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

PHILADELPHIA PLAZA–PHASE II, Plaintiff	:	May Term, 2002
	:	No. 332
v.	:	
	:	Commerce Case Program
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Defendant	:	Control No.: 050206

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DENYING PLAINTIFF-PETITIONER'S PETITION FOR PRELIMINARY INJUNCTION

Plaintiff-Petitioner Philadelphia Plaza–Phase II ("Plaza") has filed a petition ("Petition") for a preliminary injunction ("Injunction") that would enjoin Defendant Bank of America National Trust and Savings Association ("BOA") from interfering with negotiations between Plaza and Deutsche Bank Alex Brown, Inc. ("Deutsche Bank") and from disseminating Plaza's business information to its competitors. For the reasons set forth in the following findings of fact, discussion and conclusions of law, the Court has denied the Petition.

FINDINGS OF FACT

1. Plaza owns and operates Two Commerce Square ("Property"), a 41-floor commercial office building located in the Philadelphia Center City business district. Transcript of Preliminary Injunction Hearing, May 14, 2002 39, 96 ("Tr.") .

2. In 1990, BOA extended a multi-million dollar loan to Plaza to finance construction of the Property in a series of promissory notes ("Notes"). Tr. 13. This transaction, the terms of

which were subsequently modified, is currently governed by an Amended and Restated Loan Agreement, dated March 27, 1996 ("Agreement"). Ex. P-1.

3. As security for payments required under the Agreement, Plaza executed a mortgage ("Mortgage") on the Property in favor of BOA. Ex. P-1 ¶ B.

4. The Agreement requires Plaza to obtain the "Mortgagee's" approval before undertaking certain actions with regard to the Property, including leasing the Property, selecting a Property manager, negotiating for construction and obtaining insurance. Ex. P-1 §§ 6.6, 7.4, 7.14, 7.15(c).

5. The Agreement also includes the following "Assignment Provision":

> The terms of this Agreement shall bind and benefit the heirs, legal representatives, successors and assigns of the parties; provided, however, that Borrower may not assign this Agreement without the prior written consent of Bank. Bank shall have the right to transfer the Loan to any other person or entities without the consent of or notice to Borrower. Without the consent of or notice to Borrower, Bank may disclose to any prospective purchaser of any securities issued by Bank, and to any prospective or actual purchaser of any interest in the Loan or any other loans made by Bank to Borrower, any financial or other information relating to Borrower, the Loan or the Property.

Ex. P-1 § 12.5.

6. In early February 2002, Plaza learned that BOA was marketing the Notes to third parties. Tr. 15-16, 19. As part of its marketing efforts, BOA provided third parties, including some of Plaza's alleged competitors, with Plaza's confidential business information ("Confidential Information")[1] that BOA had obtained in the course of its relationship with Plaza. Tr. 3-4.

[1] The Parties have stipulated that this information is, in fact, confidential. Tr. 101.

7. Accompanying the Confidential Information was an agreement under which the prospective Note purchaser agreed to keep the Confidential Information confidential. The key portion of this agreement reads as follows:

> By receiving the attached material, the recipient agrees that the memorandum shall be kept confidential and shall not, without prior written consent of the [Plaza] and [BOA], be disclosed by the recipient in any manner whatsoever, in whole or in part, and shall not be used other than in connection with the transactions described herein. Without limiting the generality of the foregoing, the recipient agrees that it will not use all or any portion of the memorandum in any manner prohibited by law . . . nor shall the recipient contact any representative of the [Plaza] or its agents without the proper written consent of [BOA].

Ex. D-14 4 (capitalization and boldface omitted).

8. Plaza purports to have discovered that BOA has entered into negotiations to sell the Notes to a mezzanine fund managed by Deutsche Bank. Tr. 15-16, 19.

9. In conjunction with these negotiations, BOA and Deutsche Bank entered into a confidentiality agreement ("Confidentiality Agreement") on March 6, 2002. D-16.

10. The Confidentiality Agreement contains the following provisions:

> The Prospective Purchaser agrees that the Evaluation Material will be used solely for the purpose of evaluating a possible purchase of the mortgage loans referenced above and will be kept confidential by the Prospective Purchaser. . . .
>
> Without the prior written consent of [BOA], the Prospective Purchaser will not disclose and will direct its Authorized Representatives not to disclose, to any person other than the Authorized Representatives, the Evaluation Material; provided that the Prospective Purchaser may, after written notification to the Company, make such disclosures to the extent the Prospective Purchaser has been advised by legal counsel that such disclosures are required by law. . . .

