

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

CREATIVE DIMENSIONS IN	:	CIVIL ACTION
MANAGEMENT, INC.	:	
	:	
v.	:	
	:	
THOMAS GROUP, INC.	:	NO. 96-6318

MEMORANDUM ORDER

This is a diversity action. Plaintiff has asserted claims for fraud, negligent misrepresentation, conversion, trespass to chattels, breach of the covenant of good faith and fair dealing, civil conspiracy and breach of contract.¹ Presently before the court is defendant's motion for partial summary judgment on the contract claim and for summary judgment on the other claims.

From the evidence of record as uncontroverted or otherwise taken in a light most favorable to plaintiff, the pertinent facts are as follow.

Both parties provide consulting services to business clients to improve efficiency. Defendant has developed an engineering-based approach emphasizing "speed-driven" results. Plaintiff offers a psychology-based approach emphasizing "soft skills." Defendant approached plaintiff in 1995 ostensibly for the purposes of improving its own employees' soft skills and

¹ Defendant has asserted counterclaims for fraud, breach of contract and breach of a duty of good faith and fair dealing.

taking advantage of the benefits of jointly marketing its product with plaintiff's. The resulting discussions led to two agreements, the Services Agreement and the Strategic Alliance/Marketing License Agreement ("Strategic Alliance"). Both agreements were executed by the parties on January 8, 1996 at defendant's office in Irving, Texas.

The Services Agreement provided that plaintiff would offer its services to "conduct and otherwise facilitate a TGI-customized company-wide Cultural Transformation program." In return defendant was to compensate plaintiff by the payment of a fee plus expenses. Defendant paid the required fee of \$325,000. The agreement contains a choice of law provision which reads: "This Agreement shall be governed by and construed in accordance with the laws of the State of Texas."

The Strategic Alliance provided for a three-year term of joint marketing by the parties and a permanent license for defendant to use plaintiff's methodologies. Under the agreement, plaintiff was to develop customized products to be marketed jointly with defendant's product. Defendant was fully to support the sale of such a joint product. In addition, each party was to "facilitate the engagement" of the other by its own clients. Defendant agreed to pay plaintiff a commission of $\frac{1}{2}$ of 1% of revenues from sales of its "TCT programs" and plaintiff agreed to pay defendant a commission of 11% of revenues derived from its

clients during the term of the contact. Defendant at the time of execution also paid a royalty of \$250,000 for a license to use plaintiff's methodologies. The agreement provided for termination by mutual written consent of both parties. The license was to survive termination of the agreement.

After the agreement was signed, defendant failed to support the joint marketing project and did not attempt to refer its clients to plaintiff. Defendant also failed to pay the royalty. Claiming that plaintiff failed to perform its obligation to develop a product for joint marketing, defendant notified plaintiff of its intent to terminate the Strategic Alliance by letter on November 12, 1996. Defendant continued to use plaintiff's materials into at least 1997.

At court proceedings yesterday, the parties agreed that all of the claims herein are governed by Texas law.

Plaintiff alleges that it was fraudulently induced to turn over its materials and methodologies by false statements made by defendant prior to the execution of the contracts. Defendant argues it is entitled to judgment on the fraud claim because it entered into the agreements with the intent to perform. It does not clearly appear from the summary judgment record that plaintiff will be unable to produce evidence from which a jury could reasonably conclude defendant had no intent to perform its promised obligations. Summary judgment on this claim

is not appropriate.

The essence of plaintiff's negligent misrepresentation claim is that defendant falsely promised to engage in the joint marketing program to obtain plaintiff's materials at a reduced royalty. Plaintiff does not allege or present evidence that defendant failed to exercise due care in communicating its intent. Rather, plaintiff contends that defendant effectively communicated false promises of future performance.

