

Memorandum of Decision on Motion

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

Paul G. Sklodowsky

v.

John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino,
P.C.

Docket No. HNT-L-649-09

Defendants' Motion to Dismiss
Opposed

Argued & Decided March 19, 2010
The Honorable Peter A. Buchsbaum, J.S.C.

This legal malpractice case requires consideration of the Entire Controversy Doctrine.

Facts:

In November of 2003 plaintiff Paul Sklodowsky (plaintiff) entered into an agreement to sell his marital residence and real estate to American Developers of New Jersey, LLC (American Developers). The plaintiff was represented by defendant John F. Lushis, Jr., (Lushis) a member of the firm of Tallman, Hudders & Sorrentino (THS) (collectively the defendants). Lushis holds a license to practice law in Pennsylvania only and THS' offices are in Pennsylvania. The complaint in this action alleges the plaintiff advised Lushis that he was experiencing marital difficulties and wanted to transfer the property without his wife's consent. Comp. at ¶3. The complaint further alleges the defendants reassured Lushis that he could transfer the property without his wife's consent. Id.

The closing did not occur since the plaintiff could not deliver good title since his wife did not agree to sell the marital property. Id. at ¶¶5-6. Lushis subsequently referred the plaintiff to a different attorney, Joseph T. Nanovic, Esq. Both Lushis and Nanovic advised the plaintiff to sue American Developers in order to recover the plaintiff's deposit. Id. at ¶¶8-9. A third attorney filed suit against American Developers on the plaintiff's behalf.

Procedural History:

The parties in this case have been parties in three previous civil actions.

First, the plaintiff here filed suit against American Developers on October 7, 2004. See Wolf Cert., Exh. C. The docket number in this case was HNT-L-459-4. This complaint alleged American Developers breached the contract of sale by declining to accept conveyance. On November 3, 2004 American Developers filed an answer. Id. at Exh. D. It also filed a third party complaint against Lushis alleging he intentionally withheld information from American as to the plaintiff's marital status. The third party complaint alleged a breach of a duty of good faith owed to American Developers.

By order of March 21, 2006 this Court granted summary judgment for Lushis and THS on American Developers' claims for fraud against these defendants. On July 16, 2008 the Appellate Division affirmed in an unpublished opinion. Id. at Exh. B. The Appellate Division approved this Court's finding that based on the facts involved American Developers could not have relied on Lushis and no fraud could have occurred. The Sklodowsky and American Developers settled their claims on June 13, 2007. The stipulation obligated the plaintiff to provide American Developers "with an assignment of all funds that he recovers as a result of the legal malpractice lawsuit he intends to institute against John F. Lushis, Esq ... in the event of default or nonpayment." See Id. at Exh. E, ¶2.

Second, the same plaintiff in this case filed a complaint against these same defendants and two other attorneys on October 22, 2007. See Id. at Exh. G. This complaint alleged legal malpractice against Lushis and his firm for advising the plaintiff he could transfer the property without his wife's consent. The complaint also alleged Lushis practiced law in New Jersey without authorization. On May 10, 2008 this case was automatically dismissed for failure to prosecute under R. 1:13-7.

Third, Nanovic, plaintiff's second attorney, filed a complaint against the plaintiff in federal district court in Pennsylvania. Id. at Exh. I-J. By way of a third party complaint filed on September 2, 2008, the plaintiff filed suit against Lushis and THS. This complaint included a count for legal malpractice against the defendants. By order of May 22, 2009 the Honorable James Knoll Gardner, U.S.D.J. granted the defendants'

unopposed motion to dismiss the third party complaint without prejudice.

Fourth, the plaintiff began this action on November 4, 2009. He alleges legal malpractice by the defendants based on their advice and conduct during the 2003 real estate transaction. The defendants move to dismiss under the Entire Controversy Doctrine and Pennsylvania's statute of limitations for attorney malpractice.

