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

JOSEPH A. MARTINEZ, JR.,	:	March Term, 2000
Plaintiff	:	
	:	No. 1943
v.	:	
	:	Commerce Program
JOHN R. RUSSO, et al.	:	
Defendants	:	Control No. 54-00060954

Herron, J.

OPINION

Defendants John R. Russo ("Russo"), Mitchell P. Harding ("Harding") and Formed Steel, Inc. ("Formed Steel") have filed preliminary objections ("Objections") to the Amended Complaint of Plaintiff EMVEST, Inc. ("EMVEST"). For the reasons set forth in this Opinion, the Court has issued a contemporaneous Order sustaining the Objections in part and overruling the Objections in part and granting the Plaintiff leave to file a second amended complaint within twenty days.

FACTUAL ALLEGATIONS

The Court will necessarily assume certain facts in order to resolve the Objections.

Plaintiff EMVEST is a Pennsylvania corporation whose sole principal and President is Joseph A. Martinez ("Martinez"). Prior to July 1999, Martinez was also a one-third owner of Formed Steel, with Russo and Harding each owning one-third of Formed Steel.

In July 1999, EMVEST, Formed Steel, Russo and Harding entered into an Arbitration Award under which Harding and Russo agreed to purchase one share of Formed Steel common stock from

EMVEST[1] for $66,000. Payment for the share was to be made in monthly payments of $1,375.00 over 48 months, with all outstanding amounts due no later than July 1, 2003. In the event that the total payment is not made on that date, EMVEST may either enforce the entire payment obligation or require that it receive a one-third ownership of Formed Steel. EMVEST alleges that the Arbitration Award "memorializes an agreement among Russo, Harding and Martinez regarding the value of Formed Steel." Complaint at ¶ 8. In entering into this agreement, EMVEST claims that it relied on the representations of Russo, Harding and Formed Steel (collectively, "Defendants") as to the value of its stock and that the Defendants' representations were a primary basis for determining that the money to be received was a fair and reasonable market value.

The Defendants stopped making payments in November 1999. Although Martinez notified the Defendants of the continuing breach, the payments never resumed. On January 19, 2000, Martinez received a fax from Harding stating that, in resolving the payment dispute, Martinez could "alleviate any perceived difficulties Mr. Russo and [Harding] may have by purchasing [their] shares of stock for $20,000,000.00. They will not be sold separately."

Martinez claims that allowing the Defendants to keep his Formed Steel stock, which he now values at $6,333,333.33, would constitute unjust enrichment. Consequently, Martinez filed a Complaint on March 17 alleging fraudulent misrepresentation and breach of contract on the part of the Defendants. An Amended Complaint adding EMVEST as an additional plaintiff was filed on May 1.

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[1] While the Amended Complaint states that Martinez was the owner of the Formed Steel share, the Arbitration Award states that the share was owned by EMVEST and was to be transferred by EMVEST. Because EMVEST is the Plaintiff in this matter, the Court has inferred that EMVEST was the holder of the Formed Steel share.

The Defendants filed the Objections in the form of a demurrer to both counts on May 19, while Martinez filed an Answer on July 19.

DISCUSSION

I. Failure to Vacate Arbitration Award

As a threshold issue, the Defendants argue that the entire Complaint should be dismissed because arbitration awards must be appealed within thirty days of the date of the award,[2] while the Complaint was not filed until March 17, nine months after the date of the award and nearly two months after EMVEST became aware of the stock value discrepancy. In response, EMVEST claims that the document titled "Arbitration Award" does not, in fact, meet the definition of an "arbitration award" under Pennsylvania law and that, consequently, the thirty-day rule does not apply.

An arbitration award has been defined as "the judgment of a tribunal selected by the parties to determine matters actually in variance between them," Keiser v. Berks Co., 253 Pa. 167, 168, 97 A. 1067 (1916), and must be signed by the arbitrators. Weaver v. Powel, 148 Pa. 372, 379, 23 A. 1070 (1892); County of Lackawanna v. Service Employees' Int'l Union, AFL-CIO, 35 Pa. Commw. 531, 534, 387 A.2d 161, 162 (1978). In addition, "an award which is not final, or is not complete as to all

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[2] Pennsylvania courts have interpreted 42 Pa. C.S. § 7342(b) ("Section 7342(b)")

> [T]o require that any challenge to the arbitration award be made in an appeal to the Court of Common Pleas by the filing of a petition to vacate or modify the arbitration award within thirty (30) days of the date of the award. Specifically, a party must raise alleged irregularities in the arbitration process in a timely petition to vacate or modify an arbitration award.

