NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

PITT CHEMICAL & SANITARY SUPPLY HOLDING COMPANY, INC., PITT CHEMICAL & SANITARY SUPPLY CO., INC., PITTCHEM SUPPLY CO., INC. AND RICHARD W. SCHOMAKER,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
GENERATIONAL EQUITY, LLC, McCREARY & STOCKFORD, L.P. D/B/A THE STOCKFORD FIRM AND BRAD STOCKFORD	:	No. 1839 WDA 2012

Appeal from the Order Entered October 23, 2012,
in the Court of Common Pleas of Allegheny County
Civil Division at No. GD 12-003125

BEFORE: FORD ELLIOTT, P.J.E., ALLEN AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 24, 2013

This is an appeal from the order entered October 23, 2012, sustaining, in part, defendants/appellees' preliminary objections to the amended complaint. We affirm.

This matter involves a fee dispute between Generational Equity, LLC ("Generational Equity") and Pitt Chemical & Sanitary Supply Holding Company, Inc. ("Pitt Chemical"), and its owner, Richard W. Schomaker ("Schomaker"). The service contract between Generational Equity and Pitt Chemical contained an arbitration agreement. While this fee dispute

* Retired Senior Judge assigned to the Superior Court.

was ongoing, Schomaker decided to sell the company and found a buyer in Pittchem Supply Co., Inc. ("Buyer"). The sale of the company was to be financed through a loan by WesBanco Bank, Inc. ("WesBanco"). Schomaker and Buyer warranted to WesBanco that Schomaker and Pitt Chemical owned or leased all of the equipment and personal property held by Pitt Chemical, and it was free and clear of all liens other than those reflected on its financial statements, which did not disclose any lien by Generational Equity.

On or about July 1, 2011, the Stockford law firm, on behalf of Generational Equity, filed a "UCC-1"[1] financing statement asserting a security interest of $228,500. The firm also sent a letter to WesBanco informing WesBanco that Generational Equity had a first priority lien in the amount of $550,000 and that payments received by WesBanco were required to be applied to the claim of Generational Equity. Despite this, the deal went through and Buyer purchased the company on July 28, 2011.

Appellants filed a complaint on February 14, 2012, alleging that the service contract did not give Generational Equity a security interest in any of Schomaker's or Pitt Chemical's assets; that Generational Equity had no lien right; that the UCC-1 financing statement was ineffective and illegal; that the letter sent to WesBanco falsely represented that the amount of the lien was $550,000; and that the sole purpose of the lien letter was to disrupt the sale to gain leverage in the fee dispute. Appellants asserted that they

[1] Pennsylvania's Uniform Commercial Code, 13 Pa.C.S.A. § 9101 ***et seq.***

suffered damage to their reputation and incurred certain fees and costs in removing the improper UCC-1.

Appellees filed preliminary objections, which were sustained on May 11, 2012, without prejudice to appellants' right to file an amended complaint within 30 days. An amended complaint was filed on June 11, 2012, which included claims for defamation, commercial disparagement, interference with contractual relations, and violating the UCC. Appellees again filed preliminary objections, and appellants filed preliminary objections to appellees' preliminary objections. Argument was held on October 16, 2012, and on October 23, 2012, the trial court overruled appellants' preliminary objections and sustained appellees' preliminary objections in part.

The trial court's October 23, 2012 order dismissed Count I of the amended complaint without prejudice to appellants' right to submit the claim to arbitration.[2] Appellants were also granted leave to amend Counts VI and VII (interference with contractual relations) within 20 days. However, instead of filing a second amended complaint, appellants filed a "praecipe to dismiss amended complaint" on November 16, 2012. Appellants then filed a

[2] At the time the complaint was filed in this case, the parties were already engaged in arbitration in Georgia relating to the fee dispute under the service contract.

notice of appeal from the October 23, 2012 order on November 21, 2012. On January 30, 2013, the Honorable Judith L.A. Friedman filed an opinion.[3]

