

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

MAURICE ROMY, M.D.,	: MAY TERM, 2002
THE SPINE CENTER OF PENNSYLVANIA, P.C.,	
THE SPINE CENTER OF NEW JERSEY, P.C.	: No. 1236
AMERICAN LIFECARE, INC. and	
TSC MANAGEMENT OF PENNSYLVANIA, INC.	:
Plaintiffs,	:
v.	:
MICHAEL R. BURKE, ESQUIRE,	
KALOGREDIS, SANSWEET, DEARDEN & BURKE, LTD.	: Commerce Program
WILLIAM BLAEUER, DAVID BLAEUER	
PAIN & REHABILITATION INSTITUTE	:
OF PENNSYLVANIA, P.C.,	
PLEASANT HILL CONSULTING, INC.,	:
WILLIAM TINDALL, JR., RIC MARTELLO, CPA,	
HEALTHCARE CONSULTING ASSOCIATES, LLC.,	:
P.M. HEALTHCARE, INC., and	
NORTHEAST MANAGEMENT CONSULTING	: Control Numbers:
ASSOCIATES, INC.,	122182, 122241, 122628
Defendants.	:

O R D E R

AND NOW, this 2nd day of May 2003, upon consideration of: (a) the Preliminary Objections of defendants, Pain & Rehabilitation Institute of Pennsylvania, P.C., Ric Martello, CPA, Healthcare Consulting Associates, LLC, P.M. Healthcare, Inc., and Northeast Management Consulting Associates, Inc., (b) the Preliminary Objections of defendants, Michael R. Burke, Esquire and Kalogredis, Sansweet, Dearden & Burke, Ltd., and (c) the Preliminary Objections of defendants, William Blaeuer, David Blaeuer, William Tindall, Jr. and Pleasant Hill Consulting, the respective responses in opposition and 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, in part**, and **Overruled, in part**, as follows:

- 1) Maurice Romy, M.D.'s claims against all defendants are dismissed, and Dr. Romy is dismissed as a party plaintiff;
- 2) American Life Care, Inc.'s claims against all defendants are dismissed, and American Life Care, Inc. is dismissed as a party plaintiff;
- 3) TSC Management of Pennsylvania, Inc.'s, The Spine Center of Pennsylvania, P.C.'s, and the Spine Center of New Jersey, P.C.'s claims for intentional interference with contract are dismissed;
- 4) TSC Management of Pennsylvania, Inc.'s, The Spine Center of Pennsylvania, P.C.'s, and The Spine Center of New Jersey, P.C.'s claim for breach of fiduciary duty against Ric Martello, CPA, and their claim for constructive trust against Pleasant Hill Consulting, Inc., are dismissed;
- 5) TSC Management of Pennsylvania, Inc.'s, and The Spine Center of New Jersey, P.C.'s claims for conversion against Ric Martello, C.P.A. are dismissed;
- 6) Plaintiffs' claims for civil conspiracy against Michael R. Burke, Esquire, and Kalogredis, Sansweet, Dearden & Burke, Ltd. are dismissed;
- 7) Plaintiffs' claims for unjust enrichment and vicarious liability are dismissed;
- 8) All references in the Complaint to "Enron style looting" and "having illicit sexual relations on the premises at 1911 Arch Street" are stricken.

- 9) Otherwise, the Preliminary Objections are overruled.
- 10) TSC Management of Pennsylvania, Inc., The Spine Center of Pennsylvania, P.C., and The Spine Center of New Jersey, P.C., and American Life Care, Inc. may, if they so desire, file an Amended Complaint in conformity with this Order in which they may re-plead those claims which have been dismissed, within twenty (20) days of the date of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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Plaintiffs, :

v. :

MICHAEL R. BURKE, ESQUIRE,
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OF PENNSYLVANIA, P.C., :
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HEALTHCARE CONSULTING ASSOCIATES, LLC., :
P.M. HEALTHCARE, INC., and :
NORTHEAST MANAGEMENT CONSULTING : Control Numbers:
ASSOCIATES, INC., 122182, 122241, 122628
Defendants. :

O P I N I O N

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

This Opinion addresses: (a) the Preliminary Objections of defendants, Pain & Rehabilitation Institute of Pennsylvania, P.C., Ric Martello, CPA, Healthcare Consulting Associates, LLC, P.M. Healthcare, Inc., and Northeast Management Consulting Associates, Inc., (b) the Preliminary Objections of defendants', Michael R. Burke, Esquire and Kalogredis, Sansweet, Dearden & Burke, Ltd., and (c) the Preliminary Objections of defendants', William Blaeuer, David Blaeuer, William Tindall, Jr. and Pleasant Hill Consulting.

