

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

CREATIVE PRINT GROUP, INC. (Plaintiff)	: MAY TERM, 2000
	: No. 0283
v.	:
COUNTRY MUSIC LIVE, INC., and MARK MICHAELS (Defendants)	: Control No. 050289 :



FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
DISCUSSION IN SUPPORT OF ORDER
DENYING THE PETITION FOR A PRELIMINARY INJUNCTION

SHEPPARD, JR., J. June 13, 2000

This court denies the Petition for a Preliminary Injunction, primarily on the grounds that the plaintiff-petitioner has failed to demonstrate a clear right to relief on his breach of contract claim, where no written contract was ever formed and plaintiff-petitioner failed to establish the existence of an oral agreement or its underlying terms. Further, the plaintiff-petitioner has failed to establish the other prerequisites for a preliminary injunction.

The court submits the following Findings of Fact and Conclusions of Law in support of its contemporaneous Order embodying the denial of the request for injunctive relief.

FINDINGS OF FACT

1. On May 2, 2000, the plaintiff, Creative Print Group, Inc. (“Creative”), filed a Petition seeking a Preliminary Injunction against the defendants, Country Music Live, Inc. (“Country Music”), and Marc Michaels (“Mr. Michaels”), the primary shareholder ~~and~~ officer of County Music. Essentially, plaintiff is seeking a mandatory injunction requiring the defendant to utilize the plaintiff’s services in publishing future issues of defendants’ magazine.
2. In its Petition for a Preliminary Injunction, the plaintiff alleges that the defendants agreed to retain plaintiff as their exclusive print agency for at least one (1) year and to include Howard Friedman, the plaintiff’s president as “production manager,” and Robert Snyder, an employee of the plaintiff, as “art director,” on the masthead of the magazine for the same time period, but that defendants terminated the plaintiff and removed the plaintiff and its employees from the masthead, despite being satisfied with the plaintiff’s services. (Petition, at ¶ 2).
3. On the same date, the plaintiff filed a Complaint against the defendants, asking to reinstate plaintiff as the sole and exclusive print agency for the magazine; to reinstate the plaintiff’s employees’ names on the masthead of the magazine for at least one year and to enjoin future publications until the defendants comply. Plaintiff also sets forth a claim for contractual damages and/or unjust enrichment to recover an alleged outstanding balance of \$41,395.00 for services rendered.
4. An evidentiary hearing was conducted on May 25, 2000, at which the following evidence was adduced.

5. Creative, a New Jersey Corporation, is a printing distributor which performs graphics services, website development, and maintenance in the commercial printing field. (5/25/00, N.T. 7; 29).
6. In August of 1999, Creative and Country Music entered into a business relationship, in which Creative would assist Country Music in producing a start-up magazine on the country music business. (5/25/00, N.T. 7-8). Specifically, Creative agreed to help develop the design and layout of, and perform graphic services for the magazine. Id. at 8. However, Creative did not do the actual printing. Id. at 33; 57.
7. The parties agreed that the job would not exceed \$50,000 based on the time, design, labor and printing involved.¹ (5/25/00, N.T. 9).
8. The first issue was to amount to 25,000 copies, a number which was anticipated to grow with later issues. (5/25/00, N.T. 9-10).
9. Mr. Howard Friedman, the principal shareholder and CEO of plaintiff, testified that he and Mr. Michaels had verbally agreed that the relationship between Creative and Country Music would last for at least one year and that Creative would be the exclusive printer for the first six (6) issues of the magazine. (5/25/00, N.T. 8-9; 24-25). Mr. Friedman also testified that it was agreed that his name and the name of Mr. Robert Snyder, as art director, would be put on the masthead of the magazine for the first issue and the subsequent issues. (5/25/00, N.T. 11-12). He also testified that the long-term relationship between Creative and Country Music was intended because Creative would never have agreed to the deal for only one issue in a start-up business for the

¹This agreed upon price referred only to the services provided for the first issue of the magazine.

