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

YORKWOOD, L.P. and RADICCHIO, L.L.C. ,	:	November Term, 2002
Plaintiffs,	:	No. 1703
v.	:	COMMERCE PROGRAM
KEE CORPORATION,	:	
	:	Control # 101877
Defendant.	:	Control # 121342

MEMORANDUM OPINION

GENE D. COHEN, J. ***April 13_ ,2004***

Before the Court are the motions for judgment on the pleadings and summary judgment filed by the defendant, Kee Corporation ("Kee Corp.") and the responses in opposition thereto filed by the plaintiffs, Yorkwood, L.P. ("Yorkwood") and Radicchio, L.L.C. ("Radicchio") (jointly the "Plaintiffs"). For the reasons more fully set forth below the motion for judgment on the pleadings is **denied** and the motion for summary judgment is **granted** in its entirety. Therefore, the Plaintiffs' complaint is **dismissed** and the case will move forward only on the counterclaim of Kee Corp.

I. BACKGROUND

On May 7, 2001, Luis Basile ("Basile") entered into an agreement of sale (the "Agreement") with Kee Corp. to purchase a property located at 314 York Avenue/402 Wood Street, Philadelphia, Pennsylvania 19106 (the "Property"). Basile subsequently

assigned his interest in the sale to Yorkwood as permitted under the Agreement. [1] Although the record does not reflect the date Basile assigned his interest to Yorkwood, presumably it occurred prior to the closing on the Property.[2]

As part of the terms and conditions of sale, the Agreement contained the following "Use Contingency" clause:

> Use Contingency - Promptly following the expiration of both the property inspection contingency (No. 2 above) and the wood inspection contingency (No. 3 above), Seller shall file an "Application for Zoning Permit and/or Use Registration Permit" in the form of attached Exhibit "A" (the "Application"), the contents of which are incorporated herein by reference, with the Philadelphia Department of Licenses and Inspections providing that Buyer's use of the subject property as a restaurant and apartments will be lawful (the "Application"). In the event that either (i) Seller notifies Buyer that the Application has been rejected or (ii) the Seller fails to deliver the approved Application to Buyer no later that two (2) days prior to the date of Settlement, as that date may be extended by the written agreement of the parties, then in either such event Buyer may terminate this Agreement; provided, however, that Buyer shall have no right to terminate this Agreement if the Application is rejected but an Application for zoning permit and/or use registration permit which is the same in substance is submitted and approved for use if the Property as a restaurant and office. Upon such termination, Buyer shall be entitled to the prompt return of all deposit monies, after which the parties shall have no further liability to one another hereunder, and this Agreement shall be void.

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[1] The Agreement contained the following assignment clause:

> This Agreement will be binding upon the parties, their respective heirs, personal representatives, guardians and successors, and, to the extent assignable, on the assigns of the parties hereto. It is expressly understood, however, that Buyer [Basile] will not transfer or assign this Agreement without the written consent of the Seller, provided, however, that the Buyer may assign this Agreement to a limited partnership being formed to take title of the subject property.

Complaint, Exhibit A.

[2] At no point prior to the closing is the plaintiff Radicchio mentioned in connection with the sale.

Complaint, Exhibit "A".

Pursuant to this clause, Kee Corp. was required to apply for and obtain a Use Registration Permit (the "Permit") from L&I stating that it was legal to use the Property as a restaurant on the first and second floors and as an apartment on the third floor. A form application was attached to the Agreement of Sale and incorporated into the Agreement.[3] The Agreement contains no provision requiring that Yorkwood approve the final Application prior to filing with L&I.

The Plaintiffs admit in their complaint that Kee Corp. "applied for and obtained the Use Registration Permit from L&I whom it delivered to the Plaintiffs, confirming that the use of the Property as a restaurant on the first and second floors with an apartment on the third floor was a legal use of the Property." Complaint, ¶16. Kee Corp. also supplied the Plaintiffs with a Certification Statement issued by L&I confirming the use as a restaurant was legal. Id. at ¶17. The Plaintiffs allege that based upon these documents, Yorkwood consummated the sale and settlement occurred on August 7, 2001 (the "Closing Date").

