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

NAND TODI, Plaintiff,	:	June Term, 2002
v.	:	No.: 2969
J & C PUBLISHING, INC. d/b/a Commercial Reality Review, Henry J. Strusberg, and Strusberg & Fine, Inc., Defendants.	:	Control Numbers 021601 021829 Commerce Program

Gene D. Cohen, J.

MEMORANDUM OPINION

This dispute arises over the enforcement of a settlement agreement between the parties. Presently before this court are cross motions for summary judgment. For the reasons discussed below, this court grants in part denies in part the parties' motions for summary judgment.

BACKGROUND

The instant matter appears before this court after a long and involved history which originates with Mr. Stursberg's organization and incorporation of reXnow.com, LLC ("Rex"), a business-to-business real estate platform exchange between property owners and commercial real estate providers of goods and services through an Internet website. (Stursberg dep. at 40-41)

In March 2000, J & C Publishing Inc., d/b/a Commercial Reality Review ("the Magazine")[1] entered into an agreement with Intermedia Interactive Software ("Intermedia") to develop computer software necessary to operate the Rex website. (Stursberg dep. at 56-57) The

[1]The Magazine, operated by Mr. Stursberg, marketed the Rex concept to potential customers.

primary contact between Intermedia and Rex was Ashesh Shah, the principal of Intermedia. (Stursberg dep. 56)

On June 9, 2000, Mr. Nand Todi ("Todi") lent Rex the principal sum of $300,000.00 pursuant to a convertible note payable within one year. (Pl. Mtn. at Exh 3) Mr. Todi also signed a licensing fee royalty agreement with the Magazine entitling him to receive ten percent of total revenues received by the Magazine from Rex. (Pl. Mtn. Exh 4) On October 10, 2000, Mr. Todi agreed to lend an additional $200,000.00 to Rex which was transferred in two installments of $100,000.00. (Pl. Mtn. Exh. 5)

The Rex website never became operational, Intermedia never released the software to Rex and Rex was forced to go out of business. (Pl. Mtn. Exh. 6) In March 2001, Mr. Todi filed a lawsuit against Rex and the Magazine in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 01-1545 ("the First Litigation") alleging inter alia breach of contract and violations of securities' laws, and seeking injunctive relief and monetary damages. (Pl. Mtn. Exh. 8) As a result of the litigation and Rex's financial problems, Rex and the Magazine each filed for bankruptcy and the First Litigation was put into administrative suspense.

In May 2001, Mr. Todi filed a second lawsuit against Mr. Stursberg and Stursberg and Fine (S&F) in the United States District Court for the Eastern District of Pennsylvania (the "Second Litigation") alleging inter alia, civil conspiracy, fraud, violation of securities laws and seeking injunctive relief and monetary damages. (Pl. Mtn. Exh. 9) As in the First Litigation, the issue of Mr. Todi's unpaid $500,000.00 loan to Rex was central to the Second Litigation.

On December 7, 2001, a settlement conference was held before the Honorable Thomas

Rueter, U.S. Magistrate for the Eastern District of Pennsylvania, with all the interested parties and counsel present. After a long day of negotiations, the parties agreed to a "Global Settlement" resolving the First Litigation, the Second Litigation and the Bankruptcy proceedings. The material terms of the "Global Settlement" were placed on the record as follows:

1. The Magazine shall pay Mr. Todi the sum of $150,000.000 in good U.S. funds over a period of six years. The first payment shall be made on or before June 1, 2002 and continue monthly thereafter with a balloon at the end of a six-year period with the balance. (Pl. Mtn. Exh. 10 p. 3-4) As security for this obligation to Mr.Todi, Mr. Stursberg pledged his stock in the Magazine as collateral. In the event of uncured default, Mr. Todi would be entitled to confess judgment against the Magazine for $150,000.00 less the payments received. (Id.) Todi and his counsel were required to give Mr. Stursberg, Mr. Lightman and Mr. Coffey 15 days notice in the event of default prior to confession of judgment. Id.

