

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

WILLIAM BELL, : APRIL TERM, 2003
t/a MARCRIS INVESTMENTS :
 : No. 3225
v. : Commerce Program
DENNIS GEORGE, ESQUIRE, *et al.* : Control No. 070128

ORDER

AND NOW, this 24TH day of September 2003, upon consideration of the respective Preliminary Objections of defendants, William Bernicker and Dennis George, Esquire, the responses in opposition, the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that:

1. The Preliminary Objections of defendant Dennis George, Esquire are **Sustained** and plaintiff's Complaint against George is dismissed;
2. The Preliminary Objections of defendant William J. Bernicker are **Sustained, in part** and **Overruled, in part**. The court finds that, on the facts alleged, plaintiff has failed, as a matter of law, to state claims for negligent misrepresentation (Count I), fraud (Count II), and civil conspiracy (Count III). Accordingly, these Counts are dismissed; and
3. Count IV and Count V are insufficiently pled as to defendants, Bernicker and Wyatt. In the event that plaintiff is able to plead sufficient facts in support of his claims for fraudulent conveyance and constructive trust against these defendants, plaintiff is granted leave to amend his Complaint within twenty-two (22) days from the date of entry of this Order with respect to Counts IV and V, only.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. September 24, 2003

Before the court are the separate Preliminary Objections of defendants, William Bernicker and Dennis George, Esquire. For the reasons discussed, defendants Preliminary Objections are sustained, in part and overruled, in part.

I. Background

Plaintiff, William Bell t/a Marcris Investments (“Bell”), filed a Complaint against these defendants, William Bernicker (“Bernicker”), Dennis George, Esquire, (“George”) and Aaron Wesley Wyatt (“Wyatt”), asserting claims for: negligent concealment and/or misrepresentation (Count I), fraud (Count II), civil conspiracy (Count III), fraudulent conveyance (Count IV), and a constructive trust (Count V). Defendants Bernicker and George have each filed Preliminary Objections seeking dismissal of the Complaint on various grounds.¹

¹ It appears from the docket that defendant Aaron Wesley Wyatt is proceeding *pro se*. Wyatt has not filed Preliminary Objections to the Complaint.

II. Discussion

A. **Bell's Negligent Concealment/Misrepresentation Claim Fails As A Matter of Law**

In Count I, Bell purports to state a claim against each of the defendants for negligent misrepresentation/concealment. Bell argues that “Wyatt, George and Bernicker, separately and collectively, had a legal duty to make truthful disclosures to the Bankruptcy Court, and therefore to the general public (including Bell) concerning the identity of the owner of the \$1,981,000. Claim.” Compl. ¶ 40. It is the alleged breach of this “duty” which gives rise to Count I of the Complaint.

Any negligence action is premised on the existence of a duty owed by one party to another. *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882 (1994); *Barbish v. Greyhound Lines, Inc.*, 1999 WL 33248336, 48 Pa. D. & C. 4th 469 (1999). Here, Bell has failed to demonstrate the existence of a legally recognized duty owed to him by any of the defendants for which a private right of action exists under Pennsylvania law.

Admittedly, both individuals and attorneys owe a duty of candor and veracity to the tribunal in connection with judicial proceedings, however, Pennsylvania does not recognize a private cause of action against a party for failure to so act. Courts have the appropriate internal sanctions to deal with perjury or contempt and are capable of utilizing those sanctions to ensure protection of the public good, thereby obviating the need for civil damages liability. Moreover, in the case of George, an attorney may only be held liable for negligence to his client and not to anyone else with whom he has no privity, as is the case between Bell and George. *Pelagatti v. Cohen*, 370 Pa. Super. 422, 536 A.2d 1337 (1988).

“It is a fundamental rule that a negligence claim must fail if it is based on circumstances for which the law imposes no duty of care on the defendant.” *Fizz v. Kurtz, Dowd & Nuss, Inc.*, 360 Pa. Super. 151, 154, 519 A.2d 1037, 1040 (1987); *Gerace v. Holmes Protection of Phila.*, 357 Pa. Super. 467, 516 A.2d 354, 358 (1986); *Acme-Hardesty Co. v. Wegner*, 2003 WL 1847461 (CCP Phila. Jan. 31, 2003). Even when reviewing the Complaint in a light most favorable to plaintiff, as required when deciding preliminary objections, Bell has failed to demonstrate the existence of a legally cognizable duty owed to him by any of the defendants. Accordingly, Count I fails as a matter of law and is dismissed.

B. Bell Has Failed To State A Claim For Fraud Upon Which Relief May Be Granted

In support of his fraud claim (Count II), Bell alleges that defendants engaged in an “...intentional effort to defraud the creditors of the Bernicker plaintiffs, including Bell, of the ability to garnish expected distributions from the Byrne Bankruptcy estate and/or the rightful assets of Bernicker.” Compl. ¶ 49. Clearly, Bell has no standing to assert claims for wrongs perpetrated against “the creditors of the Bernicker Plaintiffs”. He may seek relief only for those wrongs actually perpetrated against him personally.

It is important to recognize that all of the wrongful conduct ascribed to defendants in Count II is alleged to have taken place in connection with the Byrne Bankruptcy proceedings. Compl ¶¶ 14-17. It is settled that private witnesses, as well as counsel, are absolutely immune from liability for testimony, even if false, given or used in connection with judicial proceedings. *Smith v. Griffiths*, 327 Pa. Super. 418, 476 A.2d 22 (1984). The doctrine of absolute judicial privilege applies to statements, including

averments in pleadings and other submissions to the court, made in the “regular course of judicial proceedings” which are “pertinent and material” to the litigation, regardless of the tort claimed. *Clodgo by Clodgo v. Bowman*, 411 Pa. Super. 267, 601 A.2d 342 (1992); *Moses v. McWilliams*, 379 Pa. Super. 150, 549 A.2d 950 (1988). This court submits that, even assuming for the purposes of the instant motion that Bell’s allegations concerning defendants’ perjury are true, these communications clearly fall within the scope of absolute judicial privilege. Thus, no cause of action founded on this conduct may lie against defendants.

