SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: Christopher Good v. Raymond Moyer
and Phoenix Payment Systems, Inc.
C.A. No. N12C-03-033 RRC

Submitted: July 20, 2012
Decided: October 10, 2012

On Defendant Raymond Moyer's Motion to Dismiss.
DENIED.

On Defendant Phoenix Payment Systems, Inc.'s Motion to Dismiss.
GRANTED IN PART AND DENIED IN PART.

Dear Counsel:

I. INTRODUCTION

Defendants move to dismiss Plaintiff's complaint for failure to state a cognizable claim. The complaint stems from a stock transfer agreement whereby Plaintiff agreed to sell shares of stock in a corporation where he was formerly employed to that corporation's President. Plaintiff's complaint asserts (1) an express breach of contract claim against both his former employer, a corporation, and the corporation's President and (2) a separate implied contract claim against the corporation only. Plaintiff seeks compensatory and punitive damages.

The corporation's president seeks to dismiss the complaint, asserting that his performance is not yet due because a condition precedent remains unfulfilled. Separately, the corporation moves to dismiss, asserting that it did not incur any obligations under the contract and the express contract prohibits the implied contract action. Both parties seek to dismiss Plaintiff's punitive damages claim.

The Court finds that Plaintiff's substantive claims are adequately pled except for the express breach of contract claim against the corporation, who retained no express payment obligation. Separately, the Court finds it premature to determine at this juncture whether Plaintiff is potentially able to recover punitive damages; such application must await the development of the entire factual record. Therefore, the president's Motion is **DENIED** and the corporation's Motion is **GRANTED IN PART AND DENIED IN PART**.

II. FACTUAL AND PROCEDURAL HISTORY

The complaint alleges that Plaintiff Christopher Good owned over 200,000 shares of fully vested stock in Defendant Phoenix Payment Systems, Inc. ("EPX"), Plaintiff's former employer, in 2010. Plaintiff is a former EPX Employee. Plaintiff alleges that he never possessed original stock certificates and that the certificates were retained by EPX or, alternatively, that the shares were never certificated. After leaving EPX. EPX's President Raymond Moyer expressed a desire to purchase Plaintiff's shares. The parties reached an agreement and Defendants' attorney prepared a Stock Transfer Agreement. Plaintiff alleges the parties executed that agreement July 2, 2010, along with the associated stock power and assignment appended to the agreement. Stapled to the agreement were two notarized pages

which provided the date July 2, 2010, but the agreement itself left the date section blank.

The agreement was executed by Plaintiff, Moyer, and EPX. The agreement designated Moyer as the stock purchaser and Plaintiff as the seller. The contract provided that "[Moyer] is purchasing the Shares for [Moyer's] own account"[1] and that Moyer had "no present intention of selling or otherwise disposing of all or any portion of the shares."[2] Plaintiff claims that Moyer represented that the purchase price would be paid by EPX, either directly or indirectly, and that Moyer acted as purchaser only as a convenience to EPX. Plaintiff asserts that Defendants have made two payments of $5,000 to Plaintiff so far.

The agreement provided no effective date; however, it provided that the closing date would occur no later than thirty days after execution. Plaintiff argues that the purchase price obligation therefore accrued no later than August 1, 2010. The agreement provided that "[o]n the terms and subject to the conditions of the Agreement, [Plaintiff] hereby agrees to sell to [Moyer], and [Moyer] hereby agrees to purchase from [Plaintiff] on the Closing date . . . [the shares] for . . . $250,000."[3] While the agreement provided no closing date, the agreement provided:

> [t]he closing of the transactions contemplated by this Agreement shall take place as soon as reasonably practicable **following satisfaction or waiver** (by the applicable party) **of the conditions set forth in Section 2, or at such other time or place as the parties may mutually agree, which date shall in no event be later than thirty (30) days following the Effective Date.**[4]

The agreement separately included an integration clause and prohibited oral modification or waiver. Section 9.9, the clause prohibiting oral modification and waiver, provided:

> **Amendment and Waivers**. This Agreement may be amended only by a written agreement executed by each of the parties hereto. No amendment of or waiver of, or modification of any obligation under this Agreement will be enforceable unless set forth in a writing signed by the

[1] Stock Transfer Agreement at ¶ 4.1.
[2] Stock Transfer Agreement at p. 1.
[3] Stock Transfer Agreement at ¶ 1.
[4] Stock Transfer Agreement at ¶ 2.1 (emphasis added).

