

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

KEVIN D. FLYNN DEVELOPMENT CORP. Plaintiff,	: JULY TERM, 2005
	: No. 3523
v.	: (Commerce Program)
CORPORATE EXPRESS OFFICE PRODUCTS, INC. <i>et al.</i>	:
Defendants.	: Control No. 101823

ORDER

AND NOW, this 19TH day of January 2006, upon consideration of defendants' Preliminary Objections, the response in opposition, the respective memoranda, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED**, as follows:

1. The Preliminary Objections of defendants, Stewart Title of Denver LLC and Brianna Hern, pursuant to Pa.R.C.P. 1028 (a)(2) are **sustained** and all claims against these defendants are **dismissed**;
2. The Preliminary Objections of defendants, Matthew C. Lenhart and CE Philadelphia Real Estate, Inc., are **sustained** and all claims against these defendants are **dismissed**;
3. The Preliminary Objections of defendant, Corporate Express Office Products, Inc., are **sustained, in part**, and the following Counts are **dismissed**: Counts II (fraud), IV (constructive trust) and XV (attorney's fees) and all demands for attorneys fees are stricken from the Amended Complaint;

4. The remainder of defendants' Preliminary Objections are **overruled**;
5. To the extent plaintiff is able to plead viable claims in accordance with the pleading requirements of the Pennsylvania Rules of Civil Procedure, plaintiff will be permitted to file a Second Amended Complaint within twenty (20) days from the date of entry of this Order.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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KEVIN D. FLYNN DEVELOPMENT CORP.	:	JULY TERM, 2005
Plaintiff,		
	:	No. 3523
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CORPORATE EXPRESS OFFICE PRODUCTS, INC.	:	
<i>et al.</i>		
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OPINION

Albert W. Sheppard, Jr., J. January 19, 2006

Currently before the court are defendants' Preliminary Objections to plaintiff's Amended Complaint. For the reasons discussed, the Preliminary Objections are **sustained, in part**, and **overruled, in part**.

BACKGROUND

According to the Amended Complaint, on or about March 18, 2003, plaintiff, Kevin D. Flynn Development Corporation ("Flynn"), entered into an agreement with Defendant Corporate Express Office Products, Inc. ("Corporate") providing Flynn the exclusive right to sell certain property in Lower Chichester, Pennsylvania (the "Property") and a six percent commission for producing a buyer. *See* Compl. Exh. A. Plaintiff contends that it produced a buyer, but did not receive the proper commissions.

This appears, at first blush, to be a garden variety breach of contract case. However, in addition to suing Corporate for breach of contract, plaintiff has also asserted

claims against Corporate for fraud (Count II), constructive trust (Count IV) and conversion (Count V). The Amended Complaint also purports to state claims against Corporate's agent, Matthew Lenhart ("Lenhart") individually, for fraud (Count III) and Stewart Title of Denver LLC ("Stewart"), the escrow agent, and its employee Brianna Hern ("Hern") in quasi-contract (Count X), constructive trust (Count XI), fraud (Counts XII and XIV) and conversion (Count XIII). Plaintiff also asserts claims against CE Philadelphia Real Estate, Inc. ("CEPRE"), the registered owner/seller of the Property (which is allegedly owned by Corporate) for breach of contract (Count VI), constructive trust (Count VII), fraud (Count VIII) and conversion (Count IX).

Despite plaintiff's "everything but the kitchen sink" approach to pleading, this case is simply a breach of contract claim between plaintiff and Corporate, and the Amended Complaint contains insufficient factual allegations to demonstrate otherwise.

This court finds that plaintiff has failed to plead sufficient facts to establish claims against any defendant other than Corporate. However, to the extent plaintiff is able to plead viable claims in accordance the pleading requirements of the Pennsylvania Rules of Civil Procedure, plaintiff will be permitted to correct the pleading deficiencies within twenty (20) days from the date of entry of this Order.

