

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

1 THE CIRCLE, SUITE 2  
SUSSEX COUNTY  
COURTHOUSE  
GEORGETOWN, DE 19947

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RE: *Spanish Tiles, Ltd. Terra Tile & Marble, Steel Buildings, Inc. d/b/a Northern Steel Buildings, Inc. v. Kurt Hensey, Ken Hensey, et al.*  
**C.A. No. 05C-07-025 RFS**

Date Submitted: December 1, 2005  
Date Decided: March, 30, 2005

Dear Counsel:

This is the Court's decision as to Defendants' Motion to Dismiss and Motion for a More Definite Statement. Defendant's motions are denied.

**BACKGROUND**

This case arises out of a dispute between Joss Hudson, the owner of Plaintiff Steel Buildings, Inc. d/b/a Northern Steel Buildings, Inc. ("NSB") and defendants Kurt and Ken Hensey ("the Henseys"). According to Plaintiff, Hudson became an equal partner with the Henseys in an entity known as Northern Steel Commercial Systems, Inc. ("NSCS"), which was formed to sell and deliver commercial warehouses on behalf of NSB.

NSB entered into a contract with Plaintiff Spanish Tiles, Ltd. d/b/a Terra Tile and Marble ("Terra Tiles") for the manufacture and delivery of a steel warehouse. NSCS was the entity which handled this contract. In March, 2004, Mr. Hudson and the Henseys had

a disagreement and Mr. Hudson was removed as a partner in NSCS. As a result, NSCS was to be wound down pursuant to Delaware law and was no longer the entity overseeing NSB. As NSCS was dissolved the clients of the entity were divided between NSB and the Henseys. The Henseys were to assume the Terra Tile contract. Terra Tile was apparently never notified and still believed that NSB was fulfilling its contract. Notwithstanding the fact that NSB was no longer involved, Defendants accepted the sum of \$72, 793.75 from Terra Tile as a deposit for a steel warehouse. The building was to be delivered in March of 2005. Defendants neither supplied a warehouse, nor returned the money. These are the basic facts and allegations which underlie the complaint.

Stemming from them, Plaintiffs allege a host of issues, including breach of contract, tortious interference with contracts and prospective contracts, violation of the Deceptive Trade Practices Act, common law fraud, unlawful practice and defamation.

### **STANDARD OF REVIEW**

The Court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a Motion to Dismiss under Rule 12 (b) (6).<sup>1</sup> The Court will not dismiss a claim unless the Plaintiff would not be entitled to recover under any circumstances that are susceptible to proof.<sup>2</sup> The complaint must be without merit as a matter of fact or law to be dismissed.<sup>3</sup> The Plaintiff or complainant will have every reasonable factual inference drawn in his favor.<sup>4</sup> “Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which

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<sup>1</sup> *RSS Acquisition, Inc. v. Dart Group Corp.*, 1999 WL 1442009, \*2 (Del. Super.).

<sup>2</sup> *Id.*

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

<sup>4</sup> [\*Ramunno v. Cawley\*, 705 A.2d 1029, 1036 \(Del.1998\).](#)

relief might be granted.”<sup>5</sup> “Where allegations are merely conclusory, however (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss.”<sup>6</sup>

Alternatively, Rule 12 (e) states that:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.

“If the complaint is found to be vague or ambiguous, the Plaintiff will be required to correct any defects with a more definite statement.”<sup>7</sup>

### **DISCUSSION**

Defendants have submitted a Motion for a More Definite Statement and Motion to Dismiss, asking this Court to dismiss all claims against the Hensey brothers as well as all counts stated in the complaint, due to failure to state a claim upon which relief can be granted. Alternatively, Defendants ask for an order from this Court directing Plaintiffs to submit a more definite statement for all counts.

Our Supreme Court has stated that “Rule 8 of the Superior Court Rules and the Federal Rules of Civil Procedure set forth the characteristics of good pleading. The intent and effect of this rule is to permit a claim to be stated in general terms and to discourage battles over the mere form of

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<sup>5</sup> *Hedenberg v. Raber*, 2004 WL 2191164, \*1 (Del. Super.) *citing* *Evans v. Perillo*, 2000 Del. Super. Lexis 243, at \*5-6.

