

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

BRIAN T. MALEWICZ, et al.,	:	
	:	
Plaintiffs,	:	December Term 2002
	:	
	:	
v.	:	No.: 1741
	:	
	:	
MICHAEL BAKER CORPORATION	:	Commerce Program
et al.,	:	
Defendants.	:	Control No.: 030042

Jones, J.

OPINION

Defendants Michael Baker Corporation and Donald P. Fusilli, Jr. have filed preliminary objections to plaintiffs’ Brian T. Malewicz, Michael D. Burns, David L. Jannetta, Mark J. De Nino and Mobility Technologies, Inc. complaint. For the reasons discussed in this opinion, this court is issuing a contemporaneous Order overruling in part and sustaining in part defendants Michael Baker Corporation and Donald P. Fusilli, Jr.’s preliminary objections.

PARTIES

Due to the number of parties involved in this suit, the court finds it necessary to identify the parties and their relationship to the respective corporations. The plaintiffs in this action are Brian T. Malewicz, Michael D. Burns, David L. Jannetta, Mark J. DeNino and Mobility Technologies Inc.(Mobility). Malewicz, Burns, Jannetta, and De Nino are shareholders of Mobility. Mobility, a Delaware Corporation, was formerly known as Argus Network, Inc.

Defendants in this action are Michael Baker Corporation(MBC), Donald P. Fusilli, Fred Johnson, Dwight Sangrey and Howard Kraye. Fusilli is a shareholder and executive officer of MBC. Johnson, Sangrey and Kraye are shareholders and executive officers of Santa Fe Technologies(SFT).

BACKGROUND

The facts alleged in plaintiffs complaint are as follows:

Mobility designs, constructs and maintains electronic monitoring systems which monitor automobile traffic and report traffic conditions in real time. (¶ 14) During the first six months of 1998, Mobility explored the possibility of cooperating with other companies to prepare and submit a bid to the U.S. Department of Transportation for a contract to fund the installation of electronic traffic monitoring systems in a number of states. (¶ 15) SFT was one of the companies Mobility considered as a potentially suitable participant. (¶ 17) In June 1998, Mobility and SFT began to discuss the possibility of cooperating with each other to prepare and submit a bid for the federal government contract. (¶ 18)

In connection with and as a result of preparing a bid, Mobility and SFT, on November 2, 1998, entered into an agreement providing for the merger of SFT into Mobility. A provision within the merger agreement specifically provided that Mobility had the unqualified right to terminate the Merger Agreement if the merger was not consummated by December 15, 1998. (¶ 19) The companies then proceeded to conduct due diligence reviews in advance of the consummation of the merger. (¶ 18) At the time the Merger Agreement was signed between Mobility and SFT, SFT was on the brink of financial collapse and desperately needed the influx of capital that the merger, if consummated, would provide. (¶ 25)

During the course of due diligence, Mobility learned and determined that (1)SFT had previously secured a loan of approximately \$200,000.00 from MBC with pledges of SFT stock by certain of SFT's shareholders, including defendants Fred Johnson ("Johnson") and Howard Kraye ("Kraye"), who collectively owned and/or controlled millions of shares of SFT stock;¹ (2) SFT's earnings in 1998 were falling well below projections(¶ 22); and (3) SFT had questionable sensor-installation credentials which caused Mobility to determine that SFT's presence as part of the team preparing for the bid would jeopardize the contract award. (¶ 22) On February 24, 1999, Mobility exercised its unqualified right to terminate the merger agreement. (¶ 23)

Mobility subsequently entered into another arrangement with Sensor Management Systems ("SMS") to provide the services originally contemplated with SFT. (¶24) Mobility merged with SMS and was awarded the contract by the U.S. Department of Transportation. (¶24) Upon termination of the SFT-Mobility merger agreement, defendants Sangrey, Kraye and Johnson allegedly devised a plan with the assistance of MBC to (1) extort money from Mobility and use that money to inject capital into SFT, (2) repay the indebtedness to MBC and (3) permit Sangrey, Kraye and Johnson to regain control of SFT's stock and resurrect a solvent SFT. (¶ 27) The plaintiffs refer to this plan as the "refinancing plan."

