

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

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BDGP, INC., t/a CLAYBAR DEVELOPMENT, L.P. and JPA DEVELOPMENT, INC.,	:	January, Term, 1999
	:	
Plaintiffs,	:	No. 0812
	:	
v.	:	COMMERCE PROGRAM
	:	
INDEPENDENT MORTGAGE CO., ITHACA PARTNERSHIP, and MICHAEL KARP.,	:	
	:	
Defendants.	:	Control No.: 111867
	:	
	:	
	:	

MEMORANDUM OPINION

GENE D. COHEN, J.*March 31, 2004*

Before the Court is the Motion for Partial Summary Judgment filed by Independent Mortgage, Co. (“IMC”), Ithaca Partnership (“Ithaca”) and Michael Karp (“Karp”)(collectively the “Defendants”) against BDGP, Inc., t/a Claybar Development, L.P. (“Claybar”) and JPA Development, Inc. (“JPA”)(jointly the “Plaintiffs”). For the reasons set forth below, the Defendants’ Motion for Partial Summary Judgment is **granted** in part and **denied** in part.

Summary judgment is granted in favor of the Defendants and against JPA on Counts I through V of Plaintiffs’ Amended Complaint (the “Complaint”). Summary judgment is also granted in favor of Karp and IMC and against Claybar on Count V and in favor of IMC and Ithaca on Counts II and III. The case will proceed on the following Claybar claims: (1) Count I against Ithaca and IMC, (2) Count IV against Karp and IMC

and (3) Counts II and III against Karp.

I. BACKGROUND

Both the Plaintiffs and the Defendants present in their pleadings a thorough but diametrically opposed history of the events leading up to the commencement of litigation in this case. Given the age of this case and the nature of the claims involved, the Court is not surprised by the length of the parties' pleadings and the voluminous nature of the exhibits. However, the Court need not recite in full detail the positions of the parties in this opinion in order to reach its conclusion.

The case, distilled into its simplest form, concerns the Plaintiffs' purchase of a piece of real estate (the "Property") and the agreements executed in connection therewith. On one side, the Plaintiffs paint a picture of an elaborate effort on the part of the Defendants to induce and deceive the Plaintiffs into entering agreements when the Defendants had no intention of ever honoring their obligations. On the other side, the Defendants assert that this is nothing more than a breach of contract action wherein the Plaintiffs failed to meet their obligations under the agreements.

The Plaintiffs commenced this action by writ of summons in 1999 and subsequently filed the Complaint which is now at issue. The Complaint contains five counts and references six agreements which are attached as exhibits. Exhibits A, B and C consist of a Construction Loan Agreement, a Mortgage Note and an Open-End Mortgage and Security Agreement (collectively the "Loan Agreements").¹ Exhibits E, F and G consist of an Agreement of Sale, a Lease Agreement and a letter that the Plaintiffs refer

¹ The signatories to the Loan Agreements are IMC and Claybar.

to as the “Exchange Agreement” (collectively the “Ithaca Agreements”).² As will be discussed further below, plaintiff JPA is not a signatory to any of the agreements.

II. STANDARD OF REVIEW

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this Court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a *prima facie* cause of action or defense. McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). To succeed, a defendant moving for summary judgment must make a showing that the plaintiff is unable to satisfy an element in his cause of action. Basile v. H&R Block, 777 A.2d 95, 100 (Pa. Super. Ct. 2001).

To avoid summary judgment, the plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the Plaintiff. McCarthy, 724 A.2d at 940. In addressing the issue, this Court is bound to review the facts in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Manzetti v. Mercy Hospital of Pittsburgh, 565 Pa. 471, 776 A.2d 938, 945 (2001). The plaintiff must be given the benefit of all reasonable inferences. Samarin v. GAF Corp., 391 Pa. Super. 340, 350, 571 A.2d 398, 403 (1989).

III. DISCUSSION

The Court begins its analysis with the Complaint itself. Plaintiffs filed a five count complaint asserting the following against each defendant: (I) Breach of Contract; (II) Tortious Interference with Contractual Relations; (III) Tortious Interference with

² The Lease and Agreement of Sale were executed by Ithaca and Claybar.

