

II and IV of Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Court set forth at length the factual and procedural background of this lawsuit in its of December 14, 1998. The Court therefore refers the reader to said Memorandum and Order for a detailed recitation of the relevant facts and interim decisions made by the Court up to that date.

II. STANDARD OF REVIEW

A. Legal Standard for Fed. R. Civ. P. 12(b)(6) Motion

"A motion to dismiss pursuant to [Federal Rule of Civil Procedure] 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). That is, a reviewing court must "refrain from granting a dismissal unless it is certain that no relief can be granted under any set of facts which could be proved." Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 412 n.5 (3d Cir. 1997) (quoting Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir. 1991)), cert. denied, 118 S. Ct. 435 (1997). In resolving a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case and exhibits attached to the

complaint may also be taken into account. Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). The court's inquiry is directed to whether the allegations constitute a statement of a claim under Federal Rule of Civil Procedure 8(a) and whether the plaintiff has a right to any relief based upon the facts pled. The ultimate "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974). Dismissal under Rule 12(b)(6) for failure to state a claim is therefore limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved. Ransom v. Marazzo, 848 F.2d 398, 401 (3d Cir. 1988); Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985), cert. denied, 470 U.S. 935, 106 S. Ct. 267 (1985).

III. DISCUSSION

A. Defendant's Motion to Dismiss Count II: Breach of Fiduciary Duty

Count II of the Complaint is a claim for breach of fiduciary duty. Count II alleges that Defendant breached its fiduciary duty by not acting "reasonably, in good faith, and with due care in managing, administering, processing, handling, defending, and resolving all claims asserted against" Plaintiffs. (Compl. at ¶ 60). Under Pennsylvania law, the fact that an insurer

and insured enter into an insurance contract does not automatically create a fiduciary relationship. See Conn. Indem. Co. v. Markman, CIV.A. No. 93-799, 1993 WL 304056, at *5 (E.D. Pa. Aug. 6, 1993) (citations omitted). Nevertheless, the insurance contract and the duties it imposes may give rise to a fiduciary relationship between the insurer and the insured in limited circumstances. See Garvey v. National Mut. Ins. Co., CIV.A. No. 95-0019, 1995 WL 115416, at *4 (E.D. Pa. March 16, 1995). Accordingly, Pennsylvania law permits an insurer to assume a fiduciary duty in limited circumstances. See Conn. Indem. Co., 1993 WL 304056, at *5. For example, an insurer assumes a fiduciary duty when it asserts a stated right under the policy to handle all claims against its insured. See Conn. Indem. Co., 1993 WL 304056, at *5.

As to the existence of a fiduciary duty, the Complaint alleges as follows:

Pursuant to the terms of . . . [Defendant's] Comprehensive General Liability Insurance Policies, [Defendant] agreed to defend and indemnify [Great Lakes] and its various divisions and subsidiaries in all suits asserting bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

(Compl. at ¶ 11). The Court finds that as the parties' policy asserts a stated right to handle all claims against the insured. Plaintiffs sufficiently allege that Defendant owed Plaintiffs a fiduciary duty.

Plaintiffs rely on New Concept Beauty Academy, Inc. v. Nationwide Mut. Ins. Co., NO. CIV.A. 97-5406, 1997 WL 746203 (E.D. Pa. Dec. 1, 1997), for the proposition that under Pennsylvania law, an insurance policyholder may sue the policy's issuer for breach of fiduciary duty, so long as the fiduciary duty claim is founded in contract. (Pl.s' Mem. of Law in Opposition to Def.'s Mot. to Dismiss at 8 (citing New Concept)). In New Concept, the New Concept Beauty Academy ("Academy") was insured by defendant Nationwide Insurance ("Nationwide"). Academy paid each of its premiums and satisfied each of its obligations under the policy. The parties' policy was in effect at all times relevant to Academy's claims. After Academy suffered damages to its premises as the direct result of a broken water pipe, it submitted a claim to Nationwide. Nationwide denied, delayed, and/or withheld payments due Academy although it knew that the claim was valid. Academy sued Nationwide for, inter alia, breach of fiduciary duty. Nationwide sought to dismiss Academy's claim pursuant to Rule 12(b)(6). The court denied Nationwide's motion because Plaintiff only sought contract damages under its breach of fiduciary duty claim. New Concept, 1997 WL 746203, at *3.

Defendant makes several arguments in support of its Motion. Defendant contends that the New Concept holding is not relevant to the instant matter because Academy only sought contract damages. Defendant also argues that Pennsylvania law requires that

once a bad faith action is instituted against an insured under 42 Pa. Cons. Stat. Ann. § 8371, a claim for breach of fiduciary duty must be dismissed as redundant. Defendant implicitly argues that insofar as Plaintiff's breach of fiduciary duty claim alleges a tort or seeks punitive damages, it should be dismissed. See Greater N.Y. Ins. Co. v. North River Ins. Co., Inc., 872 F. Supp. 1403, 1409 (E.D. Pa. 1995).

Additionally, Defendant contends that the holding in Wood v. Allstate Ins. Co., No. CIV.A. 96-4574, 1996 WL 637832 (E.D. Pa. Nov. 4, 1996), should control the Court's disposition of this breach of fiduciary duty claim.

