

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

BRISTOL TOWNSHIP	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
INDEPENDENCE BLUE CROSS	:	
et al.	:	
Defendants.	:	NO. 01-4323

M E M O R A N D U M

Newcomer, S.J. October , 2001

Defendants Independence Blue Cross and David N. Banet & Associates have each filed motions to dismiss plaintiff's Amended Complaint. Those motions, and plaintiff's responses thereto are presently before the Court.

I. BACKGROUND

Plaintiff Bristol Township ("Bristol") has filed a sixteen count Amended Complaint against Independence Blue Cross ("IBC"), David N. Banet & Associates ("Banet"), and Eric Vacca ("Vacca"). IBC now asks the Court to dismiss three causes of action Bristol asserts against it: 1) a claim for an accounting (Count I); 2) fraud (Count VII); and 3) a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO") (Count XVI). Banet also asks the Court to dismiss the causes of action Bristol has asserted against it: 1) a claim for accounting (Count I); 2) breach of contract (Count X); 3) fraud (Count XI); 4) breach of fiduciary duty (Count XII);

5) conversion (Count XIII); 6) civil conspiracy (Count XIV); 7) negligence (Count XV); and 7) RICO (Count XVI).

Bristol is a Pennsylvania township with its offices located at 2501 Bath Road, Bristol, Pennsylvania, 19007. IBC is a Pennsylvania corporation that provides health and medical insurance coverage under individual and group insurance policies with its offices at 1901 Market Street, Philadelphia, Pennsylvania. Banet is a corporation engaged in the insurance brokerage business with offices located at 5 Frame Avenue, Malvern, Pennsylvania. Defendant Vacca is an individual whose address is 224 West Mt. Airy Avenue, Philadelphia, Pennsylvania.

Bristol alleges that it provided health insurance to its employees through IBC over a six year period ending in 2000. Vacca was appointed as Bristol's insurance broker in January 1994, but Bristol alleges that Vacca did not negotiate, service, place, renew, manage, originate, solicit, purchase or sell the health insurance Bristol provided its employees through IBC. However, Bristol claims that from 1994 to 2000 IBC paid Vacca commissions from money added to Bristol's insurance premiums without Bristol's authorization. Although it concedes it has no means of calculating the alleged commissions, Bristol believes IBC paid Vacca over \$400,000 in commissions.

Bristol also alleges that IBC continued to pay Vacca these commissions after Vacca became an employee of Banet

sometime before February 1999. Bristol further alleges that IBC paid Vacca these commissions after February 19, 1999, the day Vacca's insurance broker's license was suspended after Vacca pled guilty or no contest to charges of conflict of interest, bribery and tampering with public records or information. Because Vacca's license was suspended, Bristol contends Vacca was not legally entitled to collect the commissions.

In light of these facts, the Court turns to the IBC and Banet's Motions to Dismiss.

II. DISCUSSION

Both IBC and Banet move the Court to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). When evaluating a Motion to Dismiss pursuant to Rule 12(b)(6), the Court must accept each allegation in a well pleaded complaint as true. Albright v. Oliver, 510 U.S. 266, 268 (1994). Additionally, a Motion to Dismiss should only be granted if the Court finds that no proven set of facts would entitle the plaintiff to recovery under the filed pleadings. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

It is also firmly established that in reviewing a Federal Rule of Civil Procedure 12(b)(6) motion, the Court must draw all reasonable inferences in the plaintiff's favor. Schrob v. Catterson, 948 F.2d 1402, 1405 (3rd Cir. 1991).

A. IBC and Bristol's Motions to Dismiss

**1. Bristol's Claim for Breach of Contract
Against Banet (Count X)**

Banet moves to dismiss Bristol's breach of contract claim against Banet. To plead a breach of contract, a plaintiff must allege: 1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract and (3) resultant damages. Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 884 (Pa. Super. Ct.2000). After reviewing Bristol's Amended Complaint, the Court finds that Bristol fails to allege the existence of a contract with Banet, its essential terms, and fails to explain how Banet breached the contract if it did exist. The Court will therefore dismiss Bristol's breach of contract claim against Banet.

