

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FIELD-TEC SERVICES, INC.,	:	DOCKET NO. 14-02,400
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION
	:	
SPITFIRE FIELD SERVICES CO.	:	PRELIMINARY
Defendant	:	OBJECTIONS
	:	

ORDER

Before the Court are Defendants preliminary objections to the complaint based upon five grounds. Upon consideration of the argument and briefs submitted by Counsel, the Court overrules the demurrer to Count 1 and sustains the demurrers to Counts 2 and 3. The following opinion is provided in support of this Court's rulings.

Background

Plaintiff is a business that repairs machinery. In the course of its business, Plaintiff received a Skid Mount Hydraulic Pump to repair on behalf of a customer. In order for repairs to be made, the pump needed to be taken out of a container and moved from one part of Plaintiff's property to another. Plaintiff hired Defendant to move the pump for \$600. When Defendant picked the pump out of the container, the hydraulic pump slid off the trailer and sustained extensive damage.

Plaintiff's complaint contains three counts. The first count is for breach of contract. Specifically, Plaintiff avers that Defendant breached the agreement to perform in a reasonable and workmanlike manner when moving the equipment. As a result of the breach of contract, Plaintiff seeks to recover as damages the costs incurred to repair the damage to the equipment, including Plaintiff's labor and lost work and revenue incurred by Plaintiff in order to make the repairs. The second count is a claim of negligence by Defendant in failing to hire capable and

competent employees to perform the work without damaging the equipment. Finally, the third count is a claim of negligence against Defendant for dropping the machine, failing to take adequate precautions, driving the machine too quickly; failing to properly secure the machine and ensure it was safe before attempting to move; using an improper trailer and “g) Otherwise acting negligently under the circumstances.”

Defendant’s Preliminary Objections to the Complaint

Defendant raises six preliminary objections which are summarized as follows

1. Defendant moves to dismiss Count 1 for legal insufficiency of a pleading (demurrer) pursuant to Pa. R.C.P. 1028(a)(4) because Plaintiff includes lost work and revenue as damages in its breach of contract claim which Defendant contends are not available under circumstances.¹
2. Similarly, Defendant moves to dismiss Counts 2 and 3 for legal insufficiency of a pleading (demurrer) pursuant to Pa. R.C.P. 1028(a)(4) under the gist of the action doctrine.
3. Defendant further moves to strike count 2 pursuant to Pa. R.C.P. 1028(a)(2) or 1019(a) for failure of a pleading to conform to law or rule of court which requires material facts upon which a cause of action to be stated in concise and summary form. Defendant contends that the general assertion that Defendant failed to hire an employee capable and competent of performing the work under the contract (moving the equipment) fails to conform to 1019(a).
4. In addition to striking count 2, Defendant moves for more specific pleading with respect to count 2 pursuant to Pa. R.C.P. 1028(a)(4) and Connor v. Allegheny General Hospital, 461 A.2d 600 (Pa. 1983).

¹The Court does not agree that Pa. R.C.P. No 1019(f) requires the defendant to plead “foreseability” as a special damage as Defendant contends. *See*, Pa. R.C.P. No. 1019 “(f) Averments of time, place and items of special damage shall be specifically stated.” The Court believes that Plaintiff has complied with Rule 1019 by specifically pleading a claim for lost revenue and lost work.

5. Defendant moves to strike count 3 for its failure to conform to law or rule of court pursuant to Pa. R.C.P. 1028(a)(2) and 1019(a) by alleging in paragraph 20(g) that Defendant was “otherwise acting negligently under the circumstances” without alleging facts upon which the allegation of negligence is based. At argument and in its brief, Plaintiff agreed to strike the language “otherwise acting negligently under the circumstances.” Consequently, this objection is moot and will not be discussed further.

6. Defendant moves for a more specific pleading, alleging that Count 3 of Plaintiff’s complaint is insufficiently specific and lead to amplification beyond the statute of limitations. The Court interprets this objection as being based upon Pa. R.C.P. 1028(a)(4) and Connor v. Allegheny General Hospital, 461 A.2d 600 (Pa. 1983). The Court believes this objection is also moot given the agreement to strike paragraph 20(g) of the complaint and will not be discussed further.

Legal Standards

Preliminary Objections

1. 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).
2. A demurrer tests the legal sufficiency of the complaint. Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 714 (Pa.Super. 2005).
3. 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).

4. “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).

