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

SAGOT JENNINGS & SIGMOND		: APRIL TERM, 2002
	Plaintiff,	: No. 3099
v.		: Commerce Program
NEIL SAGOT		: **Superior Court Docket**
	Defendant	**No. 434 EDA 2003**

O P I N I O N

Albert W. Sheppard, Jr., J. ..... April 2, 2003

This Opinion is submitted relative to the appeal of defendant, Neil Sagot, Esquire of this court's Order of December 31, 2002,

For purposes of this appeal this court respectfully resubmits and will rely upon its Opinion, dated December 31, 2002. A true copy of that Opinion is attached and marked Appendix "A".[1]

However, additional comments are appropriate to address appellant's Pa.R.A.P. 1925(b) response.

---

[1]It must be noted that that December 31st Opinion applied also to a companion case, C.C.P. 0206-3098, which is also on appeal at 433EDA2003.

To assist the appellate court, the relevant portions of that Opinion are at pages 1 through 14 and 26.

In his Pa.R.A.P. 1925(b) response, Mr. Sagot ascribes error to the portions of this court's Order which required him: (a) to submit to counsel for appellee a compilation of files which have been settled or otherwise disposed, listing the amount of funds received, and (b) to escrow an amount equal to 55% of the costs expended on all files he took from his prior law firm which costs had been expended by his prior law firm.[2]

These issues are addressed in the prior Opinion (Appendix "A") at page 11 through 12. In summary, this court sitting as a chancellor in equity believed it was necessary to issue the limited injunction to prevent irreparable injury and maintain the *status quo* pending arbitration, relying on Langston v. National Media Corporation, 420 Pa. Super. 611, 616-617, 617 A.2d 354, 357 (1992); Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806 (3d Cir. 1989). It was the fair thing to do under the circumstances.

In conclusion, then, this court respectfully submits that based upon its Opinion of December 31, 2002, the Order of December 31, 2002 should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[2]In his Rule 1925(b) Statement, Mr. Sagot also includes as error that portion of this court's Order requiring similar conduct of his new law firm, Neil Sagot, P.C. But, his firm is not a party to this lawsuit (although, it is a named defendant in the companion case). Accordingly, this court will not address that assignment of error.

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

SAGOT JENNINGS & SIGMOND	: APRIL TERM, 2002
Plaintiff,	: No. 3099
v.	: **Commerce Program**
NEIL SAGOT Defendant	: Control Numbers: 50455, 80450, 70940

JENNINGS SIGMOND,	: JUNE TERM, 2002
Plaintiff,	: No. 3098
v.	: **Commerce Program**
PHILLIPS & BROOKE, P.C., NEIL SAGOT, P.C., LAURA M. BROOKE, and STUART J. PHILLIPS, Defendants.	: : Control No. 71044

O P I N I O N

Albert W. Sheppard, Jr., J. ..... December 31, 2002

Presently before the court are five motions relating to two cases filed by the same plaintiff, albeit under different names. The facts underlying both complaints are essentially the same and may be summarized.

APPENDIX "A"

FACTUAL BACKGROUND

The plaintiff in Sagot, Jennings & Sigmond v. Sagot ("Sagot I"), and the plaintiff in Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura Brooke and Stuart Phillips ("Sagot II") are essentially the same entity. Sagot II, ¶ 1. Sagot, Jennings and Sigmond was the original name of the plaintiff's law firm, now Jennings Sigmond. Neil Sagot ("Sagot") was a shareholder and named partner in that firm. Id., ¶ 5; Sagot I, ¶ 6. Prior to April 17, 2002, the parties had been negotiating procedures for Sagot to leave the firm. Sagot I, ¶ 3; Sagot II, ¶ 8. Those negotiations were unsuccessful and this litigation ensued.

Sagot I was filed on April 19, 2002. Plaintiff alleges that on the night of April 17th, defendant Sagot went to the law firm ("SJS") offices and took from the premises firm possessions and files. Sagot maintains that he had a right to do so. Sagot I, ¶¶ 4-10; Sagot II, ¶¶ 12-15. These files contained client records, administrative information, corporate records, and checks made out to clients. Id. Apparently, an attorney working late became aware of what was taking place and tried to stop it. He then called Jennings and Sigmond, the other principals of the firm. Id. Allegedly, Jennings and Sigmond tried to persuade Sagot to leave the files in an area to which only the manager of the building had access, but Sagot refused and left with the contested files and possessions. Id. Plaintiff alleges that Sagot has since deposited some of the checks made out to the SJS firm in his own individual account. Id. Sagot purportedly also interfered with the distribution of mail to SJS offices. Id.

Plaintiff further alleges that the parties have a contract, the Stockholders' Agreement (the "Agreement") which states that if Sagot were to leave the firm and a client of SJS later wished to be represented by him, Sagot would be obligated to pay SJS one-third of the fee. Sagot I, ¶ 11; Sagot II, ¶

16. Plaintiff contends that, instead, for about a month before his departure, Sagot was taking on new clients in his capacity as an attorney with SJS, without establishing SJS files for the new clients, and with the intention of secretly transferring those files to his new firm without paying the one-third fee to SJS. Id. Furthermore, Sagot was allegedly incurring suspiciously high costs during his last days at SJS. Id. Sagot purportedly declared that he would not reimburse his former partners for any expenses SJS incurred in the representation of any client which he "took." Id.

