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

ODYSSEY WASTE SERVICES, LLC, Plaintiff,	:	CIVIL ACTION
v.	:	
BFI WASTE SYSTEMS OF NORTH AMERICA, INC., TAC TRANSPORT, LLC, and SAMUEL RINGGOLD, Defendants.	:	NO. 05-cv-1929

MEMORANDUM and ORDER

November 17, 2005

PRATTER, DISTRICT JUDGE

I. INTRODUCTION

Odyssey Waste Services LLC ("Odyssey") believes it was wrongfully replaced as a waste hauling subcontractor. Among various claims, Odyssey contends that its replacement, TAC Transport, LLC ("TAC"), actionably interfered with Odyssey's business relationships. Specifically, Count IV of Odyssey's Complaint alleges tortious interference by TAC with Odyssey's economic and business relationships (alternatively referred to as "tortious interference with actual and prospective business relationships" and "intentional interference with economic and business relationships"). TAC has filed a Rule 12(b)(6) Motion to Dismiss Count IV of the Complaint. TAC argues that Odyssey's claim against TAC should be dismissed because the facts, as pleaded by Odyssey, do not support a claim for tortious interference with contractual relations. Odyssey responded in opposition to the motion and TAC submitted a reply. Oral

argument on the motion was held on October 7, 2005. For the reasons stated more fully below, TAC's Motion to Dismiss is denied.

II. BACKGROUND

A. Factual Background

The Complaint outlines the following factual background. Odyssey is an African-American-owned waste hauling company with its principal place of business in Philadelphia. Defendant Allied/BFI Waste Systems of North America, Inc. ("BFI") is a Delaware corporation. TAC is a waste hauling company based out of Washington, D.C., and Defendant Sam Ringgold ("Ringgold") is a private business consultant. BFI's Solid Waste Disposal Agreement with the City of Philadelphia requires that at least 25% of BFI's annual contract revenues from the City contract be allocated to minority owned-subcontractors. In order to meet the terms of this agreement with the City, BFI entered into a Waste Transportation Agreement (the "Agreement") with Odyssey on June 17, 1998, pursuant to which Odyssey was to provide transportation services to BFI for the transport of Philadelphia municipal solid waste to BFI's Conestoga landfill disposal site in New Morgan, Pennsylvania. According to Odyssey, the Agreement entitled Odyssey to haul all of the City's municipal solid waste provided to BFI. The Agreement was for an initial term of four years, with three 1-year options to renew. According to Odyssey, at the time this claim arose, the parties were in the final year of the Agreement.

From 1998 to 2003 Odyssey and BFI worked together under the Agreement without significant problems. During this time, Odyssey's annual revenues increased by over $7 million,

a significant portion of which was derived from the Agreement. In 2003, BFI sought a permit from the Pennsylvania Department of Environmental Protection ("PDEP") to expand its disposal capacity at the Conestoga landfill by 134 acres after being fined by PDEP for various environmental violations. In order to increase its chances of obtaining the permit, BFI agreed to reduce the volume of waste it accepted at the landfill, and did so by curtailing its hours of operation and by reducing the number of trucks that could enter the landfill at a given time. Odyssey's Complaint states it was never informed of this ancillary agreement between PDEP and BFI.

Odyssey alleges that by the beginning of 2004, BFI's agreement with PDEP had a negative impact on the BFI-Odyssey relationship. BFI's agreement with PDEP reduced the number of loads Odyssey could haul to the landfill by 30 to 40%, while increasing Odyssey's wait time at the landfill by over 300%, thereby diminishing Odyssey's productivity. Odyssey claims that this alleged reduction in hauling efficiency led to a reduction in Odyssey's monthly invoicing to BFI by over 60%, which in turn led to a decline in Odyssey revenue of $2,240,000 from 2003 to 2004, resulting in Odyssey suffering operating losses of $648,000. Odyssey further alleges that BFI's agreement with PDEP led to a backlog and accumulation of solid waste at various transfer stations in the City, which, in turn, resulted in numerous violations with PDEP.

