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ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ESTATE of JOSEPH PATERNO;
AL CLEMENS, member of the Board of Trustees of Pennsylvania State University;

and

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,
former football coaches at Pennsylvania State University

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
("NCAA"),
MARK EMMERT, individually and as President of the NCAA, and
EDWARD RAY, individually and as former Chairman of
the Executive committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
NCAA's Brief in Support of its Motion for Leave to File An Amended Answer with New Matter

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

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DEBRA C. HAMEL
PROTHONOTARY
CENTRE COUNTY, PA

ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants, and THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	)	Civil Division Docket No. 2013-2082

NCAA'S BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE AN AMENDED ANSWER WITH NEW MATTER

The National Collegiate Athletic Association ("NCAA") respectfully submits this Brief in Support of its Motion for Leave to File an Amended Answer with New Matter. The Amended Answer with New Matter is attached to the NCAA's Motion as Exhibit 1.

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2015 JUN 16 PM 4:35
DEBRA C. HAMEL
PROTHONOTARY
CENTRE COUNTY, PA

This brief is largely identical to Section I of the NCAA's Opposition to Plaintiffs' Motion for Judgment on the Pleadings. To ensure compliance with Local Rule No. 210, and out of an abundance of caution, the NCAA is hereby submitting this Brief in Support of its Motion for Leave to File an Amended Answer with New Matter.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint in this case over *two years* ago. Throughout this time the NCAA has set out its position in preliminary objections, interrogatory responses, over 50,000 pages of discovery that the NCAA has produced, as well as in its many public statements in and outside this Court (including in the highly public *Corman* litigation, which centered on the same core events at issue here). Because the Court is now intimately familiar with the facts at issue in this litigation and the respective positions of the parties, the NCAA will not belabor them here.

Relevant to this issue, Plaintiffs spent nearly two years refining their claims and amending their Complaints to address manifest pleading deficiencies identified by this Court in several rounds of preliminary objection briefing. On March 30, 2015, the Court issued an order that finally put an end to Plaintiffs' serial amendment of their Complaint, and paved the way for the parties to address the merits of the case.

Accordingly, the NCAA filed its Answer with New Matter on April 29, 2015. There is currently no discovery or case management schedule, no trial date has been set, and there have been no significant developments in this case since the NCAA filed its Answer. Plaintiffs responded to the NCAA's Answer with New Matter on May 19, 2015, and nowhere contended that it lacked specificity or otherwise was technically deficient in any way. Nonetheless, on June 8, 2015, Plaintiffs simply sprung a motion asking for final judgment based on the unfounded claim that the NCAA's Answer and New Matter suffered from technical faults. That same day, while maintaining that its existing Answer with New Matter sufficiently denied the remaining material allegations in Plaintiffs' Second Amended Complaint ("SAC"), the NCAA offered to amend its Answer in order to address Plaintiffs' unfounded criticisms, moot the Motion for Judgment on the Pleadings, relieve the Court of an unnecessary burden, and proceed to resolution of the merits. Emails between B. Kowalski and P. Maher (June 8 & 10, 2015), attached as Ex. A. Despite having twice amended their own Complaint, Plaintiffs rejected the NCAA's offer, belying any genuine interest in addressing the merits of this case. *See id.* Accordingly, the NCAA is filing this Motion concurrently with its Opposition to Plaintiffs' Motion for Judgment on the Pleadings.

STATEMENT OF QUESTION INVOLVED

Whether the NCAA should be granted leave to file its Amended Answer with New Matter, where Pennsylvania has a longstanding principal that pleading amendments should be allowed with great liberality in order to dispose of cases on their merits and not on technicalities, and where granting leave to amend would address Plaintiffs' unfounded criticisms, result in no prejudice, relieve the Court of an unnecessary burden, and allow the parties to resolve the merits without further delay?

ARGUMENT

As detailed in the NCAA's Opposition to Plaintiffs' Motion for Judgment on the Pleadings, the NCAA's existing Answer with New Matter complies with Pennsylvania Rule of Civil Procedure No. 1029(b) and clearly and unequivocally denies the remaining material allegations left in the SAC. Nonetheless, in order to moot Plaintiffs' Motion, relieve the Court and the parties of the burden of resolving an unnecessary issue, and allow the parties to proceed with the merits of this case without further delay, the NCAA moves for leave to amend its Answer. Pennsylvania law is clear that in the face of Plaintiffs' (unfounded) attempt to declare victory on a technicality, the only proper alternative to denying Plaintiffs' Motion on the merits is to grant the NCAA's Motion for Leave to Amend its Answer.

Under Pennsylvania Rule of Civil Procedure No. 1033, a party may amend a pleading by leave of court "at any time," including "while a motion for judgment on the pleadings is pending." *Biglan v. Biglan*, 330 Pa. Super. 512, 520-21, 479 A.2d 1021, 1025-26 (1984). Pennsylvania courts have long recognized "the general and longstanding principle that pleading amendments under Pennsylvania Rule of Civil Procedure No. 1033 should be allowed with great liberality in order to advance the policy that cases be disposed of on their merits and not on technicalities." *Piehl v. City of Phila.*, 930 A.2d 607, 617 (Pa. Commw. Ct. 2007), *aff'd*, 604 Pa. 658, 987 A.2d 146 (2009).

In keeping with these principles, Pennsylvania courts hold that granting leave to amend is the appropriate next step when an answer purportedly lacks specificity. As a leading Pennsylvania treatise summarizes the rule, "whenever a defect in party's pleading can be cured by amendment"— including "*to correct general denials that would otherwise have the effect of admissions*"—"a motion for judgment on the pleadings should not be granted without affording that party an opportunity to amend." 3 Goodrich Amram 2d § 1034(b):14 (emphasis added), attached as Ex. B. "'The policy of this Commonwealth is to grant judgment on the pleadings *only in cases where the moving party's right to relief is certain*'"; "'[w]here there is any uncertainty or doubt, *it should not be assumed that a party cannot plead with more specificity.*'" *Pilotti*, 388 Pa. Super. at 519, 565 A.2d at

1229 (quoting *Del Quadro v. City of Phila.*, 293 Pa. Super. 173, 177, 437 A.2d 1262, 1263 (1981)) (alteration in original) (emphasis added).

Indeed, under Pennsylvania law, it is an "*abuse of discretion*" *not* to permit leave to amend pleadings in such circumstances unless the opposing party is subject to "unfair surprise or some comparable prejudice." *Pilotti*, 388 Pa. Super. at 518, 565 A.2d at 1229 (emphasis added). Prejudice "must amount to something more than the removal of the procedural defect that the amendment is intended to cure," *id.*, and "more than a detriment to the other party," *Tanner v. Allstate Ins. Co.*, 321 Pa. Super. 132, 138, 467 A.2d 1164, 1167 (1983). "To make an advantage operate as a bar to amendment," after all, would effectively "'destroy the right to amend.'" *Tanner*, 321 Pa. Super. at 138, 467 A.2d at 1167 (quoting *Sands v. Forrest*, 290 Pa. Super. 48, 53, 434 A.2d 122, 125 (1981)).

Pennsylvania courts repeatedly have applied those principles to permit a defendant to amend its answer to ensure that its pleadings are sufficiently specific to comply with Rule 1029(b). In *Pilotti*, for instance, the Superior Court reversed the trial court's decision to enter judgment on the pleadings, holding that it was "contrary to the policy of the law of this Commonwealth" to enter judgment on the pleadings where the defendant had moved to amend its answer in response to the motion, and plaintiffs were not subject to "unfair surprise." *Pilotti*, 388 Pa. Super. at 518-19, 565 A.2d at 1229. The court explained that judgment on the pleadings

is not an available remedy if the "answer, though inartfully pled, is relevant and the court cannot assume from the pleadings that the defendant cannot plead a good defense to the plaintiff's claim." *Id.* at 519, 565 A.2d at 1229. Similarly, in *Keller v. R.C. Keller Motor Co.*, the Pennsylvania Supreme Court likewise affirmed a trial court's decision to grant a party leave to amend under similar circumstances, explaining that "[i]t has long been the law that technical defects in pleadings can be amended at the discretion of the court." 386 Pa. 56, 58, 124 A.2d 105, 106 (1956). "In order to prevent the case from turning on purely technical objections," the Court agreed that "the amendment was properly allowed." *Id.*

Numerous other cases are in accord. *See, e.g.*, *Mellon Bank, N.A. v. Joseph*, 267 Pa. Super. 307, 312, 406 A.2d 1055, 1057 (1979) (even assuming answer "was not sufficiently pleaded, the remedy was *not* to strike the entire answer without leave to amend" (emphasis added)); *Medusa Portland Cement Co. v. Marion Coal & Supply Co.*, 204 Pa. Super. 5, 9, 201 A.2d 285, 287 (1964) (Defendant should be "given an opportunity to file an amended answer" to correct averments that were "insufficient" under Rule 1029); *Holland v. Lantz*, No. C-0048-CV-2008-11555, 2009 WL 6969700 (Pa. C.P. June 18, 2009) (Although defendant's answer, which "appear[ed] to consist of nothing more than general denials," was "inartfully pled and suffer[ed] technical insufficiencies, it would be contrary to the public policies of this Commonwealth to enter judgment on the pleadings on the basis of such

insufficiencies."), attached as Ex. C; *Baird v. Congello*, 39 Pa. D. & C.4th 7, 14-15 (C.P. 1998) (permitting defendant leave to amend an answer that was deficient under Rule 1029 where the plaintiff could not "demonstrate any surprise or prejudice resulting from the court permitting the amendment or in refusing to deem [the relevant paragraph] admitted"), *aff'd*, 742 A.2d 1137 (Pa. Super. Ct. 1999); *Lewis v. Spitler*, 69 Pa. D. & C.2d 259, 263 (C.P. 1975) (holding that striking an answer "for failing to comply with the rules" and "treat[ing] plaintiffs' allegations as admitted" would "not be the just thing to do. ... Consequently, we will allow defendants to amend their answer."); *Peters v. Welsh*, 36 Pa. D. & C.2d 55, 58 (C.P. 1964) ("'[I]n order to prevent the case from turning upon purely technical defects, the answer may be amended, even at trial, to make specific denials instead of general ones.'").

Plaintiffs' Motion suggests that entry of judgment on the pleadings is the proper outcome here, but Pennsylvania law permits entry of judgment due to a party's purported technical faults only in exceptional circumstances. In *Swift v. Milner*, for instance, the Superior Court recognized that "leave to amend pleadings has been liberally granted," but denied such leave only because the defendant made "absolutely no effort" to amend the defective answer, despite receiving "notice by the trial court" and "the opportunity to cure the flaw." *See* 371 Pa. Super. 302, 309-10, 538 A.2d 28, 31 (1988). Similarly, in *James J. Gory Mechanical*

Contracting v. Philadelphia Housing Authority, the court held that general denials in the defendant's answer could not be amended *after trial had commenced,* due in part to the "substantial prejudice" that would result from the defendant's "*ongoing* failure to file motions in a timely manner."[1] No. 453, 2001 WL 1807905, at *12 (Pa. C.P. July 11, 2001) (emphasis added), attached as Ex. D.

No such exceptional circumstances are present here. Rather, the NCAA promptly acted to correct any purported deficiency in its Answer by offering to file an amended answer the same day Plaintiffs filed their Motion for Judgment on the Pleadings, and, when they declined that offer, requesting leave to amend shortly thereafter.[2] The NCAA's proposed Amended Answer overwhelmingly refutes

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[1] The other cases cited by Plaintiffs are similarly inapposite. In *Bank of America, N.A. v. Gibson*, (1) there is no indication that the defendant ever attempted to amend; (2) the court explicitly limited its holding to cases involving mortgage foreclosure actions; and (3) the defendant contended it did not have sufficient information about something it obviously would know. 2014 PA Super 217, 102 A.3d 462, 466-67 (2014). Nor was there any indication in *Safeguard v. Standard Machine & Equipment Co.*—an unreported decision of the Court of Common Pleas—that any attempt to amend was made. No. 853, 1996 WL 943774, at *2 (Pa. C.P. Oct. 29, 1996), attached as Ex. E. Finally, in *Hydrair, Inc. v. National Environmental Balancing Bureau*, the court construed general denials as admissions *only* for the purpose of quashing improper service. No. 2846, 2001 WL 1855055, at *2 (Pa. C.P. Apr. 23, 2001), attached as Ex. F.

[2] In so offering, the NCAA explained to Plaintiffs that while it maintained that its existing Answer complied with Pennsylvania rules, it proposed amending its Answer to moot Plaintiffs' Motion, relieve the Court of the burden of considering an unnecessary motion, and proceed with the determination of the merits in this case. Plaintiffs refused to grant the NCAA's request. *See* Ex. A, Emails between B. Kowalski and P. Maher.

Plaintiffs' contention that "[i]t has no viable response other than simply to claim generally that it has done nothing wrong and hope to buy as much time as possible." *See* Mot. ¶ 17. To the contrary, the NCAA welcomes the opportunity to present its case and to reveal Plaintiffs' claims and allegations as weak and unfounded.

Plaintiffs cannot credibly contend that the position set forth in the NCAA's Amended Answer comes as an "undue surprise." *See Pilotti*, 388 Pa. Super. at 520, 565 A.2d at 1230. As the Court is aware, the NCAA has repeatedly made clear its many disagreements with Plaintiffs' allegations—in its Answer and New Matter, and across numerous preliminary objections, lengthy supporting memoranda, hearings, discovery responses, and public statements over more than two years.

Further, the same events featured in the Second Amended Complaint were at the center of the highly public *Corman v. NCAA* litigation. Thousands of documents, numerous deposition transcripts (including depositions of the NCAA's senior leaders about the same core events at issue in this case), substantial briefing, and even a joint pre-trial statement that includes the NCAA's extensive "statement of contested facts" from that litigation are publicly available. Indeed, Plaintiffs' own counsel in this case actually took the deposition of the former chair of the NCAA's Executive Committee that was noticed in the *Corman* litigation. And

Plaintiffs' counsel, Patricia Maher, acknowledged to this Court in February that the NCAA's "position has been set forth" in extensive discovery materials and pleadings from the *Corman* case. Hr'g Tr. 75:20-76:9 (Feb. 6, 2015). Plaintiffs' recent about face is unconvincing. *See Pilotti*, 388 Pa. Super. at 520, 565 A.2d at 1230 ("Review of the record reveals that the factual averments necessary to the defenses, which Mobil Oil sought leave to amend in order to assert, were plainly known to Pilotti even before this litigation commenced. Thus, there would be no undue surprise or prejudice from allowance of the amendment.").