Several months after Mobility terminated the merger agreement with SFT, MBC who was part of the Mobility team that was awarded the contract from the federal government, informed Sangrey, Kraye, and Johnson that Internet Capital proposed to invest \$19,000,000.00 in Mobility. According to plaintiffs, MBC willingly gave Sangrey, Kraye and Johnson the information

¹At the time the merger agreement was signed, SFT was seriously in arrears on its loan from MBC. (¶21)

regarding Mobility's prospective financing and actively participated in Sangrey, Kraye and Johnson's "refinancing plan" in order to collect its outstanding loan. (¶ 29-30)

Sangrey, Kraye and Johnson knew that claims of liability asserted in the midst of the financing process would have to be reported to the prospective investors and would necessarily induce them not to invest in Mobility, or to significantly change the terms of the financing to make them less favorable to Mobility and its shareholders. (¶ 28)

On August 3, 1999, Sangrey, Kraye and Johnson caused SFT's counsel to transmit a letter to plaintiffs DeNino, Jannetta and Burns announcing the filing of a lawsuit against them and Mobility. (¶ 32) Enclosed with the letter was a complaint filed by SFT in New Mexico state court. The lawsuit was filed against Mobility, Jannetta, Burns, DeNino and three former SFT employees who operated SMS, Nash, Musnitsky and Dollar. In the lawsuit, SFT claims that it is entitled to damages for the alleged tortious conduct of the defendants in connection with replacing SMS for SFT as a participant in the proposed federal contract bid and the failed merger of SFT into Mobility. (¶33) This lawsuit is currently pending in New Mexico.

As a result of the August 3, 1999 letter from SFT's counsel, Internet Capital declined to invest the planned \$19,000,000.00 in Mobility under the terms that had originally been proposed. Instead, Internet Capital demanded significant changes in the terms of the financing, which had the result of drastically diminishing the value of Mobility stock and of altering the control structure of the company. Mobility accepted Internet Capitals revised financing terms and suffered losses. (¶ 36)

In December 2002, plaintiffs Brian T. Malewicz, Michael D. Burns, David L. Jannetta, Mark J. DeNino, and Mobility Technologies, Inc. filed a complaint against MBC, Donald P.

Fusilli, Jr., Fred Johnson, Dwight Sangrey, and Howard Kraye. The complaint asserts six counts against defendants, tortious interference with prospective contractual relations (Count I), prima facie tort (Count II), malicious abuse of process (Count III), civil conspiracy to interfere with prospective contractual relations (Count IV), civil conspiracy to commit prima facie tort (Count V) and civil conspiracy to commit malicious abuse of process (Count VI). MBC and Donald P. Fusilli, Jr. filed preliminary objections in the nature of a Demurrer to plaintiffs complaint.

DISCUSSION

A preliminary objection in the nature of a demurrer tests the legal sufficiency of the complaint. Constantino v. University of Pittsburgh, 2001 Pa. Super. 4, 766 A.2d 1265, 1268 (Pa. Super. 2001). The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Viglione v. Pennsylvania Dept. Of Corrs. , 781 A.2d 248, 250 n.3 (Pa. Cmwlth. 2001). When considering preliminary objections, all material facts set forth in the complaint, as well as all inferences reasonably deducible therefrom are accepted as true. While conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion need not be regarded as such. Wagner v. Waitlevertch, 2001 Pa. Super. 100, 774 A.2d 1247, 1250 (Pa. Super. 2001).

