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

EDMUND A. MASSULLO, M.D., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN, P.C.	:	NO. 98-116

M E M O R A N D U M

Giles, C.J. May 17 , 1999

Edmund and Anne Marie Massullo ("the Massullos"), bring action for legal malpractice against the law firm of Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C. and two of the firm's attorneys, Steven Lupin and Carl Weiner (together "Hamburg, Rubin"). Jurisdiction is alleged based upon diversity of citizenship and amount pursuant to 28 U.S.C. § 1332(a)(2).

The Massullos are partners in two partnerships that hold title to Pennsylvania real estate and improvements. As a result of a bankruptcy petition filed by lessees of the partnerships' properties, rental reductions were approved by the bankruptcy court without the Massullos' consent. Hamburg, Rubin was retained to represent the Massullos' partnership interests but took no action for over two years to challenge the rental reductions. When the firm did file a motion to compel the lessees to pay the pre-petition rent as an administrative expense, that motion was denied on equitable grounds

because the filing was so belated. The Massullos assert that Hamburg, Rubin's inaction amounted to legal malpractice and that thereafter the firm fraudulently concealed its wrongdoing.

Hamburg, Rubin now moves for summary judgment on the grounds that the Massullos' claim is barred by the applicable statute of limitations and res judicata. Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. For the reasons that follow, Hamburg, Rubin's motion is granted.

FACTUAL BACKGROUND

The Massullos, Joseph Gentile, and the 1984 Gentile Trust were partners in two Pennsylvania partnerships, Ocean Futures Partnership and MM& G Properties (the "partnerships"), in which they held title to real estate and improvements in Quakertown and Langhorne, Pennsylvania. (Pls.' Resp. Mem. at 1-2.) Gentile was the managing partner of both partnerships. (Pls.' Resp. Mem. at 2.)

The partnership leased its properties to two companies, the Original Seafood Shantys, Inc. and Seafood Shanty of Langhorne, Inc. (the "lessees"), that specialized in the operation of retail restaurants. (Pls.' Resp. Mem. at 1-2.) Gentile was the president and sole shareholder of both lessees. (Pls.' Resp. Mem. at 2.)

A. The Lessees' Bankruptcy Petition in Federal Bankruptcy Court

On September 7, 1990, the lessees filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Pennsylvania. (Pls.' Resp. Mem. at 2.) After the filings, Gentile, as a representative of both the partnerships and the lessees, unilaterally processed post-petition rental reductions, significantly abating the rents owing to the partnerships. (Pls.' Resp. Mem. at 3.) At that time, the Massullos contracted with Hamburg, Rubin to represent their interests in the partnership and to ensure that they would continue to receive the total rent due under the pre-petition leases. (Pls.' Resp. Mem. at 3.) Lupin was the attorney responsible for all aspects of Hamburg, Rubin's representation of the Massullos. (Pls.' Resp. Mem. at 3.)

On December 19, 1990, Hamburg, Rubin filed an entry of appearance and a request for notices in the bankruptcy court. (Pls.' Resp. Mem. at 3.) It received copies of the lessees' bankruptcy disclosure statements and plans, but did not object to them or attend any hearings on the Massullos' behalf. (Am. Compl. ¶ 46.) Hamburg, Rubin took no action to challenge the rental reductions until February 3, 1993, when it filed a motion to compel the lessees to pay the pre-petition lease rent as an administrative expense. (Pls.' Resp. Mem. at 4.)

The bankruptcy court denied the motion to compel on the grounds that the Massullos' claim did not constitute an administrative expense. (Pls.' Resp. Mem. at 4;

see In re H & G Distributing, Inc., No. 90-22244T-57T (E.D. Bankr. April 30, 1993) attached to Pls.' Resp. Mem. at Ex. A.) At the hearing, the bankruptcy judge stated:

> I think these people may have slept on their rights . . . There are many things that competent bankruptcy counsel on behalf of someone like the Massullos could have done early in the case, should they have wanted to protect their clients and press their rights early on. It's just so clear to me . . . To me the problem is they didn't do anything . . .

