

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

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SHARED COMMUNICATION SERVICES	:	May Term, 2001
OF 1800-80 JFK BLVD., INC.	:	
	:	No. 3417
Plaintiff,	:	
v.	:	Commerce Program
	:	
ALBERT M. GREENFIELD & COMPANY, INC.,	:	
Defendant.	:	Control No. 091808

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**ORDER**

AND NOW, this 19th day of November, 2001, upon consideration of the Preliminary Objections of Plaintiff Shared Communication Services of 1800-80 JFK BLVD., Inc., (“SCS”) to the Counterclaims of Defendant Albert M. Greenfield & Company, Inc., (“Greenfield”), and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

(1) The Preliminary Objections Asserting Legal Insufficiency of Pleadings of Fraud and Fraudulent Misrepresentation Are SUSTAINED and DISMISSED with PREJUDICE,

(2) The Preliminary Objection Asserting Greenfield’s Failure to Allege Sufficient Facts to Sustain a Cause of Action for an Accounting is SUSTAINED,

(3) The Preliminary Objection Requesting that this Court Deny Greenfield’s Request for Punitive Damages is SUSTAINED.

(4) The Preliminary Objection Requesting that this Court Deny Greenfield’s Request for Attorneys’ Fees is SUSTAINED.

BY THE COURT:

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JOHN W. HERRON, J.

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**MEMORANDUM OPINION**

Plaintiff Shared Communication Services of 1800-80 JFK Blvd. Inc., (“SCS”) filed preliminary objections to the counterclaims of Defendant Albert M. Greenfield & Company, Inc., (“Greenfield”). For the reasons stated below, this court sustains all the preliminary objections. Further, the counterclaims asserting fraud and fraudulent misrepresentation are dismissed with prejudice.

**BACKGROUND**

Since 1986, SCS has been the exclusive provider of telecommunication services to the tenants of 1800-80 JFK Blvd. In 1996, Greenfield, a tenant of the building at 1880 JFK Blvd., received invoices from SCS for telecommunication services rendered. Greenfield disputes these charges, as it claims it had paid for telecommunications services provided by Bell - Atlantic PA and AT&T.

In 1997, Greenfield relocated its office within 1880 JFK Blvd. and, in its re-executed lease, allegedly acknowledged the exclusive right of SCS to provide telecommunication services in the

building. Pursuant to this lease, Greenfield executed a Master Shared Tenant Services Agreement (“MSTSA”) with SCS, which set forth the terms whereby SCS was to provide telephone service and lease equipment to Greenfield.

In 1999, SCS sent an invoice itemizing the charges and amount due for services provided to Greenfield. However, Greenfield, paid only the amount it believed was proper pursuant to the MSTSA. In May 2001, SCS commenced the present action against Greenfield asserting claims of breach of contract, unjust enrichment, and conversion. Greenfield filed counterclaims asserting fraud, misrepresentation and requested an accounting. SCS timely filed these preliminary objections.

### **DISCUSSION**

For purposes of reviewing preliminary objections based upon legal insufficiency, “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 whose end result would be the dismissal of a cause of action, a court should sustain the objections 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) (citations 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. The Preliminary Objections Asserting Legal Insufficiency of Pleadings of Fraud and Fraudulent Misrepresentation Are Sustained.**

SCS alleges that Greenfield's counterclaims of fraud and fraudulent misrepresentation lack the legal sufficiency needed to survive a demurrer. "Fraud is a claim easily made but difficult to support. Once an allegation of fraud is injected into a case, even though it may ultimately be shown to be without any arguable merit, the whole tone and tenor of the matter changes." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa.Super. 537, 553, 564 A.2d 919, 927 (1989). It "consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." Delahanty v. First Pennsylvania Bank, NA 318 Pa.Super. 90, 107, 464 A.2d 1243, 1251 (1983) (citation omitted). It is also true that the "breach of a promise to do something in the future is not actionable in fraud." Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa.Super.Ct. 1997) (citation omitted). However, a statement of present intention made at the time of contracting, which is false when uttered may constitute a fraudulent misrepresentation of fact. Brentwater Homes, Inc. v. Weibley, 471 Pa. 17, 23, 369 A.2d 1172, 1175 (1977).

To establish a cause of action for fraudulent misrepresentation, the plaintiff must allege the following elements:

- (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.

Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citation omitted). Moreover, under Pa.R.C.P. 1019(b), allegations of fraud must be pled with particularity. See also, Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (an allegation of fraud must "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and be "sufficient

to convince the court that the averments are not merely subterfuge.”).

