IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ACADEMY PLAZA LLC I,	: MAY TERM, 2002
PORT RICHMOND LLC, and	
WASHINGTON CENTER LLC,	: No. 2774
v.	:
WASHINGTON CENTRE SHOPS LP,	: (Commerce Program)
PORT RICHMOND ASSOCIATES LLC,	
ACADEMY STORES LP, and	: Superior Court Docket Nos.
BRYANT ASSET MANAGEMENT	3537 EDA 2006
	: 3362 EDA 2006

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OPINION

Albert W. Sheppard, Jr. J. …… May 21, 2007

This Opinion is submitted relative to the cross-appeals of plaintiffs, Academy Plaza, L.L.C. 1, Port Richmond LLC and Washington Center LLC ("plaintiffs"), and Bryant Asset Management, a/k/a Bryant Development Corporation ("defendants"), of this court's Order of October 16, 2006. In that Order, this court denied plaintiffs' Post-Trial Motion to enter judgment on Count III of the Complaint - - Unjust Enrichment, and for pre-judgment interest, punitive damages, and attorneys' fees pursuant to 42 Pa.C.S.A. §2503. Further, in that Order the court denied defendants' Post-Trial Motions for Judgment N.O.V. or, in the alternative, for a New Trial.

For the reasons discussed, this court respectfully submits that its decision should be affirmed.

BACKGROUND

Plaintiffs, Academy Plaza, L.L.C. 1, Port Richmond, L.L.C. 1, and Washington Center, L.L.C. 1, are special purpose entities created and wholly owned by Cedar Income Fund Partnership, L.P., now known as Cedar Shopping Centers, Inc.[1] Cedar is a publicly traded real estate investment trust (REIT). Defendants are Bryant Asset Management a/k/a Bryant Development Corporation; Washington Centre Shops, L.P. and Academy Stores, L.P., both Delaware Limited Partnerships; and Port Richmond Associates, LLC, a New York Limited Partnership. The parties entered into an Agreement of Sale for Academy Plaza, Port Richmond Village, and Washington Center shopping centers on May 16, 2001. The events leading up to both the execution of this Agreement and the closing on the three properties constitutes the genesis of this litigation.

Prior to making their offer, plaintiffs received financial information from defendants pertinent to the three properties. This information included rent rolls, income, expenses, statements of cash operations, and cash projections for the shopping centers. Defendants did not include any information regarding material tenant delinquencies, defaults, or early termination options. The crux of plaintiffs' lawsuit is their claim that defendants fraudulently induced plaintiffs to enter into this Agreement at an inflated price by misrepresenting the net operating income for the shopping centers and by concealing relevant information concerning tenant delinquencies and defaults.

At least one meeting took place between the parties before the execution of the Agreement to discuss the tenants of the three shopping centers. Brenda Walker ("Walker"), Vice-President of Cedar, testified that defendants did not inform plaintiffs of any tenant delinquencies or defaults at this meeting. Denis Brauchle ("Brauchle"), a

[1] This court will refer to Cedar and plaintiffs interchangeably.

property manager for Bryant, testified that the parties spent very little time discussing the tenants, and that he did not recall if he gave plaintiffs any information regarding tenant defaults.

Defendants were on notice at least one month prior to the execution of the Agreement that MaST Charter School, a tenant in the Academy Plaza shopping center, intended to exercise the early termination option in its lease. Plaintiffs' witnesses testified that plaintiffs heard through the "rumor mill" that MaST was building at another location and that MaST would be vacating its space at Academy Plaza. Plaintiffs' witnesses further testified that when plaintiffs sought to confirm this rumor, both orally and in writing, defendants stated that MaST would not exercise its early termination option. Plaintiffs only learned that MaST would indeed exercise its early termination option after the Agreement was signed.

Prior to executing the Agreement, Walker and Stuart Widowski ("Widowski"), general counsel for Cedar, went to the offices of defendants' counsel to review documents. At trial, Brauchle testified that any court document pertaining to a tenant would be kept in the tenant's file. However, both Walker and Widowski testified that the tenant files that they reviewed did not contain any court documents. The files contained only leases, title information, and surveys for the three shopping centers.

The Agreement of Sale for the three shopping centers was executed on May 16, 2001. The Agreement contained an integration clause and made specific representations and warranties pertaining to the centers' tenants. After the parties executed the Agreement, but before closing, plaintiffs learned that defendants had made serious misrepresentations. Plaintiffs were told definitively that MaST would exercise its early

termination option. In addition, plaintiffs learned that three tenants, American Furniture, Triple Play, and A Formal Celebration, were in arrears. Plaintiffs' witnesses testified that defendants offered plaintiffs a price reduction to compensate plaintiffs for these misrepresentations. Plaintiffs were forced to raise more equity for closing because the defendants **did not give** plaintiffs the price reduction that defendants had promised. Around this same time, plaintiffs issued two press releases announcing plaintiffs' purchase of the shopping centers, but upon defendants' objections, plaintiffs did not mention the shopping centers by name or defendants in the final version.

Plaintiffs instituted this lawsuit in May 2002. After a ten-day bench trial, this court entered judgment in favor of plaintiffs and against defendants in the amount of $1.7 million on plaintiffs' claim of fraudulent inducement. The parties filed comprehensive Post-Trial Motions which were, for the most part, denied.

These appeals ensued and numerous issues have been raised.

DISCUSSION

I. DEFENDANTS' APPEAL

A. This Court Did Not Err in Denying Defendants' Motion for Judgment N.O.V. or a New Trial.

Defendants argue that this court erred in denying their post-verdict motions for judgment not withstanding the verdict, or in the alternative, for a new trial. Defendants cite four grounds in support of their position: (a) that plaintiffs failed to establish that plaintiffs' reliance upon defendants' representations was justified; (b) that plaintiffs waived their cause of action for fraud in the inducement by proceeding to close on the shopping centers after plaintiffs discovered defendants' misrepresentations; (c) that

plaintiffs relied upon defendants' prior representations in violation of the parol evidence rule; and, (d) that this court improperly awarded damages to plaintiffs in the amount of $1.7 million.

This court submits that it did not err in denying defendants' Motion for Judgment N.O.V. A trial court's decision to grant or deny a motion for judgment n.o.v. will not be disturbed by an appellate court absent an abuse of discretion.[2]

> The proper standard of review for an appellate court when examining the lower court's refusal to grant a judgment n.o.v. is whether, when reading the record in the light most favorable to the verdict winner and granting that party every favorable inference therefrom, there was sufficient competent evidence to sustain the verdict. Questions of credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence.[3]

Furthermore, this court did not err in denying defendants' motion for a new trial. The decision to grant a motion for a new trial is well within the discretion of the trial court.[4] A party is not entitled to a new trial simply because another trial judge would have ruled differently.[5] Upon review, an appellate court will not disturb a trial court's decision to grant or deny a new trial absent an abuse of discretion.[6] "[A]n abuse of discretion.…requires a showing of manifest unreasonableness, or partiality, prejudice, bias or ill will, or such lack of support as to be clearly erroneous."[7]

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[2] Atwell v. Beckwith Machinery Co., 872 A.2d 1216, 1222 (Pa. Super. 2005).
[3] Id.
[4] Fanning v. Davne, 795 A.2d 388, 393 (Pa. Super. 2002).
[5] Atwell, 872 A.2d at 1221.
[6] Id.
[7] Fanning, 795 A.2d at 393.

1. Plaintiffs' Reliance Upon Defendants' Representations Was Justified.

At the outset, it must be noted that this court found that defendants fraudulently induced plaintiffs to sign the May 16, 2001 Agreement of Sale at an inflated price by misrepresenting the net operating income ("NOI") for the shopping centers. In Delahanty v. First Pennsylvania Bank, the Superior Court set forth a comprehensive definition of fraud.

> Fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, speech or silence…[F]raud may induce a person to assent to something which he would not otherwise have done…It may be by false or misleading allegations or by concealment of that which should have been disclosed, which deceives or is intended to deceive another to act upon it to his detriment.[8]

To establish a claim for fraudulent inducement, a plaintiff must prove the existence of: "(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 that was proximately caused by the reliance."[9] This court found that plaintiffs proved their claim of fraudulent inducement.

Defendants made material representations upon which plaintiffs justifiably relied. "A misrepresentation is material if the party would not have entered into the agreement but for the misrepresentation. One deceived need not prove that the fraudulent misrepresentation was the sole inducement…a material inducement is sufficient."[10]

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[8] Delahanty v. First Pennsylvania Bank, 464 A.2d 1243, 1251-1252 (Pa. Super. 1983) (citations omitted).
[9] Eigen v. Textron Lycoming Reciprocating Engine Div., 874 A.2d 1179, 1185 (Pa. Super. 2005) (citations omitted).
[10] Eigen, 874 A.2d at 1186.

Whether the party claiming to have been defrauded relied upon the false representation is a question of fact.[11]

Defendants' marketing brochure contained information about six different properties for sale. It included an overview of the properties, rent rolls,[12] income expenses and statement of cash operations (known as "NOI"), and cash projections. Defendants were on notice that plaintiffs were relying upon defendants' numbers in formulating their purchase offer.[13]

Plaintiffs argue that their offer to purchase the properties would have been lower had defendants accurately represented the NOI for the properties.[14] Defendants claim that plaintiffs were given ample opportunity to inspect the properties and gather information that would have led any reasonable purchaser in its position to the conclusion that several tenants were in arrears. Defendants argue that plaintiffs breached their duty to verify defendants' representations making plaintiffs' reliance not justified.

"In order to succeed on a claim of fraudulent inducement, the complaining party must demonstrate justifiable reliance. To be justifiable, reliance upon the representation of another must be reasonable."[15] Whether a party had a right to rely on the representation is a question of fact.[16] Pennsylvania Courts look to the Restatement (Second) of Torts as guidance in evaluating the reasonableness of a party's reliance on a fraudulent misrepresentation.

> [T]he recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he

[11] Silverman v. Bell Sav. & Loan Ass'n., 533 A.2d 110, 114 (Pa. Super. 1987).
[12] Rent rolls set out the square footage of the properties, lease expiration dates, rental amounts, rent increases under the leases, and expenses. Exh. P-111.
[13] See Exh. P-132.
[14] See N.T. 12/14/2005 at 86.
[15] Eigen, 874 A.2d at 1189.
[16] Id.

> had shown his distrust of the maker's honesty by investigating its truth. [H]e is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.[17]

This court found that plaintiffs were justified in relying upon defendants' representations. This court further found that plaintiffs did more than make a "cursory examination or investigation," but that defendants intentionally thwarted plaintiffs' efforts to perform due diligence.

Defendants were on notice at least one month before the execution of the Agreement that MaST Charter School intended to exercise its early termination option.[18] At trial, Walker testified that plaintiffs heard through the "rumor mill" that MaST was building at another location and that "[MaST] would ultimately move out of the property."[19] Leo Ullman ("Ullman"), Chairman, Chief Operating Officer, and President of Cedar, sought to confirm this rumor in an April 27, 2001 memorandum to Brauchle: "[s]pecifically, I think it important that we deal with certain essential differences as to price to wit…certain serious concerns on tenancies, such as…the impending departure of the charter school at the Academy property."[20]

