

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KEYSTONE FILLER & MANUFACTURING	:	
COMPANY,	:	
Plaintiff	:	
	:	
v.	:	No. 05-00,132
	:	CIVIL ACTION
NOVINGER WELDING & REPAIR CO.,	:	
Defendant	:	SUMMARY JUDGMENT

OPINION AND ORDER

Before this Honorable Court, is the Defendant’s November 23, 2005 (and subsequent March 14, 2006) Motion for Summary Judgment. The Defendant raises five issues in his Motion for the Court’s review. First, the Defendant claims that the Plaintiff’s first cause of action, breach of contract, is legally deficient and must therefore be dismissed. The Defendant’s next two claims allege that the Plaintiff’s negligence and fraudulent misrepresentation causes of action must be dismissed because, pursuant to the “gist of the action” doctrine, the instant matter sounds in contract not tort law. The Defendant’s fourth and fifth claims attack the damages the Plaintiff seeks. For the following reasons, the Court hereby GRANTS the Defendant’s Motion for Summary Judgment as to the Plaintiff’s negligence cause of action; the Court DENIES the remainder of the Defendant’s Motion.

Background

The Plaintiff is in the business of processing coal for resale. More specifically, the Plaintiff uses two industrial dryers to reduce the moisture content in the coal in order to make the coal more amenable for specific uses. The Plaintiff’s dryers are large tubes within tubes. When hot air travels through the center tube, the coal is dried in the space between the interior wall of

the outer tube and the exterior wall of the center tube. The Defendant is in the business of welding and welding repair.

During the summer of 2003, the Plaintiff sought to increase production at his facility, and after being introduced/referred to the Defendant by a friendly competitor who had utilized the Defendant's services in the past, the Plaintiff and Defendant began discussing possibilities to achieve the Plaintiff's goal (i.e. increase production).

On September 18, 2003, the Defendant faxed the Plaintiff a "[q]uote to redo inside of rotary kiln"; the Plaintiff signed this quote and returned it, with a deposit, to the Defendant. Later, in November 2003, the parties further discussed the Plaintiff's goals and the Defendant's experience and prior work with the competitor who recommended the Defendant to the Plaintiff. In January 2004, the Defendant began installation of the new center tube.

Prior to the Defendant installing the new center tube in January 2004, the Plaintiff was utilizing a 36-inch diameter tube; the Defendant installed, pursuant to the September 18, 2003 fax, a 24-inch center tube. After installation, the Plaintiff's production did not increase and he contacted the Defendant. The Defendant, in an attempt to increase production, increased the rate at which fuel was ignited to heat the burner that heated the air that passed through the center tube. After running the dryer in this manner from January 2004 through June 2004, the increased heat caused enough damage to the dryer that the Plaintiff sought the services of another manufacturer to replace the center tube installed by the Defendant.

The Plaintiff claims that, as a result of using the 24-inch center tube per, he claims, the recommendation and representations of the Defendant, he sustained severe losses in the nature of loss profits and the costs to repair the damages caused by the Defendant's alleged wrong actions. The Plaintiff's complaint seeks damages under three theories of liability: breach of contract,

negligence, and fraudulent misrepresentation. Currently, before the Court, is the Defendant's Motion for Summary Judgment. The Defendant first contends that he did not breach the contract between the parties because he provided the 24-inch center tube the contract called for. Next, the Defendant contends that the gist of the action doctrine precludes the Plaintiff from seeking damages under theories of both contract and tort law (i.e. breach of contract and negligence and fraudulent misrepresentation). Next, the Defendant contends that the Plaintiff, if he succeeds in proving the Defendant liable under a legal cause of action, cannot seek recovery for the replacement tube installed in June 2004 because said cost was not a result of any wrong doings by the Defendant. Lastly, the Defendant challenges the Plaintiff's request for lost profits because those figures are based upon what the Plaintiff hoped to earn instead of being based on what the Plaintiff had earned in the past.

