IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IRENE DICKERSON	:	
	:	
Plaintiff,	:	
v.	:	
	:	C.A. No. S14C-07-026 RFS
JULIANNE E. MURRAY, ESQUIRE & MURRAY LAW LLC,	:	
	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Upon Defendants' Motion for Summary Judgment.
Denied in part and Granted in part.

Submitted: January 26, 2016
Decided: March 24, 2016

Herbert W. Mondros, Esquire, Margolis Edelstein, 300 Delaware Ave., Suite 800, Wilmington, DE 19801, Attorney for Defendants.

Patrick Scanlon, Esquire, Law Offices of Patrick Scanlon, 203 NE Front Street, Suite 101, Milford, DE 19963, Attorney for Plaintiff.

STOKES, J.

I. INTRODUCTION

Before the Court is the Motion for Summary Judgment filed by Defendants Julianne E. Murray, Esquire and Murray Law, LLC (collectively "Defendants"). The Plaintiff in this matter is Irene Dickerson ("Plaintiff"). On February 3, 2015, this Court granted Defendants' motion to dismiss Count II of the Complaint.[1] After discovery, Defendants have moved for summary judgment on the remaining issues of negligence and punitive damages. For the following reasons, Defendants' Motion is **DENIED in part** and **GRANTED in part.**

II. FACTS AND PROCEDURAL POSTURE

On May 28, 2013, Defendants represented Plaintiff in a family transaction. Plaintiff mortgaged her own property to a bank. The purpose was to provide her grandson, Matthew Chasanov, the funds from the loan for him to purchase another property. Defendants prepared a promissory note (the "note") to enable Plaintiff to formalize this agreement. The note, drafted by Defendants, did not include many standard provisions, namely, clauses for acceleration, amortization, interest, attorneys' fees in the event of a default, or the signatures of her grandson and his wife, Lindsay (collectively the "Chasanovs"). The note was only between Plaintiff and Matthew Chasanov. No mortgage was prepared.

Notwithstanding these alleged deficiencies, Plaintiff agreed to complete the underlying transaction with the understanding that the Chasanovs would make her mortgage payments. Once the transaction was complete, the Chasanovs were able to purchase their home together. Subsequently, the Chasanovs defaulted after only making one payment on the note. As a result, Plaintiff filed the present suit seeking $145,200.00 in damages, essentially representing her liability to the bank.

[1] *Dickerson v. Murray*, 2015 WL 447607, at *7 (Del. Super. Feb. 3, 2015).

Defendants' Motion for Summary Judgment was filed on December 1, 2015. Briefing is complete, and the matter is ripe for decision.

III. PARTIES' CONTENTIONS

A. Defendants' Contentions

In support of the Motion for Summary Judgment, Defendants argue that the note was not negligently drafted because it "reflect[ed] the precise terms of the agreement between Plaintiff and Matthew [Chasanov]."[2] Defendants further contend that Defendants were not negligent in failing to advise Plaintiff to obtain a security interest in the Chasanovs' home because the loan officer at Plaintiff's bank had already advised Plaintiff about this idea, and she rejected the advice.[3] Also, Defendants argue that because Plaintiff's negligence exceeded Defendants' negligence, Delaware's comparative negligence statute[4] would bar recovery.[5] Further, Defendants contend that "there is no evidence in the record to support Plaintiff's claim that she was damaged in the amount of $145,200.00."[6] In addition, "even if Plaintiff had suffered damages, she cannot show that it was Defendant[s'] alleged negligence that was the proximate cause."[7] Lastly, Defendants assert that Plaintiff has not developed a factual basis to justify an award of punitive damages.[8]

B. Plaintiff's Contentions

In opposition of Defendants' Motion for Summary Judgment, Plaintiff argues that "[Defendants'] failure to advise [Plaintiff] the she should have a mortgage on the [Chasanovs'

[2] Defs.' Br. in Supp. of Defs.' Mot. for Summ. J. at 20.
[3] *Id.*
[4] 10 *Del. C.* § 8132.
[5] Defs.' Br. in Supp. of Defs.' Mot. for Summ. J. at 21-22.
[6] *Id.* at 24.
[7] *Id.* at 25.
[8] *Id.* at 28.

