

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

RHODA FISCHER, <i>et al.</i> ,	:	June Term, 2006
	:	
Plaintiffs	:	No. 508
	:	
vs.	:	(Commerce Program)
	:	
WILLIAM DAWLEY, <i>et al.</i> ,	:	Control Nos. 121481, 121987
	:	
Defendants.	:	

ORDER

AND NOW, this 6th day of February 2007, upon consideration of the Preliminary Objections of defendants William Dawley, Bernard Greenstein, Payphone, Inc., Coin Call, Inc., Franbern, Inc., and Bernard Greenstein and William Dawley t/a/ D&G Pension Fund (Control No. 121481), and the Preliminary Objections of defendants Judith Dawley and Frances Greenstein (Control No. 121987), the respective responses and memoranda in support and in opposition, all other matters of record, and in accord with the Opinion issued contemporaneously, it is **ORDERED** that said Preliminary Objections are **SUSTAINED, in part** and **OVERRULED, in part**. It is **ORDERED** that:

1. Plaintiff's claim for conversion against William Dawley, Bernard Greenstein, Payphone, Inc., Franbern, Inc., and Coin Call, Inc. is dismissed.
2. Plaintiff's claim for Abuse of Process is dismissed.
3. Plaintiff's claims for intentional interference with contractual relations are dismissed.

The remaining Preliminary Objections are **OVERRULED**. Defendants shall file Answer(s) to the remaining counts of plaintiff's Complaint within twenty (20) days of the date of entry of this order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. February 6, 2007

Before the Court are the Preliminary Objections of defendants, William Dawley, Bernard Greenstein, Payphone, Inc., Coin Call, Inc., Franbern, Inc., and Bernard Greenstein and William Dawley t/a/ D&G Pension Fund (Control No. 121481), and the Preliminary Objections of defendants, Judith Dawley and Frances Greenstein (Control No. 121987).

Payphone, Inc. was incorporated in 1985 as a closely held Pennsylvania corporation. Payphone, Inc.'s shareholders included plaintiff's decedent Harvey Fischer, as well as William Dawley and Bernard Greenstein. Coin Call, Inc. was incorporated in 1994 as a closely held Pennsylvania corporation. Coin Call, Inc.'s shareholders included plaintiff's decedent, Harvey Fischer, as well as William Dawley and Bernard Greenstein.¹ Plaintiff alleges, *inter alia*, that defendants engaged in a series of wrongful acts with the intent to deny her monies owed under Payphone, Inc.'s and Coin Call, Inc.'s shareholders'

¹ Complaint ¶¶ 18-22, 65-69.

agreements. For the reasons discussed, defendants' Preliminary Objections are sustained, in part and overruled, in part.

I. Plaintiff's Claim for Conversion Is Dismissed as to William Dawley, Bernard Greenstein, Payphone, Inc., Franbern, Inc., and Coin Call, Inc.

Plaintiff asserts two claims for conversion: one against William Dawley, Bernard Greenstein, Payphone, Inc., and Franbern, Inc.; and the other against William Dawley, Judith Dawley, Bernard Greenstein, Frances Greenstein, and Coin Call, Inc. Defendants argue that plaintiff's claim for conversion of sums owed to plaintiff as a shareholder in Payphone, Inc. and Coin Call, Inc. should be dismissed under the gist of the action doctrine.

The "gist of the action" doctrine operates to preclude a plaintiff from recasting 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. . . . 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. . . . [T]he doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.²

Where the claim is that the defendants failed to pay money that was due plaintiff under a contract, in this case distributions under a shareholders' agreement, the gist of the action doctrine bars a claim for conversion. Since plaintiff is claiming that defendants converted money that they were contractually obligated to pay plaintiff, plaintiff's conversion claim as to William Dawley, Bernard Greenstein, Payphone, Inc., Franbern, Inc., and Coin Call, Inc. should be dismissed.

² Hart v. Arnold, 884 A2d 316, 339-340 (Pa. Super. 2005).