Damages for Breach of Contract

5. Our Pennsylvania Supreme Court has recognized that damages for breach of contract include whatever damages the party suffered provided that: “(1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) they can be proved with reasonable certainty.” Helpin v. Trs. of the Univ. of Pa., 10 A.3d 267 (Pa. 2010), *quoting*, Ferrer v. Trustees of the University of Pennsylvania, 573 Pa. 310, 825 A.2d 591, 610 (Pa. 2002).
6. “The "general rule of law applicable for loss of profits" in a contract action permits recovery of lost profits when "there is evidence to establish them with reasonable certainty," "there is evidence to show that they were the proximate consequence of the wrong" and if "they were reasonably foreseeable.”” Quinn v. Bupp, 2008 PA Super 161 (Pa. Super. 2008), *citing*, Company Image Knitware, Ltd. v. Mothers Work, Inc., 2006 PA Super 272, 909 A.2d 324, 336 (Pa.Super. 2006) (quoting Birth Center v. St. Paul Co., Inc., 567 Pa. 386, 787 A.2d 376, 387-88 n.15 (Pa. 2001)). *See also*, New Hope Books, Inc. v. Datavision Prologix, Inc., No. 01741 (Phila. Co. June 24, 2003), *citing*, Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 120, 464 A.2d 1243, 1258 (1983) (*citing* R.I. Lampus Co. v. Neville Cement Products Corp., 474 Pa. 199, 378 A.2d 288 (1977), Frank B. Bozzo, Inc. v. Electric Weld Division, 283 Pa. Super. 35, 423 A.2d 702 (1980), RESTATEMENT, 2D, CONTRACTS § 351)).

Gist of the Action

7. 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).
8. Recently, the Pennsylvania Supreme Court synthesized and Pennsylvania's case-law on the gist of the action doctrine in Bruno v. Erie Insurance Co., No. 25 WAP (Pa. December 15, 2014). In that case, the Court concluded that the gist of the action doctrine did not bar a claim of negligence against an insurance agent for making false assurances regarding the toxicity of mold and for recommending continued renovations on the property causing personal injury. Id. at 61. In making this conclusion, the Court relied upon the fact that the claim was not based upon the insurance company's failure to meet its obligations under the insurance contract, but was based upon the manner in which its agents fulfilled the obligations. Id. In determining whether the gist of the action doctrine applied, the Court considered whether the alleged breach involves a social duty or a duty created by the contract itself. Id.

Discussion

Applying these legal principles to the present case, the Court will address Defendants' demurrers first. In deciding a demurrer, the Court must:

In order to sustain a demurrer, it is essential that the face of the complaint indicate that its 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).

With this standard in mind, the Court concludes that the demurrer to Count 1 is denied. Plaintiff alleged sufficient facts in support of its breach of contract claim as well as lost profits or revenue

as part of the damages for the breach. See, e.g., Helpin v. Trs. of the Univ. of Pa., 10 A.3d 267 (Pa. 2010); Quinn v. Bupp, 2008 PA Super 161 (Pa. Super. 2008). In particular, the Plaintiff alleged that it hired Defendant to move the pump belonging to a customer so that Plaintiff could make repairs for a customer. When moving the pump, Defendant dropped and damaged the pump belonging to the customer. It can be inferred that the dropping and damaging of the pump is a breach of the contract from which the natural and foreseeable result of the damage of a customer's equipment (i.e. the breach) is that Plaintiff would incur losses to repair the damage. In accordance with Pa. R.C.P. 1019(a), Plaintiff specifically plead that those losses include lost profits or revenue for the labor expended to repair the damage to the pump caused by Defendant. As such, Defendant's demurrer to Count 1 is far from clear and free from doubt, and the demurrer is overruled.

As to Defendant's demurrer to Count 2 and 3, the Court must determine whether the negligent hiring claim and the negligence claims are barred by the gist of the action doctrine. The Court believes that the Defendant's failure to provide a competent and capable employee to perform the work under the contract and the dropping of the machine are a failure to meet basic obligation under the contract and therefore should be barred by the gist of the action doctrine. See, e.g., Bruno v. Erie Insurance Co., No. 25 WAP (Pa. December 15, 2014)(the claim was not based upon the insurance company's failure to meet its obligations under the insurance contract, but was based upon the manner in which its agents fulfilled the obligations). The Court believes that hiring a competent and capable individual to perform work required by the contract is a basic contractual duty as opposed to a social duty. Furthermore, it can be inferred that the contract required that the equipment be moved without damage. Additional support for the Court's conclusion that the gist of the action is contractual as opposed to tortious is that

damages are all economic and do not involve any personal injury claims. In Bruno, supra, the plaintiff suffered physical harm from exposure to toxic mold whereas in the instant case the Plaintiff did not claim any non-economic losses. In essence the negligence claims are an attempt to recast a contract claim as a tort claim which is barred by the gist of the action doctrine.

ORDER

AND NOW this 13th day of February, 2015, the Court grants the preliminary objections in part and denies the preliminary objections in part as follows.

1. Defendant's demurrer to Count 1 is OVERRULED.
2. Defendant's demurrer to Count 2 and 3 is SUSTAINED.
3. The remaining objections are dismissed as MOOT.
4. On this date, the Court will issue a separate Order placing this matter on the list to be scheduled for arbitration.
5. Defendant shall file an Answer within 20 days.

BY THE COURT,

February 13, 2015
Date

Richard A. Gray, J.

cc: Benjamin E. Landon, Esq.
Bret J. Southard, Esq.