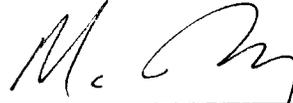


DISMISSED as Moot.¹

BY THE COURT,



MCINERNEY, J.

¹ Defendant Nordbank, AG filed a first set of preliminary objections which improperly asserted the affirmative defense based on the statute of limitations. PA. R.C.P. 1030. Plaintiffs timely filed preliminary objections to the preliminary objections. Subsequently, Defendant Nordbank, AG filed a new set of preliminary objections which did not raise the affirmative defense based on the statute of limitations. “A party may file an amended pleading as of course.... If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.” PA. R.C.P. 1028(c)(1).

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

FRAZER/EXTON DEVELOPMENT, LLC <i>et al.</i>	:	April Term, 2013
	:	
<i>Plaintiffs</i>	:	Case No. 004510
	:	
v.	:	
	:	
SOVEREIGN BANK, N.A.	:	Commerce Program
	:	
<i>and</i>	:	Control Nos. 13102501,
	:	13102503, 13121221,
NORDBANK, AG,	:	13121475
	:	
<i>Defendants</i>	:	

MEMORANDUM OPINION

The preliminary objections of defendants require this court to determine whether plaintiffs may maintain, *inter alia*, the claims of breach of contract, tortious interference with business relations and breach of fiduciary duty. The preliminary objections also require this court to decide whether it has jurisdiction to void a settlement agreement that was incorporated into an Order issued by the U.S. Bankruptcy Court. For the reasons below, plaintiffs may not maintain the claims listed above, and this court has no jurisdiction to void the settlement agreement.

Background¹

Plaintiffs are Frazer/Exton Development, LLC (“Frazer/Exton LLC”), Whiteland Village, LLC (“Whiteland Village, LLC”), Roskamp Management Company, LLC (“Roskamp Mgt., LLC”), Robert Roskamp and Paul Woodruff (collectively, “Plaintiffs”).

¹ Unless otherwise noted, the background facts in this Memorandum Opinion have been gleaned from Plaintiffs’ complaint, the preliminary objections of defendants, and plaintiffs’ responses in opposition thereto.

At all times relevant to this action, Plaintiffs were involved in the development of a retirement community (the “Project”). Defendants are Sovereign Bank, N.A. (“Sovereign Bank”) and HSH Nordbank, AG (“Nordbank”). In connection with the development of the Project, Sovereign Bank and Nordbank loaned funds to Plaintiffs, or entered into negotiations for the lending of funds to Plaintiffs.

On January 16, 2007, Plaintiffs and Sovereign Bank entered into a loan agreement (the “Remediation Loan”), in the amount of \$23 million.² Borrowers and Sovereign Bank agree that the funds under this loan would be used to cure existing environmental problems upon the land prior to actual development of the Project.³ The amount of the loan was subsequently increased by \$6 million, for a total of \$29 million, under the terms of a “First Amendment to the Loan Agreement,” which was executed by Plaintiffs and Sovereign Bank on June 20, 2008.⁴

Subsequently, Sovereign Bank and Plaintiffs began to negotiate a loan agreement to fund the construction phase. Defendant Nordbank also participated in these negotiations with a view of co-lending funds for the construction phase of the Project. On June 29, 2007, Sovereign Bank and Nordbank submitted to Plaintiffs a Summary of Proposed Terms and Conditions—Revised (For Discussion Purposes Only) (hereinafter, the “Term Sheet”), which was executed by all the parties.⁵

On February 28, 2008, Nordbank allegedly communicated to Sovereign Bank that it would not finance the construction phase of the Project. One week later,

² Loan Agreement dated January 16, 2007, Exhibit 2 to the preliminary objections of defendant Sovereign Bank.

³ Complaint, ¶ 29; preliminary objections of Sovereign Bank, ¶ 4.

⁴ First Amendment to the Loan Agreement dated June 20, 2008, Exhibit 3 to the preliminary objections of Sovereign Bank.

⁵Summary of Proposed Terms and Conditions—Revised (For Discussion Purposes Only), Exhibit A to the complaint.

Sovereign Bank allegedly informed Plaintiffs that neither Sovereign Bank, nor Nordbank, would finance the construction phase of the Project.

