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

GRAHAM B. SPANIER, Plaintiff, v. LOUIS J. FREEH, FREEH SPORKIN & SULLIVAN, LLP, AND FREEH GROUP INTERNATIONAL SOLUTIONS LLC, Defendants.	:	Docket No. 2013-2707

MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS OF LOUIS J. FREEH AND FREEH GROUP INTERNATIONAL SOLUTIONS LLC TO PLAINTIFF'S TORTIOUS INTERFERENCE CLAIM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. INTRODUCTION

In a Complaint spanning 112 pages and over 330 paragraphs, Plaintiff Graham Spanier devotes only 5 pages and 21 paragraphs to his purported tortious interference claim against Defendants Louis Freeh and Freeh Group International Solutions, LLC ("FGIS"). In so doing, and contrary to Pennsylvania's stringent fact-pleading standards, Spanier attempts to manufacture a tortious interference claim without pleading any facts.

The tortious interference claim is premised solely on a single email sent by Freeh using his FGIS email account in April 2012. In that email, Freeh responds to an email forwarded from Pennsylvania State University ("Penn State" or "PSU") Trustee Ronald Tomalis regarding Spanier's possible employment by the federal government with the comment: "[W]e have done our job notifying the Federal prosecutors regarding the latest information." Spanier claims that this vague reference in a statement to *unnamed* federal prosecutors cost Spanier opportunities with *unnamed* federal government agencies in the *undefined* U.S. intelligence community and on an *unnamed* board of directors. Spanier fails to allege any facts concerning the chronology of these alleged events. Moreover, Spanier does not allege that Freeh acted with an improper purpose or made an untrue statement to those unnamed federal prosecutors. Rather, he merely alleges that Freeh

communicated his belief that "Spanier was not fit for the national security work that he was being employed to undertake." Compl. ¶ 250.

Not only is Spanier's Complaint factually deficient, but his tortious interference claims are barred by the statute of limitations. Spanier cannot state a claim against Freeh or FGIS because the two-year statute of limitations applicable to tortious interference claims expired months before Spanier filed his February 10, 2016 Complaint.[1] Spanier alleges that he became aware of the email supporting his tortious interference claim in October 2013. Accordingly, the statute of limitations expired in October 2015, without any complaint or writ of summons being issued with respect to the tortious interference claim or FGIS.

Spanier's tortious interference claim (Count V) must be dismissed.[2]

II. STATEMENT OF FACTS

Spanier first initiated proceedings against Freeh, Freeh Sporkin & Sullivan ("FSS"), and Pepper Hamilton LLP as alleged "successor by merger" to FSS by Praecipe for Writ of Summons on July 11, 2013. The writ noted

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[1] While Defendants recognize that ordinarily a statute-of-limitations argument must be asserted as new matter, case law supports raising the issue on preliminary objections where the statute of limitations has expired on the face of the complaint. *See* Section III.B, *infra*.

[2] As explained more fully in the Preliminary Objections to Plaintiff's defamation claims filed by Louis J. Freeh and Freeh Sporkin & Sullivan LLP, those claims also fail to state a claim under Pennsylvania law. Accordingly, Spanier's Complaint must be dismissed in its entirety.

"Slander/Libel/Defamation" as the basis for Spanier's action. Spanier sought reissuance of the Writ of Summons on August 9, 2013, and, on September 12, 2013, Spanier filed a Praecipe to Issue Amended Writ of Summons against Freeh and FSS alone. Freeh and FSS filed a Praecipe to File Complaint, seeking to compel Spanier to reveal the substance of his claims. In response, Spanier moved for a stay of proceedings, which was opposed by Defendants. On February 25, 2014, the stay was granted.

Spanier did not disclose the substance of his claims until March 2015, when Spanier filed both a Motion to Modify the Stay and a Motion to Join Additional Parties. On January 11, 2016, the Court lifted the stay and granted in part and denied in part Spanier's Motion to Join Additional Parties. Spanier filed his Complaint a month later on February 10, 2016.

Spanier premises his tortious interference claim on a single email dated April 12, 2012, which Spanier alleges he only became aware of on October 7, 2013. *See* Compl. ¶ 254. In that email chain, Penn State Trustee Ronald Tomalis forwarded to Freeh's FGIS email account an article from *The Patriot News* representing that Spanier would be working on a national security project for the federal government. *See id.* ¶ 248. Tomalis stated, "Seems someone might not have done their homework." *Id.* Freeh responded to Tomalis's email, stating

"Very interesting—we have done our job notifying the Federal prosecutors regarding the latest information." *Id.* ¶ 249.

From this single sentence, Spanier infers that Freeh's email "reflects action taken by Freeh stating, to federal officials, that Dr. Spanier was not fit for the national security work that he was being employed to undertake." *Id.* ¶ 250. Freeh's supposed action "caused a government agency to terminate Dr. Spanier's then-current and prospective business relationship." *Id.* ¶ 251. Spanier alleges that in February 2012 "arrangements" were made for Dr. Spanier to serve in a "contractual capacity" on projects with the U.S. government and U.S. "intelligence community." *Id.* ¶¶ 243-44. He further alleges that in April 2012 those "opportunities were suddenly withdrawn." *Id.* ¶ 245. Spanier later alleges: "As a result of Freeh's actions, a government agency withdrew Dr. Spanier's contracts, Dr. Spanier was removed from the board of directors of a corporation, and Dr. Spanier lost out on prospective relations that were reasonably certain to occur." *Id.* ¶ 330. Spanier alleges no other facts in support of his claim, never identifies any of his existing or prospective employers, and never attaches the contracts upon which his service in a "contractual capacity" was based.

Spanier relies on the application of the discovery rule to support the belated assertion of his tortious interference claim, alleging that his claim is timely because he was not on notice of Freeh's or FGIS's alleged interference until he discovered

this email on October 7, 2013. *See id.* ¶ 254. Spanier necessarily concedes, therefore, that he had no other evidence of any action by Freeh or FGIS to interfere with his alleged prospective or actual contractual relations.

III. STATEMENT OF THE QUESTIONS INVOLVED

1. Should Plaintiff's tortious interference claim be dismissed because Plaintiff has failed to adequately allege each of the elements supporting this cause of action?

   Suggested Answer: Yes. Spanier fails to adequately allege each of the elements required to establish a tortious interference claim: (1) the existence of a contractual or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent the 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.

2. Should Plaintiff's tortious interference claim be dismissed because it is barred by the statute of limitations?

   Suggested Answer: Yes. Tortious interference claims are subject to a two-year statute of limitations. Spanier pleads that he became aware of the facts supporting his tortious interference claim in October 2013, but did not file a writ of summons or complaint based on that claim until February 2016. Because Spanier's claims were filed after the statute limitations expired, the tortious interference claim must be dismissed.

IV. ARGUMENT

A preliminary objection in the nature of a demurrer tests the sufficiency of Plaintiff's complaint. Such a preliminary objection "must be sustained where it is

clear and free from doubt that the law will not permit recovery under the alleged facts." *Africa v. Horn*, 701 A.2d 273, 274 (Pa. Commw. Ct. 1997).

Spanier's meager allegations are insufficient to meet Pennsylvania's fact-pleading standards or support any of the four elements necessary to state a tortious interference claim. Further, Spanier's tortious interference claim is subject to a two-year statute of limitations. Based on Spanier's own allegations, he was aware of the facts forming the basis of his tortious interference claim in October 2013, but did not make any claim based on it or add FGIS as a defendant until February 2016. Accordingly, his claim is time-barred.

A. Spanier Fails to Plead a Claim for Tortious Interference.

Spanier's tortious interference claim should be dismissed because Spanier fails to plead any facts supporting such a claim. In a complaint spanning 112 pages and over 330 paragraphs, Spanier devotes just 5 pages and 21 paragraphs to the facts surrounding his tortious interference claim. His sparse allegations fail to plead facts necessary to his claim and are insufficient to state a claim for tortious interference.

The elements of a cause of action for intentional interference with contractual relations, whether existing or prospective, are as follows: (1) the existence of a contractual or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant,

specifically intended to harm the existing relation, or to prevent the 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. *See Al Hamilton Contracting Co. v. Cowder*, 644 A.2d 188, 191 (Pa. Super. 1994).[3] The Complaint fails to set forth sufficient facts support any of these elements. Accordingly, this claim should be dismissed.

1. Spanier Fails to Adequately Allege the Existence of a Contractual Relationship or Prospective Contractual Relations.

In the few paragraphs devoted to his tortious interference claim, Spanier fails to make clear whether he claims that Freeh and FGIS interfered with *existing* contractual relationships or whether his claim solely alleges interference with *prospective* contractual relationships. *Compare* Compl. at 110 ("Count V: Tortious Interference with *Prospective* Contractual/Business Relations) *with id.* ¶¶ 327, 331 ("contractual and *prospective* business relations") (emphasis added). This lack of clarity evidences the vagueness with which the facts underlying Spanier's claim are pled. In any event, Spanier's allegations fail to support either claim.

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[3] Count V is based on interference with contractual or business relations. The elements of the cause of action are the same regardless of the label attached. *See InfoSage, Inc. v. Mellon Ventures, LP*, 896 A.2d 616, 627 (Pa. Super. 2006) (same elements for tortious interference with business relations claim).

To the extent that Spanier attempts to set forth a claim for *existing* contractual relations, he must identify a specific contract between himself and a third party. *See Northstar Waste, LLC v. Lishon*, No. 04699, 2004 WL 2426237, at *1 (Com. Pl. Phila. Cnty. Aug. 10, 2004) (citing *Strickland v. Univ. of Scranton*, 700 A.2d 979, 985 (Pa. Super. 1997)).[4] Without identifying any contract or any specific third party, Spanier alleges that: (i) he began to work on "two classified projects for the U.S. intelligence community" in March 2012; and (ii) his work was terminated in April 2012. Compl. ¶¶ 244-45. He asserts that Freeh's actions caused an (unnamed) government agency to terminate his "then-current" business relationship. *Id.* ¶ 251. In Spanier's Claim for Relief, Spanier makes even more imprecise allegations regarding his existing relationships, asserting that, "[a]s a result of Freeh's actions, a government agency withdrew Dr. Spanier's contracts [and] Dr. Spanier was removed from the board of directors of a corporation." *Id.* ¶ 330. Pennsylvania rules provide that, where a claim is based on an agreement, the plaintiff must specifically state whether the agreement was written or oral and, if written, attach the agreement to the complaint. *See* Pa. R. Civ. P. 1019. Spanier's vague allegations regarding an unnamed government agency, an unspecified board of directors, and the amorphous "intelligence community" fail to

[4] Each of the unpublished opinions cited herein are included in Exhibit 1.

meet Pennsylvania's rigorous fact-pleading standards. *See Foster v. UPMC South Side Hosp.*, 2 A.3d 655, 666 (Pa. Super. 2010).

Spanier's allegations regarding his prospective contractual relations are similarly vague and conclusory. Spanier asserts: (i) "[a]rrangements were made for the opportunity for Dr. Spanier to serve in a contractual capacity on significant projects that the U.S. government felt he was uniquely qualified to undertake"; (ii) that Freeh's actions caused an unnamed government agency to terminate a "prospective business relationship"; and (iii) that he lost out on "prospective relations that were reasonably certain to occur but for Freeh's tortious act." Compl. ¶¶ 243, 251, 330.

Courts have held that, to adequately allege tortious interference with prospective contractual relationships, plaintiffs must allege "more than a mere hope or the innate optimism of a salesman," *Glenn v. Point Park College*, 272 A.2d 895, 898-99 (Pa. 1971); *see Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471-72 (Pa. 1979) (the law does not protect a mere "expectation").[5] Spanier does not allege facts from which one could determine that a future contractual relationship was reasonably certain. *See Phillips v. Selig*, 959 A.2d 420, 428-29 (Pa. Super 2008) (existing relationship insufficient to support tortious interference

[5] *See also Lackawanna v. Verrastro*, 9 Pa. D. & C. 5th 35, 54 (Com. Pl. Lackawanna Cnty. 2009) (sustaining preliminary objections where "no prospective contractual relationship has been identified by defendant").

with prospective relations claim); *Foster*, 2 A.3d at 666 ("no facts are set forth to support an inference that there was a reasonable probability that Appellant would enter a contract with any of the named entities").

"As defined by courts in this Commonwealth, the tort contemplates a relationship, prospective or existing, *of some substance, some particularity*, before an inference can arise as to its value to the plaintiff and the defendant's responsibility for its loss." *Behrend v. Bell Tel. Co.*, 363 A.2d 1152, 1160 (Pa. Super. 1976) (emphasis added). Regardless of whether Spanier claims tortious interference with existing or prospective contractual relations, Spanier has failed to meet this test and allege sufficient facts to establish the requisite relationship.

2. Spanier Fails to Adequately Allege that Freeh/FGIS Acted For the Specific Purpose of Causing Harm to Spanier or that Freeh/FGIS's Conduct was Not Privileged or Justified.

To establish a tortious interference claim, Spanier also must plead facts sufficient to support the assertion that Freeh and FGIS acted for the "specific purpose of causing harm to the plaintiff." *Phillips*, 959 A.2d at 429 (citing *Glenn*, 272 A.2d at 899). Spanier must also allege facts sufficient to establish that "the defendant's actions were improper under the circumstances presented." *Id.* (citing

Restatement (Second) of Torts § 767).[6] The second and third elements are closely related. *See Glenn*, 272 A.2d at 899.

Spanier makes no allegation regarding either Freeh's or FGIS's purpose in contacting the "federal prosecutors." Absent an allegation that "[Freeh and FGIS] took purposeful action specifically intended to harm plaintiff's business relations with prospective third parties," Spanier has not stated a claim for tortious interference. *Harbor Hosp. Servs., Inc. v. GEM Laundry Servs., LLC*, No. 4830, 2001 WL 1808556, at *13 (Com. Pl. Phila. Cnty. July 18, 2001).

Spanier's *sole* allegation regarding Freeh's purpose is as follows: upon information and belief, Freeh contacted the unnamed "federal prosecutors" mentioned in his April 12, 2012 email to state that "Spanier was not fit for the national security work that he was being employed to undertake." Compl. ¶¶ 249-50. Spanier does not allege that these unnamed "federal prosecutors" would have

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[6] Those "circumstances" include: (i) the nature of the actor's conduct; (ii) the actor's motive; (iii) the interests of the other with which the actor's conduct interferes; (iv) the interests sought to be advanced by the actor; (v) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (vi) the proximity or remoteness of the interference; and (vii) the relations between the parties. *See id.* As discussed further *supra*, it is difficult to see how those elements could weigh in favor of Spanier, even if Spanier alleged facts regarding Freeh's purpose, where: Freeh, pursuing an investigation into sexual abuse of children at a public university, communicated with federal prosecutors regarding "the latest information," even if Freeh, in so doing, expressed an opinion regarding Spanier's fitness for "national security work." Compl. ¶¶ 249-50.

had any contact with the unnamed government agency, unnamed board of directors, or amorphous "intelligence community" such that Freeh's communication with the federal prosecutors was "substantially certain" to result in Spanier's termination. Moreover, it is difficult to see *how* Spanier could ever make such an allegation in good faith, given that he asserts that "the federal government had completed [its own] four-month investigation into Dr. Spanier's continued fitness to hold a Top Secret clearance, including questions about his role, if any, in the Sandusky matter." *Id.* ¶ 179. Spanier's allegation that "Freeh had no privilege to communicate with federal officials regarding Dr. Spanier's employment, or, if he did, he abused that privilege," amounts to a mere legal conclusion unsupported by the facts he pleads. *Id.* ¶ 329.

The Complaint's sparse allegations, even taken as true, regarding what Freeh/FGIS said to "federal prosecutors" for what purpose, and its conclusory abuse of privilege allegation, fail to state a viable claim. *See Miketic v. Baron*, 675 A.2d 324, 330-31 (Pa. Super. 1996). *First*, Spanier's allegation that Freeh stated that Spanier was "not fit" for his national security work is nothing more than the expression of an opinion. Compl. ¶ 250. Attacks on "job performance and professional competence," even when they appear in the press, are not "'improper' for purposes of a tortious interference claim." *Phillips*, 959 A.2d at 435; *see also Small v. Juniata College*, 682 A.2d 350, 354 (Pa. Super. 1997) (players on football

team did not act improperly by voicing negative of opinions of coach to college administration). Spanier's allegations regarding Freeh/FGIS's alleged tortious conduct do not go beyond the proffer of an opinion. As the *Phillips* Court recognized, whether someone is fit for a given position relies on opinion and cannot form the basis for a tortious interference claim.

Second, Spanier does not allege what Freeh said to federal prosecutors, or that Freeh said anything false. There is no liability for interference against one who merely provides truthful information. *See Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 478-79 (Pa. Super. 2011). Where a plaintiff fails to allege that a defendant communicated untruthfully, the plaintiff fails to state a claim. *See Pecha v. Botta*, No. 2:13cv1666, 2014 WL 4925152, at *4 (W.D. Pa. Sept. 30, 2014); *see also Rantnetwork, Inc. v. Underwood*, No. 4:11-cv-1283, 2012 WL 1021326, at *16 (M.D. Pa. Mar. 26, 2012).

Third, Spanier alleges only that Freeh and FGIS contacted certain "federal prosecutors." Compl. ¶ 249. The Pennsylvania Superior Court has held that statements made to law enforcement are absolutely privileged. *See Pawlowski v. Smorto*, 588 A.2d 36, 43 (Pa. Super. 1991) (citing *Restatement (Second) of Torts* § 587 & cmt. b). Spanier fails to allege, in more than conclusory terms, that Freeh and FGIS were not justified in conferring with federal prosecutors regarding

Freeh's investigation of activity that later formed the basis for criminal charges against Spanier.

Even taking Spanier's allegations as true, he has not alleged that Freeh or FGIS took purposeful action specifically intended to harm Spanier or that, if they did, such statements were not opinion, true, or a privileged communication to prosecutors. *See Harbor Hosp. Servs., Inc*, 2001 WL 1808556, at *13.[7]

3. Spanier Fails to Adequately Allege that Freeh/FGIS Caused the Unnamed Entities to Terminate or Fail to Engage in Contractual Relations with Spanier.

The final element of a tortious interference claim requires Spanier to show the causal connection between Freeh/FGIS's conduct and the termination of his contractual or prospective contractual relations. *See Hydrair, Inc. v. Nat'l Envtl. Balancing Bureau*, No. 2864, 2001 WL 1855055, at *6 (Com. Pl. Phila. Cnty. Apr. 23, 2001) ("Since there are no allegations of specific conduct by [defendant] causing plaintiff's decertification, the tortious interference claim against [defendant] is legally insufficient and insufficiently specific."). Spanier's allegations lack several causal connections necessary to connect Freeh/FGIS's alleged conduct to the termination of Spanier's national security "opportunities." Accordingly, Spanier fails to state a claim.

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[7] Moreover, Spanier's reliance on the "discovery rule" coupled with vague allegations that are made "upon information and belief" suggest that Spanier does not possess any facts sufficient to support his tortious interference claim.

First, Spanier fails to allege facts connecting the "federal prosecutors" to whom Freeh/FGIS spoke with the unnamed governmental agency and board of directors with whom Spanier alleges he had contractual relations. Compl. ¶¶ 249, 330. Spanier does not state that these unnamed federal prosecutors would ever have had cause to speak to Spanier's current and prospective employers. Spanier does not even allege that these unnamed federal prosecutors would have been able to identify these "Top Secret" employers in the "U.S. intelligence community" or the unnamed board of directors. Neither the Complaint nor the article mentioned in the April 12, 2012 email name the entities that were supposed to have been contacted as a result of Freeh/FGIS's purported communications. *See* Compl. at 75 (article mentions "special project for the U.S. government," "federal agencies," and "national security agencies" without identifying any particular agency).

Second, Spanier fails to allege facts to establish that Freeh or FGIS was aware of Spanier's alleged government employment or government employment opportunity *before* talking to the federal prosecutors. *See Tornese v. Cabrera-Martinez*, No. 172 MDA 2014, 2014 WL 10789964, at *6 (Pa. Super. Oct. 8, 2014) ("In fact, it is unclear [whether Defendant] was even aware of the alleged contractual relationship."). The only information in the Complaint establishing that Freeh and FGIS were aware of Spanier's national security employment is the April 12, 2012 email. Compl. at 75. The Complaint seems to assert that the article

contained in the April 12, 2012 email notified Freeh/FGIS of Spanier's employment opportunities, but there are only four minutes between that email notification and Freeh's response that he spoke to "federal prosecutors." *Id.* Spanier does not allege when Freeh contacted the federal prosecutors or when his employment opportunities with the unnamed government agencies and unnamed board of directors were terminated.

Third, Spanier fails to allege what Freeh/FGIS could have said to prosecutors that would have caused his termination. Spanier asserts that Freeh/FGIS informed federal prosecutors that Spanier was "not fit for the national security work that he was being employed to undertake." Compl. ¶ 250. Yet, only a few paragraphs earlier, Spanier alleged that "the federal government had completed a four-month investigation into Dr. Spanier's fitness to hold a Top Secret clearance, including questions about his role, if any, in the Sandusky matter" and had determined that Spanier was fit to keep his clearance. *Id.* ¶ 179. Nor does Spanier assert facts regarding why the statement "we have done our job notifying the Federal prosecutors regarding the latest information," should be read to mean that Freeh spoke to them about Spanier's employment prospects. Compl. at 75.

Accordingly, Spanier has failed to plead an adequate factual basis that Freeh or FGIS *caused* any of Spanier's alleged damages.

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This Court is not required to accept the conclusory, vague, and insufficient allegations pled in support of Spanier's tortious interference claim. "Pennsylvania is a fact pleading state, which requires that the pleader define the issues, apprise the defendant of an asserted claim, and set forth all material and essential facts to support that claim." *San Lucas Constr. Co., Inc. v. St. Paul Mercury Ins. Co.*, No. 2190, 2001 WL 1807786, at *8 (Com. Pl. Phila. Cnty. Mar. 14, 2001). Spanier's sparse factual allegations fail to satisfy any of the elements of a tortious interference claim.

B. Spanier's Tortious Interference Claim Plainly Is Barred by the Statute of Limitations.

Spanier's tortious interference claim against Freeh and FGIS likewise must be dismissed because the statute of limitations on that claim expired prior to its assertion. *See Ferraro v. McCarthy-Pascuzzo*, 777 A.2d 1128, 1132 (Pa. Super. 2001) ("A plaintiff may not add a new defendant after the applicable statute of limitations has expired."); *Heckman v. Sanchez*, No. 1229 CD 2014, 2015 WL 5314523, at *3 (Pa. Commw. Ct. Mar. 2015) ("[A]n amendment to the pleadings introducing a new cause of action will not be permitted after the statute of limitations has run in favor of [the] defendant.").

The statute of limitations is ordinarily considered an affirmative defense that must be pled as new matter. *See* Pa. R. Civ. P. 1030. However, where the bar

posed by an affirmative defense is clear on the face of the complaint, courts have recognized the efficiencies of considering such arguments on preliminary objections. As the Pennsylvania Superior Court has noted, "an affirmative defense may be raised by way of preliminary objections where it is established on the face of the complaint." *Pelagatti v. Cohen*, 536 A.2d 1337, 1346 (Pa. Super. 1987) (considering truth as a defense to a defamation claim on preliminary objections).[8] Courts have further recognized that preliminary objections raising the statute of limitations are appropriate where a plaintiff pleads facts regarding the expiration of the limitations period. *See Bonson v. Diocese of Altoona-Johnston*, 67 Pa. D & C. 4th 419, 430 (Com. Pl. Westmoreland Cnty. 2004) (analyzing statute of limitations where plaintiff pled the discovery rule exception). Not only have courts recognized that analyzing the statute of limitations is appropriate where it is clear on the face of the complaint, but Pennsylvania courts have held that they may consider a statute-of-limitations argument *before* a complaint is even filed.[9] Freeh

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[8] *See also Sloan v. Coleman*, No. 539 C.D. 2014, 2015 WL 5453073, at *4 (Pa. Commw. Ct. June 5, 2015) (trial court did not err where the expiration of the statute of limitations "was apparent on the face of the complaint"); *Gusky v. Metro. Life Ins. Co.*, No. GD00-4527, 2002 WL 34097436 (Com. Pl. Allegheny Cnty. Aug. 6, 2002) ("There is case law supporting the dismissal of a claim where an affirmative defense, based solely on the allegations in plaintiff's complaint, is raised through preliminary objections.").

[9] *See Hoare v. Bell Telephone Co. of Pa.*, 500 A.2d 1112, 1113-14 (Pa. 1985) (joinder properly denied where the statute of limitations on proposed claim against party to be joined has expired); *Liba v. Colony Square Builders*, 41 Pa. D. & C. 3d

and FGIS have raised these arguments on preliminary objections to spare the Court and the parties the time and expense of engaging in discovery on or answering time-barred claims. If the Court would prefer to consider these issues on a motion for judgment on the pleadings, Freeh and FGIS will reassert their arguments at that time.

Under Pennsylvania law, a claim for tortious interference is generally subject to a two-year statute of limitations. *See Maverick Steel Co., LLC v. Dick Corp./Barton Malow*, 54 A.3d 352, 355 (Pa. Super. 2012).[10] Spanier's tortious interference claim against FGIS and Freeh is based on a single email from Freeh, sent from his FGIS email address, dated April 12, 2012. *See* Compl. ¶¶ 248-49. Spanier alleges that his "national security work opportunities were suddenly withdrawn" in April 2012 and that he was not aware of this email exchange (which he claims prompted that withdrawal) until October 2013. *See id.* ¶¶ 245-46. In an attempt to fall under the "discovery rule" exception to the statute of limitations,

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666, 669-70 (Com. Pl. Allegheny Cnty. 1983) ("The power of the courts to order joinder of additional parties is limited by the applicable statute of limitations.").

[10] As Defendants asserted in opposition to Plaintiff's Motion to Join Additional Parties, the one-year defamation statute of limitations appropriately applies to Spanier's claim. *See Evans v. Phila. Newspapers, Inc.*, 601 A.2d 330, 334 (Pa. Super. 1991) (holding that one-year statute of limitations applied to tortious interference claim "based upon the alleged false and defamatory nature of the communication complained of"). Because Spanier's claim fails under either limitations period, however, Defendants will not address the "gravamen of the complaint" analysis under *Evans* here.

Spanier alleges: (i) he could not have seen or been aware of the email chain through exercise of reasonable diligence until October 2013; and (ii) without an awareness of the email chain, Spanier could not have been aware "of Freeh's communications with federal officials about him." *Id.* ¶¶ 252-54.[11]

Despite Spanier's own allegations that he became aware of Freeh's April 12, 2012 email in October 2013, *see* Compl. ¶ 254, FGIS did not become a party to this litigation[12] and no tortious interference claim was asserted against Freeh until February 2016 – almost three years after Spanier purportedly became aware of Freeh and FGIS's alleged wrongdoing. Spanier had ample opportunity to institute an action against FGIS and assert his tortious interference claim, but failed to do so.

Under Pennsylvania law, an action may only be commenced "by filing with the prothonotary (1) a praecipe for a writ of summons, or (2) a complaint." Pa. R. Civ. P. 1007. "Our Supreme Court has stated that the language of Rule 1007 is

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[11] Defendants do not believe that the discovery rule applies. Indeed, Spanier's assertion that he could not have known of the April 12, 2012 email before October 7, 2013 strains credulity given Spanier's allegation that Ryan Bagwell, a third party to this entire dispute, was able to obtain the email in August 2013 via a Right-to-Know-Law request. *See* Compl. ¶ 247. If Spanier truly had been harmed, he could have made his own request under the Right to Know Law and learned of the April 12, 2012 email well before October 2013.

[12] This Court, in granting the motion to join FGIS, took no position with respect to the statute of limitations. *See* Opinion at 8, n.3, dated January 11, 2016.

clear and unambiguous, and its underlying purpose is to provide certainty as to the commencement of an action. Attempts to commence an action by means other than those allowed by Rule 1007 have consistently been rejected by the courts." *Burger v. Borough of Ingram*, 697 A.2d 1037, 1040 (Pa. Super. 1997) (internal citations omitted). One such attempt rejected by the courts: the filing of a petition to amend or a draft complaint to toll the statute of limitations. *See Aivazoglou v. Drever Furnaces*, 613 A.2d 595, 599-600 (Pa. Super. 1992).[13]

In *Aivazoglou*, the plaintiff filed a petition to amend to add defendants one month before the statute of limitations was set to run. *See id.* at 597. Both the grant of the petition and the filing of the amended complaint occurred only after the limitations period had run. *See id.* The court then granted a motion for judgment on the pleadings based on the expiration of the statute of limitations. *See id.* On appeal, the Pennsylvania Superior Court affirmed, holding:

> In this case, the plaintiffs had ample opportunity to commence a timely action against the additional [defendants] in the manner provided by the Pennsylvania Rules of Civil Procedure. The rules were promulgated to promote uniformity and to provide procedural due process for all litigants. Rather than adopt an ad hoc

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[13] *See also Anthony v. St. Joseph's Hosp. Sch. of Nursing, Inc.*, No. 2236 EDA 2013, 2014 WL 10917675, at *3 (Pa. Super. June 10, 2014) ("[T]his Court has held that the only authorized way to commence an action in Pennsylvania is to proceed in accordance with Pa.R.C.P. 1007. Further, the filing of a motion to amend a complaint to add a party does not commence an action and, therefore, will not toll the statute of limitations.").

> exception to the rules and decisions interpreting those rules, we hold, consistent with prior appellate court decisions, that an action is commenced only by filing with the prothonotary a praecipe for a writ of summons, a complaint, or an agreement for an amicable action.

Id. at 600.

Based on Spanier's own Complaint, he became aware of Freeh's and FGIS's alleged tortious interference in October 2013, *see* Compl. ¶ 254, but did not assert any claim against Freeh or FGIS until he filed that February 10, 2016 Complaint, *see id.* ¶¶ 326-31. Even assuming that the discovery rule applies and that Spanier did not become aware of Freeh and FGIS's alleged tortious interference until October 2013, the two-year tortious interference statute of limitations expired in October 2015. Spanier was dilatory in pursuing his tortious interference claims and his Complaint comes too late to save them from being barred by the statute of limitations.

It is no answer to say that the case was stayed (upon *Spanier's* request), because Pennsylvania law compelled Spanier to act. The stay in this case was not granted until February 25, 2014 – months after Spanier asserts he learned of the alleged facts underlying his tortious interference claim. Spanier could have sought relief from the stay, or alerted the Court to the looming expiration of the statute of limitations. Moreover, at any time before the statute of limitations expired, Spanier could have served a writ of summons with respect to his tortious

interference claim. (Indeed, Spanier instituted his defamation claims against Freeh and FSS by writ of summons,[14] but at no time filed such a writ naming FGIS or indicating "tortious interference" as a cause of action.) It was only upon the filing of the Complaint, on February 10, 2016, that Spanier formally asserted his tortious interference claim and added FGIS as a party. That filing comes too late to fall within the statute of limitations, which by Spanier's own admission began to run on October 7, 2013. Accordingly, Spanier's tortious interference claim should be dismissed as barred by the statute of limitations.

V. CONCLUSION

For the foregoing reasons, Defendants' Preliminary Objections to Spanier's tortious interference claim should be sustained and Plaintiff's tortious interference claim against Freeh and FGIS should be dismissed.

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[14] *See* Writ of Summons, dated July 7, 2013; Amended Writ of Summons, dated Sept. 22, 2013.

Respectfully submitted,

Dated: March 28, 2016

Robert C. Heim (Pa. 15758)
Michael L. Kichline (Pa. 62293)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000 (phone)
(215) 994-2222 (facsimile)

David S. Gaines, Jr. (Pa. 308932)
Miller, Kistler & Campbell
720 South Atherton Street, Suite 201
State College, PA 16801-4669
(814) 234-1500 (phone)
(814) 234-1549 (facsimile)

Attorneys for Defendants Louis J. Freeh, Freeh Sporkin & Sullivan, LLP, and Freeh Group International Solutions LLC

CERTIFICATE OF SERVICE

I, David S. Gaines, Jr., hereby certify that I caused to be served on March 28, 2016, a true and correct copy of the foregoing Memorandum by first-class mail upon the following:

Kathleen V. Yurchak
GOODALL & YURCHAK P.C.
328 South Atherton Street
State College, PA 16801
(814) 237-4100
(814) 237-1497 (fax)
yurchak@centrelaw.com

Thomas A. Clare
Elizabeth M. Locke
Andrew C. Phillips
CLARE LOCKE LLP
902 Prince Street
Alexandria, VA 22314
(202) 628-7400
tom@clarelocke.com
libby@clarelocke.com
andy@clarelocke.com

Attorneys for Plaintiff

David S. Gaines, Jr.

EXHIBIT 1

2004 WL 2426237
Only the Westlaw citation is currently available.
Court of Common Pleas of
Pennsylvania, Philadelphia County.

NORTHSTAR WASTE LLC Plaintiff,
v.
Lester J. LISHON, U.S. Environmental Inc.
and Enviro-Waste Solutions, Inc. Defendants.

No. 04699 FEB.TERM 2004, CONTROL 062185.
|
Aug. 10, 2004.

MEMORANDUM OPINION

COHEN, J.

*1 Before the court are Defendants' Preliminary Objections to Plaintiff's Complaint. For the reasons fully set forth below, said Preliminary Objections are sustained in part and overruled in part.

DISCUSSION

Count IV of Plaintiff's Complaint purports to state a claim for tortious interference with a contract. The elements of a cause of action for intentional interference with contractual relations, whether existing or prospective, are as follows: (1) the existence of a contractual or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the 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. *Al Hamilton Contracting Co. v. Cowder,* 434 Pa.Super. 491, 497, 644 A.2d 188, 191 (1994).

