

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

HYDRAIR, INC. et al	:	FEBRUARY TERM 2000
	:	
	:	
v.	:	COMMERCE PROGRAM
	:	
NATIONAL ENVIRONMENTAL	:	
BALANCING BUREAU et al	:	NO. 2846

ORDER

AND NOW, this 27th day of July 2000, upon consideration of the preliminary objections of defendants Eastern Air Balance, Inc. ("EAB") and Bobby Roaten to the plaintiffs' complaint and plaintiffs' response, and in accordance with the court's contemporaneously-filed memorandum opinion, IT IS HEREBY ORDERED that

(1) The preliminary objections of EAB and Roaten to Counts II, IV and V of the complaint are SUSTAINED.

(2) All other preliminary objections of EAB and Roaten are OVERRULED.

Plaintiffs shall have twenty (20) days from the date of entry of this Order to file an amended complaint.

BY THE COURT:

---

JOHN W. HERRON, J.

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

HYDRAIR, INC. et al	:	FEBRUARY TERM 2000
	:	
	:	
v.	:	COMMERCE PROGRAM
	:	
NATIONAL ENVIRONMENTAL	:	
BALANCING BUREAU et al	:	NO. 2846

ORDER

AND NOW, this 27th day of July 2000, upon consideration of the preliminary objections of defendant Pennsylvania Environmental Balancing Association (“PEBA”) to the plaintiffs’ complaint and plaintiffs’ response, and in accordance with the court’s contemporaneously-filed memorandum opinion, IT IS HEREBY ORDERED that

(1) PEBA’s preliminary objections to Counts I, II, IV and V of the complaint are SUSTAINED.

(2) PEBA’s preliminary objection to Count III is OVERRULED.

Plaintiffs shall have twenty (20) days from the date of entry of this Order to file an amended complaint.

BY THE COURT:

---

JOHN W. HERRON, J.

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

HYDRAIR, INC. et al	:	FEBRUARY TERM 2000
	:	
	:	
v.	:	COMMERCE PROGRAM
	:	
NATIONAL ENVIRONMENTAL	:	
BALANCING BUREAU et al	:	NO. 2846

ORDER

AND NOW, this 27th day of July 2000, upon consideration of the preliminary objections of defendant National Environmental Balancing Bureau (“NEBB”) to the plaintiffs’ complaint and plaintiffs’ response, and in accordance with the court’s contemporaneously-filed memorandum opinion, IT IS HEREBY ORDERED that NEBB’s preliminary objections are SUSTAINED. Plaintiffs shall have twenty (20) days from the date of entry of this Order to file an amended complaint.

BY THE COURT:

---

JOHN W. HERRON, J.

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

HYDRAIR, INC. et al	:	FEBRUARY TERM 2000
	:	
	:	
v.	:	COMMERCE PROGRAM
	:	
NATIONAL ENVIRONMENTAL	:	
BALANCING BUREAU et al	:	NO. 2846

**MEMORANDUM OPINION**

Defendants National Environmental Balancing Bureau (NEBB), Pennsylvania Environmental Balancing Association (PEBA), Eastern Air Balance, Inc. (EAB) and Bobby Roaten filed preliminary objections to the complaint of plaintiffs Hydrair, Inc. and Albert Hawkins. The court grants the preliminary objections of defendant NEBB. The court grants in part the preliminary objections of the remaining defendants. Plaintiffs must file an amended complaint within 20 days of the entry of this order.

**FACTS**

NEBB is a trade association that certifies environmental balancing firms, and PEBA is its Pennsylvania chapter. Environmental balancing firms test and balance heating and air conditioning systems. EAB and Hydrair are Pennsylvania environmental balancing firms and are competitors. Roaten is a principal of EAB, and Hawkins is an employee of Hydrair.

Until this year, plaintiffs held a NEBB certification to perform balancing work. The plaintiffs

allege that the defendants conspired to revoke the plaintiffs' certification by misrepresenting the quality of the plaintiffs' balancing work to each other and to plaintiffs' customers. Plaintiffs allege that, without the certification, they cannot perform balancing work. Plaintiffs seek a preliminary injunction ordering NEBB to restore the certification. Plaintiffs assert claims against all defendants for tortious interference with contractual relations, defamation, fraud and conspiracy.

