IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL E. TAYLOR	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-CV-2702**
	:	
CREDITEL CORPORATION, et al.	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **December 13, 2004**

In this diversity action, Plaintiff Michael E. Taylor brings state law claims alleging Fraud (Counts I and II), Default on a Promissory Note (Counts III and IV), Negligent Misrepresentation (Counts V and VI), and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201, et seq. (Count VII) against Defendants John L. Osborne and Creditel Corporation ("Creditel"). The Complaint seeks damages and attorney fees. Currently before the Court is Creditel's Motion to Dismiss Counts II, IV, VI, and VII of the Complaint. For the reasons stated below, the Motion will be granted in part and denied in part.

I. BACKGROUND

Viewed in the light most favorable to Plaintiff, the relevant facts are as follows. Creditel is a Delaware corporation, with its principal place of business in Los Angeles, California. Complaint ¶¶ 2, 5. At all relevant times, Creditel employed John L. Osborne ("Osborne") as its Director of Corporate Planning and represented to potential investors, including Plaintiff, that Osborne was a co-founder of the company. Complaint ¶ 8. Plaintiff first met Osborne in July of 2001, through a mutual acquaintance, William Yates. Complaint ¶ 9. At that time, Osborne represented to Plaintiff that Creditel was on the verge of brokering key marketing agreements to

improve its business and encouraged Plaintiff to make an investment in the company (which would be secured by Osborne's personal shares of company stock). Complaint ¶ 13. Osborne also promised Plaintiff employment as a Creditel sales representative. Complaint ¶ 14. Osborne previously had solicited an investment of between $50,000 and $100,000 from Yates. Complaint ¶ 10. As a result, Yates contacted Creditel's Chief Executive Officer, Georges F. Elias, with various questions regarding Osborne and the proposed investment opportunities. Complaint ¶ 11. Elias confirmed that Osborne was a co-founder of the company and that he played a major role in developing and maintaining key business relationships. Complaint ¶ 12.

Based on these representations, and in light of the employment offer, Plaintiff agreed to provide $50,000 as an investment in Creditel's business, which was secured by a promissory note executed on or about August 14, 2001. Complaint ¶¶ 15-16; see also Convertible Promissory Note (hereinafter "Note"), attached as Exhibit A to Complaint. The Note was executed on Creditel's letterhead by "Virtual Fonlink, Inc. by J.L. Osborne" and it specifically references Osborne's position with Creditel.[1] The Note was accepted by Plaintiff. In addition, Plaintiff accepted Osborne's offer of employment with Creditel and, in reliance on this offer, resigned his position with the Burger King Corporation. Complaint ¶ 19. Although his employment was scheduled to commence on October 1, 2001, Plaintiff has not been employed by Creditel in any capacity, despite repeated inquiries. Complaint ¶¶ 20-21. Also, while the Note was due as of January 1, 2002, Osborne and Creditel have refused to make payment. Complaint ¶¶ 22-23.

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[1] At this stage in the litigation, the precise relationship between Creditel and Virtual Fonlink, Inc. is not clear. However, Creditel has indicated its correct designation is "Virtual Fonlink, Inc. d/b/a Creditel," so this Court will assume that to the extent the Note binds one entity, it binds both. See Creditel's Motion to Dismiss at 2.

Plaintiff now claims that the investment was fraudulently induced, Complaint ¶¶ 26-30, and asserts claims against both Osborne and Creditel, alleging that Creditel is liable for Osborne's fraudulent misrepresentations and failure to satisfy the Note.

Creditel brings this Motion to Dismiss based on several grounds: (1) this Court lacks personal jurisdiction; (2) service was improper; (3) Counts II and VI are barred by the applicable statute of limitations; (4) Counts II, IV, VI, and VII fail to state a claim upon which relief can be granted; and, (5) this Court lacks subject matter jurisdiction over Count IV.

