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

RAYMOND BEY, et al.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION NO. 05-388
CITY OF PHILADELPHIA, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, S. J. November 6, 2006

Presently before the Court are Defendants' Motion for Summary Judgment (Docket No. 32), Plaintiff's response thereto and Motion for Summary Judgment (Docket No. 33), Defendants' response to Plaintiff's Motion for Summary Judgment (Docket No. 35), and Plaintiff's Amended Motion for Summary Judgment (Docket No. 36). After a hearing held on November 1, 2006, and in consideration of the arguments presented by both plaintiff and defendants, for the reasons set forth below, Plaintiff's Motion is **DENIED** and Defendants' Motion for Summary Judgment is **GRANTED**.

I. PROCEDURAL HISTORY

The parties should be familiar with the history of this case. For a more complete recounting refer to the Court's Memorandum and Order dated October 13, 2005 (Docket No. 26) and Amended Order dated October 28, 2005 (Docket No. 27). On November 9, 2005, Plaintiff submitted a letter which he asked to be considered as a motion for reconsideration and demanded a hearing on the motions disposed of in the aforesaid orders. On November 16, 2005, the Court

denied Plaintiff's motion for reconsideration. On December 7, 2005, this matter was referred to Magistrate Judge Charles B. Smith for settlement discussions. A settlement conference was held on January 11, 2006, but no settlement was reached.

On December 14, 2005, Defendants filed a Motion for Summary Judgment. On December 29, 2005, Plaintiff filed a Motion for Summary Judgment and a response to Defendants' Motion. On January 13, 2006, Defendants filed their response to Plaintiff's Motion for Summary Judgment. On January 25, 2006, Plaintiff filed an Amended Motion for Summary Judgment. Although Plaintiff added claims to his Amended Motion which were not in his Amended Complaint, only the claims listed in his Amended Complaint will be considered.

II. STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. The Court must examine the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Id. at 255.

The moving party bears the initial burden of identifying the basis of the motion and the evidence which demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In order to avoid summary judgment, the burden

shifts to the non-moving party to produce evidence that a reasonable fact-finder could find for that party. Anderson, 477 U.S. at 248-249. The non-moving party must go beyond the pleadings and produce evidence through affidavits, depositions or admissions to show that there is a genuine issue for trial. Celotex, 477 U.S. at 324. Further, "an affidavit that is essentially conclusory and lacking in specific facts is inadequate." NLRB v. FES, 301 F.3d 83, 95 (3d Cir. 2002) (citing Maldonado v. Ramirez, 757 F.2d 48 (3d Cir. 1985)). A party must set forth sufficient facts showing a genuine issue for trial and may not rest upon mere allegations, general denials, or vague statements. Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d. Cir. 1991), cert. denied 502 U.S. 940 (1991).

An additional consideration is that Plaintiff pursued this lawsuit *pro se*. Courts have an obligation to read a *pro se* litigant's pleading liberally. Holley v. Dept. of Veterans Affairs, 165 F.3d 244, 247-48 (3d Cir. 1999)(citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). Courts must apply the applicable law, regardless of whether the *pro se* litigant cited the applicable law or referenced it by name. Holley, 165 F.3d at 248.

Although *pro se* litigants are generally held to less stringent standards, "a *pro se* plaintiff is not excused from complying with the rules of procedural and substantive law." Hatcher v. Potter, No. 04-2130, 2005 U.S. Dist. LEXIS 31742, at *2 (E.D. Pa. Dec. 7, 2005) (citing Faretta v. California, 422 U.S. 806, 835 n. 46 (1975)). Thus, "if a *pro se* plaintiff has been provided adequate information regarding what is expected of him and has ample opportunity to present opposing affidavits, but has nevertheless continually disregarded his obligations as a litigant, it would not be beyond the discretion of the court to dismiss his

claims."[1] Gay v. Wright, No. 90-0770, 1990 U.S. Dist. LEXIS 12893, at * 8 (E.D. Pa. Sep. 27, 1990).

