

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR KENT COUNTY**

**DAVID CASTETTER,** )  
 )  
 Plaintiff, )  
 )  
 v. ) C.A. No. 01C-03-007 HDR  
 )  
 **DELAWARE DEPARTMENT OF** )  
 **LABOR, A STATE AGENCY and** )  
 **W. THOMAS MACPHERSON,** )  
 **sued in his individual capacity only,)** )  
 )  
 Defendants. )

Submitted: January 11, 2002

Decided: April 30, 2002

Roy S. Shiels, Esq. of Brown, Shiels, Beauregard & Chasanov, Dover, Delaware,  
for Plaintiff.

Thomas H. Ellis, Esq., Deputy Attorney General, for Defendants.

**OPINION**

**Upon Defendant MacPherson's  
Motion to Dismiss Counts I, II and III  
*GRANTED***

**Upon Defendant Delaware Department  
of Labor's Motion to Dismiss Count III  
*GRANTED***

**Upon Plaintiff's Motion to Amend Complaint  
*GRANTED***

RIDGELY, President Judge

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**I. INTRODUCTION**

This is an action brought by Plaintiff David Castetter (“Castetter”) against Defendants, Delaware Department of Labor (the “DOL” or “State”) and W. Thomas MacPherson (“MacPherson”) involving a claim for financial loss and emotional distress caused by an alleged intentional interference with an employment contract. Castetter seeks recovery against the DOL and MacPherson, in his individual capacity, based on three theories: breach of the covenant of good faith and fair dealing, detrimental reliance, and fraud. Presently before the Court are the Defendants’ motion to dismiss or for summary judgment. MacPherson requests the Court to dismiss Counts I and II against him, because he is not a party to the contract and he did not agree to become personally bound for any contract negotiated on behalf of the DOL. MacPherson also moves for dismissal of Count III because it fails to allege a claim of fraud with the requisite particularity. DOL seeks summary judgment in its favor on Count III based on sovereign immunity. Castetter’s answering brief includes a motion to amend the complaint to add an additional claim. For the reasons which follow, the motion to dismiss Counts I and II against MacPherson is granted, the motion to dismiss Count III against MacPherson is granted without prejudice to any motion to amend, and the motion for summary judgment on Count III against the DOL is granted. Finally, I conclude that Castetter’s motion to amend his complaint to add a Count IV should be granted.

**II. STATEMENT OF FACTS**

On a motion to dismiss the allegations of the complaint must be accepted as

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true.<sup>1</sup> For at least the period beginning in the spring and running until the fall of 2000, Castetter was working in a contractual position, involving computer programming on the mainframe computers of the DOL. In the spring of 2000, MacPherson, as Director of the Division of Unemployment Insurance (“UI”), an agency of the DOL, relayed a verbal job offer to Castetter. The date to begin work was one specific term the parties disagreed upon. MacPherson initially wanted the start date to be October 1, 2000, while Castetter suggested a start date of November 1, 2000. A compromise start date of October 16, 2000 was suggested. Whether there was mutual assent to this date is at contention between the parties. Communications between the parties broke down and Castetter was told he would not be hired as a State employee or as a consultant. Castetter believes that MacPherson changed his attitude regarding hiring Castetter because of statements Castetter made about the UI’s compliance with federal law, or because MacPherson discovered Mrs. Castetter’s illness.

Castetter spoke with MacPherson’s administrative superior and was told the issue was resolved and he should contact MacPherson to accept the position. Castetter did so, nevertheless MacPherson remained hostile and informed Castetter that he would speak to him after having spoken with his administrative superior. Within a few days MacPherson contacted Castetter and indicated that the State Personnel Office would be notified that Castetter had declined the position.

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<sup>1</sup> See *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. Ct. 1972), *aff’d*, 297 A.2d 37 (Del. 1972); *Barni v. Kutner*, 76 A.2d 801, 806 (Del. Super. Ct. 1950).

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On March 7, 2001, Castetter filed the current action. Recovery is sought against the DOL and MacPherson, in his individual capacity. Count I of the complaint seeks recovery for a breach of the covenant of good faith and fair dealing incorporated into every Delaware contract. Count II seeks recovery upon a theory of detrimental reliance or promissory estoppel. Count III prays for a judgment based upon fraud. The Defendants have filed a motion to dismiss or for summary judgment, seeking all counts dismissed against MacPherson and summary judgment in the favor of DOL on Count III. Castetter's answering brief included a motion to amend the complaint.

