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. 0336
v.	:
PRUDENTIAL INSURANCE COMPANY OF AMERICA, PRUDENTIAL SECURITIES, INCORPORATED Defendants	: Control No. 042340

ORDER

AND NOW, this 22nd day of June 2001, upon consideration of the Preliminary Objections of defendants, Prudential Insurance Company of America and Prudential Securities Incorporated, to the Complaint of plaintiff, EGW Partners, L.P., the latter's response in opposition, all matters of record, and after oral argument and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that the Preliminary Objections are **Overruled**. The Defendants are directed to file an answer to the Complaint within twenty-two (22) days of the date of entry of this Order.

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.0336
v.	:
PRUDENTIAL INSURANCE COMPANY OF AMERICA, PRUDENTIAL SECURITIES, INCORPORATED Defendants	: Control No. 042340

.....

O P I N I O N

Albert W. Sheppard, Jr., J. ..... June 22, 2001

Defendants, Prudential Insurance Company of America ("Insurance") and Prudential Securities Incorporated ("Securities") have filed Preliminary Objections ("Objections") to the Complaint ("Complaint") of plaintiff, EGW Partners, L.P. ("EGW"). For the reasons set forth, the court is issuing a contemporaneous Order ("Order") overruling the Objections.

BACKGROUND

EGW is a Delaware limited partnership, with Atlas Partners, LLC ("Atlas Partners") as its general partner. Beginning in the spring of 2000, Jay Eisner ("Eisner"), Atlas Partners' managing member and an EGW partner, met with representatives of Securities to organize a private investment fund. This fund was intended to originate and manage a portfolio of high-yield commercial real estate loans and preferred equity investments secured by mortgages and other interests in real estate. EGW was particularly interested in Securities' resources and expertise as a market leader, and its sales and real estate investment banking staff which EGW felt could support the project on an ongoing basis.

On August 16, 2000, Securities and EGW entered into an agreement under which they would establish a $200 million investment fund ("Letter Agreement"). Under the terms of the Letter Agreement, EGW engaged Securities "as its exclusive agent in the private placement of membership interest or other equity interest" ("Membership Interests") of Atlas Mezzanine Fund, L.L.C. ("Atlas Fund").[1] Complaint Ex. A at ¶ 1. The Letter Agreement also provided that Securities would prepare a private placement memorandum ("PPM") and a list of potential investors and would assist EGW in offering the Membership Interests and in managing the Atlas Fund. In addition, Securities agreed to "use its best efforts to privately place the Membership Interests." Id. at ¶ 2(d).[2] These obligations were to be carried out by Securities' fixed-income sales force ("Sales Force").

As compensation for its services, Securities was to receive, in part, an immediate retainer of

[1] According to the Letter Agreement, the Atlas Fund was to be a limited liability company or limited partnership formed by EGW to invest in bridge and mezzanine loans on commercial real estate and structured finance-related debt securities backed by commercial real estate.

[2] The placement of the Membership Interests is referred to as the "Offering."

$125,000 and partnership interests in Atlas Partners, EGW and the general partner of the Atlas Fund[3] at the Offering's closing.[4] These partnership interests were designed to meet Securities' purported interest in having a long-term relationship with EGW and in managing the Atlas Fund. Upon signing the Letter Agreement, EGW tendered the $125,000 retainer.

After the Letter Agreement's execution, EGW and Securities began preparing the PPM. According to the Complaint, EGW expended considerable amounts of time and money complying with the Letter Agreement and the PPM, including hiring a senior vice president and a chief financial officer. EGW also alleges that it refrained from pursuing other opportunities during this period due to its exclusive relationship with Securities. On October 25, 2000, the PPM was printed, and a presentation to the Sales Force was scheduled for October 30, 2000.

On October 27, 2000, EGW was notified that Securities intended to lay off the entire Sales Force. Three days later, Securities confirmed that the last day of work for the Sales Force would be November 2, 2000. Securities officials represented that the closure of the department was necessary because it had been losing money in past years. According to the Complaint, Insurance had taken over running Securities in or before October 2000 when it replaced Securities' chairman with two Insurance executives.

In spite of these layoffs, Richard Schoninger ("Schoninger"), Securities' head of investment banking, met with Eisner on November 1, 2000 with the goal of salvaging the Offering. Schoninger allegedly stated to Eisner that Securities and Insurance had put Atlas in a "bind," and proposed hiring

---

[3] According to the PPM, the name of the Atlas Fund's general partner was Atlas SREF, L.P.

