IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lucy M. Matarazzo and Vincent Matarazzo, Appellants	:	
v.	:	No. 554 C.D. 2006
	:	Argued: May 9, 2007
Millers Mutual Group, Inc., a Pennsylvania Corporation, and the Municipal Authority of Westmoreland County	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION BY JUDGE FRIEDMAN FILED: July 2, 2007

Lucy M. Matarazzo and Vincent Matarazzo (Plaintiffs) appeal from the February 17, 2006, order of the Court of Common Pleas of Westmoreland County (trial court) granting the preliminary objections in the nature of a demurrer filed by the Municipal Authority of Westmoreland County (Authority) and dismissing Plaintiffs' complaint as to the Authority.[1] We affirm.

[1] Count II of the complaint sets forth a claim against Millers Mutual Group, Inc., a Pennsylvania Corporation (Millers), the other named defendant in this case. However, there is no dispute that, as of this time, Millers has not been served with the complaint in compliance with the Pennsylvania Rules of Civil Procedure and, therefore, is not a party in the present action. For that reason, the order dismissing the complaint as to the Authority is not an interlocutory order.

On August 23, 2005, Plaintiffs filed a complaint against the Authority, asserting, in part, the following facts. In June of 2003, Plaintiffs directed the Authority to turn off the water to their vacant property, which is located at 402 Wood Street. An Authority employee advised Lucy Matarazzo that the water would be turned off. Thereafter, the Authority provided Plaintiffs with a bill indicating that it was a final statement. In reliance upon the employee's representation and the final billing statement, Plaintiffs reasonably believed that the water was turned off. The Authority did not turn off the water to the property, and, as a result, during extremely cold weather, the pipes in the home froze and broke, flooding the home and damaging the structure and Plaintiffs' personal property. (Complaint, ¶¶ 1-18.) Count I of the complaint, captioned as a claim of detrimental reliance against the Authority, reasserts the above facts and alleges that the injuries to Plaintiffs' property resulted directly from their reasonable reliance on the Authority's assurance that the water would be turned off. (Complaint, ¶¶ 22-30.) Plaintiffs seek damages in excess of thirty thousand dollars ($30,000).

The Authority filed preliminary objections in the nature of a demurrer, asserting immunity under the statute commonly known as the Political Subdivisions Tort Claims Act (Tort Claims Act), 42 Pa. C.S. §§ 8541-8542. Specifically, the Authority argued that the exception to immunity set forth at section 8542(b)(5) of the Tort Claims Act, 42 Pa. C.S. §8542(b)(5) (utility service facilities) does not apply because the water pipes that froze are not owned by the Authority or located within a

right-of-way owned by the Authority.[2] Plaintiffs contended that they have pled a cause of action based upon a theory of detrimental reliance, or promissory estoppel, and, therefore, the doctrine of governmental immunity does not apply.

The trial court concluded that the damages Plaintiffs seek are in the nature of tort damages. The trial court relied upon our decision in *Sims v. Silver Springs-Martin Luther School*, 625 A.2d 1297 (Pa. Cmwlth.), *appeal discontinued*, 537 Pa. 636, 642 A.2d 489 (1993), which held that the legislature never intended for a local agency to be held liable for tort damages under a contract theory. Accordingly, the trial court granted the Authority's preliminary objections and dismissed Plaintiffs' complaint as to the Authority.

On appeal to this court,[3] Plaintiffs argue that the trial court erred in granting the Authority's preliminary objections because Plaintiffs pled a cause of action for detrimental reliance, a claim that is outside the scope of governmental immunity provided by the Tort Claims Act.

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[2] Section 8542(b)(5) of the Tort Claims Act, 42 Pa. C.S. §8542(b)(5), provides in part that a local agency shall be liable for damages that result from a dangerous condition of the utility service facilities owned by the local agency and located within the local agency's rights-of-way.

[3] Our scope of review on appeal from an order sustaining preliminary objections is limited to determining whether the trial court committed legal error or abused its discretion. *Cowell v. Commonwealth, Department of Transportation*, 883 A.2d 705 (Pa. Cmwlth. 2005). When considering preliminary objections, we accept as true all well pled facts and all inferences reasonably deducible therefrom. *Id.* Preliminary objections in the nature of a demurrer should be sustained only where the pleadings are clearly insufficient to establish a right to relief; any doubt must be resolved in favor of overruling the demurrer. *Id.*

Detrimental reliance is another name for promissory estoppel. *Travers v. Cameron County School District*, 544 A.2d 547 (Pa. Cmwlth. 1988). Under this theory, a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcing the promise. Restatement (Second) Contracts §90(1) (1981). In effect, the detrimental reliance of the promisee creates the consideration necessary for the formation of a contract, the breach of which is actionable. *Travers*. *See also Crouse v. Cyclops Industries*, 560 Pa. 394, 745 A.2d 606 (2000) (holding that the doctrine of promissory estoppel sounds in contract law and, like other contract actions, is subject to the four-year statute of limitations set forth at 42 Pa. C.S. §5525). The doctrine of promissory estoppel is the law in Pennsylvania. *Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc.*, 535 Pa. 469, 636 A.2d 156 (1994).

