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

THE U.S. SMALL BUSINESS ADMINISTRATION As Receiver for Acorn Technology Fund, L.P.,	:	CIVIL ACTION
Plaintiff,	:	NO. 03-3461
v.	:	
PROGRESS BANK,	:	
Defendant/Third-Party Plaintiff,	:	
v.	:	
SOVEREIGN BANK, N.A.,	:	
Third-Party Defendant.	:	

MEMORANDUM

Giles, C.J. December 22, 2004

I. Introduction

On April 26, 2004, Progress Bank ("Progress")[1], the third-party plaintiff, filed an amended complaint against third-party defendant Sovereign Bank ("Sovereign") alleging: (1) breach of contractual indemnification, (2) breach of the implied covenant of good faith and fair dealing, (3) fraudulent inducement, (4) indemnification, (5) contribution, and (6) unjust enrichment. Before the court is Sovereign's Motion to Dismiss Progress' Amended Third-Party

[1] Since the institution of this action, Progress Bank was acquired by Fleet Bank which was then subsequently acquired by Bank of America. For clarification purposes the third-party plaintiff will be referred to as "Progress" throughout the opinion.

Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons that follow, Sovereign's Motion to Dismiss is granted in part and denied in part.

II. Background

On or about October 5, 2001, Progress entered into a Loan Purchase Agreement (the "LP Agreement") with Main Street Bank ("Main Street"). (Pl.'s Am. Third-Party Compl. ¶ 6.) The LP Agreement was part of a larger transaction, covered by a Purchase and Assumption Agreement ("P&A Agreement"), by which Progress purchased certain assets and deposits from Main Street relating to the activities at its Lambertville, New Jersey branch office. (Pl.'s Am. Third-Party Compl. ¶ 8.) One of the loans Progress purchased was a loan styled as a line of credit to Princeton Technology Management, L.L.C. (the "PTM loan"). (Pl.'s Am. Third-Party Compl. ¶ 9.) Progress also acquired a two million dollar ($2,000,000) Certificate of Deposit, originally purchased by Acorn Technology Fund, L.P. (the "Acorn CD") as collateral for the PTM loan. (Pl.'s Am. Third-Party Compl. ¶ 10-11.) On or about June 3, 2002, Progress drew upon the Acorn CD to pay-off the PTM loan. (Pl.'s Am. Third-Party Compl. ¶ 23.)

On January 7, 2003 the United States commenced an action before this court against Acorn Technology Fund, L.P. ("Acorn"). On January 17, 2003 this court appointed the Small Business Administration ("SBA") as Receiver for Acorn for the purpose of pursuing any and all claims or causes of action available to Acorn. The SBA commenced an action against Progress on June 3, 2003 to recover the proceeds from the Acorn CD alleging that the underlying transactions between Main Street and Acorn relating to the PTM loan and the Acorn CD were illegal and fraudulent. (Pl.'s Am. Third-Party Compl. ¶ 28.) The SBA alleged that the use of Acorn funds to purchase the Acorn CD as collateral for the PTM loan (1) violated § 6.2 of

Acorn's Limited Partnership Agreement, which prohibited Acorn's general partners from guarantying the debts of another person or entity without the consent of the limited partners and (2) violated federal law by not receiving the SBA's approval prior to securing third-party debt. (Pl.'s Am. Third-Party Compl. Ex. 3 ¶¶ 22-25, 26-32.) The SBA alleged that Progress knew or should have known that the PTM loan and the Acorn CD transactions were illegal and fraudulent because (1) Main Street was furnished a copy of the Acorn Limited Partnership Agreement and (2) Main Street, through its employee Mr. Morrow, failed to disclose the Acorn CD as a direct or contingent liability of Acorn on an October 31, 2000 Account Verification Form (Pl.'s Am. Third-Party Compl. Ex. 3 ¶¶ 21, 35-36.) Third-party defendant Sovereign is successor-in-interest to Main Street.

