

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

<b>HAYMOND, NAPOLI DIAMOND, P.C.,</b>	:	
<b>ANDREW NAPOLI, SCOTT</b>	:	<b>CIVIL ACTION</b>
<b>DIAMOND, JACK BERNSTEIN,</b>	:	
<b>DAVID BERMAN</b>	:	
	:	
	:	
<b>v.</b>	:	
	:	
<b>JOHN HAYMOND</b>	:	
<b>and</b>	:	
<b>THE HAYMOND LAW FIRM, P.C.</b>	:	<b>No. 02-721</b>

**Norma L. Shapiro, S.J.**

**August 2<sup>nd</sup>, 2005**

**MEMORANDUM AND ORDER**

Defendants/counterclaim plaintiffs, John Haymond (“Haymond”) and the Haymond Law Firm, following a three week jury trial and jury verdict in their favor, filed a Motion for Attorneys’ Fees Pursuant to 42 PA. C.S. § 2503(7) against plaintiffs/counterclaim defendants, Haymond Napoli Diamond, P.C., d/b/a Hochberg Napoli Diamond, Robert Hochberg, Andrew F. Napoli, Scott E. Diamond, Jack Bernstein, and David S. Berman. This action arises in part from prior litigation involving the dissolution of Haymond & Lundy, LLP (“H&L”), a personal injury law firm. Haymond v. Lundy, 177 F.Supp. 2d 371 (E.D. Pa. 2001).

Marvin Lundy (“Lundy”) and Haymond formed H&L in October, 1997, and Haymond then began using the name Haymond & Lundy for his Connecticut firm (“HND-CT”). Lundy dissolved H&L in October, 1999, and his former partners immediately commenced a civil action. In December, 1999, Haymond and Lundy reached an agreement to place in escrow the fees

collected from cases formerly handled by the dissolved law firm. After the dissolution of H&L, Haymond formed a new Pennsylvania based law firm, Haymond, Napoli, Diamond, P.C. (“HND-PA”). While the Haymond v. Lundy action was pending, a new conflict arose between Haymond and his partners at HND-PA over numerous issues including escrowing fees from H&L cases. The plaintiffs/counterclaim defendants in the present action are Haymond’s former HND-PA partners and HND-PA; the defendants/counterclaim plaintiffs are Haymond and HND-CT.

After a jury verdict in favor of Haymond in August, 2001, Haymond and Lundy were both obligated to place in escrow fees already earned, and those to be earned in the future, claimed by the other party. Haymond v. Lundy, No. 99-5048, 2004 WL 2030134, at \*2 (E.D.Pa. Sept. 08, 2004). On January 15, 2002, Lundy moved to effectuate jurisdiction over HND-PA because the law firm controlled assets subject to the Haymond and Lundy litigation. Id., at 3. The court denied Lundy’s motion to join HND-PA partly because it would have been unfair to force Lundy to await protracted litigation between HND-PA and HND-CT to recover his share of fees on dissolution of H&L.

The individual plaintiffs and HND-PA initiated the present action against Haymond and HND-CT in February, 2002. The claims were: (1) breach of contract against Haymond for settling the litigation with Lundy without the consent of the individual plaintiffs in violation of a June 29, 2000 Agreement; (2) violation of Pennsylvania Wage Act for failure to pay salaries to Napoli, Diamond, Bernstein, and Berman; and (3) breach of oral promise of employment to Diamond by Haymond.

Haymond and HND-CT asserted counterclaims: (1) breach of contract by HND-PA for failure to repay amounts advanced as a loan to HND-PA by HND-CT; (2) breach of contract by

HND-PA for failure to escrow fees; (3) breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg for failure to escrow fees; (4) breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg as directors, officers and shareholders of HND-PA; (5) self-dealing and wilful misconduct by Napoli, Diamond, Bernstein, Berman and Hochberg as shareholders of a closely held corporation; and (6) an accounting of all fees from cases referred by HND-CT to HND-PA.

The court, on consideration of cross-motions for summary judgment, found genuine issues of material fact on all claims and counterclaims, and denied the motions. Haymond v. Haymond, No. 02-721 (E.D. Pa. Mar. 23, 2004) (Paper #177). In assessing counterclaims two, three, and four, the court found genuine issues of material fact whether plaintiffs were obligated to escrow fees and whether the use of the escrow fund was illegal or wrongful. Id. After a jury verdict in their favor, Haymond and HND-CT filed the pending Motion for Attorneys' Fees Pursuant to 42 Pa. C.S. § 2503(7).

## **DISCUSSION**

A federal court may assess attorneys' fees in a diversity case when state law provides the right. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975). Pennsylvania law provides:

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

- (7) as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

42 PA. C.S. § 2503.

Pennsylvania courts are reluctant to award sanctions under the statute:

Punishing all those who initiate actions which are not ultimately successful by granting the defendant's request for counsel fees would have a chilling effect on [the] right to bring a suit . . . . This was not the intent of the rule permitting recovery of counsel fees upon a showing of arbitrary, vexatious or bad faith conduct.

Berg v. Georgetown Builders, Inc. 822 A.2d 810, 818 (Pa. Super. 2003)

In their Motion for Attorneys' Fees, Haymond and HND-CT asserted all their claims under subsection 7. Under subsection 7, conduct that occurred prior to litigation cannot form the basis for an award of counsel fees. Koresk v. Farely, 844 A.2d 607, 617 (Pa. Commw. Ct. 2004).