(See Pls.' Resp. Mem. at 4 (citing Bankruptcy Court Hearing Transcript at pp. 128-129.))

On April 30, 1993, the bankruptcy court entered an Order noting that the Massullos should have objected earlier to the rent reductions. The Order stated, in relevant part:

> Even if the rent reductions were not valid and a rent deficiency did exist, the doctrines of waiver, laches and estoppel apply. Significantly, from September, 1990, the date of the filing, through the date of this claim, some twenty-eight months, Massullos did not attempt to enforce the terms of the pre-petition leases. Indeed, in February, 1991, Massullos['] attorney, Mr. Strasfield, advised local bankruptcy counsel to monitor the rental payment situation. Massullos['] inaction and failure to request the enforcement of the prepetition lease terms occurred despite their full knowledge of the rental reductions.

See Pls.' Resp. Mem. at 4 (citing In re H & G Distributing, Inc., No. 90-22244T-57T, at 2 n.1 (E.D. Bankr. April 30, 1993) attached to Pls.' Resp. Mem. at Ex. A.) On August 30, 1993, the district court affirmed the bankruptcy court order in all respects. (Pls.' Resp. Mem. at 4; see In re H & G Distributing, Inc., No. 93-3054 (E.D. Pa. August 30, 1993) attached to Pls.' Resp. Mem. at Ex. B.)

The Massullos assert that Hamburg, Rubin then tried to hide its misfeasance and non-feasance. (Pls.' Resp. Mem. at 7). They assert that the firm did not provide them with copies of the bankruptcy and district court orders in a timely manner, and then assured them that the bankruptcy court had committed reversible error, which would be cured through the appellate process. Id. The Massullos assert that they were "lulled into a false sense of security until mid-February of 1995." Id. At that time, they ended their attorney-client relationship with Hamburg, Rubin. Id.

On March 10, 1994, the third circuit affirmed the district court order on the same equitable grounds relied upon by the court below. (Pls.' Resp. Mem. at 5; see In re H & G Distributing, Inc., No. 93-1932 (3d Cir. March 8, 1994) attached to Pls.' Resp. Mem. at Ex. C .)

B. Hamburg, Rubin's State Action for Breach of Contract and Unjust Enrichment

After the Massullos terminated their relationship with Hamburg, Rubin, the firm filed a claim against them in the Court of Common Pleas of Montgomery County to recover outstanding attorneys fees and costs. (See Hamburg, Rubin Compl. filed 8/17/94 attached to Pls.' Resp. Mem. at Ex. F.) The firm alleged breach of contract or unjust enrichment by the Massullos. Id. The Massullos did not file any counterclaims to Hamburg, Rubin's action. (Pls.' Resp. Mem. at 8; see 8/17/94 Massullos' Answer with New Matter attached to Pls.' Resp. Mem. at Ex. G.) They did assert the defense of failure of consideration and/or a lack of consideration by Hamburg, Rubin. (See id.)

On October 15, 1997, the state court found that Hamburg, Rubin was entitled to judgment as a matter of law and granted summary judgment in the firm's favor. (See Hamburg, Rubin, Mullin, Maxwell & Lupin v. Massullo, No. 94-16032 (Pa. Common Pleas, Montgomery Cty. December 16, 1997) attached to Def.'s. Summ. J. Mot. at Ex. M.) The court ordered that the Massullos pay all past due accounts and prejudgment interests. See id. at 1. In affirming its grant of summary judgment, the court found that "[t]he defendants have not produced any evidence that the fees were unreasonable or the work was unsatisfactory." Id. at 3 (emphasis added). The court laid out the grounds for its decision:

> Here, the defendant, Anne Marie Massullo, admitted in her deposition that money is owed to the plaintiff and the issue is just a matter of how much. Therefore, the issue of liability has been conceded. The remaining issue is damages and this Court finds that the defendants have failed to produce any evidence to support their position that the fees were unreasonable. Furthermore, when a client, as here, receives legal services and makes payment on account without protest, his silence will be construed as an implicit contest to the correctness of the legal fees and an admission of liability for any outstanding bills. In Obermayer, Rebmann, Maxwell & Hipple v. Banta, 28 D& C 4th 225 (1996), the court held a law firm was entitled to legal fees on an account stated theory where the accounts were mailed to the client and the client never rejected the accounts or contested their validity. Similarly, in the instant case, the invoices were sent to the defendants['] attorney for review and forwarded to the defendants for payment. The defendants made payments and never complained or rejected the invoices sent by the plaintiff.