<sup>6</sup> *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000) *citing* *In re Tri-Star Pictures, Inc Litig.*, 634 a.2d 319, 326 (Del. 1993).

<sup>7</sup> *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, \*2 (Del. Super.).

statement. *United States v. Iroquois Apartments, Inc.*, D.C., 21 F.R.D. 151; *Nagler v. Admiral Corp.*, 2 Cir., 248 F.2d 319. To the pleadings is normally assigned the task of general notice-giving. The task of narrowing and clarifying the basic issues and ascertaining the facts relative to other issues is the role of the deposition discovery process. *Stitt v. Lyon*, 9 Terry 365, 103 A.2d 332; *Wiener v. Markel*, 8 Terry 449, 92 A.2d 706. See, too, *Clark, Special Pleading in the 'Big Case'*, 21 F.R.D. 45-54.

In *Buchanan Service, Inc., v. Crew*, 11 Terry 22, 122 A.2d 914, 917, this Court stated: As was stated in *Pfeifer v. Johnson Motor Lines, Inc.*, 8 Terry 191, 89 A.2d 154, the discovery devices are designed to fulfill the function of issue formulation as well as the function of fact revelation. Since pleading has been streamlined and restricted to the limited scope of notice-giving, the function of formulating and clarifying the issues has passed from the pleadings to the discovery devices and the pre-trial conference. There being nothing in the Rules to indicate otherwise, legal issues and the contentions of the parties as to what the facts are, as well as the facts themselves, are open to discovery.” *Delaware Valley Drug Co. v. Kline*, 144 A.2d 403 (Del. 1958).

The Supreme Court has further noted that “[a]n allegation, though vague or lacking in detail, is nevertheless “well-pleaded” if it puts the opposing party on notice of the claim being brought against it. *Diamond State Tel. Co. v. University of Del.*, Del.Supr., 269 A.2d 52, 58 (1970).” *Precision Air Inc. v. Standard Chlorine of Del. Inc.*, 654 A.2d 403 (Del. 1995). In addition to the rulings of the Supreme Court, this Court noted in a case on a similar motion asking for more evidentiary facts, that “if the complaint contained these facts it would no longer be a ‘short and plain statement of the claim’ as is required by Rule 8(a). It would become prolix with allegations of evidence.

The plaintiff will not be required to plead evidentiary facts and the defendant must exercise his rights under the discovery Rules in order to ascertain such of these facts as he may be entitled to obtain from the plaintiff." *Bullock v. Maag*, 94 A.2d 413 (Del. Super. Ct. 1952.).

In light of these rulings each of the counts alleged in the complaint will be discussed in turn, and reviewed according to the standard of review previously explained.

### **Count I – Breach of Contract**

Our Supreme Court has ruled that there are three elements in a breach of contract case: the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff.<sup>8</sup>

In this case, Plaintiffs have alleged that there was a contract, that the contract was assumed by one of the defendants and later breached, resulting in damages to Terra Tile. As such, Plaintiffs have met the minimal requirements for a well pleaded complaint.<sup>9</sup>

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<sup>8</sup> *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005). Quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003.).

<sup>9</sup> Although not explicitly stated, Plaintiffs' claims would support an allegation of breach of implied contract

Specifically, the allegations state that Kurt Hensey, for himself and the other defendants, breached a contract by accepting a payment of \$72,793.75 from Terra Tile for a steel building that was never delivered. Damages are alleged by reason of the breach.

For the forgoing reasons, Defendants' Motion is denied as to Count I of the Complaint.

1. Count II – Tortious Interference with Contractual Relations

Our Supreme Court has clearly iterated the standard for a cause of action for tortious interference with contractual relations. “In order to prove a

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on the theory that Kurt Hensey accepted \$72, 793.27 under such circumstances that make retention unjust. “A contract implied in law permits recovery of that amount by which the defendant has benefited at the expense of the plaintiff in order to preclude unjust enrichment. *Barrett Builders v. Miller*, 576 A.2d 455 (Conn.1990); *see also Lawrence v. DiBiase*, 2001 Del.Super. LEXIS 368 (Feb. 27, 2001 Del.Super.). To claim restitution, the plaintiff must show that the defendant was unjustly enriched and secured a benefit that it would be unconscionable to allow her to retain. *Midcoast Aviation v. General Electric Credit Corp.* 907 F.2d 732 (7th Cir.1990).The essential elements of a quasi-contract are a benefit conferred upon the defendant by the plaintiff, appreciation or realization of the benefit by the defendant, and acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable to retain it without paying the value thereof. 66 Am Jur 2d *Restitution and Implied Contracts*, Sec. 11 (2001) (citations omitted).” *Powell v. Powell*, 2006 WL 136500 (Del.Com.Pl.).

