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

PAOLA AMICO, et al.,	:	January Term, 2000
Plaintiffs	:	
	:	No. 1793
v.	:	
	:	Commerce Case Program
RADIUS COMMUNICATIONS,	:	
Defendant	:	Control No. 090876
	:	Control No. 082271

OPINION

Plaintiffs WOW Enterprises Inc. ("Wow") and Paola Amico ("Amico") have filed a motion to preclude certain defenses ("Motion to Preclude"), while Defendant Radius Communications, Inc. ("Radius") has filed a motion for summary judgment ("Motion for Summary Judgment"). For the reasons set forth in this Opinion, the Motion to Preclude is denied and the Motion for Summary Judgment is granted in part and denied in part.

BACKGROUND

In early 1999, Wow and Ms. Amico, its President, began organizing a television program called "Cooking with Mamma." Plaintiffs' App. Ex. A. at 26-28, 122-26. This program was to feature Ms. Amico's mother, Maria Chiavatti, also known as Maria di Marco or Mamma Maria ("Mamma"), who owned Mamma Maria's Ristorante Italiano ("Restaurant"). Id. Ms. Amico's goal was to have Cooking with Mamma broadcast five shows a week for a national audience and to engage in extensive merchandising, including cookbooks, a knife series and aprons. Id. at 39.

With this goal in mind, Amico set about securing a half-hour television slot from Radius for a pilot run of Cooking with Mamma on the Food Network. Plaintiffs' App. Ex. A at 43. To this end, Radius entered into a programming contract ("Contract") with Mamma as the advertiser and Ms. Amico accepting the contract on Mamma's behalf. Defendant's App. Ex. 4. The pilot run was to air in the Philadelphia area for 52 weeks. Id. The efforts to advertise Cooking with Mamma included several appearances by Mamma herself, as well as several promotional spots to be broadcast by Radius ("Spots"). Plaintiffs' App. Ex. A at 46-47, 126, 422-24.

When the Spots began airing in late August 1999, many of the Spots aired in a technically defective manner. Plaintiffs' App. Ex. A at 422-24. In addition, each of the first eight episodes of the show experienced technical difficulties of some form in airing, although the Parties disagree as to who was responsible. Id. at 463. These difficulties allegedly interfered with the Plaintiffs' merchandising plans and caused actual and potential sponsors of Cooking with Mamma to lose interest and drop their sponsorship. Defendant's App. Ex. 47 at ¶ 29. Subsequently, the Plaintiffs brought claims against Radius for breach of contract, interference with existing and prospective contractual relations,[1] fraud and punitive damages. Id. at ¶¶ 37-79.

The Motion to Preclude revolves around Radius's failure to produce the original tapes ("Tapes") the Plaintiffs submitted for broadcasting. In it, the Plaintiffs argue that the spoliation doctrine

[1] The Plaintiffs' interference with existing contractual relations claim is based on existing sponsorship agreements, while their interference with prospective contractual relations claim is based on sponsorship agreements that they assert they would have secured.

requires an inference that the missing Tapes would be unfavorable to Radius.[2] Radius contends in the Motion for Summary Judgment that each of the Plaintiffs' claims against it must be dismissed.

DISCUSSION

Because the Plaintiffs have not shown how Radius's failure to produce the Tapes has prejudiced them, the Motion to Preclude must be denied. In addition, the Plaintiffs' intentional interference claims are unsupported by the evidence. This leaves the Plaintiffs with only a breach of contract claim that may not even be theirs and a tenuous fraud claim.

I. The Plaintiff Is Not Entitled to the Preclusion of Certain Defenses Based on the Spoliation Doctrine

The Pennsylvania Commonwealth Court has described the Commonwealth's spoliation doctrine as follows:

> In Pennsylvania, the doctrine of spoliation provides that a party may not benefit from its own destruction or withholding of evidence. The doctrine attempts to compensate those whose legal rights are impaired by the destruction or withholding of evidence by creating an adverse inference against the party responsible for the destruction or withholding. It permits the jury to infer that the "spoiled" evidence would be unfavorable to the position of the spoliator.

