STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-11-006
TDW- CUM- 8/29/2013

VAUGHN SLEEPER, et al,

Plaintiffs

v.

ORDER

DANIEL G. LILLEY, et al,

Defendants

Before the court is a motion by defendants Daniel G. Lilley and Daniel G. Lilley Law Offices P.A. (collectively, "the Lilley firm") for summary judgment on a claim brought against the Lilley firm for legal malpractice by Vaughn and Mary Sleeper. The Sleepers were formerly represented by the Lilley firm in a lawsuit brought against Agway Inc. and certain of its officers and employees. After various twists and turns, including Agway's successful motion to send the claims to arbitration and Agway's subsequent bankruptcy filing, the Sleepers recovered approximately $ 51,000 but contend that they would have obtained a substantially larger recovery but for the Lilley firm's professional negligence.

The Sleepers' complaint originally included claims for breach of fiduciary duty and negligent infliction of emotional distress as well as a claim for attorney malpractice. However, the court previously dismissed the Sleepers' negligent infliction claim, and the Sleepers now concede that their claim for breach of fiduciary duty should also be dismissed. Plaintiffs' Memorandum in opposition to Summary Judgment dated April 12, 2013 at 2. Plaintiffs' professional negligence claim remains to be resolved.

1. Summary Judgment

Summary judgment should be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In considering a motion for summary judgment, the court is required to consider only the portions of the record referred to and the material facts set forth in the parties' Rule 56(h) statements. E.g., Johnson v. McNeil, 2002 ME 99 ¶ 8, 800 A.2d 702. The facts must be considered in the light most favorable to the non-moving party. Id. Thus, for purposes of summary judgment, any factual disputes must be resolved against the movant. Nevertheless, when the facts offered by a party in opposition to summary judgment would not, if offered at trial, be sufficient to withstand a motion for judgment as a matter of law, summary judgment should be granted. Rodrigue v. Rodrigue, 1997 ME 99 ¶ 8, 694 A.2d 924.

The Law Court has also ruled that to resist a summary judgment motion, a plaintiff must establish a prima facie case for each element of his cause of action. E.g., Lougee Conservancy v. CitiMortgage Inc., 2012 ME 103 ¶ 12, 48 A.3d 774. However, in Corey v. Norman Hanson & DeTroy, 1999 ME 196 ¶ 9, 742 A.2d 933, the Law Court clarified that the plaintiff's burden to establish a prima facie case only applies to those elements of the plaintiff's case that have been challenged by the defendant's summary judgment motion. Unless a defendant has first offered facts supported by record references that would negate one or more elements of the plaintiff's cause of action, the plaintiff is not required to controvert those facts.

This is significant in the instant case because, although defendants fault the Sleepers for not establishing a prima facie case on all the elements of their professional negligence claim, defendants' statement of material facts does not offer evidence to challenge certain of the specific elements of the Sleepers' claim. On those issues

summary judgment cannot be granted despite any potential weakness of plaintiffs' opposition.

At the same time the court fully agrees with defendants that the Sleepers cannot rely on an unsworn expert designation to raise disputed issues for trial when they have not submitted relevant sworn testimony from their expert either by affidavit or deposition. Similarly, on issues requiring expert testimony,[1] plaintiffs are not entitled to rely on the affidavit of Vaughn Sleeper.

Paragraph 40 of defendants' statement of material facts (SMF) asserts that the Lilley firm's representation of the Sleepers met the appropriate standard of care based on a general statement in the affidavit of Christian Foster (an attorney at the Lilley firm) to that effect. Arguably, the Sleepers' failure to controvert that particular paragraph – except by citations to their unsworn expert designation and to statements in Vaughn Sleeper's affidavit that cannot substitute for expert testimony – could form a basis for summary judgment against them. That would not, however, square with the summary judgment record as a whole.

Moreover, while the court agrees that expert testimony may be necessary to controvert sworn testimony by Attorney Foster as to the reasonableness of specific decisions made by the Lilley firm (see, e.g., Defendants' December 12, 2012 SMF ¶ 27), the court is unwilling to conclude that a general and conclusory testimony by Attorney Foster that his conduct and the conduct of his firm met the applicable standard of care is a sufficient basis for summary judgment.

