

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

HOSPITALITY ASSOCIATES OF	)	
LANCASTER, L.P.,	)	Civil Action
	)	No. 07-cv-03955
Plaintiff	)	
	)	
vs.	)	
	)	
LANCASTER LAND	)	
DEVELOPMENT, L.P.,	)	
	)	
Defendant	)	
	)	
and	)	
	)	
FCD-DEVELOPMENT, LLC,	)	
	)	
Intervenor-	)	
Defendant	)	

\* \* \*

APPEARANCES:

MARK D. BRADSHAW, ESQUIRE  
On behalf of Plaintiff/Counterclaim-Defendant  
Hospitality Associates of Lancaster, L.P.

MARYELLEN O'LAUGHLIN, ESQUIRE  
On behalf of Defendant/Counterclaim-Plaintiff  
Lancaster Land Development, L.P. and  
Intervenor-Defendant/Counterclaim-Plaintiff  
FCD-Development, LLC

\* \* \*

O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on plaintiff's motion to dismiss defendant's counterclaim, and plaintiff's separate motion to dismiss the counterclaim of intervenor-defendant. Both

motions were filed pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons expressed below, I deny both motions.

Hospitality Associates of Lancaster, L.P. is both the plaintiff and counterclaim-defendant in this matter. Lancaster Land Development, L.P. is both the defendant and a counterclaim-plaintiff. FCD-Development, LLC is both the intervenor and a counterclaim-plaintiff.

Plaintiff's initial motion was filed October 22, 2007. It is styled Hospitality Associates of Lancaster, L.P.'s Motion to Dismiss Lancaster Land Development, L.P.'s Claim of Interference with a Contractual Relation.<sup>1</sup> Defendant filed its response in opposition to plaintiff's initial motion on November 8, 2007. It is styled Memorandum of Law of Defendant/Counterclaimant Lancaster Land Development, L.P. in Opposition to the Motion to Dismiss of Plaintiff Hospitality Associates of Lancaster, L.P.

Plaintiff's second motion was filed November 29, 2007. It is styled Hospitality Associates of Lancaster, L.P.'s Motion

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<sup>1</sup> Accompanying plaintiff's initial motion to dismiss was plaintiff's memorandum of law. Plaintiff's memorandum was also filed October 22, 2007. It is styled Hospitality Associates of Lancaster, L.P.'s Memorandum of Law in Support of Motion to Dismiss Lancaster Land Development, L.P.'s Claim of Interference with a Contractual Relation.

to Dismiss FCD-Development, LLC's Claim of Interference with a Contractual Relation.<sup>2</sup> Intervenor-defendant filed its response in opposition to plaintiff's second motion on December 11, 2007. It is styled Memorandum of Law of Intervenor-Defendant FCD-Development, LLC in Opposition to the Motion to Dismiss of Plaintiff Hospitality Associates of Lancaster, L.P.

#### JURISDICTION

Jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1). Plaintiff-counterclaim defendant Hospitality Associates of Lancaster, L.P. is a citizen of Pennsylvania and Florida. Defendant-counterclaim plaintiff Lancaster Land Development, L.P. is a citizen of Massachusetts.<sup>3</sup>

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<sup>2</sup> In support of plaintiff's second motion to dismiss, plaintiff incorporated its memorandum of law in support of plaintiff's initial motion to dismiss. In plaintiff's second motion to dismiss, plaintiff stated,

The infirmities of this claim are identical to those identified in the Memorandum of Law filed October 22, [2007] with respect to Count II of Defendant Lancaster Land Development, L.P.'s counterclaims. That Motion has been fully briefed and is now ripe. Said Memorandum is hereby incorporated [by] reference in support of this Motion as well.

<sup>3</sup> This action was removed from the Court of Common Pleas of Lancaster County, Pennsylvania on September 21, 2007. At the time this action was removed, the sole defendant was defendant Lancaster Land Development, L.P. To determine whether there is proper diversity of citizenship, I need only review the citizenship of the original plaintiff and defendant in this action because diversity is to be determined at the time the complaint is filed. Frett-Smith v. Vanterpool, 511 F.3d 396, 399 n.4 (3d Cir. 2008).

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(a)(2) because the property that is the subject of the action is situated in the City of Lancaster, Lancaster County, Pennsylvania, which is located in this judicial district.

PROCEDURAL HISTORY

Plaintiff Hospitality Associates of Lancaster, L.P. commenced this action in the Court of Common Pleas of Lancaster County, Pennsylvania on August 29, 2007. The single-count Complaint for Declaratory Relief seeks an award of judgment declaring that Hospitality Associates of Lancaster, L.P. has an implied easement over a portion of a 35-acre tract of land existing on property owned by defendant Lancaster Land Development, L.P.

Lancaster Land Development removed this action to the United States District Court for the Eastern District of Pennsylvania by filing its Notice of Removal on September 21, 2007. Lancaster Land Development filed its Answer and Counterclaims to Complaint on September 24, 2007. Lancaster Land Development filed its Amended Answer and Counterclaims to Complaint on October 1, 2007.

