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

LARRY CAPLEN, NEIL B. CAPLEN, JILL CAPLEN SCHECTER, and STANLEY B. CAPLEN	:	FEBRUARY TERM 2000
	:	No. 3144
Plaintiffs		
v.	:	
RICHARD W. BURCIK, and THE CITY OF PHILADELPHIA, TRUSTEE ACTING BY THE BOARD OF DIRECTORS OF CITY TRUSTS, GIRARD ESTATES	:	
	:	
	:	
Defendants		Control No. 041650

O R D E R

AND NOW, this 4th day of August 2000, upon consideration of defendants' Preliminary Objections to plaintiffs' complaint and plaintiffs' response , the pertinent respective memoranda and all matters of record, and based on the reasons set forth in the Memorandum Opinion filed and served contemporaneously with this Order, it is **ORDERED** that defendants': (a) Preliminary Objections as to Counts I, II, III and V are **Sustained**, and (b) Preliminary Objections as to Count IV and the punitive damages claim are **Overruled.**

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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MEMORANDUM OPINION

SHEPPARD, JR., J. ..... August 4, 2000

This case involves a complicated commercial real estate transaction, in which the plaintiffs were unsuccessful in arranging debt financing for and/or the sale of properties located in the Olde City section of Philadelphia.

Presently before this court are the Preliminary Objections of defendants, the City of Philadelphia, Trustee Acting by the Board of Directors of City Trusts, Girard Estates ("the Board") and the Board's general manager, Richard W. Burcik ("Burcik") to the complaint of the plaintiffs, Larry, Neil, Jill and Stanley Caplen ("the Caplens").

For the reasons which follow, defendants' Preliminary Objections as to Counts I, II, III and V are sustained.

The Preliminary Objection as to Count IV is overruled. Further, the Preliminary Objection to the punitive damages claim is overruled.

FACTUAL BACKGROUND

The operative facts, as pleaded in the Complaint, are as follows. The Caplens were partners with associated family members in partnerships owning real estate, which the late Harry Caplen had gifted or titled to the partnerships. (Complaint, ¶¶ 8-9). In the summer of 1995, the Caplens had negotiated a "family settlement agreement" with the other family members which provided the Caplens with an option to purchase the real estate and business interests of the other family members in the partnerships. (Id. at ¶¶ 13-14). The option had a deadline of June 15, 1996, with a written thirty day option to extend the deadline. (Id. at ¶ 14).

The Caplens engaged Binswanger of Pennsylvania, Inc. ("Binswanger") to represent them in obtaining the debt financing for and marketing of the real estate properties ("Olde City Properties"). (Id. at ¶ 15). The Olde City Properties are associated with the buy-out of the other family members' interests and would be acquired for $4 million for purposes of retention and/or resale. (Id.). The agreement between the Caplens and Binswanger, entitled the "Exclusive Agency Agreement," granted Binswanger the exclusive right to obtain mortgage financing for the Caplens in the minimum aggregate principal amount of $5,250,000, based upon Binswanger's representation that this amount could be obtained. (Id. at ¶¶ 16-17; Exhibit "B").[1] The agency agreement also authorized Binswanger to present the financing proposal to a potential lender whom Binswanger also represented, and that the Caplens would execute a dual agency

[1]The "Exhibits" referenced in this Opinion are those exhibits attached to the Complaint.

agreement setting forth Binswanger's particular responsibilities.[2] (Exhibit "B", at ¶ 15).

In January 1996, the defendant Board announced that it was seeking to acquire real estate in the Olde City section of Philadelphia, the same general area where the above-mentioned properties were located. (Complaint, ¶ 18). Representatives of Binswanger, on the Caplens' behalf, contacted the Board's general manager, defendant Burcik, and informed him of a proposal being made to the real estate community about mortgage financing for the Olde City Properties with a right to convert to equity. (Id. at ¶ 20).[3] Burcik indicated that the Board was interested in acquiring the proposed properties and the defendants began conducting an investigation, with Binswanger's assistance, to obtain information regarding the leases and tenants and such other information to allow them to determine if they wanted to finance or otherwise obtain an interest in the properties. (Id. at ¶¶ 21-23).

Discussions were held between January and March of 1996 between a representative of Binswanger, John B. Vanderzwaag, and Burcik concerning the Board's financing of the properties in exchange for an equitable interest in them. (Id. at ¶ 25). These discussions resulted in a letter, dated

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[2]The relevant provision establishing the dual agency arrangement states:

> 15. *Dual Agency*. The Owner acknowledges that the Agent may present the financing proposal to a potential lender who is also represented by the Agent. In such event, the Agent will disclose such arrangement to the Owner and will disclose the applicable commission arrangement. In such circumstances the Owner agrees to execute a dual agency agreement setting forth the particular responsibilities of the Agent.

Exhibit "B", ¶ 15.

[3]Binswanger had had previous business dealings with the Board, in which Binswanger acted both as the agent for third parties with whom the Board entered into real estate transactions and as the Board's broker in these transactions. (Complaint at ¶ 19).

March 11, 1996, from Binswanger, on behalf of the plaintiffs, to Burcik ("Binswanger's letter"). (Id.) (See Exhibit "D"). Binswanger's letter suggested the following terms of the transaction: (1) a loan of $5,250,000 which could be converted into 100% ownership of all of the properties within two years of the closing, except for the one listed as 109-131 N. 2nd Street; (2) the property at 109-131 N. 2nd Street would be subject to a five year mortgage in the principal amount of $350,000 plus interest; and (3) the proposal would be subject to a due diligence period that was expected to take no more than forty-five days during which time the Board and Burcik could elect to not proceed with the proposed transaction. (Id.) Binswanger's letter also stated that "[i]f these terms are a fair reflection of the transaction you are prepared to propose, please submit a proposal to me so that we may proceed to elicit a response from Mr. Caplen." (Id.) In response to Binswanger's letter, Burcik sent a letter dated March 12, 1996, on behalf of the Board ("Burcik's letter"). (Exhibit "C"). Burcik's letter acknowledged receipt of Binswanger's letter and stated in pertinent part:

> Please be advised that Girard Estate has a sincere interest in the transaction which you have outlined. Therefore, please discuss this matter with your principals to determine if a mutuality of interests truly exists. Obviously, any deal would be contingent upon a fairly extensive and expensive due diligence, including but not limited to possible environmental and/or maintenance issues. Please let us hear from you regarding this subject at your earliest convenience.

Id. (emphasis added). Thereafter, the defendants did begin conducting a due diligence process.

Sometime during the first two weeks of April 1996, the defendants allegedly changed their minds and became interested only in purchasing the properties but not entering into the financing transaction. (Complaint, ¶ 38). In the interim, the Board and Binswanger had entered into a separate agreement whereby Binswanger, in exchange for a commission, would represent the Board in the sale

of the properties and would "seek to purchase [the properties] at the lowest prices and otherwise on terms most favorable to Girard." (Exhibit "G"). By entering this agreement, the defendants had allegedly concealed their efforts to subvert Binswanger's loyalty and fiduciary duty to the plaintiffs. Plaintiffs, allegedly, did not know of these efforts until early 1999 during the course of third party litigation brought by the plaintiffs. (Complaint, ¶¶35-36).

Two letters from Binswanger, dated April 15 and April 29, 1996, outlined Binswanger's understanding of the transaction, indicating that plaintiffs wished to sell and the defendants wished to buy the properties for $4,350,000, subject to due diligence. (Id. at ¶¶39-41; Exhibits "H" & "I"). Subsequent to these communications, plaintiff, Larry Caplen, sent a letter, dated May 3, 1996, outlining the parties' agreement for the "sale of certain real estate properties to Girard Estate." (Id. at ¶ 42; Exhibit "J"). Specifically, this letter noted that the purchase price for the properties is $4,350,000 with a closing date that would be no later than August 31, 1996, and that certain conditions had to be satisfied before the closing, including a completed engineering survey by the Board and full Board approval of the transaction. (See Exhibit "J"). Following this letter, defendant Burcik informed the plaintiffs that the Board would not offer $4,350,000, but, instead, offered the reduced price of $3,000,000 for the properties. (Complaint, ¶ 44). The plaintiffs refused to sell at this price and instituted the present litigation. (Id. at ¶ 45).

