

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

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THERMACON ENVIRO SYSTEMS, INC., :	March Term, 2001
Plaintiff :	
:	No. 4369
v. :	
:	Commerce Case Program
GMH ASSOCIATES OF AMERICA, INC., :	
Defendant :	Control No. 052290

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**OPINION**

Defendant GMH Associates of America, Inc. (“GMH”) have filed preliminary objections (“Objections”) to the complaint (“Complaint”) of Plaintiff Thermacon Enviro Systems, Inc. (“Thermacon”). For the reasons set forth in this Opinion, the Court is ordering discovery on the Objections to venue, sustaining the Objections to Thermacon’s misrepresentation claim and overruling the remaining Objections.

**BACKGROUND**

On January 25, 1999, GMH provided a purchase order (“Order”) to Thermacon for the purchase of aluminum tank covers (“Covers”). The Order directed Thermacon to “[f]urnish all necessary materials to complete all work known as 13220 Aluminum Tank Covers (Alt. Bid A) all in accordance with plans and specifications” for a waste water treatment plant on which GMH was working. According to the Complaint, GMH was responsible for the installation of the Covers as a subcontractor of Wickersham Construction and Engineering, Inc. (“Wickersham”) and promised to pay Thermacon \$744,750.00 pursuant to the Order.

Thermacon contends that, although Wickersham has made payments to GMH, GMH has failed to pay Thermacon the full amount due for the Covers. On this basis, Thermacon initiated the instant action by filing the Complaint, which asserts claims for breach of contract, detrimental reliance, unjust enrichment, misrepresentation and conversion. In response, GMH argues in the Objections that an agreement to arbitrate bars the Court from exercising subject matter jurisdiction, that four of Thermacon's claims are legally insufficient and insufficiently specific and that venue in Philadelphia is improper.

## **DISCUSSION**

Of the Objections asserting legally insufficiency, insufficient specificity and lack of subject matter jurisdiction, only the Objections to Thermacon's claim for misrepresentation is meritorious. In addition, because there are outstanding factual issues as to whether venue is proper, the Court is ordering the Parties to take depositions as to those issues and to file additional briefs.

### **I. The Agreement to Arbitrate Does Not Bind Thermacon**

GMH first asserts that the Court does not have subject matter jurisdiction over this case because the Parties have entered into an agreement to arbitrate. This argument is without merit.

Pennsylvania cases hold that "[i]f a valid arbitration agreement exists between the parties and [the] claim is within the scope of the agreement, the controversy must be submitted to arbitration." Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (1997) (quoting Messa v. State Farm Ins. Co., 433 Pa. Super. 594, 600, 641 A.2d 1167, 1170 (1994)). As a caveat, however, "[p]ersons cannot compel arbitration of a disagreement between or among parties who have not contracted to arbitrate that disagreement between or among themselves." Cumberland-Perry Area

Vocational-Tech. Sch. Auth. v. Bogar & Bink, 261 Pa. Super. 350, 354, 396 A.2d 433, 435 (1978) (citations omitted). See also Brown v. D. & P. Willow Inc., 454 Pa Super. 539, 546-47, 686 A.2d 14, 18 (1996) (noting that forcing a party into arbitration without its consent is “violative of common law and statutory principles” and a “curtailment of one’s substantive and due process rights”).

The document on which GMH bases its arbitration argument is a Wickersham purchase order that purports to incorporate an arbitration provision from a separate contract. Even if this incorporation is successful and the arbitration provision relevant, however, the Wickersham purchase order has not been signed by Thermacon. As a result, the arbitration provision does not bind Thermacon, and the Court cannot force Thermacon to submit to arbitration.