- relatively low amount of money agreed upon. (5/25/00, N.T. 21-22).
10. Only Mr. Friedman and Mr. Michaels were parties to the conversation, held in October of 1999, that embodied the alleged agreement for Creative to be the exclusive printer for the first six (6) issues. (5/25/00, N.T. 27).
 11. Mr. Michaels admitted that discussions were held regarding using Creative's services after the first issue, provided that Country Music was satisfied with Creative's efforts, but he disputes that any actual agreement was ever reached. *Id.* at 46-47.
 12. No written agreement regarding the use of Creative's services was entered into. (5/25/00, N.T. 9; 21; 24).
 13. No terms as to pricing or otherwise were ever established with regards to any subsequent issues of the magazine. (5/25/00, N.T. 27-29; 32-33; 46-47).
 14. Creative did perform significant work on the first issue, involving the initial layout, logo, design and a template to help create the look of the magazine. (5/25/00, N.T. 37-42).
 15. Creative did deliver the agreed upon number of copies for the first issue in the first week of December 1999. (5/25/00, N.T. 12-13).
 16. Mr. Friedman's name, Mr. Snyder's name and Creative's graphic designer, Paula Stearns's name were on the masthead of the first issue of the magazine. (5/25/00, N.T. 11-12).
 17. A week after the first issue was delivered, a staff meeting to introduce those involved with the first issue was held at the home of Mr. Michaels and his wife. Mr. Friedman and Paula Stearns attended this meeting. (5/25/00, N.T. 13-14; 60).
 18. There exists a dispute whether Mr. Michaels was satisfied with Creative's services in printing the

first issue. Mr. Friedman contends that Mr. Michaels “thanked [Creative] for its efforts” and had his staff applaud at the above-mentioned meeting. In contrast, Mr. Michaels asserts that he was dissatisfied with Creative’s efforts because the magazine had numerous mistakes in its final edition. (5/25/00, N.T. 13-14; 50-52).

19. The record fails to show whether Mr. Michaels was, in fact, satisfied with Creative’s services on the first issue.
20. Following the staff meeting at the Michaels’ home, Mr. Michaels and Mr. Friedman argued over the alleged mistakes in the first issue and the costs involved. Mr. Michaels had, in the interim, gotten price quotes from other printers for subsequent issues. Mr. Michaels, then, fired Mr. Friedman and Creative. (5/25/00, N.T. 19-20; 60).
21. Three subsequent issues of the magazine were produced without the use of Creative’s services and did not include Mr. Friedman’s or Mr. Snyder’s names on the masthead. (5/25/00, N.T. 16-17).
22. The printer of these subsequent issues used part of the work done by Creative; specifically, the templates, the logo and the layout. (5/25/00, N.T. 65-68).
23. Country Music has paid Creative \$15,000, as partial payment for the services performed on the first issue. (5/25/00, N.T. 14; 68).
24. The parties dispute the amount of the remaining outstanding balance. This determination is not presently before this court. (5/25/00, N.T. 69-71).

25. After being fired by Country Music, Creative's business did not suffer as it continued to work on other projects and its receivables were not affected. (5/25/00, N.T. 22-24; 30-31).
26. Creative has failed to demonstrate the existence of a verbal agreement to exclusively use Creative for subsequent issues of the magazine, or what the terms of that agreement would be.
27. Creative has failed to demonstrate that any contractual damages to which they might be entitled cannot be calculated in monetary terms.
28. Creative has also failed to demonstrate that Creative's business, reputation or future earnings were damaged when the defendants terminated their business relationship with Creative.

DISCUSSION

This court denies the request for injunctive relief since Creative has failed to sufficiently demonstrate the existence of an enforceable agreement that it would be the exclusive print agency for Country Music for a minimum of one year. Further, Creative has not shown that it will suffer the requisite immediate and irreparable harm.

In considering whether to grant a preliminary injunction, this court may rely on the averments of the pleadings and petition, affidavits of the parties, or any other proof that the court may require. Pa.R.C.P. 1531. A preliminary injunction is "a most extraordinary form of relief which is to be granted only in the most compelling cases." Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 501, 597 A.2d 141, 144 (1991). "The purpose of a preliminary injunction is to preserve the status

quo as it existed *or previously existed before the acts complained of*, thereby preventing irreparable injury or gross injustice.” Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 259, 602 A.2d 1277, 1286 (1992) (emphasis in original).

To be entitled to a preliminary injunction, the plaintiff must demonstrate the following elements:

- (1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- (2) that greater injury will occur from refusing the injunction than by granting it;
- (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- (4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and
- (5) that the plaintiff’s right to relief is clear.

