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Reports of Cases Decided in the Several Courts of Erie County for the Year 2014

XCVII

ERIE, PA

JUDGES
of the
Courts of Erie County
during the period covered
by this volume of reports

COURTS OF COMMON PLEAS

HONORABLE ERNEST J. DISANTIS, JR. ---------- President Judge
HONORABLE SHAD CONNELLY ---------- Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE ELIZABETH K. KELLY---------- Judge
HONORABLE JOHN J. TRUCILLA ---------- Judge
HONORABLE JOHN GARHART ---------- Judge
HONORABLE DANIEL J. BRABENDER, JR. ---------- Judge
HONORABLE ROBERT A. SAMBROAK, JR. ---------- Judge

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EDWARD T. O'BRIEN, M.D., Plaintiff

v.

GREAT LAKES ONCOLOGY HEMATOLOGY, INC., PHYSICIAN ONCOLOGY NETWORK, THE REGIONAL CANCER CENTER, RANJIT S. DAHLIWAL, M.D., PHILIP H. SYMES, M.D., CONRAD J. STACHELEK, M.D., and JAN M. ROTHMAN, M.D., Defendants

CIVIL PROCEDURE / MOTION FOR JUDGEMENT OF NON PROS

To dismiss a case for inactivity pursuant to a defendant's motion for non pros there must first be a lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude. Second, the plaintiff must have no compelling reason for the delay. Finally, the delay must cause actual prejudice to the defendant.

CIVIL PROCEDURE / MOTION FOR JUDGEMENT OF NON PROS

Non-docketed activity can be examined in deciding whether a compelling reason for delay exists.

CIVIL PROCEDURE / MOTION FOR JUDGEMENT OF NON PROS

Prejudice caused by delay is defined as any substantial diminution of a party's ability to properly present its case at trial.

CIVIL PROCEDURE / MOTION FOR JUDGEMENT OF NON PROS

Prejudice can be established by the death or absence of a material witness.

CIVIL PROCEDURE / MOTION FOR JUDGEMENT OF NON PROS

Defendants may be prejudiced by undue delays in litigation – memories fade, witnesses disappear, and documents become lost or destroyed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 11327-2008

Appearances: John B. Consevage, Esq., Attorney for Plaintiff
S.E. Riley, Jr., Esq., Attorney for Plaintiff
James D. McDonald, Jr., Esq., Attorney for Defendants Symes, Stachelek, & Rothman
James M. Antoun, Esq., & Lisa Smith Presta, Esq., Attorneys for Defendants Physician Oncology Network and Regional Cancer Center
Craig A. Markham, Esq., Attorney for Defendant Great Lakes Oncology Hematology, Inc.
Robert M. Linn, Esq. & Mark A. May, Esq., Attorneys for Ranjit Dhaliwal
Leonard G. Ambrose, Esq., Attorney for Ranjit Dhaliwal
Alois Lubiejewski, Esq., Attorney for Brinderjit S. Dhaliwal and Gurdeet S. Dhaliwal

OPINION

Connelly, J. January 23, 2014

The matter before the Court is pursuant to Motions for Judgment of Non Pros filed by Great Lakes Oncology Hematology Associates, Inc, (hereinafter "Defendant GLOHA"), and Philip H. Symes, M.D., Conrad J. Stachelek, M.D., and Jan M. Rothman, M.D., (hereinafter "M.D. Defendants"), as well as a Rule to Show Cause why the Executors

of Ranjit S. Dhaliwal, M.D.'s Estate should not be substituted for Defendant Dhaliwal. Plaintiff opposes the Motions for Judgment of Non Pros.

Statement of Facts

Plaintiff asserts he is owed vacation and disability compensation pursuant to a medically related leave from his practice with Defendant GLOHA between June 6, 2003, and October 9, 2003. *Am. Compl. ¶¶ 35-37.* Plaintiff also avers Defendant GLOHA owes him the value of his shares pursuant to the termination of his employment. *Id. at ¶ 72.* Plaintiff asserts M.D. Defendants and Defendant Dhaliwal "acted fraudulently with respect to the transfer of receipt of the funds distributed by GLOHA." *Id. at ¶ 106.*

On March 3, 2013, Defendant Dhaliwal passed away. *Plaintiff's Praecipe,¶ 1.* On July 18, 2013, Plaintiff filed a Praecipe for Rule upon Brinderjit S. Dhaliwal and Gurdeet S. Dhaliwal, the executors of Defendant Dhaliwal's estate, to show cause why they should not be substituted as Defendants. *Id.* On August 12, 2013, Brinderjit S. and Gurdeet S. Dhaliwal (hereinafter "Executors") filed an Answer and New Matter and Response contending they should not be substituted as Defendants due to Plaintiff's "unreasonably and unjustifiably delayed prosecution of this action. . .[which] would result in significant prejudice." *Executors' Ans. and New Matter and Resp. 1-2.*

On September 3, 2013, M.D. Defendants filed their Motion for Judgment of Non Pros. On September 11, 2013, Defendant GLOHA filed its Motion, for Judgment of Non Pros. Plaintiff filed Responses and a Memorandum in opposition to these motions.

Analysis of Law

The issue of whether to enter judgment of non pros due to a plaintiff's failure to prosecute an action within a reasonable time rests within the discretion of the trial court. *Herb v. Snyder,* 686 A.2d 412, 415 (Pa. Super. 1996) (citation omitted). The Pennsylvania Supreme Court held:

> To dismiss a case for inactivity pursuant to a defendant's motion for non pros there must first be a lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude. Second, the plaintiff must have no compelling reason for the delay. Finally, the delay must cause *actual* prejudice to the defendant.

Jacobs v. Halloran, 710 A.2d 1098, 1103 (Pa. 1998) (emphasis in original).

Defendants[1] assert a judgment of non pros should be entered "because Plaintiff has failed to pursue his causes of action with due diligence, Plaintiff can show no compelling explanation for his lack of due diligence and [Defendants have] sustained actual prejudice from the failure of Plaintiff to proceed with due diligence." *Def. GLOHA's Mot. for J. of Non Pros ¶ 31, M.D. Defs.' Mot for J. of Non Pros ¶ 19.* Plaintiff argues the Motions for Judgment of Non Pros should be denied as the Defendants have not met their burden of proof. *Pl.'s Mem. in Opp. 2.*

"[T]he law is settled that it is plaintiff's burden to move a case to trial, and it is plaintiff, not defendant, who bears the risk of not acting within a reasonable time." *Pennridge Elec.,*

[1] M.D. Defendants and Defendant GLOHA's Motions for Non Pros shall be addressed together for ease of disposition.

Inc. v. Souderton Area Joint Sch. Auth., 615 A.2d 95, 99 (Pa. Super. 1992). In the instant case, Defendant GLOHA asserts "[s]ince March 10, 2010, there has been no substantive docket or nondocket activity in this case other than a filing of a joint stipulation for the entry of a protective order on May 24, 2013, a period in excess of three and one-half (3-½) years." *Def. GLOHA's Mot for J. of Non Pros ¶ 16.* Plaintiff argues relying on "time alone in support of seeking a judgment of non pros. . .is misplaced." *Pl.'s Mem. in Opp. 4.* Plaintiff asserts non-docket activity, including drafting of the protective order, the deposition of Defendant Dhaliwal for a different case, interviews and attempted interviews of non-party witnesses, and Plaintiff's attempts to schedule party depositions demonstrate his due diligence in moving the case forward. *Pl.'s Mem. in Opp. 8-9.*

The Pennsylvania Superior Court found non-docketed discovery such as "interrogatories, requests for admissions, and requests for production of documents" to be insufficient to establish due diligence where the activity took place during only two (2) months of a four year period. *Hughes v. Fink, Fink & Assocs.*, 718 A.2d 316, 319-320 (Pa. Super. 1998) ("[I]t is Appellant's position that despite the fact that almost four years have elapsed without docket activity, a mere two months of non-docketed discovery is sufficient to establish due diligence. We are unpersuaded.") *See Madrid v. Alpine Mt. Corp.*, 24 A.3d 380, 383-384 (Pa. Super. 2011) appeal denied 2012 Pa LEXIS 599 (March 21, 2012) (Two and a half years of inactivity led to the grant of judgment of non pros.); *Luff v. Allstate Ins. Co.*, 2006 Phila. Ct. Com. Pl. LEXIS 422, *4 (Philadelphia 2006) affirmed without opinion 929 A.2d 254 (Pa. Super. 2007) (Court granted a judgment of non pros due to Plaintiff's failure to move forward with an underlying claim for four (4) years.)

Here, Plaintiff contends non-docket activity including "an initial draft of a protective order" in March of 2010, ten depositions taken in Dhaliwal's case[2] between May 9, 2011 and June 1, 2012, and attempts to schedule depositions in the instant case starting in January 2013 are sufficient to establish due diligence. *Pl.'s Mem. in Opp. 8-9.* Defendant GLOHA argues Plaintiff did not identify the seven (7) potential deponents in the instant case until April 7, 2013 and those depositions could not be taken until Defendant Dhaliwal's executors are substituted in this action. *Pl.'s Mem. in Opp. 8-9, Def. GLOHA's Br. in Supp. 3.* Defendant GLOHA asserts "Plaintiff's 'discussions' and strategy sessions with Dr. Dhaliwal relating to Dr. Dhaliwal's lawsuit did not advance Plaintiff's lawsuit." *Def. GLOHA's Mot for J. of Non Pros, ¶ 30.*

Here, the record reflects that during the over three (3) years of inactivity on the docket depositions were taken for a different case involving Defendant Dhaliwal and the M.D. Defendants, Plaintiff drafted but did not execute a protective order, and Plaintiff attempted to schedule depositions. Plaintiff's attempts to schedule depositions began in January 2013, thus comprising only three months of activity before the death of Defendant Dhaliwal. *Pl.'s Mem. in Opp. 8-9.* The Court is unpersuaded by Plaintiff's contentions that three months, of non-docketed activity, as well as the drafting of one document and depositions taken for a separate case, are sufficient to demonstrate due diligence. Thus, the Court finds a lack of due diligence on the part of the Plaintiff in failing to proceed with reasonable promptitude.

Next, M.D. Defendants assert Plaintiff "can show no compelling reason for his delay

[2] *Dhaliwal v. The Regional Cancer Center,* Docket No. 10774-2008.

in pursuing this action." *M.D. Defs.' Br. in Supp. 8.* Defendant GLOHA avers "Plaintiff's strategy to suspend all progress in our case for more than three (3) years while Dr. Dhaliwal's lawsuit proceeded through discovery, did not move our case forward at all and it is not the type nor quality of non-docket activity that is a 'compelling reason' for docket inactivity." *Def. GLOHA's Br. in Supp. 11.* Plaintiff argues Defendants have not taken into consideration "all activities and circumstances" involving the instant case. *Pl.'s Mem. in Opp. 12.*

The Pennsylvania Supreme Court has found non-docketed activity "can be examined in deciding whether a compelling reason exists." *Marino v. Hackman,* 710 A.2d 1108, 1111 (Pa. 1998). In *Marino* the Court found:

> This case had an unusual amount of activity not entered on the docket: the death of Appellants' first attorney and the substitution of his partner, an attorney not known or selected by Appellants; the taking of depositions of all the parties; the replacement of Appellants' second attorney because of Appellants' perception that he was not moving their case forward, the difficulties encountered by Appellants' third attorney in obtaining the case file from Appellants' second attorney as well as difficulty in getting the second attorney to withdraw his appearance; the exchange of letters seeking a settlement of the case; and, finally, a telephone discussion of certifying the case ready for trial.

Id.

Plaintiff avers he attempted to schedule depositions in this case but "[s]cheduling conflicts with counsel and their clients made this process very difficult." *Pl.'s Resp. to Def. GLOHA's Mot. for Non Pros ¶ 16 p. 6.* In *Hughes v. Fink, Fink & Assocs.,* the Superior Court found unpersuasive the plaintiff's contention that defendants' "failure to respond to discovery requests caused the delay. . ." *Hughes,* 718 A.2d 320. ("We remind Appellant of the well-established rule that it is the plaintiff's responsibility to move the case forward... and the plaintiff who bears the risk of judgment of non pros if he fails to act within a reasonable time to prosecute his case.")

Plaintiff also contends "it often times is more productive and cost effective to pursue informal discovery. . ." *Pl.'s Mem. in Opp. 13.* However, "[i]t has been held many times that...financial considerations do not present compelling reasons for delay." *Mackintosh-Hemphill Int'l v. Gulf & W.,* 679 A.2d 1275, 1280 (Pa. Super. 1996) quoting *County of Erie v. Peerless Heater Co.,* 660 A.2d 238, 240 (Commwlth. 1995). See *Dorich v. DiBacco,* 656 A.2d 522, 524-525 (Pa. Super. 1995) (Finding plaintiff's claim to be "economically unable to obtain" expert witnesses to not be a compelling reason for docket inactivity.)

Plaintiff also avers the discovery in Defendant Dhaliwal's case benefited both parties as "the underlying scheme, motive, and defendants are substantially identical in both suits thus, leading to the decision that collaboration between Plaintiff and Dhaliwal made sense." *Pl.'s Resp. to Def. GLOHA's Mot. for Non Pros ¶ 29.* M.D. Defendants assert "it is outrageous to suggest that the taking of a party's deposition in one lawsuit constitutes action in a separate lawsuit. Moreover, the parties in each action are not identical." *M.D. Defs.' Br. in Supp. 9.* Defendant GLOHA asserts it is not a party in Dr. Dhaliwal's lawsuit and "the salient events allegedly supporting the Dhaliwal lawsuit and those of the O'Brien

lawsuit are separated by at least three (3) years." *Def. GLOHA's Mot. for J. of Non Pros, ¶ 30.* For example:

> Dr. O'Brien's lawsuit arises from events that occurred in 2003 and early 2004 allegedly resulting in his loss of employment with GLOHA and loss of his medical privileges at RCC. Dr. Dhaliwal's suit involves events that occurred in the first six months of 2007 involving the negotiation of the 2007 Physician Services Agreement between PON and the various physician oncologists employed by PON.

