

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

KELLY RAMBO and PHILLIP J. BERG, ESQ.	:	August Term, 2004
	:	
Plaintiffs,	:	No. 03894
	:	
v.	:	
	:	Commerce Program
RONALD B. GREENE, M.D., and RONALD	:	
B. GREENE, M.D., P.C.,	:	Control No. 102365
	:	
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 28TH day of February 2005, upon consideration of Defendants' Preliminary Objections, all responses in opposition, the respective memoranda, all matters of record, and in accordance with the Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that said Preliminary Objections are **SUSTAINED** as follows:

1. Counts I (breach of contract) and II (breach of implied contract) are **dismissed** pursuant to Pa.R.C.P. 1028 (a) (3) for insufficient specificity. However, in the event that either Plaintiff is in possession of sufficient facts, Plaintiff(s) hereby are granted leave to amend their contractual claims within twenty (20) days from the date of entry of this Order;
2. Count III (breach of implied warranty and fair dealing) fails as a matter of law and is **dismissed**, as Pennsylvania recognizes no such independent cause of action;
3. Counts IV (negligence), V (fraud/fraudulent misrepresentation), VI (constructive/legal fraud), and VII (professional negligence) are barred by the gist of the action doctrine and are therefore **dismissed**;
4. Plaintiff Rambo has failed to state a legally cognizable claim for either negligent infliction of emotional distress (Count VIII) or intentional infliction of emotional distress (Count

IX). Accordingly, these claims are **dismissed**; and

5. Plaintiffs have failed to set forth a valid basis to support an award of punitive damages. All references to punitive damages hereby are **stricken** from the Complaint.

BY THE COURT:

C. DARNELL JONES, J.

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C. DARNELL JONES, J.

MEMORANDUM OPINION

Before the Court are Defendants’ Preliminary Objections to Plaintiffs’ Complaint. For the reasons fully discussed below, said Preliminary Objections are **sustained**.

BACKGROUND

According to Plaintiffs’ Complaint, this action arises out of the refusal of Defendant Ronald B. Greene, M.D. (“Dr. Greene”) to testify as an expert at the medical malpractice trial of Plaintiff Kelly Rambo, who, at the time, was represented by Plaintiff Philip J. Berg, Esquire. In their Complaint, Plaintiffs have purportedly stated claims for the following: breach of contract (Count I); breach of implied contract (Count II); breach of warranty and fair dealing (Count III); negligence (Count IV); fraud/fraudulent misrepresentation (Count V); constructive/legal fraud (Count VI); professional malpractice (Count VII); intentional infliction of emotional distress (Count VIII); and negligent infliction of emotional distress (Count IX). Plaintiffs have also demanded punitive damages. Defendants have filed Preliminary Objections to all of the foregoing claims; each will be addressed in turn.

DISCUSSION

I. Plaintiffs' Breach of Contract Claims Are Insufficiently Pled

As a preliminary matter, under the circumstances at bar, an expert witness can not be compelled to give testimony against his will. *See e.g., Williams v. South Hills Health Sys.*, 24 Pa. D. & C.3d 206, 209 (1981); *see also Moses v. Albert Einstein Med. Ctr.*, 25 Phila. 389 (1993); *Graham v. I.M.O. Indus.*, 16 Pa. D. & C.4th 492 (1992). Thus, in order to survive under these facts, any claims that Plaintiffs may have against Dr. Greene must be based upon the breach of a specific agreement. Although Counts I and II of the Complaint purport to state claims for breach of contract, the pleading falls short. To sustain a claim for breach of contract, Plaintiffs must demonstrate: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. *CoreStates Bank, Nat'l Assn. v. Cutillo*, 723 A.2d 1053 (Pa. Super. 1999). As pled, this court finds that neither Plaintiff has set forth sufficient facts to support the existence of a contract between either of them and Defendants.

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." *In re Barnes Foundation*, 661 A.2d 889, 895 (Pa. Super. 1995); *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. Super. 1991). Based upon the allegations of the Complaint, this Court finds that the legal bases for Defendants' alleged liability are impermissibly vague and conclusory, particularly concerning the nature of the agreement between the parties. The Complaint alleges that Dr. Greene's role was "contractual in nature" (¶ 30), but it fails to specifically identify the agreement or its terms.

Plaintiffs further assert that Dr. Greene's role was "evidenced" by writings, but they neglect to attach same to the Complaint. When a claim or defense is based upon an agreement,

Pa.R.C.P. 1019 (h) requires the pleading to state specifically if the claim is in writing. If the claim is in writing, the pleader must attach a copy of the writing or set forth why such writing is not accessible. Pa.R.C.P. 1019 (i). Plaintiffs have failed to comply with this Rule.

