

LEGAL NOTICES, cont.

show cause, if any they have, why the prayer of said Petition should not be granted.

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7-23-82, 7-30-82, 8-6-82, 8-13-82

NOTICE

Court of Common Pleas of
the 39th Judicial District
of Pennsylvania
Franklin County Branch
Miscellaneous Docket
Volume Y, Page 145

NOTICE IS HEREBY GIVEN that on July 8, 1982, the Petition of Jonathan Cornelius Adams was filed in the above-named Court, praying for a decree to change his name to Jonathan Cornelius Bishop.

The Court has fixed Tuesday, August 17, 1982, at 9:30 A.M., in Court Room No. 1, as the time and place for the hearing of said Petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of said Petition should not be granted.

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NOTICE OF PUBLIC SALE OF REAL ESTATE

Pursuant to Order of Court the Citizens National Bank and Trust Company of Waynesboro, Pennsylvania, guardian of the estate of James Edward Strang, an incompetent, will offer for public sale approximately 19 acres of real estate situate for the most part in Hamiltonban Township, Adams County, Pennsylvania, and partly in Quincy Township, Franklin County, Pennsylvania, on August 14, 1982, at 12:30 p.m. at the premises located on South Mountain Road, South Mountain, Pennsylvania. For deed reference see Adams County Deed Book Volume 253, Page 559, and Franklin County Deed Book Volume 208, Page 543. Terms of sale made known day of sale.

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court. We concluded that she had the right to exercise her privilege.

Whether a witness may invoke the privilege against self-incrimination is left to the sound discretion of the court which must consider all the circumstances. *Commonwealth v. Rodgers*, 472 Pa. 435, 457, 372 A.2d 771 (1977). See also *Commonwealth v. Rolon*, 486 Pa. 573, 406 A.2d 1039 (1979) and *In Re Grand Jury*, 251 Pa. Super. 43, 379 A.2d 323 (1977).

The privilege against self-incrimination extends not only to those disclosures "which would in themselves establish guilt, but also to any fact which might constitute an essential link in a chain of evidence by which guilt can be established," *Carrera*, at 553, or any "questioning which might forge a link in a chain of evidence." *Commonwealth v. Lenart*, 430 Pa. 144, 242 A.2d 259 (1968). See also *In Re Grand Jury* at 48.

For the reasons above stated we denied defendant's post-trial motions and proceeded to sentence. This opinion is filed in support of our actions.

FIRST NATIONAL BANK AND TRUST COMPANY v.
BRENER, ET AL, C.P. Franklin County Branch, A.D. 1981 -
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Assumpsit and Trespass - Legal Malpractice

1. The elements of a legal malpractice claim must indicate: 1. The employment of the attorney or other basis for duty; 2. The failure of the attorney to exercise ordinary skill and knowledge; and 3. That such negligence was the proximate cause of damage to the plaintiff.

2. Where a party is required to repay proceeds from a sale, they suffer no damages in giving up that to which they were not entitled and such repayment cannot be the basis for a legal malpractice claim.

Timothy W. Misner, Esq., Attorney for Plaintiff

Edward E. Knauss, III, Esq.
Joseph P. Hafer, Esq.
Robert M. Frankhouser, Jr., Esq.
Harvey Freedenberg, Esq.
Ronald M. Katzman, Esq.

OPINION AND ORDER

KELLER, J., July 14, 1982:

This litigation was commenced by the filing of an action in assumpsit by First National Bank and Trust Company, Waynesboro, Pa. against Helen S. Brener, Jeffrey L. Brener, and Kathryn Y. Brener Mowery, as Executors of the Estate of Lester H. Brener and Individually. The complaint alleges L. & H. Brener, Inc. borrowed \$40,000 from the plaintiff and executed and delivered a promissory note which was guaranteed by Lester H. Brener, individually, to the plaintiff. On January 22, 1980, L. & H. Brener, Inc. filed a petition under Chapter 11 of the Bankruptcy Act, and the plaintiff filed a proof of claim in the bankruptcy proceeding on February 12, 1980 alleging principal due on the said note in the amount of \$35,500.00 and interest to January 22, 1980 in the amount of \$1,225.10. No distribution has been made to the plaintiff. Lester H. Brener died testate on June 18, 1977, and his Last Will and Testament was probated in Dauphin County, Pennsylvania with Helen S. Brener, Jeffrey L. Brener and Kathryn Y. Brener Mowery appointed as executors. Debts and deductions in the amount of \$23,605 were allowed and inheritance tax was paid on the net estate of \$103,709.00. No accounting was filed in the estate. On February 18, 1980 counsel for the plaintiff notified Lewis F. Adler, Esq., counsel for the estate, of the amount due on the said note. In Count 1 the plaintiff claims from the defendants as executors of the estate a principal balance of \$35,500 with interest of \$6,094.17 to February 28, 1982, and attorney's collection fees of \$6,239.13, a total of \$47,833.30. In Count 2 the plaintiff alleges a sale of real estate of the decedent located at 123 West King Street, Shippensburg, Cumberland County, Pennsylvania by the defendants, individually, and as sole heirs and executors of the decedent for the sum of \$40,000.00 on June 16, 1980. The plaintiff claims a balance due and owing from the defendants as individuals in the amount of \$40,000.00 representing the net proceeds of the sale of the real estate. The plaintiff's complaint was filed on March 13, 1981, and served upon the defendants. The defendants' Answer and New Matter was filed May 4, 1981. The answer denies liability and under new matter alleges that Lester H. Brener lacked the mental and legal capacity to