As previously stated, an essential element of such a claim is "the existence of a contractual relationship between plaintiff and a third party." *Strickland v. Univ. of Scranton,* 700 A.2d 979, 9085 (Pa.Super.1997). At bar, Plaintiff had failed to identify a specific contract between itself and an identifiable third party that has been interfered with by Defendants. As such, Count IV is insufficiently pled.

The remainder of Defendants' Preliminary Objections are overruled. This court finds that, at this preliminary stage, the remainder of Plaintiff's Complaint has been pled sufficiently to withstand the instant Preliminary Objections. However, this court makes no finding as to the future viability of any of the counts contained therein and enters this Order without prejudice so that Defendants may later file a motion challenging same, if warranted.

CONCLUSION

Based on the foregoing, this court finds as follows:
1. Defendants' Preliminary Objection to Counts IV (tortious interference with contract) is SUSTAINED and Count IV is DISMISSED.

2. The remainder of Defendants' Preliminary Objections are OVERRULED.

This Court will enter a contemporaneous Order consistent with this Opinion.

ORDER and MEMORANDUM

AND NOW, this 10th day of August 2004, upon consideration of Defendants' Preliminary Objections, all responses in opposition, the respective memoranda, all matters of record and in accordance with the Opinion being filed contemporaneously with this Order, it hereby is ORDERED and DECREED as follows:

1. Defendants' Preliminary Objection to Count IV (tortious interference with contract) is SUSTAINED and Count IV is DISMISSED.

2. The remainder of Defendants' Preliminary Objections are OVERRULED.

3. Defendants are ORDERED to file an answer to the remaining averments in Plaintiff's Complaint within twenty (20) days from the date of entry of this Order.

All Citations

Not Reported in A.2d, 2004 WL 2426237

End of Document

2001 WL 1808556
Only the Westlaw citation is currently available.
Pennsylvania Court of Common Pleas.

HARBOR HOSPITAL SERVICES, INC., Century Textile t/a Harbor Hospital Laundry Services, Harbor Service Corp., and Earl Waxman
v.
GEM LAUNDRY SERVICES, L.L.C., Royal of PA, Inc., Royal Institutional Services, Inc., Mark Johnson, Shawn Ryan, and Mark Leibovitz
HARBOR HOSPITAL SERVICES, INC.
v.
GEM LAUNDRY SERVICES, L.L.C., Royal of PA, Inc., Royal Institutional Services, Inc., Mark Johnson, Shawn Ryan, and Mark Leibovitz

No. 4830 JULY TERM 2000,
0207 AUG.TERM 2000.
|
July 18, 2001.

OPINION

SHEPPARD, J.

***1** Presently before this court are two sets of Preliminary Objections: (1) the Preliminary Objections of defendants, Royal of PA, Inc., Royal Institutional Services, Inc., Mark Johnson, Shawn Ryan and Mark Leibovitz, to Counts II, III, IV and VIII of the Second Amended Complaint filed in the action captioned as July Term, 2000, No. 4830; and (2) these same defendants' Preliminary Objections to the Amended Complaint in the consolidated case, captioned as August Term, 2000, No. 207. [1]

For the reasons set forth, the Preliminary Objections are sustained in part and overruled in part.

BACKGROUND

This lawsuit arises out of a failed business venture to provide commercial laundry services to Philadelphia-area hospitals.

The lead plaintiff is Harbor Hospital Services, Inc. ("Harbor"), a Pennsylvania corporation engaged in the business of distributing and marketing linen and related products to various healthcare and health services institutions. Also named as plaintiffs are: Harbor Service Corp. ("HSC"), owner of the registered trademark "Harbor Linen"; Century Textile, Inc. trading as Harbor Hospital Laundry Services ("Century"), which was engaged to provide commercial laundry services for Virtua Health System in New Jersey; and Earl Waxman ("Waxman"), the sole shareholder of Harbor, HSC and Century. Plaintiffs are sometimes collectively referred to as "Harbor" or the "Harbor Group." The defendants include GEM Laundry Services, L.L.C. ("GEM"), a Pennsylvania limited liability company, whose members include Harbor and co-defendant, Royal of PA, Inc. ("Royal PA"). Royal PA was formed at the direction of co-defendant, Royal Institutional Services, Inc. ("RISI"), a Massachusetts corporation engaging in the commercial laundry business. RISI is a signatory to the GEM Operating Agreement. Together, RISI and Royal PA are sometimes referred to as the "Royal" entities. Also named as defendants are RISI's shareholders: Mark Johnson ("Johnson"), Shawn Ryan ("Ryan") and Mark Leibovitz ("Leibovitz").

Harbor has allegedly provided linen supply services for the past twenty-five (25) years to various healthcare facilities in the greater Philadelphia area, including the Jefferson Health System ("Jefferson") and the Virtua Health System ("Virtua"). In March 1998, after extensive discussions and negotiations, Harbor entered into a long-term agreement with Jefferson, whereby Harbor was engaged as the exclusive commercial laundry service provider for identified facilities within the Jefferson system and engaged as the exclusive provider for linen and linen-related products ("the Jefferson Agreement"). *See* Second Am.Compl., Exhibit A. [2] The Jefferson Agreement contemplated that Harbor may enter into subcontracts to fulfill various obligations under the agreements, such as the laundry services required to be performed by Harbor, since Harbor did not have the capacity to provide laundry services to hospitals. *Id.* at § 18.

***2** Harbor and its affiliates then had discussions with RISI and the individual defendants, who had experience in hospital laundry services in Massachusetts, about forming a joint venture to perform the laundry services to Harbor's hospital customers in Pennsylvania and New Jersey. These discussions led to the execution of the Operating Agreement, dated July 29, 1998 ("Operating Agreement") and the formation of GEM. *See* Second Am.Compl., Exhibit B.

Pursuant to the Operating Agreement, Harbor was to assign the Jefferson Agreement to GEM as part of its capital contribution. *Id*. at § 1.2.6.1. In the event that Harbor could not obtain the consent of Jefferson to this assignment, then the Operating Agreement was to be considered a subcontract between Harbor and GEM. *Id.* at § 1.2.6.1.1. In addition, the Royal entities were to arrange for the necessary capital for the operation of GEM's business activities. *Id.* at § 6.3. Royal PA, at all times, was also to provide to GEM the supervisory support necessary for the efficient operations of GEM. *Id.* The payment and performance of Royal PA's obligations under the Operating Agreement were guaranteed by the individual defendants and RISI, as sureties. *Id.* at 32.

Harbor also entered into a Laundry Services and Marketing Agreement with GEM dated July 29, 1998 ("Marketing Agreement"), pursuant to which Harbor was exclusively engaged to provide certain marketing services for GEM and GEM was obligated to pay Harbor a sales fee based upon a percentage of the GEM's laundry service revenues from all laundry service customers during the term of the agreement. *See* Second Am.Compl., Exhibit C at § 3(e). This provision was to be binding on GEM's successors and assigns. *Id.* GEM was also supposed to pay a service fee to Harbor based on "customer support activities" and a percentage of the laundry processed by GEM. *Id.* at § 3(g). In addition, the Marketing Agreement obligated GEM and the Royal entities to pay Harbor a "termination fee" in the event that any laundry services customer procured by Harbor terminated its laundry services agreement (including the Jefferson Agreement) on account of a deficiency of GEM's services. *Id.* at § 3(f).

As alleged, the beginning of GEM's operations was delayed due to the negligent actions and inactions of the Royal entities. GEM's services were allegedly substandard and inferior due to the Royal entities' grossly deficient, reckless and wanton management and supervision of GEM's business activities. As alleged, the Royal entities failed to provide for GEM management personnel with expertise in the operation of a commercial laundry for healthcare; failed to properly run the day-to-day operations of GEM in a cost-effective manner; and failed to pay GEM's debts and obligations as they became due. Further, as alleged, the Royal entities efforts had been focused on selling their entire business operations, including GEM, rather than supervising the daily business affairs of GEM.

***3** By late November 1998, GEM was in a severe cash-flow crisis due allegedly to the Royal entities' conduct. The Royal entities then insisted that Harbor or Waxman make available to GEM on a temporary or "bridge" basis, an emergency loan in the amount of $200,000 which would be repaid from the first proceeds of any alternative financing made available to GEM. On November 24, 1998, Waxman extended this loan to GEM in exchange for a promissory note in the amount of $200,000. *See* Am.Compl., Exhibit A. RISI, Royal PA and the individual defendants guaranteed, as sureties, GEM's obligations under the note to Waxman. *Id.* at 2-3.

In July 1999, the Royal entities advised the Harbor group that Royal would abandon its obligations to oversee and supervise the performance of GEM's operations. Thereafter, on August 1, 1999, Harbor was required to arrange for an alternative laundry services provider to fulfill the needs of Harbor's laundry service customers. Certain performance problems with the laundry services provider did not dramatically improve. On October 7, 1999, Jefferson sent written notice to Harbor of its intent to terminate the Jefferson Agreement. Virtua has also elected to terminate Harbor. Harbor has not been paid a termination fee by the defendants, nor has it received any portion of sales fee or services fee. Harbor also has allegedly suffered substantial damage to its name and reputation and has been foreclosed from numerous business opportunities on account of this damage.

RISI, or another corporation owned by some or all of the Royal shareholders or their affiliates, referred to as "Royal Successor," is alleged to be presently engaged by Jefferson to provide commercial laundry services after Harbor was terminated by Jefferson.

With this background, plaintiffs filed both actions against the defendants. First, in the July action, plaintiffs set forth Counts for intentional misrepresentation/fraud, negligence and gross negligence, breach of contract, breach of fiduciary duty, unjust enrichment, conversion, and tortious interference/ violation of corporate opportunities. Second Am.Compl., Counts I-VIII. Royal PA, RISI and the individual defendants filed Preliminary Objections, in the form of a demurrer to Counts II, III, IV and VIII of the complaint, as well as moving to strike the complaint for failing to attach any writing which reflects that any of the plaintiffs were engaged to provide laundry services to Virtua. [3]

Additionally, Harbor commenced the August action by filing a Complaint in Confessed Judgment, to recover on the promissory note. Defendants initially filed a Petition to Strike Off and/or Open the Confessed Judgment. On November 28,

2000, this Court ordered the confessed judgment stricken in its entirety as to all defendants.[4] Harbor then filed an Amended Complaint against the same defendants, seeking to recover under the Note. Royal PA, RISI and the individual defendants, also referred to as the "guarantor defendants" filed Preliminary Objections to this complaint, asserting Harbor's lack of standing to enforce the guaranty and the failure to attach any written assignment.

***4** This court will address both sets of objections *seriatim.*

LEGAL STANDARD

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows for preliminary objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. *Tucker v. Philadelphia Daily News,* 757 A.2d 938, 941-42 (Pa.Super.Ct.2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." *Bourke v. Kazara,* 746 A.2d 642, 643 (Pa.Super.Ct.2000) (citation omitted). Moreover,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi. 729 A.2d 1206, 1211 (Pa.Super.Ct.1999). However, the pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. *Giordano v. Ridge,* 737 A.2d 350, 352 (Pa.Commw.Ct.1999), *aff'd.* 559 Pa. 283, 739 A.2d 1052 (1999), *cert. denied,* 121 S.Ct. 307 (U.S.2000). In addition, it is not necessary to accept as true averments in the complaint which conflict with exhibits attached to the complaint. *Philmar Mid-Atlantic, Inc. v. York Street Associates II,* 389 Pa.Super. 297, 300, 566 A.2d 1253, 12 (1989).

Applying this standard, this court finds that plaintiffs have failed to state causes of action for negligence and for tortious interference with corporate opportunity or prospective contractual relations. However, the court finds that plaintiffs have sufficiently stated causes of action for breach of contract and breach of fiduciary duty. The court further finds that plaintiff, Harbor, does have standing to sue on the promissory note as against the guarantor defendants. Thus, the Preliminary Objections will be sustained in part and overruled in part.

DISCUSSION

I. PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT-JULY ACTION

A. Count II-Negligence and Gross Negligence

Defendants demur to Count II on the grounds that Pennsylvania does not recognize a cause of action for negligent breach of contract.[5] This court agrees.

Our Superior Court has stated the following rule regarding the "gist of the action" doctrine: "to be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral ... a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly." *Phico Ins. Co. v. Presbyterian Medical Servs. Corp.,* 444 Pa.Super. 221, 229, 663 A.2d 753, 757 (1995)(holding that policy exclusion for contractually based claims precluded coverage under insurance policy, notwithstanding allegations that medical corporation engaged in gross negligence or willful misconduct in the administration and management of the nursing home resulting in a breach of the management agreement). The main inquiry for applying the doctrine is the source of the duties that the defendant violated. *Id.* A tort action arises from the breach of a duty imposed as a matter of social policy while a contract action arises from the breach of a duty imposed by agreement or mutual consensus of the parties. *Id. See also, Redevelopment Auth. of Cambria County v. International Ins. Co.*, 454 Pa.Super. 374, 394-96, 685 A.2d 581, 591-92 (1996)(holding that general liability insurer had no duty to defend or indemnify public authority in underlying suit which essentially alleged a breach of contractual duties since liability did not stem from negligent behavior).

*5 Plaintiffs rely on *Hirsch v. Mount Carmel District Indus. Fund, Inc.*, 363 Pa.Super. 433, 436-37, 526 A.2d 422, 424 (1987) for the proposition that Pennsylvania law allows for a negligent breach of contract where the plaintiff alleges an improper performance of a contract rather than a nonperformance. However, the court in *Hirsch* relied on *Raab v. Keystone Ins. Co.*, 271 Pa.Super 185, 187-88, 412 A.2d 638, 639 (1979) for the misfeasance/nonfeasance distinction. This distinction was implicitly overruled by *Phico Ins. Co.*, 444 Pa.Super. at 228, 663 A.2d at 757. Therefore, *Hirsch* should no longer be controlling on this point.

Here, in Count II, plaintiffs allege that "[t]he acts of the Royal Group defendants in negligently and grossly mismanaging the commercial laundry obligations of GEM *as required pursuant to* the GEM Operating Agreement constitute negligence, gross negligence, reckless or intentional misconduct." Second Am.Compl. at ¶ 47. Plaintiffs also allege that damages flowed from this alleged negligent and gross mismanagement of the commercial laundry obligations in that: (1) Harbor had to forfeit its rights to perform laundry services under the Jefferson Agreement; (2) Century had to forfeit its rights to perform laundry services under the Virtua Agreement; (3) Harbor did not receive the marketing, sales and termination fees that it was owed pursuant to the Marketing Agreement on account of the termination of the Jefferson and Virtua Agreements; (4) Harbor would not realize the distribution of cash flows from the anticipated profits of GEM; (5) Harbor has been obligated to issue credit adjustments to Jefferson and Virtua Health Systems; (6) Harbor's and Waxman's business and professional reputations have been injured; (7) Harbor has been compelled to defend claims of creditors of GEM and incur expenses; and (8) Harbor has been obligated to satisfy various obligations of GEM. *Id.* at ¶ 48.

Clearly, these allegations reflect that plaintiffs are relying on the GEM Operating Agreement and the Marketing Agreement to set forth their claim for negligence and gross negligence. Their proper redress belongs in contract, not in tort, pursuant to the "gist of the action" doctrine. Therefore, the Preliminary Objections to Count II are sustained. Count II is stricken from the complaint.

B. Count III-Breach of Contract

Defendants demur, on several grounds, to Count III, which purportedly seeks payment of sales fees, service fees and termination fees. As to the sales fees, defendants contend that plaintiffs are not entitled to the sales fees under the Operating and Marketing Agreements since sales fees were never intended to apply to the Jefferson Agreement but were to apply to customers who actually entered into laundry service agreements with GEM and that plaintiffs make only conclusory allegations that RISI is the "successor" or "assign" of GEM. As to the service fees, defendants argue that GEM never entered into a laundry services agreement with Jefferson, and, therefore, neither it nor its successor would be liable for service fees. Defendants contend that plaintiffs' claim as to service fees fails for lack of consideration. As to termination fees, defendants assert that GEM's liability for termination fees arises only after certain conditions precedent are satisfied and that these conditions were not met in the present instance since Harbor failed to assign the Jefferson Agreement to GEM and no laundry service customer ever alleged that it had terminated its agreement with GEM, but, rather, Jefferson and Virtua had terminated the agreements they had with Harbor and Century. Defendants also argue that this court lacks jurisdiction to decide whether the laundry service agreement was terminated for cause.

*6 This court concludes that the demurrer should be overruled with respect to the sales fees and service fees, but sustained with respect to the termination fees.

In Count III of the Second Amended Complaint, plaintiffs seek sales fees and service fees pursuant to certain provisions of the Operating Agreement and related Marketing Agreement, which are alleged to be a continuing obligation of GEM or any entity succeeding to GEM's assets or business who continues to perform laundry services for a laundry customer procured during the term of the agreement(s). *See* Second Am.Compl. at ¶¶ 42, 50. Plaintiffs implicitly seek termination fees which defendants are allegedly obligated to pay them under the Marketing Agreement on account of Jefferson's termination of Harbor which is attributable to defendants' alleged performance deficiencies. *Id.* at ¶¶ 38-40; 48(d), (e). Plaintiffs also allege that RISI or Royal Successor has succeeded to the laundry service operations of GEM and continues to owe GEM's obligations to pay Harbor these fees. *Id.* at ¶ 51. Further, plaintiffs allege that defendants Royal PA, RISI and the individual defendants, who were guarantors of GEM's performance, breached the Operating Agreement and related Marketing Agreement by failing to secure GEM management personnel with sufficient experience in the laundry business or properly and efficiently run the daily operations of GEM. *Id.* at ¶¶ 28-30, 52-55. In addition to the alleged fees owed to them, plaintiffs allege

that they have suffered damages in their name, reputation and goodwill on account of defendants' actions and inactions. *Id.* at ¶ 43.

To maintain a cause of action for breach of contract, the plaintiff must allege and ultimately prove (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.1999) (citations omitted). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." *Id.* at 1058. Further, to recover on a breach of contract claim, a plaintiff must generally aver that all conditions precedent have been performed or occurred. *See Britt v. Chestnut Hill College,* 429 Pa.Super. 263, 269, 632 A.2d 557, 560 (1993). *See also,* Pa.R.C.P. 1019(c). Our Superior Court explains this principle here:

> when the consideration of the defendant's contract was executory, or his performance was to depend on some act to be done or forborne by the plaintiff, or some other event, the plaintiff must aver the fulfillment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or any other person, or must show some excuse for the nonperformance ....

Zeller v. Wunder, 1908 WL 3639, at *3 (Pa.Super.Ct. Nov. 14, 1907).

In analyzing plaintiffs' breach of contract claim, this court must look to various provisions of the Operating and Marketing Agreement to see whether plaintiffs are barred, as a matter of law, from recovering sales fees, service fees and/or termination fees for failure of a condition precedent and/or lack of consideration.[6] First, the fact that the Jefferson Agreement may not have been assigned to GEM is not fatal to plaintiffs' claim. The Operating Agreement provided, in pertinent part, that:

> *7 [i]n the event, notwithstanding Harbor's best efforts, as aforesaid, Harbor cannot obtain the consent of the Jefferson Health System to the assignment of the Jefferson Services Agreement by Harbor to [GEM], this Agreement shall not be considered under the Jefferson Services Agreement as an assignment, but instead, as contemplated by Section 18 of the Jefferson Services Agreement, this Agreement shall constitute a subcontract between Harbor and [GEM] pursuant to which [GEM] shall be engaged to perform and fulfill on behalf of Harbor all of Harbor's obligations for the performance of Laundry Services ... to the Jefferson Health System ... and [GEM] shall be entitled to receive all compensation paid by the Jefferson Health System under such Agreement for the performance of such Laundry Services, to the same extent as if the Jefferson Services Agreement were actually assigned to the Company....

Second Am.Compl., Exhibit B at § 1.2.6.1.1. Plaintiffs alleged that GEM was engaged to perform the laundry services required to be performed by Harbor under the Jefferson Agreement. Second Am.Compl. at ¶ 20. Therefore, this court may reasonably infer that Harbor performed its initial task of contributing to GEM the right to perform the laundry services under the Jefferson Agreement.

In addition, the Operating Agreement stated that "the Sales Fee (as defined under the Harbor Services Agreement) is a continuing obligation of [GEM] for so long as [GEM] (or any successor or assign to all or a substantial portion of [GEM's] business) performs Laundry Services for *any* such Laundry Service customer's facility...." Second Am.Compl., Exhibit B at § 6.2.1.1 (emphasis added). Prior to any sale of the GEM's assets, the members, i.e., Harbor and Royal, had to agree to this continuing obligation to Harbor. *Id.* Under the Operating Agreement, RISI and Royal PA were to arrange for the availability to GEM of all necessary capital for the operation of GEM's business activities and Royal PA was to provide GEM with all supervisory support necessary for its operations. *Id.* at § 6.3. Further, on the signature page of the Operating Agreement, RISI and the individual defendants guaranteed, as surety, in favor of Harbor, the payment and performance of all of Royal PA's obligations under the agreement. *Id.* at 32. It is not clear from the broad language of section 6.2.1.1 that the sales fee(s) were only intended for laundry customers procured by Harbor, other than Jefferson.

Moreover, under the Marketing Agreement, executed on the same day as the Operating Agreement, Harbor was engaged as GEM's exclusive sales and marketing representative and Harbor was to use its best efforts to procure laundry services customers for GEM. Second Am.Compl., Exhibit C at § 3(a). The exclusivity provision would not apply if Harbor does not procure, within the eighteen (18) month period following GEM's commencement of the Jefferson

Agreement, commitments for GEM to perform laundry services for an additional 7.25 million pounds weight per year of laundry. *Id.* at § 3(a)(ii). In such event, GEM could solicit and procure laundry service customers directly. *Id.* In consideration of Harbor's performance, Harbor was to receive a sales fee at the rate of 3.5% of the net collected revenues collected by GEM (and its successors and assigns). *Id.* at § 3(e).

***8** It is not clear that the sales fee provision was not triggered simply because GEM may not have formally entered into an agreement with Jefferson or another laundry service customer. Further, it is not clear that Royal Successor or some other corporation who succeeded to GEM's assets could not be obligated to Harbor to pay them a sales fee for laundry services performed for Jefferson. The extent of sales fees that may be owed to Harbor may depend on the term of the respective agreements, but this factual issue cannot be determined at this point. Therefore, the demurrer to the breach of contract claim as to the sales fee provisions is overruled.

As to services fees, the Marketing Agreement obligated Harbor to perform certain long-term customer relationship activities to the extent required under each Laundry Service Agreement entered into by GEM. *Id.* at § 3(g). In exchange for its performance, Harbor was to receive a service fee under each Laundry Services Agreement at the rate of $.005 per pound of soiled linen processed by the Laundry Facility for the healthcare customers. *Id.* The service fee was payable by GEM to Harbor on a monthly basis. *Id.* It is not clear that the fact that no service agreement may have been formally entered into by GEM bars Harbor's recovery of a service fee, when read in conjunction with the Operating Agreement and the treatment of GEM as a subcontractor. Therefore, the demurrer to the breach of contract claim as to the service fee provisions is also overruled.

As to the termination fees, GEM and Royal agreed that "in the event any Laundry Service Customer procured by Harbor alleges that it has terminated its Laundry Service Agreement with [GEM] on account of a deficiency in [GEM's] quality of Laundry Services (referred to herein as a 'for cause termination') during the initial ... term of any such Laundry Service Agreement (including without limitation, the Jefferson Services Agreement), [GEM] shall pay to Harbor within ten (10) days following the effective termination date of any such Laundry Service Agreement, a termination fee...." *Id.* at § 3(f) (emphasis in original). However, Harbor's right to the termination fee was subject to the condition that representatives of GEM and Royal have the opportunity to interact with the laundry service customer and discuss the customer's complaints prior to the effective termination date. *Id.* at § 3(f)(ii)(1). Further, in the event of a dispute between the parties concerning whether a customer's termination of a laundry service agreement was a "for cause termination," such dispute shall be finally settled by arbitration in accordance with the Rules of the American Arbitration Association.

Plaintiffs fail to allege that GEM or Royal had the opportunity to discuss Jefferson's complaints. Rather, Harbor, on its own, appears to have undertaken the complaints of the laundry service customers. Second Am.Compl. at ¶¶ 31-32. Failure to aver the performance of this condition precedent bars plaintiffs from recovering termination fees.[7] Therefore, the demurrer as to termination fees is sustained.

***9** Since this court cannot conclude with certainty that plaintiffs have failed to state a cause of action for breach of contract in Count III in order to recover sales fees or services fees, the demurrer to Count III is overruled as to those fees.

C. Count IV-Breach of Fiduciary Duty

Defendants demur to Count IV on the grounds (1) that all of the plaintiffs lack standing to sue a co-member of the limited liability company for breach of fiduciary duty; (2) the type of misconduct on which plaintiff's claim is predicated is not within the scope of fiduciary duty established by 15 Pa.C.S.A. § 8943(a); and (3) that plaintiffs are no different than creditors of GEM with respect to their contract damages. This court disagrees with respect to Harbor, but not as to the other named plaintiffs.

In Count IV of the Second Amended Complaint, plaintiffs set forth the following allegations:

> 57. GEM was an entity created to effect a joint venture between plaintiffs and defendants.
>
> 58. As a result of the defendants' breach of contract, negligence, gross negligence, severe, inefficient and willful or reckless mismanagement and otherwise, defendants violated the fiduciary duty owed among members of a limited liability company or among its partners.
>
> 59. It was reasonably foreseeable to these defendants that the entities comprising the Harbor Group would have an

expectation of trust that defendants would provide the necessary supervisory support and oversight to cause GEM to operate efficiently and to provide laundry services at least in a manner reasonably consistent with commercial healthcare industry standards. This is particularly the case due to the following language in the Marketing Agreement (Exhibit C, p. 7 ¶ (i)):

> a.... Laundry Co. [GEM] acknowledges that Harbor [HHS] has entered into this Agreement in reliance upon [GEM's] and [GEM's] principal members,' [Royal PA], representations and reputations of high quality of service. [GEM] acknowledges that quality of service at a competitive price is of paramount importance to Laundry Service Customers and Harbor has entered into this Agreement based upon Laundry Co.'s guaranty that it will be able to satisfy such Laundry Service Customers' demands with respect to such matters.

60. The aforementioned defendants breached this fiduciary duty owed to the Harbor Group. The defendants were also willfully, recklessly or grossly negligent by misrepresenting their ability to perform the responsibilities and undertakings in the joint venture.

Second Am.Compl. at ¶¶ 57-60.

In analyzing the demurrer to this Count, the court notes that no Pennsylvania case has addressed whether one member of a limited liability company may hold another member liable for breach of fiduciary duty. Defendants refer to *International Flavors and Textures, L.L.C. v. Gardner*, 966 F.Supp. 552, 554 (W.D.Mich.1997), for the proposition that a member owes a fiduciary duty to the limited liability company, but not to its members. Since that case was interpreting Michigan law on limited liability companies, this court does not find it helpful or applicable.

***10** Certain provisions of the "Limited Liability Company Law of 1994," codified at 15 Pa.C.S.A. §§ 8901 *et seq.*, are relevant for deciding this issue.[8] First, Section 8904 states, in pertinent part, that:

> (a) General Rule.-Unless otherwise provided in the certificate of organization, in any case not provided for in this chapter:
>
> (1) If the certificate of organization does not contain a statement to the effect that the limited liability company shall be managed by managers, the provisions of Chapter 81 (relating to general provision) and 83 (relating to general partnerships) govern, and the members shall be deemed to be *general partners* for purposes of applying the provisions of those chapters ...
>
> (b) Basis for determining liability of members, etc.-Except as otherwise provided in section 110 (relating to supplementary general principles of law applicable), the liability of members, managers and employees of a company shall at all times be determined solely and exclusively by the provisions of this chapter.

15 Pa.C.S.A. § 8904 (emphasis added).[9] Further, Section 8922(a) provides that "[n]either the members of a limited liability company nor the managers of a company managed by one or more managers are liable, *solely by reason of being a member or a manager,* under an order of a court or in any other manner for a debt, obligation or liability of the company of any kind or for the acts or omissions of any other member, manager, agent or employee of the company." 15 Pa.C.S.A. § 8922(a) (emphasis added). A reasonable interpretation of this section does not connote that members are immune from liability, in all circumstances, but means that members are not liable simply because of their status as members. In addition, Section 8943, which governs when a limited liability company is not to be managed by managers, obligates every member to "account to the company for any benefit and hold as trustee any profits derived by him without the consent of the other members from any transaction connected with the organization, conduct or winding up of the company or any use by him of its property." 15 Pa.C.S.A. § 8943. The 1994 Committee Comment to Section 8943 relates the following:

> ... members who do not act as managers, like corporate shareholders and limited partners, do not have the fiduciary duties of managers. Even if a member is not involved in management, however, the member has no right to appropriate for personal use property belonging to the company. It is intended that the courts will fashion rules in appropriate circumstances by analogy to principles of corporate or partnership law to deal with situations such as oppression of minority members, actions taken in bad faith, etc....

These sections, taken together, authorize this court to look to principles of partnership law and/or corporate law. Under the Uniform Partnership Act ("UPA"), a partner is accountable

to the partnership as a fiduciary for the profits derived by him without consent of the other partners in the conduct of the partnership or from any use of the partnership's property. 15 Pa.C.S.A. § 8334(a). The UPA also applies to limited liability companies. 15 Pa.C.S.A. § 8311(b). Further, partners stand in a fiduciary relationship to each other. *See Clement v. Clement*, 436 Pa. 466, 468, 260 A.2d 728, 729 (1970); *Bracht v. Bracht*, 313 Pa. 397, 402, 170 A. 297, 298 (1933). As stated in *Clement*

> ***11** partners owe a fiduciary duty one to another.... One should not have to deal with his partners as though he were the opposite party in an arms-length transaction. One should be allowed to trust his partner, to expect that he is pursuing a common goal and not working at cross-purposes.

Id. at 468, 260 A.2d at 729. *See also, Haymond v. Lundy*, 2000 WL 804432, at *14 (E.D.Pa. June 22, 2000)(finding that the fiduciary of duty between partners has limits and does not always apply to every interaction merely by the existence of a partnership); *Haydinger v. Freedman*, 2000 WL 748055, at *8 (E.D.Pa. June 8, 2000)(determining that Pennsylvania law allows a limited partner to bring an action against a general partner for breach of fiduciary duties). *Cf. Kenworthy v. Hargrove*, 855 F.Supp. 101, 105 (E.D.Pa.1994).

Here, the Operating Agreement provides that the management of GEM shall be vested in the members. Second Am.Compl., Exhibit B at § 3.3 .1. Therefore, this court should treat the members of GEM (i.e., Harbor and Royal) like partners. Further, the Operating Agreement includes the following provision with respect to liability of members:

> *To the Company and Other Members.* Each Member shall be obligated to perform all promises and covenants to contribute all monies and property undertaken by such Member set forth herein. Notwithstanding the foregoing and except as limited by the Act, any such obligation to make a contribution and/or perform services may be compromised and/or waived by a Super Majority Vote of the Members, other than the Member responsible for such obligation.

Id. at § 4.3.2. Since Royal PA was allegedly obligated to supply experienced personnel for GEM and supervise the laundry services and since Royal PA allegedly failed to properly run the daily operations of GEM, it may ultimately be held liable for breach of fiduciary duty as a co-member of GEM.

Nonetheless, this court finds that plaintiffs, Waxman and Century, do not have standing to sue Royal PA, RISI or the individual defendants for breach of fiduciary duty since neither plaintiff is a member of GEM. [10]

Since this court cannot say with certainty that Harbor has not stated a claim against Royal PA for breach of fiduciary duty, the demurrer to Count IV is overruled.

D. Count VIII-Tortious Interference/Corporate Opportunity

Defendants demur to Count VIII on the grounds that (1) plaintiffs have failed to allege an intentional interference with plaintiffs' prospective contractual relations and that (2) plaintiffs have failed to identify any prospective contractual relationship. This court agrees as to the first point.

To establish a cause of action for intentional interference with contractual relations, the plaintiffs must allege the following: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of a 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. *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa.Super.Ct.1998).

***12** As to the second element of this tort, "intent extends both to the desired consequences and to the consequences substantially certain to follow from the act." *Field v. Philadelphia Elec. Co.*, 388 Pa.Super. 400, 416, 565 A.2d 1170, 1178 (1989); 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."). As noted in the comment to Section 766 of the Restatement (Second) of Torts, this tort can apply to "an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action. The fact that this interference with the other's contract was not desired and was purely incidental in character is, however, a factor to be considered in determining whether the interference is improper." Rest. (Second) of Torts § 766, cmt. j. *See also, Glazer v. Chandler*, 414 Pa. 304, 308, 200 A.2d

416, 418 (1964)("where ... the allegations and evidence only disclose that defendant breached his contract with plaintiffs and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may only be adjudicated in that action.").

In addition, a claim for tortious interference based on a prospective contractual relation is not deficient where it fails to specifically define the specific prospective contract(s). *Kelly-Springfiled Tire Co. v. D'Ambro*, 408 Pa.Super. 301, 309, 596 A.2d 867, 871 (1991)(holding that complaint 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.").

In Count VIII, plaintiff sets forth, in pertinent part, the following allegations:

> 80. Plaintiffs have been successful providers of linen services to various hospitals in their market area.
>
> 81. The grossly deficient performance of defendants in supervising the operations of GEM, which have in turn caused the damages to plaintiffs contended in this complaint, have substantially impeded plaintiffs' ability to market and expand business activities.
>
> 82. The activities of defendants have tortiously interfered with plaintiffs' corporate opportunities to develop and expand their operations.

