

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

AK WELDING, LLC.	:	NO.: 19-01887
Plaintiff	:	
v.	:	
	:	
CHOICE FUELCORP, INC., also	:	CIVIL ACTION
d/b/a CHOICE FUELS,	:	
Defendant	:	
v.	:	
	:	
J.T. THORPE & SONS, INC.	:	
Additional Counterclaim Defendant	:	

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**Opinion and Order**

This matter came before the Court on the Preliminary Objections filed on November 21, 2022, by J.T. Thorpe & Sons, Inc. (hereinafter “Thorpe”), to the Amended Additional Counterclaim Defendant Complaint (hereinafter the “Amended Complaint”) filed by Plaintiff AK Welding, LLC (hereinafter AK Welding) on November 1, 2022.

**Background**

AK Welding initiated this action through filing its Complaint November 18, 2019, alleging breach of contract, and unjust enrichment by Choice Fuel Corp, Inc., also d/b/a Choice Fuels (hereinafter Choice). Choice Answered with Counterclaims on January 15, 2020. Although the claims were not set forth in separate counts as required by Pa.R.C.P 1020(a), Choice’ Counterclaim appears to assert three (3) causes of action; breach of contract as a result of poor workmanship, anticipatory breach of contract where time is of the essence resulting in accumulating damages, and invalid mechanic’s lien.

The parties conducted discovery. On March 9, 2022 the Court held a Civil Pretrial Conference at which the Court decided that, because the Defense intended to make additional filings which “may or may not be timely,” the matter was to be rescheduled for another Civil

Pretrial Conference on June 9, 2022. Before the June Conference, AK Welding moved for leave of court to file an additional Complaint against Thorpe, alleging that Thorpe may bear responsible on the Counterclaims asserted by Choice against AK Welding. The Court heard argument on that Motion during the June 9, 2022, Conference. The Court granted Plaintiff's Motion to file a Complaint against Thorpe. AK Welding did so on June 17 2022, alleging breach of contract, negligence, and *respondeat superior*. Plaintiff filed the Amended Complaint on November 1, 2022. Thorpe thereafter filed the Preliminary Objections which are now before the Court, on November 21, 2022. Thorpe seeks a demurrer as to Count II of the Amended Complaint, asserting a cause of action in negligence, seeks to strike a general allegation of negligence, seeks to strike the claim for attorney's fees, and seeks to strike the claim for punitive damages.

### **Questions Presented**

1. Whether Thorpe's Preliminary Objection seeking a demurrer to Count II of the Amended Complaint should be granted under the gist of the action doctrine.
2. Whether Thorpe's Preliminary Objection seeking to strike general allegations of negligence should be granted.
3. Whether Thorpe's Preliminary Objection seeking to strike AK Welding's claim for attorney's fees should be granted.
4. Whether Thorpe's Preliminary Objection seeking to strike AK Welding's claim for attorney's fees should be granted.

## Answers

1. Although it appears, at this stage of the proceedings, that AK Welding's negligence claim will fail under the gist of the action doctrine, the Court will permit AK Welding one further opportunity to amend its Complaint.
2. Thorpe's Preliminary Objection seeking to strike general allegations of negligence will be granted.
3. Although AK Welding cannot claim attorney's fees in connection with a claim based upon either a common law contract claim or common law negligence, the Court will permit AK Welding one further opportunity to amend its Complaint.
4. Although AK Welding cannot claim punitive damages based upon either a common law contract claim or common law negligence, the Court will permit AK Welding one further opportunity to amend its Complaint.

## Discussion

1. Although it appears, at this stage of the proceedings, that AK Welding's negligence claim will fail under the gist of the action doctrine, the Court will permit AK Welding one further opportunity to amend its Complaint.

The Court must begin its analysis with an examination of the legal test for preliminary objections in the nature of a demurrer:

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, *Savitz v. Weinstein*, 395 Pa. 173, 149 A.2d 110 (1959); *March v. Banus*, 395 Pa. 629, 151 A.2d 612 (1959), and every inference fairly deducible from those facts, *Hoffman v. Misericordia Hospital of Philadelphia*, 439 Pa. 501, 267 A.2d 867 (1970); *Troop v. Franklin Savings Trust*, 291 Pa. 18, 139 A. 492 (1927). The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. *Savitz v. Weinstein, supra*.

Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. *Schott v. Westinghouse Electric Corp.*, 436 Pa. 279, 259 A.2d 443 (1969); *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965); *Savitz v. Weinstein, supra*; \*\*829 *London v. Kingsley*, 368 Pa. 109, 81 A.2d 870 (1951); *Waldman v. Shoemaker*, 367 Pa. 587, 80 A.2d 776 (1951). **If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.** *Packler v. State Employment Retirement Board*, 470 Pa. 368, 371, 368 A.2d 673, 675 (1977); *see also, Schott v. Westinghouse Electric Corp., supra*, 436 Pa. at 291, 259 A.2d at 449 (emphasis added).

*Mudd v. Hoffman Homes for Youth, Inc.*, 374 Pa.Super. 543 A.2d 1092, 1093–94 (Pa. Super. 1988) (quoting *County of Allegheny v. Commonwealth*, 490 A.2d 402, 408 (Pa. 1985)) (emphasis added).

The Court has compared the allegations in the Breach of Contract claim set forth at Count I of the Amended Complaint to those alleged in the Negligence claim at Count II. That comparison leads the Court to the conclusion that Count II is little more than a breach of contract claim in “negligence clothing.”