M.D. Defs.' Br. in Supp. 4.

The Court of Common Pleas of Bucks. County found no compelling reason existed for almost ten years of docket inactivity where:

> Appellants counsel explains that for a period beginning in the fall of 2001, he was involved in class action litigation surrounding the diet drug 'FenPhen.' Allegedly, counsel's around-the-clock involvement with the class-action litigation made it "extremely difficult, if not altogether impossible" to pursue the present litigation. The Court certainly recognizes the efforts of Appellant's counsel in relation to the 'FenPhen' litigation. Such an obligation, however, does not excuse an attorney from performing due diligence on other cases he has willingly undertaken.

Londergan v. Asamura, 25 Pa, D. & C.5th 18, 24 (Bucks 2011) affirmed without opinion 48 A.3d 489 (Pa. Super. 2012).

However,

> [e]xamples of situations in which there will be a per se determination that there is a compelling reason for the delay, thus, defeating dismissal, are cases where the delaying party establishes that the delay was caused by bankruptcy, liquidation, or other operation of law, or in cases awaiting significant developments in the law.

Penn Piping, Inc. v. Insurance Co. of N. Am., 603 A.2d 1006, 1009 n.2 (Pa. 1992) overruled on other grounds by *Jacobs v. Halloran*, 710 A.2d 1098 (Pa. 1998).

Unlike the non-docketed activity in *Marino*, Plaintiff's non-docketed proceedings between March 1, 2010, and May 24, 2013, are not sufficient to establish a compelling reason for the over three year delay in pursuing the instant case. Here, discovery completed in the separate case, the economic benefits of Plaintiff's "informal discovery", and scheduling conflicts with other counsel do not create compelling reasons for the delay. Although the parties agree that after Defendant Dhaliwal's death depositions could not be scheduled until his executors were substituted in this case, the Court finds this is not a compelling reason for Plaintiff's delay as over three years had passed without meaningful docket or non-docketed activity before Defendant Dhaliwal's death. Thus, the Court finds Plaintiff has presented no compelling reason for the delay in pursuing this case.

Finally, M.D. Defendants assert they have been prejudiced because:

> First, the testimony of Dr. Dhaliwal, the former President of GLOHA, as co-defendant on Counts XIII through XV of the Amended Complaint and a material witness, is not available to benefit the Remaining Physician Defendants' defense. Second, to the extent Dr. O'Brien would offer self-serving testimony of his

> acknowledged meetings and conversations with Dr. Dhaliwal, Dr. Dhaliwal is no longer available to rebut that self-serving testimony. Third, the Remaining Physician Defendants are prejudiced by the fact that any verdict on Counts XIII through XV would be their sole responsibility without any contribution from Dr. Dhaliwal or his estate.

M.D. Defs.' Br. in Supp. 12.

Plaintiff argues M.D. Defendants' allegations "fall short of the burden. . .to establish a 'substantial diminution' of their ability to defend against this action. . ." *Pl.'s Resp. to M.D. Defs.' Mot. for Non Pros ¶ 19(c)(i-iii).* Plaintiff asserts M.D. Defendants have:

> a) already deposed Dhaliwal in his related action, b) cannot claim prejudice for any judgment that may have to be paid, in particular, since they did not file any cross-claim against Dhaliwal, and c) [M.D. Defendants] practiced with Dhaliwal and were in as good or a better position to testify as to any conversations with Dhaliwal.

Pl.'s Resp. to M.D. Defs.' Mot. for Non Pros ¶ 19(c)(i-iii).

Defendant GLOHA asserts it has been prejudiced by Defendant Dhaliwal's death as he "was one of the shareholders and/or officers of GLOHA during the events allegedly giving rise to Plaintiff's causes of action." *Def. GLOHA's Mot. for J. of Non Pros, ¶ 21.* Defendant GLOHA avers Dhaliwal is allegedly "one of the individuals" liable for failing to pay Plaintiff's salary and violating the Fraudulent Conveyance Act. *Def. GLOHA's Mot. for J. of Non Pros, ¶¶ 21-22.* Plaintiff argues Defendant GLOHA has not "suffered the required degree of prejudice to warrant entry of a judgment of non pros. . ." *Pl.'s Resp. to Def. GLOHA's Mot. for J. of Non Pros, ¶ 21.*

"The Superior Court has further defined prejudice as 'any substantial diminution of a party's ability to properly present its case at trial.'" *Jacobs*, 710 A.2d 1103; *quoting Metz Contracting Inc. v. Riverwood Builders, Inc.*, 520 A.2d 891, 894 (Pa. Super. 1987). Importantly, the Supreme Court of Pennsylvania has held that prejudice can be established by the death or absence of a material witness. *James Brothers Co. v. Union Banking and Trust Co. of DuBois*, 247 A.2d 587, 589 (Pa. 1968).

Plaintiff avers Defendant Dhaliwal's death has not prejudiced the M.D. Defendants as they do not know what Plaintiff "is yet to testify to on this case. Nor do they even know if he will rely upon any statements made by Dhaliwal that cannot be independently verified by other sources, or for that matter, by any of the other defendants in this case." *Pl.'s Mem. in Opp. 21.* Defendant GLOHA asserts "[t]here is nothing in the record to permit us to know" that the information known by Dr. Dhaliwal "can be gathered from the [M.D. Defendants]." *Def. GLOHA's Br. in Supp. 12-13.* Defendant GLOHA also asserts as it is not a party to Dr. Dhaliwal's lawsuit it did not have the opportunity to participate in his deposition. *Def GLOHA's Br. in Supp. 12.*

Plaintiff's allegations "occurred in 2003 and the first half of 2004, more than nine to ten years ago." *M.D. Defs.' Mot. for J. of Non Pros. ¶ 4.* "No depositions have been taken in this case, and the testimony of a critical Defendant, Dr. Dhaliwal, is no longer possible." *M.D. Defs.' Mot. for J. of Non Pros. ¶ 18.* The Pennsylvania Supreme Court has found, "[w]e recognize that defendants may be prejudiced by undue delays in litigation - - memories fade, witnesses

disappear and documents become lost or are destroyed." *Jacobs*, 710 A.2d 1102. Here, ten years have passed since the events alleged in the Amended Complaint, no depositions have ever been taken, and one party/material witness has died. Thus, the Court finds Defendant GLOHA and the M.D. Defendants have been prejudiced by Plaintiff's delay, having established a substantial diminution of their ability to properly present their case at trial.

Therefore, as Defendant GLOHA and the M.D. Defendants have established Plaintiff's lack of due diligence in proceeding with the instant case, no compelling reason for the delay, and that they have suffered actual prejudice, the Defendants' Motions for Judgment of Non Pros are granted. As the Motions for Non Pros have been granted neither the Estate of Ranjit S. Dhaliwal, M.D., or Brinderjit S. Dhaliwal and Gurdeet S. Dhaliwal, the Executors of the Estate, shall be substituted as parties.

ORDER

AND NOW, TO WIT, this 23rd day of January 2014, it is hereby **ORDERED, ADJUDGED & DECREED** for the reasons set forth in the forgoing opinion that Defendant GLOHA and M.D. Defendants' Motions for Judgment of Non Pros are **GRANTED** and the Estate of Defendant Dhaliwal and his Executors **SHALL NOT** be substituted as parties in this matter.

BY THE COURT:
/s/ **Shad Connelly, Judge**

BERNARD SKIFF and SHIRLEY SKIFF EXECUTRIX OF THE ESTATE OF C. BLAIR SKIFF, DECEASED, Plaintiffs

v.

ARIE KEIM, Defendant

CONTRACTS / STATUTE OF FRAUDS

The Statute of Frauds is implicated where parties intend to create a lease of real estate with a term that would likely last more than three years.

CONTRACTS / STATUTE OF FRAUDS

The Statute of Frauds requires a lease of real estate for a term in excess of three years to be in writing and signed by all parties, which includes all record title owners or their respective agents lawfully authorized in writing.

CONTRACTS / STATUTE OF FRAUDS

Where a tenancy is not memorialized in a writing which satisfies the requirements of the Statute of Frauds, the lease is at-will only unless the tenancy has continued for more than one year, in which case the tenancy is year-to-year.

CONTRACTS / STATUTE OF FRAUDS / RATIFICATION

A party may not interpose the Statute of Frauds as a defense where that party has ratified the agreement, in which instance the ratification must be in writing.

CONTRACTS / STATUTE OF FRAUDS / RATIFICATION

In response to Plaintiffs' argument that there was no formal written ratification, the Court concludes that the evidence as a whole, including the relationship between the parties, the circumstances known to the lessors, their acceptance of the benefits of the agreement, and documents signed by or created on behalf of the lessors, establishes a ratification.

AGENCY / ACCEPTANCE / BENEFITS AND OBLIGATIONS

A principal manifesting an intent to accept a transaction must accept the transaction in its entirety, including the obligations as well as the benefits; Restatement (Second) of Agency, § 96, Comment A.

CONTRACTS / STATUTE OF FRAUDS / RATIFICATION

Where property co-owned by two brothers was leased by one of the brothers prior to his death, and the other brother and the executrix of the leasing brother's estate accepted payments from the lessee of the farm property, had allowed the now deceased brother complete authority to operate the farm, were aware the lessee was operating the farm and, as concluded by the Court, understood that the farm had been leased, their actions and knowledge of the circumstances constitute ratification.

CONTRACTS / STATUTE OF FRAUDS / RATIFICATION

Written evidence of the intention of the surviving brother and the executrix to ratify the lease agreement is found in the form of checks from the lessee for payment of rent, which checks were negotiated by the surviving brother and the now-deceased brother's wife, as well as in correspondence and an inventory prepared by counsel for the brother and the executrix, which inventory recognized the lessee's lifetime interest so as to obtain a tax advantage.

CONTRACTS / STATUTE OF FRAUDS / LEASEHOLD INTEREST

The Court's determination that the lease agreement for the life of the lessee was ratified does not serve to divest the brother of his interest in the property or to dispossess either the brother or the executrix from the property.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12941-2008

Appearances: Richard E. Filippi, Esquire, Attorney for Defendant Bernard Skiff
Neal R. Devlin, Esquire, Attorney for Defendants Shirley Skiff and the Estate of C. Blair Skiff
Matthew Fuchs, Esquire, Attorney for Defendant Arie Keim

DECISION

Cunningham, J.

A bench trial has been held to determine the legal rights of the parties regarding a dairy farm which has been owned for decades by C. Blair Skiff ("Blair") and his older brother Bernard Skiff ("Bernard"). By a Purchase and Rental Agreement ("Agreement"), Blair sold dairy cows to the Defendant, Arie Keim ("Keim") and purported to lease the dairy farm to Keim. The validity of the lease to Keim is the dispute herein. At issue is whether Blair had the legal authority to enter into a lease within the Agreement with Keim and whether Bernard and Blair's widow ratified the Agreement. For the reasons that follow, this Court finds the Agreement was ratified thereby granting Keim a leasehold interest in the dairy farm.[1]

BACKGROUND

On or about December 6, 1962, Blair and Bernard Skiff purchased a 134 acre dairy farm outside of Corry, Pennsylvania from their mother, Lula Skiff. The deed was conveyed to the brothers as tenants in common.

Over time, the brothers purchased additional parcels for their farming operation. On June 22, 1967, Blair and Bernard bought a 50 acre parcel as tenants in common. A third parcel was purchased on April 26, 1977 containing two acres with title taken as tenants in partnership. A final parcel was purchased on January 31, 1979 consisting of 67.66 acres. The grantees were Bernard, Blair and Blair's first wife, Kathleen, as tenants in common.[2]

From the time of their purchase of the original farm in 1962 until the late 1960's, Blair and Bernard worked the farm together on a full-time basis. In the late 1960's, Bernard found full-time work off the farm as a Ford mechanic and later became a Ford dealer. From the late 1960's until 1982, Bernard worked on a part time basis on the farm and was paid a salary by Blair of $100 a month.

Sometime in 1982, Bernard completely stopped working on the farm because of the time demands of his Ford dealership and more importantly, the need to take care of his wife who had contracted cancer. After 1982, Bernard was not involved in any capacity working on the farm.

Bernard's absence did not affect the farm operations because Blair had been in charge of all aspects of the farm since the late 1960's. For his entire work life, Blair's livelihood was working the dairy farm.

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[1] The lawyers in this case are commended for their outstanding work in preparing and presenting this case. The written and oral advocacy has been exemplary.

[2] The dispute regarding ownership of this 67.66 acre parcel is pending before the Orphans' Court of Erie County and is not a matter in controversy before this Court.

Since the late 1960's, Blair had the authority to make all decisions necessary to operate the dairy farm. Blair bore all of the business risks of the farm. Blair paid all of the expenses of the farm. For tax purposes, all income, expenses and losses associated with the farming operations were attributed to Blair.

It was Blair who bought and sold livestock. It was Blair who bought and/or repaired equipment. It was Blair who negotiated the sale of the dairy milk. It was Blair who hired and/or fired any farmhands. Blair made all of these decisions without needing to consult with Bernard.

The record is devoid of any instance when Bernard objected to a decision Blair made about farm operations during Blair's lifetime. For example, prior to the Agreement entered into with Keim, Blair sold some fifty cows and/or heifers at an auction with the proceeds going to Blair and not Bernard. There was no objection by Bernard to the authority of Blair to engage in this transaction or the disposition of the proceeds.

In 1985, Blair leased the oil and gas rights to their 67.66 acre parcel to Park-Ohio Energy, Inc. without Bernard's written consent or signature. Bernard has never challenged Blair's authority to enter into the lease nor the validity of the lease. Any revenue from this oil and gas lease went to Blair.

Over the years, Bernard and Blair discussed major purchases of equipment and/or repairs to the barn. There were times they borrowed money to make repairs to the barn or to purchase farm equipment. The brothers consolidated these loans into a mortgage through Northwest Savings Bank in October, 2002. *See Plaintiff's Exhibit 7.* Blair and Bernard were the mortgagors. All payments on the mortgage were made by Blair until July 1, 2005 when Keim began making the payments pursuant to the Agreement. This mortgage has been fully satisfied by Keim.

