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

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| POLIN ASSOCIATES, et al., | : | March Term, 2000 |
| Plaintiffs | : | |
| | : | No. 2447 |
| v. | : | |
| | : | Commerce Case Program |
| CIGNA a/k/a INSURANCE COMPANY OF | : | |
| NORTH AMERICA, et al., | : | Control No. 090950 |
| Defendants | : | |

## MEMORANDUM OPINION

Defendants Robert McKaige ("McKaige") and FOCINT, Inc. ("FOCINT") (collectively, "Movants") have filed preliminary objections ("Objections") to the amended complaint ("Complaint") of Plaintiffs Polin Associates ("Polin") and Systems Consulting Support, Inc. ("SCS"). For the reasons set forth in this Opinion, the Court is issuing a contemporaneous Order overruling the Objections.

## BACKGROUND

SCS is an employee placement agency that provides workers to businesses in need of temporary assistance. The Complaint alleges that SCS entered into an oral agreement ("Agreement") with FOCINT and McKaige, FOCINT's sole shareholder and officer, on May 29, 1997. Under the Agreement, SCS assigned workers to the Movants, who in turn assigned the workers to positions at CIGNA a/k/a Insurance Company of North America ("CIGNA"). The Agreement further provided that CIGNA was to pay the Movants, who would then pay SCS and retain the difference between the amount received from CIGNA and the amount due to SCS.

At the time of the Agreement, the Movants allegedly represented to SCS that they were "CIGNA-approved vendors" and not vendors who provided services to CIGNA on an "exception basis." According to the Complaint, the Movants' "approved vendor" status entitled them to precedence over "exception vendors" when CIGNA used outside workers on its projects.

SCS asserts it provided the workers as required under the Agreement and sent the Movants invoices for a total of $135,401.88. However, the Movants allegedly failed to pay the invoices. Joel Polin, Polin's principal,[1] notified CIGNA of the Movants' alleged delinquency and threatened to discontinue providing workers unless CIGNA made payments directly to SCS. The Complaint alleges that CIGNA responded by orally agreeing to pay Polin in exchange for SCS continuing to provide workers.

In spite of the oral arrangement, neither Polin nor SCS received payment from CIGNA or the Movants. In addition, the Complaint claims that the Defendants are not "approved vendors," and that this misrepresentation prevented SCS from applying for and receiving "approved vendor" status.

On April 30, 1998, SCS instituted a civil action in the Court of Common Pleas of Bucks County, Pennsylvania against the Movants ("Bucks Suit"). SCS filed an amended complaint in the Bucks Suit on May 31, 1999, asserting claims for breach of contract, unjust enrichment, conversion, fraud, intentional interference with contractual relations and punitive damages against both Movants.

The Plaintiffs filed the instant suit against CIGNA in Philadelphia County ("Philadelphia Suit") on March 22, 2000. The Court sustained CIGNA's preliminary objections to the initial complaint

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[1] The Complaint states that "Polin and SCS frequently work together to jointly service clients and coordinate resources." Complaint at ¶ 4.

based on a failure to join FOCINT in the Philadelphia Suit. On August 2, the Plaintiffs filed the Complaint, which is identical to the Bucks Suit complaint except that it includes two counts by the Plaintiffs against CIGNA for breach of contract and estoppel. According to the Plaintiffs' Memorandum, an uncontested motion to coordinate the Bucks and Philadelphia Suits has been filed in the Bucks Suit and is currently pending.

**DISCUSSION**

While there are a number of similarities between the Bucks and Philadelphia Suits, the parties and the causes of action are not identical. Consequently, the Bucks Suit does not qualify as a pending prior action, and the Objections are overruled.

Pennsylvania Rule of Civil Procedure 1028(a)(6) allows a party to raise preliminary objections based on the pendency of a prior action. This protects "a defendant from harassment by having to defend several suits on the same cause of action at the same time." Penox Techs., Inc. v. Foster Med. Group, 376 Pa. Super. 450, 453, 546 A.2d 114, 115 (1988).

