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

JAY MIZRAHI	:	**CIVIL ACTION**
	:	
v.	:	
	:	
GREAT-WEST LIFE ASSURANCE CO.	:	**NO. 99-819**

M E M O R A N D U M

WALDMAN, J. **June 17, 1999**

Background

This is a diversity case. Plaintiff has asserted claims for breach of contract and for bad faith pursuant to 42 Pa. C.S.A. § 8371 in connection with defendant's refusal to pay plaintiff benefits under a disability insurance policy. Defendant has moved to dismiss for lack of subject matter jurisdiction, improper venue and failure to state a claim.

The pertinent facts as alleged or reflected in matters of public record are as follow. On February 10, 1999, defendant filed a complaint in a New Jersey Superior Court seeking a declaration that it is not obligated to pay residual disability benefits under a policy claimed by plaintiff because he is in breach of his duty to cooperate by refusing to produce requested financial information necessary to substantiate his claim and has failed to provide sufficient proof of loss. On February 17, 1999, plaintiff filed the complaint in this action. Plaintiff was served with process in the New Jersey action on February 22, 1999 and on March 1, 1999 filed an answer with affirmative

defenses and a counterclaim for breach of contract. Waiver of service in the instant case was filed in this court on March 31, 1999.

Discussion

Subject Matter Jurisdiction

Plaintiff is a citizen of New Jersey. Defendant is a Canadian corporation. Its principal place of business in the United States is in Colorado. Its U.S. claim paying agent for disability income policies is in Massachusetts. Plaintiff claims damages in excess of $75,000. The amount claimed by the plaintiff controls unless it "appear[s] to a legal certainty that the claim is really for less." Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1997). Defendant asserts that the value of plaintiff's contract claim is less than $75,000 and he has no cognizable § 8371 claim because the policy was issued by a non-Pennsylvania insurer in New Jersey to a New Jersey citizen and none of the alleged bad faith conduct occurred in Pennsylvania.

Defendant has not sought to rescind or void the policy. When an insured's present entitlement to benefits under a disability policy, but not the validity of the policy itself, is at issue, future benefits are not considered in determining the amount in controversy. See Gray v. Occidental Life Ins. Co. of Cal., 387 F.2d 935, 936 (3d Cir.) (per curiam) (possible future benefits under disability insurance policy not properly

considered in determining amount in controversy), cert. denied, 391 U.S. 926 (1968); Hilley v. Massachusetts Mut. Life Ins. Co., 32 F. Supp.2d 195, 196 (E.D. Pa. 1998) (when question was insured's continued disability, amount in controversy was amount of benefits due at time suit was instituted); Banks v. Travelers Ins. Co., 60 F.R.D. 158, 161 (E.D. Pa. 1973) (amount in controversy in suit for payment of benefits under disability policy is amount owing at time of suit).

Plaintiff acknowledges that he "is making a claim for approximately $40,000" owed at the time the complaint was filed. To establish the additional requisite amount, plaintiff relies on the availability of punitive damages and counsel fees under § 8371. If plaintiff is claiming other damages, he has not pled them. Thus, subject matter jurisdiction turns on whether plaintiff has asserted a cognizable § 8371 claim.

Venue

Defendant asserts that venue is improper because defendant does not "reside" in this district and none of the alleged acts or omissions giving rise to his claims occurred here. Although set forth under the heading "Subject Matter Jurisdictional Requirement," plaintiff appears to argue that venue is proper because "the disability arose in Pennsylvania" where plaintiff works. The disability in question is cervical arthritis. Even if the alleged disability resulted from an

accident or specific traumatic occurrence in this district, it would not support venue. Plaintiff's insurance claim arose from his asserted partial disability. His legal claim arises from defendant's refusal to pay benefits which is not an act or omission that occurred here.

As to a corporate defendant, however, venue is proper in any district in which it would be subject to personal jurisdiction if the district were a separate state. See 28 U.S.C. § 1391(c); In re Consolidated Parlodel Litig., 22 F. Supp.2d 320, 323 (D.N.J. 1998); Di Mark Mkt., Inc. v. Health Serv. & Indem. Co., 913 F. Supp. 402, 408 (E.D. Pa. 1996). Plaintiff avers that defendant "regularly conducts business within the territorial confines of the Eastern District of Pennsylvania" and defendant has presented no affidavit or other evidence to the contrary. Defendant asserts that "Mizrahi has the burden of establishing that he chose the proper venue." He does not. The burden is on the movant to demonstrate that venue is improper. Myers v. American Dental Ass'n., 695 F.2d 716, 724-25 (3d Cir. 1982), cert. denied, 462 U.S. 1106 (1983). Defendant has not done so.