Sagot II was filed on June 24, 2002. In Sagot II, plaintiff, now Jennings Sigmond ("JS"), names Neil Sagot, P.C. as a defendant. The remaining three defendants are Phillips and Brooke, P.C., Laura Brooke, and Stuart Phillips. Laura Brooke ("Brooke") and Stuart Phillips ("Phillips") were associates in SJS. Sagot II, ¶ 6. In Sagot II, plaintiff reiterates most of the allegations stated in Sagot I but also alleges the following facts: The "scheme to defraud" JS started early in the Spring of 2002, when Sagot enticed Brooke and Phillips to leave SJS with him. Id., ¶ 7. Purportedly, both Brooke and Phillips acted with Sagot to take firm files and possessions on the night of April 17, 2002. Id., ¶9. Brooke went with Sagot to the firm's Philadelphia office, and Phillips went to the New Jersey office of SJS. Id., ¶¶ 9-10. Sagot apparently left a note in the Philadelphia office to the effect that he was leaving the firm. Id., ¶ 9.

Subsequently, Sagot, individually, and Phillips and Brooke, jointly, formed two professional corporations, which purport to be independent. Id., ¶ 16. Plaintiff contends, that the corporations are represented as independent merely to allow defendants to defraud JS. Id. Plaintiff asserts that Sagot would pretend to refer clients to Phillips and Brooke, P.C. Id. That "superficially" independent firm would then reimburse Sagot, P.C. for one-third of the fees received from the referred client. Id. As this scenario goes, Sagot would have defrauded JS of the true amount of the referral fee he owes under the agreement.

Id. Additionally, in the months leading to their departure from SJS but while still employed there Phillips and Brooke had allegedly already engaged in obtaining the representation of new clients, for which they did not establish files at SJS, and which they eventually quietly transferred to their new firm, as Sagot purportedly did. Id. Also, similar to Sagot's alleged behavior, Phillips and Brooke purportedly arranged that SJS, rather than defendants' new firm, would incur certain costs for these clients. Id.

Plaintiff further alleges that subsequent to defendants' departure, defendants sent letters to SJS clients on letterhead of the newly formed corporations, intentionally misinforming the recipients that JS no longer had either personal injury or workers' compensation practices. Sagot II, ¶ 18. Purportedly, clients have requested that their files be returned to JS, but defendants have refused to do so. Id., ¶ 19.

Sagot I was filed in equity, brings claims in conversion, breaches of fiduciary duty and duty of loyalty, and seeks injunctive relief. Sagot I, ¶¶ 17, 21, 23. A summary of the requests for relief include: an accounting of all items removed from plaintiff's premises, non-destruction of such items, a return of all such items, delivery of mail interfered with and the reversal of the interference with plaintiff's mail, an accounting as to all checks or other financial instruments possessed by defendants and earned by, or intended for, plaintiff, an accounting of clients or prospective clients who contacted defendant to represent them, and an order directing a letter be sent to all clients whose files were removed informing them that they have a choice of counsel. Sagot I.

Sagot II is a civil complaint with five counts. Count I is a claim of common law fraud against all defendants for their defrauding plaintiff of its rightful client fees. Sagot II, ¶¶ 21-28. Count II is a claim for conversion against all defendants for plaintiff's property that was allegedly taken the night of April 17. Id., ¶¶ 29-33. Count III is a claim for breach of duty of loyalty against Brooke and Phillips, for their conduct

while they were employed at plaintiff's firm. Id., ¶¶ 34-38. Count IV is a claim and request for constructive trust, to be imposed on the fees defendants earn from clients who retained defendants while they still practiced at SJS. Id., ¶¶ 39-41. Finally, Count V is a claim of tortious interference with business relations, regarding defendants' actions relating to plaintiff's clients. Id., ¶¶ 42-47.

PROCEDURAL BACKGROUND

This Court issued an Order pertinent to Sagot I, temporarily granting plaintiff's requests for an accounting for both files and checks and lists of clients, and ordering defendants to comply with plaintiff's discovery. The court also entered an Order in Sagot I, dated April 30, 2002, directing the prothonotary to accept a settlement check pertaining to one of the contested clients, Joseph Reed. On May 6, 2002, the court ordered the check be divided into the amount due Mr. Reed, and an amount to be deposited into an escrow account with the Philadelphia Court Prothonotary.

On May 29, 2002, the court ordered that: (a) plaintiff could inspect the files removed from their premises, (b) plaintiff could depose Sagot within twenty days, and (c) plaintiff could send a letter to the clients who had formerly received letters from Sagot with the erroneous information that the plaintiff firm had no remaining personal injury or workers' compensation practice, notifying the clients otherwise. Sagot submitted an affidavit on June 13, 2002, containing information about client files, settled cases, fees and expenses.

Defendant Sagot initially filed an Answer, New Matter, and Counterclaim to Sagot I on June 4, 2002, to which plaintiff replied on June 20, 2002. On October 17, 2002, Sagot filed a withdrawal of his Counterclaim.

As to Sagot I, there are four motions pending before the court: 1) defendant's Motion to Stay Proceedings; 2) Plaintiff's Motion for Leave to File an Amended Complaint and Consolidate Separate Actions; 3) defendant's Petition to Compel Arbitration; and, 4) plaintiff's Motion for Contempt relating to discovery. As to Sagot II, there is a Motion to Determine Preliminary Objections.

The court conducted a hearing on September 18, 2002, on all of the issues raised in the pending motions. No testimony was taken. The parties have corresponded extensively with the court, and shared with the court copies of their correspondence with each other, containing information about client files and settled cases. Notwithstanding all the rhetoric exchanged, there is no evidence in the record, except for the critical Agreement.[1] The court will thus consider the pleadings and arguments presented in the briefs and at the hearing in ruling on the motions.[2]

---

[1] The plaintiff refers to the Agreement in both complaints. It is an essential document to the causes of action yet it was not attached to either of the Complaints. Defendants have attached it to every one of their motions and plaintiff, in referring to defendants' attached document as the Agreement, concedes it is the contract they rely upon in the Complaints. See Plaintiff's Answer to Petition to Compel Arbitration, ¶¶ 5, 14.

