

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

RICHARD F. MCCLOSKEY and ROSEMARIE K. MCCLOSKEY, Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 05-1162
	:	
NOVASTAR MORTGAGE, INC., Defendant.	:	

MEMORANDUM AND ORDER

Stengel, J.

January 29, 2007

NovaStar denied Mr. McCloskey's application for a home mortgage loan. Mr. McCloskey filed this action and NovaStar filed counterclaims based on the information Mr. McCloskey provided in the Uniform Residential Loan Application. Mr. McCloskey completed the Application in the hopes of obtaining the loan that is the subject of his Complaint. Mr. McCloskey has moved to dismiss the fraud and misrepresentation counterclaims against him on the grounds that (1) the claims are time-barred by the applicable statute of limitations, and (2) the claims are barred by the "gist of the action" doctrine. For the reasons set forth below, I will dismiss the fraud, intentional misrepresentation, and negligent misrepresentation counterclaims.

I. BACKGROUND¹

The McCloskeys applied for a residential mortgage loan from NovaStar in June of

¹This statement of facts accepts all facts alleged in NovaStar's counterclaims as true.

2003, in an effort to refinance their residence in Paoli, Pennsylvania. Mr. McCloskey completed and executed the Application for a loan in the amount of \$999,000.00, with an interest rate of 4.75%. The Application required Mr. McCloskey to provide detailed financial information about himself, including his monthly income. In the Application, Mr. McCloskey represented, *inter alia*, the following: (1) that “all statements made in this application [we]re made for the purpose of obtaining the loan indicated herein; (2) that “verification or reverification of any information contained in the application may be made at any time by the Lender, its agents, successors and assigns”; and (3) that “the Lender, its agents, successors and assigns will rely on the information contained in the application.”²

In addition, Mr. McCloskey certified the following, regarding the accuracy of the information he had provided in the Application:

I certify that the information provided in this application is true and correct as of the date set forth opposite my signature on this application and acknowledge my understanding that any intentional or negligent misrepresentation(s) of the information contained in this application may result in civil liability . . . and liability for monetary damages to the Lender . . . and any other person who may suffer any loss due to reliance upon any misrepresentation which I have made on this application.

Ex. A to Def.’s Countercl. Mr. McCloskey signed on the line immediately following the certification and dated the Application June 18, 2003.

Based on Mr. McCloskey’s stated monthly income, NovaStar proceeded with the

²NovaStar attached a copy of the signed, completed Application to its counter-complaint as Exhibit A.

Application and it undertook to evaluate his eligibility for the loan he sought. NovaStar acquired additional information about Mr. McCloskey's finances and debts and Mr. McCloskey's credit report. Ultimately, NovaStar declined to issue Mr. McCloskey the loan because it concluded that Mr. McCloskey's debt-to-income ratio was too high to warrant the extension of the requested loan.

On January 18, 2005, the McCloskeys filed suit against NovaStar in the Court of Common Pleas of Chester County, Pennsylvania. NovaStar removed the action to this court on March 11, 2005. The McCloskeys' Complaint contains three remaining counts: (1) breach of contract; (2) promissory estoppel; and (3) fraud.³

During the discovery phase of the McCloskeys' action, NovaStar requested information from the McCloskeys regarding their financial status, including confirmation of Mr. McCloskey's total monthly income. Mr. McCloskey repeatedly refused to provide this information, and did not do so until this court issued multiple orders to compel between October 2005 and March 2006. Once Mr. McCloskey provided income verification information, including tax returns, it was apparent to NovaStar that Mr. McCloskey's income was lower than he had stated on the Application.

On July 25, 2006, NovaStar filed its counterclaims against Mr. McCloskey — all stemming from Mr. McCloskey's failure to provide accurate information about his income on his loan application. In the breach of contract counterclaim, NovaStar alleges

³ The fourth count, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, was dismissed by Order of this court dated June 6, 2006. See Docket No. 14.

