

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

DAMIEN MECHETTI : CIVIL ACTION
v. :
ILLINOIS INSURANCE EXCHANGE/ :
CLASSIC SYNDICATE : NO. 97-5855

MEMORANDUM AND ORDER

BECHTLE, J.

MARCH , 1998

Presently before the court are defendant Illinois Insurance Exchange/Classic Syndicate's ("Illinois") Motion for Judgment on the Pleadings, plaintiff Damien Mechetti's ("Mechetti") Cross Motion for Partial Summary Judgment and the responses thereto. For the reasons set forth below, Illinois' motion for judgment on the pleadings will be granted in part and denied in part. Mechetti's motion for summary judgment will be granted.

I. BACKGROUND

On December 2, 1994, Mechetti was a patron at the Aztec Club (the "Club"), a nightclub located in Philadelphia. As he attempted to exit the Club, Mechetti was confronted and threatened by a group of intoxicated patrons. Mechetti asked the Club's bouncers to protect him from these patrons. The bouncers refused and the group of patrons assaulted Mechetti while still inside the Club, resulting in bodily injuries.

Mechetti filed suit against the Club's owners and operators

in the Court of Common Pleas of Philadelphia County. In the complaint, Mechetti alleged in all three counts that his injuries were caused by the Club's owners' and operators' negligence in failing to prevent the assault. The Club's owners held a commercial general liability policy with Illinois. Counsel for Mechetti and the Club reported the claim to Illinois. Illinois, acting through its authorized representative, Lobo Claims Management, denied coverage based on an assault and battery exclusion contained in the policy, and refused to defend the Club.

On March 26, 1996, the Court of Common Pleas of Philadelphia County heard the case and entered judgment in favor of Mechetti and against the Club in the amount of \$259,140.44. On April 18, 1996, the Club's owners and operators entered into an assignment agreement with Mechetti. The agreement assigned to Mechetti all causes of action the Club had against Illinois. Those causes of action included claims for breach of contract, breach of fiduciary duty and bad faith. Subsequently, Mechetti served a writ of execution and garnishment interrogatories on Illinois. Illinois answered the interrogatories and alleged that coverage was properly denied in accordance with the terms of the policy it issued to the Club's owners. On July 22, 1996, the Court of Common Pleas entered judgment for \$259,140.44 against Illinois on the pleadings. On June 10, 1997, the Superior Court of Pennsylvania affirmed the judgment. Mechetti v. Weisberg, No.

97-3102, (Pa. Super. Ct. June 10, 1997) (mem. op.).¹

On August 28, 1997, Mechetti, as assignee of the Club's interests, filed the instant action against Illinois in the Philadelphia Court of Common Pleas, seeking damages for bad faith in failing to defend under 42 Pa. Cons. Stat. Ann. § 8371. The Complaint also seeks damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("CPL").² On September 17, 1997, Illinois removed the action to this court pursuant to 28 U.S.C. § 1446.³ On October 17, 1997, Illinois filed the instant motion for judgment on the pleadings. On October 23, 1997, Mechetti filed the instant cross motion for summary judgment.

II. DISCUSSION

A. Judgment on the Pleadings

Illinois filed a motion asking the court to grant judgment on the pleadings in its favor as to Mechetti's bad faith claim under § 8371 and Mechetti's claim under the CPL.⁴ Illinois

1. On March 2, 1998, the Supreme Court of Pennsylvania denied Illinois' Petition for Allowance of Appeal.

2. Pa. Stat. Ann. tit 73, §§ 201-209.

3. The action was properly removed under 28 U.S.C. § 1446 because diversity of citizenship exists between the parties and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332.

4. In its motion for judgment on the pleadings, Illinois alternatively requested that the court enter summary judgment in its favor. (Def.'s Mot. for J. on the Pleadings.) Because the court is not presented with matters outside of the pleadings it will not treat Illinois' motion as one for summary judgment. Fed. R. Civ. P. 12(c).

argues that the undisputed facts appearing in the pleadings entitle it to judgment as a matter of law.

Under Federal Rule of Civil Procedure 12(c), a court will not enter judgment on the pleadings "unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law."

Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 290 (3d Cir. 1988). The court must "view the facts presented in the pleadings and inferences to be drawn therefrom in the light most favorable to the nonmoving party." Id. at 290-91.