Second Am.Compl. at ¶¶ 80-82. Plaintiffs also alleged that "[t]he GEM joint venture undertaking was never negotiated, commenced or performed by the Royal Group defendants in good faith. To the contrary, based upon the subsequent actions of the Royal Group, the defendants entered into the GEM joint venture principally in order to promote the size of their commercial laundry business operations in contemplation of selling all of the Royal Group's business operations." *Id.* at ¶ 37. Further, defendants' alleged misconduct rests in its focus on selling its entire business operations (including GEM) and failing to locate and secure experienced GEM management personnel or to efficiently run the daily operations of GEM in a cost-effective manner. *Id.* at ¶¶ 29-30. In addition, plaintiffs alleged that the Harbor Group arranged for an alternative laundry service provider in August 1999, after the Royal Group advised it that they would abandon their obligations to oversee and supervise the performance of laundry services. *Id.* at ¶ 34. During this transition in the performance of laundry services, the performance problems did not dramatically improve. *Id.* at ¶ 35.

***13** Even taking these allegations as true and assuming all reasonable inferences, this court finds that plaintiffs have not alleged that defendants took purposeful action specifically intended to harm plaintiffs' business relations with prospective third parties. This court also cannot reasonably infer from the allegations that defendants knew or should have known that their behavior was substantially certain to result in plaintiffs' business relations with others being negatively affected.

For these reasons, the demurrer to Count VIII is sustained and Count VIII is stricken.

E. Failure To Attach Writings

Defendants also move to strike Counts II, III and IV, to the extent that their based on an alleged agreement between Virtua and Century and between Century and GEM, for failure to attach any writings.

Preliminary objections may also be brought for failure of a pleading to conform to law or a rule of court. Pa.R.C.P. 1028(a)(2). Currently, subsection (i) of Rule 1019 requires a pleader to attach a copy of the writing or material part thereof where a claim or defense is based upon that writing. [11] Pa.R.C.P. 1019(i). Further, a pleader may state that the writing is not accessible, along with the reason and the substance of the writing, in order to comply with the rule. *Id.* Also, the current subsection (h) of Rule 1019 requires the pleader to state whether an agreement is written or oral. Nonetheless, Rule 126 provides that the procedural rules are to be liberally construed and allows the court to disregard any procedural defect which does not affect the substantial rights of the parties. Pa.R.C.P. 126.

Here, the allegations do not state whether any agreement between Virtua and any of the parties was written or oral. Plaintiffs also do not attach this agreement. Plaintiffs may not assert their claims for breach of contract or breach of fiduciary duty or any other claims without attaching this agreement or providing an explanation for why it was not attached or whether it was oral.

In this instance, the court will overrule the Preliminary Objection for failure to attach a writing with the specific direction that plaintiffs either provide the written Virtua Agreement, or provide in writing an explanation for the reasons it is not provided.

II. PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT-AUGUST ACTION

All defendants, except GEM, have also filed Preliminary Objections to the Amended Complaint in the August action filed by Harbor on the grounds that Harbor may not bring a claim against the guarantor defendants because the guaranty in question is a special guaranty in favor of Waxman, and cannot be enforced by Harbor as an assignee. These defendants also object based on Pa.R.C.P. 1019(h) and (i) for failure to attach a copy of the assignment or to state whether the assignment was contained in a writing.

In the Amended Complaint, Harbor is suing on the Promissory Note ("Note"), executed on November 24, 1998, in the principal amount of two hundred thousand dollars ($200,000.00) in favor of Earl Waxman. Am.Compl. at ¶ 9. *See,* Am.Compl., Exhibit A. Plaintiff alleges that the Note provides that an event of default exists if Fleet National Bank ("Fleet") declares a default against GEM under the July 29, 1998 Loan and Security Agreement, which Fleet did so declare in or about May 1999. *Id.* at ¶ 9. Further, plaintiff alleges that the Note was assigned without recourse by Waxman to Harbor, who is the current holder thereof. *Id.* at ¶ 13.

***14** First, this court previously addressed part of this issue in footnote 6 of its Opinion, granting the Petition to Strike the Confessed Judgment. *Harbor Hospital Services, Inc. v. Gem Laundry Services, L.L.C., et al.*, August 2000, No. 207, slip op. at 7 n. 6 (C.P.Phila.Nov. 28, 2000)(Herron, J.)(finding that "this court cannot conclude that Harbor, as an assignee, did not have authority to enforce the confession of judgment against the guarantors" since the Note specifically provided that the payee or any other holder thereof may cause such judgment to be confessed). Further, this court does not find that the "guaranty" at the end of the Note is a "special guaranty" as argued by the defendants. Rather, it is a surety agreement.

A guaranty is a "collateral agreement for performance of another's undertaking" or "[a]n agreement in which the guarantor agrees to satisfy the debt of another ... only if and when the debtor fails to pay (secondarily liable)." Black's Law Dictionary (6th ed.1990), at 705. A "special guaranty" is a "guaranty which is available only to the particular person to whom it is offered or addressed; as distinguished from a *general* guaranty, which will operate in favor of any person who may accept it." *Id.* at 706. In contrast, a surety is "[o]ne who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person ... [or] undertakes to pay money or to do any other act in event that his principal fails therein." *Id.* at 1441. A surety is a "person who is primarily liable for payment of debt or performance of obligation of another." *Id.* "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. *Id.* On the other hand, a guaranty agreement is a separate undertaking, in which the principal does not join, and is usually entered into before or after that of the principal and is often founded on separate consideration. *Id.*

Here, the "guaranty" in question is written directly under the terms of the Note and GEM's signature on the Note and was executed at the same time as the Note. Am.Compl., Exhibit A at 2-3. It states the following:

> The undersigned, Royal Institutional Services, Inc., Royal of PA, Inc., and Mark Johnson, Shawn Ryan and Mark Leibovitz, collectively constituting the sole shareholders of Royal of Pa, Inc. and of Royal Institutional Services, Inc., do each hereby acknowledge the foregoing Promissory Note executed by GEM Laundry Services, L.L.C., and do each hereby, *jointly and severally, guaranty, as surety,* in favor of Earl Waxman the payment and performance of all the Maker's obligations under such Promissory Note.

Id. (emphasis added). Its express terms reveal that it is a surety, not a special guaranty. There does not appear to be a prohibition against Harbor, as assignee, from suing the individual guarantors-RISI, Royal PA or the individual defendants-for monies owed on the Note. Moreover, Harbor's sole shareholder is Waxman, who should be able to assign the Note to his own corporation.

***15** For these reasons, the demurrer to the Amended Complaint is overruled.

Additionally, Harbor, as assignee, did not have to attach a copy of the assignment in order to proceed in this action. *See Manor Bldg. Corp. v. Manor Complex Assocs., Ltd.*, 435 Pa.Super. 246, 256, 645 A.2d 843, 848 (1994). *See also, Brown v. Esposito*, 157 Pa.Super. 147, 149, 42 A.2d 93, 94 (1945)(assignees "were not required to set out [the] assignment verbatim or attach a copy of the assignment as an exhibit to their pleadings.").

Therefore, the Preliminary Objections, based on Pa.R.C.P. 1019(h) and (i), in this action are also overruled.

CONCLUSION

For the reasons set forth, this court is entering a contemporaneous Order, sustaining the Preliminary Objections to Counts II and VIII of the Second Amended Complaint in the July action, as well as the Preliminary Objections based on failure to attach the Virtua Agreement. The Preliminary Objections to Count III are sustained, in part, and overruled, in part. Additionally, this court is overruling the remaining Objections in the July action and all of the Objections to the Amended Complaint in the August action. Defendants shall have twenty-two (22) days within entry of this Opinion and contemporaneous Order to file an Answer to both complaints.

All Citations

Not Reported in A.2d, 2001 WL 1808556

Footnotes

1 By this court's Order, dated March 7, 2001, granting the motion to consolidate the two cases, the lead case was designated as the one captioned as July Term, 2000, No. 4830. In this Opinion, the lead case shall be referred to as the "July action" and the consolidated case shall be referred to as the "August action."

2 All references in this Opinion to the Second Amended Complaint refers to the complaint filed in the July action. All references to the Amended Complaint refers to the complaint filed in the August action. The term "Exhibits" refers to those exhibits attached to the respective complaints or to the defendants' Preliminary Objections.

3 GEM does not appear to have joined the other defendants in their objections, but rather, GEM filed an Answer to Counts V, VI and VII of the Second Amended Complaint. RISI and the other defendants also filed Answers to Counts I, V, VI and VII.

4 *See Harbor Hospital Services, Inc. v. GEM Laundry Services, L. L.C., et al.*, August Term, 2000, No. 207 (C.P.Phila.Nov. 28, 2000) (Herron, J.).

5 Defendants also assert that plaintiffs lack standing to hold the Royal entities and the individual defendants liable for negligent breach of contract. However, this court is sustaining the objections to Count II on other grounds and need not now address this argument.

6 Interpretation of the Operating and Marketing Agreement is a matter of law for the court, and not a question of fact. *Onofrey v.. Wolliver*, 351 Pa. 18, 21, 40 A.2d 35, 37 (1944); *Mellon Bank, N .A. v. National Union Ins. Co. of Pittsburgh*, 768 A.2d 865, 868 (Pa . Super.Ct.2001).

7 Having determined this issue, this court need not address whether it lacks jurisdiction to determine whether the termination by Jefferson was "for cause".

8 Plaintiffs explicitly alleged that GEM is a limited liability company. Second Am.Compl. at ¶ 6. Therefore, notwithstanding plaintiffs' characterization of GEM as a "joint venture" in paragraph 57 of the Second Amended Complaint, this court will treat GEM as a limited liability company.

9 Section 110 provides that "[u]nless displaced by the particular provisions of this title, the principles of law and equity, including, but not limited to, the law relating to principal and agent, estoppel, waiver, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause, shall supplement its provisions. 15 Pa.C.S.A. § 110.

10 Though Waxman is the sole shareholder of Harbor and Century, this fact alone does not give him standing to sue Royal PA or the other defendants for an indirect injury to Harbor or to GEM, itself. *See, e.g., Kelly v. Thomas*, 234 Pa. 419, 427-28, 83 A. 307. 310 (1912)(relating the general rule that the right of an individual stockholder to act for the corporation to remedy a wrong done to the corporation is exceptional and usually arises after the corporation has refused to sue upon demand of the stockholder); *Burdon v. Erskine*, 264 Pa.Super. 584, 586, 401 A.2d 369, 370 (1979)(holding that sole stockholder of corporation could not bring derivative action on behalf of corporation seeking restitution since injury is too indirect).

This court previously recognized an exception to the shareholder-demand requirement in the case of the closely-held corporation. *See Levin v. Schiffman*, July 2000, No. 4442, slip op. at 13-14 (C.P.Phila.Feb. 1, 2001)(Sheppard, J.) and *Baron v. Pritzker*, August 2000, No. 1574, slip op. at 10-12 (C.P.Phila.Mar. 6, 2001)(Sheppard, J.). In both cases, this court relied on § 7 .01(d) of the ALI Principles of Corporate Governance to hold that a shareholder's derivative claim against a fellow shareholder may be treated as a direct claim in the case of a closely held corporation if it (i) will not unfairly expose the corporation or defendants to a multiplicity of suits; (ii) materially prejudice the interests of the corporation's creditors; or (iii) interfere with a fair distribution or recovery among all interested parties.

Here, if Harbor's claim against Royal PA is construed as a "derivative" claim, this court may treat it as a direct claim since Harbor and Royal PA are the only members of GEM. However, Waxman, though Harbor's principal, is too far removed to bring a claim for breach of fiduciary duty against Royal PA. The duty, if any, would be between the members of GEM, not between the individual shareholders of these members. Likewise, RISI and the individual defendants, who are shareholders of Royal PA and RISI, cannot be held liable for breach of fiduciary duty.

11 Formerly, subdivision (i) was listed as subdivision (h) which was amended in 2000. *See* Explanatory Comment-2000 to Pa.R.C.P. 1019.

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United States District Court,
W.D. Pennsylvania.

Chad PECHA, Plaintiff,
v.
Frank BOTTA, Defendant.

No. 2:13cv1666.
|
Signed Sept. 30, 2014.

Attorneys and Law Firms

C.E. Kurowski, James R. Jeffries, Keranko & Jeffries, LLC, Washington, PA, for Plaintiff.

Carolyn Batz McGee, John J. Myers, Eckert, Seamans, Cherin & Mellott, Pittsburgh, PA, for Defendant.

MEMORANDUM OPINION

DAVID STEWART CERCONE, District Judge.

I. INTRODUCTION

***1** On November 21, 2013, Plaintiff Chad Pecha ("Plaintiff" or "Pecha") initiated this action against a private attorney, Frank Botta ("Defendant" or "Botta"), asserting a variety of state and federal claims stemming from Botta's legal representation of Pecha's former employer, 5J Oilfield Services, LLC ("5J"). (Doc. No. 1). Specifically, Plaintiff asserts the following claims: "equal protection banning plaintiff from seeking employment and to be secure in his person" under 42 U.S.C. § 1983 (Count I); tortious interference with business relations (Count II); business disparagement (Count III); usurpation of business opportunity (Count IV); defamation (Count V); and a declaratory judgment action (Count VI). [1] *Id.*

Presently pending before the Court is Defendant's Motion to Dismiss (Docket No. 5), Plaintiff's Brief in Opposition (Docket No. 8), and Defendant's Reply Brief (Docket No. 10). For the reasons set forth below, Defendants' Motion to Dismiss will be granted in part and denied in part.

II. FACTUAL BACKGROUND

Prior to the events underlying this litigation, Pecha was employed by 5J, a company represented by Botta in his capacity as a private attorney. (Compl.¶¶ 1–3). Upon leaving his employment with 5J, Pecha executed a Confidentiality and Non–Compete Agreement ("the Agreement"), drafted by Botta, pursuant to which Pecha agreed not to seek employment with another company in the oil and gas industry for a period of three years. (Compl.Ex. A). The Agreement also contained geographic restrictions that encompassed eleven states, including Ohio. (*Id.*). In consideration for Pecha's agreement not to compete, 5J agreed to withdraw a prior federal lawsuit that it had filed against Pecha in the Western District of Pennsylvania related to his termination. (*Id.*). Pecha and a representative for 5J each signed the Agreement. (*Id.*).

At some point in October of 2013, Botta received word that an Ohio company, Mid–East Trucking ("Mid–East"), had either hired Pecha or was about to hire Pecha. (Compl. ¶ 8; Compl. Ex. B). In response, Botta drafted a letter to Mid–East informing them that Pecha was subject to a non-compete agreement and that any attempt to hire Pecha would violate that agreement. *Id.* Botta also telephoned Mid–East to advise them of the same. (Compl.¶ 8). In the course of those communications, Pecha asserts that Botta made "various statements and accusations ... designed to cast [Pecha] in a bad light to a potential employer." (*Id.* ¶ 51). Specifically, Botta allegedly stated that "I wouldn't trust [Pecha] as far as I could throw him." (*Id.* ¶ 52). As a result of Botta's actions, Pecha failed to obtain employment with Mid–East. (*Id.* ¶ 13).

III. LEGAL STANDARD

A valid complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

***2** The Supreme Court in Iqbal clarified that the decision in *Twombly* "expounded the pleading standard for 'all civil actions .' " *Iqbal*, 556 U.S. at 684. The court further explained that although a court must accept as true all of the factual allegations contained in a complaint, that requirement does not apply to legal conclusions; therefore, the pleadings must include factual allegations to support the

legal claims asserted. *Id.* at 678–79. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678 (citing *Twombly*, 550 U.S. at 555). The determination as to whether a complaint contains a plausible claim for relief "is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678–79 (citing *Twombly*, 550 U.S. at 556). In light of Iqbal, the United States Court of Appeals for the Third Circuit has instructed that district courts should first separate the factual and legal elements of a claim and then, accepting the "well-pleaded facts as true," "determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.' " *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir.2009). Ultimately, to survive a motion to dismiss, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

IV. DISCUSSION

A. Section 1983 (Count I)

Section 1983 imposes civil liability upon any person who, under color of state law, deprives someone of the rights, privileges, or immunities secured by the federal Constitution or the laws of the United States. *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir.2000). Section 1983 is "not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393–94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). To state a claim under Section 1983, a plaintiff must allege a deprivation of a right secured by the Constitution or laws of the United States and that the deprivation occurred under color of state law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 931, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). An individual acts under color of state law when: "(1) he is a state official, (2) 'he has acted together with or has obtained significant aid from state officials,' or (3) his conduct is, by its nature, chargeable to the state." *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 277 (3d Cir.1999) (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)).

In his Section 1983 claim, Pecha contends that Botta violated his right to seek and gain employment as secured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution. (Compl.¶¶ 18, 20). Pecha maintains that Botta is a state actor for purposes of Section 1983 because of his role as a licensed attorney and "officer of the Court." (*Id.* ¶ 15). Specifically, Pecha contends that Botta acted under color of state law by "calling a potential Ohio employer from his Pennsylvania law office" and by issuing an "actual and realistic threat of state action [by] fil[ing] a lawsuit" against Mid–East if they hired Pecha. (Doc. No. 8 at p. 7).

***3** There are few principles as well-settled in the law as this: an attorney cannot be considered a state actor simply because of his status as an attorney and officer of the court. As explained by the United States Supreme Court:

> It is often said that lawyers are "officers of the court." But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law" within the meaning of § 1983.

Polk County v. Dodson, 454 U.S. 312, 318–19, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). Thus, "[a]lthough states license lawyers to practice, and although lawyers are deemed 'officers of the court,' this is an insufficient basis for concluding that lawyers act under color of state law for the purposes of [Section 1983]." *Henderson v. Fisher*, 631 F.2d 1115, 1119 (3d Cir.1980); *see also Angelico*, 184 F.3d at 277–78 ("Attorneys performing their traditional functions will not be considered state actors solely on the basis of their positions as officers of the court."). Pecha's argument that Botta acted under color of state law by making an interstate telephone call and threatening to file a lawsuit to protect his client's rights is patently frivolous. In the absence of any state action, Pecha's Section 1983 claims must be dismissed. [2]

B. Tortious Interference with Business Relations (Count II)

It is generally recognized that a person "has the right to pursue his business relations or employment free from interference on the part of other persons except where such interference is justified or constitutes an exercise of an absolute right." *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1182 (Pa.1978). In order to state a claim for tortious interference under Pennsylvania law, a plaintiff must allege:

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

(2) purposeful action on the part of the defendant, specifically intending 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.

CGB Occupation Therapy, Inc. v. RHA Health Servs. Inc., 357 F.3d 375, 384 (3d Cir.2004).

In his complaint, Pecha alleges that Botta violated his right to pursue a business relationship with Mid–East by "call[ing] his potential employer in an attempt to prevent [Pecha] from becoming gainfully employed" and "[sending] a letter threatening [Pecha's] potential employer with civil suits if the Plaintiff would be or was hired." (Compl.¶¶ 27–28). There is no question that this averment properly alleges the existence of a prospective contractual relationship with Mid–East, an act by Bocha intended to harm that prospective relationship, and legal damage as a result of that action. The only remaining issue concerns the third element of Pecha's *prima facia* case: the existence or absence of a privilege or justification for Botta's acts.

***4** In determining whether a defendant's actions are privileged or justified, consideration is given to the following factors:

(a) The nature of the actor's conduct,

(b) The actor's motive,

(c) The interests of the other with which the actor's conduct interferes,

(d) The interests sought to be advanced by the actor,

(e) The proximity or remoteness of the actor's conduct to the interference, and

(f) The relations between the parties.

Adler, Barish, 393 A.2d at 1184. In addition, the Pennsylvania Supreme Court has held that "the conveyance of truthful information is not 'improper' interference." *Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, 610 Pa. 371, 20 A.3d 468, 478 (Pa.2011). Finally, courts have determined that an attorney does not act improperly when he acts in good faith to protect a client's legitimate interests. *Kelly–Springfield Tire Co. v. D'Ambro*, 408 Pa.Super. 301, 596 A.2d 867, 872 (Pa.Super.1991).

Citing the foregoing principles, Botta contends his actions were privileged because his communications with Mid–East stemmed directly from his representation of 5J and his client's interest in enforcing Pecha's agreement not to compete. The Court agrees. Under Pennsylvania law, an individual is privileged to take action when he has a legally protected interest and takes action or threatens to take action to protect that interest using proper means. *Gresh v. Potter McCune Co.*, 235 Pa.Super. 537, 344 A.2d 540, 541 (Pa.1975). Moreover, as noted above, legitimate activities undertaken by an attorney in the course of representing a client do not constitute improper interference. *Kelly–Springfield*, 596 A.2d at 872. Pecha does not allege there is anything improper about threatening to file a lawsuit to enforce a presumptively valid contractual agreement; indeed, he concedes in his complaint that Botta acted at all times in the interest of his client, 5J. (Compl.¶ 32).

Finally, there is "no liability for interference with a contractual relation on the part of one who merely gives truthful information to another." *Rantnetwork, Inc. v. Underwood*, 2012 WL 1021326, *16 (M.D.Pa. Mar.26, 2012) (quoting Restatement (Second) Torts § 772, comment b); *Walnut Street Associates*, 610 Pa. 371, 20 A .3d at 478. Pecha does not dispute that Botta's statements to Mid–East concerning the existence of an agreement not to compete and 5J's willingness to file a civil action to protect that agreement were true. Consequently, Pecha cannot establish the third element of his claim for tortious interference with business relations.

C. Business Disparagement (Count III)

In order to prevail on a claim for commercial disparagement under Pennsylvania law, a plaintiff must show that the defendant published a statement about plaintiff's business to another and that:

(1) The statement was false;

(2) the publisher either intended the publication to cause pecuniary loss or reasonably should have recognized that publication would result in pecuniary loss;

*5 (3) pecuniary loss did in fact result; and

(4) the publisher either knew the statement was false or acted in reckless disregard of its truth or falsity.

Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 570 Pa. 242, 809 A.2d 243 (Pa.2002) (citing Restatement (Second) of Torts § 623(A)). An action for business disparagement "is meant to compensate a vendor for pecuniary loss suffered because statements attacking the quality of its goods have reduced their marketability." *Synygy, Inc. v. Scott–Levin, Inc.*, 51 F.Supp.2d 570, 579 (E.D.Pa.1999). Consequently, the hallmark of an actionable "disparaging statement" is that the statement "is intended by its publisher ... to cast doubt upon the existence or extent of another's property in land, chattels or intangible things, or upon their quality." *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 924 (3rd Cir.1990) (quoting *Menefee v. Columbia Broadcasting Sys., Inc.*, 458 Pa. 46, 329 A.2d 216 (Pa.1974)).

Notably, an action for disparagement is separate and distinct from an action for defamation. As stated by the Third Circuit:

> The distinction between actions for defamation and disparagement turns on the harm towards which each is directed. An action for commercial disparagement is meant to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability, while defamation is meant protect an entity's interest in character and reputation.

U.S. Healthcare, 898 F.2d at 924. In other words, "[a] claim for defamation lies where the defamatory statement imputes ... fraud, deceit, dishonesty, or reprehensible conduct" to the plaintiff, whereas a claim for commercial disparagement attacks "the goods or products of a corporate vendor." *Electro Med. Equip. Ltd. v. Hamilton Med. AG*, 2000 WL 675716, *2 (E.D.Pa. May 24, 2000) (internal quotes omitted).

In the instant action, Pecha's business disparagement claim consists entirely of his allegation that Botta "published false statements to a potential employer ... that were disparaging to the Plaintiff regarding his ability as an effective employee." (Compl.¶ 39). Any such statements, if proven, would clearly represent an attack on Pecha's "character and reputation" rather than his "goods or products." Consequently, Pecha's allegations fall entirely within the purview of defamation law, rather than business disparagement. *See, e.g., U.S. Healthcare*, 898 F.2d at 924; *see also The Knit With v. Knitting Fever, Inc.*, 2010 WL 3792200, *7 (E.D.Pa. Sep.28, 2010) (noting that a defamatory statement attacks the reputation of an individual or a company, while a commercially disparaging statement attacks the quality of a company's goods or products); *Electro Med. Equip.*, 2000 WL 675716 at *2 (construing a defamation claim as one for business disparagement because it attacked the defendant's product rather than reputation). Pecha's independent claim for business disparagement must be dismissed.

D. Usurpation of a Business Opportunity (Count IV)

*6 In the fourth count of his complaint, Pecha attempts to state a claim for "usurpation of a business opportunity" under Pennsylvania law. This claim, based entirely on Botta's conduct in contacting Mid–East concerning Pecha's potential employment, is unsupported and frivolous. The corporate opportunity doctrine deals entirely with actions taken by a director of a corporation in violation of his fiduciary obligations. *See, e.g., Committee of Unsecured Creditors of Specialty Plastic v. Doemling*, 127 B.R. 945, 951 (W.D.Pa.1991). Thus, in order to state a claim for usurpation of a business opportunity, the plaintiff must establish that a corporate director "utilized their position to obtain any personal profit or advantage other than that enjoyed by their fellow shareholders." *Hill v. Hill*, 279 Pa.Super. 154, 420 A.2d 1078, 1081 (Pa.Super.1980). No such facts have been alleged in the instant case.

E. Defamation (Count V)

To state a claim for defamation, a plaintiff must establish: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. 42 Pa.C.S.A. § 8343(a); *Byars v. Sch. Dist.*, 942 F.Supp.2d 552 (E.D.Pa.2013). A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Tucker v. Phila. Daily News*, 577 Pa. 598, 848 A.2d 113, 124 (Pa.2004). Whether a statement is capable of a defamatory

meaning is a question of law for the court. *Blackwell v. Eskin*, 916 A.2d 1123, 1125 (Pa.Super.2007) (citing *Tucker*, 848 A.2d at 123).

It is well-established that "an opinion without more does not create a cause of action in libel." *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399, 401 (Pa.1987). Rather, in order to prevail, the "allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion." *Beckman v. Dunn*, 276 Pa.Super. 527, 419 A.2d 583, 587 (Pa.Super.1980) (citing Restatement (Second) Torts § 566). As explained by the Third Circuit:

> [A]n opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis for the idea. If the disclosed facts are true and the opinion is defamatory, a listener may choose to accept or reject it on the basis of an independent evaluation of the facts. However, if an opinion is stated in a manner that implies that it draws upon unstated facts for its basis, the listener is unable to make an evaluation of the soundness of the opinion.

Redco Corp. v. CBS, Inc., 758 F.2d 970, 972 (3d Cir.1985).

***7** In the instant case, Pecha broadly alleges that Botta made "various statements and accusations ... designed to cast [Pecha] in a bad light to a potential employer." (*Id.* ¶ 51). This vague allegation lacks the requisite level of specificity to state a claim under Iqbal and *Twombley*. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. However, Pecha does provide one specific example of allegedly defamatory conduct: Botta's statement, "I wouldn't trust [Pecha] as far as I could throw him." (*Id.* ¶ 52). Although this statement is clearly an opinion, a reasonable listener could conclude from the statement that Botta intended to imply the existence of undisclosed facts indicating that Pecha is a dishonest person who cannot be trusted in the workplace. Under such circumstances, courts have regularly permitted plaintiffs to proceed with defamation claims. *See, e.g., Regis Ins. Co. v. A.M. Best Co., Inc.*, 2013 WL 775521, *7 (E.D.Pa. Mar.1, 2013) (holding that a press release downgrading plaintiff's credit rating was capable of defamatory meaning because it failed to disclose the underlying reasons for the downgrade); *Mzamane v. Winfrey*, 693 F.Supp.2d 442, 494 (E.D.Pa.2010) (statements that new school employees would provide a "different kind of leadership" and "course correct" the direction of the school was capable of defamatory meaning with respect to a deposed employee because it implied "undisclosed facts that reflect poorly on Plaintiff's fitness for her profession as an educator"); *Weinstein v. Bullock*, 827 F.Supp. 1193, 1198–99 (E.D.Pa.1993) (police officer's opinion indicating skepticism over an alleged rape victim's description of events was capable of defamatory meaning).

Botta contends that an abundance of verifiable facts support his alleged statement that Pecha is untrustworthy. (Doc. No. 6 at p. 18 n. 9). However, at this stage in the proceedings, those facts are not part of the record before the Court. Consequently, Botta's motion to dismiss will be denied with respect to Pecha's defamation claim.

F. Declaratory Judgment (Count VI)

Finally, Pecha asks this Court to declare that the Agreement itself is invalid. Pecha contends that the Agreement "was not ancillary or contemporaneous with [his] employment" and "was not supported by adequate consideration nor reasonably limited in duration and geographic extend." (Compl.¶¶ 63–64).

To obtain declaratory relief under the Declaratory Judgment Act, a plaintiff must demonstrate the existence of "a case of actual controversy." 28 U.S.C. § 2201(a). Whether a request for declaratory relief is ripe depends on consideration of the following list of non-exhaustive factors: (1) the adversity of the interests of the parties; (2) the extent to which the judgment would conclusively define and clarify the legal rights or relations of the parties; and (3) the practical help, or utility, that the judgment would have in remedying the plaintiff's injury. *Step–Saver Data Systems, Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir.1990). Moreover, even where a declaratory judgment action is ripe, it is within a court's discretion to decline to issue declaratory relief. *Id.* at 646–647 ("Even when declaratory actions are ripe, the Act only gives a court the *power* to make a declaration regarding the rights and other legal relations of any interested party seeking such declaration [:] it does not *require* that the court exercise that power.") (internal quotes omitted) (emphasis in original).

***8** In the instant case, declaratory relief is inappropriate for the simple reason that the defendant, Botta, is not a party to the Agreement in question and has no personal stake in the Agreement's validity. *See, e.g., American Home Assur. Co. v.*

Liberty Mut. Ins. Co., 475 F.Supp. 1169. 1172 (E.D.Pa.1979) (finding a lack of standing for declaratory relief because the parties were not signatories to the indemnity agreement at issue). In drafting the agreement and communicating its existence to Mid–East, Botta merely provided a legal service to 5J, the true party in interest. As such, Botta and Pecha do not have "adverse legal interests" within the meaning of the Act.[3] *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273. 61 S.Ct. 510. 85 L.Ed. 826 (1941).

V. CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Dismiss (Docket No. 5) is granted in part and denied in part. An appropriate order follows.

All Citations

Slip Copy, 2014 WL 4925152

Footnotes

1 In his complaint, Pecha mistakenly labeled his third and fourth claims as "Count III." Consequently, the numbers for Counts IV, V and VI in his complaint are each off by one. (Doc. No. 1).

2 As noted above, Pecha invoked both the United States Constitution and the Pennsylvania Constitution in his Section 1983 claim. However, it is axiomatic that Section 1983 "solely supports causes of action based upon violations, under the color of state law, of *federal* statutory law or constitutional rights." *Benn v. Universal Health Sys., Inc.*, 371 F.3d 165, 174 (3d Cir.2004) (emphasis added). Simply put, "Section 1983 does not provide a cause of action for violations of state statutes" or state constitutional rights. *Id.* Consequently, Pecha's Section 1983 claims based upon the Pennsylvania Constitution are subject to dismissal on this basis as well.

3 Pecha did not address this claim in his brief in opposition to Botta's motion to dismiss.

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Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

RANTNETWORK, INC., Plaintiff
v.
Troy R. UNDERWOOD and
Christina A. Underwood, Defendants.

Civil Action No. 4:11–CV–1283.
|
March 26, 2012.

Attorneys and Law Firms

C. Cleveland Hummel, John A. Mihalik, Hummel and Lewis, P.C., Bloomsburg, PA, for Plaintiff.

Robert A. Graci, Eckert Seamans Cherin & Mellott, LLC, Harrisburg, PA, for Defendants.

MEMORANDUM

CHRISTOPHER C. CONNER, District Judge.

***1** This civil action is about an email. According to the complaint (Doc. 1–4), plaintiff Rantnetwork, Inc., suffered over $5 million in damages as the result of an email that defendants Troy R. and Christina A. Underwood ("Mr. Underwood" and "Mrs. Underwood," respectively) sent near the end of 2009 to Rantnetwork's CEO and several of the company's investors. (*Id.* ¶¶ 18, 24.) This email allegedly caused one of the company's investors, Dr. Angelo Mancuso, to withhold further investment in the company, despite his previously expressed willingness to invest up to $500,000. (*Id.* ¶¶ 22, 17.) The complaint describes an avalanche of negative consequences that flowed from Dr. Mancuso's cessation of further investment, ultimately causing Rantnetwork losses that it values at $5,478,166.00. (*Id.* ¶ 24.)

Rantnetwork's complaint contains two counts against Mr. and Mrs. Underwood: Count I alleges that the Underwoods' sending of that fateful email constituted intentional interference with prospective contractual relations between Rantnetwork and Dr. Mancuso, for which they seek a judgment in their favor in the above-mentioned sum; Count II seeks an injunction against the Underwoods to prohibit them from meddling with Rantnetwork's future business affairs.

Presently before the court is the Underwoods' motion (Doc. 3) to dismiss the complaint (either for this court's lack of personal jurisdiction over them or for Rantnetwork's failure to state a claim) or alternatively to stay this action pending the outcome of an action previously filed in California state court. For the reasons that follow, the court will grant the motion.

I. *Background* [1]

The Pennsylvania-based Rantnetwork is a corporation that develops various kinds of software, including network translation software for the mobile-phone industry. (Doc. 1–4, ¶¶ 1, 4.) The Underwoods are both residents of California. (*Id.* ¶ 3.) Although the complaint was originally filed on June 16, 2001, in the Pennsylvania Court of Common Pleas, Columbia County, the Underwoods removed the action to federal court on the basis of complete diversity between the parties and an excess of $75,000 in controversy, giving this court subject-matter jurisdiction under 28 U.S.C. § 1332(a).

