

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

JACK E. FEINBERG et al.,	:	Civil Action
Plaintiffs	:	No. 01-6966
v.	:	
	:	
ASSOCIATION OF TRIAL LAWYERS	:	
ASSURANCE (A MUTUAL RISK	:	
RETENTION GROUP),	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

RUFE, J.

June 21, 2005

Before the Court is Defendant's Motion to Dismiss¹ and Plaintiffs' Motion for Default Judgment. For the reasons set forth below, Defendant's Motion to Dismiss is granted and Plaintiffs' Motion for Default Judgment is denied as moot.

I. FACTUAL BACKGROUND

On August 10, 1988, Robert Moyer, the executor of the estate of his deceased wife, Michelle Moyer, retained Plaintiffs, Jack Feinberg and The Law Firm of Feinberg and Silva, to bring a medical malpractice lawsuit in state court advancing survival act and wrongful death claims on behalf of his wife's estate and survivors (collectively, "the Moyers"). On November 6, 1989, Plaintiffs filed a complaint in the Court of Common Pleas, Schuylkill County. On February 4, 1994, that court dismissed all claims as untimely. On appeal, the Pennsylvania Superior Court reversed the dismissal of the wrongful death claim because the complaint had been filed one day before the expiration of the statute of limitations, but it upheld the dismissal of the survival act claims as

¹ This Motion was filed on March 21, 2002 as a motion to dismiss or, in the alternative, a motion to stay the case pending arbitration. The Court elected to stay the case by Memorandum Opinion and Order dated November 4, 2002, and deferred action on the motion to dismiss.

untimely. On remand, a jury found the defendants liable for the death of Michelle Moyer, and awarded \$1.04 million to her survivors. The Moyers believed that the judgment would have been far greater had the jury been able to consider the survival actions as well, because of the pain and suffering that the twenty-five-year-old Michelle Moyer endured before her death.

The Moyers filed a legal malpractice suit against Plaintiffs on December 9, 1999 (the Moyers' lawsuit'), claiming that Plaintiffs failed to file the medical malpractice lawsuit in a timely manner, causing the dismissal of the survival act claims on statute of limitations grounds. According to the Moyers' complaint against Plaintiffs, the statute of limitations for the survival act claims expired on September 23, 1988, approximately six weeks after Plaintiffs were retained, and more than one year before Plaintiffs filed the complaint. The Moyers alleged that Plaintiffs' failure to file suit on or before September 23, 1988 was negligent, a breach of contract, and a breach of fiduciary duty.

At the time the Moyers filed their legal malpractice lawsuit against Plaintiffs, Plaintiffs carried a professional liability insurance policy (the "Policy") which had been issued by Defendant Association of Trial Lawyers Assurance on February 21, 1994, with annual renewal thereafter.² Plaintiffs filed a claim with Defendant requesting coverage for the Moyers' lawsuit. Defendant declined to defend or indemnify Plaintiffs, based in part on its position that the acts giving rise to the legal malpractice suit occurred prior to the Policy's retroactive date of February 21, 1994.³

² Apparently, Plaintiff had a choice of starting dates when he purchased the Policy, but chose February 21, 1994, the date he entered into the contract for the policy, rather than pay additional premiums for an earlier, retroactive date.

³ Defendants also asserted that Plaintiffs failed to disclose the possibility of a suit by the Moyers on an insurance application questionnaire, in violation of the Policy's "known circumstance clause." Defendant argues that since the Moyers' suit was dismissed on February 4, 1994 for failure to file within the applicable statute of limitations, Plaintiffs knew that this dismissal might give rise to a malpractice suit against them as of February 21,

II. PROCEDURAL BACKGROUND

On December 26, 2001, Plaintiffs filed the instant action, in which they advance claims for breach of contract, promissory estoppel, intentional misrepresentation, negligent misrepresentation, and reformation of contract.

Defendant filed a Motion to Dismiss or in the alternative a Motion to Stay Pending Arbitration. By Memorandum and Order dated November 4, 2002, the Court stayed all proceedings pending arbitration, based on a valid arbitration provision in the Policy. The Court noted that some of Plaintiffs' claims may not be subject to arbitration but elected to stay the proceedings in their entirety pending completion of arbitration. The Court's Order deferred action on the Motion to Dismiss.

The arbitration panel considered all issues raised by Plaintiffs, including their breach of contract, promissory estoppel, and reformation of contract claims.⁴ The arbitration panel found: 1) that the Policy did not need to be reformed because the February 17, 1994 letter was not part of and in no way affected the Policy; and 2) the Policy's retroactive date was a complete bar to coverage for the Moyers' legal malpractice lawsuit. Having decided these issues, the arbitration panel resolved liability in favor of Defendant without expressly addressing the other issues raised by Plaintiffs.

1994. Plaintiffs argue that they did not think this ruling made them vulnerable to suit, because they believed that the statute of limitations on these claims had expired before they were retained by the Moyers. This dispute is not before the Court, as the arbitration panel decided that Defendant was not liable to Plaintiffs.

⁴ Specifically, Plaintiffs made the following arguments in briefing to the arbitration panel: 1) Defendant improperly denied their claim for failure to disclose known circumstances; 2) Defendant improperly denied their claim based on the Policy's retroactive date; 3) the Policy results in illusory coverage; 4) Defendant breached its duty to defend Plaintiffs against the Moyers lawsuit; 5) a February 17, 1994 letter from Defendant to Plaintiffs must be read as part of the Policy, and the Policy must be reformed; and 6) the February 17, 1994 letter estops Defendant from enforcing the Policy retroactivity date.

The parties dispute whether any claims remain before the Court. Plaintiffs filed a Motion to Lift the Stay, which Defendant opposed. Plaintiffs assert that three claims remain before this Court: 1) Defendant's breach of its contractual duty to defend Plaintiffs in the Moyers suit; 2) Plaintiffs' negligent misrepresentation claim; and 3) Plaintiffs' intentional misrepresentation claim. By Order dated September 3, 2004, the Court granted Plaintiffs' Motion to Lift the Stay without reaching the merits of the parties' positions.

Defense counsel subsequently filed a motion to withdraw as counsel. The Court granted counsel's motion to withdraw, allowing Defendant time to obtain new counsel and to file an answer or renewal of its motion to dismiss. Defendant neither hired new counsel nor filed any pleadings within the time allowed, prompting Plaintiffs to file a motion for default judgment. The Court noticed the parties and counsel, and held a hearing on this Motion on February 28, 2005, at which Defendant failed to appear. At this hearing, the Court ordered Plaintiffs to submit additional support for their position, and Defendant again failed to notify the Court of its current status or position on Plaintiffs' motion.

III. DISCUSSION

Defendant's Motion to Dismiss

Because documents outside of the pleadings will be considered, the Court treats the Motion as a motion for summary judgment under Federal Rule of Civil Procedure 56(b).⁵ Therefore, the Court now determines whether Plaintiffs' remaining claims (breach of contractual obligation to

⁵ Fed. R. Civ. P. 12(b) (if a motion to dismiss relies upon matters outside the pleadings, and these are not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . .").

provide for Plaintiff's defense, negligent misrepresentation and intentional misrepresentation) can be dismissed on summary judgment.⁶ To decide this Motion, the Court must determine the scope of the Policy's arbitration clause. If Plaintiffs' remaining claims were subject to arbitration under the Policy, the claims can be dismissed.

Under Illinois law,⁷ to determine the scope of an arbitration clause, a court must examine the language of the clause and the terms of the contract.⁸ The Policy's arbitration clause provides:

As a condition precedent to an INSURED'S right to be indemnified under this Policy, all disputes that may arise between one or more INSUREDS and the Company (including its directors, officers, employees, or agents) out of or in relation to this Policy shall be finally settled by arbitration conducted according to the Commercial Arbitration Rules of the American Arbitration Association, by which the INSUREDS and the Company agree to be bound.⁹

1. Is Plaintiffs' Claim Regarding Defendant's Duty to Defend Plaintiffs Subject to the Policy's Arbitration Clause?

Plaintiffs assert that their claim regarding coverage for their defense of the legal malpractice lawsuit is not subject to arbitration. In support of this argument, Plaintiffs cite to

⁶ The familiar standard of review applies. The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The non-moving party must come forth with admissible factual evidence establishing a genuine issue of material fact. See Celotex Corp. v. Catrett, 447 U.S. 317 (1986). In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. EEOC v. Westinghouse Electric Corp., 725 F. 2d 211, 216 (3^d Cir. 1983), cert. denied, 469 U.S. 820 (1984). The Court must determine whether there are any genuine issues for trial. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986).

⁷ It is undisputed that pursuant to the Policy's choice of law provision, Illinois law applies to the dispute.

⁸ Atkins v. Rustic Woods Partners, 525 N.E.2d 551, 555 (Ill. App. Ct. 1988).

⁹ Policy at 12-13.

