

COPIES SENT PURSUANT TO Pa.R.C.P. 236(b) 11/14/2017

OLIVIA KIRSCHNER,	:	OCTOBER TERM, 2016
	:	
Plaintiff,	:	NO. 03940
	:	
v.	:	COMMERCE PROGRAM
	:	
MAIN STREET BUSINESS FUNDING, LLC,	:	2510 EDA 2017
ROBERT S. GOGGIN, III, ESQUIRE, and 48	:	
FACTORING, INC.,	:	
	:	
Defendants.	:	
	:	
v.	:	
	:	
MICHAELJ. GOLDNER, JDJSL LLC, and	:	
JOEL S. LUBER,	:	
	:	
Add'l Defendants.	:	

HOWARD GREENBERG,	:	NOVEMBER TERM, 2016
	:	
Plaintiff,	:	NO. 01717
	:	
v.	:	COMMERCE PROGRAM
	:	
MAIN STREET BUSINESS FUNDING, LLC,	:	2507 EDA 2017
ROBERT S. GOGGIN, III, ESQUIRE, and 48	:	
FACTORING, INC.,	:	
	:	
Defendants.	:	
	:	
v.	:	
	:	
MICHAELJ. GOLDNER, JDJSL LLC, and	:	
JOEL S. LUBER,	:	
	:	
Add'l Defendants.	:	

Djerassi, J.

November 14, 2017

OPINION

Michael J. Goldner (“Goldner”) and JDJSL LLC (“JDJSL”), who are defendants in the first of the above captioned cases and additional defendants in the three subsequently filed cases,

appeal from this court's Orders entered in each of these related cases,¹ in which the court granted in part and overruled in part Goldner's and JDJSL's Preliminary Objections to the Second Amended Complaint (the "Complaint") and to the Joinder Complaints filed against them by plaintiffs/joining defendants Main Street Business Funding, LLC ("MSBF") and Robert S. Goggin, III ("Goggin").

MSBF is a financial industry factoring company owned by the Goggin Family Trust and ultimately controlled by Goggin.² JDJSL, through its agent Goldner, provided consulting services to MSBF "on general financial business matters and help[ed] procure business opportunities for [MSBF's] factoring business in exchange for 50% of [MSBF's] Cash Flow."³ Goldner is an accountant who "was in charge of the day-to-day operations of [MSBF and] also was in charge of keeping the books of [MSBF]."⁴

JDJSL's and Goggin's Preliminary Objections are primarily based on an arbitration provision in a Consulting Agreement between MSBF and JDJSL. In ruling on the Preliminary Objections, this court held that "to the extent that [MSBF] seeks any contract damages against JDJSL for breach of the Consulting Agreement between those two parties, such claims must be arbitrated. [However,] the arbitration of any such contract claims between [MSBF] and JDJSL is

¹ The first Order was docketed on April 21, 2017, in Case No. 160502449 (MSBF v. Goldner). In Case No. 161003940 (Kirschner v. MSBF) and in Case No. 161101717 (Greenberg v. MSBF), the Orders were docketed on July 3, 2017. The Order in Case No. 160801661 (Cherner v. MSBF) was docketed on July 21, 2017. Copies of all such orders are attached hereto. Cherner, Kirschner, and Greenberg all claim to have been investors in MSBF who have not been repaid.

² See Complaint, ¶¶ 11-12.

³ *Id.*, ¶ 25.

⁴ *Id.*, ¶ 28.

stayed pending the outcome of this tort action against multiple defendants.”⁵ The remainder of the Preliminary Objections were overruled.

In their Complaint plaintiffs Goggin and MSBF assert claims against Goldner for fraud, conversion, conspiracy, unjust enrichment, and breach of fiduciary duty. Goggin and MSBF assert similar claims against JDJSL, along with co-defendants and alleged co-conspirators, Dovecote Lane LLC (“Dovecote”), and Joel S. Lubner (“Lubner”).⁶ MSBF and Goggin did not assert a claim against JDJSL and Goldner for breach of the Consulting Agreement.⁷

Goggin and MSBF allege that Goldner and his co-conspirators engaged in two separate conspiracies, the Malvern Property scheme and a more general embezzlement scheme. In support of these claims, Goggin and MSBF allege that Lubner, as attorney for Goggin and MSBF and manager of JDJSL, facilitated MSBF’s hiring of Goldner. This was accomplished through a conflict Lubner allegedly manipulated between JDJSL which he controlled as a consulting company and his duties to his law client MSBF. As part of his JDJSL consulting work for MSBF, Lubner recommended Goldner to be accountant and consultant to effectively run MSBF’s factoring business for Goggin.⁸

⁵ April 21, 2017, Order in Case No. 160502449, p. 1.