On or about September 20, 2001, the Plaintiffs allege that L&I received a complaint from a local civic organization asserting that the Property was not used as a restaurant for more than three years and, therefore, a restaurant could not be operated on the premises. L&I initiated an investigation and requested information from the president of Kee Corp. regarding the use of the Property. In response, counsel for Kee Corp. submitted documentation and a legal memorandum explaining that L&I's issuance of the

[3] The Use Contingency Clause referenced the form application as Exhibit "A" to the Agreement and/or contingency clause. Copies of the Agreement submitted to the Court do not contain a copy of this exhibit; however, the Plaintiffs do not contend that the proper form was not used.

Permit was proper.[4] Thereafter, on October 25, 2001, L&I revoked the Permit citing Sections 14-104(5)(a) and (5)(b) of the Philadelphia Zoning Code.[5]

L&I asserted that it only granted the Permit based upon Kee Corp.'s representations in the Application that the use of the Property as a restaurant had not been discontinued for more than three (3) years. Complaint, Exhibit "D". L&I, based upon their limited document review, decided that restaurant use was discontinued for more than three years and, therefore, the use of the Property as restaurant was abandoned.

As was their right, the Plaintiffs appealed the decision of L&I to the Zoning Board of Adjustment (the "Zoning Board"). Prior to the Zoning Board hearing, the Plaintiffs entered into an agreement with the objecting civic association which resulted in the association's support of the Plaintiffs at the hearing. On January 23, 2003, the Zoning Board granted the appeal of L&I's decision; however, the approval was expressly condition upon certain terms and conditions that the Plaintiffs voluntarily agreed to with the civic association. In any event, the decision of L&I was reversed and the Zoning Board never addressed the merits of L&I's decision.

As a result of the foregoing events, the Plaintiffs allege they suffered serious financial losses associated with delays in renovations and the concessions made to secure the Permit.[6] Plaintiffs assert that Kee Corp. breached the Agreement and made material

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4 Plaintiffs' Response to Kee Corp.'s Motion for Judgment on the Pleadings, Exhibit "4".

5 L&I never provided the opportunity to object to the revocation of the Permit.

6 The Plaintiffs include in their damages their inability to get a liquor license and the resulting loss of profits. Because the Agreement does not address a liquor license, the Plaintiffs are attempting to backdoor damages from their inability to obtain a liquor license by arguing that the purchase of a restaurant naturally entails the ability to obtain a liquor license. The Plaintiffs are overreaching with this argument. The Agreement contains no contingencies concerning a liquor license and the Plaintiffs offer absolutely no support for this expansive use of the term restaurant. If the Plaintiffs were relying on obtaining a liquor license, it should have been made a part of the Agreement like the Permit.

misrepresentations regarding the use of the Property. Plaintiffs also assert that in the alternative, Kee Corp. was unjustly enriched by its actions and should compensate the Plaintiffs.

II. STANDARD OF REVIEW

A. Motion for Judgment on the Pleadings.

Under Pennsylvania law, a motion for judgment on the pleadings is granted only where the pleadings demonstrate that no genuine issue of fact exists, and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1034; Giddings v. Tartler, 130 Pa.Cmwlth. 175, 177, 567 A.2d 766, 767 (1989).

> Like all summary judgments entered without a trial judgment on the pleadings may be entered only in clear cases free from doubt where there are no issues of fact, and only where the cause is so clear that a trial would clearly be a fruitless exercise . . . . The party moving for judgment on the pleadings admits for the purpose of his motion the truth of all the allegations of his adversary and the untruth of any of his allegations which may have been denied by his adversary.

Otterson v. Jones, 456 Pa. Super. 388, 390, 690 A.2d 1166, 1166 (1997)(quoting Beck v. Minestrella, 264 Pa. Super. 609, 401 A.2d 762, 763 (1979)). Lastly, neither party may be deemed to have admitted conclusions of law. Mellon Bank, N.A. v. National Union Fire Insurance Co. of Pitt., 768 A.2d 865, 868 (Pa. Super. Ct. 2001).

B. Summary Judgment.

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this Court may grant summary judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a *prima facie* cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa.

Super. Ct. 1998). To succeed, a defendant moving for summary judgment must make a showing that the plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa. Super. Ct. 2001).

