

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

TRANSWORLD SYSTEMS, INC.	:	March Term, 2010
	:	
f/d/b/a	:	No. 03345
	:	
CREDIT MANAGEMENT SERVICES	:	
	:	
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
BEREAN INSTITUTE, INC.	:	
	:	
and	:	
	:	
BOARD OF DIRECTORS OF BEREAN INSTITUTE, INC.,	:	Control No. 10102467
	:	
and	:	
	:	
JOHN BRAXTON <i>et al.</i>	:	
	:	
<i>Defendants</i>	:	

OPINION

Defendants' Preliminary Objections require this Court to determine whether Plaintiff may maintain the claims of Breach of Contract asserted against the Board of Directors and Board Members of a corporation. The Preliminary Objections also require this Court to determine whether Plaintiff may maintain the claim of Fraud against the Board of Directors and Board Members. For the reasons below, Plaintiff may maintain the claim of Breach of Contract against the Board of Directors, and Board Members. Plaintiff may not maintain the claim of Fraud against the Board of Directors or Board Members.

Background

Plaintiff, TransWorld Systems, Inc. (“TransWorld,”) is a corporation based in the Commonwealth of Virginia. TransWorld is assignee of a contract from Maxwell Consulting Group, LLC (“Maxwell,”) an entity providing management and consultation services to schools. Maxwell, as assignor of the contract, is not a party in this litigation.

Defendant Berean Institute, Inc. (“Berean,”) a Pennsylvania non-profit corporation, operates post-secondary trade schools. Defendant, the Board of Directors of the Berean Institute (“the Board of Directors,”) is composed of several individuals. Individual Defendants John Braxton, Lorraine Poole-Naranjo, Kim Stoudt, Diane Hannah-Wilson, Treena Reid, Ken Washington and James Jones, were members of the Board of Directors of Berean at all times relevant to this litigation.

In the fall of 2007, representatives of Maxwell and Berean met several times to discuss whether Berean should hire Maxwell for consultation services. During a meeting, Maxwell stated that “for its services, Maxwell would enter into an agreement directly with the [Berean] Board, and that therefore the contract for Maxwell’s services would be drafted naming the defendant Board as the client.”¹ Allegedly the chairman of the Board of Berean, Defendant John Braxton (“Braxton,”) acknowledged that the contract would be executed between Maxwell and the Board of Berean, and told Maxwell to “go ahead.”² Maxwell proceeded to draft the contract.

¹ Second Amended Complaint, ¶ 21.

² Second Amended Complaint, ¶ 22.

On January 3, 2008, The parties entered into an Agreement for Consulting Services (the “Agreement.”) Pursuant to the Agreement, Maxwell promised to assess and restructure the operations and finances of Berean, and to seek accreditation for two schools operated by Berean.³ The Agreement was signed on behalf of Berean by Defendant John Braxton, chairman of the Board of Directors of Berean, and by an individual named Stephen Organ, President of The Maxwell Consulting Group, LLC. According to the Second Amended Complaint, Braxton “executed the Agreement ... with the approval and authority” of each member of the Board of Berean named in the action.⁴ The relevant provisions of the Agreement state the following:

Agreement for Consulting Services

Prepared for: The Board of Directors of Berean Institute
Submitted by: The Maxwell Consulting Group. LLC

Controlling Terms and Conditions.

1. **Definitions.** The following terms and conditions (“Terms”) are an integral part of the contract to which they are attached between Maxwell Consulting Group, LLC (“Maxwell”) and the Customer, School or Client (“Client”).⁵

The Second Amended Complaint alleges that Berean breached the Agreement by failing to make payments upon invoices due. The Second Amended Complaint also states that the Members of the Board, knowing that the invoices would not be paid, misrepresented their intention to Maxwell, and induced

³ Agreement for Consulting Services, Exhibit B to the Second Amended Complaint of TransWorld Systems, Inc.

⁴ Second Amended Complaint, ¶ 23.

⁵ Agreement for Consulting Services, Exhibit B to the Second Amended Complaint of TransWorld Systems, Inc.

Maxwell not only to enter into the Agreement, but also induced Maxwell to continue performance after Berean had failed to remit payments due.⁶

On 11 February 2009, Maxwell assigned its rights to the Agreement to TranWorld, Plaintiff herein.⁷ On 18 March 2010, TransWorld commenced the instant action against Berean, its Board of Directors, and all the individually named Board Members. The Second Amended Complaint asserts the claims of Breach of Contract against Berean, Breach of Contract against the Board and its Members, and Fraud against the Board and its Members.

On 18 October 2010, Defendants Braxton, Staudt, and Reid filed Preliminary Objections to the Second Amended Complaint. On 20 October 2010, The Berean Institute, and individual Defendants Lorraine Poole-Naranjo, Diane Hanna-Wilson, James Jones, and Ken Washington, joined in the Preliminary objections of Braxton, Staudt and Reid.

Discussion

[T]he standard for preliminary objections requires that all material facts in the complaint, as well as all inferences reasonably deductible therefrom, be admitted as true.... The question presented by preliminary objections is whether, on the facts averred, the law holds with certainty that not recovery is possible. In the presence of doubt, the preliminary objection should be overruled.⁸

I. Plaintiff may maintain the breach-of-contract claim asserted against the Board of Directors of the Berean Institute and the Members of the Board.