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[2] It unclear whether this doctrine is correctly termed "spoilation" or "spoliation," as Pennsylvania courts make use of both spellings. Compare In re Seiler's Estate, 169 Pa. Super. 359, 361, 82 A.2d 556, 557 (1951) (using "spoilation"), with Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div., No. 3183 EDA 1999, 2001 WL 902501, at *4 (Pa. Super. Ct. Aug. 13, 2001) (referring to "the spoliation-of-evidence standards"), with Gicking v. Joyce Int'l, Inc., 719 A.2d 357, 358 (Pa. Super. Ct. 1998) (referring to both the "spoilation" and the "spoliation" of evidence). In this Opinion, the Court has adopted the latter spelling, as this form appears to be favored in the Commonwealth and was used by the Pennsylvania Supreme Court most recently. See Schroeder v. Commonwealth, Department of Transportation, 551 Pa. 243, 710 A.2d 23 (1998) (using "spoliation" throughout). See also Black's Law Dictionary 1401 (6th ed. 1990) (discussing "spoliation" but not "spoilation").

Manson v. Southeastern Pennsylvania Transp. Agency, 767 A.2d 1, 5 (Pa. Commw. Ct. 1998) (citations omitted). In Schroeder v. Commonwealth, Department of Transportation, 551 Pa. 243, 710 A.2d 23 (1998), the Pennsylvania Supreme Court stated that a court considering a spoliation argument must examine three factors: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." 551 Pa. at 250-51, 710 A.2d at 27 (adopting the spoliation test set forth in Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir.1994)).

To determine the degree of a party's fault, a court must examine "two components: responsibility, and the presence or absence of bad faith." Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div., No. 3183 EDA 1999, 2001 WL 902501, at *5 (Pa. Super. Ct. Aug. 13, 2001) (citations omitted). Here, the Parties dispute who was responsible for the Tapes. The Plaintiffs assert that Radius last had possession of the Tapes, while Radius contends that it returned the Tapes to the Plaintiffs between September 1999 and November 1999. Further complicating the question of fault is the Plaintiffs' failure to address the issue of bad faith and Radius's assertion that it was the Plaintiffs who acted in bad faith. This impairs the Court's ability to determine the degree of each Party's fault.

Even if Radius was at fault, however, it is unclear what prejudice the Plaintiffs would suffer because of the Tapes' absence. Pennsylvania courts have held that the existence of comparable evidence eliminates any prejudice arising from spoliation. See, e.g., Schroeder, 551 Pa. at 252, 710 A.2d at 27-28 (where a plaintiff's products liability claim asserted that there were defects an entire line of trucks, the prejudice to the plaintiff due to the absence of her husband's truck was "not great");

O'Donnell v. Big Yank, Inc., 696 A.2d 846 (Pa. Super. Ct. 1997) (failure of worker to preserve pants did not bar action since claimed defect was common to all like products and not just to worker's pants). According to the report of Swapan K. Bose, one of the Plaintiffs' experts, Mr. Bose reviewed copies of the Tapes, not the Tapes themselves, and did not mention any difficulties encountered by virtue of the fact that he reviewed only copies. Plaintiffs' Motion to Preclude Memorandum Ex. G. Based on his evaluation of these copies, Mr. Bose concluded that there was "nothing wrong with the picture and sound quality" that would have prevented broadcasting. Id. The Plaintiffs' other experts, Steven N. Archinow and John M. Donahue, made similar conclusions after reviewing the Tapes and their duplicates and gave no indication that duplicates were any less reliable or useful than originals. Plaintiffs' Motion to Preclude Memorandum Exs. H & I.[3]

Without showing how the Tapes' absence prejudices them in any way, the Plaintiffs are not entitled to an order precluding certain defenses based on the spoliation doctrine. As a result, the Motion to Preclude is denied.

II. The Defendant Is Entitled to Partial Summary Judgment

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

[3] Although Anthony Beswick, Radius's expert, states that he believes the copies of the Tapes to be "of no value," this is only because he believes that the copies show "additional problems created while making the copies" on top of the technical flaws found in the Tapes. Plaintiffs' Motion to Preclude Memorandum Ex. F. If, as the Plaintiffs and their experts believe, the copies exhibit no problems, then Mr. Beswick's comments on the usefulness of the Tapes' copies are without merit.

sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996). The Complaint asserts causes of action for intentional interference with contractual relations, breach of contract and fraud, only the last two of which can be sustained.

