

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

MITCHELL FASS,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 06-02398
	:	
v.	:	
	:	
STATE FARM FIRE AND CASUALTY	:	
COMPANY,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Stengel, J.

July 26, 2006

Mitchell Fass ("Plaintiff") brought this action to recover additional amounts from an insurance policy issued to him by State Farm Fire and Casualty Company ("Defendant") after a fire ravaged his home. Defendant has filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss three counts of the complaint. For the reasons that follow, I will grant Defendant's motion.

I. BACKGROUND¹

Defendant issued Policy No. 78-NO-2083-6 insuring Plaintiff's residence in Newtown, Pennsylvania against numerous types of losses, including losses from a fire on the premises (the "Policy"). The Policy went into effect on October 31, 2004, and it expired on October 31, 2005. On October 15, 2004, an accidental fire damaged

¹The facts are taken from the complaint and are accepted as true for the purposes of this motion.

Plaintiff's residence. The Policy covered the damages to Plaintiff's residence,² and Plaintiff retained the services of Michael Bruckner, an insurance adjuster employed by Professional Adjustment Corporation, to negotiate, adjust, and settle his claim with Defendant. As a result of the negotiations between Bruckner and Defendant, Defendant made the following payments to Plaintiff under the Policy: (1) \$769,680.00 for the Dwelling portion of Plaintiff's claim; and (2) \$320,743.13 for the Personal Property portion of the claim.

On August 5, 2005, Bruckner notified Defendant that a number of outstanding issues still remained as to the Dwelling and Personal Property portions of Plaintiff's insurance claim. Bruckner also included a computer spreadsheet with his correspondence to Defendant listing 52 items from the Personal Property portion of the claim that Defendant had either omitted or mispriced. Defendant's representative Alice C. Hoffman responded to Bruckner's correspondence on August 6, 2005. Cooper refused to address Bruckner's concerns in her response, and instead she cited a portion of the Policy requiring that Plaintiff institute a lawsuit within one year of his property loss.

Plaintiff commenced this action by filing a complaint on January 9, 2006 in the Bucks County Court of Common Pleas. The complaint alleges the following five counts: (1) bad faith in violation of 42 PA. CONS. STAT. § 8371; (2) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 PA. CONS. STAT. § 201-1, *et*

²The parties have not addressed why the damage from the fire, which occurred before the effective date of the Policy, was a loss covered by the Policy.

seq. (the "UTPCPL"); (3) breach of contract; (4) breach of the fiduciary duty of good faith and fair dealing (the "breach of fiduciary duty claim"); and (5) negligence.

Defendant removed the case to federal court on June 7, 2006,³ and filed the instant motion to dismiss on June 23, 2006. Plaintiff has not filed a timely opposition to the motion to dismiss.⁴

II. STANDARD FOR A MOTION TO DISMISS

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). Courts may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). When considering a motion to dismiss, courts must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

³There is complete diversity in this case because Plaintiff is a Pennsylvania resident and Defendant is an Illinois Corporation. See 28 U.S.C. § 1332(a). The amount in controversy requirement is met because Defendant has averred in its notice of removal that the amount in controversy exceeds \$75,000.00. Id.

⁴Plaintiff's opposition to the motion to dismiss was due on July 7, 2006, and the Court will disregard the opposition filed on July 24, 2006.

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. See id. A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995).

III. DISCUSSION

A. The UTPCPL Claim

The UTPCPL protects Pennsylvania consumers against "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." 73 PA. CONS. STAT. § 201-3. It is well-settled that a plaintiff must plead the elements of common law fraud to properly state a claim under the UTPCPL. Booze v. Allstate Ins. Co., 750 A.2d 877, 880 (Pa. Super Ct. 2000). Rule 9(b) of the Federal Rules of Civil Procedure provides in relevant part that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." FED. R. CIV. P. 9(b).⁵ Thus, in order to properly state a UTPCPL claim in Pennsylvania, a plaintiff must

⁵The Third Circuit has relaxed the application of Rule 9(b) when the factual information regarding the alleged fraud is within the defendant's control. See Christidis v. First Pa. Mortgage Trust, 71 F.2d 96, 99-100 (3d Cir. 1983).

plead the following elements with particularity: "(1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage." U.S. ex. rel. Atkinson v. Pa. Shipbuilding Co., 255 F. Supp. 2d 351, 407 (E.D. Pa. 2002) (citing Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992)).