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts provable by plaintiff. See Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

Unlike a 12(b)(6) motion, a motion pursuant to Rule 12(b)(2) claiming lack of personal jurisdiction is by its nature a matter that requires resolution of factual issues outside the pleadings. See, e.g., Colantonio v. Hilton Int'l Co., 2004 WL 1274387, at *1 (E.D. Pa. June 8, 2004) (citing Time Share Vacation Club v. Atl. Resorts. Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984)). "Once the [lack of personal jurisdiction] has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence." Id. Therefore, in considering the question of personal jurisdiction, this

Court must go beyond the Complaint and consider all competent evidence presented by Plaintiff.[2]

III. DISCUSSION

A. Personal Jurisdiction

Creditel objects to personal jurisdiction under Rule 12(b)(2), contending that it has only de minimus contacts with Pennsylvania. Under Federal Rule of Civil Procedure 4(e), a federal court may exercise personal jurisdiction over a defendant to the extent permissible under the law of the state in which the court sits. See, e.g., Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992); Hodges v. Greiff, 2001 WL 34368774, at *3 (E.D. Pa. Nov. 19, 2001). Pennsylvania law allows personal jurisdiction over non-resident defendants "to the fullest extent allowed under the Constitution of the United States...based on the most minimum contact with this Commonwealth allowed under the Constitution." 42 Pa. Cons. Stat. § 5322(b); see also Hodges, 2001 WL 34368744 at *3. The Due Process Clause of the Fourteenth Amendment permits jurisdiction where a non-resident defendant has sufficient minimum contacts with the forum state "such that the maintenance of [a] suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Weintraub v. Walt Disney World Co., 825 F. Supp. 717, 718 (E.D. Pa. 1993). This presents a two part inquiry in determining jurisdiction: (1) whether there are sufficient minimum contacts; and (2) whether the exercise of personal jurisdiction over a defendant would comport with notions of fair play and substantial justice. See IMO Indus. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998).

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[2] The question of personal jurisdiction is appropriate for consideration on a motion to dismiss because it must be raised by a defendant in his first responsive motion. See Fed. R. Civ. P. 12(h)(1).

The burden is on a plaintiff to establish a court's jurisdiction by a preponderance of the evidence. See, e.g., Patterson by Patterson v. F.B.I., 893 F.2d 595, 603-04 (3d Cir. 1990). Once a defendant has raised the jurisdictional question, a plaintiff must move beyond bare pleadings and present competent evidence that jurisdiction is proper. Id. Without an evidentiary hearing on the motion to dismiss, a plaintiff need only establish a prima facie case for personal jurisdiction. See Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004); see also Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992).

In this case, Plaintiff must establish specific jurisdiction, meaning that the cause of action arose from Creditel's forum based activities. See Eggear v. The Shibusawa Warehouse Co., Ltd., 2001 WL 267881, at *1 (E.D. Pa. March 19, 2001); Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 554 (3d Cir. 1993). There is no dispute that Osborne had sufficient contacts with Pennsylvania to be subject to jurisdiction here. Plaintiff alleges that Osborne was acting as an agent of Creditel in the course of his dealings in Pennsylvania with Plaintiff, which included the negotiation of a promissory note in the amount of $50,000 and arranging Plaintiff's potential future employment with Creditel. See Declaration of Michael E. Taylor (hereinafter "Declaration"), attached as Exhibit A to Plaintiff's Response in Opposition to Motion. Plaintiff has presented evidence that Osborne was an employee of Creditel and that he negotiated with Plaintiff on the corporation's behalf, apparently with the consent of Chief Executive Officer Georges Elias. Declaration ¶ 3. Osborne's alleged actions in Pennsylvania as an agent of Creditel are prima facie sufficient to show that Creditel availed itself of the privilege of acting within the state, establishing the constitutionally requisite minimum contacts for personal jurisdiction. See Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 483

(3d Cir. 1993) (finding limited contacts sufficient to confer jurisdiction where contacts were transactions that gave rise to the litigation); see also Miller Yacht Sales, Inc., 384 F.3d at 102 n.7 (Scirica, J., concurring in part) (stating that agent's actions in forum state constitute contacts sufficient to meet minimum contacts jurisdictional requirement); Carteret Sav. Bank, F.A., 954 F.2d at 147.[3]

B. Service of Process

Creditel next challenges service of process based on Federal Rule of Civil Procedure 12(b)(5). As with personal jurisdiction, the party effecting service and seeking to establish jurisdiction bears the burden of demonstrating the validity of service once it is challenged. See, e.g., Grand Entm't Group, Ltd., 988 F.2d at 488; Petsinger v. Dep't of Transp., 211 F. Supp. 2d 610, 611 (E.D. Pa. 2002). Service on corporations is governed by Federal Rule 4(h), which permits service pursuant to the law of the state in which the district court sits. See, e.g., McKinnis v. Hartford Life, 217 F.R.D. 359, 361 (E.D. Pa. 2003). Pennsylvania Rule 424 permits service on a corporation or similar entity by serving an executive officer, partner or trustee; by serving a manager, clerk, or other person in charge of any regular place of business of the corporation; or, by serving any agent authorized to receive service. Id.