On July 3, 2003, Progress' counsel notified Sovereign regarding the aforementioned action filed by the SBA against Progress. (Pl.'s Am. Third-Party Compl. ¶ 49.) Progress then requested that Sovereign agree to be substituted for Progress in the pending action. (Pl.'s Am. Third-Party Compl. ¶ 52.) Sovereign responded that it was investigating the allegations relating to the PTM loan and Acorn CD. The parties entered into a court-approved Joint Stipulation with the SBA to protect Progress' right to join Sovereign as a third-party defendant. (Pl.'s Am. Third-Party Compl. ¶ 53-54.) When Sovereign did not respond, Progress filed a third-party complaint against Sovereign on November 13, 2003. (Pl.'s Am. Third-Party Compl. ¶ 55.) On or about March 5, 2004 Progress entered into open settlement negotiations with the SBA. (Pl.'s Am. Third-Party Compl. ¶ 58.) Progress informed Sovereign of the settlement negotiations and invited Sovereign to participate. (Pl.'s Am. Third-Party Compl. ¶ 59.) Sovereign's counsel informed Progress that it had no intention of participating in, or funding, the settlement efforts between Progress and the SBA. (Pl.'s Am. Third-Party Compl. ¶ 60.) On March 8, 2004 Progress made an opening offer of settlement to the SBA with copies forwarded to Sovereign. (Pl.'s Am. Third-Party Compl. ¶ 61.) On April 7, 2004 Progress informed the court, as well as Sovereign, that it had reached a settlement in principle with the SBA. (Pl.'s Am. Third-Party Compl. ¶ 62.)

III. Standard for Motion to Dismiss

Dismissal of a complaint pursuant to Rule 12(b)(6) is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The court must accept all of plaintiff's allegations as true and draw all reasonable inferences therefrom. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) ("the material allegations of complaint are taken as admitted"); Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993) ("[a]t all times in reviewing a motion to dismiss we must 'accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom.'" (quoting Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990))).

IV. Discussion

A. Breach of Express Contractual Indemnity

In Count I of its Amended Third-Party Complaint entitled "Breach of Contract," Progress alleges that Sovereign breached its contractual obligations to Progress by failing to indemnify and hold Progress harmless pursuant to the parties' P&A Agreement. (Pl.'s Am. Third-Party

Compl. ¶ 68-70.) Sovereign avers in its Motion to Dismiss that the indemnity provision of the P&A Agreement does not cover Progress' claims. (Third-Party Def.'s Mot. To Dismiss at 10.) The court disagrees.

Claims for contractual indemnity follow the well-settled principles of contract interpretation. Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. Ct. 2000). Interpretation begins with the plain language of the written agreement and the principle that words must be given their ordinary meaning. Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998); Atlantic Refining Co. v. Wyoming Natl. Bank, 51 A.2d 719, 723 (Pa. 1947); In re Tops Appliance City, Inc., 372 F.3d 510, 514 (3d Cir. 2004); In re Kaplan, 143 F.3d 807, 816 (3d Cir. 1995). The purpose of contract interpretation is to give effect to the intention of the parties if expressed in clear and unambiguous terms. Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983); Brotherton Constr. Co. v. Patterson-Emerson-Comstock, Inc., 178 A.2d 696, 697 (Pa. 1962); Gleason v. Northwest Mortgage, Inc., 243 F.3d 130, 138-39 (3d Cir. 2001); Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1139 (3d Cir. 1995). The parties' intention is deemed to be embodied in the writing itself and when the words are clear and unambiguous the intent is to be gleaned exclusively from the express language of the agreement. Delaware County v. Delaware County Prison Employees Independent Union, 713 A.2d 1135, 1137 (Pa. 1998).

Section 1.11 of the P&A Agreement, entitled "Indemnification," provides for indemnification between Sovereign ("the Seller") and Progress ("the Buyer"). Section 1.11(a) states:

> Seller shall indemnify, hold harmless and defend Purchaser from

> and against all losses and liabilities, including reasonable legal fees and expenses, arising out of any actions, suits or proceedings commenced prior to the Effective Date . . .; and Seller shall indemnify, hold harmless and defend Purchaser from and against all losses and liabilities, including reasonable legal fees and expenses, arising out of any actions, suits or proceedings commenced on or after the Effective Date but which <u>relate to operations at the Branches prior to the Effective Date</u>. Seller agrees further to defend, indemnify and hold harmless Purchaser from and against all claims, losses, liabilities (including reasonable legal fees and expenses) and obligations resulting from any material breach of any agreement, representation or warranty made by Seller in this Agreement . . . . (emphasis added).

Section 1.11(c) defines the procedure the parties should follow in the event a claim for indemnification is made. Section 1.11(c) provides:

> A claim for indemnification under Sections 1.11(a) or 1.11(b) of this Agreement may be made by the claiming party by giving written notice thereof to the other party. Promptly after receipt by either party of notice of the assertion of any claim or the commencement of any action, suit or proceeding with respect to which a claim for indemnification will be made under this Agreement such party (the "Indemnified Party") shall give written notice thereof to the other party (the "Indemnitor") and will thereafter keep the Indemnitor reasonably informed with respect thereto, provided that failure of the Indemnified Party to give the Indemnitor prompt notice as provided herein shall not relieve the Indemnitor of its obligations hereunder except to the extent, if any, it shall have been materially prejudiced thereby.