[2] In affidavits, in letters to the Court, in the motion briefs, and at the hearing, the parties have often referred to their perception of the "true facts" or the "counter facts." As lawyers, the parties should realize what the court may ***not*** consider as facts. Furthermore, as officers of the court, the parties could have shown some dignity by sparing the reader of their references to each other as liars and thieves, and refraining generally from soap box rhetoric.

DISCUSSION

I. THE MOTION TO STAY PROCEEDINGS AND THE PETITION TO COMPEL ARBITRATION IN SAGOT I

In response to plaintiff filing Sagot I, defendant Sagot filed a Motion to Stay Proceedings on May 10, 2002. Plaintiff filed a response to that motion on May 14, 2002. Then came a reply, and a sur-reply. On August 8, 2002, Sagot filed a Petition to Compel Arbitration regarding Sagot I, to which plaintiff responded on September 6, 2002. The arbitration issue in both motions is substantively the same.

The Agreement, executed on January 1, 1996, by Sagot, Jennings, and Sigmond, along with other stockholders, contains an arbitration clause. Motion to Stay Proceedings ("Motion to Stay"), Exh. A, ¶ 18. The arbitration clause provides, in pertinent part:

> If any disagreement, difference or controversy relating to or arising out of or under this Agreement, whether concerning the construction or operation hereof, the respective rights and obligations of the parties hereto or otherwise, arises between (1) any Stockholder (or his heirs, personal representatives, estate or assigns) and (2) Corporation [the firm] (or its successors or assigns) and/or any other Stockholder (or his heirs, personal representatives, estate or assigns), and the parties involved cannot mutually resolve such disagreement, difference or controversy, then the same shall be finally determined by arbitration pursuant to the rules of the American Arbitration Association.

Id. The clause then addresses the finality of the arbitrators' ruling, the allocation of costs and expenses, and conflicts between the arbitrator's decision and the remaining clauses of the Agreement. Id. Notably, the clause also adds "[j]udgment upon the award of the arbitrators may be entered in any court having proper jurisdiction." Id.

"A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract." 42 Pa. C.S. § 7303. Statutory law further mandates that courts stay any proceedings involving issues allegedly subject to arbitration and proceed summarily to determine the existence and validity of an agreement to arbitrate. 42 Pa. C. S. §§ 7304 (a), (d); 9 U.S.C. § 3.

The existence of a valid arbitration agreement is not disputed. The single issue presented in both the Motion to Stay and the Petition to Compel Arbitration is whether the parties' dispute in Sagot I is subject to the arbitration clause of the Agreement. "It is well settled that the issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide." Shadduck v. Kaclik, 713 A.2d 635, 637 (Pa. Super. 1998).

In the Motion to Stay and the Petition to Compel Arbitration, Sagot claims that:

> (1) The gist of the dispute arises under the Agreement. Indeed, according to Sagot, plaintiff complains of violations of rights deriving from the contractual agreement between them and, thus, the dispute must be submitted to arbitration. Petition to Compel Arbitration, p. 4; Motion to Stay, pp. 2-3.
>
> (2) The complained of behavior is his right under the Agreement, specifically Section 11 A (2) of the Agreement. Thus, his defense even as to what arguably may be a tort claim would bring the dispute squarely under arbitration as reflected in the language of the Agreement. Id.

Plaintiff responds that:

> (1) By virtue of the plain terms of the contract, the arbitration provision only applies to disagreements sounding in contract and plaintiff only brings tort claims before the court. Id., p. 3; Plaintiff's Memorandum of Law in Opposition to Petition, pp. 6-7.

(2) Even as to arbitrable matters, parties may seek injunctive relief from the court where irreparable harm would ensue otherwise, rendering arbitration a "hollow formality." Plaintiff's Answer to Defendant's Motion to Stay Proceedings, p. 5.

(3) Defendant waived his arbitration defense by bringing counterclaims against plaintiff in court. Plaintiff's Memorandum of Law in Opposition to Petition, pp. 3-4.

This court agrees with defendant that the dispute is embedded in the relationship between the parties as stockholders, and thus, the arbitration clause applies to the plaintiff's claims. In Pittsburgh Logistics Systems, Inc. v. Professional Transportation and Logistics, Inc., 803 A.2d 776, 778 (Pa. Super. 2002), plaintiff's complaint embodied three counts in tort and one in contract, relating to an employment contract with a confidentiality agreement. There, the trial court granted defendant's preliminary objections to dismiss and compel arbitration on the contract claim but overruled the objections to the tort claims. Id. The parties had agreed to arbitration and, as in the case before this court, the arbitration clause referred only to claims or disputes *arising out of or relating to this Agreement.* Id., at 779. The Superior Court reversed, finding that the tort claims did arise out of the parties' contract. Id., at 781. The Superior Court relied on Ambridge Borough Water Authority v. Columbia, 458 Pa. 546, 328 A.2d 498 (1974) and Shadduck v. Kaclik, Inc., 713 A.2d 635 (Pa. Super. 1998), to support its holding that, notwithstanding the nature of the claims, plaintiff complains of violations of obligations which were created through the contract between the parties. Pittsburgh, at 779-80 (citing to Ambridge and Shadduck). Shadduck, which plaintiff cites, held that regardless of whether the claim was wedged in contract or tort, an arbitration clause which read: "All claims or disputes between the [parties] . . . arising out of, or relating to, this contract or the breach thereof shall be decided by arbitration . . ." included tort claims. Shadduck v. Kaclik, Inc., 713 A.2d 635, 636 (Pa. Super. 1998). The Shadduck court looked for and found no language limiting

arbitration to contract claims in the arbitration clause. Id., at 638. A close reading of the arbitration clause in Shadduck and in the instant case reveals that, if anything, the clause in the instant case is the broader of the two.[3] Thus, under Shadduck, tort claims are subject to the arbitration clause.

