

land belonged to Danko Holdings, L.P., and since Forestree agreed to act as the agent for Danko, there is no privity of contract with Klingerman individually.”

Preliminary Objections are permitted pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure. Defendants’ preliminary objection titled as a motion to dismiss for failure to state a cause of action for lack of standing, is the equivalent of a demurrer permitted by Rule 1028 (a) (4). The question presented in a demurrer is whether on the facts averred, the law indicates with certainty that no recovery is possible. *County of Dauphin v. City of Harrisburg*, 24 A.3d 1083, 1089 (Pa. Commw. 2011). When considering a demurrer, the material facts set forth in the Complaint and all inferences reasonably deducible therefrom must be admitted as true. *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208 (Pa. Super. 2012). Fact-based defenses, even those which might ultimately inure to the defendant’s benefit, are irrelevant on a demurrer. *Werner v. Plater-Zyberk*, 799 A.2d 776, 783 (Pa. Super. 2002), appeal denied, 569 Pa. 722, 806 A.2d 862 (2003).

The court’s review at this stage is confined to the content of the complaint and if a doubt exists as to whether a demurrer to the complaint should be sustained, the doubt must be resolved in favor of overruling the demurrer. *R.W. v. Manzek*, 585 Pa. 335, 888 A.2d 740, 742 (2005); *In Re: Adoption of S.P.T.*, 783 A.2d 779, 782 (Pa. Super. 2001).

The court at this stage, cannot state with certainty that no recovery is possible for Plaintiff Klingerman individually and accordingly will deny Defendants’ motion to dismiss VII, breach of contract, and Count IX, civil conspiracy.

As Defendants note in their Brief, in order to maintain a cause of action for breach of contract, Plaintiff must establish: (1) the existence of a contract including its essential terms; (2) breach of a duty imposed by the contract; and (3) resulting damages. *Lackner v. Glossner*, 892 A.2d 21, 30 (Pa. Super. 2006).

Privity of contract exists when there is a connection or relationship which exists between two or more contracting parties. “For parties to be considered to be in privity, a contractual relationship must exist between them.” *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000, 1006 (2003).

Plaintiffs’ breach of contract action against Forestree and Corl as set forth in Court VII of Plaintiffs’ Complaint, asserts that Plaintiffs entered into an oral contract by which Forestree agreed to act as Plaintiff Danko’s designated agent to, among other things, enforce terms of the timber sales contract, and that Forestree and/or Corl breached the terms of that oral contract. (Complaint, paragraphs 14, 17, 18, 19, 116, and 119).

The timber sales contract attached to the Plaintiffs Complaint and marked as Exhibit B includes Plaintiff Klingerman as a contracting party. He is listed as and signed as the “seller.” The seller’s agent is listed as Defendant Forestree.

In reading the averments of the Complaint is a light most favorable to the Plaintiffs, Plaintiff Klingerman had both an oral and written contractual relationship with the defendants and thus, is “in privity.” At the very least, Defendants failed to perform many of their obligations pursuant to the oral agreement reached between themselves and Plaintiffs, including Plaintiff Klingerman individually.

A clear example concerns Defendant Corl, who on behalf of Forestree, assured Klingerman personally that Corl would oversee every aspect of any timber sale and that the property would be timbered in such a way that Plaintiff Danko would have another harvest within five to ten years. (Complaint, paragraph 18). Plaintiffs allege that Forestree and/or Corl materially breached the terms of this provision of the oral contract in numerous ways. (Complaint, paragraph 119).

As for Count IX, civil conspiracy, Defendants argue that “Mr. Klingerman’s lack of any individual interest in the alleged substance of the case, his individual claim...should also be dismissed.” Defendants assert that “any alleged conspiracy under the facts could not have harmed him individually.”

Contrary to Defendants’ argument, however, and as asserted by Plaintiffs, Defendants’ alleged liability for civil conspiracy does not stem from any provision of either the timber sales contract or the oral contract between Plaintiffs and Forestry and Corl. Defendants are alleged to have conspired with each other to improperly circumvent the bid process and unfairly stifle legitimate competition related to the timber sales and to convert Plaintiffs’ timber payment therefor.

