

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

LEWIS S. SMALL : CIVIL ACTION
 :
 v. :
 :
 PROVIDENT LIFE AND ACCIDENT :
 INSURANCE COMPANY : NO. 98-2934

MEMORANDUM AND ORDER

HUTTON, J.

December 3, 1998

Presently before the Court are Defendant Provident Life and Accident Insurance Company's Motion to Dismiss (Docket No. 2) and Plaintiff Lewis Small's Answer to Defendant's Motion to Dismiss (Docket No. 4).

I. BACKGROUND

The Plaintiff alleges the following facts in his complaint. Plaintiff, Lewis S. Small, Esquire, purchased a disability income insurance policy from Defendant Provident Life and Accident Insurance Company with an effective date of February 4, 1985. This policy provided for monthly disability benefits of \$10,000.00 for life. Between February 4, 1985 and June 30, 1996, Plaintiff paid premiums to Provident.

On June 30, 1996, Plaintiff suffered serious disability injuries as a result of an automobile accident. Due to this accident, Plaintiff is functionally disabled and unable to perform

his duties as a trial attorney. Following the accident, in August of 1996, Plaintiff submitted his claim for disability benefits under the policy. On September 29, 1996, Provident began paying the Plaintiff disability benefits. However, on August 28, 1997, Provident stopped paying the benefits. Provident discontinued disability benefits based upon a medical opinion that found Plaintiff was able to perform his duties as a trial attorney.

On January 8, 1998, Plaintiff instituted an action in the Court of Common Pleas of Philadelphia County against Provident. Defendant removed the action to federal court. Plaintiff's complaint alleged the following: (1) a breach of contract claim (Count I); (2) an intentional misrepresentation claim (Count II); (3) a negligent misrepresentation claim (Count III); (4) a claim under 40 Pa. Cons. Stat. Ann. § 472 (Count IV); (5) an Unfair Trade Practices and Consumer Protection Law claim (Count V); (6) an Unfair Insurance Practices Act claim; (7) a claim under Pennsylvania's bad faith statute (Count VII); and (8) a punitive damages claim (Count VIII). Defendant now moves to dismiss Counts II, III, IV, V, VI, and VIII of Plaintiff's complaint.

II. MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set

out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),¹ this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). The Court will only dismiss the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

III. DISCUSSION

A. Fraud/Misrepresentation

1. Intentional Misrepresentation (Count II)

The Defendant argues that Count II should be dismissed because the Plaintiff failed to plead fraud with specificity. Rule

¹ Rule 12(b)(6) states as follows:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

9(b) of the Federal Rules of Civil Procedure provides that:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed. R. Civ. P. 9(b).

The Third Circuit has noted that in applying Rule 9(b), "focusing exclusively on its 'particularity' language is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984).

Instead, the Third Circuit explained that:

Rule 9(b) requires plaintiffs to plead with particularity the "circumstances" of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. It is certainly true that allegations of "date, place, or time" fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.

Id.; see also In re Meridian Secs. Litig., 772 F. Supp. 223, 229 (E.D. Pa. 1991) (discussing specificity requirements in fraud claim). With regard to claims of misrepresentation, the Third Circuit has further explained that the complaint need not describe the precise words used; it is sufficient if the complaint "describes the nature and subject of the alleged

misrepresentation." Id.

In Count II of the Plaintiff's complaint, the Plaintiff alleges that:

31. By entering into, accepting premiums and renewing the aforementioned policy, Provident confirmed in its representations of fact, opinion, intention and/or law that it would make monthly benefit payments of \$10,000.00 per month for life in the event of total disability as aforesaid.

32. Provident has had no intention of making monthly \$10,000.00 total disability payments for life; nor did it at any time ever intend to fully honor the subject disability policy.

33. Provident falsely, deceitfully and fraudulently made the above mentioned misrepresentations of fact, opinion, intention and/or law, including but not limited to the misrepresentation that it would pay Small a \$10,000.00 per month disability benefit for life should Small be unable to perform the duties of his occupation as a trial attorney.

Pl.'s Compl. ¶¶ 31-33.