Haymond and HND-CT argue: (1) plaintiffs violated their promises to keep fees from the H&L case fees in escrow; (2) plaintiffs deceived defendants, and the court, in repeatedly stating they had escrowed fees; and (3) the jury concluded plaintiffs made misrepresentations regarding the escrow. These claims are not viable under subsection 7 because the failure to escrow fees and misrepresentations that they had escrowed fees did not occur "during the pendency" of this action; it occurred prior to the filing of this action.

The individual plaintiffs stopped escrowing fees soon after June, 2000. Haymond v Lundy, 2002 WL 1964336, at \*2 (E.D. Pa. Aug. 23, 2002). The individual plaintiffs and HND-PA filed the complaint in this action on February 12, 2002; Haymond and HND-CT counterclaimed for breach of contract by HND-PA and breach of fiduciary duty by the individual plaintiffs for failing to escrow fees as ordered in Haymond v. Lundy; in answering the counterclaims, the individual plaintiffs admitted "they have not continued to segregate or escrow fees on cases which they worked on while at H&L and which they have worked on at HND Pa, and aver further that they never agreed to do so, nor were they legally obligated to do so." Joint Reply to Response to Amend Complaint (Nov. 22, 2002 Paper #13, ¶27)). Haymond and HND-

CT prevailed on the counterclaims sent to the jury and judgment was entered against the individual plaintiffs and HND-PA. However, 42 Pa. C.S. § 2503(7) does not permit this court to award attorneys' fees against plaintiffs for not placing fees in escrow because that action occurred long before the commencement of this action.

At the hearing on this motion, counsel for Haymond and HND-CT requested leave to claim attorneys' fees under subsection 9. Subsection 9 allows an award of attorneys' fees if, "the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith." 42 PA. C.S. § 2503. The three claims relating to the individual plaintiffs' failure to escrow fees also fail under subsection 9 because it too "applies only to bad faith conduct related to the institution of the suit or occurring after the commencement of the suit." Cher-Rob, Inc. v. Art Monument Co., 594 A.2d 362, 364 (Pa. Super. Ct., 1991); see also Pentek, Inc. v. Meininger, 695 A.2d 812, 818 (Pa. Super. Ct., 1997); Rumbaugh v. Beck, 601 A.2d 319, 328-29 (Pa. Super. Ct., 1991).

A fourth claim for attorneys' fees asserts Hochberg failed to disclose the misuse of escrow funds prior to obtaining a broad release of claims from Haymond. Hochberg managed HND-CT until Haymond fired him in February, 2001. Haymond v Lundy, 2002 WL 1964336, at \*3 (E.D. Pa. Aug. 23, 2002). Haymond and Hochberg signed a "Severance and Settlement Agreement" on April 6, 2001. Haymond v. Lundy, 2004 W.L. 2030134, at \*5 (E.D. Pa. Sept. 08, 2004). At that time, Hochberg concealed from Haymond that the individual plaintiffs were no longer escrowing fees. Id., at 16. The jury found Hochberg's actions "outrageously wrongful" and awarded defendants/counterclaim plaintiffs \$279,999.00 in punitive damages against Hochberg. Id., at 8. Although Hochberg acted in bad faith, the court may not award attorneys'

fees under Section 2503(7) or (9) because Hochberg's conduct occurred prior to commencement of this action.

A fifth claim for attorneys' fees asserts the action was filed based on unverified hearsay that John Haymond and Marvin Lundy were engaged in settlement negotiations. On June 29, 2000, Haymond, Napoli, Diamond and Hochberg entered an agreement creating the HND-PA law firm. One of the stipulations was that "the lawsuit against Marvin Lundy may be settled by John Haymond but only with the approval of at least three of the following individuals: Scott Diamond, Andrew Napoli, Jack Bernstein, David Berman, or Robert Hochberg." *Id.*, at 4. Plaintiffs may have initiated the action "based on unverified hearsay," but Haymond and Lundy were involved in settlement negotiations and Haymond signed a "Joint Litigation and Common Interest Agreement" with Lundy without consulting or getting consent from at least three of the five persons named in the June 29, 2000, agreement. *Id.*, at 5. The individual plaintiffs failed to convince a jury that the settlement negotiations materially breached the June 29, 2000 Agreement, but their claim was neither frivolous nor advanced in bad faith.

The last two claims for the award of attorneys' fees are: (1) plaintiffs secretly filed this action and did not serve defendants; and (2) plaintiffs obtained an injunction *ex parte* against Haymond's settlement negotiations and failed to disclose its existence until a mediation ordered by this court took place. These actions caused no actual harm. Plaintiffs admit they filed an injunction *ex parte* and did not serve it properly. Improper service is not a justification for awarding attorneys' fees. Defendants discovered an injunction had been filed against them during court-ordered mediation with Professor Abraham Gafni. Plaintiffs voluntarily dismissed the injunction immediately. Haymond and HND-CT could not have expended time or money

opposing an injunction they never realized had been issued.

### **CONCLUSION**

For the reasons stated, defendants/counterclaim plaintiff's Motion for Attorneys' Fees Pursuant to 42 PA. C.S. § 2503(7) will be **DENIED**. An appropriate order follows.

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**ORDER**

AND NOW, this 2nd day of August, 2005, after a hearing held on October 4, 2004, at which both parties were heard and upon consideration of defendants/counterclaim plaintiffs' Motion for Attorneys' Fees (Paper #245), plaintiffs/counterclaim defendants' Response in Opposition (Paper

#247), and defendants/counterclaim plaintiffs' Reply to the Response (Paper #252), for the reasons stated in the foregoing Memorandum, it is ordered that defendants/counterclaim plaintiffs' Motion (Paper #245) is **DENIED**.

/s/ Norma Shapiro

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Norma L. Shapiro, S.J.