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

TRAUMA SERVICE GROUP, P.C.,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO: 99-CV-5979
HUNTER, MACLEAN, EXLEY & DUNN, P.C.,	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J. MARCH , 2000

This diversity case is a legal malpractice action arising out of the representation provided by the law firm of Hunter, MacLean, Exley & Dunn. P.C. ("Hunter Maclean") for Trauma Service Group, P.C. ("Trauma") in defending against a medical malpractice claim brought against Trauma. Before this Court is Hunter Maclean's Motion for Summary Judgment. For the reasons that follow, the motion is granted.

I. BACKGROUND.

Trauma is a professional corporation with its primary business location in Coatesville, Pennsylvania. Hunter Maclean is also a professional corporation with its primary place of business located in Savannah, Georgia. On January 30, 1995, Trauma entered into an Agreement for Attorney Services ("the agreement") which authorized Hunter Maclean to defend Trauma in a medical malpractice action filed in the United States District

Court for the Southern District of Georgia. The case was captioned Patrick M. Branham, Individually and as Administratrix of the Estate of Frankie J. Branham, Deceased v. Trauma Service Group, P.C. and S.C. Love, M.D. (the "Branham action").

Pursuant to the agreement, which is in letter form and addressed to Diana R. Kadish, Esquire ("Ms. Kadish"), Trauma's General Counsel, Hunter Maclean would serve as local counsel for Trauma in the Branham action. The agreement also provided that Ms. Kadish would serve as lead counsel, and that she would advise Hunter Maclean of the specific tasks she wished Hunter Maclean to perform. Further, Hunter MacLean agreed to submit to Ms. Kadish monthly statements representing the bill for Hunter Maclean's services in connection with the Branham action, and it explained Hunter Maclean's hourly billing rates. Hunter Maclean has attached as exhibits to its motion billing statements that it claims to have provided to Trauma for the following months: February, 1995[1]; April, 1995; May, 1995; June, 1995; August, 1995; October, 1995; and January, 1996. Pursuant to the agreement, payment was to be due upon receipt of each monthly statement, and any objection to a particular statement was to be

[1] Although the year is indiscernible on the copy of this first statement, we will assume that 1995 is the correct year, since the cover letter applicable to the statement is dated February, 1995. Also, it is the first of the attached statements, which are arranged chronologically, with the next statement dated April, 1995.

made within fifteen days of its receipt.

On February 10, 1995, the United States Court for the Southern District of Georgia granted Ms. Kadish's motion, prepared by Hunter Maclean pursuant to the agreement, for special admission to practice pro hac vice before that court in connection with the Branham action. On August 7, 1995, approximately six and a half months after being retained by Trauma, Hunter Maclean filed a Motion for Summary Judgment on Trauma's behalf as defendant in the Branham action, which was granted on January 3, 1996. At that time, the bill for Hunter Maclean's services was approximately $17,095.79, and had not been paid. By letter dated January 18, 1996, Hunter Maclean requested payment in full of the bill, pursuant to the agreement.

On approximately March 4, 1996, Trauma made a partial payment toward the outstanding bill. In an accompanying letter, Dr. Joseph Nowoslawski, President of Trauma, promised to furnish Hunter Maclean with a schedule of payment by late summer of 1996, and to pay Hunter Maclean the remaining balance on the bill at an interest rate of 8% "for [Hunter Maclean's] kindness." The letter also expressed Trauma's thanks for "the fine job that you did for the group," and stated that Hunter Maclean's "work is very extraordinary in its professional approach and excellent technical ability." Id. Further, by letter dated March 21, 1996, Dr. Nowoslawski again apologized for Trauma's late payment

record, and inquired into obtaining Hunter Maclean's services in connection with another lawsuit. Dr. Nowoslawski also claimed that Trauma expected to be able to "get current" with its financial obligations within several months.

Nearly six months later, by letter dated September 6, 1996, Hunter Maclean again requested payment in full of the $15,647.86 past due bill, advising Trauma that its last partial payment toward the bill was received over six months prior. However, no further payment was forthcoming.

Subsequently, in October of 1997, Hunter MacLean filed an action in the State Court of Georgia, Chatham County, ("the Chatham County action"), seeking to recover the outstanding balance of $15,647.86 owed by Trauma. However, Trauma's Answer was stricken by the state court due to Trauma's failure to provide discovery in connection with that action, and judgment was entered in favor of Hunter Maclean in the amount of $15,647.86.

