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

ADVANCED SURGICAL SERVICES, INC., et al.,	:	August Term, 2000
Plaintiffs	:	
	:	No. 1637
v.	:	
	:	Commerce Case Program
INNOVASIVE DEVICES, INC., et al.,	:	
Defendants	:	Control No. 111107

OPINION

The background of this matter is set forth in greater detail in the Court's order ("Order") and opinion ("Opinion") dated November 8, 2001,[1] in which the Court granted in part the motion for summary judgment of Defendants Innovasive Devices, Inc. ("Innovasive") and Mitek Products ("Mitek"). In the Opinion, the Court stated that Plaintiff Advanced Surgical Services, Inc. ("ASSI") could proceed against Mitek for breach of contract only to the extent that the breached contract was an implied in fact contract that arose between Mitek and ASSI. Mitek has subsequently filed a motion for reconsideration of the Order ("Motion"). In the Motion, Mitek argues that the Plaintiffs' amended complaint ("Complaint") does not allege a claim for breach of contract implied in fact. As such, it contends, it should be granted summary judgment on ASSI's breach of contract claim, and the Complaint should be amended to assert a claim for breach of a contract implied in fact.[2] For the reasons set forth in this Opinion, the Court disagrees.

[1] Available at http://courts.phila.gov/cptcvcomp.htm.

[2] Although it does not do so explicitly, Mitek appears to ask that the time for discovery be extended to allow the exploration of this "new" cause of action.

Time and again, Pennsylvania courts have noted that our jurisdiction is a fact pleading jurisdiction in which a plaintiff "must set forth concisely the facts upon which a cause of action is based." Cianfrani v. Commonwealth, State Employees' Retirement Bd., 505 Pa. 294, 304 n.5, 479 A.2d 468, 473 n.5 (1984) (citing Line Lexington Lumber & Millwork Co. v. Pennsylvania Publishing Corp., 451 Pa. 154, 162, 301 A.2d 684, 688 (1973), and Pa. R. Civ. P. 1019(a)). Numerous cases explore the purpose and requirements of the Commonwealth's fact pleading mandate:

> The purpose of [Pennsylvania Rule of Civil Procedure] 1019(a) is to require the pleader to disclose the "material facts" sufficient to enable the adverse party to prepare his case. A complaint therefore must do more than give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. It should formulate the issues by fully summarizing the material facts. "Material facts" are "ultimate facts," i.e., those facts essential to support the claim. Evidence from which such facts may be inferred not only need not but should not be alleged. Allegations will withstand challenge under § 1019(a) if (1) they contain averments of all of the facts the plaintiff will eventually have to prove in order to recover, and (2) they are sufficiently specific so as to enable defendant to prepare his defense. . . .

Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citations, quotation marks and brackets omitted). See also Santiago v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 418 Pa. Super. 178, 185, 613 A.2d 1235, 1238 (1992) ("[u]nder the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint"); Sevin v. Kelshaw, 417 Pa. Super. 1, 7, 611 A.2d 1232, 1235 (1992) (the purpose behind Pennsylvania's fact pleading requirement is to "give the defendant notice of what the plaintiffs' claim is and the grounds upon which it rests, thus allowing the defendant to prepare a defense"); Alpha Tau Omega Fraternity v. University of Pa., 318 Pa. Super. 293, 298, 464 A.2d 1349, 1352 (1983) (a

complaint must "give the defendant notice of what the plaintiffs' claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim")

While a complaint must include the facts upon which a plaintiff's claims are based, "a plaintiff is not obliged to identify the legal theory underlying his complaint," and there is no requirement that a plaintiff title a count with the specific cause of action alleged thereunder. Weiss v. Equibank, 313 Pa. Super. 446, 453, 460 A.2d 271, 275 (1983). See also Gavula v. ARA Servs., Inc., 756 A.2d 17, 22 (Pa. Super. Ct. 2000) (even though the relevant counts were not specifically identified as "negligence" counts in plaintiff's complaint, those counts "clearly intended to be a claim for negligence" were to be treated as such); McClellan v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 142, 604 A.2d 1053, 1060 (1992) ("[t]he obligation to discover the cause or causes of actions is on the court: the plaintiff need not identify them").[3] Indeed, Pennsylvania courts faced with a conflict between the allegations of a count and the count's title look at the allegations and not the title. See, e.g., Zernhelt v. Lehigh County Office of Children and Youth Servs., 659 A.2d 89 (Pa. Commw. Ct. 1995) (treating a count titled "negligent infliction of emotional distress" as a claim for intentional infliction of emotional distress); Maute v. Frank, 441 Pa. Super. 401, 403-04, 657 A.2d 985, 986 (1995) ("since the complaint states a viable mandamus claim, we will treat that portion of the action as such, regardless of the fact that the complaint is not titled properly as one involving mandamus"); Commonwealth ex rel. Saltzburg v. Fulcomer, 382 Pa. Super. 422, 555 A.2d 912 (1989) (although action was titled as one involving