PROCEDURAL BACKGROUND

On February 28, 2000, plaintiffs filed their Complaint asserting claims for breach of contract, fraud, negligent misrepresentation, intentional interference with existing and/or prospective business and/or contractual relations and promissory estoppel. See Complaint, Counts I-V respectively. The gravamen of the Complaint is that the defendants had, through delay and deception, prevented the

plaintiffs from seeking alternative financing and/or a sales opportunity to meet the deadline(s) imposed by the family settlement agreement in order that defendants could acquire the properties at prices substantially below fair market value. (See Id. at ¶¶ 41-50). Specifically, plaintiffs allege that the defendants' motives and actions "were improper, a breach of their contractual duty of good faith and fair dealing, tortious and done with a fraudulent intent and with a further intent to induce material reliance by the plaintiffs upon the statements and promises of the defendants." (Id. at ¶ 49).

On March 22, 2000, the Board and Burcik filed Preliminary Objections in the nature of a demurrer to Counts I through V, asserting that the allegations set forth in Count I failed to establish a claim for breach of contract on the ground that no contract existed and that plaintiffs' tort claims set forth in Counts II, III and IV are barred by the doctrine of sovereign immunity. Defendants also contend that Counts II through V should be dismissed because the allegations, respectively, failed to make out claims for fraud, negligent misrepresentation, intentional interference with existing and/or prospective business and/or contractual relations and promissory estoppel. On May 26, 2000, plaintiffs filed an Answer in opposition and defendants' filed a reply on June 8, 2000. On June 29, 2000, Plaintiffs filed a sur-reply.

LEGAL STANDARD

In ruling on preliminary objections in the nature of a demurrer, a court accepts as true all well-pleaded, material and relevant facts, as well as every inference reasonably deducible from those facts. Willet v. Pennsylvania Medical Catastrophe Loss Fund, 549 Pa. 613, 619, 702 A.2d 850, 853 (1997)(citation omitted). The pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. Giordano v. Ridge, 737 A.2d 350, 352 (Pa.Commw.Ct. 1999). In addition, it is not necessary to accept as true

averments in the complaint which conflict with exhibits attached to the complaint. Philmar Mid-Atlantic, Inc. v. York Street Associates II, 389 Pa.Super. 297, 300, 566 A.2d 1253 (1989). Since sustaining a demurrer results in the denial of the pleader's claim or dismissal of his suit, a preliminary objection in the nature of a demurrer should only be sustained in cases that clearly and without a doubt fail to state a claim for which relief may be granted under any theory of law. Willet, 549 Pa. at 619, 702 A.2d at 853. Further, where doubt exists as to whether a demurrer should be sustained, the doubt should be resolved in favor of overruling it. Id. at 619-620, 702 A.2d at 853. See also, Chem v. Horn, 725 A.2d 226, 228 (Pa.Commw.Ct. 1999) (stating that "[t]he question presented by a demurrer is whether, in the facts averred, the law says with certainty that no recovery is possible"). A court may also sustain a demurrer and dismiss the complaint without further leave to amend where it appears that a defective complaint cannot be cured by amendment. Philmar, 389 Pa.Super. at 302, 566 A.2d at 1255.

DISCUSSION

The defendants' Preliminary Objections contest each Count of the Complaint separately and plaintiffs' Answer responds accordingly. For purposes of organization and clarity, this court will address each argument *seriatim*.

Defendants' Objection in the Form of a Demurrer to Count I

The defendants argue that Count I of the Complaint should be dismissed, pursuant to Rule 1028(a)(4), Pa.R.C.P., "because there was no enforceable contract nor any mutual assent between the parties as to any essential terms or the subject matter of the transaction, and all issues surrounding the proposed transaction had not been closed." Preliminary Objections, ¶ 9. Defendants also contend that the alleged "contract" is based solely on the letters of March 11 and 12, 1996, which show that there was

no mutual assent to be bound, and thus, no contract to acquire real estate or to negotiate in good faith. Id. at ¶¶ 7-8.

In response, the plaintiffs argue that defendants have ignored those paragraphs preceding Count I, which expressly allege a breach of dealing in good faith, and that the law in Pennsylvania recognizes a duty to "negotiate in good faith." Pl. Memorandum, at 10-11. Plaintiffs further agree that the defendants' language set out in the March 12, 1996 letter was intended to induce "the plaintiffs to believe it would negotiate in good faith with respect to the specific terms contained in the March 11, 1996 letter." Id. at 11.

In the breach of contract claim the plaintiffs explicitly allege in pertinent part that:

> 52. The plaintiffs, on the one hand, and defendant Girard Estates, on the other hand, entered into a contract, the terms and conditions of which were found in the letter of March 11, 1996 and the letter of March 12, 1996.
>
> 53. As a result of the breach of said agreement and/or contract, the plaintiffs sustained loss in excess of $349,000.00.

Complaint, ¶¶ 52-53. Certain preceding paragraphs also allude to the existence of a contract. For example, the plaintiffs allege that the contract, having both written and oral components, is evidenced by the letters of March 11, 1996 and March 12, 1996. Id. at ¶ 47. Referring to the March 11, 1996 letter, plaintiffs also allege that they "through Binswanger, made a specific proposal for the defendants herein to provide financing to the plaintiffs in connection with their acquisition of the properties listed on Exhibit "A" hereto." Id. at ¶ 25. Further, plaintiffs contend that the language used in the March 12, 1996 letter was intended to induce the plaintiffs to believe that the financing proposal "was a proposal which was accepted by the defendants upon which the defendants herein were prepared to proceed in good faith, subject to

requirements of due diligence." Id. at ¶ 27.

In addition, certain paragraphs preceding Count I alleged a breach of the "contractual duty of good faith and fair dealing." For example, in paragraph 42 of the Complaint, the plaintiffs set forth, in part, the defendants' alleged misconduct and bad faith, thusly:

> . . . the plaintiffs did not know and did not understand the nature of the corrupt dealings of the defendants, their secret agenda and their lack of good faith and insincerity in terms of the defendants prior dealings and representations to the plaintiffs. Instead, the plaintiffs believed that the changing position by the defendants, with respect to their abandonment of any interests in financing and their submission of a below market bid to purchase the properties as reflected in the letter of April 15, 1996 and May 3, 1996, were due to ordinary business considerations including the results of any due diligence conducted ex parte by the defendants. The discovery of the true motivations of the defendants herein, which were to extend the negotiating process beyond the point and time from which the plaintiffs could reasonably deal with other third parties, was not known to the plaintiffs until 1999, during the aforesaid discovery process.

Id. at ¶ 42. Further, plaintiffs allege that "[t]he motivations and actions as aforesaid of the defendants were improper, a breach of their contractual duty of good faith and fair dealing, tortious and done with a fraudulent intent . . .". Id. at ¶ 49.

This court must first decide whether the parties had a binding contract to either purchase or provide financing for the Olde City properties before ruling on whether there was an agreement to negotiate in good faith and whether Pennsylvania recognizes a cause of action for breach of such an agreement. Certain fundamental principles should be recalled. "It is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds." Jenkins v. County of Schuykill, 441 Pa.Super. 642, 648, 658 A.2d 380, 383 (1995). As the first essential of any contract, an offer or promise must be definite and certain. GMH Assocs., Inc. v. The Prudential Realty Group, 2000 WL 228918, at *6 (Pa.Super.Ct. Mar. 1, 2000) (citing Fahringer v. Strine Estate,

429 Pa. 48, 59, 216 A.2d 82, 88 (1966)). "[A] reply to an offer which purports to accept it, but changes the conditions of the offer, is not an acceptance but is a counter offer, having the effect of terminating the original offer." Id. at *7 (citations omitted).