“McCloskey breached his express obligations in the Application to provide truthful information regarding, inter alia, his income.” In the fraud, intentional misrepresentation, and negligent misrepresentation counterclaims, NovaStar contends that “McCloskey [knowingly] misrepresented the amount of his income on the Application in order to induce NovaStar to process his loan Application, underwrite the loan, and prepare the loan for closing.” “Further, when NovaStar attempted to confirm Mr. McCloskey’s true income information, Mr. McCloskey attempted to thwart these efforts by, inter alia, making false and misleading statements regarding his income tax information.”⁴ NovaStar claims that Mr. McCloskey’s Application would have been rejected outright if he had provided truthful income information. Instead, based on the false information provided, NovaStar incurred expenses in processing Mr. McCloskey’s loan application, in defending the McCloskeys’ claims, and in its repeated efforts to get Mr. McCloskey to reveal his true financial information.

On July 28, 2006, Richard McCloskey filed a motion to dismiss the fraud and misrepresentation counterclaims against him. Mr. McCloskey argues that the fraud, intentional misrepresentation, and negligent misrepresentation are barred by the applicable statute of limitations. In addition, Mr. McCloskey argues that the three tort claims are barred by the “gist of the action” doctrine. Finally, Mr. McCloskey asks this court to dismiss NovaStar’s request for punitive damages in the event the three tort counts are

⁴NovaStar makes this allegation only in the fraud count and intentional misrepresentation count.

dismissed. On September 8, 2006, NovaStar filed a response in opposition to Mr. McCloskey's motion to dismiss the counterclaims and on September 22, 2006, Mr. McCloskey filed a reply brief in further support of its motion to dismiss. We will examine each of Mr. McCloskey's arguments in turn.

II. RULE 12(B)(6) STANDARD

In deciding a Rule 12(b)(6) motion to dismiss, a court may dismiss the claims "only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Additionally, the court must construe the claims liberally, accepting all factual allegations as being true and drawing all reasonable inferences in favor of the non-moving party. See Prudential Ins. Co. of Am. v. Prusky, 413 F. Supp. 2d 489, 492 (E.D. Pa. 2005). The court, however, "need not accept as true 'unsupported conclusions and unwarranted inferences.'" Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84 (3d Cir. 2000). The issue in a Rule 12(b)(6) motion is not whether a plaintiff will ultimately prevail, but whether a plaintiff is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232 (1974). Courts generally consider the allegations contained in the complaint, exhibits attached to the complaint, and public records of which the court may take judicial notice. Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993).

Under Federal Rule of Civil Procedure 8©, affirmative defenses must be pleaded in

the answer. A statute of limitations defense is an affirmative defense that a defendant must typically plead in his answer. See FED. R. CIV. P. 8©. However, the Third Circuit allows an exception for limitations defenses. “[T]he law of this Circuit (the so-called ‘Third Circuit Rule’) permits a limitations defense to be raised by a motion under Rule 12(b)(6), but only if ‘the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.’” Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002) (quoting Hanna v. U.S. Veterans' Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975)). “If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6).” Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978). In addition, this court's inquiry does not end with merely observing that the counterclaims were filed beyond the applicable statute of limitations. In order to complete my inquiry, I must determine whether any legal rules toll the applicable limitations period of NovaStar’s various claims.

III. DISCUSSION

A. Statute of Limitations

1. In General

The parties do not dispute that this court should apply Pennsylvania law in its determination of the statute of limitations defense. The three tort claims under consideration, therefore, are subject to 42 Pa. C.S. § 5524, which provides:

The following actions and proceedings must be commenced within two years:

...

(7) Any other action or proceeding 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, except an action or proceeding subject to another limitation specified in this subchapter.

