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

ADVANCED SURGICAL SERVICES, INC., et al., Plaintiffs	:	August Term, 2000
	:	No. 1637
v.	:	
	:	Commerce Case Program
INNOVASIVE DEVICES, INC., et al., Defendants	:	Control No. 110998

MEMORANDUM OPINION

Defendants Innovasive Devices, Inc. ("Innovasive"), Mitek Products ("Mitek"), Christine Wells ("Wells") and Anthony Dale ("Dale") have filed preliminary objections ("Objections") to the amended complaint ("Complaint") of Plaintiffs Advanced Surgical Services, Inc. ("ASSI") and Robert Morris ("Morris").[1] For the reasons set forth in this Opinion, the Court is issuing a contemporaneous order ("Order") overruling the Objections.

BACKGROUND

On February 3, 1998, Innovasive entered into an agreement with ASSI ("Agreement").[2] Under the Agreement, ASSI was to serve as a sales representative for Innovasive and was to receive

[1] Morris is alleged in the Complaint to be an "agent" of ASSI. Dale and Wells are alleged to have been agents and/or employees of Mitek and Innovasive.

[2] The Agreement is stated to be "a letter of intent and is intended to be a letter of agreement on the 'Special Consideration' section of the 'Contract.' More definable terms will follow through the 'Contract.'" From this language, it appears that the Agreement is intended to supplement a "Contract" between ASSI and Innovasive.

commissions on invoice sales. In addition, Innovasive was to provide ASSI a monthly allowance of $2,000 for ASSI to hire a sales subagent.

The Agreement also included a provision addressing a change in control of Innovasive:

> If there is a change in control of Innovasive Devices Inc. due to a buy out, the acquiring party shall have the option within 30 Days of such change to continue the "Contract" as agreed, or take the previous 12 months[']average sales commission multiplied by 50% paid to Advanced Surgical quarterly, in arrears, for two years, or the remainder of the contract which is ever [sic] greater.

Mitek acquired Innovasive on February 11, 2000 and sent ASSI a letter on March 7 confirming the termination of the relationship between Innovasive and ASSI. However, the Complaint alleges that Mitek has failed to pay ASSI the termination fee required by the Agreement and has withheld subagent payments accruing between January 2000 and the date of the Agreement's termination. Additionally, sometime in February 2000, Wells allegedly attempted to induce ASSI customers not to place orders until after April 2000, at which point Mitek and Innovasive would have no commission obligations to ASSI. As a further matter, the Plaintiffs allege that Dale spoke to one of ASSI's customers and accused Morris of conversion.

The Complaint alleges causes of action for breach of contract, interference with contractual relations, defamation and civil conspiracy. In response, the Defendants have filed the Objections, which attack the legal sufficiency of the tort counts and the Plaintiffs' failure to attach a necessary writing.

DISCUSSION

The Objections do not raise any legitimate challenges to the Complaint. As a result, they are overruled.

I. Legal Sufficiency of Tort Claims

When a court is presented with preliminary objections based on legal insufficiency,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999). For the purposes of reviewing the legal sufficiency of a complaint, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000).

In the Objections, the Defendants contend that the gist of the action doctrine precludes the Plaintiffs from bringing actions in tort. They also assert that Dale and Wells are protected from tort liability due to their relationships with Innovasive and Mitek, rendering the Plaintiffs' tort claims legally insufficient. In addition, the Defendants claim that the Complaint fails to allege a contract between ASSI and a third party and that the claim for intentional interference must therefore fail.

A. Gist of the Action

The Pennsylvania Superior Court has described the gist of the action doctrine as follows:

> [T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done

> wantonly. Finally, . . . the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995) (citing Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)).

Here, the Complaint alleges improper conduct independent of the Agreement. Wells allegedly "attempted to induce existing customers of [ASSI] not to place orders for Innovasive products with [ASSI]." Complaint at ¶ 15. In addition, the Plaintiffs assert that Dale made defamatory statements about Morris. Complaint at ¶ 16. Furthermore, all of the Defendants allegedly "conspired to interfere with [ASSI's] existing and/or prospective business relations, as well as to discredit it . . . ." Complaint at ¶ 36. None of these actions has any connection to the Agreement, and the Objections based on the gist of the action doctrine must be overruled.

B. Claims against Dale and Wells

The Defendants claim that the fact that Wells and Dale were acting as agents of Mitek and Innovasive protects them from individual liability. As a result, they contend, the counts against them must be dismissed. This argument is without merit.