The founder and CEO of Rantnetwork, William Grandizio, spent part of his time raising capital for the company, seeking funds for the development of the translation software. (*Id.* ¶ 5–6.) It was in this capacity and pursuit that Mr. Grandiozo "was placed in contact" with the Underwoods, who, following some preliminary communications, sent their agent to Bloomsburg, Pennsylvania to perform due diligence on Rantnetwork as an investment. (*Id.* ¶ 7.)

When the Underwoods' agent completed his investigation and, evidently, recommended investing, the Underwoods "forwarded to Rantnetwork, Inc. a Convertible Note" for $300,000, simple interest payable at 20% annually, with accrued and unpaid interest payable at the end of each calendar month. (*Id.* ¶ 8.) The note, dated November 19, 2007, in Elk Grove, California, required Rantnetwork to commence making payments on the interest on December 31, 2008, with the final payment of the principal and any remaining accrued interest due on November 15, 2010. (*Id.; see also* Doc. 1–4, at 11 (reproducing the note).) The note contained a clause that allowed the Underwoods to "convert all or any part" of the then-outstanding principal and interest "into that number of shares" of Rantnetwork's common stock. (Doc. 1–4, at 11 cl. 2.)

*2 With the Underwoods' investment in hand, Mr. Grandizio continued working on the translation software, establishing business partnerships, and seeking further capital to finance the software's development and marketing. (Doc. 1–4, ¶ 9.) However, Mr. Grandizio died on August 26, 2008, at which point Rantnetwork's software was yet incomplete. Although the company had accrued investment capital of at least $475,000—$300,000 from the Underwoods and $175,000 from Dr. Mancuso—"additional capital was needed to bring the product to mass market." (*Id.* ¶¶ 10, 11.)

After Mr. Grandizio's death, his widow, Elisa, took the company's reins and sought to determine the company's financial standings and the barriers yet in place to market entry. (*Id.* ¶ 12.) Elisa hired a new CEO for Rantnetwork, Kenneth Volet, whose primary tasks were to complete the software's development, bring it to market, and avoid taking the company into bankruptcy. (*Id.* ¶ 13.) He became Rantnetwork's CEO on October 15, 2008. (Doc. 9, at 18 ¶ 1.)

As CEO, Volet assessed Rantnetwork's financial condition and "found it to be grossly undercapitalized" to the point that the company's "very existence" was "tenuous." (*Id.* ¶ 14.) Volet then contacted Rantnetwork's shareholders, lienholders, creditors, and suppliers, providing them with his assessment of the company's precarious condition and asking them to be patient while he tried to "salvage" the company, its translation-software product, and the investments that the company had received. (*Id.* ¶ 15.) The financial condition of the company prevented Rantnetwork from making the monthly payments on the Underwoods' note. (*Id.* ¶ 16.) "Over the following year," Dr. Mancuso, brother to Elisa Grandizio, "made it known to Mr. Volet that he was able and willing" to invest another $500,000 in Rantnetwork if such funds were needed. (*Id.* ¶ 17.)

Enter the fateful email. On December 29, 2009, Mr. Underwood, purportedly acting on behalf of both himself and Mrs. Underwood, sent the following email "to 4 the shareholders, officers and representative of Rantnetwork," including Dr. Mancuso:

> I thought you all should know of recent communications between Ken Volet and myself. Please read below. As you must understand not one single promise made by Rant [sic] to me has ever been kept. I will seek aggressive collection efforts if I do not receive some payment.
>
> Ken,
>
> Your answers are not sufficient. I must demand some form of payment even if it is minimal. Also, you have not been proactive in keeping investors updated. I have to regularly ask for updates.
>
> Please let me know when a payment will arrive. I will be forced to seek legal action if I do not receive a check soon.

(*Id.* ¶ 18; *see also* Doc. 1–4, at 22 (reproducing the email).) Dr. Mancuso made no further investments in Rantnetwork after this email was sent.

Rantnetwork alleges that Dr. Mancuso's decision not to invest further funds in Rantnetwork was the "result of" the Underwoods' email. (Doc. 1–4, ¶ 19.) It asserts that the Underwoods' sending of that email "served no legitimate purpose and was intentionally and improperly done to place Rantnetwork, Inc. in a bad light to pressure it into paying the Underwood debt when, because of the untimely death of William Grandizio, it did not have the means to do so." (*Id.* ¶ 20.) This email, insists Rantnetwork, caused Dr. Mancuso to refrain from further investment in the company. Count I of the complaint maintains on this basis that the Underwoods intentionally interfered with prospective contractual relations between the company and its potential investors—namely, for present purposes, Dr. Mancuso. (*Id.* ¶¶ 21, 22.)

*3 As a result of the Underwoods' email—scaring off potential investors (especially Dr. Mancuso)—Rantnetwork was unable to complete its contract for development of the translation software; the inability to complete the contract caused Rantnetwork to "forfeit" its "preliminary payment" and lose "all rights and access to the software application developed." (*Id.* ¶ 24). Consequently, Rantnetwork was forced to shut down its demonstration system and customer-trials program, which brought an end to sales and marketing activities, as well as the loss of customers and revenues. (*Id.*) Lost, too, were another software-distribution contract, sales opportunities, and market traction with eleven other international telephone carriers. (*Id.*) Ultimately, Rantnetwork "was forced to end all sales and marketing campaigns while it was required to redevelop the application with a new technology partner as a result of the loss of the rights under the software development contract previously entered into which were forfeited as set forth above." (*Id.*) The damages: $5,478,166.00. (*Id.*)

Count II of the complaint requests that the Underwoods be enjoined "from intentionally interfering with" Rantnetwork's

prospective contractual relations, because without such an injunction, says Rantnetwork, the company will suffer irreparable harm, and it has no adequate remedy at law. (*Id.* ¶¶ 26–27.)

One week after removing this action to federal court on July 8, 2011, the Underwoods filed the pending motion (Doc. 3) to dismiss the complaint, wherein they set forth two separate grounds for dismissal. First, they contend that this court lacks personal jurisdiction over them, making dismissal appropriate under Federal Rule of Civil Procedure 12(b)(2). (Doc. 3, ¶¶ 17–34.) Second, the Underwoods argue for dismissal under Rule 12(b)(6) based on the the complaint's failure to adequately state a claim of intentional interference with prospective contractual relations against them. The Underwoods' motion alternatively seeks a stay of this action pending resolution of a purported related action currently under way in California state court. (*Id.* ¶¶ 51–60.)

II. *Standard of Review*

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). When ruling on a motion to dismiss under Rule 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Gelman v. State Farm Mut. Auto. Ins. Co.*, 583 F.3d 187, 190 (3d Cir.2009) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008)); *see also Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir.2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir.2005)). Although the court is generally limited in its review to the facts contained in the complaint, it "may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n. 2 (3d Cir.1994); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997).

***4** Federal notice and pleading rules require the complaint to provide "the defendant notice of what the ... claim is and the grounds upon which it rests." *Phillips*, 515 F.3d at 232 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To test the sufficiency of the complaint in the face of a Rule 12(b)(6) motion, the court must conduct a three-step inquiry. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 130–31 (3d Cir.2010). In the first step, "the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' " *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1947, 173 L.Ed.2d 868 (2009)). Next, the factual and legal elements of a claim should be separated; well-pleaded facts must be accepted as true, while mere legal conclusions may be disregarded. *Id.*; *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir.2009). Once the well-pleaded factual allegations have been isolated, the court must determine whether they are sufficient to show a "plausible claim for relief." *Ashcroft v. Iqbal*, 556U.S. 662, 129 S.Ct. at 1950 (citing *Twombly*, 550 U.S. at 556); *Twombly*, 550 U.S. at 555 (requiring plaintiffs to allege facts sufficient to "raise a right to relief above the speculative level"). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. 662, 129 S.Ct. at 1949, 173 L.Ed.2d 868. When the complaint fails to present a prima facie case of liability, however, courts should generally grant leave to amend before dismissing a complaint. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir.2002); *Shane v. Fauver*, 213 F.3d 113, 116–17 (3d Cir.2000).

III. *Discussion* [2]

Among the issues contested at this juncture is this court's exercise of personal jurisdiction over the Underwoods. Complicating the resolution of this contest is Rantnetwork's allegation that Mr. Underwood was acting as his wife's agent, the theory being that, although the vast majority of acts that Rantnetwork claims to support the exercise of personal jurisdiction were allegedly undertaken by Mr. Underwood (particularly the sending of the December 29, 2009, email), those acts can be imputed to Mrs. Underwood if she were Mr. Underwood's principal—and thus this court would have personal jurisdiction over her as well. Essentially, Rantnetwork argues that the court has personal jurisdiction over Mrs. Underwood via her role as principal to her husband.

Because the alleged principal—agent relationship between Mrs. and Mr. Underwood not only creates a threshold question affecting the jurisdictional analysis but is intertwined with the question of jurisdiction itself, the determination of whether Rantnetwork has sufficiently established its claim of agency must precede the personal-jurisdiction inquiry.

A. *Existence of an Agency Relationship*

***5** Under Pennsylvania law, all agency relationships have three basic features in common: (1) "the manifestation by the

principal that the agent shall act for him"; (2) "the agent's acceptance of the undertaking"; and (3) "the understanding of the parties that the principal is to be in control of the undertaking." *Scott v. Purcell*, 490 Pa. 109, 415 A.2d 56, 61 (Pa.1980) (quoting Restatement (Second) of Agency § 1, cmt. b (1958)). Although Pennsylvania recognizes four kinds of agency—actual (or express)[3] authority, apparent authority, implied authority, and agency by estoppel—agency relationships typically arise through the granting of either actual or apparent authority.[4] These two kinds receive focus here.

Express or actual authority is directly granted by the principal to the agent, whereas apparent authority arises from representations that the principal makes to those third parties with whom the agent acts on the principal's behalf. *Reifsnyder v. Dougherty*, 108 N.J.L. 424, 158 A. 98, 100 (Pa.1930). In the case of apparent authority, the answer to a question essentially appealing to common sense determines whether such authority is legitimate: "The test ... is whether a man of ordinary prudence, diligence and discretion would have a right to believe and would actually believe that the agent possessed the authority he purported to exercise." *Apex Fin. Corp. v. Decker*, 245 Pa.Super. 439, 369 A.2d 483, 485–86 (Pa.Super.1976) (citing *Murphy v. Beverly Hills Realty Corp.*, 98 Pa.Super. 183 (1930)).

Whether the alleged authority is actual, apparent, or otherwise, "the element of control is the touchstone of a principal—agent relationship." *Johnson v. Summa Corp.*, 632 F.Supp. 122, 125 (E.D.Pa.1985) (citing *Kelly v. U.S. Steel Corp.*, 170 F.Supp. 649 (W.D.Pa.1959)). *Accord Scott v. Lackey*, No. 02–1586, 2010 WL 272275, at *6 (M.D.Pa. Jan.20, 2010) (citing *Colantonio v. Hilton Int'l Co.*, No. 03–1833, 2004 WL 1274387, at *6 (E.D.Pa. June 8, 2004)). *See also Basile v. H & R Block, Inc.*, 563 Pa. 359, 761 A.2d 1115, 1120 (Pa.2000) (quoting *Smalitch v. Westfall*, 440 Pa. 409, 269 A.2d 476, 480 (1971)) ("[A]gency results only if there is an agreement for the creation of a fiduciary relationship with control by the beneficiary.") (alteration in original). Of equally broad applicability in all matters of agency, "the agent must act with the utmost good faith in furthering and advancing the principal's interests," which includes "a duty to disclose to the principal all relevant information." *Basile*, 761 A.2d at 1120 (citing *Sylvester v. Beck*, 406 Pa. 607, 178 A.2d 755, 757 (Pa.1962)).

The existence of an agency relationship is a question of fact. *Volunteer Fire Co. v. Hilltop Oil Co.*, 412 Pa.Super. 140, 602 A.2d 1348, 1351 (Pa.Super.1992) (citing *Bolus v. United Penn Bank*, 363 Pa.Super. 247, 525 A.2d 1215, 1221 (Pa.Super.1987)). The party claiming that an agency relationship exists has the burden of so showing. *Id.* (citing *Apex Fin. Corp. v. Decker*, 245 Pa.Super. 439, 369 A.2d 483, 485 (Pa.Super.1976). This burden ultimately requires the party asserting agency to prove it "by a fair preponderance of the evidence," *id.*, but given that, in this case, the issue of agency before the court is cast as part of the jurisdictional question, Rantnetwork is held to the same burden of production here as in the context of jurisdiction itself: to the extent that the Underwoods contest agency in Mr. Underwood's affidavit, Rantnetwork must make a prima facie showing of an agency relationship between the Underwoods through the introduction of its own "affidavits or other competent evidence." *See infra* Part III.B. *Cf. Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 330 (3d Cir.2009) (quoting *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir.1996)) (citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002)) (placing an equivalent burden of production on a plaintiff when the defendant has raised a jurisdictional defense). Direct proof is unnecessary when the proffered evidence allows an inference of "at least an implied intention to create the relationship of principal and agent." *Morilus v. Countrywide Home Loans, Inc.*, 651 F.Supp.2d 292 (E.D.Pa.2008) (quoting *B & L Asphalt Indus., Inc. v. Fusco*, 753 A.2d 264, 269 (Pa.Super.2000)). However, the "mere showing that one person does an act for another" does not give rise to an inference that an agency relationship existed. *Fusco*, 753 A.2d at 269 (citing *Ferry v. Fisher*, 709 A.2d 399, 409 n. 5 (Pa.Super.1998)).

***6** In its brief opposing dismissal and attachments thereto, Rantnetwork emphasizes four facts in support of its claim that Mrs. and Mr. Underwood were engaged in a principal—agent relationship. First, Rantnetwork points out, Mrs. Underwood was a party to the $300,000 note; second, she wired $50,000 of the loan to Rantnetwork; third, she was copied on certain emails that her husband sent to Rantnetwork's representatives regarding the status of their loan; and fourth, the consultant who performed due diligence on Rantnetwork before the Underwoods made their full investment was paid with funds from the loan (to which, of course, Mrs. Underwood was a party).

"Quod erat demonstrandum," Rantnetwork effectively says, proffering these four facts to the court. "Why would Troy Underwood copy his wife, a party to the note, with emails dealing with collection of their joint debt." Rantnetwork

rhetorically asks in its brief, "if he was not acting as her agent?" (Doc. 9, at 8.) Rantnetwork points out that of the two defendants, Mr. Underwood was the sole person that acted first to negotiate the loan and then attempt to collect upon it, which supports an inference that he was all the while "acting on behalf of his wife." (*Id.*)

But the very documents that Rantnetwork submitted in an attempt to show a principal—agent relationship between the Underwoods belie such a claim. Even when viewed in a light most favorable to Rantnetwork, neither the well-pleaded allegations of the complaint nor other competent evidence before the court do so much as hint at Mrs. Underwood possessing the critical element of control in her relationship with Mr. Underwood. To the contrary, all the relevant material before the court tends to show that Mr. Underwood acted independently in his business dealings with Rantnetwork. Of the sixty-two emails between Mr. Underwood and Rantnetwork that Rantnetwork chronicled in the attachments to its opposition brief (*See* Doc. 9, at 18–20, 21–22), Mr. Underwood copied only five of those emails to Mrs. Underwood. The instance in which Mrs. Underwood sent $50,000 to Rantnetwork personnel appears to have been taken at Mr. Underwood's behest, according to emails that Rantnetwork submitted:

> On Feb 22, 2008, at 7:50 AM, <bill@rantnetwork.com> wrote:
>
> Hello Troy—
>
> When possible could you wire $50K to our account. It's now time to prepare for our 3 new deployments for the next 60 days
>
> ....
>
> Regards,
>
> Bill [Grandiozo]

(Doc. 9, at 30.) Mr. Underwood responded by email the next morning: "Hi bill sounds great! I'm out of town but christina will send $50,000 on Monday."[5] (*Id.*) Other than that single instance, Mrs. Underwood was neither the sender nor among the direct recipients of any communications regarding the business relationship between the Underwoods and Rantnetwork. The five emails that she received copies of represent about eight percent of the sixty-two emails that Rantnetwork documented. And as to the email central to Rantnetwork's complaint—the one that Mr. Underwood sent on December 29, 2009, which allegedly caused Dr. Mancuso to cease further investment in Rantnetwork—Mrs. Underwood neither sent nor received that email; in addition, she appears not to have been among the carbon-copy recipients. Nor indeed, as the Underwoods assert, is there the slightest suggestion anywhere in the present record that Mrs. Underwood played any role in formulating or in causing that email to be sent.

*7 In short, upon review of the well-pleaded allegations in the complaint and other competent evidence before the court, there is nothing but speculation to support the notion that Mr. Underwood sent the December 29th email at his wife's direction or that she was otherwise, at any point, in control of the relationship between the Underwoods and Rantnetwork. Rantnetwork has failed to make a prima facie showing that Mr. Underwood served as agent for his wife. As a result, there is no basis upon which to impute any of Mr. Underwood's acts to Mrs. Underwood, and the questions of whether this court may exercise personal jurisdiction over each of the Underwoods require separate analyses to answer.

B. *Personal Jurisdiction*

Personal jurisdiction "represents a restriction on judicial power ... as a matter of individual liberty," and relates to whether a court may permissibly exercise decision-making power over a defendant. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)). Because the fundamental issue is not the court's ability to adjudicate the dispute but the court's ability to issue decisions affecting a given person's rights, a defendant may either invoke jurisdictional limitations or waive them. Defendants believing that a court does not have personal jurisdiction over them bear the burden of raising the issue. *Id.*; *Clark v. Matsushita Elec. Indus. Co.*, 811 F.Supp. 1061, 1064 (M.D.Pa.1993) (citing Fed.R.Civ.P. 12(h)(1) (indicating that the defense of lack of personal jurisdiction is waivable)); Fed.R.Civ.P. 12(b)(2) (allowing a defendant to move to dismiss for lack of personal jurisdiction).

Once a defendant has raised a jurisdictional defense, the burden shifts to the plaintiff to "prov[e] by affidavits or other competent evidence that jurisdiction is proper." *Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 330 (3d Cir.2009) (alteration in original) (quoting *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir.1996)) (citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002)). In

the absence of an evidentiary hearing, a plaintiff "need only establish a prima facie case of personal jurisdiction," because as with Rule 12(b)(6) motions to dismiss, "a court is required to accept the plaintiff's allegations as true, and is to construe disputed facts in favor of the plaintiff." *Id.* (quoting *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 316 (3d Cir.2007) and *Toys "R" Us, Inc. v. Step Two S.A.*, 318 F.3d 446, 457 (3d Cir.2003)).

Because Pennsylvania's long-arm statute authorizing personal jurisdiction, 42 Pa. Cons.Stat. Ann. § 5322(b) (West 2011), is coextensive with the Due Process Clause, "the statutory assessment of jurisdiction collapses into the constitutional one." *Clark v. Matsushita Elec. Indus. Co.*, 811 F.Supp. 1061, 1065 (M.D.Pa.1993).

***8** There are two forms of personal jurisdiction: specific and general. In rough terms, specific jurisdiction allows a court to adjudicate the rights of a nonresident person whose activities within or directed toward the forum of adjudication are related to the subject matter of the action, whereas general jurisdiction allows adjudication over a dispute even when the person's connections to the forum are unrelated to the dispute, although the exercise of such jurisdiction requires the person to have "systematic and continuous contacts" with the forum state-a much higher threshold. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 415 n. 9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir.2007); *Telcordia Tech Inc. v. Telkom S.A.*, 458 F.3d 172, 177 (3d Cir.2006). The "central concern" of the personal-jurisdiction inquiry is the particular facts that define "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

Because Rantnetwork makes no argument that either of the Underwoods' contacts with Pennsylvania would be sufficient to support the exercise of general jurisdiction, specific jurisdiction will be the sole focus of the court's jurisdictional analysis.

(1) *Doctrinal principles of specific jurisdiction*

Three factors determine whether the court has specific personal jurisdiction over a party: (1) whether the party purposefully directed his activities at the forum; (2) whether the litigation relates to at least one of those activities; and (3) if the first two requirements are met, the court may consider whether the exercise of jurisdiction otherwise comports with fair play and substantial justice. *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 102 (3d Cir.2009) (citing *Burger King*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). *See also Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (calling it "essential" that the defendant "purposefully avail[ ] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws").

The first two parts of the test "determine whether a defendant has the requisite minimum contacts with the forum." *D'Jamoos*, 566 F.3d at 103. The defendant's physical entrance into the forum is not necessary. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Grand Entm't Grp., Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir.1993). When a defendant has "deliberately" engaged in "significant activities" or created " 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there." *Burger King*, 471 U.S. at 474, 475–76 (citations omitted) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)) (citing *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648, 70 S.Ct. 927, 94 L.Ed. 1154 (1950)). Litigation against the defendant in that forum becomes foreseeable, and "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.*

***9** The final factor is consideration of whether the exercise of jurisdiction otherwise "comport[s] with 'fair play and substantial justice.' " *Burger King*, 471 U.S. at 476 (alteration in original) (quoting *Int'l Shoe*, 326 U.S. at 320). The existence of minimum contacts makes jurisdiction presumptively constitutional, and the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477. If a plaintiff establishes that a defendant has minimum contacts with the forum state, jurisdiction will be unreasonable only in those "rare cases" where the defendant meets its "heavy" burden of showing "an absence of fairness or lack of substantial justice." *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 (3d Cir.1998); *Grand Entm't Grp.*, 988 F.2d at 483. *See also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.").

(2) *Application to Troy Underwood*

As the following paragraphs show, Rantnetwork has set forth sufficient facts to make out a prima facie case that this court may exercise jurisdiction over Mr. Underwood. This conclusion rests upon application of the traditional three-step analysis for specific jurisdiction rather than the "effects" test first enunciated in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984),[6] on which both parties based their jurisidictional arguments.

According to the complaint, the affidavit of Kenneth Volet, and other competent evidence that Rantnetwork has submitted in connection with the pending motion, the court finds, for the sole purpose of adjudicating this motion, that Troy Underwood has purposefully directed toward the forum state of Pennsylvania sufficient activities related to this litigation to satisfy the constitutional "minimum contacts" requirement. Near the beginning of Mr. Underwood's series of related activities is his and his wife's issuance of the $300,000 convertible note to Rantnetwork, a Pennsylvania corporation, after an agent that Mr. and Mrs. Underwood hired had traveled to Pennsylvania to perform due diligence on Rantnetwork. Both before and after issuing the note, Mr. Underwood carried on a series of emails and telephone conversations with Pennsylvania-based Rantnetwork personnel; by Rantnetwork's count, Mr. Underwood sent or received at least sixty-two emails to or from Rantnetwork personnel spanning a period of over two years, all of which concerned Rantnetwork's product development or the repayment of the note that the Underwoods issued. (Doc. 9, at 18–27, 30.) Finally, Mr. Underwood sent the December 29, 2009, email that forms the basis of this claim to at least six recipients, four of whom were residents of Pennsylvania. Mr. Underwood's years-long series of contacts, directed toward Pennsylvania, exclusively concerning Rantnetwork or the note he and his wife issued to Rantnetwork and culminating in the very email that led Rantnetwork to file suit against the Underwoods, can be characterized as nothing less than "minimal" for constitutional due process purposes.

***10** Mr. Underwood has set forth no overriding concerns that, in light of his contacts with Pennsylvania, would make this court's exercise of jurisdiction over him unconstitutional in the present case. To the contrary, his issuance of the $300,000 note to Rantnetwork, which by its very terms established a relationship between them that would last nearly three years (See Doc. 1–4, at 11) created continuing obligations between Mr. Underwood and Rantnetwork. The note, combined with Mr. Underwood's subsequent related activities—his communications with Rantnetwork to keep abreast of its product development and to attempt collection on his note—evince his deliberate availment of the privilege of conducting business in Pennsylvania and made litigation against him in this forum both foreseeable then and presumptively reasonable now. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (citations omitted) (quoting *World–Wide Volkswagen Corp.*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)) (citing *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648, 70 S.Ct. 927, 94 L.Ed. 1154 (1950)). Nothing before the court suggests that this is one of those rare cases that, despite Mr. Underwood's at-least-minimal contacts with Pennsylvania, jurisdiction would be unfair or unjust. *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 (3d Cir.1998).

(3) *Application to Christina Underwood*

In contrast to her husband, and despite some overlap between the facts concerning their contacts with this state, Christina Underwood's connection with Pennsylvania is too tenuous for this court to exercise jurisdiction over her person in a way that would comport with the requirements of constitutional due process. The following paragraphs explicate the different answers to the jurisdictional question for the husband-and-wife defendants.[7]

To restate briefly the three parts of the traditional analysis for specific personal jurisdiction, jurisdiction properly lies in a given forum when (a) the defendant purposefully directed activity toward or availed herself of the privilege of conducting business in the forum; (b) the litigation relates to or arises out of such activity; and (c) exercising jurisdiction otherwise comports with traditional notions of fair play and substantial justice. *See* Part III.B.1 *supra*.

For the sake of clarity in maintaining the distinctions between the analyses for the codefendants, each of the three parts of the jurisdictional analysis will be addressed seriatim.

a. *Purposefully directed activity*

"Reaching out" to create a business relationship with a resident of the forum state generally supports constitutes purposefully directed activity. The Supreme Court clearly enunciated this doctrinal principle at least as long ago as 1985,

stating: "[W]ith respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 94 L.Ed. 1154 (1950) (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23, 78 S.Ct. 199, 2 L.Ed.2d 223(1957).

***11** In *Burger King*, defendant Rudzewicz (of Michigan) applied to be a franchisee of Burger King (a Florida corporation) and ultimately had his franchise terminated for failure to make franchise payments. *Id.* at 464–66, 68. Burger King filed suit against Rudzewicz in Florida; the Supreme Court upheld the district court's exercise of jurisdiction over him despite his lack of physical ties to Florida. *Id.* at 479–80. Reasoning that the litigation "grew directly out of" a contract that had a "substantial connection" with Florida —a contract that Rudzewicz "deliberately 'reach[ed] out beyond' Michigan" to negotiate with a Florida corporation rather than take "the option of operating an independent local enterprise"—the Court held that the "quality and nature" of his relationship to the Florida-based company could "in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' " *Id.* (alteration in original) (quoting *Travelers Health Ass'n*, 339 U.S. at 647, *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), and *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)).

Significantly, it was entirely Rudzewicz' own actions that prompted the suit against him: his "refusal to make the contractually required payments in Miami" and his "continued use of Burger King's trademarks and confidential business information ... caused foreseeable injuries to the corporation in Florida." *Id.* at 480. However, the Court was careful to avoid creating a hard-and-fast rule that a defendant who enters into a contract with a resident of another state is, simply by virtue of that contract, subject to suit in that state. Asking hypothetically "whether an individual's contract with an out-of state party alone can automatically establish minimum contacts in the other party's home forum," the Court answered its own question in no uncertain terms: "[W]e believe the answer clearly is that it cannot." *Id.* at 478. *See also id.* at 478–79 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945)) (underscoring the Court's longstanding rejection of "mechanical" tests for personal jurisdiction).

The Third Circuit decided a case some years later that had facts in many ways analogous to those in *Burger King*, ultimately reaching a similar conclusion, although the court called the jurisdictional question "close." *Mellon Bank (E.) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992). Mellon Bank, a Pennsylvania corporation, filed suit in Pennsylvania district court against several nonresident defendants who were limited partners of limited partnerships. *Id.* at 1219. Before Mellon filed suit, these limited partnerships sent their mortgage broker to Mellon to seeking financing for the partnerships. *Id.* at 1219–20. The broker told Mellon that the limited partners would personally guarantee any loans made to the partnerships; the partnerships themselves insisted to Mellon that "the talent and experience that each partner brough to the partnerships was fundamental to their success." *Id.* Based in part on these representations, Mellon made over $4 million in loans to the partnerships, but the partnerships defaulted on all the loans and the guarantors all failed to remit payment. *Id.*

***12** In upholding the district court's personal jurisdiction over the partnerships, the Third Circuit stressed that "Mellon did not approach the borrowers seeking to lend money nor did Mellon initially request the [guarantees]." *Id.* at 1223. Rather, the partnerships had approached Mellon, establishing through their own deliberate efforts a business relationship with the Pennsylvania-based bank. *Id.*

A third case provides contrast to *Burger King* and *Mellon Bank*: when a nonresident defendant is merely a "passive buyer" of a plaintiff's products, the defendant is unlikely to be found to have purposefully directed its activities toward the plaintiff's home state. *See Vetrotex Certainteed Corp v. Consol. Fiber Glass Prods. Co.*, 75 F.3d 147, 148, 152–53 (3d Cir.1996) (discussing the differing consequences, for jurisdictional purposes, of whether the plaintiff or the defendant actively solicited a business relationship). In that case, Vetrotex CertainTeed Corporation (Vetrotex), a Pennsylvania corporation, sued California-based Consolidated Fiber Glass Products Company (Conglas) in Pennsylvania district court. *Id.* at 148. On appeal, the Third Circuit held that personal jurisdiction over Conglas did not lie in Pennsylvania because Conglas did not purposefully direct its activities there. *Id.*

The district court in *Vetrotex* had found the following facts undisputed, which the appellate panel recounted thus:

> Vetrotex solicited Conglas to obtain the 1991–92 contract by telephone and by personal visits to Conglas headquarters in California. The parties engaged in telephone communication prior to entering into the 1991–92 contract. Conglas signed the disputed contract in California and sent it to Vetrotex in Pennsylvania. Conglas made all payments for goods to Vetrotex CertainTeed's California office. Under the disputed contract, Vetrotex did not deliver any goods to Conglas in Pennsylvania.

Id. at 152. On these facts, the *Vetrotex* court characterized Conglas as "merely a passive buyer of Vetrotex's product." *Id.* Distinguishing the case from others in which jurisdiction over a nonresident defendant was found proper largely on the basis of the defendant's contract with a plaintiff residing in the forum, the Third Circuit observed that *Vetrotex* was not a case in which the defendant "solicited the contract," "initiated the business relationship leading up to the contract," "sent any payments to the plaintiff in the forum state," or "engaged in extensive post-sale contacts with the plaintiff in the forum state." *Id.* at 152–53 (citing and distinguishing *Mellon Bank*, 960 F.2d at 1217, *N. Penn Gas v. Corning Natural Gas*, 897 F.2d 687, 690–91 (3d Cir.1990), and *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 700 (3d Cir.1990)). *See also id.* at 152 n. 5 (quoting *United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir.1992)) (citing *Bell Paper Box, Inc. v. Trans Western Polymers, Inc.*, 53 F.3d 920, 922 (8th Cir.1995) and Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L.REV. 5, 45–46 (1989)) (remarking that in the 8th Circuit, " 'reaching out' is particularly difficult to find" when the nonresident defendant is a buyer, not a seller, of the resident plaintiff's products, a distinction "even more telling when the defendant is a 'passive' buyer" solicited as a customer by the plaintiff; and observing that the First Circuit requires a defendant's "forum-related activities in contract cases [to have been] 'instrumental in the formation of the contract.' ")

***13** Applying the principles and comparing the facts of these three cases—*Burger King*, *Mellon Bank*, and *Vetrotex*—to the instant case elucidates the basis for holding that Christina Underwood did not purposefully direct her activities toward Pennsylvania, even though her husband did.

The nature of the relationship between the Underwoods and Rantnetwork shows that the Underwoods have much in common with what the *Vetrotex* court and the Eighth Circuit have called "passive buyers."[8] It was Rantnetwork, not the Underwoods, that initiated the business relationship and solicited the loan from the Underwoods. *Vetrotex*, 75 F.3d at 152. (*Compare* Doc. 1–4, ¶¶ 7–8 (Rantnetwork's allegation in the complaint that Grandizio, Rantnetwork's CEO, "was placed in contact with" the Underwoods, who later "forwarded" the convertible note to Rantnetwork) *with* Doc. 3–2, ¶¶ 5–6, 9 (Troy Underwood's declaration that he and his wife were approached by Rantnetwork personnel; that such personnel solicited their investment in the company; and that Rantnetwork "made, executed and delivered" the note to them in California to reflect their loan of $300,000 to the company).) Moreover, although the Underwoods did send money to Rantnetwork in Pennsylvania ($50,000 of which was allegedly sent by Mrs. Underwood), these transfers were not independent transactions but separate remittances of a single loan to Rantnetwork. *See Vetrotex*, 75 F.3d at 152 (in explaining their holding that plaintiff had not purposefully availed itself of the forum state, giving weight to the absence of payments by defendant to plaintiff in the forum state). And, of course, there is the Supreme Court's statement that the mere existence of a contract like the convertible note under discussion here "clearly" cannot, by itself, "automatically establish sufficient minimum contacts" in the plaintiff's home state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). If the relevant facts of the instant case went no further than those discussed in this paragraph, neither of the Underwoods, being very much like passive buyers, could be said to have purposefully availed themselves of the privileges of doing business in Pennsylvania.[9]

But the facts go further, and these further facts detail crucial differences in the Underwoods' respective activities. Although Christina Underwood remained largely in the background throughout the course of the relationship between the parties, apparently actively participating only to the extent that she wired $50,000 of the loan to Rantnetwork, Troy Underwood engaged in significant, extensive, and ongoing communications and other contacts with Rantnetwork after the issuance of the loan. He admits writing emails and making telephone calls to Rantnetwork (Doc. 3–2, ¶¶ 20, 22); Rantnetwork submitted a table documenting sixty-two

emails sent to or received by Mr. Underwood, over the course of more than two years, that related either to Rantnetwork's product development or the company's repayment schedule for the loan (Doc. 9, at 21–22). Mrs. Underwood had no telephone communication with Rantnetwork (Doc. 3–2, ¶ 23); she sent no emails to Rantnetwork (*Id.* ¶ 21); and of the dozens of emails exchanged between Mr. Underwood and Rantnetwork, Mrs. Underwood was copied on only five of them. Further, Rantnetwork's Cap Table dated July 1, 2009, lists Mr. Underwood, but not Mrs. Underwood, as a partial owner of Rantnetwork (Doc. 9, at 28), and an agreement authorizing an increase in Rantnetwork's authorized shares from 1000 to 2000 listed Mr. Underwood, but not Mrs. Underwood, as a party to the agreement, despite the agreement stating that the named partiers were "all of the shareholders" of Rantnetwork (*id.* at 29). Finally, the December 29, 2009, email that precipitated the instant matter was sent by Mr. Underwood, not Mrs. Underwood, and as discussed in Part III.A *supra,* there is no basis to impute the sending of this email to Mrs. Underwood.