Plaintiffs allege that Defendants conspired and acted together in concert to convert the timber, commit trespass, breach the contracts, and destroy agricultural crops. (Complaint, paragraph 128).

Based upon the averments of the Complaint read in a light most favorable to the Plaintiffs, Plaintiff Klingerman has properly pled an individual action in civil conspiracy against Defendants. Not only is Plaintiff named as a seller in the timber sales contract but Defendant Forestry is designated as Plaintiff Klingerman’s agent. Moreover and perhaps determinatively, Plaintiff Klingerman personally engaged in numerous conversations with Defendant Corl wherein specific representations were made by Corl to Klingerman regarding among other things, insuring long term sustainability of the timber, maintaining the opportunity for future harvesting activities, limiting the acreage of the timber to be harvested, the bidding process and payment for the timbering.

Defendant Corl next asserts that Count VII, breach of contract, should be dismissed for failure to state a cause of action against Corl personally. He argues that since he was not a party to the alleged contract, he cannot be held liable for a breach thereof.

The court disagrees. It cannot state with certainty at this time that no recovery is possible for the plaintiffs against Defendant Corl individually.

The court agrees with Plaintiffs' argument that the Complaint contains adequate facts to set forth a cognizable claim for breach of contract against Corl. Plaintiffs assert in the Complaint that Klingerman requested that Corl visit the property and provide his recommendations (Complaint, paragraph 16). Plaintiffs further allege that Klingerman made clear to Corl at the time of that conversation that the overriding concern and primary goal for the property was that it be harvested and manicured with the utmost care to insure long term sustainability of the timber resource, enhance the value of the timber asset and maintain the option and opportunity for future harvesting activities. (Complaint, paragraph 17). Plaintiffs also allege that Corl assured Klingerman that he would personally oversee every aspect of the timber sale and that Corl further assured him that the property would be timbered in such a way that Danko could have another harvest within five to ten years. (Complaint, paragraph 18).

Plaintiffs further allege that they relied on the representations and assurances of Corl, and that in reliance on those representations and assurances, engaged Forestree to prepare the timber sale. (Complaint, paragraph 19). Finally, the Complaint sets forth in numerous and varied ways, that Corl breached the oral agreement for timber consulting and marketing services (Complaint, paragraph 119).

Defendants next argue that Count IX, civil conspiracy, should be dismissed because the gist of the action against Defendants is breach of contract and that claims for

damages arising out of alleged conversion, trespass, crop destruction, destruction and conspiracy are improper in violation of the gist of the action doctrine.

Generally speaking, the gist of the action doctrine precludes a plaintiff from asserting tort claims when the conduct complained of is based in contract. Defendants argue that the true gist of the action by Plaintiffs is an alleged breach of an oral contract with Defendant Forestreet.

In *Bruno v. Erie Insurance Company*, 106 A.3d 48 (Pa. 2014), the Pennsylvania Supreme Court confirmed that the fundamental principles comprising the gist of the action doctrine have long been an integral part of Pennsylvania law to determine whether, as a matter of law, tort claims should be dismissed because the gist of the claim was for breach of contract. The touchstone standard for ascertaining the true gist or gravamen of the complaint is the nature of the duty alleged to have been breached.

The mere labeling by the plaintiff of a claim as being in tort, e.g. for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the term of their contract, i.e, a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract, then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals and, hence, exists regardless of the contract, then it must be regarded as a tort. *Id.* at 68.

Further, the mere existence of a contract between two parties does not, ipso facto, classify a claim by a contracting party for injury or loss suffered as a result of the actions of the other party in performing the contract, as one for breach of contract. *Id.* at 69. A negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself since it is not founded on the breach of any

of the specific executory promises which comprise the contract. Instead, the contract is provided merely as the vehicle, or mechanism, which established the relationship between the parties during which the tort was committed. *Id.* at 69, 70.

In this particular case at least at this stage, the court cannot state with certainty that no recovery is possible for the Plaintiffs on the tort claims. It appears at this stage that while the contracts were allegedly breached, they as well established a relationship between the parties during which alleged torts were committed.