To avoid summary judgment, the plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in its favor. McCarthy, 724 A.2d at 940. In addressing the issue this Court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The non-moving party must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

III. DISCUSSION

The Plaintiffs' complaint contains three counts against Kee Corp.: (1) breach of contract, (2) unjust enrichment and (3) negligent misrepresentation. Kee Corp., in both of its motions seeks the dismissal of all of the Plaintiffs' claims. Additionally, in the summary judgment motion, Kee Corp. asserts that Radicchio does not have standing to bring suit because it is not a party to the Agreement.[7] Regarding the motion for judgment on the pleadings, Court finds that that judgment is not warranted based upon a review limited to the pleadings. However, in reviewing the broader record in light of Kee

[7] The Plaintiffs acknowledge that Radicchio is not a direct party to the Agreement and, instead, assert that Radicchio is a third party beneficiary. The Plaintiffs base this argument on the fact that Kee Corp. always knew that a restaurant was going to be operated on the premises and would need the necessary permits. The Court need not address this argument because the Court finds that none of the Plaintiffs' counts survive Kee Corp.'s motion for summary judgment; however, the issue of whether Radicchio could be considered a third party beneficiary is not as clear cut as the Plaintiffs believe.

Corp.'s motion for summary judgment, the Court finds in favor of Kee Corp. on all counts of the Plaintiffs' complaint. As a result, the case will proceed on Kee Corp.'s counterclaim only.

A. Kee Corp. Is Entitled To Summary Judgment On Count I.

The Plaintiffs allege that Kee Corp., while not breaching the express terms of the Agreement, breached certain implied terms. Under this theory, the Plaintiffs assert that Kee Corp. had an implied obligation to submit the Application without misrepresentations and thereafter defend the issuance of the Permit. Because (1) L&I revoked the Permit based upon what it believed was an incorrect statement on the Application and (2) Kee Corp. did not litigate the issue on behalf of Yorkwood, the Plaintiffs believe that Kee Corp. breached certain implied obligations of the Agreement.[8] However, the Court finds that L&I's decision was made without consideration of recent Pennsylvania case law on abandonment and, therefore, was wrong. Had L&I conducted a hearing where the full merits of Kee Corp.'s position could have been properly addressed, all parties to this action would have not needlessly expended time and money in this litigation.

1. The Agreement, the Use Contingency Clause and Kee Corp.'s Obligations

It is clear under the Use Contingency Clause that Kee Corp was required to file a specific form application with L&I and give Yorkwood a valid use permit before closing. The use permit was to state that the Property could be used legally as a restaurant on the first and second floors and as an apartment on the third floor. These obligations are

[8] As will be discussed, the Plaintiffs do not argue that L&I was correct in its decision or that the use of the Property was indeed abandoned. Instead, the Plaintiffs are content to rely solely upon L&I's decision on abandonment as the proof required for their claims. In other words, the Plaintiffs proffer no evidence of abandonment independent of L&I's decision.

expressly set forth in the Agreement and the Plaintiffs admit that Kee Corp. delivered the proper documentation prior to the Closing. In addition to these express obligations, the Plaintiffs argue that the Agreement, specifically the Use Contingency Clause, imposed additional implied obligations upon Kee Corp. It is these implied obligations that the Plaintiffs allege Kee Corp. breached.

After a review of the Plaintiffs' pleadings, it appears that the Plaintiffs are seeking to impose two separate implied obligations: (1) Kee Corp. was obligated to submit to L&I the Application without misrepresentation; and, (2) Kee Corp. was obligated to ensure that the Permit remained valid, even after the closing on the Property. This obligation would have required Kee Corp. to litigate with L&I over the Permit's revocation.

In Pennsylvania, courts have recognized the contractual doctrine of necessary implication.

> In the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract. Accordingly, a promise to do an act necessary to carry out the contract must be implied.

Daniel B. Van Campen Corp. v. Bldg. & Constr. Trades Council of Phila., 202 Pa.Super. 118, 195 A.2d 134, 136 (1963). "In the absence of an express term, the doctrine of necessary implication may act to imply a requirement necessitated by reason and justice without which the intent of the parties is frustrated." Somers v. Somers, 418 Pa.Super. 131, 613 A.2d 1211, 1214 (1992). It is also clear that "unequivocal contract terms hold a position superior to any implied by courts, leaving implied covenants to serve as gap

filler." John B. Conomos, Inc. v. Sun Co., Inc (R & M), 831 A.2d 696, *706 (Pa.Super. 2003).

