

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

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James E. Smith, Sr. and	:	
Louvenia Smith,	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 97-CV-5862
Office of Servicemembers	:	
Group Life Insurance,	:	
Defendant.	:	
	:	
	:	

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MEMORANDUM OF DECISION

**McGlynn, J.** **November** , 1997

Before the court are the Motion to Dismiss by defendant Office of Servicemembers Group Life Insurance ("Servicemembers") and plaintiffs James E. Smith, Sr. and Louvenia Smith's response thereto. For the reasons set forth below, plaintiffs' complaint will be dismissed without prejudice for failure to plead allegations of fraud or mistake with particularity in accordance with Federal Rule of Civil Procedure 9(b).

**I. Background**

The allegations of plaintiffs' complaint can be summarized as follows. The decedent in this case, James M. Smith, died on March 23, 1992. Plaintiffs James E. Smith, Sr. and Louvenia Smith are the decedent's father and step-mother. "[A]t various times prior to the death of James M. Smith," plaintiffs were named as either sole or joint beneficiaries of a life insurance policy for \$100,000.00 issued to the decedent by Servicemembers.

Compl. ¶ 3. Upon the decedent's death, plaintiffs requested payment on the policy, but Servicemembers refused because they had earlier received from the decedent a "Servicemen's Group Life Election and Certificate" (dated January 11, 1992) changing the beneficiary of his policy from plaintiffs to his mother, Mary R. Green. Servicemembers paid the proceeds of the policy to the decedent's mother.

Plaintiffs have attached to their complaint copies of: a "Servicemen's Group Life Insurance Election" form dated 2/28/90 designating plaintiff James E. Smith, Sr. as beneficiary; a subsequent "Servicemen's Group Life Insurance Election and Certificate" form dated 1/11/92 naming Mary R. Green as beneficiary; and a "Record of Emergency Data" form dated 11/4/90.<sup>1</sup> They contend that "the change of beneficiary form was not properly executed by the decedent in that it was not the intent of the deceased to leave the money to his mother." Compl. ¶ 7. In support of this statement, plaintiffs factually aver: (1) that the deceased was not known to favor his mother over plaintiffs or his children; (2) that the documents were handled by the U.S. Army and/or U.S. Army reserve "and they had advised the plaintiffs that they or anyone he decided could be named as the beneficiary and collect the proceeds of the policy," Compl. ¶

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<sup>1</sup> While this form addresses to whom benefits should be paid upon the death of the servicemember, it is not clear from the form itself whether it is an insurance document issued by the defendant insurance company, or an Army document which has no direct relation to the decedent's insurance contract with defendant.

9; (3) that the signature on the most recent change of beneficiary form (dated 1/11/92) is not the decedent's or that the form was completed by Servicemembers' agents to defeat plaintiffs' rights under the policy; and (4) that plaintiff told witnesses he did not intend the money to go to his mother. Further, plaintiffs accuse Servicemembers of failing to take reasonable steps to prevent fraud in the completion of the beneficiary form and to verify that the forms were correctly processed to reflect the true intent of the policy holder. Plaintiffs contend that, as a result of these failures, the decedent's intent -- that the proceeds of policy at issue be paid to plaintiffs for the benefit of his children -- was defeated. Plaintiffs demand \$100,000.00 in damages and interest from March 23, 1992, as well as court costs.

## **II. Discussion**

Defendant Servicemembers has moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In support of its motion, Servicemembers argues that plaintiffs' claim is a breach of contract action, and that plaintiff has not alleged any breach of duty under the contract. Servicemembers alternatively asserts that, to the extent plaintiffs have alleged fraudulent inducement or fraudulent execution, they have not met the Rule 9(b) requirement that "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

### **A. Standard for Rule 12(b)(6) Dismissal**

Under Rule 12(b)(6)'s failure-to-state-a-claim standard, the court must determine if the plaintiffs may be entitled to relief under any reasonable reading of the pleadings, assuming the truth of all the factual allegations in the complaint. Alexander v. Whitman, 114 F.3d 1392, 1397-98 (3d Cir. 1997). The complaint may be dismissed only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. Id. at 1398.

Plaintiffs have not identified any specific causes of action supporting their claim. Upon close scrutiny, however, three common law claims are discernable among the allegations of plaintiffs' complaint: (1) breach of contract for failure to make payment on the insurance policy to plaintiffs; (2) fraud or mistake relating to the completion of the decedent's final change of beneficiary form; and (3) negligence on the part of Servicemembers for failure to implement policies protecting the decedent and his beneficiaries from fraud or mistake.

### **B. Breach of Contract**

Under Pennsylvania law, plaintiffs must allege four elements in order to plead a proper claim for breach of contract: (1) the existence of a contract to which the plaintiffs and the defendant were parties; (2) the contract's essential terms; (3) breach of the contract by the defendant; and (4) damages resulting from the breach. See Rototherm v. Penn Linen & Uniform Service, Inc., Civ. A. No. 96-6544, 1997 WL 419627, at \*11 (E.D.

Pa. July 3, 1997).

Servicemembers argues that plaintiffs' complaint should be dismissed because they "have conceded performance under the contract," Def. Mot. to Dis. at 4, and therefore have not alleged the breach of any duty existing under the contract. The court does not agree. While plaintiffs admit that Servicemembers made payment to the decedent's mother, plaintiffs' claim is that this payment was in fact made to the wrong party under the contract. If that is true, then Servicemembers' disposition of the insurance proceeds to the decedent's mother would not satisfy its contractual obligation to pay the correct beneficiary under the policy. See Santiny v. Pitre, 591 So.2d 1245 (La. Ct. App. 1991)("Payment to the wrong person does not generally diminish what is owed to a creditor.")(citing Louisiana & So. Life Ins. v. New Orleans S.S., 384 So.2d 594 (La. Ct. App. 1980)).

However, because plaintiffs' breach of contract claim is essentially premised upon a theory of fraud or mistake,<sup>2</sup> their complaint must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b).

**B. Fed. R. Civ. P. 9(b)**

Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be

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<sup>2</sup> Plaintiffs aver: "The signature on the change of beneficiary form was either not the signature of the deceased or the form was completed or changed to defeat the rights of the plaintiffs either by the defendant or by its agents, servants, workmen or employees, acting within the course and scope of their authority." Compl. ¶ 11.

stated with particularity." Fed. R. Civ. P. 9(b). In complaints alleging fraud, the Rule requires plaintiffs to plead: (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. Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992), cert. denied, 506 U.S. 934 (1992); see also 2 James W. Moore et al., Moore's Federal Practice § 9.03[1][b] (3d ed. 1997)(when pleading fraud, claimants must "allege at a minimum the identity of the person who made the fraudulent statement, the time, place, and content of the misrepresentation, the resulting injury, and the method by which the misrepresentation was communicated"). "The requirements for pleading fraud with particularity apply equally to pleading mistake with particularity." 2 James W. Moore et al., Moore's Federal Practice § 9.03[2] (3d ed. 1997).

Despite these stringent pleading requirements, the courts should be sensitive to the fact that application of Rule 9(b) prior to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud." Christidis 717 F.2d at 99-100. Thus, courts have generally relaxed the requirements of Rule 9(b) when factual information is peculiarly within the defendant's knowledge or control. In re Craftmatic Sec. Litig., 890 F.2d 628, 645 (3d Cir. 1990). Under this relaxed application of the rule, pleaders must still allege "that

the necessary information lies within defendants' control, and their allegations must be accompanied by a statement of the facts upon which the allegations are based." In re Craftmatic Sec. Litig., 890 F.2d 628, 645 (3d Cir. 1990). To avoid dismissal in such circumstances, the complaint must delineate at least the nature and scope of plaintiffs' effort to obtain -- prior to filing the complaint -- the information needed to plead with particularity. Shapiro, 964 F.2d at 285. Even when the relevant information is inaccessible, however, the pleader may not proceed on mere suspicions of fraud. 2 James W. Moore et al., Moore's Federal Practice § 9.03[1][g] (3d ed. 1997)(citing Inn Chu Trading Co. v. Sara Lee corp., 810 F. Supp. 501, 507 (S.D.N.Y. 1992); Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990)); see also In re Craftmatic Sec. Litig., 703 F Supp 1175, 1182 (E.D. Pa. 1989)("[S]uspicion alone does not satisfy Rule 9(b)."), aff'd in part, rev'd in part, 890 F.2d 628 (3d Cir. 1989)(remanding to allow amendment in light of court's instructions on pleading with particularity).

