

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

MARGOLIS EDELSTEIN and )  
KLEHR HARRISON HARVEY )  
BRANZBURG & ELLERS LLP, ) C.A. No. 09C-05-034 DCS  
a Delaware limited liability )  
partnership, )  
)  
Plaintiffs, )  
)  
v. ) CONSOLIDATED  
)  
STEVEN GOLDSTEIN, )  
)  
Defendant. )

Submitted: February 17, 2011

Decided: March 1, 2011

Upon Plaintiff, Margolis Edelstein's Motion for  
Summary Judgment on its Complaint - **DENIED**

Plaintiff, Klehr Harrison Harvey Branzburg & Ellers, LLP's  
Motion for Summary Judgment on its Complaint - **DENIED**

Plaintiff, Klehr Harrison Harvey Branzburg & Ellers, LLP's  
Motion for Summary Judgment on Defendant's Counterclaim  
for Breach of Contract - **DENIED**

Plaintiff, Klehr Harrison Harvey Branzburg & Ellers, LLP's  
Motion for Summary Judgment on Defendant's  
Counterclaim for Negligence - **GRANTED**

**GRANTED IN PART; DENIED IN PART**

**MEMORANDUM OPINION AND ORDER**

*Appearances:*

Scott L. Silar, Esquire, Wilmington, Delaware, Margolis Edelstein, Attorney for Margolis Edelstein.

David S. Eagle, Esquire and Kelley A. Green, Esquire, Wilmington, Delaware, Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, Attorneys for Klehr, Harrison, Harvey, Branzburg & Ellers, LLP.

Thomas C. Marconi, Esquire, Wilmington, Delaware, Losco & Marconi, P.A., Attorney for Steven Goldstein.

**STREETT**, Judge.

This instant matter involves breach of contract and quantum merit actions for non-payment of legal fees originally filed separately by two law firms in 2009 arising from representation of Defendant in estate and related issues in the Court of Chancery. Defendant has counterclaimed against one of the firms for breach of contract and professional negligence.

### **FACTS**

Margolis Edelstein (ME) and Klehr, Harrison, Harvey, Branzburg & Ellers, LLP (KH) are law firms practicing in Delaware. ME represented Defendant in Chancery Court regarding a partnership matter<sup>1</sup> and related Estate Litigation.<sup>2</sup> KH also represented Defendant in the related Estate Litigation.<sup>3</sup> ME and KH allege that although Defendant signed representation agreements, Defendant stopped paying billed invoices.

Defendant, a member of the Delaware Bar, filed a *pro se* answer and counterclaim against each firm alleging breach of contract and professional negligence. Defendant, who lives in Washington, D.C. and has practiced for more than 30 years as an attorney for H.U.D., retained counsel in October

---

<sup>1</sup> *Ronald Goldstein v. Nine Thirteen Partnership, a Delaware general partnership, and Steven Goldstein, Del. Ch. C.A. No. 2679 (VCS) ["the Partnership"]*.

<sup>2</sup> *Estate of Louis and Selma Goldstein, Del. Ch. C.A. No. 2680 (VCS)*. Defendant has two siblings: Karen Lipsy and Ronald Goldstein.

<sup>3</sup> Included in the estate litigation was Defendant's displeasure with the Register of Wills' appointment of an estate administrator in 2006. Although this Superior Court Judge was the Register of Wills for New Castle County during that time, this judge was not involved in the ensuing Court of Chancery litigation.

2009. Plaintiffs subsequently consolidated their action in April 2010 and Defendant was given time to amend the counterclaim against ME. The counterclaim against ME was never amended and, instead, a July 21, 2010 stipulation between Defendant and ME dismissed Defendant's breach of contract counterclaim against (ME).<sup>4</sup>

### **THE PARTIES' CONTENTIONS**

ME asserts that Defendant signed a letter of engagement in July 2008 wherein he retained ME to provide legal representation concerning "the Partnership" matters. ME also asserts that Defendant later requested that ME represent him in the Estate Litigation. ME calculates that, although Defendant paid an initial retainer deposit of \$15,000, ME provided further and additional representation amounting to \$99,165.01 for additional consultation, advice, legal services performed, and out of pocket costs. Defendant has not made any additional payments.