***14** Accordingly, the facts as currently presented to the court definitively establish that Christina Underwood did not engage in extensive contacts with Rantnetwork after the issuance of the loan. Her conduct throughout the relevant time span makes her analogous to the "passive buyer" described in *Vetrotex* and unlike the active solicitors of out-of-state business discussed in *Burger King* and *Mellon Bank.* The facts of this case and the applicable law point unerringly to the conclusion that Christina Underwood did not "reach out" to Pennsylvania and did not "purposefully avail" herself of the privilege of conducting business in Pennsylvania.

b. *"Relates to" or "arises out of" forum-related activity*

Although Mrs. Underwood, as a cosigner of the loan to Rantnetwork, could be said to have committed acts "but for" which this litigation would not have arisen (i.e., but for the loan that she and her husband made to Rantnetwork, Mr. Underwood would not have sought payment on the loan and would not have sent the email that prompted Rantnetwork to file suit), but-for causation "cannot be the sole measure of relatedness because it is vastly overinclusive in its calculation of a defendant's reciprocal obligations." *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 322 (3d Cir.2007). As the parenthetical remark above illustrates, but-for causation "has ... no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Id.* (alteration in original) (quoting *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir.1986)).

To avoid such absurd results, the *O'Connor* court held that specific jurisdiction "requires a closer and more direct causal connection than that provided by the but-for test." *Id.* at 323. And by any "closer and more direct" measure, the instant action cannot be characterized as relating to or arising out of any of Mrs. Underwood's actions. Essentially, all that she did was jointly issue a loan to Rantnetwork, wire the company a $50,000 portion of the loan, and passively receive copies of a handful of emails containing communications between other people. Further, the loan itself is not the focus of this litigation, which is not a contract case but a tort case; the loan forms part of the background, but Rantnetwork explicitly states that Mr. Underwood's December 29, 2009 email "is the crux of [the company's] claim of intentional interference with prospective contractual relations." (Doc. 9, at 8.)

c. *Fair Play and Substantial Justice*

After reaching a conclusion regarding the previous two elements, together composing the "minimum contacts" test, a court has the option of considering whether the exercise of jurisdiction would comport with traditional notions of fair play and substantial justice. *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 205. However, given Rantnetwork's failure to show that Christina Underwood has sufficient minimum contacts to warrant exercising personal jurisdiction over her in this court, no fair-play inquiry is necessary. *Id.*

C. *Intentional Interference with Prospective Contractual Relations*

***15** A complaint must adequately allege four elements in order to properly state a cause of action for intentional interference with prospective contractual relations: "(1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 471 (Pa.1979) (citing *Glenn v. Point Park Coll.*, 441 Pa. 474, 272 A.2d 895, 898 (Pa.1971). The dispute in the instant case focuses on the second and third elements.

With regard to intent, case law from the Pennsylvania Supreme Court establishes that the complaint must contain an allegation that the defendant acted for the specific purpose of causing harm to the plaintiff. *Glenn,* 272 A.2d at 899. The

complaint contains no such allegation; the closest averment states only generally that Underwood's December 29, 2009, email constituted intentional and improper interference with the prospective contractual relations between Rantnetwork and potential investors (Doc. 1–4, at ¶ 21), but this is nothing more than a threadbare recitation of the tort allegedly committed—a statement devoid of any averment of fact, a legal conclusion of the sort that *Twombly* and *Iqbal* disapprove and disregard. Rantnetwork's complaint does not adequately allege intent.

Rantnetwork cites *Kelly–Springfield Tire Co. v. D'Ambro*, 408 Pa.Super. 301, 596 A.2d 867, 872 (Pa.Super.1991), for the proposition that a defendant need not have knowledge of the specific prospective contractual relation that the defendant allegedly interfered with (and that a complaint need contain no such averment), but Rantnetwork's reliance on *D'Ambro* is misplaced for two primary reasons. First, the complaint in *D'Ambro* alleged (1) that the plaintiffs were trying to sell a warehouse they owned; (2) that the defendant, a law firm, knew of the plaintiff's efforts; (3) the defendant filed suit against the plaintiff not to protect a legitimate interest of a client but solely "for the purpose of harrassing [the plaintiff] and interfering wrongfully with its efforts to resell the warehouse property"; and (4) potential buyers had been deterred from purchase by the pending litigation. *Id.* at 871–72. On the basis of these allegations, the *D'Ambro* court held the complaint to have sufficiently stated a claim for intentional interference with prospective business relations. *Id.* at 872. Not only was the actual claim under consideration not the same—interference with prospective *business* rather than *contractual* relations—but the litigation that the *D'Ambro* defendant initiated against the plaintiff could reasonably be expected to have a much greater cooling effect vis-à-vis prospective buyers than could the single email at issue in the instant case be expected to have on prospective investors, given that the email, sent to six people, contained only a seven-sentence forwarded message with an additional four prefatory sentences. The different legal claims in *D'Ambro* and in the present case, as well as the factual differences, make *D'Ambro* uncompelling. Second, *D'Ambro* is a Superior Court case, nonbinding on this court, whereas *Glenn* and *Thompson Coal Co.* are both decisions of the Pennsylvania Supreme Court that this court must regard as binding authority.

***16** As to the lack of privilege or justification, Pennsylvania law contains no hard-and-fast rules delineating privileged from unprivileged conduct in this context. However, in this case, there need be no meandering through the thicket of considerations concerning what constitutes privileged or improper conduct. Mr. Underwood responded to Rantnetwork's allegation that the sending of the December 29, 2009, email was improper by claiming that the contents of the email were true—and the Pennsylvania Supreme Court recently held that a defendant's raising a truthfulness defense per Restatement (Second) of Torts § 772(a) against a claim of tortious interference obviates the need for an analysis of the relative weight of the seven otherwise-applicable considerations in § 767 of the Restatement. *Walnut Street Assocs., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 477 (Pa.2011) (citing Restatement (Second) of Torts §§ 766, 767, 772 (1979)). Quoting comment (b) to § 772, which states that "[t]here is of course no liability for interference with ... a prospective contractual relation on the part of one who merely gives truthful information to another," the *Walnut Street* court adopted § 772 on its basis of its consistency with "the very nature of the tort" as well as Pennsylvania law. *Walnut Street*, 20 A.3d at 478–79 (quoting Restatement (Second) of Torts § 772 cmt. b (1979)).

Not only has Mr. Underwood claimed that the contents of his email were true, but Rantnetwork neither states in its complaint that the email's contents were untrue nor effectively rebuts Mr. Underwood's claim in its brief opposing the Underwoods' motion. In fact, Rantnetwork admits that the email truthfully states that Rantnetwork failed to repay any portion of the Underwoods' loan as of the writing of the email. Rantnetwork attempts to minimize the significance of this admission by claiming that "the email contains more than factual assertions; it implies dishonesty on behalf of the corporation." (Doc. 9, at 14.) But, as the Underwoods' reply brief points out, Rantnetwork made no attempt to explain what those "more than factual" assertions are; and the email, rather than implying that Rantnetwork was somehow dishonest, simply states the fact that Rantnetwork had not kept its promises to repay the loan on the schedule set forth in the note. (Doc. 10, at 17, 19.)

The Underwoods' unrefuted assertion of truthfulness is sufficient grounds by itself to dismiss Rantnetwork's claim for tortious interference. Dismissal is only further justified by the complaint's failure to allege that the email was sent for the specific purpose of causing harm to the plaintiff.

D. *Rantnetwork's request for an injunction*

The complaint's failure to properly state a claim for relief renders Rantnetwork's request for an injunction moot, thus

relieving the court from any need to say more on the matter than this brief statement.

E. *Alternative motion to stay this action*

*17 The inadequacy of the complaint's statement of its sole cause of action and the consequent conclusion that the complaint should be dismissed likewise renders moot the Underwoods' alternative motion to stay this action pending the outcome of a previously filed case in California involving the same parties to the instant case.

IV. *Conclusion*

For the above-stated reasons, the court will grant the motion to dismiss filed by the defendants, Troy and Christina Underwood, and deny as moot their alternative motion to stay this action. Rantnetwork shall be granted leave of court to file an amended complaint within twenty (20) days to address the deficiencies in personal jurisdiction over Christina A. Underwood and the deficiencies in its principal cause of action—intentional interference with prospective contractual relations. [10] Failure to file an amended complaint shall result in termination of the action. An appropriate order follows.

ORDER

AND NOW, this 26th day of March, 2012, upon consideration of the motion to dismiss the complaint or alternatively for a stay (Doc. 3) filed by Troy and Christina Underwood, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The motion to dismiss is GRANTED; the complaint is DISMISSED without prejudice.

2. The alternative motion to stay this action is DENIED as moot.

3. Within twenty (20) days of the date of this Order, plaintiff may file an amended complaint. Failure to file an amended complaint in a timely fashion shall result in the termination of this matter and the Clerk of Court shall mark this file closed without further order of court.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1021326

Footnotes

1 Following the standard of review for a motion to dismiss under Rule 12(b)(6), the complaint's well-pleaded factual allegations are taken as true, except where controverted by an opposing affidavit. *See infra* Parts II, III. Although the Federal Rules demand no "detailed" averments of fact in a complaint, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Those portions of the complaint that demonstrate the shortcomings disapproved of in *Iqbal* are disregarded. *See Santiago v. Warminster Twp.,* 629 F.3d 121, 130–31 (3d Cir.2010) (applying *Iqbal* in giving no presumption of truth to mere "conclusions").

2 Subject-matter jurisdiction in this case is based on diversity of citizenship. Accordingly, Pennsylvania law applies to the parties' substantive claims, with the state's Supreme Court decisions binding on this court and the Superior Court decisions nonbinding but persuasive. *State Farm Fire & Cas. Co. v. Estate of Mehlman,* 589 F.3d 105, 107 n. 2 (citing *Jewelcor Inc. v. Karfunkel,* 517 F.3d 672, 676 n. 4 (3d Cir.2008)); *Norfolk S. Ry. Co. v. Basell USA Inc.,* 513 F.3d 86, 91–92 (3d Cir.2008).

3 The most precise definitions of express authority and actual authority evince slight differences between them, but recognizing those distinctions in the context of this case would be a hair-splitting distraction.

4 The four kinds of agency are concisely defined in *Bolus v. United Penn Bank,* 363 Pa.Super. 247, 525 A.2d 1215, 1221 (Pa.Super.1987) (quoting *SEI Corp. v. Norton & Co.,* 631 F.Supp. 497 (E.D.Pa.1986)). For a brief discussion of why actual and apparent authority are usually the focus of disputes over agency, *see generally Scott v. Lackey,* No. 02–1586, 2010 WL 272275, at *5 & n. 12 (M.D.Pa. Jan.20, 2010).

5 Typographic and other errors are reproduced here as they appear in the record.

6 In the briefing (Docs.8, 9, 10) on the pending motion, both Rantnetwork and the Underwoods focused their jurisdictional arguments exclusively on the *Calder* effects test, apparently in reliance on a prior memorandum and order that this court issued: *Scott v. Lackey,* No. 02–1586, 2010 WL 272275 (Jan. 20, 2010) (Conner, J.). The following passage appears

in *Lackey:* "When a defendant is charged with committing an intentional tort, the court's juridictional inquiry is guided by the *'Calder* effects test.' "(*Id.* at *9 (citing *Calder v. Jones,* 465 U.S. 783, 788–90, 104 S.Ct. 1482, 79 L.Ed.2d 804, (1984); *Miller Yacht Sales, Inc. v. Smith,* 384 F.3d 93, 96 n. 2 (3d Cir.2004); *IMO Indus., Inc. v. Kierkert AG,* 155 F.3d 254, 261 (3d Cir.1998)). The parties in this case seem to have read *Lackey* to mean that the *Calder* effects test *controls* the jurisdictional inquiry in intentional-torts cases, but this is not so. Rather, *Calder* merely provides an alternative route to satisfying constitutional due process requirements.

Calder held that jurisdiction over out-of-state parties was proper because their intentional conduct was "calculated to cause injury" to the respondent in California, *Calder,* 465 U.S. at 791, but not before remarking that a plaintiff's "lack of 'contacts' will not defeat otherwise proper jurisdiction," *id.* at 788 (citing *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 777–81, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)). This general language in *Calder* suggested that satisfying the "effects" test is not the only way to establish jurisdiction in intentional-tort cases. The Third Circuit made this suggestion explicit in a subsequent case applying *Calder,* stating that *Calder* did not "carve out a special intentional torts exception to the traditional specific jurisdiction analysis." *IMO Indus., Inc. v. Kierkert AG,* 155 F.3d 254, 265 (3d Cir.1998). Rather, the unique circumstances that intentional-tort cases present may sometimes "render the defendant's contact with the forum—which otherwise would not satisfy the requirements of due process—sufficient." *Id.*

Although the parties' briefs do not incorporate the traditional specific-jurisdiction analysis, this court is still free to undertake the analysis itself: "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law ." *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly,* 309 F.3d 144, 158 n. 15 (3d Cir.2002) (quoting *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991)) (internal quotation marks omitted).

7 As in the previous section—discussing whether personal jurisdiction over Mr. Underwood lies in Pennsylvania—the analysis here focuses on the traditional three-part minimum-contacts analysis. Not only does *Calder* not control the jurisdictional inquiry, as explained in note 6 *supra,* but application of the *Calder* effects test to Mrs. Underwood's would clearly counsel against exerting jurisdiction: the sole basis of the intentional-tort claim, which would also form the operative basis of the *Calder* effects test, is an email sent by Mr. Underwood that cannot be imputed to his wife.

8 The analogy of the Underwoods to (passive) buyers, rather than just lenders, receives support from the provision in the note that gave the Underwoods the option of converting some or all of the principal and interest of their loan into shares of Rantnetwork's stock, although nothing before the court suggests that this option was exercised.

9 In the context of the "passive buyer" analogy, there is little significance to the Underwoods' sending of an agent to Pennsylvania to perform due diligence on Rantnetwork before they lent the company $300,000. The nascent business relationship between the parties in this case was initiated and solicited entirely by Rantnetwork, as was the loan, and from the standpoint of common good business practices, it would have been sheer foolishness for the Underwoods to loan over a quarter-million dollars to a company without conducting some limited research into that company. *Cf. United Elec. Workers v. 163 Pleasant St. Corp.,* 960 F.2d 1080, 1089 (1st Cir.1992) (requiring, in contract cases, a showing that the defendant's forum related activities were "instrumental in the formation of the contract").

10 When a complaint is found to be defective upon a successful challenge by a defendant, courts should generally grant the plaintiff leave to amend the complaint before dismissing the action with prejudice. *See Grayson v. Mayview State Hosp.,* 293 F.3d 103, 108 (3d Cir.2002); *Shane v. Fauver,* 213 F.3d 113, 116–17 (3d Cir.2000).

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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.

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. The court interprets 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. *See Adler, 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 *et seq.* 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.

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), *quoted in Flynn 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); *see also* 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. *See Kelly–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]

***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. *See Kelly–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."). *See also B.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. *See Creeger 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.

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.

***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]

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.

All Citations

Not Reported in A.2d, 2001 WL 1855055, 52 Pa. D. & C.4th 57

Footnotes

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.")

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. *Compare Eberhart 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) *with Detweiler 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) *and Satchell 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. *See Framlau 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).

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. *See Hydrair, 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.

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.

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

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.

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2014 WL 10789964
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NON–PRECEDENTIAL DECISION–
SEE SUPERIOR COURT I.O.P. 65.37.
Superior Court of Pennsylvania.

John F. TORNESE and J &
P Enterprises, Appellants
v.
Wilson F. CABRERA–MARTINEZ, Appellee.

No. 172 MDA 2014.
|
Filed Oct. 8, 2014.

Appeal from the Order Entered December 27, 2013, In the Court of Common Pleas of Luzerne County, Civil Division, at No. 2013–10204.

BEFORE: PANELLA, SHOGAN and FITZGERALD *, JJ.

Opinion

MEMORANDUM BY SHOGAN, J.:

*1 John F. Tornese ("Tornese") and J & P Enterprises (collectively "Appellants"), appeal the trial court's order granting preliminary objections in the nature of a demurrer filed by Appellee, Wilson F. Cabrera–Martinez ("Cabrera–Martinez"). We affirm.

The trial court summarized the factual and procedural history of this case as follows:

> On August 28, 2013, [Appellants] filed a Complaint against [Cabrera–Martinez]. The Complaint was premised upon an alleged contract between ... J & P Enterprises, and Wendy Almanzar, the wife of [Cabrera–Martinez]. On October 18, 2013, [Cabrera–Martinez] filed Preliminary Objections to [Appellants'] Complaint. On October 28, 2013, [Appellants] responded to [Cabrera–Martinez's] original Preliminary Objections by filing an Amended Complaint. [Appellants'] Amended Complaint contains two counts, one for tortious interference with a contract and the other for terroristic threats. In response thereto, [Cabrera–Martinez] filed a second set of Preliminary Objections. [Appellants] did not file a Second Amended Complaint, choosing to rely on the Amended Complaint they filed on October 28, 2013, and filing the identical brief in opposition to the preliminary objections that [they] filed previously without referencing the new preliminary objections. The Court, on December 20, 2013, reviewed the matter, granted the Preliminary Objections and Dismissed [Appellants'] Complaint against [Cabrera–Martinez]. [1]
>
> [Appellants'] Amended Complaint is premised on a claim that ... J & P Enterprises and Wendy Almanzar, the wife of [Cabrera–Martinez], entered into a contract for the delivery of an ATM machine and one lighted sign owned by [J & P Enterprises], but to be delivered to [Cabrera–Martinez's] business [Harlem World].
>
> Trial Court Opinion, 3/21/14, at 1–2.

Appellants filed a timely notice of appeal from the trial court's order dismissing Appellants' amended complaint. The trial court ordered a Pa.R.A.P.1925(b) statement and Appellants timely complied.

Appellants present the following issue for our review:

> Whether the lower court erred by sustaining [Cabrera–Martinez's] preliminary objections in the nature of a demurrer and dismissing all of [Appellants'] claims, when [Appellants have] adequately pled all of [their] claims, including conversion, tortious interference with contractual relations, and intentional infliction of emotional distress?

Appellants' Brief at 9 (full capitalization omitted).

We must first consider whether Appellants' claims are properly before this Court. Although Appellants present a single issue, the claim consists of three distinct questions: 1) whether Appellants adequately pled a claim of conversion; 2) whether Appellants adequately pled a claim of tortious interference with contractual relations; and 3) whether Appellants adequately pled a claim of intentional infliction of emotional distress. Appellants' Brief at 9. Indeed, the argument section of Appellants' brief consists of three subparts, each providing argument in support of these three individual claims. *Id.* at 12–23.

*2 As mentioned previously, however, Appellants' amended complaint contained two counts: one for tortious interference with a contract and the second for terroristic threats. Amended Complaint, 10/28/13, at 1–4. Thus, the claims raised in Appellants' appellate brief for conversion [2] and intentional infliction of emotional distress, were not raised in Appellants' amended complaint, and thus are not properly before this

Court for review. *See* Pa.R.A.P. 302(a) (Issues not raised in the lower court are waived and cannot be raised for the first time on appeal).

Furthermore, Appellants fail to present as an issue in their appellate brief the trial court's ruling on the averment of terroristic threats. Accordingly, the only issue properly before this Court for review is Appellants' allegation that they adequately set forth a claim of tortious interference with contractual relations and, therefore, the trial court erred in granting the preliminary objections. [3]

Appellants maintain that they have adequately pled a claim for tortious interference with actual contractual relations, establishing each of the four requisite elements. [4] Appellants' Brief at 14–19. Thus, Appellants contend the trial court erred in granting the preliminary objections and dismissing Appellants' amended complaint. *Id.*

Our standard of review of an appeal from the grant of preliminary objections is as follows:

> [O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
>
> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Discover Bank v. Snicka, 33 A.3d 82, 86 (Pa.Super.2011). It is well-established that a plaintiff must provide sufficient factual averments in his or her complaint to sustain a cause of action. *Feingold v. Hendrzak,* 15 A.3d 937, 942 (Pa.Super.2011). "Pennsylvania is a fact-pleading state; a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but the complaint must also formulate the issues by summarizing those facts essential to support the claim ." *Id.* at 942.

The elements necessary to a cause of action for interference with existing contractual relations are as follows:

> ***3** (1) the existence of a contractual relationship between the complainant and a third party;
>
> (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship;
>
> (3) the absence of privilege or justification on the part of the defendant; and
>
> the occasioning of actual damage as a result of defendant's conduct.

Phillips, 959 A.2d at 429 (Pa.Super.2008).

In an attempt to establish the first element, Appellants contend that they have "clearly pled the existence of a contractual relation between the complainant and a third party, satisfying prong one." Appellants' Brief at 17. In support of this claim, Appellants cite to paragraph 5 of their amended complaint, which provides:

> The Plaintiff, J & P Enterprises, entered into a contractual agreement with Wendy Almanzar for her placement and maintenance of an ATM terminal at Harlem World.

Id. Appellants' citation to their *claim* in the amended complaint that there was a contractual agreement with Wendy Almanzar, however, does not establish that there was, in fact, a contractual agreement with Wendy Almanzar.

Rule 1019 of Pennsylvania Rules of Civil Procedure provides, in relevant part, as follows:

> **Rule 1019. Contents of Pleadings. General and Specific Averments**
>
> * * *
>
> (h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.
>
> Note: If the agreement is in writing, it must be attached to the pleading. See subdivision (i) of this rule.

> (i) When any claim or defense is based upon 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. Furthermore, "a contract implied in fact is a contract arising when there is an agreement, but the parties' intentions are inferred from their conduct in light of the circumstances." *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa.Super.2006).

Here, despite the claim being based on an agreement, Appellants have failed to state whether the agreement was oral or written pursuant to Pa.R.C.P. 1019(h). Furthermore, if the agreement was written, Appellants failed to attach any such writing, or an explanation for its absence, to their amended complaint pursuant to Pa.R.C.P. 1019(i). Moreover, Appellants failed to sufficiently plead or establish that there was an implied contract. In fact, Appellants have provided no details regarding the alleged arrangement, such as the date the ATM and sign were placed at Harlem World, the duration of the agreement, and any arrangement for payment between the parties. As such, Appellants have failed to sufficiently plead the existence of a contractual relationship between the parties. *See Foster v. UPMC South Side Hosp.*, 2 A.3d 655, 666 (Pa.Super.2010) (trial court properly granted preliminary objections in the nature of a demurrer where plaintiff failed to establish that a contract existed for purposes of a claim of intentional interference with a contract because the complaint failed to provide a scintilla of information regarding the purported contractual relationship). Accordingly, we conclude that Appellants failed to establish the first prong necessary to a claim of interference with actual contractual relations.

***4** Additionally, we note that Appellants allege that the contractual relationship was between Appellants and Wendy Almanzar ("Almanzar") and maintain that "[Appellants] entered into a contractual agreement with Wendy Almanzar for her placement and maintenance of an ATM terminal at Harlem World." Appellants' Brief at 15; Amended Complaint, 10/28/13, at ¶ 5. Furthermore, Appellants assert that Almanzar is married to Cabrera–Martinez and advised Appellants that she had authority to place the ATM at Harlem World. *Id.*; Amended Complaint, ¶¶ 5, 6. Appellants maintain that, at the direction of Almanzar, Appellants placed the ATM at Harlem World. *Id;*. Amended Complaint, at ¶ 7.

There is no allegation in the amended complaint or evidence of record that establishes Almanzar's relationship to Cabrera–Martinez and Harlem World other than the allegation that she was married to Cabrera–Martinez. Despite Appellants' allegation that Almanzar advised Appellants that she had authority to have the ATM placed at Harlem World, there is no claim or evidence of record that she did, in fact, have authority to act on Harlem World's behalf.

However, even presuming that Almanzar had authority to allow J & P Enterprises to place the ATM at Harlem World, it would not be unreasonable to conclude that she was acting as agent for Harlem World.[5] Followed to its logical end, if Almanzar was acting as agent for Harlem World, there was no third party as is required by the first element. Appellants cannot have it both ways: they cannot argue on one hand that Almanzar had authority on behalf of Cabrera–Martinez and Harlem World to have the ATM placed there, but then, on the other, argue that Almanzar was the third party with whom they contracted and Cabrera–Martinez acting on Harlem World's behalf interfered with that contractual relationship.

Next, Appellants assert that Cabrera–Martinez specifically intended to harm the existing contractual relationship, thus satisfying prong two. Appellant's Brief at 17. Appellants claim that when they demanded return of the ATM, Cabrera–Martinez refused to allow Appellants to retrieve the ATM. *Id.* at 17. Additionally, Appellants argue that Cabrera–Martinez's threat to shoot Tornese. While such behavior, if true, would obviously be "improper," we note references to two "personal" visits by Tornese, and we decline to shoot Tornese if he attempted to retrieve the ATM constituted "improper conduct," satisfying the third element. *Id.* at 19.

This Court has provided the following guidance when analyzing the second and third prongs of a claim for intentional interference with contractual relations:

> The second element requires proof that the defendant acted 'for the specific purpose of causing harm to the plaintiff.' *Phillips v. Selig*, 959 A.2d 420, 429 (Pa.Super.2008) (quoting *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 899 (1971)). The second element of this cause of action is closely intertwined with the third element, which requires a showing that Appellant's actions were not privileged. *See* Restatement (Second) of Torts § 766. Thus, in order to succeed in a cause of action for tortious interference with a contract, a plaintiff must prove not only that a defendant acted intentionally to harm the plaintiff,

but also that those actions were improper. In determining whether a defendant's actions were improper, the trial court must take into account the following factors listed in Restatement (Second) of Torts section 767:

> *5 (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the others with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.

Restatement (Second) of Torts § 767; *see, e.g., Adler Barish Daniels Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1184 (1978); *Phillips*, 959 A.2d at 429–30.

Courts require a showing of both harm and improper conduct because we have recognized that some intentionally harmful conduct is done "at least in part for the purpose of protecting some legitimate interest which conflicts with that of the plaintiff." *Phillips*, 959 A.2d at 430.

Empire Trucking Co., Inc. v. Reading Anthracite Coal Co., 71 A .3d 923, 933–934 (Pa.Super.2013).

In the case *sub judice*, the trial court provided the following analysis regarding these two prongs:

> A review of [Appellants'] Complaint discloses that [Appellants] have failed to state a claim for the intentional interference with a prospective contractual relation because Count 1 fails to contain a sufficient allegation of specific intent. *Glenn* [*v. Point Park College*], 441 Pa. 474, 272 A.2d [895.] 899 [(Pa.1971)]. [Appellants] do not plead any allegation that [Cabrera–Martinez] knew or had knowledge of any contractual relationship between [Appellants] and Wendy Almanzar. There is no allegation that [Cabrera–Martinez] intended to cause harm to [Appellants]. The [Appellants] plead that there was harm but not that [Cabrera–Martinez] intended to harm [Appellants].
>
> The Supreme Court of Pennsylvania has held that in order to state a claim for tortious interference with a contract, there needs to be an allegation that [Cabrera–Martinez] acted with 'the specific purpose of causing harm to the Plaintiffs. *Glenn*, 272 A.2d 899 ("the wrong ordinarily requires conduct intended to interrupt negotiations or prevent the consummation of the contract").' ... At most, [Appellants] plead, in paragraph 17, that the "conduct of [Cabrera–Martinez] in converting [Appellants'] property was intentional, willful, wanton and outrageous", but this is insufficient to state a cause of action under this theory. In *Glenn*, the court ruled that even an allegation that the [d]efendant "intentionally, wrongfully, and maliciously ... interfered with a prospective contractual relationship" [6] was insufficient because there was no allegation that the [d]efendant intended to cause harm to the [p]laintiffs. There is nothing in the pleading to suggest that [Cabrera–Martinez] intended to cause harm to [Appellants] or its business, even if harm was inevitable by the actions of [Cabrera–Martinez]. Moreover, there is no allegation in the Amended Complaint regarding whether [Cabrera–Martinez's] actions were made with or without "privilege or justification."

*6 Trial Court Opinion, 3/21/14, at 2–3.

We agree with the trial court's analysis. Here, there is no allegation that Cabrera–Martinez acted with the intent to harm Appellants by interfering with the alleged contractual relationship. In fact, it is unclear that Cabrera–Martinez was even aware of the alleged contractual relationship. Appellants have failed to allege that Cabrera–Martinez's actions of refusing to allow Appellants to retrieve the ATM were not privileged. The complaint as drafted does not negate the existence of privilege on the part of Cabrera–Martinez. *Glenn*, 272 A.2d at 900. Indeed, as our Court has recognized, "some intentionally harmful conduct is done 'at least in part for the purpose of protecting some legitimate interest which conflicts with that of the plaintiff.' " *Empire Trucking Co., Inc.*, 71 A.3d at 933–934. [7]

As such, we conclude that Appellants have failed to satisfactorily plead facts establishing the second and third prongs of the cause of action for intentional interference with existing contractual relations. Accordingly, the trial court properly granted Cabrera–Martinez's preliminary objections in the nature of a demurrer.

Order affirmed. Jurisdiction relinquished.

All Citations

Not Reported in A.3d, 2014 WL 10789964

Footnotes

* Former Justice specially assigned to the Superior Court.

1 The court's order granting Cabrera–Martinez's preliminary objections was entered on December 27, 2013.

2 Appellants assert that although they raised the issue of conversion in the body of the amended complaint, the trial court "completely ignored" their claim of conversion. Appellants' Brief at 13. As noted, Appellants' amended complaint included two counts: Count One–Tortious Interference [With] Contract; and Count Two–Terroristic Threats. Amended Complaint, 10/28/13, at 1–4. The trial court did not have a duty to scour the complaint and uncover all potential claims therein. *Steiner v. Markel,* 600 Pa. 515, 968 A.2d 1253, 1258 (Pa.2009). Accordingly, the trial court properly declined to address the alleged claim of conversion.

3 We note that although Appellants fail to specifically identify the claim for intentional interference with an existing contractual relation as an issue they were pursuing on appeal, we conclude that in reading the Pa.R.A.P.1925(b) statement, the claim is fairly pled. Plaintiffs' Concise Statement of Matters Complained of on Appeal, 2/12/14, at 1–2. Thus, we decline to find this issue waived. *See Commonwealth v. Hill,* 609 Pa. 410, 16 A.3d 484, 491 (Pa.2011) (quoting *Commonwealth v. Lord,* 553 Pa. 415, 719 A.2d 306, 309 (Pa.1998)) (holding "[a]ny issues not raised in a Pa.R.A.P.1925(b) statement will be deemed waived.").

4 *See Phillips v. Selig,* 959 A.2d 420 (Pa.Super.2008) for discussion of claims of interference with prospective contractual relations versus claims of interference with existing contractual relations.

5 Without details regarding the contract, it is impossible to determine in what, if any, capacity Almanzar acted on behalf of Harlem World.

6 We note that *Glenn* involved an allegation of interference with **prospective** contractual relationship wherein the case at hand involves a claim of interference with **existing** contractual relationships. The analysis in **Glenn** as to the second and third elements, however, is helpful and relevantto our inquiry here as the second, third and fourth elements of both claims are the same. *See Phillips,* 959 A.2d at 428–430 (outlining requirements for allegations of interference with prospective contractual relations and allegations of interference with existing contractual relations.)

7 We make no ruling regarding Appellants' claim that Cabrera–Martinez's conduct was not privileged and was improper when he threatened to speculate as to what may have occurred during these exchanges and fueled subsequent interactions between the parties. Furthermore, given our conclusion that Appellants have failed to establish the first and second elements of his claim, a decision regarding this allegation is not necessary to the disposition of this case.

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2001 WL 1807786
Only the Westlaw citation is currently available.
Pennsylvania Court of Common Pleas.

SAN LUCAS CONSTRUCTION
COMPANY INC. Plaintiff
v.
ST. PAUL MERCURY INSURANCE COMPANY
d/b/a The St. Paul Surety, Philadelphia
Housing Authority, and Bob Kahan d/b/
a Contract Completion, Inc. Defendants

No. 2190FEB.TERM.2000.
|
March 14, 2001.

OPINION

SHEPPARD, J.

*1 Presently before this court is defendant, St. Paul Mercury Insurance Company, d/b/a The St. Paul Surety ("St.Paul")'s Motion for Judgment on the Pleadings ("Motion") and plaintiff, San Lucas Construction Company, Inc. ("San Lucas")'s opposition to it.

For the reasons set forth, the Motion is Granted and San Lucas's claims against St. Paul are dismissed.

BACKGROUND

This case arises out of a dispute over the unsuccessful completion of a construction contract involving the renovation of a public housing project and the termination of one of the general contractors.

