

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

FRANK J. DIPALMA : CIVIL ACTION
 :
 v. :
 :
 MEDICAL MAVIN, LTD., et al. : NO. 95-8094

MEMORANDUM ORDER

Presently before the court is the Motion of defendants Kevin J. Ryan and Crawford, Wilson, Ryan & Agulnick, P.C. for Leave to File Amended Affirmative Defenses. Defendants seek to add the affirmative defense of "collectibility" to their original pleading. Plaintiff contends that the amendment should be denied because of "futility" since no such defense is available in this case.

Leave to amend "shall be freely granted when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend is generally allowed absent undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility. Foman v. Davis, 371 U.S. 178, 182 (1962); Kiser v. General Elec. Corp., 831 F.2d 423, 427 (3d Cir. 1987), cert. denied sub nom. Parker-Hannifin Corp. v. Kiser, 485 U.S. 906 (1988); J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 613 (3d Cir. 1987); Tucker v. Reading Co., 55 F.R.D. 327, 329 (E.D. Pa. 1972).

The pertinent facts alleged by plaintiff are as follow. Plaintiff contracted with Medical Mavin, a brokerage firm, to find and qualify a suitable buyer for plaintiff's podiatry practice. Medical Mavin produced Michael LaLiberte who entered into an

Agreement of Sale with plaintiff. Defendant Ryan and his law firm represented Dr. LaLiberte in this transaction. Unknown to plaintiff, Mr. Ryan was also the Chief Executive Officer, owner and lawyer of Medical Mavin. The Agreement provided for a purchase price of \$965,000, with \$665,000 and two notes for the balance to be delivered at closing. Mr. Ryan represented that the two promissory notes would be executed by Dr. LaLiberte and his wife, Patricia LaLiberte, and would be secured by a pledge of stock worth \$200,000. Mr. Ryan induced plaintiff to close without the notes and stock pledge by falsely assuring him that they had been executed and were in transit from Florida. Plaintiff never received notes executed by both LaLibertes or the stock security. He ultimately received notes signed only by Dr. LaLiberte.

Defendants state that discovery has produced documents which create a question as to the value of any stock the LaLibertes could have pledged as collateral and as to "what effect Mrs. LaLiberte's execution of the subject Promissory Notes would have had on DiPalma's ability to collect upon a default by Dr. LaLiberte." Defendants state that discovery has revealed the LaLibertes owned few assets and they were encumbered by liens superior to any plaintiff would have held.

Defendants rely solely on Kituskie v. Corban, 682 A.2d 378, 381 (Pa. Super 1996) to assert a "collectibility" defense. Kituskie was a legal malpractice action against a lawyer for failing to file a personal injury claim before the applicable statute of limitations expired. Id. at 379. The Court held that

in such circumstances a defendant could prevail by pleading and proving that even if the case had been timely filed and successfully pursued to verdict, any resulting judgment would have been uncollectible. Id. at 382. The reason for this is simply that in so doing, the attorney would establish that his conduct did not cause any actual loss to his client. Id. at 381. The Court in Kituskie made clear that "the collectibility of a judgment is not an issue in other types of cases in this Commonwealth" but that "a legal malpractice action is distinctly different from an ordinary lawsuit." Id. The Court explained that "[t]he attorney in a malpractice action did not cause the initial harm or damage to the plaintiff; a third party caused that harm." Id.

Mr. Ryan did not represent plaintiff. Plaintiff does not allege that defendants prevented him from securing relief from an injury inflicted by another. Rather, plaintiff alleges that he sustained substantial losses because of misstatements made directly to him by Mr. Ryan. Plaintiff avers that had Mr. Ryan not falsely represented that notes collateralized by valuable stock had been executed by the LaLibertes and were in transit, plaintiff would have never proceeded to consummate the transaction. Plaintiff is not suing to recover on the notes. Plaintiff is suing to recover for losses suffered from an ill-advised business transaction he would not have consummated had Mr. Ryan not misrepresented to him the status and security of the notes.

Defendants, of course, may show that Mr. Ryan's alleged representation about the notes and value of the collateral was not

fraudulently or carelessly made. There is in the circumstances presented, however, no cognizable defense of "collectibility."

ACCORDINGLY, this day of August, 1997, upon consideration of the Motion of defendants Kevin J. Ryan and Crawford, Wilson, Ryan & Agulnick, P.C. for Leave to File Amended Affirmative Defenses and plaintiff's opposition thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.