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

DANIEL ORRISON, ET AL.	:	CIVIL ACTION
	:	
v.	:	
	:	
FARMERS NEW CENTURY INSURANCE COMPANY	:	NO. 04-CV-1003

MEMORANDUM

Padova, J. **June 8, 2004**

Plaintiffs, Daniel and Linda Orrison, have brought this action for breach of a homeowner's insurance contract, bad faith, negligence, and negligent misrepresentation against Farmers New Century Insurance Company ("Farmers"). Defendant has moved to dismiss Counts II - IV of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") for failure to state a claim upon which relief may be granted. For the reasons that follow, the Motion is granted in part and denied in part.

I. BACKGROUND

The Complaint alleges that Farmers issued a homeowners' insurance policy, Policy No. 92096-43-88, covering Plaintiffs' premises at 3961 Mechanicsville Road, Bensalem, Pennsylvania (the "Policy"). (Compl. ¶ 3.) On June 24, 2002, while the Policy was in full force and effect, Plaintiffs suffered a physical loss to the insured premises resulting in damage to several areas of the premises, including the infiltration of water into the interior of the home. (Compl. ¶ 5.) Plaintiffs promptly gave Farmers notification of their loss. (Compl. ¶ 6). Farmers determined that

Plaintiffs had suffered a covered loss and paid certain benefits to Plaintiffs, including benefits for the replacement of their roof. (Compl. ¶ 7.) Farmers, in accordance with the Policy, retained Mark Irwin to replace Plaintiffs' roof. (Compl. ¶ 7.) Plaintiffs' roof was replaced by Irwin either through his own company or through a subcontractor. (Compl. ¶ 7.)

Not long thereafter, Plaintiffs discovered mold growth on the underside of their new roof, in the attic, and in other areas of their home. (Compl. ¶ 8.) They promptly notified Defendant, who investigated and refused to provide coverage for the mold growth. (Compl. ¶ 8.) The mold growth was due in whole or in part to Farmers' roofer's improper installation of the roof, which affected the ventilation within the home and provided an environment which encouraged mold growth. (Compl. ¶ 9.) The mold growth was also caused by the infiltration of water into Plaintiffs' home on June 24, 2002. (Compl. ¶ 10.) As a result of the mold growth, Plaintiffs have suffered damage to their home, personal property, and health. (Compl. ¶ 11.)

The Complaint asserts causes of action for breach of contract (Count I) and bad faith in violation of 42 Penn. Cons. Stat. Ann. § 8371 (Count II). The Complaint also alleges negligence and negligent misrepresentation claims (Counts III and IV).

II. LEGAL STANDARD

"The test for reviewing a 12(b)(6) motion is whether under any

reasonable reading of the pleadings, plaintiff may be entitled to relief." Simon v. Cebrick, 53 F.3d 17, 19 (3d Cir. 1995). The court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. DISCUSSION

Farmers has moved to dismiss Count II of the Complaint on the grounds that the Complaint fails to adequately state a claim for bad faith under Pennsylvania law. Additionally, Farmers has moved to dismiss Counts III and IV of the Complaint on the grounds that, in Pennsylvania, breach of contract is the exclusive remedy for failure to pay the proceeds of an insurance policy, and state law does not provide a cause of action based on negligence or tort theories for the failure to pay the proceeds of an insurance policy.

A. Bad Faith

Count II of the Complaint alleges a claim against Farmers for insurance bad faith based on Farmers' treatment of Plaintiffs pertaining to their covered loss and Farmers' refusal of coverage for the mold damage to the property. The Pennsylvania insurance

bad faith statute provides as follows:

> 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 in 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.

42 Pa. Cons. Stat. Ann. § 8371. "To establish a claim for bad faith denial of insurance coverage under Pennsylvania law, a Plaintiff must prove by clear and convincing evidence that: the insurer (1) lacked a reasonable basis for denying coverage, and (2) knew or recklessly disregarded its lack of a reasonable basis." Justofin v. Metropolitan Life Ins. Co., No.CIV.A. 01-6266, 2002 WL 1773007, (E.D. Pa. July 29, 2002) at *7 (citing Adamski v. Allstate Ins. Co., 738 A.2d 1033, 1036 (Pa. Super. Ct. 1999), appeal denied, Goodman v. Durham, 759 A.2d 387 (Pa. 2000)).

Farmers argues that Count II should be dismissed pursuant to Rule 12(b)(6) because the Complaint does not allege that Farmers acted without a reasonable basis, or with the knowledge that it lacked a reasonable basis, in investigating and denying Plaintiffs' claim. However, the Complaint does plead that the Defendant engaged in bad faith conduct toward Plaintiffs. The Complaint sets forth the basic facts of the Plaintiffs' interaction with Farmers, including the issuance of the insurance

policy, the coverage of the initial loss, and Farmers' refusal to provide coverage for the mold growth. The Complaint specifically avers that Farmers did not have a reasonable basis for denying Plaintiffs' benefits and that Farmers knowingly or recklessly disregarded its lack of reasonable basis when it denied Plaintiffs' claim. (Compl. ¶ 18(f).) Under Rule 8 of the Federal Rules of Civil Procedure, "[t]he complaint will be deemed to have alleged sufficient facts if it adequately put the defendants on notice of the essential elements of the plaintiffs' cause of action." Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). Count II of the Complaint provides Defendant with adequate notice of the bad faith claim and the basis on which it rests. Consequently, the Motion to Dismiss will be denied with respect to Count II of the Complaint.

B. Negligence and Negligent Misrepresentation

Counts III and IV of the Complaint allege claims for negligence and negligent misrepresentation pertaining to both Plaintiffs' initial loss and the mold growth in their home. Count III alleges that Defendant was negligent in selecting a contractor to perform repairs to Plaintiffs' home, in failing to properly inspect Plaintiffs' home, and in failing to provide compensation sufficient to enable them to prevent the growth of mold. Count IV alleges that Defendant was negligent in its representation to Plaintiffs that the repair plan for Plaintiffs' property was

adequate to repair the damages related to the initial loss.

Farmers argues that Plaintiffs' negligence and negligent misrepresentation claims should be dismissed on the grounds that the "gist of the action" doctrine bars Plaintiffs from recasting breach of contract claims as tort claims.[1] "When a plaintiff alleges that the defendant has committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is 'collateral' to conduct that is primarily tortious." Yocca v. Pittsburgh Steelers Sports, Inc., 806 A.2d 936, 944 (Pa. Cmwlth. Ct. 2002) (citing Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D.Pa. 1999)). "[T]he important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Phico Ins. Co. v. Presbyterian Med. Serv. Corp., 663 A.2d 753, 757 (Pa. Super. Ct.

[1]The "gist of the action" doctrine is one of three approaches taken by the Pennsylvania courts in determining whether a cause of action arising from a contractual relationship should be brought in contract or tort. The other two are the economic loss doctrine and the misfeasance/nonfeasance distinction. Although the Supreme Court of Pennsylvania has not yet adopted the gist of the action doctrine (or the other two approaches), the Pennsylvania intermediate appellate courts and a number of the United States District Courts have predicted that it would. See Air Products and Chemicals, Inc. v. Eaton Metal Products, Co., 256 F. Supp. 2d 329, 340 (E.D. Pa. 2003) (collecting cases).

1995) (citing Bash v. Bell Telephone Co., 601 A.2d 825 (Pa. Super. Ct. 1992)).

Plaintiffs argue that their negligence and negligent misrepresentation claims pertaining to Farmers' selection of a contractor to repair their home, his repair plan, and the work performed by that contractor are not barred by the gist of the action doctrine. They maintain that Farmers exceeded the scope of its duties under the Policy by selecting the contractor who repaired their roof and, in doing so, undertook an extra-contractual duty to exercise reasonable care. The Restatement (Second) of Torts provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (2d) of Torts § 323. However, Plaintiffs allege in the Complaint that Defendant retained the services of a contractor "in accordance with its options under the applicable insurance policy." (Compl. ¶ 7.) When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 at 1261. The Complaint alleges that selection of the contractor falls within

the bounds of Farmers' policy. Consequently, the "gist" of Plaintiffs' negligence and negligent misrepresentation claims pertaining to Farmers' selection of a contractor to repair their home, his repair plan, and the work conducted by that contractor sound in contract. Additionally, the allegations of the Complaint pertaining to Defendant's failure to: 1) properly inspect Plaintiffs' home after the initial loss; 2) provide compensation for the repair of areas in Plaintiffs' home that would permit the growth of mold; 3) cover germicides; 4) notify Plaintiffs of the hazards of water filtration; 5) warn Plaintiffs of its failure to provide proper compensation for the initial loss; and 6) provide compensation for mold growth, all arise out of the contractual relationship between Plaintiffs and Defendant. Consequently, the Motion to Dismiss is granted with respect to Plaintiffs' claims for negligence and negligent misrepresentation in Counts III and IV of the Complaint.

An appropriate order follows.

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O R D E R

AND NOW, this 8th day of June, 2004, upon consideration of Defendant's Motion to Dismiss the Complaint (Docket No. 3), and Plaintiffs' response thereto, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part as follows:

1. Defendant's Motion to Dismiss Count II of the Complaint is **DENIED**.

2. Defendant's Motion to Dismiss Counts III and IV of the Complaint is **GRANTED**.

BY THE COURT:

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John R. Padova, J.