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Keefer v. Wilson Inc. t/d/b/a Hagerstown KIA

**Anthony Keefer, Plaintiff v.
Wilson, Inc. t/d/b/a Hagerstown KIA, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No.
2013-2975

HEADNOTES

Preliminary objections, personal jurisdiction, website, gist of the action doctrine

- 1.) Pennsylvania courts have the authority to exercise general personal jurisdiction over a foreign corporation that carries on a continuous and systematic part of its general business within Pennsylvania.
- 2.) Whether a website provides a sufficient basis to exercise personal jurisdiction over a foreign corporation depends on the degree and type of interactivity of the website; it is a sliding scale.
- 3.) The gist of the action doctrine bars tort claims where the claim arises solely from a contract between the parties.

Appearances:

W. Scott Arnoult, Esq., *Attorney for Plaintiff*

Melissa L. Kelso, Esq., *Attorney for Defendant*

OPINION

Before Krom, J.

Before the Court for review is Wilson Inc. t/d/b/a Hagerstown Kia's Preliminary Objections to Anthony Keefer's Complaint. For the reasons that follow the Court overrules in part and sustains in part Hagerstown Kia's Preliminary Objections.

Background/ Procedural History

Anthony Keefer ("Keefer"), a Pennsylvania resident, brought his 2004 KIA Sorento ("the Vehicle") to Wilson Inc. t/d/b/a Hagerstown Kia ("Hagerstown Kia"), a Maryland corporation with a principal place of business in Hagerstown, Maryland, to have the Vehicle's engine repaired. During the original repair, Hagerstown Kia performed extensive work on the Vehicle's engine in October/ November 2012 which took several weeks and totaled \$ 6,618.45. *Complaint* Exhibit 1. Approximately half of the costs associated with the engine repair were covered by an extended warranty. *Id.* Ten days after picking up the Vehicle from Hagerstown Kia, the Vehicle made the same noise that it had before the original repairs were performed and the engine shut down. *Complaint* ¶ 19. Keefer had the Vehicle towed to Hagerstown Kia's garage. *Complaint* ¶ 20. Keefer alleges that when he called the warranty company to see what portion of the second round of engine repairs would be covered by his warranty, he was informed that the warranty company would not pay for anything because the engine problems were caused by a faulty repair. *Complaint* ¶ 27. Keefer alleges that while discussing the second round of repairs someone from Hagerstown Kia informed him that while they believed that the current defective part should have been sent to a machine shop to be checked during the original repair, it was not sent because the warranty company would not pay to have the part sent to a machine shop. *Complaint* ¶ 29. Keefer further alleges that he was not informed of the fact that a possibly defective part remained in the engine or of the need to send the part to a machine shop to be checked when the original repairs were being completed. *Complaint* ¶¶ 30, 31.

Keefer's Complaint, filed on July 30, 2013, contains three counts. Count I is a breach of contract claim. *Complaint* ¶¶ 33-40. Complaint Count II is a negligence claim. *Complaint* ¶¶ 41-46. Count III is a claim based on

a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. *Complaint* ¶¶ 47-55.

On August 20, 2013, Hagerstown Kia filed a Petition to Dismiss Plaintiff's Complaint in the Nature of a Preliminary Objection. Hagerstown Kia asserts three bases for its Preliminary Objections. Initially, Hagerstown Kia asserts that the Court should dismiss the Complaint because the Court does not have personal jurisdiction over Hagerstown KIA. *PO* ¶¶ 12-17. Hagerstown Kia then asserts that even if the Court chooses to exercise personal jurisdiction over Hagerstown Kia, the negligence claim is barred by the gist of the action doctrine and the entire Complaint should be dismissed because Keefer failed to plead his cause of action with the requisite specificity. *PO* ¶¶ 18-35.

On September 9, 2013, Keefer filed a Response to Defendant's Preliminary Objections. By Order of Court dated October 4, 2013, oral argument scheduled for November 5, 2013 was stricken. Hagerstown Kia filed a Brief in Support on October 10, 2013, and Keefer filed a Brief in Opposition on October 24, 2013. After reading the Brief in Support and the Brief in Opposition the Court does not believe that oral argument is necessary; therefore, Hagerstown Kia's Preliminary Objections to the Complaint are now properly before the Court and ripe for decision.