As in Pittsburgh, the language of the instant arbitration clause encompasses the behavior plaintiff complains of because the torts claimed were violations of obligations created by the contract. The arbitration clause indicates that, if at any stage in a dispute, an issue is raised which appears to be related to the Agreement, arbitration would be the selected forum."If any disagreement, difference or controversy *relating to* or arising out of or under this Agreement, whether concerning the construction or operation hereof, *the respective rights and obligations of the parties* hereto or otherwise, arises . . .". Motion to Stay, Exh. A, ¶ 18 (emphasis added). Thus, Sagot's response alone in which he claims that all he took was rightfully his under the Agreement, would require interpretation of the Agreement, which the parties intended to go to arbitration. "As with any contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 626, 105 S. Ct. 3346, 3354 (1985). This court thus finds that whether plaintiff filed in tort or in contract, its claims were intended to be resolved by arbitration when the parties executed their Agreement.

Nonetheless, plaintiff maintains that the rationale giving full effect to the intention of the parties to arbitrate should not be extended where the parties seek equitable relief. In fact, however, arbitrators may dispense equitable relief. Dickler v. Shearson Lehman Hutton, 408 Pa. Super. 286, 596 A.2d 860 (1991).

---

[3] The language in Shadduck is more detailed and refers to specific examples of what might be referred to arbitration, such as plans, specifications, exhibits to the contract, and payments under the contract.

In Dickler, the complaint filed as a class action sought recovery for breach of fiduciary duty, breach of contract and conversion. Our Superior Court reversed the trial court's finding that the equitable relief requested cannot be awarded through arbitration. Id., 408 Pa. Super. at 290, 596 A.2d at 861. The court looked to the language of the clause and found that, as in this case, the language did not except equitable claims. Id. More significantly, the court cited federal and Pennsylvania statutory law and a directive from the Supreme Court of the United States that arbitrators be allowed to dispense equitable relief. Id., 408 Pa. Super. at 291-93, 596 A.2d at 862-63. Specifically, the court cited Southland Corp. v. Keating, for the proposition that "the Federal Arbitration Act was motivated by a congressional purpose to overcome the rule that courts of equity will not enforce arbitration agreements." Id., 408 Pa. Super. at 292, 596 A.2d at 863, citing Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852 (1984). Our Superior Court further stated that in Southland, the Court issued "a strong suggestion that arbitrators be allowed to dispense equitable relief." Dickler, 408 Pa. Super. at 293, 596 A.2d at 863 citing Southland, 465 U.S. at 13, 104 S. Ct. at 859. Finally, Dickler relies on the Pennsylvania Arbitration Act, which empowers a trial court to enforce an arbitrator's equitable "decree," to support its reasoning that the Pennsylvania legislature intends to empower and support arbitrators in their deciding issues of equity. Dickler, citing 42 Pa. C.S. § 7316. Accordingly, this court believes that plaintiff's equitable claims do not constitute an obstacle to enforcing the arbitration agreement. In fact, the parties to this Agreement had contemplated having recourse to a court of equity to enforce, if the need arose, the arbitrator's decision.

Plaintiff cites to a Third Circuit case for the proposition that an injunction is essential here to prevent irreparable harm and maintain the status quo pending arbitration. Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806 (3d Cir. 1989). In Ortho, the Third Circuit affirmed the district court's injunction,

which purported to enhance the arbitration process. Id., at 814. According to the Third Circuit, the arbitration process would have been meaningless were the conduct of the party opposing the injunction not halted, as that conduct directly threatened the availability of the relief sought in arbitration. Id. The district court's injunction also directed expedited arbitration on the merits, including the issues underlying the enjoined conduct. Id. Our Superior Court has cited to Ortho in deciding that injunctive relief should be available even in the presence of an arbitration agreement to preserve the status quo prior to adjudication by arbitration. Langston v. National Media Corporation, 420 Pa. Super. 611, 616-617, 617 A.2d 354, 357 (1992) (citing to Ortho).

Plaintiff argues that such irreparable harm is likely to occur here if the relief it requests is not granted. To a limited extent, we agree. In Langston, the dispute was between an employee and her corporate employer. Id. 420 Pa. Super. at 613, 617 A.2d at 355. The employee sought to have certain disputed funds she claimed were owed her under her contract placed in escrow pending the resolution of the issue of her termination, as called for by the contract terms in case of termination disputes. Id., 420 Pa. Super. at 614, 617 A.2d at 355. Unlike Langston, in the instant case, the arbitration clause makes no mention of escrowing any disputed damages and plaintiff has not persuaded us of imminent irreparable harm to the essentially monetary damages requested, namely the disputed fees. Nonetheless, the court believes that plaintiff's concern over the destruction of the files taken from its offices and the costs incurred towards the cases of disputed clients is legitimate. Indeed, if not enjoined, defendant may act in such a way that the above information, which is essential to an arbitrator's decision, and which plaintiff claims to be solely in defendant's possession and/or control, could be disposed in part or in whole when the case comes before arbitration. Accordingly, the court will issue an injunction order limited to those matters.

Finally, plaintiff argues that defendant waived his rights to arbitration when he filed a counterclaim in this court. "Waiver should not be lightly inferred, and unless one's conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished the right." Goral v. Fox Ridge, Inc., 453 Pa. Super. 316, 321, 683 A.2d 931, 933 (1996). The Goral court nonetheless found that defendant had waived its right to arbitration. Id., 453 Pa. Super. At 318, 683 A.2d at 932. Plaintiff's reliance on Goral is misplaced. See Plaintiff's Memorandum of Law in Opposition to Defendant's Petition, pp. 4-5 (citing Goral). In Goral, the defendant did not file a motion to compel arbitration until about a year and a half past the filing of the complaint. Goral, 453 Pa. Super. 319, 683 A.2d at 932. In the case before us, Sagot moved to stay proceedings invoking the arbitration agreement less than a month after the complaint was filed. See also, Marranca General Contracting Co., Inc. v. Amerimar Cherry Hill Associates, 416 Pa. Super. 45, 610 A.2d 499 (1992)(finding that arbitration was waived in part because defendant waited until it received an adverse ruling to seek enforcement of the arbitration clause).

The Commonwealth Court of Pennsylvania articulated a test to determine whether a party has waived its right to arbitration. In St. Clair Area Sch. Dist. Bd. of Ed. v. E.I. Assocs., the Court stated:

> The key to determine whether arbitration has been waived is whether the party, by virtue of its conduct, has accepted the judicial process. Acceptance of the judicial process is demonstrated when the party (1) fails to raise the issue of arbitration promptly, (2) engages in discovery, (3) files pretrial motions which do not raise the issue of arbitration, (4) waits for adverse rulings on pretrial motions before asserting arbitration, or (5) waits until the case is ready for trial before asserting arbitration.

St. Clair Area Sch. Dist. Bd. of Ed. v. E.I. Assocs., 733 A.2d 677, 682 n.6 (Pa. Commw. 1999) (citations omitted). The record here, particularly the transcript of the hearing, leaves no doubt that Sagot has not

acquiesced to this court's jurisdiction. See Notes of Testimony Wednesday September 18, 2002, pp. 34, 46, 78.

The only time Sagot submitted to the court's jurisdiction was when he filed an Answer, New Matter and Counterclaim. But, in both the New Matter and Counterclaim, Sagot invokes the arbitration claim. Further, Sagot has since withdrawn his counterclaim. The rules of pleading permit the withdrawal of a claim before a verdict is given. See Hachick v. Kobelak, 259 Pa. Super. 13, 19, 393 A.2d 692, 695 (1978) ("a pleading which has been withdrawn or stricken out or superseded by amendment is out of the case in its capacity as a pleading"). When taking into account Sagot's prompt filing of the Motion to Stay Proceedings, his consistent outspoken rejection of this court's jurisdiction, and the withdrawal of his counterclaim, and applying the Superior Court's directive to construe waiver narrowly, this court finds that Sagot has not waived his right to arbitration. See Goral, 453 Pa. Super. at 321, 683 A.2d at 933; Marranca, 416 Pa. Super. At 49, 610 A.2d at 501 ("Waiver may be established by a party's *express* declaration or by a party's *undisputed* acts or language so inconsistent with a purpose to stand on the contract provisions *as to leave no opportunity for a reasonable inference to the contrary*") (emphasis added).

Plaintiff next points out that Sagot I and Sagot II arise from the same nexus of facts, and that therefore the court should "keep" Sagot I, in the interests of judicial economy. Plaintiff's Memorandum of Law in Opposition to Defendant's Petition to Compel Arbitration, p. 8. Judicial economy, however, cannot supersede binding law, which directs us to compel arbitration in Sagot I. Accordingly, the court will address the merits of the remaining motions separately.

Both the Motion to Stay Proceedings and the Petition to Compel Arbitration in Sagot I are

Granted.

II. THE MOTION TO CONSOLIDATE SAGOT I AND SAGOT II

Plaintiff filed a Motion for Leave to File an Amended Complaint and Consolidate Sagot I and Sagot II on July 11, 2002. In light of the fact that the court finds that Sagot I should be decided in Arbitration, the motion to consolidate is **Denied**.[4]

III. PLAINTIFF'S CONTEMPT MOTION IN SAGOT I

On August 5, 2002, plaintiff filed a motion for contempt in Sagot I to sanction Phillips and Brooke for failing to produce documents formerly requested by subpoenas.[5]

The court does not believe that defendants' conduct warrants either costs or sanctions. The parties have been informally communicating both among themselves and with the court. There have been discussions with the court about quashing discovery, as reflected in the hearing before the court on September 18, 2002. Additionally, in a letter dated October 1, 2002, Phillips and Brooke submitted to plaintiff information about some of the documents requested in the subpoenas. A copy of such letter and acknowledging response from plaintiff were sent to the court. In addition, the documents produced were the documents (lists of clients Sagot had taken with him, cases which settled, costs and fees) the court had highlighted at the hearing. See Notes to Hearing, p. 96.

Plaintiff's Motion for Contempt in Sagot I is thus **Denied**.

---

[4] If an appellate court were to reverse our sending Sagot I to arbitration, plaintiffs may refile its motion to consolidate.

[5] Both Phillips and Brooke had received the subpoenas on or about June 21, 2002. Counsel for both Phillips and Brooke allegedly had indicated to plaintiff that his clients would not comply.

IV. THE PRELIMINARY OBJECTIONS TO SAGOT II

Next, defendants Phillips & Brooke, P.C., Neil Sagot, P.C., Brooke, and Phillips have raised eight preliminary objections to the Complaint in Sagot II ("Complaint II"), all in the nature of a demurrer, which they filed on July 12, 2002.[6] Memorandum of Law in Support or Preliminary Objections of Defendant ("Objections").

A. Legal Standards on a Demurrer

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure ("Pa. R. Civ. P.") allows for preliminary objections based on the legal insufficiency of a pleading or a demurrer. Pa. R. Civ. P. 1028. For the purposes of reviewing preliminary objections in the form of a demurrer, all well-pleaded material, factual averments and all inferences fairly deductible therefrom are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. 2000) (citations omitted). When presented with preliminary objections in the nature of a demurrer, a court should sustain the objections 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. Kazaras, 746 A.2d 642, 643 (Pa. Super. 2000). Furthermore,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

---

[6] Defendants withdrew an Objection to the Complaint's failure to attach the Agreement. See Defendants' Reply Memorandum in Response to Plaintiffs' [sic] Opposition to Defendants' Preliminary Objections, last non-numbered page. Defendants have also conceded that their Objection raising improper Service is now moot. Id., sixth page.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. 1999) (citations omitted).