**III. ANALYSIS**

Several issues are presented in these motions: (1) whether personal liability will attach to MacPherson on an employment contract he negotiated between Castetter and the DOL; (2) whether Castetter has failed to allege with particularity all the necessary elements for fraud; (3) whether the DOL is immune from suit pursuant to the doctrine of sovereign immunity; and (4) whether Castetter may amend his complaint. The parties' arguments are addressed within the discussion section of each claim.

**A. Motion to Dismiss**

A motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6) requires the Court to determine whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible to proof under the complaint.<sup>2</sup> A

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<sup>2</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

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complaint cannot be dismissed unless the plaintiff has either failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged in the complaint (including all reasonable inferences) could the plaintiff state a claim for which relief might be granted.<sup>3</sup>

**1. Personal Liability**

MacPherson seeks dismissal of Counts I and II against him because he was acting within his authority, in his official capacity, and at no time expressed an intent to assume personal responsibility for a breach of contract. Castetter asserts that officials may have personal liability if their actions violate clearly established rights of other parties which a reasonable competent official would have known, or if such acts are done with malice or in bad faith.

Certain types of public officials may be held personally liable for tortious acts that are clearly outside the scope of their authority, or if such acts are done with malice or bad faith or improper motive.<sup>4</sup> The generally recognized rule is that:

“[a] public officer acting within the scope of his authority and in his official capacity is generally not personally liable on contracts executed in behalf of the government. Where public agents, in good faith, contract with persons having full knowledge of the extent of their authority, or who have equal means of knowledge, they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed, even though it is found that through ignorance of

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<sup>3</sup> *Id.*

<sup>4</sup> *See Shellborn, Inc. v. Roberts*, 238 A.2d 331, 338 (Del. 1967).

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law they may have exceeded their authority.”<sup>5</sup>

I accept this general rule as the law to be applied in Delaware. Here there is no evidence to support any claim that MacPherson was a party to any employment contract. Only a party to a contract can breach the implied covenant of good faith and fair dealing.<sup>6</sup> Accordingly, because MacPherson was not a party to the contract, his motion to dismiss Counts I and II is granted.

**2. Particularity Requirement**

The second prong of the Defendants’ motion to dismiss seeks dismissal of Count III against MacPherson based on Castetter’s failure to allege fraud with the requisite particularity required by Superior Court Civil Rule 9(b). Specifically, Castetter failed to allege in his complaint what the false statement of material fact by MacPherson to him was, or where or when it was made.

The elements of fraud under Delaware law are well established. A party claiming fraud must allege: (1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken

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<sup>5</sup> 63C Am.Jur.2d, *Public Officers and Employees* § 342 (1997); see, e.g., *Wilson v. Strange*, 219 S.E.2d 88, 95 (Ga. 1975) (finding public officials are not personally liable on contracts entered into by them within the scope of their authority); *Hailey v. King County*, 149 P.2d 823 (Wash. 1944) (holding that municipal authorities are not personally liable, in the absence of fraud, for acts purportedly done in behalf of the corporation).

<sup>6</sup> *Wallace ex rel. Cencom v. Wood*, 752 A.2d 1175 (Del. Ch. 1975).

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in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.<sup>7</sup> While fraud must be alleged with particularity under Superior Court Civil Rule 9(b), it is only necessary to allege ultimate facts and not evidence.<sup>8</sup> General allegations of fraud are insufficient, but sufficient facts must be set out to apprise opposing party what fraudulent acts are charged.<sup>9</sup> The allegations must include at least " 'the time, place and contents of the false representations ... and what [was] obtained thereby.' "<sup>10</sup>

Because the claim of fraud, if established, may result in an award of punitive damages it is important that the defendants be provided with the specifics of the alleged conduct.<sup>11</sup> In Count III of his complaint, Castetter asserts that "MacPherson knowingly or with reckless indifference made false representations regarding plaintiff's hire as a State employee intending to induce plaintiff to leave his existing employment in order to accept specific State position, which plaintiff did."<sup>12</sup> However, in his answering brief, Castetter contends that the false representation is contained in paragraph 17 of the complaint, when MacPherson reported to the State

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<sup>7</sup> *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

<sup>8</sup> *See Strasburger v. Mars, Inc.*, 83 A.2d 101 (Del. Super. Ct. 1951).

