IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

PENNSYLVANIA BUSINESS BANK	:	MAY TERM, 2002
	:	
vs.	:	NO. 2507
	:	
FRANKLIN CAREER SERVICES, LLC, ET AL.	:	COMMERCE PROGRAM
	:	

PETER C. MORSE AND R.. BRUCE DALGLISH	:	
	:	
vs.	:	
	:	
FRANKLIN CAREER SERVICES, INC., ET AL.	:	
	:	

OPINION

In May of 2002, Pennsylvania Business Bank ("PBB") initiated this lawsuit against Franklin Career Services, LLC ("Franklin") and MP III Holdings, Inc. ("MP III"). Peter C. Morse and R. Bruce Dalglish, the principal stockholders of MP III, intervened as plaintiffs. Subsequently, Morse and Dalglish joined as defendants 22 additional parties: Leeds Equity Partners III, L.P., Leeds Equity Advisors, Inc., Leeds Equity Associates, L.P., Leeds Equity Management, LLC, Leeds Equity Executive Investors, L.P., Leeds Octavian Partnership, Leeds Funding LLC, Leeds Weld & Co, Leeds Equity Partners I, L.P., Advance Capital Partners, L.P., Advance Capital Associates, L.P., Leeds Advance Capital Management, Advance Capital Off Shore Partners, L.P., Advance Capital Off Shore Associates, Leeds Group, Inc., Richmont, Inc., Leeds Equity Partners IV, L.P., Richmont Leeds Education Company LLC, Robert A. Bernstein, William F. Weld, Jeffrey T. Leeds, and Peter A. Lyons (referred to, collectively, as the " 22 Additional

Parties Joined By Intervening Plaintiffs"). Defendant MP III filed cross-claims against the "22 Additional Parties Joined By Intervening Plaintiffs."

Trial was scheduled to begin on October 22, 2006. Shortly before trial, defendant Franklin filed for bankruptcy. Plaintiff PBB determined that its only remedy was in bankruptcy court, and this case proceeded to trial solely on behalf of intervening plaintiffs Morse and Dalglish and defendant MP III (collectively, the "Intervening Plaintiffs") and against the "22 Additional Parties Joined By Intervening Plaintiffs." At trial, the Intervening Plaintiffs attempted to prove that each of the "22 Additional Parties Joined By Intervening Plaintiffs" tortiously interfered with a supposed merger agreement between MP III and Franklin.

Prior to the events which precipitated this action, MP III was in the business of training truck drivers. One of their main competitors in that industry was Franklin. A financial crisis in the industry occurred when the business entity that provided most of the funding for loans for student drivers went out of business. Jeffrey Woodcox, on behalf of Franklin, engaged in conversations with Morse, Dalglish and others to "roll up the industry" and thereby create a monopolistic situation. To that end, Woodcox invited truck driver training providers from all over the country to a meeting in Louisville for the purpose of "rolling up" the industry

Although an industry wide agreement could not be effectuated, Woodcox met separately with Dalglish, and, on March 25, 2002, MP III and Franklin entered into a two and a half page "letter agreement" regarding a proposed merger. This March 25th agreement between Woodcox, acting on behalf of Franklin, and Morse and Dalglish, acting on behalf of MP III, was offered into evidence and marked as D-244. In relevant

part it reads: “Franklin and [MP III] agree to act in good faith to immediately complete such agreements as will be necessary to effect the Acquisition [a/k/a the merger].” The overwhelming evidence presented at trial regarding the parties’ subsequent course of conduct demonstrated that all parties viewed the letter agreement as an agreement to negotiate in good faith with respect to additional, essential, terms of the intended merger. This document was not a final and complete statement of the terms of the merger.

During the parties’ negotiation of the terms of the proposed merger, both Woodcox/Franklin and Morse/Dalglish/MP III demanded modifications of the provisional terms outlined in the letter agreement. During the course of such negotiations between the parties, MP III, Morse, and Dalglish revealed changed financial conditions, adopted different positions, and imposed additional requirements not contained in the letter agreement. These new terms were unacceptable to Franklin, and, after good faith efforts by the parties, the merger negotiations ceased.