## **II. With the Exception of Thermacon’s Claim for Misrepresentation, the Complaint Is Sufficiently Specific and Legally Sufficient**

To determine if a pleading meets Pennsylvania’s specificity requirements, a court must ascertain whether the allegations are “sufficiently specific so as to enable [a] defendant to prepare [its] defense.” Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted). See also In re The Barnes Found., 443 Pa. Super. 369, 381, 661 A.2d 889, 895 (1995) (“a pleading should . . . fully summariz[e] the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [a] cause of action is based”). Allegations of fraud are held to an even higher standard. Pa. R. Civ. P. 1019(b). See also Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (an allegation of fraud must “explain the nature of the claim to the opposing party so as to permit the preparation of a defense” and be “sufficient to convince the court that the averments are not merely subterfuge”).

For the purposes of reviewing preliminary objections asserting legal insufficiency, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000).

Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

#### **A. Count III - Detrimental Reliance**

GMH first asserts that detrimental reliance is an element of a claim, not an independent claim in and of itself. Pennsylvania recognizes a cause of action based on a theory of promissory estoppel:

This Court has previously stated that a cause of action under a theory of promissory estoppel will lie when a party relies to his or her detriment on the intentional or negligent representations of another party, so that in order to prevent the relying party from being harmed, the inducing party is estopped from showing that the facts are not as the relying party understood them to be. In Pennsylvania, the elements of promissory estoppel are:

- (1) Misleading words, conduct or silence by the party against whom the estoppel is asserted,
- (2) unambiguous proof of reasonable reliance on the misrepresentation by the party seeking to assert the estoppel; and
- (3) no duty of inquiry on the party seeking to assert estoppel.

Thomas v. E.B. Jermyn Lodge No. 2, 693 A.2d 974, 977 (Pa. Super. Ct. 1997) (citations omitted).

A cause of action based on this theory has alternatively been referred to as “a cause of action under detrimental reliance. . . .” Lehigh Valley Hosp. v. County of Montgomery, 768 A.2d 1197, 1200 (Pa.

Commw. Ct. 2001) (citing Thomas, 693 A.2d at 977).<sup>1</sup> As a result, the Objections to Count III must be overruled.

#### **B. Count IV - Unjust Enrichment**

The elements of a claim for unjust enrichment are “benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for [the] 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) (citations omitted), app. denied, 561 Pa. 700, 751 A.2d 193 (2000). Thermancon has pled that it provided GMH with the Covers but has not received payment. This allows the inference that GMH appreciated the benefits of the Covers and that allowing it to retain these benefits without payment would be inequitable. Moreover, the facts alleged in the Complaint are specific enough to allow GMH to prepare a defense. Thus, Count IV is legally sufficient and adequately specific.

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<sup>1</sup> Even if this were not the case, Pennsylvania courts faced with a conflict between the allegations of a count and the count’s title look at the allegations and not the title. See, e.g., Zernheld v. Lehigh County Office of Children and Youth Servs., 659 A.2d 89 (Pa. Commw. Ct. 1995) (treating a count titled “negligent infliction of emotional distress” as a claim for intentional infliction of emotional distress); Maute v. Frank, 441 Pa. Super. 401, 403-04, 657 A.2d 985, 986 (1995) (“since the complaint states a viable mandamus claim, we will treat that portion of the action as such, regardless of the fact that the complaint is not titled properly as one involving mandamus”); Commonwealth ex rel. Saltzburg v. Fulcomer, 382 Pa. Super. 422, 555 A.2d 912 (1989) (although action was titled as one involving habeas corpus relief, petitioner’s action clearly was one for mandamus and was therefore treated as such). Cf. McClellan v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 142, 604 A.2d 1053, 1060 (1992) (“[t]he obligation to discover the cause or causes of actions is on the court: the plaintiff need not identify them”). Thus, the Court could merely examine the allegations in Count III and, recognizing that it presents a cause of action based on promissory estoppel, allow Thermancon to proceed.

