

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

THE FLYNN COMPANY, Plaintiff	: June Term, 2000
	: No. 2102
v.	:
CYTOMETRICS, INC., MARTIN E. SCHMEIG, WAVERLY MANAGEMENT, INC., SEVENTH & CHESTNUT ASSOCIATES, and RICHARD G. NADEAU Defendants	: : : Motion Control Nos. : <b>081419</b> and <b>091128</b>

**O R D E R**

AND NOW, this 17th day of November 2000, upon consideration of the Preliminary Objections of defendants, Cytometrics, Inc., Richard G. Nadeau, Martin E. Schmiege, Waverly Management, Inc. and Seventh & Chestnut Street Associates, to plaintiff's Complaint and the plaintiff's response, and the respective memoranda and all other matters of record, and in accordance with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

1. The Preliminary Objections to Count II - Fraud, Count III - Misrepresentation and Count V - For a Brokerage Commission are **Sustained** and those Counts are **Stricken**;
2. The remaining Preliminary Objections are **Overruled**; and
3. The Plaintiff may file an amended complaint within twenty days of this Order.

**BY THE COURT,**

---

**ALBERT W. SHEPPARD, JR., J.**

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

THE FLYNN COMPANY, Plaintiff	: June Term, 2000
	: No. 2102
v.	:
CYTOMETRICS, INC., MARTIN E. SCHMEIG, WAVERLY MANAGEMENT, INC., SEVENTH & CHESTNUT ASSOCIATES, and RICHARD G. NADEAU Defendants	: : : : Motion Control Nos. : <b>081419</b> and <b>091128</b>

---

**O P I N I O N**

**Sheppard, Jr., J. .... November 17, 2000**

Defendants, Cytometrics, Inc. (“Cytometrics”), Richard G. Nadeau (“Nadeau”), Martin E. Schmiege (“Schmiege”), Waverly Management, Inc. (“Waverly”) and Seventh & Chestnut Street Associates (“Associates”) have filed Preliminary Objections (“Objections”) to the Complaint (“Complaint”) of plaintiff, The Flynn Company (“Flynn”).<sup>1</sup>

For the reasons set forth in this Opinion, this court will enter a contemporaneous Order sustaining the Objections to Count II - Fraud, Count III - Misrepresentation and Count V - For a Brokerage Commission, and overruling the remaining Objections.

---

<sup>1</sup> Cytometrics, Nadeau and Schmiege are collectively referred to as the “Cytometrics Defendants.” Waverly and Associates are collectively referred to as the “Landlord Defendants.” Both defendant groups filed Preliminary Objections.

## **BACKGROUND**

On October 1, 1997, Cytometrics and Flynn entered into an agreement that authorized Flynn exclusively to assist Cytometrics in its search for either a facility to house its new headquarters or land where a suitable facility could be constructed (“Representation Agreement”). Under the Representation Agreement, any inquiries or offers received by Cytometrics were to be referred to Flynn, regardless of their source. Flynn was also responsible for handling and supervising Cytometrics’ real estate negotiations. In exchange, Flynn was to look to the owner of the property ultimately purchased or leased for a commission. The Representation Agreement had an expiration date of August 1, 1999.

The Complaint alleges that after execution of the Representation Agreement, Flynn invested significant time and resources to fulfill its obligations under the Representation Agreement. This included preparing a comprehensive survey of available properties meeting Cytometrics’ criteria and arranging tours of approximately thirty properties. Flynn also allegedly contacted Waverly and Associates about possible space at 615 Chestnut Street (“Philadelphia Space”), where Cytometrics was then subleasing space from an unnamed tenant. In the course of these contacts, Flynn informed Waverly and Associates of the Representation Agreement and its contents.

Flynn claims that Cytometrics inspected, negotiated for and solicited proposals regarding the Philadelphia Space, a number of other Center City locations and several prospective sites in Delaware during April and May 1999. These actions led to Cytometrics entering into a two-year lease with Waverly and/or Associates for the Philadelphia Space (“Philadelphia Lease”) without Flynn’s knowledge or consent. Flynn further alleges that during the term of the Representation Agreement, Cytometrics also entered into a 25-year lease with the Delaware River and Bay Authority for space at the Corporate Commons in New

Castle, Delaware (“Delaware Space”).

In June 2000, Flynn brought this action for breach of contract, fraud, misrepresentation, promissory estoppel, unjust enrichment, a brokerage commission and tortious interference with contract.<sup>2</sup> Using the base rents for the Spaces,<sup>3</sup> Flynn calculates that it is entitled to an industry standard market-rate commission of \$119,026.00 for the Philadelphia Space and a \$1,706,560.00 commission for the Delaware Space.

Defendants have filed two sets of Objections asserting, in essence, that the Counts contain technical defects and fail to state causes of action.<sup>4</sup>

This court sustains the Preliminary Objections, in part. Briefly, as to the Cytometrics Defendants’ Objections, the court finds that the Complaint does not allege facts to support a tort action for breach of the Representation Agreement. Further, the Objections to the Counts for fraud and misrepresentation are sustained. As to the Landlord Defendants’ Objections, Pennsylvania does not recognize an action for a brokerage commission, and that Count is dismissed.

The remaining Objections are overruled.

---

<sup>2</sup> The claim for breach of contract is brought against Cytometrics only. The claims for fraud, misrepresentation and promissory estoppel are brought against the Cytometrics Defendants. The claims for a brokerage commission, unjust enrichment and tortious interference with contract are brought against the Landlord Defendants.

<sup>3</sup> Flynn maintains that Cytometrics agreed to pay an annual, base rent of \$1,082,050.00 for the Philadelphia Space and an initial annual base rent of \$1,500,000.00 for the Delaware Space.

<sup>4</sup> The Landlord Defendants also filed an Objection to service on both Waverly and Associates. However, the Parties have resolved this issue.

## **DISCUSSION**

When reviewing preliminary objections in the form of a demurrer, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000). When presented with preliminary objections which, if sustained, would result in the dismissal of the action, a court should sustain the objections only where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. Ct. 2000) (citation omitted). Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

### **I. Cytometrics Defendants’ Objections**

#### **A. Count I - Breach of Contract**

To sustain a claim for breach of contract, a complaint must allege “(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages.” CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1059 (Pa. Super. Ct. 1999). Cytometrics first argues that the Representation Agreement does not bar it from engaging in its own search for appropriate premises or conducting negotiations itself. As a result, it reasons, its conduct in procuring the Leases on its own did not breach the Representation Agreement.

If parties disagree as to the meaning of a contract’s terms, a court should attempt to interpret the contract using standard rules of interpretation. Banks Eng’g Co. v. Polons, 561 Pa. 638, \_\_\_

n.4, 752 A.2d 883, 886 n.4 (2000).<sup>5</sup> When interpreting a contract, “the intention of the parties is paramount and the court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished.” Charles D. Stein Revocable Trust v. General Felt Indus., Inc., 749 A.2d 978, 980 (Pa. Super. Ct. 2000). In addition, any ambiguities are to be construed against the drafter. Smith v. The Windsor Group, 750 A.2d 304, 308 (Pa. Super. Ct. 2000).

The Representation Agreement appoints Flynn as Cytometrics’ “exclusive broker” and grants Flynn “the exclusive right to obtain, on [Cytometrics’] behalf, a lease or purchase of [f] premises.” The Representation Agreement also speaks to Flynn’s role regarding properties brought to Cytometrics’ attention by an entity other than Flynn:

[A]ny and all inquiries and offerings which [Cytometrics] receive[s] with respect to the lease or purchase of premises shall be referred to [Flynn], regardless of the source of such inquiries or offerings. All negotiations shall be handled solely by [Flynn] or under [Flynn’s] supervision, subject to [Cytometrics’] review and final approval.

. . . Once [Cytometrics has] identified a location, [Flynn] will negotiate terms and conditions of a lease or purchase on [Cytometrics’] behalf and in [Cytometrics’] best interests.