⁶ Dovecote Lane, LLC is allegedly wholly owned by the Goldner Family Trust, which is also the majority owner of JDJSL. *See* Complaint, ¶ 32. Dovecote owns or owned 7 Dovecote Lane in Malvern, Pennsylvania (the “Malvern Property”), which was apparently Defendant Goldner’s personal residence. *See id.*, ¶¶ 3, 30, 31, 43.

Defendant Lubner is an attorney and allegedly Defendant Goldner’s cousin. *See id.*, ¶¶ 12-13, and 17. Defendant Lubner is the manager of Dovecote and JDJSL. *See id.*, ¶ 33. Defendant Lubner also allegedly represented MSBF and Plaintiff Goggin at the same time he represented or was otherwise involved with Dovecote, Defendant Goldner, and JDJSL. *See id.*, ¶¶ 11-17.

Plaintiff Goggin and MSBF assert additional claims against Defendant Lubner for aiding and abetting Defendant Goldner’s breach of fiduciary duty, as well as for Defendant Lubner’s own breach of fiduciary duty and legal malpractice, in which latter claims Defendant Lubner’s law firm is also named.

⁷On review, we recognize the appellate court may reasonably inquire why the court decided to send a portion of the case to potential arbitration while keeping the cognizable tort claims for court litigation. Our consideration follows Goldner’s and JDJSL’s broad assertion that plaintiffs’ tort cases belong in arbitration. As defendants were apparently prepared to appeal *any* denial of arbitration, the effect of our separation allows discovery to continue on the complicated tort claims while this appeal is decided.

⁸ *See id.*, ¶¶ 16-22.

Plaintiffs Goggin and MSBF also claim that Goldner and Lubner, acting through JDJSL, caused MSBF to take out a high interest loan of approximately \$700,000 to fund Dovecote's purchase of the Malvern Property for Goldner's family's benefit.⁹ Meanwhile they allege that Goldner stole approximately \$2 million in funds from MSBF to pay his own personal expenses and debts.¹⁰

Goggin and MSBF also allege that defendant "Lubner drafted the consulting agreement between his client [MSBF] and his other client JDJSL, for his own personal benefit, and knowing that the two clients were in conflict."¹¹ This Consulting Agreement contains the following arbitration provision:

Any controversy or claim arising out of or relating to this Agreement, or breach thereof, may be resolved by mutual agreement; or if not, shall be settled in accordance with the Arbitration rules of the American Arbitration Association in Philadelphia, Pennsylvania.¹²

JDJSL and Goldner claim that this provision requires that all of MSBF and Goggin's claims against them in these consolidated actions be arbitrated. This court disagrees for several reasons. Firstly, neither Goldner nor Goggin are parties to the Consulting Agreement;- they both

⁹ Plaintiff Goggin and MSBF allege that, in surreptitiously causing MSBF to borrow money to fund Dovecote's purchase of the Malvern Property, Defendant "Goldner was attempting, with [Defendant] Lubner's connivance, to secure funds for [Defendant Goldner] and his family in a manner that would permit them to avoid the reach of any creditors, including any victims to whom [Defendant] Goldner owed restitution as a result of his guilty plea" to tax and wire fraud charges in a federal court action. Complaint, ¶ 43.

In the federal criminal action, Defendant Goldner pled guilty to soliciting victims "to invest in various real estate investments through Arcadia Capital Group, Inc. [and then using] the investments for [Defendant Goldner's] personal expenses and debts." *USA v. Goldner*, 2:15 CR 00002 (GAM), Superseding Information, ¶ 3 (E.D. Pa. 7/20/15). Ultimately, the federal court ordered that the Malvern Property be sold and the net profits be distributed to the victims of Defendant Goldner's Arcadia scheme. *See id.*, Amended Judgment (E.D. Pa. 8/9/16).

