NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

ROBERT J. LEWIS	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
PIETRAGALLO BOSICK & GORDON, LLP, A PENNSYLVANIA LIMITED LIABILITY PARTNERSHIP,	:	No. 1607 WDA 2012
Appellant	:	

Appeal from the Order, October 2, 2012,
in the Court of Common Pleas of Allegheny County
Civil Division at No. GD 06-016521

ROBERT J. LEWIS,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
PIETRAGALLO BOSICK & GORDON, LLP, A PENNSYLVANIA LIMITED LIABILITY PARTNERSHIP	:	No. 1650 WDA 2012

Appeal from the Order, August 8, 2012,
in the Court of Common Pleas of Allegheny County
Civil Division at No. GD 06-016521

BEFORE: FORD ELLIOTT, P.J.E., ALLEN AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 5, 2013

Robert J. Lewis ("Lewis") and Pietragallo Bosick & Gordon, LLP ("PBG") have filed cross-appeals in this legal malpractice action. We affirm.

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* Retired Senior Judge assigned to the Superior Court.

The factual background of this case was set forth in part by the trial court in its opinion, filed January 27, 2009, as follows:

> The matter before [the trial court] was a legal malpractice action filed by writ on July 14, 2006. [Appellant] had sought the advice of [PBG] for purposes of preparing a "cohabitation agreement" with his paramour, Jill Neely. It appears that [Appellant] and Ms. Neely had a relationship from which a son had been born. Ms. Neely was living in New Mexico in August of 1995. [Appellant] wanted her to relocate to Pittsburgh and take up residence with him and their son. [Appellant] ultimately decided that he did not wish to marry Ms. Neely, nor did he wish to be considered married as of the common law. [Appellant] was seeking to avoid the financial obligations of marriage while achieving the social benefits of a cohabitation arrangement, including living as a nuclear family and having a relationship with his son. [Appellant] thus sought to have [PBG] draft a cohabitation agreement and a custody agreement.
>
> Several drafts of both agreements were circulated to [Appellant] and Ms. Neely, who was unrepresented at the time. Ms. Neely apparently requested various changes in the terms and conditions of both of these agreements.
>
> A point in controversy between [Appellant] and Neely involved a payment to Neely in the event of a termination of their cohabitation. [Appellant] wanted to provide a one-time lump-sum payment to Neely, and Neely wanted an annual payment [(until the

> death of either Neely or Appellant)] measured by the number of 12-month periods that she and [Appellant] lived together.
>
> [PBG] provided a draft to Neely in September of 1995. This draft provided for a one-time lump-sum payment to her. Neely advised [Appellant] that she wished to change that provision to provide for annual payments. By letter dated September 21, 1995, [PBG] advised Neely of [Appellant's] objection to an annual payment. Neely later advised an attorney with [PBG] that [Appellant] had changed his mind and had agreed to the annual payment measured by the number of 12-month periods of cohabitation. This advisement was made by letter dated October 13, 1995.
>
> [PBG] subsequently sent [Appellant] a handwritten letter which enclosed a draft of the cohabitation agreement with alternative pages for either the annual payment [arrangement] or the one-time lump-sum payment [arrangement]. [Appellant] apparently signed this document and sent it to Ms. Neely for her signature. Neely signed this agreement on October 7, 1995. Neely then sent the version that she signed to [Appellant]. [Appellant] in turn signed this agreement on December 12, 1995. The agreement that Neely signed and returned to [Appellant] contained the version providing for multiple annual payments. [Appellant] signed this same document, apparently without consulting with any attorneys from [PBG].

> Toward the end of 2003, [Appellant] and Neely terminated their cohabitation. On October 21, 2003, Neely made claims in [the trial court] under the cohabitation agreement, including a claim that the agreement provided for her to receive multiple payments throughout [Appellant's] life. Neely's claim was made known to [Appellant] at least as of the time of the filing and service of her petition on October 21, 2003[,] and the presentation of that petition in [the trial court] on November 17, 2003.
>
> The dispute over the cohabitation agreement was ultimately moved to arbitration. A board of arbitrators hearing this dispute ruled in favor of Ms. Neely, and awarded her annual payments measured by the number of 12-month periods of cohabitation, which the arbitrators determined to be 3. As noted, [Appellant] commenced the instant lawsuit [against PBG] by filing a writ on July 14, 2006.

Trial court opinion, 1/27/2009, at 1-3.

Lewis v. Pietragallo, Bosick & Gordon, LLP, 981 A.2d 945 at 1-3 (Pa.Super. 2009) (unpublished memorandum), ***appeal denied***, 608 Pa. 632, 8 A.3d 899 (2010).

