

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

JOHN and CHRISTINA BOSI H/W,	:	
	:	
Plaintiffs	:	
	:	
vs.	:	No. 12-1226
	:	
DANGES HOME IMPROVEMENT, LLC	:	
t/a PUROFIRST OF NORTHEASTERN	:	
PA,	:	
	:	
Defendant	:	

Rachel L. Possinger, Esquire	Counsel for Plaintiffs
Richard T. Curley, Esquire	Counsel for Plaintiffs
James R. Nanovic, Esquire	Counsel for Defendant

**MEMORANDUM OPINION**

Matika, J. - June , 2013

Before the Court are preliminary objections filed by Defendant, Danges Home Improvement, LLC t/a Purofirst of Northeastern PA, to Plaintiffs' complaint in a breach of contract and implied warranty action. After consideration of the briefs, Defendant's preliminary objections are **GRANTED in part and DENIED in part.**

**FACTUAL AND PROCEDURAL BACKGROUND**

The action before the Court is based upon a series of contracts by John Bosi and Christina Bosi, (hereinafter "Plaintiffs") and Danges Home Improvement, LLC t/a Purofirst of Northeastern PA (hereinafter "Defendant"). On June 2, 2009, water, as a result of a broken toilet seal, caused certain

damage to Plaintiffs' home and more specifically the kitchen ceiling, cabinets, and bathroom floor. Consequently, Plaintiffs' filed a claim with their insurance company who referred the matter to the Defendant to provide various materials and labor in order to repair the water damage to Plaintiffs' home. On that same day, June 2, 2009, Plaintiffs and Defendant entered into additional written contracts that included an authorization for emergency service and authorization to repair.

Three months later, on September 1, Plaintiffs and Defendant entered into additional written contracts relating to damages caused by the water leak. Included in one of the contracts was a warranty and a work summary; the other contract was a direct agreement for additional work between Plaintiffs and Defendant. Under the warranty, Defendant warranted against any and all defects in material and workmanship for one year starting from the date of completion of the work. The warranty provided that Defendant would repair or replace any defect with either the material or workmanship quality.

On November 2, 2009, the parties entered into another contract whereby Defendant would perform certain additional work under a written change order.

Around December 12, 2009, before the work was completed, Plaintiffs allege Defendant requested them to sign an

authorization to pay and a certificate of satisfaction for the work covered pursuant to Plaintiffs home insurance policy. The reason for such was that Defendant wanted to collect payment as Christmas season had begun. Additionally, Defendant sent Plaintiffs a revised scope of services that included a warranty.<sup>1</sup> Pursuant to the warranty, Defendant warranted that all workmanship will be free from any defect and be of good quality for a period of five (5) years. The warranty also provided that for a one year period all materials and equipment furnished by Defendant would be new and free from defects. If Plaintiffs felt that any material or labor provided by Defendant did not meet the standard as prescribed in the warranty, upon written notification to Defendant, Defendant would correct any defect within ninety (90) days and if Defendant could not correct such defect Plaintiffs would be reimbursed the dollar value of the repair.

Plaintiffs allege in their complaint that they gave written notification of various warranty defects to Defendant on numerous occasions and attached an example of such notification to the complaint.<sup>2</sup> Moreover, in response to the various written

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<sup>1</sup> In the complaint Plaintiff avers that in the written contracts between the parties, Defendant would furnish labor and materials in accordance with specifications for the repairs of Plaintiffs home.

<sup>2</sup> The exhibit attached to the complaint, labeled "Exhibit I," is titled "KITCHEN DAMAGES/REPAIRS NEEDED," and is a list of what the Court perceives to be various issues within the repairs in Plaintiffs' home. However, there

notifications provided to Defendant, Plaintiffs allege Defendant acknowledged such issues raised by them as evidenced by a correspondence from Defendant to Plaintiffs dated February 19, 2011. However, such correspondence is not attached to the complaint.

Based upon the contracts, Plaintiffs asserts that Defendant promised to perform all repairs in a workmanship quality and in a manner conformity to standard practice; nonetheless, Defendant has failed to do so. The result, Plaintiffs state, is that it will cost them additional money beyond the sum they already paid Defendant to remedy Defendant's defects.

