

JERILYNNE ADAMS,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 03-01,057
	:	
DON BREON, INC., DON BREON FORD/	:	
JEEP, INC., DON BREON COLLISION	:	
CENTER, ANCHOR AUTO II, INC.,	:	
ANCHOR AUTO III, INC., DONALD W.	:	
BREON, THOMAS R. STAGGERT,	:	
JAMES KANOUFF,	:	
Defendants	:	PRELIMINARY OBJECTIONS

Date: November 26, 2003

OPINION and ORDER

Before the Court for resolution are the Preliminary Objections of Defendants Don Breon, Inc. *et al* to Plaintiff's Complaint. The Complaint was filed on July 7, 2003 asserting various causes of action against Defendants arising out of the Plaintiff entering into contracts and agreements with the various Defendants for the repair of an automobile. The Preliminary Objections of Defendants were filed on August 12, 2003.

Plaintiff's Complaint essentially asserts that Defendants improperly and/or incompletely repaired Plaintiff's automobile, which had been damaged in a motor vehicle accident. The Complaint alleges causes of action against five corporate defendant and three individual defendants including Donald W. Breon. Defendants' First Preliminary Objection is that there is no basis for Donald W. Breon to be individually liable to Plaintiff. Defendants assert that Donald W. Breon is solely a shareholder of one or more of the corporations and an officer. In setting up this Preliminary Objection, Defendants rely upon the allegations of Paragraphs 70 and 71 of the Complaint, which assert that Donald W. Breon is a principal

shareholder/officer of the corporations that bear his name and utilized corporate shells that satisfy the corporate form of organization in the Commonwealth.

The Preliminary Objection, however, cannot be sustained. In Paragraph 3, the Complaint alleges the failure of Donald W. Breon to appropriately organize and carry forth business in corporate form. Paragraph 8 of the Complaint further asserts that Donald W. Breon acted individually on his own behalf and as agent and/or principal of the corporations. In doing so, as alleged in Paragraph 9, Donald W. Breon participated in the alleged misconduct by supervising a repair estimator, Thomas R. Staggert, and directing Staggert to take inappropriate actions in relation to representations and/or repairs to Plaintiff's automobile.

The Second Preliminary Objection is in the nature of a Motion to Strike the claim for attorney's fees made in Counts I, II, III and IV of Plaintiff's Complaint. Counts I and II are breach of contract claims and Counts III and IV are breach of express and implied warranties claims. Plaintiff acknowledges that attorneys' fees are not an appropriate item of damage in these types of claims. Accordingly, the Second Preliminary Objection will be sustained, and the claim for attorney's fees in those counts will be stricken.

The Third Preliminary Objection is in the nature of a Motion to Strike, or in the alternative, a Motion for a More Specific Pleading, relates to the claims for consequential damages. The Complaint sets forth claims for consequential damages in all of the *ad damnum* clauses. A review of the Complaint does not indicate any specific claim for consequential damages. Consequential damaged must be pleaded with specificity. Accordingly, this Preliminary Objection will be granted, and the claims for consequential damages made in the *ad damnum* clauses stricken.

The Fourth Preliminary Objection is in the nature of a Demurrer, or in the alternative a Motion to Strike Count V, a fraudulent misrepresentation claim against the “Breon” Defendants; Count VI, a fraudulent misrepresentation claim against all Defendants and Count VII, a civil conspiracy claim against all Defendants. The basis of this Preliminary Objection is that the claims are barred by the Economic Loss Doctrine, which prohibits “plaintiffs from recovering in tort economic losses to which their entitlement flows from a contract.” *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 671 (3d Cir. 2002) (citing *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995)). The Court believes that this Preliminary Objection is closely related to the Fifth Preliminary Objection, which demurs or seeks to strike the same Counts (V, VI, VII) on the basis that the tort claims are barred by the gist of the action doctrine.

As to Counts V and VI this Court believes the tort claims must be stricken based on the gist of the action doctrine. The purpose of the gist of the action doctrine is to maintain the conceptual distinction between breach of contract and tort claims by precluding a plaintiff from casting a breach of contract claim as a tort claim. *Etoll, Inc. v. Ellias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. 2002). That is not to say that a breach of contract can never give rise to a tort claim, but the wrong giving rise to the tort claim must be the gist of the action and the contract collateral. *Ibid.* The distinction between the two claims lies in the duties at issue. A breach of contract arises when there is a breach of duties imposed by mutual consent, while a tort action arises when there is a breach of duties imposed as a matter of social policy. *Ibid.* Therefore, “ ‘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.’’ *Ibid.* (quoting *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 104 (3rd Cir. 2001)).