In response to the Authority's assertion of governmental immunity, Plaintiffs rely on *Travers* and *Herzfeld v. City of Philadelphia*, No. 84-5014, 1985 U.S. Dist. LEXIS 16020 (E.D. Pa. September 13, 1985), as cases that allow for a suit against a governmental agency even where the claim does not fall within an exception to immunity under the Tort Claims Act. In *Travers*, the school district hired James E. Travers (Travers) for a teaching position. Upon accepting the job, Travers moved from Ohio to Pennsylvania. After school started, the school district learned that Travers did not have the proper teaching certification. The school district informed Travers that he had until the beginning of the second semester to acquire the certification and that failure to do so would result in the cancellation of his contract.

Because classes necessary to obtain certification were already underway, Travers was unable to obtain certification.

Travers filed a complaint against the school district, alleging in part that the district, through its agents/employees, had assured him when it offered him the position that he was qualified for the position and had promised Travers that it would prepare and submit the requisite Pennsylvania certification application if Travers accepted the position. Travers alleged that the school district failed to do so, breaking its promise, that he relied on their promises and inducements and that he suffered irreparable financial harm, which was foreseeable to the school district.

The trial court dismissed Travers' action for failure to state a cause of action. Our court reversed, holding that the allegations and inferences were sufficient to state a cause of action based on promissory estoppel.[4] Plaintiffs here assert that the holding in *Travers* establishes that the immunity normally afforded to a governmental entity may not be available when reliance upon the governmental agency's actions and words induces another into acting or forbearing from acting to that person's detriment.

Herzfeld involved a property owner, Gerald Herzfeld (Herzfeld), who was notified by letter from the assistant city solicitor that a hearing would be held on June 13, 1984, during which the city would seek an order to demolish his property.

[4] The court in *Travers* stated that it may be inferred from the allegations in Travers' complaint that, based on the school district's promise, Travers discontinued any further job search and forbore from obtaining the requisite certification himself.

The building was demolished three weeks before the scheduled hearing, and Herzfeld filed suit in the district court against the city, the assistant city solicitor and other defendants, asserting a variety of claims under federal and state law. The case was tried before a jury, which found in Herzfeld's favor only on his theory of detrimental reliance and awarded damages in the amount of $562,000. In its ruling on post-trial motions, the district court concluded that Pennsylvania courts have held that the theory of promissory estoppel may be applied against governmental entities. Plaintiffs here concede that this court is not bound by the decision in *Herzfeld*, but they argue that it persuasively suggests that Pennsylvania law supports their claim for detrimental reliance against the Authority.

The Authority asserts that Plaintiffs are attempting to transform a negligence action into a contract action in an attempt to avoid the defense of governmental immunity. The Authority distinguishes *Travers* on the grounds that the facts of that case involved a negotiated employment situation that could not support a cause of action in tort. The Authority also asserts that the cases relied upon by the court in *Herzfeld* do not involve tort actions pled as actions in assumpsit supported by promissory estoppel, thus diminishing the persuasiveness of the decision in *Herzfeld*. The Authority maintains that, in contrast to the facts in *Travers* and *Herzfeld*, the facts of this case do not support a conclusion that a contract was formed or even contemplated by the parties.

The Authority points out that when it receives a request to turn off water, it may not determine whether it wishes to do so and then negotiate a mutually

agreeable price for terminating service. Instead, it must turn off the water upon a customer's request.

The Authority characterizes the Plaintiffs' allegations as stating that: Plaintiffs called upon the Authority to perform a pre-existing duty (turning off the water); the Authority breached that duty by failing to shut off the water; and the Authority's breach of that duty resulted in frozen pipes and damages to Plaintiffs' building. The Authority notes that duty, breach, causation and harm are the essential elements of a cause of action in negligence, not contract, and the Authority argues that, in a situation where a real contract would not have arisen, it is improper to plead a quasi-contract into existence in a complaint.