2. Rex will pay Mr. Todi the sum or up to the sum of $700,000.00 separate and apart from and in addition to the $500,000,00. The payment is conditioned upon (a) Rex reacquiring the software from Intermedia and Ashesh Shah; (b) Intermedia and Shah making the software operational and (3) Todi and Stursberg's ability to convince Intermedia to transfer the software rights to Rex. With respect to this provision, Stursberg cannot assert that Mr. Todi breached the settlement agreement by failing to cooperate and vice versa. The issues of good faith and reasonableness were not to be involved. (Id. at 4- 5).

3. In the event Rex receives the software from Intermedia and it is operational and Rex becomes operational (a) Rex shall commence making monthly payments to Mr. Todi and pay him $700,000.00 which will be paid by monthly payments of 10% of the gross revenues of Rex with a $10,000.00 per month cap; (b) Rex shall grant Mr. Todi a lien on the software to secure Rex's payments to Todi up to $700,000.00; (c) Stursberg's Magazine stock pledged as collateral to secure the $150,000.00 will serve as further security for the first $100,000.00 worth of payments that Rex will make to Todi; and (d) the first $100,000.00 will be paid to Todi within six years from the time Rex gets the software, fixes it and it becomes operational. (Id. p. 5-6).

4. Mr. Todi shall 18 months from the time Rex gets the software, fixes it and it becomes operational, convert the remaining debt into a 10% equity position in Rex. This right to convert will be exercisable at Mr. Todi's sole discretion and upon conversion he will be paid up to but not exceeding the sum of $75,000.00 from $150,000.00 of the Magazine payments he is suppose to receive. At the time of conversion, there will be no further debt owed by Rex or the Magazine or Stursberg to Todi. Todi will receive a 10 % equity position and stock will be released from escrow and returned to Stursberg. If there is a payment default by Rex, Mr. Todi would have the right to confess judgment. Once the judgment is confessed the only issue Mr. Stursberg is entitled to raise as a defense is the issue of payment. Mr. Stursberg is to retain the

voting rights to the stock, dividend rights or merger or splits until an uncured default. (Id. at 8-9,11-12).

5. The Magazine and Rex's bankruptcy proceedings would be dismissed by consent and the two federal court actions will be marked settled, discontinued and ended with each party to bear its own fees and costs. (Id. at 9).

6. The parties would exchange mutual releases except for the parties obligations under the settlement agreement and any claims the parties may have against third parties. (Id. 12-13).

Additionally, the parties agreed that counsel for Mr. Todi would prepare a written agreement to conform with the material terms of the settlement placed on the record and that Magistrate Reuter would retain jurisdiction over the matter to enforce the settlement and resolve any disputes under the settlement. (Id. p. 11).

After the material terms were placed on the record, counsel for Mr. Todi supplemented the settlement terms with the following: (1) that Mr. Todi's right to convert his interest in Rex to equity has no impact on the obligation of the Magazine to pay $150,000.00 to Mr. Todi (Id. 11-12); (2) that the Fines, partners in Stursberg and Fine, be signatures under the agreement (Id. 13-13) and (3) restricted the use of the Intermedia Software to Rex's business only and that Mr. Stursberg could not use the software in another company that might compete or otherwise diminish the capability of Rex. (Id. at 14).

After the material terms of the settlement were placed on the record, Mr. Stursberg and Mr. Todi testified that they agreed to the terms of the settlement as placed on the record. (Id. p. 14, 16-17).

On December 11 and 12, 2001 Judge DuBois entered orders dismissing First and Second Litigation with prejudice. On December 28, 2001, pursuant to the Global Settlement, the Court

dismissed the Magazine's bankruptcy proceeding, and on June 28, 2002, Rex's bankruptcy proceeding was likewise dismissed.

On February 21, 2002, counsel for Mr. Todi forwarded a draft of the Settlement Agreement to counsel for Mr. Stursberg. (Pl. Mtn. Exh. 13) Counsel for Mr. Stursberg objected to the draft claiming that the terms were materially different from the terms set forth on the record on December 7, 2001. (Pl. Mtn. Exh. 14)[2] Included within the draft agreement was a non compete provision precluding the Stursberg parties from developing and operating another commercial real estate business to business platform exchange, transferring the obligations under the Global Settlement to any new entity created by Mr. Stursberg and precluding Rex from licencing the software to another company and other discrepancies. (Pl. Mtn. Exh.13).

