

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

BANACOL MARKETING CORPORATION	:	
	:	November Term, 2004
Plaintiff,	:	No. 01257
v.	:	
	:	Commerce Program
PENN WAREHOUSING & DISTRIBUTION. INC., et al.	:	
	:	Control No. 040672
Defendants	:	

ORDER and MEMORANDUM

AND NOW, this 29TH Day of August 2005, upon consideration of the Preliminary Objections of Defendant Penn Warehousing and Distribution, Inc. (“PWD”), all responses in opposition, the respective memoranda, all matters of record and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that PWD’s Preliminary Objections are **SUSTAINED** and all claims against it are **DISMISSED**.

BY THE COURT:

C. DARNELL JONES, J.

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MEMORANDUM OPINION

C. DARNELL JONES, J.

Currently before the court are the Preliminary Objections of Defendant Penn Warehousing & Distribution, Inc. (“PWD”). For the reasons fully set forth below, PWD’s Preliminary Objections are **sustained**.

DISCUSSION

PWD filed preliminary objections to BMC’s Complaint on several grounds. Each will be addressed in turn. However, as a preliminary matter, this court finds that BMC’s claims against PWD fail for essentially the same reasons that this court found its claims against PRPA failed: BMC has not demonstrated a causal link between PWD’s alleged conduct and its “injury,” nor has it pled the existence of actual damages. The court’s analysis is specifically set forth in its earlier Opinion of May 25, 2005, which is incorporated herein by reference, which applies equally to BMC’s claims against PWD. This court will also

address the additional Preliminary Objections filed by PWD which are currently pending before the court.

I. BMC Has Failed To State A Claim For Breach of Contract Against PWD.

Count IV of the BMC's Complaint purports to state a claim against PWD for breach of contract. To sustain a claim for breach of contract, the plaintiff must demonstrate: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 1999 Pa. Super. 14, 723 A.2d 1053 (1999). Aside from the reasons set forth in this court's earlier Opinion, BMC's breach of contract claim also fails because BMC has failed to demonstrate the existence of a contractual relationship between itself and PWD. BMC itself admits that no direct contractual relationship exists between them.

BMC's argument that it is a third-party beneficiary of the lease between PWD and PRPA likewise fails. In order to establish that it is third party beneficiary of the lease, BMC must satisfy a two prong test:

[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti v. Weborg, 530 Pa. 366, 372-73, 609 A.2d 147, 150-51 (1992). "The first part of the [above] test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third-party beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third-party

beneficiaries. If a party satisfies both parts of the test, a claim may be asserted under the contract.” Id., 530 Pa. at 371, 609 A.2d at 150. *See also Fizz v. Kurtz, Dowd & Nuss, Inc.*, 360 Pa. Super. 151, 154, 519 A.2d 1037, 1039 (1987) (it is up to the Court to determine “whether recognition of a beneficiary’s right to performance is appropriate to effectuate the intention of the parties.”)

Clearly, the lease contains no express intention by PWD or PRPA to benefit BMC. Nor does this court find the circumstances at bar to be “so compelling” as to warrant the imposition of third party beneficiary status upon BMC. The bald and conclusory allegations of the Complaint do little to persuade the court otherwise. Accordingly, PWD’s Preliminary Objection to Count IV is sustained and Count IV is dismissed.

II. BMC’s Tort Claims Against PWD Fail As A Matter of Law

Counts V and VI of the Complaint purport to state claims against PWD for negligent misrepresentation and innocent misrepresentation, respectively. Aside from the issue of causation and damages, these claims also fail for other reasons.

With respect to BMC’s negligent misrepresentation claim, the damages sought are solely economic in nature. Compl. at 14. “The economic loss doctrine precludes recovery in negligence actions for injuries which are solely economic.” David Pflumm Paving & Excavating, Inc. v. Foundation Services, Co., 2003 Pa. Super. 41, 816 A.2d 1164, 1170 (2003). Since the damages claimed by BMC are just that, Count V fails as a matter of law and must be dismissed.

As to Count IV, which purports to state a claim for “innocent misrepresentation,” BMC’s claim against PWD likewise fails. This court is not aware of any cases in which

Pennsylvania courts have recognized a cause of action for innocent misrepresentation outside the context of a sale, rental or exchange of real property. *See e.g., Bortz v. Noon*, 556 Pa. 489 (Pa., 1999); Restatement (Second) of Torts § 552C (1977). The contract at issue in the Complaint was a services contract and did not involve real property. This court is not inclined to extend this cause of action based on the facts at bar. As such, PWD's Preliminary Objection to Count VI is sustained and Count VI is dismissed.

CONCLUSION

For the reasons fully set forth above, PWD's Preliminary Objections are sustained and all claims against it dismissed.

BY THE COURT:

C. DARNELL JONES, J.