Even crediting the extremely unlikely assertion that Plaintiffs are uncertain about the NCAA's position in this litigation, that state of affairs has only existed for a mere few weeks: from the time the NCAA was required to file an answer (on April 29, 2015) to today, when the NCAA filed a proposed Amended Answer that directly addressed Plaintiffs' unfounded criticisms concerning its denials. During the interim period, not a single event has taken place in this litigation that would be impacted by the content of the denials in the NCAA's Answer. Plaintiffs cannot credibly identify any surprise or prejudice whatsoever (much less any that rises to the level of "undue" or "unfair").

In any event, as Plaintiffs' own motion makes clear, Plaintiffs will not be prejudiced if the NCAA's motion for leave to amend is granted. The only source of prejudice Plaintiffs identify—their supposed inability to "understand[] ... what

issues are actually in dispute"—is one that amendment would *cure*, rather than cause. *See* Mot. ¶ 15. Moreover, "[p]rejudice must amount to something more than the removal of the procedural defect that the amendment is intended to cure." *Pilotti*, 338 Pa. Super. at 518, 565 A.2d at 1229. Here, granting the NCAA leave to amend will resolve any purported uncertainty regarding what issues are actually in dispute, thereby facilitating the "search for truth" Plaintiffs have long claimed to lie at the heart of this litigation. SAC ¶¶ 5, 90, 125 (Oct. 13, 2014); *see also* Compl. ¶¶ 5, 76, 104 (May 30, 2013) (stating Plaintiffs are searching for the "truth"); First Am. Compl. ¶¶ 5, 83, 115 (Feb. 5, 2014) (same) ("FAC").

Granting the NCAA leave to amend its Answer is particularly warranted given that Plaintiffs have themselves amended their own pleadings on numerous occasions. Since filing their original Complaint on May 30, 2013, Plaintiffs' *own* pleading deficiencies have twice led this Court to grant them leave to amend. The Court allowed Plaintiffs to amend their initial Complaint to remedy the lack of jurisdiction over their two breach of contract claims, due to the failure to join an indispensable party. The Court also permitted Plaintiffs William Kenney and Jay Paterno to amend to plead "facts supporting an inference that actual contracts were probably forthcoming"—a critical component of their intentional interference claim. *See* Op. & Order at 13, 22 (Jan. 7, 2014).

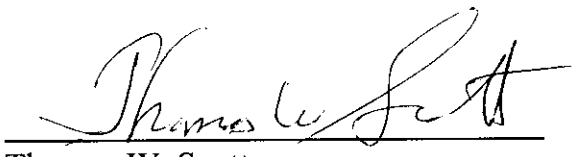
Plaintiffs filed a First Amended Complaint on February 5, 2014, which the Court held did not sufficiently specify what relief was sought against Penn State, and was therefore "insufficient to put Penn State on notice of the claims upon which they will have to defend." Op. & Order at 15-16 (Sept. 11, 2014). However, the Court once again allowed Plaintiffs to amend their complaint. Plaintiffs filed their Second Amended Complaint on October 13, 2014, which included additional amendments beyond the scope of what the Court authorized and without consent from the adverse parties. Despite the fact Plaintiffs "didn't follow the mandated process," the Court noted at oral argument that leave to amend "probably would have" been expeditiously granted, if Plaintiffs had requested it. Hr'g Tr. 40:22-41:4 (Feb. 6, 2015). In the face of this procedural history, denying the NCAA even *one* reciprocal opportunity to amend would be patently unjust. *See, e.g.*, *Martin v. Barfield*, 66 Pa. D. & C. 321, 324 (C.P. 1948) (permitting amendment to correct insufficiently specific denials based on "require[ments]" of "justice").

Accordingly, to cure any purported deficiency in the NCAA's original Answer, to relieve the Court and the parties of the burden of resolving an unnecessary motion, and to commence with litigation of the merits, the NCAA respectfully requests that this Court grant it leave to file its proposed Amended Answer.

CONCLUSION

For the foregoing reasons, this Court should grant the NCAA leave to file its Amended Answer with New Matter.

Respectfully submitted,



Dated: June 16, 2015

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Counsel for Defendants the NCAA, Dr. Emmert, and Dr. Ray

EXHIBIT A

From:	Maher, Trish
To:	Kowalski, Brian (DC); Johnson, Everett (DC); Wisniewski, Drew (DC); Gragert, Sarah (DC)
Cc:	Doran, Samuel
Subject:	RE: Paterno v. NCAA
Date:	Wednesday, June 10, 2015 1:46:16 PM

Brian,

I am following up on our call on Monday and your email message below. In light of Donald Remy's public statement made at essentially the same time we were talking, we think it is best to let the Court rule on our pending motion and your request for leave to amend, if you decide to seek leave. Of course, if the NCAA does believe that its Answer complies with Pennsylvania law, as Mr. Remy stated, then no amendment will be necessary.

Trish

From: Brian.Kowalski@lw.com [mailto:Brian.Kowalski@lw.com]
Sent: Monday, June 08, 2015 4:45 PM
To: Maher, Trish; Doran, Samuel
Cc: EVERETT.JOHNSON@LW.com; Sarah.Gragert@lw.com
Subject: Paterno v. NCAA

Trish –

I wanted to confirm our discussion today. As discussed, the NCAA disagrees strongly with Plaintiffs' position in their motion for judgment on the pleadings that the NCAA's Answer does not comply with Pennsylvania Rule of Civil Procedure 1029, or that any "denials" therein should be deemed "admissions." In any event, even if Plaintiffs were correct on that issue, Pennsylvania law does not permit entry of judgment on the pleadings in these circumstances; if there were any technical faults in the NCAA's Answer (which there are not), the NCAA would have the ability to amend to cure them.

As such, while we maintain our position, we have offered to amend our Answer now, and ask for consent under Rule 1033. Based on your motion, it appears that Plaintiffs believe the NCAA's Answer should provide additional detail concerning its denials, as well as include additional affirmative averments concerning the actual facts in this case. Without agreeing that any amendment to our existing answer is required here, we are more than happy to do so, and welcome the opportunity to once again set forth our positions in this case, as we have been doing for over two years now. We'd propose that Plaintiffs withdraw their motion if the NCAA amends its Answer, as the motion is premised entirely on the existing Answer and would therefore be moot.

We believe this approach is preferable to the alternative: engaging in extensive briefing and argument and placing significant, unnecessary burden on the court, where even if you prevailed on the technical issue, the NCAA would be given the opportunity to amend.

The NCAA believes it is time to move forward and resolve the merits of this case, rather than engage in further, unnecessary briefing and argument. Please let us know if you consent under Rule 1033 to the NCAA amending its Answer. If not, we are prepared to file an opposition to your motion.

Regards,

Brian

Brian E. Kowalski

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Latham & Watkins LLP

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EXHIBIT B

3 Goodrich Amram 2d § 1034(b):14

Goodrich Amram 2d
Database updated June 2015
Civil Action

Christine M. Gimeno, J.D., LL.M.

Rule 1034. Motion for Judgment on the Pleadings
Commentary

§ 1034(b):14 Opportunity to amend pleadings in response to motion

West's Key Number Digest

West's Key Number Digest, Pleading ⚖350(1)

During the pendency of the motion for judgment on the pleadings a party may amend his or her pleading, even though it may remove the issues pending in the motion, and may make the motion moot. [192] Whenever a defect in a party's pleading can be cured by amendment, a motion for judgment on the pleadings should not be granted without affording that party an opportunity to amend his or her pleading. [193] Thus, when the court determines, on a motion for judgment by the defendant, that the complaint fails to state an actionable claim, the court may grant the plaintiff an opportunity to amend. [194] Similarly, the court may grant leave to a defendant to amend the answer while a motion for judgment on the pleadings is pending in order to correct general denials that would otherwise have the effect of admissions, [195] or where the amendment would present a meritorious defense sufficient to withstand the motion. [196] An opportunity to amend the pleadings in response to a motion for judgment on the pleadings need not be granted, however, where it is apparent that any attempt to correct the defect or insufficiency in the pleading would be futile. [197]

Practice Tip:

After judgment on the pleadings is entered upon the granting of a motion, it is generally too late to amend the pleadings in response to the motion. [198] Nevertheless, in one instance, an amendment of the complaint in a medical malpractice action was permitted, following the entry of a judgment on the pleadings in favor of the defendants, where the pleadings disclosed clearly and unequivocally that the plaintiff's action against the physicians had not been commenced within the two-year limitations period following the allegedly unnecessary surgery, and the defendants' answer raised the defense of the statute of limitations as new matter, leave to amend the reply to allege facts to avoid the defense was granted where the plaintiff's application for reconsideration of the entry of judgment on the pleadings was accompanied by an affidavit citing that the plaintiff first became aware of the injury from the unnecessary surgery on his back within two years of the commencement of the action. [199]

Observation:

Where the trial court grants a party an opportunity to amend a defective pleading while a motion for judgment on the pleadings is pending, and the party against whom the motion is directed neglects to file an amended pleading, judgment on the pleadings is properly granted. [200]

192 Swift v. Milner, 371 Pa. Super. 302, 538 A.2d 28 (1988); Beardell v. Western Wayne School Dist., 91 Pa. Commw. 348, 496 A.2d 1373, 27 Ed. Law Rep. 223 (1985).

Treatises and Practice Aids

For a general discussion of the discretionary authority of the court to grant leave to amend a pleading, see Goodrich-Amram § 1033:5 (2d ed.).

193 Bata v. Central-Penn Nat. Bank of Philadelphia, 448 Pa. 355, 293 A.2d 343 (1972); Williams By and Through Williams v. Lewis, 319 Pa. Super. 552, 466 A.2d 682 (1983).

194 Williams By and Through Williams v. Lewis, 319 Pa. Super. 552, 466 A.2d 682 (1983).

195 Pilotti v. Mobil Oil Corp., 388 Pa. Super. 514, 565 A.2d 1227 (1989); Swift v. Milner, 371 Pa. Super. 302, 538 A.2d 28 (1988).

196 Bata v. Central-Penn Nat. Bank of Philadelphia, 423 Pa. 373, 224 A.2d 174 (1966); Pilotti v. Mobil Oil Corp., 388 Pa. Super. 514, 565 A.2d 1227 (1989).

197 Balush v. Borough of Norristown, 292 Pa. Super. 416, 437 A.2d 453 (1981); Wimbish v. School Dist. of Penn Hills, 59 Pa. Commw. 620, 430 A.2d 710 (1981).

198 Bata v. Central-Penn Nat. Bank of Philadelphia, 448 Pa. 355, 293 A.2d 343 (1972); Christie v. Kun, 2 Pa. D. & C.2d 582, 1955 WL 5210 (C.P. 1955).

199 Puleo v. Broad St. Hospital, 267 Pa. Super. 581, 407 A.2d 394 (1979).

200 Swift v. Milner, 371 Pa. Super. 302, 538 A.2d 28 (1988).

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EXHIBIT C

2009 WL 6969700 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania,
Civil Division - Equity.
Northampton County

Margaret HOLLAND n/k/a Meg Holland, Plaintiff,
v.
Jamie LANTZ, Defendant.

No. C-0048-CV-2008-11555.
June 18, 2009.

Order of Court

William F. Moran, J.

AND NOW, this 18th day of June 2009, Plaintiff's Motion for Judgment on the Pleadings is hereby DENIED, as set forth more fully below in the attached Statement of Reasons.

STATEMENT OF REASONS

Presently before the Court is Plaintiff's Motion for Judgment on the Pleadings. This matter commenced on October 30, 2008 with the filing of Plaintiff's Complaint, instituting an action in ejectment against Defendant and seeking equitable relief in the form of an Order of Court directing Defendant to remove a fence adjacent to his property but situate on Plaintiff's property. Defendant filed an Answer and New Matter on November 20, 2008 and the present Motion for Judgment on the Pleadings was then filed on March 26, 2009. The matter came before the Honorable William F. Moran via the Argument Court list of May 5, 2009. The parties having submitted briefs on the motion, the matter is now ready for disposition.

Standard of Law

A motion for judgment on the pleadings functions as a pretrial mechanism, the purpose of which is to allow a court to evaluate the sufficiency of a case. *DiAndrea v. Reliance Savings and Loan Association,* 456 A.2d 1066, 1069 (Pa. Super. Ct. 1986). A party may file such motion at any time after the pleadings are closed but within such time as to cause no unreasonable delay in the case coming to trial. PA.R.CIV.P. 1034. In ruling on a motion for judgment on the pleadings, a court may only consider the content of the pleadings themselves and any documents attached thereto, and must accept as true all well-pleaded facts contained therein. *Wachovia Bank, N.A. v. Ferretti,* 935 A.2d 565, 571 (Pa. Super. Ct. 2007). Further, the court may consider only those facts which have been specifically admitted by the party against whom the motion is made. *Id.* Finally, we note that a court may grant a motion for judgment on the pleadings only when it is clear as a matter of law that no dispute of fact exists between the parties, and therefore, the moving party is entitled to judgment as a matter of law. *Kosor v. Harleysville Mut. Ins. Co.,* 595 A.2d 128, 129 (1991).

Discussion

Plaintiff predicates her motion for judgment on the pleadings on the contention that Defendant's Answer to the underlying Complaint raises no issues of material fact. Specifically, Plaintiff argues that Defendant's Answer and New Matter set forth

nothing more than general denials amounting to admissions, and fails to set forth any valid defense to the action. However, by a brief contra the motion, Defendant asserts the validity of the defenses raised therein, and argues that the Answer contains denials which are specific in nature, thereby raising genuine issues of material fact for the Court to decide. Accordingly, Defendant asserts that the Court must deny Plaintiff's motion.

Under the Rules of Civil Procedure, a general denial in a pleading is deemed an admission. PA.R.CIV.P. 1029 (1994). A denial is deemed specific if it denies the facts averred and affirmatively avers that which did or did not occur. *Id.* Whether an answer constitutes a general denial requires an examination of the pleadings in their entirety. As to the pleading of affirmative defenses, the Court notes that it is not enough to state ones' defenses without summarizing the facts upon which such defenses are based. PA.R.CIV.P. 1019(a) (2001).

