

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

PENNSYLVANIA BUSINESS BANK,	:	MAY TERM, 2002
	:	
Plaintiff,	:	No. 2507
	:	
v.	:	Commerce Program
	:	
FRANKLIN CAREER SERVICES LLC, et al.,	:	Control Nos. 021876, 061969
	:	
Defendants	:	

PETER C. MORSE and R. BRUCE DALGLISH,	:
	:
Intervening-Plaintiffs,	:
	:
v.	:
	:
FRANKLIN CAREER SERVICES, INC., et al.,	:
	:
Intervened-Defendants	:

ORDER AND MEMORANDUM

AND NOW, this 14TH day of March, 2005, upon consideration of plaintiff Pennsylvania Business Bank’s Motion for Partial Summary Judgment, and the Motion for Summary Judgment of Franklin Career Services, Inc., Franklin Career Services, LLC, Gerald Woodcox, Jeffrey Woodcox, Career Financial Services, LLC, Capital Steel Ventures, William Weld and Robert Bernstein (the “FCS Defendants”), the respective responses thereto, the memoranda in support and opposition, and all other matters of record, and in accord with the Memorandum Opinion filed contemporaneously herewith, it is hereby **ORDERED** as follows:

1. Plaintiff’s Motion is **DENIED**;
2. The FCS Defendants’ Motion is **GRANTED** in part, and the claim for fraud

asserted against the FCS Defendants is **DISMISSED**; and

3. The remainder of the FCS Defendants' motion is **DENIED**.

BY THE COURT,

C. DARNELL JONES, II, J.

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	:
Intervened-Defendants	:

MEMORANDUM OPINION

Before the court is plaintiff Pennsylvania Business Bank’s (“PBB”) Motion for Partial Summary Judgment on its breach of contract claim against defendant Franklin Career Services, Inc. (“FCS”) and the cross Motion for Summary Judgment of FCS, Franklin Career Services, LLC, Gerald Woodcox, Jeffrey Woodcox, Mark Vogt, Career Financial Services, LLC, Capital Steel Ventures, William Weld and Robert Bernstein (collectively the “FCS Defendants”).

PBB previously loaned \$1.5 million to MP III Holdings, Inc. (“MPIII”), which loan was secured by all of MPIII’s assets (the “MPIII Loan”). PBS claims that FCS subsequently entered into an agreement to acquire all of the assets of MPIII (the “Alleged Acquisition Agreement”). PBB further claims that the execution of the Alleged Acquisition Agreement was an event of

default under the MPIII Loan, which entitled PBB to accelerate the MPIII Loan.

Defendant Mark Vogt, one of the principals of FCS, apparently discussed with Alan S. Fellheimer, the President of PBB, the possibility of obtaining a 60 day extension of the MPIII Loan in exchange for a guarantee of that loan by FCS. PBB claims that such negotiations culminated in a binding guarantee agreement (the “Alleged Guarantee Agreement”). FCS denies that either the Alleged Acquisition Agreement or the Alleged Guarantee Agreement were anything more than steps in the negotiation process, and FCS denies that it was contractually obligated to acquire MPIII or to repay MPIII’s loan from PBB. By the time that FCS’ made its refusal to pay the MPIII Loan clear to PBB, many of MPIII’s assets, which had served as collateral for the MPIII Loan, had been dissipated, and PBB now claims that the FCS Defendants and other defendants converted them to FCS’ use.¹

In its Summary Judgment Motion, PBB asserts that there is a binding guarantee agreement between PBB and FCS based on several e-mails exchanged between Mr. Vogt on behalf of FCS and Mr. Fellheimer on behalf of PBB. In its cross Motion, FCS argues that these same e-mails show that no guarantee agreement was ever entered into. The court finds the subject e-mails to be ambiguous as to the parties’ intent to form a guarantee agreement. Therefore, they raise disputed issues of fact that cannot be resolved without consideration of additional evidence, including the testimony of witnesses.

