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COMMERCE PROGRAM

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

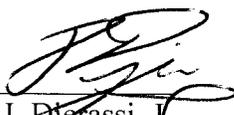
Kay, Tabas & Niknam Ophthalmology Associates, P.C.	:	
<i>Plaintiff</i>	:	
v.	:	May Term, 2015
	:	
	:	No. 00404
	:	
Gibraltar Technologies, Inc. and Thomas Hogue	:	Control No. 15061603
<i>Defendants</i>	:	

ORDER

And now, this 2nd day of October, 2015, upon consideration of Defendants Gibraltar Technologies and Thomas Hogue’s Preliminary Objections to Plaintiff Kay, Tabas & Niknam Ophthalmology Associates, P.C.’s Complaint and the Response thereto, it is hereby ORDERED that Defendants’ Preliminary Objections are SUSTAINED in part and OVERRULED in part:

1. Preliminary objections in the form of demurrers are sustained in favor of Defendant Hogue and Defendant Gibraltar at Count I, Count III, Count IV which are dismissed.
2. Preliminary objections as to improper venue on Count II is sustained in favor of Defendant Gibraltar and venue is transferred to the Court of Common Pleas, Cumberland County.
3. All remaining preliminary objections at Count II are OVERRULED.

By the Court:



Ramy I. Djerassi, J.

Kay, Tabas & Niknam Oph-ORDOP



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**IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION**

Kay, Tabas & Niknam Ophthalmology Associates, P.C. <i>Plaintiff</i>	:	
	:	May Term, 2015
	:	
	:	No. 00404
v.	:	
	:	Commerce program
Gibraltar Technologies, Inc. and Thomas Hogue <i>Defendants</i>	:	Control No. 15061603
	:	

OPINION

DJERASSI, J.

October 2, 2015

Presently before the Court are Defendants’ preliminary objections. Plaintiff’s Complaint seeks damages for the loss of electronic business data after contracting with Gibraltar Technologies, Inc. (“Gibraltar”) to provide data backup services. Kay, Tabas and Niknam Ophthalmology Associates, P.C. is a healthcare provider.

We sustain demurrers to Count I, Count III, Count IV, and Count V. This results in dismissal of all claims against Defendant Thomas Hogue.

A breach of contract claim remains, however, at Count II against Defendant Gibraltar who has objected to venue in Philadelphia. Because a forum selection clause is contained within a service contract between the remaining parties (the “Service Agreement”), venue is enforced according to its terms. The forum selection clause specifies the Cumberland County Court of Common Pleas as the adjudicative forum for any dispute involving the Service Agreement.

This case is therefore transferred to Cumberland County Court of Common Pleas on the remaining Count II.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Kay, Tabas & Niknam is a professional corporation which maintains its principal place of business at The Curtis Center, Suite L30, Philadelphia, PA 19106. Defendant Gibraltar has its principal place of business at 2 Market Plaza Way, Mechanicsburg, PA 17055 and also maintains an office in Philadelphia at 4775 League Island Blvd.

According to the Complaint, Kay, Tabas & Niknam contracted in 2012 with Gibraltar to convert its patient records, billing records, and other business records into a paperless system. Hogue is the CEO of Gibraltar.

On November 28, 2013, Plaintiff's on-site servers malfunctioned and transmitted corrupt data to ZETTA Support, a third-party subcontracted by Defendant Gibraltar to store Plaintiff's back-up data. ZETTA is not a party to this action. Plaintiff's back-up data was corrupted and lost.

Plaintiff brought suit on May 6, 2015, claiming: (1) negligence by Gibraltar; (2) breach of contract by Gibraltar; (3) intentional misrepresentation by Gibraltar and Hogue; (4) negligent misrepresentation by Gibraltar and Hogue; and (5) violation of the UTPCPL by Gibraltar and Hogue.

