

IN THE COURT OF COMMON PLEAS OF COLUMBIA COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

THE REMIT CORPORATION, HARRY
STRAUSSER, III, AND DWANYE HEISLER,
Plaintiffs,

v.

EASTERN REVENUE, INC. AND KYLE
SHANAHAN,
Defendants.

Attorney for Petitioner:
Attorney for Respondent:

Bruce L. Castor, Jr., Esquire
Joshua J. Voss, Esquire

No. 54 of 2018

CLERK OF COURTS
COUNTY OF COLUMBIA

2018 JUL 19 A 9 25

FILED
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OPINION AND ORDER

Presently before the Court as Eastern Revenue, Inc. and Kyle Shanahan's ("Defendants") Preliminary Objections to Remit Corporation, Harry Strausser, III, and Dwayne Heisler's ("Plaintiffs") Complaint. Upon review of the record, the Defendant's Preliminary Objections are **OVERRULED** in part and **SUSTAINED** in part.

Discussion

Pennsylvania Rules of Civil Procedure 1028(a)(4) states that a preliminary objection may be granted for "legal insufficiency of a pleading (demurrer)." Preliminary objections in the nature of a demurrer test the legal sufficiency of the plaintiff's complaint. *State Farm Mut. Auto. Ins. Co. v. Ware's Van Storage*, 953 A.2d 568, 571 (Pa. Super. 2008) (quoting, *Sexton v. PNC Bank*, 792 A.2d 602, 604 (Pa. Super. 2002)). Preliminary objections should only be sustained where it appears with certainty that the law permits no recovery under the allegations pleaded. *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997) (citing, *Al Hamilton Contraction Co. v. Cowder*, 644 A.2d 188,190 (Pa. Super. 1994)). When a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. *Id.* (citing, *Snyder v. Speciality Glass Products, Inc.*, 658 A.2d

366, 368 (Pa. Super 1995)).

1. Demurrer- Breach of Contract (Remit v. Eastern)

“In order to give rise to a renunciation amounting to a breach of contract, there must be an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so.” *McClelland v. New Amsterdam Cas. Co.*, 322 Pa. 429, 433 (1936).

Defendant’s first preliminary objection challenges several parts of Count I of the Complaint. The Plaintiff’s Complaint alleges that they received a letter informing the Plaintiffs that the Defendants would stop making payments under Section 3 of the APA. Complaint, 61. This wording as alleged would be an absolute and unequivocal refusal to perform under the contract and therefore, upon the facts plead, the defendant breached the contract. Therefore, Count I subsection (a) and (b) are properly plead and Defendant’s Preliminary Objection concerning those subsections is **OVERRULED**.

Section 9(D) of the APA states:

“To the best of Purchaser’s knowledge, information and belief, none of the representations contained in the ¶9, or in any document furnished by Purchaser to Seller in connection with this agreement, contains any untrue statement of a material fact or omits any statement of material fact necessary to make any statement contained herein misleading.”

Plaintiffs have plead that the Defendants made statements that they knew were not true. Therefore, at this stage Defendants’ first preliminary objection regarding section (c) of Count I is **OVERRULED**.

Section 11 of the agreement clearly limits the covenants in that section to between the date of the agreement and the closing date. Section 12 of the agreement clearly states the closing date as May 1, 2017. The Court finds that the Plaintiffs have plead that Defendants knew of the requirements on April 13, 2017 and that Defendants did not meet the requirements to sustain the business with the third party, Unifund. Plaintiff has sufficiently plead allegations to sustain a breach

of Section 11(C). Therefore, Defendant's first preliminary objection regarding section (d) of Count I is **OVERRULED**.

2. Demurrer- Fraudulent Inducement (Remit v. Eastern)

The gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 13 (Pa. Super. 2002). "Fraudulent inducement claims are commonly barred if the contract at issue is fully integrated." *Hart v. Arnold*, 884 A.2d 316, 340 (Pa. Super. 2005). The Court finds that the fraudulent inducement claim in Count II replicates a Count I's breach of contract claim, specifically a breach of Section 9(D), and is barred by the gist of the action doctrine. The Court will **SUSTAIN** the Defendant's second objection and **DISMISS** Count II.

