

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

ROBERT C. BOYLES and	:	
LAURA M. BOYLES	:	
Plaintiff	:	CV 22-01113
v.	:	
	:	
ROBERT R. BOYLES and	:	
TRISH A. BOYLES	:	
Defendant	:	

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**ORDER ON PRELIMINARY OBJECTIONS FILED MAY 3, 2023**

**I. Introduction:**

This remarkably acrimonious litigation arose out of the alleged sale of a farm and related equipment by the Plaintiffs to the Defendants, pursuant to the terms of a written Sales Agreement dated January 7, 2021, attached to the Complaint as Exhibit A, and an unsigned draft agreement attached to the Complaint as Exhibit B. It appears that both sellers and buyers (which are father and son and their spouses) were jointly represented by the same counsel in the underlying sale, which may have contributed to the misunderstandings which led to this litigation. The Complaint alleges the sale of farm real property pursuant to the January 7, 2021 Sale Agreement, and alleges that Defendants have been in wrongful possession of related farm equipment, farm machinery, and cattle since the date of the Sales Agreement. Assuming that to be true, it is curious that it took the Plaintiffs from January 7, 2021 until November 14, 2022 to assert the claims set forth in the Complaint.

Although the Complaint was filed over six (6) months ago, this matter is now mired down at the pleading stage. Defendants filed an Answer and New Matter and Counterclaim, and an Amended Answer, New Matter and Counterclaim, both of which resulted in preliminary objections by the Plaintiffs. Most recently, Plaintiffs filed Preliminary Objections in the nature of a demurrer on May 3, 2023, to the Amended Answer, New Matter, and Counterclaim filed April 13, 2023. Those preliminary objections have been briefed and argued, and are ripe for decision.

It is obvious to the Court that the gravamen of both the Complaint and the Counterclaim is that each party claims that the other has breached the terms of the farm sale

agreement. The Complaint seeks relief in replevin and conversion, and appears to suggest that the equipment, farm machinery, and cattle were simply stolen (as opposed to a subject of the Agreement of Sale). Paragraph 30 of Defendant's New Matter appears to claim that the equipment, farm machinery, and cattle were part of the consideration for the purchase price, in the Agreement of Sale. The Court anticipates that, when this matter reaches a later stage, the parties will need to carefully consider the implications of the gist of the action doctrine. See, *Glazer v. Chandler*, 414 Pa. 304, 308, 200 A.2d 416 (1964).

## **II. The Test for Consideration of Preliminary Objections in the Nature of a Demurrer**

Preliminary objections in the nature of a demurrer should be granted where the contested pleading is legally insufficient. *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa.Super.2001) (citing Pa.R.C.P. 1028(a)(4)). "Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805 (Pa.Super.2007) (quoting *Cardenas*, 783 A.2d 317 at 321). All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Id.* *Cooper v. Church of St. Benedict*, 2008 Pa.Super. 171, 954 A.2d 1216 (Pa.Super. 2008). In reviewing preliminary objections, "[a]ll well-pled facts in the complaint, *and reasonable inferences arising from those facts*, are accepted as true. However, unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion need not be accepted." *Richardson v. Wetzel*, 74 A.3d 353, 356 (Pa. Cmwlth. Ct. 2013) (quoting *Wilson v. Marrow*, 917 A.2d 357, 361 n. 3 (Pa. Cmwlth.2007) (*emphasis added*)). "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." 16 Pa.R.C.P. § 1019(a). "The purpose of this rule is to require the plaintiff to disclose the material facts sufficient to enable the adverse party to prepare the case." *Bennett v. Beard*, 919 A.2d 365, 367 (Pa.Cmwlth. 2007). "Pennsylvania is a fact-pleading jurisdiction; consequently, a pleading must not only apprise the opposing party of the asserted claim, 'it must also formulate the issues by summarizing those facts essential to support the claim.'" *Wetzel*, 74 A.3d at 356–57 (quoting *Sevin v. Kelshaw*, 611 A.2d 1232, 1235 (Pa. Super.1992)).

While a complaint must allege facts sufficient to support the claims asserted, it need not contain evidentiary detail. **The proper test is not whether the facts alleged establish that the Defendants are entitled to the particular relief sought, but whether it is clear from the face of the complaint that the claimed relief cannot be granted.**

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).

