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

| | | |
|---|---|---|
| HYDRAIR, INC. and ALBERT D. HAWKINS, | : | FEBRUARY TERM, 2000 |
| Plaintiffs, | : | No. 02846 |
| v. | : | Control Nos. 033343, 033383, 033384, 033385, 033392 |
| NATIONAL ENVIRONMENTAL BALANCING BUREAU, PENNSYLVANIA ENVIRONMENTAL BALANCING ASSOCIATION, BOBBY ROATEN, EASTERN AIR BALANCE, and TED SALKIN, | : | |
| Defendants. | : | |

**ORDER AND MEMORANDUM**

**AND NOW**, this 17th day of July, 2003, upon consideration of the defendants' Motions for Summary Judgment and Motion to Dismiss, plaintiffs' responses thereto, the briefs in support and opposition, and all other matters of record, after hearing oral argument on said motions, and in accord with the contemporaneous Memorandum Opinion being filed of record, it is hereby

ORDERED that defendants' Motions for Summary Judgment are GRANTED and all claims against defendants are hereby dismissed, and it is further

ORDERED that defendants' Motion to Dismiss is DENIED.

**BY THE COURT:**

_____

**GENE D. COHEN, J.**

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

| | | |
|---|---|---|
| HYDRAIR, INC. and ALBERT D. HAWKINS, | : | FEBRUARY TERM, 2000 |
| Plaintiffs, | : | No. 02846 |
| v. | : | Control Nos. 033343, 033383, 033384, 033385, 033392 |
| NATIONAL ENVIRONMENTAL BALANCING BUREAU, PENNSYLVANIA ENVIRONMENTAL BALANCING ASSOCIATION, BOBBY ROATEN, EASTERN AIR BALANCE, and TED SALKIN, | : | |
| Defendants. | : | |

**MEMORANDUM OPINION**

The court hereby considers the Motion for Summary Judgment of defendant, National Environmental Balancing Bureau ("NEBB"), the Motion for Summary Judgment of defendant Pennsylvania Environmental Balancing Association ("PEBA"), the Motion for Summary Judgment of defendant Ted Salkin ("Salkin"), the Motion for Summary Judgment of defendants Eastern Air Balance, Inc. ("EAB") and Bobby Roaten ("Roaten"), and the Motion to Dismiss of all defendants.

**STATEMENT OF FACTS**

NEBB is a trade association that operates through regional chapters such as PEBA. NEBB certifies firms to do testing, adjusting, and balancing ("TAB") of heating, ventilating, and air conditioning systems ("HVAC"). Plaintiff Hydrair, Inc. ("Hydrair") is a firm that performs HVAC TAB work. From 1991 until 2000, Hydrair was a member of PEBA and certified by NEBB to perform TAB work. Plaintiff Albert Hawkins ("Hawkins") was Hydrair's NEBB

qualified supervisor of its TAB work. EAB is also a NEBB certified firm that performs HVAC TAB work. Roaten was president of both PEBA and EAB.

In 1996 and1997, Hydrair performed TAB work on two school projects, denominated by the parties as the Hamburg project and the Kunkel project. *See* Exs. 36-8. In 1997, PEBA received complaints regarding the TAB work performed by Hydrair on these projects, and, on September 24, 1997, PEBA held a hearing regarding such complaints. *See* Exs. 41, 45-7. Roaten spoke at the hearing, as did another representative of EAB, who testified that EAB had reviewed Hydrair's work on the two school projects and that it was not done properly.[1] *See* Ex. 48. Plaintiffs also allege that, at various times in 1997, EAB and Roaten made similar disparaging statements regarding Hydrair and Hawkins to persons involved with the Hamburg and Kunkel projects and to other persons in the trade.

On October 6, 1997, after the hearing, PEBA sent a written recommendation to NEBB that Hydrair be de-certified.[2] Ex. 52. On October 10, 1997, PEBA also forwarded to NEBB the documents that PEBA had gathered regarding Hydrair's work on the Hamburg and Kunkel school projects, which included statements from Roaten and EAB. Exs. 53-4.

