

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

SIPCO SURFACE PROTECTION, INC., :
: NOVEMBER 2010
: Plaintiff, :
: v. : No. 0177
: AKER PHILADELPHIA SHIPYARD, INC.:
and CMP COATINGS, INC., : Commerce Program
: Defendants. : Control Number 11092406 and 11091955

ORDER

AND NOW, this 11th day of April, 2012, upon consideration of the Defendants' Preliminary Objections, the Plaintiff's responses thereto, and the Memoranda in Support and Opposition, it is **ORDERED** that the objections are SUSTAINED in part and OVERRULED in part as follows:

1. Aker's preliminary objections to Sipco's claim for constructive fraud are SUSTAINED;
2. Aker's preliminary objections to Sipco's claim for fraud in the inducement are SUSTAINED;
3. Aker's preliminary objections to Sipco's claim for fraud in the execution are SUSTAINED;
4. Aker's preliminary objections to Sipco's claim for breach of the duty of good faith and fair dealing are SUSTAINED;
5. Aker's preliminary objections to Sipco's claim for promissory estoppel are SUSTAINED;
6. Aker's preliminary objections to Sipco's claim for equitable estoppel are SUSTAINED;

Sipco Surface Protectio-ORDOP



7. CMP's preliminary objections to Sipco's claim for breach of express warranty are SUSTAINED;
8. CMP's preliminary objections to Sipco's third party beneficiary claim are SUSTAINED;
9. CMP's preliminary objections to Sipco's claim for fraudulent misrepresentation are SUSTAINED;
10. Defendants' preliminary objections to Sipco's claim for attorneys' fees are SUSTAINED;
11. Defendants' preliminary objections to Sipco's claim for punitive damages are SUSTAINED;
12. All of Defendants' other preliminary objections are OVERRULED.

BY THE COURT:



PATRICIA A. MCINERNEY, J.

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OPINION

This action arises out of a contract. Plaintiff Sipco Surface Protection, Inc. (“Sipco”) is a marine painting contractor, who contracted with Aker Philadelphia Shipyard, Inc. (“Aker”) for the blasting and painting of the cargo and ballast tanks of four ships being built by Aker. CMP Coatings, Inc. (“CMP”) manufactured the paints used in this process. Aker issued a Request for Quote (“RFQ”) for the work on these vessels, and Sipco submitted a fixed-price bid in response. Sipco and Aker signed two contracts (“Original Purchase Orders”) in September 2009. The RFQ specified that Sipco was to use paint manufactured by CMP and supplied by Aker, and that the painting must conform to CMP’s standards. Sipco alleges that a CMP representative was onsite during the work and that CMP and Aker were required to find each stage of the work satisfactory in order for Sipco to receive payment for it.

Sipco alleges that the CMP products were inadequate to the task, that the wrong product data sheets were supplied with the paints, and that incorrect painting procedures were required by CMP and Aker, all of which caused the work to take significantly longer and be much more

expensive than expected. Sipco asserts that Aker knew that previous contractors had experienced similar problems with CMP products, which they did not disclose to Sipco; and in addition, that Aker caused significant delays with the commencement of the painting, which pushed it back by several months. Sipco alleges that when it brought the problems with the paint (some of which had expired) to Aker's attention, CMP simply recertified it as good. Sipco further alleges a number of other instances in which the paint was inadequate or the procedures required were inappropriate, causing delays and costing more to perform than expected or necessary, and that it brought these to Aker's attention without effect.

In February 2010, the representatives of Sipco and Aker renegotiated the purchase orders and signed two modified contracts ("Revised Purchase Orders"), which changed the scope of the work, the amount of payment, and the deadline. However, Sipco alleges that the problems with the paint and the ships continued. Sipco claims it informed Aker that due to these problems and the unusual snowfall, Sipco could not meet the newly-set February 20 deadline; however, Aker only agreed to give them an additional two days. On February 16, 2010, Aker sent Sipco a Notice Letter informing Sipco that it was in default regarding the delays and giving it until March 2, 2010 to remedy them. Sipco alleges that it remedied these defaults and completed all work under the Revised Purchase Orders by March 9, 2010, but that work performed on a "time and materials" basis continued. However, on April 29, 2010, Aker wrote to Sipco, claiming it was still in default and terminating the Revised Purchase Orders.

In its complaint, Sipco brings claims against Aker for breach of contract, breach of the implied warranty of adequate specifications, constructive fraud, fraudulent inducement to contract, fraud in the execution of a contract, breach of the duty of good faith and fair dealing, promissory estoppel, equitable estoppel, and unjust enrichment. In addition, Sipco brings claims

against CMP for breach of express and implied warranties, third party beneficiary status, tortious interference with contract, fraudulent and negligent misrepresentation, and unjust enrichment. Both Aker and CMP have filed preliminary objections.

