

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

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HARRY J. TUCCI, SR.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 02-1765
	:	
CP KELCO ApS and	:	
LEHMAN BROTHERS, INC.,	:	
	:	
Defendants.	:	

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**MEMORANDUM**

ROBERT F. KELLY, Sr. J.

OCTOBER 10, 2002

Presently pending before this Court are two Motions to Dismiss. The first Motion, filed by CP Kelco ApS (“Kelco”), is a Motion to Dismiss the Plaintiff’s Claims Pursuant to the Pennsylvania Wage Payment and Collection Law. The Second Motion, filed by Lehman Brothers, Inc. (“Lehman”), is a Motion to Dismiss the Amended Complaint. In this action, the Plaintiff Harry J. Tucci (“Tucci”) contends that the Defendants breached his employment contract by failing to provide him with all of the post-employment compensation to which he was allegedly entitled. For the reasons that follow, Kelco’s Motion to Dismiss is granted and Lehman’s Motion to Dismiss is granted in part and denied in part.

**I. BACKGROUND**

Tucci alleges that he was induced by Lehman to leave Hercules, Inc. (“Hercules”) in September 2000, and enter into an employment contract with the newly created company Kelco to become Kelco’s Chairman, President, and CEO. Kelco is a private Danish company with its principal place of business in Delaware. Lehman is a Delaware corporation with its

principal place of business in New York. Lehman allegedly financed Kelco's acquisition of a food gums business from Hercules and a biopolymers business which merged to become Kelco. Tucci alleges that Lehman became the majority shareholder of Kelco while Hercules became a minority shareholder. Tucci further alleges that Lehman was Kelco's agent, promoter, and controlling person at all times.

Tucci contends that Lehman and Tucci extensively negotiated the Kelco employment contract and that he extracted many promises from Lehman regarding his benefits and compensation at Kelco, including post-employment compensation. According to Tucci, all of Lehman's alleged oral representations were incorporated into the final employment contract between Tucci and Kelco. Under the employment contract, Tucci was to receive a more favorable post-employment compensation package if his employment was terminated without cause than he would receive if his employment was terminated with cause.

On September 28, 2000, Kelco's acquisition of the food gum business and the biopolymers business was completed. On September 30, 2000, Tucci and Kelco entered into the employment contract. The employment contract contained, *inter alia*, a Delaware choice of law clause; an integration clause stating that the agreement contained the entire understanding of the parties; and a clause acknowledging that the agreement superseded all prior representations made during the negotiations.

Tucci asserts that after Kelco incurred serious losses which Lehman blamed on Tucci, Lehman began searching for Tucci's replacement. Tucci alleges that on June 25, 2001, Lehman directed the Kelco board of directors to terminate Tucci's employment. Tucci states that the reason he was given for the termination was a lack of "chemistry." However, the Defendants

told Tucci that he could still consult for Kelco. On June 26, 2001, the Defendants issued a press release stating that Tucci had retired and that he would continue to be involved with Kelco as an adviser. Tucci alleges that he did not retire and that he was terminated without cause.

According to Tucci, after June 26, 2001, he continued to be available for consulting and Kelco provided him with his post-employment compensation to his residence in Pennsylvania every two weeks. However, Tucci alleges that in February 2002, Lehman induced Kelco to stop paying Tucci the post-employment compensation and benefits that he was due under the employment contract provisions dealing with termination without cause, in violation of the employment contract.

Tucci commenced this action on April 1, 2002, and he filed the present Amended Complaint on July 19, 2002. The Counts in the Amended Complaint are as follows: Count I: Breach of Employment Contract against both Defendants; Count II: Violation of Wage Payment and Collection Laws against both Defendants; Count III: Tortious Interference With the Employment Contract against Lehman; Count VI: Detrimental Reliance against Lehman; and Count V: Breach of the Implied Covenant of Good Faith and Fair Dealing against both Defendants.

## **II. STANDARD**

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville

Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all well pled allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

### **III. DISCUSSION**

#### **A. KELCO'S MOTION TO DISMISS TUCCI'S CLAIMS PURSUANT TO THE PENNSYLVANIA WAGE PAYMENT AND COLLECTION LAW**

In Count II of the Amended Complaint, Tucci alleges that Kelco and Lehman failed to pay him the compensation that he was due in violation of Pennsylvania's Wage Payment and Collection Law, 43 Pa. C.S.A. § 260.1, *et seq.* ("PWPCCL") or, in the alternative, Delaware's Wage Payment and Collection Act, 19 Del C. § 1101, *et seq.* ("DWPCA"). Kelco alleges that the portion of Count II dealing with the PWPCCL should be dismissed because the PWPCCL is not applicable in this situation.

In support of its Motion, Kelco points out that Kelco is located in Delaware, that Tucci was employed in Delaware, and that most importantly, the employment contract contained a Delaware choice of law clause which provided that "[t]his Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to conflicts of laws principles thereof." (Employment Contract, ¶ 12(a)). Tucci counters by stating that the PWPCCL should apply because he resides in Pennsylvania, his checks were sent to Pennsylvania, he occasionally worked from home, and that after he stopped working for Kelco, he was available for consulting in Pennsylvania. Tucci does not allege that he actually consulted for Kelco at any time after his alleged termination.

““Pennsylvania courts generally honor the intent of the contracting parties and enforce choice of law provisions in contracts executed by them.”” Synesiou v. Designtomarket, Inc., No. 01-5358, 2002 WL 501494, at \*3, n.3 (E.D. Pa. April 3, 2002)(quoting Kruzits v. Okuma Mach. Tool, Inc., 40 F.3d 52, 55 (3d Cir. 1994)). Here, the employment contract contains a Delaware choice of law clause, and thus we will honor the intention of the parties and apply the DWPCA.

Furthermore, the court in Killian v. McCulloch, 873 F. Supp. 938 (E.D. Pa. 1995) stated that “that the protections contained in the [PWPCCL] extend only to those employees based in Pennsylvania.” Id. at 942;but see Crites v. Hoogovens Tech. Servs., Inc. 43 Pa. D.&C.4th 449, 452-56 (Pa. Com. Pl. 2000)(disagreeing with the reasoning in Killian). Here, Tucci was based in Delaware because he was employed as the CEO of a company located in Delaware under an employment contract with a Delaware choice of law clause. Tucci does not allege that he had an office in Pennsylvania or that he was hired to perform work in Pennsylvania. Furthermore, the facts raised by Tucci are insufficient to show that he was based in Pennsylvania because these facts, when weighed against the facts raised by the Defendants, do not sufficiently relate to where he and his employment were based.

Tucci claims that Synesiou supports his position that the PWPCCL should apply. However, in Synesiou, the court declined to dismiss the PWPCCL claim because, although the plaintiff was a California resident and did not work in Pennsylvania, his employer had its principal place of business in Pennsylvania and his employment contract contained a Pennsylvania choice of law clause. Synesiou, 2002 WL 501494, at \*3. As argued by Kelco, the decision in Synesiou turned on the location of the employer and the choice of law clause, both of

which in this case favor Delaware. Id. Furthermore, Tucci will be adequately protected by the DWPCA. See Id. (expressing concern that the protections of another state's equivalent of the PWPCCL were unavailable to the plaintiff).

In Crites, the court stated that the broad definition of “employer” in the PWPCCL indicated that the “General Assembly intended to bring all employers within the scrutiny of the [PWPCCL] unless to do so would yield an unreasonable or absurd result.” Crites, 43 Pa. D.&C.4th at 455. Here, based on the facts above, the result would be unreasonable if Kelco were to be considered an employer subject to the PWPCCL. Therefore, Kelco’s Motion to Dismiss must be granted and Tucci’s claims pursuant to the PWPCCL must be dismissed.

**B. LEHMAN’S MOTION TO DISMISS THE AMENDED COMPLAINT**

**1. Breach of the Employment Contract**

In Count I of the Amended Complaint, Tucci alleges that Kelco and Lehman breached the employment contract. Lehman seeks to dismiss this Count because there is no contract between Tucci and Lehman. Indeed, it was Tucci and Kelco that entered into the employment contract. There is absolutely no evidence of a contract between Tucci and Lehman. A contract must exist between Lehman and Tucci before Tucci may allege that Lehman breached the contract. Williams v Nationwide Mut. Ins., 750 A.2d 881, 884 (Pa. Super. 2000); Goodrich v. E.F. Hutton Group, Inc., 542 A.2d 1200, 1203-04 (Del. Ch. 1988). Tucci responds by arguing that Lehman was Kelco’s promoter, and since Lehman did not obtain a novation, Lehman is liable under the employment contract. It is true that Tucci alleges in the Amended Complaint that Lehman is Kelco’s agent and promoter. However, it is clear that there is no set of facts under which Tucci could prove that Lehman was Kelco’s promoter during the employment

contract negotiations. Therefore, there is no contractual relationship between Lehman and Tucci and this Count must be dismissed.

