

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

THOMAS GUSMANO, individually
and derivatively on behalf of
SHELBY LEASING COMPANY, LLC,

Plaintiff,

vs.

Case No. 2015-2670-CB

GIARMARCO, MULLINS & HORTON,
P.C. and WENDY I. PAGE, personal
representative of the estate of
JOSEPH F. PAGE, III,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for partial reconsideration of the Court's March 14, 2016 Opinion and Order.

I. Factual and Procedural History

Joseph F. Page, III was a licensed attorney in the State of Michigan and a member of the law firm Defendant Giarmarco, Mullins & Horton, P.C. ("Defendant GMH"). Mr. Page passed away in 2014. Defendant Wendy I. Page, Mr. Page's widow, has been appointed the personal representative of Mr. Page's estate.

Mr. Page had served as the attorney for Associated Internists of Macomb, P.C. ("Internists") and other business owed by the following four physicians: Antonio Morreale, III, M.D., Ronald Pierskalla, M.D., Thomas Piazza, M.D. and Steven Taormina, D.O (collectively, "Physicians"). One of those businesses was Shelby-Macomb Diagnostic Center, PLC ("Shelby Diagnostic"). On behalf of Diagnostic Center, Mr. Page formed Shelby-Macomb Leasing Company, LLC ("Shelby Leasing"). Shelby

Leasing was formed to acquire certain equipment and then lease the equipment to Shelby Diagnostic pursuant to a seven year non-cancellable lease ("Lease").

In order to obtain investors in Shelby Leasing, Mr. Page drafted a Private Placement Memorandum ("PPM") for the sale of membership units in Shelby Leasing. Under the PPM, the price of the equipment was 2 million dollars, with 1.5 million being obtained through a secured loan and the remaining \$500,000.00 being obtained by selling units to investors for \$5,250.00 each, with a minimum purchase of 2 units. The investors were to obtain an 18% return on their investment.

Plaintiff Thomas J. Gusmano ("Plaintiff Gusmano") purchased 25 units in Shelby Leasing. On July 31, 2015, Plaintiff filed his complaint in this matter ("Complaint"). In the complaint, Plaintiff Gusmano asserts that his interest in Shelby Leasing was oppressed by Mr. Page (Count I), that Mr. Page and GMH committed legal malpractice in multiple ways (Count II), and that Mr. Page and GMH breached fiduciary duties they owed to him (Count III).

On October 1, 2015, Defendants their instant motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff filed a response and requested that the motion be denied. In addition, Defendants filed a reply brief in support of their motion. On January 4, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

On March 14, 2016, the Court issued its Opinion and Order granting, in part, and denying, in part, Defendants' motion for summary disposition. Specifically, the Court granted Defendants' motion with respect to Plaintiff's oppression claim and the portion of Plaintiff's breach of fiduciary duty claim based solely on violations of the Michigan

Rules of Professional Conduct. The remainder of Defendants' motion was denied. On April 5, 2016, Defendants filed their instant motion for partial reconsideration.

II. Standard of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

III. Arguments and Analysis

In their motion, Defendants contend that the Court improperly denied their motion for summary disposition of Count II of the Complaint (Legal Malpractice). First, Defendants contend that their duties to Shelby Leasing were limited to those stated in the PPM. While the PPM stated that the scope of Defendants' relationship with Shelby Leasing, Shelby Leasing did not sign the PPM and Defendants have failed to set forth any authority that would operate to bind Shelby Leasing to those statements within the PPM. Consequently, the Court is satisfied that Defendants' position is improperly supported, and that there exists an outstanding issue as to what the scope was of the attorney-client relationship between Defendants and Shelby Leasing.

Defendants also aver that they did not/do not owe Plaintiff Gusmano a fiduciary duty. "A fiduciary relationship arises from the reposing of faith, confidence, and trust,

and the reliance of one upon the judgment and advice of another.” *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194; 196; 480 NW2d 910 (1991). “Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial.” *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 515; 309 NW2d 645 (1981). “Furthermore, whether there exists a confidential relationship apart from a well-defined fiduciary category is a question of fact.” *Id.*

In their motion, Defendants contend that Plaintiff Gusmano’s claim fails because he has failed to present any evidence that he reposed any trust, faith or confidence in Mr. Page or that he relied on Mr. Page for advice relative to the transactions at issue. While Defendants raised the same contention in their reply brief, their argument with respect to Plaintiff Gusmano’s breach of fiduciary claim in their initial motion was based solely on their position that Plaintiff Gusmano failed to state a cause of action for breach of fiduciary duty. However, for the reasons discussed in its March 14, 2016 Opinion and Order, the Court remains satisfied that Plaintiff Gusmano has, based solely on reviewing the face of the Complaint, stated a viable breach of fiduciary duty claim. Further, while Defendants may ultimately establish that they are entitled to summary disposition or to prevail at trial based upon the facts present in this case, the Court is not persuaded that Defendants should be granted summary disposition based on their back-doored argument within their reply brief that converted their (C)(8) argument with respect to Count III into a (C)(10) argument that deprived Plaintiffs an opportunity to respond. Consequently, the Court is satisfied that Defendants’ position was improperly raised and should be rejected at this time.

Finally, Defendants assert that all of Plaintiffs' claims should be dismissed to the extent that they rely on their allegation that Mr. Page failed to obtain executed copies of the Guaranties, and/or the allegation that Mr. Page violated the Michigan Rules of Professional Conduct. The Court has previously noted that Defendants have provided executed copies of the Guaranties, which establishes that they were properly signed. Moreover, the Court also recognized that while the Michigan Rules of Professional Conduct do govern an attorney's conduct in instances involving conflicts of interest, MRPC 1.0(b) provides that the rules do not give rise to a cause of action for damages caused by an attorney's failure to comply with the rules. Consequently, the Court agrees that the portions of all of Plaintiffs' claims based on either of those allegations must be dismissed.

IV. Conclusion

For the reasons discussed above, Defendants' motion for reconsideration of the Court's March 14, 2016 Opinion and Order is GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendants' motion is granted to the extent that they seek summary disposition of the portions of Plaintiffs' claims that are based on Defendants' alleged violations of the Michigan Rules of Professional Conduct and/or Mr. Page's failure to obtain executed copies of the Guaranties. The remainder of Defendants' motion for reconsideration is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: MAY 25 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge