

IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PENNSYLVANIA

AVIATION HOLDINGS, L.P.	:	No. CV 23-00100
Plaintiff	:	
VS	:	CIVIL ACTION
	:	
DeGOL JET CENTER, L.P.	:	
Defendant	:	

OPINION AND ORDER

This matter came before the Court on October 2, 2023, for oral argument on Defendant's Preliminary Objections to the Amended Complaint, both in the nature of a motion to strike and a demurrer, and Plaintiff's Preliminary Objections to those Preliminary Objections. For the reasons more fully set forth below, those Preliminary Objections are granted in part, and denied in part.

Background

Plaintiff's Amended Complaint (which incorporates by reference the entire contents of Plaintiff's original Complaint) alleges that Defendant breached the terms of various contract documents associated with a transfer from Defendant to Plaintiff of Defendant's rights under a Lease and Asset Purchase Agreement, which transfer is alleged to have occurred on November 1, 2012. Reading the original Complaint into the Amended Complaint as incorporated by reference, Plaintiff claims breach of express contract (Count I of original Complaint) and breach of warranty (mistakenly titled as breach of contract at Count II of original Complaint) and breach of contract implied at law (Count III of Amended Complaint) and Promissory Estoppel (County IV of Amended Complaint). Defendant filed Preliminary Objections on July 24, 2023, which appear to assert five (5) claims. At Claim A, Defendant asserts that the Amended Complaint should be dismissed pursuant to the applicable statute of limitations. At Claim B, Defendant seeks a demurrer to Counts I and II as insufficiently pled. At Count C, Defendant asserts that Counts III and IV should be dismissed pursuant to the gist of the action doctrine. At Count D, Defendant asserts that the Amended Complaint should be dismissed for failure to name the Williamsport Municipal Airport Authority (hereinafter "Authority"), which Defendant contends to be a necessary party under Rule 2227(a) of the Pennsylvania Rules of Civil

Procedure. At Count E, Defendant seeks to strike Plaintiff's various demands for attorney's fees. Plaintiff filed Preliminary Objections to Defendant's Preliminary Objections on August 11, 2023. Those Objections appear to be more in the nature of an Answer to Defendant's Preliminary Objections filed July 24, 2023, since the Plaintiff simply contends that Defendant's Preliminary Objections lack merit. Since Plaintiff's Preliminary Objections to Defendant's Preliminary Objections filed August 11, 2023, do not raise distinct legal issues, the Court will address itself to Defendant's Preliminary Objections.

Questions Presented:

Count A: Whether the Amended Complaint should be dismissed pursuant to the applicable statute of limitations.

Count B: Whether a demurrer should be entered to Counts I and II.

Count C: Whether Counts III and IV should be dismissed under the gist of the action doctrine.

Count D: Whether the Amended Complaint should be dismissed for failure to name the Authority as a party.

Count E: Whether Plaintiff's demands for attorney's fees should be stricken.

Brief Answer:

Count A: The Amended Complaint will not be dismissed under any statute of limitations, since the expiration of the applicable statute of limitations is an affirmative defense which must be asserted in New Matter pursuant to Rule 1030 of the Pennsylvania Rules of Civil Procedure.

Count B: No demurrer will be entered to Counts I or II, although Plaintiff should reconsider the title to the claim asserted at Count II.

Count C: Counts III and IV will not be dismissed under the gist of the action doctrine.

Count D: The Amended Complaint will not be dismissed for failure to name the Authority as a party, but Plaintiff will be directed to file a Second Amended Complaint, joining the Authority, in order to provide the Authority an opportunity to be heard.

Count E: Plaintiff's demands for attorney's fees will be stricken.

Count A: The Amended Complaint will not be dismissed pursuant to any statute of limitations, since the expiration of the applicable statute of limitations is an affirmative defense which must be asserted in New Matter.

Rule 1030(a) of the Pennsylvania Rules of Civil Procedure requires that, with the exception of three defenses identified in subsection (b), “all affirmative defenses . . . shall be pleaded in a responsive pleading under the heading ‘New Matter.’” The affirmative defenses of statute of limitations is specifically identified.

By their very nature, affirmative defenses generally require investigation through discovery. Discovery may reveal that Plaintiff paid rent under the Lease for years, suggesting that Plaintiff had actual notice that Plaintiff had no ownership interest in the Leased property. Alternatively, discovery may reveal that Defendant never collected rent and that Plaintiff had no such notice, but for the contents of the transaction documents.