Defendant acknowledges that he signed an engagement letter and retained ME on July 14, 2008. Defendant asserts that the terms of the contract were limited to the Partnership issue and that he has already paid

---

<sup>4</sup> Although the Interim Status Report filed by ME on January 14, 2011 states that Defendant "intends to file a professional negligence claim against ME," the Court is not in receipt of such claim. Moreover, the Court, having allowed numerous changes to the Scheduling Order, on February 17, 2011 denied any pending (and future) motions to amend.

“nearly all<sup>5</sup> of the fees and costs that were the subject of the letter. He alleges that ME’s breach of contract claim for approximately \$99,000 was for ME’s involvement with the Estate Litigation. Defendant contends that said involvement was unauthorized, not contemplated in the engagement letter, and was unrelated to the Partnership issue. Specifically, Defendant alleges that ME inserted itself into real property matters and took full responsibility to settle the fees of the estate administrator’s counsel.

Although it is undisputed that Defendant consulted with ME concerning the Estate Litigation, sought its legal advice, accepted its advice, and signed a letter accepting and understanding that additional costs would accrue, Defendant seeks to avoid payment.

KH asserts that, on June 11, 2008, Defendant retained KH to represent his interests in ongoing Chancery Court litigation, that Defendant signed an engagement letter agreeing to pay KH for services based on time expended by KH’s attorneys and paralegals at their hourly rates, and that KH’s invoices were due and payable upon receipt. KH was the third set of attorneys hired by Defendant regarding the Estate matters.<sup>6</sup> Litigation was in its third year. Some of the estate issues included parents’ (decedents’) legal domicile, court jurisdiction, appointment of an estate administrator,

---

<sup>5</sup> Defendant’s Answering Brief at 20.

<sup>6</sup> Defendant’s reason(s) for severing relations from previous law firms were not provided.

title to more than 25 separate parcels of property, and sibling claims of breach of fiduciary duties.

The legal services that KH provided included document review; preparation and filing of court documents; preparation, attending and participation in depositions; legal research; motion practice; negotiations; conferences with Defendant; conferences with Defendant's sister and her attorney; conferences and communications with the estate administrator; conferences with ME concerning Defendant's partnership dispute with his brother (Ronald Goldstein); and trial preparation.

KH also had an active role in negotiating Defendant's potential acquisition of uncontested estate properties.<sup>7</sup> Defendant instructed KH to offer only \$10,000 for 1401 North King Street, despite the fact that Defendant's appraisal valued that parcel at \$40 – 50,000. KH apparently informed the administrator's attorney of Defendant's offer; however, the administrator subsequently offered to sell it to Defendant for \$28,000.

On September 23, 2008 ME (and KH) wrote an eleven page letter reviewing the status of the case, possible outcomes of the impending trial, tangential issues – including tax consequences and additional administrator's fees, and possible settlement strategies. The letter advised Defendant that he

---

<sup>7</sup> In July 2008, Chancery Court allowed the administrator to sell the uncontested properties to pay estate expenses and allowed Defendant or his siblings to counter any offers that the administrator received on the properties

would, in all likelihood, be unsuccessful in the upcoming trial. ME and KH, in the letter, estimated that trial preparation would cost Defendant approximately \$300,000 in additional legal fees. Defendant subsequently signed an acknowledgement letter indicating that he understood the increasing and anticipated litigation fees if the Chancery Court case was not settled quickly. Nevertheless, Defendant decided to move forward with the litigation. Accordingly, KH prepared for trial.

Shortly thereafter, on September 26, 2008, the administrator received a \$30,000 offer for 1401 N. King Street and Defendant (or his siblings) had until September 29, 2008 at 5 p.m. to respond if they wanted to buy that parcel. During that weekend, counsel for the uncontested properties informed Defendant and his sister of the offer and its urgency.<sup>8</sup>

Although Defendant previously denied receiving notice, the unchallenged facts are that Defendant and his sister (who also lived in the D.C. area) had actual knowledge of the offer and took immediate action. They drove from Washington to Delaware the morning of September 29, 2008, discussed the offer with their brother, then went to the ME law firm to discuss it. Defendant and his sister instructed the attorney for the uncontested properties to go back to the administrator and continue

---

<sup>8</sup> Defendant in his Answering Brief admits notice of this deadline. Defendant's Answering Brief at 9.

negotiating. The property was sold to someone else. Trial preparations continued.

