

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

DAVID J. DARDZINSKI, <i>et al.</i>	:	JULY TERM 2008
Plaintiffs,	:	
v.	:	No. 04141
	:	
FOLEY INSURANCE AGENCY, INC., <i>et al.</i>	:	
Defendants.	:	Commerce Program
	:	
	:	Control Number 09050699

ORDER

AND NOW, this 25th day of August, 2009, upon consideration of the Preliminary Objections of Foley Insurance Agency, Inc., and Timothy J. Foley to plaintiffs' Amended Complaint, plaintiffs' response in opposition, all matters of record and in accord with the Opinion being filed contemporaneously, it is **ORDERED** that defendants' Preliminary Objections are **sustained, in part**, as to: Count II (intentional or negligent misrepresentation), Count IV (interference with business or contractual relations), Count V (interference with prospective business or contractual relationship), Count VII (violation of Unfair Trade Practice and Consumer Protection Law), Count VIII (breach of fiduciary or confidential relationship), and Count IX (civil conspiracy).

Defendants' Preliminary Objections are overruled as to Count I (breach of contract) and Count VI (professional negligence).

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. August 25, 2009

Presently before the court are Preliminary Objections of defendants, Foley Insurance Agency, Inc., and Timothy J. Foley, seeking to dismiss Count I (breach of contract), Count II (intentional or negligent misrepresentation), Count IV (interference with business or contractual relations), Count V (interference with prospective business or contractual relationship), Count VI (professional negligence), Count VII (violation of Unfair Trade Practice and Consumer Protection Law), Count VIII (breach of fiduciary or confidential relationship), and Count IX (civil conspiracy).

This court grants the Objections and dismisses all counts, **except**; (a) Count I (breach of contract) and (b) Count VI (professional negligence).

Factual Background

Plaintiff, Dardzinski, is the owner of the building and real estate located at Roberts Avenue Block #125 (“Roberts Block Building”). Plaintiff, Studio R5 Architects, Ltd., is an architectural firm which formerly had a place of business located at Roberts Block Building (Dardzinski and Studio R5 Architects are collectively referred to as “Plaintiffs”).

Defendant, Foley Insurance Agency, Inc., is a corporation which regularly conducts professional insurance counseling and brokerage services in Philadelphia. Defendant, Timothy J. Foley, President and agent of Foley Insurance Agency, Inc., is a licensed insurance producer and Certified Insurance Counselor in Pennsylvania (Foley Insurance Agency and Timothy J. Foley are collectively referred to as “Defendants” or “Foley Defendants”).

Since March 14, 2003, Peter S. Whitby (“Whitby”) held two private mortgages on Roberts Block Building with Plaintiffs. Roberta Larocca (“Larocca”) was an agent with durable power of attorney on behalf of Whitby from at least July 11, 2006.¹

In June 2006, Plaintiffs entered into negotiations to sell Roberts Block Building to Mark Greenberg (“Greenberg”) and others. In mid-July 2006, Plaintiffs requested that Defendants secure property and liability insurance coverage for Roberts Block Building. In July 2006, Defendants allegedly made an offer to place liability and property insurance coverage on behalf of Plaintiffs for Roberts Block Building through Essex Insurance Company, and Plaintiffs accepted. On or about July 31, 2006, Defendants bound property and liability insurance coverage on behalf of Whitby and Larocca for Roberts Block Building with Essex Insurance Company for the full fair market value of the property (\$700,000) and identified Whitby and

¹ Whitby, Larocca, and Delaware Valley Underwriting Agency, Inc. d/b/a DVUA are also named defendants. However, they have not filed Preliminary Objections.

Larocca as the building owners. Defendants **did not bind** insurance coverage on behalf of Plaintiffs.

On July 31, 2006, Plaintiffs and Greenberg entered into an agreement for the sale of Roberts Block Building for the sum of \$625,000 (“Sales Agreement”), with closing scheduled for August 17, 2006. On August 16, 2006, Roberts Block Building was subject to a fire causing a total loss. Thus, Plaintiffs were not able to close the Sales Agreement with Greenberg.

On April 20, 2009 David J. Dardzinski, individually and on behalf of Studio R5 Architects, Ltd., filed an Amended Complaint against Foley Insurance Agency, Inc., Timothy J. Foley, Delaware Valley Underwriting Agency, Inc. d/b/a DVUA Hatboro, Peter S. Whitby, and Roberta Larocca, individually and as attorney-in-fact for Peter S. Whitby, alleging breach of contract, intentional or negligent misrepresentation, intentional or fraudulent misrepresentation, interference with business or contractual relationship, interference with prospective business or contractual relationship, professional negligence, violation of unfair trade practices and consumer protection law, breach of fiduciary or confidential relationship, civil conspiracy, and punitive damages. On May 8, 2009, Defendants (Foley Insurance Agency Inc., and Timothy J. Foley) filed Preliminary Objections.

