

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

TUTORBOTS, INC.,	:	JULY TERM, 2002
	:	
Plaintiffs,	:	No. 00855
	:	
v.	:	COMMERCE PROGRAM
	:	
EINSTEIN ACADEMY CHARTER	:	Control No. 030700
SCHOOL,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of July, 2005, upon consideration of defendant’s Motion for Summary Judgment, plaintiff’s response thereto, the briefs in support and opposition and all other matters of record, and in accordance with the Opinion issued simultaneously herewith, it is hereby **ORDERED** that said Motion is **DENIED**.

BY THE COURT:

C. DARNELL JONES, II, J.

Tutorbots² and the other defendants, who were the principals of Tutorbots, agreed to cease using Einstein's servicemarks and agreed to return Einstein's materials. However, the remaining claims of the Complaint in the Federal Action, including Einstein's claim for failure to donate net profits in accordance with the Contract, were dismissed without prejudice.

In the Federal Action, Tutorbots was required to interpose as a counterclaim any claim which, at the time of serving the Answer, Tutorbots had against Einstein, if it arose out of the transaction or occurrence that was the subject matter of Einstein's claims. Fed. R. Civ. P. 13(a). "A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, *after the rendition of judgment in that action*, from maintaining an action on the claim if . . . the counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court." Restatement (Second) Judgments § 22(2)(a) (1982) (emphasis added).

If Einstein had proceeded to judgment on its claim against Tutorbots for breach of the Contract, then the court would be inclined to find that Tutorbots is precluded from now asserting its claim against Einstein for breach of the Contract because the claim should have been asserted in the Federal Action as a compulsory counterclaim.³ However, since the resolution of the Federal Action left Einstein free to bring its claim for breach of the Contract in another court and another action, Tutorbots is likewise able to do so.

² Although the court had previously entered a default judgment against Tutorbots, it still permitted Tutorbots to participate in the subsequent settlement.

³ Since both parties' claims involve breaches of the same Contract, there is a logical relationship between them that argues strongly for them being tried together. See Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc., 292 F.3d 384, 389-390 (3d Cir., 2002). However, the same reasoning does not necessarily apply to Tutorbots' claim against Einstein based upon the separate promissory notes.

CONCLUSION

For all the foregoing reasons, The Einstein Academy Charter School's Motion for Summary Judgment is denied.

BY THE COURT:

C. DARNELL JONES, II, J.