

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

PAOLA AMICO, et al.,	:	January Term, 2000
Plaintiffs	:	
	:	No. 1793
v.	:	
	:	Commerce Case Program
RADIUS COMMUNICATIONS,	:	
Defendant	:	Control No. 102450

MEMORANDUM OPINION

Defendant Radius Communications, Inc. (“Radius”) has filed preliminary objections (“Objections”) to the third amended complaint (“Complaint”) of Plaintiffs WOW Enterprises Inc. (“WOW”) and Paola Amico (“Amico”). For the reasons set forth in this Opinion, the Court is issuing a contemporaneous order (“Order”) overruling the Objections.

BACKGROUND

In the summer of 1999, WOW and Amico, its president, entered into a contract (“Contract”) with defendant Radius. Under the Contract, Radius was to broadcast “Cooking with Mamma, Old Worlds Secrets,” a television show featuring Amico (“Show”), on Fridays from 12:00 to 12:30 p.m. The Show was to begin airing on August 23, 1999 and was to continue for fifty-two weeks. Radius represented that more than 1,300,000 households in eighteen zones throughout Philadelphia, Delaware and Southern New Jersey (“Zones”) would be able to view the show.

In addition to agreeing to air the Show, Radius promised the Plaintiffs that it would produce and show several promotional spots (“Spots”). The Spots began airing in late August 1999. However, the Complaint alleges that Radius failed to broadcast as many Spots as it had promised. Moreover, many

of the Spots aired in a technically defective manner, allegedly causing embarrassment to the Plaintiffs and depriving them of the publicity the Spots were designed to create.

The Show first aired on September 10, 2000. However, the Complaint contends that Radius failed to broadcast the first episode or any subsequent episode of the Show in all of the Zones, as required by the Contract. The Plaintiffs also allege numerous other shortcomings on the part of Radius, including failure to correct technical deficiencies, intentional withholding of transmissions and improprieties in airing the Spots. These errors allegedly interfered with the Plaintiffs' merchandising plans and caused actual and potential sponsors of the Show to lose interest and drop their sponsorship of the Show.

The Complaint alleges causes of action for breach of contract, interference with existing and prospective contractual relations, fraud and punitive damages. In response, Radius has filed the Objections, which attack the legal sufficiency of the tort and punitive damages counts.

DISCUSSION

The Objections asserting the invalidity of Count V - Punitive Damages are sustained. The remaining Objections are without merit and are overruled.

When a court is presented with preliminary objections based on legal insufficiency,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

I. Legal Sufficiency of Tort Claims¹

To be legally sufficient, a successful claim for intentional interference with contractual relations, whether existing or prospective, must allege the following:

- (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 a privilege or justification on the part of the defendant; and
- (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998) (citation omitted). The elements of a cause of action for fraud are:

- (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.

Gruenwald v. Advanced Computer Applications, Inc., 730 A.2d 1004, 1014 (Pa. Super. Ct. 1999) (citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994)).

Radius contends that the gist of the action and economic loss doctrines preclude the Plaintiffs from bringing an action in tort and that the Complaint fails to allege an intent to interfere with contractual relations. As a result, they claim, the Plaintiffs' claims for fraud and intentional interference are legally insufficient.

¹ In raising the Objections, Radius does not argue that the parol evidence rule bars consideration of the misrepresentations alleged in the Complaint. As a result, the Court must examine the alleged misrepresentations and cannot regard them as being integrated into the Contract. See LeDonne v. Kessler, 256 Pa. Super. 280, 296 n.11, 389 A.2d 1123, 1132 n.11 (1978) (refusing to address issue of parol evidence sua sponte).

A. Allegations of Intent

Radius first asserts that the Complaint does not allege intent, as required for an intentional interference claim. However, the Complaint alleges Radius acted intentionally. Complaint at ¶¶ 35, 37, 44. Thus, the Objections cannot be sustained on this ground.

