

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

JOHN JOSEPH EDWARDS
Plaintiff,

v.

DUANE, MORRIS & HECKSCHER LLP
and DONALD R. AUTEN, ESQ.
Defendants.

CIVIL ACTION

NO. 01-4798

MEMORANDUM AND ORDER

Tucker, J.

November 29, 2004

Presently before this Court are the Parties' Cross-Motions for Summary Judgment (Docs. 66 & 68). For the reasons set forth below, upon consideration of the Parties' Cross-Motions, Responses thereto (Docs. 71 & 72) and Replies (Docs. 81 & 83), this Court will deny both the Defendants' Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment.

PROCEDURAL HISTORY

John J. Edwards ("Plaintiff") filed a complaint on September 21, 2001, against Duane Morris & Heckscher, LLP ("Duane Morris"). The complaint was amended on November 13, 2001, to add Donald R. Auten, a partner of Duane Morris, as a Defendant ("Auten"). Duane Morris and Auten (collectively, "Defendants") filed a motion to dismiss on January 9, 2002. The motion was denied as to Counts I and III for fraud and breach of contract, and granted as to Counts II and IV for breach of fiduciary duty and legal malpractice. Following the completion of discovery, on March 5, 2004, Plaintiff filed a motion for partial summary judgment on the

claim of fraud. On the same date, Defendants filed a motion for summary judgment on both the remaining fraud and breach of contract claims.

BACKGROUND

From the evidence of record, the pertinent facts are as follows. From the late 1970s until the early 1990s, Plaintiff was the President and a Director of Pilot Air Freight Corporation (“PAF” or “Pilot”), a Pennsylvania corporation engaged in the air freight business. Pls. Mem. at 3. In January 1994, Mellon Bank (“Mellon”) provided PAF an \$8,000,000 line of credit. Plaintiff provided a 100% individual guarantee for the PAF loan with Mellon. As a part of that guarantee, Plaintiff was required to provide a second mortgage to Mellon on his residence in the amount of \$8,000,000.¹

Shortly thereafter, Plaintiff began experiencing difficulties with Richard Phillips, the Chief Executive Officer and Chairman of the Board of Directors of PAF.² In May 1994, Plaintiff retained Defendants to assist him in his disputes with Phillips and PAF.³ In April 1995, Phillips terminated Plaintiff from his position as President of PAF. After Plaintiff was

¹Prior to the above-mentioned securitization, Plaintiff entered into a security agreement with Mellon. On or about October 1, 1986, Edwards and his wife executed a promissory note and security agreement in the principal amount of \$700,000.00 in favor of Mellon. The promissory note was secured by a mortgage on the Edwards’ home located at 117 Raynham Road, Merion Station, Pennsylvania.

²Defendants state that Mellon required Plaintiff be removed from financial control of Pilot due to concerns about his financial management, including a history of “excessive advances and benefits paid to shareholders.” Mellon also imposed restrictions on the salary, bonuses and other amounts Pilot could pay Plaintiff. Defs. Mem. at n.2.

³Defendants state that Plaintiff contacted Auten to assist him in “negotiating an exit strategy, [including] the sale of [his] stock in Pilot Air Freight” and his interest in a company called the Edwards Partnership, which owned real estate used by Pilot. Defs. Mem. at 3.

terminated, PAF and Phillips refused to pay Plaintiff his salary, bonuses and S-corporation distributions, including amounts owed for 1994.

In May 1995, Auten, in preparation for his potential representation of Plaintiff against PAF, Phillips and others, conducted a conflict check of the parties potentially adverse to Plaintiff. The results of that conflict check showed a conflict with Mellon Bank. It is disputed whether Auten told Plaintiff in May 1995 that Mellon Bank was a client of Duane Morris. Pls. Mem. at 4. On May 23, 1995, Plaintiff and Duane Morris entered into a contingency fee agreement for claims that he had against PAF, Phillips, Richard G. Phillips & Associates, A. Wesley Wyatt, Wyatt Construction Corporation, Wyatt Incorporated, and Michael Schwartz (collectively, "Pilot Air Defendants").

