

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

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

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

January 5, 2001

This action arises from the dissolution of Haymond & Lundy, LLP, a personal injury law firm.<sup>1</sup> Motions to dismiss have been granted, in part, and denied, in part, and the following claims remain: John Haymond ("Haymond") asserts claims on behalf of himself and his current law firm, Haymond Napoli Diamond, P.C. against Marvin Lundy ("Lundy") for breach of contract, injunctive relief, Lanham Act violations, unfair competition and tortious interference, and Lundy asserts counterclaims for unauthorized practice of law against Robert Hochberg ("Hochberg"), breach of

---

<sup>1</sup> The facts and procedural history of this action are comprehensively set forth in the court's previous opinions. See Haymond v. Lundy, No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 8585 (E.D. Pa. June 22, 2000); Haymond v. Lundy, No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 17879 (E.D. Pa. Dec. 12, 2000).

contract against Haymond and Hocherg, and civil conspiracy against Haymond, Haymond Napoli Diamond, P.C., Hochberg, and Scott Diamond ("Diamond"). Each party submitted a motion for summary judgment. Lundy's motion for summary judgment will be granted, in part, and denied, in part. Haymond's motion for summary judgment will be denied as to counts I & II of Lundy's counterclaims and counts I, II, and V of Haymond's claims. Haymond's motion as to count III of Lundy's counterclaims will remain under advisement.

#### I. Standard on Summary Judgment

A motion for summary judgment may be granted only "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 judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the opposing party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). If the moving party meets its burden, the opposing party must introduce specific, affirmative evidence manifesting a genuine issue of material fact requiring a trial. See id. An issue is one of material fact only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 248 (1986). The nonmoving party is entitled to every favorable inference that can be drawn from the record. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Relevant facts will be considered according to this standard in the discussions of the motions.

## II. Lundy's Motion for Summary Judgment

Lundy moves for summary judgment on the Lanham Act and unfair competition claims, counts three and four of Haymond's first amended complaint. Lundy also requests a declaratory judgment, "enforcing the provisions of the Haymond & Lundy LLP Partnership Agreement with respect to the vesting of the 'Lundy Cases' in Mr. Lundy." Lundy's Mot. for Summ. J., at 1.

### A. The Lanham Act and Unfair Competition Claims

Haymond alleges that Lundy made three false or misleading representations in violation of 15 U.S.C. § 1125 and the state law of unfair competition for which he is entitled to damages: (1) Lundy implied to clients that certain associates worked for him, when in fact they worked for Haymond's new firm, Haymond Napoli Diamond, P.C.; (2) Lundy represented to clients that he had been handling their cases or claims personally, when those cases and claims were being handled by other attorneys at Haymond and Lundy, LLP, some of whom then worked for Haymond Napoli Diamond, P.C.; (3) Lundy represented to clients of Haymond & Lundy, LLP in New Jersey that he had been supervising their cases

when Lundy is not admitted to practice law in the state of New Jersey. Haymond alleges that the statements caused clients to choose future representation by Lundy's new firm instead of Haymond's new firm and seeks damages.

Section 1125(a) of the Lanham Act provides:

(a) Civil Action

(1) 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, or

(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.

The elements of a cause of action for unfair competition under Pennsylvania common law are identical to those for a claim under the unfair competition section of the Lanham Act, except there is no requirement that the goods or services have traveled in interstate commerce. See Guardian Life Ins. Co. of America v.

American Guardian life Assur. Co., 943 F. Supp. 509, 517 (E.D. Pa. 1996).

1. The Use of the Names of the Six Associates

Two letters were sent on stationary from Marvin Lundy & Associates, LLP with letterhead listing Scott Diamond, Andrew Napoli, Robert Pollan, David Berman, George Szymanski, and Jack Bernstein. The first letter, dated October 15, 1999, was addressed to a client in Florida; it requested the client forward medical records to the law firm. Pl. Trial Ex. 13. The letter was written by Kim Morrissey ("Morrissey"), a case manager.<sup>2</sup> The second letter, dated October 16, 1999, was addressed to a medical center in Pennsylvania; it requested a clients' file with the charge billed to the law firm. The second letter was also from Morrissey. Pl. Trial Ex. 17. Haymond contends that these letters constituted violations of § 1125(a)(1)(A) of the Lanham Act and Pennsylvania unfair competition law because they caused clients to believe that the six listed associates continued to work with Lundy when, in fact, they were employed by Haymond after the dissolution of Haymond & Lundy, LLP.

