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

ACADEMY INDUSTRIES, INC., and STUART POLSKY	: May Term, 2000
Plaintiffs	: No. 2383
v.	:
PNC BANK, N.A., HERBERT MCDONALD, FULCRUM GROUP and ACADEMY INDUSTRIES	: **Commerce Program**
Defendants	:
PNC BANK, N.A.	: July Term, 2000
Plaintiff	: No. 0634
v.	:
ACADEMY INDUSTRIES, INC. Defendant	: Control No. 120682

O R D E R

AND NOW, this 20th day of May 2002, upon consideration of the Motion for Summary Judgment of PNC Bank, N.A., Herbert McDonald and The Fulcrum Group, and the response in opposition of Academy Industries, Inc., Stuart Polsky and Richard Kaufman, and all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and DECREED as follows:

a. The Motion is **Granted** as to Count III - Intentional Interference with Prospective Contractual Relations, Count VI - Violations of the Federal Anti-Tying Statute and Count X - Invasion of Privacy, and Counts III, VI and X are **Dismissed**.

b. The Motion is **Granted** as to the Plaintiffs' demand for punitive damages in Count I - Breach of Contract.

c. In all other respects, the Motion is **Denied**.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. .... May 20, 2002

PNC Bank, N.A. ("PNC"), Herbert McDonald ("McDonald") and The Fulcrum Group ("Fulcrum") have filed a motion for summary judgment ("Motion") to resolve claims brought by Academy Industries, Inc. ("Academy"), Stuart Polsky ("Polsky") and Richard Kaufman ("Kaufman"),[1] as well as counterclaims brought by the Defendants against the Plaintiffs. For the reasons set forth, the Court is issuing a contemporaneous order granting the Motion in part and denying the Motion in part.

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[1] For the sake of relative simplicity, PNC, McDonald and Fulcrum are referred to as the "Defendants," and Academy, Polsky and Kaufman are referred to as the "Plaintiffs."

BACKGROUND

These consolidated actions arise out of loans ("Loans") extended by PNC to Academy pursuant to a loan and security agreement dated December 9, 1996 ("Loan Agreement"). In connection with the Loan Agreement, Academy also agreed to a "Revolving Loan Note" in the principal amount of $1.5 million, a "Term Note" in the principal amount of $600,000 and a "Mortgage Note" in the principal amount of $680,000 million (collectively, "Notes"). In addition, Academy guaranteed the Loans under a guaranty and suretyship agreement ("Guaranty"), while three of Academy's principals, including Polsky and Kaufman, guaranteed up to $500,000 of the Loans under a limited guaranty and suretyship agreement ("Limited Guaranty").[2]

When Academy encountered financial difficulties, several events of default supposedly occurred by the fall of 1998. Among these events were violations of financial covenants in the Loan Documents and failure to pay principal due on the Revolving Loan Note on May 31, 1998. Although two lenders, Reservoir Capital Corporation ("Reservoir") and The CIT Group ("CIT") offered to pay PNC all outstanding monies and to provide Academy with additional capital in early 1999, PNC refused to accept either offer.

Instead of exercising the remedies available to it under the Loan Documents, PNC entered into two forbearance agreements ("Forbearance Agreements") with Academy, the second of which ran until April 30, 1999. By September 1999, Academy had defaulted on its obligations under the Forbearance

[2] The Guaranty and the Limited Guaranty are collectively referred to as the "Guaranty Agreements." The Agreement, the Notes and the Guaranty Agreements are collectively referred to as the "Loan Documents."

Agreements and filed for bankruptcy, although its petition was later dismissed due to its inability to establish a plan of reorganization.

After the dismissal of Academy's bankruptcy petition, PNC hired Fulcrum and McDonald, Fulcrum's principal, to work with Academy to maximize a return on its assets and, if warranted, to sell Academy or its assets. The parties eventually attempted to sell Academy as a going concern after they concluded that this would provide the best price. In May 2000, most of Academy's personal property was sold at a public auction, with the proceeds being applied to the Loans. Academy's real property was sold in March 2001, leaving an outstanding balance of $600,000 on the Loans.

On May 16, 2000, the Plaintiffs filed the first of the above-captioned actions against the Defendants for breach of contract, intentional interference with contractual relations, breach of fiduciary duty and declaratory relief. Each of these claims relates to PNC's actions taken in connection with the declaration of default and the sale of Academy's assets. In the second action, PNC confessed judgment against Academy on July 7, 2000 under the Revolving Loan Note and the Mortgage Note, and Academy subsequently filed a petition to open the judgment, a move PNC opposed.

The Plaintiffs filed an amended complaint ("Complaint") on October 12, 2001. The Complaint asserts ten separate claims:

1. Breach of the Loan Documents, brought by all three Plaintiffs against PNC;
2. Intentional interference with Academy's prospective contractual relations with potential lenders, brought by all three Plaintiffs against PNC;
3. Intentional interference with Academy's prospective contractual relations with buyers expressing an interest in purchasing Academy's business, brought by all three Plaintiffs

against all three Defendants;

4. Breach of fiduciary duty arising from the Defendants' failure to sell Academy's business as a going concern, brought by Academy against all three Defendants;

5. Declaratory relief declaring all of Polsky and Kaufman's obligations satisfied, brought by all Polsky and Kaufman against PNC;

6. Violations of the federal anti-tying statute[3] by the Defendants' insistence that any purchaser of Academy's assets assume certain of Academy's leases or make a payment of $200,000, brought by all three Plaintiffs against PNC;[4]

7. Trespass to real estate by entering onto Academy's premises ("Premises"), brought by Academy against all three Defendants; and

8. Conversion, trespass to chattels and invasion of privacy claims stemming from the Defendants' diverting, opening and disposing of Academy's mail, brought by all three Plaintiffs against all three Defendants.

DISCUSSION

Pennsylvania Rule of Civil Procedure 1035.2 allows a court to enter summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action." A court must grant a motion for summary judgment when a non-moving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return

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[3] The anti-tying statute the Defendants allegedly have violated is known as the Bank Holding Company Act ("BHCA").

[4] 12 U.S.C.A. § 1972 ¶¶ (1)(A) and (B).

a verdict in his favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996).

I. The Plaintiffs Have Not Released the Defendants from the Claims Asserted

As an initial matter, the Defendants point to three provisions in the Loan Documents that they contend release them from liability for several of the claims presented in the Complaint. A close examination of these purported releases ("Releases") shows that they do not apply to the facts on which the Plaintiffs' claims are based.

Generally, a release is to be given effect according to the ordinary meaning of its language. Seasor v. Covington, 447 Pa. Super. 543, 547, 670 A.2d 157, 159 (1996). However, it must also be construed narrowly and in light of the circumstances at the time of its execution:

> The courts of Pennsylvania have traditionally . . . interpreted the release as covering only such matters as can fairly be said to have been within the contemplation of the parties when the release was given. Moreover, releases are strictly construed so as not to bar the enforcement of a claim which had not accrued at the date of the execution of the release.
>
> . . . [A] release covers only those matters within the parties' contemplation. In construing this general release, a court cannot merely read the instrument . . . . [I]t is crucial that a court interpret a release so as to discharge only those rights intended to be relinquished. The intent of the parties must be sought from a reading of the entire instrument, as well as from the surrounding conditions and circumstances.

