

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

PANTHER VALLEY SCHOOL DISTRICT, :	:	
Plaintiff :	:	
	:	
vs. :	:	<b>No. 13-1618</b>
	:	
WATER WELLNESS, INC., :	:	
MARIA ZUPKO AND NICOLE BAILEY, :	:	
INDIVIDUALLY AND D/B/A WATER :	:	
WELLNESS, INC., :	:	
Defendants :	:	

Robert T. Yurchak, Esquire	Counsel for Plaintiff
David W. Crossett, Esquire	Counsel for Zupko
Jeffrey P. Bowe, Esquire	Counsel for Bailey
Water Wellness, Inc.	Unrepresented

**MEMORANDUM OPINION**

Matika, J. - March , 2014

Before the Court are preliminary objections filed by Defendant, Maria Zupko, (hereinafter "Zupko"), to Plaintiff's amended complaint in a breach of contract and piercing of the corporate veil action.<sup>1</sup> After consideration of the briefs, Zupko's preliminary objections are **GRANTED in part and DENIED in part** for the reasons stated below.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff, Panther Valley School District, (hereinafter "Panther Valley"), in its amended complaint, alleges that it is

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<sup>1</sup> It should be noted that in addition to Zupko being named a Defendant, the complaint makes reference to two other Defendants. Defendant Nicole Bailey, (hereinafter "Bailey"), had previously filed an answer to Plaintiff's amended complaint and default judgment was already entered against Defendant Water Wellness, Inc. (hereinafter "Water Wellness"), on October 23, 2013, for failure to take any action in this matter.

the owner of an indoor pool facility located at the Panther Valley high school. In the summer of 2011, Zupko and Bailey submitted a proposal to Panther Valley to lease the indoor pool from Panther Valley in hopes of operating and maintaining an aquatic program. Panther Valley avers that prior to the execution of the lease agreement, on December 16, 2011, Zupko and Bailey filed incorporation papers with the Pennsylvania Corporation Bureau to form Water Wellness, Inc.

Thereafter, on December 22, 2011, Panther Valley entered into the lease agreement with Water Wellness. Per the agreement, Water Wellness would lease the indoor swimming pool owned by Panther Valley for the operation, supervision, and management of an adequate program for a one-year period starting January 1, 2012. The contract was signed by Zupko as president of Water Wellness and attested to by its secretary, Bailey.

Subsequent to the execution of the lease agreement, Panther Valley alleges that all Defendants became delinquent in the terms of the lease for non-payment, and as of December 2012, all Defendants owed a total of thirty-seven thousand three hundred thirty-three dollars and thirty-six cents (\$37,333.36). In accordance with the agreement, which is attached to the complaint, "[f]ailure to make payment for a period of one (1) billing cycle during a one year period shall permit the School to declare Water Wellness in default and immediately terminate

the agreement." Accordingly, by letter dated December 21, 2012, Panther Valley's solicitor informed Water Wellness that they are in default of the agreement and the contract is terminated immediately.<sup>2</sup>

As a result of the alleged non-payment, Panther Valley filed the instant action. Panther Valley asserts various claims against all three Defendants, namely: count I - Unjust Enrichment; count II - Breach of Contract; count III - Fraud; and count IV - Piercing the Corporate Veil.<sup>3</sup>

Zupko, in response, filed certain preliminary objections to all four counts. The Court will address each of these objections accordingly; however, this memorandum opinion will first address counts three and four before concentrating on the objections to counts one and two for reasons that will become apparent.

### **DISCUSSION**

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

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<sup>2</sup> The letter sent by Panther Valley's solicitor was addressed to Water Wellness, Inc. "Attn: Maria Zupko" and declared "Water Wellness" in default.

<sup>3</sup> As previously stated, Bailey has filed an answer in response to Panther Valley's complaint on September 25, 2013. Default judgment was entered against Water Wellness on October 23, 2013.

*Systems, Inc.*, 14 A.3d 120, 123 (Pa. Super. Ct. 2011). As such, a court, when deciding preliminary objections, must consider all material facts set forth in the challenged pleading as true. *Turner v. Medical Center, Beaver, PA, Inc.*, 686 A.2d 830, 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).

The Court will now address the preliminary objections asserted by Zupko to each count against her in accordance with the legal standard stated above.

### **Count III - Fraud**

Zupko's first objection to count III is a legal insufficiency objection based upon the "gist of the action" doctrine. The gist of the action doctrine is designed to maintain the conceptual distinction between breach of contract and tort claims. *The Brickman Group, Ltd. v. CGU Ins. Co.*, 865 A.2d 918 (Pa. Super. Ct. 2004). The doctrine precludes a plaintiff from recasting an ordinary breach of contract claim into a tort claim. The doctrine acts to foreclose a tort claim: 1) arising solely from the contractual relationship between the parties; 2) when the alleged duties breached were grounded in

the contract itself; 3) where any liability stems from the contract; and 4) when the tort claim essential duplicates a breach of contract claim or where the success of the tort claim is dependent on the success of a breach of contract claim. *Reardon v. Allegheny College*, 926 A.2d 477 (Pa. Super. Ct. 2007).

The courts of this Commonwealth have set forth the test to determine if a tort claim is barred by the gist of the action doctrine.

Distinct differences between civil actions for tort and contractual breaches have been developed at common law. Tort actions lie for breach of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreement between particular individuals. . . . To permit a promise to sue his promisor in tort for breaches of contract *inter se* would erode the usual rules of contractual recovery and inject confusion into our well-settled form of actions.

*Pittsburgh Construction Co. v. Griffith*, 834 A.2d 572, 582 (Pa. Super. Ct. 2003) (quoting *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. Ct. 2002)); see also, *Bash v. Bell Telephone Co. of Pennsylvania*, 601 A.2d 825, 829 (Pa. Super. Ct. 1992) (quoting *Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc.*, 458 F. Supp. 1158 (E.D. Pa. 1978)). In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the

terms of the contract and not by the larger social policies embodied in the law of tort.

In examining Panther Valley's fraud claim, the crux of said claim is founded upon all Defendants' alleged failure to comply with the agreement, more specifically all Defendants' failure to tender payment for the use of the indoor swimming pool. Panther Valley does include various other averments about potential fraudulent conduct by all the Defendants, however, those averments are potential reasons why the corporate form should be pierced and not acts of fraud perpetrated against Panther Valley. Thus, Panther Valley's claim of fraud is based upon the alleged breach of duty imposed by mutual agreement of the parties and not a social policy. Consequently, count three of Panther Valley's amended complaint is barred by the gist of the action doctrine and is dismissed as it relates to Zupko.

Zupko also asserts other legal insufficiency objections to this count. Notwithstanding the merits of those objections, since the Court has dismissed count III on the basis of the gist of the action doctrine, it finds it unnecessary to address the merits of the other objections.

#### **Count IV - Piercing the Corporate Veil**

Zupko has raised two objections, legal insufficiency and lack of specificity, to count IV of Panther Valley's amended

complaint, a count labeled "Piercing the Corporate Veil." The Court will first address the merits of Zupko's legal insufficiency objection.

A preliminary objection in the form of a demurrer alleges 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, the 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 pleading 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).

In determining the merits of Defendant's preliminary objection, the Court can only consider the facts averred in the complaint and the attached supporting exhibits to the complaint. *Crozer Chester Medical Center v. Department of Labor & Industry Bureau of Workers' Compensation Health Care Services Review Division*, 955 A.2d 1037, 1040 (Pa. Cmwlth. Ct. 2008) *aff'd* 22 A.3d 189 (Pa. 2011). A demurrer by a defendant admits all relevant facts sufficiently plead in the complaint and all

inferences fairly deducible therefrom. *Barto v. Felix*, 378 A.2d 927 (Pa. Super. Ct. 1977). Accordingly, this Court may only consider such facts that arise out of the complaint itself and may not supply a fact missing in the complaint. *Vartan v. Commonwealth, Through Unified Judicial System by Administrative Office of Pennsylvania Courts*, 616 A.2d 160 (Pa. Cmwlth. Ct. 1992).