Lancaster Land Development's amended answer asserts four counterclaims against plaintiff Hospitality Associates. The counterclaims are for trespass (Count One), interference with

contractual relationships (Count Two) and two counts seeking declaratory relief (Count Three and Count Four). The trespass and interference with contractual relationships claims seek injunctive relief against Hospitality Associates.

As noted above, Hospitality Associates moved to dismiss Lancaster Land Development's counterclaim for interference with contractual relationships on October 22, 2007, and Lancaster Land Development filed its response in opposition to the motion to dismiss on November 8, 2007.

On October 17, 2007, FCD-Development, LLC moved to intervene as a defendant in this action. By my Order dated November 8, 2007, FCD-Development, LLC became an intervenor-defendant. Based upon my Order, the Answer and Counterclaim of Intervenor Defendant FCD-Development, LLC to Complaint was filed on November 9, 2007.

In its answer, FCD-Development, as intervenor-defendant and counterclaim-plaintiff, asserts a single counterclaim against Hospitality Associates for interference with contractual relationships and seeks injunctive relief against Hospitality Associates. As also noted above, Hospitality Associates moved to dismiss FCD-Development's counterclaim on November 29, 2007 and FCD-Development filed its response in opposition to the motion to dismiss on December 11, 2007.

FACTS<sup>4</sup>

Division and Ownership of the Land

This action arises out of a dispute regarding land use of a pond spanning two adjoining tracts of land. The land involved in this dispute once comprised a single contiguous 208-acre parcel of real property in Lancaster, Pennsylvania. In 1995, the owner of the 208-acre parcel subdivided the property into two adjacent lots creating a 35-acre tract and a 173-acre tract of land.

The 208-acre parcel contained a pond spanning approximately one-acre which cut across the boundary lines of the two sub-parcels. Two-thirds of the pond is located on the 35-acre tract and one-third is located on the 173-acre tract.

At the time of the subdivision in 1995, the principal owners of Lancaster Land Development controlled both tracts of land. After the 208-acre parcel was subdivided, Lancaster Land

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<sup>4</sup> The facts presented here are based upon Defendant Lancaster Land Development's Answer and Counterclaims to Complaint; the Answer and Counterclaim of Intervenor Defendant FCD-Development, LLC to Complaint; the allegations of plaintiff's Complaint for Declaratory Relief which were admitted in defendants' respective answers; and the docket entries and Orders of record in this case.

Pursuant to the applicable standard of review, discussed below, in ruling on a motion to dismiss a counterclaim, I must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to defendant Lancaster Land Development, L.P. and intervenor-defendant FCD-Development, LLC, as the non-moving parties. However, as also noted in the Standard of Review section, below, evidence beyond a counterclaim which the court may consider in deciding a 12(b)(6) motion to dismiss includes the type of items appearing in the record of this case which I considered (as noted, above, in this footnote).

Accordingly, these facts are deemed true for the purpose of the within motions only.

Development determined that the pond spanning the two tracts was no longer necessary. Thereafter, use of the pond area was abandoned for all purposes.

Subsequently, Hospitality Associates acquired ownership of the 173-acre tract from a third-party in September 2005. Notwithstanding this change in ownership, the pond remained abandoned until 2007. However, in 2007 Hospitality Associates released water into the pond without prior notice to or approval from defendant Lancaster Land Development.

#### Development Plan

On March 10, 2006, Lancaster Land Development entered into a Purchase and Sale Agreement with FCD-Development. Under this agreement, FCD-Development intends to purchase the 35-acre tract and to develop a shopping center. Part of the development plans contemplate the construction of a department store on the site of the pond. The 35-acre tract is currently zoned for commercial development.

Lancaster Land Development has undertaken several preliminary steps related to the completion of the Purchase and Sale Agreement. On September 11, 2006, Lancaster Land Development filed an Application for a Conditional Use with the East Lampeter Township Board of Supervisors for the construction of a shopping center as a Regional Impact Development on the 35-acre tract. The Conditional Use plan calls for the construction

of a retaining wall along the common boundary between the 35-acre and 173-acre tracts which will bisect the pond area between the parcels. This will have effect of eliminating the two-thirds portion of the pond which is located on the 173-acre tract.

Attempt to Impede Development

Hospitality Associates has engaged in a series of acts intended to impede FCD-Development's shopping center development on the 35-acre tract. These actions include the release of water into the pond area in 2007 and discussions between Hospitality Associates involving Lancaster Land Development, FCD-Development and High Real Estate Group (a non-party in this action).

In the summer of 2006 representatives of Lancaster Land Development and Hospitality Associates engaged in a series of meetings related to the development of the 35-acre tract. During these meetings, FCD-Development was introduced to Hospitality Associates as the purchaser of the 35-acre tract. In the course of these meetings, Hospitality Associates indicated to Lancaster Land Development that Lancaster Land Development would be more likely to develop the property if Lancaster Land Development terminated its relationship with FCD-Development.

Hospitality Associates further stated that if Lancaster Land Development did not either sell the 35-acre tract to Hospitality Associates or develop the project jointly with Hospitality Associates, Hospitality Associates was fully prepared

to raise objections until Lancaster Land Development lost FCD-Development as a purchaser.

