

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

GENERAL REFRACTORIES CO., ET AL. : CIVIL ACTION
: :
v. : :
: :
FIREMAN'S FUND INS. CO., ET AL. : NO. 01-CV-5810

MEMORANDUM

Padova, J. February , 2002

Plaintiffs brought this action against Fireman's Fund Insurance Company ("Fireman's Fund") and its counsel, the law firm of Gilberg & Kiernan and lawyer Andrew Butz (the "Attorney Defendants"), for insurance bad faith pursuant to 42 Pa. Cons. Stat. Ann. § 8371, breach of fiduciary duty, abuse of process, and civil conspiracy arising from discovery abuses committed by Fireman's Fund and the Attorney Defendants during insurance coverage litigation brought by Plaintiffs against Fireman's Fund in the Philadelphia Court of Common Pleas. Before the Court are Defendants' Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons which follow, the Attorney Defendants' Motion is granted and Fireman's Fund's Motion is granted in part and denied in part.

I. BACKGROUND

The Complaint in this action arises from egregious discovery abuses committed by Defendants in the course of the case captioned General Refractories Company & Grefco, Inc. v. Fireman's Fund Insurance Company, No. 1449, CCCP, April Term, 1998 (the

"Insurance Coverage Action"). In the Insurance Coverage Action, Plaintiffs alleged that Fireman's Fund had breached the three-year excess blanket liability insurance policy which it sold to Plaintiffs by claiming that the policy had a total coverage limit of \$5,000,000 when it had previously agreed that the policy had three annual coverage limits of \$5,000,000 per year. Fireman's Fund was originally represented by Andrew Butz of Gilberg & Kiernan. Plaintiffs filed a motion for sanctions in that proceeding, alleging that Andrew Butz and Gilberg & Kiernan, together with Fireman's Fund, had committed a multitude of discovery abuses.¹ Four days of hearings were held with respect to these alleged discovery abuses in the Court of Common Pleas, which found that the abuses had occurred, awarded Plaintiffs \$126,897.91 in attorney's fees for bringing the Motion for Sanctions, fined Fireman's Fund \$126,897.91, payable to the City of Philadelphia, and removed Gilberg & Kiernan as Fireman's Fund's counsel. General Refractories Co. & Grefco, Inc. v. Fireman's Fund Ins. Co., No. 1449, April Term, 1998, Order (C.C.C.P. Apr. 20, 2000). The Insurance Coverage Action is presently on appeal to the Pennsylvania Superior Court.

In this proceeding, Plaintiffs seek recompense for attorneys fees and costs in the amount of \$497,588 which they

¹The specific discovery abuses committed by Defendants in the Insurance Coverage Action are listed by Plaintiffs in Paragraph 4 of the Complaint.

allege they incurred in the Insurance Coverage Action as a result of Defendants' discovery abuses. Plaintiffs claim that these fees and costs were not included in the attorney's fees awarded by the Court of Common Pleas.

The Complaint asserts causes of action for bad faith in violation of 42 Penn. Cons. Stat. Ann. § 8371 and breach of fiduciary duty against Fireman's Fund (Counts I and II). The Complaint also alleges a cause of action against Gilberg & Kiernan and Butz for tortious interference with contractual relations (Count IV). The Complaint further alleges causes of action against all Defendants for abuse of process and civil conspiracy (Counts III and V). Fireman's Fund has moved to dismiss on the grounds that this Court should abstain from deciding this case and defer to the ongoing state proceedings pursuant to Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Fireman's Fund and the Attorney Defendants have also moved to dismiss the Complaint for failure to state a claim on which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. COLORADO RIVER ABSTENTION

Fireman's Fund argues that the Court should abstain from adjudicating this matter and defer to the ongoing state court proceeding (which is currently on appeal to the Superior Court of Pennsylvania) pursuant to Colorado River Water Conservation Dist.

v. United States, 424 U.S. 800 (1976). In Colorado River, the Supreme Court determined that, in exceptional circumstances, a Federal Court could dismiss a Federal suit due to the presence of concurrent state court proceedings. 424 U.S. at 817. The threshold factor is that the state and federal suits are parallel:

As a threshold matter, Colorado River abstention is only appropriate where the federal and state cases are parallel. Cases are parallel when they involve the same parties and claims, or when they are substantially identical, essentially identical, or raise nearly identical allegations and issues. Neither the reversal of roles nor the presence of additional parties destroys the parallel nature of the actions.

Worldcom Technologies, Inc. v. Intelnet Intern., Inc., No.Civ.A. 00-2284, 2001 WL 118957, at *3 (E.D. Pa. Feb. 8, 2001) (citations omitted).

Fireman's Fund argues that abstention is appropriate in this case because the cases are parallel, the issues are purely state law issues (primarily insurance bad faith), the state court proceeding is at an advanced stage, and it would be desirable to avoid piecemeal litigation. However, this proceeding is not substantially identical to the Insurance Coverage Action. Although both cases have some parties and facts in common, the subject matter of this case is not the same as the subject matter of the Insurance Coverage Action. The Insurance Coverage Action concerned Fireman's Fund's position that Plaintiffs' policy of insurance had

a total coverage limit of \$5,000,000. The subject matter of this proceeding is the manner in which Fireman's Fund and its counsel conducted the Insurance Coverage Litigation. In addition, the parties to the two cases are not the same, since the Attorney Defendants were not parties to the Insurance Coverage Action, and most of the causes of action brought by Plaintiffs in this case are different from those asserted in the Insurance Coverage Action. Consequently, Colorado River abstention is not appropriate in this matter and Fireman's Fund's Motion to Dismiss is denied with respect to this issue.

III. RULE 12(b)(6)

A. Standard of Review

When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordon v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

B. Bad Faith

Count I of the Complaint alleges a claim against Fireman's Fund for insurance bad faith based on the manner in which it conducted the Insurance Coverage Action. The Pennsylvania insurance bad faith statute provides as follows:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
(2) Award punitive damages against the insurer.
(3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371. The Pennsylvania Superior Court defines bad faith for purposes of this statute as "any frivolous or unfounded refusal to pay proceeds of a policy." Terletsky v. Prudential Property & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994) (citations omitted). Fireman's Fund argues that this claim should be dismissed pursuant to Rule 12(b)(6) because the insurance bad faith statute does not extend to an insurance company's conduct during litigation. Fireman's Fund is only partially correct. The Pennsylvania Superior Court has recognized that the statute applies to an insurance company's conduct during the pendency of litigation: "we find that the broad language of section 8371 was designed to remedy all instances of bad faith conduct by an insurer, whether occurring before, during or after

litigation. In so finding, we refuse to hold that an insurer's duty to act in good faith ends upon the initiation of suit by the insured." O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. Ct. 1999). However, the Superior Court also found that the bad faith statute does not apply to discovery violations: "Despite the broad language of section 8371, we find that the statute clearly does not contemplate actions for bad faith based upon allegation of discovery violations." Id. at 908. The Court finds the reasoning of O'Donnell persuasive and predicts that the Supreme Court of Pennsylvania would adopt its holding.

Plaintiffs, however, base their insurance bad faith claim on more than just discovery abuses. The Complaint also alleges that Fireman's Fund made misrepresentations to the court and filed abusive motions during the Insurance Coverage Action. (Compl. ¶¶ 4, 52.) Since Plaintiff's cause of action for insurance bad faith is not entirely founded on Defendants' discovery tactics, the Court cannot say, at this time, that Plaintiffs cannot prove any set of facts which would entitle them to relief on Count I of the Complaint. Consequently, the Motion to Dismiss will be denied with respect to Count I of the Complaint.

C. Breach of Fiduciary Duty

Count II of the Complaint alleges that Fireman's Fund breached its fiduciary duty to Plaintiffs by putting its own financial interests above Plaintiffs' interests in securing

benefits under the insurance policy. (Compl. ¶ 75.) Fireman's Fund argues that Plaintiffs' claim for breach of fiduciary duty must be dismissed pursuant to Rule 12(b)(6) because Fireman's Fund did not owe a fiduciary duty to Plaintiffs. Plaintiffs admit that the Complaint does not state a claim for breach of fiduciary duty, but argue that it alleges a breach of the contractual duty of good faith and fair dealing.

The Pennsylvania Courts recognize that a duty of good faith and fair dealing arises out of the contract between an insurer and its insured. See Gray v. Nationwide Mut. Ins. Co., 223 A.2d 8 (Pa. 1966). This duty is explained in Section 205 of the Restatement (Second) of Contracts which provides that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). "Good faith is defined as 'honesty in fact in the conduct or transaction concerned.'" Allstate Transp. Co, Inc. v. Southeastern Penn. Transp. Auth., No.Civ.A. 97-1482, 2000 WL 329015, at *18 (E.D. Pa. Mar. 27, 2000) (citing Slagan v. John Whitman & Assoc., No.Civ.A. 97-3961, 1997 WL 587354, at *4 (E.D. Pa. Sept. 10, 1997)). Conduct which breaches this duty includes "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."

Id. (citing Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992)). Count II of the Complaint, entitled "Breach of Fiduciary Duty" does state the elements of a cause of action for breach of the contractual duty of good faith and fair dealing. Therefore, Fireman's Fund's Motion to Dismiss is denied as to Count II of the Complaint, and it will go forward as a claim for breach of the duty of good faith and fair dealing.

D. Abuse of process

Count III of the Complaint alleges a cause of action against all Defendants for abuse of process. A party may bring a claim for abuse of process where the defendant has improperly used existing process after its issuance: "The touchstone of the tort is that, subsequent to the issuance of process, a party has perversely, coercively, or improperly used that process." Cameron v. Graphic Management Associates, Inc., 817 F. Supp. 19, 21 (E.D. Pa. 1992). "The essence of an abuse of process claim is that proceedings are used for a purpose not intended by the law." Schmidheiny v. Weber, 164 F. Supp. 2d 484, 487 (E.D. Pa. 2001); see also Rosen v. American Bank of Rolla, 627 A.2d 190, 192 (Pa. Super. Ct. 1993) ("the significance of the word primarily is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant."); Cameron v. Graphic Manaq. Assoc., Inc., 817 F. Supp. 19, 21 (E.D.

Pa. 1992) ("there is no cause of action for abuse of process if the claimant, even with bad intentions, merely carries out the process to its authorized conclusion.") (citing Shaffer v. Stewart, 473 A.2d 1017, 1019 (Pa. Super. Ct. 1984)). In order to state a claim for abuse of process, Plaintiffs must assert that Defendants "(1) used a legal process against them; (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused." Schmidheiny, 164 F. Supp. 2d at 486 (citing Hart v. O'Malley, 647 A.2d 542, 551 (Pa. Super. Ct. 1994)).

The Complaint alleges that Defendants abused process through their improper discovery tactics and the filing of three motions for an improper purpose. (Compl. ¶¶ 47, 52). The Complaint also alleges that Defendants' motive for these actions was to gain an unfair litigation advantage. (Compl. ¶ 48.) Defendants argue that the Complaint does not state a claim for abuse of process on which relief could be granted because the Complaint does not allege that they affirmatively used process to harm Plaintiffs. The Pennsylvania Superior Court has defined "process" for purposes of this tort as follows: "The word process as used in the tort of abuse of process has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process. Thus, it is broad enough to include discovery proceedings, the noticing of depositions and the issuing of subpoenas." Rosen, 627 A.2d at 192. The Pennsylvania courts

have also found that the filing of motions or petitions in order to harass the opposing party is abuse of process. See Shiner v. Moriarty, 706 A.2d 1228, 1236-37 (Pa. Super. Ct. 1998).

The Complaint alleges that Defendants used abusive discovery tactics and improper motion practice in order to gain a litigation advantage in the Insurance Coverage Action. This allegation is not sufficient to support a claim for abuse of process because the Complaint does not allege that Defendants abused process for an unlawful purpose unconnected to the purpose for which the process was designed, i.e., a successful conclusion to the Insurance Coverage Action. See Schmidheiny, 164 F. Supp. 2d at 486. Moreover, Defendants have correctly asserted that their responses to discovery and court filings in the Insurance Coverage Action are absolutely privileged and, as such, cannot support a claim for abuse of process. Statements made in pleadings, during trial, or to the court, are absolutely privileged. Post v. Mendel, 507 A.2d 351, 353 (Pa. 1986). The privilege extends to "communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought. Id. at 355 (emphasis in original). For these reasons, Defendants' Motions to Dismiss will be granted with respect to Count III of the Complaint.

E. Tortious Interference with Contractual Relations

Count IV of the Complaint asserts a claim against the Attorney Defendants for tortious interference with Plaintiffs' contractual relations with Fireman's Fund. To state a claim for tortious interference with contractual relations, a Complaint must allege the following: "(1) existence of contract; (2) purposeful action by the defendant specifically intended to harm the existing relation; (3) absence of privilege or justification on the part of the defendant; and (4) occasioning of actual legal damage as a result of defendant's conduct." CAT Internet Services Inc. v. Magazines.com, Inc., No.Civ.A. 00-2135, 2001 WL 8858, at *5 n.1 (E.D. Pa. Jan. 4, 2001).

The Complaint alleges that Fireman's Fund had agreed with Plaintiffs that Plaintiffs' policy of insurance had three separate annual limits of \$5,000,000 and that the Attorney Defendants caused Fireman's Fund to change its position, thereby breaching that agreement. (Compl. ¶¶ 84-85.) The Complaint further alleges that the Attorney Defendants caused Fireman's Fund to change its position by telling Fireman's Fund that it could change its position, suggesting to employees of Fireman's Fund that they provide misleading testimony in the Insurance Coverage Action, and covering up Fireman's Fund's pre-litigation admission that the policy had three separate annual limits. (Compl. ¶¶ 86-90.)

The Attorney Defendants argue that the Complaint does not state a claim for tortious interference with contractual relations on which relief may be granted because their actions were privileged and justified. The Complaint alleges that the Attorney Defendants gave Fireman's Fund advice with respect to a legal position asserted by Plaintiffs. The actions of an attorney who is acting to protect the legal interests of his client are privileged for purposes of a claim for tortious interference with contractual relations. Buschel v. MetroCorp., 957 F. Supp. 595, 599 (E.D. Pa. 1996) (citing Schulman v. J.P. Morgan Inv. Management, Inc., 35 F.3d 799, 810 (3d Cir. 1994)). Moreover, since the Attorney Defendants were acting as Fireman's Fund's agents in the Insurance Coverage Litigation, they cannot be liable for tortiously interfering in a contract between Fireman's Fund and a third party:

a client and lawyer, acting in an agency relationship, constitute a single entity. A client, through his attorney, therefore, cannot tortiously interfere with a contract to which [the client] is a party. Clearly, the attorney, if acting within the scope of his or her representation, is immune from liability for tortious interference with a client's contract.

Bowdoin v. Oriel, No.Civ.A. 98-5539, 2000 WL 134800, at *6 (E.D. Pa. Jan. 28, 2000). Accordingly, the Attorney Defendants' Motion to Dismiss is granted with respect to Count IV of the Complaint.

F. Civil conspiracy

Count V of the Complaint alleges a claim against all Defendants for civil conspiracy for conspiring to conduct the

Insurance Coverage Action in a manner which constituted insurance bad faith and abuse of process. Defendants argue that the Complaint cannot state a claim for civil conspiracy on which relief may be granted because the communications on which Plaintiffs' claim is based are subject to judicial immunity. They also argue that, as a matter of law, Fireman's Fund cannot conspire with its attorneys. The United States Court of Appeals for the Third Circuit has recognized a conspiracy immunity for attorneys acting on behalf of their clients based upon the "intracorporate conspiracy doctrine, which holds that a corporation cannot conspire with its agents." Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999). Although conspiracy immunity does not apply where the attorney has acted outside of the scope of his representation, "the mere fact that attorneys have 'mixed motives,' such as 'enhancing' their reputation by aggressive representation," does not eliminate their immunity to suit for conspiracy. Id. The Complaint does not allege that the Attorney Defendants acted outside the scope of their representation of Fireman's Fund. Therefore, the Attorney Defendants could not have conspired with Fireman's Fund to commit insurance bad faith or to abuse process in the Insurance Coverage Action. Accordingly, Defendants' Motions to Dismiss are granted with respect to Count V of the Complaint.

An appropriate order follows.

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O R D E R

AND NOW, this day of February, 2002, in consideration of Defendant Fireman's Fund's Motion to Dismiss (Docket No. 5) and Defendants Andrew Butz and Gilberg and Kiernan's Motion to Dismiss (Docket No. 6), Plaintiffs' responses thereto, and the argument of the Parties held on January 28, 2002, **IT IS HEREBY ORDERED** as follows:

1. Fireman's Fund's Motion to Dismiss pursuant to Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) is **DENIED**;
2. Fireman's Fund's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is **GRANTED** with respect to Counts III and V of the Complaint;
3. Fireman's Fund's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED** with respect to Counts I and II of the Complaint;
4. Count II of the Complaint will go forward as a claim for breach of the contractual duty of good faith and fair dealing;

5. Defendants Andrew Butz and Gilberg and Kiernan's Motion to Dismiss is **GRANTED** as to Counts III, IV, and V of the Complaint and the Complaint is **DISMISSED** as to those Defendants.

BY THE COURT:

John R. Padova, J.