The actions of Sovereign's predecessor Main Street involving the purchase of the Acorn CD and its use as collateral for the PTM loan are clearly covered by the language of § 1.11(a) "relating to the operations" of the Lambertville Branch. Working with customers to purchase certificates of deposits or qualify for loans represent two of the fundamental operations of any bank. Furthermore, Progress has sufficiently established that it complied with the requirements set forth in § 1.11(c) regarding proper notice of a claim for indemnification. Progress promptly notified Sovereign of the SBA's claims relating to the PTM loan and the Acorn CD and continued to communicate with Sovereign regarding its position that Sovereign was the primary wrongdoer in regards to these transactions and its request for indemnification and/or the substitution of Sovereign as the defendant in the action between the SBA and Progress. The express language of section 1.11(a) of the P&A Agreement covers the conduct at issue and Progress has sufficiently established that it informed Sovereign of the underlying grounds for its indemnification claim and kept it reasonably informed of the development of the case with the SBA and the ensuing settlement efforts. Therefore, the court finds that Progress has sufficiently alleged a claim for express contractual indemnity. Accordingly, Sovereign's motion to dismiss is denied as to that claim.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

In Count I of its Amended Third-Party Complaint, Progress also asserts a claim against Sovereign for breach of the implied covenant of goof faith and fair dealing. (Pl.'s Am. Third-Party Compl. ¶ 71.) Sovereign submits in its Motion to Dismiss that Progress is barred by Pennsylvania law from asserting an independent action for breach of the implied covenant of good faith and fair dealing, given the existence of Progress' breach of contract claim. (Third-Party Def.'s Mot. To Dismiss at 7.) The court agrees with Sovereign.

Pennsylvania courts have adopted § 205 of the Restatement (Second) of Contracts which provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981); Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153 (Pa. Super. Ct. 1989); Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992); Killian v. McCulloch, 850

F. Supp. 1239, 1250 (E.D. Pa. 1994). The purpose of implying the duty of good faith and fair dealing is to "to allow enforcement of the contract terms in a manner that is consistent with the parties' reasonable expectations." Killian, 850 F. Supp. at 1250. Pennsylvania courts have determined that the duty of good faith is not implied where "a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith." Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 867 (Pa. Commw. Ct. 2001). See also Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701-02 (3d Cir. 1993) (finding that under Pennsylvania law the plaintiff could not maintain a separate cause of action for an implied duty of good faith and fair dealing where the implied claim was identical to, and therefore covered, by another cause of action in the same case). Therefore, a plaintiff cannot seek to recover from a defendant on a separate theory of breach of implied duty of good faith and fair dealing while maintaining an action for breach of contract, which includes that duty. See JHE, Inc. v. Southeastern Pennsylvania Transp. Auth., No. 1790 Nov. Term 2001, 2002 WL 1018941 at * 7 (Pa. Com. Pl. May 17, 2002) (holding that "a breach of the covenant of good faith is nothing more than a breach of contract claim and that separate causes of action cannot be maintained for each, even in the alternative."); Allstate Transp. Co., Inc. v. Southeastern Pennsylvania Transp. Auth., No.Civ.A.97-1482, 2000 WL 329015 at *18-19 (E.D. Pa. Mar. 27, 2000) (finding that "there can be no implied covenant as to any matter specifically covered by the written contract between the parties."); McHale v. NuEnergy Group, No.Civ.A.01-4111, 2002 WL 321797 at *8 (E.D. Pa. Feb. 27, 2002) (determining that "Pennsylvania law would not recognize a claim for breach of covenant of good faith and fair dealing as an independent cause of action separate from the breach of contract claim since the actions forming the basis of the breach of contract claim are essentially the same as the actions forming the basis of the bad faith claim."). As the third circuit has explained, "[t]he covenant of good faith and fair dealing 'involve[s] an implied duty to bring about a condition or to exercise discretion in a reasonable way'" so that "implied covenants and any express terms of a contract are necessarily mutually exclusive–one can invoke 'implied' terms only when there are no express terms in the contract relating to the particular issue." USX Corp. v. Prime Leasing Inc., 988 F.2d 433, 438 (3d Cir. 1993) (emphasis in original).

Progress has failed to establish that its claim for breach of the implied covenant of good faith and fair dealing is distinct and separate from its claim for breach of contract. First, both allegations are contained in the same count, which generally sets forth Progress' contention that Sovereign breached the contractual obligations set forth in the P&A Agreement. Second, Progress has not adequately pled a separate claim for breach of the implied covenant of good faith and fair dealing. It states that Sovereign's actions and inactions were "also" in breach of the implied covenant implicit in the P&A Agreement. (Pl.'s Third-Party Am. Compl. ¶ 71.) The court concludes that there exists no separate basis for the breach of implied covenant of good faith and fair dealing. It is not present in the Third-Party Complaint or the response to the Motion to Dismiss. More importantly, the parties contract constitutes the entire agreement between them.

