

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

DAVID C. MARKS,	:	June Term 2003
	:	
Plaintiff,	:	No. 3618
v.	:	
	:	Commerce Program
E. HOPKINS CO., INC., STEPHEN L.	:	
MARMAR, HUGH G. BUCKLEY, JR.	:	
AND ALBERT A. PAPPAS,	:	
	:	Control Number 061201
Defendants.	:	

**ORDER**

**AND NOW**, this 19<sup>th</sup> day of August, 2004, upon consideration of Plaintiff David C. Marks' Motion for Summary Judgment to Defendant E. Hopkins Co., Inc.'s Counterclaim, Defendants' response in opposition, memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that Plaintiff's Motion for Summary Judgment is **GRANTED**.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

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**MEMORANDUM OPINION**

*JONES, II, J*.....

Presently before the court is the Motion for Summary Judgment of Plaintiff David C. Marks (“Marks”) to Defendant E. Hopkins Co., Inc. (“Hopkins”) Counterclaim to Plaintiff’s complaint. For the reasons that follow, the motion summary judgment is Granted.

**BACKGROUND**

This action arises from Marks’ request to examine Hopkins’ corporate books and records pursuant to 15 Pa. C.S. § 1508.<sup>1</sup> In response to the complaint, Hopkins filed a counterclaim and an amended counterclaim asserting claims of fraud and intentional misrepresentation. In the amended counterclaim, Hopkins seeks to recover in excess of \$483,000.000 which it paid to Marks over a four year period based on Marks’ alleged misrepresentations concerning his disability and ability to return to work.

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<sup>1</sup> The court adopts and incorporates the factual background set forth in its Memorandum Opinion signed on July 21, 2004 and docketed July 23, 2004.

## DISCUSSION

A party may move for summary judgment after pleadings are closed in two situations. First, when there is no genuine issue of material fact that could be established by additional discovery, and second, after discovery, if an adverse party bearing the burden of proof has failed to produce evidence of essential facts so as to warrant the submission of the issue to a jury. Fazio v. Fegley Oil Co., Inc., 714 A.2d 510, 512 (Pa. Commw. 1998). Further, under the rules, a court may grant summary judgment where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law. Boyer v. Walker, 714 A.2d 458, 459 (Pa. Super. 1998).

Marks argues that summary judgment is appropriate since no factual basis exists to prove Hopkins claim for fraud.<sup>2</sup> In response, Hopkins, relying upon the Borough of Nanty-Glo v. American Surety Co. of New York, 309 Pa. 236, 163 A.523 (1932), argues that summary judgment is not appropriate since Marks solely relies upon oral deposition testimony to support his motion. Generally, “The Nanty-Glo decision directs that summary judgment may not be entered where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact.” Poterfield v. Trustees of the Hosp. of the Univ. of Pa., 441 Pa. Super. 529, 657 A.2d 1293, 1295 (1995). However, “if the non-moving party has failed, in the first instance, to allege facts sufficient to make out a prima facie case, then summary judgment may be granted properly, even if the moving party

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<sup>2</sup> Marks also argues that summary judgment is appropriate since the counterclaim contains misrepresentations of a future promise which is not cognizable as fraud under Pennsylvania law. Marks is correct that a breach of a promise to perform in the future does not constitute fraud. In this case, Hopkins’ argues that its claim for fraud is not based on a future promise but based on Marks repeated misrepresentations concerning his disability and inability to work at the time the misrepresentations were made to Pappas, Marmar and Buckley.

has only set forth the pleadings and depositions of his witnesses in support thereof.”

Winwood v. Bregman, 788 A.2d 983 (Pa. Super. 2001) (quoting Dudley v. USX Corp., 414 Pa. Super. 160, 606 A.2d 916 (1992)).

In the case at bar, Nanty-Glo does not apply since Hopkins failed to produce evidence to establish a prima facie case of fraud or intentional misrepresentation.<sup>3</sup> To prove fraud Hopkins must demonstrate by clear and convincing evidence: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Feeney v. Disston Manor Pers. Care Home, Inc., 849 A.2d 590, 597 (Pa. Super. 2004)(citing Blumenstock v. Gibson, 811 A.2d 1029, 1034 (Pa. Super. 2002)).

Reviewing only the pleadings and Hopkins’ own response to the summary judgment motion, in a light most favorable to Hopkins, Hopkins failed to make out a prima facie case of fraud and intentional misrepresentation. Hopkins failed to produce evidence that Marks misrepresented his ability to work and/or return to work.<sup>4</sup> Additionally, Hopkins failed to produce any evidence that Marks intended to misrepresent his disability and /or his ability to work to induce Hopkins to pay the difference in his salary. Based on the foregoing, since Hopkins failed to establish a prima

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<sup>3</sup> The elements of fraud and intentional misrepresentation are similar. To state a claim for intentional misrepresentation the following must be proved: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Kramer v. Dunn, 749A.2d 984, 991 (Pa. Super. 2000).

<sup>4</sup> The court finds that the vacation to Puerto Rico and the numerical mileage on his vehicle alone is not enough evidence to support Hopkins claim that Marks misrepresented his disability and ability to return to work.

facie case of fraud, this court finds as a matter of law, not as a matter of fact, that summary judgment is appropriate.

**CONCLUSION**

For the foregoing reasons, Plaintiff David C. Marks Motion for Summary Judgment to Defendant Hopkins counterclaim for fraud and intentional misrepresentation is Granted. An order contemporaneous with this Memorandum Opinion will be filed of record.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**