

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

THE NORWOOD COMPANY	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
RLI INSURANCE COMPANY, et al.	:	
Defendants.	:	NO. 01-CV-6153

Reed, S.J.

April 1, 2002

MEMORANDUM

Plaintiff The Norwood Company (“Norwood”), brings this diversity action against the defendants RLI Insurance Company (“RLI”) and Great American Insurance Company (“Great American”) for alleged breach of surety bonds issued by each defendant to non-party Bennett Composites, Inc. (“Bennett”). Presently before the court is what RLI labels a motion to strike Count Two of the complaint, which asserts a bad faith claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Document No. 14), and the response, reply and sur-reply thereto. For the reasons which follow, this Court will consider this motion as one for a judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) and will grant the motion.

I. Background¹

Norwood hired Bennett as a subcontractor to produce and install glass fiber reinforced concrete panels for a construction project in King of Prussia, Pennsylvania. (Compl. ¶ 11.) On or about March 30, 2001, Bennett, as principal, and RLI, as surety, issued a performance bond naming Norwood as obligee. (Id. ¶ 12.) Thereafter, Bennett failed to perform its obligations under the subcontract. (Id. ¶¶ 13-14.) By letter to Bennett dated October 22, 2001, Norwood

¹ The facts laid out in this section are taken from the complaint and viewed in the light most favorable to Norwood. See Green v. Fund Asset Mgmt. L.P., 245 F.3d 214, 220 (3d Cir. 2001).

declared Bennett in default of its obligations under the subcontract. (Id. ¶ 20.) On that same day, Norwood notified RLI of Bennett's default and demanded that RLI either complete the contract in accordance with its terms or take steps necessary to assure that Bennett complete the contract. (Id. ¶ 21.) In response, by letter dated October 30, 2001, RLI advised that there was a dispute regarding the claim and that it could take no action in the matter. (Id. ¶ 22.) Norwood alleges that RLI has failed to take any action to have the contract obligations performed, thus breaching its obligations as surety under the performance bond, (Id. ¶¶ 23-24), and that RLI failed to reasonably investigate Norwood's claim for relief under the bond, (Id. ¶¶ 29-30.) It is alleged that these failures constitute bad faith. (Id. ¶¶ 37-38.)

II. Standard

RLI labels its motion as a “motion to strike.” As Norwood aptly points out, the Federal Rules of Civil Procedure, which govern the motions filed in this federal Court, include no such motion. RLI is under the mistaken belief that it has filed a motion pursuant to Federal Rule of Civil Procedure 12(b)(6). Before filing this motion, however, RLI filed an answer (Document No. 10). If defendant had read Rule 12(b)(6), it would have discovered that a party may not file a 12(b)(6) motion *after* it has opted to answer the complaint. A further reading of the Rules would have led to the discovery that a motion for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), may be filed at any time “[a]fter the pleadings are closed but within such time as to not delay the trial,” and may include the defense that the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(c), (f). Accordingly, this Court will interpret the present motion as a motion for judgment on the pleadings.

Where a 12(c) motion is premised on the failure to state a claim upon which relief may be granted, the court is directed to apply the same standards employed under 12(b)(6). See Turbe v.

Gov't of the Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991) (collecting cases); Katzenmoyer v. City of Reading, 158 F. Supp. 2d 491, 496 (E.D. Pa. 2001); 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 at 515 (2d ed. 1990). Accordingly, I must “view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the ... non-moving party.” Green v. Fund Asset Mgmt. L.P., 245 F.3d 214, 220 (3d Cir. 2001) (quoting Gordon & Breach, 931 F.2d at 1004). A motion to dismiss should be granted if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984).

III. Analysis

As both parties recognize, neither the Pennsylvania Supreme Court, nor the intermediate appellate courts, nor the Court of Appeals for the Third Circuit, have addressed the issue of whether a surety can be sued for bad faith under 42 Pa. C.S.A. § 8371, which provides:

§ 8371. Actions on insurance policies

In an action arising *under an insurance policy*, if the court finds that the *insurer* has acted in bad faith toward the *insured*, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the *insured* an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the *insurer*.
- (3) Assess court costs and attorney fees against the insurer.

(emphasis added). Therefore, this court must predict how the Pennsylvania Supreme Court would rule on this issue. See Packard v. Provident National Bank, 994 F.2d 1039, 1046 (3d Cir. 1993). In attempting to forecast state law, this Court “consider[s] relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.” Id.

RLI argues that this Court should adopt the holding of Chief Judge Giles in Superior Precast, Inc. v. Safeco Insurance Co. of America, 71 F. Supp. 2d 438 (E.D. Pa. 1999), and predict that the Pennsylvania Supreme Court would rule that § 8371 does not include sureties in its purview. Norwood essentially counters that the reasoning in Superior Precast is flawed and that this Court should interpret § 8371 *in pari materia* with § 1171.3 of the Unfair Insurance Practice Act (“UIPA”), 40 P.S. 1171.1, *et. seq.*, which includes a suretyship in its definition of insurance policy or contract.