Lowther v. Roxborough Mem. Hosp., 738 A.2d 480, 485 (Pa. Super. Ct. 1999) (citations omitted).

the matters included in the submission, is void altogether." Hamilton v. Hart, 125 Pa. 142, 149, 17 A. 226 (1889). See also Pa. Law Encyc. Arbitration § 12 (defining "arbitration award" as "the final judgment or decision pronounced by the arbitrators in settlement of the controversy submitted to them. It is the judgment of the tribunal selected by the parties to determine the matters actually in variance between them"); 6 C.J.S. Arbitration § 95 (stating that "[t]he essence of an arbitration award is that there be a substantive determination on the merits").

According to the Answer, "the agreement between the parties did not result from an adversary proceeding with witness and exhibits. Rather, the agreement was reached by means of discussion between counsel. No 'arbitration' was conducted. No proceeding occurred." In addition, Paragraph 8 of the Amended Complaint alleges that the Arbitration Award memorializes an agreement among the Parties, not a decision by the arbitrator. Also significant is the fact that, while the Arbitration Award includes a signature line for the arbitrator, the Arbitration Award as attached to the Amended Complaint does not have an arbitrator's signature.

In resolving this dispute, the Court notes that:

C a.C The Defendants bear the burden of supporting the Objections;

C a.C The Defendants have not presented a copy of an agreement to arbitrate, which would indicate the issues to be resolved through arbitration;

C a.C There is no evidence before the Court that the Arbitration Award is a final decision or addresses all of the issues presented to the arbitrators;

C a.C The Arbitration Award has not been signed by an arbitrator; and

C a.C The Complaint alleges that the Arbitration Award does not meet the definition of an "arbitration award."

In light of these facts, the Court cannot sustain the Objections on the basis of this argument.

II. Fraudulent Misrepresentation Claim

As a second argument, the Defendants object to EMVEST's fraudulent misrepresentation claim on the grounds that the Complaint fails to make out a cause of action for fraud.

Pennsylvania recognizes three theories on which a misrepresentation action may be based: intentional misrepresentation, negligent misrepresentation and innocent misrepresentation. In order to state a viable cause of action for intentional fraudulent misrepresentation, a complaint 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).

In general, "[s]tatements of value are but a part of the 'trade talk' and bargaining which customarily accompany negotiations for the sale of property" and cannot serve as the basis for an action for fraud, even if they are not specifically described as opinions. Moore v. Steinman Hardware Co., 319 Pa. 430, 433, 179 A. 565, 566 (1935) (holding that representations by corporate president

as to value of stock were not actionable deceit). A party's right to rely on a false assertion of value is diminished further "where the one supposed to rely on such statement has an equal opportunity to ascertain the facts on which such opinion might be based." Klerlein v. Werner, 307 Pa. 16, 22, 160 A. 719, 720 (1932). Specifically, when a plaintiff's status as a shareholder entitles him or her to an examination of corporate records,[3] a purchaser's representations as to share value are outweighed by the shareholder's opportunity to make his or her own evaluation. See Binns v. Copper Range Co., 335 Pa. 257, 265, 6 A.2d 895, 898-99 (1939); Moore, 319 Pa. at 433, 179 A. at 566. In addition, directors are permitted "at all reasonable times" to inspect the books of the corporation. Machen v. Machen & Mayer Elec. Mfg. Co., 237 Pa. 212, 217, 85 A. 100, 101 (1912). See also Strassburger v. Philadelphia Record Co., 335 Pa. 485, 490, 6 A.2d 922, 923 (1939) (stating that a director's right to inspect records is even broader than that accorded to shareholders).

Here, the entire basis for EMVEST's fraudulent misrepresentation claim is the false nature of the Defendants' statements about the Formed Steel share value prior to the execution of the Arbitration Award. However, even if the Defendants' statements were inaccurate, EMVEST cannot rely on such "trade talk" to support a claim for fraudulent misrepresentation.

EMVEST's position is weakened further because, as a shareholder, it had a right to examine the Formed Steel books and to make his own determination as to the value of its shares. In addition, Martinez, who was and continues to be EMVEST's President and sole principal, served as a director of Formed Steel, giving him even greater access to that company's records. Consequently, any

[3] Under 15 Pa. C.S. § 1508, a shareholder has the right to examine corporate records for any purpose related to the interest of the person as a shareholder.

reliance on representations by Russo and Harding was certainly inappropriate, and the Defendants' comments cannot serve as a basis for a fraud claim.

Because the claim for fraudulent misrepresentation should be dismissed on other grounds, there is no need to consider the Defendants arguments as to minority interest discount, a lack of specificity and particularity in the Amended Complaint or allegations of fraudulent conduct on the part of Formed Steel.