In Wood, Plaintiff alleged breach of fiduciary duty. Defendant motioned for the dismissal of said claim, arguing that in Pennsylvania there exists no such tort against an insurer. The court dismissed Plaintiff's claim, reasoning that "there is no common law tort action for . . . breach of fiduciary duty. The [Pennsylvania] bad faith statute provides the sole remedy for punitive damages for insureds who allege . . . breach of fiduciary duty." Wood, 1996 WL 637832, at *2 (emphasis added) (citations omitted).

Plaintiffs allege that their breach of fiduciary duty claim neither sounds in tort nor seeks punitive damages but rather

sounds in contract and seeks an award of interest.¹ Notwithstanding Defendant's arguments, federal courts interpreting Pennsylvania law recognize that breach of fiduciary duty is essentially a contractual claim. See Ingersoll-Rand Equip. Corp. v. Transport Ins. Co., 963 F. Supp. 452, 454 (M.D. Pa. 1997); New Concept, 1997 WL 746203, at *3. Accordingly, the Court finds that in accepting as true the allegations in the Complaint and all reasonable inferences drawn therefrom, Plaintiffs sufficiently allege facts to survive defendant's Motion to Dismiss. Said Motion is denied as it relates to the breach of fiduciary duty claim.

B. Defendant's Motion to dismiss count IV: Wrongful Use of Civil proceedings as to Grefco in Violation of 42 Pa. Cons. Stat. Ann. § 8351 et seq.

Plaintiffs acknowledge that they incorrectly captioned the instant cause of action and intended to state an Abuse of process claim. (See Pl.s' Mem. of Law at 6 n.4). Indeed, Count IV expressly seeks relief under the common law remedy of abuse of

¹ Plaintiffs also argue that because their other three claims sound in tort, the breach of fiduciary duty claim must sound in contract as the Court would not otherwise have a basis to award interest as prayed for in the Ad Damnum clause of their Complaint. (Pl.s' Mem. of Law in Opposition to Def.'s Mot. to Dismiss at 10 n.7). The Court notes that Plaintiffs may recover interest under Pennsylvania's bad faith statute. See 42 Pa. Con. Stat. Ann § 8371(1) (West 1999). Accordingly, Plaintiffs' claim that their breach of fiduciary duty claim must sound in contract because their other claims state tort causes of action is therefore unpersuasive. In support of their argument against dismissal, however, Plaintiffs state that their breach of fiduciary duty claim is stated broadly so as to encompass a contract theory for breach of said duty. The Court agrees. Finally, the Court notes that the first paragraph of Plaintiffs' Complaint states that "this is an action for bad faith claims and other breaches of common law obligations arising out of [Defendant's] refusal to provide the insurance coverage that . . . the Third Circuit . . . had determined [Plaintiff] Grefco acquired from Great Lakes Carbon Corporation . . . in an asset purchase and sale that took place in 1966." (Pl.s' Compl. at ¶ 1 (emphasis added)). In consideration of the above, the Court cannot conclude that Plaintiffs claim is legally insufficient under the parameters of Rule 12(b)(6).

process. (See Compl. at ¶ 74 (Defendant "abused process in the District Court Action") (emphasis added)). The Court therefore treats Count IV as an abuse of process claim.

Abuse of process is a common law tort defined by Pennsylvania case law. See Rosen v. Tabby, No. CIV.A. 95-2968, 1997 WL 667147, at *8 (E.D. Pa. Oct. 9. 1997). Abuse of process is "the use of the legal process against another 'primarily to accomplish a purpose for which it is not designed.'" Rosen, 1997 WL 667147, at *8 (citation omitted). The tort is intended to remedy the "improper use or perversion of 'process' after it is issued." Braden v. City of Phial., No. CIV.A. 98-CV-2718, 1998 WL 633988, at *3 (E.D. Pa. Aug. 21, 1998) (citation omitted). The word "process" as it is used in this tort is "interpreted broadly and encompasses the entire range of procedures incident to the litigation process." Rosen v. American Bank of Roll, 627 A.2d 190, 192 (Pa. Super. Ct. 1993) (citations omitted).

To satisfy the requirements of an abuse of process claim, Plaintiffs must demonstrate that Defendant (1) used a legal process against Plaintiffs, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to Plaintiffs. See Braden, 1998 WL 633988, at *3.

Plaintiffs allege that Defendant acted without reasonable basis on numerous occasions to, inter alia, prolong the litigation. (See Compl. at ¶¶ 74-75). Plaintiffs also allege that Defendant

abused process "for the purpose of delay and harassment, and to continue its efforts to ignore the contractual obligations owed to [Plaintiff] Greco." (Compl. at ¶ 76). Finally, Plaintiffs allege that real and substantial damage has been and continues to be suffered. (See Compl. at ¶ 78). In light of the foregoing, the Court finds that Plaintiff alleges sufficient facts to survive Defendant's Rule 12(b)(6) Motion. Accordingly, said Motion is denied as it relates to Plaintiffs' abuse of process claim.

An appropriate Order follows.