DISCUSSION

I. Count II is Barred By the Gist of the Action Doctrine.

Count II purports to state a claim for fraud against Corporate. This claim fails under the gist of the action doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." Etoll, Inc. v. Elias/Savion Advertising, Inc., 2002 Pa. Super. 347, 811 A.2d 10, 14 (2002). "[A] contract action may not be converted

into a tort action simply by alleging that the conduct in question was done wantonly.” Phico Ins. Co. v. Presbyterian Medical Services Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995). A tort claim is barred where, as here, “the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract.” Etoll, Inc., 811 A.2d at 19. As pled, the only duty allegedly breached by Corporate was that which was created by the agreement between the parties. The fact that Corporate may have negligently, recklessly, or intentionally breached that contractual duty does not give rise to a tort claim. Therefore, Count II is dismissed.

II. Plaintiff Has Failed To Establish Personal Jurisdiction Over Either Stewart Title of Denver LLC or Brianna Hern.

Defendants, Stewart and Hern, have filed Preliminary Objections pursuant to Pa.R.C.P. 1028 (a)(2) asserting lack of personal jurisdiction. This court finds that plaintiff has failed to plead sufficient facts to establish personal jurisdiction over either Stewart or Hern.

Where a party objects to a court’s exercise of personal jurisdiction, the non-moving party bears the burden of demonstrating contacts with the forum state sufficient to justify the assertion of personal jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Barr v. Barr, 2000 Pa. Super. 99, 749 A.2d 992 (2000). Pursuant to the Judiciary Act, 42 Pa.C.S.A. § 5301, *et seq.*, Pennsylvania courts may exercise two types of *in personam* jurisdiction over a non-resident defendant. General jurisdiction founded upon a defendant's general activities within the forum as evidenced by continuous and systematic contacts with the state. Specific jurisdiction has a more

defined scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. Mar-Eco, Inc. v. T & R & Sons Towing & Recovery, Inc., 2003 Pa. Super. 444, 837 A.2d 512 (2003). Regardless of whether general or specific *in personam* jurisdiction is asserted, 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. Id.

Here, plaintiff has failed to plead sufficient facts to establish either general or specific *in personam* jurisdiction over either Stewart or Hern. As alleged, the actions of Stewart were limited solely to the escrowing of funds in connection with a real estate closing which took place in Colorado. There have been no allegation that the funds were held in Pennsylvania or that Stewart had any contact with Pennsylvania. The fact that the underlying sale dealt with a Pennsylvania company in connection with a Pennsylvania property alone is insufficient to establish jurisdiction.

There is no jurisdiction as to Hern for these same reasons. Furthermore, plaintiff has failed to plead any facts in its Amended Complaint to sustain a cause of action against Hern individually. All allegations against Hern are in her capacity as employee/agent of Stewart and plaintiff has failed to plead specific facts to warrant liability against her in her individual capacity. Accordingly, all claims against Stewart and Hern are dismissed.

III. Plaintiff's Breach of Contract Claim Against CEPRE Is Dismissed.

Count VI purports to state a claim against defendant CEPRE for breach of contract. To set forth a valid claim for breach of contract, plaintiff must demonstrate: (1) the existence of a contract, including its essential terms; (2) breach of a duty imposed by

the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 1999 Pa. Super. 14, 23 A.2d 1053 (1999). Here, plaintiff has failed to demonstrate the existence of a contract between itself and CEPRE. The contract at issue is by and between plaintiff and Corporate.

Plaintiff argues that there should be liability against CEPRE under a theory of piercing the corporate veil. As a preliminary matter, it must be noted that a strong presumption exists in Pennsylvania against disregarding the corporate form. Wedner v. Unemployment Compensation Bd. of Review, 449 Pa. 460, 464, 296 A.2d 792, 794 (1972). “Piercing the corporate veil is the exception, and courts should start from the general rule that the corporate entity should be upheld unless specific, unusual circumstances call for [such] an exception.” First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 600 A.2d 601, 604 (1991). In order to withstand a demurrer, plaintiff must set forth the conduct in which CEPRE allegedly engaged that would bring its actions within the parameters of a cause of action based on a theory of piercing the corporate veil.¹ Plaintiff has failed to do so. Indeed, plaintiff has pled no facts whatever in support of this theory. While it is not necessary to set forth the evidence by which facts are to be proved, it is essential that the facts the pleader depends upon to show liability be averred. Id. (*quoting* Frey v. Dougherty, 286 Pa. 45, 48, 132 A. 717, 718 (1926)). Plaintiff has failed to do so here; accordingly, Count IV is dismissed.

¹ Under Pennsylvania law, the following factors are to be considered in determining whether to pierce the corporate veil: 1) undercapitalization; 2) failure to adhere to corporate formalities; 3) substantial intermingling of corporate and personal affairs; and 4) use of the corporate form to perpetrate a fraud. Lumax Indus. v. Aultman, 543 Pa. 38, 669 A.2d 893 (1995); Village at Camelback Prop. Owners Ass'n, Inc. v. Carr, 371 Pa. Super. 452, 461, 538 A.2d 528, 533 (1988), *aff'd* 524 Pa. 330, 572 A.2d 1 (1990).

IV. Plaintiff Has Failed To Plead Valid Claims Against Lenhart or CEPRE.

As pled, it is unclear what plaintiff's theory of liability is against defendants Lenart and CEPRE, as the claims against them lack the requisite specificity required by the Rules. For example, Count III (fraud) purports to state a claim against Lenhart, in his individual capacity. However, plaintiff has failed to plead any facts to sustain such a cause of action. All allegations against Lenhart relate to actions allegedly taken within his capacity as employee/agent of Corporate. The mere averment that a corporate officer should have known the consequences of the liability-creating corporate act alone is insufficient to impose liability. Wicks v. Milo Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983).

Moreover, the fact that Lenhart may also own CEPRE is immaterial to the issues presented in that plaintiff has failed to plead any actionable conduct by either party. For this reason, as well as those set forth in Section III, *supra*, Counts II (fraud), VII (constructive trust),² VIII (fraud), and IX (conversion) against CEPRE are likewise dismissed for insufficient specificity. To the extent plaintiff is able to plead viable claims against either Lenhart or CEPRE in accordance with the pleading requirements of the Pennsylvania Rules of Civil Procedure, plaintiff will be permitted to file a Second Amended Complaint within twenty (20) days from the date of entry of this Order.

² Furthermore, as pled, plaintiff has also failed to demonstrate the requisite basis for imposing a constructive trust. Under Pennsylvania law, a constructive trust may be imposed if a transferee conveys property to another due to fraud, duress, undue influence, mistake or abuse of a confidential relationship in conjunction with a promise to hold the property in trust and reliance thereon. Kohr v. Kohr, 271 Pa. Super. 321, 328, 413 A.2d 687, 690 (1979). A constructive trust may also be imposed where "a person holding title to property is subject to an equitable duty to convey it to another on the grounds that he would be unjustly enriched if he were permitted to retain it." Id. In its current state, the Amended Complaint does not set forth sufficient facts to support such a cause of action.

V. Plaintiff Is Not Entitled To Attorney's Fees.

In Count XV, plaintiff seeks an award of attorney's fees. "[T]he parties to litigation are responsible for their own fees unless otherwise provided by statutory authority, agreement of the parties or some other recognized exception." Equibank v. Miller, 422 Pa. Super. 240, 619 A.2d 336, 338 (1993). Here, no such authority or exception exists which would permit the award of attorney's fees.

Accordingly, defendants' Preliminary Objection to Count XV is sustained. Count XV and all demands for attorney's fees are stricken from the Amended Complaint.

CONCLUSION

For these reasons, the court finds that:

1. The Preliminary Objections of defendants, Stewart Title of Denver LLC and Brianna Hern, pursuant to Pa.R.C.P. 1028 (a) (2) are **sustained** and all claims against these defendants are **dismissed**;

2. The Preliminary Objections of defendants, Matthew C. Lenhart and CE Philadelphia Real Estate, Inc. are **sustained** and all claims against these defendants are **dismissed**;

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4. The remainder of defendants' Preliminary Objections are **overruled**;

5. To the extent plaintiff is able to plead viable claims in accordance the pleading requirements of the Pennsylvania Rules of Civil Procedure, plaintiff will be permitted to file a Second Amended Complaint within twenty (20) days from the date of entry of this Order.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.