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

LEONARD GELMAN, et. al.,	:	February Term 2010
Plaintiffs	, :	
v.	:	No. 3332
CITIZENS BANK OF PENNSYLANI	A :	
and CITIZENS FINANCIAL GROUP,	:	COMMERCE PROGRAM
INC.,	:	
Defendar	nts. :	Control Number 11072558
	:	

ORDER

AND NOW, this 18th day of October 2011, upon consideration of Defendants' Motion for Summary Judgment and Plaintiffs' response in opposition, it hereby is **ORDERED** that the Motion is **Granted in part** and counts II (tortious interference with existing and prospective contracts) and III (negligent misrepresentation) are dismissed. All other aspects of the motion are **Denied.**

BY THE COURT,

MARK I. BERNSTEIN, J.

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OPINION

This action was instituted by plaintiffs Leonard Gelman, Neil Erlichman, 13250 Trevose, LLC., Allied Land Transfer, Inc., Attorneys Select Abstract, Inc., Liberty Building Associates, LLC, Liberty One Financial, Inc., PAQ Holdings Corporation and Wellington Companies, LLC (hereinafter "Plaintiffs") against Citizens Bank of Pennsylvania and Citizens Financial Group Inc. (hereinafter "Defendants"). Gelman is the sole shareholder and/or member of Liberty One Financial, a residential mortgage company, Liberty Building Associates, LLC and Attorney's Select Abstract, Inc. Gelman and Erlichman are each 50% shareholders and/or members of 13250 Trevose and PAQ. PAQ owned 80% of Wellington with the remaining 20% held by a third party investor Larry Chachkes (hereinafter "Chachkes"). Chachkes advanced \$1,000,000.00 in February 2008 to Wellington. The investment was contingent on there being no adverse actions or adverse financial position taken against Wellington as well as Erlichman or Gelman. Wellington was a precious metals buyer. Gelman's wife, Nonna Gelman, and Erlichman respectively own 50% of Allied Land Transfer, Inc., a title insurance company.

Liberty Building Associates, LLC is a real estate holding company which owns the real estate located at 13250 Bustleton Avenue in Philadelphia, Pennsylvania. 13250 Trevose is a real

estate holding company and owns the real estate located at 13250 Trevose Road, Philadelphia, Pa.

On December 27, 2006, 13250 Trevose, LLC (hereinafter "Trevose") borrowed \$540,000 from defendant Citizens Bank. The Trevose loan was secured by real estate and guaranteed by Gelman and Erlichman, Allied Land Transfer, Inc. and Attorneys Select Abstract, Inc. As part of loan agreement, Trevose also entered into an interest rate swap agreement. The Trevose loan agreement contained the following financial covenants:

<u>Tangible Net Worth</u>- The Borrower shall not permit its Tangible Net Worth to be less than \$1.00 at any time.

<u>Cash Flow (after distributions) to CMLTD plus Interest</u>- The Borrower shall not permit the ratio of its Cash Flow, minus Distributions, to CMLTD¹ plus Interest Expense, to less than 1.00 to 1.0 for any fiscal year.

The Trevose loan agreement defines an "Event of Default" as the default of any liability,

obligation, covenant or undertaking of Borrower or any guarantor of the obligations to the Bank.

The Allied Guaranty for the Trevose loan agreement also contained the following

covenant:

<u>Financial Covenants</u>. The Guarantor [Allied] will not at any time or during any fiscal period (as applicable) fail to be in compliance with any of the financial covenants in this section.

EBITA² (plus Rental Expense) to Interest Expense and CMLTD (plus Rental Expense)-The Guarantor shall not permit the ratio of its EBITA minus taxes pain in cash and

¹ CMLTD is defined in the Trevose Loan as Current Maturity of Long Term Debt which is for any period the current scheduled principal or capital lease payments required to be paid during the applicable period.

²" EBITDA" means, for any period, Earnings meaning earnings as defined under generally accepted accounting principals in effect from time to time in the United States, commonly referred to as "GAAP" from continuing operations before payment of federal, state and local income taxes, plus Interest Expense [meaning, for any period, ordinary, regular, recurring, and continuing expenditures for interest on all borrowed money], depreciation and amortization, in each case for such period, computed and calculated in accordance with GAAP. See Plaintiffs' Motion in Opposition to Defendants' Motion for Summary Judgment Exhibit "X".

Distributions, plus Rental Expenses to Interest Expense, plus CMLTD and Rental Expenses, to be less than 1.15 to 1.0 for any fiscal year.

Any default under the Trevose loan agreement would trigger a default under the Swap Agreement.

On April 5, 2007, Attorneys Select Abstract, Inc. entered into a revolving loan

agreement with defendant in an aggregate amount of up to \$100,000. The loan was secured by

Attorneys Select Abstract, Inc.'s assets and was guaranteed by Gelman.