Upon examination of Defendant's Answer, the Court notes that Defendant makes specific objections as to averments regarding the permit process applicable to the construction of the subject fence. Yet, all of the other portions of the Answer appear to consist of nothing more than general denials. As to the New Matter, we note that while several defenses are raised therein, Defendant fails to set forth facts in support of the same. Although Defendant's Answer and New Matter are inartfully pled and suffer technical insufficiencies, it would be contrary to the public policies of this Commonwealth to enter judgment on the pleadings on the basis of such insufficiencies. "Where there is any uncertainty or doubt, it should not be assumed that a party cannot plead with more specificity. The court should consider the advisability of directing a party to amend." *Pilotti v. Mobil Oil Corp.*, 565 A.2d 1227, 1229 (Pa. Super. Ct. 1989) quoting *Del Quadro v. City of Philadelphia,* 437 A.2d 1262, 1263 (Pa. Super. Ct. 1981).

In light of the foregoing, Plaintiff's motion for judgment on the pleadings is hereby DENIED without prejudice, and Defendant shall have twenty (20) days within which to file an Amended Answer and New Matter in accordance with the Rules of Civil Procedure and the case law governing the same.

BY THE COURT:

.....

WILLIAM F. MORAN,

J.

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EXHIBIT D

2001 WL 1807905
Only the Westlaw citation is currently available.
Pennsylvania Court of Common Pleas.

JAMES J. GORY MECHANICAL CONTRACTING, INC., Plaintiff
v.
PHILADELPHIA HOUSING AUTHORITY, Defendant

No. 453. | July 11, 2001.

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

HERRON, J.

*1 Plaintiff James J. Gory Mechanical Contracting, Inc. initiated the instant action against Defendant Philadelphia Housing Authority for breach of a construction contract. Unfortunately, both the facts and the procedural history of this matter reveal the Defendant's seeming inability to accomplish tasks in a reasonable period of time, as well as chronic missteps, errors and delays attributable to the Defendant in the conduct of this litigation. The Court has found in favor of the Plaintiff and against the Defendant and has awarded appropriate damages in the amount of $239,984.75, exclusive of interest.

FINDINGS OF FACT

1. James J. Gory Mechanical Contracting, Inc. ("Gory") is a Pennsylvania corporation engaged in business as a mechanical and plumbing construction contractor. N.T. [1] I:9.

[1] All references to Notes of Testimony ("N.T.") are to testimony taken on April 17 and 18, 2000 at trial ("Trial") in Courtroom 443, City Hall, before the Honorable John W. Herron. References to testimony taken on April 17 are marked with a Roman numeral "I," and references to testimony from April 18 are marked with a Roman numeral "II."

2. James J. Gory ("Mr.Gory") has been Gory's president and owner for the past 14 years. N.T. I:9. Mr. Gory has been licensed as a master plumber for 34 years, has extensive work experience in the construction industry and extensive experience in preparing estimates and bids for public works construction contracts. N.T. I:9-I:11.

3. The Philadelphia Housing Authority ("PHA") is the owner of a public housing development known as "Emlen Arms," located at 6733 Emlen Street, Philadelphia, Pennsylvania 19119. N.T. I:12.

The Emlen Arms Project and the Contract

4. On May 9, 1996, PHA and Gory entered into a public works construction contract for plumbing construction ("Contract") in connection with the modernization of Emlen Arms ("Project"). N.T. I:10-I:11; Plaintiff's Ex. 5. [2] As part of the Project, Emlen Arms' nine floors would be gutted and remodeled, beginning with the bottom floor and continuing up to the ninth floor. N.T. I:21-I:22.

[2] The Contract was composed of several documents, including the General Conditions of the Contract for Construction, Public and Indian Housing Programs" and "PHA General Conditions." Plaintiff's Exs. 2 and 3.

5. Gory was responsible for the Project's plumbing and sprinkler work ("Plumbing Work"). N.T. I:11. The original Contract price for the Gory's Plumbing Work was $1,227,900.00. *Id.* I:12.

6. About the same time, PHA entered into three other contracts for the Project: a "General Construction" contract with Daniel J. Keating ("Keating"); a "Mechanical Construction" contract with Ross/ ARACO and an "Electrical Construction" contract with Nucero. N.T. I:12.

7. The Contract set forth a set of "Special Contract Requirements." Plaintiff's Ex. 4. The Special Contract Requirements identified Barclay White/ McCrae ("Barclay") as the Project construction manager and Sheward & Associates ("Sheward") as the Project architect. *Id.* at ¶¶ 3-4.Each of Barclay and Sheward was "PHA's authorized representative to the extent set forth below and elsewhere in this contract."*Id.* at ¶¶ 5A, 7A.

8. According to the Special Contract Requirements, Barclay was to provide "services necessary to manage and coordinate construction on" the

Project. Plaintiff's Ex. 4 at ¶ 5A. Barclay's specific duties included the following:

Preparing a comprehensive Project plan and schedule and requiring that each prime contractor take necessary and appropriate measures to maintain the schedule.

*2 Requiring each prime contractor to coordinate work on the Project with the work to be performed with other contractors.

Establishing procedures for coordination between each prime contractor, PHA, other contractors, Sheward and the residents of Emlen Arms.

Calling meetings, which were to be attended by each prime contractor and their subcontractors and material suppliers, as necessary for effective pursuit and coordination of the work.

Determining the adequacy of each prime contractor's personnel and equipment and the availability of necessary materials and suppliers.

Taking action necessary to maintain the Project schedule.

Id. at ¶ 5B.

9. The Special Contract Requirements also included "Preliminary Project Milestones," which set forth "the number of calendar days by which defined work activities on the Project are to be completed."Plaintiff's Ex. 4 at D-37. According to the Preliminary Project Milestones, the Project was to be completed within 500 days of the date on which the notice to proceed was issued. *Id.*

10. The Contract also included a provision requiring that Gory submit certain Contract disputes to a "Contracting Officer" for a written decision prior to filing suit in court ("Arbitration Provision"). Plaintiff's Ex. 2 at ¶ 31.

11. In preparing its bid for the Project, Gory relied on the terms of the Contract, especially the 500-day deadline for Project completion in the Preliminary Project Milestones. N.T. I:15. Specifically, this completion date impacted calculations as to overhead costs and bonding capacity. *Id.* at I:16-I:17.

12. PHA issued a "Notice to Proceed" in the Project on May 15, 1996. Plaintiff's Ex. 5. The Notice to Proceed directed Gory to begin work on the Project on May 20, 1996 and set October 1, 1997 as the Project completion date. *Id.*

13. The Notice to Proceed stated that Clarence Mosely ("Mr.Mosely") was the Contract representative and that he had "the responsibility of coordinating this work on a daily basis and, as such, will be [PHA's] principal contact person" with Gory. Plaintiff's Ex. 5.

14. When the Project began, Mr. Gory attended biweekly Project meetings and additionally was on the Project site approximately three times a week from May 1996 to April 1998 and once a week from May to July 1998. N.T. I:34, I:87-I:88.

Project Problems

15. On December 5, 1996, Gory advised Barclay by letter that Gory was being delayed in completing the Plumbing Work in 12 specific units on upper floors of Emlen Arms due to a lack of metal studs. N.T. I:19-I:22; Plaintiff's Ex. 6. The responsibility for installing these studs fell on Keating, the general contractor for the Project. N.T. I:19-I:20. Gory received no response to this letter. *Id.* 21.

16. On December 19, 1996, Gory sent Barclay a second letter regarding the delay. N.T. I:22; Plaintiff's Ex. 7. Gory received no response to this letter. N.T. I:23.

*3 17. On January 3, 1997, Gory sent Barclay a letter via certified mail advising Barclay that the studs still had not been installed and complaining that Gory was being "piecemealed" and "financially burdened" as a result. N.T. I:23-I:24; Plaintiff's Ex. 8. [3] Gory informed Barclay that the continuing delay was interfering with Gory's completion date and that Gory would withdraw its employees from the Project if the Project was not completed on time. *Id.* Although Barclay received this letter on January 10, 1997, Gory received no response. N.T. I:24; Plaintiff's Ex. 8.

3 "Piecemealing" refers to completing small portions of work in different areas and parts of a project and is contrary to typical construction procedures. N.T. I:24;

Plaintiff's Ex. 19. In this case, it led to Gory "jumping around the building trying to find work to do...." N.T. I:24.

18. On May 13, 1997, Gory sent Barclay a fourth letter, which requested $565 per month for each month after May 1, 1997 for storing plumbing fixtures. N.T. I:25; Plaintiff's Ex. 9. The need for storage arose because construction that had to be completed before Gory could install the fixtures was not completed.*Id.* Gory received no response to this letter. N.T. I:26.

19. On September 24, 1997, Gory advised Barclay that Gory was being delayed due to a lack of bathroom tile floors and kitchen cabinets and tops. N.T. I:26-I:27; Plaintiff's Ex. 11. The responsibility for installing the bathroom tile floors and kitchen cabinets and tops fell on Keating. N.T. I:26. Gory received no response to this letter.*Id.* at I:27.

20. Gory sent Barclay a fax memorandum on October 9 and again on October 10, 1997 notifying Barclay that Gory anticipated being "out of work" as of the week of October 17, 1997 due to lack of progress in specific areas and floors. N.T. I:27-I:28; Plaintiff's Ex. 12. Gory received no response to this fax memo. N.T. I:28.

21. On October 20, 1997, Gory notified Barclay via fax memorandum that, for the reasons stated in its fax memo of October 10, 1997, it had removed its work force from the Project as of October 16, 1997. N.T. I:28; Plaintiff's Ex. 13.

22. On December 3, 1997, Gory faxed Barclay a letter advising that "[t]he delay past the completion date of 10/1/97 is not the fault of JJGory [sic] Mechanical and we expect to be compensated for any and all cost beyond that date."N.T. I:35-I:36; Plaintiff's Ex. 15. Gory also informed Barclay that it had not been paid since May 1997 and requested an open change order for $500.00 per diem past the completion date. *Id.* Gory received no response to this letter. N.T. I:36.

23. By a contract modification dated January 19, 1998 ("Modification"), PHA extended the Project completion date 190 days from October 1, 1997 to April 10, 1998. N.T. I:36-I:37; Plaintiff's Ex. 17. This extension purported to be at no additional cost to PHA. N.T. I:37-I:38; Plaintiff's Ex. 17.

24. Gory refused to accept the Modification at no cost and advised Barclay as much in a letter dated January 28, 1998. N.T. I:41; Plaintiff's Ex. 18. In its letter, Gory indicated that it would accept a change order in the total amount of $95,000.00, based on a $500.00 charge per day for 190 days. N.T. I:43-I:44; Plaintiff's Ex. 18. Gory sent a copy of this letter to Mr. Mosely and attached copies of its previous letters informing Barclay of the delay. N.T. I:41-I:42; Plaintiff's Ex. 18. Mr. Mosely did not respond to this letter. N.T. I:43.

*4 25. On February 3, 1998, Gory returned the signed Modification to PHA with the following language inserted:

It should further be understood that the execution of this document neither prejudices, limits or adversely affects James J. Gory Mechanical Contracting, Inc.'s intended delay claim against the Philadelphia Housing Authority and/or others.

N.T. I:38; Plaintiff's Ex. 17. A representative of PHA signed the Modification on March 2, 1998. Plaintiff's Ex. 17. At no point thereafter did PHA make additional contract modifications extending the Project's completion date. N.T. I:50.

26. On January 28, 1998, Gory sent a letter to Barclay and Mr. Mosely stating that Gory was still being piecemealed and that the work necessary for Gory to install plumbing was "randomly missing throughout the 9th, 8th and 7th floors."N.T. I:45-I:47; Plaintiff's Ex. 19. In the letter, Gory advised Barclay and Mr. Mosely that Gory would "complete what is available" and would not return to "unfinished floors without additional compensation." Plaintiff's Ex. 19. Gory received no response to this letter. N.T. I:45.

27. In addition to sending letters and fax memoranda to Barclay and Mr. Mosely, Gory and others regularly raised the delay concerns at the biweekly Project meetings, at which Mr. Mosely and representatives of Barclay were present. N.T. I:29-I:30, I:89-I:90, I:114-I:115, I:157.

28. Between April 10, 1998, the Project completion date as modified, and July 11, 1998, PHA made at least four performance and installation

requests of Gory. N.T. I:54-I:55; Plaintiff's Ex. 29. Although the Contract modification authorizing this additional work was not approved by a Contracting Officer until January 5, 1999, Gory did the work in question earlier based on the belief that PHA was behind on its paperwork and would subsequently authorize and issue payment. N.T. I:49-I:50; Plaintiff's Ex. 29.

29. All work on the Project was substantially completed in July 1998, and the building was occupied around that time. N.T. I:56-I:57, I:87-I:88, I:102, I:176.

Outstanding Amounts for Contract Work

30. On December 18, 1998, Gory submitted Application for Payment Number 16, in which Gory sought payment for ten items of change order work it had performed. N.T. I:72-I:74. The total amount requested in Application for Payment Number 16 at that time was $60,948.11. *Id.* at I:72.

31. Between December 18, 1998 and October 5, 2000, Gory repeatedly telephoned, faxed and sent letters to Mr. Mosely and PHA employee Daniel McCusker ("Mr.McCusker") regarding Application for Payment Number 16. N.T. I:72-I:76; Plaintiff's Exs. 34-39. At no point did PHA respond or make payment on Application for Payment Number 16. N.T. I:72-I:76.

32. On October 5, 2000, Gory submitted a Revised Application for Payment Number 16 for $93,520.75. N.T. I:77; Plaintiff's Ex. 40. This amount represented payment for six items of change order work completed by Gory, totaling $56,864.92, and retainage withheld from payment on an earlier application, totaling $36,655.83. Plaintiff's Exs. 33A, 40. To date, Gory has not received payment on Revised Application for Payment Number 16. N.T. I:77.

*5 33. In addition to the amount outstanding on Revised Application for Payment Number 16, Change Order Number Eight reflects a charge of $4,964.00 for underground storm line testing done by Gory. N.T. I:78-I:79. Although PHA paid Gory for the amount due on this change order, it later retracted payment, and the $4,964.00 charge is not included in Revised Application for Payment Number 16. *Id.* I:79.

34. The total amount of the payment due and owing Gory by PHA for contract work performed and completed, inclusive of change order work, is $98,484.75.

