IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSLYVANIA
CIVIL TRIAL DIVISION

Temple University Health System, Inc., Et. al.,	:	February Term, 2004
Plaintiffs,	:	No. 1547
v.	:	
National Union Fire Insurance Company of Pittsburgh, Pa.,	:	Commerce Program
Defendant.	:	Control Number 061705

ORDER

AND NOW, this 7th day of January, 2005, upon consideration of Defendant National Union Fire Insurance Company of Pittsburgh, PA's Motion for Judgment on the Pleadings, all responses in opposition, memoranda, all matters of record, after oral argument and in accord with the contemporaneous Memorandum Opinion being filed of record, it hereby is **ORDERED** and **DECREED** that Defendant's Motion for Judgment on the Pleadings is **GRANTED** as to Counts I, II, III, IV and VI and **DENIED** as to Count V.

BY THE COURT,

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C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

Presently before the court is Defendant National Union Fire Insurance Company of Pittsburgh, Pa.'s ("National Union") Motion for Judgment on the Pleadings. For the reasons that follow, National Union's motion for judgment on the pleadings is granted as to Count I, II, III, IVand VI and denied as to Count V.

BACKGROUND

Plaintiffs[1], insureds under a Management Liability Policy issued by National Union which provides coverage to plaintiff for the period July 1, 2002 to July 31, 2003, seek a declaration that National Union has a duty to defend and indemnify the corporate insureds and indemnify the individual insureds in a lawsuit brought against them in Montgomery County captioned AIM High Income Municipal Fund, et. al. v. Temple University Health Systems, Inc., et. al., Court of Common Pleas Montgomery County Civil Action No. 03-07372 ("the Aim High lawsuit").

[1] Plaintiffs are Temple University Health Systems, Inc. ("TUHS"), Temple University Hospital, Inc. ("TUH"), Greater Philadelphia Health Services III Corporation ("GPHS") (hereinafter collectively referred to as "corporate insureds"), and Albert P. Black, Beth C. Koob, Robert H. Lux, John C. Cameron, Paul H. Boehringer, Herbert P. White and Joseph W. Marshall III (hereinafter collectively referred to "individual insureds").

The Aim High lawsuit arose from the issuance of tax free revenue bonds in 1999 by the Montgomery County Higher Education and Health Authority ("Authority"). The Authority loaned the proceeds from its sale of the 1999 bonds ($48 million) to Greater Philadelphia Health Services III, Inc. ("GPHS") pursuant to a written loan agreement to enable GPHS to purchase and improve a 538 bed nursing home in Philadelphia ("Facility"). GPHS was contractually obligated to repay its loan from the Authority. TUH is also a signatory to the Loan Agreement. In the Loan Agreement, TUH agreed to advance GPHS working capital to run the facility. The loan agreement between TUH and GPHS for the working capital is contained in a separate loan agreement.

In addition to the above agreements, GPHS also entered into a Purchase Service/Lease Agreement ("The Management Agreement") with Temple University Health Systems, Inc. ("TUHS") under which TUHS was to provide GPHS with management services to assist it in operating the Facility.[2]

The Authority sold the 1999 Bonds pursuant to a written offering memorandum, known as the "Official Statement." The Official Statement allegedly contains covenants made by GPHS promising success of the Facility and payment to the bondholders.

The Aim High lawsuit alleges that the Facility failed to succeed financially and closed on or around February 6, 2003. As a result, GPHS and TUH defaulted on its loan payments to the Authority, and in turn, the Authority defaulted on its payments to the Bond Investors. Consequently, the Bond Investors sued GPHS, TUH and its related entities as well as the individual officers and directors of GPHS, TUH and TUHS to recover their loss of principal and interest due on the 1999 Bonds. The lawsuit alleges claims for breach of contract by the corporate insureds (Counts I, II, III, and VI),

[2] This agreement was not made a part of the record before the court.

negligence (Count IV) by the corporate insureds and breach of fiduciary duty (Count V) by the individual insureds.

Upon receipt of the Aim High lawsuit, Plaintiffs contacted National Union. Pursuant to the terms of its policy, National Union allegedly has an obligation to advance defense costs to its insureds. Defense costs are defined as "reasonable and necessary fees, costs, and expenses …resulting solely from the investigation, adjustment, defense and appeal of a Claim against the Insureds…" National Union also has an obligation under the policy to indemnify its insureds for any loss suffered because of a claim. Loss is defined to include "damages…judgments, settlements, [and] pre-and post – judgment interest…" The Policy does contain exclusions, including an exclusion for claims arising out of any losses in connection with the insureds' contractual obligations.