III. Breach of Contract Claim[4]

Finally, the Defendants argue that the breach of contract claim should be dismissed because the Complaint does not include facts that support the allegation that Defendants have breached the Arbitration Award.

According to the Defendants, so long as all payments for the stock are made by July 1, 2003, there is no default under the Arbitration Award. This assessment ignores Paragraph 1(a) of the Arbitration Award, which specifically requires monthly payments of $1,375.00 beginning on August 1, 1999. If, as the Amended Complaint alleges, the Defendants have failed to make these monthly payments, as they are required to do under the Arbitration Award, the Amended Complaint alleges facts sufficient to support a breach of contract claim, and the Objections on this ground should be overruled.

[4] It is important to note that, in spite of the fact that the Arbitration Award as attached to the Complaint has not been executed by all of the Parties, the Defendants make no arguments based on this fact.

However, in the absence of an acceleration clause, the total debt owed may not be accelerated. Parliament Industs., Inc. v. William H. Vaughan & Co., 501 Pa. 1, 13, 459 A.2d 720, 726-27 (1983). See also Vincler v. Vincler, 400 Pa. Super. 157, 160, 583 A.2d 4, 5 (1990) (prohibiting confession of judgment for total debt under an agreement lacking an acceleration clause). Here, the Arbitration Award does not include an acceleration clause, leaving the Defendants responsible only for the installments unpaid since November 1999.[5]

IV. Leave to Amend

In the event a preliminary objection based on legal insufficiency in the nature of a demurrer is granted, the pleader has a right to file an amended pleading if she has not done so already. 5A Standard Pa. Practice 2d § 25:66. See also Connor v. Allegheny Gen. Hosp, 501 Pa. 306, 311, 461 A.2d 600, 602 (1983) (holding that "the right to amend should be liberally granted); Otto v. American Mut. Ins. Co., 482 Pa. 202, 205, 393 A.2d 450, 451 (1978) (stating that "the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully").

Nevertheless, while some Pennsylvania cases permit a court to deny leave to amend "only where prejudice to the other party would result," Pilotti v. Mobil Oil Corp., 388 Pa. Super. 514, 518, 565 A.2d 1227, 1229 (1989), the Pennsylvania Supreme Court has stated that a complaint may be dismissed without leave for amendment if such leave would be "a futile exercise." Carline v. Whitpain

[5] It is important to note that the amount in controversy totals $13,750.00, plus any interest. This leaves EMVEST with a claim of less than $50,000, which may require matter's transfer to the Compulsory Arbitration Program under Philadelphia Civil Rule 1301.

Investors, 499 Pa. 498, 505, 453 A.2d 1385, 1388 (1982). See also Mace v. Senior Adult Activities Center of Montgomery County, 282 Pa. Super. 566, 568, 423 A.2d 390, 391 (1980) (holding that "successive and continuous amendments to a complaint cannot be permitted to go on ad infinitum"). In addition, "liberality of pleading does not encompass a duty in the courts to allow successive amendments when the initial pleading indicates that the claim asserted cannot be established." Behrend v. Yellow Cab Co., 441 Pa. 105, 110, 271 A.2d 241, 243 (1970).

Here, EMVEST has already filed one amended complaint.[6] While it is doubtful that a second amended complaint would cure the defects found in the Amended Complaint, granting EMVEST leave to do so would not prejudice the Defendants and would not rise to the level of being a futile exercise. As a result, the Court grants EMVEST leave to file a second amended complaint.

CONCLUSION

In accordance with the analysis set forth above, the Preliminary Objections have been sustained as to Count I and denied as to Count II. EMVEST is granted twenty days to file an amended pleading.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: August 8, 2000

[6] There are some differences between the Complaint and the Amended Complaint: the Amended Complaint omits the Complaint's count for punitive damages and includes additional allegations as to causation.

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	:	No. 1943
v.	:	
	:	Commerce Program
JOHN R. RUSSO, et al.	:	
Defendants	:	Control No. 54-00060954

ORDER

AND NOW, to wit, this 8th day of August, 2000, upon consideration of Defendants John R. Russo's, Formed Steel, Inc.'s and Mitchell P. Harding's Preliminary Objections to Plaintiff Joseph A. Martinez, Jr.'s Amended Complaint and any responses thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Preliminary Objections are SUSTAINED as to Count I - Fraudulent Misrepresentation and OVERRULED as to Count II - Breach of Contract. The Plaintiff is directed to file an amended pleading within twenty days of this Order.

BY THE COURT:

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JOHN W. HERRON, J.