The first letter, dated October 15, 1999, is not an actionable misrepresentation because there is no evidence that at

---

<sup>2</sup> On October 17, 1999, Morrissey informed her supervising attorney at Haymond & Lundy, LLP., Don Marino, of her intention to accept a position with Haymond's new firm.

the time it was mailed by Morrissey, Lundy had been informed that the six listed associates would disassociate with him. Lundy made each of these associates an offer of employment upon the dissolution of Haymond & Lundy, LLP. He was not informed, until he received letters dated October 15, 1999, that these six attorneys had accepted employment offers with Haymond and wished their names removed from the Lundy firm letterhead. Pl. Trial Ex. 14-16.

Moreover, to assert a Lanham Act or unfair competition claim, a plaintiff must demonstrate that consumer confusion resulted from the misrepresentation made by defendant. This letter does not discuss the dissolution of the partnership, nor does it request that the client authorize Lundy's new firm to represent him. While Haymond presents evidence that after the dissolution of the partnership some clients initially selected Lundy's firm to represent them because they believed certain attorneys would continue to work with Lundy, Pl. Mem. in Opp. To D. Mot. for Summ. J., Ex. 40, there is no evidence, nor a reasonable inference, relating this mistaken belief to the letter of October 15, 1999.<sup>3</sup>

---

<sup>3</sup> While Haymond requested the court send a questionnaire related to the October 15, 1999 letter asserting Lundy supervised and directed the prosecution of client claims, no additional discovery was requested with regard to the letterhead listing the six associates as members of the Lundy firm.

The second letter, dated October 16, 1999, was not an actionable misrepresentation because there is no evidence the letter was likely to cause confusion among consumers. See Warner-Lambert, Co. v. Breathasure, Inc., 204 F.3d 87, 91-92 (3d Cir. 2000). The letter of October 16, 1999 was sent to a medical provider, not a client.

There is no evidence that Lundy, or anyone acting on his behalf, ever sent a letter after October 15, 1999 to former Haymond & Lundy clients implying these six attorneys were associated with Lundy's new firm. The only letter in the record from Lundy to clients written after October 15, 1999 was dated October 18, 1999 in which Lundy specifically disavowed a continuing association with these attorneys. Pl. Trial Ex. 6. No reasonable juror could conclude that the two letters listing the names of six associates who had accepted or would accept positions with Haymond's new firm caused or were likely to cause confusion. Summary judgment will be granted in favor of Lundy on this Lanham Act and unfair competition claim.

2. The October 15, 1999 letter claiming Lundy supervised and directed the prosecution of clients' claims

In a letter dated October 15, 1999, sent to all former clients of Haymond & Lundy, LLP, Lundy asserted he had "supervised and directed the prosecution of [each client's]

claim." Haymond claims this statement violated the Lanham Act and unfair competition law of Pennsylvania in two ways: (1) with regard to clients of the Pennsylvania office, Haymond alleges the statement, while true, was misleading because clients understood it to mean that Lundy had personally handled their claims, to the exclusion of all other attorneys; and (2) with regard to clients of the New Jersey office, Haymond asserts the statement is false. He alleges that, as a result of Lundy's statement, clients elected to have Lundy's firm represent them instead of Haymond Napoli Diamond, P.C.; he seeks damages for the loss of these clients.

a. Lundy's letter is not actionable as to Pennsylvania clients because no consumer could find it misleading or deceiving.

The Lanham Act permits competitors to challenge not only false advertising, but misleading advertising. See Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 227 (3d Cir. 1990). Section 1125(a) "creates a new statutory tort of broader scope, which requires neither proof of literal or obvious falsehood; it embraces innuendo indirect intimations and ambiguous suggestions evidenced by the consuming public's misapprehension." Id. (citations omitted).