[4] Securities also was to receive a fee of $625,000 at the initial closing of the Offering, subject to reduction to a minimum of $375,000, and an additional fee equal to 3 percent of certain subscription commitments, subject to certain reductions.

Chadwick Saylor & Co., Inc. ("Chadwick") as a co-manager to help place the Membership Interests. EGW contends that Schoninger also told Eisner that three Securities employees who had been working on placement of the Membership Interests, including Christopher L. Poli ("Poli"), would continue doing so and that all personnel changes would be completed by Thanksgiving.[5]

Soon after his meeting with Schoninger, Eisner participated in a conference call with several Chadwick and Securities employees. During the course of this call, Poli allegedly stated that Insurance was likely to start raising funds in early 2001 for Prudential Carbon Mesa ("Carbon Mesa"), an Insurance-owned real estate structured finance fund. According to EGW, the offering of interests in Carbon Mesa would compete with the placement of the Atlas Fund's Membership Interests.

On November 28, 2000, Securities informed Eisner that Schoninger was being forced to leave Securities by the end of the year. In response, Eisner sent Securities a letter describing the alleged damage caused by Securities' failure to market the Offering and the elimination of the Sales Force. Although EGW did not receive a response to this letter, Eisner met with two Securities representatives on December 8, 2000. At this meeting, Eisner was told that, even if there were further layoffs at Securities, at least one senior person, probably Poli, would remain assigned to the Offering on a full-time basis and that Chadwick would be hired to work on marketing. By the end of the year, however, even Poli was no longer with Securities.

According to the Complaint, Securities' restructuring and downsizing had a number of detrimental effects on the Offering and EGW. First, by virtue of the terminations at the end of October, the PPM

[5] The other two individuals were F. Fuller O'Connor, Jr. and John Zakoworotny.

became inaccurate and obsolete within days of its printing. In addition, EGW asserts that Securities has never engaged in any efforts to sell the Membership Interests and has not sold any such interests, causing a delay in completing the Offering. At the same time, EGW was unable to offer the Membership Interests through any other agent, since the Engagement Letter provided that Securities' was EGW's exclusive agent for the Offering, while Insurance was free to market interests in Carbon Mesa, a competitor of the Atlas Fund. On the basis of these alleged facts, EGW gave notice of termination of the Engagement Letter on February 16, 2001.

In its Complaint, EGW asserts causes of action for breach of contract, intentional misrepresentation and negligent misrepresentation against Securities. EGW also asserts a claim for tortious interference with contract against Insurance. In response, the defendants have filed the Objections, which contend that EGW's claims are legally insufficient and that there is no basis for an award of punitive damages.

DISCUSSION

Each of the Objections contests the legal sufficiency of EGW's claims and request for damages. When a court is presented with preliminary objections asserting legal insufficiency,

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

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

I. EGW's Breach of Contract Claim Is Sufficient Because it Alleges a Breach of the Engagement Letter.

EGW argues that Securities' failure to use its best efforts to place the Membership Interests makes it liable for breach of the Engagement Letter. Assuming that the allegations in the Complaint are correct, the court agrees.

Under New York law,[6] a successful breach of contract claim requires evidence of an agreement, consideration, performance by the plaintiff and a breach of the agreement by the defendant. Furia v. Furia, 498 N.Y.S.2d 12, 13 (N.Y. App. Div. 1986). Of these elements, Securities challenges only EGW's allegations that Securities breached the Engagement Letter.

According to the terms of the Engagement Letter, Securities did not guarantee that it would place the Membership Interests but rather agreed to use its "best efforts" to secure placement. Ex. A at ¶¶ 1, 2(d). The term "best efforts" requires an obligee to "pursue all reasonable methods" to achieve its objectives and almost invariably gives rise to a question of fact. Kroboth v. Brent, 625 N.Y.S.2d 748, 749 (N.Y. App. Div. 1995). See also Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 614 (2nd Cir. 1979) (defendant's obligation to use its "best efforts" precluded it from relying on a "philosophy of emphasizing profit uber alles without fair consideration of the effect on" the plaintiff); US Airways Group v. British Airways PLC, 989 F. Supp. 482, 491 (S.D.N.Y. 1997) (stating that questions as to whether the defendant used its "best efforts" involved "factual issues that cannot be resolved on the face of the complaint"); Pfizer Inc. v. PCS Health Sys., Inc., 650 N.Y.S.2d 164, 165 (N.Y. App. Div. 1996) (the defendant was still

[6] Paragraph 15 of the Engagement Letter States that it is to be governed by "the laws of the State of New York, without regard to its principles of conflicts of laws." Complaint Ex. A at ¶ 15.

bound by its contractual obligations to use its best efforts "even if the agreement . . . has became disadvantageous to defendant").