¹⁰ *See* Complaint, ¶ 83.

¹¹ *Id.*, ¶ 22. This allegation serves as one of the bases for Plaintiff Goggin's and MSBF's claims for legal malpractice against Defendant Lubner and his firm. *See id.*, ¶ 160.

¹² Preliminary Objections, Ex. 1, ¶ 14.

signed only on behalf of their respective companies and not in their individual capacities¹³ – so the tort claims involving them as individuals are not subject to the arbitration provision.

Secondly, MSBF has not asserted any claim against JDJSL for a simple contractual breach of the Consulting Agreement.¹⁴ Instead, MSBF's and Goggin's many tort claims against JDJSL and Goldner are based on an elaborate scheme to embezzle money from MSBF. This scheme was neither contemplated nor embodied in the Consulting Agreement. The Consulting Agreement was more likely a means to facilitate the conspirators' fraudulent schemes and these allegedly involved numerous overt acts of wrongdoing by defendants Goldner, Lubner and others.

Contrary to JDJSL's and Goldner's arguments in their Preliminary Objections, the gist of MSBF's and Goggin's embezzlement action against defendants Goldner, Lubner, and others sounds clearly in tort, not in contract.¹⁵ The duty not to steal is a broad societal duty, not one created by and set forth in the Consulting Agreement. Tort claims arising in theft and fraud are not contemplated by contractual agreement, and any arbitration provision in the Consulting Agreement itself is inapplicable to outrageous conduct alleged in this case.

Thirdly, inefficiency and risk of inconsistent decisions are foreseeable outcomes if MSBF's embezzlement conspiracy claims against JDJSL were litigated in front of an arbitration

¹³ See *id.*, p. 5.

¹⁴ In an abundance of caution, the court, in its ruling on the Preliminary Objections, reserved any claims for contract damages for the arbitrators and stayed them while the court adjudicates the claims for tort damages. However, it does not appear from a reading of the Complaint that such contract damages are really being sought by MSBF in this action. See footnote 7.

¹⁵ See *Bruno v. Erie Ins. Co.*, 630 Pa. 79, 111–12, 106 A.3d 48, 68 (2014) (“[O]ur Court has consistently regarded the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint, to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract. . . . If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.”)


panel while MSBF's and plaintiff Goggin's embezzlement conspiracy claims go forward against Goldner, Luber, and others in this court.¹⁶ While this court recognizes and applauds our general policy favoring arbitration of disputes where the parties have contractually agreed to do so, this preference should not apply here.

This is a case where an agreement containing an arbitration provision was signed by only one of the defendants, JDJSL. But JDJSL was only one of several co-conspirators who allegedly defrauded multiple plaintiff parties. Only one of the alleged plaintiff victims---MSBF--- signed an agreement containing an arbitration provision. Under these consolidated circumstances, an arbitration proceeding addressing tort and fraud claims only between JDJSL and MSBF invites both gross inefficiency and inconsistency.

CONCLUSION

For all the foregoing reasons, this court respectfully requests that its Orders regarding defendant JDJSL's and Goldner's Preliminary Objections be affirmed on appeal.

BY THE COURT



RAMY I. DJERASSI, J.

¹⁶ See Thermal C/M Servs., Inc. v. Penn Maid Dairy Prod., 831 A.2d 1189, 1193 (Pa. Super. 2003) ("As noted above, [defendant] is among the plaintiffs in the action at No. 915 and [plaintiff] is a named defendant in that action and the arbitration proceeding. The action at No. 915 predates [plaintiff's] petition to compel arbitration, and it will dispose of the issue [plaintiff] seeks to arbitrate. Thus, litigating the two actions at the same time would be a waste of judicial resources, and it would promote a race to judgment. Undoubtedly, it is more efficient to address the issue in a single disposition rather than have parallel actions in independent forums with potentially different results. Similarly, considering the size and complexity of the consolidated action, it would be unreasonably burdensome to require the parties to litigate these issues concurrently. Therefore, we invoke Rule 213(a) and affirm the order denying the petition to compel arbitration.")