In an effort to prove Lundy's statement about supervision misleading, Haymond sought permission of the court to send a

questionnaire to former Haymond & Lundy clients. The proposed questionnaire asked the clients to review the letter, identify whether they had previously received it, and answer certain questions about what they believed the letter meant. The court, concerned that the questionnaire was unduly suggestive and would interfere with ongoing attorney-client relationships, concluded that it should first be determined whether the statement was false or misleading. See Tr. Hr'g Oct. 13, 1999, at 37. The court suggested that while the statement might or might not be false, the statement might also be non-misleading as a matter of law. See id. at 33-35. At that time, the court was not presented with evidence regarding Lundy's supervision and direction of claims at Haymond & Lundy, LLP.

Lundy moves for summary judgment on this claim. The court, having been presented with the evidence necessary to evaluate whether the statement is false, finds that it is true. In addition the court finds as a matter of law that no consumer could have been misled or deceived by Lundy's assertion.

The Lanham Act makes misleading statements actionable, but a misunderstood statement is not the same as a misleading one. See Mead Johnson & Co. v. Abbott Labs, 201 F.3d 883, 886-87 (7th Cir. 2000)("[I]nterpreting misleading to include factual propositions that are susceptible to misunderstanding would make consumers as a whole worse off."). A court is permitted to find as a matter

of law, without discovery to establish what consumers actually believed, that no reasonable consumer could be misled by the challenged advertising. See, e.g., Marriott Corp. v. Ramada Inc., 826 F. Supp. 726 (S.D.N.Y. 1993).

Taking the evidence in the light most favorable to Haymond, the statement in question is true with regard to the Pennsylvania clients of Haymond & Lundy, LLP. To supervise means "to oversee, direct, or manage work, workers, or a project;" to direct means "to manage the affairs, course or action of." Webster's New World Dictionary, 1345 & 389 (3d College Ed. 1988). There is substantial deposition evidence from employees, including an attorney who chose to work for Haymond post-dissolution, that Lundy assigned cases, discussed them with the assigned attorney, individually and at weekly attorneys' meetings, dictated notes on those cases, met with clients. See, e.g., Diamond Dep. 9/21/00 274-77; Mirow Dep. 25-30; Morrissey Dep. 9/22/00 15-17 & 26. There is no evidence contradicting Lundy's involvement with cases at the Pennsylvania offices of Haymond & Lundy.

Under the Partnership Agreement, only Lundy was required to "devote his full working time and energy to the practice of law with the Partnership." Partnership Agreement, § 5.03. Indeed, he was the only partner whose position involved the legal claims of clients. In contrast, the agreement contemplated Hochberg, as managing partner, would devote his time to the "day-to-day

business and administration of the partnership," and that Haymond would supervise the firm's creative marketing activities.

Agreement, § 5.02. Plaintiff avers that Hochberg did nothing but manage the day-to-day activities of the firm, and there is no evidence Haymond did anything on behalf of the Philadelphia and New Jersey clients, but only supervised the advertising campaigns.

Haymond asserts that Lundy has never taken or defended a deposition, tried a case, signed pleadings, or made a court appearance. Lundy Dep., at 5. There is also testimony that Lundy did not personally handle client files. This does not contradict Lundy's statement that he supervised client cases. Supervision is always at least one step removed from actual performance, and here would contrast with, not contradict, the personal handling of the client's claim by an assigned attorney. If a client interpreted Lundy's statement to mean that Lundy was personally handling the client's claim, that interpretation was

unreasonable as a matter of law.<sup>4</sup> Summary judgment will be granted on this claim.

b. With regard to New Jersey clients, there are material facts precluding summary judgment on this Lanham Act claim.