Furthermore, the UTPCPL only protects plaintiffs against a defendant's malfeasance; nonfeasance is not covered by the statute. See, e.g., Gordon v. Pa. Blue Shield, 548 A.2d 600, 604 (Pa. Super. Ct. 1988). Malfeasance has been defined by federal courts as the improper performance of a contractual obligation. Novick v. Unumprovident Corp., Civ. A. No. 01-00258, 2001 WL 793277, at *2 (E.D. Pa. July 10, 2001) (citing Smith v. Nationwide Mut. Fire Ins. Co., 935 F. Supp. 616, 620 (W.D. Pa. 1996)). Nonfeasance, by contrast, is a failure to perform a contractual obligation. Id. In other words, a defendant's improper performance of a contractual obligation is actionable under the UTPCPL, while its failure to perform a contractual duty is not. For example, the Pennsylvania Superior Court has found that a mere refusal or failure to pay an insurance claim constitutes nonfeasance and is therefore not actionable alone under the UTPCPL. Gordon, 548 A.2d at 604.

Plaintiff has not sufficiently plead a UTPCPL claim in this case. First, the complaint does not allege with particularity the elements of common law fraud.⁶ Instead, the complaint makes only general allegations that Defendant violated the UTPCPL. There are no allegations in the complaint that Defendant or its representatives ever made a false representation of material fact. Even if there were such an allegation, there are no allegations that the hypothetical speaker knew of its falsity.

Second, the complaint is at best unclear as to any allegations of Defendant's malfeasance in violation of the UTPCPL. At first blush, the complaint alleges only nonfeasance. See Compl. ¶ 11 ("No payment has ever been offered by [Defendant] for Debris Removal or Tree, Shrub and Other Plants coverage"); Compl. ¶ 15 (Defendant "refused to go to appraisal on the losses, failed to address the tree/shrub claim completely"); Compl. ¶ 16 (Defendant failed to explain how it arrived at the amounts it paid out on Plaintiff's claims). These allegations suggest that Defendant failed to perform its obligations under the insurance contract, or mere nonfeasance.

A more zealous reading of the complaint could infer malfeasance on the part of Defendant. Paragraph 8 states that Defendant paid out \$769,680.00 on the Dwelling portion of Plaintiff's claim and \$320,743.13 on the Personal Property portion of his claim. Compl. ¶ 8. Paragraph 14 provides that Bruckner informed Defendant that there "remained outstanding issues as to both Dwelling and [P]ersonal [P]roperty claims, and

⁶Nor does the complaint allege that any factual information surrounding Defendant's violation of the UTPCPL is within Defendant's control. Thus, the pleading with particularity requirements of Rule 9(b) apply.

included a spreadsheet of 52 items [from] the [P]ersonal [P]roperty claim that were either omitted or mispriced." Compl. ¶ 14. Read broadly and in conjunction, these allegations could support an inference that Defendant acted improperly by omitting or inappropriately pricing the Dwelling and Personal Property portions of Plaintiff's insurance claim, instead of merely failing to pay Plaintiff what he thought was due under his policy. Even if these allegations do infer malfeasance, however, I find that they do not state malfeasance "with particularity" as required by Rule 9(b). The allegations are simply too general to satisfy the pleading requirements of the Rule, and I will grant the motion to dismiss Plaintiff's UTPCPL claim.

B. The Breach of Fiduciary Duty Claim

Pennsylvania's intermediate courts have created the "gist of the action" doctrine by holding that plaintiffs may not recast ordinary breach of contract claims as tort claims. See, e.g., Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 (3d Cir. 2001) (citing Bash v. Bell Tel. Co., 601 A.2d 825, 830 (Pa. Super. Ct. 1992)); Redev. Auth. of Cambria Co. v. Int'l Ins. Co., 685 A.2d 581, 590 (Pa. Super. Ct. 1996); Phico Inc. Co. v. Presbyterian Med. Servs. Corp., 663 A.2d 753, 757 (Pa. Super Ct. 1995).⁷

"The important difference between contract and tort actions is that the latter lie from the