Defendants' Arguments:

The defendants argue the plaintiffs should have brought his malpractice claims in the first suit in 2004. They invoke *Grunwald v. Brokesh*, 131 N.J. 483, 494 (1993), as showing a cause of action for legal malpractice occurs when a plaintiff suffers damages or discovers or should have discovered the essential facts for a claim. They argue the plaintiff's claims accrued before the 2004 litigation ended based on the claims American Developers brought against him out of this real estate transaction.

They also point to the complaint as showing the cause of action accrued earlier. They note the complaint alleges the defendants advised the plaintiff his wife did not need to approve the sale. They point to the allegation the sale did not occur for this reason, and argue the plaintiff knew or should have known he possessed a claim at the time of closing. They also point to the allegation in the complaint that Lushis committed an unauthorized practice of law and argue he knew or should have known Lushis lacked a New Jersey license to practice law.

The defendants take issue with the allegation that they attempted to hide their conduct or prevent the plaintiff from asserting malpractice claims. They invoke *Vastano v. Algeier*, 178 N.J. 230, 241-243 (2003), where the Court found a plaintiff learned of the essential facts for her malpractice claim upon receipt of a file and its mention of an unmentioned settlement offer. The Court held this constituted accrual of the malpractice claim. *Id.* The defendants argue the claim accrued when the real estate litigation was pending.

Next the defendants argue dismissal would further the policies behind the Entire Controversy Doctrine because the plaintiff enjoyed an adequate opportunity to litigate his claims in prior litigations.

Lastly the defendants argue that the two year Pennsylvania statute of limitations applies and would require dismissal. They argue Pennsylvania law applies because it possesses a greater interest in this case.

Plaintiff's Arguments:

The plaintiff argues the Entire Controversy Doctrine does not apply to this action. He also argues New Jersey's six year statute of limitations applies.

The plaintiff first asserts the Court held the Entire Controversy does not apply to legal malpractice actions in *Olds v. Donnelly*, 150 N.J. 424 (1997). He asserts he settled the 2003 litigation with American Developers because he was faced with the prospect of using attorney-client communications between him and the defendant to refute the allegations of fraud.

The plaintiff also argues application of the Entire Controversy Doctrine would be unfair. He characterizes a dismissal as allowing Lushis to advise him to sue American Developers in order to mitigate his own malpractice damages. The plaintiff also asserts dismissal would not further judicial economy because American Developers pursued a different claim against the plaintiff than the one he seeks against this defendant.

Next the plaintiff argues the Entire Controversy Doctrine does not apply because his cause of action did not accrue in the 2004 litigation. He argues he did not suffer damage from the defendant's malpractice before or during the 2004 real estate litigation. He also states unfairness would result in requiring him to have asserted claims against the defendants in the 2004 litigation, since they advised him to undertake it. He concludes he did not know and should not have known about the essential facts for a claim against the defendants until after the 2004 litigation.

Lastly the plaintiff takes issue with the application of Pennsylvania's statute of limitations for legal malpractice. He argues that since the defendants allegedly practiced law in New Jersey without authorization, New Jersey possesses the greater interest in this case.

Analysis:

R. 4:30A provides that "[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided," for foreclosure and summary actions. The entire controversy doctrine embodies a principle that a legal controversy should be resolved in one action. *Cogdell v. Hosp. Ctr. at Orange*, 116 N.J. 7, 15 (1989). "[A]ll parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." *Id.* The Doctrine provides that "if a party withholds a constituent claim ... and the case is tried to judgment or settled, that party risks losing the right to bring that claim later." *Kaselaan & D'Angelo Assocs. v. Soffian*, 290 N.J. Super. 293, 299 (App. Div. 1996) (citing *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 142 N.J. 310, 324, (1995)).