Haymond claims Lundy's assertion that he supervised and directed client claims is false with regard to New Jersey clients.<sup>5</sup> He asserts that Lundy was not licensed in New Jersey, and could not supervise or direct the prosecution of client claims there. The court need not address Haymond's argument at this time. Assuming Lundy could supervise and direct claims pending in New Jersey under certain circumstances, there is a factual dispute as to whether he did so, and, if he did, whether he supervised from Pennsylvania or New Jersey. There is conflicting testimony whether Lundy ever met with clients or

---

<sup>4</sup> Haymond only produced one client letter suggesting a misunderstanding of Lundy's role. That client wrote, "I was originally misled by Mr. Lundy as to who was handling my case after the dissolution of the partnership. Therefore wish to remain with Haymond Napoli & Diamond as the overseers of my case." Pl. Opp. To D's Mot. for Summ. J., Ex. 40. The client did not explain how or when she was misled, and there is no evidence that this client's misunderstanding resulted from the October 15, 1999 letter from Lundy stating that he supervised the prosecution of the client's claim. Despite being "originally misled" this client realized her error and transferred the representation of her claim to Haymond, Napoli Diamond, P.C. Whatever the misinterpretation, it appears to have been readily corrected.

<sup>5</sup> It is unclear whether he refers to clients residing in New Jersey, or those with actions pending in New Jersey.

attended attorneys' meetings at the New Jersey office of Haymond & Lundy, LLP, compare Kemp Dep. 18-19 with Lundy Dep. 281-84; therefore, summary judgment cannot be granted for Lundy on this Lanham Act claim.

B. Enforcement of the Partnership Agreement provisions concerning the Lundy Cases

Lundy moves the court for entry of an order enforcing the Partnership Agreement provisions on dissolution with regard to the Lundy cases. He seeks a declaration that he alone is entitled to the fees awarded him at the conclusion of the arbitration concerning the dissolution of Lundy's former firm, Manchel, Lundy & Lessin ("ML&L") because it was still pending at the time of the dissolution of Haymond & Lundy.

The ML&L fees collected after that firm's dissolution had been placed in a restricted account by order of former Judge Leon Katz, arbitrator of the dispute between Manchel and Lundy, former partners of the firm. Arbitrator Katz ruled on the division of those funds between Manchel and Lundy shortly after the dissolution of Haymond & Lundy, LLP. Because the arbitration dispute was not concluded until after the dissolution, Lundy believes that under the Partnership Agreement, he is entitled to all the ML&L funds awarded him in the arbitration. Had the arbitration decision been announced prior to the firm's

dissolution, the amount awarded Lundy would have been paid to the partnership under the agreement.

The court cannot grant Lundy summary judgment on his contractual claim because the pending breach of contract claims could affect the enforceability of the contract provisions regarding the Lundy cases. Haymond alleges Lundy breached the Partnership Agreement, § 3.02, requiring him to utilize his best efforts on behalf of the partnership to obtain as many of the ML&L cases and as high a percentage of the ML&L fees as possible. He asserts that Lundy intentionally delayed the resolution of the ML&L arbitration until after the dissolution of Haymond & Lundy, LLP, so that he could deprive the Haymond & Lundy partnership of any ML&L funds.

A breach of a contractual promise to use best efforts is actionable under Pennsylvania Law. See Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993). Haymond has offered evidence that Lundy took actions to prevent a pre-decision distribution of ML&L funds to Haymond & Lundy and acted in his own interest, rather than the interests of the partnership, as required by the Partnership Agreement. See P. Mot. for Summ. J., Ex. 26.

Lundy argues § 3.02 leaves all decisions concerning how to resolve the ML&L dispute in the best interests of the partnership to his "sole discretion," but Haymond argues that the contract grants Lundy discretion only to chose whether to pursue the funds

through arbitration, litigation or mediation. When the parties disagree about the meaning of a contractual provision, the court must determine whether the contract is ambiguous. See Hullet v. Towers, Perrin, Forster & Crosby, Inc., 38 F.3d 107, 111 (3d Cir. 1994).

A contract is ambiguous if it susceptible to two reasonable alternative interpretations. See id. Section 3.02(a) of the Partnership Agreement states,

Lundy shall use his best efforts, through negotiation, arbitration, or litigation, as he shall determine in his sole discretion, to obtain as large a portion of the cases of MLL for the benefit of the Partnership as possible, together with rights to a portion of the fees realized from MLL on the inventory of cases which Lundy will not retain or maintain . . . responsibility for handling.

This contract provision is ambiguous regarding the extent of Lundy's discretion, and neither party's interpretation of the provision is contrary to the plain meaning of the words of the section or clearly at odds with a related passage. Under these circumstances, it is for the jury to determine the interpretation intended by the parties.<sup>6</sup> See id. Summary judgment on the contractual claim will not be granted in favor of Lundy.

