FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

VICENTE M. DELEON GUERRERO, et al.,	**CIVIL ACTION NO. 11-0090**
Plaintiffs,	
v.	**ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
JOSEPH J. IACOPINO,	
Defendant.	

INTRODUCTION

THIS MATTER came before the Court for a hearing on April 10, 2014, on Defendant's Motion for Summary Judgment based upon the failure of Plaintiff's to present expert witnesses to elicit necessary testimony regarding attorney conduct within the time designated to do so by the Court. Joaquin Torres, Esq., appeared on behalf of Plaintiffs Vicente and Nadine Deleon Guerrero, while Robert Myers, Esq., appeared on behalf of Plaintiff Chazrae Deleon Guerrero.

BACKGROUND

On November 18, 2013, Defendant filed a Motion for Summary Judgment pursuant to Rule 56 of the Commonwealth Rules of Civil Procedure, alleging that Plaintiffs had not disclosed their expert witnesses within the time they were ordered to do so by the Court, and Plaintiffs' claims against Defendant cannot be proven without expert testimony at trial. (Def.'s Mot. for Summ. J., at 1.)

Originally, Plaintiffs were required to disclose the names, resumes, and reports of any expert witnesses on or before September 1, 2013. (Def.'s Mot. for Summ. J., at 2.) The Court amended the

August 16, 2013 Stipulated Case Management Order to afford Plaintiffs two additional weeks, requiring disclosure on or before September 15, 2013. After the deadline passed, on September 16, 2013, Plaintiff Vicente Deleon Guerrero moved to extend the deadline once again. (*Id*.) The Court reluctantly granted the motion, extending all Plaintiffs' expert disclosure deadline to October 30, 2013.

Defendant argues that since Plaintiffs have yet to designate any expert witnesses, they have thereby foregone the opportunity to present any expert testimony in their case at trial. (*Id*.) Plaintiffs claim that an expert witness is not required to establish any of the four causes of action alleged in the Second Amended Complaint: (1) legal malpractice – breach of fiduciary duty, (2) breach of duty of loyalty, (3) punitive damages, and (4) violation of the Consumer Protection Act – unfair or deceptive business practice. (Pl.'s Opp., at 2.) In reply, Defendant argues that all of the remaining claims require expert testimony in order to present even a *prima facie* case to the jury, and that Plaintiffs have thus far introduced no evidence – even non-expert evidence – in opposition to the present motion. (Def.'s Repl., at 1, 10.) Thus, Defendant claims that there is no genuine issue of material fact under Rule 56, because "an issue without the necessary evidence to support it is not a genuine issue . . . [and] can[not] and should [not] be taken before the jury." (*Id*. at 12.)

LEGAL STANDARD

The Court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NMI R. Civ. P. 56(c). In considering the motion, the court views facts and inferences in the light most favorable to the non-moving party. *Century Ins. Co. v. Hong Kong Ent. Invs., et. al.*, 2009 MP 4 ¶ 14, citing *Estate of Mendiola*, 2 NMI 223, 240 (1991); *Aplus Co. v. Niizeki Int'l Saipan Co.*, 2006 MP 13 ¶ 10.

A party moving for summary judgment "bears the initial responsibility of informing the [] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Furuoka v. Dai Ichi Hotel*, 2002 MP 5 ¶ 22, citing *Santos v. Santos*, 4 NMI 206, 210 (1995). The movant must show the absence of evidence to support the nonmoving party's case. *Id.* at 325; *see*

Furuoka, 2002 MP 5 ¶ 22 (specifying that "[i]f a movant is the defendant, he or she has the […] duty of showing that the undisputed facts establish every element of an asserted affirmative defense."). "Once the moving party satisfies the initial burden, the non-moving party must respond by establishing that a genuine issue of material fact exists." *Id.* ¶ 24. However, "[i]f the non-moving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Id.*

In shouldering its burden, the opposing party may not simply rely upon the pleadings but must tender evidence of specific facts in the form of affidavits, and/or admissible evidence. NMI R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586, n. 11 (1986). A disputed fact is considered material "if its determination may affect the outcome of the case." *Triple J Saipan, Inc. v. Agulto*, 2002 MP 11 ¶ 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)).

Once the movant has discharged its burden, the burden of production shifts to the nonmoving party. *Roberto*, 2002 MP 23 ¶ 17. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted).

To establish a genuine issue, the nonmoving party must assert sufficient factual indicia for a reasonable trier of fact to sustain a finding in their favor. *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 272 (1995). "Both the 'quantum and quality of proof' is to be considered, and 'the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 254 (1986). "If the evidence set forth by the non-moving party is 'merely colorable . . . or [was] not significantly probative . . . summary judgment may be granted.'" *Eurotex, Inc. v. Muna*, 4 NMI 280, 284 (1995) (citing *Anderson*, 477 U.S. at 249-50).

DISCUSSION

Having reviewed the written materials and oral arguments presented on the present motion, the Court will now address Plaintiff's summary judgment motion as to each of Plaintiffs' remaining claims.

I. MALPRACTICE BASED ON BREACH OF FIDUCIARY DUTY & DUTY OF LOYALTY

As a threshold matter, the Court highlights the fact that Plaintiffs' original professional negligence claim has been dismissed. (Order Partially Granting and Partially Denying Defendants' Motion to Dismiss, NMI Super. Ct., Feb. 22, 2013.) The Court reasoned that while "Plaintiffs have pled facts establishing a duty because of the attorney-client relationship between [Defendant] and Plaintiffs," Plaintiffs "have failed to demonstrate expressly how [Defendant's] conduct fell beneath the standard of care owed by lawyers to clients." (*Id*. at 9.) At the same time, the Court refused to dismiss Plaintiffs' malpractice claim based on breach of fiduciary duty, holding that "sufficient facts have been alleged to infer evidence of material points demonstrating breach of fiduciary duty may be introduced later at trial." (*Id*.)

However, the Court acknowledges that, generally, the applicable standard of care in a professional negligence action mirrors the standard of conduct in a malpractice action based on a fiduciary breach. *See* Mallen & Smith, LEGAL MALPRACTICE § 37:24 ("In most respects, the rules concerning establishing a fiduciary breach parallel those concerning negligence."); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 49, cmt. d. ("The principles governing proof that a lawyer's acts constitute negligence apply generally to proving breach of fiduciary duty."). Thus, although the Court has previously dismissed Plaintiffs' original claim for professional negligence, nearly the same evidence will be required to be introduced to establish a prima facie case of malpractice based on fiduciary breach.

Accordingly, the Court rejects Plaintiffs' claim that the standard of care for a negligence malpractice claim is not the same as that for a breach of fiduciary duty malpractice claim, on behalf of which Plaintiffs cite one Mississippi case, which is not controlling authority in this jurisdiction. *See Crist v. Loyacono*, 65 So.3d 837, 842 (Miss. 2011) (holding that "[t]he law recognizes a clear distinction between allegations of legal malpractice based on negligence . . . and those based on a breach of fiduciary duty . . ."). Further, *Crist* is distinguishable from the present case because it focuses on the proximate cause element requiring proof of success in the underlying case, where the plaintiffs were not required to establish a prima facie case that had their attorneys not entered into settlement negotiations, they would have prevailed on their underlying claims and would have been awarded a

monetary sum greater that the settlement negotiated by the defendants. *See id*. at 841-43. Here, Plaintiffs are not required to prove that they would have won the underlying lawsuit, but rather that Defendant's conduct concerning the settlement of the case and the loans provided to Plaintiffs breached a fiduciary duty owed to Plaintiffs, and therefore caused them damages.

A. Expert Testimony Necessary to Prove Standard of Conduct & Breach

The standard of care applicable to a lawyer in respect to a particular issue, as well as whether the conduct of a particular lawyer are in conformity with that standard of care, has been held to require expert testimony. "[E]xpert testimony of an attorney is essential to prove the plaintiff's cause of action. Expert testimony is used as evidence to establish the standard of care or standard of conduct by which the defendant's conduct is to be judged. Expert testimony usually is necessary to show a breach of the appropriate standard." Mallen & Smith, LEGAL MALPRACTICE § 37:22.

The same standard applies to Plaintiffs' claim of malpractice based on an alleged breach of Defendant's fiduciary duties to Plaintiffs. "Expert testimony usually is necessary to establish a fiduciary breach, because the standards governing loyalty and confidentiality may not be matters of common knowledge. Mallen & Smith, LEGAL MALPRACTICE § 37:23. Further, "[e]xpert testimony usually is necessary to establish the 'standard of conduct,' which determines the fiduciary obligations and whether there was a deviation therefrom." *Id*. at § 37:24. Moreover, "[a] plaintiff alleging professional negligence or breach of fiduciary duty ordinarily must introduce expert testimony concerning the care reasonably required in the circumstance of the case and the lawyer's failure to exercise such care." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 52, cmt. g.[1]

Although there is no local precedent addressing whether expert testimony is required in a breach of fiduciary duty malpractice claim, a survey of similar cases revealed that an overwhelming number of trial and appellate courts in various jurisdictions have required such expert testimony in order to proceed to trial. *See, e.g.*, *Bandlow v. Cadigan,* 72 Fed. Appx. 562 (9th Cir. 2003) (applying Arizona law); *Geiserman v. MacDonald*, 893 F.2d 787, 794 (5th Cir. 1990); *Hamilton v. Bangs, McCullen, Butler, Foye & Simmons, LLP*, 2011 U.S. Dist. LEXIS 26553 (D.S.D., Mar. 15, 2011); *Club Vista Financial Services, LLC v. Maslon, Edelman, Borman & Brand, LLP*, 2011 WL 4947629 at *14 (D.

[1] Pursuant to 7 CMC § 3401, the Restatement constitutes the controlling law in the CNMI.

Minn. 2011); *Floyd v. Hefner*, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008); *Frazier v. Boyle*, 206 F.R.D. 480, 491 (E.D. Wis. 2002); *Zimmerman v. Brown*, 306 P.3d 306 (Kan. Ct. App. 2013); *Crystal Homes, Inc. v. Radetsky*, 895 P.2d 1179 (Colo. App. 1995); *Tonsmeire v. AmSouth Bank*, 659 So. 2d 601 (Ala. 1995); *Hodge v. Jennings Mill, Ltd.*, 215 Ga. App. 507 (1994); *Beattie v. Firnschild*, 152 Mich. App. 785 (1986). The Court recognizes these cases as further persuasive authority for the premise that expert testimony is required to establish a prima facie malpractice case based on a fiduciary breach.[2]

Accordingly, as Plaintiffs' allege a breach of fiduciary duty and breach of loyalty in the present case, expert testimony is required in order to establish their prima facie case. However, the Court now considers whether the exceptions to the general rule apply to this case, obviating the need for expert testimony and precluding a favorable ruling to Defendant on summary judgment.

B. Common Knowledge Exception Does Not Apply

The general requirement that expert testimony is required to establish a prima facie malpractice claim based on a breach of fiduciary duty is an extension of the general rule that expert testimony is vital to establish facts outside the common knowledge of lay jurors. Moreover, "[w]ithout expert assistance, lay juries cannot understand most litigation issues, legal practices or the range of issues that influence how an attorney should act or advise." *See id*. This is because most litigation issues or legal practices involve tasks which "require the exercise of professional judgment and skill," which is ordinarily outside of the ken of the average juror. *See, e.g.*, *CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.*, 469 S.E.2d 466, 468 (Ga. App. 1996).

1. Common Knowledge Exception

However, a number of courts have held that expert testimony is not required where the common knowledge of experience of laypersons is extensive enough to recognize or infer a breach of the

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[2] The reasoning of one court in particular, in the case of *Lenius v. King*, 294 N.W.2d 912, 914 (S.D. 1980), resonates with the Court:

> [E]xcept in clear and palpable cases (such as the expiration of a statute of limitation), expert testimony is necessary to establish the parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice . . . . The reason for this requirement is simply that a jury cannot rationally apply negligence principles to professional conduct absent evidence of what the competent lawyer would have done under similar circumstances, and the jury may not be permitted to speculate about what the 'professional custom' may be. Expert evidence as to the 'professional custom' is required in malpractice actions against other professionals. . . . Consistence demands a similar standard for attorneys.

applicable standards of care or conduct from the facts or where the attorney's negligence is so grossly apparent that a layperson would have no difficulty in appraising it. *See, e.g.*, *Barth v. Reagan*, 130 Ill.2d 399, 564 N.E.2d 1196 (1990); *Mills v. Cooter*, 647 A.2d 1118 (D.C. 1994); *Kirsch v. Duryea*, 21 Cal. 3d 303, 146 Cal. Rptr. 218 (1978); *First Union Nat. Bank v. Benham*, 423 F.3d 855 (8th Cir. 2005); *Paul v. Gordon*, 58 Conn. App. 724 (Conn. App. Ct. 2000);

Plaintiff provides several instances where expert testimony is not required, all of which are logically based in the common knowledge exception to the general rule. These examples include: when an attorney lets the statute of limitations run, where the attorney's negligence is apparent and undisputed, and where the record discloses an attorney's failure to meet the duty of care is obvious and explicit. *Brainard v. Kates*, 68 Ill. App. 3d 781, 386 N.E.2d 586, 589 (Ill. App. Ct. 1st Dist. 1979). (Pl.'s Opp., at 5.) As the first two exceptions do not apply to the present case, as the statute of limitations is not implicated here and Defendant previously prevailed on a motion to dismiss the negligence claim, the Court examines the third exception discussed by the court in *Brainard*.