As of May 23, 1995, Plaintiff owed Duane Morris approximately \$38,000⁴ for its representation of him under their prior engagement agreement dated May 11, 1994. As a condition of Duane Morris' continued representation, Plaintiff and his wife were required to provide an Open Note and \$400,000 mortgage on their home.⁵ Pls. Mem. at 5. In May 1995, the Edwards' residence had a value of \$2,000,000, while the Mellon mortgage had approximately \$400,000 outstanding. On May 23, 1995, Duane Morris conducted a title search that showed the existence of the Mellon mortgage. The Contingent Fee Agreement between Plaintiff and Duane Morris was approved by the Contingent Fee Committee of Duane Morris.

⁴Defendants state that Plaintiff owed Duane Morris \$41,000 from the 1994 engagement.

⁵Defendants state that in connection with the May 23, 1995 engagement, Duane Morris obtained an open-end mortgage on Edwards' home up to a maximum principal amount of \$300,000. Def. Resp. to Pls. Stat. Undisputed Facts at ¶ 17. However, it is undisputed that this is the same residence on which Mellon held a lien, and Mellon has at all relevant times been a client of Duane Morris.

In May 1995, Mellon began foreclosure proceedings on the Edwards' residence because Plaintiff was unable to make his mortgage payments. In June 1995, Plaintiff took the Mellon foreclosure pleadings to Auten. Auten told Plaintiff that he would take care of the Mellon foreclosure because the foreclosure was entwined with PAF's refusal to compensate Plaintiff. Rosetta Packer represented Mellon in its foreclosure upon the Edwards residence. In June and July 1995, Auten and a Duane Morris associate had a series of conversations with Packer concerning the Mellon foreclosure proceedings against Plaintiff. Additionally, Auten and others at Duane Morris recorded time spent on the foreclosure and were paid in full for working on the Mellon foreclosure proceeding. Def. Resp. to Pls. Stat. Undisputed Facts at ¶ 30.

In correspondence dated June 21, 1995, from Packer to Duane Morris, Mellon gave notice that it was moving for a default judgment in its foreclosure proceeding against Plaintiff. Plaintiff argues that Duane Morris then "ghostwrote" a pleading in opposition to Mellon's foreclosure complaint under the name of a former Duane Morris attorney, Mark Cedrone. The draft pleading asserted valid defenses to Mellon's foreclosure action and a counterclaim, however, it was never filed on Plaintiff's behalf.⁶ Pls. Mem. at 7. On July 11, 1995, William Stallkamp, CEO of Mellon Bank's Northeast Region and Vice Chair of Mellon Bank, Sheldon Bonovitz, Vice Chair of Duane Morris, and Auten met to discuss Edwards. *Id.* at 9. Plaintiff was not present at this meeting.

⁶Defendants aver that Duane Morris could not file any response to the foreclosure action on Plaintiff's behalf because the firm also represented Mellon. Defs. Mem. at 4. Defendants argue that the draft pleading set forth six paragraphs under the heading "New Matter." Whether the New Matter constituted a valid defense and/or permissible counterclaim to the foreclosure action is a question of law. Further, Defendants argue that certain allegations in the draft answer have no basis in fact and could never have been proved. Def. Resp. to Pls. Stat. Undisputed Facts at ¶ 34.

On July 20, 1995, Plaintiff directed Duane Morris to file the Complaint that Duane Morris prepared against the Pilot Air Defendants. Auten wrote to the Plaintiff on the same day and stated that it was against Plaintiff's best interest for Duane Morris to file the Complaint. In this letter, Auten told Plaintiff that he would avoid foreclosure against his residence through continued settlement discussions. In fact, Auten was making progress in the negotiations; the parties had reached an agreement on ten of the fourteen discussion points and were close on three of the remaining four. There were also other risks involved with filing the Complaint against the Pilot Air Defendants, namely, Auten's concern that a lawsuit against Pilot might severely diminish the value of Plaintiff's stock and Plaintiff's apparent inability to support himself during the pendency of what threatened to be a protracted lawsuit. Defs. Mem. at 4.

On July 25, 1995, Mellon obtained a default judgment against Plaintiff in the foreclosure action. After obtaining the default judgment, counsel for Mellon began efforts to have the Edwards' residence sold through a Sheriff's sale. Auten was able to stall the Sheriff's sale of the Edwards' residence by negotiating a "Standstill Agreement" with counsel for Mellon. The terms of the Standstill Agreement were finalized on July 28, 1995, three days after default judgment was granted against Plaintiff. Under this agreement, Plaintiff was not to file the Complaint against the Pilot Air Defendants until October 16, 1995, and PAF agreed to prevent Mellon from proceeding with the Sheriff's sale of Plaintiff's residence until October 16, 1995.⁷ Plaintiff directed Duane Morris to file the Complaint against the Pilot Air Defendants when the Standstill Agreement expired. On the morning of October 16, 1995, Plaintiff signed the verification for

⁷Ultimately, PAF paid Mellon \$70,000 for Plaintiff's benefit to delay the Sheriff's sale. PAF also agreed to make many other payments on Plaintiff's behalf, most notably \$5,000 per week to Plaintiff through October 15, 1995.

the Complaint and a messenger was dispatched to file the Complaint. However, Auten obtained an agreement with the Pilot Air Defendants for an extension of the Standstill Agreement, and he stopped the Complaint from being filed. Pls. Mem. at 12.

In October 1995, Auten advised Plaintiff that it was necessary for him to file bankruptcy to protect his house, but Duane Morris could not represent him in the bankruptcy proceeding because Duane Morris represented Mellon. Auten further advised Plaintiff that bankruptcy court would provide a better forum for filing the Complaint against the Pilot Air Defendants and that Duane Morris would be appointed as special counsel to litigate Plaintiff's claims against the Pilot Air Defendants.⁸ Defendants contacted Gary Schildhorn to represent Plaintiff in the bankruptcy proceedings. On October 25, 1995, Plaintiff filed a voluntary Chapter 11 bankruptcy petition, as well as an application to retain Schildhorn and his firm as bankruptcy counsel. On November 2, 1995, the bankruptcy court approved that application. Duane Morris continued to represent Plaintiff by negotiating with PAF and Phillips until October 1997.⁹

⁸Duane Morris never sought leave of the bankruptcy court to be appointed special counsel in Plaintiff's bankruptcy proceeding. Duane Morris decided that their representation of several of Plaintiff's creditors, "especially when combined with Mellon's status as both a Duane Morris client and Pilot's biggest lender," created a situation where the bankruptcy court would not approve of Duane Morris as special litigation counsel. Def. Mem. at 6-7.

⁹Defendants state that Schildhorn and Auten's continued efforts to settle the dispute between Plaintiff and the Pilot Air Defendants in late 1995 were unsuccessful. Consequently, in February 1996, they referred Plaintiff to the firm of Chimicles, Jacobsen & Tikellis to pursue his claims against PAF. In March 1996, Chimicles partner Kenneth Jacobsen and his associate, Steven Schwartz, began representing Plaintiff in his dispute with PAF and others. Jacobsen filed two lawsuits against PAF on Plaintiff's behalf.

The bankruptcy court dismissed Plaintiff's bankruptcy proceeding on June 16, 1996.¹⁰ Plaintiff re-filed for bankruptcy on August 21, 1996, to protect his home from being sold by Mellon through a Sheriff's sale. Schildhorn attempted to represent Plaintiff in his second bankruptcy proceeding, but was disqualified by the bankruptcy court on November 1, 1996. Plaintiff was *pro se* in his bankruptcy proceeding until Stephen Braga entered his appearance on Plaintiff's behalf on August 20, 1997.¹¹ In February 1997, the bankruptcy court Judge converted Plaintiff's bankruptcy to a Chapter 7 proceeding. In April 1997, Duane Morris filed a Proof of Claim for fees and expenses incurred while representing Plaintiff.¹² On June 17, 1997, the bankruptcy court approved the sale of the Edwards' residence by Edwards' bankruptcy trustee.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed.2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

¹⁰The Plaintiff's Brief states that the bankruptcy court dismissed Plaintiff's bankruptcy proceeding on June 16, 1997, however, the Court is treating this as a typographical error.