Id. at 9-10.

The court's decision was affirmed by the Pennsylvania Superior Court on August 20, 1998. (See Hamburg, Rubin, Mullin, Maxwell & Lupin v. Massullo, No.

4500 Philadelphia 1997 (Pa. Super. Ct. August 20, 1998) attached to Def.'s Summ. J. Motion at Ex. N.) On February 25, 1999, the Pennsylvania Supreme Court denied the Massullos' petition for allowance of appeal. (See Hamburg, Rubin, Mullin, Maxwell & Lupin v. Massullo, No. 985 M.D. Allocatur Docket 1998 (Pa. February 25, 1999)).

ANALYSIS

A. Statute of Limitations

Pennsylvania's statute of limitations for a legal malpractice tort claim is two years. See 42 Pa. Const. Stat. Ann. § 5524(7). The Massullos assert that they have also pled a legal malpractice claim based on the breach of an implied contract. A four year statute of limitations would apply to that claim. See 42 Pa. Const. Stat. Ann. § 5525(4).

Hamburg, Rubin asserts that the Massullos' legal malpractice claim is barred by the applicable statute of limitations period because the complaint, filed on January 9, 1998, was brought more than four years after the Massullos became aware, or should have become aware, that the alleged injury had occurred. They assert that the Massullos and their general counsel attended the hearing on the motion to compel before the bankruptcy court and heard, or were informed of, the court's decision and admonishments towards the firm. The Massullos assert that the statute of limitations is tolled under Pennsylvania's equitable discovery rule and fraudulent concealment doctrine.

Under Pennsylvania law, the statutory period commences at the time the

harm is suffered, or if appropriate, at the time the alleged malpractice is discovered. See Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993) (footnote omitted). The equitable discovery rule tolls the statute of limitations when a plaintiff is unable to know of the existence of the injury and its cause, despite the exercise of due diligence. See Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991) (citations omitted). Pursuant to this rule, the statute of limitations begins to run as soon as the plaintiff knows, or reasonably should know (1) that he has been injured and (2) that his injury has been caused by another party's conduct. See id.

As a corollary to the discovery rule, Pennsylvania courts have developed the doctrine of fraudulent concealment which tolls the statute of limitations where "through fraud or concealment the defendant causes the plaintiff to relax his or her vigilance or deviate from the right of inquiry." Ciccarelli v. Carey Can. Mines, Ltd., 757 F.2d 548, 556 (3d Cir. 1985). Analysis is the same under the fraudulent concealment doctrine as under the discovery rule. See Bohus, 950 F.2d at 926.

The Massullos assert that they were not aware initially that Hamburg, Rubin caused injury to them because Hamburg, Rubin concealed its alleged malpractice. They assert that Hamburg, Rubin repeatedly assured them that the bankruptcy court's decision was incorrect and that they would be vindicated on appeal. The Massullos assert that they were

> lulled into a false sense of security until mid-February of 1994, at which time they ended the attorney-client relationship with their letter of February 15, 1994, dismissing the Hamburg firm from all representation.

(Pl.'s Resp. Mem. at 7). They contend that the limitations period did not begin to run until they terminated their attorney-client relationship with Hamburg, Rubin on February 15, 1994. In the alternative, they assert that the statute of limitations was tolled until about May 10, 1994, when the third circuit upheld the denial of the Massullos' motion to compel and completed the appellate review of the bankruptcy court's decision.