“This cause of action was developed at common law as one of the counts general assumpsit. 66 Am Jur 2d *Restitution and Implied Contracts*, Sec.169; *see also Ramunno v. Persimmon Lane Apts.*, 1976 Del. C.P. LEXIS 11 (July 8, 1976). It is founded on the principle that one should not enrich himself at the expense of another.” *Id.*

cause of action for interference with contractual relations, the claimant must show: (1) a contract; (2) of which the defendant was aware; (3) an intentional act by the defendant that is a significant factor in causing the breach of the contract; (4) without justification; and (5) that act causes injury or results in injury. *Aeroglobal Capital Mgmt. v. Cirrus Indus.*, 871 A.2d 428 (Del. 2005)” ***Murphy v. Bishop***, 2005 WL 991400 (Del.Com.Pl.).

As in Count I, Plaintiff has alleged the existence of a contract of which the defendants were aware, that one or more of the defendants, without justification, did accept payment from Terra Tile for a building that was not delivered, thereby breaching the contract and causing injury to Terra Tile.

Defendants respond that Counts II and III of Plaintiff’s complaint are inconsistent and should therefore be dismissed. However, Superior Court Civil Rule 8 (2) clearly states that:

“A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. *The party may also state as many separate claims or defenses as the party has, regardless of consistency.*” (emphasis added).

For the foregoing reasons, Defendants’ Motion is denied as to Count II of the Complaint.

2. Count III – Tortious Interference with Prospective Contractual Relations

In Count III of the Complaint, Plaintiffs allege tortious interference with contractual relations. “The elements of that tort are: (1) the existence of a valid business relation or expectancy, (2) the interferer’s knowledge of the relationship or expectancy,

(3) intentional interference that (4) induces or causes a breach or termination of the relationship or expectancy and that (5) causes resulting damages to the party whose relationship or expectancy is disrupted. *CPM Indus., Inc. v. Fayda Chemicals & Minerals, Inc.*, Del. Ch., C.A. No. 15996, Jacobs, V.C. (Nov. 26, 1997), and cases cited therein." *In re Frederick's of Hollywood, Inc.*, 1998 WL 398244 (Del.Ch.).

In their Complaint, Plaintiffs allege that one or more of the defendants has been intentionally interfering in the relations of NSB with its clients and prospective clients. The Complaint alleges that as one or more of the defendants was formerly employed by NSB and is now a competitor, the business relations and expectancies are known to the defendants. It further alleges that one or more of the defendants are interfering in such way as to cause the termination of these relations and expectancies, and that this interference has resulted in damages to NSB.

For the foregoing reasons, Defendants' Motion is denied as to Count III of the Complaint.

### 3. Count IV - Violation of the Deceptive Trade Practices Act

6 Delaware Code § 2531 lays out the elements of the Deceptive Trade Practices Act. It states:

"(a) A person engages in a deceptive trade practice when, in the course of a business, vocation, or occupation, that person:

- (1) Passes off goods or services as those of another;
- (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
- (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;



(6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) Disparages the goods, services, or business of another by false or misleading representation of fact;

(9) Advertises goods or services with intent not to sell them as advertised;

(10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of, price reductions; or

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

(b) In order to prevail in an action under this chapter, a complainant need not prove competition between the parties or actual confusion or misunderstanding.”

In this case, Plaintiffs make nine separate allegations concerning violations of the Deceptive Trade Practices act. Plaintiffs first allege that the defendants, in the course of their business, have assumed contracts, including but not limited to the Terra Tile contract by, passing off their goods and/or services as those of NSCS and/or NSB. The facts alleged in the complaint, incorporated by reference by numbered paragraph 60, make out a prima facie for this charge under 6 *Del. C.* §2532.