Here, Greenfield has not convinced the court that the averments of fraud and misrepresentation are not merely subterfuge. Specifically, Greenfield has not pled all the elements of fraud or fraudulent misrepresentation to survive a demurrer because Greenfield’s counterclaim is legally insufficient as to element (1) one of a fraud claim, i.e., a representation.<sup>1</sup> The counterclaims of Greenfield at ¶¶ 77, 78 read:

77. On or about August 22, 1997, SCS represented to Greenfield that SCS would charge Greenfield for telecommunication services and equipment the amounts set forth in the proposed [MSTSA] and Schedule A thereto.

78. Greenfield relied upon the representation made by SCS described in Paragraph 77 hereof in accepting telecommunication services and equipment from SCS.

Def.’s Counterclaim at ¶¶ 77,78. Greenfield alleges that since the amounts reflected in the invoices it received from SCS “constituted double billing” and “were in excess of those disclosed in the proposed [MSTSA],” SCS fraudulently misrepresented the amounts it would charge in the MSTSA. Def.’s Response Mem. of Law to Pl.’s P.O. at 10. However, this alleged misrepresentation does not adequately support a claim of fraud or fraudulent misrepresentation. Although a statement of a present intention which is false when uttered may constitute a fraudulent misrepresentation of fact, a promise to do something in the future, which promise is not kept, is not fraud. Brentwater Homes, Inc. v. Weibley, 471 Pa. 17, 369 A.2d 1172 (1977); Krause v. Great Lakes Holdings, Inc., 387 Pa.Super. 56, 563 A.2d 1182 (1989). Here, Greenfield does not allege that the charges, when uttered in the MSTSA, were false. Instead, it alleges that SCS’s promise to charge at the MSTSA rates were not honored. In its counterclaim, Greenfield argues that “SCS charged Greenfield significantly more than

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<sup>1</sup>Since the elements for proving fraud and fraudulent misrepresentation both require a “representation”, this court addresses both the preliminary objections here.

the amounts set forth in the proposed [MSTSA] and Schedule A thereto...” Def.’s Counterclaim at ¶ 79. Further, at no point in Greenfield’s counterclaim is it alleged that the charges enumerated in the MSTSA consist of anything calculated to deceive or are themselves fraudulent. Instead, the gravamen of Greenfield’s counterclaim is that when SCS sent Greenfield its first invoice, SCS included charges that were in excess of and not provided for in the MSTSA. Def.’s Counterclaim at ¶¶ 63 - 67. The inclusion of allegations expressing disagreement with so-called “bogus” charges in a counterclaim does not satisfy the element of “representation”. Since Greenfield failed to properly allege a representation to support its claim of fraud or fraudulent misrepresentation, the court finds that it is clear and free from doubt from all the facts pleaded that Greenfield will be unable to prove facts legally sufficient to establish its right to relief. Therefore, the court sustains the preliminary objection of SCS to Greenfield’s counterclaim of fraud and fraudulent misrepresentation.

The court is also unpersuaded by Greenfield’s citation to United States v. Gill, 156 F.Supp 955 (W.D.Pa. 1957) in support of its allegation that “it pleaded a misrepresentation of a future occurrence coupled with misrepresentation of present fact.”<sup>2</sup> Def.’s Response Mem. of Law to Pl’s P.O. at 20. In Gill, it was represented to the defendant that the price of a certain aircraft in limited supply was about to be increased and, therefore, should quickly purchase the aircraft. However, after purchasing the aircraft, the defendant discovered that there was a substantial number of identical aircraft on the market, and as a result, the purchase price was in fact lowered dramatically. Id. The federal

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<sup>2</sup>Although decisions of federal courts construing Pennsylvania law have persuasive authority, Pennsylvania state courts are not bound by those decisions. Hutchinson v. Luddy, 763 A.2d 826, 837 n.8 (Pa.Super.Ct. 2000); In re Insurance Stacking Litig., 754 A.2d 702, 705 (Pa. Super.Ct. 2000). See also Moore v. Sims, 442 U.S. 415, 429 (1979) (stating that “[s]tate courts are the principal expositors of state law”).

court, overruling the preliminary objections for lack of specificity, held that a claim for fraudulent misrepresentation exists “where there is a misrepresentation of opinion or future occurrence coupled with a misrepresentation of present existing facts.” Id. at 958. The facts alleged here are quite different than those in Gill. Here, the alleged misrepresentation does not involve a misrepresentation of an opinion or future occurrence. Instead, this case involves a promise in a contract to charge certain specified prices for services to be performed in the future. The fact that Greenfield discovered that the prices as previously promised did not appear on the invoice, alone, does not rise to the level of misrepresentation needed to support a cause of action of fraud or fraudulent misrepresentation. “The breach of a promise to do something in the future is not fraud.” Edelstein v. Carole House Apartments, Inc., 220 Pa.Super. 298, 303, 286 A.2d 658, 661 (1971).

