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

COLLINS COLLISION CENTER, INC., ET AL	:	**AUGUST TERM, 2012**
	:	**NO. 01057**
v.	:	
	:	**COMMERCE PROGRAM**
REPUBLIC FIRST BANK	:	
	:	**Control No. 12111370**

ORDER

AND NOW, this 13th day of December , 2012, upon consideration of the preliminary objections of defendant, Republic First Bank, and any response thereto, it is hereby

ORDERED

that the said preliminary objections are **SUSTAINED** and plaintiffs' complaint is dismissed.

BY THE COURT:

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GLAZER, J.

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OPINION

GLAZER, J. December 13, 2012

Before the Court are the preliminary objections of defendant, Republic First Bank. For the reasons set for the below, defendant's preliminary objections are sustained.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs commenced this action on August 13, 2012. Preliminary objections to the complaint were filed on September 28, 2012. Subsequently, plaintiffs filed an amended complaint rendering the September 28, 2012 preliminary objections moot. Defendant now brings preliminary objections to plaintiffs' amended complaint. This case arises out of two commercial loans made by Republic First Bank to plaintiffs. On or around April 24, 2006, parties entered into a promissory note, business loan agreement, commercial guarantees and open-ended mortgage for the amount of $205,000.00. The original maturity date of the April 24, 2006 loan was May 1, 2011. See plaintiffs' amended complaint, exhibit A. On or about February 20, 2007, parties entered into a second promissory note, open-end mortgage and business loan agreement in the amount of $75,000.00. In or around April, 2011, the parties

orally agreed to extend the maturity date of the April 24, 2006 loan to January 1, 2012.[1] Furthermore, the parties had been in discussion to refinance the loan ("bridge loan").

Plaintiffs assert that defendant told them to continue making payments until the bridge loan could be reduced to writing. During said negotiations, plaintiffs were in the process of selling a property, 3212-3216 West Cheltenham Avenue, Philadelphia, PA 19150 ("Cheltenham property"), with a contract selling price of $350,000.00. With approximately $173,000.00 remaining owed on the loan, the parties agreed that the proceeds of the sale would be used toward the bridge loan. Specifically, "an agreement was reached between the parties that plaintiff would add $75,000.00 additional collateral to be secured under the existing loan agreement by paying off the line of credit from the sale of the Cheltenham property." See plaintiffs' amended complaint, ¶ 25. On or about January 19, 2012, plaintiffs received a notice of default of the April 24, 2006 and the February 20, 2007 loan agreements ("original loan agreements"). Plaintiffs allege that defendant told them to ignore the notice and settlement on the Cheltenham property was scheduled for January 25, 2012. Id. at ¶ 29. The closing of the Cheltenham property occurred on January 25, 2012. On or about January 27, 2012, defendants filed a complaint in confession of judgment against plaintiffs on the loan agreement originating April 24, 2006 in the amount of $191,677.00. Additionally, on January 27, 2012, defendant filed a praecipe to issue writ of attachment to the title agency that handled the Cheltenham property settlement to seize the sale proceeds.

Plaintiffs now bring an action for: (1) breach of contract (the new bridge loan); (2) breach of contract (the original loan agreement); (3) fraudulent misrepresentation; (4) violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 PA. Stat. § 201.1

[1] Although plaintiffs' amended complaint states that the loan was extended till January 1, 2011, it is assumed by the court that the plaintiffs meant January 1, 2012. This assumption is supported by plaintiffs' response to preliminary objections of defendant. See plaintiffs response to preliminary objection, pp. 17.

(plaintiffs Gary Collins and Weatta Collins only); (5) detrimental reliance; and (6) unjust enrichment.

DISCUSSION

A preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient. Cardenas v. Schober, 2001 PA Super 253, 783 A.2d 317, 321 (Pa.Super. 2001) (citing Pa.R.C.P. 1028(a)(4)). "Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." Id. at 321-22 (citation omitted). When considering preliminary objections, all material facts and all inferences set forth in the complaint must be admitted as true. Haun v. Community Health Systems, Inc., 14 A.3d 120, 123 (Pa. Super. 2011). However, this court is not bound to accept as true any averments in the pleading that are in conflict with exhibits that are attached to the pleading. Philmar Mid-Atlantic, Inc. v. York Street Associates, 389 Pa. Super. 297, 299-301, 566 A.2d 1253, 1254 (1989).

I. Breach of Contract – Original Loan Agreements

In Pennsylvania, three elements are necessary to properly plead a cause of action for breach of contract: "(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, 1058 (Pa.Super. 1999). Plaintiffs properly plead the existence of a contract and resultant damages. However, plaintiffs cannot prove a breach because defendant was acting within its rights of the contract.

Plaintiffs first allege that, "pursuant to the integrated loan document (business loan, note and mortgage) a twenty (20) day period is required under both original loan agreements, prior to

defendant Republic's ability to declare default on either Loan." See plaintiffs' amended complaint, ¶ 76. Moreover, plaintiffs assert that defendant breached this paragraph in the contract by declaring default on both loans eight (8) days after plaintiffs received the default letter sent by defendant. Id. at ¶ 77. However, in the underlying contract, twenty (20) days is only required when the default is non-monetary. Id. at exhibit A and B. Plaintiffs contend that as of the maturity date of their loan, which commenced in January of 2012, they owed $173,000.00. Id. at ¶ 25. Therefore, the default was monetary and a twenty (20) day waiting period is not required.

Second, plaintiffs argue that the oral modification or extension, the bridge agreement, constitutes an express breach of the original loan agreements. The loan agreements state, "[t]his agreement together with any related documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment." See plaintiffs' exhibit A, pp. 5. This clause does not state that if an amendment was made, the original contract would be void. This paragraph simply refers to the validity of any subsequent agreements, not the original agreement. In light of the original loan agreements and its terms, the court finds that plaintiffs have failed to plead a breach of duty imposed by the original loan agreements.

II. Breach of Contract – Bridge Agreement

Plaintiffs' claim for breach of contract in respect to the bridge agreement fails because plaintiffs did not establish a breach of duty imposed by the contract. Plaintiffs allege that defendant breached the bridge agreement by again not allowing a twenty (20) day period before

declaring default on either loan. This obligation was created by the original agreement and therefore, plaintiffs' claim for breach of contract is legally insufficient.

III. Fraudulent Misrepresentation

Plaintiffs also allege that defendant represented that they would be refinancing plaintiffs' April 24, 2006 loan. However, the gist of the action doctrine bars this claim for fraudulent misrepresentation. The gist of the action doctrine "is designed to maintain the conceptual distinction between breach of contract claims and tort claims. As a practical matter, the doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." eToll, Inc. v. Elias/Savon Adver., Inc., 811 A.2d 10, 14 (Pa. Super. 2002). In some circumstances, "it is possible that a breach of contract also gives rise to an actionable tort. To be construed as in tort, however, the wrong ascribed to defendant must be the gist of the action, the contract being collateral." Id. (quoting Bash v. Bell Tel. Co., 601 A.2d 825, 829 (Pa.Super. 1992). Where fraud claims are "inextricably intertwined" with the contract claims, the gist of the action is contractual, and the fraud claim should be dismissed. Id. at 21. All of the claims stem out of the original loan agreements or the bridge loan. Therefore, the claim of fraudulent misrepresentation is barred by the gist of the action doctrine.

IV. Unfair Trade Practices and Consumer Protection Law

Count IV of plaintiffs' amended complaint alleges defendant violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Without discussing the merits of plaintiffs' claim, the court finds that plaintiffs lack standing to raise said claim. A private person may bring a claim under the UTPCPL as set forth in Section 9.2, which provides:

Any person who leases or purchases goods or services primarily for personal,

> family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater.