B. The Objection in the Nature of a Demur to Compel Arbitration

Whereas the arbitration issue before the court in Sagot I was whether the dispute was within the scope of the arbitration clause, the issue in this Objection to Sagot II is who are the parties to the arbitration agreement. According to plaintiff, only Neil Sagot, the individual, and not Neil Sagot, P.C., nor Phillips & Brooke, P.C., nor Brooke or Phillips, as individuals, entered into the arbitration agreement and, therefore, no one but Sagot as an individual has a right to claim arbitration. Defendants reply that Neil Sagot, P.C. is the same "party" as Neil Sagot, relative to the Agreement and the lawsuits. Defendants further argue that the nature of the claims in Sagot II, because they arise under the Agreement, make both of Phillips and Brooke, as well as their corporation, parties to the Agreement. At oral argument, defendants offered a more interesting argument claiming that they were "assignees" of Neil Sagot, and thus, they now stand in his shoes with respect to his rights to arbitration as a party to that Agreement. See Notes to Hearing, pp. 131-140.

Neil Sagot and Neil Sagot, P.C. are not the same persons under the law. "A corporation is to be treated as a separate and independent entity even if its stock is owned entirely by one person." Commonwealth v. Vienna Health Prods., Inc., 726 A.2d 432, 434 (Pa. Commw. 1999).[7] As for defendants' argument that Phillips and Brooke became parties to the Agreement because they are sued for

[7] There must be some evidence of fraud to disregard the independent entity. See Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893 (1995). See also Knoll v. Butler, 675 A.2d 1308 (Pa.Commw.1996), aff'd 548 Pa. 18, 693 A.2d 198 (1997) (factors which may, at times, justify disregarding the corporate form and holding the shareholder(s) liable include intermingling of personal and corporate affairs, undercapitalization, failure to adhere to corporate formalities, or using the corporate form to perpetrate a fraud). None of those indicia of fraud have been alleged here.

violations of the Agreement, the court is not persuaded because neither of those individuals, nor their corporation, has been sued for breach of contract.

The court does not believe that any of the defendants here was assigned the right to arbitrate disputes. The courts should make "every reasonable effort to favor such [arbitration] agreements." DiLucente Corp. v. Pennsylvania Roofing Co., Inc., 440 Pa. Super. 450, 456-57, 655 A.2d 1035, 1038 (1995)(citations omitted). However, arbitration agreements are to be found valid only where there is "clear, express and unequivocal intent of the parties as manifested by the writing itself." Midomo Co. v. Presbyterian Housing Dev. Co., 739 A.2d 180, 190 (Pa. Super. 1999).

This court submits that the parties' intention when they entered into the Agreement was to include as "assignees" only natural heirs or representatives of the signatories to the Agreement. In fact, accepting that the "assignee" could include any third party unrelated to the signatories and not deriving his/her rights and obligations from one of the parties' death or incapacity, would mean that the assignee would had to have been assigned the entire Agreement, even if only by incorporation, and not for a limited purpose (only certain files).[8]

In Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 687 A.2d 1167 (1997), our Superior Court considered a similar issue. There, an owner and a contractor had entered into a construction contract with an arbitration clause. Id. The contractor subsequently assigned the job to a subcontractor,

---

[8] The validity of the agreement to arbitrate is "a matter of contract and, as such, it is for the court to determine whether an express agreement between the parties to arbitrate exists." Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (1997). Furthermore, the construction and interpretation of contracts is a question of law. Emlenton Area Municipal Authority v. Miles, 378 Pa. Super. 303, 307, 548 A.2d 623, 625 (1988) (citations omitted).

incorporating the initial contract. Id. The subcontractor sought arbitration in a dispute and the owner argued that it never entered into an agreement to arbitrate with the subcontractor. The Superior Court held that the contract as a whole, thus including the arbitration clause, was assignable even without the owner's consent. Id., 455 Pa. Super. at 285, 687 A.2d at 1172.

We believe that the Smith Court would find otherwise under the facts in this case. In Smith, the Court referred to ordinary contract principles and considered whether "the contract with the [contractor] was one for *personal services*, and therefore, was *not* assignable." Id., 455 Pa. Super. at 284-85, 687 A.2d at 1171 (emphasis added). The Court further stated, "the rights and duties under an executory bilateral contract *which does not involve personal skill, trust, or confidence* may be assigned without the consent of the other party so long as it does not materially alter the other party's duties and responsibilities." Id., 455 Pa. Super. At 285, 687 A.2d at 1172 (emphasis added).[9] In a footnote, the Court explained that "if mechanical or utilitarian qualities or other criteria readily judged for reasonable completion dominate the contractual duty, then the contract's subject matter is not personal." Id., 455 Pa. Super. at 286, 687 A.2d at 1172 n. 6 .

A contract for lawyering services has to be one the Superior Court would contemplate as involving "personal skill, trust, or confidence." No vocation better typifies personal services, trust, or confidence, than that of a lawyer. The services are also often open-ended, rarely conducive to have reasonable completion measured in a "mechanical" manner. These parties, as they entered into an agreement to form

---

[9] The Smith Court supported its decision citing the fact that the owner had ratified the assignment by working with the subcontractor, thus recognizing the assigned contract between them. In the instant case, the parties never worked together after the purported assignment of the cases.

a law firm together as partners, expected to be working only with their "old friends."

Accordingly, we hold that parties may not assign an agreement to arbitrate where the agreement was related to a contract for lawyering services. The Objection in the nature of a demurrer and to compel arbitration as to Sagot II is **Overruled**.