For the reasons discussed below, the court will sustain these preliminary objections in part and overrule them in part.

I. Aker's preliminary objections to Sipco's claim for constructive fraud are sustained.

Although Sipco does not cite a source for the elements of constructive fraud upon which it relies, they appear to be those listed in Acchione & Canuso v. Commonwealth, and inapplicable to the facts before us.¹ In Acchione, our Supreme Court has made it clear that these factors apply to contracts with governmental agencies, and the court can find no authority for applying them to a contract between private individuals.

Further, as Aker notes, this fraud claim is barred by the gist of the action doctrine, which prohibits a party from recasting a breach of contract claim as a tort claim.² The doctrine bars tort claims: (1) "arising solely from a contract between the parties"; (2) where "the duties allegedly breached were created and grounded in the contract itself"; (3) where "the liability stems from a contract"; or (4) where the tort claim "essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract."³ Sipco's fraud claim arises from the contract between the parties and essentially duplicates the breach of contract claims. Accordingly, this claim is barred.

¹ 501 Pa. 337, 343-4; 461 A.2d 765, 768 (1983).

² eToll, Inc. v. Elias/Savion Adver., 811 A.2d 10, 14 (Pa. Super. 2002).

³ Id. at 19.

II. Aker’s preliminary objections to Sipco’s claims for fraud in the inducement are sustained.

The existence and validity of the contracts between Sipco and Aker is not disputed. These contracts, the Original and Revised Purchase Orders, were attached to the Complaint. Both contracts incorporate by reference Aker’s “Terms and Conditions of Purchase” which contains a clause indicating that these agreements constitute the entire agreement of the parties. Because of the existence of these integration clauses, the court may not consider Sipco’s claim for fraud in the inducement.

“[P]arol evidence may be introduced to vary a writing meant to be the parties' entire contract, when a party avers that the contract is ambiguous or that a term was omitted from the contract because of fraud, accident or mistake.”⁴ Regarding the fraud exception, our Supreme Court “has restricted the exception to allegations of fraud in the execution of a contract, and has refused to apply the exception to allegations of fraud in the inducement of a contract.”⁵

Because the integration clause is contained in both the Original and the Revised Purchase Orders, both counts for fraud in the inducement are stricken.

III. Aker’s preliminary objections to Sipco’s claim for fraud in the execution are sustained.

Fraud in the execution of a contract is defined as a situation “where a party alleges that he was mistaken as to the terms and the actual contents of the agreement he executed due to the other's fraud.”⁶ While this is an exception to the parol evidence rule, Sipco has not made out a claim for fraud in the execution of a contract.

⁴ Toy v. Metro. Life Ins. Co., 593 Pa. 20,49; 928 A.2d 186, 204 (2007).

⁵ Id. at 49-50.

⁶ Id. at 52; HCB Contractors v. Liberty Place Hotel Assoc., 539 Pa. 395, 398; 652 A.2d 1278, 1279 (Pa. 1995).

Sipco argues that Aker was aware of problems with the CMP paints and that as a result, other contractors performed similar work on a time and materials basis rather than a fixed-price basis. Aker did not share this information in its RFQ, which resulted in the contracts between Aker and Sipco. Sipco argues that Aker's silence constitutes fraud in the execution. Sipco is mistaken, however, as a request for quote is not a contract, nor is it alleged that a term was fraudulently left out of the contracts between Sipco and Aker. At most, Aker's silence on these issues could be fraud in the inducement to contract – which, as discussed above, is barred here by the parol evidence rule.

Additionally, as previously discussed, fraud in the execution is barred by the gist of the action doctrine. For all of these reasons, Aker's preliminary objections to this claim are sustained.

IV. Aker's preliminary objections to Sipco's claim for breach of the duty of good faith and fair dealing are sustained.

The duty of good faith and fair dealing is one that is imposed on parties to a contract.⁷ This court has previously held that the claim for breach of duty of fair dealing and good faith duplicates the breach of contract claim, and is not a cause of action in itself: "The implied covenant of good faith does not allow for a claim separate and distinct from a breach of contract claim. Rather, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself."⁸ Accordingly, Aker's preliminary objections are sustained.

⁷ Bethlehem Steel Corp. v. Litton Industries, Inc., 507 Pa. 88, 125, 488 A.2d 581, 600 (1985) (internal citations omitted).

