

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PREFERRED BUSINESS SERVICE, INC.,)
)
Plaintiff,)
)
v.) C.A. No. CPU4-11-003581
)
BRUNY'S BAIL BONDS, INC.)
)
Defendant.)

Submitted: October 29, 2012
Decided: November 14, 2012

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MEMORANDUM OPINION AND ORDER

This is an action for breach of contract arising out of tax preparation services provided by Plaintiff, Preferred Business Services, Inc. ("PBSI") to Defendant, Bruny's Bail Bonds ("Bruny's"). On September 4, 2012, the Court held a trial on PBSI's Complaint alleging breach of contract and Bruny's Counterclaims for breach of contract, negligence/malpractice, and conversion. This is the Court's Memorandum Opinion and Order after consideration of the pleadings, the oral and documentary evidence submitted at trial, the arguments of the parties, and the applicable law. For the following reasons, the Court enters judgment in favor of PBSI for \$5,218.25.

I. Procedural Background

On June 3, 2011, PBSI filed its Complaint alleging that PBSI provided services to Bruny's, that Bruny's has failed to pay for those services in breach of an agreement between the parties, and that PBSI has suffered damages in the amount of \$5,218.25. PBSI also requested that the Court award court costs, reasonable attorney fees, and post-judgment interest.

Bruny's filed their Answer on August 19, 2012, denying the allegations in the Complaint and asserting multiple affirmative defenses, including a statute of limitations defense. Additionally, Bruny's alleged three counterclaims for accountant negligence and malpractice, breach of contract, and conversion.¹ Bruny's contends that they paid PBSI for accounting and tax preparation services, that PBSI had a fiduciary relationship and duty to competently advise Bruny's on proper tax strategies, that PBSI breached this duty by negligently preparing Bruny's tax returns, and that the breach was the proximate cause of the damages incurred—*i.e.*, excessive tax liability and the amount expended to amend the tax returns. Bruny's also claims that PBSI's failure to provide competent accounting and tax preparation services constituted a breach of the contract between the parties.

On September 4, 2012, the Court held a trial on PBSI's Complaint against Bruny's and Bruny's counterclaims against PBSI. Prior to the commencement of trial, Bruny's moved to dismiss the breach of contract action as time-barred under the statute of limitations, 10 *Del. C.* § 8106. However, Defense Counsel had previously submitted a motion to dismiss due to the expiration of the statute of limitations, and subsequently withdrew the motion. The Court reserved decision on the motion made before trial and it is discussed *infra*.

¹ Only the negligence and breach of contract counterclaims are at issue and discussed in this Opinion. The conversion claim, which requested injunctive relief, was withdrawn by Counsel.

Trial proceeded and Mr. Edward Swan (“Mr. Swan”), the sole owner of PBSI, testified during his case in chief. Ms. Brunilda Luna-Mercado (“Ms. Luna-Mercado”), the sole owner of Bruny’s, and Danny Caputo, Sr., C.P.A. (“Mr. Caputo”), testified for the defense. The parties submitted numerous documents into evidence at trial. At the conclusion of the trial, the Court ordered the parties to submit their closing arguments in the form of written memoranda of law. Accordingly, on September 5, 2012, the Court issued a briefing schedule. The memoranda have been submitted and the following is the Court’s decision on the merits of the parties’ arguments.

II. The Facts

Mr. Swan testified during Plaintiff’s case-in-chief that he is the sole owner of PBSI, a business that has provided tax and accounting related services in Delaware since 1988. Mr. Swan’s education consists of no more than three classes in accounting at Delaware Technical Community College sometime in the 1980s. Mr. Swan testified that Bruny’s approached PBSI for tax services for a start-up business sometime in 2002. Then, in 2003, the parties agreed that PBSI would provide services to Bruny’s including the preparing the company payroll, bookkeeping, and filing tax returns. PBSI billed Bruny’s by sending monthly invoices.

A. PBSI’s Invoices

PBSI provided several documents supporting their claim that Bruny’s has failed to compensate them for services provided. Mr. Swan introduced a Customer Balance Detail (“CBD”) for Bruny’s as of April 30, 2009, which lists Bruny’s payment history from 2005 through 2009.² The CBD shows that all invoices were paid except for Invoices #2546 and #2774, and that the last payment Bruny’s paid towards the account was on February 9, 2009. Next, Mr. Swan introduced a 2006 corporate tax return prepared by PBSI for Bruny’s which was dated

² Joint Exhibit #1.

