IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

LEONARD A. SYLK, et al.	: JANUARY TERM, 2002
Plaintiffs,	: No. 1906
v.	: Commerce Program
BARRY BERNSTEN,	:
Defendant.	: Control Nos. 080528, 080530

O R D E R

AND NOW, this 4th day of February 2003, upon consideration of: (a) Leonard A. Sylk's Preliminary Objections to defendant's Counterclaim (Control No. 080528) and the response in opposition, and (b) Winston J. Churchill and Churchill Family Partnership's Preliminary Objections to defendant's Counterclaim (Control No. 080530) and the response in opposition, the respective memoranda, all matters of record, and in accordance with the contemporaneous Opinion being filed of record, it is **ORDERED** that:

(a) Sylk's preliminary objection to Bernsten's fraudulent inducement claim (Count I) is **Sustained**;

(b) Sylk's preliminary objection to Bernsten's negligent misrepresentation claim (Count II) is **Sustained**;

(c) Sylk's preliminary objection to Bernsten's breach of fiduciary duty claim (Count III) is **Sustained**;

(d) Sylk's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained**;

(e) Sylk's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled**;

(f) Sylk's preliminary objection to Bernsten's breach of duty of good faith and fair dealing claim (Count VI) is **Sustained**;

(g) Sylk's preliminary objection to strike scandalous and impertinent matter is **Overruled**;

(h) Churchill Family Partnership's preliminary objection to Bernsten's Counts I-VI for Failure to Allege Agency is **Overruled**;

(i) Churchill and Churchill Family Partnership's preliminary objection to Imposition of Punitive Damages As to Counts I-V is **Overruled** without prejudice to reassert in a future motion after the completion of discovery, if appropriate;

(j) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's fraudulent inducement and negligent misrepresentation claims (Counts I and II, respectively) is **Sustained**;

(k) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained**;

(l) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled**;

(m) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's breach of the duty of good faith and fair dealing claim (Count VI) is **Sustained**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... February 4, 2003

There are two sets of preliminary objections pending in this case. Plaintiff, Leonard Sylk ("Sylk"), has filed preliminary objections to the Counterclaim of defendant, Barry Bernsten ("Bernsten") (Control No. 080528). In addition, Winston J. Churchill ("Churchill") and the Churchill Family Partnership have filed preliminary objections to Bernsten's Counterclaim (Control No. 080530).[1] For the reasons discussed, this court is issuing a contemporaneous Order sustaining certain objections and overruling others.

[1] The Churchill Family Partnership is a named plaintiff and counterclaim defendant, but Winston J. Churchill, as an individual, is a counterclaim defendant only.

FACTS

The Counterclaim sets forth the following factual allegations.[2]

In February, 1999, Bernsten sought funds for the development and construction of a proposed steel galvanizing plant in Estonia, and discussed the situation with Sylk. Counterclaim, ¶ 58. Thereafter, Bernsten met with Sylk and Churchill and they discussed the possibility of investing in Bernsten's partial interest in the entity(ies) formed to construct, own and operate the proposed plant. Id. at ¶ 59. Churchill is the general partner of the Churchill Family Partnership, a Pennsylvania limited partnership. Id. at ¶¶ 56-57. Bernsten further states that upon information and belief, Sylk and the Churchill Family Partnership had an existing investment partnership or joint venture. Id. at ¶ 62. Sylk, individually, and Churchill, on behalf of the Churchill Family Partnership, ultimately agreed to purchase a portion of Bernsten's interest in the entity(ies) formed to construct, own and operate the proposed plant. Id. at ¶ 59.

According to Bernsten, he explained to Sylk and Churchill that any interest that Sylk, Churchill or the Churchill Family Partnership bought would not be a direct interest in the steel plant, and that they would not have any rights of control, such as voting rights, relating to the proposed plant. Id. at ¶ 60. Bernsten agreed that if Sylk and the Churchill Family Partnership purchased a portion of Bernsten's interest, they would receive a portion of Bernsten's share of profits, if and when Bernsten received any profits. Id. at ¶ 61. On February 10, 1999, Sylk and Churchill, on behalf of the Churchill Family Partnership, gave Bernsten a letter they had prepared containing terms of the purchase of a portion of Bernsten's interest, and represented to Bernsten that the letter conformed to the agreement reached among them. Id. at ¶¶

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[2] For purposes of the pending objections, this court will accept the facts as presented by Bernsten.

60, 63-64; Amended Compl., Ex. A. On February 10, 1999, Bernsten executed the letter agreement. Id. at ¶ 66; Amended Compl., Ex. A.

In April 2000, Sylk and Churchill, on behalf of the Churchill Family Partnership, gave Bernsten a second letter, which Churchill prepared, for the purchase of an additional portion of Bernsten's interest in the subject entity(ies). Counterclaim, ¶ 67; Amended Compl., Ex. B. According to Bernsten, Sylk and Churchill, on behalf of the Churchill Family Partnership, reiterated that they anticipated receiving a percentage of the proposed plant's profits based on their portion of Bernsten's interest, provided that profits were, in fact, distributed. Counterclaim, ¶ 68. In addition, Sylk and the Churchill Family Partnership again agreed that they would have no ownership in the entity that would own the proposed plant. Id. at ¶ 68. On April 25, 2000, Bernsten executed the second letter agreement. Id. at ¶ 69; Amended Compl., Ex. B.