As previously noted, the purpose of the pleadings is to put the defendant on notice as to the elements of the complaints against it. In this case, as the first of the nine allegations of violations of the Deceptive Trade Practices Act has met Plaintiffs' burden at the pleading stage, the other eight allegations need not be addressed at this time. Further review of these allegations can be made during the deposition and discovery process.

Considering the forgoing, Defendants' Motion is denied as to Count IV of the Complaint.

4. Count V - Unlawful Practice

6 Delaware Code §2513 lays out the elements of an unlawful practice claim. It states in pertinent part that:

“(a) The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.”

In this case, Plaintiffs allege that the defendants' have violated 6 *Del. C.* § 2513 in their actions pertaining to the sale and non-delivery of a steel building to Terra Tile, including the obtaining of a down payment on the building in March, as well as the promise to deliver the building made in January.

The facts alleged in the Complaint, incorporated by reference in numbered paragraph 64, make out the elements of a prima facie case for unlawful practice.

Considering the foregoing, Defendants' Motion is denied as to Count V of the Complaint.

5. Count VI - Common Law Fraud

“In order to plead common law fraud in Delaware, plaintiffs must aver facts supporting the following elements: (1) the defendant made a false representation, usually one of fact; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant had the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages

as a result of such reliance. *Albert v. Alex Brown Management Services, Inc.*, 2005 WL 2130607, at \*7 (Del. Ch.).” *Unisuper Ltd. v. News Corp.*, 2005 WL 3529317 (Del.Ch.).

“Fraud claims are subject to the heightened pleading standards of Rule 9(b). This means that the pleading must identify the “time, place and contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby.” *York Linings v. Roach*, 1999 Del. Ch. LEXIS 160, at \*25 (Del. Ch. July 28, 1999). (internal quotations and citations omitted).” *Albert v. Alex Brown Management Services, Inc.*, 2005 WL 2130607 (Del.Ch.).

In this case, Plaintiffs’ Complaint lays out all the requisite facts of an action for fraud. Plaintiff allege that on or about May 28, 2004, Kurt Hensey, acting on behalf of NSCS and/or BQ misrepresented to Terra Tile that he would be supplying them with a steel building as per the terms of their original contract with NSB. As a result of this misrepresentation, Kurt Hensey induced Terra Tile to send him \$72,793.75 a deposit check made out to him personally as “Kurt Hensey of NSCS.” Kurt Hensey then accepted this check. On January 10, 2005, Kurt Hensey then fraudulently induced the defendant Terra Tile to refrain from acting against him by promising a steel building would be delivered on or before March 20, 2005. No steel building was ever delivered and Plaintiffs Terra Tile suffered economic damages as a result of their justifiable reliance on Kurt Hensey’s representation.

Considering the foregoing, Defendants’ Motion is denied as to Count VI of the Complaint.

6. Count VII - Defamation

“A plaintiff must plead five elements in a defamation action: 1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third party’s understanding of the communication’s defamatory character; and 5) injury.”<sup>10</sup> Special damages are required for slander (oral defamation) to be actionable.<sup>11</sup> However, slander per se is actionable without proving special damages.<sup>12</sup> Slander per se is made up of four general categories of statements.<sup>13</sup> The four types of statements are ones that: 1) malign one in a trade, business, or profession; 2) impute a crime; 3) imply one has a loathsome disease; or 4) impute unchastity to a woman.<sup>14</sup> Libel (written defamation) does not require special damages.<sup>15</sup>

In this case, Plaintiffs allege that one or more of the defendants, made statements about Joss Hudson and NSB during their competition with NSB which has diminished the esteem, respect, goodwill and/or confidence in which NSB and Joss Hudson are held within the professional community. These statements were made to customers and suppliers as well as members of the community. Plaintiffs have successfully pled all the elements of defamation.

Considering the foregoing, Defendants’ Motion is denied as to Count VII of the Complaint.

### **CONCLUSION**

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<sup>10</sup> *Read v. Carpenter*, 1995 WL 945544, \*2 (Del. Super.).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Spence v. Funk*, 396 A.2d 967, 971 (Del. 1978).

For the foregoing reasons, defendants' Motion to Dismiss and the Motion for a More Definitive Statement are denied in their entirety. Sufficient notice is provided by the pleadings and the details can be flushed out through discovery.

**IT IS SO ORDERED.**

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Richard F. Stokes, Judge

CC: Prothonotary