

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

EIZEN FINEBURG & MCCARTHY, L.L.P.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 98-5561
	:	
CATALINK DIRECT, INCORPORATED,	:	
ELCOM SERVICES GROUP, INC.,	:	
f/k/a CATALINK DIRECT, INC.,	:	
and STEVE FARRELL,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J.

DECEMBER 11, 1998

This case arose from a contract whereby the Defendants agreed to upgrade the Plaintiff's computer system. The agreement provided for the sale of equipment along with the installation and testing of the equipment in the Plaintiffs' office. The Plaintiffs brought this action based upon Defendants' alleged failure to perform in accordance with the agreement. The Plaintiff's Amended Complaint brings claims based upon negligence (Count I), breach of contract and/or warranty (Count II), promissory estoppel (Count III), intentional and negligent misrepresentation (Count IV), and violations of the Racketeer Influenced and Corrupt Organizations Act (Count V). Before the Court is the Defendants' Motion to Dismiss Counts I and II of the Plaintiff's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, the Motion will be granted as to Count I and denied as to Count II.

Standard

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. See Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal is appropriate only when it clearly appears that the plaintiff has alleged no set of facts which, if proved, would entitle him or her to relief. Conley, 355 U.S. 41, 45-46 (1957); Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

Discussion

The Defendants argue that the Plaintiff's claim based upon the theory of negligence is precluded by the economic loss doctrine.¹ In general, the economic loss doctrine "prohibits

¹In addition to the economic loss doctrine, Pennsylvania courts have also applied a "gist of the action" test in analyzing whether a cause of action arising from a contractual relationship should be brought in contract or tort. Neither the Plaintiff nor the Defendants argue in this case that the "gist of the action" test should be applied, creating little need for an extensive analysis. Under this test, in order for a claim to be construed as a tort action, "the wrong ascribed to the defendant must be the gist of the action with the contract being collateral."

plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995). The rationale for this rule is that "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." Sun Co. v. Badger Design & Constructors, 939 F. Supp. 365, 371 (E.D. Pa. 1996) (quoting Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 1271 (M.D. Pa. 1990)). A party cannot recover in negligence merely for failed commercial expectations that can be recovered in a contract action. Factory Market, Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 396-97 (E.D. Pa. 1997). "In order to recover in negligence, 'there must be a showing of harm above and beyond disappointed expectations evolving solely from a prior agreement.'" Sun Co., 939 F. Supp. at 371 (quoting Palco, 755 F. Supp. at 1271).

In this case, the Plaintiff's negligence claim is

Phico Ins. Co. v. Presbyterian Med. Servs., 663 A.2d 753, 757 (Pa. Super. 1995). Further, "the important difference between contract and tort actions is the latter lie from the breach of duties imposed as matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Id. Applying this test, it is clear that the Plaintiff's claim sounds more properly in contract than in negligence.

The Plaintiff also mentions the existence of a third test involving a misfeasance/nonfeasance distinction. (Pl.'s Mem. of Law at p. 5 n.1.) But this Court has previously held that Pennsylvania courts no longer attempt to distinguish tort claims from breach of contract claims on the basis of misfeasance or nonfeasance. See Factory Market, Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 394 (E.D. Pa. 1997); New Chemic (U.S.) v. Fine Grinding Corp., 948 F. Supp. 17, 19 (E.D. Pa. 1996).

clearly barred by the economic loss doctrine. In Count I, the Plaintiff claims to have sustained damages including amounts paid to the Defendants, amounts paid to others to correct the Defendants' work, and consequential and incidental damages. (See Am. Compl. at ¶ 23.) There are no allegations in Count I that the Defendants inflicted harm beyond the Plaintiff's disappointed expectations and dissatisfaction with performance of the contract. This is a case of failed commercial expectations, and therefore, the Plaintiff's recovery is in contract, not tort.

In arguing that the economic loss doctrine should not bar the Plaintiff's negligence claim, the Plaintiff argues that the Amended Complaint actually states two separate negligence claims. The first is for damages suffered prior to the contract including "lost time, money and resources utilized during the frivolous negotiations," while the second is for damages caused by the Defendants' "negligent performance under the contract." (Pl.'s Mem. of Law at p. 6.) While it does not address the latter claim, the Plaintiff argues that its claim for damages suffered prior to the contract is not barred by the economic loss doctrine. But such a negligence claim would be entirely without merit. The Plaintiff cites no authority for the proposition that the Defendants owed the Plaintiff a duty of care during contract negotiations. Indeed, were such a claim allowed to proceed, virtually any breach of contract action would carry with it a tort action. Therefore, the economic loss doctrine bars the Plaintiff's negligence claim and, accordingly, Count I of the

Amended Complaint is dismissed.

In Count II, the Plaintiff alleges breach of contract and/or warranty. It is not clear at this time that the Plaintiff has alleged no set of facts that, if proved, would entitle it to relief. Therefore, the Defendants' Motion will be denied as to Count II.

An appropriate Order follows.

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	:	
Defendants.	:	

O R D E R

AND NOW, this 11th day of December, 1998, upon consideration of Defendants' Motion to Dismiss Counts I and II of Plaintiff's Amended Complaint, and all responses thereto, it is hereby ORDERED that:

1. Defendants' Motion is GRANTED as to Count I;
2. Defendants' Motion is DENIED as to Count II.

BY THE COURT:

Robert F. Kelly, J.