Appellants have raised the following issues for this court's review:

> A. Can an attorney be found liable in tort for sending a letter which includes false statements to a third party intending to harm [appellants'] business relationship?
>
> B. Upon preliminary objections to claims for defamation and commercial disparagement, are [appellants'] averments of fact that statements made to a third party were false required to be accepted by the lower court and must privilege be pled as an affirmative defense?
>
> C. Does a Plaintiff named as a debtor in a UCC-1 lien document have standing to recover damages under the UCC when the filing party inaccurately identifies that Plaintiff's name?
>
> D. Can arbitration be compelled where the claim at issue does not arise from the Agreement containing the arbitration clause?

[3] Judge Friedman opines that because she granted appellants leave to further amend their complaint, the appeal is interlocutory and should be quashed. We disagree. There is precedent for appellants' actions. Pursuant to ***Hionis v. Concord Township***, 973 A.2d 1030 (Pa.Cmwlth. 2009), where a trial court dismisses some but not all counts of a multi-count complaint and grants leave to amend, a plaintiff can convert the otherwise unappealable interlocutory order into a final order by filing a praecipe to dismiss the complaint. ***See also Ayre v. Mountaintop Area Joint Sanitary Authority***, 427 A.2d 1294 (Pa.Cmwlth. 1981), in which "this [Commonwealth] Court explained that a plaintiff who chooses not to file an amended complaint may appeal by filing a praecipe with the trial court to dismiss the original complaint with prejudice. In this way, the plaintiff can convert an interlocutory order into a final and appealable order." ***Hionis***, 973 A.2d at 1035-1036. Therefore, we decline to quash the appeal.

> E. Are [appellants] required to plead a specific sum for an unliquidated damage claim?

Appellants' brief at 4.

Appellants' first two issues relate to their claims against Brad Stockford, Esq., and his law firm ("Stockford"). Appellants brought claims against Stockford for defamation, commercial disparagement, and interference with contractual relations on the basis of the letter to WesBanco. Appellants allege that Stockford knew or should have known that the UCC-1 lien filed by Generational Equity was ineffective and illegal. Appellants also claim that the sole purpose for sending the letter to WesBanco was to disrupt the sale of Pitt Chemical and put pressure on Pitt Chemical and Schomaker to resolve the ongoing fee dispute with Generational Equity.

> "Defamation is a communication which tends to harm an individual's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her." ***Elia v. Erie Insurance Exchange***, 430 Pa.Super. 384, 634 A.2d 657, 660 (1993). Only statements of fact, not expressions of opinion, can support an action in defamation. ***Id.*** In a defamation case, a plaintiff must prove: "(1) The defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion." ***Porter v. Joy Realty, Inc.***, 872 A.2d 846, 849 n. 6 (Pa.Super. 2005), quoting, 42 Pa.C.S.A. § 8343(a).

> ***See also, Weber v. Lancaster Newspapers, Inc.***, 878 A.2d 63 (Pa.Super. 2005).

Moore v. Cobb-Nettleton, 889 A.2d 1262, 1267 (Pa.Super. 2005).

> It is for the trial court to determine as a matter of law whether a statement is one of fact or opinion, as well as to determine whether a challenged statement is capable of having defamatory meaning. ***Elia***, 634 A.2d at 660, citing ***Braig v. Field Communications***, 310 Pa.Super. 569, 456 A.2d 1366 (1983), ***cert. denied***, 466 U.S. 970, 104 S.Ct. 2341, 80 L.Ed.2d 816 (1984). "A communication is . . . defamatory if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession." ***Maier v. Maretti***, 448 Pa.Super. 276, 671 A.2d 701, 704 (1995), ***appeal denied***, 548 Pa. 637, 694 A.2d 622 (1997), citing ***Gordon v. Lancaster Osteopathic Hospital Association***, 340 Pa.Super. 253, 489 A.2d 1364 (1985). Additionally, the court should "consider the effect the statement would fairly produce, or the impression it would naturally engender, in the minds of average persons among whom it is intended to circulate." ***Maier***, 671 A.2d at 704, citing ***Rybas v. Wapner***, 311 Pa.Super. 50, 457 A.2d 108 (1983).