School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 n.2 (1995); Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 500, 426 A.2d 1123, 1128 (1981); New Castle Orthopedic Assoc. v. Burns, 481 Pa. 460, 464, 392 A.2d 1383, 1385 (1978). These requisite elements “are cumulative, and if one element is lacking, relief may not be granted.” Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, 705 A.2d 509, 512 (Pa.Comm. Ct. 1998). Moreover, here, the relief sought is in the form of a mandatory injunction. Courts will only grant a mandatory injunction upon a very strong showing that the plaintiff’s right to relief is clear because such an injunction compels the defendant to perform an act, rather than merely restraining the defendant from acting. Sovereign Bank v. Harper, 449 Pa. Super. 578, 674 A.2d 1085, 1092 (1996).

The present inquiry turns on whether Creative has established that it had an agreement to

be the exclusive print agency for Country Music for at least one year, such that its right to relief is clear. The first essential of any contract is the existence of a “definite and certain” promise or an offer to enter into a contract. GMH Assocs., Inc. v. The Prudential Realty Group, 2000 WL 228918, at *6 (Pa.Super. Mar. 1, 2000) (citation omitted). See, Ingrassia Constr. Co., Inc. v. Walsh, 337 Pa.Super. 58, 68, 486 A.2d 478, 484 (1984) (stating that “[a] court cannot enforce a contract unless it can determine what it is.”) (quoting I A. Corbin, Corbin on Contracts § 95 (1963)). If the existence of an informal or oral contract is alleged, “it is essential to the enforcement of such an informal contract that the minds of the parties should meet on all the terms as well as the subject matter.” GMH Assocs., 2000 WL 228918, at *7. See also, Courier Times, Inc. v. United Feature Syndicate, Inc., 300 Pa.Super. 40, 54, 445 A.2d 1288, 1295 (1982). “A true and actual meeting of the minds is not necessary to form a contract, but determining the parties’ intent depends upon their outward and objective manifestations of assent, rather than their undisclosed and subjective intentions”. Ingrassia, 337 Pa.Super. at 66, 486 A.2d at 483. To ascertain the parties’ intent, the court may consider the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject matter of the agreement. Darlington v. General Electric, 350 Pa.Super. 183, 193, 504 A.2d 306, 311 (1986) (citations omitted). “Absent a manifestation to be bound, however, negotiations concerning the terms of a possible future contract do not result in an enforceable agreement.” Philmar Mid-Atlantic, Inc. v. York St. Assocs. II, 389 Pa.Super. 297, 301, 566 A.2d 1253, 1255 (1989).

Applying these principles, here, this court finds that the record fails to establish that the parties had reached an enforceable agreement that Creative would be Country Music's exclusive print agency for at least one year. It is undisputed that the parties had never entered into a written agreement. (5/25/00, N.T. 9; 21; 24). It is also undisputed that no essential terms as to the price, the services needed, delivery dates or the number of copies were ever established with regard to using Creative's services for subsequent issues of the magazine. (5/25/00, N.T. 27-29; 32-33; 47). Rather, the parties had only established these terms for the first issue. (5/25/00, N.T. 9-13). While discussions may have taken place regarding the use of Creative's services in future issues, it is not proven that an actual agreement was ever reached, but rather, these discussions appear to have been negotiations for a possible future contract. The pertinent evidence presented was conflicting testimony. Thus, Mr. Michaels testified that Country Music had been willing to continue to work with Creative, provided that it was "satisfied" with Creative's efforts in the first issue, but that it was not satisfied with their efforts. (5/25/00, N.T. 47; 50-52). On the other hand, Mr. Friedman testified that Mr. Michaels and Country Music were satisfied with Creative's work on the first issue and that the agreement had been solidified. (5/25/00, N.T. 13-14; 21-22).

The fact that Country Music terminated Creative shortly after the first issue and used a different printer in the three subsequent issues negates Creative's contention. The issue of Country Music's satisfaction is more aptly directed at the assessment of monetary damages on the outstanding balance owed to Creative and whether Country Music has a legitimate counter-claim or set-off to the alleged amount in the Complaint. However, a determination on monetary damages is not presently before this court and would be readily calculable at a later date.

In sum, Creative has not established a clear right to injunctive relief since the record fails to demonstrate that there was a mutual manifestation of assent to be bound or the existence of an enforceable oral agreement or what the terms of that agreement would be.