Odyssey further alleges that BFI attempted to alleviate its own problems by engaging in a deliberate course of conduct that breached several provisions of the Agreement. The course of

conduct by BFI, as alleged by Odyssey, was for BFI to conspire with its consultant Ringgold to first identify and then to have the City of Philadelphia certify another minority hauling company to replace Odyssey before the expiration of the agreement. In 2003 and 2004, Odyssey alleges that BFI contracted with several non-minority hauling companies to transport the waste that BFI was obligated to provide to Odyssey under the Agreement, and throughout 2004 refused to provide Odyssey priority in loading at its transfer stations and unloading at the landfill. Odyssey further alleges that in December 2004, BFI, with the active participation of Ringgold and TAC, sought permission from the City to breach its agreement with Odyssey. According to the Complaint, since early 2005, TAC has been hauling the waste that Odyssey is entitled to haul under the Agreement, and Odyssey further alleges that TAC has been interfering with Odyssey's operations by attempting to recruit Odyssey drivers to work for TAC.

Beginning in June, 2004 a series of letters were exchanged between Odyssey and BFI wherein Odyssey complained about BFI's numerous breaches of the Agreement. Odyssey alleges that despite these notices of default, BFI failed to comply with the Agreement, and, on December 21, 2004, Odyssey filed a complaint with the Minority Business Enterprise Council in the City of Philadelphia. Copies of these letters are attached to the Complaint.

When BFI failed to respond to Odyssey's numerous letters and requests to comply with the Agreement, Odyssey brought the instant action against BFI for breach of contract and intentional interference with business and economic relations, for allegedly retaining Odyssey's subcontractors for itself. Odyssey's complaint also charges Ringgold and TAC with intentional

interference with economic and business relations for tortiously interfering with the Agreement between Odyssey and BFI. Specifically, Odyssey alleges that Ringgold recruited TAC as a replacement for Odyssey under the agreement and entered into a contract with TAC to exploit Odyssey's business opportunities. Odyssey further alleges that, *inter alia*, TAC conspired with Ringgold and BFI to develop a strategy to violate Odyssey's agreement with BFI, encouraged employees of Odyssey to begin working for TAC, took actions to divert revenue that Odyssey was legally entitled to, and conspired with Ringgold to exploit Odyssey's prospective business opportunities.

B. Procedural Background

Odyssey brought this action in the Court of Common Pleas of Philadelphia County against BFI, TAC and Ringgold, alleging the breach of contract and intentional interference with economic and business relationships against BFI (Counts I and II), intentional interference with economic and business relationships against Ringgold (Count III), and intentional interference with economic and business relationships against TAC (Count VI). Defendants BFI, TAC and Ringgold timely filed a Notice of Removal pursuant to 28 U.S.C. §§ 1446 and 1452, and Rule 9027 of the Federal Rules of Bankruptcy Procedure. (Docket No. 1).[1] Removal is proper under 28 U.S.C. §1441(a) because complete diversity exists between the parties. Odyssey is a citizen of Pennsylvania. BFI is a citizen of Delaware, its state of incorporation, and of Arizona, where it

[1]Before commencing the instant suit, Odyssey filed a petition for relief under Chapter 11 of Title 11 of United States Code, 11 U.S.C. §101-1330 in the United States Bankruptcy Court for the Eastern District of Pennsylvania, Case No. 05-13719.

has its principal place of business. TAC is a citizen of Washington, D.C., where it is both incorporated and has its principal place of business. Ringgold is domiciled in New Jersey and thus a citizen of that state. The amount in controversy requirement of 28 U.S.C. §1332 has been met. Removal is also proper under 28 U.S.C. §1452(a) and 28 U.S.C. §1334(b), on the basis of bankruptcy jurisdiction. Venue is proper in this judicial district pursuant to 28 U.S.C. §1441(a).

On June 17, 2005 BFI and Ringgold filed an Answer with affirmative defenses, along with a single-count counterclaim against Odyssey alleging breach of contract (Docket No. 6). On the same day, TAC filed the instant Motion to Dismiss. (Docket No. 5).

III. DISCUSSION

A. Standard of Review

To decide a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

B. Tortious Interference with Existing and Prospective Contracts

For tortious interference with contract claims, Pennsylvania has specifically adopted the

Restatement (Second) of Torts § 766, which provides that "[o]ne who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." See Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1183 (Pa. 1978). Courts interpreting this standard have set forth the following elements that a plaintiff must prove in order to prevail on a cause of action for tortious interference with an existing or prospective contractual relation -- "(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (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 damage as a result of the defendant's conduct." Crivelli v. General Motors Corp., 215 F.3d 386, 344 (3d Cir. 2000); see also, Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

1. Existence of a Contract

Essential to the right of recovery under a tortious interference with contract claim is the existence of a contractual relationship between the plaintiff and a third person other than the defendant. Daniel Adams Associates, Inc. v. Rimbach Publishing, Inc., 519 A.2d 997, 1000 (Pa. Super. 1987). The Pennsylvania Supreme Court has defined a "prospective contractual relation" as "something less than a contractual right, but something more than mere hope." Synthes v.

