

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

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EIGHTH FLOOR, INC.	:	
	:	July Term, 2003
Plaintiff,	:	No. 02855
v.	:	
	:	Commerce Program
TERMINAL INDUSTRIAL CORP., MOUNT	:	
CORP., KAPLAN/GROLL	:	
	:	Control No. 091811
Defendants.	:	
	:	

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**ORDER and MEMORANDUM**

**AND NOW**, this 29th day of December, 2003, upon consideration of the Preliminary Objections of Defendants Terminal Industrial Corporation (“Terminal”), Mount Corporation (“Mount”) and Kaplan Groll (“Groll”), all responses in opposition, the respective memoranda, all matters of record, and in accordance with the Memorandum Opinion being contemporaneously filed with this Order, it hereby is **ORDERED** and **DECREED** as follows:

1. By stipulation, Count I (breach of contract) is **DISMISSED** as to Defendants Mount and Groll. Pl. Resp. at ¶ 7.
2. Defendants’ Preliminary Objection to Count II is **SUSTAINED** and Plaintiff’s negligence claim is dismissed as to all Defendants;
3. Defendants’ Preliminary Objection concerning attorney’s fees is **SUSTAINED** and all references to same are stricken from the Complaint;
4. Defendants’ Preliminary Objection concerning punitive damages is **SUSTAINED** as to Count I and all such references are stricken from Count I of the Complaint; and
5. The remainder of Defendants’ Preliminary Objections are **OVERRULED**.

Defendants are directed to file an answer to the remainder of Plaintiff's Complaint within twenty (20) days from the date of entry of this Order.

**BY THE COURT:**

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***GENE D. COHEN, J.***

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	:	Control No. 091811
Defendants.	:	
	:	

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**MEMORANDUM OPINION**

***GENE D. COHEN, J.***

Before the Court are the Preliminary Objections of Defendants Terminal Industrial Corporation (“Terminal”), Mount Corporation (“Mount”) and Kaplan Groll (“Groll”). For the reasons fully set forth below, Defendants’ Preliminary Objections are **sustained in part** and **overruled in part**.

**I. Defendants’ Preliminary Objections to Count I (Breach of Contract) Are Sustained in Part and Overruled in Part**

Defendants have filed Preliminary Objections to Count I of the Complaint seeking dismissal of Plaintiff’s breach of contract claim as to all Defendants. As a preliminary matter, in its response, Plaintiff admits that Mount and Groll were not parties to the lease at issue and agrees to their dismissal from Count I by stipulation. Pl. Resp. at ¶ 7. Accordingly, Count I is dismissed as to these Defendants.

To sustain a claim for breach of contract, a plaintiff must demonstrate: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat’l Assn. v. Cutillo, 723 A.2d 1053 (Pa. Super. 1999).

Based on the foregoing, this court finds that at this preliminary stage of the litigation, Plaintiff's breach of contract claim against Terminal has been sufficiently pled to withstand the instant Preliminary Objections. As such, Terminal's Preliminary Objection to Count I is **overruled** and Plaintiff's breach of contract claim against it will proceed accordingly.

## **II. Plaintiff's Negligence Claim (Count II) Is Dismissed as to All Defendants**

Count II of Plaintiff's Complaint purports to state a claim for negligence against all Defendants. Any negligence action is premised on the existence of a duty owed by one party to another. Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994); Barbish v. Greyhound Lines, Inc., 1999 WL 33248336, 48 Pa. D. & C. 4th 469 (1999). According to the Complaint, the "duty" purportedly breached by Defendants is based upon their alleged breach of the lease. Compl. at ¶ 38. However, Count II fails as to all Defendants.

First, Plaintiff has failed to demonstrate the existence of a legally recognized duty owed to it by either Mount or Groll, as Plaintiff's negligence claim is based upon the breach of a lease to which, by Plaintiff's own admission, neither Mount nor Groll was a party. As a matter of fact, Plaintiff pleads no facts whatsoever concerning the role of either Mount or Groll in this dispute. If Plaintiff seeks to assert a breach of a duty by Mount or Groll other than that which arises by contract, it must plead sufficient facts to support such a claim in its Complaint, otherwise it fails as a matter of law. Accordingly, Count II is dismissed as to those Defendants.

In addition, Plaintiff's negligence claim against Terminal fails under the gist of the action doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." 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, as here, “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. As stated in the Complaint, the only duty allegedly breached by Terminal was its contractual duty under the lease agreement. The fact that Terminal may have negligently, recklessly, or intentionally breached that contractual duty does not give rise to a tort claim, but instead provides a basis for a breach of contract claim only. Therefore, Count II is dismissed as to Terminal.<sup>1</sup>

### **III. Plaintiff Is Not Entitled To Punitive Damages in Count I**

Defendants have also moved to strike Plaintiff’s demand for punitive damages. Under Pennsylvania law, punitive damages are not awardable for breach of contract. The Flynn Company v. Peerless Door & Glass, Inc., 2002 WL 1018937, \*3 (Pa.Com.Pl. 2002). As such, Defendants’ Preliminary Objection regarding punitive damages is sustained as to Count I and all references to punitive damages hereby are stricken from Count I of the Complaint.

### **IV. Plaintiff Is Not Entitled To Attorney’s Fees**

Plaintiff has also requested an award of attorney’s fees, which are not recoverable at bar. “[T]he parties to litigation are responsible for their own fees unless otherwise provided by statutory authority, agreement of the parties or some other recognized exception.” Equibank v. Miller, 422 Pa. Super. 240, 619 A.2d 336, 338 (1993). Plaintiff cites no statute, agreement or recognized exception authorizing an award of attorney’s fees in this matter. Accordingly, the court sustains Defendants’ Preliminary Objection and strikes all demands for attorney’s fees

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<sup>1</sup> This court has additional grounds upon which to sustain Defendants’ Preliminary Objection to Plaintiff’s negligence claims against them. “The economic loss doctrine precludes recovery in negligence actions for injuries which are solely economic.” David Pflumm Paving & Excavating, Inc. v. Foundation Services, Co., 816 A.2d 1164,

from the Complaint.

### CONCLUSION

For the above-stated reasons, Defendants' Preliminary Objections are sustained in part and overruled in part as follows:

1. By stipulation, Count I (breach of contract) is **dismissed** as to Defendants Mount and Groll. Pl. Resp. at ¶ 7;
2. Defendants' Preliminary Objection to Count II (negligence) is **sustained** and Plaintiff's negligence claim is dismissed as to all Defendants;
3. Defendants' Preliminary Objections concerning attorney's fees is **sustained** and all references to same are stricken from the Complaint;
4. Defendants' Preliminary Objections concerning punitive damages is **sustained** as to Count I and all such references are stricken from Count I of the Complaint; and
5. The remainder of Defendants' Preliminary Objections are **overruled**.

Defendants are directed to file an answer to the remainder of Plaintiffs' Complaint within twenty (20) days from the date of entry of this Order.

The court will enter a contemporaneous Order consistent with this Opinion.

**BY THE COURT:**

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**GENE D. COHEN, J.**

***Dated: December 29, 2003***