Moreover, defendant acknowledges in its motion that it is a Canadian corporation. An alien corporation may be sued in any district in which it can be subject to personal jurisdiction. See 28 U.S.C. § 1391(d); Naegler v. Nissan Motor Co., Ltd., 835

F. Supp. 1152, 1157 n.5 (W.D. Mo. 1993); Velcro Group Corp. v. Billarant, 692 F. Supp. 1443, 1449 (D.N.H. 1988); Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1425 (E.D. Wisc. 1983). Defendant has effectively conceded that it is subject to personal jurisdiction in this district by waiving any objection when filing the instant motion. See Fed. R. Civ. P. 12(h)(1); Pilgrim Badge & Label Corp. v. Barrios, 857 F.2d 1, 3 (1st Cir. 1988) (defendant waived objection to personal jurisdiction by failing to assert it in Rule 12 motion to dismiss for improper venue). See also Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909 (5th Cir. 1993) (defendant waived specific objection to venue by failing to assert it in its motion to dismiss for improper venue on other grounds).

Failure to State a Claim

Pennsylvania has little interest in the application of its laws governing the duties of an insurer to an insured where a foreign insurer issues a policy to a New Jersey citizen and none of the conduct complained of regarding the processing of the insured's claim occurred in Pennsylvania. See General Star Nat'l Ins. Co. v. Liberty Mut. Ins. Co., 960 F.2d 377, 379 (3d Cir. 1992). See also Celebre v. Windsor-Mount Joy Mut. Ins. Co., 1994 WL 13840, *2-*3 (E.D. Pa. Jan. 14, 1994) (dismissing § 8371 claim by New Jersey resident even where insurer was Pennsylvania corporation). It is highly unlikely that the Pennsylvania

Supreme Court would hold that § 8371 is applicable to alleged bad faith conduct by a non-Pennsylvania insurer under a policy issued to an insured in New Jersey who was not and is not a citizen or resident of Pennsylvania.

Plaintiff has made no response in his brief to defendant's contention that he has failed to state a cognizable § 8371 claim. Even taking plaintiff's argument in his discussion of venue that his disabling condition "arose" here, this does not show he is entitled to maintain a § 8371 claim. If plaintiff were disabled in a skiing accident in Utah, the refusal of defendant to pay benefits would not create a cause of action under any Utah law governing the duty of insurers to their insureds. A New Jersey citizen whose foreign insurer denied an automobile accident claim would not have a § 8371 claim because the accident occurred in Pennsylvania. There is no indication that that the legislature enacted § 8371 to provide remedies to anyone who happens to sustain an insured loss while in Pennsylvania.

Plaintiff has not asserted a cognizable § 8371 claim. By his own calculation, he has thus failed to satisfy the requisite amount in controversy when suit was filed.

Conclusion

Because plaintiff has not asserted a cognizable § 8371 claim, he cannot rely on the potential damages available under

that statute to satisfy the requisite amount in controversy. Defendant has not sought to void or rescind its policy. It has merely questioned plaintiff's entitlement to certain claimed residual disability benefits, at least until plaintiff submits satisfactory documentation of income and proof of loss. The amount in controversy is thus the $40,000 in benefits allegedly owed when suit was filed.

Accordingly, this case must be dismissed for lack of subject matter jurisdiction. Plaintiff, of course, may still seek to recover any relief available on his breach of contract counterclaim in the pending New Jersey action.

An appropriate order will be entered.

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O R D E R

AND NOW, this day of June, 1999, upon consideration of defendant's Motion to Dismiss Plaintiff's Complaint (Doc. #4) and the response of plaintiff thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that plaintiff's complaint is **DISMISSED,** without prejudice to pursue any relief available in connection with his pending New Jersey breach of contract claim.

BY THE COURT:

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JAY C. WALDMAN, J.