

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JAMES S. ARSTRONG, JR. and,	: NO. 06-02298
JAMES S. ARMSTRONG, JR., INC.,	:
Plaintiffs	:
	: CIVIL ACTION - LAW
v.	:
	:
ALLIED DEVELOPMENT, INC.;	:
L'ATTACHE CONSULTANTS, LLC;	:
FAIRWAY LENDING, INC.; WEST	:
BRANCH ABSTRACT SERVICES, INC.;	:
MARK NASWORTHY; JOSEPH WILLIAMS;	:
RONALD R. POORMAN, JR.,	:
Defendants	:

**OPINION IN SUPPORT OF ORDER OF SEPTEMBER 5, 2007 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

The Plaintiffs appeal the Court's Order of September 5, 2007, which sustained the Preliminary Objections of the Defendants Lending, Inc. (Fairway), West Branch Abstract Services (West Branch) and Ronald Poorman, Jr. (Poorman). The Plaintiffs filed a notice of appeal on April 29, 2010, and on April 30, 2010, the Honorable Dudley N. Anderson directed the Plaintiffs, in accordance with Pa.R.A.P. No. 1925(b), to file within thirty days a concise statement of matters complained of on appeal. The Court received the Plaintiffs' concise statement of matters complained of on appeal on May 11, 2010.

The Plaintiffs raise one issue on appeal; 1) the Trial Court committed error by sustaining the Preliminary Objections of Defendants Fairway Lending, Inc., West Branch Abstract Services, Inc., and Ronald R. Poorman (the Defendants).

Background

On December 14, 2006, the Defendants filed Preliminary Objections to the Plaintiffs' original Complaint for the Plaintiffs' failure to properly plead causes of action for negligence, fraud and civil conspiracy; for violations of the Economic Loss and Gist of Action Doctrines; and for Plaintiffs' failure to attach all documents upon which Plaintiffs' claims were based.

On December 18, 2006, the Defendants Allied Development, Inc., and Mark Nasworthy filed Preliminary Objections on the same basis. The Court scheduled an argument on all Defendant's Preliminary Objections; however, prior to the scheduled argument, the Plaintiffs' Counsel contacted counsel for all objecting Defendants and advised he would amend the Plaintiffs' Complaint to address the outstanding Preliminary Objections. As a result of the Plaintiffs' agreement to amend, and with the consent of all objecting parties, the Court cancelled the argument on the Preliminary Objections.

On February 9, 2007, the Plaintiffs filed their Amended Complaint. The Plaintiffs' Amended Complaint was identical to their original Complaint, except for the fact that the Plaintiffs did attach the documents upon which their claims were based. On February 26, 2007, the Defendants filed Preliminary Objections to the Plaintiffs' Amended Complaint on the same grounds as the Preliminary Objections to the original Complaint. The Defendants Allied Development, Inc., and Mark Nasworthy filed similar Preliminary Objections. After oral argument on all Defendants' Preliminary Objections, the Court sustained all of the Motioning Defendant's Preliminary Objections by Order dated April 26, 2007, and ordered the Plaintiffs to file a Second Amended Complaint on or before May 25, 2007.

On May 10, 2007, the Plaintiffs filed their Second Amended Complaint which the Defendants claim is identical to their Amended Complaint except for a few minor additions to

their introductory paragraphs and Count III. The Defendants further claim that the Plaintiffs made no changes or additions to Counts II or IV in their Second Amended Complaint. The Plaintiffs allege in their Second Amended Complaint that on or about June 1, 2006, Poorman approached the Plaintiffs seeking a loan in the amount of one hundred ten thousand dollars (\$110,000.00) for the Defendants Allied Development, Inc. (Allied) and Mark Nasworthy (Nasworthy). The Plaintiffs also allege that at all times relevant hereto, Poorman was an agent, servant and/or workman of the Defendants Fairway and West Branch and that the actions of Poorman are imputed to Fairway. Poorman assured the Plaintiffs that the loan was a good investment and that the Plaintiffs would be paid five hundred dollars (\$500.00) per day interest on the loan. As a result of the assurances made by Poorman, the Plaintiffs agreed to lend the Defendants Allied and Nasworthy one hundred ten thousand dollars (\$110,000.00). The Plaintiffs further allege that on or about June 23, 2006, Poorman approached the Plaintiffs seeking a loan of two hundred seventy-eight thousand dollars (\$278,000.00) for the Defendants Allied and Nasworthy. As a result of the assurances made by Poorman, the Plaintiffs approached Roger Brown and Catherine Brown (the Browns) to provide the loan for Allied and Nasworthy. The Defendant Joseph Williams (Williams), acting within the scope of his employment with the Defendant L'Attache Consultants, LLC (L'Attache), obtained the aforementioned two hundred seventy-eight thousand dollar (\$278,000.00) loan for the Defendants Allied and Nasworthy. The Browns were given a Promissory Note personally guaranteed by the Plaintiffs and by the Defendants Nasworthy, Williams, Poorman and Allied. The Browns requested payment from the Plaintiffs and the aforementioned Defendants and only the Plaintiffs and the Defendants Williams and L'Attache repaid the Browns a portion of the funds. The Plaintiffs paid the Browns seventy-three thousand dollars (\$73,000.00) of the funds owed under the Promissory