The evidence cannot be disputed that the Massullos had actual knowledge by February 15, 1994 of Hamburg, Rubin's failure to make a timely and successful application to obtain a pre-petition lease rent result. That is when they fired the firm. Even if the limitations period were tolled until that date, the complaint was not filed until nearly four years thereafter. Therefore, under any rationale, the Massullos' claim for legal malpractice sounding in tort is time barred since the applicable statute of limitations period of two years was not met.

Even assuming that the Massullos have sufficiently pled a legal malpractice claim sounding in contract, the court does not have to reach the issue of whether there is a genuine material issue of fact as to when the Massullos discovered, or reasonably should have discovered, Hamburg, Rubin's alleged harmful inaction because res judicata precludes the claim.

B. Res Judicata

A federal court must give the same preclusive effect to a state court judgment as would be given that judgment under the law of the state in which it was rendered. Migra v. Warren City School District Board of Education, 465 U.S. 75, 82 (1984); see 28 U.S.C. § 1738. Under Pennsylvania law, the doctrine of res judicata bars any future claim involving the same parties or their privies and based on the same subject matter and cause of action as a previous claim. See Gregory v. Chehi, 843 F.2d 111, 116-19 (3d Cir. 1988). In order for a future claim to be precluded, both claims must share an identity of the (1) thing sued on; (2) cause of action; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued. See id. at 116. However, res judicata will "not be defeated by minor differences of form, parties or allegations" where the "controlling issues have been resolved in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." Helmig v. Rockwell Manufacturing Co., 131 A.2d 622, 627 (Pa. 1957); see Balent v. City of Wilkes-Barre, 669 A.2d 309, 313 (Pa. 1995) (res judicata applies to any claim "which could have been litigated").

Hamburg, Rubin asserts that the Massullos' present legal malpractice claim is precluded by the state courts' decisions in the firm's previous action for breach of contract or unjust enrichment because the Massullos' assertions of legal malpractice were, or could have been, addressed in that action. The Massullos assert that res judicata does not bar their present claim because they were not required to file a counterclaim in

Hamburg, Rubin's state action under Pennsylvania's permissive counterclaim rule. Further, they assert that the ultimate and controlling issue of the present malpractice civil action was not, and could not have been, litigated in Hamburg, Rubin's previous action.

Pennsylvania does not have a compulsory counterclaim rule.[1] In Martin v. Poole, 336 A.2d 363, 367 (Pa. Super. Ct. 1975), the Pennsylvania Superior Court discussed the significance of Pennsylvania's permissive counterclaim rule on the principle of res judicata. At that time, the Superior Court adopted the Restatement of Judgments § 58 as the general rule:

> Where the defendant does not interpose a counterclaim although he is entitled to do so, he is not precluded thereby from subsequently maintaining an action against the plaintiff on the cause of action which could have been set up as a counterclaim.

Id. (quoting Restatement of Judgments § 58 (1942)); See Riverside Memorial Mausoleum, Inc. v. UMET Trust, 581 F.2d 62 (3d Cir. 1978) (noting the Superior Court's adoption of Restatement of Judgments Section 58 as the general rule).

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[1] Pennsylvania's counterclaim Rule, provides in pertinent part:

> (a) The defendant may set forth in the answer under the heading "Counterclaim" any cause of action heretofore asserted in assumpsit or trespass which he has against the plaintiff at the time of filing the answer.
>
> (b) A counterclaim need not diminish or defeat the relief demanded by the plaintiff. It may demand relief exceeding in amount or different in kind from that demanded by plaintiff.

42 Pa. Cons. Stat. Ann. § 1031 (note omitted).

Subsequently, however, the Superior Court adopted and applied the Restatement (Second) of Judgments § 22 (1980), which is the progeny of Restatement of Judgments § 58. See Del Turco v. Peoples Home Savings Association, 478 A.2d 456, 463 (Pa. Super. Ct. 1984). Section § 22 provides:

> (1) Where the defendant may interpose a claim as a counterclaim but he failed to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).
>
> (2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action from maintaining an action on the claim if:
>
> (a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or
>
> (b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

Restatement (Second) of Judgments § 22 (1980) (emphasis added). In Del Turco the court found that subsection (2)(b) encompassed the situation "where two claims have a measure of identity and are so inextricably intertwined that a different judgment in the second action would operate to nullify or substantially impair rights or interest established by the judgment in the first." Del Turco, 478 A.2d at 463 (applying Section 22 to claim which could have been asserted as permissive counterclaim in a prior action). The Superior Court's application of Section 22 has been followed in this district. See, e.g., Zhang v. Haven-Scott Associates, Inc., No. Civ. A. 95-2126, 1996 WL 355344 (E.D. Pa. June 21, 1996).

