

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

FIBONACCI GROUP, INC.,	:	JANUARY TERM 2005
	:	
Plaintiff	:	No. 001399
	:	
v.	:	Commerce Program
	:	
FINKELSTEIN & PARTNERS, LLP,	:	Control Nos. 030086/
ANDREW FINKELSTEIN,	:	031568
KEITH ALTMAN,	:	
THOMAS SCHRACK,	:	
KELLY CASEY and	:	
ARI KRESCH	:	
	:	
Defendants	:	

ORDER

AND NOW, this 30th day of June 2005, upon consideration the Preliminary Objections of Defendants Finkelstein & Partners, LLP, Andrew Finkelstein, Keith Altman, Kelly Casey and Ari Kresch (Control No. 030086) and the Preliminary Objections of Thomas Schrack (Control No. 031568), plaintiff's response in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion filed or record, it hereby is **ORDERED** and **DECREED** that

1. The Preliminary Objections of Defendants Finkelstein & Partners, Andrew Finkelstein, Keith Altman, Kelly Casey and Ari Kresch are **Overruled**.
2. The Preliminary Objections of Defendant Thomas Schrack pertaining to Counts VI (trade libel and defamation) and X (negligence) are **Sustained**. All other Preliminary Objections are **Overruled**.

Defendants are directed to answer the Complaint within twenty (20) days from the date of this Order.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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	:	
Defendants	:	

MEMORANDUM OPINION

ABRAMSON, J......

Presently before the court are the Preliminary Objections of defendants Finkelstein & Partners, LLP, Andrew Finkelstein, Keith Altman, Kelly Casey and Ari Kresch (Control No. 030086) and the Preliminary Objections of defendant Thomas Schrack (Control No. 031568). For the reasons discussed, defendants’ Preliminary Objections are Sustained in part and Overruled in part.

BACKGROUND¹

In 1999, Keith Altman founded Fibonacci Systems (“plaintiff”). Compl., ¶ 18. Plaintiff was a Pennsylvania corporation providing consulting services for trial attorneys in drug class action cases, and had developed software known as “Mind Set” to provide technical support for such cases. *Id.* at ¶¶ 9, 18, 19, 24, 25, 33. Plaintiff employed Altman, Kelly Casey and Thomas

¹ The facts set forth in the Background section of this Memorandum Opinion are taken directly from plaintiff’s complaint. All material facts set forth in plaintiff’s complaint are considered to be true only for purposes of ruling on demurrers. *Jackson v. Garland*, 424 Pa. Super. 378, 381, 622 A.2d 969, 970 (1993).

Schrack, among others. *Id.* at ¶¶ 5-7, 21, 22. Altman had a 30% ownership share while Casey and Schrack each owned a 3% partnership share. *Id.* at ¶ 21. Altman, Casey, Schrack and all employees were members of plaintiff's Board of Directors. *Id.* Altman served as plaintiff's Vice President for Technology and lead consultant. *Id.* at ¶¶ 21, 22, 42. Casey was plaintiff's accountant, and had an office in California. *Id.* at ¶ 43. Schrack performed services for plaintiff in Philadelphia. *Id.* at ¶ 44. Finkelstein & Partners ("the Firm"), Finkelstein, Casey and Kresch are all domiciled outside of Pennsylvania. *Id.* at ¶¶ 3, 4, 8.

At some time prior to July 2003 (unknown to plaintiff), Altman, Casey and Schrack entered into an agreement with Finkelstein, Finkelstein & Partners and Kresch to divert all of plaintiff's business and assets to the Firm. Compl., ¶¶ 10-14, 46-49. In exchange for diverting plaintiff's business to the Firm, it was agreed that Altman, Casey and Schrack would become employees of the Firm while remaining employees of Fibonacci. *Id.* at ¶ 50. Altman, Casey and Schrack then took steps to transfer all of plaintiff's books and records to Casey's California office and represented to plaintiff that the transfer was for plaintiff's benefit. *Id.* at ¶¶ 50, 51.

In or about July 2003, the defendants all prepared and reviewed drafts of a letter to plaintiff's clients stating that plaintiff was merging with the Firm. *Id.* at ¶¶ 52(a), (b). In preparation for a professional association's conference, Finkelstein, Kresch, Altman, Casey and Schrack discussed a public relations piece to be used during the conference, to represent the merger to potential customers. *Id.* at ¶¶ 52(d), (e), (g), (h). Casey and Schrack obtained letterhead from the Firm to print out the piece for use during the conference. *Id.* at ¶ 52(e). Altman, Casey and Schrack used plaintiff's assets during their employment by both plaintiff and the Firm to pay for expenses incurred either while working for the Firm, or while representing the merger between the firm and plaintiff. *Id.* at ¶¶ 53, 54.