C. Fraud

Progress has asserted a claim for fraudulent inducement in Count II of its Amended-Third Party Complaint against Sovereign. (Pl.'s Am. Third-Party Compl. ¶ 74-86.) In moving to dismiss this Count, Sovereign argues that Progress has failed to establish the necessary elements of fraudulent inducement or, in the alternative, that Progress' claim is barred by either the economic loss doctrine, the gist of the action doctrine, or the two-year statute of limitations applicable to tort actions in Pennsylvania. (Third-Party Def.'s Mot. To Dismiss at 12-20.) The court finds that Progress has sufficiently alleged a claim for fraudulent inducement and that its claim is not barred.

1. *Fraudulent Inducement*

Fraud is a generic term covering "anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture." Moser v. DeSetta, 589 A.2d 679, 682 (Pa. 1991); Frowen v. Blank, 425 A.2d 412, 415 (Pa. 1981). In Pennsylvania, the tort of fraudulent inducement[2] requires:

> (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. Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

Pennsylvania courts have consistently held that the concealment of a material fact by a defendant amounts "to a culpable misrepresentation no less than does an intentional false statement." Moser, 589 A.2d at 682. See also De Joseph v. Zambelli, 139 A.2d 644, 647 (Pa. 1958) (holding that "[f]raud arises where the misrepresentation is knowingly false, where there is a concealment calculated to deceive, or where there is a non-privileged failure to disclose.").

[2] Also referred to as "intentional misrepresentation."

While silence is insufficient to constitute actionable fraud, if the party has a duty to speak, concealment or non-disclosure of a material fact constitutes fraudulent misrepresentation. See Sewak v. Lockhart, 699 A.2d 755, 759 (Pa. Super. Ct. 1997) (holding that "mere silence without a duty to speak will not constitute fraud."); Smith v. Renaut, 564 A.2d 188, 192 (Pa. Super. Ct. 1989) (same). Such a duty arises, for example, "as a result of one party's reliance on the other's representations, if one party is the only source of information to the other party" leaving the parties without equal knowledge of and access to material facts. City of Rome v. Glanton, 958 F. Supp. 1026, 1038 (E.D. Pa. 1997). A misrepresentation is material "when it is of such a character, that if it has not been made the transaction would not have been entered into." De Joseph, 139 A.2d at 647.

Progress has sufficiently alleged the requisite elements to establish fraudulent inducement at this stage in the litigation. Progress' claim is essentially that Main Street, Sovereign's predecessor-in-interest, intentionally concealed material facts concerning the extension of the Acorn CD and its use as collateral for the PTM loan for the purpose of inducing Progress to accept these instruments as part of the larger transaction between the parties. Specifically, Progress has noted the absence of the Account Verification Form as potential evidence of Main Street's intention to deceive. Furthermore, it is reasonable to conclude that it was material to the transaction that Progress believed that in accepting the PTM loan and the Acorn CD that it was receiving legal transactions of marketable value. Progress' reliance on Main Street's assertions, contained, for example, in their representations and warranties to the effect that the loan and CD were legal and binding, cannot be said, as a matter of law, to be unreasonable. Progress has pled sufficient facts for a jury to determine that it was fraudulently induced by Main Street to purchase and assume liability for the PTM loan and the Acorn CD.

2. *Economic Loss Doctrine*

The economic loss doctrine is a judicially created bar to recovery under tort for purely economic harm. New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 654 A.2d 919, 925 (Pa. Super. Ct. 1989). The economic loss doctrine precludes recovery for purely economic harm in actions based on negligence or strict liability. Id. The Pennsylvania Supreme Court, however, has not determined whether the economic loss doctrine extends to claims based on intentional tortious conduct. See Werwinski v. Ford Motor Co., 286 F.3d 661, 670, 674-76 (3d Cir. 2002) (finding that "the law in Pennsylvania with respect to the application of the economic loss doctrine to intentional fraud actions remains unsettled, and the district court opinions interpreting Pennsylvania law on the point provide little guidance.").

However, the emerging trend in lower Pennsylvania courts and in other jurisdictions has been to permit purely economic recovery in causes of action for intentional fraud. Id. at 676. Many such courts have found that claims for intentional fraudulent conduct are an exception to the economic loss doctrine and no Pennsylvania court has found that the doctrine precludes recovery in the face of a claim for intentional wrongdoing. See David Pflumnn Paving & Excavating, Inc. v. Foundation Serv. Co., F.T., 816 A.2d 1164, 1171 n.2 (Pa. Super. Ct. 2003) (nothing that "[t]here are no Pennsylvania Supreme Court or Superior Court cases that indicate that the economic loss doctrine bars a claim for fraudulent misrepresentation"); Aikens v. Baltimore & Ohio R.R. Co., 501 A.2d 277, 278 (Pa. Super. Ct. 1985) (holding that claims for intentional wrongdoing are an exception to the economic loss doctrine); New Hope Books, Inc.

v. Datavision Prologix, Inc., No.01741 July Term 2001, 2003 WL 21672991 at *6 n.8 (Pa. Com. Pl. June 24, 2003) (same); Oppenheimer v. York Int'l, No.4348 March Term 2002, 2002 WL 31409949 at *2 (Pa. Com. Pl. Oct. 25, 2002) (same); Zwiercan v. General Motors Corp., No.3235 June Term 1999, 2002 WL 31053838 at *6 (Pa. Com. Pl. Sept. 11, 2002) (same); WorldWideWeb Network Corp. v. Entrade, Inc., No.3839 Dec. Term 2001, 2002 WL 1472336 at *3 (Pa. Com. Pl. June 20, 2002) (same); JHE, Inc., 2002 WL 1018941 at *7 (same); Paola Amico v. Radius Communications, No. 1793 Jan. Term 2000, 2001 WL 1807924 at *3 (Pa. Com. Pl. Jan. 9, 2001) (same); First Republic Bank v. Brand, No.147 Aug. Term 2000, 2000 WL 33394627 at *5 (Pa. Com. Pl. Dec. 19, 2000) (same).

This court, following the third circuit, finds the reasoning expressed by the Michigan Court of Appeals on this subject to be of significant guidance:

> Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely–which normally would constitute grounds for invoking the economic loss doctrine–but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. Huron Tool & Eng'g Co. v. Precision Consulting Serv., Inc., 532 N.W.2d 541, 545 (Mich. Ct. App. 1995) (quoted in Werwinski, 286 F.3d at 676).

In its Third-Party Complaint Progress has sufficiently alleged that it was fraudulently induced by Main Street to purchase the PTM loan and the Acorn CD as part of the larger transaction between the parties. Progress' theory that Main Street intentionally concealed material information regarding the purchase and use of the loan and the CD is sufficient to maintain a claim for fraudulent inducement.

3. *Gist of the Action Doctrine*

Like the economic loss doctrine, the "gist of the action" doctrine is designed to maintain a conceptual distinction between the laws of contracts and torts. Freestone v. New England Log Homes, 819 A.2d 550, 554 (Pa. Super. Ct. 2003). The purpose of the doctrine is to prevent a plaintiff from re-casting breach of contract claims as tort actions by merely alleging that the conduct in question was done wantonly. Id.; Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 581 (Pa. Super. Ct. 2003); Phico Ins. Co. v. Presbyterian Med. Serv. Corp., 663 A.2d 753, 757 (Pa. Super. Ct. 1995). To determine whether the plaintiff has sufficiently alleged a tort, as opposed to a contract claim, Pennsylvania courts look to see whether the "gist," or gravamen, of the alleged conduct sounds in contract or tort. Freestone, 819 A.2d at 554. In making this determination, courts have determined whether (1) the contract is collateral to, rather than intertwined with, the tortious conduct; (2) the alleged conduct concerned the performance of the contract; or (3) the parties obligations are defined by the terms of the contract or the larger social policies embodied in the law of torts. See, e.g., Pittsburgh Constr., 834 A.2d at 582 (holding that "a breach of contract may give rise to an actionable tort where the wrong ascribed to the defendant is the gist of the action, the contract being collateral."); Etoll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 19 (Pa. Super. Ct. 2002) (determining that Pennsylvania case law concerning the gist of the action doctrine "turn[s] on the question of whether the fraud concerned the performance of contractual duties."); Air Products & Chem., Inc. v. Eaton Metal Products Co., 256 F. Supp. 2d 329, 341 (E.D. Pa. 2003) (looking to the issue of social policy to determine whether the claim is contractual or tortious in nature). When applying these principles to allegations of fraudulent inducement, courts have reasoned that fraud in the inducement claims will generally not be covered by the gist of the action doctrine because fraud to induce a person to enter a contract is generally collateral to, rather than intertwined, with the terms of the contract thus implicating social policy concerns against fraud which are external to the contractual obligations of the parties. Etoll, Inc., 811 A.2d at 17; Air Products, 256 F. Supp. 2d at 341.

