IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

MIDDLETOWN CARPENTRY, INC.,	:	JUNE TERM, 2001
Plaintiff	:	No. 2698
v.	:	COMMERCE PROGRAM
C. ARENA & CO., INC.,	:	
Defendant	:	Control No. 091526

O R D E R

AND NOW, this 27th day of November 2001, upon consideration of Middletown Carpentry, Incorporated's Preliminary Objections to the Counterclaim of C. Arena & Co., Inc., defendant's opposition thereto, the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

1. The Preliminary Objections, in the nature of a demurrer, to Counts I and II of the Counterclaim are **Overruled**.

2. The Preliminary Objections, moving for a more specific pleading, as to Counts I and II are also **Overruled**.

3. The Preliminary Objections, in the nature of a demurrer, to Count III of the Counterclaim are **Sustained** and that count is **Dismissed**.

4. Plaintiff shall file an Answer to Counts I and II of the Counterclaim within twenty-two (22) days of the date of this Order.

BY THE COURT,

_____

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

SHEPPARD, JR., J. ..... November 27, 2001

This is a dispute between a general contractor and a subcontractor, involved a multi-phased construction project, over a failure to pay for work performed and the termination of the subcontractor following the termination of the general contractor.

Presently before this court are the Preliminary Objections of plaintiff, Middletown Carpentry, Inc. ("Middletown") to the Counterclaims of defendant, C. Arena & Co., Inc. ("Arena"), asserting demurrers to each count and moving for a more specific pleading.

For the reasons set forth, the Preliminary Objections are **Overruled,** in part, and **Sustained,** in part.

BACKGROUND

The operative facts, as derived from the relevant pleadings, are as follows. On August 21, 1998, Arena and Middletown entered into a written agreement (the "Subcontract") pursuant to which Middletown agreed to provide certain project or construction management services for Arena in exchange for compensation at various hourly rates on a multi-phased project known as the University of the Arts, 211 S. Broad Street, Philadelphia, PA (the "Project"). Compl., ¶ 3. See Compl., Exhibit A. The Subcontract provided, *inter alia*, that Middletown would perform services "from August 31, 1998 through the completion and closeout of the project." Compl., Exhibit A at 1. It also provided that neither party could terminate the agreement "for convenience." Id. at 3.

In July 1998, prior to executing the Subcontract, Arena had entered into a written construction agreement with the University of the Arts (the "Prime Contract") pursuant to which Arena agreed to provide construction management services to the University of the Arts, as Owner. Compl., ¶ 7. See Compl., Exhibit B. The Prime Contract included a "Termination or Suspension" provision at Section 14. Compl., Exhibit B at §14. The owner could terminate the contractor "for cause"; that is if the contractor:

1. persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

2. fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

3. persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or

4. otherwise is guilty of substantial breach of a provision of the Contract Documents.

Id. at § 14.2.1. The owner could also, "without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the [o]wner may determine." Id. at § 14.3.1. Adjustments in the cost of performance, including profit on the increased cost of performance, caused by the suspension, delay or interruption would be made if the Prime Contract was suspended for convenience but not for another cause for which the Contractor is responsible. Id. at § 14.3.2.

On or about May 12, 2000, representatives of the owner, Arena and Middletown met. Answer with New Matter and Counterclaim ("Answer"), ¶ 51. At this meeting, Middletown's president, Harry Arena, purportedly alleged that Arena had over-billed the owner in the amount of $906,816. Id. at ¶ 51. Mr. Arena of Middletown also circulated a memorandum, summarizing the alleged over-billing by Arena. Id. at ¶ 52. See Answer, Exhibit 1. The owner then retained counsel to investigate Middletown's allegations. Answer, ¶ 53. Its counsel purportedly concluded that Arena had not over-billed the owner and that its billing practices were in accordance with industry standards. Id. at ¶ 54. Then, as alleged, the owner elected to terminate the Prime Contract between itself and Arena for convenience, effective May 25, 2000.[1] Compl., ¶ 9. Arena allegedly accepted the termination and then refused to allow Middletown to perform any further work on the Project, refused to pay Middletown for any further services, and withheld payment for certain services already provided. Id. at ¶ 10. The Project work then allegedly continued with a replacement construction manager hired by the owner. Id. at ¶ 11.

[1]In its Complaint, Middletown asserts that the letter of February 8, 2001 from John Trojan, Chief Financial Officer of the University of the Arts, confirming termination of the Prime Contract was attached as Exhibit C. However, no such exhibit was attached to the Complaint.

