

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

ROBERT B. MOZENTER, ESQUIRE	: MAY TERM, 2002
Plaintiff,	
v.	: No. 0595
JOEL P. TRIGIANI, ESQUIRE	:
Defendants.	: Commerce Program
ROBERT B. MOZENTER, ESQUIRE	: JUNE TERM, 2002
Plaintiff,	
v.	: No. 0605
JOEL P. TRIGIANI, ESQUIRE	:
Defendants.	: Control Nos. 072652 and 060421

O R D E R

AND NOW, this 2nd day of April 2003, upon consideration of defendant's Preliminary Objections to the Amended Complaint in the Equity Action (0206-0605) and plaintiff's Motion for Preliminary Injunction, all responses in opposition, the respective memoranda, all matters of record, and after a hearing, and in accord with the contemporaneous Opinion, it is hereby is **ORDERED** as follows:

1. Plaintiff's Motion for Preliminary Injunction is **Denied**;
2. Defendant's Preliminary Objections are **Overruled**; and

3. The above-captioned matters are consolidated for purposes of discovery and trial under the lead case, May Term 2002, No. 00595 (the “Law Action”). To the extent that the conversion and breach of contract counts in the Equity Action (June Term 2002, No. 0605) are duplicative of those contained in the Law Action, such counts are deemed merged into the Law Action and dismissed from the Equity Action.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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ROBERT B. MOZENTER, ESQUIRE : MAY TERM, 2002
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.....
O P I N I O N

Albert W. Sheppard, Jr., J. April 2, 2003

Before the court are the following Motions: 1) defendant’s Preliminary Objections to the Amended Complaint in Equity; 2) and plaintiff’s Motion for Preliminary Injunction. For the reasons discussed, plaintiff’s Motion for Preliminary Injunction is **denied** and defendant’s Preliminary Objections are **overruled**.

FINDINGS OF FACT

1. Plaintiff, Robert Mozenter, Esquire, and defendant, Joel Trigiani, Esquire, originally shared office space and practiced law as separate and independent sole practitioners. (N.T.¹ at 25).

2. In 1996, Samuel Staten, Sr., Business Manager for Local Union #322, approached Mozenter about performing legal services on behalf of certain Union related entities (collectively, the “Union”). (N.T. at 17, 23-27).

3. Mozenter discussed the arrangement with Trigiani and the parties reached an oral agreement that all fees generated from representation of the Union would be equally split between them, regardless of whom performed the work.² (N.T. at 26, 107).

4. In 1996, Mozenter and Trigiani established a joint checking account bearing the name “Trigiani and Mozenter” and acted to place all revenue generated from their joint representation of the Union into that account. (N.T. at 90-93, 127).

5. On May 21, 1998, the Union forwarded a letter to its former attorney informing him that the Union had retained new counsel: “Robert B Mozenter, Esquire and Joel P. Trigiani, Esquire.” (N.T. at D-16, 235).

6. From 1998 through 2002, Trigiani performed approximately 99% of the work for

¹The annotation “N.T.” shall hereinafter refer to the Notes of Testimony of the hearing on October 22, 2002.

² The issue remains as to the exact legal nature of the relationship between the parties. However, for purposes of the motions currently before this court, a final determination is not required, nor would such a determination be appropriate at this stage of the litigation.

the Union clients on behalf of Mozenter and Trigiani. (N.T. at 34, 166).

7. In May 2001, the parties modified the terms of their oral agreement regarding the distribution of Union related revenue from 50/50 to 60/40, with Trigiani receiving 60 and Mozenter receiving 40 of the net revenue. (N.T. at 43, 124-5, 166-7).

8. On April 5, 2002, Trigiani, via letter, expressed that it was his intention to terminate his professional relationship with “Mozenter and Trigiani.” (N.T. at Ex. D-7, D-10, D-48).

9. On April 9, 2002, Mozenter, via letter, demanded that he continue to receive 40% of all Union revenues regardless of the Trigiani’s intention to dissolve their business relationship. (N.T. at Ex. D-7).

10. On April 10, 2002, Trigiani, via letter, requested instructions from the Union concerning the possession of the Union files pending its selection of new counsel. (N.T. at Ex. D-10).

11. Also on April 10, 2002, Trigiani, via letter, informed Mozenter that it was his belief that all billing relating to the Union should no longer be in the name of “Mozenter and Trigiani” and that “each individual should bill based on the work performed for the respective clients.” Trigiani further stated that, “prior to the termination (April 4, 2002), all billing and funds received in connection with [the Union] will be distributed in accordance with our prior understanding.” (N.T. at Ex. D-10).

12. On April 12, 2002, Wade Stevens, Business Manager for Laborer’s District Counsel, via letter, directed that Trigiani was to maintain possession of the Union files until a decision regarding new counsel was made. (N.T. at Ex. D-12).