Under Pennsylvania law, as quoted by the Defendants, "[a]n authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party." Defendants' Memorandum at 6 (quoting Viso v. Werner, 471 Pa. 42, 27, 369 A.2d 1185, 1187 (1977)). However, the context of the quotation shows that this statement addresses "recovery on a contract from one who was not a party thereto and who signed it only on behalf of a disclosed principal." Viso, 471 Pa. at 27, 369 A.2d at 1187 (quoting

Geyer v. Huntingdon County Agric. Ass'n, 362 Pa. 74, 77, 66 A.2d 249, 250 (1949)). Here, the claims against Wells and Dale are not contractual in nature.

It is clear that an individual's employment or agency relationship generally does not protect the individual from tort liability:

> It has long been a basic tenet of agency law that an agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal. Thus, the question is not whether the individual defendants were acting as agents of [the employer-defendant], but whether the individual defendants actually committed a tort. If so, they are liable for that tort regardless of their agency or employment relationship.

Cosmas v. Bloomingdales Bros., Inc., 442 Pa. Super. 476, 487, 660 A.2d 83, 88 (1995) (citations and quotation marks omitted). See also Eckert v. Merchant's Shipbuilding Corp., 280 Pa. 340, 347, 124 A. 477, 480 (1924) ("[t]hat a defendant was an agent acting for another is no defense in a suit to recover for his own or his servant's torts"). Consequently, regardless of what employment or agency relationship Dale and Wells had with Innovasive or Mitek, the relationship alone does not protect them from liability for the torts of which they are accused.

C. Interference with Own Contract

Next, the Defendants assert that a claim for tortious interference with contractual relations must involve a contractual relationship between a plaintiff and a third party. Here, they claim, Innovasive and Mitek are parties to the Agreement, thus precluding liability for interference with the relationship governed by the Agreement.

The Defendants are correct that a contract giving rise to a claim for intentional interference must be between the complainant and a third party. Rutherfoord v. Presbyterian Univ. Hosp., 417 Pa.

Super. 316, 331, 612 A.2d 500, 507-08 (1992) ("[e]ssential to a right of recovery . . . is the existence of a contractual and/or business relationship between the plaintiff and a 'third person' other than the defendant").[3] However, the Complaint alleges not that the Defendants interfered with the Agreement, but rather with the contractual relations between the Plaintiff and ASSI's customers. Complaint at ¶ 30. As a result, the tort counts in the Complaint are legally sufficient, and the Objections asserting otherwise are overruled.[4]

II. Failure to Attach a Writing

Last, the Defendants claim that the Agreement's reference to a "Contract" requires the Plaintiffs to attach a copy of the Contract to the Complaint. The Plaintiffs' failure to do so, they assert, dictates that the Complaint be dismissed.

If a claim set forth in a complaint is based on a writing, a plaintiff must attach a copy of the writing to the complaint. Pa. R. Civ. P. 1019(h). Here, in contrast, the Plaintiffs' claims arise from the Defendants' alleged breaches of the Agreement, not the Contract. If the Defendants intend to raise the terms of the Contract as a new matter in their answer to the Complaint, they may do so. However, the Plaintiffs cannot be required to anticipate the Defendants' response to their claims and to attach writings

[3] The remaining elements for an intentional interference with contractual relations claim are purposeful action by the defendant intended to harm or to prevent the relation, absence of privilege on the part of the defendant and resulting damage. Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997) (citation omitted).

[4] The Court notes that the Defendants have not raised preliminary objections to the specificity of the Complaint.

related to such a response. Consequently, the Complaint does not present a cause of action based on the Contract, and the Plaintiffs have no obligation to attach it to the Complaint.[5]

CONCLUSION

The Objections are without merit and are overruled. The Defendants are directed to file an answer to the Complaint within twenty days of the Order.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: January 12, 2001

[5] In addition, the Complaint asserts that "there are other records available to [Defendants] not in [Plaintiffs'] control." Complaint at ¶ 24. As a result, even if the Complaint's claims were based on the Contract, the Plaintiffs' failure to attach it may be excusable. Cf. McLelland v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 145 n.10, 604 A.2d 1053, 1061 n.10 (1992) (objections based on a failure to attach a document were without merit where the complaint alleged that the document was in the possession of the defendants and set forth the substance of the document).

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ORDER

AND NOW, this 12th day of January, 2001, upon consideration of the Preliminary Objections of Innovasive Devices, Inc., Mitek Products, Christine Wells and Anthony Dale to the Amended Complaint of Plaintiffs Advanced Surgical Services, Inc. and Robert Morris and Plaintiffs' response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Preliminary Objections are OVERRULED. The Defendants are directed to file an Answer to the Amended Complaint within twenty days of the date of entry of this Order.

BY THE COURT:

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JOHN W. HERRON, J.