In addition, if the existence of an informal contract is alleged, "it is essential to the enforcement of such an informal contract that the minds of the parties should meet on all the terms as well as the subject matter. If anything is left open for future [negotiation], the informal paper cannot form the basis of a binding contract." GMH Assocs., 2000 WL 228918, at *7 (quoting Isenbergh v. Fleisher, 188 Pa.Super. 99, 106, 145 A.2d 903, 907 (1958)). It is also well-settled that "[a]bsent a manifestation of an intent to be bound, however, negotiations concerning the terms of a possible future contract do not result in an enforceable agreement." Jenkins, 441 Pa.Super. at 648, 658 A.2d at 383 (citing Philmar, 389 Pa.Super. at 301, 566 A.2d at 1255). See also, Sociedad Comercializadora y De Servicos Unifrutti Traders Limitada v. Quizada, 434 Pa.Super. 48, 56, 641 A.2d 1193, 1197 (1993) ("preliminary negotiations do not constitute a contract.").

Applying these principles, here, it is submitted that the parties did not have a binding agreement to purchase or provide financing for the Olde City properties. The purported contract is embodied in the letters of March 11 and March 12, 1996. See, Complaint, at ¶¶ 47, 52-53. Binswanger's letter of March 11, 1996, written on behalf of the Caplens, merely recommends certain terms and conditions to be included in the Board's proposal, and is, at best, merely an offer to enter

into negotiations, not an offer to enter into a contract. See, Exhibit "D".[4] Despite the specific nature of this letter, its terms are not binding on the Board or the Caplens since the proposal would be subject to a due

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[4]The complete March 11, 1996 letter, on Binswanger stationery, addressed to Mr. Richard Burcik of Girard Estates, reads as follows:

Dear Rick:

In accordance with our conversations in recent weeks, I would recommend that you prepare a proposal to provide financing to Larry Caplen, or his nominee, in connection with his acquisition of the outstanding limited partnership interests in: Har-Jul, L.P.; HJN, L.P.; National Investors, L.P. and National Products, L.P. (the "Partnerships"). The loan ("the Loan") would be a first mortgage loan secured by the properties set forth on the attached Exhibit "A". Terms of the Loan would be as follows:

Initial Principal Amount:	$5,250,000
Term:	5 years
Interest Rate:	10%
Payments:	Interest only for 2 years, thereafter according to a 20 year amortization schedule.
Prepayment:	None.
Borrower:	The Partnerships, jointly and severally.
Security:	A non-recourse loan secured by assignments of rents. The loan would provide for cross-collateralization and cross-default.
Conversion:	The loan would be convertible for a period of 24 months from closing, into:

(a) 100% ownership of all properties except the property listed as 109-131 N. 2nd Street; and

(b) a first mortgage loan on the property listed as 109-131 N. 2nd Street in the principal amount of $350,000 requiring constant monthly payments of principal and interest, in arrears at an annual interest rate of 10% for a term of 5 years.

As we have discussed, your proposal should be subject to a due diligence period, expect to take no more than 45 days, during which time you may elect to proceed or not to proceed with the proposed transaction, in your sole discretion.

If these terms are a fair reflection of the transaction you are prepared to propose, please submit a proposal to me so that we may proceed to elicit a response from Mr. Caplen.

Very truly yours,
/s/
JBV/slh

diligence period, after which the Board may decide how or even whether it wants to proceed with the transaction. Id. Further, the letter is dependent upon a response from both the Board and the Caplens. Id. Burcik's letter of March 12, 1996, in response, indicates that the Board has a "sincere interest" in the outlined transaction and specifically requests that Binswanger discuss the matter with the Caplens "to determine if a mutuality of interest truly exists." Exhibit "C". This letter also does not bind the parties to any formal terms, but merely indicates a willingness to enter into negotiations. It also explicitly states that "any deal would be contingent upon a fairly extensive and expensive due diligence, including but not limited to possible environmental and/or maintenance issues." Id. The "due diligence" provisions of this letter change the conditions of those provided in the March 11th letter, and thus, this letter cannot be considered an "acceptance" of the March 11th letter, but would constitute a counter offer. Since these letters do not demonstrate a mutual intent to be bound and no terms had been finalized, there was no enforceable contract to support the plaintiffs' breach of contract claim.

This court also disagrees with the plaintiffs' alternate position that they have stated a breach of a duty to negotiate in good faith. Pl. Memorandum, at 10-11. The Third Circuit Court of Appeals did predict that Pennsylvania would recognize such an action. See, Flight Systems, Inc. v. EDS Corp., 112 F.3d 124, 130 (3d Cir. 1997) (citing Channel Home Centers v. Grossman, 795 F.2d 291, 299 (3d Cir. 1986)). However, Pennsylvania courts have not yet determined whether a cause of action for breach of a duty to negotiate in good faith is cognizable in Pennsylvania. GMH Assocs., 2000 WL 228918, at * 11; Jenkins, 441 Pa.Super. at 649-52, 658 A.2d at 384-85; Philmar, 389 Pa.Super. at 302, 566 A.2d at 1255.

As recognized in Channel Homes, a contract to negotiate in good faith would arise where:

(1) both parties manifested an intention to be bound by the agreement; (2) the terms of the agreement were sufficiently definite to be enforced; and (3) consideration had been given. 795 F.2d at 299. In that case, the court enforced a duty to negotiate in good faith, based on a letter of intent to enter into a formal lease agreement with a prospective tenant, which established that the prospective lessor would withdraw the store from the rental marketplace and the parties explicitly agreed to negotiate the proposed leasing transaction to completion. Id. at 299-300. The court found that the letter of intent contained an "unequivocal promise" to negotiate, was sufficiently definite to be enforced and consideration or value passed between the parties. Id. at 300. See also, Flight Systems, 112 F.3d at 130-31 (holding that plaintiff stated a claim for breach of duty to negotiate in good faith where the letter of intent allegedly showed that the parties agreed to negotiate a lease on specific terms and within a specific time and the property was removed from the market during that time period).

The Pennsylvania Superior Court has approved the principle that "the scope of any obligation to negotiate in good faith can only be determined from the framework the parties have established for themselves in their letter of intent." Jenkins, 441 Pa.Super. at 652, 658 A.2d at 385 (quoting A.S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc., 873 F.2d 155, 158-59 (7th Cir. 1989)). In Jenkins, the court recognized that:

> [i]n a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. And in the context of this case, no legal rule bounds the run of business interest. So one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for "bad faith" in negotiations.

Id. (citations omitted). In that case, the court reviewed a response letter by the county to a bidder's

proposal package; a package submitted pursuant to the county's request to lease a building for public purposes. Id. at 645, 658 A.2d at 381. The county's letter explicitly expressed that the bidder was the "prime candidate," and that the county desired to establish a lease within thirty days and to hold "good faith negotiations." Id. The letter also related that the "proposal is not accepted until the Board of County Commissioners takes official action on the lease." Id. at 645, 658 A.2d at 382. The trial court sustained the county's preliminary objections in the nature of a demurrer. Id. at 647, 658 A.2d at 383. Affirming this ruling, our Superior Court held that the cause of action for breach of a duty to negotiate in good faith did not apply where no specific terms were agreed upon and the language of the letter did not reveal that the parties intended to be bound by any terms of the original specifications. Id. at 652, 658 A.2d at 385. It also held that no implied contract to enter into a lease was formed because there was no mutual manifestation of an intent to be bound. Id. at 648, 658 A.2d at 383.

Likewise, in Philmar, the breach of contract claim was based on a letter of intent, which merely proposed that it would recommend various terms and conditions, and was signed by the real estate agency who had conducted negotiations on behalf of the owner and approved by the president of the plaintiff-appellant. 389 Pa.Super. at 300, 566 A.2d at 1254. Lease negotiations had broken down after an application for a zoning variance, filed by the defendant corporation on behalf of the plaintiff-appellant, was withdrawn due to objections from the zoning board. Id. Our Superior Court, affirming the demurrer, held that the letter of intent did not create a binding lease contract nor an obligation to negotiate in good faith where the letter specifically expressed that "neither party was to be bound until a mutually satisfactory lease had been negotiated and executed." Id. at 302, 566 A.2d at 1255.