On August 15, 2007, a representative of Hospitality Associates met with representatives of High Real Estate Group (a non-party in this action). During this meeting, Hospitality Associates indicated that it would only drop its opposition to the development of the 35-acre tract if Hospitality Associates could replace FCD-Development in the development of the 35-acre tract. In addition, Hospitality Associates also stated that it desired to integrate a vacant portion of its 173-acre tract into a mixed use lifestyle project on the 35-acre tract.

Furthermore, during this meeting with High Real Estate Group, Hospitality Associates also made clear its intention to delay and hold up FCD-Development's planned development of the 35-acre tract. Specifically, Hospitality Associates stated that it would pursue litigation opposing the development project until FCD-Development could no longer develop the site.

#### Injury

Lancaster Land Development and FCD-Development aver that if Hospitality Associates is permitted to continue its course of action and the FCD-Development project on the 35-acre tract is terminated, both companies will suffer irreparable harm and injury. FCD-Development further asserts that if Hospitality Associates succeeds in its attempt to scuttle the Purchase and

Sales Agreement, FCD-Development will sustain substantial damages, including the loss of hundreds of thousands of dollars in expenses already incurred and millions of dollars in lost profits.

CONTENTIONS OF THE PARTIES

Hospitality Associates<sup>5</sup>

Plaintiff and counterclaim-defendant Hospitality Associates contends that the counterclaims asserted by Lancaster Land Development and FCD-Development for interference with a contractual relation fail to state claims upon which relief can be granted and must be dismissed. Hospitality Associates asserts that neither counterclaim for interference with contractual relations is supported by any allegation of improper conduct by Hospitality Associates. Moreover, Hospitality Associates argues that neither counterclaim contains a sufficient averment regarding damages.

Hospitality Associates asserts that Lancaster Land Development has not demonstrated that any of Hospitality Associates' actions were undertaken without justification or privilege (which it avers is analogous to improper conduct in this context). Hospitality Associates argues that neither

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<sup>5</sup> As noted above, Hospitality Associates fully incorporated its memorandum in support of its motion to dismiss Lancaster Land Development's counterclaim into its motion to dismiss FCD-Development's counterclaim. Because the arguments are identical, I apply the arguments presented by Hospitality Associates to each counterclaim.

counterclaim alleges that Hospitality Associates engaged in improper conduct which interferes with the contract between Lancaster Land Development and FCD-Development.

Hospitality Associates contends that it believed it had the right to use the pond area located on the 35-acre tract for the purpose of drainage and irrigation by virtue of an implied easement. Hospitality Associates asserts that it has averred it has this right in its Complaint for Declaratory Relief. Because of its belief that it was acting under color of right, Hospitality Associates argues that it had a just and proper basis for flooding the pond area with water and such actions cannot form the basis of a claim for interference with a contractual relation.

Hospitality Associates asserts that its comments to Lancaster Land Development and non-party High Real Estate Group do not constitute wrongful conduct. With regard to its comments to Lancaster Land Development, Hospitality Associates contends that its comments demonstrate that Lancaster Land Development, not FCD-Development, was the target of the alleged interference with contract. Hospitality Associates avers that the counterclaims do not allege that any of the comments were false, misleading or in violation of any agreement. Moreover, Hospitality argues that there is no allegation that FCD-

Development was even aware of the comments made by Hospitality Associates to Lancaster Land Development.

Similarly, Hospitality Associates argues that neither counterclaim alleges that Hospitality Associates' comments to High Real Estate Group were false, misleading, in violation of any agreement or otherwise improper. Hospitality Associates also avers that there is no allegation that FCD-Development was aware of its alleged comments.

Hospitality Associates contends that its request for a judicial ruling confirming its right to an implied easement over that portion of the pond site on the 35-acre tract cannot form the wrongful-conduct basis of an interference with a contractual-relation claim. Hospitality Associates asserts that the argument that its conduct is wrongful is in conflict with the admissions in Lancaster Land Development and FCD-Development's answers and counterclaims insofar as they admit there is an actual controversy between the parties as to their respective rights to the pond site and that judicial consideration of this issue is appropriate.

Hospitality Associates also argues that the allegations of the counterclaims are clear that neither Lancaster Land Development, nor FCD-Development have suffered actual legal damage as a result of Hospitality Associate's purported interference with contractual relations. Hospitality Associates

avers that Lancaster Land Development and FCD-Development have only offered speculative allegations that they will suffer irreparable harm and injury as a result of Hospitality Associates' alleged improper conduct.

Thus, Hospitality Associates argues that the counterclaims asserted against it for interference with contractual relations must be dismissed for failure to adequately plead required elements of the claim.

Contentions of Lancaster Land Development  
and FCD-Development<sup>6</sup>

Lancaster Land Development and FCD-Development ("counterclaim-plaintiffs") oppose Hospitality Associates' arguments to dismiss their claims. Counterclaim-plaintiffs contend that the allegations of the counterclaims, construed in the light most favorable to them as the non-movants, demonstrate that Hospitality Associates has committed wrongful conduct which has resulted in actual legal damage to counterclaim-plaintiffs. Therefore, counterclaim-plaintiffs aver that they are entitled to injunctive relief.