A. While the Plaintiffs' Request for Punitive Damages and Injuries Suffered by Third Parties Has No Support, the Plaintiffs' Remaining Requests for Damages Are Sustainable

Radius first attacks the Plaintiffs' request for lost profits, out of pocket losses and punitive damages.[4] Lost profits are available under Pennsylvania law "where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong; and, in the contract actions, that they were reasonably foreseeable." Delahanty v. First Pa. Bank, N.A., 318 Pa. Super. 90, 120, 464 A.2d 1243, 1258 (1983) (noting further that Pennsylvania courts are "reluctant" to award lost profits "except when the business concerned is established and not 'new and untried'") (citations omitted). But see Spang & Co. v. United States Steel Co., 519 Pa. 14, 26, 545 A.2d 861, 866 (1988) ("mere uncertainty as to the amount of damages will not bar recovery where it is clear that damages were the certain result of the defendant's conduct").

[4] Each of the Plaintiffs' claims requires proof of damages. See CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999) (listing "resultant damages" as an element of a breach of contract claim); Gruenwald v. Advanced Computer Applications, Inc., 730 A.2d 1003, 1014 (Pa. Super. Ct. 1999) (claim for fraud requires evidence of a "resulting injury"); Triffin v. Janssen, 426 Pa. Super. 57, 63, 626 A.2d 571, 574 (1993) (a successful intentional interference with contractual relations claim requires proof of "damages resulting from the defendant's conduct").

In addition to the Plaintiffs' marketing and development plans, the report of Plaintiffs' expert David Nuell supports the conclusion that the Plaintiffs lost profits as a result of Radius's actions and identifies those damages. Plaintiffs' App. Ex. C. Cf. Riley v. General Mills, Inc., 226 F. Supp. 780, 784-85 (E.D. Pa. 1964) (although the actual bills and records are the best evidence of expenses, plaintiff's opinion as to out-of-pocket expenses is sufficient, even in the absence of any documentary evidence); Kituskie v. Corbman, 552 Pa. 275, 281, 714 A.2d 1027, 1030 (1998) ("[d]amages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages"). It is also possible to find that Radius's actions were a proximate cause of the Plaintiffs' damages and that such damages were reasonably foreseeable. See Montgomery v. South Phila. Med. Group, Inc., 441 Pa. Super. 146, 160, 656 A.2d 1385, 1392 (1995) ("[s]o long as reasonable minds can conclude that the defendant's conduct was a substantial factor in causing the harm, the issue of causation may go to the jury upon a less than normal threshold of proof").[5] Assuming that the Plaintiffs meet their burden of proof at trial, they will be entitled to lost profits.

Two of the damages arguments advanced by Radius are valid. The first is the contention that a person does not have standing to recover for damages sustained by another. Rosenthal v. Carson, 149 Pa. Super. 428, 432, 27 A.2d 499, 501 (1942). This principle bars the Plaintiffs from seeking

[5] Radius's reliance on Massachusetts Bonding & Insurance Co. v. Johnson & Harder, Inc., 348 Pa. 512, 35 A.2d 721 (1943) is misplaced. There, the Pennsylvania Superior Court held that the defendant's immediate termination of the contract entitled the plaintiff to no more than 30 days' profits for breach of contract because the relevant contract allowed for termination on 30 days' notice. In the instant dispute, in contrast, it is Radius's breach of the contract, not notice of the contract's termination, that is the source of the Plaintiff's claim, making Massachusetts Bonding & Insurance Co. inapplicable.

recovery for damages incurred by Mamma or any other non-Plaintiff, to the extent that such damages are sought.[6]

The Plaintiffs also are not entitled to punitive damages. Pennsylvania allows an award of punitive damages only under limited conditions:

> This Court has adopted Section 908(2) of the Restatement (Second) of Torts regarding the imposition of punitive damages. That provision permits punitive damages for conduct that is "outrageous because of the defendant's evil motives or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1977). See Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984); Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (1963). A court may award punitive damages only if the conduct was malicious, wanton, reckless, willful, or oppressive. Chambers, 411 Pa. at 344-45, 192 A.2d at 358. The proper focus is on "the act itself together with all the circumstances including the motive of the wrongdoer and the relations between the parties . . . ." Id. at 345, 192 A.2d at 358. In addition, the actor's state of mind is relevant. The act or omission must be intentional, reckless, or malicious.

Rizzo v. Haines, 520 Pa. 484, 507, 555 A.2d 58, 69 (1989). To support their argument that Radius acted recklessly, the Plaintiffs solely point to the fact that Cooking with Mamma did not air properly even though Radius represented that it would and that Cooking with Mamma advertisements continued to air after the show had been discontinued. Plaintiffs' Motion for Summary Judgment Memorandum at 53-55. While these actions may demonstrate violations of Radius's obligations to the Plaintiffs, such actions alone do not indicate that Radius acted recklessly. Accordingly, the Plaintiffs are not entitled to punitive damages.