Globus Medical, Inc., 2005 WL 2233441, *8 (E.D. Pa. Sept. 14, 2005) (quoting Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979)). A plaintiff must establish a reasonable probability that but for the wrongful acts of the defendant, a contractual relationship would have been established. Thompson, 412 A.2d at 417 (citing Myers v. Arcadio, Inc., 180 A.2d 329, 331 (N.J. Super. 1962)).

TAC challenges the existence of a contract between BFI and Odyssey. According to the Complaint, BFI contracted with TAC in 2005 to haul waste that BFI was otherwise obligated to provide to Odyssey under the Agreement. Odyssey further alleges that prior to that point TAC conspired with Ringgold and BFI to develop a strategy to violate Odyssey's Agreement with BFI. The Complaint alleges that in December 2004, with the active participation of Ringgold and TAC, BFI sought permission from the City of Philadelphia to breach its Agreement with Odyssey.

In its Motion, TAC argues that the City granted BFI's request to terminate its contract with Odyssey and substitute TAC as the minority participation partner under the BFI-City Waste Disposal Agreement, thereby eviscerating the BFI-Odyssey contract, and causing Odyssey's tortious interference with contract claim to fail. Def's. Mot. at 7. Odyssey argues that TAC's argument is an unsupported allegation outside the four corners of the Complaint, and should not be considered in evaluating TAC's motion to dismiss. Pl's. Resp. at 6. In Reply, TAC attached copy of a March 24, 2005 letter from Wendy Stanton, Deputy Director of the Minority Business Enterprise Council of the City of Philadelphia to BFI, which purports to state that Ms. Stanton

approved of BFI's request to substitute TAC for Odyssey under BFI's Waste Disposal Agreement with the City of Philadelphia. Reply, Exhibit "A". Defendant TAC urges the Court to take judicial notice of the contents of the letter under Rule 201 of the Federal Rules of Evidence. Odyssey disputes the propriety of the Court doing so.

Rule 201(b) provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). In deciding a motion to dismiss, courts can take judicial notice of matters of "public record." City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998). Courts have defined "public record," for purposes of what may be considered on a motion to dismiss, to include "criminal case dispositions such as convictions or mistrials, letter decisions of government agencies, and published reports of administrative bodies." Pension Ben. Guar. Corp. v. White Consol. Industries, Inc., 998 F.2d 1192, 1197 (3d Cir. 1993). See also, Pittsburgh, 147 F. 2d at 259 (taking judicial notice of documents pertaining to regulatory proceedings); New Delview Place Associates v. Delaware Sav. Bank, 1992 WL 346281 at *5 (E.D. Pa. Nov. 10, 1992) (finding that a foreclosure proceeding is a public record of which judicial notice could be taken).

The letter from Ms. Stanton to BFI is not the type of public record of which this Court can or will take judicial notice. It is neither a published report nor the record of an official proceeding, and it is not a "letter decision" within the meaning of the term. To the extent

determinable from the letter's vague language, in this context, it appears that the City is acting more akin to a private actor with regard to the Agreement, rather than as a government decision-maker. Furthermore, Ms. Stanton's letter speaks only to the BFI-City contract, and not necessarily the BFI-Odyssey contract. Odyssey's Complaint alleges that in 2004 BFI and Ringgold, along with TAC, sought permission from the City of Philadelphia to breach the Odyssey-BFI agreement, and that TAC conspired with Ringgold to develop a strategy to violate Odyssey's Agreement with BFI. Here, pursuant to the corollary obligations of Fed.R.Civ.P. 8 and 12(b), and from the plain language of the Complaint, an inference can be drawn that the alleged conspiring that occurred as between Ringgold, TAC and BFI could have resulted in BFI's attempt to receive the City's permission to breach the Agreement. Moreover, such a relationship, if found to be true, is sufficient action by TAC to constitute an attempt by TAC to harm Odyssey's existing relation with BFI, which, in turn, are required elements for establishing tortious interference. The Stanton letter answers none of those issues in any fashion, inappropriateness for judicial notice notwithstanding.

