

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

CHICAGO INSURANCE COMPANY : CIVIL ACTION
 :
 v. :
 :
 ROSALYN SAMPSON, :
 TARGET REHABILITATION CO., :
 MARSHALL FRICK, and CAROL FRICK :
 :
 v. :
 :
 MAGINNIS & ASSOCIATES : NO. 97-5514

MEMORANDUM AND ORDER

HUTTON, J.

March 1, 1999

Presently before the Court are Plaintiff Chicago Insurance Company's Motion for Summary Judgment (Docket No. 23), Third Party Defendant Maginnis & Associates' Motion for Summary Judgment (Docket No. 24), and Defendants' reply thereto (Docket No. 29). Also before the Court are Defendants' Motion for Partial Summary Judgment (Docket No. 26), Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Partial Summary Judgment (Docket No. 27), Defendants' reply (Docket No. 34), and Plaintiff's sur reply thereto (Docket No. 35). Also before the Court are Defendants' Motion in Limine (Docket No. 28) and Plaintiff's reply thereto (Docket No. 37). Finally, also before the Court are Defendants' Motion for Enlargement of Time for Submission of Expert Testimony and Pretrial Memorandum (Docket No. 30) and Plaintiff's reply thereto (Docket No. 36).

I. BACKGROUND

The Plaintiff, Chicago Insurance Company ("Chicago"), issued insurance policy No. 44-2010129 to Defendant Target Rehabilitation Company ("Target"). Target secured the insurance policy with the help of their insurance agent, Maginnis & Associates. The policy contained the following provision:

If indicated by a specific premium on the Declarations Page, the Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages because of Bodily Injury, Property Damage or Advertising Injury to which this insurance applies in the operation of the business or conduct of the profession of the Named Insured as specified on the Declaration page, caused by an Occurrence during the Policy Period.

The policy also contained exclusion 4 which stated that the insurance coverage did not apply:

to Bodily Injury, Personal Injury or Advertising Injury of any employee of the Insured arising out of and in the course of his/her employment by the Insured or to any obligation of the Insured to indemnify another because of Damages arising out of such injury.

The policy was effective from December 11, 1994, to December 11, 1995.

In November 1995, Maginnis sent Target a solicitation letter. The letter encouraged Target to renew their Chicago insurance coverage for another year. The letter provided that Target would receive "product enhancements" if Target renewed their coverage. Eventually, Target renewed their insurance policy and

Chicago issued a renewal policy which provided general liability coverage from December 11, 1995 to December 11, 1996. The renewal policy, however, also added exclusion 29 which provided that the insurance coverage did not apply:

to any claims brought by or on behalf of any person employed by the Named Insured, any person who had been employed by the Named Insured or any person seeking employment with the Named Insured alleging any act or omissions by an Insured with respect to hiring, termination, compensation, or the tenure, term, condition, benefits, or privilege of employment of any such person.

On September 24, 1996, Marshall and Carol Frick filed a complaint in the Montgomery County Court of Common Pleas against Target and Defendant Rosalyn Sampson, Target's Chief Executive Officer. The complaint alleges that Target terminated Marshall Frick for sexual harassment, embezzlement, and other forms of financial misconduct. The complaint further alleges that Sampson and Target conspired to falsely accuse Frick of sexual harassment, embezzlement, and other theft in order to terminate his employment. The complaint alleges that Target and Sampson sought to terminate Frick's employment to cover up Target's financial troubles and protect Sampson's compensation. The complaint has ten counts: (1) a wrongful discharge claim - Count I; (2) a defamation claim - Count II; (3) a negligence claim - Count III; (4) an invasion of privacy claim - Count IV; (5) a breach of implied contract claim - Count V; (6) a punitive damages claim - Count VI; (7) a loss of

consortium claim - Count VII; (8) a negligent infliction of emotional distress claim - Count VIII; (9) an intentional infliction of emotional distress claim - Count IX; and (10) an interference with prospective business relations claim - Count X.

On August 29, 1997, Chicago filed a complaint in federal court seeking a declaratory judgment that it is not required to defend or indemnify Target or Sampson in the lawsuit filed by the Fricks. Target and Sampson responded by bringing two counterclaims against Chicago: (1) a breach of contract counterclaim and (2) bad faith counterclaim. Target and Sampson also filed a third party complaint against Maginnis. Target and Sampson allege two counts against Maginnis in their third party complaint: a negligence claim and (2) a breach of contract claim.