During the due diligence period, Franklin discovered that MP III’s finances were significantly different than MP III had represented. The sums owed by MP III at the time the letter agreement was signed were subsequently revealed to be larger and larger as Morse and Dalglish tried to deal with MP III’s severe cash-flow problem. In addition, the parties’ inability to agree on the terms of MP III’s intended consulting contract with Dalglish became another impediment to merger because Dalglish insisted on full pay for minimal work.

Finally, Woodcox, acting on behalf of Franklin, made a good faith decision to end negotiations with MP III and not to finalize the merger. As a result, on May 24, 2002,

counsel for Franklin officially advised MP III that "Franklin will not proceed with the proposed acquisition of [MP III]."[1]

At trial, MP III, Morse and Dalglish claimed that Franklin's decision to cease further negotiations with the MP III was not caused by Woodcox's legitimate business determination that the ever changing terms of the proposed merger were not in Franklin's best interest. Instead, Intervening Plaintiffs attempted to prove that each of the "22 Additional Parties Joined By Intervening Plaintiffs" had tortiously interfered with MP III's contractual relationship with Franklin.

After 8 days of trial and after both parties had rested, all "22 Additional Parties Joined By Intervening Plaintiffs" moved for a directed verdict on the claims against them. At oral argument on the Motion for Directed Verdict, Intervening Plaintiffs conceded that they had no valid claim against the majority of the defendants whom they had named and against whom they had prosecuted their claims for over four years. In agreeing to the entry of directed verdicts against the following defendants, Intervening Plaintiffs admitted that several of them do not exist and that no evidence had been offered to show that the others had anything to do with either Franklin or the proposed merger.

Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Equity Executive Investors, L.P. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Octavian Partnership. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Funding LLC. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Weld & Co. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Equity Partners I, L.P.

[1] Trial Ex. IP 59, p. 3.

Intervening Plaintiffs did not contest entry of a directed verdict in favor of Advance Capital Partners, L.P. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Advance Capital Associates, L.P. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Advance Capital Management. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Advance Capital Off Shore Partners, L.P. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Advance Capital Off Shore Associates. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Group, Inc. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Richmont, Inc. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Leeds Equity Partners IV, L.P. Intervening Plaintiffs did not contest entry of a directed verdict in favor of Richmont Leeds Education Company LLC. Intervening Plaintiffs did not contest entry of a directed verdict in favor of William F. Weld. And finally, Intervening Plaintiffs did not contest entry of a directed verdict in favor of Jeffrey T. Leeds.[2]

Intervening Plaintiffs claimed to have offered evidence against only Leeds Equity Partners III, L.P., Leeds Equity Associates, L.P., Leeds Equity Management, LLC, Leeds Equity Advisors, Inc., Robert A. Bernstein and Peter A. Lyons. The undisputed evidence at trial showed that these 6 defendants did have some relationship to Franklin as follows:

1. Leeds Equity Partners III, L.P. ("LEP III")[3] invested $29,422,000.00 in Franklin.[4] In return for this investment, LEP III was given a minority interest in Franklin and the

[2] N.T., Nov. 2, 2006, pp. 30-37.

[3] Leeds Equity Associates, L.P. was the general partner of LEP III, and Leeds Equity Management, LLC was the general partner of Leeds Equity Associates, L.P.

[4] Trial Ex. D-36.

right to appoint two of Franklin's board members, and LEP III's consent was required before Franklin could undertake the proposed merger with MP III.[5]

2. Leeds Equity Advisors, Inc. ("Leeds Advisors") entered into a Management Services Agreement with Franklin under which Leeds Advisors' employees, Bernstein, Weld, Leeds and Lyons, provided financial advisory services to Franklin. That Management Services Agreement stated that Franklin "desire[d] to receive financial and advisory services from [Leeds Advisors] and to obtain the benefit of the experience of [Leeds Advisors] in business and financial management."[6] Leeds Advisors was paid $16,666 a month in exchange for providing "financial advisory services regarding the business of [Franklin] and such other services relating to [Franklin] as may from time to time be reasonably requested by the Board of Directors or executive officers of [Franklin]."[7]

3. Defendant Bernstein was an employee of Leeds Equity Advisors. As such, he provided financial advisory services to Franklin under the Management Services Agreement. He was also a member of Franklin's board of directors.