### DISCUSSION

Defendants allege that the complaint fails to plead facts with sufficient specificity and that the complaint is legally insufficient. Pa.R.C.P. 1028(a)(3) and (4). The complaint must give the defendant notice of what the plaintiffs' claim is and the grounds of the claim, and must summarize the facts essential to support the claim. Sevin v. Kelshaw, 417 Pa.Super. 1, 611 A.2d 1232, 1235 (1992). The purpose of these requirements is to permit the defendants to prepare a defense and to convince the court that the averments are not merely subterfuge. Bata v. Central-Penn National Bank of Philadelphia, 423 Pa. 373, 380, 224 A.2d 174, 179 (1966); Sevin, 611 A.2d at 1235. If the complaint fails to meet these requirements the court may sustain a preliminary objection for lack of specificity. Pa.R.C.P. 1028(a)(3).

A demurrer tests the legal sufficiency of the complaint. Pa.R.C.P. 1028(a)(4); Smith v. Wagner, 403 Pa.Super. 316, 588 A.2d 1308, 1310 (1991). A demurrer admits all well-pleaded material facts set forth in the pleadings as well as all reasonable inferences, but does not admit conclusions of law. Id. If the plaintiffs' complaint indicates on its face that the claim is legally insufficient and that the law will not permit recovery, the court must sustain the demurrer. Id. The court must

resolve all doubts in favor of the plaintiffs. Id.

**I. THE COURT GRANTS NEBB’S PRELIMINARY OBJECTIONS TO COUNT I (PRELIMINARY INJUNCTION).**

Count I seeks to enjoin NEBB from decertifying plaintiffs. NEBB argues that plaintiffs have not stated Count I with sufficient specificity and that the count is legally insufficient. Though Count I seeks relief from NEBB only, PEBA objects to Count I on specificity grounds to the extent that Counts II through IV incorporate the allegations of Count I.

In Count I, plaintiffs allege that defendants’ actions in decertifying plaintiffs were “omissions to do acts which are specifically required to be done under the NEBB by-laws and under the statutory and common law, the requirements of which are incorporated under the NEBB charter and by-laws.” Complaint ¶ 29. Plaintiffs do not identify any applicable by-laws and statutes and do not identify any requirement of those by-laws and statutes that defendants did not meet. In addition, to the extent that common law refers to defamation, tortious interference conspiracy and fraud, this Count is legally insufficient because plaintiffs have failed to state a claim against NEBB on these theories. Therefore, the court will sustain the preliminary objections of NEBB and PEBA to Count I.

**II. THE COURT GRANTS DEFENDANTS’ PRELIMINARY OBJECTIONS TO COUNT II (TORTIOUS INTERFERENCE, FRAUD AND CONSPIRACY).**

The defendants argue that plaintiffs have not stated Count II with sufficient specificity and that the count contains more than one cause of action. Pa.R.C.P. 1020, 1028(a)(2) and (3). The court agrees. Count I offers at least three causes of action: fraud, tortious interference with contractual

relations and conspiracy. As it is not clear which cause of action this count asserts, the court will grant the preliminary objection. If plaintiffs wish to assert all of these causes of action, the plaintiffs should assert them in separate counts. Pa.R.C.P. 1020.

The complaint also fails to state a legally sufficient claim against NEBB and PEBA for tortious interference with Hydrair's contractual relations. The existence of a contractual relationship between the plaintiff and a third person is an essential element of this cause of action. Rutherford v. Presbyterian-University Hospital, 417 Pa.Super. 316, 612 A.2d 500, 507 (1992). The complaint appears sufficiently to allege only two contractual relationships -- the first between Hydrair and Kunkle and the second between Hydrair and Hamburg. The complaint does not allege that NEBB or PEBA participated in interfering with either of these relationships.

The complaint does not allege that defendants interfered with any contract to which Hawkins was a party. Therefore, the claim fails to state a legally sufficient claim for tortious interference with Hawkins' contractual relations.

The court sustains all defendants' preliminary objections to Count II.

III. THE COURT SUSTAINS THE PRELIMINARY OBJECTIONS OF NEBB TO COUNT III (DEFAMATION) AND OVERRULES THE PRELIMINARY OBJECTIONS OF PEBA, EAB AND ROATEN TO COUNT III.