Defendants filed the following preliminary objections on June 12, 2015: (1) objection to venue pursuant to Pa. R.C.P. 1028(a)(1); (2) demurrer to all claims because they are precluded by the contract between the parties; (3) demurrer to Count II, breach of contract; (4) demurrer to Counts III and IV based on the gist of the action doctrine; (5) demurrer to Counts III and IV based on the parol evidence rule; (6) demurrer to Count III as legally insufficient; (7) demurrer to Count IV as legally insufficient; and (8) demurrer to Count V as legally insufficient.

II. DISCUSSION

Under Pa. R.C.P. 1028(a)(4), preliminary objections in the form of a demurrer test the legal sufficiency of a complaint. When analyzing a demurrer, courts consider as true all well-pleaded, material, relevant facts and any inferences fairly deduced from those facts. *Willet v. Penn. Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997). Review is limited to the content of the complaint. *In re Adoption of S.P.T.*, 783 A.2d 779, 782 (Pa. Super. 2001).

A. Demurrer to Count III, Intentional Misrepresentation, for Failure to State a Claim as to Both Defendants Hogue and Gibraltar

In Count III, Intentional Misrepresentation, Plaintiff claims in pertinent part:

42. Subsequent to the events which occurred in November/December 2013, [Plaintiff] learned that, contrary to representations made by Hogue that he was committed to the financial integrity and longevity of Gibraltar, he had purchased luxury items through Gibraltar while concurrently failing to pay taxes to the United States Internal Revenue service in the Commonwealth of Pennsylvania resulting in tax liens against himself as “responsible for” the debts of Gibraltar. Said liens, in the amount of \$346,533.48 (IRS) and \$32,128.79 (Pennsylvania) had been assessed and/or issued between August 30, 2010 and October 24, 2011.

43. [Plaintiff] reasonably relied upon the material misrepresentations of fact made by Gibraltar and Hogue for the purpose of inducing [Plaintiff] to enter into a contractual relationship with Gibraltar and as a result of such reliance has suffered damages and losses for an amount in excess of \$50,000.00.

Defendant raises a demurrer to the claim, arguing that it is legally insufficient. We agree.

To sustain a claim for intentional misrepresentation, the following elements must be shown: (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 false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. *Bortz v. Noon*, 729 A.2d 555, 560 (Pa. 1999).

Here, Plaintiff's reach into the personal IRS affairs of Hogue does not relate to their decision to hire Gibraltar. A corporate CEO's belief in the "financial integrity and longevity" of his company is neither an intentional misrepresentation nor a factual cause of damages. The statement is neither material to Plaintiff's decision to contract with Gibraltar nor a proximate cause of its data loss. Plaintiff fails to state a claim for intentional misrepresentation and demurrer is sustained.

B. Demurrer to Count IV, Negligent Misrepresentation, for Failure to State a Claim As to Defendant Hogue but not Defendant Gibraltar

In Count IV, Plaintiff alleges that negligent misrepresentations by both Defendants Gibraltar and Hogue caused damages:

45. Gibraltar and Hogue negligently misrepresented that they would provide the services described in their website and advertising materials...

46. Gibraltar and Hogue intended that [Plaintiff] would be reliable upon these negligent misrepresentations.

47. [Plaintiff] reasonably relied upon the negligent misrepresentations made by Gibraltar and Hogue and as a result of such reliance suffered damages and losses for an amount in excess of \$50,000.00.

Defendants seek demurrer on the grounds that Plaintiff failed to state a legally sufficient claim. We agree as to Defendant Hogue but overrule as to Defendant Gibraltar. However, in Section C, we sustain a demurrer to the negligent misrepresentation claim against Gibraltar on the basis of the gist of the action doctrine.

Relating to Hogue, our Supreme Court adopted §552 of the Restatement (Second) Torts in *Bilt-Rite Construction, Inc. v. Architectural Studio*, 866 A.2d 270, 285 (Pa. 2005), holding that a person is liable for negligent misrepresentation who:

...in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for

pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

In Count IV of the Complaint, Plaintiff incorporates all previous averments, but only one refers to Hogue. At Paragraph 9, Plaintiff claims Hogue represented that he was devoted to the financial stability and long-term existence of Gibraltar and that he would be there “for the long haul.” Plaintiff’s only other factual support for its Count IV claim against Hogue is Exhibit B to the Complaint, a contract document which *inter alia* lists Gibraltar’s service promises to Plaintiff as part of Gibraltar’s Remote Backup Solution (RBS) package. “Exhibit B” is specifically referred to as “Exhibit A” in the Service Agreement itself and is incorporated there.