[1] Where legal malpractice claims have been raised, expert testimony is required in most cases to establish the appropriate standard of care and that the attorney breached that standard of care. See Kurtz & Perry P.A. v. Emerson, 2010 ME 107 ¶ 26, 8 A.3d 677.

2. Elements of Legal Malpractice Claim

To prove that the Lilley firm committed attorney malpractice or professional negligence, the Sleepers must prove (1) that the law firm breached the applicable standard of conduct with respect to its handling of their case against Agway and (2) that the breach was a legal cause of injury to the Sleepers – i.e., that they would have received a more favorable decision in the Agway case if the Lilley firm had not committed professional negligence in the handling of their claims. See Corey v. Norman Hanson & DeTroy, 1999 ME 196 ¶¶ 10, 13.

In cases where attorney malpractice is based on an alleged "failure to plead" claims that should have been asserted, a plaintiff has to demonstrate on summary judgment that there are sufficient facts to allow a jury to conclude that (1) the attorney was negligent in failing to assert the claims in question; (2) that his negligence caused the client to lose an opportunity to achieve a favorable result (3) which would have been allowed by the applicable law and (4) which would have been supported by the facts. Niehoff v. Shankman & Associates Legal Center P.A., 2000 ME 214 ¶ 10, 763 A.2d 121.

The Sleepers argue that the Lilley firm was negligent in pursuing claims of antitrust violations, tortious interference with advantageous economic relations, and defamation. All of those claims were in fact set forth in the complaint that Lilley filed on behalf of the Sleepers against Agway. See Exhibit C to the December 10, 2012 affidavit of Christian Foster. As a result, this is not strictly a "failure to plead " case.[2] Instead, the

[2] The only exception involves the Sleepers' apparent contention that the Lilley firm should have included a common law "unfair competition" claim against Agway. Plaintiffs' Memorandum in Opposition to Summary Judgment dated April 12, 2013 ("Plaintiffs' April 12, 2013 Memorandum") at 26. However, the only common law unfair competition claim that has been recognized in Maine involves the appropriation of a trade name. See Hubbard v. Nisbet, 159 Me. 406, 193 A.2d 850 (1963). The Sleepers cite FTC v. Sperry & Hutchinson Co., 405 U.S. 233

Sleepers argue that the Lilley firm negligently prosecuted the antitrust, tortious interference, and defamation claims set forth in the complaint, in part because Lilley allegedly perceived those claims as being speculative. See Plaintiffs' April 12, 2013 Memorandum at 16-17.

Even if the Niehoff "failure to plead" standard does not apply here, that standard is not materially different from the basic standard set forth in Corey v. Norman Hanson & DeTroy. Thus, if a claim is not legally or factually viable, it follows that the attorney cannot have been negligent in failing to pursue that claim and that the claim would not have produced a favorable result. The Lilley firm's summary judgment motion is premised on the contention that the antitrust, tortious interference, and defamation claims on which the Sleepers base their claim of professional negligence were not legally and factually viable.

3. Antitrust

The Sleepers argue that the Lilley firm negligently failed to pursue federal and state antitrust claims based on an alleged refusal to deal by Agway and on Agway's alleged involvement in a boycott that the Sleepers contend constituted a conspiracy in restraint of trade.[3] As defendants' papers demonstrate, there are numerous potential problems with the antitrust claims that the Sleepers contend the Lilley firm failed to

---

(1972), but that was an enforcement case brought under the FTC statute. Maine's Unfair Trade Practice Act was not available here because that statute only provides a remedy to persons who purchase or lease goods or services for personal, family or household purposes. 5 M.R.S. § 213(1). The defendants are therefore entitled to summary judgment on the Sleepers' claim that they negligently failed to assert a common law claim of unfair competition.

[3] The only material difference between state and federal antitrust laws is that the former do not require an effect on interstate commerce. In terms of their substantive prohibitions, the Maine antitrust statutes, 10 M.R.S. §§ 1101-04, parallel the federal antitrust statute in all respects pertinent to this case. Tri-State Rubbish Inc. v. Waste Management Inc., 998 F.2d 1073, 1081 (1st Cir. 1993).

adequately pursue. However, the court concludes that the summary judgment record does not establish that there are no genuine disputes for trial as to the Sleepers' ability to prevail on those claims.