Plaintiffs have thus filed this current action against Defendant claiming breach of contract and warranty among other things, and seek monetary damages. In response, Defendant has filed the preliminary objections before the Court.

### **DISCUSSION**

Pursuant to Pennsylvania Rule of Civil Procedure 1028 any party may file preliminary objections to any pleading for "insufficient specificity in the pleading" and "legal insufficiency of a pleading (demurrer)." Pa.R.C.P. 1028(a)(3),(4). "Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint." *Haun v.*

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is no indication who this "notification" is addressed to, whether it was sent, and what remedy Plaintiffs seek.

*Community Health Systems, Inc.*, 14 A.3d 120, 123 (Pa. Super. Ct. 2011). As such, a court, when deliberating upon preliminary objections, must consider all material facts set forth in the challenged pleadings as true. *Turner v. Medical Center, Beaver, PA, Inc.*, 686 A.2d 831 (Pa. Super. Ct. 1996). "Preliminary Objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief." *Feingold v. Hendrzak*, 15 A.3d 937, 941 (Pa. Super. Ct. 2011).

#### **I. LACK OF SPECIFICITY**

Defendant's first preliminary objection to Plaintiff's complaint is grounded in a lack of specificity objection. Defendant argues that Plaintiffs have pled certain causes of action in general terms and not specific enough in order for Defendant to admit or deny such averments. More specifically, Defendant states that Plaintiffs have pleaded six (6) different contracts but have not specifically spelled out which contract or contracts Defendant breached, nor the specific provision of such contract. Furthermore, Paragraph 40 of the complaint alleges "Plaintiffs and Defendant entered into a series of oral and written agreements, whereby Defendant promised to provide certain labor and materials and Plaintiffs promised to

compensate Defendant for such labor and materials." Nevertheless, Plaintiffs fail to plead any oral agreements reached between the parties insofar as when such agreements occurred and the terms of those oral agreements.

Additionally, Defendant objects to numerous paragraph in the complaint, that being paragraphs 62, 64, 69, 91, and 93 for the use of such terms as "construction industry practices and standards," and "construction industry standards," as these terms are not defined in any contract. Defendant concludes that without such terms being defined in a contract or in the complaint, it cannot admit or deny that its work product did not meet the requisite "industry standard."

Lastly, Defendant objects in terms of more specificity as it relates to the correspondence between Plaintiffs and Defendant for notifications of any warranty issue. Defendant argues that the attached exhibit, purporting to be an example of a notification Plaintiffs sent to Defendant about various warranty issues, is nothing more than a list of certain repairs needed and not necessarily a notification to Defendant that such defects were material breaches of the warranties and thus needs to be repaired or replaced. Also, Defendant notes that Paragraph 24 states Defendant acknowledged such notifications from Plaintiffs about certain defects as evidences by a February

19, 2011 letter. However, such letter is not attached to the complaint.

In stating a cause of action, a complaint must at a minimum, set forth such necessary facts upon which a cause of action can be based. *Burnside v. Abbott Laboratories*, 505 A.2d 973 (Pa. Super. Ct. 1985). However, it is not necessary that a plaintiff outline the specific legal theory or theories underlying the complaint. *Weiss v. Equibank*, 460 A.2d 271 (Pa. Super. Ct. 1983). It is the duty of the court to discern from the alleged facts in the complaint the cause of action, if any, stated therein. *Bartanus v. Lis*, 480 A.2d 1178 (Pa. Super. Ct. 1984). The complaint need only give a defendant notice of the claim or claims being asserted; nonetheless, the complaint must summarize the essential facts to support such a claim or claims. *Alpha Tau Omega Fraternity v. University of Pennsylvania*, 464 A.2d 1349 (Pa. Super. Ct. 1983). A plaintiff cannot evade this duty by a general averment that the facts are in the possession of the defendant.

The pertinent question in evaluating a preliminary objection based upon insufficient specificity is whether the complaint is sufficiently clear to enable a Defendant to prepare his or her defense, or whether plaintiff's complaint provides defendant with accuracy and completeness, the specific basis on

which recovery is sought so that a defendant knows without question upon what grounds to make his or her defense. *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa. Super. Ct. 2006). A preliminary objection in the form of a motion for a more specific pleading raises the sole question of whether the pleading is sufficiently clear to enable a defendant to prepare a defense. *Unified Sportsmen of Pennsylvania v. Pennsylvania Game Commission (PGC)*, 950 A.2d 1120, 1134 (Pa. Cmwlth. Ct. 2008). In determining whether a particular paragraph in a complaint is stated with the necessary specificity, such paragraph must be read in context with all the allegations and averments in the complaint. *Paz v. Commonwealth, Department of Corrections*, 580 A.2d 452, 456 (Pa. Cmwlth. Ct. 1990). Only then can a court determine whether a defendant is put on adequate notice of the claim against which it must defend. *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. Super. Ct. 1991).

In examining the complaint in its full context, the Court agrees with Defendant and finds such averments lacking the specificity necessary to place Defendant on proper notice of the claims asserted against it. For example, Plaintiffs have plead six different written contracts with some of these contracts including a warranty, nevertheless, the complaint is devoid of any averment that states which contract was breached, and more



specifically, what provisions of that contract were breached. Further, Plaintiffs alleged that the parties entered into a series of oral agreements under the theory of breach of contract, yet the complaint does not ascertain when these agreements were reached or the terms of such agreement.

Plaintiffs' counts I and II of the complaint, breach of contract and unjust enrichment are causes of actions founded upon contract law. Accordingly, for Defendant to be found liable for either cause of action, Defendant must have violated certain provision or provisions of a contract or quasi-contract. In examining all of the contracts Plaintiffs attached to the complaint, the terms: "construction industry practices and standards," and "construction industry standards" do not appear within those contracts. Accordingly, Defendant cannot admit or deny the averments in paragraph 62, 64, 69, 91, and 93 as such averments are based upon terms not included in the contract nor defined within the complaint.

Lastly, a pleading is deemed insufficiently specific where the complaint does not attach a copy of a writing referred to in the complaint, or where there is an inconsistency between an attached exhibit and an averment of the pleading. See Pa.R.C.P. 1019 (i); *Goldman v. Schlanger*, 49 Pa.D. & C.2d 225 (Pa. Com. Pl. 1970); *Tellco Trading, Inc. v. Sitkin Smelting & Refining*,

*Inc.*, 61 Pa. D. & C.2d 55 (Pa. Com. Pl. 1972).

Here, one of Plaintiffs' causes of action is a breach of contract in that Plaintiffs allege Defendant has breached certain provisions of a warranty insofar as not fixing various repairs that are below "industry standards." In their attempt to plead such breach, Plaintiffs claim they sent written notifications to Defendant about the warranty issues as evidenced by the attached exhibit to the complaint that Plaintiffs purport to be an example of the notice they sent Defendant. Plaintiff alleges that Defendant, having acknowledged such notice as demonstrated by a February 19, 2011 letter, has failed to remedy such issues. Accordingly, Plaintiffs must attach such documentation evidencing one of the various notices Plaintiffs state it sent Defendant about the defects in the repairs along with the correspondence Plaintiffs claim evidence Defendant's acknowledgment of such defects.

Consequently, Plaintiffs are required to file a more specific pleading delineating which contract or contracts, along with the specific provision, Defendant breached. Additionally, if the parties entered into any oral contracts, Plaintiffs must aver when such agreements were reached and the provisions at issue as it relates to this current matter. Lastly, Plaintiffs must attach such correspondence evidencing Plaintiffs providing

Defendant with notice of the alleged defective repairs and the letter from Defendant to Plaintiffs acknowledge such notice of the defects.

## ***II. LEGAL INSUFFICIENCY***

Defendant's remaining three Preliminary objections are in the nature of a demurrer. Preliminary objections in the form of a demurrer allege that the pleading is legally insufficient. *Nationwide Mutual Ins. Co. v. Wickett*, 763 A.2d 813 (Pa. 2000). The issue presented by a demurrer is whether on the facts averred, that law states with certainty that no recovery is possible. *Employers Ins. of Wausau v. Commonwealth, Department of Transportation*, 865 A.2d 825, 830 n.5 (Pa. 2005); *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 131 (Pa. 2004). Thus, a preliminary objection in the form of a demurrer challenges the pleadings as failing to set forth a cause of action upon which relief can be granted under any theory of law. *Balsbaugh v. Rowland*, 290 A.2d 85, 87 (Pa. 1972); *Regal Industrial Corp. v. Crum & Forster, Inc.*, 890 A.2d 395, 398 (Pa. Super. Ct. 2005).

### ***A. BREACH OF IMPLIED WARRANTY***

Plaintiff's third and fourth counts are breached of implied warranty of proper workmanship and breach of implied warranty of fitness for intended purpose, respectively. To plead a cause of action for breach of such warranties, a complaint must aver the

existence of the warranty, breach thereof, causation, and damages. 13 Pa.C.S.A. § 2314 cmt. 13 (1934). In addition, to properly plead a breach the implied warranty of fitness for a particular purpose, the complaint must allege that at the time of contracting the seller had reason to know of any particular purpose for which the goods are required, and the buyer relied upon the skill or judgment of the seller to select or furnish suitable goods. 13 Pa.C.S.A. § 2315.

In examining both counts, the Court does not agree with Defendant that if the complaint was properly pled, Plaintiffs would still be barred from recovery. Nonetheless, the Court does recognize that each count does not specifically plead the necessary elements for breach of implied warranties. For example, the complaint does not state which specific warranty was breached, and although the rules of civil procedure allow Plaintiffs to incorporate previous averments, neither count explicitly states which averments in paragraphs 62 through 69 apply to the particular implied warranty.

Accordingly, Defendant's preliminary objection is granted insofar as Plaintiffs are required to file an amended complaint alleging the necessary facts to support the elements for a cause of action for breach of implied warranty of workmanship and warranty of fitness for particular purpose respectively.

B. HOME IMPROVEMENT CONSUMER PROTECTION ACT

Plaintiff's fifth count is a cause of action based upon the Home Improvement Consumer Protection Act (hereinafter "Act"), 73 P.S. § 517.1 et seq. Plaintiffs allege in this count that Defendant has violated certain provisions of the Act and as such seeks relief in the form of a private action for monetary damages.

Defendant asserts a preliminary objection in the form of a demurrer to the damages Plaintiffs seek to recover under the Act. Defendant argues that pursuant to subsection 517.7(e) of the Act, Plaintiffs remedy under the Act for a contract that is alleged to have violated the Act is that the contract becomes voidable by the owner; the Act does not permit monetary damages for a home owner.

In probing through all of the provisions of the Act, the Court gleans from section 517.10 of the Act that a owner does have a private cause of action that allows for monetary compensation. Pursuant to section 517.10 "[a] violation of any of the provisions of this act shall be deemed a violation of the . . . Unfair Trade Practices and Consumer Protection law." 73 P.S. § 517.10. Under the Unfair Trade Practices and Consumer Protection Law, an individual may bring a private cause of action seeking monetary relief. See, 73 P.S. § 201-9.2.

Defendant argues in its preliminary objection that section 517.10 of the Act specifically provides that nothing under the Act shall prevent an owner from exercising any right under the Unfair Practices and Consumer Protection Law and thus if Plaintiffs are seeking a private cause of action they must proceed under the Unfair Practices and Consumer Protection Law not the Act. The Court however, in applying statutory construction, finds that a violation of the Act necessary implies a violation under the Unfair Trade Practices and Consumer Protection Law pursuant to the plain language of section 517.10 of the Act. Accordingly, if an owner can allege a violation of the Act he or she can necessarily seek a private cause of action through the inner workings of the Act and the Unfair Practices and Consumer Protection Law.

