IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CBG OCCUPATIONAL THERAPY INC. d/b/a CGB, and DÉCOR UNLIMITED	: APRIL TERM, 2003
Plaintiffs	: No. 1758
v.	: Commerce Program
BALA NURSING AND RETIREMENT CENTER, LTD. PARTNERSHIP MDC ASSET MANAGEMENT CORPORATION PHILIP R. MILLER, and CENTER FOR REHABILITATIVE THERAPIES, INC.	: Control No. 010592

ORDER

AND NOW, this 27th day of January 2005, upon consideration of defendants' Motion for Reconsideration of this court's denial of defendants' Motion for Summary Judgment and a complete reevaluation of the issue presented in the Summary Judgment Motion, including a review and analysis of the original memoranda submitted in support and opposition of that Motion, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that:

(1) This court's Order of April 8, 2004 is **Vacated**.

(2) Summary Judgment in favor of defendants is **Granted** as to Counts II through VI, and

(3) Counts II through VI of the Complaint are **Dismissed**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CBG OCCUPATIONAL THERAPY INC. d/b/a CGB, and DÉCOR UNLIMITED	: APRIL TERM, 2003 :
Plaintiffs	: No. 1758 :
v.	: Commerce Program :
BALA NURSING AND RETIREMENT CENTER, LTD. PARTNERSHIP MDC ASSET MANAGEMENT CORPORATION PHILIP R. MILLER, and CENTER FOR REHABILITATIVE THERAPIES, INC.	: : : : : : : : Control No. 010592

.....

O P I N I O N

Albert W. Sheppard, Jr., J. …… January 27, 2005

Defendants, Bala Nursing and Retirement Center, Ltd. Partnership ("Bala"), MDC Asset Management Corporation ("MDC"), Philip R. Miller ("Miller") and Center for Rehabilitative Therapies, Inc. ("CRT"), have filed a Motion for Reconsideration of this court's denial of their Motion for Summary Judgment.

Upon reflection and a complete review of the submissions filed in support of and in opposition to that original Motion for Summary Judgment, the court has concluded that its denial of the Motion was improvidently entered and in error. Accordingly, the Order of April 8, 2004 will be vacated. Further, Summary Judgment will be entered in favor of defendants on Counts II through VI for the reasons discussed below.

In summary, Counts II through V are dismissed based on application of the statute of limitations.[1] Further, Counts V and VI are dismissed for failure to provide evidence sufficient to sustain these claims. The Motion is denied as to Count I (Contract) of the Complaint.

BACKGROUND

On December 3, 1997, defendant CRT and plaintiff CGB entered into a Rehabilitation Management Services Agreement ("Agreement"). Section 6 of the Agreement provided that: "[T]he term of the Agreement shall be for a period of two year(s) from the date of the execution." The Agreement also called for at least 60 days notice (after the initial two years) in the event that a party chose not to renew. CGB agreed to manage rehabilitation services, which CRT agreed to provide to defendant Bala. CGB was responsible for hiring therapists who would become CRT's employees working at Bala under CGB's management. Plaintiffs allege that the recruitment fees were to be paid by CRT to CGB for hiring and recruiting therapists.

On July 1, 1998, CRT assigned to Bala all of its rights, interest and obligations in the Agreement. On March 22, 1999, Gordon Nedwed, Bala's administrator, gave notice to CGB that Bala was terminating the Agreement. CGB took the position that this notice was in violation of the Agreement.

On January 29, 1998, CGB had sent to Bala a copy of the "Equipment Procedure and Policy," which provided that after the equipment was delivered by CGB to Bala and the therapist checked in the equipment, Bala and CRT were responsible for any losses due to the theft, destruction, or use which rendered the equipment unusable for future

[1] Counts II and IV should be dismissed for the additional reason of the "gist of the action doctrine".

patients.[2] On May 27, 1999, a representative of CGB went to Bala to pick up equipment that was to be returned to CGB. Plaintiffs allege that, when they inspected the equipment that was to be returned, they discovered that "much of the equipment . . . was used and was unacceptable for reuse." Compl. at ¶ 129. Plaintiffs allege that Mr. Nedwed refused to compensate plaintiff for the "missing" equipment.[3] Plaintiffs further allege that CGB was asked by Bala to provide Polaroid cameras and film, for which Bala has refused to pay. Id. at ¶ 136.