Even according to the cases cited by Plaintiff, a promoter is an individual who assumes to act on behalf of a corporation that is not yet in existence. In the three cases cited by Tucci, each of the promoters signed a contract themselves on behalf of a corporation which was subsequently formed. In re Rothman, 204 B.R. 143, 150 (Bankr. E.D. Pa. 1996)(stating that “[a] promoter is a person who assumes to act on behalf of a proposed corporation which is not yet incorporated. In this case, since Stoney Creek was not yet formed at the time the Debtor entered into the Lease, his legal relationship to Stoney Creek is that of its promoter.” (internal citations omitted)); Surovcik v. D&K Optical, Inc., 702 F. Supp. 1171 (M.D. Pa. 1988); RKO-Stanley Warner Theaters, Inc. v. Graziano, 355 A.2d 830 (Pa. 1976) . Here, Lehman did not sign any contract on Kelco’s behalf, and Kelco was already in existence at the time Tucci and Kelco entered into the contract. Tucci simply does not allege any facts that would establish that Lehman was Kelco’s promoter.

Furthermore, if Lehman did in fact act as Kelco’s agent, we must note that it is a basic tenet of agency law that an agent for a disclosed principal is not a party to a contract and is not liable for its nonperformance. B & L Asphalt Ind. Inc. v. Fusco, 753 A.2d 264, 270 (Pa. Super. 2000); Am. Ins. Co. v. Material Transit, Inc., 446 A.2d 1101, 1105 (Del. Super. 1982). Therefore, because Lehman did not act as a promoter regarding the employment contract between Tucci and Kelco, Tucci’s claim for breach of contract against Lehman must be dismissed.

## **2. Wage Payment and Collection Law**

In Count II of the Amended Complaint, Tucci alleges that Kelco and Lehman

violated the PWPCL or, in the alternative, the DWPCA by failing to pay Tucci all of his wages that were due. Lehman claims that because it was not Tucci's employer, it is not subject to any state's wage payment and collection laws. However, Tucci alleges that Lehman was Kelco's agent and controlling person. Under the DWPCA, "the officers of a corporation and *any agents having the management thereof* who knowingly permit the corporation to violate this chapter shall be deemed to be the employers of the employees of the corporation." 19 Del. C. § 1101(b) (emphasis added). Because there are issues of fact regarding whether Lehman acted as Kelco's agent and controlling person, and thus whether Lehman may be considered Tucci's employer, this claim cannot be dismissed.

If Lehman is liable under any wage payment and collection laws, it is liable because it acted as Kelco's agent. Moreover, as addressed above, we found that if Kelco is liable for failure to pay wages, it is liable under the DWPCA. In light of these facts, and in light of the choice of law clause in the employment contract and the fact that the DWPCA will adequately protect Tucci, we also find that if Lehman is liable under any statute for failure to pay wages to Tucci, it is liable under the DWPCA. See Synesiou, 2002 WL 501494, at \*3. Therefore, while the DWPCA claim in Count II must survive, the PWPCL claim must be dismissed.

### **3. Tortious Interference With the Employment Contract**

In Count III of the Amended Complaint, Tucci alleges that Lehman tortiously interfered with the employment contract between Tucci and Kelco by inducing Kelco to breach the contract. In order to state a claim for tortious interference with a contract, Tucci must show that: (1) there was a contract; (2) which Lehman knew about and intentionally interfered with in order to harm Tucci; (3) without privilege or justification; and (4) which caused injury.

Beidleman v. Stroh Brewery Co., 182 F.3d 225, 234 (3d Cir. 1999); Lloyd v. Jefferson, 53 F. Supp.2d 643, 676 (D. Del. 1999). Lehman claims that Tucci has not met the third factor because any interference was privileged as Lehman was protecting a legitimate business interest.