To be actionable under Texas law, a negligence misrepresentation must pertain to an existing fact and not a promise of future action. See Airborne Freight Corp. v. C.R. Lee Enterprises, Inc., 847 S.W.2d 289, 294 ("the sort of 'false information' contemplated in a negligent misrepresentation case is a misstatement of existing fact") (emphasis added); Clardy Mfg. Co. v. Marine Midland Business Loans Inc., 88 F.3d 347, 357 (5th Cir. 1996) (same); Perez v. ALCOA Fujikura, Ltd., 969 F. Supp. 991, 1008 (W.D. Tex. 1997) (misstatement regarding defendant's future acts cannot sustain claim for negligent misrepresentation); 5636 Alpha Road v. NCNB Texas Nat. Bank, 879 F. Supp. 655, 665 (N.D. Tex. 1995) (defendant entitled to judgment where alleged misrepresentation concerned future event). Plaintiff has adduced no evidence and does not contend that defendant negligently misrepresented facts existing at the time of the alleged misstatements. At court proceedings yesterday,

plaintiff consented to the entry of judgment for defendant on this claim.

Defendant argues that it is entitled to summary judgment on plaintiff's claim for breach of the Service Agreement because defendant fully performed its obligations by paying the specified fee. Plaintiff, however, points to other unfulfilled obligations including identification of five clients to be interviewed by plaintiff and refraining from use of plaintiff's videotapes for external purposes without express permission. The former requirement appears to be for the sole benefit of defendant in developing a program to improve defendant's corporate environment. The latter provision, however, is another matter and, if credited, evidence of the prohibited use of the videotapes would constitute a breach of the parties' agreement.

Defendant requests partial summary judgment on plaintiff's claim for lost profits from joint marketing under the Strategic Alliance because such profits are unduly speculative as the product to be jointly marketed was unique and untested. The marketing strategy may have been unique but the products to be offered were essentially the parties' established separate products. One could reasonably calculate likely lost profits from evidence of the success and profit margin of each party in marketing its program.

Summary judgment on the contract claim is not appropriate on the record presented.

Plaintiff's claims for conversion and trespass to chattels are predicated on defendant's alleged misappropriation of plaintiff's methodologies and processes. To sustain these claims, plaintiff must show that it had property rights in the methodologies and processes and that defendant wrongfully deprived them of those rights. See Waisath v. Lack's Stores, Inc., 474 S.W.2d 444, 447 (Tex. 1971) (elements of conversion are unauthorized and wrongful exercise of dominion and control over the personal property of another to the exclusion of or inconsistent with the owner's rights).²

There is evidence, including statements by defendant's officers and employees, to suggest defendant may have used plaintiff's materials at least until February of 1997. If credited, evidence of fraud would put the validity of the license in dispute. It further appears that defendant may have exceeded the scope of the license.

² The elements of trespass to chattels are essentially the same. The difference is that conversion entails a more serious deprivation of the owner's rights such that an award of the full value of the property is appropriate. See Restatement (Second) of Torts § 217 (trespass to chattels requires intentional dispossession or use or intermeddling with a chattel of another); § 222 (the actor is subject to liability for conversion where the dispossession "seriously interferes with the right of the other").

Plaintiff, however, has adduced no evidence to show it had recognizable property rights in its methodologies or processes. Moreover, rights in intangible property are not subject to conversion. Conversion encompasses theft of intangible property only where the rights have been merged with a document. See Neles-Jamesbury, Inc. v. Bill's Valves, 974 F. Supp. 979, 982 (S.D. Tex. 1997). The class of rights merged with a document is generally limited to commercial paper and other writings entitling the holder to legal rights and has not been extended to misappropriation of an idea capable of being expressed in a writing. See W. Page Keeton et al., Prosser and Keeton on Torts § 15 (1984). See also Ciccorp., Inc. v. Aimtech Corp., 32 F. Supp. 2d 425, 430 n.9 (S.D. Tex. 1998) (liability for conversion does not extend "to alleged unlawful dominion and control over intangible property"); Pebble Beach Co. v. Tour 18 I, Ltd., 1996 WL 511928, *44 (S.D. Tex. Sept. 10, 1996) (no action for conversion of unique golf course design), aff'd, 155 F.3d 526 (5th Cir. 1998).³

³ To the extent that plaintiff has any intellectual property rights in the materials, state law claims for conversion and trespass to chattels would also be preempted by federal copyright law. See United States ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 1463 (4th Cir. 1997) (claim for conversion of ideas and methods preempted by Copyright Act); Daboub v. Gibbons, 42 F.3d 285, 289 (5th Cir. 1995).