DISCUSSION

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows a court to enter summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action." A court must grant a motion for summary judgment when a nonmoving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in its favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-102, 674 A.2d 1038, 1042 (1996). A motion for summary judgment must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Pennsylvania State University v. County of Centre, 532 Pa. 142, 145, 615 A.2d 303, 304 (1992). Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered. Skipworth v. Lead Industries Ass'n., Inc., 547 Pa. 224, 230, 690 A.2d 169, 171 (1997).

[2] The therapy equipment belonged to CGB and plaintiff Décor Unlimited.
[3] Plaintiffs allege that the "old and dirty equipment had been substituted for much of the equipment inventoried on May 14, 1999." Id. at ¶ 130.

Here, defendants argue that: (1) plaintiffs knew or should have known of the alleged breach of the Agreement on or about March 22, 1999, barring plaintiffs' "Breach of Contract" claim based on the applicable statute of limitations, (2) Counts II, III, IV, V and VI[4] are time barred, (3) the claims of alleged tortious misconduct violates the "gist of the action" doctrine, (4) the allegations in the Complaint of fraud were not sufficiently pled, (5) plaintiffs have produced no documentary or other evidence to support the allegations of conspiracy, or the allegation that Bala, MDC and CRT "acted with malice and with specific intent to injure Plaintiff CGB", (6) there is no allegation in the Complaint of actions by a third party, which is a necessary element of the tortious interference claim, and (7) plaintiffs have produced no documentary or other evidence to support the allegations of Piercing the Corporate Veil.[5]

The parties disagree as to which event constituted a breach of the Agreement. Plaintiffs argue that May 20, 1999 was the date of breach, since that was the date by which defendants terminated their services in violation of the Agreement. Defendants argue that March 22, 1999, was the date of the breach because on that date defendant Bala's Administrator sent notice to plaintiff CGB terminating the Agreement, violating the notice provision of the two year Agreement entered into on December 3, 1997.

The notice sent on March 22, 1999 was a breach by anticipatory repudiation. "An anticipatory breach of contract by a promisor is a repudiation of his contractual duty before the time fixed in the contract for his performance has arrived. Such a repudiation

[4] These are for Fraud and Misrepresentation against Bala, MDC, Miller, and CRT (Count II), Conversion of therapy equipment against Bala, MDC and CRT (Count III); Civil Conspiracy against Bala, MDC, CRT and Miller (Count IV); Tortious Interference against Miller (Count V), and "Breaching the Corporate Veil" against Bala, MDC, CRT and Miller, respectively (Count VI).

[5] Plaintiffs have misnamed Count VI. For the purposes of this Opinion, "Breaching the Corporate Veil" will be referred to as "Piercing the Corporate Veil".

may be made either by word or by act. If the promisor makes a definite statement to the promisee that he either will not or can not perform his contract, this is a repudiation and will operate as an anticipatory breach unless the promisor had some justifying cause for his statement." Corbin on Contracts, § 959 (1993).

In 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies, 507 Pa. 166; 489 A.2d 733 (1985), the court set out the elements for an anticipatory breach as "an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so." citing McClelland v. New Amsterdam Casualty Co., 322 Pa. 429, 433, 185 A. 198, 200. The McClelland standard is still the rule of law in Pennsylvania. See William B. Tanner v. WIOO, Inc., 528 F.2d 262 (3d Cir.1975); McCloskey v. Minweld Steel Co., 220 F.2d 101 (3d Cir.1955); Alabama Football, Inc. v. Greenwood, 452 F. Supp. 1191 (W.D.Pa.1978); Wolgin v. Atlas United Financial Corp., 397 F.Supp. 1003 (E.D.Pa.1975), aff'd. *mem.*, 530 F.2d 966 (3d Cir.1976); Shafer v. A.I.T.S., Inc., 285 Pa. Super. 490, 428 A.2d 152 (1981).

Defendant Bala's March 22, 1999 correspondence to plaintiffs was an unambiguous notice of termination of the Agreement between CRT and CGB. Upon receiving this notice, plaintiffs could have regarded defendants' anticipatory repudiation as the breach of their Agreement. However, "[t]here is no necessity for making the statutory period of limitations begin to run against the plaintiff until the day fixed by the contract for the rendition of performance." Corbin on Contract, § 989 (1993). "For the purpose of determining when the period of limitation begins to run, the defendant's non-performance at the day specified may be regarded as a breach of duty as well as the anticipatory repudiation. The plaintiff should not be penalized for leaving to the

defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately." Id.

