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

BRICKS, BOARDS & GARGOYLES	:	
	:	March Term 2004
Plaintiff,	:	
v.	:	No.: 02295
	:	
PLANT REALTY COMPANY, INC.	:	Commerce Program
	:	
Defendant.	:	Control No.: 080607

ORDER and MEMORANDUM

AND NOW, this 7th day of December, 2004, upon consideration of Defendant's Preliminary Objections to Plaintiff's Complaint and Plaintiff's Response thereto, it is hereby **ORDERED** and **DECREED** that Defendant's Preliminary Objections to Counts II, III, IV and V are **SUSTAINED** and Counts II, III, IV and V are **DISMISSED**.

Defendant's remaining Preliminary Objections are **OVERRULED** and Defendant is **ORDERED** to file an answer to the remaining averments in Plaintiff's Complaint within twenty (20) days of this Order.

BY THE COURT,

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GENE D. COHEN, J.

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MEMORANDUM OPINION

COHEN, J.

Presently before the court are Defendant Plant Realty Company, Inc.'s ("Plant") Preliminary Objections to Plaintiff Bricks, Boards and Gargoyles' ("BB&G") Complaint.

The dispute between the parties derives from a commercial lease. Summarizing the allegations in the Complaint, BB&G leased premises from Plant for its operations. Plant was required to replace the roof on the premises, but did not, which allowed rain to damage BB&G's property. Thereafter, BB&G escrowed its rent and Plant locked the premises, resulting in further damage to BB&G's property.

Defendants have raised Preliminary Objections to each count of the Complaint in the nature of a demurrer. In this posture, the court considers all material facts set forth in the Complaint as well as all inferences reasonably deducible therefrom as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer is sustained, this doubt should be resolved in favor of overruling it. Moser v. Heistand, 545 Pa. 554, 559, 681 A.2d 1322, 1325 (1996).

Plaintiff brings a claim against the Defendant for breach of contract (Count I). Defendant's key objection to this claim asserts that BB&G cannot support its claim because it failed to comply with the Rules of Civil Procedure.

Both parties concur that the lease and rider make up part of any agreement between the parties. BB&G, however, asserts that the contract also contains an addendum and subsequent writings. Complaint, ¶¶7, 8, 11, 26, 27. As this claim relies upon an inaccessible writing, BB&G must set forth the substance of the writing and state why it does not have a copy of the writing. Pa. R.C.P. 1019(i). The Complaint states that the addendum describes Plant's responsibilities to fix the roof and that Plant has a copy. Complaint, ¶¶26, 27. These allegations meet the requirements of the Rules. Therefore, Defendant's objection to Count I is overruled.

Plaintiff brings claims for negligence (Count II), wrongful eviction (Count III), and conversion (Count IV) against Defendant. Defendant contends that these claims are barred by the gist of the action doctrine. Plaintiff counters that these claims are unconnected to the lease and, therefore, should proceed.

The purpose of the gist of the action doctrine is to maintain the conceptual distinction between a breach of contract claim and a tort claim. "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). Thus, the doctrine bars tort claims (1) arising 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; or (4) where the tort claim essentially

duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. Id. at 19.

BB&G bases its negligence, wrongful eviction, and conversion claims upon Plant's failure to fix the roof and its locking of the leased premises. BB&G's assertion that the lease addendum required Plant to fix the roof, Complaint, ¶¶7, 8, 11, 26, 27, makes these claims duplicative of the breach of contract claim. Although BB&G contends that Plant's locking of the leased premises without providing security for its contents is unconnected to the lease, the lease contains a provision for such occurrences, Complaint, Exh. A, ¶11(b), placing these claims under the lease. Therefore, the gist of the action doctrine bars these three claims and Defendant's objections to Counts II, III, and IV are sustained and these Counts are dismissed.

Plaintiff brings a claim for breach of the implied warranty of habitability (Count V). The court in Pawco, Inc. v. Bergman Knitting Mills, Inc., 283 Pa. Super 443, 452, 424 A.2d 891, 895 (1980), found that a warranty of habitability will not be implied in commercial leases. Plaintiff asserts that two later decisions by trial courts of this Commonwealth overcome this precedent. In one case, C & B Enterprises v. Intercarbon Coal Co., 28 Pa. D. & C.3d 285 (1982), the court relied upon an express term in the lease and in the other case, Sieber v. Burns, 1 Pa. D. & C.4th 350 (1987), the court did not discuss or acknowledge the Pawco decision. Therefore, Defendant's objection to Count V is sustained and this Count is dismissed.

Plaintiff brings a claim for breach of the covenant of quiet enjoyment (Count VI). Defendant asserts that it took no affirmative action and could not breach the covenant, relying on Checker Oil Co. v. Harold H. Hogg, Inc., 251 Pa. Super 351, 358, 380 A.2d

815, 818 (1977) (covenant breached "when a tenant's possession is impaired by acts of the lessor."). As Plant locked the leased premises without warning or justification, Complaint, ¶22, Plant actively interfered with BB&G's possession and breached the covenant. Defendant's objection to Count I and Count VI is overruled.

Defendant seeks to strike Plaintiff's claims for lost profits and delay damages. The case cited by Plant, Exton Drive-In, Inc. v. Home Indemnity Co., 436 Pa. 480, 488-89, 261 A.2d 319, 324 (1969), serves merely to highlight the difficulty BB&G may have proving lost profits; it does not rule them out. Rule 238 allows for delay damages in instances in which there has been property damage, which has been alleged by BB&G, Complaint, ¶16. Defendant's objection to such damages is overruled.

Finally, Defendant challenges the specificity of Plaintiff's claims. The Complaint clearly sets forward the material facts supporting the causes of action. Defendant's objection based on Rule 1019(a) is overruled.

BY THE COURT,

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GENE D. COHEN, J.