August 2008.³ Mr. Swan stated that the reason the 2006 year tax preparation was delayed until 2008 is that Bruny's had not provided enough information and PBSI could not prepare the returns without the information. Mr. Swan introduced a 2007 corporate tax return that was dated February 6, 2009.⁴

Mr. Swan provided Invoices #2546 and #2774.⁵ Invoice #2546 was dated August 28, 2008, and was for PBSI's preparation of Bruny's 2006 Federal, State, and personal tax returns. Mr. Swan stated that Bruny's received these invoices either through the mail or attached to the returns and that Bruny's failed to pay the full amount of Invoice #2546, which was \$1,363.25. Invoice #2774 was dated February 9, 2009 and was for payroll services and corporate tax returns. Mr. Swan stated that Bruny's did not pay any amount due on that invoice for \$3,855.00. Mr. Swan also testified that the total amount due was \$5,218.25, and that the last invoice sent to Bruny's was in April 2009.

Additionally, on cross examination, the Defense introduced a copy of the statements issued by PBSI.⁶ These statements were printed on May 6, 2012 and showed the running balance of Bruny's Account from 2005-2009. The last statement is dated February 9, 2009 and shows a payment in the amount of \$2,000.00 made on February 9, 2009, shows the amount due on Invoice #2774 as \$3,855.00, and lists the total amount due on the account as \$6,118.25. However, the statement dated December 2, 2009 lists the amount due as the balance forward from November 2, 2009 in the amount of \$5,318.25.

³ Joint Exhibit #3.

⁴ Joint Exhibit #2.

⁵ Joint Exhibits #4 and #5.

⁶ Defense Exhibit #2.

Ms. Luna-Mercado, sole owner of Bruny's, testified during the Defense case-in-chief. Bruny's is a company that provides bail bonds. Ms. Luna-Mercado stated that the business relationship between the parties began in 2003. The Defense then introduced a written agreement between the parties for bookkeeping, payroll, and tax preparation services.⁷ She acknowledged that the 2006 Agreement between the parties that was typical of the services provided by PBSI annually, and that all services listed in the invoices for 2006-2007 were performed. PBSI obtained the information to perform these services by having their employees pick up bank statements and receipts and by receiving payroll checks weekly. She claimed that the parties never discussed business deductions.

B. PBSI's Alleged Deficient Performance

Ms. Luna-Mercado discussed several problems she encountered with PBSI's services, which were only discovered after meeting with a Certified Public Account for a second opinion in 2008. Ms. Luna-Mercado stated that the business relationship between Bruny's and PBSI ended in January 2009 because Bruny's refused to use PBSI after the tax year of 2008 due to inappropriate tax advice. Ms. Luna-Mercado alleges three main deficiencies: in the failure to properly notate the cash assets held in the BUF account, in the computation of payroll taxes, and in listing business deductions.

Ms. Luna-Mercado acknowledged that in 2008 the parties were still under contract and she continued to receive monthly statements. In June 2008, PBSI called to pick up information to file the 2007 tax returns which were late, and PBSI stated that they would auto-file for an extension. Ms. Luna-Mercado asserted that PBSI did not ask for any information regarding the 2007 tax year from January 2008 through June 2008.

⁷ Defense Exhibit #1.

Ms. Luna-Mercado testified that there were problems with the April 2007 tax return which resulted in greater tax liability. In Bruny's bail bond industry, the business operates using a cash bail investor, American Funding. Bruny's and American Funding put a percentage of cash funds in a BUF account of which Bruny's had no control. The BUF account stands for "build-up-account" and is a type of escrow account and only the surety (American Financier) has control of the money to use for forfeitures, which is withdrawn and sent to courts in the event of a default by a customer. Ms. Luna-Mercado explained that instead of accounting for the money sent to the BUF account, PBSI included all BUF account funds which resulted in an extra \$200,000.00 listed as gross income. Ms. Luna-Mercado stated that she had to pay \$3,500.00 to amend her tax returns for 2006 and 2007 to reflect the proper amount, taking into account the money put into the BUF account. However, Ms. Luna-Mercado admitted that before she got the second opinion on tax advice, no one knew about the problem with the BUF account. Ms. Luna-Mercado was not aware of the BUF account issue until 2008 when American Funding informed her of the problem.

Ms. Luna-Mercado also testified that Bruny's had issues with PBSI's payroll taxes at the end of 2008. She stated that Bruny's had paid an entire year of bad checks to people without business licenses, and Mr. Caputo, C.P.A., had to correct the payroll problem which resulted in about \$5,000.00 in penalties and \$5,000.00 in billing from Mr. Caputo.

