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

HONEYWELL INTERNATIONAL, INC., f/k/a HONEYWELL, INC.,	:	MAY TERM, 2001
Plaintiff,	:	No. 2219
v.	:	
	:	Commerce Program
ARCHDIOCESE OF PHILADELPHIA,	:	
Defendant.	:	Control No. 081210

ORDER

AND NOW, this 24th day of October, 2001, upon consideration of the Preliminary Objections of Plaintiff Honeywell International, Inc., f/k/a Honeywell, Inc. ("Honeywell") to the Counterclaims of Defendant Archdiocese of Philadelphia ("the Archdiocese") and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objection asserting legal insufficiency of the unjust enrichment and quantum meruit pleadings is OVERRULED;

2. The Preliminary Objection asserting legal insufficiency of the negligence pleading is SUSTAINED and DISMISSED with prejudice.

BY THE COURT

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JOHN W. HERRON, J..

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ARCHDIOCESE OF PHILADELPHIA,	:	
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MEMORANDUM OPINION

Presently before this court are the preliminary objections of plaintiff Honeywell International, Inc., f/k/a Honeywell, Inc. ("Honeywell") to the counterclaims of defendant Archdiocese of Philadelphia ("the Archdiocese"). For the reasons set forth below, the preliminary objection asserting legal insufficiency of the unjust enrichment and quantum meruit pleadings is overruled. However, the preliminary objection asserting legal insufficiency of the negligence pleading is sustained.

BACKGROUND

This action arises after Honeywell entered into a written agreement with the Archdiocese to provide for service and maintenance of certain systems at all Archdiocese high schools and other buildings. Specifically, the parties agreed for Honeywell to provide, *inter alia*, water treatment service, and temperature control maintenance. Honeywell commenced this action on May, 22, 2001, alleging that the Archdiocese failed to pay it certain sums due pursuant to the contract. The Archdiocese filed several counterclaims alleging, *inter alia*, that Honeywell's lack of maintenance resulted in it having to hire another contractor to repair what Honeywell had not done, and, therefore, it alleges Honeywell not

only breached the contract but was also unjustly enriched as result. On August 20, 2001, Honeywell filed these preliminary objections to the Archdiocese's counterclaims of unjust enrichment, quantum meruit, and negligence asserting legal insufficiency of a pleading.

DISCUSSION

Pennsylvania Rule of Civil Procedure [Pa.R.C.P] 1028(a)(4) allows for preliminary objections based on legal insufficiency of a pleading. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct 2000). Preliminary objections, whose end result would be the dismissal of a cause of a cation, should be sustained only 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. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000) (citations omitted).

I. Plaintiff's Preliminary Objection Asserting Legal Insufficiency of Unjust Enrichment and Quantum Meruit Pleadings is Overruled

Honeywell avers that the Archdiocese has failed to plead sufficient facts to support a cause of action based on unjust enrichment or quantum meruit. This court disagrees. Unjust enrichment is a quasi-contractual doctrine based in equity which requires the following elements: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa.Super.Ct.1999), appeal denied, 561 Pa. 700, 751 A.2d 193 (2000).

The Pa.R.C.P. permit plaintiffs to plead causes of action in the alternative. See Pa.R.C.P.

1020(c). Further, the complaint is not defective merely because the causes of action are inconsistent or conflicting. Baron v. Bernstein, 175 Pa.Super. 608, 610, 106 A.2d 668, 669 (1954). Plaintiffs may properly plead causes of action for breach of contract and unjust enrichment in the same complaint. See, e.g. J.A. & W.A. Hess, Inc. v. Hazle Township, 465 Pa. 465, 468, 350 A.2d 858, 860 (1976) (holding that the trial court erred in refusing to consider unjust enrichment claim along with breach of contract claim); Lampl v. Latkanich, 210 Pa.Super. 83, 88, 231 A.2d 890, 892 (1967). However, it is true that plaintiffs cannot recover on a claim for unjust enrichment if such claim is based on a breach of a written contract. See Birchwood Lakes Community Ass'n v. Comis, 296 Pa.Super. 77, 442 A.2d 304, 308 (1982); Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987).