Trial was scheduled in Court of Chancery for November 24, 2008. On the eve of trial, Defendant decided to enter into a settlement agreement that included the administrator's fee approved by the court, and Defendant obtained several of the contested properties. Matters were resolved.

KH subsequently billed Defendant for legal services provided in October and November that led to the settlement of the case in November 2008. Although itemized invoices were sent to Defendant totaling \$158,633.44, Defendant has not paid KH since September 2008.

Defendant in his counterclaim against KH alleges breach of contract and negligence.<sup>9</sup> Defendant asserts that KH:

- overbilled or unreasonably billed because prior counsel had done most of the pretrial preparation,
- grossly and inadequately represented him,
- did little work
- failed to engage in substantive motion practice,
- passively attended depositions,
- engaged in meaningless and useless discovery,
- failed to put critical legal issues before the Court ,
- ineffectively negotiated a settlement with opposing counsel,
- was utterly unprepared for trial,
- improperly relinquished the majority of the uncontested properties,

---

<sup>9</sup> Defendant, during the Estate Litigation, also opposed the *Administrator's* fees and costs, counterclaimed allegations of misconduct and breach of duty against the Administrator, and sought damages from the Administrator. ME's September 23, 2008 letter to Defendant.



- did not prepare Defendant for trial,
- did not prepare witnesses for trial,
- did not discuss trial strategy with Defendant,
- failed to secure an expert witness,
- failed to recover Defendant's out of pocket expenses or rents collected,
- ignored Defendant's instructions,
- failed to review the settlement document with Defendant,
- advised Defendant that he had "no choice",
- refused to inform the Court that Defendant had signed the settlement document under duress,
- threatened to withdraw as counsel and leave the courthouse if Defendant told the Court that the settlement was procured under duress,
- misled Defendant to believe that the settlement could be amended, and
- refused to negotiate amending the settlement.

Defendant contends that ME and KH's unauthorized and deficient representation excused his obligation to pay. Defendant further asserts that he suffered damages because the administrator's counsel fees and costs were greater on the eve of trial in November than they were when a bill was submitted months before, that the contested properties issue was mishandled, and that he did not recover unreimbursed expenses or money that he claimed his deceased father owed to him. Defendant believes that his damages are approximately \$3 million.

Plaintiffs each moved for summary judgment on their claims for breach of contract. KH moved for summary judgment on Defendant's counterclaims of breach of contract and negligence.

## STANDARD OF REVIEW

It is settled law that summary judgment is appropriate only where there is no genuine issue of material fact in dispute.<sup>10</sup> The moving party bears the burden of establishing that no such genuine issue of material fact exists.<sup>11</sup> Moreover, all facts are viewed in the light most favorable to the non-moving party. When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.<sup>12</sup> The Court may not grant summary judgment if the record indicates that a material fact is in dispute or if there is a need to inquire more thoroughly into the facts in order to clarify the application of law to the specific circumstances.<sup>13</sup> “Summary Judgment must also be denied if there is a dispute regarding the inferences which might be drawn from the facts”.<sup>14</sup>

In this matter before the Court, the parties have presented argument and a paper record consisting of affidavits and documentation to support their versions and interpretations of events leading up to the denouement of

---

<sup>10</sup> Del. Super. Ct. Civ. R. 56(c); *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009); *Snyder v. Baltimore Trust Co.*, 532 A.2d 624, 625 (Del. Super. 1986).

<sup>11</sup> *Hart v. Resort Investigations & Patrol*, 2004 WL 2050511, at \*6 (Del. Super. Sept. 9, 2004).

<sup>12</sup> *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

<sup>13</sup> Del. Super. Ct. Civ. R. 56(c).

<sup>14</sup> *84 Lumber Company v. Derr*, 2010 WL 2977949, a \*3 (Del. Super. July 29, 2010) (citing *Myers v. Nicholson*, 192 A.2d 448, 451 (Del. 1963)).

the partnership and estate litigations in the Court of Chancery. The Court will not grant a motion for summary judgment unless it determines that no genuine issue of fact exists as to the claims.