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[6] The Parties dispute whether certain expenses were incurred by the Plaintiffs or by Mamma and the Restaurant. Compare Plaintiffs' App. Ex. A at 32-38, 96-98 (expenses were incurred by the Plaintiffs) with Plaintiffs' App. Ex. S (copies of expense checks drawn from Mamma Maria, Inc.'s account and signed by Mamma). These issues of material fact cannot be resolved in the context of a motion for summary judgment.

B. Because There Is No Evidence That Radius Acted Intentionally, the Plaintiffs' Claims for Intentional Interference with Contractual Relations must Be Dismissed

A successful claim for intentional interference with contractual relations must satisfy 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). While an intent to harm the plaintiff's relations is required, such intent may be inferred. See Shared Communication Servs. of 1800-80 JFK Blvd. Inc. v. Bell Atl. Props., Inc., 692 A.2d 570, 575-76 (Pa. Super. Ct. 1997) (defendant's actions "combined to offer the jury evidence from which intent and purpose could be inferred").[7]

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). A prospective contractual relation is "something less than a contractual right, something more than a mere hope," although the term admittedly "has an evasive quality, eluding precise definition."

[7] In contrast, proof of malice is not required. See Ruffing v. 84 Lumber Co., 410, Pa. Super. 459, 469, 600 A.2d 545, 550 (1992) ("[i]ll will toward the person harmed is not an essential condition of liability").

Thompson Coal v. Pike Coal Co., 488 Pa. 198, 209, 412 A.2d 466, 471 (1979). In essence, a plaintiff may recover when, "but for the wrongful acts of the defendants it is reasonably probable that a contract would have been entered." SHV Coal, Inc. v. Continental Grain Co., 376 Pa. Super. 241, 250, 545 A.2d 917, 921 (1988) (citation omitted), rev'd on other grounds, 526 Pa. 489, 587 A.2d 702 (1991). See also Glenn, 441 Pa. at 480, 272 A.2d at 898-99 (focusing on whether there is a "reasonable likelihood or probability" that a contract will arise).

The element missing from the Plaintiffs' claims is Radius's intent to interfere with the Plaintiffs' contracts, whether existing or prospective. The Plaintiffs have produced evidence to support the argument that they had a sponsorship agreement with McDuffie Construction Management Group Inc. and that Radius was aware of that agreement. Plaintiffs' App. Exs. T, U. It is also possible that the evidence purporting to establish prospective contractual relations may be sufficient. Plaintiffs' App. Ex. A at 687-91; Plaintiffs' App. Ex. V at 36-38, 50-87. There is, however, no evidence that allows even the inference that Radius intended to harm the Plaintiffs' relations. See Glazer, 414 Pa. at 308, 200 A.2d at 418 ("where . . . defendant breached his contracts with plaintiff and . . . as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies

only in contract for defendant's breaches").[8] In the absence of such support, the Plaintiffs' intentional interference claims must fail.

C. Although Many of the Alleged Misrepresentations on Which the Plaintiffs' Fraud Claim Is Based Are Barred by the Parol Evidence Rule, the Fraud Claim as a Whole Is Sustainable

A fraud claimant in Pennsylvania must establish the following six elements:

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994) (footnote omitted). Even if a plaintiff satisfies these elements, "the breach of a promise to do something in the future is not actionable in fraud." Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. Ct. 1997) (citations

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[8] The Plaintiffs rely solely on Reliable Tire Distributors, Inc. v. Kelly Springfield Tire Co., 592 F. Supp. 127 (E.D. Pa. 1984), in which the Eastern District of Pennsylvania held that the plaintiff "need not show express evidence of intent; it is enough that the interference is certain or substantially certain to occur as a result of the action." 592 F. Supp. at 139 (quoting Restatement (Second) of Torts § 766 note j (1979)). To the extent that Reliable Tire Distributors, Inc. is persuasive, however, it presents an incomplete picture:

> The fact that this interference with the other's contract was not desired and was purely incidental in character is, however, a factor to be considered in determining whether the interference is improper. 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.

Restatement (Second) of Torts § 766 note j (1979). Thus, the absence of any evidence of Radius's improper intent is fatal to the Plaintiff's case.

omitted). See also Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 68, 563 A.2d 1182, 1187 (1989) ("a cause of action for fraud must allege a misrepresentation of a past or present material fact").