The limitations period begins to run when a cause of action accrues, which is "as soon as the right to institute and maintain suit arises," Fine v. Checcio, 870 A.2d 850, 857 (Pa. 2005), or when the injury is sustained, Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir.1991). See also DiCicco v. Willow Grove Bank, 308 F. Supp. 2d 528, 534 (E.D. Pa. 2004) ("In Pennsylvania, a cause of action accrues on the date the injury was sustained, or when a party has a legal right to institute suit and can maintain a successful action." (internal quotations and citation omitted)). Under most circumstances, "[m]istake, misunderstanding, or lack of knowledge" does not toll the statute of limitations. Fine, 870 A.2d at 857 (citations omitted). Accordingly, unless a tolling doctrine applies, the fraud, intentional misrepresentation, and negligent misrepresentation counterclaims must have been filed within two years of when the fraudulent conduct allegedly occurred. See Schnelling v. Prudential Secs., Inc., No. 03-6021, 2004 U.S. Dist. LEXIS 15628, at *5-6 (E.D. Pa. Aug. 9, 2004) (discussing the Pennsylvania two-year statute of limitations for fraud and negligent misrepresentation claims); Freedman v. Haydinger, No. 98-3045, 2002 U.S. Dist. LEXIS 22276, at *7-8 (E.D. Pa. Oct. 21, 2002) (discussing the Pennsylvania two-year statute of limitations for intentional misrepresentation claims). "Once a cause of action has accrued and the statutory period for bringing the action has expired, an injured

party is barred from bringing suit unless the statute of limitations has been tolled.” Bohus, 950 F.2d at 924 (citing Pocono International Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)); see also Fine, 870 A.2d at 857.

Initially, the parties dispute when the cause of action accrued. Mr. McCloskey argues that the tort actions accrued on June 18, 2003, when Mr. McCloskey completed the Application with the alleged false information. As a result, the tort counterclaims are time-barred because they were filed in July of 2006, over two years after the Application submission. NovaStar claims that Mr. McCloskey’s repeated refusal to provide his income information in connection with the discovery phase of his litigation is the last act giving rise to NovaStar’s claims. Since Mr. McCloskey’s actions in this regard occurred less than two years ago, the tort claims of NovaStar are not prohibited by the statute of limitations.

Based on the dates and allegations of NovaStar in the counterclaims, the fraud, intentional misrepresentation, and negligent misrepresentation causes of action accrued in the summer of 2003 when Mr. McCloskey submitted the Application to NovaStar.⁵ NovaStar’s tort allegations against Mr. McCloskey are based on the injury it suffered from the false information on the Application. In particular, NovaStar argues that the false monthly income amount induced NovaStar to process and attempt to underwrite Mr.

⁵Although the Application is dated June 18, 2003, there is some uncertainty as to the exact date on which NovaStar received the completed Application. In the McCloskeys’ Complaint, they allege the Application was completed and returned to NovaStar on July 22, 2003. They backdated the Application to June of 2003 at NovaStar’s request. The difference between the two dates does not impact the limitations analysis because both dates are outside the two-year window.

McCloskey's mortgage loan. If Mr. McCloskey had accurately stated his income on the Application, NovaStar would have known immediately he was not qualified for the loan, it would have rejected the Application, and it would not have incurred the cost of processing the Application or defending the McCloskeys' lawsuit. Therefore, NovaStar sustained its injury and acquired a right to sue when the false information resulted in unnecessary expenditures in June or July of 2003.

NovaStar's argument regarding Mr. McCloskey's obstruction of its determination of the truth does not change when the causes of action accrued, but the argument may be considered when looking at any tolling period. The tort counterclaims are not automatically time-barred just because they were filed over two years after the causes of action accrued. Next, it is necessary for me to look at the different Pennsylvania tolling principles to determine if any of them apply to NovaStar's claims and save the claims from dismissal. See Beauty Time v. VU Skin Sys., 118 F.3d 140, 144 (3d Cir. 1997) ("Because we look to state law for the appropriate statute of limitations, we also look to Pennsylvania law on the closely related questions of tolling and application."); Vernau v. Vic's Market, Inc., 896 F.2d 43, 45 (3d Cir. 1990) (same).