2. Purposeful Action Intended to Harm Existing Contract

Purposeful action intended to harm an existing contract can exist where the "the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action." Restatement (Second) Torts § 766, cmt. j. Odyssey alleges that (1) TAC conspired with Ringgold and BFI to develop a strategy to allow BFI to get out of its contract with Odyssey, (2) entered into a contract

with BFI in 2005 to haul the waste Odyssey was entitled to haul under the agreement, and (3) TAC attempted to recruit Odyssey's employees by spreading rumors about Odyssey's stability. Taking these allegations as true, as the Court must at this stage, an inference can be drawn about TAC's knowledge of Odyssey's existing contracts with BFI and other employees, and leads to the logical conclusion that TAC knew or should have known that its actions would be certain, or substantially certain, to interfere with Odyssey's relations and contracts. See, e.g., Airline Terminal Services, Inc v. Lehigh-Northampton Airport Authority, 1996 WL 460059, *3 (E.D. Pa. Aug. 1, 1996) (holding that plaintiff sufficiently alleged the necessary elements for tortious interference so as to defeat defendant's motion to dismiss, where plaintiff alleged defendant contracted with third party while knowing of third-party's exclusivity contract with plaintiff); see also, Total Care Systems, Inc. v. Coons, 860 F. Supp. 236, 241 (E.D. Pa. 1994) (holding that plaintiff's allegations were sufficient to create a reasonable inference that tortfeaser conduct was substantially certain to interfere with plaintiff's contractual relations, where plaintiff alleged tortfeaser made disparaging remarks about plaintiff, attempted to intimidate employer into discharging plaintiff, and communicated incomplete and misleading information about plaintiff).

3. Absence of Privilege or Justification

TAC, in its Motion, also challenges Odyssey's Complaint on the third element of the test for tortious interference -- the absence of privilege or justification on the part of the defendant to interfere with or harm the existing or perspective relation. Specifically, TAC argues that Ringgold was acting as the corporate agent of BFI and thus can not be considered a third

party to support Odyssey's tortious interference claim. Under Pennsylvania law, "[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract," so long as the agent is acting within the scope of its authority. CGB Occupational Therapy, Inc. v. RHA Health Services Inc., 357 F.3d 375, 385 (3d Cir. 2004). Under Pennsylvania law, a principal-agency relationship is created by "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Basile v. H&R Block, Inc., 761 A.2d 1115, 1120 (Pa. 2000). Without concluding whether Ringgold is or is not an agent for this purpose, the argument is of no moment as to TAC's Motion.

Whether Ringgold was acting as an agent of BFI is irrelevant to TAC's exposure in the instant matter, inasmuch as nowhere in the Complaint is this fact alleged by Odyssey. Rather, Odyssey alleges that TAC, BFI and Ringgold collectively conspired to develop a strategy to violate the Odyssey-BFI agreement. Essential to recovery on the theory of tortious interference with contract is the existence of three parties: (1) a tortfeaser who intentionally interferes with a contract between (2) the plaintiff and (3) a third person. Maier v. Maretti, 671 A.2d 701, 707 (Pa. Super. 1995). Odyssey has at least minimally alleged in the Complaint that such circumstances exist.

Even if, after discovery, it becomes evident that Ringgold was in fact acting as an agent of BFI, to the effect that BFI and Ringgold can be considered to have been acting as a singular entity, such a finding would not dispose of Odyssey's primary claim against TAC. The three

necessary *prima facie* parties and allegations would still exist -- "BFI/Ringgold" and Odyssey, as the parties to the Agreement, and TAC as the tortfeaser who allegedly interfered with the Agreement. On the face of the Complaint, this inference can be drawn from Odyssey's allegations.

Nonetheless, in support of this agency argument, TAC cites two cases from the Eastern District of Pennsylvania, Avins v. Moll, 610 F. Supp. 308 (E.D. Pa. 1984), and Wells v. Thomas, 569 F. Supp. 426 (E.D. Pa. 1984). In Avins, the plaintiff was the founder of the Delaware Law School of Widener University who alleged he was wrongfully fired from his positions as Dean and faculty member. 610 F. Supp. at 312. Avins brought a tortious interference claim against many parties, including but not limited to, the President of Widener University, another Dean, and a trustee of the university. Id. at 318. The Avins court held that because the defendants were corporate officers and supervisory employees of the university and/or law school, they were agents of the institutions and could not as a matter of law be considered third parties who had tortiously interfered with the plaintiffs contract or business relations with the institutions. Id. The Avins facts are not remotely useful to understanding or evaluating the facts in the instant case. Moreover, the Avins decision is in any event distinguishable with regard to the instant matter and thus of little relevance to TAC's claim because, even if Ringgold can be considered an agent of BFI in this case (and akin to the corporate officers in Avins), such an agency relationship would not vitiate the argument that TAC may be considered the tortfeasing third party who allegedly interfered with both Odyssey's contract with BFI and Odyssey's relations

with its own employees. TAC does not in any way allege that TAC itself was acting as an agent of BFI.