> party against which enforcement is sought. Any amendment effected in accordance with this section will be binding upon all parties hereto and each of their respective successors and assigns. No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. No waiver granted under this Agreement as to any one provision herein shall constitute a subsequent waiver of such provision or of any other provision herein, nor shall it constitute the waiver of any performance other than the actual performance specifically waived.[5]

The agreement provided that "[s]eller hereby delivers to the Company [ ] the original stock certificates representing the Shares, if in Seller's possession, or otherwise authorizes Company to remove any such share certificates from escrow for cancellation and reissuance to Purchaser."[6]

The complaint alleges that after failing to make the required payment by the closing date, Moyer made several subsequent promises and misrepresentations that payment would be forthcoming. Defendant allegedly eventually made two partial payments totaling $5,000. Plaintiff alleges that Moyer's further assurances were "outright lies" and that Moyer never planned to compensate Plaintiff fully. In March 2012, Plaintiff sued Defendants asserting (1) Breach of Contract against both Defendants and; (2) Breach of Implied Contract-As to EPX only. Defendants both moved to dismiss Plaintiff's complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[7]

III. CONTENTIONS

A. Defendants' Contentions

Defendants first challenge whether the agreement was even effectuated on July 2, 2010 because the attached notarizations only indicate that an "instrument" was effectuated on that date. Defendants contend that the agreement initially required the fulfillment of a condition precedent to compel payment. Specifically, Defendants assert that the agreement conditioned Moyer's payment responsibility upon Plaintiff returning the stock certificates. Since Plaintiff's complaint does not

[5] Stock Transfer Agreement at ¶ 9.9.
[6] Stock Transfer Agreement at ¶ 2.2.
[7] Del. Super. Civ. Ct. R. 12(b)(6).

allege he delivered stock certificates to EPX, Defendants contend the complaint merits dismissal because Defendant owes no performance.

Even assuming the condition precedent's fulfillment, EPX separately claims that the express breach claim must fail as a matter of law because EPX and Moyer had separate and distinct contract rights and obligations. EPX argues it was never obligated to pay the purchase price, because Moyer solely retained that obligation since the stock was purchased for Moyer's "own account." EPX contends Plaintiff's claim is an "aggressive effort," which "must be rejected out of hand."

EPX also challenges the implied contract claims, asserting that the implied claims are "concocted," "baldly asserted," and a "red herring, " and must fail because an express contract governs the parties' rights completely. EPX asserts that the express contract invalidated any possible implied agreement and required written amendment since it was integrated. EPX argues the alleged partial payments did not reform the agreement, are not linked to the agreement, and must not be considered on a motion to dismiss because they are beyond the pleadings.[8]

Third, both Defendants challenge Plaintiff's punitive damages claim as being insufficiently pled in this "simple" non-tort breach of contract action.

B. Plaintiff's Contentions

Plaintiff alleges that both Defendants were obligated to tender payment by August 2010 because the contract's effective date was July 2, 2010, and even if the contract did not specify a precise closing, this Court can imply a reasonable time. Plaintiff challenges Defendant Moyer's attempts to "negate his contractual obligations" by arguing that the contract was not effectuated on July 2, 2010. Although the notary public did not specify the "instrument" signed, Plaintiff contends there is no other possible instrument referenced.

Plaintiff argues that the contract contained no conditions precedent. Rather, Plaintiff asserts the contract simply "evidences and acknowledges that Plaintiff was relinquishing possession of the Shares." Plaintiff contends Defendants' argument is "specious" because Defendants were both aware that Plaintiff never possessed stock certificates since the shares were either maintained in escrow or never certificated.

[8] *See* Super Ct. Civ. R. 12(b)(6).

Plaintiff contends that EPX's claims that it owes no payment obligation fails because EPX has already tendered part payment to Plaintiff and because Moyer allegedly repeatedly insisted that the purchase price was payable by EPX. Plaintiff argues that the integration and waiver and modification prohibition clauses were waived by Defendant EPX's subsequent partial payments.

Last, Plaintiff argues that punitive damages are recoverable because Defendants acted maliciously and willfully in that they underwent a "campaign of deceit and malice" in attempting to avoid compensating Plaintiff.

