

IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

RONALD INSINGER and INSINGER'S :
PERSONAL CARE HOME, INC. :
Plaintiffs : NO: 10-00326
vs. :
: :
QUALITY AIR MECHANICAL, INC. and : CIVIL ACTION
AUTOMATIC SPRINKLER SUPPLY, :
INC. :
Defendants :

OPINION

On April 15, 2010 Plaintiffs filed an Amended Complaint. In their Amended Complaint, Plaintiffs allege that they contracted with Defendant Quality Air Mechanical, Inc. (hereinafter "QAM") to build an addition to the Insinger Personal Care Home, Inc. facility. Plaintiffs allege that they executed an addendum to their contract with QAM on September 24, 2007, which provided that QAM would also provide a sprinkler system within the addition. Plaintiffs allege that QAM contracted with Automatic Sprinkler Supply, Inc. (hereinafter "Automatic Sprinkler") for the selection, design and installation of the sprinkler system called for in the addendum to Plaintiffs' contract with QAM. Plaintiffs' Complaint sets forth a single Count, Count III, against Automatic Sprinkler for negligence. Plaintiffs allege that Automatic Sprinkler was negligent in the selection, installation and design of the system and assert that the systems malfunction resulted in harm.

On May 5, 2010 Defendant Automatic Sprinkler filed Preliminary Objections to Plaintiffs' Amended Complaint. Defendant Automatic Sprinkler asserts that the only duties allegedly breached by Automatic Sprinkler are those established by and

arising out of its contract with QAM, and accordingly, Plaintiffs negligence claim should be dismissed pursuant to Pennsylvania's "gist of the action" doctrine. This Court agrees.

Pennsylvania's "gist of the doctrine" action bars plaintiffs from bringing a tort claim that merely replicates a claim for breach of an underlying contract. Federal Insurance Company v. Philotimo, Inc., 2009 U.S. Dist. LEXIS 108105 (W.D. Pa. 2009). "Under Pennsylvania law tort claims allegedly committed in the course of carrying out a contractual agreement are dismissible if the "gist" of them sound in contract instead of tort." Id. at 15-16, quoting Quorum Health Res., Inc. v. Carbon-Schuylkill Comm. Hosp., 49 F.Supp.2d 430, 432 (E.D. Pa. 1999). The Pennsylvania Superior Court has described the application of the doctrine as follows:

The gist of the action doctrine acts to foreclose tort claims: 1) arising solely from the contractual relationship between the parties; 2) when the alleged duties breached were grounded in the contract itself; 3) where any liability stems from the contract; and 4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.....**The critical conceptual distinction between a breach of contract claim and a tort claim is that the former arises out of 'breaches of duties imposed by mutual consensus agreements between particular individuals,' while the latter arises out of 'breaches of duties imposed by law as a matter of social policy.'**(Emphasis added)(Citations omitted). Reardon v. Allegheny College, 926 A.2d 477, 486-7 (Pa.Super. 2007).

Although Plaintiffs assert their action against Automatic Sprinkler is pursuant to their breach of a duty imposed by law as a matter of social policy, they have failed to identify the social policy allegedly breached. The Plaintiffs instead appear to rely upon some undefined general duty of care.

In Reardon, *supra*, the Superior Court held:

It is axiomatic that a plaintiff must establish he or she was owed a duty of care by the defendant, the defendant breached this duty, and this breach resulted in injury and actual loss in order to successfully prove negligence....Appellant's charges of negligence are premised on the concept that Allegheny and Professor Nelson owed appellant, 'as a member of the college community,' duties that are 'in addition to and apart from any contractual obligation raised.'...**The problem with this concept is that appellant fails to plead from where this duty arises or what this duty entails.**" (Emphasis added). Id. at 487.

Similarly, the Plaintiffs have failed to identify from where Automatic Sprinkler's alleged social policy duty arose, and what the duty entailed. Moreover, in reviewing the Amended Complaint, it appears clear that despite the Plaintiffs' contention that there is no contract-based duty, all claims alleged with regard to Defendant Automatic Sprinkler arose from contractual duties between the parties.

Paragraph 9 of Plaintiffs' Amended Complaint states:

9. Quality Air Mechanical, Inc. contracted with Automatic Sprinkler Supply, Inc. for the selection, design and installation of the sprinkler system for the Plaintiff's addition.

Since the only allegation regarding any duty that could be breached by Automatic Sprinkler relates to duties arising out of Automatic Sprinkler's contract with QAM, Plaintiffs' tort-based claim of negligence can only be construed as alleging Automatic Sprinkler failed to live up to its contractual obligations. "A contract action does not become a tort action by virtue of allegations in the complaint that contractual duties were negligently performed." Federal Ins. Co. v. Philotimo, Inc., *supra*, p. 17.

The facts of Herman Goldner Company, Inc. et al., v. CIMCO Lewis Industries, et al., 2001 Phila.Ct.Com.Pl. LEXIS 31, are instructive on this issue. The dispute in Herman Goldner, *supra*, revolved around the construction of the First Union Center. Spectrum entered into a contract with Driscoll, the general contractor. Driscoll entered into a subcontract with Goldner for HVAC work. Goldner, in turn, entered into a purchase order with HTT whereby HTT agreed to secure the design and fabrication of refrigeration equipment. HTT then entered into a written purchase order agreement with Klenzoid in which Klenzoid agreed to design and manufacture a water treatment/filtration system. According to the complaint, operation of the equipment and systems resulted in abnormal corrosion in the heat exchange tubes which resulted in system failures. Plaintiffs complaint included a claim for negligence against Klenzoid for alleged improper construction of the system. In sustaining Klenzoid's Preliminary Objections, the court held:

The Pennsylvania Superior Court has described the gist of the action doctrine as follows:

To be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, ...a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally,...the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa.Super. 221, 229, 663 A.2d 753, 757 (1995)(citing Bash v. Bell Telephone Co., 411 Pa.Super. 347, 601 A.2d 825 (1992)). See also Snyder Heating Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 715 A.2d 483, 487 (Pa.Super. Ct. 1998)("to be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral"). Here, there is no social imposed duty implicated by Klenzoid's conduct. Rather, the duties Klenzoid is alleged to

have breached arise solely from the various contracts between and among the Parties. Thus, Goldner's negligence action is barred by Pennsylvania law.

Similarly, in the present action, the parties have identified no social duty implicated by Automatic Sprinkler's alleged negligent conduct; rather, any duties allegedly breached by Automatic Sprinkler's conduct arose solely from contracts among and between the parties. As the gist of the action doctrine precludes a tort action against Automatic Sprinkler and there is admittedly no contract between the Plaintiffs and Automatic Sprinkler, Count III of the Amended Complaint is DISMISSED.¹

ORDER

AND NOW, this ___ day of July, 2010, upon consideration of the Preliminary Objections of Defendant Automatic Sprinkler Supply, Inc. to Plaintiffs' Amended Complaint, it is hereby ORDERED that the Preliminary Objection is SUSTAINED and Count III of Plaintiffs' Amended Complaint is hereby DISMISSED with prejudice.

BY THE COURT,

Richard A. Gray, J.

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¹ As Count III of Plaintiffs' Amended Complaint is dismissed, application of the economic loss rule to limit damages on this Count is not relevant.