13. On April 18, 2002, the Executive Board of the Union voted unanimously to terminate its prior relationship with Mozenter and Trigiani. (N.T. at 216, 244). Thereafter, the Union unanimously voted to retain Trigiani as its counsel and notified both Mozenter and Trigiani of its decision. The Union stated that it chose Trigiani because he had already been performing all of the Union's labor work. (N.T. at 240-1, 245). This decision was confirmed by a letter from Stevens dated May 10, 2002. (N.T. at Ex. D-15).

14. On May 8, 2002, Mozenter filed a Complaint at Law (May Term 2002, No. 00595), seeking money damages based on several causes of action, including: 1) breach of contract; 2) conversion; 3) defamation; 4) breach of fiduciary duty; and 5) tortious interference with contract (the "Law Action").

15. On June 5, 2002, Mozenter filed a Complaint in Equity, captioned June Term 2002, No. 0605, asserting counts for: 1) breach of contract and 2) conversion (the "Equity Action").³ At the same time, plaintiff filed the instant Motion for Preliminary Injunction.

16. Thereafter, defendant filed Preliminary Objections in the nature of a demurrer to the Equity Action complaint, asserting that plaintiff has failed to state claims for either breach of contract or conversion upon which relief may be granted.

³The Equity Action Complaint was later amended on July 15, 2002. The Amended Equity Action Complaint shall hereinafter be referred to as the "Equity Action" for the sake of convenience.

DISCUSSION

I. Plaintiff's Motion for Preliminary Injunction

Plaintiff's Motion for Preliminary Injunction asks this court to place the fees generated from legal representation of the Union in escrow pending adjudication of the merits of the underlying claims. Pl. Reply at ¶ 25. Plaintiff contends that he is "being deprived of his right to a unique and unidentifiable fund which, in the absence of the requested relief, is likely to be dissipated." Id. at ¶ 15. This court submits that this argument lacks merit and plaintiff's request for injunctive relief is denied.

A preliminary injunction is regarded as "a most extraordinary form of relief which is to be granted only in the most compelling cases." Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa. Super. 495, 597 A.2d 141, 144 (1991). "The purpose of a preliminary injunction is to preserve the *status quo* as it exists or previously existed before the acts complained of, thereby preventing irreparable injury or gross injustice." Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277, 1286 (1992). The court may grant the preliminary injunction only if the moving party has sufficiently established the following five elements:

- (1) that relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages;
- (2) that greater injury will occur from refusing the injunction than from granting it;
- (3) that the injunction will restore the parties to the *status quo* as it existed immediately before the alleged wrongful conduct;
- (4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and
- (5) that the plaintiff's right to relief is clear.

Cappiello v. Duca, 449 Pa. Super. 100, 672 A.2d 1373, 1376 (1996); Valley Forge Historical Society

v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123, 1128 (1981). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted." Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, 705 A.2d 509, 512 (Pa. Commw. 1998).

Plaintiff's request for injunctive relief fails for several reasons. First, plaintiff has failed to establish the actual existence of irreparable harm which would necessitate the issuance of an injunction. An injury is regarded as "irreparable" if it will cause damage which can be estimated "only by conjecture and not by an accurate pecuniary standard." Sovereign Bank v. Harper, 449 Pa. Super. 578, 674 A.2d 1085, 1093 (1996)⁴. Thus, the plaintiff must demonstrate the likelihood of a loss that is not entirely ascertainable or compensable by money damages. John G. Bryant Co. v. Sling Testing and Repair, Inc., 471 Pa. 1, 369 A.2d 1164 (1977). Moreover, even when monetary damages are fully calculable, a preliminary injunction may be granted "when there is proof that the threatened monetary loss is so great as to threaten the existence of the business." Three County Services, Inc. v. Philadelphia Inquirer, 337 Pa Super. 241, 486 A.2d 997, 1001 (1995). Here, plaintiff has made no such showing.

Even assuming *arguendo* that plaintiff may prove some future right to relief on his allegations, the present inquiry turns on whether injunctive relief is necessary to thwart an immediate and irreparable harm which monetary damages could not remedy. *Id.* Plaintiff previously filed the Law Action seeking money damages in connection with the same alleged breach of contract and conversion as described in the Equity Action. Thus, any damages allegedly sustained by plaintiff may be adequately compensated by an award of money damages in the Law Action. Plaintiff has offered no evidence to support any other conclusion.

⁴Harm must be irreversible before it will be deemed "irreparable." Sovereign, 674 A.2d at 1093.

Moreover, plaintiff has failed to establish “a clear right to relief,” insofar as he has failed to demonstrate that he is entitled to any portion of the legal fees generated by defendant in connection with legal work for the Union after April 18, 2002. The testimony of record established that by a unanimous vote on April 18, 2002, the Union chose to terminate its relationship with Trigiani and Mozenter (whatever the entity) and to retain Trigiani as its counsel. (N.T. at 216, 244). In Pennsylvania, a client has an absolute right to retain the lawyer of his choosing. Likewise, “[t]he right of a client to terminate the attorney-client relationship is an implied term of every contract of employment of counsel....” Hiscott and Robinson v. King, 426 Pa. Super. 338, 626 A.2d 1235, 1236 (1993).