IV. STANDARD OF REVIEW

On a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), all well pleaded allegations must be accepted as true.[9] It is the Court's determination whether the pleading posits a viable cause of action.[10] Conclusory allegations that are devoid of specific factual support are not acceptable.[11] "[T]he Court must determine whether the claimant may recover under any reasonably conceivable set of circumstances susceptible to proof."[12] "In addition, every reasonable factual inference will be drawn in favor of the non-moving party."[13]

Contract construction must prioritize the parties' intentions.[14] A court must construe an agreement in its entirety and attempt to effectuate all provisions.[15] Contract interpretation is a legal question "and a motion to dismiss is a proper vehicle to determine the meaning of contract language."[16]

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[9] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[10] *Rich Realty, Inc. v. Potter Anderson & Corroon LLP*, 2011 WL 743400, at *3 (Del. Super. Feb. 21, 2011).
[11] *Nemec v. Schrader*, 991 A.2d 1120, 1125 (Del. 2010) (citation omitted).
[12] *State ex rel. Higgins v. Source Gas, LLC*, 2012 WL 1721783, at *2 (Del. Super. May 15, 2012) (citing *Spence*, 396 A.2d at 968).
[13] *Id*. (citing *Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson* 2009 WL 597268, at *2 (Del. Super. Mar. 9, 2009) (quoting *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[14] *Radio Corp. of Am. v. Philadelphia Storage Battery Co*., 6 A.2d 329, 340 (Del. 1939).
[15] *State v. Dabson*, 217 A.2d 497, 501 (Del. 1966).
[16] *Boyce Thompson Inst. v. MedImmune, Inc*., 2009 WL 1482237, at *5 (Del. Super. May 19, 2009).

V. DISCUSSION

A. Plaintiff Has Adequately Pleaded an Express Breach of Contract Claim Against Raymond Moyer.

"[F]ailure to satisfy a condition precedent results in a forfeiture of that party's rights under the contract."[17] The Court must consider the contract's language and circumstances to determine whether the parties intended a condition precedent.[18] "[I]n an action on a contract obligation . . . the plaintiff must allege the occurrence of conditions precedent. Thus where the benefit of a clause in a contract will inure to the plaintiff only on the occurrence of certain conditions, he must allege that those conditions existed."[19]

The Court may not consider matters outside the pleadings on a motion to dismiss for failure to state a claim.[20] "Before a motion to dismiss may be converted to one for summary judgment, parties must be given adequate notice and a reasonable opportunity to present pertinent material."[21] If a contract does not include a performance date, courts will imply that performance must occur within a reasonable time.[22] What constitutes a reasonable time depends on the case's specific facts.[23]

Plaintiff has properly pleaded an express breach of contract claim against Moyer. The complaint adequately contemplates conceivable circumstances under which Moyer breached the express contract terms. In accepting Plaintiff's allegations as true, the contract must be assumed effectuated on July 2, 2010, despite Moyer's contrary argument.

Moyer's argument that a condition precedent remains unfulfilled does not compel dismissal. In considering the contract language and circumstances, it is

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[17] *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church*, 2006 WL 2567916, at *21 (Del. Super. Aug. 31, 2006).
[18] *Reserves Development LLC v. R.T. Properties, L.L.C.*, 2011 WL 4639817, at *6 (Del. Super. Sept. 22, 2011).
[19] *Pobst v. Nanticoke Memorial Hosp.*, 1991 WL 166073, at *5 (Del. Super. July 30, 1991) (citation omitted).
[20] *Appriva Shareholder Litig Co. v. ev3, Inc.*, 937 A.2d 1275, 1287 (Del. 2007).
[21] *Id*. at 1288.
[22] *Delaware Fin. Mgmt. Corp. v. Vickers*, 1999 WL 456633, at * 7 (Del. Super. June 9, 1999) (citing *Martin v. Star Publishing Company*, 126 A.2d 238, 244 (Del. 1956).
[23] *Tull v. Smith*, 50 A.2d 908, 909-10 (Del. Ch. 1946).

unclear whether the parties intended that the stock certificate transfer be a condition precedent to performance. The lack of clarity results in part because the contract provides for the transfer of certificates only if in Plaintiff's possession, and otherwise does not transfer certificates if in escrow or buyer's possession. There is no present agreement (and presumably there was no agreement at the time of contracting) regarding the stock certificates' location or existence. The parties could not have intended the transfer of certificates be required as a condition precedent if the certificates were never in Plaintiff's possession or if the shares were not certificated. Discovery is needed to determine whether the shares were ever certificated at all, and if so, to locate them. It is "conceivable" that if the certificates have always been in Defendants' possession, that Moyer's performance is past due, and thus that Moyer has breached the contract.

Therefore, Defendant Moyer's Motion to Dismiss Count I against him is **DENIED**.

B. Plaintiff has Not Adequately Pleaded an Express Breach of Contract Claim Against EPX.

Conversely, Plaintiff has inadequately pleaded an express breach of contract claim against EPX. Plaintiff's complaint asserts that "upon information and belief" Moyer acted as the purchaser only "as a convenience to EPX" and insisted that EPX would actually pay for the shares. Even assuming these facts, at most they infer an implied contract and would not constitute an express breach. Under the express contract's terms, EPX had no obligation to make payment, and therefore could not have breached by failing to tender the purchase price. The contract expressly provided that Moyer purchased the shares for his "own account" and when strictly limited to the contract's terms, no express breach against EPX can stand. Plaintiff has proffered no independent reason or addressed any separate express contract provision which expressly obligates EPX. [24]

Therefore, Defendant EPX's Motion to Dismiss Count I against it is **GRANTED**.

[24] *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co*., 901 A.2d 106, 116 (Del. 2006) (granting motion to dismiss on express contract claim where plaintiff failed to identify any express contract provision that was breached.).

C. Plaintiff has Adequately Pleaded an Implied Breach of Contract Claim Against EPX.

A contractual obligation cannot be implied where an express obligation exists.[25] A court will only consider recovery under an implied contract if there is no express contract which governs the parties' rights and obligations.[26] An implied contractual obligation cannot "flow from matters expressly addressed" in a written contract.[27]

Despite EPX's arguments otherwise, Plaintiff has adequately pleaded conceivable circumstances for maintaining the implied breach of contract claim against EPX. Having determined that the express contract does not control EPX's relationship with Plaintiff, the Court is free to determine that an implied theory is appropriate. While the implied theory is absolutely related to the express provisions in the Stock Transfer Agreement, Plaintiff has sufficiently pleaded circumstances whereby EPX subsequently implied obligations from matters not flowing directly from the written contract. The implied theory is supported by several pleaded facts which provide a conceivable implied contract. First, and notably, EPX has made payments to Plaintiff, shortly after the alleged performance date that could conceivably represent part payment of the purchase price. Second, the complaint alleges that Moyer repeatedly represented that the purchase price would be funded by EPX, despite the contract listing Moyer as the sole purchaser.

Defendant argues that the agreement's integration clause and no oral modification and waiver clause prohibit Plaintiff's implied contract theory. The integration clause proscribes the Court's consideration of all oral and written communications and agreements regarding the stock transfer that occurred ***prior to*** the agreement.[28] However, the integration clause itself does nothing to prevent the Court's consideration of subsequent promises, communications, or modifications to the express agreement.[29] To the extent that any of Moyer's alleged

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[25] *CIT Communs. Fin., Corp v. Level 3 Commons., LLC,* 2008 WL 2586694, at *4 (Del. Super. June 6, 2008) (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 24 (2001)).
[26] *William M. Young Co. v. Bacon,* 1991 WL 89817, at *8 (Del. Super. May 1, 1991).
[27] *Moore Bus. Forms v. Cordant Holdings Corp.*, 1995 WL 662685, at *9 (Del. Ch. Nov. 2, 1995).
[28] Furthermore, as neither party presently contends that the express contract was ambiguous; parole evidence cannot be considered at this procedural posture.
[29] The integration clause provides: "**9.7. Entire Agreement.** This Agreement and the documents referred to herein constitute the entire agreement and understanding of the parties with respect to the subject matter of this Agreement, and supersede all prior understandings and

representations that EPX was funding the purchase price, or that Moyer was signing as purchaser solely as a convenience to EPX occurred ***prior to*** the written agreement's effectuation, the integration clause bars their consideration. However, to the extent any representations occurred ***after*** the contract's effectuation, the representations may be considered.

EPX's position is that the paragraph 9.9 of the agreement prohibits the Court's consideration of subsequent promises, communications, or modifications to the express agreement. However, Plaintiff relies upon *Mergenthaler v. Hollingsworth Oil Co., Inc*.[30] for the proposition that integration clauses and clauses such as paragraph 9.9 can all be waived by the parties' subsequent conduct. However, *Mergenthaler* does not explicitly discuss integration or oral modification prohibition clauses and Defendant contends it is therefore inapt. *Mergenthaler* only provides that, "[a] non-waiver clause in a contract may itself be waived through knowledge, coupled with silence and conduct inconsistent with the terms of the contract."[31]

Plaintiff's assertion is better supported by *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc*.[32] In *Pepsico*, the Delaware Supreme Court analyzed modifications through conduct that occurred despite clauses prohibiting modification. The Court reasoned that:

> [A] written agreement between contracting parties, despite its terms, is not necessarily only to be amended by formal written agreement. . . . [A] written agreement does not necessarily govern all conduct between contracting parties until it is renounced in so many words. The reason for this is that the parties have a right to renounce or amend the agreement in any way they see fit and by any mode of expression they see fit. They may, by their conduct, substitute a new oral contract without a formal abrogation of the written agreement. We think the existence of [a joint integration and no-oral modification clause] does not prohibit the modification of making of a new agreement

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agreements, whether oral or written, between or among the parties hereto with respect to the specific subject matter hereof." Stock Transfer Agreement at ¶ 9.7.