May 20, 1999 was, therefore, the date when defendants terminated their services, thus triggering the limitations period. Plaintiffs filed this lawsuit in April 2003, within the applicable four year statute of limitations. As a result, plaintiffs' claim for Breach of Contract (Count I) is not barred.

However, defendants argue that Counts II through V, which all sound in tort, should be barred by the statute of limitations. Plaintiffs contend that all of the defendants' conduct complained of in these Counts constitutes continuing violations and that, therefore, they are not time barred.

A continuous tort is "one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted . . . A continuing tort sufficient to toll the statute of limitations is occasioned by continual unlawful acts, *not by continual ill effects from an original violation*." David E. Poplar, Comment, *Tolling the Statute of Limitations for Battered Women After Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 Dick. L. Rev. 161, 186 (1993), *See* Curtis v. Firth, 123 Idaho 598, 603, 850 P.2d 749, 754 (1993) (quoting 54 C.J.S. Limitations of Actions 177, at 231 (1987)). (Emphasis added.)

Plaintiffs allege that the defendants committed fraud and misrepresentation by making assurances to coerce plaintiff CGB into hiring professionals for use at the defendants' facility, while having no intention of paying recruiting fees and conspiring to steal these people away by prematurely terminating the defendants' contract and keeping

these individuals for the defendants' permanent use and benefit. Compl. at ¶¶ 85-115, 138-145. The Complaint states that fraud and conspiracy were ongoing because the individuals that were hired continued to work for defendants. Id. at ¶¶ 83, 98 and 102. The Complaint goes on to state that the defendants engaged in this conduct with an intent to deprive plaintiffs of the use of these personnel for placement by the plaintiffs at other facilities, up to and including the date of filing the Complaint. Id. at ¶¶ 100-102. While the fact that two of the three individuals that were hired continued to work for defendants may be an ill effect of the defendants' alleged violation, it does not circumvent the applicable two year statute of limitations period.

As noted, the statute of limitations began to toll on May 20, 1999, the date by which plaintiff knew or had reason to know that the Agreement at issue in this case had been breached. Therefore, Counts II through V are dismissed as being time barred by virtue of the two year tort limitations period.

Counts II and IV are also dismissed under the gist of the action doctrine.

The gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims . . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." Etoll, Inc. v. Elias/Savon Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002). A tort claim is barred "where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Id. at 19.

Count II of plaintiffs' Complaint alleges fraud and misrepresentation. More specifically, plaintiffs allege an intentional failure of the defendants to pay certain fees in accordance with the Agreement, after representing that they would pay those fees. The fact that defendants may have intentionally breached a contractual duty does not give rise to a tort claim, but instead provides a basis for a breach of contract claim. Therefore, plaintiffs' claim for fraud and misrepresentation is barred by the gist of the action doctrine.

Similarly, Count IV of plaintiffs' Complaint alleges that defendants conspired and acted in concert with a common purpose to defraud plaintiff CGB of the money due to CGB under the Agreement. Compl. at ¶ 139. This claim is firmly rooted in the Agreement. Accordingly, plaintiffs' claim for conspiracy is also barred by the gist of the action doctrine.

As to plaintiffs' conversion claim, generally, "courts are cautious about permitting tort recovery based on contractual breaches." Pittsburgh Construction Company v. Paul Griffith and Saundra Griffith, 2003 Pa. Super. 374, *20, 834 A.2d 572, 581. However, "a breach of contract may give rise to an actionable tort where the wrong ascribed to the defendant is the gist of the action, the contract being collateral." The Insurance Adjustment Bureau, Inc. v. Allstate Insurance Company, 2004 Pa. Super. 381, *14, 860 A.2d 1038, 1043. Count III of plaintiffs' Complaint alleges conversion of the plaintiffs' therapy equipment. Plaintiffs allege that Bala's administrator refused to pay for the converted equipment after the Agreement had been breached. Compl. at 46. Thus, plaintiffs' conversion claim is a tort claim collateral to the contract and must be allowed to stand.

Plaintiffs assert a claim against defendant Philip Miller for his intentional interference with the relationship between CRT and plaintiff CGB and his intentional interference between plaintiff CGB and "its skilled professionals."