This doctrine requires the exercise of judicial discretion based on the facts of individual cases. *Highland Lakes Country Club & Cmty. Ass'n v. Nicastro*, 2009 N.J. LEXIS 1291 (Dec. 8, 2009). Its purpose is encouraging one fair resolution of disputes and the promotion of judicial economy. *Id.*

In determining whether the doctrine applies courts should ascertain whether the claims asserted arise out of the same core set of related facts. *Garvey v. Twp. of Wall*, 303 N.J. Super. 93, 100 (App. Div. 1997) (citing *DiTrollo v. Antiles*, 142 N.J. 253, 272 (1995)). If the claims do not arise out of the same set of facts, a party need not join them. *Garvey*, 303 N.J. Super. at 100 (citations omitted). The entire controversy doctrine does not prohibit a party from re-asserting a claim dismissed without prejudice where the dismissal occurred due to violation of discovery rules or where a federal court lacked jurisdiction. *Burrell v. Quaranta*, 259 N.J. Super. 243, 250 (App. Div. 1992) (citations omitted). A party against whom the entire controversy doctrine is invoked must have enjoyed a "fair and reasonable opportunity," to fully litigate their claim in the earlier action. *Id.* at 254 (citing *Cafferata v. Peyser*, 251 N.J. Super. 256, 261 (App. Div. 1991)).

In *Olds v. Donnelly*, 150 N.J. 424, 428 (1997) a plaintiff sued his former attorney who previously represented him in a medical malpractice action. The medical malpractice action was dismissed with prejudice due to the failure of the attorney to serve the summons and complaint on the defendant doctor. *Id.* at 429. In a second suit for legal malpractice, the attorney moved to dismiss based on the Entire Controversy Doctrine and argued

the plaintiff should have joined him to the initial medical malpractice action. Id. The Court held "the party-joinder requirements of the entire controversy doctrine do not extend to claims of attorney malpractice." The Court noted that "legal malpractice claims uniquely raise the specter of forcing a party in an action to sue the same lawyer who is representing that party in the action." Id. at 446. The Court reached this decision prior to the 1998 amendment revising R. 4:30A to require joinder of claims only.

Cases involving accrual for statute of limitations purposes have relied on the treatment of legal malpractice claims under the Entire Controversy Doctrine. The two are related since accrual of a claim can make the statute run while also evidencing the existence of a pending claim for purposes of the Doctrine. Thus, in *Dinizo v. Butler*, 315 N.J. Super. 317 (App. Div. 1998), the Appellate Division referenced entire controversy doctrine cases when it considered the tolling for the statute of limitations in a legal malpractice action. The plaintiffs hired the defendant attorney to represent them in a real estate transaction around 1988. Id. at 319. After they bought the property, the plaintiffs discovered deficiencies with the title and sued the sellers of the property. Id. at 319-320. This suit was dismissed in 1992. Id. at 320. In 1997 the plaintiffs filed suit against their transactional attorneys and argued the cause of action did not accrue until 1996. Id. at 320.

The Appellate Division first considered the Court's holding in *Olds*, supra, that "the entire controversy doctrine no longer compels the assertion of a legal-malpractice claim in an underlying action that gives rise to the claim." *Dinizo*, 315 N.J. Super. at 321 (quoting *Olds*, 150 N.J. at 443. This holding required only that the plaintiff did not need to join his attorney as a party in the first suit against the sellers. *Dinizo*, 315 N.J. Super. at 321. The court then determined that the remedy for a client suing in an action against third parties which arise out of his attorney's malpractice was "to have the client file the malpractice complaint and stay it pending the outcome of the underlying litigation." Id. at 322 (citing *Grunwald v. Bronkesh*, 131 N.J. 483, 499-500 (1993). The Court did not have before it and did not address the situation as here, where the attorney had become a party to the first suit based on factual allegations of malfeasance regarding the same transaction whence comes the instant malpractice claim.

In *Grunwald v. Bronkesh*, 131 N.J. 483 (1993), the Court also considered when a cause of action accrues for legal

malpractice. The plaintiff retained the defendant attorney to negotiate an option contract for the purchase of real property owned by the plaintiff in Atlantic City. Id. at 487-488. The attorney prepared a sales agreement and option contract which Resorts International Hotel and Casino, Inc. (Resorts) signed. Id. at 488. The attorney then advised the plaintiff that by signing the sales agreement Resorts bound itself to purchasing the property. Id. Resorts never purchased the property and the plaintiff filed suit, upon his attorney's advice, alleging he lost an opportunity to develop the property. Id. A different attorney represented the plaintiff in the suit against Resorts. Id. The trial court in this first suit found the sales contract unenforceable in July of 1984. Id.

