

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

NICHOLAS A. CLEMENTE, ESQ., and	:	DECEMBER TERM, 2002
NICHOLAS A. CLEMENTE, P.C., on	:	
behalf of themselves and all others	:	No. 00802
similarly situated,	:	
	:	Commerce Program
Plaintiffs,	:	
	:	Control No. 011399
v.	:	
	:	
REPUBLIC FIRST BANK,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 9th day of May, 2003, upon consideration of the Preliminary Objections to the Complaint of defendant, Republic First Bank, the response and the memoranda in support and in opposition, and all other matters of record, and in accord with the contemporaneous Opinion being filed of record, it is hereby **ORDERED** and **DECREED** as follows:

1. Defendant's Preliminary Objections are **SUSTAINED** in part and **OVERRULED** in part, and Counts I, III, IV, and V of the Complaint are hereby dismissed with prejudice;
2. Defendant is directed to file an answer to the remaining counts of the Complaint within 20 days of the date of entry of this Order;
3. The parties shall jointly complete the attached case management order regarding class certification and return a completed copy within 30 days of the date of entry

of this Order. If the parties are unable to arrive at an agreement as to all dates, they shall submit letters to the Court setting forth those dates agreed upon and those dates in dispute.

BY THE COURT,

C. DARNELL JONES, II, J.

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

NICHOLAS A. CLEMENTE, ESQ., and	:	DECEMBER TERM, 2002
NICHOLAS A. CLEMENTE, P.C., on	:	
behalf of themselves and all others	:	No. 00802
similarly situated,	:	
	:	Commerce Program
Plaintiffs,	:	
	:	Control No. 011399
v.	:	
	:	
REPUBLIC FIRST BANK,	:	
	:	
Defendant.	:	

MEMORANDUM AND OPINION

The Court hereby considers the Preliminary Objections of defendant, Republic First Bank, to the Complaint. In their Complaint, plaintiffs allege that they borrowed money from defendant pursuant to written loan documents that provided for interest to be calculated and charged in a certain manner, but that defendant charged them more than it was entitled to under such loan contract. Plaintiffs have brought claims against defendant for fraud, breach of contract, breach of the duty of good faith and fair dealing, negligence, gross negligence, and unjust enrichment based on defendant's interest overcharges. Defendant has filed preliminary objections to all but the breach of contract claim.

I. Plaintiffs' Tort Claims Must Be Dismissed Pursuant to the Gist of the Action Doctrine.

Plaintiffs' tort claims must be dismissed under the gist of the action doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract

actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.” Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002). “[A] contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly.” Phico Ins. Co. v. Presbyterian Medical Services Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995). A tort claim is barred “where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract.” Etoll, Inc., 811 A.2d at 19 (dismissing claims for fraud in performance of contract against defendants.)

In this case, the only duty allegedly breached by defendant was its contractual duty to charge interest at a certain rate. The fact that defendant may have negligently, recklessly, or intentionally breached that contractual duty does not give rise to a tort claim, but instead provides a basis for a breach of contract claim only. Therefore, plaintiffs’ claims for fraud, negligence, and gross negligence must be dismissed.

II. Plaintiffs’ Negligence Claims Must Be Dismissed Pursuant to the Economic Loss Doctrine.

This Court has additional grounds upon which to sustain defendant’s preliminary objection to plaintiffs’ negligence and gross negligence claims against them. “The economic loss doctrine precludes recovery in negligence actions for injuries which are solely economic.” David Pflumm Paving & Excavating, Inc. v. Foundation Services, Co., 816 A.2d 1164, 1170 (Pa. Super. 2003). In this case, plaintiffs claim excessive interest payments as the only damages they suffered due to the defendant’s alleged wrongs. Since such damages are solely for economic

loss, plaintiffs' negligence and gross negligence claims must be dismissed.

III. Plaintiffs' Claim for Breach of the Duty of Good Faith and Fair Dealing Must be Dismissed.

"The implied covenant of good faith does not allow for a claim separate and distinct from a breach of contract claim. Rather, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself." JHE, Inc. v. SEPTA, 2002 WL 1018941 (Phila. Com. Pl. May 17, 2002). Since plaintiffs have already asserted a claim against defendant for breach of contract, plaintiffs redundant claim for breach of the contractual duty of good faith and fair dealing must be dismissed.

IV. Plaintiffs Claim for Unjust Enrichment Is Proper.

"While plaintiff cannot ultimately recover on both theories of contract and unjust enrichment, plaintiff may plead unjust enrichment in the alternative along with a claim for breach of contract." Duane Morris, LLP v. Todi, 2002 WL 31053839 (Phila. Com Pl. Sept. 3, 2002). Therefore, defendant's preliminary objection to plaintiffs' unjust enrichment claim must be overruled.

CONCLUSION

For all the foregoing reasons, the court sustains in part and overrules in part the Preliminary Objections of defendant, Republic First Bank, to the Complaint.

BY THE COURT,

C. DARNELL JONES, II, J.

Dated: May 9, 2003