The parties introduced Bruny's tax returns prepared by PBSI for the years 2006 and 2007 and the amended tax returns for those same years which Bruny's had prepared and filed by Anthony R. D'Amato, Jr., C.P.A.⁸ The returns prepared by PBSI have the same gross income as the amended returns prepared by a C.P.A. accounting practice. The returns differ in the amounts

⁸ Joint Exhibits #2-3 (PBSI's returns) and #6-7 (amended returns).

listed for ordinary business income, after deducting certain business deductions. The returns also differ greatly when listing the cash assets of the company at the end of the year.

The amended tax returns list more business deductions than the original returns. The 2006 PBSI tax return lists ordinary business income as \$97,402.00 while the 2006 amended return lists \$34,664.00 in ordinary business income. The 2006 PBSI return had deductions totaling \$492,324.00 and the amended returns listed total deductions of \$537,293.00 – a difference of \$44,969.00. The 2007 original and amended returns have a similar pattern of deviations in the listing of certain business deduction amounts.

The difference in the deductions mainly consists of easily manipulated expenses. For example, PBSI's return lists \$3,669.00 in deductions for 2006 repairs and maintenance while the amended return lists \$13,357.00 for repairs and maintenance. The 2006 amended return also claims a \$1,027.00 depreciation deduction while the original return claims a \$457.00 deduction. The deductions for fixed expenses such as compensation of officers, salaries and wages, rents, taxes, and advertising are all the same between the original and amended returns. This same pattern exists between the 2007 original and amended returns.

Additionally, differences exist in the “total liabilities and shareholder's equity” between the original and amended returns for the years 2006 and 2007. The 2006 amended return lists \$0.00 for the end of the year cash assets while the original returns lists \$119,525.00. This discrepancy was explained by Mr. Caputo, C.P.A. and Ms. Luna-Mercado. PBSI listed the amount of cash as an asset, while due to the nature of the bail bond business, Bruny's actually did not have the money because Bruny's deposited the cash into a BUF escrow account which was used for payment in case of customer default.

Mr. Danny J. Caputo, Sr., C.P.A. testified for Bruny's. Mr. Caputo graduated from the Wharton School of Finance at the University of Pennsylvania and has over 50 years of experience as a certified public accountant. Mr. Caputo reviewed Bruny's 2006 and 2007 amended tax returns. He stated that he looked for gross errors and omissions on Bruny's original 2006 and 2007 returns that were prepared by PBSI. Mr. Caputo stated that the 2006 return failed to account for lack of access to the funds in the BUF account because PBSI listed \$119,525.00 in the end of year cash column, which Mr. Caputo states creates a large liability. The 2007 return had the same discrepancy. Additionally, Mr. Caputo stated that he corrected the business deductions on both the 2006 and 2007 amended returns. Ms. Luna-Mercado admitted that she was not aware of the problems with listing the cash in the BUF account until she got a second opinion on her taxes.

III. Parties' Contentions

Bruny's argues that PBSI's contract claim is time-barred under the statute of limitations. PBSI contends that Bruny's is liable for a breach of contract between the two parties because PBSI provided Bruny's tax and bookkeeping services, and Bruny's failed to pay two invoices totaling \$5,218.25. Conversely, Bruny's alleges that PBSI is liable for breach of contract because PBSI provided deficient services resulting in the amendment of Bruny's tax returns. Lastly, Bruny's contends that PBSI is liable for malpractice and negligence.

IV. Discussion

The Court must decide three issues. First, whether PBSI's breach of contract claim is barred by the statute of limitations. Second, if the action is not time-barred, whether Bruny's has breached their service contract with PBSI by failing to pay, or whether PBSI has breached the

contract by providing deficient services. Lastly, the Court must decide the merits of Bruny's counterclaims for malpractice and negligence.

A. Statute of Limitations

The Court finds that PBSI's breach of contract claim is not time-barred by the statute of limitations. Delaware law provides a three year statute of limitations on claims for breaches of contract.⁹ The "three year statute of limitations on breach of contract claims begins to run when contract is breached."¹⁰ The contract is breached when Defendant fails to make payment by the date required under the agreement between the parties.¹¹

PBSI filed their breach of contract action on June 3, 2011, so to be within the statute of limitations, the alleged breach of the contract must have occurred on or after June 3, 2008. Both of the invoices attached to the Complaint and introduced at trial are dated after June 3, 2008. Invoice #2546 is dated August 28, 2008 and Invoice #2774 is dated February 5, 2009. Even though the work on these invoices references work completed for 2006 and 2007 tax returns, testimony and documentary evidence revealed that those tax returns were dated August 27, 2008 and February 6, 2009, respectively. Both invoices stated that the terms of payment were 15 days. Invoice #2546 was due under the agreement on September 12, 2008, and Invoice #2774 was due under the agreement by February 20, 2009. Therefore, PBSI's breach of contract claim was filed within the three-year statute of limitations.