2. *Inherent Fraud*

The doctrine of inherent fraud tolls the running of the statute of limitations in Pennsylvania. In Sheet Metal Workers Local 19 v. 2300 Group, Inc., 949 F.2d 1274 (3d Cir. 1991) , the Third Circuit discussed the parameters of the inherent fraud doctrine:

Pennsylvania's inherent fraud doctrine, as set forth in Gee [v. CBS, Inc.], 471 F. Supp. 600 (E.D. Pa.), *aff'd*, 612 F.2d 572 (3d Cir. 1979),] focuses on whether the underlying events are based upon fraud or deceit. If they are, then that, without more, will toll the statute of limitations until such time as the fraud has been revealed or should have been revealed by the exercise of due diligence by plaintiffs. To prove inherent fraud, which is considered self-concealing by its nature, a plaintiff must first establish that the defendant made a representation in regard to a material fact. Second, the plaintiff must demonstrate that the representation was false. Third, the plaintiff must show that the representation was not actually believed by the defendant, on reasonable grounds, to be true. Fourth, the plaintiff must have acted on the misrepresentation to his damage. Finally, the plaintiff must show he was not only ignorant of the falsity of the representation, but also reasonably believed it to be true.

Sheet Metal Workers, 949 F.2d at 1280. See also Beauty Time v. VU Skin Sys., 118 F.3d 140, 148(3d Cir. 1997) (“[T]he discovery rule applies in Pennsylvania when the underlying cause of action sounds in fraud, and that the statute of limitations is tolled until the plaintiff learns or reasonably should have learned through the exercise of due diligence of the existence of the claim.”).⁶

In the instant case, NovaStar’s underlying tort claims are based on Mr. McCloskey’s alleged false statements and misrepresentations on the Application he completed. Accepting all the well-pleaded allegations in the counterclaims as true, NovaStar has successfully pleaded inherent fraud to defeat the statute of limitations argument of Mr. McCloskey. First, NovaStar has alleged that Mr. McCloskey represented

⁶In Gee, the court noted: “the fraud or deceit necessary to toll the statute of limitations ‘does not mean fraud in the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional deception.’” Gee, 471 F. Supp. at 623 (quoting Nesbitt v. Erie Coach Company, 204 A.2d 473 (Pa. 1964)). Therefore, the inherent fraud doctrine applies to the fraud and intentional misrepresentation claims, as well as to the negligent misrepresentation claim.

that his monthly income was \$16,700, an essential piece of information in the application for a loan. Second, the counterclaims allege that Mr. McCloskey's monthly income was less than what he claimed it was. Third, NovaStar claims that Mr. McCloskey knew that his statement of his income was false. Fourth, based on the false reporting of his monthly income, NovaStar proceeded with the processing of Mr. McCloskey's loan. The attempted underwriting resulted in the unnecessary expenditure of funds, i.e., damages. Finally, NovaStar did not know that Mr. McCloskey's income information was false and it reasonably believed it to be true because Mr. McCloskey certified that the information he was providing in the Application was "true and correct." In sum, NovaStar's underlying tort claims "sound[] inherently in fraud or deceit" which, pursuant to the Third Circuit's decision in Sheet Metal Workers and Beauty Time, automatically tolls the statute of limitations until such time as the fraud has, or should have, been revealed.

Mr. McCloskey contends that NovaStar could have uncovered his income information in 2003 through the exercise of reasonable diligence. McCloskey emphasizes that NovaStar is "a sophisticated lending institution" and points out that NovaStar did not exercise any type of diligence in trying to ascertain Mr. McCloskey's income, even though it had the right to under the terms of the Application.⁷ The Application gave NovaStar the right to verify or re-verify any of the information contained in the Application.

⁷Mr. McCloskey makes these arguments in his Reply Brief. In his Reply Brief, Mr. McCloskey cites to several documents produced during discovery and attached to his brief. Since he filed a motion to dismiss under Rule 12(b)(6), and the motion was not converted to a summary judgment motion pursuant to Rule 12(b), I did not consider any of these documents or any of the facts contained in them.