Vaughn v. Didizian, 436 Pa. Super. 436, 439, 648 A.2d 38, 40 (1994) (citations and quotation marks omitted) (emphasis added). See also Wenger v. Ziegler, 424 Pa. 268, 271, 226 A.2d 653, 654 (1967) (relying on "the rule mandating strict construction of an instrument whereby a party surrenders rights to which he might otherwise be entitled"); Crum v. Pennsylvania R.R. Co., 226 Pa. 151, 156, 75 A. 183, 185 (1910) ("[A]n agreement comprehends only those things in respect to which it appears the contracting parties proposed to contract, and not others they never thought of. . . . [T]he release cannot be allowed

to embrace anything beyond it."). When trial courts have looked only at the language of the release and failed to take into account the surrounding events, they have been criticized and reversed. See, e.g., Vaughn, 436 Pa. Super. at 439, 648 A.2d at 40 (holding that "the trial court erred in failing to construe the language of this general release in light of the conditions and circumstances surrounding its execution" and reversing the trial court's application of the release to bar the plaintiff's claims).

The Defendants rely on the three Releases, each of which was executed on a different day. The first Release is found in the First Amendment to Loan Documents and was agreed to by the Plaintiffs in January 1998 ("January 1998 Release"):

> 9. RELEASE. In consideration for Bank's agreement to consent to the modifications set forth herein, Obligor and each Guarantor hereby waives and releases and forever discharges Bank and its officers, directors, attorneys, agents and employees harmless from any loss, damage, judgment, liability or expense (including counsel fees) suffered by or rendered against Bank or any of them on account of any claims arising out of or relating to the Loans. Obligor and each Guarantor further states that it has carefully read the foregoing release, knows the contents thereof and grants the same as its own free act and deed.

Def. Ex. 35 ¶ 9. The two Forbearance Agreements, the second of which became effective on November 1, 1998, include similar provisions ("Forbearance Releases"):

> f. Reaffirmation and Release. Borrower and each Guarantor hereby ratify and reaffirm all of the obligations and liabilities to Bank and agree that the same are owing without set-off, counterclaim or other defense of any nature. Borrower and each Guarantor hereby specifically ratifies and reaffirms all confession of judgment and waiver of jury trial provisions set forth in the Loan Agreement, the Notes and other Collateral Documents. Each Borrower and each Guarantor hereby specifically releases Bank, its past and present officers, employees and legal counsel, from any and all manner of claims, liabilities, suits, actions, causes of action and damages of any kind or nature whatsoever, at law or equity, which the Borrower and/or any Guarantor now has arising from or related to any act or omission by Bank and/or any such officer, employee or legal counsel, through the date hereof in connection with the consideration, negotiation, consummation, administration and/or enforcement of the Loans and/or the Loan Agreement and other Collateral

Documents, including this Agreement.

Pl. Ex. 36 ¶ 8(f).

To the extent the January 1998 Release and the Forbearance Release preclude claims arising prior to November 1, 1998,[5] the court finds the Defendants' argument irrelevant. None of the Plaintiffs' claims speak to events taking place before November 1, 1998. Accordingly, these two Releases are of no import.

The third Release ("Stipulation Release") is found in the Stipulation Pertaining to the Use of Cash Collateral and Adequate Protection, which Academy and PNC entered into in September 1999. The Stipulation Release reads as follows:

> 1. Debtor confirms that as of September 9, 1999 (subject to its rights to confirm such amounts prior to the final hearing in this Stipulation), it is indebted to Lender for advances previously made to Debtor under Pre-Petition Agreements in the aggregate principal amount of $1,977,928.25 consisting of $1,056,752.11 under the Line of Credit, $280,557.39 under the Term Loan and $640,618.75 under the Mortgage Loan, plus costs and attorneys' fees, as well as ongoing interest subsequent to September 9, 1999 (collectively the "Pre-Petition Loan"), and further confirms that all such indebtedness is valid and owing to Lender and <u>there are no set-offs, counterclaims, deductions or charges</u> to or against the Pre-Petition Loan or Lender.

Def. Ex. 36 ¶ 1 (emphasis added).

What is missing from the Stipulation Release is the essential word "release" or any related or similar words. This omission is particularly glaring given the word's use or incorporation in the title and body of the earlier Releases. Accordingly, the court must determine whether a provision in which a party confirms

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[5] Although the Forbearance Releases do not include the term "release" or any similar term, they arguably incorporate and reiterate the January 1998 Release. Although the court has not weighed the merit of this potential argument, the Plaintiffs do not challenge the November 1, 1998 cut-off date proposed by the Defendants. As such, the court need not discuss or decide this matter.

that is has "no set-offs, counterclaims, deductions or charges" against another amounts to a release of any claims that may have accrued to the confirming party prior to that date.

In debating this issue, the primary focus is on two Pennsylvania Supreme Court cases, each of which involved a declaration of no set-off in the context of an assigned mortgage.[6] In Quigley v. Breyer Corp., 362 Pa. 139, 66 A.2d 286 (1949), the plaintiffs had mortgaged property to Joseph and Bessie Toll. In addition to the mortgage agreement, these individuals had entered into a collateral agreement that permitted the plaintiffs to make early payments on the mortgage. The Tolls subsequently assigned their interest in the mortgage to the defendant, at which time the plaintiffs signed a declaration of no set-off. When the plaintiffs attempted to tender the balance of the mortgage ahead of schedule, the defendants refused to accept payment, arguing that the declaration estopped the plaintiffs from invoking the collateral early payment agreement. On appeal, the Pennsylvania Supreme Court affirmed the trial court's decision in favor of the plaintiffs based on the fact that the defendant had notice of the collateral agreement at the time the mortgage was assigned to him. Of particular interest is the court's description of a declaration of no set-off:

> The purpose of a declaration of no set-off is to dispense with personal inquiry by a purchaser of the mortgage as to whether there is any equity or defense: Robertson v. Hay, 91 Pa. 242, 246. While the party giving a declaration of no set-off will ordinarily be estopped to assert any defense or equity against an assignee who purchases the mortgage on the faith of it, it is well settled that such declaration will not operate as an estoppel

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[6] It appears from Pennsylvania case law that declarations of no set-off, such as those discussed here, are most commonly used in the context of an assignment of a mortgage. See, e.g., McUne v. Gross, 377 Pa. 360, 105 A.2d 367 (1954); Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Wallace, 346 Pa. 532, 31 A.2d 71 (1943); Federal Reserve Bank of Phila. v. Gearon, 331 Pa. 65, 200 A. 80 (1938).

> where the assignee had actual notice of the defense or equity, or where, as here, the circumstances under which he became assignee were such as to put him on inquiry. 'To avail himself of such an estoppel upon the debtor, the assignee who sets it up, must show that either he or some prior assignee from whom he claims, was an assignee for value, and without notice': Ashton's Appeal, 73 Pa. 153, 162. See also Fort Pitt Real Estate Co. v. Schaefer, 96 Pa. Super. 497, 502.