¹¹Defendants state that the bankruptcy court appointed Christine Shubert as trustee of Plaintiff's estate in February or 1997. Shubert selected the law firm of Ciardi, Maschmeyer & Karalis as her counsel.

¹²The Proof of Claim was not paid until December of 1999.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed.2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Celotex, 477 U.S. at 325, 106 S. Ct. at 2553-54. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322, 106 S. Ct. at 2552-53. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against the opponent, even if the quantity of the movant’s evidence far outweighs that of its opponent.” Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513-14.

DISCUSSION

Plaintiff brings this action for breach of contract and fraud, the two remaining counts of

the Complaint, against Duane Morris and Donald R. Auten, Esquire, for issues arising out of the Defendants' three-year legal representation of the Plaintiff.¹³ Both the Plaintiff and Defendants have moved for summary judgment. The Court will consider each summary judgment motion in turn.

I. Defendants' Motion for Summary Judgment

Defendants argue that they are entitled to summary judgment on both remaining counts of the Complaint because both are barred by the applicable statutes of limitations. In addition, Defendants state that Plaintiff's claims are barred by the doctrine of res judicata because Plaintiff was aware of these claims during his bankruptcy but never raised them in response to Duane Morris' request for fees in the Proof of Claim. Finally, Defendants argue that the bankruptcy court adjudicated the value of Plaintiff's three main items of damage, and he received full and fair compensation for each. Therefore, even assuming that any of Plaintiff's claims could survive to trial, almost all of his damage claims are barred by the doctrine of collateral estoppel.

A. Statutes of Limitations

Under Pennsylvania law, the statute of limitations for an action on a written contract is four years. See 42 Pa. Cons. Stat. Ann. § 5525(8). As a general rule, a statute of limitations begins to run when the plaintiff's cause of action arises or accrues. Naples v. Nat'l Seating & Mobility, Inc., 2004 U.S. Dist. LEXIS 20327, *4 (E.D. Pa. Sept. 30, 2004) (citing Leedom v. Spano, 436 Pa. Super. 18, 647 A.2d 221, 226 (Pa. Super. 1994)). In a contract case, the cause of action accrues when there is an existing right to sue based on the breach of contract. Id.

¹³The amount of time that the Defendants represented the Plaintiff is disputed. Defendants claim that their relationship ended in February of 1996. Plaintiff claims that the Defendants represented him in some capacity until October of 1997.

The statute of limitations for fraud in Pennsylvania is two years. Dongelewicz v. PNC Bank Nat'l Assoc., 104 Fed. Appx. 811, 818 (3d Cir. 2004) (non-precedential opinion). A claim accrues when injury is suffered and the statute begins to run when the injured person knows or reasonably should know that he has been injured and that his injury has been caused by another party's conduct. Id. at 818-19.

Defendants argue that Plaintiff's breach of contract and fraud claims are untimely as a matter of law. More specifically, Defendants state the following: (1) the statute of limitations on Plaintiff's breach of contract claim based on Defendants' failure to defend the Mellon Bank foreclosure action began to run on July 25, 1995, the date that Mellon Bank obtained default judgment against the Plaintiff, and was time-barred as of July 25, 1999; (2) the statute of limitations on Plaintiff's claim that Defendants failed to file a complaint against the Pilot Air Defendants began to run in February of 1996, when Defendants referred Plaintiff to the law firm of Chimicles, Jacobsen & Tikellis to pursue his claims, and was time-barred as of February 2000; and (3) the statute of limitations on Plaintiff's fraud claim began to run on May 30, 1996, when Plaintiff's bankruptcy counsel received a letter ("the Packer letter") from Mellon's counsel, Rosetta Packer, explaining that Duane Morris asserted the conflict of interest, and was time-barred two years later, in 1998.

