

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 29, 2001

This action arises from the dissolution of Haymond & Lundy, LLP, a personal injury law firm.¹ Cross-motions to dismiss were granted in part, and denied in part; prior to trial both parties submitted motions for summary judgment. In a Memorandum Opinion and Order dated January 5, 2001, Marvin Lundy's ("Lundy") motion for summary judgment was granted, in part, and denied, in part, and John Haymond's ("Haymond") motion for summary judgment was denied, in part. The court retained under advisement the portion of Haymond's motion for summary judgment addressing count III of

¹ The facts and procedural history of this action are set forth in two of 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).

Lundy's counterclaims for civil conspiracy. The court now will grant summary judgment in favor of Haymond on the civil conspiracy count.

I. Standard on Summary Judgment

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). A defendant moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the plaintiff'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. "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). The court has a duty to grant summary judgment when the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation. See Barnes Foundation v. Township of Lower Merion, 982 F. Supp. 970, 982 (E.D. Pa. 1997).

II. Haymond's Motion for Summary Judgment on the Civil Conspiracy Counterclaim:

Lundy alleges that Haymond, Hochberg and Diamond conspired "to deprive Mr. Lundy of his name, reputation, law practice, client base, cases, fee entitlements, assets and/or property." Ans. ¶ 135. Haymond, moving for summary judgment, argues Lundy failed to offer sufficient evidence to sustain the claim.

Each element of a civil conspiracy must be proved by full, clear and convincing evidence. See Fife v. Great Atlantic & Pacific Tea Co., 52 A.2d 24, 27 (Pa. 1947). The court must take this heightened evidentiary standard into account in determining whether to grant a motion for summary judgment. See Anderson, 477 U.S., at 254.

To establish a civil conspiracy, plaintiff must prove:

(1) an agreement by two or more persons to perform an unlawful act or perform an otherwise lawful act by unlawful means; (2) an overt act accomplished in pursuit of that common purpose; and (3) actual legal damage. See Smith v. Wagner, 588 A.3d 1308, 1311-12 (Pa. Super. Ct. 1991). Each conspirator must be possessed of the intent to do the unlawful act and be aware of such intent by his co-conspirators. Fife, 52 A.2d, at 27. In addition, plaintiff must prove a separate underlying tort as a predicate for civil conspiracy liability. See Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 407 (3d Cir. 2000).

In Boyanowski, the Court of Appeals reversed a jury verdict on a civil conspiracy claim in favor of the plaintiff because the jury had found in favor of the defendant on the underlying tort. See id. at 405-07. The court held that a civil conspiracy claim may not be used to make actionable conduct that, on its own, is not actionable. See id. A civil conspiracy claim merely serves to connect the actions of other defendants with the actionable tort of one defendant. See In re Orthopedic Bone Screw Products Liability Litigation, 193 F.3d 781, 789 (E.D. Pa. 1999). It is "a means of establishing vicarious liability for the underlying tort." See Boyanowski, 215 F.3d, at 407 (citations omitted).

Under Boyanowski, to survive summary judgment on a claim for civil conspiracy the plaintiff must maintain a sufficiently

viable claim for an underlying unlawful act or unlawful means in another count. It is the trial judge's duty to screen out claims at the motion to dismiss or summary judgment stage if an alleged civil conspiracy is unconnected to an assertable claim for an underlying tort. See id. at 406.

In his pleading, Lundy asserts, "the vehicle for the [civil conspiracy claim] is the unauthorized practice of law by Hochberg." Ans. ¶ 134. Lundy alleges that "with knowledge and specific intent, Hochberg engaged in unauthorized practice of law, as encouraged, facilitated and secreted by Haymond and Diamond, in order to take over the reputation and practice of Lundy." Ans. ¶ 134. The court understands the counterclaim to assert that Haymond and Diamond conspired to conceal Hochberg's status so that he could maintain his position as Managing Partner.