Altman, Casey and Schrack resigned from plaintiff's Board of Directors on or about July 28, 2003. Compl., ¶¶ 13, 56. After Altman, Casey and Schrack resigned, Casey wrote Altman a payroll check to which he was not entitled for \$4,100 and continued to use plaintiff's account to ship materials to the Firm. *Id.* at ¶¶ 57(a), (b), (c). After his resignation, Altman continued to use plaintiff's credit card into about August 2003 and maintained plaintiff's internet account. *Id.* at ¶ 57(e). Casey contacted the telephone company and, stating that she was plaintiff's employee, transferred the telephone account to the Firm so that plaintiff's customers' calls would reach the Firm instead of plaintiff. *Id.* at ¶ 57(f). After the resignations of Altman, Casey and Schrack, plaintiff asked them to return property in the employees' possession that belonged to plaintiff. *Id.* at ¶ 58. Some property has not been returned. *Id.*

Plaintiff filed the instant suit against defendants alleging claims for intentional interference with economical and business relationships (Count I); unfair competition (Count II); conversion (Count III); fraud and misrepresentation (Count IV); unjust enrichment (Count V); trade, libel and defamation (Count VI); conspiracy (Count VII); breach of fiduciary duties (Count VIII); aiding and abetting breach of fiduciary duties (Count IX); and negligence (Count X). Defendants have now filed preliminary objections to the Complaint.

DISCUSSION

I. THE PRELIMINARY OBJECTIONS OF DEFENDANTS FINKELSTEIN & PARTNERS, LLP, ANDREW FINKELSTEIN, KEITH ALTMAN, KELLY CASEY AND ARI KRESCH (CONTROL NO. 030086).

Defendants Finkelstein, the Firm, Altman, Casey and Kresch (collectively, "defendants") maintain that plaintiff's Complaint against them should be dismissed because 1) this court lacks personal jurisdiction over defendants; 2) plaintiff's claims of recklessness, willfulness, wantonness and malice are legally insufficient; and 3) plaintiff failed to assert separate causes of

action as to each defendant in separate counts. “In ruling on a preliminary objection, the court must consider the evidence in the light most favorable to the non-moving party.” *Maleski by Taylor v. DP Realty Trust*, 653 A.2d 54, 61 (Pa. Commw. Ct. 1994), citing *Derman v. Wilair Svcs., Inc.*, 404 Pa. Super. 136, 141, 590 A.2d 317, 319-20 (1991), *application for allowance of appeal denied*, 529 Pa. 621, 600 A.2d 537 (1991). For the reasons discussed below, defendants’ preliminary objections are overruled.

A. This Court Has Personal Jurisdiction Over Defendants.²

A trial court may exercise personal jurisdiction over a non-resident defendant if either general or specific jurisdiction is found. *Gen. Motors Acceptance Corp. v. Keller*, 737 A.2d 279, 281 (Pa. Super. Ct. 1999); *Derman*, 404 Pa. Super. at 141, 590 A.2d at 319-20. General jurisdiction is based upon a defendant’s general activities within a forum as evidenced by continuous and systematic contacts within the state. *Fid. Leasing Inc. v. Limestone County Bd. of Educ.*, 758 A.2d 1207, 1210 (Pa. Super. Ct. 2000). Specific jurisdiction is narrower in scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. *Id.* Regardless of whether general or specific jurisdiction is found to exist, the propriety of submitting a defendant to Pennsylvania law “must be tested against the Pennsylvania long arm statute, 42 Pa. C.S.A. § 5322, and the Due Process Clause of the Fourteenth Amendment.” *Mar-Eco, Inc. v. T&R and Sons Towing and Recovery*, 837 A.2d 512, 515 (Pa. Super. Ct. 2003).

The test for exercising general in *personam* jurisdiction over individuals and partnerships is found at 42 Pa. C.S.A. § 5301. As to partnerships, this section provides that a court may exercise general jurisdiction over partnerships when they (i) are formed under or qualify as a foreign entity under Pennsylvania law; (ii) consent to suit in Pennsylvania; or (iii) carry on continuous and systematic business in Pennsylvania. 42 Pa. C.S.A. § 5301(a)(3). General

² Defendants do not challenge this court’s personal jurisdiction over defendant Keith Altman.

jurisdiction may be exercised over a nonresident individual defendant when (i) he is present in Pennsylvania when process is served; (ii) he is domiciled in Pennsylvania when process is served; or (iii) he consents to suit. 42 Pa. C.S.A. § 5301(a)(1); *Am. Bus. Fin. Svcs., Inc. v. First Union Nat'l Bank*, 2002 Phila. Ct. Com. Pl. LEXIS 93, *11 (March 5, 2002) (Herron, J.).