## **II. The Preliminary Objection Asserting Greenfield’s Failure to Allege Sufficient Facts to Sustain a Cause of Action for an Accounting is Sustained.**

In requesting an accounting, a complaint “seeks to turn over to the party wrongfully deprived of possession all benefits accruing to defendant by reason of its wrongful possession.” Boyd & Mahoney v. Chevron U.S.A., 419 Pa. Super. 24, 35, 614 A.2d 1191, 1197 (1992). In reviewing a request for an accounting, “it is reasonable for the court to permit some latitude since often times it is not certain what claims a plaintiff may have until the accounting is completed.” In re Estate of Hall, 517 Pa. 115, 136, 535 A.2d 47, 58 (1987). An equitable accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law. Rock v. Pyle, 720 A.2d 137, 142 (Pa. Super. 1998) (citations omitted).

Alternatively, plaintiff may seek his remedy for an accounting under Pa.R.C.P. 1021. However, the

right to relief pursuant to Rule 1021 is “merely an incident to a proper assumspit claim.” Buczek, 366 Pa. Super. at 555, 531 A.2d at 1123.

Here, Greenfield is not entitled to an accounting as it is unnecessary. Greenfield alleges that since SCS “overcharged [it] for the telecommunication services and equipment previously furnished by SCS, [and] Greenfield is without adequate means to determine the amount by which SCS overcharged Greenfield”, it, therefore is entitled to an accounting. Def.’s Counterclaim at ¶83. However, Greenfield to date has only paid what it believed was necessary pursuant to the MSTSA, and beyond that, Greenfield does not allege that SCS wrongfully possesses anything of Greenfield’s which SCS is now accruing the benefits therefrom. Def’s Counterclaim at ¶69. Further, this court will not grant a request for an accounting “merely because the plaintiff desires information he could obtain through discovery.” Buczek, 531 A.2d at 1124. Therefore, this court sustains this preliminary objection.

### **III. The Preliminary Objection Requesting that the Court Deny Greenfield’s Request for Punitive Damages is Sustained.**

SCS alleges that since Greenfield has failed to state a claim for fraud or fraudulent misrepresentation, punitive damages are not warranted. “A request for punitive damages does not constitute a cause of action in and of itself. Rather, a request for punitive damages is merely incidental to a cause of action.” Nix v. Temple University, 408 Pa.Super. 369, 380, 596 A.2d 1132, 1138 (1991). In fact, “a cause of action for misrepresentation can support a claim for punitive damages.” McClellan, 604 A.2d at 1061. A plaintiff may recover punitive damages when the defendant’s acts are the result of reckless indifference to the rights of others or an evil or malicious motive. Rizzo v. Michener, 401 Pa.Super. 47, 584 A.2d 973, 979 (1990). “Reckless indifference to the interests of others” means that “the actor has intentionally done an act of an unreasonable character, in disregard to a risk known to

him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.” Evans v. Philadelphia Transportation Company, 418 Pa. 567, 574, 212 A.2d 440, 443 (1965).

Here, after reviewing the Greenfield’s counterclaim in its entirety, this court is not convinced that sufficient allegations have been presented to substantiate Greenfield’s request for punitive damages. Absent the causes of action of fraud and fraudulent misrepresentation, which this court has already demurred, Greenfield’s request for punitive damages cannot now survive.

See Kirkland v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A.2d 800 (1989) (“If no cause of action exists, then no independent action exists for a claim of punitive damage since punitive damages is only an element of damages.”).

#### **IV. The Preliminary Objection Requesting That This Court Deny Greenfield’s Request for Attorneys’ Fees is Sustained.**

The parties to litigation are responsible for their own counsel fees unless otherwise provided by statutory authority, agreement of the parties, or some other recognized exception. Hart v. O’Malley, 781 A.2d 1211, 1216 (Pa.Super. 2001). Here, Greenfield does not allege facts to support a claim for attorney’s fees based upon statutory authority, or agreement of the parties. Further, although Greenfield claims that its “entitlement to attorney’s fees is grounded in statutory law as well as the equity powers of this Court,” it does not reveal to the court which statute applies to the present request for attorney’s fees. Moreover, Greenfield alleges that “42 Pa. §2503(7) and 42 Pa. §2503 (9) allow recovery of counsel fees where the opposing party engages in dilatory, obdurate and vexatious conduct.” Def.’s Response Mem. of Law to Pl.’s P.O. at 21. However, Greenfield has failed to specifically, or even, generally identify any conduct by SCS which would support a finding of dilatory, obdurate and

vexatious conduct by SCS.

**CONCLUSION**

For the reasons stated above, all the preliminary objections of SCS are sustained. Therefore, the counterclaims of Greenfield of fraud and fraudulent misrepresentation are dismissed with prejudice.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: November 19, 2001