Assuming the Massullos have pled a claim for legal malpractice sounding in contract, analysis of that claim would proceed along the lines of established contract law. Any liability by Hamburg, Rubin would be based on the terms of the contract between the parties. See Bailey, 621 A.2d at 115. Damages would be limited to the amount actually paid for the services, plus statutory interest. See id.

Proof that a plaintiff failed to perform its contractual obligations is a well established defense to an action for breach of contract. See, e.g., Ott v. Buehler Lumber Co., 541 A.2d 1143 (Pa. Super. Ct. 1988) ("A party. . . may not insist upon performance of the contract when he himself is guilty of a material breach of contract.") (citing 17 Am. Jur. 2d. Contracts § 425). Courts have applied this rule to agreements for professional services. See Geisinger Medical Center v. Gough, 160 F.R.D. 467, 469 (M.D. Pa. 1994) (finding that defendant's medical malpractice claim was a compulsory counterclaim to the plaintiff's claim for unpaid medical bills); see also Bailey, 621 A.2d at 115 ("[A]n attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large.").

The Massullos terminated their relationship with Hamburg, Rubin on February 15, 1994, before Hamburg, Rubin brought the state action against them. Therefore, the Massullos clearly had knowledge of Hamburg, Rubin's alleged failings and the harm that resulted before the state court action was commenced. Any assertions

by the Massullos that the firm should not have been paid because its work was unsatisfactory would have been appropriate and, indeed, significant to that case. A finding that Hamburg performed inadequately under the contract, would have voided any claim by the firm to unpaid fees owing pursuant to the contract's terms.

In Hamburg, Rubin's state court action, the Massullos did in fact state the defense of failure of consideration or lack of consideration by the firm although they did not specifically couch it in terms of malpractice. The trial court examined the issue of the firm's performance and found that "[t]he defendants have not produced any evidence that the fees were unreasonable or the work was unsatisfactory." (See Hamburg, Rubin, Mullin, Maxwell & Lupin v. Massullo, No. 94-16032, slip op. at 3 (Pa. Common Pleas, Montgomery Cty. December 16, 1997). Finding that the issue of liability had been conceded, the court proceeded to address the issue of damages. See id. at 9. It found that the law firm was entitled to legal fees on an account stated theory as "the invoices were sent to the defendants[']attorney for review and forwarded to the defendants for payment. The defendants made payments and never complained about or rejected the invoices sent by plaintiff." Id. at 10. Finding that no genuine issues of material fact existed, the court granted Hamburg, Rubin's motion for summary judgment.

The present action involves the same parties as Hamburg, Rubin's state court action and individuals in privity with these parties. In the state case, the validity of the implied contract and the firm's performance were evaluated, and the courts concluded

that the Massullos owed outstanding attorneys' fees to the firm under the contract's terms. Since the controlling issues in the Massullos' present action have already been addressed and decided by the Pennsylvania courts, a judgment by this court, sitting as a state court, on the Massullos' present action would nullify and substantially impair the earlier judgment. Therefore, to the extent that the Massullos have pled a claim for legal malpractice based on breach of contract, principles of res judicata preclude such a claim.

An appropriate order follows.

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HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN, P.C.	:	NO. 98-116

JUDGMENT ORDER

AND NOW, this 17th day of May 1999, upon consideration of defendant's Motion for Summary Judgment and plaintiffs' response thereto, it is hereby Ordered that defendant's Motion is GRANTED. Judgment is entered in favor of defendant, Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C., and against plaintiffs, Edmund and Anne Marie Massullo.

BY THE COURT:

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JAMES T. GILES, C.J.