<sup>9</sup> *See id.*

<sup>10</sup> *Browne v. Robb*, 583 A.2d 949, 956 (Del. 1990); (citing *Nutt v. A.C. & S, Inc.*, 466 A.2d 18, 23 (Del. Super. Ct. 1983)).

<sup>11</sup> *Nutt*, 466 A.2d at 23.

<sup>12</sup> Compl. at 4, ¶ 24.

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Personnel Office that Castetter had declined the position.<sup>13</sup>

The complaint alleges false representations were made to Castetter to induce him to leave his existing employment and accept the State position. The time, place and contents of the false representations are not alleged. Since Count III of the complaint fails to comply with Rule 9(b), it is dismissed as to MacPherson without prejudice.

**B. Motion for Summary Judgment**

Summary judgment is appropriate if, after viewing the record in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.<sup>14</sup> However, if from the evidence produced, there is a reasonable indication that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment will not be granted.<sup>15</sup> When the facts permit a reasonable person to draw but one inference, the question becomes one for decision on summary judgment.<sup>16</sup> If the basic facts are not in dispute and point to only one justifiable conclusion, summary

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<sup>13</sup> Pl.'s Answering Br. at 7.

<sup>14</sup> *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. Ct. 1994).

<sup>15</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962), *rev'd in part and aff'd in part*, 208 A.2d 495 (Del. 1965).

<sup>16</sup> *Wotten v. Kiger*, 226 A.2d 238, 239 (Del. 1967); *Frelick v. Homeopathic Hosp. Ass'n*, 150 A.2d 17, 19 (Del. Super. Ct. 1959).



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judgment is appropriate.<sup>17</sup> In discharging this function, the Court must view the evidence in the light most favorable to the non-moving party. In doing so, the Court will accept as established all undisputed factual assertions made by either party, and accept the non-movant's version of any disputed facts.<sup>18</sup>

The doctrine of sovereign immunity was part of the common law at the time when the State of Delaware was the colonial government of the three lower counties of Delaware.<sup>19</sup> It was established initially by the State's first Constitution and has been continued thereafter by successive Constitutions.<sup>20</sup> Sovereign immunity is an absolute bar to any action, whether *ex delicto* or *ex contractu*, against the State of Delaware unless waived by the Legislature.<sup>21</sup> Waiver need not be in express statutory language.<sup>22</sup> When the Legislature authorizes the State to enter into a contract the State implicitly waives the protection of sovereign immunity for breach of that contract.<sup>23</sup> In authorizing an agency of the State to enter into a valid contract,

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<sup>17</sup> *489.137 Square Feet of Land v. State ex rel. Price*, 259 A.2d 378, 381 (Del. 1969).

<sup>18</sup> *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

<sup>19</sup> *Shellhorn & Hill, Inc. v. State*, 187 A.2d 71, 73 (Del. 1962).

<sup>20</sup> *Id.*

<sup>21</sup> *Turnbull v. Fink*, 668 A.2d 1370, 1374 (Del. 1995); *Wilmington Housing Auth. v. Williamson*, 228 A.2d 782, 786 (Del. 1967); *George & Lynch, Inc. v. State*, 197 A.2d 734, 736 (Del. 1964).

<sup>22</sup> *Blair v. Anderson*, 325 A.2d 94, 96 (Del. 1974).

<sup>23</sup> *Id.*

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“the General Assembly has necessarily waived the State’s immunity to suit for breach by the State of that contract.”<sup>24</sup>

The Legislature has expressly authorized the DOL to enter into contracts with third parties.<sup>25</sup> Assuming the facts most favorable to Castetter, the DOL and Castetter entered into an employment contract. By entering into such a contract the State has implicitly waived its sovereign immunity with respect to a breach of contract claim. If the evidence shows that the State failed to live up to this contractual obligation, it should be made to answer for its actions.<sup>26</sup> Castetter’s breach of contract claim cannot be dismissed on the grounds of sovereign immunity.