1. Discovery Rule

Plaintiff responds to each of the Defendants' statute of limitations arguments by stating that there are factual issues concerning Plaintiff's discovery of his claims, which should be resolved by a jury. Under Pennsylvania's discovery rule, the statute of limitations will not begin to run until "the plaintiff reasonably knows or reasonably should know: (1) that he has been

injured, and (2) that his injury has been caused by another party's conduct.” In re: Mushroom Transp. Co. Inc., 382 F. 3d 325, 338 (3d Cir. 2004) (quoting In re TMI Litig., 89 F. 3d 1106, 1116 (3d Cir. 1996)). The discovery rule will only toll the statute of limitations where the plaintiff shows that he or she has exercised “‘reasonable diligence’ in ascertaining the existence of the injury and its cause.” Id. (quoting Bohus v. Beloff, 950 F. 2d 919, 925 (3d Cir. 1991)).

Whether the statute has run on a claim is usually a question of law for the trial judge, but where the issue involves a factual determination, that determination is for the jury. Naples, 2004 U.S. Dist. LEXIS 20327 at *6 (citing Melley v. Pioneer Bank, N.A., 2003 Pa. Super. 389, 834 A.2d 1191, 1201 (Pa. Super. 2003)). “Specifically, the point at which the complaining party should reasonably be aware that he has suffered an injury is generally an issue of fact to be determined by the jury.” Id. Only where the facts are so clear that reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law. Id. (citing Pearce v. Salvation Army, 449 Pa. Super. 654, 674 A. 2d 1123, 1125 (Pa. Super. 1996)).

In this case, it seems most appropriate to allow the jury to determine when Plaintiff knew or should have known that he had a cause of action against Duane Morris. There are several issues of material fact surrounding the circumstances of Duane Morris' representation of the Plaintiff and what occurred after that representation was terminated. Both sides point to facts to support their positions, making it impossible for this Court to determine as a matter of law when the commencement of the limitations period began.

For instance, the fact that the Plaintiff continued to allow Duane Morris to represent him after default judgment was entered against him in the foreclosure proceedings and that he paid Duane Morris' Proof of Claim in bankruptcy for fees and costs related to their representation of

him without objections further bolsters Plaintiff's argument that he was not aware that he had a potential claim against Duane Morris for fraud and/or breach of contract. Further, Duane Morris can point to no credible evidence to suggest that Plaintiff was made aware of the conflict with Mellon Bank before default judgment was obtained. This is important to note because Duane Morris knew there was a conflict when Plaintiff retained them as counsel. Duane Morris was on notice of the conflict when (1) it ran a conflict check to present to the contingency fee committee; (2) it ran a title search on Plaintiff's home, which Plaintiff had given Duane Morris a mortgage on; and (3) when Mellon Bank, a client of Duane Morris, began foreclosure proceedings against Plaintiff on the home in which both Duane Morris and Mellon Bank had a financial interest.

Further, Duane Morris' argument that it told Plaintiff it could not represent him in the foreclosure is disingenuous because at all other times relevant, when a conflict precluded it from representing the Plaintiff, Duane Morris referred the Plaintiff to other counsel. However, it never referred Plaintiff to other counsel to defend against the foreclosure proceedings. The "ghostwritten" pleading suggests that Duane Morris knew that the foreclosure required defending, but Duane Morris did not file any pleading on the Plaintiff's behalf. Moreover, Mellon Bank's counsel notified Duane Morris that it was moving for default judgment, and nothing was filed on Plaintiff's behalf. Plaintiff had been told that Duane Morris would handle his foreclosure and had no reason to believe that it was not doing just that. Even after the default judgment was entered, Duane Morris continued to act on behalf of the Plaintiff by negotiating the standstill agreement. It would appear to any reasonable person that Duane Morris was zealously representing the Plaintiff as required. Only after the "ghostwritten" pleading was

linked to the Duane Morris server did Plaintiff realize that Duane Morris neglected to zealously represent him in his foreclosure. Indeed, Duane Morris neglected to represent the Plaintiff, by any standard, in his foreclosure.

