

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

NORMAN WERTHER, M.D.	: MAY TERM, 2002
Individually and as a shareholder	
derivatively on behalf of CUBITROL	: No. 1078
LEASING INC. and CUBITROL	
MEDICAL MANAGEMENT, INC.,	:
Plaintiff,	
	: Commerce Program
v.	
	:
CRAIG ROSEN, LBBJ MEDICAL	
MANAGEMENT, INC. t/a and d/b/a	:
VAX-D INSTITUTE OF PHILADELPHIA,	
LBBJ CONSULTANTS, INC.,	:
LBBJ MEDICAL, INC.,	
ALAN FRANK, ESQUIRE, and	:
FRANK & ROSEN,	
Defendants.	: Superior Court Docket No. 1009 EDA 2003

OPINION

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

This Opinion is submitted relative to plaintiffs' appeal of this court's Order of February 13, 2003.

For purposes of this appeal this court respectfully resubmits and will rely upon its Opinion, dated February 13, 2003. A true copy of that Opinion is attached and marked Appendix "A".

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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VAX-D INSTITUTE OF PHILADELPHIA,	
LBBJ CONSULTANTS, INC.,	:
LBBJ MEDICAL, INC.,	
ALAN FRANK, ESQUIRE, and	:
FRANK & ROSEN,	
Defendants.	: Control Numbers: 111967 and 010977

OPINION

Albert W. Sheppard, Jr., J. February 13, 2003

Before the court are the Preliminary Objections of Craig Rosen (“Rosen”), LBBJ Medical Management, Inc. t/a and d/b/a Vax-D Institute of Philadelphia, LBBJ Consultants, Inc., LBBJ Medical, Inc. (collectively “LBBJ”), and the Preliminary Objections of Alan Frank, Esq. and Frank & Rosen (collectively “Frank”) to the Complaint of Norman Werther (“Werther”), individually and derivatively on behalf of Cubitrol Leasing Inc. and Cubitrol Medical Management, Inc. (collectively “Cubitrol”).

For the reasons discussed, the court will sustain these Preliminary Objections and dismiss the Complaint

APPENDIX “A”

Werther alleges that he is the majority shareholder and that Rosen is the minority shareholder and manager of Cubitrol. Werther alleges that Rosen mismanaged Cubitrol, created and operates LBBJ, which is a competing business, and diverted Cubitrol's assets and opportunities to LBBJ. Werther further alleges that Frank represented Rosen and LBBJ with respect to the events that gave rise to this action. Werther also alleges that Frank represents Rosen and Cubitrol in two pre-existing consolidated actions in which Rosen and Werther dispute their respective rights and liabilities with respect to Cubitrol (the "Underlying Litigation").¹

In this action, Werther has brought claims: (a) for breach of fiduciary duty, breach of covenant not to compete, fraud, and breach of contract against Rosen, (b) for tortious interference with contract against Frank and LBBJ, (c) for legal malpractice against Frank, and (d) against all defendants for violation of RICO. The defendants have filed Preliminary Objections with respect to all claims.

The Preliminary Objections to Counts I, II, III, and IV of the Complaint.

Werther, on his own behalf and on behalf of Cubitrol,² claims that Rosen breached his fiduciary duty to Cubitrol and to Werther, breached his covenant not to compete with Cubitrol (which count was misnamed "Fraud"), committed fraud against Werther and Cubitrol, and breached three contracts with

¹ The consolidated actions are Rosen v. Werther, Phila. C.C.P. February Term 2001 No. 01413, and Werther v. Rosen, Phila. C.C.P., April Term 2001, No. 01539.

² This court assumes for purposes of this opinion only that Werther is entitled to bring a derivative action on behalf of Cubitrol. "In an action to enforce a secondary right brought by one or more stockholders or members of a corporation or similar entity because the corporation or entity refuses or fails to enforce rights which could be asserted by it, the complaint shall set forth . . . the efforts made to secure enforcement by the corporation or similar entity or the reason for not making such efforts." Pa. R. Civ. P. 1506(a)(2). Werther has alleged that it would have been futile for him to make any demand upon Cubitrol to bring these claims against Rosen and Frank because Rosen was in operational control of Cubitrol. Complaint, ¶ 5.

Werther/Cubitrol not to disclose confidential information. Rosen and LBBJ claim that these causes of action were previously raised by Werther in the Underlying Action and that Werther should not have a ‘second bite of the apple’ in this action.

“[A] party may raise preliminary objections based on the pendency of a prior action. In order to plead successfully the defense of *lis pendens* . . . it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same. The purpose of the *lis pendens* defense is to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. . . . [T]he question of prior pending action is purely a question of law determinable from an inspection of the pleadings.” Crutchfield v. Eaton Corp., 806 A.2d 1259 (Pa. Super 2002).

