

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

ATCHISON CASTING CORP.,	:	
	:	JULY TERM, 2002
Plaintiff/Counter-Defendant	:	
	:	No. 003193
v.	:	
	:	Commerce Program
DELOITTE & TOUCHE, LLP,	:	
	:	
Defendant/Counter-Plaintiff,	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	Control No. 092939
HUGH H. AIKEN	:	Control No. 101332
KEVIN T. McDERMED	:	
THOMAS ARMSTRONG	:	
JEFFREY BRENTANO	:	
THOMAS LAMBACH	:	
CHARLES TIMOTHY STOREY,	:	
BRYAN FAUS,	:	
	:	
Third-Party Defendants	:	
	:	

ORDER

AND NOW, this 14th day of March, 2003, upon consideration of the Preliminary Objections of plaintiff/counter-defendant, Atchison Casting Corp. (“Atchison”), to the defendant/counter-plaintiff’s, Deloitte & Touche (“Deloitte’s”) Answer and Counterclaim, and the Preliminary Objections of third-party defendants, Hugh H. Aiken, Kevin T. McDermid, Thomas Armstrong, and Jeffrey Brentano, to Deloitte’s Third-Party Complaint, as well as the respective responses, the memoranda in support and in opposition, and all other matters of record, and in accord with the contemporaneous Opinion being filed of record, it is hereby

ORDERED and **DECREED** as follows:

1. Atchison's and Mssrs. Aiken's, McDermed's, Armstrong's, and Brentano's preliminary objections to Deloitte's fraud and negligent misrepresentation claims against them are **sustained**, and said claims are dismissed with prejudice;
2. Mssrs. Aiken's, McDermed's Armstrong's and Brentano's preliminary objection to Deloitte's contribution claim against them is **sustained**, and said claim is dismissed without prejudice to re-plead within 20 days; and
3. Deloitte's claims against Atchison and third-party defendants for aiding and abetting fraud and against Atchison for breach of the covenant of good faith and fair dealing have been **withdrawn** by Deloitte with prejudice.

BY THE COURT,

C. DARNELL JONES, II, J.

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BRYAN FAUS,	:	
	:	
Third-Party Defendants	:	
	:	

OPINION

Before the court are the Preliminary Objections of plaintiff/counter-defendant, Atchison Casting Corp. (“Atchison”), to the defendant/counter-plaintiff, Deloitte & Touche (“Deloitte’s”) Answer and Counterclaim, and the Preliminary Objections of third-party defendants, Hugh H. Aiken, Kevin T. McDermed, Thomas Armstrong, and Jeffrey Brentano, to Deloitte’s Third-Party Complaint. For the reasons set forth below, this court sustains both sets of Preliminary Objections.

Deloitte’s pleadings set forth the following facts, which the court assumes to be true only

for purposes of ruling on the Preliminary Objections. Atchison engaged Deloitte to audit Atchison's annual consolidated financial statements for the years 1996 through 2000, and, in 1999, Atchison engaged Deloitte to conduct a review of certain of Atchison's financial and business processes (collectively, the "Audit and Review"). Deloitte's Answer and Counterclaim, ¶ 151. During the period that Deloitte was conducting its Audit and Review, third-party defendant, Thomas Lambach, who was the CFO of one of Atchison's subsidiaries, apparently misappropriated funds, submitted incorrect financial information to Atchison, and 'cooked the books' of Atchison's subsidiary. *Id.* at ¶¶ 153-5.