In Pennsylvania, there is a strong presumption against piercing the corporate veil; however, "a court will not hesitate to treat as identical the corporation and the individual or individuals owning all its stock and assets whenever justice and public policy demand and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless." *Kellytown Co v. Williams*, 426 A.2d 663, 668 (Pa. Super. Ct. 1981). "The corporate entity or personality will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime." *Sams v. Redevelopment Authority of City of New Kensington*, 244 A.2d 779 (Pa. 1968).

Courts have disregarded the legal principle that a shareholder cannot be held liable for the debts of the corporation if it can be established that the court should pierce the corporate veil. *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC*, 846 A.2d 1264 (Pa.



Super. Ct. 2004). In deciding whether to pierce the corporate veil, courts are tasked with determining if equity requires that the shareholders' traditional insulation from personal liability be disregarded and also with ascertaining whether the corporate form is a sham, constituting a façade for the operations of the dominant shareholder. *Carpenters Health and Welfare Fund of Philadelphia and Vicinity by Gray v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983). In deciding if the corporate form should be pierced, there are certain factors a court will analyze. These factors are: 1) undercapitalization; 2) failure to adhere to corporate formalities; 3) substantial intermingling of corporate and personal affairs; and 4) use of corporate form to perpetrate a fraud. *Lumax Industries, Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995).

This Court, in assessing all the averments plead in the amended complaint find that Panther Valley has alleged that: Zupko and Bailey failed to adhere to corporate formalities by executing an agreement to permit Bailey to withdraw her interest from Water Wellness without holding a corporate meeting at which time withdrawal could be approved, and by not filing any amendments with the Pennsylvania Corporation Bureau. Additionally, Panther Valley, in claiming Zupko and Bailey did not adhere to the corporate formalities, asserts that both Zupko and Bailey, as officers of Water Wellness, failed to hold any

corporate meetings pertaining to the formation or the business operation of the corporation.

Moreover, Panther Valley alleges Zupko operated the corporation for her own benefit as evidenced by the fact that she, Bailey, or both depositing monies received from the operation of the aquatic program into their personal accounts. The result of such conduct was that the corporation had insufficient funds to pay its bills.<sup>4</sup> If such averment is proven true, it is evidence to support Panther Valley's request to pierce the corporate veil. Given such, and considering that the Court shall only grant a preliminary objection in the nature of a demurrer where, based upon the facts plead the law will not permit recovery, the Court must dismiss Zupko's preliminary objection of legal insufficiency to count IV.

Notwithstanding the fact that the Court found Panther Valley to have plead sufficient facts to survive a preliminary objection of demurrer, the complaint lacks the necessary specificity to fully and adequately apprise Zupko of the specific facts it intends to prove at trial in order to pierce the corporate veil.

Pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(3), any party may file a preliminary objection for lack

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<sup>4</sup> Panther Valley sets forth other allegations such as it believing the corporation was a last minute shell created only on paper; however, such averments are conclusions of fact that the Court cannot consider in terms of concrete facts to support its request to pierce the corporate veil.

of specificity. In stating a cause of action the pleading 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 the party outline the specific legal theory or theories underlying the pleading. *Weiss v. Equibank*, 460 A.2d 271 (Pa. Super. Ct. 1983). The pleading need only give the opposing party notice of the claim or claims being asserted; nonetheless, the pleading 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).

The pertinent question in evaluating a preliminary objection based upon a lack of specificity is whether the pleading is sufficiently clear to enable the opposing party to prepare 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 the opposing part 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 pleading is stated with the necessary specificity, such paragraph must be read in context with all the allegations and averments in the pleading. *Paz v. Commonwealth*,

*Department of Corrections*, 580 A.2d 452, 456 (Pa. Cmwlth. Ct. 1990). Only then can a court determine whether the opposing party 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 evaluating the facts plead by Panther Valley in count IV, the Court agrees with Zupko's assertion that such facts plead in said count are merely a mechanical recitation of the factors necessary in order for a piercing of the corporate veil. The subparagraphs of averment sixty-two state: 1) Defendants failed to observe corporate formalities in its day-to-day operation; 2) Defendants siphoned off corporate funds; 3) Defendants Zupko and Bailey operated the corporation as a façade and repeatedly and improperly intermingled their personal affairs with those of the corporation; and 4) Defendants used corporation as a façade to perpetrate fraud upon Plaintiff as Defendants did not adequately capitalize the corporation. Such averments are mere factual conclusions devoid of any specific facts to support the conclusion. See, CONCLUSION OF FACT, BLACK'S LAW DICTIONARY (9th ed. 2009). Consequently, the Court grants Zupko's preliminary objection for lack of specificity as it relates to count IV and orders Panther Valley to file an amended complaint setting forth the necessary facts to support the

factual conclusions Panther Valley has averred in paragraph sixty-two of the amended complaint.<sup>5</sup>

**Count I - Unjust Enrichment**

In response to count I, a cause of action grounded upon the legal theory of unjust enrichment, Zupko filed three preliminary objections. The first preliminary objection asserted by Zupko is a legal insufficiency objection arguing that said cause of action is barred based upon the legal principle that an individual cannot be held personally liable for the debts of the corporation. As stated above, although generally an individual is not liable for the debts of the corporation, such is not absolute. Based upon the averments plead, in conjunction with the standard previously identified that the Court must apply in deciding whether to grant a motion of demurrer, Zupko's preliminary objection is dismissed.

Zupko's second preliminary objection to count I is also a legal insufficiency objection. Zupko contends that Panther Valley has, in stating a cause of action for unjust enrichment,

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<sup>5</sup> The rationale for such ruling is found in the oft-cited *Connor* case. *Connor v. Allegheny General Hospital*, 461 A.2d 600 (Pa. 1983). The Pennsylvania Supreme Court in *Connor* held that general averments in a complaint may be remedied by preliminary objections. *Id.* at 603 n.3. *Connor* affords a party the option of asserting preliminary objections to general averments in a pleading or allows the party to undertake discovery in hopes that such process will not give rise to a new claim. The reason a party will exercise the former option, that being asserting preliminary objections to the general averments, is to eliminate the potential of surprise to a new claim on the eve of trial.

only enumerated the elements of unjust enrichment and has not set forth a cause of action based upon particular facts.

Unjust enrichment is essentially an equitable doctrine that is sounded in quasi-contract or contract implied-in-law. *Mitchell v. Moore*, 729 A.2d 1200 (Pa. Super. Ct. 1999). The elements of unjust enrichment are: 1) benefits conferred on one party by another; 2) appreciation of such benefits by the recipient; and 3) acceptance and retention of these benefits under such circumstances that it would be inequitable for the recipient to retain the benefits without payment of their value. *Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.*, 832 A.2d 501 (Pa. Super. Ct. 2003); *Stoeckinger v. Presidential Financial Corp. of Delaware Valley*, 948 A.2d 828 (Pa. Super. Ct. 2008).

Panther Valley in its amended complaint avers that there was a lease agreement whereby Water Wellness would be able to operate and maintain an aquatic swimming program at Panther Valley's high school. Moreover, it is averred that from January 2012 until December of that year, Zupko and Bailey charged an admission fee for the use of the swimming pool. Thus, Panther Valley conferred a benefit upon Zupko and Bailey, that being charging an admission fee for the use of Panther Valley's swimming pool.