In a letter dated July 14, 2003, National Union relying upon the contractual exclusion contained within the policy denied indemnity coverage for all of the insureds and defense coverage for the corporate insureds. National Union agreed to pay the defense costs for the individual insureds.

Thereafter, Plaintiffs instituted this action against National Union seeking a declaration that National Union has an obligation to provide defense and indemnity coverage to the corporate insureds and indemnity coverage to the individual insureds for the Aim High lawsuit. National Union has now filed the instant motion for judgment on the pleadings.

DISCUSSION

I. Legal Standard

Entry of judgment on the pleadings is permitted under Pa. R. Civ. P. 1034 which provides for such judgment after the pleadings are closed, but within such time as not to delay trial. A motion for judgment on the pleadings is similar to a demurrer.

> It may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. In determining if there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents. Cole v. Lawrence, 701 A.2d 987, 988 (Pa. Super. 1997).

Lastly, neither party may be deemed to have admitted conclusions of law. Mellon Bank, N. A. v. National Union Fire Ins. Co., 768 A.2d 865, 868 (Pa. Super. 2001).

In Pennsylvania, the proper construction of an insurance policy is a matter of law. Fisher v. Harleysville Ins. Co., 423 Pa. Super.362, 621 A.2d 158 (1993). In interpreting an insurance policy, the court must ascertain the intent of the parties as manifested by the language of the written agreement. When the policy language is clear and unambiguous, the court will give effect to the language of the contract. Paylor v. Hartford Ins. Co., 536 Pa. 583, 640 A.2d 1234 (1994).

The duty to defend an insured is broader than the duty to indemnify. Snyder Heating Co. v. Pennsylvania Mfrs'. Ass'n Ins. Co., 715 A.2d 483, 491 (Pa. Super. 1998). "An insurer's duty to defend is dependent upon the derivative question of coverage. It is well established that while an insurer is not required to defend an insured in every claim brought against it, an insurer must defend in any suit in which there exists actual or potential coverage." Acceptance Ins. Co. v. Seybert, 757 A.2d 380, 382 (Pa. Super. 2000)(quoting Hartford Mut. Ins. Co. v. Moorhead, 578 A.2d 492, 494 (1990)). In determining whether there exists a duty to defend, "the terms of the policy must be

compared to the nature of the allegations of the complaint, and a determination made as to whether, if the allegations are sustained, the insurer would be obligated to incur the expenses of the judgment." Id.

The insured has the initial burden of establishing coverage under an insurance policy. Butterfield v. Guintoli, 448 Pa. Super. 1, 670 A.2d 646, 651-52 (1995). On the other hand, when the insurer relies on a policy exclusion as the basis for denying coverage, it bears the burden of proving that the exclusion applies. Mistick, Inc. v. Northwestern Natl. Cas. Co., 806 A.2d 39, 42 (Pa. Super. 2002).

II. The Breach of Contract Claims alleged in Counts I, II, III and IV Are Excluded From Coverage By National Union Policy's.

The policy issued to Plaintiffs by National Union contains a specific policy exclusion that the insurer shall not make any payment for loss in connection with a claim made against an insured that alleges, arises out of, is based upon or is attributable to a contract. Specifically, the policy exclusion provides:

> k) alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the Organization or an Insured under any express written or oral contract or agreement (including, but not limited to, any liquidated damages, severance agreement or payment, golden parachute agreement, or any compensation agreement payable upon the termination of any Insured); provided, however, that this exclusion shall not apply to:
>
> (5) solely with respect to Directors, Officers or Trustees, this exclusion shall not apply to covered Defense Costs incurred in connection with a Claim alleging a Wrongful Act, provided that this exception for Directors, officers and Trustees shall not apply to a Claim alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the Organization or any other Insured under any express employment contract or agreement;

Policy Section II, Amendment to Exclusions, paragraph A.

In the case at bar, the AIM High lawsuit alleges claims for breach of contract in Counts I, II and VI as well as a claim for breach of the covenant of good faith and fair dealing in Count III. Breach of the covenant of good faith and fair dealing is nothing more than a breach of contract claim. Separate causes of action cannot be maintained for each, even in the alternative. *See*, JHE, Inc. v. Southeastern Pennsylvania Transport Auth., 2002 WL 1018941, *7 (Pa. Com. Pl. 2002)(Sheppard, J.). Based on the clear language of the policy exclusion, the claims for breach of contract and breach of the covenant of good faith and fair dealing found in Counts I, II, III and IV are excluded from coverage by the terms of the policy. Pennsylvania law does not recognize the applicability of a general liability policy to such causes of action. *See*, Redevelopment Auth. v. International Ins. Co., 454 Pa. Super. 374, 685 A.2d 581 (Pa. Super. 1996)(the purpose and intent of a general liability policy is to protect the insured from liability for essentially accidental injury to the person or property of another rather than coverage for disputes between parties to a contractual undertaking). Accordingly, defendant's motion with respect to Counts I, II, III, and VI is granted.