While the Chatham County action was pending, Trauma filed a Writ of Summons against Hunter Maclean in the Chester County Court of Common Pleas in Pennsylvania on December 5, 1997. However, Trauma failed to prosecute this action and the Chester County Prothonotary entered a judgment of non pros against Trauma on August 31, 1998.

Over one year later, on October 28, 1999, Trauma filed

a complaint in the Chester County Court of Common Pleas against Hunter Maclean, alleging: (1) negligence/breach of contract; (2) fraudulent misrepresentation; (3) fraudulent inducement; (4) negligent misrepresentation; and (5) punitive damages. On December 6, 1999, Hunter Maclean filed a Notice of Removal in the Chester County Court of Common Pleas, and the action was subsequently transferred to this Court.

In connection with the present action, Hunter Maclean claims to have served Trauma with Requests for Admissions on December 7, 1999, to which Trauma never responded. Although Hunter Maclean never requested that the Clerk of Court enter an order deeming the Requests for Admission admitted, Hunter Maclean now claims that the Requests for Admission should be so deemed. Trauma asserts, in its three-page opposition to Hunter Maclean's summary judgment motion, that "this is the first time plaintiff's counsel has seen these admissions," and that the admissions are "specifically denied." Pl.'s Resp. Def.'s Mot. Summ. J. at ¶ 5 ("Pl.'s Resp."). However, this Court need not determine the status of the Requests for Admissions, as the facts of record clearly establish that summary judgment in favor of Hunter Maclean is warranted.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the

nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a 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 Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION.

Trauma's complaint alleges legal malpractice claims under both contract and tort theories. "A plaintiff may combine tort and contract claims in one malpractice complaint . . . by

asserting that defendants have breached both specific contractual terms and a general lawyers' duty of care." Sherman v. Goldhammer, 683 F. Supp. 502, 506 (E.D.Pa. 1988) (citing Guy v. Liederbach, 459 A.2d 744, 748 (Pa. 1983)).[2] In order to

[2] In its response to Hunter Maclean's motion, which is hardly responsive, Trauma claims it does not dispute "many of the facts" presented in Hunter Maclean's motion. However, Trauma sets forth the following counter-assertions of fact, some of which are relevant to this motion and some of which are not: (1) that Hunter Maclean has failed to respond to Trauma's Interrogatories and Requests for Admissions; (2) that the agreement provided that Ms. Kadish "would perform all services by being admitted to practice in the State of Georgia through a Pro Hac Vice Motion which was filed"; (3) that the "contract was solely authorized by Hunter Maclean"; (4) that the term "efficient legal means" describing Hunter's promised performance under the agreement is vague; that "the work performed, if any, was not performed by the undersigned counsel or the counsel discussed between the parties"; (5) that Hunter Maclean failed to send Trauma regular bills throughout the litigation, but rather sent a final "enormous" bill; (6) that the bill attached to Hunter Maclean's motion is not "accurate"; (7) that the requests for admissions should be deemed admitted; and (8) that the default entered against Trauma in the Georgia litigation was entered due to "no communication/miscommunication between the parties, rather than due to Trauma's failure to provide discovery" and "is in the process of being Opened." Trauma also asserts generally that summary judgment is inappropriate because the contract was ambiguous.

Trauma has provided absolutely no support or explanation for any of the above conclusory allegations. Further, the allegations concerning Trauma's Interrogatories, the Requests for Admissions, and the default judgment against Trauma in the Chatham County action are irrelevant to this motion. Moreover, whether the term "efficient legal means" is vague is irrelevant due to the grant of summary judgment in favor of Trauma. Trauma provides no other support or explanation for its generalized claim that the contract is ambiguous. Further, the fact that the agreement was authorized solely by Hunter Maclean is inaccurate because Trauma signed the agreement and, in fact, is now attempting to enforce the terms it argues have been breached. The remaining claims fall within the purview of the breach of contract claims against Hunter Maclean, and will be

establish a claim for legal malpractice, a plaintiff must show: (1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge of a similar attorney; and (3) that such negligence was the proximate cause of damage to the plaintiff. Sherman, 683 F. Supp. at 506.

