

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Precision Marketing, Inc., :  
Petitioner :  
 :  
v. :  
 :  
Commonwealth of Pennsylvania, :  
The Republican Caucus of the :  
Senate of PA/AKA The Senate of :  
PA Republican Caucus, : No. 562 M.D. 2010  
Respondent : Argued: December 8, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: May 11, 2011

Precision Marketing, Inc. (Petitioner) commenced this action by filing a Statement of Claim (Claim) with the Board of Claims (Board) on January 28, 2010.<sup>1</sup> The Republican Caucus of the Senate of Pennsylvania a/k/a The Senate of Pennsylvania Republican Caucus<sup>2</sup> (Caucus) preliminarily objects to the Claim on the grounds that (1) the Board lacked subject matter jurisdiction, and (2) Petitioner’s contract claim against the Caucus is barred by sovereign immunity.

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<sup>1</sup> Petitioner filed a statement of claim with the Board of Claims pursuant to the Procurement Code, 62 Pa.C.S. §1712.1, entitled Contract Controversies, which authorizes a contractor to file a claim for damages for breach of contract against a Commonwealth agency.

<sup>2</sup> It is noted in the statement of claim filed with the Board, that Petitioner named “The Republican Caucus of the Senate of Pennsylvania a/k/a The Senate of Pennsylvania Republican Caucus” as the Respondent in the matter. However, the Pennsylvania Rules of Civil Procedure require that “[a]n action against a Commonwealth agency or party must be styled in the following manner: Plaintiff v. ‘(Name of Agency or Party)’ of the Commonwealth of Pennsylvania.” Pa.R.C.P. No. 2102(a)(2). The Board *sua sponte* amended the caption in this matter to conform with Rule 2102 by

On April 26, 2010, the Board determined that the Caucus was not a “Commonwealth agency” as defined by the Procurement Code. 62 Pa. C.S. §103. The Board concluded that, consequently, it was without subject matter jurisdiction<sup>3</sup> and transferred the matter to this Court because the Republican Caucus of the Senate of Pennsylvania is “the Commonwealth Government” for purposes of defining the Commonwealth Court’s jurisdiction. 42 Pa.C.S. §761.

Presently before this Court in its original jurisdiction is the remaining Preliminary Objection that Petitioner’s contract claim is barred by the doctrine of sovereign immunity.

### **Consulting Agreement**

In 1997, Petitioner and the Caucus entered into a Consulting Agreement whereby Petitioner agreed to develop and provide the Caucus with computer consulting and programming services. According to the Consulting Agreement, the services provided to the Caucus by Petitioner included:

the development of base files or constituent<sup>[4]</sup> contact lists compiled from the data base of voter information found at county boards of elections, including purchase of county data files, carrier route coding, update processing, export and shipping of enhanced files to the Customer [Republican Senate Caucus], telephone matching and telephone verification of all voters, and the development of enhanced or derivative files or lists, data analysis, or other output generated

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adding “Commonwealth of Pennsylvania.” The amended caption was adopted by this Court upon transfer from the Board.

<sup>3</sup> The Procurement Code limits the Board’s subject matter jurisdiction to claims arising from contracts with a “Commonwealth agency.” 62 Pa. C.S. §1724.

<sup>4</sup> A “constituent” is someone who lives in an electoral district who is eligible to vote.

by the application of the Company's consulting and programming services to the base file or contact lists.

Exhibit "A" to Statement of Claim, Consulting Agreement, March 25, 1997, at 1-2. (Emphasis added).

The initial term of the Consulting Agreement was automatically renewable at the conclusion of eight years for successive one year terms unless terminated in accordance with the terms of the Consulting Agreement.

On July 29, 2004, the parties executed an Addendum to the Agreement whereby the contract term was extended through December 31, 2014. The Addendum specifically refers to the Caucus' purchase of "the statewide voter file." Exhibit "B" to Statement of Claim, Addendum to Consulting Agreement, July 29, 2004, at 2. (Emphasis added).

On January 5, 2006, the parties signed a Second Addendum to the Consulting Agreement which specially retained and contracted Petitioner "to provide constituent outreach [telephone] calls... to be undertaken at the direction of the Customer [Caucus]." Exhibit "C" to Statement of Claim, Second Addendum to Consulting Agreement, January 5, 2006, at 1. (Emphasis added).