Therefore, this Court finds that the issue of when the Plaintiff knew or should have known that he had a cause of action against Duane Morris for fraud and/or breach of contract is a matter best left to the province of the jury.¹⁴

2. Fraudulent Concealment

It is unnecessary to determine whether Defendants fraudulently concealed Plaintiff's claims and should, therefore, be estopped from invoking a statute of limitations defense. The test for tolling the statute of limitations for fraudulent concealment is the same as the test for the discovery rule: whether the plaintiff knew or should have known that he was injured and that his injury was caused by another party's conduct. Urland v. Merrell-Dow Pharm., 822 F.2d 1268, 1273 (3d Cir. 1987). Therefore, because it has been determined *supra* that when the plaintiff knew or should have known that he had a possible cause of action against Duane Morris is a disputed fact, an in depth analysis of fraudulent concealment is unnecessary. The result is the same.

¹⁴Since it has been determined in this Court's Memorandum and Order in response to Defendants' motion to dismiss the amended complaint, as well as in response to this motion, that when Plaintiff knew or should have known of the alleged fraud cannot be determined as a matter of law, the Defendants argument concerning whether the statute of limitations was tolled at the filing of the original complaint or at the time of service of the amended complaint is a nullity.

3. The *Packer* Letter

Defendants contend that the information contained in the Packer letter, dated May 30, 1996, and sent to Plaintiff's bankruptcy counsel, should be imputed to Plaintiff.¹⁵ Defendants contend that courts have repeatedly held that the statute of limitations begins to run on a claim when a plaintiff's lawyer has knowledge sufficient to constitute inquiry notice. Defendants further argue that this is true even where the attorney was retained to handle a matter other than the claim subsequently found to be time-barred.

Plaintiff, on the other hand, argues that knowledge of the information contained in the Packer letter should not be imputed to the Plaintiff because determining whether Plaintiff had claims against Defendants was not within the scope of the bankruptcy counsel's representation. Plaintiff further argues that his bankruptcy counsel testified that he did not know that Plaintiff had a potential claim against Duane Morris until he was contacted by Plaintiff's present counsel just prior to filing the complaint in this case. See Pl's Exhibit K, Schildhorn Dep. at 6-7.

A brief discussion of agency law will clarify this issue. The Restatement (Second) of Agency §272 states that "the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information." (Emphasis added). Comment (a) to the Restatement explains,

¹⁵The exact language of the Packer letter, in pertinent part, reads as follows: "...I have checked with the legal department at Mellon Bank, N.A. and, after numerous conversations, have determined that there is no one responsive to your request to produce the employee of Mellon Bank, N.A. who "called the conflict" on Duane, Morris & Heckscher. In light of my findings, I telephoned David Sykes to ask him to identify that person. David informed me that there was no such individual at Mellon Bank, N.A. and that it had been a decision of Duane, Morris & Heckscher not to proceed with its representation of John Edwards..."

[T]he liability of a principal because of the knowledge of the agent is based upon the existence of a duty on the part of the agent to act in light of the knowledge which he has. The principal is affected by the agent's knowledge whenever the knowledge is of importance in the act which the agent is authorized to perform.

(emphasis added).

Furthermore, knowledge should only be imputed to the principal where it is apparently relevant. Section 275 of the Restatement explains,

[T]he principal is bound only by the agent's knowledge which appears to be important in view of the agent's duties and prior knowledge. The principal is not affected by information acquired by an agent which seems irrelevant to him because he does not know that the principal or another agent of the principal is transacting business in which such knowledge is relevant.

Restatement (Second) of Agency §275, Comment d (1958) (emphasis added).

The cases cited in support of Defendants' argument are distinguishable from the facts of this case. In Owens v. Lac D'Amiante du Quebec, Ltee., 656 F. Supp. 981 (E.D. Pa. 1987), the plaintiff's claim for an asbestos related personal injury was time-barred. In that case, three years before the plaintiff filed his personal injury action, he had seen another attorney relating to a worker's compensation claim for asbestos exposure. His attorney in that action sent him to see a physician who found that he had injuries/illnesses due to asbestos exposure. Plaintiff then attempted to bring a personal injury action three years later, based on the same injuries, claiming that he had no knowledge of his injuries because his previous attorney had the physician's report. The court held that, through reasonable diligence, the plaintiff could have obtained personal knowledge of his injuries.