Norwood claims that the courts which have addressed this issue are split. A close reading of the existing cases, however, shows otherwise. Two district court opinions and one court of common pleas are in accord with the decision of Judge Giles. See Pullman Power Prod Corp. v. Fidelity and Guaranty Ins. Co., Civ. A. No. 96-636, 1997 U.S. Dist. LEXIS 23554 (W.D. Pa. Feb. 21, 1997); Allegheny Valley Joint Sewage Auth/ v. American Ins. Co., Civ. A. No. 94-2105, 1995 U.S. Dist. LEXIS 22091 (W.D. Pa. Aug. 17, 1995); M.A. Bruder & Sons Inc. v. Williams, 47 Pa. D. & C.4th 243 (2000). Another district court concluded that the record contained insufficient facts to support a finding of bad faith; it appears, however, the parties did not litigate whether a bad faith claim could legally be asserted. See Turner Constr. Co. v. First Indemnity of Am. Ins. Co., 829 F. Supp. 752, 763-64 (E.D. Pa. 1996). A different district court relied on Turner for the statement that “[c]ourts have extended [§ 8371] to actions against sureties,” without further analysis. See Reading Tube Corp. v. Employers Ins. of Wausau, 944 F. Supp. 398, 403 (E.D. Pa. 1996). A common pleas court permitted a plaintiff to amend the complaint to include such a claim, concluding that “there does not exist positive rule of law which would prohibit the proposed amendment.” Pensy Supply, Inc. v. Mountbatten Sur. Co., Inc., 117 Dauph. 343, 345 (1997). Thus, those courts which have directly and thoroughly analyzed this

issue have held that a bad faith claim cannot be asserted against a surety under § 8371.

Statutory construction begins with the actual words of the statute. See, e.g., Superior Precast, 71 F. Supp. 2d at 450. Where an Act does not include a precise definition, “statutes are presumed to employ words in their popular and plain everyday sense, and the popular meaning of such words must prevail.” Centolanza v. Lehigh Valley Dairies, Inc., 540 Pa. 398, 406, 658 A.2d 336, 340 (1995). This Court is to “presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992) (citations omitted).

The title of § 8371 provides: “Actions on insurance policies,” and the clear, unequivocal and unambiguous language of this section reads, in pertinent part, that the section applies only “in an action arising under an insurance policy.” A policy of insurance is defined in Black’s Law Dictionary as: “An instrument in writing, by which one party (insurer), in consideration of a premium, engages to indemnify another (insured) against a contingent loss, by making him a payment in compensation, whenever the event shall happen by which the loss is to accrue.” Black’s Law Dictionary 1156 (6th ed. 1991). A contract of suretyship is a unique tripartite legal relationship whereby “one person engages to be answerable for the debt, default or miscarriage of another.” Id. at 1442. As Judge Giles observed, not only has “the United States Supreme Court . . . noted that ‘the usual view, grounded in commercial practice, [is] that suretyship is not insurance,’” Superior Precast, 71 F. Supp. 2d at 451 (quoting Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 n.19, 83 S. Ct. 232, 236 n.19, 9 L. Ed. 2d 190 (1962)), but Pennsylvania courts have agreed, acknowledging that there exists “‘fundamental differences’” between bilateral contracts of insurance and tripartite surety agreements, id. (quoting Grode v. Mutual Fire, Marine

and Inland Ins. Co., 132 Pa. Commw. 196, 213, 572 A.2d 798, 806 (1990), aff'd in relevant part sub nom. Foster v. Mutual Fire, Marine and Inland Ins. Co., 531 Pa. 598, 623, 614 A.2d 1086, 1099 (1992)).² See also Pullman Power, 1997 U.S. Dist. LEXIS 23554, at *9-10 (noting same distinct differences). Accordingly, the plain and popularly used language of the statute indicate that a suretyship is not included in § 8371's reach.

Norwood contends that because § 8371 was enacted in response to the Pennsylvania Supreme Court's refusal in D'Ambrosio v. Pennsylvania. National Mutual Casualty Insurance Co., 494 Pa. 501, 431 A.2d 966 (1981), to recognize a private cause of action under UIPA, this Court should import the UIPA's definition of insurance policy and § 8371. While this argument has initial surface appeal, for the following reasons, I am inclined to disagree with plaintiff. The clear purpose of the UIPA is "to regulate trade practices in the business of insurance." 40 P.S. § 1171.3. The definitions contained therein expressly apply to the terms "as used in this act." Id. The Act vests the Insurance Commissioner of the Commonwealth of Pennsylvania with the authority to investigate the specifically defined acts and practices of insurers. § 1171.7. Section 8371, enacted as a separate statute in response to D'Ambrosio, has the more narrow purpose of providing a private cause of action for insureds against insurers. See Superior Precast, 71 F. Supp. 2d at 453; Pullman Power, 1997 U.S. Dist. LEXIS 23554, at *12.