Count I of the present Complaint against Rosen raises the same causes of action as, and is almost identical to, Counts I and II against Rosen in the Underlying Action. Count II of the present Complaint is substantially similar to Count V of the Complaint in the Underlying Action. Count III in this action is identical to Count III in the Underlying Action, and Count IV of this action is identical to Count V of the Underlying Action. Because in each instance, the prior case is the same, the parties are the same, and the relief requested is the same, the Preliminary Objections are granted as to Counts I, II, III and IV of the present Complaint. Those Counts are dismissed.

The Preliminary Objection to Count V of the Complaint.

Werther claims that he and Cubitrol were damaged by Frank’s and LBBJ’s tortious interference with Rosen’s contracts with Cubitrol. “The tort of interference with contract is defined in terms of unprivileged interference with a contract with a third party. Essential to the right of recovery on this theory is the existence of a contractual relationship between the plaintiff and a party other than the defendant.” Nix

v. Temple University of Commw. System of Higher Educ., 408 Pa. Super. 369, 378-9, 596 A.2d 1132, 1137 (1991). An agent cannot tortiously interfere with its principal's contract when acting within the scope of his agency. *See id.* (corporate agents were not liable for tortiously interfering with corporation's contract with plaintiff.) *See also* Rutherford v. Presbyterian-University Hospital, 417 Pa. Super. 316, 612 A.2d 500 (1992) (same); Daniel Adams Assoc., Inc. v. Rimbach Pub., Inc., 360 Pa. Super. 72, 519 A.2d 997 (1987) (same).

Werther alleges that Frank was Rosen's attorney, so therefore he was Rosen's agent. As Rosen's agent, Frank could not tortiously interfere with Rosen's contract with Cubitrol/Werther.

Similarly, LBBJ cannot be liable for tortiously interfering with Rosen's contracts where Werther has alleged that Rosen is the sole shareholder of LBBJ. Just as an employee of the contracting corporation cannot be liable in tort for causing the corporation's breach of contract, a wholly owned corporation cannot be viewed as causing its sole controlling shareholder's breach of contract. In essence, Werther is alleging that Rosen interfered with his own contract, *i.e.*, breached it, which cause of action is already being litigated in the Underlying Action. Since Frank and LBBJ are not third parties to Rosen's contracts with Werther/Cubitrol, they cannot be liable for tortiously interfering with them. Thus, Count V of the Complaint is dismissed.

The Preliminary Objection to Count VI of the Complaint.

Werther³ on behalf of Cubitrol asserts a claim for “legal malpractice” against Frank as follows:

Upon information and belief Frank and Frank & Rosen have provided legal services to Rosen and/or [LBBJ] in competing with Cubitrol and thereby have assisted Rosen in breaching his fiduciary and contractual obligations to Cubitrol by among other things, assisting Rosen in the creation of [LBBJ] knowing that these companies and Rosen through those companies were intending to, would, and, in fact, are competing with Cubitrol; by counseling Rosen or otherwise assisting him in breaching his fiduciary obligations to manage the affairs of Cubitrol by not paying the debts and obligations of Cubitrol, including loans and taxes thereby causing Cubitrol to be in default of same; and by lending assistance and legal counsel to Rosen in the conduct of the Underlying Litigation all of which Frank and Frank & Rosen knew, or upon the exercise of reasonable diligence would know was to the detriment of their client, to Cubitrol in conflict with their duty of loyalty to Cubitrol.

Complaint, ¶ 44.

By assisting Rosen in breaching his fiduciary and contractual obligations as aforesaid and in diverting business from [Cubitrol] as aforesaid, and by providing service to Rosen and/or [LBBJ] contrary to the interests of [Cubitrol], Frank and Frank & Rosen have engaged in professional negligence to their client [Cubitrol] by breaching their duty of loyalty to [Cubitrol]. As a result of such professional negligence, [Cubitrol] has been damaged in an amount which cannot be pleaded with specificity because the information with which to do so is in the exclusive possession of persons other than [Werther].

Complaint, ¶ 61.

³ “The general rule is that an attorney will be held liable for negligence only to his client.” Smith v. Griffiths, 327 Pa. Super. 418, 425, 476 A.2d 22, 26 (1984). In this case, Werther does not allege that he is or ever was represented by Frank, so Frank cannot be liable to Werther for malpractice. To the extent that Werther is trying recover for himself against Frank on the malpractice claims, that claim is dismissed.

This claim, however, is not really one for professional negligence because Werther does not allege that Frank's provision of services to Cubitrol was improper. The only services that Frank allegedly provided to Cubitrol was his representation of Cubitrol on its Motion to Intervene in the Underlying Litigation. Complaint ¶ 39. Since the Underlying Litigation is a dispute between Cubitrol's two principals over the ownership and management of Cubitrol, it is proper for Cubitrol to be a party in that litigation. Furthermore, since Werther has made no allegation that Frank mishandled the Motion to Intervene, Werther has not asserted a claim for professional negligence against Frank.

Instead, Werther appears to be attempting to assert a claim (on behalf of Cubitrol) against Frank for breach of his fiduciary duty of loyalty to Cubitrol by: 1) participating in the creation of LBBJ, 2) engaging in conflicting representations of Rosen and LBBJ, and 3) aiding and abetting Rosen's mismanagement of Cubitrol.