### **C. Count V - Misrepresentation**

The elements of intentional fraudulent misrepresentation are:

(1) A representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and, (6) the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999). See also Smith v. The Windsor Group, 750 A.2d 304, 307 (2000) (noting that “the elements of fraud and fraudulent misrepresentation are essentially identical”). Negligent misrepresentation requires “a duty owed by one party to another,” as well as “(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.” Bortz, 556 Pa. at 501, 729 A.2d at 561. GMH contends that Thermacon has not set forth the specific misrepresentations made by GMH or all of the elements for misrepresentation.<sup>2</sup>

According to the Complaint, GMH consistently represented that it would pay Thermacon on time. Complaint at ¶ 29. There is no indication, however, that GMH knew of the statements’ falsity, that the statements were material to the transaction at hand or that GMH intended for Thermacon to act based on the statements. As a result, the Objections to Thermacon’s misrepresentation claim must be sustained.

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<sup>2</sup> GMH does not argue that Thermacon’s tort claims are barred by the gist of the action doctrine or the economic loss doctrine.

#### **D. Count VI - Conversion**

GMH contends that Thermacon's conversion claim must be dismissed because it has not alleged that it has an immediate right to possession of the property and because the claim is insufficiently specific. The Court does not agree.

Pennsylvania law defines conversion as "the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification." Paves v. Corson, 765 A.2d 1128, 1134 (Pa. Super. Ct. 2000) (quoting Brinich v. Jencka, 757 A.2d 388, 403 (Pa. Super. Ct. 2000)). An essential element of a conversion claim is that the plaintiff "had actual or constructive possession of a chattel or an immediate right to possession of a chattel at the time of the alleged conversion." Chrysler Credit Corp. v. Smith, 434 Pa. Super. 429, 434, 643 A.2d 1098, 1100 (1994). Among the ways a person may incur liability for conversion is by "[u]nreasonably withholding possession from one who has the right to it." Martin v. National Sur. Corp., 437 Pa. 159, 165, 262 A.2d 672, 675 (1970) (citing Prosser, Torts § 15 (2d ed. 1955)).

While allegations of conversion based on tangible property may be easily assessed, the legal sufficiency of conversion allegations based on other property may be more difficult to measure. Thermacon correctly points out that money may be the subject of a claim for conversion. McKeeman v. CoreStates Bank, N.A., 751 A.2d 655, 659 n.3 (Pa. Super. Ct. 2000) (citing Shonberger v. Oswell, 365 Pa. Super. 481, 485, 530 A.2d 112, 114 (1987)). However, Pennsylvania courts have held that "failure to pay a debt is not conversion." Francis Bernhardt, III, P.C. v. Needleman, 705 A.2d 875, 878 (Pa. Super. Ct. 1997) (citing Petroleum Marketing v. Metropolitan Petroleum Corp., 396 Pa. 48, 151 A.2d 616 (1959)).

The federal court for the Eastern District of Pennsylvania has distinguished legitimate money conversion claims from illegitimate ones.<sup>3</sup> On the one hand, “if a plaintiff entrusts money or goods with the defendant, with the intent that the defendant sell or transfer the goods and give the proceeds to the plaintiff, and defendant keeps the proceeds or applies it to his own use, there has been conversion.” Montgomery v. Federal Ins. Co., 836 F. Supp. 292, 300 (E.D. Pa. 1993) (citation omitted). Cf. Shonberger v. Oswell, 365 Pa. Super. at 484-85, 530 A.2d at 114 (where parties had entered into a consignment agreement, defendant’s failure to pay portion of proceeds of sale permitted claim for conversion). In other cases, however, plaintiffs have been precluded from asserting money-based conversion claims:

Pennsylvania courts disallow conversion claims where an immediate right to possession is lacking. Specifically, an action for conversion will not lie where the alleged converter (1) borrowed money, (2) collected money to satisfy a debt, (3) refused to return proceeds already paid under an insurance contract, or (4) refused to pay the proceeds of an insurance policy. See Corporate Plaza Partners, Ltd. v. American Employer’s Ins. Co., No. 95-5234, 1996 WL 180696, at \*2 (E.D. Pa. Apr. 3, 1996) (granting 12(b)(6) motion to dismiss insurance company’s conversion claim to retrieve money it voluntarily advanced to an insured because the insurance company “no longer had an immediate right of possession” to the money); Montgomery v. Federal Ins. Co., 836 F. Supp. 292, 300-01 (E.D. Pa. 1993) (recognizing that “an action for conversion will not lie where an alleged converter borrowed money, even though he had an intent not to pay back the loan . . . [or] when the money is collected to satisfy a debt” and disallowing plaintiff’s conversion claim based upon “defendants’ refusal to pay proceeds on plaintiff’s claim under the insurance contract”) (citations omitted).