DISCUSSION

I. Plaintiffs' claim against the Foley Defendants for breach of contract is factually and legally sufficient.

Defendants assert that there was no breach of contract because no contract had been formed between Plaintiffs and Defendants. In order for there to be a breach of contract, Plaintiffs must allege “(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages.”² Furthermore, in order to form an enforceable contract, there must be an offer, acceptance, and consideration or mutual meeting of the minds.³

Here, Defendants assert that no enforceable contract was formed between Plaintiffs and Defendants because Plaintiffs failed to accept in the manner expressly set forth by the terms of the offer. Plaintiffs allege that they entered into an oral contract with Defendants, in which the parties agreed that Defendants would obtain insurance coverage for Roberts Block Building on behalf of Plaintiffs and, in exchange, Plaintiffs would purchase insurance through Defendants. Taking as true Plaintiffs' allegations that an oral contract was formed, Plaintiffs have alleged sufficient facts to sustain a cause of action for a breach of contract. Therefore, Defendants' preliminary objection to the breach of contract claim is overruled.

² Corestate Bank, N.A. v. Cutillo, 1999 Pa. Super 14; 723 A.2d 1053, 1058 (1999).

³ Jenkins, 658 A.2d at 383 (citing Schreiber v. Olan Mills, 426 Pa. Super. 537, 627 A.2d 806, 808 (Pa. Super. Ct. 1993)).

II. Plaintiffs' claims against the Foley Defendants for intentional or negligent misrepresentation (Count II) are barred by the Gist of the Action Doctrine.

In Count II, plaintiff purports to state a claim for intentional or negligent misrepresentation.⁴

These claims are barred by the gist of the action doctrine. In eToll, Inc v. Elias/Savion Adver., Inc., 2002 Pa. Super. 347811 A.2d 10, 22 (Pa. Super. Ct. 2002), the court adopted the gist of the action doctrine, set forth by federal courts interpreting Pennsylvania law, which 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. In applying the test, our Superior Court affirmed the trial court's dismissal of appellant's fraud claim because the alleged acts of fraud arose in the course of the parties' contractual relationship, the duties were created and grounded in the parties' contract, and the types of damages were compensable in an ordinary contract action.⁵

Here, the alleged misrepresentations arise solely from the contract between the parties and are inextricably intertwined with the contract claim. The duties that were breached are grounded in the contract to obtain insurance, and subsequently, liability stems from the contract. Since Plaintiffs' intentional and/or negligent misrepresentation claim duplicates the breach of contract

⁴ Pa. R. Civ. P. 1020(a) requires that all causes of action be pled separately. Plaintiffs allege a claim for intentional misrepresentation and negligent misrepresentation in the same Count. Although this is improper, as intentional misrepresentation and negligent misrepresentation have similar elements, the court will address the merits of the claims together.

⁵ Id.

claim, the claims are barred by the gist of the action doctrine. The Preliminary Objection is sustained and Count II is dismissed.

III. Plaintiffs' claim against the Foley Defendants for interference with business or contractual relationship (Count IV) is dismissed for failure to state a claim.

Plaintiffs allege that Defendants intentionally and improperly interfered with Plaintiffs' contractual relationship with Greenberg. The four elements of a cause of action for intentional interference with contractual relations are: (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendants' conduct.⁶ The courts in Pennsylvania have traditionally applied the RESTATEMENT (SECOND) OF TORTS §767 (1982) in reviewing claims of intentional interference with contractual relations, which provides that consideration is to be given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interest of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the proximity or remoteness of the actor's conduct to the interference, and (f) the relations between the parties.⁷ In addition, RESTATEMENT (SECOND) OF TORTS §766A cmt. *e* (1979) states that "interference with the other's performance of his contract is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action."

Plaintiffs have failed to state a claim for tortious interference. The cause of Plaintiffs' inability to complete their Sales Agreement with Greenberg was not any action or inaction taken by Defendants but rather an independent act, the fire. If there had been no fire, Plaintiffs would

⁶ Triffin v. Janssen, 426 Pa. Super. 57, 626 A.2d 571, 574 (Pa. Super. Ct. 1993).

⁷ Id. (citing RESTATEMENT (SECOND) OF TORTS § 767 (1982)).

have been able to close the Sales Agreement with Greenberg regardless of Defendants' alleged failure to procure appropriate insurance.