III. DISCUSSION

A. Breach of Contract

Count II of Plaintiff's Amended Complaint is a claim for breach of contract. The Plaintiff provided computer network support and consulting in the Treasurer's Office of the City of Philadelphia (the "City"). On September 22, 2004, the acting Treasurer informed Plaintiff that his contract had been transferred to the IT Cluster. Plaintiff alleges that Defendants' refusal to continue to use his services and to pay him for past services performed is a breach of contract. Defendants respond that the contract between the City and Plaintiff merely set a cap on the amount payable under the contract and did not obligate the City to pay Plaintiff up to the amount of the cap. Defendants claim that it was within the City's rights to delete or terminate Plaintiff's services at any time. Finally, Defendants maintain that Plaintiff has been fully paid all money due to him under the contract.

Pennsylvania law requires that a plaintiff seeking to proceed with a breach of contract action must establish "(1) the existence of a contract, including its essential terms, (2) a breach of duty imposed by the contract[,] and (3) resultant damages." Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003). In interpreting a contract, a court must first consider the intent of the parties as expressed in the words used in the agreement. Martin v. Monumental Life

1. Although Plaintiff represented himself to be a certified paralegal and legal assistant, during the course of this litigation, the Court has strongly encouraged Plaintiff to secure or consult with counsel. The Court even offered to have counsel appointed *pro bono*. At the Rule 16 Conference on June 21, 2005, in response to Judge Ludwig's offer to appoint counsel for consulting purposes, Plaintiff stated "I consult with a counsel now. I have many lawyer friends, and no one seems to understand what's going on here, but, no, I do consult with counsel regularly." (Docket No. 15 at 21-22).

Insurance, Co., 240 F.3d 223, 232-33 (3d Cir. 2001), citing Mellon Bank N.A. v. Aetna Bus. Credit, 619 F.2d 1001, 1009 (3d Cir. 1980). The court can grant summary judgment on an issue of contract interpretation if the language at issue "is subject to only one reasonable interpretation." Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co., 180 F.3d 518, 521 (3d Cir. 1999)

Here, the relevant documents comprising the contract include (1) the Provider Agreement dated February 13, 2003 ("Provider Agreement"); (2) the Professional Services Contract, Computer and Information Services, General Provisions ("General Provisions"), which is attached to the Provider Agreement; and (3) the Standard Amendment Agreement dated September 2, 2004 ("2004 Amendment Agreement").[2] Together, the Provider Agreement and General Provisions make up the "Base Contract." (Pl. Mot. Summ. J. Ex. A). Successive one year terms were added to the Base Contract by Standard Amendment Agreements signed September 25, 2003 (Def. Mot. Summ. J. Ex. 10) and September 2, 2004. (Pl. Mot. Summ. J. Ex. A).

The initial term as stated in the Provider Agreement lasted from July 1, 2002 until June 30, 2003. (Def. Ex. 9 at Section 3.1). The 2004 Amendment Agreement added a term commencing July 1, 2004 and expiring June 30, 2005. (Pl. Mot. Summ. J. Ex. A). Plaintiff argues that the term stated in the 2004 Amendment required Defendants to continue to use his services until the expiration of the term, June 30, 2005.

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2. The General Provisions define "The Contract" as meaning "all of the Contract Documents. (Def. Ex. 9 at Section 1.4). "The Contract Documents" is further defined as "the General Provisions, the Provider Agreement, any and all other documents or exhibits (including attachments thereto) incorporated by reference in either the General Provisions or the Provider Agreement, and any and all Amendments to any of these documents." (Def. Ex. 9 at Section 1.5)

Defendants respond that the Provider Agreement merely set a cap on the total amount payable under the contract, and that it was within the City's right to terminate Plaintiff's services at any time. In support of their position, Defendants point to specific language in the contract documents. Significantly, Section 13.1 of the General Provisions has a provision entitled "Termination for Convenience" permitting the City "to terminate the Contract at any time during the term of the Contract, for any reason, including, without limitation, its own convenience." (Def. Ex. 9 at Section 13.1). It is clear from the termination clause that the City did not intend to bind itself to use Plaintiff's services for the entire time period covered by the contract. Instead, the City expressly reserved the right to terminate the contract at any time. Thus, as a matter of law, the Defendants' termination of the contract prior to the expiration of the 2004 Amendment Agreement is not a breach of contract.