In Veal v. Geraci, 23 F. 3d 722 (2d Cir. 1994), the plaintiff, who was charged criminally with armed robbery, brought a civil rights action against the arresting officer. The officer moved to dismiss the plaintiff's action as untimely. The plaintiff countered that he commenced the action three years from the date he *personally* received the transcripts of the officer's testimony. The court granted the officer's motion to dismiss because the plaintiff was *in attendance* when the officer gave his testimony. The information was clearly relevant to the attorney, because it was the same testimony that the attorney attempted to suppress at trial. Therefore, knowledge was imputed to the plaintiff.

In the instant case, the injuries or claims that are alleged are unrelated to the issues that arose during Schildhorn's representation of Plaintiff in his bankruptcy. In Schildhorn's deposition, he explained that the other litigation on behalf of the Plaintiff was to be handled by Duane Morris. Schildhorn Dep. at 21. Thus, as previously stated, Schildhorn did not deem the information in the Packer letter to be relevant to his representation of the Plaintiff, and knowledge of that information should not be imputed to the Plaintiff.

B. Res Judicata (Challenge to Duane Morris' Proof of Claim)

Defendants argue that the bankruptcy court's approval of Duane Morris' Proof of Claim is *res judicata* as to Plaintiff's breach of contract and fraud claims, even though Plaintiff did not raise them in the bankruptcy court. Therefore, the claims should be barred in their entirety. Claim preclusion, or *res judicata* requires: (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privities; and (3) a subsequent suit based on the same cause of action. Corestates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 194 (3d Cir. 1999).

First, the Court must determine whether the Bankruptcy Court's Order allowing the proof of claim constitutes a final judgment on the merits. The Defendants only cite one case from the 9th Circuit in support of this proposition. See Siegel v. Fed. Home Loan Mortg. Co., 143 F.3d 525, 529-30 (9th Cir. 1998). However, in the case of In re Giordano, 234 B.R. 645, 649 (Bankr. E.D. Pa. 1999), the Bankruptcy Court for the Eastern District of Pennsylvania questioned the soundness of the result in Siegel. The Court in deciding In re Giordano agreed with the Fourth Circuit's decision in County Fuel Co. v. Equitable Bank Corp., 832 F.2d 290, 292 (4th Cir. 1987), which held that failure to object to a claim causes no res judicata effect. Although the Third Circuit has not provided clear guidance on this issue, this Court finds that there should be no res judicata effect here.

However, even if this Court were to find that the bankruptcy court's order was a final judgment on the merits and that the bankruptcy proceedings involved the same parties or their privities, the Defendants cannot prove the third element of the *res judicata* analysis, that the instant suit is based on the same cause of action. Defendants, once again, cite non-controlling and non-persuasive authority to support this position. But what can be derived from the authority cited by Defendants is that parties *who had knowledge* of possible challenges to the proofs of claim and were represented by counsel in their bankruptcy proceedings were precluded from bringing new claims in a different court challenging those same proofs of claims. See Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 1999 WL 284788, at *7 (N.D. Ill. Apr. 26, 1999); Def's Mem. at 32-33. The Plaintiff's knowledge is at the heart of the dispute in this case, and has already been deemed a matter for the jury to decide. Further,

Plaintiff is not challenging the Proof of Claim in the instant action. Therefore, this Court declines to find that Plaintiff is precluded from bringing his breach of contract and fraud claims.

C. Collateral Estoppel (Damages)

Defendants state that the bulk of the damages identified by Plaintiff relate to assets sold by the bankruptcy court, including: (1) Plaintiff's house; (2) his one-third stock interest in Pilot; (3) his one-third interest in the Partnership; and (4) any claims against Pilot. Defendants argue that Plaintiff is collaterally estopped from re-litigating the value of the aforementioned items because their value has already been judicially determined.

