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

SAN LUCAS CONSTRUCTION COMPANY, INC. Plaintiff	: FEBRUARY TERM, 2000
	: No. 2190
v.	:
ST. PAUL MERCURY INSURANCE COMPANY d/b/a The St. Paul Surety, PHILADELPHIA HOUSING AUTHORITY, and BOB KAHAN d/b/a Contract Completion, Inc. Defendants	:
* *	
ST. PAUL MERCURY INSURANCE COMPANY d/b/a The St. Paul Surety	:
	:
v.	:
GALO GUTIERREZ, and URKIA HERNANDEZ,	:
Additional Defendants	: **Control No. 050099**

ORDER

AND NOW, this 11th day of October 2001, upon consideration of defendant, Bob Kahan d/b/a Contract Completion Inc. ("CCI"),'s Motion for Summary Judgment, plaintiff, San Lucas Construction Co., Inc. ("San Lucas"),'s opposition thereto, the respective memoranda, all other matters of record, and in accord with the Opinion being contemporaneously filed with this Order, it is hereby **ORDERED** that the Motion is **Granted** and San Lucas's claims against CCI are **Dismissed**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ..... October 11, 2001

Presently before this court is the Motion for Summary Judgment ("Motion") of defendant, Bob Kahan ("Kahan") d/b/a Construction Completion, Inc. ("CCI"), and the opposition of plaintiff, San Lucas Construction Company, Inc. ("San Lucas").[1]

For the reasons set forth, the Motion is **Granted** and San Lucas's claims against Kahan d/b/a CCI are dismissed.

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[1]The other two defendants, St. Paul Mercury Insurance Company and Philadelphia Housing Authority, also filed separate motions for summary judgment. For purposes of clarity and convenience, the court will address these motions separately.

BACKGROUND

On November 6, 1997, the Philadelphia Housing Authority ("PHA") hired San Lucas to provide general construction for a part of the public housing project known as the Richard Allen Homes ("the Project"). St. Paul Mercury Insurance Company d/b/a the St. Paul Surety ("St. Paul") acted as the surety for San Lucas' obligations under the Project through the issuance of payment and performance bonds in the name of San Lucas. The bonds were issued on October 16, 1997. Prior to the issuance of these bonds, St. Paul required San Lucas to sign a General Agreement of Indemnity, dated June 20, 1997, ("the Indemnity Agreement").

During the course of the Project, problems developed between San Lucas and PHA which involved, *inter alia*, various delays in meeting the completion deadline. On December 10, 1999, PHA issued a "Notice of Intent to Default" to San Lucas, asserting, *inter alia*, that San Lucas has failed to perform the work within the time required or cure the conditions endangering its performance under the contract. Motion, Exhibit 9.[2] On December 21, 1999, St. Paul, through its claims attorney, Christine T. Alexander, Esq., sent a letter to San Lucas, referring to a previous meeting among PHA, San Lucas and St. Paul where concerns were raised about the status of the Project. Motion, Exhibit 10. In this letter, St. Paul informed San Lucas that it had retained an accountant and an engineer to evaluate the Project. Further, it requested access to San Lucas's books and records, and documentation related to the Project. Id. On that same date, St. Paul issued a letter to the PHA, demanding that it "refrain from paying out any

[2]The term "Exhibit" in this Opinion refers generally to those exhibits attached to the present Motion for Summary Judgment and/or those exhibits attached to the relevant pleadings.

portion of the remaining contract balance without the express written consent of [St. Paul]." Compl., Exhibit 10.

On January 10, 2000, San Lucas responded, stating that it was "not abandoning the job," but that it could not continue to provide labor and materials without payment from the PHA. Motion, Exhibit 11. See also, Motion, Exhibit 12 (San Lucas's letter, dated January 12, 2000, relating the same message as the January 10th letter). On January 13, 2000, PHA issued a "Notice of Default" to San Lucas, advising that "[a]lthough you are in default, at this time the PHA is not terminating the above contract," but is requiring San Lucas to continue to perform its obligations. Motion, Exhibit 14 (emphasis in original). Following this notice, the parties again exchanged correspondence, in which San Lucas requested a meeting with St. Paul and PHA to resolve the outstanding issues, and St. Paul requested documentation in order to investigate the matter and determine the appropriate action. Motion, Exhibits 15-17.

