

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ROOSEVELT'S, INC. t/a	:	November Term 2003
PHILADELPHIA MANAGEMENT	:	
COMPANY	:	No.: 01929
	:	
Plaintiff,	:	
	:	Commerce Program
v.	:	
	:	
VALERIE H. LIEBERMAN, ESQUIRE	:	Control Number: 042110
and POST & SCHELL, P.C.	:	
	:	
Defendants	:	

ORDER

AND NOW, this 10th day of June, 2004, upon consideration of Defendants' Preliminary Objections to Plaintiff's Amended Complaint and Plaintiff's Response thereto, it is hereby **ORDERED** and **DECREED** that Defendants' Preliminary Objections are **OVERRULED**.

Defendants are **ORDERED** to file an answer to Complaint within twenty (20) days hereof.

BY THE COURT,

GENE D. COHEN, J.

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ROOSEVELT’S, INC. t/a	:	November Term 2003
PHILADELPHIA MANAGEMENT	:	
COMPANY	:	No.: 01929
	:	
Plaintiff,	:	
	:	
vi.	:	Commerce Program
	:	
VALERIE H. LIEBERMAN, ESQUIRE	:	Control Number: 042110
and POST & SCHELL, P.C.	:	
	:	
Defendants	:	

MEMORANDUM OPINION

COHEN, J.

Presently before the court are the Preliminary Objections of Defendants Valerie H. Lieberman, Esquire (“Lieberman”), and Post & Schell, P.C. (“P&S”), to the Amended Complaint of Plaintiff Roosevelt’s Inc. t/a Philadelphia Management Company. For the reasons that follow, the court overrules Defendants’ Preliminary Objections.

BACKGROUND

The conflict between Plaintiff and Defendants involves legal services. The parties dispute Defendants’ responsibilities with respect to a civil lawsuit filed against Plaintiff and other parties that resulted in a default judgment and an award of \$3.75 million against Plaintiff. Plaintiff brings causes of action for negligence, malpractice and breach of contract (Count I) and breach of fiduciary duty (Count II). Defendants assert a demurrer to both Counts or, in the alternative, seek to stay this action.

DISCUSSION

Defendants object to Plaintiff’s legal malpractice claim. To prevail on such a claim, a plaintiff must demonstrate: (1) employment of the attorney or other basis of duty owed to the plaintiff by the attorney; (2) failure of the defendant to exercise ordinary skill

and knowledge in the exercise of that duty; and (3) such failure was the proximate cause of actual damages to the plaintiff. See, e.g., Capital Care Corp. v. Hunt, 847 A.2d 75, 82 (Pa. Super. 2004). Defendants challenge both the first and third elements of the claim.

Whether a duty exists is a question of law. Brisbine v. Outside in Sch. of Experiential Educ., Inc., 799 A.2d 89, 95 (Pa. Super. 2002). The following facts in the Amended Complaint describe Defendants' duty to Plaintiff. P&S and Lieberman represented Plaintiff and its insurer in a worker's compensation matter (Complaint, ¶11, 19). The injured employee filed a civil action against Plaintiff and other parties (*id.*, ¶13, 14), which Lieberman monitored on behalf of the insurer and Plaintiff (*id.*, ¶22). While monitoring the civil action, Lieberman received notice of Plaintiff's default (*id.*, ¶23, 24), knew Plaintiff had defaulted (*id.*, ¶37, 38, 39), and failed to prevent the entry of \$3.75 million in damages pursuant to the default (*id.*, ¶40, 44, 54). As alleged, the legal services provided by Defendants to Plaintiffs are not restricted to the worker's compensation matter and Defendants owe a duty to Plaintiff.

On the element of damages, Defendants' assert Plaintiff's failure to appeal an order denying its petition to reopen the default judgment is the proximate cause of the damage award. This argument is inappropriate at this stage of the proceeding. When considering a demurrer, the court is limited to the allegations as set forth in the complaint. See, e.g., Mellon Bank, N.A. v. Fabinyi, 650 A.2d 895, 899 (Pa. Super. 1994). As noted above, Plaintiff alleges \$3.75 million in damages as a result of Defendants' failure to fulfill its duty. Thus, Defendants' demurrer to Count I is overruled.

Defendants object to Plaintiff's claim for breach of fiduciary duty on the basis that Defendants were not acting in a fiduciary capacity. This reading of the germane

cases is too narrow. An attorney owes a fiduciary duty to his client which “demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest.” Maritrans GP Inc., v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1283 (Pa. 1992). As set forth in the Amended Complaint, Lieberman monitored the civil action for both Plaintiff and the insurer (Complaint, ¶22). Lieberman understood there were divergent consequences for Plaintiff and the insurer in the civil action (id., ¶40). Lieberman failed to prevent the entry of \$3.75 million in damages pursuant to the default (id., ¶44, 54). These allegations are sufficient to show divided loyalties and a potential conflict of interest. Therefore, Defendants’ demurrer to Count II is overruled.

Alternatively, Defendants seek to stay this action until resolution of two related cases. Defendants assert these two cases may eliminate Plaintiff’s damages from the default judgment. Clearly this assertion raises factual issues not evident from the face of the complaint. As alleged in the complaint, a judgment for \$3.75 was entered against Plaintiff (Complaint, ¶61). This establishes damages for purposes of legal malpractice. Ammon v. McCloskey, 655 A.2d 549, 553 (Pa. Super. 1995). Defendants’ attempt to stay this action is overruled.

BY THE COURT,

GENE D. COHEN, J.

6/10/04