attorney. *Smith v. Griffiths*, 476 A.2d 22, 26 (Pa. Super. Ct. 1984) (noting that "in the absence of special circumstances, [an attorney] will not be held liable to anyone [but his client]"). In considering whether a third party can maintain a negligence suit against an attorney, the Pennsylvania Supreme Court has found that privity, or at the very least, a scenario approaching privity, is required. *Guy v. Liederbach*, 459 A.2d 744, 749 (Pa. 1983). The situation is found to approach privity when there has been "a specific undertaking on the attorney's part to perform a specific service for a third party, coupled with the reliance of the third party and the attorney's knowledge of that reliance." *Id.*

It is an undisputed fact that Brown Rudnik performed a service for I & S, when it

provided loan documents, including the wrong promissory note, to I & S's counsel. Doc. 141, Ex.D. What is vigorously disputed is whether Brown Rudnik had knowledge that I & S would rely on these documents when deciding to purchase the property and assume North Queen's loan obligation. Brown Rudnik maintains that it believed that I & S had already performed due diligence and was aware of the terms of the deal, and therefore I & S would not be relying on the loan documents provided by Brown Rudnik to its counsel. Moreover, Brown Rudnik maintains that it thought that the loan documents would be used by I & S's counsel solely for the purpose of drafting an opinion letter regarding the enforceability of the loan. Doc. 141 at 2. However, I & S claims that Brown Rudnik knew that I & S would rely on the documents sent to its counsel regarding the terms of the loan. Doc. 140 at 4. Whether Brown Rudnik had knowledge sufficient to establish a special undertaking by Brown Rudnik on behalf of I & S is a disputed issue of material fact. However, as Brown Rudnik was retained to represent LaSalle in the loan assumption by I & S, a reasonable juror could infer that Brown Rudnik had knowledge that I & S would receive and rely on these loan documents. The fact that Brown Rudnik engaged in a specific service for I & S by providing the loan documents to its counsel and the possible reasonable inference that Brown Rudnik knew that I & S would receive and rely on these documents, demonstrates that there is sufficient evidence that Brown Rudnik engaged in a specific undertaking on I & S's behalf, thereby allowing I & S to survive summary judgment on its non-client action against Brown Rudnik for professional negligence.

C. Justifiable Reliance

In order to maintain an action for negligent misrepresentation, the plaintiff must prove:

(1) a misrepresentation of material fact; (2) the person making the representation knew or should have known of the falsity of the representation; (3) intent of the representer to induce another to act on the misrepresentation; and (4) resulting injury on the party acting in justifiable reliance. *Gibbs v. Ernst*, 647 A.2d 882, 890 (Pa. 1994). [6] Brown Rudnik alleges that I & S cannot demonstrate that it was justified in relying on the promissory note provided by Brown Rudnik to I & S's counsel. Doc. 102 at 21.

There is a material dispute over whether prior to closing I & S obtained a copy of Note I upon which it relied when assuming the loan obligation. Dr. Trocki, principal of I & S, testified that prior to closing he received a copy of Note I, and that he relied on the absence of a prepayment penalty in this note when assuming the North Queen loan obligation. Doc. No. 115, Ex. K, Trocki dep. p. 340; Ex. J, Trocki Aff. Brown Rudnik asserts, however, that Dr. Trocki did not have possession of Note I prior to closing on the property, and therefore he could not have relied on its terms when purchasing the property. Doc. No. 158 at 9-10. Brown Rudnik supports its contention by citing a letter written by I & S's counsel, which indicates that I & S was given a transaction binder after the closing. Doc. No. 102, Ex. Z. This letter does not clearly indicate what documents were included in the binder or whether this was the first time I & S received these documents.[7] This evidence does not definitely establish that I & S did not have

[6] As neither party raises justifiable reliance with regard to the professional negligence claim, I will not consider justifiable reliance in this context.

[7] Brown Rudnik also asserts that I & S could not have relied on the terms of Note I when purchasing the property because I & S was not in existence at the time Dr. Trocki agreed to purchase the North Queen property. Doc. 102 at 18. Brown Rudnik argues that I & S is not able to maintain a negligent misrepresentation action because if anyone was deceived in this action it was Dr. Trocki and not I & S. Doc. 102 at 19-20 (citing cases which hold that the plaintiff in a negligent misrepresentation action must be the party deceived by the misrepresentation). This

possession of Note I prior to closing. As the moving party, Brown Rudnik has not carried its initial burden of showing that there is no genuine issue of material fact which would entitle it to summary judgment. Therefore, Brown Rudnik's motion for summary judgment must be denied.

Even assuming that I & S relied on Note I in assuming the loan obligation, there is a further material dispute as to whether this reliance was justified. Brown Rudnik alleges that prior to closing on the property Dr. Trocki was advised that the operative promissory note contained a penalty for early payment. Doc. No. 102 at 21. This assertion is supported in the record. Numerous people have testified that they had conversations with Dr. Trocki concerning the existence of a prepayment penalty in the promissory note that he was assuming. Doc. 102, Ex. I, Greene dep. pp. 69-71; Ex. O, Margolis dep. pp. 15-16; Ex. R, Conroy Sr. dep., pp. 25-26. I & S points to no record evidence that it was not told of the prepayment penalty. However, regardless of what I & S was told about the promissory note, I & S's knowledge does not necessarily preclude it from justifiably relying on the absence of a prepayment penalty in the note it physically received from Brown Rudnik. The question of justifiable reliance is more appropriately left to a jury than decided by a court on summary disposition. *Krisa v. Equitable Life Assurance* Soc'y, 113 F.Supp.2d 694, 706 (M.D.Pa. 2000); *Williams Controls, Inc. v. Parente, Randolph, Orlando, Carey & Assocs.*, 39 F.Supp.2d 517, 534 (M.D.Pa. 1999) ("Reasonableness of reliance involves all of the elements of the transaction, and is rarely susceptible of summary disposition."). At this stage in the proceedings it is not appropriate to

