

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KEITH ARMSON and KAREN ARMSON,	:	DOCKET NO. 15-01194
Plaintiffs,	:	
	:	CIVIL ACTION
vs.	:	
	:	
AQUARIUS POOLS,	:	
Defendants	:	PRELIMINARY OBJECTIONS

OPINION AND ORDER

Before the Court are preliminary objections filed by Defendant, Aquarius Pools, to Keith and Karen Armson’s, complaint. Aquarius Pools demurs to Count 2 of the complaint. In Count 2, the Armsons seek recovery for violations of the Unfair Trade Practices and Consumer Protection Law, UTPCPL, 73 Pa. C.S.A. § 201-1 *et. seq.* as to breach of warranties, inferior repairs and other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. Aquarius Pools contends that such claims under the UTPCPL are barred by the gist of the action doctrine because they are grounded in contract and not in tort. In the alternative, Aquarius Pools objects to the lack of specificity in the complaint as to any deceptive conduct that was justifiably relied upon by the Armsons. Upon consideration of the pleadings, argument and briefs, the Court OVERRULES the demurrer as to the gist of the action doctrine and SUSTAINS, in part, the demurrer as to the lack of specificity as to the catchall provision under the UTPCPL claim. The following opinion is provided in support of this Court’s rulings.

Factual Background.

The Armsons filed a two count complaint against Aquarius Pools in which they averred the following facts.¹ On June 28, 2012, the parties entered a written agreement which required Aquarius Pools to install an in-ground swimming pool according to specifications and warranties

¹ For purposes of deciding preliminary objections, 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).

for a total of \$39,845. A copy of that agreement is attached to the complaint. In that agreement, Aquarius Pools warranted that all material used would be of good quality and all work would be done in a competent and workmanlike manner. Aquarius Pools further warranted that it would “remedy any defect in the workmanship” upon notice within a year without additional cost. As a condition precedent to the warranties, the principal amount of the contract, together with any extras must have been paid in full.

On August 15, 2012, the parties executed a written change order for upgrades costing an additional \$16,983.50. Aquarius Pools guaranteed that all material would be as specified and that all work would be completed in a workmanlike manner according to standard practices. In addition, the parties contracted in writing for Aquarius Pools to install a fence around the pool area according to specifications and warranties laid out in that contract for a cost of \$9,485.00. The parties modified the cost to \$8,200.00. The quote/contract for the fence included a one year warranty on installation workmanship.

The Armsons aver that Aquarius Pools delayed work, failed to complete specified work and performed substandard work. The Armsons provided the following examples of delay, incompleteness and substandard work.

- A. The entire pool area was improperly graded and finished, resulting water drainage issues and mud and sediment entering the pool on multiple occasions;
- B. The plumbing for the pool was improperly installed and had to [be] excavated and repaired on four separate occasions, resulting in costs to Plaintiffs for plumbing repairs, excavating and landscaping in the pool area;
- C. The fencing was substandard and requires replacement as installed and remains of varying heights, crooked, and bent;
- D. A multicoat stain was never applied to the concrete within the pool area and steps of the pool, resulting in pitting, holes and cracking to the concrete;
- E. Large sections of concrete subsided shortly after installation by Aquarius and much of the concrete surface of the pool area is pitted, with holes, and has cracked and decayed; and
- F. The winter cover for the pool developed a hole shortly after installation.

The Armsons repeatedly contacted Aquarius Pools about the issues, seeking that Aquarius Pools honor the agreements and warranties. Aquarius Pools shifted blame for faulty services to other parties who had not contracted with the Armsons. The Armsons fully performed their obligations under the agreements. The Armsons sued for breach of contract in count 1 of their complaint. In Count 2, the Armsons sued for violations of the UTPCPL, contending that Aquarius Pools engaged in unfair and deceptive trade practices by the following:

- (A) failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;
- (B) making repairs, improvements, or replacements on tangible, real, or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing; and
- (C) engaging in any other fraudulent or deceptive conduct which created a likelihood of confusion or misunderstanding.

Legal Standards.

Preliminary Objections

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). In deciding a demurrer the face of the complaint must indicate that the “claims may not be sustained and that the law will not permit a recovery. If there is any doubt, it should be resolved by the overruling of the demurrer.” Melon Bank, N.A. v. Fabinyi, 650 A.2d 895, 899 (Pa. Super. 1994) (citations omitted). “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).

Gist of the Action

The gist of the action doctrine precludes the recasting of ordinary breach of contract claims into tort claims. Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10 (Pa. Super. 2002); Reardon v. Allegheny College, 926 A.2d 477 (Pa. Super. 2007); Knight v. Springfield Hyundai, 81 A.3d 940 (Pa. Super. 2013). The Pennsylvania Supreme Court synthesized Pennsylvania's case-law on the gist of the action doctrine in Bruno v. Erie Insurance Co, 106 A.3d 48 (Pa. 2014). In Bruno, the Pennsylvania Supreme Court concluded that the gist of the action doctrine did not bar a claim of negligence against an insurance agent. The agent made false assurances regarding the toxicity of mold and recommended that renovations continue, causing personal injury. The agent was not performing contractual duties when making those assurances and recommendations. In determining that the gist of the action doctrine did not apply, the Court considered whether the alleged breach involved a social duty or a duty created by the contract itself.

Unfair Trade Practices

The UTPCPL, 73 Pa. C.S.A. § 201-3, declares unlawful unfair methods of competition and unfair or deceptive acts or practices defined in 73 P.S. § 201-2 (4)(i) through (xxi). Specific statutory unlawful conduct includes the following:

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

(xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. 73 P.S. § 201-2 (xiv)(xvi) and (xxi).