Progress alleges that Main Street intentionally concealed material information regarding the particulars of the PTM loan and the Acorn CD prior to the finalization of the contract between the parties. Progress has specifically alleged that vital documentation was withheld during the parties' due diligence, leaving it without cause to distrust Main Street's assertions that the PTM loan and the Acorn CD were legally sound and marketable. Accepting Progress' allegations as true, the gist of its action against Sovereign does not arise from the performance or obligations contained in the parties' contract, but from the pre-contract assertions and conduct of Main Street. Therefore, the gist of the action doctrine is inapplicable to the facts of this case and will not bar Progress from going forward on its claim of fraudulent inducement.

4. *Statute of Limitations*

An action "to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud" must be commenced within two years. 42 Pa. Cons. Stat. Ann. § 5524(7) (West 2004). Generally, the statute of limitations begins to run "as soon as the right to institute and maintain a suit arises . . . ." Pocono Int'l Raceway, Inc., v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983). However, if a plaintiff, despite exercising due diligence, is unable to discover or know of the injury or its cause, the "discovery rule" exception applies to toll the statute of limitations until such time as the plaintiff discovers, or reasonably should have discovered, the injury. Pocono, 468 A.2d at 471; Pickett v. American Ordnance Pres. Ass'n, 60 F. Supp. 2d 450, 454 (E.D. Pa. 1999); Kirschner v. Cable/Tel Corp., 576 F. Supp. 234, 238 (E.D. Pa. 1983). Determination of whether a plaintiff has exercised due diligence in discovering the harm is generally a matter for the jury, making a dispositive determination inappropriate. Kingston Coal Co. v. Felton Mining Co., Inc., 690 A.2d 284, 288 (Pa. Super. Ct. 1997); Haggart v. Cho, 703 A.2d 522, 528 (Pa. Super. Ct. 1997); Pickett, 60 F. Supp. 2d at 454. However, if the facts are so clear that reasonable minds could not "differ as to whether the plaintiff should reasonably be aware that he has suffered an injury, the determination as to when the limitations period commences may be made as a matter of law." Kingston, 690 A.2d at 288. The standard for reasonable diligence is an objective or external one, focusing on whether a reasonable person in the plaintiff's position would have been unaware of the salient facts associated with the injury and its cause. Haggart, 703 A.2d at 528. Under Pennsylvania law, if the defendant actively conceals his fraudulent conduct the discovery rule applies to toll the statute until the plaintiff could reasonably have discovered the harm. Dalzell v. Lewis, 97 A. 407, 409 (Pa. 1916); Deemer v. Weaver, 187 A. 215, 216 (Pa. 1936); Turtzo v. Boyer, 88 A.2d 884, 885 (Pa. 1952); Lange v. Burd, 800 A.2d 336, 339 (Pa. Super. Ct. 2002).

Progress has sufficiently alleged that Main Street actively concealed the true nature of the Acorn transactions for the purpose of fraudulently inducing Progress into purchasing and assuming liability for the PTM loan and the Acorn CD. The absence of the Account Verification Form from Main Street's production of documents during and leading up to the closing of the transaction provides sufficient support to assume, at this stage, that Progress was both unaware, and without the means of discovering independently, the alleged illegal activity surrounding both the loan and the CD. Taking all Progress' allegations as true and drawing all reasonable inferences therefrom, it cannot be said as a matter of law that Progress should have discovered the issues surrounding these transactions before it was served with a complaint by the SBA on June 3, 2003. The fact that Progress drew upon the Acorn CD to pay off the PTM loan on June 3, 2002 supports Progress' claim that it was unaware of any problems associated with such transactions prior to the SBA's action. Accordingly, the motion to dismiss this claim is denied.

D. Indemnification

In Count III Progress asserts a claim for "Indemnification." (Pl.'s Am. Third-Party Compl. ¶¶ 95, 98.) Sovereign argues in its Motion to Dismiss that Progress is not entitled to either contractual indemnification, based on the representations and warranties contained in the parties' P&A Agreement, or common law indemnification. (Third-Party Def.'s Mot. To Dismiss at 20-26.) The court finds that Count III, as written, is the same as the claim of fraud set out in Count II of the complaint. Therefore, the motion to dismiss is granted as to Count III.

Paragraph 87 of the Third-Party Complaint incorporates all previous allegations, including Count II–Fraudulent Inducement. Progress' description of the factual grounds for its claim for "Indemnification" under Count III consistently follows the elements necessary for a claim for fraudulent misrepresentation. For example, in paragraphs 89 and 90 Progress alleges that it "reasonably relied" on Main Street's due diligence and disclosures regarding the PTM loan and the Acorn CD which were "defective, false and misleading." Progress continues that it was "induced" to enter into the transaction by Main Street's assurances that the financial instruments were legal and proper. (Pl.'s Am. Third-Party Compl. ¶ 91.) Finally, Progress argues that Main Street "knowingly, deliberately and inequitably put Progress in harm's way of the SBA's eventual claims against Progress." (Id. at ¶ 92.) Taken together, the allegations contained in Count III only replicate the allegations contained in Count II of the same complaint, and is not a separate cause of action.