Leonard A. Feinberg, Inc. v. Central Asia Capital Corp., Ltd., 974 F. Supp. 822, 845 (E.D. Pa. 1997).

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<sup>3</sup> Although federal court decisions on Pennsylvania law are not binding on Pennsylvania state courts, they may be persuasive. In re Ins. Stacking Litig., 754 A.2d 702, 705 n.6 (Pa. Super. Ct. 2000).



In this matter, the conduct alleged by Thermacon is more similar to those cases in which courts have found that the plaintiffs had an immediate right to the funds in question and were permitted to proceed on their claims. Thermacon supplied the Covers to GMH, who then used them to complete its subcontract work for Wickersham. Although Wickersham has made payments to GMH, GMH allegedly has failed to pay Thermacon the entire sum to which it is entitled. This is more akin to entrusting a defendant with goods with an expectation of payment than a defendant's failure to satisfy a debt. On this basis, the Objections to Thermacon's conversion claim must be overruled.

### **III. The Objections to Venue Require Additional Factual Development Before They Can Be Resolved**

GMH also claims that venue is not proper in Philadelphia. Because this Objection raises questions of fact, additional information is required before a determination is possible. As a result, the Court is ordering the Parties to take depositions and to file briefs on this issue, as outlined in the Order.

As an initial matter, when preliminary objections challenge venue, "the defendant is the moving party and bears the burden of supporting [its] claim" of improper venue. Liggitt v. Liggitt, 253 Pa. Super. 126, 131, 384 A.2d 1261, 1263-64 (1978). See also Gale v. Mercy Catholic Med. Center Eastwick, Inc., Fitzgerald Mercy Div., 698 A.2d 647, 652 (Pa. Super. Ct. 1997) (the moving party has the burden of showing that the original choice of venue is improper). Consequently, to prevail, GMH must show that Philadelphia constitutes improper venue.

Pennsylvania Rule of Civil Procedure 2179 governs venue when a corporation is a defendant:

- (a) Except as otherwise provided by an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in
  - (1) the county where its registered office or principal place of business is located;
  - (2) a county where it regularly conducts business;

- (3) the county where the cause of action arose; or
- (4) a county where a transaction or occurrence took place out of which the cause of action arose.

Pa. R. Civ. P. 2179(a).

Here, GMH contends that none of the bases for venue in Philadelphia exists here: it does not have a registered office or principal place of business in Philadelphia, it does not regularly conduct business in Philadelphia and all transactions, occurrences and other matters giving rise to the cause of action took place outside of Philadelphia. Objections at ¶¶ 8-10. In contrast, Thermacon asserts that its claims arise “out of transactions or occurrences which took place in whole or in part in Philadelphia, Pennsylvania” and that venue is thus proper. Complaint at ¶ 4.

Factual disputes such as these are to be resolved through interrogatories, depositions or an evidentiary hearing. American Housing Trust, III v. Jones, 548 Pa. 311, 319-20, 696 A.2d 1181, 1185 (1997); Luitweiler v. Northchester Corp., 456 Pa. 530, 535, 319 A.2d 899, 902-03 (1974). Cf. Burns v. Pennsylvania Mfgs. Ass’n. Ins. Co., 417 Pa. Super. 631, 634-35, 612 A.2d 1379, 1381 (1992) (“[o]n petitions to transfer pursuant to rule 1006(d) [for forum non conveniens], the parties and the court must resolve all material issues of disputed fact through procedures established by Pa. R.C.P. 209”).<sup>4</sup> While affidavits may be used if the facts are clear and specific, “[t]his is not a recommended procedure,” and it is “preferable to proceed by depositions or written interrogatories.” Slota v.