In his Counterclaim, Bernsten asserts that Sylk and Churchill, on behalf of the Churchill Family Partnership, intentionally and deceptively drafted the letters of February 10, 1999 and April 25, 2000 (the "Letter Agreements") to provide a basis for the argument that Bernsten must pay Sylk and the Churchill Family Partnership a portion of Bernsten's salary and expenses received by Bernsten for his work on the proposed plant. Counterclaim, ¶ 70. Bernsten further asserts that Sylk and Churchill, on behalf of the Churchill Family Partnership, intentionally and deceptively drafted the Letter Agreements to provide a basis for the argument that if Sylk and the Churchill Family Partnership wanted to sell or transfer their interests in the proposed plant, then Bernsten would have a right of first refusal, and otherwise, the interests could be sold or transferred to any purchaser or transferee. Id. at ¶ 71. Bernsten contends that in drafting the Letter Agreements, Sylk and Churchill intended to extort money from Bernsten by forcing him to purchase

back the interests he had sold to Sylk and the Churchill Family Partnership at a commercially unreasonable price (ten million dollars), or else risk having the interests be sold to another purchaser. Id. at ¶¶ 72, 74, 81. Bernsten states that if he had known what Sylk and Churchill intended to demand, he would not have executed the Letter Agreements. Id. at ¶ 73.

In addition, Bernsten maintains that Sylk, on his own behalf and on behalf of Churchill, the Churchill Family Partnership, and the joint venture between Sylk and the Churchill Family Partnership, slandered Bernsten in order to pressure him to purchase back the interests that Sylk and the Churchill Family Partnership had previously purchased. Id. at ¶¶ 80-81. Bernsten contends that Sylk told Harvey and Babette Snyder, parents of an employee of Bernsten's, that Bernsten violated the Letter Agreements by paying for travel-related expenses in connection with Mr. and Mrs. Snyder's trip to Estonia for the groundbreaking of the proposed steel plant. Id. at ¶¶ 75-77. Bernsten further alleges that Sylk told Mr. and Mrs. Snyder that Bernsten was dishonest, had committed fraud in his business dealings, filed false tax returns, and that their son, David Snyder, should not work for Bernsten because "Bernsten would teach and train David to act dishonestly." Id. at ¶ 78. In addition, according to Bernsten, Sylk repeated and continues to repeat those false statements to Bernsten's social friends and business associates, including Daniel Bain (Bernsten's business partner). Id. at ¶¶ 79-80.

Moreover, Bernsten asserts that in the spring of 2001, Sylk advised Bernsten that if he and the Churchill Family Partnership did not receive a portion of Bernsten's salary and expense reimbursement, or if Bernsten did not purchase their interests back for ten million dollars, then Sylk and the Churchill Family Partnership would contact Byerische Hypo-Und Vereinsbank Aktiengesellschaft, the bank which had partially financed the proposed steel plant, and tell the bank's representatives of Bernsten's "fraud." Id.

at ¶ 82. According to Bernsten, Sylk also threatened to file suit against Bernsten for breach of the Letter Agreements. Id. Moreover, Sylk and Churchill also demanded that Bernsten enter into an additional written agreement in connection with their interests in the proposed plant. Id. at ¶ 83. Bernsten states that the new agreement would have provided that Sylk and Churchill Family Partnership did have rights of control over the proposed plant and direct ownership in the company(ies) that would construct and run the plant. Id. at ¶ 84.

Bernsten further states that he paid Sylk and Churchill approximately $75,000 of his salary to "save the proposed plant and his business relationships" and to "prevent this blackmail." Id. at ¶ 85. However, Bernsten did not agree to enter into a new agreement relating to the interests Sylk and the Churchill Family Partnership purchased and did not agree to purchase those interests for ten million dollars. Id. at ¶ 86. Counsel for Bernsten apparently offered to purchase the interests back for two million dollars, but Sylk and Churchill refused that offer. Id. at ¶ 87.

On March 5, 2002, Sylk and the Churchill Family Partnership filed an Amended Complaint alleging breach of contract and breach of fiduciary duty and good faith. Amended Compl., ¶¶ 33-42. Bernsten asserts that the plaintiffs filed this lawsuit to "cover up their extortionist conduct," and at the same time, "to force Bernsten to give into their demands." Counterclaim, ¶¶ 89-90.

On June 19, 2002, Bernsten filed an Answer, New Matter, and Counterclaim to the Amended Complaint. Bernsten's Counterclaim asserts six counts against Sylk, Churchill and the Churchill Family Partnership: fraudulent inducement (Count I), negligent misrepresentation (Count II), breach of fiduciary duty (Count III), interference with business relations (Count IV), defamation (Count V) and breach of the duty of good faith and fair dealing (Count VI).

On August 8, 2002, Sylk, as well as Churchill and the Churchill Family Partnership, filed preliminary objections to Bernsten's Counterclaim. Bernsten filed memoranda of law in opposition to both sets of objections, and Sylk then filed a reply in support of its set of objections.

