

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

TEMPLE UNIVERSITY - OF THE	:	December Term, 2000
COMMONWEALTH SYSTEM OF	:	
HIGHER EDUCATION	:	No. 353
Plaintiff	:	
v.	:	Commerce Program
NORMAN JOHANSON, M.D.,	:	
PHILADELPHIA HEALTH and	:	Control No. 092011
EDUCATION CORPORATION d/b/a MCP :	:	
HAHNEMANN UNIVERSITY	:	
Defendants.	:	

ORDER

AND NOW, this 15th day of November, 2001, upon consideration of the Preliminary Objections of Defendant Norman Johanson, M.D (“Johanson”) to the Complaint of Plaintiff Temple University - of the Commonwealth System of Higher Education (“Temple”) and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the preliminary objection asserting legal insufficiency of a pleading of breach of contract is OVERRULED.

BY THE COURT:

JOHN W. HERRON, J.

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EDUCATION CORPORATION d/b/a MCP :	:	
HAHNEMANN UNIVERSITY	:	
Defendants.	:	

MEMORANDUM OPINION

Defendant Norman Johanson, M.D. (“Johanson”) filed these preliminary objections to the complaint of Plaintiff Temple University - of the Commonwealth System of Higher Education (“Temple”). For the reasons stated below, the preliminary objection asserting insufficiency of a legal pleading of breach of contract is overruled.

BACKGROUND

In September 1996, Temple and Johanson entered into an employment agreement which included a restrictive covenant that prohibited Johanson from practicing his specialty of orthopaedic surgery for one year following the termination of his employment with Temple within a ten mile radius of Temple University Hospital. The employment agreement also contained a waiver clause that provided for the waiver of a breach of the restrictive covenant if Johanson paid a liquidated damages sum to Temple in an amount equal to the compensation paid to him by Temple during the last twelve months of his employment at Temple.

In October 1996, after being appointed to a new administrative position, Johanson entered into a revised second agreement which included the same restrictive covenant as before. In September 2000, Johanson ended his employment with Temple and began working with Philadelphia Health and Education Corporation d/b/a MCP Hahnemann University (“MCPHU”) at a location that is within ten square miles of Temple University Hospital. Also, Johanson has not tendered the waiver payment to Temple.

In December 2000, Temple filed this action pleading, *inter alia*, breach of contract against Johanson for not satisfying his obligations pursuant to the employment agreements. Johanson has filed these timely preliminary objections.

DISCUSSION

For purposes of reviewing preliminary objections based upon legal insufficiency, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). When presented with preliminary objections whose end result would be the dismissal of a cause of action, a court should sustain the objections where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa.Super.Ct. 2000) (citations omitted). Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa.Super.Ct. 1999).

I. The Preliminary Objection Asserting Legal Insufficiency of a Pleading of Breach of Contract is Overruled

Temple, on the face of its complaint, properly pleads that Johanson breached his contract. In Pennsylvania, three elements are necessary to properly plead a cause of action for breach of contract: "(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, 723 A.2d 1053, 1058 (Pa.Super.1999).

To begin with, Temple properly pleads the existence of a contract, including its essential terms. Temple argues that it executed a contract with Johanson on September 1996 and then a second agreement on October 1996, containing the same restrictive covenant as the earlier agreement. Pl's Complaint at ¶¶11, 12, 13, 14, 15. Further, the essential terms are sufficiently pled. The complaint shows Johansons' \$307,732.92 salary pursuant to the contract, the ten mile radius provision and the waiver clause in the restrictive covenant.¹ Id at ¶¶12, 17, 19.

The alleged breach of the duty imposed by the contract is sufficiently pled, as well. Here, pursuant to both the September and October 1996 agreements, the restrictive covenant includes a

¹Johanson avers that the October 1996 agreement fails for lack of consideration. Def's P.O. at 2. In support of his argument, Johanson directs this court to Davis & Warde Inc., v. Tripoli, 616 A.2d 1384, 1387 (1992). There, the court held that "when an employee enters into an employment contract containing a covenant not to compete subsequent to employment,... the covenant 'must be supported by new consideration which could be in the form of a corresponding benefit to the employee or a beneficial change in his employment status.'" Here, however, the October 1996 agreement contains the same restrictive covenant provision and waiver clause as the September 1996 agreement, therefore additional consideration was not required. Furthermore, the October 1996 agreement, in fact, contains additional consideration offered by Temple for Dr. Johanson's services. Therefore, this court disagrees with the averment that the October 1996 agreement fails for lack of consideration.

waiver clause which allows relief from its provisions if Johanson agreed to pay “[Temple] a sum equal to the total compensation paid to him during the twelve calendar months preceding the month in which the termination occurred.” Id. at ¶13. Temple alleges that Johanson directly violated the restrictive covenant by working for MCPHU within a ten mile radius, and less than one year after terminating his employment with Temple. Id. at ¶¶21, 22. Furthermore, Temple alleges that Johanson refused to tender the waiver payment to Temple, thereby breaching his duty pursuant to both the September and October 1996 agreements. Id. at ¶23.

Finally, the resultant damages have sufficiently been pled by Temple. Here, both the September and October 1996 agreements contained a waiver clause which required the payment of one years salary in order to allow for relief from the provisions of the restrictive covenant. Id. at ¶13. Temple alleges that by refusing to tender the waiver payment, Johanson’s alleged breach caused damages. Pl’s Complaint at ¶¶ 23, 26, 27. Specifically, Temple seeks an award of damages including the amount of salary paid by Temple to Johanson, \$307,732.92, compensatory and/or consequential damages, and Temple’s costs and expenses incurred with this lawsuit. Id. at ¶28.

Therefore, having found that Temple has sufficiently pled the three elements necessary for a cause of action for breach of contract, this court overrules the preliminary objection of Johanson.²

²In support of his preliminary objections, Johanson also avers, *inter alia*, that the waiver payment is illegal and void because it is an excessive penalty, and if it is enforceable then Temple should not be entitled to any extra-contractual damages. Def’s P.O. at 2. At this stage, it is premature for the court to address arguments which go directly to the merits of the case. Instead, the focus of this courts inquiry is whether “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa.Super.Ct. 2000) (citations omitted).

CONCLUSION

For the reasons stated above, this court overrules Johanson's preliminary objection asserting legal insufficiency of a pleading of breach of contract.

BY THE COURT:

JOHN W. HERRON, J.

DATE: November 15, 2001