

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

MCKESSON CORPORATION, : October Term 2010
Plaintiff, :
v. : No. 1732
GREGORY S. CAMPBELL, ET. AL., :
Defendants. : Commerce Program
:
: Control Number 12071839

ORDER

AND NOW, this 8th day of January 2013, upon consideration of Defendant Gregory S. Campbell's Motion for Summary Judgment and all responses in opposition, it hereby is **ORDERED** that said Motion is **Granted in part** and the claims for fraudulent misrepresentation and negligent misrepresentation are dismissed. All other aspects of the motion are **Denied**.

BY THE COURT,


ALBERT JOHN SNITE, JR., J.

Mckesson Corporation Vs-ORDOP



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Defendants.	:	Commerce Program
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OPINION

This action arises from a contract entered into between Plaintiff McKesson Corporation (“McKesson”) and Defendant Jet Direct Aviation, Inc. (“Jet Direct”).¹ McKesson is a pharmaceutical distribution and healthcare services company with its headquarters in San Francisco, California. Robert Pocica (“Pocica”) was the McKesson officer responsible for business aviation. JetDirect Aviation, Inc. was the successor operating company that managed McKesson’s aircraft pursuant to the Management Agreement at issue. Defendant Gregory S. Campbell (“Campbell”) was the Chairman and CEO of JetDirect at relevant times herein.

On or about February 24, 2006, McKesson contracted with TAG Aviation USA, Inc. for the provision of aircraft management services for its corporate aircraft program. TAG was an aircraft management company based in California. TAG’s aircraft management services included flight crew and aircraft scheduling, hanger facilities, maintenance, fuel, insurance, crew training and all other services required to operate McKesson’s three corporate aircraft.

Pursuant to section 12.3 of the contract, McKesson agreed to deposit with TAG an operating fund in the amount of \$1,800,000 to cover the working capital requirements for

¹ TAG Aviation USA, Inc. contracted with McKesson. In late August, 2007, Sentient Flight Group, Inc. (“Sentient”) acquired TAG. TAG’s obligations under the Management Agreement were assigned to Sentient by way of an Assignment Agreement. In August 2008, Sentient changed its name to JetDirect Aviation, Inc. as part of a corporate reorganization.

McKesson's three aircraft and to serve as a security deposit. Section 12.3 (b) of the Management Agreement provides as follows as it pertained to the operating fund:

(b) The Operating Fund will initially be reflected as a credit balance in Provider's [TAG] accounting records of McKesson's account. Provider [TAG] acknowledges that at all times the balance, if any, reflected in Provider's [TAG] books and records as being the amount contained in McKesson's Account shall remain the property of McKesson. Provider [TAG] will be immediately entitled to use funds from McKesson's Account to pay for the Start-Up Fee, Management Fee, Operating Expenses, and Non-recurring Expenses incurred by Provider [TAG] on McKesson's behalf or otherwise payable to Provider [TAG] by McKesson in accordance with this Agreement. Upon Provider's [TAG] receipt of payment from McKesson of the invoices for such fees and expenses, Provider [TAG] shall credit such payment to McKesson's Account.²

In accord with the Management Agreement, upon termination or expiration of the contract, TAG was to pay to McKesson "the balance remaining" in the operating fund as of the date of the next regular monthly billing, less the "Retention". The retention is defined by the contract as 50% of the operating fund, or up to \$900,000, which TAG could retain for a period of three months in order to pay outstanding aircraft expenses pursuant to the Management Agreement.

The Management Agreement also required TAG, on a monthly basis, to prepare an invoice setting forth all of the McKesson aircraft costs incurred during the month on behalf of McKesson. McKesson would review the monthly invoices with Policies for approval and payment. Once approved McKesson would pay TAG to "replenish that cash flow on our behalf." Monthly invoice payments received from McKesson would in essence "replenish" the Operating Fund balance reflected in TAG's accounting system.

In December 2007, the assets of TAG including customer contracts, were acquired by Sentient Flight Group, LLC which took over management of McKesson's aircraft. On

² Exhibit "O" to McKesson's response to Campbell's Motion for Summary Judgment-12.3 (b) of the Management Agreement.