However, this Court is at a loss to find any legal authority in which a plaintiff attempted to bring a legal malpractice claim based upon, or despite, the successful disposition of the underlying claim giving rise to the action. Indeed, one of the elements a plaintiff must prove in bringing a legal malpractice claim is damages, namely that he would have prevailed in the underlying action but for the attorney's negligence. Duke & Co. v. Anderson, 418 A.2d 613, 617 (Pa. 1980); McCartney v. Dunn & Conner, Inc., 563 A.2d 525, 528 (Pa.Super. 1989). Thus, the concept of malpractice would seem to encompass the requirement that the disposition of the underlying case was adverse to the client. In the instant case, however, Trauma cannot prove that it would have prevailed in the Branham action because it did prevail, a fact which would appear to yield the logical conclusion that no malpractice occurred. Nevertheless, we will address Trauma's tort and contract claims.

A. Trauma's tort claims are barred by the statute of

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discussed later.

limitations.

All of the above allegations contained in Trauma's Complaint in the instant action pertain to the quality of Hunter Maclean's representation of Trauma in the Branham action. As such, Trauma's tort claims are barred by the statute of limitations. Under Pennsylvania law, "a two year statute of limitations applies to 'any . . . action or proceeding to recover damages for injuries to person or property which is founded on negligent . . . or otherwise tortious conduct.'" Sherman, 683 F. Supp. at 505 (quoting 42 Pa.C.S.A. § 5524 (7)). This includes claims of negligent and intentional fraudulent misrepresentation, as well as fraudulent inducement. 42 Pa.C.S.A. § 5524(7); XL Enterprises v. Cendant Mobility Servs. Corp., NO.CIV.A. 99-3186, 1999 WL 1157622, at *2 (E.D.Pa. Dec. 14, 1999). Moreover, the two year period begins to run "as soon as the right to institute and maintain suit arises." Romah v. Hygienic Sanitation Co., 705 A.2d 841 (Pa.Super. 1997)(citations omitted). Further, "a person asserting a claim has the duty to use 'all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period.'" Id.

In the instant case, Trauma was dismissed from the Branham action on January 3, 1996, when summary judgment was granted in its favor. Therefore, Trauma was or should have been

aware of any of the alleged negligence or fraud on Hunter Maclean's part upon receipt of Hunter Maclean's January 18, 1996 letter demanding payment of its final bill, at the latest. However, Trauma did not file the instant complaint until October 28, 1999, nearly four years after the completion of Hunter Maclean's representation of Trauma.[3] Therefore, Trauma's claims for negligence, fraudulent misrepresentation, negligent misrepresentation, and fraudulent inducement are barred by the statute of limitations, and summary judgment is granted in favor of Hunter Maclean on all of these claims.[4]

B. Trauma's breach of contract claims also fail.

In order to establish its claims for breach of contract, Trauma was required to demonstrate that it suffered damages as a result of Hunter Maclean's alleged breach of the agreement. "It is fundamental that damages are an essential element of a breach of contract action." Rade v. Transition

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[3] As Hunter Maclean correctly points out, while Trauma did file a Writ of Summons in December of 1997, the judgment of non pros against Trauma in that action did not toll the statute of limitations. Hatchigian v. Koch, 553 A.2d 1018 (1989) (citing Doner v. Jowitt and Rodgers Co., 445 A.2d 1237, 1239 (Pa. Super. 1982)("The legal effect of the entry of a judgment of non pros is not such as to preclude a plaintiff who suffers such a judgment from instituting another suit on the same cause of action provided, however, that the second suit is brought within the period of the statute of limitations.")).

[4] Notably, Trauma failed to mention, much less address, the statute of limitations argument in its response to Hunter Maclean's motion.

Software Corp., NO.CIV.A. 97-5010, 1998 WL 767455, at *2 (E.D.Pa. Oct. 30, 1998)(citing Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 878 (3d Cir. 1995)). Further, "when it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action, whether the action be denominated in assumpsit [contract] or trespass [tort], is proof of actual loss." Svarzbein v. Saidel, NO.CIV.A. 97-3894, 1999 WL 729260, at *9 (E.D.Pa. Sept. 10, 1999); Trice v. Mozenter, 515 A.2d 10 (Pa.Super. 1986)(citations omitted). In order to prove actual loss, a plaintiff must establish that but for the attorney's malpractice, the action would have been successful. Duke & Co., 418 A.2d at 618; McCartney, 563 A.2d at 528. As explained above, Trauma cannot prove actual loss by showing it would have prevailed because it did prevail.