With this background, Middletown filed its Complaint on June 21, 2001, asserting counts for breach of contract, estoppel, violation of the Pennsylvania Contractor and Subcontractor Payment Act, 73 P.S. §§ 501 et seq., fraudulent misrepresentation, and breach of the implied duty of good faith. In turn, Arena filed an Answer with New Matter and Counterclaim on August 1, 2001. As part of its Counterclaim, Arena asserts counts for tortious interference with contractual relations, defamation, and breach of the implied duty of good faith and fair dealing. Middletown filed the instant Preliminary Objections, setting forth a demurrer to each of these counts, and, alternatively, moving for a more specific pleading.

LEGAL STANDARD

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows for preliminary objections based on legal insufficiency of a pleading (demurrer). When reviewing preliminary objections in the form of a demurrer, "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). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000)(citation omitted). However, the pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. Giordano v. Ridge, 737 A.2d 350, 352 (Pa. Commw. Ct. 1999), aff'd. 559 Pa. 283, 739 A.2d 1052 (1999), cert. denied, 121 S.Ct. 307 (U.S. 2000). In addition, "a court is not bound to accept as true any averments in a complaint which are in conflict with exhibits attached to it."

Baravordeh v. Borough Council of Prospect Park, 699 A.2d 789, 791 (Pa. Commw. Ct. 1997)(citations omitted).

Additionally, under Pa.R.C.P.1028(a)(3), a party may assert preliminary objections based on insufficient specificity in a pleading. To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the facts alleged are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa.Super. 316, 319, 588 A.2d 1308, 1310 (1991)(citation omitted). See also, In re The Barnes Foundation, 443 Pa.Super. 369, 381, 661 A.2d 889, 895 (1995)("a pleading should formulate the issues by fully summarizing the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [the] cause of action is based."). Further, under Pa.R.C.P.1019(a), the plaintiff is required to state "[t]he material facts on which a cause of action . . . is based . . . in a concise and summary form." This rule requires that the complaint give notice to the defendant of an asserted claim and synopsize the essential facts to support the claim. Krajsa v. Keypunch, Inc., 424 Pa.Super. 230, 235, 622 A.2d 335, 357 (1993).

DISCUSSION

A. Arena Sufficiently Set Forth A Counterclaim for Tortious Interference With Contractual Relations By Alleging that Middletown Falsely Represented That Arena Was Over-billing and Induced the Owner to Terminate Its Contract With Arena.

Middletown first asserts that Arena fails to state a cause of action for tortious interference with contractual relations in Count I of its Counterclaim because it is not alleged that the Owner or any other party breached its agreement with Arena. This court disagrees.

To set forth a cause of action for intentional interference with contractual or prospective contractual relations, the following elements must be pleaded:

> (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.

Hess v. Gebhard & Co., 769 A.2d 1186, 1194 (Pa.Super.Ct. 2001)(citations omitted). See also, Hennesy v. Santiago, 708 A.2d 1269, 1278 (Pa.Super.Ct. 1998). Further, one may be liable to another for interference with a contract for damages for "(a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference...". Hess, 769 A.2d at 1194 (quoting Restatement (Second) of Torts § 774A).

Here, Arena explicitly alleged that it had contractual relationships with customers and others, including the owner. Answer, ¶ 57. Arena also alleged that Middletown purposely with the intention of harming Arena, and without privilege to do so, caused the owner to not perform its contract with Arena. Id. at ¶ 58. Specifically, Arena alleged that "Middletown falsely represented to the [o]wner that Arena was over-billing for services performed on behalf of the [o]wner and caused the [o]wner to terminate the Prime Agreement with Arena." Id. at ¶ 59. Arena further alleged that it has suffered loss of work and capital, injury to business, interest charges and restrictions upon the ability to pursue other business, loss of revenue, unabsorbed overhead costs and loss of profits as a result of Middletown's interference. Id. at ¶ 61.

Clearly, Arena's allegations, taken together, sufficiently set forth a cause of action for tortious interference with contractual relations. Therefore, the demurrer to Count I of the Counterclaim is overruled. Similarly, Arena's allegations are sufficiently specific to give notice to Middletown of the nature

of the claim and enable it to prepare its defense. Krajsa, 424 Pa.Super. at 235, 622 A.2d at 357. Accordingly, the Preliminary Objection, moving for a more specific pleading, as to Count I, is also overruled.

B. Arena Sufficiently Set Forth A Counterclaim for Defamation By Alleging That Middletown's Publication to Owner Included False Statements Imputing Arena's Financial Practices And Business Practices, Damaging Arena's Reputation And Prompting the Termination of the Prime Contract.

Middletown asserts that Arena's counterclaim for defamation is defective because it does not set forth the requisite statutory elements for this tort; it does not identify with particularity the allegedly defamatory statements; its alleged damages are unspecific; and it has not pled abuse of conditional privilege. This court cannot agree.