DISCUSSION

The majority of plaintiffs' preliminary objections are in the nature of demurrers. A demurrer tests the legal sufficiency of the causes of action as alleged in a complaint or counterclaim. Pa. R. Civ. P. 1028(a)(4); Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. 2000); Smith v. Wagner, 403 Pa. Super. 316, 320, 588 A.2d 1308, 1310 (1991). A demurrer admits all well-pleaded material facts set forth in the pleadings as well as all reasonable inferences, but does not admit conclusions of law. Id. Furthermore,

> [i]t is essential that the face of the complaint [or counterclaim] 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.

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

A. Sylk's Preliminary Objections to Counterclaim

1. Demurrer to Count I (Fraudulent Inducement)

Sylk first asserts that Bernsten has failed to allege a cause of action for fraudulent inducement because Bernsten does not allege that Sylk made any material misrepresentations of past or presently existing fact. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 4-5.

To state a claim of fraudulent inducement, a party must allege (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, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citation omitted); See also Blumenstock v. Gibson, 811 A.2d 1029, 1034 (Pa. Super. 2002).

Bernsten maintains that he has sufficiently alleged a fraudulent inducement claim because Sylk and Churchill prepared Letter Agreements which Bernsten executed that did not include all of the terms and conditions upon which they now rely. Counterclaim, ¶¶ 63- 64, 70-71, 93. The Counterclaim states that:

> [A]t the time [Bernsten] entered into the Letter Agreements, [Sylk and Churchill] had no intention to accept from Bernsten only a portion of the profits but, rather, [they] at all times intended to demand from Bernsten and receive in addition to a portion of the profits, a portion of Bernsten's salary and expense reimbursements and, further, intended to extort Bernsten into repurchasing their interest at exorbitant prices and forcing the paying of such amounts upon the threat of defaming him, interfering with his business relationships, and initiating frivolous litigation, and to destroy his future and the investment.

Counterclaim, ¶ 93.

The essence of Bernsten's fraudulent inducement claim, therefore, is that Sylk and Churchill represented that the Letter Agreements they prepared conformed to the agreement they had reached with Bernsten, that Sylk and Churchill misrepresented the terms of the agreement by failing to include in the Letter Agreements a description of the monies that they now claim are owed by Bernsten, that Sylk and Churchill intended to mislead Bernsten, that Bernsten justifiably relied on the misrepresentation by signing the Letter Agreements, and that he suffered damages as a result of his reliance. Thus, the misrepresentation that Bernsten asserts is actually in the nature of an omission.

An assertion of an omission may suffice as a misrepresentation under the standard for fraud. "To be actionable, a misrepresentation need not be in the form of a positive assertion but is any artifice by which a person is deceived to his disadvantage and may be by false or misleading allegations or by concealment of that which should have been disclosed, which deceives or is intended to deceive another to act upon it to his detriment." Wilson v. Donegal Mutual Insurance Co., 410 Pa. Super. 31, 41, 598 A.2d 1310, 1315 (1991), citing Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 108, 464 A.2d 1243, 1252 (1983). However, "an omission is actionable as fraud only where there is an independent duty to disclose the omitted information . . . and such an independent duty exists where the party who is alleged to be under an obligation to disclose stands in a fiduciary relationship to the party seeking disclosure . . . ." In re Estate of Evasew, 526 Pa. 98, 105, 584 A.2d 910, 913 (1990) (citation omitted). Thus, to state a claim for fraud, an assertion of an omission must be accompanied by a duty to speak. Wilson, 410 Pa. Super. at 41, 598 A.2d at 1316; Smith v. Renaut, 387 Pa. Super. 299, 306, 564 A.2d 188, 192 (1989); See also IRPC, Inc. v. Hudson United Bankcorp, 2002 WL 372945, *7 (Pa. Com. Pl. 2002).

Here, Sylk and Churchill did not have a duty to speak because they owed no fiduciary duties to Bernsten. A fiduciary relationship exists "when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Commonwealth Dep't of Transp. v. E-Z Parks, Inc., 153 Pa. Commw. 258, 267, 620 A.2d 712, 717 (1993) (citations omitted). It was Bernsten, not Sylk or Churchill, who held the equity interest in the entity(ies) to own and operate the proposed steel plant, and who sold a non-voting portion of that interest. Counterclaim, ¶¶ 58-60. Bernsten's argument that Sylk and Churchill owed a fiduciary duty to him because Bernsten needed their

investment is not persuasive. See Bernsten's Memorandum of Law In Opposition to Preliminary Objections, p. 15. Since they did not owe a fiduciary duty, Sylk and Churchill had no duty to disclose to Bernsten that any terms of the agreement to purchase a portion of his interests that they had discussed were not included in the Letter Agreements.

Absent a duty to speak, Sylk's and Churchill's failure to disclose any terms of their agreement in the Letter Agreements does not qualify as an omission. Wilson, 410 Pa. Super. at 41, 598 A.2d at 1316; Smith, 387 Pa. Super. at 306, 564 A.2d at 192; See also, IRPC, 2002 WL 372945 at *7. Therefore, Bernsten has failed to assert the first element of a fraudulent inducement claim.