C. Demur for Failure to Attach Essential Documents

Defendants object to plaintiff's Complaint and move to strike it for failure to attach three documents that defendants claim are relied upon to assert plaintiff's claims. Objections, pp. 7-8. These documents are the Agreement, Sagot's note of withdrawal, and the letter alleged to have been sent by Sagot to plaintiff's clients.

Rule 1019(i) states, in pertinent part:

> When a claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa. R.Civ. P. 1019(i).

Plaintiff claims that these documents are not essential to its claims because its claims sound in tort. Plaintiff's Answer to Defendants' Objections ("Answer to Objections"), p. 11. The court disagrees. In Count I and Count IV, plaintiff bases its claims, albeit in tort, on violations of the fee agreement appearing in the Agreement between the plaintiff and Sagot. See Sagot II, ¶¶ 24, 40. Plaintiff also pleads the letter to clients to support Count V of Complaint II. Id., ¶ 44.[10]

[10] The court does not agree with defendants that Sagot's withdrawal "note" was essential to the Complaint, notwithstanding Sagot's calling upon it in his defense.

Nonetheless, the purpose of the Rule 1019(i) is to give a defendant adequate notice of the claim against which he must defend. See Yacoub v. Lehigh Valley Medical Associates, P.C., 805 A.2d 579 (Pa. Super. 2002). The purpose of the rule has been adequately served here. The court, as well as all of the parties, knew to which writings plaintiff was referring, and knew the material contents of those writings. In fact, defendants have attached all of them in their Objections. Objections, Exhs. 2, 3, and 5. Where the court and the defendant are both in the possession of the document in question, an objection based on Rule 1019(i) will be overruled. See Narcotics Agents Regional Committee v. A.F.L.- C.I.O., Council 13, 780 A.2d 863, 869 (Pa. Commw. 2001).

The court **Overrules** the Objection in the nature of a Motion to Strike for failure to attach essential documents.

D. The Demurrer as to Count I for Insufficient Pleading

Defendants argue that plaintiff failed to plead fraud with the specificity required by Pennsylvania law. Objections, p. 8. To establish a claim for fraudulent misrepresentation, the plaintiff must allege the following elements: (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, 565 Pa. 489, 498, 729 A.2d 555, 560 (1999) (citations omitted). Moreover, deliberate non-disclosure has the same elements and is the same as culpable misrepresentation. Id.; McClellan v. Health Maintenance Organization of Pennsylvania, 413 Pa. Super. 128, 142, 604 A.2d 1053, 1060 (1991).

The court finds that plaintiff's claim of fraud is sufficiently pled. Plaintiff has complained of

omissions of material facts, such as the set up of the allegedly superficially independent corporations, and the illicit enlisting of plaintiff's clients while defendants were at the prior firm. Complaint II, ¶¶ 7, 9, 13, 16. Plaintiff alleged scienter when it alleged that defendants deliberately intended and carried out sequential acts to defraud plaintiff of client fees. Id., ¶¶16, 22. The fact that the fees may or may not have accrued yet, thus not establishing past or present fraud according to defendants, not only is an issue of fact, but even were it true, would not defeat plaintiff's claim. The present intent not to honor a promise is fraud. See Babiarz v. Bell Atlantic, 2001 WL 1807378 (Pa. Com. Pl. July 10, 2001)(Herron, J.). It is equally true that plaintiff pled reliance on the Agreement. Sagot II, ¶ 24. Whether plaintiffs' perception of the facts they relied on was incorrect, as defendants argue, is not for the court to contemplate at this stage. See Objections, p. 10.

The Court **Overrules** this Objection to Count I.

E. The Demurrer to Count II for Insufficient Pleading

Pennsylvania defines conversion as "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." L.B. Foster Co. v. Charles Caracciolo Steel & Metal Yard, Inc., 777 A.2d 1090, 1095 (Pa. Super. 2001)(citation omitted). The Complaint alleges that defendants removed plaintiff's property from plaintiff's offices, and used it to their benefit by, *inter alia*, contacting the clients and using some of the checks, all of which plaintiff, not only did not consent to, but was unaware of. Complaint II, ¶¶ 9-11, 13-14, 15, 17. The property allegedly taken included furniture, artwork, and corporate documents, along with client files. Id., ¶ 9.

Defendants claim that the property taken belonged to Sagot and, therefore, no conversion could have been committed. Defendants rely upon language in the Agreement to that effect. Plaintiff responds that the court should restrict itself to the facts pled in the complaint, which do not include the Agreement. The court considers the Agreement part of the Complaint. Plaintiffs should have attached it because they rely on it, as discussed above, and the court opted to integrate it, even as it was submitted by defendants, only to save time and resources in not ordering an amendment to the Complaint.

Nonetheless, even considering the Agreement as part of the pleadings, the court submits that defendants are arguing facts in this Objection. Indeed, if the language of the Agreement were to assign to Sagot certain files, the facts concerning what was taken, who actually took what, and whether Sagot has withdrawn under the Agreement to trigger his purported rights, are in dispute.

Defendants also move to strike the conversion claim for inclusion of scandalous or impertinent matter. Having read the parties' briefs and their inflammatory correspondence and heard them in argument, this court perhaps became somewhat desensitized to scandalous matter and could not find any in Count II. Furthermore, "the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." Commonwealth Dep't of Environmental Resources v. Hartford Accident & Indem. Co., 40 Pa. Commw. 133, 137-38, 396 A.2d 885, 888 (1979) (citations omitted).

Accordingly, the court **Overrules** the Objection to Count II (Conversion) of the Complaint.

F. The Demurrer to Count III for Insufficient Pleading

Count III asserts violations of the duty of loyalty against defendants Brooke and Phillips. Complaint II, ¶¶ 34-38. An employee owes a duty of loyalty to its employer. Hozlock v. Donegal

Companies/Donegal Mutual Ins. Co., 745 A.2d 1261, 1263-1264 (2000); Goodwill Industries v. Unemployment Compensation Board of Review, 160 Pa. Commw. 147, 152, 634 A.2d 738, 740 (1993). Plaintiff alleges facts sufficient to support a breach of loyalty claim. Complaint II, ¶¶ 7, 9, 13-20. Defendants not only merely dispute facts, which is improper at this stage of the litigation, they dispute facts not related to the allegations. See Objections, pp. 13-14.