From this language, it is clear that the Representation Agreement contemplated Flynn playing a key role in negotiating a lease or purchase for Cytometrics, regardless of who located the property in question. Important, too, is the fact that the Representation Agreement appears to have been

---

<sup>5</sup> The responsibility for interpreting a contract falls on the court. Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999).

drafted by Cytometrics,<sup>6</sup> which requires construing ambiguities, if any, in the Representation Agreement in Flynn's favor. Thus, under the Representation Agreement, Cytometrics had an obligation to turn the negotiations for the Spaces over to Flynn. Cytometrics' alleged failure to do so could constitute a breach of the Representation Agreement.

Cytometrics also maintains that the Complaint does not assert that the Leases were executed during the term of the Representation Agreement and that, accordingly, there was no breach. This argument is not persuasive. The Complaint alleges that the Leases were executed while the Representation Agreement was in effect. Complaint at ¶¶ 33, 38. In addition, the Representation Agreement states that, after its termination, Flynn will continue as Cytometrics' exclusive broker with respect to locations examined during the term of the Agreement. Thus, the Complaint alleges, with requisite specificity, a breach of contract, and the Objections to this Count should be overruled.

**B. Count II - Fraud  
and  
Count III - Misrepresentation**

The elements of a cause of action for fraud are:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and
- (6) the resulting injury was proximately caused by the reliance.

Gruenwald v. Advanced Computer Applications, Inc., 730 A.2d 1003, 1014 (Pa. Super. Ct. 1999) (citing

---

<sup>6</sup> The Representation Agreement is presented in the form of a letter from Cytometrics to Flynn. Flynn was directed to sign and return copies of the letter if the terms of the document accurately set forth the parties' agreement. These facts suggest strongly that Cytometrics prepared the final draft of the Agreement.

Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994)). Similarly, a cause of action for misrepresentation requires evidence of “(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damages to the recipient as the proximate result.” McClellan v. Health Maintenance Org. of Pa., 413 Pa. Super. 128, 142, 604 A.2d 1053, 1060 (1992). See also Smith v. The Windsor Group, 750 A.2d 304, 307 (2000) (noting that “the elements of fraud and fraudulent misrepresentation are essentially identical”). The Cytometrics Defendants argue that the Complaint does not allege facts to support a cause of action in tort and is not sufficiently specific.

At one time, it was unclear what rule Pennsylvania courts should apply in determining whether an action sounded in contract or in tort. See Grode v. Mutual Fire, Marine, and Inland Ins. Co., 154 Pa. Commw. 366, 369, 623 A.2d 933, 934 (1993) (noting the “somewhat confused state of Pennsylvania law on this question”). However, in 1995, the Superior Court provided the following guidance:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally, . . . the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 228, 663 A.2d 753, 756 (1995) (citing Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)).<sup>7</sup> See also Snyder Heating

---

<sup>7</sup> Flynn cites this case as standing for the rule that a cause of action in tort arising from a breach of contract is appropriate where “there was an improper performance of a contractual obligation (misfeasance) rather than the mere failure to perform (nonfeasance).” Phico Ins. Co., 444 Pa. Super.

Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 715 A.2d 483, 487 (Pa. Super. Ct. 1998) (“[t]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral”).

Here, the Complaint alleges that Nadeau and Schmiegl, on behalf of Cytometrics, represented that Flynn would be Cytometrics’ exclusive real estate broker and negotiator. Complaint at ¶ 56. There is no allegation that these representations were made independent of the Representation Agreement. Moreover, the Cytometrics Defendants’ alleged actions are in violation of “duties imposed by mutual consensus” and do not relate to “a matter of social policy.” As a result, the Complaint does not allege facts to support the tort claims.

Even if the Complaint alleged an action in tort, Counts II and III are not sufficiently pleaded. Allegations based on fraud must be averred with particularity. Pa. R. Civ. P. 1019(b). To meet this standard, the pleadings must “explain the nature of the claim to the opposing party so as to permit the preparation of a defense” and must “be sufficient to convince the court that the averments are not merely subterfuge.” Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (citing Bata v. Central-Penn Nat’l Bank of Phila., 423 Pa. 373, 380, 224 A.2d 174, 179 (1966)).