#### **IV. Questions Presented:**

- 1) Whether Plaintiffs are entitled to a demurrer striking all claims within the Counterclaim related to punitive damages.
- 2) Whether Plaintiffs are entitled to a demurrer striking Count II of the Counterclaim asserting a claim for deceit.

- 3) Whether Plaintiffs are entitled to a demurrer striking Count III of the Counterclaim asserting a claim for fraud.
- 4) Whether Plaintiffs are entitled to a demurrer striking Count IV of the Counterclaim asserting a claim for conversion.
- 5) Whether Plaintiffs are entitled to a demurrer striking Count V of the Counterclaim asserting a claim for replevin.
- 6) Whether Plaintiffs are entitled to a demurrer striking Count VI of the Counterclaim asserting a claim for “damages.”
- 7) Whether Plaintiffs are entitled to a demurrer striking Count VII of the Counterclaim asserting a claim for conversion.
- 8) Whether Plaintiffs are entitled to a demurrer striking Count VIII of the Counterclaim asserting a claim for “contract in fact.”
- 9) Whether Plaintiffs are entitled to a demurrer striking Count IX of the Counterclaim asserting a claim for unjust enrichment related to care of cattle.
- 10) Whether Plaintiffs are entitled to a demurrer striking Count X of the Counterclaim asserting a claim for unjust enrichment related to the maintenance of machinery.
- 11) Whether Plaintiffs are entitled to a demurrer striking Count XI of the Counterclaim asserting a claim for slander of title to personal property.
- 12) Whether Plaintiffs are entitled to a demurrer striking Count XII of the Counterclaim asserting a claim for defamation.
- 13) Whether Plaintiffs are entitled to a demurrer striking Count XIII of the Counterclaim asserting a claim for trespass to real property.

**V. Brief Answer:**

- 1) Plaintiffs are not entitled to a demurrer striking all claims within the Counterclaim related to punitive damages. Although punitive damages are ordinarily not available in an action for breach of contract, at least some of Defendant’s claims, if established, might yield punitive damages.
- 2) Although it is unclear from the allegations set forth in Count II of the Counterclaim whether Defendant are asserting a claim for fraudulent misrepresentation, Defendants will be given an opportunity to amend their Counterclaim, in order to more clearly articulate their claims for fraudulent misrepresentation.

- 3) Although it is unclear from the allegations set forth in Count III of the Counterclaim whether Defendants are asserting a claim for fraudulent misrepresentation for actual fraud, Defendants will be given an opportunity to amend their Counterclaim, in order to more clearly articulate the nature of their fraud claim.
- 4) Although it is somewhat unclear whether the allegations of County IV of the Counterclaim regarding a Bobcat 7753 Skidsteer claim that Plaintiffs damaged the property (trespass to personal property) or destroyed the property (conversion), Defendants will be given an opportunity to amend their Counterclaim, in order to more clearly articulate that claim.
- 5) Plaintiffs are not entitled to a demurrer striking Count V of the Counterclaim asserting a claim for replevin.
- 6) Plaintiffs are entitled to a demurrer striking Count VI of the Counterclaim asserting a claim for “damages.”
- 7) Although it is somewhat unclear whether the allegations of Count VII of the Counterclaim regarding a post hole drill, extension ladders, a Bobcat 100 Mini Excavator, and a 7139 Farmall tractor claim that Plaintiffs damaged the property (trespass to personal property) or destroyed the property (conversion) Defendants will be given an opportunity to amend their Counterclaim, in order to more clearly articulate that claim.
- 8) Plaintiffs are not entitled to a demurrer striking Count VIII of the Counterclaim asserting a claim for breach of contract implied in fact.
- 9) Plaintiffs are not entitled to a demurrer striking Count IX of the Counterclaim asserting a claim for quantum merit damages for care of cattle.
- 10) Plaintiffs are not entitled to a demurrer striking Count X of the Counterclaim asserting a claim for quantum merit damages for maintenance of machinery.
- 11) Plaintiffs are not entitled to a demurrer striking Count XI of the Counterclaim, asserting a claim of slander of title.
- 12) Plaintiffs are not entitled to a demurrer striking Count XII of the Counterclaim asserting a claim for common law defamation.
- 13) Plaintiffs are not entitled to a demurrer striking Count XIII of the Counterclaim asserting a claim for trespass to real property.