362 Pa. 139, 142, 66 A.2d 286, 287 (citations omitted).

The Pennsylvania Supreme Court distinguished Quigley in Harrison v. Galilee Baptist Church, 427 Pa. 247, 234 A.2d 314 (1967). In Harrison, the defendant entered into a purchase-sell agreement with Bernard Kanter. Under this agreement, the defendant purchased a building from Kanter, paying $8,000 in cash and securing the purchase price balance of $27,000 with a mortgage on the property to be held by Kanter. Attached to the agreement was an addendum that required Kanter to furnish labor and materials to make certain repairs within sixty days of settlement. In connection with Kanter's subsequent assignment of the mortgage to the plaintiff, the defendant approved a declaration of no set-off. When Kanter failed to make the required repairs, the defendant refused to make payments on the mortgage, and the plaintiff brought suit against it.

In affirming the trial court's finding in favor of the plaintiff, the Harrison court held that the declaration of no set-off estopped the defendant from using Kanter's breach of the repair agreement as a defense to the plaintiff's claims:

> The declaration of no set-off given by Galilee to Esther Harrison effectively estops Galilee from defending on the ground of its claim against Kanter, the assignor of the mortgage and bond. To hold otherwise under the instant circumstances would nullify completely the clear language of the declaration. See: Fort Pitt Real Estate Co. v. Schaefer, 96 Pa. Super. 497 (1929); Quigley v. Breyer Corp., 362 Pa. 139, 142, 66 A.2d 286 (1949); 51 A.L.R.2d 886 et seq.

427 Pa. at 251, 234 A.2d at 316. The court differentiated Quigley by stating that the question there was

one of notice, while the record in Harrison did not reveal notice of any claim.

The fact that the declaration of no set-off is being invoked for the protection of the mortgagee and not a third party makes this case distinguishable from Harrison. Moreover, it appears from the facts asserted that the Defendants may well have had notice of the Plaintiffs' claims at the time the Stipulation Release was executed, making the case more similar to Quigley. The court also notes again that the language and titles of the earlier Releases were perfectly clear and are easily contrasted with the less unequivocal terms used in the Stipulation Release. This leads to the conclusion that the Releases do not bar the Plaintiffs from presenting claims arising after November 1, 1998.[7]

II. The Defendants Are Not Entitled to Summary Judgment on the Plaintiffs' Breach of Contract Claim

A successful breach of contract action requires "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999) (citation omitted).[8] The Plaintiffs contend that the Defendants breached their obligations arising from the implied covenant of good faith that is inherent in the Loan Documents.

[7] This result finds support from other jurisdictions as well. See, e.g., Iloh v. Stein, 589 N.E.2d 1054, 1056 (Ill. App. Ct. 1992) (Endorsement of check with words "in payment of any and all claims including bodily injury arising from accident of 12-12-78" did not constitute release because "[t]he words release,' 'discharge,' or 'payment in full' were not used."); Carpenter v. Machold, 447 N.Y.S.2d 46, 47 (1982) (Although "[a]n analysis of the language of the instant document indicates that the promisor had a present intention not to sue defendant," language that plaintiff "did not intend" to sue defendant did not constitute release because "the document bears no words of release, discharge or renunciation as are required in a writing purporting to be a release.").

[8] Section 12.07 of the Agreement states that it is governed by Pennsylvania law.

1. The Loan Documents Include an Implied Covenant of Good Faith

The implied covenant of good faith, also known as the contractual duty of good faith,[9] is a legal concept shrouded in mystery in Pennsylvania due to conflicting appellate court decisions and the misapplication and imprecise use of the term "good faith" by attorneys. This confusion is compounded by the parties' failure to appreciate the complexities of this concept and to brief this issue accordingly. Although this court has addressed the implied covenant of good faith in other contexts, in no other case has this court confronted the contradictory case law laid out in the Commonwealth directly. After reviewing the relevant decisions, this court concludes that each contract, regardless of the relationship between the parties, gives rise to an implied covenant of good faith, a breach of which the Plaintiffs have correctly prosecuted as a breach of contract claim.

Pennsylvania's appellate courts have yet to resolve the issue whether the covenant of good faith is present in every contract or whether the covenant arises only in limited circumstances. On the one hand, state and federal courts interpreting Pennsylvania law have stated that "[e]very contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." Donahue v. Federal Exp. Corp., 753 A.2d 238, 242 (Pa. Super. Ct. 2000) (citation omitted). See also Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001) ("Under Pennsylvania Law, a covenant of good faith and fair dealing is implied in every contract."); Somers v. Somers, 418 Pa. Super. 131, 613 A.2d 1211 (1992) (holding plaintiff could proceed on breach of the covenant of good faith implied in an employment contract); Liazis v. Kosta, Inc., 421 Pa. Super. 502, 510, 618 A.2d 450, 454

[9] To emphasize the contractual nature of a claim for breach of this covenant/duty, the court will refer to this obligation as a covenant wherever possible.

(1992) ("[E]very contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract."). A recent Pennsylvania Superior Court decision discussed contractual good faith as follows:

> Section 205 of the Restatement (Second) of Contracts, which was adopted by this Court in Baker v. Lafayette College, 350 Pa. Super. 68, 84, 504 A.2d 247, 255 (1986), aff'd., 516 Pa. 291, 532 A.2d 399 (1987), and Creeger Brick & Building Supply, Inc. v. Mid-State Bank & Trust Company, 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989), provides: "Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts, § 205. A similar requirement has been imposed upon contracts within the scope of the Uniform Commercial Code (UCC) by 13 Pa.C.S.A. section 1203. Somers v. Somers, 418 Pa. Super. 131, 135, 613 A.2d 1211, 1213 (1992). "Good faith" has been defined as "[h]onesty in fact in the conduct or transaction concerned." 13 Pa.C.S.A. § 1201. The breach of the obligation to act in good faith cannot be precisely defined in all circumstances, however, examples of "bad faith" conduct include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Somers, 613 A.2d at 1213 (citing Restatement (Second) of Contracts, § 205(d)).

Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 318, 671 A.2d 716, 721-22 (1996).

On the other hand, a number of courts interpreting Pennsylvania law have found that the covenant of good faith is not implicated in every contractual relationship:

> In Pennsylvania, the courts have recognized the duty of good faith only in limited situations. Creeger; Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3rd Cir. 1993). More specifically, the duty of good faith may not be implied where (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties. Department of Transportation v. E-Z Parks, Inc., 153 Pa. Cmwlth. 258, 620 A.2d 712 (1993), appeal denied, 534 Pa. 651, 627 A.2d 181 (1993); USX Corp. v. Prime Leasing, Inc., 988 F.2d 433 (3rd Cir. 1993); Allstate Transportation Co. v. Southeastern Pennsylvania Transportation Authority, 2000 WL 329015 (E.D. Pa., No. Civ.A. 97-1482, filed March 27, 2000).

Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 867 (Pa. Commw. Ct. 2001). See also Benevento v. Life USA Holding, Inc., 61 F. Supp. 2d 407, 424 (1999) ("[U]nder Pennsylvania law, every contract does not imply a duty of good faith. Instead, the duty of good faith and fair dealing is limited to special types of contracts, involving special relationships between the parties."). Thus, under this line of cases, only contracts that entail a "special relationship" give rise to the covenant of good faith.

This court agrees with those decisions holding that a covenant of good faith is implied in every contract. As an initial matter, the requirement that a special relationship exist between the parties before the covenant of good faith arises has unclear origins. This requirement was first imposed in E-Z Parks, Inc. in 1993:

> Pennsylvania courts have recognized a separate duty of good faith performance of contracts only in limited circumstances. Creeger Brick v. Mid-State Bank, 385 Pa. Superior Ct. 30, 560 A.2d 151 (1989). This duty of good faith is limited to situations where there is some special relationship between the parties, such as a confidential or fiduciary relationship. A confidential relationship exists when "one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other." Estate of Clark, 467 Pa. 628, 635, 359 A.2d 777, 781 (1976). (citation omitted).

