IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DANKO HOLDINGS, L.P.,	**:**	**No. CV-19-0636**
& DANIEL A. KLINGERMAN,	**:**	
Plaintiffs	**:**	
	:	
vs.	**:**	
	:	
J.C. FORESTREE, INC., JAMES CORL,	**:**	
& WHEELAND LUMBER COMPANY,	**:**	**Plaintiff's Preliminary Objections to**
Defendant	**:**	**Counterclaims of Forestree & Corl**

OPINION AND ORDER

"An equitable society needs a place for its citizens to resolve personal conflicts, and one that isn't too expensive or inefficient." "Five Steps for Fixing the Civil Justice System", The Atlantic, Rebecca Kourlis, 6-11-2012. Too often, civil litigation is drawn out for years causing needless expense and long-lasting frustration. More importantly, the system seemingly drowns in a flood of unreliability and the lack of credibility.

This case has lingered at the pleading stage for far too long. Plaintiffs filed their original Complaint on April 18, 2019. Following an Opinion and Order by this Court, filed on December 12, 2019 addressing Defendants' Preliminary Objections to the Complaint, Defendants J.C. Forestree, Inc. (Forestree) and James Corl (Corl) filed their Answer, New Matter and Counterclaims on January 9, 2020. On February 4, 2020, Plaintiffs filed Preliminary Objections to said Defendants' Counterclaims. The parties subsequently filed briefs in support of their respective positions. Oral argument was scheduled for March 22, 2020, but after reviewing the pleadings and briefs, it was cancelled by the Court.

Count I of Defendants' Counterclaim purports to assert an action for breach of contract against Plaintiffs. Forestree alleges that Plaintiffs breached the Timber Marketing

Agreement (TMA) dated June 17, 2014 by informing Forestree that its timber management services were no longer needed to specify, designate, measure or mark timber as required under the TMA…attached as Exhibit "Z." (Counterclaim, paragraph 195).

Count II of Defendants' counterclaim purports to assert a civil conspiracy claim against Plaintiffs. Corl alleges that he and Plaintiff Klingerman are "equal members" of a limited liability company known as Legendary Land Acquisitions, LLC (Legendary). Corl alleges that Plaintiff Klingerman owes him approximately $43,000.00 "following the sale of…Legendary…property." (Counterclaim, paragraph 199). Corl alleges that these funds are being improperly withheld "in an effort to squeeze [Corl] economically and in an effort to offset any monies that may be due and owing pursuant to the instant litigation." (Counterclaim, paragraph 201).

Corl asserts that the effort by Plaintiffs to withhold funds on this unrelated matter constitutes a civil conspiracy and that said actions are blatantly illegal, improper and the result of ill will and bad motive sufficient to support a claim of punitive damages. (Counterclaim, paragraphs 202, 203). Corl asserts that the actions of Plaintiffs are "an effort to force [Corl] out of business and represent a predatory action against the party for no valid commercial reason." (Counterclaim, paragraph 204).

The factual basis upon which Corl asserts the existence of the conspiracy for the improper purposes is an alleged "statement" on June 7, 2019 by Marc Demshock, General Counsel and Assistant Vice President of the Liberty Group, "an umbrella organization…which includes Plaintiff Klingerman's holdings" that the funds due to Corl are being withheld, with the knowledge of Plaintiffs, pending the outcome of the "instant litigation." (Counterclaim, paragraph 200).

Plaintiffs' Preliminary Objections are in the nature of a demurrer to both Count I and Count II, as well as a Motion to Strike Corl's demand for punitive damages and attorney's fees in connection with Count II.

As this Court has previously noted, Rule 1028 of the Pennsylvania Rules of Civil Procedure Rule 1028 of the Pennsylvania Rules of Civil Procedure permits parties to file preliminary objections. Rule 1028(a)(4) governs a demurrer. The question presented in a demurrer is whether on the facts averred, the law indicates with certainty that no recovery is possible. *Forbes v. King Shooters Supply*, 2020 PA Super 70, 2020 WL 1445434, *4 (3-25-2020)(citing *Tucker v. Philadelphia Daily News,* 848 A.2d 113, 131 (Pa. 2004)). When considering a demurrer, the material facts set forth in the Complaint and all inferences reasonably deducible therefrom must be admitted as true. *Weiley v. Albert Einstein Medical Center,* 51 A.3d 202, 208 (Pa. Super. 2012). Fact-based defenses, even those that might ultimately inure to the defendant's benefit, are irrelevant on a demurrer. *Werner v. Plater-Zyberk,* 799 A.2d 776, 783 (Pa. Super. 2002), *appeal denied*, 569 Pa. 722, 806 A.2d 862 (2003).

At this stage, the court must limit its review to the content of the Counterclaim, and any doubt must be resolved in favor of overruling the demurrer. *Werner*, *id.*

Forestree's counterclaim asserting a breach of contract against Plaintiffs is based on a theory of anticipatory repudiation. Under Pennsylvania law, anticipatory repudiation requires "an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so." *Harrison v. Cabot Oil and Gas Corporation,* 110 A.3d 178, 185 (Pa. 2015) (citation omitted). Indeed, the courts have adamantly reinforced the

clear predicates of repudiation by rejecting any dilution of the absolute and unequivocal refusal to perform standard. *Id.*

For purposes of Plaintiffs' demurrer, the court cannot conclude with certainty that no recovery is possible under the facts as pled.

