

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

GMHV, LLC

*Plaintiff*

v.

GETMYHOMESVALUE.COM, INC.

*Defendant*

: March Term, 2012  
:  
: Case No. 004026  
:  
:  
: Commerce Program  
:  
: Control No. 12062869  
:

ORDER

And Now, this 12<sup>th</sup> day of December, 2012, upon consideration of the preliminary objections of defendant GetMyHomesValue.Com, Inc., the answer in opposition of plaintiff GMHV, LLC, and the respective memoranda of law, it is

**Ordered** that the preliminary objections are **Sustained-in-part** and **Denied-in-part** as follows:

- I. the preliminary objections are sustained as to plaintiff's prayer to recover start-up expenditures under the breach-of-contract claim. The prayer to recover such expenditures is stricken from the breach-of-contract claim asserted in count I of the complaint;
- II. the preliminary objections are sustained as to plaintiff's prayer to recover punitive damages under the breach-of-contract claim. The prayer to recover such damages is stricken from the breach-of-contract claim asserted in count I of the complaint;
- III. the preliminary objections are sustained as to plaintiff's prayer to recover

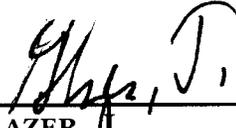
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attorney's fees. Plaintiff's prayer to recover attorney's fees is stricken as to all counts of the complaint;

IV. the preliminary objections are otherwise overruled.

**By The Court,**

  
\_\_\_\_\_  
GLAZER, J.

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

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<b>GMHV, LLC</b>	:	March Term, 2012
<i>Plaintiff</i>	:	Case No. 004026
<b>v.</b>	:	
<b>GETMYHOMESVALUE.COM, INC.</b>	:	Commerce Program
<i>Defendant</i>	:	Control No. 12062869
	:	

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**OPINION**

Defendant’s preliminary objections to Plaintiff’s complaint ask the court to dismiss the claims of negligent misrepresentation and intentional misrepresentation, and to strike Plaintiff’s prayer to recover start-up expenditures, punitive damages, interest and attorney’s fees. For the reasons below, the preliminary objections are sustained-in-part and overruled-in-part.

**Background**

Plaintiff, GMHV, LLC, (“Plaintiff,”) is s Pennsylvania limited-liability company with an address at 911 Primrose Lane, in Wynnewood, Pennsylvania. Defendant, GETMYHOMESVALUE.COM, Inc. (“Defendant,”) is a Pennsylvania corporation with an address at 221 Rohrerstown Road, in Lancaster, Pennsylvania.)

On March 30, 2012, Plaintiff filed a complaint asserting against Defendant four claims sounding in breach-of-contract, negligent misrepresentation, intentional misrepresentation, and punitive damages. Under the claims of breach-of-contract, negligent misrepresentation and intentional misrepresentation, Plaintiff prays for

recovery of attorney's fees, punitive damages, interest and lost start-up expenditures. In the complaint, Plaintiff avers that it entered with Defendant into a business relationship whereby Plaintiff agreed on behalf of Defendant to sell to nationwide realtors the names and addresses of prospective real estate buyers and sellers. In the complaint, Plaintiff avers that it leased office space, acquired a computer system, hired employees, and performed its work, pursuant to a written contract titled Sales and Marketing Agreement (the "Contract.") The Contract, attached as Exhibit A to the complaint, was never signed. However, the complaint asserts that "the parties agreed to move forward with their business relationship based upon the terms of [the Contract,]" even though the Contract had not been signed by either party.<sup>1</sup> The unsigned Contract contains the following provisions:

All disputes between the parties to this Agreement arising out of, or relating to, the interpretation, or performance pursuant to the terms of this Agreement, or any breach thereof, that are not resolved by mediation ... shall, without exception, be resolved ... by binding arbitration....<sup>2</sup>

\* \* \*

#### Limitation of Liability

NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY REIMBURSEMENTS OR DAMAGES FOR LOST PROFITS, EXPENDITURES, INVESTMENTS OR COMMITMENTS, WHETHER MADE IN THE ESTABLISHMENT, DEVELOPMENT OR MAINTENANCE OF THE BUSINESS GOODWILL OF SUCH PARTY, OR ANY OTHER REASON WHATSOEVER. UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND.<sup>3</sup>

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<sup>1</sup> Complaint, ¶ 11.

<sup>2</sup> Sales and Marketing Agreement, ¶ 18(c), Exhibit A to the Complaint.

<sup>3</sup> Id., ¶ 7.

On June 4, 2012, Defendant filed a Petition to Compel Arbitration based on the mandatory arbitration provision in the unsigned Contract. Subsequently, on June 22, 2012, more than twenty days after the complaint was served, Defendant filed preliminary objections to the complaint. The preliminary objections ask the court to rule that pursuant to the Limitation of Liability provision in the unsigned Contract, there cannot be recovery for start-up expenditures incurred by Plaintiff.<sup>4</sup> The preliminary objections also ask the court to dismiss the claims sounding in negligent and intentional misrepresentation, and strike Plaintiff's demand to recover punitive damages and attorney's fees.