### **Termination of the Consulting Agreement by the Caucus**

By letter dated July 29, 2009, the Caucus informed Petitioner that the Consulting Agreement would be terminated as of August 31, 2009. The letter did not set forth any legal cause for terminating the Consulting Agreement and did not aver that Petitioner's work was unsatisfactory. The letter stated "[t]he Caucus has the legal right

to cancel a contract with a private party that relates to a governmental function, without cause, and irrespective of the termination date or other procedures for cancellation set forth in the contract.” Letter to Precision Marketing, Inc., July 29, 2009, at 1.

### **Petitioner’s Claim**

Petitioner seeks damages for breach of the Consulting Agreement. Petitioner avers that the Caucus lacked a legal basis to terminate the Consulting Agreement and that Petitioner is entitled to damages in the amount of \$1,223,402.88, which represents the sum of the monthly payments Petitioner would have received between September of 2009 and December 31, 2014.

### **Preliminary Objections**

The Caucus preliminary objects<sup>5</sup> on the ground that it is immune from suit under the doctrine of “sovereign immunity.” The Caucus argues that “as an organization of the Senate, it is part and parcel of the General Assembly, and is thus immune from suit” pursuant to 1 Pa.C.S. §2310. (Emphasis added).<sup>6</sup>

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<sup>5</sup> When considering preliminary objections, this Court must accept as true all well-pleaded facts set forth in the complaint, as well as all inferences reasonable deducible therefrom. Firetree, Ltd v. Fairchild, 920 A.2d 913 (Pa. Cmwlth. 2007). Preliminary objections in the nature of a demurrer should be sustained only where the pleadings are clearly insufficient to establish a right of relief; any doubt must be resolved in favor of overruling the demurrer. Jacobs v. Merrymead Farm, Inc., 799 A.2d 980 (Pa. Cmwlth. 2002). Documents attached to a complaint, and facts stated in those documents, may be considered to sustain a demurrer. Detweiler v. School Dist. of Borough of Hatfield, 376 Pa. 555, 558, 104 A.2d 110, 113 (1954).

<sup>6</sup> Brief in Support of Preliminary Objections, at 7.

## Sovereign Immunity

The Legislative enactment of sovereign immunity is set forth at 1 Pa. C.S. §2310 and states that “the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity.”

The Caucus asserts that it is part and parcel of the General Assembly; therefore, it is the Commonwealth and entitled to absolute sovereign immunity.

Immunity from suit is an affirmative defense that must be raised in a responsive pleading under the heading “New Matter.” Pa.R.C.P. No. 1030(a). It is not properly raised by preliminary objection. State Workmen’s Insurance Fund, Commonwealth Department of Labor and Industry v. Caparo Real Estate, Inc., 635 A.2d 705 (Pa. Cmwlth. 1993). In order for parties to be allowed to raise the affirmative defense of immunity as a preliminary objection, the affirmative defense must be clearly applicable on the face of a complaint. Sweeny v. Merrymead Farm, Inc., 799 A.2d 972 (Pa. Cmwlth. 2002).

Because it is not clear from the face of the Complaint that the Caucus is the Commonwealth and entitled to sovereign immunity, the Preliminary Objection is overruled.

The Caucus is ordered to file its Answer and New Matter to the Complaint within 30 days from entry of this Order.

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BERNARD L. McGINLEY, Judge

Judge Cohn Jubelirer and Judge Simpson did not participate in the decision in this case.

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Commonwealth of Pennsylvania,	:	
The Republican Caucus of the	:	
Senate of PA/AKA The Senate of	:	
PA Republican Caucus,	:	No. 562 M.D. 2010
Respondent	:	

**ORDER**

AND NOW, this 11<sup>th</sup> day of May, 2011, the Preliminary Objections of The Commonwealth of Pennsylvania, The Republican Caucus of the Senate of PA/AKA The Senate of PA Republican Caucus in the above-captioned matter are hereby overruled. Respondent is ordered to file its Answer and New Matter to the Complaint within 30 days of the date of this order.

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BERNARD L. McGINLEY, Judge