Law Assn
c/o Gary Weber

JOANNE F. MAHONSKI, et al., Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA
vs.	:	CIVIL ACTION - LAW
	:	DOCKET NO. 11-01458
JOSEPH L. RIDER, ESQUIRE, PAUL A. ROMAN and LAW OFFICES OF JOSEPH L. RIDER, et al.,	:	
Defendants	:	

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OPINION

Saylor, J.

Before the court in this legal malpractice case is the second motion for summary judgment filed on behalf of the above Defendant attorneys, Joseph L. Rider, Esquire ("Rider") and Paul A. Roman, Esquire ("Roman"). The gravamen of the action is that back in 1990 there were some missteps of the Defendant attorneys in their undertaking of legal services for Plaintiffs in a real estate transaction involving 362.2 acres of unimproved mountain land in Cogan House Township.

At that time, the subject tract was owned in fee simple by nine siblings. A prospective third party, Tom Smith, had expressed an interest in purchasing the property. Subsequently, in March 1990, Caroline Engel, one of the siblings, contacted Rider and informed him that she and her husband would purchase the property rather than Smith. They asked Rider to perform a title search. Shortly thereafter, another sibling's husband, Chet Griggs asked Rider to prepare the necessary legal documents to effect a transfer of the property for all the siblings and spouses to the Engels. They were aware that a written agreement of sale, a deed, and an assignment of leases for minerals, oil and gas royalties required preparation by an attorney, as to which Defendant attorneys were engaged by the family.

As with any real estate transaction, there were negotiations conducted with respect to the actual terms of any possible agreement. The Defendant attorneys were not involved directly in these negotiations, rather the family held a private meeting among themselves. On April 9, 1990, the siblings and spouses met to discuss the terms upon which they would sell their interests to the Engels. Also involved in the meeting on this occasion was Leo Klementovich, Esquire ("Klementovich"), a licensed attorney in Pennsylvania, who was the son of one of the sibling-owners. He had organized the meeting after preparing a terms sheet for discussion.

At the end of the meeting the terms sheet that was prepared by Klementovich was agreed to as a proposal to make to the Engels. Among the terms, aside from the purchase price, was the conveyance of 51% of the oil and gas rights to the Engels, retaining the rest for themselves. On an occasion prior to the family meeting, Klementovich had spoken with Roman over the telephone, whereby it was represented by Roman to Klementovich that "under the law, the Engels as purchasers had to have 51% of the mineral rights to accomplish 'control'". The typed term sheet (annotated by hand in two respects) was then given to Caroline Engel for consideration.

Thereafter, the Engels delivered the annotated term sheet to Roman. Roman then proceeded to prepare a written agreement of sale based on such terms, which was then circulated among the siblings. In July 1990, Klementovich sent to Roman a second revision of the sales agreement, and later created a third revision that ultimately became the final written agreement of sale executed by all the parties to the transaction that same month.

The sales agreement was based on ongoing negotiations between Klementovich and Caroline Engel, and a prior letter of June 22, 1990, sent by Klementovich to Rider. Significantly, Klementovich in this correspondence insists upon an integration clause being

included in the agreement of sale. Klementovich further states therein: "I recalling (sic) discussing with you these questions of your representation of the groups in view of the potential conflicting interests. I do not believe that the present differences should in any way change your assessment that all interests can be adequately protected by one attorney." The letter is signed above the designation of "Leo F. Klementovich, Esq.", indicative of his professional status as a lawyer at that time.

The closing on the property occurred over multiple days in October 1990, with the signatories coming to the Defendant attorneys' law office independent of each other to execute the deed and the assignment of leases. There were no requests by any of the sellers for review with counsel prior to signing the documents. Both sides of the family in the transaction shared in the fee of the services of Defendant attorneys. The Engels paid the total sum of $135,000 for the property. The respective retained interest in "all minerals, gas, petroleum and coal royalties paid under existing and future leases" varied among the siblings between 5.444% and 6.125%; however, the Engels retained the majority, 56.444% thereof.

It was only fairly recently in the summer of 2008 that the Marcellus Shale became economically developable, resulting in a boom in lease rates and signing bonuses. The frenzied activity with the Marcellus Shale boom as it related to Lycoming County certainly piqued the interest of Klementovich and Plaintiffs. After 20 plus years of contentment with the original deal, they discovered the tract was under a lease agreement entered into in 2008 by Caroline Engel with Great Lakes. Thereafter, this suit against the Defendant attorneys was initiated. In a companion case to this one, after a jury trial, it was determined that Caroline Engel was entitled to the proceeds of leasing the subject tract for oil, gas, or other mineral explorations, except for

royalties received, in which event Plaintiffs are entitled to their respective percentage shares. *Mahonski, et al. v. Engel*, CV-2012-01292. (Order of Court of May 27, 2015).

