

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

JOSEPH A. ROBINSON,	:	NOVEMBER TERM, 2002
MOTORWORKS, INC., and AR22, INC.,	:	
	:	No. 00220
Plaintiffs,	:	
	:	Control No. 091139
v.	:	
	:	
BERWIND FINANCIAL, L.P., and	:	
BERWIND SECURITIES CORP.,	:	
	:	
Defendants.	:	

**ORDER AND MEMORANDUM**

**AND NOW**, this \_8<sup>TH</sup> day of January, 2004, upon consideration of the Preliminary Objections of defendants to the Second Amended Complaint, plaintiffs' response thereto, the memoranda in support and in opposition, and all other matters of record, and in accord with the contemporaneous Memorandum Opinion being filed of record, it is hereby

**ORDERED** and **DECREED** that said Preliminary Objections are **OVERRULED**, and defendants are directed to file an Answer to the Second Amended Complaint within twenty (20) days of the date of entry of this order.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

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BERWIND SECURITIES CORP.,	:	
	:	
Defendants.	:	

**MEMORANDUM OPINION**

The court hereby considers the Preliminary Objections of defendants, Berwind Financial, L.P. and Berwind Securities Corp. (collectively “Berwind”) to plaintiffs’ Second Amended Complaint. As alleged in the Complaint, the parties entered into an agreement whereby Berwind was to act as plaintiffs’ exclusive financial advisor to obtain \$5,000,000 in financing for plaintiffs and otherwise to assist them in closing such loan. In this action, plaintiffs have asserted claims against Berwind for breach of that contract and for unjust enrichment, to both of which claims Berwind objects.

**I. Plaintiffs’ Claim For Breach of Contract.**

Berwind objects that plaintiffs have failed to make out a cause of action for breach of contract because Berwind did obtain a \$5 million dollar loan for plaintiffs and thereby performed its obligation under the parties’ contract. Plaintiffs allege that, although Berwind did obtain the loan for them, it was the wrong kind of loan, and as a result they defaulted under it and were forced into bankruptcy. This allegation supports plaintiffs’ claim that Berwind breached the parties’ contract, which required Berwind “on a best efforts basis . . . to secure a lender(s) and/or

investor(s) which will enable [plaintiff] to meet its financing objectives regarding structure, terms, conditions, flexibility, timing and a desirable lender/investor relationship.” Second Amended Complaint, Ex. B, p. 2.

Plaintiffs also allege that Berwind lied on their behalf (but apparently without their knowledge) in order to obtain the loan for them. In essence, plaintiffs are alleging that Berwind acted in bad faith in obtaining the loan for them. A duty of good faith and fair dealing is implied in every contract, and a breach of that duty is a breach of the contract. *See JHE, Inc. v. SEPTA*, 2002 WL 1018941 (Phila. Com. Pl. May 17, 2002) *citing Somers v. Somers*, 418 Pa. Super. 131, 136, 613 A.2d 1211, 1213 (1992). Therefore, plaintiffs have sufficiently alleged a claim for breach of contract against Berwind.

Whether plaintiffs may ultimately be able to prove that their alleged financial ruin was caused by Berwind’s alleged breach of the contract is a different matter that cannot be addressed at this Preliminary Objection stage of the case.

## **II. Plaintiffs’ Claim For Unjust Enrichment.**

Berwind objects that plaintiffs have not made out a claim for unjust enrichment against it because there is no allegation that Berwind’s retention of its \$65,000 fee for obtaining the loan was inequitable. A claim for unjust enrichment requires that plaintiff plead the following elements:

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 defendant to retain the benefit without payment of value. . . . Where unjust enrichment is found, the law implies a contract, . . . which requires that the defendant pay to plaintiff the value of the benefit conferred. In short, the defendant makes restitution to the plaintiff in *quantum meruit*.

Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 97-8, 666 A.2d 327, 328-9 (1995). Since plaintiffs have alleged that defendants did not do the work, i.e. obtain an appropriate loan for plaintiffs, for which Berwind was to receive this fee, its retention of the fee is unjust. Such allegations are sufficient to support a claim for unjust enrichment.

Berwind also objects that the unjust enrichment claim is duplicative of the breach of contract claim, which it is. “While plaintiff cannot ultimately recover on both theories of contract and unjust enrichment, plaintiff may plead unjust enrichment in the alternative along with a claim for breach of contract.” Duane Morris, LLP v. Todi, 2002 WL 31053839 \*6 (Phila. Com. Pl. Sept. 3, 2002). Therefore, Berwind’s preliminary objection to plaintiffs’ unjust enrichment claim must be overruled. However, given that Berwind apparently does not dispute the existence of the contract that governs the relations between the parties, it is unlikely that plaintiffs will be able to proceed much further with their unjust enrichment claim. *See* Mercy Health Systems of Southeastern Pa. v. Metropolitan Partners Realty LLC, 2003 WL 21904583 \*3 (Phila. Com. Pl. July 10, 2003) (dismissing unjust enrichment claim as a result for Motion for Judgment on the Pleadings).

### **CONCLUSION**

For all the foregoing reasons, defendants’ Preliminary Objections to the Second Amended Complaint are overruled.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

**Dated: January 8, 2004**