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

GEMINI BAKERY EQUIPMENT	:	FEBRUARY TERM 2004
	:	
v.	:	NO: 3204
	:	
BAKTEK, et. al	:	CONTROL NO: 012073
	:	
	:	

O R D E R

AND NOW, this 11th day of April, 2005, it is hereby ORDERED and DECREED that Defendants' Preliminary Objections to Plaintiff's Complaint are SUSTAINED in part and DENIED in part.

Defendants' Preliminary Objection in the nature of a motion to dismiss the Complaint for lack of personal jurisdiction is OVERRULED.

Defendants' Preliminary Objection in the nature of a motion to strike Count I of the Complaint for Failure to Comply with Pa. R.C.P. 1019(h) and (i) is SUSTAINED. Count I of the Complaint is hereby stricken. Plaintiff is granted leave to file an amended complaint within twenty (20) days from the date of this Order.

Defendants' Preliminary Objection in the nature of a motion to dismiss Counts II, III, and IV of the Complaint is SUSTAINED in part and OVERRULED in part. Counts II and III may go forward; Count IV of the Complaint is DISMISSED with a right to plead with more specificity within (20) days from the date of this Order.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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MEMORANDUM OPINION

Before the Court are Defendants' Preliminary Objections to Plaintiff's Complaint. Plaintiff ("Gemini), a Pennsylvania corporation, filed a Complaint against Baktek, a California business, and Mr. Lunsford and Mr. Beard, both residents of California, for breach of contract, conversion/misappropriation of trade secrets, unfair competition, and tortious interference with contractual relations. The following allegations are set forth in Plaintiff's Complaint:

Gemini is in the business of designing, manufacturing, marketing, and selling baking machinery. Gemini alleges that in May 2001, it retained and paid Lunsford and Beard to assist Gemini in performing some work related to the finishing of several machinery pieces for Gemini. Lunsford and Beard traveled to Pennsylvania from California to engage in the project. While they worked on the project, Lunsford and Beard were given access to use Gemini's Baking Machines Intellectual Property. Gemini alleges that Lunsford and Beard agreed that they would not be permitted to use Gemini's Baking Machines Intellectual Property in the future for manufacturing or production of a 12,000 or 24,000 pieces per minute industrial bagel makeup line. When the project ended, Lunsford and Beard returned to California. Gemini alleges that upon defendants return to California, they wrongfully used and converted Gemini's Baking

Machines Intellectual Property for their own benefit. Specifically, Gemini alleges that in violation of the parties' agreement, defendants are manufacturing and selling 12,000 or 24,000 pieces per minute industrial bagel makeup line, which incorporates Gemini's Baking Machines Intellectual Property and directly competes with Gemini's products.

In the present motion, defendants have raised three (3) Preliminary Objections to plaintiff's Complaint. The Court will address each in turn.

I. Defendants' Preliminary Objection in the Nature of a Motion to Dismiss Complaint for Lack of Personal Jurisdiction is Overruled.

Defendants assert that Plaintiff's Complaint should be dismissed because the Court lacks personal jurisdiction over the defendants. The Court disagrees, and finds that specific personal jurisdiction over defendants is established in Pennsylvania.

Where a party objects to a court's exercise of personal jurisdiction, the non-moving party bears the burden of proving personal jurisdiction. Barr v. Barr, 2000 Pa. Super. 99, *P4, 749 A.2d 992, 994 (2000). A trial court in Pennsylvania may exercise personal jurisdiction over a non-resident defendant if either of the following two bases is present: (1) specific jurisdiction, which is based upon the specific acts of the defendant that gave rise to the cause of action, and (2) general jurisdiction, which is based upon a defendant's general activities within the state. King v. Proctor & Gamble, 452 Pa. Super. 334, 337, 682 A.2d 313, 314 (1996). Regardless of whether specific or general jurisdiction is claimed, "the propriety of such an exercise must be tested against the Pennsylvania long arm statute, 42 Pa. C.S.A. § 5322, and the due process clause of the Fourteenth Amendment." Efford v. Jockey Club, 2002 Pa. Super. 100, *P8, 796 A.2d 370, 373 (2002). The Pennsylvania long-arm statute permits jurisdiction to be exercised

"to the fullest extent allowed under the Constitution of the United States and may be based upon the most minimum contact with this Commonwealth allowed under the Constitution of the United States." Id., quoting 42 Pa. C.S.A. § 5322(b).

For a court to exercise specific personal jurisdiction over a non-resident, "(1) the non-resident defendant must have sufficient minimum contacts with the forum state, and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice." Kubik v. Letteri, 532 Pa. 10, 17, 614 A.2d 1110, 1114 (1992), citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Whether sufficient minimum contacts exist for the assertion of in personam jurisdiction is based on a finding that the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Id., citing Burger King, 471 U.S. at 474. As the Pennsylvania Supreme Court articulated in Kubik:

> Critical to the analysis of whether a defendant should reasonably anticipate being haled into court in the forum state is the determination that the defendant purposefully directed his activities at residents of the forum and purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. Contacts with the forum that are "random," "fortuitous" or "attenuated" are not sufficient for the assertion of personal jurisdiction nor is unilateral activity in the forum by others who claim some relationship with the defendant.

Id., citing Burger King, 471 U.S. at 475.