In the matter of *Glazer v. Chandler*, 414 Pa. 304, 200 A.2d 416 (1964), the plaintiff prevailed at trial in an action in trespass, based upon facts which indicated that defendant breached a contract with the plaintiff. On appeal, the Court reversed “without prejudice to Glazer to institute an action based in assumpsit.”

“. . .where, as in this case, the allegations and evidence only disclose that defendant breached his contracts with plaintiff and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may be adjudicated only in that action. To permit a promisee to sue his promisor in tort for breaches of contract *inter se* would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions. Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with this policy. See *Developments in the Law-Competitive Torts*,

77 Harv.L.Rev. 888, 968 (1964). The methods of proof and the damages recoverable in actions for breach of contract are well established and need not be embellished by new procedures or new concepts which might tend to confuse both the bar and litigants.

*Glazer v. Chandler*, 414 Pa. 304, 308, 200 A.2d 416 (1964).

At oral argument on the Preliminary Objections, counsel for AK Welding suggested that deposition testimony supports the conclusion that agents of Thorpe deliberately conspired to permit sub-standard welds on the project, in an effort to deliberately “engineer” a contract breach by AK Welding. Those facts are not yet alleged in the Amended Complaint. If those facts were alleged in detail, and were based upon a good faith analysis of sworn testimony, they might support a cause of action for fraud, or civil conspiracy, or other claims recognized at applicable Pennsylvania law. The Amended Complaint as written, however, does not support a cause of action in common law negligence. As discussed above, the test to be employed in judging Defendants’ demurrer is whether the allegations set forth in the Amended Complaint are sufficient to establish with certainty that the law will permit no recovery. All doubt must be resolved in favor of the non-moving party. *Gregory v. Pennsylvania State Police*, 160 A.3d 274, 276 (Pa.Cmwlth. 2017), citing *Stilp v. Commonwealth*, 927 A.2d 707, 709 (Pa. Cmwlth. 2007), aff’d, 596 Pa. 493, 946 A.2d 636 (Pa. 2008). While the facts alleged in the Additional Counterclaim Defendant Complaint fail to assert any more than a common law breach of contract claim, the Court is not yet convinced that other causes of actions could not be sufficiently asserted in an amended pleading. For that reason, the Court will permit the AK Welding one additional opportunity to amend.

2. Thorpe's Preliminary Objection seeking to strike general allegations of negligence will be granted.

Paragraph 35(m) and 38(m) of the Amended Complaint claim that Thorpe "allowed other deficiencies in the welding." Those claims obviously constitute only general allegations of negligence, and will be stricken from any Second Amended Complaint filed by AK Welding.

3. Although AK Welding cannot claim attorney's fees in connection with a claim based upon either a common law contract claim or common law negligence, the Court will permit AK Welding one further opportunity to amend its Complaint.

In the matter of *Chatham Communications, Inc. v. General Press Corporation*, A.2d 837, 842 (Pa. 1975), the Court cited *Corace v. Balint*, 210 A.2d 882, 887-888 (Pa. 1965), for the proposition that:

Over and over again we have decided there can be no recovery for counsel fees from the adverse party to a cause, in the absence of express statutory allowance of the same . . .', *Smith v. Equitable Trust Co.*, 215 Pa. 413, 417, 64 A. 591, 592 (1906), or clear agreement by the parties, *Fidelity-Philadelphia Trust Company v. Philadelphia Transportation Company*, 404 Pa. 541, 548, 173 A.2d 109, 113 (1961), or some other established exception, see *Hempstead v. Meadville Theological School*, 286 Pa. 493, 134 A. 103, 49 A.L.R. 1145 (1926).<sup>1</sup> *Shapiro v. Magaziner*, 418 Pa. 278, 280, 210 A.2d 890, 892 (1965).

The allegations in the Amended Complaint do not support a claim for attorney's fees. For the same reason set forth above, however, the Court is not yet convinced that those facts could not be sufficiently asserted. The Court will permit AK Welding one additional opportunity to amend to allege sufficient facts to support its claim for attorney's fees.

4. Although AK Welding cannot claim punitive damages based upon either a common law contract claim or common law negligence, the Court will permit AK Welding one further opportunity to amend its Complaint.

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. *Vance v. 46 and 2, Inc.*, 2007 Pa.Super. 71, 920 A.2d 202, 206 (2007), *citing Restatement (Second) Of Torts* § 908(2) (1979). The allegations in the Amended Complaint do not support the conclusion that Thorpe's conduct was so willful or malicious, or wanton as to justify the imposition of punitive damages. For the reason more fully set forth above, the Court is not yet convinced that those facts could not be sufficiently asserted. The Court will permit AK Welding one additional opportunity to amend, to allege sufficient facts to support its claim for punitive damages.

**ORDER**

And now, this 1<sup>st</sup> day of February, 2023, for the foregoing reasons the Court hereby ORDERS as follows:

1. AK Welding, LLC, is granted leave of Court to file a Seconded Amended Additional Counterclaim Defendant Complaint. If AK Welding, LLC, chooses to assert causes of action other than common law breach of contract, or to assert a claim for an award of attorney's fees or a claim for punitive damages, AK Welding, LLC, is directed to allege sufficient material facts to support those claims, pursuant to applicable Pennsylvania law.
2. The general allegations of negligence at Paragraph 35(m) and 38(m) of the Additional Counterclaim Defendant Complaint are hereby stricken, and should not appear in any Second Amended Complaint filed by AK Welding.

By The Court,

Hon. William P. Carlucci, Judge

cc:  
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