Count III of the complaint alleges that the defendants defamed the plaintiffs. A claim for defamation must generally allege: "1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third party's understanding of the communication's defamatory character; and 5) injury." Raneri v. DePolo, 65 Pa.Commw. 183, 441

A.2d 1373, 1375 (1982); 42 Pa.C.S.A. 8343(a). A complaint for defamation must allege with particularity, among other things, the content of the defamatory oral or written statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made. Itri v. Lewis, 281 Pa.Super. 521, 422 A.2d 591, 592 (1980). A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession. Agriss v. Roadway Express, 334 Pa.Super. 295, 483 A.2d 456, 461 (1984).

The complaint properly states a cause of action against EAB and Roaten for defamation based on their statements to members of PEBA. The complaint identifies the maker of the statements: Roaten. The complaint identifies the recipients of the statements: the members of PEBA. The complaint identifies the content of the statements: (1) that the balancing problems at Kunkle and Hamburg were plaintiffs' fault, and (2) that Roaten received numerous complaints about plaintiffs' work before the Hamburg and Kunkle complaints. These statements support an action for defamation per se because they would tend to impute that plaintiff lacked competence in the balancing trade, and therefore plaintiffs need not plead special damages. Holland v. Flick, 212 Pa. 201, 61 A. 828 (1905); Price v. Conway, 134 Pa. 340, 19 A. 687 (1890); Zerpol Corp. v. DMP Corp., 561 F.Supp. 404, 409 (E.D.Pa. 1983). The circumstances in which Roaten made these statements -- in a meeting where PEBA would vote to decertify plaintiffs based on poor performance -- increase the defamatory nature of the statements. Therefore, the court overrules the preliminary objection of EAB and Roaten to Count III.<sup>1</sup>

---

<sup>1</sup> Contrary to plaintiffs' argument in its briefs, however, the complaint does not specifically allege any specific defamatory statements to Hamburg or Kunkle. The other allegations of

The plaintiffs have sufficiently stated a cause of action for defamation against PEBA. The complaint states that “recommendations and falsehoods [were] generated by Roaten and [PEBA]” and that “NEBB relied upon the falsehoods and fraudulent recommendations generated by Roaten and [PEBA] . . . .” Thus the complaint alleges the makers of the statements -- Roaten and PEBA -- and the recipients -- NEBB. Though the complaint does not directly allege the content of PEBA’s recommendations and falsehoods, the court can reasonably deduce that the content of the statements was that (1) the balancing problems at Kunkle and Hamburg were plaintiffs’ fault, and (2) Roaten received numerous complaints about plaintiffs’ work before the Hamburg and Kunkle complaints. Therefore, the court overrules PEBA’s preliminary objection to Count III.

The defamation claim against NEBB is not legally sufficient. The complaint does not allege that NEBB made any defamatory statements. Instead, the complaint alleges that NEBB relied on statements of others in its decision to decertify plaintiffs. Therefore, Count III fails to state a claim for defamation against NEBB. The court sustains NEBB’s preliminary objection to Count III as to NEBB.

#### IV. THE COURT SUSTAINS THE DEFENDANTS’ PRELIMINARY OBJECTION TO COUNT IV (CONSPIRACY TO DEFAME).

To state a cause of action for conspiracy, plaintiffs must allege (1) a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an

---

defamation against EAB and Roaten appear to be insufficiently specific. The complaint alleges that “Roaten and Eastern Air would frequently offer untrue and unfair criticisms of plaintiffs’ work to prospective and existing customers of plaintiffs in an effort to lure business away from plaintiffs.” Complaint ¶ 13. Any claim based on EAB and Roaten’s statements to these other customers is insufficiently specific because it does not identify the recipients and content of the statements.

unlawful purpose, (2) an overt act done in furtherance of the common purpose, and (3) actual legal damage. Baker v. Rangos, 229 Pa.Super. 333, 324 A.2d 498, 506 (1974). Therefore, a complaint for conspiracy must either allege facts that are direct evidence of the combination and intent, or circumstantial evidence that, if proven, will support an inference of the combination and intent. Id. Circumstantial evidence may include evidence of acts that occurred after the collusive agreement. Id. But these subsequent acts must clearly indicate the prior collusive combination. Id. Intent is a required element: the evidence must show that each conspirator is possessed of the intent to do the unlawful act and is aware of the intent of the co-conspirators. Larsen v. Philadelphia Newspapers, Inc., 411 Pa.Super. 534, 602 A.2d 324, 339 (1991).

