

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

TRUSTEES OF THE INTERNATIONAL : CIVIL ACTION
BROTHERHOOD OF ELECTRICAL :
WORKERS LOCAL 98 PENSION PLAN, :
 :
 v. :
 :
AETNA CASUALTY & SURETY COMPANY, :
 :
 v. :
 :
LAURANCE E. BACCINI, ESQ. : NO. 97-7407

M E M O R A N D U M

WALDMAN, J.

September 11, 1998

I. Introduction

Presently before the court is third-party defendant Laurance Baccini's Motion to Dismiss the Third-party Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

The Trustees of the International Brotherhood of Electrical Workers Local 98 Pension Plan reached a settlement with the United States Department of Labor which terminated litigation that spanned seven years. The Labor Department had charged that the Plan's Trustees then serving had violated their fiduciary duties under ERISA. Defendant Aetna, which insured the Plan and its Trustees, was required to pay \$140,000 in connection with that settlement.

The Plan's current Trustees then filed this suit against Aetna claiming that it breached its contractual obligation to defend the Trustees in the prior litigation. The

Trustees also allege that Aetna provided them with inexperienced counsel who were not capable of representing the Trustees adequately. The Trustees allege that counsel provided by Aetna "did not seek to represent the former trustees' interests, but rather sought solely to advance the interests of its true client, Aetna, to the detriment of the former trustees." The Trustees allege that as a result, they were forced to spend hundreds of thousands of dollars to secure representation from their own attorney, third-party defendant Laurance Baccini.

The Trustees also assert claims against Aetna for quantum meruit recovery and bad-faith under 42 Pa. C.S.A. § 8371.

Aetna filed a third-party complaint against Mr. Baccini seeking indemnity or contribution and damages for tortious interference with contractual relations. Aetna alleges that to the extent the firm it engaged did not participate effectively in the prior litigation, it was because Mr. Baccini prevented it from doing so. Aetna alleges that on multiple occasions it informed Mr. Baccini that it had engaged another firm to represent the Trustees and would not pay for Mr. Baccini's services. Aetna alleges that Mr. Baccini nevertheless "interfered with, hindered and impeded" that firm's ability to represent the Trustees.

II. Legal Standard

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding such a motion, the court accepts as true the factual allegations in the complaint and reasonable inferences therefrom, and views them in a light most favorable to the nonmovant. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal of a claim is appropriate only when it appears beyond doubt that the claimant can prove no set of facts in support of his claim which would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

III. Discussion

A. Aetna's Common'Law Indemnity and Contribution Claims

Mr. Baccini contends that any indemnity or contribution claim against him is premature because under Pennsylvania law no such claim accrues until the party seeking indemnity has had to pay damages or, in the case of contribution, has at least suffered an adverse judgment.

Fed. R. Civ. P. 14(a) permits defendants to implead a person "who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." (emphasis added.) Rule 14(a) "permits a defendant to bring in a third-party defendant even though the defendant's claim is purely inchoate -- i.e., has not yet accrued under the

governing substantive law -- so long as the third-party defendant may become liable for all or part of the plaintiff's judgment." Andrulonis v. United States, 26 F.3d 1224, 1233 (2d Cir. 1994). See also IHP Industrial, Inc. v. Permalert, ESP, 178 F.R.D. 483, 487 (S.D. Miss. 1997) ("Rule 14 does not require that the third-party plaintiff await the outcome of the plaintiff's claim against it before it may assert its third-party claim" even when the defendant's cause of action for indemnity has not yet arisen under state law); Tormo v. Yormark, 398 F. Supp. 1159, 1175 n.20 (D.N.J. 1975) (same). Aetna's claim for indemnity or contribution is not premature.

Mr. Baccini also contends that Aetna cannot state an indemnity or contribution claim against him because he was not a party to the insurance contract the Trustees accuse Aetna of breaching, because there can be no claim for indemnity or contribution in connection with a quantum meruit claim and because he cannot be sued under § 8371 since he is not an insurer. Each of Baccini's arguments will be addressed in turn.

A right to common law indemnity does not require that the defendant sue the third-party defendant on a theory similar to that on which the plaintiff has sued the defendant. Rather, indemnity is an equitable common law remedy which shifts the loss from a party who has been compelled by reason of some legal obligation to pay a judgment occasioned by the wrongful conduct

of another. See In re One Meridian Plaza Fire Litigation, 820 F. Supp. 1492, 1496 (E.D. Pa. 1993); Willet v. Pa. Medical Catastrophe Loss Fund, 702 A.2d 850, 854 (Pa. 1997). See also Tromza v. Tecumseh Products Co., 378 F.2d 601, 604 (3d Cir. 1967) (Pennsylvania law does not limit indemnity to cases where a legal relationship exists between the party primarily liable and the party secondarily liable); Petite v. Mehl Mfg. Co., 333 F. Supp. 207, 208 (E.D. Pa. 1970) (lack of contractual or other legal relationship between defendant and third-party defendant is no defense to indemnity claim under Pennsylvania law); Eckrich v. DiNardo, 423 A.2d 727, 729 n.2 (Pa. Super. 1980) (a party "secondarily liable is entitled to indemnity for any damages he is compelled to pay from one who is primarily liable").

The court cannot conclude beyond doubt at this juncture that Aetna can prove no set of facts that would entitle it to recover on a theory of indemnity or contribution should Aetna be held liable to the Trustees for breach of contract.

