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. OCTOBER ___, 2001

Plaintiff I & S Associates ["I & S"] brings 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. Brown Rudnik then impleaded Barry Greene and Greene's law firm, Portnoy & Greene (collectively, "Greene"), along with Greene's client, the seller, North Queen Street Limited Partnership ("North Queen").[1]

[1] On June 20, 2001, North Queen was dismissed with prejudice by all parties to the present action.

Brown Rudnik's third-party complaint against Greene and North Queen sought contribution and indemnification. However, on September 25, 2001, LaSalle and GMAC were dismissed from the present action, thereby mooting Brown Rudnik's claim for contribution and indemnification against Greene. By letter of October 3, 2001, counsel for Brown Rudnik has agreed with this conclusion.

I & S subsequently amended its complaint to add Count VIII against Brown Rudnik and Count IX against Greene, alleging negligence.[2] Presently before the court is Greene's motion to dismiss Count IX of I & S's amended complaint (Doc. No. 142). In addition, pending before the court is Greene's motion for summary judgment on I & S's amended complaint. (Doc. No. 156).

For the reasons set forth below, I will grant summary judgment to Greene on plaintiff's amended complaint.[3]

BACKGROUND

On August 7, 1997, Granite Investment I Corp ("Granite") and North Queen Street Limited Partnership ("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 did 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

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[2] Although the complaint titles Count IX as a claim for negligence, the parties have examined this claim as one for negligence, professional negligence and negligent misrepresentation. Therefore, I will discuss all three variations of negligence in deciding Greene's motion for summary judgment.

[3] As I will grant Greene's motion for summary judgment, Greene's motion to dismiss Count IX is moot.

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, Boston Capital 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.

Some time before I & S and North Queen agreed to the property sale, counsel for I & S asked counsel for GMAC, Brown Rudnik Freed & Gesmer ("Brown Rudnik"), for a copy of the operative loan documents. Having misplaced its copy of the relevant documents, Brown Rudnik requested that Barry Greene, an attorney at the law firm of Portnoy & Greene, P.C. (collectively, "Greene"), provide Brown Rudnik with access to its file of the original 1997 loan transaction. Greene agreed to this request and subsequently provided Brown Rudnik with the original closing binder (or a copy thereof), which Greene had obtained from Brown Rudnik at the conclusion of the original loan agreement. Doc. 102, Greene dep., pp. 67, 91, Ex. I. The closing binder, however, erroneously contained a copy of Note I. As a result, 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. GMAC then joined Brown, Rudnik as a third-party defendant to the litigation. Subsequently, Brown Rudnik impleaded Greene and North Queen. On March 12, 2001, I & S filed an amended complaint, adding two claims against LaSalle and GMAC, a claim against Brown Rudnik, and a claim against Greene, alleging negligence. On June 20, 2001, North Queen was released from the present action.

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 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. Count IX - I & S v. Greene - Negligence, Negligent Misrepresentation & Professional Negligence

A. Economic Loss Doctrine

I & S alleges that Greene was negligent in sending I & S the wrong promissory note and in representing that this note governed the loan being assumed. Am.Compl. ¶ 87. 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).[4]

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. Greene, in its role as an attorney, supplied information regarding the underlying loan obligation, including the incorrect promissory note, to Brown Rudnik. Greene was aware that I & S was assuming the loan and that lender's counsel, Brown Rudnik, did not possess a copy of the relevant loan documents. A reasonable inference can be

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

drawn that Greene knew that the documents it provided to Brown Rudnik were for the guidance of I & S in assuming the loan. Thus, a reasonable jury could find that Greene's alleged negligent misrepresentation 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 Greene, the economic loss doctrine is not an absolute bar to I & S's negligent misrepresentation claim against Greene.[5]

B. Privity

Greene 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 Greene. Doc. 142 at 6. I & S counters that, under Pennsylvania law, privity is not required to maintain an action of negligent misrepresentation against an attorney. Doc. 143 at 4-7. Section 552 of the Restatement (second) of Torts, adopted by Pennsylvania, stipulates that a negligent misrepresentation defendant must 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.[6] *First Options of*

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

[6] Section 552 of the Restatement of Torts provides:

> 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

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 § 552). 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 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 Greene is not fatal to I & S's negligent misrepresentation claim.

However, in order for I & S to maintain its professional negligence claim against Greene, 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). 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. In considering whether a third party can maintain a negligence suit against an attorney,

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the information.
Restatement (Second) Torts § 552.

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.* Thus, in order for I & S to maintain a negligent misrepresentation action against Greene, I & S must plead facts sufficient to demonstrate that Greene negligently supplied information while engaging in a specific undertaking on I & S's behalf.

