

TRANSPORT DESIGNS, : IN THE COURT OF COMMON PLEAS OF  
 : LYCOMING COUNTY, PENNSYLVANIA  
 Plaintiff :  
 :  
 vs. : NO. 03-01,491  
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 WNB, formerly Williamsport National Bank, : CIVIL ACTION  
 :  
 Defendant : PRELIMINARY OBJECTIONS

*Date: June 8, 2004*

**OPINION and ORDER**

Before the Court for determination are the Preliminary Objections of Defendant WNB Bank (WNB) filed February 10, 2004. WNB raises three preliminary objections. All the preliminary objections will be denied.

The present Preliminary Objections were filed in response to the Amended Complaint filed January 27, 2004. The Amended Complaint asserts a breach of contract cause of action and a negligence cause of action against WNB. At the center of the claims brought by Plaintiff Transport Designs, Inc. (Transport Designs) is an account it had with WNB. With respect to this account, the Amended Complaint alleges that WNB had a duty to provide Transport Designs with monthly account statements and breached its duty by accepting the instructions of an unauthorized individual, Kathy Schick, a former employee of Transport Designs, not to mail the statements to Transport Designs, but instead to retain them for her to personally pick up. Transport Designs asserts that by allowing Schick to pick up the statements WNB prevented them from detecting a large number of not sufficient funds (NSF) charges. The Amended Complaint contends that Schick's pilfering of the corporate funds from this account was enabled by WNB's failure to properly deliver the monthly statements to Transport

Designs. Transport Designs further alleges that the imposition of NSF charges had resulted from deficiencies in the account caused by Schick's conversion of the funds to her personal use.

WNB raises three preliminary objections. The first is a demurrer to the negligence claim asserted in Count II of the Amended Complaint. WNB argues that the Amended Complaint fails to establish a negligence claim because it does not establish causation. The Amended Complaint states that the alleged breach of duty was a substantial factor in enabling Schick to convert Transport Designs' funds. WNB asserts that the Amended Complaint is devoid of material facts to support such a conclusion.

In response, Transport Design argues that the Amended Complaint sufficiently pleads the element of causation to make out a negligence claim against WNB. Transport Design argues that the question of whether a defendant's negligence is a substantial factor in causing the harm suffered by the plaintiff is normally a question for the jury and can only be taken from their province when reasonable minds could not differ on the issue. Transport Designs argues that such is not the case here. Transport Designs argues that sufficient facts have been pleaded to show a chain of causation between WNB's negligence and the loss of corporate funds suffered by Transport Designs at the hands of Schick.

The second preliminary objection is a demurrer to the breach of contract claim asserted in Count I of the Amended Complaint. WNB argues that the Amended Complaint fails to set forth a claim for breach of contract because the actions of a third party, who is not a party to the contract, cannot be the basis of a breach of contract. WNB contends that the actions of Schick were neither part of nor covered by the contract between it and Transport

Designs. WNB argues that a plaintiff is only permitted to recover for damages that flow directly from the defendant's alleged breach of contract. As the alleged conversion of funds by Schick was not part of the contract between WNB and Transport Designs, Transport Designs has no remedy available under a breach of contract theory since the alleged conversion of funds are not part of its expectation, reliance, or restitution interests under the contract.

As to the second preliminary objection, Transport Designs argues that the contract between it and WNB included within the contract the duty of WNB to use ordinary care. Transport Designs acknowledges that Schick was not a party to the contract between it and WNB. However, Transport Designs argues that WNB's failure to use ordinary care by allowing an unauthorized employee to pick up account statements rather than sending them to the account owner concealed and facilitated the misdeeds of Schick. It is this breach that injured Transport Designs and is the subject of the breach of contract claim. Transport Designs further argues that WNB's breach of duty to use ordinary care did violate its expectation, reliance, and restitution interests under the contract. Transport Designs contends that if WNB had performed its contractual duty then Transport Designs would have remained whole. As would relate to its restitution interest, Transport Designs asserts that it could be reimbursed the \$18,025 in NSF charges imposed by WNB.

The third preliminary objection is a motion to dismiss the Amended Complaint for failing to join a necessary party. WNB argues that Schick is an indispensable party because a bulk of the allegations in the Amended Complaint is directly related to her conduct and how it injured Transport Designs. WNB contends that without this indispensable party the Court may not grant relief.

With respect to the third preliminary objection, Transport Designs argues that Schick is not an indispensable party. Transport Designs contends that the theories of liability and factual underpinnings supporting those theories are different as to WNB and Schick. Transport Designs also argues that it is free to choose whom it wishes to sue, and it has decided to pursue its claims against WNB in this action.