On December 28, 2008, Sovereign Bank and Plaintiffs entered into a Second Amendment to the Remediation Loan.⁶ Sovereign called the Remediation Loan on July 27, 2009, and demanded full repayment thereof no later than July 31, 2009.

On May 19, 2011, Plaintiffs filed for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the Eastern District of Pennsylvania.⁷ On November 16, 2009, Sovereign and Plaintiffs entered into a Settlement and Forbearance Agreement (the “Settlement Agreement”), which included releases in favor of Sovereign Bank.⁸ On December 20, 2011, Plaintiffs, as debtors in the bankruptcy proceeding, filed their Second Amended Plan of Reorganization. The Second Amended Plan of Reorganization incorporated the terms of the above mentioned Settlement Agreement.⁹ On February 22, 2012, the U.S. Bankruptcy Court for the Eastern District of Pennsylvania issued an Order. The Order confirmed the Second Amended Plan of Reorganization which contained the terms of the Settlement Agreement between Plaintiffs and Sovereign Bank.¹⁰

On January 1, 2013, Plaintiffs filed in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania a motion to reopen the bankruptcy case. In that motion, which as of the date of this *Memorandum* Opinion is still pending, Plaintiffs averred as follows:

1. The Debtors [Plaintiffs herein] seek to reopen their

⁶ Second Amendment to Loan Agreement, Exhibit 4 to the preliminary objections of Sovereign Bank

⁷ *In re Frazer/Exton Dev., L.P. et al.*, U.S.B.C. E.D., Bankruptcy No. 11-14041.

⁸ Settlement and Forbearance Agreement, Exhibit B to the complaint, ¶ 23.

⁹ *In Re: Frazer/Exton Development, LP et al. Debtor*, U.S.B.C. E.D., Bankruptcy No. 11-14041 Second Amended Plan of Reorganization Proposed by Debtor.

¹⁰ *Id.*

bankruptcy cases in order to, among other things, pursue relief from [the Settlement] with Sovereign Bank ... and modification of their confirmed plan.

2. The [Settlement Agreement] ... with Sovereign, and the plan that resulted from it, were the product of discovery misconduct and, likely, fraud by Sovereign. After the confirmation of the plan and the closure of ... [Plaintiffs'] bankruptcy cases, it was revealed in another case pending in this district that, while the [Plaintiffs] were in litigation with Sovereign, Sovereign was engaged in a company-wide pattern of egregious discovery violations –including the intentional withholding of *directly relevant*, proverbial smoking-gun type documents.¹¹

On April 30, 2013, Plaintiffs filed the instant action against Sovereign Bank and Nordbank. The complaint asserts the claims of breach of contract, fraudulent and/or negligent misrepresentation, tortious interference, promissory estoppels, breach of fiduciary duty, and declaratory judgment. The declaratory judgment claim specifically asks the court to void the Settlement Agreement which was incorporated by the U.S. Bankruptcy Court into its Order. In essence, the complaint avers that Sovereign and Nordbank improperly failed to fund the construction phase of the Project and caused Plaintiff to suffer damages, including incurred pre-construction costs and loss of business relations.

On October 18, 2013, Sovereign Bank filed its preliminary objections to the complaint. The preliminary objections of Sovereign Bank challenge all the claims asserted in Plaintiff's complaint, including the declaratory judgment claim asserted in count VI therein. Sovereign Bank seeks *inter-alia* dismissal of the declaratory judgment claim on grounds that this court lacks subject matter jurisdiction to void the Settlement Agreement. Subsequently, this court entered an Order directing Plaintiffs to respond

¹¹ Id., Introductory Statement.

only to the portion of Sovereign Bank's preliminary objections which had raised the issue of subject matter jurisdiction.¹²

Also on October 18, 2013, Nordbank filed its own preliminary objections. The preliminary objections of Nordbank specifically raised the affirmative defense based on the statute of limitations.¹³ On December 9, 2013, Plaintiffs filed preliminary objections to the preliminary objections of Nordbank. With this filing, Plaintiffs challenged the preliminary objections of Nordbank on grounds that an affirmative defense based on the statute of limitations is not permitted under the Pennsylvania Rules of Civil Procedure.¹⁴ On December 11, 2013, Nordbank filed its "Amended Preliminary Objections" to the complaint of Plaintiffs. These Amended Preliminary Objections do not raise the affirmative defense based on the statute of limitations. As a result of this amended pleading, the original preliminary objections of Nordbank, and Plaintiffs' preliminary objections thereto, are moot.¹⁵ The surviving preliminary objections are ripe for a resolution.