On November 24, 1997, NEBB directed Hydrair to show cause why it should not be de-certified. Ex. 58. On or about August 14, 1998, NEBB retained an expert to review Hydrair's work on the Kunkel and Hamburg projects. Ex. 67. NEBB then held a hearing on August 30,

---

[1] EAB took over from Hydrair and completed the TAB work on the Kunkel project. *See* Exs. 39-40. Hydrair completed the TAB work on the Hamburg project. *See* Ex. 38. Both projects were apparently completed during 1997.

[2] In doing so, PEBA acted through Salkin. At that time, Salkin was the chairman of PEBA's technical committee, on its board of directors, and on the board of directors of NEBB.

1999, at which Hydrair was given an opportunity to respond to the complaints against it. Ex. 22-3. On January 3, 2000, NEBB informed Hydrair that it was de-certified and, therefore, in the future, it could not perform TAB work on jobs that require NEBB certification. Ex. 82.

Plaintiffs filed this action for an injunction and damages on February 25, 2000, claiming *inter alia*, that defendants had defamed plaintiffs and had intentionally interfered with their existing and prospective contractual relations. In ruling on the defendants' preliminary objections to the Second Amended Complaint, Judge Herron found that Hydrair has asserted a tortious interference claim against:

> 1) EAB and Roaten for interfering with Hydrair's existing contracts regarding the Hamburg and Kunkel School projects; and
>
> 2) NEBB, PEBA, EAB, Roaten and Salkin for interfering with Hydrair's prospective contracts by causing Hydrair to be decertified.

*See* Hydrair et al. v. NEBB et al. February Term 2000, No. 02846, Control Nos. 110967, 110984, 111337, 111338, 111382, 111986 (April 23, 2001). Judge Herron also found that Hydrair and Hawkins had asserted a defamation claim against:

> 1) EAB and Roaten for the statements they made regarding Hydrair's work on the Kunkel and Hamburg projects; and
>
> 2) PEBA for the statements it made to NEBB.

*See id.*; Hydrair et al. v. NEBB et al. February Term 2000, No. 02846, Control No. 052233 (July 27, 2000).

## I. The Claims Against PEBA, EAB, Roaten, and Salkin Must Be Dismissed As Time Barred.

PEBA, EAB, Roaten, and Salkin have moved for summary judgment on both the defamation and tortious interference claims against them on the basis that all such claims are time barred.[3] The statute of limitations for defamation claims is one year. 42 Pa. C. S. § 5523(1). The statute of limitations for claims for intentional interference with both prospective and existing contracts is generally two years. *See* Eagan v. U.S. Expansion Bolt Co., 322 Pa. Super. 396, 469 A.2d 680 (1983). *But see* Evans v. Philadelphia Newspapers, Inc., 411 Pa. Super. 244, 252, 601 A.2d 330, 334-5 (1991) (the one year statute of limitations for defamation applies to a tortious interference claim where, as here, the claim is based on defamatory statements.)

"The statute of limitations begins to run as soon as the right to institute and maintain a suit arises." Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468 (1983). This action was commenced on February 25, 2000, so the defamatory statements of which plaintiffs complain must have occurred after February 25, 1999, and any other tortious acts must have occurred after February 25, 1998, in order for them to serve as the basis for viable claims. Plaintiffs have not proffered admissible evidence of any wrongful statements or acts occurring after those operative dates.