In this case, it is clear that plaintiffs have brought this action solely on the suspicion that defendant has defrauded them or made a mistake in processing the decedent's most recent change of beneficiary form. The complaint expressly states, "plaintiffs were very suspicious that the change of beneficiary form was not proper [sic] executed by the decedent . . . ." Compl. ¶ 7. Plaintiffs then make conclusory allegations that Servicemembers itself acted to defraud plaintiffs, or acted negligently in

allowing plaintiffs to be defrauded. The only facts averred to support their theories of fraud are: (1) that the deceased was not known to favor his mother over plaintiffs or his children; (2) that the documents were handled by the U.S. Army and/or U.S. Army reserve "and they had advised the plaintiffs that they or anyone he decided could be named as the beneficiary and collect the proceeds of the policy," Compl. ¶ 9; (3) that the signature on the 1/11/92 change of beneficiary form is not the decedent's or that the form was completed by defendant's agents to defeat plaintiffs' rights under the policy; and (4) that plaintiff told witnesses he did not intend the money to go to his mother.<sup>3</sup>

These allegations are a far cry from meeting the particularity requirements of Rule 9(b). As noted by the district court in Sun Co. v. Badger Design & Constructors, "[p]laintiff may not simply point to a bad result and allege fraud. Rather, plaintiff must . . . inject precision and some measure of substantiation into [the] allegations [of fraud] . . . . who what, when, where, and how: the first paragraph of a newspaper story would satisfy the particularity requirements." 939 F. Supp. 365, 369 (E.D. Pa. 1996)(quoting In re Chambers Dev. Sec. Litig., 848 F. Supp. 602, 616 (W.D. Pa. 1994)). Plaintiffs

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<sup>3</sup> Plaintiffs' reply brief contains additional factual averments attempting to flesh out the circumstances underlying their claim. The court will not address the adequacy of these allegations under Rule 9(b), however, as plaintiffs may not amend their complaint in an opposition brief. Commonwealth of Pa. v. Pepsico, Inc., 836 F.2d 173, 181 (3d Cir. 1988)("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.').

have not alleged the particular identities of their defrauders. They have not pleaded the contents of a specific false representation made to the decedent or any other party. They have failed to state how, when, or where the alleged fraud or mistake took place. Further, plaintiffs have neither alleged that such information is in the exclusive control of defendant, nor detailed what efforts they took before filing this complaint to obtain that information. In short, plaintiffs have pleaded a mere suspicion of fraud or mistake based upon their general belief that the decedent desired his insurance proceeds to go to plaintiffs. This will not suffice under Rule 9(b).

Moreover, plaintiffs' negligence claim is similarly impaired by its lack of particularity. Plaintiffs allege that

The defendant insurance company did not use reasonable methods of protection to prevent fraud, abuse, unauthorized completion or changes in beneficiary forms before they arrived and did not take reasonable means to verify that they were correctly completed and processed after they arrived to insure that the true intent of the policy holder was given priority.

Compl. ¶ 10 (emphasis added).

While the reasonableness language of this paragraph suggests negligence, that cause of action is grounded in "fraud, abuse, [or] unauthorized completion or changes in beneficiary forms." As a result, the allegations of fraud underlying plaintiffs' negligence claim must also be pleaded in conformity with Rule 9(b). See Shapiro v. UJB Fin. Corp., 964 F.2d 272, 288 (3d Cir. 1992)(stating that averments of fraud require the court

to examine the factual allegations supporting a particular legal claim).

### **III. Conclusion**

For the foregoing reasons, plaintiffs' complaint is dismissed without prejudice in accordance with Fed. R. Civ. P. 9(b) for failure to plead circumstances constituting fraud or mistake with particularity. Plaintiffs may amend their complaint within twenty (20) days hereof for the purpose of remedying the above-mentioned defects. An appropriate order follows.