---

<sup>6</sup> Even if the jury adopts Lundy's interpretation of the contract, the discretion granted to him by the provision would not be absolute. A breach could still be established were the jury to find Lundy acted arbitrarily and capriciously. Under either interpretation of the contract, taking the evidence presented in the light most favorable Haymond, a reasonable jury could find that Lundy breached the provision.

### III. Haymond's Motion for Summary Judgment

Haymond argues that he is entitled to summary judgment on Counts I, II, and III of Lundy's Counterclaims: (I) unauthorized practice of law; (II) breach of contract; and (III) civil conspiracy. He also seeks summary judgment on his own claims against Lundy for: (I) breach of contract; (II) injunctive relief; and (V) tortious interference.

#### A. Lundy's Claim for Unauthorized Practice of Law

Lundy asserts a claim against Hochberg for unauthorized practice of law in Pennsylvania under 42 Pa. Cons. Stat. § 2524. Haymond contends Lundy's unauthorized practice of law claim is moot because Hochberg's suspension in Connecticut has ended and he is now licensed to practice law in that state.

A claim for injunctive relief is moot only if the action sought to be enjoined cannot reasonably be expected reoccur. See Natural Resources Defense Council, Inc. v. Texaco, 2 F.3d 493, 502 (3d Cir. 1993). Hochberg was suspended on an interim basis in Connecticut as of April 17, 1998, while proceedings against him continued. Eventually, the Connecticut court suspended Hochberg "for a period of three years commencing November 21, 1997," and made his readmission contingent upon successful completion of his sentence of probation in Massachusetts. Statewide Griev. Comm. v. Hochberg, CV 970575688S, 1999 Conn. Super. LEXIS 1979, at \* 10 (Conn. Super. Ct. July 12, 1999). The

Connecticut court heard argument on whether Hochberg's suspension should be extended, and concluded no further sanctions were necessary. Statewide Griev. Comm. v. Hochberg, CV 970575688S, 2000 Conn. Super. LEXIS 2528, at \* 3 (Conn. Super. Ct. Sept. 13, 1999). Hochberg's suspension in Connecticut concluded on November 21, 2000, and he is now licensed to practice law in that state.

The Pennsylvania statute on the unauthorized practice of law provides:

[A]ny person including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law . . . in such manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law . . . commits a misdemeanor.

42 Pa. Cons. Stat. Ann. § 2524(a) (West, 2000). Subsection (c) of the statute gives private parties the right to bring a cause of action to enjoin unauthorized practice of law.

Pennsylvania law recognizes a person as holding the office of attorney at law when he or she is admitted to the bar of the courts of this Commonwealth and authorized to practice under the general rules of the state. See 42 Pa. Cons. Stat. Ann. § 2521 (West, 2000). Under this definition, Hochberg still does not hold the office of attorney at law in Pennsylvania.

Pennsylvania courts have sanctioned attorneys for advertising within the Commonwealth their status as attorneys when they are not admitted to the bar of the state courts. For example, in Ginsburg v. Kovrak, 139 A.2d 889 (Pa. 1958), the Supreme Court of Pennsylvania concluded that an attorney who was admitted to the bars of the United States Supreme Court, the Court of Appeals for the District of Columbia, and the United States District Court for the Eastern District of Pennsylvania was engaged in the unauthorized practice of law because he listed himself as an attorney in a telephone book and legal directory, and distributed business cards containing a Philadelphia address, bearing his name and the title "Attorney at Law."

There is evidence that Hochberg continues to engage in practices that could constitute the unauthorized practice of law in Pennsylvania, including distribution of business cards bearing his name and the title "Managing Partner."<sup>7</sup> The court cannot grant summary judgment on this claim.

---

<sup>7</sup> The court acknowledges that some organizations and jurisdictions are proposing to amend the rules of unauthorized practice to acknowledge the increasingly multijurisdictional nature of legal profession, see, e.g., American Bar Associations's Report of the Commission on Evaluation of the Rules of Professional Conduct, at proposed changes to Model Rule 5.5, available at <http://www.abanet.org/cpr/ethics2k.html>, but as no party has argued for a change in the legal standard, the court applies current law on this motion for summary judgment.