[30] *Mergenthaler v. Hollingsworth Oil Co*., 1995 WL 108883, at *2 (Del. Super. Feb. 22, 1995).

[31] *Id*. at *2.

[32] 297 A.2d 28 (Del. 1972).

> by conduct of the parties, despite a prohibition [ ] against any change except by written bilateral agreement.
>
> The prohibition against amendment except by written change may be waived or modified in the same way in which any other provision of a written agreement may be waived or modified, including a change in the provisions of the written agreement by the course of conduct of the parties.[33]

Despite paragraph 9.9's provision proscribing oral modifications, Plaintiff's assertion that EPX subsequently modified the written agreement by providing part performance is sufficient conceivably to demonstrate a modification based on conduct.[34] Furthermore, if Defendant Moyer provided subsequent assurances that EPX would fund the purchase price or that his purchaser status was merely a convenience to EPX, those subsequent assurances could similarly modify the written agreement. As it is entirely conceivable at this posture that EPX's conduct waived or modified contract provisions, Defendant's Motion to Dismiss Count II of the Complaint is **DENIED**.

D. Determination of Plaintiff's Potential Right to Seek Punitive Damages is Premature at this Juncture.

"[A] party may not recover punitive damages in a breach of contract action, unless the breach amounts to a tort in and of itself or was malicious or willful."[35] "An assertion of malice without factual basis is insufficient. . . ."[36] "

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[33] *Id*. at 33 (citing *Congress Factors v. Malden Mills, Inc*., 332 F.Supp. 1384 (D.N.J.1971); *Taylor v. University National Bank*, 263 Md. 59, 282 A.2d 91 (1971), and *Beatty v. Guggenheim Exploration Co*., 225 N.Y. 380, 122 N.E. 378 (1919)).

[34] At oral argument, defense counsel argued that the Court cannot consider allegations of part performance by defendants because Plaintiff attached canceled checks proving the payment only in briefing before the Court on this Motion. Defense counsel argued that consideration of the canceled checks would be beyond the pleadings and would be inappropriate on a motion to dismiss. While Defendant is correct, the Court need not look to the canceled checks because Plaintiff adequately pleaded that part performance had been made within the complaint. See Complaint ¶¶ 8, 11. The canceled checks attached to briefing only bolstered the pleading which contained adequate information to sustain Plaintiff's implied theory in light of the motion to dismiss standard that all well pleaded allegations are accepted as true.

[35] *Meltzer v. City of Wilmington*, 2011 WL 1312276, at *15 (Apr. 6, 2011); *Universal Capital Management, Inc. v. Micco World, Inc.*, 2012 WL 1413598, at *4 (Del. Super. Feb. 1, 2012).

[36] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del. Super. 1982).

In *Ripsom v. Beaver Blacktop, Inc*[37], this Court held that a reasonable jury might conclude a breaching defendant had acted with the requisite state of mind so as to compel punitive damages. The *Ripsom* defendant knew it would not perform yet refused to so advise Plaintiff, despite repeated inquiries. The Court held that "the jury could conclude that [defendant] never intended to follow through on its contract with [plaintiff], and simply developed these 'reasons' as ex post facto justification for its conduct."[38]

Ripsom was decided on a motion for directed verdict after a full trial, but that does not modify the Court's reasoning, in fact, it bolsters it.[39] Punitive damages are potentially available but require complete factual development. Discovery will aid in determining whether the facts are so egregious as to constitute a "campaign of deceit and malice" and compel punitive damages. However, this Court notes that a plaintiff's entitlement in a breach of contract case to recover punitive damages is a high bar. Therefore, Defendants' Motion to Dismiss Plaintiff's punitive damages claim is **DENIED**, without prejudice to its renewal at a later appropriate time.

VI. CONCLUSION

For all the reasons stated in this Opinion, Defendant Raymond Moyer's Motion to Dismiss is **DENIED**. Defendant EPX's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART.** The Motion is **GRANTED** only as to Count I of the Complaint. EPX's Motion is **DENIED** as to Count II. The stay of discovery is immediately lifted.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary

[37] 1998 WL 32071 (Del. Super. Apr. 6, 1988).
[38] *Ripsom*, 1988 WL 32071, at *18.
[39] The motion for a directed verdict in the Superior Court is now known as a motion for judgment as a matter of law. See Super. Ct. Civ. R. 50.