In 1988, Keim began working as a housekeeper for Shirley Skiff, Blair's second wife ("Shirley" is also a Plaintiff herein as Executrix of Blair's estate). Keim became a de facto family member and often joined the Skiff family for holidays and other family events.

In 1989, Keim began working on the dairy farm full-time under the auspices of Blair. She learned how to perform all farm-related responsibilities. Keim plowed, planted and harvested crops. Blair taught her how to weld and repair farm equipment and machinery. Fortunately for Blair he trained Keim to take over the farm operations when his health made it very difficult to do so.

Blair's arthritis worsened with age. Eventually Blair had both of his knees replaced. He had separate operations on his hands and a shoulder. He also underwent heart surgery. During the times when Blair was physically unable to work, Keim assumed all of the duties of the farm operations.

It is undisputed that Blair and Keim entered into the Agreement on June 17, 2005. *Plaintiff's Exhibit 4.* The Agreement covers two transactions. In the first transaction, Blair sold Keim fifty heifers in exchange for Keim's promise to pay the balance of $49,005.00 owed on a mortgage to Northwest Savings Bank with Blair and Bernard as mortgagors. In the second transaction, Blair leased to Keim 300 acres of farmland, a barn and farm equipment. As rent, Keim was to pay one half of the real estate taxes, all of the liability and hazard insurance and all but $100 of the electric bill. The lease was to commence on July 1, 2005 and last as long as Keim paid the rent.

The following parts of the Agreement are uncontested by the parties. Blair sold Keim fifty heifers. As consideration for the heifers, Keim was to satisfy the mortgage held by Northwest Savings Bank. The fair market value of the fifty heifers was equivalent to the remaining balance on the Northwest Savings Bank mortgage, in other words, it was a fair trade.

In addition, Keim became obligated to pay one half of the real estate taxes, pay the entire cost of hazard and liability insurance and part of the electric bill. Bernard and Shirley admit knowing about these terms prior to Blair's death and have accepted Keim's payments for all of these items since 2005. What Bernard and Shirley dispute is whether the Agreement also conveyed to Keim a lease for the 300 acres of farm land, one barn and the farm equipment.

It is uncontroverted that since July 1, 2005, Keim has paid off the mortgage owed by the brothers to Northwest Savings Bank. Likewise, she has paid for all of the hazard and liability insurance, one half of the real estate taxes and her share of the electric bill since July 1, 2005.

After entering into the Agreement, Keim assumed responsibility for all operations of the farm and care of the farm animals. She no longer was on Blair's payroll. Instead, she earned her livelihood from the farm operations. Keim has filed federal tax returns since 2006 as the lessee of the farm. These tax returns reflect her income and expenses, including depreciation of the farm equipment.

Keim has never excluded Bernard or Shirley from the farm property or interfered with their use of the farm. Bernard and Shirley harvested timber from the property after Blair's death and kept the proceeds from the timber sale. Keim did not ask for nor receive any of the timber revenue.

Shirley continues to lease the farmhouse on the property. Keim receives no rental income from the farmhouse nor does she object to Shirley's use of the farmhouse.

Keim does not receive any income from the oil and gas lease entered into by Blair with Park-Ohio Energy, Inc. Those monies, if any are owed, are payable to Bernard and Shirley without objection from Keim.

After Blair died, Bernard had a water well drilled to service the farmhouse and therefore relieved Bernard and Shirley of any water bill for the farm operations. Keim did not oppose or prevent this well from being dug.

After Blair died, Bernard had a separate electric meter installed on the farmhouse so the electric bills were separated. Keim did not object to or oppose Bernard's actions. To Bernard's knowledge, this means that Keim pays for all electric used in the farm operations. It also means that Bernard and Shirley likely have electric bills of less than $100 per month which is a better situation for them.

From 2005 to 2010, Bernard kept his horse "Babe" on the dairy farm at no expense to Bernard. Keim bore all of the time and expenses of caring for Bernard's horse.

PROCEDURAL HISTORY

On June 18, 2008, Bernard filed a complaint against Keim setting forth causes of action under theories of Ejectment, Rents and Profits, Unjust Enrichment, Quiet Title and Partition. After Preliminary Objections were filed, Bernard filed an Amended Complaint on August 26, 2008.

Keim filed a second set of Preliminary Objections. Plaintiff, Shirley Skiff, Executrix of Blair's Estate, joined Bernard in filing a second Amended Complaint. The sole count in the second Amended Complaint is an action in Ejectment seeking to remove Keim from the farm and requesting the fair rental value of the property.

Keim filed an Answer and New Matter to Plaintiff's second Amended Complaint. Thereafter, Keim filed a first Amended Answer, New Matter and Counterclaim to Plaintiff's second Amended Complaint.

The Plaintiffs contend that Blair did not have any written authority to enter into a lease with Keim, nor did the Plaintiffs ratify the lease in writing, therefore the lease expired on June 24, 2009. Plaintiffs seek ejectment and recovery of the rental value of the farm since June 24, 2009 (which is one year after the service of this lawsuit on Keim).

Keim's position is that Blair had the authority to make binding agreements regarding the dairy farm. The Plaintiffs have always accepted all of the benefits of the Agreement. Keim operates the farm at no cost to the Plaintiffs and without interfering with the Plaintiffs use of the farm. Keim argues the Plaintiffs have ratified the Agreement by their conduct and a series of documents. Therefore Keim maintains the Agreement granted her a leasehold interest in the dairy farm. If there is no binding leasehold interest, then Keim's Counterclaim seeks damages from the Plaintiffs based on her justifiable reliance on the Agreement.

STATUTE OF FRAUDS

The parties agree Blair and Keim intended to create a lease with a term that would likely last more than three years and thus the Statute of Frauds is implicated. In relevant part, the Statute of Frauds provides:

> Real property, including any personal property thereon, may be leased for a term for more than three years by a landlord to a tenant or by the respective agents lawfully authorized in writing. Any such lease must be in writing and signed by the parties making or creating the same, otherwise it shall have the force and effect of a lease at will only and shall not be given any greater force or effect either in law or equity, notwithstanding any consideration therefore, unless a tenancy is continued for more than one year and the landlord and tenant have recognized its rightful existence by claiming and admitting liability for the rent, in which case the tenancy shall become one from year to year.

68 P.S. §250.202.

The Statute of Frauds requires the lease to be in writing and signed by all parties. In the case of the lessor, the lease needs to be signed by all record title owners or their respective agents who are "lawfully authorized in writing." *Id.*

In this case, the Agreement was in writing but not signed by the Plaintiffs nor is there any written document authorizing Blair to sign the Agreement on behalf of the Plaintiffs.

The Plaintiffs concede that Keim's tenancy existed for more than one year prior to this lawsuit, which converts the lease from a lease at will to a year-to-year lease. According to the Plaintiffs, this lawsuit constituted Keim's notice to vacate the premises on June 24, 2009, which was one year from the date that Keim was served with the Complaint. The Plaintiffs seeks monetary damages from June 25, 2009 to the present.

RATIFICATION

The Statute of Frauds cannot be interposed by a party who did not sign a lease but who subsequently ratified it. A ratification of a lease has to be in writing. *Ripple v. Pittsburgh Outdoor Advertising Corporation,* 280 Pa. Super 121, 421 A2d. 435 (1980).

The Plaintiffs argue they have not ratified the lease to Keim in writing. However, this Court finds that the relationship between the parties, the circumstances known to the Plaintiffs, the Plaintiffs' acceptance of all of the benefits of the Agreement and the documents created or signed by the Plaintiffs constitute their ratification of the Agreement, including the lease to Keim.

As a threshold matter, this Court does not accept the Plaintiffs' attempt to parse out of the Agreement which terms are ratified. In so doing, the Plaintiffs want the focus of this case to be only on the lease provisions of the Agreement, i.e., to look at the lease in a vacuum. However, Bernard and Shirley cannot accept all of the benefits of the Agreement and reject their sole obligation created by it.

The issue then is whether Bernard and Shirley ratified the Agreement, not simply whether they ratified the lease in writing. This analysis begins with the manner in which the parties did business.

From 1962 until the late 1960's, Blair and Bernard were equally active partners in the farm operations. In the late 1960's, Bernard made a conscious decision to engage in full-time employment off the farm. Bernard's work on the farm was gradually reduced through 1982. By his own admission, after 1982, Bernard did not work on the farm at all.

Bernard's departure left Blair in control of the farm operations. The decisions affecting the farm operations were made by Blair without the need for the consent of Bernard. This was because Blair had assumed all of the business risks of running the farm. It remained Blair's sole livelihood while Bernard was involved in the car business.

To Bernard's credit, there were times he provided input into farm operations and co-signed for various loans to benefit the farm. However, payment of all of the loans was the responsibility of Blair and not Bernard.

There is no evidence of any occasion where Bernard challenged Blair's authority to make any decision during Blair's lifetime. There were opportunities for Bernard to do so, for example, when Blair sold cows and kept the proceeds or when Blair entered into an oil and gas lease without Bernard's signature. Also, all of the expenses of the farm operations were paid by Blair and not Bernard. Based on the trial record, the only objection Bernard expressed to Blair was his belief Keim should be paying more of the electric bill.

To Bernard's knowledge, his younger brother Blair had increasingly significant health problems which made it difficult to manage the farm. Bernard was also aware that Keim was doing everything to keep the farm functioning.

From Blair's perspective, he had been running the farm since the late 1960's. Because of poor health, he could no longer run the farm and his older brother Bernard had been out of the farming picture since 1982. The business relationship between the brothers permitted Blair to make unilateral decisions about the farm because it was his livelihood. Blair groomed Keim to take over the farm. Hence, it made sense from Blair's viewpoint to enter into the Agreement with Keim because he benefitted from her assumption of most of his farm bills.

The Agreement was consistent with past decisions Blair made which resulted in a financial benefit only to Blair. Bernard acquiesced to those decisions. The likely alternative for Blair was to cease the dairy farm operations without any source of revenue to him.

From Keim's perspective, Bernard had never been part of the farming operation. Bernard ceased any involvement with the farming operations since 1982, some seven years before Keim became a farmhand. It is plausible that Keim did not know that Bernard was a title holder to the farm property since he was not involved in the farming operations during her time leading up to the Agreement. In this respect, Keim's observations were consistent with that of Rita Caulder, who lived across the street from the farm property since 1974 and never observed Bernard performing any work on the farm.

Neither Blair nor Keim appeared to be sophisticated in business. Understandably, Blair and Keim relied on Attorney Carney in preparing the legal agreement to effectuate their intent. They accepted the Agreement and abided by its terms until Blair's death. To the Plaintiffs' knowledge, Keim continues to fulfill all of her financial obligations under the Agreement.

Keim was no stranger to Bernard and Shirley. She had become part of the Skiff family. She proved capable of running the farm. To his credit, Bernard and his wife sent Keim a Christmas card in December, 2006, shortly after Blair's death, recognizing her work in the barn. *See Plaintiff's Exhibit 2.*

Bernard and Shirley admitted they knew Keim was operating the farm prior to Blair's death. Neither Bernard nor Shirley objected to Blair about Keim's operation of the farm or Keim's care of the farm equipment and cattle. Nor did they object to Blair about Keim's payments of the farm expenses, taxes, insurance or electric bill.

Prior to Blair's death, Shirley told Keim what Keim owed for the electric bill, real estate taxes and liability insurance. Keim paid Shirley by bank checks for these expenses. This same arrangement continued after Blair's death. At some point, Keim began making these payments to Bernard.

Bernard's contention that he never gave his consent in writing for Blair to enter into the Agreement with Keim is consistent with their business practices. The reality is that Blair and Bernard never reduced their working arrangements to writing. Despite their decades together, there was no written partnership agreement between the brothers. There was no filing of a fictitious partnership name. There was no federal tax identification number and no partnership tax returns were ever filed. By their conduct since the late 1960's, there was no need for the brothers to formalize their legal relationship by written documents.

UNTENABLE DENIAL

Bernard and Shirley want this Court to believe that while they knew all of the terms of the Agreement that benefitted them, they were not aware of the Agreement or lease provision with Keim prior to Blair's death. For a host of reasons, Bernard and Shirley are not credible on this point.

Beginning with Bernard, he strikes a posture of claiming to be abreast of all matters involving the farm operation, including all of the favorable benefits he was receiving, yet at the same time, he was unaware of the purported lease with Keim. His denial is inconsistent with his relationship with Blair.

According to Bernard, he was "always in contact with Blair" even after 1982 when he

quit working on the farm. Given their history together, Blair and Bernard always had an open dialogue about farm operations. Bernard was willing to co-sign on debt incurred on the farm, affirming his consent to what Blair was doing. Bernard knew the farm was Blair's livelihood and did not object to Blair receiving revenue from the oil and gas lease. Nor did Bernard object to Blair selling roughly half of their cattle herd at an auction and keeping the proceeds.

During Blair's lifetime, there is no evidence of any rifts, arguments or feuds between Blair and Bernard. At the time of Blair's death on November 27, 2006, the brothers still had an amiable relationship. There is no evidence that Blair ever hid any business matter from Bernard.

Bernard knew that since 1982, he had no active part in doing farm work. Bernard is older than Blair. In 2005/2006, Bernard would have been in his mid-seventies and did not have any interest in taking over the farm.

Bernard was well aware of Blair's declining health and inability to do some of the farm work. At the same time, Bernard was aware of the increasing role that Keim was playing in operating the farm prior to Blair's death.

Bernard testified that he knew and consented to the sale of the fifty heifers by Blair to Keim in exchange for Keim's agreement to pay off the balance of the Northwest Savings Bank Mortgage. Bernard acknowledged this was an exchange at fair market value, i.e., the heifers had a value equivalent to the mortgage balance. Bernard also knew that this transaction was favorable to him since it relieved him of his debt on the mortgage. This Court is hard-pressed to believe that in the course of discussing this transaction of the heifers that Blair did not mention the Keim lease arrangement to Bernard.