As to tort liability, the State has retained sovereign immunity unless it insures against a particular risk and the action in question is done in bad faith or with gross negligence.<sup>27</sup> The State does not currently insure against potential losses as outlined

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<sup>24</sup> *George & Lynch, Inc.*, 197 A.2d at 736.

<sup>25</sup> 29 *Del. C.* § 8503(5) provides that the Secretary of the Department of Labor shall have the power

“[t]o make and enter into any and all contracts, agreements or stipulations, and to retain, employ and contract for the services of private and public consultants, research and technical personnel, and to procure by contract, consulting, research, technical and other services and facilities, whenever the same shall be deemed by the Secretary necessary or desirable in the performance of the functions of the Department...”

<sup>26</sup> *Shively v. Ken-Crest Ctr. for Exceptional Pers.*, 1998 WL 960719 at \*2 (Del. Super. Ct.).

<sup>27</sup> *Id.* at \*2 (citing *Doe v. Cates*, 499 A.2d 1175, 1181 (Del. 1985)).

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by Count III of the complaint.<sup>28</sup> Because the State has not obtained such insurance, it has not waived its sovereign immunity with respect to this issue and Castetter's claim for fraud against the State must be dismissed. Accordingly, notwithstanding the lack of specificity in Count III, the DOL's motion for summary judgment with respect to the tort claim under Count III is barred by the doctrine of sovereign immunity.

**C. Motion to Amend**

Finally, there remains for consideration the motion to amend which was appended to Castetter's answering brief. Rule 15(a) permits amendment of the pleading, by leave of the Court, and "shall be freely given when justice so requires."<sup>29</sup> The purpose behind this liberal rule is to encourage the disposition of cases on their merits.<sup>30</sup> It is also well known that an amendment which merely makes an allegation more specific or changes the legal theory will be allowed and will relate back to the date of the original complaint.<sup>31</sup> This Court, in its sound discretion, must weigh the desirability of ending cases on their merits with any

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<sup>28</sup> See Aff. of Ms. Debra Lawhead, Risk Manager of the State of Delaware. Def.'s Mot. to Dismiss or for Summ. J. (stating that the State of Delaware does not insure against this type of action).

<sup>29</sup> Super. Ct. Civ. R. 15(a); *Annone v. Kawasaki Motor Corp.*, 316 A.2d 209, 211 (Del. 1974).

<sup>30</sup> *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 72 (Del. 1993).

<sup>31</sup> *DiFonzo v. Robelen Piano Co.*, 144 A.2d 247, 248 (Del. Super. Ct. 1958).

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possible prejudice or surprise to the opposing party.<sup>32</sup> If the objecting party does not satisfy the court that the amendment will be prejudicial, then the motion will be granted.<sup>33</sup>

The amendment submitted by Castetter seeks to add a fourth theory of liability based upon intentional interference with a contractual relationship. This tort claim asserted in the amended complaint arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original complaint. The Defendants' reply brief merely acknowledges the motion to amend by labeling all references to the record as the "verified pleading."<sup>34</sup> Because the Defendants' reply brief is absence of a demonstration of prejudice, this Court grants Castetter's motion to amend the complaint.

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<sup>32</sup> *Bellanca Corp. v. Bellanca*, 169 A.2d 620, 622 (Del. 1961).

<sup>33</sup> *Rogers v. Delaware Power & Light Co.*, 95 A.2d 842, 845-46 (Del. Super. Ct. 1953).

<sup>34</sup> Defs.' Reply Br. at 2-3.

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#### **IV. CONCLUSION**

In conclusion, MacPherson's motion to dismiss Counts I and II for failure to state a claim upon which relief may be granted is granted. MacPherson's motion to dismiss Count III for failure to plead fraud with sufficient particularity is granted. I find that the Department of Labor is entitled to summary judgment on Count III, because it is protected from this tort claim by the doctrine of sovereign immunity. Finally, I conclude that Castetter's motion to amend the complaint is granted.

**IT IS SO ORDERED.**

/s/ Henry duPont Ridgely

President Judge

cmh

oc: Prothonotary

xc: Order distribution