IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

EGW PARTNERS, L.P., Plaintiff	: MARCH TERM, 2001 : No. 336
v.	: Commerce Program
PRUDENTIAL INSURANCE COMPANY OF AMERICA and PRUDENTIAL SECURITIES, INCORPORATED Defendants	: Control No. 111603

.....

O P I N I O N

Albert W. Sheppard, Jr., J. ..... February 12, 2003

Defendants, Prudential Insurance Company of America ("PI"), and Prudential Securities, Incorporated ("PSI"), filed the instant Motion for Summary Judgment. For the reasons discussed the Motion is granted as to Count IV (tortious interference with contract) and to the claim for punitive damages, but otherwise denied.

BACKGROUND

In the spring of 2000, EGW Partners, L.P. ("EGW") and PSI discussed creating the "Atlas Fund" to "originate and manage a portfolio of high-yield commercial real estate loans and preferred equity investments." Opp. Sum. Judg. Exs. 1, 3. In June 2000, EGW and PSI signed a letter of intent outlining the structure of the Atlas Fund. Opp. Sum. Judg. Ex. 35. On June 21, 2000, PSI's Commitment Committee approved the general terms of the deal, which provided, inter alia, that PSI would prepare investment documents, use its best efforts to place Atlas Fund interests, and execute a subscription commitment for $5 million. Opp. Sum. Judg. Exs. 4, 5.

During the summer of 2000, Arthur Ryan, ("Ryan") Chairman of the Board of PSI, as well as CEO and Chairman of the Board of PI, considered restructuring PSI. Opp. Sum. Judg. Ex. 49 at 30-34. At a July 31, 2000 meeting Ryan discussed, with John Strangfeld ("Strangfeld") and Bernard Winograd of PI, changing PSI's private equity strategy. Opp. Sum. Judg. Ex. 55 at 18-19. At this meeting, Ryan also indicated that he and others at PI held discussions with Lehman Brothers to consider ways to change the company's investment banking strategy. Id. Within a few days of this meeting, draft memoranda were circulated detailing various restructuring proposals for PSI. Opp. Sum. Judg. Exs. 27, 28. The memoranda specifically detailed PI's plans to "reorient PSI from issuer focus to investor focus," with possible solutions including the elimination of PSI's investment banking group (the "Restructuring Memoranda"). Id. The Restructuring Memoranda set forth the strategy that was ultimately implemented by Ryan. Opp. Sum. Judg. Ex. 55 at 20-21.

On August 16, 2000, PSI signed an engagement letter with EGW (the "Engagement Letter"). Opp. Sum. Judg. Ex. 5. It is undisputed that the parties to the Engagement Letter did not have knowledge of the plans to restructure PSI when they entered into the agreement. It is also undisputed that Ryan did not know of the Engagement Letter until after the letter was signed.

On September 12, 2000, nearly one month after PSI signed the Engagement Letter, plans to restructure PSI, including plans to eliminate PSI's investment banking and capital markets group, were presented to PI's Board of Directors. Opp. Sum. Judg. Ex. 30. At this meeting, Ryan also revealed plans to replace PSI's CEO, Hardwick Simmons, with Strangfeld. Opp. Sum. Judg. Ex. 49 at 53-54. On October 6, 2000, in a memorandum to PI's Board of Directors, Ryan formally announced Strangfeld's appointment as CEO of PSI. Opp. Sum. Judg. Ex. 22. It is alleged that Simmons was replaced as CEO, in part, because Strangfeld agreed with Ryan's plans to restructure PSI. Opp. Sum. Judg. at 7-9.

While Ryan and PI's Board of Directors discussed restructuring PSI, PSI's bankers continued to work with EGW to prepare the Private Placement Memorandum for the Atlas Fund (the "PPM"). On October 26, 2000, final drafts of the PPM were circulated for review by EGW and PSI's team, in advance of the scheduled October 30, 2000 presentation to PSI's sales force. Opp. Sum. Judg. Ex. 10, 14. During this same period, PI became aware of PSI's commitment to the Atlas Fund. Between October 17-26, 2000, a series of e-mails circulated indicating that PI was unaware of the existence of the Atlas Fund and that PI questioned whether PSI should be engaged in real estate investment banking activity. Opp. Sum. Judg. Exs. 6, 8, 9, 11. On October 30, 2000, PSI eliminated its entire institutional fixed income sales force. Opp. Sum. Judg. Ex. 14.