Here, the Archdiocese sufficiently pleads its claim of unjust enrichment. Specifically, the Archdiocese alleges that since it was forced to pay "another contractor for parts and labor that should have been covered under the Honeywell contract" the benefit conferred upon Honeywell was the money it saved by not performing its duties pursuant to the contract. Def's Counterclaim to Pl's Complaint at ¶35; Def's Reply to Pl's P.O. at 4. Furthermore, the Archdiocese alleges that "to the extent that Honeywell chose not to perform these repairs or perform them in a shoddy manner, it appreciated that it was not expending money for services and parts..." Def's Repl to Pl's P.O. at 5. Finally, the Archdiocese has alleged the final element of its unjust enrichment claim - namely that acceptance and retention of such benefits is inequitable. "It is inequitable" for Honeywell to "retain these benefits" because "Honeywell...accept[ed] payment for work that was not performed or faultily performed." Id. Having found that the Archdiocese has sufficiently pleaded its claim for unjust enrichment, this court overrules plaintiff's preliminary objection.

The court now turns to the Archdiocese's claim for quantum meruit. The Pennsylvania

Superior Court has held the following:

> The equitable doctrine of quantum meruit involves a class of obligations imposed by law, regardless of the intention or assent of the parties for reasons dictated by justice and is based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby. To avoid such unjust enrichment, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor. In short, this doctrine describes the extent of liability on a contract implied-in-law for labor and materials and, while there is no contract per se, the form of action is contract.

Bednar v. Marino, 435 Pa. Super. 417, 426, 646 A.2d 573, 578 (1994) (citations omitted).

Furthermore, "a cause of action in quasi-contract for quantum meruit... is made out where one person has been unjustly enriched at the expense of another." Mitchell v. Moore, 729 A.2d 1200, 1202 n.2 (Pa.Super. 1999) (citations omitted). "Therefore, a claim of quantum meruit raises the issue of whether a party has been unjustly enriched, and in order to prove such claim a party must successfully prove the elements of unjust enrichment..." Id.

Here, the Archdiocese has sufficiently alleged the cause of action of unjust enrichment for purposes of pleadings. As mentioned above, it is alleged that Honeywell benefitted from services and materials provided by the contractor the Archdiocese was forced to hire in fixing the alleged "defective maintenance." Def's Reply to Pl. P.O. at 6. Therefore, whether the Archdiocese can recover in quantum meruit will be determined by the evidence presented in proving that Honeywell was unjustly enriched. For now, however, it is enough that the factual averments of the unjust enrichment claim and request for quantum meruit are legally sufficient and therefore withstand plaintiff's preliminary objections.

II. Defendant's Negligence Claim is Dismissed with Prejudice Because it is Not the "Gist of the Action"

Honeywell avers that the counterclaim for breach of contract, not for negligence, is the "gist of

the action." Therefore, this court should dismiss defendant's claim of negligence. This court agrees. Determining whether the Archdiocese counterclaim sounds primarily in contract or in tort "is difficult due to the somewhat confused state of our law." Redevelopment Authority of Cambria County v. International Ins. Co., 454 Pa.Super. 374, 391, 685 A.2d 581, 590 (1996) (citing Grode v. Mutual Fire, Marine, and Inland Ins. Co., 154 Pa.Commw. 366, 623 A.2d 933 (1993)). There are two lines of case law relating to the issue. The first line arose with Raab v. Keystone Insurance Co., 271 Pa.Super. 185, 412 A.2d 638 (1979), which examined a claim that an insurance company had negligently failed to pay benefits according to an insurance contract. In Raab, the court stated the following:

> Generally, when the breach of a contractual relationship is expressed in terms of tortious conduct, the cause of action is properly brought in assumpsit and not trespass. However, there are circumstances out of which a breach of contract many give rise to an actionable tort. The test used to determine if there exists a cause of action in tort growing out of a breach of contract is whether there was an improper performance of a contractual obligation (misfeasance) rather than the mere failure to perform (nonfeasance).

Id. at 187-88, A.2d at 639 (citations omitted).

The Pennsylvania Superior Court has later rejected the "simple rule" expressed in Raab as inadequate to determine the true character of a claim, but, instead, has followed the approach announced in Bash v. Bell Telephone Co., 411 Pa.Super. 347, 601 A.2d 825 (1992).[1] See, e.g. Redevelopment Authority, 454 Pa.Super. at 392, 685 A.2d at 590; Phico Ins. Co. v. Presbyterian Medical Services Corp., 444 Pa.Super. 221, 228, 663 A.2d 753, 757 (1995). The Phico court noted the following:

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[1]In Bash, the Superior Court, affirming the preliminary objections, held that the alleged failure to include the customer's advertisement in the telephone directory arose out of the contractual obligations, and was not actionable in negligence. Id. at 356-57, 601 A.2d at 829-30.

> In [Bash], which arose in connection with the breach of an agreement relating to the publication of a telephone directory advertisement, we examined federal authority and indicated that 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. In addition, we noted that a contract action may not be converted into a tort action simply by alleging that the conduct in question was done *wantonly*. Finally, we stated that the 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.

Id. at 228-29, 663 A.2d at 757 (emphasis added).

The reasoning and procedural posture of Grode is persuasive in deciding the present issue. In that case, the Commonwealth Court overruled preliminary objections to the tort claims brought by an insurance company against a contractor despite the parties contractual relationship. 154 Pa.Commw. at 373, 623 A.2d at 937. It recognized that the complaint clearly alleged negligent and fraudulent performance under the contractual relationship, rather that a failure to perform. Id. at 373, 623 A.2d at 936. Further, the court reasoned that "a tort claim in a contractual relationship for services should not be dismissed at an early stage of proceedings prior to the production of evidence" since "a substantial body of Pennsylvania case law holds a defendant liable for misfeasance in the performance of a contract." Id. at 372, 623 A.,2d at 936 (quoting Public Service Enterprise Group, Inc. v. Philadelphia Electric Co., 722 F.Supp. 184, 212 (D.N.J. 1989)).

However, unlike in Grode, here it is clear and free from doubt that the Archdiocese's claim for negligence is entirely dependent upon the express terms of the contract, and it is merely a way of re-stating its breach of contract claim. The gravamen of the negligence claim alleges that Honeywell, by "its dangerous repairs or lack thereof," improperly failed to perform its contractual obligation. Def's Counterclaim at ¶ 37. Similarly, the gravamen of the breach of contract claim is that due to Honeywell's "mismanagement and lack of maintenance" it failed "to perform its obligations under its service

agreement with the Archdiocese." Id at ¶ ¶32, 34. It is clear that both alleged "wrongs" find their source in and relate directly to the duties arising under the contract - namely Honeywell's obligation to maintain and service. Since the claim for negligence is wholly dependent upon the express terms of the contract and "not by the larger social policies embodied in the law of torts," the counterclaim by the Archdiocese is merely a way of stating that the conduct in question was done wantonly. Bash at 357, 601 A.2d 830. Therefore because the contract action here is clearly the "gist of the action," this court dismisses the negligence claim with prejudice.[2]

CONCLUSION

For the reasons set forth above, the preliminary objection asserting legal insufficiency of the unjust enrichment and quantum meruit pleadings is overruled. However, the preliminary objection asserting legal insufficiency of the negligence pleading is sustained and therefore dismissed with prejudice.

BY THE COURT

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[2]Defendant directs this court to Lang Tendons, Inc v. Northern Insurance Company of New York, 2001 WL 228920 (E.D. Pa. March 27, 2001) in support if its argument that the negligent claim does not fall within the scope of the contract claim. However, the present matter is clearly distinguishable from that case. In Lang Tendons, the court held that "allegations, especially allegations of negligent design, involve[d] conduct that presumably predated the contract... If its materials caused damage due to a defect that reasonably should have been avoided or discovered through reasonable testing or design procedures, then Lang could still be held liable for such damages based on traditional common law negligence principles." Id at*7. Here, however, any duty Honeywell had to the Archdiocese clearly arose exclusively from the contract, and not from conduct predating the contract. There is a difference between the malfunctioning of a product giving rise to tort claims and claims arising out of failure to perform under terms of an agreement. See Ryan Homes, Inc. v. Home Indem. Co., 436 Pa.Super. 342, 647 A.2d 939 (1994).

JOHN W. HERRON, J.

DATE: October 24, 2001