Here, it is clear from the record and indeed plaintiff concedes that general jurisdiction over defendants Finkelstein, Kresch and the Firm does not exist. Plaintiff's Memorandum in Opposition to Defendants' Preliminary Objection p. 10. The court also concludes that the same is true with respect to defendant Casey. Casey, an individual, was not served in Pennsylvania, was not domiciled in Pennsylvania, nor is there any allegation that she consented to suit here. As such, general personal jurisdiction does not exist over Casey.

This, however, does not end the court's inquiry, for now the court must determine if it can exercise specific *in personam* jurisdiction over these defendants. A Pennsylvania tribunal may exercise specific jurisdiction over a person when that person acts directly or through its agents, causing harm or tortious injury by an act or omission inside this Commonwealth, or causes harm or tortious injury inside this Commonwealth by an act or omission occurring outside this Commonwealth. *See* 42 Pa. C.S.A. §§ 5322(a)(3), (4). The rule allows Pennsylvania tribunals to gain specific jurisdiction "extend[ing] to all persons who are not within the scope of section 5301 . . . to the fullest extent allowed under the Constitution of the United States and [the jurisdiction] may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. C.S.A. § 5322(b).

The court finds that it has specific jurisdiction over defendants. The Complaint alleges that defendants reached out from their home states into Pennsylvania with the purpose of harming plaintiff. Specifically, the Complaint alleges that the Firm, Finkelstein and Kresch

agreed to provide Altman, Casey and Schrack, plaintiff's employees, assistance and money to support the conspiracy to divert plaintiff's assets located in Philadelphia to the Firm in New York (*Id.* at ¶ 50); that all defendants conspired to divert plaintiff's business in Pennsylvania to the Firm in New York by creating a letter announcing a merger between plaintiff and the Firm (*Id.* at ¶ 52); and that as a result of the actions of all defendants, plaintiff's business has been destroyed because defendants "stole its name and reputation and used them for its own business..." causing plaintiff to lose its operating business, equipment, profits and investments. (*Id.* at ¶¶ 63-66). The Firm, Finkelstein and Kresch, while outside Pennsylvania, acted through their agents Altman, Shrack and Casey, who concurrently were agents of the plaintiff.

As for Casey, a shareholder and employee of plaintiff responsible for the company's accounting, specific jurisdiction also exists. The Complaint contains sufficient allegations that Casey purposefully and specifically directed her activities to plaintiff, a Pennsylvania corporation with its principal place of business in Philadelphia, to allegedly destroy plaintiff and to divert its current and prospective business and assets to the Firm (Compl., ¶¶ 50(a), (c), 51(a), (b), (c), (f), 54(a), (b), (c), (f), 57(b), (c), (f)). Such conduct allegedly included directing that all books and records of the company be sent to Fibonacci's office in California which was manned and supervised by Casey (*Id.* at ¶51(b)), taking steps to transfer all books and records of the company to the office in California so that they would be under her direct control and possession (*Id.* at 51(c)); preparing, reviewing and exchanging drafts of letters to Fibonacci clients alleging a merger between Fibonacci and the Firm (*Id.* at ¶ 52); using plaintiff's assets in Pennsylvania to do business for the Firm in New York (*Id.* at ¶ 54); and continuing to use plaintiff's monetary assets and chattels gathered in Pennsylvania to defendants advantage outside the Commonwealth, even after she resigned (*Id.* at ¶ 57).

Taking these facts as true (*see Maleski*, 653 A.2d at 61), the court finds that defendants not only purposefully availed themselves of Pennsylvania laws but also could have reasonably anticipated being haled into court here. Having found “minimum contacts” sufficient, the court also finds that jurisdiction in Pennsylvania satisfies the traditional notions of fair play and substantial justice.³ Pennsylvania has an interest in protecting plaintiff, a Pennsylvania partnership, from harm caused by out-of-state entities. Furthermore, suit is most convenient in Pennsylvania since defendants Altman and Schrack do not contest Pennsylvania jurisdiction and plaintiff has essentially the same claims against all defendants. Hence, it is most efficient for trial to be conducted here. The burden upon defendants will not be wholly unfair even though some of them are located far away in light of Pennsylvania’s interest in protecting partnerships within its Commonwealth from tortious conduct by out-of-state entities. Accordingly, defendants’ preliminary objection as to jurisdiction is overruled.