Under Pennsylvania law, the Plaintiffs are correct in their first contention that the Agreement imposed upon Kee Corp. an implied obligation to submit an application to L&I that was true and correct, without misrepresentations. If Kee Corp. made misrepresentations within the Application, and thereby caused the revocation of the Permit, Kee Corp. may have breached an implied term of the Agreement.

Plaintiffs' second contention, that Kee Corp. was obligated to ensure that the Permit remain valid after Closing, is without merit. The Agreement simply does not impose an obligation upon Kee Corp. to ensure that the Permit *remain* valid after the date of closing.[9] Such an implied obligation would directly conflict with the express terms of the Contingency Clause; specifically, Kee Corp.'s obligation to provide an acceptable Permit prior to closing. Once closing occurred and Kee Corp. delivered a valid Permit, the Plaintiffs assumed the risk that the actions of third parties or intervening events might otherwise jeopardize the Permit. Accordingly, Kee Corp. was under no obligation to assist the Plaintiffs in the litigation with L&I and the Zoning Board.

2. Kee Corp. Did Not Breach Any Implied Terms Of The Agreement.

The Court now turns to the question of whether Kee Corp. breached the implied obligation to submit to L&I a truthful application. The Plaintiffs believe that Kee Corp. breached the Agreement by stating the following on the Application: "*Restaurant used* [sic] *not discontinued since 1986*". Answer of Kee Corporation, Exhibit "1". Plaintiffs

[9] Indeed, it seems that the Plaintiffs would have the Court hold that Kee Corp. agreed to become the indefinite guarantor of the Permit, regardless of the reasons upon which it may be revoked in the future. The Court will not imply such an onerous obligation when there is no basis to do so.

assert that this statement was a misrepresentation based upon L&I's letter in which the Permit was revoked. It is important to note that the Plaintiffs present absolutely no other evidence or argument in support of its claim that there was a misrepresentation. No argument is made by the Plaintiffs that L&I was correct in its determination and the Plaintiffs actually abandoned the use of the Property under Pennsylvania law. Indeed, it seems that the actual merit of L&I's decision is irrelevant to the Plaintiffs' claim. Rather than argue the statement made by Kee Corp. was untrue based upon Pennsylvania law and the facts of the case as learned through discovery, the Plaintiffs simply assume it was a misrepresentation because L&I summarily revoked the Permit.

Based upon the record before this Court, the decision of L&I is not in any way entitled to preclusive effect. L&I's decision, by the Plaintiffs own admission, was overruled by the Zoning Board when it appealed the Permit revocation.[10] Procedurally, regardless of the reasons for the Zoning Board's reversal of L&I's decision, the revocation of the Permit was overturned and the use of the Property as a restaurant was thereby held not abandoned. Therefore, in order for the Plaintiffs to succeed in their claims, they must show an abandonment of the use by Kee Corp. under Pennsylvania law and adduce evidence in support of this conclusion. The Plaintiffs fail to do so.

L&I in its revocation letter alleges that the fact there was no operating restaurant at the Property for over three years, the use is considered abandoned under §14-104(5)(a) and (b). Section14-104(5)(a) and (b) provide for the following:

[10] Under § 14-1705 an aggrieved party may appeal the decision of L&I to the Zoning Board and decisions of the Zoning Board may be appealed to the Court of Common Pleas. Plaintiffs assert that in order to minimize its damages, they reached an agreement with the civic association prior to the Zoning Board hearing. Plaintiffs entered into this agreement at their own risk. As will be discussed, this Court believes that L&I's decision was made in complete disregard of, and contrary to, Pennsylvania law on abandonment. Plaintiffs chose not to argue the merits of the issue before the Zoning Board and must live with their settlement.

> (a) A non-conforming use when discontinued for a period of three consecutive years or less may be resumed as the same non-conforming use and no other.
>
> (b) A non-conforming use when discontinued for a period of more than three consecutive years shall be considered abandoned and may not be resumed, and any subsequent use of the land or structure must comply with the use requirements of the district in which it is located, subject to the provisions of paragraph (6) below.

Under these code sections, L&I considered the Property's use as a restaurant abandoned and, under §14-1610(5)(1), the operation of a restaurant at that location was forbidden. L&I, in makings its decision ignored the Pennsylvania law on this issue.[11]

Under Pennsylvania law the fact that a property is not used for a certain period of time is only evidence of an intent to abandon. See Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township, Westmoreland County, 553 Pa. 883, 720 A.2d 127 (1998). Once the property owner rebuts this presumption by showing there was no intent to abandon, the burden shifts back to the party trying to prove *actual* abandonment. Id.

