

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ALLEGHENY VALVE AND COUPLING,
INC.,

Appellant

v.

QUINN, BUSECK, LEEMHUIS,
TOOHEY & KROTO, INC. AND
JOHN W. MCCANDLESS,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 731 WDA 2012

Appeal from the Judgment of April 23, 2012,
in the Court of Common Pleas of Warren County,
Civil Division at No. 778-2008

BEFORE: BOWES, LAZARUS and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

FILED MAY 22, 2013

This is an appeal from a judgment entered in favor of Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc. ("Law Firm") and John W. McCandless ("McCandless") (collectively referred to as "Appellees"). Prior to the entry of judgment, the trial court granted in part and denied in part Appellees' motion for summary judgment. Allegheny Valve and Coupling, Inc. ("Appellant") challenges the trial court's decision to enter summary judgment in favor of Appellees. We reverse the portion of the order that granted Appellees' motion for summary judgment and remand for further proceedings.

*Retired Senior Judge assigned to the Superior Court.

The trial court summarized the background underlying this matter in the following manner.

In December 2002, [Appellant] retained [Appellees] for representation in [Appellant's] corporate law suit against the former officers of [Appellant] (i.e. David Martin, Mary Garvey & Harold Johnson). [Appellees] actively pursued the claims until November 22, 2006, when [] McCandless filed a Praecipe for Discontinuance. On December 13, 2006, David Martin and Mary Garvey filed an action against [Appellant] for mandatory indemnification for the expenses they incurred in defending the original action. On September 4, 2007, the Erie County Court of Common Pleas entered judgment against [Appellant] and in favor of Martin and Garvey for \$75,003.19. [Appellant] appealed said judgment, but the Superior Court affirmed on October 2, 2008. While the Martin and Garvey suit was pending on appeal, the estate of the final former officer of [Appellant] (Harold Johnson) filed an action against [Appellant] for mandatory indemnification for \$46,847.00 on October 15, 2007. The parties agreed to stay those proceedings until the Martin and Garvey action was resolved on appeal. Thereafter, [Appellant] settled the action with Johnson's Estate on July 19, 2010.

On February 1, 2010, [Appellant] filed an Amended Complaint, in which [Appellant] asserts two causes of action against [Appellees], including Breach of Contract and Professional Negligence. More specifically, in [Appellant's] breach of contract claim, [Appellant] alleges that in the weeks preceding the filing of the discontinuance, [] McCandless advised [Appellant] that it would be prudent to discontinue the action against the former officers because [] McCandless had determined the former officers were judgment proof. It is further alleged that [Appellant] expressed concern to [] McCandless regarding the effect of a voluntary discontinuance upon [Appellant's] indemnification obligation and that [] McCandless "guaranteed" [Appellant] that there would be no effect (i.e. the former officers could not pursue [Appellant] for indemnification). Seemingly, [Appellant's] breach of contract count is based upon a breach of this alleged guarantee. In [Appellant's] professional negligence count, [Appellant] alleges that [Appellees] breached the applicable professional standard of care in three respects:

(1) by advising [Appellant] that a voluntary discontinuance could not trigger an indemnification obligation under applicable law;

(2) by failing to advise [Appellant] that the question of whether a voluntary discontinuance could trigger an indemnity obligation was at best an unsettled question of law in Pennsylvania; and

(3) by failing to attempt to obtain a release in exchange for the discontinuance.

[Appellant] now seeks compensatory damages in the amount of \$179,345.19 plus interest and costs of suit (which [Appellant] alleges is the amount of legal expenses and costs he [sic] incurred to defend the indemnity actions).

On May 7, 2010, [Appellees] filed an Answer and New Matter to [Appellant's] Amended Complaint. Therein, [Appellees] deny [Appellant's] allegation that [] McCandless made a guarantee and assert that [Appellees] advised [Appellant] that an indemnification suit should be anticipated. Further, on March 6, 2009, [Appellees] asserted a Counterclaim against [Appellant] for unpaid attorney fees in the amount of \$43,725.95 plus interest (for a total of \$76,679.41). . . .

Trial Court Opinion, 03/25/11, at 1-2.

Appellees filed a motion for summary judgment. On March 25, 2011, the trial court issued an order wherein it granted in part and denied in part Appellees' motion. The court determined that, in Appellant's breach of contract claim, Appellant failed to state a cause of action for which relief can be granted. Regarding Appellant's legal malpractice claim, the court concluded that Appellant failed to set forth sufficient evidence to establish the causation element of such a claim. For these reasons, the court dismissed Appellant's complaint. However, with regard to Appellees'

counterclaim, the court concluded that summary judgment was inappropriate because an issue of material fact existed.