B. Plaintiff’s Claims of Recklessness, Willfulness, Wantonness and Malice Are Sufficient to Merit Consideration of Punitive Damages.

Plaintiff’s Complaint purports to state a claim for punitive damages. In determining whether punitive damages are appropriate, Pennsylvania courts have adopted Restatement (Second) of Torts § 908 (1979), which states in part that “punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him or his outrageous conduct and to deter him . . . from similar conduct in the future.” *Id.*; *see also Phillips v. Cricket Lighters*, 852 A.2d 365, 373 (Pa. Super. Ct. 2004). Punitive damages may also be awarded for conduct that is outrageous because of the defendant’s evil motive or reckless

³ In determining whether this requirement has been met, a court should consider a) the burden on defendant, b) the forum state’s interest in adjudicating the matter, c) plaintiff’s interest in obtaining convenient and effective relief, d) the interstate judicial system’s interest in securing the most efficient resolution of controversies, and e) the shared interests of the states in furthering fundamental substantive social policies. *Kubik v. Letteri*, 532 Pa. 10, 17-18, 614 A.2d 1110, 1114 (1992).

indifference to others' rights. Restatement (Second) of Torts § 908(2) (1979). "A reasonable relationship must exist between the nature of the cause of action underlying the compensatory award and the decision to grant punitive damages. . . .punitive damages is only an element of damages." *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 214 (Pa. Super. Ct. 2003); *see also Judge Tech. Svcs., Inc. v. Clancy*, 813 A.2d 879, 888 (Pa. Super. Ct. 2002).

Plaintiff's Complaint alleges that defendants agreed to take steps to destroy plaintiff and divert all of plaintiff's assets, records, customers, and business to the Firm (Compl., ¶¶ 50-54). If proven, said facts may warrant the imposition of punitive damages. Accordingly, defendants' preliminary objection is overruled.

C. Plaintiff Need Not Assert Separate Causes of Action Against Each Defendant in Separate Counts.

Defendants maintain that plaintiff's Complaint should be stricken for failure to assert separate causes of action as to each defendant in separate counts of the Complaint. In support thereof, defendants rely upon Rule 1020(a) of the Pennsylvania Rules of Civil Procedure. That rule requires separate counts for two or more causes of action in a complaint. Pa. R. Civ. P. 1020(a) (West 2005). "Where a plaintiff sues several defendants jointly, alleging liability jointly or in the alternative, separate counts are not required." *See* Pa. R. Civ. P. 1020(a); *Treco, Inc. v. Wolf Invs. Corp.*, 2001 Phila. Ct. Com. Pl. LEXIS 75, *9 (Feb. 15, 2001) (Herron, J.).

Plaintiff alleges that the defendants were jointly and severally liable in each count of the Complaint (*See* Compl., ¶¶ 68-116). Consequently, the allegations against each defendant need not be spelled out individually, and defendants' preliminary objections are overruled.

II. THE PRELIMINARY OBJECTIONS OF DEFENDANT THOMAS SCHRACK (CONTROL NO. 031568).

Defendant Thomas Schrack ("Schrack") filed preliminary objections to plaintiff's

Complaint seeking dismissal of the Complaint in its entirety. Schrack specifically maintains that each of plaintiff's ten claims should be dismissed since 1) plaintiff's claim for intentional interference with economical and business relationships is legally insufficient; 2) plaintiff's claim for unfair competition was inadequate; 3) plaintiff had no valid claim for conversion; 4) plaintiff failed to establish the elements for fraudulent misrepresentation; 5) plaintiff failed to assert a claim for unjust enrichment; 6) plaintiff failed to establish the elements of trade libel and defamation; 7) plaintiff failed to allege facts supporting a claim for conspiracy; 8) plaintiff did not adequately plead a breach of fiduciary duty; 9) plaintiff failed to properly plead a claim for aiding and abetting a breach of fiduciary duty; and 10) plaintiff failed to assert a valid claim for negligence. In addition, Schrack filed objections claiming failure to conform to rule of law and lack of specificity in the pleadings.