Outstanding Amounts for Project Extension Costs

35. Gory's bid on the Project was based on a Project duration of 500 calendar days. N.T. I:16; Plaintiff's Ex. 4.

36. Gory was required to continue its presence at Emlen Arms for a period of 283 calendar days beyond the 500-calendar day period originally allotted for completion of the Project ("Extension"). N .T. II:18; Plaintiff's Ex. 18; Defendant's Ex. 2.[4] The reasons for the Extension are in no way attributable to Gory and arise from Keating's failure to complete its work in a timely fashion, PHA and Barclay's failure to coordinate and manage the Project efficiently and PHA and Sheward's design defects. N.T. I:29-I:35, I:174.

4 Gory originally asserted that the Extension Period was 190 days long but amended its calculations to 283 days based on evidence presented by PHA at the Trial. N.T. II:24-II:28.

37. For each calendar day beyond the original 500-calendar day period that Gory continued its presence at Emlen Arms, Gory incurred additional expenses of $500.00. N.T. I:43. This amount included additional expenses for a project manager, superintendent, payroll preparation, bookkeeping, bonding capacity and other extended general conditions and administrative costs. *Id.* I:16-I:17, I:44, I:121-I:124.

38. Although PHA has disputed this additional expense amount, they have provided no substantive basis for their proposed expense amount. N.T. II:16-II:17. In addition, Mr. McCusker, who testified as to the expense amount proposed by PHA, had no involvement in the Project and has never owned or managed a construction company.*Id.* II:17-II:18.

39. The total amount of costs incurred by Gory due to the delay of the Project's completion beyond the 500-calendar day period amount to $141,500.00.

Procedural Issues

40. Gory commenced this action by filing a complaint against PHA ("Complaint") on February 9, 2000. In the Complaint, Gory asserted that it had "fully performed and completed all of the work required for the Plumbing Construction of the Project, and all conditions precedent to Gory's right to claim and have judgment entered against PHA in this civil action have been satisfied and discharged, or have been waived by PHA."Complaint at ¶ 10.

41. In its Answer, filed April 19, 2000, PHA purported to deny the allegations in Paragraph 10 of the Complaint:

> It is specifically denied that the plaintiff performed and completed all of the work required for the Plumbing Construction of the Project and further specifically denied that all conditions precedent have been satisfied, discharged or waived by answering defendant Philadelphia Housing Authority. On the contrary defendant incorporates its answer to paragraph nine above as if the answer was herein set forth at length.

***6** PHA's answer to the Complaint and new matter ("Answer") at ¶ 10. [5]

5 Paragraph Nine of the Answer states as follows:

> It is specifically denied that plaintiff undertook the performance of the work for the Plumbing Construction of the Project and did at all times stand ready, willing and able to furnish, install and complete all of the required work in accordance with the requirements of the Contract Documents. On the contrary plaintiff failed to adhere to the required provisions of the contract in question and therefore breached same. The specifics of the contract breach are in dispute and are the subject matter of this lawsuit.

Answer at ¶ 9.

42. As part of the Answer, PHA asserted as a new matter that the Court did not have jurisdiction over this dispute because of Gory's alleged failure to adhere to the Arbitration Provision's requirements and to submit the dispute to a Contracting Officer. Answer at ¶¶ 29-33.

43. Discovery in this matter, in which both Parties actively participated, was closed on August 7, 2000, and the deadline for filing pre-trial motions was October 16, 2000.

44. On November 27, 2000, over seven months after it filed the Answer, PHA filed a praecipe to demand a jury trial. Because this demand was not filed within 20 days of the last pleading, as required by Pennsylvania Rule of Civil Procedure 1007.1(a), the Court granted Gory's Motion to Strike Demand for Jury Trial on March 13, 2001.

45. The Parties attended a court-sponsored settlement conference on February 9, 2001. At no point between filing the Answer and attending this conference did PHA make any attempt to invoke the Arbitration Provision or request the extension of any deadline.

46. On February 16, 2001, nearly one year after being served with the Complaint and a mere two months before the scheduled Trial date of April 17, PHA filed a motion for summary judgment requesting that the Court enter judgment in its favor based on Gory's alleged failure to abide by the Arbitration Provision's terms.

47. On February 27, 2001, PHA filed a motion requesting leave to amend its answer to the Complaint to include a counterclaim arising from Gory's alleged failure to complete its work on the Project. The Court denied this motion on April 5, 2001.

48. On April 10, 2001, the Court issued an order and an accompanying opinion denying PHA's motion for summary judgment. *James J. Gory Mech. Contr., Inc. v. Philadelphia Housing Auth.*, February Term, 2000, No. 453 (C.P.Phila.Apr. 5, 2001) (Herron, J.) . [6]

6 Available at http://courts.phila.gov/cptcvcomp.htm.

49. At the Trial, the Court ruled that PHA's denial in Paragraph 10 of the Answer was a general denial and constituted an admission that Gory had completed the Plumbing Work required of it in the Contract and had

satisfied all conditions precedent. N.T. I:108-I:109. PHA sought leave to amend the Answer to include a more specific denial, but the Court denied PHA's motion and prevented PHA from presenting testimony as to Gory's alleged failure to comply with the Contract. *Id.* at II:7-II:7, II:11-II:12.

DISCUSSION

PHA's proposed findings of fact and conclusions of law are peculiar in that they discuss only the alleged errors made by the Court during the Trial and effectively ignore the substantive matters in dispute in this case. Specifically, PHA focuses almost exclusively on the Court's refusal to enforce the Arbitration Provision and the Court's treatment of portions of the Answer as an admission that was unamendable at Trial.

PHA's assertions cannot mask the fact that the Court's conclusions are attributable not to "legal error" or to any fault of Gory. Rather, PHA's arguments are fatally undermined by its repeated failure to manage both the Project and this case in a responsible manner and by the prejudice that the course of action it urges would cause Gory. As a result, the Arbitration Provision does not preclude Gory from seeking redress in this forum, and Gory's substantive claims are meritorious.

I. PHA Has Waived its Right to Enforce the Arbitration Provision

*7 In its proposed findings of fact and conclusions of law, PHA reiterates the previously rejected argument that the Arbitration Provision requires Gory to submit this dispute to a Contracting Officer before the Court can hear the matter. Because PHA did not act on this claim until two months before the Trial, however, it waived the right to raise this argument. [7]

7 Although the Court believes it addressed this matter adequately in its April 10, 2001 opinion, it has incorporated its justifications into this opinion for the sake of completeness and comprehensiveness.

In general, Pennsylvania favors the dispute settlement through arbitration [8] as a way "to promote swift and orderly disposition of claims."*Midomo Co. v. Presbyterian Hous. Dev. Co.*, 739 A.2d 180, 190 (Pa.Super.Ct.1999) (quoting *Hazleton Area School Dist. v. Bosak*, 672 A.2d 277, 282 (Pa.Commw.Ct.1996)).*See also In re Fellman*, 412 Pa.Super. 577, 582, 604 A.2d 263, 265 (1992) ("[a]rbitration agreements are generally encouraged as a prompt, economical and adequate solution of controversies"). A line of Pennsylvania cases holds that a mandatory arbitration provision deprives a court of subject matter jurisdiction. *See, e.g., Shumake v. Philadelphia Bd. of Educ.*, 454 Pa.Super. 556, 561, 686 A.2d 22, 25 (1996). Because "lack of subject matter jurisdiction is a defense that cannot be waived,"*LaChappelle v. Interocean Mgmt. Corp.*, 731 A.2d 163, 167 (Pa.Super.Ct.1999), it could be inferred from this line of cases that an objection based on an agreement to arbitrate may be raised at any time and cannot be waived.

8 While PHA bases its argument on Gory's failure to exhaust administrative remedies, it has been noted that Pennsylvania's policy of favoring arbitration is comparable to the "long-standing public policy of hesitancy to interfere with administrative proceedings before all administrative remedies have been exhausted."*Mid-Atlantic Toyota Distribs., Inc. v. Charles A. Bott, Inc.*, 101 Pa. Commw. 46, 52-53, 515 A.2d 633, 636 (1986) (citation omitted).*Cf. Lancaster Cty. v. Pennsylvania Labor Relations Bd.*, 761 A.2d 1250, 1257 (Pa.Commw.Ct.2000) (applying law on failure to exhaust administrative remedies to a request for arbitration).

Recently, however, Pennsylvania courts have reached the opposite conclusion, and a pattern of cases holding that the defense of arbitration is waivable has emerged. *See, e.g., Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. Partnership*, 416 Pa.Super. 45, 49, 610 A.2d 499, 501 (1992) (concluding that the defendant "waived its right to enforce the arbitration clause"). Courts have looked at the following to evaluate a claim of waiver:

> The key to determining whether arbitration has been waived is whether the party, by virtue of its conduct, has accepted the judicial process. Acceptance of the judicial process is demonstrated when the party (1) fails to raise the issue of arbitration promptly, (2) engages in discovery, (3) files pretrial motions which do not raise the issue of arbitration, (4) waits for adverse rulings on pretrial motions before asserting arbitration, or (5) waits until the case is ready for trial before asserting arbitration.

St. Clair Area Sch. Dist. Bd. of Ed. v. E.I. Assocs., 733 A.2d 677, 682 n. 6 (Pa.Commw.Ct.1999) (citations omitted).

While a defense of arbitration clearly is waived if not raised as a new matter, the Superior Court made it clear in *Goral v. Fox Ridge, Inc.*, 453 Pa.Super. 316, 683 A.2d 931 (1996), that merely raising an agreement to arbitrate in this manner is not sufficient to preserve the defense. In *Goral,* the defendants pleaded as a new matter that, "alternatively, any of [the plaintiffs'] claims that are not barred by the applicable statute of limitations are required by ... agreement of sale to be submitted to common law arbitration." 453 Pa.Super. at 319, 683 A.2d at 932. Ten months later, the defendants objected to a request for discovery, arguing that the plaintiffs' claims had to be submitted to arbitration. Nearly six months after the discovery dispute, the defendants filed a motion to compel arbitration, which the trial court denied.

***8** On appeal, the Superior Court affirmed the lower court's decision, concluding that the defendants' "repeated references to the arbitration [were] not sufficient to avoid a finding of waiver."453 Pa.Super. at 321, 683 A.2d at 933. The fact that the defendants raised the question of arbitration in their new matter specifically was unpersuasive because "[t]hey did so ... only as an alternative to their preferred option of winning a favorable ruling from the court."453 Pa.Super. at 322, 683 A.2d at 933. The court also noted that, prior to filing their motion to compel, the defendants "did nothing to move the matter to arbitration" and instead "allowed the case to linger on the trial court's docket and awaited discovery."453 Pa.Super. at 323, 683 A.2d at 934. Had the defendants truly wanted the matter resolved by arbitration, the court counseled, they could have, and, impliedly, should have, taken steps toward that end in their preliminary objections. 453 Pa.Super. at 322, 683 A.2d at 934.

The facts of this matter are similar to those of *Goral.*Here, before filing the Motion on February 16, 2001, PHA made no attempt to invoke the defense of administrative remedies after raising it in its answer almost a year before.[9] Indeed, the court's reasoning in *Goral* is even more convincing here, as this case had progressed far beyond discovery and was scheduled for trial less than a month after the relevant motion was assigned.[10] By engaging in discovery, waiting until the eve of the Trial to submit its motion, participating in a court-sponsored settlement conference, demanding a jury trial and attempting to assert a counterclaim, PHA demonstrated a clear acceptance of the judicial process. In addition, referring this matter to arbitration after such extensive court involvement would fail to advance, and would even subvert, arbitration's purpose of increased efficiency and judicial economy. *Cf. School Dist. of Phila. v. Livingston-Rosenwinkel, P.C.*, 690 A.2d 1321, 1322 (Pa.Commw.Ct.1997) (refusing to enforce arbitration provision "because enforcement of the arbitration provision would frustrate the public policy interest in efficient dispute resolution"). Thus, PHA waived any right it may have had to enforce the Arbitration Provision, and PHA's argument that this matter must be submitted to a Contracting Officer must be rejected once again.

9 PHA's failure to raise the defense of administrative remedies is even more inadequate than the *Goral* defendants' "repeated references" to the arbitration provision in that case. In addition, the *Goral* defendants cited the relevant arbitration provision in their new matter, while PHA did not specifically invoke the Arbitration Provision or Gory's obligation to submit this matter to a Contracting Officer at any point before filing the Motion.

10 According to the docket in this matter, PHA's motion for summary judgment was assigned on March 23, 2001, and its motion to amend was assigned on April 3, 2001.

II. Gory Has Sustained its Breach of Contract Claim

To establish a claim for breach of contract, a claimant must show "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages."*CoreStates Bank, N.A. v. Cutillo,* 723 A.2d 1053, 1058 (Pa.Super.Ct.1999) (citation omitted). While a breaching party may pursue a breach of contract claim against another breaching party, the pursuing party's recovery is limited to those benefits "in excess of the loss that he has caused by his own breach."*Lancelotti v. Thomas,* 341 Pa.Super. 1, 10, 491 A.2d 117, 122 (1985) (quoting Restatement (Second) of Contracts § 374(1) (1979)).

***9** Gory has established, and PHA appears to acknowledge, that the Contract satisfies the first requirement of this cause of action, namely, the existence of a contract. The remaining questions are whether PHA breached the Contract and, if so, the amount of damages Gory suffered as a result.

A. By Failing to Pay Gory for its Work and by Failing to Ensure the Project's Timely Completion, PHA Breached the Contract

In the course of the Trial, Gory showed that PHA breached the Contract by failing to pay Gory for its work. Even a cursory examination of the record reveals a recurring pattern: Gory requested payment, and PHA invariably ignored to Gory's requests. Because of PHA's continuing delinquency, there remain outstanding amounts that PHA has never paid Gory, a clear breach of the Contract.

PHA also breached the Contract through the delay of the Project and its failure to ensure that the Preliminary Project Milestones were met. The Contract specifies that the Project is to extend 500 days and assigns responsibility for ensuring completion within that time frame to PHA and its representatives. Plaintiff's Ex. 4 at 5B, D-37. While Plaintiff's Exhibit 17 establishes that Gory agreed to the 190-day Extension proposed by PHA,[11] this was done with the express condition that Gory's consent "neither prejudices, limits or adversely affects" Gory's delay claim against PHA. Plaintiff's Ex. 17. In addition, the reasons for the delay are clearly attributable to PHA: in spite of the many specific notices Gory sent to PHA and its representatives informing them of the ongoing Project delays, PHA ignored these notices and took no action to remedy the situation.[12] *Cf. Coatesville Contractors & Eng'rs. Inc. v. Borough of Ridley Park,* 509 Pa. 553, 560, 506 A.2d 862, 865 (1986) ("exculpatory provisions in a contract cannot be raised as a defense where ... there is a failure on the part of the owner to act in some essential matter necessary to the prosecution of the work"). Thus, PHA breached the Contract by failing to ensure that the Project was completed within the 500-day period set forth in the Contract and by failing to pay Gory amounts required by the Contract.

