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

ACME-HARDESTY CO., A DIVISION OF JACOB STERN & SONS, INC., JACOB STERN & SONS, INC., ENGINEERED ARRESTING SYSTEMS CORP.,t/a ESCO ARRESTING SYSTEMS, JADE INTERNATIONAL, INC. and AMERICAN DAWN, INC.,	: FEBRUARY TERM, 2001 : : No **1799** : : Consolidated with C.C.P. Numbers: : **0102-1870, 0102-1873, 0102-1875**, : 0103-2051, **0104-4703**, 0105-1849, : **0106-1284, 0106-1599, 0108-1756**, : **0111-1107, 0111-1561,** 0202-1197, : 0204-3095, 0205-1624, 0205-1857, : **0205-2043.**
Plaintiffs,	:
v.	:
DAVID WENGER, et al. ,	:
Defendants.	: **Commerce Program**

HONEYWELL INC. and HONEYWELL PROTECTION SERVICES DIVISIONS,	:
Third-Party Plaintiffs,	:
v.	:
EVANS, CONGER, BROUSSARD & McCREA, INC. and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	: Motion Control Numbers: : 101227, 101319, 092474, 092467, 101320, : 092470, 101325, 092464, 101314, 092465, : 101324, 101317, 092466, 101322, 092473,
Third-Party Defendants	: 101318, 092468, 092469, 101316, 092472, : 101321, 092800, 101315.

O R D E R

AND NOW, this 31st day of January 2003, upon consideration of the Preliminary Objections of the third-party defendants (Evans, Conger, Broussard & McCrea, Incorporated and St. Paul Fire and Marine Insurance Company) and the Motion for Leave to File Amended Joinder Complaint of third-party

plaintiffs (Honeywell, Incorporated and Honeywell Protection Services Divisions) the respective responses and memoranda in support and in opposition, all matters of record, and in accord with the contemporaneous Opinion being filed of record, it is **ORDERED** that:

1. the Preliminary Objections are **Sustained** and the Joinder Complaint is **Dismissed**, and

2. the Motion for Leave to File Amended Joinder Complaint is **Denied**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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Plaintiffs,	: **0111-1107, 0111-1561,** 0202-1197,
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O P I N I O N

Albert W. Sheppard, Jr., J. ..... January 31 , 2003

Presently before the court are two disputed matters pertinent to these consolidated actions. First, there are the Preliminary Objections of third-party defendants, St. Paul Fire and Marine Insurance Company ("St. Paul") and Evans, Conger, Broussard & McCrea, Inc. ("ECBM") to the Joinder Complaint of defendants and third-party plaintiffs, Honeywell, Inc. and Honeywell Protection Services Division ("Honeywell"). Second, there is a Motion for Leave to File Amended Joinder Complaint filed by Honeywell.

For the reasons discussed, third-party defendants' Preliminary Objections are sustained and the third-party plaintiff's Joinder Complaint is dismissed. Further, the third-party plaintiff's Motion for Leave to File Amended Joinder Complaint is denied.

BACKGROUND[1]

These consolidated actions arise out of a fire that consumed a warehouse owned by defendant, Eastern America Transport and Warehousing, Inc. ("Eastern"). The plaintiffs are entities who lost property in the fire, or their insurers suing as subrogees. At the time of the fire, Honeywell was responsible for monitoring the warehouse burglar and fire alarm systems from a remote location and for relaying any system alarm to the proper authorities.

Plaintiffs brought suit against Eastern and other entities, including Honeywell, alleging that they are liable for plaintiffs' losses resulting from the fire. Specifically, as against Honeywell, the plaintiffs challenged the adequacy of the fire detection and prevention systems in the warehouse at the time of the fire.

[1] The facts set forth are either undisputed or, where disputed, are taken from Honeywell's proposed Amended Joinder Complaint and accepted as true only for purposes of deciding these pending issues.

Honeywell cross-claimed against Eastern for indemnification based on a written agreement between Honeywell and Eastern in which Eastern agreed "to either list Honeywell as additional insured on all insurance policies in effect at the [warehouse] or to indemnify and save harmless Honeywell, its employees and agents against all claims" such as those alleged by Plaintiffs.[2] *See* Exhibit A to Honeywell's Proposed Amended Joinder Complaint, which is attached to the Motion for Leave to Amend as Exhibit 1.

In a separate action, also pending before this court, Eastern has asserted claims against, *inter alia*, its insurer St. Paul, and ECBM, the agent who recommended and procured Eastern's insurance (the "Coverage Action"). In its Complaint in the Coverage Action, Eastern alleges that ECBM, and its principal St. Paul, breached a contract between ECBM and Eastern under "which, in exchange for a fee, ECBM would identify, evaluate and quantify [Eastern's] risks [relating to the warehouse] and then procure sufficient insurance to cover those risks, and assist [Eastern] with any claims arising under the policies it recommended and procured." Coverage Action, Fourth Amended Complaint, ¶¶ 107, 133. Eastern also asserted the following claims in the Coverage Action:

> 1) Against St. Paul for negligence/recklessness in failing to inform Eastern of "the enormous underinsurance regarding the replacement coverage on the Warehouse." Id. at ¶ 140.
>
> 2) Against St. Paul and ECBM for negligence/recklessness due to their "failure to properly identify, evaluate and quantify [Eastern's] risks and

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[2] For the purpose of ruling on the present motions, the court views the facts in the light most favorable to Honeywell. The statement that Eastern's promise to insure or indemnify Honeywell covers the claims asserted by plaintiffs should **not** be read as a determination of that issue.

insurance needs and properly advise [Eastern] and procure insurance for [Eastern.]" Id. at ¶ 152.