For example, Plaintiffs' claim for civil conspiracy is based on actions that fall outside the scope of the contracts between the parties. The claim for civil conspiracy centers around Defendants' concerted actions in intentionally, deliberately, unlawfully and improperly "rigging" and/or circumventing the bid process for the timber sale such as to exclude legitimate competitors from the process and to ensure that Defendant Wheeland was awarded the bid. Plaintiffs allege a plan by Defendants to "fix" the bid process for the subject timber sale in such a way that several interested, well known and well established timber companies in the area never received notice of the timber sale from Forestree or Corl and were excluded from the opportunity to bid on the sale, leaving Defendant Wheeland as the only lumber company of significant size bidding on the sale. (Complaint, paragraphs 51 through 53, 119 (f)).

As Plaintiffs argue in their brief, the civil conspiracy claim in Court IX arises out of duties imposed upon the defendants that are collateral to, and go beyond, the scope of their obligations under the contracts and thus, give rise to a cause of action separate and distinct from any contract claim.

Defendants next assert that Plaintiffs should be required to more specifically plead their allegations of "unfair, fraudulent, deceptive acts or conduct" and how Defendants were benefitted by the alleged civil conspiracy.

Rule 1028 (a) (3) of the Pennsylvania Rules of Civil Procedure permits a preliminary objection in the nature of insufficient specificity in a pleading. This argument, however, has not been sufficiently developed by Defendants in their brief or argument and will be denied.

On the other hand, Defendants do argue that Plaintiffs have not pled any facts related to the state of mind of Defendants sufficient to support a claim for punitive damages. Defendants allege that Plaintiffs' request should either be stricken or that the Plaintiffs should be required to more specifically plead facts in support of their request for punitive damages.

Punitive damages are an "extreme remedy" available in only the most exceptional matters. *Phillips v. Cricket Lighters*, 584 Pa. 179, 883 A.2d 439, 445 (2005). Punitive damages may be appropriately awarded only when the plaintiff has established that the defendant has acted in an outrageous fashion due to either "the defendant's evil motive or his reckless indifference to the rights of others." *Id.* A showing of mere negligence or even gross negligence, will not suffice to establish that punitive damages should be imposed. Rather, the plaintiff must adduce evidence which goes beyond a showing of negligence, evidence sufficient to establish that the defendant's acts amounted to "intentional, willful, wanton or reckless conduct." *Id.* at 445-446, citing *SHV Coal, Inc. v. Continental Grain Company*, 526 Pa. 489, 587 A.2d 702, 704-705 (1991).

Punitive damages are awarded as an additional punishment on a defendant who is found to have acted in a fashion that is particularly egregious. *Phillips*, 883 A.2d at 446. Punitive damages should be reserved for cases in which the defendant has acted in a particular outrageous fashion. *Id.*

This court has significant concerns as to Plaintiffs' right to claim punitive damages under the facts as alleged.

The court agrees with Defendants that the “bald conclusions” are insufficient.

The court will next address the preliminary objections filed by Defendant Wheeland.

The parties agree that Court VIII will be dismissed.

Defendant Wheeland next argues that Plaintiffs’ request for punitive damages in connection with V, trespass, Count VI, agricultural crop destruction and Count IX, civil conspiracy should be stricken because Plaintiffs have allegedly not plead any facts relating to the state of mind of Defendant that would support a claim for punitive damages. The court agrees.

Defendant Wheeland’s third preliminary objection is in the nature of a motion to strike for legal insufficiency of pleading (demurrer), Count I, intentional conversion of timber and Count II, negligent conversion of timber.

Defendant Wheeland submits that the request for relief in the Complaint as set forth in paragraphs 73 and 83 of Plaintiffs’ Complaint should be stricken, arguing that this relief is expressly not permitted pursuant to a cause of action under 42 Pa. C.S. §8311.

It does not appear that Plaintiffs contest this preliminary objection. There is no portion of Plaintiffs’ brief that addresses such. Accordingly, the preliminary objection shall be granted. Paragraphs 73 and 83 of Plaintiffs’ Complaint are stricken.

Defendant Wheeland next contends that Count IX, civil conspiracy, should be stricken based upon insufficiency grounds. Consistent with this court’s ruling in connection with the other defendants, this preliminary objection will be denied.