Accordingly, Defendants' Preliminary Objections to Counts I and II are sustained and such counts are dismissed. However, in the event that either Plaintiff is in possession of sufficient facts, Plaintiff(s) hereby are granted leave to amend their contractual claims within twenty (20) days from the date of entry of this Order.

II. Count II (Breach of Implied Warranty and Fair Dealing) Fails As A Matter of Law

Count II purports to state a claim for "breach of implied warranty and fair dealing." Pennsylvania does not recognize such a claim as an independent cause of action. "A breach of the covenant of good faith is nothing more than a breach of contract claim and separate causes of action cannot be maintained for each, even in the alternative." JHE, Incorporated v. Southeastern Pennsylvania Transport Authority, 2002 WL 1018941, *7 (Pa. Com. Pl. 2002). Count III is merely a repetition of Counts I and II wherein the Plaintiffs allege a breach of an unspecified contract. However, the Court has already found that Plaintiffs have failed to plead the existence of a contract between themselves and Defendants. As a result, there can be no claim for a breach of good faith and fair dealing when there is no contract to which such an obligation can attach. Therefore, the Plaintiffs' claim fails.

III. Counts IV, V, VI and VII Are Barred By the Gist of the Action Doctrine

Plaintiffs have also alleged several tort claims against Defendants, including negligence (Count IV); fraud/fraudulent misrepresentation (Count V); constructive/legal fraud (Count VI); and professional malpractice (Count VII). Each of the foregoing tort claims fail by reason of the gist of the action doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super.

2002). 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.” *Id.* at 19. Because this Court has already determined that, under the circumstances at bar, an expert witness can not be compelled to give testimony against his will, any claims that Plaintiffs may have against Dr. Greene must be based upon the breach of a specific contractual agreement in order to survive. Accordingly, Defendants’ Preliminary Objections to Counts IV, V, VI and VII are sustained and these counts are dismissed.

IV. Counts VIII and IX Fail As A Matter of Law

In Counts VII and IX of the Complaint, Plaintiff Rambo purports to state claims for both intentional and negligent infliction of emotional distress, respectively. Although there is much controversy over whether Pennsylvania jurisprudence recognizes the tort of intentional infliction of emotional distress, it is clear that in order to state such a claim, plaintiff must allege physical injury. *Rolla v. Westmoreland Health System*, 651 A.2d 160, 163 (Pa. Super. 1994).

Pennsylvania case law likewise establishes that a claimant may not recover for negligent infliction of emotional distress in the absence of physical injury. *Id.* At bar, Plaintiff Rambo has failed to allege any physical injury; rather, she states that she has suffered “severe emotional distress” and injury to her “emotional well-being.” Compl. ¶¶ 64 and 67. Such allegations are insufficient to state a valid claim for either intentional or negligent infliction of emotional distress. Accordingly, the demurrers to Counts VIII and IX are sustained.

V. Plaintiff Is Not Entitled To Punitive Damages

Defendants have also moved to strike Plaintiffs’ demand for punitive damages. A court may only award punitive damages where the described conduct was “malicious, wanton, reckless, willful or oppressive.” *G.J.D. v. Johnson*, 552 Pa. 169; 713 A.2d 1127 (1998).

Plaintiffs have failed to set forth sufficient facts to warrant the imposition of punitive damages in the instant matter. Moreover, under Pennsylvania law, punitive damages are not awardable for breach of contract. The Flynn Company v. Peerless Door & Glass, Inc., 2002 WL 1018937, *3 (Pa.Com.Pl. 2002). Since a breach of contract claim is the only claim that may lie against Defendants here, the Preliminary Objection regarding punitive damages is sustained and all references to punitive damages hereby are stricken from the Complaint.

CONCLUSION

For the above-stated reasons, this Court finds as follows:

1. Counts I (breach of contract) and II (breach of implied contract) are **dismissed**. However, in the event that either Plaintiff is in possession of sufficient facts, Plaintiff(s) hereby are granted leave to amend their contractual claims within twenty (20) days from the date of entry of this Order;
2. Count III (breach of implied warranty and fair dealing) fails as a matter of law and is **dismissed**;
3. Counts IV (negligence), V (fraud/fraudulent misrepresentation), VI (constructive/legal fraud), and VII (professional negligence) are barred by the gist of the action doctrine and are therefore **dismissed**;
4. Plaintiff Rambo has failed to state a legally cognizable claim for either negligent infliction of emotional distress (Count VIII) or intentional infliction of emotional distress (Count IX). Accordingly, these claims are **dismissed**; and
5. Plaintiffs have failed to set forth a valid basis to support an award of punitive damages. All references to punitive damages hereby are **stricken** from the Complaint.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

C. DARNELL JONES, J.