### **DISCUSSION**

Based on the parties' contentions, two issues are now before the Court. The first issue is whether Defendant breached his contract to pay ME for legal services concerning a partnership agreement and related Estate Litigation representation. The other issue is the contract between KH and Defendant – whether Defendant breached his contract to pay KH for legal services concerning Estate Litigation and whether KH breached the contract by inflating bills for deficient services.

**ME's MOTION FOR SUMMARY JUDGMENT ON ITS  
BREACH OF CONTRACT COMPLAINT**

Plaintiff ME argues that Defendant agreed to pay ME its hourly rate for legal services performed pursuant to a retention letter whereby ME would represent Defendant's interest in a partnership matter and address "relevant legal issues."<sup>15</sup> This matter was related to pending Estate Litigation in the Court of Chancery. Defendant, however, asserts that ME's \$99,000.00 unpaid legal fees are not owed because ME billed for services provided that were outside the scope of the retention agreement. Specifically, he posits that ME's involvement in the Estate Litigation property issues and settlement negotiations were separate and distinct from partnership issues.

Here, Defendant acknowledges receiving ME's eleven page September 23, 2008 letter weighing the advisability of Estate Litigation settlement, accepting ME's advice and acting on that letter by eventually agreeing to settle, and actually consulting at ME's office with ME regarding matters other than the Partnership. Although it would appear that Defendant's position (that ME's representation was restricted to Partnership

---

<sup>15</sup> July 14, 2008 Retention Letter.

matters) is contradicted by the record,<sup>16</sup> and that Defendant essentially seeks \$99,000.00 of legal services for free, Defendant has presented an issue regarding the interpretation, inferences, and scope of the retention contract.

“When the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous...To succeed in its Motion for Summary Judgment, [Movant] must establish that its construction of the ... agreement is the *only* reasonable interpretation”.<sup>17</sup> Where the contract provisions at issue are reasonably or fairly susceptible to different interpretations, summary judgment should be denied.<sup>18</sup> Here, a genuine issue of material fact has been raised regarding interpretation, or alternatively, mutual assent to modification of the contract. Therefore, ME’s Motion for Summary Judgment on its Breach of Contract claim is **DENIED**.

---

<sup>16</sup>The September 23, 2008 letter refers to the settlement of partnership issues and estate claims as a “global settlement.” KH’s Motion for Summary Judgment, Ex. 20.

<sup>17</sup> *United Rentals Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007)(denying summary judgment and finding Merger Agreement ambiguous where the language presented a direct conflict between two provisions on remedies and both parties’ interpretations were reasonable).

<sup>18</sup> *Id.* (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

**KH's MOTION FOR SUMMARY JUDGMENT  
ON ITS BREACH OF CONTRACT CLAIM**

KH seeks payment for legal services provided pursuant to the engagement agreement signed by Defendant. KH agreed to represent Defendant's interests in the ongoing Estate Litigation and had submitted extensive, detailed invoices. KH explained that the Chancery Court litigation was complex and antagonistic. Indeed, Defendant's proffered witness calculated that KH filed 32 pleadings, took 7 depositions, and that seven scheduling orders were issued from November 2007 through June 2009, during which a total of 1,177.85 hours were billed to Defendant.<sup>19</sup>

Defendant attacks the combined invoices by suggesting, *inter alia*, that the bills were padded to reflect more hours than were actually expended, that KH ignored Defendant's verbal instructions, and that the settlement to which he agreed was a hastily created cover-up of KH's bilking of Defendant.

To sustain a claim of breach of contract, the plaintiff must establish: (1) the existence of an express or implied contract; (2) the breach of an obligation imposed by that contract; and (3) resulting damages to the plaintiff.<sup>20</sup> Furthermore, a plaintiff alleging breach of contract must

---

<sup>19</sup> Proffered Letter of Bradley S. Eaby, Esq. at 1.

<sup>20</sup> *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

demonstrate substantial compliance with all the provisions of his contract in order to recover damages for any breach.<sup>21</sup> “As a general rule the party first guilty of a material breach of contract cannot complain if the other party subsequently refuses to perform.”<sup>22</sup>

Here, the parties agree that a contract for legal representation existed,<sup>23</sup> however, Defendant claims that KH did not perform their end of the contract.<sup>24</sup> Specifically, Defendant asserts that KH failed to prepare his case adequately for trial, refused to follow Defendant’s ongoing instructions to focus the court’s attention on certain key issues, refused to follow Defendant’s instruction to ask the Court to review the settlement for fairness, and refused to inform the Court that Defendant had signed the settlement under duress.<sup>25</sup> Defendant has raised a genuine issue concerning the content of the bill for legal services.