On November 13, 1998, both parties filed motions for summary judgment. On November 30, 1998, Defendants also filed a motion in limine to preclude certain expert testimony at trial. Finally, on December 4, 1998, Defendants filed a motion for enlargement of time to submit pretrial memorandum and expert testimony. The Court considers these motions together.

II. DISCUSSION

A. Summary Judgment Motions

1. Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is No genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

2. Plaintiff's and Defendants' Motions for Summary Judgment

Both parties move for summary judgment. In its motion for summary judgment, Plaintiff asks this Court to enter a declaratory judgment that it owes no duty to defend or indemnify Target or Sampson in the actions stemming from the alleged wrongful termination of Frick. In their motion for partial summary judgment, Defendants ask this Court to enter a declaratory judgment that Chicago owes a duty to defend and indemnify Target and Sampson in the Frick action.

a. Coverage of the Claims Presented in the Underlying Action

An insurer owes a duty to defend an insured whenever the allegations in a complaint, taken as true, set forth a claim which potentially falls within the coverage of the policy. See Visiting Nurse Ass'n of Greater Phila. v. St. Paul Fire & Marine Ins. Co., 65 F.3d 1097, 1100 (3d Cir. 1995); Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484, 487 (Pa. 1959); Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1174 (Pa. Super. Ct. 1991). The insurer has the burden of establishing the applicability of an exclusion. See Allstate Ins. Co. v. Brown, 834 F. Supp. 854, 857 (E.D. Pa. 1993). An insurer owes a duty to indemnify an insured only if liability is established for conduct which actually falls within the scope of the policy coverage. See Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 831 n. 1 (3d Cir. 1995). The insured has the burden to establish coverage under an insurance policy. See Erie

Ins. Exch. v. Transamerica Ins. Co., 533 A.2d 1363, 1366-67 (Pa. 1987); Benjamin v. Allstate Ins. Co., 511 A.2d 866, 868 (Pa. Super. Ct. 1986).

The principles governing the interpretation of an insurance contract under Pennsylvania law are well settled. See Altipenta, Inc. v. Acceptance Ins. Co., No. CIV.A.96-5752, 1997 WL 260321, at *2 (E.D. Pa. May 14, 1997), aff'd, 141 F.3d 1153 (3d Cir. 1998) (unpublished table decision). The court generally performs task of interpreting an insurance contract. See Allstate, 834 F. Supp. at 856. The court must read the policy as a whole and construe it according to the plain meaning of its terms. See Bateman v. Motorists Mut. Ins. Co., 590 A.2d 281, 283 (Pa. 1991). In determining whether a claim falls within the scope of coverage, the court compares the language of the policy and the allegations in the underlying complaint. See Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246-47 (Pa. 1988); Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. 1996).

Whether the provisions of a contract are clear and unambiguous is a matter of law to be determined by the court. See Allegheny Int'l Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1424 (3d Cir. 1994). "A term is ambiguous if reasonable people, considering it in the context of the entire policy, could fairly ascribe different meanings to it." See Altipenta, Inc., 1997 WL 260321, at *2; see also Northbrook Ins. Co. v. Kuljian Corp., 690

F.2d 368, 372 (3d Cir. 1982); United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 986 (Pa. Super. Ct. 1986). If a provision is ambiguous, it is construed against the insurer as the drafter of the agreement. See Lazovick v. Sun Life Ins. Co. of Am., 586 F. Supp. 918, 922 (E.D. Pa. 1984). Nevertheless, a court should not torture the language of a policy to create ambiguities. See Eastern Assoc. Coal Corp. v. Aetna Cas. & Surety Co., 632 F.2d 1068, 1075 (3d Cir. 1980).

In the instant case, this Court finds that the insurance policy did not cover the Fricks' underlying action. It is undisputed that exclusion 4 was in the original policy purchased by Target and the renewal policy. Exclusion 4 states that the insurance does not apply to bodily injury, personal injury, or advertising injury of "any employee of the Insured arising out of and in the course of his/her employment by the Insured or to any obligation of the Insured to indemnify another because of Damages arising out of such injury." The United States Court of Appeals for the Third Circuit has held that "arising out of and in the course of employment" means causally connected. See Forum Ins. Co. v. Allied Sec. Inc., 866 F.2d 80, 82 (3d Cir. 1989). The Third Circuit in Forum also found that "but for" causation is enough to satisfy this exclusion. See id.

