

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LEOPOLD GRAPHICS, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 01-CV-6028
	:	
THE CIT GROUP/EQUIPMENT	:	
FINANCING, INC. a/k/a TYCO	:	
CAPITAL and GRAPHICS	:	
INTERNATIONAL, INC.,	:	
	:	
Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

June 26, 2002

Plaintiff Leopold Graphics, Inc. (“Plaintiff”) brings this action against Defendants The CIT Group/Equipment Financing, Inc. a/k/a Tyco Capital (“CIT”) and Graphics International, Inc., (“Graphics”) (CIT and Graphics, collectively, “Defendants”), alleging, *inter alia*, claims for breach of contract, interference with contract and interference with prospective contractual advantage. Presently before the Court are Defendants’ Motions to Dismiss Counts VI and VII of the Complaint, which set forth Plaintiff’s tort claims for (1) interference with contract and (2) interference with prospective contractual advantage. Defendants also seek to strike Plaintiff’s request for punitive damages. For the reasons stated below, Defendants’ Motions are **GRANTED**.

## **I. FACTS**

According to the Complaint, in the late summer and early fall of 2000, Plaintiff, a commercial printer, negotiated with Graphics, an equipment broker, to purchase an industrial printing press with color and high speed capabilities. Graphics represented that it could deliver a used press to Plaintiff that met those specifications in December 2000. Plaintiff and Graphics negotiated and executed a conditional sales and security agreement through which Plaintiff would receive credit for trading in its then-current press. CIT was engaged to provide financing for the transaction, and would lease the printer to Plaintiff. According to Plaintiff, Graphics was obligated to inspect the press, which was in use by another company, before its delivery to Plaintiff to ensure that it was in conforming condition. In October, the printer was inspected with a Graphics representative present. Plaintiff relied on the press' arrival in December 2000 in contracting for various printing jobs and in preparing its budget.

However, Graphics failed to deliver the press – which was still in use by the other firm – to Plaintiff in December 2000. As the delay wore on, in January 2001, Graphics loaned a press to Plaintiff. However, the loaned press did not have the same capabilities as the bargained-for press, and in any event did not function properly. As a result, Plaintiff incurred additional costs to perform the printing jobs for which it had already contracted, and had to forego additional jobs. Plaintiff alleges that Graphics assured it that, due to the length and nature of the delay in delivering the press, it would be re-inspected by Graphics before its delivery to Plaintiff.

By the second quarter 2001, Graphics still had not provided the bargained-for press to Plaintiff. At that time, Plaintiff alleges that CIT and Graphics began to pressure Plaintiff to execute the lease documents – which would cause payment from CIT to Graphics to become

due and would trigger Plaintiff's obligations to make lease payments to CIT – even though it had not received or inspected the bargained-for press. Plaintiff, it alleges, was under duress to execute the documents. Fearing the disruption to its business if it did not agree to do so because it could not arrange to receive another printer quickly, Plaintiff's representatives executed the lease agreement and a certificate acknowledging acceptance of the bargained-for press without actual receipt or inspection. Additionally, Plaintiff contends that at about this same time, at CIT's request, Graphics indemnified Plaintiff against any losses due to failure to deliver the press, and warranted the condition of the press for six months.

Several weeks later, the bargained-for press was actually delivered to Plaintiff. Plaintiff alleges that it had in fact not been re-inspected by Graphics and did not work up to its capacity in terms of speed, rendering it unfit for its intended use. Both Graphics and the manufacturer attempted to fix the press, but to no avail. Plaintiff contends that, while certain parts of the press have been temporarily repaired, it remains unfit for its intended use to this day.

Plaintiff's obligations to make monthly lease payments to CIT on the press began in or about July 2001. Plaintiff admits that it has made only one such payment – under threat of default and repossession of the press – since it contends that Graphics is responsible for these payments. On November 27, 2001, in a letter from counsel, CIT declared Plaintiff in default of the lease and demanded return of the press and lease payments of \$36,000. CIT has also reported Plaintiff as delinquent to Dun & Bradstreet, which resulted in negative information being placed in Plaintiff's credit report. Plaintiff states that it is depositing its disputed lease payments with counsel until the rights of the parties are adjudicated.

The instant suit was filed in December 2001. Defendants now move to dismiss Counts VI and VII of the Complaint, which set forth Plaintiff's tort claims for (1) interference with contract and (2) interference with prospective contractual advantage. In these counts, Plaintiff asserts that Defendants have acted to interfere with its current and prospective printing contracts with its customers. Defendants also seek to strike Plaintiff's request for punitive damages. Since Defendants' Motions are identical, the Court will consider them together.

## II. LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert.denied, 501 U.S. 1222 (1991). To prevail, the movant must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, (1957). In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court must only consider those facts alleged in the complaint. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

### III. DISCUSSION

#### A. Choice of Law

As a preliminary matter, the parties disagree on the substantive state law to be applied to the claims at issue. Defendants argue that North Carolina law governs. Plaintiff contends that Pennsylvania law applies. Therefore, the Court must first determine the law governing these claims. In making this determination, the Court looks first to the conflict of laws rules of the forum state of Pennsylvania. See Kirschbaum v. WRGSB Assocs., 243 F.3d 145, 151 (3d Cir. 2001). For substantive tort law issues, Pennsylvania uses a combination of the “government interest” and “significant relationship” approaches to conflict of laws analysis. Id. Under this analysis, “a court must evaluate ‘the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.’” Id. (quoting Troxel v. A.I. duPont Inst., 431 Pa. Super. 464, 636 A.2d 1179, 1181 (1994)).

The tort claims advanced by Plaintiff allege that Defendants interfered with its ability to perform existing contracts and to seek out new printing contracts with its customers. Performance of these contracts was to take place in Pennsylvania by Plaintiff, a Pennsylvania corporation with its principal place of business in Pennsylvania. Furthermore, the harm suffered by Plaintiff occurred in Pennsylvania. North Carolina’s only direct connection with these tort claims is that one of the alleged tortfeasors (Graphics) is a North Carolina corporation with its principal place of business in North Carolina. In light of the above, the Court concludes that

Pennsylvania law governs these tort claims.<sup>1</sup> The Court notes that, as described infra, North Carolina law does not appear to differ on the point upon which the Court decides Defendants' Motions.

## **B. Interference with Contract**

Defendants argue, *inter alia*, that the allegations made by Plaintiff fail to state a claim for intentional interference with contract because Plaintiff alleges that Defendants directed tortious activity only at it, rather than at any third party with which it had a contract.<sup>2</sup> Indeed, Pennsylvania courts analyze claims for intentional interference with contract under Section 766 of the Restatement (Second) of Torts. See Peoples Mortgage Co. v. Federal Nat'l Mortgage Ass'n, 856 F. Supp. 910 (E.D. Pa. 1994); Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 659 (3d Cir. 1993) (citing Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 429-31, 393 A.2d 1175, 1181-83 (1978), cert. denied, 442 U.S. 907, 99 S.Ct. 2817, 61 L.Ed.2d 272 (1979)). Section 766 provides that:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third

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1. Defendants also assert that North Carolina law should govern these claims because the conditional sales and security agreement entered into by Plaintiff and Graphics states that North Carolina law governs it. This choice of law provision may well be dispositive as to the law to be applied to Plaintiff's breach of contract claim against Graphics. However, Plaintiff's *tort* claims are conceptually distinct from its breach of contract claims, principally in that their focus is on the Defendants' interference with Plaintiff's relationships with third parties. To the extent that Plaintiff asserts these independent tort claims, the Court's determination of applicable tort law is independent of, and may be different from, its determination as to the applicable law governing a related contract dispute. See, e.g., Kirschbaum v. WRGSB Assocs., 243 F.3d 145, 151 (3d Cir. 2001) (tort claim governed by Pennsylvania law, but related contract claim governed by Illinois law pursuant to choice of law provision). In this case, these independent torts may (in part) involve actions that constitute breach of a contract governed by North Carolina law. However, this alone is not a persuasive reason to apply North Carolina *tort* law. For the reasons set out supra, the Court will apply Pennsylvania tort law.