What is more telling is the fact that Bernard knew that the sale of these heifers to Keim meant that Blair had sold all of the remaining cattle for the dairy farm. Bernard is not naive. Bernard knew that Blair could not continue as a dairy farmer without any cattle. The proceeds from the sale to Keim went to pay off an existing debt and did not provide an influx of capital to buy new cattle. At that point in time, Blair had retired from being a dairy farmer.

Hence, it is inconceivable that there were no discussions between Blair and Bernard between June 17, 2005 when the Agreement was entered, and November 27, 2006 when Blair died, about the future of the dairy farm. In this seventeen-month window of time, during which Bernard and Blair continued to have frequent contact, Blair's health was declining, Bernard and Blair had no more cattle and Keim was operating the farm, Bernard, with his decades of business acumen, was savvy enough to discuss with Blair any plan in place for the operation of the farm, particularly since neither he nor Blair were then in a position to continue the farm operations.

There is more compelling evidence to reach this conclusion. Prior to Blair's death, Bernard and Shirley became aware of the fact that Keim started paying one half of the real estate taxes for the farm, all of the liability and hazard insurance for the farm and all but $100 of the electric bill. Bernard attempted to justify accepting these payments because there were "farm expenses that needed to be paid." This answer begs the question which certainly Bernard posed to Blair regarding why Keim is now paying these bills.

There is no plausible reason for Keim to be paying these expenses other than the fact that

it was in consideration for her use of the farm. Bernard and Shirley do not characterize these payments as gifts nor provide any reason why Keim pays these bills. Common sense leads to the inescapable conclusion Keim was receiving something of value in return for her payments.

Shirley is similarly situated to Bernard because she had firsthand observations of her husband's declining health, knew that Blair had sold all of his heifers to Keim, knew that Keim was running the farm and paying on the taxes, insurance and electric bill. Bernard and Shirley also offer no explanation why Blair would have kept the Agreement a dark secret for seventeen months from his wife and brother (with whom he had been in business for decades).

The attempted denial by Bernard and Shirley of any discussion with Blair or knowledge of the Agreement prior to Blair's death is simply not credible.

Bernard contends that Blair's act in entering the Agreement was unauthorized because the lease of the dairy farm was outside the usual business of the partnership. According to Bernard, the business of the partnership was farming, not leasing the partnership assets. This argument is unpersuasive.

This was not the first time that Blair leased some of their acreage without Bernard's signature. As Bernard knows, Blair entered into an oil and gas lease for one of their parcels. Bernard has never challenged Blair's authority to sign the oil and gas lease or disputed the fact any lease revenue went to Blair.

Moreover, Bernard loses sight of the context of the Agreement. At the time the Agreement was entered, Blair could no longer work the farm and Bernard had no interest in working the farm. By entering into the lease agreement with Keim, Blair allowed their dairy farm to continue as a dairy farm and derive income from Keim's rent. Blair's ability to lease the farm allowed him to continue to generate revenue as he had done with the consent of Bernard since the late 1960's.

Blair was also leasing the dairy farm to someone he trained and trusted. As evidenced by the Christmas card in 2006, Bernard also trusted Keim's work on the farm. Bernard and Shirley never expressed any concerns to Blair about Keim's work. Without the Agreement, the partnership business of farming could have ceased.

Bernard and Shirley are willing to accept all of the benefits of the Agreement without suffering any of the burdens. Their position is untenable. As stated by the Superior Court:

> The purported principal must take the transaction in its entirety, with the burdens as well as the benefits… If he manifests that he does not intend to affirm the transaction or to receive the benefits unless he can do so without assuming the obligation, he does not thereby ratify the transaction or any portion of it; except if he brings or maintains an action upon, or received or retains benefits of, an unauthorized transaction with knowledge of the facts, such conduct constitutes an affirmance of the entire transaction irrespective of a manifestation of intent not to be bound by the liability it imposes, if the other party elects to treat it as such."

Comment A to §96 of the Restatement (Second) of Agency cited w/approval by *Sterl v. Galiardi Coal and Coke Company,* 77 A.2d 669, 673 (Pa. Super 1951).

By retaining all of the benefits of an "unauthorized" transaction with knowledge of all

of the facts after Blair's death, if not before, Bernard and Shirley must take the transaction in its entirety, meaning they are bound by all of the terms of the Agreement including the lease to Keim. Bernard and Shirley cannot accept all of the benefits of the Agreement while disavowing the only obligation created by it. Accordingly, Bernard and Shirley are deemed to have ratified the entire Agreement, including the Keim lease.

WRITTEN RATIFICATIONS

There are a variety of written documents signed or created by Bernard and Shirley manifesting their intention to ratify the Agreement, including the lease provision to Keim.

These documents begin in 2005 prior to Blair's death. In the seventeen-month window of time between the Agreement and Blair's death, Bernard and Shirley accepted payments from Keim for the real estate taxes, insurance and the electric bill. These payments were all made by bank checks from Keim.

Prior to Blair's death, every time Bernard and/or Shirley received one of these checks from Keim, they had an opportunity to inquire of Blair as to why Keim was paying these bills. Bernard and/or Shirley then had to decide whether to negotiate each of Keim's checks. Their decision to negotiate each of these checks prior to Blair's death constitutes their ratification of Keim's lease. There is no explanation for the purpose of these checks other than it was rent as described in this Agreement. Keep in mind, the heifers were paid for by the satisfaction of the Northwest Savings Bank mortgage. Hence, there is no other reason for the additional consideration being paid by Keim with no end date in sight for these payments.

Shortly after Blair's death when Bernard and Shirley purport to learn for the first time of the Agreement and lease with Keim, they sought legal counsel. Both Bernard and Shirley testified they retained the services of Attorney Robert Bailey regarding the administration of Blair's estate. Bernard and Shirley went to Attorney Bailey "to get this resolved" referring to the lease provisions of the Agreement.

After consulting with Attorney Bailey, Bernard and Shirley continued to accept Keim's checks for payment on the taxes, insurance and electric bill. Every time Bernard or Shirley cashed one of Keim's checks, it constituted a ratification of the Keim lease as these sums were for the rent as described in the Agreement. Bernard and Shirley accepted, signed and negotiated a multitude of Keim's checks for three years before filing this lawsuit.

What is troubling in terms of this lawsuit is another matter involving the collusive ratification of the Agreement by Bernard and Shirley. After Blair's passing, Bernard worked closely with Shirley on matters affecting Blair's estate. As a tenant in common and/or a partner with Blair, Bernard had a vested interest in how Blair's estate was distributed.

It is obvious that after consulting with Attorney Bailey, Bernard and Shirley resolved to ratify the Agreement and not contest the lease to Keim. Consistent with the intentions of his clients, Attorney Bailey prepared several documents.

By letter dated January 9, 2008, to Attorney L.C. TeWinkle, who was then representing Keim, Attorney Bailey stated "(a)s you know, as part of our responsibility in handing the Estate of Blair Skiff, we are required to file a Pennsylvania inheritance tax return. In light of the fact that your client has certain rights to the real estate, those rights will reduce the value of the property ultimately passing to Blair Skiff's heirs. In order to make an accurate calculation we need Arie Keim's date of birth." *Defense Exhibit 4.*

Clearly this letter is a written acknowledgement on behalf of Bernard and Shirley that Keim held a leasehold interest in the farm which would reduce the value of the property passing to Blair's heirs. Attorney Bailey described Keim's rights to the real estate as a "fact." The need for Arie Keim's date of birth was to establish the value of her life estate in the farm. This letter is also important for what it did not say. Absent is any statement indicating Bernard and/or Shirley disputed the validity of the lease to Keim, repudiated the terms of the Agreement or otherwise demanded she vacate the premises. Instead, the letter ratified Keim's interest in the real estate.

Consistent with his letter to Attorney TeWinkle, Attorney Bailey, on behalf of Bernard and Shirley, filed an Inventory for Blair's estate with the Register of Wills on February 27, 2008 stating, *inter alia*, that "the farm equipment was left to Shirley Skiff…subject to the life estate of Arie Keim under a certain agreement." *Defense Exhibit 3.*[3]

These two documents unequivocally establish Bernard and Shirley were acknowledging in writing Keim's leasehold life estate in the farm and were seeking to receive a tax benefit therefrom because it reduced the taxable value of the property passing through Blair's estate.

After having sought the tax benefit of Keim's life estate, Bernard and Shirley cannot deny by way of this lawsuit the existence of Keim's life estate. Notably, this lawsuit was filed on June 18, 2008, nearly four months after the Inventory was filed for Blair's estate acknowledging Keim's life interest.

In summary, Bernard and Shirley ratified the Agreement by virtue of their acceptance, signature and negotiation of every check Keim tendered to them as payment on the real estate taxes, insurance and electric bill for the three years prior to this lawsuit. Importantly, there were over seventeen months before Blair died during which Bernard and/or Shirley would have learned from Blair the purpose of Keim's payments. At the latest, after Blair's death, when Blair and Shirley purportedly learned of the Agreement, their continued acceptance of Keim's payments constituted written ratification of the lease Agreement.

In addition, Bernard and Shirley affirmed in writing their acknowledgment of Keim's life estate through the January 8, 2008 letter from their attorney and the filing of the Inventory for Blair's estate. Bernard and Shirley cannot now deny their ratification after having sought a tax benefit for Keim's life estate.

CONCLUSION

Given the relationship between the parties, the manner in which they did business, the circumstances as created and known by the parties and the written documents, Bernard and Shirley have enjoyed every benefit of the Agreement and have ratified it. Hence, Keim has

[3] Bernard claimed he had never seen the Inventory before the trial. The credibility of this testimony is doubtful. If he had not seen the actual Inventory, he certainly was aware of its contents as a matter of direct and circumstantial evidence. By his own admission, he was very concerned about the lease to Keim and quickly went with Shirley to meet with Attorney Bailey "to get this resolved." By his own admission, he worked closely with Shirley administering Blair's estate. Attorney Bailey represented both Bernard and Shirley. Bernard did not hire counsel separate from Shirley and take a different approach to contesting Keim's lease. Bernard also worked closely with Shirley after Blair's death to harvest timber, dig a water well and install a separate electric meter on the farmhouse. Hence, any attempted denial by Bernard of his knowledge of the substance of the January 8, 2008 letter from the attorney he and Shirley hired or the Inventory filed by the same attorney is not credible.

a leasehold interest in the farmland, farm equipment and a barn as long as she pays the rent.

As the title infers, the Statute of Frauds was intended to prevent fraudulent transfers of an interest in real estate. In this case, there was nothing fraudulent about the manner in which Blair granted a leasehold interest to Keim. They reduced the transfer to writing. They were transparent in the manner in which they abided by its terms. It was no secret to Bernard and Shirley that Keim was running the farm instead of Blair and paying the bills. Under these facts, to invoke the Statute of Frauds means that Blair tried to perpetrate a fraud upon his wife and brother, with whom he had been in business with for decades.

Blair and Keim did not engage in any deceptive behavior designed to fraudulently convey a leasehold interest. In their minds, they effectuated their intent with a lawyer and relied on the lawyer's expertise in preparing the Agreement.

Importantly, Bernard and Shirley became aware of all of the relevant information needed to discuss this matter with Blair prior to Blair's demise. After Blair's passing, Bernard and Shirley continued to cash Keim's checks and let eighteen months lapse before filing this lawsuit. During that eighteen months, through their counsel, Bernard and Shirley did not repudiate the Agreement or dispute Keim's lease. To the contrary, through their counsel, they affirmed Keim's lease and sought to receive a tax benefit from it. Under all of the facts, to allow Bernard and Shirley to defeat Keim's leasehold interest would create an injustice unintended by the Statute of Frauds.

Nothing in this Court's ruling divests Bernard of his interest in the real property. In fact, nothing in this ruling changes his relationship to the farming operations because he has not farmed the property since 1982.

Likewise, nothing in this Court's ruling dispossesses Bernard or Shirley from the property. Bernard and Shirley have harvested timber, drilled a water well for the farmhouse and installed a separate electric meter. Shirley leases the farmhouse. Keim took care of Bernard's horse on the farm. Bernard and Shirley stand to benefit from any oil and gas revenue. Keim has not opposed or prevented Bernard or Shirley from any desired use of the property.

Based on the foregoing, there are no money damages owed by Keim to Bernard and/or Shirley. There is also no basis to grant relief for Keim's Counterclaim.

BY THE COURT:
/s/ WILLIAM R. CUNNINGHAM, JUDGE

THORP-PATTERSON CONSTRUCTION & MANAGEMENT, Plaintiff

v.

THE SARAH A. REED CHILDREN'S CENTER; BUEHLER & ASSOCIATES, INC.; BUECHLER & ASSOCIATES, INC. d/b/a BUEHLER & ASSOCIATES; and SHELANE A. BUEHLER, Individually, Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

When the court rules on preliminary objections, it must accept as true all well-pled facts which are relevant and material. The court must also accept all inferences reasonably deducible from these facts as true. For the court to sustain a preliminary objection, it must appear certain that from the facts pleaded, "the pleader will be unable to prove facts legally sufficient to establish his right to relief."

TORTS / CIVIL CONSPIRACY

Civil conspiracy requires the plaintiff to demonstrate "two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." To succeed on such a claim, the particular act itself must give rise to a civil cause of action. Proof of malice must also be proven to recover on conspiracy.

TORTS / FRAUD

Under Pennsylvania law, essential elements needed to recover on a claim of fraud include a representation, material to the transaction at hand, which is knowingly or recklessly made falsely with the intent of misleading another into reliance on it. Additionally, the moving party must have sustained an injury proximately caused by the justifiable reliance on this misrepresentation.

AWARDS / ATTORNEY'S FEES

Unless provided by statute or otherwise agreed upon by the parties, in Pennsylvania, litigants are required to pay their own attorney's fees and costs. Absent such a showing, an award for attorney's fees is inappropriate.

CONTRACTS / UNJUST ENRICHMENT | PLEADINGS / COMPLAINT

At the trial stage, where an express contract exists and defines the duties of the parties, such parties are precluded from seeking the equitable remedy of unjust enrichment; they must, instead, look to contract remedies. However, at the pleading stage, a party may, in his pleadings, seek both unjust enrichment and contract remedies.