The evidence shows that all of EAB's and Roaten's alleged false statements and wrongful acts in connection with the Hamburg and Kunkel projects took place in 1997, more than two

[3] Plaintiffs argue that the statute of limitations issue is not yet ripe because discovery is not yet complete. However, plaintiffs have had over two years to conduct discovery, the deadline for taking discovery has passed, and much, if not all, of the discovery delays in this case were caused by plaintiffs' dilatory conduct. *See* Defendants' Joint Motion to Dismiss. Therefore, this court will proceed to consider the statute of limitations claim in light of the evidence accumulated to date.

years prior to the commencement of this action. Specifically, with respect to the Kunkel project, EAB began working on that job in June, 1997, and EAB submitted its last report to the architect in August, 1997. Gallagher Affidavit, ¶¶ 15-6. With respect to the Hamburg project, EAB and Roaten submitted their allegedly interfering reports in the Fall of 1997. Larrick Affidavit, ¶ 13. In addition, the PEBA meeting at which EAB and Roaten said that plaintiffs had done a bad job on those two projects occurred in September, 1997. Ex. 48. Therefore, Hydrair's claims against Roaten and EAB for tortious interference with existing contract and for defamation with respect to the Hamburg and Kunkel school projects must be dismissed as time barred

Likewise, the events giving rise to plaintiffs' claims against PEBA, EAB, Roaten and Salkin for defamation and tortious interference with prospective relations based on their participation in the NEBB decertification process occurred more than two years prior to the filing of this action. In support of such claims, Hydrair alleges that its January, 2000 decertification by NEBB caused it not to obtain future contracts and that PEBA's, EAB's, Roaten's and Salkin's statements caused NEBB to decertify Hydrair.

The statute of limitations began to run on those claims when the defendants first made their allegedly interfering/defamatory statements. *See* Evans v. Philadelphia Newspapers, Inc., 411 Pa. Super. 244, 601 A.2d 330 (1991) (defamation and tortious interference claims based on same allegedly false statements); Eagan v. U.S. Expansion Bolt Co., 322 Pa. Super. 396, 469 A.2d 680 (1983) (tortious interference claim); Spain v. Vicente, 315 Pa. Super. 135, 142, 461 A.2d 833, 837 (1983) (defamation claim). In this case, the evidence shows that the last such statements that EAB and Roaten made were at the September, 1997 PEBA meeting, and the last such statements that PEBA and Salkin made were in their October, 1997 submissions to NEBB

recommending that Hydrair be decertified. Exs. 48, 52-4. Since such statements were made more than two years prior to the filing of this action, all of Hydrair's tort claims against PEBA, EAB, Salkin, and Roaten based on such statements must be dismissed.

The only evidence offered by plaintiffs in opposition to the motion for summary judgment on statute of limitations grounds is contained in Hawkins' and Sharon Lohr's[4] depositions. Hawkins claims to have overheard Salkin and another representative of PEBA make defamatory statements about him and Hydrair in March, 1998. Hawkins Dep, p. 450, Ex. 15. However, such statements were made outside the one year defamation statute of limitations, and any action on them would be time barred as well.

In addition, both Lohr and Hawkins claim to have been told by third parties that the defendants made defamatory statements about Hydrair to those third parties. *Id*. at 451, 506-8, 537, 542-4; Lohr Dep., pp. 178-180, 289-96. Ex. 16. Even if claims based on such statements were not time-barred,[5] such defamatory statements are unsworn, unrecorded, out of court assertions by third parties which are being offered to prove the truth of their contents, i.e. that defendants said something bad about plaintiffs, so they are inadmissible as hearsay. *See* Pa. R. Evid. 801(c). "[A] motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence." Samarin v. GAF Corp., 391 Pa. Super. 340, 349, 571 A.2d 398, 403 (1989). *See also* Pa. R. Civ. P. 1035.4 ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

[4] Ms. Lohr is a principal of Hydrair.

[5] All of such third party statements appear to have been made in connection with the Hamburg and Kunkel school projects and, therefore, occurred in 1997, more than two years before this action was brought.

evidence . . .”). Therefore, plaintiffs have not sustained their burden of showing that the conduct of which they complain occurred within the limitations period, and their claims against PEBA, EAB, Salkin and Roaten must be dismissed.