The gist of Plaintiff’s action is a breach of contract. What Plaintiff alleges is the breach of a contract and representations made concerning warranties and the ability to perform the contract. It is the contract and agreements that establish the obligations of the Plaintiff and the Defendants in this matter. All of the issues raised by the Complaint as would relate to the asserted fraudulent misrepresentations really are intertwined with various factual assertions as to ways in which the contracts were breached and/or upon which Plaintiff may have detrimentally relied or received certain warranties. This is not a fraudulent misrepresentation tort case and should not be pursued as such. Therefore, Counts V and VI be dismissed.

As to the Count VII, civil conspiracy, in addition to being subject to the demurrer in the Fourth and Fifth Preliminary Objections, Defendants also demur to the civil conspiracy in the Sixth Preliminary Objection, or in the alternative seek to have that claim stricken. In this regard the Court notes that the Complaint alleges that Defendants conspired to cause harm to Plaintiff in a general nature in the allegations of Paragraphs 126 and 127 of Count VII. However, Paragraph 125 under that Count is an incorporation clause incorporating all prior actual allegations.

Plaintiff appears to rely upon the allegations that the automobile was not repairable but was “totaled” at the time it was first taken to the Breon Defendants, as set forth in Paragraphs 65-67, and that Thomas Staggert and the Breon Defendants should have known that at the time. Paragraph 52 of the Complaint further alleges that the Breon Defendants contacted James Kanouff at Anchor Auto when Plaintiff complained that all repairs were not

made. In Paragraph 53, it is alleged that James Kanouff indicated he could put the Mercedes back to pre-accident condition making that representation on behalf of the Anchor Defendants. Paragraph 67 alleges that when the Breon Defendants requested it be examined by the Anchor Defendants and that “[the Anchor Defendants] intentionally failed to advise [Plaintiff] of such (that “the vehicle was totaled”) in order to secure pecuniary gain and protect the Breon Defendants from liability.

Based upon these allegations which precede Count VII, but were incorporated by reference, the Court believes that Plaintiff has asserted sufficient facts, which if true, may give rise to an action in civil conspiracy. This ruling is not meant to state that the claim is valid or can be substantiated, nor that it can survive a motion for judgment on the pleadings, or summary judgment.

The Seventh Preliminary Objection in the Nature of a Demurrer, or in the alternative a Motion for More Specific Pleading, relates to the asserted failure of Plaintiff to set forth and attach writings upon which the breach of contract and/or warranty claims in Counts I-IV are based. A reading of the Complaint would indicate that the Complaint is not specific in stating that all contracts are “oral” or stating they were written contracts. However, this does not make the Complaint fatal as asserted by Defendants or in violation of Pennsylvania Rule of Civil Procedure 1019(a)(i). An overall reading of the Complaint indicates that such things as the initial estimate given on or about July 9, 2001 by the Breon Defendants (see Paragraphs 26-28) is attached and marked as Exhibit “A” to the Complaint. A fair reading of the Complaint does not indicate there were any other documents or agreements between the parties with the exception of Exhibit “B” which is attached and purports to be a writing from James Kanouff, as

identified in Paragraph 53, as being his personal and/or Anchor Auto Defendants' undertaking to make repairs to Plaintiff's automobile. Plaintiff also does rely upon the estimate of another third party non-defendant dealer concerning the deficiency in Defendant's repairs. It is referenced in Paragraph 64 and attached to the Complaint as Exhibit "C." It does not appear that Plaintiff asserts there are any other written undertakings. Therefore, the seventh Preliminary Objection must be denied.

Accordingly, the following Order is entered.

ORDER

The First Preliminary Objection of Defendants is DENIED.

The Second Preliminary Objection of Defendants is GRANTED and the reference in the *ad damnum* clauses in Counts I, II, III and IV of Plaintiff's Complaint as to attorneys' fees is STRICKEN.

The Third Preliminary Objection is GRANTED, and the claims in the *ad damnum* clauses of Plaintiff's Complaint for consequential damages is STRICKEN.

The Fourth and Fifth Preliminary Objections, as to Counts V and VI, are GRANTED, and those Counts are DISMISSED.

The Sixth Preliminary Objection is DENIED.

The Seventh Preliminary Objection is DENIED.

Plaintiff is given a period of twenty days after notice of this Order to file an amended complaint.

BY THE COURT:

William S. Kieser, Judge

cc: Matthew J. Zeigler, Esquire
Brian J. Bluth, Esquire
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)