Discussion

Summary judgment is appropriate, after the close of the relevant pleadings, "where there is no genuine issue of material fact that is a necessary element of the cause of action, or if an adverse party, who will bear the burden of proof at trial, has failed to produce evidence of facts essential to the cause of action." Pa.R.C.P. No. 1035.2. In reviewing the motion for summary judgment, the Court must review the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Fine v. Checcio*, 582 Pa. 253, 264, 870 A.2d 850, 857 (Pa. 2005) citing *Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435 (Pa. 2001). Finally, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. *Fine*, at 264, 857 citing *Marks v. Tasman*, 527 Pa. 132, 589 A.2d 205 (Pa. 1991).

Instantly, the evidence derived from the relevant pleadings provides sufficient facts so as to permit the Plaintiff to proceed with his claims of breach of contract and fraudulent misrepresentation and to seek the damages flowing from said alleged claims; however, pursuant to the gist of the action doctrine, the Plaintiff's negligence claim must be dismissed.

The gist of the action doctrine requires the Court to examine the claim at issue and determine whether the "gist" of the claim sounds in contract or tort, *Etoll, Inc. v. Elias/Savion Adver.*, 2002 PA Super 347; 811 A.2d 10, 14 (2002). "Tort actions, the *Etoll* explained, 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." *Id.* at 14 citing *Bash v. Bell Tel. Co.*, 411 Pa. Super. 347, 601 A.2d 825 (Pa. Super. 1992); therefore, a tort claim is maintainable only if the contract is "collateral" to conduct that is primarily tortuous, *Yocca v. Pittsburgh Steelers Sports, Inc.*, 806 A.2d 936 (Pa. Commw. Ct. 2002), appeal granted, 573 Pa. 713, 827 A.2d 1203 (2003) and rev'd on other grounds, 578 Pa. 479; 854 A.2d 425 (Pa. 2004).

Instantly, the Plaintiff alleges that the Defendant negligently performed under the contract; "negligent performance" is simply "failure to perform as contracted" restated, and because failure to perform is actually an element of the Plaintiff's breach of contract claim, the gist of the action doctrine bars the Plaintiff from proceeding with this cause of action (i.e. negligence). Conversely, the Plaintiff's fraudulent misrepresentation claim alleges that the Defendant fraudulently induced the Plaintiff into entering into the contract at issue. The distinction between fraudulent performance (largely barred by the gist of the action doctrine) and fraud in the inducement is critical because, as the *Etoll* Court notes, "fraud in the inducement claims are much more likely to present cases in which a social policy against the fraud, external

to the contractual obligations of the parties, exists.” *Etoll* at 14 citing *Bash Bell Telephone Co.*, 411 Pa. Super. 347, 601 A.2d 825 (Pa. Super. 1992). Here, the Plaintiff’s fraudulent misrepresentation claims are collateral to the Defendant’s performance of the contract (i.e. but for the Defendant’s alleged fraudulent misrepresentation, the Plaintiff would not have entered into a contractual relationship with the Defendant) and are therefore not barred by the gist of the action doctrine.

ORDER

AND NOW, this _____ day of May 2006, the Court hereby **ORDERS** and **DIRECTS** as follows:

1. The Defendant’s Motion for Summary Judgment as to the Plaintiff’s breach of contract and fraudulent misrepresentation causes of action and subsequent damages is **DENIED**; and
2. The Defendant’s Motion for Summary Judgment as to the Plaintiff’s negligence cause of action is **GRANTED**; accordingly, Count Two of the Plaintiff’s Complaint (Negligence) is hereby **STRICKEN**.

By the Court,

Nancy L. Butts, Judge

cc: Gavin Lentz, Esq. and Todd S. McGarvey, Esq., 1524 Locust Street, Philadelphia, PA 19102
Joseph R. Musto, Esq.
Hon. Nancy L. Butts
Judges
Gary L. Weber, Esq.
Laura R. Burd, Law Clerk