Ullman testified that he went to Andrew Hascoe ("Hascoe"), owner of Bryant Management, and raised this issue along with other concerns. Ullman testified that Hascoe "unequivocally said to me that they [MaST] would not exercise that right to leave."[21] In a series of questions dated June 4, 2001, Walker asked Brauchle: "…[MaST] has until the end of August 2001 to terminate the lease…Hascoe told Leo [Ullman] that

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[17] Silverman, 533 A.2d at 115.
[18] See Exh. P-92.
[19] See N.T. 1/11/2006 at 15.
[20] See Exh. P-10.
[21] See N.T. 12/8/2005 at 118-119.

the time for such termination to be exercised had passed… . Are we wrong?"[22] Defendants continued to insist that MaST would not exercise the early termination option on its lease. Plaintiffs only learned that MaST intended to terminate their lease after the Agreement of Sale was signed.

More importantly, however, Bryant representatives thwarted plaintiffs' attempts to verify defendants' representations prior to the execution of the Agreement. In a May 8, 2001 letter from Cedar's counsel, Stuart Widowski, to Bryant's counsel, Samuel Becchofer ("Becchofer"), Widowski wrote: "I am concerned that not all promised documentation has been made available in a timely fashion…. ." A May 24, 2001 letter from Walker to Brauchle reiterated Cedar's growing frustration: "I have been communicating with you since the week of May 7th…regarding certain information that we require to complete our due diligence…. . As of this writing we have not received the information requested on May 10 and May 16…. ."[23]

Prior to the execution of the Agreement and as part of plaintiffs' due diligence, Widowski and Walker reviewed documents at Becchofer's office. At trial, Brauchle testified that any court documents pertaining to their tenants "were typically kept in the tenant file along with any correspondence and billings and reconciliations…. ."[24] However, plaintiffs' witnesses testified that plaintiffs did not have access to this information. Walker testified that she and Widowski reviewed the existing leases, title information, and surveys for the three properties. Widowski's testimony corroborated that of Walker's: "…we were given access to copies of leases and previous title

[22] See Exh. P-39.
[23] See Exh. P-46.
[24] See N.T. 1/12/2006 at 143-144.

information and surveys **only** at the offices of [Becchofer] where Brenda Walker and I spent several days going through these boxes of photocopies."[25]

This court found that plaintiffs' witnesses testified credibly. This court further found that plaintiffs did not breach their duty to verify. On the contrary, defendants impeded plaintiffs' ability to verify defendants' representations by withholding material information concerning tenant defaults and litigation histories. This information was material to an accurate assessment of the financial performance of the three shopping centers.

Potential buyers in real estate must determine whether a property has steady income or income potential. If potential buyers are not given relevant information with which they can predict future income, they are buying their real estate blind. In this case, defendants, with their experience buying and selling commercial real estate, knew that this missing information was essential to plaintiffs. Contrary to defendants' assertion, "the law is clear that there is no obligation on the part of a purchaser to examine public records prior to purchase."[26] Moreover, in signing the Agreement of Sale, defendants represented to plaintiffs that no tenant was in material default and that all information in the rent rolls was true. This court properly found that plaintiffs' reliance upon defendants' representations was justified.

2. Plaintiffs Did Not Waive Their Fraud Claim by Closing.

Defendants argue that plaintiffs waived their fraud claim because they proceeded to closing with knowledge of defendants' misrepresentations. This court disagrees. "The affirmance of a contract induced by fraud of the seller does not extinguish the right of the

[25] Id. at 272.
[26] Silverman, 533 A.2d at 115.

purchaser, and it is not a waiver of the fraud, nor does it bar the right of the purchaser to recover damages for the fraud. Affirmance of the contract is not a waiver of the fraud; nor does it bar the right to recover; it does bar a subsequent rescission."[27]

Plaintiffs argue that they had to close after issuing two press releases informing their investors and other interested parties that they were purchasing the three shopping centers. According to plaintiffs, these press items had to be issued because at that time, both the SEC and NASDAQ required a company to disclose within 48 hours any material transaction which might have meaningful effect on the value of the company or its shares.[28]