**II. Plaintiffs Have Waived the Right to Bring Their Claims Against NEBB.**

Hydrair has asserted a claim against NEBB for intentional interference with prospective contractual relations based upon NEBB’s decision to decertify Hydrair, and NEBB has moved for summary judgment on that claim on the basis that Hydrair expressly waived its right to sue NEBB in tort.[6]

Specifically, when Hydrair applied for NEBB certification, the application contained terms, which were initialed by plaintiff, providing that Hydrair

> [f]urther agrees that it shall not have any cause of action in its own right or on behalf of any other firm against any chapter of the NEBB or any officer or director thereof for any action of commission or omission, arising out of its failure to receive certification or termination of its certification.

Ex. 33, ¶ 6. In addition, the PEBA by-laws, to which plaintiffs agreed to adhere, provide that

> No firm affiliated with [PEBA] shall have any cause of action in its own right, or on behalf of another affiliated firm against [PEBA] or NEBB or any officer or director thereof for any action of commission or omission, and no formerly affiliated firm of [PEBA] shall have any cause of action arising out of the termination of affiliation against this Chapter or NEBB or any officer or director thereof.

Ex. 29, Art. XI. Hydrair admits the waiver provisions, but claims that they are unconscionable and therefore unenforceable against it. However, Hydrair has failed to prove unconscionability.

---

[6] Judge Herron previously held that Hydrair’s claim for an injunction against NEBB is contingent on the success of Hydrair’s claim for tortious interference against NEBB. *See* Hydrair et al. v. NEBB et al. February Term 2000, No. 02846, Control Nos. 110967, 110984, 111337, 111338, 111382, 111986 (April 23, 2001). Therefore, this court will treat the injunction claim the same as the tort claim upon which it is based.

"Inquiries concerning whether a contract or clause is unconscionable are properly a question of law for the court." Ferguson v. Lakeland Mut. Ins. Co., 408 Pa. Super. 332, 336, 596 A.2d 883, 885 (1991).

> Generally, the party challenging the contract or a particular contract term has the burden of proving unconscionability. . . . On a motion for summary judgment, a court may conclude, as a matter of law, that a contract or clause is enforceable regardless of an allegation of unconscionability, as long as there is no genuine issue of material fact.

Bishop v. Washington, 331 Pa. Super. 387, 399, 480 A.2d 1088, 1094 (1984).

Hydrair has not pointed to "any evidence of record tending to prove that [Hydrair] was unaware of the [waiver] terms or that [it] was deceived in some way by [NEBB]. . . [A] disparity of bargaining power . . .[is not] sufficient, by itself to render the contract unconscionable." *Id*. In addition, neither the application nor the by-laws were written in obfuscatory language or in small print buried in a lengthy text. *See id. See also* Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563 (1983) (policy limitation was not unconscionable where it was clearly worded and conspicuously displayed). Furthermore, this case does not involve a contract of adhesion, particularly a sale of goods or an insurance contract, which are the sorts of contracts most likely to be found to be unconscionable. *See* Ferguson v. Lakeland Mut. Ins. Co., 408 Pa. Super. 332, 596 A.2d 883 (1991); Moscatiello v. Pittsburgh Contractors Equipment Co., 407 Pa. Super. 363, 595 A.2d 1190 (1991). *See also* Germantown Mfg. Co. v. Rawlinson, 341 Pa. Super. 42, 491 A.2d 138 (1985) (contract provision obtained through fraud and duress was unconscionable). Instead, this case evolves out of a commercial actor's decision to join, and its agreement to be governed by, an association of its peers. One of the terms of membership in such association, which was imposed on all members equally, was that they not bring claims

against the association based on their rejection by the association. The court is unwilling to find that such a requirement for affiliation with a private association was improper.

> [C]ontracts providing for immunity from liability are not favorites of the law and will be construed strictly. . . .Nevertheless, where the intention of the parties is spelled out with particularity and their agreement shows an unequivocally expressed purpose to release from liability, the law will give effect to that agreement. The language of the agreement in the instant case is clear.

Valeo v. Pocono International Raceway, Inc., 347 Pa. Super. 230, 500 A.2d 492 (1985). The court, therefore, finds that the waiver provisions at issue are not unconscionable under the facts of this case, but the court does not thereby make any determination as to the enforceability of such waiver provisions in general or in other factual settings.