11 As an aside, there is no evidence that Gory consented to extending the completion date for the Project beyond the Extension Period.

12 PHA also appears to take issue with the fact that Gory first communicated its concerns about the Project to Barclay and not to Mr. Mosely, the Contracting Officer or PHA directly. The Contract, however, indicates that Barclay is PHA's authorized representative on the Project, and the concerns that Gory was seeking to have addressed fall within the scope of Barclay's responsibilities. Plaintiff's Ex. 4 at ¶ 5A. In addition, Gory raised its concerns about the delay at meetings at which Mr. Mosely was present. As a result, even if Gory did not communicate with the official Contracting Officer or anyone else at PHA directly, its actions are understandable and excusable.

B. Gory Is Entitled to Damages for the Full Amounts Due for Work Completed and for the Project Delays

Gory contends that it is owed compensation for unpaid Plumbing Work it did on the Project and for the delays in completing the Project. The Court agrees and further concludes that PHA's allegations that Gory also breached the Contract do not entitle it to limit the amounts it owes Gory.

1. PHA's Breach of the Contract Has Damaged Gory in the Amount of 239,984.75, Exclusive of Interest

Gory's claim for damages can be broken down into two parts: damages for Plumbing Work for which it was never paid and damages for the delay in the Project's completion.

Plaintiff's Exhibit 40 shows that the total adjusted Contract amount payable to Gory was $1,523,097.77. This is within the payment modification amounts authorized by PHA. Plaintiff's Ex. 29.[13] To date, Gory has been paid only $1,429,577.02, leaving a balance of $93,520.75. Plaintiff's Ex. 40; N.T. I:77. In addition, PHA had paid Gory $4,964.00 for work done in accordance with Change Order Number Eight but subsequently withdrew its payment. N.T.I:77-I:79. Thus, the total amount outstanding for Gory's work on the Project is $98,484.75.

13 Although Plaintiff's Exhibit 29 indicates an adjusted authorized Contract amount of $1,537,174.66, it appears from Plaintiff's Exhibit 40 that subsequent modifications lowered this to $1,523,097.77.

***10** Gory contends that it is entitled to interest on the amount outstanding, and the Court must concur. Under 73 Pa.C.S. § 1628 (repealed as of Nov. 11, 1998), which was in effect at the time the Contract was executed, a contractor working under a public contract[14] is entitled to interest on a final payment:

14 A "public contract" is defined as follows:

> A contract exceeding $50,000 for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including heating or plumbing contracts, under the terms of which the contractor is required to give a performance bond and labor and material payment bond as provided by the act of December 20, 1967 (P.L. 869, No. 385) known as the "Public Works Contractors' Bond Law of 1967," but excepting work performed for the State Highway and Bridge Authority.

73 Pa.C.S. § 1621 (repealed as of Nov. 11, 1998). The Contract appears to satisfy these requirements.

The final payment due the contractor from the contracting body after substantial completion of the contract shall bear interest at a rate of 6% per annum for all contracts without provisions for retainage and at a rate of 10% per annum for all contracts with provisions for retainage, such interest to begin after the date that such payment shall become due and payable to the contractor: Provided, however, That where the contracting body has issued bonds to finance the project, interest shall be payable to the contractor at the rate of interest of the bond issue or at the rate of 10% per annum, whichever is less.

73 Pa.C.S. § 1628.[15] Here, the Contract includes a retainage clause, and there is no indication that PHA issued bonds to finance the Project. Plaintiff's Ex. 2 at ¶ 27(f). Moreover, it is apparent that the Project, including Gory's work under the Contract, was substantially completed[16] and that the outstanding amounts were payable and due by February 1, 1999, the date from which Gory has requested that the Court compute interest. Thus, Gory is entitled to interest on the outstanding amount of $98,484.75 at a rate of 10 percent per annum beginning February 1, 1999.

15 This statute may be treated as part of the Contract because "substantive laws in effect when the parties enter into a contract are implicitly incorporated into it."*Parsonese v. Midland Nat'l Ins. Co.*, 550 Pa. 423, 428-29, 706 A.2d 814, 816 (1998) (citing *DePaul v. Kauffman*, 441 Pa. 386, 398, 272 A.2d 500, 506 (1971)).

16 "Substantial completion" is defined as follows:

> Construction that is sufficiently completed in accordance with contract documents and certified by the architect or engineer of the contracting body, as modified by change orders agreed to by the parties, so that the project can be used, occupied or operated for its intended use. In no event shall a project be certified as substantially complete until at least 90% of the work on the project is completed.

73 Pa.C.S. § 1621 (repealed Nov. 11, 1998). Because Emlen Arms has been occupied, the Court has inferred that PHA has certified it as completed.

Gory is also entitled to damages caused by the PHA's failure to prevent the 283-calendar day delay of the Project. Pennsylvania law allows a plaintiff to establish damages by "expert witnesses, or by persons with knowledge and experience qualifying them to form a reasonably intelligent judgment as to value."*Walnut Street Fed. Sav. & Loan Ass'n v. Bernstein*, 394 Pa. 353, 356, 147 A.2d 359, 361 (1959) (quoting *Westinghouse Air Brake Co. v. City of Pittsburgh*, 316 Pa. 372, 376, 176 A. 13, 15 (1934)). Mr. Gory's credentials and extensive experience qualify him to estimate the delay-related damages, and the evidence supporting his conclusion that he suffered losses amounting to $500.00 per calendar day of delay is compelling. *Cf. Pennsylvania Dept. of Transp. v. James D. Morrissey, Inc.*, 682 A.2d 9, 16 (Pa.Commw.Ct.1996) (a contractor "is not required to prove its actual costs with mathematical certainty; rather, it need only introduce evidence which affords a sufficient basis for estimating the damages with reasonable certainty," and "estimates which have a basis in reason are legally sufficient to support an award"); *Barrack v. Kolea*, 438 Pa.Super. 11, 22, 651 A.2d 149, 155 (1994) (evidence is sufficiently substantial to support an award of damages if it is "relevant and adequate to support a reasonable person's conclusion"). Mr. McCusker, in contrast, does not have Mr. Gory's expertise or experience, was not involved in the Project and gave no substantive basis for his estimate of $75.00 per week in damages. *Cf. Sprang & Co. v. USX Corp.*, 410 Pa.Super. 254, 264, 599 A.2d 978, 983 (1991) (discounting testimony of appellant's witnesses where they did no more than "attack the conclusions drawn by appellee's experts"). As a result, the Court must agree with Gory that it suffered damages attributable to PHA as a result of the 283-calendar day delay in the amount of $500.00 per calendar day, for a total of $141,500.00 in damages. When the amount owed for Gory's work on the Project is included, PHA owes Gory a total sum of $239,984.75 in damages, exclusive of interest.

2. Gory Fulfilled its Obligations under the Contract, Precluding Any Limitation on Damages

***11** PHA has attempted to argue that Gory breached its obligations under the Contract, precluding it from recovering the full amount it claims is due.[17] In answering the Complaint, however, PHA admitted that Gory completed all the work required of it under the Contract. In addition, allowing PHA to amend the Answer at Trial and to withdraw its admission would have caused Gory substantial prejudice and would have been improper. Accordingly, the Court cannot find that Gory breached the Contract or that its damages should be limited.[18]

17 PHA sought to amend the Answer to assert a counterclaim on this basis. Due to the lateness of its motion to amend and the prejudice it would have caused Gory, however, the Court denied PHA's motion.

18 As noted *supra*, the fact that a claimant has also breached a contract does not foreclose the possibility of recovery completely but merely limits the claimant to damages in excess of the harm he or she has caused. *Lancelotti v. Thomas*, 341 Pa.Super. 1, 10, 491 A.2d 117, 122 (1985) (quoting Restatement (Second) of Contracts § 374(1))

a. PHA's General Denial in its Answer Constitutes an Admission That Could Not Be Amended at Trial

Under Pennsylvania Rule of Civil Procedure 1019(c) ("Rule 1019(c)"), a pleading party may aver the satisfaction of conditions precedent generally. In contrast, Rule 1019(c) requires that a denial of the performance, occurrence or satisfaction of conditions precedent be made "specifically and with particularity." Rule 1019(c). When a denial of this kind is made without specificity, such a general denial "shall have the effect of an admission."Pa. R. Civ. P. 1029(b).*See also First Wis. Trust Co. v. Strausser*, 439 Pa.Super. 192, 199, 653 A.2d 688, 692 (1995) (mortgagor's general denial of mortgagee's allegation regarding total amount due on mortgage constituted admission, allowing summary judgment); *Swift v. Milner*, 371 Pa.Super. 302, 309, 538 A.2d 28, 30 (1988) (by failing to deny specifically, the defendant admitted all allegations as to liability, allowing summary judgment on that issue); *City of Phila. v. Kenny*, 28 Pa. Commw. 531, 543-45, 369 A.2d 1343, 1250-51 (1977) (because general denial of liability did not imply denial of alleged failure to file return or to pay tax, such allegations were deemed admitted).[19] To determine whether a denial has been made with the requisite degree of specificity, a court must look at the pleading as a whole.*Commonwealth by Preate v. Rainbow Associates, Inc.*, 138 Pa. Commw. 56, 61, 587 A.2d 357, 360 (1991) (citation omitted); *Cercone v. Cercone*, 254 Pa.Super. 381, 391, 386 A.2d 1, 6 (1978).

19 In this sense, a general denial is unlike a general allegation in a complaint, which violates Pennsylvania's pleading rules and is subject to preliminary objections. *See Connor v. Allegheny Gen. Hosp.*, 501 Pa. 306, 311 n. 3, 461 A.2d 600, 602 n. 3 (1983) (if the defendant believed that allegations in the complaint were insufficiently specific, it "could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of [the] complaint").

PHA has asserted that Paragraphs Nine and Ten of the Answer constitute a specific denial of Gory's assertions of complete performance and satisfaction of conditions precedent:[20]

20 PHA relies on *Roban Construction, Inc. v. Housing Authority of City of Hazleton*, 67 Pa. D. & C.2d 130 (C.P. Luzerne 1974), to assert that Gory's Complaint does not include the allegation that it completed the work required of it under the Contract. In *Roban Construction, Inc.*, the court held that an averment of completed work does not constitute an allegation that conditions precedent have been satisfied if the contract in question imposed additional obligations on the plaintiff. In the instant case, however, Gory has specifically alleged that it satisfied all conditions precedent, rendering *Roban Construction, Inc.* irrelevant.

> 9. Denied. It is specifically denied that plaintiff undertook the performance of the work for the Plumbing Construction of the Project and did at all times stand ready, willing and able to furnish, install and complete all of the required work in accordance with the requirements of the Contract Documents. On the contrary plaintiff failed to adhere to the required provisions of the contract in question and therefore breached same. The specifics of the contract breach are in dispute and are the subject matter of this lawsuit.
>
> 10. Denied. It is specifically denied that the plaintiff performed and completed all of the work required for the Plumbing Construction of the Project and further specifically denied that all conditions precedent have been satisfied, discharged or waived by answering defendant Philadelphia Housing Authority. On the contrary defendant incorporates its answer to paragraph nine above as if the answer was herein set forth at length.

***12** Answer at ¶¶ 9-10.

In no way do these paragraphs constitute a specific denial. The second sentence of each paragraph does nothing more than preface Gory's allegations with the phrase "it is specifically denied that...." The remaining sentences of Paragraph Nine essentially state that Gory breached the Contract by failing to comply with it and that the instant dispute relates to the Contract. Notwithstanding PHA's repeated use of "specific" and related words, there is nothing specific about PHA's denial whatsoever. As a result, PHA's failure to set forth a specific denial constitutes an admission that Gory fully performed and completed the work required of it and that all conditions precedent to its claim have been satisfied.

The Court's refusal to allow PHA to amend the Answer to provide greater specificity and thus to revoke its admission was also proper. While Pennsylvania trial courts are granted

broad discretion to allow the amendment of a pleading, "Pennsylvania appellate courts have repeatedly ruled that an amendment will not be permitted ... where the amendment will surprise or prejudice the opposing party."*Capobianchi v. BIC Corp.*, 446 Pa.Super. 130, 134, 666 A.2d 344, 346 (1995) (quoting *Horowitz v. Universal Underwriters Ins. Co.*, 397 Pa.Super. 473, 479, 580 A.2d 395, 398 (1990).*See also Burger v. Borough of Ingram*, 697 A.2d 1037, 1041 (Pa.Commw.Ct.1997) (a pleading may not be amended "where surprise or prejudice to the other party will result"). A court may consider the question of timeliness "insofar as it presents a question of prejudice to the opposing party, as by loss of witnesses or eleventh hour surprise."*Pilotti v. Mobil Oil Corp.*, 388 Pa.Super. 514, 518-19, 565 A.2d 1227, 1229 (1989).

Here, there can be no question that Gory would be prejudiced by allowing PHA to withdraw its admission of Gory's complete performance. It goes without saying that a plaintiff's course of action, from discovery to trial, is framed by the matters in dispute. In the instant case, PHA's admission justified Gory's inference that PHA had acknowledged the satisfaction of its obligations under the Contract and that the Parties' dispute centered solely on the terms of the Contract, PHA's breach and damages. Thus, Gory, in preparing for Trial, reasonably omitted those facts and items that would have supported its allegation of full performance. To allow PHA now to withdraw its admission would effectively render Gory's work on this matter for the past year worthless and would amount to substantial prejudice, while rewarding PHA for its defective pleading and its ongoing failure to file motions in a timely manner.[21]

21 This prejudice is succinctly summarized by Gory's statement that it made "strategy decisions which were made relative to discovery which was undertaken and not undertaken" based on the Answer and "[t]he issues in the claims are framed by the pleadings."N.T. II:8.

PHA contends that "the plaintiff was prepared for defendant's claim of lack of performance of the contract and in fact presented evidence that the final payment was made on the contract and therefore performance was not an issue."PHA's Proposed Findings of Fact and Conclusions of Law at ¶ 18. These allegations of preparedness, however, are unsubstantiated, and PHA's assertions that Gory presented extensive evidence of its performance are not supported by the record.

