

JERILYNNE ADAMS,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 03-01,057
	:	
DON BREON, INC., DON BREON FORD/	:	CIVIL ACTION - LAW
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: April 8, 2004*

**OPINION and ORDER**

Before the Court for determination are the Preliminary Objections of Defendants filed December 31, 2003 to Plaintiff's Amended Complaint, which claims damages arising out of Defendants' alleged failure to properly repair Plaintiff's vehicle. Defendants also have made a request for sanctions for Plaintiff's failure to replead the Amended Complaint in good faith. The Court will grant the Preliminary Objections but will refuse the Motion for Sanctions.

Plaintiff instituted this case by filing a Complaint on July 7, 2003. Defendants filed Preliminary Objections to the Complaint on August 12, 2003. On November 26, 2003, this Court entered an Opinion and Order as to those the Preliminary Objections. In that Opinion and Order, the Court, *inter alia*, struck Counts V (Fraudulent Misrepresentation against the Breon Defendants) and VI (Fraudulent Misrepresentation against all Defendants) on the basis of the gist of the action doctrine. Opinion and Order dated November 26, 2003, *Adams v. Don Breon, Inc.*, No. 03-01,057 at 3 (Lycoming Cty. 2003). The Court concluded that this was not a fraudulent misrepresentation tort case as the gist of the action was a breach of contract.

Plaintiff filed an Amended Complaint on December 16, 2003. Defendants have demurred to Counts V and VI of the Amended Complaint. Count V of the Amended Complaint was entitled as a misfeasance claim against the Breon Defendants (Don Breon, Inc., Don Breon Ford/Jeep, Inc., Don Breon Collision Center, Donald W. Breon, and Thomas R. Staggert). Count VI was entitled as a misfeasance claim against all Defendants. The allegations in Counts V and VI of the Amended Complaint are identical to the allegations that were stricken from the original Complaint with two exceptions. Paragraph 111 was added to Count V of the Amended Complaint and Paragraph 122 was added to Count VI of the amended Complaint. Paragraphs 111 and 122 allege that the actions taken by Defendants involved the doing of a wrongful act, which could lawfully be done.

The Amended Complaint asserts the same factual allegations that were contained in the original Complaint. Plaintiff has alleged that her Mercedes 300SEL was involved in a serious accident, in which the vehicle sustained significant damage. In July 2001, Plaintiff sought to have the vehicle repaired by Breon Defendants. Plaintiff has alleged that Breon Defendants promised to make all necessary repairs to put the vehicle back into its pre-accident condition. Plaintiff has alleged that Breon Defendants' repair work did not fulfill this promise as after the repairs the vehicle still had numerous defects. Plaintiff further pleads that because the vehicle needed further repairs, Breon Defendants contacted Anchor Defendants (Anchor Auto II, Inc., Anchor Auto III, Inc., James Kanouff) to take a look at the vehicle. After examining the vehicle, Anchor Defendants also promised Plaintiff to place the vehicle in its pre-accident condition. Plaintiff alleges that Anchor Defendants did not perform as promised and her vehicle still had numerous problems.

In their Preliminary Objections, Defendants assert that Counts V and VI of the Amended Complaint do not state a claim upon which relief can be granted arguing that this Commonwealth does not recognize a misfeasance cause of action. As Counts V and VI of the Amended Complaint are merely restatements of the allegations that were dismissed from the original Complaint, Defendants argue that Counts V and VI of the Amended Complaint should be dismissed for the same reasons set forth in this Court's November 26, 2003 Opinion and Order.

Defendants also seek the imposition of sanctions for the pleading of the allegations in Counts V and VI. Defendants argue that by pleading Counts V and VI in the Amended Complaint Plaintiff has not made a good faith effort to comply with the November 26, 2003 Opinion and Order of this Court. Defendants seek an order requiring Plaintiff to pay the attorney's fees associated with the prosecution of the preliminary objections currently before the Court.<sup>1</sup>

A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination "is confined to the content of the complaint." *In re Adoption of S.P.T.*, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint." *Ibid*. The court must

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<sup>1</sup> Defendants also seek to have the Amended Complaint struck because Plaintiff failed to verify the Amended Complaint. As to this issue, the Court issued an Order on February 5, 2004 requiring Plaintiff to file and serve an appropriate verification. Plaintiff filed the verification on February 17, 2004. Defendants' Preliminary Objection in this regard is now moot.

admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997). ““If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.”” *Ibid.*

The demurrer to Counts V and VI of the Amended Complaint must be granted. Misfeasance, in and of itself, does not exist as a tort in this Commonwealth. The misfeasance/nonfeasance distinction was a way to determine if a plaintiff “may have an actionable tort claim despite having a contractual relationship with the defendant.” *Yocca v. Serwonski*, 806 A.2d 936, 944 (Pa.Cmwlt. 2002), *app. granted*, 827 A.2d 1203 (Pa. 2003). Two tests have been recognized by Pennsylvania courts to determine whether a cause of action “sound[s] in contract or in tort ....” *Phico Ins. Co. v. Presbyterian Med. Services Corp.*, 663 A.2d 753, 757 (Pa. Super. 1995). These two tests are: the gist of the action test and the misfeasance/nonfeasance test. *Yocca*, 806 A.2d at 944.