In its Memorandum Opinion and Order dated December 12, 2000, the court held Lundy could not maintain a claim against Haymond and Diamond for conspiracy to facilitate Hochberg's unauthorized practice; the Pennsylvania Supreme Court has exclusive jurisdiction over such a claim because Haymond and Diamond, the alleged conspirators, are members of the bar of Pennsylvania. See Haymond v. Lundy, No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 17879, at * 6 (E.D. Pa. Dec. 12, 2000). The court's decision effectively dismissed the civil conspiracy claim of

Lundy's counterclaims,² although the court retained jurisdiction over the underlying claim against Hochberg, who is not a member of the Pennsylvania bar, for unauthorized practice of law.

Lundy now attempts to revive his civil conspiracy claim by alleging new underlying torts: unfair competition, breach of fiduciary duty, and intentional and negligent misrepresentation. At oral argument and in his final pretrial memo, Lundy argued that these torts were always implicit in his civil conspiracy pleading and that he should be permitted to amend his counterclaims to assert them as additional counts to make the pleadings conform to the evidence. Pretrial Mem. of Countercl. Pl. Marvin Lundy, at 6.

Rule 15(b) of the Federal Rules of Civil Procedure permits a party to amend pleadings to conform to the evidence, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties." The evidence in question had not yet been presented to a jury; Rule 15(b) is inapplicable.

² Even after the court's decision of December 12, 2000, Lundy has continued to state the conspiracy in these terms. At oral argument on the Summary Judgment motions, Lundy's counsel, asked specifically to describe the purpose of the conspiracy, stated that the defendants conspired "to keep Mr. Hochberg managing the firm in the appearance of the lawyer . . . [so that] when the three years [suspension] was up and he automatically is reinstated, no harm, no foul, no one would have found out." Tr. 12/13/00 Hr'g, at 136.

Rule 15(a) states, "leave [to amend a pleading] shall be freely given when justice so requires," but courts are free to deny leave when permitting the amendment would prejudice the opposing party, cause undue delay, or be futile. See In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)(citations omitted). The amendment was proposed in Lundy's final pretrial memorandum, submitted to the court on the eve of trial, and a proposed amended pleading was not attached. To have permitted Lundy leave to assert amorphous additional counterclaims at that late date would have prejudiced the plaintiff and caused undue delay, as the trial would have had to be postponed. See, e.g., Spring Ford Indus. v. Aetna U.S. Healthcare, No. 98-3555, 2000 U.S. Dist. LEXIS 7650, * 3-4 (E.D. Pa. May 25, 2000). Lundy's request for leave to amend his answer was denied.

Even if Lundy were permitted to proceed on the conspiracy counterclaim on merely the allegation of an underlying tort, without a separate tort counterclaim, the facts, taken in the light most favorable to defendant Lundy, do not demonstrate a tort on which the conspiracy can be based, nor clear and convincing evidence of a conspiracy.³ The evidence Lundy asserts

³ Lundy's counsel has offered varied descriptions and theories of the conspiracy claim at varying times, but the court will decide the motion for summary judgment on the counterclaim presented in the Answer and Counterclaims of Marvin Lundy and the written

to support his newly-constructed allegation of civil conspiracy is: (1) Haymond and Hochberg contacted other attorneys named "Lundy" to affiliate with one of them and form a new firm named "Haymond & Lundy;" the new firm would benefit unfairly from the prior advertising of Haymond & Lundy, LLP; (2) Haymond chose the name Haymond Napoli Diamond, P.C. as the pseudonym for his Pennsylvania and New Jersey offices post-dissolution; and (3) Diamond registered the domain name www.marvinlundy.com to prevent Lundy from using the site to advertise. See Ans. of Lundy to Mot. for Summ. J., at 24.

The first two underlying acts do not constitute tortious conduct. Haymond and Hochberg contacted other attorneys named "Lundy," but they did not actually enter a contract with any other "Lundy," and their contacting other Lundys did not cause Marvin Lundy legal damage. Lundy maintains that this act by Haymond and Hochberg breached the fiduciary duty or duty of loyalty to the partnership.

Preparing to compete with one's partners or partnership prior to leaving or dissolving the partnership violates neither a fiduciary duty nor a duty of good faith. See, e.g., Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989) ("[F]iduciaries may plan to compete with the entity to which they owe allegiance,

submissions on Counterclaim Defendants' Motion for Summary Judgment.

provided that in the course of such arrangements they do not otherwise act in violation of their duties."); see also Restatement (Second) of Agency § 393 cmt. e (1958) ("Even before the termination of the agency, [an employee] is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein."); Midland-Ross Corp. v. Yokana, 293 F.2d 411, 413 (3d Cir. 1961). Lundy has offered no evidence that the alleged conspirators failed to perform their duties to the firm while they were negotiating with other Lundys, or that the partnership was harmed by Haymond and Hochberg seeking out other Lundys. The actual use of Lundy's name by another law firm after the dissolution of Haymond & Lundy might have been tortious, but neither Haymond, Hochberg nor Diamond ever associated with any other Lundy or otherwise followed through on this plan.

Similarly, choosing the pseudonym Haymond Napoli Diamond, P.C. for the new law firm was not tortious. Haymond had permission from Napoli and Diamond to use their names. See P. Mot. Summ. J., Ex. 47.

The third alleged underlying act, Diamond's purchase of the domain name www.marvinlundy.com is arguably tortious,⁴ but there

⁴ Such actions are now generally brought under the Anticybersquatting Consumer Protection Act of 1999, an amendment to the Lanham Act provisions on misleading advertising. See 15 U.S.C. § 1125(d). Lundy has not alleged a breach of this

is no evidence, and certainly not clear and convincing evidence, that Haymond or Hochberg had a common purpose to commit this tort with Diamond. The evidence presented on this issue suggests Haymond and Hochberg did not know of Diamond's action in advance. See Diamond dep. 486-88. None of the underlying torts alleged to support the conspiracy in Lundy's response to the motion for summary judgment would survive an independent motion for summary judgment, so Lundy cannot assert a civil conspiracy claim based upon their allegation.

Pennsylvania law suggests there may be a cause of action for a civil conspiracy to breach a contract. See, e.g. Fife v. Great Atlantic & Pacific Tea Co., 52 A.2d 24, 27 (Pa. 1947). Lundy has never pled a civil conspiracy based on breach of contract, nor does his final pretrial memorandum suggest it. Moreover, Lundy has not offered evidence by which a reasonable jury could conclude by clear and convincing evidence that Hochberg, Diamond and Haymond conspired to breach the Haymond & Lundy Partnership Agreement.

Lundy has offered no direct evidence that Hochberg, Haymond and Diamond specifically agreed or planned to breach the partnership agreement. The evidence, taken in the light most favorable to Lundy, that suggests such an agreement is: (1)

provision.

Haymond and Diamond admit to knowing of Hochberg's indictment, disbarment, and suspension; (2) Haymond and Hochberg admit they did not inform Lundy of the existence or terms of the agreement by which Hochberg transferred his partnership interest in Haymond & Lundy to Haymond, although they deny knowing that the other did not inform Lundy or that they agreed not to inform Lundy; and (3) Hochberg continued to manage the law firm. Such evidence might permit inference of a by the preponderance of the evidence, but it is insufficient as a matter of law under the applicable clear and convincing standard.

The evidence, taken in the light most favorable to Lundy, fails to support Lundy's counterclaim for civil conspiracy. Summary judgment will be granted in favor of counterclaim defendants on count III of Lundy's counterclaims.

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ORDER

AND NOW this 29th day of January, 2001, in consideration of plaintiffs' motion for summary judgment (# 149), and defendant's answer thereto (# 151), it is **ORDERED** that summary judgment is **GRANTED** in favor of the counterclaim defendants on count III of Lundy's counterclaims.

Norma L. Shapiro, S.J.