

The Complaint avers that it was understood between the parties that Resources would bring the Absecon Center on line as soon as possible. It is undisputed that Resources did not take steps to open and operate the facility, even after requests from ATI to do so. It is also uncontested that Resources failed to deliver, pursuant to the Agreement, a statement of the annualized pre-tax income of the Absecon Center to determine the purchase price consideration adjustment (“second adjustment”).

Resources agreed to pay a one-time purchase price of \$12,900,000 in consideration for ATI’s assets. In addition, the Agreement provided for two types of post-closing adjustments. The calculation for the second adjustment, pertaining solely to the Absecon Center, is set forth in section 1.3(b)(ii) of the Agreement, as follows:

“(A) Within sixty (60) days after the twelve (12) month period *following the date on which the Absecon Center becomes fully operational* and continuously open to the public for the performance of diagnostic imaging services, Buyer shall prepare a statement of Annualized Pre-Tax Net Income...attributable to the Absecon Center (the “Absecon Statement”).

....

(C) within thirty (30) days following final completion of the Absecon Statement, ...Buyer shall pay to Seller additional cash consideration in an amount equal to the product of (I) Annualized Pre-Tax Net Income multiplied by (ii) 3.2.

Agreement § 1.3(b)(ii) at 6-7 (emphasis added).

There are two other portions of the contract relevant to the Court’s ruling. The first is section 10.3 of the Agreement, in which both parties agree, at their own expense, to take actions as may be reasonably necessary to effectuate the purpose of the Agreement. See Agreement § 10.3 at 57. The second is an integration clause, pronouncing that “the Agreement sets forth the entire understanding of the parties with respect to the subject matter hereof, supersedes all existing agreements among them concerning such subject matter and may be modified only by a

written instrument duly executed by each party hereto.” Id. §10.5 at 57-58.

ATI has not contested the lump sum payment for the assets nor the first purchase price consideration adjustment for the ten centers open to the public already paid to ATI (\$1.5 million). In the present claim, ATI seeks only the second adjustment regarding the Absecon Center. ATI alleges that Resources’ failed to promptly open and operate the Absecon Center and failed to adjust the purchase price accordingly, and MR, Resources’ guarantor, also is liable.

II. **Discussion**

A. **Motion to Dismiss Standard**

A motion to dismiss brought under Rule 12(b)(6) should be granted where the moving party has shown that “no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1983) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Court must take all allegations set forth the complaint as true and liberally give the plaintiff the benefit of all inferences that may be drawn from the complaint. See, e.g., Lake v. Arnold, 112 F.3d 682, 684 (3d Cir. 1997) (citing D.R. v. Middle Bucks Area Voc. Tech. School, 972 F.2d 1364, 1367 (3d Cir. 1992)). The issue for the Court is whether the plaintiff would be entitled to relief under any set of facts set forth in the complaint, not whether the plaintiff will ultimately prevail. Hishon, 467 U.S. at 73. The Court may examine all factual allegations set forth in the complaint as well as any exhibits attached to the complaint. See Fed. R. Civ. P. 10(c) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”); see also Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990)). Accordingly, the Court not only may consider the complaint but is free to examine and interpret the Agreement as a matter of law.

B. Breach of Contract

Defendants urge the Court to dismiss ATI's breach of contract claim because ATI can prove no set of facts establishing that Defendants breached a contract. Defendants argue that the plain meaning of the contract did not require them to open the Absecon Center, but rather required payment only in the event that the Center be opened. ATI maintains the Agreement, particularly section 1.3(b)(ii), does not provide an option or choice to Resources or MR as to whether to open the center.

Under Pennsylvania law, when interpreting a contract, "the court's paramount goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." Bethlehem Steel Corp. v. Matx, Inc., 703 A.2d 39, 42 (Pa. Super. Ct. 1997). The Court must adopt an interpretation of the contract that ascribes the most reasonable, probable, and natural conduct to the parties. Village Beer & Beverage, Inc. v. Vernon Fox & Co., 475 A.2d 117, 123 (Pa. Super. Ct. 1984). In so doing the Court must examine the entire agreement and "all writings that are part of the same transaction." Restatement (Second) of Contracts § 202(2), quoted in Williams v. Metzler, 132 F.3d 937, 947 (3d Cir. 1997). As a corollary rule, an "ambiguous subsidiary contractual provision must be given an interpretation consistent with the dominant purpose of the contract." Barco Urban Renewal Corp. v. Housing Auth., 674 F.2d 1001, 1009 (3d Cir. 1980). The Third Circuit recently clarified the difference between ambiguous and unambiguous contracts as follows:

A contract will be found ambiguous "if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which

from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.”