With regard to improper conduct, counterclaim-plaintiffs assert that the allegations in the counterclaims establish that Hospitality Associates unlawfully flooded the pond

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<sup>6</sup> Lancaster Land Development and FCD-Development filed separate memoranda in opposition to Hospitality Associates' two motions to dismiss the counterclaims for interference with a contractual relation. However, because the arguments in opposition are essentially the same, I address the arguments of these parties as if they were presented in a single memorandum.

area on the 35-acre tract. Counterclaim-plaintiffs argue that this action itself constitutes an independently actionable tort of trespass. Moreover, counterclaim-plaintiffs contend that Hospitality Associates was not exercising a clearly delineated contractual or other right when it flooded the pond area.

Counterclaim-plaintiffs also argue that the chronology of events detailed in the allegations demonstrates that Hospitality Associates has engaged in conduct which is not sanctioned by the rules of the game which society has adopted. These events include Hospitality Associates' threats to impede the development of the 35-acre tract by FCD-Development, threats to commence the within litigation and the affirmative act of flooding of the pond site.

Counterclaim-plaintiffs assert that Hospitality Associates' argument that neither counterclaim-plaintiff has suffered damage is specious. As an initial matter, Lancaster Land Development avers that it has suffered damage in that its property has been unlawfully flooded by Hospitality Associates.

Both counterclaim-plaintiffs contend that they do not need to wait until Hospitality Associates' scheme to interfere with their contractual relations is successful in order to pursue an action to enjoin the improper interference. Counterclaim-plaintiffs argue that it is well-settled in Pennsylvania that

equity will act to prevent an unjustified interference with contractual relations.

Counterclaim-plaintiffs aver that they have alleged that FCD-Development will not complete the purchase of the 35-acre tract if it cannot develop a storefront on the site of the pond. Counterclaim-plaintiffs assert this allegation is sufficient to support their interference with contractual relations counterclaims.

Thus, counterclaim-plaintiffs argue that they have adequately pled the elements of their counterclaims for interference with contractual relations and may maintain their claims for injunctive relief.

#### STANDARD OF REVIEW

A counterclaim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted". Courts use the same standard in ruling on a motion to dismiss a counterclaim under Rule 12(b)(6) as they do for a complaint. Bray, II v. Dewese, 2008 U.S. Dist. LEXIS 17540 at \*3-\*4 (E.D.Pa. March 6, 2008)(Kauffman, J.); Retail Brand Alliance, Inc. v. Rockvale Outlet Center, L.P., 2007 U.S. Dist. LEXIS 7318 at \*7 (E.D.Pa. January 31, 2007) (Stengel, J.); United States v. Union Gas Company, 743 F.Supp. 1144, 1150 (E.D.Pa. 1990)(Bechtel, C.J.).

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Ordinarily, a court's review of a motion to dismiss is limited to the contents of the complaint, including any attached exhibits. See Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992). However, evidence beyond a complaint which the court may consider in deciding a 12(b)(6) motion to dismiss includes public records (including court files, orders, records and letters of official actions or decisions of government agencies and administrative bodies), documents essential to plaintiff's claim which are attached to defendant's motion, and items appearing in the record of the case. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 and n.2 (3d Cir. 1995).

Except as provided in Federal Rule of Civil Procedure 9, a claim is sufficient if it complies with Rule 8(a)(2). That rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to give the defendant fair notice of what the claim is and

the grounds upon which it rests. Twombly, \_\_\_ U.S. at \_\_\_, 127 S.Ct. at 1964, 167 L.Ed.2d at 940.

Additionally, in determining the sufficiency of a claim, the court must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003). Nevertheless, a court need not credit "bald assertions" or "legal conclusions" when deciding a motion to dismiss. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-1430 (3d Cir. 1997).

In considering whether the complaint survives a motion to dismiss, both the district court and the court of appeals review whether it "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." Twombly, \_\_\_ U.S. at \_\_\_, 127 S.Ct. at 1969, 167 L.Ed.2d at 945 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984))(emphasis in original); Maspel v. State Farm Mutual Auto Insurance Company, 2007 WL 2030272, at \*1 (3d Cir. July 16, 2007).

As noted above, the same standard applies to 12(b)(6) motions whether they seek dismissal of claims asserted in a complaint or in a counterclaim. Bray, II, supra.; Retail Brand Alliance, Inc., supra.; Union Gas Company, supra.

## DISCUSSION

The tort of intentional interference with a contractual relation has been adopted by the Supreme Court of Pennsylvania. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 431-432, 393 A.2d 1175, 1183 (1978). With respect to existing contractual relations, defendants<sup>7</sup> may be held liable for "intentionally and improperly interfer[ing] with the performance of a contract...between another and a third person by inducing or otherwise causing the third person not to perform the contract". Id., 482 Pa. at 431, 393 A.2d at 1183 (quoting Restatement (Second) of Torts § 766 (Tentative Draft No. 23, 1977)).<sup>8</sup>

As recognized by the United States Court of Appeals for the Third Circuit, the elements of intentional interference with a contractual relation under Pennsylvania law, whether existing or prospective, are as follows:

- (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;

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<sup>7</sup> As used throughout this Discussion, the term "defendant" refers to counterclaim-defendant (in other words, plaintiff).