As of December 7, 2001, Mr. Strutsberg made two payments under the Global Settlement which were placed in his attorney's escrow account. (Pl. Mtn. Exh. 19). On June 21, 2002, Mr. Todi filed the instant action as a declaratory judgment action against J & C Publishing, Inc. d/b/a Commercial Realty Review, Henry J. Stursberg and Stursberg and Fine, Inc. seeking to compel Mr. Stursberg to execute the draft settlement agreement and declare defendants in breach of the Global Settlement. Plaintiff also requests damages for breach of contract, fraud, breach of the covenant of good faith and fair dealing and unjust enrichment. The Stursberg parties filed a counterclaim against Mr. Todi for breach of contract, tortious interference, breach of fiduciary duty, breach of the duty of good faith and fair dealing, fraud, and negligent misrepresentation seeking compensatory damages as well as injunctive and declaratory relief, attorney's fees,

[2]Counsel for plaintiff submitted a second draft settlement agreement which corrected several points of contention between the parties. (Pl. Mtn. Exh. 24)

interests, costs and delay damages. Mr. Todi filed preliminary objections to Stursberg parties' counterclaims which were sustained by the court.

DISCUSSION

I. Legal Standard

A proper grant of summary judgment depends upon an evidentiary record that either: (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc. v. Cohen, 2002 WL 1472340,* 2 (Pa. Com. Pl. 2002) (Herron). Under Pa. R.C. P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. The nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the moving party, "summary judgment is proper when if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory he has pled." Id (quoting Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999)). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id.

II. The "Global Settlement" Agreement Entered on the Record on December 7, 2001 is Binding Upon the Parties

The Pennsylvania Supreme Court stated the following with respect to the formation,

interpretation and enforcement of settlement agreements:

> The enforceability of settlement agreements is governed by principles of contract law. Mc Donnell v. Ford Motor Co., 434 Pa. Super. 439, 445 643 A.2d 1102, 1105 (1994) (citations omitted) To be enforceable, a settlement agreement must possess all of the elements of a valid contract. Gogel v. Blazofsky, 187 Pa. Super. 32, 36, 142 A.2d 313, 315 (1958) (citation omitted) As with any contract, it is essential to the enforceability of a settlement agreement that " the minds of the parties should meet upon all the terms, as well as the subject-matter, of the agreement." Onyz Oils & Resins, Inc. v. Moss, 367 Pa. 416, 420, 80 A.2d 815, 817 (1951)
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> Where the parties have agreed on the essential terms of a contract, the fact that they intend to formalize their agreement in writing but have not yet done so does not prevent enforcement of such agreement. Field v. Golden Triangle Broadcasting, Inc., 451 Pa. 410, 418, 305 A.2d 689, 693 (1973) (citation omitted) Given the inability of the parties to an oral agreement to reduce such agreement to writing after several attempts does not necessarily preclude a finding that the oral agreement was enforceable. See Woodbridge v. Hall, 366 Pa. 46, 48, 76 A2d 205, 206 (1950)
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> When there exists conflicting evidence as to whether the parties intended that a particular writing would constitute a complete expression of their agreement, the parties intent is a question to be resolved by the finder of fact .... Field, 451 Pa. at 414, 305 A.2d at 691.
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> .....
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> If all the material terms of the agreement are agreed upon, the settlement agreement will be enforced. Miller, 124 Pa. Cmwlth. at 256. If however there exists ambiguities and undetermined matters which render a settlement agreement impossible to understand and enforce, such an agreement must be set aside. Id;. Mazzella v. Koken, 559 Pa. 216, 224-25, 739 A.2d 531, 536-537 (Pa. Super. 1999).

