

BRUCE VINCENT,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 03-00,693
	:	
LIBERTY BUSINESS INFORMATION, INC. and TUCKER SMITH,	:	
	:	
Defendants	:	PRELIMINARY OBJECTIONS

*Date: February 4, 2004*

**OPINION and ORDER**

Before the Court for determination are the Preliminary Objections of Defendant Liberty Business Information, Inc. (Liberty) filed October 7, 2003 and Defendant Tucker Smith (Smith) filed October 14, 2003. The Court will grant in part and deny in part the Preliminary Objections.

Plaintiff, Bruce Vincent (Vincent) instituted this suit by filing a Complaint on May 1, 2003. Liberty filed Preliminary objections to the Complaint on May 27, 2003. Smith filed Preliminary Objections to Vincent's Complaint on June 4, 2003. Vincent filed an Amended Complaint on June 16, 2003, thereby mooting the preliminary objections filed by Defendants.

On June 25, 2003, Liberty filed Preliminary Objections to the Amended Complaint. Smith followed by filing Preliminary Objections on July 8, 2003. By an Order of this Court dated September 2, 2003, Defendants' Preliminary Objections were granted. The Court concluded that the Amended Complaint lacked the requisite material facts that were

needed to set forth the causes of actions alleged. The Court gave Vincent twenty days to file a Second Amended Complaint that set forth the material facts upon which his claims were based.

Vincent filed a Second Amended Complaint on September 22, 2003. In the Second Amended Complaint Vincent has alleged a breach of contract claim against Liberty (Count I), a breach of contract claim against Smith (Count II), a tortious interference with a contractual relationship claim against Liberty (Count III), and a civil conspiracy claim against both Liberty and Smith (Count IV). Liberty and Smith argue, as they did in their Preliminary Objections to the First Amended Complaint, that Vincent has failed to plead the necessary material facts to support his claim and that the pleaded facts are legally insufficient to establish the claims alleged by Vincent.

Pennsylvania is a fact pleading state. *Miketic v. Baron*, 675 A.2d 324, 330 (Pa. Super 1986). A complaint must set forth the material facts upon which the cause of action is based in a concise and summary form. Pa.R.C.P. 1019(a). The complaint must apprise the defendant of the claim being asserted and summarize the material facts needed to support that claim. *Cardenas v. Schober*, 783 A.2d 317, 325 (Pa. Super. 2001). The complaint must also set forth enough material facts to allow the defendant to prepare a defense to the allegations contained within the complaint. *Weiss v. Equibank*, 460 A.2d 271, 274 (Pa. Super. 1983).

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 court must admit as true all well pleaded material, relevant facts and any inference fairly deducible from those facts. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 720 A.2d 850, 853

(Pa. 1997). If the pleaded facts set forth a claim for relief, which may be granted under any theory of law, then the demurrer should be denied. *Ibid.*

The Court will address each of the Counts in *seriatim*.

The first count of the Second Amended Complaint pleads sufficient facts to state a claim for breach of contract against Liberty. The basis of the breach of contract claim against Liberty is that Vincent was a third party beneficiary of the contract between Liberty and Smith. The determination of whether an individual is a third party beneficiary of a contract is a question of law that must be decided by a court. *Hicks v. Metropolitan Edison, Co.*, 665 A.2d 529, 536 (Pa. Cmwlth. 1995). A party becomes a third party beneficiary of a contract if the two parties to the contract express an intention to benefit the third party in the contract itself. *Scarpitti v. Weborg*, 609 A.2d 147, 150 (Pa. 1992). If the contract expresses no such intention, then the party must satisfy a two part test to be recognized as a third party beneficiary of a contract. The party must show that:

the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

*Id.* at 150.

The first part of the test is a standing requirement that gives the court discretion to determine whether "recognition of third party beneficiary status would be appropriate." *Scarpitti*, 609 A.2d at 150; *Clifton v. Suburban Cable TV Co., Inc.*, 642 A.2d 512, 514 (Pa. Super. 1994). The second part of the test "defines the two types of claimants who may be intended third party beneficiaries." *Scarpitti*, 609 A.2d at 150; *Clifton*, 642 A.2d at 514. Third

party beneficiary status will not be conferred to the public at large, but only to a specific, limited group intended to benefit from the contract. *Hicks*, 665 A.2d at 536.

