

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BUTTER’S ENTERPRISES, INC.,	:	No. 00-01482
and TIM BUTTERS,	:	
	:	
Plaintiffs	:	
	:	
vs.	:	CIVIL ACTION - LAW
	:	
JOSEPH A. PRATO and	:	
ANN C. PRATO, his wife,	:	
KELLY PRATO t/d/b/a	:	
JOEY PRATO’S PRODUCE,	:	
and JOEY PRATO, INC.,	:	
Defendants	:	

ORDER

AND NOW, this day of December 2001, upon consideration of the defendants’ preliminary objections to the plaintiff’s second amended complaint, it is ORDERED and DIRECTED as follows:

1. At this stage of the proceedings the Court DENIES the defendants’ preliminary objections to Count I Unfair Competition without prejudice to this issue being raised later in these proceedings. Although the Court does not believe there would be confusion between the names Butter’s Enterprises and Joey Prato’s Produce, Tim Butters purchased the exclusive right to use the name Prato’s Produce. There would be confusion or a tendency of confusion between the names Prato’s Produce and Joey Prato’s Produce. Furthermore, the complaint alleges that the defendants initially used the name Prato’s Produce, which Butters had the exclusive right to use. The Court notes this count

inadvertently did not include damages for Butters Enterprises. The Court gives the plaintiffs thirty (30) days within which to amend their complaint to add the damages suffered by Butters Enterprises.

2. The Court notes the plaintiffs, through their counsel have agreed to drop Count II, III and IV.

3. The Court GRANTS the defendants' preliminary objections to Count V, which attempts to assert a cause of action for interference with business relations. The elements of this cause of action are: (1) an existing contractual, or prospective contractual, relationship between the complainant and a third party; (2) purposeful action on the part of the defendant intended to harm the existing relation or prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) pecuniary loss. Shiner v. Moriarity, 706 A.2d 1228, 1238 (Pa.Super. 1998); Al Hamilton Contracting Co. v. Cowder, 434 Pa.Super. 491, 497, 644 A.2d 188, 191 (1994). The plaintiffs have alleged facts for the second element. Although the plaintiffs have alleged pecuniary loss in a conclusory fashion, the plaintiffs have not pled sufficient facts for this element or the first and third elements. The Court will give the plaintiffs a final opportunity to amend their complaint to assert this cause of action. Any such amendment shall be filed within thirty (30) days.

4. With respect to Count VI breach of contract, the Court finds the plaintiffs have pled sufficient facts for a breach of contract claim against Joey Prato, Inc. and Joseph and Ann Prato as paragraph 6.I of the contract applies to Joey Prato Inc and its principals. Since Joseph and Ann Prato signed the contract as the President and

Secretary of Joey Prato, Inc. one can infer they are principals of that corporation.

However, there are no facts pled to support that Kelli Cillo was a principal of Joey Prato Inc. or that there is an agency relationship between Kelli Cillo and Joseph and Ann Prato or that they acted in concert. At oral argument, the plaintiffs' counsel argued that Joey Prato's Produce was operating from the same location as Joey Prato Inc. t/d/b/a Prato's Produce. The plaintiffs' counsel also asserted that Ann and Joseph Prato managed or operated Joey Prato's Produce or worked for Kelli Cillo t/d/b/a as Joey Prato's Produce.¹ The Court will give the plaintiffs' thirty (30) days within which to amend their complaint to allege these and any other facts which may support their conclusion of agency or action in concert.

5. When the plaintiffs file their third amended complaint, they shall submit a verification signed Tim Butters individually and an official of Butters Enterprises or explain why they cannot obtain such a verification.

By The Court,

Kenneth D. Brown, J.

cc: Scott T. Williams, Esquire
Marc Lovecchio, Esquire

¹Some such facts, such as the same location, were alleged in Counts II, III and IV, which were withdrawn by the plaintiffs. The Court is allowing the amendment to clarify the pleading by deleting Counts II, III and IV and moving the facts to support an agency relationship to Count VI as well as to allow the plaintiffs to be more specific regarding the relationship between the defendants.