

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

EGW PARTNERS, L.P.,
Plaintiff

: March Term, 2001

v.

: No. 0336

PRUDENTIAL INSURANCE COMPANY OF AMERICA
and PRUDENTIAL SECURITIES, INC.
Defendants

: Commerce Program

: Control No. 022411

O R D E R

AND NOW, this 28th day of March 2003, upon consideration of plaintiff's Motion for Reconsideration of Summary Judgment as to the Tortious Interference Count, defendants' response in opposition, the respective memoranda, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that the Motion for Reconsideration is **Denied**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. March 28, 2003

Plaintiff, EGW Partners, L.P. has filed this Motion for Reconsideration of this court’s Order granting Summary Judgment as to the Tortious Interference Count. For the reasons discussed, that Motion is **denied**.

BACKGROUND¹

In the spring of 2000, EGW Partners, L.P. (“EGW”) and Prudential Securities, Inc. (“PSI”) discussed creating the “Atlas Fund,” to “originate and manage a portfolio of high-yield commercial real estate loans and preferred equity investments.” Opp. Sum. Judg. Exs. 1, 3. In June 2000, EGW and PSI

¹The facts and chronology here presented are basically a reiteration of those set forth in the prior Opinion. They are presented anew merely to assist a reader not intimately familiar with the history of this case.

signed a letter of intent outlining the structure of the Atlas Fund. Opp. Sum. Judg. Ex. 35. On June 21, 2000, PSI's Commitment Committee approved the general terms of the deal, which included, *inter alia*, that PSI would prepare investment documents, use best efforts to place the Atlas Fund interests, and execute a subscription commitment for \$5 million. Opp. Sum. Judg. Exs. 4, 5.

During the summer of 2000, Arthur Ryan, ("Ryan") Chairman of the Board of PSI, as well as CEO and Chairman of the Board of Prudential Insurance Co. ("PI"), discussed restructuring PSI. Opp. Sum. Judg. Ex. 49 at 30-34. At a July 31, 2000 meeting Ryan discussed, with John Strangfeld ("Strangfeld") and Bernard Winograd of PI, changing PSI's private equity strategy. Opp. Sum. Judg. Ex. 55 at 18-19. At this meeting, Ryan also indicated that he and others at PI had held discussions with Lehman Brothers to consider ways to change the company's investment banking strategy. *Id.* Within a few days of this meeting, draft memoranda were circulated detailing various restructuring proposals for PSI. Opp. Sum. Judg. Exs. 27, 28. The memoranda specifically detailed PI's plans to "reorient PSI from issuer focus to investor focus," with possible solutions including the elimination of PSI's investment banking group (the "Restructuring Memoranda"). *Id.* The Restructuring Memoranda set forth the strategy that was ultimately implemented by Ryan. Opp. Sum. Judg. Ex. 55 at 20-21.

On August 16, 2000, PSI signed an engagement letter with EGW (the "Engagement Letter"). Opp. Sum. Judg. Ex. 5. It is undisputed that the parties to the Engagement Letter did not have knowledge of the plans to restructure PSI when they entered into the agreement. It is also undisputed that Ryan did not know of the Engagement Letter until after the letter was signed.

On September 12, 2000, nearly one month after PSI signed the Engagement Letter, plans to restructure PSI, including plans to eliminate PSI's investment banking and capital markets group, were

presented to PI's Board of Directors. Opp. Sum. Judg. Ex. 30. At this meeting, Ryan also revealed plans to replace PSI's CEO, Hardwick Simmons, with Strangfeld. Opp. Sum. Judg. Ex. 49 at 53-54. On October 6, 2000, in a memorandum to PI's Board of Directors, Ryan formally announced Strangfeld's appointment as CEO of PSI. Opp. Sum. Judg. Ex. 22. It is alleged that Simmons was replaced as CEO, in part, because Strangfeld agreed with Ryan's plans to restructure PSI. Opp. Sum. Judg. at 7-9.

While Ryan and PI's Board of Directors discussed restructuring PSI, PSI's bankers continued to work with EGW to prepare the Private Placement Memorandum for the Atlas Fund (the "PPM"). On October 26, 2000 final drafts of the PPM were circulated for review by EGW and PSI's team, in advance of the scheduled October 30, 2000 presentation to PSI's sales force. Opp. Sum. Judg. Ex. 10, 14. During this same period, PI became aware of PSI's commitment to the Atlas Fund. Between October 17-26, 2000, a series of e-mails circulated indicating that PI was unaware of the existence of the Atlas Fund and that PI questioned whether PSI should be engaged in real estate investment banking activity. Opp. Sum. Judg. Exs. 6, 8, 9, 11. On October 30, 2000, PSI eliminated its entire institutional fixed income sales force. Opp. Sum. Judg. Ex. 14.