Similarly, in GMH Assocs., the Superior Court examined a letter of intent to enter into the sale of commercial real estate, which detailed certain terms and conditions regarding the contemplated sale of property, and allowed for a due diligence period and a closing date. 2000 WL 228918, at *1. The letter also expressly provided that either party could terminate at any time for any reason without incurring liability, but it did not include an explicit provision regarding the duty to negotiate in good faith or a provision referring to the property's "off the market" status. Id. at *12. At trial, it was established that the seller told the buyer that it would take the property "off the market" in exchange for the buyer's execution of the letter of intent and assurances were made in this regard through later dealings between the parties. Id. at * 1. The court held that, even if the courts were to recognize the cause of action, the duty to negotiate in good faith was not breached by the seller's failure to keep the property "off the market" or reveal that it was negotiating with another buyer. Id. at *12.

Here, like Jenkins, Philmar and GMH Assocs., the purported agreement to negotiate in good faith did not evidence a mutual intent to be bound to specific terms. The language in the March 12, 1996 letter, providing that "the Girard Estate has a sincere interest in the transaction," is directly limited by the defendants' express request for Binswanger to "discuss this matter with [the Caplens] to determine if a mutuality of interest truly exists." Exhibit "C" (emphasis added). Further, the due diligence provisions of this letter, and those of the March 11th letter, demonstrate that the defendants were not bound to any deal and provided them with an escape clause. This court cannot find that the parties had an enforceable agreement to negotiate in good faith, absent a mutual intent to be bound.

In addition, the plaintiffs never alleged that the parties had agreed to take the property off the market or deal exclusively with the defendants, which could otherwise serve as consideration. Rather,

they attempt to assert that promissory estoppel would serve as a substitute for consideration.[5] The plaintiffs did allege in various paragraphs of their Complaint that the defendants lacked "good faith" in their representations to the plaintiffs in order to induce the plaintiffs to forego other opportunities and extend the negotiation process beyond the time when the plaintiffs could market their properties to other third parties. See Complaint, at ¶¶ 42-49. However, the plaintiffs knew that the defendants were only interested in purchasing the properties by the first two weeks in April of 1996. Id. at ¶ 38. They contend that the defendants never had a "sincere interest in entering into the financing transaction." Id. Through the letters of April 15 and April 29, 1996, Binswanger, acting as intermediary, had informed both parties that the proposed purchase price for the properties was $4,350,000 and that this price was subject to due diligence. Id. at ¶¶ 39-41; Exhibits "H" & "I". Thereafter, on May 3, 1996, plaintiff Larry Caplen sent a letter to defendant Burcik, relating the details and conditions of the sale of the properties. Exhibit "J". Following this date, the defendants offered the lower number of $3,000,000, which was allegedly a "rapacious attempt to buy real estate at distress prices." Complaint, at ¶ 44. The plaintiffs alleged that they would not "bow to the extortionate demands of the defendants. Id. at ¶ 45. Despite the "bad faith" allegations, this situation is more reflective of the breakdown of the bargaining process, as recognized in Jenkins. The proper recourse would have been to walk away from the negotiating table or look for alternative financing, rather than suing for "bad faith." Further, the defendants' representation that they had a "sincere interest" in the outlined financing transaction cannot reasonably be construed as an enforceable promise since the deal was contingent on the results of due diligence. In addition, the proposed deal, at

[5]This court will discuss this issue in greater detail when it addresses the promissory estoppel claim in Count V of the Complaint.

the onset, included a provision for converting the properties into equity ownership, which strongly indicates that the defendants had always been interested in owning the properties. See Exhibit "D".

Under these circumstances, the plaintiffs have failed to state a cause of action for breach of an agreement to negotiate in good faith.

Defendants' Objections to Counts II thru IV
Based on the Doctrine of Sovereign Immunity

Defendants have moved to dismiss Count II (fraud), Count III (negligent misrepresentation) and Count IV (intentional interference with contractual relations) on the grounds that "the Board is an agency of the Commonwealth of Pennsylvania [and] is shielded by the doctrine of sovereign immunity from the imposition of liability for tort claims," pursuant to 1 Pa. C.S.A. § 2310; and 42 Pa. C.S.A. §§ 8521-8522. Preliminary Objections, ¶ 11. Defendants also contend that Burcik, as the Board's general manager, is protected by sovereign immunity since plaintiffs did not allege that he acted beyond the scope of his employment. Id. at ¶ 13. In response, plaintiffs contend that the Board is not a "commonwealth agency" within the meaning of 42 Pa. C.S.A. § 102 and is not shielded by the doctrine of sovereign immunity, but, if it is an agency, it is excluded as an "agency of the unified judicial system" because the Board is appointed by members of the judiciary and the Orphans' Court has exclusive jurisdiction over it. Pl. Memorandum of Law in Response to Preliminary Objections, at 16-18. ("Pl. Memorandum").

Initially, the court recognizes that the defense of sovereign immunity may be raised by preliminary objection where it is apparent on the face of the pleadings or where the plaintiff has not objected to this procedure, despite that immunity is an affirmative defense which normally should be

pleaded as new matter in accordance with Pa.R.C.P. 1030.[6] Chester Upland School Dist. v. Yesavage, 653 A.2d 1319, 1327 (Pa.Cmwlth.Ct. 1994); E-Z Parks, Inc. v. Larson, 91 Pa.Cmwlth. 600, 608, 498 A.2d 1364, 1369 (1985), aff'd 110 Pa.Cmwlth. 629, 532 A.2d 1272 (1987). As stated in Yesavage, "the defense of governmental immunity is an absolute unwaivable defense, not subject to any procedural device that could render the governmental agency liable beyond exceptions granted by the legislature." 653 A.2d at 1327 (citation omitted). See also, Tulewicz v. Southeastern Pennsylvania Transportation Authority, 529 Pa. 588, 594 n. 6, 606 A.2d 427, 429 n. 6 (1992) (holding that the defense of immunity is "non-waivable.").

Pennsylvania courts have not yet determined whether the Board is a "commonwealth agency" for the purposes of sovereign immunity. Thus, this is an issue of first impression. Nor have the courts decided whether the Board qualifies as a "local agency" for governmental immunity purposes, under what is commonly referred to as the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §§ 8541-8542. Though the parties do not raise the latter issue, Pennsylvania courts interpret both statutes consistently and rely upon cases in one area when dealing with a similar problem in the other. See DeLuca v. School Dist. of Philadelphia, 654 A.2d 29, 31 (Pa.Commw.Ct. 1994); Downing By and Through Downing v. Philadelphia Housing Authority, 148 Pa.Commw. 225, 229, 610 A.2d 535, 537 (1992). Therefore, in determining this matter, this court should address whether the Board would qualify for either sovereign or governmental immunity.

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[6]Here, in their Answer, plaintiffs have not objected to the procedure employed by the defendants in raising the immunity defense, but rather, they dispute only the classification of the Board as a "commonwealth agency." See Pl. Memorandum, at 16-18.

The Pennsylvania legislature reaffirmed the doctrine of sovereign immunity when it enacted 1 Pa. C.S.A. § 2310, which reads as follows:

> Pursuant to section 11 of Article 1 of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) or 62 (relating to procurement) unless otherwise specifically authorized by statute.

Id. See 42 Pa.C.S.A. § 8521(a) (stating "[e]xcept as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity . . ."). Compare 42 Pa. C.S.A. § 8541 (conferring governmental immunity on local agencies). For causes of action sounding in tort based on the negligent acts of its employees, the sovereign immunity of Commonwealth parties has been waived only for the circumstances listed in 42 Pa. C.S.A. § 8522.[7] Compare 42 Pa. C.S.A. § 8542 (listing similar exceptions to governmental immunity).[8] Absent these waivers to sovereign immunity or governmental immunity, the Commonwealth, its political subdivisions and/or local agencies, and respective employees

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[7]The limited instances when Commonwealth parties may be held liable in tort are: (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines. 42 Pa. C.S.A. § 8522 (b)(1)-(9).