Forestree avers that Plaintiffs specifically advised it that timber management services were no longer needed since Plaintiffs desired to sell all remaining timber "without the need for [Forestree] to specify, designate, measure or mark the timber as required under the [TMA.]" (Answer, New Matter and Counterclaim, paragraphs 118, 185). Forestree further averred that the parties entered the TMA to provide timber management services on the tract and to authorize Forestree to act as Plaintiffs' agent for timber sales as particularly described in the TMA. (Answer, New Matter and Counterclaim, paragraph 147). Forestree proceeded to mark certain trees with a goal of ensuring further growth and harvesting. (Answer, New Matter and Counterclaim, paragraph 155). The scope of the timber sale was based upon the trees marked in pink and not on any particular geographic area. (Answer, New Matter and Counterclaim, paragraph 174).

Furthermore, and as asserted by Forestree in its brief, the interpretation and execution of the contract is clearly at issue. The court must consider the language, the intent of the parties and, if necessary, the surrounding circumstances. Whether the trees that remained on the property as of January 2008 were subject to the TMA is unclear.

Alternatively, Plaintiffs argue that if Forestree has pled sufficient facts to withstand a demurrer, the court should dismiss the claim against Plaintiff Danko Holdings because "it is clear from the face of the contract that Danko Holdings is not a party to the TMA." (Plaintiffs' Brief, p. 8).

There is no doubt that the TMA includes Plaintiff Klingerman as a contracting party. He is listed as, and signed as, the "seller." Curiously, it appears that Plaintiffs are advancing a position different from what they previously advanced in connection with their opposition to the preliminary objections to their Complaint previously filed by Forestree and Corl.

As Plaintiffs noted in their prior brief, Defendants "conveniently ignore the fact that in preparing the timber sale contract at issue in this matter, they themselves are the ones who identified Klingerman rather than Danko as the 'seller' and further identified J.C. Forestree as the 'sellers' timber agent." (Plaintiffs' Brief, p. 11). Plaintiffs further argued that Defendants' attempt to have Plaintiff Klingerman's claims against them dismissed is "at best, ironic, and at worst, completely disingenuous, given that the sole reason that Klingerman needed to be named as a party in this matter is because of the defendants." (Brief, p. 11). Plaintiffs conclude that given Klingerman's standing and status as a necessary party being created by and through Defendants, their motion to dismiss for lack of capacity to sue is "completely without merit." (Brief, paragraph 11).[1]

While Danko Holdings is not named or otherwise identified in the TMA, its role at this point is not clear and given Plaintiffs' previous position in this matter, they can certainly not have it both ways. The court does not agree that Count I of the Counterclaim fails to state a claim against Danko Holdings.

Plaintiffs also demur to Corl's Counterclaim against Plaintiffs for civil

[1] Each side wants to blame the other for any confusion regarding the capacities in which Plaintiff Klingerman and Defendant Corl were acting when any such confusion could have easily been avoided by both simply indicating their capacity (either individually and/or as representative for their respective corporations) in writing on the documents. Even if Defendants prepared the TMA, Klingerman could have requested changes to the paperwork or simply handwritten his capacity after his signature. Due to both sides' lack of precision, these

conspiracy. As Plaintiffs accurately note, to state a claim for civil conspiracy, a party must allege: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in furtherance of the common purpose; and (3) actual legal damage. *Baker v. Rangos,* 324 A.2d 498, 506 (Pa. Super. 1974).

Plaintiffs argue that Corl's general averments of conspiracy "do not even track the basic elements of a claim for civil conspiracy, much less assert any facts in the counterclaim which, if true, would be sufficient to state a claim of civil conspiracy against Plaintiffs." (Brief in Support of Preliminary Objections, p. 10).

Additionally, Plaintiffs argue that Corl cannot prevail on a civil conspiracy claim because he fails to establish that two or more persons combined to act in a conspiracy. (Brief in Support of Preliminary Objections, p. 10). Plaintiffs argue that as a matter of law, there can be no conspiracy between a limited partnership and its agents and/or employees, because the limited partnership, like other corporate entities, can only act through those agents or employees. (Brief, p. 11). Plaintiffs conclude that there can be no conspiracy between Danko Holdings, Klingerman and Danko Holdings' in-house attorney "as they are all agents of a single entity." (Brief, p. 11).

Under the facts as pled, the court cannot conclude as a matter of law that no relief is possible. At the very minimum, Corl alleges that three separate entities, Klingerman, Danko and Legendary, conspired to withhold funds from Corl for no legitimate reason whatsoever. Without restating the argument set forth by Corl in its brief, the court generally agrees at least for the purposes of addressing the demurrer.

---

issues will need to be clarified in discovery.

On the other hand, the court disagrees with Corl's assertion that his claims for punitive damages and attorney's fees have merit. Corl argues that a dismissal of the punitive damages and attorney's fees claims at this point of the proceedings "before discovery" would be premature.

To the contrary, Corl has not set forth any facts or legal authority to support his claims for punitive damages or attorney's fees.

ORDER

AND NOW, this ___ day of March 2020, upon review of the Preliminary Objections of Plaintiffs to the Counterclaims of Forestree and Corl, the following is entered:

1. Plaintiffs' Preliminary Objections to the Counterclaim of Forestree are **DENIED**;
2. Plaintiffs' Preliminary Objections to the Counterclaim of Corl are **DENIED**; and
3. Plaintiffs' Motion to Strike Corl's claim for punitive damages and attorney's fees is **GRANTED**. Said claims are **STRICKEN**.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Stephanie Carfley, Esquire
McNees Wallace & Nurick, LLC (Counsel for Plaintiffs)
570 Lausch Lane, Ste 200
Lancaster PA 17601-3057
C. Edward S. Mitchell, Esquire (Counsel for Wheeland Lumber Company)
Frank S. Miceli, Esquire
Roberts Miceli LLP (Counsel for J.C. Forestree, Inc. & James Corl)
146 East Water Street
Lock Haven PA 17745