Here, aside from information relating to the Representation Agreement, there are no details as to the Cytometrics Defendants’ alleged misrepresentations. The Complaint does not include particulars such as the time and place the representations were made or to whom the Cytometrics Defendants made

---

at 228, 663 A.2d at 756 (citing Behrend v. Bell Tel. Co., 53 D. & C.2d 421 (1971)). However, the Phico Insurance Co. court cites this rule only to highlight its inadequacy and goes on to adopt the position set forth in the text.

the representations. These defects preclude the Cytometrics Defendants from preparing a defense and are therefore insufficient. As a result, the Objections to Count II and III are sustained.

It is difficult to see how Flynn will be able to plead facts to sustain a cause of action in tort. However, “parties are liberally granted leave to amend their pleadings.” Frey v. Pennsylvania Elec. Co., 414 Pa. Super. 535, 538, 607 A.2d 796, 797 (1992). Accordingly, Flynn is granted twenty days in which it may file an amended complaint.

### **C. Count IV - Promissory Estoppel**

To support a claim based on promissory estoppel, a complaint must allege that “1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; 2) the promisee actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise.” Crouse v. Cyclops Indus., 560 Pa. 394, 403, 745 A.2d 606, 610 (2000). The Cytometrics Defendants assert that there was no violation of a promise made to Flynn and that the Count must be dismissed.

Contrary to this assertion, the Complaint alleges that Cytometrics promised to use Flynn to negotiate any real estate transaction. In addition, Paragraphs 33 and 38 of the Complaint state that Cytometrics violated that promise by negotiating the Leases on its own. As a result, to the extent that the violation of a promise is required, Count IV is sufficient and the Objection to it is overruled.

## **II. Landlord Defendants’ Objections**

### **A. Count V - For a Brokerage Commission**

The Landlord Defendants argue that Count V fails to plead a claim recognized by Pennsylvania law. Landlord Defendants’ Objections at ¶ 10. Flynn concedes that the Landlord

Defendants are correct and “does not object to the dismissal of Count V.” Flynn’s Memorandum at 9. Thus, the Objections to Count V are sustained.

### **B. Count VI - Unjust Enrichment**

Proving unjust enrichment requires evidence of three conditions: “benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.” Styer v. Hugo, 422 Pa. Super. 262, 267, 619 A.2d 347 (1993), aff’d, 535 Pa. 610, 637 A.2d 276 (1994) (citations omitted). The primary focus must be on “whether the enrichment of the defendant is unjust. The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff.” Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa. Super. Ct. 1999), app. denied, 561 Pa. 700, 751 A.2d 193 (2000). With this in mind, the Landlord Defendants urge that the Complaint does not assert that the benefit they received was unjust.

The Complaint does not explicitly state that inequity resulted from the Landlord Defendants’ conduct. However, there are allegations that the Landlord Defendants acted “improperly.” This is sufficient for the Court to infer that the benefit conferred on the Landlord Defendants was unjust.

The Landlord Defendants also maintain that a claim for unjust enrichment does not lie where there is a written contract, as there is here. While a written contract may preclude recovery for unjust enrichment, it is necessary that the written contract be between those parties in question. See Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. Ct. 1999) (a court “may not make a finding of unjust enrichment . . . where a written or express contract between parties exists”); Gee v. Eberle, 279 Pa. Super. 101, 119, 420 A.2d 1050, 1060 (1980) (allowing plaintiffs to assert claim for unjust enrichment where they did not

and could not assert any contractual right against defendant); Roman Mosaic & Tile Co. v. Vollrath, 226 Pa. Super. 215, 217, 313 A.2d 305, 307 (1974) (doctrine of unjust enrichment is “inapplicable when the relationship between the parties is founded on a written agreement or express contract”). Here, because the Landlord Defendants are not parties to the Representation Agreement, the Agreement cannot bar Flynn’s claim for unjust enrichment against them. As a result, the Objections to Count VI are overruled.