The Sleepers' claim involving an alleged refusal to deal would require the Sleepers to show that Agway exercised monopoly power and that it refused to deal with the Sleepers for anticompetitive motives. Defendants' statement of material facts does not offer evidence as to Agway's absence of monopoly power, so the Sleepers cannot be faulted for their failure to submit any admissible evidence that Agway did possess monopoly power.[4] Moreover, to the extent that the parties have addressed anticompetitive motivation, that issue presents a disputed issue for trial.

Similarly, the Sleepers have offered just enough evidence, construed in the light most favorable to the Sleepers as the party opposing summary judgment, to demonstrate the existence of a factual issue for trial on a boycott/concerted refusal to deal claim. See Ronald Barnes Aff. ¶¶ 4-5. While the court doubts the Sleepers' apparent contention that parties can "unwittingly" enter into an agreement in restraint of trade, an agreement secured by alleged intimidation would be cognizable under the antitrust laws.

On the Sleepers' claim that the Lilley firm negligently failed to prosecute their antitrust claims, therefore, summary judgment is denied.

4. Tortious Interference with Prospective Economic Advantage

To prevail against Agway on a claim of tortious interference with a prospective economic advantage, the Sleepers would have been required to prove (1) that a valid

[4] Notwithstanding the Sleepers' contention in their memorandum that Agway's monopoly position is "undisputed," there appears to be a considerable dispute as to this issue.

contract or prospective advantage existed; (2) that Agway interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages. Rutland v. Mullen, 2002 ME 98 ¶ 13, 798 A.2d 1104. The Sleepers' argument is that Agway interfered through intimidation with the Sleepers' ability to sell to Agway's contract growers. See Plaintiff's April 12, 2013 Memorandum at 30. Although defendants have offered substantial evidence to contradict that claim, the Ronald Barnes affidavit is sufficient to raise a factual dispute for trial on that issue.

Moreover, although the Barnes Affidavit demonstrates that he, as well as the other contract growers, was eventually able to obtain seed potatoes from the Sleepers through an intermediary, the Sleepers have offered evidence that this resulted in a financial loss to the Sleepers. See Plaintiffs' SMF ¶ 64.

Summary judgment is therefore denied on the Sleepers' claim that the Lilley firm committed professional negligence with respect to the Sleepers' claim against Agway for tortious interference.

5. Defamation

The Sleepers' defamation claim is based on the contention that Agway falsely informed Howard Giberson that potatoes delivered to Giberson by Sleeper Farms in 1999 contained a mixture of genetically modified seed potatoes ("GM seed potatoes") and non-GM seed potatoes. The first problem with this claim is that defendants' submissions demonstrate that on a number of occasions during the course of the litigation against Agway, Vaughn Sleeper acknowledged that he had in fact delivered a mixed load of GM and non-GM seed potatoes to Giberson. See Badger Affidavit ¶¶ 12-14 and annexed exhibits L through O.

At that time Sleeper contended that he had delivered the mixed load because he had been instructed to do so by Agway. However, Sleeper now contends that he always believed that none of the potatoes delivered to Giberson in 1999 were GM potatoes and that he had told attorneys at the Lilley firm that he had not delivered a mixed load. However, given Sleeper's prior admissions that he had delivered a mixed load containing some GM seed potatoes to Giberson, several of which were under oath,[5] it would appear impossible for the Lilley firm to have reversed course and contended that Sleeper Farms did not deliver any GM seed potatoes to Giberson in 1999.

That is particularly true given that Sleeper testified that he changed his mind based on documents that were produced for the first time at the arbitration in August 2005. Vaughn Sleeper Dep. 280. The Lilley firm cannot have been expected to pursue a claim for defamation based on information that Sleeper did not learn until the very end of the case – after he had already testified to the contrary under oath.[6]

Even aside from this issue and even assuming that any statement that Sleeper delivered a mixed load containing some GM seed potatoes to Giberson in 1999 would have been false, the Sleepers have offered no evidence to controvert defendants' showing that there is no evidence that Agway ever made such a statement to Giberson or to anyone else. See Defendants' SMF dated December 12, 2012 ¶¶ 11-13. Although the Sleepers have denied ¶¶ 11-13 in their statement of material facts, they have no direct or admissible evidence that Agway made any such statements, and the evidence they cite – including unsupported and inadmissible speculation by Vaughn Sleeper –

[5] See Badger Aff. Exs. L and M.