Summary Judgment is only granted when there is no genuine issue of material fact.<sup>26</sup> Defendant’s challenge to KH’s billing and complaint of

---

<sup>21</sup> *Emmett S. Hickman Co. v. Emilio Capaldi Developer, Inc.*, 251 A.2d 571, 573 (Del. Super. 1969)(citing *Carroll v. Cohen*, 5 Boyce 233 (Del. Super. 1914)).

<sup>22</sup> *Hudson v. D & V Mason Contractors, Inc.*, 252 A.2d 166 (Del. Super. 1969).

<sup>23</sup> KH Opening Brief at 6; Defendant’s Answering Brief at 15.

<sup>24</sup> Defendant’s Answering Brief at 15.

<sup>25</sup> *Id.* at 15-16.

<sup>26</sup> Del. Super. Ct. Civ. R. 56(c).

ignored conversations created a genuine issue as to the content of the bill presented. Under these circumstances, KH's Motion for Summary Judgment on its claim of Breach of Contract is **DENIED**.



**KH's MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S  
COUNTERCLAIM FOR BREACH OF CONTRACT**

KH also petitions for Summary Judgment on Defendant's Breach of Contract Counterclaim. KH argues that Defendant "fails to identify a single contractual provision that was breached by KH."<sup>27</sup> Defendant's Counterclaim alleges overbilling, failure to follow through on Defendant's instructions, and KH reaching a settlement to cover-up its overbilling and deficiencies.

Delaware case law addressing breach of contract claims against attorneys is scarce, thus it is necessary to look to Pennsylvania's relevant case law for guidance.<sup>28</sup> Pennsylvania courts have held that a client who sues his attorney for breach of contract "must allege that an attorney breached a contract term or failed to follow a specific instruction of the client."<sup>29</sup> In *Healthtrio, Inc. v. Margules*, this Court granted the defendants/attorneys' motion to dismiss a breach of contract count because the plaintiff failed to identify a specific provision of the contract that defendants had breached or a specific instruction with which defendant had failed to comply, but merely alleged that the defendants failed their duty as

---

<sup>27</sup> KH Opening Brief at 7.

<sup>28</sup> *Healthtrio, Inc. v. Margules*, 2007 WL 544156, at \*11 (Del. Super. Jan 16, 2007).

<sup>29</sup> *Id.* (quoting *Rogers v. Williams*, 616 A.2d 1031, 1033 (Pa. Super. 1992)).

attorneys by not including certain counterclaims in the pleadings in a timely manner.<sup>30</sup>

Here, Defendant has identified precise instructions that he claims KH failed to follow. Specifically, Defendant asserts that KH refused to follow his instruction to focus the litigation strategy on the key issues of “whether the appointment of the administrator by the Register of Wills was proper” and “whether [Defendant’s] deceased parents’ domicile was the state of Florida.”<sup>31</sup> Defendant further contends that KH refused to follow Defendant’s instruction to ask the Chancery Court to review the settlement for fairness on the morning of trial and refused to inform the Chancery Court that the settlement was signed under duress.<sup>32</sup> Defendant has raised a genuine issue concerning the content of the bill for legal services.

Summary Judgment is only granted where there is no genuine issue of material fact.<sup>33</sup> Because Defendant has raised issues with KH’s alleged failure to follow instructions, Plaintiff KH’s Motion for Summary Judgment of Defendant’s Breach of Contract Counterclaim is **DENIED**.

---

<sup>30</sup> *Id.*

<sup>31</sup> Defendant’s Answering Brief at 11, 16.

<sup>32</sup> Defendant’s Answering Brief at 16.

<sup>33</sup> Del. Super. Ct. Civ. R. 56(c).