A cause of action for defamation requires the pleader to state the following elements: (1) the defamatory character of the communication; (2) the communication's publication by the defendant; (3) its application to the plaintiff; (4) the understanding of the recipient of the communication's defamatory meaning; (5) the understanding of the recipient that the communication as intended to be applied to the plaintiff; (6) special harm resulting from the communication's publication; and (7) abuse of a conditionally privileged occasion. 42 Pa.C.S.A. § 8343. See also, Jaindl v. Mohr, 432 Pa.Super. 220, 229, 637 A.2d 1353, 1358 (1994)(citation omitted). A statement may be deemed to be defamatory if it harms a person's reputation, injures his business or profession, lowers a person in the estimation of the community, deters third persons from associating with him, or adversely affects his fitness for the proper conduct of his lawful business or profession. Green v. Mizner, 692 A.2d 169, 172 (Pa.Super.Ct. 1997).

Here, in its Counterclaim for defamation, Arena alleged the following:

> 64. Middletown's publication of its May 12, 2000 memo asserting that Arena had over[-]billed the Owner included false statements imputing Arena's financial practices, business practices and the qualifications and reputation of key senior personnel.
>
> 65. The statements published and distributed in Middletown's May 12, 2000 memorandum were distributed to representatives of the Owner and the Architect, and upon information and belief, other parties involved in the project.
>
> 66. Middletown's defamatory publications have damaged Arena because they were injurious to Arena's reputation, prompted the termination of the Prime Agreement and exposed the corporation to economic harm and harm to its relationships with its existing and potential clients.

Answer, ¶¶ 64-66. In previous paragraphs, which are incorporated by reference in the defamation count, Arena alleged that Middletown's false statement with regard to Arena's over-billing was made without privilege and in order to induce the Owner to terminate its contract with Arena and cause harm to Arena's business. Id. at ¶¶ 59-60. Additionally, Arena specifically alleged that Middletown through Harry Arena made these accusations of over-billing at a meeting on May 12, 2000 and that a memorandum was circulated at that meeting among representatives of the owner. Id. at ¶¶ 51-52. Arena also alleged that the owner retained counsel to investigate Middletown's allegations. Id. at ¶ 53.

Taking these allegations as true and all reasonable inferences derived therefrom, this court concludes that Arena has sufficiently set forth a cause of action for defamation. Therefore, the demurrer to Count II of the Counterclaim is overruled. Similarly, Arena's allegations are sufficiently specific and the Preliminary Objection, moving for a more specific pleading as to Count II, is also overruled.

C. Arena Cannot Maintain A Counterclaim for Breach of the Implied Duty of Good Faith and Fair Dealing Since It Failed to Allege A Breach of the Underlying Contract Between Itself and Middletown.

Middletown also demurs to Arena's Counterclaim for breach of the implied duty of good faith and fair dealing on the grounds that: (1) Arena's claim is redundant and identical to its claim for tortious interference with contractual relations; and (2) that Arena has failed to set forth an independent claim for breach of the implied duty of good faith. This court agrees with the latter argument.

First, the implied duty of good faith arises under the law of contracts, not under the law of torts. Creeger Brick and Building Supply Inc. v. Mid-State Bank and Trust Company, SEDA, 385 Pa.Super. 30, 35, 560 A.2d 151, 153 (1989). Section 205 of the Restatement (Second) of Contracts (1979) suggests that "[e]very contract imposes each party a duty of good faith and fair dealing in its performance and its enforcement." The Pennsylvania Superior Court expressly adopted this section in Creeger Brick, 385 Pa.Super. at 35, 560 A.2d at 153 and Baker v. Lafayette College, 350 Pa.Super. 68, 84, 504 A.2d 247, 255 (1986). See also, Donahue v. Federal Express Corp., 753 A.2d 238, 242 (2000)(examining duty in employment context); Kaplan v. Cablevision of Pa., Inc., 448 Pa.Super. 306, 318, 671 A.2d 716, 721-22 (1996)(addressing duty in class action suit by subscribers against cable companies); Liazis v. Kosta, Inc., 421 Pa.Super. 502, 510, 618 A.2d 450, 454 (1992)(examining duty in context of opening confessed judgment on note); Germantown Manufacturing Co. v. Rawlinson, 341 Pa.Super. 42, 60, 491 A.2d 138, 148 (1985)(same). A similar requirement has been imposed upon contracts within the Uniform Commercial Code by 13 Pa.C.S.A. § 1203. Somers v. Somers, 418 Pa.Super. 131, 136, 613 A.2d 1211, 1213 (1992). The duty of "good faith" has been defined as "[h]onesty in fact in the conduct or transaction concerned." Id. (citing 13 Pa.C.S.A. § 1201).