[6] The parties dispute the admissibility of certain documents which Vaughn Sleeper contends support his change of testimony as to whether he delivered a mixed load of GM and non-GM seed potatoes to Giberson. The court agrees with defendants that the documents in question are unauthenticated hearsay but does not base its ruling on that ground.

does not support any inference that such statements were made and is insufficient to create a disputed issue for trial on that issue.

As a result, defendants are entitled to summary judgment dismissing the Sleepers' claims of professional negligence with respect to defamation claims against Agway.[7]

6. Arbitration and Discovery

The Sleepers contend that the Lilley firm was professionally negligent in submitting all of the Sleepers' claims to arbitration rather than seeking to have the arbitrator send certain claims back to the federal district court. In response to defendants' evidence that this was a reasonable decision to which the Sleepers consented, see Defendants' December 12, 2013 SMF ¶¶ 26-27, the Sleepers cite to Vaughn Sleeper's testimony that he had wanted a jury trial and only consented to arbitration based on advice from lawyers at the Lilley firm. However, this does not raise a disputed issue for trial as to whether the Lilley firm's advice was negligent based on the circumstances existing at the time – given that Judge Singal had already referred the case to arbitration and Agway had thereafter filed for bankruptcy.

The Sleepers also rely on deposition testimony from their designated expert criticizing the decision not to request that the arbitrator send back certain claims to the district court. Crouter Dep. 116. Two pages later in his deposition, however, after being reminded that Agway was already in bankruptcy by that point, the Sleepers' expert

[7] The court is not suggesting that evidence as to the composition of the potatoes delivered to Giberson in 1999 might not be relevant to other issues, including the antitrust claims, only that the Sleepers are precluded from asserting that the Lilley firm was professionally negligent in not pursuing a defamation claim based on whether the load delivered to Giberson in 1999 included GM potatoes.

acknowledged that sending the case back to the district court would not have been possible. Id. 118.

As a result, the Sleepers have not adequately controverted defendants' showing on this issue, and defendants are entitled to summary judgment with respect to the Sleepers' claim of professional negligence based on the decision to submit their entire claim to arbitration.

Similarly, the Sleepers have not adequately controverted the Lilley firm's showing that it diligently pursued discovery. See Defendants' December 12, 2012 SMF ¶ 29. Plaintiffs' reliance on Vaughn Sleeper's interrogatory answers, which are conclusory and which cannot substitute for expert testimony, are insufficient to preclude summary judgment for defendants with respect to the Sleepers' allegations of negligence with respect to discovery.

7. Damages

Defendants finally contend that summary judgment should be granted on the Sleepers' professional negligence claims because the Sleepers have shown no evidence of damages. The defendants are correct that claims filed by the Lilley firm on behalf of the Sleepers in the bankruptcy case do not constitute admissible evidence as to damages. They are also correct that the Sleepers do not have any expert testimony to support their damage claim.

Allen McCausland had been designated as a damages expert by the Lilley firm in the underlying case against Agway. Apparently without notifying or retaining him in advance, the Sleepers then designated McCausland as their expert in this case. However, McCausland's earlier report is inadmissible hearsay, and McCausland is

either unable or unwilling (or both) to substantiate his prior calculations or to offer any expert testimony relating to the Sleepers alleged damages.

This may present a significant obstacle at trial, but there is at least some evidence of damages sufficient to avoid summary judgment based on an inability to prove damages. The evidence offered by the Sleepers that they incurred a financial loss in selling potatoes to Maine Potato Growers as an intermediary, Plaintiffs' SMF ¶ 64, is itself sufficient to generate a factual issue with respect to damages for purposes of summary judgment.

The entry shall be:

Defendants' Motion for Summary Judgment is granted as to Count II of the complaint and is granted in certain respects with respect to Count I. Specifically, on Count I the court grants summary judgment on plaintiffs' claims of professional negligence with respect to the specific claims identified in this order. On the remaining aspects of Count I, Defendants' motion for summary judgment is denied.

The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: August 29, 2013

Thomas D. Warren
Justice, Superior Court