**KH's MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S  
PROFESSIONAL NEGLIGENCE COUNTERCLAIM**

Defendant alleges that KH committed professional negligence because KH was allegedly unprepared for trial, ignored Defendant's instructions, and created an atmosphere that caused Defendant to acquiesce to a settlement agreement under duress. Defendant, in his section of the pretrial order and his motion in limine reply brief, quantifies his damages. Defendant estimates that he had combined losses of approximately \$3,263,000.00 plus \$600 per month loss of rent for an unspecified number of months.<sup>34</sup>

Specifically, Defendant claims that he lost \$349,844.35 in administrator's counsel's fees and costs, \$600 per month rent for the property located at 1401 North King Street, \$114,000.00 in funds owed by the estate to defendant for work performed, \$2.3 million for the combined value of the contested properties that went to the Administrator's control, and \$400,000.00 owed to him by his parents.

While it is appropriate to challenge a bill for legal services by filing a professional negligence counterclaim,<sup>35</sup> a defendant has the burden of presenting evidence that would support the counterclaim. The law is clear,

---

<sup>34</sup> Defendant's Reply Brief at 19.

<sup>35</sup> *Law Offices of Jerris Leonard, P.C. v. Mideast Sys., Ltd.*, 111 F.R.D. 359 (D.D.C. 1986).

and Defendant concedes,<sup>36</sup> that each of the following elements must be met to establish a legal malpractice/professional negligence claim: (1) the employment of an attorney; (2) the attorney's neglect of a professional obligation; and (3) resultant loss.<sup>37</sup> Nevertheless, Defendant has only established one prong of this three prong test; he has shown legal representation. Although Defendant recites a litany of dissatisfactions with KH's representation, Defendant has failed to show neglect or loss.

To satisfy the second prong of a claim for professional negligence, that an attorney neglected a professional obligation, Defendant must establish the applicable standard of care through the presentation of expert testimony.<sup>38</sup> Here, Defendant neither produced an expert nor set forth the applicable standard of care for an expert to render an opinion. Defendant proffered a Delaware attorney to assess KH's work; however Defendant has not shown that the proffered attorney is an expert qualified to give an opinion on professional malpractice. Defendant failed to offer a curriculum vitae<sup>39</sup> or concrete information about the proffered expert's professional experience (including complex practice before the Court of Chancery, estate

---

<sup>36</sup> Defendant's Reply Brief at 19.

<sup>37</sup> *HealthTrio, Inc. v. Margules*, 2007 W.L. 544156, at \*1 (Del. Super. Jan. 16, 2007).

<sup>38</sup> *Middlebrook v. Ayres*, 2004 WL 1284207, at \*5 (Del. Super. June 9, 2004).

<sup>39</sup> Defendant's Answering Brief at 18.

experience, negotiations of real estate purchases, or even year admitted to the Delaware Bar). Instead, Defendant's attorney continues to incorrectly maintain the position that opposing counsel could have deposed the proffered expert "had KH bothered to take [his] deposition."<sup>40</sup>

Furthermore, Defendant's proffered attorney failed to articulate a standard of care that was allegedly breached and the substance of his proffered testimony was not contained in his deposition.<sup>41</sup> Defendant has not met his burden. "A moving party may succeed on summary judgment by pointing to the absence of evidence proffered by the non-moving party."<sup>42</sup>

Additionally, Defendant has failed to show a resultant loss or that KH caused the loss. Defendant's proffered expert report did not contain quantified losses, although Defendant (as the movant) has "the burden of proving the existence and extent of the injury."<sup>43</sup> Also, Defendant waited until the pretrial order and motion in limine reply brief to allege new claims for damages.<sup>44</sup> Defendant has waived his damage claim.

---

<sup>40</sup> Defendant's Answering Brief at 18 and at oral argument.

<sup>41</sup> See *Russell v. K-Mart Corp.*, 761 A.2d 1 (Del. Super. 2000) (affirming the limitation of the proffered expert's testimony).

<sup>42</sup> *Hickey v. Scott*, 738 F.Supp.2d 55, 60 (D.D.C. 2010).

<sup>43</sup> *Thompson v. D'Angelo*, 320 A.2d 729, 731 (Del. 1974).

<sup>44</sup> Defendant alleged different losses during discovery.

