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

VASILE MARINCAS,	:	MARCH TERM, 2004
Plaintiff,	:	No. 3123
v.	:	COMMERCE PROGRAM
U.S. MAIL DELIVERY SYSTEM, INC., ST. PAUL FIRE AND MARINE INC., CO., MIDLAND TRANSPORTATION, INC. PROGRESSIVE FIRE INSURANCE CO., JEFFERSON FIRE INSURANCE CO., VANDNA GUPTA, SIPI GUPTA, NACHIKETA GUPTA, GHANSYHYAN GUPTA, MIRCEA AIRINEI,	:	Control No. 052027
Defendants.	:	

O R D E R

AND NOW, this 20TH day of July 2004, upon consideration of Jefferson Fire Insurance Company's Preliminary Objections, plaintiff's response in opposition, the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously, it is **ORDERED** that the Preliminary Objections are **SUSTAINED,** in part, and Count VI (Bad Faith) against Jefferson Insurance Company is **DISMISSED** without prejudice. Plaintiff may file an Amended Complaint within twenty-two (22) days of the date of entry of this Order. The remaining Preliminary Objections are **OVERRULED**.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ……..…….. July 20, 2004

In this Declaratory Judgment action, plaintiff, Vasile Marincas, seeks coverage from a number of insurers, including defendant Jefferson Fire Insurance Company. ("Jefferson"), with respect to an accident occurring in Philadelphia involving a tractor truck owned by plaintiff and insured by Jefferson.[1] Plaintiff asserts claims against Jefferson for breach of contract and bad faith for failure to provide coverage to plaintiff. Jefferson has filed Preliminary Objections to both claims, which are presently before this court.

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[1] Defendants, Vandna Gupta, Sipi Gupta, Nachiketa Gupta, and Ghansyhyan Gupta (the "Gupta Defendants"), were the occupants of a motor vehicle involved in the accident and are the plaintiffs in certain underlying tort litigation brought against Mr. Marincas and others. Defendant Mircea Airnei was plaintiff's agent who was driving plaintiff's tractor trailer at the time of the accident.

Defendants Midland Transportation, Inc. ("Midland") and U.S. Mail Delivery System, Inc. ("U.S. Mail") are alleged to have owned the cargo trailer that was being hauled by plaintiff's tractor trailer at the time of the accident. Defendants St. Paul Fire and Marine Insurance Co. ("St. Paul") and Progressive Insurance Co. ("Progressive") are allegedly the insurers of U.S. Mail and Midland, respectively.

Plaintiff previously brought similar claims against Jefferson, U.S. Mail, St Paul, Midland, and Progressive in a separate action before this court (the "Prior Action").[2] The Prior Action was dismissed by another judge of this court for failure to join indispensable parties, namely the Gupta Defendants and Mircea Airnei.

I. The Dismissal of the Prior Action Does Not Bar Plaintiff From Bringing This Action.

Jefferson argues that plaintiff is precluded from bringing this action because the Prior Action was dismissed. Jefferson styles this objection as a "Motion to Dismiss for Pendency of a Prior Action". However, that is not a proper basis for the objection, here. Although "a party may raise preliminary objections based on the pendency of a prior action, . . . the doctrine of *lis pendens* requires that the prior action be [still] pending." Critchfield v. Eaton Corp., 806 A.2d 1259, 1262 (Pa. Super. 2002). Since the Prior Action involving certain of these parties was dismissed, this objection based on prior pending action is without merit.

Instead, Jefferson's objection appears to be premised upon the doctrine of *res judicata* rather than upon the doctrine of *lis pendens*. "Strict *res judicata*, also known as claim preclusion, provides that where there is a final judgment on the merits, future litigation on the same cause of action is prohibited." McGill v. Southwark Realty Co., 828 A.2d 430, 435 (Pa. Super. 2003) ("a default judgment is *res judicata* with regards to transactions occurring prior to entry of judgment.") However, the dismissal order in the Prior Action, which was based upon the failure to join indispensable parties, does not have *res judicata* effect.[3]

> [I]n the absence of an indispensable party, the court lacks jurisdiction over the matters before it that affect the rights of the missing party. . . . Thus the trial court

[2] Philadelphia County Court of Common Pleas, November Term 2002, No. 1017.

[3] The related doctrine of collateral estoppel also does not bar this action because the issues raised here were not "actually litigated" in the Prior Action. *See* McGill, 828 A.2d at 435.

> [must dismiss such an] action without reaching the merits of [plaintiff's] claims since any order of the court on the merits would [be] null and void for want of jurisdiction.

D'Amico v. Royal Ins. Co., 383 Pa. Super. 239, 242, 556 A.2d 886, 887 (1989). *See also* Nicoletti v. Allegheny County Airport Auth., 841 A.2d 156 (Commw. 2004) (vacating trial court's order and dismissing case without prejudice for lack of jurisdiction where plaintiff failed to join indispensable party).

Because the court in the Prior Action found that certain indispensable parties were not before it, it necessarily lacked jurisdiction over plaintiff's claims.[4] Therefore, its order dismissing the Prior Action was not 'on the merits.' Although the court did not specifically say so, its order was also necessarily entered without prejudice to plaintiff's "right to institute a new action wherein all indispensable parties are made parties to the proceedings." Nicoletti, 841 A.2d at 163. Therefore, the dismissal order entered in the Prior Action does not preclude plaintiff from bringing this action.[5]

II. Jefferson's Preliminary Objection to Plaintiff's Breach of Contract Claim Must Be Overruled.

Jefferson argues that plaintiff's claim for breach of the insurance contract is barred by the applicable four year statute of limitations because the accident for which plaintiff is attempting to obtain coverage occurred more than four years before the filing of this suit. However, the statute of limitations on plaintiff's claim did not begin to run on that date.

> The general rule is that the statute of limitations begins to run when the plaintiff's cause of action arises or accrues. . . . [A] cause of action for a declaratory

[4] The court issued an order in the Prior Action granting Jefferson's Motion for Summary Judgment, which would have had preclusive effect if the court had not subsequently vacated that order. The court presumably did so because it recognized that it lacked jurisdiction under the indispensable party doctrine.

[5] Since plaintiff has included as defendants in this action the parties deemed indispensable in the Prior Action, this action does not suffer from the same defect as the Prior Action.

> judgment does not arise or accrue until an 'actual controversy' exists. . . . . In this case, the 'actual controversy' surrounding the interpretation of the insurance policy at issue did not arise until [Jefferson] denied [plaintiff's] request for coverage.

Zourelias v. Erie Ins. Group, 456 Pa. Super. 775, 778, n. 2, 691 A.2d 963, 965, n. 2 (1997). The issue when Jefferson denied coverage to plaintiff is a factual issue that the court cannot resolve at this stage in the proceedings.[6] Therefore, Jefferson's Preliminary Objection based on the statute of limitations must be denied without prejudice to its being raised later at a more appropriate stage of the proceedings.

III. Jefferson's Preliminary Objection to Plaintiff's Bad Faith Claim Must Be Sustained.

Jefferson objects to plaintiff's claim for bad faith because in making that claim plaintiff relied on the Pennsylvania bad faith statute, which Jefferson asserts does not apply to the policy at issue. In his response, plaintiff concedes that Illinois, rather than Pennsylvania, law may apply to his claim for bad faith since he resides in Illinois and the applicable insurance policy was issued to him in Illinois. *See* Plaintiff's Memorandum of Law in Opposition to Preliminary Objections, pp 6-7; Complaint, ¶ 1; Ex. 1.

The Illinois 'bad faith' statute is not identical to Pennsylvania's, so plaintiff's allegations that Jefferson breached the Pennsylvania statute do not necessarily satisfy the requirements of the Illinois statute. *See* 215 Il. C.S. § 155(1) (allowing insured to recover attorneys' fees, costs, and a prescribed penalty for an insurer's "action or delay [that] is vexatious and unreasonable.") In order to remedy this defect in his claim, plaintiff suggests that all references to the Pennsylvania bad faith statute be stricken. However, the court believes that the better solution

[6] "The appropriate means to raise the bar of the statute of limitations is as an affirmative defense with the filing of New Matter in a responsive pleading. However, [plaintiff] did not object to the issue being raised by means of preliminary objection," so the court has addressed the issue at this stage. Johnson v. Allgeier, ___ A.2d ___, 2004 WL 1345068 * 3, n. 1 (Pa. Super. June 16, 2004)

would be for plaintiff to replead his bad faith claim under the appropriate state's law. Therefore, the court will sustain Jefferson's objection to the bad faith claim and dismiss that claim without prejudice to plaintiff's right to replead it properly.

CONCLUSION

For all the foregoing reasons, Jefferson Insurance Company's Preliminary Objections to plaintiff's Complaint are sustained in part and overruled in part. An Order consistent with this Opinion will be entered of record.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.