

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

PHILADLEPHIA REGIONAL PORT AUTHORITY	: JULY TERM, 2003
Plaintiff,	
	: No. 02701
v.	:
CARUSONE CONSTRUCTION COMPANY,	: Commerce Program
SUMMIT STRUCTURES, LLC,	
SUMMIT STRUCTURES, a Division of	:
COVER-ALL BUILDING SYSTEMS, INC.,	
COVER-ALL BUILDING SYSTEMS, INC.,	:
PAUL H. REIMER, JR., and REIMER ASSOCIATES, INC.,	
Defendants,	: Control No. 012067
v.	:
MAJEK, INC., <i>et al.</i> ,	:
Add'l Defendants.	

O R D E R

AND NOW, this 14th day of April, 2004, upon consideration of plaintiff's Preliminary Objections to the Counterclaim of defendants, Summit Structures, LLC, Cover-All Building Systems, Inc., and Cover-All Building Systems, Inc. t/a Summit Structures, a Division of Cover-All Building Systems, Inc. (the "Summit Defendants"), the response in opposition, the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously, it is **ORDERED** that the Preliminary Objections are **Sustained, in part**, and that Counts I, III, and V of the Summit Defendants' Counterclaim against plaintiff are dismissed and that Count IV is

dismissed with a right to plead with more specificity within twenty (20) days of the date of entry of this Order. It is further **ORDERED** that the remaining Preliminary Objections are **Overruled**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. April 14, 2004

Before the court are the Preliminary Objections of plaintiff, The Philadelphia Regional Port Authority (the "Port Authority"), to the Counterclaim of defendants, Summit Structures, LLC, Cover-All Building Systems, Inc., and Cover-All Building Systems, Inc. t/a Summit Structures, a Division of Cover-All Building Systems, Inc. ("Summit").

The Port Authority entered into a construction contract with defendant, Carusone Construction Company ("Carusone"), to build a storage facility. Carusone, in turn, sub-

contracted with Summit to provide the building structures. The building subsequently collapsed, and the Port Authority contracted directly with Summit, through a series of three purchase orders, to have Summit demolish it.

In its Counterclaim, Summit is attempting to recover from the Port Authority the amounts that were never paid to Summit in connection with both the construction and the demolition of the building. Summit has asserted claims against the Port Authority for breach of two separate contracts, fraud, negligence, and tortious interference with contract, to each of which the Port Authority has objected.

Preliminary Objection to Count I - Breach of Contract

In its Response to the Port Authority's Preliminary Objections, Summit asserts that its first claim for breach of contract against the Port Authority is based on the construction contract between the Port Authority and Carusone, of which Summit claims to be a third-party beneficiary. However, that is not the claim that Summit pled in Count I of its Counterclaim. Instead, Summit alleged that the Port Authority breached the sub-contract between Carusone and Summit, of which the Port Authority was allegedly a third-party beneficiary. Assuming without deciding that the Port Authority was a third-party beneficiary of the Carusone/Summit contract, it does not follow that the Port Authority assumed Carusone's payment obligations under the contract. Since the Port Authority is not a party to the Carusone/Summit contract, Summit may not assert a claim for breach of that contract against the Port Authority. Summit's proper remedy is to assert its claim for breach of the Carusone/Summit contract against Carusone.

Preliminary Objection to Count II – Breach of Contract

Summit's second claim for breach of contract against the Port Authority is based on the Port Authority's alleged failure to pay Summit for demolition work under Purchase Order 3. The

Port Authority objects that it is not obligated to pay Summit because Purchase Order 1 contains language limiting Summit's right to repayment until after it is determined that Summit is not liable for the collapse of the building. At this stage, it does not appear to the court that the limiting language found in Purchase Order 1 is incorporated in Purchase Order 3. However, the court cannot determine as a matter of law if Summit is indeed precluded from receiving payment on the latter Purchase Order because, *inter alia*, the court has not been provided with a copy of the document that is incorporated by reference in Purchase Order 3. The Port Authority's objection to this Count is, therefore, premature at best.

Preliminary Objection to Count III – Fraud

Summit's fraud claim against the Port Authority is barred by the gist of the action doctrine, which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort 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." Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002). A tort claim is barred "where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." *Id.* at 19.

Summit claims that the Port Authority knew at the time it entered into Purchase Order 3 that it would never pay Summit for the demolition work. However, "it is well established that a cause of action for fraud must allege a misrepresentation of a past or present material fact . . . a promise to do something in the future . . . is not a proper basis for a cause of action for fraud." Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 67-8, 563 A.2d 1182, 1187 (1989).

Summit also claims that the Port Authority's representation that it would make payment is expressly set forth in Purchase Order 3. *See* Counterclaim, ¶¶ 26-7. Therefore, the Port Authority's alleged failure to live up to its representation is a breach of that contract, if it is anything. Clearly, the gist of Summit's claim for payment from the Port Authority sounds in contract not in tort, and Summit's claim for fraud must be dismissed.

Preliminary Objection to Count IV – Tortious Interference

Summit alleges that “as a direct and proximate result of the negative criticism, commentary and publicity [generated by unknown persons at the behest of the Port Authority, Summit has] lost bids, proposals and contracts to perform work for other customers.” Counterclaim, ¶¶ 35-7. However, Summit does not say who those potential customers were. While Summit need not list every prospective contractual relation with which the Port Authority allegedly interfered, it must set forth at least one such relationship in more detail. *See Kelly-Springfield Tire Co. v. D'Ambro*, 408 Pa. Super. 301, 309, 596 A.2d 867, 871 (1991) (complaint set forth one potential buyer who was deterred by defendants' wrongful conduct). In addition, Summit must set forth in more detail at least one example of “the criticism, harassment and/or negative publicity” that it has allegedly suffered. Furthermore, Summit must describe more particularly who made the allegedly harmful statements and why they are attributable to the Port Authority. *See Sylk v. Bernstein*, 2003 WL 1848565 *7 (Phila. Co. Feb. 4, 2003).

Preliminary Objection to Count V – Negligence

Summit claims that the Port Authority was negligent in failing to require Carusone to secure bonds or insurance as Carusone was required to do under the Port Authority/Carusone contract. Under the gist of the action doctrine, it is clear that Summit's negligence claim is really a claim for breach of the Port-Authority/Carusone contract, of which contract Summit claims to

be a third-party beneficiary. Since this alleged breach of that contract was committed by Carusone, not the Port Authority, to the extent that Summit has the right to bring any claim under that contract, it should bring the claim against Carusone.

CONCLUSION

For all the foregoing reasons, plaintiff's Preliminary Objections to defendants' Counterclaims are sustained, in part, and overruled, in part. A contemporaneous Order consistent with this Opinion will be issued.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.