The statute provides a private cause of action for “[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful” to recover actual damages or \$100, whichever is greater. 73 P.S. § 201-9.2

Discussion

The Court will first discuss the demurrer to the UTPCPL count on the grounds that the gist of the action doctrine bars that count. The Court will next discuss the objection based upon lack of specificity.

UTPCPL – Gist of the Action

The gist of the action doctrine does not bar UTPCPL claims because a UTPCPL claim is not a tort; it is a statutory cause of action. The gist of the action doctrine has been employed in Pennsylvania to preclude a party from bringing a tort claim for what is truly a breach of contract claim. *See, Bruno*, 106 A.3d at 60, 66 & 68. In *Diodato v. Wells Fargo Ins. Servs., USA*, 44 F. Supp. 3d 541 (M.D. Pa. 2014), Chief Judge Conner declined to apply the gist of the action doctrine to a statutory claim for misappropriation of trade secrets, stating that “at least three district courts within the Third Circuit” had “declined to apply the doctrine to preclude statutory claims in light of the dearth of authority supporting such an application.” *Diodato, supra*, 44 F.Supp. at 576. (citations omitted). In one of those three cases cited, *Clark v. EMC Mortg. Corp.*, No. 08-1409, 2009 U.S. Dist. LEXIS 61181, at *18 (E.D. Pa. Jan. 29, 2009), the Court rejected application of the gist of the action doctrine to statutory claims under the UTPCPL. Similarly in *Gadley v. Ellis*, No. 3:13-17, 2015 U.S. Dist. LEXIS 63914, 20-21 (W.D. Pa. May 14, 2015), the Court concluded that a violation of duties imposed by statute rather than contract

was not barred by the gist of the action doctrine but rather fell under a general duty of care created by law owed to the public.

Furthermore, the statutory obligations created by the UTPCPL fall within the type of social duty owed to the public which is not barred by the gist of the action doctrine under Bruno, supra. The UTPCPL creates a social duty by statute, separate and apart from any contractual duty at issue between parties, by rendering certain conduct unlawful and actionable. The UTPCPL defines unlawful conduct and explicitly authorizes a private cause of action for such conduct. The UTPCPL contemplates deterrence to promote social duties by authorizing recovery, in the court's discretion, of "up to three times the actual damages sustained" but not less than one hundred dollars (\$ 100)" as well costs and reasonable attorney fees. As noted by the Superior Court, recovery for conduct rendered unlawful by the UTPCPL is not merely a masked breach of contract action. *See, e.g., Knight v. Springfield Hyundai*, 2013 PA Super 309, 81 A.3d 940, 951 (Pa. Super. 2013) (Gist of the action doctrine did not warrant the dismissal UTPCPL claims where false advertisements, statements, and assurances were rendered unlawful by statute.) Since the UTPCPL, addresses a social duty owed to the public as opposed to a contractual duty, the claim would not be barred by gist of the action under the analysis of Bruno, supra.

Lastly, applying the gist of the action to bar UTPCPL claims, such as those in the present case, would render the UTPCPL completely ineffective as to some of its provisions. The UTPCPL expressly declares unlawful the failure "to comply with the terms of any written guarantee or warranty given to the buyer" and failing to meet standards agreed to the quality of repairs and improvements." 73 P.S. § 201-2 (4) (xiv) (xvi). "The General Assembly intends the entire statute to be effective and certain[,] and favors a public interest over a private interest. 1 Pa.C.S. § 1922. Applying the gist of the action doctrine to bar violations that that are based upon

written guarantees and warranties or failure to meet written standards for workmanship renders subsection (xiv) and (xvi) of 73 P.S. § 201-2 (4) completely ineffective in violation of statutory construction. Our trial court has recently rendered a verdict awarding double damages for violations of the Unfair Trade Practices and Consumer Protection Law with respect to quality of workmanship agreed to in writing which struck the court as somewhat egregious. See, Rauch v. Rauch, No. 13-00,997 (C.P. Lycoming, March 2, 2015)(J. Anderson). Accordingly, this Court concludes that such claims are not barred by the gist of the action doctrine.

Lack of Specificity

As to the objections based upon lack of specificity, the Court notes that the complaint tracks the language of UTPCPL 73 P.S. § 201-2 (4) (xiv), (xvi) and (xxi) when specifying the UTPCPL violations violated. Complaint, ¶ 15. The complaint includes sufficient factual allegations to support violations as to 73 P.S. § 201-2 (4) (xiv) and (xvi). However, it is unclear what, if any, conduct in the complaint falls outside 73 P.S. § 201-2 (4) (xiv) and (xvi) but within the catchall provision of (xxi), i.e., “other fraudulent or deceptive conduct which created a likelihood of confusion or misunderstanding.”

Accordingly, the Court enters the following Order.

ORDER

AND NOW this **19th** day of **November, 2015**, it is ORDERED and DIRECTED as follows. The demurrers are SUSTAINED in part and OVERRULED in part as follows.

1. The demurrer to Count 2 – UTCPL claim is OVERRULED.
2. The objection as to lack of specificity as to Count 2 – UTCPL is OVERRULED in part and SUSTAINED in part. The objection to lack of specificity is OVERRULED as to the

alleged violations of 73 P.S. § 201-2 (xiv) and (xv) but SUSTAINED as to the alleged violation of the catchall provision, 73 P.S. § 201-2 (xxi).

3. Plaintiffs shall file an amended complaint within 20 days or strike the claim for a violation 73 P.S. § 201-2 (xxi). In their amended complaint, Plaintiffs shall specify how it alleges that Defendants engaged in “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”

BY THE COURT,

November 19, 2015
Date

Richard A. Gray, J.

c: Michael J. Zicoello, Esq. & Joshua J. Cochran, Esq.
Bret J. Southard, Esq.