

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

MRED GENERAL PARTNER, LLC t/a	:	November Term 2004
MRED 3870 LANCASTER AVENUE, L.P. :		
Successor by Assignment to SAM HOY t/a :		No. 2531
MCBRIDE REAL ESTATE	:	
DEVELOPMENT, L.P.,	:	COMMERCE PROGRAM
	:	
Plaintiff,	:	
	:	
v.	:	Control Number 021380
TOWER ECONOMICS COMPANY, INC. :		
And LEONARD B. STEVENS,	:	
	:	
Defendants.	:	

ORDER and MEMORANDUM OPINION

AND NOW, this 12TH day of April 2005, upon consideration of the Preliminary Objections of Defendants Tower Economics Company, Inc. and Leonard B. Stevens, Plaintiffs' response in opposition, Memoranda, all matters of record and in accord with the Contemporaneous Opinion filed of record, it hereby is **ORDERED** and **DECREED** that the Preliminary Objections are **SUSTAINED** in part, Counts III, IV and V are dismissed. Plaintiff is granted leave to amend Count V only within twenty (20) days from the date of this Order. All other Preliminary Objections are **OVERRULED**.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

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

MRED GENERAL PARTNER, LLC t/a	:	November Term 2004
MRED 3870 LANCASTER AVENUE, L.P. :		
Successor by Assignment to SAM HOY t/a :		No. 2531
MCBRIDE REAL ESTATE	:	
DEVELOPMENT, L.P.,	:	COMMERCE PROGRAM
	Plaintiff,	:
v.	:	Control Number 021380
TOWER ECONOMICS COMPANY, INC. :		
And LEONARD B. STEVENS,	:	
Defendants.	:	

MEMORANDUM OPINION

ABRAMSON, J.

This action arises from plaintiff MRED General Partner, LLC’s (“MRED”)¹ allegations that Tower Management (“Tower”) and its President Stevens (“Stevens”) wrongfully sought to misappropriate the development of cellular towers, intentionally interfered with MRED’s prospective contracts with self storage users and interfered with its plans to purchase the building onto which the cell towers and storage facility were to be placed.

Plaintiff’s amended complaint includes claims for breach of contract (Count I), promissory estoppel (Count II), breach of the covenant of good faith and fair dealing (Count III), breach of fiduciary duty (Count IV), tortious interference with contractual relations (Count V) and unjust enrichment (Count VI). Defendants have now filed

¹ Plaintiff MRED General Partner, LLC is the general partner of MRED 3870 Lancaster Avenue, L.P., a Pennsylvania Limited Partnership. MRED 3870 L.P. allegedly is the successor by assignment to Sam Hoy, a partner in a joint venture trading as McBride Real Estate Development, L.P. (Plaintiff’s amended complaint ¶¶ 1-5).

preliminary objections to the amended complaint.² For reasons discussed below, defendants' preliminary objections are sustained in part and overruled in part.

I. MRED has capacity to sue.

Defendants argue that the court should sustain its preliminary objection and dismiss MRED's amended complaint with prejudice since MRED failed to commence this action in the names of its partners as required under Pennsylvania law. The court does not agree. While Pa. R. Civ. P. 2127 (a) requires a partnership that has a right of action to prosecute such right in the names of the then partners trading in the firm name, in the following manner: "A, B and C trading as X & Co.," the rule does not apply to limited partners. Actions by partnerships are to be brought in the names of the partners. A partner is defined as a general partner or a limited partner who has become subject to the liability of a general partner. See Pa. R. Civ. P. 2126.

Here, plaintiff alleges that MRED General Partner LLC is the general partner of MRED 3870 Lancaster Avenue, L.P. (Amended Complaint ¶¶ 1,2). Based on the foregoing allegation it appears that the action was correctly commenced and defendants' objection for lack of capacity to sue is overruled.

² Plaintiff filed its complaint in November 2004. Defendants filed preliminary objections to the complaint. In response plaintiff filed an amended complaint.

II. MRED's claim for Breach of the Implied Duty of Good Faith and Fair Dealing is Dismissed.³

In Count III of the amended complaint, MRED alleges that the defendants' breached the duty of good faith and fair dealing that, under Pennsylvania law, is implicit in every contract. Although the court agrees with MRED that every contract imposes the duty of good faith and fair dealing; the court finds that an alleged breach of this implied duty does not provide an independent ground for liability.

JHE, Incorporated v. Southeastern Pennsylvania Transport Authority, 2002 WL 1018941 (Pa. Com. Pl. 2002) contains a thorough review of the law of Pennsylvania on the implied duty of good faith and fair dealing. Basically, the JHE court held "that a breach of the covenant of good faith is nothing more than a breach of contract claim and that separate causes of action cannot be maintained for each, even in the alternative." Id. at 7. Accordingly, Count III of MRED's amended complaint is dismissed.

III. Count IV alleging Breach of Fiduciary Duty is Dismissed.

Count IV of the amended complaint alleges a claim for breach of fiduciary duty. A fiduciary relationship is a prerequisite to a finding of a fiduciary duty. "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."

