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 Type of Pleading: REPLY MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S TORTIOUS INTERFERENCE CLAIM Filed on Behalf of: Defendants Counsel of Record: Robert C. Heim, Esquire Michael L. Kichline, Esquire Asha T. Mehrotra, Esquire William T. McEnroe, Esquire David S. Gaines, Jr., Esquire

ORIGINAL

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

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

Plaintiff's Brief in Opposition to Defendants Louis J. Freeh and Freeh Group International Solutions, LLC's Preliminary Objections to Plaintiff's Tortious Interference Claim (the "Opposition Brief"),[1] suffers from many of the same defects as his Complaint – it relies on conclusory assertions rather than facts or case law. Under Pennsylvania law, when setting forth a cause of action, "every act or performance essential to that end must be set forth in the complaint." *Miketic v.*

[1] Defendant Louis J. Freeh ("Freeh") and Defendant Freeh Group International Solutions, LLC ("FGIS") are referred to collectively as "Defendants."

Baron, 675 A.2d 324, 330 (Pa. Super. 1996) (citing *Santiago v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 613 A.2d 1235, 1238 (Pa. Super. 1992)). The meager and vague "facts" that Spanier alleges with respect to tortious interference fail to adequately plead the four elements necessary to state a claim. Moreover, based on Spanier's own allegations in the Complaint, the tortious interference claim against Freeh and FGIS is barred by the statute of limitations. For both of these reasons, Spanier's tortious interference claim must be dismissed.

I. Spanier Fails to Plead Facts Capable of Supporting a Claim for Tortious Interference.

Spanier's Opposition Brief accuses Defendants of "repeatedly arguing that Dr. Spanier failed to allege facts that he actually did allege." Opp. Br. at 11. Yet, a plaintiff must do more than simply lob a series of conclusory allegations. Under Pennsylvania law, those facts must be "sufficiently specific so as to enable [a] defendant to prepare [its] defense." *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. Super. 1991) (citation omitted). Plaintiffs' pleadings "must define the issues and thus every act or performance to that end must be set forth in the complaint." *Koch v. First Union Corp.*, Nos. Control 100727, Control 100746, 2002 WL 372939, at *2 (Pa. Ct. Com. Pl. Jan. 10, 2002);[2] *see also Scott v. Willis*, 543 A.2d 165, 170 (Pa. Commw. Ct. 1988) (affirming dismissal of a complaint whose "fatal flaw"

[2] All unpublished cases are attached hereto as Exhibit A.

was "that the allegations [were] almost totally devoid of specific facts to support Appellants' theory"). Spanier has failed to meet this standard with respect to each of the elements of tortious interference: (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).

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

Spanier now concedes that he "does not allege a claim for interference with existing contractual relations." Answer ¶ 12.[3] Spanier's claims for tortious interference with prospective contractual relations still suffers, however, from his failure to allege facts supporting his claim.

Spanier asserts that he has identified his employer because he alleges that his employer was the "federal government." Opp. Br. at 11. But the "federal

---

[3] This concession seems contrary to Spanier's assertion that he had already begun "to work on two classified projects for the U.S. intelligence community," that "a government agency *withdrew Dr. Spanier's contracts*," and that Spanier "was removed from the board of directors of a corporation." Compl. ¶¶ 244, 330 (emphasis added).

government" is an amorphous entity which includes numerous separate agencies, departments, commissions, offices, and other organization, *each* of which has independent hiring authority.[4] That the Complaint refers to a "U.S. government agency," Compl. ¶ 327, does not provide Defendants with sufficiently specific notice so that they may prepare a defense. *See Smith*, 588 A.2d at 1310. The lack of notice is especially true where Spanier claims that he was working pursuant to *existing* projects. *See* Compl. ¶ 244 ("Dr. Spanier began to work on two classified projects for the U.S. intelligence community.").

Spanier attempts to allege new facts in his Opposition Brief when he alleges that he "repeatedly travelled to Washington, D.C. for meetings, discussions, and briefings in preparation for his employment." Opp. Br. at 11. Spanier's vague allegation does not make his employment "reasonably certain," without details regarding those "meetings, discussions, and briefings." Moreover, the Complaint does not allege that any of those steps were taken "in preparation for his employment" or that they were related to his potential employment. *See* Compl. ¶ 243 (no allegation that travel was related to prospective employment).

---

[4] "There are hundreds of federal agencies and commissions charged with handling such responsibilities as managing America's space program, protecting its forests, and gathering intelligence." Federal Agencies & Commissions, https://www.whitehouse.gov/1600/federal-agencies-and-commissions (last visited May 31, 2016).

The lack of clarity underlying Spanier's tortious interference claim makes it impossible for Defendants to determine what facts and relationships form the basis of his claim. "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). Spanier's allegations fail to meet this burden.

B. 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.

Spanier concedes in his Opposition Brief that he has no facts regarding alleged conversations between Freeh and federal prosecutors. *See* Opp. Br. at 12. Instead, he asks that the Court speculate regarding what was said. *See id.* Again Spanier runs afoul of Pennsylvania's fact-pleading standard, which requires that Spanier plead "*every* act or performance essential to that." *Miketic*, 675 A.2d at 330 (emphasis added).

Spanier's *sole* allegation regarding Freeh's communications with the unnamed "federal prosecutors" was that, "upon information and belief," Freeh stated that "Spanier was not fit for the national security work that he was being employed to undertake." Compl. ¶¶ 249-50. Spanier alleges no facts regarding what was said, but speculates that Freeh must have made statements to federal

prosecutors regarding Spanier's fitness for national security work. As recognized by the Pennsylvania Superior Court, however, any statement that Spanier was "not fit" or attacking his "professional competence" will not suffice for purposes of a tortious interference claim. *See Phillips v. Selig*, 959 A.2d 420, 435 (Pa. Super 2008); *see also Small v. Juniata College*, 682 A.2d 350, 354 (Pa. Super. 1997). Spanier has made no other allegations regarding what Freeh did to tortiously interfere with Spanier's employment prospects. Rather than grapple with any of the cases cited by Defendants or deny that what Plaintiff has alleged is opinion, Spanier simply asserts that "Defendants ask too much," Opp. Br. at 11.

Spanier alleges in conclusory terms that "Freeh had no privilege to communicate with federal officials regarding Dr. Spanier's employment." Compl. ¶ 329. If such allegations, without more, are sufficient to proceed with a case based on communications with federal prosecutors, there would be a clear risk of chilling communications with federal authorities. The Pennsylvania Superior Court has recognized this threat. *See Pawlowski v. Smorto*, 588 A.2d 36, 43 (Pa. Super. 1991) (citing Restatement (Second) of Torts § 587 & cmt. b). While *Pawlowski* arose in the context of statements preliminary to a criminal prosecution, fears regarding the chilling of speech apply equally to an investigation of potentially criminal activities. In any event, Spanier's conclusory allegation is insufficient to establish that Freeh's statements were not privileged.

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

Finally, Spanier fails to address the causal connection between Freeh/FGIS's conduct and the termination of his prospective contractual relations in his Opposition Brief and does so only in vague terms in his Answer. Spanier simply asserts that he "pleads facts showing the relevant timeline and demonstrating that Dr. Spanier's employment opportunities were withdrawn shortly after Freeh contacted federal officials." Answer ¶ 17. Yet, Spanier alleges no facts to support why temporal proximity creates a causal connection that would support the Court drawing an inference that the facts were more than coincidence. *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.").

As discussed in Defendants' Opening Brief, Spanier fails to allege:

- facts connecting the "federal prosecutors" to whom Freeh/FGIS allegedly spoke with the unnamed governmental agency and board of directors with whom Spanier alleges he had prospective contractual relations
- facts to establish that Freeh or FGIS was aware of Spanier's alleged prospective government employment or government employment opportunity *before* talking to the federal prosecutors
- facts to establish what Freeh/FGIS could have said to prosecutors that would have caused his termination

Spanier responds that Freeh and FGIS were aware of Spanier's prospective employment at least as of April 12, 2012. *See* Answer ¶ 18. However, Spanier makes no allegations regarding when Freeh communicated with federal prosecutors, when the federal prosecutors would have spoken with his "federal government" employers, or on what date Spanier's employment opportunities were withdrawn. *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."). Spanier fails to allege facts sufficient to establish causal connections necessary to connect Freeh/FGIS's alleged conduct to the termination of Spanier's national security "opportunities." Accordingly, Spanier has failed to plead an adequate factual basis that Freeh or FGIS *caused* any of Spanier's alleged damages.