Plaintiff states “[t]he only relief that Mozenter seeks by way of preliminary injunction is the placement of the disputed funds in escrow pending adjudication of the merits of his underlying claims.” Pl. Reply at ¶ 25. This court finds that plaintiff has not sufficiently demonstrated his entitlement to his equitable demands for relief and has not produced evidence which would warrant requiring defendant to place all revenues received from the Union in escrow. However, this court reserves the right to order an accounting, upon the request of plaintiff.⁵

⁵Defendant concedes that plaintiff is entitled to an accounting of “partnership” revenues generated from the time of dissolution of April 5, 2002 until the date of Mozenter’s dismissal notice from the Union on April 18, 2002. Def. Fin. Fact/Concl. Law at ¶ 30.

II. Plaintiff's Preliminary Objections

A. Mozenter Has Sufficiently Plead His Breach of Contract Claim

To sustain a claim for breach of contract, a plaintiff must prove: (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 (Pa. Super. 1999). In order to recover damages pursuant to a breach of contract, the plaintiff must also show a causal connection between the breach and the claimed loss. Exton Drive-In, Inc. v. Home Indemnity Co., 436 Pa. 480, 261 A.2d 319 (1969); Logan v. Mirror Printing Co. of Altoona, Pa., 410 Pa. Super. 446, 600 A.2d 225 (1991).

At bar, defendant claims that plaintiff has failed to state a claim for breach of contract upon which relief may be granted. However, a demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. Bailey v. Storlazzi, 1999 Pa. Super. 97, 729 A.2d 1206, 1211 (1999). For the purposes of reviewing preliminary objections asserting legal insufficiency, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 2000 Pa. Super. 183, 757 A.2d 938, 941-42 (2000). However, the pleader's conclusions or averments of law are not considered to be admitted as true. County of Allegheny v. Commw., 507 Pa. 360, 372, 490 A.2d 402, 408 (1985).

Based upon a review of the Complaint and accompanying exhibits, this court finds that plaintiff has satisfied this burden of pleading as respects its breach of contract claim (Count I). The majority of the grounds cited by defendant in support of its Preliminary Objections are premature and not proper grounds for a dismissal in the present posture of the case.

Accordingly, defendant's Preliminary Objection to Count I hereby is overruled.

B. Plaintiffs Have Stated A Claim For Conversion

An essential element of a conversion claim is that the plaintiff "had actual or constructive possession of a chattel or an immediate right to possession of a chattel at the time of the alleged conversion." Chrysler Credit Corp. v. Smith, 434 Pa. Super. 429, 434, 643 A.2d 1098, 1100 (1994). Among the ways a person may incur liability for conversion is by "[u]nreasonably withholding possession from one who has the right to it." Martin v. National Sur. Corp., 437 Pa. 159, 165, 262 A.2d 672, 675 (1970). In the Complaint, plaintiff has pled a valid claim for conversion, at least through the pleading stage.

Accordingly, defendant's Preliminary Objection to Count II hereby is overruled.

III. Consolidation of the Law Action and the Equity Action

As noted, plaintiff originally filed the Law Action (May Term 2002, No. 00595) seeking money damages based on several causes of action, including: 1) breach of contract; 2) conversion; 3) defamation; 4) breach of fiduciary duty; 5) tortious interference with contract. Thereafter, plaintiff filed the Equity Action (June Term 2002, No. 0605) asserting counts for: 1) breach of contract and 2) conversion, along with the Motion for Preliminary Injunction. Other than the relief sought, the causes of action for breach of contract and conversion are identical in the Law Action and the Equity Action Complaints.

In the interest of judicial economy, these actions will be consolidated under the Law Action as the lead case.⁶ To the extent that the conversion and breach of contract counts in the Equity Action are duplicative of those contained in the Law Action, those counts are stricken. Thus, this action will proceed with, *inter alia*, one count for breach of contract and one for conversion. However, any demands for relief

⁶It had been agreed earlier in the litigation that these matters would be consolidated, however it appears that no order has yet been entered. (N.T. at 5-6).

contained within the Equity Action which are properly recoverable in the Law Action and which have not previously been ruled upon by this court, are now considered to be part of the Law Action, including, without limitation, plaintiff's demand for an accounting.

CONCLUSION

For the above-stated reasons, this court finds as follows:

1. Plaintiff's Motion for Preliminary Injunction is **denied**;
2. Defendant's Preliminary Objections are **overruled**; and
3. The above-captioned matters are consolidated under the caption May Term 2002, No. 00595 (the "Law Action"). To the extent that the conversion and breach of contract counts in the Equity Action (June Term 2002, No. 0605) are duplicative of those contained in the Law Action, such counts are stricken.

This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.