Further, a plaintiff bringing a legal malpractice claim under a contract theory must show that the defendant breached a specific provision of the contract, and "must raise an issue as to whether it specifically instructed the defendant to perform a task that the defendant failed to perform, or as to whether the defendant made a specific promise upon which plaintiff reasonably relied to its detriment." Sherman, 683 F. Supp. at 506.

The first factual issue that Trauma asserts relating to the breach of a specific provision in the agreement is that Ms. Kadish "would perform all services by being admitted to practice

in the State of Georgia through a Pro Hac Vice motion which was filed." Pl.'s Resp. at ¶ 2. However, the agreement simply did not provide that Ms. Kadish would perform all services. Rather, the agreement provided that although Ms. Kadish would serve as lead counsel, Hunter Maclean would perform all tasks that Ms. Kadish directed it to perform. Agreement at ¶ 2. There is no evidence of record, nor has Trauma provided any, to suggest that the agreement was executed in any manner other than in conformity with this provision. Therefore, Trauma has failed to show breach of a specific promise upon which it relied to its detriment, and, as such, this claim fails.

Trauma next argues that "the work performed, if any, was not performed by the undersigned counsel or the counsel discussed between the parties." Pl.'s Resp. at ¶ 2. First, Trauma's allusion that no work was performed on its behalf in connection with the Branham action is belied by the fact that it was dismissed from that action, as well as the gratitude expressed by Dr. Nowoslawski on Trauma's behalf for Hunter Maclean's "extraordinary" legal services. Further, this Court cannot discern, nor has Trauma attempted to explain, which counsel Trauma asserts actually performed the services or why that counsel was improper. Accordingly, as no breach of a provision of the agreement or detrimental reliance have been established, this claim lacks merit as well.

Trauma's allegation that Hunter Maclean breached the agreement by failing to send monthly statements of its bill to Trauma also fails. In response to Hunter Maclean's assertion that it did indeed supply monthly statements of the bill to Trauma, Trauma asserts, without any specification, that "it is contested that the bill in the exhibits submitted to this court [by Hunter Maclean] as exhibits are accurate."[5] Pl.'s Resp. at ¶ 3. However, Trauma has failed to oppose the motion by providing this court with an accurate figure representing the value of Hunter Maclean's legal services in connection with the Branham action, much less any documents which Trauma claims to be accurate.[6] Rule 56 of the Federal Rules of Civil Procedure requires the non-moving party to go beyond the pleadings and provide supporting affidavits or, based on the discovery on file, designate specific facts showing that there is a genuine issue for trial. In its response, Trauma merely alleges that it contests the accuracy of the bills, without submitting any affidavits or depositions of anyone who could support its assertion that the bills are inaccurate. Because Trauma has failed to make a sufficient showing of proof, Hunter Maclean is entitled to summary judgment. See Celotex Corp. v. Catrett, 477

[5] Presumably, "the bill" refers to the monthly statements.

[6] Indeed, Trauma has attached no documents to its extremely brief opposition to this motion.

U.S. 317 (1986).

Moreover, the facts of record establish that Trauma's claim relating to the billing statements is substantively meritless. Although Trauma contests the accuracy of "the bill" attached to Hunter Maclean's motion, it does not contest that it was aware in January of 1996, when it received Hunter Maclean's letter demanding payment in full, that the total amount it owed was $17,095.79. After Trauma received the bill, Dr. Nowoslawski wrote two letters to Hunter Maclean promising to happily, if belatedly, pay the bill with interest, apologizing for being in arrears, and thanking Hunter Maclean for its "extraordinary" services. Fairness and common sense dictate that since Trauma did not contest the bill or perceive that it had been harmed in March of 1996, it cannot allege, circumstances having remained unchanged, that it presently perceives it was harmed due to the inaccuracy of the bill. Therefore, summary judgment is granted in favor of Hunter MacLean on Trauma's breach of contract claims as well as the tort claims. Accordingly, Trauma's claim for punitive damages is also dismissed.

An appropriate Order follows.