* * *

"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 allegations fail to meet this standard. Accordingly, his tortious interference claim must be dismissed.

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

As Defendants explained in their Memorandum of Law, the Court may properly address the statute of limitations on preliminary objections.[5] While Spanier's Answer asserts in conclusory fashion that the statute of limitations must be raised as an affirmative defense, *see* Answer ¶ 26, his Answer and his Opposition brief fail to distinguish the case law cited by Freeh and FGIS. Spanier suggests in his Answer that the *Pelagatti* Court "merely held that on appellate review it could affirm a dismissal by the trial court." *Id.* ¶ 25 (citing *Pelagatti v. Cohen*, 536 A.2d 1337, 1346 (Pa. Super. 1987)). He is incorrect.

The *Pelagatti* Court recognized the principle that "an affirmative defense may be raised by way of preliminary objections where it is established on the face of the complaint." 536 A.2d at 1346. Moreover, Spanier ignores that Pennsylvania courts have consistently permitted defendants to raise affirmative defenses on preliminary objections, where they are clear on the face of the complaint. *See, e.g., 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

---

[5] 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.

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.").[6] Accordingly, the statute of limitations is properly before the Court.

Spanier's Opposition Brief focuses only on the argument that his *proposed* complaint, which added the tortious interference claim against Freeh and asserted a claim against FGIS for the first time, was sufficient to provide notice to Freeh and FGIS. This argument ignores Pennsylvania law. *See* Pa. R. Civ. P. 1007 (detailing that a case may only be instituted by filing a praecipe for writ of summons or the filing of a complaint). In Pennsylvania, notice to defendants is not determinative with respect to whether an action has been *commenced* for purposes of the statute of limitations. *See Johnson v. Allgeier*, 852 A.2d 1235, 1237 (Pa. Super. 2004) (holding, on preliminary objections, that an action is "timely commenced by the filing of a praecipe for writ of summons within the statutory period" even where defendants are served following its expiration). Defendants had notice that Spanier *desired* to assert a tortious interference claim against Freeh and FGIS, but until a

---

[6] Courts have even permitted the statute of limitations to be raised as a bar to joinder, *before* a complaint is even filed. *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 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.").

complaint or praecipe was filed in compliance with Rule 1007 there *was no such claim* for purposes of the statute of limitations. "Notice" alone cannot be sufficient to toll the statute of limitations, for there is no difference in the "notice" to Defendants between the Spanier's motion attaching a proposed complaint and a mere letter from counsel attaching a proposed complaint.

Moreover, unlike federal courts, in Pennsylvania, filing a proposed complaint *with the court* as part of a motion to amend is not sufficient to toll the statute of limitations. *See Aivazoglou v. Drever Furnaces*, 613 A.2d 595, 599-600 (Pa. Super. 1992). Spanier's attempt to recast the holding of *Aivazoglou* as resting on principles of notice misconstrues the Superior Court's holding and ignores the body of Pennsylvania case law recognizing the clear limits imposed by Rule 1007. *See* Opp. Br. at 14-15. The *Aivazoglou* Court similarly held, in rejecting the same argument that Spanier tries to make here, that: "[i]n Pennsylvania, however, a civil action can only be commenced in the manner provided by R.C.P. 1007." 613 A.2d at 599-600. Moreover, "attempts to commence an action by means other than those allowed by Rule 1007" – as Spanier has attempted to do here – "have consistently been rejected by the courts." *Burger v. Borough of Ingram*, 697 A.2d

1037, 1040 (Pa. Super. 1997) (citing *Hartmann v. Peterson*, 265 A.2d 127 (Pa. 1970); *Aivazoglou v. Drever Furnaces*, 613 A.2d 595 (Pa. Super. 1992)).[7]

Furthermore, the *only* case upon which Spanier relies for this proposition, *Morgan v. Harnischfeger Corp.*, No. 3929-C, 1993 WL 766113 (Com. Pl. Luzerne Cnty. Mar. 3, 1993), *see* Opp. Br. at 14, does not involve the same principles at issue here. In *Morgan*, the alleged defect was *not* failure to comply with Rule 1007. Instead, "plaintiffs complied with the directives of the rule cited by the *Aivazoglou* court," but failed to seek leave of court to do so. *See Morgan*, 1993 WL 766113, at *2. Accordingly, by complying with Rule 1007, the *Morgan* action was commenced *prior to the expiration of the statute of limitations*. *See id.* This decision does not create an exception to Rule 1007 and does not undermine the Superior Court's holding in *Aivazoglou*.

Spanier alleges that he became aware of Freeh's April 12, 2012 email in October 2013, *see* Compl. ¶ 254, yet no tortious interference claims were asserted against Freeh or FGIS until well after the two-year statute of limitations had run –

---

[7] *See also Chichester Sch. Dist. v. Chichester Educ. Ass'n*, 750 A.2d 400, 403 (Pa. Commw. Ct. 2000) (holding that "a petition is not the procedurally proper way in which to initiate an action"); *City of Phila. v. White*, 727 A.2d 627, 630-31 (Pa. Commw. Ct. 1999) ("Attempts to commence an action by means other than those allowed by Rule 1007 have consistently been rejected by the courts."); *Mansour ex rel. Mansour v. Gnaden Huetten Memorial Hosp.*, 3 Pa. D. & C. 5th 149, 160 (Com. Pl. Pike Cnty. 2007) ("Although Rule 1007 states that a plaintiff can commence an action by complaint, it does not state that an action may be commenced by filing an amended complaint.").

in February 2016.[8] Moreover, Spanier misleadingly complains that he "could not simply file a new complaint naming FGIS as a defendant." Opp. Br. at 15. But Spanier could have and should have done exactly that.

The stay of *this* action – which was instituted at Spanier's request – applied only to *this* action and did not prevent Spanier from instituting a *new* action. Spanier could have instituted a separate action asserting his tortious interference claims against Freeh and FGIS by filing either a complaint or praecipe for writ of summons in compliance with Rule 1007. Moreover, Spanier claims that he became aware of the facts necessary to assert his claim in October 2013. Accordingly, he could have asserted his tortious interference claims well before October 2015. He also could have filed an emergency motion with this Court to lift the stay in this action, notifying the Court of the impending statute of limitations and seeking to add additional parties and claims. Instead, he did nothing. Spanier let the statute of limitations period run on his tortious interference claims and now seeks to have the Court create a carve-out to Rule

---

[8] As Freeh and FGIS asserted in their Opening Brief, they assume only for purposes of these preliminary objections that the longer two-year statute of limitations would apply. However, 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"). Moreover, Spanier could have learned of Freeh's April 12, 2012 email well before October 2013 and, therefore, the discovery does not apply.

1007 to remedy his error. The Court should not indulge him and Spanier's tortious interference claim should be dismissed as barred by the statute of limitations.

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.

Respectfully submitted,

Dated: May 31, 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

Exhibit A

2002 WL 372939
Only the Westlaw citation is currently available.
Pennsylvania Court of Common Pleas.

Harry W. KOCH, Alice M. Koch, and Joyce M. Meehan, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

FIRST UNION CORPORATION, First Union National Bank of Delaware, Pennsylvania Resource Corporation, First Liberty Financial Services, Inc., and Does I-V Defendants.

Nos. CONTROL 100727, CONTROL 100746.

|

May Term, 2001.

|

Jan. 10, 2002.

ORDER

HERRON, J.

*1 AND NOW, this 10th day of January, 2002, upon consideration of the Preliminary Objections of Defendants First Union Corp. ("First Union"), First Union National Bank of Delaware ("FUNBD"), First Liberty Financial Services, Inc. ("First Liberty") and Pennsylvania Resources Corporation ("PRC") to the Amended Complaint of Harry W. Koch, et al. and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objection asserting failure to properly verify the Amended Complaint is SUSTAINED in part, and this court directs plaintiffs to file Amended Verifications to their Amended Complaint pursuant to Pa.R.C.P. 1024.