B. PBSI's Breach of Contract Claim and Bruny's Breach of Contract Counterclaim

⁹ 10 *Del. C.* § 8106. *See Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del.Super.1969).

¹⁰ *Aronow Roofing v. Gilbane Building Co.*, 902 F.2d 1127, 1128 (3d. Cir 1990).

¹¹ *Hercules, Inc. v. Tomaszewski*, 2011 WL 6951839, at *4 (Del. Com. Pl. Dec. 29, 2011).

In civil claims, the plaintiff, here PBSI, bears the burden to prove each and every element of its claim(s) by a preponderance of the evidence.¹² The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists.¹³ Further, in order to succeed on the breach of contract claim, PBSI must prove the following elements by a preponderance of the evidence: (1) the existence of a contract; (2) that defendants breached an obligation imposed by the contract; and (3) that plaintiff incurred damages as a result of the breach.¹⁴

A party is excused from performance under a contract when the other party materially breaches that contract.¹⁵ “The converse of this principal is that a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract.”¹⁶ When there is simply a minor breach, resulting in an action for damages, and the injured party fails to perform their obligations under the contract, the injured party itself is in breach of contract.¹⁷

First, in regards to PBSI’s breach of contract claim, the Court finds that PBSI has proven by a preponderance of the evidence that Bruny’s breached the contract for bookkeeping, payroll and tax preparation services by failing to pay Invoices #2546 and #2774. There is no dispute that a contract for these services existed between the parties. Both documentary evidence and

¹² *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).

¹³ *Id.*

¹⁴ *VLIW Tech., LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

¹⁵ *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

¹⁶ *Eastern Electric and Heating, Inc. v. Pike Creek Professional Center*, 1987 WL 9610, at *4 (Del. Super. Apr. 7, 1987) (citing 11 *Williston on Contracts* § 1292, at 8 (3d ed. 1968)).

¹⁷ *See id.*

testimonial evidence prove by a preponderance of the evidence that Bruny's never paid the total amount of the two invoices. Therefore, Bruny's owes PBSI for the amount due under the contract, \$5,218.25, unless Bruny's is excused from performing under the contract due to a material breach by PBSI or PBSI breached the contract resulting in damages.

The Court finds that PBSI did not commit either a material or minor breach of the contract. PBSI has provided Bruny's with low-cost, non-C.P.A., services since Bruny's began business in 2003. Bruny's did not complain about PBSI's services for over five years, and has paid them for their services over the course of their business relationship. It was not until 2008, when Bruny's sought the advice of a certified public accountant ("C.P.A.") and discovered that a C.P.A. would have prepared the taxes differently, that Bruny's decided not terminate PBSI's services. Bruny's decided to have a C.P.A. file amended returns, to terminate their business relationship with PBSI, and to disregard paying them for their services because they paid a C.P.A. to file amended tax returns.

Moreover, Bruny's failed to prove by a preponderance of the evidence that PBSI breached the service contract. The evidence demonstrates PBSI provided the services they were obligated to perform under the contract. PBSI employees went weekly to pick up information to provide bookkeeping and payroll services. PBSI also prepared and filed the 2006 and 2007 with information provided to them by Bruny's. Bruny's chose to seek the services of a C.P.A. and to have their taxes amended. PBSI did not breach the contract because they did not prepare the tax returns with the refinement that a C.P.A. would have provided.

C. Bruny's Negligence and Malpractice Counterclaims

1. Bruny's failed to prove that PBSI was negligent by a preponderance of the evidence

In order to establish a prima facie case for negligence, a plaintiff must prove by a preponderance of the evidence that “defendant owed plaintiff a duty of care; defendant breached that duty; and defendant’s breach was the proximate cause of plaintiff’s injury.”¹⁸ There must have been a legal obligation owed by defendant— “a duty to protect the plaintiff from the risk of harm which caused his injuries.”¹⁹ “[W]hether a duty exists is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined by the court.”²⁰

The standard of care applicable to a professional “can only be established through expert testimony. An exception to his rule exists, however, when the professional’s mistake is so apparent that a layman, exercising his common sense, is perfectly competent to determine whether there was negligence.”²¹ As in any tort action, the standard of care required is that of a reasonably prudent man and the details of the standard must be formulated in light of the particular facts of this case.²²

At trial, the Defense failed to prove the applicable standard of care by a preponderance of the evidence. Mr. Caputo, C.P.A. testified that he found errors in PBSI’s tax returns; however, the Court will not hold PBSI to the standard of care of a C.P.A. The Court finds it unsurprising

¹⁸ *New Haverford P’ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001).