It is a well-settled doctrine that settlement agreements are a highly favored judicial tool. In re Estate of Misko, 2002 WL 372943 * 3 (Pa. Com. Pl. 2002) (O'Keefe); citing Miller v. Clay Township, 555 A.2d 972, 973 (Pa. Cmwlth. 1989). In the absence of fraud and mistake, courts are loathed to second guess or undermine the original intention of the parties to a settlement agreement. Id. If it were the role of the courts to re-evaluate settlement agreements, the judicial

policies favoring settlements would be useless. Id. As the Superior Court has suggested, "if all the material terms of the bargain are agreed upon", the court will enforce the settlement. Id. (quoting McDonnell v. Ford Motor Co., 434 Pa. Super. 439,445, 643 A.2d 1102, 1105 (Pa. Super. 1994)).

In the present case, Mr. Todi and Mr. Stursberg intended to enter into an enforceable settlement agreement on December 7, 2001. The record in this matter demonstrates that Mr. Lightman, counsel for Mr. Stursberg, reported to the court "I'm pleased to report and with the Court's permission would like to place on the record the material terms of the settlement agreement reached between the parties." (Hearing Transcript p. 3) Counsel even engaged in some clarification of the exact terms on the record. Counsel for Mr. Todi supplemented the agreement with three additional terms. One of which was to preclude Mr. Stursberg from utilizing Intermedia software in any other business except Rex. (Hearing Transcript p.14) After the terms were placed on the record, Mr. Todi and Mr. Stursberg testified that they agreed with the terms of the settlement. (Hearing Transcript p. 16-17). Although it was indeed contemplated that the settlement agreement would be subsequently reduced to writing, neither party stated on the record that there would not be a contract until a writing had been executed.

This court is not persuaded by plaintiff's argument that he would not have agreed to enter into a settlement agreement and give up his claims against the Stursberg parties unless the disputed provisions were included within the agreement. Plaintiff had ample opportunity to include the disputed provisions within the Global Settlement at the time the agreement was negotiated and placed on the record. This court cannot now compel defendants to sign a document that differs from the agreement reached by the parties on December 7, 2001.

> The law demands of every man who bargains with another that he should do so only after due reflection of the possible consequences of his bargain and if he misjudges consequences that could have been expected by a reasonably intelligent man, he cannot rely on the law to remedy his fecklessness.

Century Inn, Inc. v. Century Inn Realty, Inc., 358 Pa. Super. 53, 516 A.2d 765,769 (Pa. Super. 1986)

Based on the foregoing, this court finds that the Global Settlement is a binding and enforceable settlement between the parties.

II. Count II - Declaratory Judgment -The Magazine and Count III Breach of Contract

This court will grant the Stursberg parties' motion for summary judgement with respect to Count II (Declaratory Judgment -Magazine) and Count III (Breach of Contract), as Todi has failed to provide the Magazine with fifteen days notice prior to confessing judgment as required under the Global Settlement. Accordingly, these counts are dismissed without prejudice.

III. Implied Covenant of Good Faith and Fair Dealing-Count V

"The implied covenant of good faith and fair dealing does not allow for a claim separate and distinct from a breach of contract claim. Rather a claim arising under a breach of covenant of good faith and fair dealing must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract action." JHE, Inc. v. Septa, 2002 WL 1018941 (Phila. Com. Pl. May 17, 2002) (Sheppard). Since plaintiff's breach of contract claim has been dismissed by the court and since plaintiffs claim for breach of covenant of good faith and fair dealing is redundant, the court hereby dismisses Count IV of plaintiff's complaint.

V. Fraud in the Inducement -Count V

Plaintiff's fraud claim must be dismissed under the gist of the action doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims...tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus and agreements between particular individuals." Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002). A tort claim is barred "where the duties allegedly breached were created and grounded in the contract itself ...[or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Etoll, Inc., 811 A.2d at 19.

In this case, the only duty breached by defendants was their contractual duty under the Global Settlement which provides a basis for a breach of contract claim. Therefore, plaintiff's claim for fraud is dismissed.