4. Lyons was an employee of Leeds Equity Advisors. As such, he provided financial advisory services to Franklin under the Management Services Agreement.

All of the evidence presented at trial regarding these six remaining defendants demonstrated that their interests were at all times entirely aligned with Franklin's and that they had legitimate business reasons, and contractual or fiduciary obligations, to express

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[5] *Id.*

[6] Trial Ex. IP 641, p. 1.

[7] *Id.*, p. 1-2.

their honest opinion regarding the proposed merger. There was, however, no evidence whatsoever presented that any of them actually interfered with the proposed merger, nor that they counseled Woodcox/Franklin to terminate the negotiations, nor even that they expressed any opinion to Woodcox/Franklin that the negotiations should cease.

The elements of a cause of action for intentional 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 the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
> (3) the absence of privilege or justification on the part of the defendant; and
> (4) the occasioning of actual legal damage as a result of the defendant's conduct.[8]

Intervening Plaintiffs failed to present any evidence of any "purposeful action" taken by any defendant to interfere with the proposed merger. Even if evidence of purposeful action had been presented, the remaining defendants' relationship to Franklin rendered their honest advice and counsel privileged and justified. Based on their relationship with Franklin, they were entitled to suggest that Franklin abandon the proposed merger, but there was no evidence that they did so advise.

The Intervening Plaintiffs relied upon very weak, circumstantial innuendo to oppose the entry of directed verdicts against the six remaining defendants. Intervening Plaintiffs could only direct the court to the fact that Franklin's letter terminating negotiations was sent by a lawyer from Kirkland & Ellis. Kirkland & Ellis, a major law firm in Chicago, also represented many of the defendants. Intervening Plaintiffs claim

[8] Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

that this letter and phone records, which showed nothing more than phone calls from Bernstein and other unidentified persons, who may have been connected to one or more of the 22 Additional Parties Joined By Intervening Plaintiffs, to some person at Kirkland & Ellis, are somehow probative of a conspiracy to interfere with the proposed merger. They are not.

Intervening Plaintiffs also relied upon innuendo evidence that Bernstein and Lyons may have discussed the terms of the termination letter with Kirkland & Ellis and Woodcox.[9] However, that evidence in no way showed that either Bernstein or Lyons compelled, directed, or even advised Woodcox to terminate Franklin's negotiations with MP III. Most significantly, there is not even any evidence that either Bernstein or Lyons communicated displeasure with the deal to Woodcox. Neither was there any evidence that there was any vote taken in which they voted against the deal.

At all times, each of the six remaining additional defendants acted as an investor in, a director or agent of, or a financial advisor to, Franklin. Every one of them acted as Franklin and not as a third parties foreign to Franklin's relationship with MP III.

> Essential to a right of recovery under this section is the existence of a contractual relationship between the plaintiff and a "third person" other than the defendant. By definition, this tort necessarily involves three parties. The tortfeasor is one who intentionally and improperly interferes with a contract between the plaintiff and a third person. . . . A corporation is a creature of legal fiction which can "act" only through its officers, directors and other agents. Acts of a corporate agent which are performed within the scope of his or her authority are binding upon the corporate principal. . . . [Where] a plaintiff has entered into a contract with a corporation, and that contract is terminated by a corporate agent who has acted within the scope of his or her authority, the corporation and its agent

[9] Trial Ex. IP 12, p. RB 0135.

> are considered one so that there is no third party against whom a claim for contractual interference will lie.[10]

Hypothetically, even if one or more of the remaining defendants could somehow be viewed as a party acting separately from Franklin, their actions were not improper.

