

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

PHILIP H. BEHR	:	MARCH TERM, 2004
	:	
<i>Plaintiff</i>	:	No. 0589
v.	:	
W. JOSEPH IMHOFF,	:	(Commerce Program)
BERNARD B. MARKEY, and	:	
PEPPER HAMILTON, LLP	:	Motion Control Nos. 061327,
<i>Defendants</i>	:	091096, 061335 and 062187.

ORDER

AND NOW, this 5TH day of March 2007, upon consideration of: (a) the Motion for Summary Judgment of defendants, Joseph Imhoff and Bernard Markey (No. 061327), (b) the Motion to Amend the counterclaim to include a libel claim filed by counterclaim-plaintiffs, Joseph Imhoff and Bernard Markey (No. 062187), (c) the cross Motion for Summary Judgment filed by counterclaim-defendant, Philip Behr (No. 091096), and (d) the Motion for Summary Judgment filed by defendant, Pepper Hamilton (No. 061335), the respective memoranda in support and opposition, the reply briefs, and all other matters of record, and in accord with the Opinion being filed contemporaneously, it is **ORDERED** that:

1. the Motion for Summary Judgment filed by defendants, Joseph Imhoff and Bernard Markey, is **GRANTED, in part**, in that Count I (breach of fiduciary duty) is **DISMISSED**. Otherwise, the Motion is **DENIED**;
2. The Motion to Amend the counterclaim to amplify the libel claim filed by counterclaim-plaintiffs Joseph Imhoff and Bernard Markey is **GRANTED**;

3. Philip Behr's cross Motion for Summary Judgment to dismiss the libel counterclaim filed by Joseph Imhoff and Bernard Markey is **DENIED**; and,
4. Pepper Hamilton's Motion for Summary Judgment is **DENIED**.

BY THE COURT,

ALBERT W. SHEPPARD, JR. J.

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OPINION

Albert W. Sheppard, Jr., J. March 5, 2007

Philip Behr (“Behr”) brought this action against Joseph Imhoff (“Imhoff”), Bernard Markey (“Markey”), and the law firm of Pepper Hamilton. Imhoff and Markey, together, and Pepper Hamilton filed separate Motions for Summary Judgment. Imhoff and Markey, as counterclaim-plaintiffs, filed a Motion to Amend to amplify their libel claim. Behr, as a counterclaim-defendant, filed a Motion for Summary Judgment as to the libel Counterclaim.

For the reasons discussed, Count I of the Behr’s Complaint against Imhoff and Markey is dismissed. Further, the Motion to Amend the Counterclaim filed by Imhoff and Markey is granted. Otherwise, the Motions are denied.

Background

Behr, Imhoff and Markey, experts in the private-equity investment industry, joined forces to create a private investment fund. They formed three separate Delaware entities: 1) Navigator Equity Partners, LLC (“NEP”); 2) Navigator Equity G.P., LLC (“NEPG”); and 3) Navigator Growth Partners, L.P. (the “Fund”), a limited partnership licensed by the Small Business Administration, and created to operate a venture capital fund.¹ Several operating agreements provide the legal and operational framework for the investment project. Under these agreements, NEGP serves as the general partner of the Fund, and NEP provides assistance to NEGP. In exchange for NEP’s services, the Fund pays NEP an annual fee. Behr, Imhoff, and Markey drew their salaries from a portion of that fee. The law firm of Pepper Hamilton drafted the operating agreements and served as counsel to NEP and to the three individual members.

The Complaint alleges that Imhoff and Markey breached their duties and the contractual obligations owed to Behr. Specifically, Behr alleges that his former business partners failed to originate new deals for the Fund, presented false and misleading information at an annual meeting of the Fund’s limited partners, derailed an investment deal, interfered with two other deals, attempted to charge inappropriate expenses, and engaged in unethical business practices. The Complaint also alleges that Pepper Hamilton committed malpractice. Specifically, Behr contends that Pepper Hamilton, while having individual attorney-client relationships with Behr, Imhoff, and Markey, represented them jointly despite conflicts of interests among the partners.

¹ Amended and Restated Agreement of Limited Partnership of ANC Growth Partners, L.P., Exhibit 3 to Imhoff’s and Markey’s motion to amend their counterclaims, p. 13, sec. 2.01(a).

Discussion

The court may enter summary judgment only if the record lacks any genuine issues of material fact. Summary judgment is appropriate only if reasonable minds cannot disagree that the moving party is entitled to win as a matter of law.²

When a contract contains a choice-of-law provision, the forum court will give effect to that choice.³ However, the forum court will employ its procedural rules even if a choice-of-law provision calls for the application of the substantive laws of another state.⁴ In this dispute, each of the operative agreements identifies the substantive laws of Delaware as controlling; therefore, the court will apply the substantive laws of Delaware and the procedural laws of Pennsylvania.

I. Behr May Not Maintain a Claim for Breach of Fiduciary Duty (Count I) While Maintaining Claims for Breach of Contract.

Imhoff and Markey move for summary judgment as to Count I (breach of fiduciary duty) on grounds that such a claim duplicates those based on breach of contract.

A claim for breach of fiduciary duty may not be maintained simultaneously with a claim for breach of contract, if both claims hinge on the same underlying facts.⁵ To permit the coexistence of a claim for breach of fiduciary duty and one for breach of contract would undermine the primacy of contract law over the law of fiduciary duty.⁶

Behr avers that Imhoff and Markey, as managers and members of NEP and NEGP, “breached their fiduciary duties and contravened their obligations under the Operative Agreements” to the detriment of Behr.⁷ In this case, Behr’s claim for breach of fiduciary duty

² Kvaerner Metals Div. of Kvaerner United States, Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 895-896 (Pa. 2006).

³ Educ. Res. Inst., Inc. v. Cole, 827 A.2d 493, 498, (Pa. Super. 2003).

⁴ Drapeau v. Joy Techs., 670 A.2d 165, 168 (Pa. Super. 1996).

⁵ Blue Chip Capital Fund v. Jerry L. Tubergen, 906 A.2d 827, 833-34 (Del. Ch. 2006).

⁶ Id. at 834.

⁷ Complaint, Counts III, IV, and V.

relates exclusively to the duties and obligations that Defendants assumed under the Operative Agreements; therefore, Defendants' motion for summary judgment against Count I is granted.

II. Imhoff and Markey May Amend Their Counterclaim in Libel.

Imhoff and Markey move to amend their libel counterclaim. They argue that during discovery, Behr made additional false and defamatory remarks about the defendants, and that their counterclaim should be amplified to reflect those new defamatory statements.

“A party ... by leave of court may at any time amend his pleading.”⁸ However, Pennsylvania courts will not allow such an amendment if it will surprise or prejudice the opposing party.⁹ The court may allow the inclusion of a proposed amendment if the new matter “merely amplifies” the averments in the complaint.¹⁰

In this case, Imhoff and Markey represent that the proposed amendment will amplify or clarify what was averred in the Complaint, or admitted during discovery. They also represent that the amendment will not prejudice Behr, nor modify their theory of recovery, nor change the amount of damages that they seek.¹¹ The court grants the motion to amend the counterclaim as to libel.

The court will issue a contemporaneous Order consistent with this Opinion.¹²

BY THE COURT

ALBERT W. SHEPPARD, JR. J.

⁸ PA. R.C.P. 1033.

⁹ Horowitz v. Universal Underwriters Ins. Co., 580 A.2d 395, 398 (Pa. Super. 1990).

¹⁰ Connor v. Allegheny General Hospital, 501 Pa. 306 (1983).

¹¹ Defendants Imhoff's and Markey's memorandum of law in support of their motion to amend their counterclaims, p. 6.

¹² With respect to the numerous remaining claims, the court submits that there exist disputed issues of material facts which preclude summary judgment.