⁸ JHE, Inc. v. SEPTA, 2002 Phila. Ct. Com. Pl. LEXIS 78, *13; see also LSI Title Agency, Inc. v. Evaluation Servs., 951 A.2d 384, 392 (Pa. Super. 2008) (determining that "that the claim for breach of the implied covenant of good faith and fair dealing is subsumed in a breach of contract claim.")

V. Aker's preliminary objections to Sipco's claim for promissory estoppel are sustained.

Promissory estoppel is the theory that a "promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."⁹ Promissory estoppel may be pled in the alternative to a breach of contract claim; however, Sipco has not pled this claim with sufficient particularity.

"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."¹⁰

The Complaint's Count IX for promissory estoppel merely incorporates the preceding paragraphs by reference and asserts that "Plaintiff justifiably relied upon promises which were supported by a continuing course of conduct between the parties." It is not possible to determine what promises Aker allegedly made, in what way Sipco relied upon them, and the absence of a duty of inquiry on Sipco's part. Accordingly, these preliminary objections are sustained.

⁹ Thatcher's Drug Store v. Consolidated Supermarkets, 535 Pa. 469, 476; 636 A.2d 156, 160 (1994).

¹⁰ Rinehimer v. Luzerne County Community College, 372 Pa. Super. 480, 496; 539 A.2d 1298, 1306 (1988).

VI. Aker's preliminary objections to Sipco's claim for equitable estoppel are sustained.

It is well-established that "equitable estoppel does not create a cause of action at law."¹¹ Rather, equitable estoppel is a defense.¹² Accordingly, Sipco cannot maintain a cause of action for equitable estoppel, and this claim must be stricken.

VII. Aker's preliminary objections to Sipco's incorporations by reference are overruled.

Aker objects to Sipco's incorporations by reference in each count, stating that the allegations of fraud thereby included constitute scandalous and impertinent material. The court can find nothing scandalous or impertinent in the allegations of fraud made by Sipco; accordingly, these preliminary objections are overruled.

VIII. CMP's preliminary objections to Sipco's claim for breach of express warranty are sustained.

Sipco claims damages from CMP for breach of express warranty. Express warranties for goods are created either by an affirmation of fact or promise made by the seller to the buyer in a transaction, or a description of the goods that is made part of the basis of the bargain between them.¹³ Sipco is not a party to the transaction for the sale of the paint; this contract was between CMP and Aker. Sipco alleges that it has standing to enforce this warranty as an intended third-party beneficiary of the contract between the defendants; however, the court does not find that it has alleged sufficient facts to prove this allegation.

¹¹ Peluso v. Kistner, 970 A.2d 530, 533 n. 4 (Pa. Commw. 2009) (internal citations omitted).

¹² Id. at 533 n.5.

¹³ 13 Pa. C.S.A. § 2313; Goodman v. PPG Indus., 849 A.2d 1239, 1243 (Pa. Super. 2004).

Ordinarily, express warranties are limited to the buyer, and are created by offer and acceptance: “Given that express warranties are specifically negotiated (rather than automatically implied by law), it follows that to create an express warranty, the seller must expressly communicate the terms of the warranty to the buyer in such a manner that the buyer understands those terms and accepts them.”¹⁴

Sipco cites *Scarpitti v. Weborg*, which articulates the exception to this rule; that

a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself... unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.¹⁵

In order to meet this test, the circumstances must be compelling that recognition of [Sipco's] right is appropriate to effectuate the intention of [Aker and CMP], and that the performance satisfies an obligation of the [Aker] to pay money to [Sipco], or the circumstances indicate that the [Aker] intends to give [Sipco] the benefit of the promised performance. Sipco has not alleged such circumstances. The purpose of the contract was to supply paint necessary for the painting of the vessels, however that does not mean that Sipco was the intended beneficiary of the performance, and nothing indicates that the performance of the contract between Aker and CMP satisfied an obligation of Aker to pay money to Sipco. Aker's contract with Sipco is an entirely separate matter.

Further, in *Goodman v. PPG Industries*, the Superior Court held that

third parties may enforce express warranties only under circumstances where an objective fact-finder could reasonably conclude that (1) the party issuing the warranty intends to extend the specific terms of the warranty to the third party (either directly, or through an

¹⁴ *Goodman v. PPG Indus.*, 849 A.2d at 1243.