The Restatement (Second) of Torts § 766 provides in pertinent part:

". . . One who, without a privilege to do so, induces or otherwise purposefully causes a third person not to a) perform a contract with another, or b) enter into or continue a business relation with another is liable to the other for the harm caused thereby."[6]

Essential to the right of recovery on this theory is the existence of a contractual relationship between the plaintiff and a party other than the defendant. Nix v. Temple University, 408 Pa. Super. 369, 379, 596 A.2d 1132, 1137 (1991). A corporation cannot tortiously interfere with a contract to which it is a party. Id., (citing Menefee v. Columbia Broadcasting System, Inc., 458 Pa. 46, 329 A.2d 216 (1974)). Because a corporation acts through its agents and officers, such agents or officers cannot be regarded as third parties when they are acting in their official capacities. Id.

Concerning the alleged interference between CRT and CGB, Philip Miller was a registered agent of defendant CRT[7]. In order to determine that Miller could have tortiously interfered with the Agreement between CRT and CGB, plaintiffs must allege facts that show he was without a privilege - - that is, performing the acts alleged under this Count outside of the scope of his agency relationship with CRT. Plaintiffs, in paragraphs 87 and 88 of their Complaint, allege that Philip Miller had the ability to veto any decision made by Mr. Nedwed, Bala's administrator, and that Philip Miller was aware of the alleged issues relating to non-payment for service and therapy fees and theft

[6] The Restatement (Second) of Torts § 766 was adopted by Pennsylvania in Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895 (1971).

[7] According to Defendants' Motion for Summary Judgment, Philip Miller was the CEO of CRT.

of equipment. In paragraph 89, plaintiffs allege that Philip Miller, by not responding to phone calls or letters, approved the decisions made by Mr. Nedwed. These allegations do not demonstrate or imply that Philip Miller was acting outside of the scope of his agency relationship with CRT when he allegedly tortiously interfered with the relationship between CRT and CGB.

Similarly, with respect to plaintiffs' allegation that Philip Miller tortiously interfered with the relationship between CGB and "its skilled professionals", plaintiffs have not alleged facts that would explain how he interfered with these relationships. Plaintiffs do not allege facts sufficient to establish that Mr. Miller, without a privilege, tortiously interfered with the relationship between CGB's and "its skilled professionals". Therefore, plaintiffs' claim for tortious interference is dismissed.

In Count VI, plaintiffs allege that: "upon information and belief", defendants Bala, CRT and MDC are grossly undercapitalized for their business purpose, have failed to observe corporate formalities, have not regularly paid dividends to their owner or owners, have been siphoning funds of the corporations, have no functioning officers or directors, have not maintained adequate corporate records, and are merely facades for the operations of Philip Miller and Robert Miller. Plaintiffs ask that this court hold Philip Miller personally liable for his own acts and the alleged acts of CRT, MDC and Bala.

Plaintiffs, in their response, rely on the affidavit of Philip Miller, which states that he is/was either the CEO or the President of all of the defendant entities. From there, they leap to the conclusion that these businesses were merely an instrumentality of Miller.

In Pennsylvania, there is a strong presumption against piercing the corporate veil. Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 41-42, 669 A.2d, 893, 894 (Pa. 1995). "Piercing the corporate veil is an exception, and courts should start from the general rule that the corporate entity should be upheld unless specific, unusual circumstances call for [such] an exception." JK Roller Architects, LLC v. Tower Investments, Inc., 2003 WL 1848101, *1 (2003)(Jones)(quoting First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 577-578, 600 A.2d 601, 604 (Pa. Super. 1991). Under Pennsylvania law, the following factors are to be considered in determining whether to pierce the corporate veil: 1) undercapitalization; 2) failure to adhere to corporate formalities; 3) substantial intermingling of corporate and personal affairs; and 4) use of the corporate from to perpetuate a fraud. Id. (quoting Lumax Indus. v. Aultman, 543 Pa. 38, 669 A.2d 893 (Pa. 1995)).

In order to withstand defendants' motion for summary judgment, plaintiffs must set forth the conduct which Philip Miller allegedly engaged in that would bring his actions within those parameters enumerated. Id.

Here plaintiffs rely solely on the affidavit of Philip Miller to show that Mr. Miller engaged in conduct that would subject him to liability on the theory of piercing the corporate veil. The affidavit of Mr. Miller merely states that he was either the President or the CEO of the defendant business entities. In sum, the plaintiffs have failed to present sufficient evidence to support Philip Miller's personal liability. Accordingly, this Count must be dismissed.

CONCLUSION

For all of the foregoing reasons, defendants' Motion for Summary Judgment is granted in part and denied in part. A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

_____

ALBERT W. SHEPPARD, JR., J.