

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

FREDERICK & EMILY’S, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	NO. 03-CV-6589
WESTFIELD GROUP,	:	
Defendant.	:	

Diamond, J.

Memorandum

Defendant Westfield Group asks the Court (1) to sever the breach of contract claim brought by Plaintiff Frederick & Emily’s, Inc. from Plaintiff’s bad faith claim; and (2) to stay discovery relative to Frederick’s bad faith claim until the contract claim is resolved. I deny Westfield’s motion.

I. Background

Frederick, a church pew restorer, has alleged that in November 2002, it purchased from Westfield a commercial property insurance policy that includes business interruption coverage. Frederick further alleges that a March 5, 2003 fire at its offices interrupted Frederick’s business, resulting in lost income compensable under the insurance policy. Westfield, believing that the fire did not cause Frederick to lose any income, denied Frederick’s claim. On October 29, 2003, Frederick sued Westfield in the Lancaster County Common Pleas Court, alleging breach of contract and bad faith under 42 Pa.C.S. § 8371. On December 8, 2003, Westfield removed the case to this Court.

II. The Motion to Sever and Stay

Westfield argues primarily that judicial economy weighs heavily in its favor: that a defense verdict on the breach of contract claim would necessarily dispose of Plaintiff's § 8371 claim. In that circumstance, Westfield believes the efforts of the parties and the Court expended on the bad faith claim would have been wasted.

Westfield also argues that denial of its severance motion will be highly prejudicial. Allowing discovery on the § 8371 claim, in Westfield's view, will not only dramatically expand discovery, it will give Frederick access to Westfield's trade secrets and proprietary information. Westfield also argues that trying the breach of contract and § 8371 claims together will compound the prejudice: evidence relevant to the § 8371 claim will inflame the jury; the differing standards of proof (preponderance of evidence on the breach of contract claim; clear and convincing evidence on the § 8371 claim) will be impossibly confusing.

Finally, Westfield argues that the delay resulting from proceeding first with the breach of contract claim would not be prejudicial because Frederick could receive delay damages should it ultimately prevail on both its claims.

III. Discussion

Federal Rule of Civil Procedure 21 provides that "any claim against a party may be severed and proceeded with separately." FED. R. CIV. P. 21 (2004). In applying this Rule, a court has considerable discretion in determining whether or not to grant a severance. Grigsby v. Kane, 250 F. Supp. 2d 453, 456 (M.D. Pa. 2003); Rodin Properties-Shore Mall, N.V. v. Cushman & Wakefield of Pennsylvania, Inc., 49 F. Supp. 2d 709, 721 (D.N.J. 1999). Although a court may sever "for any sound reason of judicial administration," 10-54 Moore's Federal Practice - Civil §

54.29 [7] [c], it must first balance several factors, including “the convenience of the parties, avoidance of prejudice to either party, and promotion of expeditious resolution of the litigation.” United States v. AMTRAK, No. 86-1094, 2004 U.S. Dist. LEXIS 10867, at *21-22 (E.D. Pa. Jun. 15, 2004) (quoting Official Comm. of Unsecured Creditors v. Shapiro, 190 F.R.D. 352, 355 (E.D. Pa. 2000)).

In the circumstances of this case, there is no “balance” to strike: all the factors weigh heavily against severance. Westfield’s claims of “prejudice,” however heated, appear to have little substance. For instance, Westfield argues that allowing discovery on the § 8371 claim will dramatically expand discovery and compromise Westfield’s proprietary information. Westfield does not remotely explain why this is so, and the Record appears to show the opposite. There is a very considerable overlap between Frederick’s discovery requests intended to obtain evidence relevant to both the breach of contract and § 8371 claims. Indeed, only three interrogatories (and corresponding document requests) appear to be directed specifically at “bad faith” evidence:

Interrogatory 25 states: “*How is the March 5, 2003 loss in this action outside of policy guidelines?*”

Interrogatory 30 states: “*Why did Defendant fail to refuse to settle in good faith or negotiate in good faith to settle this action?*”

Interrogatory 34 states: “*How is Defendant’s failure to settle Plaintiff’s action not bad faith?*”

Westfield does not adequately explain how answering these questions or producing related documents will compromise sensitive or proprietary information. Moreover, Westfield does not suggest that information relevant to the § 8371 claim is so sensitive that it is undiscoverable. Rather, Westfield seeks only to delay its discovery until after the company is found to have breached the insurance agreement. Further, corporate state of mind evidence of

this type is commonly the focus of commercial litigation. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 676 F.2d 51 (3d Cir. 1982) (state of mind relevant in patent and antitrust litigation to determine whether company intended to defraud the Patent Office); Martin v. PNC Fin Servs. Group, No. 02-7191, 2003 U.S. Dist. LEXIS 15552 (E.D. Pa. Jul. 24, 2003) (company's state of mind relevant in securities fraud litigation); Specialty Ins. v. Royal Indem. Co., No. 99-3689, 2004 U.S. Dist. LEXIS 13386, at *13-16 (E.D. Pa. Jul. 9, 2004) (inquiry into corporation's state of mind to determine breach of covenant of good faith and fair dealing claim). In these circumstances, Westfield has not made out prejudice warranting a stay of discovery and a severance. Should Frederick dramatically expand its discovery requests, calling for the production of evidence whose proprietary nature cannot be shielded by a confidentiality agreement, Westfield is, of course, free to seek appropriate protective relief.