Appellant filed a motion for reconsideration, which the court granted. Later, however, the court effectively reinstated its March 25, 2011, order. As to Appellees' outstanding counterclaim, the parties entered into a consent judgment, signed by the trial court, whereby judgment was entered in favor of Appellees in the amount of \$78,000.00 plus interest. Appellant timely filed a notice of appeal from the entry of judgment.¹

In its brief to this Court, Appellant asks us to consider the following questions:

- 1) Does Rule 1035.3(a) require a plaintiff to adduce evidence in support of an issue of fact not challenged in the defendant's summary judgment motion as lacking evidentiary support?
- 2) Is a plaintiff's failure to expressly allege a breach of the standard of care in a separate 'contract' count of a legal malpractice complaint grounds for summary judgment where it is otherwise pleaded in the correlative "negligence" count of the same complaint?

¹ Pursuant to 42 Pa.C.S.A. § 742, this Court has jurisdiction over appeals from final orders. Pennsylvania Rule of Appellate Procedure 341 defines "final order" as any order that, *inter alia*, "disposes of all claims and of all parties[.]" Pa.R.A.P. 341(b)(1).

Appellant purports to appeal from the order granting in part and denying in part Appellees' motion for summary judgment. The entry of that order is not the appealable event in this case, as the order did not dispose of all parties and all claims. Instead, the entry of judgment constitutes the appealable event.

Appellant's Brief at 2.²

The general principles governing our review of orders granting summary judgment can be summarized in the following manner:

The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt. An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion. . . .

Swords v. Harleysville Insurance Companies, 883 A.2d 562, 566-67 (Pa. 2005) (citations omitted).

Appellant first contends that the trial court erred by granting summary judgment in favor of Appellees regarding Appellant's professional negligence

² Appellees advocate that this Court find Appellant's issues waived due to Appellant's failure to timely abide by the trial court's directive to comply with Pa.R.A.P. 1925(b). Appellees' Brief at 18. While the record supports a finding that Appellant failed to timely file a Pa.R.A.P. 1925(b) statement, as Appellant points out in its reply brief, Appellant's failure in this regard is excused because the docket does not indicate that notice of the entry of a Pa.R.A.P. 1925(b) order was provided to Appellant. ***In re L.M.***, 923 A.2d 505, 510 (Pa. Super. 2007).

claim. As we noted above, in support of its decision to grant summary judgment in favor of Appellees on the professional negligence claim, the court concluded that Appellant failed to set forth sufficient evidence to establish the causation element of such a claim. Appellant points out that Appellees' motion for summary judgment did not raise any issues regarding Appellant's ability to establish the causation element of its professional negligence claim. According to Appellant, because Appellees' motion did not raise such an issue, the Rules of Civil Procedure did not require it to produce evidence to establish the causation element. Thus, Appellant argues, the court's grant of summary judgment on this claim was baseless.³

In order to establish its claim of legal malpractice, Appellant ultimately would have to demonstrate:

³ Such an issue implicates a question of law. As with all questions of law, "our standard of review is *de novo*. Our scope of review, to the extent necessary to resolve the legal question before us, is plenary." ***Swords v. Harleysville Insurance Companies***, 883 A.2d 562, 567 (Pa. 2005). Furthermore, to the extent that we must interpret the Rules of Civil Procedure in order to dispose of this issue, we must interpret the rules, in part, as follows:

(a) The object of all interpretation and construction of rules is to ascertain and effectuate the intention of the Supreme Court.

(b) Every rule shall be construed, if possible, to give effect to all its provisions. When the words of a rule are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Pa.R.C.P. 127(a) and (b).

1) employment of the attorney or other basis for a duty; 2) the failure of the attorney to exercise ordinary skill and knowledge; and 3) that such negligence was the proximate cause of damage to the plaintiff.

Myers v. Robert Lewis Seigle, P.C., 751 A.2d 1182, 1184 (Pa. Super. 2000) (citation omitted).

Pennsylvania Rule of Civil Procedure 1035.2 states, in relevant part:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law . . . if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2(2). This rule clearly permitted Appellees to move for summary judgment on the ground that Appellant failed to produce evidence of facts essential to the causation element of its legal malpractice claim.

In their motion for summary judgment, Appellees presented the following arguments:

64. [Appellant] cannot prove its breach of contract claim because there are no Pennsylvania cases recognizing a cause of action against an attorney for breach of a guarantee or warranty to obtain a specific result.

65. [Appellant] cannot prove its professional negligence allegation based upon McCandless' alleged opinion that a voluntary discontinuance could not trigger an indemnification obligation . . . because a lawyer cannot guarantee a litigation result as a matter of law.

