

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

CHARLES HENSLEY, JR., & : CIVIL ACTION
CHARLES HENSLEY, SR., & :
BARBARA HENSLEY, h/w :
 :
v. :
 :
NATIONWIDE MUTUAL INSURANCE CO. : NO. 98-6680

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

June 14, 1999

Plaintiffs Charles Hensley, Jr., Charles Hensley, Sr., and Barbara Hensley, filed this action against their insurer, defendant Nationwide Mutual Insurance Company ("Nationwide"); defendant has moved to dismiss certain counts of the complaint. For the reasons set forth below, the motion to dismiss will be granted in part and denied in part; plaintiffs will be given leave to amend their complaint.

FACTS

On May 2, 1997, plaintiffs obtained from Nationwide an insurance binder for the motorcycle owned by Charles Hensley, Sr., and operated by Charles Hensley, Jr. This policy was added to other policies held by plaintiffs, and the policies were "stacked." Nationwide represented that the binder was immediately effective.

On June 8, 1997, Charles Hensley, Jr., sustained serious

injuries while riding the motorcycle. When plaintiffs attempted to collect on the insurance policy, Nationwide refused payment and accused Barbara Hensley of obtaining the binder by abusing her position as a Nationwide employee. Nationwide also accused Mrs. Hensley of illegally gaining access to its office and committing fraud in acquiring the policy. Such accusations were made to attorneys and investigators during Nationwide's investigation of the accident and particularly in a letter dated October 27, 1997.

On December 23, 1998, plaintiffs filed this action alleging: 1) Violation of the Unfair Trade Practices and Consumer Protection Law; 2) Insurer bad faith; 3) Negligent misrepresentation; 4) Fraudulent misrepresentation; 5) Breach of contract; 6) Libel; 6) [sic] Slander per se. Defendant moves to dismiss Count 1, Count 6 - Libel, and Count 6 - Slander.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert.

denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957).

II. Unfair Trade Practices and Consumer Protection Law

To assert a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Con. Stat. Ann. § 201-1 - 201-9.3, plaintiffs must allege misfeasance on the part of defendant, not mere nonfeasance. See Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307 (3d Cir. 1995); Gordon v. Pennsylvania Blue Shield, 548 A.2d 600, 604 (Pa. Super. Ct. 1988). Mere failure to pay an insurance policy is not actionable.

In their complaint, plaintiffs assert, inter alia, that defendant acted affirmatively in violation of the UTPCPL when it: (1) represented the insurance binder was effective immediately (Compl. at ¶ 12); (2) improperly attempted to obtain a post-accident stacking rights waiver (Compl. at ¶ 16); and (3) committed additional miscellaneous affirmative acts of

misrepresentation and false advertising (Compl. at ¶ 46).

While plaintiffs may ultimately prove unable to produce evidence to support these allegations, the complaint pleads misfeasance sufficient to withstand a motion to dismiss. See 73 Pa. Con. Stat. Ann. § 201-2(4)(definition of "unfair or deceptive practices or acts" includes misrepresentations and false advertisement); Schroeder v. Acceleration Life Ins. Co. of Pa., 972 F.2d 41, 46 (3d Cir. 1992)(promises, calculations, and premature termination are acts of misfeasance); Parasco v. Pacific Indemnity Co., 870 F. Supp. 644, 648 (E.D. Pa. 1994)(allegations of improper performance of contract, including unfair post-accident investigation, withstands a motion to dismiss); Henry v. State Farm Ins. Co., 788 F. Supp. 241, 246 (E.D. Pa. 1992)(misrepresentations regarding coverage and misapplication of benefits standard fall within the purview of the UTPCPL).

III. Elements of Libel and Slander Per Se

Defamation includes both libel and slander. See Restatement (Second) of Torts § 568 (1977). Libel is usually in printed or other physical form; slander is usually in the form of oral statements. See id.