On May 29, 2007, Liberty Building Associates borrowed \$800,000 from defendant. This

loan was secured by real estate owned by Liberty Building Associates and guaranteed by Liberty

Financial One. The loan was also guaranteed by Gelman and Attorneys Select Abstract, Inc.

The Liberty Loan contained the following financial covenants:

EBITDA (after Taxes, Distributions and Unfinanced CAPEX) to Interest Expense plus CMLTD-The Borrower shall not permit the ratio of its EBITDA, minus taxes paid in cash, Distributions and Unfinanced CAPEX, to Interest Expense plus CMLTD, to be less than 1.0 to 1.0 for any fiscal year.

The Liberty Financial One Inc. guaranty for the Liberty loan contained the following financial covenants: 1) EBITDA (after Taxes, Distributions and Unfinanced CAPEX) to Interest Expense plus CMLTD- The Guarantor shall not permit the ratio of its EBITDA, minus taxes paid in cash, Distributions and Unfinanced CAPEX, to Interest Expense, plus CMLTD, to be less than 1.15 to 1.0 for any fiscal year and 2) Guarantor Tangible Net Worth- Guarantor shall not have Tangible Net Worth less than \$400,000 at any time.

On March 5, 2009, defendant informed Gelman that Liberty Building Associates, LLC defaulted on its obligations to the Bank under the loan as a result of the failure of Liberty One Financial, Inc., a guarantor of the loan, to maintain a Tangible Net Worth of not less than

\$400,000 as required by the terms of the Unconditional Guaranty executed by Liberty One Financial, Inc. on May 29, 2007.

In separate letter dated March 5, 2009, defendant also informed Erlichman as managing member of Trevose that Trevose may have defaulted on its obligations to the Bank under the loan. Defendant stated the default was based on the possible failure of 13250 Trevose, LLC to maintain the Cash Flow, minus Distributions, to CMLTD plus Interest Expense ratio as required under the Loan Agreement. Additionally, defendant stated the default was also based on the possible failure of Allied Land Transfer, Inc., a guarantor of the loan, to maintain the EBITDA ratio as required by the terms of the Unconditional Guaranty.

On June 4, 2009, defendant also notified Liberty Building Associates that additional events of default occurred under the Liberty Loan Agreement for the failure to maintain a ratio of EBITDA. On the same date, Elrichman was informed by the defendant that an event of default occurred under the Trevose loan by failing to meet the Tangible Net Worth and Cash Flow covenants in fiscal years 2007 and 2008.

In July 2009, defendant informed plaintiffs that all of their accounts were unilaterally closed. Plaintiffs informed Chachkes of the default, threat of confession of judgment and closed accounts. One week later, Chachkes demanded a return of his investment in Wellington. Wellington eventually ceased doing business.

On May 18, 2010, plaintiffs filed a complaint alleging they were not in default and that Citizens breached the terms of the Trevose Loan, the Liberty Loan and guarantees by incorrectly declaring the events of default on March 5, 2009 and June 4, 2009. The complaint alleges claims for breach of contract, intentional interference with existing and prospective contracts, negligent misrepresentation, defamation, commercial disparagement and civil conspiracy. Plaintiffs have

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voluntarily dismissed defendant Citizens Financial and the claim for civil conspiracy from the complaint. Presently before the court is defendant Citizen Bank's motion for summary judgment.

DISCUSSION

I. The claim for Tortious Interference with Contract (Count II) is dismissed.

In Count II of the complaint, plaintiffs purport to state a claim for tortious interference with prospective lenders, investors and brokers and existing contractual relations with investors. The elements of a cause of action for intentional interference with a contractual relation, whether existing or prospective, 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.³

With respect to plaintiffs' interference with existing contractual relations claim, the plaintiffs have satisfied the first element, that is, the existence of a contract. However, plaintiffs have failed to satisfy the second element of an interference with existing contractual relations claim, that is proof that the defendant acted "for the specific purpose of causing harm to the plaintiff."⁴ In analyzing whether an actor's conduct in intentionally interfering with a contract of another is improper or not, consideration is given to the following factors: (a) the nature of the

³ <u>Pelagatti v. Cohen</u>, 370 Pa. Super. 422, 434, 536 A.2d 1337, 1343 (1987). *See also* <u>Small v. Juniata College</u>, 452 Pa. Super. 410, 418, 682 A.2d 350, 354 (1996).

⁴ <u>Glenn v. Point Park College</u>, 441 Pa. 474, 272 A.2d 895, 899 (the tort of interference with contract "is an intentional one: the actor is acting as he does [f]or the purpose of causing harm to the plaintiff").

actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and, (g) the relations between the parties.⁵

Comment "j" to § 766 of the Restatement (Second) of Torts expands upon the issue of intent:

... If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.⁶

Thus, in order to succeed on their claim, the plaintiffs must demonstrate that defendant acted solely, or at least primarily, to cause specific harm to plaintiffs' relationship with Larry Chachkes. In this regard, plaintiffs have failed to satisfy their burden. Plaintiffs have not set forth any sufficient factual basis to prove that defendant's actions were motivated by a desire to harm plaintiffs rather than protect its own specific interests.

Our Supreme Court has advised that when the purpose of the defendant's conduct is, in whole or in part, to protect a legitimate right or interest that conflicts with the interests of the plaintiff, "a line must be drawn and the interests evaluated." ⁷ Although this evaluation of interests is not always susceptible of "precise definition," it is clear that the central inquiry is

⁵ <u>Small v. Juniata College</u>, 452 Pa. Super. 410, 682 A.2d 350 (1996); <u>Strickland v. University of Scranton</u>, 700 A.2d 979, 985, (Pa. Super. 1997) ("[i]n order for intentional interference with contract to be actionable as a tort, the interference must be improper").

⁶ Comment "j" to § 766 Restatement of Torts (Second).

⁷ <u>Glenn</u>, 441 Pa. at 482, 272 A.2d at 899.

whether the defendant's conduct is "sanctioned by the 'rules of the game' which society has adopted."⁸ Plaintiffs' admit that they disclosed the declarations of default and threats of confession of judgment to Chachkes which prompted his demand for the return of his investment in Wellington. There is no record evidence that defendant intended to harm the relationship between plaintiff and Chachkes. Although plaintiffs argue they were harmed when Chachkes withdrew his investment from Wellington, the harm suffered was incidental to defendant's allegation of default. Chachkes decision to withdraw the investment was based on his own independent assessment as to whether the investment should be withdrawn from Wellington. Since plaintiffs failed to satisfy their burden of proof as it pertains to defendant's specific intent to harm, defendant's motion for summary judgment as to the claim for tortious interference with an existing contract is granted.

As for the claim for interference with prospective contractual relations, the court finds that the plaintiffs similarly failed to identify any prospective contracts that were interfered with by defendants. A prospective contract is something less than a contractual right, something more than a mere hope."⁹ Plaintiffs only identified Harleysville National Bank as a prospective lender, broker or investor with whom defendant interfered. The deposition testimony of Dennis Matarangas, a representative of Harleysville, clearly establishes that Harleysville National Bank's decision not to enter into a banking relationship with plaintiffs was not due to any action by defendant but because Harleysville National Bank could not take an assignment of Plaintiffs'

⁸ <u>Phillips v. Selig</u>, 959 A.2d 420 (Pa. Super. Ct. 2008); <u>Small</u>, 682 A.2d 350, 354 (players on football team did not act improperly by voicing negative opinions of coach to college administration, which, upon investigation, discharged him, since in the academic world students are encouraged to voice their opinions).

⁹ <u>Thompson Coal Co. v. Pike Coal Co.</u>, 488 Pa. 168, 209, 412 A.2d 466, 471.

swap agreement.¹⁰ Based on the foregoing, defendant's motion for summary judgment is granted as to the claim for tortious interference with prospective contractual relations.

II. Plaintiffs' claim of Negligent Misrepresentation (Count III) fails as a matter of Law.

In count III of the complaint, plaintiffs purport to allege a claim for negligent misrepresentation. Proof of the following elements is required in order to hold a party liable for negligent misrepresentation: misrepresentation of (1)а material fact: a (2) the representor must either know of the misrepresentation, must make the misrepresentation without the knowledge as to its truth or falsity or must make the representation under which circumstances in he ought have known of its falsity; to (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.¹¹

As it pertains to the claim for negligent misrepresentation, it is clear that the claim is duplicative of the breach of contract claim. The alleged misrepresentations are subsumed within the respective loan agreements and swap agreement. Plaintiffs allege that defendant negligently calculated and misrepresented that plaintiffs violated various financial covenants in declaring default on and after March 5, 2009, that defendant misrepresented its policy with regard to financial covenants and "technical defaults, that defendant negligently misrepresented and induced Gelman, Elrichman and their respective entities to enter into the Trevose and Liberty Swap Agreements upon the defendant's repeated misrepresentations that termination fees related

¹⁰ Exhibit 13, Defendant's Motion for Summary Judgment Matarangas Transcript at 20:8-13.

