

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

NVRF, LLC,	:	JUNE TERM, 2008
	:	
Plaintiff,	:	NO. 03173
	:	
v.	:	COMMERCE PROGRAM
	:	
TREVOSE FUNDING SERVICES and	:	Control Nos.: 09082170, 09082129
JOEL GLAUSER,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 30th day of December, 2009, upon consideration of defendants' Motions for Summary Judgment, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. Joel Glauser's Motion is **GRANTED**, and all claims against Joel Glauser are **DISMISSED**;
2. Trevoze Funding Services' ("Trevoze") Motion is **GRANTED in part**, and Count III for Fraud and Count IV for Negligent Misrepresentation are **DISMISSED**; and
3. The remainder of Trevoze's Motion is **DENIED**.

BY THE COURT:

ARNOLD L. NEW, J.

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

NVRF, LLC,	:	JUNE TERM, 2008
	:	
Plaintiff,	:	NO. 03173
	:	
v.	:	COMMERCE PROGRAM
	:	
TREVOSE FUNDING SERVICES and	:	Control Nos.: 09082170, 09082129
JOEL GLAUSER,	:	
	:	
Defendants.	:	

OPINION

Defendant Trevoze Funding Services (“Trevoze”) is the owner of certain improved real property located at 6000 Old York Road in Philadelphia, Pennsylvania (the “Property”) which it leased to plaintiff NVRF, LLC (“NVRF”) under a written Agreement of Lease (the “Lease”).

The Lease provides as follows:

17. Representations and Warranties. Landlord represents and warrants that the property has not been used for the purpose of treating, producing, handling, transferring, processing, transporting, disposing, using or storing a Toxic Substance, nor has there been an Environmental Release on the Property.

* * *

17.3. Indemnification; Breach of Representations and Warranties. Without limiting the generality of Section 12.1, Landlord covenants and agrees to exonerate, indemnify, defend, protect and save harmless Tenant, its partners, shareholders, members, officers, directors, agents and employees, from and against any and all claims, demands, costs, expenses, losses, liabilities, suits and damages arising from or relating to: (a) a breach of representations and warranties contained in this Section 17; (b) any Environmental Release not caused solely by Tenant or its agents, employees, contractors, licensees or invitees.

* * *

24. OPTION TO PURCHASE

24.1. Option; Exercise. At any time during the Term, Tenant shall have the option of purchasing the Property (the “Purchase Option”) on the terms set forth in this Article 24. . . .¹

¹ Complaint, Ex. A, ¶¶ 17, 17.3, and 24.1.

NVRF, with Trevose's permission, assigned its rights under the Option to Purchase to a non-party, Tommy D's, in an Assignment of Purchase Option and Agreement of Sale signed by all three parties (the "Assignment Agreement"). Under the terms of the Assignment Agreement, Tommy D's had the right to conduct due diligence on the Property and to void the Assignment Agreement if it was not satisfied with the condition of the Property.² During the due diligence period, Tommy D's learned that the Property had a negative environmental history, and Tommy D's refused to complete the sale. If the sale had been consummated under the Assignment Agreement, Tommy D's would have paid \$570,000 to Trevose and \$367,000 to NVRF.³

As a result of the aborted sale to Tommy D's, NVRF filed this lawsuit against Trevose and Trevose's agent, defendant Joel Glauser, claiming as damages \$367,000 in lost profits from the sale and "approximately \$134,000 in construction costs and improvements to the property" incurred by NVRF.⁴ In its Complaint, NVRF asserts claims against Trevose for breach of contract and breach of warranty. NVRF also asserts claims against Trevose and Glauser for fraud and negligent misrepresentation. Trevose and Glauser have moved for summary judgment on all claims.

Trevose argues that the breach of contract and breach of warranty claims fail because the Indemnification language of the Lease does not cover NVRF's claimed lost profits. The Indemnification provision covers all "losses" suffered by NVRF as a result of a breach of the environmental warranty by Trevose. The Indemnification language is, therefore, broad enough to cover NVRF's lost profits if Trevose breached the warranty and its breach caused such losses. Trevose's request for dismissal of the contract and warranty claims is denied.

² Complaint, Ex. B, ¶ 14(a).

³ *Id.*, Ex. C, ¶ 1.

⁴ NVRF's Opposition to Trevose's Motion for Summary Judgment, p. 6.

Trevose and Glauser both argue that the fraud and negligent misrepresentation claims fail because they are simply reiterations of NVRF's contract and warranty claims in tort guise.

When a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort. The test is not limited to discrete instances of conduct; rather, the test is, by its own terms, concerned with the nature of the action as a whole. The critical conceptual distinction between a breach of contract claim and a tort claim is that the former arises out of breaches of duties imposed by mutual consensus agreements between particular individuals, while the latter arises out of breaches of duties imposed by law as a matter of social policy. As a practical matter, the doctrine precludes plaintiffs from recasting ordinary breach of contract claims into tort claims.⁵

In support of its tort claims, NVRF alleges that Trevose and Glauser

knowingly, intentionally, and/or with reckless disregard for their accuracy falsely represented to [NVRF] **in the Lease** that the Property had not been used for the purpose of treating, producing, handling, transferring, processing, transporting, disposing, using or storing a Toxic Substance, nor had there been an Environmental Release on the Property[,] knowing such statements to be false in order to induce [NVRF] to enter into a Lease Agreement with a Purchase Option, and further knowing that [NVRF's] Purchase Option would be virtually without value because the pervasive and serious environmental problems with the property made it unmarketable.⁶

In this case, it is clear that "the tort claims aris[e] solely from the contractual relationship between the parties, . . . the alleged duties breached were grounded in the contract itself, . . . any liability stems from the contract, . . .the tort claims essentially duplicate the breach of contract claims, [and] the success of the tort claims is dependent on the success of the breach of contract claims."⁷ The gist of NVRF's action clearly sounds in contract, so its redundant tort claims must be dismissed.

⁵ Erie Ins. Exch. v. Abbott Furnace Co., 972 A.2d 1232, 1238-9 (Pa. Super. 2009).

⁶ Complaint, ¶ 31(emphasis added). *See also id.*, ¶ 35 ("Defendants negligently misrepresented to Plaintiff in the Lease that the Property had not been used for the purpose . . .").

⁷ Reardon v. Allegheny College, 926 A.2d 477, 486-487 (Pa. Super. 2007).

CONCLUSION

For all the foregoing reasons, Trevose's Motion for Summary Judgment is granted in part and denied in part, and Glauser's Motion for Summary Judgment is granted.

BY THE COURT:

ARNOLD L. NEW, J.