⁷While the Pennsylvania Supreme Court has neither accepted nor rejected the gist of the action doctrine, the Pennsylvania Superior Court and several federal courts have predicted that it would adopt the doctrine were the issue presented before it. See, e.g., eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002); Bash, 601 A.2d at 829–30; Williams v. Hilton Group, PLC, 93 Fed. Appx. 384, 385 (3d Cir. 2004) (not precedential); Air Prods. and Chems., Inc. v. Eaton Metal, 256 F. Supp. 2d 329, 340 (E.D. Pa. 2003). When a state's highest court has not decided an issue, district courts may look to intermediate state appellate court decisions to assist in its prediction of how the state supreme court would rule. Paolella v. Browning-Ferris, Inc., 158 F.3d 183, 189 (3d Cir. 1998).

breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Redev. Auth. of Cambria County, 685 A.2d at 590. Thus, Pennsylvania courts limit a plaintiff's allegations to contract claims when "the parties' obligations are defined by the terms of the contract, and not by the larger social policies embodied in the law of torts." Bohler Uddeholm Am., 247 F.3d at 104 (quoting Bash, 601 A.2d at 830). The Pennsylvania Superior Court has found that the gist of the action doctrine "bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contracts claim or the success of which is wholly dependant on the terms of a contract." eToll, Inc., 811 A.2d at 19.

I will dismiss Plaintiff's breach of fiduciary duty claim in this case under the gist of the action doctrine. As an initial matter, I note that a claim for an insurer's breach of fiduciary duty is a contractual action. See Greater N.Y. Mut. Ins. Co. v. North River Ins. Co., 872 F. Supp. 1403, 1406, 1409 (E.D. Pa. 1995), aff'd 85 F.3d 1088 (3d Cir. 1996) (citations omitted). The breach of fiduciary duty claim, however, fits within the first three scenarios described in eToll. Were it not for the insurance contract between the parties, Defendant would have no obligation to perform any of the duties Plaintiff has alleged that it breached.

Moreover, several courts in this district have dismissed breach of fiduciary duty claims under similar circumstances. See Belmont Holdings Corp. v. Unicare Life & Health Ins. Co., Civ. A. No. 98-2365, 1999 WL 124389, at *4 (E.D. Pa. Feb. 5, 1999) (dismissing insured's breach of fiduciary duty claim against insurer as redundant of claim for breach of contract and bad faith claim under Pennsylvania bad faith statute); Garvey v. Nat'l Grange Mut. Ins. Co., Civ. A. No. 95-0019, 1995 WL 115416, at *4 (E.D. Pa. March 16, 1995) (same). Accordingly, I will grant Defendant's motion to dismiss with respect to the breach of fiduciary duty claim because it is essentially a contract claim recast as a tort claim.

C. The Negligence Claim

Plaintiff's negligence claim also fits within many of the categories set forth in eToll and described supra. For instance, paragraph 40 of the complaint alleges that Defendant breached its duty to Plaintiff by "failing to proceed to appraisals on Plaintiff's contents claim" and by "failing to provide an explanation as to the proper limits of insurance applicable to [the fire] loss to Plaintiff." Compl. ¶ 40. These alleged breaches of conduct are based solely on duties imposed by mutual consensus and were created by the insurance contract between the parties. Without this contract, Defendant would have no obligations imposed as a matter of social policy.

Furthermore, courts in this district have also dismissed negligence claims in similar situations. See Specialty Ins. v. Royal Indem. Co., 423 F. Supp. 2d 674, 678 n.5 (E.D. Pa. 2004) (dismissing negligence claim based on alleged breach of agreement because it arose from same set of facts as contractual claim). Accordingly, I find that Plaintiff's negligence claim is essentially a breach of contract claim disguised as a tort claim, and I will dismiss it under the gist of the action doctrine.

IV. CONCLUSION

For the reasons described above, I will grant Defendant's motion and dismiss the following claims: (1) the UTPCPL claim (Count II); (2) the breach of fiduciary duty claim (Count IV); and (3) the negligence claim (Count V). An appropriate Order follows.

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	:	
Defendant.	:	

ORDER

AND NOW, this 26th day of July, 2006, upon consideration of Defendant's Motion to Dismiss (Docket No. 4) and Plaintiff's response thereto, it is hereby **ORDERED** that the motion is **GRANTED** and the following claims will be dismissed: (1) the UTPCPL claim (Count II); (2) the breach of fiduciary duty claim (Count IV); and (3) the negligence claim (Count V).

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.