2. Specifically, Defendants argue that "[Plaintiff] cannot and does not allege that [Defendants] contacted any of its customers or in any way 'induced' [them] not to perform a contract with [Plaintiff]."

person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Section 766 “addresses disruptions caused by an act directed not at the plaintiff, but at a third person: the defendant causes the promisor to breach its contract with the plaintiff.” Windsor Securities, 986 F.2d at 660. As noted above, in the Complaint, Plaintiff alleges that it was hindered in its ability to perform its contracts for its customers, not that its customers were induced to breach their contracts with it. Therefore, it does not state a claim against Defendants under § 766.

In contrast to § 766, § 766A of the Restatement (Second) of Torts “covers situations where, as here, the defendant's alleged tortious interference is directed toward the plaintiff, rather than toward a third person with whom the plaintiff has a contractual relation.” Peoples Mortgage, 856 F. Supp at 931. In such a case, the defendant impedes plaintiff’s own performance. Section 766A states that:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Plaintiff has not directed this Court to any Pennsylvania case in which a court specifically applied § 766A or recognized a cause of action for tortious interference with contract in the absence of any alleged act directed toward a third party. In Windsor Securities, the Third Circuit concluded that courts in Pennsylvania have not adopted § 766A, and criticized that

section as likely duplicating protection already afforded through contract or other tort law, chilling socially valuable conduct, and creating new liability of uncertain dimensions. Id. at 659-63. Shortly thereafter, in Gemini Physical Therapy & Rehabilitation, Inc. v. State Farm Mut. Auto. Ins. Co., 40 F.3d 63, 66 (3d Cir. 1994), it predicted that the Pennsylvania Supreme Court would not adopt § 766A. In the absence of any evidence from Pennsylvania courts to the contrary, federal district courts have followed suit. See, e.g., Allen v. Washington Hosp., 34 F. Supp.2d 958, 964 (W.D. Pa. 1999); The New L & N Sales and Marketing, Inc., v. Menaged, No. 97-4966, 1998 WL 575270, at \*9 (E.D. Pa. Sept. 9, 1998). As a result, this Court also declines to recognize a cause of action under § 766A.<sup>3</sup> Therefore, Plaintiff's interference with contract claim, as pled, must be dismissed since it does not allege that Defendants directed any action toward Plaintiff's customers in an attempt to induce them to breach their contracts with Plaintiff.

Defendants also make a variety of other arguments in support of dismissal of this claim. However, since Plaintiff has not stated a claim under Pennsylvania law for the reasons stated supra, the Court need not address them.

### **C. Interference with Prospective Contractual Advantage**

Plaintiff's claim for interference with prospective contractual advantage must also be dismissed for substantially the same reason as its claims for interference with existing contracts. Restatement (Second) of Torts § 766B sets out such a cause of action. It states:

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3. The Court notes that a claim for interference with contract under North Carolina law also requires that a defendant induce a third party to breach a contract with the plaintiff. Under North Carolina law, the tort of interference with contract has five elements: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. See United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing Childress v. Abeles, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954)).

One who intentionally and improperly interferes with another's prospective contractual relation ... is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Section 766B(a) focuses on acts directed at third parties, and is therefore analogous to § 766. See Allen, 34 F. Supp.2d at 964; Peoples Mortgage, 856 F. Supp. at 932 n.15. Section 766B(b), which addresses acts directed toward the plaintiff, is analogous to § 766A. See Allen, 34 F. Supp.2d at 964; Peoples Mortgage, 856 F. Supp. at 932 n.15. As described earlier, in the Complaint Plaintiff alleges that it was hindered in its ability to engage prospective customers, not that prospective customers were influenced not to enter into contracts with it. Therefore, although Plaintiff does not so state, its claim for interference with prospective contractual advantage is governed by § 766B(b). While Pennsylvania courts look in part to § 766B to define the tort of interference with prospective contract, they have not adopted that section in its entirety. See Allen, 34 F. Supp.2d at 964.