The Court is aware of limited authority which supports preliminary objection raising the issue of expiration of the applicable statute of limitation, where that defect is clear on the face of the pleading. *See, Eddington v. Bixler*, 1040 C.D. 2019 (unreported) (Pa.Cmwlth. 2020). The Court is also aware that, in one of the cases relied upon by Defendant, the Commonwealth Court reversed a decision of the Court of Common Pleas of Lackawanna County, and held that the trial court erred by granting preliminary objections on that basis. *Scavo v. Old Forge Borough*, 978 A.2d 1076, 1078 (Pa.Cmwlth. 2009).

In the view of this Court, those cases which justify the dismissal of a claim on preliminary objection raising the affirmative defense of statute of limitation are few and far between. This is not such a case.

Count B: No demurrer will be entered to Counts I or II, although Plaintiff should reconsider the title to the claims asserted at Count II.

The settled law of this Commonwealth is that preliminary objections in the nature of a demurrer are not favored.

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*; *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.

Mudd v. Hoffman Homes for Youth, Inc., 374 Pa. Super. 522, 524–25, 543 A.2d 1092, 1093–94 (1988) (quoting *County of Allegheny v. Commonwealth*, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985)).

Defendant's Preliminary Objection B, containing an exhaustive examination of the documents related to the November 1, 2012 transaction, is more in the nature of a Motion for Judgment on the Pleadings than preliminary objection. Defendant asserts that Plaintiff could not reasonably conclude from the contents of those documents that the November 1, 2012 transaction included a sale of "Building (100x200)," which is identified as asset number 1 on Exhibit A to the Asset Purchase Agreement (Exhibit B to the Complaint).

There are clearly some aspects of the November 1, 2012, transaction which would give a wary buyer cause for concern. The closing documents did not include a deed to the building which is the subject of the Complaint. Asset number 11 on Exhibit A to the Asset Purchase Agreement attached to the Complaint as Exhibit B is the assignment of the Lease under which Defendant was operating. The existence of the Lease suggests the absence of ownership. Subsection 13 of that Lease permits the Lessee to make improvements to the Leased Premises, which improvements become the property of the Authority. Since the buyer knew or should have known that the buyer was receiving an assignment of that Lease, and that any modification to the Leased Premises would become the property of the Authority, a wary buyer might conclude that Defendant had no ownership interest in the real property (except to the extent specifically provided by the Lease).

Those “red flags” notwithstanding, the Bill of Sale attached to the Complaint as Exhibit E states that “The Seller hereby warrants and represents that it has good and marketable title to the Assets and that it has the right to sell the same.” Assets is a defined term in the Bill of Sale, defined as “all of the items listed on Exhibit A to the Agreement (also a defined term, the Asset Purchase Agreement) that are not enumerated under the heading “EXCLUDED,” hereafter called the “Assets.” Exhibit A to the Asset Purchase Agreement identifies as transferred asset 1. “Building (100x200).” The Excluded items make no reference to real estate. Thus, the wording of the Bill of Sale suggests that the seller is warranting the buyer’s title to “Building (100x200),” even though the plain wording of the Lease and the Lease Assignment suggest that seller had no interest to convey.

Since the Court cannot conclude with certainty that the Complaint and Amended Complaint fail to state a claim under any theory of law, Defendant’s preliminary objection in the nature of a demurrer will be denied. *Packler v. State Employment Retirement Board*, 470 Pa. 368, 371, 368 A.2d 673, 675 (1977) (citing *Lerman v. Rudolph*, 413 Pa. 555, 198 A.2d 532 (1964)). For other reasons stated elsewhere herein, the Court will require Plaintiff to file a Second Amended Complaint. The Court suggests that Plaintiff compare the title to Count II to the language asserted at Paragraphs 28-30, in order to consider whether that claim is accurately titled.

Count C: Counts III and IV will not be dismissed under the gist of the action doctrine.

The Court confesses some confusion between the title to Count C of Defendant’s Preliminary Objections, and the text which follows. The gist of the action doctrine stands for the proposition that claims for breach of contract may not be “costumed” as tort claims, simply in an effort to secure non-economic damages in contract litigation. *See Glazer v. Chandler*, 414 Pa. 304, 308-309, 200 A.2d 416 (1964). In contrast, the text contained at Count C suggests that the gravamen of Defendant’s objection is that Plaintiff has pled causes of action which are mutually exclusive (a litigant cannot prevail on either a claim for promissory estoppel or a claim for unjust enrichment where the relationship of the parties was controlled by the terms of an express contract).

The short response to Count C is that Rule 1020 of the Pennsylvania Rules of Civil Procedure permits Plaintiff to assert inconsistent claims in the alternative. While Plaintiff cannot prevail on inconsistent claims, they may all reside within the same Complaint.

Count D: The Amended Complaint will not be dismissed for failure to name the Authority as a party, but Plaintiff will be directed to file a Second Amended Complaint, joining the Authority, in order to provide the Authority an opportunity to be heard.

The Court is at a loss to understand how Defendant can argue both that Plaintiff knew or must have known that Plaintiff obtained no interest in the “Building (100x200)” listed as asset number 1 on Exhibit A to the Asset Purchase Agreement, and that the Authority is a necessary party to this litigation. Logically, Defendant should assert either that Plaintiff had actual notice that Authority was the sole owner of the Building (in which case Authority’s participation is unnecessary) or that Plaintiff obtained good title to the Building (in which case Authority must be named as a party whose interest may be affected by the outcome of the litigation).

While the Court is at a loss to understand why Defendant is asserting two mutually inconsistent positions, the Court will direct Plaintiff to name and serve the Authority as a Defendant in Plaintiff’s Second Amended Complaint. Plaintiff need not seek relief against the Authority, unless Plaintiff concludes that Plaintiff can do so in good faith. No basis for such a claim appears to the Court, at this early stage of the proceedings.

Count E: Plaintiff’s demands for attorney’s fees will be stricken.

Counts II of the Original Complaint and Count IV of the Amended Complaint contain claims for attorney’s fees. The text of 42 Pa. C.S. Section 1726(a)(1) regarding taxable costs specifically provides that “Attorney’s fees are not an item of taxable costs except to the extent authorized by section 2503. . . .” 42 Pa. C.S.A. § 1726. The Pennsylvania Supreme Court has consistently “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 . . . , or clear agreement by the parties, ...or some other established exception.” *Chatham Communications, Inc. v. General Press Corporation*, A.2d 837, 842 (Pa. 1975) (citing *Corace v. Balint*, 210 A.2d 882, 887-888 (Pa. 1965)) (citations omitted); 42 Pa.C.S.A. § 2503. The three established exceptions upon which attorneys’ fees have been awarded are the common fund exception, the obdurate behavior exception, and the private attorney general exception. *Feist v. Luzerne Cnty. Bd. of Assessment Appeals*, 347 A.2d 772, 780-1 (Pa. Cmwlth. 1975). The common fund exception is applicable only in class action suits. *Id.* The bad faith exception is contained in Section 2503 of the Judicial Code. *Jones v. Muir*, 515 A.2d 855, 858 (Pa. 1986). Those

claims are ordinarily asserted after the underlying litigation is concluded, only by the prevailing party, and before the expiration of thirty (30) days after judgment. *See Szwerc v. Lehigh Valley Health Network, Inc.*, 235 A.3d 331 (Pa. Super. 2020), appeal granted 249 A.3d 250, appeal dismissed as improvidently granted 278 A.3d 859. The private attorney general exception applies where the end result of the litigation effectuated Congressional or legislative policy. *Jones*, 515 A.2d at 861. The power to authorize awards of attorney's fees under the private attorney-general theory, rests exclusively in the General Assembly. *Id.* at 862. In *Feist*, the Court narrowed the applicability of these exceptions by stating that, in its analysis, the “Court also must take note that in most cases where awards of this nature have been allowed, the class of litigants involved have been relatively indigent groups such as low-rent housing residents.” *Feist*, 347 A.2d at 781.

Plaintiff has not alleged any agreement regarding attorney’s fees, nor any of the other bases listed above. The Court infers that no agreement or other basis exists. Therefore, the Court will strike Plaintiff’s claims for attorney’s fees.

AND NOW, this 5th day of October, 2023, Defendant's Preliminary Objections to the Amended Complaint filed May 2, 2023, are granted in part and denied in part.

Plaintiff is directed to file a Second Amended Complaint within twenty (20) days of the date of filing of this Order. The Second Amended Complaint will name the Williamsport Municipal Airport Authority as a Defendant. The Second Amended Complaint need not seek relief against the Authority, unless Plaintiff concludes that Plaintiff can do so in good faith. Plaintiff will serve that Authority in the manner required by the Pennsylvania Rules of Civil Procedure.

Plaintiff's claims for attorney's fees are stricken. The Second Amended Complaint will contain no demand for attorney's fees, unless the Second Amended Complaint clearly alleges facts which support that demand pursuant to applicable Pennsylvania law.

In all other respects, Defendant's Preliminary Objections to the Amended Complaint filed May 2, 2023, are denied.

By the Court,

William P. Carlucci, Judge

WPC

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