¹ In its Fourth Amended Complaint, PBB asserted claims against some or all of the FCS Defendants for Declaratory Judgment, Conversion, Tortious Interference with Contract, and Fraud. However, the fraud claim must be dismissed under the gist of the action doctrine because it is more properly pled (and has been pled) as a breach of contract claim against Franklin Career Services, Inc., the entity that the other FCS Defendants allegedly influenced, controlled and/or acted on behalf of. *See Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. 2002).

The evidence proffered by PBB to prove the claims for tortious interference with contract and conversion is mostly circumstantial. However, that evidence also requires the trier of fact to make several credibility determinations, so these claims must be left for decision at trial.

PBB claims that the following e-mail from Mr. Vogt to Mr. Fellheimer, dated April 25, 2002, constitutes an offer to PBB from FCS:

After discussing it with my partners, [FCS] would be willing to guarantee the loan provided [PBB] would give us a 60 day extension from calling the loan. During which time we would like to work with [PBB] to refinance the [MPIII Loan].

Summary Judgment Motion (“SJM”), Ex. D.

PBB also claims that it accepted this offer in the following e-mail from Mr. Fellheimer to Mr. Vogt, dated April 30, 2002:

The [PBB] Creditor Committee has voted to approve the extension of the MPIII Loan with the [FCS] guaranty. The documents will be sent to you by overnight delivery (U.P.S.) tomorrow. Please have them signed by the appropriate people and returned to me **and that will put the extension into place.**

Id., Ex. E (emphasis added). However, PBB’s alleged acceptance is clearly conditioned upon the execution of the newly proffered documents, which execution never occurred. A conditional acceptance is really a counter-offer that extinguishes the original offer. *See* Restatement (Second) Contracts §§ 39, 59 (1981); First Home Savings Bank, FSB v. Nernberg, 436 Pa. Super. 377, 390, 648 A.2d 9, 16 (1994) (“a reply to an offer which purports to accept it, but changes the conditions of the offer, is not an acceptance but is a counter-offer, having the effect of terminating the original offer.”)

PBB next offers a follow-up email from Mr. Fellheimer to Mr. Vogt and others, dated May 2, 2002, as proof of PBB’s acceptance of FCS’ April 25th offer:

Enclosed please find the extension documents we discussed. **This document** extends the loan until July 1, 2002, as requested by [FCS]. I believe that they state the deal **to which agreed.**

SJM, Ex. F (emphasis added). This email is more ambiguous on the issue of acceptance than Mr. Fellheimer’s first one was; he treats the parties’ agreement as completed, but he indicates that the extension and the documents that need to be signed are one and the

same.

Since PBB has not produced any writing to show that FCS' original offer was unconditionally accepted by PBB or that PBB's counter-offer was accepted by FCS, there is no conclusive evidence presently before the court to show that there was a meeting of the minds between the parties. *See Franklin Interiors v. Wall of Fame Management Co.*, 510 Pa. 597, 601, 511 A.2d 761, 762 (1986) ("until accepted by [the offeree] in the mode and manner expressly provided by the terms of the offer, this document remains an unaccepted offer and cannot, in itself, be considered a binding contract.") Since no contract was formed via the proffered e-mails alone, the court must deny PBB's Motion for Summary Judgment.

However, since a contract may have been formed by additional oral communications between Mr. Fellheimer, Mr. Vogt, and/or other persons acting on behalf of PBB and FCS, or by other actions of the parties, the court must also deny FCS' Motion. The determination of whether a guarantee agreement was entered into, which involves weighing the credibility of Mr. Fellheimer, Mr. Vogt and other witnesses, must await trial. *See id.* ("subsequent performance by parties [of unsigned contract] may give rise to a binding contract between them."). *See also Thomas A. Armbruster, Inc. v. Barron*, 341 Pa. Super. 409, 491 A.2d 882 (1985) (question of whether defendant agreed orally to guaranty a debt was for jury.)

CONCLUSION

For all the foregoing reasons, MPIII's Motion for Partial Summary Judgment is denied and the FCS Defendants' Motion for Summary Judgment is granted in part and denied in part.

BY THE COURT,

C. DARNELL JONES, II, J.