This action concerns the alleged mismanagement of several related professional medical service corporations by a number of their officers, directors and/or employees, and the employees' alleged improper use of the corporations' business plan and assets to set up competing professional medical service corporations. Due to the complex corporate inter-relationships of the plaintiff and defendant corporations and the plaintiffs' creativity in crafting their claims, there are 5 plaintiffs asserting 13 claims against 11 defendants. Not all of the parties and claims belong in this action.

The cast of characters described in plaintiffs' Complaint includes:

Plaintiffs

The Spine Center of Pennsylvania, P.C. ("SC-Pa") and The Spine Center of New Jersey, P.C. ("SC-NJ") - two medical service corporations that were allegedly harmed by their officers, directors and/or employees and a competing enterprise.

TSC Management of Pennsylvania, Inc. ("TSC") - a company that provided management services to SC-Pa and SC-NJ.

American Life Center, Inc. ("ALC") - the parent corporation of TSC.

Maurice Romy, M.D. - majority shareholder, guarantor, and a creditor of SC-Pa and SC-NJ, and manager of ALC and TSC.

Defendants

Pain & Rehabilitation Institute of Pennsylvania, P.C. ("PRI") - a professional service corporation that competes with SC-Pa and SC-NJ

William Blaeuer and David Blaeuer (the "Blaeuers") - officers, directors, and/or employees of ALC, TSC, SC-Pa, SC-NJ, and PRI, who allegedly received improper payments/benefits from SC-Pa and SC-NJ. William Blaeuer is also an employee of Pleasant Hill Consulting, Inc. ("PHC").

William Tindall, Jr. - employee of TSC, SC-Pa, SC-NJ and PRI, who allegedly received improper payments/benefits from SC-Pa and SC-NJ.

Ric Martello, CPA - officer, director and/or employee of ALC, LFFC, HCA, NEMCA, PMH, PRI, who allegedly received improper payments from SC-Pa.

Pleasant Hill Consulting, Inc. (“PHC”) - employed William Blaeuer.

Healthcare Consulting Associates (“HCA”) - employed Ric Martello, and may have provided management services to PRI.

P.M. Healthcare, Inc. (“PMH”) - employed Ric Martello, and allegedly received improper payments from SC-Pa

Northeast Management Consulting Associates, Inc. (“NEMCA”) - employed Ric Martello, purchased William Blaeuer’s services from PHC, and may have provided management services to PRI.

Kalogredis, Sansweet, Dearden and Burke, Ltd. (“KSD&B”) - attorneys who represented SC-Pa, SC-NJ, TSC, PRI, the Blaeuers, Martello, PRI, NEMCA, HCA and CCMA.

Michael R. Burke, Esquire - shareholder of KSD&B who allegedly performed services for SC-Pa, SC-NJ, TSC, PRI, the Blaeuers, Martello, PRI, NEMCA, HCA and CCMA.

Non-Parties

L-Four Five, LLC (“LFFC”) - funded ALC’s purchase of certain assets from Dr. Romy. Martello is a principal of this corporation.

Center City Medical Associates (“CCMA”) - managed by TSC, and provided services to patients at SC-Pa and SC-NJ.

Joel Swartz, M.D.- shareholder of CCMA, who performed services for patients of SC-Pa and SC-NJ, and who was allegedly involved as straw doctor in the incorporation of PRI.