execute the promissory note which is, therefore, unenforceable. The plaintiff's reply to defendants' new matter was filed May 20, 1981, and demands proof of defendants' allegations.

On June 3, 1981, the defendants filed their complaint in assumpsit and trespass naming Lewis F. Adler, Esq. and his Law Firm of Kohn, Adler & Adler as additional defendants. In Count I in Assumpsit, the defendants inter alia allege the retaining of the additional defendants as counsel for the estate of Lester H. Brener; that the additional defendants had actual or constructive knowledge of the existence of decedent's personal guarantee of the note; that additional defendants failed to disclose the existence of the personal guarantee to the defendants and settled the estate without deducting the amounts claimed due by the plaintiff and distributed the proceeds to the defendants as beneficiaries under the Will; that by failing to disclose the personal guarantee and failing to instruct the defendants not to sell the real estate the additional defendants breached their contractual obligations to properly represent the defendants; and by failing to file an account and obtain an adjudication which would have cutoff the plaintiff's claim, the additional defendants breached their contractual obligation to properly represent the defendants. In Count II in Trespass, the defendants alleged losses claimed by the plaintiff were the result of the negligence, carelessness and recklessness of the additional defendants for various alleged reasons. The defendants demand judgment against the additional defendants in the amounts claimed by the plaintiff in the two counts of its complaint.

On August 3, 1981, counsel for the additional defendants filed their praecipe for a writ to join as additional defendants, Thomas J. Williams Esq., William F. Martson, P.C., John C. Howett, Jr., Esq., John C. Howett, Jr. & Associates, P.C., John P. Manbeck, Esq., and Rhoads, Sinon & Hendershot. The writs were served upon the additional defendants on August 6, 1981. Appearances were entered by separate counsel on behalf of Thomas J. Williams and William F. Martson, P.C., John C. Howett, Jr. and John C. Howett, Jr. & Associates, P.C., and John P. Manbeck and Rhoads, Sinon & Hendershot. (Hereafter the second group of additional defendants shall be referred to as Additional Defendants II.) Praecipes for rules to file a complaint were also filed on behalf of Additional Defendants II.

On July 9, 1981, the additional defendants filed their answer inter alia admitting they had agreed to advise the defendants in their capacity as executors; denying that they had

actual or constructive knowledge of the existence of the personal guarantee of the note by the decedent; alleging that the defendants and specifically defendant Jeffrey L. Brener who had signed the promissory note in question had failed to inform the additional defendants of the existence of the guaranteed note; denying knowledge of any distributions made after February 18, 1980; alleging the defendants consulted and relied upon the advice of other counsel in the sale of the real estate; alleging that even if the sale of the real estate was the result of faulty advice of the additional defendants, the sale has not placed the defendants in any worse position regarding their liability to the plaintiff, and denying liability to the defendant.

On March 22, 1982, the additional defendants filed their complaint in assumpsit and trespass against the Additional Defendants II alleging inter alia that the additional defendants were not consulted by the defendants, and that the additional defendants did not represent the defendants in the sale of the real estate, and to the contrary individual defendants consulted with and were represented by the Additional Defendants II. Therefore, the additional defendants claim the Additional Defendants II are liable over to them or in the alternative that judgment be entered directly against the Additional Defendants II.

