

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

DOCKETED
DEC 19 2018
R. POSTELL
COMMERCE PROGRAM

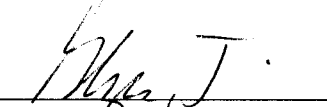
BETHPAGE FEDERAL CREDIT UNION	:	January Term, 2017
	:	Case No. 01103
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
MOMUDU KAMARA and KOMBOYA TRANS., INC.	:	
	:	
<i>Defendants</i>	:	Control No. 18103258

ORDER

AND NOW, this 19th day of December, 2018, upon consideration of the preliminary objections of plaintiff to the counterclaims of defendant Komboya Trans., Inc., it is **ORDERED** that the preliminary objections are **SUSTAINED-IN-PART** and **OVERRULED-IN-PART** as follows:

- I. The preliminary objections to the counterclaims of fraud and negligent misrepresentation are **SUSTAINED** and those claims are **DISMISSED**.
- II. The remainder of plaintiff's preliminary objections are **OVERRULED**.

BY THE COURT,



GLAZER, J.

Bethpage Federal Credit-ORDOP



MEMORANDUM OPINION

The instant action commenced on January 6, 2017 as plaintiff, Bethpage Federal Credit Union (hereinafter, “Lender”), filed a complaint against individual defendant Momodu Kamara (the “Borrower”), and corporate defendant Komboya Trans., Inc. (the “Guarantor”). In the complaint, Lender asserts claims of breach-of-contract respectively against Borrower and Guarantor. Specifically, Lender alleges that Borrower and Guarantor defaulted on a document titled “Balloon Note.”¹ The Balloon Note had been executed by Borrower in his dual capacities –as the individual borrower of a loan in the amount of \$303,000.00, and as the owner/president of Guarantor.

On October 4, 2018, Guarantor filed an answer with new matter and counterclaim to the complaint. The counterclaim asserts three claims against Lender: fraud, negligent misrepresentation, and breach-of-contract. Lender timely filed preliminary objections to the three counterclaims.

I. **The Guarantor may not maintain the counterclaims of fraud and negligent misrepresentation.**

In the preliminary objections, Bethpage argues that Guarantor’s counterclaims of fraud and negligent misrepresentation should be dismissed because the averments therein are not stated with particularity, in violation of Pa. R.C.P. 1019(b).² To determine whether Guarantor has averred fraud and negligent misrepresentation with particularity, the court turns its attention to the paragraphs that most pointedly assert such claims. The identically-written paragraphs for the two counterclaims state as follows:

[a]s averred above ... Bethpage ... made misrepresentations

¹ Exhibit A to the complaint.

² “Averments of fraud or mistake shall be averred with particularity.” Pa. R.C.P. 1019(b).

to Defendants relating to the renewability of the balloon loans, Defendants' qualifications for such loans and ability to repay the same, and the continued appreciation of the value of the [taxi-cab] medallion that were material to the loan at issue....

* * *

[Guarantor] acted in reasonable and justifiable reliance on ... Bethpage's misrepresentations and false statements.³

The court finds these allegation lacking the degree of particularity necessary to preserve the claims of fraud and negligent misrepresentation. The Pennsylvania Supreme Court has explained that—

averments of fraud or mistake shall be averred with particularity. Averments of fraud are meaningless epithets unless sufficient facts are set forth which will permit an inference that the claim is not without foundation or offered simply to harass the opposing party and to delay the pleader's own obligation. In satisfaction of the particularity requirement we have required that two conditions must always be met: the pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense, and they must be sufficient to convince the court that the averments are not merely subterfuge.⁴

In this case, the counterclaims of fraud and negligent misrepresentation conflate several vague averments: first, Guarantor alleges it was misled to believe that the Balloon Note would be renegotiated, yet Guarantor describes no facts from which this court could reach a similar inference; second, Guarantor suggests it was misled to believe that it had the qualifications to obtain a \$303,000.00 loan under the Balloon Note, yet fails to explain why it adopted such a misrepresentation while dealing with Lender in an arms-length transaction; and third, Guarantor asserts it was misled to believe that it would be able to fully repay its indebtedness to Bethpage, yet fails to explain how its

³ Answer, new matter and counterclaim at ¶¶ 39, 45; 42, 48.

⁴ In re Estate of Schofield, 477 A.2d 473, 477 (Pa. 1984).

sophisticated owner/president could form such a belief on the tenuous prediction that the collateral to the loan –the taxi-cab medallion– would continue to appreciate indefinitely.

Guarantor’s above-quoted averments do not adequately explain the nature of its counterclaims, do not allow Bethpage to prepare a defense, and do not permit this court to infer that the claims of fraud and negligent misrepresentation have any foundation. Since the averments of fraud and negligent misrepresentation fail to meet the particularity requirements of Pa. R.C.P. 1019(b), the preliminary objections thereto are sustained, and these counterclaims are dismissed.

II. **The claims of fraud and negligent misrepresentation are unavailable pursuant to the gist-of-the-action doctrine.**

Under Pennsylvania law—

[t]he gist of the action doctrine bars a plaintiff from recasting ordinary breach of contract claims into tort claims.

* * *

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 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.

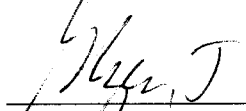
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The important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus. In other words, a claim should be limited to a contract claim when the parties' obligations **are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.**⁵

⁵ Knigh v. Springfield Hyundai, 81 A.3d 940, 950 (Pa. Super. 2013) (emphasis added).

In this case, the obligations of the parties are defined by the terms of the Balloon Note and not by larger social policies embodied by the tort laws of fraud and negligent misrepresentation. Guarantor may not maintain the claims of fraud and negligent misrepresentation under the gist-of-the-action doctrine, and for this additional reason such claims are dismissed.

BY THE COURT,



GLAZER, J.