<sup>8</sup> As noted by the United States Court of Appeals for the Third Circuit, although the Supreme Court of Pennsylvania relied on a tentative draft of the Restatement (Second) of Torts § 766, the final version is the same in substance. See Windsor Securities, Inc. v. Hartford Life Insurance Company, 986 F.2d 655, 659 n.6 (3d Cir. 1993).

- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Crivelli v. General Motors Corporation, 215 F.3d 386, 394 (3d Cir. 2000)(citing Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa.Super. 1997)).

In short, the four elements of the tort are:

(1) existence of a contract; (2) intent to harm the contractual relationship; (3) absence of privilege or justification; and (4) actual damage. As stated, none of these elements requires plaintiff<sup>9</sup> to establish that defendant's conduct was improper or wrongful. However, as noted in the discussion of privilege, below, the privilege or justification element is another way of stating that defendant's conduct must be proper.

In the within action, Hospitality Associates has challenged only the sufficiency of the third and fourth elements as pled in Lancaster Land Development and FCD-Development's counterclaims for interference with contractual relations. Therefore, my analysis of the counterclaims is limited to

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<sup>9</sup> As used throughout this Discussion, the term "plaintiffs" refers to counterclaim-plaintiffs (in other words, defendant and intervenor-defendant).

consideration of the sufficiency of the third and fourth elements of the tort (absence of privilege and actual damages).

#### Privilege

In the context of tortious interference with contractual relation claims, "[t]he presence of a privilege is not an affirmative defense, rather, the absence of such a privilege is an element of the cause of action which must be pleaded and proven by the plaintiff." Bahleda v. Hankison Corporation, 228 Pa.Super. 153, 156, 323 A.2d 121, 122-123 (1974)(internal citations omitted).

The absence of privilege or justification element of a claim for interference with contractual relations is closely related to intent. Adler, Barish, 482 Pa. at 432, 393 A.2d at 1183 (internal citation omitted). However, ill-will is not an element of the cause of action. Yaendl v. Ingersoll-Rand Company Standard Pump-Aldrich Division, 281 Pa.Super. 560, 581 n.11, 422 A.2d 611, 622 n.11 (1980).

This element requiring proof of the absence of privilege or justification on the part of the defendant "is merely another way of stating that the defendant's conduct must be improper." Id. This requires an inquiry into the "mental and moral character of the defendant's conduct." Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 159 (3d Cir. 1988) (internal citation omitted).

What is or is not privileged conduct in a given situation is not susceptible of precise definition. Adler, Barish, 482 Pa. at 432-433, 393 A.2d at 1183-1184 (internal citation omitted). When a defendant acts at least in part to protect some legitimate concern which conflicts with an interest of the plaintiff, a line must be drawn and the interests evaluated. Advent Systems Ltd. v. Unisys Corporation, 925 F.2d 670, 673 (3d Cir. 1991)(citing Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895 (1971)).

The Supreme Court of Pennsylvania has approached this privilege issue by considering whether the defendant's actions "are sanctioned by the 'rules of the game' which society has adopted". Adler, Barish, 482 Pa. at 433-434, 393 A.2d at 1184. In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors<sup>10</sup>:

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<sup>10</sup> The Supreme Court of Pennsylvania stated, "We are guided, too, by *Section 767 of Restatement (Second) of Torts*, which focuses on what factors should be considered in determining whether conduct is "improper:" Adler, Barish, 482 Pa. at 433, 393 A.2d at 1184 (emphasis in original).

Then the Supreme Court enumerated six factors, designated "(a)" through "(f)". Factors (a) through (d) are identical to factors (a) through (d), above, in the text of this Opinion. Adler, Barish factor (e) is identical to the above Opinion factor (f). Adler, Barish factor (f) is identical to the above Opinion factor (g).

The remaining factor (e) in the Opinion, above, is not found in the Adler, Barish Opinion. However, it is identical to factor (e) in section 767 of the Restatement (Second) of Torts, upon which the Adler, Barish Court relied.

(Footnote 10 continued):

- (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.

Adler, Barish, 482 Pa. at 433, 393 A.2d at 1184 (quoting Restatement (Second) of Torts § 767).

The general thrust of this multi-factor analysis "is whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without

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(Continuation of footnote 10):

The seven factors (a) through (g) listed, above, in the text of this Opinion, together with the sentence of the within Opinion immediately preceding them [except for the footnote "10" designator] is a verbatim quotation of the entire Restatement (Second) of Torts § 767.

As noted in footnote 8, above, the Supreme Court of Pennsylvania relied on a tentative draft of the Restatement of Torts (Second) § 766. Presumably the Supreme Court relied upon a tentative draft of section 767 as well. And presumably, the current section 767(e) was subsequently added to the final draft. I assume that, if it has not already done so, the Pennsylvania Supreme Court would adopt and rely upon the entire current section 767, including subsection (e).