I. Dr. Romy Does Not Have Standing to Bring Any Claims Against Defendants.

Dr. Romy has asserted claims against Burke and KSD&B for breach of fiduciary duty, against the Blaeuers, Tindal, Martello, PHC, PRI, HCA, PMH, and NEMCA for intentional interference with contract, and against all defendants for civil conspiracy. However, all of Dr. Romy’s allegations in support of such

claims concern wrongs allegedly suffered by TSC, SC-Pa, and SC-NJ, not by Dr. Romy directly. Dr. Romy asserts that, because he is the majority shareholder, the guarantor, and a creditor of SC-Pa and SC-NJ, and because he manages TSC, he is entitled to bring such claims. However, SC-Pa, SC-NJ and TSC have brought their own claims in this action; there is no need for Dr. Romy to assert them, as well. *See* 15 Pa. C. S. § 1782 (a) (defining derivative action as one in which shareholder asserts a secondary right “because the corporation or entity refuses or fails to enforce rights which could be asserted by it”); Pa. R.C.P. 1506 (2003) (same).

Specifically, Dr. Romy has not alleged facts to show that Burke and KSD&B owed him, personally, a fiduciary duty. He has not alleged an express contract, nor has he offered facts to show an implied attorney-client relationship under which Burke and KSD&B owed him a duty, which they then breached.

An implied attorney-client relationship will be found if 1) the purported client sought advice or assistance from the attorney; 2) the advice sought was within the attorney’s professional competence; 3) the attorney expressly or impliedly agreed to render such assistance; and 4) it is reasonable for the putative client to believe the attorney was representing him.

Cost v. Cost, 450 Pa. Super. 685, 692, 677 A.2d 1250, 1254 (1996). Here, Dr. Romy neither sought nor received personal advice or assistance from Burke and KSD&B, rather he sought advice on behalf of SC-Pa, SC-NJ and/or TSC, and those entities paid for such advice. Burke and KSD&B do not owe Dr. Romy a fiduciary duty simply because he was the majority shareholder of their clients. His claim against them is dismissed.

Further, Dr. Romy has not alleged a contract between himself and SC-Pa and SC-NJ with which defendants intentionally interfered. At best he has alleged that he is a creditor of SC-Pa and SC-NJ and

as a result of the Blaeuers', Tindal's, Martello's, PHC's, PRI's, HCA's, PMH's, and/or NEMCA's wrongful actions, SC-Pa and SC-NJ are no longer able to pay him what they owe him. The court is not persuaded that this indirect harm gives rise to an intentional interference with contract claim.

Finally, Dr. Romy's claim for civil conspiracy fails because he no longer has any underlying intentional tort claim against these defendants. *See Burnside v. Abbot Laboratories*, 351 Pa. Super. 264, 278, 505 A.2d 973, 981 (1985) (plaintiff must allege that each defendant "entered into an unlawful agreement for the express purpose of committing either a criminal act or an intentional tort.")

II. TSC, SC-Pa, and SC-NJ Have Alleged Sufficient Facts to Support Their Breach of Contract Claim Against Burke and KSD&B.

Our Superior Court has recently held that a client may maintain a breach of contract claim against its attorney for "failure to fulfill his or her contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large," and the client need not allege that the attorney failed to follow a specific instruction. *Gorski v. Smith*, 812 A.2d 683, 695 (Pa. Super. 2002). As a result, evidence that establishes a breach of fiduciary duty may also establish a breach of contract by an attorney. *See id.* citing *Fiorentino v. Rapoport*, 693 A.2d 208 (Pa. Super. 1997). In this case, plaintiffs claim that Burke and KSD&B engaged in an impermissible conflict of interest, which is not consistent with the provision of services by the legal profession at large. Therefore, plaintiffs have alleged facts sufficient under current law to make out a claim for breach of contract against Burke and KSD&B.

III. TSC, SC-Pa, and SC-NJ Have Not Alleged Sufficient Facts to Support Their Claim for Intentional Interference with Contract.

Plaintiffs assert a claim against defendants for their intentional interference with a contract between TSC, SC-Pa, and/or SC-NJ on the one hand, and CCMA and/or Dr. Swartz on the other. In order to make out a claim for this tort, plaintiffs must allege that defendants “intentionally and improperly interfere[d] with the performance of a contract . . . between [plaintiff] and a third person by inducing or otherwise causing the third person not to perform the contract . . . [and] pecuniary loss resulting to [plaintiff] from the failure of the third person to perform the contract.” Restatement (Second) of Torts § 766 (1979).