In the instant matter, the Complaint alleges that Securities breached its obligation to use its best efforts to place the Membership Interest and "has engaged in no efforts to sell such interests. . . ." Complaint at ¶ 29. This alone is sufficient to sustain EGW's breach of contract claim is sufficiently pleaded, and this Objection is overruled.[7]

II. EGW Has Alleged a Special Relationship Between Itself and Securities and May Proceed on its Negligent Misrepresentation Claim.

Defendants' argue that plaintiffs' claim for negligent misrepresentation is defective because there is no allegation that EGW and Securities had a fiduciary or other special relationship. This argument is unpersuasive.

The existence of a "special relationship" between a plaintiff and defendant is an essential element of a negligent misrepresentation cause of action in New York.[8] Fab Indus., Inc. v. BNY Fin. Corp., 675

[7] The fact that EGW may have elected to continue under the contract after Securities' breach does not preclude it from bringing a breach of contract cause of action. See Alesayi Beverage Corp. v. Canada Dry Corp., 947 F. Supp. 658, 668 (S.D.N.Y. 1996) ("the non-breaching party may later sue for breach, even though it elected to continue to perform rather than terminate the agreement, if notice of the breach was given to the breaching party"). See also Times Mirror Magazines, Inc. v. Field & Stream Licenses Co., 103 F. Supp. 2d 711, 736-37 (S.D.N.Y. 2000) (a non-breaching party's election to continue under a contract does not preclude it from bringing a claim based on the breach but merely forecloses it from terminating the contract because of the breach).

[8] The defendants argue fervently and convincingly that New York law applies to EGW's tort claims, but concurrently track the application of Pennsylvania law in footnotes throughout their memorandum. EGW does not express an opinion as to which state's law governs and instead attacks the Objections under both Pennsylvania and New York law. The court agrees with EGW that its claims are sustainable under both New York and Pennsylvania law, but has generally followed the defendants' example of discussing New York law in the body of the text and Pennsylvania law in footnotes.

N.Y.S.2d 77, 78 (N.Y. App. Div. 1998). See also Hudson River Club v. Consolidated Edison Co. of N.Y., Inc., 712 N.Y.S.2d 104, 106 (N.Y. App. Div. 1996) (negligent misrepresentation claimant must show "a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given").[9] Whether a special relationship has been formed depends on the following:

> In Kimmell the Court of Appeals held that whether a special relationship exists between two parties is an issue of fact, to be governed by the weighing of three factors:
>
> > [A] fact finder should consider whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose.

Suez Equity Investors, L.P. v. Toronto-Dominion Bank, No. 99-9042, 2001 WL 487111, at *11 (2nd Cir. May 8, 2001) (quoting Kimmell v. Schaefer, 675 N.E.2d 450, 454 (N.Y. 1996)).[10] A principal-agent relationship specifically has been held to constitute a special relationship. Westinghouse Elec. Supply Co. v. Pyramid Champlain Co., 597 N.Y.S.2d 811, 814 (N.Y. App. Div. 1993) (plaintiff satisfied the

---

[9] In total, New York law requires proof of four elements to sustain a cause of action for negligent misrepresentation:

> There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.

International Products Co. v. Erie R.R. Co., 155 N.E. 662, 664 (N.Y. 1927).

[10] The court is puzzled by the circuity of this statement, in that the existence of a special relationship depends, in part, on whether a special relationship existed.

requirement of pleading a special relationship where it alleged the existence of an agency relationship).[11]

The Complaint alleges facts that support finding a special relationship between EGW and Securities. According to the Complaint, Securities had an "international reputation, experience and relationships," as well as a "large and experienced fixed-income sales force and investment bank." Complaint at ¶ 14. These assets allegedly were buttressed by Securities' "resources and expertise as a market leader in originating and issuing mortgage-backed securities" and "the size and strength of its parent company, Prudential Insurance." Id. at ¶ 5. Most significantly, the Letter Agreement itself states that Securities was EGW's "exclusive agent" in the placement of the Membership Interests. Complaint Ex. A at ¶ 2(b). Furthermore, the details in the PPM and the allegations in the Complaint allow the court to infer that EGW may have shared confidential information with and relied upon Securities, and that Securities was aware of EGW's dependence on its representations and reputation. Thus, the Complaint supports finding a special