Atchison alleges in its Complaint against Deloitte that Deloitte should have, but failed to, uncover Mr. Lambach's wrongdoing, and, as a result, Atchison suffered significant economic and reputational harm. Deloitte has counterclaimed that Atchison caused its own harm and caused harm to Deloitte because Atchison learned of Mr. Lambach's suspicious activities in late 1999 or early 2000, but failed to inform Deloitte of them until October, 2000. *Id.* at ¶¶ 154-6. Deloitte has also brought a third-party complaint against certain of Atchison's current and former employees, including Mssrs. Aiken, McDermed, Armstrong, and Brentano, whom Deloitte claims knew about Mr. Lambach's wrongdoing, but failed to inform Deloitte about it. Atchison has filed preliminary objections to Deloitte's claims against it for fraud, negligent misrepresentation, breach of covenant of good faith and fair dealing, and aiding and abetting fraud, but Atchison has not objected to Deloitte's breach of contract claim against it. Mssrs. Aiken, McDermed, Armstrong, and Brentano have objected to all of Deloitte's claims against them, which include fraud, negligent misrepresentation, aiding and abetting fraud, and contribution.

I. Deloitte’s Fraud and Negligent Misrepresentation Claims Against Atchison and Mssrs. Aiken, McDermed, Armstrong, and Brentano.

Deloitte’s tort claims against the objecting defendants must be dismissed under the gist of the action doctrine which “precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . 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). “[A] contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly.” Phico Ins. Co. v. Presbyterian Medical Services Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995). A tort claim is barred “where the duties allegedly breached were created and grounded in the contract itself . . .[or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract.” Etoll, Inc., 811 A.2d at 19 (dismissing claims for fraud in performance of contract against defendants.)

In this case, Deloitte claims that Atchison “had a duty to make truthful representations and disclosures to Deloitte in connection with each of Deloitte’s audits and its process review.” Answer and Counterclaim, ¶¶ 165, 176. Deloitte further alleges that Atchison, through Mssrs. Aiken, McDermed, Armstrong, and Brentano, intentionally and negligently breached that duty by making “material, false representations and omissions to Deloitte.” Id. at ¶ 166. *See also id.* at ¶ 177. However, Deloitte later admits that the duty that was breached was imposed by the contracts between Atchison and Deloitte. Id. at ¶ 181 (“[b]y contracting with Deloitte, Atchison undertook . . . the obligation to deal honestly with Deloitte [and] fully disclose all information to

it”). Therefore, Deloitte’s intentional and negligent misrepresentation claims against Atchison are really claims that Atchison, through its agents, intentionally and negligently breached the contract with Deloitte. It does not matter in what manner Atchison committed the alleged breach; it is still simply a breach of contract, and the gist of Deloitte’s action in this case clearly sounds in contract. Therefore, Deloitte’s tort claims against Atchison and Mssrs. Aiken, McDermed, Armstrong, and Brentano are dismissed¹.

II. Deloitte’s Negligent Misrepresentation Claim Against All Objecting Third-Party Defendants.

This Court has additional grounds upon which to sustain third-party defendants’ preliminary objection to Deloitte’s negligent misrepresentation claim against them. “Where a plaintiff asserts negligent misrepresentation and seeks only damages for economic loss, the defendant is entitled to judgment as a matter of law.” David Pflumm Paving & Excavating, Inc. v. Foundation Services, Co., __, A.2d __, 2003 WL 220475, *7 (Pa. Super. Feb. 3, 2003). In

¹ The Superior Court in Etol likewise dismissed the fraud claims against both the advertising agency and its individual employee-agents under the gist of the action doctrine.

Both the gist of the action doctrine and the economic loss doctrine, which is discussed in the next section of this opinion, have long served the laudatory goal of keeping the law of tort and the law of contract from becoming merged or confused. Since both such doctrines clearly apply to the facts of this case, this court must dismiss Deloitte’s tort claims against Atchison and its agents pursuant to the policy of *stare decisis*.

Unfortunately, both of these tort limiting doctrines run the risk of being viewed as a license to lie by the businesspersons to whose conduct they apply. See Jason Miller, J.D., Fraud Claims that Concern Performance of Contractual Duties Barred, 4 No. 26 Lawyers J. 3 (Dec. 27, 2002). In light of current events in the business world, e.g., the problems faced by Enron, MCI Worldcom and many others, it might behoove the Pennsylvania legislature to step in, as the federal government has attempted to do, to find a way to prevent or punish deceitful acts committed by corporations, their officers, employees, and agents. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7241 *et seq.*

this case, Deloitte claims only legal fees (and potential payments to Atchison) as the damages it suffered due to the third-party defendants' alleged wrongs. Third-Party Complaint, ¶ 28. Since Deloitte alleges only economic loss, its negligent misrepresentation claim against Atchison and Mssrs. Aiken, McDermed, Armstrong and Brentano must be dismissed.