The Court finds that exclusion 4 precludes insurance coverage of the Fricks' claims. The claims of Marshall Frick are

causally connected to his employment with Target. But for Frick's employment with Target, the underlying action would not have existed because all ten of his counts stem from a wrongful termination claim. Defendants argue that this exclusion should be read "in conjunction with the risks generally insured by a worker's compensation and employer's liability policy." See Defs.' Mem. of Law at 4. Defendants thus contend that this exclusion only provides that Chicago does not insure worker compensation risks. See id. This Court, however, finds that the language of exclusion 4 much broader than simply precluding coverage for workmen's compensation claims. Moreover, the Third Circuit has rejected such an argument in a similar case. See Forum, 866 F.2d at 82 (noting that, under Pennsylvania law, security guard's death at hands of fellow guard was "out of and in the course of" his employment within meaning of insurance exclusion notwithstanding that guard's injuries were not covered by worker's compensation statute). Therefore, the Court finds that exclusion 4 precludes insurance coverage for Fricks' underlying claims.

After concluding that the clear and unambiguous language of exclusion 4 precludes insurance coverage in this case, the Court finds that resolution of the validity and clarity of exclusion 29 is unnecessary. Exclusion 29 states that the insurance does not apply to "any claims brought by or on behalf of any person employed by the Named Insured . . . alleging any act or omissions by an

Insured with respect to hiring, termination, compensation, or the tenure, term, condition, benefits, or privilege of employment of any such person." With respect to exclusion 29, Defendants argue that: (1) the exclusion is ambiguous and (2) the doctrine of reasonable expectations prevents application of the exclusion because Chicago surreptitiously included this exclusion upon renewal of the policy. Exclusion 4, which was in the original policy, would preclude coverage of the Fricks' claims even if exclusion 29 did not exist. Therefore, the Court concludes that the resolution of these issues is unnecessary.

b. Defendants' Breach of Contract and Bad Faith Counterclaims

In its motion for summary judgment, Chicago maintains that the Defendants' breach of contract and bad faith counterclaims should be dismissed because it reasonably declined to defend and indemnify Target and Sampson. This Court agrees. The Plaintiff reasonably relied upon exclusion 4 in denying insurance coverage to Target and Sampson. Therefore, the Court grants summary judgment in Plaintiff's favor on Defendants' breach of contract and bad faith counterclaim. See Viola v. Fireman's Fund Ins. Co., 965 F. Supp. 654, 666 (E.D. Pa. 1997) (dismissing insured's breach of contract and bad faith counterclaims because court granted summary judgment for the insurance company who had reasonable basis for denying indemnity and legal assistance).

2. Third Party Defendant's Motion for Summary Judgment

In their third party complaint, Defendants allege two counts against Maginnis. First, in Count I, Defendants allege that Maginnis breached its agreement with Target and Sampson.¹ Second, in Count II, Defendants allege that Maginnis committed professional negligence.

a. Breach of Contract

In their breach of contract claim, Defendants allege that Maginnis failed to provide adequate insurance pursuant to their agreement and/or failed to advise them of the changes to the policy upon renewal. More specifically, Defendants allege that Maginnis induced Target to renew their insurance coverage without reviewing any policy changes in a solicitation letter. Maginnis contends that summary judgment is proper because Target and Sampson could

¹ The Court notes that both parties frame their arguments concerning Count I in terms of an intentional misrepresentation claim by Target and Sampson against Maginnis. After reviewing the third party complaint, this Court cannot understand how Count I states a claim for misrepresentation. Rather, Count I alleges that:

Maginnis & Associates breached its agreement with Defendants Sampson and Target Rehabilitation in failing to provide proper and adequate insurance for Defendants' business and/or failing to properly and adequately advise Defendants as to the nature and scope of the coverage afforded under the policies in question and/or failing to properly and adequately advise Defendants of material changes made to coverage at the time of policy renewal and issuance of the 1995-96 renewal policy.

Third Party Compl. at ¶ 22. Thus, this count is a claim for breach of contract and not misrepresentation. The Court will address the claim accordingly.

not have justifiably relied on the solicitation letter because it was sent after Target decided to renew their insurance.²

In order to prove a breach of contract under Pennsylvania law, a plaintiff must prove five elements. See Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa. 1996). First, the plaintiff must show the existence of a valid and binding contract to which the plaintiff and defendants were parties. See id. Second, the plaintiff must show the contract's essential terms. See id. Third, the plaintiff must prove that he or she complied with the contract's terms. See id. Fourth, the plaintiff must demonstrate that the defendant breached a duty imposed by the contract. See id. Fifth and finally, the plaintiff must show the damages resulting from the breach. See id.