Waitzman v. Classic Syndicate, Inc., 648 N.E.2d 104 (Ill. App. Ct. 1995), in which the Illinois appellate court ruled that the duty to defend is distinct from the duty to indemnify, and that the arbitration clause at issue did not apply to the defendant's duty to defend.¹⁰ The facts in Waitzman are easily distinguished from the facts before this Court. The Waitzman policy was very specific about what types of disputes were arbitrable. In contrast, Plaintiffs' Policy states that "*all disputes* . . . shall be finally settled by arbitration" (emphasis added). Moreover, the Waitzman court held that "the 'term or condition' language [in the Waitzman Policy] is not so broad that it covers any dispute arising under the policy. If the defendants had intended to arbitrate 'any dispute' arising under the policy, they could have used such language when they drafted the agreement."¹¹ Such all encompassing language is exactly what Plaintiffs' Policy contains.

Although Defendant's duty to indemnify and duty to defend are indeed separate obligations, the arbitration provision nevertheless applies equally to disputes over both. The Court notes that Plaintiffs raised the issue of Defendant's duty to defend before the arbitration panel, briefing it in their pre-hearing arbitration memorandum, supplemental memorandum, and post-hearing arbitration memorandum. The arbitration panel considered all the issues raised by Plaintiffs and found that the retroactive date of the Policy was a complete bar to coverage for the Moyers' lawsuit. Furthermore, the Policy requires Defendant to pay the costs of defending a legal malpractice lawsuit *only if* the costs are "incurred by the insured in connection with the defense of any claim covered hereunder."¹² Because the claims were beyond the coverage or potential coverage of the Policy, the arbitration panel did not need to explicitly address Defendant's duty to defend in its

¹⁰ Waitzman, 648 N.E.2d at 108.

¹¹ Id.

¹² Policy at 10.

findings.

2. Are Plaintiffs' Misrepresentation Claims Subject to the Policy's Arbitration Clause?

Plaintiffs also argue that their negligent and intentional misrepresentation claims are not subject to arbitration. Plaintiffs allege that Defendant made false representations about coverage in a letter to Plaintiffs dated February 17, 1994 (the "Letter"), which summarized the Policy terms. The letter allegedly led Plaintiffs to believe they would be covered for acts occurring in part before and in part after the Policy retroactive date of February 21, 1994, as well as for acts occurring in whole after the retroactive date. In fact, the Policy excluded coverage for acts which occurred in part before and in part after the retroactive date. Plaintiffs argue that this misleading information in the Letter fraudulently induced them to purchase the Policy, entitling them to recover all costs flowing from the misrepresentation, including indemnification and defense costs for the Moyers lawsuit.

Plaintiffs argue that these claims are not arbitrable because they do not "arise out of or relate to" the Policy. Plaintiffs reason that the misrepresentation was made in a letter sent prior to the issuance of the Policy, so it could not arise out of or relate to the policy. However, Plaintiffs' misrepresentation claims rest on the allegation that the Letter containing the misinformation negligently or intentionally *induced* Plaintiffs to purchase the Policy from Defendant. Therefore, the misrepresentation claims are "related to" the Policy, and are subject to its arbitration provision.¹³ Furthermore, the arbitration provision is not limited to contract claims, and therefore Plaintiffs' tort claims are also subject to arbitration.¹⁴ By failing to litigate the misrepresentation claims before the

¹³ When an allegation of fraud in the inducement is directed towards the contract as a whole, and not solely against the arbitration clause, the claim is within the scope of a broad arbitration clause. See Prima Paint Corp. v. Flood Conklin Mfr. Co., 388 U.S. 395, 406 (1967); In re Oil Spill by Amoco Cadiz, 659 F.2d 789, 794 (7th Cir. 1981).

¹⁴ Am. Patriotic Ins. Agency, Inc. v. Mut. Risk Mgmt., 364 F.3d 884, 889 (7th Cir. 2004).

arbitration panel, Plaintiffs waived these claims.

Accordingly, summary judgment is granted on the merits as to Plaintiffs' remaining claims.

Plaintiffs' Motion for Default Judgment

Having dismissed all remaining claims, Plaintiffs' Motion for Default Judgment can be denied as moot.

An appropriate Order follows.

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

JACK E. FEINBERG et al.,	:	Civil Action
Plaintiffs	:	No. 01-6966
v.	:	
	:	
ASSOCIATION OF TRIAL LAWYERS	:	
ASSURANCE (A MUTUAL RISK	:	
RETENTION GROUP),	:	
Defendant	:	

ORDER

AND NOW, this 17th day of June, 2005, upon consideration of Defendant's Motion to Dismiss [Doc. # 4] and Plaintiffs' Response thereto, and Plaintiffs' unopposed Motion for Default Judgment and Plaintiffs' briefs in support thereof [Doc. # 27, 28], the Court **ORDERS** as follows:

1. Defendant's Motion to Dismiss is **GRANTED** ;
2. Plaintiffs' Motion for Default Judgment is **DENIED** as moot.
3. The Clerk of Court shall mark this case **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

/S/ Cynthia M. Rufe

CYNTHIA M. RUFÉ