## **VI. Discussion:**

**1) Plaintiffs are not entitled to a demurrer striking all claims within the Counterclaim related to punitive damages. Although punitive damages are ordinarily not available in an action for breach of contract, at least some of Defendant's claims, if established, might yield punitive damages.**

Plaintiffs are not entitled to a demurrer striking all claims within the Counterclaim related to punitive damages. It is settled Pennsylvania law that punitive damages are not available for breach of a contract, nor for claims arising out of ordinary negligence. Rather, they will lie only in cases of outrageous behavior, where defendant's egregious conduct shows either an evil motive or reckless indifference to the rights of others. Punitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct. *Pestco, Inc., v. Associated Products, Inc.* 2005 Pa.Super. 276, 880 A.2d 700 (Pa.Super. 2005) citing *Slappo v. J's Development Associates, Inc.*, 2002 Pa.Super. 18, 791 A.2d 409 (Pa.Super. 2002).

Claims for punitive damages are not contained within the claim for relief in Count I of the Counterclaim seeking damages for breach of contract, or Count V seeking judgment in replevin, or Counts VIII and IX and X asserting claims for breach of contract implied in fact or implied at law, but are included within the fraud and conversion claims asserted elsewhere.

The deceit and fraud claims asserted in the Counterclaim collectively allege that the Plaintiff had actual knowledge that the representations that they made to the Defendants were materially false, but that Plaintiffs made them knowingly and maliciously, with the actual intent to mislead the Defendants in connection with the farm sale. The Defendants allege that they relied upon those misrepresentations, and suffered damage as a result. The conversion claims in the Counterclaim allege that Plaintiff intentionally damaged or stole Defendants' personal property, for the purpose of depriving the Defendants of its use.

The Court is suspicious about Defendants' ability to secure evidence which will support their claims for punitive damages. Weighing potential future evidence, however, is not the Court's task in resolving preliminary objections. Because the allegations in Counterclaim, if proven, would support an award of punitive damages, Plaintiff's demurrer will be denied.

**2) Although it is unclear from the allegations set forth in Count II of the Counterclaim whether Defendant are asserting a claim for common law deceit or fraudulent misrepresentation, Defendants will be given an opportunity to amend their Counterclaim, in order to more clearly articulate their claims for fraudulent misrepresentation.**

The elements of deceit in Pennsylvania are “(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result.” *Borelli v. Barthel*, 445, 211 A.2d 11, 13 (Pa. Super 1965). The elements of fraud in Pennsylvania are described in *Milliken v. Jacono*.

“(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.”

*Milliken v. Jacono*, 2012 PA Super 284, 60 A.3d 133, 140 (Pa. Super. 2012), *aff'd*, 103 A.3d 806 (Pa. 2014), *as modified on reconsideration* (Nov. 12, 2014).

It appears to this Court that that the titles of the common law claim of “deceit,” as compared to the common law claim of fraudulent misrepresentation may provide a distinction with no difference. It is quite likely that references in Pennsylvania jurisprudence to the claim of “deceit is simply older terminology for a claim of fraud. The Court will grant the Defendants leave of Court to amend the Counterclaim to more clearly articulate whether they claim that the Plaintiffs procured the underlying sale by fraud, or whether the Plaintiffs have committed fraud after the sale, or both.

**3) For the reasons more fully set forth above, Defendants will be given an opportunity to amend the Counterclaim to more clearly articulate whether they claim that the Plaintiffs procured the underlying sale by fraud, or whether the Plaintiffs have committed fraud after the sale, or both.**

The elements of a claim of fraudulent misrepresentation are well-settled.

The elements of fraudulent misrepresentation are well settled. In order to void a contract due to a fraudulent misrepresentation, the party alleging fraud must prove, by clear and convincing evidence: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of

misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance.

*Porreco v. Porreco*, 811 A.2d 566, 570 (Pa. 2002).