[8]Local agencies and their employees, acting within the scope of his or her office, may be held liable for the following "negligent acts": (1) vehicle liability; (2) care custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; (8) care, custody or control of animals. 42 Pa. C.S.A. § 8542 (b)(1)-(8). "Negligent Acts" do not include acts or conduct which constitutes actual fraud, actual malice or willful misconduct. Id. at § 8542(a)(2).

of either, acting within the scope of their employment, are shielded from liability for intentional torts, including the tort for intentional interference with contract.[9] Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc., 694 A.2d 1134, 1140 (Pa.Commw.Ct. 1997). See also, E-Z Parks, Inc., 110 Pa.Commw. at 637, 532 A.2d at 1277 (stating that "any suit involving an injury, whether the injury is physical, mental, reputational or economic, is barred, unless the suit falls within one of the eight exceptions to immunity contained in section 8542(b).").

None of the plaintiffs' tort claims fall under the limited waivers to sovereign immunity or governmental immunity. See 42 Pa. C.S.A. §§ 8522(b); 8542(b), respectively. Therefore, the only issue(s) to be decided are whether the Board constitutes a "commonwealth agency" or a "local agency" under the relevant statutory definitions and applicable case law.

Defendants, in support of their position, rely on the determination of the United States Supreme Court in Commonwealth of Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 230, 231 (1957), that the Board was an agency of the Commonwealth of Pennsylvania for 14th Amendment purposes. In that case, the Supreme Court held that the Board's refusal to admit two applicants to Girard College, on the basis of their race, was discrimination prohibited under the 14th Amendment, though the trust funds left by Stephen Girard's will were expressly designated to

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[9]The scope of immunity differs somewhat under both statutes. "Unlike Commonwealth employees, local agency employees can be held liable if they have engaged in crime, actual fraud, actual malice or willful misconduct. Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc., 694 A.2d 1134, 1140 (Pa.Commw.Ct. 1997). However, liability will not be imposed on the local agency, itself, where the action of an employee is determined to constitute crime, actual fraud, actual malice or willful misconduct. Tiedeman v. City of Philadelphia, 732 A.2d 696, 700 (Pa.Commw.Ct. 1999). See also, 42 Pa.C.S.A. § 8550.

establish a college for poor white male orphans. Id. This court finds that this holding is not dispositive of whether or not the Board qualifies as a "commonwealth agency" for purposes of sovereign immunity. See City of Philadelphia v. Local 473, 96 Pa.Commw. 629, 631, 508 A.2d 628, 629 (1986) (recognizing that Supreme Court's decision in Board of Directors of City Trusts "finding state action for Fourteenth Amendment purposes" is not dispositive of whether or not employees of Girard College are employees of the City of Philadelphia). See also, In re School Asbestos Litigation: School Dist. of Lancaster v. Lake Asbestos of Quebec, Ltd. et al., 56 F.2d 515, 520-21 (3d Cir. 1995)(determining that Board is not a city agency nor a "nonprofit association" for purposes of the class certification issue, but not ruling on whether the Board is a state agency); Poitier v. Sun Life of Canada, 1998 WL 754980, at *2 (E.D.Pa. Oct. 28, 1998)(finding that Girard College as administered by the Board is not a political subdivision of the state for purposes of ERISA).

On the other hand, the court disagrees with the plaintiffs' argument that the Board could constitute an "agency of the unified judicial system," which would otherwise exclude it from the definition of "commonwealth agency" under 42 Pa.C.S.A. § 102. This court also finds that the plaintiffs misapply the holding in Wilson v. the Board of Directors of City Trusts, 324 Pa. 545, 188 A. 588 (1936). In Wilson, the Pennsylvania Supreme Court determined that the Orphans' Court of Pennsylvania had exclusive jurisdiction over the Board, as administrator of a charitable trust, though the common pleas judges appoint members of the Board. Id. at 553-554, 188 A. at 593. The holding in Wilson simply dealt with a jurisdictional issue, and it cannot be stretched to turn the Board into an agency of the judiciary. Plaintiffs fail to cite any other case which would support their argument.

Boards, created by statute, and other authorities are not automatically considered to be "the Commonwealth" for all purposes. Southeastern Pennsylvania Transportation Authority v. Union Switch & Signal, Inc., 161 Pa.Commw. 400, 406, 637 A.2d 662, 666 (1994). Rather, "[t]o determine whether they should be considered as 'the Commonwealth', [courts] examine the intent of the General Assembly in enacting a particular piece of legislation." Id. For example, the Pennsylvania Supreme Court in Marshall v. Port Authority of Allegheny County, 524 Pa. 1, 5-6, 568 A.2d 931, 933-934 (1990), referred to the definitions contained in that portion of the Judicial Code relating to sovereign immunity in order to determine whether a "Port Authority" ("PAT"), created under the Second Class County Port Authority Act,[10] was a "Commonwealth party." It stated:

> Clearly, PAT may claim sovereign immunity if it is a "Commonwealth party." A "Commonwealth party" is defined in 42 Pa.C.S.A. § 8501 as "[a] Commonwealth agency and an employee thereof . . ." Under 42 Pa.C.S.A. § 102, "Commonwealth agency" is defined as "[a]ny executive or independent agency." Agencies are classified as "executive" if they are under the supervision and control of the Governor, and, it they are not, as "independent." Id. Both of these types of agencies are expressly defined as including entities such as boards, commissions, authorities, and other agencies "of the Commonwealth government." Id. "Commonwealth government" is, in turn, defined as encompassing the following:
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> > . . . the departments, boards, commissions, authorities and officers and *agencies of the Commonwealth*, but the term does not include any political subdivision, municipal or other local authority, or any officer or

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[10]Act of April 6, 1956, P.L. (1955) 1414, *as amended*, 55 P.S. §§ 551-702. The Marshall court specifically examined § 553(a) of the Act, which provides:

There are hereby created bodies corporate and politic in counties of the second class, to be known as Port Authority (insert name of county), which shall constitute public bodies corporate and politic; exercising the public powers of the *Commonwealth as an agency thereof*.

Id. at 5, 568 A.2d 933-34 (emphasis in original).

agency of any such political subdivision or local authority.
Id. (emphasis added).

Id. at 4-5, 568 A.2d at 933. The Marshall court held that PAT was entitled to sovereign immunity as a "commonwealth agency" because its authorizing legislation explicitly provided PAT with this status. Id. at 5-6, 568 A.2d at 934. See also, Feingold v. Southeastern Pennsylvania Transportation Authority, 512 Pa. 567, 577-79, 517 A.2d 1270, 1275-76 (1986) (determining SEPTA is a commonwealth agency for sovereign immunity purposes, after examining similar language in its enabling Act).

An analogous case is Doughty v. the City of Philadelphia et al., 141 Pa.Commw. 659, 596 A.2d 1187 (1991). In that case, the plaintiffs filed a personal injury action against Temple University/Woodhaven Center ("Temple"). Id. at 660, 596 A.2d at 1187-88. The trial court granted summary judgment in favor of Temple, ruling that it was entitled to sovereign immunity as a "commonwealth agency," on the basis of the description of Temple as an "instrumentality of the Commonwealth," as stated in the Temple Act.[11] Id. at 660-61, 596 A.2d at 1188. The Commonwealth court reversed, holding that the mere description of Temple as an "instrumentality" of the Commonwealth does not entitle Temple to use the defense of sovereign immunity. Id. at 666, 596 A.2d at 1191. It reasoned that "[t]he use of an entity by the Commonwealth to achieve a purpose does not in itself transform the entity into a commonwealth agency." Id. at 665, 596 A.2d at 1190. The court, referring to Mooney v. Board of Trustees of Temple University, 448 Pa. 424, 292 A.2d 395 (1972), also recognized that the Temple Act

[11]Temple University--Commonwealth Act, Act of November 30, 1965, P.L. 843, P.S. §§ 2510-1--2510-12. Specifically, § 2510-2 of the Temple Act provided that "Temple University" was an "*instrumentality* of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education." (emphasis added).

provides for the appointment of twelve Commonwealth representatives to Temple's board of trustees, which consisted of thirty-six voting members;[12] and that the Act permits the board to acquire land, erect and equip buildings, and provide facilities for the use of Temple.[13] Id. at 662-63, 596 A.2d at 1189. The Temple Act also requires the board of trustees to submit reports of all of the universities activities to the Governor and members of the General Assembly.[14] See also, Northampton County Area Community College v. Dow Chemical, 389 Pa.Super. 11, 22-23, 566 A.2d 591, 596-97 (1989)(concluding that the Community Colleges cannot be construed as being "commonwealth parties," under the Judicial Code's definitions, because the legislature did not create them but merely authorized their creation by means of an enabling statute, 24 P.S. §§ 19-1901 et seq., and the Commonwealth does not control the Colleges' creation and operation).