During November and December EGW had numerous conversations with PSI concerning the future of the Atlas Fund. Opp. Sum. Judg. Ex. 39. In December, PSI stated that it would continue to work with EGW to promote the Atlas Fund. Id. It is alleged that as late as December PSI restated its commitment to invest \$5 million in the Atlas Fund, and hire the Chadwick Saylor firm to replace PSI's sales force. Id. On or around December 18, 2000, PSI terminated a significant portion of its remaining investment bankers, including the bankers working on the Atlas Fund. Opp. Sum. Judg. Ex. 44 at 90-96.

In January 2001, after a series of alleged representations and misrepresentations, and at the end of the six-month lock out period, EGW terminated its agreement with PSI.

DISCUSSION

This Court's Original Ruling Should Stand -- Plaintiff's Tortious Interference Count Fails Because Plaintiff Cannot Overcome Defendant's Economic Interest Defense.

This case is governed by New York law. Under New York law, a claim for tortious interference requires proof of the following elements: 1) the existence of a valid contract between plaintiff and a third party, 2) the defendant's knowledge of the contract, 3) the defendant's intentional interference resulting in a breach of the contract, and 4) damages. Foster v. Churchill, 665 N.E.2d 153, 156 (N.Y. 1996). While plaintiff has alleged facts, which if true, satisfy the four required elements, plaintiff has failed to present sufficient facts to overcome defendant's economic interest defense.

Under New York law, a defendant may be privileged to interfere with a contract if it acts in good faith to protect a legitimate economic interest. Id. However, a defendant may be liable, despite claims of an economic interest, if the plaintiff can show that defendant acted with malice, or by fraudulent or illegal means. Id. (citing Felsen v. Sol Cafe Mfg. Corp., 249 N.E.2d 459 (N.Y. 1969)). Here, plaintiff has failed to present sufficient facts to demonstrate that the defendant acted with malice or employed illegal means to protect its economic interest.

Plaintiff urges that the court erred in granting summary judgment, on the issue whether defendant acted with malice or employed illegal means to protect an economic interest. Specifically, plaintiff argues that the question whether defendant acted to further its economic interest should be determined by the trier of fact.

Following the seminal case of Felson v. Sol Cafe Mfg. Corp., 249 N.E.2d 459, 124 N.Y.2d 682 (1969), and its progeny, this court determined that plaintiff's claim should be dismissed. In Felson, the New York Court of Appeals held that a party may be privileged to interfere with the contract of another when that party has a legitimate economic interest in the other party's business. Id. at 687. That court found that the defendant "had an existing economic interest in the affairs of Sol Cafe which it was privileged to attempt to protect when it 'interfered' with plaintiff's contract of employment with Sol Cafe." Id. Furthermore, finding that the plaintiff presented no evidence that the defendant's "interference" was motivated by malice, the court held that the claim should have been dismissed. Id.

Here, the defendant had an "economic interest" in its subsidiary's activities. Plaintiff admits that defendant's restructuring of its subsidiary was strategically motivated to improve its return on equity, gain further control of the subsidiary's operations, and improve its prospects for a successful initial public offering. See Def. Mot. Sum. Judg. Ex. B. at 13 n.1, 18. Given the economic interest of PI in the affairs of its subsidiary, to prevail here plaintiff must show that PI acted with malice or used illegal means to "interfere" with the contract.

Plaintiff argues that this court ignored plaintiff's evidence of "malice." But, plaintiff's alleged "evidence" of malice demonstrates that defendant, PI, was "surprised" and "concerned" upon learning about its subsidiary's activities with EGW. This court suggests that plaintiff's allegation that defendant took measures to "specifically thwart" the launch of plaintiff's Atlas Fund does support the inference that defendant acted maliciously. Plaintiff's "evidence" of malicious intent rests on the following actions: 1) after eliminating the subsidiary's fixed income sales force, defendants made no effort to use other sales forces to support the Atlas Fund, 2) defendant, PI, refused to assist its subsidiary in launching the Atlas Fund, 3)

defendants chose not to invest \$5,000,000 in the Atlas Fund, and 4) defendant, PI, stated that it wanted to eliminate the use of its balance sheet to support real estate banking activities. Plf. Mot. Recons. Sum. Judg. at 8-9. This court is not persuaded that these allegations support a finding that the defendant acted with malice in its conduct vis-a-vis plaintiff. To the contrary once PI was informed about the existence of plaintiff's contract, its activities were consistent with defendant's ongoing restructuring activities. In the absence of evidence of malice or illegal activity on the part of defendant, PI, this court's grant of summary judgment in favor of defendant as to plaintiff's Tortious Interference Count was proper. Accordingly, Count IV of plaintiff's Complaint is dismissed.

CONCLUSION

For the reasons stated, this court finds that defendant had an economic interest in the affairs of its subsidiary, and that plaintiff has failed to present sufficient evidence of malice or illegal activity on the part of defendant. Accordingly, relying on its original Opinion and all matters of record, this court denies plaintiff's Motion for Reconsideration of Summary Judgment as to the Tortious Interference Count. A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.