

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

DOCKETED
DEC 20 2018
R. POSTELL
COMMERCE PROGRAM

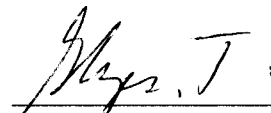
BETHPAGE FEDERAL CREDIT UNION	:	September Term, 2017
	:	Case No. 03654
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
WILNER PIERRE and D&W CAB CO.	:	
	:	
<i>Defendants</i>	:	Control No. 18063428

ORDER

AND NOW, this 20th day of December, 2018, upon consideration of the preliminary objections of plaintiff to the counterclaims of defendants, it is **ORDERED** that the preliminary objections are **SUSTAINED-IN-PART** and **OVERRULED-IN-PART** as follows:

- I. The preliminary objections to the counterclaims of fraud and negligent misrepresentation are **SUSTAINED** and those claims are **DISMISSED**.
- II. The remainder of plaintiff's preliminary objections are **OVERRULED**.

BY THE COURT,



GLAZER, J.

Bethpage Federal Credit-ORDOP



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MEMORANDUM OPINION

In the instant action, Bethpage Federal Credit Union (“Plaintiff”), filed a complaint against individual defendant Wilner Pierre and corporate defendant D&W Cab Co. (“Defendants”). In the complaint, Plaintiff asserts a claim of breach-of-contract against the individual defendant, and a claim of breach-of-contract against the corporate defendant. Specifically, Plaintiff alleges that the Defendants defaulted on a document titled “Balloon Note.”¹ The Balloon Note had been executed by individual defendant in his dual capacities as the borrower of a loan in the amount of \$325,000.00, and as the owner of the corporate defendant/guarantor.

On June 7, 2018, the Defendants filed an amended answer with new matter and counterclaim to the amended complaint of plaintiff. The counterclaim asserts three claims against Plaintiff: fraud, negligent misrepresentation, and breach-of-contract. Plaintiff timely filed preliminary objections to the three counterclaims.

I. **The Defendants may not maintain the counterclaims of fraud and negligent misrepresentation.**

In the preliminary objections, Plaintiff asserts that the Defendants’ counterclaims of fraud and negligent misrepresentation should be dismissed because the averments therein are not stated with particularity, in violation of Pa. R.C.P. 1019(b).² To determine whether Guarantor has averred fraud and negligent misrepresentation with particularity, the court turns its attention to the paragraphs that most pointedly assert such claims. The identically-written paragraphs asserting the two counterclaims state as follows:

[a]s averred above ... Bethpage ... made misrepresentations

¹ Exhibit A to the complaint.

² “Averments of fraud or mistake shall be averred with particularity.” Pa. R.C.P. 1019(b).

to Defendants relating to the renewability of the balloon loans, Defendants' qualifications for such loans and ability to repay the same, and the continued appreciation of the value of the [taxi-cab] medallion that were material to the loan at issue....

* * *

Defendants acted in reasonable and justifiable reliance on ... Bethpage's misrepresentations and false statements.³

The court finds these allegation lacking the degree of particularity necessary to preserve the claims of fraud and negligent misrepresentation. The Pennsylvania Supreme Court has explained that—

averments of fraud or mistake shall be averred with particularity. Averments of fraud are meaningless epithets unless sufficient facts are set forth which will permit an inference that the claim is not without foundation or offered simply to harass the opposing party and to delay the pleader's own obligation. In satisfaction of the particularity requirement we have required that two conditions must always be met: the pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense, and they must be sufficient to convince the court that the averments are not merely subterfuge.⁴

In this case, the counterclaims of fraud and negligent misrepresentation conflate several vague averments: first, Defendants allege they were misled to believe that the Balloon Note would be renegotiated, yet Defendants describe no facts from which this court could reach a similar inference; second, Defendants suggest they were misled to believe that they had the qualifications necessary to obtain a \$325,000.00 loan under the Balloon Note, yet fail to explain why they believed Plaintiff's alleged misrepresentation in the course of an arms-length transaction; and third, Defendants asserts they were misled to believe that they would be able to fully repay the

³ Answer, new matter and counterclaim at ¶¶ 39, 45; 42, 48.

⁴ In re Estate of Schofield, 477 A.2d 473, 477 (Pa. 1984).

indebtedness, yet fail to explain how the individual defendant, a sophisticated businessman acting as a borrower/owner, could anchor such a belief on the tenuous prediction that the collateral to the loan would continue to appreciate indefinitely.

Defendants' above-quoted averments do not adequately explain the nature of their counterclaims, do not allow Plaintiff to prepare a defense, and do not permit this court to infer that the claims of fraud and negligent misrepresentation have any foundation. Since the averments of fraud and negligent misrepresentation fail to meet the particularity requirements of Pa. R.C.P. 1019(b), the preliminary objections thereto are sustained, and such counterclaims are dismissed.

II. **The claims of fraud and negligent misrepresentation are unavailable pursuant to the gist-of-the-action doctrine.**

Under Pennsylvania law—

[t]he gist of the action doctrine bars a plaintiff from recasting ordinary breach of contract claims into tort claims.

* * *

Although they derive from a common origin, distinct differences between civil actions for tort and contract breach have developed at common law. 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.... To permit a promisee to sue his promisor in tort for breaches of contract *inter se* would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.

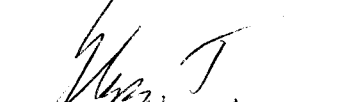
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The important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus. In other words, a claim should be limited to a contract claim when the parties' obligations **are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.**⁵

⁵ Knigh v. Springfield Hyundai, 81 A.3d 940, 950 (Pa. Super. 2013) (emphasis added).

In this case, the obligations of the parties are defined by the terms of the Balloon Note and not by larger social policies embodied by the tort laws of fraud and negligent misrepresentation. Defendants may not maintain the claims of fraud and negligent misrepresentation under the gist-of-the-action doctrine, and for this additional reason such claims are dismissed.

BY THE COURT,



GLAZER, J.
