COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

JOHN and CHRISTINE MCDERMOTT, Plaintiffs	: NO. 21-0227 :
vs.	: CIVIL ACTION – LAW :
MARY FINCK, Defendant	: : *Preliminary Objections*

ORDER

AND NOW, following argument held July 1, 2021 on the Preliminary Objections of Defendant, Mary Finck, to Plaintiff's Complaint, the Court hereby issues the following ORDER.

Plaintiffs, John and Christine McDermott ("Plaintiffs" or "Landlord"), initiated the foregoing action by the filing of a Complaint on March 15, 2021. The Complaint pleads Count I for Negligence and Count II for Breach of Contract relating to a fire occurring on March 31, 2019 at the property owned by Plaintiffs and leased by Defendant, Mary Finck ("Defendant" or "Tenant").[1] Specifically, the Complaint alleges that Defendant allowed a guest to smoke on the front porch of the building, and that the careless disposal of the smoking materials caused a fire to erupt on the porch, resulting in significant damage.[2] Plaintiffs seek damages totaling $335,830.37–representing damage to the house, personal property, and additional living expenses–as well as interest, delay damages, and costs of suit.[3] On April 8, 2021, Defendant filed Preliminary Objections to the Complaint, accompanied by a supportive brief. Plaintiffs filed both a Reply to the Preliminary Objections and a Memorandum of Law in Response to the Preliminary Objections on April 26, 2021.

A. Defendant's First Preliminary Objection

Defendant's First Preliminary Objection in the nature of a demurrer objects that under the parties' Lease Agreement, the Tenant was required to obtain insurance

[1] Defendant's Preliminary Objections identify the foregoing as a subrogation action and name the subrogee, Travelers Home & Marine Insurance Company, as a party in the case caption. However, Plaintiffs have correctly noted in response that pursuant to Pa.R.C.P. 2002(d), a subrogating insurance carrier, as the real party in interest, may choose to prosecute an action in the name of its insured.
[2] *See* Complaint ¶¶ 5-9 (March 15, 2021).
[3] Complaint ¶¶ 13, 21.

coverage for any personal losses, while the Landlord would obtain insurance for the structure.[4] Defendant contends that under the Superior Court's recent decision *in Joella v. Cole*, when a lease provision requires a landlord to maintain insurance on a building, pursuant to the reasonable expectations of the parties, the tenant is an implied co-insured and therefore cannot be subject to a subrogation action brought by the landlord's insurance company.[5]

In *Joella*, the plaintiff/landlord brought a subrogation claim against the defendant/tenant, alleging that the tenant's negligent conduct had prompted a fire. On appeal, the Superior Court considered whether the trial court had properly ruled on summary judgment that the tenant was an implied co-insured on the landlord's insurance policy. The Superior Court first concluded after review of the case law that Pennsylvania has taken a case-by-case approach when considering the issue of whether a landlord who has procured insurance for property can file a subrogation claim against a tenant who negligently damaged the property.[6] When applying the case-by-case approach, "courts determine the availability of subrogation based on the reasonable expectations of the parties as expressed in the lease under the facts of each case. Under this approach, the court will look to the lease agreement between the landlord and the tenant."[7]

The *Joella* Court then reviewed the language of the parties' lease agreement. Paragraph 10 of the agreement provided that the landlord would be responsible for, "[i]nsurance on the building only" while under paragraph 11, "tenant ha[d] the right to maintain fire and casualty insurance on the premises to cover their personal possessions, which [we]re not covered by the [l]andlord's fire insurance."[8] The Court found that reading these provisions together, "it was reasonable for [t]enant to expect she would be a co-insured under the terms of the lease for any damage caused to the [p]roperty. We find this to be the most reasonable interpretation because a natural

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[4] Preliminary Objections of Defendant, Mary Finck, to Plaintiff's Complaint ("Preliminary Objections") ¶ 14 (April 8, 2021) (quoting Lease Agreement ¶ 17). The Lease Agreement is attached as Ex. A to the Complaint.
[5] Preliminary Objections ¶ 16 (citing *Joella v. Cole*, 221 A.3d 674 (Pa. Super. 2019)).
[6] *Joella*, 221 A.3d at 679 (citing *Remy v. Michael D's Carpet Outlets*, 571 A.2d 446 (Pa. Super. 1990), *aff'd sub nom. Kimco Dev. Corp. v. Michael D's Carpet Outlets*, 637 A.2d 603 (Pa. 1993)).
[7] *Id.* at 678.
[8] *Id.* at 676.

