

**IN THE COURT OF COMMON PLEAS OF TIOGA COUNTY,
PENNSYLVANIA**

TRENCO, INC	:	
Plaintiff	:	No. 14-00,537
vs.	:	
MARCELLUS ENERGY COLLECTION	:	CIVIL ACTION - LAW
Defendant	:	

OPINION

This case arises out of an alleged breach of a commercial lease for real property located in the city of Williamsport. The Defendant filed an Answer with New Matter and Counter Claims essentially alleging that Plaintiff landlord improperly terminated the lease and kept or improperly retained the personal property and fixtures of Defendant left on the real property. The Plaintiff filed Preliminary Objections to Defendant's New Matter and Counter Claim as follows:

1 That paragraph 27 of the New Matter is vague and not consistent with the Rules of Civil Procedure.

2. That the conversion count, Count #3, is essentially a repeat of Count #1, the contract count, and is therefore barred by the Gist of the Action Doctrine.

3. Count #3, Unjust Enrichment Claim, should be dismissed as contrary to law when a contract claim is alleged.

A party may file preliminary objections based on the legal sufficiency or insufficiency of a pleading (demurrer) pursuant to Pa. R.C.P. 1028(a)(4). A demurrer tests the legal sufficiency of the

complaint. Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 714 (Pa.Super. 2005). When reviewing preliminary objections in the nature of a demurrer, the Court must “accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts.” Thierfelder v. Wolfert, 52 A.3d 1251, 1253 (Pa. 2012), *citing*, Stilp v. Commonwealth, 940 A.2d 1227, 1232 n.9 (Pa. 2007). “Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt.” Bower v. Bower, 611 A.2d 181, 182 (Pa. 1992)(emphasis added).

Initially paragraph 27 of the New Matter is vague, conclusory, lacks facts and is stricken as contrary to the Rules of Civil Procedure.

As to the Gist of the Action argument, the Court concludes that that theory does in fact bar Count #3 of the Counter Claim. Paragraph 11 of the lease specifically covers the topic of personal property and fixtures and the tenant’s entitlement to those. Essentially that paragraph provides that the tenant may elect to retain or remove the personal property and fixtures. The gravamen of the Complaint in both Count #1, breach of the lease in contract, and Count #3 conversion in Tort, is that the landlord improperly retained and kept possession of Defendant’s personal property and fixtures. Therefore it is clear that the issue of possession of the property was contemplated by the parties in the lease and specific lease language is applicable in this case.

The Gist of the Action Doctrine forecloses Tort claims arising solely from the contractual relationship between the parties when the alleged duties breached was grounded in the contract itself, where any liability stems from the contract and when Tort claims essentially duplicates the Breach of Contract claims. Reardon v. Allegheny College, 926 A.2d 477 (Pa. Super. 2007). In addition, the Gist of the Action Doctrine bars a Plaintiff from recasting ordinary Breach of Contract claims into Tort claims. Knight v. Springfield Hyundai, 81 A.3d 940 (Pa. Super. 2013). This is precisely what Defendant has attempted to do in Count #3 of his Counterclaim.

As to Count #2, Unjust Enrichment, Plaintiff has conceded that Unjust Enrichment may move ahead at the pleading stage as alternative pleading is permitted by Pa. R.C.P. 1020.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this ____ day of September, 2014, it is Ordered and Directed as follows:

1. Paragraph 27 of Defendant's Answer and New Matter is **STRICKEN**.
2. The objection to Count #3 of Defendant's Counter Claim for conversion is GRANTED and Count #3 is **DISMISSED** .
3. The Objection to Count #2 in Unjust Enrichment is **OVERRULED**.
4. Plaintiff shall file a reply to the New Matter and Counter Claim within 20 days.

By the Court,

Richard A. Gray,
Judge

RAG/kae

cc: Brett J. Southerd, Esq.
Austin White, Esq.