Preliminary objections in the nature of demurrers were filed by counsel on behalf of Additional Defendants II on March 30, 31, and April 1, 1982, and by praecipe on counsel for the additional defendants dated April 2, 1982 the preliminary objections were placed on the Argument List to be heard May 6, 1982. By Order of Court of April 23, 1982 the motion of counsel for Additional Defendants II for postponement of oral argument for one month was granted, and the matter was listed for June 3, 1982. Pursuant to Local Rules of Court briefs were exchanged and filed by the additional defendants and Additional Defendants II. No briefs were filed by the plaintiff or the defendants. Arguments were heard on June 3, 1982 by counsel for the additional defendants and Additional Defendants II. No arguments were made by the plaintiff or defendants. The matter is now ripe for disposition.

There does not appear to be direct liability against the additional defendants II in favor of the original defendants, the Breners. The elements of a legal malpractice claim must indicate:

1. The employment of the attorney or other basis for duty;
2. The failure of the attorney to exercise ordinary skill and

knowledge; and 3. That such negligence was the proximate cause of damage to the plaintiff." *Schenkell v. Monheit*, 266 Pa. Super. Ct. 396, 399, 405 A. 2d 493 (1979).

The element of any damages suffered by the Breners appears to be missing.

The plaintiff-bank's claim against the defendants is based upon a promissory note executed by L. H. Brener, Inc. and a personal guarantee of that note by Lester Brener, defendants' decedent. The sale of the Shippensburg real estate had no effect on the ultimate liability of the defendants to the plaintiff on this cause of action. The real estate, or the proceeds from its sale, merely represent a source from which the alleged obligation of Lester Brener to the bank could be satisfied. The defendants aver in paragraph 9 of their complaint against additional defendants that distribution of the proceeds of the estate was made to them as beneficiaries in accordance with the will. Also, attached to the bank's complaint as Exhibit "F" is a copy of a deed for the subject real estate, executed by the defendants in their capacities as personal representatives and individuals and indicating the receipt of \$40,000 "lawful money of the United States of America, well and truly paid." If we accept these factual averments as being true as pleaded, it would appear to the Court that the proceeds of the estate and the proceeds from the sale of the real estate were used by or for the benefit of the defendants, either individually or as executors of the estate of Lester Brener. *Yania v. Bigan*, 397 Pa. 316, 155 A. 2d 343 (1959); *Byers v. Ward*, 368 Pa. 416, 84 A. 2d 307 (1951). If the defendants are required to disgorge any of these proceeds, they would suffer no damages in giving up that which they were not entitled to in the first place. The essential element of damages appears to be missing, and thus there is no basis for liability by the additional defendants II, directly to the defendants.

The prayer for relief in additional defendants' complaint also asks for judgment over against the additional defendants II in their favor in the event that they are found liable. However, no basis for this indemnification is pleaded in the complaint. Additional defendants' brief suggests that they might have sustained damage as a result of some unspecified action by the additional defendants II. The additional defendants II did not address this issue in their briefs; presumably because no basis for this alleged liability was pleaded. The additional defendants' appear only to address the issue of possible direct liability of the additional defendants II to the defendants.

When a complaint fails to set forth a cause of action, a preliminary objection in the nature of a demurrer should be sustained. *Rose v. Wissinger*, Pa. Super. Ct. , 439 A. 2d 1193 (1982); *Sinn v. Burd*, 486 Pa. 146, 404 A. 2d 672 (1979); *Gekas v. Shapp*, 469 Pa. 1, 364 A. 2d 691 (1976); *Commonwealth ex rel. Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A. 2d 812 (1974). It appearing evident to this Court that the additional defendants' complaint, on its face, does not allege a sufficient cause of action which would permit recovery from the additional defendants II; their demurrers are accordingly sustained.

ORDER OF COURT

NOW, this 14th day of July, 1982, the Additional Defendants' II preliminary objections in the nature of demurrers are sustained.

The Additional Defendants are granted leave to file an amended complaint within twenty (20) days of this date.

Exceptions are granted the additional defendants.

COVER, ET AL v. HORTON, ET AL, C.P. Fulton County Branch, A.D. 1982 - 48 of 1982 - C

Equity Jurisdiction - Demurrer - Paving of subdivision's roads

1. A preliminary objection in the nature of a demurrer is itself insufficient when it merely states that a pleading is insufficient and raises no issue, or that it does not set forth a cause of action.
2. Damages for the failure to pave the roads in a subdivision can be readily ascertained in monetary terms and there is an adequate remedy at law for such damages.
3. Unjust enrichment per se is not a basis for equitable jurisdiction.

George E. Wenger, Jr., Esq. Counsel for Plaintiffs

Charles H. Davison, Esq., Counsel for Defendant Horton

Gary D. Wilt, Esq., Counsel for Defendant Ayr

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