DAMAGES / CONSEQUENTIAL DAMAGES | CONTRACTS / DAMAGES

Generally, consequential damages are appropriate in breach of contract cases when either the damages are such that would "naturally and ordinarily result" from the breach, or the damages are "reasonably foreseeable" and "within the contemplation of the parties at the time of contracting." However, such damages are not recoverable when an express contract specifically precludes them.

PLEADINGS / COMPLAINT

Dismissal of a contract claim may be premature at the pleading stage since discovery generally has not been completed and such discovery may serve to clarify contractual terms.

PLEADINGS / GENERAL REQUIREMENTS

Pursuant to Rule 1019(i) of the Pennsylvania Rules of Civil Procedure, a plaintiff must attach all writings upon which his case relies.

TORTS / TORTIOUS INTERFERENCE WITH A CONTRACT

To recover on a claim of tortious interference with a contract there must be a contractual relationship between the complainant and a third-party which the defendant interferes with by either inducing a breach or otherwise causing the third-party not to perform the contract. Further, the defendant must not be privileged to act thusly and a monetary loss from the breach of the contract must result.

TORTS / COMMERCIAL DISPARAGEMENT

To recover on a claim of commercial disparagement, the plaintiff must prove that a false statement, known or recklessly made by the publisher, was published with either the intention of causing monetary loss or the reasonable expectation that such loss would occur. Further, the plaintiff must have actually suffered a monetary loss before being able to recover.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 13017 - 2013

Appearances: Tibor R. Solymosi, Esq., Attorney for Plaintiff
Craig A. Markham, Esq., Attorney for Defendant SRCC
Michael J. Cremonese, Esq., Attorney for Defendant B&A
William C. Wagner, Esq., Attorney for Defendant B&A

OPINION

Connelly, J., June 11, 2014

The matter before the Court is pursuant to two sets of Preliminary Objections, one filed by Sarah A. Reed Children's Center (hereinafter "Defendant SRCC") and the other by Shelane Buehler, individually, and Buehler and Associates (hereinafter collectively "Defendant B&A"). Thorp-Patterson Construction & Management (hereinafter "Plaintiff") opposes.

Statement of Facts and Procedural History

Prior to May 2012, Defendant SRCC retained Defendant B&A to prepare documents regarding renovations of Defendant SRCC's main building, located on West 34th Street in Erie, Pennsylvania. *Compl. ¶¶ 11-12.* Plaintiff won the bidding for the job and entered into a construction contract to perform the renovations outlined by Defendant B&A in exchange for a payment of $1,719,000. *Id. at ¶¶ 13-16.* Pursuant to the contract, Defendant SRCC was to obtain all necessary permits before Plaintiff would begin construction, and any requested change orders would be handled by the architect, Defendant B&A. *Id. at ¶ 18.* Due to alleged errors in obtaining permits by Defendant SRCC, Plaintiff was forced to halt production for thirty-two (32) days, causing losses to Plaintiff. *Id. at ¶¶ 19-25.* During the course of construction, Plaintiff requested numerous change orders due to alleged errors, misrepresentations, and mistakes in the construction plan created by Defendant B&A. *Id. at ¶¶ 26-29.* Many of those change orders were denied or partially denied by Defendant B&A, requiring Plaintiffs to cover the alleged cost of the changes. *Id. at ¶¶ 26-39.* Further, Defendant B&A allegedly did not make progress payments and failed to reduce retainage as outlined in the construction contract. *Id. at ¶¶ 40-51.*

On November 7, 2013, Plaintiff filed a Complaint alleging eight counts, including

Breach of Contract, against both Defendant SRCC and Defendant B&A. Defendants SRCC and B&A filed separate Preliminary Objections to the Complaint on November 27, 2013, and later filed corresponding Briefs. Plaintiff filed briefs in opposition to both sets of Preliminary Objections on January 22 and 23, 2014, and Defendant SRCC filed a Reply Brief on February 4, 2014.

Analysis of Law

The Pennsylvania Rules of Civil Procedure state "any party to any pleading" may file preliminary objections. *Pa. R.C.P. 1028(a).* When ruling on preliminary objections, a court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefrom. *Bower v. Bower,* 611 A.2d 181,182 (Pa. 1992). To sustain preliminary objections, it must appear with certainty, or be "clear and free from doubt" based on the facts as pleaded, "that the pleader will be unable to prove facts legally sufficient to establish his right to relief." *Id.*

1. Defendants SRCC and B&A argue the civil conspiracy claim is legally insufficient because Plaintiff has not pled the elements of the claim.

Defendant SRCC contends Plaintiff's civil conspiracy fraud claim fails to state a claim upon which relief may be granted because Plaintiff has failed to offer any proof of malice or intent to injure stemming from an agreement between the Defendants. *Def. SRCC's Prelim. Objs. ¶¶ 5-7.* Defendant B&A asserts Plaintiff has not "adequately pled a fraud claim" and has "failed to allege facts, beyond a mere belief, that two or more parties acted in concert". *Def. B&A's Br. In Supp. 2.* Plaintiff argues it has "pled all of the necessary elements of a civil conspiracy." *Pl.'s Br. in Opp. to Def. SRCC's Prelim. Objs. 5.*

A claim of civil conspiracy requires a plaintiff to show "that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." *Skipworth by Williams v. Lead Indus. Ass'n,* 690 A.2d 169,174 (Pa. 1997) (citing *Thompson Coal Co. v. Pike Coal Co.,* 412 A.2d 466,472 (Pa. 1979)). "Additionally, 'absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.'" *Goldstein v. Phillip Morris, Inc.,* 854 A.2d 585, 590 (Pa. Super. 2004) (quoting *McKeeman v. Corestates Bank, N.A.,* 751 A.2d 655, 660 (Pa. Super. 2000)).

It is well settled law in Pennsylvania that

> [t]o recover on a claim of fraud, the plaintiff must prove by clear and convincing evidence six 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.

Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. 2004).

In the instant case, Plaintiff has averred Defendant SRCC "executed the contract" and related documents "with the intention that [Plaintiff] rely on said documents." *Compl. ¶ 27.* Plaintiff "justifiably relied upon the contract, contract documents, drawings, specifications, and other construction documents provided by Defendant SRCC through Defendant

SRCC's architect. . . " *Id. at ¶ 28.* Plaintiff asserts these documents "contained a number of material misrepresentations, errors and omissions which have resulted in [Plaintiff] expending addition time, labor and materials and a loss of profits. . ." *Id. ¶ 29.* Plaintiff avers "Defendant SRCC did not have sufficient financing in place and/or did not want to pay the full amount due. . ." *Id at ¶ 97.*

Thus, Plaintiff has alleged Defendants made false representations, with the intention that Plaintiff would rely upon them, which were material to the contract and related work, that Plaintiff justifiably relied on the misrepresentations resulting in injury. However, Plaintiff has not alleged Defendants knew the representations were "made falsely, with knowledge of its falsity or recklessness as to whether it is true or false."

Additionally, "[p]roof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." *Skipworth by Williams,* 690 A.2d at 174. Here, Plaintiff has alleged that two entities - Defendant SRCC and Defendant Buehler - agreed to improperly and unlawfully withhold money from Plaintiffs. *Pl's Compl. ¶¶ 98-105.* However, Plaintiff has not alleged that Defendants acted with an intent to cause injury to Plaintiff. Thus, as Plaintiff has not sufficiently alleged the elements of its civil conspiracy fraud claim Defendants' First Preliminary Objections are sustained.[1] Plaintiff shall file an Amended Complaint within twenty (20) days.

II. Defendant SRCC argues Plaintiff's claim for attorney's fees within the civil conspiracy to commit fraud claim must be dismissed.

Defendant SRCC contends Plaintiff may not receive an award of attorney's fees because Plaintiff has failed to offer a basis on which to receive them. *Def. SRCC's Prelim. Objs. ¶¶ 15-16.* Plaintiff offers no supporting argument for the award of attorney's fees in either its Complaint or its Brief in Response to Defendant' SRCC's Preliminary Objections. See: *Compl.; Pl's Br. in Opp. to Def. SRCC's Prelim. Objs.*

Generally, "parties to litigation are responsible for their own counsel fees and costs unless otherwise provided by statutory authority, agreement of parties, or some other recognized exception." *Cresci Constr. Servs. v. Martin,* 64 A.3d 254, 266 (Pa. Super. 2013) (citing *Cher-Rob, Inc. v. Art Monument Co.,* 594 A.2d 362, 363 (Pa. Super. 1991)). Plaintiff has failed to offer any reason, whether it be statutory authority, an agreement between the parties in this case, or any other exception, to support its request for attorney's fees in this case. Therefore, an award of attorney's fees is inappropriate and Defendant SRCC's Second Preliminary Objection is **SUSTAINED.** Plaintiff shall file an Amended Complaint within twenty (20) days.

III. Defendant SRCC argues Plaintiff's unjust enrichment claim cannot be supported by a written contract and should be dismissed.

Defendant SRCC contends that Plaintiff's unjust enrichment claim cannot proceed because a cause of action for unjust enrichment may arise only from transactions "not otherwise governed by an express contract." *Def. SRCC's Prelim.* Objs. ¶¶ *17-18* (citing *Villoresi v. Femminella,* 856 A.2d 78, 84 (Pa. Super. 2004)). As the only supporting facts alleged in the Complaint rely on the breach of a written contract, Defendant SRCC avers

[1] As Court has determined Plaintiff has not sufficiently pled its civil conspiracy fraud claim, it need not address whether the claim is barred by the gist of the action doctrine at this time.

unjust enrichment is inappropriate. *Id.* Plaintiff argues "a party may. . .plead both an express contract and unjust enrichment in the alternative". *Pl's Br. in Opp. to Def. SRCC's Prelim. Objs. 7* (citing *Lugo v. Farmer's Pride, Inc*., 967 A.2d 963 (Pa. Super. 2009) and *Birchwood Lake's Community Ass'n., Inc. v. Comis,* 442 A.2d 304 (Pa. Super. 1982)).

In *Villoresi,* the Superior Court held "[w]here an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist." *Villerosi,* 856 A.2d at 84. However, the Superior Court has expressly rejected applying the *Villerosi* standard to the pleading stage, stating "the bar against recovering under both causes of action [should not be confused] with a notion that pleading both causes of action is also prohibited." *Lugo v. Farmers Pride, Inc.,* 967 A.2d 963, 969-70 (Pa. Super. 2009).

Defendant SRCC argues the *Villerosi* holding should apply because, like *Villerosi* and unlike *Lugo,* the entirety of the agreement is contained in a written contract, and there is no oral agreement upon which a claim for unjust enrichment can rely. *Defendant SRCC's Br. in Supp. of Prelim. Objs. 11-12.* However, the *Lugo* Court did not address or even mention a distinction between written and oral contracts. Therefore, as the instant case is in the early pleading stages, dismissing the unjust enrichment claim solely on the existence of a written contract would be inappropriate. Thus, Defendant SRCC's Third Preliminary Objection is **OVERRULED.**

IV. Defendant SRCC argues that the delay damages in Count One of the Complaint are consequential damages which are excluded by the Contract.

Defendant SRCC contends the delay damages sought by Plaintiff are consequential damages which are precluded by the terms of their contract. *Def. SRCC's Prelim. Objs.* ¶¶ *22-23.* Plaintiff argues consequential damages are appropriate in a breach of contract setting. *Pl.'s Br. in Opp. to Def. SRCC's Prelim. Objs. 8.*

Consequential damages are appropriate in breach of contract cases when "the damages were such that would naturally and ordinarily result from the breach, or the damages were reasonably foreseeable and within the contemplation of the parties at the time of contracting." *Condominium Ass'n Court of Old Swedes v. Stein-O'Brien,* 973 A.2d 475, 483 (Pa. Commw. Ct. 2009) (citing *James Corp. v. North Allegheny Sch. Dist.,* 938 A.2d 474, 497 (Pa. Commw. Ct. 2007)).

However, when a contract specifically precludes recovery of all or some consequential damages as a result of a future breach, a party will not be permitted to recover the type of damages precluded. See *Ferrer v. Trs. of the Univ. of Pa.,* 825 A.2d 591, 610 (Pa. 2002) ("Where one party to a contract without any legal justification, breaches the contract, the other party is entitled to recover, *unless the contract provided otherwise,* whatever damages he suffered...") (emphasis added) (citing *Taylor v. Kaufhold,* 84 A.2d 347, 351 (Pa. 1951)).

Defendant SRCC relies on a specific paragraph of the contract, titled "General Conditions, Section 15.1.6 Claims for Consequential Damages." Section 15.1.6 states:

> The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes ... damages incurred by the Contractor for principal office expenses including the compensation

of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

Ex. A of the Compl. General Conditions, Section 15.1.6 Claims for Consequential Damages.

Plaintiff asserts it may recover consequential damages which "naturally and proximately flowed from SRCC's breach of contract." *Pl.'s Br. in Opp. to Def. SRCC's Prelim. Objs. 8-9.* At this stage in the proceedings, it would be premature to dismiss any claim based on the contract. Discovery has not been completed, and the legitimacy of any or all parts of the contract has not yet been determined. Hence, it is not clear and free from doubt that Plaintiff would be unable to recover consequential damages at this time. Therefore Defendant SRCC's Fourth Preliminary Objection is **OVERRULED.**

V. Defendant SRCC argues Plaintiff failed to attach the contract upon which Plaintiff's breach of contract claim was based.

Defendant SRCC argues Plaintiff failed to attach to its Complaint essential documents, such as "various drawings, specifications and change orders" as required by Pa. R.C.P. 1019(i). *Def. SRCC's Prelim. Objs. ¶¶ 24-28.* Plaintiff contends that, because Defendant SRCC already possesses the essential documents, the requirement of attachment is deemed waived. *Pl's Br. in Opp. to Def. SRCC's Prelim. Objs. 9* (citing *Leiby v. New Hampshire Insurance Co.,* 51 Pa. D. & C.2d 643 (Columbia Co. 1970) and *I.W. Lewin & Co., Inc. v. Oldsmobile Div. of General Motors Corp.,* 8 Pa. D. & C.3d 361 (Philadelphia Co. 1978)).