Radius first challenges the Plaintiffs' proof of an intent to defraud, including the misrepresentation of a past or present material fact. However, Ms. Amico contends that Radius's agents falsely represented to her that the necessary broadcasting tests had been conducted. Plaintiffs' App. Ex. A at 160-162; Plaintiffs' App. Ex. E at 60-61. To the extent that the Plaintiffs' claims are based on these misrepresentations, they are sustainable at this point. Cf. Denny v. Cavalieri, 297 Pa. Super. 129, 134, 443 A.2d 333, 335-36 (1982) ("[a] fraudulent intention at the time of a transaction can be inferred from the totality of the circumstances surrounding the transaction, including subsequent conduct on the part of the defendant").

That said, the Court cautions the Plaintiffs that many of the other events on which their fraud claim appears to be based might not be grounds for the relief requested:

> In Bardwell v. Willis Company, 375 Pa. 503, 507, 100 A.2d 102, 104 (1953), our Supreme Court held that only if a party to a contract averred that a promise had been omitted from the final, written contract because of fraud, accident, or mistake could parol evidence properly be admitted. After several subsequent decisions which suggested a different approach, the Supreme Court reasserted the Bardwell holding in Nicolella v. Palmer, 432 Pa. 502, 507-8, 248 A.2d 20, 22-23 (1968). This court has subsequently held that where the assertions put forth by one party are specifically contradicted by the written agreement, Bardwell applies and parol evidence is admissible only to prove fraud in the execution, not the inducement, of the contract. A party cannot justifiably rely upon prior oral representations, yet sign a contract denying the existence of those representations. . . .
>
> Cases . . . have applied Bardwell to foreclose reliance on evidence of allegedly fraudulent precontractual misrepresentations. In Iron Worker's Sav. & Loan Ass'n v. IWS, Inc., 424 Pa. Super. 255, 622 A.2d 367 (1993), for example, a panel of this court enforced

> the written terms of a promissory note against the debtor despite the debtor's allegation that the creditor had orally and fraudulently assured the debtor that the written terms of the note would not be enforced. In doing so, the court applied the Bardwell rule, excluding evidence of representations that are specifically contradicted by the written agreement unless fraud in the execution is alleged.

1726 Cherry St. Partnership v. Bell Atl. Props., Inc., 439 Pa. Super. 141, 152-53, 653 A.2d 663 (1995) (footnotes and citations omitted). See also HCB Contractors v. Liberty Place Hotel Ass'n, 539 Pa. 395, 398-400, 652 A.2d 1278, 1279-80 (1995) (reiterating and applying the Bardwell test to bar plaintiff's fraud claims that related to "subjects that were specifically addressed in the written contract"). The Plaintiffs' claims based on the absence of proper equipment stem from representations made, in the Plaintiffs' own words, "[w]hen Defendant induced Plaintiff to sign this contract." Plaintiffs' Memorandum at 48. Thus, while the Plaintiffs may proceed generally on their fraud claim, representations that were made prior to or contemporaneous with the Contract are barred under Pennsylvania law and cannot be presented at trial.

D. The Plaintiffs May Have the Right to Sue under the Contract, and the Contract's Limitation of Liability Provision Is Inapplicable

Finally, Radius attacks the Plaintiffs' claim for breach of contract by contending that the Plaintiffs do not have any rights to sue under the Contract and that the Contract's limitation of liability provision bars the instant breach of contract action.

With certain exceptions, Pennsylvania Rule of Civil Procedure 2002 requires that all actions be prosecuted by the real party in interest. Pa. R. Civ. P. 2002(a). The definition of a real party in interest has proven somewhat elusive:

> While Rule 2002 does not define "real party in interest," the generally accepted definition of this term is that the real party in interest is the person who has the power to discharge

> the claim upon which suit is brought and to control the prosecution of the action brought to enforce rights arising under the claims. To be a real party in interest, then, one must not merely have an interest in the result of the action, but must be in such command of the action as to be legally entitled to give a complete acquittal or discharge to the other party upon performance.

Clark v. Cambria County Bd. of Assessment Appeals, 747 A.2d 1242, 1246 n.9 (Pa. Commw. Ct. 2000).