2. First Union is dismissed from the Amended Complaint because the plaintiffs have not alleged facts sufficient to pierce the corporate veil.

3. The Preliminary Objection asserting improper pleading of John Doe claims is OVERRULED.

4. The Preliminary Objection asserting legal insufficiency of a pleading of violations of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL") based upon Real Estate Settlement Procedures Act ("RESPA") violations is SUSTAINED.

5. The Preliminary Objection asserting legal insufficiency of and insufficient specificity in a pleading of breach of fiduciary duty as to PRC and First Liberty is OVERRULED.

6. The Preliminary Objection asserting legal insufficiency of and insufficient specificity in a pleading of breach of fiduciary duty as to FUNBD is SUSTAINED.

7. The Preliminary Objection asserting insufficient specificity in a pleading and legal insufficiency of a pleading in Counts I, III, IV, and V is OVERRULED.

8. The Court cannot examine the plaintiffs' class action allegation in the context of Preliminary Objections.

9. The Preliminary Objections asserting an agreement for alternative dispute resolution is OVERRULED.

10. The Preliminary Objection asserting legal insufficiency of a pleading for punitive relief is OVERRULED.

11. The Preliminary Objection asserting legal insufficiency of a pleading of an accounting, rescission, and restitution is OVERRULED.

MEMORANDUM OPINION

Defendants First Union Corporation ("First Union"), First Union National Bank of Delaware ("FUNBD"), Pennsylvania Resource Corporation ("PRC"), and First Liberty Financial Services, Inc. ("First Liberty") filed these Preliminary Objections to the Amended Complaint of Plaintiffs Harry W. Koch, et al. For the reasons stated below, the preliminary objections are sustained in part.

BACKGROUND

The plaintiffs in the present action are homeowners. PRC is a contractor who provides home repairs and home improvement financing, through its broker First Liberty. The plaintiffs, through PRC and First Liberty, obtained home equity loans from FUNBD, a subsidiary of First Union.

The present action arises from allegations that all the defendants worked in concert to secure home equity loans on the basis of misleading "good faith cost estimates." The plaintiffs allege that these estimates were misleading in several ways. Am. Compl. ¶ 12. First, the same good faith estimates were given to all borrowers regardless of their financial status or creditworthiness. Id at ¶ 13. Second, the good faith estimates only identified closing costs totaling $470. However, the plaintiffs allege that these totals were far less then what they eventually paid. Id at ¶ 14. Third, the loan origination fee, listed in the estimate, was explained as "N/A" and therefore misleading. Id at ¶ 15. Further, the mortgage broker fee of 4-7% did not reveal what these percentages were based upon. Id. at ¶ 16. Finally, the settlement charges that the plaintiffs actually paid far exceeded the amounts specifically disclosed in the estimates. Specifically, prior to closing, the plaintiffs were given an estimated monthly repayment figure. Then, at closing, although the actual monthly figure equaled the previous estimated monthly figure, the plaintiffs allege that they had no way of knowing that the final settlement charges included in this monthly figure, would not equal the earlier good faith estimates. Id at ¶¶ 18, 19.

*2 In May 2001, the plaintiffs initiated this action, and after the case was removed to federal court, it was remanded, by stipulation of the parties, to this court. In August 2001, the plaintiffs filed an Amended Complaint asserting violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), breach of fiduciary duty, unjust enrichment, common law fraud and deceit, and civil conspiracy. The defendants timely filed these Preliminary Objections.

DISCUSSION

Preliminary objections may be brought based on insufficient specificity in a pleading. Pa.R.C.P. 1028(a)(3). Rule 1019(a) requires the plaintiff to state "[t]he material facts on which a cause of action ... is based ... in a concise and summary form." Pa .R.C.P. 1019(a). This rule requires that the complaint give notice to the defendant of an asserted claim and synopsize the essential facts to support the claim. *Krajsa v. Keypunch, Inc.*, 424 Pa.Super. 230, 235, 622 A.2d 335, 357 (1993). In addition, "[a]verments of time, place and items of special damage shall be specifically stated ." Pa.R.C.P. 1019(f). To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the facts alleged are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." *Smith v. Wagner*, 403 Pa.Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted). "In this Commonwealth, the pleadings must define the issues and thus every act or performance to that end must be set forth in the complaint." *Estate of Swift v. Northeastern Hosp. of Philadelphia*, 456 Pa.Super. 330, 337, 690 A.2d 719, 723 (1997).

Pa.R.C.P 1028(a)(4) also allows for preliminary objections based on legal insufficiency of a pleading. 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 a cation, 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) (citations omitted).

I. The Preliminary Objection Asserting Failure to Properly Verify Amended Complaint is Sustained in Part

The defendants argue that contrary to Pa.R.C.P.1024, the Amended Complaint averred new facts of record that were not stated in the original complaint. Defs' P.O. Mem. of Law at 3-4. Since the Amended Complaint was signed by counsel without further explanation as to why verification of these new facts were not made by one of the plaintiffs, the defendants assert that this pleading fails to conform to a rule of court. Id.

Pa.R.C.P 126 allows for the liberal construction of Pennsylvania's Rules of Civil Procedure. "[T]o secure the just, speedy, and inexpensive determination of every action or proceeding to which [these rules] are applicable," the court "may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Pa.R.C.P. 126. Here, the court liberally construes Pa.R.C.P. 1024 which, *inter alia*, reads that "every pleading containing an averment of fact not appearing of record in the action ... shall state that the averment ... is true upon the signer's personal knowledge or information and belief and shall be verified." Pa.R.C.P. 1024(a).

*3 Although the Amended Complaint does contain newly alleged facts, this court will not dismiss the entire Amended Complaint as the error does not affect the substantial rights of the parties. Here, the plaintiffs allege in their Amended

Complaint that they reasonably misunderstood the term "N/A" on the "Good Faith Estimates." Am. Compl. ¶ 15. The plaintiffs argue that this is not a new fact as it originated in the Answer of defendant First Liberty to the original Complaint. Pls' Reply Mem. of Law. at 21. However, since the plaintiffs here have not attached First Liberty's Answer to the original Complaint as an exhibit evidencing such a preexisting fact of record, and in the interest of securing the just, speedy and inexpensive determination of this case, this court directs the plaintiffs to file Amended Verifications to their Amended Complaint pursuant to Pa.R.C.P. 1024.

II. First Union is Dismissed from the Complaint Because Plaintiffs Have Not Alleged Facts Sufficient to Pierce the Corporate Veil

The plaintiffs have alleged that FUNBD, a bank, and its parent, First Union, a bank holding company, are liable to them for the high closing costs associated with the loans. First Union, however, argues that since it is not a state chartered bank, or a national bank association, it lacks the capacity to be sued with respect to these loans. [1] Defs' Mem. of Law at 18. Furthermore, First Union argues that the plaintiffs have failed to allege facts sufficient to pierce the corporate veil and therefore, First Union avers that it has been misjoined as a defendant.

1 A bank is an institution which engages in the business of making "any loan other than a loan to an individual for personal, family, household, or charitable purposes" including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 106 S.Ct. 681, 474 U.S. 361, 88 L.Ed.2d 691 (1986) citing 12 U.S.C.A. S 1841(c). Unlike a bank, a "bank holding company" means any company which has control over any bank or over any company that is or becomes a bank holding company. 12 U.S.C.A. S 1841(a)(1).

"A parent corporation possesses a separate existence and is treated separately from a subsidiary unless there are circumstances justifying disregard of the corporate entity," *Matter of Chrome Plate, Inc.*, 614 F.2d 990, 996 (5th Cir.), cert. denied, 449 U.S. 842, 101 S.Ct. 123, 66 L.Ed.2d 50 (1980). [2] Pennsylvania law allows the corporate form to be disregarded in situations where there is gross undercapitalization, failure to adhere to corporate formalities, substantial intermingling of personal and corporate affairs, and the use of the corporate form to perpetrate a fraud. *Saint Joseph Hospital v. Berks County Board of Assessments*, 709 A.2d 928 (Pa.Commw.Ct.1998) (citations omitted). "In applying this test, however, any court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception.... Care should be taken on all occasions to avoid making 'the entire theory of the corporate entity useless.' " *Wedner v. Unemployment Compensation Bd. of Rvw.*, 449 Pa. 460, 464, 296 A.2d 792, 794-95 (1972) (citation omitted). In Pennsylvania, there is a strong presumption against piercing the corporate veil. *Lumax Industries, Inc. v. Aultman*, 543 Pa. 38, 669 A.2d 893 (1995).