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argument ignores the fact that I & S Trust Associates was formed on July 9, 1998, prior to the execution of the assignment and assumption agreement (dated July 13, 1998) and the actual closing on the property (July 24, 1998). As I & S was in existence at the time of both the loan assumption and property closing, I & S may properly argue that at some point prior to closing it relied on Brown Rudnik's misrepresentations.

decide whether I & S was justified in relying on Brown Rudnik's representation that Note I governed the loan or whether I & S was unjustified in this reliance, as I & S should have known that a prepayment penalty existed on the loan and that Note I was sent by Brown Rudnik in error.[8]

III. Statue of Limitations

Brown Rudnik alleges that the statute of limitations for this negligence action expired prior to the date I & S amended its complaint to include a claim against Brown Rudnik. Doc. 135 at 11. It is not disputed that the negligence action against Brown Rudnik, in the form of a motion to file an amended complaint, was commenced at the earliest on January 12, 2001, more than two years after Brown Rudnik's negligence, whether the measuring date be the date Brown Rudnik provided Note I to counsel for I & S (July 9, 1998) or the date of closing on the property (July 24, 1998).

In Pennsylvania, the applicable statute of limitations for negligence actions is two years. 42 Pa. C.S.A. § 5524(2). Generally, the statute of limitations begins to run as soon as the right to institute a suit arises. *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). The statute of limitations will not begin to run, however, when a plaintiff is not able to know of his injury despite the exercise of despite due diligence. When a plaintiff's failure to file a complaint is due to excusable ignorance of injury, the "discovery rule" acts as a toll on the

[8] Again neither party considers whether § 552A of the Restatement (second) of Torts is applicable to this transaction, and, if so, the result therefrom. Under section 552A, contributory negligence of a negligent misrepresentation recipient is a complete bar to that recipient's recovery for pecuniary loss.

statute of limitations until the time the plaintiff discovers or reasonably should have discovered the injury. *Id*.

I & S claims that it is entitled to the discovery rule tolling because it did not and could not have known of Brown Rudnik's negligence until March 3, 1999, the date I & S first inquired about prepaying the loan without a penalty. Doc. 140 at 8. Brown Rudnik contends, however, that I & S is not entitled to the "discovery rule" tolling because if I & S had performed adequate due diligence prior to closing I & S would have noticed the promissory note discrepancy and the alleged economic losses would not have occurred. Doc. 141 at 7. It is not disputed that Brown Rudnik sent I & S's counsel a copy of the wrong promissory note prior to closing. When considering Brown Rudnik's motion for summary judgment, the evidence must be construed in the light most favorable to I & S. As such, the court must believe the testimony and affidavit of Dr. Trocki that I & S was given a copy of the wrong promissory note prior to closing. Doc. No. 115, Ex. K, Trocki dep. p. 340; Ex. J, Trocki Aff. I & S believed that Note I, which it received in hard copy, represented the terms of the loan. Whether this testimony is credible and whether I & S knew or should have known about the prepayment penalty prior to January 12, 1999 is a disputed issue of material fact that must be resolved by the jury. I must, therefore, deny Brown Rudnik's motion for summary judgment on the statute of limitations grounds.

IV. Mitigation of Damages

Brown Rudnik asserts that had I & S paid LaSalle the $1.2 million dollar prepayment penalty, it would have avoided the $4.6 million dollars in damages that it now claims to have suffered as a result of not being able to prepay the loan. Brown Rudnik seeks to limit the

damages available to I & S in the pending action, claiming that by refusing to pay the prepayment penalty, I & S failed to mitigate damages. Doc. 158 at 5 - 9.

Under Pennsylvania law, a plaintiff who has suffered a loss has a duty to mitigate its damages. *Gloviak v. Tucci Const. Co.*, 608 A.2d 557, 560 (Pa. Super. Ct. 1992). In determining whether a plaintiff has acted appropriately to mitigate its damages the test is one of reasonableness. *Toyota Industrial Trucks U.S.A., Inc. v. Citizens Nat'l Bank of Evans City*, 611 F.3d 465, 471 (3d Cir. 1979) All the facts and circumstances must be considered in determining whether a plaintiff acted reasonably in the face of a breach. *Id*. Whether I & S acted reasonably in maintaining its loan with LaSalle and incurring the alleged $4.6 million dollars in damages instead of paying the $1.2 million dollar penalty is a disputed issue of fact. A reasonable jury could find that I & S acted reasonably in not paying the 1.2 million dollar penalty, especially when I & S claims not to have had this money at its disposal. Brown Rudnik's motion for partial summary judgment to limit damages will be denied.

CONCLUSION

For the reasons set forth above, the court will deny all motions that Brown Rudnik has pending before this court. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I & S ASSOCIATES TRUST,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
LaSALLE NATIONAL BANK, et. al.	:	NO. 99-4956
Defendants.	:	

Order

And now, this day of September, 2001, upon consideration of the amended complaint (Doc. 127); Brown Rudnik's motion for summary judgment and memorandum in support therein (Doc. 150); and Brown Rudnik's supplemental motion for summary judgment to dismiss the amended complaint or in the alternative to limit damages available to plaintiff and memorandum in support therein (Doc. 158); it is hereby ORDERED that Brown Rudnik's motions for summary judgment are DENIED. It is further ORDERED that Brown Rudnik's motion for partial summary judgment to limit the damages available to plaintiff is DENIED.

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William H. Yohn, Jr., Judge