I note that the Superior Court of Pennsylvania has already done so in Ruffing v. 84 Lumber Company, 410 Pa.Super. 459, 468, 600 A.2d 545, 549 (1991). ("Following the lead provided by Adler, supra, we shall evaluate the facts of the instant case under section 767 of the Restatement (Second) of Torts" [quoting all seven sections]).

liability, despite its effect of harm to another." Crivelli, 215 F.3d at 395 (citing Adler, Barish, supra, citing Restatement (Second) of Torts § 767, cmt. b). The nature of the actor's conduct is a chief factor in determining whether the conduct is improper. Id. (citing Restatement (Second) of Torts § 767, comment c)).

In the within action, Hospitality Associates attempts to separate its alleged acts of wrongdoing into four distinct categories. These categories are: (1) the release of water into the pond site; (2) comments made to Lancaster Land Development; (3) comments to High Real Estate Group; and (4) request for judicial determination. In response, counterclaim-plaintiffs argue that all of Hospitality Associates' actions, including the flooding of the pond, should be considered together in assessing the propriety of Hospitality Associates' conduct.

No party in this action has pointed to any authority indicating that there is a requirement in interference-with contractual-relations claims that allegations of multiple actions undertaken by a single defendant must each be considered separately. In the absence of any such authority, all relevant actions of Hospitality Associates are properly considered in a single analysis because, as alleged in the counterclaims, they are part of a common scheme to hinder, delay and impede FCD-Development in its development of the 35-acre tract.

Applying the Adler, Barish multi-factor analysis for determining whether an actor's conduct is intentionally interfering with a contract of another is improper, and therefore lacks privilege, it is clear that the allegations of the counter-claims are sufficient to plead a prima facie case. The guiding factor in this analysis is the action of Hospitality Associates in flooding the pond site. However, of great import in the analysis are the allegations concerning the motivation behind the decision to flood the pond site on the 35-acre tract.

The first Adler, Barish factor which must be considered is the nature of Hospitality Associates' conduct. The counter-claim allegations establish that after the original 208-acre parcel was subdivided into two adjoining tracts in 1995, the pond site spanning the two subdivisions was abandoned for all purposes for twelve years. Crediting this averment for the purpose of the within motions and inferring that the pond site did not contain water during this twelve-year interval, I conclude that Hospitality Associates did not have an implied easement over the pond site.

Furthermore, there is no allegation which supports any right of Hospitality Associates to utilize the pond site for any purpose or which confers upon Hospitality Associates a right to enter the 35-acre tract at any time.

Moreover, counterclaim-plaintiffs have averred that Hospitality Associates' flooding of the pond site was a tortious trespass. This is a legal conclusion and not a factual averment. Therefore, it is not to be credited. Nevertheless, the allegations supporting this conclusion are contained throughout the counterclaims.

Accordingly, for purposes of this analysis, Hospitality Associates unlawfully released water into the pond in 2007, and its actions weigh in favor of a finding that its conduct was improper.

Because the flooding of the pond site is the main impetus behind the assertion of the counterclaims, and because such actions were improper, I do not consider whether Hospitality Associates' threats that it would commence a declaratory judgment action, and its actual commencement of such action, were alone improper. However, threats of unmerited civil litigation are recognized as improper conduct within the meaning of tortious interference with contractual relations. See Crivelli, 215 F.3d at 395 (citing Restatement (Second) of Torts § 767, comment c).

Additionally, I do not decide whether Hospitality Associates' alleged comments to Lancaster Land Development and High Real Estate Group were also sufficiently improper within the meaning of a claim for tortious interference with contractual relations. However, such actions, threats and expressed

intentions are properly considered part of Hospitality Associates' overall scheme to thwart the development project, especially with regard to its intent in flooding the pond site.

Turning to the second Adler, Barish factor, Hospitality Associates' motive, the allegations of the counterclaims contain a number of averments which demonstrate Hospitality Associates' hostile intent. The allegations include Hospitality Associates' stated opposition to Lancaster Land Development's proposed development project with FCD-Development, Hospitality Associates' expression of its desire to substitute itself for FCD-Development in a joint venture with Lancaster Land Development, Hospitality Associates' offer to develop a mixed-use lifestyle project with Lancaster Land Development, and Hospitality Associates' intent to delay and hold up the development by FCD-Development of the 35-acre tract.

Construed in the light most favorable to counterclaim-plaintiffs, these allegations establish that Hospitality Associates flooded the pond site, lobbied Lancaster Land Development to terminate its contract with FCD-Development and threatened, and instituted, judicial process as part of an overall scheme to interfere with Lancaster Land Development's sale of the 35-acre tract to FCD-Development and the development of a shopping center on the site.

Although not explicitly stated, a reasonable inference from the allegations contained in the counterclaims is that the shopping center on the 35-acre tract contemplated by the Purchase and Sales Agreement cannot be completed if the pond site remains filled with water on the 35-acre tract. Thus, Hospitality Associates' intention to prevent or block development of the 35-acre tract, and the pond site in particular, would be clearly hostile and weighs in favor of finding improper conduct.

The third factor in the Adler, Barish analysis scrutinizes the interests of others with which the actions of Hospitality Associates have purportedly interfered. Counterclaim-plaintiffs share a common interest in the sale and development of the 35-acre tract. The counterclaim-plaintiffs have a joint economic interest in the sale and development of the 35-acre tract. As averred in the counterclaims, these interests cannot be advanced if the pond site remains filled with water. Therefore, this factor also weighs in favor of finding improper conduct.

