IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LIBERTY GAMES AND AMUSEMENTS, Plaintiff	:	**NO. 24-00876**
v.	:	**CIVIL ACTION-LAW**
MIELE MANUFACTURING, INC. Defendant	:	**Preliminary Objections**

OPINION

Before the Court are the Defendant's Preliminary Objections filed on February 21, 2025, to Plaintiff's original Complaint filed on January 31, 2025. The Defendant simultaneously filed a brief in support of its preliminary objections. This dispute arises out of an agreement between the parties, and the Plaintiff alleges a breach of contract, fraud, and unjust enrichment based on the Defendant's alleged actions. On March 10, 2025, argument was scheduled for April 7, 2025. Pursuant to Pa.R.C.P. Rule 1028(c)(1), and per the scheduling order, the Plaintiff was directed to notify the Court and the Defendant promptly if it amends its Complaint. On March 19, 2025, Plaintiff filed a second complaint without notifying the Court or the Defendant properly under Pa.R.C.P. Rule 1033. Accordingly, the Court proceeded with argument on Defendant's Preliminary Objections on April 7, 2025, noting the objections are applicable to the original and second complaints. Timothy Reitz, Esquire, and Andrea Pulizzi, Esquire, appeared on behalf of the Plaintiff, and Benjamin Colburn, Esquire, appeared on behalf of the Defendant.

Background

The Complaint is born of an agreement between Defendant, Miele Manufacturing, Inc. and Liberty Amusement Company. Prior to November 11, 2020, Plaintiff purchased electronic games of skill from Defendant. Contemporaneously with the purchase of the systems, Defendant advised Plaintiff that the games require "refilling," and for this process to

occur, Plaintiff needed to enter a Pennsylvania Operator Agreement. The Defendant and Liberty Amusement Company entered into a Pennsylvania Operator Agreement effective November 11, 2020 (the "Agreement"). Accordingly, Plaintiff used and sublicensed software from Defendant to operate game systems at certain establishments. A copy of the Agreement is attached to the Complaint as "Exhibit A."[1] The Agreement sets forth terms for use, revenue split, and the fill process for the game systems.

The game units utilize a Fill System defined in the Agreement as a "proprietary revenue generation refill system" which is a patented proprietary component of the Game System.[2] The Plaintiff alleges the Agreement outlined the revenue split formula in accordance with Pennsylvania legislation. (Complaint, paragraph 5). Plaintiff alleges it was advised that the split would be "40% to the Location, 40% to Operator (Plaintiff), and 20% to Pace-O-Matic for the Software Restoration Fee. (Complaint, paragraph 5). Pace-O-Matic develops, produces, and licenses the games, and all operators must execute a Pace-O-Matic contract in Pennsylvania. At argument, Defendant stated that it is an exclusive distributor for Pace-O-Matic. In that capacity, Defendant distributes and installs the software. Pursuant to the Agreement, the "Manufacturer/Distributor or SSP or its designee would maintain the fill system upon request of the Operator." (Second Complaint, para. 14). Pace-O-Matic administers the fills. (Second Complaint, paragraph 13). Plaintiff contacted Defendant when a fill was necessary. (Second Complaint, paragraph 15). Defendant distributed weekly invoices for $1060.00 per machine, and Plaintiff would pay Defendant that amount to Defendant. (Second Complaint, paragraphs 16 and 17).

[1] In the original complaint, the Plaintiff attached a signed Agreement with the parties to the Agreement filled in. The Plaintiff filed a second complaint that attached a boiler plate Pennsylvania Operator Agreement without any information filled in and not signed by anyone.

[2] The patented proprietary component was developed by the State Supplementary Program("SSP") to permit Operators and/or Locations to operate the game system software on a fee basis. (Complaint, paragraph 10).

In or around January of 2024, Plaintiff discovered that Pace-O-Matic was receiving 12% of the $1060.00, or about $636.00 per fill per machine and Defendant was receiving 8% of the $1060.00 or about $424.00 weekly for the fill of each machine operated by Plaintiff. (Second Complaint, paragraphs 14 and 20). Plaintiff asserts that Defendant does not have a contract with Pace-O-Matic to engage in further splitting the revenue assigned to the entity. (Second Complaint, paragraph 24). Moreover, the Agreement between the parties does not provide that Defendant received a portion of the revenue owed to Pace-O-Matic. (Second Complaint, paragraph 22). On or around April 5, 2024, Plaintiff notified Defendant that it was terminating the Agreement without objection from Defendant. (Second Complaint, paragraphs 23 and 24).

Plaintiff asserts that Defendant fraudulently accrued $981,136.00 from Plaintiff by collecting a fee from Plaintiff for a service it did not perform. (Second Complaint, paragraph 27). Thus, Plaintiff alleges it suffered monetary damages in the amount of $981,136 because it paid that amount in excess of the actual percentage fill price charged by Pace-O-Matic. (Second Complaint, paragraphs 28 and 29). Accordingly, Plaintiff alleges fraud, unjust enrichment, and breach of contract.

In Count I, Fraud, Plaintiff alleges that Defendant knowingly misrepresented its role in filling the machines. Specifically, Plaintiff claims that Defendant materially misrepresented that it was a necessary party to the process of filling the machines which directly impacts the revenue generating capability of the game units at the core of the Agreement. Plaintiff maintains that Defendant knowingly and falsely represented its role because it knew it took a portion of the percentage of revenue garnished and owed to Pace-O-Matic without disclosing that information to Plaintiff. Plaintiff furthers its argument by stating that Defendant intended to mislead Plaintiff as to its role in filling the game systems

to secure the agreement and the ongoing payments thereof. Plaintiff bases its claim on justifiably relying on Defendant's misrepresentation to Plaintiff's financial detriment. Plaintiff asserts that Defendant's fraud is quantified by Plaintiff's overpayment for fills and additional costs incurred while attempting to rectify the issues caused by Defendant's misrepresentation.

In Count II, Unjust Enrichment, Plaintiff claims that Defendant's retention and collection of additional fees for the fill service is unjust and inequitable under the circumstances. As such, Plaintiff seeks restitution for the overpayment for the fill service. Plaintiff supports its claim Defendant collected weekly fees from Plaintiff for services he did not render nor disclose to Plaintiff he would be collecting, Defendant retained and benefitted unjustly from the fees collected from Plaintiff.

In Count III, Breach of Contract, Plaintiff avers that "Defendant failed to disclose to Plaintiff that the 20% fee included a 8% share it would be collecting. Defendant collected a percentage that Plaintiff was not aware of nor would it agreed[sic] to."(Complaint, paragraph 48). Plaintiff concludes that Defendant's actions amount to a breach of the implied fair and reasonable costs of service.

In response to the Complaint, Defendant raises eight (8) preliminary objections which are addressed below.

1. Plaintiff Lacks Standing as it is not a party to the Agreement

Defendant's first preliminary objection pursuant to Pa.R.C.P. 1028(a)(5), lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action, alleges that Plaintiff is not a party to the agreement attached to the Complaint. "It is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract." *Electron Energy Corp. v. Short*, 597 A.2d 175, 177 (Pa. Super.1991) *aff'd* 618

A.2d 395 (Pa. 1993). Defendant specifically argues that the document attached to the Complaint clearly states the purported contract with Miele is with "Liberty Amusement Company," not the named plaintiff "Liberty Games & Amusements." Additionally, Defendant argued that the entities are distinct and separate legal entities per the Secretary of State that provides different results when the names are searched. Defendant proceeded to argue that Plaintiff's Complaint is devoid of any factual connections linking Liberty Amusement Company and Liberty Games & Amusements, Inc. nor does the complaint establish that Plaintiff is the proper party to this contract which explicitly conveys otherwise. The Court agrees with the Defendant, and the first Preliminary Objection is **SUSTAINED.**

2. Plaintiff Cannot Enforce an Unsigned Contract

Defendant's second Preliminary Objection, pursuant to Pa.R.C.P. Rule 1028(a)(4), legal insufficiency of a pleading, alleges that the contract attached to the Complaint is signed only by a representative of "Liberty Amusement Company" without conveying that a representative of Miele Manufacturing actually executed the contract.

"It is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds." *Gasbarre Products, Inc. v. Smith*, 270 A.3d 1209, 1218 (Pa. Super. 2022)(citing *Jenkins v. Cty. Of Schuykill*, 441 Pa. Super. 642, 658 A.2d 380, 383 (1995)). Here, Defendant avers the Complaint does not contain any allegations that support the formation of the contract. Defendant asserts Plaintiff's Complaint does not establish a meeting of the minds between the alleged parties to the contract, and fails as a matter of law. The Court agrees with Defendant that the Complaint's failure to provide support explaining how the contract was formed or why the contract was only signed by one party; and, thus, the Preliminary Objection is **SUSTAINED**.

3. Plaintiff Fails to Establish Any Contract Damages

Defendant's third Preliminary Objection, pursuant to Pa.R.C.P. Rule 1028(a)(4), legal insufficiency of a pleading, alleges that Plaintiff's Complaint does not support a claim for any damages under a breach of contract cause of action. Defendant cites *Aiken Industries, Inc. v. Estate of Wilson*, 477 Pa. 34, 383 A.2d 808, 812 (1978), to support its claim that Plaintiff failed to establish damages in its complaint, "[t]hough any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged."

The basis of Plaintiff's Complaint on this ground is that the party does not have a contract with Pace-O-Matic to allow for the further revenue split between Defendant and Pace-O-Matic. Plaintiff's Complaint arises from its discovery in January of 2024 that Miele was taking 8% and Pace-O-Matic was receiving 12% per fill for each machine which to Plaintiff amounts to a breach of contract between the above-named parties under their Agreement.

Defendant deduced that, based on Plaintiff's own Complaint, the party could not have suffered any monetary damages. The Agreement between the parties apportioned the revenue by providing "40% to the Location, 40% to the Operator (Plaintiff), and 20% for the Software Restoration Fee Pace-O-Matic." (Complaint, paragraph 5). Defendant argues that when taking this apportionment as true, the percentage of revenue assigned to the designated parties was followed. Moreover, Defendant argues that Plaintiff's Complaint does not allege that it was not receiving its 40% of the apportioned revenue nor does the Complaint allege that Defendant was taking an additional 8% per fill beyond the established 20% designated to Pace-O-Matic in the Agreement. Defendant asserts that Plaintiff's Complaint is an attempt to

recover damages from Defendant for how Pace-O-Matic chose to divide its own share of the revenue.

The Court agrees with Defendant that Plaintiff has not alleged the way in which it was harmed by the separate agreement between Defendant and Pace-O-Matic or that Plaintiff did not receive the revenue it was promised under the agreement. Thus, the Defendant's third Preliminary Objection is **SUSTAINED**.

4. Plaintiff's Unjust Enrichment Claim Fails as a Matter of Law

Defendant's fourth Preliminary Objection, pursuant to Pa.R.C.P. Rule 1028(a)(4), legal insufficiency of a pleading, alleges that Plaintiff is unable to sustain an unjust enrichment claim because Plaintiff received what it was owed under the Agreement.

Where a written or express contract exists between parties, courts may not make a finding of an unjust enrichment claim, *First Wisconsin Trust Co. v. Strausser*, 439 Pa.Super. 192, 653 A.2d 688 (1995), because unjust enrichment claims are based on a quasi-contractual theory of liability and unjust enrichment is asserted as an alternative to a breach of contract. *Silva v. Rite Aid Corp.*, 416 F. Supp. 3d 394, 403 (M.D. Pa. 2019). "Where unjust enrichment is found, the law implies a contract, which requires the defendant to pay to the plaintiff the value of the benefit conferred." *Mitchell v. Moore*, 729 A.2d 1200, 1203 (Pa. Super. 1999). The following elements are necessary to prove unjust enrichment:

> (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. (citations omitted). The application of the doctrine depends on the particular factual circumstances of the case at issue. 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.