In this case, Plaintiff personally served Rebecca Nevarez on June 30, 2004 at the address alleged to be Creditel's principal place of business, 1990 S. Bundy Dr., Suite #650, Los Angeles, California. Plaintiff claims that Ms. Nevarez was authorized to accept service; Creditel counters that she is the employee of a real estate holding company located at that address and that she is

[3] Furthermore, the exercise of personal jurisdiction over Creditel would not offend traditional notions of fair play and substantial justice. See Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 113 (1987).

neither an agent nor employee of Creditel's. Neither party has presented more than bald, conclusory statements as to her identity. Accordingly, Plaintiff has failed to meet his burden of establishing proper service. See McKinnis, 217 F.R.D. at 361.

Where service is improper, a district court has broad discretion in choosing whether to dismiss the complaint or to quash service. See Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). Creditel is a Delaware corporation, with identified officers and locations. Thus, there is a reasonable possibility that proper service may be obtained. Given that Creditel received notice of the suit and was able to respond with this Motion to Dismiss in a timely fashion, dismissal of the Complaint at this time would be improper. See id. (ruling that dismissal would be improper where there exists a reasonable possibility that proper service may be obtained); see also Schmoltz v. County of Berks, 2000 WL 62600, at *2 (E.D. Pa. Jan. 14, 2000) (noting that fundamental purpose of service is to ensure that defendant receives notice of suit and has an opportunity to present his objections). Accordingly, service will be quashed and Plaintiff will be afforded leave to effect proper service within thirty (30) days of the date of this Order.

C. The Statute of Limitations Defense

Creditel moves to dismiss Counts II and VI under Rule 12(b)(6), based on the applicable statute of limitations. Although the Federal Rules of Civil Procedure generally require a statute of limitations defense to be raised in an answer, the Third Circuit permits this defense to be raised by a 12(b)(6) motion if it is clear from the face of the complaint that the cause of action has not been brought within the appropriate limitations period. See, e.g., Loach v. Hafer, 2003 WL 23024530, at *1 (E.D. Pa. Dec. 23, 2003).

In Pennsylvania, the statute of limitations for fraud and negligent misrepresentation is two

years. See 42 Pa. Cons. Stat. § 5524(7). Under state law, the limitations period begins to run when "the right to institute and maintain the suit arises." Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983). Creditel contends that because the Note became due on January 1, 2002, the statute of limitations expired in January 2004– approximately five months before Plaintiff brought this suit.[4] Plaintiff argues that: (1) the statute of limitations did not begin to run until he demanded payment of the Note and (2) in any event, the statute was tolled by Pennsylvania's discovery rule.

The Note specifically provides for a due date of January 1, 2002, without qualification. As a result, the running of the statute of limitations is not contingent on a demand for payment. See Gurenlian v. Gurenlian, 595 A.2d 145, 150 (Pa. Super. 1991). Pennsylvania law, however, recognizes the "discovery rule," which tolls the statute of limitations until the complaining party knows or reasonably should know, through the exercise of due diligence, that he has been injured. See, e.g., Crouse v. Cyclops Indus., 745 A.2d 606, 611 (Pa. 2000). Unless the facts of a case are so clear that reasonable minds cannot differ over when the limitations period commenced, the point at which the complaining party should reasonably be aware of his injury is a factual issue "best determined by the collective judgment, wisdom and experience of jurors." Crouse, 745 A.2d at 611 (quoting White v. Owens-Corning Fiberglas Corp., 668 A.2d 136, 144 (Pa. Super. 1995)); Anthon v. Cabot Corp., 2002 WL 32334276, at *3 (E.D. Pa. June 21, 2002). The discovery rule applies to causes of action, like Plaintiff's, based on fraud and negligent misrepresentation. See Beauty Time, Inc. v. VU Skin Sys., Inc., 118 F.3d 140, 148 (3d Cir. 1997).

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[4] This suit was commenced in June 2004.

Plaintiff claims that: (1) he contacted Osborne in January 2002, after the Note matured; (2) Osborne assured him that payment would be made by the "end of the second quarter 2002"; (3) Osborne repeatedly contacted him to explain delays in payment on the Note and offered specific assurances that payment was forthcoming; and, (4) it was not until July 2002 that he realized Osborne and Creditel had no intention of paying the Note. Declaration ¶¶ 8-10. Thus, under the discovery rule, the question of when the statute of limitations commenced is one of fact, to be determined by a jury. See, e.g., Haugh v. Allstate Ins. Co., 322 F.3d 227, 231-32 (3d Cir. 2003) (finding jury question where start of limitations period was unclear). Accordingly, Creditel's Motion to Dismiss both Counts II and VI based on the statute of limitations will be denied.

D. Creditel's Liability for Fraud and Negligent Misrepresentation

Creditel next moves to dismiss Counts II and VI under Rule 12(b)(6) for failure to state a claim. Plaintiff's claims against Creditel on these counts rest on his allegation that Osborne was acting as an agent on behalf of Creditel when he first contacted Plaintiff, made certain material misrepresentations, offered Plaintiff employment, secured an investment of $50,000 on behalf of Creditel, and then failed to repay the invested money or find Plaintiff a position within the company as promised. Plaintiff has alleged that Osborne was an employee specifically authorized to undertake these actions on behalf of Creditel or, at the very least, that he was cloaked in apparent authority as a result of the representations of Creditel's Chief Executive Officer Georges F. Elias. See Complaint ¶¶ 8-12. Plaintiff has sufficiently pled that Osborne was functioning as an agent of Creditel, either actual or apparent, and it is well established under Pennsylvania law that a principal may be liable for the misrepresentations, frauds, or other torts

committed by an agent in the course of his employment, whether or not such actions were authorized. See Aiello v. Ed Saxe Real Estate, Inc., 499 A.2d 282, 287 (Pa. 1985); see also Bolus v. United Penn Bank, 525 A.2d 1215, 1222 (Pa. Super. 1987) (summarizing Pennsylvania agency law and noting that ultimate question of agency relationship is one of fact appropriate for jury). In addition, Plaintiff has properly and specifically alleged the elements of his claims for fraud and negligent misrepresentation, based on the statements of Creditel's agent Osborne and on the alleged representations of Creditel's C.E.O. Elias.[5] As a result, Creditel's Motion to Dismiss Counts II and VI under Rule 12(b)(6) will be denied.

E. Creditel's Liability on the Note

Similarly, Creditel seeks to dismiss Count IV (default on the promissory note) claiming that there is no evidence to hold it liable on a note executed by Osborne. Under Pennsylvania state law, the burden is on a plaintiff to prove the existence of a contract to which a defendant is party. See, e.g., Geyer v. Huntingdon County Agric. Ass'n, 66 A.2d 249, 250-51 (Pa. 1949). In considering whether a contracting agent was acting on behalf of a disclosed principal in entering a contract (or rather individually), the Court must consider the contract as a whole. Id. If the terms of the contract indicate an intent to bind some disclosed principal, that principal may be liable even for an agent's unauthorized actions if, under the circumstances, the principal is responsible for a third party's misapprehension as to the extent of the agent's authority. See, e.g.,

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[5] These elements include: (1) a material representation of fact; (2) which was false; (3) where the maker was aware of its falsity or reckless as to whether it was true or false; (4) that the statement was made with the intent of misleading another into relying on it; (5) that there existed a justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. See Kerrigan v. Villei, 22 F. Supp. 2d 419, 428-29 (E.D. Pa. 1998) (citing Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994)); Huddleston v. Infertility Ctr. of America, Inc., 700 A.2d 453, 461 (Pa. Super. 1997).

Sustrik v. Jones & Laughlin Steel Corp., 149 A.2d 498, 500 (Pa. Super. 1959).