A cause of action in tort for negligent misrepresentation requires proof of several elements, one of which is material fact. *See Gongloff Contracting, LLC v. L. Robert Kimball & Associates and Engineers*, 2015 Pa. Super. 149, --- A.3d --- (finding that a negligent misrepresentation must be a material fact). Plaintiff has not shown how Hogue’s representation that he is devoted to his company’s financial stability and is in it “for the long haul” translates to pecuniary loss caused by justifiable reliance.

A CEO’s confidence in his company is not false information within the meaning of Restatement (Second) Torts §552. It is the kind of assurance that is generally assumed in consumer transactions unless there is a known reason for concern which is then answered by a company’s management. Recent false representations by car manufacturers Toyota, General Motors and Volkswagen come to mind. Their denials of now-confirmed product defects arguably caused buyers to justifiably rely on their representations when buying their cars. Here, Plaintiff does not allege Gibraltar denied the existence of problems and induced Plaintiff to rely on false

assurances before signing the Service Agreement. Nor does Plaintiff explain how Hogue's statement is false. Indeed, the company is still in business according to the Complaint.

For these reasons, demurrer is sustained as to Defendant Hogue for failure to state a claim at Count IV, Negligent Misrepresentation.

C. Demurrers to Count I, Negligence, and Count IV, Negligent Misrepresentation, Under the Gist of the Action Doctrine as to Both Defendant Hogue and Defendant Gibraltar

In addition to the foregoing demurrers for failure to state a legally sufficient claim, Defendants Hogue and Gibraltar raise demurrers to Count I, Negligence, and Count IV, Negligent Misrepresentation, under the gist of the action doctrine. Following review of recent case law, demurrers to Counts I and IV are sustained under the gist of the action doctrine.

1. The Gist of the Action Doctrine and Count I, Negligence, Against Gibraltar

In Count I, Plaintiff alleges negligent conduct by Defendant Gibraltar caused damages. This claim follows promises in the Service Agreement. The averred facts show that the alleged conduct that caused Plaintiff's damage was Gibraltar's non-performance of promises contained in Exhibit B of Plaintiff's Complaint.

How and when the gist of the action doctrine applies to negligence claims was recently addressed in *Bruno v. Erie Insurance Company*, 106 A.3d 48 (Pa. 2014). Following a comprehensive review of the common law origins of the gist of the action doctrine and its various expressions over the years in many different courts, *Bruno* held as follows:

If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract – i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract – then the claim is to be viewed as one for breach of contract.

If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of

torts and, hence, exists regardless of the contract, then it must be regarded as a tort...

Id. at 68-70.

Among many references ***Bruno*** cites as framework for its general holding, the following black letter law citation is clear: “Tort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others...*which are independent of promises* made and therefore apart from any manifested intention of parties to a contract, or other bargaining transaction.” *Id.* at 68 citing W. Page Keeton’s *Prosser and Keeton on Torts* (5th ed. 1984) at page 654 (emphasis added).

Analyzing how ***Bruno*** applies to Count I and accepting as true Plaintiff’s averments, we find Plaintiff and Gibraltar contracted directly for a data backup plan. This was promised by Gibraltar through its Remote Backup Solution Agreement (RBS), which was incorporated into the Service Agreement. The data backup services Gibraltar failed to deliver are the precise services Plaintiff expected through their contract.

In ***Bruno***, the Court distinguished between business actions that are within the scope of actual promises made in a contract and business actions that go beyond them. The contractor in ***Bruno*** was an insurance company that had issued a homeowner’s policy. Promised was \$5000 against losses associated with mold damage and other stipulated services. After learning of mold damage at the insured home, the insurance company met its contractual commitments by conducting air quality testing inside the property and paying \$5,000.00.

