



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

|                           |   |                                       |
|---------------------------|---|---------------------------------------|
|                           | : | MARCH TERM 2011                       |
| EAGLE NATIONAL BANK and   | : |                                       |
| EAGLE NATIONWIDE MORTGAGE | : |                                       |
| COMPANY,                  | : |                                       |
| Plaintiffs,               | : |                                       |
| v.                        | : |                                       |
|                           | : | No. 685                               |
| ISCP FUNDING LLC,         | : |                                       |
|                           | : | Commerce Program                      |
| Defendant, and            | : |                                       |
|                           | : |                                       |
| ROYAL BANK AMERICA,       | : |                                       |
|                           | : | Control Numbers 12061530 and 12090151 |
| Additional Defendant.     | : |                                       |
| _____                     | : |                                       |

**OPINION**

**I. Factual and Procedural History**

This matter arises from a contract for the sale of a mortgage brokerage business by plaintiffs Eagle National Bank and Eagle Nationwide Mortgage Company (“Eagle”) to defendants ISCP Funding, LLC (“ISCP”). The parties entered into the Asset Purchase Agreement (“APA”) on August 5, 2010, by which ISCP acquired Eagle’s mortgage lending business. The primary dispute between the parties involves the status of certain sums of money associated with the business. Eagle contends that these funds are branch reserves held in trust for the branch offices, and were assigned to ISCP in trust to be used for certain liabilities such as branch expenses. Conversely, ISCP argues that the funds are unencumbered, and denies any obligation to hold the funds in trust or disperse them to the branch offices. Further, Eagle argues that ISCP failed to make lease payments on the Chadds Ford Office, and failed to reimburse it, as

required by the APA, while ISCP argues that it has no obligation to reimburse Eagle for lease payments, and that Eagle wrongfully locked it out of that office.

Eagle filed its original complaint against ISCP for breach of contract, constructive trust, and accounting. ISCP filed a counterclaim for declaratory judgment, breach of contract, conversion, tortious interference with contract or prospective contractual relations, fraudulent and negligent misrepresentation, misappropriation, and indemnification and contribution. Eagle has filed the instant Preliminary Objections to the Counterclaim of ISCP. For the reasons following, the Court sustains these preliminary objections in part and overrules them in part.

Additionally, ISCP has filed a motion to strike the *lis pendens* which Eagle has placed on several parcels of real property, to which ISCP allegedly purchased the rights to a confessed judgment and mortgage with the funds at issue. As discussed below, the Court grants this motion, and strikes the *lis pendens*.

**1. Eagle's preliminary objections to Counts I (Declaratory Judgment), V (Fraudulent Misrepresentation) and VI (Negligent Misrepresentation) are overruled.**

Eagle objects to ISCP's claims for negligent and fraudulent misrepresentation, and for declaratory judgment, arguing that all of these claims rely on the theory that ISCP assumed Eagle's liabilities with respect to the Branch Reserves. Eagle argues that this theory is contrary to the 'law of the case,' because the Court's previous grant of Eagle's request for a Preliminary Injunction. However, the Court cannot agree.

Although it is true that courts of the same jurisdiction cannot overrule each other's decisions in the same case, the interpretation of the contract at issue here was not decided with finality in the ruling on the Preliminary Injunction. "The object of a preliminary injunction is to maintain the status quo until the parties' rights can be considered and determined after a full

hearing for a permanent injunction.”<sup>1</sup> Therefore, “[i]n contrast to a permanent injunction, a decision regarding a preliminary injunction is not binding for purposes of a final adjudication.”<sup>2</sup>

**2. Plaintiff’s preliminary objections to Counts III (Conversion), V (Fraudulent Misrepresentation) and VI (Negligent Misrepresentation) are sustained in part and overruled in part.**

The gist of the action doctrine

precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . 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. [A tort claim is barred] where 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.<sup>3</sup>

Here, the conversion that ISCP alleges Eagle committed is a breach of duties created by the contract itself: the obligation to turn over control of the Chadds Ford property, and not to withdraw funds, are duties that only exist in the context of the contract between the parties, not as greater social policies. Accordingly, Eagles’ preliminary objections to the conversion count are sustained; this count is dismissed.

ISCP’s claims for fraudulent and negligent misrepresentation, however, remain. The doctrine “does not bar a fraud claim stemming from the fraudulent inducement to enter into a contract.”<sup>4</sup> ISCP alleges in its counterclaim that Eagle misrepresented the status of the cash, that it could be transferred free of encumbrances, and other material

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<sup>1</sup> Buck Hill Falls Co. v. Press, 791 A.2d 392, 396 (Pa. Super. 2002).

<sup>2</sup> Id. at 397.

<sup>3</sup> Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14-19 (Pa. Super. 2002).

<sup>4</sup> Mirizio v. Joseph, 4 A.3d 1073, 1085 (Pa. Super. 2010) (internal citations omitted).

misrepresentations and omissions regarding Eagles' obligations, and that these misrepresentations and omissions induced ISCP to enter into the APA. ISCP has thereby adequately alleged fraudulent and negligent inducement to contract; accordingly, these preliminary objections are overruled.

**3. Eagles' preliminary objections to Count IV (Tortious Interference) are overruled.**

"To set forth a legally sufficient cause of action for intentional interference with contractual or prospective contractual relations, four elements must be pled:

- (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual legal damage as a result of the defendant's conduct."<sup>5</sup>

ISCP, in its counterclaim, alleged facts that, if proven, could constitute tortious interference with prospective contractual relations: that it was actively negotiating with Eagles' branch managers, that Eagle sent the managers a defamatory letter, and that the letter interfered with the negotiations, causing six bank managers not to work for ISCP. Accordingly, this claim may not be dismissed at this stage.

**4. Eagle's preliminary objections to Count VIII (indemnification and/or contribution) are overruled.**

Under Pennsylvania law, indemnity is available only in the following circumstances: (1) where parties are primarily and secondarily liable to each other or (2) where there is an express

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<sup>5</sup> Pelagatti v. Cohen, 370 Pa. Super. 422, 434; 536 A.2d 1337, 1343 (1987).

contract to indemnify.<sup>6</sup> ISCP has alleged that the APA contains an express indemnification provision; this allegation is adequate for the claim to survive preliminary objections.

Furthermore, Eagle argues that ISCP's claim for contribution should be dismissed because contribution only exists where there is a viable tort claim.<sup>7</sup> This is true; however, as the Court has overruled Eagle's preliminary objections to ISCP's negligent and fraudulent misrepresentation claims, the claim for contribution remains as well. Accordingly, these preliminary objections are overruled.

**5. Plaintiffs' preliminary objections to Defendants' claim for attorneys' fees are sustained.**

The general rule in Pennsylvania is in the absence of a statute or a contractual provision, parties are responsible for their own counsel fees.<sup>8</sup> ISCP alleges that the APA contains a provision specifically providing for indemnification. No party has alleged the contract between them provided for attorneys' fees in the event of a dispute, nor has ISCP cited any statute permitting the recovery of attorneys' fees for the claims that remain in this complaint. Accordingly, ISCP's requests for attorneys' fees are stricken.

**6. Eagle's request to strike impertinent matter is denied.**

Eagle requests that paragraphs 127-143 be stricken as scandalous and impertinent under Pa. R. Civ. Pro. 1028(a)(2). Whether or not these paragraphs are relevant, the Court cannot see anything scandalous or impertinent in them; accordingly, this request is denied.

**7. ISCP's request to strike Eagle's *lis pendens* on the Germantown avenue properties is granted.**

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<sup>6</sup> Fulmer v. Duquesne Light Co., 374 Pa. Super. 537, 547; 543 A.2d 1100, 1105 (1988).

<sup>7</sup> 42 Pa.C.S. § 8324.

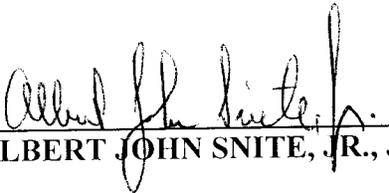
<sup>8</sup> Jones v. Muir, 511 Pa. 535, 541; 515 A.2d 855, 858 (1985).

Eagle's *lis pendens* on the real property bought by IS JAM, with the funds allegedly misappropriated from the Branch Reserves, is inappropriate.

“*Lis pendens* has no application except in cases involving the adjudication of rights in specific property. Thus, a party is not entitled to have his case indexed as *lis pendens* unless title to real estate is involved in litigation. *Lis pendens* may not be predicated upon an action seeking to recover a personal demand.”<sup>9</sup>

The property itself is not the subject of the litigation, nor is title to it unclear; rather, Eagle seeks a money judgment against the ISCP defendants. This judgment may not be collected unless and until it is granted by the Court. Eagle's claim for constructive trust does not affect this outcome, as the claim is against the Branch Reserves, not against the real property. Accordingly, the *lis pendens* against IS JAM's properties on Germantown Avenue, Philadelphia, is stricken.

**BY THE COURT,**

  
ALBERT JOHN SNITE, JR., J.

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<sup>9</sup> Psaki v. Ferrari, 377 Pa. Super. 1,3; 546 A.2d 1127, 1128 (1988).