Id at 1203-04 citing *Schenck v. K.E. David, Ltd.*, 446 Pa.Super. 94, 666 A.2d 327 (1995).

"[A] cause of action for unjust enrichment arises only when a transaction is not subject to a written or express contract." Toppy v. Passage Bio, Inc., 285 A.3d 672, 688 (Pa. Super. 2022). Thus, "[b]ecause a claim for unjust enrichment cannot stand when there is an express contract," *id*, a plaintiff cannot assert its expectation damages under an unenforceable contract to substantiate an assertion that a benefit was conferred on a defendant and that that benefit was wrongfully obtained or passively received and retained unconscionably. *Id*.

Plaintiff's Complaint alleges that the benefit conferred on Defendant by Plaintiff is due to the percentage of Pace-O-Matic's fee that it split with Defendant. Defendant maintains that Plaintiff's unjust enrichment claim is duplicative of its breach of contract complaint, and similarly, the claim is devoid of the facts necessary to establish any relationship between Defendant and Plaintiff. On its face, Plaintiff's Complaint seeks to impose liability for a benefit conferred to Defendant not by Plaintiff, but by Pace-O-Matic; and, Plaintiff does not have standing to base its unjust enrichment claim either on the revenue split contemplated in the Agreement nor on an amount paid to Defendant by a third-party (Pace-O-Matic). The Court agrees with Defendant, and thus, Defendant's fourth Preliminary Objection is **SUSTAINED.**

5. Plaintiff's Fraud Claim is Barred by the Gist of the Action Doctrine

Defendant's fifth Preliminary Objection, pursuant to Pa.R.C.P. Rule 1028(a)(4), alleges that Plaintiff's fraud claim is barred by the gist of the action doctrine. The gist of the action doctrine operates to "maintain the conceptual distinction between breach of contract claims and tort claims" and "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." *eToll, Inc. v. Elias/Savion Adver*., 811 A.2d 10, 14 (Pa.Super. 2002)(citing *Bash v. Bell Tel. Co*., 601 A.2d 825 (Pa.Super. 1992). "Although they derive from a common origin, distinct differences between civil actions for tort and contract breach

have developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensual agreements between particular individuals." *Iron Mountain Sec. Storage Corp. v. American Specialty Foods, Inc.*, 457 F. Supp. 1158, 1165 (E.D. Pa. 1978). Allowing "a promisee to sue his promissor 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." *Id*.

Defendant argued that Plaintiff's fraud claim is derivative of its alleged contractual relationship with Defendant, barring the claim by the gist of the action doctrine. Plaintiff's Complaint bases its fraud claim on the misrepresentation by Defendant regarding its relationship with Pace-O-Matic and the fill system for the machines. Plaintiff's Complaint alleges that the misrepresentations were made intentionally by Defendant for the purpose of the contract at issue. Additionally, Plaintiff alleges that Defendant's receipt of a portion of Pace-O-Matic's revenue share amounts to fraud. Defendant further asserts that Plaintiff's fraud claim is a reiteration of the breach of contract claims, and is precluded from the relief Plaintiff seeks because the claim is already asserted under the breach of contract claim. Accordingly, the Court agrees with the Defendant, and the fifth Preliminary Objection is **SUSTAINED.**

6. Plaintiff Fails to Plead its Fraud Claim with the Required Specificity

Defendant's fifth Preliminary Objection, pursuant to Pa.R.C.P. Rule 1028(a)(2) alleges that Plaintiff failed to compose its Complaint with the requisite particularity. Under the Pennsylvania Rules of Civil Procedure, Rule 1019 states, "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form…averments of fraud or mistake shall be averred with particularity. Malice, intent,

knowledge and other conditions of mind may be averred generally." The extent of Plaintiff's fraud complaint alleges the Defendant "knowingly misrepresented the role it took in the Fill system for the machines." Defendant further argues that Plaintiff's allegation is overly broad and vague as to be meaningless under the Rule, and additionally, the supporting content is boilerplate recitations of elements of a fraud claim without the requisite specificity as it applies to this matter. The Plaintiff's allegations fail to state any details regarding Defendant's alleged fraudulent actions. Thus, Plaintiff's allegation leaves Defendant without the necessary facts, parties, claims, and circumstances to refute the allegation of fraud. Accordingly, the Court agrees with Defendant, and the sixth Preliminary Objection is **SUSTAINED.**