**2. Bristol's Claim for Breach of Fiduciary Duty
Against Banet (Count XII)**

Banet also contends that Bristol fails to state a valid claim for breach of fiduciary duty against it because Banet was not Bristol's fiduciary. In response, Bristol argues that because Banet employed Vacca, Bristol Township's insurance broker, and collected commissions from IBC through Vacca, Banet acted as Bristol's agent, and therefore fiduciary. It is true that an agent's duty to his principal is the same as that of a fiduciary. Garbish v. Malvern Federal Sav. and Loan Assn., 517 A.2d 547, 554 (Pa. Super. Ct. 1986). A fiduciary has the duty to

act for the benefit of another as to matters within the scope of the relation. Id.

In support of its contention that Banet was Bristol's agent and fiduciary through Banet's employment of Vacca, Bristol cites the Restatement (Second) of Agency, § 15 cmt. e:

One acting for the benefit of another without a manifestation of consent by the other may subject himself to the liabilities of an agent at the election of the principal. Thus, one who purports to act on behalf of another but without the authority to do so is subject to liability to the other as if he were a disobedient agent if he affects the principal's interests either by binding the principal to a third person where he has apparent authority, or by disposing of or meddling with the principal's assets.

Assuming this Court were to adopt the Restatement's view of the law, Bristol fails to claim that Banet employed Vacca while Vacca still served as Bristol's broker. To the contrary, Bristol's Amended Complaint explains that "[p]laintiff does not have knowledge of the . . . specific nature of the relationship between Vacca and Banet." Amended Complaint ¶ 19. Further, Bristol's Amended Complaint states that "Banet was never appointed or retained by Bristol as its insurance broker." Amended Complaint ¶ 21. Because Bristol has failed to allege that Vacca served as its broker while Banet employed him, it has not stated a claim for breach of fiduciary duty against Bristol.

3. Bristol's Claim for an Accounting (Count I)

IBC moves to dismiss Count I of plaintiff's Complaint

where Bristol demands that IBC provide Bristol with a full and complete accounting of the commissions IBC allegedly paid Vacca at Bristol's expense.

Some courts have explained that accounting is an equitable remedy which is available only when there is no adequate remedy at law. Benefit Control Methods v. Health Care Services, Inc., 1998 WL 22080, at *2 (E.D.Pa. Jan 16, 1998); Taylor v. Wachtler, 825 F. Supp. 95, 104 (E.D.Pa.1993). Other courts recognize that an action for an accounting also exists at law and is proper where:

(1) there was a valid contract, express or implied, between the parties whereby the defendant

(a) received monies as agent, trustee or in any other capacity whereby the relationship created by the contract imposed a legal obligation upon the defendant to account to the plaintiff for the monies received by the defendant, or

(b) if the relationship created by the contract between the plaintiff and defendant created a legal duty upon the defendant to account and the defendant failed to account and the plaintiff is unable, by reason of the defendant's failure to account, to state the exact amount due him, and

(2) that the defendant breached or was in dereliction of his duty under the contract.

Haft v. U.S. Steel Corp., 499 A.2d 676, 677-78 (Pa. Super. Ct. Oct 18, 1985; see also Berger & Montague, P.C. v. Scott & Scott, LLC, 153 F. Supp.2d 750, 754 (E.D.Pa. 2001)(recognizing that a claim of accounting may exist both in equity and at law.

Here, IBC only argues that Bristol cannot state an

equitable claim for accounting, but fails to address whether Bristol can state a cause of action for an accounting at law. Moreover, IBC does not move to dismiss Bristol's breach of contract claim against it, nor has IBC argued that it was not under a legal obligation to account to Bristol. Consequently, the Court will not dismiss plaintiff's claim for an accounting against IBC.

Banet also moves to dismiss Bristol's claim for an accounting. However, unlike IBC, Banet argues that Bristol has failed to state a claim for legal or equitable accounting. The Court agrees. To the extent Bristol seeks an accounting against Banet on equitable grounds, Bristol has an adequate remedy at law: discovery. Benefit Control Methods v. Health Care Svcs., Inc., No. 97-4418, 1998 WL 22080, at *2 (E.D.Pa. Jan. 16, 1998). To the extent Bristol seeks an accounting at law against Banet, as explained above, Bristol has failed to allege the existence of a contract between it and Banet, and has failed to allege that Banet was Bristol's agent. Thus, Bristol has failed to state a claim for accounting against Banet.

4. Bristol's Claims for Fraud (Count VII and XI)

IBC also moves to dismiss Bristol's fraud claim. IBC first argues that the economic loss doctrine bars Bristol's fraud claim. The economic loss doctrine "prohibits 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 of the economic loss 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., Inc. (R & M) v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 372 (E.D.Pa. 1996)(quoting Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 1271 (M.D.Pa. 1990)). Thus, to determine whether the economic loss doctrine precludes recovery, the court must consider whether the damages plaintiff seeks to recover "were in the contemplation of the parties at the origination of the agreement." Cortez v. Keystone Bank, Inc., 2000 WL 536666, at *8 (E.D.Pa. May 03, 2000)(quoting Duquesne Light Co., 66 F.3d at 618).

However, there is a split of authority among Pennsylvania district courts as to whether the economic loss doctrine applies to intentional fraud claims. Compare KNK Medical-Dental Specialities, Ltd. v. Tamex Corp., 2000 WL 1470665 (E.D.Pa. Sep 28, 2000)(Van Antwerpin, J.)(unwilling to dismiss plaintiff's fraud claim on the economic loss rule because of the lack of clarity from either Pennsylvania state courts or the Third Circuit); Sunquest Info. Systems v. Dean Witter Reynolds, 40 F. Supp.2d 644, 658 (W.D.Pa. 2000)(finding economic loss rule inapplicable to tort claim based on intentionally false

representation); Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 127 (M.D.Pa. 1990)(noting the exception to the economic loss rule but not relying on it); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp.2d 519, 535 (W.D.Pa.2000)(same); with Montgomery County v. Microvote Corp., No. Civ.A. 97-6331, 2000 WL 134708, at *7 (E.D.Pa. Feb. 3, 2000)(Kelly, J.)(concluding economic loss rule bars recovery for both negligent and intentional misrepresentation); Werwinski v. Ford Motor Co., No. Civ.A. 00- 943, 2000 WL 1291576, at *5 (E.D.Pa. Aug. 15, 2000)(Buckwalter, J.)(“This Court finds more persuasive the reasoning of courts that do bar fraud claims that are intertwined with contract claims and the only resulting loss has been economic.”).

Nevertheless, this Court does not need to reconcile the differing opinions of courts in this Circuit. At this early stage of the litigation, the Court is unconvinced that plaintiff has not stated a claim for fraud separate and distinct from its breach of contract claim. Plaintiff’s fraud claim involves parties who were not parties to the contract between IBC and Bristol, and IBC’s alleged payment of the commissions were not contemplated in the contract between IBC and Bristol. Moreover, it would be of no consequence if plaintiff’s case did rely on the same set of facts because those facts can give rise to both causes of action. KNK Medical-Dental Specialities, Ltd., 2000 WL

1470665, at 6. Additionally, if plaintiff's allegations are true, this case involves more than negligent misrepresentation. Indeed, plaintiff alleges that IBC actively concealed the commissions it paid Vacca both in its invoices and throughout their six year relationship. Thus, the Court will not dismiss plaintiff's fraud claim based upon the economic loss doctrine.

Alternatively, IBC argues the Bristol's fraud claim should be dismissed because there is no confidential relationship between Bristol and IBC, and therefore, IBC had no duty to tell Bristol that its invoices included inflated premiums to conceal the commissions IBC allegedly paid Vacca.

It is true that there is no liability for fraudulent concealment absent some duty to speak. Duquesne Light Co. v. Westinghouse Electric Corp., 66 F.3d 604, 611-12 (3d Cir. 1995); City of Rome v. Glanton, 958 F. Supp. 1026, 1038 (E.D.Pa. 1997). While a duty to speak does arise in fiduciary and confidential relationships, a "duty to speak may also arise as a consequence of an agreement between parties, or as a result of one party's reliance on the other's representations, if one party is the only source of information to the other party, or the problems are not discoverable by other reasonable means." City of Rome, 958 F. Supp. at 1038. Additionally, a duty to speak may also occur when disclosure is necessary to prevent an ambiguous or partial statement from being misleading. Id.; see also Duquesne, 66 F.3d

at 612- 13.

Assuming, as this Court must, that plaintiff's allegations are true, IBC and Bristol not only had an agreement, but IBC and not Bristol knew that IBC was paying Vacca commissions. Further, Bristol relied on IBC invoices when paying IBC for the premiums Bristol owed IBC. According to Bristol though, those premiums were inflated to hide the commissions IBC paid Vacca. Thus, IBC has not persuaded the Court that Bristol has failed to state a claim for fraud.

Banet has also moved to dismiss Bristol's claim of fraud against it. Banet first argues that Bristol's Amended Complaint fails to state a claim for fraud. Upon a review of plaintiff's Amended Complaint and the relevant law, the Court disagrees at this juncture.

Banet further contends that Bristol's Complaint fails to allege fraudulent misrepresentation with sufficient particularity. Claims for fraud must be pleaded with adequate particularity to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). However, "in applying Rule 9(b), 'focusing exclusively on its "particularity language" is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'" Id. (citations omitted). The rule's purpose is to give notice to the

defendant of the precise misconduct with which she is charged, and to protect her from any spurious charges of fraudulent or immoral behavior. In Re Meridian Securities Litigation, 772 F. Supp. 223, 229 (E.D.Pa. 1991). As long as there is some precision and some measure of substantiation in the pleadings, the rule will be satisfied. Id.

Here, Bristol has adequately plead its claims of fraud. Bristol alleges that Banet approved and furthered IBC's alleged scheme to charge Bristol for commissions Bristol did not approve. The Complaint alleges the time frame of the alleged fraud, the means used to perpetrate the fraud, and each defendant's conduct. Consequently, the Court will not dismiss plaintiff's fraud claims against Banet.

5. Bristol's Claims for Conversion, Civil Conspiracy and Negligence (Counts XIII, XIV and XV)

Banet argues that Bristol's claim for conversion against it should be dismissed. Under Pennsylvania law conversion is the "deprivation of another's right of property in, or use or possession of a chattel, or other interference therewith, without the owner's consent and without lawful justification." Cenna v. United States, 402 F.2d 168, 170 (3d Cir. 1968). Banet argues that Bristol fails to allege that Banet interfered with Bristol's property, and at worst, it only accepted commissions from IBC.

Bristol argues that it has alleged that Banet and IBC

agreed to charge Bristol for commissions for which Banet was not entitled, and disguised the overcharges as premiums. Thus, Bristol contends it has properly alleged conversion. If Bristol's allegations are true, then Banet has interfered with Bristol's property, and may be liable for conversion. The Court will not dismiss Bristol's conversion claim at this time.

Banet further argues that the Court should dismiss Bristol's claim of civil conspiracy. To prove a civil conspiracy under Pennsylvania law, a plaintiff must show the following elements: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. SNA, Inc. v. Array, 51 F. Supp. 2d 554, 561 (E.D.Pa. 1999). Proof of malice or an intent to injure is essential to the proof of a conspiracy. Strickland v. University of Scranton, 700 A.2d 979, 987-88 (Pa. Super. Ct. 1997). An action will lie only where the sole purpose of the conspiracy is to cause harm to the party who claims to be injured. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979). Thus, where the facts show that a person acted to advance his own business interests, those facts constitute justification and negate any alleged intent to injure. Id.

Banet argues that because Bristol's Complaint alleges

that one purpose of the conspiracy was to further defendants' business dealings and obtain money for Vacca and/or Banet, Bristol failed to allege that Banet has acted with malice. The Court agrees. That it may have been necessary to deceive plaintiff to carry out their scheme does not indicate that the defendants acted with malice solely to injure plaintiff. Spitzer v. Abdelhak, 1999 WL 1204352, at *9 (E.D.Pa. Dec 15, 1999). The Court will dismiss plaintiff's claim of civil conspiracy.

In addition, Banet asks this Court to dismiss Bristol's negligence claim. However, after reviewing plaintiff's Complaint, and the parties briefs, Banet has not persuaded the Court that it should dismiss Bristol's negligence claim at this juncture.

6. Bristol's RICO Claim (Count XVI)

IBC and Banet argue that Bristol's RICO claim should be dismissed. First Banet claims that Bristol's RICO claim fails to allege that defendants engaged in interstate commerce. More specifically, Banet argues that Bristol's Complaint concedes that all defendants here are located and conduct business in Pennsylvania, and fails to allege that defendants conduct business outside of Pennsylvania.

18 U.S.C. 1962(a) makes it unlawful:

for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal

within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The requirement that RICO affect interstate commerce is satisfied by "minimal" effects. Rose v. Bartle, 871 F.2d 331, 357 (3d Cir. 1989).

Here, even if Bristol has failed to expressly plead the interstate aspect of defendants activities, the interstate requirement may be reasonably inferred from the nature of defendants' activities in the field of employee benefits. See Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166 (3d Cir. 1989)(explaining that the interstate requirement may be reasonably inferred from the nature of a defendant's activities). Indeed, Congress has expressly found that:

employee benefit plans. . . have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce. . .

29 U.S.C. § 1001. Moreover, plaintiff has alleged that the defendants carried out their unlawful scheme through the United States mails. Thus, given the low threshold of activity that satisfies the interstate requirement, and defendants interstate activities, the Court will not dismiss plaintiff's RICO claim on

this ground.

IBC and Banet then argue that Bristol has failed to allege that defendants exist as an enterprise within the meaning of RICO. To support that contention, they urge the Court to apply the Supreme Court's decision in United States v. Turkette, 452 U.S. 576 (1981), and the Third Circuit's decision in United States v. Riccobene, 709 F.2d 214, 221 (3d Cir. 1983). IBC and Banet therefore invite this Court to commit reversible error.

In Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 789-90 (3d Cir. 1984), the Third Circuit explained:

In so ruling, the district court confused what must be pleaded with what must be proved. Riccobene and Turkette certainly stand for the proposition that a plaintiff, to recover, must prove that an alleged enterprise possesses the three described attributes. But neither case speaks to what must be pleaded in order to state a cause of action. The district court erred in applying the Riccobene-Turkette proof analysis to the allegations in Seville's complaint.

We need cite no authority for the proposition that the Federal Rules of Civil Procedure were designed to eliminate the vagaries of technical pleading that once plagued complainants, and to replace them with the considerably more liberal requirements of so-called "notice" pleading. Under the modern federal rules, it is enough that a complaint put the defendant on notice of the claims against him. It is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action.

In the present case, Seville identified the four entities it believed were the enterprises that had been marshalled against it. The rules of pleading require nothing more at this early juncture than that bare allegation.

742 F.2d 789-90 (citations omitted). Like the plaintiff in Seville, Bristol has alleged that the defendants were an enterprise, and the Court will not dismiss plaintiff's RICO claim.

An appropriate Order follows.

Clarence C. Newcomer, S.J.