In ruling on a preliminary objection, the court must consider the averments in the pleadings in the light most favorable to the non-moving party. *Maleski*, 653 A.2d at 61; *Derman*, 404 Pa. Super. at 141, 590 A.2d at 319-20. All well-pleaded material and factual averments and all inferences reasonably deducible there from are presumed to be true for purposes of reviewing preliminary objections based on legal sufficiency. *Levin v. Gauthier*, 2002 WL 372949, *4 (Pa. Ct. Com. Pl. Jan. 14, 2002) (Sheppard, J.). Where a cause of action would be dismissed by a preliminary objection, a court should only sustain the objections where it is clear from the facts pleaded that the plaintiff will be unable to prove facts legally sufficient to establish its right to relief. *Id.* Any doubt as to a preliminary objection should be resolved against the non-moving party. *Commonwealth v. Percudani*, 844 A.2d 35, 39-40 (Pa. Commw. Ct. 2004). For reasons that follow, this court sustains Schrack's demurrers to plaintiff's claims for trade libel and defamation and negligence, and overrules the remainder of Schrack's demurrers.

A. Schrack's Demurrer to Plaintiff's Claim for Trade Libel and Defamation is Sustained.

Count VI purports to state a claim for trade libel and defamation. A *prima facie* case for defamation requires a plaintiff to plead 1) the defamatory character of the communication; 2) publication of the communication to a third party; 3) that the communication refers to plaintiff; 4) the third party's understanding of the communication's defamatory bent; and 5) injury. *Brown v. Blaine*, 833 A.2d 1166, 1173 n.14 (citing 42 Pa. C.S.A. § 8343). A communication is defamatory if it harms one's reputation so as to deter others from associating with him. *Bell v. Mayview State Hosp.*, 853 A.2d 1058, 1062 (Pa. Super. Ct. 2004); citing *Feldman v. Lafayette Green Condo. Ass'n*, 806 A.2d 497, 500 (Pa. Commw. Ct. 2002). Whether a statement is capable of defamatory construction is an issue of law for a court to decide. *Id.* Libel is a maliciously written publication tending to blacken a person's reputation. *Feldman*, 806 A.2d at 500.

Plaintiff's Complaint fails to allege with specificity that Schrack made any communications to third parties that could be defamatory in character. The Complaint alleges that defendants drafted letters to plaintiff's clients stating that the Firm and plaintiff would merge (Compl., ¶¶ 52(a), (b)), but does not specify any alleged communications that Schrack made during this process that would have blackened plaintiff's reputation or prevented others from associating with plaintiff. Based on the forgoing, this court finds that Schrack's preliminary objection is sustained.

B. Schrack's Demurrer to Plaintiff's Claim for Negligence is Sustained.

Count X purports to state a claim for negligence. The elements of negligence are 1) the existence of a duty requiring an actor to conform to a certain standard of conduct; 2) the defendant's breach of the duty or his failure to conform to the duty; 3) a causal connection

between the breach and resulting injury; and 4) actual harm. *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 586, 812 A.2d 1218, 1222 (2002); *Orner v. Mallick*, 515 Pa. 132, 135, 527 A.2d 521, 523 (1987).

Plaintiff's Complaint alleges that Schrack breached his duty of loyalty, honesty, and good faith (Compl., ¶ 111). However, plaintiff provides no facts in its Complaint above those used to maintain a claim for breach of fiduciary duty due to Schrack's employment by plaintiff.

Plaintiff's allegations that Schrack took steps to serve the Firm while in plaintiff's employ (*Id.* at ¶¶ 49, 50(a), (c)); transferred books and records to the Firm while representing that the transfer was for plaintiff's benefit (*Id.* at ¶¶ 51(b), (c)); was employed simultaneously by plaintiff and the Firm (*Id.* at ¶ 53(a)); and submitted an expense report to plaintiff for travel to the Firm (*Id.* at ¶ 54(f)) are all based on Schrack's fiduciary duties to plaintiff. Count X (negligence) duplicates Count VIII (breach of fiduciary duties). Based on the forgoing, this court finds that Schrack's preliminary objection is sustained as repetitious.

CONCLUSION

For the forgoing reasons, the court sustains in part and overrules in part Defendants' Preliminary Objections as follows:

1. The Preliminary Objections of Defendants Finkelstein & Partners, Andrew Finkelstein, Keith Altman, Kelly Casey and Ari Kresch are **Overruled**.
2. The Preliminary Objections of Defendant Thomas Schrack pertaining to Counts VI (trade libel and defamation) and X (negligence) are **Sustained**. All other Preliminary Objections are **Overruled**.

Defendants are directed to answer the Complaint within twenty (20) days from the date of this Order.

BY THE COURT,

HOWLAND W. ABRAMSON, J