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<sup>4</sup> When trial courts have failed to follow this rule, appellate courts have been unrestrained in expressing their displeasure. See Delaware Valley Underwriting Agency, Inc. v. Williams & Sapp, Inc., 359 Pa. Super. 368, 518 A.2d 1280 (1986) (remanding the case to the lower court with instructions to follow the “current version” of the law); Luria v. Luria, 220 Pa. Super. 168, 170, 286 A.2d 922, 923 (1971) (reprimanding the lower court for making factual determinations without ordering the taking of depositions or the filing of interrogatories or both).

Moorings, Ltd., 343 Pa. Super. 96, 100, 494 A.2d 1, 2 (1985). Cf. Ambrose v. Cross Creek Condominiums, 412 Pa. Super. 1, 13-14, 602 A.2d 864, 869 (1991) (recognizing that resolving objections to personal jurisdiction by the “submission of evidence by affidavit is not a recommended procedure” and requiring a trial court to resolve a factual dispute “through interrogatories, depositions or an evidentiary hearing”).<sup>5</sup>

In accordance with Pennsylvania law, the Court is ordering that the Parties take depositions regarding those facts that would render venue in Philadelphia proper. These depositions are to be completed within 45 days of the issuance of this Opinion and in accordance with Pennsylvania Rule of Civil Procedure 4007.1. Once this has been accomplished and within 60 days of the issuance of this Opinion, the Parties are to file briefs addressing the issue of venue and referencing the depositions and any other relevant evidence. In the interim, the Objections to venue will be held under advisement.

## **CONCLUSION**

The Objections to venue require additional facts before they can be resolved and will be held under advisement while the Parties engage in discovery. While Thermacon’s misrepresentation claim is

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<sup>5</sup> In arguing that discovery is unnecessary, Thermacon correctly states that, “in the absence of agreement to the contrary, . . . payment is due at the plaintiff’s residence or place of business, and venue is proper there in a breach of contract action alleging failure to make payment.” Lucas Enters., Inc. v. Paul C. Harmon Co., 273 Pa. Super. 422, 425, 417 A.2d 720, 721 (1980). Because its principal place of business is located in Philadelphia, it argues, payments were due in Philadelphia, and venue is proper. If the Parties’ discovery establishes that this is the case, it is likely that the Objection to venue will be overruled. Because GMH has asserted that all events underlying the cause of action took place elsewhere, however, the Court must assume that this includes the location where payments were due and must order discovery to determine the veracity of the Parties’ claims.

legally insufficient, the Objections to the remaining claims are without merit and are overruled accordingly.

BY THE COURT:

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JOHN W. HERRON, J.

Date: July 18, 2001

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

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THERMACON ENVIRO SYSTEMS, INC., :	March Term, 2001
Plaintiff :	
:	No. 4369
v. :	
:	Commerce Case Program
GMH ASSOCIATES OF AMERICA, INC., :	
Defendant :	Control No. 052290

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**ORDER**

AND NOW, this 18th day of July, 2001, upon consideration of the Preliminary Objections of Defendant GMH Associates of America, Inc. to the Complaint of Plaintiff Thermacon Enviro Systems, Inc. and the Plaintiff's response thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objections asserting improper venue will be held under advisement for sixty days so that within forty-five days, depositions pursuant to Pa. R. Civ. P. 4007.1 may be taken to resolve the factual questions regarding venue in Philadelphia;
2. After the forty-fifth day but on or before the sixtieth day, the Parties shall file with this Court briefs offering any further argument and referencing the depositions or other relevant evidence on the issue of venue in Philadelphia;

3. The Preliminary Objections to Count V - Misrepresentation are SUSTAINED; and
4. The remaining Preliminary Objections are OVERRULED.

BY THE COURT:

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JOHN W. HERRON, J.