home] and a Note signed by [the Chasanovs] is a clear breach of her duty to [Plaintiff].[9] Plaintiff further contends that Defendants' negligence was the proximate cause of Plaintiff's damages.[10] Plaintiff also argues that comparative negligence is inapplicable because Plaintiff has not committed a negligent act.[11] Plaintiff contends she is damaged because "the value of the claim that she is holding is virtually worthless, and she should have been holding a mortgage against the [Chasanovs' home].[12] Finally, Plaintiff argues that Defendants recklessly disregarded her interests in favor of the Chasanovs.[13]

IV. STANDARD OF REVIEW

The Court will grant summary judgment when it is clear from the record "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[14] If the movant is able to show "that the undisputed facts support [its] claims or defenses, the burden shifts to the non-moving party to demonstrate that material facts remain in dispute for resolution by the ultimate fact-finder."[15] While the Court is required to view the evidence in a light most favorable to the non-moving party, "the opponent cannot create a genuine issue of material fact through bare assertions or conclusory allegations."[16] "If the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary to clarify the application of the law, summary judgment will not be granted."[17]

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[9] Pl.'s Br. in Opp. of Defs.' Mot. for Summ. J. at 12.
[10] *Id.* at 18.
[11] *Id.* at 23.
[12] *Id.* at 27.
[13] *Id.* at 32.
[14] Super. Ct. Civ. R. 56(c).
[15] *Image Hair Solutions Med. Ctr. v. Fox Television Stations*, 2016 WL 425158, at *3 (Del. Super. Jan. 29, 2016) (quoting *Gerstley v. Mayer*, 2015 WL 756981, at *3 (Del. Super. Ct. Feb. 11, 2015) (internal quotation marks omitted)).
[16] *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 53 (Del. Super. 1995) (citing *Martin v. Nealis Motors, Inc.*, 247 A.2d 831, 833 (Del. 1968)).
[17] *Grasso v. First USA Bank*, 713 A.2d 304, 307 (Del. Super. 1998).

V. DISCUSSION

A. Count I – Negligence

On a claim of legal malpractice, the plaintiff must establish the following elements: 1) the employment of the attorney; 2) the attorney's neglect of a professional obligation; and 3) resulting loss.[18] "In order to recover for an attorney's malpractice, the client must prove the employment of the attorney and the attorney's neglect of a reasonable duty, as well as the fact that such negligence resulted in and was the proximate cause of loss to the client."[19] Finally, it is well-established in Delaware that expert testimony is necessary to support a claim of legal malpractice.[20]

1) The employment of the attorney

After a careful review of the record, it is undisputed that Plaintiff employed Defendants to represent her in the underlying transaction.[21] Plaintiff has proven this element of legal malpractice and the Court need not address it further.

2) The attorney's neglect of a professional obligation

At this stage in the proceeding, the trial judge may not weigh evidence or resolve conflicts arising from pretrial documents, depositions, or other evidence.[22] That role belongs to the trier of fact; it is an axiom of the judicial process.[23] Further, if the matter depends to any material extent upon a determination of credibility, summary judgment is inappropriate. [24]

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[18] *Flowers v. Ramunno*, 2011 WL 3592966, at *2 (Del. Aug. 16, 2011).
[19] *Weaver v. Lukoff*, 1986 WL 17121, at *1 (Del. July 1, 1986) (citing *Pusey v. Reed*, 258 A.2d 460, 461 (Del. Super. 1969)).
[20] *Phillips v. Wilks, Lukoff & Bracegirdie, LLC*, 2014 WL 4930693, at *3 (Del. Oct. 7, 2014) (citing *Middlebrook v. Ayres*, 2004 WL 1284207, at *5 (Del. June 9, 2004)).
[21] Am. Compl. ¶ 4; *see also* Murray Aff. at 2 ¶ 7.
[22] *Cerebrus Intern., Ltd. v. Apollo Mgmt., LP*, 794 A.2d 1141, 1149 (Del. 2002).
[23] *Id.*
[24] *Young v. Frase*, 702 A.2d 1234, 1237 (Del. 1997) ("Delaware law observes the 'fundamental tenet of American jurisprudence' that the jury is the sole trier of fact responsible for assessing the credibility of witnesses, resolving conflicting testimony and drawing inferences from proven facts.").

Turning to the case at bar, two questions must be answered. *First*, did Defendants have a duty to inform Plaintiff that she should obtain a promissory note from the Chasanovs as well as a mortgage on the new property the Chasanovs were purchasing? *Second*, should Defendants have discussed with Plaintiff the downfalls and potential consequences of an unsecured loan? Both parties have submitted expert reports establishing the applicable standard of care a lawyer must observe when representing a client in a real estate transaction. However, only Defendants' expert was deposed, and unsworn statements cannot be considered.[25] Accordingly, the Court will rely on Defendants' expert to establish the applicable standard of care in this legal malpractice claim.