B. Gist of the Action

The Pennsylvania Superior Court has described the gist of the action doctrine as follows:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally, . . . the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995) (citing Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)).²

Here, the Complaint alleges improper conduct independent of the Contract. By failing to broadcast the Show properly, Radius intentionally interfered with the Plaintiffs' existing and potential sponsorship agreements. Complaint at ¶ 35. The fact that Radius's alleged actions were in violation of

² The Plaintiffs assert that a cause of action in tort arising from a breach of contract is appropriate where "there was an improper performance of a contractual obligation (misfeasance) rather than the mere failure to perform (nonfeasance)." Raab v. Keystone Ins. Co., 271 Pa. Super. 185, 187-88, 412 A.2d 638, 639 (1979). However, the rule cited by the Plaintiffs is no longer valid, as recognized by several courts. See Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co., 963 F. Supp. 452, 454 (M.D. Pa. 1997) ("Raab's approach . . . has been expressly rejected by the [Pennsylvania] Superior Court"); The Flynn Co. v. Cytometrics, Inc., June 2000, No. 2102, slip op. at 8 n.7 (C.P. Phila. Nov. 17, 2000) (Sheppard, J.) (noting repudiation of the misfeasance-nonfeasance test) (opinion available at <http://courts.phila.gov/cptcvcomp.htm>). Indeed, the Phico Insurance Co. court cites the misfeasance-nonfeasance test to highlight its inadequacy and goes on to adopt the position set forth supra.

the Contract is irrelevant: when a party purposefully brings about the demise of the existing or prospective contract of a complainant, the fact that its actions may give rise to additional claims is of no import.

In addition, the Contract does not appear to cover the quality of the Show's broadcast or Radius's promise to produce the Spots. Thus, the alleged inferior quality of both the Spots and the broadcasts gives rise to a fraud action unrelated to the Contract, and the Objections based on the gist of the action doctrine are without merit.

C. Economic Loss Doctrine

Radius also claims that the economic loss doctrine bars the Plaintiffs' intentional interference and fraud claims. The purpose of the economic loss doctrine, as adopted in Pennsylvania, is "maintaining the separate spheres of the law of contract and tort." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989). The Commonwealth's version of the doctrine precludes recovery for economic losses in a negligence action where the plaintiff has suffered no physical or property damage. Spivack v. Berks Ridge Corp., 402 Pa. Super. 73, 78, 586 A.2d 402, 405 (1991) ("economic losses may not be recovered in tort (negligence) absent physical injury or property damage").³

³ Originally, the economic loss doctrine applied solely to strict liability torts but has gradually been extended to negligence claims and, by some courts, to intentional torts as well. See Steven C. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, Bucking the "Trend": The Uniform Commercial Code, The Economic Loss Doctrine and Common Law Causes of Action for Fraud and Misrepresentation, 84 Iowa L. Rev. 875, 885-891 (1999) (tracing the history of the economic loss doctrine nationwide).

In Aikens v. Baltimore & Ohio Railroad Co., 348 Pa. Super. 17, 501 A.2d 277 (1985), the Pennsylvania Superior Court held that the economic loss doctrine barred recovery based on tortious interference with contract or economic advantage under a negligence theory. In contrast, it held that “[a] cause of action exists . . . if the tortious interference was intentional.” 348 Pa. Super. at 20, 501 A.2d at 278. As mentioned supra, the Complaint alleges that Radius’s interference with the Plaintiffs’ contractual relations was intentional. Consequently, the economic loss doctrine does not bar the Plaintiffs’ claims for intentional interference.

Recently, the Court examined the application of the economic loss doctrine to fraudulent misrepresentation claims. In First Republic Bank v. Brand, August 2000, No. 147 (C.P. Phila. Dec. 19, 2000) (Herron, J.),⁴ the Court noted the absence of Pennsylvania case law on the subject and the conflicting decisions in Pennsylvania federal courts. For public policy and other reasons set forth in detail in the opinion, the Court ultimately concluded that the economic loss doctrine did not bar fraudulent misrepresentation claims “if the representation at issue is intentionally false.” Slip op. at 13 (quoting North Am. Roofing & Sheet Metal Co. v. Building & Constr. Trades Council, No. Civ. A. 99-2050, 2000 WL 230214, at *7 (E.D. Pa. Feb. 29, 2000)).⁵

⁴ Opinion available at <http://courts.phila.gov/cptcvcomp.htm>.

⁵ In reaching its conclusion, the Court relied on All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862 (7th Cir. 1999); KNK Medical-Dental Specialties, Ltd. v. Tamex Corp., No. Civ. A. 99-3409, 2000 WL 1470665 (E.D. Pa. Sept. 28, 2000); Sunquest Info. Sys. v. Dean Witter Reynolds, 40 F. Supp. 2d 644 (W.D. Pa. 1999); Budgetel Inns, Inc. v. Micros Sys., Inc., 34 F. Supp. 2d 720 (E.D. Wis. 1999); Stoughton Trailers, Inc. v. Henkel Corp., 965 F. Supp. 1227 (W.D. Wis. 1997); Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269 (M.D. Pa. 1990); Comptech Int’l, Inc. v. Milam Commerce Park, Ltd., 735 So. 2d 1219 (Fla. 2000); R. Joseph Barton, Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims, 41 Wm. & Mary L. Rev. 1789 (2000); Tourek, Boyd & Schoenwetter, 84 Iowa L. Rev. 875.