Note for the aforementioned two hundred seventy-eight thousand dollar (\$278,000.00) loan. The Plaintiffs made requests to the Defendants for repayment of the one hundred ten thousand dollar (\$110,000.00) loan and the seventy three thousand dollars (\$73,000.00) paid by the Plaintiffs to the Browns, plus interest.

On June 8, 2007, the Defendants filed Preliminary Objections to Plaintiffs' Second Amended Complaint (the Defendants).

Discussion

The Trial Court committed error by granting the Preliminary Objections of Defendants Fairway Lending, Inc., West Branch Abstract Services, Inc., and Ronald R. Poorman

The Plaintiffs claim that the Trial Court committed error by sustaining the Preliminary Objections of the Defendants. The Defendants' Preliminary Objections claimed that Counts II, III, and IV of the Plaintiffs' Second Amended Complaint, like the Plaintiffs' Complaint and Amended Complaint, failed to aver material facts which would sustain claims for negligence, fraud, and civil conspiracy respectively. The Defendants raised their Preliminary Objections under Pa. R. C. P. 1028(a)(4) which allows a party to file a preliminary objection on the ground of the legal insufficiency of a pleading.

A. Count II

Count II of the Plaintiffs' Second Amended Complaint alleges negligence against the Defendants Fairway and Poorman. The Plaintiffs list in their Second Amended Complaint alleged negligent actions taken by Poorman. However, the Plaintiffs fail to allege any negligent action taken by the Defendant Fairway. The Court notes that the Plaintiffs' Count II does

incorporate by reference paragraphs one (1) through twenty-three (23) of the Plaintiffs' Second Amended Complaint and that paragraph twelve (12) of the Plaintiffs' Second Amended Complaint claims that Poorman was an agent of Fairway and that any actions of Poorman were therefore imputed to Fairway. As the Plaintiffs fail to allege any specific negligent action on the part of Fairway in Count II of their Second Amended Complaint, the Court is left to deduce that the so-called agent relationship between the Defendants Poorman and Fairway is the basis of the Defendant Fairway's supposed negligent action.

In order to plead a claim based on an agency relationship, a complainant must: "(1) identify the agent by name or appropriate description; and (2) set forth the agent's authority, and how the tortuous acts of the agent either fall within the scope of that authority, or if unauthorized, were ratified by the principal." Rachlin v. Edmison, 813 A.2d 862 (2002). citing Alumni Association v. Sullivan, 535 A.2d 1095, 1100 (Pa. Super. 1987). In this case, the Plaintiffs' Second Amended Complaint merely alleges that "At all times relevant hereto, the Defendant-Ronald L. Poorman, Jr. was an agent, servant and/or workman of the Defendant-Fairway Lending, Inc. and Defendant-West Branch Abstract Services, Inc. the actions of the Defendant-Ronald L. Poorman, Jr. are imputed to the Defendant-Fairway Lending, Inc." The Plaintiffs' Second Amended Complaint fails to set forth Poorman's authority as an agent, state how the tortuous acts of Poorman fell within his authority as an agent, or how Fairway as the principal ratified Poorman's actions. Therefore, as the Plaintiffs failed to plead the necessary facts required for a claim based on an agency relationship, the Plaintiffs' complaint against Fairway for negligence in Count II of the Second Amended Complaint fails to state a claim upon which relief may be granted.

As to the complaint of negligence against Poorman, the Plaintiffs state that Poorman's negligence was the legal cause of the Plaintiffs' damages. The Plaintiffs' Second Amended Complaint fails to distinguish between the two separate aforementioned loans when discussing the negligent actions of Poorman. As the circumstances surrounding the loans were distinct, the Court finds that the legal arguments to dismiss any negligent action on the part of Poorman in respect to each loan are also distinct. The Court will therefore discuss Poorman's actions in regard to each loan separately.