Here, Plaintiffs allege numerous instances of misconduct where Defendant failed to meet the standards of conduct created by the fiduciary nature of an attorney-client relationship. These failures include Defendant's conduct in relation to the settlement in the underlying case, and the loans provided to Plaintiffs, among others. As an ordinary juror does not possess the requisite knowledge of the standards of conduct of an attorney in a particular situation, the Court holds that Defendant's alleged failure to meet the duty of care in this case cannot reasonably be viewed as obvious and explicit such that a juror would possess the independent knowledge or expertise – without expert testimony to guide their analysis – necessary to determine the standard of conduct and whether Defendant's alleged conduct breached that standard.

2. Professional Rules Violations

Further, Plaintiff cites *In re Kinderknect*, 470 B.R. 149 (Bkrtcy. D. Kan. 2012) to support the premise that expert testimony is not required to establish the appropriate standard of care when the attorney's conduct is viewed in relation to violations of Rules of Professional Conduct. (Pl.'s Opp., at 5-6.) Plaintiffs also go on to reiterate the factual bases for direct violations of the Model Rules of Professional Responsibility, which they allege in their Second Amended Complaint. (Pl.'s Opp., at 6-

7.) Plaintiffs argue that Defendant's "numerous and disturbing conducts which directly violated the express language of the [Model Rules] is so clear . . . that an expert witness is not needed under these facts." (Pl.'s Opp., at 7.)

While the Court declines to rule on whether there were, in fact, violations of the Model Rules of Professional Conduct, it acknowledges that no such exception to the general rule requiring expert testimony exists. Importantly, the Model Rules of Professional Responsibility explicitly specify that they are intended to serve solely as a basis for disciplinary action within the bar, and that violations do not create a separate basis for civil liability: "[v]iolation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." Model Rules of Professional Responsibility: Preamble and Scope ¶ 20; *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 52(2)(a) ("Proof of a violation of a rule . . . regulating the conduct of lawyers . . . does not give rise to an implied cause of action for . . . breach of fiduciary duty."); *Gagne v. Vaccaro*, 255 Conn. 390, 403 (2001) (stating that "[t]he Rules of Professional Conduct caution those who seek to rely on their provisions.").

Further, even if the applicable ethical rule is admissible, they cannot serve as a substitute for the required evidence to prove Plaintiffs' case. *See* Mallen & Smith, LEGAL MALPRACTICE § 37:23 (stating that "the rules are not self-effecting to particular facts. Thus, the use of an ethics rule is no different than a jury instruction for negligence. The analysis of a rule's application, in general, and to the particular conduct, requires the testimony of expert witnesses."). However, even "[e]xpert testimony that a lawyer violated provisions of the Code is not sufficient evidence to present an issue of fact for the jury." *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 407 (Tenn. 1991). Thus, even if a prospective jury would be able to evaluate whether violations of the Model Rules have occurred – with or without expert testimony -- any violation could not independently establish the standard of conduct or create a presumption that a breach of a legal duty has occurred.

Plaintiffs' reliance on *Kinderknect* does not change the Court's substantive analysis. The court in *Kinderknect* held that expert testimony was not necessary because the attorney's failure to reasonably

inform his client was within the jury's common knowledge such that they were able to find the attorney had so clearly and obviously deviated from the standard of care required of his fiduciary duty without the assistance of expert testimony. The attorney in that case failed to inform a client seeking debt relief about the possibility of bankruptcy, despite later admitting that "bankruptcy may have been a better option" for the client. *Kinderknect*, 470 B.R. at 172. The court held that, after hearing all of the Plaintiffs' evidence, the particular ethical rule at issue and the improper conduct of the lawyer were so clear and obvious that no further analysis – by way of expert testimony – was required to submit the case to the jury. *Id.* at 173.

