

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

PLATE SALES, INC./WILMINGTON STEEL	:	November Term 2003
	:	
Plaintiff,	:	No. 03714
	:	
v.	:	Commerce Program
	:	
MARATHON EQUIPMENT CO.	:	Control No. 030773
	:	
Defendant.	:	

ORDER and MEMORANDUM

AND NOW, this 16th day of April, 2004, upon consideration of Defendant's Preliminary Objections, all responses in opposition, the respective memoranda, all matters of record and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that said Preliminary Objections are **sustained** and that Counts III and IV are **dismissed**.

Defendant is directed to file an answer to the remainder of Plaintiff's Complaint within twenty (20) days from the date of entry of this Order.

BY THE COURT:

GENE D. COHEN, J.

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MEMORANDUM OPINION

Before the court are the Preliminary Objections of Defendant Marathon Equipment Company (“Marathon”) to the Complaint of Plaintiff Plate Sales Inc./Wilmington Steel (“Plate”). For the reasons fully set forth below, said Preliminary Objections are **sustained**.

DISCUSSION

I. Plaintiff Has Failed To State A Claim For Fraudulent Misrepresentation

Count III of Plaintiff’s Complaint purports to state a claim for fraudulent misrepresentation. In Pennsylvania, in order to maintain a cause of action for fraud, the plaintiff must allege the following: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999). At bar, Plaintiff has failed to establish a valid claim for fraud. Specifically, Plaintiff has failed to set forth facts to support its allegation that Defendant acted with the intent to deceive Plaintiff. Moreover, 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). As pled, the conduct in question relates to obligations to be undertaken in the future. Because Plaintiff has failed the plead sufficient facts to support its fraud claim, such claim fails as a matter of law.¹

II. Plaintiff Has Failed To State A Valid Claim Under The UTPCPL

Count VI of the Complaint purports to state a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. C.S.A. § 201-1 *et. seq.* In support of its claim, Plaintiff relies upon § 201-2(4)(xxi) of the UTPCPL, also known as the “catch-all” provision.

A private right of action under the UTPCPL is available for “...a person who purchases or leases goods or services primarily for personal, family or household purposes...” 73 Pa.C.S.A. § 201-9.2; Trackers Raceway, Inc. v. Comstock Agency, Inc., 400 Pa. Super. 432, 583 A.2d 1193, 1197 (1990). As pled in the Complaint, it is clear that the goods in question were not purchased for “personal, family or household purposes” but rather for commercial resale. Accordingly, a claim under the UTPCPL can not lie here.

Plaintiff’s claim is also deficient because, in order to establish a claim under the catchall provision, a party must either demonstrate the elements of common law fraud, or that defendant’s deceptive conduct caused harm to the plaintiff. *See e.g. Zweircan v. General Motors Co.*, 2002

¹ Moreover, Count III is also 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., 2002 Pa. Super. 347, 811 A.2d 10, 19 (2002). Regardless of how the count was captioned by Plaintiff, the facts pled therein clearly demonstrate that the crux of Plaintiff’s fraud claim is Defendant’s alleged breach of the “oral rolling stock contractual agreement.” Therefore, the claim would likewise be barred under the gist of the action doctrine

WL 31053838; Weiler v. SmithKline Beecham, 53 Pa. D. & C. 4th 449 (C.P. Phila. 2001). As fully discussed *supra*, plaintiffs have failed to satisfy their burden of pleading with respect to Defendant's alleged attempt to deceive and therefore, their UTPCPL claim is likewise dismissed.

CONCLUSION

For the above-stated reasons, Defendant's Preliminary Objections are **sustained** and Counts III (fraudulent misrepresentation) and IV (violation of UTPCPL) of the Complaint are **dismissed**. Defendant is directed to file an answer to the remainder of Plaintiff's Complaint within twenty (20) days from the date of entry of this Order.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

GENE D. COHEN, J.

Dated: 4/16/04

