STATE OF VERMONT
WINDSOR COUNTY

THOMAS SCHRECK and GASPARE BUSCAGLIA	)	**Windsor Superior Court**
	)	**Docket No. 580-8-08 Wrcv**
v.	)	
MARTIN NITKA, ESQ.	)	

DECISION ON MOTION FOR SUMMARY JUDGMENT ON COUNT III

Plaintiffs Thomas Schreck and Gaspare Buscaglia filed a complaint alleging that defendant Martin Nitka, Esq., represented them in a real estate transaction gone sour. The essence of the complaint is that Attorney Nitka advised the plaintiffs to go forward with the purchase of real property despite a known boundary encroachment, saying that the title defect was a minor issue that could be cured through a post-closing exchange of deeds. The complaint further alleges that the boundary issue has subsequently become embroiled in expensive litigation. The complaint seeks damages from Attorney Nitka under theories of legal malpractice, common law fraud, consumer fraud, fraudulent misrepresentation, and breach of fiduciary duty.

Attorney Nitka seeks partial summary judgment on the claim for consumer fraud. He contends that he is entitled to judgment as a matter of law on this claim because the undisputed facts show that he did not engage in any deceptive acts or practices in commerce.

Summary judgment is appropriate when the moving party demonstrates that there are no genuine issues of material fact for trial and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). In assessing the motion, the court views all of the evidence in the light most favorable to the non-moving party and grants the non-moving party the benefits of all reasonable doubts and inferences. *Id.* "It is not enough, however, for the nonmoving party to rest on allegations in the pleadings to rebut credible documentary evidence or affidavits." *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413 (citation omitted). Instead, once the moving party has met its initial burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citation omitted).

The following facts are established for purposes of summary judgment. Plaintiffs hired Attorney Nitka in June 2006 to represent them in the purchase of real estate. The choice of representation was based on Mr. Schreck's prior experiences with Attorney Nitka. It was not based on any advertising, solicitations, or statements on the part of Attorney Nitka.

The property sellers prepared a survey of the parcel before closing. The survey showed that a neighboring building owned by the Birge-Curran Real Estate Partnership, LLP, was encroaching on the property.

Attorney Nitka discussed the boundary encroachment with his clients prior to the closing. He told them that he had reviewed the survey and that he knew the Birge-Curran principals, Stephen Birge and Mark Curran. He opined that the boundary encroachment was a minor issue that could be corrected by a post-closing exchange of deeds, and offered to assist the plaintiffs with the exchange of deeds. Plaintiffs went forward with the closing.

After the closing, Mr. Buscaglia asked Attorney Nitka to represent them in their attempt to resolve the Birge-Curran boundary encroachment issue. He declined, saying that he had a conflict of interest because he was friends with Stephen Birge and Mark Curran.

Attorney Nitka did not disclose at that time, or prior to closing, that he had represented Mr. Birge and Mr. Curran in the past, or that he had served on a charitable foundation with Mr. Birge for many years. Plaintiffs assert that they would not have gone forward with the closing if they had known that Attorney Nitka had personal and professional connections with the Birge-Curran principals. Plaintiffs also assert that they would have retained a different lawyer to represent them in the closing.

Attorney Nitka also misstated whether he had reviewed the survey prior to closing. He had not. Plaintiffs assert that they would have dismissed Attorney Nitka and hired another attorney if they had known this at the time.

The question is whether a claim for consumer fraud can be sustained on these facts. The Vermont Consumer Fraud Act prohibits "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce," 9 V.S.A. § 2453(a). The CFA is intended to "protect this state's citizens from unfair and deceptive business practices and to encourage a commercial environment highlighted by integrity and fairness." *Gramatan Home Investors Corp. v. Starling*, 143 Vt. 527, 536 (1983).

The term "unfair or deceptive acts or practices" includes material misrepresentations or omissions likely to mislead a reasonable consumer. *Bisson v. Ward*, 160 Vt. 343, 351 (1993). In the context of professional services, the plaintiff must show a misrepresentation of fact rather than an erroneous or misguided opinion, since the tort of fraud is based upon factual misrepresentations, and opinions are not facts. *Webb v. Leclair*, 2007 VT 65, ¶ 22, 182 Vt. 559 (mem.); *Winton v. Johnson & Dix Fuel Corp.*,

147 Vt. 236, 240 (1986). This means that erroneous legal advice—an expression of one attorney's opinion based upon his or her own professional judgment and legal skill—is generally not actionable under consumer fraud laws. *Kessler v. Loftus*, 994 F. Supp. 240, 243 (D. Vt. 1997) (cited with approval in *Webb*, 2007 VT 65, ¶¶ 22–23).