A plaintiff in Pennsylvania is expected to exercise reasonable diligence to ascertain the existence and cause of an injury. See Sheet Metal Workers, 949 F.2d at 1281 (“[T]o continue to benefit from tolling, a plaintiff must exercise reasonable diligence.”).

“Reasonable diligence has been defined as follows: ‘A fair, proper and due degree of care and acting, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity.’ . . .

[T]here are few facts which diligence cannot discover, but there must be some reason to awaken inquiry and suggest investigation.” Beauty Time, 118 F.3d at 144 (quoting BLACK'S LAW DICTIONARY 457 (6th ed. 1991)). “Plaintiffs need not know that they have a cause of action or that the injury was caused by another party's wrongful conduct, for once [a plaintiff] possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim.” Sheet Metal Workers, 949 F.2d at 1282.

NovaStar has alleged facts that are sufficient to show it did not, and could not, have discovered the fraud and misrepresentation until Mr. McCloskey refused to turn over documents in the discovery phase of his lawsuit. NovaStar was justified in believing the monthly income amount on the Application. NovaStar could not be expected to verify the truth of Mr. McCloskey's income after he certified that it was true under penalty of law in the Application. The purpose of the certification was to protect NovaStar in offering such

a stated income loan⁸ and to benefit the borrower in expediting the loan process.

“This is not to say, however, that it is reasonable in all circumstances for a recipient of information under a self-reporting regime to rely solely on the representations

Rather, such a party must remain vigilant with regard to other possible reasons to know of a defendant's breach.” Sheet Metal Workers, 949 F.2d at 1282. Although NovaStar had the right under the Application to inquire into the McCloskeys’ income, it had no “reason to awaken [such an] inquiry” after it rejected his Application on other grounds. When NovaStar determined that Mr. McCloskey’s debt-to-income ratio was insufficient to issue the requested loan, his stated monthly income and its accuracy became a dead issue until Mr. McCloskey initiated suit against NovaStar. Therefore, the first instance that NovaStar had reason to examine the truthfulness of Mr. McCloskey’s stated income was when Mr. McCloskey refused to turn over his income tax information during the discovery phase of his litigation, which happened in the latter part of 2005, *i.e.*, less than two years ago. See Sheet Metal Workers, 949 F.2d at 1281-83 (holding statute of limitations tolled because the plaintiffs had no reason to uncover the fraud at issue when there was “no indication on the face” of the submission to the plaintiffs of the fraud and “no aspect of the [submission] that should have alerted the plaintiffs to irregularities”).

I conclude, therefore, that although NovaStar’s tort causes of action against Mr. McCloskey accrued in 2003, NovaStar could not have been expected to know of the fraud

⁸A stated income loan does not require a borrower to provide full proof of his income. As a result of the minimal supporting documentation, borrowers typically pay a premium for such loans.

until, at the earliest, it filed its first motion to compel discovery of Mr. McCloskey's income tax information. Under the inherent fraud doctrine, the statute of limitations was tolled during the intervening period. The first motion to compel was filed by NovaStar on September 22, 2005, see Docket No. 21, and the counterclaims were filed on July 25, 2006, see Docket No. 46, well within the two-year statute of limitations for all three tort counterclaims. The fraud, intentional misrepresentation, and negligent misrepresentation counterclaims are timely.⁹

B. Gist of the Action Doctrine

Mr. McCloskey also argues in his motion to dismiss that the three tort counterclaims are actually contract claims, and as a result, NovaStar cannot recover under the claims pursuant to the "gist of the action" doctrine. Under the gist of the action doctrine, a plaintiff is precluded from recasting a breach of contract claim as a tort claim. See eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002).¹⁰ The doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3)

⁹I do not need to address NovaStar's alternative argument that it is entitled to recoupment through its counterclaims because I have found that based on the counterclaims' allegations, and applying the Rule 12(b)(6) standard, the claims are timely.

