

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

RICHARD J. COPPOLA, JR. : CIVIL ACTION
: :
v. : :
: :
TRAVELERS INDEMNITY COMPANY : NO. 07-39

MEMORANDUM

Bartle, C.J.

March 27, 2007

Plaintiff, Richard J. Coppola, instituted this action in the Court of Common Pleas of Bucks County, Pennsylvania against defendant, Travelers Indemnity Company ("Travelers"). Travelers removed the action to this court based on our diversity jurisdiction. After we denied plaintiff's motion to remand, plaintiff filed an amended complaint against Travelers alleging breach of contract, bad faith under 42 Pa. Cons. Stat. Ann. § 8371, and concerted tortious action. Now before this court is the motion of Travelers to strike certain paragraphs contained in plaintiff's amended complaint and to dismiss plaintiff's claim for concerted tortious action.

Rule 12(f) of the Federal Rules of Civil Procedure provides:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant,

immaterial, impertinent, or scandalous matter.

Fed. R. Civ. P. 12(f).

Travelers moves to strike five paragraphs in plaintiff's amended complaint that make factual allegations related to his bad faith claim pursuant to 42 Pa. Cons. Stat. Ann. § 8371. The paragraphs allege:

22. A mere eight days later, [after plaintiff filed suit against Travelers], on August 8, 2006, Defendant issued an inspection report by Millennium Survey that reported an alleged increase in the square footage of the covered residence and that made other errors of fact pertinent to the valuation of the covered residence. A true and correct copy of this report is provided at EXHIBIT E.

23. Based on this assessment of the covered residence, Defendant unilaterally raised Plaintiff's premium to \$3,054.00, an action that Plaintiff avers was made in direct retaliation for his having filed suit against Defendant eight days earlier.

24. On November 6, 2006, Millennium Survey again, at Defendant's direction, conducted another survey of Plaintiff's residence. A true and correct copy of this report is provided at EXHIBIT F.

25. In this survey, Millennium again overstated the square footage of Plaintiff's residence, and again made several errors of fact pertinent to the valuation of the house, as well as concluding erroneously that the roof was in acceptable condition.

26. On the strength of the latest survey, Defendant again attempted to increase Plaintiff's premium to an even higher amount: \$5,370.00.

Pl.'s Am. Compl. ¶¶ 22-26.

The five paragraphs allege, in essence, that Travelers adjusted plaintiff's insurance premiums in retaliation after he filed suit against Travelers. The retaliation purportedly began on August 8, 2006, eight days after he sued Travelers for its failure to pay him after his roof was damaged in a wind storm.¹

Travelers argues that these allegations are not actionable under the Pennsylvania bad faith statute. The statute states:

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.

The motion to strike is not a motion to dismiss. At this time we cannot conclude as a matter of law that the paragraphs in issue contain "redundant, immaterial, impertinent, or scandalous matter" insofar as plaintiff's claim under the bad faith statute is concerned. See Fed. R. Civ. P. 12(f). Accordingly, defendant's motion to strike will be denied.

1. Plaintiff filed a lawsuit against Travelers on August 1, 2006. This court dismissed it without prejudice on November 27, 2006 upon the motion of the plaintiff. The present action is based on the same operative facts.

Defendant has also moved to dismiss plaintiff's concerted tortious action claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. A claim should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004). All well-pleaded allegations in the amended complaint must be accepted as true, and all reasonable inferences are drawn in favor of the non-moving party. Id.

Travelers argues that plaintiff's concerted tortious action claim, which is based on the same retaliatory actions Travelers moved to strike with regard to his claim under the bad faith statute, must be dismissed under the "gist of the action doctrine." The doctrine precludes plaintiffs from bringing tort claims when the true "gist" of the claim sounds in contract. Freestone v. New England Log Homes, 819 A.2d 550, 554 (Pa. Super. 2003). Travelers asserts that plaintiff cannot bring a separate tort claim because the gravamen of plaintiff's suit is based on the denial of his insurance claim. Therefore, according to Travelers, the gist of plaintiff's action sounds in contract, not in tort.

Plaintiff argues that his concerted tortious action claim should not be dismissed because it is based on entirely different facts than his breach of contract claim. He argues

that the Pennsylvania bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371, imposes a statutory duty on Travelers to act in good faith, and that if there is any overlap between the claims in the amended complaint, it is between plaintiff's statutory claim and common law tort claim. We disagree.

The gist of the action test is used to distinguish contract claims from tort claims:

The test determines from the complaint the essential nature of the claims alleged by distinguishing between contract and tort actions on the basis of source of the duties allegedly breached; if the complaint essentially alleges a breach of duties that flow from an agreement between the parties, the action is contractual in nature, whereas if the duties allegedly breached were of a type imposed on members of society as a matter of social policy, the action is essentially tort-based.

American Guar. & Liab. Ins. Co. v. Fojanini, 90 F. Supp. 2d 615, 622 (E.D. Pa. 2000).

Plaintiff argues that the duties allegedly breached in his concerted tortious action claim flow from the Pennsylvania bad faith statute, not from the insurance contract. The Pennsylvania bad faith statute, however, does not create a new duty but only provides for additional remedies when the court finds that an insurer has acted in bad faith. We have previously stated:

In Pennsylvania, breach of a duty of good faith pertaining to an insurance policy sounds in contract, not in tort. The right to punitive damages under the "bad faith" statute is allowed in an action "arising under an insurance policy," which is a

contract. Accordingly, there is no actionable tort of conspiring or taking concerted action to breach a duty of good faith.

Greater N.Y. Mut. Ins. Co. v. North River Ins. Co., 872 F. Supp. 1403, 1408 (E.D. Pa. 1995) (internal citation omitted).

Accordingly, the gist of plaintiff's action sounds in contract, and plaintiff's claim for concerted tortious action will be dismissed.

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

RICHARD J. COPPOLA, JR. : CIVIL ACTION
 : :
 : :
 : :
 : :
TRAVELERS INDEMNITY COMPANY : NO. 07-39

ORDER

AND NOW, this 27th day of March, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant to strike paragraphs 22, 23, 24, 25, and 26 of plaintiff's amended complaint is DENIED; and

(2) the motion of defendant to dismiss plaintiff's claim for concerted tortious action is GRANTED.

BY THE COURT:

/s/ Harvey Bartle III

C.J.