⁶ Second Amended Complaint, ¶¶ 32-33.

⁷ Assignment of Rights, attached as Exhibit A to the Second Amended Complaint.

⁸ Emples. Ins. Of Wausau v. DOT, 865 A.2d 825, 830 (Pa. 2005).

Individual Defendants John Braxton, Kim Staudt and Treena Reid, joined by individual Defendants Lorraine Poole-Naranjo, Diane Hanna-Wilson, James Jones and Ken Washington, move to dismiss the claim of Breach of Contract asserted against the Board of the Berean Institute and the Members of the Board in their individual capacity. They assert that the claim of Breach of Contract may not be maintained against the Board of Berean or its Members because TransWorld may not pierce the corporate veil. They conclude that TransWorld may not pierce the corporate veil unless it “asserts and establishes a theory of liability specifically imposing liability on [the individual] Members.”⁹

In this case, the Second Amended Complaint alleges that the contract for Maxwell’s services would be drafted naming the Board as the **client**.¹⁰ The pertinent language in the Agreement identifies the contractual parties as Maxwell Consulting Group on one side, and the Customer, School or **Client** (“**Client**”) on the other.¹¹ Admitting as true the facts averred in the Second Amended Complaint, and all inferences reasonably deductible therefrom, this Court cannot hold that recovery in favor of Plaintiff is impossible against the Board of Berean or against its individual Members. The Court cannot hold that recovery against the Board and its Members is impossible because the Second Amended Complaint clearly alleges that the Board and its Members agreed to be contracting parties. The Preliminary Objection seeking to dismiss Count II of the Second Amended Complaint is overruled.

⁹ Memorandum of Law of Defendants Braxton, Staudt and Reid in support of the Preliminary Objections, p. 7.

¹⁰ Second Amended Complaint, ¶ 21 (*emphasis supplied*).

¹¹ Agreement for Consulting Services, Exhibit B to the Second Amended Complaint of TransWorld Systems, Inc.

II. Plaintiff may not maintain the claim of fraud asserted in Count III of the Second Amended Complaint.

In the Second Amended Complaint, TransWorld alleges that the Board of Berean or its Members fraudulently induced Maxwell to execute the Agreement, and fraudulently induced Maxwell to continue performance, after non-payment of invoices.

In Pennsylvania, a plaintiff asserting fraudulent misrepresentation must prove—

- (1) a misrepresentation;
- (2) a fraudulent utterance thereof;
- (3) an intention by the maker to induce the recipient thereby;
- (4) justifiable reliance by the recipient on the misrepresentation; and
- (5) damage to the recipient as a proximate result of the misrepresentation.

[A] breach of a promise to do something in the future is not fraud.

Bash v. Bell Tel. Co., 601 A.2d 825 (Pa. Super. 1992).

In Bash, Plaintiff, a dentist, contracted with Defendants for publication of a quarter-page advertisement on the yellow pages. Defendants received payment for the advertisement, yet failed to perform. Plaintiff sued Defendants, and alleged various claims including the claim of violation of the Unfair Trade Practices Act. One of the named Defendants filed preliminary objections to the claim. Plaintiff amended the claim, restated it as a claim of fraud, and alleged all required

elements thereof.¹² The trial court ruled on the restated claim and dismissed it.¹³ Plaintiff appealed.

The Pennsylvania Superior Court affirmed and held: “an unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made.” The Superior Court concluded that “failure to act according to ... representations ... does not rise to the level of fraud.”

In this case, TransWorld alleges in its Second Amended Complaint that—

Defendants ... each knew or should have known that Defendant Berean did not have the ability and/or the intention to pay Maxwell’s invoices as they became due....

Defendants intentionally ... misrepresented to Maxwell that they intended to pay for Maxwell’s services under the Agreement, with the intent that Maxwell rely upon same and be induced to execute the Agreement and provide services to ... Berean and/or [the] ... Board.

Defendants ... on an approximate weekly basis, made representations to Maxwell that its overdue invoices would be paid, and they were working on getting Maxwell paid.

The aforestated representations ... were made with intent that Maxwell rely on same in order to induce Maxwell to continue to work for Defendants without payment by representing to Maxwell that it would be paid in the future.¹⁴

¹² To establish a claim under the Unfair Trade Practices Act, “plaintiff ha[s] to prove the same elements as for a common law fraud claim.” Liss & Marion, P.C. v. Recordex Acquisition Corp., 983 A.2d 652, 665 (Pa. 2009).

¹³ Bash v. Bell Tel. Co., 601 A.2d at 826-32 (Pa. Super. 1992).

¹⁴ Second Amended Complaint, ¶¶ 32-36.

This claim avers that the Board of Berean or its Members breached promises to pay current and overdue invoices in the future. However, a breach of a promise to do something in the future is not fraud, and Count III of the Second Amended Complaint asserting the claim of Fraud is dismissed.

The Court will issue a simultaneous Order consistent with this Opinion.

By The Court,

Arnold L. New, J.

February 16, 2011