Ex. D-16 2.

11. Plaza has sought to negotiate with Deutsche Bank regarding possible participation in the purchase of the Notes and other related issues. Tr. 31.

12. BOA contends that any discussions between Deutsche Bank and Plaza have the potential to disrupt the negotiations between BOA and Deutsche Bank by alienating Deutsche Bank or presenting terms that reduce the value of the Notes. Tr. 75-76, 88-91.

13. BOA and Deutsche Bank have agreed between themselves that Deutsche Bank will not speak with Plaza about the Mortgage without BOA's consent. Tr. 64, 68. BOA has provided its consent on two occasions, but has subsequently refused to give its permission for continued discussions between Plaza and Deutsche Bank. Tr. 72-73.

14. According to Plaza, BOA has precluded Deutsche Bank from negotiating with Plaza regarding the purchase of the Notes based on the Confidentiality Agreement. Tr. 27, 31, 110-11.

15. Plaza asserts that mezzanine fund managers typically seek to foreclose on properties mortgaged to them as a way of maximizing return on their investment. Tr. 30. Plaza further asserts that Deutsche intends to bifurcate ownership of the Notes. Tr. 28-29, 45. These conditions, Plaza contends, will complicate its ability to secure the various approvals required under the Agreement and will create an intensely adversarial relationship with the Note holders. Tr. 28-30.

16. Plaza believes that it has a prospective contractual relation with Deutsche Bank and that BOA's actions interfere with that prospective relation. Compl. ¶¶ 46-50.

17. Based on its allegations, Plaza has requested an injunction ("Injunction") that (1) bars BOA from interfering with discussions between Plaza and Deutsche Bank and (2) prohibits BOA

from dissemination of additional Confidential Information to Plaza's alleged competitors. Compl.[2]

DISCUSSION

Plaza has provided four bases that supposedly provide it with a clear right to relief. Because none of these bases is sufficient, the Petition is denied.

In order for a petitioner to be entitled to a preliminary injunction, as governed by Pennsylvania Rule of Civil Procedure 1531, a petitioner must satisfy a five-part test:

1. The activity sought to be restrained is actionable and the petitioner has a clear right to relief therefrom;

2. The injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;

3. The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct;

4. Greater injury will result from refusing to issue the injunction than from issuing it; and

5. The injunction is reasonably suited to abate the activity in question.

School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 542 Pa. 335, 337 n.2, 667 A.2d 5, 6 n.2 (1995). A court may issue a preliminary injunction only "if each element is fully and completely established." McCluskey v. Washington Twp., 700 A.2d 573, 576 (Pa. Commw. Ct. 1997).

[2] Plaza has also requested, in effect, a declaration that the Confidentiality Agreement and the subsequent discussions between BOA and Deutsche Bank do not preclude Deutsche Bank from communicating with Plaza regarding the Notes. Pl. Prop. F.F. & Concl. L. in Sup. of Prelim. Inj. ¶ 4-6.

In this matter, Plaza has based its asserted clear right to relief on the implied covenant of good faith and fair dealing, trade secret misappropriation, "lender liability" and BOA's alleged interference with Plaza's prospective contractual relations with Deutsche Bank. Plaza does not have a clear right to relief on any of these grounds.

I. BOA Has Not Breached the Covenant of Good Faith and Fair Dealing Implied in the Agreement

Plaza concedes that BOA has not breached the express terms of the Agreement, but argues that the covenant of good faith and fair dealing implied in the Agreement and the doctrine of necessary implication bar BOA from disclosing the Confidential Information to third parties. Plaza also makes vague accusations that BOA's conduct breaches its implied obligation not to interfere with Plaza's right to redeem the Mortgage, although this assertion is articulated only generally and in passing. These arguments are without merit.