Thus, Sylk's demurrer to the fraudulent inducement claim is sustained.[3]

2. Demurrer to Count II (Negligent Misrepresentation)

Similar to Sylk's argument relating to the fraudulent inducement claim, Sylk asserts that Bernsten has failed to allege a cause of action for negligent misrepresentation because Bernsten does not allege that Sylk made material misrepresentations of past or presently existing facts. Sylk's Memorandum of Law In Support of Preliminary Objections, p. 7.

To state a claim for negligent misrepresentation, the pleadings must allege (1) a representation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known of its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable

[3] Sylk also asserts that Bernsten's fraudulent inducement claim should be dismissed because the parol evidence rule prohibits the court's consideration of any representations made prior to the Letter Agreements being signed because the subject of the representations are covered by the Letter Agreements. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 5-6. The court declines to analyze this parol evidence argument because the objection is sustained for the reasons discussed.

reliance on the misrepresentation. Bortz, 556 Pa. at 501, 729 A.2d at 561.

Bernsten has failed to assert either a representation of a material fact, or an omission along with a duty to disclose (See Discussion, Section A.1. *supra*). Thus, Bernsten has failed to assert the first element of a negligent misrepresentation claim, and Sylk's demurrer to Count II is sustained.

3. Demurrer to Count III (Breach of Fiduciary Duty)

Sylk next argues that Bernsten's cause of action for breach of fiduciary duty fails because no fiduciary duty exists. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 9-10. In this claim, Bernsten asserts that Sylk, Churchill and the Churchill Family Partnership owed Bernsten a duty of loyalty and that they breached their fiduciary duty through fraudulent inducement, defamation and threats of litigation with the intention of interfering with the contractual relationship between Bernsten and Daniel Bain and between Bernsten and "others." Counterclaim, ¶ 105. Bernsten asserts that "Sylk and the Churchill Defendants were, on the basis of the fact that they were sophisticated businessman [sic] who had the financing that Bernsten needed for his project, in a superior position to Bernsten because he needed their investment." Bernsten's Memorandum of Law In Opposition to Preliminary Objections, p. 15.

The determination of whether Sylk (and Churchill and the Churchill Family Partnership) owed Bernsten a fiduciary duty requires this court to consider the relative positions of the parties. "The Supreme Court has determined that a confidential relationship and the resulting fiduciary duty may attach 'wherever one occupies toward another such a position of advisor or counsellor as reasonably to inspire confidence that he will act in good faith for the other's interest.'" Basile v. H&R Block, Inc., 777 A.2d 95, 101-02 (Pa. Super. 2001), *appeal denied*, 569 Pa. 714, 806 A.2d 857 (2002) (quoting Brooks v. Conston, 356 Pa. 69, 76, 51 A.2d 684, 688 (1947)). Stated in another way, a fiduciary relationship exists "when one

person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Commonwealth Dep't of Transp. v. E-Z Parks, Inc., 153 Pa. Commw. 258, 267, 620 A.2d 712, 717 (citations omitted), *appeal denied*, 534 Pa. 651, 627 A.2d 181 (1993). In the context of a business relationship, Pennsylvania courts have held that "[a] business association may be the basis of a confidential relationship 'only if one party surrenders substantial control over some portion of his affairs to the other.'" E-Z Parks, 153 Pa. Commw. at 269, 620 A.2d at 717, quoting In re Estate of Scott, 455 Pa. 429, 433, 316 A.2d 883, 886 (1974).

This court concludes that Sylk did not owe a fiduciary duty to Bernsten. Bernsten admits that he represented to Sylk that as of February 10, 1999, he would have an equity interest of 50% in a company(ies) to be formed which would develop, own and operate a steel galvanizing plant. Answer to Amended Complaint, ¶ 8. Bernsten agreed to sell a portion of this interest to Sylk and the Churchill Family Partnership. Counterclaim, ¶¶ 59, 67. This court is not persuaded that, simply because Bernsten sought additional funds to offset the expenses he incurred relating to the development of the proposed plant (Counterclaim, ¶ 58) and Sylk and Churchill Family Partnership had the funds and the motivation to purchase a portion of Bernsten's interest, a confidential relationship and resulting fiduciary duty were created. The Counterclaim fails to assert facts that show that Bernsten surrendered substantial control over his affairs as to lead to an overmastering dominance on the part of Sylk and the Churchill Family Partnership, or a weakness, dependence or justifiable trust on the part of Bernsten. Further, the fact that Churchill is an attorney does not, in and of itself, create a fiduciary duty because there is no allegation that Bernsten was his client. On the contrary, Churchill, on behalf of the Churchill Family Partnership, was on

the other side of a one million dollar deal from Bernsten.

This court disagrees with Bernsten's argument that the facts as pleaded parallel the facts in Burdett v. Miller, 957 F.2d 1375 (7th Cir. 1992).[4] In that case, the appellant appealed the district court's finding that he had violated a fiduciary duty to appellee by giving misleading investment advice on which the appellee relied to her detriment. Appellant was a certified public accountant, the owner of his own accounting firm and an investment advisor to appellee. Appellee was a salesperson for a typography firm and an unsophisticated investor. Id. at 1378. Judge Posner found that appellant "cultivated a relation of trust with [appellee] over a period of years, holding himself out as an expert in a field (investments) in which she [appellee] was inexperienced and unsophisticated. He knew that she took his advice uncritically and unquestioningly . . . ." Id. at 1381. Based on these facts, the Court held that the district judge did not commit clear error in finding that the appellant owed a fiduciary duty to appellee. Id. at 1382. Unlike the facts in Burdett, this case does not reveal that Sylk (or Churchill) advised Bernsten in any regard, or that Bernsten reposed any degree of trust in Sylk (or Churchill). Instead, the Counterclaim asserts that Bernsten initiated and negotiated a sizable business transaction with Sylk and the Churchill Family Partnership.