On the other hand, the practice of law involves some commercial and entrepreneurial components, such as "advertising, billing and collection practices, fee arrangements, and methods of obtaining, retaining and dismissing clients." *Id.* A factual misrepresentation by an attorney as to one of these entrepreneurial components of legal practice may give rise to consumer fraud liability. *Id.* Thus, an attorney may be liable if he makes a factual misrepresentation for the purpose of obtaining new clients, retaining existing clients, or otherwise increasing profits.[1] *Id.*; *Eriks v. Denver*, 824 P.2d 1207, 1214 (Wash. 1992) (en banc).

Here, the facts show that Attorney Nitka told his clients that he would represent them in the recommended post-closing deed exchange, and that his clients went forward with the closing on this understanding. The understanding was mistaken, however: Attorney Nitka did not represent them in the deed exchange. Instead, he declined representation for the previously-undisclosed reason that he had a conflict of interest based on his past personal and professional connections with the owners of the encroaching building.

The record does not explain why Attorney Nitka told his clients that he would represent them in the post-closing transaction while omitting the facts about his conflict of interest. Since the court must draw reasonable inferences in favor of the non-moving party, the court must infer that Attorney Nitka meant to persuade his clients to close the deal with him as their attorney. This means that there is a genuine issue for trial as to whether Attorney Nitka made a factual omission for the purpose of retaining existing clients and increasing profits.

Given these inferences, the court is not persuaded that the misrepresentation was immaterial as a matter of law. It would have been objectively reasonable for the clients to seek advice from another lawyer once they knew that Attorney Nitka did not plan to represent them in the post-closing transaction he was recommending. See *Vastano v. Killington Valley Real Estate*, 2007 VT 33, ¶ 8, 182 Vt. 550 (mem.) (defining a material misrepresentation as one likely to affect the consumer's decision with regard to a product). There is accordingly a genuine issue for trial here on the consumer fraud claim.

---

[1] Attorney Nitka argues that consumer fraud liability may only be established by showing misrepresentations made for the purpose of obtaining new clients, and that he is not liable because the facts show that he did not make any representations at all for the purpose of inducing Mr. Schreck to retain him in the first instance. This argument is not supported by *Kessler* or *Eriks*, both of which hold that consumer fraud liability may be triggered by factual misrepresentations made for the purpose of obtaining clients *or* increasing profits. Retaining existing clients and obtaining new clients are both important to profit margins in legal practice. Moreover, it would not be consistent with the purposes of the CFA to condone factual misrepresentations designed to increase profits so long as the deceptive act occurs after the formation of the attorney-client relationship.

However, the clients have not shown the materiality of any misrepresentations regarding whether or not Attorney Nitka actually looked at the survey prior to closing. *Vastano*, 2007 VT 33, ¶ 8. Everyone knew that the survey showed a boundary encroachment, and the clients had the ability to look at the survey themselves. It made no difference to the transaction whether or not Attorney Nitka had looked at the survey, and any misrepresentation on this point was not objectively likely to affect the clients' decisions about going forward with the transaction or retaining Attorney Nitka as counsel.

For these reasons, the court concludes that genuine issues of material fact remain as to whether Attorney Nitka misled his clients into believing that he would represent them in the deed exchange, and if so, whether he did so for the purpose of retaining existing clients and thereby increasing profits. Attorney Nitka is entitled to summary judgment, however, to the extent that plaintiffs sought to prove consumer fraud liability based on any misrepresentation about the survey.

ORDER

Consistent with the foregoing rulings, Defendant's Motion for Summary Judgment on Count III (MPR #3), filed Mar. 27, 2009, is ***granted in part and denied in part.***

Dated at Woodstock, Vermont this 15 day of September, 2009.

Hon. Harold E. Eaton, Jr.
Presiding Judge

FILED

SEP 15 2009

WINDSOR COUNTY CLERK