III. Deloitte's Contribution Claim Against Aiken, McDermed, Armstrong and Brentano.

Third-party defendants' demurrer to Deloitte's contribution claim against them must be sustained. "The equitable obligation of contribution may be asserted where: (1) the parties combined to produce the plaintiff's injury; (2) the parties are each liable in tort to the plaintiff; and (3) [a claim has been asserted against the party claiming contribution demanding that he] discharge the common liability by paying more than his pro rata share." Mattia v. Sears, Roebuck & Co., 366 Pa. Super. 504, 508, 531 A.2d 789, 791 (1987). In this case, Deloitte has not asserted valid contribution claims against Mssrs. Aiken, McDermed, Armstrong and Brentano because Deloitte has not alleged that they are liable to Atchison in tort.

Deloitte alleges that Mssrs. Aiken, McDermed, Armstrong and Brentano committed the following wrongs vis-a-vis Atchison:

"As high level employees of Atchison, Aiken, McDermed, Armstrong [and] Brentano . . . each owed Atchison a duty of care, a duty of good faith and a fiduciary duty." Third-Party Complaint, ¶ 15.

"During the time that Deloitte was performing each of its audits and its Process Review, Aiken, McDermed, Armstrong, [and] Brentano . . . became aware of suspicious activities by Lambach," but did not tell Deloitte about their suspicions. Id. at ¶ 16.

"The withholding of this material information from Deloitte was . . . a breach of [Aiken's, McDermed's, Armstrong's and Brentano's] duties to Atchison and Deloitte." Id. at ¶ 25.

As a result of their failure to disclose their suspicions about Lambach to Deloitte, Aiken, McDermed, Armstrong and Brentano “were a direct and proximate cause of Atchison’s injury, and thus are liable in contribution to Deloitte for any loss Deloitte sustains as a result of any judgment on Atchison’s Complaint.” *Id.* at ¶ 29.

Aiken, McDermed, Armstrong and Brentano “are joint tortfeasors with Deloitte, [since they] breached their duties of care and honest dealing to Atchison.” *Id.* at ¶ 53.

The wrong that Deloitte claims Mssrs. Aiken, McDermed, Armstrong and Brentano committed against Atchison was a breach of their fiduciary duties to Atchison. However, their alleged fiduciary duties arise out of their employment relationship, i.e. contract, with Atchison, so that Deloitte’s breach of fiduciary duty claim against them (if any) sounds in contract, not in tort. *See Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10 (Pa. Super. 2002) (gist of the action doctrine). Since Deloitte has not alleged facts that show that Mssrs. Aiken, McDermed, Armstrong and Brentano committed a tort against Atchison, Deloitte has not alleged facts that show that they are joint tortfeasors with Deloitte, and they cannot be liable to Deloitte for contribution. Deloitte’s contribution claim is, therefore, dismissed as against Mssrs. Aiken, McDermed, Armstrong and Brentano without prejudice to re-plead it within 20 days to set forth what tort, if any, these third-party defendants committed against Atchison.

IV. Deloitte’s Breach of Covenant of Good Faith and Fair Dealing Against Atchison and Aiding and Abetting Fraud Claim Against Atchison and Third Party Defendants.

Deloitte has agreed to the dismissal of these claims with prejudice.

CONCLUSION

For all of the foregoing reasons, this court sustains plaintiff's preliminary objections to the Answer and Counterclaim, and this court sustains third-party defendants' preliminary objections to the Third-Party Complaint.

BY THE COURT,

C. DARNELL JONES, II, J.

Dated: March 14, 2003