Constantino v. University of Pittsburgh, 766 A.2d 1265, 1270 (Pa.Super. 2001). "It is clear that expressions of pure opinion that rely on disclosed facts are not actionable." ***Feldman v. Lafayette Green Condominium Ass'n***, 806 A.2d 497, 501 (Pa.Cmwlth. 2002) (citations omitted).

Instantly, Stockford's letter to WesBanco asserting that Generational Equity had a superior lien was a statement of opinion based on disclosed facts. The UCC-1 financing statement and the service contract between Generational Equity and Pitt Chemical were both attached to the

letter as exhibits. The factual basis for Stockford's legal opinion that a valid lien existed was fully disclosed. Although the UCC-1 lien was subsequently determined to be improper because Generational Equity did not have a security interest in Pitt Chemical's assets, Stockford's opinion was based on information available at the time. As the trial court remarked during argument on preliminary objections,

> No, they – lawyers do it all the time. They make a mistake. That's why I have a job. They say we have a security interest. They send a letter to WesBanco. This is what we base our security interests on, the agreement that's appended to the UCC1 and here's our filing, and we've got it, and you should have known it. And so forth. Okay? They say they're entitled to fees in the amount of $550,000 in their letter. That's the amount that they say they're still owed. I don't see how it's actionable. I mean, we're talking about defamation. Lawyers would be sued every day for defamation if they took a legal position that was later found to be incorrect. But legal opinion – and as I read their letter, it is – it's just expressing the legal opinion saying this is what we base it on.

Notes of testimony, 10/16/12 at 39. "So a separate action in defamation, that even as a matter of just general policy, lawyers would be subjected to a lawsuit for defamation every time they asserted their client's position to an opponent." (***Id.*** at 40.)

Appellants argue that judicial privilege is an affirmative defense which must be raised as new matter, not via preliminary objections. However, Stockford did not assert judicial privilege, and the trial court did not decide the matter on the basis of privilege. ***Cf. Bochetto v. Gibson***, 580 Pa. 245,

860 A.2d 67 (2004) (attorney not protected by judicial privilege where he re-published the plaintiff's complaint to the press, which was an extrajudicial act that occurred outside the regular course of judicial proceedings). Rather, the trial court held that Stockford's letter to WesBanco constituted legal opinion based on disclosed facts. Although Stockford's opinion ultimately proved to be incorrect, it is not actionable. The trial court did not err in dismissing appellants' defamation claims.

In addition, other than attorneys' fees and costs associated with removing the UCC-1 lien, discussed below, appellants have failed to allege any damages as a result of Stockford's letter. ***SNA, Inc. v. Array***, 51 F.Supp.2d 554, 566 (E.D.Pa. 1999), ***affirmed***, ***Silva v. Karlsen***, 259 F.3d 717 (3rd Cir. 2001) ("Unlike a defamation action, a plaintiff claiming commercial disparagement must prove actual pecuniary loss.") (citation omitted); ***Phillips v. Selig***, 959 A.2d 420, 428 (Pa.Super. 2008), ***appeal denied***, 600 Pa. 764, 967 A.2d 960 (2009) (to make out a cause of action for interference with prospective contractual relations, a plaintiff must show actual damages resulting from the defendant's conduct) (citations omitted). Here, the deal went through and WesBanco financed the purchase of Pitt Chemical by Buyer. Appellants argue that a lien would have constituted a default under the agreement with WesBanco and a breach of the warranties that Schomaker, Pitt Chemical, and Buyer made to WesBanco. However, appellants were able to reassure WesBanco that no such lien

existed, the UCC-1 lien was terminated, and Pitt Chemical was sold to Buyer. As such, appellants are unable to show actual damages. The trial court did not err in dismissing appellants' claims against Stockford.