Discussion

At the onset, the court notes the standard for preliminary objections:

[a]ll material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true.... The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.¹⁶

¹² Order dated November 19, 2013. Subsequently, on May 21, 2014, Plaintiffs stipulated that the court could decide "all of [Sovereign Bank's] outstanding Preliminary Objections based on existing briefing – which includes Plaintiffs' response to both [Sovereign Bank's] subject matter jurisdiction argument and all of ... Nordbank's Preliminary Objections – without Plaintiffs filing a more formal response thereto."

¹³ Preliminary objections filed on October 18, 2013, Control No. 13102503, ¶¶ 25–30.

¹⁴ Pa. R.C.P. 1030, 1028(a)(4)—*Note*.

¹⁵ Pa. R.C.P. 1028(c)(1).

¹⁶ Employers Ins. of Wausau v. Com., Dep't of Transp., 581 Pa. 381, 389, 865 A.2d 825, 830 (2005).

I. This court lacks jurisdiction to alter or vacate the settlement agreement.

The preliminary objections of Sovereign Bank assert that this court lacks jurisdiction to vacate or modify the Settlement Agreement which was approved by the Bankruptcy Court and incorporated into an Order issued therefrom. According to the preliminary objections, “where a matter has been settled by federal court order the federal court retains jurisdiction and the state court lacks jurisdiction.”¹⁷ Sovereign Bank relies on Yaracks v. Summit Academy and C.S.C. Academy, Inc., which explained that—

[c]omity ... is not a rule of law, but a principle, given effect out of deference and respect for the actions of courts of other jurisdictions. The doctrine of comity teaches that one court should defer action or causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of litigation, have had an opportunity to pass upon the matter.¹⁸

In Yaracks, a dispute arose between a township and a landowner over the landowner’s right to use the property as a juvenile detention center. After the landowner filed a lawsuit in Federal Court, the parties reached a settlement which was approved by the Federal Court and was incorporated into the Order therefrom.¹⁹ Subsequently Yaracks, a township resident, commenced a declaratory judgment action in a Pennsylvania Court. Through this action, Yaracks asked the trial court to void the settlement agreement which had been incorporated by the Federal Court in its Order. The landowner filed preliminary objections arguing that any state court lacked subject matter jurisdiction to invalidate the settlement agreement incorporated into the Federal

¹⁷ Defendant Sovereign Bank’s brief in support of the preliminary objections of defendant Santander at C(1).

¹⁸ Yaracks v. Summit Academy and C.S.C. Academy, Inc., 845 A. 2d 203, 207 (Pa. Commw. 2004).

¹⁹ Id. at 207.

Court Order. The trial court sustained the preliminary objections holding that it had “no jurisdiction to hear this federal Consent Order.”²⁰ Yaracks appealed. Affirming, the Pennsylvania Superior Court held that “any attack by Yaracks on the validity of the Consent Order must be addressed before the same federal court.”²¹ This court is persuaded that the reasoning in Yaracks applies to the case at hand.

Notwithstanding the similarities between this case and Yaracks, Plaintiffs argue that this court has subject matter jurisdiction because state courts routinely “**interpret** and resolve disputes concerning federal courts’ settlement agreements,” including the instant settlement agreement which the U.S. Bankruptcy Court incorporated into its Order.²² In support of this argument, Plaintiffs rely on a number of cases emanating from within and without Pennsylvania, all of which hold generally that any court of competent jurisdiction can interpret an agreement and resolve disputes therefrom.²³ However, reliance on these cases is inapposite because the issue herein is not whether this court may interpret an agreement incorporated into an Order issued by a federal court, but whether it may altogether void such an agreement. This court is persuaded that it lacks jurisdiction to void an agreement which was incorporated into an Order issued by the U.S. Bankruptcy Court. For this reason, the preliminary objection of defendant Sovereign is sustained as to count VI of the complaint, and that count is dismissed.

II. The Term Sheet shows that the parties did not intend to be bound.

²⁰ Id.

²¹ Id. at 208.

²² Plaintiffs’ brief in opposition to the preliminary objections of defendant Sovereign Bank, C.(1) (emphasis supplied).

²³ In re Kmart Corp., 307 B.R. 586, 596 (Bank. E.D. Mich. 2004); In re Sunbrite Cleaners, Inc., 284 B.R. 336, 342 (N.D.N.Y. 2002); Robinson v. Penske Truck Leasing Co., LP, 495 EDA 2012, 2013 WL 4400108, *3 (Pa. Super. May 10, 2013) (stating that “Settlement agreements are contracts, and courts employ contract principles when interpreting agreements.”)

In count I of the complaint, Plaintiffs aver that pursuant to the Term Sheet, Sovereign Bank and Nordbank agreed to provide Plaintiffs with a \$181.5 million loan to fund construction of the Project. Plaintiffs further aver that all conditions precedent within the Term Sheet were either satisfied by Plaintiffs, or waived by Defendants, who, without intending to fund the loan, induced Plaintiffs to expend millions of dollars in pre-construction costs.²⁴ In the preliminary objections, Sovereign Bank and Nordbank assert that they manifested no intent to loan funds to Plaintiffs, as evinced by the clear and unambiguous language contained in the Term Sheet.²⁵ In the response in opposition to the preliminary objections of Sovereign and Nordbank, Plaintiffs assert that the plain language of the Term Sheet “demonstrates the parties’ mutual intent to be bound, and grants rights and imposes obligations” upon the parties thereto.²⁶

In Pennsylvania,

To successfully maintain a cause of action for breach of contract the plaintiff must establish:

- (1) the existence of a contract, including its essential terms,
- (2) a breach of a duty imposed by the contract, and
- (3) resultant damages....

The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. The intent of the parties to a written agreement is to be regarded as being embodied in the writing itself.... Courts do not assume that a contract's language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed....²⁷

Thus, to determine whether the parties to the Term Sheet intended to be bound

²⁴ Complaint, ¶¶129–139.

²⁵ *Memorandum* of law in support of defendant Nordbank’s preliminary objections at I–(2).

²⁶ Plaintiffs’ brief in opposition to the amended preliminary objections of defendant Nordbank, at III–A.

²⁷ Hart v. Arnold, 2005 Pa. Super 328, 884 A.2d 316, 332 (Pa. Super. 2005).

thereunder as lenders and borrower, this court shall examine the language contained in that document. The Term Sheet states as follows:

**SUMMARY OF PROPOSED
TERMS AND CONDITIONS—REVISED
(FOR DISCUSSION PURPOSES ONLY)**

* * *

*We are pleased to provide this **indicative** term sheet outlining the general terms and conditions under which Sovereign Bank and ... Nordbank ... **would be willing to provide financing** to Whiteland Village [the Project]. The following **proposed terms are provided for discussion purposes only and do not constitute an offer, agreement or commitment to lend on these terms. The indicative term sheet is meant for discussion purposes only, to help reach a final structure which is mutually acceptable.**²⁸*

* * *

Governing Law: State of New York....²⁹

The law in New York is settled:

[d]ismissal of the breach of contract counterclaims is required where ... the parties have agreed that there would be no binding agreement until their execution of a written contract....

[It is] preferable to allow sophisticated parties operating in the business world to decide when and how they wish to enter into legally enforceable contract....³⁰

In this case, the Term Sheet clearly and unambiguously states that it did not constitute an offer, agreement or commitment to lend funds under the terms therein,

²⁸ Summary of Proposed Terms and Conditions—Revised (For Discussion Purposes Only), Exhibit A to the complaint, p. 1 (emphasis supplied).

²⁹ *Id.*, p. 9.

³⁰ *StarVest Partners II, L.P. v. Emportal, Inc.*, 101 A.D.3d 610, 612-613, 957 N.Y.S.2d 93, 95 (2012). Under Pennsylvania law the result would be the same: “[a] mutual manifestation of intent to be bound is an essential element of a contract.... Absent a manifestation of an intent to be bound ... negotiations concerning the terms of a possible future contract do not result in an enforceable agreement.” *Philmar Mid-Atl., Inc. v. York St. Associates II*, 389 Pa. Super. 297, 301, 566 A.2d 1253, 1255 (Pa. Super. 1989).

and that its purpose was merely to facilitate a discussion in anticipation of an actual agreement. Since the Term Sheet does not constitute an offer, agreement or commitment to lend funds, Plaintiff may not prove an essential element required to preserve the claim of breach of contract –namely, that Sovereign Bank and Nordbank breached an agreement to lend funds to Plaintiffs. Consequently, the breach-of-contract claim asserted in count I of the complaint is dismissed.

III. Plaintiffs may not maintain the claims of tortious interference with existing and prospective business relations.

In count III of the complaint, Plaintiffs allege that the conduct of Sovereign and Nordbank caused Plaintiffs to lose existing and prospective business relations with “depositors ... residents/tenants, contractors and equity investors.”³¹ In the preliminary objections to the complaint, Sovereign and Nordbank assert that plaintiffs have failed to state a cause of action for tortious interference because both lenders were justified to exercise their “legal right not to finance the ... Project.”³²

In Pennsylvania,

[o]ne who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.³³

The necessary elements of a cause of action for interference with **existing** contractual relations are as follows:

³¹ Complaint, ¶ 151.

³² Preliminary objections of defendant Nordbank, ¶ 34, preliminary objections of defendant Sovereign, ¶¶ 66–69.

³³ Walnut St. Associates, Inc. v. Brokerage Concepts, Inc., 2009 Pa. Super 191, 982 A.2d 94, 98 (Pa. Super. 2009) aff'd, 610 Pa. 371, 20 A.3d 468 (2011).

- (1) the existence of a contractual relationship between the complainant and a third party;
- (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual damage as a result of defendant's conduct.³⁴

The requisite elements of a cause of action for interference with **prospective** contractual relations are as follows:

- (1) a prospective contractual relationship;
- (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual damage resulting from the defendant's conduct.³⁵

In this case, the Term Sheet states that its “proposed terms do not constitute an offer, agreement or commitment to lend on [herein] terms.”³⁶ This clear and unambiguous language shows that Sovereign and Nordbank were privileged to exercise the right not to lend funds to Plaintiffs. By exercising this privilege, Sovereign and Nordbank may have interfered with Plaintiffs existing and prospective business relations; however, this interference was justified and Plaintiffs cannot prove an essential element required to preserve the claims of tortious interference with existing and prospective business relations. Count III of the complaint is dismissed.

IV. Plaintiffs may not maintain the claim of breach of fiduciary duty.

Count V of the complaint alleges that a fiduciary relationship existed between Sovereign Bank and Nordbank, on one side, and Plaintiffs on the other. In the

³⁴ Phillips v. Selig, 2008 Pa. Super 244, 959 A.2d 420, 429 (Pa. Super. 2008).

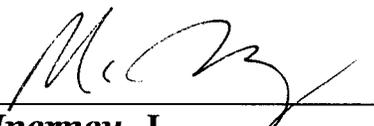
³⁵ Foster v. UPMC S. Side Hosp., 2010 Pa. Super 143, 2 A.3d 655, 665 (Pa. Super. 2010).

³⁶ Summary of Proposed Terms and Conditions—Revised (For Discussion Purposes Only), Exhibit A to the complaint, p. 1.

preliminary objections, Sovereign Bank and Nordbank assert that under Pennsylvania law, no fiduciary relationship may exist between a lender and a borrower on grounds that their dealings may only occur at arm's length.³⁷ In the response in opposition to the preliminary objections, Plaintiffs argue that under Pennsylvania law, a fiduciary duty may be created between a lender and a borrower if the lender "exercises substantial control over some portion of the borrower's financial affairs," or when the lender has the ability to compel a borrower to engage in "unusual transactions."³⁸

Notwithstanding Plaintiffs' focus on the existence of a lender—borrower relationship, this court has already determined that there was no lender—borrower relationship pursuant to the language of the Term Sheet. This determination leads to the inescapable conclusion that neither Sovereign Bank nor Nordbank could have exercised "substantial control over some portion of [Plaintiffs'] financial affairs," as lenders thereof, because defendants were not lenders pursuant to the language of the Term Sheet. The claim asserting breach of fiduciary duty may not survive because Plaintiffs have failed to state a cause of action thereof. Count V of the complaint is dismissed.

By The Court,



McInerney, J.

³⁷ Preliminary objections of defendant Sovereign, ¶¶ 71-72.

³⁸ Plaintiffs' brief in opposition to the Amended Preliminary Objections of defendant Nordbank, p.26.