Lundy, in his response to Haymond's motion, attempts to broaden his claim against Hochberg for unauthorized practice by noting § 2524 provides that any violation of that section also constitutes a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Lundy may be asserting the right to seek injunctive relief and damages for past harm caused by Hochberg's unauthorized practice under the UTPCPL.

The Pennsylvania Unfair Trade Practices and Consumer Protection Law provides for private causes of action by "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property . . . as a result of the use or employment by any person of a method, act or practice declare unlawful" by this statute. Pa. Stat. Ann. tit. 73, § 201 - 9.2(a). Lundy did not purchase the services of Hochberg, see Gottlieb v. Tropicana Hotel & Casino, 109 F. Supp. 2d 324 (E.D. Pa. 2000)(defining a purchaser under the UTPCPL as one who exchanges money for services). Even if Lundy were a purchaser of Hochberg's services, he did not purchase those services for personal purposes. See Gemini Physical Therapy & Rehabilitation v. State Farm Mutual Auto Ins., Inc., 40 F.3d 63, 65 (3d Cir. 1994); West Coast Franchising Co. v. WCV Corp., 30 F. Supp. 2d 498, 500 (E.D. Pa. 1998)(A company that did not purchase goods

for household or personal purposes lacked standing to sue under the UTPCPL). Lundy does not have standing to bring suit against Hochberg for unauthorized practice of law under the Pennsylvania UTPCPL.

Lundy's counterclaim against Hochberg for unauthorized practice of law will proceed under § 2524 as a claim for injunctive relief only; summary judgment will not be granted.

B. Lundy's Breach of Contract Claim

Lundy asserts in count II of his counterclaims that Haymond and Hochberg breached the Partnership Agreement by failing to inform Lundy of the transfer of Hochberg's ten percent partnership interest to Haymond. Lundy argues that this transfer materially altered the obligations and duties among and between the partners under the Partnership Agreement. He maintains that Haymond and Hochberg then continually breached the Partnership Agreement by permitting Hochberg, a non-partner, to be involved in partnership decisions and act as managing partner of the firm.

Hochberg transferred his interest in Haymond & Lundy, LLP to Haymond by Conditional Agreement, dated November 29, 1997, although the language of the Agreement suggests that it was written prior to that date. After that transfer, Hochberg was no longer a partner in Haymond & Lundy, LLP, but continued to manage the day-to-day activities of the firm. There is also evidence that he continued to vote as if he were still a partner.

Haymond claims that the failure to inform Lundy of the transfer was not a breach of the Partnership Agreement because § 6.01 of the agreement states "the consent of Lundy shall not be required for transfers of interests in the Partnership between Haymond and Hochberg." The provision clearly contemplates that Haymond and Hochberg may transfer partnership interests to one another despite an objection by Lundy to the transfer, but not necessarily without Lundy being informed.

Terms that are clearly implied from the language of the contract or required to effectuate the parties' intentions constitute enforceable contractual provisions. See MacDonald v. Winfield Corp., 93 F. Supp. 153, 157 (D. Pa. 1950), aff'd 191 F.2d 32 (3d Cir. 1951). Other provisions of the Partnership Agreement contemplate that all partners in the firm would know the percentage partnership interest held by each partner. Section 5.01 governing partnership decisions, for example, provides that when there are more than two partners, decisions are to be made "by the Partners holding a majority of the Percentage Interests held by all Partners." To calculate whether a decision binds the partnership, one would have to know the percentage partnership interest owned by each partner. A reasonable jury could find that Hochberg's transfer of his partnership interest to Haymond without informing Lundy constituted a breach of the partnership agreement.

Haymond also argues that because the transfer of interest had no effect on Lundy's power with regard to decisions of the partnership, a transfer in a breach of the Partnership Agreement would be immaterial as a matter of law. Whether a breach of contract constitutes a material breach is generally a question of fact for a jury to determine. Forest City Grant Liberty Associates v. Genro II, Inc., 652 A.2d 948, 951 (Pa. Super 1995). Unless no reasonable jury could find the breach material, the court will not grant summary judgment.