Here, contrary to the defendants' position, the mere inclusion of the word "board" in the Judicial Code's definition of "independent agency"[15] does not mean that the Board of Directors of City Trusts qualifies as a "commonwealth agency" for purposes of sovereign immunity. Cf. Pennsylvania Turnpike Comm'n v. Jellig, 128 Pa.Commw. 171, 177-181, 563 A.2d 202 (1989)(holding that the Pennsylvania Turnpike Commission is entitled to sovereign immunity as a "commonwealth party" because the legislative history indicates that it is included as an "independent agency" within the meaning of the statute). Rather, under the Marshall rationale, this court must look to the statutory language in 53 P.S. §

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[12]24 P.S. § 2510-4.

[13]24 P.S. § 2510-7.

[14]24 P.S. § 2510-10.

[15]42 Pa.C.S.A. § 102.

16365, which created the Board.

The Board was created by the Pennsylvania legislature in June of 1869 to act as a trustee in administering a number of estates and trusts left to and for the benefit of the City of Philadelphia.[16] The enabling statute which created the Board says nothing about the Board being an agency of the Commonwealth or performing an explicitly "public" function on behalf of the Commonwealth. Cf. Marshall, 524 Pa. at 5-6, 568 A.2d 933-34; Feingold, 512 Pa. at 577-79, 517 A.2d at 1275-76. Further, "[t]he Board has authority to sue and may be sued pursuant to the state statute which created the Board." School Dist. of Lancaster 56 F.3d at 521.[17] Like in Northampton, this legislation merely authorized the Board's creation, but it did not turn the Board into a creature of the Commonwealth. In addition, similar to the board of trustees in Doughty, the Board consists of both public and private members, it is authorized to

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[16]The Board's composition and its powers are statutorily defined as follows:

> All and singular the duties, rights and powers of the city of Philadelphia, concerning all property and estate whatsoever, dedicated to charitable uses or trusts, the charge or administration of which is now or shall hereafter become vested in or confined to the city of Philadelphia, shall be discharged through the *instrumentality of a board* composed of fifteen persons, including the mayor of said city, the presidents of the select and common councils for the time being and twelve other citizens, appointed as hereinafter provided, to be called directors of city trusts, who shall exercise and discharge all the duties and powers of said city, however acquired, concerning any such property appropriated to charitable uses, as well as the control and management of the persons of any orphans or others, the objects of such charity, to the extent that the same have been or hereafter may be, by statute law or otherwise, vested in or delegated to the said city or the officers thereof.

Act of June 30, 1869, P.L. 1276, 53 P.S. § 16365, repealed in part, Act of November 19, 1959, P.L. 1526 (emphasis added).

[17]In that case, the court did not take the opportunity to declare that the Board is a "state agency" in order to exclude it from the certified class in the asbestos litigation, but simply held that the Board was not a "non-profit association" and cannot be included in the class. Id. at 520-21.

acquire land on behalf of Girard College, and it has to make reports of its activities to the City Council, the State Legislature and the Philadelphia Orphans' Court. See Wilson, 324 Pa. at 553-55, 188 A. at 592-93. Under Doughty and Northampton, the Board's obligation to report its activities to the Commonwealth does not mean that the Commonwealth controls those activities and does not turn the Board into a Commonwealth entity. Under the explicit statutory language, which created the Board, and analogous case law, this court submits that the Board should not be considered a "commonwealth agency" for purposes of sovereign immunity.

This court must now determine if the Board, which performs a function for the city, can be considered a local agency. The language contained in 53 P.S. § 16365 could, at first glance, indicate that the Board may be considered a "local agency" since that statute charges the Board with the duty of administering charitable trusts on behalf of the City of Philadelphia. It is established that the City of Philadelphia is considered a local agency for purposes of governmental immunity, under the Political Subdivision Tort Claims Act. Walsh v. City of Philadelphia, 526 Pa. 227, 237 n.8, 585 A.2d 445, 450 n.8 (1991). In 1936, the Wilson court noted that "[the Board] performs a part of the city's duties, and as such, could be considered a part of the city government, but its functions are apart from the general governmental powers exercised by the city itself." 324 Pa. at 554, 188 A. at 593. Despite this statement, it is doubtful that the Board can be considered a local agency for immunity purposes.

"Local agency" is defined as "[a] government unit other than the Commonwealth government. The term includes an intermediate unit." 42 Pa.C.S.A. § 8501. In turn, "government unit" is defined as "[t]he General Assembly and its officers and agencies, any government agency or any court or other officer or agency of the unified judicial system. 42 Pa.C.S.A. § 102. In addition, "government

agency" includes "any *political subdivision, municipal authority or other local authority*[18] or any officer or any agency of such political subdivision or local authority. Id. (emphasis added). A municipal authority has been recognized as neither the "Commonwealth government" nor a "local agency," but it still enjoys governmental immunity. Rhoads v. Lancaster Parking Authority, 103 Pa.Commw. 303, 310-11, 520 A.2d 122, 126-27 (1987) (holding that municipal parking authority is entitled to governmental immunity). Municipal authorities are considered to be "independent corporate agents of the Commonwealth which exercise *governmental*, as well as private corporate power, in assisting the Commonwealth in meeting the needs of its citizens . . . . [and] must be separate and distinct entities from the municipalities which form them for reasons of public policy and convenience. Id. at 310, 520 A.2d at 126 (citations omitted).

Unlike municipal authorities and other local agencies, the Board does not perform a governmental function and should not enjoy governmental immunity, even though it acts on behalf of the city in administering the trusts and estates left to the city. Section A-100 of the Philadelphia Home Rule Charter

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[18] 1 Pa.C.S.A. § 1911 defines those terms as follows:

"Political subdivision": Any county, city, borough, incorporated town, township, school district, vocational school district and county institution district.

"Municipal authority": A body corporate and politic created pursuant to the Municipality Authorities Act of 1935 or to the Municipality Authorities Act of 1945.

"Local authority": When used in any statute finally enacted on or after January 1, 1975, a municipal authority or any other body corporate and politic created by one or more political subdivisions pursuant to statute.

Here, the Board was created in 1869 and would not fit under any of these definitions.

explicitly exempts the Board from any relationship with the city.[19] Further, the department of public welfare, which is charged with the administration of charitable agencies and institutions which are entrusted to the city, is prohibited from interfering with the functions of any board of directors of city trusts which had been created by the General Assembly.[20]

Moreover, recent federal cases, which discussed the Board's status also suggest that the Board should not be considered a local agency for immunity purposes. The United States District Court for the Eastern District of Pennsylvania noted the following:

> [t]he Board is composed of fifteen members, thirteen of whom are private citizens appointed by the Philadelphia Orphan's Court. The Mayor of the City of Philadelphia and the President of City Council also serve as members of the Board. The mere fact that the private members of the Board are appointed by an elected official does not make the Board or the college responsible to the public within the meaning of Natural Gas.[21] The presence of two city officials on the Board is also not sufficient to make the Board a political subdivision of the state.

Poitier, 1998 WL 754980, *2.

In addition, the Court of Appeals for the Third Circuit expressed the following:

> [w]e doubt that the Board is a city agency. The Board was created by the state for the purpose of administering charitable bequests left to and for the benefit of Philadelphia.

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[19]Section A-100 of the Philadelphia Home Rule Charter provides that "[e]xcept as otherwise specifically provided, this charter shall not apply to the Board of Directors of City Trusts and to any institutions operated by it."

[20]Act of June 25, 1919, P.L. 581, art. VIII, § 3, 53 P.S. § 12323.

