

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

FRANCES M. BAGDEN : CIVIL ACTION
: :
v. : :
: :
THE EQUITABLE LIFE ASSURANCE : :
SOCIETY OF THE UNITED STATES : NO. 99-CV-66

M E M O R A N D U M

Ludwig, J.

February 5, 1999

Defendant Equitable Life Assurance Society of the United States moves to dismiss Counts II through VII of the complaint. Fed. R. Civ. P. 12(b)(6).¹ Jurisdiction is diversity. 28 U.S.C. § 1332. The motion will be granted in part and denied in part.

This action is for payment benefits alleged to be due under a disability insurance policy issued on November 14, 1990. In April 1995, plaintiff began to receive payments for disability. In October 1998, these were terminated based on an independent medical exam performed for defendant. The complaint asserts breaches of contract, of the duty of good faith, and of fiduciary duty, fraud, violation of the Unfair Insurance Practices Act, bad faith, and violation of the Unfair Trade Practices and Consumer Protection Law.

The motion to dismiss will be ruled on as follows:

¹ Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle her to relief. See Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997).

1. Breach of the duty of good faith and breach of fiduciary duty (Counts II and III) – Granted. “There is no common law private remedy for bad faith conduct” in Pennsylvania. PolSELLI v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 530 (3d Cir. 1997); see also Johnson v. Beane, 541 Pa. 449, 455 n.3, 664 A.2d 96, 99 n.3 (1995) (“[T]here is no common law remedy in Pennsylvania for bad faith on the part of insurers. However, the Pennsylvania Legislature has created a statutory remedy in 42 Pa.C.S.A. § 8371, which became effective on July 1, 1990.” (citation omitted)); Terletsky v. Prudential Property & Cas., 437 Pa. Super. 108, 124, 649 A.2d 680, 688 (1994) (same).² “The Pennsylvania Supreme Court treats the breach of the contractual duty of good faith and breach of fiduciary duty synonymously in the context of insurance cases.” Greater N.Y. Mut. Ins. Co v. North River Ins. Co., 872 F. Supp. 1403, 1409 (E.D. Pa. 1995) (citing Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 188 A.2d 320, 322 (1963)), aff’d, 85 F.3d 1088 (3d Cir. 1996).

2. Fraud (Count IV) – Denied.³ The complaint alleges sufficient facts to support a claim of fraud: “(1) a misrepresentation; (2) which is material to the transaction at

²Plaintiff contends that Jung v. Nationwide Mut. Fire Ins. Co., 949 F. Supp. 353 (E.D. Pa. 1997) recognizes the common law remedy for breach of good faith. However, the Pennsylvania bad faith statute – not common law – was the basis of the Jung claim. See id. at 354-55.

³The motion to strike Count IV for failure to plead fraud with particularity as required by Rule 9(b) is also denied.

hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994).

3. Breach of the Unfair Insurance Practices Act (Count V) – Granted. There is no private remedy under the Unfair Insurance Practices Act. See Sabo v. Metro. Life Ins. Co., 137 F.3d 185, 192 (3d Cir. 1998) ("[T]he UIPA does not allow private causes of action."); Caplan v. Kaskey, Eichen, Braverman & Kaskey, 5 F. Supp. 2d 299, 302 (E.D. Pa. 1998) ("It is now well established . . . that the UIPA can only be enforced by the state insurance commissioner and not by way of private action.").

4. Bad faith under section 8371 (Count VI) – Denied without prejudice. "[T]o recover under a claim of bad faith [under section 8371], the plaintiff must show that the defendant did not have a reasonable basis for denying benefits under the policy and that defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim." Terletsky, 437 Pa. Super. at 125, 649 A.2d at 688. Plaintiff contends that benefits were terminated based on an independent medical examination. Compl. ¶¶ 12, 15; pl.'s br. at 8. Although this could be a reasonable basis to deny benefits, the motion will be denied to allow further factfinding.

5. Violation of Unfair Trade Practices and Consumer Protection Law (Count VII) – Granted as to the termination of benefits; otherwise, denied. “In Pennsylvania, only malfeasance, the improper performance of a contractual obligation, raises a cause of action under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq., and an insurer’s mere refusal to pay a claim which constitutes nonfeasance, the failure to perform a contractual duty, is not actionable.” Horowitz v. Federal Kemper Life Assurance, 57 F.3d 300, 307 (3d Cir. 1995). Although the essence of plaintiff’s claim is defendant’s refusal to pay benefits, the complaint also alleges that defendant misrepresented the nature of its contractual obligations and defrauded plaintiffs. Compl. ¶ 50. Accordingly, defendant’s motion is granted only as to the termination of benefits.

Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 5th day of February, 1999, the motion to dismiss of defendant Equitable Life Assurance Society of the United States is granted as to Counts II, III, and V, denied as to Counts IV and VI, and granted in part and denied in part as to Count VII. Fed. R. Civ. P. 12(b)(6).

A memorandum accompanies this order.

Edmund V. Ludwig, J.