

**THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

BILLY S. BROWNING, JR., individually )	
and as proprietor, owner and/or member of )	
B & BROWN, INC., ONEK, LLC, and )	
KORWIT, LLC, on behalf of himself and a )	
proposed class of those similarly situated, )	
Plaintiffs, )	C.A. No.: 09C-10-248 FSS
)	
v. )	
)	
DATA ACCESS SYSTEMS, INC. and )	
FIRST BANK OF DELAWARE, )	
Defendants. )	

Submitted: October 6, 2010  
Decided: January 31, 2011

**MEMORANDUM OPINION AND ORDER**

**Defendant’s Motion to Dismiss for Failure to State a Claim –  
*GRANTED.***

This case, involving claims of conversion and tortious interference, began when First Bank froze Data Access Systems’ account to reimburse itself for fines it incurred on Data’s behalf. That had a ripple effect on Data’s business of facilitating automatic teller machine (ATM) transactions. With its account frozen,

Data could not use that money to pay what it owed to Plaintiffs, a class of owners/operators of ATMs.

In short, Plaintiffs had no business with First Bank. The money in Data's account was deposited by other banks – not by Plaintiffs. Nor did Plaintiffs receive money directly from Data's account at First Bank. Rather, they were paid by another bank, Great Northern Bank. So, but for First Bank's conduct, Data probably would have transferred the money to Great Northern Bank to pay Plaintiffs. Even so, the money that First Bank froze was not Plaintiffs and Plaintiffs did not expect First Bank to pay them either.

Plaintiffs sued Data and First Bank, alleging: the bank “converted the money it held for” Plaintiffs; the bank breached “a duty of care to protect and pay money owned by and owed to” Plaintiffs; the bank tortiously interfered with Plaintiffs' business, and as third party beneficiaries on a contract First Bank breached. Now, First Bank moves to dismiss all claims.

The motion to dismiss is about whether Plaintiffs stated a claim against First Bank. As explained below, the conversion claim is dismissed because the money was not Plaintiffs and the bank was not holding the money for them. The money, at best, was a source of funds that Data could have used to settle with Plaintiffs. The negligence claim is dismissed because First Bank owed no duty to

Plaintiffs. The breach of contract claim is dismissed because it is too vague. Finally, the tortious interference claims are dismissed because Plaintiffs have not pleaded any facts suggesting First Bank was even aware they existed.

## I.

From the pleadings, it appears Plaintiffs run gas stations, convenience stores, and the like. They provide ATMs for their customers. Data developed software used by Plaintiffs' ATMs. When a cardholder used Plaintiffs' ATMs, Data transmitted the request to the cardholder's bank. If approved, the cardholder's bank electronically deposited money into Data's account at First Bank, the ATM disbursed the money, and Plaintiffs received part of a surcharge the cardholder paid to use the ATM.

The ATMs were connected to banks by an electronic network. Visa cards operated on the Visa network, MasterCard cards operated on the MasterCard network, and so on. Data had a Master Data Processing Agreement with a services provider, TranSend (later TS Assets). TranSend had a contract with First Bank and arranged for First Bank to sponsor Data to operate on the networks.

As mentioned, Plaintiffs had no interaction with First Bank. Eventually, Data would transfer money from First Bank to Great Northern Bank. From there, Data

instructed Great Northern to distribute an amount to each Plaintiff. Simply put, Visa debited the cardholder's account and funneled that money to First Bank. Data then directed First Bank to transfer money to Great Northern. Finally, Data told Great Northern how to disperse the money to Plaintiffs, as their reimbursement. This process continued for several years with Plaintiffs being paid by Great Northern out of funds transferred from Data's account at First Bank.

Things fell apart. Data violated network protocols, leading to fees imposed on its sponsor, First Bank. First Bank ended its sponsorship of Data, and it refused to transfer money remaining in Data's account. Instead, First Bank tapped Data's account to pay the fees.