Discussion:

Preliminary Objection Standard

The Rules of Civil Procedure authorize preliminary objections on several grounds. Pa.R.C.P. 1028(a). The standard of review for preliminary objections in Pennsylvania is well-settled. Preliminary objections are properly granted only when, "based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief." *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008). In considering preliminary objections, "all well-pleaded allegations and material facts averred in the complaint, as well as all reasonable inferences deductible therefrom, must be accepted as true." *Wurth by Wurth v. City of Philadelphia*, 584 A.2d 403, 407 (Pa. Commw. Ct. 1990). However, the trial court "need not accept as true conclusions of law, unwarranted inferences from fact, argumentative allegations, or expressions of opinion." *Penn Title Ins. Co. v. Deshler*, 661 A.2d 481, 482 (Pa. Commw. Ct. 1995).

The Court has personal jurisdiction over Hagerstown Kia

Hagerstown Kia alleges that the Complaint should be dismissed because the Court does not have personal jurisdiction over Hagerstown Kia. Pa.R.C.P. 1028(a)(1). Hagerstown Kia asserts that they do not conduct any direct activity in Pennsylvania, nor do they own or operate any dealerships or service centers in Pennsylvania. *PO* ¶¶ 4, 5. Additionally, the repairs that are the basis of the litigation were performed at Hagerstown Kia's service center which is located in Maryland. *PO* ¶7. Hagerstown Kia admits that a portion of their advertising reaches Pennsylvania residents, but assert that this does not rise to the level of sufficient contacts with Pennsylvania necessary for the Court to exercise personal jurisdiction over Hagerstown Kia. *PO* ¶ 6.

Keefer asserts that Hagerstown Kia has the necessary minimum contacts with Pennsylvania such that it is proper for the Court to exercise personal jurisdiction over Hagerstown Kia in this case. In support of the Court exercising personal jurisdiction over Hagerstown Kia, Keefer asserts that Hagerstown Kia "has a highly interactive website which allows customers from the Chambersburg area to apply for preapproval for financing." *Response* ¶ 4. Keefer also alleges that Hagerstown Kia

purposefully targets Pennsylvania and more specifically Chambersburg area residents for [*sic*] its advertising via billboards located along the roads in Chambersburg as well as its highly interactive website, on which Defendant states it is a dealership serving Chambersburg, Frederick and Martinsburg, customers.

Response ¶ 6. Keefer asserts that Hagerstown Kia's "website [and advertising] is sufficient to show that a systematic and continuous part of its general business being conducted in Pennsylvania." *Brief in Opposition* p. 4.

Pennsylvania courts have the authority to exercise general personal jurisdiction over a foreign corporation that carries on a continuous and systematic part of its general business within Pennsylvania. 42 Pa.C.S. § 5301(a)(2)(iii). The Pennsylvania long arm statute permits jurisdiction to be exercised "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa.C.S. § 5322(b). "[D]ue process requires... that... if [the defendant] [is] not present within the territory of the forum, he have certain minimum contacts with it such that the

maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Pennsylvania state and federal courts that have addressed the issue of whether a website provides a sufficient basis for Pennsylvania to exercise personal jurisdiction over a foreign corporation have applied a “sliding scale” of jurisdiction based on the degree and type of interactivity of the website. “The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997) (applied the sliding scale to specific personal jurisdiction).

The Pennsylvania Superior Court affirmed a Franklin County Court of Common Pleas Order which overruled a Maryland car dealership’s preliminary objections challenging the jurisdiction of the Court of Common Pleas of Franklin County. *Mar-Eco, Inc. v. T&R and Sons Towing and Recovery, Inc.*, 837 A.2d 512 (Pa. Super. 2003). The Pennsylvania Superior Court held that Pennsylvania had jurisdiction over the Maryland car dealership because

[t]he record reflect[ed] that [the car dealership’s] customers could use the website to apply for employment, search the new and used vehicle inventory, apply for financing to purchase a vehicle, calculate payment schedules, order parts and schedule service appointments...the activity on the website was of a commercial nature that permitted extensive interaction with the host computer and would only serve to enhance [the car dealership’s] commercial business.

Id. at 517.