However, the ***Bruno*** facts also involved tort damage according to the Court, because the insurance company performed an act beyond the scope of its Policy promises. While assessing the homeowner’s mold damage, the insurance adjustor gave the policyholder incorrect assurances regarding the toxicity of the mold itself and whether the homeowner could continue

with ongoing renovations involving ripping out basement walls. Relying on the insurance adjustor's assurances, the homeowner continued the basement repairs. This resulted in the release of mold fibers, an outcome the adjustor had assured would not happen. It was this assurance, given beyond the scope of the insurance Policy itself, which *Bruno* holds to be actionable in tort. The homeowner relied on the adjustor's assurance, went ahead with basement wall demolition, and the result was release of toxic mold into the atmosphere. The consequences of releasing toxic mold into the atmosphere implicates a general social duty applicable to all – protecting public health. This violation gave rise to an action in tort, and the insurance company who gave incorrect assurances to the homeowner proximately caused a harm that affected the public health.

Plaintiff's loss of data in this case, however, does not impact a general societal duty nor does its damages come from actions beyond the scope of its Service Agreement between Gibraltar and Plaintiff. Plaintiff's harm comes from "specific executory promises which comprise the contract." *eToll, Inc.*, 811 A.2d at 19 (where a tort claim is inextricably tied to a contract, the gist of the action doctrine applies).

Demurrer to Count I, Negligence, is sustained against Gibraltar under the gist of the action doctrine.

2. The Gist of the Action Doctrine and Count IV, Negligent Misrepresentation, as to Gibraltar and Hogue

Defendants Gibraltar and Hogue also demur to Count IV, Negligent Misrepresentation, under the gist of the action doctrine. Demurrer is sustained at Count IV as to both defendants.

As discussed above, Plaintiff's negligent misrepresentation claim against Gibraltar does not raise a general societal duty, but is instead based on particular business promises that were unfulfilled.

The claim as to Hogue, as discussed *supra*, is based on his assurances as CEO that he is in it “for the long haul.”

The gist of the action doctrine as explained in *Bruno* applies to these averments as well. *See also eToll, Inc.*, 811 A.2d at 19 (approving fraud or negligent misrepresentation claims under the law of contract when the conduct derives from non-performance of an agreement).

Demurrer to Count IV, Negligent Misrepresentation, is sustained as to both Defendants under the gist of the action doctrine.

D. Demurrer to Count V, Violation of Pennsylvania’s UTPCPL as to both Defendants Hogue and Gibraltar for Lack of Capacity to Sue

In Count V, Plaintiff alleges that Defendants Gibraltar and Hogue violated Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (the “UTPCPL”), 73 Pa C.S. § 201-3 (2006). The pertinent averments are:

49. Gibraltar and Hogue intentionally or negligently represented that the services which it provided were of a particular kind and quality when it knew, or in the exercise of reasonable care should have known that such representations were false, fraudulent or misleading.

50. Gibraltar failed to provide the services which it represented to [Plaintiff] it would provide and, as a result of its reasonable reliance upon the negligent and/or intentional misrepresentations of Gibraltar and Hogue, suffered damages and losses for an amount in excess of \$50,000.00.

Defendants Hogue and Gibraltar demur and state that Plaintiff lacks standing to bring a claim under the UTPCPL because Plaintiff is a business. Their demurrer is sustained.

The UTPCPL makes unlawful “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” 73 P.A. § 201-3 (2006). Pursuant to § 201-9.2, private causes of action are available to:

- (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the

use or employment by any person of a method, act, or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars, whichever is greater.