153 Pa. Commw. at 268, 620 A.2d at 717. Notably, there is no citation to support the conclusion that a special relationship is necessary. Moreover, those courts outside the Commonwealth that have imposed a special relationship requirement have done so only when examining whether a plaintiff may bring a tort or tort-like claim based on a breach of the covenant of good faith. See, e.g., Freeman & Mills v. Belcher Oil Co., 900 P.2d 669, 676 (Cal. 1995); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex.1987). Cf. Coca-Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 414, 430-31 (3d Cir. 1993) (distinguishing between covenant of good faith and duties arising from a fiduciary or confidential

relationship); Steven J. Burton & Eric G. Anderson, Contractual Good Faith: Formation, Performance, Breach, Enforcement § 9.2.3 n.28 (1995) ("To avoid misunderstanding, requirements of contractual good faith do not depend on a fiduciary relationship.").[10]

Holding that the implied covenant of good faith arises in every contractual relationship finds support from outside the jurisdiction more broadly as well. As noted supra, Section 205 of the Restatement (Second) of Contracts states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." This principle has been widely adopted by state and federal courts alike. See, e.g., Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co., 680 F.2d 933, 941 (3d Cir. 1982); Kleiner v. First Nat'l Bank of Atlanta, 581 F. Supp. 955, 960 n.5 (N.D. Ga. 1984); Mitford v. de Lasala, 666 P.2d 1000, 1006 (Alaska 1983); Central New Haven Dev. Corp. v. La Crepe, Inc., 413 A.2d 840, 843 (Conn. 1979). Moreover, the Uniform Commercial Code, as adopted in Pennsylvania and elsewhere, echoes this sentiment, providing that "'[e]very contract or duty within this title imposes an obligation of good faith in its performance or enforcement." 13 Pa. C.S. § 1203.

[10] As an aside, this court's discussion of the covenant of good faith addresses claims that arise in contract only and does not confront insurance bad faith or the common law tort of bad faith that has emerged in other jurisdictions. Cf. Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co., 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989) ("Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts."), with D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co., 494 Pa. 501, 431 A.2d 966 (1981) (rejecting Gruenberg v. Aetna Insurance Co., 510 P.2d 1032 (Cal. 1973), which allowed insured to bring a claim in tort against insurer for bad faith), and 42 Pa. C.S. § 8371 (allowing an insured to bring a statutory claim against an insurer for bad faith).

Many courts have relied on Creeger Brick for their limited application of the implied covenant of good faith. This Court posits that this is in error. Rather, Creeger Brick held solely that the facts presented did not give rise to a tort claim for breach of the covenant of good faith:

> It seems reasonably clear from the decided cases that a lending institution does not violate a separate duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights as a creditor. The duty of good faith imposed upon contracting parties does not compel a lender to surrender rights which it has been given by statute or by the terms of its contract. Similarly, it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan which are favorable to itself. As such, a lender generally is not liable for harm caused to a borrower by refusing to advance additional funds, release collateral, or assist in obtaining additional loans from third persons. A lending institution also is not required to delay attempts to recover from a guarantor after the principal debtor has defaulted. Finally, if the bank in this case falsely represented appellants' financial circumstances to other creditors for the purpose of damaging appellants' ability to continue doing business, appellants may have causes of action in tort for slander, misrepresentation, or interference with existing or prospective contractual relations. There is no need in such cases to create a separate tort for breach of a duty of good faith.

385 Pa. Super. at 36-37, 560 A.2d at 154. This limited holding does not justify the conclusion that the covenant of good faith is inherent in some contracts, but absent from others.

This is not to say that the implied covenant of good faith can override the express terms of a contract. On the contrary, it is axiomatic that the covenant of good faith does nothing more than fill in those terms of a contract that have not been expressly stated. See, e.g., Stonehedge Sq. L.P. v. Movie Merchants, Inc., 454 Pa. Super. 468, 480, 685 A.2d 1019, 1025 (1996) ("[T]he law will not imply a contract different than that which the parties have expressly adopted."). In addition, the question of what constitutes a breach of the covenant will depend greatly upon the scenario presented and will vary from situation to situation. Nevertheless, parties owe each other a contractual obligation of good faith, even where those parties do not have a "special relationship." Accordingly, the Loan Documents include an

implied covenant of good faith.

The Defendants have cited a number of cases that supposedly stand for the proposition that the covenant of good faith does not arise in a creditor-lender relationship. Each of these cases purports to rely on the Superior Court's ruling in Creeger Brick, and, to the extent that they advance the Defendants' argument, they are in error. Creeger Brick spoke not to whether the implied covenant of good faith was present in a creditor-lender relationship. Rather, the Superior Court held that "it cannot be said that a lender has violated a duty of good faith merely because it has negotiated terms of a loan which are favorable to itself," and that the availability of other remedies obviated the "need . . . to create a separate tort for breach of a duty of good faith." 385 Pa. Super. at 37, 560 A.2d at 154. Those decisions relying on Creeger Brick to avoid the covenant of good faith and to narrow its application appear to confuse the existence of the covenant with the alleged breach of the covenant and to expand Creeger Brick into unintended areas. Compare Fellheimer v. Maryland Nat'l Bank, No. Civ. A. 93-2670, 1994 WL 2525, at *7 (E.D. Pa. Jan. 6, 1994) ("[A] lender does not breach an implied contractual duty of good faith by adhering to the terms of its contract with a borrower.") with Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 319 (E.D. Pa. 1992) ("While Pennsylvania recognizes an implied contractual duty of good faith in limited situations, it has refused to do so in the lender/borrower relationship."). Thus, Creeger Brick cannot be read as supporting the Defendants' position or justifying those courts that have held that this covenant is not implied in every contract.

2. The Plaintiffs's Current Claims Do Not Amount to an Amendment of the Pleadings

The Defendants next assert that the Plaintiffs are attempting to amend their pleading by asserting a new claim. The Defendants are correct that a plaintiff may not amend its complaint by stealth and guile through a response to a motion. See, e.g. Raleigh v. Pennsylvania Human Relationship Comm'n, 660 A.2d 177, 180 (Pa. Commw. Ct. 1995) ("[A] response to a preliminary objection cannot be used as a tool to amend the complaint."). Cf. Holmes v. Lankenau Hosp., 426 Pa. Super. 452, 627 A.2d 763 (1993) (holding that defendants should have requested leave to amend new matter instead of simply filing motion for summary judgment based on release, but that procedural error did not warrant reversal of order granting summary judgment); Martin v. Poole, 232 Pa. Super. 263, 267, 336 A.2d 363, 365 (1975) ("[S]ubstantive justice would be better served by treating [defendant's] petition for summary judgment as an 'amendment' of his original [new matter] 'pleading' with leave of court."). Nevertheless, the Court sees no reason why any amendment is necessary. As this court recently concluded, the implied covenant of good faith is a principle of contract interpretation typically used in a breach of contract claim and is not a separate cause of action. JHE, Inc. v. Southeastern Pa. Transp. Auth., November Term, 2001, No. 1790, slip op at 8-13 (Pa. Com. Pl. May 17, 2002) (Sheppard, J.).[11] Moreover, Pennsylvania's pleading rules require only that a plaintiff set forth the facts underlying a claim, not the legal theory on which he or she intends to proceed. Heinley v. Commonwealth, 153 Pa. Commw. 599, 605 n.5, 621 A.2d 1212, 1215 n.5 (1993); Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 277, 505 A.2d 973, 980 (1985); IRPC, Inc. v. Hudson United Bancorp, No. 0474, 2002 WL 372945, at *3 (Pa. Com. Pl. Jan. 18, 2002).