Here, the facts of the present case does not fall within a clear and obvious area of attorney conduct such that jurors with common knowledge would be able to evaluate whether an attorney's duty to avoid conflicts of interest prohibits him to make loans to his clients, the appropriate standard of conduct in handling settlements with multiple clients, and whether the settlement obtained could have been higher had a different attorney handled the case. In fact, these are matters exclusive to an attorney expert's specialized knowledge, experience, and expertise, for which it necessarily follows that expert testimony is required in order to assist the trier of fact in its evaluation of the causes of action presented by Plaintiffs. *See, e.g.*, *Meyer v. Dygert*, 156 F. Supp. 1081, 1091 (Minn. 2001) (holding that "the claims relate to conflicts of interest, which involves information that is not within the common knowledge of the jury."); *Deptula v. Kane*, 2008 WL 49-6905 (Vt. 2008).

In conclusion, as Plaintiffs have not designated any expert witnesses they plan to call to testify as to these matters outside the ambit of the ordinary juror within the time previously designated by the Court, they will be unable to prove two essential elements of their prima facie case at trial, and summary judgment is warranted. *See Celotex Corp*., 477 U.S. at 322-23 (the rule "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."). Accordingly, the Court hereby **GRANTS** Defendant's motion for summary judgment with respect to the malpractice claims based on breach of fiduciary duty and breach of loyalty.

II. CONSUMER PROTECTION ACT CLAIM & PUNITIVE DAMAGES

The Court first acknowledges that all of the claims which remain in Plaintiffs' Second Amended Complaint are based on the previously dismissed professional negligence claim, where the same facts are plead verbatim under the respective sections of the complaint.

This precise situation occurred in *OFS Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344 (11th Cir. 2008) and *Vort v. Hollander*, 607 A.2d 1339 (N.J. App. 1992), where both courts held that the lack of expert testimony was case-dispositive because the cases could not be proven without it, under any of the legal theories asserted by the plaintiffs. The court in *OFS Fitel* opined that "the crux of [the client's] unjust enrichment and breach of fiduciary duty claims is [the lawyer's] failure to meet the standard of care imposed by the attorney-client relationship. Both the breach of fiduciary duty and unjust enrichment counts incorporate the allegations of legal malpractice without adding any independent factual allegations. *OFS Fitel*, 549 F.3d at 1357, n.8. Similarly, the court in *Vort* upheld a grant of summary judgment based upon lack of expert testimony because "the legal malpractice aspects, the fraud aspects, [and] the so called contract aspects all deal with a lawyers performance." *Vort*, 607 A.2d at 1341.

Further, Defendant argues that a determination of fairness – the presence or absence of which is crucial to Plaintiffs' consumer protection claims – "depends upon the understanding of a specialized context in which the case arises, [and] expert testimony is again required." (Def.'s Mot. for Summ. J., at 5.) Defendant cites a case requiring expert testimony in the context of an insurer breaching its good faith duty to fairly evaluate an insured's claim because it "involved 'unusually complex or esoteric' matters beyond the ken of an average juror." *Weiss v. United Fire and Casualty Co.*, 541 N.W.2d 753, 758-59 (Wis. 1995). This case is analogous to the present case because the Consumer Protection claims necessarily evaluate Defendant's practices as a lender in the context of being an attorney owing various fiduciary duties to Plaintiffs. Any prospective jury would not be able to decide what is "fair" in this particularly complex context without the assistance of an expert's testimony – whether in determining whether Defendant violated the Model Rules or applicable law, or if a violation of professional ethical rules would constitute unfair business practices in the context of the Consumer Protection Act.

Regardless, the Court refuses to hold – without ruling on the merits of these claims – that

Plaintiffs would be unable to prove violations of the Consumer Protection Act or obtain an award of punitive damages without expert testimony to assist the jury with matters outside of their common knowledge. Thus, the Court **DENIES** Defendant's Motion as to counts III & IV.

CONCLUSION

Based on the reasons stated above, the Court hereby **GRANTS** Defendant's Motion for Summary Judgment as to the causes of action requiring expert testimony, namely counts I and II – the malpractice claims based on breach of fiduciary duty and breach of loyalty, respectively. Accordingly, the Court **DENIES** Defendant's Motion with respect to counts III & IV – the Consumer Protection Act claim and the punitive damages claim, respectively – as they do not require expert testimony.

It is **FURTHER ORDERED**, in view of the fast approaching trial, that the parties shall appear in Court on Wednesday, May 21, 2014, at 10:00 a.m, to discuss any remaining pre-trial issues.

SO ORDERED this 16th day of May 2014,

/s/
David A. Wiseman, Associate Judge