66. [Appellant] cannot prove its professional negligence allegation that [Appellees] were negligent for failing to obtain a mutual release in exchange for the discontinuance . . . because the evidence establishes that [Appellees] attempted to secure a release and [Appellant] was clearly aware it was not receiving a release when it discontinued the litigation.

67. [Appellant's] professional negligence count regarding the indemnification claims asserted against it by the former officer Johnson's Estate is barred by the applicable statute of limitations.

68. [Appellees] are entitled to summary judgment on their counterclaim for unpaid attorney's fees since there exists no genuine issues of material fact as to [Appellees'] cause of action for account stated.

Motion for Summary Judgment, 07/16/10, at 16. None of these arguments includes an allegation that Appellant could not or did not produce any evidence to support the causation element of its legal malpractice claim.

We now turn our attention to Pennsylvania Rule of Civil Procedure 1035.3. That rule provides, in relevant part, as follows:

(a) Except as provided in subdivision (e),^[4] the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

* * * * *

(2) evidence in the record establishing the facts essential to the cause of action or defense **which the motion cites as not having been produced.**

⁴ Subdivision (e) is irrelevant to this matter.

(b) An adverse party may supplement the record or set forth the reasons why the party cannot present evidence **essential to justify opposition to the motion** and any action proposed to be taken by the party to present such evidence.

Pa.R.C.P. 1035.3(a)(2) and (b) (emphasis added).

Pursuant to the clear language of Rule 1035.3(a)(2), if Appellees' motion for summary judgment would have alleged that Appellant failed to produce evidence to establish the causation element of its legal malpractice claim, then Appellant would have been required to identify such evidence in the record or supplement the record to include such evidence. If Appellant would have failed in that regard, then the trial court could have properly granted summary judgment based upon Appellees' allegation.

However, Appellees' motion for summary judgment did not make any allegation that Appellant could not or did not produce evidence to support the causation element of its legal malpractice claim. Appellant, therefore, had no obligation to identify or produce any such evidence in opposing the motion. Thus, the court erred by granting summary judgment in favor of Appellees based upon a conclusion that Appellant failed to identify or produce such evidence.

In its opinion addressing Appellant's motion for reconsideration, the trial court justified its decision, in part, by stating that Appellant was "on notice" that Appellees believed that Appellant failed to produce evidence of the causation element of its legal malpractice claim because Appellees included such an issue in their "Response to [Appellant's] Brief in Opposition to [Appellees'] Motion for Summary Judgment." Trial Court Opinion,

05/11/11, at 1-2. While Appellees did include such an issue in their responsive brief to Appellant's brief in opposition to Appellees' motion for summary judgment, such a fact is of no consequence. Appellees did not include the issue in its **motion**; Appellant, therefore, had no duty to respond thereto; and the court erred by granting summary judgment to Appellees thereupon.

Under its second issue, Appellant argues that the trial court also erred by granting summary judgment to Appellees with respect to Appellant's breach of contract claim. The following excerpt adequately summarizes the law in this area.

Preliminarily, we also recognize that [a]n action for legal malpractice may be brought in either contract or tort. The elements of a legal malpractice action, sounding in negligence, include: (1) employment of the attorney or other basis for a duty; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) that such failure was the proximate cause of the harm to the plaintiff. With regard to a breach of contract claim, an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large. . . .

Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565, 570-71 (Pa. Super. 2007) (citations and quotation marks omitted).

In moving for summary judgment on Appellant's breach of contract claim, Appellees' sole contention was as follows:

[Appellant] cannot prove its breach of contract claim because there are no Pennsylvania cases recognizing a cause of action against an attorney for breach of a guarantee or warranty to obtain a specific result.

Motion for Summary Judgment, 07/16/10, at 16, ¶64.

In response to this allegation, Appellant maintained, "In conformance with what *is* Pennsylvania law, [Appellees'] liability in contract is not founded upon the guarantee itself, but on [Appellees'] implied promise to perform legal services within the applicable standard of care." Appellant's Brief in Opposition to Appellees' Motion for Summary Judgment, 05/07/11, at 4 (emphasis in original). Appellant stated that "it adduced proof that its willingness to discontinue the Original Action was predicated on McCandless's advice that the voluntary discontinuance would obviate the possibility of a successful indemnity countersuit." ***Id.*** at 5. According to Appellant:

[T]here is evident on the face of the record genuine issues of fact for resolution by the fact-finder at trial, namely, whether McCandless gave the advice of which he is accused by [Appellant] (which he has denied), and if so, (2) whether it constitutes conduct falling below the standard of care applicable to attorneys (as [Appellant's] expert opines).