In September of 1990, the plaintiff sued his former attorney. Id. He alleged reliance on the defendant's opinion that the sales agreement was enforceable, caused him damage in not developing the property. Id. at 489. The Court held that for legal malpractice actions, a cause of action accrues "when the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim." Id. at 494. The Court determined a plaintiff can suffer damages through detrimental reliance on legal advice, and the damages can include attorney's fees in the underlying action. Id. (citations omitted). The Court found that the plaintiff suffered damages when Resorts refused to purchase the property and the plaintiff previously rejected an offer to purchase it. Id. at 500. The court held that the plaintiff knew or should have known about this damage after he heard the Chancery court's finding that the sales contract was unenforceable. Id.

In this case, the Court must similarly decide whether the plaintiff possessed an accrued claim in the 2004 litigation which he should have then brought against the defendants under the Entire Controversy Doctrine. The gist of the plaintiff's complaint is that the defendants wrongly advised him he could sell marital property without his wife's consent. His damages occurred when American Developers refused to close on the property for lack of good title. Similarly to *Grunwald*, 131 N.J. at 500, at this point plaintiff had knowledge that the attorney's advice that the real estate agreement bound the other party and would proceed had turned out to be erroneous and he has suffered damages from the failed closing. He also knew American Developers had sued defendants for the same conduct complained of here -- failure to advise that the contract could not close without his wife's signature.

Furthermore, the plaintiff subsequently filed suit with a different attorney. Plaintiff's complaint in paragraph 9 acknowledged retaining Nanovic in the underlying action. Legal fees paid for this action would also form the plaintiff's damages of which he long ago had knowledge.

Thus plaintiff had knowledge that the advice was wrong during the 2004 suit.

The above suggests that the plaintiff knew or should have known about the essential facts for his claim in 2004. See *Grunwald*, 131 N.J. at 494. The aborted closing occurred on September 30, 2004. Sklodowsky Cert. ¶2. The plaintiff's certification indicates that in April of 2004 Lushis advised him that he needed his wife's signature to deliver good title. *Id.* He states that if he had known this would never have signed the contract. *Id.* The plaintiff asked his attorney in the underlying litigation whether he should pursue a legal malpractice action against the Lushis. *Id.* at ¶4. The failure of the defendant's advice to hold true and the plaintiff's questioning regarding malpractice demonstrates he knew the essential facts of his claim against Lushis before undertaking the 2004 litigation. He also knew Lushis had been sued based on the same alleged wrong advice. Because he suffered damage and knew the facts implicating the defendants as the cause of this damage by the time of the 2004 litigation, the plaintiff's cause of action accrued then.

Since the plaintiff possessed a claim against the defendants during the underlying 2004 litigation, the Court must next consider whether to apply the Entire Controversy Doctrine. The Doctrine requires that "*Cogdell v. Hosp. Ctr. at Orange*, 116 N.J. 7, 15 (1989). "[All] parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." *Cogdell*, *supra*, 116 N.J. at 15. Here the defendants were parties to the 2004 litigation through the third party complaint brought by American Developers. Comp. at ¶10. The plaintiff was a party by virtue of filing the 2004 suit. *Id.* Thus, this is not a case involving a claim against a non-party to the original litigation.

The Court is not persuaded by the plaintiff's argument that *Olds*, *supra*, precludes applying the Entire Controversy Doctrine to any legal malpractice action. *Olds* mandated that in a legal malpractice action, a party need not join his or her attorney to

the underlying litigation. See *Dinizo*, 315 N.J. Super. at 321. Because the defendants were already parties to the 2004 litigation based on the same interaction involving the wife's torpedoing this closing, the Court's holding in *Olds* does not bar invoking the Doctrine here. Nor do the limitations on party joinder in R. 4:30A.