The Contract is not a model of clarity. The Contract establishes the obligations and rights of Radius and the "ADVERTISER/AGENCY," which is set forth as "Mamma Maria." The billing address and the fax and telephone numbers are those of the Restaurant. Defendant's App. Ex. ¶¶ 9-10. It is equally obvious that Ms. Amico has some connection to the Contract. Ms. Amico executed the Contract, thereby accepting it on behalf of Mamma, and is listed as the contact for Mamma. Defendant's App. Ex. 5. This creates disputed questions of material fact as to who is the true party in interest under the Contract and precludes the Court from granting summary judgment on Amico's breach of contract claim.

Wow's relation to the Contract is more tenuous. On the Contract's face, the only indication that Wow had any involvement is the fact that Amico executed the Contract as "Owner," presumably of Wow. While the Plaintiffs assert that Radius "knew" that Ms. Amico and Wow were parties to the Contract and that Amico was the owner of Wow, their citations to the record do not support this conclusion and instead reveal that Radius's representative was "probably a little confused" about who the true advertiser was. Plaintiff's Motion at ¶¶ 27-28; Plaintiffs' App. Ex. A at 179. The Plaintiffs' argument is further undermined by the fact that Wow was not incorporated until several months after the Contract was signed. Defendant's App. Ex. 9. Nevertheless, Ms. Amico's signature as

"owner" is consistent with her claim that Wow was understood to be a party to the Contract. As such, although the Court harbors doubts about whether Wow is entitled to bring a claim for breach of contract, the Motion for Summary Judgment as to its claim must be denied.[9]

Similarly, the Court cannot now hold that the Contract's limitation of liability provision applies to the Plaintiffs' breach of contract claim. Paragraph Three of the Contract limits Radius's liability when Radius is unable to telecast at the time specified for reasons "beyond the control or without the fault of Radius provided the Radius has taken reasonable precautions against their recurrence. . . ." Defendant's App. Ex. 5 at ¶ 3. In this instance, however, the Plaintiffs contend that Radius was at fault for the failure to telecast and that Radius took no reasonable precautions. Plaintiffs' App. Exs. 5-7. As a result, the Motion for Summary Judgment as to the Plaintiffs' breach of contract claim cannot be granted.

CONCLUSION

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[9] The Plaintiffs also contend that Mamma Maria's interest was assigned to the Plaintiffs through a "Talent Agreement." Plaintiffs' App. Ex. F. There is also mention of an oral agreement for assignment between Mamma and Ms. Amico, although no details are given. Plaintiffs' App. Ex. G at ¶ 1.

Were there any merit to the Plaintiffs' assignment argument, the Court would rely on it and avoid the real party in interest issue entirely. However, there is none. Even if the Talent Agreement and the vague oral agreement can, in fact, be construed as an assignment, the Contract states that the rights arising under the Contract "may not be assigned or transferred without first obtaining the consent of Radius in writing; nor may Radius be required to telecast hereunder for the benefit [of any] Advertiser/Agency [other] than the one named on the face of the contract." Plaintiffs' App. Ex. 4 at ¶ 6(b) (capitalization removed). Such provisions barring assignment generally are valid and respected. Noal v. J. & M. Doyle Co., 338 Pa. 398, 405, 13 A.2d 59, 63 (1940) (citation omitted). The Plaintiffs concede that Radius never gave written consent for the assignment of the Contract. Defendant's App. Ex. 6 at ¶ 13. To allow the Plaintiffs to step into Mamma Maria's shoes in this way would thus permit persons to whom Radius owed no obligations under the Contract to present claims against it and cannot be permitted by way of an assignment.

Essentially, the Plaintiffs are limited to those claims based on Radius's false representations that certain necessary broadcasting tests had been conducted.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: October 29, 2001

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

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v.	:	
	:	Commerce Case Program
RADIUS COMMUNICATIONS,	:	
Defendant	:	Control No. 090876
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ORDER

AND NOW, this 29th day of October, 2001, upon consideration of the Motion to Preclude Certain Defenses of Plaintiffs Paola Amico and WOW Enterprises, Inc. and Defendant Radius Communication's response thereto, the Defendant's Motion for Summary Judgment and the Plaintiffs' response thereto and all other matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Motion to Preclude Certain Defenses is DENIED;

2. The Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART;

3. Summary Judgment is GRANTED in favor of the Defendant as to Count II - Interference with Existing Contractual Relations and Count III - Interference with Prospective Business Relations.

4. In all other respects the Motion for Summary Judgment is DENIED.

BY THE COURT:

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JOHN W. HERRON, J.