The Plaintiffs' Second Amended Complaint alleges that the Plaintiffs, relying on assurances by Poorman, agreed to lend Nasworthy and Allied a one hundred ten thousand dollar (\$110,000.00) loan. It appears to the Court that the Plaintiffs attempted to establish a confidential relationship between the Plaintiffs and Poorman such that Poorman owed the Plaintiffs a duty to provide truthful information. Describing a confidential relationship, the court in Basile v. H&R Block, Inc., 777 A.2d 95 (Pa. Super. 2001) stated "the essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." Citing In re Estate of Scott, 316 A.2d 883 (1974). The Basile Court stated further that a confidential relationship "...appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust justifiably reposed [.]" citing Frowen v. Blank, 425 A.2d 412, 416-417 (1981). In their Second Amended Complaint, the Plaintiffs merely allege that Poorman had a duty to provide truthful information because he approached the Plaintiffs to provide funding, and that as a result of Poorman's assurances, the Plaintiffs decided to provide Nasworthy and Allied a one hundred ten thousand dollar (\$110,000.00) loan. Nothing in the Plaintiffs' Second Amended Complaint even hints that the Plaintiffs' relationship with

Poorman was even remotely confidential in nature. It appears to the Court that the Plaintiffs failed to plead the necessary facts required for a negligence claim based on a confidential relationship, and therefore failed to plead the necessary facts for a negligence action against Poorman in regards to the one hundred ten thousand dollar (\$110,000.00) loan.

The Plaintiffs also allege in their Second Amended Complaint that Poorman approached the Plaintiffs to secure a two hundred seventy-eight thousand dollar (\$278,000.00) loan for Nasworthy and Allied. The Plaintiffs relied on assurances from Poorman and approached the Browns to provide the loan. The Plaintiffs co-signed a Promissory Note with Poorman to guarantee repayment to the Browns. When the Browns requested payment from the parties, the Plaintiffs paid the Browns Seventy-Three Thousand (\$73,000.00). The Plaintiffs want Poorman to repay them for the seventy-three thousand dollar (\$73,000.00) payment the Plaintiffs made to the Browns. It appears to the Court that the Plaintiffs' claim for repayment of the seventy-three thousand dollars (\$73,000.00) is barred by the Gist of the Action Doctrine, which is "...designed to maintain the conceptual distinction between breach of contract claims and tort claims." Etoll v. Elias/Savion, 811 A.2d 10 (Pa. Super. 2002) citing Bash v. Bell Tel. Co., 601 A.2d 825, 829 (Pa. Super. 1992). "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.'" Etoll at 14. citing Bohler-Uddeholm Am., Inc., v. Ellwood Group, Inc., 247 F.3d 79, 104 (3rd Cir. Pa. 2001) quoting Bash at 830. In this case, it appears that the Plaintiffs' request for repayment by Poorman arises from the Promissory Note signed by both the Plaintiffs and Poorman which guaranteed payment to the Browns. Therefore, the Plaintiffs claim that Poorman was negligent for failing to repay the Plaintiffs for the seventy-three thousand dollar (\$73,000.00) loan is barred by the Gist of the Action Doctrine.

As the Plaintiffs failed to plead sufficient facts for an action in negligence against either Fairway or Poorman, the Court believes that its Order of September 5, 2007, which granted the Defendant's Preliminary Objections, should be affirmed.

B. Count III

Count III of the Plaintiffs' Second Amended Complaint alleges fraud against unspecified Defendants. The Plaintiffs allege that they justifiably relied upon fraudulent statements made by the Defendants to enter into the Promissory Note. Specifically, the Plaintiffs' allege that the Defendants knew that the project called Sea Angel Cove had not received funding for over two and one half years, but the Defendants fraudulently told the Plaintiffs that funding for the project was immediate. The Plaintiffs further allege that at the time the Defendants induced Plaintiffs to enter into the Promissory Note, the Defendants knew that the project called Sea Angel Cove had not received local approval and never would receive local approval because of the lack of infrastructure.