In addition to arguing that the termination of Plaintiff's services is a breach, Plaintiff also claims that Defendants' refusal to pay Plaintiff for work performed is a breach of contract. From Plaintiff's argument it is not clear whether he is referring to the rejection of a specific invoice that continues to remain unpaid or that the refusal itself, even if the invoice was eventually paid, is a breach entitling Plaintiff to damages. Since Plaintiff is *pro se*, both arguments will be given consideration.

First, the record is lacking in evidence support Plaintiff's allegation that payment on an invoice remains outstanding. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims. Celotex Corp., 477 U.S. at 323-24. Defendants maintain that Plaintiff has been fully paid for all work performed. Plaintiff has not produced any invoices nor specified the amount that remains outstanding. To the contrary,

Plaintiff admits in his Statement of Facts that "[f]inally it was decided to pay the invoice after my protestations[.]" (Pl. Mot. Summ. J. at 4). In fact, Plaintiff admitted at the hearing that there are no outstanding invoices. Thus, to the extent that Plaintiff is claiming that an invoice remains unpaid, the court finds insufficient evidence for a breach of contract claim.

Second, Plaintiff's claim that the City's refusal to pay for work already performed "established an immediate breach" (Pl. Amended Mot. Summ. J. at 8) is not supported by the language of the contract itself. As discussed above, the "Termination for Convenience" clause permits the City to terminate the contract at any time during the term of the Contract for any reason. If Plaintiff was paid in a timely manner for the invoice in question, then the City's initial refusal to approve the invoice is immaterial. To the extent that Plaintiff is seeking damages for the initial refusal, there is no factual support in the record for such a claim.

Therefore, whether the Plaintiff's basis for his breach of contract claim is the termination of the contract, an unpaid invoice, or the City's refusal to approve the invoice, Defendants' motion for summary judgment is granted on the entire claim for breach of contract.

B. Discrimination Claim

Plaintiff alleges that his contract with the City was cancelled because he is African-American. This claim falls under 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of contracts. Pamintuan v. Nanticoke Memorial Hospital, 192 F.3d 378, 385 (3d Cir. 1999). To state a claim under § 1981 a plaintiff must allege 1) he is a member of a racial minority, 2) the defendant discriminated against him on the basis of race, and 3) the discrimination concerned one of the activities listed under the statute, e.g. the making and enforcement of contracts. North American Roofing & Sheet Metal Co., Inc. v. Building &

Construction Trades Council of Philadelphia & Vicinity, AFL-CIO, 2000 WL 230214, at *2 (E.D. Pa. Feb. 29, 2000); see also Seeney v. Kavitski, 866 F.Supp. 206, 211 (E.D. Pa. 1994).

Plaintiff has failed to make a prima facie case of discrimination because he has not presented evidence that Defendants discriminated against him based on his race. Instead, Plaintiff mainly relies on allegations and conclusory statements in the briefs accompanying his motions for summary judgment.[3] For example, Plaintiff asserts that he is "easily recognized as a 'minority' because he does not have a Caucasian Surname, such as McGreevy, or O'Neal." (Pl. Amended Complaint at 10). Plaintiff also claims that since he had never had a contract cancelled or an invoice refused by any of the City Treasurers who were "of African descent[,]" and Alice DeYoung, the person who Plaintiff alleges cancelled his contract and refused payment on his invoice, was Caucasian, the "motivation was clearly racial." (Pl. Amended Mot. Summ. J. at 9-10).