[11] Available at http://courts.phila.gov/cptcvcomp.htm.

Here, the facts alleged sustain the assertion that the Defendants violated their obligation to the Plaintiffs to act in good faith, through both their operation of Academy's business and their negotiations with third parties.[12] Thus, the Motion as to the Plaintiffs' breach of contract claim is denied.[13]

III. One of the Plaintiffs' Intentional Interference with Contractual Relations Claims Is Supportable, While the Other Is Not

The Defendants proceed by attacking the Plaintiffs' two claims for intentional interference with contractual relations. The attack on the second of these claims is persuasive, while the attack on the first is not.

A successful claim for intentional interference with contractual relations requires evidence of the following four elements:

> (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.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997) (citation omitted). Pennsylvania law permits an intentional interference action based on both existing and prospective contractual relationships. Glenn v. Point Park College, 441 Pa. 474, 477-78, 272 A.2d 895, 897 (1971); Glazer v. Chandler, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964).

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[12] In addition, the Plaintiffs identified the Defendants' alleged breach of the implied covenant of good faith in answers to interrogatories served in February 2001.

[13] The Defendants also point out that the Plaintiffs have demanded punitive damages for their breach of contract claim. This demand must be stricken because "punitive damages cannot be recovered merely for breach of contract." Baker v. Pennsylvania Nat'l Mut. Cas. Inc. Co., 370 Pa. Super. 461, 469-70, 536 A.2d 1357, 1361 (1987).

The Defendants contest the validity of the Plaintiffs' first intentional interference claim, which centers on the Defendants' conduct regarding the CIT and Reservoir proposals, by contending that their conduct was intended to protect PNC's interest in the Loan and is therefore privileged. The definition of "privilege" in the context of a claim for intentional interference has proven elusive:

> Unlike other intentional torts such as intentional injury to person or property or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in [Restatement (Second) of Torts] §§ 766, 766A or 766B.

Ruffing v. 84 Lumber Co., 410 Pa. Super. 459, 468, 600 A.2d 545, 549 (1992) (quoting Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 433 n.17, 393 A.2d 1175, 1184 n.17 (1978), and Restatement (Second) of Torts § 767 cmt. b).[14] Because of this, Pennsylvania courts have held that "the absence of privilege or justification on the part of the defendant is merely another way of stating that the defendant's conduct must be improper." Cloverleaf Dev., Inc. v. Horizon Fin. F.A., 347 Pa. Super. 75, 83, 500 A.2d 163, 167 (quoting Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 281 Pa. Super. 560, 581 n.11, 422 A.2d 611, 622 n.11 (1980)) (quotation marks omitted). See also Adler, Barish, Daniels, Levin & Creskoff, 482 Pa. at 433 n.17, 393 A.2d at 1184 n.17 (noting that Restatement (Second) of Torts § 767 "focuses upon whether conduct is 'proper,' rather than 'privileged'").

To determine whether a defendant's conduct is improper, a court must weigh the following six factors:

> (a) the nature of the actor's conduct;

[14] These sections address intentional interference with performance of contract by a third party, intentional interference with another's performance with his own contract and intentional interference with prospective contractual relations.

(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.

Small v. Juniata College, 452 Pa. Super. 410, 418, 682 A.2d 350, 354 (1996) (quoting Restatement (Second) of Torts § 767). The Defendants rely in part on Restatement (Second) of Torts § 773 to argue that their conduct was proper:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

See also Schulman v. J.P. Morgan Investment Mgmt., 35 F.3d 799, 810 (3d Cir. 1994) ("Interference is also privileged when the actor believes in good faith that his legally protected interest may otherwise be impaired by the performance of the contract.").

Ordinarily, the question is whether a defendant acted in good faith or for a proper purpose is a question of fact for a jury. See, e.g., SDK Investments, Inc. v. Ott, 1996 WL 69402, at *14 (E.D. Pa. Feb. 15, 1996) ("Whether [Defendant] Ahn's conduct was not privileged in the context of a business acquisition is a question for the jury."); P.V.C. Realty v. Weis Markets, Inc., No. 1995-635, 2000 WL 33406981, at *14 (Pa. Com. Pl. Dec. 19, 2000) ("The essence of the section 773 privilege is that the party act in good faith. It was a question of fact for the jury whether Weis acted in good faith when asserting the exclusivity provision of the lease."); Restatement (Second) of Torts § 767, cmt. 1 ("[W]hen

there is room for different views, the determination of whether the interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in question."). This court is inclined to agree with the Defendants that their conduct was privileged, but the evidence presented by the Plaintiffs leaves sufficient room for doubt. Thus, the Court may not grant summary judgment on Count II.

The same cannot be said of Count III. The Plaintiffs' second claim for intentional interference with contractual relations focuses on the Defendants' conduct regarding the prospective contractual relations between the Plaintiffs and those third parties interest in purchasing Academy's assets. The Defendants' challenge to this claim is based on the doctrine of judicial estoppel:

> Judicial estoppel is an equitable, judicially-created doctrine designed to protect the integrity of the courts by preventing litigants from "playing fast and loose" with the judicial system by adopting whatever position suits the moment. Unlike collateral estoppel or res judicata, it does not depend on relationships between parties, but rather on the relationship of one party to one or more tribunals. In essence, the doctrine prohibits parties from switching legal positions to suit their own ends.

Sunbeam Corp. v. Liberty Mut. Ins. Co., 566 Pa. 494, 500, 781 A.2d 1189, 1192 (2001) (citations omitted). Moreover, the Defendants contend, the Plaintiffs had no right to enter into a contract for the sale of Academy's assets, as the Loan Documents specifically preclude the Plaintiffs from transferring such assets and grant all disposal rights to PNC. Pl. Ex. 1 §§ 6.02(B), 7.02.

The Plaintiffs make no attempt to confront these assertions. Indeed, the Plaintiffs ignore Count III completely in their responses. The Motion is granted with regard to Count III, and accordingly it is dismissed.

IV. The Defendants Are Not Entitled to Summary Judgment on the Breach of Fiduciary Duty Claim

The Defendants' attack on the Plaintiffs' breach of fiduciary duty claim is two-pronged in nature: first, the Defendants contend they owed the Plaintiffs no fiduciary duty, and second, they did not breach any such duty, to the extent that it did exist. The court finds that the Defendants did owe such a duty and that the Plaintiffs have presented sufficient evidence to support their claim that the Defendants breached that duty.