Accordingly, Defendants' preliminary objection is sustained and Count IV is dismissed.

IV. Plaintiffs' claim against the Foley Defendants for interference with prospective business or contractual relationship (Count V) is dismissed for failure to state a claim.

Plaintiffs assert that Defendants intentionally and improperly interfered with prospective contractual relationships that Plaintiffs could have formed with potential buyers of Roberts Block Building. In order to sustain a cause of action for interference with prospective business relationships, it must be alleged that (1) there was prospective contractual relation between plaintiff and a third party, (2) the purpose or intent to harm plaintiff by preventing the relationship from occurring, (3) the absence of privilege or justification on the part of the actor, and (4) the occurrence of actual harm or damage to plaintiff as a result of the actor's conduct.⁸ Here, Plaintiffs have not pled sufficient facts to sustain this claim.

First, Plaintiffs have not alleged with specificity the existence of any prospective contractual relations between Plaintiffs and a third party. Plaintiffs must allege that there was a reasonable likelihood or probability that Plaintiffs would have entered into a contractual relation with a prospective third party, and such reasonable likelihood or probability must be "something more than a mere hope or the innate optimism of the salesman."⁹ Here, Plaintiffs have not identified any prospective third party with whom Plaintiffs had a reasonable probability to enter into a contractual relation.

⁸ Thompson Coal Co., 412 A.2d at 471.

⁹ Id.

Second, it cannot be said that Defendants intentionally and improperly interfered with prospective business relations because Defendants' actions are too remote from the cause of action. RESTATEMENT (SECOND) OF TORTS §766B cmt. *d* (1979) states that "interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." Again, Plaintiffs' ability to enter into contractual relations with other prospective businesses was unaffected by Defendants' actions. If the fire had not taken place, Plaintiffs would have been bound by the Sales Agreement between Plaintiffs and Greenberg, and therefore, unlikely to have entered into an agreement of sales for Roberts Block Building with another business. Furthermore, if the fire had not taken place and the Sales Agreement was not closed with Greenberg, Plaintiffs were in a position to sell Roberts Block Building to another prospective business regardless of Defendants' alleged failure to procure appropriate insurance. Therefore, Plaintiffs have not alleged sufficient facts to support their allegation that Defendants had the purpose or intent to harm Plaintiffs by preventing the prospective business relationship from occurring. Accordingly, Defendants' preliminary objection is sustained and Count V is dismissed.

V. Plaintiffs' claim against the Foley Defendants for professional negligence (Count VI) is factually and legally sufficient.

Defendants assert that Plaintiffs' claim for negligence is barred by the economic loss rule. The economic loss rule maintains the dividing line between tort and contract, and "bars a plaintiff from recovering purely economic losses suffered as a result of a defendant's negligent or otherwise tortious behavior, absent physical harm to a plaintiff or his property."¹⁰

¹⁰ Comcast Spectacor L.P. v. Chubb & Son, Inc., 2006 U.S. Dist. Lexis 55226, 77-78 (E.D. Pa. 2006).

However, in Bilt-Rite Contractors, Inc. v. Architectural Studio, 581 Pa. 454, 866 A.2d 270, 288 (Pa. 2005), the Supreme Court stated that “Pennsylvania has a long recognized that purely economic losses are recoverable in a variety of tort actions including the professional malpractice actions.”¹¹ Furthermore, in Rapidigm Inc. v. ATM Mgmt. Serv., 63 Pa. D. & C.4th 234 (2003), the court stated that “[u]nder settled Pennsylvania case law, a client may bring both a contract action and a tort action against a professional based on allegations that he or she failed to provide the client with professional services consistent with those expected of the profession.”¹² The economic loss rule and gist of the action doctrine do not bar tort recovery to claims involving a professional’s failure to exercise the proper standard or care, even if the claim is arising out of the contract.¹³

In this case, Plaintiffs have alleged that Defendants are liable for professional negligence rather than ordinary negligence. Therefore, Plaintiffs are not barred from asserting their professional negligence claim. Accordingly, Defendants’ Preliminary Objection is overruled.

VI. Plaintiffs’ claim against the Foley Defendants for violation of Unfair Trade Practice and Consumer Protection Law (Count VII) is dismissed for failure to state a claim.

Defendants allege that Plaintiffs do not have standing to bring a claim under the Unfair Trade Practice and Consumer Protection Law (hereinafter “UTPCPL”). UTPCPL provides that, “any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a

¹¹ Bilt-Rite Contractors, Inc. v. Architectural Studio, 581 Pa. 454, 866 A.2d 270, 288 (Pa. 2005).

¹² Rapidigm, 63 Pa. D. & C.4th at 242.