It is apparent that the Plaintiffs' claim for fraud amounts to a claim against the Defendants for fraudulent misrepresentation. The court in Busy Bee v. Corestates Bank, 67 Pa. D & C. 4th 496 (Pa. D & C. 4th 2004) states that "One who fraudulently makes a misrepresentation of fact or law for the purpose of inducing another to act or refrain from acting in reliance thereon in a business transaction is liable to the other for any harm caused by justifiable reliance upon the misrepresentation." See Smith v. Renaut, 564 A.2d 188, 191 (Pa. Super. 1989) (citing Savitz v. Weinstein, 149 A.2d 110,113 (1959)). The Busy Bee court states further in order for a plaintiff to recover on a fraudulent misrepresentation claim,

the plaintiff must prove by clear and convincing evidence six elements; (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

citing Goldstein v. Phillip Morris Inc., 854 A.2d 585, 590-91 (Pa. Super. 2004). In addition to pleading the required elements of fraudulent misrepresentation, the Plaintiffs' pleading had to comply with Pa.R.C.P. 1019(b) which requires that "averments of fraud or mistake shall be averred with particularity...." The Plaintiffs in this case clearly did not meet the requirements of Pa.R.C.P. 1019(b). The Plaintiffs failed to specify which Defendants they were accusing of fraud or why the Plaintiffs' reliance on the unspecified Defendants' statements was justifiable. The Plaintiffs merely stated the legal conclusion that they justifiably relied on the Defendant's fraudulent statements; it is well established that the Court is not required to accept as true a pleader's conclusions of law. See Pike County Hotels Corp. v. Kiefer, 396 A.2d 677, 681 (Pa. Super. 1978).

As the Plaintiffs failed to plead sufficient facts for an action in fraud, the Court believes that its Order of September 5, 2007, which granted the Defendant's Preliminary Objections, should be affirmed.

C. Count IV

Count IV of the Plaintiffs' Second Amended Complaint alleges conspiracy against unspecified Defendants. A cause of action for civil conspiracy requires "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common

purpose; and (3) actual legal damage.” Smith v. Wagner, 588 A.2d 1308 (Pa. Super. 1991). Burnside v. Abbott Laboratories, 505 A.2d 973, 980 (Pa. Super. 1985); Gordon v. Lancaster Osteopathic Hospital Ass'n, 489 A.2d 1364, 1372 (Pa. Super. 1985); Aetna Electroplating Co. v. Jenkins, 484 A.2d 134, 137 (Pa. Super. 1984); Baker v. Rangos, 324 A.2d at 506 (Pa. Super. 1974); Raneri v. DePolo, 441 A.2d 1373, 1376 (Pa. Commw. 1983). The court in Brown v. Blaine, 833 A.2d 1166 n.16 (Pa. Commw. 2003) notes that

A complaint alleging civil conspiracy must allege facts showing the existence of all the elements, and if the plaintiff is unable to allege facts that are direct evidence of the combination and its intent, he must allege facts that, if proved, will support an inference of the combination and its intent.

See Baker v. Rangos, 324 A.2d 498 (Pa. Super. 1974). Furthermore, “Bare allegations of conspiracy, without more, are insufficient to survive a demurrer.” Brown at n.16 citing Petula v. Melody, 588 A.2d 103 (Pa. Commw. 1991). In this case, the Plaintiffs’ Second Amended Complaint states that “On information and belief, the Defendants acted in concert and conspired to deprive Plaintiffs of the aforementioned funds.” The Plaintiffs further allege that they suffered damages as a result of the alleged conspiracy and that the actions of the Defendants in conspiring to deprive the Plaintiffs of money constituted outrageous conduct. The Court observes that the Plaintiffs allegations against the Defendants for conspiracy amount to nothing more than a bare allegation. The Plaintiffs failed to allege facts which showed the existence of the elements of conspiracy or to allege facts supporting an inference of conspiracy.

As the Plaintiffs failed to plead sufficient facts for an action in civil conspiracy against the Defendants, the Court’s Order of September 5, 2007, which granted the Defendant’s Preliminary Objections, should be affirmed.

Conclusion

As the Plaintiffs' argument is without merit, it is respectfully suggested that this Court's Order of September 5, 2007, which sustained the Defendant's Preliminary Objections, be affirmed.

Respectfully submitted,

Nancy L. Butts, President Judge

xc: Joseph Orso, III., Esq.
Robin A. Read, Esq.
Allied Development, Inc.
c/o Mark Nasworthy
2225 Red Maple Road
Flower Mount, TX 75022
Mark Nasworthy
2225 Red Maple Road
Flower Mound, TX 75022
Hon. Dudley N. Anderson
Amanda Browning, Esq. (Law Clerk)
Gary L. Weber, Esq. (LLA)