1. CPL Claim

Illinois moves for judgment on the pleadings on Mechetti's CPL claim.⁵ Private actions brought under the CPL are limited to "any person who purchases or leases goods or services primarily for personal, family or household purposes." Pa. Stat. Ann. tit 73, § 201-9.2. As plainly indicated in the pleadings, the underlying insurance policy was purchased for business purposes and not for personal, family or household purposes. (Compl. ¶¶ 4-10.) Therefore, because the policy was purchased for business purposes, Mechetti lacks standing to assert a private cause of action under the CPL. See Britamco Underwriters Inc. v. C.J.H., Inc., 845 F. Supp. 1090, 1096-97 (E.D. Pa. 1994), aff'd, 37 F.3d 1485 (3d Cir. 1994) (table). The court will grant Illinois' motion for judgment on the pleadings

5. Pa. Stat. Ann. tit. 73, §§ 201-209.

as to Mechetti's CPL claim.

2. Bad Faith Claim

Illinois asks the court to grant judgment on the pleadings on Mechetti's bad faith claim under 42 Pa. Con. Stat. Ann. § 8371. As stated above, in the underlying state court action, the Superior Court affirmed the Court of Common Pleas' ruling that the policy issued by Illinois covered the negligence claim brought against the Club. Mechetti v. Weisberg, No. 97-3102, (Pa. Super. Ct. June 10, 1997) (mem. op.). The present action seeks damages under § 8371 for Illinois' refusal to defend its insured in the underlying state court tort action. Under Pennsylvania law, a two-part test is applied to bad faith claims under § 8371. Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997). To recover, a plaintiff must show by clear and convincing evidence "that the insurer lacked a reasonable basis for denying benefits" and "that the insurer knew or recklessly disregarded its lack of reasonable basis." Id. (citing Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994)).

In support of its motion for judgment on the pleadings, Illinois argues that it did not act in bad faith because it properly refused to defend its insured, under the belief that the assault and battery clause excluded the negligence action brought by Mechetti against the Club.⁶ To support its argument, Illinois

6. The exclusion reads as follows:

asserts that the case law in Pennsylvania "unanimously recognized" that an assault and battery exclusion applies to claims for negligent failure to prevent an assault and battery. Illinois cites two Pennsylvania Superior court cases in support of its position. A review of these cases shows that they do not support Illinois' position.

In Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649 (Pa. Super. Ct. 1994), appeal denied, 655 A.2d 508 (Pa. 1994), the Superior Court held that an insurance company had a duty to defend its insured against a negligence action, in spite of the presence of an assault and battery exclusion. In Weiner, a patron filed suit against the Eagle Bar alleging that a co-owner of the bar and an employee of the bar struck the patron in the neck. Id. at 650. The complaint asserted alternative theories of liability including negligently "failing to provide adequate protection for business invitees." Id. at 652. The court found that these theories were potentially within the coverage of the policy. Id. Thus, the insurer was required to defend its insured. Id.

The assault and battery exclusion at issue in Weiner is very

It is hereby agreed that no coverage shall apply under this policy for any claim, demand or suit based on assault and battery, and assault shall not be deemed an accident, whether or not committed by or at the direction of the insured.

(Def.'s Mem. Supp. Mot. for J. on the Pleadings, Ex. B).

similar to the exclusion contained in the policy Illinois issued to its insured. Additionally, the underlying facts and allegations in Weiner are similar to those present in the case before this court. Therefore, Weiner does not support Illinois' position, but rather bolsters Mechetti's assertion that under Pennsylvania case law Illinois should have defended its insured in this situation.

The second Superior Court case cited by Illinois is Britamco Underwriters, Inc. v. Grzeskiewicz, 639 A.2d 1208 (Pa. Super. Ct. 1994). In Grzeskiewicz, the Superior Court held that an assault and battery exclusion excluded coverage where the plaintiff made allegations of negligence in failing to protect a business invitee. Id. at 1211. However, Grzeskiewicz does not support Illinois' position. In reaching its decision, the Grzeskiewicz court relied upon the specific language contained in the policy's assault and battery exclusion. Id. at 1211. That provision specifically excluded claims for negligent failure to prevent an assault and battery. Id. The policy in this case, like the one at issue in Weiner, does not contain language specifically excluding coverage for negligence or failure to protect a business invitee. Therefore, Grzeskiewicz is not controlling in this situation.

Illinois also cites a line of cases from this district for the proposition that an "assault and battery exclusion bars all forms of negligence claims instituted against insureds arising

out of assaults to patrons." ⁷ Id. at 7. Because these cases are either distinguishable or in conflict with the Pennsylvania Superior Court's decision in Weiner, the court declines to follow these cases.⁸ A federal court sitting in diversity is required to follow the applicable state law. It is a settled principle that "[f]ederal courts presiding over diversity cases must give decisions of state intermediate appellate courts 'substantial weight in the absence of an indication that the highest state court would rule otherwise.'" Winterberg v. CNA Ins. Co., 868 F. Supp. 713 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). Because there is no indication that the Pennsylvania Supreme Court would rule otherwise, the court will follow the decision of the Superior Court as set forth in Weiner. Further, the Superior Court's opinion in Mechetti v. Weisberg confirms Weiner's validity. Therefore, it is this court's view that Weiner represents the current law of Pennsylvania. More importantly, it

7. The court notes that many of these cases predate the Superior Court of Pennsylvania's opinion in Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649 (Pa. Super. 1994). See Terra Nova Insurance Co, LTD. v. North Carolina Ted, Inc., 715 F. Supp. 688 (E.D. Pa. 1989); Terra Nova Insurance Co, LTD. v. Thee Kandy Store, Inc., 679 F. Supp. 476 (E.D. Pa. 1988). Because these cases predate Weiner, Illinois' reliance on these cases is misplaced.

8. The United States Court of Appeals for the Third Circuit's recent decision in Nationwide Mut. Fire Ins. Co. v. Pipher, No. 97-1282, 1998 WL 113933 (3d Cir. March 17, 1998), further weakens the viability of these decisions when interpreting Pennsylvania insurance law. The Third Circuit's analysis supports this court's view that, under Pennsylvania law, it is the nature of the allegations contained in the plaintiff's complaint that determines whether an insurer has a duty to defend its insured and not the nature of the act which caused the injury.

is the court's view that Weiner represented the law of Pennsylvania at the time Illinois made its decision not to defend its insured in the underlying state court tort action. Because Illinois had the guidance of the Superior Court's decision in Weiner at the time it decided not to defend its insured in the underlying state court tort action, the court can not find that, as a matter of law, Illinois acted in good faith in disregarding Weiner and refusing to defend the Club. Thus, Illinois is not entitled to judgment as a matter of law. The court will not grant Illinois' motion for judgment on the pleadings as to Mechetti's bad faith claim.

B. Mechetti's Cross-Motion for Summary Judgment

In his opposition to Illinois' motion for judgment on the pleadings, Mechetti requests that the court grant summary judgment in his favor on the bad faith claim. Summary judgment shall be granted "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). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the

non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true.'" Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 512 (3d Cir. 1994)(quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358 (3d Cir. 1992)).

Mechetti relies on Bracciale v. Nationwide Mut. Fire Ins. Co., C.A. No. 92-7190, 1993 WL 323594 (E.D. Pa. Aug. 20, 1993), in support of his motion for summary judgment. In Bracciale, the court granted summary judgment on the plaintiffs' bad faith claim under 42 Pa. Cons. Stat. § 8371. However, the Bracciale court applied a different bad faith standard from that later set forth by the Pennsylvania Superior Court in Terletsky, 649 A.2d 680, 688 (Pa. Super. Ct. 1994) and as explained by the Third Circuit in Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997). In Bracciale, the court stated that:

In order to sustain a claim of bad faith, the insured must prove by clear and convincing evidence that the insurer's evaluation of the case was less than honest, intelligent and objective or that it failed to accord the interest of the insured the same faithful consideration that it gave its own.

Bracciale, 1993 WL 323594 at *6 (citations omitted). Because that standard differs from the two-part test set forth in Terletsky, this court will apply the Terletsky standard and not the standard employed in Bracciale as Mechetti urges.