2 Federal court decisions are not binding on Pennsylvania state courts, but they are persuasive. *Hutchinson v. Luddy*, 763 A.2d 826, 837 n. 8 (Pa.Super.Ct.2000); *In re Insurance Stacking Litig.*, 754 A.2d 702, 705 (Pa.Super.Ct.2000). *See also Moore v. Sims*, 442 U.S. 415, 429 (1979) (stating that "[s]tate courts are the principal expositors of state law").

In the instant matter, the plaintiffs have not alleged sufficient facts to pierce the corporate veil and proceed with their action against First Union. Here, the identified lender of the particular loans at issue is FUNBD and not First Union. Am. Compl., Exh. B. However, in their Amended Complaint, the plaintiffs merely argue that because First Union "appears to dominate FUNBD in such a manner that their separate corporate entities may be disregarded" First Union can be held liable. Am. Compl. ¶ 20. However, no where in the Amended Complaint do plaintiffs allege that First Union engaged in gross undercapitalization, failed to adhere to corporate formalities, substantially intermingled personal and corporate affairs, nor that First Union used the corporate form to perpetrate a fraud. Absent these allegations, the plaintiffs cannot proceed against First Union. Since it is clear and free from doubt from all the facts pleaded that the plaintiffs will be unable to prove facts legally sufficient to establish First Union's liability, the court sustains the preliminary objection and further dismisses all counts as to First Union.

III. The Preliminary Objections Asserting Improper John Doe Claims is Overruled.

***4** The defendants argue that this court should strike the Amended Complaint for failure to conform to Pa.R.C.P. 1018. In pertinent part, Pa.R.C.P. 1018 states, "The caption of a complaint shall set forth the form of the action and the names of all the parties...." Here, the defendants argue

that the plaintiffs' attempt to join "Does I-V" should not be permitted because no allegations have been offered to identify the "Does."

The court in *Rummings v. Bd. of Probation and Parole*, 18 Pa. D. & C. 4th 278 (1992) was faced with a similar issue. In *Rummings*, the defendants argued that the plaintiff's use of the phrase "John Doe, an unidentified employee of the Board of Probation and Parole," was not a "sufficient designation" of a party defendant within the scope of Pa.R.C.P. 1018. *Rummings*, 18 Pa. D & C. 4th at 279-80. There, the "John Doe" was an employee of the Board of Probation and Parole and had allegedly acted in concert with two named individuals in committing a battery against the plaintiff. The court, based on the sparse precedent on this issue, concluded that

> [T]he evil to be prevented by this rule, as expressed by our esteemed colleague Thomas Raup, P.J., is the emersion of an individual in a lawsuit without "notice of the existence of the claim," nor an "opportunity to muster and preserve evidence...." *Rightmire v. Minier*, 12 Pa. D. & C.3d 234, 237 (1979); *see also Paulish v. Bakaitis*, 442 Pa. 434, 275 A.2d 318 (1971); *Boatman v. Thomas*, 320 F.Supp. 1079 (M.D.Pa.1971). Viewing the facts of the instant complaint in the light most favorable to the plaintiff, this court determines that the unnamed defendants were placed on notice of the existence of a claim and had been afforded an opportunity to muster and preserve evidence at the time of the battery perpetrated on the plaintiffs.

Rummings, 18 Pa. D & C. 4th at 279-80.

As in *Rummings*, here the Amended Complaint does provide notice of the existence of claims and further allows for the formulation of a defense. The plaintiffs' Amended Complaint reads in pertinent part:

> Defendant Does I-V are other contractors and/or mortgage brokers that solicit home equity loans for First Union based on the same, or substantially the same, materially misleading estimates of closing costs as were submitted to the Kochs, Mrs. Meehan, and the other members of the Class.

Am. Compl. at ¶ 7. Here, it is "easily ascertainable" that the Doe defendants named are those specific contractors and/or mortgage brokers that solicited certain home equity loans from FUNBD. Moreover, the "Doe" defendants are those contractors and/or mortgage brokers who submitted the same alleged misleading estimates of closing costs. Viewing the facts of the Amended Complaint in the light most favorable to the plaintiffs, this court determines that the "Doe" defendants were placed on notice of the existence of claims and have been afforded an opportunity to formulate a defense. Therefore, this preliminary objection is overruled.

IV. The Preliminary Objections To All Counts of the Amended Complaint

***5** Here, all the defendants have filed preliminary objections asserting legal insufficiency of all pleadings and insufficient specificity in all pleadings as to all counts. [3]

3 Having determined above that defendant First Union is dismissed from the Amended Complaint, this court need only address the remaining preliminary objections as they apply to PRC, First Liberty, and FUNBD.

A. Violations of the UTPCPL Based Upon RESPA Violations

The plaintiffs contend that the defendants did not comply with the requirements of RESPA, since the defendants failed to provide them with a "good faith estimate" of the charges they would incur when settling their mortgages. Pls' Reply Mem. of Law at 15. Conversely, the defendants argue that since RESPA contains no private right of action for the plaintiffs' claim, the plaintiffs have failed "to explain how an alleged RESPA violation gives rise to a claim under the UTPCPL." Defs' P.O. Mem of Law at 6.

"A statute must be read in accordance with its plain and common meaning when it is clear and unambiguous on its face." *Paul J. Dooling Tire Co v. City of Philadelphia*, 2001 WL 1548730 ***** 2 (Pa.Cmwlth) (citation omitted). Moreover, the "primary source of any private right of action is in the text of the statute itself." *Brophy v. Chase Manhattan Mortgage Co.*, 947 F.Supp. 879, 881 (E.D.Pa.1996). Here, Section 2604(c) of RESPA provides that:

> Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary.

12 U.S.C. § 2604(c). The requirements for a good faith estimate are set forth in Regulation X, 24 C.F.R. § 3500.7(c):

> Content of good faith estimate. A good faith estimate consists of an estimate, as a dollar amount or range, of each charge which:
>
> * * * * *
>
> 2) That the borrower will normally pay or incur at or before settlement based upon common practice in the locality of the mortgaged property. Each such estimate must be made in good faith and bear a reasonable relationship to the charge a borrower is likely to be required to pay at settlement, and must be based upon experience in the locality of the mortgaged property ...

24 C.F.R. § 3500.7(c). Moreover, Section 2614 of RESPA, the only provision of the Act that provides for a private right of action, states:

> Any action pursuant to the provisions of section 2607 or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction ...

12 U.S.C.A. § 2614. Thus § 2614 allows for a private right of action for claims brought under § 2607 (prohibiting, *inter alia,* the giving or accepting of fees or kickbacks) and § 2608 (prohibiting the seller from requiring the buyer to purchase title insurance from any particular title company) but does not provide for a private right of action for claims brought under § 2604.

Here, although the plaintiffs concede in their Amended Complaint that "[§ 2604 (c)] of RESPA has been held not to provide a private cause of action in and of itself," the plaintiffs argue that the good faith estimates provided to them by the defendants were not only inadequate, but were in fact intentionally misleading, thereby violating 12 U.S.C.A. § 2604(c) of RESPA and the relevant regulation, Regulation X, 24 C.F.R. § 3500.7(c). Am. Compl. at ¶ 48. However, this court finds that the plaintiffs do not have a private cause of action based upon § 2604(c) of RESPA. Not only does the statute explicitly not provide for one, but there is significant support in extensive legislative history for not allowing a private cause of action based on § 2604(c) of RESPA. *Brophy,* 947 F.Supp at 881. "In January 1976, Congress repealed ... the private right of action against lenders who failed to comply with the advance disclosure/good faith estimate provisions. [T]he legislative history reveals that Congress was well aware that it was eliminating a private right of action" under § 2604. *Id.* 947 F.Supp. at 883 (citing H.R.Rep. No. 667, 94th Cong., 1st Sess. 2 (1975), reprinted in 1975 U.S.C.C.A.N. 2448, 2449). Since RESPA specifically contains no private cause of action for alleged violations of "good faith estimates" provisions, this court will not construe the UTPCPL to provide relief for these alleged RESPA violations. However, this does not preclude the plaintiffs from finding a private cause of action from the UTPCPL. Therefore, the court sustains this preliminary objection.