Preliminary objections may only be granted in cases where it is clear and free from doubt that the facts alleged are legally insufficient to establish a right to relief. Stair v. Turtzo, Spry, Sbrocchi, Faul & LaBarre, 564 Pa. 305, 309, 768 A.2d 299, 301 (Pa. 2001). For that reason, a demurrer should not be sustained simply because of the novelty of a claim. Denton v. Silver Stream Nursing and Rehabilitation Center, 739 A.2d 571, 575 (Pa. Super. 1999). Furthermore, if there is any doubt as to whether a demurrer should be granted, it should be resolved in favor of

overruling the preliminary objections. Lennon ex rel. v. Wyeth-Ayerst Laboratories Inc., 2001 WL 755944, *1 (Pa. Super. June 14, 2001).

A. Choice of Law Analysis

As the threshold issue, it is necessary to decide which state law applies before discussing the merits of MBC and Fusilli's preliminary objections. MBC and Fusilli assert that Pennsylvania law governs this action, while plaintiffs contend that New Mexico law should apply. Since this court has jurisdiction over this dispute, the court will apply Pennsylvania conflict of law principles to decide which state's law governs this matter. Miller v. Gay, 323 Pa. Super. 466, 470 A.2d 1353, 1357 (Pa. Super. 1983).²

Choice of law analysis in Pennsylvania first entails a determination of whether the laws of the competing states actually differ. If the laws of the competing states do not differ than, no further analysis is necessary. If the court determines, however, that a conflict is present, courts utilize the approach set forth in the Restatement (Second) of Conflicts Section 145. Wurtzel v. Park Towne Place Associates Ltd. Partnership, 2002 WL 31487894 * 17 (Pa. Com. Pl. 2002) (Herron). This approach requires courts to analyze "the policies and interest underlying the particular issue before the court." Id. quoting Troxel v. A.I. duPont, 431 Pa. Super. 464, 636 A.2d

²MBC and Fusilli in a footnote in their brief question this court's subject matter jurisdiction. This court has subject matter jurisdiction over this matter. Under the judiciary article of the Pennsylvania constitution, Art. 5, section 5, each of the 50 common pleas courts of the Commonwealth has unlimited original jurisdiction in all cases and proceedings except as otherwise provided by law. See also, Judicial Code, 42 Pa. C.S. A section 931(a). Where there is valid service of process on a defendant, the fact that the causes of action may have arisen outside the Commonwealth is not pertinent or controlling on the question of this courts jurisdiction over the subject matter. Coriander, Inc. v. Universal Carloading & Distributing Co., Inc., 14 Pa. D. & C. 3d 732, 737 (1980). See Garfield v. Homowack Lodge, Inc., 249 Pa. Super. 392, 378 A.2d 351 (Pa. Super. 1977).

903, 1179 (Pa. Super. 1994). In applying the choice of law analysis, the relevant inquiry is not the number of contacts each litigant has had with a state. Instead, a court must evaluate the extent to which one state rather than another has demonstrated by reason of its policies and their connection and relevance to the matter in dispute a priority of interest in the application of its rule of law. Troxel, 431 Pa. Super. at 468, 636 A.2d at 1181.

The following factors may be considered in the analysis, but they should be analyzed qualitatively rather than quantitatively: 1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) domicile, residence, nationality, place of incorporation, and place of business of the parties; 4) and the place where the relationship between the parties is centered. Wurtzel at *1. Additionally, the conflicting interests of each state must be analyzed within the context of the specific facts at issue in a particular case. Id.

With regard to plaintiffs claim for intentional interference with prospective contractual relations and conspiracy to commit the interference no conflict exists between Pennsylvania and New Mexico law. With regard to plaintiffs remaining claims for prima facie tort, malicious abuse of process, and conspiracy to commit said torts, this court concludes that a conflict does exist between Pennsylvania and New Mexico law. Pennsylvania does not recognize prima facie tort and malicious abuse of process as torts. New Mexico, however, recognizes causes of action in prima facie tort and malicious abuse of process. Thus, this court concludes that a conflict of law does exist between Pennsylvania law and New Mexico law requiring an analysis under section 145 of the Restatement (Second) of Conflicts.

