

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

PENNSYLVANIA BUSINESS BANK,	:	MAY TERM, 2002
	:	
Plaintiff,	:	No. 2507
	:	
v.	:	Commerce Program
	:	
FRANKLIN CAREER SERVICES LLC, et al.,	:	Control No. 061974
	:	
Defendants	:	

PETER C. MORSE and R. BRUCE DALGLISH,	:
	:
Intervening-Plaintiffs,	:
	:
v.	:
	:
FRANKLIN CAREER SERVICES, INC., et al.,	:
	:
Intervened-Defendants	:

ORDER AND MEMORANDUM

AND NOW, this 14th day of March, 2005, upon consideration of the Motion for Summary Judgment of Intervening Plaintiffs and Cross-Claim Defendant, the Intervened-Defendants' responses thereto, the memoranda in support and opposition, and all other matters of record, and in accord with the Memorandum Opinion filed contemporaneously herewith, it is hereby

ORDERED that the Motion is **GRANTED** in part, and Counts I, II, and IV of the Counterclaims and Cross-Claims of Franklin Career Services, Inc., Franklin Career Services, LLC, Gerald Woodcox, Jeffrey Woodcox, Mark Vogt, Career Financial Services, LLC, Capital

Steel Ventures, William Weld and Robert Bernstein against Peter C. Morse, R. Bruce Daglish,
and MPIII Holdings, Inc. are **DISMISSED**. The remainder of the Motion is **DENIED**.

BY THE COURT,

C. DARNELL JONES, II, J.

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	:	
v.	:	
	:	
FRANKLIN CAREER SERVICES, INC., et al.,	:	
	:	
Intervened-Defendants	:	

MEMORANDUM OPINION

Before the court is the Motion for Summary Judgment of Intervening Plaintiffs, Peter C. Morse, R. Bruce Daglish, and Defendant, MP III Holdings, Inc. (“MPIII”) (collectively, “Morse, Daglish, and MPIII”) to Franklin Career Services, Inc.’s, Franklin Career Services, LLC’s, Gerald Woodcox’, Jeffrey Woodcox’, Mark Vogt’s, Career Financial Services, LLC’s, Capital Steel Ventures’, William Weld’s, and Robert Bernstein’s (collectively, the “Franklin Defendants”) counterclaims against Morse and Daglish and the Franklin Defendants’ cross-claims against MPIII.

In this action, MPIII claims that it and its primary shareholders, Morse and Daglish, entered into a written contract dated March 25, 2002 with Franklin Career Services, Inc.

(“Franklin”) whereby Franklin agreed to acquire MPIII (the “March 25, 2002 Agreement”).

MPIII further claims that Franklin breached that agreement by failing to complete the acquisition of MPIII. The Franklin Defendants deny that the March 25, 2002 Agreement is an acquisition agreement; instead, they view it as an agreement to agree or an agreement to negotiate in good faith towards an acquisition. Furthermore, the Franklin Defendants claim that if anyone breached the March 25, 2002 Agreement, it was Morse, Daglish and MPIII by not negotiating in good faith. To that end, the Franklin Defendants have asserted claims against Morse, Daglish and MPIII for fraudulent and negligent misrepresentation, breach of a contractual duty of good faith, and breach of the duty of good faith and fair dealing. In the present motion, Morse, Daglish, and MPIII have asked the court to dismiss all such claims.

I. The Franklin Defendants’ Tort Claims Must Be Dismissed.

The Franklin Defendants’ misrepresentation claims are barred under the gist of the action doctrine.¹ That doctrine:

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. [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. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14-19 (Pa. Super. 2002) (dismissing claims for fraud in performance of contract against defendants.)

¹ The gist of the action doctrine has long served the laudatory goal of keeping the law of tort and the law of contract from becoming merged or confused. Since the doctrine is clearly implicated by the facts underlying the Franklin Defendants’ claims, this court will apply it *sua sponte* to narrow the issues for trial.

The court also notes that the Franklin Defendants, in their own Motion for Summary Judgment on Morse’s, Daglish’s, and MPIII’s claims, requested that the court apply the gist of the action doctrine to the latter’s claims, so the Franklin Defendants are in no position to complain when the doctrine is applied to their own claims.