Businesses may have standing to bring a private action under the UTPCPL but only for purchases of goods and/or services to be used primarily for the personal, family or household purposes of business owners or employees. *Valley Forge Towers S. Condo. v. Ron-Ike Foam Insulators, Inc.*, 574 A.2d 641, 643 (Pa. Super. 1990) *aff'd* 605 A.2d 798 (Pa. 1992) (permitting a condominium association to bring a private action under the UTPCPL because the association was the statutory representatives of the owners whose joint purchase of a roof was for their own personal, family, or household purposes); *but see Cumberland Valley Sch. Dist. v. Hall-Kimbrell Env'tl. Servs.*, 639 A.2d 1199, 1201 (Pa. Super. 1994) (upholding dismissal of UTPCPL claim because school was not acting as legal representative of students and the primary purpose of the school's purchase of asbestos removal services was not for the personal, family or household purposes of its students and families); *Lal v. Ameriquest Mortgage Co.*, 858 A.2d 119, 125 (Pa. Super. 2004) (affirming trial court after preliminary objection was sustained on UTPCPL claim, finding that party could not bring private action under UTPCPL because purchase of residential property was made for investment purposes, not personal, family or household purposes); *Balderston v. Medtronic Sofamor Danek, Inc.*, 152 F. Supp. 2d 772, 778 (E.D. Pa. 2001) *aff'd*, 285 F.3d 238 (3d Cir. 2002) (denying doctor who purchased pedicle screws standing under UTPCPL, in part, because doctor clearly purchased screws for business purposes within his surgical practice and was not bringing suit as a representative of his patients).

Here, Plaintiff brings suit on its own behalf, not its patients. Its Complaint alleges damage to its business. Plaintiff has not shown standing under the UTPCPL to bring a private

cause of action, and the demurrer of both Defendants Gibraltar and Hogue is sustained at Count V for lack of capacity to sue.

E. Preliminary Objection to Improper Venue

Finally, Plaintiff and Defendant Gibraltar entered into a forum selection clause as part of the Service Agreement. Defendants allege that venue is improper in Philadelphia because the forum selection clause identifies Cumberland County Court of Common Pleas as the forum for any legal action arising from the contract. The forum selection clause states:

Dispute-Jurisdiction: The Provider and Client explicitly agree that any dispute involving the terms of this Agreement or efforts required to collect compensation due, shall be filed in the Cumberland County Court of Common Pleas, Cumberland County, PA. Furthermore, both the Provider and Client agree that the Provider shall be entitled to collect from the Client all collection and legal fees incurred to enforce the Agreement; to defend against claims made by the Client; or to collect compensation due. The signer of this Agreement, in addition to representing that his/her signature legally binds the Client and that all actions have been taken by the Client to duly grant this authority, does, by his/her execution, personally and individually undertake and assume the full performance hereof including payment of all amounts due hereunder.

Forum selection clauses are enforceable when they are clear and unambiguous. *Patriot Commercial Leasing Co. v. Kremer Rest. Enterprises, LLC*, 915 A.2d 647, 650 (Pa. Super. 2006). A forum selection clause in a commercial contract between businesses is presumptively valid and becomes unenforceable only when: 1) the clause itself was induced by fraud or overreaching; 2) the forum selected in the clause is so unfair or inconvenient that a party, for all practical purposes, will be deprived of an opportunity to be heard; or 3) the clause is found to violate public policy. *Id.* at 651. None of these circumstances apply here.

Here, Gibraltar and Plaintiff agreed to adjudicate disputes arising from their contract in Cumberland County. Neither party disputes the validity of the forum selection clause, and

Plaintiff makes no claim that enforcement would inconvenience or prejudice its opportunity to enjoy a fair hearing. The forum selection clause is therefore enforced.

Plaintiff has no remaining actions against Defendant Hogue. All counts against him are dismissed. The remaining parties are Plaintiff and Gibraltar, and the only remaining claim between them is Count II, Breach of Contract.

Improper venue is therefore sustained pursuant to Pa.R.C.P. 1028(a)(1) as the Service Agreement states that the Cumberland County Court of Common Pleas is the selected forum.

III. CONCLUSION

For the foregoing reasons, Defendants' Preliminary Objections are sustained with the exception of Count II which is overruled as to Defendant Gibraltar.

Adjudication of Count II is transferred to the Court of Common Pleas, Cumberland County

BY THE COURT:



Ramy I. Djerassi, J.