Applying the flexible government approach described in section 145 of the Restatement (Second) of Conflicts, this court concludes that New Mexico law should be applied to plaintiffs

claims for prima facie tort, malicious abuse of process and conspiracy to commit said torts. The allegations in plaintiffs complaint demonstrate that the injury to plaintiffs, the conduct causing the injury to plaintiffs and the center of the relationship between the parties is in New Mexico.

Plaintiffs allege that (1) Sangrey, Kraye and Johnson devised their refinancing plan in New Mexico or during the course of communications that originated in or that had one or more participants in New Mexico (¶ 30); (2) communications informing SFT that MBC and Fusilli would participate in the refinancing plan originated in Pennsylvania and were directed to persons in New Mexico (¶ 31); and the lawsuit was filed in New Mexico against plaintiffs state court. (¶32).

This court recognizes that only, one party is domiciled in New Mexico and some of the conduct evidencing defendants intent occurred in Pennsylvania, however on balance, this court finds that the interest of New Mexico outweighs that of Pennsylvania. New Mexico has the strongest interest in protecting and controlling its judicial system when maliciously used. See Rosen v. Tesoro Petroleum Corporation, 20 Phila. Co. Rptr. 374 (1990) aff'd 399 Pa. Super. 226, 582 A.2d 27 (1990). Thus, New Mexico law will be applied to plaintiffs claims for prima facie tort and malicious abuse of process.

B. Demurrer to Count I (Tortious Interference with Prospective Contractual Relations) and Count IV (Civil Conspiracy to Interfere with Prospective Contractual Relations)

MBC and Fusilli assert that Count I and Count IV of plaintiffs complaint alleging tortious interference with prospective contractual relations and conspiracy to interfere with prospective contractual relations should be dismissed. For the reasons that follow MBC and Fusilli's preliminary objections are overruled.

The elements of a cause of action for intentional interference with a contractual relation,

whether existing or prospective, are as follows:

- (1) the existence of a contractual, 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.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

MBC and Fusilli claim that the allegations set forth in Count I of plaintiffs complaint fail to identify or specify the existence of any prospective contract to which plaintiffs would be parties since an investment is not a contract. Defendants brief page 5-6. The court does not find MBC and Fusilli argument persuasive. The relations protected against intentional interference include any prospective contractual relation, except those leading to marry, if the potential contract would be of a pecuniary value to the plaintiff. Restatement (Second) of Torts, section 766B comment c. Included are interferences leading to potentially profitable contracts. Id. The expression, prospective contractual relations, is not to be used in a strict technical sense. Id. Based on the foregoing, this court finds that the investment in the case sub judice does qualify as a prospective contract under the tort of intentional interference with contractual relations.

MBC and Fusilli further maintain that there are no allegations in plaintiffs' complaint that constitute improper conduct by defendants or MBC and Fusilli. Defendants brief page 7. The court disagrees. In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper consideration is given to the nature of the actor's conduct, the actor's motive, the interests of the other with which the actor's conduct interferes, the interest sought to be advanced by the actor, the social interests in protecting

the freedom of action of the actor and the contractual interest of the other, the proximity or remoteness of the actor's conduct to the interference and the relations between the parties.

Restatement of Torts (Second) section 767.

The court finds that plaintiffs complaint sufficiently alleges improper conduct on the part of MBC and Fusilli to state a claim for intentional interference with prospective contractual relations. Plaintiffs allege that MBC and Fusilli joined with Sangrey, Kraye and Johnson to interfere in the financing plan of Mobility. MBC and Fusilli provided the information to Sangrey, Kraye and Johnson knowing that they would use the information to threaten a lawsuit against Mobility and file a lawsuit to extort money from Mobility so that Sangrey, Kraye and Johnson could repay a debt to MBC and Fusilli. MBC and Fusilli assisted Sangrey, Kraye and Johnson in calculating the timing of the lawsuit so that Mobility's attempts to refinance would be hindered. (¶34).