### **C. Count VII - Tortious Interference with Contract**

A successful claim for intentional interference with contractual relations<sup>8</sup> must satisfy four elements:

(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997) (citation omitted). The Landlord Defendants argue that the Complaint fails to allege malice and does not contend that the negotiations between Cytometrics and the Landlord Defendants were not privileged. Landlord Defendants’ Objections at ¶ 26.

As an initial matter, malice is not an element of intentional interference. See Ruffing v. 84 Lumber Co., 410, Pa. Super. 459, 469, 600 A.2d 545, 550 (1992) (“[i]ll will toward the person harmed is not an essential condition of liability”). Even if Flynn were required to allege malice, Paragraphs 106 and 109 of the Complaint state that the Landlord Defendants’ conduct was, in fact, malicious. As a result, the

---

<sup>8</sup> Based upon Flynn’s Memorandum, it seems clear that this cause of action is for intentional interference with an existing contract. See Flynn’s Memorandum at 13-14.

Objection based on absence of malice is without merit.

The definition of what constitutes “privilege” in the context of a claim for intentional interference has proven elusive:

Unlike other intentional torts such as intentional injury to person or property or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in [Restatement (Second) of Torts] §§ 766, 766A or 766B.<sup>9</sup>

Id., 410 Pa. Super. at 468, 600 A.2d at 549 (citing Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 433 n.17, 393 A.2d 1175, 1184 n.17 (1978)). Because of this, Pennsylvania courts have held that “the absence of privilege or justification on the part of the defendant is merely another way of stating that the defendant’s conduct must be improper.” Cloverleaf Development, Inc. v. Horizon Fin., F.A., 347 Pa. Super. 75, 83, 500 A.2d 163, 167 (citing Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 281 Pa. Super. 560, 581 n.11, 422 A.2d 611, 622 n.11 (1980)). See also Adler, Barish, 482 Pa. at 433 n.17, 393 A.2d at 1184 n.17 (noting that Restatement (Second) of Torts § 767 “focuses upon whether conduct is ‘proper,’ rather than ‘privileged’”).

To determine whether a defendant’s conduct is improper, a court must examine the following six factors:

- (a) the nature of the actor’s conduct;
- (b) the actor’s motive;
- (c) the interests of the other with which the actor’s conduct interferes;
- (d) the interests sought to be advanced by the actor;

---

<sup>9</sup> These sections address intentional interference with performance of contract by a third party, intentional interference with another’s performance with his own contract and intentional interference with prospective contractual relations, respectively.

- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
- (f) the proximity or remoteness of the actor's conduct to the interference; and
- (g) the relations between the parties.

Small v. Juniata College, 452 Pa. Super. 410, 418, 682 A.2d 350, 354 (1996) (citing Restatement (Second) of Torts § 767).

Here, examination of the Complaint in the light of the six factors militates against finding privilege on the part of the Landlord Defendants. First, the Complaint alleges that the Landlord Defendants' conduct was undertaken wilfully and maliciously. Complaint at ¶ 102. In addition, Paragraph 101 of the Complaint maintains that the Landlord Defendants' activities were improper and unethical.

Importantly, the Representation Agreement required Cytometrics to involve Flynn in any negotiations regarding its lease with the understanding that Flynn would seek a commission from the landlord. If the Landlord Defendants did indeed circumvent Flynn's role, even after being informed of the Representation Agreement as the Complaint alleges, their conduct can be deemed actionable. This is especially true in light of the fact that they would have been responsible for any commission, thus creating an interest on their part in excluding Flynn from the negotiation process.

Admittedly, it may be difficult for Flynn to prove these facts at trial. However, this court is required to consider all facts alleged in a complaint as true for present purposes. Accordingly, the Objections to this Count are overruled.

**CONCLUSION**

For the reasons stated, this court will enter a contemporaneous Order sustaining the Preliminary Objections as to Counts II and III (as to the Cytometrics Defendants) and to Count V (as to the Landlord Defendants), and overruling the remaining Preliminary Objections.

**BY THE COURT,**

---

**ALBERT W. SHEPPARD, JR., J.**