Unfortunately, no drilling for gas occurred during the terms of that lease, which is now terminated. There is no oil or gas being produced from the property, nor has there ever been for that matter. Currently, no leasing for development exists.

The theories of liability against the Defendant attorneys are that there was negligence on their part, in the previously noted incorrect statement of oil and gas law from Rider to Klementovich (majority interest required for executory authority as to leasing); there was a conflict of interest in representing all parties by them; the attempt to limit the attorney-client relationships by them to document preparation only; and, lack of communication to all clients.

The role of Klementovich, a licensed attorney, in fashioning the terms of the agreement of sale at the family meeting, and the subsequent correspondence by him to Rider, along with his revised second and third agreements of sale typed by him, cannot be ignored completely or even discounted by this court. The "improper legal advice" was not communicated to a client here. It was a communication between two attorneys. A necessary prerequisite in maintaining a suit for attorney negligence is that Plaintiff shows an attorney-client relationship. *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983). Defendant attorneys did not owe any duty to Klementovich who was not a client. *See generally*, *Cost v. Cost*, 677 A.2d 1250 (Pa. Super. 1995) (no duty to client's wife as to legal effects upon her of buy-out of family owned business). Moreover, unlike a typical third party, Klementovich had the training, education and ability to independently perform legal research to make his own judgment on the legal issue. According to Plaintiffs' expert report, by Michelle O'Brien, Esquire, this specific oil and gas law question was long ago

settled by the Supreme Court's decision in *McIntosh v. Ropp*, 82 A. 949 (Pa. 1912), and followed in *Lichtenfels v. Bridgeview Coal Co.*, 496 A.2d 782 (Pa. Super. 1985).

As far as any conflict of interest, Klementovich was at all times out in front in negotiating terms for the benefit of members of the family selling their interests. None of the sellers themselves sought specific legal advice from Defendant attorneys. After all, why pay additional fees since Klementovich was an attorney as well. Moreover, Klementovich cannot now claim impropriety in Defendant attorneys drafting the documents for all the siblings when his letter to them of June 22, 1990, allayed any concerns about their singular role in the transaction.

The integration clause insisted upon by Klementovich in the aforesaid letter demonstrates legal prowess on his part, far greater than the inexperienced advisor back then he now portends was the situation. Of course, the integration clause (like the doctrine of merger by deed) bars consideration by the court as to any "other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever concerning this sale". *See Toy v. Metropolitan Insurance Co.*, 928 A.2d 186 (Pa. 2007). This ensures some finality to a transaction. Plaintiffs do not point to any representations, etc. other than the Klementovich and Rider phone call.

In any event, Plaintiffs' claims must fail at this time due to the fact that any harm to them as a result of the Defendant attorneys' advice or omissions, i.e. lack of advice, in the handling of the transaction is just speculation. As stated in *Mariscotti v. Tinari*, 485 A.2d 56 (Pa. Super. 1984) (alleged attorney malpractice for not being in a better negotiating position if aware of value of stock):

> 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." Duke & Co. v. Anderson, 418 A.2d 613, 617 (1980). "The mere breach of a professional duty,

> causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action..." *Schenkel v. Monheit*, 405 A.2d 493, 494, quoting *Budd v. Nixen*, 6 Cal.3d 195, 200, 491 P.2d 433, 436 (1971). "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." *Pashak v. Barish*, 450 A.2d 67, 69 (1982), quoting R. Mallen & V. Levitt, *Legal Malpractice* § 302 (2d ed. 1981).

Twenty-five years after this deal was made, there is no entity presently identified with an offer of even leasing rights at this time. Plaintiffs cannot proffer a reasonable basis for a jury to award any proper damages.

Plaintiffs contend in his brief that the harm is the "loss of the minerals themselves", and they have submitted an appraisal report of Jeffrey R. Kern, MRP, ASA. This misses the mark. Under the circumstances here, as previously noted, Plaintiffs are only entitled under the deed and assignment of leases (established in the companion litigation) to royalties, if any are realized. Again, the fact is that there has never been drilling and no entity has been identified having the interest, wherewithal and the capital to proceed with extracting the gas, and then paying a royalty. Clearly, Plaintiffs would have recognized the speculative nature of these subsurface rights back in 1990. As the boom has passed this property by, the recovery of royalties are equally as speculative today.

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ORDER

AND NOW, this 12th day of November 2015, upon due consideration of oral arguments and briefs of counsel, and for the reasons stated above, Defendants' Motion for Summary Judgment is hereby GRANTED and the case docketed at CV-11-01458 is DISMISSED. All other pending motions are now moot.

BY THE COURT:

Charles H. Saylor, Judge

cc: Leo F. Klementovich, Esquire, 2150 Almond Springs Drive, Paso Robles, CA 93446
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