The moving defendant, CCI, generally acts as a building consultant for surety companies where building contracts, bonded by a surety, have been terminated or are in default. On or about January 18, 2000, CCI was hired by St. Paul as the technical consultant to report to St. Paul the status of the Project, and to provide percentages of the work that was complete or incomplete. Motion, Exhibit B (confirmation of engagement); Motion, Exhibit C (Aff. of Kahan, ¶¶ 2, 3, 5); Motion, Exhibit C (Dep. of Christine T. Alexander, Esq., pp. 68-69, 75-77); Motion, Exhibit E (Dep. of Kahan, pp. 16-18, 21-22). San Lucas disputes the date when CCI's services were first used, but maintains that St. Paul confirmed it was using these services as of January 12, 2000, according to a letter exhibit attached to the Complaint. San Lucas's Answer to Motion, ¶¶ 6, 14. This letter, dated January 12, 2000, provides, in pertinent part, that: "we [St. Paul] propose utilizing an engineering consultant to assess the status of the project and to assist in

reviewing pay applications to the PHA and determining appropriate payment of contract funds." Compl., Exhibit 13. Additionally, on January 27, 2000, St. Paul sent a letter to Galo A. Gutierrez, San Lucas's president, stating, in relevant part, that: "[w]e appreciate your cooperation in arranging for your project manager to meet with our engineering consultant Bob Kahan last Friday and Saturday at the project site." Compl., Exhibit 19. CCI purportedly completed its survey of the percentage of work to be completed in February 2000.

On January 24, 2000, PHA sent San Lucas a letter terminating its contract with San Lucas, asserting the same grounds it had set forth previously in its "Notice of Intent to Default." Motion, Exhibit 18. In this letter, the PHA also demanded that St. Paul, as surety, ensure performance of the underlying contract. Id. San Lucas purportedly received the termination letter on January 27, 2000. San Lucas's Answer to Motion, ¶ 5. See also, Motion, Exhibit 20 (San Lucas's response letter, dated January 28, 2000, indicating that it had received the termination letter by fax on January 27, 2000).

With this background, San Lucas filed its Complaint against PHA, St. Paul and CCI. San Lucas's sole claim[3] against CCI is for tortious interference with the San Lucas-PHA Contract, alleging, in pertinent part, that "[CCI] intentionally provided grossly inflated estimates of the scope and cost of work that

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[3]In its response to the present motion, San Lucas seeks leave to amend its complaint to include a count for "gross and fraudulent misrepresentation" by defendant CCI, asserting that the job was 82% complete, not 50-55% as estimated by CCI, and that CCI caused St. Paul to engage a replacement contractor at a cost 300 percent (300%) above that necessary to complete the contract. San Lucas's Answer to Motion, ¶¶ 7, 8, 35.

First, it is not proper to seek to amend one's complaint as part of a response to a motion. Rather, such a request must be asserted in an independent motion. Second, this court finds that San Lucas has not sufficiently stated a cause of action for fraud or misrepresentation against CCI, and granting it leave to amend would be against a positive rule of law.

remained to be done at the Project . . . in order to induce St. Paul and PHA to terminate the San Lucas-PHA Contract . . . so that Kahan could monetarily benefit in completing the Project." Compl., ¶¶ 106-109.[4]

This court previously (March 14, 2001) granted St. Paul's Motion for Judgment on the Pleadings, dismissing San Lucas's claims against St. Paul on the grounds that the Indemnity Agreement was enforceable and that St. Paul's actions in taking over the contract's completion were justified since San Lucas admitted that it owed $242,000 to its subcontractors. See, San Lucas Construction Company, Inc. v. St. Paul Mercury Ins. Co., et al., February 2000, No. 2190, slip op. at 12-17 (C.P. Phila. Mar. 14, 2001)(Sheppard, J.) ("San Lucas I"). This court also denied CCI's initial Motion for Summary Judgment without prejudice to refile "if appropriate circumstances are present in the future." See Order of Court, dated March 14, 2001, control no. 1020655.

