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

EILEEN H. SLAWEK and JOSEPH SLAWEK	:	April Term, 2005
Plaintiffs	:	
v.	:	No. 2847
ACCUPAC, INC. and H.I.G. CAPITAL, LLC	:	
Defendants	:	Motion Control Nos. 031354, 031380

ORDER

AND NOW, this 26th day of September 2007, upon consideration of the cross motions for summary judgment filed by Defendants Accupac, Inc. and H.I.G Capital, LLC., and by Plaintiffs Eileen and Joseph Slawek, the responses thereto, the respective memoranda of law in support and opposition, and the respective reply briefs, it is **ORDERED** that:

1. the motion for summary judgment filed by Defendants Accupac, Inc. and H.I.G. Capital, LLC is **GRANTED** as to Count IV of the Complaint (tortious interference with an existing contract), and **DENIED** as to all other Counts;
2. the motion for partial summary judgment filed by Plaintiffs Eileen and Joseph Slawek is **GRANTED** in part and **DENIED** in part. The court **DECLARES** that there has been no event of termination of the Consulting Agreement dated April 10, 2003, between Eileen Slawek and Accupac Inc.[1] Further, the court

[1] A hearing is scheduled for October 1, 2007, at 10.00 A.M, in courtroom 443, City Hall, to determine the amount of past payments and interests to which Slawek is entitled. See Kessler v. Old Guard Mut. Ins. Co., 570 A.2d 569, 573 (Pa. Super. 1990) (holding that interest on money owed under a contract is a legal right).

DISMISSES Accupac, Inc.'s counterclaim in its entirety. The remaining issues in Plaintiffs' motion for partial summary judgment are **DENIED**.

BY THE COURT,

HOWLAND W. ABRAMSON, J

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Howland W. Abramson, J. …… September 26, 2007

MEMORANDUM OPINION

The cross-motions for summary judgment require this court to determine whether Plaintiff's inaccurate representations and warranties breached the indemnification clause in a contract. The court finds that the inaccurate representations and warranties did not breach the indemnification clause.

Background

Plaintiff, Eileen Slawek ("Slawek"), founded a manufacturing and packaging company, Accupac, Inc. ("Accupac"), in 1974. In 2003, Slawek sold her Accupac shares to Accupac Acquisitions, Inc. ("Accupac"), a company owned by Defendant H.I.G. Capital, LLC ("HIG"), a private investment firm. Under this transaction, Slawek agreed to transfer her Accupac shares to Acquisition, and Acquisition agreed to pay cash and to convey some of its stock to Slawek. At the closing, on April 10, 2003, Slawek and Acquisition entered into an Exchange and Purchase Agreement (the "Purchase Agreement.") Under this agreement, Slawek warranted that Accupac's financial

statements complied with generally accepted accounting practices, and that Accupac obeyed federal immigration laws, and held clear title to its equipment.[2] On the same day, Accupac and Slawek entered into a related Contract for Consultation Services (the "Consultation Contract"), as required by the Purchase Agreement.[3] Under the Consultation Contract, Slawek agreed to work as a consultant for Accupac for up to ten hours each week. In exchange for Slawek's work, Accupac agreed to pay Slawek approximately $200,000 per year, and to provide Slawek and her husband with medical benefits "substantially similar to the health and dental insurance" that the Slaweks already received.[4]

On the same day in which the parties executed the Purchase Agreement and the Consultation Contract, Acquisition and Slawek entered into a related Indemnity Fund Escrow Agreement (the "Escrow Agreement"). Under the Escrow Agreement, Slawek and Acquisition reserved $3 million in escrow: if Slawek' inaccurate representations in the Purchase Agreement caused Acquisition to suffer any adverse consequences, Acquisition could obtain indemnification for up to $3 million from the escrowed fund.[5] The Escrow Agreement contained a provision compelling the parties to resolve any controversy or claim through arbitration.[6]

Also on April 10, 2003, Accupac and HIG entered into Management Agreement. Under the Management Agreement, HIG promised to provide management and

[2] Exchange and Purchase Agreement, Exhibit D to Accupac's motion for summary judgment, Section 4(a)(vi), 4(a)(ix), 4(a)(xiii).
[3] Id., Section 6(k).
[4] Contract for Consulting Services, Exhibit E to Accupac's motion for summary judgment, Section 3.
[5] Indemnity Fund Escrow Agreement, Exhibit F to Accupac's motion for summary judgment, Recitals.
[6] Id., ¶ 22.

consultation services to Accupac and to its subsidiaries. In this agreement, Accupac acknowledged that Acquisition owned all of Accupac's outstanding capital stock.[7]

After the sale, Acquisition claimed that Slawek had breached the Purchase Agreement, and had caused Acquisition to suffer damages. When Acquisition demanded indemnification from the escrow fund, Slawek denied any breach and instituted arbitration proceedings. The arbitrator ruled that Slawek had breached the Purchase Agreement by misrepresenting Accupac's equipment ownership and use of temporary labor, and by improperly treating Accupac's accounting entries.[8] On December 6, 2006, the Court of Common Pleas, Philadelphia County, entered an Order confirming the Arbitration Award.[9] There was no appeal, and Slawek indemnified Acquisition.[10]

On March 3, 2005, before the Arbitrator ruled on the Award, Accupac discontinued payments to Slawek for her consulting services. Accupac reached the decision to discontinue payments upon the recommendations of its manager, Defendant HIG. Slawek sued, and asserted the claims of breach of contract and tortious interference with existing business relations, against Accupac and HIG respectively. Accupac and HIG counterclaimed. On cross-motions, Slawek seeks an Order declaring that the Consulting Contract was never terminated, and Accupac and HIG move to dismiss the claims of breach of contract and tortious interference with existing business relations.

