

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

BUCKEYE RETIREMENT CO., LLC, LTD.	:	December Term 2004
	:	
Plaintiffs,	:	No. 03257
	:	
v.	:	Commerce Program
	:	
MICHAEL W. LLOYD	:	
	:	Control No. 060504, 061533,
Defendant.	:	060505

ORDER and MEMORANDUM

AND NOW, this 1ST day of September 2005, upon consideration of the separate Preliminary Objections of Counterclaim Defendant Buckeye Retirement Co., LLC, (“Buckeye”) (Control No. 060505) and Third Party Defendants The Cadle Company, Michelle Harris, David K. Delonge, Esquire, Shumann, Hanlon, Dohery, McCrossin & Paolino, David Banks, Esquire and Banks & Banks (collectively “Third Party Defendants”) (Control Nos. 061533 and 060504), the response in opposition,¹ the respective memoranda, all matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** as follows:

1. Buckeye’s Preliminary Objections are **SUSTAINED** and the Counterclaim of Michael W. Lloyd (“Lloyd”) is **DISMISSED**.

¹ Lloyd did not file a response to Third Party Defendants’ Preliminary Objections, only to Buckeye’s Preliminary Objections.

2. Third Party Defendants' Preliminary Objections are **SUSTAINED** and the Third Party Complaint is **DISMISSED**.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

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MICHAEL W. LLOYD	:	
	:	Control No. 060504, 061533,
Defendant.	:	060505

MEMORANDUM OPINION

HOWLAND W. ABRAMSON, J.

Before the court are the separate Preliminary Objections of Counterclaim Defendant Buckeye Retirement Co., LLC, (“Buckeye”) (Control No. 060505) and Third Party Defendants The Cadle Company, Michelle Harris, David K. Delonge, Esquire, Shumann, Hanlon, Dohery, McCrossin & Paolino, David Banks, Esquire and Banks & Banks (collectively, “Third Party Defendants”) (Control Nos. 061533 and 060504).² For the reasons fully set forth below, both sets of Preliminary Objections are sustained.

DISCUSSION

Buckeye has brought the instant action seeking to collect under a Demand Note (the “Note”). The Note was executed by and between Defendant Michael W. Lloyd (“Lloyd”) and First Pennsylvania Bank, N.A. (“First Penn Bank”) on November 19, 1986 in the amount of \$100,000 plus interest. According to the Complaint, the Note was assigned on December 18, 2000 to the Cadle Company (“Cadle”) by First Union National Bank, successor by merger to

² For some unknown reason, the identical preliminary objections were filed twice and assigned two

CoreStates Bank, N.A., formerly known as Philadelphia National Bank, successor by merger to First Penn Bank. Compl. at ¶ 4. Thereafter, Cadle assigned the Note to Buckeye. Id. In response to Buckeye's Complaint, Lloyd filed an Answer, Counterclaims, Affirmative Defenses and a Third Party Complaint. Cadle Mtn. Exh. B. Buckeye has moved to dismiss the Counterclaims and the Third Party Defendants have moved to dismiss the Third Party Complaint. Each will be discussed in turn.

A. Lloyd's Counterclaims

In the Counterclaim, Lloyd purports to state claims for: malicious prosecution (Count I); frivolous action (Count II); fraud in the inducement (Count III); fraud; (Count IV); breach of contract (Count V); consumer fraud (Count VI); and extortion (Count VII). Buckeye has filed Preliminary Objections to each of the foregoing.

1. Lloyd Has Failed to State A Valid Claim For Malicious Prosecution or Frivolous Action

Count I of the Counterclaim purports to state a claim for malicious prosecution based upon a similar action which was filed in New Jersey, voluntarily discontinued, then filed in this court. Countercl. at ¶¶ 2-4. In order to properly plead a claim for malicious prosecution, a party must demonstrate that the person taking part in the initiation, procurement or continuation of civil proceedings either acted in a grossly negligent manner or lacked probable cause. 42 Pa.C.S.A. § 8351; Broadwater v. Sentner, 1999 Pa. Super. 24, 725 A.2d 779, 782 (1999); Iama, Inc. v. Law Offices of Peter Meltzer, 2003 Phila. Ct. Com. Pl. LEXIS 39 (March 14, 2003). That party must also demonstrate that that the proceedings terminated in his favor. Id. Although the New Jersey action was voluntarily discontinued by Buckeye, the subject of the action is still

pending before this court and the merits of the case have yet to be determined. Clearly, should Buckeye prevail on its claims against Lloyd, his malicious prosecution can not succeed. Accordingly, Count I is both legally insufficient and unripe for disposition.

With respect to Count II, Pennsylvania courts do not recognize a separate tort of “frivolous action,” nor do the allegations of the Counterclaim support a separate claim. Such a claim is consumed within the Dragonetti statute. *See* 42 Pa.C.S.A. § 8351. Thus, Count II is duplicative of Count I and fails for the same reasons.

Accordingly, Buckeye’s Preliminary Objections to Counts I and II are sustained and these counts dismissed.

2. Lloyd Has Failed to Set Forth Valid Claims for Fraud (Counts III and IV)

Counts III and IV of the Counterclaim purport to state claims for fraudulent inducement and fraud, respectively. In Pennsylvania, in order to maintain a cause of action for fraud (including fraudulent inducement), the plaintiff must allege the following: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

As pled, the basis of Lloyd’s fraud claims are twofold. First, Lloyd asserts that First Penn Bank never informed him that by signing the Note, the Pennsylvania courts would have jurisdiction over him in the event of a default. Countercl. at ¶ 17. Lloyd further contends that First Penn Bank failed to “inform, advise or notify” him or seek his “consent” to assign the Note and further, that any such an assignment was “unlawful.” Id. at ¶¶ and 22. Clearly, these fraud claims, as pled, relate to the conduct of First Penn Bank, not Buckeye. Counts III and IV fails to

contain any factual basis to support a fraud claim against Buckeye. As such, Lloyds' fraud claims (Counts III and IV) are dismissed.

3. Lloyd Has Failed To State A Claim Against Buckeye for Breach of Contract

Count V purports to state a claim for breach of contract against Buckeye. To sustain a claim for breach of contract, a party must demonstrate: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 1999 Pa. Super. 14, 723 A.2d 1053 (1999). Count V sets forth none of the requisite elements of such a claim. The assertions contained within Count V, namely that Buckeye lacks standing to bring the instant action and is unlicensed to do business in Pennsylvania, have nothing whatsoever to do with a claim for breach of contract. Accordingly, Buckeye's Preliminary Objection to Count V is sustained, and the claim is dismissed.

4. Lloyd Has Failed To State A Claim Under the Consumer Fraud Act

Count VI of the Complaint purports to state a claim under the "Consumer Fraud Act," however Lloyd fails to cite to any specific provisions of the Act and does not set forth a factual basis for such a claim and instead relies upon bald conclusion of law. Lloyd fails even to identify under which state's Consumer Fraud Act he is seeking relief, although in his Memorandum of Law, Lloyd claims that he is seeking protection under the New Jersey Consumer Fraud Act. Since Counts VI fails to contain any factual basis to support an against Buckeye under the New Jersey Consumer Fraud Act, Buckeye's Preliminary Objection is sustained and Count VI is dismissed.

5. Pennsylvania Does Not Recognize the Tort of Civil Extortion

Count VII of the Counterclaim purports to state a claim for civil extortion. No such

cause of action exists under Pennsylvania law and Lloyd has failed to provide any authority which demonstrates otherwise. Accordingly, Count VII is dismissed.

B. The Third Party Complaint

In the Third Party Complaint, Lloyd purports to assert several claims against the Third Party Defendants, which includes Cadle, the servicing company for Buckeye, Harris, an employee of Cadle and two law firms which have represented Buckeye.³ The claims set forth in the Third Party Complaint are as follows: malicious prosecution (Count I), frivolous action (Count II); extortion (Count III); conspiracy (Count IV) and frivolous claim (Count V). Counts I, II, III and V of the Third Party Complaint fail for essentially the same reasons as the Counterclaims and therefore are dismissed.⁴

Lloyd's conspiracy claim (Count IV) likewise fails. In order to sustain a claim for civil conspiracy, a party 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. Abbott Laboratories, 351 Pa. Super. 264, 278, 505 A.2d 973 (1985); Baker v. Rangos, 229 Pa. Super. 333, 324 A.2d 498, 506 (1974). However, there can be no cause of action for conspiracy absent a civil cause of action for a particular act. Pelagatti v. Cohen, 370 Pa. Super. 422, 536 A.2d 1337 (1988). This court finds that Lloyd has not alleged any facts which could support a finding that Third Party Defendants, or any of them, committed illegal acts which would subject them to liability for civil conspiracy. Accordingly, Count IV of the Third Party Complaint likewise is

3 It should be noted that the identity of these parties are not set forth in the Complaint, but rather Cadle's Memorandum of Law in Support of its Preliminary Objections.

4 In addition, with respect to Lloyd's malicious prosecution claims (Count I) and the duplicative "frivolous action" claims (Counts II and V), these claims are further deficient insofar as Lloyd has failed to demonstrate that Cadle, Banks & Banks or David Banks instituted an action against him or were in any

dismissed.⁵

Based on the foregoing, Third Party Defendants' Preliminary Objections are sustained and the Third Party Complaint is dismissed in its entirety.

CONCLUSION

For the reasons fully set forth above, this court finds as follows:

1. Buckeye's Preliminary Objections (Control No. 060505) are sustained and Lloyd's Counterclaim is dismissed.
2. The Preliminary Objections of Third Party Defendants (Control Nos. 061533 and 060504) are sustained and the Third Party Complaint is dismissed.

way involved in the New Jersey litigation. See 42 Pa.C.S.A. § 8351; Broadwater, 725 A.2d at 782.

5 Aside from the fact that these claims are insufficiently plead, such claims are improper under Pa.R.C.P. 2252. Pennsylvania Rule of Civil Procedure 2252 governs the right to join additional defendants and provides that "any defendant or additional defendant may join as an additional defendant any person, whether or not a party to the action, who may be: 1) solely liable on the plaintiff's cause of action; 2) liable over to the joining party on the plaintiff's cause of action; 3) jointly or severally liable with the joining party on the plaintiff's cause of action, or 4) liable to the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the plaintiff's cause of action is based." Pa.R.C.P. 2252 (b). Rule 2252 (a) is to be given a broad interpretation. Free v. Lebowitz, 463 Pa. 387, 344A. 2d 886 (1975). However, even applying this liberal standard to the case at bar, Lloyd has failed his burden. Buckeye's cause of action, *i.e.* "the harm of which plaintiff complains," consists of monies allegedly due under the Note. The causes of action purportedly set forth in the Third Party Complaint do not arise out of this same "transaction or occurrence" but instead relate to the filing of the instant lawsuit and raise entirely different legal questions from those presented by Buckeye in the initial complaint.

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

BY THE COURT:

HOWLAND W. ABRAMSON, J.