Defendant's Preliminary Objection to plaintiff's conversion claim against Judith Dawley and Frances Greenstein is overruled. "The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the demurrer."³ This conversion claim is not subject to the gist of the action doctrine. Neither Judith Dawley nor Frances Greenstein was party to a contract, namely the shareholders' agreement, between plaintiff and defendants William Dawley, Bernard Greenstein, and Coin Call, Inc.

"A conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification."⁴ Plaintiff alleges that Judith Dawley and Frances Greenstein unlawfully converted more than \$100,000 in assets belonging to Coin Call, Inc. by moving the subject funds into checking accounts held jointly with their husbands, William Dawley and Bernard Greenstein. Plaintiff further alleges that she is entitled to 25% of the assets under Coin Call, Inc.'s shareholders' agreement. Based upon the facts averred in the Complaint as to Judith Dawley and Frances Greenstein, the Court finds that it is possible for plaintiff to recover on her conversion claim.⁵ Therefore, this Preliminary Objection is overruled.

II. Plaintiff's Claim For Abuse of Process Must Be Dismissed

To establish a claim for Abuse of Process, a plaintiff must allege that the defendant: "(1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for

³ Clayton v. McCullough, 448 Pa. Super. 126, 129, 670 A.2d 710, 712 (1996).

⁴ Baker v. Rangos, 229 Pa. Super. 333, 348, 324 A.2d 498, 505 (1974).

⁵ Id. at 129.

which the process was not designed; and (3) harm has been caused to the plaintiff.”⁶ In bringing such an action, “[i]t is not enough that the defendant had bad or malicious intentions or that the defendant acted from spite or with an ulterior motive.”⁷ Moreover, “there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions;” instead, there must be a “perversion” of the process.⁸

Plaintiff alleges that defendants William Dawley, Bernard Greenstein, and D&G Pension Fund engaged in fraudulent litigation with malice and wrongful intent to intimidate plaintiff from pursuing her claims against them. Whether or not defendants acted with bad intent in pursuing a confessed judgment against plaintiff, their acts, as pled by plaintiff, did not amount to a “perversion” of the process. Therefore, plaintiff’s claim for Abuse of Process is dismissed.

III. Plaintiff’s Claims for Intentional Interference with Contractual Relations Must Be Dismissed.

To establish a claim for intentional interference with contractual relations, a plaintiff must allege:

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 legal damage as a result of the defendant’s conduct.⁹

Plaintiff alleges that defendants William Dawley and Bernard Greenstein used their positions as shareholders in both Payphone, Inc. and Coin Call, Inc. to interfere with the

⁶ Rosen v. American Bank, 426 Pa. Super. 376, 382, 627 A.2d 190, 192 (1993).

⁷ Al Hamilton Contracting v. Cowder, 434 Pa. Super. 491, 499, 644 A.2d 188, 192 (1994).

⁸ Shaffer v. Stewart, 326 Pa. Super. 135, 138-9, 473 A.2d 1017, 1019 (1984).

⁹ Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997).

relationship between plaintiff and the above named companies. This argument fails, however, because defendants did not interfere with a purported contractual relationship between plaintiff and a third party. In this case, the relationship at issue is the one between plaintiff and defendants as shareholders in Payphone, Inc. and Coin Call, Inc. Plaintiff and defendants William Dawley and Bernard Greenstein are parties to the same shareholders' agreement. Moreover, plaintiff's Complaint does not aver the existence of a third party with whom plaintiff had an existing or prospective contractual relationship.

Plaintiff further alleges that defendants Judith Dawley and Frances Greenstein knew or should have known that they were not entitled to the proceeds of the sale of Coin Call, Inc. However, plaintiff fails to establish that Judith Dawley's and Frances Greenstein's actions were 'purposeful....[and] specifically intended to harm the existing [contractual] relation' between plaintiff and defendants William Dawley and Bernard Greenstein.¹⁰ Therefore, plaintiff's claims for intentional interference with contractual relations are dismissed.

CONCLUSION

For these reasons, the court sustains, in part the Preliminary Objections of defendants. An Order consistent with this Opinion will be issued.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

¹⁰ Strickland, 700 A.2d at 985.