Westfield also argues in very general terms that the presentation of "bad faith" evidence will inflame the trial jury. Surely Westfield here inadvertently suggests too much. If the jury is indeed incensed by "bad faith" evidence, this rather strongly suggests that once Frederick is provided the discovery to which it is entitled, it will find evidence supporting its "bad faith" claim. The presentation of such evidence would simply prove that claim; it would not unfairly prejudice Westfield. If Westfield can show the existence of specific evidence whose prejudicial impact on the jury will greatly outweigh its probative value regardless of even a strong cautionary instruction, I would be prepared to revisit this issue. Until Westfield makes such a showing, however, the drastic remedy of severance is not warranted.

Westfield's claim that differing standards of proof will confuse the jury is also unpersuasive. Juries commonly determine claims of civil fraud -- which must be proven by clear

and convincing evidence -- along with claims subject to a preponderance standard. Fallowfield Dev. Corp. v. Strunk, No. 89-8644, 1994 U.S. Dist. LEXIS 12758 (E.D. Pa. Sep. 9, 1994); Tyler v. O'Neill, No. 97-3353, 1998 U.S. Dist. LEXIS 20007 (E.D. Pa. Dec. 15, 1998).

In any event, Westfield's claims of jury prejudice and confusion -- assuming they have any substance -- are better addressed in a request for bifurcation at trial. FED. R. CIV. P. 42(b) (2004). They do not warrant severing and staying Frederick's § 8371 claim.

Westfield's contention that Frederick cannot proceed with its § 8371 claim if its breach of contract claim fails is doubtful. A significant body of Third Circuit law strongly suggests that § 8371 claims exist apart from the underlying contract claims. See Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 529 (3d Cir. 1997) (42 Pa.C.S. § 8371 provides an "independent cause of action to an insured that is not dependent upon success on the merits, or trial at all, of the contract claim" (quoting Nealy v. State Farm Mut Auto Ins. Co., 695 A.2d 790, 792 (Pa. Super. Ct. 1997); accord March v. Paradise Mut. Ins. Co., 646 A.2d 1254, 1256 (Pa. Super. Ct. 1994)); Schubert v. Am. Indep. Ins. Co., No. 02-6917, 2003 U.S. Dist. LEXIS 10769, at *10-11 (E.D. Pa. Jun. 24, 2003) (holding that § 8371 creates an independent cause of action); Doylestown Electrical Supply Co. v. Maryland Casualty Insurance Co., 942 F. Supp. 1018, 1020 (E.D. Pa. 1996) ("a plaintiff may succeed on its bad faith claim even if it fails on the underlying breach of contract claim"). Accordingly, trial on the bad faith claim might very well proceed regardless of the outcome of the breach of contract litigation. Thus, severing and staying the § 8371 claim would obligate Frederick to fund and prosecute two largely overlapping discovery efforts and trials. This would be the opposite of "expeditious resolution of the litigation." Delay damages, assuming they would be awarded some time in the future, would not compensate Frederick for

this prejudice.

Perhaps most significant, Westfield's very general arguments would compel the severance of virtually every bad faith claim brought together with a claim that an insurance contract was breached. As a practical matter, this would largely nullify § 8371, as few plaintiffs would have the resources to prosecute the bad faith claims only after they had successfully prosecuted their breach of contract claims. Perhaps this is why Westfield has offered almost no federal authority to support its request for severance. See, e.g., Helman v. Erie Insurance Exchange, No. A.D. 1997-269 C.C.P. Franklin Co. (Feb. 16, 1998); Roycroft v. Nationwide Mutual Fire Ins. Co., No. 92-Su-0562301, C.C.P. York Co. (1996); Corrente v. Fitchburg Mut. Fire Ins. Co., 557 A.2d 859 (R.I. 1991). Federal courts, in applying state law, must take special care not to allow federal procedural rules to curtail or even eliminate substantive rights. 28 U.S.C.S. § 2072 (b) (2004) (“[Rules of procedure] . . . shall not abridge, enlarge or modify any substantive right”).

This is not to say that severance should always be denied. There may well be cases where the prompt determination of other, simpler claims might necessarily also resolve more complex § 8371 claims. See, e.g., Vanderveer v. Erie Malleable Iron Company, 238 F.2d 510 (3d Cir. 1956); Nicklos v. Firestone Tire & Rubber Co., 346 F. Supp. 185 (E.D. Pa. 1972). Further, in cases where “bad faith” claims themselves appear to have been brought in bad faith -- whether

artificially to inflate potential damages, to injure a defendant unnecessarily, or for any other vexatious reason -- severance could well be warranted. Such determinations necessarily are made on a case by case basis.

The Motion to Sever and Stay Plaintiff's Bad Faith Claims is denied.

An appropriate Order follows.

Date

Paul S. Diamond, J.

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Order

AND NOW, this 25th day of August, 2004, upon consideration of Defendant’s Motion to Sever and Stay Plaintiff’s Bad Faith Claims and Plaintiff’s response, it is ORDERED and DECREED that the Motion is DENIED.

BY THE COURT:

Paul S. Diamond, J.