Frank's involvement in the formal incorporation or other legal creation of LBBJ cannot in itself have caused Cubitrol any damage; the harmful acts that Rosen allegedly committed through LBBJ after Frank caused LBBJ to come into being cannot serve as a basis for asserting a claim against Frank. "When it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action, whether the action be denominated in [contract] or [tort], is proof of actual loss. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm - not yet realized- does not suffice to create a cause of action for negligence." Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989). Since Frank's assistance in the formation of LBBJ cannot have harmed Cubitrol, Werther cannot assert a claim for breach of fiduciary duty against Frank based on the formation of LBBJ.

Furthermore, Werther cannot assert a claim for breach of fiduciary duty based on his allegation that, in addition to representing Cubitrol, Frank represented Rosen and LBBJ, whose interests conflicted with Cubitrol's. "An attorney's representation of a . . . client whose interests are materially adverse to [those of another] client constitutes an impermissible conflict of interest actionable at law." Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 252, 602 A.2d 1277, 1282 (1992). The underlying rationale for such causes of action is the belief that one client will be harmed by the attorney's use, in his/her representation of the adverse party, of confidential information obtained from the first client. *See id.*, 529 Pa. at 257, 602 A.2d at 1285.

In this case, Frank is charged with representing the competing interests of Rosen and LBBJ, as well as Cubitrol. However, Rosen is the alleged manager and principal of both LBBJ and Cubitrol, so there can be no danger that Frank will disclose any information about Cubitrol that LBBJ and Rosen do not already know. Therefore, Frank cannot have caused Cubitrol any damages by dual representation, and Werther's claim for such damages must be dismissed.⁴

Werther's final ground for his breach of fiduciary claim is his allegation that Frank counseled and assisted Rosen in failing to pay Cubitrol's debts. However, Werther alleges no facts in support of this conclusionary assertion that Frank somehow aided and abetted Rosen's alleged wrongdoing. Just because an attorney represents a client with respect to some activities does not mean that he represents that client with respect to all the client's activities. Furthermore, Frank's counseling of Rosen, if it occurred,

⁴ If Werther believes that it is improper for Frank to continue representing both Rosen and Cubitrol in the Underlying Litigation, then he may bring a motion to disqualify Frank in the Underlying Litigation.

necessarily took place prior to Frank's limited representation of Cubitrol in the Underlying Litigation since the alleged mismanagement of Cubitrol that Frank supposedly aided and abetted serves as the basis for Werther's claim against Rosen in the Underlying Litigation. Since Frank did not yet represent Cubitrol when he allegedly counseled Rosen not to pay Cubitrol's debts, Frank owed no fiduciary duty to Cubitrol. Therefore, Werther's allegations regarding Frank's breach of a non-existent fiduciary duty to Cubitrol must be dismissed.

The Preliminary Objection to Count VII of the Complaint.

Werther alleges that Rosen, Frank and LBBJ engaged in RICO violations against Cubitrol and Werther. This RICO claim was previously dismissed by Judge Ludwig of the United States District Court for the Eastern District of Pennsylvania. *See* Memorandum and Order dated October 30, 2002. Judge Ludwig thoroughly analyzed the facts set forth in Werther's Complaint and in a supplemental RICO case statement and determined that Werther had failed to allege facts sufficient to make out a RICO claim against defendants. Under the doctrine of claim preclusion, this court is obliged to dismiss Werther's RICO claim in light of the District Court's decision to dismiss the identical claim on substantive grounds. See Gatling v. Eaton Corp., 807 A.2d 283 (Pa. Super. 2002).⁵

⁵ *Res judicata* is not usually an appropriate basis for a preliminary objection but instead should be raised as an affirmative defense where the pleadings do not contain all of the facts necessary to decide the issue. *See 220 Partnership v. Philadelphia Electric Co.*, 437 Pa. Super. 650, 656, 650 A.2d 1094, 1097 (1994). However, plaintiff has not objected to the defendants' raising collateral estoppel at this stage, and plaintiff admits that the same claim was dismissed in the federal court action. Thus, this court may dismiss that previously litigated claim at the preliminary objection stage. *See Commonwealth v. Desiderio*, 698 A.2d 134, 138 (Pa. Commw. 1997).

CONCLUSION

For the foregoing reasons, this court sustains defendants' Preliminary Objections and dismisses plaintiff's Complaint. An Order consistent with this Opinion will be issued

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O R D E R

AND NOW, this 13th day of February, 2003, upon consideration of the Preliminary Objections of defendants, Craig Rosen, LBBJ Medical Management, Inc. t/a and d/b/a Vax-D Institute of Philadelphia, LBBJ Consultants, Inc., LBBJ Medical, Inc., and the Preliminary Objections of defendants, Alan Frank, Esquire and Frank & Rosen, the responses in opposition and the respective memoranda in support and in opposition, all other matters of record, and in accord with the contemporaneous Opinion being filed of record, it is **ORDERED** that the Preliminary Objections are **Sustained** and the plaintiff's Complaint is **Dismissed**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.