Under Pennsylvania Rules of Civil Procedure, plaintiffs must attach any piece of writing upon which their case relies. *Pa. R.C.P. 1019(i).* In *Leiby*, the Columbia County Court of Common Pleas found the plaintiff did not need to attach an insurance policy to his complaint where "defendant issued the insurance policy, so it must have a copy, to a third party. Therefore, plaintiff not being a party to the writing has no copy available to attach and requiring him to do so would be an unnecessary and vain burden." *Leiby,* 51 Pa. D. & C.2d at 645. In *I.W. Lewin & Co., Inc.,* the Philadelphia Court of Common Pleas found writings need not be attached where "[defendant agrees that plaintiff has not alleged a contract with Oldsmobile. Consequently, any such contract, if it does exist, need not be attached." *I.W. Lewin & Co., Inc.,* 8 Pa. D. & C.3d at 363. Thus, these cases are inapposite to the instant case, which contains a breach of contract claim between Plaintiff and Defendant SRCC. Thus, Plaintiff has offered no reason for which the relevant documents should not be attached. Defendant SRCC's Preliminary Objection is therefore **SUSTAINED** and Plaintiff shall attach all essential documents to its Amended Complaint.

VI. Defendant B&A asserts Plaintiff's claim for tortious interference with a Contract must be dismissed.

Defendant B&A contends it did not interfere with any contract between Defendant SRCC and Plaintiff because Defendant B&A was privileged to act and its actions did not induce a breach of contract by Defendant SRCC. *Defendant B&A's Br. in Supp. of Prelim. Objs. 7-10.* Plaintiff argues that Defendant B&A's decisions as "Initial Decision Maker" regarding change orders and other disputes between Defendant SRCC and Plaintiff were either grossly negligent or intentionally favored the interests of Defendant SRCC to the point that Defendant SRCC breached its contract with Plaintiff. *Pl's Br. in Opp. to Def. B&A's Prelim, Objs. 7-10.*

Tortious interference with a contract occurs when the following factors are present: (a) The existence of a contractual relationship between the complainant and a third party; (b) Interference with the performance of the contract by inducing a breach or otherwise causing the third-party not to perform the contract; (c) The absence of a privilege by defendant to act; (d) Pecuniary loss as a result of a breach of contract, *Al Hamilton Contracting Co. v. Cowder*, 644 A.2d 188,191 (Pa. Super. 1994).

Defendant B&A asserts there was no interference or induced breach, and that Defendant B&A was privileged to act because the contract gave it the duty of determining whether the change orders and other alterations should be granted. *Defendant B&A's Br. in Supp. of Prelim. Objs. 7-10.* Plaintiff asserts a contract existed between it and Defendant SRCC and that Defendant B&A, either through gross negligence or nefarious intent, made erroneous decisions that benefited Defendant SRCC and injured Plaintiff. *Pl's Br. in Opp. to Def. B&A's Prelim. Objs. 7-10.* Thus, Plaintiff has sufficiently pled the elements of its claim of tortious interference with a contract at this time. Therefore, Defendant B&A's Preliminary Objection is **OVERRULED**.

VII. Defendant B&A asserts Plaintiff's claim for commercial disparagement must be dismissed.

Defendant B&A challenges Plaintiff's claim for commercial disparagement on the grounds that Plaintiff has failed to allege specific disparaging statements, recipients of the statements, or actual damages. *Defendant B&A's Br. in Supp. of Prelim. Objs. 10.* Plaintiff argues it has pled all required elements of the claim of commercial disparagement. *Pl's Br. in Opp. to Def. B&A's Prelim. Objs. 11-12.*

The tort of commercial disparagement requires the plaintiff to prove: (1) that a statement is false, (2) that the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss, (3) that pecuniary loss does in fact result, and (4) that the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity. *Pro Golf Mfg. v. Tribune Review Newspaper Co.*, 761 A.2d 553, 555-56 (Pa. Super. 2000) (citing *Restatement (second) of Torts § 623(A) (1977)* (overturned on other grounds in *Pro Golf Mfg. v. Tribune Review Newspaper Co.*, 809 A.2d 243 (Pa. 2002)).

In the instant case, Plaintiff asserts Defendant Buehler "made publicized disparaging statements concerning [Plaintiff's] performance and business conduct. . ." *Pl's Br. In Opp. to Def.'s B&A's Prelim. Objs. 12*. Plaintiff alleges "Defendant S. Buehler made statements degrading and criticizing the quality of work performed by [Plaintiff]. . .accused [Plaintiff] of poor and substandard workmanship. . .attack[ed] [Plaintiff's ability as a general contractor; and. . . published statements that accused [Plaintiff] of proving false lien waivers." *Compl. ¶ 125(a)-(d).* Plaintiff asserts these statements "are false and misleading." *Id. at ¶ 126.* However, Plaintiff has not alleged these "slanderous and disparaging" remarks resulted in pecuniary loss.

Thus, as Plaintiff has failed to set forth the required elements of its commercial disparagement claim, Defendant B&A's Preliminary Objection is **SUSTAINED**. Plaintiff shall file an Amended Complaint within twenty (20) days.

ORDER

AND NOW, TO WIT, this 11th day of June 2014, it is hereby **ORDERED, ADJUDGED & DECREED:**

I. Defendant SRCC's First Preliminary Objection seeking to dismiss Plaintiff's claim of civil conspiracy to commit fraud is **SUSTAINED** and Plaintiff shall file an Amended Complaint within twenty (20) days.

II. Defendants SRCC's Second Preliminary Objection seeking to dismiss Plaintiff's request for attorney's fees is **SUSTAINED** and Plaintiff shall file an Amended Complaint within twenty (20) days.

III. Defendant SRCC's Third Preliminary Objection requesting dismissal of Plaintiff's unjust enrichment claim is **OVERRULED** without prejudice.

IV. Defendant SRCC's Fourth Preliminary Objection requesting dismissal of claims based on delay damages is **OVERRULED** without prejudice.

V. Defendant SRCC's Fifth Preliminary Objection seeking attachment of all necessary documents is **SUSTAINED** and Plaintiff shall attach any essential documents to its Amended Complaint.

VI. Defendant B&A's First Preliminary Objection seeking to dismiss Plaintiff's claim of civil conspiracy to commit fraud is **SUSTAINED** and Plaintiff shall file an Amended Complaint within twenty (20) days.

VII. Defendant B&A's Second Preliminary Objection seeking dismissal of Plaintiff's claim of tortious interference with a contract is **OVERRULED.**

VIII. Defendant B&A's Third Preliminary Objection seeking dismissal of Plaintiff's claim of commercial disparagement is **SUSTAINED** and Plaintiff shall file an Amended Complaint within twenty (20) days.

BY THE COURT:
/s/ **Shad Connelly, Judge**

EASTERN STEEL CONSTRUCTORS, INC., Plaintiff

v.

WHIPPLE-ALLEN CONSTRUCTION CO., WHIPPLE-ALLEN REAL ESTATE, AND SCOTT D. ALLEN, T/A WHIPPLE-ALLEN CONSTRUCTION CO. AND WHIPPLE-ALLEN REAL ESTATE, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Any party may move for summary judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action which would be established by additional discovery or expert report.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

The standard of review of a motion for summary judgment shall be in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

CIVIL PROCEDURE / COMMENCEMENT OF ACTION

A claim for breach of contract is limited by a four year statute of limitations which begins to run at the time of the breach under 42 Pa.C.S. §5525.

CIVIL PROCEDURE / JUDGMENT

When a valid and final personal judgment is rendered in favor of a plaintiff, a plaintiff cannot maintain a subsequent action on any part of the original claim.

CIVIL PROCEDURE / JUDGMENT

A judgment concludes all controversial matters between parties prior to its rendition but not for transgressions which had not occurred at the time the judgment was rendered.

CIVIL PROCEDURE / JUDGMENT

For res judicata to apply, a final judgment rendered by a court of competent jurisdiction must have been reached on the merits.

CORPORATIONS / MERGERS AND ACQUISITIONS

A corporation does not succeed to the liabilities of its predecessors merely by purchasing assets, rather the purchaser must expressly or implicitly agree to assume the liability, the transaction must amount to a consolidation or merger, the purchaser is merely a continuation of the selling corporation, the transaction was fraudulently entered to escape liability or the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation.

CORPORATIONS / MERGERS AND ACQUISITIONS

For a de factor merger to occur, there must be continuity of the successor and predecessor corporation evidenced by continuity of ownership, a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible, assumption by the successor of the liabilities, a continuity of management, personnel, physical location, aspects and general business operation.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW NO. 10461-2005

Appearances: Brian S. Jablon, Esq., Attorney for Plaintiff
Daniel J. Pastore, Esq., Attorney for Defendants
Sumner E. Nichols, II, Esq., Attorney for Defendants

OPINION

Bozza, J., July, 16, 2014.

This matter comes before the Court on Defendants' Motion for Summary Judgment. Following a review of the record and oral argument, Defendants' Motion for Summary Judgment is **DENIED.**

I. FACTUAL AND PROCEDURAL HISTORY

The instant action stems from a subcontract entered into by Eastern Steel Constructors, Inc. (Plaintiff) and Whipple-Allen Construction Co. (hereinafter, "Whipple-Allen") on January 2, 1993. Under the subcontract, Plaintiff was to erect reinforcing steel for the construction of St. Vincent New South Building in Erie, Pennsylvania. Under this subcontract, Article 15.4 provided as follows:

> 15.4 ATTORNEY'S FEES. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any matter arising under this Agreement, or to collect damages for the breach of the Agreement or to recover on a surety bond given by a party under this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fee, charges and expenses expended or incurred therein.

(Pl.'s Br. In Supp. of Opp'n to M. for Summary J., Ex 3 at 12.)

As the project was a large, publicly-bid project, Whipple-Allen was required to secure a performance bond. Whipple-Allen obtained a bond in the amount of $4,237,000.00 from St. Paul Mercury Insurance Company (hereinafter "St. Paul"). Under the performance bond, St. Paul acted as surety to pay Plaintiff if Whipple-Allen did not pay.

Following the completion of the project, a dispute arose between the parties. Whipple-Allen refused Plaintiff's demand for payment, and on July 1, 1994, Plaintiff commenced an arbitration proceeding against Whipple-Allen pursuant to the terms of the subcontract. Subsequently, and as the arbitration proceeding was ongoing, counsel for Plaintiff sent a demand letter to St. Paul on September 29, 1994, making a payment bond claim. After St. Paul refused to make payment to Plaintiff, Plaintiff commenced suit against St. Paul in Montgomery County, Pennsylvania on April 27, 1995.[1] This matter was subsequently transferred to the Erie County Court of Common Pleas on January 22, 1996.

On October 6, 1995, the arbitration panel in the original arbitration proceeding entered an award against Whipple-Allen and for Plaintiff in the amount of $220,533.72. On October 11, 1995, upon receipt of notice of the arbitration award, Plaintiff demanded that St. Paul pay the award. St. Paul refused.

Subsequently, on November 3, 1995, Plaintiff filed a petition to confirm the arbitration award in the United States District Court for the Western District of Pennsylvania. The district court granted the petition and entered judgment in favor of Plaintiff and against Whipple-Allen on August 5, 1996. On August 15, 1996, Plaintiff filed a motion to amend the federal court judgment to add attorneys' fees incurred since the date of the arbitration hearing, together with pre-judgment and post-judgment interest. In its motion, Plaintiff did not request future attorney's fees it would incur until the date the judgment was

[1] In this action, only St. Paul was named, and neither Whipple-Allen nor the other Defendants were named.

satisfied. On February 4, 1997, the district court granted Plaintiff's motion and amended the judgment, increasing it to $239,657.71.

Meanwhile, Plaintiff's action against St. Paul proceeded to a jury trial before the undersigned. On February 9, 2001, the jury returned a verdict in favor of Plaintiff and against St. Paul for $146,069.00 plus $38,799.93 retainage. It also awarded Plaintiff $260,000.00 in punitive damages. Judgment was entered by the undersigned on May 9, 2001. Plaintiff subsequently sent a demand letter to Whipple-Allen on June 30, 2001 for attorney fees incurred as a result of the action against St. Paul.

In the meantime, Plaintiff appealed and St. Paul cross-appealed the judgment in the St. Paul action to the Superior Court. The Superior Court affirmed the judgment on August 2, 2002. A petition for allowance of appeal was filed with the Pennsylvania Supreme Court and denied by order of March 18, 2003.

Subsequently, on November 14, 2003, Plaintiff returned to federal court and again moved to amend the judgment against Whipple-Allen to add attorney's fees incurred in pursing the action on the surety bond. The district court denied that motion with prejudice by oral order issued August 4, 2004.

The instant action was initiated on February 7, 2005 against Whipple-Allen Construction Company, Whipple-Allen Real Estate (hereinafter, "WARE"), and Scott D. Allen. Plaintiff seeks to recover attorneys' fees incurred in the St. Paul Action under Article 15.4 of the subcontract and named Whipple-Allen Real Estate and Scott Allen as defendants under theories of successor liability and alter ego, respectively.[2] Plaintiff argues that when it became the prevailing party in the St. Paul Action, "it became entitled to attorney's fees, costs charges and expenses relating to said litigation" under Article 15.4 of the subcontract. (Second Am. Compl. at ¶ 55-56.)

II. DISCUSSION

A. Standard for Summary Judgment

Pursuant to Pennsylvania Rule of Civil Procedure 1035.2, "any party may move for summary judgment . . . whenever there is no genuine issue of any material fact as to a necessary element of the cause of action . . . which would be established by additional discovery or expert report." According to our Supreme Court, the record is to be viewed "in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001). Under this standard, this Court shall address each of Defendant's arguments in support of summary judgment in turn.

B. Plaintiff's Claims Are Not Barred by the Statute of Limitations

Defendants first argue that Plaintiff's instant claim is barred by the statute of limitations. Generally, a claim for a breach of contract is limited by a four year statute of limitations that begins to run at the time of the breach. *See* 42 Pa.C.S § 5525.