Our Superior Court has stated that the Supreme Court's decisions which address fiduciary duty suggest that the "disparity between the respective parties is to be adjudged subjectively, and may occur anywhere on a sliding scale of circumstances." Basile, 777 A.2d at 102. Admitting all of the well-pleaded facts and reasonable inferences in the Counterclaim as true, there is no evidence that Sylk (or Churchill or

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[4] Although this Seventh Circuit case does not constitute binding authority, this court discusses it because Bernsten relies on it in his memorandum of law. Commonwealth v. Lambert, 765 A.2d 306, 315 n.4 (Pa. Super. 2000).

the Churchill Family Partnership) owed a fiduciary duty to Bernsten. Thus, the demurrer to this cause of action is sustained.

4. Demurrer to Count IV (Interference with Business Relations)

Sylk also argues that Bernsten's claim for intentional interference with business relations fails because the Counterclaim does not identify the existence of any contract or prospective contract, any interference with contract or prospective contract, or any actual damages. Sylk's Memorandum of Law In Support of Preliminary Objections, pp. 11-12.

The elements of a cause of action for intentional interference with business relations are: (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. Pawlowski v. Smorto, 403 Pa. Super. 71, 78, 588 A.2d 36, 39-40 (1991) (to analyze the intentional interference with business relations claim, the court employed the standard for intentional interference with contractual or prospective contractual relations); See also Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994). To state this claim, there must be an assertion of an act which served to deprive the claimant of some benefit to which he was entitled by contract. Id. (citation omitted).

The Counterclaim does not offer sufficient allegations to support the claim of intentional interference with business relations. Bernsten states that "[a]t all relevant times, Sylk and Churchill were aware of Bernsten's ongoing and continuing business relationship with, among others, Daniel Bain and David

Snyder." Counterclaim, ¶ 109. Regarding David Snyder, Bernsten states that he was an employee of Bernsten, and that Sylk told Harvey and Babette Snyder that their son, David Snyder, should not work for Bernsten. Id. at ¶ 78. Bernsten refers to Daniel Bain as his "business partner." Id. at ¶ 80. In addition, Bernsten states that "Sylk and Churchill were aware of Bernsten's potential business relationships with PNC Bank." Id. at ¶ 109.

Assuming these well-pleaded facts and all reasonable inferences are true, Bernsten fails to state the existence of a contractual, or prospective contractual relation between himself and a third party. There is no assertion that there was an employment contract between David Snyder and Bernsten. In fact, there is no indication of the type of work David Snyder performs. In addition, Bernsten fails to describe any contract or business dealing with Daniel Bain. The only information this court can glean from the Counterclaim regarding Daniel Bain is that he is Bernsten's "business partner." Moreover, aside from stating that he had "potential business relationships" with PNC Bank, Bernsten fails to describe them in any way, and in any event, fails to state how Sylk or Churchill interfered with those potential relationships. As for damages, Bernsten fails to assert what actual legal damages he suffered as a result of an interference with business relations.[5] Therefore, Sylk's demurrer to Count IV is sustained.

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[5] Although Bernsten does not argue that his assertions regarding the bank, Byerische Hypo-Und Vereinsbank Aktiengesellschaft, state a claim for intentional interference with business relations, this court considers those allegations in that context in the interest of thoroughly studying the Counterclaim. Bernsten asserts that in the spring of 2001, Sylk advised Bernsten that if he and the Churchill Family Partnership did not receive a portion of Bernsten's salary and expense reimbursement, or if Bernsten did not purchase their interests back for ten million dollars, then Sylk and the Churchill Family Partnership would contact Byerische Hypo-Und Vereinsbank Aktiengesellschaft, the bank which had partially financed the proposed steel plant, and tell the bank's representatives of Bernsten's "fraud." Counterclaim, ¶ 82. Upon review, these assertions do not state a claim for intentional interference with business relations because Bernsten failed to assert that Sylk or Churchill or anyone

5. Demurrer to Count V (Defamation)

Sylk maintains that Bernsten's defamation claim is legally insufficient because it fails to identify the third parties to whom the defamatory statements were made, who heard and understood the statements to be defamatory, and the actual damages caused by the statements. Sylk's Memorandum of Law in Support of Preliminary Objections, pp. 13-14.

A claim for defamation must allege: "(1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the complaining party; (4) the third party's understanding of the communication's defamatory character; and (5) injury." Raneri v. DePolo, 65 Pa. Commw. 183, 186, 441 A.2d 1373, 1375 (1982); See also 42 Pa.C.S. § 8343(a). A complaint for defamation must allege with particularity the content of the defamatory statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made. Itri v. Lewis, 281 Pa. Super. 521, 524, 422 A.2d 591, 592 (1980).