¹³ Id.

result of the use or employment by any person of a method, act or practice declared unlawful may bring a private action to recover actual damages.”¹⁴ Thus, in order for Plaintiffs to bring claims under the UTPCL, they must be a consumer of services for personal, family or household purposes.¹⁵

Plaintiffs’ allegations of facts fail to support their averment that they were consumers of services for “personal, family or household purposes.” It is clear from the Plaintiffs’ amended complaint that the Robert Block Building was used for commercial purposes. The Insurance Proposal designated as “Commercial Package Policy,” is for commercial property. Additionally, the Sales Agreement designated as “AGREEMENT FOR THE SALE OF COMMERCIAL REAL ESTATE,” is also for commercial property. While the designation in the Insurance Proposal and Sales Agreement are not dispositive of the character of the transaction, it is indicative that the Roberts Block Building was commercial real estate. Moreover, Plaintiffs assert that they have “sustained financial loss consisting of a loss of business, loss of rents and loss of personal and business properties” in Counts I, II, III, IV, V, VI, VIII, and IX of the Plaintiffs’ amended complaint. The only reasonable inference that can be drawn from the alleged facts and from the amended complaint as a whole is that the transaction in question between Plaintiffs and Defendants was for commercial purposes. Based on the foregoing, Plaintiffs do not have standing to bring claims under the UTPCPL. Accordingly, Defendants’ preliminary objection is sustained and Count VII is dismissed.

¹⁴ Unfair Trade Practice and Consumer Protection Law, 73 PA. STAT. ANN. §201-9.2(a).

¹⁵ See, e.g. Lockwood v. Auto. Fin. Corp., 2005 U.S. Dist. LEXIS 35897 (2005) (holding that plaintiff, who formally operated a used car dealership and incurred debt, did not have a cause of action under UTPCPL.)

VII. Plaintiffs' claim against the Foley Defendants for breach of fiduciary or confidential relationship (Count VIII) is dismissed for failure to state a claim.

In Count VIII, Plaintiffs purport to state a claim for breach of fiduciary duty. Plaintiffs allege that Defendants were acting as agents of Plaintiffs or in a confidential/fiduciary capacity, and breached their duty of fair dealing and good faith. The elements required to establish an agency relationship and confidential relationship differ. Consequently, these two relationships will be analyzed separately.

First, the three basic elements of agency are (1) the manifestation by the principal that the agent shall act for him, (2) the agent's acceptance of the undertaking, and (3) the understanding of the parties that the principal is to be in control of the undertaking.¹⁶

In Wisniski v. Brown & Brown Ins. Co., the court held that there was no agency relationship between an insurance agent and the insured where the decision remained exclusively with the insured.¹⁷ The court held that while the insurance agent was acting as the middleman and used his discretion to select an insurance company or policy and the insured put trust in the insurance agent's judgment, there was no principal/agent relationship between the insurance agent and the insured because the decision remained exclusively with the insured.¹⁸

Similarly, in the instant case, one could reasonably infer from the allegations that while Plaintiffs may have relied on Defendants' knowledge and skill in selecting the insurance policy and company, the decision making as to which insurance policy, the scope of coverage, and the particular insurance company remained exclusively with Plaintiffs. Specifically, Defendants

¹⁶ Wisniski v. Brown & Brown Ins. Co., 2006 Pa. Super 216, 906 A.2d 571, 577 (2006).

¹⁷ Id. at 578.

¹⁸ Id.

allegedly made an offer to secure insurance on behalf of Plaintiffs for Roberts Block Building through Essex Insurance Company on or about July 27, 2006, which Plaintiffs subsequently accepted. Thus, Defendants were required to obtain Plaintiffs' approval with respect to which insurance company to obtain coverage from. As such, no principal/agent relationship existed between Plaintiffs and Defendants.

Next, Plaintiffs allege that a confidential/fiduciary relationship existed between them and Defendants. A confidential relationship appears when circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed.¹⁹

In eToll, the Superior Court held that a "special relationship" giving rise to a fiduciary relationship did not exist where the appellant-plaintiff and appellee-defendant entered into an arms length commercial agreement for the advertisement of appellant's e-mail product.²⁰ The Superior Court stated that "[m]ost contracts for professional services involve one party relying on the other party's superior skill or expertise, and if parties to routine arms length commercial contracts amounted to a 'special relationship,' then virtually every breach of such contract would support a tort claim."²¹ "The critical question is whether the relationship goes *beyond* mere

¹⁹ Basil v. H&R Block, Inc., 2001 Pa. Super. 136, 777 A.2d 95, 101-103 (Pa. Super. Ct. 2001) (quoting Frowen v. Blank, 493 Pa. 137, 425 A.2d 412, 416-17 (Pa. 1981)).