Defendants claim that Section 15.4 of the contract is limited to claims between the two parties to the contract, namely the Plaintiff and Whipple-Allen, not to a third party, such

[2] The Second Amended Complaint also contains allegations of successor liability, which need not be addressed further herein. Count 4, which alleged a fraudulent transfer, was voluntarily withdrawn by stipulation on June 7, 2007.

as St. Paul. (*See* Def.'s Br. in Support of M. to Summary J. at 8) Therefore, the statute of limitations began to run on October 11, 1995, when the parties received notice of the arbitration award and Plaintiff became a "prevailing party" under the contract. (*See id*.). At this time, according to Defendants' theory of the case, all possible claims for attorney's fees and costs accrued.

However, the plain language of the contract contradicts the Defendants' argument. The language employed in Section 15.4 contains a disjunctive and sets forth four separate instances wherein attorney's fees would be available "should either party employ an attorney to institute suit or demand arbitration":

1) to enforce any of the provisions hereof
2) to protect its interest in any matter arising under this Agreement
3) to collect damages for the breach of this Agreement
4) to recover on a surety bond given by a party under this Agreement.

(*See* Ex. 3 at 12).

Under any one of these four instances, either Plaintiff or Whipple-Allen could be a "prevailing party" whether against each other or, in the cause of recovering on a surety bond, against the bondsman. Once one of the parties prevails in any one of these four different instances and the other party refuses to pay, then a claim for breach of contract arises.

In the instant case, there were two causes of action arising from a breach of Section 15.4. The first was the cause of action before the federal court for Whipple-Allen's failure to perform pursuant to the subcontract. Plaintiff was entitled to attorney's fees pursuant to Section 15.4 of the subcontract for employing an attorney to demand arbitration to enforce a provision of the subcontract. The instant second cause of action stems from Plaintiff's action against St. Paul, when Plaintiff employed an attorney to institute suit to recover on a surety bond given by Whipple-Allen. Plaintiff's right to attorney's fees only accrued in the instant case when it became a prevailing party against St. Paul. Plaintiff became a prevailing party on March 18, 2003, when the Pennsylvania Supreme Court denied the allowance of appeal in the St. Paul case, making the judgment therein final. The earliest the statute of limitations can begin to run, therefore, is March 18, 2003. Plaintiffs filed the instant claim on February 7, 2005, well within four years of March 18, 2003. Consequently, the statute of limitations does not bar the instant action and summary judgment on that basis would be improper.

C. Plaintiff's Claim for Attorney's Fees for the St. Paul Action Was Not Merged into the Federal Judgment

Defendants next argue that all of Plaintiff's rights under the contract, including the right to recover attorney's fees, merged into the federal judgment entered by Judge McLaughlin on August 5, 1996 and were extinguished. (*See* Def.'s Br. in Support of M. to Summary J. at 12). Defendants cite *Commissioners of Sinking Fund of the City of Philadelphia v. City of Philadelphia*, 188 A. 314, 316 (Pa. 1936), for the proposition that "[t]he judgment concludes all controversial matters between the parties *prior to its rendition* and substitutes a sum of money based upon ascertained rights and duties." (*Emphasis* added). Defendants further cite *In re. Schlecht,* 36 B.R. 236, 240 (Bankr. D. Alaska 1983) which sets forth the concept of merger as follows:

> The doctrine of merger is one aspect of the larger principle of *res judicata*. 46 AmJr.2d Judgments § 383 (1969). The general rule of merger is that when a valid and final personal judgment is rendered in favor of the plaintiff, the plaintiff cannot maintain a subsequent action on any part of *the original claim.* Restatement, Second Judgments § 18 (1980). *The original claim* merges into the final judgment. The effect of the merger is that the old debt ceases to exist and the new judgment debt takes its place.

(*See* Def.'s Br. in Support of M. to Summary J. at 15)(*Emphasis added*).

As set forth above, under the doctrine of merger it is the original claim and the attendant rights of a party pursuant to that claim that are merged into a final judgment. For example, in the instant case, Plaintiff's right to attorney's fees based on employing an attorney to demand arbitration to enforce a provision of the subcontract was accrued only when it prevailed against Whipple-Allen in the arbitration proceeding. Therefore, any right to attorney's fees based on that claim would be merged into the judgment entered by the Honorable Sean J. McLaughlin in the federal action on August 5, 1996.

As set forth *supra*, however, Plaintiff's instant claim for attorney's fees is a separate cause of action based upon Plaintiff's right to recover attorney's fees from Whipple-Allen for prevailing against St. Paul in its action to recover on the surety bond. Because the instant action is a separate claim and not a part of the original claim, the doctrine of merger is inapplicable. To put the matter in the language of *Commissioners of Sinking Fund of the City of Philadelphia,* Plaintiff's claim for attorneys' fees for the St. Paul action was not one of the controversial matters between the parties prior to when judgment was rendered in the original federal action. *Cf.* 188 A. at 316. Under the plain language of the contract, it could not have been because at that time Plaintiff was not a prevailing party against St. Paul in its separate action on the surety bond and therefore not a prevailing party pursuant to paragraph 15.4 of the contract with Whipple-Allen.

In the federal action, without ruling on the underlying entitlement to attorney fees, the Court essentially concluded that amending the federal court judgment was not proper because the state court action on the bond was a separate cause of action and that Eastern Steel was not the prevailing party for purposes of attorney fee determination until it was concluded. The Federal Court noted:

> In my view, however, in the state court case, the petitioner became a prevailing party against the surety subsequent to the entry of a judgment in its favor. In short, in my view, utilizing the vehicle of a motion to amend the judgment, I believe that the petitioner is attempting to improperly pin an attorney's fee's tail on the wrong donkey or judgment.

(Pl.'s Br. In Supp. of Opp'n to M. for Summary J., Ex. 23 at 40).

To require a different result would have required Plaintiff to predict the outcome of the St. Paul action at the time the federal judgment was entered on August 5, 1996. Although Plaintiff had instituted its cause of action against St. Paul on April 27, 1995, before the federal judgment was entered, a jury verdict was not returned in the St. Paul matter until February 9, 2001. Subsequently, Plaintiff appealed and St. Paul cross-appealed to the Pennsylvania Superior Court. After the Pennsylvania Superior Court affirmed the judgment

of the trial court on August 2, 2002, St. Paul filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on March 18, 2003. When judgment was entered in the federal case on August 5, 1996, Plaintiff could not have foreseen the expenses it would incur in instituting suit to recover on the surety bond held by St. Paul, which would incur multiple pre- and post-trial motions before this Court, a jury trial, argument before our Superior Court and, finally, an appeal before the Pennsylvania Supreme Court. These facts further support that the instant action is a separate and distinct claim from the original action of Plaintiff against Whipple-Allen and that Plaintiff could not have set forth this separate claim at the time judgment was entered in the federal action.

The merger doctrine is an expression of a public policy encouraging respect for properly rendered judgments and to bring finality to lawsuits therefore avoiding the waste of judicial resources and vexatious legal proceedings. *Bailey v. Harleysville Mut. Ins. Co.* 341 Pa. Super. 420, 491 A.2d. 888 (1985). The notion is that one should proceed to pursue its claims against a party at one time, and to obtain judgments that reflect a resolution of all the issues in the case. It is an extension of the concept of *res judicata* which encompasses the same rationale. *See, Stevenson v. Silverman* 417 Pa. 187, 208 A.2d.786 (1965).

To apply this conceptual framework to the case before the Court would be to ignore the legal and practical realities of the course, albeit a very long course, of this litigation. It would make little practical sense to have required Eastern Steel to include in its original claim, that was initially resolved through a mandated Arbitration process, and thereafter in its federal judgment, a claim for attorney fees to which it may have been entitled as a result of an entirely separate legal action at an uncertain time in the future. Moreover, there is no legal or jurisprudential benefit to requiring a party to seek financial compensation for a transgression that had not yet occurred, *i.e.*, the failure of Whipple-Allen to pay attorney fees to Eastern Steel for its action against St. Paul. Whether Whipple-Allen's surety was responsible for Whipple-Allen's alleged contractual violations was an entirely separate question involving the applicability of a different contract and esoteric legal principles.

The doctrine of merger is inapplicable to the instant case because Plaintiff's claim for attorney's fees is a separate claim from the one finalized in the federal judgment entered on August 5, 1996. For this reason, Defendants Motion for Summary Judgment will be denied.

D. <u>Plaintiff's Action is Not Otherwise Barred by *Res Judicata* or Claim Preclusion</u>

Defendant also argues that Plaintiff's instant claim is barred by claim preclusion because Plaintiff's second Motion to Amend Judgment in the federal action against Whipple-Allen was dismissed with prejudice by Judge McLaughlin on August 4, 2004. (*See* Def.'s Br. in Support of M. to Summary J at 19). Our Superior Court has explained:

> "*Res judicata"* means "a thing adjudged" or a matter settled by judgment. Traditionally, American courts have used the term *res judicata* to indicate claim preclusion, i.e., the rule that a final judgment rendered by a court of competent jurisdiction on *the merits* is conclusive as to the rights of the parties and constitutes for them an absolute bar to a subsequent action involving the same claim, demand or cause of action.

Robinson Coal Co. v. Goodall, 72 A.3d 685, 689 (Pa.Super. 2013) (citing *Stoeckinger v. Presidential Financial Corp of Delaware Valley*, 948 A.2d 828, 832 n. 2 (Pa.Super. 2008)) (*Emphasis* added).

As set forth above, for *res judicata* to apply a final judgment rendered by a court of competent jurisdiction must have been reached on the merits. In the instant case, Judge McLaughlin ruled as follows:

> Here, in my view, the request for attorney's fees is not only collateral, but even more so in the sense that the fees which are sought here were not incurred in connection with the litigation which gave rise to the federal judgment here. Indeed, those fees long ago have been paid. The fees that are sought here were fees that were allegedly generated exclusively in the state court action against the surety. Thus, in my view, the 10-day provision found in Rule 59(E) is inapplicable.
>
> That, however, begs, in my view, the larger question as to whether a motion to amend the judgment, such as that which has been filed here, under the unique factual and procedural circumstances of this case is an appropriate vehicle at all to seek the fees which were incurred in a different court in a different action.
>
> First, we note that where attorney's fees are requested subsequent to the entry of a judgment, and that is to say in cases where those fees were incurred in connection with that very litigation, courts utilize equitable considerations to determine whether the motion should be permitted to be filed. (Citation omitted).
>
> In the case before me where the arbitration award was confirmed, the petitioner was a prevailing party within the meaning of the contract against Whipple-Allen. In my view, however, in the state court case, the petitioner became a prevailing party against the surety subsequent to the entry of a judgment in its favor. In short, in my view, utilizing the vehicle of a motion to amend the judgment, I believe that the petitioner is attempting to improperly pin an attorney's fee's tail on the wrong donkey or judgment.
>
> That having been said, inasmuch as the only pleading before me at this time is the motion to amend the judgment, I find it unnecessary, for purposes of disposing of the motion *to reach the other uniquely state law issues of merger – among other, of merger, statute of limitations, res judicata, collateral estoppel.*
>
> . . .
>
> So, for the foregoing reasons, the motion to amend the judgment to include post-arbitration fees and expenses is denied with prejudice as to any further motion to amend the judgment. So the record is clear, *I did not rule or reach any of those other issues that were unnecessary to a resolution of that claim.*

(Pl.'s Br. In Supp. of Opp'n to M. for Summary J., Ex. 23 at 38-41) (*Emphasis* added).

As demonstrated above, Judge McLaughlin explicitly stated that he did not issue a ruling on the merits of Plaintiff's claim for attorney's fees incurred as a result of its action against St. Paul. Therefore, Judge McLaughlin's August 4, 2004 Order denying Plaintiff's Motion to Amend Judgment was not a final judgment on the merits for purposes of *res judicata*. Summary judgment cannot be granted on this basis.

E. <u>There Exist Issues of Material Fact as to Plaintiff's Claims of Successor Liability against WARE and Scott Allen</u>

Defendant finally argues that Plaintiff cannot present a genuine issue of material fact to support its claims of successor liability against WARE and Scott Allen. (*See* Def.'s B. in Supp. of M. for Summary J. at 22). Plaintiff recognizes that "a corporation does not succeed to the liabilities of its predecessor merely by purchasing its assets." (Pl.'s Br. In Supp. of Opp'n to M. for Summary J. at 37) *(citing Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 308 (3d Cir. 1985)). However, there are five exceptions to this general rule:

> (1) the purchaser expressly or implicitly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation.

Continental Ins. Co. v. Schneider, Inc., 873 A.2d 1286, 1291 (Pa. 2005) (citations omitted).

In the instant case, Plaintiff claims that the following exceptions are applicable: (1), regarding assumption of obligations; (2), regarding "de facto" merger; and (3), regarding continuation. The two theories regarding de facto merger and continuation are frequently analyzed simultaneously. *See, e.g., Fizzano Bros. Concrete Prods. v. XLN, Inc.*, 42 A.3d 951 (Pa. 2012).

In *Fizzano*, our Supreme Court explained:

> For a de facto merger to occur, there must be continuity of the successor and predecessor corporation as evidenced by (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor, and (4) a continuity of management, personnel, physical location, aspects, and general business operation. Not all of these factors are needed to demonstrate a merger; rather, these factors are only indicators that tend to show a de facto merger.

Id. at 962.

As indicated by the briefs submitted in this matter, there are contested facts as to whether there was a de facto merger between Whipple-Allen and WARE. The parties contest Scott Allen's role in running both Whipple-Allen and WARE; at what point Whipple-Allen ceased its business; whether WARE assumed any liabilities of Whipple-Allen; and whether the management, employees and general business operation of Whipple-Allen was continued through WARE. It is in the interest of both parties that these facts be ascertained through a developed record at trial. Again, when considering a motion for summary judgment "all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Jones v. SEPTA, supra.*

III. CONCLUSION

Summary judgment is inappropriate in this case because Plaintiff's claims are not barred by the statute of limitations, the doctrine of merger, or *res judicata.* Additionally, there are genuine issues of material fact related to Plaintiff's claims regarding successor liability. An appropriate order denying Whipple-Allen's' Motion for Summary Judgment shall follow.

