

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

GUTHRIE CLINIC, LTD.	:	
	:	3: 00 CV 1173
v.	:	
	:	
THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS	:	(Judge Munley)
	:	

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MEMORANDUM

Before the court for disposition is the motion to dismiss filed by the defendant. The plaintiff is Guthrie Clinic, Ltd., and the defendant is the Travelers Indemnity Company of Illinois. The parties have briefed their respective positions, and oral argument has been heard. The matter is thus ripe for disposition. For the reasons that follow, the motion to dismiss will be denied.

Background

This case arises out of the issuance of umbrella liability insurance policies by the defendant to the plaintiff in 1996, 1997, 1998 and 1999. The policies provided excess insurance coverage above the underlying medical malpractice coverage that plaintiff obtained through other sources.

In June 1998, plaintiff was sued by Ellen Thurston. Plaintiff sent notice of the action to defendant in July of 1999. In September 1999, a declination of coverage was issued by the defendant based on the revised terms and conditions contained in the 1998 renewal policy. Plaintiff brought suit involving the defendant's actions in the renewal of the policies

and its declination of coverage with respect to the Thurston claim. Plaintiff contends that the defendant never provided any notice of the substantial and material revisions that it unilaterally made to plaintiff's 1998 and 1999 policies. In fact, plaintiff alleges that the defendant never even provided a copy of the changed excess umbrella renewal policy to plaintiff until long after the inception date of the 1998 renewal policy. Consequently, plaintiff claims to be entitled to the same insurance coverage provided to it under its 1996 and 1997 policies.

The complaint contains claims for declaratory relief, breach of contract, breach of common law duty of good faith, breach of fiduciary duties, common law fraud, intentional misrepresentation, negligent misrepresentation, and bad faith pursuant to Pa.C.S.A. § 8731.

Defendant has moved under Federal Rule of Civil Procedure 12(b)6 to dismiss several portions of the complaint, based on the following three contentions: 1) Plaintiff's claim for fraud fails to set forth the circumstances constituting fraud with particularity as required under Federal Rule of Civil Procedure 9(b); 2) Plaintiff's claims for breach of common law duty of good faith (in Count III) and breach of fiduciary duty (in Count IV) fail to state a claim upon which relief may be granted; and 3) Several paragraphs in plaintiff's bad faith claim should be dismissed as they relate to renewal of a policy as opposed to declination of insurance benefits.

Standard of Review

When a 12(b)6 motion is filed, the sufficiency of a complaint's allegations are tested.

The issue is whether the facts alleged in the complaint, if true, support a claim upon which relief can be granted. In deciding a 12(b)6 motion, the court must accept as true all factual allegations in the complaint and give the pleader the benefit of all reasonable inferences that can fairly be drawn therefrom, and view them in the light most favorable to the plaintiff.

Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

Because we are sitting in diversity, the substantive law of Pennsylvania shall apply to the instant case. Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

I. Fraud

Defendant's first argument is that plaintiff's claim for fraud fails to set forth the circumstances constituting fraud with particularity as required under Rule 9(b) of the Fed.R.Civ.Pro. Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The United States Court of Appeals for the Third Circuit has held 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. Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984), cert denied, 469 U.S. 1211 (1985). The rule is satisfied where some precision and some measure of substantiation is present in the pleadings. Killian v. McCulloch, 850 F. Supp. 1239, 1254

(E.D.Pa. 1994).

Count V of plaintiff's complaint claims that the defendant committed common law fraud. The elements of common law fraud include a material misrepresentation of existing fact, scienter, justifiable reliance on the misrepresentation, and damages. Hammer v. Nikol, 659 A.2d 617, 620 (Pa. Commw. 1995).

Defendant's position is as follows: Plaintiff's complaint alleges that the renewal policy issued to plaintiff in 1998 contained a revised definition of the term "claim" which defendant knowingly concealed from the plaintiff. No allegation of an affirmative misrepresentation is made. Therefore, this is basically a fraudulent concealment case. To establish fraudulent concealment, a plaintiff needs to allege that the defendant prevented plaintiff from acquiring material information, and the plaintiff has failed to do so in the instant case. Plaintiff only asserts that the defendant was silent about the change. Mere silence cannot be the basis for a claim of fraudulent concealment.

Plaintiff asserts that in the instant case, mere silence is enough to establish a material misrepresentation, because the defendant had a duty to speak. We agree with the plaintiff that the allegations are sufficient to support a cause of action for fraud.

While it may be true that mere silence *in the absence of a duty to speak* cannot suffice to prove fraudulent concealment, under Pennsylvania law, when an insurer elects to issue a policy differing from what the insured requested and paid for, there is an affirmative duty to advise the insured of the changes so made. Tonkovic v. State Farm Mutual Automobile Ins.

Co., 521 A.2d 920, 925 (Pa. 1987); Highlands Insurance Group v. Van Buskirk, 2000 WL 1659918 *3 (E.D.Pa.).

In the instant case, it is asserted that the defendant altered the insurance policy without advising the insured of the changes made. Therefore, we find that the plaintiff has sufficiently pled a material misrepresentation and the other elements of common law fraud so as to overcome the defendant's motion to dismiss.

II. Common Law Duty of Good Faith, Breach of Fiduciary Duty.

Next, the defendant claims that the plaintiff's allegations of a breach of a common law duty of good faith and breach of fiduciary duty should be dismissed. Defendant argues that in Belmont Holding Corp. v. Unicare Life and Health Ins., 1999 WL 124389 (E.D. Pa.), the court found that Pennsylvania law does not establish a fiduciary duty based on good faith and fair dealing with respect to insurance contracts, and to the extent that failure to act in good faith under an insurance policy exists, a breach of fiduciary duty claim is redundant of a claim for breach of contract. Hence, the breach of contract claim in Count III of the Amended Complaint covers the breach of common law duty of good faith and the breach of fiduciary duties claims asserted in Counts III and IV, and they should be dismissed according to the defendant.

Plaintiff, however, cites the case of Birth Center v. St. Paul Cos., Inc., 727 A.2d 1144, 1155 (Pa. Super. Mar. 9, 1999), alloc. granted, 747 A.2d 858 (Pa. 2000)¹ for the proposition

¹Although allocatur has been granted by the Pennsylvania Supreme Court, none of the issues we will address were included as issues that the court will review. Birth Center v. St. Paul Cos. Inc.,

that a policyholder may proceed simultaneously on its claims that the insurer breached its fiduciary duty to its insured, that the insurer had breached its implied covenant of good faith and fair dealing with its insured, and that the insurer had breached its insurance contract with its insured, as well as its bad faith claims under 42 Pa.C.S.A. § 8371. Significantly, the Birth Center case was decided after the Belmont case.

In the Birth Center case, claims were brought against an insurance company including, *inter alia*, that it had breached its fiduciary duty, its implied covenant of good faith and fair dealing and its contract. Id. at 1151. The Pennsylvania Commonwealth Court stated that “the insurer assumes a fiduciary responsibility towards the insured and becomes obligated to act in good faith and with due care in representing the interests of its insured when handling, *inter alia*, all third party claims brought against the insured.” Id. at 1155. The court further explained that the duty to act in good faith “is said to arise not under the terms of the contract, but because of the contract, and to flow from the contract.” Id. The breach of fiduciary duty or the duty of good faith is not a breach of the terms of the contract but a breach of the duty, which arises because of the contract and flows from it. Id. Accordingly, based upon the Birth Center case we find that it is proper for the plaintiff to plead causes of action for breach of fiduciary duties and breach common law duty of good faith that are separate from the breach of contract claim, and the defendant’s motion to dismiss these claims will be denied.

747 A.2d 858 (Pa. 2000)

III. Bad Faith

Defendant lastly contends that two paragraphs in the plaintiff's claim for bad faith should be dismissed. Defendant's position is that a bad faith cause of action only arises out of an insurance company's denial of benefits. The paragraphs at issue, paragraphs 174 and 175, deal with the renewal of the policy, not with a declination of benefits; therefore, they should be stricken. We are not convinced. When read as a whole, it is apparent that plaintiff's claim of bad faith in the denial of benefits includes the issues involving the renewal of the policy. In other words, plaintiff is not merely asserting that the defendant acted in bad faith because it failed to follow proper procedure in renewing the policy. Plaintiff alleges that coverage was denied and the reason it was denied involves the manner in which the policy was renewed. Therefore, the paragraphs will not be stricken.

Conclusion

In conclusion, we find that the plaintiff has sufficiently pled its claim for common law fraud. It was proper for the plaintiff to plead causes of action for breach of fiduciary duties, breach of the common law duty of good faith and breach of contract in the manner that it did. In addition, the paragraphs regarding the renewal of the policy located in the claim for bad faith need not be stricken. Accordingly, the defendant's motion to dismiss will be denied. An appropriate order follows.

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THE TRAVELERS INDEMNITY	:	(Judge Munley)
COMPANY OF ILLINOIS	:	

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ORDER

AND NOW, to wit, this _____ day of December 2000, the defendant's motion to dismiss [7-1] is hereby **DENIED**.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court