¹⁵ *Scarpitti v. Weborg*, 530 Pa. 366,372-3; 609 A.2d 147, 150-1 (1992).

intermediary); and (2) the third party is aware of the specific terms of the warranty, and the identity of the party issuing the warranty.¹⁶

Sipco has not alleged facts that would lead a fact-finder to conclude that CMP intended to extend any express warranty to Sipco – the warranty on the paint would have been intended for Aker’s benefit, not Sipco’s. Moreover, Sipco has not alleged facts showing that CMP was aware of Sipco’s identity or involvement at the time that the warranty was issued. Accordingly, CMP’s preliminary objections to Sipco’s claim for breach of express warranty are sustained.

IX. CMP’s preliminary objections to Sipco’s third party beneficiary claim are sustained.

As discussed above, Sipco has not pled facts that demonstrate that it was the intended beneficiary of the contract between Aker and CMP. The fact that CMP was involved in inspecting Sipco’s performance, or that it had to approve Sipco’s work before Sipco received payment, is not sufficient to permit Sipco to proceed on a third-party beneficiary theory. Accordingly, this claim is stricken.

X. CMP’s preliminary objections to Sipco’s claim for tortious interference with contract are overruled.

The elements of a claim for interference with contractual relations are:

- (1) the existence of a contractual relationship between the complainant and a third party;
- (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual damage as a result of defendant's conduct.¹⁷

¹⁶ Goodman v. PPG Indus., 849 A.2d 1239, 1246 (Pa. Super. 2004).

¹⁷ Phillips v. Selig, 959 A.2d 420, 429 (Pa. Super. 2008); Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 2004).

In order to determine whether an actor's conduct is improper (element three above), the following factors are to be considered:

- a) the nature of the actor's conduct;
- b) the actor's motive;
- c) the interest of the other with which the actor's conduct interferes;
- d) the interests sought to be advanced by the actor;
- e) the social interest in protecting the freedom of action of the actor and the contractual interests of the other; and
- f) the relations between the parties.¹⁸

Here, Sipco has alleged facts that could make out a claim for tortious interference with contract. The existence of contracts between Sipco and Aker are undisputed by any party; the actual damage alleged is Sipco's loss of the contract with Aker. Sipco alleges that its performance was impeded due to CMP's inspection process, including intentional reports that the tanks failed inspection even though they were painted according to industry standard, for the purpose of covering up its substandard products. These allegations, if proven, would constitute an intent to harm and an improper purpose on the part of CMP. Therefore these preliminary objections are overruled.

XI. CMP's preliminary objections to Sipco's claim for fraudulent misrepresentation are sustained, but its preliminary objections to Sipco's claim for negligent misrepresentation are overruled.

Although Sipco alleges numerous irrelevant facts, it has ultimately made out a claim for negligent misrepresentation.

¹⁸ Walnut St. Assocs. v. Brokerage Concepts, Inc., 20 A.3d 468, 471 (Pa. 2011).

The elements of negligent misrepresentation are “(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.”¹⁹ In order to make out a claim for negligent misrepresentation, there must also be a duty owed by the defendant to the plaintiff.²⁰

Sipco alleges that CMP, through Aker, supplied it with the wrong product data sheets as part of the Request for Quote (RFQ). It alleges that it relied upon these data sheets in submitting its bid, and in performing the work. Because of its reliance on these false statements of material fact, Sipco suffered damages including cancellation of the contracts by Aker.

CMP argues that no contractual relationship between Sipco and CMP is alleged, and that it had no legal duty to supply information to Sipco. However, our Supreme Court has acknowledged that a duty can arise in the absence of privity.²¹ The Court explained that this rule applies “where information is negligently supplied by one in the business of supplying information... and where it is foreseeable that the information will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of information.”²² In accord therewith, a previous Commerce Court opinion held that a claim for negligent misrepresentation was legally sufficient in a case involving a lawyer who was involved in collecting a delinquent tax lien. We found there that because the lawyer “undertook to

¹⁹ Bortz v. Noon, 556 Pa. 489, 500; 729 A.2d 555, 561 (1999).

²⁰ Id. at 501.

²¹ Bilt-Rite Contrs., Inc. v. Architectural Studio, 581 Pa. 454, 483-3; 866 A.2d 270, 287 (2005).

²² Id. at 482.

provide information regarding the pay-off of the tax lien [he] also undertook a duty to exercise reasonable care or competence in obtaining or communicating that information.”²³

CMP’s argument that the Complaint does not allege that CMP had knowledge of Sipco’s intention to bid on the project does not make the negligent representation claim legally insufficient – whether or not CMP knew of Sipco’s identity, it would be foreseeable that a painting contractor would rely upon the data sheets supplied by CMP.