³ Defendants' preliminary objections to Counts III and IV are in the nature of a demurrer. "A demurrer is a preliminary objection that the pleadings fail to set forth a cause of action upon which relief can be granted under any theory of law." Sutton v. Miller, 592 A.2d 83, 87 (Pa. Super. 1991). (emphasis in original). It will not be sustained unless the law says with certainty that no recovery is possible. Hull v. Rose, Schmidt, Hasley & DiSalle P.C., 700 A.2d 996, 998 (Pa. Super. 1997). All material facts set forth in the complaint, as well as inferences reasonably deducible therefrom, are admitted as true. Webb Manufacturing Co. v. Sinoff, 674 A.2d 723 (Pa. Super. 1996); Clifton v. Suburban Cable TV Co. Inc., 642 A.2d 512, 514 (Pa. Super. 1994). However, the court need not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion. Penn Title Insurance Co. v. Deshler, 661 A.2d 481 (Pa. Commw. 1995). In addition, a demurrer can only be granted in cases that are clear and free from doubt, and any doubt must be resolved against the non-moving party. Mellon Bank N.A. v. Fabinyi, 650 A.2d 895 (Pa. Super. 1994).

Restatement (Second) of Torts § 874, cmt. a (1979). A relationship of blood, business, friendship or association may give rise to a fiduciary relationship.

Here, Plaintiff alleges that a fiduciary relationship existed between the parties. Specifically, plaintiff alleges that the parties were not on equal terms (Amended Complaint ¶ 38), that it relied upon and trusted defendant Tower to act in its position as advisor and counselor (Id. ¶ 39) and that Tower was plaintiff's agent. These allegations alone are insufficient as a matter of law to establish the "special relationship" necessary to state a claim for breach of fiduciary duty. Most commercial contracts for professional services involve one party relying on the other party's superior skill or expertise in providing that particular service. See eToll, Inc. v. Elias/Savion Adver. Inc., 811 A.2d 10, 23 (Pa. Super. 2002). A confidential or fiduciary relationship does not exist merely because one party relies on and pays for the specialized skill or expertise of the other party. Id. Rather, the critical question is whether the relationship goes beyond mere reliance on superior skill, and into a relationship characterized by "overmastering influence" on one side or "weakness, dependence, or trust, justifiably reposed" on the other side. Id. A confidential relationship is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power. Id.

Here, the amended complaint fails to allege any facts suggesting weakness, dependence, inferiority or a disparity in the parties' position giving rise to an abuse of power. Although, the allegations suggest a reliance on Tower's skill and expertise in the area of cellular towers, such allegations are insufficient to create a fiduciary or confidential relationship. See eToll v. Elias/Savion, supra. at p. 22-23.

Moreover, plaintiff's allegation of agency is also insufficient to create the fiduciary or confidential relationship necessary to state a claim for breach of fiduciary duty. The agent must have the ability to actually bind the principal or alter the principal's legal relations. Basile v. H & R. Block, 761 A.2d 1121 (Pa. 2000).

Here, absent from the amended complaint are any factual allegations that Tower had the ability to actually bind plaintiff or alter plaintiff's legal relations. The Exclusive Agreement, attached to the complaint as Exhibit "B" and relied upon by plaintiff in support of its breach of contract claim, states that Tower "shall provide such services as an independent contractor." (Exhibit "B" to amended complaint ¶ 10). Additionally, the Agreement further provides that Tower nor its employees or agents shall be considered an employee of plaintiff for any purpose and that Tower is not authorized to act on behalf of plaintiff and shall not have authority to enter into agreements of any nature in the name of or on behalf of plaintiff. (Exhibit "B" ¶ 10 attached to Plaintiff's amended complaint).

Accordingly, taking all the facts alleged within the amended complaint as true, defendants' demurrer to Count IV is sustained and plaintiff's claim for breach of fiduciary duty is dismissed.

IV. Count V- Tortious Interference With Contractual Relations Is Dismissed.

In Count V of the amended complaint, plaintiff alleges that defendants Tower and Stevens, "upon information and belief", purposefully and specifically acted and sought to (a) harm and prevent the plaintiff from entering into contractual relations with the Prospective Cell Tower Purchasers for the use of the roof top of the building, (b) harm and prevent the plaintiff from entering into contractual relations with the prospective storage space users of the warehouse, and (c) harm and prevent the plaintiff from entering

into the contract with the owner to lease and purchase the building. (Amended Complaint ¶ 46). The requisite elements for a claim of intentional interference with prospective contractual relations are as follows: (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. Milicic v. Basketball Mktg. Co., 857 A.2d 689 (Pa. Super. 333 (Pa. Super. 2004)(citing Reading Radio, Inc. v. Fink, 833 A.2d 199, 211 (Pa. Super. 2003)).

Although plaintiff identifies who the Prospective Cell Tower Purchasers were in paragraph 14 of the amended complaint, plaintiff fails to identify the prospective storage space users of the warehouse. While plaintiff need not list every prospective contractual relation with which defendants allegedly interfered, it must set forth at least one such relationship in more detail. *See* Kelly-Springfield Tire Co. v. D'Ambro, 596 A.2d 867, 871 (Pa. Super. 1991)(complaint set forth one potential buyer who was deterred by defendant's wrongful conduct).

Additionally, plaintiff must set forth in more detail at least one example of how defendants acted to prevent plaintiff from entering into contractual relations with the Prospective Cell Tower Purchasers, prospective storage space users and with the owner of the Building. Accordingly, defendants' preliminary objection to Count V is sustained. In the event plaintiff is in possession of the facts necessary to state a claim for

interference with prospective contractual relations, plaintiff is granted leave to amend Count V only within twenty days from the date of this Order.

CONCLUSION

For the foregoing reasons, defendants' preliminary objections are sustained as it pertains to Counts III, IV and V and Counts III, IV and V are dismissed. Plaintiff is granted leave to amend Count V only within twenty (20) days from the date of this Order. All other preliminary objections are overruled. An order contemporaneous with this Opinion will follow.

BY THE COURT,

HOWLAND W. ABRAMSON, J.