During November and December 2000, EGW had numerous conversations with PSI concerning the future of the Atlas Fund. Opp. Sum. Judg. Ex. 39. In December, PSI stated that it would continue to work with EGW to promote the Atlas Fund. Id. It is alleged that as late as December PSI reiterated its commitment to invest $5 million in the Atlas Fund, and hire the Chadwick Saylor firm to replace PSI's sales force. Id. On or around December 18, 2000, PSI terminated a significant portion of its remaining investment bankers, including the bankers working on the Atlas Fund. Opp. Sum. Judg. Ex. 44 at 90-96. In January 2001, after a series of alleged representations and misrepresentations and at the end of the six-month lock out period, EGW terminated its agreement with PSI.

DISCUSSION

This court may grant summary judgment when the material facts are undisputed, or the facts of record are insufficient to make out a prima facie cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998), Pa. R. Civ. P. 1035.2. To avoid summary judgment, the plaintiff, must adduce sufficient evidence on the issues essential to its case, and on which it bears the burden of proof, such that a reasonable jury could find in favor of the plaintiff. McCarthy, 724 A.2d at 940. In addressing the issue, this court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The plaintiff must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

I. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiff's Intentional and Negligent Misrepresentation Claims.[1]

Defendants argue that plaintiff's claim for fraudulent inducement must be dismissed because PSI agents who negotiated the Engagement Letter lacked the specific intent to deceive. Mot. Sum. Judg. at 7. Defendants also argue that plaintiff's theory of "collective knowledge" fails because plaintiff has not shown that any single individual had the requisite state of mind to deceive EGW. Specifically, defendants suggest that because PSI agents did not have knowledge of PI's restructuring plans, defendants cannot be held liable for misrepresentation.

First, defendants should realize that under New York law[2] fraudulent inducement can be actionable where the actor demonstrates a "reckless indifference to error." Skrine v. Staiman, 292 N.Y.S.2d 275 (N.Y. App. Div. 1968). Second, defendants fail to acknowledge that plaintiff's claims rest on PSI agents' negligent or innocent misrepresentations. The fact that PSI agents were not aware of the restructuring plans during contract negotiations does not absolve the corporation from liability. Here, plaintiff's "collective knowledge" argument is based on the principal's knowledge, not the agent's. Under New York law, a principal can be held liable for his agent's misrepresentations, innocent or otherwise. Abbate v. Abbate, 441 N.Y.S.2d 506 (N.Y. App. Div.

---

[1] Defendants also argue that plaintiff's tort claims must be dismissed because they duplicate their contract claims. Following the reasoning of this court's June 22, 2001 Order, and accepting the facts as presented, this court remains unpersuaded. See also, Graubard v. Moskovitz, 653 N.E.2d 1179, 1184 (N.Y. 1995).

[2] New York law is applicable to this case. (See Order of June 22, 2001).

1981). Plaintiff relies on §256 of the Restatement of Agency which provides:

> If a principal knows facts unknown to a servant or other agent and which are relevant to a transaction which the agent is authorized to conduct, and, because of his justifiable ignorance, the agent makes a material misstatement of facts, *the principal*:
> (a) *is subject to liability for an intentional misrepresentation, if he believed the agent would make the statement*, or for a negligent misrepresentation, if he had reason to know the agent would make the statement. (Emphasis added).

New York courts routinely follow the Restatement of Agency. Thus, following §256 of the Restatement of Agency, defendant, PSI, can be liable for its principal's alleged reckless indifference to the ramifications of allowing PSI agents to continue to solicit investment banking clients, and negotiate a contract with EGW, when it was likely that PSI would cease to provide those very services that were the subject of the Engagement Letter. Accepting plaintiff's facts as true, a reasonable finder of fact could conclude that principals of PSI, namely Ryan, knew that PSI agents would continue to solicit investment banking clients, like EGW, and that PSI agents would represent PSI's capacity to develop, market and place investment banking products like the Atlas Fund.