As with its claim for interference with existing contracts, Plaintiff has not directed this Court to any Pennsylvania case specifically adopting § 766B(b), or in which a Pennsylvania court recognized a cause of action for tortious interference with a prospective contract in the absence of any alleged act directed toward a third party. For reasons similar to those pertaining to § 766A, federal courts have been equally unwilling to interpret Pennsylvania law as recognizing a cause of action under § 766B(b). See Alpern v. Cavarocchi, No. 98-3105, 1999 WL 257695, at \*13 n.13 (E.D. Pa. Apr. 28, 1999); Allen, 34 F. Supp.2d at 964-965; The New L

& N Sales and Marketing, 1998 WL 575270, at \*9; Peoples Mortgage, 856 F. Supp. at 933-34.

This Court also declines to do so.<sup>4</sup> Therefore, the Court will also dismiss Plaintiff's claims for interference with prospective contracts.

Again, although Defendants also make a variety of other arguments in support of dismissal of this claim, the Court need not address them.

#### **D. Punitive Damages**

For the reasons stated above, the Plaintiff has failed to state a tort claim in the Complaint, and only contract-based claims remain. Pennsylvania law is "clear that punitive damages are not recoverable in an action for breach of contract." See Nelson v. State Farm Mut. Auto. Ins. Co., 988 F. Supp. 527, 529 (E.D. Pa. 1997) (citing AM/PM Franchise Ass'n v. Atlantic Richfield Co., 526 Pa. 110, 584 A.2d 915, 927 (1990) & Thorsen v. Iron and Glass Bank, 328 Pa. Super. 135, 476 A.2d 928, 932 (1984)). Therefore, Defendants' request to strike Plaintiff's request for punitive damages is granted.

#### **IV. CONCLUSION**

The Court grants Defendants' Motions to Dismiss Counts VI and VII of the Complaint. These counts, which set forth Plaintiff's tort claims for (1) interference with contract, and (2) interference with prospective contractual advantage, are dismissed because Plaintiff has failed to allege that Defendants directed any tortious activity at a third party, inducing that party to breach a contract or fail to contract with Plaintiff. Furthermore,

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4. Again, North Carolina law does not appear to differ with Pennsylvania law on this point. In order to maintain an action for tortious interference with prospective advantage in North Carolina, a plaintiff must show that a defendant induced a third party to refrain from entering into a contract with the plaintiff without justification. See Daimlerchrysler Corp. v. Kirkhart, 561 S.E.2d 276, 286 (N.C. App. 2002).

Defendants' request to strike Plaintiff's demand for punitive damages is granted since, after these claims' dismissal, no valid tort claims remain.

In its sur-reply, Plaintiff requests leave to amend the Complaint to set forth additional tort claims against Defendants, such as fraudulent inducement, and perhaps to re-plead its tortious interference claims. Under Fed. R. Civ. P. 15 (a), leave to amend is to be "freely given when justice so requires." Furthermore, Defendants have not objected to this request. Therefore, the Court will permit Plaintiff to file an amended complaint within ten (10) days.

An order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LEOPOLD GRAPHICS, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 01-CV-6028
	:	
THE CIT GROUP/EQUIPMENT	:	
FINANCING, INC. a/k/a TYCO	:	
CAPITAL and GRAPHICS	:	
INTERNATIONAL, INC.,	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 26<sup>th</sup> day of June 2002, upon consideration of Defendants' Motions to Dismiss Counts VI and VII of Plaintiff's Complaint (Docket Nos. 9 and 13), Plaintiff's opposition thereto (Docket No. 19), Defendants' Replies (Docket Nos. 20 and 21), and Plaintiff's Sur-reply (Docket No. 22), it is hereby **ORDERED** that Defendants' Motions are **GRANTED**. It is further **ORDERED** that:

- (1) Counts VI and VII of the Complaint are dismissed.
- (2) Plaintiff's demand for punitive damages is stricken.
- (3) Plaintiff is granted leave to file an amended complaint. Such complaint

shall be filed within ten (10) days of this Order.

Additionally, Plaintiff's Request for Oral Argument on Defendant CIT's Motion for Writ of Seizure is **GRANTED**. **ORAL ARGUMENT** is set for Wednesday, July 10, 2002 at 9:30 a.m. in Courtroom 14A .

BY THE COURT:

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RONALD L. BUCKWALTER, J.