Discussion

The law on summary judgment is clear: "any party may move for summary judgment … if, after the completion of discovery relevant to the motion … an adverse

[7] Management Agreement, p. 1, Exhibit G to Accupac's motion for summary judgment.
[8] Arbitrator's Interim and Final Awards, Exhibits A, B, to Accupac's motion for summary judgment.
[9] Accupac Acquisitions, Inc., v. Heck Family Partnership *et al.*, 0610-3087, Control No. 101430.
[10] Id. See also Reimbursement check paid to Accupac Acquisitions, Inc., Exhibit I to Accupac's motion for summary judgment.

party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause or action…."[11] "In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt."[12]

I. Slawek did not breach Section 9(b) of the Purchase Agreement.

Accupac asserts that Slawek breached Section 9(b) of the Exchange Agreement by refusing to instantly indemnify Acquisition with funds held in escrow. Accupac contends that this breach entitled Accupac to terminate the Consulting Agreement. In the response in opposition, Slawek argues that the Purchase and Escrow Agreements allowed her to withhold disbursement of the escrow funds until an arbitrator determined the amount of indemnification that she owed to Acquisition. Slawek asserts that she did not breach Section 9(b) of the Purchase Agreement because she indemnified Acquisition promptly upon the arbitrator's final determination. The court concludes that Slawek, by promptly indemnifying Acquisition pursuant to the Escrow Agreement, did not breach Section 9(b) of the Exchange Agreement.

The task of interpreting a contract is for the court, not for the jury.[13] "It is firmly settled that the intent of the parties to a written contract is contained in the writing itself.

[11] PA. R.C.P. 1035.2.
[12] Sevast v. Kakouras (Appeal of Sunday), 915 A.2d 1147, 1152-1153 (Pa. 2007).
[13] Ruzzi v. Butler Petroleum Co., 527 Pa. 1, 18; 588 A.2d 1, 10 (Pa. 1991).

When the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the contents alone."[14]

The Purchase and Escrow Agreements show that the parties clearly and unambiguously allowed Slawek to withhold the escrow funds until an arbitrator made a final determination of the amount of indemnity owed to Acquisition.

The Purchase Agreement states:

> Remedies for Breaches of This Agreement.
> * * *
> (b) Indemnification By the Shareholder [Slawek]….
> [E]ach Shareholder … jointly and severally, agrees to indemnify and hold harmless Acquisition … against the full amount of any and al Adverse Consequences arising from … (i) any breach, violation or, solely with respect to representations and warranties, inaccuracy of … any of the representations, warranties … or agreements … contained in this Agreement….[15]

The Escrow Agreement states:

> The Escrow Agent shall hold the Escrow Fund in its possession until authorized hereunder to deliver the Escrow Fund or any specified portion thereof as follows:
> * * *
> If the Representative [Slawek] does object in writing to the disbursement of the claimed Adverse Consequence or any portion thereof … and has given written notice of such objection to the Escrow Agent, the Escrow Agent shall not disburse the disputed amount until … there has been a delivery of a written notice of a Final Determination … of the amount of such Adverse Consequences. Upon written notice to the Escrow Agent of such Final Determination and upon delivery to the Escrow Agent of written notice of the amount of Adverse Consequences as provided in the Final Determination, the Escrow Agent shall promptly distribute to the Indemnitee

[14] Phila. Eagles Football Club, Inc. v. City of Philadelphia, 573 Pa. 189, 216; 823 A.2d 108, 125 (Pa. 2003) (quoting Steuart v. McChesney, 498 Pa. 45; 444 A.2d 659 (Pa. 1982)).
[15] Exchange and Purchase Agreement, Section 9(b), Exhibit D to Accupac's response in opposition to Slawek's motion for partial summary judgment.

> [Acquisition] the amount of such Adverse Consequences….
> * * *
> For purposes of this Agreement, a "Final Determination" shall mean … an award determined by the Arbitrator … setting forth the amount of the Adverse Consequences to be satisfied by disbursement from the Escrow Fund as finally determined in accordance with Section 9(b) of the Purchase Agreement.[16]

The Purchase and Escrow Agreements state that Slawek had an obligation to indemnify Acquisition upon a final determination of the amount owed to Acquisition. The record shows, and Acquisition admits, that Slawek indemnified Acquisition upon the arbitrator's final determination.[17] The court concludes that Slawek did not breach Section 9(b) of the Purchase Agreement because she indemnified Acquisition upon a final determination setting forth the amount of Adverse Consequences arising from her inaccurate representations and warranties.