The determination of the first and second preliminary objections will be guided by the standard for a demurrer. A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination “is confined to the content of the complaint.” *In re Adoption of S.P.T.*, 783 A.2d 779, 781 (Pa. Super. 2001). “The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint.” *Ibid.* The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997). “If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.” *Ibid.*

### *Demurrer to the Negligence Claim*

A plaintiff must prove four elements to make out a negligence cause of action. A plaintiff must establish: “(1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or breach thereof; (3) a causal connection between the defendant’s breach and the resulting injury; and (4) actual loss or damage suffered by the complainant. *Atcovitz v. Gulph Mills Tennis Club*, 812 A.2d 1218, 1222 (Pa. 2002); *Rabutino v. Freedom State Realty Co.*, 809 A.2d 933, 938 (Pa. Super. 2002). Causation involves two distinct concepts, cause in fact and legal causation/proximate cause. *Summers v. Giant Food Store, Inc.*, 743 A.2d 498, 509 (Pa. Super. 1999), *app. denied*, 764 A.2d 1071 (Pa. 2001); *see also, Vattimo v. Lower Bucks Hosp., Inc.*, 465 A.2d 1231, 1233 (Pa. 1983).

Cause in fact (factual causation) exists when “the harmful result would not have come about but for the negligent conduct ....” *Summers*, 743 A.2d at 509; *First v. Zem Zem Temple*, 686 A.2d 18, 21 (Pa. Super. 1996), *app. denied*, 700 A.2d 441 (Pa. 1997). Proximate cause is established if the defendant’s negligent act was a substantial factor in bringing about the harm suffered. *Jones v. Montefiore Hosp.*, 431 A.2d 920, 923 (Pa. 1981); *Gutteridge*, 803 A.2d at 665. A substantial factor is “conduct [that] has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense ...” *Jeter v. Owens-Corning Fiberglass Corp.*, 716 A.2d 633, 636 (Pa. Super. 1998) (quoting Restatement (Second) of Torts, §431, comment a (1965)) (change in original). A cause is substantial if it is significant or recognizable; it does not have to be quantified as considerable

or large. *Ibid.* A cause is not a substantial factor if the harm would have been sustained even if the defendant had not been negligent. *Id.* at 637.

The first preliminary objection is denied. The Amended Complaint sets forth sufficient allegations that, if true, could establish causation. The Amended Complaint alleges that Transport Designs opened an account with WNB on January 18, 1995. The Amended Complaint also alleges that WNB was required to send to Transport Designs an account statement. This statement would provide Transport Designs with knowledge of activity on the account. The Amended Complaint then alleges that in 1998 WNB permitted Schick, who had no authority to do so, to halt the sending of the statements to Transport Designs and had WNB retain them so that she could pick them up.<sup>1</sup>

The Amended Complaint goes on to allege that WNB imposed a total of 721 overdraft item charges for NSF checks from January 1999 through April 2002. The Amended Complaint asserts that Transport Designs never received notice of the overdraft charges, as the account statements were not sent to it. The Amended Complaint alleges that Schick was engaged in self-dealing and converted Transport Designs' funds to her personal use to the sum of over \$100,000 over a forty-month period. The Amended Complaint alleges that Schick's actions led to the imposition of NSF charges on the account by WNB. The Amended Complaint further alleges that WNB's failure to provide the statements to Transport Designs was a substantial factor in allowing Schick's actions to go undetected.

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<sup>1</sup> The Amended Complaint states that this occurred in 1988. The Court views this to be a typographical error. The Amended Complaint alleges that Transport Designs started its accounts with WNB in 1990 and that the account at issue was not established until January 18, 1995.

It is Transport Designs alleged lack of knowledge regarding the NSF charges that provides a sufficient pleading of both factual and proximate causation. The statements would have provided Transport Designs with evidence of activity on the account. The statements would have shown the NSF charges and the withdrawal of money. Without this information, Transport Designs would have no reason to be suspicious of Schick's activities. The failure to provide the statements aided Schick's concealment of her theft from Transport Designs, and allowed her to keep siphoning money from the account. The allegations made in the Amended Complaint could allow a trier of fact to conclude that but for WNB's failure to provide the monthly account statements to Transport Designs Transport Designs would not have incurred the NSF charges and the loss of its funds. The allegations in the Amended Complaint could also permit a trier of fact to conclude that WNB's failure to provide the monthly account statements to Transport Designs was a substantial factor in Transport Designs incurring the NSF charges and it having its funds stolen.

While the statements in the Amended Complaint that the breach of duty to use reasonable care was a substantial factor in allowing Schick to convert over \$100,000 are conclusions of law, the Amended Complaint read as a whole sets forth sufficient facts to establish causation. A trier of fact could find that the statements and notification of the 721 NSF charges likely would have prompted Transport Designs to investigate that matter and discover Schick's actions. Such a finding would not necessarily be speculation. Any reasonably prudent businessman, or any person for that matter, would be inquisitive as to why there were such significant problems with his account and why he was incurring such significant penalties. The failure to provide the account statements was a circumstance that

logically could have prevented Transport Designs from gaining this knowledge and could be found to be the cause of the damages suffered – NSF charges and conversion of corporate funds.