Additionally, Panther Valley has avowed that Zupko, Bailey, or both have personally retained the monies they collected from the operation of the pool and have failed to pay Panther Valley for the use of the pool as per the terms of the lease agreement. Moreover, Panther Valley, in maintaining the upkeep of the pool, was compelled to expend monies for which all Defendants were contractual obligated to pay but have failed to do so. Such factual averments, if proven true, would establish that Zupko, Bailey, Water Wellness, or all three received the benefit of using the pool by collecting money from patrons for the use of the pool and retaining said monies collected. Further, such factual averments could allow a trier of fact to conclude that it would be inequitable for any of the three Defendants to retain the benefit of using the swimming pool without paying the value for such use. Therefore, the Court finds Panther Valley has set forth specific factual averments to support an unjust enrichment cause of action and accordingly dismisses Zupko's second legal insufficiency preliminary objection to this count.

The third preliminary objection Zupko raised in response to count I in claiming Panther Valley cannot recover under this cause of action is on the account of the gist of the action doctrine. As stated previously, the doctrine only bars tort actions re-casted in a breach of contract claim. *Hart v. Arnold*, 884 A.2d 316 (Pa. Super. Ct. 2005). Notwithstanding

such, a claim for unjust enrichment is an action that is sounded in quasi-contract or implied-in-law. *Sevast v. Kakouras*, 915 A.2d 1147 (Pa. 2007); *Discover Bank v. Stucka*, 33 A.3d 82 (Pa. Super. Ct. 2011). Therefore, the gist of the action doctrine has no applicability to Panther Valley's claim of unjust enrichment.

Accordingly, Zupko's three preliminary objections to count I of Panther Valley's amended complaint are dismissed.

**Count II - Breach of Contract**

Lastly, Zupko asserts a preliminary objection in the form of legal insufficiency to count II of the amended complaint, which is a cause of action based upon the alleged breach of contract. This preliminary objection mirrors the same legal argument Zupko made in her request that counts I and IV be dismissed insofar as restating the general legal principle that an individual cannot be held liable for the debts of the corporation. For the reasons stated previously, the Court dismiss Zupko's preliminary objection to count II of the amended complaint.

Accordingly, the Court enters the following order:



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

<b>PANTHER VALLEY SCHOOL DISTRICT</b>	:	
Plaintiff	:	
	:	
vs.	:	<b>No. 13-1618</b>
	:	
<b>WATER WELLNESS, INC.,</b>	:	
<b>MARIA ZUPKO AND NICOLE BAILEY,</b>	:	
<b>INDIVIDUALLY AND D/B/A WATER</b>	:	
<b>WELLNESS, INC.</b>	:	
Defendants	:	

Robert T. Yurchak, Esquire	Counsel for Plaintiff
David W. Crossett, Esquire	Counsel for Zupko
Jeffrey P. Bowe, Esquire	Counsel for Bailey
Water Wellness, Inc.	Unrepresented

**ORDER OF COURT**

**AND NOW**, this                      day of March, 2014, upon consideration of the Preliminary Objections filed by Defendant, Maria Zupko, the brief in support thereof, Plaintiff's Answer and brief in response thereto, and following oral argument thereon, it is hereby

**ORDERED and DECREED** that Defendant Maria Zupko's Preliminary Objections are **GRANTED in part and DENIED in part** as follows:

1. Defendant Zupko's preliminary objection to Count III - Fraud, as set forth in Plaintiff's Amended Complaint is **GRANTED** and said Count is **DISMISSED** as it relates to Defendant Zupko;

2. Defendant Zupko's preliminary objection to Count IV of Plaintiff's Amended Complaint, Piercing the Corporate Veil, is **GRANTED** insofar as Plaintiff must plead a more specific complaint as prescribed in the memorandum opinion; **and**

3. All other preliminary objections filed by Defendant Maria Zupko are **DENIED and DISMISSED**.

It is **FURTHER ORDERED and DECREED** that the Plaintiff shall file an Amended Complaint, within thirty (30) days from the date of this Order. Failure to do so will result in Count IV of the Amended Complaint being dismissed with prejudice.

**BY THE COURT:**

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**Joseph J. Matika, J**