Defendants' expert, Brandon Jones, Esquire, testified that the promissory note drafted for the underlying transaction could have been drafted in a manner to better protect Plaintiff. He further testified that at the very least, Defendants should have advised Plaintiff to obtain a mortgage on the Chasanovs' property. Therefore, viewing the facts in a light most favorable to the Plaintiff, Defendants' expert report demonstrates the existence of material issues of fact precluding summary judgment.

Alternatively, Defendants argue that summary judgment is appropriate because even if Defendants were negligent, Plaintiff was more negligent and should not be permitted to recover. Under 10 *Del. C.* § 8132, the determination of the respective degrees of negligence attributable to the parties usually presents a question of fact for the jury.[26] Only "[i]n rare cases, however, where the evidence requires a finding that a plaintiff's negligence exceeded that of the defendant, is it the duty of the trial court, as a matter of law, to bar recovery."[27]

[25] *See Laugelle v. Bell Helicopter Textron, Inc.*, 88 A.3d 110, 117 (2014) (noting that upon receipt of a motion for summary judgment, the Court may only rely on evidence that would be admissible at trial).
[26] *See Trievel v. Sabo*, 714 A.2d 742, 745 (Del. 1998).
[27] *Id.*

On the state of the record, Defendants' arguments in support of a finding of contributory negligence are thinly veiled attempts to shift the blame to anyone else but themselves. Furthermore, Defendants' assertion that "[a]ny negligence is solely the result of the Plaintiff's informed decision," is superficial.[28] Deposition testimony shows that Defendants did not inform Plaintiff about the risks associated with the underlying transaction.[29] To ask a rhetorical question: How could Plaintiff have made an informed decision if Defendants never explained the matter to the extent reasonably necessary?

3) The attorney's negligence resulted in and was the proximate cause of Plaintiff's loss

Defendants argue that Plaintiff cannot recover damages because "[t]he mere breach of professional duty, causing only . . . speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence . . . ."[30] However, the Court notes:

> The test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages. Thus, damages are speculative only if the uncertainty concerns the *fact* of damages rather than the amount.[31]

Defendants also argue that even if Defendants were negligent, their negligence was not the proximate cause of Plaintiff's damages.

California's Court of Appeal for the Third District, in *Johnson v. Simonelli*,[32] dealt with a situation much like the situation at bar. In *Johnson*, the plaintiff retained the defendants to represent him in the sale of his business.[33] The plaintiff sold his business for $125,000.00; a

[28] Defs.' Br. in Supp. of Defs.' Mot. for Summ. J. at 23.
[29] *See* Murray Dep. at 43:4-13.
[30] *Balinski v. Baker*, 2013 WL 4521199, at *3 (Del. Super. Aug. 22, 2013) (quoting *Rizzo v. Haines*, 555 A.2d 58, 68 (Pa. 1989)).
[31] *Pashak v. Barish*, 450 A.2d 67, 69 (Pa. Super. 1982) (emphasis in original).
[32] 282 Cal. Rptr. 205 (Cal. Ct. App. 1991).
[33] *Id.* at 206.

portion of the purchase price was paid in cash, and the buyers executed a promissory note for the remaining $117,000.00.[34] Soon, the buyers defaulted on the promissory note.[35] The plaintiff sought advice from other attorneys and learned that the promissory note drafted by the defendants was defective and inadequate.[36]

Although the court in *Johnson* focused primarily on the statute of limitations, its reasoning concerning the timing of the plaintiff's injury is helpful. The court explained that the defendants' negligent representation created only the potential for injury to the plaintiff.[37] However, once the buyers defaulted, the plaintiff was harmed by the absence of sufficient security to recover the balance remaining on the note.[38] Furthermore, the fact that the plaintiff may recover from the buyers does not negate the fact that he was deprived a security interest he would have received but for the defendants' negligence.[39] Thus, "at the time of default on the note if the security was adequate, plaintiff had no cause of action; if the security was inadequate actual injury occurred."[40]

Additionally, courts in other jurisdictions have applied the "walk-away scenario" in legal malpractice cases. In *Clark v. Harmon*, the plaintiff entered into an oral agreement to sell his dry-cleaning business.[41] To better protect his interests, the plaintiff hired an attorney to represent him in the sales transaction.[42] For unknown reasons, the plaintiff's attorney did not investigate the buyer's financial background.[43] At closing, the buyer paid $500,000.00 in cash and paid the

[34] *Id.*
[35] *Id.* at 206-07.
[36] *Id.*
[37] *Id.* at 208.
[38] 282 Cal. Rptr. at 208.
[39] *Id.*
[40] *Id.*
[41] *Clark v. Harmon*, 2012 WL 6675008, at *2 (Ohio Ct. App. Dec. 21, 2012).
[42] *Id.*
[43] *Id.* at *3.

remaining $400,000.00 with an unsecured promissory note.[44] Subsequently, the buyer defaulted on the note and filed for bankruptcy.[45] Given the amount of secured claims, there were no funds available to pay the plaintiff.[46]

The defendant filed for summary judgment and offered an affidavit of an attorney who represented the buyer in a similar transaction.[47] In the affidavit, the attorney explained that despite his best efforts, security would not be provided for notes issued in connection with the sale of the dry-cleaning companies.[48] The Court of Appeals of Ohio noted that this evidence was relevant but further explained:

> [This evidence] does not release the attorneys from an obligation to: (1) inquire about security; (2) inform the client of the seller's refusal to provide security; and (3) inform the client of the potential consequences of taking an unsecured promissory note for a sizeable debt. Had the [plaintiff] been advised of the risk posed by the unsecured unpaid balance of the purchase price, [he] could have chosen to walk away from the transaction and continue[d] operating [his] business.[49]

Determining whether the plaintiff would have gone through with the transaction was not conclusive.[50] Rather, the question concerned whether the client was properly advised of the risks accompanying a large, exposed and vulnerable balance.[51]

Like the situation in *Clark*, the record suggests Defendants missed the mark. Whether Plaintiff would have walked away from the deal had she been fully advised is a jury question. As stated, a judge does not make credibility determinations at this stage of the litigation, and the conflicting nature of Plaintiff's deposition testimony may be challenged by cross-examination.

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[44] *Id.*
[45] *Id.* at *4.
[46] *Id.*
[47] *Clark*, 2012 WL 6675008, at *5.
[48] *Id.* at *6.
[49] *Id.*
[50] *Id.* at *9.
[51] *Id.*

Count II – Punitive Damages

The fundamental purpose of punitive damages is to punish outrageous conduct and to deter such conduct in the future.[52] It is distinct from a compensatory damages award that is designed to fully compensate the plaintiff.[53] Only after a determination that the defendant's conduct was outrageous because of an "evil motive" or a "reckless indifference to the rights of others" will an award of punitive damages be justified.[54] "Mere inadvertence, mistake or errors of judgment which constitute mere negligence will not suffice."[55]

After viewing the record in a light most favorable to the Plaintiff, there is no genuine issue of material fact with respect to Plaintiff's claim for punitive damages. Plaintiff has not proffered sufficient evidence from which any rational trier of fact would find that Defendants' conduct was egregious enough to justify an award of punitive damages. In her affidavit, Defendant, Julianne E. Murray, Esquire, stated:

> This was the totality of the agreement as the parties had explained it to me. Prior to, and even after the closing on Ms. Dickerson's loan, there had been no mention that Mr. Chasanov's wife, Lindsay Chasanov, would have an obligation to repay Ms. Dickerson. Nor was there any mention that Ms. Dickerson would have a security interest in the Chasanovs' new property. . . . In fact, there was no mention of a promissory note. The absence of these terms did not seem unusual to me, as this was a loan between family members, and in my experience such loans are often lacking in terms and documentation.[56]

At most, Defendants made an error of judgment. This mistake may have led to Defendants' representation of conflicting interests. A jury could not rationally transform Defendants' misjudgment to the untoward mental state required for punitive damages.

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[52] *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 697 (Del. Super. 1989).
[53] *Jardel v. Hughes*, 523 A.2d 518, 528 (Del. 1987).
[54] RESTATEMENT (SECOND) OF TORTS § 908 (1965).
[55] *Jardel*, 523 A.2d at 529.
[56] Murray Aff. at 2 ¶ 9.

VI. CONCLUSION

Considering the foregoing, Defendants' Motion is **DENIED** as to Count I in the Complaint and **GRANTED** as to Count II in the Complaint.

IT IS SO ORDERED.