ORDER

AND NOW, this 16th day of July, 2014, upon consideration of Defendants' Motion for Summary Judgment with Brief in Support, Plaintiff's Brief in Opposition thereto, Defendants' Reply Brief, and after oral argument, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that Defendants' Motion for Summary Judgment is **DENIED**.

BY THE COURT:
/s/ **John A. Bozza, Senior Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
HENRY ANDINO

CRIMINAL LAW AND PROCEDURE / SEARCHES AND SEIZURES 108

The determination as to whether probable cause exists for the issuance of a search warrant is limited to the four (4) corners of the probable cause affidavit.

CRIMINAL LAW AND PROCEDURE / AUTOMOBILES 349 (10) (18)

Continued questioning of a defendant after the conclusion of a traffic stop, including notification that "he was free to go", constitutes an investigative detention.

CRIMINAL LAW AND PROCEDURE / AUTOMOBILES 349 (17)

Law enforcement must possess reasonable suspicion of criminal activity to justify an investigatory detention of the defendant once a traffic stop is concluded.

CRIMINAL LAW AND PROCEDURE / ARREST 63.5 (4)

Reasonable suspicion to conduct an investigative detention only exists when an officer is able to articulate specific facts, together with the reasonable inferences drawn therefrom, that lead him to reasonably conclude that criminal activity is afoot.

CRIMINAL LAW AND PROCEDURE / ARREST 63.5 (4)

The fundamental inquiry of a reviewing court is objectivity, specifically, whether the facts known by the officer at the moment of intrusion warrant the action taken by a man of reasonable caution.

CRIMINAL LAW AND PROCEDURE / AUTOMOBILES 349 (17)

The requisite cause for suspicion is independent of the basis upon which the initial traffic stop was based.

CRIMINAL LAW AND PROCEDURE / AUTOMOBILES 349 (17)

Subjective interpretations of a defendant's non-verbal behavior do not constitute a reasonable suspicion that criminal activity is afoot when the officer has no experience or training that qualifies him to render reliable interpretations of the defendant's body movements or mindset.

CRIMINAL LAW AND PROCEDURE / AUTOMOBILES 349 (17); ARREST 63.5 (4)

An officer's subjective interpretations of body language do not justify the government's intrusion into the defendant's right of privacy or the defendant's detention based upon reasonable suspicion.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 3503 OF 2013

Appearances: Anthony Logue, Esq., Attorney for Plaintiff
James A. Pitonyak, Esq., Attorney for Plaintiff

OPINION

Cunningham, William R., J. June 17, 2014

The presenting matter is a Motion to Suppress filed by the Defendant. At issue is whether there was reasonable suspicion to conduct a dog search of the exterior of the Defendant's

vehicle for narcotics and/or whether there was probable cause for the subsequent search warrant secured for the vehicle the Defendant was operating.

This case presents a somewhat novel situation because the justification for the government's intrusion into the Defendant's right of privacy is based on the affiant's subjective interpretations of the Defendant's body language. After an evidentiary hearing, the Motion to Suppress is **GRANTED.**

FINDINGS OF FACT

At the outset, it must be noted what will not be considered in this case. In making the determination of whether probable cause exists for the search warrant, the inquiry is limited to the four corners of the probable cause affidavit. Nowhere in the probable cause affidavit does the affiant, Trooper J.C. Matson, set forth that he was part of the Drug Interdiction Unit who received a radio communication to be on the lookout for a silver Toyota Sedan which was transporting one kilo of cocaine allegedly placed in the vehicle earlier that day before leaving Philadelphia. While this testimony was admitted at the suppression hearing, it does not constitute evidence to consider in determining whether probable cause exists for the search warrant since it was not included in the probable cause affidavit.[1]

On September 14, 2013, a traffic stop of a silver 1993 Toyota Corolla bearing PA registration JHB1892 was conducted on Interstate 90 near mile marker 23EB. The basis for the traffic stop was a non-working brake light and the Defendant was driving forty miles per hour in a sixty-five mile an hour zone northbound on Interstate 79. The time was approximately 6:00 p.m. on a Saturday. It was full daylight and the weather conditions were clear.

When Trooper Matson activated the lights to effectuate the traffic stop, there was nothing suspicious about the manner in which the Defendant pulled over. The location of this traffic stop was just off of the exit ramp from Interstate 79 onto Interstate 90 heading eastbound. It is approximately two miles before the next exit, Peach Street, which is the most commercialized area in Erie County. The next eastbound exit after Peach Street contains the only casino for northwest Pennsylvania, which attracts a lot of gambling business from Ohio. As a result, this stretch of Interstate 90 was busy during this traffic stop.

Trooper Matson parked behind the Defendant's vehicle. He exited his vehicle and approached the passenger side of the Defendant's vehicle. From his vantage point, Trooper Matson could see the entire interior of the vehicle. The probable cause affidavit notes a fast food bag on the floorboard of the passenger side of the vehicle. There were no other items noted.

To Trooper Matson's observation, the Defendant's hands were shaking so bad that he almost dropped the paperwork regarding his license, registration and insurance. According to Trooper Matson, the Defendant's heartbeat could be seen beating through his shirt and his carotid artery was pounding in his neck.

[1] It is puzzling why Trooper Matson and/or his supervisor chose not to include this information within the probable cause statement of the search warrant, particularly in light of the paucity of objective information to support the search warrant.

Trooper Matson directed the Defendant to exit his vehicle and stand behind it while the Trooper returned to his police vehicle. This placement put the Defendant directly in front of Trooper Matson's dashboard camera such that all of the relevant events were recorded. This Court viewed the entire video, which includes audio, twice.

For at least the next nine minutes, Trooper Matson had the Defendant standing behind the vehicle he was driving while the Trooper was in his police vehicle. During this time span, Trooper Matson was joined by Trooper Knott, who is also trained in drug interdiction. Trooper Matson conveyed to Trooper Knott his observations and both Troopers were observing the Defendant.

Trooper Matson then exited his police vehicle and engaged the Defendant in conversation. Trooper Matson gave the Defendant a written warning for the brake light infraction. Trooper Matson returned the paperwork to the Defendant. Trooper Matson clearly told the Defendant he was free to go. As a result, the conversation ended and so did the traffic stop.

The Defendant was about to enter his driver's side door when he was re-engaged in conversation by Trooper Matson. Trooper Matson peppered the Defendant with a host of innocuous questions. Several times the Defendant expressed to Trooper Matson his belief that he thought he was free to go. The Defendant attempted to return to the driver's door but Trooper Matson refused to disengage in conversation with him. Physically, Trooper Matson is a larger man than the Defendant and he was in a police uniform. Trooper Knott, who arrived in his own state police vehicle and was also in full uniform, joined the interaction with the Defendant.

Trooper Matson conducted a pat down search for weapons on the Defendant's person. No weapons were found. The Defendant was cooperative throughout the pat down.

In all of his interaction with the Defendant, Trooper Matson was professional. He was not overbearing and his tone of voice was conversational. There were no orders or demands made of the Defendant by either Trooper nor were any weapons drawn by the police. Trooper Knott was likewise professional and courteous to the Defendant at all times.

To their credit, both Troopers informed the Defendant that he did not have to consent to any search and suggested to the Defendant that he read the consent form before signing it. While the Defendant initially verbalized an intent to consent to the search of the vehicle, within a short period of time and upon further reflection, he chose not to consent to the search of the vehicle. In refusing to sign the written consent form, the Defendant informed the police that it was not his car.

Corporal Peters from the canine team then arrived with his drug sniffing dog, Iggy. Corporal Peters and Iggy did an outside sniff search of the exterior of the Defendant's vehicle. According to Corporal Peters, Iggy alerted to the odor of narcotics that he is trained to detect. Thereafter, Trooper Matson secured a search warrant for the Defendant's vehicle. The search discovered a quantity of cocaine and money which formed the basis for the present charges against the Defendant.

CONCLUSIONS OF LAW

The Defendant does not contest the justification for the traffic stop. According to Trooper Matson, the Defendant was travelling forty miles per hour on Interstate 79 and had a brake light out. Hence, there was legal justification for a traffic stop.

The Defendant did not consent to the search of the vehicle. While he initially verbalized his assent, ultimately he decided not to consent and so informed the police. He did not execute the written consent form because "it was not his car."

Thus, the inquiry becomes whether there was reasonable suspicion of criminal activity to justify an investigatory detention of the Defendant after the traffic stop concluded. This Court is constrained to find there was not a reasonable suspicion of criminal activity for the investigatory detention of the Defendant and the use of the drug sniffing dog.

Since November of 2007, Trooper Matson has been employed as a Pennsylvania State Police Trooper and has training and ample experience in narcotics investigations and interdictions. The same is true of Trooper Knott. This Court respects the professional manner in which they did a risky job in this case. Despite their best efforts, the Defendant did not provide any incriminating evidence to create a reasonable suspicion of criminal activity.

When an investigatory detention occurs after a lawful traffic stop, there must be reasonable suspicion which arises after the end of the traffic stop and independent of any basis for the traffic stop. *Commonwealth vs. Johnson,* 833 A2d. 755, 762 (Pa. Super 2003) *appeal denied*, 847 A2d. 1280 (2004).

For purposes of determining whether there was reasonable suspicion of criminal activity to justify the investigatory detention of the Defendant, the inquiry begins at the time Trooper Matson returned to the Defendant his license, registration and insurance card and told him he was free to go.

As the Defendant was about to enter his driver side door, he was forced to engage in further conversation with Trooper Matson who had returned to the rear of the Defendant's vehicle intentionally for that purpose. The ensuing conversation was largely one-sided as it consisted of continual questions from Trooper Matson leaving little opportunity for the Defendant to disengage from the conversation. Several times during this questioning, the Defendant was physically attempting to get closer to his driver's door and expressing his belief that he thought he was free to go.

During this questioning, the Defendant's responses did not provide any incriminating information. According to the probable cause affidavit, the Defendant "related that he was coming from the Grove City Outlets. When asked what he bought, he related that he did not buy anything. He related that he went there to meet a girl. Andino later related that the girl he was supposed to meet never showed up." On its face, nothing within these statements is incriminating.

The subsequent attempt by the Commonwealth to make these comments incriminating is unavailing since Trooper Matson chose not to include information in the probable cause affidavit that the Defendant was coming from Philadelphia with a kilo of cocaine and had not been to the Grove City Outlets. As a result, a neutral, detached magistrate would have no reason to know the Defendant was lying about his trip to Grove City.

What remains are the subjective interpretations of the non-verbal behavior of the

Defendant. None of the proffered interpretations are persuasive. Notably, Trooper Matson never met the Defendant before. Thus, he would not be familiar with the Defendant nor the nature or intent of any of his idiosyncratic body language. Although Trooper Matson has significant experience interacting with subjects of a traffic stop and concomitant training, nothing within his experience or training qualifies him to render reliable interpretations of the Defendant's body movements and mindset as proffered in this case.

According to Trooper Matson, when the Defendant was required to wait outside the rear of his vehicle for nearly ten minutes, the Defendant "stood in a defensive posture with his arms crossed, leaning against the trunk of the car. This is in opposition to the thousands of motorists I have stopped who are only guilty of a summary violation. Motorists not engaged in criminal activity stand with their arms at their side at a very relaxed manner yet Andino was very guarded in his stance. This is the same posture I have seen in numerous people who are being interviewed as a suspect in a crime who later confessed or were found guilty of committing a crime. It should also be noted that Andino felt the need to lean against his car rather than stand upright as most innocent motorists do. This lean is also a common action of motorists engaged in criminal activity. This occurs because they become so nervous that they become "weak in the knees" and light-headed, therefore they lean for fear they may lose consciousness."

Having viewed this ten minute segment twice, this Court cannot accept the reliability of the conclusions and inferences Trooper Matson tenders. During this nine to ten minute segment, the Defendant was looking directly into the sunlight. Throughout this time period, there was constant traffic passing close by at a relatively high rate of speed. Nothing in the Defendant's posture or gestures manifested any nervousness or suggested a consciousness of guilt. To the contrary, the Defendant appeared to be patient and polite during this extended time period.

The Defendant did lean back to rest against the trunk of his vehicle, a circumstance likely caused by the lengthy delay created by Trooper Matson. There is nothing within this video to create an inference of guilt because the Defendant did not stand upright "as most innocent motorists do." The sweeping generalizations of human behavior expressed by Trooper Matson based on his training and experience do not under the circumstances of this case create a reasonable suspicion of criminal activity by the Defendant.

During the course of the questioning of the Defendant, Trooper Matson avers that the Defendant assumed a submissive position "commonly referred to as the arrest position. The arrest position is with the head down, hands behind the back and feet spread shoulder width apart... it is an involuntary action of those who had been arrested in the past, who are currently engaged in criminal activity. This typically occurs when the individual is facing the reality of his imminent arrest. Even though he is verbally professing his innocence, with a submissive arrest position is often subconscious, and a non-verbal indicator of guilt." *Affidavit of Probable Cause.*

There is no evidence on the video that the Defendant assumed a submissive position manifesting his involuntary consciousness of guilt. There is no evidence to support Trooper Matson's ability to draw conclusions about the Defendant's thought process. Drawing psychological conclusions based on the interpretation of the body language of someone Trooper Matson did not know does not lend itself to scientific analysis or provide

any degree of reliability justifying an intrusion into constitutionally protected areas of a citizen's privacy interests.

In this case, the only evidence related to a reasonable suspicion of criminal activity are the subjective interpretations by Trooper Matson of the non-verbal behavior of the Defendant. None of the proffered interpretations accurately give rise to a reasonable suspicion of criminal activity under these circumstances.

As a result, there is no legal justification for the dog search of the exterior of the vehicle. There is not probable cause for the issuance of the search warrant in this case.

Accordingly, the Motion to Suppress is **GRANTED.**

ORDER

For the reasons set forth in the accompanying Opinion, the Motion to Suppress is **GRANTED** in its entirety and the items seized as a result of the search of the Defendant's vehicle are hereby suppressed.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**