¹⁰The Pennsylvania Supreme Court has not expressly adopted the gist of the action doctrine, but the Pennsylvania Superior Court and several United States District Courts have predicted that it will. See Sunburst Paper, LLC v. Keating Fibre International, Inc., No. 06-3959, 2006 U.S. Dist. LEXIS 78890, at *5-6 (E.D. Pa. Oct. 30, 2006); Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co., 256 F. Supp. 2d 329, 340 (E.D. Pa. 2003); Caudill Seed and Warehouse Co. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 833-34 (E.D. Pa. 2000); eToll, 811 A.2d at 14; Bash, 601 A.2d 825.

where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. Id. at 19 (internal quotations and citations omitted). Another way to distinguish between a tort claim and a contract claim is to examine the duty the defendant allegedly breached. “Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.” Bash v. Bell Tel. Co. Of Pennsylvania, 601 A.2d 825, 829 (Pa. Super. Ct. 1992). To allow a party to frame a breach of contract claim as a tort claim would “erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.” Id. Since in this case NovaStar alleges that Mr. McCloskey committed a tort in the course of carrying out a contractual agreement, I must “examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is 'collateral' to conduct that is primarily tortious.” Sunquest Info. Sys. v. Dean Witter Reynolds, 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999).¹¹

In eToll, the Pennsylvania Superior Court held that “the gist of the action doctrine should apply to claims for fraud in the performance of a contract.” eToll, 811 A.2d at 20.

That is because:

¹¹In order to determine what the “gist” of the action is “[t]he test is not limited to discrete instances of conduct; rather, the test is, by its own terms, concerned with the nature of the action as a whole. . . . [It] is a general test concerned with the ‘essential ground,’ foundation, or material part of an entire ‘formal complaint’ or lawsuit.” eToll, 811 A.2d at 15 (internal quotations and citation omitted).

courts have not carved out a categorical exception for fraud, and have not held that the duty to avoid fraud is always a qualitatively different duty imposed by society rather than by the contract itself. Rather, the cases seem to turn on the question of whether the fraud concerned the performance of contractual duties. If so, then the alleged fraud is generally held to be merely collateral to a contract claim for breach of those duties. If not, then the gist of the action would be the fraud, rather than any contractual relationship between the parties.

Id. at 19. Therefore, if the duties in question are intertwined with the contractual obligations, the claim sounds in contract, but if the duties are collateral to the contract, the claim sounds in tort. Sunburst Paper, LLC, 2006 U.S. Dist. LEXIS 78890, at *7.

In examining the tort counterclaims here, the duty asserted by NovaStar in each of them — the duty to provide truthful information in the Application — arises solely from the Application contract that the parties entered into. The breach of contract counterclaim alleges that NovaStar and Mr. McCloskey entered into a contract with the execution of the Application. Mr. McCloskey agreed to provide truthful information to NovaStar in the Application and NovaStar promised to process the Application and attempt to provide the loan. Mr. McCloskey allegedly breached his obligation because he failed to state his correct income in the Application. NovaStar now seeks the damages it is entitled to under the contract. This very conduct that constitutes the breach of the contract, i.e., McCloskey's misrepresentation or fraudulent statement about his income, forms the basis of the three tort claims. The fraud concerned the performance of the contractual duties. Therefore, the nature of the tort claims is so intertwined with the contractual claims that the gist of the action sounds in contract and the tort claims are barred.

While courts have found exception to the gist of the action doctrine where the fraud concerns an act collateral to the parties' contract, NovaStar has failed to plead such an act in its counterclaims. Fraudulent inducement to enter into a contract has been held to be collateral to a contract. See eToll, 811 A.2d at 17. NovaStar has not alleged such facts here. In the tort counterclaims, NovaStar does not contend it was fraudulently induced into agreeing to the contract terms. Rather, NovaStar contends that Mr. McCloskey's fraudulent performance of his duties under the contract caused NovaStar to perform its duties under the contract. NovaStar alleges that Mr. McCloskey made a misrepresentation in the performance of the contract which caused it to suffer damages. As noted above, this merely restates the breach of contract claim. See Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co., 256 F. Supp. 2d 329, 341-42 (E.D. Pa. 2003) (noting the distinction between fraud in the inducement and fraud in the performance claims with regard to the gist of the action doctrine).