The Objection to Count III is **Overruled**.

G. The Demurrer to Count IV for Insufficient Pleading

In Count IV, plaintiff requests that the court issue a mandatory injunction, preliminarily and thereafter permanently, ordering that a constructive trust be imposed upon the fees defendants receive from clients who retained plaintiff's firm before Sagot's withdrawal. Plaintiff claims that defendants would be unjustly enriched if they retained the full amount of the fees. In response, defendants invoke the Agreement, but ignore that there are facts in dispute relating to "hidden" clients.

Plaintiff contends that the absolute amount received by defendants may never be known to it, never mind what fraction of those fees it is entitled to under the Agreement. See Complaint, ¶ 16 (b). At this stage, we must view as true the facts pled in the Complaint.

Nonetheless, the court does not find it necessary to issue a preliminary injunction imposing a constructive trust imminently. This court does not perceive immediate irreparable harm. The court, therefore, sustains this Objection, without prejudice for plaintiff to refile a petition should facts come to light which make it necessary.

H. The Demurrer to Count V for Insufficient Pleading

Count V alleges tortious interference with business relations. Such a claim requires allegations of:

(1) an existing valid contract, (2) knowledge of the contract, (3) a breach of the contract, (4) intentional procurement of that breach by the defendant, (5) the absence of privilege for or improper nature of defendants' actions, and (6) the actual harm as a result. Objections, p. 16. We find that plaintiff did so plead.

Plaintiff pled that defendants contacted plaintiff's clients by letter, while aware they were plaintiff's clients. It is a reasonable inference of the facts as pled that defendants knew that the clients were plaintiff's clients because defendants allegedly improperly obtained the list of the clients from plaintiff's offices. Complaint, Sagot II, ¶¶ 44-46. It is a reasonable inference that a law firm and its existing clients have a contract. Defendants purportedly misinformed the clients, in the alleged correspondence, that plaintiff could no longer represent them, knowing that information was wrong and plaintiff would be damaged as a result. Id. Plaintiff further alleged actual harm resulting from defendants' actions. Id., ¶ 47.

The Objection to Count V is **Overruled**.

I. The Motion to Strike the Complaint in Its Entirety for Lack of Specificity

Defendants have objected to every claim in the Complaint for lack of specificity. Here, they object to the whole Complaint on the same grounds. Defendants' complain of "vague" and "incomplete" language such as "items" and "property." Objections, p. 18. A plaintiff is required to plead the elements of a claim with enough particularity to give defendants fair notice of the claims and a summary of the facts supporting the claims. Yacoub v. Lehigh Valley Medical Associates, P.C., 805 A.2d 579 (Pa. Super. 2002). Given this standard, the court finds plaintiff has pled its Complaint with sufficient particularity.

The Objection to the Complaint for lack of specificity in is overruled.

CONCLUSION

For the reasons discussed, the court will enter contemporaneous Orders: (1) granting defendant's Motion to Stay Proceedings and Petition to Compel Arbitration in Sagot I, (2) denying plaintiff's Motion for Leave to File an Amended Complaint and Consolidate Separate Actions, (3) denying plaintiff's Motion for Contempt in Sagot I, and overruling the defendants' Preliminary Objections to the Complaint in Sagot II, except that the request for a mandatory injunction imposing a constructive trust is denied.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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

SAGOT JENNINGS & SIGMOND		: APRIL TERM, 2002
	Plaintiff,	: No. 3099
v.		: **Commerce Program**
NEIL SAGOT		: Control Numbers: 50455, 80450, 70940
	Defendant	

O R D E R

AND NOW, this 31st day of December 2002, upon consideration of the various motions filed and the responses in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion being filed, it is **ORDERED** that:

1. The Petition to Compel Arbitration is **Granted**. The parties are directed to submit the dispute to arbitration as soon as practicable;
2. The Motion to Stay Proceedings is **Granted**, except to the extent this Order or previously issued Orders are inconsistent;
3. The Motions For Leave to File an Amended Complaint and to Consolidate the two actions (C.C.P. Numbers 0204-3099 and 0206-3098) are **Denied**; and

4. The Motion for Contempt relative to discovery disputes is **Denied.**

It is further **ORDERED** that defendant, **Sagot**, individually and **Neil Sagot, PC**, shall:

1. Maintain all files taken from the premises of plaintiff and shall maintain a comprehensive and accurate list of those files;

2. Submit to counsel for plaintiff a compilation of those files which have settled or otherwise been disposed, listing the amount of money received. This compilation shall be submitted on a monthly basis.

3. Escrow an amount equal to 55% of all costs expended on all files taken, which costs were incurred by the plaintiff. The court will permit counsel for the parties to agree on a proper escrow arrangement.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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

JENNINGS SIGMOND,	: JUNE TERM, 2002
Plaintiff,	: No. 3098
v.	: **Commerce Program**
PHILLIPS & BROOKE, P.C., NEIL SAGOT, P.C., LAURA M. BROOKE, and STUART J. PHILLIPS,	:
Defendants.	: Control No. 71044

O R D E R

AND NOW, this 31st day of December 2002, upon consideration of the Preliminary Objections filed by defendants, the plaintiff's opposition to them, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion being filed, it is **ORDERED** that:

1. The Objection to the Request for a Mandatory Injunction Imposing a Constructive Trust on fees is **Granted**;

2. All other Preliminary Objections are **Overruled.** The defendants should file a responsive pleading within twenty-two (22) days of the date of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.