

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

COMSUP COMMODITIES, INC.,	:	February Term, 2003
	:	
Plaintiff,	:	No. 01438
	:	
v.	:	Control No. 072032
	:	
OSRAM SYLVANIA, INC., and	:	Commerce Program
OSRAM SYLVANIA PRODUCTS, INC.,	:	
	:	
Defendants.	:	

ORDER AND MEMORANDUM OPINION

AND NOW this __3rd_ day of December, 2003, upon consideration of defendants' Preliminary Objections to plaintiff's Amended Complaint, plaintiff's response thereto, the memoranda in support and opposition, and all other matters of record, and in accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby **ORDERED** that said Preliminary Objections are **SUSTAINED** in part and plaintiff's request for attorneys' fees is dismissed.

It is further **ORDERED** that the remaining Preliminary Objections are **OVERRULED** and defendants are directed to file their Answer(s) to the remaining claims of the Amended Complaint within twenty (20) days of the date of entry of this Order.

BY THE COURT,

GENE D. COHEN, J.

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	:	
Defendants.	:	

MEMORANDUM OPINION

The court hereby considers the Preliminary Objections of defendants, Osram Sylvania, Inc. and Osram Sylvania Products, Inc., to plaintiff’s Amended Complaint. Plaintiff alleges that defendants negotiated with it to purchase quantities of tungsten from plaintiff, but that defendants then refused to accept and pay for such quantities of tungsten. Plaintiff has brought claims against defendants for breach of contract, promissory estoppel, and intentional and negligent misrepresentation to which defendants now object.

Prior to the commencement of this action, one of the defendants brought a declaratory judgment action against plaintiff in Bradford County in which it requested the court to declare that the contract alleged by plaintiff did not exist. The Bradford County trial court apparently refused to exercise its jurisdiction under the Declaratory Judgments Act, and that decision is now before the Superior Court on appeal.

I. Defendants’ Preliminary Objection to Plaintiffs’ Tort Claims Must Be Overruled.

Defendants object that the gist of the action doctrine precludes plaintiff from bringing its claims for intentional and negligent misrepresentation alongside its claims for breach of contract and promissory estoppel. 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.” Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002). However, defendants apparently deny the existence of the contract that plaintiff claims was breached, so the court is not comfortable dismissing plaintiff’s alternative tort claims at this preliminary objection stage in the proceedings.

II. Defendants’ Preliminary Objection to Plaintiff’s Request for Attorneys’ Fees Must Be Sustained.

Defendants object to plaintiff’s request for attorneys’ fees. Under the “American Rule,” a party may not recover attorneys’ fees from its adversary absent an express statutory or contractual provision allowing for the recovery of such attorneys’ fees. *See Mosaica Academy Charter School v. Commonwealth Dept. of Education*, 572 Pa.191, 206-7, 813 A.2d 813, 822 (2002). Since plaintiff has not identified any applicable contractual or statutory provision that permits it to recover attorneys’ fees from defendants, plaintiffs’ request for such relief must be dismissed.

III. Defendants’ Preliminary Objection Based on Prior Pending Action Must Be Overruled.

Defendants object that the action one of them brought in Bradford County pre-empts plaintiff from bringing this action in this court. “In order to find lis pendens a valid objection to the immediate entertainment or continuation of a suit, the objecting party must demonstrate to the court that in each case the parties are the same, and the rights asserted and the relief prayed for are the same.” Virginia Mansions Condominium Assoc. v. Lampl, 380 Pa. Super.452, 456, 552 A.2d 275, 277 (1988).

Although this action and the Bradford County action do arise from the same transaction or occurrence, *i.e.* the alleged sale of tungsten by plaintiff to defendants, the two actions cannot be viewed as sufficiently identical to satisfy the requirements of the doctrine of lis pendens. The Bradford County action involves a claim for declaratory judgment whereas this action involves claims for breach of contract, promissory estoppel, fraud, and negligent misrepresentation. *See Penox Technologies, Inc. v. Foster Medical Corp.*, 376 Pa. Super. 450, 546 A.2d 114 (1988) (court would not dismiss or stay breach of contract action due to prior declaratory judgment action). Furthermore, Osram Sylvania, Inc. is not a party to the Bradford County action, although it is a defendant here. Therefore, this court will not abate or stay the present action due to the pendency (on appeal) of the Bradford County action.

CONCLUSION

For all of the foregoing reasons, defendants' Preliminary Objections to plaintiff's Amended Complaint are sustained in part and overruled in part

BY THE COURT,

GENE D. COHEN, J.

Dated: 12/3/03