Since the plaintiff was a party to the previous litigation the Court must next consider whether it arises out of the same core set of facts. See *Garvey*, supra, 303 N.J. Super. at 100. The 2004 litigation and this case arose out of the same transaction, namely the unsuccessful closing. The plaintiff now alleges the defendants caused him damage due to their negligent representation, which led to the aborted closing. Therefore the 2004 complaint and this action arise out of the same set of facts and involve the same parties.

Lastly, the Court must consider whether it is equitable to apply the Entire Controversy Doctrine and bar the plaintiff's claims. This Doctrine exists to (1) prevent piecemeal decisions, (2) promote fairness to the parties, and (3) promote judicial efficiency. *DiTrollo v. Antiles*, 142 N.J. 253, 267 (1995).

Allowing the plaintiff to proceed in this claim would undermine all three purposes. First, it would allow the plaintiff to proceed in one action against the sellers which resulted in a summary judgment and settlement. Allowing this case to proceed would result in one case in 2004 about the underlying transaction allegedly undermined by legal malpractice and this case for the legal malpractice.

Second fairness requires dismissal of this action. The underlying transaction occurred seven years ago. The evidence indicates the plaintiff considered suing the defendants around 2004 but chose not otherwise. Allowing him to change his mind six years later would prejudice the defendants by forcing them defend a case long after the fact.

Furthermore this is the fourth action involving these parties. The plaintiff filed an action in 2007 with an identical complaint yet failed to prosecute it. This failure to prosecute resulted in dismissal. He provided no explanation for this inaction or why he filed the instant second identical action instead of seeking to vacate the dismissal for the 2007 case. In addition, the plaintiff also asserted these claims in the federal case but chose not to oppose the defendants' motion to dismiss. This failure is unexplained. The plaintiff's inactions

and choices to not aggressively pursue his claims against the defendants require a finding that fairness precludes this fourth suit on the same facts.

Lastly this action implicates the goals of judicial efficiency. This is the fourth action involving these same parties and third in New Jersey's courts. Allowing the plaintiff to bring these claims, which he considered bringing earlier, at this stage would frustrate judicial efficiency. Therefore consideration of judicial efficiency and the other policies underlying the Entire Controversy Doctrine, favor dismissal of this action.

Finally, plaintiff cannot claim that defendants hid the facts from him. He knew in April 2004 that Lushis had erred as to his wife's signature. He also specifically asked Nanovic about a malpractice claim. Thus, he certainly was aware of the claim and made a tactical decision not to pursue it. That decision does not avoid application of the Doctrine.

Therefore the Court will grant the motion to dismiss. However, the Court is not persuaded that Pennsylvania law would apply in this case involving the sale of real estate in New Jersey. In New Jersey the determination of which state's law to apply depends on "the state that has the most significant connections with the parties and the transaction." *Pfizer, Inc. v. Empls Ins.*, 154 N.J. 187, 193 (1998) (citing *Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 134 N.J. 96, 102 (1993)). New Jersey courts consider the following factors for choice of law analysis (1) the competing interests of the states, (2) the interests of commerce between the states, (3) the parties' interests and expectations, and (4) concerns of judicial administration. *Pfizer*, 154 N.J. at 197-199.

Under the first factor, New Jersey would possess a greater interest in resolving this dispute. The transaction arose out of a sale of property in New Jersey by residents of this state. Furthermore, the plaintiff's allegations include the assertion that the defendants committed unauthorized practice of law here. Given New Jersey's interest in regulating attorneys who practice here, this state possesses a greater interest in this dispute than Pennsylvania.

While the second factor, free commerce, might (or might not) favor Pennsylvania's two year statute of limitations instead of New Jersey's six year statute, the remaining factors favor applying New Jersey law. Given that the defendants gave

legal advice to a New Jersey resident for a New Jersey transaction, the parties could expect our state's law to apply. On the fourth factor, nothing suggests New Jersey law would prove more difficult to apply or that this case would prove more complex here. Given the connections between the plaintiff's allegations and this state, New Jersey law applies, and the complaint is not time-barred.

Conclusion:

Based upon the foregoing, the defendants' motion to dismiss is **GRANTED**, pursuant to the Entire Controversy Doctrine.