> Failure to use the property for a designated time provided under a discontinuance provision is evidence of the intention to abandon. The burden of persuasion then rests with the party challenging the claim of abandonment. If evidence of a contrary intent is introduced, the presumption is rebutted and the burden of persuasion shifts back to the party claiming abandonment.
>
> What is critical is that the intention to abandon is only one element of the burden of proof on the party asserting abandonment. The second element of the burden of proof

[11] The Court is dismayed by the summary manner that L&I revoked the Permit. L&I revoked the Permit without affording the parties the benefit of a hearing, before or after, wherein the merits of the abandonment claim could have been fully and fairly addressed. "The requirement of notice and an opportunity to be heard applies whenever a local agency renders a final decision affecting personal or property rights." City of Philadelphia, Board of License & Inspection Review v. 2600 Lewis, Inc., 661 A.2d 20 (Pa.Commw.Ct., 1995). The Court cannot fathom how L&I could have reached its decision without providing an opportunity for the parties involved to present objections. L&I also presents no response to Kee Corp.'s position in its revocation letter, leaving it a mystery as their position on Kee Corp.'s counter arguments based upon Latrobe and Pappas.

> is actual abandonment of the use for the prescribed period. This is separate from the element of intent.

Id. at 553 Pa. at 592, 720 A.2d at 132 (quoting Pappas v. Zoning Board of Adjustment of the City of Philadelphia, 527 Pa. 149, 156, 589 A.2d 675, 678 (1991).

In this case Kee Corp. submitted a lengthy response to L&I in an attempt to explain why the use of the Property was not abandoned.[12] This response was also attached as an exhibit to the Plaintiffs' response to Kee Corp.'s motion for judgment on the pleadings and is part of the record before the Court. The Plaintiffs do not even attempt to refute or otherwise challenge the assertions made by Kee Corp. that there was no abandonment. No deposition testimony, documents or any other evidence is proffered to substantiate the Plaintiffs' claim that Kee Corp. made a misrepresentation as to the use of the Property.[13] Plaintiffs solely rely upon L&I's letter, which is insufficient to carry their burden.

As a result, based upon the record before the Court and no sufficient evidence to the contrary having been submitted by the Plaintiffs, the Court finds as a matter of law that Kee Corp.'s use of the Property as a restaurant was not abandoned. Therefore, Kee Corp. made no misrepresentation on the Application and it is entitled to summary judgment on Count I.

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[12] The Court need not state in detail the assertions made by Kee Corp. regarding the continued use of the Property as a restaurant. Suffice to say, Kee Corp. states that the Property was continually marketed as a restaurant while it was not in operation and the Property itself continued to have the attributes of a restaurant, including, *inter alia*, restaurant counters and the installation of specialized ventilation and exhaust systems in the kitchen. These assertions and Kee Corp.'s conclusions flowing therefrom are not challenged by the Plaintiffs.

[13] Curiously, the Plaintiffs did not even respond to the Defendant's legal argument as to why the use of the Property was not abandoned under Pennsylvania law. No argument is made by the Plaintiffs that under Latrobe and Pappas, L&I was correct in revoking the Permit based on abandonment.

B. Kee Corp. Is Entitled To Summary Judgment On The Plaintiffs' Claims For Unjust Enrichment And Negligent Misrepresentation.

Plaintiffs' claims of unjust enrichment and negligent misrepresentation must also fail. Both of these counts are based upon the allegation that Kee Corp. made misrepresentations that caused the Plaintiffs to suffer damages. Specifically, the Plaintiffs allege that Kee Corp. wrongly represented to them that the Property could be legally used as a restaurant. The damages suffered are alleged to be the result of the restrictions agreed upon by the Plaintiffs in exchange for the civic association's support in front of the Zoning Board. The Court finds that the restrictions agreed to by the Plaintiffs in response to L&I's actions, while unfortunate, are not the result of any misrepresentations or actions of Kee Corp.

