

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

DAVID C. MARKS,	:	June 2003
Plaintiff,	:	
v.	:	No. 3618
E. FRANKS HOPKINS CO., INC.,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 120301

**ORDER**

**AND NOW**, this 25<sup>th</sup> day of February, 2005, upon consideration of Defendant E. Franks Hopkins Co. Inc's Motion for Reconsideration of this Court's Order dated August 19, 2004 granting summary judgment on Defendant's Counterclaim, Plaintiff's response in opposition, Memoranda, all matters of record, after oral argument and in accord with the Memorandum Opinion filed of record, it hereby is **ORDERED** and **DECREED** that Defendant's Motion is **Denied**.

**BY THE COURT,**

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C. DARNELL JONES, II, J.

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**MEMORANDUM OPINION**

***JONES, II, J.***

Presently before the court is Defendant E. Franks Hopkins Co., Inc.’s (hereinafter referred to as “Hopkins”) Motion for Reconsideration of this court’s order dated August 19, 2004. For the reasons discussed, Defendant’s Motion for Reconsideration is Denied.

**Background**

This action arises from David C. Marks’ (Marks’) request to examine Hopkins’ corporate books and records pursuant to 15 Pa. C.S. § 1508.<sup>1</sup> In response to the complaint, Hopkins filed a counterclaim and an amended counterclaim asserting claims of fraud and intentional misrepresentation. In the amended counterclaim, Hopkins seeks to recover in excess of \$483,000.000 which it paid to Marks over a four year period based on Marks’ alleged misrepresentations concerning his disability and ability to return to work.

On June 14, 2004, Marks filed a Motion for Summary Judgment. On August 19, 2004, this court granted Marks’ Motion for Summary Judgment finding that Hopkins failed to state a prima facie case of fraud and intentional misrepresentation.

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<sup>1</sup> The court adopts and incorporates the factual background set forth in its Memorandum Opinion signed on July 21, 2004 and docketed July 23, 2004 granting Plaintiff’s Motion for Summary Judgment on its claims against Defendant.

Thereafter, on September 28, 2004, Hopkins presented a motion to the court seeking to compel Marks to produce disability insurance records and request an extension of time to file a motion for reconsideration of this court's order dated August 19, 2004. The court granted Hopkins' motion and directed Marks to produce copies of the disability insurance records from Northwestern Mutual Insurance Company and UNUM Provident Insurance Company. The court also granted Hopkins leave to file a motion for reconsideration of the court's order dated August 19, 2004 within twenty days after receipt of the records.

On December 7, 2004, Hopkins filed the instant motion for reconsideration of this court's order dated August 19, 2004. On January 11, 2004, the court entertained oral argument of the motion for Reconsideration.

### **Discussion**

Pa. R. Civ. P. 1035.2 provides that any party may move for summary judgment in whole or in part as a matter of law

“(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or  
(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.” Pa. R. Civ. P. 1035.2

A court may only grant summary judgment where the right is clear and free from doubt. “The record 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 nonmoving party.” Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (1991).

In opposing a motion for summary judgment, the adverse party “may not rest upon the mere allegations or denials of the pleadings”. Pa. R. Civ. P. 1035.3 (a). Instead, the nonmoving party “must adduce sufficient evidence on [all] issues[s] essential to his case on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Ertel v. Patriot-News Co., 544 Pa. 93, 101-102, 674 A.2d 1038, 1042 (1996).

Taking the pleadings and Hopkins’ response to the summary judgment motion, in a light most favorable to Hopkins, the court determined that Hopkins failed to make out a prima facie case of fraud and intentional misrepresentation. The court found that the evidence produced by Hopkins, a vacation to Puerto Rico and the numerical mileage on a vehicle, was insufficient to establish a prima facie case of fraud. Additionally, the court found that Hopkins failed to produce any evidence that Marks intended to misrepresent his disability and/or his ability to work to induce Hopkins to pay the difference in his salary. Consequently, the court granted Marks’ motion for summary judgment.

Subsequent to the entry of summary judgment, Hopkins informed the court that additional evidence existed to support its motion for summary judgment and sought leave to submit supplemental evidence.<sup>2</sup> The court granted Hopkins’ motion and permitted it to supplement the record. *See* Pa. R. Civ. P. 1035.3 (b).

The supplemental evidence produced by Hopkins consists of portions of Marks’ disability records from two insurance companies. Based on the disability records, Hopkins has now altered its theory of fraud. Prior to receiving the disability records,

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<sup>2</sup> Interestingly, Hopkins never informed the court in its response to the motion for summary judgment that additional documents may exist to support its claim of fraud such as medical documentation and that such documents had been requested and not produced as of the date of the filing of the response.

Hopkins maintained that Marks medical condition was not as bad as he claimed and he could have returned to work at Hopkins on a full time basis. Hopkins now maintains that the supplemental evidence demonstrates that Marks condition was far worse than what he represented to Hopkins and therefore he misrepresented his ability to return to work in the first place.

Whether fraud has been committed is generally “a question of fact which is always a jury question.” Greenwood v. Kadoich, 239 Pa. Super. 372, 375, 357 A.2d 604, 606 (1976). However, since evidence of fraud must be clear and convincing, the preliminary issue of whether the evidence meets the required standard so as to justify its submission to the jury is a question of law for the court to decide in the first instance. Id. Hence, the court must conduct an initial inquiry to determine whether Hopkins has stated a prima facie case of fraud under the exacting standard in Pennsylvania.

To establish a claim for fraud, a claimant must prove the following: “(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury proximately caused by the reliance.” Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994)(footnote omitted).<sup>3</sup>

Taking into consideration the supplemental evidence produced by Hopkins, the court finds that Hopkins, once again, fails to state a prima facie case for fraud. Hopkins claims that the supplemental evidence demonstrates that Marks misrepresented the extent of his disability since his disability was far worse than what he represented. Assuming

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<sup>3</sup> To state a claim for intentional misrepresentation the same elements must be proven. Kramer v. Dunn, 749 A.2d 984, 991 (Pa. Super. 2000).

the supplemental evidence stands for the proposition proposed by Hopkins, the record is devoid of any evidence that Marks made a false representation concerning the severity of his disability. On, the contrary, the record demonstrates that Hopkins was aware of the severity of Marks' disability. In a verification submitted by Stephen Marmar, an officer and shareholder of Hopkins, in opposition to Marks' motion for summary judgment, Marmar states that Marks represented to Hopkins that from September 1999 to April 2003 **he was disabled and unable to work full time in his position at Hopkins.**

(Verification of Stephen Marmer ¶ 2) (emphasis added). Marmar also states that when Marks made the representations concerning his physical condition and inability to work, Hopkins believed Marks was telling the truth. (Id. at ¶ 3). Hopkins relied upon Marks representations concerning his physical condition and inability to work when it paid him the difference between his monthly disability benefit and his salary. (Id. at ¶ 4).

These statements constitute an admission by Hopkins that it was indeed aware that Marks' disability was severe and consequently nullify its claim of fraud.<sup>4</sup> Accordingly, Hopkins has failed to state a prima facie case of fraud and the order entered on August 19, 2004 granting Marks' summary judgment on Hopkins' counterclaim should not be vacated.

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<sup>4</sup> Use of the verification by Marmar is not contrary to the Nanty-Glo rule. The general rule flowing from Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 532 (Pa. 1932), is that summary judgment may not be had where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the genuine issue of material fact. Where the moving party supports its motion for summary judgment by using the admissions of the opposing party, however, even though they are testimonial, Nanty-Glo does not forbid the entry of summary judgment. In such a situation, the court may grant the motion without determining the credibility of the testimony, for it is an "unconditional surrender" by the opposing party, to which he must be held. See Garcia v. Savage, 402 Pa. Super. 324, 586 A.2d 1375, 1378 (1991).

### **Conclusion**

For the foregoing reasons, Defendant's Motion for Reconsideration of this court's order dated August 19, 2004 is Denied. An order consistent with this opinion will follow.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**