Quantum meruit is a "quasi-contractual remedy in which a contract is implied-in-law under a theory of unjust enrichment; the contract is one that is implied in law, and 'not an actual contract at all.'" Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987) (internal citation omitted). The claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit

that would be unconscionable for the party to retain without compensating the provider." Id. at 999.

The essence of Aetna's claim is that to the extent that Mr. Baccini or the Trustees conferred a benefit on Aetna in the form of Mr. Baccini's services, it was a "benefit" Aetna had expressly eschewed and repeatedly advised it would not pay for. Aetna essentially pleads that it would be neither unjust nor unconscionable not to compensate Mr. Baccini for his unwanted services. Nevertheless, assuming that Aetna can be held liable in quantum meruit for receiving the unwanted benefit of Mr. Baccini's services, the court cannot conclude beyond doubt that Aetna can prove no facts effectively to demonstrate that it passively received these services due to Mr. Baccini's wrongful conduct.

Mr. Baccini cannot be sued under § 8371 if he is not an "insurer" within the ambit of the statute. It does not necessarily follow, however, that he cannot be liable for contribution if he engaged in wrongful conduct which induced or contributed to a violation of § 8371 by an insurer. A defendant may not assert a third-party claim for contribution for intentional tortious conduct. See In re One Meridian Plaza, 820 F. Supp. at 1496; Canavin v. Naik, 648 F. Supp. 268, 269 (E.D. Pa. 1986). An insurer, however, may be liable under § 8371 for reckless as well as intentional conduct.

The claim for indemnity is another matter. Aetna could only recover in indemnity if it were held liable to the Trustees. Aetna cannot be held liable to the Trustees absent clear and convincing evidence that Aetna had no reasonable basis for failing adequately to defend the Trustees and knew or recklessly disregarded such a reasonable basis. See *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 899 F. Supp. 1385, 1396 (E.D. Pa. 1995), aff'd 91 F.3d 13 (3d Cir. 1996), cert. denied 117 S. Ct. 737 (1997). Such proof necessarily entails a finding that Aetna was not merely secondarily or passively liable.

B. Aetna's Claim for Tortious Interference With Contract

Under Pennsylvania law, a plaintiff claiming for tortious interference with contractual relations must prove:

- (1) the existence of a contractual relation between itself and a third party;
- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation;
- (3) the absence of a privilege or justification on the part of the defendant;
- (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 530 (3d Cir. 1998).

Mr. Baccini contends that Aetna cannot state a claim against him for tortious interference with contract because his actions were privileged and he was acting as the Trustees' agent.

Courts have recognized a broad privilege which protects attorneys from being sued by third parties as a consequence of the advice they give to their clients in good faith. See, e.g., World-Wide Marine Trading Corp. v. Marine Transport Service, Inc., 527 F. Supp. 581, 583-86 (E.D. Pa. 1981); Macke Laundry Service Ltd. Partnership v. Jetz Service Co., Inc., 931 S.W.2d 166, 180-82 (Mo. Ct. App. 1996); Beatie v. DeLong, 561 N.Y.S.2d 448, 451-52 (Sup. Ct. App. Div. 1990). These same decisions, however, recognize limits to the privilege when the attorney's conduct consisted of "self-interested activity" beyond the proper scope of the practice of law, see World-Wide Marine Trading Corp., 527 F. Supp. at 584, when the attorney utilized wrongful means or acted in bad faith, see Macke Laundry Service Ltd. Partnership v. Jetz Service Co., Inc., 931 S.W.2d at 182, or when the attorney acted fraudulently, with malice or in bad faith, see Beatie, 561 N.Y.S.2d at 451. The court cannot conclude beyond doubt at this juncture that Aetna can prove no set of facts which would overcome this privilege.

Mr. Baccini argues that any communications Aetna might seek to discover to overcome the privilege would themselves be protected by the attorney-client privilege and thus not subject to discovery. A motion to dismiss tests the legal sufficiency of a pleading and not whether a party who asserts a facially cognizable claim will ultimately be able to sustain it. It is

not impossible that Aetna may adduce relevant non-privileged evidence sufficient to overcome any attorney-advice privilege.

Mr. Baccini's argument that he cannot be liable for tortious interference because an agent's actions are attributed to his principal who cannot tortiously interfere with his own contract presumes an agent acting within the scope of his authority. Consistent with the allegations in its third-party complaint, Aetna may be able to show that Mr. Baccini was not. Under Pennsylvania law, an agent may be held liable for intentionally interfering with his principal's contract if the agent was acting outside the scope of his authority. See, e.g., American Trade Partners, Inc., v. A-1 International Importing Enterprises, Ltd., 757 F. Supp. 545, 555 (E.D. Pa. 1991).

IV. Conclusion

Consistent with the foregoing, third-party defendant Baccini's motion will be granted as to the claim for indemnification in connection with plaintiffs' § 8371 claim and will otherwise be denied. An appropriate order will be entered.

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O R D E R

AND NOW, this day of September, 1998, upon consideration of the Motion of third-party defendant Laurance Baccini to dismiss the Third-Party Complaint (Doc. #7) and defendant's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part in that the third-party claim for indemnification in connection with plaintiffs' bad faith insurance claim is **DISMISSED** and said Motion is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.