Plaintiff, San Lucas, is a family owned construction business, located in Philadelphia. Compl. at ¶ 1. Defendant, Philadelphia Housing Authority ("PHA"), is the largest public housing agency in Pennsylvania. *Id.* at ¶ 3. On November 6, 1997, PHA hired San Lucas to provide general construction for a part of the public housing project known as the Richard Allen Homes project ("the Project"). *Id.* at ¶ 5. Defendant, St. Paul, a Minnesota corporation, is the surety for San Lucas's obligations under the Project. *Id.* at ¶ 2. Prior to issuing any bonds to San Lucas, St. Paul required San Lucas to sign a General Agreement of Indemnity, dated June 20, 1997 ("Indemnity Agreement"). [1] St. Paul's Answer, New Matter and Counterclaim at ¶¶ 115-116 ("St. Paul's Answer"); San Lucas's Reply at ¶¶ 115-116. *See* Exhibit B3. [2] The Indemnity Agreement contained exculpatory clauses for the benefit of St. Paul, which provided that St. Paul could take certain actions without incurring liability, in the event that San Lucas breached its contract or failed to promptly discharge its obligations. *See* Exhibit B3 at ¶¶ 12-13.

During the course of the Project, problems developed between San Lucas and PHA which involved, *inter alia,* various delays in meeting the completion deadline. *See* Compl. at ¶¶ 13, 16, 21, 23, 24, 25, 28, 32, 34, 35, 39, 44, 48. San Lucas and PHA disagree about the cause of the problems. *See* Exhibits A5, A6, A9, A10-25. The contract between PHA and San Lucas provided in pertinent part:

> Article 4. *Payment for Materials, Etc.* The Contractor agrees to make prompt payment for all materials furnished, for labor supplied or performed, equipment rented and services rendered by public utilities, in or in connection with the prosecution of the work, whether or not the said material, labor, equipment or services enter into and become a component part of the work or improvement contemplated.

Exhibit A1, art. 4. On December 10, 1999, PHA issued a "Notice of Intent to Default" to San Lucas. Compl. at ¶ 58; Exhibit A9. This notice included the following:

> Since you have failed to perform the work under Contract No. 9589 within the time required by its terms, or "cure the conditions endangering performance under [C]ontract No. 9589 as related to you at a meeting with you and your surety held on August 10, 1999," the Philadelphia Housing Authority (PHA) is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine the extent of your failure to perform and the recourse PHA must take to secure the services necessary to complete the contract....

*2 Exhibit A9. On December 20, 1999, San Lucas met with PHA and St. Paul to respond to PHA's Notice of Intent to Default. Compl. at ¶ 59.

Immediately, after the meeting with PHA, San Lucas met separately with representatives of St. Paul to review outstanding issues, including the status of claims by subcontractors and suppliers. *Id* . at ¶ 60. San Lucas acknowledged that $242,000 in subcontractors' claims were due at that time. *Id.* at ¶ 61. San Lucas also purportedly agreed to enter into a joint check agreement with St. Paul so that all funds from PHA could be monitored and directed by St. Paul. *Id.* at ¶ 62. In addition, St. Paul purportedly agreed not to interfere with San Lucas' negotiations with PHA, which included asking PHA to reduce its retainage in order to pay subcontractors, asking PHA to increase the contract price, and asking for an additional time extension. *Id.* at ¶ 63. St. Paul, however, denies that it agreed to refrain from interfering with San Lucas's negotiations with PHA. St. Paul's Answer at ¶ 64.

The next day, on December 21, 1999, St. Paul sent letters to both PHA and San Lucas, referring to the meeting of December 20, 1999, as well as the concerns of PHA regarding the status of the Project and the unpaid bills for the Project. Compl. at ¶ 65; Exhibit A10. These letters demanded that PHA "refrain from paying out any portion of the remaining contract balance without the express written consent of [St. Paul]." Exhibit A10. On January 10, 2000, San Lucas issued a response letter, requesting instructions on how to proceed. Compl. at ¶ 67. Specifically, this letter indicated that San Lucas was not abandoning the job but also stated that San Lucas could not continue to provide labor and materials without payment from PHA. Exhibit A11. Thereafter, additional correspondence passed between St. Paul and San Lucas. Compl. at ¶ 69. *See* Exhibit A13.

On January 13, PHA issued a "Notice of Default" to San Lucas, advising that "[a]lthough you are in default, at this time the PHA is *not* terminating the above contract." Exhibit A14 (emphasis in original). Following this notice, the parties again exchanged correspondence, but St. Paul and PHA purportedly refused to meet with San Lucas. Compl. at ¶¶ 71-73. *See* Exhibits A15, A16, A17. Specifically, on January 21, 2000, St. Paul issued a letter to PHA, indicating its needs for documentation in order to investigate the matter and determine the appropriate action. Exhibit A17. Then, on January 24, 2000, PHA terminated its contract with San Lucas, asserting the same grounds it had asserted previously in its "Notice of Intent to Default", and demanded that St. Paul, as surety, ensure performance of the underlying contract. Compl. at ¶ 75; Exhibit A18. On January 27, 2000, St. Paul sent a letter to San Lucas stating: "[i]t is our goal to resolve the performance and payment issues in the most cost effective manner. We would really appreciate your assistance and input in this process." Exhibit A19.

***3** San Lucas's subsequent request for an appeal through the administrative process within the PHA was denied. Compl. at ¶¶ 76-77; Exhibit A20.

Within this context, San Lucas filed its Complaint against PHA, St. Paul and Bob Kahan, setting forth counts for wrongful termination against PHA, tortious interference with contract against both St. Paul and Bob Kahan, as well as claims for exemplary and punitive damages against both St. Paul and Kahan. Compl. at ¶¶ 91-113. St. Paul filed its Answer with New Matter and Counterclaim, raising the exculpatory clauses in the Indemnity Agreement as a defense, along with a fraud claim. St. Paul's Answer at ¶¶ 115-143. San Lucas, in its Reply, asserted that St. Paul did not act to "minimize any ultimate loss" as provided in the Indemnity Agreement but rather acted "recklessly, foolishly and incomprehensibly" in not investigating before acting and taking over the Project. San Lucas's Reply at ¶ 117.

Thereafter, St. Paul filed this Motion for Judgment on the Pleadings, contending that it is entitled to judgment as a matter of law in light of the Indemnity Agreement's "unambiguous exculpatory clauses" and the absence of any allegations which would constitute "deliberate and willful malfeasance." St. Paul's Motion at ¶¶ 18-22. In response, San Lucas filed its Answer, asserting that the Indemnity Agreement is a contract of adhesion which contains self-serving exculpatory clauses that attempt to circumvent St. Paul's legal duty to act in good faith, particularly with regard to its duty to investigate all claims asserted by defendant PHA. San Lucas's Answer at ¶¶ 18-22.

For the reasons set forth, St. Paul's Motion is granted and San Lucas's claims against St. Paul are dismissed.

DISCUSSION

The question presented is whether St. Paul's Motion for Judgment on the Pleadings should be granted because as a matter of law the exculpatory clauses in the Indemnity Agreement are valid and enforceable under the facts alleged so as to absolve St. Paul of any liability. Concomitantly, this court must consider whether the pleadings support a conclusion that St. Paul engaged in deliberate and willful malfeasance of (conduct which is excluded from the exculpatory clauses and which would constitute tortious interference with contract), when it demanded that PHA

refrain from making additional payments on the contract to San Lucas without St. Paul's express written consent. This court holds that the exculpatory clauses are valid and enforceable and St. Paul's actions, as alleged in the pleadings, cannot reasonably constitute deliberate and willful malfeasance that would otherwise make it liable for tortious interference with contract.

A. *Legal Standard*

Rule 1034 of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). On a motion for judgment on the pleadings, which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party, but only those facts specifically admitted by the nonmovant may be considered against him. *Mellon Bank v. National Union Ins. Company of Pittsburgh*, 2001 WL 79985, at *2 (Pa.Super. Jan. 31, 2001). However, "neither party will be deemed to have admitted conclusions of law." *Id. See also, Flamer v. New Jersey Transit Corp.*, 414 Pa.Super. 350, 355, 607 A.2d 260, 262 (1992)("While a trial court cannot accept the conclusions of law of either party when ruling on a motion for judgment on the pleadings, it is certainly free to reach those same conclusions independently.") (citations omitted).

***4** In ruling on a motion for judgment on the pleadings, the court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any documents or exhibits properly attached to them. *Kelly v. Nationwide Ins. Co.*, 414 Pa.Super. 6, 10, 606 A.2d 470, 471 (1992). *See also, Kotovosky v. Ski Liberty Operating Corp.*, 412 Pa.Super. 442, 445, 603 A.2d 663, 664 (1992). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise. *Ridge v. State Employees Retirement Board*, 690 A.2d 1312, 1314 n. 5 (Pa.Commw.Ct.1997) (citations omitted). "This may often be the case when the dispute will turn on the construction of a written agreement." *Brown v. Cooke*, 707 A.2d 231, 232 (Pa.Super.Ct.1998) (citations omitted).

B. *St. Paul's Motion Is Timely And Not Premature*

San Lucas, in its opposition to the Motion, first argues that it is premature since, at the time that St. Paul filed its motion, it had not filed or served its Joinder Complaint against Galo Gutierrez and Urkia Hernandez, [3] and these additional defendants had not yet responded. San Lucas's Mem. of Law in Opposition to St. Paul's Motion ("San Lucas's Mem. of Law"), at 2. In support of this point, San Lucas relies upon *Sameric Corp. of Brookhaven v. Kober Co., Inc.*, 73 Pa. D. & C.2d 437 (C.P.Phila.1975), which held that the motion for judgment on the pleadings was premature where the builder-defendant had joined owner and sureties as additional defendants, but had inadvertently not filed the complaint and service had not been made.

This court finds no merit in San Lucas's assertions in light of the facts of this case. First, Pa.R.C.P. 1034(a) explicitly allows for such a motion after the "relevant" pleadings are closed. The relevant pleadings to the claims filed by San Lucas, for which St. Paul seeks to be dismissed, are San Lucas's Complaint, St. Paul's Answer, New Matter and Counterclaim, and San Lucas's Reply to New Matter and Counterclaim. The docket clearly reflects that these pleadings had been filed prior to St. Paul's Motion for Judgment on the Pleadings. Further, St. Paul's Motion to Join Additional Defendants was filed before its present motion. In addition, the Joinder Complaint has actually been filed and served, and defendants Gutierrez and Hernandez have answered it. Clearly, the relevant pleadings to the present motion before the court have been closed.

Therefore, this court finds that St. Paul's motion was not premature but was timely filed.

C. *The Exculpatory Clauses In The Indemnity Agreement Are Valid And Enforceable To Absolve St. Paul From Liability And St. Paul's Actions As Admitted Cannot Be Construed As Willful And Deliberate Malfeasance*

St. Paul, in support of its Motion, contends that paragraphs 12 and 13 of the Indemnity Agreement clearly and unambiguously exculpate it from liability for any conduct short of deliberate and willful malfeasance. St. Paul's Mem. of Law in Support of Its Motion ("St. Paul's Mem. of Law"), at 9-10. In response, San Lucas argues that the exculpatory clauses are not enforceable because the Indemnity Agreement is a mere contract of adhesion, in which San Lucas had no power to negotiate its terms. San Lucas's Mem. of Law, 6-7. San Lucas also argues that the exculpatory clauses are void against public policy. Alternatively, San Lucas urges that St. Paul acted in bad faith in contravention of 42 Pa.C.S.A. § 8371 in failing to investigate PHA's determination of default and termination of its contract with San Lucas. *Id.* at 7-8.

*5 Generally, exculpatory clauses or contracts against liability, while not favored at law, may nevertheless be valid. *Leidy v. Deseret Enterprises, Inc.*, 252 Pa.Super. 162, 167, 381 A.2d 164, 167 (1977). Our Supreme Court has established the following principles:

> It is generally accepted that an exculpatory clause is valid where three conditions are met. First, the clause must not contravene public policy. Secondly, the contract must be between persons relating entirely to their own private affairs and thirdly, each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion....

Topp Copy Products, Inc. v. Singletary, 533 Pa. 468, 471, 626 A.2d 98, 99 (1993) (citations omitted). In addition, even if an exculpatory clause is determined to be valid, it must meet the following standards:

> (1) the contract language must be construed strictly, since exculpatory language is not favored by the law; (2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; (3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and (4) the burden of establishing the immunity is upon the party invoking the protection under the clause.

Id. See also, Employers Liability Assurance Corp. v. Greenville Business Men's Ass'n. 423 Pa. 288, 291-92, 224 A.2d 620, 623 (1966); *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 434, 192 A.2d 682, 687 (1963).

In Pennsylvania, an adhesion contract is defined as a "standardized contract form offered to consumers of goods and services on [an] essentially 'take it or leave it' basis without affording [the] consumer a realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing [to the] form contract." *Todd Heller, Inc. v. United Parcel Service, Inc.*, 754 A.2d 689, 699-700 (Pa.Super.Ct.2000) (citations omitted). "The fundamental nature of this type of contract is such that the consumer who is presented with it has no choice but to either accept the terms of the document as they are written or reject the transaction entirely." *Id.* at 700. Nonetheless, "merely because a contract is a contract of adhesion does not automatically render it unconscionable and unenforceable." *Id.* Rather, the issue of whether a contract or clause is unconscionable is a question of law for the court. *Id.* For a contractual provision to be deemed unconscionable, the court must determine both "that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." *Id.* In addition, since insurance contracts are frequently viewed as adhesion contracts, Pennsylvania courts strictly construe exclusionary provisions and exceptions to the insurer's general liability under the policy. *See Treasure Craft Jewelers v. Jefferson Ins. Co. of New York*, 583 F.2d 650, 655 (3d Cir.1978)(citing Pennsylvania cases).

*6 In support of its argument that the Indemnity Agreement is a contract of adhesion, San Lucas asserts that as "a small family construction company, [it] is powerless to negotiate the documents demanded by [ ] St. Paul, the world's largest surety company." However, San Lucas fails to allege that it could not deal with another surety company or that it had not benefitted from the contract relations which existed between itself and St. Paul. Further, as admitted, San Lucas and St. Paul are both business entities which entered into the Indemnity Agreement as a condition precedent to St. Paul's issuance of a performance bond and a materialmen's bond on the Project. *See* Compl. at ¶¶ 1-2; St. Paul's Answer at ¶¶ 115-116 and San Lucas's Reply at ¶¶ 115-116. Therefore, this court doubts San Lucas's assertion that the Indemnity Agreement constitutes a contract of adhesion and this court is not bound to accept mere legal conclusions. *See Phillippe v. J.H. Rhoads*, 233 Pa.Super. 503, 506-07, 336 A.2d 374, 376-77 (1975)(holding that indemnity clause does not contravene public policy and appellants do not allege that they could not deal with another business for installing the fixtures and equipment necessary for selling gasoline). *C.f., Leidy*, 252 Pa.Super. at 172, 381 A.2d at 170 (holding that reply to new matter specifically denying the validity of the exculpatory clause precluded the entry of judgment on the pleadings).

Even assuming *arguendo* that the Indemnity Agreement is an adhesion contract, the exculpatory clauses may still be valid and enforceable but must be strictly construed against St. Paul, as the drafter. *See Todd Heller*, 754 A.2d at 700; *Phillippe*, 233 Pa.Super. at 507, 336 A.2d at 376 (stating "an agreement or instrument which reduces legal rights which would otherwise exist is strictly construed against the party asserting it and must spell out with the utmost particularity the intention of the parties.") (citation omitted). Despite San Lucas's arguments, this court does not find that the language in the Indemnity Agreement is ambiguous, nor is it unconscionable. *See Tuthill v. Tuthill*, 763 A.2d 417, 420 (Pa.Super.Ct.2000)(noting that the fact that parties have different interpretations of a contract does not render it ambiguous, but a contract will be found to be ambiguous only if it is fairly susceptible of different constructions and capable of being understood in more than one sense).

Paragraph 12 of the Indemnity Agreement provides the following, in pertinent part:

> 12. In the event the Contractor shall breach, or default in or delay the performance of, any Bonded Contract, or fail promptly to discharge all obligations which might be claimable under any Bond executed in connection therewith or which might give rise to a lien or charge upon any unpaid contract balance or the property of an Obligee named in any such Bond, or in the event of any breach of the terms of this instrument, the undersigned, and each of them, hereby assign and set over unto the Surety, as of the date hereof, their right, title and interest in and to: (a) *All of the deferred payments and retained percentages, and all moneys and properties that may be, and that thereafter may become, payable to the Contractor on account of, and all claims and actions and causes of action relating to, such contract, or on account of or relating to extra work or materials supplied in connection therewith, as well as all other moneys or properties of the Contractor, hereby agreeing that such money and the proceeds of such payments, properties, claims, actions and causes of action shall be the sole property of the Surety to be by it credited upon any sum due or to become due it under the terms of this instrument.* ... In addition, in any such event aforesaid, the Surety, at its option and in its sole discretion, may take possession of all or any part of the work under any or all Bonded Contracts, and at the expense of the Undersigned complete, or cause the completion of, such work, or re-let, or consent to the re-letting or completion thereof; and in such event, may invite the Obligees, and the Obligees are authorized, to declare the Contractor in default under such contracts, any provisions thereof to the contrary notwithstanding. *Neither the Surety nor the Obligees shall incur any liability to any of the Undersigned in the exercise of the rights granted by this Section 12, except for deliberate and willful malfeasance.*

*7 Exhibit B3 at ¶ 12 (emphasis added). The Indemnity Agreement also expressly stated:

> If it becomes necessary or advisable in the judgment of the Surety to control, administer, operate or manage any or all matters connected with the performance of any Bonded Contract for the purpose of attempting to minimize any ultimate loss to the Surety, or for the purpose of discharging its obligations of suretyship, *the Undersigned hereby expressly covenant and agree that such action on the part of the Surety shall be entirely within its rights and remedies under the terms of this instrument and as Surety, and do hereby fully release and discharge the Surety, in this connection, from liability for all actions taken by it or for its omissions to act, except for deliberate and willful malfeasance.*

Id. at ¶ 13 (emphasis added). This language, on its face, clearly and unambiguously releases St. Paul from liability for discharging its obligations of suretyship under any bonded contract and taking over the contract's completion or the contract's monies in the event that San Lucas breaches its contract or fails to promptly discharge its obligations. An important caveat to these clauses, and their enforceability, is that St. Paul may not act with deliberate and willful malfeasance in protecting its ultimate loss as surety.

Alternatively, San Lucas asserts that the exculpatory clauses are unenforceable as void against public policy since St. Paul is a governmentally regulated surety. San Lucas's Mem. of Law, at 7. San Lucas relies upon *Rempel v. Nationwide Life Ins. Co. Inc.*, 227 Pa.Super. 87, 93, 323 A.2d 193, 196 (1974), which stated that "a clause in an insurance contract which seeks to exculpate the insurer for torts committed by its agent while acting within the scope of his employment is void as against public policy." Despite its reliance on *Rempel,* San Lucas fails to cite a case which stands for the proposition that a surety's indemnity agreement rendered in conjunction with a performance bond is void against public policy. Rather, courts have found indemnity agreements to be contrary to public policy in the following instances: (1) in the employer-employee relationship; (2) in situations where one party is charged with the duty of a public service; (3) in agreements which attempt to exculpate one from liability for the violation of a statute or regulation designed to protect human life; and (4) in the limitations of consequential damages for personal injury in the case of consumer goods. *See Leidy,* 252 Pa.Super. at 168-69, 381 A .2d at 167-68 (cases and examples cited therein). This court does not agree that the exculpatory clauses in the present instance can be held void against public policy since St. Paul would still be held liable if its actions constituted willful and deliberate malfeasance.

Finally, San Lucas argues that St. Paul acted in bad faith in contravention of 42 Pa.C.S.A. § 8371, and that St. Paul's conduct renders the exculpatory clauses inapplicable. First, no bad faith claim is presently before this court since San Lucas did not include any bad faith claim in its Complaint. [4] This court is also not convinced that San Lucas could assert such a claim against St. Paul under the circumstances.

***8** The facts admitted by San Lucas demonstrate that it had failed to promptly pay its subcontractors and could possibly be in default under the construction contract with PHA, [5] which permits St. Paul to act in accordance with the Indemnity Agreement in order to minimize its liability as surety. For example, San Lucas specifically admitted that $242,000 was due on subcontractors' claims. Compl. at ¶ 61. The construction contract with PHA required San Lucas to make prompt payment to all its subcontractors. *See* Exhibit A1, art. 4. San Lucas also admitted that it was negotiating with PHA to ask PHA to reduce its retainage so that San Lucas could immediately pay its subcontractors and to ask PHA to extend the time on its contract. *Id.* at ¶ 63. Paragraph 12 of the Indemnity Agreement clearly authorized St. Paul to take over control of the construction work and the contract monies in the event that San Lucas failed promptly to discharge its obligations which might be claimable under any bond. Exhibit B3 at ¶ 12. San Lucas implicitly, if not explicitly, admitted to its failure to pay its subcontractors in a timely manner.

Further, San Lucas's own allegations, which may be deemed admissions, contradict themselves. On the one hand, San Lucas alleged that St. Paul agreed to refrain from interfering with San Lucas's negotiations with PHA. Compl. at ¶ 64. On the other hand, San Lucas admitted that it had "agreed with St. Paul to enter into a joint check agreement with St. Paul so that all funds from PHA could be monitored and directed by St. Paul." *Id.* at ¶ 62. In addition, San Lucas admitted that St. Paul issued letters to PHA and San Lucas, demanding payment of all contract funds directly to St. Paul. *Id.* at ¶ 65. St. Paul's letter of December 21, 1999 to San Lucas explicitly stated that "we have demanded that the [PHA] refrain from paying out any portion of the remaining contract balance without the express written consent of [St. Paul.]." Exhibit A10. St. Paul's letter to the PHA stated that "claim is hereby made for payment to the surety of the entire amount of the contract funds remaining in the custody of the [PHA] ...". *Id.* Under these circumstances, this court finds no reason to hold that the exculpatory clauses in the Indemnity Agreement are invalid or unconscionable.

Moreover, this court does not find that St. Paul's actions as alleged could constitute deliberate and willful malfeasance or tortious interference with the San Lucas-PHA contract. The only allegations of St. Paul's alleged malfeasance are that St. Paul, on December 21, 1999, made demand upon PHA for the remaining contract funds and to refrain from paying San Lucas out of the retainage, even though St. Paul had previously agreed to refrain from interfering with San Lucas's negotiations with the PHA. Compl. at ¶¶ 64-65. Nonetheless, San Lucas had agreed that all funds from the PHA could be monitored and directed by St. Paul. *Id.* at ¶

62. Thereafter, St. Paul, along with the PHA, had refused to meet with San Lucas, despite San Lucas's requests. *Id.* at ¶ 73. Approximately one month after St. Paul's demand on the PHA, the PHA terminated its contract with San Lucas even though San Lucas had completed in excess of 82% of the contract. *Id.* at ¶ 78. Following this termination, which San Lucas asserts was wrongful, correspondence passed between San Lucas and St. Paul regarding the costs to complete the contract and San Lucas's reasons for the extensive delays on the Project. *Id.* at ¶¶ 82-88. San Lucas also asserts in a conclusory manner that St. Paul is obligated to conduct an investigation of PHA's wrongful termination before taking action and that St. Paul intentionally and/or tortiously interfered with San Lucas's contractual relationship with the PHA. *Id.* at ¶¶ 89, 99. In addition, without providing an adequate factual basis, San Lucas alleges that "[t]he intentional and/or tortuous acts and conduct of St. Paul are incomprehensible, outrageous and reflect an evil motive and a reckless disregard of the rights of San Lucas." *Id.* at ¶ 103. However, this court is not bound to accept mere legal conclusions. *See Mellon Bank*, 2001 WL 79985, at *2. Rather, Pennsylvania is a fact pleading state, which requires that the pleader define the issues, apprise the defendant of an asserted claim, and set forth all material and essential facts to support that claim. *Miketic v. Baron*, 450 Pa.Super. 91, 104-05, 675 A.2d 324, 330-31 (1996)(holding that defendants were properly granted judgment on the pleadings in their favor where plaintiff failed to provide factual bases to establish abuse of privilege in a defamation action). *See* Pa.R.C.P. 1019. Here, San Lucas failed to allege sufficient facts that would demonstrate that St. Paul was not justified in acting as it did.

*9 While it may be true that St. Paul interfered with San Lucas's contractual relationship with PHA and with San Lucas's negotiations with PHA, the real question of St. Paul's liability depends upon whether St. Paul's actions were improper. St. Paul, as surety, had a right to protect reasonably its own liability and act in accordance with paragraphs 12 and 13 of the Indemnity Agreement. Section 773 of the Restatement (Second) of Torts provides that:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Id. Pennsylvania courts have routinely upheld this section. *See, e.g., Kelly-Springfield Tire Co. v. D'Ambro*, 408 Pa .Super. 301, 311, 596 A.2d 867, 872 (1991); *Gresh v. Potter McCune Co.*, 235 Pa.Super. 537, 541, 344 A.2d 540, 542 (1975); *Bahleda v.. Hankison Corp.*, 228 Pa.Super. 153, 156-57, 323 A.2d 121, 123 (1974); *Ramondo v. Pure Oil Co.*, 159 Pa.Super. 217, 224, 48 A.2d 156, 160 (1946). Under the clear exculpatory provisions of the Indemnity Agreement, St. Paul was authorized to take over the Project's monies or its completion in the event that San Lucas failed to pay promptly its obligations or was in default of its contract with the PHA. Exhibit B3 at ¶¶ 12-13. Both conditions existed even though San Lucas had failed to pay its subcontractors. It owed them $242,000, even though the San Lucas-PHA contract required San Lucas to pay its subcontractors. Compl. at ¶ 61; Exhibit A1, art. 4. Under the circumstances, St. Paul did not act improperly in taking over control of the contract proceeds and in deciding to complete the Project on December 21, 1999. San Lucas has stated no facts which would establish that St. Paul acted with deliberate or willful malfeasance.

Even accepting all of San Lucas's allegations in the light most favorable to San Lucas, this court finds that St. Paul's actions cannot reasonably be construed as willful and deliberate malfeasance. This court finds that the exculpatory clauses in the Indemnity Agreement are valid and enforceable and St. Paul's actions cannot be construed as willful and deliberate malfeasance which would make it liable for tortious interference with the San Lucas-PHA contract.

CONCLUSION

For the reasons stated, this court grants St. Paul's Motion for Judgment on the Pleadings and dismisses San Lucas's claims for tortious interference and punitive damages[6] against St. Paul, only. A contemporaneous Order consistent with this Opinion will be entered of record.

ORDER

AND NOW, this 14th day of March 2001, upon consideration of defendant, St. Paul Mercury Insurance Company, d/b/a The St. Paul Surety ("St.Paul")'s Motion for Judgment on the Pleadings ("Motion"), plaintiff, San Lucas Contruction Co., Inc. ("San Lucas")'s opposition to it, the respective memoranda, all other matters of record, and in accord with the Opinion being contemporaneously filed with this Order, it is hereby ORDERED that the Motion is Granted and San Lucas's claims against St. Paul, only, are hereby dismissed.

All Citations

Not Reported in A.2d, 2001 WL 1807786

Footnotes

1 After execution of the Indemnity Agreement, on October, 16, 1997, St. Paul issued a performance bond on the Project for the benefit of PHA, as well as a materialmen's (payment) bond. St. Paul's Answer at ¶¶ 119-120; Exhibits B1 & B2.

2 For purposes of convenience, "Exhibits" in this Opinion shall be understood as those exhibits attached to St. Paul's Motion. Further, Exhibit "A# " refers to exhibits attached to the Complaint and Exhibit "B # " refers to exhibits attached to St. Paul's Answer. San Lucas's Reply was attached at Exhibit "C".

3 Galo Gutierrez is the President of San Lucas and Urkia Hernandez is its Secretary, as evidenced by their signatures on the PHA-San Lucas Contract. *See* Exhibit A1.

4 San Lucas did allege that "St. Paul is subject to the implied-in-law duty to act fairly and in good faith in order not to deprive Plaintiff of the benefits of the San Lucas PHA Contract and the related bonds obtained from St. Paul." Compl. at ¶ 98. Despite this allegation, this court does not find that San Lucas has stated a cause of action under 42 Pa.C.S.A. § 8371, which normally involves the mishandling of claims or denial of coverage or benefits. *See Brickman v. CGU Ins. Co.*, July 2000, No. 909, slip op. at 19 (Jan. 8, 2001)(Herron, J.).

5 This court does not now make a determination as to whether San Lucas's default was material or whether San Lucas had a legitimate defense for its actions. Rather, the court must confine itself to whether the pleadings show that St. Paul's actions were justified under the circumstances.

6 Incidentally, a request for punitive damages cannot stand as an independent cause of action. *Holl & Associates, P.C. v. 1515 Market Street Associates, P.C.*, May 2000, No.1964, slip op. at 5 (Aug. 10, 2000) (Herron, J.).

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2015 WL 5314523
Only the Westlaw citation is currently available.

Commonwealth Court of Pennsylvania.

Robert D. HECKMAN, Appellant
v.
William SANCHEZ and Rush Township Board of Supervisors.

No. 1229 C.D.2014.
|
Submitted Feb. 13, 2015.
|
Decided March 11, 2015.

BEFORE: HONORABLE DAN PELLEGRINI, President Judge, and HONORABLE ROBERT SIMPSON, Judge, and HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge.

MEMORANDUM OPINION

PELLEGRINI, President Judge.

***1** Robert D. Heckman (Heckman) appeals the order of the Schuylkill County Court of Common Pleas (trial court) granting the summary judgment motion of William Sanchez (Sanchez) and Rush Township (Township) Board of Supervisors (Township Board) and dismissing Heckman's complaint with prejudice. We affirm.

On June 25, 2007, the Township Board voted to terminate Heckman's employment as a CDL Driver and Laborer for the Township. On June 25, 2009, Heckman initiated a civil action against the Township Board and one of its members, Sanchez, by filing a Praecipe for a Writ of Summons. [1] In February 2010, Heckman filed a Praecipe to Reinstate the Writ of Summons and the Township was served with the writ by the Schuylkill County Sheriff in March 2010. In March 2011, the Township moved to dismiss for lack of prosecution which was denied by the trial court in May 2011.

In August 2011, Heckman filed a Complaint to bring an action under 42 U.S.C. § 1983 (Section 1983) by claiming that the events surrounding his discharge have "stigmatized" him and have "caused him to be the object of scorn and ridicule," "thereby violating [his] liberty interest in his good name in violation of the Fourteenth Amendment to the United States Constitution." (Reproduced Record (RR) at b7). In September 2011, the Township filed Preliminary Objections seeking to dismiss the Complaint for lack of subject matter jurisdiction under 28 U.S.C. § 1331 (Section 1331) [2] that the trial court overruled, noting that state courts have concurrent jurisdiction over Section 1983 actions. In March 2012, Sanchez and the Township Board filed an Answer with New Matter [3] alleging, *inter alia*, that the claim raised in Heckman's Complaint is barred because it was not brought within the two-year statute of limitations. [4]

After discovery was completed, the Township Board filed a Motion for Summary Judgment alleging, *inter alia*, that the Section 1983 action is time-barred because Heckman did not make a good faith attempt to effectuate service of the Writ of Summons within 30 days of its issuance which was needed to toll the running of the statute and to preserve the cause of action within the two-year period. On the merits, Sanchez and the Township Board alleged that the matter must be dismissed because: Heckman failed to request a name-clearing hearing; there is no evidence that they published false and stigmatizing comments about him or did so through implementing an official policy, custom or practice; and Sanchez has qualified immunity from liability because his actions were limited to voting for Heckman's discharge.

In January 2014, Heckman filed a Motion to Amend Complaint to add an additional Section 1983 count based on a violation of his Fourteenth Amendment procedural due process rights and a claim under Section 510 of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (Section 510), because he was terminated to prevent him from vesting and obtaining retirement and severance benefits owed him under an ERISA retirement plan. [5] (RR at c6–c9, c11–c12). At argument on the Motion for Summary Judgment, Heckman withdrew the Section 510 ERISA claim. (SRR at 55b).

*2 The trial court granted the Motion for Summary Judgment and dismissed Heckman's Complaint with prejudice, finding that it was without jurisdiction due to the running of the applicable two-year statute of limitations because Heckman failed to make a good-faith effort to timely serve the Praecipe for a Writ of Summons within the two-year limitations period. [6] The trial court also denied his Motion to Amend Complaint as moot because it was without jurisdiction over the action.

On appeal, [7] Heckman claims that the trial court erred in dismissing the Complaint because there was no inordinate delay and he exercised reasonable efforts to effectuate service so the two-year limitations period was tolled until service was ultimately perfected nine months after it had run. [8] He also asserts that because leave to amend pleadings is to be liberally granted, [9] the trial court erred in denying his request to amend the Complaint to add the Section 510 ERISA claim because it has a four-year statute of limitations.

As noted above, Pa. R.C.P. No. 401(a) requires service "within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint," and Pa. R.C.P. No. 401(b)(1) provides that if service is not made within the required time, "the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint...." While there is no mechanical approach to be applied in determining what constitutes a good-faith effort to serve process, for purposes of tolling the statute of limitations, it is a plaintiff's burden to demonstrate that his or her efforts were reasonable. *Englert v. Fazio Mechanical Services, Inc.*, 932 A.2d 122, 125 (Pa.Super.), *appeal denied*, 938 A.2d 1053 (Pa.2007) (citation omitted).

In *Lamp v. Heyman*, 366 A.2d 882, 889 (Pa.1976), the Supreme Court held that "a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which services to stall in its tracks the legal machinery he has just set in motion." As a result, "*Lamp* requires of plaintiffs a good faith effort to effectuate notice of commencement of the action." *Farinacci v. Beaver County Industrial Development Authority*, 511 A.2d 757, 759 (Pa.1986).