III. The Negligence Claim in Count IV is Barred by the Gist of the Action Doctrine and the Economic Loss Doctrine.

In addition to contract claims, the Aim High lawsuit also alleges a negligence claim (Count IV) against the corporate defendants. The Aim High plaintiffs claim that the corporate defendants owed them a duty to operate and manage the facility in a manner consonant with their stated skills and experience. (Complaint ¶ 104). The Aim High plaintiffs set forth the duties which the corporate defendants negligently performed including but not limited to failing to maintain a consistent, predictable and adequate flow of patients at the facility, failing to institute expeditiously the capital improvements

identified in the official statement and grossly mismanaging the facility. (Complaint ¶ 105 (1) –(9)). The duties which the Aim High plaintiffs claim the Corporate Defendants negligently performed are the same duties the Aim High plaintiffs claim the Corporate Defendants failed to perform under the Loan Agreement, Official Statement and Management Agreement. See Counts (I and II).

"When a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the "gist" or gravemen of it sounds in contract or tort." Freestone v. New Eng. Log Homes, Inc., 819 A.2d 550, 554 (Pa. Super. 2003). "The test is not limited to discrete instances of conduct; rather, the test is, by its own terms, concerned with the nature of the action as a whole." Id (quoting American Guar. and Liab. Ins. Co. v. Fojanini, 90 F.Supp. 2d 615, 622 (E.D. Pa. 2000).

Applying the foregoing principles to the case at bar, the court finds that the gist of the negligence claim in Count IV of the Aim High lawsuit is in contract and therefore excluded from coverage under the terms of National Union's policy. In Count I, the Aim High plaintiffs acknowledge that the duties which it claims were negligently breached were imposed by the loan agreement and the official statement. Similarly, the allegations contained in Count II also acknowledge that the duties which it claims were negligently breached were imposed by the management agreement. The tort claim contained in Count IV essentially duplicates the contract claims in Counts I and II. Therefore, the Aim High plaintiff's negligence claim against the Corporate Defendants is really a claim that the Corporate Defendants negligently breached the Loan Agreement, the Official Statement and the Management Agreement. It does not matter in what manner the

Corporate Defendants committed the alleged breach; it is still simply a breach of contract and therefore the gist of the Aim High Plaintiffs' claim clearly sounds in contract.

An insurer has no duty to defend or indemnify an insured for a contract action when the policy contains express contractual claim exclusion, even if the action asserts tort claims, so long as the contract is not collateral to the tort claim and is the "gist of the action". Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 663 A.2d 753, 756-58 (1995). Here since Count IV sounds in tort and is the gist of the action, National Union does not have a duty to defend or indemnify the Corporate Defendants. Accordingly, defendant's motion for judgment on the pleadings is granted as to Count IV.

The Corporate Defendants in the instant action attempt to shield themselves from the gist of the action doctrine claiming that not all the Corporate Defendants were signatories to the Loan Agreement, the Official Statement and the Management Agreement and therefore the doctrine does not apply. The court recognizes that TUHS is not a signatory to the Loan Agreement or the Official Statement. The court also recognizes that the gist of the action doctrine applies to tort claims that arise from a contract between the parties. However, based on the factual allegations within the Aim High lawsuit, this court finds that gist of the action doctrine is appropriate.

In City of Philadelphia et. al. v. Human Services Consultants, II, Inc., March Term 2003 No. 00950 (March 23, 2004)(Jones, J), the court applied the gist of the action doctrine against Roger Adams, an officer of HSC. Although Adams was not a party to the contracts in issue, the tort claims brought against him were dismissed based on the gist of the action doctrine since the conduct alleged could potentially pierce the corporate veil. Here, like Human Services, the Aim High plaintiffs also allege conduct which could

p+otentially pierce the corporate veil of GPHS by TUH and TUHS. Thus, as in Human Services, the application of the gist of the action doctrine is appropriate.

This court has additional grounds upon which to grant defendant's motion. "Where a plaintiff asserts negligence and seeks only damages for economic loss, the defendant is entitled to judgment as a matter of law." David Pflumm Paving & Excavating, Inc. v. Foundation Servs Co., 816 A.2d 1164 (Pa. Super. 2003). In this case, the Aim High Plaintiffs seek the principal amount of the 1999 Bonds together with accrued and unpaid interest, all other amounts due and unpaid on the 1999 bonds and prejudgment and post judgment interest, cost, and attorney fees as damages. Since the Aim High Plaintiffs allege only economic loss, the negligence claim is subject to the economic loss doctrine.[3] Accordingly, National Union's motion for judgment on the pleadings is Granted as to Count IV.