7. Plaintiff Fails to Attach All Relevant Provisions of a Written Contract

Defendant's seventh Preliminary Objection, pursuant to Pa.R.C.P. Rule 1028(a)(2), alleges that Plaintiff omitted Exhibit C, page 17 of the 17-page contract, and relevantly, the only page of the contract material to the cause of action. According to the contract, page 17, Exhibit C, contains the revenue split formula at the heart of Plaintiff's claims in this matter. Pennsylvania Rule of Civil Procedure, Rule 1019(i) provides that "[w]hen any claim…is based upon a writing, the pleader *shall* attach a copy of the writing, or the *material part thereof*." (Emphasis added). At the hearing on the Preliminary Objections, Plaintiff conceded that more specificity is necessary to succeed beyond this stage of the proceeding. The Court finds that Plaintiff's Complaint omits the necessary documentation and factual basis to establish a sufficient cause of action. Accordingly, Defendant's seventh Preliminary Objection is **SUSTAINED.**

8. Venue is Not Proper in this Court Under the Agreement

Defendant's eighth Preliminary Objection, pursuant to Pa.R.C.P. 1028(a)(2), asserts that should the Court agree that Plaintiff's contract may be enforced, or there is any doubt as to its enforceability, this Court should transfer the matter to the Court of Common Pleas of Dauphin County as it is set forth in the contract.

A forum selection clause proving to be valid should be considered controlling in every case except extreme circumstances. *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 63 (2013). As the party defying a valid forum selection clause, the plaintiff bears the burden of substantiating that the transfer of the forum to which the parties agreed is unwarranted because the plaintiff's choice of forum bears no weight. *Id*. Pennsylvania Courts have consistently held that valid forum selection clauses in contracts are appropriate and enforceable. See: *Central Contracting Co. v. C.E. Youngdahl & Co.*, 418 Pa. 122, 133–34, 209 A.2d 810, 816 (1965)*Autochoice Unlimited, Inc. v. Avangard Auto Finance, Inc.*, 9 A.3d 1207, 1215 (Pa.Super.2010); *Midwest Fin. Acceptance Corp. v. Lopez*, 78 A.3d 614, 628 (Pa.Super.2013); *Patriot Commercial Leasing Co., Inc., v. Kremer Restaurant Enters., LLC*, 915 A.2d 647, 650 (Pa. Super. 2006).

The Complaint ignores the forum selection clause in the Complaint. However, the contract attached to the Complaint provides that "any disputes arising under this Agreement shall be subject to the exclusive jurisdiction of the state courts located in Harrisburg, Pennsylvania and the parties hereby consent to the personal jurisdiction and venue of such courts." (Ex. A. at paragraph 7.8.). Defendant argues that Plaintiff proffers no proof as to why the venue provision should not be enforced in this matter. More specifically, Defendant asserts that Plaintiff's Complaint simply does not address the issue of the forum selection clause.

The Court finds that Plaintiff's Complaint is entirely lacking any facts suggesting the application of the forum selection clause is unreasonable or unjust in this matter. Accordingly, the Court agrees with Defendant, and Defendant's eighth Preliminary Objection is **SUSTAINED.**

Accordingly, the Court enters the following Order:

ORDER

AND NOW, this 30th day of May, 2025, upon consideration of Plaintiff's Complaint and Defendant's Preliminary Objections, all eight of Defendant's Preliminary Objections are **SUSTAINED**. The Plaintiff is granted leave to amend the Complaint within twenty days to adequately address all of the issues sustained in this Order. Failure to do so may lead to dismissal with prejudice.

By the Court,

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Ryan M. Tira, Judge

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