Specifically, the Restatement (Second) of Torts § 766 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 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.

Restatement (Second) of Torts § 766; see also Windsor Sec., Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 660 (3d Cir. 1993)(stating that the Pennsylvania Supreme court utilizes Restatement (Second) of Torts § 766 in analyzing inducement torts); Smith v. Hercules, Inc., No. 01C-08-291, 2002 WL 499817, at \*2 (Del. Super. Mar. 28, 2002)(stating that Delaware courts have adopted the Restatement (Second) of Torts for analyzing intentional interference with contract relations).

The Restatement (Second) of Torts § 769 would, in some situations, exempt a party like Lehman, who allegedly has a financial interest in Kelco and who allegedly interfered in Kelco's contractual relations, from tort liability. Section 769 states that:

One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he  
(a) does not employ wrongful means and  
(b) acts to protect his interest from being prejudiced by the relation.

Restatement (Second) of Torts § 769. However, this section does not protect Lehman as it is alleged that Lehman induced Kelco to breach the contract. Comment b to § 769 clearly states that "[t]he rule stated in this Section does not apply to the causing of a breach of contract. (See §

766). This does not imply, however, that the actor's interference is necessarily improper in such a case under the general principle stated in § 767.” Restatement (Second) of Torts § 769 cmt. b.

Therefore, because § 769 does not apply to the facts as stated in the Amended Complaint, we must utilize the factors set forth in § 767 to determine whether the third factor listed above, which Lehman argues Tucci cannot prove, has been met. Lloyd, 53 F. Supp.2d at 676. The factors to consider in determining whether Lehman was justified in conducting the actions alleged are as follows:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

Restatement (Second) of Torts § 767. It is not possible for us to effectively analyze these factors without appropriate discovery. Therefore, this claim cannot be dismissed at this time.

#### **4. Detrimental Reliance/Promissory Estoppel**

In Count IV of the Amended Complaint, Tucci alleges a claim for detrimental reliance, also known as promissory estoppel, against Lehman. Specifically, Tucci alleges that when Lehman was inducing Tucci to leave Hercules and join Kelco, it made various promises regarding what compensation and benefits Tucci would receive under the employment contract. Tucci further contends that he relied on these promises to his detriment because the employment contract was breached and he did not receive the full benefit of the promises. Tucci repeatedly states in the Amended Complaint that all of Lehman’s alleged promises to him were incorporated

into the employment contract between Tucci and Kelco. Furthermore, there is absolutely no allegation that the employment contract is not valid and binding.<sup>1</sup>

In order to state a claim for promissory estoppel, one must show that: (1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000); Lord v. Souder, 748 A.2d 393, 399 (Del. Super. 2000).

According to the Amended Complaint, essentially, Lehman promised that the employment contract between Tucci and Kelco would contain provisions detailing all of the items agreed upon during the negotiations between Tucci and Lehman. There is no allegation that Lehman promised to honor these provisions if Kelco did not, nor is there any allegation that Lehman agreed to do anything more than put the negotiated terms into the employment contract. Furthermore, there are no allegations that Tucci thought he was contracting with Lehman or that the alleged principal, Kelco, was not disclosed. Anything Lehman promised has been fulfilled. Tucci was provided with an employment contract that contained all of the agreed upon provisions. Any further issue regarding breach of the employment contract is between the parties to the contract, Tucci and Kelco. There is no question that the employment contract covered all of the alleged promises regarding compensation and benefits, therefore, Tucci's claim for

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<sup>1</sup> Tucci argues that this Court should not be dismissed because it is plead in the alternative. However, even though "promissory estoppel may be pleaded in the alternative, . . . if the court finds that a contract exists, the promissory estoppel claim must fall." Iversen Baking Co., Inc. v. Weston Foods, Ltd., 874 F. Supp. 96, 102 (E.D. Pa. 1995)(citing Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 416 (3d Cir. 1990)).

promissory estoppel regarding these promises is not appropriate. Rudder v. Am. Honda Motor Co., Inc., No. 94-6769, 1995 WL 216955, at \*6 (E.D. Pa. April 12, 1995)(citing Carlson v. Arnot-Ogden Mem’l Hosp., 918 F.2d 411, 416 (3d Cir. 1990); see Weiss v. Northwest Broad. Inc., 140 F. Supp.2d 336, 345 (D. Del. 2001).