The facts pleaded in the Second Amended Complaint would establish a breach of contract claim against Liberty based on Vincent's third party beneficiary status. Vincent has alleged in Paragraph Eight of the Second Amended Complaint that "said agreement appears in the LBI Contract itself." The agreement Vincent is referencing is the alleged agreement that Vincent was to be a third party beneficiary of the contract between Liberty and Smith since he was to provide the cleaning services and receive the monetary benefits of doing the work. Taking this allegation as true, this allegation would establish that Vincent was a third party beneficiary of the contract between Liberty and Tucker Smith. If the agreement was in the contract itself, then this would express an intention on the part of Liberty and Smith to benefit Vincent.

Vincent prefaced the allegation concerning the agreement he was to be a third party beneficiary of the Liberty-Smith contract by stating, "Upon information and belief..." Vincent also alleges that the written contract is in the possession of the Defendants. As such, the contract was not attached to the Second Amended Complaint pursuant to Pa.R.C.P. 1019(i). However this is not fatal to Vincent's claim. Writings that are in the possession of the opposing party need not be attached to a pleading. *Narcotics Agents Reg'l Comm. v. Fed'n of State, County and Municipal Employees*, 780 A.2d 863, 869 (Pa. Cmwlth. 2001). It is sufficient that the plaintiff state that the writing is not accessible, the reason why, and the substance of the writing. Pa.R.C.P. 1019(i). Vincent has done that here. Therefore, Vincent

has pleaded facts, which if true, would allow him to be considered a third party beneficiary of the contract between Liberty and Smith.

Although Vincent has pleaded that the Liberty-Smith contract expresses the intention that he was to be a third party beneficiary of that contract, Vincent has made allegations in the Second Amended Complaint that this Court interprets as an attempt to establish third party beneficiary status under the two part *Scarpitti* test. Vincent has alleged that it was “understood” that he would perform the work agreed to in the Liberty-Smith contract and that Liberty was “aware” that he was going to be the third party beneficiary, perform the contract, and get the benefits. Second Amended Complaint, ¶6,7, *Vincent v. Liberty Business Information, Inc.*, No. 03-00,693 (Lycoming Cty). While all this may be true, these are conclusory statements. There are no facts pleaded in the Second Amended Complaint that could establish or would allow an inference to be made concerning this understanding and awareness. The mere existence of the contract between Liberty and Smith is insufficient to establish third party beneficiary status under the two-part *Scarpitti* test. As such, Liberty’s preliminary objection will be granted in that the Second Amended Complaint does not set forth facts that could establish Vincent’s third party beneficiary status under the two-part *Scarpitti* test. Paragraphs 6, 7, and 23 shall be stricken from the Second Amended Complaint.

Vincent’s second count is a breach of contract claim against Smith. To establish a breach of contract claim, the 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.” *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999). “Every contract in

Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>1</sup> *Donahue v. Federal Express Corp.*, 753 A.2d 238, 242 (Pa. Super. 2000). “Good faith has been defined as ‘honesty in fact in the conduct or transaction concerned.’” *Ibid.* (quoting *Kaplan v. Cablevision of PA, Inc.*, 671 A.2d 716, 722 (Pa. Super. 1996)). A breach of the duty of good faith and fair dealing is dependant upon the circumstances of a particular case and cannot be precisely defined in all circumstances; however, “ ‘examples of ‘bad faith’ include: ‘evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.’” *Kaplan*, 671 A.2d at 722 (quoting *Somers v. Somers*, 613 A.2d 1211, 1213 (Pa. Super. 1992)).

Vincent has pleaded sufficient facts that could establish a claim for breach of contract against Smith. Vincent has pleaded that there was a contract between him and Smith. Under that contract, Vincent was to perform cleaning services at Liberty’s place of business and Smith was to pay Vincent \$3061.80 every two weeks for his work at Liberty. As part of that contract, there was a duty of good faith and fair dealing. Per the implied duty of good faith and fair dealing, Smith was required to abstain from interfering with Vincent’s performance of the contract or right to its benefits.

Vincent has pleaded that the work was reduced, as was his payment. Eventually he was stopped from doing any work. Vincent has also alleged that he has not received the full amount of money due under the contract. Vincent has alleged that this was the result of an

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<sup>1</sup> However, as a matter of law, a cause of action for a breach of the implied duty of good faith and fair dealing cannot be maintained if the underlying claim is for termination of an at-will employment relationship. *Donahue*, 753 A.2d at 243.

agreement between Liberty and Smith to terminate Vincent's contract so that Liberty and Smith could enter into a new contract without Vincent. Therefore, Vincent has pleaded a cause of action against Smith for breach of contract.