***13** PHA's reliance on the recent Superior Court decision in *Ghaner v. Bindi*, No. 30 MDA 2000, 2001 WL 729191 (Pa.Super.Ct. Jun. 29, 2001) is also misplaced. In *Ghaner*, the plaintiff failed to file a pre-trial statement, and the trial court granted the defendant's request for an order precluding the plaintiff from presenting any testimony or exhibits at trial on this basis. On appeal, the court reversed, finding that the trial court had abused its discretion by imposing such a severe sanction.

While there are some similarities, the differences between *Ghaner* and the instant case are numerous:

> The deficiency in *Ghaner* was a failure to file a pre-trial statement, which was due sixty days before trial. Pa. R. Civ. P. 212 .1(b)(1). The Superior Court thus concluded that the prejudice to the defendant was "in his immediate trial preparation" and was "curable on remand." 779 A.2d 585, 2001 WL 729191, at *5. In the instant matter, PHA's admission dates back to the Answer and has had an impact on every aspect and stage of this case for the past year.
>
> In *Ghaner*, the plaintiff attributed her failure to file a pre-trial statement to withdrawal of her counsel, changes in court procedure and difficulties in communicating due to severe hearing loss. Here, PHA has presented no justification for its general denial and its delay in seeking to amend the Answer.
>
> Under Pennsylvania Rule of Civil Procedure 212.2, a trial court has discretion as to what sanctions to impose for a failure to file a pre-trial statement and "may" include in the relief ordered a preclusion on testimony or exhibits. Pa. R. Civ. P. 212.2(c). In contrast, the Pennsylvania Rules of Civil Procedure implicated here are mandatory and direct that a denial of conditions precedent "*shall* be made specifically and with particularity" and that a general denial "*shall* have the effect of an admission." Pa. Rs. Civ. P. 1019(c), 1029(b) (emphasis added).
>
> The *Ghaner* record revealed "only a single failure to comply with the Rules of Civil Procedure" and "no evidence of repeated failure to comply with the Rules of Civil Procedure or other orders of the trial court."779 A.2d 585, 2001 WL 729191, at *4-*5. In this case, PHA has repeatedly filed documents with the Court in an untimely manner.
>
> In *Ghaner*, the trial court's order prohibited the plaintiff from presenting any testimony or exhibits at trial whatsoever and "was tantamount to a dismissal" of

the action. 779 A.2d 585, 2001 WL 729191, at *3. Here, the Court refused to allow evidence as to Gory's supposed failure to satisfy conditions precedent but granted PHA wide latitude in exploring Gory's other actions, the Contract's terms, PHA's own conduct and the amount and extent of damages.

Because *Ghaner* is easily distinguishable from the instant case, it does not support PHA's claims of error.[22] Thus, for the foregoing reasons, granting PHA leave to amend the Answer would have prejudiced Gory, and PHA is bound by its admission in the Answer.[23]

22 PHA also complains that, until Trial, Gory did not highlight PHA's admission by filing preliminary objections, a motion for judgment on the pleadings or any other manner. This argument verges on the absurd. In the first place. it would be laughable for a party to file preliminary objections on the grounds that an opposing party's failure to deny an allegation specifically and with particularity has resulted in an admission. Additionally, PHA has not supplied the Court with a single case that would require a party to file a motion for judgment on the pleadings, a request for admissions or any other document to confirm admissions made in the answer to a complaint. PHA's argument must therefore be rejected.

23 In spite of PHA's protestations to the contrary, the Court's decision at Trial to allow Gory to amend the length of the Extension Period does not conflict with this conclusion. Gory's motion was based on PHA's own exhibits and evidence, as presented to the Court, and thus could not have prejudiced PHA.

b. PHA's Admission Establishes That Gory Fully Performed Under the Contract, Precluding Any Limitation on Damages

***14** An admission in a pleading, such as PHA's admission in the Answer, constitutes a judicial admission and has "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact."*Durkin v. Equine Clinics, Inc.*, 376 Pa.Super. 557, 567, 546 A.2d 665, 670 (1988) (stating further that such admissions are "conclusive in the case").*See also Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, 1054 (Pa.Commw.Ct.1997) (judicial admissions, which include "statements made by a party in the pleadings," are "conclusive" and "have the effect of withdrawing a fact from issue and dispensing it without the need for proof of the fact"). As a result, PHA's admission was dispositive, and the Court must conclude that Gory performed fully and completed all work required of it under the Contract.

Because Gory satisfied its responsibilities under the Contract, no limitation on damages applies. Thus, PHA is responsible to Gory for $141,500.00 in damages stemming from the delay in completing the Contract and $98,484.75, plus interest on that amount computed at a rate of 10 percent per annum from February 1, 1999, owed for Gory's work on the Project.

CONCLUSIONS OF LAW

1. Because PHA waived its right to invoke the Arbitration Provision, Gory need not present its claim to Contracting Officer, and the Court has subject matter jurisdiction in the instant matter.

2. There was a contract, in the form of the Contract, between Gory and PHA.

3. PHA breached the Contract by failing to pay Gory the full amounts required under the Contract and by failing to ensure that the Project was completed within the 500-calendar day period set forth in the Contract.

4. Gory fully performed and completed all of the work required of it under the Contract.

5. As a result of PHA's breach of the Contract, Gory has suffered the following damages: $98,484.75 for Contract work performed and completed, inclusive of change orders; and $141,500.00 for the 283-day delay in completing the Project.

6. Gory is entitled to prejudgment interest on the amount owed for its work under the Contract. Such interest is to be computed at a rate of 10 percent per annum beginning February 1, 1999.

7. The Court awards Gory $98,484.75, plus interest on this amount to be computed at the rate of 10 percent per annum from February 1, 1999 until the date on which PHA makes payment, and an additional $141,500.00.

ORDER

AND NOW, this 11th day of July, 2001, upon consideration of the pleadings, trial, and the briefs of counsel, and for the

reasons set forth in the contemporaneously filed Findings of Fact and Conclusions of Law, this court finds in favor of Plaintiff James J. Gory Mechanical Contracting, Inc. and against Defendant Philadelphia Housing Authority. It is hereby ORDERED and DECREED that the Defendant shall pay the Plaintiff $98,484.75, plus interest on this amount to be computed at the rate of 10 percent per annum from February 1, 1999 until the date on which PHA makes payment, and $141,500.00.

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EXHIBIT E

1996 WL 943774 (Pa.Com.Pl.)
Court of Common Pleas of
Pennsylvania, Fayette County.

Safeguard

v.

Standard Machine and Equipment Co. Inc.

No. 853 of 1996, G.D. | October 29, 1996.

Opinion

SOLOMON, J.

Attorneys and Law Firms

***2** *Vincent J. Roskovensky Jr., James R. Apple* and *James S. Alter*, for plaintiff.

Nancy Duffield Vernon, for defendant.

STATEMENT OF THE CASE

The plaintiff's complaint contained 14 paragraphs. The first two identified the parties and were admitted in the defendant's answer. In short, the remaining paragraphs averred that: the defendant requested the goods and services which are the subject of the complaint; ***3** the defendant agreed to pay the prices charged; there is a balance due the plaintiff in the amount of $5,163.43; and that the plaintiff has made repeated demands for payment which the defendant refuses.

The defendant's answer admitted the identity of the parties, but purported to deny the remaining averments by using the identical language in paragraphs three through 14, inclusive, as follows: "The averment contained in paragraph ... is specifically denied. After reasonable investigation, the defendant is without sufficient knowledge or information to form a belief as to the truth of the averment. Proof is demanded."

DISCUSSION

Pa.R.C.P. 1029(b) provides that "[A] general denial or a demand for proof, except as provided by subdivision (c) of this rule, shall have the effect of an admission." The pertinent exception in paragraph (c) of Rule 1029 sets forth that "[A]n averment shall be deemed to be denied if proof thereof is demanded and the pleader states ... (2) that he is without such knowledge or information because the means of proof are within the exclusive control of an adverse party or hostile person."

This exception affords relief to a pleader who is unable to obtain the information needed in order to plead because such information is in the control of the adverse party. However, "where it is obvious that the means of information are not within the exclusive control of the adverse party the court ought to ignore such an averment": *Elia v. Olszewski*, 368 Pa. 578, 580 n.1, 84 A.2d 188, 190 n.1 (1951); *Delaware Valley Carpeting v. Leicht*, 73 Pa. D. & C.2d 51 (1975).

In the instant case, the defendant certainly must know whether it requested the plaintiff's goods and services, whether it agreed to a price, and whether it received the goods. Since this knowledge or information is not within the exclusive control of the plaintiff, the defendant ***4** may not rely upon Rule 1029(c)(1) to excuse a failure to make a specific denial of the factual allegations contained in the complaint of the plaintiff. *Cercone v. Cercone*, 254 Pa. Super. 381, 386 A.2d 1 (1978). If the defendant could not properly rely upon the exception provided by Rule 1029(c)(1), Rule 1029(b) imposed upon it an obligation to deny specifically the factual allegations of the complaint. *Id.* Having failed to deny specifically the factual allegations of the complaint, with the exception of admitting the identity of the parties, the answer of the defendant effectively manifests the defendant's admission to the facts averred in the complaint. *Swift v. Milner*, 371 Pa. Super. 302, 538 A.2d 28 (1988). Hence, judgment on the pleadings must be entered in favor of the plaintiff.

Wherefore, we will enter the following order.

ORDER

And now, October 29, 1996, it is hereby ordered and directed that the motion of the plaintiff for judgment on the pleadings is granted.

Parallel Citations

34 Pa. D. & C.4th 1

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EXHIBIT F

2001 WL 1855055
Pennsylvania Court of Common Pleas.

HYDRAIR, INC. et al
v.
NATIONAL ENVIRONMENTAL BALANCING BUREAU et al

No. 2846 FEB.TERM.2000. | April 23, 2001.

OPINION

HERRON, J.

***1** Defendants National Environmental Balancing Bureau (NEBB), Pennsylvania Environmental Balancing Association (PEBA), Eastern Air Balance, Inc. (EAB), Bobby Roaten, Ted Salkin, Patricia Casey, Michael Dolim, Carlin Management and William Reardon filed six sets of preliminary objections to the second amended complaint of plaintiffs Hydrair, Inc. and Albert Hawkins. The court sustains the objections in part.

BACKGROUND

NEBB is a trade association that certifies environmental balancing firms. NEBB's offices are in Gaithersburg, Maryland. Dolim is a former vice-president of NEBB. He has not worked for NEBB since November 30, 1999.

PEBA is the Pennsylvania chapter of NEBB. Carlin Management is the company that PEBA hired to manage its office. Reardon is an owner of Carlin Management and secretary or treasurer of PEBA. Casey is a Carlin Management employee who serves as PEBA's office manager. Salkin is chairman of the PEBA technical committee. Roaten is the former president of PEBA.

Environmental balancing firms test and balance heating and air conditioning systems. EAB and Hydrair are Pennsylvania environmental balancing firms and are competitors. Roaten is the president and owner of EAB, and Hawkins is an employee of Hydrair.

Until this year, plaintiffs held a NEBB certification to perform balancing work. The plaintiffs allege that the defendants conspired to revoke the plaintiffs' certification by misrepresenting the quality of the plaintiffs' balancing work to each other and to plaintiffs' customers. Plaintiffs allege that, without the certification, they cannot perform balancing work.

On February 25, 2000, plaintiffs Hydrair and Hawkins filed the original complaint against defendants NEBB, PEBA, EAB and Roaten. On July 27, 2000, the court sustained in part these defendants' preliminary objections to the complaint and granted the plaintiffs leave to file an amended complaint within 20 days. The plaintiffs filed an amended complaint on August 21, 2000—5 days late. Defendants filed preliminary objections, including an objection to strike the amended complaint as untimely. Instead of answering the preliminary objections, the plaintiffs filed a second amended complaint. The second amended complaint added Salkin, Casey, Dolim, Carlin Management and Reardon as defendants. The defendants again filed preliminary objections, including a motion to strike the second amended complaint based on the untimeliness of the first amended complaint. The court sustained the objection to untimeliness and struck the second amended complaint. On motion for reconsideration the court vacated that order.

At issue now are the preliminary objections to the second amended complaint. The second amended complaint—which is not a model of clarity—has five counts. Count I asks for an injunction against only NEBB to that orders NEBB to restore the certification. Count II claims tortious interference with contractual relations against all defendants. The plaintiffs base this claim on two sets of actions: Roaten and EAB's interference with Hydrair's existing balancing contracts with two school districts and all defendants' participation in decertifying the plaintiffs such that plaintiffs could not get future balancing contracts. Count III claims fraud against all defendants. Count IV claims defamation against all defendants except NEBB based on derogatory statements about the quality of the plaintiffs' work. Count V claims conspiracy to defame against all defendants except NEBB.

DISCUSSION

I. THE COURT OVERRULES THE OBJECTIONS TO PLAINTIFFS' UNTIMELY AMENDMENT OF THE COMPLAINT.

***2** NEBB objects to the second amended complaint as untimely. The court overrules the objection. In their motion

for reconsideration, the plaintiffs set forth just cause for the five-day delay, and the court sees no prejudice accruing to the defendants from the delay. *Peters Creek Sanitary Auth. v. Welch,* 545 Pa. 309, 681 A.2d 167, 170 (1996).

II. THE COURT SUSTAINS DOLIM'S OBJECTION TO IMPROPER FORM OF SERVICE.

Dolim objects on the ground of improper service of the second amended complaint and lack of personal jurisdiction. The court sustains the objections and quashes service on Dolim.

Under Pennsylvania's Long–Arm Statute, a plaintiff may serve a defendant outside of Pennsylvania by any form of mail addressed to the defendant and requiring a signed receipt. 42 Pa.C.S.A. § 5323(a)(3).[1] The defendant or his authorized agent must sign the return receipt. Pa.R.C.P. 403*and* 404(2). The certificate of service that the plaintiffs filed with the Prothonotary shows that the plaintiffs sent a copy of the second amended complaint to NEBB in Gaithersburg, Maryland. Attached to the certificate of service are the transmittal letter addressed to Dolim at NEBB and the return receipt addressed only to NEBB, received on October 16, 2000 and bearing the signature of what appears to be "Toni Day." Dolim did not sign the receipt. Without Dolim's signature, service was not proper. Pa.R.C.P. 403.