The Court believes that the holding in First Republic Bank applies to claims for fraud as well. First, applying the economic loss doctrine to fraud claims but not to fraudulent misrepresentation claims could create legal inconsistencies, as “the elements of fraud and fraudulent misrepresentation are essentially identical.” Smith v. The Windsor Group, 750 A.2d 304, 307 (Pa. Super. Ct. 2000). In addition, the same public policy reasons are relevant for causes of action for fraud: a party making an intentional misrepresentation is in a better position to assess the true risks associated with a contract and therefore should bear the risk of liability for a fraud claim. Moreover, including prophylactic anti-fraud provisions in contracts would undermine the contracting parties’ relationship from the start and would increase transactional costs. For these reasons, the economic loss doctrine does not bar common law fraud claims where the misrepresentation is intentionally false.

The Complaint alleges that Radius’s misrepresentations were intentional, Complaint at ¶¶ 49, 50, precluding the application of the economic loss doctrine to the Plaintiffs’ fraud claim. As a result, the Complaint presents complete counts for intentional interference and fraud, and the Objections asserting legal insufficiency are overruled.

II. Legal Sufficiency of Punitive Damages Claim

Under Pennsylvania law, “[a] request for punitive damages does not constitute a cause of action in an[d] of itself.” Nix v. Temple Univ. of the Commw. Sys. of Higher Educ., 408 Pa. Super. 369, 380, 596 A.2d 1132, 1138 (1991). See also Holl & Assocs. v. 1515 Market St. Assocs., May 2000, No. 1964, slip op. at 5-6 (C.P. Phila. Aug. 10, 2000) (Herron, J.) (“[a] request for punitive damages

cannot stand as an independent cause of action”).⁶ Rather, such a request should be made in a clause requesting relief for a viable cause of action that permits the recovery of punitive damages. As a result, the Objections to the Plaintiffs’ cause of action for punitive damages are sustained, and Count V is stricken.⁷

CONCLUSION

The Objections to Counts II, III and IV are overruled, while the Objections challenging the Plaintiffs’ claim for punitive damages are sustained. The Plaintiffs may file a fourth amended complaint within twenty days of this Opinion.

BY THE COURT:

JOHN W. HERRON, J.

Dated: January 9, 2001

⁶ Opinion available at <http://courts.phila.gov/cptcvcomp.htm>.

⁷ While punitive damages are not permitted in a breach of contract action, Johnson v. Hyundai Motor Am., 698 A.2d 631, 639 (Pa. Super. Ct. 1997), such damages are permitted for intentional interference and fraud claims where the defendant acted with malice. Pittsburgh Live, Inc. v. Servov, 419 Pa. Super. 423, 429, 615 A.2d 438, 442 (1992) (fraud); Golumb v. Korus, 261 Pa. Super. 344, 347, 396 A.2d 430, 431 (1978) (intentional interference). Count V asserts that Radius’s actions were malicious. Complaint at ¶ 55. Assuming this assertion is integrated into Counts II, III and IV, the Plaintiffs may legitimately request punitive damages for those counts.

In addition, the requests for relief following the counts for intentional interference with prospective contractual relations and common law fraud include a demand for punitive damages. However, the request for relief following Count II does not. Consequently, the Plaintiffs are granted leave to amend the Complaint to insert a request for punitive damages for Count II and to integrate allegations of malice where appropriate.

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RADIUS COMMUNICATIONS,	:	
Defendant	:	Control No. 102450

ORDER

AND NOW, this 9th day of January, 2001, upon consideration of the Preliminary Objections of Defendant Radius Communications to the Third Amended Complaint of Plaintiffs Paola Amico and WOW Enterprises, Inc. and the Plaintiffs' response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objections to Count V - Punitive Damages are SUSTAINED and Count V is STRICKEN;
2. The remaining Preliminary Objections are OVERRULED; and
3. The Plaintiffs may file a fourth amended complaint within twenty days of this Order.
4. If the Plaintiffs do not file a fourth amended complaint in accordance with Paragraph Three of this Order, the Defendant is directed to file an answer to the Plaintiffs' Third Amended Complaint within forty days of this Order.

BY THE COURT:

JOHN W. HERRON, J.