Assuming Lundy's consent to all partnership decisions was required for a decision to bind the firm both before and after the transfer of Hochberg's interest to Haymond, the breach might still affect other rights of Lundy under the agreement. Under § 5.02 of the Partnership Agreement, "normal day-to-day business and administration of the Partnership shall be supervised by a Managing Partner who shall initially be Hochberg." Because the agreement specifically calls for a managing partner, a reasonable jury could find that Hochberg was no longer qualified to manage the firm after he transferred his partnership interest to Haymond. By keeping the transfer secret, Lundy was arguably denied the right to require Hochberg to step down as managing partner. A reasonable jury could find this right significant and the breach, if proven, material. Because questions of material fact remain as to whether Haymond and Hochberg breached the

Partnership Agreement and whether such a breach was material, summary judgment will not be granted on Count II of Lundy's Counterclaims.

C. Lundy's Civil Conspiracy Claim

Haymond, moving for summary judgment on Lundy's counterclaim III for civil conspiracy, argues the claim is res judicata, legally impermissible, and unsupported by evidence sufficient to sustain the claim. The court will defer judgment on this aspect of Haymond's motion for summary judgment; the matter will remain under advisement.

D. Haymond's Breach of Contract, Injunctive Relief Claims

Haymond argues that he is entitled to summary judgment on his claim that Lundy breached the Partnership Agreement by failing: (1) to use his best efforts under § 3.02 to obtain for the benefit of the partnership as large a portion of the ML&L fees and cases as possible; and (2) to abide by the contractual provisions of the Partnership Agreement regarding the division of cases after the dissolution of the partnership. Summary judgment is rarely granted to a plaintiff on his or her own claims particularly where oral testimony is required to meet the burden of proof, because credibility determinations are the province of the factfinder. See Thompson Coal, 488 Pa., at 213-14.

Because certain contract provisions are ambiguous and there is an evidentiary conflict whether a breach occurred, oral testimony is required for either party to prevail. For example, each party asserts a different interpretation the Partnership Agreement, § 3.02, neither of which contradicts the plain meaning of the words. Lundy asserts that the provision gives him complete discretion over how best to pursue the ML&L funds and cases. Haymond contends that the provision gives Lundy discretion only with regard to the selection of litigation, arbitration or mediation to resolve the dispute. It is for the jury to determine the extent of Lundy's discretion, and whether it was abused, after hearing the testimony of the parties to the contract.

Taking the evidence in the light most favorable to Lundy, a reasonable jury could find Haymond's evidence insufficient to show Lundy acted contrary to the best interests of the partnership. Summary judgment cannot be granted on the alleged breach by Lundy of his duty to use his best effort in obtaining as much as possible in the ML&L arbitration because factual disputes remain for the jury to decide.

Summary judgment also cannot be granted in favor of Haymond on his breach of contract claim concerning Lundy's solicitation of clients post-dissolution. The claim depends on the credibility of oral testimony. Also, Lundy has a claim pending

for breach of contract. See Section III(B) above. Were a jury to find that Haymond materially breached the contract prior to the firm's dissolution, Lundy would no longer be obligated to abide by the dissolution provisions. Haymond's motion for summary judgment on counts I & II of his amended complaint for breach of contract and injunctive relief will be denied.

E. Haymond's Tortious Interference Claim

To recover on a claim for intentional interference with prospective contractual relationships, plaintiff must prove: (1) the existence of a prospective contractual relationship between plaintiff and a third party; (2) purposeful action by defendant intended to prevent the prospective relation from occurring; (3) absence of privilege or justification; (4) actual legal damage; and (5) reasonable likelihood that the prospective contract would have been consummated but for the interference of the defendant. See Brokerage Concepts, Inc. v. U.S. Healthcare, 140 F.3d 494, 529 (3d Cir. 1998). Lundy has offered evidence suggesting plaintiff never had prospective contractual relationships with Haymond & Lundy, LLP clients because he was not actively practicing law in the Delaware Valley after the dissolution of the law firm. A reasonable jury could determine that Haymond had no prospective contractual relationships with clients of the former Haymond & Lundy, LLP, and there could be no tortious interference.