Under Pennsylvania law, the question of a pending prior action "is purely a question of law determinable from an inspection of the pleadings." Davis Cookie Co. v. Wasley, 389 Pa. Super. 112, 121, 566 A.2d 870, 874 (1989) (quoting Hessenbruch v. Markle, 194 Pa. 581, 592, 45 A. 669, 671 (1900)). To sustain a preliminary objection based on a pending prior action, "the objecting party must demonstrate to the court that in each case the parties are the same, and the rights asserted and the relief prayed for are the same." Virginia Mansions Condominium Ass'n v. Lampl, 380 Pa. Super. 452, 456, 552 A.2d 275, 277 (1988). This test must be applied strictly. Norristown Auto. Co. v. Hand, 386 Pa. Super. 269, 274, 562 A.2d 902, 904 (1989). See also Davis Cookie Co., 389 Pa. Super. at 120,

566 A.2d at 874 (requiring that the parties be "acting in the same legal capacity" in both actions). But see Hessenbruch, 194 Pa. at 594, 45 A. at 671 (although a plaintiff in the first suit may be a defendant in the second suit, the fact that the same persons are present in both suits allows a court, "with perhaps some liberality of construction, [to] assume that the parties are the same").

Although the Complaint bares a striking resemblance to the amended complaint filed in the Bucks Suit, there are several key differences. First, the parties in the two Suits are different. In the Philadelphia Suit, Polin is a Plaintiff and CIGNA is a Defendant, but neither one has any apparent connection to the Bucks Suit. In addition, the claims asserted against CIGNA here are not raised in the Bucks Suit. These differences appear to doom the Objections.

The Movants counter that the Plaintiffs have involved CIGNA and Polin in the Philadelphia Suit in an attempt to circumvent the rules regarding pending prior actions. They maintain that "lis pendens prevents this type of gamesmanship because [of] judicial economy, expense and duplication of effort."[2] No citation is offered to bolster this conclusion.

Pennsylvania law does not support the position put forward by the Movants:

> While federal courts are free to consider the motivations of the parties and the interests of judicial economy, Pennsylvania courts are not. In Pennsylvania, the record is reviewed to determine if the required common law unities are present. If they are present, the plea is to be sustained; if they are not, the plea may not be sustained. It is a question of law, rather than a question of the court's discretion.

[2] FOCINT and McKaige assert that the Plaintiffs were motivated by the fact that "Philadelphia presented a more favorable venue." FOCINT/McKaige Memorandum at 4.

Davis Cookie Co., 389 Pa. Super. at 121, 566 A.2d at 874. Consequently, the Movants' efficiency and motivation arguments are irrelevant for the purposes of the Objections. Accordingly, the Objections are overruled.[3]

**CONCLUSION**

Because the parties and the causes of action in the Philadelphia Suit are not identical to those in the Bucks Suit, the Objections are overruled. The Movants are to file an answer to the Complaint within twenty days of this Opinion.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: November 3, 2000

[3] It is important to note that a party "raising the defense of lis pendens can ask that the action in which the defense is being raised be abated, that it be stayed pending the outcome of the prior litigation, or that the actions be consolidated." Norristown Auto. Co., 386 Pa. Super. at 275-76, 562 A.2d at 905 (citing Virginia Mansions Condominium Ass'n, 380 Pa. Super. at 456, 552 A.2d at 278). The Court has received no such request from the Movants.

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**ORDER**

AND NOW, this 3rd day of November, 2000, upon consideration of the Preliminary Objections of Defendants Robert McKaige and FOCINT, Inc. to the amended complaint of Plaintiffs Polin Associates and Systems Consulting Support, Inc. and the Plaintiffs' response 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 OVERRULED. The Defendants are directed to file an answer within twenty days of this Order.

BY THE COURT:

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JOHN W. HERRON, J.