1 Plaintiffs do not argue that service was proper under Maryland law. 42 Pa.C.S.A. § 5323(a) ("When the law of this Commonwealth authorizes service of process outside this Commonwealth, the service, when reasonably calculated to give actual notice, may be made ... (2) In the manner provided or prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction.")

In their brief, plaintiffs argue that service was proper because they served NEBB and NEBB is Dolim's agent. The court disagrees for two reasons. First, the certificate of service that plaintiffs filed is not sufficient for this court to find that NEBB or Day was Dolim's authorized agent to accept service of process. Pa.R.C.P. 405(b)("A return of service shall set forth ... the identity of the person served and any other facts necessary for the court to determine whether proper service has been made."); *Neff v. Tribune Printing Co.,* 421 Pa. 122, 218 A.2d 756, 757 (1966)(stating that there is no presumption of validity of service of process, and holding service was invalid where, among other things, the return of service did not set forth the agency of the person served). Second, the plaintiffs have admitted that Dolim has not appointed an agent for service of process. In paragraph 26 of his preliminary objections, Dolim alleges that he "has not authorized any person at NEBB's offices or anyone else to accept, receive or sign for service of process on his personal behalf."In violation of Pa.R.C.P. 1029(a) and Phila.Civ.R. *1028(C)(1), plaintiffs did not specifically admit or deny this factual averment or assert lack of knowledge under Pa.R.C.P. 1029(c). Instead, plaintiffs answered paragraph 26 as follows: "Denied. This allegation avers matters outside the four corners of the complaint and is thus not cognizable by way of preliminary objection."Answer to Dolim's Preliminary Objections ¶ 26. The plaintiffs are incorrect in arguing that they need not specifically answer this objection raising outside evidence. The rules specifically provide for the admission of outside evidence to resolve an objection raising issues of fact about improper service. Pa.R.C.P. 1028(c)(2)*and* Note. Had plaintiffs specifically denied paragraphs 26 or alleged lack of knowledge, the court might have ordered discovery to resolve the objection. But because plaintiffs did not specifically admit or deny paragraph 26 or assert a lack of knowledge, the court must deem plaintiffs to have admitted that Dolim has not authorized anyone at NEBB to accept service for him. Pa.R.C.P. 1029(b); *Cercone v. Cercone,* 254 Pa.Super. 381, 386 A.2d 1, 4 (1978). Therefore, Day was not Dolim's agent to accept service.

*3 Plaintiffs also argue that service was proper because they served Dolim at his usual place of business. The court disagrees. A plaintiff may serve process by *handing* the complaint at the "office or usual place of business of the defendant to his agent or the person for the time being in time of the office."*See*Pa.R.C.P. 402(a)(2)(iii)*and* 404(1). Because plaintiffs *mailed* a copy of the complaint, the service-by-hand rules do not apply. Pa.R.C.P. 403 governs service by mail. *See also*Pa.R.C.P. 404(2). Since that rule contains no provision allowing a person in charge of a defendant's office to sign for the defendant, such service is ineffective. *Weaver v. Martin,* 440 Pa.Super. 185, 655 A.2d 180, 193 (1995)(stating that service of process by mail is allowed only pursuant to the limited procedures under Pa.R.C .P. 403, and holding that service was improper where plaintiff's attempted service by mail did not follow any of those limited procedures).

Plaintiffs did not properly serve Dolim and the court cannot exercise personal jurisdiction over Dolim. *Sharp v. Valley Forge Med. Ctr. and Heart Hosp.,* 422 Pa. 124, 221 A.2d 185, 187 (1966) ("The rules relating to service of process must be strictly followed, and jurisdiction of the court over

the person of the defendant is dependent upon proper service having been made...."). The court sustains the preliminary objection to improper service and personal jurisdiction. The court will order service of the complaint on Dolim stricken. Should the plaintiffs have the complaint reinstated, they shall serve Dolim in Pennsylvania within 30 days after that reinstatement or outside of Pennsylvania within 90 days after that reinstatement. *See*Pa.R.C.P. 401*and*404; *Collins v. Park,* 423 Pa.Super. 601, 621 A.2d 996, 999 (1993) (holding that, "[w]here service of process is defective, the proper remedy is to set aside the service[,]" and that plaintiff cannot proceed against defendant until plaintiff effects proper service on the defendant).

Because the lack of effective service deprives the court of personal jurisdiction over Dolim, the court need not now consider Dolim's other arguments regarding lack of personal jurisdiction. Dolim may raise these arguments again should plaintiffs serve Dolim properly.

Dolim also alleges that plaintiffs did not attach copies of all prior pleadings to the process that they attempted to serve on Dolim. Pa.R.C.P. 425(a). The court deems plaintiffs' failure to specifically deny this factual allegation as an admission that they did not attach the pleadings. Pa.R.C.P. 1029(b); *Cercone,* 386 A.2d at 4. Though a violation of Pa.R.C.P. 425(a) would not ordinarily warrant striking service, it would warrant an order that plaintiffs serve Dolim with the omitted pleadings. *Almart Stores v.. Liberty Shop Ctr.,* 54 Pa.D. & C.2d 415, 418 (C.P. Lehigh 1972); *Jacobs v. Brooks,* 69 Pa.D. & C.2d 112, 114 (C.P. Somerset 1972); 2 Goodrich Amram 2d § 425(a)(2). Should plaintiffs attempt to serve Dolim again, that service shall include all prior pleadings.

III. THE COURT OVERRULES NEBB'S PRELIMINARY OBJECTION TO COUNT I (INJUNCTION).

*4 Count I seeks to enjoin NEBB from decertifying plaintiffs. NEBB argues that Count I is insufficiently specific and legally insufficient because Count I does not identify any bylaw, statute or common law that NEBB violated. The court disagrees and overrules the objection.

Count I alleges that defendants' actions in decertifying the plaintiffs were "omissions to do acts which are specifically required to be done under the NEBB by-laws and under the statutory and common law, the requirements of which are incorporated under the NEBB charter and by-laws."Second Amended Complaint ¶ 48. Thc court interprcts the "acts which are specifically required ... under common law" as referring to the tort claims against NEBB in Counts II and III. The claim for tortious interference in Count II, if proven, would support a claim for an injunction. *SeeAdler, Barish, Daniels, Levin and Creskoff v. Epstein,* 482 Pa. 416, 393 A .2d 1175, 1181–1186 (1978) (affirming trial court's order enjoining tortious interference with contractual relations). Therefore, the court must overrule NEBB's objection to Count I.

The court notes, however, that the plaintiffs' claim for an injunction must depend entirely upon their right to relief for tortious interference, for the plaintiffs' claim under the bylaws is not legally sufficient and is insufficiently specific. Count I alleges that the NEBB bylaws give plaintiffs the right to notice of allegations and the right to a full and fair evidentiary hearing, and that NEBB violated these rights.[2] Second Amended Complaint ¶¶ 49, 50. In considering this preliminary objection, the court accepts as true the factual allegation that the bylaws state that plaintiffs shall receive notice of allegations and a full and fair evidentiary hearing.[3] *Borden v. Baldwin,* 444 Pa. 577, 281 A.2d 892 (1971). But the court need not accept as true plaintiffs' legal conclusion that these provisions confer legally enforceable rights on the plaintiffs. *Detweiler v. School Dist. of Borough of Hatfield,* 376 Pa. 555, 104 A.2d 110, 113 (1954) (though court must accept as true the plaintiff's factual averments as to the contents of a writing, the court is not bound by plaintiff's legal interpretation of these provisions). In their complaint, plaintiffs cite no law giving plaintiffs the right to enforce the bylaws against NEBB. In their brief, plaintiffs do not even discuss Count I. Do plaintiffs base their right to enforce the bylaws on contract law? Do plaintiffs base their claim on tort law? Do they base it on the Maryland General Corporation Law? Md.Code.Ann., Corps. & Ass'ns § 1–101 *etseq.* After three rounds of pleading, the court still can only speculate as to plaintiffs' legal theory; and the plaintiffs' failure to attach a copies of the bylaws —which defendants produced to plaintiffs during discovery —compounds the court's confusion. Therefore, if plaintiff's tortious interference claim eventually fails, so must its claim for an injunction.

2 Though plaintiffs did not attach a copy of the bylaws to its complaint, defendants did not object to this defect.

3 NEBB attached a copy of the bylaws to their March 7, 2000 response to plaintiffs' petition for a preliminary injunction. It is not clear whether the court may consider

these bylaws in determining the preliminary objections. *CompareEberhart v. Nationwide Mut. Ins. Co.*, 238 Pa.Super. 558, 362 A.2d 1094, 1097 (1976) (holding that court cannot consider writing introduced into record by defendant making preliminary objection unless plaintiff admits the authenticity of the writing) *withDetweiler v. School Dist. of Borough of Hatfield,* 376 Pa. 555, 104 A.2d 110, 113 (1954) (holding that, under an exception to the speaking demurrer rule, court may consider writing introduced into record by defendant making preliminary objection if plaintiff bases his claims on the writing) *andSatchell v. Insurance Placement Facility of Pennsylvania,* 241 Pa.Super. 287, 361 A.2d 375, 377 (1976)(same). Even were the court to consider the copy of the bylaws, however, the result would not change, for the bylaws do not expressly set forth the rights to which plaintiffs claim they are entitled. *SeeFramlau Corp. v. Delaware County,* 223 Pa.Super. 272, 299 A.2d 335, 338 (1972) (holding that, to the extent that a plaintiff's allegations are inconsistent with the writing upon which the plaintiff bases a claim, the writing governs).

IV. THE COURT SUSTAINS IN PART THE PRELIMINARY OBJECTIONS TO COUNT II (TORTIOUS INTERFERENCE).

***5** Count II alleges that the defendants tortiously interfered with Hydrair's existing and prospective contractual relations. The defendants object on the grounds of legal insufficiency and insufficient specificity. The court sustains these objections in part.

The elements of a claim for tortious interference with existing or prospective contractual relations are

(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;

(2) purposeful action on the part of defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;

(3) the absence of privilege or justification on the part of the defendant; and

(4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa.Super.Ct.1997) (citations omitted), *quotedinFlynn Corp. v. Cytometrics,* June 2000, No. 2102, op. at 11 (C.P.Phila.Nov. 17, 2000) (Sheppard, J.). "Absence of privilege or justification" means that the defendant's conduct was "improper." *Cloverleaf Dev., Inc. v. Horizon Fin., F.A.,* 347 Pa.Super. 75, 500 A.2d 163, 167 (1985) (citing Restatement (Second) of Torts § 767 for six factors to consider when determining whether defendant's conduct was improper). The plaintiffs must show actual pecuniary loss. *Shiner v. Moriarty,* 706 A.2d 1228, 1238 (Pa.Super.Ct.1998). They cannot recover solely for emotional distress or injury to reputation. *Id.*

A. Hawkin's Tortious Interference Claims.

As did the original complaint, the second amended complaint fails to allege the existence of a contract to which Hawkins was a party or a prospective contract to which he would be a party. Therefore, the court sustains the demurrers of all defendants to Hawkins' tortious interference claim in Count II. *Rutherfoord v. Presbyterian-University Hospital,* 417 Pa.Super. 316, 612 A.2d 500, 507 (1992) (stating that the existence of a contractual relationship between the plaintiff and a third person is an essential element of tortious interference).

B. Hydrair's Tortious Interference Claims.

Hydrair's tortious interference claim is legally sufficient against all defendants except Reardon.

1. *Hydrair's claims for tortious interference with existing contractual relations.*

Hydrair states a legally sufficient claim against Roaten and EAB for tortious interference with existing contractual relations based on the Hamburg and Kunkle contracts. The complaint identifies contractual relations with third parties: Hamburg and Kunkle school districts. The complaint alleges that Roaten and EAB acted purposefully to harm those relations: they made false statements to the Hamburg and Kunkle school districts in an effort to take over those jobs. Second Amended Complaint ¶¶ 20, 34–36. The complaint alleges that the actions of Roaten and EAB were unprivileged, Second Amended Complaint ¶ 48, and sufficiently alleges that Roaten and EAB acted improperly: they made false statements to Hamburg and Kunkle. *Birl v. Philadelphia Elec. Co.,* 402 Pa. 297, 167 A.2d 472, 474–75 (1960) (allegation that defendant made false statements to plaintiff's employer with purpose and result of inducing employer to terminate plaintiff employee stated legally sufficient claim of intentional interference with contract); *Evans v. Philadelphia Newspapers, Inc.,* 411 Pa.Super. 244, 601 A.2d 330, 333 (1991) (stating that plaintiff may base claim of intentional

interference on a variety of torts, including defamation); *seealso*Restatement (Second) of Torts, § 768, cmt. h (stating that competition is not a defense to intentional interference with an *existing* contract). The complaint alleges actual damage: Roaten and EAB caused Hydrair to be delayed in finishing the Hamburg job and caused Hydrair to lose the Kunkle job. *SeeKelly–Springfield Tire Co. v. D'Ambro,* 408 Pa.Super. 301, 596 A.2d 867, 871 (1991) (holding that allegation that defendant's interference caused unnecessary delay in the sale of plaintiff's property to a third party was a sufficient allegation of actual damage). [4]

4 The court does not read the second amended complaint as alleging that any defendants except Roaten and EAB induced Kunkle or Hamburg school districts to breach their contracts. *SeeHydrair, Inc v. National Envtl. Balancing Bureau,* February 2000, No. 2846, op. at 4 (C.P.Phila. July 27, 2000) (Herron, J.) (sustaining preliminary objections to tortious interference claim of original complaint). Like the original complaint, the second amended complaint does not allege that the decertification proceedings interfered with the Hamburg and Kunkle jobs or that Hamburg and Kunkle even knew about the decertification proceedings. If Hydrair does claim tortious interference with existing contractual relations against NEBB, PEBA, Carlin Management, Casey, Dolim, Reardon or Salkin, that claim is legally insufficient and insufficiently specific.

***6** 2. *Hydrair's claim for tortious interference with prospective contractual relations.*

Hydrair states a legally sufficient claim against all defendants except Reardon for tortious interference with prospective contractual relations. Hydrair does not identify any specific prospective contracts with third parties, but instead alleges that defendants' conduct completely barred Hydrair from doing business in its territory. Second Amended Complaint ¶ 46. This is a sufficient allegation that prospective contractual relations existed. Hydrair need not identify specific prospective contracts. *SeeKelly–Springfield Tire Co.,* 596 A.2d at 871 (holding that plaintiff's was not deficient for failing to identify a specific prospective contractual relation, because "prospective contractual relations are, by definition, not as susceptible of definite, exacting identification as is the case with an existing contract with a specific person.").