Creditel denies that it authorized Osborne to execute a promissory note as security for Plaintiff, or that it benefitted from the Note in any way. On its face, however, the Note appears to bind both the agent Osborne, and his alleged principal. The Note was executed on Creditel's letterhead; it specifically references Osborne's position with Creditel; Osborne had at least represented to Plaintiff that he was acting on behalf of Creditel in soliciting business investments; and, the signature indicates that the Note is executed by "Virtual Fonlink, Inc. by J.L. Osborne." See Note; cf. Viso v. Werner, 369 A.2d 1185, 1187 (Pa. 1977) (finding contract on principal company's letterhead, signed on behalf of principal, indicated contract was designed to bind disclosed principal, further noting the "strong presumption" in such cases that the principal is bound); In re Estate of Duran, 692 A.2d 176, 179 (Pa. Super. 1997). Thus, Creditel's liability under the Note is a question properly submitted to the jury, and its Motion to Dismiss Count IV will be denied.

F. Creditel's Liability Under Pennsylvania's UTPCPL

Creditel also moves to dismiss Count VII, which alleges a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201, et seq., arguing that such actions may be brought only by consumers in a consumer transaction. Section 201-9.2(a) of the UTPCPL creates a private right of action for "[a]ny 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" as a result of the seller's deceptive or unlawful actions. 73 Pa. Cons. Stat. § 201-9.2. The statute is intended to enhance the protection of consumers against deceptive or unfair trade practices. See Valley Forge Towers S. Condo. v.

Ron-Ike Foam Insulators, Inc. ("Valley Forge"), 574 A.2d 641, 644 (Pa. Super. 1990); Balderston v. Medtronic Sofamor Danek, Inc., 285 F.3d 238, 240 (3d Cir. 2000). Pennsylvania courts have emphasized that the law is intended for application in a specific class of transactions– those by consumers for primarily personal, not business-related, reasons. See, e.g., Lal v. Ameriquest Mortgage, Co., 858 A.2d 119, 125 (Pa. Super. 2004); see also Algrant v. Evergreen Valley Nurseries Ltd. P'ship, 941 F. Supp. 495, 499 (E.D. Pa. 1996).

Consequently, the transaction at issue here is not of the type the statute was intended to encompass. First, the transaction between Plaintiff and Osborne was not a "purchase" or "lease" of goods; Osborne executed a promissory note, secured by his shares of Creditel/ Virtual Fonlink, Inc., and negotiated an offer of employment with Plaintiff.[6] Furthermore, taking the allegations of the Complaint as true and drawing all inferences in Plaintiff's favor, Plaintiff provided $50,000 as a business investment and not for personal or family purposes. See Complaint at 3 ("Plaintiff provided Defendants $50,000 as an investment in Creditel's business"); cf. Lal, 858 A.2d at 125 (finding no application of UTPCPL where company purchased property as an investment); Valley Forge, 574 A.2d at 644 (emphasizing that it is the purpose of the purchase and not necessarily the type of product that determines standing to sue under the UTPCPL). Nowhere does Plaintiff aver that this was a consumer transaction for personal, family, or household purposes. Accordingly, Plaintiff has not properly pled a claim under Pennsylvania's UTPCPL and Creditel's Motion to Dismiss Count VII of the Complaint will be granted.

G. The Economic Loss and "Gist of the Action" Doctrines

Creditel next moves to dismiss Counts II and VI based on the related doctrines of

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[6] See fn.1 on p.2 hereof.

economic loss and "gist of the action."[7] Under Pennsylvania law, the "gist of the action" doctrine bars tort claims that are "merely another way of stating [a] breach of contract claim." Advanced Tubular Prod., Inc. v. Solar Atmospheres, Inc., 2004 WL 540019, at *4 (E.D. Pa. March 12, 2004).[8] Specifically, the doctrine bars tort actions that: (1) arise 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; and, (4) where the tort essentially duplicates a breach of contract claim or its success is wholly dependent on the terms of the contract. eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 19 (Pa. Super. 2002). The purpose of the rule is to maintain the distinction between tort and contract; the gravamen of this distinction is whether the duty alleged to have been breached arises from social policy, in which case a tort action is appropriate, or merely from mutual consent, in which case the action arises under contract. Id. at 14; Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 103 (3d Cir. 2001). Under this analysis, courts have permitted tort actions to go forward based on fraud in the inducement of a contract, but generally prohibited such actions when the fraud relates to performance under a contract. See eToll, Inc., 811 A.2d at 17; NutriSystem, Inc. v. Nat'l Fire Ins. of Hartford, 2004 WL 2646598, at *5 (E.D. Pa. Nov. 19, 2004); Longview Dev. LP v. Great Atl. & Pac. Tea Co., Inc., 2004 WL 1622032, at *3 (E.D. Pa. July 20, 2004). In each

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[7] Because this Court has already granted the Motion to Dismiss Count VII, there is no need to consider whether that claim would be barred.