Moreover, it is the law that a malpractice action against an attorney cannot be established in the absence of a showing that his wrongful conduct has deprived his client of something to which he would otherwise have been entitled.<sup>45</sup> Defendant's claim of \$3 million in losses, belatedly enumerated, was the result of Defendant's choice to forego a trial. Defendant had at least two months (from the September 23, 2008 letter from ME advising him to weigh his options until November 23, 2008) to consider a settlement. Defendant, an educated man, evidently weighed these options when he entered into a signed settlement agreement on the eve of trial. His settlement was then reviewed and accepted by Vice Chancellor Strine and was incorporated in the Court's Stipulation and Order of Dismissal with Prejudice. Defendant's settlement was knowing, voluntary, and intelligent. It was not the product of attorney negligence or duress.

Rather, administration related fees had increased \$349,844.35 because of additional work from the date of the letter until the settlement; the \$600 per month rent "loss" is speculative and open-ended; the sale of the 1401 North King Street parcel to someone else was a result of Defendant offering \$10,000 despite its own appraisal of \$40 – 50,000. They and the other losses

---

<sup>45</sup>*Thompson at 734.*

that Defendant attributes to KH are not causally connected to his attorney's representation.

Furthermore, these issues were included in the settlement agreement and the settlement was vetted by the Court of Chancery and found to be reasonable.<sup>46</sup> Defendant is collaterally estopped from now attempting to relitigate a previously litigated matter. "Where a question of fact essential to the judgment is litigated and determined by a valid final judgment, the determination is conclusive between the same parties in a subsequent case on a different cause of action."<sup>47</sup>

Lastly, Defendant cannot allege the same set of facts to maintain a Breach of Contract Counterclaim and a Malpractice Counterclaim in the same action. This violates the *economic loss doctrine*, which prohibits a party from recovering in tort for economic losses, the entitlement to which flows only from the contract.<sup>48</sup> The *economic loss doctrine* provides that "where an action is based entirely on a breach of the terms of a contract between the parties and not on a violation of an independent duty imposed

---

<sup>46</sup> *Goldstein Estate Litigation*, Consol. Case No. 2680-VCS, at \*1 (Del. Ch. Nov. 28, 2008)(Stipulation and Order of Dismissal With Prejudice).

<sup>47</sup> *Brown v. State*, 721 A.2d 1263, 1265 (Del. 1998)(quoting *Tyndall v. Tyndall*, 238 A.2d 343, 345 (Del. 1968)).

<sup>48</sup> *Sea Star Line, LLC v. Emerald Equipment Leasing, Inc.*, 2006 WL 214206 (D.Del. 2006).

by law, a plaintiff must sue in contract and not in tort.”<sup>49</sup> While some exceptions to the *economic loss doctrine* have been recognized, none are applicable here.<sup>50</sup> Similarly, Delaware courts have recognized that, in the context of legal malpractice, a claimant cannot assert both negligence and breach of contract claims based on the same conduct because tort claims and breach of contract claims are not alternative theories of recovery for the same acts.<sup>51</sup>

Therefore, KH’s Motion for Summary Judgment as to Defendant’s Counterclaim for Professional Negligence is **GRANTED**.

---

<sup>49</sup> *Pinkert v. Olivieri*, 2001 WL 641737, at \*5 (D.Del. May 24, 2001)(quoting *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1195 (Del. 1992)).

<sup>50</sup> See *Marcucilli v. Boardwalk Builders, Inc.*, 1999 WL 1568612, at \*4 (Del. Super. Dec. 22, 1999) (recognizing an exception to the economic loss doctrine in residential construction cases based in tort to recover damages resulting from negligence).

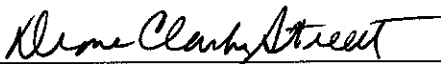
<sup>51</sup> *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at \*11 (Del. Super. Jan. 16, 2007) (citing *F & G Associates v. Pomerantz*, 2000 WL 33155748 (Pa.C.P. Jan. 18, 2000)).



**CONCLUSION**

**THEREFORE**, Plaintiff ME's Motion for Summary Judgment on its Complaint is **DENIED**. Plaintiff KH's Motion for Summary Judgment on its Complaint is **DENIED**. Plaintiff KH's Motion for Summary Judgment on Defendant's Counterclaim for Breach of Contract is **DENIED**. Plaintiff KH's Motion for Summary Judgment on Defendant's Counterclaim for Negligence is hereby **GRANTED**.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Diane Clarke Streett  
Judge