Defendant submits that these allegations are nothing more than a breach of contract claim "liberally sprinkled with operative terms designed to invoke the common law tort of deceit." In support, Defendant relies on Abramson v. State Farm Ins., No. CIV.A.92-7239, 1993 WL 126413 (E.D. Pa. Apr. 16, 1993). In Abramson, State Farm refused to pay a claim because it found that the plaintiffs' car was not a total loss. See id. at *1. The plaintiffs brought a fraud claim and alleged that:

Plaintiffs justifiably relied upon defendant's representation in the policy, in sales presentations by defendant's agents and/or in public advertising that all claims would be fairly and promptly paid, which representations were false when made, and therefore, the defendant's conduct constitutes the common law tort of deceit

Id. at *7. The Court found that the Abramsons provided State Farm with no factual information of the circumstances surrounding the alleged misrepresentations by State Farm agents or through public advertising. See id. Thus, the court dismissed the claim without prejudice because the paragraphs pertinent to the deceit claim set forth merely generalized allegations of fraud and deceit. See id.

In this case, however, the Court finds the allegations in Plaintiff's complaint sufficient under Rule 9(b) and distinguishable from the allegations found in Abramson. The allegations in Plaintiff's complaint set forth sufficient factual information surrounding the alleged misrepresentations. For instance, Plaintiff's complaint attaches the letter of Provident agent Michael J. Eskra, who states the circumstances under which Plaintiff could recover disability benefits. Plaintiff also alleges that he relied on these statements by Provident agents and that Provident never had the intention of carrying them out. See Pl.'s Compl. at ¶¶ 31-33. The Court concludes that these allegations give the Defendant sufficient notice of the exact misconduct with which they are charged and the person or persons who allegedly acted improperly. Accordingly, the Defendant's

motion is denied.

2. Negligent Misrepresentation (Count III)

Defendant also argues that Count III of Plaintiff's complaint should be dismissed under Rule 9(b). By its terms, Rule 9(b) applies only to averments of fraud or mistake. See 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1297 (1990). Under Pennsylvania law, the courts clearly distinguish the torts of fraud and negligent misrepresentation. See Browne v. Maxfield, 663 F. Supp. 1193, 1202-06 (E.D. Pa. 1987). "Because a claim of negligent misrepresentation is distinct from a claim of fraud under Pennsylvania law, Rule 9(b) does not apply to the former according to its terms." HCB Contractors v. Rouse & Assocs., Inc., No. CIV.A.91-5350, 1992 WL 176142, at *6 (E.D. Pa. July 13, 1992). Hence, Plaintiff's claim of negligent misrepresentation cannot be dismissed for lack of specificity.

B. 40 Pa. Cons. Stat. Ann. § 472 (Count IV)

Defendant argues that Count IV should be dismissed because 40 Pa. Cons. Stat. Ann. § 472 does not provide for a private cause of action. Predictably, Plaintiff disagrees and argues that a private cause of action does exist under this statute. This statute provides:

No insurance company, association, or exchange, or any member, officer, director, or attorney-in-fact thereof, or any other person in its behalf, shall issue, circulate, or use, or cause or permit to be issued, circulated, or

used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, association, or exchange, or make and estimate, with intent to deceive, of the future dividends payable under any such policy.

40 Pa. Cons. Stat. Ann. § 472 (West 1995). This Court finds that no private cause of action exists under this statute.

The parties can cite to only one case that discusses any potential liability under this statute. In Hamilton v. Hartford Accident & Indem. Co., 425 F. Supp. 224 (E.D. Pa. 1977), the court held there was an insufficient jurisdictional amount to give the court diversity jurisdiction. See id. at 225. More importantly, in evaluating the jurisdictional amount, the plaintiff argued that this statute creates a "statutory duty not to deceive its insured and subjects the insurer to potential liability for punitive damages." Id. The court held that 40 Pa. Cons. Stat. Ann. § 472 does not provide the basis for a claim by an insured for punitive damages because no Pennsylvania case supports such a conclusion. See id.

This Court finds that 40 Pa. Cons. Stat. Ann. § 472 does not provide for a private cause of action. While Hamilton addressed only punitive damages, the Hamilton court's analysis applies with equal weight with respect to any potential liability on the part of the insurer under this statute. Plaintiff cannot cite, nor can this Court find, any case that supports a private cause of action under this statute. Furthermore, this section of

the Pennsylvania Code regulates the conduct of insurance companies. Any violation of this section is redressed by the Insurance Commissioner, not private individuals. The common law tort of fraud is available to private individuals who believe that their insurance company violated this statute. Therefore, the Court dismisses Count IV of the Plaintiff's complaint.