The Court has already found that the Application contained no misrepresentations because, under Pennsylvania law, the use of the Property was not abandoned. Accordingly, there was no misrepresentation when Kee Corp. allegedly stated that the Property could be legally used as a restaurant. [14] Likewise, there can be no claim for

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[14] The Court also notes that there is another basis upon which the negligent misrepresentation claim must fail. Under Pennsylvania law, claims of negligent misrepresentation are barred by the economic loss doctrine. The economic loss doctrine bars the recovery of economic damages for torts when the only harm is to the product itself and not to other property. See Werwinski v. Ford Motor Company, 286 F.3d 661 (3d. Cir. 2002). If the only damages from the alleged tort are economic, the tort claims cannot stand. Id. This Court has held previously that claims of negligent misrepresentation are barred when the only damages alleged are economic in nature, such as in this case. See JHE, Incorporated v. Southeastern Pennsylvania Transportation Authority, 2002 WL 1018941, *6 (Pa.Com. Pl. 2002).

Additionally, any claims of misrepresentation occurring after the Agreement was executed are barred by the gist of the action doctrine. Pennsylvania's gist of the action doctrine bars tort claims that: (1) arise solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; and (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract. Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 19 (Pa. Super. 2002). Plaintiffs allege that "prior to, during and after the sale of the Property to Yorkwood, the Defendant made material misrepresentations concerning the right and ability of the Plaintiffs to use the Property as a restaurant . . ." Complaint, ¶ 70. Any claims of misrepresentation made after the Agreement was executed are barred by the gist of the action doctrine.

unjust enrichment. "Unjust enrichment is a quasi-contractual doctrine based in equity which requires the following elements: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Honeywell International, Inc. v. Archdiocese of Philadelphia, 2001 WL 1807938 (Pa.Com.Pl. 2001)(citing Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa.Super.Ct. 1999). It is hardly inequitable that Kee Corp. retains the benefits it received under the Agreement when it fully complied with the Agreements' terms and conditions.[15] Therefore, Counts II and III must also be dismissed.

IV CONCLUSION

For the reasons set forth above, the Motion for Judgment on the Pleadings is **denied** and the Motion for Summary Judgment is **granted** in its entirety. Therefore, the Plaintiffs' complaint is **dismissed** and the case will proceed only on the counterclaim of Kee Corp.

BY THE COURT:

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GENE D. COHEN, J.

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[15] Furthermore, "under Pennsylvania law, 'the quasi-contractual doctrine of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract.'" Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987)(quoting Benefit Trust Life Ins. Co. v. Union Nat. Bank, 776 F.2d 1174 (3d Cir.1985). "[I]t is true that plaintiffs cannot recover on a claim for unjust enrichment if such claim is based on a breach of a written contract. Honeywell International, Inc. v. Archdiocese of Philadelphia, 2001 WL 1807938 (Pa.Com.Pl. 2001)(citing Birchwood Lakes Community Ass'n v. Comis, 296 Pa.Super. 77, 442 A.2d 304, 308 (1982); Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987). Since it is clear that the Agreement governs the issues in question and the entire relationship of the parties is grounded upon it, Plaintiffs cannot recover under an unjust enrichment claim when under the Agreement Kee Corp. fully performed.

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

YORKWOOD, L.P. and RADICCHIO, L.L.C. ,	:	November Term, 2002
Plaintiffs,	:	No. 1703
v.	:	COMMERCE PROGRAM
KEE CORPORATION,	:	
	:	Control # 101877
Defendant.	:	Control # 121342

ORDER

AND NOW, this 13TH day of April, 2004, upon consideration of the Motion for Judgment on the Pleadings and the Motion for Summary Judgment filed by the defendant, Kee Corporation ("Kee Corp."), the responses in opposition thereto filed by the plaintiffs, Yorkwood, L.P. ("Yorkwood") and Radicchio, L.L.C. ("Radicchio") (jointly the "Plaintiffs"), the parties' respective memoranda, all matters of record and after oral argument, it is hereby

ORDERED and DECREED that Kee Corp.'s Motion for Judgment on the Pleadings is **DENIED;**

It is further **ORDERED** and **DECREED** that Kee Corp's Motion for Summary Judgment is **GRANTED** on Counts I, II and III;

It is further **ORDERED** and **DECREED** that Plaintiffs' Complaint is **DISMISSED** in its entirety;

It is further **ORDERED** and **DECREED** that this case will proceed on the counterclaim of Kee Corp.

BY THE COURT:

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GENE D. COHEN, J.