Id. at 6.

The trial court offered the following rationale in support of its decision to grant summary judgment in favor of Appellees with respect to Appellant's breach of contract claim.

With regard to [Appellant's] Breach of Contract claim, [Appellees] contend that summary judgment is appropriate because Pennsylvania does not recognize a cause of action for a breach of a guarantee to obtain a specific legal outcome. However, [Appellant] asserts that [Appellees] have mischaracterized its breach of contract claim. For instance, [Appellant] states that said claim is not based upon a breach of a guarantee, but rather it is based upon [Appellees'] failure to

provide legal services consistent with the profession at large (an action which is recognized in Pennsylvania). . . .

[A] breach of contract claim for legal malpractice requires [Appellant] to plead and establish that [Appellees] agreed for a fee to represent [Appellant] and thereby impliedly agreed to provide [Appellant] with professional services consistent with those expected of the profession at large. Unfortunately for [Appellant], [Appellant] did not make any such assertions in his [sic] Amended Complaint. More specifically, although [Appellant] did allege that [Appellees] agreed for a fee to represent [Appellant], [Appellant] did not allege that [Appellees] failed to provide [Appellant] with professional services consistent with those expected of the profession at large. Rather, [Appellant] alleged that [Appellees] made a “guarantee” as to one aspect of their legal representation and failed to meet that guarantee. Therefore, even assuming *arguendo*, that [Appellees] did make such a guarantee, it would not be grounds for a breach of contract claim. Accordingly, [Appellees] are entitled to summary judgment as to Count I of [Appellant’s] Amended Complaint, as [Appellant] has failed to state a cause of action for which relief can be granted.

Trial Court Opinion, 03/25/11, at 19-20.

On appeal, Appellant takes the position the trial court’s rationale was flawed in three ways. First, Appellant argues that its Amended Complaint does allege that Appellees breached the applicable standard of care. As to this argument, Appellant concedes that it failed to include the relevant allegation under its breach of contract claim. Appellant, however, points out that it did include the allegation under its professional negligence claim. Appellant maintains that, because Pennsylvania is a fact-pleading jurisdiction, the location of the allegation is of no consequence.

Secondly, Appellant presents a version of the argument it made under its first issue. Appellant argues that Appellees did not allege in their motion

for summary judgment that Appellant failed to plead the proper standard of care. Thus, for the reasons cited above, Appellant contends that the court erred by basing its decision to grant summary judgment to Appellees upon such an allegation. Lastly, Appellant argues that it produced sufficient evidence to establish that Appellees breached the applicable standard of care.

With respect to Appellant's breach of contract claim, we find that Appellees' poorly crafted motion for summary judgment possibly raised two questions: (1) Is Appellant's breach of contract claim based upon an allegation that Appellees breached a guarantee or warranty to obtain a specific result?; and, if the answer to the first question is "yes", then (2) Does Pennsylvania recognize a breach of contract cause of action based upon an allegation that an attorney breached a guarantee or warranty to obtain a specific result?

It is not clear to us exactly how, or if, the trial court answered these questions in its opinion in support of its decision to grant Appellees' motion for summary judgment. However, in its opinion addressing Appellant's motion for reconsideration, the court characterized its rationale for granting summary judgment in favor of Appellees on Appellant's breach of contract claim as follows:

. . . Upon review of the record (including [Appellant's] expert opinion), the [c]ourt found that summary judgment was appropriate because [Appellant] did not allege that [Appellees] failed to provide [Appellant] with professional services consistent with those expected of the profession at large.

Trial Court Opinion, 05/11/11, at 3.

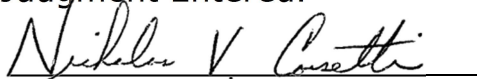
Appellees' motion for summary judgment did not present this issue. Consequently, just as it did with Appellant's professional negligence claim, the trial court erroneously granted summary judgment in favor of Appellees based upon an issue that was outside the scope of Appellees' motion for summary judgment. For all of these reasons, we reverse the portion of the trial court's order that granted Appellees' motion for summary judgment and remand for further proceedings.⁵

Order reversed. Case remanded. Jurisdiction relinquished.

Judge Bowes files a Concurring Statement.

Judge Lazarus joins both the majority and the Concurring Statement.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casetta", is written over a horizontal line.

Deputy Prothonotary

Date: 5/22/2013

⁵ In their consent judgment, the parties agreed, *inter alia*, that, if this Court reversed the order granting summary judgment, then the judgment on the counterclaim would be deemed vacated without prejudice so that the counterclaim could be tried before the trial court. Consent Judgment, 04/23/12, at ¶3.