---

[11] Pennsylvania law includes a similar, if less rigorous, requirement that a defendant owe a negligent misrepresentation claimant a duty. See, e.g., Gibbs v. Ernst, 538 Pa. 193, 212-13, 647 A.2d 882, 891-92 (1994) (a defendant must have made "reasonable efforts to determine whether its representations are true" and a "duty does not exist if the defendant could not reasonably foresee any injury as the result of his acts or if his conduct was reasonable in light of what he could anticipate"). See also Weisblatt v. Minnesota Mut. Life Ins. Co., 4 F. Supp. 2d 371, 380 (E.D. Pa. 1998) ("under Pennsylvania law, an omission or nondisclosure is only actionable under the theory of negligent misrepresentation if there is a duty to speak"). It appears that the Pennsylvania requirement of a duty presents a lower threshold than the New York requirement of a special relationship. See Gibbs, 538 Pa. at 214, 647 A.2d at 892 (holding that "an adoption agency has a duty to disclose fully and accurately to the adopting parents all relevant non-identifying information in its possession concerning the adoptee" in the context of a negligent misrepresentation claim). Thus, if EGW satisfies the New York special relationship requirement, the Pennsylvania duty requirement will also be satisfied.

The other elements for a negligent misrepresentation claim in Pennsylvania are "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." Kramer v. Dunn, 749 A.2d 984, 991 (Pa. Super. Ct. 2000) (quoting Bortz v. Noon, 556 Pa. 489, 500, 729 A.2d 555, 560 (1999)).

relationship between EGW and Securities.

The defendants argue that the Complaint's allegations are negated by Paragraph 17 of the Engagement Letter, which states that EGW and Securities "do not intend to create any special, fiduciary or agency relationship between them." Complaint Ex. A at ¶ 17. This provision is inconsistent with the agency relationship established between EGW and Securities in Paragraph One of the Agreement and does present questions as to EGW's assertion of a special relationship between itself and Securities.[12] In the context of evaluating the Objections, however, the court must regard EGW's allegations of fact as true and must conclude that the Complaint sets forth sufficiently the requisite special relationship. On this basis, the Objections to EGW's negligent misrepresentation claim must be overruled.

III. EGW's Intentional Misrepresentation Claim is Legally Sufficient.

The defendants next argue that EGW's intentional misrepresentation claim must be dismissed because it is not sufficiently distinct from its breach of contract claim.[13] Because EGW pleads that Securities violated a non-contractual duty, however, it may proceed with its intentional misrepresentation claim.

Pennsylvania and New York require proof of substantially identical elements for fraudulent

---

[12] EGW's argument against the application of Paragraph 17 is premised on the assertion that the PPM included no such disclaimer and represented that EGW and Securities would become partners. EGW's Memorandum at 27. This argument may be bolstered by the fact that the events allegedly giving rise to the special relationship between EGW and Securities took place after the Engagement Letter was executed.

[13] In challenging EGW's intentional misrepresentation claim, the Defendants also assert that EGW has failed to allege scienter. At the least, however, the allegations of Securities' malice and bad faith set forth in the Complaint allow the court to infer the requisite scienter.

misrepresentation.[14] In both jurisdictions, a claim for fraudulent misrepresentation can arise from a failure to disclose information. In New York, such a claim must be premised on a special relationship between the parties, St. Patrick's Home for Aged & Infirm v. Laticrete Int'l, Inc., 696 N.Y.S.2d 117, 124 (N.Y. App. Div. 1999), while Pennsylvania requires that one party owe the other a duty of disclosure. Wilson v. Donegal Mut. Ins. Co., 410 Pa. Super. 31, 41, 598 A.2d 1310, 1316 (1991). See also Stevenson Equip., Inc. v. Chemig Construction Corp., 565 N.Y.S.2d 318, 320 (N.Y. App. Div. 1991) ("where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge, there is a duty to disclose that information"); Mobil Oil Corp. v. Joshi, 609 N.Y.S.2d 214, 215 (N.Y. App. Div. 1994) (silence is not actionable as fraud "in the absence of a confidential or fiduciary relationship"); Sewak v. Lockhart, 699 A.2d 755, 759 (Pa. Super. Ct. 1997) ("mere silence without a duty to speak will not constitute fraud"). As discussed supra, the Complaint asserts facts that establish a special relationship between EGW and the Defendants and that support finding a duty of disclosure on the defendants' part.