Section 205 of the Restatement (Second) of Contracts ("Section 205") states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Pennsylvania appellate courts have adopted Section 205 and relied on it repeatedly. See, e.g., Bethlehem Steel Corp. v. Litton Indus., Inc., 507 Pa. 88, 125, 488 A.2d 581, 600 (1985); Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 318, 671 A.2d 716, 721-22 (1996); Baker v. Lafayette College, 350 Pa. Super. 68, 84, 504 A.2d 247, 255 (1986), aff'd, 516 Pa. 291, 532 A.2d 399 (1987).[3]

[3] More recently, several Pennsylvania courts have ignored Section 205 and held that a covenant of good faith is implied only where the contracting parties have a "special relationship." See, e.g., Benevento v. Life USA Holding, Inc., 61 F. Supp. 2d 407, 424 (1999); Agrecycle, Inc. v. City of

One of the significant restrictions on the implied covenant of good faith is that it may not be used to imply terms that are inconsistent with the express terms of an agreement. Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91 (3d Cir. 2000); Stonehedge Square Limited Partnership v. Movie Merchants, Inc., 454 Pa. Super. 468, 480, 685 A.2d 1019, 1025 (1996), aff'd, 715 A.2d 1082; Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co., 385 Pa. Super. 30, 35, 560 A.2d 151, 153-54 (1989); Reading Terminal Merchants Ass'n v. Samuel Rappaport Assocs., 310 Pa. Super. 165, 176, 456 A.2d 552, 557 (1983). See also Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 198, 519 A.2d 385, 388 (1986) ("The law will not imply a contract different than that which the parties have expressly adopted."). The Pennsylvania Superior Court has stated that this principle is "particularly apt when reviewing a contract involving two parties of relatively equal bargaining power. . . ." Stonehedge Square, 454 Pa. Super. at 480, 685 A.2d at 1025.

Here, Plaza asks that the Court do exactly what Pennsylvania law prohibits. The Agreement specifically and broadly allows Plaza to disclose to a prospective Note purchaser "any financial or other information relating to Borrower, the Loan or the Property" "[w]ithout the consent of or notice to Borrower. . . ." Ex. P-1 § 12.5. Given Plaza's sophistication, it is proper to infer that Plaza contemplated the possibility, if not the probability, that a purchaser of the Notes would review information regarding the Property, including information that Plaza would consider confidential. In

---

Pittsburgh, 783 A.2d 863, 867 (Pa. Commw. Ct. 2001). This Court recently addressed this conflict in significant detail and concluded that the line of cases implying a covenant of good faith in all contracts is more persuasive and well reasoned. See Academy Indus., Inc. v. PNC Bank, N.A., May Term, 2000, No. 2383, slip op. (Pa. Com. Pl. May 20, 2002) (Sheppard, J.) (available at http://courts.phila.gov/cptcvcomp.htm).

addition, there is no indication that BOA either is insincere in its professed desire to assign the Notes or has disclosed the Confidential Information indiscriminately.[4] Thus, it would be inappropriate for the Court to impose limitations on BOA's disclosure rights along the lines of those proposed by Plaza, and BOA has not violated the covenant of good faith implied in the Agreement.

Plaza's reliance on the doctrine of necessary implication is similarly misplaced. The Pennsylvania Superior Court has articulated the doctrine of necessary implication as follows:

> In the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.

Slater v. Pearle Vision Center, 376 Pa. Super. 580, 586, 546 A.2d 676, 679 (1988) (quoting Frickert v. Deiter Bros. Fuel Co. Inc., 464 Pa. 596, 347 A.2d 701 (1975) (Pomeroy, J., concurring)).

Plaza's necessary implication argument hinges in primary part on its asserted right to redeem the Mortgage. Under Pennsylvania law, "[t]he mortgagor's equity of redemption is the title remaining in him subject to the mortgage and the right of redemption is the right to require the holder of the mortgage to receive payment of the matured debt and to satisfy the lien." Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Broad Street Hosp., 354 Pa. 123, 126, 47 A.2d 281, 282 (1946). To redeem a mortgage, the mortgagor must pay off the entire mortgage. 7 Summ. Pa. Jur. 2d Property § 21:116 (2000). See also Marshall E. Tracht, Renegotiation & Secured Credit: Explaining the Equity of Redemption, 52 Vand. L. Rev. 599 (1999) (tracing history of and justification for equity of

[4] Moreover, even those entities receiving BOA's initial "pitch book," which included a limited portion of the Confidential Information, were likely bound by the pitch book's confidentiality provision.

redemption). While Plaza has made allegations about the effect the sale of the Notes to Deutsche Bank or Plaza's competitors will have on its interest in the Property, there is no indication that these allegations are more than speculation or that any successors would refuse to honor Plaza's right to redeem the Mortgage. Moreover, by requesting that Deutsche Bank, now nothing more than a potential successor to BOA's rights under the Mortgage, restrict its contact with Plaza, BOA has not acted "to clog Philadelphia Plaza's equity of redemption." Pl. Mem. 14. Thus, the implied covenant of good faith and fair dealing and the doctrine of necessary implication do not grant Plaza a clear right to relief.