[3] It is required that a plaintiff plead "each cause of action against each defendant in a separate count under a separate heading." Goodrich Amram § 1020(a):5. Such heading, however, must state only the number of the count and nothing more. See Id. § 1020(a):2 ("[e]ach count should open with a heading First count, Second count, etc.").

habeas corpus relief, petitioner's action clearly was one for mandamus and was therefore treated as such). Cf. Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 626, 375 A.2d 1285, 1291 (1977) (the Pennsylvania Rules of Civil Procedure explicitly permitted petitioners to seek relief in the alternative based upon a different legal theory when advised that their petition is going to be denied).

Mitek asserts that the fact that the sustainable claim against it is titled "breach of contract" limits ASSI to seeking relief based solely on the written agreement between ASSI and Innovasive. This assertion is doubly flawed. First, despite Mitek's interpretation, the Order and Opinion do not state that ASSI may not pursue a breach of contract action against Mitek. On the contrary, the Court concluded that ASSI proffered sufficient evidence to sustain its claim for breach of contract against Mitek. The limitation placed on ASSI's claim against Mitek went not to the sufficiency of the claim itself but rather to the manner in which a contract between ASSI and Mitek arose. As such, ASSI's claim, as recognized by the Court in the Order and Opinion, is unchanged from and encompassed within the "breach of contract" claim set forth in the Complaint.[4]

Even if this were not the case, emphasis is properly put on the facts alleged in a complaint, not on the title of any one count. Here, the Complaint alleges those facts necessary to put Mitek on notice that ASSI could assert that an implied in fact contract arose between them. Hence, the potential cause

[4] If the Court were to hold that the title of a count limited a plaintiff solely to the narrow and specific claim set forth in the count's title, it is likely that plaintiffs would refrain from naming the causes of action they intended to assert, as titling is not required and would merely lock a plaintiff into the particular cause of action specified.

of action noted by the Court in the Opinion is no different from that set forth in the Complaint, and there is no need for the Complaint to be amended.[5]

It may be that the Complaint violates Pennsylvania Rule of Civil Procedure 1020(a), which requires that claims based on distinct contracts be pled separately. See General State Auth. v. Lawrie & Green, 24 Pa. Commw. 407, 411, 356 A.2d 851, 854 (1976) (where two separate and distinct contracts gave rise to the plaintiff's causes of action, the breach of each contract was to be pled in a separate count). Technically, the agreement between ASSI and Innovasive and any potential contract implied in fact between ASSI and Mitek would be separate contracts, and breaches of each should be pled in separate counts. The proper way to object to this flaw, however, was through preliminary objections, and Mitek's failure to do so results in the waiver of its argument. See Pa. Rs. Civ. P. 1028(b), 1032(a) (all objections not raised in preliminary objections to a pleading are waived); Kazanjian to Use of Shelengian v. Cohen, 175 Pa. Super. 195, 199, 103 A.2d 491, 494 (1953) (a party waives objections to those defects that should have been addressed by preliminary objections but were not).

[5] While several cases address the distinction between breach of contract claims and an action in quasi-contract, only Birchwood Lakes Community Association, Inc. v. Comis, 296 Pa. Super. 77, 442 A.2d 304 (1982), touches on Mitek's assertion that a plaintiff is barred from proceeding on a contract implied in fact unless such an action has been averred in the complaint. To the extent that this is correct, the fact that the Complaint alleges facts to establish an implied in fact contract makes the instant action distinguishable.

If Mitek needs additional time for discovery to investigate ASSI's "new" claim or wishes to update its answer to the Complaint or new matter, it may file an appropriate petition for extraordinary relief or motion for leave to amend for the Court's consideration. Such a desire, however, does not require that the Parties return to the pleadings stage, and the Motion is denied.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: December 4, 2001

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ORDER

AND NOW, this 4th day of December, 2001, upon consideration of the Motion for Reconsideration of Defendant Mitek Products and all other matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Motion is DENIED.

BY THE COURT:

_____
JOHN W. HERRON, J.