CCI has now resubmitted its Motion for Summary Judgment, asserting that no genuine issue of material fact exists regarding the timing and extent of CCI's involvement with the Project, and that the facts establish that CCI did not tortiously interfere with the San Lucas-PHA contract. This court agrees that CCI is entitled to summary judgment.

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[4]Count V of the Complaint purports to state a claim for punitive damages against CCI. However, a right to punitive damages is "a mere incident to a cause of action." Baker v. Pennsylvania Nat'l. Mut. Cas. Ins. Co., 522 Pa. 80, 84, 559 A.2d 914, 916 (1989). "[A] court may not award punitive damages merely because a tort has been committed. Additional evidence must demonstrate willful, malicious, wanton, reckless or oppressive conduct." McClellan v. Health Maintenance Org. of Pennsylvania, 413 Pa.Super. 128, 144, 604 A.2d 1053, 1061 (1992)(citations omitted).

Since this court is now granting CCI's Motion for Summary Judgment, the Order also applies to Count V since San Lucas has failed to adduce sufficient evidence of willful, malicious, wanton, reckless or oppressive conduct on the part of CCI.

DISCUSSION

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows a court to enter summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action." A court must grant a motion for summary judgment when a nonmoving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996). A motion for summary judgment must be viewed in the light most favorable to the nonmoving party, and all doubts as the existence of a genuine issue of material fact must be resolved against the moving party. Pennsylvania State University v. County of Centre, 532 Pa. 142, 145, 615 A.2d 303, 304 (1992). Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered. Skipworth v. Lead Industries Ass'n., Inc., 547 Pa. 224, 230, 690 A.2d 169, 171 (1997).

In its present motion, CCI argues: (1) that San Lucas has provided no facts in support of its allegations that CCI tortiously interfered with the contract; (2) that CCI, as St. Paul's agent, was justified to act as it did and perform a limited assignment for St. Paul since this court had previously validated St. Paul's right to manage the contract's completion to minimize its ultimate loss as surety; and (3) that no contract existed when CCI arrived at the project, thereby negating a necessary element of a cause of action for tortious interference with contract.

Since this court previously concluded that St. Paul did not act improperly when it took over the control of the Project and since CCI was acting at St. Paul's direction when it performed its tasks, this court now holds that CCI cannot be held liable for tortious interference with the San Lucas-PHA contract.

To establish a claim for tortious interference with contract, the plaintiff must plead: (1) the existence of a contractual relationship, (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship, (3) the absence of a privilege or justification for such interference, and (4) damages resulting from the defendant's conduct. Hennesy v. Santiago, 708 A.2d 1269, 1278 (1998)(citations omitted).

First, this court previously found that St. Paul could not be held liable for tortious interference, in that it was legally justified in taking over the completion of the San Lucas-PHA contract, pursuant to the Indemnity Agreement, in accord with Section 773 of the Restatement (Second) of Torts,[5] and upon the admission of San Lucas that it owed $242,000 to its subcontractors. San Lucas I, slip op. at 14-17. Similarly, this court holds that CCI was legally justified to perform the work for which it was hired; i.e., to assist St. Paul in its completion of the contract. Specifically, CCI was hired to report the status of the Project and provide percentages of the work that was complete or incomplete. Motion, Exhibit B (confirmation of engagement); Motion, Exhibit C (Aff. of Kahan, ¶¶ 2, 3, 5); Motion, Exhibit C (Dep. of