CMP also argues that this claim is barred by the economic loss doctrine; however, the Pennsylvania Supreme Court has held that the economic loss doctrine does not bar the tort of negligent misrepresentation in cases “when one supplies information to others, for one’s own pecuniary gain, where one intends or knows that the information will be used by others in the course of their own business activities.”²⁴ The Court goes on to acknowledge that the tort is narrowly tailored, applying only to “those businesses which provide services and/or information that they know will be relied upon by third parties in their business endeavors, and it includes a foreseeability requirement, thereby reasonably restricting the class of potential plaintiffs.”²⁵ Even under the narrow interpretation of the tort in Bilt-Rite, Sipco has alleged facts that make it improper to dismiss this claim on preliminary objections. Accordingly, CMP’s preliminary objections to Sipco’s claim for negligent misrepresentation are overruled.

However, Sipco has not made out a claim for fraudulent misrepresentation. The elements of 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

²³ Fid. Nat’l Title Ins. Co. v. Linebarger Goggan Blair & Sampson, LLC, 2008 Phila. Ct. Com. Pl. LEXIS 244, *6-7.

²⁴ Bilt-Rite Contrs., Inc. v. Architectural Studio, 581 Pa. 454, 479; 866 A.2d 270, 285-6 (2005).

²⁵ Id. at 479.

false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance.”²⁶ Sipco does not allege that CMP intentionally supplied the wrong product data sheets upon which it relied, and its allegations of false statements by CMP are not pled with particularity (the one statement pled by Sipco, that “a real marine painting contractor” wouldn’t have problems with CMP’s paint, was allegedly made to Aker, not Sipco, and it is not pled how Sipco learned of this statement in order to rely upon it. Accordingly, CMP’s preliminary objections to Sipco’s claim for fraudulent misrepresentation are sustained.

XII. Defendants’ preliminary objections to Sipco’s claim for punitive damages are sustained.

Both defendants have objected to Sipco’s claim for punitive damages. “Punitive damages are awarded in tort actions, not for breach of contract.”²⁷ All tort claims against Aker have been stricken, therefore punitive damages claims against Aker must also be stricken. Further, although tort claims remain against CMP, “it is well-settled that “punitive damages are an ‘extreme remedy’ available in only the most exceptional matters.”²⁸ CMP’s alleged actions simply do not rise to the level necessary for punitive damages; accordingly, Sipco’s punitive damages claims against CMP are stricken as well.

²⁶ Porreco v. Porreco, 571 Pa. 61, 69; 811 A.2d 566, 570 (2002).

²⁷ McShea v. City of Philadelphia, 606 Pa. 88, 98 n. 5; 995 A.2d 334, 340 n. 5 (2010).

²⁸ Phillips v. Cricket Lighters, 584 Pa. 179, 188; 883 A.2d 439, 445 (Pa. 2005).

XIII. Defendants' preliminary objections to Sipco's 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.²⁹ No party has alleged the contract between them provided for attorneys' fees in the event of a dispute, nor has Sipco cited any statute permitting the recovery of attorneys' fees for the claims that remain in this complaint. Accordingly, all requests seeking attorneys' fees are stricken.

XIV. Defendants' preliminary objections to Sipco's claim for unjust enrichment are overruled.

Sipco's claim for unjust enrichment is legally sufficient to survive Defendants' preliminary objections. "The elements of 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 defendant to retain the benefit without payment of value.'"³⁰ Sipco properly alleges the details regarding the benefit conferred on CMP (payment for its allegedly inferior products) and its acceptance and retention thereof. Whether or not it is inequitable for Defendants to retain this benefit is a factual question, not appropriate to be dismissed as a preliminary objection. This objection is therefore overruled.

Aker objects to the unjust enrichment count under the parol evidence rule, and the gist of the action and economic loss doctrines. However, the gist of the action doctrine will not bar an unjust enrichment claim at the preliminary objection stage. "While plaintiff cannot ultimately

²⁹ Jones v. Muir, 511 Pa. 535, 541; 515 A.2d 855, 858 (1985).

³⁰ Lackner v. Glosser, 892 A.2d 21, 34 (Pa. Super. 2006).

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.”³¹ The economic loss doctrine applies to tort actions specifically, and unjust enrichment does not sound in tort, but in equity, as a quasi-contractual remedy.³² Accordingly, these preliminary objections are overruled.

CONCLUSION

For the foregoing reasons, Defendants’ preliminary objections are sustained in part and overruled in part.

BY THE COURT:


PATRICIA A. MCINERNEY, J.

³¹ Duane Morris, L.L.P. v. Todj, 2002 Phila. Ct. Com. Pl. LEXIS 57, *16.

³² Wiernik v. PHH U.S. Mortg. Corp., 736 A.2d 616, 622 (Pa. Super. 1999).