December 17, 2007, McKesson assigned to Sentient and Sentient assumed all of TAG's rights and responsibilities under the Management Agreement. Pursuant to the Assignment, TAG transferred to Sentient any balance remaining in the operating fund and all records of TAG relating to the Management Agreement. After the assignment, McKesson continued to pay the monthly invoices issued by Sentient and the money McKesson paid was deposited into Sentient's operating bank account.

In August 2008, Sentient changed its name to JetDirect Aviation, Inc. as part of a corporate reorganization. At the time, Sentient was experiencing financial difficulties. In April 2008, Sentient was in default on its loan obligations to its senior secured lender Sovereign Bank. Sentient, now JetDirect, continued to remain in default through December 31, 2008. For the period August 2008 through March 2009, Campbell was the Chairman of JetDirect Aviation Inc.

In the summer of 2008, Pocica, initiated a Request for Proposal to explore the possibility of changing aircraft management companies due to Sentient/JetDirect's financial problems. As part of the RFP process, McKesson retained Peter Agur of the Van Allen Group, a management consultant to business aviation, to conduct due diligence on JetDirect as well as three other aircraft management companies. As part of the due diligence, Agur and his team reviewed financials of JetDirect and contacted several of Jet Direct's vendors and customers to prepare a report. The report was finalized on September 10, 2008.

Agur made the following observations regarding JetDirect:

Leverage: JetDirect is highly leveraged. They have \$19.6 MM of current debt that is under a forbearance agreement with their senior lender, Sovereign Bank. They also have \$71.2MM of subordinated notes, as well as customer deposits of \$37.8 MM. After adjustments reflecting the sale of the charter card and fuel sales business units, JetDirect will still have Third party debt of over \$90.0MM while their net income is negative.

Operating Losses: With a negative EBITDA they are burning cash. Their stated plans for establishing positive cash flows are based on aggressive increases in revenue margins and reductions in overhead. Their plan for aggressive revenue growth is in the face of a challenging charter aircraft market. The economy is, at best, stagnant plus the added impact of high fuel costs have caused a recent charter demand to decline of at least 20%. Even so, JetDirect indicates charter revenue is a critical element of their financial recovery.

Financial Controls: Jet Direct's financial condition is critical. Yet, their financial reports are substantially behind the present window. Therefore, their financial controls and decision are not well supported with current information.

Cash: a. JetDirect is already in a difficult position with their vendors for being substantially in arrears on accounts payable (90+days for a significant portion of their accounts). Their plan to further manage and extend the payment period, even temporarily, must be handled extremely well or they risk being placed on COD.

b. Their plan is to aggressively reduce receivables while, at the same time, substantially increasing revenues. This is apt to be a dramatic challenge since any growth in revenues puts corresponding strong pressure on receivables growth, too.

c. The timing and sale price of the Technical Services Group (FBOs and Maintenance Operations) sale is critical to JetDirect's cash flow. They indicate they are not in direct negotiations with any buyers at this time yet plan to close prior to year end.

d. Customer deposits are a critical element of JetDirect's cash reserves. If there is a reduction of these deposits as a consequence of client departures the pressure on JetDirect's financial condition will be substantial. Of the nine clients who are current customers of JetDirect, we are aware of at least four clients (representing at least 10 aircraft) who are contemplating leaving JetDirect's customer base.³

McKesson met with several potential management companies, including JetDirect, as part of the RFP process. McKesson met with JetDirect on November 7, 2008. Campbell led the JetDirect presentation. Campbell circulated a Power Point presentation which described JetDirect's recent financial performance and its recent ongoing and projected efforts to raise

³ Exhibit "S" to Defendant Campbell's Motion for Summary Judgment – Agur Report.

capital. Campbell's presentation included representations regarding certain business units, the timing of those transactions and the amount to be realized by the transactions, including the potential sale of various divisions of JetDirect.

On February 5, 2009 McKesson provided written notice to JetDirect Aviation that it was terminating its Management Agreement with JetDirect effective as of March 10, 2009. In the termination letter, McKesson requested JetDirect to credit amounts incurred and paid by JetDirect during January and February 2009 against the remaining balance of its operating fund.