Moreover, in light of the lack of any extra promise from Lehman that it would perform the terms of the employment contract if Kelco did not, it would have been unreasonable for Tucci to have relied on Lehman’s alleged promises which were specifically incorporated into the employment contract. This is especially true since the employment contract contained an integration clause that stated that the agreement contained the entire understanding of the parties, and a clause specifically acknowledging that the agreement superseded all prior representations made during the negotiations. “A party cannot justifiably rely upon prior oral representations, yet sign a contract denying the existence of those representations.” 1726 Cherry St. P’ship v. Bell Atl. Prop., Inc., 653 A.2d 663, 669 (Pa. Super. 1995). We further note that the integration clause would encompass any promises made by Lehman, the alleged agent, even though Lehman is not a party to the contract. Bowman v. Meadow Ridge, Inc., 615 A.2d 755, 757-88 (Pa. Super. 1992).

Tucci also cannot meet the third element as injustice will be avoided because Tucci may pursue his breach of contract claim against Kelco. Furthermore, it is well established that an agent, as Tucci alleges Lehman to be, is not liable for its principal’s contracts. B & L Asphalt Ind. Inc., 753 A.2d at 270; Am. Ins. Co. 446 A.2d at 1105. Tucci is attempting to dodge this principle of law by making Lehman liable for the contents of the employment contract under a theory of promissory estoppel. Tucci admits throughout the Amended Complaint that every

promise allegedly made by Lehman was put into the employment contract. Tucci's remedy stems from the contract entered into between himself and Kelco. For the reasons stated, Tucci's claim for promissory estoppel must be dismissed.

#### **5. Breach of the Implied Covenant of Good Faith and Fair Dealing**

In Count V of the Amended Complaint, Tucci alleges that Kelco and Lehman breached the implied covenant of good faith and fair dealing under the employment contract. As discussed above, there was no contract between Tucci and Lehman. Before a party can breach a covenant implied into a contract, there must be a valid contract. Heritage Surveyors & Eng'rs, Inc. v. Nat'l Penn Bank, 801 A.2d 1248, 1253 (Pa. Super. 2002)(stating that where a duty of good faith arises, it arises under the law of contracts and that the duty of good faith is imposed upon contracting parties); Corp. Prop. Assoc. 6 v. Hallwood Group Inc., 792 A.2d 993, 1002 (Del. Ch. 2002)(stating that "[u]nder Delaware law an implied duty of good faith and fair dealing inheres in every contract. That implied covenant is a judicial convention designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." (internal quotations omitted)). Because there was no contract between Tucci and Lehman, there can be no implied terms between Tucci and Lehman. Therefore, Tucci's claim against Lehman for a breach of the implied covenant of good faith and fair dealing must be dismissed.

#### **VI. CONCLUSION**

Kelco's Motion to Dismiss the Plaintiff's Claims Pursuant to the PWPCL must be granted as the DWPCA is the proper vehicle for Count II of the Amended Complaint.

Lehman's Motion to Dismiss the Amended Complaint must be granted in part and

denied in part. Count I must be dismissed against Lehman because there is no contract between Tucci and Lehman and Lehman cannot be considered Kelco's promoter. In Count II of the Amended Complaint, the portion dealing with the PWPCL must be dismissed as the DWPCA is the proper statute to be utilized. However, the portion dealing with the DWPCA must not be dismissed at this time because there are questions regarding Lehman's relationship with Kelco that might make Lehman a liable employer under the law. Count III of the Amended Complaint must not be dismissed at this time because factual questions remain regarding whether Lehman's activities, which allegedly induced Kelco to breach the employment contract, were privileged. Count IV of the Amended Complaint must be dismissed as the promissory estoppel claim may not stand in light of the fully integrated contract. Lastly, Count V of the Amended Complaint must be dismissed against Lehman because a claim for a breach the implied covenant of good faith and fair dealing may not stand in the absence of a contract between Tucci and Lehman.

An appropriate Order follows.