Hagerstown Kia’s website allows customers to do all of the things highlighted by the Pennsylvania Superior Court in *Mar-Eco Inc. v. T&R and Son Towing and Recovery, Inc.* except apply for employment. Hagerstown Kia’s website also advertises that Hagerstown Kia is “a dealership serving Chambersburg, Frederick & Martinsburg Kia customers.” Therefore, the Court finds that Hagerstown Kia through its interactive website and advertising carries on a continuous and systematic part of its general business in Pennsylvania such that it is proper for the Court to exercise personal jurisdiction over Hagerstown Kia. Hagerstown Kia’s preliminary objections to the Complaint based on the lack of personal jurisdiction over Hagerstown Kia are overruled.

The material facts are plead with the requisite level of specificity

Hagerstown Kia asserts that the Complaint should be dismissed because the Complaint fails to plead the material facts upon which the claim is based with the requisite specificity. *PO* ¶ 31. Hagerstown Kia alleges that all Keefer does is vaguely plead that Hagerstown Kia failed to correctly diagnose the engines problem and later discusses a defective part. *PO* ¶¶ 32-34.

Keefer denies the facts pled are not specific enough to allow Hagerstown Kia to respond. *Response* ¶ 32.

While the Complaint does refer to a defective part, it is clear that that refers to the cradle bearing,¹ which is what Keefer was allegedly told was the cause of the problem with the engine necessitating the second round of repairs. The essence of Keefer’s claim is that Hagerstown Kia did not send the cradle bearing to a machine shop after they were informed that this would not be covered by the warranty company or to inform Keefer of the possibility of a problem with the cradle bearing, and that by failing to do so Hagerstown Kia *failed to correctly determine the cause of the Vehicle’s engine problems*. Keefer’s Complaint pleads the material facts with the requisite level of specificity to allow Hagerstown Kia to respond; therefore, Hagerstown Kia’s preliminary objections to the Complaint based on the lack of specificity and failure to conform to Pennsylvania Rule of Civil Procedure 1019(a) are overruled.

The negligence claim is barred by the gist of the action doctrine

Hagerstown Kia asserts that even accepting as true all of Keefer’s well pled facts, his negligence claim lacks legal sufficiency. *PO* ¶ 20. Hagerstown Kia asserts that Keefer’s claim is based on a contract between the parties for repairs of the Vehicle and therefore the gist of Keefer’s action sounds in contract and not tort. *PO* ¶¶ 21, 22. Pennsylvania courts have repeatedly held that the gist of the action bars tort claims where the claim arises solely from a contract between the parties. *Reed v. Dupuis*, 920 A.2d 861 (Pa. Super. 2007). Hagerstown Kia asserts that

¹ Cradle (or cradle) bearing is specifically referred to several times in the Complaint.

since Keefer bases his claim on the duties that arose between the parties pursuant to the contract, the negligence claim is legally insufficient and should be dismissed.

Keefer responds that he is allowed to plead alternative causes of action and he can pursue recovery under both contract and tort theories. *Response* ¶¶ 21, 22. Keefer denies that the gist of the action doctrine bars his negligence claim. *Response* ¶ 23. However, Keefer does not cite any cases in support of his argument that his negligence claim is not barred by the gist of the action doctrine, nor does he address the issue in his Brief in Opposition.

The duty that Hagerstown Kia owed Keefer arose solely out of the contract, as evidenced by the invoice,² between the parties. Keefer's negligence claim duplicates the breach of contract claim (Keefer essentially argues that Hagerstown Kia negligently performed their contractual duties). Therefore, the Court finds that Keefer's negligence claim is barred by the gist of the action doctrine. As a result, Hagerstown Kia's preliminary objection to the legal sufficiency of the negligence claim is sustained and the negligence claim is dismissed.

An appropriate Order of Court follows.

ORDER OF COURT

NOW THIS 4th day of November, 2013, upon review and consideration of Defendant's Petition to Dismiss Plaintiff's Complaint in the Nature of a Preliminary Objection Plaintiff's Response, and the briefs,

IT IS HEREBY ORDERED that:

- 1.) Defendant's preliminary objection to the Complaint based on lack of personal jurisdiction is **OVERRULED** pursuant to the attached Opinion.
- 2.) Defendant's preliminary objection to the Complaint based on the failure of Plaintiff to plead with the requisite specificity is **OVERRULED** pursuant to the attached Opinion.
- 3.) Defendant's preliminary objection to the negligence claim (Count II) on the basis that it is barred by the gist of the action is **SUSTAINED** pursuant to the attached Opinion. Therefore, Count II is **DISMISSED**.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.

² It appears to the Court that the one page invoice submitted as Exhibit 1 of the Complaint is actually the last page of a multi-page invoice.