Plaintiffs further argue, and this court found, that plaintiffs closed the deal because defendants promised a price reduction to compensate for the delinquencies that were uncovered during due diligence. Defendants flatly deny giving any such promise. According to Hascoe, the topic of a price reduction was raised at a meeting between Hascoe, Brauchle, and Ullman, but that "Ullman walked out of the office knowing that he was not going to get a price reduction."[29] Brauchle's testimony was not helpful on this issue and on the meeting itself. He testified that he "kind of" remembered hearing something about a request for a reduction in price, and that he did not recall having a conversation with Ullman about a price reduction.[30]

This court found that had this meeting proceeded consistent with Hascoe's testimony, Brauchle, in this multi-million dollar deal, would have had more than a "kind of" remembrance about a reduction in price. Importantly, Walker testified that plaintiffs

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[27] Scaife Co. v. Rockwell-Standard Corp., 446 Pa. 280, 289; 285 A.2d 451, 456 (1971).
[28] See N.T. 12/8/2005 at 165.
[29] See N.T. 1/11/2006 at 149.
[30] See N.T. 1/12/2006 at 95.

were forced to raise more equity for closing because plaintiffs did not get the price reduction plaintiffs were relying upon.[31]

This court found Walker and Ullman to be credible. This court further found that a promise for a price reduction was given as an inducement to close, and that a failure to close would have resulted in greater damage to plaintiffs than to close and face the uncertainty that underlies all lawsuits.[32] Thus, plaintiffs did not waive their right to bring this action.

3. <u>The Parol Evidence Rule Is Inapplicable.</u>

Defendants claim that the parol evidence rule bars plaintiffs' reliance upon pre-contractual representations. Defendants argue that parol evidence may not be considered in a case alleging fraud in the inducement of an integrated commercial contract. "Where the parties to an agreement adopt a writing as the final and complete expression of their agreement…evidence of negotiations leading to the formation of the agreement is inadmissible to show **an intent at variance with** the language of the written agreement."[33] Our Supreme Court has said:

> [T]he law is now clearly and well settled that in the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract, and parol evidence to **vary, modify or supersede** the written contract is inadmissible in evidence.[34]

In this case, plaintiffs do not seek to vary, modify or supersede the terms of the written contract. Plaintiffs' fraudulent inducement claim is not an attempt to change the Agreement of Sale. Defendants' misrepresentations pertaining to the net operating

[31] <u>See</u> N.T. 12/14/2005 at 90-92.
[32] Defendants argue that the Statute of Frauds bars this court's finding of a promise for a price reduction.
[33] <u>McGuire v. Schneider Inc.</u>, 534 A.2d 115, 117 (Pa. Super. 1987) (emphasis added).
[34] <u>Bardwell v. The Willis Company</u>, 375 Pa. 503, 506 (1953) (emphasis added).

income and tenant histories were incorporated into the Agreement itself, making defendants' misrepresentations **consistent with** the terms of the agreement. Thus, this court properly found that the parol evidence rule is inapplicable to this case.

4. <u>This Court Did Not Err in Awarding Damages to Plaintiffs.</u>

This court found that plaintiffs were injured by defendants' misrepresentations, and that the misrepresentations were the legal cause of their injury. Defendants argue that this court improperly awarded damages in the amount of $1.7 million. Defendants claim that the proper measure of damages is limited to the expenses plaintiffs incurred during the due diligence period, prior to the discovery of defendants' fraud. This court disagrees.