Plaintiffs contend that Defendants' claims of fraud do not allege sufficient facts to survive a demurrer. Defendants have alleged that they secured a loan to finance the purchase of the farm, in reliance on the Plaintiff's assertion that the Plaintiff's mortgage would be satisfied by a payment of seven hundred and eighty thousand dollars. It is somewhat unclear to the Court whether Defendants claim that Plaintiffs' misstatements constitute a breach of the terms of the written agreement of sale, or that Plaintiffs willfully procured a sale of the farm by affirmative fraud, or both. The Court will grant the Defendants leave of Court to amend the Counterclaim to more clearly articulate whether they claim that the Plaintiffs breached the terms of the written Agreement of Sale, or that Plaintiffs procured the underlying sale by fraud, or that Plaintiffs have committed fraud after the sale, or some combination of those claims.

**4) Although it is somewhat unclear whether the allegations of County IV of the Counterclaim regarding a Bobcat 7753 Skidsteer claim that Plaintiffs damaged the property (trespass to personal property) or destroyed the property (conversion) Defendants will be given an opportunity to amend their Counterclaim, in order to more clearly articulate that claim, and in order to make clear the claim is for the damage to that property.**

Conversion is "the deprivation of another's right of property in, or use or possession of, a chattel or other interference therewith, without the owner's consent and without lawful justification." *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 726 (Pa. 1964).

Plaintiffs assert that Defendants do not own the Bobcat 7753 Skidsteer, and thus cannot claim for conversion. That defense on the merits might eventually prevail, but it is certainly not the proper subject for preliminary objection. Since Defendants claim title in their Counterclaim, and since Defendants are entitled to a presumption that the fact alleged therein are true, Plaintiffs' preliminary objections to Count IV will be dismissed.

**5) Plaintiffs are not entitled to a demurrer striking Count V of the Counterclaim asserting a claim for replevin.**

Replevin is an action at law to recover the possession of personal property and to recover damages incurred as a result of its illegal detention. *In re Trustees of Conneaut Lake Park, Inc.*, 563 B.R. 784, 790 (Bankr. W.D. Pa. 2017).



Plaintiffs contend that the farm equipment, machinery, and livestock were not included in the sale. At Count V of the Counterclaim, Defendants contend the contrary. The Court must decide preliminary objections by accepting as true all well-pleaded facts. Plaintiffs' preliminary objections to Count V of the Counterclaim will be dismissed

**6) “Damages” is not a cause of action under applicable Pennsylvania law.**

The Pennsylvania Rules of Civil Procedure require damages to be pled alongside the related cause of action in a single count. Pa.R.C.P. 1020. (“The plaintiff may state in the complaint more than one cause of action cognizable in a civil action against the same defendant. Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief.”)

Count VI of the Counterclaim will be stricken, without prejudice to the Defendant to demand damages in each remaining count of the Amended Counterclaim.

**7) Although it is somewhat unclear whether the allegations of Count VII of the Counterclaim regarding a post hole drill, extension ladders, a Bobcat 100 Mini Excavator, and a 7139 Farmall tractor claim that Plaintiffs damaged the property (trespass to personal property) or destroyed the property (conversion), Defendants will be given an opportunity to amend their Counterclaim, in order to more clearly articulate their claim.**

In the matter of *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 726 (Pa. 1964), the Court analyzed the dichotomy between an action claiming trespass to chattel, as opposed to conversion.

“Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification.” *Witherspoon*, 241 A.3d at 1187 (citation omitted). Trespass to chattels is a similar tort committed when an individual “dispossess[es] another of chattel ... or us[es] or intermeddl[es] with a chattel in the possession of another.” *Pestco, Inc. v. Associated Products, Inc.*, 880 A.2d 700, 708 (Pa. Super. 2005) (citing Restatement (Second) of Torts § 217); *see also Rosemont Taxicab Co., Inc. v. Philadelphia Parking Authority*, 327 F.Supp.3d 803, 828 (E.D. Pa. 2018) (noting that in Pennsylvania, the elements of trespass to chattel “are essentially the same” as those of the tort of conversion) (citation omitted).