Pennsylvania courts have elaborated on the determination of whether a publication is defamatory. "A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule or injure him in his business or profession." Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 305, 483 A.2d 456, 461 (1984) (citation omitted). A publication is also defamatory if it "lower[s] a person in the estimation of the community, deter[s] third persons from associating with him, or adversely affect[s] his fitness for the proper conduct of his lawful business or profession." Green v. Mizner, 692 A.2d 169, 172 (Pa. Super. 1997).

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on behalf of the Churchill Family Partnership, in fact, contacted the bank.

Bernsten has asserted that Sylk, individually, and on behalf of Churchill, the Churchill Family Partnership, and the joint venture between Sylk and the Churchill Family Partnership (Counterclaim, ¶ 62), made and published false statements to Harvey and Babette Snyder, as well as Daniel Bain. Id. at ¶¶ 78, 113. Bernsten states that "Sylk specifically falsely stated to the Snyders that Bernsten filed false tax returns and 'warned' the Snyders that their son, David, should terminate his employment with Bernsten because Bernsten would teach and train David to act dishonestly." Id. at ¶ 78. In addition, Bernsten states that "Sylk made the same false and fraudulent statements to Bernsten's business partner, Daniel Bain, to undermine Bernsten's relationships with his business associates." Id. at ¶ 80. Bernsten asserts that the Snyders and Bain understood Sylk's statements to apply to Bernsten and to be defamatory. Id. at ¶ 114. The statements were made without privilege or justification, according to Bernsten. Id. at 115. Furthermore, Bernsten asserts that he "suffered actual monetary damages as a result of the slanderous and defamatory statements made and published by Sylk including, but not limited to, additional business costs and loss of business opportunities." Id. at ¶ 116.

Sylk argues that this defamation claim, which might be considered a slander *per se* claim, fails because Bernsten fails to assert general damages, which has been defined as "proof that one's reputation was actually affected by the slander, or that [one] suffered personal humiliation, or both." Sylk's Memorandum of Law In Opposition to Preliminary Objections, pp. 14-15; Walker v. Grand Central Sanitation, Inc., 430 Pa. Super. 236, 246, 634 A.2d 237, 242 (Pa. Super. 1993), citing Restatement (Second) of Torts, § 573. Initially, it should be noted that in Walker, the case upon which Sylk relies, our Superior Court considered the evidence of damages as had been presented at a jury trial. The instant case is only at the nascent preliminary objection stage. Further, at this stage, the court must consider all

reasonable inferences from Bernsten's assertions, and if there is any doubt, it should be resolved by the overruling of the demurrer. Bailey, 729 A.2d at 1211. One reasonable inference from Bernsten's assertion that he has suffered business costs and lost business opportunities as a result of the slander is that his reputation in the business community was actually affected by the slander. Therefore, this court finds that Bernsten has stated a legally sufficient claim for defamation, including the damages element. Sylk's demurrer to this Count V is overruled.

6. Demurrer to Count VI (Breach of Duty of Good Faith and Fair Dealing)

Sylk contends that Bernsten has failed to set forth a claim for breach of duty of good faith and fair dealing because he does not allege a breach of any agreement, and Pennsylvania law does not recognize this claim absent an underlying breach of an agreement.

The implied duty of good faith and fair dealing arises under the law of contracts. Creeger Brick and Building Supply Inc. v. Mid-State Bank and Trust Company, SEDA, 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989). There is no independent cause of action for breach of the implied duty of good faith absent an underlying breach of contract. Donahue v. Federal Express Corp., 753 A.2d 238, 242 (Pa. Super. 2000).

Good faith "has been defined as [h]onesty in fact in the conduct or transaction concerned." Heritage Surveyors & Engineers, Inc. v. National Penn Bank, 801 A.2d 1248, 1253 (Pa. Super. 2002), quoting Creeger Brick, 385 Pa. Super. at 35, 560 A.2d at 153. The obligation to act in good faith in the performance of contractual duties varies within different factual contexts, but bad faith could include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other

party's performance." Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 318, 671 A.2d 716, 721-22 (1996).

The only agreements that Bernsten refers to in the Counterclaim are what he terms the "Letter Agreements," the letters of February 10, 1999, and April 25, 2000, which Bernsten executed. Counterclaim, ¶¶ 63-64, 66-70; Amended Compl., Exs. A and B. In responding to the preliminary objections, however, Bernsten argues that the underlying agreement for his good faith and fair dealing claim is the "oral agreement which the parties entered into prior to the execution of the letter agreements." Bernsten's Memorandum of Law In Opposition to the Preliminary Objections, p. 21.

The Counterclaim describes the discussions between Sylk, Churchill and Bernsten prior to the execution of each Letter Agreement as negotiations, rather than as oral agreements separate from the Letter Agreements. Indeed, Bernsten refers to the parties' discussions as negotiations when he asserts that he relied on Sylk's and Churchill's assurances that the Letter Agreements conformed to the terms agreed to in their discussions. Counterclaim, ¶¶ 60, 64, 68, 70. (In fact, Bernsten employs this very argument for his fraudulent inducement and negligent misrepresentation claims.) Admitting all of Bernsten's well-pleaded material facts and all reasonable inferences, this court does not find that Bernsten pled in the Counterclaim any agreement which could serve as the basis for his good faith and fair dealing claim. Sylk's demurrer to this claim is sustained.

7. Objection to Strike Scandalous and Impertinent Matter

Finally, Sylk argues that pursuant to Pa. R. Civ. P. 1028(a)(2), this court should strike scandalous and impertinent matter contained in the Counterclaim, such as the terms "blackmail" and "extortion," because that matter implies criminal conduct. Sylk's Memorandum of Law in Support of Preliminary

Objections, p. 16. Sylk requests that the court order Bernsten to amend the Counterclaim to delete all scandalous and impertinent matter.

"Scandalous and impertinent matter" is defined as "allegations . . . immaterial and inappropriate to the proof of the cause of action." Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 115 (Pa. Commw. 1998) (citation omitted), *aff'd*, 562 Pa. 632, 757 A.2d 367 (2000). "[T]here is some authority for the proposition that even if the pleading . . . [is] impertinent matter, that matter need not be stricken but may be treated as 'mere surplusage' and ignored. 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 Envtl. Resources v. Hartford Accident & Indem. Co., 40 Pa. Commw. 133, 137-38, 396 A.2d 885, 888 (1979) (citations omitted).

To the extent that the terms which Sylk considers scandalous and impertinent are relevant to Bernsten's defamation claim, this court will consider that language as part of Bernsten's claim. The court will ignore the remaining language and consider it "mere surplusage." Therefore, this preliminary objection is overruled.

B. Winston J. Churchill and The Churchill Family Partnership's Preliminary Objections to Counterclaim

Churchill and the Churchill Family Partnership also raise preliminary objections to the Counterclaim.

1. Demurrer to Counts I-VI of Counterclaim for Failure to Allege Agency

The first objection, brought by the Churchill Family Partnership only, states that Counts I-VI of the Counterclaim should be dismissed because Bernsten fails to allege that the Churchill Family Partnership authorized an agent to engage in tortious activities on its behalf, or that the Churchill Family Partnership

ratified those acts. Memorandum of Law In Support of Preliminary Objections, pp. 4-5.

In response, Bernsten argues that there is no need to reach the issue of agency because he has alleged that Sylk, Churchill and the Churchill Family Partnership "all act as agents of the other" and are "bound by the tortious acts of their co-adventurers committed in furtherance of the joint venturer." Bernsten's Memorandum of Law In Opposition to Preliminary Objections, p. 5.

The court agrees with Bernsten. In a joint venture, "each joint venturer is both an agent and a principal of the joint venture." Gold & Co., Inc. v. Northeast Theater Corp., 281 Pa. Super. 69, 73 n.1, 421 A.2d 1151, 1153 n.1 (1980) (citations omitted). Similarly, "[e]very member of a partnership is liable for a tort committed by one of the members acting in the scope of the firm business, even if the other partners did not participate in, ratify or have knowledge of the tort." Svetik v. Svetik, 377 Pa. Super. 496, 505, 547 A.2d 794, 799 (1988), *appeal denied*, 522 Pa. 604, 562 A.2d 827 (1989); See also 15 Pa.C.S. § 8325 ("Wrongful Act of Partner").

The Counterclaim asserts that Sylk and the Churchill Family Partnership entered into a joint venture or partnership together, as follows: "Sylk and the [Churchill] Family Partnership, at the direction of Churchill, were an existing investment partnership or joint venture, which investment partnership or joint venture . . . would invest in and own an interest in Bernsten's equity interest pursuant to the terms of the agreement." Counterclaim, ¶ 62. The Counterclaim further asserts that Sylk acted in the scope of the business by investing in a portion of Bernsten's interest in the proposed steel plant. Counterclaim, ¶¶ 60, 62-64, 67. Therefore, Bernsten has sufficiently stated that Sylk, as a joint venturer or partner of the Churchill Family Partnership, acted on behalf of the Churchill Family Partnership.

Moreover, the Counterclaim asserts that Churchill acted on behalf of the Churchill Family Partnership. Counterclaim, ¶¶ 59, 62-64, 67-68, 71-72. In the February 10, 1999 letter attached as Exhibit A to the Amended Complaint (and as referenced in the Counterclaim, ¶ 66), Winston J. Churchill signed the letter agreement on behalf of the Churchill Family Partnership. In addition, in the April 25, 2000 letter attached as Exhibit B to the Amended Complaint (and as referenced in the Counterclaim, ¶ 67), Winston J. Churchill signed the letter agreement on behalf of the Churchill Family Partnership.

In fact, the Churchill Family Partnership is hard-pressed to argue that Churchill did not act on its behalf because in its Amended Complaint it stated that Winston J. Churchill is a general partner of Churchill Family Partnership and holds a 32% limited partnership interest in that Pennsylvania limited partnership. Amended Compl., ¶¶ 3-4. Moreover, Winston J. Churchill signed the verification to the Amended Complaint stating that he is empowered to make the verification on behalf of the Churchill Family Partnership.

Therefore, although some of Bernsten's claims against the Churchill Family Partnership fail to state a claim, as discussed below, the claims do not fail for lack of allegations regarding agency. This preliminary objection is overruled.