TAC's other case citation, Wells v. Thomas involved a similar claim by a former employee of the Hospital of the University of Pennsylvania ("HUP") against HUP, the University of Pennsylvania and managerial employees of both institutions for tortious interference with contractual relations arising out of her termination as Director of Personnel for HUP. 569 F. Supp. 426, 428, 434 (E.D. Pa. 1984). The Wells court held that the plaintiff could not maintain a claim against the individual defendants because they were managerial employees acting in their official capacities, and thus could not be "third parties" for purposes of a tortious interference claim. Id. at 435. Like Avins, discussed *supra*, Wells is distinguishable from the instant matter, inasmuch as Odyssey was not an employee of BFI, but was a subcontractor. Likewise, there is no basis for considering TAC to be in any sort of agency relationship with BFI.

To determine whether an actor's conduct was improper or wrong, Pennsylvania courts follow the Restatement (Second) Torts § 767, which states that courts should look to the following factors: (1) nature of the actor's conduct; (2) actor's motive; (3) interest's of the plaintiff; (4) interests sought to be advanced by the actor; (5) proximity or remoteness of the actor's conduct to the interference; and (6) the relations between the parties." Adler, 393 A.2d at 1184. The determination as to whether a party's behavior was improper such that it constituted interference is based on the circumstances of each case and "a determination of propriety requires inquiry into the mental and moral character of the defendant's conduct." Big Apple BMW, Inc.

v. BMW of North America, Inc., 974 F.2d 1358, 1382 (3d Cir 1992). Proper conduct in this context is that which is "socially acceptable conduct that comports with the rules of the game which society has adopted." Id. at 1381. Odyssey argues that TAC's actions were taken with the purpose of interfering with Odyssey's existing and prospective business relations, a situation that courts have found sufficient to withstand a motion to dismiss. See Total Care Systems, 860 F. Supp. at 242 (holding that an allegation in the complaint that defendant had a knowing and purposeful intent to interfere with the contract was sufficient to meet Restatement (Second) § 767 standard of impropriety for purposes of motion to dismiss). Thus, Odyssey's allegations, if found to be true, could certainly lead to the conclusion that TAC's actions were improper and neither privileged nor justified, even if TAC had been recruited by BFI to replace Odyssey in the relevant contract. Therefore, because of the fact-intensive nature of this inquiry, this issue is one that will require at least some discovery to resolve.

4. Damages

To prevail on a claim of tortious interference, Odyssey will need to prove the occasioning of actual damage that occurred as a result of (a) TAC's interference with Odyssey's contract with BFI and (b) as between Odyssey and its driver employees. See Crivelli, 215 F.3d at 394. The Superior Court of Pennsylvania has stated that liability for tortious interference with prospective or contractual relations includes "the pecuniary loss of the benefits of the contract or the prospective relation; consequential losses for which the interference is a legal cause; and emotional distress or actual harm to reputation, if they are reasonably to be expected to result

from the interference." Pawlowski v. Smorto, 588 A.2d 36, 40 (Pa. Super. 1991) (citing Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. 1987)).

Odyssey alleges that TAC's relationship with BFI subsequent to the Agreement diverted revenue that Odyssey was legally entitled to under the Agreement and that TAC has been interfering with Odyssey's operations by attempting to recruit Odyssey drivers. Both allegations are sufficient to withstand the lenient Rule 12(b)(6) standard, assuming that Odyssey can put forth evidence of the revenue lost as a result of TAC's actions.

IV. CONCLUSION

Odyssey has alleged sufficient facts in its Complaint to meet the standards of a motion to dismiss under Rule 12(b)(6), and for the reasons set forth above, TAC's Motion to Dismiss is denied.

An appropriate Order follows.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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ORDER

November 17, 2005

PRATTER, DISTRICT JUDGE

AND NOW, this 17th day of November, 2005, upon consideration of Defendant TAC Transport, LLC's Motion to Dismiss (Docket No. 5), Plaintiff Odyssey Waste, LLC's Response (Docket No. 6), TAC Transport, LLC's Reply (Docket No. 10), and arguments heard by the Court on October 7, 2005, **IT IS HEREBY ORDERED** that TAC Transport, LLC's Motion is **DENIED**. TAC shall file and serve its answer to the Complaint within twenty-one (21) days of the date of this Order.

It is so ORDERED.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE