

Fixed/Adjustable Rate Note dated December 6, 2013 for the construction of a residence. (Complaint, ¶4).

4. BB&T is successor in interest to Susquehanna Bank. (Complaint, ¶12). Although the Complaint lists “BB&T Mortgage” as a named Defendant, BB&T Mortgage is not a separate entity, and the Complaint contains no factual allegations to identify BB&T Mortgage as an individual defendant.

5. The Complaint alleges that Susquehanna Bank failed to comply with its obligations under the loan agreements in refusing to advance additional funds to Plaintiffs for construction of the home. (Complaint, ¶11).

6. The Complaint alleges that the inspection agency utilized by Susquehanna Bank certified work as completed by Plaintiffs’ contractor when it was not completed, advanced funds directly to the builder for that work and, upon learning that it advanced funds for work that was not completed, refused to make any further advances. (Complaint, ¶¶7-11).

7. The Complaint contains five counts by Plaintiffs as follows: (i) breach of express contract; (ii) breach of contract implied in fact common law obligation of good faith and fair dealing; (iii) 13 Pa.C.S.A. §1304; (iv) breach of fiduciary duty; and (v) common law negligence.

8. Plaintiffs’ Complaint is properly dismissed pursuant to Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6).

9. Count I of Plaintiffs' Complaint states a claim for breach of contract. In Pennsylvania, "it is well-established that three elements are necessary to plead a cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of the contract; and (3) resultant damages." *Meyer, Darragh, Bebenek & Eck, P.L.L.C v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1258 (Pa. 2016). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." *Pennsy Supply v. American Ash Recycling Corp. of Pa.*, 895 A.2d 595, 600 (Pa. Super. 2006) (citing *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999)). Plaintiffs, however, fail to allege that BB&T breached any duty imposed by the provisions in the documents attached to the Complaint. Instead, Plaintiffs make vague assertions that BB&T breached some unidentified responsibility to refrain from making advances to the Builder and to issue advances to Plaintiffs upon demand. (Complaint, ¶¶7, 10, 12-15). The Note, Mortgage and Addendum attached to the Complaint instead concern obligations and duties imposed on Plaintiffs. Accordingly, Plaintiffs have failed to establish the existence of a contractual duty that was breached by BB&T rendering Count I legally insufficient.

10. Count II of Plaintiffs' Complaint purports to state a claim for breach of "common law obligation of good faith and fair dealing to the Plaintiffs. . . ." (Complaint, ¶20). Pennsylvania Courts have recognized a cause of action sounding

in tort for breach of the duty of good faith and fair dealing, but only “in limited situations.” *Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank and Trust Co.*, 560 A.2d 151, 153-54 (Pa. Super. 1989). There is, however, no such duty of good faith and fair dealing with respect to borrowers and their lender, precluding any such claim in this case. *Cable & Assoc. Ins. Agency, Inc. v. Commercial Nat’l Bank of Pa.*, 875 A.2d 361, 364 (Pa. Super. 2005).

11. Count III of the Complaint references Section 1304 of the Pennsylvania Uniform Commercial Code, 13 Pa.C.S.A. §1304. While that provision states that “[e]very contract or duty within this title imposes an obligation of good faith in its performance and enforcement”, it does not support an independent cause of action rendering Count III properly dismissed. *See* 13 Pa.C.S.A. §1304, cmt. 1 (explaining “[t]his section does not support an independent cause of action for failure to perform or enforce in good faith”).

12. Count IV of the Complaint alleges a breach of fiduciary duty. Under Pennsylvania law, a lender owes no fiduciary duty to a borrower absent “substantial control over the borrower’s business affairs.” *Temp-Way Corp. v. Continental Bank*, 139 B.R. 299, 318 (E.D. Pa. 1992). As Plaintiffs’ Complaint is devoid of any factual allegations to establish that BB&T had any, let alone substantial, control over Plaintiffs’ business affairs, the claim for breach of fiduciary duty should be

dismissed. *Taggart v. Norwest Mort., Inc.*, No. 09-1281, 2010 WL 114946, *8 (E.D. Pa. January 11, 2010).

13. Even if Count IV were considered despite its preclusion by Pennsylvania law, Counts IV and V constitute tort claims. BB&T submits that where, as here, the relationship between BB&T and Plaintiffs is based on express contracts – loan and other documents executed by the parties – the tort claims are barred by the gist of the action and/or the economic loss doctrines rendering these claims properly dismissed as a matter of law. *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 623 A.2d 933, 934 (Pa. Commw. 1993); *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 19 (Pa. Super. 2002).

14. Pursuant to Middle District Rules of Procedure, Counsel for BB&T sought the concurrence to this Motion from counsel. Attorney Carlucci, counsel for Plaintiffs, does not concur in this Motion.

WHEREFORE Defendant Branch Banking and Trust Company respectfully requests that this Honorable Court grant the within Motion to Dismiss and dismiss Plaintiffs' Complaint.

Respectfully submitted,

BARLEY, SNYDER LLP

By: /S/ Stephanie DiVittore

Stephanie DiVittore, Esquire

Attorney I.D. No. 85906

sdivittore@barley.com

Robert J. Tribeck Esquire

Attorney I.D. No. 74486

rtribeck@barley.com

213 Market Street, 12th Flr.

Harrisburg, PA 17101

(717) 231-6603

Attorneys for Branch Banking & Trust
Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2019, the foregoing document was electronically filed with the Clerk of the Court for the United States District Court for the Middle District of Pennsylvania using the CM/ECF system with electronic notice upon the following:

William Carlucci, Esquire
Elion, Grieco, Carlucci & Shipman, P.C.
125 East Third Street
Williamsport, PA 17701

/S/ Stephanie DiVittore
Stephanie DiVittore, Esquire
Attorney I.D. No. 85906