The key weakness in Norwood's primary argument is that it would require this Court to look beyond the ordinary meaning of the term "insurance policy," which runs counter to the above outlined rules of statutory construction. Where a statutory term is given a clear and specific meaning in an earlier statute, but not defined in the latter statute, this Court must

² The Court in Superior Precast also cited to two legal treatises in support of the conclusion that there are important distinctions between suretyship and insurance contracts. See id. at 451-51 (citing 74 Am. Ju. 2d Suretyship § 253 (1974) and 44 C.J.S. Insurance § 2(b) (1993)).

presume that the omission was intended by the legislature and that the specific and special definition does not extend to the latter statute. See Superior Precast, 71 F. Supp. 2d at 454 (citing Creighan v. Firemen’s Relief and Pension Fund Bd., 397 Pa. 419, 422, 155 A.2d 844, 846 (1959)). See also Commonwealth v. Moon, 383 Pa. 18, 27, 117 A.2d 96,101 (1955) (“It is a canon of statutory construction that where words on a later statute differ from those of a previous one on the same subject, they presumably are intended to have a different construction.”); Commonwealth v. Pavia Co., 381 Pa. 488, 491, 113 A.2d 224, 226 (1955) (same). Put bluntly, had the state legislature meant to create a private cause of action for bad faith claims encompassing every instrument covered in the UIPA, it would have opted to either amend the UIPA or specifically incorporate the UIPA’s definition section into § 8371. See Superior Precast, 71 F. Supp. 2d at 454; Pullman Power, 1997 U.S. Dist. LEXIS 23554, at *12; Allegheny Valley, 1995 U.S. Dist. LEXIS 22091, at *11. The legislature did not so opt.

Norwood invites this Court to give a liberal construction to § 8371 because it is a remedial statute. I do not dispute that remedial statutes are to be liberally construed; however, penal statutes are to be strictly construed, see Commonwealth of Pa. v. Stallworth, 781 A.2d 110, 124 (Pa. 2001) (citing 1 Pa. C.S. § 1921(a)), and the Pennsylvania Supreme Court has characterized punitive damages as being “purely penal in nature,” Hoy v. Angelone, 554 Pa. 134, 142, 720 A.2d 745, 749 (1998); G.J.D. v. Johnson, 552 Pa. 169, 172, 713 A.2d 1127, 1129 (1998). Section 8371(2) allows for the recovery of punitive damages; accordingly, I will not construe the provision liberally. See Superior Precast, 71 F. Supp. 2d at 453 (employing similar analysis).

I conclude with the following observation. Assuming, *arguendo*, that suretyship is included in the meaning of insurance policy, the act only allows insureds to bring actions against

insurers. This dynamic is inherent in the relationship among the parties to an insurance contract and implies contractual privity. A surety, such as RLI, and a protected party, such as Norwood, share no such direct contractual relationship. Their relationship is more akin to that of an injured third-party claiming against the insured under a traditional liability insurance contract, and that of an insurer. The Pennsylvania intermediary appellate court has held that an injured third-party as plaintiff in a personal injury action is prohibited from asserting a bad faith action against the tortfeasor's insurance company unless these rights have been expressly assigned by the policyholder. See Marks v. Nationwide Ins. Co., 762 A.2d 1098 (Pa. Super. 2000); Brown v. Nationwide Ins. Co., 708 A.2d 104 (Pa. Super. 1998). Here, even if § 8371 permitted a bad faith claim to be asserted against a surety, the language of the statute would only permit the principal (Bennett) to bring an action against the surety (RLI) under § 8371, but the obligee (Norwood), like the injured third-party plaintiff, would have no direct cause of action for bad faith against RLI.

IV. Conclusion

For the foregoing reasons, I conclude that the plain language of § 8371 indicates that a statutory bad faith claim may not be asserted against a surety under Pennsylvania law. While Norwood makes an earnest attempt to convince this Court otherwise, the proper construction of the statute favors RLI. I will therefore grant the motion for judgment on the pleadings with respect to Count Two.

An appropriate Order follows.

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THE NORWOOD COMPANY	:	CIVIL ACTION
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v.	:	
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RLI INSURANCE COMPANY, et al.	:	
Defendants.	:	NO. 01-CV-6153

ORDER

AND NOW this 1st day of April, 2002, upon consideration of the motion of defendant RLI Insurance Company (“RLI”) to strike Count II of the complaint pursuant to Rule 12(b)(6) (Document No. 14), and the response, reply and sur-reply thereto, and having concluded for reasons set forth in the foregoing memorandum that this motion should be considered as one for judgment on the pleadings pursuant to Rule 12(c), and that plaintiff has failed to state a cause of action for bad faith against RLI as a surety, it is hereby **ORDERED** that the motion is **GRANTED** and Count Two of the complaint is **DISMISSED** with prejudice

LOWELL A. REED, JR., S.J.