Finally, NovaStar attempts to save its tort counterclaims by highlighting allegations that the McCloskeys made in their Complaint and by pointing to Mr. McCloskey's refusal to hand over the tax documents during discovery. In ruling on the application of the gist of the action doctrine, I am limited to what NovaStar alleges in its counterclaims. The tort counterclaims focus on the representations made during the performance of the contract and not on statements made prior to the execution of the Application. In addition, Mr. McCloskey's refusal to comply with the discovery requests does not save NovaStar's tort

claims. NovaStar does allege that Mr. McCloskey made additional false statements during the discovery period. See Countercl. ¶¶ 25, 31. And while the Application may be collateral to these false representations, the false statements themselves do not equate to tortious conduct.¹² Rather, Mr. McCloskey’s refusal to cooperate with NovaStar’s requests simply prevented NovaStar from uncovering the fraud. Such conduct tolls the statute of limitations and subjects a party to possible sanctions from the court, but it does not create causes of action for fraud, intentional misrepresentation, or negligent misrepresentation when NovaStar did not rely on the misrepresentations. See supra footnote 12.

In sum, NovaStar’s fraud, intentional misrepresentation, and negligent misrepresentation counterclaims essentially duplicate the breach of contract claim. NovaStar entered into an agreement with Mr. McCloskey to process a loan application based on Mr. McCloskey providing truthful financial information. Mr. McCloskey misrepresented his income on the Application in contravention of his promise. The duties that NovaStar alleges Mr. McCloskey breached were created by and grounded in the

¹²An element of each of the tort claims is that the plaintiff relied on the representation of the defendant. See Bortz v. Noon, 729 A.2d 555, 560-61 (Pa. 1999) (“The elements of intentional misrepresentation are . . . (5) justifiable reliance on the misrepresentation Negligent misrepresentation requires proof of . . . (4) [an] injury to a party acting in justifiable reliance on the misrepresentation.”); Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 540 (Pa. Super. Ct. 2003) (“To recover on a claim of fraud, the plaintiff must prove . . . 5) justifiable reliance on the misrepresentation; and 6) the resulting injury was proximately caused by the reliance.”). NovaStar does not aver that it ever relied on any false statements Mr. McCloskey made during the discovery process. Since NovaStar does not allege a sufficient basis for the tort claims, it has failed to state a cause of action upon which relief can be granted.

Application. The Application is at the heart of NovaStar's tort counterclaims, and therefore, the gist of NovaStar's fraud and misrepresentation counts are contractual. Accordingly, I will dismiss the tort counterclaims.

C. Punitive Damages

The gist of the action doctrine bars NovaStar's fraud, intentional misrepresentation, and negligent misrepresentation claims. Because these tort claims must be dismissed, and the only remaining count is the breach of contract claim, NovaStar's punitive damages claims also must be dismissed. Punitive damages are not available for breach of contract claims. See Baker v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 536 A.2d 1357, 1361 (Pa. Super. Ct. 1987) ("The law is clear that punitive damages cannot be recovered merely for breach of contract.").

IV. CONCLUSION

As NovaStar's counterclaims for fraud, intentional misrepresentation, and negligent misrepresentation fail to state a claim under Pennsylvania law, I will grant Mr. McCloskey's motion to dismiss. The only counterclaim that survives is the breach of contract claim for compensatory damages.

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

RICHARD F. MCCLOSKEY and ROSEMARIE K. MCCLOSKEY, Plaintiffs,	:	CIVIL ACTION
	:	
	:	
v.	:	NO. 05-1162
	:	
NOVASTAR MORTGAGE, INC., Defendant.	:	

ORDER

AND NOW, this 29th day of January, 2007, upon consideration of plaintiff Richard McCloskey's Motion to Dismiss Counts II-IV of Defendant's Counterclaims (Docket No. 47), and the responses thereto, it is hereby **ORDERED** that the motion is **GRANTED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.