[21]This statement refers to the United States Supreme Court's decision in NLRB v. Natural Gas Utility District, 402 U.S. 600 (1971), which adopted a two-part test for determining when an entity is a political subdivision for purposes of the National Labor Relations Act, 29 U.S.C.A. §§ 151 et seq. Under this test, an entity is a political subdivision if it is "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or the general electorate." Id. at 604-05.

> Although the Board performs this function for the city, it is neither a part of the city, nor responsible to the city. The Board was designed merely to independently carry out this service for the city whenever the city is left sizeable [*sic*] estates that require management.

School Dist. of Lancaster, 56 F.3d at 520.

In light of this analysis, this court should not sustain the defendants' Preliminary Objections to Counts II through IV based on the doctrine of Sovereign Immunity, because the Board does not constitute a "commonwealth agency" or a "local agency" for purposes of immunity from tort liability.

Defendants' Objection to Count II for Failure to Allege Fraud with the Requisite Particularity

Defendants have moved to dismiss Count II for plaintiffs' failure to aver fraud with particularity, as required by Rule 1019(b), Pa.R.C.P. Preliminary Objections, ¶¶ 15-17. Alternatively, the defendants assert that the plaintiffs failed to aver a material misrepresentation or an actual loss. Id. at ¶¶ 18-25. In addition, defendants assert that plaintiffs have failed to state any claims based on an alleged non-disclosure. Id. at ¶¶ 38-41.

In response, the plaintiffs contend that they adequately made out a claim for fraud where the Complaint sets forth allegations that the defendants falsely expressed a sincere interest in the proposed financing transaction and attempted to corrupt the relationship between the plaintiffs and their fiduciary, Binswanger, in order to obtain the properties at the lowest possible prices and at terms most favorable to the defendants. Pl. Memorandum, at 19 (referring to ¶¶ 22-37 of the Complaint). Plaintiffs also maintain that they sufficiently alleged the "malicious and evil" intent of the defendants to mislead the plaintiffs, in order that the plaintiffs abandon the prospect of dealing with other third parties, leaving them without sufficient time, given extrinsic deadlines, to effectively market their properties. Id. (referring to ¶¶ 48-49 of the

Complaint).

Before addressing the parties' arguments, this court submits that certain principles associated with fraud claims should be noted. "Fraud is a claim easily made but difficult to support. Once an allegation of fraud is injected into a case, even though it may ultimately be shown to be without any arguable merit, the whole tone and tenor of the matter changes." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa.Super. 537, 553, 564 A.2d 919, 927 (1989). It "consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." Delahanty v. First Pennsylvania Bank, N.A., 318 Pa.Super. 90, 107, 464 A.2d 1243, 1251 (1983)(citing Frowen v. Blank, 493 Pa. 137, 143, 425 A.2d 412, 415 (1981)).

In Pennsylvania fraud must be averred with "particularity." Rule 1019(b), Pa.R.C.P. The Pennsylvania Supreme Court has stated that "although it is impossible to establish precise standards as to the degree of particularity required under this rule, two conditions must be met to fulfill the requirement: (1) the pleadings must adequately explain the nature of the claim to the opposing party so as to permit the preparation of a defense, and (2) they must be sufficient to convince the court that the averments are not merely subterfuge." Martin v. Lancaster Battery Co., Inc., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992)(citing Bata v. Central-Penn National Bank, 423 Pa. 373, 380, 224 A.2d 174, 179 (1966)).

In determining whether this requirement has been satisfied, this court must examine the complaint in its entirety. Commonwealth by Zimmerman v. Bell Telephone Co. of Pa., 121 Pa.Commw. 642, 649, 551 A.2d 602, 605 (1988). To establish a claim for fraud based on an intentional misrepresentation, the plaintiff must allege (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. Bortz v. Noon, 556 Pa. 489, __, 729 A.2d 555, 560 (1999)(citations omitted).[22] Further, "[t]he tort of intentional non-disclosure has the same elements as intentional misrepresentation 'except in the case of intentional non-disclosure, the party intentionally conceals a material fact rather than making an affirmative misrepresentation.'" Id. See Restatement (Second) of Torts, § 550 (1976)(describing liability for fraudulent concealment). "Mere silence in the absence of a duty to speak, however, cannot suffice to prove fraudulent concealment." Sevin v. Kelshaw, 417 Pa.Super. 1, 9, 611 A.2d 1232, 1236 (1992)(citation omitted). In addition, "[a] misrepresentation is material if it is of such character that had it not been made, or . . . had it been made, the transaction would not have been consummated." Id. at 10, 611 A.2d at 1237.

Here, at first blush, it appears that plaintiffs have sufficiently averred fraud with particularity, as required by Rule 1019(b), Pa.R.C.P. See Complaint, at ¶¶ 26-37; 48-49.[23] Plaintiffs lay out exactly

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[22]In Sevin v. Kelshaw, 417 Pa.Super. 1, 9, 611 A.2d 1232, 1236 (1992), the Pennsylvania Superior Court set forth a slightly different set of elements for fraud: (1) a misrepresentation; (2) a fraudulent utterance of it; (3) the maker's intent that the recipient be induced thereby to act; (4) the recipient's justifiable reliance on the misrepresentation; and (5) damage to the recipient proximately caused. Count II of the Complaint, which incorporates the preceding paragraphs, is based primarily on the defendant, Burcik's statement of "sincere interest in the transaction" in the March 12, 1996 letter and the defendants' intentions behind that statement. Therefore, the test used in Bortz is relevant to deciding this issue.

[23]Defendants also moved to strike paragraphs 35, 37, 39, 41, 42, 44, 45, 47, 52, 55, 56 and 59 of the Complaint and to dismiss Counts I, III, IV and V for failure to plead material facts with specificity in accordance with Rule 1019(a), Pa.R.C.P. Preliminary Objections, at ¶¶ 26-30. The allegations contained in these paragraphs provide context to the tortious interference claim and will not now be stricken as they are factually sufficient for the defendants to prepare a defense when read in conjunction with the remainder of the Complaint.

what the alleged affirmative misrepresentation is and when it took place; i.e., that defendants never intended to go forward with the proposed financing transaction despite their representation of "sincere interest," as described in the March 12, 1996 letter. Id. at ¶¶ 26-28. Plaintiffs also repeatedly allege that defendants concealed their true motivations, in order to force the plaintiffs to forego opportunities to deal with other third parties and to pressure the plaintiffs into selling the properties to the defendants at a price lower than would be fair. Id. at ¶¶ 29; 32; 36; & 48. In addition, plaintiffs explicitly allege that the defendants intended to mislead the plaintiffs into relying on the defendants' representations, and that such reliance was reasonable, forcing the plaintiffs to forego their opportunity to successfully sell and/or market the properties to other third parties, which resulted in a loss in excess of five million dollars. See Id. at ¶¶ 28-30; 46-48. These allegations would be sufficient to explain the nature of the claim for fraud and enable the defendants to prepare a defense, based either on the intentional misrepresentation claim or the one for fraudulent concealment. See Id. at ¶¶ 29, 31, 37, & 41.