This, however, does not end the court's inquiry. According to the defendants, EGW has not pled any misrepresentations of present facts that were collateral to the contract and that caused damages not

[14] Under New York law, a plaintiff must establish "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Lama Holding Co. v. Smith Barney Inc., 668 N.E.2d 1370, 1373 (N.Y. 1996) (citations omitted). Under Pennsylvania law, a plaintiff must show a representation material to the transaction at hand made falsely, with knowledge of its falsity or recklessness as to whether it is true or false with the intent of misleading another into relying on it, justifiable reliance on the misrepresentation and that the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citation omitted).

recoverable under a contract measure of damages. These additional elements are required for a fraudulent misrepresentation claim under New York law where the claim is based on the same facts that underlie a plaintiff's breach of contract action. See Krantz v. Chateau Stores of Canada Ltd., 683 N.Y.S.2d 24, 25 (N.Y. App. Div. 1998); Orix Credit Alliance, Inc. v. R.E. Hable Co., 682 N.Y.S.2d 160, 161 (N.Y. App. Div. 1998); J.E. Morgan Knitting Mills, Inc. v. Reeves Bros., Inc., 663 N.Y.S.2d 211, 211 (N.Y. App. Div. 1997). EGW counters that "the intentional misrepresentation claim pleads facts establishing that Prudential Securities violated a non-contractual duty it owed to Plaintiff" and that the additional requirements do not apply because the facts underlying its two causes of action are different. Plaintiff's Memorandum at 18.

As with the law of many states, New York law does not set forth a talismanic test for determining whether facts support an action in contract or in tort:

> Courts have long grappled with the difficulty of formulating a precise test to determine under what circumstances a party to a contract may be held liable in tort to another party thereto as a result of some clash in the contractual relationship. While no precise test has ever evolved, it has at least been established that the focus is not . . . on whether the tortious conduct is separate and distinct from the defendants' breach of contractual duties, for it has long been recognized that liability in tort may arise from and be inextricably intertwined with that conduct which also constitutes a breach of contractual obligations. Rather, the focus is on whether a noncontractual duty was violated; a duty imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contractual agreement.

Apple Records, Inc. v. Capitol Records, Inc., 529 N.Y.S.2d 279, 281-82 (N.Y. App. Div. 1988) (citations omitted). See also Sommer v. Federal Signal Corp., 593 N.E.2d 1365, 1369 (N.Y. 1992) ("[p]rofessionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the

parties' contract, that gives rise to a duty of due care"); Charles v. Onandaga Community College, 418 N.Y.S.2d 718, 720 (N.Y. App. Div. 1979) ("[a] duty extraneous to the contract often exists where the contract results in or accompanies some relation between the parties out of which arises a duty of affirmative care as in cases involving bailor and bailee, public carrier and passenger, innkeeper and guest, lawyer and client, or principal and agent").

The court agrees with EGW that its distinct allegations sustain a separate intentional misrepresentation claim under New York law. After the execution of the Engagement Letter, Securities allegedly was aware of the planned restructuring and, presumably, the elimination of the Sales Force but did not disclose these plans to EGW. Complaint at ¶ 37. This failure to disclose, along with Securities' alleged failure to attempt to sell the Membership Interests, left EGW unable to realize any benefit from its relationship with Securities, and, at the same time, unable to engage a second placement agent. Id. at ¶ 30; Complaint Ex. A at ¶ 1.[15] If true, these events constitute a breach of Securities' noncontractual duties that arise from social policy, not the terms of the Engagement Letter, and the facts on which EGW's intentional misrepresentation claim is based are distinguishable from the facts supporting its breach of contract claim. Accordingly, the court concludes that EGW need not plead the additional elements and that the Complaint allows EGW to pursue its fraudulent misrepresentation claim.[16]

---

[15] According to the Complaint, Schoninger himself acknowledged that "Prudential had put Atlas in a 'bind.'" Complaint at ¶ 22.

[16] EGW's fraudulent misrepresentation claim would be sustainable under Pennsylvania law as well. Pennsylvania courts apply the "gist of the action" doctrine to distinguish between tort and contract claims:

> [T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, . . . a contract action may not

IV. Because the Complaint Alleges That Insurance Acted with Malice and Tortious Intent, EGW's Tortious Interference with Contract Claim Is Properly Pled.