As this Court has recently explained:

> [I]n *Lamp*, our Supreme Court ... require[d] a plaintiff to promptly serve the complaint [and] not to prevent or delay service. The Supreme Court stated that failure to promptly notify the defendants results in nullification of the commencement of the action. *Lamp*,[ ]366 A.2d at 889; *see also Farinacci* [, 511 A.2d at 759] (requiring plaintiff to make "a good-faith effort to effectuate notice of commencement of the action"); *Moses* [, 725 A.2d at 797] (finding a plaintiff's failure to make a good-faith effort to serve the defendant will nullify both the commencement of the action and the tolling of the statute of limitations). Therefore, in order to toll the statute of limitations, the plaintiff must make a good-faith effort to serve the complaint in a timely manner. *Devine v. Hutt*, 863 A.2d 1160, 1167–68 (Pa.Super .2004); *see also Miller* [, 871 A.2d at 336] (holding that a "single attempt to serve ... did not constitute a good faith effort").

*3 *Daniel*, 86 A.3d at 957. [10]

The record in this case shows that Heckman made no attempt to serve the first writ on Sanchez or the Township Board of the commencement of the action within the 30–day period required by Pa. R.C.P. No. 401(a) or within the two-year statute of limitations that expired in June 2009. Heckman only made a single attempt to serve Sanchez and the Township Board with the writ after it was reissued under Pa. R.C.P. No. 401(b)(1) in March 2010, nine months after the limitations period had expired. Even though the Writ of Summons was filed within the limitations period, Heckman's failure to make a good-faith effort to serve Sanchez and the Township Board with the writ did not toll the statute of limitations and the trial court did not err in granting summary judgment and dismissing the Complaint with prejudice on that basis. [11]

Likewise, the trial court did not err in denying Heckman's Motion to Amend Complaint to add the Section 510 ERISA claim because Heckman withdrew this cause of action at the hearing on the Motion for Summary Judgment. Moreover, as outlined above, the Section 510 ERISA claim had the same two-year statute of limitations as his Section 1983 claims, *Grosso*, and Heckman sought leave to amend the Complaint after the limitations period had expired in June 2009. "[A]n amendment to the pleadings introducing a new cause of action will not be permitted after the statute of limitations has run in favor of [the] defendant." *M.R. Mikkilineni v. Amwest Surety Insurance Co.*, 919 A.2d 306, 313 (Pa.Cmwlth.), *appeal denied*, 932 A.2d 1290 (Pa.2007) (citation omitted).

Accordingly, the trial court's order is affirmed.

ORDER

AND NOW, this *11th* day of *March*, 2015, the order of the Schuylkill County Court of Common Pleas dated June 20, 2014, at No. S–1751–2009, is affirmed.

All Citations

Not Reported in A.3d, 2015 WL 5314523

Footnotes

1 Pa. R.C.P. No. 1007 states that "[a]n action may be commenced by filing with the prothonotary (1) a praecipe for a writ of summons, or (2) a complaint." Pa. R.C.P. No. 401(a) states that "[o]riginal process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint." Pa. R.C.P. No. 401(b)(1) states that "[i]f service within the Commonwealth is not made within the time prescribed by subdivision (a) of this rule ..., the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint...."

2 Section 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

3 This Court has noted:

> Pa. R.C.P. No. 1030(a) provides that "all affirmative defenses including ... statute of limitations ... shall be pleaded in a responsive pleading under the heading of 'New Matter'." A statute of limitations defense must "be raised as an affirmative defense by filing new matter and not as a preliminary objection." Thus, the City properly raised its statute of limitations defense in its new matter.

Daniel v. City of Philadelphia, 86 A.3d 955, 958 (Pa.Cmwlth.2014) (citation omitted).

4 "With respect to claims pursuant to [Section] 1983, the Supreme Court has concluded that such claims are best characterized as personal injury actions for purposes of state statutes of limitations. *Wilson v. Garcia,* 471 U.S. 261 (1985). As such, claims which are brought pursuant to [Section] 1983 are also subject to a two-year statute of limitations in Pennsylvania. *See* 42 Pa.C.S. § 5524." *Burger v. Borough of Ingram,* 697 A.2d 1037, 1041 (Pa.Cmwlth.1997).

5 As explained by a federal District Court:

> The statute of limitations for claims under [Section] 510 of ERISA "is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs." In *Anderson v. Consolidated Rail Corp.,* 297 F.3d 242, 252 (3d Cir.2002), the Third Circuit applied a two-year statute of limitations to a [Section] 510 claim on the ground that the claim was "most analogous to a wrongful discharge" under Pennsylvania law. In *Anderson* and in this case, "the 'gravamen' of the alleged violation is that the plaintiff[ ] '[was] singled out for adverse treatment' so as to prevent [him] from receiving retirement-related benefits.' " Thus, the two-year statute of limitations applied in *Anderson* governs plaintiff's [Section] 510 claim.

Grosso v. Federal Express Corporation, 467 F.Supp.2d 449, 457 n. 5 (E.D.Pa.2006) (citations omitted).

6 The trial court found:

> The original writ was issued to Heckman on June 25, 2009. The record is devoid of activity until February 25, 2010, eight months later, when Heckman had the writ reissued.... Heckman asked the sheriff to serve the writ on March 18, 2010, some nine months after the original writ was issued. The writ was served on the [Township Board] on March 25, 2010 and on [ ] Sanchez on March 26, 2010. The Complaint containing the cause of action against the Defendants was not filed until August 25, 2011, after the Prothonotary praeciped Heckman to file a complaint.
>
> [ ]The Complaint alleges that Heckman was fired on June 25, 2007. Heckman argues that there was no inordinate delay in this case and that [he] "certainly exercised reasonable efforts to complete service on his complaint[.]" Heckman does not state what those efforts were, and the docket reflects a complete lack of activity for eight months after filing the initial writ. It strains belief to imagine that Heckman made any reasonable effort to serve the Defendants, one of whom is the Board of a local municipality with its offices within Schuylkill County. Rather, it appears that Heckman believed that by filing the writ, and then reinstating it eight months later, he preserved his action and the statute of limitations would toll, regardless of lack of service. Unfortunately for Heckman, the record is devoid of any evidence of a good faith effort to serve the writ until March 18, 2010, long after the statute of limitations had run on his action.

(RR at f6–f7). The trial court properly relied on the docket entries and was not required to conduct an evidentiary hearing because Heckman never requested one, and he has never alleged that he attempted or served the initial writ within 30 days of its issuance or within the limitations period or that Sanchez or the Township Board had actual knowledge

of its existence. *Miller v. Klink*, 871 A.2d 331, 335–36 (Pa.Cmwlth.2005); *Moses v. T.N.T. Red Star Express*, 725 A.2d 792, 797 (Pa.Super.), *appeal denied*, 739 A.2d 1058 (Pa.1999).

7 When reviewing the trial court's order granting summary judgment, this Court's scope of review is limited to determining whether the trial court committed an error of law or an abuse of its discretion. *Dwight v. Girard Medical Center*, 623 A.2d 913 (Pa.Cmwlth.1993). Summary judgment may be granted only in the clearest of cases and is appropriate only where there are no genuine issues of material fact and the movant clearly establishes that it is entitled to judgment as a matter of law. *Id.*

8 As a corollary to this claim, Heckman argues that the trial court's denial of Sanchez's and the Township Board's Motion to Dismiss for lack of prosecution somehow translates into a determination that he made a good-faith effort to serve them with the writ. To the contrary, the trial court made no such determination and denied the motion in a four-line order, (SRR at 3b), and Heckman does not allege or demonstrate what good-faith effort was made after the writ was initially issued in June 2009 and within the two-year statute of limitations or that Sanchez or the Township Board had any notice of the commencement of the action before March 2010 when they were served with the reissued writ.

9 *See* Pa. R.C.P. No. 1033 ("A party ... by leave of court, may at any time change the form of action ... or amend his pleading....").

10 *See also Watts v. Owens–Corning Fiberglass Corp.*, 509 A.2d 1268, 1270–71 (Pa.Super.1986), *appeal denied*, 522 A.2d 559 (Pa.1987) (holding that the statute of limitations was not tolled where the plaintiff did not deliver the writ to the sheriff for service within 30 days of its issuance, even though the plaintiff's inaction was not due to bad faith or an overt attempt to delay and the defendants did not allege any prejudice caused by the delay). *But cf. McCreesh v. City of Philadelphia*, 888 A.2d 664, 674 (Pa.2005) (holding that a plaintiff satisfies his or her obligation to make a good-faith effort to give notice of the commencement of an action when the defendant has actual notice of its commencement and is not otherwise prejudiced).

11 *See Daniel*, 86 A.3d at 957 ("Daniel validly commenced her action when she filed her complaint on May 22, 2012, just within the two-year limit. However, Daniel concedes that she did not attempt to serve this complaint on the City. As such, Daniel failed to toll the statute of limitations. Daniel reinstated the complaint on January 29, 2013, after the statute of limitations had expired.") (citation to record omitted).

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2015 WL 5453073
Only the Westlaw citation is currently available.

Commonwealth Court of Pennsylvania.

Aaron SLOAN, Appellant
v.
Brian COLEMAN, R. Workman, Stephen Buzas, Jane Doe, Officer Hawkinberry, Officer Bogucki, Officer Zueger, Officer Anderson, C.A. Yauger, J.B. Skrobacz and Officer Prescott.

No. 539 C.D.2014.
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Submitted Dec. 12, 2014.
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Decided June 5, 2015.
|
Reconsideration Denied July 23, 2015.

BEFORE: BONNIE BRIGANCE LEADBETTER, Judge, and PATRICIA A. McCULLOUGH, Judge, and JAMES GARDNER COLINS, Senior Judge.

MEMORANDUM OPINION

JAMES GARDNER COLINS, Senior Judge.

***1** Aaron Sloan (Plaintiff), *pro se*, appeals the February 21, 2014 order of the Fayette County Court of Common Pleas sustaining the Preliminary Objections of Superintendent Brian Coleman, Unit Manager Stephen Buzas, Captain Richard Workman and Corrections Officers Joseph Skrobacz, Chad Yauger, John Anderson, and James Zueger (collectively Defendants), and dismissing Plaintiff's June 24, 2013 complaint on the grounds that: (i) the statute of limitations has run and (ii) the Defendants are entitled to sovereign immunity as employees of the Pennsylvania Department of Corrections (DOC) at State Correctional Institution (SCI)—Fayette. We affirm.

Our review of a trial court's order sustaining preliminary objections in the nature of a demurrer is limited to determining whether "the trial court abused its discretion or committed an error of law." *Schrier v. Kissleback*, 879 A.2d 834, 835 n. 4 (Pa.Cmwlth.2005). In reviewing preliminary objections in the nature of a demurrer, this Court has stated:

> Preliminary objections in the nature of a demurrer are deemed to admit all well-pleaded material facts and any inferences reasonably deduced therefrom, but not the complaint's legal conclusions and averments. The allegations of a *pro se* complainant are held to a less stringent standard than that applied to pleadings filed by attorneys. If a fair reading of the complaint shows that the complainant has pleaded facts that may entitle him to relief, the preliminary objections will be overruled. A demurrer should be sustained only in cases that are clear and free from doubt and only where it appears with certainty that the law permits no recovery under the allegations pleaded.

Danysh v. Department of Corrections, 845 A.2d 260, 262–263 (Pa.Cmwlth.2004) (citations omitted).

Plaintiff alleges in his complaint that on April 26, 2012, May 19, 2012, and June 21, 2012, his personal property was in the possession of Defendants, Defendants knew the property was Plaintiff's, and Defendants refused to return, repair or replace any of his property and instead disposed of it in the garbage. (Complaint ¶¶ 66–67.) Plaintiff identifies the property at issue and its value. (*Id.* ¶ 65.)

Plaintiff's complaint sets forth the following factual averments. Plaintiff is an inmate at SCI–Fayette. (*Id.* ¶ 3.) On April 22, 2012, Plaintiff was informed he was being transferred to SCI–Fayette from SCI–Somerset. (*Id.* ¶ 37.) During preparation for transfer to SCI–Fayette, Plaintiff's property was inventoried at SCI–Somerset; it was determined that Plaintiff's property filled six (6) boxes, that two (2) boxes would travel with him to SCI–Fayette, and that four (4) boxes would be shipped separately to SCI–Fayette. (*Id.* ¶ 38 & ¶¶ 39–40 (describing contents of the 6 boxes).) On April 26, 2012, Plaintiff arrived at SCI–Fayette with the two (2)

boxes and a paper bag containing additional property. (*Id.* ¶ 42.) Plaintiff was taken to the property room at SCI–Fayette for an inventory of his property, at which point Plaintiff discovered some of his property was missing and/or damaged. (*Id.* ¶¶ 42–43.) Plaintiff refused to sign a form stating "all property accounted for" and requested to speak with the Unit Manager about his property as well as the missing forms that documented his property, which had been completed at SCI–Somerset prior to his transfer. (*Id.* ¶¶ 45–47.)

***2** Plaintiff further alleges that on May 18, 2012, Plaintiff's remaining four (4) boxes arrived at SCI–Fayette and on May 19, 2012, he was taken to the property room to inventory his property. (*Id.* ¶ 48.) Plaintiff discovered that a substantial amount of his property was missing and upon registering a complaint, the property inventory form that had accompanied his property was destroyed by Officer Yauger, and a new inventory form was created by Officer Anderson. (*Id.* ¶¶ 48–50.) Plaintiff filed multiple grievances in an attempt to locate or replace his property, which Defendants refused to assist him in and prevented him from making timely corrections to. (*Id.* ¶¶ 51–53, 56.)

Plaintiff further alleges that on June 21, 2012, Plaintiff was taken to the property storage room in order to exchange legal materials and he discovered that his property still was or had become missing. (*Id.* ¶ 54.) Plaintiff again grieved the loss of his property and on September 18, 2012, one or more of the Defendants searched Plaintiff's cell to determine if he was in possession of the missing property. (*Id.* ¶ 56.) Defendant Buzas accused Plaintiff of fabricating his claims of lost property, threatened Plaintiff in an attempt to make Plaintiff withdraw his grievance, and left the property taken from Plaintiff's cell during the search in the garbage. (*Id.* ¶ 57.) Plaintiff further alleges that after the September 18, 2012 search, Captain Workman provided a review of Plaintiff's grievance, during which Officers Yauger and Anderson provided false information and accused Plaintiff of wrongdoing related to his property. (*Id.* ¶¶ 58–61.) Defendants "did encourage, condone, & participate in the loss/destruction of and refusal to locate and return, replace & fix Plaintiff's property." (*Id.* ¶ 62.)

Plaintiff also alleges that the destruction of his property prevented him from being able to access the courts in order to file a claim for denial of his 8th Amendment right to be free from cruel and unusual punishment. (*Id.* ¶ 69.)

Plaintiff further alleges that upon becoming an inmate, Plaintiff informed DOC officials that he is allergic to beans and seafood. (*Id.* ¶ 13.) On February 19, 2009, Plaintiff was temporarily transferred from SCI–Somerset to Erie County Prison and his medical records were altered to indicate that he did not suffer from food allergies. (*Id.* ¶ 20.) On April 29, 2009, Plaintiff's medical records were again altered to show that he had no food allergies, but that he was to receive a diet that did not include beans and seafood. (*Id.* ¶ 21.) Plaintiff did not receive a diet without beans and seafood and became ill, which included, among other symptoms, severe abdominal pain and rashes; DOC Bureau of Health Services alleged that the diet was being followed and that Plaintiff was only allergic to pinto beans. (*Id.* ¶¶ 22–23.) Plaintiff began to research and to prepare a complaint in order to bring a claim for denial of adequate medical care in violation of the 8th Amendment guarantee against cruel and unusual punishment secured by the United States Constitution. (*Id.* ¶¶ 25–26.) Plaintiff alleges that he was unable to file his claims prior to the expiration of the statute of limitations because of Defendants' actions. (*Id.* ¶ 69.)

***3** In response to Plaintiff's allegations in his complaint concerning his property and his inability to access the courts, Defendants filed preliminary objections in the nature of a demurrer. First, Defendants objected to Plaintiff's claim that he was prevented from accessing the courts because of Defendants' conduct on the grounds that his complaint demonstrated that his access to the courts was prevented not by Defendants' conduct, but by the statute of limitations on his underlying claim. Second, Defendants objected to Plaintiff's claim that his property was destroyed on the grounds that his claim for conversion was barred by sovereign immunity. The Trial Court agreed with Defendants and sustained their preliminary objections.

Before this Court, Plaintiff argues that the Trial Court erred by permitting Defendants to raise the affirmative defenses of statute of limitations and sovereign immunity by preliminary objection. Plaintiff argues that even if Defendants were permitted to raise the issue of statute of limitations by preliminary objections, the statute had not run. Plaintiff also argues that his access to courts claim falls under 42 U.S.C. § 1983 [1] and therefore cannot be barred by state statute.

Plaintiff's access to courts claim is legally insufficient. Prisoners have a fundamental constitutional right of access to the courts and measures must be in place in correctional settings to insure that this access is adequate, effective, and

meaningful. *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). In order to bring a claim alleging that access to the courts has been denied, an inmate must allege an actual injury or "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or present a claim." *Lewis v. Casey*, 518 U.S. 343, 351–352, 358, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Plaintiff has failed to allege an actual injury because the claim Plaintiff alleged he was prevented from bringing by Defendants' tortious actions was barred by the applicable statute of limitations.

When bringing an 8th Amendment claim under 42 U.S.C. § 1983 for denial of adequate medical care, the statute of limitations is determined by the state statute of limitations the claim most resembles: a personal injury claim. *See Wilson v. Garcia*, 471 U.S. 261, 276–280, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), *superseded by statute on other grounds*, as stated in *Jones v. R.R. Donnelley & Sons Company*, 541 U.S. 369, 377–378, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004). In the Commonwealth of Pennsylvania, personal injury claims have a two year statute of limitations. 42 Pa.C.S. § 5524.

The facts pled by Plaintiff in his complaint state that his claim under 42 U.S.C. § 1983 for inadequate medical care in violation of the 8th Amendment protection from cruel and unusual punishment came into existence as a legal claim on February 19, 2009 at the earliest and on April 29, 2009 at the latest, at which time Plaintiff knew of the harm to his health. The conduct that Plaintiff alleges denied him the ability to bring this claim in court occurred, according to Plaintiff's allegations, on April 26, 2012, May 19, 2012, and June 21, 2012, which was well beyond the date when Plaintiff was required to file his 42 U.S.C. § 1983 claim in order to comply with the statute of limitations. As a result, actions taken by Defendants on April 26, 2012, May 19, 2012, and June 21, 2012 could not have prevented Plaintiff from bringing the claim that is described in his complaint as the contemplated litigation. Therefore, the inability to bring the contemplated underlying action cannot serve as the actual injury necessary for Plaintiff to state a claim for denial of his constitutionally guaranteed right of access to the courts.

***4** Moreover, the Trial Court did not err in concluding that the statute of limitations could be asserted as a part of Defendants' preliminary objections. Statute of limitations is an affirmative defense that must be asserted by new matter and may not be raised by preliminary objection. Pa. R.C.P. Nos. 1028(a)(4), 1030; *Borough of Nanty Glo v. Fatula*, 826 A.2d 58, 64 (Pa.2003). Here, Plaintiff alleged that Defendants committed tortious conduct that prevented him from accessing the courts to bring an 8th Amendment Claim. The statute of limitations was not raised as, and did not provide, an affirmative defense to this claim. Rather, Plaintiff's admission in his complaint that the statute had run on his underlying 8th Amendment claim when the alleged tortious conduct took place demonstrated that he had not pled a sufficient access to courts claim. Accordingly, the Trial Court did not err in granting the demurrer where the statute of limitations was addressed as a factual admission and it was apparent on the face of the complaint that Plaintiff could not make out his claim for denial of access to the courts. Pa. R.C.P. No. 1028(a)(4); *Borough of Nanty Glo*, 826 A.2d at 64.

The Trial Court also did not err in permitting Defendants to assert that Plaintiff's claims concerning his property were barred by sovereign immunity. Unlike other affirmative defenses, the affirmative defense of sovereign immunity may be raised by preliminary objection in the nature of a demurrer where it is apparent on the face of the complaint that sovereign immunity bars the claim. *Wurth v. City of Philadelphia*, 136 Pa.Cmwlth. 629, 584 A.2d 403, 407 (Pa.Cmwlth.1990). In the instant matter, the Trial Court properly considered at the preliminary objection stage of the proceedings whether sovereign immunity rendered Plaintiff's complaint facially deficient.

Next, we discern no error in the Trial Court's conclusion that sovereign immunity barred Plaintiff's claims concerning his property. Contrary to Plaintiff's argument on appeal, the Trial Court did not conclude that the Commonwealth of Pennsylvania's sovereign immunity statute barred Plaintiff's 42 U.S.C. § 1983 claim. Rather, the Trial Court concluded that Plaintiff was attempting to allege a state law claim for conversion of his property by Defendants and that sovereign immunity prevented Plaintiff from being able to bring this claim.

The General Assembly has waived sovereign immunity for claims of negligence where a party can establish: (1) a common law or statutory cause of action under which damages would be recoverable if not for the immunity defense; and (2) the alleged negligent act falls within one of the specifically enumerated exceptions provided by statute. 1 Pa.C.S. § 2310; 42 Pa.C.S. § 8522; *La Chance v. Michael Baker Corporation*, 869 A.2d 1054, 1057 (Pa.Cmwlth.2005). A claim made by an inmate for negligent damage to the inmate's personal property while the property is within the

possession of Commonwealth parties falls within the personal property exception to sovereign immunity. 42 Pa.C.S. § 8522(b)(3); *Williams v. Stickman*, 917 A.2d 915, 918 (Pa.Cmwlth.2007). However, sovereign immunity protects an employee of the Commonwealth acting within the scope of his or her employment from the imposition of liability for intentional torts. 42 Pa.C.S. § 8521; *LaFrankie v. Miklich*, 152 Pa.Cmwlth. 163, 618 A.2d 1145 (Pa.Cmwlth.1992).

***5** Plaintiff has not alleged that Defendants caused damage to his property through negligence. Plaintiff has alleged that Defendants committed an intentional tort: conversion.[2] Because Plaintiff has alleged that the acts committed by Defendants were intentional, the personal property exception to sovereign immunity does not apply to permit Plaintiff's claim. To overcome the bar of sovereign immunity and state a cognizable claim for the commission of an intentional tort, Plaintiff must allege that Defendants were acting outside the scope of their employment or that the allegations did not involve Defendants' duties or powers as employees of SCI–Fayette. *Kull v. Guisse*, 81 A.3d 148, 154–159 (Pa.Cmwlth.2013); *La Frankie*, 618 A.2d at 1149. Plaintiff has not done so.

Accordingly, the order of the Trial Court is affirmed.

ORDER

AND NOW this 5th day of June, 2015, the order of the Court of Common Pleas of Fayette County sustaining preliminary objections in the above-captioned matter is hereby AFFIRMED.

All Citations

Not Reported in A.3d, 2015 WL 5453073

Footnotes

1 Section 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." 42 U.S.C. § 1983

2 Conversion is defined under Pennsylvania law as "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 659 n. 3 (Pa.Super.2000).

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2002 WL 34097436 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Allegheny County

Ray R. GUSKY, Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY MEMORANDUM and Philip Ganster, Defendants.

No. GD00-4527.
August 6, 2002.

Memorandum

Counsel for Plaintiff: Kenneth R. Behrend, Esquire, 306 Fourth Avenue, Suite 300 Union National Bank Bldg., Pittsburgh, PA 15222.

Counsel for Defendants: William M. Wycoff, Esquire, Kimberly A. Brown, Esquire, Kevin P. Allen, Esquire, 301 Grant Street, 14th Floor One Oxford Centre, Pittsburgh, PA 15219-1425.

Honorable R. Stanton Wettick, Jr.

On May 8, 2002, I sustained defendants' preliminary objections seeking dismissal of plaintiff's first amended complaint. Plaintiff has filed an appeal from this order of court. This Memorandum setting forth my reasons for my ruling is filed pursuant to Pa.R.A.P. No. 1925.

The first amended complaint raises claims based on unfair insurance sales practices. Plaintiff alleges that in 1992 he purchased a Metropolitan policy furnishing insurance of $500,000 on his life. The product that plaintiff received was not what he was led to believe that he had purchased because of improper sales practices. Plaintiff paid a total of $1,812 in gross premiums into the 1992 policy (paragraph 64-71).

In 1994, plaintiff converted his 1992 policy into a different investment product. Because of defendants' alleged improper sales practices, plaintiff did not receive what plaintiff was led to believe he had purchased. Plaintiff paid gross premiums of $6,241 into his 1994 policy. (Paragraphs 72-82.)

Plaintiff's amended complaint contains the following allegations concerning events following the 1994 sale:

83. On or about February 24, 1995, the Plaintiff received a letter from Metropolitan informing him that $2.955.00 was due to keep his 1994 Policy in force. (See attached Exhibit "3" Plaintiff's Bates No. RRG000010)

84. The Plaintiff could not afford to pay this amount to Metropolitan and therefore in early 1995 the policy lapsed.

85. On or about July 6, 1995. the Plaintiff sent a written complaint to the Metropolitan Customer Service Center describing the manner in which Defendant Ganster misrepresented the 1994 Policy to him. (See attached Exhibit "4" Plaintiff's Bares No. RRG000010).

86. On or about July 28, 1995, the Plaintiff received a letter from Metropolitan representative Arlene Shelton, informing the Plaintiff that Metropolitan would not refund the premiums that he had already paid on the 1994 policy.

87. On or about August 15, 1995, the Plaintiff received another letter from Metropolitan representative Arlene Shelton. informing the Plaintiff that Metropolitan had again reviewed his written complaint and had decided to rescind the 1994 Policy and refund the premiums already paid into the policy on the condition that the Plaintiff sign a Release Form. which was enclosed with the letter, and return the original policy to Metropolitan. (See attached Exhibit "5" Plaintiff's Bates Nos. 000014 and 000027)

88. Neither the August 15, 1995 letter nor the Release Form itself advised the Plaintiff that he should obtain a lawyer or at feast seek legal advice before singing the Release Form.

89. Defendant Metropolitan did not inform Plaintiff that he was also entitled to a payment of interest on the amount that was to be rescinded.

90. It is believed and therefore averred that Metropolitan had a procedure in handling consumer complaints with assertions about the deceptive manner in which a life insurance policy was sold. Metropolitan would perform an internal investigation. and after investigation by Metropolitan. if a decision was made by Metropolitan to reverse the sale of a policy and to pay a refund, that Metropolitan would also pay interest on the refunded amount but only if the insured brought up the issue of the payment of interest.

91. Without the aid of legal counsel, and without the knowledge that Metropolitan also paid interest. when the sale of a policy was reversed, on August 18, 1995 the Plaintiff, without the aid of legal counsel. signed the release form and had it notarized as the August 15, 1995 letter instructed.

92. The Plaintiff then forwarded the Release Form and the original policy to Metropolitan as the August 15, 1995 letter instructed.

93. On or about August 31, 1995, the Plaintiff received a letter enclosing a check in the amount of $1,715,07, which Metropolitan represented was to refund excess sales charges which were charged on the 1994 Policy.

94. On or about September 7, 1995. the Plaintiff received a check in the amount of $6.241.00.

95. The Plaintiff never received any of the interest that was gained on the premiums that were paid on the 1994 Policy.

I dismissed the case on the basis of the allegations within paragraphs 83-95. My order of court reads as follows:
On this 8 day of May, 2002, upon consideration of defendants' preliminary objections seeking dismissal of plaintiff's first amended complaint,

it appearing that paragraphs 83-95 of plaintiff's complaint allege that plaintiff signed a written release which released Metropolitan Life Insurance Company and its employees from all claims in exchange for a refund check of $6,241,

it appearing that plaintiff alleges only that the release should not be honored because Metropolitan Life did not advise plaintiff to seek legal advice or advise him that he was also entitled to a payment of interest on the refund,

it appearing that these allegations do not support a ruling that the release is not binding on plaintiff,

it appearing that plaintiff's brief in opposition to defendants' preliminary objections does not suggest that plaintiff has any other grounds for setting aside the release, and

it appearing that defendants should not be compelled to answer a 146 paragraph complaint that on its face establishes that plaintiff cannot recover,

IT IS HEREBY ORDERED that defendants' preliminary objections are sustained and plaintiff's complaint is dismissed.

Plaintiff's Statement of Matters Complained of on Appeal is attached as Attachment 1.

I.

Plaintiff contends that "the operative effect of a release is a question of fact to be determined by the jury, thus preventing dismissal on Defendants' preliminary objections." This is incorrect. Where the facts concerning the release are not disputed, a court determines its legal effect. [1]

In this case, my ruling is based solely on the facts set forth in plaintiff's complaint. Plaintiff alleges that he signed the release, had it notarized, forwarded the release to Metropolitan, and received the money that Metropolitan had agreed to pay in exchange for the release. As a matter of law, plaintiff's claims are barred by the release.

II.

Plaintiff contends that the release should not be honored because its terms and conditions were not fair: Metropolitan never offered to pay interest; however, Metropolitan would have paid interest if plaintiff had requested interest on the refunded amount.

Plaintiff contends that there was a confidential relationship between Metropolitan and plaintiff. Consequently, the insurance company could not make a proposal to plaintiff that was inconsistent with plaintiff's best interests.

This lawsuit is one of several hundred pending lawsuits raising claims against Metropolitan based on alleged unfair insurance practices. I have made certain rulings that apply to each of the unfair insurance practice cases pending in Allegheny County, including this case. One of the rulings that I have made is that the relationship between a person purchasing insurance and the insurance company may not be characterized as a confidential relationship. In his Statement of Matters Complained of on Appeal, plaintiff is seeking reversal of this ruling.

I initially addressed this issue in *Ihnat v. Pover Part II.* 146 P.L.J. 299, 305-10 (1998).
It is difficult to address the breach of fiduciary claims raised by the various plaintiffs because these claims are not defined. The gravamen of plaintiffs' claims is that the benefits provided in the insurance agreements which they obtained differ from the benefits that they anticipated as a result of insurance agents' representations.

Plaintiffs correctly assert that in a transaction in which an insurance agent seeks to sell new or replacement insurance, the insurance agent has superior knowledge of the matter and is in a position to take advantage of the would-be buyer by providing information and advice on which the agent intends the buyer to rely that is inaccurate, misleading, and incomplete. There are several causes of action which Pennsylvania courts may recognize where an individual purchased life insurance based on misleading information provided by an insurer or its agent. The insured may bring a claim based on common law fraud if the insured can establish a misrepresentation, a fraudulent utterance thereof, an intention by the maker that the recipient will be induced to act or refrain from acting, justifiable reliance by the recipient on the misrepresentation, and damage to the recipient. *Krause v. Great Lakes Holdings, Inc.*, 563 A.2d 1182, 1187 (Pa. Super. 1989), *alloc. denied,* 574 A.2d 70 (Pa. 1990). The courts have permitted an insured who justifiably relied on representations of an agent to maintain a negligent misrepresen-tation claim based on §552 of the *Restatement (Second) of Torts.* See *[text illegible] v. Nationwide Life Insurance Co. Inc.*, 370 A.2d 366 (Pa. 1977). Under §299A of the *Restatement (Second) of Torts,* an insurance agent who undertakes to provide advice must exercise ordinary skill, knowledge, and judgment in rendering this advice and is liable through a professional negligence action for damages resulting from his or her failure to do so. Pennsylvania law recognizes a contractual cause of action based on an

insurance company's breach of a duty of good faith and fair dealing to their insureds. *Banker v. Valley Forge Insurance Co.*, 585 A.2d 504, 510 (Pa. Super. 1991). Under §9.2 of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-9.2, a person who purchases life insurance primarily for personal, family, or household purposes may recover actual damages sustained as a result of an insurance company's engaging in conduct creating a likelihood of confusion or of misunderstanding.[6] Under 42 Pa.C.S. §8371, plaintiffs may pursue a bad faith claim.

Under each of these causes of action, plaintiffs must establish misconduct and prove that they sustained losses from such misconduct. Through their breach of fiduciary duty claims, plaintiffs are apparently seeking recovery under more relaxed standards of proof and/or based on a higher standard of care. If the entire transaction between plaintiffs and defendants is governed by what the law recognizes as a fiduciary relationship, the burden would shift to defendants to show that plaintiffs fully understood the transaction, that they knowingly and voluntarily entered into the transaction, and that the transaction was, to the best of defendants' knowledge, consistent with plaintiffs' interests. See *In re Estate of Evasew*, 584 A.2d 910 (Pa. 1990), where the Court said that when a fiduciary relationship exists, the following rules apply:
In such cases, if the superior party obtains a possible benefit, equity raises a presumption against the validity of the transaction or contract, and casts upon such party the burden of proving fairness, honesty, and integrity in the transaction or contract. He must show that there was no abuse of confidence, that he acted in good faith, and that the act by which he has benefitted was the free, voluntary, and independent act of the other party, done with full knowledge of its purpose and effect.... Thus, if in a transaction between the parties who stand in a relationship of trust and confidence, the party in whom the confidence is reposed obtains an apparent advantage over the other, he is presumed to have obtained the advantage fraudulently, and if he seeks to support the transaction, he must assume the burden of proof that he has taken no advantage of his influence or knowledge and the arrangement is fair and conscientious. *Id.* at 912-13.