Creative has also failed to demonstrate that it will suffer immediate and irreparable harm if the injunctive relief is denied. In support of its Petition for a Preliminary Injunction, Creative contends that it will lose the benefits that it was supposed to obtain as Country Music's exclusive print agency; such as, an enhanced reputation, expansion to related products and customers, and future earnings and profits. (Petition, at ¶ 3). Generally, Pennsylvania courts sitting in equity are authorized to enjoin wrongful breaches of contract where money damages are an inadequate remedy. Sovereign Bank, 674 A.2d at 1093. See also, Straup v. Times Herald, 283 Pa.Super. 58, 67-68, 423 A.2d 713, 718 (1980). In addition, irreparable harm has been found in the commercial context where there is an impending loss of a business opportunity or market advantage. Sovereign Bank, 674 A.2d at 1093 (discussing John G. Bryant Co. v. Sling Testing and Repair, Inc., 471 Pa.1, 8, 369 A.2d 1164, 1167 (1977)); Three County Services, Inc. v. Philadelphia Inquirer, 337 Pa.Super.241, 252, 486 A.2d 997, 1003 (1985) (Beck, J., concurring); Courier Times, 300 Pa.Super. at 55-56, 445 A.2d at 1296. For example, in John G. Bryant, the Pennsylvania Supreme Court upheld a preliminary injunction enforcing an anticompetitive employment covenant on the grounds that the alleged interference with customer relationships would be "irreparable" because the extent of the injury was unascertainable. 471 Pa. at 8, 369 A.2d at 1167. Likewise, in Courier Times, the Pennsylvania Superior Court held that the newspapers would suffer irreparable harm if they were deprived of the popular syndicated feature, the "Peanuts" comic strip, since this loss would hamper efforts to compete for the business of customers. 300 Pa.Super. at 56, 445 A.2d at 1296.

Here, the record does not demonstrate that the requisite irreparable harm will be visited upon Creative. Mr. Friedman testified that Creative had other projects besides the Country Music project and that it continued to work on those projects after it was fired by Country Music. (5/25/00, N.T. 30-31). He also testified that Creative's receivables have not been affected and that its business is doing "okay." (5/25/00, N.T. 22-24; 30-31). Contrary to its allegations, Creative failed to present any evidence that, if the injunction was not granted, its reputation would be damaged or that it would lose a business opportunity to which it was entitled.

In addition, Creative has not established the other prerequisites for a preliminary injunction. The balance of harms does not weigh in favor of granting the injunction. The requested injunction could damage the business relationships that Country Music has with its other printer(s) that were used for subsequent issues. Further, it could be more harmful to force Country Music and Creative to stay in business together when these parties so obviously disagree on most issues. Moreover, Creative has failed to demonstrate that the injunction would restore the status quo, or even that the termination of Creative's services was an actionable wrong, since it is doubtful that the parties had an agreement to exclusively use Creative's services for one year.

CONCLUSIONS OF LAW

In summary, the Plaintiff has failed to satisfy the requisite elements of a preliminary injunction. Thus, it is submitted that:

1. Plaintiff has failed to establish a clear right to relief since it has not been demonstrated that a verbal agreement to exclusively use the plaintiff's print services for subsequent issues of the defendant magazine for one year existed.
2. Plaintiff has failed to show that it will suffer irreparable harm that could not be compensated by monetary damages if it is not reinstated as the exclusive print agency for the defendant.

3. The balance of harms weighs in favor of denying the injunction.
4. An injunction will not restore the parties to the status quo since it is unclear that the parties had agreed to use the plaintiff's print services beyond the first issue.
5. An injunction is not reasonably suited to provide relief in this instance.

Accordingly, this court will enter a contemporaneous Order Denying the Preliminary Injunction.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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

CREATIVE PRINT GROUP, INC. (Plaintiff)	: MAY TERM, 2000
v.	: No. 0283
COUNTRY MUSIC LIVE, INC., and MARK MICHAELS (Defendants)	: : Control No. 050289 :

**ORDER
DENYING PETITION
FOR PRELIMINARY INJUNCTION**

AND NOW, this 13th day of June 2000, upon consideration of plaintiff's Petition for a Preliminary Injunction and defendant's opposition to it and all matters of record, and after a hearing, and based upon the Findings of Fact and Conclusions of Law being contemporaneously filed, it is **ORDERED** that the Petition for Injunctive Relief is **Denied**.

It is further **ORDERED** that, it appearing that a dispute remains as to the amount of damages due and owing by defendant to plaintiff and that that amount is less than \$50,000.00, this matter is transferred to the Arbitration Program and placed in a waiting to list Arbitration Hearing status.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.