PEBA, Salkin, and Roaten have also moved for summary judgment based on the same waiver provisions. If the claims against PEBA and Salkin were not already subject to dismissal based on statute of limitations grounds, then they would be dismissed on the basis that Hydrair waived its right to sue PEBA, as a chapter of NEBB, and Salkin, as an officer of PEBA. However, since Roaten may have engaged in his allegedly wrongful acts as an agent of EAB, rather than solely as an agent of PEBA, the claims against him cannot be dismissed based upon the waiver provision.

**III. NEBB Was Privileged to Interfere With Plaintiff's Contracts.**

NEBB has also moved for summary judgment on the grounds that its decision to decertify Hydrair was privileged and therefore that its alleged interference with Hydrair's prospective contractual relations was not improper. Hydrair argues that NEBB has not proved the existence of the privilege. However, with respect to its tortious interference claim against NEBB, Hydrair has the burden of proving the absence of a privilege. *See* Neish v. Beaver Newspapers, Inc., 398

Pa. Super. 588, 599, 581A.2d 619, 625 (1990). "[T]o withstand a motion for summary judgment, [plaintiff] must do more than allege the non-existence of a privilege in [its] pleadings." Maier v. Maretti, 448 Pa. Super. 276, 287, 671 A.2d 701, 706 (1996).

In this case, NEBB's privilege to interfere with Hydrair's prospective contractual relations by decertifying Hydrair is expressly set forth in NEBB's by-laws. Specifically, the by-laws provide that

> The Board of Directors shall establish certification requirements and issue certification credentials to firms who meet these requirements. These requirements including provisions for suspension and decertification shall be published by the Board of Directors which shall have authority to amend same. The powers and responsibilities of the Board of Directors with respect to certification and decertification shall be set forth in said publication.

1998 NEBB By-laws, Art. IX, Ex. 25. The requirements for decertification published by the Board of NEBB provide that

> Certification may be terminated for failure of the firm to abide by objectives and performance standards of NEBB. Termination of certification by NEBB requires a 2/3rds vote of the members of the Board of Directors of NEBB, provided that by similar vote the Board shall first find that certification is prejudicial to the best interests of [NEBB] and provided further that the certified firm in question shall have had opportunity upon written notice of at least fifteen(15) days to show cause why the certification should not be terminated.

Operational Guide for the Chapters of the NEBB, IX-7(c), Ex. 25. Furthermore, when Hydrair applied for NEBB certification, Hydrair implicitly acknowledged NEBB's privilege to chose which firms it will certify and which it will not. *See* Ex. 33.

Hydrair has not proffered any evidence that NEBB abused its own procedures or acted from any improper motive in decertifying Hydrair. *See* Baker v. Lafayette College, 516 Pa. 291, 299-300, 532 A.2d 399, 403 (1987) ("This court has no jurisdiction to review the factual

determinations of a college's governing body unless it can be clearly demonstrated that that body violated its own [review] procedures.") In fact, NEBB gave Hydrair more process than was due to it under NEBB's by-laws when NEBB allowed Hydrair additional time within which to respond, and when NEBB gave Hydrair a hearing regarding the claims against it. Since NEBB was privileged to decertify Hydrair and it did not abuse that privilege, NEBB cannot be held liable for tortious interference with Hydrair's contract as a result of engaging in such privileged conduct.

**IV. Defendants' Motion to Dismiss Must Be Denied**

Defendants allege that plaintiffs' counsel has engaged in a pattern of delay and has repeatedly failed to comply with discovery requests and orders to provide documents and appear for depositions. Defendants request dismissal as a sanction. Since this court is dismissing plaintiffs' claims on the merits, there is no need for the court to impose dismissal as a sanction.

**CONCLUSION**

For all the foregoing reasons, defendants' Motions for Summary Judgment are granted and their Motion to Dismiss is denied.

**BY THE COURT:**

_____

**GENE D. COHEN, J.**

Dated : July 17, 2003