In this case, the Franklin Defendants claim that Morse, Daglish, and MPIII “in making [their allegedly false] representations . . . breached their express duty to negotiate in good faith under the March 25, 2002 writing.” Therefore, the Franklin Defendants’ intentional and negligent misrepresentation claims against Morse, Daglish and MPIII are really claims that they intentionally and negligently breached their contract with the Franklin Defendants.² It does not matter in what manner Morse, Daglish and MPIII committed the alleged breach; it is still simply a breach of contract, and the gist of the Franklin Defendants’ action in this case clearly sounds in contract. Therefore, the Franklin Defendants’ claims for Fraudulent and Negligent Misrepresentation against Morse, Daglish, and MPIII are dismissed.

II. The Franklin Defendants’ Claims for Breach of the Duty of Good Faith And Fair Dealing Must Be Dismissed.

[T]he 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 *5 (Phila. Co. May 17, 2002). Since the Franklin Defendants have also asserted breach of contract claims against Morse, Daglish, and MPIII for failure to perform in good faith under the March 25, 2002 Agreement, the Franklin Defendants’ separate claims for breach of the duty of good faith must be dismissed as redundant.

III. There is a Disputed Issue of Fact As to Whether Morse, Daglish, and MPIII Breached Their Contract With The Franklin Defendants.

The March 25, 2002 Agreement provides that “Franklin and MPIII agree to act in good faith to immediately complete such agreements as will be necessary to effect the acquisition.”

² The gist of the action doctrine does not preclude a party from bringing claims for fraud in the inducement of a contract alongside breach of contract claims, so long as the two claims arise out of two different wrongful acts. However, where, as here, the alleged wrongful conduct occurred after the formation of the contract, it can serve as the basis for a breach of contract claim only.

See SJM, Ex. A, p. 2. Furthermore, as parties to that Agreement, Morse, Daghish and MPIII have an implied duty to perform their contractual obligations in good faith. *See* Restatement (Second) Contracts, § 205 (1981). “Good faith” “emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving “bad faith” because they violate community standards of decency, fairness or reasonableness.” *Id.*, Comment “a.”

Morse’s, Daghish’s, and MPIII’s Summary Judgment Motion and the Franklin Defendants’ response thereto are focused on the extent to which the Franklin Defendants have proffered evidence sufficient to establish their claims for misrepresentation, and neither party directly addresses the issue of whether the Franklin Defendants can point to sufficient evidence to prove that Morse, Daghish, and/or MPIII breached their contractual duty of good faith. However, at least one of the bases that the Franklin Defendants proffer for their misrepresentation claims may also serve as a basis for their claim for breach of the duty of good faith, namely that Morse, Daghish, and MPIII refused to execute allegedly reasonable closing documents presented to them by the Franklin Defendants. Morse, Daghish and MPIII counter that the proffered documents were not reasonable in that they conflicted with the terms of the March 25, 2002 Agreement. Clearly, the issue of the reasonableness of the documents and of Morse’s, Daghish’s, and MPIII’s good faith in refusing to sign them are disputed issues of fact that must be resolved at trial.³ Therefore, the court declines to dismiss the Franklin Defendants’ breach of contract claim against Morse, Daghish, and MPIII at this juncture.

³The Franklin Defendants assert as additional bases for their claims against Morse, Daghish, and MPIII that Morse, Daghish and/or MPIII provided the Franklin Defendants with allegedly false Balance Sheets, and accounts payable, accounts receivable, and payroll amounts. Morse, Daghish, and MPIII deny that any such information was false and also argue that the Franklin Defendants’ evidence of such falsity is inadmissible hearsay.

Since the court has decided to let the Franklin Defendants proceed on their breach of contract claim on other grounds, the court need not rule on the admissibility of the proffered evidence of falsity at this time and, instead, reserves such issues for trial.

CONCLUSION

For all the foregoing reasons, Morse's, Darglish's, and MPIII's Motion for Summary Judgment is granted in part and denied in part.

BY THE COURT,

C. DARNELL JONES, II, J.