B. Violations of UTPCPL

***6** The defendants argue that since the plaintiffs have not adequately alleged all the elements of fraud, they cannot recover under any of the provisions of the UTPCPL. Defs' P.O. Mem of Law at 8-10. Specifically, the defendants argue that the plaintiffs cannot allege violations of § 201-2(4)(xxi) of the UTPCPL ("Catchall Provision") since their Amended Complaint "does not aver any 'ascertainable loss of money or property' suffered by Plaintiffs in reliance upon a misrepresentation by Defendants." [4] *Id* at 10. However, the plaintiffs contend that they "properly have alleged all of the requisite elements of a UTPCPL claim, including causation and damages and, to the extent it is required, reliance." Pls' Reply Mem of Law. at 16.

4 The plaintiffs also allege violations of sections 201-2(4)(iii) (causing the likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification of another); § 201-2(4)(v) (representing that their financial services have characteristics which they do not have); and § 201-2(4)(xiv)(failure to comply with the terms of any written agreement or warranty). However, the defendants argue that none of these apply to the plaintiffs' allegations and that the only UTPCPL provision that applies is the Catchall Provision. Def's Mem of Law at 8. Since the defendants have not met their burden of showing why these remaining alleged UTPCPL violations do not apply here, the court need only focus on whether the plaintiffs have averred facts necessary for a claim pursuant to the Catchall Provision.

Certain UTPCPL claims do require that a plaintiff prove all the elements of fraud. *See Weinberg v. Sun Co.,* 777 A.d 442, (2001) (a claim brought under the false advertising provision of the UTPCPL requires traditional common law elements of reliance and causation). However, this court has held that

in order to sustain a claim under the Catchall Provision a plaintiff need not plead all the elements of fraud. *Weiler v. SmithKline Beecham Corp.*, March 2001, No. 2422, slip op. at 3 (C.P. Phila October 8, 2001) (Since 201-2(4)(xxi) prohibits either fraudulent *or deceptive conduct,* this court concluded that the phrase "or deceptive" implies that either deceptive or fraudulent conduct constitutes a violation of the Catchall Provision and that deceptive conduct is not the same as fraudulent conduct. Therefore a plaintiff need not plead all the elements of fraud to sustain a claim under the Catchall Provision).

Here, however, the plaintiffs have plead all the elements of fraud.[5] In their Amended Complaint, the plaintiffs allege, *inter alia,* that defendants engaged in fraudulent and deceptive conduct which created a likelihood of confusion or misunderstanding. Am. Compl. at ¶ 47. Specifically, the plaintiffs have argued that they "detrimentally rel[ied]" upon the defendants' alleged misrepresentations. Id at ¶¶ 62, 63. Moreover, the plaintiffs specifically allege that they justifiably relied upon misrepresentations and non-disclosures which included:

> (1) closing costs associated with the home equity loans in suit would be approximately $470; and (2) Class members had no reason to suspect that the actual amount of closing costs associated with the home equity loans in suit were significantly greater than estimated because the amount of their monthly payments was substantially equal to that which they had been told to expect.

Id. at ¶ 64. Finally, the plaintiffs also argue that "as a result of defendants' violations of the UTPCPL, plaintiff and members of the class have suffered an ascertainable loss of property ." Id at ¶ 50. Having determined that the plaintiffs have sufficiently alleged the elements of fraud in support of an alleged violation of the Catchall Provision of the UTPCPL, this court overrules all the preliminary objections to this count.[6]

5 To plead fraud the elements of material misrepresentation of an existing fact, scienter, justifiable reliance on the misrepresentation, and damages, must be proven. *Booze v. Allstate Ins. Co.*, 750 A.2d 877, 880 (Pa.Super.Ct.1999) (citation omitted).

6 Having determined that the plaintiffs have plead all the elements of fraud, this court need not address whether, alternatively, deceptive conduct has been sufficiently pled to sustain a claim under the Catchall Provision.

C. Breach of Fiduciary Duty

*7 The defendants argue that since the Pennsylvania Mortgage Bankers and Brokers Act, 63 P.S. 456.01, et seq, imposes no fiduciary duty on mortgage brokers, the plaintiffs cannot allege that the defendants breached a fiduciary duty. Defs' P.O. Mem. of Law at 10. The plaintiffs disagree and argue that, here, a confidential relationship gave rise to a fiduciary duty which the defendants allegedly breached. Pls' Reply Mem. of Law at 25.

Our Superior Court has recognized that "[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line." *Basile v. Block,* 777 A.2d 95, 101 (Pa.Super.2001) (citing *In re Estate of Scott,* 455 Pa. 429, 316 A.2d 883, 885 (1974). "The essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." *Id.* Therefore, "[a confidential relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed [.]" *Frowen v. Blank.* 493 Pa. 137, 425 A.2d 412, 416-17 (1981).

As a result of this confidential relationship, a fiduciary duty arises which represents "the law's expectation of conduct between the parties and the concomitant obligations of the superior party." *Basile,* 777 A.2d at 101. "[T]he party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage." *Young v.. Kaye,* 443 Pa. 335, 279 A.2d 759, 763 (1971). Furthermore, the resulting fiduciary duty may attach "wherever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest." *Basile,* 777 A.2d at 102. Moreover, those offering business advice may have created a confidential relationship "if others, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel." *Id.* (citations omitted).

Here, the plaintiffs have sufficiently alleged the existence of a legally cognizable fiduciary duty of PRC and First Liberty. Specifically, the plaintiffs argue that a confidential relationship arose when the PRC and First Liberty acted as "the position of financial advisor and actively [sought] to

inspire confidence that they will act in good faith for" the plaintiffs' interests. Am. Compl. at ¶ 23. Furthermore, the plaintiffs argue the following:

> Defendants entered the plaintiffs' homes armed with vastly superior knowledge of financing and home equity loans; sought extremely personal information from plaintiffs, including sources and debt factors; and promised to help take care of plaintiffs financial needs and desires.

***8** Pls' Reply Mem. of Law at 27. Finally, the plaintiffs allege that PRC and First Liberty breached their fiduciary duties by materially misrepresenting the closing costs associated with the home equity loans. Am. Compl. at ¶ 55. Since the plaintiffs have sufficiently alleged that a fiduciary duty has arisen from the confidential relationship between PRC, First Liberty and the plaintiffs and that this duty was allegedly breached, this court overrules the preliminary objection as to PRC and First Liberty.

However, the plaintiffs have not sufficiently alleged a fiduciary duty owed to them by FUNBD. "Under Pennsylvania law, the lender-borrower relationship ordinarily does not create a fiduciary duty ... unless a creditor 'gains substantial control over the debtor's business affairs." ' *I & S Assoc. Trusts v. LaSalle Nat'l Bank*, 2001 WL 1143319, * 6 (E.D.Pa.) (citations omitted). Although the plaintiffs do argue that there was a "frequent presence of a First Union loan officer at PRC's place of business," no where in the Amended Complaint, do the plaintiffs allege that FUNBD was involved in the actual "day-to-day management and operations" of their affairs. Id. Unlike the plaintiffs' contact and reliance upon the financial advice and counsel of PRC and First Liberty, there is no such evidence of a similar relationship with FUNBD. Instead, FUNBD was merely the lender in this matter. Since the plaintiffs have not alleged a confidential relationship between them and FUNBD, there is no resulting fiduciary duty. Therefore, all the preliminary objections to the breach of fiduciary duty claim as to FUNBD are sustained.

D. Unjust Enrichment

The defendants allege that the plaintiffs have failed to plead a claim of unjust enrichment. Unjust enrichment is a quasi-contractual doctrine based in equity which requires the following elements: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Wiernik v. PHH U.S. Mortgage Corp.*, 736 A.2d 616, 622 (Pa.Super.Ct.1999), *appeal denied*, 561 Pa. 700, 751 A.2d 193 (2000).

Here, the plaintiffs have sufficiently plead their claim of unjust enrichment. Specifically, plaintiffs have argued that the high amounts charged to and paid by the plaintiffs were conferred on the defendants. Am. Compl. at ¶ 58. Moreover, the plaintiffs assert that the defendants "wrongfully obtained money from" the plaintiffs in the form of high closing costs. Id at ¶ 59. Finally, the plaintiffs assert that it would be inequitable for the "defendants to retain the amounts charged" because they were obtained by "false representation and omissions." Id. at ¶¶ 58, 59. All the objections to the plaintiffs' unjust enrichment claim must therefore be overruled.

E. Common Law Fraud

***9** The defendants argue that the plaintiffs' Amended Complaint "fails to fulfill the elements of common law fraud and deceit." Defs' P.O. Mem of Law at 12. Pennsylvania courts have held that to plead a claim of common law fraud, the elements of material misrepresentation of an existing fact, scienter, justifiable reliance on the misrepresentation, and damages, must be proven. *Booze v. Allstate Ins. Co.*, 750 A.2d 877, 880 (Pa.Super.Ct.1999) (citation omitted). The pleadings need only "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and "be sufficient to convince the court that the averments are not merely subterfuge." *Martin v. Lancaster Battery Co.*, 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (citing *Bata v. Central-Penn National Bank of Philadelphia*, 423 Pa. 373, 380, 224 A.2d 174, 179 (1966)). In determining whether fraud has been averred with the requisite particularity the court considers the complaint as a whole. *Commonwealth by Zimmerman v. Bell Telephone Co. of Pa.*, 121 Pa. Commw. 642, 551 A.2d 602 (1988).

This court has already determined above that the plaintiffs have sufficiently plead the elements of fraud with regards to the alleged UTPCPL violations. Therefore, this court overrules all the preliminary objections to the plaintiffs' common law fraud claim.

F. Civil Conspiracy

The defendants argue that because the Amended Complaint "fails to allege or show any facts leading to malice on the

part of [the defendants]" the court should dismiss the civil conspiracy claims. Defs' P.O. Mem of Law at 13. To state a cause of action for conspiracy, plaintiffs must allege (1) 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, (2) an overt act done in furtherance of the common purpose, and (3) actual legal damage. *Baker v. Rangos*, 229 Pa.Super. 333, 324 A.2d 498, 506 (1974). Malice and intent are required elements of this cause of action, however may be averred generally. *See Larsen v. Philadelphia Newspapers, Inc.*, 411 Pa.Super. 534, 602 A.2d 324, 339 (1991); Pa.R.C.P. 1019(b). Therefore, a complaint for conspiracy must either allege facts that are direct evidence of the combination and intent, or circumstantial evidence that, if proven, will support an inference of the combination and intent. *Baker*, 324 A.2d at 506.

Here, the plaintiffs have sufficiently alleged a claim of conspiracy for purposes of pleadings. Contrary to the defendants' argument, the plaintiffs have generally alleged malice. The plaintiffs claim that the "defendants have agreed to engage in a scheme to injure plaintiffs and other class members by misrepresenting and concealing facts concerning their loans, with the intent that plaintiffs would rely thereon, which caused them to pay unreasonably high closing costs." Pls' Reply Mem. of Law at 20. Whether the plaintiffs can prove that the defendants conspired to injure it will be determined by the evidence presented. For now, however, it is enough that the factual averments of the entire complaint are legally sufficient. Therefore, the court overrules all the defendants' preliminary objections.

V. The Court Cannot Examine the Plaintiffs' Class Action Allegation in the Context of Preliminary Objections

***10** The defendants argue that since factual disparities may exist among the plaintiffs, class certification should not be granted. This argument cannot be raised in the context of preliminary objection and must be overruled.

As this court held in *Weiler*,

> Under Pennsylvania Rules of Civil Procedure ("Rules"), the class that the plaintiff claims to represent must be certified by the court. Pa.R.Civ.P. 1707. To certify a class, a court must find that the class meets the requirements of numerosity, predomination of common questions of law or fact, typicality of the named plaintiff's claims, ability of the named plaintiffs to fairly and adequately protect the interests of the class and fairness and efficiency. Pa.R.Civ.P. 1702.
>
> While these five elements are important, a court may not address question of certification "until the pleading stage is concluded, [and] attacks on the form of the complaint or demurrers to attack the substance" have already been disposed of. *Niemiec v. Allstate Ins. Co.*, 721 A.2d 807, 810 (Pa.Super.1998). This is "to ensure that the class proponent is presenting a non-frivolous claim capable of surviving preliminary objections." *Janicik v. Prudential Ins.Co. of America*, 305 Pa.Super 120, 129 (1982). Thus, a trial court reviewing preliminary objections "should not ... concern[ ] itself with the preliminary objections to the class actions allegations at all." *Sherrer v. Lamb*, 319 Pa.Super. 290, 294, 466 A.2d 163, 165 (1983). *See also* Pa.R.Civ.P. 1705 (stating that issues of fact with respect to the class action allegations are not to be raised in preliminary objections); *Niemic*, 721 A.2d at 810 (distinguishing between the certification and the pleading states by stating that "upon a motion for class action certification the court considers whether a claim may be brought by a class of plaintiffs, whereas at the earlier, preliminary stage, the court must decide whether there exists a valid claim to be brought at all, no matter who the plaintiff"). [7]

7 One case appears to be an isolated exception to this rule. In *Adamson v. Commonwealth*, 410 A.2d 392, 49 Pa. Commw. 54 (1980), the Superior Court thoroughly measured the proposed class against the class requirement and, based on the defendant's preliminary objections, concluded that the plaintiff's action would not benefit the class. This, however, is the only case where a Pennsylvania court has examined the class itself when reviewing preliminary objections and appears to violate the principle set forth in later cases.

Weiler, slip-op at 8-9. Here, the court must limit its current examination of those issues properly raised in preliminary objections, not at a certification hearing. Consequently, the ability of the plaintiffs to sustain this suit in a class action cannot be considered now, and the objections attacking the class allegations must be overruled.

VI. The Preliminary Objections Asserting Agreement for Alternative Dispute Resolution is Overruled

Defendant PRC argues that the plaintiffs "agreed to resolve all claims between $5,000 and $35,000 in amount by submitting such claims to a single arbitrator for the American Arbitration Association." Defs' P.O. Mem of Law at 17. Therefore, PRC

argues that "the existence of the arbitration provision divests this Court of jurisdiction." Id. The plaintiffs argue that the present action is beyond the scope of the arbitration provision, and therefore it does not apply here.

*11 The standard of review for a preliminary objection asserting an agreement for alternative dispute resolution is well established.[8] When there is a dispute as to whether arbitration should be compelled "judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration agreement." *Midomo Company, Inc. v. Presbyterian Housing Development Co.*, 739 A.2d 180, 186 (Pa.Super.1999). *See also Santiago v. State Farm Insurance Co.*, 453 Pa.Super. 343, 683 A.2d 1216, 1217-18 (1996). Thus, when considering a preliminary objection asserting an agreement to arbitrate, a court may not consider the merits of the dispute. *Mesa v. State Farm Insurance Co.*, 433 Pa.Super. 594, 641 A.2d 1167, 1168 (1994).

8 Although the instant case is in the form of a preliminary objection asserting an agreement for alternative dispute resolution, this court applies the same standard to the present case as that for a petition to compel arbitration. *Midomo Company, Inc. v. Presbyterian Housing Development Co.*, 739 A.2d 180 (Pa.Super.1999) (holding that although appellants' preliminary objections are not precisely in the form of a petition to compel arbitration, nevertheless, "the court will not exalt form over substance." *Id.* at 186.)

