

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

THE FLYNN COMPANY, : NOVEMBER TERM, 2001

Plaintiff, : No. 0830

v. :

PEERLESS DOOR & GLASS, INC., : **Commerce Program**

ED PRATT, BUNKER PLASTICS, INC., and

LAIRD PLASTICS, INC.

Defendants. : Control No. 121202

O R D E R

AND NOW, this 15th day of May 2002, upon consideration of defendants Ed Pratt and Peerless Door & Glass, Inc.'s Preliminary Objections to the Complaint, the plaintiff's response in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion, it is

ORDERED that:

1. Defendants' Objection seeking dismissal of the Complaint in its entirety is **OVERRULED**;
2. Defendants' Objections seeking dismissal of all claims against Ed Pratt are **SUSTAINED**;
3. Defendants' Objections seeking dismissal of the strict liability, fraud, and punitive damages claims against Peerless Door & Glass, Inc. are **SUSTAINED**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. May 15, 2002

Before the court are defendants' Peerless Door & Glass, Inc. ("Peerless"), Ed Pratt ("Pratt"), Bunker Plastics, Inc., and Laird Plastics, Inc., Preliminary Objections ("Objections") to the Flynn Company's Complaint.

For the reasons discussed, this court is issuing a contemporaneous Order **overruling** the Objections, in part, and **sustaining** the Objections, in part.

BACKGROUND

Plaintiff, a real estate broker and manager, manages an office building located at the Philadelphia International Airport (the “Premises”). Complaint, ¶ 2-3. Plaintiff and Peerless executed a written contract entitled “The Flynn Company Standard Service Contract” (the “Agreement”), on March 3, 2000. Id., Exh. A. Under the Agreement, Peerless was to replace forty existing windows with forty new acrylic windows at the Premises. Complaint, ¶ 10, Exh. A, Proposal. According to the Complaint, defendant Pratt is an officer and agent of Peerless, defendant Bunker is the manufacturer of the new windows, and defendant Laird is the Pennsylvania distributor of the windows. Complaint, ¶¶ 6, 14.

Under the Agreement, plaintiff was to pay Peerless a total amount of \$27,987.00 for the work, which was substantially completed on June 7, 2000. Id., ¶ 12-13, Exh. A, Proposal. On that date, plaintiff inspected the Premises, and, dissatisfied with some of the caulking around the new windows, and deeming such condition a “defect” as defined in the Agreement, retained an amount of \$7,987.00. Complaint, ¶ 13. The Agreement permitted plaintiff to retain monies owed to correct defects, if defendant were in default of curing a defect within five working days of written notice of that defect. Id. Exh. A ¶ 4.

The problem allegedly was “a severe adhesion problem with the caulk used” around the new windows. Complaint, ¶ 15. Claiming that Peerless failed to remedy the problem, plaintiff hired another contractor to carry out remedial measures. Id., ¶ 18.

Meanwhile, Peerless, sent warranty letters to plaintiff, guaranteeing the workmanship for a period of one year from June 7, 2000. Id., ¶ 19. From early 2001 through May of 2001, the defective caulking caused windows to crack and water to leak onto the Premises. Id., ¶¶ 20, 27, 29. Plaintiff notified Peerless, again in vain, and was ultimately required to hire others to effect repairs. Id., ¶¶ 21, 28.

Plaintiff was allegedly told by Bunker that the windows used by Peerless were of the wrong type. Id., ¶ 24. Specifically, the windows should have been made of aluminum rather than acrylic. Id. The other defendants never provided warnings and/or instructions regarding the inappropriateness of said “wrong” windows. Id., ¶ 33.

Plaintiff eventually replaced all the windows. Plaintiff also allegedly incurred costs to repair damage caused by water leakage from the defective windows. Id., ¶ 31.

The Complaint embodies claims of negligence against all defendants, claims for Breach of Implied Warranties against all defendants, claims for Breach of Express Warranty against defendants, Peerless and Pratt, claims in Strict Liability against all of the defendants, and claims of Fraud against defendants Peerless and Pratt. Plaintiff seeks compensatory and punitive damages. **DISCUSSION**

Defendants’ Objections are essentially in the nature of a demurrer as to: (1) all claims against Pratt; (2) the Strict Liability claims in Count IV of the Complaint, and; (3) all claims of recklessness and punitive damages.¹

¹ In their memorandum in support of the Objections, Defendants state that the complaint must be dismissed for the following reasons: (1) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter; (2) insufficient specificity in a pleading; (3) demurrer. See Pa. R.C.P. 1028 (a)(2); (3); and (4). Defendants represent that the above-listed reasons are pled. However, only the demurrer objection is pled. In Foster v. Peat Marwick, the court concluded that failure to plead the objection over the lack of particularity in the complaint effectively constituted a waiver of that objection. Foster v. Peat Marwick, 138 Pa. Cmwlth. 147, 155, 587 A.2d 382, 386 (1991). Accordingly, the defendants have waived the objections under 1028(a)(2) & (3). Id.; Pa. R.C.P. 1028 (a)(2) & (3).

I. Legal Standards For A Demurrer

For the purposes of reviewing preliminary objections in the form of a demurrer, all well-pleaded material, factual averments and all inferences fairly deductible therefrom are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. 2000) (citations omitted). When presented with preliminary objections in the nature of a demurrer, a court should sustain the objections where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. 2000). Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. 1999) (citations omitted).