A defendant is not liable for tortious interference under either New York or Pennsylvania law unless it acted without privilege and with a specific intent to injure.[17] Hessel v. Goldman, Sachs & Co., 722 N.Y.S.2d 21, 23 (N.Y. App. Div. 2001); EDP Hosp. Computer Sys., Inc. v. Bronx-Lebanon Hosp. Center, 622 N.Y.S.2d 557, 558 (N.Y. App. Div. 1995); Strickland v. University of Scranton, 700 A.2d

---

(Footnote 16 - continued)
be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally, . . . the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995) (citing Bash v. Bell Tel. Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)). See also Snyder Heating Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 715 A.2d 483, 487 (Pa. Super. Ct. 1998) ("[t]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral"). As discussed supra, the duties Securities allegedly breached arise from social policy. In addition, at least some of Securities supposed misleading statements and omissions were made after the execution of the Engagement Letter, making them collateral and distinguishable from the allegations underlying EGW's contractual claims. Complaint at ¶¶ 21-28, 37. Thus, Pennsylvania law allows EGW to prosecute its intentional misrepresentation claim.

[17] A successful claim for intentional interference with contractual relations in Pennsylvania must satisfy four elements:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997) (citation omitted).

In New York, a corresponding claim requires "(1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." Foster v. Churchill, 665 N.E.2d 153, 156 (N.Y. 1996).

979, 985 (Pa. Super. Ct. 1997). Because its actions were privileged and undertaken without specific intent, Insurance contends, the tortious interference claim against it must fail.

Insurance correctly points out that New York law protects a corporation's right to interfere in the contracts of its subsidiary as privileged in the absence of malice or illegality. Foster v. Churchill, 665 N.E.2d 153, 157 (N.Y. 1996) (citing Felsen v. Sol Café Mfg. Corp., 249 N.E.2d 459, 461 (N.Y. 1969)).[18] Paragraph 53 of the Complaint, however, alleges that Insurance acted with malice, thus precluding Insurance from asserting any claim of privilege. This allegation of malice, as well as the allegations of Insurance's bad faith, similarly allow the inference that Insurance acted with the specific intent of harming EGW. Cf. Goodman Mfg. Co. L.P. v. Raytheon Co., No. 98 Civ. 2774(LAP), 1999 WL 681382, at *12 (S.D.N.Y. Aug. 31, 1999) (plaintiffs' allegation that the defendants were the "motivating force" behind the third-party's breach were sufficient to support an inference of tortious intent).[19] As a result, the Objections to EGW's tortious interference claim must be overruled.

V. EGW's Request for Punitive Damages Should Not Be Dismissed At This Juncture.

Under New York law, "[p]unitive damages are available in fraud actions if defendant's acts constitute wilfull [sic], wanton and reckless misconduct, even if there is no harm aimed at the public

[18] Pennsylvania law appears to be in accord with this conclusion. In Shared Communications Services of 1800-80 JFK Boulevard v. Bell Atlantic Properties, 692 A.2d 570 (Pa. Super. Ct. 1997), the court limited the parent corporation's interference privilege to those circumstances where the parent intended to prevent asset dissipation and held the parent liable because it acted "to help its subsidiary . . . to aggrandize." 692 A.2d at 575.

[19] Further, the Complaint includes allegations regarding Insurance's desire to advance the competing Carbon Mesa offering. This desire could be read as an intent to obstruct the Offering and thus injure EGW. In addition, at no point in the Complaint does EGW assert that Schoninger's representations as to the financial motivations for terminating the Sales Force were true, precluding the court from considering them as part of Insurance's motivation.

generally." Key Bank of N.Y. v. Diamond, 611 N.Y.S.2d 382, 383 (N.Y. App. Div. 1994) (citation and quotation marks omitted).[20] The Complaint alleges that both defendants acted recklessly and in bad faith. Complaint at ¶¶ 30, 40, 45, 53. These allegations allow EGW to request punitive damages.

CONCLUSION

While well-argued, the points the defendants raise in the Objections are, given the applicable legal test, ultimately unpersuasive. As a result, the court will enter a contemporaneous Order overruling the Objections and directing the defendants to file an answer to the Complaint.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[20] Similarly, a Pennsylvania court "may award punitive damages only if the conduct was malicious, wanton, reckless, willful, or oppressive." Rizzo v. Haines, 520 Pa. 484, 507, 555 A.2d 58, 69 (1989) (citing Chambers v. Montgomery, 411 Pa. 339, 344-45, 192 A.2d 355, 358 (1963)).