As set forth in this court's July 17, 2009 memorandum, Lewis filed a complaint against PBG sounding in breach of contract, legal malpractice, and breach of a fiduciary duty. (***Id.*** at 3.) The trial court granted PBG's motion for summary judgment on the basis that the statute of limitations had run. (***Id.*** at 4.) Lewis filed an appeal, and this court affirmed in part and

reversed in part, concluding that the trial court did not err in granting summary judgment for PBG on the basis of the operation of the relevant statutes of limitation for Lewis' negligence-legal malpractice claim and his breach of a fiduciary duty claim. However, we found that his breach of contract legal malpractice claim was not time barred, and remanded for further proceedings.

The matter proceeded to trial on the breach of contract claim, and the jury rendered a verdict in favor of Lewis in the amount of $525,000. PBG filed post-trial motions requesting judgment ***non obstante veredicto*** ("JNOV") or, in the alternative, a new trial. Lewis filed a post-trial motion for pre-judgment interest. On August 8, 2012, the trial court granted PBG's motion for JNOV and vacated the jury's verdict; Lewis' motion for pre-judgment interest was moot as a result. On October 2, 2012, the trial court denied PBG's motion for a new trial. PBG timely appealed from that order on October 16, 2012; and on October 23, 2012, Lewis filed a cross-appeal.[1]

As we find that the trial court did not err in granting JNOV in favor of PBG, we need not address the remaining issues raised on appeal, including

[1] Lewis had initially filed notice of appeal on August 23, 2012 from the trial court's August 8 order. On October 29, 2012, we dismissed that appeal as unnecessary and consolidated the cross-appeals at No. 1607 WDA 2012 and No. 1650 WDA 2012.

whether Lewis is entitled to pre-judgment interest and whether a new trial is warranted.

> Our Court's standard of review in an appeal from the grant of a judgment notwithstanding the verdict is well settled:
>
> > [I]n order to determine the propriety of a decision granting judgment n.o.v. we must determine whether there was sufficient competent evidence to sustain the verdict, granting the verdict winner the benefit of every reasonable inference that can reasonably be drawn from the evidence and rejecting all unfavorable testimony and inferences. We will not reverse the trial court's decision absent the demonstration of either an abuse of discretion or an error of law.
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> ***Rowinsky v. Sperling***, 452 Pa.Super. 215, 681 A.2d 785, 788 (1996), ***appeal denied***, 547 Pa. 738, 690 A.2d 237 (1997) (internal citations and quotations omitted).

Gorski v. Smith, 812 A.2d 683, 697-698 (Pa.Super. 2002), ***appeal denied***, 579 Pa. 692, 856 A.2d 834 (2004).

> There are two bases upon which a [JNOV] can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Lockley v. CSX Transp. Inc., 5 A.3d 383, 393 (Pa.Super. 2010), ***appeal denied***, 613 Pa. 668, 34 A.3d 831 (2011), quoting ***Schindler v. Sofamor, Inc.***, 774 A.2d 765, 771 (Pa.Super. 2001).

"Preliminarily, we also recognize that '[a]n action for legal malpractice may be brought in either contract or tort.'" ***Wachovia Bank v. Ferretti***, 935 A.2d 565, 570 (Pa.Super. 2007), quoting ***Garcia v. Community Legal Servs. Corp.***, 524 A.2d 980, 982 (Pa.Super. 1987).

> Generally speaking, for a plaintiff to successfully maintain a cause of action for breach of contract requires that the plaintiff establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. ***Corestates Bank v. Cutillo***, 723 A.2d 1053, 1058 (Pa.Super. 1999). In the narrow realm of legal malpractice claims based on an alleged breach of a contract between an attorney and a client, the appellate courts of this Commonwealth have jurisprudentially established, and refined through time, the specific facts which a plaintiff is required to demonstrate in order to establish that a breach of a contractual duty on the part of the attorney has occurred.

Gorski, 812 A.2d at 692.

> [***Bailey v. Tucker***, 533 Pa. 237, 621 A.2d 108 (1993),] established the proposition that every contract for legal services contains, as an implied term of the contract, a promise by the attorney to render legal services in accordance with the profession at large. Thus, when an attorney enters into a contract to provide legal services, there automatically arises a contractual duty on the part of the attorney to render those legal services in a manner that comports with the profession at large. Hence, a breach of contract claim may properly be premised on an attorney's failure to fulfill his or her

> contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large.

Id. at 694. "[I]f a plaintiff demonstrates by a preponderance of the evidence that an attorney has breached his or her contractual duty to provide legal service in a manner consistent with the profession at large, then the plaintiff has successfully established a breach of contract claim against the attorney." ***Id.*** at 697. ***See also Ferretti***, 935 A.2d at 571 ("With regard to a breach of contract claim, 'an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large.'"), quoting ***Bailey***, 533 Pa. at 251-252, 621 A.2d at 115.

"Where one party to a contract is the cause of another's failure to perform, it cannot assert that failure against the other." ***Wayne Knorr, Inc. v. Department of Transp.***, 973 A.2d 1061, 1091 (Pa.Cmwlth. 2009) (citation omitted). ***See also Gorski***, ***supra*** (contributory negligence of a client may be raised as an affirmative defense by an attorney in a legal malpractice action).

Instantly, the trial court determined that Lewis' failure to read communications from Attorney Kelleher, including the October 13, 1995 note, and his failure to read the proposed cohabitation agreement before signing it, prevented Attorney Kelleher from protecting his interests and performing her obligations under the contract. Therefore, Lewis materially

breached his contract with PBG. (Trial court opinion, 8/8/12 at 4.) As the trial court explained:

> A cursory reading of the October 13, 1995, note[2] would have made it obvious to [Lewis] that accompanying the note was an unfinished draft with alternate language regarding a significant bone of contention between him and Jill Neely, i.e., whether the cohabitation agreement should provide for multiple annual payments (as Neely wanted), or a lump sum payment if and when they separated (which [Lewis] wanted). The note further instructed [Lewis] to "choose" between the two "versions." Just as the law imposes a contractual duty on counsel to adhere to the standard of care in her dealings with the client, so too does it impose a duty of ***some*** cooperation on the part of the client, if only just enough to enable counsel to achieve the client's objectives. [PBG], through Kelleher, had a reasonable expectation that the easily readable note would be read and responded to in some fashion. Had [Lewis] read the four-sentence note, he would have picked the paragraph 24(b) of his preference, or at least called Kelleher for clarification. Instead, he signed the version later sent to him by Neely, which provided for multiple annual payments, without contacting Kelleher or any attorney in the [PBG] firm.

Id. at 2-3 (emphasis in original).

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[2] The note stated:

> Bob, Here is the agreement. I have attached to the front alternate language for paragraph 24(b), which would require you to give Jill $10,000 at the end of each twelve months, rather than at the end of cohabitation as a lump sum. She told me this change was fine with you, but I've included both versions, so you can choose. Hope you have a good weekend. Jaci.

Lewis did not bother to read the October 13, 1995 note from Attorney Kelleher, nor did he review the copy of the cohabitation agreement Neely gave him before signing it. Apparently, Neely had inserted her preferred version of paragraph 24(b), providing for annual payments, but Lewis never read it. Lewis never followed up with Attorney Kelleher regarding the alternate language for paragraph 24(b). As the trial court states, "Communication is a two-way street." (***Id.*** at 3.) We agree that Lewis breached the contract with PBG by failing to read critical correspondence from Attorney Kelleher and failing to read or seek clarification of the unfinished document prior to signing it. ***Compare Gorski***, 812 A.2d at 702-704 (client must exercise reasonable diligence for his own protection, including communicating with the attorney and following specific instructions).

In addition, Lewis failed to prove actual damages.[3] ***See Ferretti***, 935 A.2d at 571 ("when it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action, whether the action be denominated in assumpsit or trespass, is proof of actual loss") (citations omitted); ***see also Nelson v. Heslin***, 806 A.2d 873, 876 (Pa.Super. 2002), ***appeal denied***, 574 Pa. 761, 831 A.2d 600

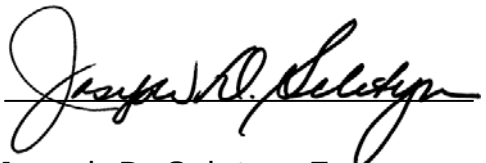
[3] As an appellate court, we may uphold a decision of the trial court if there is any proper basis for the result reached; thus, we are not constrained to affirm on the grounds relied upon by the trial court. ***Jones v. Harleysville Mutual Insurance Co.***, 900 A.2d 855, 858 (Pa.Super. 2006); ***In re Adoption of R.J.S.***, 889 A.2d 92, 98 (Pa.Super. 2005).

(2003) ("An essential element to this cause of action is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or threat of future harm") (citation omitted). Neely wanted annual payments for each 12-month period of cohabitation, and there is no indication she would have agreed to a lump sum payment, as Lewis preferred. If the agreement had provided for a lump sum payment, Neely might not have signed it. In this regard, Lewis' damages were speculative.

Having determined that the trial court did not err in granting JNOV for PBG, we need not address the remaining issues on appeal.

The order of August 8, 2012, vacating the jury's verdict and granting JNOV in favor of PBG is affirmed. PBG's appeal from the order of October 2, 2012, denying its motion for new trial, is dismissed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/5/2013