II. The Preliminary Objection to Dismiss the Complaint in its Entirety

Plaintiff appropriately notes that “there is no justification expressly or impliedly set forth in any Preliminary Objection that would warrant the dismissal of all of the Counts.” Opposition Memo, p.2. Indeed, the court cannot make a decision to dismiss all the claims in a vacuum, particularly when “any doubt should be resolved by a refusal to sustain [preliminary objections].” Milton S. Hershey Medical Center of Pennsylvania State University v. Medical Professional Liability Catastrophe Loss Fund, 763 A.2d 945, 947 n.5 (Pa. Cmwlth. 2000). “All preliminary objections . . . shall state specifically the grounds relied upon . . .” Pa. R.C.P. 1028(b); See also, DelConte v. Stefonick, 268 Pa. Super. 572, 578 n.2, 408 A.2d 1151, 1153 n.2 (1979) (“[W]hen averring that the complaint fails to state a cause of action upon which

relief can be granted, [defendant] must specifically provide the reasons why the complaint does not state a cause of action”; Stewart v. Pennsylvania Bd. of Probation & Parole, 714 A.2d 502, 504 (Pa. Cmwlth. 1998) (respondents who failed to brief issues raised in preliminary objections had waived the right to have those issues considered); Statewide Bldg. Maintenance, Inc. v. Pennsylvania Convention Center Auth., 160 Pa. Cmwlth. 544, 557 n.13, 635 A.2d 691, 698 n. 13 (1993) (support for a preliminary objection, consisting entirely of brief reference to the issue in a footnote, was considered insufficient, and objection to that issue was considered waived).

Here the defendants’ free-floating request must fail. The Preliminary Objection to dismiss the Complaint in its entirety is overruled.

III. The Claims Against Pratt

Plaintiff acknowledges that the Objections seeking dismissal of the claims for Breach of Implied Warranty and Breach of Express Warranty against Pratt are proper. Opposition Memo, p. 6. Defendants’ Objections to those claims are sustained.

There remain three Objections pertinent to Pratt: (a) the negligence claim, (b) the strict liability in tort claim, and (c) the fraud claim. Plaintiff has alleged that defendant Pratt had a duty to use ordinary and reasonable care in providing and installing the windows and in properly installing the caulk around the windows. Complaint, ¶¶ 35-36, 38-40. Merely using tort terms of art to describe defendants’ conduct does not make them actions in tort. Our Superior Court has stated:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. . . [T]he important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 228, 663 A.2d 275, 756 (1995)(citations omitted). See also, Snyder Heating Co. v. Pennsylvania Mfrs. Ass’n. Ins. Co., 715 A.2d 483, 487 (Pa. Super. 1998) (“To be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral”); Redevelopment Authority of Cambria County v. International Insurance Company, 454 Pa. Super. 347, 379-80, 390-91, 685 A.2d 581, 582-83, 589 (Pa. Super. 1996) (finding no tort merely from the use of negligence concepts where the plaintiff had alleged that defendant “had failed to ‘properly perform’ the duties it had assumed under the contract, had been negligent, and had been unjustly enriched” because “the claims arise out of and are based upon duties imposed upon the [defendant] Authority solely as a result of the contract”).

Here, it is the contract between plaintiff and defendants that created the duties which Pratt allegedly breached. Therefore, the gist of the action is a breach of contract. There is no social policy imposing a duty upon Peerless, and its officer Pratt, to replace windows in a proper manner. The duty arises solely from the contract, entered into by mutual consent, between the parties.

The gist of the action doctrine also bars plaintiff’s fraud claim. Count V of the Complaint which alleges fraud is merely a reiteration, albeit in fraud terms, of defendants’ purportedly tortious wrongs. Complaint, ¶¶ 67-75. Again, the gist of those alleged wrongs is in the contract. The fraud allegations are collateral to the breach of contract. “[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 Med. Servs. Corp., 444 Pa. Super. 221, 228, 663 A.2d 275, 756 (1995)(citations omitted). See also, Snyder Heating Co. v. Pennsylvania Mfrs. Ass’n. Ins. Co., 715 A.2d 483, 487 (Pa. Super. 1998).

Accordingly, defendants’ Objections as to all claims against Pratt are sustained.

IV. The Strict Liability Claims

In accord with the analysis which implicates the gist of the action doctrine, the court sustains the Objections to the claims in strict liability against defendant Peerless.²

V. Punitive Damages Claims

“Punitive damages are not recoverable in an action solely based upon breach of contract.” Johnson v. Hyundai Motor Amer., 698 A.2d 631, 639 (Pa. Super. 1997) (citing Thorsten v. Iron & Glass Bank, 328 Pa. Super. 135, 143, 476 A.2d 928, 932 (1984)). Accordingly, since this is action in contract, the defendants’ Objections to claims for punitive damages are sustained.

CONCLUSION

For the reasons discussed, this court will enter a contemporaneous Order sustaining the Objections to all claims against Pratt, the Strict Liability and Fraud claims against Peerless, and the demand for punitive damages. The Objection to dismiss the Complaint in its entirety is overruled.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

² Defendants Laird and Bunker, who are each represented by separate counsel, have not submitted preliminary objections nor joined in the Preliminary Objections of Peerless and Pratt.