73 .S. § 201-9.2(a) (2008). Plaintiffs' claim that, assuming the bridge loan is separate, "there is no written distinction how the loan is to be classified and as such plaintiff's Gary Collins and Weatta Collins are entitled to damages." However, the bridge loan was allegedly agreed upon in order to modifying the commercial loan by extending the maturity date. Therefore, plaintiff lacks standing to raise this claim because it was not for personal, family, or household purposes.

V. Detrimental Reliance

Detrimental reliance is another name for promissory estoppel. Travers v. Cameron County School District, 544 A.2d 547 (Pa. Cmwlth. 1988). The doctrine of promissory estoppel is the law in Pennsylvania. Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 535 Pa. 469, 636 A.2d 156 (1994). The elements of promissory estoppel are: "(1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promise; (2) the promise actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise." Id. at 476. Moreover, damages are limited to those which were incurred in the course of this reasonable reliance. Lobolito Inc. v. North Pocono School District, 562 Pa. 380, 755 A.2d 1287 (2000). The remedy granted for breach may be limited as justice requires." Kreutzer v. Monterey County Herald Co., 560 Pa. 600, 606, 747 A.2d 358, 361 (2000), citing Restatement (Second) Contracts § 90 (1981). Under the "America Rule," a party may not recover attorneys' fees from its adversary absent an express statutory or contractual provision allowing for the

recovery of such attorneys' fees. Mosaica Academy Charter School v. Commonwealth Dept. of Education, 572 Pa. 191, 206-7, 813 A.2d 813, 822 (2002).

Plaintiffs have alleged that because they detrimentally relied on plaintiffs' promise to accept the proceeds from the Cheltenham property and that they have suffered, "loss of all payments made under the April 24, 2006 loan agreement, line of credit and bridge agreement; consequential damages including but not limited to all costs and fees associated with the alleged default of both the April 24, 2006 loan agreement and the line of credit, all attorney's fees and costs incurred and continuing for civil litigation pursuant to the Philadelphia Court of Common Pleas…, loss of business reputation, credit reputation and standing in the community, and all attorney's fees and costs associated with the instant action." See plaintiffs' amended complaint, ¶ 106.

Plaintiffs have not identified any express statutory or contractual provision allowing for the recovery of such attorneys' fees and therefore their damages are limited to loss of business reputation, credit reputation and standing in the community. The damages alleged would have been suffered absent the promise. The damages flow from the default. Moreover, plaintiffs do not even allege that the money from the Cheltenham property was delivered. Furthermore, plaintiffs did not state that if the promise to refinance had been completed or that payment of the Cheltenham property was accepted, that their reputation or standing in the community would have been any different. Plaintiffs admit in their amended complaint that money was owed on the original loans to defendant. Plaintiffs further admit that the maturity date had passed. Moreover, plaintiffs did not allege that they would have done anything different, for example obtain another loan, if the promise was completed. Therefore, plaintiffs have not shown that they relied to their detriment on defendant's promise.

VI. Unjust Enrichment

Plaintiffs aver that defendant has unjustly profited at the expense of the plaintiffs and therefore must make restitution for the reasonable value of profits that have been unfairly received and retained. Unjust enrichment is a quasi-contractual doctrine based in equity which requires the following elements: (1) benefit conferred on defendant by plaintiff; (2) appreciation of such benefit by defendant; and (3) acceptance and retention of such benefit 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). In the current case, plaintiff did not plead that any benefit was conferred on the defendant by the plaintiffs. Defendant merely collected payments on a commercial loan in which plaintiffs admit they owed.

CONCLUSION

In light of the pleadings in the amended complaint and exhibits attached, the preliminary objection of defendant, Republic First Bank, to the amended complaint of Collins Collision Center, Inc., et al, plaintiffs is sustained and the amended complaint is dismissed.

BY THE COURT:

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GLAZER, J.