Based on the foregoing, this court finds that plaintiffs complaint has alleged improper conduct to state a claim for intentional interference of prospective contractual relations.³ The court also finds that the plaintiffs have sufficiently alleged a claim for civil conspiracy to interfere with prospective contractual relations. A civil conspiracy is a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by an unlawful means or for an unlawful purpose. A conspiracy becomes actionable when some overt act is done in a pursuance of the common purpose or design held by the conspiracy and actual damages result. Baker v. Rangos, 229 Pa.

³Defendants attached to their brief press releases which they claim contradict allegations in plaintiffs complaint relating to damages. Although a court may rely on documents forming in part the substance of the suit, the use of such collateral information should be strictly limited. Red Ball Brewing Co. v. Buchanan Ingersoll P.C., 51 Pa. D.& C. 4th 129, 135 (2001). The court finds that the press releases attached to defendants' brief do not form the substance of plaintiffs complaint and therefore were not considered in deciding these preliminary objections.

Super. 333, 351, 324 A.2d 498 (Pa. Super. 1974); see also McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa. Super. 2000).⁴ Taking all the facts in plaintiffs complaint as true, plaintiffs have alleged that the August 3, 1999 letter and the New Mexico lawsuit were the product of a combined action of the defendants for the unlawful purpose of interfering with plaintiffs prospective contractual relations.

Thus, MBC and Fusilli's demurrer to Count I and IV are overruled.

C. Demurrer to Count II and Count V to Plaintiffs Complaint

Count II of Plaintiffs complaint alleges a cause of action for prima facie tort and Count V alleges a claim for civil conspiracy. Prima facie tort is not recognized as a cause of action in Pennsylvania. In New Mexico, however, the tort is recognized. As set forth in Section A of this opinion New Mexico law will be applied.

The elements necessary to state a claim for prima facie tort are: (1) an intentional, lawful act by defendant; (2) an intent to injure the plaintiff; (3) injury to the plaintiff; and (4) insufficient justification for the defendant's act. Hagebak v. Stone, 133 N. M. 75, 61 P.3d 201, 208 (2002). Prima facie tort is intended to provide a remedy for persons harmed by acts that are intentional and malicious, but otherwise lawful, which fall outside of the rigid traditional intentional tort categories. Id. Prima facie tort should be used to address wrongs that otherwise escape categorization but should not be used to evade stringent requirements of other established doctrines of law. Id. The courts apply a balancing test to determine whether there is a cause of action under prima facie tort since not every intentionally caused harm gives rise to an actionable tort. Id. The

⁴In New Mexico, the elements necessary to state a claim for conspiracy are the same as in Pennsylvania. See Ettenson v. Burke, 130 N.M. 67, 17 P.3d 440 (2000).

activities complained of must be balanced against its justification and the severity of the injury, weighing: (1) the injury; (2) the culpable character of the conduct; and (3) whether the conduct is unjustifiable under the circumstances. Id.

New Mexico courts have accepted the view that prima facie tort may be pleaded in the alternative. Id. However, if at the close of the evidence, a plaintiff's proof is susceptible to submission under one of the accepted categories of tort, the actions should be submitted to the jury on that cause and not under prima facie tort. Id.; citing Schmitz v. Smentowski, 109 N.M. 386, 396, 785 P.2d 726 (1990).

The court finds that plaintiffs have sufficiently alleged a cause of action for prima facie tort. The complaint alleges an intentional lawful act by MBC and Fusilli informing Sangrey, Kraye, and Johnson of Mobility's financial plans. The complaint alleges an intent to injure the plaintiffs - the refinancing plan to extort money from Mobility to repay SFT debt to MBC. The complaint alleges an injury to plaintiffs- Mobility's inability to obtain \$19,000,000.00 in financing from Internet Capital under the terms proposed prior to the letter of August 3, 1999 and deprivation of personal benefits to Mobility's shareholders. Lastly, the complaint alleges insufficient justification for defendants actions- repayment of a debt by SFT to MBC.

Based on the forgoing, MBC and Fusilli's preliminary objections are overruled.