Additionally, the elements necessary to prove a violation of the Act and a violation of the Unfair Practices and Consumer Protection Law are different. See, 73 P.S. § 517.7, 517.9; 73 P.S. § 201-2, 201-3. A contractor could violate the Unfair Practices and Consumer Protection Law but not the Act. Given the purpose of the two acts, that being to prevent fraud and deceptive business practices, this Court does not believe it was the legislative intent to only allow a private cause of action under one act and not the other.

Accordingly, Defendant's preliminary objection to Plaintiffs' count five for legal insufficiency is denied and dismissed.

C. UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

Defendant's last preliminary objection is to Plaintiffs' sixth and final count that being an alleged violation of the Unfair Trade Practices and Consumer Protection Law (hereinafter "Unfair Practices Law"), 73 P.S. § 201-1 et seq. Plaintiffs aver that Defendant made false and misleading statements of fact concerning the quality and workmanship of its services and resulting products. Further, Plaintiffs allege Defendant's custom, policy, and practices are fraudulent and misleading and thus create confusion. Based upon such averments, Defendant claims Plaintiffs' allegations do not rise to the requisite level to plead a violation of the Unfair Practices Law and thus argues such cause of action should be dismissed for legal insufficiency.

Plaintiffs' complaint does not allege that Defendant committed any of the expressly prohibited acts enumerated in section 201-2 of the Unfair Practice law; however there is a catch-all provision of the Law. See, 73 P.S. § 201-2(4)(xxi). Fraudulent or deceptive conduct that creates a likelihood of confusion or misunderstanding is prohibited by the catch-all

provision. *Hammer v. Nikol*, 659 A.2d 617, 619 (Pa. Cmwlth. Ct. 1995). The catch-all provision is designed to cover, generally, all unfair and deceptive acts or practices in the conduct of trade or commerce. *Creamer v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974). To recover under this provision, the elements of common law fraud must be proven. *Prime Meats, Inc. v. Yochim*, 619 A.2d 768 (Pa. Super. Ct. 1993), *appeal denied*, 646 A.2d 1180 (Pa. 1994). The necessary elements of common law fraud include a material misrepresentation of existing fact, scienter, justifiable reliance on the misrepresentation, and damages. *Mancini v. Morrow*, 458 A.2d 580, 584, 85 (Pa. Super Ct. 1983).

Plaintiffs' complaint does set forth some of the requisite elements necessary to plead a cause of action pursuant to the catch-all provision of the Unfair Practices Law, but not all elements are specifically plead. Although Defendant requests the Court to dismiss Plaintiffs' cause of action for violation of the Unfair Practices Law, given the legal standard that a demurrer is only proper when the law states with certainty that no recovery is possible, the Court finds such action unwarranted given the facts Plaintiffs did plead in the complaint. Consequently, Defendant's preliminary objection is granted insofar as requiring Plaintiffs to file an amended complaint that pleads with greater specificity those acts Defendant is



alleged to have committed that are expressly prohibited by the Unfair Practices Law or such facts to support a cause of action under the catch-all provision of the Unfair Practices Law.

Accordingly, the Court enters the following order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

JOHN and CHRISTINA BOSI H/W,	:	
	:	
Plaintiffs	:	
	:	
vs.	:	No. 12-1226
	:	
DANGES HOME IMPROVEMENT, LLC	:	
t/a PUROFIRST OF NORTHEASTERN	:	
PA,	:	
	:	
Defendant	:	

Rachel L. Possinger, Esquire	Counsel for Plaintiffs
Richard T. Curley, Esquire	Counsel for Plaintiffs
James R. Nanovic, Esquire	Counsel for Defendant

**ORDER OF COURT**

AND NOW, to wit, this \_\_\_\_\_ day of June, 2013, upon consideration of Defendant's "Preliminary Objections to Plaintiff's Complaint," the brief of counsel, Plaintiffs' response thereto, and oral argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Defendant's Preliminary Objections are GRANTED in part and DENIED in part. Plaintiffs are required, within thirty (30) days from the date of this Order, to file an Amended Complaint pursuant to this Court's Memorandum Opinion or the above-captioned case will be dismissed with prejudice.

BY THE COURT:

\_\_\_\_\_  
Joseph J. Matika, Judge