On February 18, 2009, McKesson demanded Campbell, as Chairman of the Board of JetDirect, transition the management of McKesson's aircraft away from JetDirect by March 2, 2009 and wire the remaining balance of the operating fund to McKesson. After the February 18, 2009 letter to Mr. Campbell, Pocica reached out to Mr. Campbell on several occasions and left messages with him requesting the status of McKesson's operating fund.

On February 25, 2009, Sovereign Bank notified JetDirect of its intent to dispose of its collateral by sale, assignment, transfer and conveyance of all of its assets at a private sale on or after March 9, 2009. On February 27, 2009, Campbell informed Pocica that JetDirect was not in a financial position to return any portion of McKesson's operating fund. In April 2009, JetDirect's assets were sold to JDA Acquisition Company, Inc., an entity formed to acquire all of the assets of JetDirect Aviation, Inc. following a negotiated foreclosure by Sovereign Bank. JDA Acquisition Company, Inc. was later rebranded Wayfarer Aviation, Inc.

The instant action was instituted in October 2010 by McKesson against JetDirect, its various related entities and Campbell. Presently pending before the court is Campbell's motion for summary judgment on McKesson's claims for conversion, breach of fiduciary duty, fraud and negligent misrepresentation.

DISCUSSION⁴

Under California law, the economic loss doctrine "requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise."⁵ To that end, the economic loss rule prohibits the recovery of tort damages in a breach of contract case.⁶ "Quite simply, the economic loss rule 'prevents the law of contract and the law of tort from dissolving one into the other.'" ⁷ The rule generally bars tort actions for contract breaches, thereby limiting contracting parties to contract damages. A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. ⁸

In the case *sub judice*, McKesson purports to state claims for fraud and negligent misrepresentation. Specifically, McKesson alleges Campbell intentionally and negligently made false statements of material fact regarding JetDirect's financial soundness in order to continually service the McKesson account.⁹ However, McKesson's allegations of fraud and negligent

⁴ In response to Campbell's motion for summary judgment McKesson raises the question of choice of law. After reviewing the parties' respective positions and the law, the court concludes that as it pertains to the claims for conversion and breach of fiduciary duty, a false conflict exists since the laws of Pennsylvania and California are the same with respect to said claims. As it pertains to the claims for fraud and negligent misrepresentation, the court concludes the choice of law provision contained within the Management Agreement applies since the claims contained therein concern the performance of the Management Agreement. Consequently, California law governs the claims for fraud and negligent misrepresentation.

⁵ Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 102 P.3d 268, 272 (Cal. 2004).

⁶ Butler-Rupp v. Lourdeaux, 134 Cal.App.4th 1220, 36 Cal.Rptr.3d 685 (2005).

⁷ Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979,988, 22 Cal. Rptr. 3d 352, 102 P.2d 268 (2004).

⁸ Robinson, *supra*.

⁹ McKesson's response to Campbell's motion for summary judgment p. 7-8, 42-46.

misrepresentation are nothing more than a failure to fulfill contractual promises contained within the Management Agreement. The Management Agreement specifically gives McKesson the right to terminate the agreement in the event JetDirect files for bankruptcy or becomes insolvent. As such, the notion of financial soundness and strength is contained within the Management Agreement. Since McKesson fails to allege any conduct which is independent from the various promises made by the parties in the course of their contractual relationship, the economic loss doctrine bars McKesson's claims for fraud and negligent misrepresentation. Consequently, Campbell's motion for summary judgment is granted as it pertains to the claims for fraud and negligent misrepresentation.¹⁰

CONCLUSION

Based on the foregoing, Defendant Campbell's motion for summary judgment is granted as to the claims for fraud and negligent misrepresentation and denied as to the claims for conversion and breach of fiduciary duty.

BY THE COURT,


ALBERT JOHN SNITE, JR., J.

¹⁰ Campbell also seeks summary judgment on McKesson's claims for conversion and breach of fiduciary duty. After considering the parties' respective positions, the court concludes the economic loss doctrine does not apply to bar said claims and questions of fact exist precluding the entry of summary judgment.