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[5]Section 773 of the Restatement (Second) of Torts states, in pertinent part, that:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Id. Pennsylvania courts have routinely upheld this section as a defense to claims for tortious interference with contract. See, e.g., Kelly-Springfield Tire Co. v. D'Ambro, 408 Pa.Super. 301, 311, 596 A.2d 867, 872 (1991); Gresh v. Potter McCune Co., 235 Pa.Super. 537, 541, 344 A.2d 540, 542 (1975); Bahleda v. Hankison Corp., 228 Pa.Super. 153, 156-57, 323 A.2d 121, 123 (1974); Ramondo v. Pure Oil Co., 159 Pa.Super. 217, 224, 48 A.2d 156, 160 (1946).

Christine T. Alexander, Esq., pp. 68-69, 75-77); Motion, Exhibit E (Dep. of Kahan, pp. 16-18, 21-22). Plaintiff has presented no testimonial or documentary evidence to negate that CCI was justified to perform this work. Further, even if the percentages provided by CCI were "grossly inflated," as argued by San Lucas, there is no evidence that CCI induced PHA or St. Paul to terminate the San Lucas-PHA contract. Rather, it appears that PHA intended to declare San Lucas in default on December 10, 1999, prior to CCI's involvement in the Project. Motion, Exhibit 9. In addition, plaintiff's allegations against CCI are merely conclusory and fail to negate that CCI was justified to act at St. Paul's behest.

Moreover, the contract had been terminated prior to or soon after CCI became involved in the Project, which negates the first requisite element to make out a cause of action for tortious interference with contract; i.e., the existence of a contract. The PHA terminated its contract, by letter dated January 24, 2000, even though San Lucas maintains that it did not receive this letter until January 27, 2000. See Motion, Exhibits 18, 20. The precise time when CCI was hired appears to be in dispute, however this dispute is not material to the claim asserted against CCI. Further, this dispute as to the timing could not lead a jury to conclude that CCI induced the PHA or St. Paul to terminate the San-Lucas-PHA contract. It is undisputed that PHA intended, as of December 10, 1999, to declare San Lucas to be in default. Motion, Exhibit 9. The PHA did in fact issue a "Notice of Default" on January 13, 2000. Even assuming *arguendo* that this declaration of default was wrongful on the part of PHA, liability cannot be assessed to CCI since the PHA intended to declare San Lucas in default prior to CCI's involvement. The evidence shows that an engineering consultant's services were merely contemplated to be used in the letter dated January 12, 2000. Compl., Exhibit 13 (St. Paul's letter to San Lucas, dated January 12, 2000). However, this letter did not specifically name CCI and no evidence was presented to show that CCI's services were

being used as of this date. Moreover, the decision to engage an engineering consultant occurred over one month after the PHA issued its "Notice of Intent to Default" to San Lucas. Therefore, CCI's involvement with the Project was subsequent to PHA's purportedly wrongful conduct.

Indeed, CCI maintains, and the evidence demonstrates, that it was hired as of January 18, 2000. See Motion, Exhibit B (confirmation of engagement); Motion, Exhibit C (Aff. of Kahan, ¶¶ 2, 3, 5); Motion, Exhibit C (Dep. of Christine T. Alexander, Esq., pp. 68-69, 75-77); Motion, Exhibit E (Dep. of Kahan, pp. 16-18, 21-22). The evidence also indicates that Kahan may have visited the project site on January 21, 2000. See Compl., Exhibit 19 (St. Paul's letter, dated January 27, 2000). Further, CCI did not complete its survey of the percentage of work to be completed until February 2000, well after the contract had been terminated by the PHA.

Under these circumstances and reviewing the evidence in the light most favorable to the plaintiff, this court finds that there are no genuine issues of material fact pertinent to whether CCI tortiously interfered with the San Lucas-PHA contract. Accordingly, CCI is entitled to summary judgment as a matter of law.

CONCLUSION

For the reasons stated, this court grants CCI's Motion for Summary Judgment and dismisses San Lucas' claims for tortious interference with contract, and its request for punitive damages.

A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.