Plaintiffs have failed to identify and describe sufficiently the contract they had with CCMA and/or Dr. Schwartz, the events which constituted a breach or termination of that contract, and the resultant damages plaintiffs allegedly suffered. Moreover, with respect to Burke, KSD&B, PHC, HCA, and NEMCA, plaintiffs have failed to allege that these defendants had any intent to interfere with the alleged contract. Thus, plaintiffs have failed to plead the requisite elements of a claim for intentional interference with contract. This claim is dismissed.

IV. TSC, SC-Pa, and SC-NJ Have Alleged Sufficient Facts to Support Their Claims For Breach of Fiduciary Duty, but ALC Has Not.

In support of their claims against the Blaeuers and Tindall for breach of fiduciary duty, corporate plaintiffs allege that the Blaeuers and Tindall were officers, directors, and/or employees of ALC, TSC, SC-Pa, and SC-NJ. Therefore, each of those plaintiffs has set forth a fiduciary relationship between it and the Blaeuers and Tindall. 15 Pa. C.S. § 512 (2003) (directors and officers owe fiduciary duties to corporation); SHV Coal, Inc. v. Continental Grain Co., 376 Pa. Super. 241, 545 A.2d 917 (1988), rev'd

on other grounds, 526 Pa. 489, 587 A.2d 702 (1991) (agent/employee has fiduciary duty not to act against his principal/employer's interest).

The plaintiffs also allege that the Blaeuers and Tindall formed and worked for PRI, which competed with SC-Pa and SC-NJ, that they misappropriated business plans and trade secrets from SC-Pa and SC-NJ, and that they wrongfully obtained money from SC-NJ (in the form of a misappropriated tax refund), SC-Pa (in the form of unjustified checks drawn to themselves and others), and SC-Pa and SC-NJ (in the form of unauthorized sporting event tickets). TSC, SC-Pa. and SC-NJ, but not ALC, have, therefore, set forth sufficient facts to show that the Blaeuers and Tindall breached their fiduciary duties by usurping assets of TSC, SC-Pa and SC-NJ.

In support of their claims against Martello, plaintiffs allege that he was a director of ALC, the parent of TSC, and that he received one of the improper checks from SC-Pa. Such allegations do not make out a claim for breach of fiduciary duty against him by any of the plaintiffs.

V. TSC, SC-Pa and SC-NJ Have Alleged Sufficient Facts to Support Their Claim for Conversion, But ALC Has Not.

The above facts also make out a claim for conversion by TSC, SC-Pa. and SC-NJ against each of the Blaeuers and Tindall, and by SC-NJ against Martello. ALC, once again, has not made such a showing against the defendants.

Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 659 n. 3 (Pa. Super. 2000). Money constitutes a chattel that may be converted, but business goodwill and other intangibles do not unless they have been merged into

a tangible document. *See id.*, 751 A.2d at 659 (“money may be the subject of conversion”); Northcraft v. Edward C. Michener Assoc., Inc., 319 Pa. Super. 432, 466 A.2d 620 (1983) (“The process of expansion [of the tort of conversion] has stopped with the kind of intangible rights which are customarily merged in, or identified with some document”); Restatement (Second) Torts § 242 (1965) (discussing conversion of intangible rights which are or could be merged in document).

ALC does not claim that any of its money or other tangible property was converted by any defendant, so its claim for conversion must be dismissed. TSC, SC-Pa and SC-NJ ultimately may not be able to prove that defendants converted much more than their money, but the court will not dismiss their more broadly drawn claims for conversion at this juncture.

VI. TSC, SC-Pa and SC-NJ Have Alleged Sufficient Facts to Support Their Claim for Civil Conspiracy Against All Defendants Except Burke and KSD&B.