Defendants point out that Plaintiff has failed to conduct any depositions, a presumable means by which he could develop the evidence necessary for his claim. Specifically, Defendants identify Adrienne Pearson, the African-American female who Defendants assert assumed Plaintiff's functions. Plaintiff simply responds that Ms. Pearson did not assume his duties. The Court is mindful that when ruling on a motion for summary judgment, a court must assess the material facts in light of the proof required of the plaintiff on substantive issues. Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir. 1996). Here, Plaintiff has failed to go

3. In support of his motion for summary judgment, Plaintiff submitted the following: (1) the 2004 Standard Amendment Agreement (Pl. Mot. Summ. J. Ex. A); (2) a letter from Mayor Street regarding the city policy on gifts from vendors (Pl. Mot. Summ. J. Ex. B); and (3) Defendants' responses to Plaintiff's first set of interrogatories and document requests (Pl. Amended Mot. Summ. J. Ex. A).

beyond the allegations in his pleadings. Because no genuine issue of material fact exists, Defendant's Motion for Summary Judgment is granted as to Plaintiff's discrimination claim.

C. Breach of Implied Covenant of Good Faith

Plaintiff claims that due to his longstanding business relationship with the City Treasurer's Office and the fact that he often provided phone support, hardware, and software at no charge, the City was obligated to continue to use his services. Plaintiff argues that the Defendants' refusal to use his services until the expiration of the contract term is a breach of the covenant of good faith and fair dealing. Defendants respond that not only has Plaintiff failed to demonstrate that Defendants violated any implied covenant, but the express terms of the contract permitted it to be terminated at will.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Baker v. Lafayette College, 504 A.2d 247, 255 (Pa. Super. Ct. 1986), aff'd, 532 A.2d 399 (Pa. 1986). However, "implied duties cannot trump the express provisions in the contract." John B. Conomos, Inc. v. Sun Co., Inc. ® & M), 831 A.2d 696, 706 (Pa. Super. Ct. 2003). The duty of good faith may not be implied where it would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid. South Eastern Transportation Authority v. Holmes, 835 A.2d 851, 858 (Pa. Commw. Ct. 2003).

Plaintiff seems to be asking the court to imply a duty *not* to terminate the contract. However, such a duty is in direct conflict with the express language of the contract, which permits the City to cancel the contract for any reason, including its own convenience. (Def. Mot. Summ. J. Ex. 9). Plaintiff has given no reason why the contract as agreed to by the parties should be

disregarded. Because the record is lacking in evidence to support a claim for breach of the implied covenant of good faith and fair dealing, Defendant's Motion for Summary Judgment on Count V is granted.

D. Negligence Claim

Although Count III is a negligence claim, the factual and legal basis for Plaintiff's claim is unclear. Plaintiff seems to argue that, since the City derives a benefit from dealing with minority contractors such as Plaintiff, the City owed Plaintiff a duty of due care in its contractual dealings with Plaintiff. Thus, the tortious interference with contractual relations and breach of contract allegedly committed by Defendants violates their duty of care under tort principles as well. Defendants respond that Plaintiff is not registered with the Minority Business Enterprise Council, and even if he were, there is no law requiring Defendants to provide a duty of care to a minority contractor based on his minority status. Finally, Defendants assert that Plaintiff has failed to show any negligence under even an ordinary standard of care.

In support of his negligence claim, Plaintiff presents a letter he received from Mayor Street addressed to "Vendor." (Pl. Mot. Summ. J. Ex. B). This letter explains the gift ban policy instituted by the Mayor, which prohibits City officials from receiving gifts from City contractors. As Defendants point out, this letter has little bearing on the issue of negligence. Plaintiff has failed to set forth specific evidence of Defendants' conduct or their failure to conform to a standard of due care owed to a minority contractor or otherwise. Defendants, on the other hand, have provided documentation regarding the restructuring of the City's computer services, which Defendants allege as a cause for the elimination of the need for Plaintiff's services. (Def. Mot. Summ. J. Ex. 15). In light of this evidence, no genuine issue of material fact

is presented by Plaintiff's claim. Defendants' Motion for Summary Judgment on Plaintiff's negligence claim is granted.

E. Quantum Meruit

Count VI of Plaintiff's Amended Complaint is a claim for quantum meruit. It appears that Plaintiff is arguing that Defendants owe him the remainder of the contract. Plaintiff alleges that he "sent a final invoice for the payment of the remainder of the contract to John Naccio and E. Ray Zies by email[,]" and "[n]either has responded in any way to my request for payment." (Pl. Amended Complaint at 11). However, Defendants maintain that the contract was an "as-needed one," and Plaintiff has been paid for all work performed.