Present and Future Contractual Relations; (IV) Fraud; and, (V) Negligent Misrepresentation. Although not apparent from the Complaint, both Claybar and JPA are asserting claims in their own individual right under each count.

The Defendants, through their summary judgment motion, request: (1) the dismissal of all counts asserted by JPA and (2) the dismissal of Counts II through V as asserted by Claybar. The Plaintiffs respond that the Defendants' motion should be dismissed in its entirety and the case proceed on all counts. In order to address the Defendants' motion in an orderly manner, the Court will examine their arguments in the context of Claybar and JPA separately.

A. IMC and Ithaca Are Entitled To Summary Judgment Against Claybar on Counts II, III And Karp and IMC Are Entitled To Summary Judgment Against Claybar on Count V.

The Court finds that IMC and Ithaca are entitled to summary judgment on Counts II and III. The Court further finds that Karp and IMC are entitled to summary judgment on Count V. But, the Court also holds that Claybar has presented sufficient evidence to permit it to proceed on the breach of contract claims against IMC and Ithaca, the tortious interference claims against Karp and the fraud claims against Karp and IMC.³

1. Claybar's Tortious Interference Claims Against IMC.

Claybar's claims of tortious interference against IMC and Ithaca are barred by the gist of the action doctrine.⁴ Tortious interference with contract relations and future contract relations has been defined as:

³ The Court makes no findings on the merits of these claims.

⁴ Defendants assert that the tortious interference claims asserted against Karp individually should also be dismissed because Karp was acting in his capacity of a corporate agent and within the scope of his authority. The Court finds that the Plaintiffs have presented sufficient evidence to create a material issue of fact as to the capacity Karp was acting which prevents summary judgment from being entered. Again, the Court makes no findings as to the merits of the claim.

[I]nducing or otherwise causing a third person not to perform a contract with another, or not to enter into or continue a business relation with another, without a privilege to do so. Restatement, Torts § 766 (1939). Numerous cases in this Commonwealth are in accord with this definition. See Restatement, Torts, Pa.Annot. § 766 (Supp.1953).

* * *

Our courts have also indicated that there may be recovery under this tort theory where a defendant has interfered with prospective contracts or business relationships of third parties with a plaintiff. See *Neel v. Allegheny County Memorial Park*, 391 Pa. 354, 358, 137 A.2d 785, 787 (1958) and *Locker v. Hudson Coal Company*, 87 Pa. Dist. & Co. 264, 267 (1953).

Glazer v. Chandler, 414 Pa. 304, 307, 200 A.2d 416, 418 (Pa. 1964). When “the allegations and evidence only disclose that defendant breached his contracts with plaintiff and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may be adjudicated only in that action.”

Id.

Pennsylvania's gist if 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., 811 A.2d 10, 19 (Pa. Super. 2002).⁵

⁵ Contrary to the Defendants' assertion, the gist of the action does not bar all fraud claims. The gist of the action only bars claims of fraud in the performance. See Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 19 (Pa. Super. 2002). Claims of fraud in the inducement are not barred.

The Court finds that allegations under Counts II and III are nothing more than a repetition of the breach of contract claims asserted by Claybar in Count I. A careful review of these counts reveals that the entire basis of Claybar's tortious interference claims stem from the Defendants' alleged failures to honor their commitments under the Loan and Ithaca Agreements. This failure on the part of the Defendants allegedly caused Claybar to breach numerous obligations and contracts with third parties. The Complaint is devoid of any allegations that would distinguish the breach of contract claims from the tortious interference claims. Although the Plaintiffs attempt to expand upon the bare allegations of the Complaint in their Motion pleadings, the Court finds the Plaintiffs are still not able to separate the claims.

Under the Plaintiffs theories, if IMC and Ithaca performed in accordance with their obligations under the agreements, there would be no basis for Claybar's tortious interference claims. In fact, as alleged under the Complaint, Counts II and III would most certainly fail against IMC and Ithaca if the Plaintiffs did not prove under Count I that the agreements were in fact breached by IMC and Ithaca. The tortious interference claims are incidental to the contract claims in this action and, as a result, Claybar's tortious interference claims fall squarely within the parameters of the gist of the action doctrine. Therefore, the Court finds in favor of the IMC and Ithaca on Counts II and III.

2. **Claybar's Negligent Misrepresentation Claim.**

Claybar's negligent misrepresentation claims are barred by the economic loss doctrine. The economic loss doctrine bars the recovery of economic damages for torts when the only harm is to the product itself and not to other property. See Werwinski v. Ford Motor Company, 286 F.3d 661 (3d. Cir. 2002). Therefore, if the only damages

from the alleged tort are economic, the tort claims cannot stand. Id.

This Court has held before that claims of negligent misrepresentation are barred when the only damages alleged are economic in nature. See JHE, Incorporated v. Southeastern Pennsylvania Transportation Authority, 2002 WL 1018941, *6 (Pa.Com. Pl. 2002). The damages allegedly suffered by Claybar as a result of the negligent misrepresentation claim are purely economic and, therefore, Claybar's claim of negligent misrepresentation in Count V must be dismissed.

B. Defendants Are Entitled To Summary Judgment On All Counts As Alleged By JPA.

The Court finds that all of the counts asserted by JPA against the Defendants should be dismissed.⁶ Preliminarily, the Court notes the virtual absence of any allegations on behalf of JPA against the Defendants in the Complaint. JPA is not a signatory to any of the agreements at issue and, other than in paragraph 77, there is no attempt to explain a nexus between JPA's claims and the Defendants' actions. If not for paragraphs 77 and 3, the Court would not even know that JPA was a plaintiff based on the Complaint. Apparently recognizing this void, Plaintiffs take great lengths in their Motion responses to explain how the Defendants are liable to JPA. Plaintiffs assert that, through discovery, JPA uncovered facts that sustain its claims.⁷ Even taking into

⁶ Throughout their response, the Plaintiffs continually assert that the Defendants tacitly conceded that JPA is a party to the agreements in question. The Plaintiffs base this argument on the fact that the Defendants in a separate motion sought to bind JPA to a contractual jury waiver contained in the CLA. Plaintiffs believe that the Defendants are therefore estopped from arguing in the present motion that JPA is not a party to any agreement. The Court finds no support for this argument and notes that the Defendants are not prevented from arguing alternate positions at this stage. In any event, the Court need not address the jury waiver issue because the Court finds in favor of the Defendants as to all claims of JPA. The Court also notes that the jury waiver argument presented by the Defendants would not have necessarily required the Court to hold JPA was a party to any agreements.

⁷ Given the tone of the arguments set forth in the Plaintiffs' responses, it appears that the Plaintiffs are astounded by the Defendants request that JPA's claims be dismissed. Plaintiffs refer to thousands of documents and assert that, from the beginning, JPA was an integral and essential part of the business dealings with the Defendants. Such assertions lead to the question why, if JPA played such a significant

consideration these additional allegations, the Court finds that JPA has not met its burden in defending against the Defendants' Motion.

1. JPA's Breach of Contract Claim.

JPA has no standing to sue under any of the agreements at issue because it is neither a signatory to nor a third party beneficiary of the agreements. Since JPA is not a signatory to any of the agreements, it must establish that it is a third party beneficiary. Yet, looking at the Complaint, there are no allegations that JPA was an intended third party beneficiary under any of the agreements. As a result, the Court must entirely rely upon the assertions made by the Plaintiffs in their Motion responses. In those pleadings, the Plaintiffs do not argue that JPA is a party to the Ithaca Agreements and, instead, focus solely on the CLA.⁸

In order to be considered a third party beneficiary under Pennsylvania law, a party must satisfy a strict two part test. Cardenas v. Schober, 783 A.2d 317 (Pa. Super. Ct. 2001). This test, as articulated by the Pennsylvania Superior Court, is as follows:

- (1) [T]he recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and
- (2) . . . the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Id. at 322 (citing Guy v. Liederbach, 501 Pa. 47, 459 A.2d. 744 (1983)). The Superior Court also clearly stated that "the fact that the obligor knows that his services will benefit a third person is not alone sufficient to vest in such third person the rights of a third

role, the Complaint barely acknowledges JPA's existence. Nonetheless, the Court carefully considered the additional allegations asserted by JPA in reaching its judgment.