In order to assert a claim for civil conspiracy, plaintiffs must allege “that [each defendant] entered into an unlawful agreement for the express purpose of committing either a criminal act or an intentional tort.” Burnside v. Abbot Laboratories, 351 Pa. Super. 264, 278, 505 A.2d 973, 981 (1985). In addition, plaintiffs must allege facts showing concerted action or agreement; “a contemporaneous and negligent failure to act” is not sufficient. *Id.*, 351 Pa. Super. at 280, 505 A.2d at 982. Furthermore, plaintiffs must allege facts to show malice, *i.e.* of each defendant’s intent to injure plaintiffs. Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979). While TSC, SC-Pa and SC-NJ have set forth facts to show malice on the part of the Blaeuers, Tindal, Martello (and PRI, PMH, HCA and NEMCA vicariously) in converting the property of TSC, SC-Pa and SC-NJ, they have not set forth facts showing malice on the part of their conflicted attorneys Burke, and KSD&B. Thus, the conspiracy claim

against those two defendants is dismissed. Furthermore, since ALC has not set forth an underlying tort against any of the defendants, its conspiracy claim fails as well.

VII. TSC, SC-Pa and SC-NJ Have Alleged Sufficient Facts to Support Their Constructive Trust Claim, But Not Their Unjust Enrichment Claim.

A constructive trust is a remedy that may be available where a representative of one company has utilized that company's tangible and intangible assets to set up a competing business. See Santoro v. Morse, 781 A.2d 1220 (Pa. Super. 2001). In this case, plaintiffs have alleged that the Blauers and Tindall, who were officers, director and/or employees of plaintiffs, utilized plaintiffs' assets to set up PRI, HCA and NEMCA, so plaintiffs may assert constructive trust claims against those entities. However, plaintiffs have not alleged that PHC was the recipient of anything more than payment from NEMCA for William Blauer's services, so the constructive trust claim against PHC is dismissed.

In addition to requesting a constructive trust, plaintiffs also request damages for unjust enrichment. However, plaintiffs have not set forth the elements of a claim for unjust enrichment that is separate and apart from their claim for a constructive trust. "The controlling factor in determining whether a constructive trust should be imposed is whether it is necessary to prevent unjust enrichment." Santoro, 781 A.2d at 1231.

On the other hand, a claim for unjust enrichment requires that plaintiff plead the following elements:

benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. . . . Where unjust enrichment is found, the law implies a contract, . . . which requires that the defendant pay to plaintiff the value of the benefit conferred. In short, the defendant makes restitution to the plaintiff in *quantum meruit*.

Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 97-8, 666 A.2d 327, 328-9 (1995). Such a claim

makes sense in cases involving a contract or a quasi-contract, but not, as here, where plaintiffs are claiming damages for torts committed against them by defendants. Therefore, plaintiffs' claim for unjust enrichment is dismissed.

VIII. Plaintiffs' Claim for Vicarious Liability Must Be Dismissed as Duplicative of Their Tort Claims.

Plaintiffs claim that PRI, PMH, PHC, HCA and NEMCA are vicariously liable under the doctrine of *respondeat superior* for the torts committed by their agents, the individual defendants Blaeuer, Blaeuer, Tindall and Martello. However, plaintiffs have already listed PRI, PMH, PHC, HCA and NEMCA as (vicariously) liable parties with respect to the conversion and conspiracy claims. Therefore, the separate count for vicarious liability is dismissed, as redundant.

IX. Some of The Claimed Scandalous and Impertinent Matter Set Forth In the Complaint Must Be Stricken.

Pennsylvania Rule of Civil Procedure 1028(a)(2) permits parties to file preliminary objections to the "inclusion of scandalous or impertinent matter." "To be scandalous or impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action." Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 114 (Commw. 1998) aff'd, 562 Pa. 632, 757 A.2d 367 (2000). In this case the references to defendants' "Enron style looting" of the plaintiff professional corporations are neither material nor appropriate proof of the breach of fiduciary duty, conversion and other claims against defendants. Such statements are hereby stricken.

Plaintiffs' references to William Blaeuer's extra-marital affair with an employee of the corporate plaintiffs, who received money from the corporate plaintiffs in addition to her usual and customary payroll and bonus checks, are to some extent material and appropriate proof of his wrongful motive for converting

such money to her use. However, the references to their “having illicit sexual relations on the premises at 1911 Arch Street” are both immaterial and inappropriate and are hereby stricken.

CONCLUSION

For the foregoing reasons, the court sustains, in part, and overrules, in part, the Preliminary Objections of defendants to the Complaint. A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J