I reject plaintiffs' contention that a confidential relationship is deemed to exist between parties to a transaction whenever a party with superior knowledge of the matter provides advice to the other regarding the transaction. A fiduciary relationship is ordinarily imposed only where one person, either by agreement or by law, has been entrusted to make a decision on behalf of another person. Consider, for example, a policy provision under which the insured gives the insurer the right to handle all claims against the insured, including the right to make a binding settlement. *Gray v. Nationwide Mutual Insurance Co.*, 223 A. 2d 8, 9-10 (Pa. 1966).

Unequal bargaining power, by itself, does not create a fiduciary relationship. Instead, at the time of the transaction, the party with the superior knowledge and sophistication must have an independent obligation, recognized in the law or by agreement of the parties, to act for the benefit of the other party and not to take advantage of his or her position to further his or her own interests. See, generally, *In re Estate of Scott*, 316 A.2d 883 (Pa. 1974); *Young v. Kaye*, 279 A.2d 759 (Pa. 1971); *Peoples First National Bank and Trust Co. v. Ratajski*, 160 A.2d 451 (Pa. 1960); *Brooks v. Conston*, 51 A.2d 684 (Pa. 1947); *Leedom v. Palmer*, 117 A. 410 (Pa. 1922).

In this litigation, plaintiffs are not contending that they delegated decision making to defendants. The alleged wrongdoing involves the use of improper sales tactics that induced the insureds to agree to purchase new life insurance, and in some instances, to give up benefits under existing life insurance. The insureds allege that they would not have agreed to purchase the new insurance if they had not been mislead. The relationship which plaintiffs' complaints describe is a buyer-seller relationship, and the law has never defined this relationship as one in which the seller is bound to act in furtherance of the interests of the buyer. There may be duties of fair dealing imposed by statutory, tort, and contract law that provide private remedies where improper sales tactics are used. However, the law governing the duties of a fiduciary is not applicable.

I reach the same result where there was an existing relationship between the insurance agent and the insured. Under the existing relationship, the insured did not delegate to the agent the ability to alter the existing insurance arrangement. Plaintiffs are not stating that the new transaction resulted from decisions made by the insurance agent; rather, they complain about tactics that the insurance agent used to obtain the insured's agreement.

If the law imposed the obligation on any seller with superior knowledge who purports to act as an advisor to prove that the buyer understood the transaction and that this transaction appeared to be consistent with the buyer's interests, fiduciary law would govern countless relationships including the sale of stock and other types of investments, loan transactions, every insurance transaction, and probably even a consumer's dealings with his or her automobile mechanic, plumber, interior decorator, firearms' dealer, or travel agent. Disappointed buyers of goods and services would no longer need to satisfy the requisites of the law governing actions based on express and implied warranties, tort law, and contract law to obtain relief.

I next consider the more limited claim raised in the *Sabow* complaint that the insurance agent had a fiduciary duty to purchase a new policy that would not be paid through funds from the existing policy because the application for the new policy stated that it was nonreplacement insurance. The difficulty with this argument is that plaintiffs allege that the application did not describe the actual transaction between the parties. Plaintiffs are not stating that they agreed to purchase a new policy that they would pay for without utilizing funds from an existing policy. Their claim is that the insurance agent prepared an application that inaccurately described the transaction in order to avoid various disclosure requirements and to obtain additional commissions and fees for the agent and company. Thus, plaintiffs are arguing that the insurance agent/insurance company had a fiduciary duty to ensure that plaintiffs received what plaintiffs had never intended to receive.

Pennsylvania case law addressing the scope of the duty of an insurance company to inform an insured of benefits to which the insured may be entitled supports my conclusion that the law governing fiduciary relationships does not govern the relationship between an insured and an insurance company except in those situations in which the insurance company has assumed authority to handle claims on behalf of the insured.

The opinion of Mr. Justice Larsen announcing the judgment of the Court in *Dercoli v. Pennsylvania National Mutual Insurance Co.*, 554 A.2d 906 (Pa. 1989), is the highwater mark with respect to obligations that the law has imposed on an insurance company to protect a policyholder's insurance benefits. Prior to the *Dercoli* decision, the Pennsylvania Supreme Court in *Taglianetti v. Workmen's C[text illegible] Appeal Board*, 469 A.2d 548 (Pa. 1983), had ruled that in a workers' compensation setting an employer does not have an affirmative duty to apprise an employee or potential claimant of available benefits. In that case, the widow of the employee had failed to raise a claim for work-related benefits to which she might have been entitled within the three-year limitation period. She sought to pursue her claim on the ground that the employer had voluntarily sent a check representing a three-months' death gratuity and, in response to the widow's inquiry regarding the availability of other widow's benefits, had informed her that apart from the life insurance and the death gratuity, she had no other widow's benefits. The widow's inquiry did not refer to workers' compensation benefits. The Court held that an employer does not have an affirmative duty to appraise an employee of possible workers' compensation benefits; that the widow had failed to show fraud, misrepresentation, or other actions which would have lulled her into a false sense of security; and, thus, that her claim was barred by the statute of limitations.

In *Dercoli,* the plaintiff sued to recover benefits to which she might be entitled as a result of a recent Supreme Court ruling abolishing interspousal immunity. In her complaint, she alleged that agents of the insurance company had voluntarily undertaken to provide assistance and advice to her regarding the benefits to which she was entitled under the insurance policy. The insurance agents told her that they would see that she received all benefits to which she was entitled and advised her against retaining independent legal counsel. She contended that under these circumstances the insurance company had a duty to deal with her fairly and in good faith, including a duty of full and complete disclosure as to any benefits that became available as a result of a change in the law.

The trial court and the Superior Court ruled that the plaintiff's claim was governed by *Taglianetti.* Mr. Justice Larsen's opinion (in which one other Justice joined) stated that *Taglianetti* was wrongly decided because it relieves insurers and other entities of the obligation to deal fairly, honestly, openly, and in good faith with lay claimants and non-experts who may be entitled to benefits and who are the very people the insurers have obligated themselves to protect. In a concurring opinion (joined in by another Justice), Mr. Justice Papadakos disassociated himself from the portions of Mr. Justice Larsen's opinion stating that

Taglianetti was wrongly decided. Mr. Justice Papadakos agreed with the ruling that the insurance company had a duty to advise the insured of the change in the law because the insurance company had voluntarily assumed the duty to provide the insured with all available benefits. He said that *Taglianetti* involved a situation in which the insurer had not voluntarily assumed such a duty, so the two cases are legally and factually distinct.

In *Miller v. Keystone Insurance Co.*, 636 A.2d 1109 (Pa. 1994), the insurance company without a specific demand voluntarily paid funeral, collision, and survivor's loss benefits to the mother of the deceased insured. Subsequently, she filed a claim for postmortem work loss benefits beyond the limitation period. She cited *Dercoli* in support of her position that the law imposes an affirmative obligation on an insurance company to inform an unrepresented insured that it has knowledge of the possibility of a claim for recovery and that it is no longer acting in the interests of the insured in this matter. The Court rejected the argument stating that it was reaffirming its earlier ruling in *Taglianetti* that in the absence of evidence of fraud, intentional deception, or the making of misleading statements, an insurance company has no affirmative duty to apprise an insured of available benefits. The Court held that *Dercoli* did not create any new duties; it imposed an obligation to disclose all benefits to which an insured may be entitled only where the insurer has voluntarily elected to act as the insured's counsel.
In *Treski v. Kemper National Insurance Companies*, 674 A.2d 1106 (Pa. Super. 1996), the Court defined the relationship between the insured and insurer during negotiations as a contractual relationship requiring fair dealing and good faith on the part of the insurer rather than as a fiduciary relationship in which the insurer is responsible for determining that the insured fully understands the transaction. In *Treski*, the insureds, who had paid additional premiums for full tort coverage, contended that they were unaware that if they were involved in an automobile accident in New Jersey, under New Jersey law they might be permitted to recover only economic damages. They contended that the insurance companies had a duty to advise them that the full tort coverage which they were providing might not, in fact, provide the benefits the insureds believed that they were purchasing; if they had been properly advised, they may not have paid the additional premiums for full tort coverage. The Superior Court rejected the argument; it stated that this case was similar to *Kilmore v. Erie Insurance Co.*, 595 A.2d 623 (Pa. Super. 1991), *alloc. denied*, 529 Pa. 664, 604 A.2d 1030 -(1992), where the Superior Court ruled that an automobile insurance carrier and health insurance carrier had no duty to explain the extent and limits of the coverage to an insured:

"We find no justification in the law to impose the additional burden on insurers that they anticipate and then counsel their insured on the hypothetical, collateral consequences of the coverage chosen by the insured. The basic contractual nature of insurance coverage set forth in [*Standard Venetian Blind Company v. American Empire Insurance Company*, 503 Pa. 300, 469 A.2d 563 (1983)] and [*Dercoli v. Pennsylvania National Mutual Insurance Company*, 520 Pa. 471, 554 A.2d 906 (1989)], requires fair dealing and good faith on the part of the insurer, not hand holding and substituted judgment. While we acknowledge insurance is an area in which the contracting parties stand in somewhat special relationship to each other, the relationship is not so unique as to compel this Court to require an insurer to explain every permutation possible from an insured's choice of coverage. Each insured has the right and obligation to question his insurer at the time the insurance contract is entered into as to the type of coverage desired and the ramifications arising therefrom. Once the insurance contract takes effect, however, the insured must take responsibility for his policy. We, therefore, decline to extend the duties of an insurer to provide ongoing advice concerning the limits of its coverage." *Kilmore*, 595 A.2d at 626-27 (footnote omitted). *See also Banker v. Valley Forge [text illegible]* 363 Pa.Super. 456, 465, 526 A.2d 434, 438 (1987), *rev'd on other grounds, Banker v. Valley Forge Insurance Company*, 401 Pa.Super. 367, 585 A.2d 504 (1991) (where the insurance policy provision is clear and unambiguous, the insurer does not have a duty to explain all of the hypothetical consequences which might result from an excess coverage endorsement). *Treski v. Kemper National Insurance Companies, supra*, 674 A.2d at 1114-15.

Federal case law also construes Pennsylvania case law in a manner consistent with my ruling. In *In re The Prudential Insurance Company of America Sales Practices Litigation*, 975 F.Supp. 584, 617 (D.N.J. 1997), the Court in a MDL proceeding held that under Pennsylvania law an insurer's failure to exercise its contractual duty of good faith and fair dealing under Pennsylvania law does not give rise to a claim for breach of a fiduciary duty:

An essential feature and consequence of a fiduciary relationship is that the fiduciary becomes bound to act in the interests of her beneficiary and not of herself. Obviously, this dynamic does not inhere in the ordinary buyer-seller relationship. Thus, "the efforts of commercial sellers--even those with superior bargaining power--to profit from the trust of consumers is not enough to create a fiduciary duty. If it were, the law of fiduciary duty would largely displace both the tort of fraud and much of the Commercial Code." *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 221, 197 Cal.Rptr. 783, 789, 673 P.2d 660, 675 (1983) (en bane). 975 F.Supp. at 616.

In *Connecticut Indemnity Co. v. Markman*, 1993 WL 304056 (E.D. Pa. 1993), the Court ruled that under Pennsylvania law there is no fiduciary relationship between an insurer and insured except for the situation in which an insurer asserts its rights under the insurance policy to handle claims brought against the insured:

No Pennsylvania law establishes a fiduciary duty based on the duty of good faith and fair dealing. Thus, the court concludes that the alleged failure to exercise the duty of good faith and fair dealing does not give rise to an actual claim for a breach of a fiduciary duty. However, the court recognizes that such a failure of Connecticut Indemnity's part could give rise to a breach of contract action for breach of the separate duty of good faith and fair dealing. *Id.* at 6.

Also see *Garvey v. National Grange Mutual Insurance Co.*, 1995 WL 115416 at 4 (E.D. Pa. 1995).

There are two narrower breach of fiduciary duty claims that plaintiffs may be raising that they may pursue. In certain complaints, plaintiffs may be claiming that an insurance agent or an insurance company removed funds from a policy reserve without obtaining the insured's approval. While these claims may also be raised as conversion and breach of contract claims, an insurance agent/insurance company has an obligation to handle an insured's funds only in the manner in which the insured has approved. [7]

Plaintiffs also may be raising claims as to the manner in which the insurance agent structured the transaction. Where benefits under an existing policy would be preserved if the transaction to which the insured consented was structured in one fashion and not preserved if structured in another fashion, there may be a fiduciary duty on the part of the insurance agent to structure the transaction in accordance with the interests of the insured because this may be a decision that was delegated to the insurance agent. This means, for example, that if the holder of a $25,000 life insurance policy had a right to increase the policy limits to $50,000 by meeting medical requirements and paying an increased premium and if, instead, the insurance agent cancelled the first policy and wrote a new policy for $50,000 that would give the insured no other additional benefits while resulting in payments of increased commissions and expenses, the insurer may have breached a fiduciary duty. [8]

Counsel for plaintiff sought reconsideration of my ruling that the law does not characterize the relationship between a purchaser of insurance and an insurance company as a fiduciary relationship on the basis of a ruling of the Pennsylvania Superior Court in *Basile v. H&R Block, Inc.*, 777 A.2d 95 (Pa. Super. 2001). On May 6, 2002, I denied the motion for reconsideration. My court order was accompanied by the following Memorandum:

MEMORANDUM AND ORDER OF COURT

WETTICK, J.
The subject of this Memorandum and Order of Court is plaintiff's motion for reconsideration of orders granting preliminary objections regarding fiduciary duty.

In *Ihnat v. Pover*, 146 P.L.J. 299, 305-310 (1997), I ruled that the law of fiduciary duty does not govern the buyer/seller relationship between the insured and the insurance agent/insurance company.

I stated that the law provides many protections to the purchaser of insurance: [1] the purchaser may bring a claim based on common law fraud; a negligence claim based on the insurance agent's failure to exercise ordinary skill, knowledge, and judgment in rendering advice; breach of contract claims; and claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law if the seller engaged in conduct creating the likelihood of confusion or misunderstanding. Under each of these causes of action, plaintiffs must establish misconduct and prove that they sustained losses from the misconduct.

I stated that if the relationship between purchasers and sellers of insurance is governed by what the law characterizes as a fiduciary relationship, the burden would shift to the seller of insurance to show that the buyer of insurance understood the transaction, that the buyer knowingly and voluntarily entered into the transaction, and that the transaction was, to the best of seller's knowledge, consistent with buyer's best interests. Under this standard, a purchaser would prevail unless the insurance company could establish that a knowledgeable advisor, looking at the purchaser's entire financial picture, would likely recommend the purchase of the insurance that was in fact purchased.
I concluded that there was no basis in Pennsylvania law to characterize the relationship between an insurance agent and the insured as a confidential relationship. I rejected plaintiffs' argument that a confidential relationship is deemed to exist between the parties to a transaction whenever a party with superior knowledge provides advice to the other regarding the transaction. If I accepted this argument, legal relationships would be dramatically altered: The principles of "fiduciary law would govern countless relationships including the sale of stock and other types of investments, loan transactions, every insurance transaction, and probably even a consumer's dealings with his or her automobile mechanic, plumber, interior decorator, firearms' dealer, or travel agent. Disappointed buyers of goods and services would no longer need to satisfy the requisites of the law governing actions based on express and implied warranties, tort law, and contract law to obtain relief." *Id.* at 307.

Plaintiffs seek reconsideration on the basis of the ruling of the Pennsylvania Superior Court in *Basile v. H.&R. Block, Inc.*, 777 A.2d 95 (Pa. Super. 2001). Plaintiffs rely on general language within the opinion stating that a confidential relationship may be established whenever a significant disparity is established between the parties' positions in the relationship and the inferior party places primary trust in the other's advice. The *Basile* opinion, however, does not suggest that it is altering prior case law. Consequently, I believe that *Basile* covers only the situation in which the tax preparer is offering the client a "service" outside the scope of the preparation of the tax return. The tax preparer, in preparing the return, has an obligation to make decisions on behalf of the client that the client would make if the client had the same knowledge of tax law. This is a confidential relationship because the tax preparer, in preparing the return, must subordinate its interests to those of the client. Once this relationship has been established, *Basile* holds that the tax preparer cannot furnish related services that further its interests without fully advising the client.

In the present case, there never was a confidential relationship. Consequently, *Basile* is not controlling.

ORDER OF COURT

On this 6 day of May, 2002, it is hereby ORDERED that plaintiffs' request for recon-sideration is denied.

For the reasons set forth in my *Ihnat v. Pover* Opinion and my May 6, 2002 Memorandum, the law does not support plaintiff's claim that the release is not binding on plaintiff because Metropolitan breached a fiduciary obligation by its failure to direct plaintiff to seek legal advice and its failure to inform plaintiff that he was also entitled to payment of interest on the refunded amount.

III.

In the Statement of Matters Complained of on Appeal, plaintiff also raises a procedural issue: Defendants could not raise through preliminary objections the defense of a release based on the allegations set forth in plaintiff's complaint.

There is case law supporting the dismissal of a claim where an affirmative defense, based solely on the allegations in plaintiff's complaint, is raised through preliminary objections. See case law holding that the affirmative defense of res judicata may be considered through preliminary objections where the complaint sets forth the essential facts upon which the defense is based (*Del Turco v. Peoples Home Savings Assoc.*, 478 A.2d 456, 461 (Pa. Super. 1984); compare *MacNeal v. I.C.O.A., Inc.*, 555 A.2d 916, 919-20 (Pa. Super. 1989)). See case law holding that the defense of governmental immunity may be raised by preliminary objection where it is apparent on the face of the complaint that recovery is not possible *Tiedeman v. City of Philadelphia*, 732 A.2d 696, 697 n.4 (Pa. Cmwlth. 1999); *Chester Upland School District v. Yesavage*, 653 A.2d 1319, 1327 (Pa. Cmwlth. 1994). Consider *Bocchicchio v. General Public Utilities Corp.*, 689 A.2d 305, 307-08 (Pa. Super. 1997), where the Court differentiated between the affirmative defenses referred to in the Note to Rule 1028(a)(4) (statute of frauds and statute of limitations) and other affirmative defenses.

This is an appropriate case in which to address this defense through preliminary objections because defendants should not be required to plead to a 38 page, 146 paragraph amended complaint if the case will be dismissed through a motion for judgment on the pleadings.

Furthermore, based on the allegations in plaintiff's complaint that Metropolitan returned the premiums that plaintiff had paid after the policy lapsed, plaintiff has not sustained any damages. Consequently, the complaint fails to state a cause of action.

BY THE COURT:

DATED: August 6, 2002 <<signature>>

WETTICK, J.

Footnotes

1 The release, which is attached to plaintiff's first amended complaint, reads as follows:
RELEASE
Submission of this form to MetLife and the refund of premiums paid on Policy 944-903-580-UM will constitute a release of MetLife and all its current and former employees, agents, subsidiaries, affiliates, officers and directors from any and all claims, demands, and causes of actions which the undersigned may have arising out of any events, matters or transactions relating to the purchase of the Policy 944-903-580-UM.

6 Section 9.2 also permits the court in its discretion to award up to three times the actual damages sustained.

7 This claim covers only the situation in which there was no written or oral approval to remove funds from a policy reserve. I distinguish this claim from plaintiffs' claim that they had approved the use of the funds from a policy reserve only to pay for new insurance which the agent had described.

8 The parties' briefs did not address the narrower issues raised in this paragraph and the prior paragraph of this Opinion.

1 In *Ihnat v. Pover*, 146 P.L.J. 288 (1997), I ruled that certain bad faith claims based on 42 Pa.C.S. §8371 may be brought by the insured.

2014 WL 10917675
Only the Westlaw citation is currently available.
NON–PRECEDENTIAL DECISION—
SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

Margaret ANTHONY, Sabrina Whitaker, Barbara Prosser, Sybil White and Natacha Battle, Appellants
v.
ST. JOSEPH'S HOSPITAL SCHOOL OF NURSING, INC., Appellee.

No. 2236 EDA 2013.
|
Filed June 10, 2014.

Appeal from the Order Entered July 8, 2013, In the Court of Common Pleas of Philadelphia County, Civil Division at No(s): October Term, 2009; 04335.

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J. *

Opinion

MEMORANDUM BY MUNDY, J.:

*1 Appellants, Margaret Anthony, Sabrina Whitaker, Barbara Prosser, Sybil White and Natacha Battle, appeal from the July 8, 2013 order denying their motion to amend complaint and dismissing their case against Appellee, St. Joseph's Hospital School of Nursing, Inc. (SJHSON). After careful review, we affirm.

The instant action commenced when Appellants, former students matriculated in SJHSON, filed a complaint on October 28, 2009, against SJHSON, alleging breach of contract and fraud in connection with each Appellant's failure to receive promised educational services and support. Appellants filed an amended complaint on December 15, 2009. On June 18, 2010, SJHSON filed preliminary objections to Appellants' amended complaint. SJHSON also filed a motion for summary judgment on July 1, 2010. On August 26, 2010, the trial court sustained SJHSON's preliminary objections in part, striking Appellants' fraud count for failure to plead averments with sufficient particularity in accordance with Pennsylvania Rule of Civil Procedure 1028(a)(3).

On October 27, 2010, SJHSON filed an answer and new matter to Appellants' complaint, together with counterclaims against each Appellant for alleged unpaid tuition, costs and fees. Appellants filed an answer to the new matter and counterclaim on September 13, 2010. On December 9, 2010, the trial court issued an order granting in part SJHSON's motion for summary judgment. Specifically, relative to Appellants' contract claims the trial court granted "[s]ummary [j]udgment as to academic judgment and physical facilities, leaving open only [SJHSON's] compliance with remediation and grievance procedures following academic failure and a decision to deny graduation." Trial Court Opinion and Order, 12/9/10, at 2. The trial court left only Appellants' contract claim relative to SJHSON's "compliance with remediation and grievance procedures following academic failure and a decision to deny graduation." *Id.*

The case proceeded with extended discovery. On May 2, 2012, citing subsequent discovery, Appellants filed a motion for reconsideration of the trial court's August 26, and December 9, 2010 orders, seeking reinstatement of its stricken fraud and contract claims. On May 4, 2012, Appellants filed a motion to amend their complaint to add North Philadelphia Health System (NPHS) as an additional defendant. Before the trial court acted on either motion, SJHSON [1] filed a Suggestion of Bankruptcy, notifying the trial court that it had petitioned for relief in the Bankruptcy Court for the Eastern District of Pennsylvania.

Upon application of Appellants and stipulation of the parties, the Bankruptcy Court subsequently ordered the following.

> [T]he Automatic Stay of § 362 of the Bankruptcy Code shall be terminated, annulled and vacated to allow [Appellants] to prosecute the Action *Margaret Anthony, et al., v. St. Joseph's Hospital School of Nursing* October Term 2009, No 04335 in the Philadelphia Court of Common pleas to-judgment. As agreed in the stipulation, [Appellants] shall not seek to collect any judgment against [SJHSON] through any assets of [SJHSON] under the purview of the Bankruptcy Court.

*2 Motion to Quash, 11/26/12, Exhibit C—Bankruptcy Court's 8/21/12 Order. [2]

On January 23, 2013, Appellants filed a praecipe to attach their proposed amended complaint to their motion to amend. On July 8, 2013, the trial court denied Appellants' motion to amend their complaint to add NPHS as a defendant on the ground that the statute of limitations had run. The trial court also denied Appellants' motion for reconsideration, deeming the request to reinstate claims against SJHSON as impermissible under the bankruptcy stipulation and order lifting the stay. Appellants filed a timely notice of appeal on July 24, 2013.[3]

On appeal, Appellants raise the following issues for our review.

I. Did the [trial] court abuse its discretion in denying [Appellants'] motion to amend the pleading and to add the North Philadelphia Health Systems as a defendant?

II. Did the trial court abuse its discretion in failing to restore [Appellants'] fraud and breach of contract claims based upon developments in discovery?

III. Did the trial court abuse its discretion in dismissing [Appellants'] entire case, including the breach of contract count that remained prior to the motion practice?

Appellants' Brief at 4.

Appellants first challenge the trial court's denial of their motion to amend the complaint to add NPHS as an additional party. As noted, the trial court's denial was based on its determination that the amendment is barred by the statute of limitations. Our standard of review of this issue is well settled.

> The decision of the trial [c]ourt to deny a motion to amend a complaint is within the sound discretion of the trial court, and the trial court's determination will not be disturbed absent an abuse of that discretion. It is insufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, it was charged with the duty imposed on the trial court below.

TCPF Ltd. P'ship v. Skatell, 976 A.2d 571, 574 (Pa.Super.2009) (citations and quotation marks omitted).

Pursuant to Pennsylvania Rule of Civil Procedure 1033, "[a] party, either by filed consent of the adverse party or by leave of the court, may at any time change the form of action, correct the name of a party or amend the pleading." Pa.R.C.P. 1033. However "[a] plaintiff may not amend a pleading to add a new and distinct party once the statute of limitations has expired." *Kincy v. Petro*, 606 Pa. 524, 2 A.3d 490, 497 (2010) (citation omitted)....

Phillips v. Lock, 2014 WL 806225, *5 (Pa.Super.2014).

The parties and the trial court agree that Appellants' contract claims are subject to a four-year statute of limitations. *See* Appellants' Brief at 19; SJHSON's Brief at 11; Trial Court Opinion, 9/20/13, at 1; *see also* 42 Pa.C.S.A. § 5525. "Generally speaking, the statute of limitations begins to run as soon as the right to institute and maintain the suit arises. Whether a complaint is timely filed within the limitations period is a matter of law for the court to determine." *Sevast v. Kakouras*, 915 A.2d 1147, 1153 (Pa.2007) (internal quotation marks and citation omitted).

***3** Appellants' fraud claims are governed by a two-year statute of limitations.

> An action to recover damages for injury to person or property which sounds in fraud is governed by a two-year statute of limitations. *See* 42 Pa.C.S.A. § 5524(7). Typically, the two-year period begins to run as soon as the right to institute and maintain a suit arises.

Toy v. Metropolitan Life Ins. Co., 863 A.2d 1, 7 (Pa.Super.2004) (citation omitted), affirmed, 928 A.2d 186 (Pa.2007).

The trial court stated that by November 2008, each of the Appellants had left SJHSON without graduating. Trial Court Opinion, 9/20/13, at 1, n. 1. The trial court found that the proposed second amended complaint adding NPHS as a defendant was not filed as part of Appellants' motion to amend until January 2013. *Id.* at 1. The trial court therefore concluded Appellants' proposed addition of a new party was outside the four-year statute of limitations and denied Appellants' motion to amend. *Id.* at 1; Trial Court Order, 7/8/13, at 1, ¶ 1.

Appellants submit that their May 4, 2012 motion to amend their complaint to add NPHS as an additional defendant was timely filed.[4] However, this Court has held that the only authorized way to commence an action in Pennsylvania is

to proceed in accordance with Pa.R.C.P. 1007. *Aivazoglou v. Drever Furnaces*, 613 A.2d 595, 598 (Pa.Super.1992). Further, the filing of a motion to amend a complaint to add a party does not commence an action and, therefore, will not toll the statute of limitations. *Id.*

Appellants argue that, as a general rule, amendment of pleadings should be liberally granted and denied only upon a showing of prejudice and that "the [trial] court did not consider the issue of prejudice." Appellants' Brief at 17–18. Additionally, Appellants recognize that an amendment that adds a cause of action is "not permitted after the statute of limitations on the new cause of action expired." *Id.* at 18. However, Appellants contend their proposed addition of NPHS as a defendant merely "amplified" the existing cause of action and neither SJHSON nor NPHS would experience any prejudice therefrom. *Id.* Appellants conclude that "if the proposed amendment does not change the cause of action but merely amplifies that which has already been averred, it should be allowed even though the statute of limitations has already run." *Id.* (citations omitted).

Appellants fail to recognize that as to NPHS, the claims in their proposed second amended complaint are new causes of action, and not amplifications of existing causes of action. Appellants' motion to amend is clearly an effort to add a new and distinct party. Since both the two-year and four-year statute of limitations had expired at the time of the trial court's July 8, 2013 order, the trial court did not err in refusing to permit the addition of NPHS as a defendant. *See Phillips, supra; see also Tork–Hiis v. Com.*, 735 A.2d 1256 (Pa.1999) (holding that the test to determine if an amendment adding a defendant may be permitted after the expiration of the statute of limitations "is whether the right party was sued but under a wrong designation-in which event the amendment [is] permissible-or whether a [different] party was sued and the amendment [is] designed to substitute [or add] another and distinct party," which is impermissible) (citations omitted). Instantly, SJHSON and NPHS are distinct entities against which Appellants allege distinct theories of liability. Appellants' claim against NPHS is based on master/servant or *respondeat superior* theories stemming from its relationship with SJHSON.

***4** Finally, Appellants suggest that they only learned of SJHSON's connections with NPHS through discovery and that salient facts were withheld. Appellants' Brief at 20. "The agency relationship was significant information that [Appellants] did not have knowledge of until after discovery, though NPHS and [SJHSON] withheld this information." *Id.* Thus Appellants argue the recourse to the statute of limitations is barred. *Id.*

> The [ ] doctrine of fraudulent concealment tolls the statute based on an estoppel theory and provides that a defendant may not invoke the statute of limitations if through either intentional or unintentional fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his duty of inquiry into the facts.

Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc., 892 A.2d 830, 835 n. 2 (Pa.Super.2006) (citations omitted).

Beyond their bald assertion, Appellants have not demonstrated any fraud or concealment by SJHSON or NPHS concerning their relationship. To the contrary Appellants note that "[d]uring discovery, it was [ ] revealed that, on separate occasions, [the dean of SJHSON] informed two of the Plaintiffs that they had to await the arrival of [the] CEO of the St. Joseph's Hospital of NPHS for her decision on their status." Appellants' Brief at 20. Appellants also cite the use by SJHSON of NPHS facilities. *Id.* at 22–23. Accordingly, the facts Appellants allege were only lately "discovered" were certainly known by some of Appellants at the time their causes of action accrued. Appellants point to no instance where either SJHSON or NPHS obfuscated Appellants' inquiry into the facts essential to perfecting a claim against NPHS. Under these circumstances, we discern no error in the trial court rejecting Appellants' argument that NPHS is equitably estopped from relief under the statute of limitations.

Appellants, in their second issue, allege the trial court erred in failing to grant their motion for reconsideration and to permit restoration of the previously dismissed fraud and contract claims. Appellants' Brief at 22. However, Appellants' argument is contingent on the success of its first issue, to wit, being permitted to add NPHS as an additional defendant. Appellants argue that, "[g]iven the developments during discovery and the possibility of additional evidence with respect to NPHS and [SJHSON's] close ties, [the Superior] Court should allow [Appellants] to amend the pleading in order to restore [Appellants'] claims." *Id.* at 23. As discussed above, relative to NPHS, both the fraud and contract claims

that Appellants seek to have restored to their complaint are barred by the two-year and four-year statute of limitations, respectively. 42 Pa.C.S.A. §§ 5524(7), 42 Pa.C.S.A. § 5525. With regard to the trial court's refusal to permit restoration of the previously dismissed fraud and contract claims as against SJHSON, we discern no abuse of discretion by the trial court in light of the parties' stipulation before the bankruptcy court.

***5** That stipulation implicates the issue raised by Appellants in their third question on appeal as well, wherein they allege the trial court erred in dismissing the sole remaining contract claim. *Id.* at 24. "Here, despite its prior order retaining the breach of contract claim, the [trial] court erroneously dismissed the entire case without providing a proper basis for doing so." *Id.* at 25.

The trial court, having rejected Appellants' motion to join NPHS, concluded the remainder of Appellants' issues "are subsumed" in the bankruptcy action. We agree. According to the stipulation, upon which the order of the bankruptcy court lifting the stay in this matter was premised, "[Appellants] agreed not to seek any recovery from [SJHSON] but to attempt to establish liability only in pursuance to its efforts to establish an agency/principal or master/servant relationship between [SJHSON] and others." Motion to Quash, 11/26/12, Exhibit C–Stipulation at 2, ¶ 5. Given Appellants' inability to initiate an action against NPHS, only SJHSON remains in the suit. Since the qualified lifting of the stay by the bankruptcy court precludes recovery against SJHSON, Appellants' motion to reconsider the trial court's prior dismissal of the fraud and contract counts is moot. Additionally, since no recovery is possible on the sole remaining contract claim, any judgment against SJHSON would be unenforceable. Accordingly, we discern no abuse of discretion in the trial court's dismissal of Appellants' action.

For the foregoing reasons, we conclude the trial court properly denied Appellants' request to amend their complaint to add NPHS as a party on the basis that the relevant statutes of limitations had expired. We further conclude the trial court did not err in declining to reach the merits of Appellants' motion for reconsideration or in dismissing the action, given the terms imposed by the parties' stipulation and the bankruptcy court's limited removal of the stay, which precluded recovery against SJHSON.

Accordingly, we affirm the trial court's July 8, 2013 order.

Order affirmed.

All Citations

Not Reported in A.3d, 2014 WL 10917675

Footnotes

* Former Justice specially assigned to the Superior Court.

1 By this time, SJHSON had changed its corporate identity to The Little House Day Care Center, Inc.

2 The stipulation specifically provided the following. "[Appellants] agree[ ] not to seek any recovery from [SJHSON] but to attempt to establish liability only in pursuance to its efforts to establish an agency/principal or master/servant relationship between [SJHSON] and others." Motion to Quash, 11/26/12, Exhibit C–Stipulation at 2, ¶ 5.

3 Appellants and the trial court have complied with Pa.R.A.P.1925.

4 Appellants do not supply a detailed analysis of the appropriate dates for the commencement of the limitation period. However, assuming Appellants' causes of action arose upon their respective departures from SJHSON, the latest date for commencing an action against NPHS would be November 2010 for the fraud claims and November 2012 for the contract claims, absent a tolling of the statute.

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