More important, the Authority observes that Pennsylvania courts have consistently held that a plaintiff may not avoid the defense of governmental immunity by couching a claim for the recovery of tort damages under a breach of contract theory. For example, in *Gilius v. Board of Supervisors of Fairview Township*, 552 A.2d 327 (Pa. Cmwlth. 1988), *appeal denied*, 523 Pa. 633, 564 A.2d 1262 (1989), the court rejected an attempt by landowners to recover damages on a cause of action for breach of an implied warranty, reasoning as follows:

> These counts clearly sound in tort, because in essence they charge that the Board, acting through its agent, Mr. Hartman, was negligent in that the latter failed to perform a percolation test in a competent non-negligent manner. This court has previously rejected attempts to avoid the immunity provisions of Subchapter C by alleging causes of action which sound in tort but are fashioned as assumpsit counts. …. To allow recovery of damages from the appellees for breach of implied warranty after refusing

> recovery for negligence would completely defeat the legislative grant of immunity.

Id. at 330 (citation omitted). *See also Sims*, 625 A.2d at 1302 ("[T]he legislature never intended for a local agency to be held liable for tort damages under a contract theory."); *Bendas v. Upper Saucon Township*, 561 A.2d 1290, 1293 (Pa. Cmwlth. 1989) ("Appellants' assumpsit count sounds in tort as Appellant essentially avers that the Township negligently issued the permit in question. Previous attempts to disguise tort causes of action not falling within the exceptions to governmental immunity as assumpsit counts … have been rejected by this Court."); *Schreck v. North Codorus Township*, 559 A.2d 1018, 1022-23 (Pa. Cmwlth. 1989) ("This court has previously rejected attempts to circumvent the above immunity provisions of 42 Pa. C.S. §§8541-8564 by fashioning a cause of action in assumpsit which is in reality nothing more than a cause of action sounding in tort."), *appeal dismissed*, 526 Pa. 266, 585 A.2d 464 (1991); *Silkowski by Silkowski v. Hacker*, 504 A.2d 995, 997 (Pa. Cmwlth. 1986) ("Appellants' argument, while an ingenious attempt to avoid the immunity provisions of the Act, fails to do so. Their claim against the County as an additional defendant clearly sounds in tort…."); *cf. McKeesport Municipal Water Authority v. McCloskey*, 690 A.2d 766 (Pa. Cmwlth.) (permitting suit against the local agency under the Pennsylvania Uniform Commercial Code, 13 Pa. C.S. §§ 1101-9507, based on the agency's failure to supply potable water under the terms of a contract in breach of the implied warranty of merchantability), *appeal denied*, 549 Pa. 708, 700 A.2d 445 (1997).

Courts are similarly reluctant to permit a contract action to be converted into a tort action merely by alleging negligent conduct. In *Bash v. Bell Telephone Company of Pennsylvania*, 601 A.2d 825 (Pa. Super. 1992), the court explained that

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 agreements between particular parties. The court further reasoned that to permit a promisee to sue his promisor in tort for breaches of contract *inter se* would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions. *See also Yocca v. Pittsburgh Steelers Sports, Inc.*, 806 A.2d 936 (Pa. Cmwlth. 2002), *rev'd on other grounds*, 578 Pa. 479, 854 A.2d 425 (2004), and *Redevelopment Authority of Cambria County v. International Insurance Company*, 685 A.2d 581 (Pa. Super. 1996), *appeal denied*, 548 Pa. 649, 695 A.2d 787 (1997), (relying on *Bash* to distinguish contract and tort actions).

Thus, the dispositive question before us is whether the trial court properly characterized Plaintiffs' claims as a tort action. We agree with the trial court that Plaintiffs' allegations can be fairly characterized as assertions that the Authority, through its employees, breached the duty of care that it owes to all of its customers to provide service in a competent and careful manner by failing to ensure that Plaintiffs' request to cancel service to their property was acted upon.[5] Thus, Plaintiffs claim sounds in tort, and there is no dispute that the facts do not fall within an exception to governmental immunity.

[5] Plaintiffs' complaint asserts that the Authority is a local agency, "organized pursuant to applicable statute." (Complaint, ¶4.) If the Authority is organized pursuant to the Municipality Authorities Act, 53 Pa. C.S. §§5601-5623, that statute provides support for the Authority's argument, in that the stated purpose and intent of that act is "to benefit *the people of the Commonwealth* by, among other things, increasing their commerce, health, safety and prosperity…." 53 Pa. C.S. §5607(b)(2) (emphasis added).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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O R D E R

AND NOW, this 2nd day of July, 2007, the order of the Court of Common Pleas of Westmoreland County, dated February 17, 2006, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge