

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

ADVANTAGE SYSTEMS, INC. t/d/b/a "THE CAD CONTINUUM,"	: OCTOBER TERM, 2005
	: NO. 4908
Plaintiff,	: (Commerce Program)
v.	:
BENTLEY SYSTEMS, INC.,	: Superior Court Docket
Defendant.	No. 1437EDA2006

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OPINION

Albert W. Sheppard, Jr., J. September 19, 2006

Plaintiff, Advantage Systems, Inc., appeals from this court's Order of April 24, 2006, in which the court granted the Preliminary Objections of defendant, Bentley Systems, Inc., and dismissed plaintiff's Complaint in its entirety.

Plaintiff and defendant previously had a business relationship which plaintiff described as follows:

In 1998, Plaintiff and Defendant entered into a written contract [(the "Agreement")] by which Plaintiff would provide sales of Defendant's products to Plaintiff's client base, and Defendant's authorized resellers would not in any way compete with Plaintiff in terms of sales of competing products or services or interfere with Plaintiff's existing accounts and clientele. Pursuant to that [A]greement, Defendant agreed to compensate Plaintiff for the sale of every product that Plaintiff was authorized to sell, regardless or whether or not Plaintiff actually made the sale.¹

¹ Plaintiff's Memorandum of Law in Opposition to Defendant's Preliminary Objections, p. 3. *See also* Complaint, ¶¶ 30-34.

The parties' Agreement also contained the following arbitration provision:

In the event of any dispute, controversy or claim between the parties arising under or related to this Agreement, the parties shall submit to binding arbitration before a single arbitrator in Philadelphia, Pennsylvania in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrators shall be final and binding on the parties, and the judgment upon the award rendered by the arbitrators shall be enforceable in any court of competent jurisdiction.²

The parties' business relationship apparently deteriorated, and it was eventually terminated, allegedly by defendant, in 2000.³ Plaintiff demanded arbitration beginning in April 2000, and its claims against defendant were eventually arbitrated.⁴ In the arbitration proceeding, plaintiff asserted a breach of contract claim, as well as all of the tort claims that it raised in the present action.⁵ In 2005, prior to the commencement of this action, the arbitrator found for plaintiff on its breach of contract claim and dismissed the tort claims.⁶

Plaintiff then brought this action in which it re-asserted its claims against defendant for tortious interference with contract, fraud, and civil conspiracy (collectively the "Tort Claims"). Plaintiff also requested a declaratory judgment that such Tort Claims need not be submitted to arbitration under the parties' Agreement. Defendant filed Preliminary Objections in which it claimed that plaintiff's Tort Claims are subject to arbitration, are barred by the doctrines of res

² A copy of the Agreement was not attached to plaintiff's Complaint. It should have been because plaintiff's claims are based upon the terms of the Agreement. *See* Pa. R. Civ. P. 1019(i). A copy of the Agreement is attached as Exhibit B to Defendant's Preliminary Objections. Plaintiff has not denied the existence or validity of the Agreement presented by defendant and has otherwise admitted it. *See* Answer to Preliminary Objections, ¶ 3; Complaint, ¶ 30; Plaintiff's Memorandum of Law in Opposition to Defendant's Preliminary Objections, p. 3. *See also* Phila. R. Civ. P. 1028(c)(5) (an Answer is required to Preliminary Objections based on an agreement for alternative dispute resolution).

³ *See* Complaint, ¶ 67.

⁴ *See id.*, ¶¶ 85, 88.

⁵ *See id.*

⁶ *See id.*, ¶¶ 84-89; Plaintiff's Memorandum of Law in Opposition to Defendant's Preliminary Objections, p. 5.

judicata and gist of the action, and are legally insufficient.⁷

The Tort Claims raised in this action are subject to the arbitration provision of the parties' Agreement because, as stated in that provision, they "arise under" and "relate to" the terms of that Agreement. Specifically, plaintiff asserts that it conveyed confidential information, including customer lists, to defendant under the terms of their Agreement, that defendant agreed not to use such information in competition with plaintiff, and that defendant used that confidential information to compete with plaintiff.⁸ These allegations form the basis for plaintiff's claim for tortious interference, but they clearly arise out of and relate to those provisions of the Agreement whereby defendant agreed not to misuse confidential information or compete with plaintiff. Therefore, the tortious interference claim must be arbitrated.

Plaintiff also asserts that, in the Agreement, defendant promised to coordinate marketing to maximize revenue for both parties and to pay plaintiff compensation based on revenue earned, but that defendant "fraudulently understated revenue" and "misappropriated compensation" that was due to plaintiff under the Agreement.⁹ This claim of fraud clearly arises out of and relates to the terms of the Agreement under which defendant agreed to compensate plaintiff, so the fraud claim must be arbitrated.

⁷ As defendant points out, plaintiff's Complaint is not verified, in violation of Pa. R. Civ. P. 1024. The lack of verification is alone sufficient grounds for dismissing the Complaint.

⁸ See Complaint, ¶¶ 30-32, 75-76, 93-96, 103.

⁹ See *id.*, ¶¶ 33-34, 103-108.

In addition, plaintiff's civil conspiracy claim must be arbitrated since it is predicated upon both of the other Tort Claims and is inseparable from them.¹⁰ Furthermore, since the facts alleged in the Complaint make clear that the Tort Claims must be arbitrated, plaintiff's request for a declaratory judgment that such claims are not arbitrable cannot stand.

Normally, the court would order the parties to proceed with arbitration and would stay this action pending the outcome of such arbitration.¹¹ However, in this case, the parties have already submitted the Tort Claims to arbitration, and they were dismissed by the arbitrator. It would be improper and wasteful to order the parties to re-arbitrate such claims.¹²

In addition to being arbitrable (and previously arbitrated), plaintiff's Tort Claims in this action are subject to dismissal under the gist of the action doctrine.

The "gist of the action" doctrine operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims. . . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. . . . In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts. . . . [T]he doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.

Hart v. Arnold, 884 A.2d 316, 339-340 (Pa. Super. 2005). As set forth above, plaintiff's tortious interference and fraud claims, and the resulting conspiracy claim, arise from the parties'

¹⁰ See McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa. Super. 2000) ("Absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.")

¹¹ See Stern v. Prudential Fin., Inc., 836 A.2d 953, 955, n.1 (Pa. Super. 2003) ("Even if ordering arbitration, the proper method is not to dismiss the civil action but to stay it.")

¹² "A final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court." Restatement (Second) Judgments, § 84 (1982). "If the arbitration award were not treated as the equivalent of a judicial adjudication for purposes of claim preclusion, the obligation to arbitrate would be practically illusory." *Id.*, § 84, Comment b.

Agreement and involve defendant's alleged breaches of duties created and grounded in that Agreement. The Tort Claims are merely a re-casting of the breach of contract claim upon which plaintiff already prevailed at arbitration. Therefore, the duplicative Tort Claims were properly dismissed.

For the foregoing reasons, this court's Order of April 24, 2006, sustaining defendant's Preliminary Objections to plaintiff's Complaint, should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.