This court also finds that plaintiffs have sufficiently stated a claim for conspiracy to commit a prima facie tort.

D. Demurrer to Count III - Malicious Abuse of Process and Count VI Conspiracy to Commit Malicious Abuse of Process

In Count III and Count VI of the complaint, plaintiffs allege a cause of action in malicious

abuse of process and conspiracy to commit the same. Similar to plaintiffs cause of action for prima facie tort, the court will apply New Mexico law.

In Devaney v. Thriftway Marketing Corp., 124 N.M. 512, 953 P.2d 277 (1997), the court concluded that the torts of malicious prosecution and abuse of process should be restated as a single cause of action known as malicious abuse of process. The elements necessary to state a claim for malicious abuse of process are: (1) the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages. Id. In short, there must be a misuse of the power of the judiciary by a litigant and a malicious motive. Id.

MBC and Fusilli argue that plaintiffs have failed to sufficiently allege a cause of action for malicious abuse of process because MBC and Fusilli did not initiate the lawsuit in New Mexico against Mobility and its shareholders. After reviewing the law and plaintiffs complaint, this court sustains MBC and Fusilli's preliminary objections to Count III and Count VI.

In Weststar Mortgage Corp. v. Jackson, 133 N.M. 114, 61 P.3d 823 (2002), the court was faced with the similar issue in the context of a criminal proceeding. In resolving the issue, the appellate court, adopting the reasoning of the lower court, stated the following:

Merely providing information that is not false to the authorities does not initiate proceedings so as to give rise to a malicious prosecution claim. If the decision to proceed is left to the discretion of another person such as the prosecutor and the absence of falsity allows the prosecutor to exercise independent judgment.
Id. at 830.

This reasoning is derived in part from the Restatement (Second) of Torts section 653.

Reviewing the Restatement (Second) of Torts section 653, which is also applicable to wrongful use

of civil proceedings⁵, it is clear that MBC and Fusilli did not initiate the New Mexico lawsuit against plaintiffs. This section of the Restatement states that “one who merely encourages or advises a third person to bring proceedings that the third person already has in contemplation, does not thereby procure the institution of the proceedings.” Plaintiffs’ complaint does not allege that MBC and Fusilli encouraged Sangrey, Kraye and Johnson to institute the lawsuit against Mobility.

Thus, MBC and Fusilli’s preliminary objection is sustained to Count III. Since the court is sustaining MBC and Fusilli’s preliminary objection to Count III, the preliminary objection to Count VI, conspiracy to commit malicious abuse of process, is also sustained as it pertains to MBC and Fusilli.

E. Preliminary Objection for More Specific Pleading

Defendants’ preliminary objections asserting that the complaint is insufficiently specific are overruled in part and sustained in part. To determine if a pleading meets Pennsylvania’s specificity requirements, a court must ascertain whether the allegations are “sufficiently specific so as to enable a defendant to prepare a defense.” Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (Pa. Super. 1991) (citation omitted). See also In re The Barnes Found., 443 Pa. Super. 369, 381, 661 A.2d 889, 895 (1995) (“a pleading should....fully summarize the material facts, and as a minimum, a pleader must set forth concisely the facts upon which a cause of action is based.”) Here, the allegations in the complaint are more than sufficient to allow the defendants to prepare a defense and therefore this court overrules MBC and Fusilli’s preliminary objection.

With respect to defendants claim that allegations within the complaint alleging agency are

⁵Restatement (Second) of Torts section 674 comment b discussing procuring the initiation of a judicial proceeding refers readers to section 653 comment f for interpretation.

insufficient, the court will sustain defendants preliminary objections. When pleading allegations of agency, Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 369 Pa. Super. 596, 535 A.2d 1095 (Pa. Super. 1987) requires that, at a minimum, the complainant allege facts which “(1) identify the agent by name or appropriate description and (2) set forth the agent’s authority, and how the tortious acts of the agent either fell within the scope of that agency, or if unauthorized, were ratified by the principal.” Id. In this case, it is clear from the complaint that Fusilli is an agent of MBC and that he was acting in his authority as senior management, president and CEO of MBC during the transaction alleged in the complaint. However, the plaintiffs in the complaint refer to the conduct of other employees of MBC without satisfying the requirements of Sullivan. Based on the foregoing, MBC and Fusilli’s preliminary objections are sustained and plaintiffs are directed to file an amended complaint in accordance with Sullivan.