3. Demurrer- Promissory Estoppel (Remit v. Eastern)

In order to maintain an action in promissory estoppel, the aggrieved party must show that 1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; 2) the promisee actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise.

Crouse v. Cylcops Industries, 560 Pa. 394, 403 (2000). Causes of action can be pleaded in the alternative. Pa.R.C.P. 1020(c). Causes of action for promissory estoppel and unjust enrichment can be plead in the alternative to a breach of an express contract. See, *Birchwood Lakes Community Ass'n, Inc. v. Comis*, 442 A.2d 304, 308 (Pa. Super. 1982). The Court finds that the Plaintiffs have plead that Defendants made a promise that induced Plaintiffs to act, that Plaintiffs did act in reliance on the promise, and injustice could only be avoided by enforcing the promise. Therefore, on the facts pled the Defendant's preliminary objection is **OVERRULED**.

4. Demurrer- Unjust Enrichment (Remit v. Eastern)

"Essential 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 for value.” *Wolf v. Wolf*, 514 A.2d 901, 905-906 (Pa. Super. 1986), *overruled on other grounds*, *Van Buskirk v. Van Buskirk*, 527 Pa. 218 (1991). As stated above, unjust enrichment may be properly plead in the alternative to a breach of contract claim. *Birchwood Lakes Community Ass’n, Inc.*, 442 A.2d at 308. The Court finds that the Plaintiffs have plead that benefits were conferred on the Defendants, that the Defendant’s accepted the benefits, and that retention under the circumstance would be inequitable. Therefore, the preliminary objection is **OVERRULED**.

5. Demurrer- Breach of Contract (Strausser v. Eastern)

If it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this contract are in all respects definitely understood and agreed on, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement, which dates from the making of the oral agreement and not from the date of the subsequent writing.

Taylor v. Stanley Co. of America, 305 Pa. 546, 553 (1932) (quoting, 13 C.J. 290). The Court, having reviewed the record thoroughly must **OVERRULE** Defendants’ preliminary objection to Count V. Count V specifically states, “Eastern assured Mr. Strausser that his independent contractor arrangement would last for at least 4 years and that it would deliver an “Independent Contractor Agreement” to that effect for Mr. Strausser to sign”. Complaint, ¶ 149. Plaintiff’s Complaint that states the fact that Strausser was terminated after only six months. Complaint, ¶ 150. Paragraphs 36 and 39 of the Complaint clearly state that there was an understanding that the independent contractor engagement would last for four years, there were specific conversations to that effect, and Eastern promised to pay Strausser “a total of \$260,000 in base compensation under his independent contractor arrangement -- namely, \$65,000 per year over at least 4 years”. Complaint, ¶ 36, 39. Plaintiff’s Complaint also relies on clauses in the APA for compensation and the fact that the agreement was to be memorialized. Plaintiff admits that Eastern never delivered the

“Independent Contractor Agreement” it promised. Complaint, ¶ 40.

Plaintiff’s complaint clearly tries to rely on a written contract that was to be produced according to clear terms that already were already agreed to. The Plaintiff cannot attach a writing as per Pa.R.C.P. 1019(i) as the written contract was never delivered. Based on the facts as plead, the parties are still obligated by their agreement from the date of the oral agreement. See, *Taylor*, 305 Pa. at 553. The complaint clearly states that there was an agreement to the terms of the agreement including salary, benefits, duration, and that the independent contractor agreement was part of and consideration for the APA. Therefore the Court **OVERRULES** the Defendants’ preliminary objection to Count V.

6. Demurrer- Fraudulent Inducement (Strausser v. Eastern)

The Non-Compete agreement clearly states that the restricted parties are agreeing to the non-compete in connection with the sale of assets. That is consideration for the restrictions in the non-compete. The non-compete has an integration clause and therefore the parole evidence rule bars evidence of fraudulent misrepresentations in the inducement for this agreement. See, *Hart*, 884 A.2d at 340. Therefore, the preliminary objection is **SUSTAINED** and Count VI is **DISMISSED**.

7. Insufficient Specificity- (Strausser v. Eastern)

Defendant’s seventh preliminary objection challenges the specificity for Count VII. The complaint clearly states what promises were made to induce Plaintiff Strausser and the parties to the promises. See, Complaint ¶ 32-41. The complaint states that Eastern and Shanahan made specific promises about an independent contractor agreement which included salary, duration, and benefits. This is sufficient to adequately inform the Defendants of the facts and to prepare their defenses. Therefore, this Court **OVERRULES** the Defendants’ seventh preliminary objection.