Finally, defendants' argument that any alleged misstatement concerned "matters of futurity" misses the point. Here, the alleged misrepresentations concerned the present ability of PSI to provide ongoing investment banking services. Prior to entering the Engagement Letter, Ryan and others at PI were seriously considering restructuring PSI, such that they discussed restructuring plans with Lehman Brothers. Moreover, the decision to eliminate PSI's investment banking group would have been material to EGW.

Thus, this court believes that genuine issues of material facts preclude summary judgment as to Count II (intentional misrepresentation) and Count III (negligent misrepresentation).

II. Plaintiff's Tortious Interference Claim Fails Because Defendant Did Not Have the Requisite Intent to Harm.

A claim for tortious interference requires proof of the following elements: 1) the existence of a valid contract between plaintiff and a third party, 2) the defendant's knowledge of the contract, 3) the defendant's intentional interference resulting in a breach of the contract, and 4) damages. Foster v. Churchill, 665 N.E.2d 153, 156 (N.Y. 1996). While plaintiff has alleged facts, which if true, satisfy the four required elements, plaintiff has failed to present facts which would overcome defendants' economic interest defense.

Under New York law, a defendant may be privileged to interfere with a contract if it acts in good faith to protect a legitimate economic interest. Id. However, a defendant may be liable, despite claims of economic interest, if the plaintiff can show that the defendant acted with malice, or by fraudulent, or illegal means. Id. (citing Felsen v. Sol Cafe Mfg. Corp., 687, 249 N.E.2d 459 (N.Y. 1969). Here, plaintiff has failed to demonstrate that defendant acted with malice or employed illegal means to protect its economic interest. Therefore, this court will grant Summary Judgment in favor of defendant as to plaintiff's Tortious Interference claim. Accordingly, Count IV of the Complaint is dismissed.

III. Defendants' Conduct Does Not Rise to the Level of Egregious Conduct Required for Punitive Damages.

To prevail on its claim for punitive damages in a case where plaintiff has alleged an independent tort claim, the tortious conduct must be of an egregious nature, such that it is wanton, gross, or morally reprehensible. Key Bank v. Diamond, 611 N.Y.S.2d 382, 383 (N.Y. App. Div. 1994). Here, although plaintiff may proceed with its independent tort claims, plaintiff has not set forth sufficient evidence such that

a reasonable juror could find that defendant acted with the high degree of moral culpability that rises to the level of egregious conduct required to impose punitive damages.

CONCLUSION

For the reasons discussed, this court submits that plaintiff has presented sufficient disputed issues of material facts to require denial of the Motion for Summary Judgment on the fraudulent and negligent inducement claims. However, the court finds that plaintiff has not alleged sufficient facts to establish that defendants acted with the requisite malice to support plaintiff's tortious interference claim. Additionally, plaintiff has failed to meet its burden to proceed with its claim for punitive damages.

Accordingly, this court will issue a contemporaneous Order granting the defendants' Motion for Summary Judgment as to plaintiff's tortious interference claim and request for punitive damages. Defendants' Motion as to the remaining claims is denied.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

EGW PARTNERS, L.P., Plaintiff	: MARCH TERM, 2001
	: No. 336
v.	
	: Commerce Program
PRUDENTIAL INSURANCE COMPANY OF AMERICA and PRUDENTIAL SECURITIES, INCORPORATED Defendants	: Control No. 111603

O R D E R

AND NOW, this 12th day of February 2003, upon consideration of the Motion for Summary Judgment of defendants, Prudential Insurance Company of America and Prudential Securities, Incorporated, the plaintiff's response in opposition, the respective memoranda, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that the Motion is **Granted** as to the claim for tortious interference with contract (Count IV) and the claim for punitive damages. In other respects the Motion is **Denied.**

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.