As noted by one federal District Court, "[u]nder Pennsylvania law, the lender-borrower relationship does not ordinarily create a fiduciary duty." Gonzalez v. Old Kent Mtge. Co., No. Civ. A. 99-5959, 2000 WL 1469313, at *6 (E.D. Pa. Sept. 21, 2000) (citing Federal Land Bank of Baltimore v. Fetner, 269 Pa. Super. 455, 461, 410 A.2d 344, 348 (1979)). However, under certain circumstances, a creditor may owe such a duty to a debtor:

> Although a lender does not ordinarily owe a fiduciary duty to a borrower, a confidential relationship may arise if the creditor "gains substantial control over the debtor's business affairs." Stainton v. Tarantino, 637 F. Supp. 1051, 1066 (E.D. Pa.1986). Generally, courts have insisted upon a strong showing of control. See, e.g., NCNB Nat. Bank v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987) ("actual day-to-day involvement in management and operations of the borrower or the ability to compel the borrower to engage in unusual transactions is required [to show] that a lending institution had control over the borrower"); Cossoff v. Rodman, 699 F.2d 599, 610-11 (2d Cir. 1983) (creditor's monitoring of operations and proffering management advice, without more, does not show control); Krivo Indus. Supply Co. v. Nat. Distillers & Chemical Corp., 483 F.2d 1098, 1105 (5th Cir. 1973) ("merely taking an active part in the management of the debtor corporation does not automatically constitute control"); James E. McFadden, Inc. v. Baltimore Contractors, Inc., 609 F. Supp. 1102, 1105 (E.D. Pa.1985) (creditor must assume absolute and total control not just take steps to minimize risk).

Blue Line Coal Co. v. Equibank, 683 F. Supp. 493, 496-97 (E.D. Pa. 1988) (citation omitted). This obligation running from the creditor to the debtor has been held to be fiduciary in nature and to exist where

the creditor liquidates the debtor's collateral. See Solfanelli v. CoreStates Bank, N.A., 203 F.3d 197, 200 (3d Cir. 2000) ("[I]n liquidating the collateral, the creditor acts as the debtor's fiduciary and has a corresponding good faith duty to maximize the proceeds of the collateral's sale").

Here, the control exercised by the Defendants over Academy's operations is sufficient to justify the imposition of a fiduciary duty. The Defendants came onto the Premises and effectively began running its business. They opened Academy's mail, cashed checks made out to Academy, hired and fired employees and made purchasing decisions. In addition, the Defendants conducted negotiations for the sale of Academy's business and attempted to dispose of the Loan collateral. This level of involvement in a debtor's operations allows for the conclusion that the Defendants owed Academy a fiduciary duty.

The Defendants counter that this "fiduciary" duty is not as deep as a conventional fiduciary duty and that it requires only that a creditor's actions be "commercially reasonable," as required by 13 Pa. C.S. § 9610(b).[15] The court disagrees. "Reasonableness" is an objective standard that requires only that a person act with "the care which an ordinarily prudent person would exercise under the same or similar circumstances." Colonial Taxi & Paratransit Servs., Inc. v. Commonwealth, 104 Pa. Commw. 264, 269 n.2, 521 A.2d 536, 538 n.2 (1987) (citing Maternia v. Pennsylvania R.R. Co., 358 Pa. 149, 56 A.2d 233 (1948)). In contrast, requiring that a person act in "good faith," the term used by the Solfanelli court, imposes a subjective standard and demands that an individual so bound adhere to the "obligations of loyalty, fairness . . . and full disclosure," among others. McRoberts v. Phelps, 391 Pa. 591, 603, 138 A.2d

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[15] This statute requires that "every aspect of a disposition of collateral, including the method, manner, time, place and other terms, . . . be commercially reasonable."

439, 445 (1958). See also Manzetti v. Mercy Hosp. of Pittsburgh, 565 Pa. 471, 483, 776 A.2d 938, 945 (1994) (contrasting objective "reasonableness" standard with "a subjective good faith standard"). Thus, the Court must determine whether the Defendants's actions comported with their fiduciary duty to the Plaintiffs, not merely whether the Defendants acted in a commercially reasonable manner.

This court submits that there are significant disputes as to material facts that preclude granting summary judgment on this Count. According to the Plaintiffs, liquidating Academy's assets in early 2000 would have provided the Defendants with sufficient funds to pay PNC in full, and the Defendants' continued operation of Academy's business dissipated those assets. Moreover, it is questionable whether the Defendants examined offers for purchasing Academy's business in accordance with the duties they owed to the Plaintiffs. Thus, the Defendants are not entitled to summary judgment on the Plaintiffs' claim for breach of fiduciary duty.

V. The Plaintiffs May Be Entitled to Declaratory Relief Ordering the Discharge of Their Guaranties

The Defendants next challenge Polsky and Kaufman's request that they be discharged from their guaranties. Because the request for discharge raises disputed questions of material fact, this challenge fails.

The Pennsylvania Supreme Court engaged in a lengthy discussion of a commercial reasonability and guarantor's right to a discharge in Savoy v. Beneficial Consumer Discount Co., 503 Pa. 74, 468 A.2d 465 (1983):

> The Uniform Commercial Code confers upon a secured party the right, upon default, to dispose of collateral by sale or lease, subject to the requirement that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." When a private sale of repossessed collateral has been made, and the debtor raises the question of the commercial reasonableness of that sale, the great weight of authority holds that the burden of proof on this issue is shifted to the secured party seeking

> a deficiency judgment to show that, under the totality of circumstances, the disposition of collateral was commercially reasonable.
>
> . . .
>
> When there has been a commercially unreasonable disposition of collateral, the issue arises as to the effect of that disposition upon a creditor's entitlement to recovery of remaining debt. It is the view in certain jurisdictions that when a sale is found to have been commercially unreasonable, the creditor should be barred entirely from obtaining a deficiency judgment against the debtor. Other courts have held that failure to establish commercial reasonableness of the resale price creates a presumption that the value of the collateral equaled the indebtedness secured, thereby extinguishing the indebtedness unless the secured party rebuts the presumption. We believe that the latter approach, which was adopted by Superior Court in the instant case, is the more enlightened and equitable. The former approach, foreclosing a creditor from the possibility of securing any deficiency judgment, would provide the debtor with a windfall relief from his obligation while extinguishing a creditor's right to recover sums truly owed. Further, in conjunction with the rebuttable presumption now adopted, the debtor's interests are adequately protected by Code provisions allowing the debtor a right to recover any losses caused by a secured party's failure to comply with the requirement that collateral be disposed of in a commercially reasonable manner.

503 Pa. at 78, 468 A.2d at 467-68 (emphasis added) (citations and footnote omitted). At least one Pennsylvania court has extended this principle to a guarantor's right to an extinguishment. See Turner v. National Bank of Olyphant, 9 D. & C.4th 614 (1991). Cf. Reuter v. Citizens & N. Bank, 410 Pa. Super. 199, 208, 599 A.2d 673, 677 (1991) ("Under Pennsylvania law, a guarantor is a "debtor" within the meaning of Division 9 of our Commercial Code."). The initial questions at hand, therefore, are whether the Defendants can establish that their disposal of Academy's property was commercially reasonable and whether the Plaintiffs have adduced sufficient proof to rebut that presumption.

The Defendants provide assertions to back up their claim that they acted in a commercially reasonable manner. However, the Plaintiff have supplied their own evidence that the Defendants acted

inappropriately. This includes supposed discrepancies between appraisal values and sale prices[16] and the Defendants' responses to the three offers for Academy's assets. These disputed material facts prevent the Court from granting summary judgment on the requests for declaratory relief.