The elements of a defamation action are: (1) defamatory communication; (2) publication by the defendant; (3) application

to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient it is intended to be applied to the plaintiff; (6) special harm resulting to plaintiff from publication; and (7) abuse of a conditionally privileged occasion. 42 Pa. Con. Stat. Ann. § 8343(a).

The complaint alleges that: (1) defendant falsely accused plaintiffs of fraudulently and illegally obtaining the insurance binder; (Compl. at ¶¶ 78-80, 86-88); (2) defendant published these statements to third parties, including attorneys and investigators (Compl. at ¶¶ 33, 81, 89); and (3) the statements referred to plaintiffs (see, e.g., Compl. at ¶¶ 78, 83, 87, 91). Plaintiffs' complaint pleads the first three elements of both libel and slander.¹

In determining whether the fourth element is met, "[t]he test is the effect [the statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." Corabi v. Curtis Pub. Company, 273 A.2d 899, 907 (Pa. 1971). The

¹ The complaint is unclear whether defendants made defamatory statements against all of the plaintiffs, as it emphasizes the defendant's statements regarding Barbara Hensley's employment with defendant. Plaintiffs may be alleging defendant accused them of acting in concert to obtain the binder through burglary, trespass, and forgery. If the plaintiffs decide to amend their complaint, such allegations should be stated more clearly.

complaint alleges that the statements accused plaintiffs of fraudulently obtaining the insurance binder by criminal means. (Compl. at ¶¶ 78-79, 86-87). These statements could be considered defamatory by recipients of the information.

Since plaintiffs allege defendant's statements specifically accused them of acting fraudulently and/or criminally, recipients could understand that defendant's statements applied to plaintiffs. (Compl. at ¶¶ 78, 83, 87, 91). The fifth element is satisfied.

A person asserting a slander claim must plead special damages unless the claim is for slander per se, in which case a plaintiff need not satisfy the sixth element under 42 Pa. Con. Stat. Ann. § 8343(a). See Clemente v. Espinosa, 749 F. Supp. 672, 677 (E.D. Pa. 1990). Slander per se falsely accuses plaintiff of: "(1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct." Id. Plaintiffs have alleged slander per se because the statements complained of accuse them of committing the crimes burglary, trespass, and forgery. (Compl. at ¶ 79, 87.)

Plaintiffs have no burden to plead abuse of a privileged occasion unless defendant asserts the existence of a privileged occasion as an affirmative defense. See 42 Pa. Con. Stat. Ann. § 8343(b); see also Oweida v. The Tribune-Review Pub. Co., 599 A.2d 230, 235 (Pa. Super. Ct. 1991).

IV. Statute of Limitations

The statutory period within which a claim for libel or slander may be filed is one year. 42 Pa. Con. Stat. Ann. § 5523(1). This action was filed December 23, 1998. The complaint alleges defendant made defamatory statements in a letter dated October 27, 1997, and during the investigation of plaintiffs' insurance claim. (Compl. at ¶¶ 22-24, 31, 33.) The complaint does not specify any other dates on which defamatory statements were made. Any defamatory statements made before December 23, 1997, including statements made in the letter dated October 27, 1997, are not actionable. Plaintiffs will be given the opportunity to amend the complaint to set forth with particularity any defamatory statements not barred by the statute of limitations.

An appropriate Order follows.

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ORDER

AND NOW, this 14th day of June, 1999, upon consideration of defendant's motion to dismiss three counts of plaintiffs' complaint, plaintiffs' response, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Defendant's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**:

a. The motion to dismiss Count I is **DENIED** without prejudice to a motion for summary judgment at the conclusion of discovery.

b. The motion to dismiss Count 6 - Libel and Count 6 - Slander is **GRANTED** with leave to file an amended complaint on or before June 28, 1999.

2. Defendant shall answer the original or amended complaint, if one is filed, on or before July 16, 1999.

Shapiro, S.J.