The fourth factor, the interest sought to be advanced by Hospitality Associates, is the protection of its purported easement by implication over the pond site. Counterclaim-plaintiffs have admitted that there is an actual dispute concerning the existence of Hospitality Associates' easement by implication over the portion of the pond site located on the

35-acre tract. However, accepting the allegations of the counterclaims as true for the purpose of this motion, I conclude that Hospitality Associates does not possess any legal interest, through an easement by implication or otherwise, over the pond site on the 35-acre tract. Thus, because Hospitality Associates has no valid interest which it seeks to advance, the fourth factor supports an improper-conduct determination.

The fifth factor in this analysis requires consideration of the social interests in protecting the freedom of action of Hospitality Associates and the contractual interests of the counterclaim-plaintiffs. Hospitality Associates' does not have a valid social interest in its freedom of action insofar as it seeks to enter and utilize real property in which does not have a valid interest. In contrast, counterclaim-plaintiffs have a valid social interest in enforcing their contractual rights free from interference, consistent with the public policy of enforcing valid agreements. Therefore, the fifth factor weighs in favor of finding improper conduct.

The sixth Adler, Barish factor analyzes the temporal proximity or remoteness of Hospitality Associates' conduct to the interference. As alleged in the counterclaims, Hospitality Associates' interference with the Purchase and Sale Agreement between Lancaster Land Development and FCD-Development occurred as soon as Hospitality Associates released the water into the

pond site. There was no lag between the release of the water and the contemporaneous interference with the Purchase and Sale Agreement between Lancaster Land Development and FCD-Development, as averred, that is, that their contract cannot be completed. Accordingly, this factor also weighs in favor of concluding Hospitality Associates' actions were improper.

The seventh and final Adler, Barish factor is the relations between the parties. As alleged in the counterclaims, Hospitality Associates and Lancaster Land Development are adjoining land owners who dispute their respective rights to utilize the pond site located on the 35-acre tract owned by Lancaster Land Development. Thus, there is significant adversity in this relationship. In contrast, Lancaster Land Development and FCD-Development are parties to a pre-existing contract with a unity of interest in the sale and development of the 35-acre tract.

The relationship between Hospitality Associates and FCD-Development is similarly adverse. Hospitality Associates is attempting to impede the contract between Lancaster Land Development and FCD-Development. Both Hospitality Associates and FCD-Development seek to use the 35-acre tract for development projects and both seek to develop projects with Lancaster Land Development. Therefore, the relationship between Hospitality

Associates and FCD-Development is analogous to that of competitors.

This seventh factor does not weigh either in favor of, or against, a finding of improper conduct by Hospitality Associates. The Comment to Clause (g) of § 767 of the Restatement (Second) of Torts makes clear that the significant relationship for the tort of intentional interference with contractual relations can exist among any of the parties in the action. The Comment to § 767(g) also makes clear, however, that if two parties are competitors, the inducement offered to a third-party by one competitor to break a contract with the other competitor may not in fact be improper. Therefore, I conclude that the factor of the relations between these parties does not weigh in favor of either party.

In sum, six of the seven Adler, Barish factors weigh in favor of finding that Hospitality Associates' conduct was improper. Thus, construing the allegations of the counterclaims in favor of the counterclaim-plaintiffs, as non-movants, as I am required to do, I conclude that counterclaim-plaintiffs have sufficiently pled that Hospitality Associates, without legal authority, privilege or justification, and for the sole purpose of interfering with FCD-Development's project to develop a shopping center on the 35-acre tract, flooded the abandoned pond

site, a portion of which is located on the 35-acre tract owned by Lancaster Land Development.

Accordingly, these averments support a finding that Hospitality Associates has engaged in conduct sufficiently outside the rules of the game which society has adopted in order to protect interests in private property and to preserve the alienable nature of real property, and, therefore, had no privilege or justification to engage in such conduct. In other words, counterclaim-plaintiffs have failed to sustain their burden of proving the third element of the tort of intentional interference with contractual relations.

#### Damages and Injunctive Relief

The damages element of a claim for intentional interference with contractual relations (the fourth element) requires a plaintiff to prove that the alleged interference has caused an actual pecuniary loss, the benefits of which flowed from the contract itself. Although an actual pecuniary loss must be established, non-pecuniary harms are also recoverable under this tort. Shiner v. Moriarty, 706 A.2d 1228, 1239 (Pa.Super. 1998); Perry v. H&R Block Eastern Enterprises, Inc., 2007 WL 954129, at \*10 (E.D.Pa. March 27, 2007)(McLaughlin, J.).

Moreover, the actual pecuniary loss requirement does not defeat actions for tortious interference with contractual relations, such as this one, which seek to enjoin the interfering

conduct before it is successful. In Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 436 n.21, 393 A.2d 1175, 1185 n.21 (1978), the Supreme Court of Pennsylvania specifically held that notwithstanding the actual pecuniary loss requirement, “[i]t is well settled that equity will act to prevent unjustified interference with contractual relations.” See also Restatement (Second) of Torts § 766, comment u.