Even if Haymond had prospective contractual relationships with some portion of the Haymond & Lundy clients, his interference with those relationship was arguably excused or justified by an earlier breach of the Partnership Agreement by Haymond. At issue is whether the conduct of Lundy malicious interference or privileged and justified. Defendant Lundy's explanation for his conduct is a disputed factual issue. Lundy presents evidence, that if believed by a jury, would permit a finding of justification.

Haymond's motion for summary judgment on Count V will be denied.

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

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

ORDER

AND NOW this 5th day of January, 2001, in consideration of defendant's motion for summary judgment (# 147), plaintiffs' memorandum in opposition thereto (# 152), plaintiffs' motion for summary judgment (# 149), and defendant's answer thereto (# 151), it is **ORDERED** that:

(A) Defendant's motion for summary judgment (# 147) is **granted, in part, and denied, in part.**

(1) Defendant Lundy's motion for summary judgment on the Lanham Act and unfair competition claims of Haymond's amended complaint are granted, in part, and denied, in part.

(a) Summary judgment is denied on the claim alleging that the letter dated October 15, 1999 in which Lundy stated "I supervised and directed . . ." was false or misleading as to clients of the New Jersey office of Haymond & Lundy, LLP. Genuine issues of material of fact remain as to whether Lundy actually supervised the New Jersey cases.

(b) Summary judgment is granted in favor of Lundy with regard to the supervision statement made to clients of the Pennsylvania office. The undisputed evidence demonstrates the statement is true. Lundy's statement is also non-misleading as a matter of law.

(c) Summary judgment is granted in favor of Lundy with regard to Lanham Act claims involving the inclusion of certain attorneys' names on Marvin Lundy & Associates letterhead for lack of evidence the letterhead was used in a communication to a client after the date the attorneys announced they would not accept a position with Lundy and asked that their names be removed from his letterhead.

(2) Summary judgment is denied on Lundy's claim seeking enforcement of the contractual provision regarding the Lundy cases because Haymond states a claim for breach of contract that could render those contractual provisions unenforceable.

(B) Plaintiffs' motion for summary judgment (# 149) is **denied, in part**. The court will **RESERVE JUDGMENT** on whether summary judgment should be granted in favor of Haymond on Lundy's counterclaim III for civil conspiracy.

(1) Summary judgment is denied Haymond on count I of Lundy's counterclaims for unauthorized practice of law. Genuine issues of material fact remain whether Hochberg's past and current conduct constitute unauthorized practice of law under 42 Pa. Cons. Stat. § 2524.

(2) Summary judgment is denied Haymond on count II of Lundy's counterclaims for breach of contract because genuine issues of material fact remain whether the Conditional Agreement constituted a material breach of the Partnership Agreement.

(3) The court defers deciding Haymond's motion for summary judgment on count III of Lundy's counterclaims for civil conspiracy. The motion remains under advisement.

(4) Summary judgment is denied Haymond on counts I & II of his amended complaint alleging breach of contract and injunctive relief because there is a material issue of fact whether Haymond breached the contract first. A preceding breach

by Haymond could affect Lundy's obligation to fulfill his contractual duties.

(5) Summary judgment is denied Haymond on count V of his amended complaint alleging tortious interference with prospective contractual agreements. Genuine issues of material fact remain regarding the prospective contractual relationships of Haymond and Lundy with the former clients of Haymond & Lundy, LLP, who was interfering with whom, and whether the interference was proper.

(C) The claims remaining for trial are:

(1) Haymond, on behalf of himself and Haymond, Napoli, Diamond P.C., asserts claims for (I) breach of contract; (III) Lanham Act (New Jersey cases); and (V) tortious interference against Lundy.

(2) Lundy asserts claims for (I) unauthorized practice of law against Hochberg; (II) breach of contract against Haymond and Hochberg; and (III) civil conspiracy against Haymond, Hochberg, Diamond and Haymond Napoli Diamond, P.C. (pending the court's decision on Haymond's motion for summary judgment on this claim).

---

Norma L. Shapiro, S.J.