reading of the lease supports the position that everything, except for [t]enant's personal possessions, is covered under [l]andlord's insurance policy."[9] The Court acknowledged that paragraph 8(f) of the lease stated: "the tenant shall not negligently damage the premises[.]"[10] However, the Court concluded "that provision does not impart liability…[and e]ven if [p]aragraph 8(f) of the lease were construed as a general liability for negligence clause, the language of [p]aragraphs 10 and 11 of the lease creates the reasonable expectation that [l]andlord would look only to his insurance policy for compensation for fire loss covered by his policy."[11]

Plaintiffs counter that *Joella* is distinguishable, as the Lease Agreement here includes an express clause holding the tenant financially responsible for damages caused by the Tenant or her guests.[12] Plaintiffs assert that the recent, unreported *Thomas v. Jones* decision is more analogous. In *Thomas*, the Superior Court held that a lease provision requiring the tenants to acquire renter's insurance and keep the apartment "damage free" was sufficient for a finding that the tenant had contractually assumed responsibility for damage to the apartment during his residency. The *Thomas* Court concluded that the tenant could therefore be held individually liable in a subrogation suit relating to a fire negligently caused by a co-tenant.[13]

Having reviewed these cases, the Court finds that *Thomas* lacks persuasive value, as it fails to perform an analysis distinguishing its holding from that in *Joella*. Nevertheless, the Court finds that the *Joella* opinion does not stand for the proposition that a lease requiring the landlord to obtain fire insurance for the structure and the tenant to obtain insurance for damage to personal property inherently precludes a subrogation claim. Rather, in applying the case-by-case approach, a court must read the relevant provisions of a lease agreement in conjunction to determine the reasonable expectations of the parties. The two relevant provisions in this matter are found under paragraphs 7 and 17 of the Lease Agreement. Paragraph 7 of the Lease provides as follows:

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[9] *Id.* at 680.
[10] *Id.*
[11] *Id.* at 680-81.
[12] *See* Memorandum of Law of Plaintiffs in Response to the Preliminary Objections of Defendant, Mary Finck ("Plaintiffs' Memorandum of Law") at pg. 5 (April 26, 2021).

7. CARE AND MAINTENANCE OF LEASED PREMISES: Tenant, Tenant's Family, and Guests shall use good care when using the Leased Premises.

A. Tenant will:

1) keep the property clean and safe. . .

5) pay to repair any damage to the property or to any item in or on the property that **Tenant** or **Tenant's guests** cause through a lack of care.[14]

Paragraph 17 provides:

17. RELIEF OF LANDLORD FROM LIABILITY: Insurance and Liabilities described below outline the **Landlord's** and **Tenant's** responsibility.

A. **Insurance: Tenant** acknowledges that **Landlord's** insurance does not cover personal property damage caused by fire, theft, rain, war, acts of God, flooding and acts of other, and/or any other causes, nor shall **Landlord** be liable for such losses or neglect. **Tenant** is hereby advised to obtain his/her own insurance policy to cover any personal losses. **Landlord** shall insure the structure within which the Lease Premises is located for fire and extended damages. **Tenant** shall repay to Landlord any money spent by the **Landlord** due to **Tenant's** intentional act or neglect.

B. **Liability: Landlord** shall not be responsible for loss, injury or damage to any person, unless it is caused by **Landlord's** intentional act or neglect. **Tenant** shall be responsible to **Tenant, Tenant's family**, and **Tenant's guest(s)** for any loss or claim including Attorney fees that result from injury.[15]

In applying the case-by-case analysis approach, the Court finds pursuant to the express terms of the Lease Agreement as set forth above, the reasonable expectation of the parties would be that Tenant would reimburse Landlord for damages resulting from the negligence of Tenant or her guests. Having so concluded, Defendant's First Preliminary Objection is OVERRULED.

[13] Plaintiffs' Memorandum of Law at pgs. 6-7 (citing Thomas v. Jones, 249 A.3d 1138 (Table), 2021 WL 462025 (Pa. Super. Feb. 9 2021)).