Under the gist of the action test, the court must examine the claim and determine whether the “‘gist’ or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is ‘collateral’ to conduct that is primarily tortious.” *Yocca*, 806 A.2d at 944. “[T]he important difference between contract and tort actions is that the latter [(tort)] lie from the breach of duties imposed as a matter of social policy while the former [(contract)] lie for breach of duties imposed by mutual consensus.” *Phico Ins. Co.*, 663 A.2d at 757. Under the misfeasance/nonfeasance test, “the test used to determine if there exists a cause of action in tort growing out of a breach of contract is whether there was an improper performance of a

contractual obligation (misfeasance) rather than the mere failure to perform (nonfeasance).” *Id.* at 756 (quoting *Raab v. Keystone Ins. Co.*, 412 A.2d 638, 639 (Pa. Super. 1979). In *Phico Ins. Co.*, *supra*, the Superior Court rejected the misfeasance/nonfeasance test expressed in *Raab*, *supra*, and stated that the gist of the action test was more appropriate in determining the character of a claim. *Id.*, at 757.

In *Jahanshahi v. Centura Devel. Co., Inc.*, 816 A.2d 1179, 1187 (Pa. Super. 2003), the Superior Court stated, “The ‘improper performance of a contractual obligation (misfeasance)’ is an actionable tort.” Contrary to the argument advanced by Plaintiff, this language did not create a new tort but only restated the misfeasance/nonfeasance test. That is, that conduct characterized as misfeasance was actionable in tort, as opposed to in contract.

It is unclear whether the use of misfeasance in *Jahanshahi*, *supra*, has raised the misfeasance/nonfeasance test from the ashes as the language in *Jahanshahi*, *supra*, does create a question as to what is the appropriate standard to be used when determining whether a cause of action sounds in tort or contract. In stating that the “‘improper performance of a mutual obligation (misfeasance)’ is an actionable tort” *Jahanshahi* cited to *Fink v. Delaware Valley HMO*, 612 A.2d 485, 489 (Pa. Super. 1992). The *Fink* case had cited to *Raab*, *supra*, as authority for the use of the misfeasance/nonfeasance test.

The Superior Court in *Phico Ins. Co.*, *supra*, attacked the authority upon which *Jahanshahi* subsequently relied. In its criticism of the misfeasance/nonfeasance test expressed in *Rabb*, the Superior Court stated that *Rabb* “possesses no precedential authority” and declined to follow it. *Ibid.* (citing *Hirsch v. Mount Carmel Dist. Industrial Fund*, 526 A.2d 422, 423, n.1 (Pa. Super. 1987)). With regard to *Fink*, the *Phico* court stated in footnote

number one that, “even though we ostensibly applied *Raab* in *Fink v. Delaware Valley HMO*, [citation omitted], we do not believe that its rule possesses any vitality.” *Ibid.*, n1. The Superior Court went on to state in the footnote that while it may have cited to *Raab* it did not engage in a “pure misfeasance/nonfeasance analysis,” but “examined the gist of the complaint.” *Ibid.* This indicates that the precedential import of *Fink* would be applicable to the gist of the action test, not the misfeasance/nonfeasance test.

In any event, this Court does not need to decide as to what the current test is in order to resolve the preliminary objections before the Court. As stated in *Yocca*:

The ‘gist of the action’ test and the misfeasance/nonfeasance test tend to achieve the same results, as both require the court to analyze how much the claims in the pleadings relate to contracts involved. If there is ‘misfeasance,’ there is an improper performance of the contract in the course of which the defendant breaches a duty imposed by law as a matter of social policy. In such instances, the ‘gist’ of the plaintiff’s action sounds in tort and the contract itself is collateral to the cause of action. On the other hand, if there is ‘nonfeasance,’ the wrong attributed to the defendant is solely a breach of the defendant’s duty to perform under the terms of the contract. In such instances, the ‘gist’ of the plaintiff’s action sounds in contract, and plaintiff would not have a cause of action but for the contract.

806 A.2d at 944. Under both tests, the Amended Complaint fails to set forth a claim that sounds in tort.

As stated in this Court’s November 26, 2003 Opinion and Order, the gist of Plaintiff’s cause of action sounds in contract. The contract and agreements entered into by Plaintiff and Defendants established the obligations of the parties in this matter. The alleged wrongs are breaches of those duties, and not ones imposed as a matter of social policy. Thus, under the gist of the action test, Plaintiff’s claims against Defendants sound in contract.

Under the misfeasance/nonfeasance test, Plaintiff's claims sound in contract as well. Plaintiff has alleged a failure to perform the terms of the contract. Plaintiff has alleged a failure to put the vehicle back into its pre-accident condition. Plaintiff has alleged nonfeasance. As such, Plaintiff's claims sound in contract, not tort, under the misfeasance/nonfeasance test.

Therefore, the demurrer to Counts V and VI of the Amended Complaint shall be granted. Pennsylvania does not recognize a misfeasance cause of action. Under both the gist of the action and misfeasance/nonfeasance tests, Plaintiff's claims sound in contract. Counts V and VI are tort claims and shall be dismissed.

As would relate to the request for sanctions, the Court does not feel that sanctions are required. The Court accepts Plaintiff's allegations in Counts v and VI of the Amended Complaint as a vigorous attempt to advocate all possible causes of action rather than as dilatory or frivolous. The Court will deny the Preliminary Objections in this regard.

Accordingly, Defendants' Preliminary Objections to the Second Amended Complaint are granted in part and denied in part.

**ORDER**

It is hereby ORDERED that the Preliminary Objections of Defendants filed December 31, 2003 are GRANTED IN PART and DENIED IN PART.

The Preliminary Objections are GRANTED in that Counts V and VI of the Amended Complaint are DISMISSED.

The Preliminary Objections are DENIED in that the Court will not sanction Plaintiff for including Counts V and VI in the Second Amended Complaint.

BY THE COURT:

William S. Kieser, Judge

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