"The determination of damages is a factual question to be decided by the fact-finder."[35] An appellate court will not disturb a trial court's damages award "unless it clearly appears that the amount awarded resulted from partiality, caprice, prejudice, corruption or some other improper influence."[36] Under Pennsylvania law, the proper measure of damages in an action for fraud where the party does not seek to rescind the contract "is the difference in value between the real, or market, value of the property at the time of the transaction and the higher, or fictitious, value which the buyer was induced to pay for it."[37]

This court properly awarded plaintiffs $1.7 million which represents the difference between the actual value of the properties and the misrepresented value. Douglas Nickel, plaintiffs' expert in the valuation of commercial real estate, prepared

[35] <u>Delahanty</u>, 464 A.2d at 1257.
[36] <u>Id</u>.
[37] <u>Sands v. Forrest</u>, 434 A.2d 122, 124 (Pa. Super. 1981).

appraisals both prior to and subsequent to the closing.[38] Nickel's pre-closing appraisal was based upon the information available to him at that time.[39] His second appraisal on July 29, 2004 was based upon actual post-closing events and took into account defendants' misrepresentations.[40] Nickel concluded that a well informed purchaser aware of the misrepresentations would have paid $1.7 million less than what plaintiffs paid.[41] Thus, this court properly awarded damages to plaintiffs in the amount of $1.7 million. This court respectfully submits that its decision should be upheld.

I. PLAINTIFFS' APPEAL

A. This Court Did Not Err in Denying Plaintiffs' Claim for Unjust Enrichment.

This court properly denied plaintiffs' claim for unjust enrichment. By its nature, the doctrine of quasi-contract, or unjust enrichment, is inapplicable where a written or express contract exists between the parties.[42]

> A cause of action for unjust enrichment may arise only when a transaction of the parties not otherwise governed by an express contract confers a benefit on the defendant to the plaintiff's detriment without any corresponding exchange of value…Where an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist.[43]

Here, the transaction at issue is governed by the Agreement of Sale. Contrary to plaintiffs' assertion, this court did not find that the Agreement was unenforceable.

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[38] See N.T. 12/13/2005 at 15.
[39] Id. at 42.
[40] Id. at 48-49.
[41] Id. at 17.
[42] Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999).
[43] Villoresi v. Femminella, 856 A.2d 78, 84 (Pa. Super. 2004) (citations omitted).

Rather, this court found that plaintiffs' contract claim was barred by the gist of the action doctrine.

The gist of the action doctrine prevents a plaintiff from recasting ordinary breach of contract claims into tort claims.[44] Conversely, the gist of the action doctrine must also prevent tort claims from being molded into breach of contract claims.

> 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 consensus agreements between particular individuals….In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.[45]

In determining that plaintiffs' claim for fraudulent inducement is the gist of the action, this court found that the misrepresentations that induced plaintiffs to enter into the Agreement of Sale implicate society's interest in preventing the formation of contracts based upon fraud. In making this determination, this court did not conclude that the Agreement was unenforceable, only that plaintiffs' tort claim was the gist of the action. Thus, this court properly denied plaintiffs' claim for unjust enrichment.

B. <u>This Court Properly Denied Plaintiffs' Request for Punitive Damages and Attorneys' Fees.</u>

This court denied plaintiffs' request for punitive damages based on the totality of circumstances surrounding this case. Plaintiffs argue that because this court found that defendants committed actual fraud in defendants' dealings with plaintiffs, punitive damages are warranted. This court disagrees.

[44] Hart v. Arnold, 884 A.2d 316 (Pa. Super. 2005).
[45] Id. at 339-340.

Proof of fraud alone is insufficient to award punitive damages.[46] "If the rule were otherwise, punitive damages could be awarded in all fraud cases. This is not the law. The rule, rather, is that for punitive damages to be awarded there must be acts of malice, vindictiveness, and a wholly wanton disregard of the rights of others."[47] A plaintiff must prove the existence of aggravated circumstances to justify the award of punitive damages.[48] "[A] court may not award punitive damages merely because a tort has been committed."[49]

It is well settled that the decision to award punitive damages is within the fact-finder's discretion.[50] This court, upon review of all the evidence in this case, found that plaintiffs failed to show that defendants' conduct was malicious or vindictive, or that they acted with a wanton disregard of plaintiffs' rights. Thus, this court properly denied plaintiffs' request for punitive damages.