I & S alleges that upon request by I & S's counsel, Brown Rudnik provided I & S with copies of the supposedly operative loan documents. Am. Compl. ¶ 85. The complaint further alleges that Brown Rudnik had received these loan documents from Greene, who knew that the documents, including the promissory note, would be sent to and relied upon by I & S. Am. Compl. ¶¶ 86,87. It is not alleged that Greene directly performed any services for I & S. Thus, I & S's claim against Greene may be maintained only if the services Greene provided to Brown Rudnik coupled with Greene's knowledge that I & S would rely on these services is enough to find that Greene engaged in a specific service for the benefit of I & S.

In this case, the reliance of I & S on services provided to Brown Rudnik is not sufficient to find a specific undertaking by Greene for the benefit of I & S. Greene's only service was to provide Brown Rudnik with access to a transactional binder that Brown Rudnik, itself, had prepared in connection with the original 1997 loan transaction. Greene was merely a conduit. Greene neither prepared the documents for the benefit of I & S nor directly provided the documents to I & S. The actions taken by Greene, being courteous and supplying Brown Rudnik

with access to Brown Rudnik's own work product, do not present a scenario approaching privity so as to warrant holding Greene liable to I & S for any alleged negligent misrepresentation that occurred during this business transaction. As there is an absence of privity or a substantial undertaking between I & S and Greene, I & S cannot maintain a third-party action against Greene for professional negligence.

C. Duty

I & S has failed to produce evidence to establish all of the elements required to maintain a a negligent misrepresentation action against Greene.[7] Negligent misrepresentation requires proof of (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter should have known of its falsity; (3) with an intent to induce another to act on the misrepresentation; and (4) justifiable reliance by a party who has demonstrated a resulting injury. *Bortz v. Noon*, 729 A.2d 555, 561 (Pa. 1999). In addition, the negligent misrepresentation defendant must have owed a duty to the injured party. *Id.*

There is no evidence in the record to support the contention that Greene owed I & S a duty that it breached by supplying the incorrect promissory note to Brown Rudnik. The evidence presented does not indicate that Greene had a duty to investigate the accuracy of the documents

[7] Although Greene raises § 552A of the Restatement (second) of Torts as a defense to Brown Rudnik's third-party complaint, neither I & S nor Greene considers the applicability of this section with regard to I & S's direct claim against Greene. Under section 552A, contributory negligence of a negligent misrepresentation recipient is a complete bar to that recipient's recovery for pecuniary loss. As I & S points to no record evidence to dispute the fact that it was told on numerous occasions about the existence of a prepayment penalty in the operative note, it may be that when I & S received a note from Brown Rudnik that did not contain such a penalty, I & S was negligent in not verifying the terms of the note it was assuming.

included in the closing binder, which was originally prepared by Brown Rudnik. Greene simply supplied Brown Rudnik with a copy of Brown Rudnik's own work product. Greene never had any direct interaction with I & S; any involvement Greene had with I & S was merely tangential. Dr. Trocki, I & S's principal, admits that he never had any conversations with Greene concerning the existence or nonexistence of the prepayment penalty in the promissory note. Doc. 156, Ex. B, Trocki dep. at 183. Furthermore, as explained above, there was no special undertaking between I & S and Greene that would require Greene to verify the accuracy of the note contained in the binder. As there is a lack of evidence establishing a duty on the part of Greene, I & S's claim for negligent misrepresentation cannot be maintained.[8]

CONCLUSION

I & S's negligence claim is barred by the economic loss doctrine; I & S's professional negligence claim is prevented by the lack of privity or a substantial undertaking by Greene on I & S's behalf, and I & S's negligent misrepresentation claim cannot be maintained because of the absence of a duty. Thus, as there is no basis for I & S to maintain a claim under Count IX against Greene, I will grant Greene's motion for summary judgment on plaintiff's amended complaint.

An appropriate order follows.

[8] The absence of a duty owed by Greene to I & S prevents the claim for negligent misrepresentation from proceeding. Therefore, it is unnecessary to consider whether there is evidence of the other elements of a negligent misrepresentation claim.

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Plaintiff,	:	CIVIL ACTION
v.	:	
LaSALLE NATIONAL BANK, et. al.	:	NO. 99-4956
Defendants.	:	

Order

And now, this day of October, 2001, upon consideration of the amended complaint (Doc. 127); Greene's motion to dismiss Count IX of plaintiff's amended complaint and memorandum in support therein (Doc.142); and Greene's motion for summary judgment on plaintiff's amended complaint and memorandum in support therein (Docs. 156); it is hereby ORDERED that Greene's motion for summary judgment on plaintiff's amended complaint is GRANTED and judgment is entered in favor of defendants Portnoy & Greene, P.C., and Barry Greene, Esquire only, and against plaintiff. It is further ORDERED that Greene's motion to dismiss Count IX is DISMISSED as moot.

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William H. Yohn, Jr., Judge