¹⁹ *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002).

²⁰ *Id.*

²¹ *Weaver v. Lukoff*, No. 15, 1 (Del. July 1, 1986) (McNeilley, J.)(citations omitted).

²² *Robelen Piano Co. v. DiFonzo*, 169, A.2d 240, 245 (Del. Super. 1961).

that a C.P.A. with a degree from Wharton Business School and over 50 years of experience was able to find errors in tax returns prepared by business ran by a man with three classes in accounting from a community college and experience only from providing general business services at low-cost. A person who has taken three medical classes is certainly not a doctor, and a person who has taken three accounting classes is not a certified public accountant. PBSI offers alternative services to a C.P.A. at a lower cost.

Even if the Court evaluated PBSI's conduct under the correct reasonable person standard of care, the Defense has still failed to meet their burden. Bruny's failed to prove by a preponderance of the evidence that PBSI breached the duty owed by a reasonable, non-C.P.A., provider of payroll, bookkeeping, and tax preparation services.²³

2. PBSI did not commit Malpractice

Malpractice is defined as an instance of negligence on the part of a professional.²⁴ The elements of an accounting malpractice claim are: (1) an accountant-client relationship giving rise to a duty, (2) the accountant breached the duty, and (3) the breach of that duty was the approximate cause of the claimed damages.²⁵ A client "is a person or entity that employs a professional for advice or help in that professional's line of work."²⁶ Malpractice is a breach of

²³ The several facts pertaining to the standard of care submitted by Bruny's in post-trial briefing that are not in evidence are deemed irrelevant by the Court.

²⁴ Black's Law Dictionary, pg. 978, Bryan A. Garner, Editor in Chief, 8th Edition, 1994.

²⁵ *Patel v. Murphy*, 2009 WL 1449010, at *2 (Del. Super. May 20, 2009).

²⁶ *Id.*

the professional standard of care.²⁷ In Delaware, there is no case law that suggests that the elements of accountant malpractice would be applied to a non-C.P.A.

There is no accountant-client relationship between PBSI and Bruny's. Bruny's suggested that the Court apply the elements provided by the Superior Court in *Patel v. Murphy* to this case, however a malpractice claim is not applicable under these facts. In *Patel v. Murphy*, the accountant claimed to have committed malpractice in that case was a C.P.A. Malpractice is a negligence action against a professional. As discussed *supra*, PBSI is not a professional, will not be held to the professional standard of care equivalent to a C.P.A., and will therefore not be liable for malpractice. In short, there cannot be any malpractice when there is no professional practice. The correct inquiry is whether PBSI was negligent under a reasonable person standard, which the Court found Bruny's failed to prove at trial by a preponderance of the evidence.

D. Attorney's Fees

The Court finds no basis for an award of attorney fees to Bruny's. The "American Rule" provides that each party bear its own legal fees in the absence of some recognized basis for fee shifting.²⁸ An exception to the American Rule is that the Court may grant attorney's fees "if it finds that a party brought litigation in bad faith or acted in bad faith during the course of the litigation."²⁹ Bruny's alleges that PBSI has brought a frivolous claim. The Court finds no merit to this argument and further finds that PBSI has not acted in bad faith during the course of this litigation.

²⁷ *Trenwick America Litigation Trust v. Ernest & Young, L.L.P.*, 2006 WL 4782378, at *36 (Del. Ch. Aug. 10, 2006).

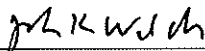
²⁸ *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Pan Am. Energy LLC*, 2003 WL 1432419, at *7 (Del Ch. March 19, 2003) (citations omitted).

²⁹ *Reserves Dev. LLC v. Severn Sav. Bank*, 2007 Del. Ch. LEXIS 156 *69 (Del. Ch. Nov. 9., 2007)(citations omitted).

V. Conclusion

Therefore, for the reasons set forth in this Memorandum Opinion and Order, judgment is hereby entered in favor of PBSI and against Bruny's.

IT IS SO ORDERED this 20th day of November, 2012.



John K. Welch,
Judge.