VI. The Plaintiffs' Claim for Violations of the BHCA Is Legally Flawed

The Defendants argue that the Bank Holding Company Act ("BHCA") does not apply to their behavior for several reasons, including the fact that PNC was acting to protect its investment in Academy. The BHCA prohibits certain behavior referred to as "tying":

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement–
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
> >
> > (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company; . . .

12 U.S.C.A. § 1972 ("Section 1972"). To state a viable BHCA claim under Section 1972, a plaintiff must show (1) the banking practice in question was unusual in the banking industry, (2) the existence of an anti-competitive tying arrangement, and (3) that the practice benefits the bank. Bieber v. State Bank of Terry, 928 F.2d 328, 330 (9th Cir. 1991). The Plaintiffs assert that PNC conditioned the sale of Academy's assets on the purchaser either assuming Academy's obligation under a lease with PNC Leasing

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[16] Such discrepancies in price have been held to be "relevant to a determination of whether a challenged sale was 'commercially reasonable.'" Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797, 801 (E.D. Pa. 1968) (citing, inter alia, Alliance Discount Corp. v. Shaw, 195 Pa. Super. 601, 604, 171 A.2d 548, 550 (1961)).

Corp. ("Leasing"), a PNC affiliate,[17] or paying of the $200,000 due under this "Lease." This, the Plaintiffs contend, violates the BHCA.

The purpose of Section 1972 "is to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire." Swerdloff v. Miami Nat'l Bank, 584 F.2d 54, 58 (5th Cir. 1978) (citation omitted). Courts have interpreted Section 1972's provisions narrowly:

> [I]t seems clear that Congress did not intend to "federalize" large segments of existing commercial and banking law, or to impose treble damage liability whenever a federal court might conclude that the specific terms of a loan transaction were onerous or uncommon for some other reason. Section 1972 is not a general regulatory provision designed to insure fair interest rates, collateral requirements, and other loan agreement terms. It has a narrow target; it is "intended to provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition or unfair competitive practices." S. Rep. No. 91-1084, 91st Cong., 2d Sess. 3.

Freidco of Wilmington, Del. Ltd. v. Farmers Bank of Del., 499 F. Supp. 995, 1001 (D. Del. 1980).

The Defendants raise a wide range of defenses against the Plaintiffs' BHCA claim. These defenses focus on interpretations of what is required under Section 1972 and whether the Plaintiffs' claims satisfy those requirements.[18] The Defendants also contend that its actions to benefit Leasing are not covered by Section 1972 because of PNC was entitled to base its actions on its entire relationship with Academy, including the Lease, provided by a PNC affiliate.

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[17] The exact nature of PNC's relationship with Leasing is unclear. Accordingly, it is difficult to evaluate how acting for Leasing's benefit was intended to protect PNC's investment in Academy.

[18] Specifically, the dispute focuses on whether the BHCA requires, and whether the Plaintiffs have provided sufficient evidence to show, that the Defendants' actions were anti-competitive, that there was a consummated transaction, that the Plaintiffs suffered a direct injury and that no prospective purchaser of Academy's assets was a "customer."

The Defendant's second contention is most convincing. Numerous courts have held that the BHCA permits a lender to review its entire relationship with the borrower, including entities related to the borrower. See, e.g., NCNB Tex. Nat'l Bank v. Johnson, 11 F.3d 1260, 1268 & 1268 n.11 (5th Cir. 1994) (Requiring that a purchaser assume debts owed by a company's vice president and secretary is "perfectly normal restructuring of debt during reorganization, not tying."); Palermo v. First National Bank & Trust Co. of Oklahoma, 894 F.2d 363, 369 (10th Cir. 1990) (permitting bank to "evaluate its entire existing relationship with the plaintiffs" when considering renewal of plaintiff's credit); Alpine Elec. Co. v. Union Bank, 776 F. Supp. 486, 490 (W.D. Mo. 1991) ("[B]anks are permitted to consider a customer's complete financial picture, including the loans of related companies, in conducting loan transactions."), aff'd, 979 F.2d 133 (8th Cir. 1992).[19] Assuming that PNC and Leasing may be treated as having the same interests, it was appropriate for PNC to join the transfer of the Lease and the remainder of Academy's assets, even though the Lease is a transaction separate from the Loan.[20] Cf. McCoy v. Franklin Sav. Ass'n, 636 F.2d 172, 175 (7th Cir. 1980) (holding that the BHCA was not intended "to prohibit attempts (like these) by banks to protect their investments"); New Engl. Co. v .Bank of Gwinnett County, 891 F. Supp. 1569, 1575 (N.D. Ga. 1995) ("[C]ourts have upheld a wide range of conditions placed upon

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[19] The Court notes that none of these cases addresses whether a bank may take into account the interests of its own affiliates when making lending decisions that would otherwise be covered by the BHCA. However, the fact that a bank gives weight to the interests of related third parties does not appear to give rise to any difficulty, as Section 1972 treats a bank and its subsidiary as one. See 12 U.S.C.A. § 1972(1)(B)-(E) (referring to the conduct "a bank holding company of such bank, or from any other subsidiary of such bank holding company"). Because the Plaintiffs do not challenge this view, or even provide a substantive response to this asserted defense, the Court has considered it to be so for the purposes of the Motion.

[20] This is especially true given the narrow scope of the BHCA.

debtors in efforts to protect the investment of the creditor-bank."); Sterling Coal Co. v. United Amer. Bank, 470 F. Supp. 964, 965 (E.D. Tenn. 1979) (Section 1972 "does not prohibit attempts by banks to protect their investments.").[21] Because PNC's conduct was designed to protect its interest and is not "unusual," the Plaintiffs cannot establish their BHCA claim, and Count VI is dismissed.[22]

VII. The Defendants Are Not Entitled to Summary Judgment on the Plaintiffs' Trespass Claim

Pennsylvania defines a trespass as "an unprivileged, intentional intrusion upon land in possession of another." Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing Kopka v. Bell Tel. Co., 371 Pa. 444, 91 A.2d 232, 235 (1952)). This encompasses intrusions that begin as privileged but ultimately exceed the scope of the privilege. See, e.g., Commonwealth v. Johnston, 438 Pa. 485, 489, 263 A.2d 376, 379 (1970) (Invitee became a trespasser when he failed to leave when requested.); Rawlings v. Bucks County Water & Sewer Auth., 702 A.2d 583, 586 (Pa. Commw. Ct. 1997) (Defendant was liable for trespass where its encroachment was not temporary and not concluded upon notice and demand by plaintiff.).[23]

The Defendants point to Section 7.02(A) and (B) of the Loan and Security Agreement, which grants PNC the right upon default to "[e]nter upon any premises of Obligors, exclude Obligors, and take

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[21] At this juncture, it is also worth reiterating the Creeger Brick holding that "[t]he duty of good faith imposed upon contracting parties does not compel a lender to surrender rights which it has been given by statute or by the terms of its contract." 385 Pa. Super. at 36-37, 560 A.2d at 154.

[22] The Court is somewhat disappointed that it will not have the opportunity to address the remaining issues, as these sections of the parties' briefs are particularly well researched, drafted and argued.

[23] While the case law on exceeding a privilege's scope primarily addresses temporal, not physical, limitations, the Court does not see any reason to distinguish between the two in this instance.

immediate possession of the Collateral" and to "use, operate, manage and control the Collateral. . . ." This authorizes the Defendants to enter Academy's property and to have full access to Academy's personal property and equipment.