## **II.**

This is Plaintiffs' third amended complaint. Plaintiffs previously alleged conversion and negligence against First Bank. Now, they also allege a third party beneficiary breach of contract claim, and that First Bank tortiously interfered with a contract and with prospective economic advantage. At oral argument, the court did not grant First Bank's motion to dismiss the second complaint or Plaintiffs' third motion to amend. Instead, the court instructed First Bank to brief its opposition to Plaintiffs' third motion to amend, as if it were a motion to dismiss. That avoided duplicative rulings on First Bank's motions to dismiss.

A motion to dismiss for failure to state a claim tests the sufficiency of Plaintiffs' complaint. All well-pleaded allegations are accepted as true.<sup>1</sup> To survive, Plaintiffs' allegations need to put First Bank on notice of the claims and set out facts from which Plaintiffs could recover.<sup>2</sup> The court will not dismiss a claim unless no circumstances exist under which Plaintiffs could recover.<sup>3</sup> "Where allegations are merely conclusory, however ( i.e., without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss.<sup>4</sup> Finally, in some circumstances, the court can consider documents that are pleaded in the complaint, without converting the motion to dismiss into one for summary judgment.<sup>5</sup>

### **III.**

#### **A. Conversion**

Plaintiffs' conversion claim will be dismissed without a conflict of law analysis. The parties contend that Pennsylvania law and Delaware law conflict over whether money can be converted. The court does not have to address that issue because Plaintiffs have not stated a claim under either State's law that the money was

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<sup>1</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

<sup>2</sup> *Id.*; *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406 (Del. 1995)

<sup>3</sup> *Ramuno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

<sup>4</sup> *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).

<sup>5</sup> *In re General Motors (Hughes) Shareholder Litigation*, 897 A.2d 162, 169 (Del. 2006).

theirs to be converted. In Delaware and Pennsylvania, conversion is the wrongful exercise of control over another's personal property.<sup>6</sup> Conversion requires a property interest in the converted property, right of possession, and damages.<sup>7</sup>

As First Bank points out, "Plaintiffs simply have no claim to money in the accounts at issue and First Bank had no legal duty to pay anything to Plaintiffs from those accounts." Just because Data would have probably transferred that money to another bank, which then would have paid Plaintiffs, does not mean Plaintiffs had a protectable property interest in the money frozen by First Bank. All they had was an expectation, on their part, that Data would use the funds indirectly to settle with them. Therefore, Plaintiffs' claim is dismissed because it fails to plead any facts that the money frozen by First Bank was theirs.

### **B. Negligence**

Plaintiffs' negligence claim is dismissed because it fails to identify a duty First Bank owed Plaintiffs as Data Access's creditors. Negligence claims must be pleaded with greater particularity than other claims.<sup>8</sup> Among other things, Plaintiffs must allege that First Bank owed them a specific duty of care.

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<sup>6</sup> *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 889 (Del. Ch. April 15, 2009) *citing* *Drug, Inc. v. Hunt*, 168 A 87, 93 (Del. 1933); *Lanning v. West*, 803 A.2d 753 (Penn. 2002) *citing* *Pioneer Comm. Funding Corp. v. Am. Fin. Mortg. Corp.*, 797 A.2d 269, 279-80 (Penn. 2002).

<sup>7</sup> *Id.*

<sup>8</sup> Super. Ct. Civ. R. 9(b).

Plaintiffs argue at length that the economic loss doctrine should not preclude them from recovering in tort for First Bank’s alleged negligent performance of its contract with Data. Plaintiffs first argue “it is sound policy to allow pleading in the alternative under Rule 8 . . . .” Failing that, Plaintiffs argue First Bank assumed a duty under common law or owed a duty under 6 *Del. C.* §4A-302.

Those duties are, at best, ones allegedly owed Data – not Plaintiffs. Plaintiffs’ economic loss arguments are secondary to identifying the specific duty of care First Bank owed Plaintiffs as Data’s creditors. Plaintiffs have failed to do that. Therefore, Plaintiffs’ negligence claim is dismissed.