There is insufficient support in the record to support Plaintiff's claim that he is owed the balance of the contract. Plaintiff has failed to present any evidence in support of this claim besides his allegation that Defendants were not permitted to terminate the contract prior to its expiration on June 30, 2005. Defendants, on the other hand, highlight the termination clause in the Base Contract which permits the City to terminate the contract "at any time during the term of the Contract, for any reason[.]" (Def. Mot. Summ. J. Ex. 9). In support of their characterization of the contract as an "as needed one," Defendants point to Section 4.2. of the Provider Agreement, entitled "Change in Scope of Service and Deliverables," which provides that "At any time during the term of this Contract, the City may make changes in any of the Service and Deliverables...including, without limitation, the addition or deletion of Services and Deliverables, and changes in the time of performance." (Def. Mot. Summ. J. Ex. 9). In light of the record as developed by both parties, there remains no genuine issue of material fact for trial on the quantum

meruit claim. Defendant's Motion for Summary Judgment on the claim for quantum meruit is granted.

F. Tortious Interference with Contract

Count I of Plaintiff's amended complaint is a claim for tortious interference with contractual relations. Plaintiff argues that when Alice DeYoung refused to approve payment of Plaintiff's invoice and subsequently cancelled the contract between the City and Plaintiff, she committed tortious interference. Defendants respond that DeYoung is the City and therefore incapable of interference.

To make out a claim for tortious interference with contractual relations, a plaintiff must show: (1) existence of contractual relationship or prospective contractual relationship between complainant and third party, (2) purposeful action on the part of the defendant, specifically intending to harm the existing relation, or to prevent a prospective relation from occurring, (3) absence of privilege or justification on the part of defendant, and (4) the occasioning of actual legal damage as a result of the defendant's conduct. Pelligrino Food Products Co. v. City of Warren, 136 F.Supp.2d 391, 408 (W.D. Pa. 2000) (citing Pelagatti v. Cohen, 536 A.2d 1337 (Pa. Super. Ct. 1988)). "[M]anagerial employees acting within the scope of their employment are not third persons for purposes of satisfying the elements for maintaining an action for interference with contractual relations." Adams v. USAir, Inc., 652 A.2d 329, 330 (Pa. Super. Ct. 1994).

Here, Plaintiff's claim fails as a matter of law. Plaintiff's argument that "[n]othing in the contract gave [DeYoung] any right to interfere with it" is not bourne out by

language in the contract itself. (Pl. Mot. Summ. J. at 10). Section 6.1 in the General Provisions provides:

> "From time to time during the Initial Term and any Additional Term(s) of the Contract, and for a period of five (5) years after termination of the Contract, the City may audit Provider's performance under the Contract. **Audits may be conducted by representatives of the Department or other authorized City representatives**, including without limitation, the City Controller. If so requested, Provider shall submit to the City all vouchers or invoices presented for payment pursuant to the Contract...All such vouchers or invoices...shall be subject to periodic review and audit by the City."

(Def. Ex. 9)(emphasis added). Based on this language, city representatives other than the City Treasurer's Office could review Plaintiff's performance. Moreover, defendants maintain that DeYoung, had ample justification for her review and decision not to renew Plaintiff's contract in light of the reorganization of computer-related functions. The record is devoid of evidence that DeYoung acted outside the scope of her authority. Therefore, Defendants' Motion for Summary Judgment on Plaintiff's claim for tortious interference is granted.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is denied and Defendants' Motion for Summary Judgment is granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
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Plaintiff,	:	
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CITY OF PHILADELPHIA, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 6th day of November, 2006, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 32), Plaintiff's Reply and Motion for Summary Judgment (Docket No. 33), Defendants' Reply (Docket No. 35), and Plaintiff's Amended Motion for Summary Judgment (Docket No. 36), it is hereby **ORDERED** that Plaintiff's Motion is **DENIED** and Defendants' Motion is **GRANTED**. Judgment is entered in favor of all Defendants and against Plaintiffs.

This case is **CLOSED**.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.