⁸ Even if the Plaintiffs were to maintain that they were third party beneficiaries of other agreements, there is no evidence to support such contentions.

person beneficiary. Id.

The arguments made by the Plaintiffs do not support JPA's position that it was an intended third party beneficiary. There is no evidence presented by the Plaintiffs that indicates, under the circumstances, IMC intended in the CLA to give JPA the benefit of the promised performance.⁹ Under Pennsylvania law, the simple fact that IMC knew that JPA would receive benefits under the CLA is not a sufficient basis to consider JPA a third party beneficiary. Using the Plaintiffs' reasoning, anyone who a bank knows may receive a benefit from its loan agreements would be a *de facto* third party beneficiary. This is not the case under Pennsylvania law. Therefore, JPA cannot assert breach of contract claims for either the Loan Agreements or the Ithaca Agreements because it lacks the standing to do so.¹⁰

2. JPA's Tortious Interference Claims.

Plaintiffs fail to present sufficient evidence to sustain JPA's claims for tortious interference with contractual relations against the Defendants. Consistent with the entire Complaint, there is no mention of JPA in Counts II and III. These counts deal exclusively with Claybar and the Complaint is without a single allegation that the Defendants intentionally interfered with any contractual relations of JPA. As previously discussed, the only paragraph alleging a nexus between JPA and the Defendants' actions

⁹ In moving for summary judgment:

Under Rule 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. *Id.* Correspondingly, the non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party.

Rauch v. Mike-Mayer, 783 A.2d 815, 824 (Pa.Super. 2001).

¹⁰ The Court also notes that the CLA contained a clause which specifically stated that the parties did not intend any third party beneficiaries. See Exhibit "A" of Complaint, ¶ 10.

is paragraph 77. In paragraph 77, the Plaintiffs assert:

As a result of the defendants' breaches, JPA has had a judgment entered against it by a vendor and has been named as a defendant in other actions. In addition, JPA has allocated resources to support the project with could have been used to pursue other development projects.

Complaint, ¶ 77.

Only after the most generous of readings could a court find that this single allegation contains within in it sufficient allegations of tortious interference to move forward. Even if the Court were to hold Paragraph 77 was sufficient, the Plaintiffs cannot solely rely upon the allegations in their complaint to survive a motion for summary judgment.¹¹ The Plaintiffs again attempt to buttress JPA's allegations through their briefs; but, these efforts are insufficient to sustain the claim.¹² Rather than proffer evidence to support JPA's claims, the Plaintiffs present only conclusory allegations and generalized commentary. Merely stating that there are material issues in dispute and citing to various attached exhibits does not automatically create a barrier to the granting of summary judgment if the evidence cited is without substance.

For example, one element of a tortious interference claim is the establishment of a contractual relationship. Plaintiffs do not even attempt to state with any specificity the contracts or parties that were allegedly tortiously interfered with. Generalizations are not sufficient at this stage of the proceedings, particularly when discovery is closed and a

¹¹ “[P]arties seeking to avoid the entry of summary judgment against them may not rest upon the averments contained in their pleadings. On the contrary, they are required to show, by depositions, answers to interrogatories, admissions or affidavits, that there is a genuine issue for trial.” Washington Federal Savings and Loan Assoc. v. Stein, 357 Pa.Super. 286, 288, 515 A.2d 980, 981 (1986).

¹² Referring to Paragraph 77, the Plaintiffs allege in their brief that Karp sent a letter to the “third party condominium owners alleging malfeasance by JPA” and refer to Exhibit 19 attached to their responses. Plaintiffs’ Brief, ¶34. Exhibit 19 is a letter from Karp to the Barclay Condominium Counsel. The Court can find no mention of JPA within the letter and, instead, Claybar appears to be the sole subject.

party is defending against a motion for summary judgment. As a result, Counts II and III as alleged by JPA are dismissed in their entirety.