Similarly, in affirming the issuance of a preliminary injunction in a case based upon tortious interference with contractual relations and trespass claims, the Third Circuit recognized that injunctive relief may be appropriate before an actual pecuniary loss is sustained. In this regard, the Third Circuit held that a preliminary injunction may issue where the claimant has demonstrated that there is a “presently existing actual threat of injury”. Ride the Ducks of Philadelphia, LLC v. Duck Boat Tours, Inc., 138 Fed.Appx. 431, 434 (3d Cir. 2005) (citing Continental Group, Inc. v. Amoco Chemicals Corporation, 614 F.2d 351, 359 (3d Cir. 1980)).

In the within action, counterclaim-plaintiffs have not pled that they have sustained an actual pecuniary loss. To the extent that Lancaster Land Development avers that it has suffered a loss as a result of the pond site on its property being

flooded, such harm is not the type of pecuniary loss which flows from the benefits of its contract with FCD-Development.

However, counterclaim-plaintiffs' failure to allege that they have suffered an actual pecuniary loss at the point at which the counterclaim was interposed is not fatal to their ability to maintain their tortious interference with contractual relations claims. A reasonable inference drawn from the allegations in the counterclaims is that the counterclaim-plaintiffs cannot complete their Purchase and Sale Agreement and develop a shopping center on the 35-acre tract while the pond site remains filled with water.

If the pond remains flooded, counterclaim-plaintiffs will be unable to complete their development project and will lose the benefits of their contractual agreement. Such a result is the reasonable outcome of Hospitality Associates' actions based upon the averments in the counterclaims and the reasonable inferences drawn therefrom in counterclaim-plaintiffs' favor.

Based on the actions of Hospitality Associates, counterclaim-plaintiffs face a presently existing actual threat of injury which may be prevented by this court's exercise of its equitable powers. Therefore, if counterclaim-plaintiffs can establish the truth of their counterclaim averments, this court may intervene to prevent Hospitality Associates unjustified interference with counterclaim-plaintiffs' contract.

CONCLUSION

For all the foregoing reasons, I deny plaintiff's two motions to dismiss the counterclaims for intentional interference with contractual relations asserted by defendant and intervenor-defendant.

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

HOSPITALITY ASSOCIATES OF	)	
LANCASTER, L.P.,	)	Civil Action
	)	No. 07-cv-03955
Plaintiff	)	
	)	
vs.	)	
	)	
LANCASTER LAND	)	
DEVELOPMENT, L.P.,	)	
	)	
Defendant	)	
	)	
and	)	
	)	
FCD-DEVELOPMENT, LLC,	)	
	)	
Intervenor-	)	
Defendant	)	

O R D E R

NOW, this 30<sup>th</sup> day of September, 2008, upon  
consideration of the following pleadings:

- (1) Hospitality Associates of Lancaster, L.P.'s Motion to Dismiss Lancaster Land Development, L.P.'s Claim of Interference with a Contractual Relation, which motion was filed October 22, 2007, together with
  - (A) Hospital Associates of Lancaster, L.P.'s Memorandum of Law in Support of Motion to Dismiss Lancaster Land Development, L.P.'s Claim of Interference with a Contractual Relation, which memorandum was filed October 22, 2007;
  - (B) Memorandum of Law of Defendant/Counterclaimant Lancaster Land Development, L.P. in Opposition to the Motion to Dismiss of Plaintiff Hospitality Associates of Lancaster, L.P., which memorandum in opposition was

filed November 8, 2007;

- (2) Hospitality Associates of Lancaster, L.P.'s Motion to Dismiss FCD-Development, LLC's Claim of Interference with a Contractual Relation, which motion was filed November 29, 2007, together with
- (A) Hospitality Associates of Lancaster, L.P.'s Memorandum of Law in Support of Motion to Dismiss Lancaster Land Development, L.P.'s Claim of Interference with a Contractual Relation, which memorandum was filed October 22, 2007, and which memorandum is incorporated by plaintiff by reference in support of this motion<sup>11</sup>; and
  - (B) Memorandum of Law of Intervenor-Defendant FCD-Development, LLC in Opposition to the Motion to Dismiss of Plaintiff Hospitality Associates of Lancaster, L.P., which memorandum in opposition was filed December 11, 2007;

and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that Hospitality Associates of Lancaster, L.P.'s Motion to Dismiss Lancaster Land Development, L.P.'s Claim of Interference with a Contractual Relation is denied.

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<sup>11</sup> In plaintiff's motion (2), plaintiff Hospitality Associates of Lancaster L.P. stated,

The infirmities of this claim are identical to those identified in the Memorandum of Law filed October 22, [2007] with respect to Count II of Defendant Lancaster Land Development, L.P.'s counterclaims. That Motion has been fully briefed and is now ripe. Said Memorandum is hereby incorporated [by] reference in support of this Motion as well.

IT IS FURTHER ORDERED that Hospitality Associates of Lancaster, L.P.'s Motion to Dismiss FCD-Development, LLC's Claim of Interference with a Contractual Relation is denied.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner  
United States District Judge