The Court finds that summary judgment is not proper on Defendants' claim of breach of contract. While Maginnis contends that Target did not receive the solicitation letter until after Target's decision to renew the solicitation letter, it offers no evidence supporting this argument. Furthermore, the misleading nature of the solicitation letter is not the only breach alleged in the third party complaint. Defendants allege that Maginnis breached their agreement by failing to obtain proper insurance coverage and by offering deceptive advice in the solicitation

² The Court notes that Maginnis frames this argument in terms of misrepresentation. Justifiable reliance is an element of fraud, not breach of contract. Nevertheless, the Court addresses Maginnis' argument.

letter. See Third Party Compl. at ¶ 22. Therefore, the Court denies Maginnis' motion for summary judgment on this claim.

b. Negligence

In their negligence claim, Defendants allege that Maginnis breached their professional duty to provide adequate insurance and/or to advise them of the changes to the policy upon renewal. In Pennsylvania, the elements required to maintain an action for negligence are as follows:

[A] duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; a failure to conform to the standard required; a causal connection between the conduct and the resulting injury and actual loss or damage resulting to the interests of another.

Morena v. South Hills Health Sys., 462 A.2d 680, 684 n.5 (Pa. 1983). An insurance agent owes a duty to an insured to obtain coverage that a reasonable and prudent professional insurance agent would have obtained under the circumstances. See Fiorentio v. Travelers Ins. Co., 448 F. Supp. 1364, 1369-70 (E.D. Pa. 1978). Maginnis contends that there is no factual record to support such a claim.

This Court must disagree. For instance, Target and Sampson offered the solicitation letter encouraging Target to renew the Chicago insurance policy. Sampson testified at her deposition that this letter led her to renew Target's insurance policy without determining if any policy changes were made by Chicago. Based upon

this letter, Sampson testified that she "proceeded under the assumption that she was renewing exactly what she had previously and the policy information that she had reviewed in the past." Sampson Dep. at 38-39. This testimony, and the testimony of Maginnis' representatives rebutting Sampson's testimony, is not properly weighed by this Court at the summary judgment stage. Rather, this evidence should be weighed by a jury. See Big Apple BMW, 974 F.2d at 1363 (noting that a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent). Accordingly, the Court denies Maginnis' motion for summary judgment on this claim.

B. Defendants' Motion in Limine

Defendants filed a motion in limine to preclude the admission of Plaintiff's expert testimony. This expert testimony concerns the reasonableness of Chicago's decision to refuse to defend and indemnify Target and Sampson in the Frick underlying action. Therefore, because this Court grants Plaintiff's summary judgment motion and enters judgment in Plaintiff's favor concerning this matter, this Court denies the Defendants' motion in limine as moot.

C. Defendants' Motion for Enlargement of Time

Finally, Defendants filed a motion for enlargement of time seeking to extend the time to disclose expert testimony, extend the time to file pre-trial memoranda, and extend the date for placement of the case in the trial pool. Defendants base this motion upon new and complex issues raised by their breach of contract and bad faith counterclaims against Chicago. Therefore, because the Court grants Plaintiff's summary judgment motion and dismisses these counterclaims, the Court denies this motion as moot.

An appropriate Order follows.

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O R D E R

AND NOW, this 1st day of March, 1999, upon consideration of Plaintiff's Motion for Summary Judgment, Third Party Defendant's Motion for Summary Judgment, Defendants' Motion for Partial Summary Judgment, Defendants' Motion in Limine, and Defendants' Motion for Enlargement of Time, IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is **GRANTED**, Third Party Defendant's Motion for Summary Judgment is **DENIED**, and the Defendants' Motion for Partial Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that:

(1) Declaratory Judgment is **ENTERED** in favor of Chicago Insurance Company and against Defendants Rosalyn Sampson, Target Rehabilitation Co., Marshall Frick, and Carol Frick;

(2) Chicago Insurance Company owes no obligation to defend or indemnify its insured in the pending state court action, Frick v. Sampson, Civil Action No. 16760 (Montgomery Ct. Com. Pl.);

(3) Defendants' counterclaims against Plaintiff Chicago Insurance Company are **DISMISSED**;

(4) Defendants' Motion in Limine is **DENIED AS MOOT**; and

(5) Defendants' Motion for Enlargement of Time is **DENIED AS MOOT**.

BY THE COURT:

HERBERT J. HUTTON, J.