Duquesne Light Co. v. Westinghouse Elec. Co., 66 F.3d 604, 614 (3d Cir. 1995) (quoting Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d 17, 21-22 (Pa. Super. Ct. 1995).

The Court, after examining the complaint and the Agreement and finding more than one reasonable interpretation of section 1.3(b)(ii) of the Agreement, cannot conclude as a matter of law that Resources had no duty to open the Absecon Center. Section 1.3(b)(ii) of the Agreement, quoted in full above, requires Resources to pay to ATI the second adjustment twelve months “following the date on which the Absecon Center becomes fully operational and continuously open to the public for the performance of diagnostic imaging services.” This provision of the Agreement, considered in conjunction with the language of the entire contract and the overall purpose of the agreement, may lend itself to the interpretation that Resources had a duty to open the Absecon Center. The ambiguity regarding the existence of this duty creates the possibility that ATI could recover damages for Resources breach of contract. Once the court examines the contract and “an ambiguity arises, the inquiry is at an end.” Cf. American Original Corp. v. Legend, Inc., 652 F. Supp. 962, 966-67 (D. Del. 1986) (applying Delaware law); see also USX v. Penn Central Corp., 130 F.3d 562, 566 (3d Cir. 1997) (applying Pennsylvania law) (finding that the issue of whether a contract provision is ambiguous is a question for the court, while the interpretation of the terms is a question for the factfinder). Therefore, Defendants’ motion is denied. The Court will reserve consideration of the applicability of the parol evidence rule and the existence of conditions precedent for a more appropriate time.

C. **Breach of Covenant of Good Faith**

Defendants argue the breach of the covenant of good faith should also be dismissed because Pennsylvania does not recognize a cause of action in tort for breach of a duty of good faith separate and apart from a breach of contract claim. The Defendants further argue the covenant of good faith is not implied when the parties have negotiated at arms-length. The Court, however, rejects these arguments.

The duty of good faith requires “[h]onesty in fact in the conduct or transaction concerned.” 13 Pa. Cons. Stat. Ann. § 1201 (West 1999). Examples of bad faith conduct include, but are not limited to, “evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance.” Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992) (citing Restatement (Second) of Contracts § 205(d)). The duty of good faith is implied only absent express terms in the contract relating to the particular issue. USX Corp. v. Prime Leasing Inc., 988 F.2d 433, 438 (3d Cir. 1993). The Agreement in this case does not specifically address any duty of good faith; therefore, the duty of good faith could be implied if Resources and MR prevail in ATI’s breach of contract claim.

Defendants correctly note that Pennsylvania courts have recognized that, if a plaintiff is able to recover for breach of contract or another established cause of action, “[t]here is no need in such cases to create a separate tort for breach of a duty of good faith.” Parkway Garage, Inc. v. City of Phila., 5 F.3d 685, 701 (3d Cir. 1993) (quoting Creeger Brick & Building Supply Inc. v. Mid-State Bank and Trust Co., 560 A.2d 151, 153-54 (Pa. Super. Ct. 1989)). The existence of another possible ground for recovery is not dispositive, however. The Court’s denial of

Defendants' motion to dismiss the breach of contract claim does not mean ATI will prevail at trial. It therefore would be premature to dismiss the breach of the duty of good faith claim on this 12(b)(6) motion on the ground that ATI has an alternative cause of action.

Defendants also argue the nature of contractual relationship, specifically the arms-length negotiation for the sale of ATI's assets, precludes implication of the duty of good faith.

Pennsylvania courts have recognized the duty of good faith "only in limited circumstances," particularly situations in which the parties have a confidential or fiduciary relationship.