Moreover, the legal requisites of a fraud claim are essentially the same as for negligent misrepresentation, except that a valid fraud claim must include an allegation that a misrepresentation was made with an intent to defraud the plaintiff. *Gibbs*, 647 A.2d at 889. Bell has failed to plead facts to support his contention that any of the defendants acted with the intent to defraud him personally or that any misstatements of fact were made to him directly. Accordingly, Bell’s fraud claim necessarily fails and Count II is dismissed.

**C. Bell Has Failed To State
A Claim For Civil Conspiracy**

In Count III, Bell asserts a claim against all defendants for civil conspiracy. However, Bell fails to plead facts sufficient to support this cause of action. In order to sustain a claim for civil conspiracy, plaintiff must allege that each defendant “entered into an unlawful agreement for the express purpose of committing either a criminal act or an intentional tort.” *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 278, 505 A.2d 973 (1985); *Baker v. Rangos*, 229 Pa. Super. 333, 324 A.2d 498, 506 (1974).

However, there can be no cause of action for conspiracy absent a civil cause of action for a particular act. *Pelagatti*, 536 A.2d 1347. This court finds that Bell has not alleged facts to support a finding that defendants committed illegal acts which would subject them to liability for civil conspiracy. Accordingly, Count III is dismissed.

D. Bell Has Failed To State A Claim Against George For Fraudulent Conveyance Or Constructive Trust

Count IV purports to state a claim for fraudulent conveyance against each of the defendants. Fraudulent conveyance actions in Pennsylvania are governed by the Pennsylvania Uniform Fraudulent Transfer Act (“PUFTA”), 12 Pa.C.S.A. § 5191, *et seq.* Sections 5107 of PUFTA sets forth the applicable remedies available under the statute:

- (a) Available remedies.—In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Sections 5108 (relating to defenses, liability and protection of transferee) and 5109 (relating to extinguishment of cause of action), may obtain:
 - (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor’s claim;
 - (2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by applicable law.
 - (3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
 - (i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
 - (ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
 - (iii) any other relief the circumstances may require.

12 Pa.C.S.A. § 5107.

The statute also sets forth against whom a judgment may be taken:

- (b) Judgment for certain voidable transfers.—Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 5107(a)(1) (relating to remedies of creditors), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor’s claim, whichever is less. The judgment may be entered against:
 - (1) the first transferee of the asset or the person for whose benefit the transfer was made; or
 - (2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

12 Pa.C.S.A. § 5108(b).

Based on the allegations of the Complaint, George does not fall into either of the categories of parties against whom a judgment may be taken. Bell does not aver that George is a transferee, a person for whose benefit the transfer was made or a subsequent transferee. Moreover, Bell has pled no facts to support the contention that George was the holder of an asset that was improperly transferred, a necessary requirement for the establishment of an constructive trust. Accordingly, Counts IV and V are dismissed as to George.

**E. Counts IV and V Are Insufficiently Pled
As To Bernicker and Wyatt**

For the purposes of reviewing preliminary objections in the form of a demurrer, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. *Tucker v. Philadelphia Daily News*, 2000 Pa. Super. 183, 757 A.2d 938, 941-42 (2000). When presented with preliminary objections where the end result would be the dismissal of a cause of action, as here, a court should sustain the objections when “it is clear and free from doubt from all the facts

pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” *Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. Super. 2000). Furthermore, it 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 overruling the demurrer. Simply put, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Bailey v. Storlazzi*, 1999 Pa. Super. 97, 729 A.2d 1206, 1211 (1999).

This court has such doubts here, especially in light of the lack of specificity in the Complaint. To determine if a pleading meets Pennsylvania’s specificity requirements, a court must ascertain whether the facts alleged are “sufficiently specific so as to enable [a] defendant to prepare [its] defense.” *Smith v. Wagner*, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991); *In re: The Barnes Foundation*, 443 Pa. Super. 369, 381, 661 A.2d 889, 985 (1995) (“a pleading should formulate the issues by fully summarizing the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [the] cause of action is based”). After a review of the Complaint, this court finds that plaintiff’s claims against Bernicker & Wyatt for fraudulent conveyance (Count IV) and a constructive trust (Count V) are impermissibly vague, conclusory and insufficient to allow these defendants to prepare a defense. In the event that plaintiff is able to plead sufficient facts in support of his claims for fraudulent conveyance and constructive trust against these defendants, Bell should be granted leave to amend his Complaint with respect to Counts IV and V, only.

CONCLUSION

For the reasons discussed, this court finds as follows:

1. The Preliminary Objections of defendant Dennis George, Esquire are Sustained and plaintiff's Complaint against George is dismissed;
2. The Preliminary Objections of defendant William J. Bernicker are Sustained, in part and Overruled, in part. The court finds that, on the facts alleged, plaintiff has failed, as a matter of law, to state claims for negligent misrepresentation (Count I), fraud (Count II), and civil conspiracy (Count III). Accordingly, these Counts should be dismissed; and
3. Count IV and Count V are insufficiently pled as to defendants, Bernicker and Wyatt. In the event that plaintiff is able to plead sufficient facts in support of his claims for fraudulent conveyance and constructive trust against these defendants, plaintiff is granted leave to amend his Complaint within twenty-two (22) days from the date of entry of this Order with respect to Counts IV and V, only.

This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.