The real question is whether PNC's decision to continue to operate Academy as a going concern and refusal to remove the Collateral from the Premises violated the extent of the Defendants' privilege. Questions as to the specific time when the Defendants were on the Premises and the areas of the Premises entered are not appropriately answered in the context of a motion for summary judgment. Because this claim raises disputed issues of material fact, the Motion as to Count VII is denied.

VIII. The Defendants Are Not Entitled to Summary Judgment on the Plaintiffs' Conversion and Trespass to Chattel Claims

The Plaintiffs' conversion and trespass to chattel claims are based on the Defendants' interception and retention of the Plaintiffs' mail without their permission. This mail included notices from state, local and federal taxing authorities, as well as creditors and the United States Bankruptcy Court.

Pennsylvania law defines conversion as "the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification." Brinich v. Jencka, 757 A.2d 388, 403 (Pa. Super. Ct. 2000) (citation omitted). Among the ways a person may incur liability for conversion is by "[u]nreasonably withholding possession from one who has the right to it." Martin v. National Sur. Corp., 437 Pa. 159, 165, 262 A.2d 672, 675 (1970) (citing Prosser, Torts § 15 (2d ed. 1955). In reviewing a claim for conversion, a court must focus not on a defendant's specific intent to commit a wrong, but rather its intent to exercise control over the chattel in question. McKeeman v. CoreStates Bank, N.A., 751 A.2d 655, 659 n.3 (Pa. Super. Ct. 2000). The elements of trespass to

chattel are essentially the same, although "conversion entails a more serious deprivation of the owner's rights such that an award of the full value of the property is appropriate." Creative Dimensions in Mgmt., Inc. v. Thomas Group, Inc., No. 96-6318, 1999 WL 225887, at *3 n.2 (E.D. Pa. Apr. 16, 1999). See also Restatement (Second) of Torts § 217 (1965) (Trespass to a chattel requires "intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.").

The Defendants point to a section of the Loan and Security Agreement that they assert grants them the right to "[c]ollect and receive all accounts receivable, rents, income, revenue, earnings, issues and profits therefrom." Pl. Ex. 1 § 7.02(C). Because they did no more than open the mail, search for checks and forward mail to the Plaintiffs, they contend, they are not liable for conversion or trespass to chattel. However, given the evidence presented by the Plaintiffs, the court cannot accept this argument at this stage. The Plaintiffs contend that the Defendants delayed forwarding mail to the Plaintiffs for up to three months after it was received. Moreover, it is alleged the Defendants cashed checks to which the Defendants were not entitled. If the Plaintiffs are able to substantiate these allegations at trial, they may recover on their conversion and trespass to chattel claims. As such, the Motion is denied as to Counts VIII and IX.

IX. The Defendants Are Entitled to Summary Judgment on the Plaintiffs' Invasion of Privacy Claim

The Pennsylvania Supreme Court has adopted the portions of the Restatement (Second) of Torts Sections that govern actions for invasion of privacy. Vogel v. W.T. Grant Co., 458 Pa. 124, 327 A.2d 133 (1974). While an invasion of privacy plaintiff may proceed on any one of four theories, the Plaintiffs

assert that the Defendants actions constitute intrusion upon seclusion.[24] Under this theory, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person." Larsen v. Philadelphia Newspapers, Inc., 375 Pa. Super. 66, 77, 543 A.2d 1181, 1186-87 (1988). Moreover, "[t]he right of privacy is a qualified right to be let alone; but to be actionable, the alleged invasion of that right must be unlawful or unjustifiable." Harris v. Easton Pub. Co., 335 Pa. Super. 141, 152, 483 A.2d 1377, 1383 (1984) (citation omitted).

As an initial matter, to the extent that Academy is asserting an invasion of privacy claim, the claim can be dismissed. Under Restatement (Second) of Torts Section 652I, "an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded" because entities like a corporation have no right to personal privacy.[25] Cf. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy."). This precludes Academy from bringing a claim for intrusion on seclusion.

In Harris, the Pennsylvania Superior Court discussed intrusion on seclusion in substantial detail:

> An action pursuant to this section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. The invasion may be (1) by physical intrusion into a place where the plaintiff has secluded himself, (2) by use of the defendant's senses to oversee or overhear the plaintiff's private affairs, or (3) some other form of investigation or examination into plaintiff's private concerns.

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[24] The remaining three theories are appropriation of another's name or likeness for commercial purposes, unreasonable publicity given to another's private life; and publicity that unreasonably places another in a false light before the public. Jenkins v. Bolla, 411 Pa. Super. 119, 123, 600 A.2d 1293, 1295 (1992).

[25] The exception to this is a claim for appropriation of one's name or likeness. Restatement (Second) of Torts § 652I

> The defendant is subject to liability under this section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. There is also no liability unless the interference with the plaintiff's seclusion is substantial and would be highly offensive to the ordinary reasonable person.

335 Pa. Super. at 153-54, 483 A.2d at 1383-84 (citations omitted).

The Defendants assert that they did nothing more than collect checks from the Plaintiffs' mail and did not read any letters addressed to the Plaintiffs. While it may strain credulity to believe that the Defendants opened mail addressed to the Plaintiffs and removed checks without examining any of the envelopes' contents, the Plaintiffs have offered nothing to support their assertion that the Defendants intruded on the Plaintiffs' private affairs. Indeed, the Plaintiffs' argument amounts to nothing more than the bald assertion that the Defendants <u>must</u> have read their personal mail. This allegation is eroded by the Plaintiffs' own experiment, in which the Defendants' cashed a personal check sent to Kaufman at Academy. Had the Defendants read the letter accompanying the check, they no doubt would have realized the check's personal nature and refrained from cashing it. The fact that they cashed the check implies that they did not, in fact, read the personal communication that came with it. Accordingly, the Plaintiffs have failed to produce evidence to support their invasion of privacy claims.

X. The Defendants Are Not Entitled to Summary Judgment on the Counterclaim

Given the unsettled nature of the Plaintiffs' claims, the Defendants' counterclaim, which asserts claims for breaches of various Loan Documents, cannot be resolved at present:

> The general rule is that a party who has materially breached a contract may not complain if the other party refuses to perform his obligations under the contract. A party also may not insist upon performance of the contract when he himself is guilty of a material breach of the contract. Moreover, where the evidence to sustain the justification for discharge is disputed, the jury must pass on it.

Ott v. Huehler Lumber Co., 373 Pa. Super. 515, 518, 541 A.2d 1143, 1145 (1988) (citations omitted). See also Bafile v. Borough of Muncy, 527 Pa. 25, 30, 588 A.2d 462, 464 (1991) ("[A] party who suffers a loss due to a breach of contract has a duty to make a reasonable effort to mitigate his losses."). Accordingly, the Court has denied the Motion as it relates to the Defendants' counterclaim.

CONCLUSION

The Defendants are entitled to summary judgment on the Plaintiffs' claims for intentional interference with contractual relations (Count III only), violations of the BHCA and invasion of privacy.[26] As to the remaining counts, the Motion is denied.

The court will issue a contemporaneous Order in accord with this Opinion.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

[26] The Court has also granted summary judgment as to the Plaintiffs' request for punitive damages for their breach of contract claim.