Essentially, the obligation to act in good faith in the performance of contractual duties varies somewhat with the factual context. However, examples of "bad faith" conduct include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Kaplan, 448 Pa.Super. at 318, 671 A.2d at 722 (quoting Somers, 418 Pa.Super. at 136, 613 A.2d at 1213, citing Restatement (Second) of Contracts, § 205, cmt. d.).

Nonetheless, the implied duty of good faith cannot act to displace the express terms of the contract. Further, there can be no implied duty as to any matter specifically covered by the written agreement. See Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 198, 519 A.2d 385, 388 (1986); Greek v. Wylie, 266 Pa. 18, 23, 109 A.529, 530 (1920); Reading Terminal Merchants Ass'n v. Samuel Rappaport Assocs., 310 Pa.Super. 165, 176, 456 A.2d 552, 557 (1983). See also, 11 Williston on Contracts § 1295 (3d ed. 1968) (implied term justifiable only when not inconsistent with express terms of contract and absolutely necessary to effectuate intent of parties). It is also true that "[t]he law will not imply a contract different than that which the parties have expressly adopted." Stonehedge Square Limited Partnership v. Movie Merchants, Inc., 454 Pa.Super. 468, 480, 685 A.2d 1019, 1025 (1996)(quoting Hutchison, 513 Pa. at 198, 519 A.2d at 388.). See also, Creeger Brick, 385 Pa.Super. at 36-37, 560 A.2d at 154 ("[t]he duty of good faith imposed upon contracting parties does not compel a lender to surrender rights which it has been given by statute or by the terms of its contract."); Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91 ("[c]ourts have utilized the good faith duty as an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action, but that duty is not divorced from the specific clauses of the contract and cannot be used to override an express contractual term."); Advanced

Lifeline Servs., Inc. v. Northern Health Facilities, Inc., 1997 WL 763024, at *4 (E.D.Pa. Dec. 9, 1997).

Moreover, there is no independent cause of action for breach of the implied duty of good faith absent an underlying breach of contract. See, e.g., Donahue, 753 A.2d at 242 (affirming dismissal of at-will employee's claim for breach of implied duty of good faith and fair dealing arising out of employee's termination); Kaplan, 448 Pa.Super. 306, 318, 671 A.2d 716, 721-22 (1996)(concluding that plaintiff did not have a viable claim for breach of contractual duty of good faith and fair dealing since cable companies were not contractually bound to provide continuous service or voluntarily provide credits for interruption of cable service); Commonwealth v. BASF, April 2000, No. 3127, slip op. at 21-22 (C.P. Phila. Mar. 15, 2001)(Herron, J.)(holding that plaintiff failed to allege that pharmaceutical company improperly performed one of the contractual duties imposed by the agreement, even though agreement had express "integrity" provisions).

Here, Arena set forth the following allegations in support of its Counterclaim for breach of the implied duty of good faith and fair dealing:

> 68. Upon information and belief, Middletown's publication of its May 12, 2000 memo was prepared so that the University would terminate the Prime Agreement and retain Middletown to perform the contractual work.
>
> 69. Middletown owed an implied duty of good faith and fair dealing to Arena to not interfere with the Prime Agreement between Arena and the University of the Arts.
>
> 70. Middletown's publication of its May 12, 2000 memo breached the aforesaid implied duty of good faith and fair dealing.
>
> 71. Middletown's actions in publishing its May 12, 2000 memo were intentional, willful, reckless and/or grossly negligent.
>
> 72. As a direct and proximate result of Middletown's breach of its implied duty of good faith and fair dealing, Arena incurred damages, costs and expenses in excess of

$100,000.

Answer, ¶¶ 68-72. Arena also alleged that it had entered into a written service agreement with Middletown, pursuant to which Middletown agreed to provide specified services in exchange for payment in accordance with agreed hourly rates. Id. at ¶ 50.

Notwithstanding these allegations, Arena did not plead an underlying breach of its agreement with Middletown. Rather, this dispute arises from the termination of Arena by the University of the Arts and the subsequent termination of Middletown by Arena. Arena's claims are more properly set forth in Counts I and II of its Counterclaim. It does not appear that Arena can set forth a cognizable claim for breach of the implied duty of good faith against Middletown. Therefore, the demurrer to Count III of the Counterclaim is sustained and this Count is dismissed.

CONCLUSION

For the reasons stated, this court is issuing a contemporaneous Order, overruling the Preliminary Objections to Counts I and II of the Counterclaim, and sustaining the Objections to Count III. Middletown shall have twenty-two (22) days from the date of this Opinion and contemporaneous Order to file an Answer to Counts I and II of the Counterclaim.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.