II. BOA's Actions Do Not Constitute an Intentional Interference with Plaza's Contractual Relations with Deutsche Bank

A successful claim for intentional interference with contractual relations 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).

Pennsylvania law permits an intentional interference action based on both existing and prospective contractual relationships. Glenn v. Point Park College, 441 Pa. 474, 477-78, 272 A.2d 895, 897 (1971); Glazer v. Chandler, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964). A prospective contractual relation is "something less than a contractual right, something more than a mere hope," although the term admittedly "has an evasive quality, eluding precise definition."

Thompson Coal v. Pike Coal Co., 488 Pa. 198, 209, 412 A.2d 466, 471 (1979). In essence, a plaintiff may recover when, "but for the wrongful acts of the defendants it is reasonably probable that a contract would have been entered." SHV Coal, Inc. v. Continental Grain Co., 376 Pa. Super. 241, 250, 545 A.2d 917, 921 (1988) (citation omitted), rev'd on other grounds, 526 Pa. 489, 587 A.2d 702 (1991). See also Glenn, 441 Pa. at 480, 272 A.2d at 898-99 (focusing on whether there is a "reasonable likelihood or probability" that a contract will arise).

Here, Plaza has failed to establish a reasonable probability that it would have reached an agreement with Deutsche Bank in the absence of BOA's actions. It is a significant leap from the testimony of James Thomas, Plaza's President, that "Deutsche Bank appeared to be willing to negotiate with him" to the conclusion that these negotiations would necessarily have been fruitful. A readiness to negotiate does not in and of itself signify that a contract is probable or likely. Accordingly, Plaza has not shown the existence of a contractual relation, a prerequisite for an intentional interference claim.

Moreover, BOA's conduct is privileged and therefore cannot constitute improper interference with Plaza's relation with Deutsche Bank. Pennsylvania courts have discussed the definition of "privilege" in the context of a claim for intentional interference in great detail:

> Unlike other intentional torts such as intentional injury to person or property or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in [Restatement (Second) of Torts] §§ 766, 766A or 766B.[5]

[5] These sections address intentional interference with performance of contract by a third party, intentional interference with another's performance with his own contract and intentional interference with prospective contractual relations.

Ruffing v. 84 Lumber Co., 410 Pa. Super. 459, 468, 600 A.2d 545, 549 (1992) (quoting Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 433 n.17, 393 A.2d 1175, 1184 n.17 (1978), and Restatement (Second) of Torts § 767 cmt. b). Because of this, Pennsylvania courts have held that "the absence of privilege or justification on the part of the defendant is merely another way of stating that the defendant's conduct must be improper." Cloverleaf Dev., Inc. v. Horizon Fin. F.A., 347 Pa. Super. 75, 83, 500 A.2d 163, 167 (quoting Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 281 Pa. Super. 560, 581 n.11, 422 A.2d 611, 622 n.11 (1980)) (quotation marks omitted). See also Adler, Barish, Daniels, Levin & Creskoff, 482 Pa. at 433 n.17, 393 A.2d at 1184 n.17 (noting that Restatement (Second) of Torts § 767 "focuses upon whether conduct is 'proper,' rather than 'privileged'").

To determine whether a defendant's conduct is improper, a court must weigh the following six factors:

> (a) the nature of the actor's conduct;
> (b) the actor's motive;
> (c) the interests of the other with which the actor's conduct interferes;
> (d) the interests sought to be advanced by the actor;
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
> (f) the proximity or remoteness of the actor's conduct to the interference; and
> (g) the relations between the parties.

Small v. Juniata College, 452 Pa. Super. 410, 418, 682 A.2d 350, 354 (1996) (quoting Restatement (Second) of Torts § 767).

Each of these factors weighs in favor of treating BOA's conduct as proper. BOA's conduct has amounted to nothing more than asking Deutsche Bank to refrain from negotiating with Plaza and is

motivated by its legitimate interest in preventing any Plaza-Deutsche Bank negotiations from souring BOA's discussions with Deutsche Bank. Moreover, Plaza's desire to secure an interest in the Mortgage and to reach an arrangement with Deutsche Bank is subordinate to BOA's right, as authorized in the Agreement, to transfer its interest in the Mortgage and the Notes.[6] Thus, Plaza's intentional interference argument is rejected.

