

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

DANIEL KERKEL	:	
	:	May Term, 2003
Plaintiff,	:	No. 01876
v.	:	
	:	Commerce Program
SPD ELECTRICAL SYSTEMS d/b/a	:	
SPD TECHNOLOGIES	:	
	:	Control No. 070065
Defendant	:	
	:	

ORDER and MEMORANDUM

AND NOW, this 9th day of December 2003, upon consideration of the Preliminary Objections of Defendant SPD Electrical Systems d/b/a SPD Technologies (“SPD”), 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. SPD’s Preliminary Objection to Count III is **SUSTAINED** and Plaintiff’s fraud claim is dismissed.

2. The remainder of SPD’ Preliminary Objections are **OVERRULED**.

SPD is 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:

GENE D. COHEN, J.

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MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are the Preliminary Objections of Defendant SPD Electrical Systems d/b/a SPD Technologies (“SPD”). For the reasons fully set forth below, SPD’s Preliminary Objections are **sustained in part** and **overruled in part**.

DISCUSSION

I. Plaintiff’s Fraud Claim (Count III) Fails Under the Gist of the Action Doctrine

Plaintiff’s fraud claim against SPD is barred by 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 pled, Plaintiff’s fraud claim centers upon SPD’s alleged failure to pay fair market value for the stock at issue, a duty which arises pursuant to the written agreement(s) between the parties. The fact that SPD may have willfully 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. Accordingly, Count III is dismissed.

CONCLUSION

For the above-stated reasons, SPD’s Preliminary Objections are **sustained in part** and **overruled in part** as follows:

1. SPD’s Preliminary Objection to Count III is **sustained** and Plaintiff’s fraud claim is dismissed.
2. The remainder of Defendants’ Preliminary Objections are **overruled**.¹

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:

GENE D. COHEN, J.

¹ While Plaintiff will not be permitted ultimately to recover for both breach of contract and unjust enrichment, the court will permit these causes of action to proceed in the alternative, at least at this stage of the litigation.