Defendant Wheeland’s next preliminary objection is a demurrer to Count VII titled Agricultural Crop Damage. Defendant Wheeland argues that Count VII is based on 42 Pa. C.S. § 8313 and that relief under this statute is “only available for trees raised for scientific and commercial purposes.” Defendant Wheeland argues that the averments of the Complaint state

that the property is “vacant land which is wooded with various species of oak, maple, birch, pine, cherry and hickory trees.”

While it is correct that Paragraph 10 of Plaintiff’s Complaint states such, Paragraph 112 of the Complaint specifically states that the “trees/timber [were] raised for commercial purposes on the property.” Given this allegation, the court cannot state at this time or with certainty, that no recovery is possible.

First, the court does not see any inconsistency between the different averments. Secondly, an inference can clearly be drawn from the other allegations of the Complaint that the trees were being raised for the specific purpose of eventually selling the timber. Accordingly, this preliminary objection will be denied.

Defendant Wheeland next demurrers to Counts III, IV, V, VI and IX. Defendant Wheeland argues that pursuant to the language of 42 Pa. C.S. § 8311, Plaintiffs’ claims for conversion of the timber are limited to Counts I and II and that the other counts cannot be pursued. Defendant Wheeland argues that 42 Pa. C.S. § 8311 specifically states that any claims pursuant thereto are “in lieu of all other damages or civil remedies provided by law.” Defendant Wheeland argues as well that the various counts are not pleaded in the alternative. Defendant Wheeland concludes that Counts 1 and 2 are “in lieu of all other damages or civil remedies provided by law.”

Without repeating Plaintiffs’ rebuttal in full, the court agrees with such. While Plaintiffs cannot receive any double recovery of damages under ultimate causes of action, they are permitted to plead causes of action in the alternative. Alternative causes of action that are inconsistent with one another are permissible as long as they are asserted as separate counts. *Lugo v. Farmer’s Pride, Inc.*, 967 A.2d 963, 970 (Pa. Super. 2009).

ORDER

AND NOW, this ____ day of December, 2019, with respect to the preliminary objections of Defendants Forestree and Corl, said Defendants’ motion to dismiss Count VIII, a claim under Pennsylvania’s Unfair Trade Practices and Consumer Protection Law is granted. Defendants’ motion to dismiss Counts VII and IX with respect to Plaintiff Daniel Klingerman, individually, is denied. Defendants’ motion to dismiss Count VII with respect to Defendant Corl is denied. Defendants’ motion to dismiss IX based on the gist of the action doctrine is denied. Defendants’ motion for a more specific pleading is denied. Defendants’ motion to strike Plaintiffs’ request for punitive damages is granted.

With respect to the preliminary objections of Defendant Wheeland, the court grants Defendant Wheeland’s motion to dismiss and/or demurrer with respect to Count VIII, violation of Unfair Trade Practices and Consumer Protection Law. The court grants Defendant Wheeland’s motion to strike Plaintiffs’ punitive damages requests. The court grants Defendant Wheeland’s request to strike Paragraphs 73 and 83 of Plaintiffs’ Complaint. The court denies Defendant Wheeland’s request to dismiss Count IX, civil conspiracy, based on the gist of the action doctrine. The court denies Defendant Wheeland’s request to dismiss Count VII. The court denies Defendant Wheeland’s request to dismiss Counts III, IV, V, VI, and IX.

All Defendants shall file an Answer to Plaintiffs complaint within thirty (30) days of the date of this Order.

BY THE COURT,

Date: _____

Marc F. Lovecchio, Judge

cc: Stephanie Carfley, Esquire
McNees Wallace & Nurick, LLC (Counsel for Plaintiffs)
570 Lausch Lane, Ste 200
Lancaster PA 17601-3057
C. Edward S. Mitchell, Esquire (Counsel for Wheeland Lumber Company)

Frank S. Miceli, Esquire
Roberts Miceli LLP (Counsel for J.C. Forestree, Inc. & James Corl)
146 East Water Street
Lock Haven PA 17745
Gary Weber, Lycoming Reporter
Work file