8. Demurrer- Unjust Enrichment (Strausser v. Eastern)

As previously stated above, a plaintiff may advance an alternative theory of unjust

enrichment in conjunction with a breach of contract claim. *Birchwood Lakes Community Ass'n, Inc.*, 442 A.2d at 308. The Court finds that Plaintiff Strausser has sufficiently pled that he conferred a benefit onto the Defendants, that they appreciated that benefit, and that retention of the benefit would be unjust. Therefore, the Court will **OVERRULE** the Defendants eighth preliminary objection.

9. Counts and Preliminary Objections Involving Heisler

In accordance with Plaintiffs' representations in their Answer to Preliminary Objections, Defendant's ninth, tenth, and eleventh preliminary objections are deemed **MOOT** as Plaintiffs have stated the Counts involving Mr. Heisler are withdrawn.

10. Demurrer- Fraud in the Inducement (Remit and Strausser v. Shanahan) and Aiding and Abetting Liability (Remit v. Strausser and Heisler v. Shanahan)

As discussed above, the gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." *eToll, Inc. v.*, 811 A.2d at 13. Here the claims against Shanahan concern his actions in regard to the contracts at issue in this case. As stated previously, the APA clearly has a clause regarding fraud and that issue is properly covered as an ordinary breach of contract issue. The non-compete contract as stated above is fully integrated and any parol evidence of fraudulent inducement is not permitted. Further, the Complaint does not contain allegations that Shanahan's actions would be outside of the APA clause regarding fraud. The Court **SUSTAINS** Defendant's Preliminary Objections and **DISMISSES** Counts XII and XIII.

11. Demurrer- Injunctive Relief

The Court notes that Defendant's preliminary objection to Count XIV is solely based on a "failure to conform to law or rule of court" and not whether it is legally sufficient. Therefore the Court will not examine that issue. The Court finds that Count XIV requests injunctive relief and is not in itself a cause of action. Therefore the Court will **SUSTAIN** Defendant's fourteenth

preliminary objection and **DISMISS** Count XIV without denying or otherwise preventing Plaintiffs' ability to seek an injunction through other processes.

12. Motion to Strike Demand for Punitive Damages

The Court, after reviewing the document as a whole, finds that the Plaintiffs have sufficiently plead conduct that could be considered to be malicious, wanton, willful, oppressive, or exhibit a reckless indifference to other's rights. See, *Jahanshahi v. Centura Development Co.*, 816 A.2d 1179, 1188 (Pa. Super. 2003). Therefore, the Court will **OVERRULE** the Defendant's Motion to Strike Demand for Punitive Damages.

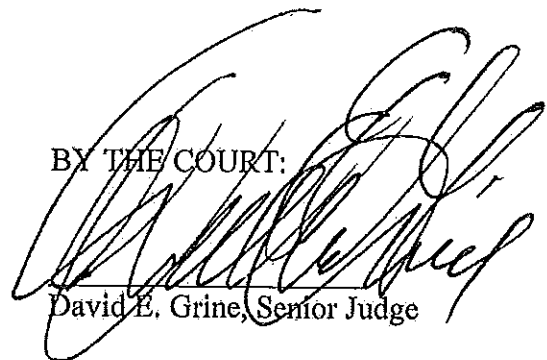
ORDER

AND NOW, this 17 day of July, 2018, this Court hereby ORDERS:

1. Defendants' second, sixth, thirteenth, and fourteenth Preliminary Objections are **SUSTAINED**;
2. Defendants' first, third, fourth, fifth, seventh, and eighth Preliminary Objections are **OVERRULED**;
3. Defendant's Motion to Strike Punitive Damages are **DENIED**;
4. Defendants' ninth, tenth, eleventh, and twelfth Preliminary Objections are **MOOT**;
5. Counts II, VI, XII, XIII, and XIV of the Complaint are **DISMISSED**; and
6. Defendants shall file an Answer to Plaintiff's Complaint within twenty (20) days of the date of this Order.

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COUNTY OF COLCHESTER, PA

BY THE COURT:



David E. Grine, Senior Judge