The two-part test set forth in Terletsky requires a plaintiff to demonstrate, by clear and convincing evidence that the insurer lacked a reasonable basis for denying benefits and

that the insurer knowingly or recklessly disregarded its lack of reasonable basis. Terletsky, 649 A.2d at 688. In Weiner, the Superior Court reviewed the general principles of Pennsylvania law that govern an insurer's duty to defend its insured. The court stated that:

The duty to defend is a distinct obligation, separate and apart from the insurer's duty to provide coverage. Moreover, the insurer agrees to defend the insured against any suits arising under the policy even if such suit is groundless, false, or fraudulent. Since the insurer agrees to relieve the insured of the burden of defending even those suits which have no basis in fact, the obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy. In order to determine whether a claim may potentially come within the coverage of the policy, we must first ascertain the scope of the insurance coverage and then analyze the allegations in the complaint.

Weiner, 636 A.2d at 650-51 (citations omitted). Additionally, the duty to defend remains with the insurer until the insurer can eliminate all causes of action that are potentially within the scope of the policy's coverage. Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484, 488 (Pa. 1959).

Based on the Superior Court's decision in Weiner, and applying the principles set forth above, Illinois should have defended the Club against Mechetti's claims. Like the plaintiff in Weiner, Mechetti alleged a negligence claim for failure to protect a business invitee. Weiner, 636 A.2d at 652. Illinois' policy does not specifically exclude this type of negligence claim. Therefore, as in Weiner, the court finds that this claim was potentially within the coverage of the policy.

At the time Illinois was presented with the claim against its insured the Weiner decision was more than one year old, giving Illinois adequate notice of the holding in that case. Further, the Superior Court noted in its opinion affirming Mechetti's judgment against Illinois that counsel for the insured provided Illinois with the applicable Pennsylvania case law standing for the proposition that it owed a duty to defend in this situation. Mechetti, No. 3102 at 5. Viewing the facts in the light most favorable to Illinois, the court finds that Illinois did not have a reasonable basis for refusing to defend its insured in the underlying state court tort action against Mechetti's claims. Additionally, in light of the fact that Weiner directly spoke to the duty an insurer in Illinois' position had here, the court finds that Illinois recklessly disregarded the clear absence of a reasonable basis to refuse to defend its insured. Further, the Superior Court's subsequent decision involving this plaintiff in Mechetti v. Weisberg that Illinois must provide coverage for the claim supports this finding.⁹ The court will grant Mechetti's motion for summary

9. The court notes that it is not resting its decision solely on the Superior Court's opinion in Mechetti v. Weisberg. In Mechetti, the Superior Court stated in dicta that Illinois acted in bad faith. Mechetti argues that the doctrines of collateral estoppel and res judicata prevent the relitigation of this issue in this court. However, the issue of bad faith was not litigated before that court when it affirmed the Court of Common Pleas' decision. Similarly, the issue of bad faith was not before the Court of Common Pleas when it initially decided the coverage issue. Therefore, contrary to Mechetti's argument, the doctrines of collateral estoppel or res judicata do not apply in this situation. See Ranger Ins. Co. v. General Acc. Fire and Life

judgment.

III. CONCLUSION

For the reasons set forth above, Illinois' motion for judgment on the pleadings will be granted in part and denied in part. Mechetti's motion for summary judgment will be granted.

An appropriate Order follows.

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

DAMIEN MECHETTI	:	CIVIL ACTION
	:	
v.	:	
	:	
ILLINOIS INSURANCE EXCHANGE/ CLASSIC SYNDICATE	:	NO. 97-5855

ORDER

AND NOW, TO WIT, this day of March, 1998 upon consideration of defendant Illinois Insurance Exchange/Classic Syndicate's Motion for Judgment on the Pleadings, plaintiff Damien Mechetti's Cross Motion for Partial Summary Judgment, and the responses thereto, IT IS ORDERED that:

- (1) Illinois' Motion for Judgment on the Pleadings is DENIED IN PART and GRANTED IN PART. Illinois' motion is denied in respect to Mechetti's claim under 42 Pa. Cons. Stat. Ann. § 8371. Illinois' motion is granted with respect to Mechetti's claim under Pa. Stat. Ann. tit. 73, §§ 201-209.
- (2) Mechetti's Cross Motion for Summary Judgment on his claim under 42 Pa. Cons. Stat. Ann. § 8371 is GRANTED.

Assur. Corp., 800 F.2d 329, 330-31 (3d Cir. 1986).

(3) Mechetti shall submit to the court a petition detailing the specific relief he seeks to recover under 42 Pa. Cons. Stat. Ann. § 8371 within twenty (20) days of the date of this Order.

LOUIS C. BECHTLE, J.