II. Slawek's inaccurate representations and warranties are immaterial.

Acquisition argues that Slawek' inaccurate representations and warranties constituted a material breach of the Purchase Agreement, and that such a breach excused Accupac from performing its obligations under the Consultation Contract. The court disagrees: Section 9(b) of the Purchase Agreement shows that any breaches, violations, or inaccurate representations and warranties made by Slawek, could be cured through indemnification. Section 9(b) states: "each Shareholder [including Slawek] … agrees to indemnify and hold harmless Acquisition … against the full amount of any … Adverse Consequences, arising from … any breach, violation, or, solely with respect to

[16] Indemnity Escrow Agreement, Sections 4(c), 4(f), Exhibit F to Accupac's response in opposition to Slawek's motion for partial summary judgment.
[17] Deposition of Matthew Sanford, managing director of Defendants H.I.G. and Acquisition, Exhibit F to Accupac's motion for partial summary judgment, 5-6, 47.

representations and warranties, inaccuracy of … any of the representations, covenants, or agreements … contained in this Agreement."[18] This language is clear an unambiguous: as long as Slawek indemnified Acquisition, her inaccurate representations and warranties did not constitute a material breach.

III. There has been no event of termination of the Consulting Contract.

Slawek moves for a declaration that there has been no termination of the Consulting Contract. Slawek argues that Accupac may terminate the Consulting Contract only upon Slawek's death, or upon Slawek's breach of Section 9(b) of the Purchase Agreement. The Consulting Contract states:

> This Agreement … is entered into … between Accupac … (the "Company") … and Eileen Slawek….
>
> Section 1. Consultation Services/Duties.
>
> (a) The Company … engages Slawek as a consultant and Slawek … agrees to render such services in accordance with the terms and conditions hereinafter set forth.
>
> Section 2. Term of Agreement. This Agreement may only be terminated … (i) by the Company [Accupac] upon the death of Slawek or upon a final, non-appealable determination by a court of competent jurisdiction that Slawek shall have breached … Section 9(b) of the Agreement; or (ii) by Slawek, for any … or no reason….

This language is clear and unambiguous: Accupac is entitled to terminate the Consultation Contract only when Slawek dies, or when a court of competent jurisdiction determines that Slawek breached Section 9(b) of the Purchase Agreement. Accupac has not asserted that Slawek died, and this court has concluded that Slawek did not breach

[18] Exchange and Purchase Agreement, Section 9(b), Exhibit D to Accupac's response in opposition to Slawek's motion for partial summary judgment.

Section 9(b) of the Purchase Agreement. The court finds that the Consulting Contract has not been terminated.

IV. HIG did not interfere with the Consultation Contract.

HIG moves for summary judgment against the claim of tortious interference with an existing contract. HIG asserts that it was an agent of Accupac when it directed Accupac to terminate the Consulting Contract. HIG argues that when a principal is a party to a contract, its agent may not be liable for tortiously interfering with that contract.

The law is settled: to recover on the theory of tortious interference with a contract, the plaintiff must show the existence of three parties: the tortfeasor, the plaintiff, and the other contracting party.[19] Agents and officers are not third parties when they act on behalf of their principal.[20]

The Management Agreement states:

> This Agreement is … entered into … between Accupac, Inc., a Pennsylvania corporation … and H.I.G. Capital, L.L.C. … (the "Manager").
> * * *
> Manager will render management, consulting and financial services to [Accupac] … which services will include advice and assistance concerning any and all aspects of the operations … including advising [Accupac] and its subsidiaries in their relationships with banks …attorneys, financial advisers and other professionals.[21]

The language in the Management Agreement leaves no doubt: HIG is not a third party because it was an agent of Accupac when it directed Accupac to terminate the Consulting Contract. Slawek cannot prove that HIG was a third party, and may not

[19] Maier v. Maretti, 671 A.2d 701, 707, (Pa. Super. 1995).
[20] Maier v. Maretti, 671 A.2d at 707.
[21] Management Agreement, p. 1, Exhibit G to Defendant Accupac's motion for summary judgment.

maintain the claim of tortious interference with an existing contract against HIG. Count IV of the Complaint is dismissed.

V. Slawek may not recover counsel fees.

Accupac asks the court to enter judgment against Slawek's prayer for counsel fees. Accupac asserts that the Consulting Contract does not provide for the recovery of counsel fees, and that no statutory authorization entitles Slawek to the same.

The law is settled: under the American Rule adopted in Pennsylvania, a litigant may not recover counsel fees unless there is an express statutory authorization, a clear contractual agreement, or some other established exception.[22] Discovery is closed, and Slawek has failed to show the existence of a statutory authorization, a contractual provision, or any other established exception allowing recovery of counsel fees. Accuapc's motion is granted, and Slawek may not recover counsel fees.

The court will issue an Order contemporaneously with this Opinion.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

[22] Mosaica Acad. Charter Sch. v. Commonwealth, 813 A.2d 813, 822 (Pa. 2002).