III. BOA's Disclosure of the Confidential Information Does Not Constitute a Misappropriation of Trade Secrets

Next, Plaza contends that BOA's disclosure of the Confidential Information to prospective Note purchasers amounts to misappropriation of Plaza's trade secrets. The Court does not agree.

The Pennsylvania Supreme Court has adopted the test set forth in Restatement of Torts Section 757 (1939) for determining whether there has been a misappropriation of trade secrets:

> One who discloses or uses another's trade secret, without privilege to do so, is liable to the other if
>
> (a) he discovered the secret by improper means, Or
>
> (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, ...

College Watercolor Group, Inc. v. William H. Newbauer, Inc., 468 Pa. 103, 112, 360 A.2d 200, 205 (1976); Van Products Co. v. General Welding and Fabricating Co., 419 Pa. 248, 258 n.3, 213 A.2d 769, 774 (1965). See also Den-Tal-Ez, Inc. v. Siemens Capital Corp., 389 Pa. Super. 219, 249, 566

[6] Plaza's assertion that transferring the Notes to Deutsche Bank will lead to default and foreclosure on the Property is nothing more than speculation and cannot be relied on for issuing the Injunction.

A.2d 1214, 1229 (1989) ("Pennsylvania law . . . requires the existence of a confidential relationship or discovery of the trade secret by improper means.").[7]

In this instance, it is impossible to conclude that BOA's disclosure of the Confidential Information was improper. The Agreement itself specifically authorizes the disclosure of information to prospective Note purchasers and allows such disclosure without Plaza's permission. This renders BOA's conduct proper, if not privileged. Cf. Restatement of Torts § 757 cmt. d (1939) ("A privilege to disclose or use another's trade secret may arise from the other's consent or from other conduct on his part by which he is estopped from complaining."). Thus, Plaza's misappropriation of trade secrets theory does not provide it with a clear right to relief.

IV. Plaza Does Not Have a Clear Right to Relief under a Lender Liability Theory

---

[7] Under a similar approach set forth in Restatement of Torts Section 759 (1939), "[o]ne who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information." Den-Tal-Ez, 389 Pa. Super. at 253, 566 A.2d at 1231. In an employee context, Pennsylvania courts have adopted a slightly different test:

> (1) that there was a trade secret . . . ; (2) that it was of value to employer and important in the conduct of his business; (3) that by reason of discovery [or] ownership the employer had the right to the use and enjoyment of the secret; and (4) that the secret was communicated to the employee while he was in a position of trust and confidence under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer.

A.M. Skier Agency, Inc. v. Gold, 747 A.2d 936, 940 (Pa. Super. Ct. 2000) (citing Gruenwald v. Advanced Computer Applications, Inc., 730 A.2d 1004, 1012-13 (Pa. Super. Ct. 1999)). See also Felmlee v. Lockett, 466 Pa. 1, 351 A.2d 273, 277 (1976) (applying test to request for injunctive relief against former employee). Under each of these tests, the focus is on whether the defendant's conduct is improper, inequitable or unjust.

Last, Plaza asserts a claim based on "lender liability." The phrase "lender liability" does not refer to a specific course of conduct, but rather "has now taken on a broad meaning to refer to any kind of liability that can grow out of the lender/borrower relationship." Pearson v. Component Tech. Corp., 247 F.3d 471, 492 (3d Cir. 2000). See also Cary Smith, Breach fo Good Faith as an Expansive Basis for Lender Liability Claims: An Idea Whose Time Has Come–and Gone?, 42 Rutgers L. Rev. 177 (1989) (reviewing "the development of the legal doctrine of good faith as the bellwether claim for lender liability"). However, lender liability itself is not the basis for a separate claim:

> Lender liability is not an independent cause of action, but a term that refers to the imposition of traditional contract or tort liability on a bank or other financial institution. It may be predicated on, inter alia, breach of contract, breach of fiduciary duty, common law fraud, duress, tortious interference with contract, defamation or negligence.

Cary Oil, Inc. v. MG Refining & Mktg., Inc., 90 F. Supp. 2d 401, 418 (S.D.N.Y. 2000) (footnotes omitted) (dismissing plaintiffs' stand-alone lender liability claim as "entirely duplicative" where they alleged separate claims on vicarious liability and tortious interference theories). Furthermore, to the extent Plaza's lender liability arguments are duplicative of its good faith contentions, they have been addressed and rejected supra. Cf. Creeger Brick, 385 Pa. Super. at 36, 560 A.2d at 154 ("It seems reasonably clear from the decided cases that a lending institution does not violate a separate duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights as a creditor.").[8] As such, lender liability does not provide Plaza with a clear right to relief.[9]

---

[8] Indeed, Plaza's lender liability arguments are little more than a rehashing of its good faith points.

[9] Plaza's request for an interpretation of Deutsche Bank's obligations under the Confidentiality Agreement must be denied as well. As a preliminary matter, Plaza has never explicitly asserted a claim for a declaratory judgment. More significantly, granting Plaza's request would amount to issuing an

CONCLUSIONS OF LAW

1. The Plaintiff has failed to show that it has a clear right to relief.

2. The Court must deny the Plaintiff's Petition for Preliminary Injunction.

---

impermissible advisory opinion:

> The purpose of awarding declaratory relief is to bring a final settlement to and make certain the rights or legal status of the parties. A declaratory judgment action cannot be used as a vehicle to determine rights in anticipation of events that may not occur, for consideration of moot issues, or for an advisory opinion that may prove to be purely academic. Only where there is a real controversy, may a party obtain a declaratory judgment. The presence of a real controversy indicating imminent and inevitable litigation coupled with a clear manifestation that the declaration sought will be of practical value in ending the controversy are essential to obtaining relief by way of a declaratory judgment action.

Lowther v. Roxborough Mem. Hosp., 738 A.2d 480, 489-90 (Pa. Super. Ct. 1999) (citing Geisinger Clinic v. DiCuccio, 414 Pa. Super. 85, 606 A.2d 509 (1992)).

Here, the dispute is over Deutsche Bank's obligations and rights under the Confidentiality Agreement and is, in truth, not a "controversy." Plaza cannot insinuate itself into BOA's relationship with Deutsche Bank, and its attempt to manufacture a conflict over the Confidentiality Agreement's interpretation is nothing more than theoretical in the absence of an indication that Deutsche Bank has a desire to communicate with Plaza. The record reveals no such desire. Indeed, the fact that Deutsche Bank agreed to BOA's request not to speak with Plaza may be interpreted as a lack of a substantial desire to communicate with Plaza. Thus, there is no basis for allowing the Court to issue a pronouncement regarding the Confidentiality Agreement.

In addition, the Court questions whether it is appropriate for Plaza to request a declaration as to the rights of Deutsche Bank, a non-party to these proceedings, that arise under an agreement to which Plaza is not a party. Cf. Pennsylvania Ins. Guar. Ass'n v. Schreffler, 360 Pa. Super. 319, 322, 520 A.2d 477, 479 (1987) ("When declaratory relief is sought, our Declaratory Judgments Act mandates that all persons who have or claim any interest which would be affected by the declaration be made parties to the proceeding."). If Deutsche Bank seeks to have the Court ascertain its obligations under the Confidentiality Agreement, perhaps such a request could be entertained. However, Plaza cannot do this on its own, and its request for a declaration interpreting Deutsche Bank's responsibilities under the Confidentiality Agreement is denied.

On this basis, the Court is entering a contemporaneous Order denying the Petition.

BY THE COURT:

_____

JOHN W. HERRON, J.

Dated: May 30, 2002

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

PHILADELPHIA PLAZA–PHASE II,	:	May Term, 2002
Plaintiff	:	
	:	No. 332
v.	:	
	:	Commerce Case Program
BANK OF AMERICA NATIONAL TRUST :		
AND SAVINGS ASSOCIATION,	:	Control No.: 050206
Defendant	:	

AND NOW, this 30th day of May, 2002, upon consideration of the Petition of Plaintiff Philadelphia Plaza–Phase II for a Preliminary Injunction, the response thereto by Defendant Bank of America National Trust and Savings Association, the hearing and oral argument held thereon and all relevant documentation, and in accordance with the reasons set forth in the contemporaneously issued Opinion, it is hereby ORDERED that the Petition is DENIED.

BY THE COURT:

_____
JOHN W. HERRON, J.