¹¹ <u>Ferris v. Golf Car Supply Co.</u>, 2010 Pa. Dist. & Cnty. Dec. LEXIS 406 (Pa. County Ct. 2010)(*citing* <u>Halper v.</u> <u>Jewish Family & Children's Service of Greater Philadelphia</u>, 600 Pa. 145, 963 A.2d 1282, 1286 (2009)).

to the Swap Agreements would only become due and payable if the plaintiffs voluntarily refinanced and that defendant misrepresented that it was going to confess judgment on the loans by a date certain when it did not. These misrepresentations are the same breaches alleged against defendants in count I breach of contract. As such since the misrepresentations alleged in count III are the same as the breaches alleged in count I, count III is duplicative and is dismissed.

Notwithstanding the foregoing, the loan agreements and the swap agreements are fully integrated contracts. Any representations outside the contracts are barred by the parole evidence rule. The parol evidence rule provides that where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract unless fraud, accident or mistake is averred. The writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parol evidence.¹² Therefore, for the parol evidence rule to apply, there must be a writing that represents the "entire contract between the parties."¹³

The integration clauses state that the writings are meant to represent the parties' entire agreement is a clear sign that the writing expresses all of the parties' negotiations, conversations, and agreements made prior to its execution.¹⁴ Since loan agreements and the swap agreement are the parties' entire contract, the parol evidence rule applies and evidence of any previous representations involving the same subject matter is inadmissible to explain or vary the terms of

¹² <u>Gianni v. Russell & Co.</u>, 281 Pa. 320, 126 A. 791, 792 (Pa. 1924) (citations omitted); *see also* <u>Scott v. Bryn Mawr</u> <u>Arms, Inc.</u>, 454 Pa. 304, 312 A.2d 592, 594 (1973).

¹³ <u>Gianni</u>, 126 A. at 792.

¹⁴ Exhibit "C" paragraph 6.8 and Exhibit "E" paragraph 15 of defendant's Motion for Summary Judgment.

the contract.¹⁵ Based on the foregoing, plaintiffs' claim for negligent misrepresentation is dismissed.¹⁶

III. Genuine issues of material fact exist as to whether compelled self-publication exists.

In counts IV and V of the complaint, plaintiffs purport to assert claims for defamation and commercial disparagement. In order to maintain an action under either claim, plaintiffs must prove that defendant published defamatory statements about plaintiffs and that this publication actually caused special harm or pecuniary loss to plaintiffs.¹⁷ An essential element of the claims is publication. The general rule is that the originator of the statement cannot be held liable for the plaintiff's action in repeating the statement or letter to one or more third parties. An exception to this rule, under certain circumstances, is compelled self-publication. Under a proper set of circumstances, self-publication may be recognized as sufficient publication in a suit for defamation. ¹⁸ The exception may apply when publication by plaintiff is foreseeable, that is that defendant knew or had reason to know that the plaintiff would repeat the statements to a third person.¹⁹

In the case *sub judice*, plaintiffs argue that they were compelled to publish defendant's wrongful declaration of default and threats of confession of judgment to Mr. Chachkes based on the terms of their agreement with him. Plaintiffs argue that defendant was made aware of the

¹⁵ See <u>Bardwell v. Willis</u> Co., 375 Pa. 503, 100 A.2d 102, 104 (1953).

¹⁶ Any evidence of subsequent modifications to agreements at issue may be considered as part of the claim for breach of contract.

¹⁷ See 42 Pa. C. S. section 8343 (a) and <u>Pro Golf Mfg. v. Tribune Review Newpaper Co.</u>, 809 A.2d 243, 246 (Pa. 2002).

¹⁸ Yetter v. Ward Trucking Corp., 401 Pa. Super. 467, 585 A.2d 1022 (1991); <u>Ritter v. Pepsi Cola Operating Co.</u>, 785 F. Supp. 61 (M.D. 1992).

¹⁹ <u>Stine v. Walter</u>, 29 Pa. D. & C. 4th 193, 199 (1996)(republication of letter advising plaintiff of exposure to the HIV virus and obligating her to advise anyone with whom she had been intimate of possible expose satisfies the publication prong of a cause of action for demotion.).

agreement between them and Chachkes and the publication caused Mr. Chachkes to demand the return of his investment in Willington which caused Wellington to become insolvent and cease operation. Based on the foregoing, the court finds that genuine issues of material fact exist as to whether plaintiffs were compelled to publish defendant's declaration of default and threats of confession of judgment and whether defendant knew or had reason to know that plaintiff would repeat the statements to Chachkes. As such, defendant's motion for summary judgment to counts IV and V are denied.

CONCLUSION

Based on the foregoing, defendant's motion is granted in part and counts II (tortious interference with contract) and III (negligent misrepresentation) are dismissed. All other aspects of the motion are denied.²⁰

BY THE COURT,

MARK I. BERNSTEIN, J.

²⁰ Since genuine issues of material fact exist, defendant's motion summary judgment to count I (breach of contract) is denied.