Plaintiff's methodologies and processes are admittedly intangible ideas. At court proceedings yesterday, plaintiff consented to entry of judgment for defendant on these two claims.

The breach of a duty of good faith and fair dealing claim is premised on defendant's "willfully failing to cooperate" with plaintiff.

Under Texas law, there is no implied covenant of good faith and fair dealing in each contract. Texas does not recognize Restatement (Second) of Contracts § 205. See English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983); Central Sav. and Loan Ass'n v. Stemmons Northwest Bank, 848 S.W.2d 232, 238 (Tex. App. 1992).

Texas has recognized an independent action for breach of a duty of good faith between parties to a "special relationship," but has recognized such a special relationship only in the context of an insured and insurer. See Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987). In doing so, the Court relied heavily upon the unequal bargaining power of the insurer and the special nature of insurance that creates an incentive for an insurer arbitrarily to deny legitimate claims. Where these concerns are absent, Texas has declined to recognize such an implied duty. See Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 71 (Tex. 1997). Texas courts have found no special relationship to exist between

suppliers and distributors, mortgagors and mortgagees, creditors and guarantors, lenders and borrowers and even franchisors and franchisees. See Central Savings, 848 S.W.2d at 239.

There is no special relationship between commercial parties to an arms-length business agreement. Id. at 238; Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 481 (Tex. App. 1989). That one businessman trusts another and relies upon him to perform a contract does not give rise to a special relationship or create an implied a duty of good faith and fair dealing under Texas law. Farrah v. Mafriqe & Kormanik, 927 S.W.2d 663, 675-76 (Tex. App. 1996).

Plaintiff states that the Strategic Alliance created a joint venture but has cited no case recognizing a special relationship between joint venturers under Texas law. Moreover, the plain language of the agreements is inconsistent with the creation of such a relationship. The Service Agreement provides: "[n]othing in this Agreement shall be construed as constituting a partnership or joint venture, or the relationship of principal/agent between the parties." The Service Alliance states: "[n]othing in this Agreement shall be construed as constituting a partnership, or the relationship of principal/agent between the parties."

At court proceedings yesterday, plaintiff consented to the entry of judgment for defendant on the good faith claim as

well.⁴

Plaintiff concedes in its brief that it has not supported its claim for civil conspiracy. Judgment will also be entered for defendant on this claim.

ACCORDINGLY, this day of April, 1999, **IT IS HEREBY ORDERED** that defendant's motion for partial summary judgment (Doc. #90) is **GRANTED** as to plaintiff's claims for negligent misrepresentation, conversion, trespass to chattels, breach of the duty of good faith and fair dealing and civil conspiracy and the motion is otherwise **DENIED**.

IT IS FURTHER ORDERED that defendant's counterclaim for breach of a duty of good faith and fair dealing is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.

⁴ It is the court's understanding that having itself successfully argued in support of its summary judgment motion that Texas does not recognize an action for breach of a duty of good faith by those sharing the relationship of the parties, defendant has acquiesced in the dismissal of its good faith counterclaim. Indeed, were defendant now to persist in pressing its claim, a question of judicial estoppel could be implicated. See Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996). In any event, the court will dismiss this counterclaim consistent with its understanding of defendant's position from court proceedings yesterday, without prejudice promptly to seek reconsideration if defendant's position in fact is that it but not plaintiff may pursue a good faith claim on the record presented.