IV. The Gist of the Action Doctrine Does Not Exclude Count V Breach of Fiduciary Duty From Coverage.

The Aim High plaintiffs also allege a claim for Breach of Fiduciary Duty against the individual insured. With respect to this count, National Union is paying defense costs. National Union argues that under the policy it is not required to indemnify the individual insureds since the underlying claim for breach of fiduciary duty arises from the contractual relationship among the parties and therefore the contractual exclusion applies. The individual insureds, on the other hand, argue that the contractual exclusion does not

[3] Plaintiffs seek to avoid the imposition of the gist of the action doctrine and the economic loss doctrine by claiming that Count IV alleges a claim for negligent misrepresentation. Notwithstanding how the plaintiffs wish to interpret Count IV, negligent misrepresentation claims are barred by the gist of the action doctrine and the economic loss doctrine. *See* Atchinson Casting Corp. v. Deloitte & Touche, LLP., 2003 WL 1847665 (March 2003) (Jones, J.), McShane v. Recordex, 2003 WL 22805233 (Pa. Com. Pl. 2003)(Jones, J.); Atchinson Casting Corp. v. Deloitte & Touche, 2003 WL 1847665 (Pa. Com. Pl. 2003)(Jones, J.).

apply since the individual insureds are not a party to the underlying contract and therefore the gist of the action doctrine does not apply.

A breach of fiduciary duty is in essence a breach of trust which does not require a professional relationship or a professional standard of care. Nardella v. Dattilo, 36 Pa. D. & C. 4th 364, 380 (Pa. Com. Pl. 1997). Our Superior Court has recognized that "the concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line." Basile v. H & R Block, Inc. 777 A.2d 95, 101 (Pa. Super. 2001). "In essence a [confidential] relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." Id at 4 (quoting In re Estate of Scott, 455 Pa. 429, 432, 316 A.2d 883, 885 (1974)). A confidential relationship exists where the parties do not deal on equal terms, "but, on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed." Id (quoting Frowen v. Blank, 293 Pa. 137, 145-46, 425 A.2d 412, 416-17 (1981). "The party in whom the confidence is reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage." Id (quoting Young v. Kaye, 443 Pa. 335, 342, 279 A.2d 759, 763 (1971)). "[A] confidential relationship and the resulting fiduciary duty may attach 'wherever one occupies toward, another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest'." Id. Such a relationship may be found as between a trustee and cestui que trust, guardian and ward, attorney and client, or principal and agent, or where the facts and circumstances so indicate and are apparent on the record. Id. Normally, it is the agent or the employee who owes the

fiduciary duty to his principal or employer, and not the other way around. Babiarz v. Bell Atlantic-Pennsylvania, Inc., 2001 WL 1808554, *12 (Pa. Com. Pl. 2001) (J. Herron).

Here, the Aim High plaintiffs allege that a fiduciary relationship exists among the bondholders and the individual insureds because at the time GPHS was insolvent, the individual defendants had a duty to manage and cause GPHS to operate the facility in a manner consistent with their stated skill, experience and abilities and to place the interest of GPHS's creditors above their own actions and those of TUHS. (Complaint ¶108). The Aim High plaintiffs do not allege nor can one infer from the allegations within the complaint that the alleged fiduciary duty arises from a contractual relationship between the parties. Indeed, a review of the contracts made a part of the record demonstrates that the individual defendants are not signatories to the Loan Agreement or the Official Statement. Although the pleadings acknowledge the existence of a Management Agreement between GPHS and TUHS, the parties have not attached this agreement to its pleadings and therefore at this stage in the proceedings the court does not have the benefit of this document.

Based on the above allegations, this court finds that the gist of the breach of fiduciary duty claim is not contractual in nature since the alleged fiduciary relationship exists independently from any contractual relationship between the parties. See eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10 (Pa. Super. 2002)(where fiduciary duties extend beyond contractual duties the claim is not barred by the gist of the action doctrine); see also Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79 (3rd Cir. 2001)(breach of the fiduciary duty claim was not barred by the gist of the action doctrine because the fiduciary duties flowing from majority partners to minority partners

are separate and distinct from the contractual duties contained in the joint venture agreement). In reaching this decision, the court makes no finding as to the future viability of this claim. Accordingly, defendant's motion for judgment on the pleadings is denied as to Count V.

CONCLUSION

For the reasons discussed above, Defendant's Motion for Judgment on the Pleadings is Granted as to Counts I, II, III, IV and VI and Denied as to Count V. An order contemporaneous with this Opinion will follow.

BY THE COURT,

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C. DARNELL JONES, II, J.