

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

Y & C ENTERPRISE, INC., and SOON P.	:	SEPTEMBER TERM, 2008
YUN,	:	
	:	NO. 02687
Plaintiffs,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	
OKAN’S FOOD, INC. and OKAN	:	
APAYDIN,	:	
	:	
Defendants.	:	

OPINION

Defendants Okan’s Foods, Inc. and Okan Apaydin appeal from the court’s Orders of April 25, 2010 and July 19, 2010. This dispute arises out of defendants’ sale of a restaurant to plaintiffs pursuant to an “Agreement With Intent to Buy” (hereinafter “Agreement”).

After a bench trial of the parties’ claims, the court entered the April 25th Order. The court found that the sellers’ warranties made by Okan’s Foods in the Agreement were false when made and Okan’s Foods never intended to comply with them. Specifically, Okan’s Foods made the following false statements to plaintiffs:

1. “[Okan’s Foods] has an unencumbered interest in the Lease [for the restaurant] and no encumbrances exist to prevent the transfer of [Okan’s Food’s] leasehold interest to [plaintiffs].”
2. “[Okan’s Foods] is not bound by any agreement that would prevent any transactions connected with this Agreement.
3. “[Okan’s Foods] is not in default under any terms of the Lease.”
4. “[Okan’s Foods] is properly authorized to enter into this [A]greement.”

Contrary to these representations, the Lease between Okan's Foods and its landlord required Okan's Foods to obtain the landlord's permission before it could assign the Lease. Okan's Foods did not have any such permission when it entered into the Agreement with plaintiffs.

As a result of Okan's Foods' misrepresentations, plaintiffs paid \$75,000 to Okan's Foods for the restaurant. Okan's Foods never received permission from the landlord to assign the Lease, and the landlord eventually locked the parties out. By making the misrepresentations regarding its right to assign the Lease, Okan's Foods fraudulently induced plaintiffs to enter into the Agreement and to pay Okan's Foods for the restaurant. Okan's Foods thereby committed the tort of fraud.

Okan's Foods is a corporation. A corporation necessarily acts through its officers and other agents.¹ "An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor."² Defendant Okan Apaydin is the President of Okan's Foods. He signed the Agreement containing the corporation's misrepresentations. By doing so, he took part in Okan's Foods' fraud, and he is personally liable for such fraud.

Plaintiffs raised the issue of Okan Apaydin's liability in their Post-Trial Motions, which the court granted on July 19th. In that Order, the court held that Okan's Food and Okan Apaydin were jointly and severally liable for the fraud and entered judgment in plaintiffs' favor against both defendants in the amount of \$75,000.

Defendants argue on appeal that their fraud was only a simple breach of the parties' Agreement. Defendants claim the "gist of the action doctrine" prohibits the court from recognizing their activity as tortious. Defendants are wrong.

¹ See Watters v. De Milio, 390 Pa. 155, 159, 134 A.2d 671, 674 (1957).

² Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 621, 470 A.2d 86, 90 (1983).

[A]lthough mere non-performance of a contract does not constitute a fraud, 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. 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.³

The gist of the action doctrine does not bar all tort claims where a contract exists between the parties. The court must analyze the wrong committed to see if it is a breach of the party's private duty (contract) or a breach of a general societal duty (tort) or both. "While the gist of the action doctrine may bar a tort claim arising from the performance of a contract, it does not bar a fraud claim stemming from the fraudulent inducement to enter into a contract."⁴ In this case, defendants fraudulently induced plaintiffs to enter into the Agreement by telling plaintiffs that the Lease was assignable. The sellers' warranties contained in the Agreement evidence defendants' fraud in the inducement. Defendant Okan Apaydin cannot avoid tort liability for his misrepresentations by the simple expedient of writing them into a contract.

For the foregoing reasons, the April 25th Order,- as modified by the July 19th Order, finding both defendants liable for fraud, should be affirmed.

Date: February 4, 2011

MARK I. BERNSTEIN, J.

³ *Mirizio v. Joseph*, 4 A.3d 1073, 1079-1080 (Pa. Super. 2010).

⁴ *Id.*, 4 A.3d at 1085.