[8] The Third Circuit has recognized Pennsylvania's economic loss doctrine, which similarly seeks to separate true tort and contract actions, but has clarified that the doctrine applies primarily in products liability cases, while the gist of the action doctrine is a "better fit" for non-products liability claims. See Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 n.11 (3d Cir. 2001). Accordingly, this Court will apply the gist of the action doctrine.

case, a searching, fact-specific analysis of the plaintiff's allegations is required. See eToll, Inc., 811 A.2d at 19.

Here, Plaintiff brings claims for fraud and negligent misrepresentation stemming from the failure of payment on a promissory note and an alleged offer of employment that never materialized. Although Plaintiff's claims are related to contractual agreements, the heart of this action involves alleged fraudulent misrepresentations by Osborne, which Plaintiff claims induced him to make a $50,000 investment in Creditel's business (secured by an apparently fraudulent promissory note) and leave his job with the Burger King Corporation. The duties allegedly violated in this case are not merely the product of a bargained for contractual exchange. Furthermore, the allegations that form the basis of Plaintiff's claims are generally matters outside and not incorporated into the related contracts. Cf. NWJ Prop. Mgmt. v. BACC Builders, Inc., 2004 WL 2095446, at *5 (E.D. Pa. Sept. 17, 2004) (allowing tort claims for matters "not addressed by the parties' contracts"); Penn City Invs., Inc. v. Soltech, Inc., 2003 WL 22844210, at *3 (E.D. Pa. Nov. 25, 2003). Taking all allegations in the complaint as true and drawing all inferences in favor of Plaintiff, any contractual claims appear secondary to the larger complaint of a scheme designed to defraud apparently unsophisticated investors, such as Plaintiff. As a result, Creditel's Motion to Dismiss on this ground will be denied. See also Longview Dev. LP, 2004 WL 1622032 at *5 (collecting cases and noting reluctance to dismiss a case based on the gist of the action doctrine at early stages in the litigation).

H. Subject Matter Jurisdiction as to Count IV

Finally, Creditel challenges this Court's subject matter jurisdiction over Count IV. As alleged in the Complaint, this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a).

There is no dispute that the parties are diverse. In addition, Plaintiff has properly pled damages sufficient to meet the amount in controversy requirement. Creditel argues that Count IV should be dismissed because the damages alleged in that count alone fall below the amount in controversy required for federal jurisdiction. However, it is well established that claims brought by a single plaintiff against a single defendant may be aggregated when calculating the amount in controversy. See Suber v. Chrysler Corp., 104 F.3d 578, 588 (3d Cir. 1997) (citing Snyder v. Harris, 394 U.S. 332, 335 (1969)). Accordingly, Creditel's Motion to Dismiss Count IV for lack of subject matter jurisdiction will be denied.

IV. CONCLUSION

For the foregoing reasons, Creditel's Motion to Dismiss will be granted in part and denied in part. Service will be quashed and Plaintiff shall have thirty (30) days from the date of this Order to perfect service. Count VII will be dismissed; Counts II, IV, and VI will not be dismissed. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL E. TAYLOR	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-CV-2702**
	:	
CREDITEL CORPORATION, et al.	**:**	

ORDER

AND NOW, this day of December, 2004, upon consideration of Defendant Creditel Corporation's Motion to Dismiss (docket no. 3), and Plaintiff's Response thereto, it is **ORDERED** that the Motion is **GRANTED IN PART AND DENIED IN PART**. Accordingly, Count VII of the Complaint is **DISMISSED**. Counts II, IV, and VI will not be dismissed. It is **FURTHER ORDERED** that service is quashed and that Plaintiff shall have thirty (30) days from the date of this Order properly to serve Defendant Creditel Corporation.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.