*Sherwood v. Farber*, 266 A.3d 663 (Pa. Super. Ct. 2021) (*nonprecedential*), *reargument denied* (Jan. 6, 2022) (emphasis added). The difference between conversion and trespass to chattels is that “conversion entails a more serious deprivation of the owner’s rights such that an award of the full value of the property is appropriate.” *QVC, Inc. v. Resultly, LLC*, 159 F. Supp. 3d 576, 599 (E.D. Pa. 2016).

As more fully set forth above regarding Count IV, the parties dispute ownership to the personal property which is the subject of the Counterclaim. It appears that both Plaintiffs and Defendants assert title to the post-hole drill, extension ladders, a Bobcat 100 Mini Excavator, 7139 Farmall tractor, and a host of other personal property. Although the issue of title will almost certainly be a key issue at trial, it is not the proper subject for preliminary objection. Since Defendants claim title in their Counterclaim, and since Defendants are entitled to a presumption that the fact alleged therein are true, Plaintiff's preliminary objections to Count VII will be dismissed.

**8) Plaintiffs are not entitled to a demurrer striking Count VIII of the Counterclaim asserting a claim for breach of contract implied in fact.**

A contract implied in fact, or an implied contract, in the proper sense, arises when the intention of the parties is not expressed, but an agreement in fact creating an obligation is implied or presumed from their acts; or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual interest to contract.

*In re Montgomery's Est.*, 149 A. 705, 707 (Pa. 1930).

The transaction which is the subject of the Complaint and the Counterclaim is obviously based upon an express contract. Plaintiffs seek an Order dismissing Count VIII, on the basis of the clear existence of an express contract. While the existence of an express contract is undisputed, there is at least some chance that the evidence secured through discovery will reveal the existence of one or more implied contracts, either associated with the express contract, or thereafter. At this early stage of the proceeding, it seems unlikely that Defendants will prevail claims of contract implied in fact or implied at law. Nevertheless, Defendants are entitled to an opportunity to attempt to discover facts in support of those claims. For that reason, Plaintiff's Preliminary Objections to Count VIII will be dismissed.

**9) Plaintiffs are not entitled to a demurrer striking Count IX of the Counterclaim asserting a claim for quantum merit damages for care of cattle.**

To prevail on a claim for unjust enrichment, a plaintiff must prove: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

In determining if the doctrine applies, our focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. The

most important factor to be considered in applying the doctrine is whether the enrichment of the defendant is *unjust*. Where unjust enrichment is found, the law implies a contract, referred to as either a *quasi contract* or a contract implied in law, which requires that the defendant pay to plaintiff the value of the benefit conferred.

*Walter v. Magee-Womens Hosp. of UPMC Health Sys.*, 876 A.2d 400, 407 (2005), *aff'd*, 588 Pa. 739, 906 A.2d 1194 (Pa. Super. 2006)(citations omitted). Defendants claim ownership of the cattle, but assert in the alternative a claim for the time, capital, and expertise in keeping, maintaining, caring for, and selling the cattle.

It seems very unlikely that Defendants will fail to establish any express contract or contract implied in fact, yet establish that the Plaintiffs were unjustly enriched by Defendants' activities related to the cattle and farm machinery. . Nevertheless, Defendants are entitled to an opportunity to attempt to discover facts in support of those claims. Plaintiff's Preliminary Objections to Count IX will be dismissed.

**10) Plaintiffs are not entitled to a demurrer striking Count X of the Counterclaim asserting a claim for quantum merit damages for maintenance of machinery.**

Count X appears to assert a quantum merit claim for maintenance of the farm machinery, parallel to the claim asserted at Count IX for maintenance of cattle. For the reasons listed above in connection with Count IX, the likelihood that Defendants will fail to establish any express contract or contract implied in fact, yet establish that the Plaintiffs were unjustly enriched by Defendants' activities related to the farm machinery, seem remote. That fact notwithstanding, Defendants are entitled to participate in discovery sufficient to determine whether any claim of unjust enrichment is viable. Plaintiff's Preliminary Objections to Count X will be dismissed.

**11) Plaintiffs are not entitled to a demurrer striking Count XI of the Counterclaim asserting a claim for common law slander of title.**

Disparagement of title, variously labeled slander of title, defamation of title, or in other contexts, slander of goods, trade libel or injurious falsehood, is the false and malicious representation of the title or quality of another's interest in goods or property.

*Pro Golf Mfg., Inc. v. Trib. Rev. Newspaper Co.*, 570 Pa. 242, 247, 809 A.2d 243, 246 (Pa. 2002) (*citing Triester v. 191 Tenants Ass'n*, 415 A.2d 698, 701 (1979)). Malice is an essential element of slander of title. *Forman v. Cheltenham Nat. Bank*, 562, 502 A.2d 686, 688 (Pa. Super. 1985).

As with his objections to Counts IV, V, and VII, the Plaintiffs allege that the Defendants could not possibly succeed on Count XI because the Plaintiffs own the goods at issue. As with Counts IV, V, and VII, title to the personal property at issue is the fulcrum of this litigation, and is a disputed issue of material fact. The Defendants allege in their Counterclaim that they own the personal property, and that Plaintiffs have maliciously slandered their title. The preliminary objections to Count XI will be dismissed.

**12) Plaintiffs are not entitled to a demurrer striking Count XII of the Counterclaim asserting a claim for common law defamation.**

In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised: (1) The defamatory character of the communication. (2) Its publication by the defendant. (3) Its application to the plaintiff. (4) The understanding by the recipient of its defamatory meaning. (5) The understanding by the recipient of it as intended to be applied to the plaintiff. (6) Special harm resulting to the plaintiff from its publication. (7) Abuse of a conditionally privileged occasion.

42 Pa.C.S.A. § 8343. Claims of slander *per se* do not require proof of special damage. *Krolczyk v. Goddard Sys., Inc.*, 164 A.3d 521, 531 (Pa. Super. 2017). Slander “*per se* occurs when the statement ascribes to the plaintiff commission of a criminal offense...” *Id.*

“Alleged claims for defamation should not be dismissed on the basis of a preliminary objection in the nature of a demurrer unless it is clear the communication is incapable of defamatory meaning.” *Balletta v. Spadoni*, 47 A.3d 183, 197 (Pa. Commw. Ct. 2012).

Plaintiffs seek to have the Court strike Count XII of the Counterclaim, based upon their contention that Defendants failed to plead special damages. Defendants assert that their claim of defamation should not be dismissed, because Plaintiffs have accused Defendants of the crime of theft, which is arguably *per se*. For that reason, Plaintiffs’ preliminary objection to Count XII will be dismissed.

**13) Plaintiffs are not entitled to a demurrer striking Count XIII of the Counterclaim asserting a claim for trespass to real property.**

“In Pennsylvania, a trespass occurs when a person who is not privileged to do so intrudes upon land in possession of another, whether willfully or by mistake.” *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 346 (Pa. 2020). The Plaintiff’s objection to Count XIII is once again predicated on dispute as to who is legally entitled to certain property.

Assuming that all allegations set forth in the Counterclaim are true, the Plaintiffs have willfully intruded upon real property owned by the Defendants, without justification. For that reason, the preliminary objection to Count XIII will be dismissed.

### **ORDER**

For the reasons more fully set forth above, Plaintiffs' Preliminary Objections to Defendants' Counterclaim are granted in part and denied in part. Count VI of the Counterclaim is stricken, without prejudice to the Defendant to demand damages in each remaining Count of the Amended Counterclaim. Defendants are directed to file an Amended Counterclaim within twenty (20) days of the date of filing of this Order, which Amended Counterclaim will clearly articulate whether Defendants claim damages for breach of express contract, or contract implied in fact, or contract implied at law (unjust enrichment), or if Defendants are asserting those claims in the alternative, as separate Counts. Further, the Amended Counterclaim will clearly articulate whether Defendants contend that Plaintiffs procured the underlying sale by fraud, or whether the Plaintiffs secured closing on that sale by fraud, or whether Plaintiffs committed fraud after the sale, or some combination of those claims.

Except to the extent expressly granted in this Order, Plaintiffs' Preliminary Objections to Defendants' Counterclaim are denied.

By The Court,

Hon. William P. Carlucci, Judge