C. Unfair Trade Practices and Consumer Protection Law (Count V)

Defendant argues that the only unlawful conduct alleged in the complaint under Plaintiff's Unfair Trade Practices and Consumer Protection Law (CPL) claim is the mere failure to pay claims. The CPL provides that any person who purchases or leases goods or services for personal, family, or household purposes and suffers any loss of money or property as a result of the use of unfair or deceptive acts or practices may bring a private action to recover damages. See 73 Pa. Cons. Stat. Ann. § 209-9.2(a) (West 1995). Defendant contends that a failure to pay a claim is not actionable misfeasance required by the statute, but merely nonfeasance, which is not cognizable under the CPL.

Defendant correctly states that the insurer's refusal to pay benefits to which the insured felt entitled is not actionable under the CPL. See Parasco v. Pacifica Indem. Co., 920 F. Supp. 647, 656 (E.D. Pa. 1996) ("The mere failure to pay a claim, however, is considered nonfeasance; and as such, it is not actionable under the [CPL]."); MacFarland v. U.S. Fidelity & Guar.

Co., 818 F. Supp. 108, 111 (E.D. Pa. 1993) ("Failure to pay under an insurance contract constitutes nonfeasance."). Defendant, however, overlooks the conduct set forth in paragraph 50 of the complaint. In paragraph 50, the Plaintiff alleges that:

The Provident engaged in unfair and/or deceptive acts or practices pursuant to the Unfair Practices Act by offering life-time disability benefits to Small for a premium which the Provident knew it would not pay based upon the use or employment of biased, incomplete, inaccurate and/or false and misleading sham medical opinions procured by Provident for the sole purpose of denying coverage regardless of disability from injuries or sickness.

Pl.'s Compl. at ¶ 50.

Thus, in this case, the Plaintiff has alleged more than merely nonfeasance, albeit a little more. As the Pennsylvania Superior Court stated, nonfeasance is the "omitting to do, or not doing something which ought to be done." Raab v. Keystone Ins. Co., 412 A.2d 638, 639 (Pa. Super. Ct. 1979). According to the Plaintiff, Defendant acted affirmatively and in bad faith to frustrate his claim for disability benefits by producing "sham medical opinions." Indeed, the Defendant concedes that "the plaintiff makes conclusory allegations that Provident's denial is part of an over-arching scheme." Def.'s Mem. of Law in Support of Mot. to Dismiss at 19. While Defendant states that these allegations are nothing more than a breach of contract claim, at this early juncture, the Court finds that the alleged misconduct in the complaint provides sufficient basis for the Plaintiff's CPL

claim to withstand a motion to dismiss.

D. Unfair Insurance Practices Act (Count VI)

Defendant argues that Count VI should be dismissed because there is no private cause of action under the Unfair Insurance Practice Act. See Lombardo v. State Farm Mut. Auto. Ins. Co., 800 F. Supp. 208 (E.D. Pa. 1992). Plaintiff concedes that there is no private cause of action under this Act. Therefore, the Court dismisses Count VI of the Plaintiff's complaint.

E. Punitive Damages (Count VIII)

Defendant argues that Count VIII of Plaintiff's complaint, which simply states a claim for punitive damages, should be dismissed because there is no independent cause of action for punitive damages. Clearly, punitive damages are not available under all of Plaintiff's claims. See Thorsen v. Iron & Glass Bank, 476 A.2d 928, 932 (Pa. Super. Ct. 1984) (noting that punitive damages are not available under an action for breach of contract). Therefore, the Court dismisses Count VIII of Plaintiff's complaint. However, the Court also grants the Plaintiff leave to file an amended complaint within twenty (20) days of the date of this Order to include a request for punitive damages under the appropriate claims.

An appropriate Order follows.

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O R D E R

AND NOW, this 3rd day of December, 1998, upon consideration of the Defendant's Motion to Dismiss, IT IS HEREBY ORDERED that the Motion is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that:

(1) Counts IV, VI, and VIII of Plaintiff's complaint are **DISMISSED**; and

(2) Plaintiff has twenty (20) days from the date of this Order to amend his complaint to claim punitive damages.

BY THE COURT:

HERBERT J. HUTTON, J.