E. Contribution

In Count IV Progress asserts a claim for common law contribution against Sovereign. (Pl.'s Am. Third-Party Compl. ¶ 99-101.) In moving to dismiss Progress' claim, Sovereign argues that Progress is not entitled to contribution because Sovereign and Progress are not joint tortfeasors. (Third-Party Def.'s Mot. To Dismiss at 26.) This court finds that Progress has sufficiently established the necessary elements to continue to pursue a claim for contribution from Sovereign.

In 1951, Pennsylvania adopted the Uniform Contribution Among Tort-feasors Act ("UCATA"), 42 Pa. Cons. Stat. Ann. §§ 8321-27 (West 2004), "to establish generally the existence of the right of contribution among joint tort-feasors and to provide the procedure whereby that right might be made effective in practice." Swartz v. Sunderland, 169 A.2d 289, 291 (Pa. 1961). The right of contribution is an equitable principle based on the understanding that "as between the two tort-feasors [] contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done." Puller v. Puller, 110 A.2d 175, 177 (Pa. 1955). See also Swartz, 169 A.2d at 290 (holding that "[t]he doctrine of contribution rests on the principle that, when two parties stand in aequali jue, the law requires equality; which is equity, and one of them shall not be obliged to bear a common burden in ease of the rest." (quoting Parker to Use of Bunting v. Rodgers, 189 A. 693, 695 (Pa. Super. Ct. 1937)); Mong v. Hershberger, 186 A.2d 427, 429 (Pa. 1963) (finding that equity is the keynote of the doctrine of contribution); Brown v. Dickey, 155 A.2d 836, 838 (Pa. 1959) ("The right to contribution is an equitable right based on a common liability to plaintiff.") (emphasis in original).

Section 8324 of the UCATA outlines the requirements for contribution under Pennsylvania law:

> (a) **General rule**: The right of contribution exists among joint tort-feasors.
>
> (b) **Payment required**: A joint tort-feasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.
>
> (c) **Effect of settlement**: A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement.

In other words, "the equitable obligation of contribution may be asserted where: (1) the parties combined to produce the plaintiff's injury; (2) the parties are each liable in tort to the plaintiff; and (3) a tortfeasor has discharged the common liability by paying more than his pro rata share." Mattia v. Sears, Roebuck & Co., 531 A.2d 789, 791 (Pa. Super. Ct. 1987).

Before seeking contribution, a party must first establish that it and the defendant are joint tort-feasors. The fact that one party has paid money to settle the claim of the original plaintiff is not a sufficient basis for recovery in the absence of an established joint tortfeasor relationship. Slaughter v. Pennsylvania X-Ray Corp., 638 F.2d 639, 642 (3d Cir. 1981). The Uniform

Contribution Among Tort-feasors Act defines "joint tort-feasors" as “two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them.” 42 Pa. Cons. Stat. Ann. § 8322 (West 2004). Under Pennsylvania law, “two actors are joint tortfeasors if their conduct ‘causes a single harm which cannot be apportioned . . . even though [the actors] may have acted independently.’” Mattia, 531 A.2d at 791 (quoting Capone v. Donovan, 480 A.2d 1249, 1251 (Pa. Super. Ct. 1984)); Kovalesky v. Gain Rug Mkt., 618 A.2d 1044, 1046 (Pa. Super. Ct. 1993); Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 25 (3d Cir. 1986). In other words, a party can establish the joint tortfeasor relationship by showing either that both parties acted together to commit the wrong, or that the parties’ independent acts caused a single injury. Lasprogata v. Qualls, 397 A.2d 803, 805 n.4 (Pa. Super. Ct. 1979) (looking to Black’s Law Dictionary to find the joint tortfeasor relationship where the parties “either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury.”).

Once the joint tortfeasor relationship is established, the party seeking contribution must further demonstrate “(1) that one joint tort-feasor has discharged the common liability or paid more than its pro rata share” and “(2) that the liability of the other joint tort-feasor to the injured persons has been extinguished by the settlement.” Swartz, 169 A.2d at 291. Uniform Contribution Among Tort-feasors Act, 42 Pa. Cons. Stat. Ann. § 8324(b)-(c) (West 2004). As the Superior Court of Pennsylvania explained in Svetz v. Land Tool Co., 513 A.2d 403, 407 (Pa. Super. Ct. 1986):

> [A] tortfeasor’s right to receive contribution from a joint tortfeasor derives not from his liability to the claimant but rather from the equitable principles that once the joint liability of several

> tortfeasors has been determined, it would be unfair to impose the financial burden of the plaintiff's loss on one tortfeasor to the exclusion of the other. It matters not on which theory a tortfeasor has been held responsible for the tort committed against the plaintiff. So long as the party seeking contribution has paid in excess of his or her share of liability, it would be inequitable under the Act to deny that party's right to contribution from a second tortfeasor who also contributed to the plaintiff's injury.

When, as here, settlement occurs before the plaintiff has proven his case at trial, the settling tortfeasor cannot enforce his right to contribution unless he establishes that the settlement figure was reasonable. Nationwide Mut. Ins. Co. v. Philadelphia Elec. Co., 443 F. Supp. 1140, 1143 (E.D. Pa. 1977).

Progress has sufficiently established its right to proceed against Sovereign for contribution. First, Progress conceded its status as a tortfeasor for the purpose of seeking contribution by averring that Main Street's alleged fraudulent representations led Progress to act negligently regarding the Acorn CD and the PTM loan. By honoring the Acorn CD and using the proceeds to pay off the PTM loan, Progress performed an act that tortiously injured Acorn and prompted the SBA to take action on Acorn's behalf. One may also reasonably infer from Progress' settlement that it conceded its status as a tortfeasor. Progress has also sufficiently pled that Sovereign was a joint tortfeasor. The majority of the allegations contained in the SBA action against Progress pertained to the negligent, reckless, and/or willful misconduct of Main Street. Progress argues that discovery may reveal that the collective actions of Progress and Main Street, although independent, united in causing a single injury to Acorn for which both are liable. Therefore, taking all Progress' allegations as true and drawing all reasonable inferences therefrom, Progress has sufficiently established that it and Sovereign are joint tortfeasors.

Second, Progress has sufficiently established that it has discharged its common liability with Sovereign through its settlement with the SBA. Although the court has not been made aware of the particulars of the settlement agreement between Progress and the SBA, it is reasonable to assume that Progress' settlement with the SBA regarding the Acorn CD and the PTM loan extended to Sovereign. By extinguishing its own liability regarding the Acorn CD and the PTM loan, Progress has effectively barred the SBA from seeking further recovery from Sovereign for the use of $2,000,000 of Acorn funds to purchase the Acorn CD and collateralize the PTM loan. Furthermore, there has been no allegation by either Progress or Sovereign that Sovereign's liability for these transactions has not been extinguished by settlement or that the settlement was unreasonable. Therefore, Progress has established all the necessary elements to proceed against Sovereign for contribution.

F. Unjust Enrichment

Finally, Progress asserts a claim for unjust enrichment. (Pl.'s Am. Third-Party Compl. ¶ 102-06.) Sovereign has moved to dismiss Count V arguing that unjust enrichment is unavailable where the relationship between the parties is founded on an express agreement. (Third-Party Def.'s Mot. To Dismiss at 27.) Progress has answered that its claim for unjust enrichment should remain because it is entitled to plead an alternative form of recovery to its claim for breach of contract. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. To Dismiss at 36). The court agrees with Progress.

A claim for unjust enrichment arises when one party retains a benefit that in justice and equity belongs to another. Lucey v. Workmen's Compensation Appeal Bd. (Vy-Cal Plastics

PMA Group), 732 A.2d 1201, 1207 (Pa. 1999). Since unjust enrichment is an equitable doctrine, it is generally "inapplicable when the relationship between [the] parties is founded on a written agreement or express contract." Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 448 (Pa. 1969). See also Villoresi v. Femminella, 856 A.2d 78, 84 (Pa. Super. Ct. 2004) ("Where an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist."). However, under Rule 8(a) of the Federal Rules of Civil Procedure, plaintiffs are free to plead alternative theories of relief. Accordingly, Sovereign's motion to dismiss this claim is denied.

V. Conclusion

For the foregoing reasons, Sovereign's Motion to Dismiss is granted in part and denied in part. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE U.S. SMALL BUSINESS	:	CIVIL ACTION
ADMINISTRATION	:	
As Receiver for Acorn Technology	:	
Fund, L.P.,	:	
	:	
Plaintiff,	:	NO. 03-3461
	:	
v.	:	
	:	
PROGRESS BANK,	:	
	:	
Defendant/Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
SOVEREIGN BANK, N.A.,	:	

:

Third-Party Defendant. :

ORDER

AND NOW, this 22nd day of December, 2004, upon consideration of the Third-Party Defendant's Motion to Dismiss Third-Party Plaintiff's Amended Third-Party Complaint pursuant to Fed. R. Civ. P. 12(b)(6), it is hereby ORDERED that Third-Party Defendant's Motion is GRANTED in part and DENIED in part.

BY THE COURT:

S/ James T. Giles

C.J.

copies by FAX on

to