In addition, Defendants argue that, under Pennsylvania law, damages for a legal malpractice claim "sounding in contract" are limited to the amount paid for the attorney's services. Therefore, this Court should hold that Plaintiff's damages are limited to the attorneys' fees he paid to Duane Morris.

This Court finds that an analysis Plaintiff's damages at this point in the litigation is inappropriate. The Defendants are not challenging whether or not the Plaintiff has any damages, but what amount those damages, if any, should be. Thus, this Court holds that since the issue of damages is not dispositive, it is better resolved with pre-trial motions.

II. Plaintiff's Motion for Summary Judgment

Plaintiff argues that he is entitled to summary judgment on his fraud claim because, during the course of this case, Plaintiff's counsel discovered a previously concealed document and obtained testimony that unequivocally shows that Defendants knowingly permitted Mellon Bank to obtain a default judgment against Plaintiff in a foreclosure action against his residential

home. Plaintiff states that Defendants' failure to disclose this to him constituted fraud under Pennsylvania law.

Defendants argue that Plaintiff's fraud claim on which he moves for summary judgment is a new one. Thus, Plaintiff has not met the pleading requirements of Federal Rule of Civil Procedure ("F.R.C.P.") 9(b)¹⁶, cannot rely on F.R.C.P. 15(b)¹⁷ to amend, and should not be granted leave to amend under F.R.C.P. 15(a)¹⁸. This argument warrants a brief discussion.

Initially, it is clear that Plaintiff cannot amend his complaint pursuant to Rule 15(b). Rule 15(b) allows for amendment to the Complaint when an issue that has not been raised in the pleadings has already been tried. Therefore, the circumstances of this case clearly do not fit within the limits of 15(b). However, if it were necessary, Rule 15(a) would apply in this case. Rule 15(a) is meant to apply to precisely the circumstances that exist here—to amend pleadings when new facts are discovered. Despite its applicability, this Court finds it is unnecessary to invoke Rule 15(a) here because the Court agrees with Plaintiff—the complaint was plead broadly enough to encompass the new facts of his fraud claim.

Alternatively, Defendants argue that if the allegations in the complaint were plead broadly enough to encompass the new facts as a theory of fraud, then the complaint must not

¹⁶F.R.C.P. 9(b) states in relevant part: "In the averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

¹⁷F.R.C.P. 15(b) states in relevant part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

¹⁸F.R.C.P. 15(a) states in relevant part: ". . . [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

have been plead with the specificity required by Rule 9(b). Consequently, Defendants request that Plaintiff's fraud claim be dismissed based on his failure to meet this standard alone.

Plaintiff's amended complaint was filed on November 13, 2001. Approximately three years have passed without one objection to the complaint as failing to satisfy the specificity requirements of Rule 9(b) for fraud. In fact, up until this point, Defendants have been "puzzled" about Plaintiff's fraud claim. *See* Defs' Reply Mem. in Support of Defs' Mot. for Summary Judgment at 1. Now, Defendants not only claim to know exactly what Plaintiff plead in the complaint, but in a moment of clarity, are also certain that the Plaintiff's fraud claim does not fit within these pleadings. Defendants cannot have it both ways and cannot now assert that the complaint was "broadly plead" to dismiss the Plaintiff's fraud claim.

However, Plaintiff's motion for summary judgment will be denied for many of the same reasons previously enumerated *supra* in the discussion of Defendants' motion for summary judgment. There are clear issues of material fact surrounding Plaintiff's fraud claim, specifically whether the Defendants knowingly permitted Mellon Bank to obtain default judgment in the Plaintiff's foreclosure action. In fact, that is at the heart of this action. Therefore, Plaintiff's motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, this Court will deny Defendants' Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment. An appropriate order follows.

IT IS FURTHER ORDERED that upon consideration of Plaintiff's Motion for Partial Summary Judgment (Doc. 66), Defendants' Response (Doc. 71), and Plaintiff's Reply (Doc. 81), the Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.