As the Pennsylvania Supreme Court observed, agreements to settle disputes by arbitration are not only valid but favored by state statute. *Borough of Ambridge Water Authority v. Columbia*, 458 Pa. 546, 328 A.2d 498, 500 (1974). Furthermore, interpretation of an arbitration provision is controlled by rules of contractual construction. Therefore, proper interpretation of a contract "is a question of law. [T]he ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." *Liddle v. Scholze*, 768 A.2d 1183, 1185 (Pa.Super 2001) (citations omitted).

Applying these standards to the present case, the court submits that, first, there exists a valid arbitration clause between PRC and the plaintiffs only, and, further, the dispute involved here is beyond the scope of this clause. To begin with, there exists a valid arbitration agreement. The Work Authorization Form, which contains the arbitration agreement, was entered into between PRC and the plaintiffs only. Defs' P.O. Mem of Law, Exhibit G (containing signatures of the plaintiffs and the representative of PRC). However, there is nothing in the record which reflects a valid and binding arbitration agreement between First Liberty and the plaintiffs.

Although there exists a valid arbitration agreement between the plaintiffs and PRC, the present dispute, a consumer fraud case, is beyond the scope of the agreement. Here, the agreement is printed on a construction contract for repairs to be completed by PRC on the plaintiffs' homes. The arbitration provision provides for:

> On all claims and/or cause of actions exceeding $5000 and which do not exceed $35,000, the contractor and owner shall submit said claims before a single arbitrator for the American Arbitration Association. The party initiating the claim shall pay the initial costs subject to the decision of the arbitrator to apportion costs. All decisions by the arbitrator shall be binding and enforceable by a court of law. This contract covers and supercedes conversations and agreements, expressed or implied, between the parties, their agents or representatives.

*12 Pls' Reply Mem. of Law at 28-29. Although this arbitration provision does not explicitly exclude the current dispute,[9] it is clear from the intent of the parties that it was meant to cover claims arising from the actual repairs to be completed on plaintiffs homes. *Liddle*, 768 A.2d 1183 (giving effect to the intent of the parties as reasonably manifested by the language of their written agreement); *Highmark, Inc. v. Hospital Service Ass'n of Northeastern Pa*, 785 A.2d 93 (Pa.Super.2001) ("[T]he issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide.") (citation omitted). Here, the plaintiffs have no claims against PRC for the construction done pursuant to the Work Authorization Form, but instead have claims based on the alleged fraudulent lending practices of the defendants. Since the current dispute is beyond the scope of the arbitration agreement, this court is not divested of its jurisdiction and therefore overrules the preliminary objection.

9 In support of their assertion that Pennsylvania courts refuse to impose a limitation of the scope of an arbitration agreement where no limitation was explicitly stated, the defendants direct this court to several cases. However, none of these are persuasive. In *Kardon v. Portare*, 466 Pa. 306, 333 A.2d 368 (1976), the court held that a controversy contractually assigned to arbitration should remain in arbitration for determination of procedural details. However, *Kardon* does not suggest that a dispute, distinct from the contract to which the arbitration clause was found, should be bound by the same arbitration agreement.

Furthermore, the present arbitration provision is distinguishable from that in *Goral v. Fox Ridge, Inc.* 453 Pa.Super. 316, 683 A.2d 931 (1996), and *Anderson v. Erie Ins. Group*, 384 Pa.Super. 387, 395, 558 A.2d 886, 890 (1989). Unlike the provision before the court presently, both the arbitration provisions in those cases contained language which clearly defined the scope of the arbitration agreement. *Goral*, 683 A.2d at 931 ("Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration"); *Anderson*, 558 A.2d at 888 ("Disagreement over the legal right to recover damages or the amount of damages will be settled by arbitration ..."). Here, no such language exists. Therefore, the court must determine the scope of the agreement. *Highmark, Inc. v. Hospital Service Ass'n of Northeastern Pa.* 785 A.2d 93 (Pa. Super 2001) ("[T]he issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide.") (citation omitted).

VII. The Court Overrules the Preliminary Objection to the Demand for Punitive Damages

The plaintiffs ask for punitive damages against the defendants. However, the defendants argue that the claim is legally insufficient and insufficiently specific. The court disagrees. In their Amended Complaint, the plaintiffs concede that their punitive damages demand relate only to the tort claims of breach of fiduciary duty, common law fraud and civil conspiracy. These are claims for which the plaintiffs may recover punitive damages. *Delahanty v. First Pennsylvania Bank*, 318 Pa.Super. 90, 130, 464 A.2d 1243, 1262-63 (1983) (stating that punitive damages are available only in tort actions where defendant's conduct was willful, malicious, wanton, reckless or oppressive). Whether the plaintiffs can prove that the defendants acted outrageously, willfully, maliciously, and intentionally, will be determined by the evidence presented. For now, however, it is enough that the factual averments of the entire complaint are legally sufficient to support a demand for punitive damages. Therefore, the preliminary objection is overruled and the plaintiffs' demand for punitive damages under Counts II, IV and V may stand.

VIII. The Court Overrules the Preliminary Objection to the Demand for an Accounting, Rescission, and Restitution

The defendants request that the plaintiffs' demands for an accounting, rescission and restitution be dismissed by this court. In requesting an accounting, a complaint "seeks to turn over to the party wrongfully deprived of possession all benefits accruing to defendant by reason if its wrongful possession." *Boyd & Mahoney v. Chevron U.S.A.*, 419 Pa.Super. 24, 35, 614 A.2d 1191, 1197 (1992). In reviewing a request for an accounting, "it is reasonable for the court to permit some latitude since often times it is not certain what claims a plaintiff may have until the accounting is completed." *In re Estate of Hall*, 517 Pa. 115, 136, 535 A.2d 47, 58 (1987). An equitable accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation (of the correct amount due) is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law. *Rock v. Pyle*, 720 A.2d 137, 142 (Pa.Super.Ct.1998) (citations omitted); *See also Pittsburgh's Airport Motel, Inc. v. Airport Asphalt and Excavating Co.*, 469 A.2d 226, 229 (Pa.Super.1983); *Meier v. Maleski*, 648 A.2d 595 (Pa.Commw.Ct.1994).

*13 Here, all the elements are met to withstand a demurrer to a request for an accounting. The plaintiffs request an accounting for all monies paid to the defendants as a result of the alleged misleading closing cost estimates. Am.Compl. at ¶ 69. The plaintiffs also have alleged that a fiduciary relationship existed between themselves, PRC and First Liberty. Id. at ¶¶ 51-56. The request for an accounting may only survive if one or more of the other counts survive a demurrer as well. Since the claims of breach of fiduciary duty, common law fraud, and civil conspiracy, will withstand a demurrer, the demand for an accounting may also remain.

The plaintiffs also demand the remedies of rescission and restitution. The purpose of equitable rescission is to return the parties as nearly as possible to their original positions where warranted by the circumstances of the transaction. *Gilmore v. Northeast Dodge Co., Inc.*, 278 Pa.Super. 209, 420 A.2d 504 (1980) (citations omitted). Furthermore, if a plaintiff alleges fraud in a transaction, a right of rescission is established. *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757 (Pa. Super 1999). Here, having already determined that the plaintiffs

have sufficiently plead common law fraud, this court allows for the plaintiffs' demand for a rescission to be plead.

In addition to granting equitable relief, in the form of rescission, a court may also allow for the plaintiffs restitution of losses incurred. "Restitution ... is a remedy not inconsistent with rescission." *Baker*, 725 A.2d at 766 (citations omitted). Furthermore, "restitution being an equitable remedy is ... a permissible remedy under the [UTPCPL]." *Commonwealth by Corbett v. Ted Sopko Auto Sales and Locator*, 719 A.2d 1111, 1114 (Pa.Commw.1998). Moreover, the doctrine of unjust enrichment expresses the general principle that a party unjustly enriched at the expense of another should be required to make restitution for benefits received where it is just and equitable to do so and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. *Crawford's Auto Center v. Pennsylvania State Police*, 655 A.2d 1064 (Pa.Cmwlth.1995). Here, the court has already determined that the plaintiffs have sufficiently alleged claims based on violations of the UTPCPL, and unjust enrichment. Therefore, the plaintiffs may plead a demand for restitution.

CONCLUSION

For the reasons stated above, this court sustains in part the preliminary objections of the defendants. Furthermore, this court directs plaintiffs to file Amended Verifications to their Amended Complaint pursuant to Pa.R.C.P. 1024.

All Citations

Not Reported in A.2d, 2002 WL 372939

End of Document

2001 WL 1855055
Pennsylvania Court of Common Pleas.

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

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

OPINION

HERRON, J.

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

BACKGROUND

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

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

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

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

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

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

DISCUSSION

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

*2 NEBB objects to the second amended complaint as untimely. The court overrules the objection. In their motion for reconsideration, the plaintiffs set forth just cause for the five-day delay, and the court sees no prejudice accruing to the defendants from the delay. *Peters Creek Sanitary Auth. v. Welch*, 545 Pa. 309, 681 A.2d 167, 170 (1996).

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

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

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

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

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

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

Plaintiffs did not properly serve Dolim and the court cannot exercise personal jurisdiction over Dolim. *Sharp v. Valley Forge Med. Ctr. and Heart Hosp.*, 422 Pa. 124, 221 A.2d

185, 187 (1966) ("The rules relating to service of process must be strictly followed, and jurisdiction of the court over the person of the defendant is dependent upon proper service having been made...."). The court sustains the preliminary objection to improper service and personal jurisdiction. The court will order service of the complaint on Dolim stricken. Should the plaintiffs have the complaint reinstated, they shall serve Dolim in Pennsylvania within 30 days after that reinstatement or outside of Pennsylvania within 90 days after that reinstatement. *See* Pa.R.C.P. 401 *and* 404; *Collins v. Park*, 423 Pa.Super. 601, 621 A.2d 996, 999 (1993) (holding that, "[w]here service of process is defective, the proper remedy is to set aside the service[,]" and that plaintiff cannot proceed against defendant until plaintiff effects proper service on the defendant).

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

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

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

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

Count I alleges that defendants' actions in decertifying the plaintiffs were "omissions to do acts which are specifically required to be done under the NEBB by-laws and under the statutory and common law, the requirements of which are incorporated under the NEBB charter and by-laws." Second Amended Complaint ¶ 48. 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.

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).

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]

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.

***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.

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

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

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

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

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

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

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

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

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

the demurrer and specificity objections of Casey Carlin Management to Count IV.

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The court will enter a contemporaneous order sustaining in part the defendants' preliminary objections in accordance with this opinion. As there were dozens of objections by nine defendants to one confusing complaint, the order is lengthy.

ORDER

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

DEFENDANT DOLIM

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

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

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

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

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

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

DEFENDANT NEBB

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

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

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

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

DEFENDANT PEBA

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

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

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

DEFENDANT SALKIN

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

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

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

DEFENDANTS ROATEN AND EAB

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

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

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

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

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

DEFENDANTS CASEY, CARLIN MANAGEMENT AND REARDON

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

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

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

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

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

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

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

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

All Citations

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

End of Document

2014 WL 10789964
Only the Westlaw citation is currently available.
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.

* Former Justice specially assigned to the Superior Court.

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

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.

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]

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.").

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.*

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.

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. Stucka, 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.

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

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 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.)

***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]

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.

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

End of Document

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.

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".

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.

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.

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.

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.).

***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.

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.

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.

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.).

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

End of Document

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.
|
Submitted Dec. 12, 2014.
|
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.

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

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.

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).

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

End of Document

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]

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.

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.

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

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]

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.

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]

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

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.

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.

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.

End of Document

1993 WL 766113 (Pa.Com.Pl.)
Court of Common Pleas of
Pennsylvania, Luzerne County.

Morgan
v.
Harnischfeger Corporation

No. 3929-C of 1990.
|
March 5, 1993

Attorneys and Law Firms

Neil T. O'Donnell, John M. Elliott, and *Thomas J. Elliott,* for plaintiffs.

Harry V. Cardoni, for defendant Roadway Safety Inc.

Joseph A. McGinley, for defendant Kobe Steel Ltd.

Ralph J. Johnston Sr., for defendant L.B. Smith Inc.

Chester C. Corse, for defendant Penn East Corp.

Opinion

MUNDY, J.

*1 This matter returns to the court on the petition for reconsideration of the order of this court dated September 28, 1992, filed by the defendants, L.B. Smith Inc., Kobe Steel Ltd, Century II Inc., Penn East Corporation, Roadway Safety Inc., and Michael Baker Inc.

The defendants' petition for reconsideration centers on the recent holding of our Superior Court in *Aivazoglou v. Drever Furnaces,* 418 Pa. Super. 111, 613 A.2d 595 (1992).

The Superior Court in *Aivazoglou* held that the filing of a petition for leave to join additional defendants is not effective to toll the expiration of a statute of limitations **177 in the underlying action for personal injuries against the joined defendants.

The defendants cite *Aivazoglou* in the present case and argue that the plaintiffs' failure to seek leave of this court join them as defendants, prior to the expiration of the statute of limitations, precludes their joinder in this cause of action.

In our previous opinion and order we clearly noted that by virtue of the complaints filed against and served upon them, each of the additional defendants had received notice, prior to the expiration of the statute of limitations, of the plaintiffs' cause of action. While the complaints filed were not in strict compliance with the Rules of Civil Procedure, leave of court not being sought prior to the filing, we noted that Pa.R.C.P. 126 empowered us to disregard an error or defect of procedure which does not affect the substantial rights of the parties.

In our view, since the joined defendants had received notice of the cause of action, and the basis therefor, prior to the expiration of the statute, their substantial rights were not affected.

After a thorough review of the *Aivazoglou* case, our view has not changed. It is important to note that the court therein reaffirmed that notice to the defendant is one of the underlying purposes for a prescribed statute of limitations.

"The Pennsylvania Supreme Court has repeatedly emphasized the important purposes which are served by statutes of limitation. They not only serve to give prompt notice to defendants that claims are being made against them, but they prevent stale claims and thus promote **178 finality and stability..." (citations omitted) *Id.* at 114, 613 A.2d at 597.

*2 The court, equally emphasized that the *lack of notice* to the aggrieved defendants in *Aivazoglou* was the impetus behind preclusion of the plaintiff's claim against them:

"The plaintiffs knew well before the running of the statute of limitations that claims could be asserted against additional manufacturers of asbestos. They could have commenced an action against the additional manufacturers of asbestos--and thereby tolled the statute of limitations--in any one of three means provided for commencement of an action by the Rules of Civil Procedure. They could have commenced an action by filing (1) a praecipe for writ of summons; (2) a complaint, or (3) an agreement for amicable action.... If they had done so, the defendants would have been duly served and would have received prompt notice that they had been sued." (footnote omitted) (citation omitted) *Id.* at 116, 613 A.2d at 598.

In the case at bar the plaintiffs complied with the directives of the rule cited by the *Aivazoglou* court (Pa.R.C.P. 1007). Having commenced the action plaintiffs filed a complaint, on the defendants prior to the expiration of the statute, albeit

without leave of court and in violation of the procedural rules. Notwithstanding the procedural violation, however, it is without question that the objecting defendants received notice that a cause of action had been commenced against them, and the basis for that cause of action, prior to the expiration of the statute.

Therefore, we reiterate our first holding that the procedural error brought about by the failure to seek leave of this court prior to joining the additional defendants is not an adequate basis for shielding them from potential **179 liability for their alleged negligent actions where the defendants had formal notice of the basis for the claim prior to the expiration of the statute.

Accordingly, this court enters the following:

ORDER

It is hereby ordered, adjudged and decreed as follows:

(1) The petition for reconsideration filed by the defendants, L.B. Smith Inc., Kobe Steel Ltd., Century II Inc., Penn East Corporation, Roadway Safety Inc., and Michael Baker Inc., is denied and dismissed; and

(2) The prothonotary is directed to mail notice of entry of this order to all counsel of record pursuant to Pa.R.C.P. 236.

All Citations

1993 WL 766113, 21 Pa. D. & C.4th 176

End of Document

CERTIFICATE OF SERVICE

I, David S. Gaines, Jr., hereby certify that I caused to be served on May 31, 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.