The complaint alleges specific purposeful actions by NEBB, PEBA, Roaten, EAB, Salkin, Casey, Carlin Management and Dolim to decertify Hydrair. Second Amended Complaint ¶¶ 22, 24, 29, 33, 34, 37, 38, 39. The court can reasonably deduce from the complaint that NEBB certification is a requirement for obtaining a balancing contract, *see* Second Amended Complaint ¶¶ 46 *and* 51, and that these defendants would have known that the substantially certain result of decertification would be Hydrair's inability to get balancing contracts.*Field v. Philadelphia Elec. Co.*. 388 Pa.Super. 400, 565 A.2d 1170, 1178 (1989) (stating that "intent extends both to the desired consequences and to the consequences substantially certain to follow from the act."); Restatement (Second) of Torts § 8A (stating that "intent" means "that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it.").*SeealsoB.T.Z., Inc. v. Grove,* 803 F.Supp. 1019, 1023 (M.D.Pa.1992) (stating that the intent required for a tortious interference claim can be inferred where the result is substantially certain to occur.). Therefore, the complaint sufficiently alleges that these defendants "took purposeful action ... specifically intended ... to prevent" Hydrair from getting balancing contracts. *Strickland,* 700 A.2d at 985.But the second amended complaint does not allege any specific actions by Reardon. It only alleges that Reardon was the "owner/member" of Carlin Management, that he was "Secretary and/or Treasurer of PEBA," that he ran "the daily workings of PEBA," that he hired Casey, that he was a co-conspirator and that he caused PEBA's members to vote for Hydrair's decertification. Second Amended Complaint ¶¶ 27, 33, 37. Since there are no allegations of specific conduct by Reardon causing plaintiffs' decertification, the tortious interference claim against Reardon is legally insufficient and insufficiently specific.

***7** The complaint specifically alleges that the defendants' actions were not privileged, Second Amended Complaint ¶ 48, and it alleges sufficient facts such that the court cannot now conclude that the defendants did not act improperly. Second Amended Complaint ¶¶ 22, 33, 37, 38, 40. *SeeCreeger Brick & Bldg. Supply, Inc. v. Mid–State Bank & Trust Co.,* 385 Pa.Super. 30, 560 A.2d 151, 152 (1989) ("If there is any doubt as to whether a claim for relief has been stated, the trial court should resolve it in favor of overruling the demurrer.").

The complaint alleges actual damage: the decertification made Hydrair unable to get balancing contracts.

C. The Demand for Punitive Damages

Roaten, EAB, Carlin Management, Dolim and Casey [5] object to the demand for punitive damages in Count II. A plaintiff

may recover punitive damages for tortious interference when the defendant's "actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct...."*SHV Coal, Inc. v. Continental Grain Co.,* 526 Pa. 489, 587 A.2d 702, 704 (1991). The complaint alleges intentional acts by Roaten, EAB, Dolim, Casey and Carlin, and the court overrules their objections to the punitive damages demand in Count II.

5 Reardon objects to the demands for punitive damages in all counts. Since there is no legally sufficient claim against Reardon, the court does not address these objections.

In summary the court (1) sustains Reardon's objections to Count II; (2) sustains the objections of the NEBB, PEBA, Roaten, EAB, Salkin, Casey, Dolim and Carlin Management to Hawkin's claims in count II; (3) overrules the objections of NEBB, PEBA, Roaten, EAB, Salkin, Casey, Dolim and Carlin Management to Hydrair's claims in Count II; and (4) overrules the objections of Roaten, EAB, Carlin Management, Dolim and Casey to the demand for punitive damages in Count II.

V. THE COURT SUSTAINS THE DEFENDANTS' PRELIMINARY OBJECTIONS TO COUNT III (FRAUD).

Count III alleges that the defendants fraudulently crafted complaints about plaintiffs work on the Kunkle and Hamburg jobs and other jobs. The defendants argues that Count III is legally insufficient and insufficiently specific. The court agrees. Two of the elements of fraud are a misrepresentation by the defendant and the plaintiff's justifiable reliance on the misrepresentation.*Bortz v. Noon,* 566 Pa. 489, 729 A.2d 555, 560 (1999). As in the original complaint, there is no allegation in the second amended complaint that the defendants made a statement to the plaintiffs on which the plaintiffs relied. Instead, the second amended complaint alleges that the defendants made false statements to others —to Hydrair's customers and to each other— which caused plaintiffs harm. The court sustains the preliminary objections of the defendants to Count III.

VI. THE COURT SUSTAINS IN PART THE PRELIMINARY OBJECTIONS TO COUNT IV (DEFAMATION).

Count IV of the complaint alleges that PEBA, EAB, Roaten, Casey, Dolim, Carlin, Reardon and Salkin defamed the plaintiffs. In the July 27, 2000 opinion addressing the preliminary objections to the original complaint, the court held that plaintiffs had stated a legally sufficient claim for defamation against PEBA, EAB and Roaten . [6] Casey, Dolim, Reardon, Carlin Management and Salkin argue that Count III is legally insufficient and insufficiently specific. The court sustains the objections in part.

6 Roaten and EAB again object to the defamation claim and the court again overrules their objection.

***8** A claim for defamation must generally allege: " '1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third party's understanding of the communication's defamatory character; and 5) injury." ' *Walder v. Lobel,* 339 Pa.Super. 203, 448 A.2d 622, 627 (1985), quoting *Raneri v. DePolo,* 65 Pa.Commw. 183, 441 A.2d 1373, 1375 (1982); 42 Pa.C.S.A. 8343(a). The complaint must allege with particularity, among other things, the content of the defamatory oral or written statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made. *Itri v. Lewis,* 281 Pa.Super. 521, 422 A.2d 591, 592 (1980). "A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession." *Agriss v. Roadway Express, Inc.,* 334 Pa.Super. 295, 483 A.2d 456, 461 (1984).

The second amended complaint states a legally sufficient claim for defamation against Casey and Carlin Management. The complaint alleges that Casey wrote NEBB that she had been receiving numerous complaints about plaintiffs for years. This alleged statement supports an action for defamation per se because it could impute that plaintiffs lacked competence in the balancing trade.*Holland v. Flick,* 212 Pa. 201, 61 A. 828 (1905); *Price v. Conway,* 134 Pa. 340, 19 A. 687 (1890); *Zerpol Corp. v. DMP Corp.,* 561 F.Supp. 404, 409–10 (E.D.Pa.1983). The circumstances in which Casey made these statements—in a letter recommending decertification of plaintiffs based on poor performance—increases their defamatory nature. The defamation claim against Carlin Management is legally sufficient because the complaint sufficiently alleges that Casey acted within the scope of her authority when writing the letters.Restatement (Second) of Agency § 247. Therefore, the court overrules the demurrer and specificity objections of Casey Carlin Management to Count IV.

Casey and Carlin Management also object to the demand for punitive damages in Count IV. A plaintiff may recover punitive damages for defamation when the defendant acted with actual malice. *Bargerstock v. Washington Greene Community Action Corp.*, 397 Pa.Super. 403, 580 A.2d 361, 366 (1990). Actual malice means that the defendants published the defamatory statement with knowledge that it was false or with reckless disregard of whether it was false. *Id.* The complaint does not allege that Casey wrote the letter with knowledge that her statements in the letter were false or with reckless disregard of whether they were false. Therefore, the court sustains the objection of Casey and Carlin Management to the demand in Count IV for punitive damages.

The second amended complaint does not specifically identify any statements by Dolim or Reardon. It does not identify any statements by Salkin except statements by him to the plaintiffs. Therefore, the court sustains the objections of Dolim, Reardon and Salkin to Count IV. *Itri,* 422 A.2d at 592.

VII. THE COURT SUSTAINS THE DEFENDANTS' PRELIMINARY OBJECTIONSTO COUNT V (CONSPIRACY TO DEFAME).

***9** Count V alleges that PEBA, EAB, Roaten, Salkin, Casey, Carlin Management, Reardon and Dolim conspired to defame the plaintiffs. To state a cause of action for conspiracy, plaintiffs must allege a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an unlawful purpose. *Baker v. Rangos,* 229 Pa.Super. 333, 324 A.2d 498, 506 (1974). The Second Amended Complaint alleges that

> At all times material hereto, Roaten, Reardon, Casey, [Salkin], Dolim, Carlin Management, Eastern Air Balance and PEBA acted as the agents, servants, workmen and/or employees of defendant[s] PEBA & NEBB and were then and there acting within the scope of their agency, servitude, work and/or employment, as well as in their capacity as agents, servants and employees for each other.

Second Amended Complaint ¶ 13. Accepting this allegation as true, EAB, Roaten, Salkin, Dolim, Casey, Carlin Management and Reardon were agents of PEBA and were, for the purposes of the plaintiffs' conspiracy claim, a single entity. *Perrige v. Horning,* 440 Pa.Super. 31, 654 A.2d 1183, 1189 (1995) (stating that "averments of agency generally are considered as admitted facts for the purposes of demurrer, rather than as conclusions of law."). A single entity cannot conspire with itself. *Rutherfoord v. Presbyterian–University Hosp.,* 417 Pa.Super. 316, 612 A.2d 500, 508 (1992). Because the plaintiffs do not allege that this single entity conspired with a second person, plaintiffs conspiracy claim is legally insufficient. *Id.; Baker,* 324 A.2d at 506.The court sustains the objections of PEBA, Roaten, EAB, Salkin, Casey, Carlin Management and Reardon to Count V.

VIII. THE COURT SUSTAINS CASEY AND CARLIN'S OBJECTION FOR FAILURE TO ATTACH A WRITING.

All claims against Casey and Carlin Management are based on the letter that Casey sent to NEBB. Casey and Carlin Management object because the plaintiffs did not attach a copy of the letter to the second amended complaint.Pa.R.C.P. 1019 and 1028(a)(2). When a claim is based on a writing,

> the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.C.P. 1019(i). [7] Plaintiffs did not attach a copy of the letter, and they did not state that they do not have access to the writing. Therefore, the court sustains the objection for failure to conform with Pa.R.C.P. 1019(i). [8]

7 When plaintiffs filed the Second Amended Complaint, former Pa.R .C.P. 1019(h) governed the attachment of writings. That rule, amended effective January 1, 2001, is now located at Pa.R.C.P. 1019(i). Since the language quoted is identical in the new and the old versions of the rule, the court cites to the amended version.

8 Reardon also objects on the ground of failure to attach the letter. Because there is no legally sufficient claim against Reardon, the court does not address that objection.

CONCLUSION

The court will enter a contemporaneous order sustaining in part the defendants' preliminary objections in accordance with

this opinion. As there were dozens of objections by nine defendants to one confusing complaint, the order is lengthy.

ORDER

AND NOW, this 23rd day of April 2001, upon consideration of the preliminary objections of all defendants to the complaint and plaintiffs' response, and in accordance with the court's contemporaneously-filed memorandum opinion, the court HEREBY ORDERS the following:

DEFENDANT DOLIM

***10** (1) Dolim's preliminary objections based on improper service and lack of personal jurisdiction are SUSTAINED.

(2) Service of the complaint on Dolim is STRICKEN.

(3) Should the plaintiffs have the Second Amended Complaint reinstated against Dolim, plaintiffs shall serve Dolim in Pennsylvania within 30 days after reinstatement of the Second Amended Complaint or outside Pennsylvania within 90 days after reinstatement.

(4) Dolim's objections to Hawkin's claim in Count II are SUSTAINED.

(5) Dolim's objections to Hawkin's claim in Count II, including the objection to the demand for punitive damages, are OVERRULED.

(6) Dolim's objections to Counts III, IV and V are SUSTAINED.

DEFENDANT NEBB

(7) NEBB's objection to the second amended complaint based on untimeliness is OVERRULED.

(8) NEBB's objections to Hawkin's claims in Count I and II are SUSTAINED.

(9) NEBB's objections to Hydrair's claim in Count I and II are OVERRULED.

(10) NEBB's objections to Count III are SUSTAINED.

DEFENDANT PEBA

(11) PEBA's objections to Hawkins' claims in Count II are SUSTAINED.

(12) PEBA's objections to Hydrair's claims in Count II are OVERRULED.

(13) PEBA's objections to Counts III and V are SUSTAINED.

DEFENDANT SALKIN

(14) Salkin's objections to Hawkins' claims in Count II are SUSTAINED.

(15) Salkin's objections to Hydrair's claims in Count II are OVERRULED.

(16) Salkin's objections to Counts III, IV and V are SUSTAINED.

DEFENDANTS ROATEN AND EAB

(17) Roaten and EAB's objections to Hawkins' claims in Count II are SUSTAINED.

(18) Roaten and EAB's objections to Hydrair's claims in Count II, including the objection to the demand for punitive damages, are OVERRULED.

(19) Roaten and EAB's objections to Counts III and V are SUSTAINED.

(20) Roaten and EAB's objections to Count IV, including the objection to the demand for punitive damages, are OVERRULED.

(21) Roaten and EAB's objection to the plaintiffs' verification is OVERRULED.

DEFENDANTS CASEY, CARLIN MANAGEMENT AND REARDON

(22) Reardon's preliminary objections to Counts II through V are SUSTAINED.

(23) Casey and Carlin Management's objections to Hawkins' claims in Count II are SUSTAINED.

(24) Casey and Carlin Management's objections to Hydrair's claims in Count II, including the objection to the demand for punitive damages, are OVERRULED.

(25) Casey and Carlin Management's objections to Counts III and V are SUSTAINED.

(26) Casey and Carlin Management's demurrers and specificity objections to Counts IV are OVERRULED.

(27) Casey and Carlin Management's objections to the punitive damages claim in Count IV are SUSTAINED.

(28) Casey and Carlin Management's objections for failure to attach a writing are SUSTAINED.

(29) The plaintiffs shall file a third amended complaint within twenty (20) days of the entry of this order.

Parallel Citations

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CERTIFICATE OF SERVICE

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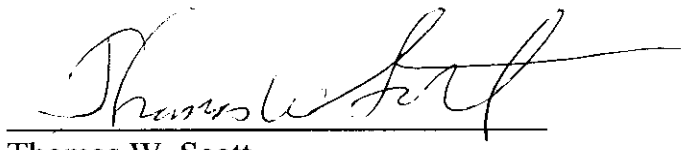

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