> In determining whether a particular course of conduct is improper for purposes of setting forth a cause of action for intentional interference with contractual relationships, or, for that matter, potential contractual relationships, the court must look to section 767 of the Restatement (Second) of Torts. This section provides the following factors for consideration: 1) the nature of the actor's conduct; 2) the actor's motive; 3) the interests of the other with which the actor's conduct interferes; 4) the interests sought to be advanced by the actor; 5) the proximity or remoteness of the actor's conduct to interference, and 6) the relationship between the parties.[11]

Even had there been any evidence that defendants advised Franklin regarding its merger with MP III,[12] they were required to give such advice in accord with their contractual and/or fiduciary responsibilities to Franklin.[13] There cannot have been anything improper about such advice. There is no evidence that any advice contra the merger was ever given.[14]

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[10] Daniel Adams Associates, Inc. v. Rambach Public, Inc., 360 Pa. Super. 72, 79-82, 519 A.2d 997, 1000-1002 (1987).

[11] Strickland, 700 A.2d at 985.

[12] No evidence of any such advice was presented.

[13] "One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice." Restatement (Second) Torts, § 772, cited with approval in Menefee v. Columbia Broadcasting System, Inc., 458 Pa. 46, 56, 329 A.2d 216, 221 (1974) (Individual defendants, "as employees of [defendant] radio station with a privilege to advise the station on handling its employees, were privileged to cause the station to terminate the [plaintiff's] contract.")

[14] In fact, the evidence showed that at least one of the "22 Additional Parties Named by Intervening Plaintiffs," Weld, was in favor of the merger.

Intervening Plaintiffs conceded that Leeds Advisors did nothing other than perform its duties towards Franklin under the Management Services Agreement. Such performance was undertaken in large part by Leeds Advisors' employees, Bernstein and Lyons. Counsel admitted that Leeds Advisors, acting through its employees, "did what it was supposed to do according to its contract"[15] and did not give Franklin any untruthful information or advice.[16]

Without any question, the record reflects that Bernstein and Lyons did not veto the merger, they had a fiduciary responsibility to provide their best advice on the merger, and they had a contractual obligation to advise Franklin. Any advice that Intervening Plaintiffs speculate Bernstein or Lyons may have given in which they questioned the advisability of the merger transaction was proper and privileged.[17]

As defendants concisely and accurately summarized in their written Motion for a Directed Verdict, "[h]ere plaintiffs have not sustained their burden of proving any interference, much less improper interference. After 8 days of trial testimony, there is not one scintilla of evidence regarding conduct by any defendant that could give rise to a claim of tortious interference."[18] "Totally contrary to plaintiffs' theory of their claim, the evidence shows that the actions of defendants were geared toward protecting Franklin's interests and their own legitimate legal and financial interest."[19]

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[15] N.T., Nov. 2, 2006, p. 56.

[16] *Id*, p. 59.

[17] The court again notes that there was no evidence that any such advice was given.

[18] Motion for Directed Verdict, p. 15.

[19] *Id*., p. 16.

Intervening Plaintiffs also complain in their post verdict motion that the decision to bifurcate was error. "The decision whether to bifurcate is entrusted to the sound discretion of the trial court, which is in the best position to evaluate the necessity for such measures."[20] Since this court correctly found that the evidence failed to present even a prima facie claim of liability, it is inconceivable that the court's decision to bifurcate, so as to eliminate days of trial testimony related solely to damages, could in any way have been prejudicial.

For the reasons set forth above, the Judgment of the court granting a directed verdict should be sustained.[21]

Dated: January 14, 2008

MARK I. BERNSTEIN, J.

[20] Gallagher v. Pa. Liquor Control Bd., 584 Pa. 362, 374, 883 A.2d 550, 557 (2005).

[21] Intervening Plaintiffs also claim this court erred in sustaining an objection to a question regarding the capacity in which Bernstein believed he was acting, where he necessarily was simultaneously acting in several capacities. The witness' opinion as to the capacity in which he acted is irrelevant. It is not possible to determine that a person who simultaneously and properly wears many hats in a transaction was wearing only one at any given time.