3. JPA's Fraud and Negligent Misrepresentation Claims.

The Court now turns to the last two claims of JPA, Counts IV and V. In these counts, JPA alleges fraud and negligent misrepresentation; although, as with the previous counts, there is no mention of JPA in the Complaint. To the contrary, in the Complaint the basis of counts IV and V are the actions of Karp and IMC regarding Claybar and the CLA. Because JPA is neither a signatory nor third party beneficiary of the CLA, JPA is unable to ride the coattails of Claybar in order to proceed under either claim as alleged in the Complaint.¹³

In their briefs, the Plaintiffs take a different tack and assert that JPA was fraudulently and negligently induced into entering numerous contracts with unnamed third parties as a result of the Defendants' actions. However, the Plaintiffs do not allege that the Defendants made representations directly to JPA in order to induce it into entering these third party contracts. Instead, they attempt to tie in JPA's entering into third party contracts with Karp and IMC's representations to Claybar. Once again, these allegations are nothing more than conclusory statements and general commentary of the nature generally found in a Complaint.¹⁴ Plaintiffs present no evidence to support either

¹³ It is questionable that JPA could entertain either count even if it were a third party beneficiary; but, the Court need not address this issue.

¹⁴ In order to proceed on a fraud count a plaintiff must allege and prove the following: (1) a representation was made; (2) that is material to the transaction; (3) made falsely, with knowledge of falsity or with recklessness regarding its truth or falsity; (4) with the intent leading another to rely on it; (6) which is justifiably relied upon; and, (7) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 486, 499, 729 A.2d 555, 559 (Pa. 1999). While the Court finds that the Plaintiffs have sufficiently plead and proffered evidence on the Claybar fraud claim in order to survive summary judgment, the fraud claim of JPA is not sufficiently pled with particularity in the Complaint or the briefs.

a fraud or negligent misrepresentation claim.¹⁵ Therefore, the Court finds in favor of IMC and Karp on counts IV and V of the Complaint and against JPA.

IV CONCLUSION

For the reasons set forth above, the Defendants' Motion for Partial Summary Judgment is **granted** in part and **denied** in part. Summary judgment is granted in favor of the Defendants and against JPA on Counts I through V of the Complaint. Furthermore, summary judgment is granted in favor of the Defendants and against Claybar on Count V of the Complaint and in favor of IMC and Ithaca on Counts II and III. The case will proceed on: (1) Count I against Ithaca and IMC, (2) Count IV against Karp and IMC and (3) Counts II and III against Karp only.

BY THE COURT:

GENE D. COHEN, J

¹⁵ Additionally, as with Claybar's negligent misrepresentation claim, Pennsylvania's economic loss doctrine bars the claim.

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Defendants.	:	Control No.: 111867
	:	
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ORDER

AND NOW, this 31st day of March 2004, upon consideration of the Motion for Partial Summary Judgment of Independent Mortgage, Co. (“IMC”), Ithaca Partnership (“Ithaca”) and Michael Karp (“Karp”)(collectively the “Defendants”), the responses in opposition thereto filed by BDGP, INC., t/a Claybar Development, L.P. and JPA Development, Inc. (the “Plaintiffs”), the parties respective memorandum and all matters of record, it is hereby

ORDERED and **DECREED** that the Motion is **GRANTED** in part and **DENIED** in part; it is further

ORDERED and **DECREED** that summary judgment is granted in favor of the Defendants and against JPA on Counts I through V of Plaintiffs’ Amended Complaint, it is further

ORDERED and **DECREED** that summary judgment is also granted in favor of

Karp and IMC and against Claybar on Count V of the Complaint, it is further

ORDERED and **DECREED** that summary judgment is granted in favor of IMC and Ithaca and against Claybar on Counts II and III, it is further

ORDERED and **DECREED** that this case will proceed on: (1) Count I against Ithaca and IMC, (2) Count IV against Karp and IMC and (3) Counts II and III against Karp.

BY THE COURT:

GENE D. COHEN, J.