### **C. Breach of Contract**

Plaintiffs’ third party beneficiary claim is too vague to put First Bank on notice. In the complaint, Plaintiffs allege, “First Bank entered into a contract in which [Plaintiffs were] intended third party beneficiaries, as indicated in said contract.” In their brief, Plaintiffs say their “cause of action for third party beneficiary of contract should [not] be dismissed [,] based on the lack of discovery thus far in the action.” Then, “[Plaintiffs] respectfully request the Court deny defendants’ motion to dismiss as to plaintiffs’ Third Party Beneficiary of Contract claim so that plaintiff [sic] may engage in discovery . . . .”

As mentioned, Plaintiffs must plead, at a minimum, enough facts to put First Bank on notice. As First Bank points out, the complaint “does not identify any counter-party to the alleged contract, any reason that First Bank . . . intended to benefit the Plaintiffs, any pre-existing obligation that could have driven such an intent, or any contract to which such a benefit could be material.”

In a case like this, which involves multiple parties’ business dealings over several years, Plaintiffs’ complaint is too vague. Nowhere do Plaintiffs’ provide more detail. Instead, they ask for discovery. Plaintiffs may not use discovery to search for new causes of action.<sup>9</sup> Thus, to the extent Plaintiffs seek to make a claim through discovery, the claim is dismissed. Otherwise, the claim is dismissed because the complaint is too vague to put First Bank on notice.

#### **D. Tortious Interference**

Plaintiffs have not pleaded facts showing First Bank was aware Plaintiffs existed, much less intentionally interfered with their business. The tortious interference with contract claim requires allegations there was “(1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in

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<sup>9</sup> *Dann v. Chrysler Corp.*, 166 A.2d 431 (Del. Ch. 1960).

causing the breach of such contract (4) without justification (5) which causes injury.”<sup>10</sup>

Plaintiffs’ complaint declares First Bank “knew of the contract obligations of plaintiffs.” That conclusory allegation is followed in Plaintiffs’ brief by a statement that various documents “point[] to the presence of contracts between [Data] and [Plaintiffs].” Then, Plaintiffs predict that “[i]f discovery is permitted to proceed, it is expected that most, if not all, of the merchants injured by [First Bank’s] actions entered into similar, if not identical merchant processing agreements.”

Plaintiffs’ documents hardly speak for themselves. They are a redacted Master Processing Agreement and a blank check. Even if the documents are what Plaintiffs allege them to be, Plaintiffs still have not pleaded facts that show First Bank intentionally interfered with them. This is particularly true when Plaintiffs do not allege facts to show First Bank was aware of Plaintiffs. After construing all well-pleaded allegations in Plaintiffs’ favor, the complaint fails to state a claim for tortious interference.

Finally, Plaintiffs’ claim that First Bank caused Plaintiffs to “lose and [to] have lost opportunities and expectancies to enter into . . . business relationships . . . .” If Plaintiffs expect to survive dismissal they have to plead more than just

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<sup>10</sup> *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1266 (Del. 2004) *citing* *Goldman v. Pogo.com, Inc.*, 2002 WL 1358760 at \*8 (Del. Ch. June 14, 2002).

causation and damages. Plaintiffs must also allege that First Bank intentionally interfered with the business opportunities.<sup>11</sup> Again, Plaintiffs do not plead facts showing that First Bank knew of Plaintiffs or their business opportunities. Without that, Plaintiffs fail to state a claim that First Bank tortiously interfered with a prospective business opportunity. Therefore, Plaintiffs' tortious interference with prospective economic advantage claim is dismissed.

#### IV.

For the foregoing reasons, First Bank's motion to dismiss is **GRANTED**.

**IT IS SO ORDERED.**

/s/ Fred S. Silverman

Judge

cc: Prothonotary  
Philip T. Edwards, Esquire  
Edmond D. Johnson, Esquire

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<sup>11</sup> See *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151 (Del. 1981).