Plaintiffs also seek the award of attorneys' fees under 42 Pa.C.S.A. §§ 2503 (7) and (9). The statute states in relevant part:

> The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter: ….[a]ny participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter….[a]ny participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.[51]

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[46] Smith v. Renaut, 564 A.2d 188, 193 (Pa. Super. 1989).
[47] Id.
[48] Pittsburgh Live, Inc. v. Servov, 615 A.2d 438 (Pa. Super. 1992); see also, Viener v. Jacobs, 834 A.2d 546 (Pa. Super. 2003) (affirming trial court's award of punitive damages where defendant misused corporate funds, failed to take affirmative steps to provide for the continued success of the corporation, and disregarded the rights of minority shareholders); Nebesho v. Brown, 846 A.2d 721 (Pa. Super. 2004) (determining that the trial court's opinion formed an adequate basis to award punitive damages where defendant forged plaintiff's name on a deed transferring property to defendant's wife).
[49] McClellan v. Health Maint. Org. of Pennsylvania, 604 A.2d 1053, 1061 (Pa. Super. 1992).
[50] Delahanty, 464 A.2d at 1263.
[51] See 42 Pa.C.S.A. § 2503 (2006).

The trial court has "great latitude and discretion" in deciding whether to award attorneys' fees.[52] However, the trial court "must make specific findings of the proscribed conduct to award attorneys' fees."[53] Upon review, an appellate court will not reverse a trial court's decision absent an abuse of discretion.[54] Here, this court did not find that defendants' litigation conduct was obdurate, vexatious, or in bad faith. Thus, it properly denied plaintiffs' request for attorneys' fees under the statute.[55]

C. Plaintiffs Are Not Entitled to Pre-Judgment Interest or Delay Damages.

Plaintiffs argue that this court erred in refusing to award pre-judgment interest or delay damages in this case. In Pennsylvania, pre-judgment interest may be awarded to a plaintiff as a matter of right in breach of contract cases. However, that right has not been extended to cases in tort. Instead, a court, in its discretion, may award prejudgment interest based upon specific factual findings and taking into account all the circumstances of the case.[56] An award of pre-judgment interest or delay damages in a tort case is appropriate where "considerations of justice and fair dealing have required it."[57] Upon review of the evidence and the circumstances of this case, this court properly found that plaintiffs are not entitled to pre-judgment interest or delay damages.

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[52] Scalia v. Erie Ins. Exchange, 878 A.2d 114, 116 (Pa. Super. 2005).
[53] Id.
[54] Id.
[55] Attorneys' fees were awarded pursuant to this court's entry of a declaratory judgment in favor of plaintiffs and against defendants with respect to claims by tenant Pep Boys of alleged overpayment of Common Area Maintenance ("CAM") charges during the time defendants owned the properties.This court found that defendants breached the Assumption and Assignment of Leases and Contracts provision in the Agreement of Sale, and ordered defendant to defend and indemnify plaintiffs against claims brought by Pep Boys related to the alleged overpayment of CAM charges. Accordingly, after a hearing on the matter, this court awarded plaintiffs attorneys' fees in the amount of $53,000.
[56] Marrazzo v. Scranton Nehi Bottling Co. Inc., 438 Pa. 72, 75; 263 A.2d 336, 337 (1970); Robert Wooler Co. v. Fidelity Bank, 479 A.2d 1027, 1035-37 (Pa. Super. 1984) (citations omitted).
[57] Robert Wooler Co., 479 A.2d at 1035.

CONCLUSION

The court respectfully submits that for the reasons discussed the Order denying the cross post-trial motions dated October 16, 2006 should be affirmed.

The court incorporates by reference, for purposes of this appeal, the Findings of Fact, Discussion and Conclusion of Law filed in this litigation.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.