But, the plaintiffs have failed to set forth that the misrepresentation was material to the transaction, which is a necessary element for stating a claim for intentional misrepresentation or one for fraudulent concealment.[24] In addition, the plaintiffs' own allegations contravene their contention that their reliance on the representation was reasonable. See Id. at ¶ 28. This court found above that no transaction or contract was ever fully consummated based on the letters of March 11 and March 12, 1996. Therefore, it would not be reasonable to conclude that fraud was committed in its alleged procurement, or that the

[24]The plaintiffs also failed to establish that the defendants had a legal duty to disclose their "true" intentions, which is necessary to support a claim for fraudulent concealment and/or intentional non-disclosure.

representation(s) were material. See GMH Assocs., 2000 WL 228918, *9. The same letter, which contained the allegedly false representation that the defendants had a "sincere interest" in the outlined transaction, also stated that "any deal would be contingent upon a fairly extensive and expensive due diligence . . . ." Exhibit "C". This language can be construed as modifying the due diligence period that was proposed in Binswanger's letter on March 11, 1996, as well as emphasizing the contingent nature of any negotiation discussed at that point. It thus demonstrates that no deal would truly be finalized until after the due diligence period. Further, plaintiffs never alleged that they had an agreement to take the properties off the market or deal exclusively with Burcik and the Board. Moreover, the proposed transaction always contained the provision for converting the property into equity ownership. See Exhibit "D". As alleged in the Complaint, the defendants, in or about January 1995,[25] announced their intention to **acquire** real estate in the Olde City section of Philadelphia. Complaint, at ¶ 18. By April 15, 1996, if not sooner, the Plaintiffs certainly knew that the defendants were only interested in buying the properties. Id. at ¶¶ 32, 38; and Exhibit "H". On that same date, the plaintiffs were informed of the defendants' proposed purchase price.[26] Id. Therefore, the plaintiffs' early knowledge of the defendants' true interests belies the contention that a fraud was committed. Even assuming that the expression of "sincere interest" was false, it was not material to the transaction since any deal was always contingent on an extensive due diligence.

For these reasons, the plaintiffs have failed to sufficiently make out a claim for fraud based on an intentional misrepresentation or one for intentional concealment. Therefore, Count II of the

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[25]Plaintiffs may have mis-stated this date and really intended to state "January of 1996."

[26]The allegation that the defendants offered a lower purchase price in May of 1996 adds no support to the claim of fraud.

Complaint is dismissed.

Defendants' Objection as to Count III for Negligent Misrepresentation

Defendants move to dismiss the negligent misrepresentation claim in Count III, on the grounds that plaintiffs have not alleged any misrepresentation of a material fact, nor did they allege the failure to exercise reasonable care. Preliminary Objections, at ¶¶ 31-33. Alternatively, defendants assert that they owed no duty to the plaintiffs, as required to maintain an action for negligence. Id. at ¶¶ 34-37. In response, plaintiffs contend that they have sufficiently made out this tort where "the complaint alleges that defendants had a pecuniary interest in obtaining the properties . . . and for that purpose, they had supplied false information both to the plaintiffs and to Binswanger with respect to their alleged sincere interest in the transaction." Pl. Memorandum, at 21-22. In support of this argument, plaintiffs rely upon Section 552 of the Restatement (Second) of Torts (1976).[27]

Negligent misrepresentation requires proof of the following: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Bortz, 556 Pa. at __, 729 A.2d at 561 (citations omitted). Negligent misrepresentation differs from intentional misrepresentation in that the misrepresentation must concern a

[27]Section 552 of the Restatement (Second) of Torts provides in pertinent part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words. Id. Further, like any action in negligence, there must be an existence of a duty owed by one party to another. Id.

As noted above, this court does not find that the defendants' expression of a "sincere interest" was a material misrepresentation since the statement was qualified by a contingent due diligence period. Further, this court finds that this statement would not induce reasonable reliance or force the plaintiffs to forego other marketing opportunities when there was no agreement to deal exclusively with the defendants. The only exclusive arrangement was between the plaintiffs and Binswanger. See Complaint, at ¶ 16. While there may have been a duty to the plaintiffs on Binswanger's part, there was no such duty owed by the defendants where they did not have a contract and had not finalized any deal for either the financing or sale of the properties.

Therefore, Count III of the Complaint is dismissed because defendants did not owe a duty to the plaintiffs and no material misrepresentation existed.

Defendants' Objection to Count IV
for Tortious Interference with Contractual Relations

Defendants have moved to dismiss Count IV of the Complaint for failure to allege any existing contractual right with a third party or a prospective contractual relation. Preliminary Objections, at ¶¶ 42-49. Plaintiffs, in response, urge that the complaint does assert this cause of action.

To establish a cause of action for intentional interference with contractual relations, the plaintiffs must allege the following: (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 a 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. Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa.Super.Ct. 1998).

Plaintiffs specifically alleged that they had an exclusive agreement with Binswanger to represent them in marketing the properties. Complaint, at ¶¶ 15-16. They also repeatedly alleged that the defendants had taken purposeful action to secretly "corrupt" the relationship between the plaintiffs and their fiduciary Binswanger. Id. at ¶¶ 35-37. These actions included a proposed agency agreement between the Board and Binswanger, in which Binswanger would "seek to purchase [the Olde City properties] at the lowest prices and otherwise on terms most favorable to Girard." Exhibit "G". Plaintiffs also alleged that the defendants' actions with Binswanger, and their representations, caused the plaintiffs to forego marketing opportunities with other third parties. Id. at ¶¶ 41-42, 46, 62. As a result, the plaintiffs were allegedly "left without sufficient time, given extrinsic deadlines to effectively market their properties" and "suffered a loss in excess of $5,000,000.00." Id. at ¶¶ 46 & 48.

On the face of these allegations, and accepting them as true, this court finds that the plaintiffs have sufficiently stated the elements for tortious interference with contractual relations. Therefore, the Preliminary Objections in the nature of a demurrer with respect to Count IV are overruled.

Defendants' Objection as to Count V for Promissory Estoppel

Defendants have moved to dismiss Count V of the Complaint on the grounds that the plaintiffs have failed to state a cause of action for promissory estoppel where they "have not alleged that defendants made a promise that they should have reasonably expected would induce action or forbearance

on the part of the plaintiffs." Preliminary Objections, at ¶ 51.

To establish a cause of action based on promissory estoppel, the plaintiffs must allege that: "(1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise." GMH Assocs., 2000 WL228918, at *12 (citations omitted). "However, the doctrine of promissory estoppel does not apply if the complaining party acted on its own will and not as the result of the defendant's representations." Id.

Plaintiffs maintain that the "promise" of the defendants was the expression of a "sincere interest" contained in the letter of March 12, 1996. Exhibit "C". Further, the plaintiffs alleged that they were forced to forego other marketing opportunities as a result of the defendants' conduct and representations. However, the plaintiffs did not allege that the defendants should have **reasonably expected** that this purported "promise" would induce the plaintiffs to forego other opportunities. In addition, the defendants qualified their interest by making it contingent on an extensive due diligence period. Just as there was no enforceable contract nor an agreement to negotiate in good faith, this court finds that there existed no enforceable "promise" for the defendants to provide the mortgage financing to the plaintiffs to the exclusion of all other prospective third parties.

For these reasons, the Preliminary Objections are sustained with respect to Count V.

Preliminary Objection as to Punitive Damages

Defendants have moved to strike plaintiffs' demand for punitive damages from Counts II through IV.

Punitive damages are proper only if the defendants' conduct was malicious, wanton, willful, oppressive or exhibited a reckless indifference to the rights of others. Costa v. Roxborough Memorial Hospital, 708 A.2d 490, 497 (Pa.Super.Ct. 1998). Further, an award of punitive damages may only be recovered "if there are aggravating circumstances beyond those that justified the award of compensatory damages." Pittsburgh Live, Inc. v. Servov, 419 Pa.Super. 423, 430, 615 A.2d 438, 442 (1992).

The claim for tortious interference with contractual relations is supported by allegations of willful and intentional conduct on the part of the defendants. See Complaint, at ¶¶ 35, 37, 39, 44, & 48, 55. It would, therefore, be premature to strike the demand for punitive damages at this stage of the proceedings.[28]

CONCLUSION

For the reasons stated, this court sustains the demurrers to Counts I, II, III and V, pursuant to Rule 1028(a)(4), Pa.R.C.P. Counts I, II, III and V are dismissed with prejudice.[29] This court finds that the plaintiffs have sufficiently stated a claim for tortious interference with contractual relations, and thus, the Preliminary Objections to Count IV are overruled. This court also denies the Objection to the claim for punitive damage. An Order will be entered this date in accord with this Memorandum Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[28]This determination is without prejudice for defendants to reassert its opposition to the punitive damages claim following the conclusion of discovery.

[29]This court recognizes the proposition that in most instances the opportunity to amend should be liberally afforded plaintiff in instances where preliminary objections are sustained. However, in this instance, there is no reasonable basis to call for an amended complaint.