**Demurrer to Breach of Contract Claim**

In order to maintain a cause of action for a breach of contract, a plaintiff must plead: (1) the existence of a contract including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. *Presbyterian Med. Ctr. v. Budel*, 832 A.2d 1066, 1070 (Pa. Super. 2003); *Gorski v. Smith*, 812 A.2d 683, 692 (Pa. Super. 2002). A complaint does need to plead every term of the contract in complete detail, but every element must be specifically pleaded. *Presbyterian*, 832 A.2d at 1071; *Corestates Bank, N.A., v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999).

The Amended Complaint sets forth facts that could establish a cause of action for breach of contract. The Amended Complaint alleges that Transport Designs and WNB entered into a Deposit Contract on January 15, 1995. A copy of that agreement was attached to the Amended Complaint as exhibits A and B. Exhibit B sets forth the terms of the contract. The contract states that incorporates state and federal law, except to the extent that the agreement varied said rules or laws. The Amended Complaint alleges that this would incorporate as part of the contract parts of the Pennsylvania Commercial Code. The Amended Complaint alleges that the Commercial Code would thereby impose a term in the contract that WNB send Transport Designs a statement showing payment of items in the account in a fashion to sufficiently allow the customer to reasonably identify the items paid. The Amended Complaint also alleges that there is an implicit duty in the contract to exercise ordinary care in



carrying out its contractual duties. The Amended Complaint alleges that these contractual duties were breached when WNB allowed Schick to keep Transport Designs from receiving the account statements. As a result, Transport Designs incurred NSF charges and the loss of corporate funds.

To determine if there is a breach, the conduct of the parties to the contract must be examined in light of the duties imposed by the contract. What constitutes the breach of the contract is WNB's failure to send Transport Design the account statements and to use ordinary care. The actions of Schick in converting the corporate funds are immaterial to this issue. If all that had happened was that WNB failed to send Transport Designs the account statements, but no corporate funds had been lost, then WNB would still technically be in breach of the contract. In all likely hood, the damages in such a situation would be nominal, but the point is the same. The focus of the breach of contract cause of action is on the conduct of WNB with respect to the duties created under the deposit contract.

WNB's argument that Transport Designs has no remedy available for the conversion of funds under a breach of contract theory since they were not part of Transport Designs expectation, reliance, and restitution interests under the contract must fail as well. Transport Designs can recover to secure both its expectation and reliance interests under the contract. Transport Designs expectation interest would be meet by putting it back in a position that it would have been in had WNB sent the statements. If this occurred, then Transport Designs likely would not have incurred the NSF charges or the loss of funds. As to the reliance interest, Transport Designs would be reimbursed for the loss caused by relying on the contract in that it relied on the fact the WNB would send statements and keep it apprised of activity

regarding its account. The damages it suffered for relying on this agreement would be the NSF charges and loss of funds. As such, Transport Designs has recoverable interests under the contract between it and WNB.

**Failure to Join a Necessary Party**

The failure to join an indispensable party renders any decree or order in the matter void for lack of jurisdiction. *Hubert v. Greenwald*, 743 A.2d 977, 980 (Pa. Super. 1999); *Barren v. Dubas*, 441 A.2d 1315, 1316 (Pa. Super. 1982). “An indispensable party is one whose rights or interests are so pervasively connected with the claims of the litigants that no relief can be granted without infringing on those rights or interests.” *Hubert*, 743 A.2d at 979. The basic question that is asked when trying to determine whether a party is indispensable is whether justice can be done in his absence. *Id.*, at 890. In making the determination, a court should consider the following factors:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

*Mechanicsburg Area School District v. Kline*, 431 A.2d 953, 956 (Pa. 1981). In determining whether a party is indispensable, the court should focus on the nature of the claim asserted and the relief sought. *Hubert*, 743 A.2d at 890.

Schick is not an indispensable party. The claims asserted against WNB are breach of contract and negligence. The focus of both these claims centers on the duties WNB

owed to Transport Designs and how the conduct of WNB breached those duties. In this case, the real focus is on the conduct of WNB, not Schick.

The conduct of Schick will be a part of the case against WNB. Transport Designs will need to establish that Schick was converting corporate funds and thereby causing a depletion of the account, which resulted in a loss of funds and the NSF charges. Transport Designs will need to establish the conduct of Schick in order to establish causation and damages. Thus, Schick does have an interest in the case, and that interest is her liability concerning the alleged conversion of funds. However, any liability Schick may have arising from the alleged conversion will not be adversely affected by a determination made in this case. Relief can be granted in this case without infringing upon Schick's interests. As such, Schick is not an indispensable party.

Accordingly, WNB's Preliminary Objections are denied.

**ORDER**

It is hereby ORDERED that the Preliminary Objections of Defendant WNB Bank filed February 10, 2004 are DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Daniel K. Mathers, Esquire  
Matthew Golden, Esquire  
Judges  
Christian J. Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)