Commonwealth v. E-Z Parks, Inc., 620 A.2d 712, 717 (Pa. Commw. Ct. 1993). A "[c]onfidential relation is not confined to any specific association of the parties; it is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms. . . ." Kees v. Green, 75 A.2d 602, 605 (Pa. 1950) (quoting Leedom v. Palmer, 117 A. 410, 411, 412 (Pa. 1922)). The determination of whether a confidential relationship exists may be a question of law in limited situations, but is generally a question of fact to be established by a jury. See Rebidas v. Murasko, 677 A.2d 331, 334 (Pa. Super. Ct. 1996); contra Biddle v. Johnsonbaugh, 664 A.2d 159, 161 (Pa. Super. Ct. 1995) (declining to determine as a matter of law whether confidential relationship exists beyond relationships "between a trustee and cestui que trust, guardian and ward, attorney and client, and principal and agent"). At this point in the proceedings the nature of the parties' relationship is unclear, and the Court accordingly will defer judgment until the record is more fully developed. Defendants' motion for this claim is denied without prejudice.

D. Intentional Interference With Contract

Defendants also ask the Court to dismiss ATI's claim against MR for intentional

interference with contract, asserting that “[b]ecause plaintiff fails to plead that a ‘contract’ has been interfered with or breached, plaintiff’s claim should be dismissed.” (Defs.’ Mot. to Dismiss at 18.) This argument is without merit because the Complaint alleges both a breach and an interference of contract. Paragraphs seven through twenty-two, as discussed in Part III(A), allege a breach of contract. Paragraphs thirty-three through thirty-five allege an interference with contract. The complaint states that MR “determined, directed, and/or caused Resources not to open or operate the Center,” “intentionally failed to provide” funding to make opening the Center possible, and “knew that the failure to open the Center would operate to frustrate the intention of the parties [and] would constitute a breach of Resources’ obligations.” (Compl. ¶¶ 33-35.) “Interfere” was not specifically used in the Complaint, but can be inferred from these allegations.

MR alternatively argues the interference claim should be dismissed because ATI has failed to allege that MR’s conduct was justified. The determination of whether MR was justified in the conduct alleged, however, is something to be addressed during discovery. It is not necessary for ATI to plead specific facts on which its case relies; ATI’s complaint need only set forth a statement of facts from which Defendants can base a responsive pleading. See, e.g., Conley, 355 U.S. at 47-48. The facts alleged in ATI’s complaint, particularly Paragraph thirty-seven, and the inferences drawn therefrom demonstrate ATI may be entitled to relief for the intentional interference claim. Although ATI is correct that a court’s determination of a party’s justification requires an investigation of the actor’s motives, interests sought, and relations between the parties, Green v. Interstate United Management Service Corp., 748 F.2d 827, 831 (3d Cir. 1984), the Court finds the complaint adequately sets forth a claim upon which relief can

be granted.

E. **Fraud and Misrepresentation**

Defendants next urge the Court to dismiss the fraud and misrepresentation claim because the parol evidence rule bars admission of ATI's evidence of oral representations on which ATI bases its fraud claim. Defendants also argue that ATI has failed to plead facts sufficient under Federal Rule of Civil Procedure 9(b) to sustain its fraud claim. The elements of fraudulent misrepresentation are: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the representation; and (5) damage to the recipient as a proximate result. See Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs., 951 F.2d 1399, 1409 (3d Cir. 1991).

The Complaint alleges Defendants' oral representations, on which ATI relied, induced ATI to enter the Agreement. (Compl. ¶¶ 44-50.) At trial, Plaintiff must prove by clear and convincing evidence each element of the fraud and misrepresentation claim, which may be a difficult hurdle to clear given the possible application of the parol evidence rule. See, e.g., 1726 Cherry Street Partnership v. Bell Atlantic Properties, Inc., 653 A.2d 663, 664, 666 (Pa. Super. Ct. 1995). As discussed in Part III(A) of this opinion, however, resolution of whether the parol evidence rule applies must await greater development of the record.

Defendants alternatively argue the fraud and misrepresentation claim should be dismissed because the Rule 9(b) requirements have not been satisfied, specifically because the speaker and recipient of the alleged misrepresentations were not identified in the complaint. Rule 9(b)

requires “plaintiffs to plead with particularity the ‘circumstances’ of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged.” Seville Indus. Mach. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). The claim must be “pleaded with greater particularity than other pleadings.” Saporito v. Combustion Eng’g Inc., 843 F.2d 666, 675 (3d Cir. 1988).