In their third issue on appeal, appellants claim that the trial court erred when it concluded Pitt Chemical's subsidiary, Pitt Chemical and Sanitary Supply Co., Inc. ("Pitt Chemical Subsidiary"), did not have standing to pursue a claim under 13 Pa.C.S.A. § 9625. Under Section 9625(e) of the Commercial Code, a debtor or person named as a debtor may recover $500 from a person that fails to comply with the statute, ***e.g.***, by filing an unauthorized financing statement. As appellees argue in their brief on appeal, Pennsylvania's UCC makes it clear that the name of the debtor is extremely important and failure to provide the registered name of the debtor results in an ineffective UCC-1 financing statement. (Appellees' brief at 20-21.) Here, the UCC-1 listed the debtors as "Pitt Chemical & Sanitary Supply Holding Co., Inc. and Subsidiary," with Schomaker identified as an additional debtor. Generational Equity did not specifically name Pitt Chemical Subsidiary as a debtor, as required by the UCC.

Appellants agree that failure to name Pitt Chemical Subsidiary as a debtor renders the UCC-1 financing statement ineffective as to Pitt Chemical Subsidiary. Nonetheless, appellants contend that appellees should not benefit from their mistake and Pitt Chemical Subsidiary should be allowed to file a claim for statutory damages under Section 9625.

We agree with the trial court that where Pitt Chemical Subsidiary was not actually named as a debtor in the UCC-1 filing, as required by the statute, it lacks standing to bring a claim under Section 9625. To be a debtor, one has to be specifically named as such. Since Pitt Chemical Subsidiary was not named as a debtor, it cannot bring an action claiming the UCC-1 financing statement was wrongly filed against it.

Next, appellants argue the trial court erred in determining that Count I, relating to failure to comply with Article 9 of the UCC, had to be submitted to arbitration.

> By now it has become well established that "(S)ettlement of disputes by arbitration are no longer deemed contrary to public policy. In fact, our statutes encourage arbitration and with our dockets crowded and in some jurisdictions congested arbitration is favored by the courts." ***Mendelson v. Shrager***, 432 Pa. 383, 385, 248 A.2d 234, 235 (1968). When one party to an agreement to arbitrate seeks to enjoin the other from proceeding to arbitration, judicial inquiry is limited to the questions of whether an agreement to arbitrate was entered into and whether the dispute involved falls within the scope of the arbitration provision. ***Borough of Ambridge Water Authority v. J. Z. Columbia***, 458 Pa. 546, 328 A.2d 498 (1974). Thus a party who can establish that he did not agree to arbitrate, or that the agreement to arbitrate, limited in scope, did not embrace the disputes in issue, may be entitled to enjoin an arbitration proceeding. ***See Westmoreland Hospital Association v. Westmoreland Construction Company***, 423 Pa. 255, 223 A.2d 681 (1966); ***Emmaus Municipal Authority v. Eltz***, 416 Pa. 123, 204 A.2d 926 (1964); ***Goldstein v. International Ladies' Garment Worker's Union***, 328 Pa. 385, 196 A. 43 (1938).

Flightways Corp. v. Keystone Helicopter Corp., 459 Pa. 660, 662-663, 331 A.2d 184, 185 (1975).

> [T]here is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Such a presumption is particularly applicable where the clause is [a] broad . . . one.

Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 862-863 (Pa.Super. 1991), ***appeal denied***, 532 Pa. 663, 616 A.2d 984 (1992), quoting ***AT&T Technologies v. Communications Workers***, 475 U.S. 643, 650 (1986) (citation omitted) (parentheses omitted). "To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." ***J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.***, 863 F.2d 315, 319 (4th Cir. 1988), citing ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.***, 473 U.S. 614, 622 n.9 (1985).