Vincent's third count is a tortious interference with a contractual relationship claim against Liberty. To establish a tortious interference with a contractual relationship cause of action, the plaintiff must plead "(1) the existence of a contract or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; (4) the occasioning of actual legal damage as a result of the defendant's conduct." *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 211 (Pa. Super. 2003); *Strickland v. Univ. of Scranton*, 700 A.2d 979, 985 (Pa. Super. 1997). Vincent has pleaded a cause of action for tortious interference with a contractual relation against Liberty. Vincent has pleaded that a contract existed between Smith and him whereby Vincent would perform cleaning services for Liberty. Vincent has pleaded that Liberty unilaterally reduced the work and payment schedules under the Liberty-Smith contract, which in turn reduced the work and payment schedules under the Vincent-Smith contract. Vincent has also pleaded that Liberty terminated the Liberty-Smith contract, which as a result, terminated the Vincent-Smith contract. Because of this, Vincent has alleged that he has not received the payments he would have if the contracts had not been terminated. Specifically, Vincent alleges that he has not received \$129,362.85, which was the initial amount due under the Vincent-Smith contract. Therefore, Vincent has pleaded a cause of action for tortious interference with a contractual relation against Liberty.

Vincent's fourth count is a civil conspiracy cause of action against both Defendants. To establish a civil conspiracy claim, a plaintiff must plead " 'that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means.'" *Reading Radio*, 833 A.2d at 212 (quoting *Thompson Coal, Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979)). Malice (intent to injure) is an essential element to a civil conspiracy claim. *Reading Radio*, 833 A.2d at 212. There must also be an overt act that is done in furtherance of the common purpose or design. *Ibid.* The elements of a civil conspiracy claim can be proven circumstantially by the subsequent acts of the alleged conspirators, so long as the evidence is "full, clear, and satisfactory." *Ibid.* (quoting *Rumbaugh v. Beck*, 601 A.2d 319, 325 (Pa. Super. 1991)). "Additionally, 'absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.'" *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 660 (Pa. Super. 2000) (quoting *Pelagatti v. Cohen*, 536 A.2d 1337, 1342 (Pa. Super. 1987)).

Vincent has pleaded sufficient facts that could establish a cause of action for civil conspiracy against both Defendants. The thrust of this count is that Liberty and Smith conspired together to terminate the contract between Vincent and Smith so that Liberty and Smith could negotiate a new agreement between them that was more financially advantageous. Vincent has pleaded that Liberty unilaterally reduced the work schedule and payments made on the contract between it and Smith. Consequently, Vincent's work was reduced, as was the payment he received. Vincent then pleaded that, on March 8, 2002, Liberty terminated its contract with Smith without cause, which resulted in the termination of Smith's contract with Vincent. Subsequently, on November 1, 2002, Liberty and Smith entered into a new contract



where Smith would provide professional cleaning services to Liberty. Vincent was not a party to that contract nor was he mentioned in it. Viewing these allegations in the light most favorable to Vincent, he has pleaded a cause of action for civil conspiracy against the Defendants.

Accordingly, the Preliminary Objections are denied in part and granted in part.

**ORDER**

It is hereby ORDERED that Preliminary Objections of Defendant Liberty Business Information, Inc. filed October 7, 2003 are GRANTED IN PART and DENIED IN PART.

Liberty Business Information, Inc.'s demurrer to Plaintiff's breach of contract claim against it are granted in so far as the claim is based on third party beneficiary status being established under the two part *Scarpitti* test. Therefore, Paragraphs 6, 7, and 23 of the Second Amended Complaint are stricken. The demurrer is DENIED as to the Complainant's assertions that the Liberty-Smith contract expresses an intent to make Plaintiff a third-party beneficiary.

Plaintiff shall have twenty (20) days to file an Amended Complaint if he feels that he can plead third party beneficiary status under the two-part *Scarpitti* test. This twenty days shall not begin to run until March 9, 2004 on which date a the thirty-day stay, which this Court imposed on February 4, 2004 as part of an order granting Plaintiff's counsel's motion to withdraw, will end.

Liberty Business Information, Inc.'s remaining preliminary objections asserting lack of specificity and demurrers are DENIED.

The Preliminary Objections of Defendant Tucker Smith filed October 14, 2003  
are DENIED.

BY THE COURT:

William S. Kieser, Judge

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