VI. Negligent Misrepresentation -Count VI

Where a plaintiff asserts negligent misrepresentation and seeks only damages for economic loss, the defendant is entitled to judgment as a matter of law. David Pflumm Paving & Excavating, Inc. v. Foundation Services Co., 816 A.2d 1164 (Pa. Super. 2003) In this case, plaintiff is requesting the court to enter judgment in his favor for $500,000.00, the amount of Mr. Todi's investment. Since such damages are solely for economic loss, defendants are entitled to judgment as a matter of law on this issue.

VII. Unjust Enrichment

Unjust enrichment is a quasi-contractual doctrine based in equity which requires a

plaintiff to establish the following: (1) benefits conferred on defendants by plaintiffs; (2) appreciation of such benefits by defendants; (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendants to retain the benefit without payment of value. Abrams v. Toyota Motor Credit Corp., 2001 WL 1807357, * 11 (Pa. Com. Pl. 2001) (citing Wiernik v. PHH U.S. Mortg Corp., 736 A.2d 616, 622 (Pa.Super. 1999)). However, Pennsylvania law holds that a court "may not make a finding of unjust enrichment ... where a written or express contract between the parties exists." Id.(quoting Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999)); see also, Birchwood Lakes Community Ass'n v. Comis, 296 Pa. Super. 77, 442 A.2d 304, 308 (Pa. Super. 1982) (a plaintiff cannot recover on a claim for unjust enrichment if such claim is based on a breach of a written contract).

Here, the Global Settlement is clear and explicit and governs the parties' relationship. Thus, this court hereby denies plaintiff's motion for summary judgment and grants defendants' motion for summary judgment on this issue.

CONCLUSION

For these reasons, this court finds that:

1. The parties cross motions for summary judgment to Count I of Plaintiff's complaint are **Granted in part Denied in part**. The December 7, 2001 Global Settlement is a valid and enforceable contract that is binding upon the parties;

2. Defendants Motion for Summary Judgment is **Granted** with respect to Count II (Declaratory Judgment- Magazine), Count III (breach of contract), Count IV (implied covenant of good faith and fair dealing), Count V (fraud), Count VI (negligent misrepresentation) and Count VII (unjust enrichment). Count II and Count III are

dismissed without prejudice.

3. Plaintiff's Motion for Summary Judgment is **Denied** with respect to Count II Declaratory Judgment- Magazine), Count III (breach of contract), Count IV (implied covenant of good faith and fair dealing), Count V (fraud), Count VI (negligent misrepresentation) and Count VII (unjust enrichment).

This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT

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GENE D. COHEN, J

Dated: July 17, 2003

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

NAND TODI,	:	
Plaintiff,	:	June Term, 2002
v.	:	No.: 2969
J & C PUBLISHING, INC. d/b/a Commercial Reality Review, Henry J. Strusberg, and Strusberg & Fine, Inc.,	:	Control Numbers 021601 021829 Commerce Program
Defendants.	:	

ORDER and MEMORANDUM OPINION

AND NOW, this 17th day of JULY, 2003, upon consideration of the Cross Motions for Summary Judgment of the parties, all responses in opposition, the respective memoranda, all matters of record, after oral argument and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby **ORDERED AND DECREED** as follows:

1. The parties cross motions for summary judgment to Count I of Plaintiff's complaint are **Granted in part Denied in part**. The December 7, 2001 Global Settlement is a valid and enforceable contract that is binding upon the parties.

2. Defendants Motion for Summary Judgment is **Granted** with respect to Count II (Declaratory Judgment- Magazine), Count III (breach of contract), Count IV (implied covenant of good faith and fair dealing), Count V (fraud), Count VI (negligent misrepresentation) and Count VII (unjust enrichment). Count II and Count

III are **dismissed without prejudice**.

3. Plaintiff's Motion for Summary Judgment is **Denied** with respect to Count II Declaratory Judgment- Magazine), Count III (breach of contract), Count IV (implied covenant of good faith and fair dealing), Count V (fraud), Count VI (negligent misrepresentation) and Count VII (unjust enrichment).

BY THE COURT

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GENE D. COHEN, J