The only remaining parties to Count I are Generational Equity, Pitt Chemical, and Schomaker. All were signatories to the service contract, which included an arbitration clause providing for binding arbitration of "Any controversy, dispute, or claim between the parties relating to this Agreement . . . ." Generational Equity filed the lien because it believed it was due

monies under the service contract. The disputed fee led directly to the filing of the lien and the allegedly improper UCC-1 financing statement. Therefore, whether appellants are entitled to damages under Section 9 of the UCC "relates to" the parties' service contract. We find the arbitration provision is sufficiently broad to encompass this issue. The trial court did not err in dismissing Count I without prejudice to appellants' right to submit it to arbitration.[4]

Finally, in their fifth assignment of error, appellants claim that the trial court erred by requiring them to amend Counts VI and VII (interference with contractual relations) to specifically identify the amount of damages, limited to attorneys' fees and costs incurred in order to obtain the removal of the lien. The trial court held punitive damages were not available where the transaction did go forward once the lien was removed.

Appellants argue that this issue was raised by appellees in their second round of preliminary objections, after appellants filed an amended complaint. The amended complaint contained the same requests for damages as the original complaint. Appellants cite Pa.R.C.P. 1028(b) for the proposition that all preliminary objections must be raised at one time, not piecemeal. (Appellants' brief at 29.)

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[4] While generally a trial court's order directing arbitration puts a party into court and therefore may be interlocutory (***see Niemiec v. Allstate Ins. Co.***, 721 A.2d 807, 808 (Pa.Super. 1998) (an order compelling arbitration is interlocutory and not appealable)), appellants' action in praecipeing to dismiss the amended complaint in toto, renders the October 23rd order final.

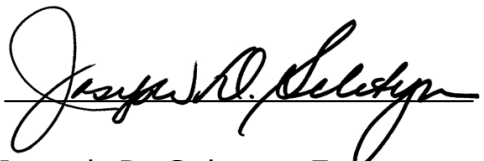
As appellees point out, appellants have failed to raise this issue in their Rule 1925(b) statement. (Appellees' brief at 29.) As such, it is deemed waived. Pa.R.A.P., Rule 1925(b)(4)(vii), 42 Pa.C.S.A.

Regarding the trial court's order to amend their complaint to limit damages to attorneys' fees and costs incurred in removing the improper UCC-1 lien, we assign no error. As stated above, the only conceivable damages under Counts VI and VII, intentional interference with contractual relations, are the attorneys' fees and costs incurred in reassuring WesBanco and having the improper lien removed. Appellants argued that they were in technical default of their agreement with WesBanco until the lien was removed. (Notes of testimony, 10/16/12 at 53.) However, the deal did proceed and Buyer completed its purchase of Pitt Chemical, financed by WesBanco. The only possible damages here are the reasonable attorneys' fees and related costs. (***Id.***) Even if, as alleged in the amended complaint, appellees' motive was to "blow up the deal," they did not succeed. (***Id.*** at 54.) It appears that appellants averred general damages in excess of $25,000 merely to avoid compulsory arbitration, where any recoverable damages are, in reality, far less. The trial court did not err in ordering appellants to limit damages to reasonable attorneys' fees and costs, and to

set forth such damages with specificity, where they are known and easily ascertainable.[5]

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013

[5] Furthermore, appellants chose not to file a second amended complaint, instead filing a praecipe to dismiss the amended complaint in a procedural maneuver to finalize the order for appellate review. Appellants declined to specify damages under Counts VI and VII as ordered by the trial court. Since appellants effectively voluntarily withdrew their complaint, all that remains below is the arbitration proceeding. As such, the matter could be considered waived. While we declined to quash the appeal as interlocutory, as Judge Friedman observes, by withdrawing the amended complaint, appellants have waived the right to seek leave to further amend Counts VI and VII. (Trial court opinion, 1/30/13 at 3, 7.)