In support of their motion, Defendants rely on several decisions in which plaintiffs failed to allege facts sufficient for a fraud claim because the pleading omitted the identity of the speaker or recipient of the alleged misrepresentation. In those cases, however, the complaints were insufficient as a whole; the failure to identify the speakers of the misrepresentations, while contributing to the insufficiency of the pleadings, was not the sole factor in the courts’ conclusions to dismiss the claim. See, e.g., id. (finding the complaint indicated only the general content of the misrepresentations and reference to speaker, “defendants *and/or persons acting under their direction and control*,” and recipient, “*certain C-E employees other than plaintiffs*,” was insufficient) (emphasis in original); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209, 1220-21 (E.D. Pa. 1994) (finding the complaint did not satisfy Rule 9(b)’s particularity requirement because the alleged misrepresentations were made over a period of over twenty-seven years by a wide range of possible speakers); Ethanol Partners Accredited v. Weiner, Zuckerbrot, & Weiss, 635 F. Supp. 15, 22 (E.D. Pa. 1985) (finding the “shotgun” approach to plaintiff’s pleading, not stating the time, place, and manner of each alleged fraudulent statements or actions, was not sufficient to meet the Rule 9(b) requirements).

In the present case, although the speakers of the misrepresentations are not specifically identified in the Complaint, they may be identified from the signatures of Resources’ president

and MR's president and chief operating officer, both of which are on the Agreement. This is not a case in which the alleged representations were made by an incalculable number of Defendants' employees or over a period of decades. The Complaint gave Defendants notice of the claim without exposing them to "spurious charges of immoral and fraudulent behavior" and is therefore in accordance with the particularity requirement of Rule 9(b). See Seville, 742 F.2d at 791. The Court accordingly finds that ATI has alleged sufficient facts to withstand a motion to dismiss.

F. Punitive Damages

Finally, Defendants maintain ATI's claim for punitive damages should be dismissed because the damages are based on allegations of breach of the covenant of good faith, intentional interference with contract, and fraud and misrepresentation, claims which Defendants urge should be dismissed by the Court. Under Pennsylvania law, punitive damages are not recoverable under a breach of contract claim. See, e.g., AM/PM Franchise Ass'n v. Atlantic Richfield Co., 584 A.2d 915, 927 (Pa. 1990). Accordingly, ATI cannot base its punitive damage claim on the breach of covenant of good faith claim. See Creeger, 560 A.2d at 153 (stating the duty of good faith "arises under the law of contracts, not under the law of torts"). ATI has alleged, however, and the Court has not dismissed, tort claims for which punitive damages are permitted. See, e.g., Western Essex Corp. v. Casio, Inc., 674 F. Supp. 8, 9 (W.D. Pa. 1987) (denying motion to dismiss claim for punitive damages connected to tortious interference with contract claim); McClellan v. HMO of Pa., 604 A.2d 1053, 1060 (Pa. Super. Ct. 1992) (allowing punitive damage claim for alleged fraud and misrepresentation). Because the intentional interference with contract and fraud claims have not been dismissed, dismissal of the punitive damage claim would be inappropriate at this time. Contra Waye v. Commonwealth Bank, 846 F.

Supp. 321, 330 (M.D. Pa. 1994) (“If the cause of action for compensatory damages to which [the punitive damages] are linked is dismissed, the punitive damage claim must be dismissed as well.”).

An Order follows.

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

ATI CENTERS, INC	:	CIVIL ACTION
	:	
v.	:	
	:	
ATI RESOURCES, INC. and	:	
MEDICAL RESOURCES, INC.	:	NO. 99-CV-734

ORDER

AND NOW, this 2nd day of August, 1999, upon consideration of Defendant ATI Resources Incorporated's and Medical Resources Incorporated's Motion to Dismiss (Document No. 2), Plaintiff ATI's Response, ATI Resources Incorporated's and Medical Resources Incorporated's Reply, and ATI's Sur-Reply, it is hereby **ORDERED** Defendants' motion is **DENIED**.

BY THE COURT

JAMES MCGIRR KELLY, J.