²⁰ eToll, 811 A.2d at 22-24.

²¹ Id., at 23-24. (quoting Valley Forge Convention & Visitors Bureau v. Visitor' Servs., Inc., 28 F. Supp. 2d 947, 952-953 (E.D. Pa. 1998), in which the court analyzed Pennsylvania case law pertaining to a "special relationship." Courts in Pennsylvania have found special relationships to exist between attorney and client, between an 86 year old widow with no formal education and her sole business counselor, between attorney-scrivener and testator, between widow and sons upon whom she relied to manage her property, and between guardian and ward. The plaintiffs in eToll did not cite any cases in which a special relationship was found to exist between parties to an arms length business contract.)

reliance on superior skill, and into a relationship characterized by ‘overmastering influence’ on one side or ‘weakness, dependence, or trust, justifiably reposed’ on the other side”²² (emphasis in original). A confidential relationship is marked by such a disparity in position that the inferior party places complete trust in the superior party’s advice and seeks no other counsel, so as to give rise to a potential abuse of power.²³

In the instant case, Plaintiffs assert that Defendant-Foley held himself out to the public as a Certified Insurance Counselor, that they relied on Defendants superior expertise, and that Defendants had knowledge about the property from prior transactions. However, as articulated by the eToll Court, merely relying on the specialized skill of Defendants in an arms length commercial transaction does not give rise to a confidential relationship. Here, Plaintiffs do not allege any facts to support an inference that their alleged contract with Defendants was not made in arms length, that their relationship went beyond mere reliance of superior skill, or that their relationship was so markedly imbalanced as to give rise to a confidential relationship as defined by Pennsylvania law.²⁴ Therefore, Plaintiffs have failed to allege facts sufficient to support their claim that Plaintiffs and Defendants had a fiduciary or confidential relationship.

Accordingly, Defendants’ Preliminary Objection is sustained and Count VIII is dismissed.

²² Id.

²³ Id.

²⁴ Id.

VIII. Plaintiffs' claim against the Foley Defendants for civil conspiracy (Count IX) is dismissed for failure to state a claim.

In Count IX, Plaintiffs purport to state a claim for civil conspiracy. To state a cause of action for civil conspiracy under Pennsylvania law, a complaint must allege the existence of all elements necessary to such a cause of action.²⁵ A cause of action for conspiracy requires that two or more persons combine or enter an agreement to commit an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice is an essential part of a cause of action for conspiracy.²⁶

In Slaybaugh v. Newman, 330 Pa. Super. 216, 479 A.2d 517 (Pa. Super. Ct. 1984), the Superior Court affirmed the trial courts dismissal of the civil conspiracy complaint, where appellants contended that appellee-sales persons conspired to defraud appellants into purchasing more land than he intended to buy. The court affirmed the trial court's order dismissing the civil conspiracy counts but not the fraud counts, because appellees failed to establish how each individual allegation of fraud was part of a combination or agreement.

Similar to appellants in Slaybaugh, these Plaintiffs do not allege how Defendants and Whitby/Larocca's actions were part of a combination or agreement. Plaintiffs merely make the conclusory statement that Defendants and Whitby/Larocca's actions were meant to prevent Plaintiffs from securing property and liability insurance coverage for Roberts Block Building and hamper or prevent sales of real estate. Plaintiffs fail to "allege the manner in which a conspiratorial scheme was devised and carried out," or facts to support the inference that Defendants and Whitby/Larocca had combined or entered an agreement in order to carry out the

²⁵ Burnside v. Abbott Labs, 351 Pa. Super. 264, 505 A.2d 973, 980 (Pa. Super. Ct. 1985).

²⁶ Thompson Coal Co., 412 A.3d at 472-73.

alleged unlawful acts.²⁷ Therefore, Plaintiffs have failed to allege sufficient facts to state a claim for which relief can be granted.

Accordingly, Defendants' preliminary objection is sustained and Count IX is dismissed.

CONCLUSION

For the foregoing reasons, Defendants' Preliminary Objections are sustained, in part, as to Count II (intentional or negligent misrepresentation), Count IV (interference with business or contractual relations), Count V (interference with prospective business or contractual relationship), Count VII (violation of UTPCPL), Count VIII (breach of fiduciary or confidential relationship), and Count IX (civil conspiracy).

Defendants' Preliminary Objections are overruled as to Count I (breach of contract) and Count VI (professional negligence).

An Order consistent with this conclusion will be issued.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

²⁷ Id.