B. Defendant's Second Preliminary Objection

Defendant's Second Preliminary Objection in the nature of a demurrer asserts that under the "gist of the action" doctrine, Plaintiffs are precluded from recasting an ordinary breach of contract claim into a tort claim.[16] Defendant therefore asserts that Count I of the Complaint for Negligence should be dismissed. Plaintiffs contend in response that the gist of the action doctrine is inapplicable because the basis of lability for the Negligence and Breach of Contract claims are "separate and distinct."[17] Plaintiffs also contend that, pursuant to the relevant case law, it would be premature to dismiss the Negligence Count of the Complaint under the gist of the action doctrine at the preliminary objections stage, before development of the full factual record.[18]

The gist of the action doctrine is a common law doctrine expressly adopted as the law of the Commonwealth through the Pennsylvania Supreme Court's decision in *Bruno v. Erie Insurance, Co.*:

> [T]he "gist of the action" doctrine. . .provides that an alleged tort claim against a party to a contract, based on the party's actions undertaken in the course of carrying out a contractual agreement, is barred when the gist or gravamen of the cause of action stated in the complaint, although sounding in tort, is, in actuality, a claim against the party for breach of its contractual obligations.[19]

The gist of the action doctrine will preclude a party from proceeding in tort when the party's claims, (1) "aris[e] solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a

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[14] Complaint ¶ 16 (quoting Lease Agreement ¶ 7) (emphasis added).
[15] Preliminary Objections ¶ 14 (quoting Lease Agreement ¶ 17) (emphasis added).
[16] Preliminary Objections ¶ 22 (citing *Bash v. Bell Tel. Co.*, 601 A.2d 825 (Pa. Super. 1992)).
[17] Plaintiffs' Memorandum of Law at pg. 8.
[18] *See* Plaintiffs' Memorandum of Law at pgs. 9-10 (citing *Pratter v. Penn Treaty Am. Corp.*, 11 A.3d 550, 558-60 (Pa. Commw. 2010); *Grode v, Mut. Fire, Marine, and Island Ins. Co.*, 623 A.2d 933, 936-37 (Pa. Commw. 1993); *Nitterhouse Concrete Prods. v. Pennsylvania Manufacturers' Ass'n Ins. Co.*, 67 Pa. D. & C.4th 225, 235-36 (Franklin Cty. 2004); *Lebish v. Whitehall Manor, Inc.*, 57 Pa. D & C 4th 247, 251(Lehigh Cty. 2002); Gemini Bakery Equip. v. Baktek, No. 3204 FEB.TERM 2004, 2005 WL 957635, at *1 (Phila. Cty. Apr. 11, 2005)).
[19] *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 53 (Pa. 2014) (internal quotations and citations omitted).

contract."[20]

The gist of the action doctrine will not bar a claim of negligence against a contracting party performing contractual duties when liability is not predicated on violation of the contract, but rather on the violation of a general social duty.[21] Further, other courts have found a distinction between misfeasance–or improper performance of a contractual obligation– and nonfeasance–or failure to perform a contractual obligation–and held that recovery under tort may be available in the former instance but not the in latter.[22]

The Court finds that Plaintiffs in the Complaint plead a distinct basis of liability for each claim. Plaintiffs' Negligence Count is predicated on a breach of the general duty to exercise reasonable care to prevent reasonably foreseeable harm, while the Breach of Contract Count is predicated on paragraph 7 of the lease, requiring Defendant pay for damage to the property caused by her lack of care or that of her guest. Having made a *prima facie* claim for negligence, upon review of the relevant case law, the Court agrees with the position asserted by Plaintiffs that it is premature, prior to the close of pleadings and discovery, for the Court to determine whether Plaintiffs have sufficiently proven an independent basis for their negligence claim. Therefore, Defendant's Second Preliminary Objection is OVERRULED.

Defendant shall have twenty (20) days from the date of this Order to file an Answer to the Complaint.

IT IS SO ORDERED this 13th day of July 2021.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/crp
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[20] *eToll, Inc. v. Elias/Savion Advert., Inc.*, 811 A.2d 10, 19 (Pa. Super. 2002).
[21] *Bruno*, 106 A.3d at 71.
[22] *Pratter*, 11 A.3d at 559 (citations omitted).