Here, there are sufficient minimum contacts between defendants and Pennsylvania. Defendants traveled to Pennsylvania, lived in Pennsylvania for several months, did all the work for Gemini in Pennsylvania, and received payment in Pennsylvania for their work by Gemini (Affidavit of Mark Rosenberg, ¶10). Additionally, defendants *learned* of the trade secrets (both the prohibited and non-prohibited trade secrets) in Pennsylvania while working in Pennsylvania.

It can hardly be said that defendants did not purposefully direct its activities toward Pennsylvania. On the contrary, by traveling to Pennsylvania, working in Pennsylvania for an extended period of time, learning various trade secrets while working in Pennsylvania, and receiving pecuniary benefit for their work in Pennsylvania, defendants have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Colt Plumbing Co. v. Boisseau, 435 Pa. Super. 380, 390, 645 A.2d 1350, 1356 (1994), quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958). Therefore, it is not unreasonable that defendants should anticipate being haled into court in Pennsylvania.

There are various reasons why a forum state may exercise personal jurisdiction over a non-resident who purposefully directs his activities toward forum residents. One reason is that a state "generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of state actors." Colt Plumbing 435 Pa. Super. at 389, quoting Burger King, 471 U.S. 462. Additionally, where non-residents purposefully obtain benefit from their activities in the forum state, "it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." Id. Moreover, because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engaged in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." Id.

Here, the Court finds that Pennsylvania has a valid interest in adjudicating this dispute. Pennsylvania has an interest in providing a means of redress for its residents in contract disputes. Moreover, if the allegations are proved at trial, defendants have caused harm and injury in

Pennsylvania to residents of Pennsylvania. See Kubik, 532 Pa. at *21. Additionally, Pennsylvania was convenient enough for defendants to travel to and work in, so the burden on defendants to defend the present dispute in Pennsylvania is minimal. See Kronenburg v. Van De Plas, 56 Pa. D. & C.4th 468, *482 (2002).

In sum, there is specific personal jurisdiction over defendants in Pennsylvania. Since the Court finds that there is specific jurisdiction, it will not address the issue of general jurisdiction.

II. Defendants' Preliminary Objection in the Nature of a Motion to Strike Count I of the Complaint for Failure to Comply with Pa. R.C.P. 1019(h) and (i) is Sustained.

Pennsylvania Rule of Civil Procedure 1019(h) states, "When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written." Plaintiff's Complaint fails to state whether the alleged agreement upon which Plaintiff's claim is based is oral or written, in contravention of Rule 1019(h). Further, if the alleged agreement is written, plaintiff has failed to attach such written agreement, or explain why such writing is not accessible, as required by Rule 1019(i). Therefore, Count I of plaintiff's complaint is stricken.

III. Defendants' Preliminary Objection in the Nature of a Motion to Dismiss Counts II, III, and IV of the Complaint Pursuant to the Gist of the Action Doctrine is Sustained in Part and Overruled in Part.

Defendants assert that plaintiff's claims for Counts II, III, and IV of the Complaint (for conversion/ misappropriation of trade secrets, unfair competition, and tortious interference with contractual relations, respectively) must be dismissed under the gist of the action doctrine, because each seeks to assert tort claims when the gravamen of the actions sounds, if at all, solely in contract.

The gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." Etoll, Inc. v. Elias/Savion Advertising, Inc., 2002 Pa. Super. 347, *P14, 811 A.2d 10, **14 (2002). The doctrine seeks to uphold the conceptual difference between breach of contract claims and tort claims, in that "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 agreements between particular individuals." Id., citing Bash v. Bell Tel. Co., 411 Pa. Super. 347, 601 A.2d 825 (1992).

The Court believes that it is premature to dismiss plaintiff's alternative tort claims under Counts II and III at this stage in the proceeding. At this point, it is not clear whether defendants admit to or deny the existence of an agreement between themselves and plaintiff. Thus, the Court will not dismiss the tort claims at this point because it may eventually be found that there was no agreement between the parties. See Comsup Commodities, Inc. v. Osram Sylvania, Inc., February Term, 2003, No. 1438, Control No. 072032, Commerce Program, Cohen, J. (December 2003) (court overruled defendants' preliminary objection based on gist of the action, stating that "defendants apparently deny the existence of the contract that plaintiff claims was breached, so the court is not comfortable dismissing plaintiff's alternative tort claims at this preliminary objection stage in the proceedings").

However, with respect to plaintiff's claim for tortious interference with contractual relations under Count IV, the Court finds that this claim should be dismissed. The elements of a cause of action for tortious interference with contractual relations are as follows:

> (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.

Sudarkasa v. Glanton, 57 Pa. D. & C.4th 472, 499 (2002). In the present action, plaintiff has failed to identify the existence of *any* contractual or prospective contractual relation between plaintiff and a third party. While plaintiff is not required to list every possible prospective relation with which defendants allegedly interfered, it must set forth at least one such relationship in more detail. See Philadelphia Regional Port Authority v. Carusone Construction Co., July Term 2003, No. 2701, Control No. 012067, Commerce Program, Sheppard, J. (April 2004); Raskin, Liss and Franciosi, P.C. v. Franciosi, December 2004, No. 2364, Control No. 030363, Commerce Program, Abramson, J. (April 2005). Plaintiff should specifically name any existing and prospective contractual relation(s) that defendants have allegedly interfered with, since any existing contracts, and prospective customers and/or markets should be known to plaintiff.

CONCLUSION

For all the foregoing reasons, defendants' Preliminary Objections to plaintiff's Complaint are sustained in part and overruled in part.

BY THE COURT,

HOWLAND W. ABRAMSON, J.