On July 5, 2012, Plaintiff filed preliminary objections to the preliminary objections of Defendant ("Plaintiff's Preliminary Objections.") Plaintiff's Preliminary Objections asked the court to strike Defendant's preliminary objections as untimely because more than twenty days had elapsed since the filing of the complaint.

On July 13, 2012, this court entered an Order denying Defendant's Petition to Compel Arbitration.<sup>5</sup> Subsequently, Defendant filed a motion for reconsideration on July 31, 2012, and this court entered an Order denying that motion.<sup>6</sup>

On August 8, 2012, this court entered an Order overruling Plaintiff's Preliminary Objections to the preliminary objections of Defendant. The court explained that although Defendant had untimely filed its preliminary objections to the complaint, the late filing was permitted "if the opposing party is not prejudiced and justice requires."<sup>7</sup>

On July 13, 2012, Defendant appealed the Order of this court which had denied Defendant's Petition to Compel Arbitration. However, Defendant withdrew its appeal

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<sup>4</sup> Defendant's preliminary objections to the complaint, ¶¶ 8-18.

<sup>5</sup> Order dated July 13, 2012, issued by the Honorable Judge John W. Herron.

<sup>6</sup> Order dated July 31, 2012, issued by the Honorable Judge John W. Herron.

<sup>7</sup> Order dated August 8, 2012.

on December 6, 2012, before the Pennsylvania Superior Court could issue a ruling.

The preliminary objections of Defendant are ripe for a decision.

### **Discussion**

The law on preliminary objections is well settled:

All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true.... The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.<sup>8</sup>

I. **Defendant's preliminary objections are overruled as to the claims of negligent and intentional misrepresentation.**

In the preliminary objections, Defendant asserts that the claims of negligent and intentional misrepresentation should be dismissed under the parol evidence rule and the gist-of-the-action doctrine. Under the parol evidence rule,

Alleged prior or contemporaneous oral representations or agreements concerning subjects that are specifically dealt with in the written contract are merged in or superseded by that contract. The effect of an integration clause is to make the parol evidence rule particularly applicable. Thus the written contract, if unambiguous, must be held to express all of the negotiations, conversations, and agreements made prior to its execution, and neither oral testimony, nor prior written agreements, or other writings, are admissible to explain or vary the terms of the contract.<sup>9</sup>

Under the gist-of-the-action doctrine, a plaintiff is precluded from

re-casting ordinary breach of contract claims into tort claims.... The ... difference between contract claims and tort claims [is] as follows: although they derive from a common origin, distinct differences between civil actions for tort and contract breach have developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social

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<sup>8</sup> Emplrs. Ins. of Wausau v. DOT, 581 Pa. 381, 389; 865 A.2d 825, 830 (Pa. 2005).

<sup>9</sup> 1726 Cherry St. Partnership v. Bell Atlantic Properties., 439 Pa. Super. 141, 145; 653 A.2d 663, 665 (Pa. Super. 1995).

policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.... To permit a promisee to sue his promisor in tort for breaches of contract inter se would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.<sup>10</sup>

Both the parol evidence rule and the gist-of-the-action doctrine require the existence of a contract. The contract must be written if the parol evidence rule applies, or may be written or oral if the gist-of-the-action does. In this case however, a question of fact exists as to whether the unsigned Contract is altogether valid and enforceable because it lacks the signatures of any party. Indeed, the signature page of the Contract states:

IN WITNESS WHEREOF, the parties hereto have duly executed this Sales and Marketing Agreement, as of the date first above written.

GETMYHOMESVALUE.COM, INC.:  
By [**Unsigned**]  
Print Name \_\_\_\_\_  
Title \_\_\_\_\_

GMHV, LLC:  
By [**Unsigned**]  
Print Name \_\_\_\_\_  
Title \_\_\_\_\_<sup>11</sup>

In addition, the same page also states:

Intending to be legally bound, the parties below, who are all shareholders of GetMyHomesValue.Com. Inc., hereby join in section 10 of this Agreement [relating to a right-of-first refusal provision.]

\_\_\_\_\_  
[Name of ... Shareholder] [**Unsigned**]

\_\_\_\_\_  
[Name of ... Shareholder] [**Unsigned**]  
\_\_\_\_\_

<sup>10</sup> eToll, Inc. v. Elias/Savion Adver., 2002 Pa. Super. 347, P14; 811 A.2d 10, 13 (Pa. Super. 2002).

<sup>11</sup> Sales and Marketing Agreement, Exhibit A to the Complaint, p. 9.

[Name of ... Shareholder] [**Unsigned.**]<sup>12</sup>

In this case, the absence of any signature creates the inference that neither the shareholders of GETMYHOMESVALUE.COM, INC., nor the officers and directors of either party, intended to be bound to any provision of the Sales and Marketing Agreement. The inference that neither party intended to be bound to the terms of the entire unsigned Contract raises a question of fact –namely, whether the unsigned Contract is altogether valid and enforceable. Admitting the inference as true under the standards for preliminary objections, Plaintiff must be allowed to maintain the claims of negligent and intentional misrepresentation as alternatives to its breach-of-contract claim. However, if it is determined at a later stage of litigation that the unsigned Contract is enforceable and the claim of breach-of-contract viable, then Plaintiff will be barred from maintaining the claims of negligent and intentional misrepresentation under the parol evidence rule, or under the gist-of-the-action doctrine. The preliminary objections are overruled as to Defendant’s demurrer to the claims of negligent misrepresentation and intentional misrepresentation.

**II. Under the terms of the unsigned Contract, start-up expenditures are not recoverable.**

The complaint asserts that as a result of Defendant’s breach of contract, Plaintiff sustained financial losses which include “monies paid out for rent, wages, insurance, I[formation] T[echnologies], business supplies and furniture.”<sup>13</sup> Plaintiff thus seeks recovery of start-up expenditures under the claims of breach-of-contract, negligent misrepresentation and intentional misrepresentation, asserted respectively in counts I, II and III of the complaint. In the preliminary objections attacking the complaint,

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<sup>12</sup> Id.

<sup>13</sup> Complaint, ¶ 25.

Defendant argues that the unsigned Contract specifically bars reimbursement of any investment expenditures made by either party.

“The interpretation of the terms of a contract is a question of law.”<sup>14</sup> Where the language of the contract is clear and unambiguous, a court is required to give effect to that language.<sup>15</sup> In this case, the unsigned Contract clearly and unambiguously states that “neither party shall be liable to the other party for ... damages ... made in the establishment ... of the business goodwill ... or for any other reason whatsoever....”<sup>16</sup> This clear and unambiguous language precludes Plaintiff from seeking recovery of any start-up expenditures under the breach-of-contract claim. Consequently, Defendant’s preliminary objections seeking to strike Plaintiff’s prayer for recovery of start-up expenditures is sustained only as to the claim of breach-of-contract.<sup>17</sup>

**III. Under the terms of the unsigned Contract, punitive damages are not recoverable.**

Plaintiff seeks recovery of punitive damages in each and every claim asserted in the complaint. Conversely, Defendant argues that “[p]unitive damages are not recoverable in a breach of contract case.”<sup>18</sup> Plaintiff also argues that the unsigned Contract specifically bars recovery of punitive damages.<sup>19</sup>

In Pennsylvania, “[p]unitive damages are awarded in tort actions, not for breach of contract.”<sup>20</sup> Also, “[w]here the language of the contract is clear and unambiguous, a

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<sup>14</sup> McMullen v. Kutz, 603 Pa. 602, 609; 985 A.2d 769, 773 (Pa. 2009).

<sup>15</sup> Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606; 735 A.2d 100, 106 (1999).

<sup>16</sup> Marketing Sales Agreement, ¶ 7, attached as Exhibit A to the Complaint (emphasis removed).

<sup>17</sup> Plaintiff is not precluded from seeking to recover start-up expenditures under the claims of negligent and intentional misrepresentation, asserted in counts II and III of the complaint, if the unsigned Contract is unenforceable and the breach-of-contract claim consequently fails.

<sup>18</sup> Defendant’s preliminary objections, ¶ 27.

<sup>19</sup> Id.

<sup>20</sup> McShea v. City of Philadelphia, 606 Pa. 88, 98; 995 A.2d 334, 340 (Pa. 2010).

court is required to give effect to that language.”<sup>21</sup> In this case, Plaintiff may not seek recovery of punitive damages under its breach-of-contract claim because such damages are barred under Pennsylvania case law and by the clear and unambiguous provision in the unsigned Contract. Plaintiff’s prayer for punitive damages is stricken from the claim asserting breach of contract in count I of the complaint.<sup>22</sup>

V. **Plaintiff may not seek recovery of attorney’s fees for legal work obtained in the course of the instant litigation.**

Plaintiff prays for recovery of attorney’s fees in each and every claim asserted in the complaint. In Pennsylvania, “a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception.”<sup>23</sup> In this case, Plaintiff has not identified any express statutory authorization, clear agreement of the parties, or other established exception which would allow recovery of attorney’s fees. Plaintiff’s prayer for attorney’s fees is stricken as to each and every count of the complaint.<sup>24</sup>

**By The Court,**

  
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GLAZER, J.

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<sup>21</sup> Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606; 735 A.2d 100, 106 (1999).

<sup>22</sup> Plaintiff is not barred from seeking punitive damages under the tortious claims of negligent misrepresentation and intentional misrepresentation if the unsigned Contract is unenforceable and the breach-of-contract claim consequently fails.

<sup>23</sup> Mosaica Acad. Charter Sch. v. Commonwealth, 572 Pa. 191, 206-207; 8130A.2d 813, 822 (Pa. 2002).

<sup>24</sup> Plaintiff is not barred from seeking recovery of start-up attorney’s fees, if any, if necessary to set up Plaintiff in its alleged business relationship with Defendant.