F. The August 3, 1999 Letter

Defendants also assert preliminary objection on the grounds that the plaintiffs failed to attach a letter dated August 3, 1999 to the complaint. Pa. R. Civ. P. 1019(i) requires a plaintiff to attach a copy of a writing on which his or her claim is based. Here, plaintiffs claim is based upon the August letter. This letter purportedly enclosed a courtesy copy of the complaint filed in New Mexico against plaintiffs. From the briefs, it is apparent that MBC and Fusilli are not in possession of this document. Since plaintiffs claims are in part based upon this letter, the court will sustain MBC and Fusilli’s preliminary objections. Plaintiffs are directed to file an amended complaint attaching a copy of the August 3, 1999 letter in accordance with Pa. R. Civ. 1019 (i).

G. Punitive Damages

MBC and Fusilli have also filed preliminary objections to strike plaintiffs request for

punitive damages. Punitive damages may only be awarded under limited conditions. Pennsylvania has adopted section 908(2) of the Restatement (Second) of Torts regarding the imposition of punitive damages and permits punitive damages only for conduct that is “outrageous because of the defendant’s evil motives or his reckless indifference to the rights of others.” Arbor Associates, Inc. v. Aetna U.S. Healthcare, 2003 WL 1847497 (Pa. Com. Pl. 2003) quoting Restatement (Second) of Torts section 908(2). A court may award punitive damages only if the described conduct was “malicious, wanton, reckless, willful; or oppressive.” Id.; quoting Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (Pa. 1963). The proper focus is on the act itself together with all the circumstances including the motive of the wrongdoer and the relation between the parties. Id.

Based on the averments of the complaint, this court finds that plaintiffs have sufficiently alleged facts which warrant the imposition of punitive damages. Accordingly, MBC and Fusilli’s preliminary objections regarding punitive damages are overruled.

CONCLUSION

For these reasons, this court finds that:

1. MBC and Fusilli’s preliminary objections to Count I (Intentional Interference with Prospective Contractual Relations) and Count IV (Conspiracy to Interfere with Prospective Contractual Relations) are **Overruled**;
2. MBC and Fusilli’s preliminary objections to Count II (Prima Facie Tort) and Count V (Conspiracy to commit a Prima Facie Tort) are **Overruled**;
3. MBC and Fusilli’s preliminary objections to Count III (Malicious Abuse of Process) and Count VI (Conspiracy to commit Malicious Abuse of Process) are **Sustained**;
4. MBC and Fusilli’s preliminary objections regarding the specificity of the allegations

within the complaint are **Sustained** in part and **Overruled** in part;

5. MBC and Fusilli's preliminary objection regarding the failure to attach a document to the complaint is **Sustained**; and

6. MBC and Fusilli's preliminary objection regarding punitive damages is **Overruled**.

Plaintiffs are hereby granted leave to amend the complaint within twenty days from the date of entry of this Order. This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT

C. DARNELL JONES II, J

Count VI (Conspiracy to commit Malicious Abuse of Process) are **Sustained**;

4. MBC and Fusilli's preliminary objections regarding the specificity of the allegations within the complaint are **Sustained** in part and **Overruled** in part;

5. MBC and Fusilli's preliminary objection regarding the failure to attach a document to the complaint is **Sustained**; and

6. MBC and Fusilli's preliminary objection regarding punitive damages is **Overruled**.

Plaintiffs are hereby granted leave to amend the complaint within twenty days from the date of entry of this Order.

BY THE COURT

J. DARNELL JONES II, J

Dated: August 6, 2003