2. Demurrer to Counts I-V for Imposition of Punitive Damages against Churchill Family Partnership

The Churchill Family Partnership argues that Bernsten's claim for punitive damages against it in Counts I-V of the Counterclaim should be stricken because Bernsten fails to allege that Sylk or Churchill acted in a clearly outrageous manner to warrant punitive damages, on behalf of the Churchill Family Partnership, with the intent to further its interests. Memorandum of Law In Support of Preliminary

Objections, pp. 5-6.

Generally, a plaintiff may recover punitive damages when the defendant's acts are the result of reckless indifference to the rights of others or an evil or malicious motive. Rizzo v. Michener, 401 Pa. Super. 47, 60, 584 A.2d 973, 979 (1990), *appeal denied*, 528 Pa. 613, 596 A.2d 159 (1991). For a defamation claim, punitive damages are available if the defamed party can show that the publisher acted with actual malice. Bargerstock v. Washington Greene Community Action Corp., 397 Pa. Super. 403, 415, 580 A.2d 361, 366 (1990), *appeal denied*, 529 Pa. 655, 604 A.2d 247 (1992). Actual malice exists if the publisher made the defamatory statement with knowledge that it was false or with reckless disregard of whether it was false. Id. (citation omitted).

Here, Bernsten has asserted that "the Counterclaim Defendants acted with oppression, fraud and malice." Counterclaim, ¶¶ 97, 117. To support the element of malice, Bernsten has further asserted that "Sylk, acting on his own behalf and on behalf of Churchill and the Family Partnership, embarked upon a concerted plan to defame Bernsten . . . in furtherance of a forced sale of their interests to Bernsten." Counterclaim, ¶ 74. Bernsten's assertions that the defamation was a "concerted plan" meant to pressure Bernsten into buying back the interests at a commercially unreasonable price are akin to stating that Sylk knew that the statements were false, or at least, that he made them with reckless disregard of whether they were false. Counterclaim, ¶¶ 78-81, 86.

Therefore, at this stage, assuming all well-pled facts and reasonable inferences of the Counterclaim as true, this preliminary objection is overruled.

3. Demurrer to Counts I (Fraudulent Inducement) and Count II (Negligent Misrepresentation)

Churchill and the Churchill Family Partnership contend that Bernsten's claims of fraudulent inducement and negligent misrepresentation are legally insufficient. Memorandum of Law In Support of Preliminary Objections, pp. 6-8. For the reasons discussed above in Section A.1., Bernsten has failed to set forth the first element of a fraudulent inducement claim, and thus, the demurrer to that claim is sustained. In addition, for the reasons discussed in Section A.2., Bernsten has failed to set forth the first element of a negligent misrepresentation claim, and thus, the demurrer to that claim is sustained.

4. Demurrer to Count IV (Interference with Business Relations)

Churchill and the Churchill Family Partnership argue that Bernsten's claim of interference with business relations is legally insufficient. Memorandum of Law In Support of Preliminary Objections, pp. 8-9. For the reasons discussed above in Section A.4., Bernsten fails to state a claim for interference with business relations. The demurrer to that claim is sustained.

5. Demurrer to Count V (Defamation)

Churchill and the Churchill Family Partnership urge that Bernsten's claim of defamation is legally insufficient. Memorandum of Law In Support of Preliminary Objections, p. 10. For the reasons discussed above in Sections B.1. (relating to joint ventures and agency) and A.5. (relating to defamation), the demurrer to the defamation claim is overruled.

6. Demurrer to Count VI (Breach of the Duty of Good Faith and Fair Dealing)

Churchill and the Churchill Family Partnership argue that Bernsten's claim of breach of the duty of good faith and fair dealing is legally insufficient. Memorandum of Law In Support of Preliminary

Objections, p. 10. For the reasons discussed above in Section A.6., Bernsten has failed to set forth the requisite underlying breach of an agreement for this claim. Thus, the demurrer to this claim is sustained.

CONCLUSION

For these reasons, this court finds that:

(a) Sylk's preliminary objection to Bernsten's fraudulent inducement claim (Count I) is **Sustained**;

(b) Sylk's preliminary objection to Bernsten's negligent misrepresentation claim (Count II) is **Sustained**;

(c) Sylk's preliminary objection to Bernsten's breach of fiduciary duty claim (Count III) is **Sustained**;

(d) Sylk's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained**;

(e) Sylk's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled**;

(f) Sylk's preliminary objection to Bernsten's breach of duty of good faith and fair dealing claim (Count VI) is **Sustained**;

(g) Sylk's preliminary objection to strike scandalous and impertinent matter is **Overruled**;

(h) Churchill Family Partnership's preliminary objection to Bernsten's Counts I-VI for Failure to Allege Agency is **Overruled**;

(i) Churchill and Churchill Family Partnership's preliminary objection to Imposition of Punitive Damages As to Counts I-V is **Overruled** without prejudice to reassert in a future motion after the completion of discovery, if appropriate;

(j) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's fraudulent inducement and negligent misrepresentation claims (Counts I and II, respectively) is **Sustained**;

(k) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's interference with business relations claim (Count IV) is **Sustained**;

(l) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's defamation claim (Count V) is **Overruled**;

(m) Churchill and Churchill Family Partnership's preliminary objection to Bernsten's breach of the duty of good faith and fair dealing claim (Count VI) is **Sustained**.

This court will issue a contemporaneous Order in connection with this Opinion.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.