Plaintiffs' conspiracy claim against PEBA and NEBB is legally insufficient because the complaint does not allege direct or circumstantial evidence of a combination and intent involving NEBB or PEBA. Baker, 324 A.2d at 506; Raneri v. DePolo, 441 A.2d at 1376. The complaint merely alleges that PEBA responded to the unilateral actions of Roaten by voting to decertify plaintiffs and by repeating Roaten's defamatory statements to NEBB. Complaint ¶¶ 18-21. The complaint merely alleges that NEBB responded to the defamatory statements of Roaten and PEBA by decertifying plaintiffs. Complaint ¶¶ 20-21. There is no allegation that NEBB and PEBA knew that Roaten's statements were false or that NEBB and PEBA knew of and shared Roaten's wrongful intentions. The allegations do not support an inference of combination and intent. Baker, 324 A.2d at 506; Raneri v. DePolo, 441 A.2d at 1376.

Therefore, there remain only two defendants who could have conspired: Roaten and EAB. Any claim of conspiracy between EAB and Roaten is legally insufficient because a principal may not

conspire with its agent. Rutherford v. Presbyterian-University Hosp., 417 Pa.Super. 316, 612 A.2d 500, 508 (1992).

The court sustains all defendants' preliminary objections to Count IV.

V. THE COURT SUSTAINS THE DEFENDANTS' PRELIMINARY OBJECTIONS TO COUNT V (FRAUD).

Count V alleges fraud. The elements of fraud are 1) a misrepresentation, 2) a fraudulent utterance of the misrepresentation, 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. Lokay v. Lehigh Valley Cooperative Farmers, Inc., 342 Pa.Super. 89, 492 A.2d 405, 408 (1985). There is no allegation in the complaint that the defendants made a statement to the plaintiffs on which the plaintiffs relied. Instead, the complaint alleges that the defendants made false statements to others -- to Hydrair's customers, to PEBA, to NEBB -- which caused plaintiffs harm. Therefore, the allegation of fraud is legally insufficient. The court sustains the preliminary objection of all defendants to Count V.

VI. THE COURT OVERRULES THE PRELIMINARY OBJECTIONS OF EAB AND ROATEN BASED ON STATUTE OF LIMITATIONS AND PROXIMATE CAUSE.

EAB and Roaten object to Counts II, III and IV on the ground that the statute of limitations bars these claims. A party may assert the defense of statute of limitations only in a responsive pleading as new matter and not in a preliminary objection. Pa.R.C.P. 1028(a)(4), Note; Pa.R.C.P. 1030(a). Therefore, the court overrules EAB and Roaten's preliminary objection based on the statute of limitations.

The court also overrules the preliminary objection of EAB and Roaten based on proximate cause.

**VII. THE COURT GRANTS THE PRELIMINARY OBJECTION OF NEBB TO PLAINTIFFS' PUNITIVE DAMAGES CLAIM AND OVERRULES THE PRELIMINARY OBJECTION OF EAB AND ROATEN TO THE PUNITIVE DAMAGES CLAIM.**

NEBB, EAB and Roaten object to plaintiffs' demand for punitive damages. A plaintiff may recover punitive damages when the defendant's acts are the result of reckless indifference to the rights of others or an evil or malicious motive. Rizzo v. Michener, 401 Pa.Super. 47, 584 A.2d 973, 979 (1990). The complaint adequately pleads that EAB and Roaten acted with a malicious motive. In an effort to have their competitor decertified, Roaten and EAB intentionally made false statements to PEBA that Hydrair and Hawkins had caused the problems at Kunkle and Hamburg and that Roaten had fielded complaints from other Hydrair customers. Therefore, the court overrules the preliminary objection of EAB and Roaten to the plaintiffs' demand for punitive damages.

The court sustains NEBB's preliminary objection to punitive damages because the plaintiffs have failed to state any claim against NEBB on which the court can grant relief.

BY THE COURT:

---

JOHN W. HERRON, J.

Dated: July 27, 2000