3) Against St. Paul and ECBM for negligent and fraudulent misrepresentation, bad faith, breach of fiduciary duty, and civil conspiracy in saying that they would, and had, performed the above tasks, when they had not. Id. at ¶ 156-7.

Rather than move to join in the Coverage Action,[3] Honeywell is attempting to join ECBM and St. Paul as parties in this action. Honeywell's claims in the Joinder Complaint (and the proposed Amended Joinder Complaint) are based, in large part, on the claims raised by Eastern against ECBM and St. Paul in the Coverage Action. Specifically, Honeywell alleges that it was an intended third-party beneficiary of the contract (alleged by Eastern in the Coverage Action) in which ECBM and St. Paul promised Eastern that they would assess the risks associated with Eastern's warehousing business, recommend ameliorative measures and adequate insurance coverage, and obtain/provide such insurance for those identified risks, which included Eastern's promise to indemnify Honeywell. *See* Proposed Amended Joinder Complaint, Count II, attached as Exhibit A to Motion for Leave to Amend. Honeywell further alleges that ECBM and St. Paul breached these contract(s) with Eastern thereby causing damage to Honeywell in the form of the

[3] Another of the defendants in this case, Burns International Security Services Corp. ("Burns"), which is similarly situated to Honeywell, petitioned to intervene in the Coverage Action so that it could assert claims against ECBM and St. Paul similar to those now being asserted by Honeywell. The court denied Burns' Petition to Intervene in the Coverage Action in part because "its interests are adequately represented by Eastern." Eastern America Transport & Warehousing, Inc. v. Evans Conger Broussard & McCrea, Inc., Phila. Co. C.C.P., Case No. 010702187, Control No. 071266, p. 6 (Herron, J. July 31, 2002)

claims brought against Honeywell by plaintiffs. Id. at ¶ 72. In addition, Honeywell alleges that it suffered such damages because ECBM/St. Paul negligently failed to perform all of the above undertakings. Id. at Count I.

The alleged risk analysis contract(s) between Eastern and ECBM/St. Paul were apparently oral, since the only document attached to the Fourth Amended Complaint in the Coverage Action is the policy of insurance issued by St. Paul to Eastern. Since Honeywell does not claim first hand knowledge of the terms of the risk analysis contract(s) between Eastern and ECBM/St. Paul, Honeywell must rely on Eastern's allegations in the Coverage Action as evidence of the terms of the alleged contract.

In the Coverage Action, Eastern does **not** allege that its agreement to indemnify Honeywell was one of the risks that ECBM/St. Paul failed to identify and cover, nor does it allege that ECBM/St. Paul undertook to inspect and warn of inadequacies in the fire detection and prevention system. *See* Coverage Action, Fourth Amended Complaint. To the extent that Honeywell attempts to assert such claims here, its only basis is what Honeywell believes ECBM/St. Paul should have done.

ECBM and St. Paul have filed Preliminary Objections to Honeywell's Joinder Complaint, and Honeywell has filed a Motion for Leave to File an Amended Joinder Complaint. The parties in their respective pleadings have raised many of the same issues, notably whether Honeywell has standing to bring an action against ECBM and St. Paul and, if so, whether such an action should be part of this case. This court has, therefore, considered both motions together.

The court finds that the Motion for Leave to Amend, if granted, would **not** obviate ECBM's and St. Paul's substantive objections to the original Joinder Complaint, which objections the court finds to be meritorious. Thus, this court's decision to grant the Preliminary Objections obliges the court to deny the

Motion for Leave to File an Amended Joinder Complaint.

DISCUSSION

ECBM and St. Paul argue in their Preliminary Objections that Honeywell has not averred that it had any relationship with either of them sufficient to make them liable to Honeywell in either tort or contract. In essence, ECBM and St. Paul contend that Honeywell, as an indemnitee of their insured, does not have standing to sue them for failure to assess their insured's risks and provide adequate insurance.

Pennsylvania Rule of Civil Procedure 1028(a)(4) permits preliminary objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, "all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true." DeMary v. Latrobe Printing and Pub. Co., 762 A.2d 758, 761 (Pa. Super. 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. 2000). However, the pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. Giordano v. Ridge, 737 A.2d 350, 352 (Pa. Commw.), *aff'd.* 559 Pa. 283, 739 A.2d 1052 (1999).

I. Honeywell Has Not Asserted a Valid Cause of Action Against ECBM and St. Paul For Negligence.

Honeywell's negligence claim against ECBM/St. Paul must be dismissed as duplicative of its breach of contract claim. "[A] contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly." Phico Ins. Co. v. Presbyterian Medical Services Corp., 444

Pa. Super. 221, 229, 663 A.2d 753, 757 (1995). The gist of the action "doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." Etol, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002).

"It is a fundamental rule of tort law that a negligence claim must fail if it is based on circumstances for which the law imposes no duty of care on the defendant." Fizz v. Kurtz, Dowd & Nuss, Inc., 360 Pa. Super. 151, 154, 519 A.2d 1037, 1040 (1987). Therefore, in order to bring its negligence claim against ECBM/St. Paul, Honeywell must assert that ECBM/St. Paul owed some duty to Honeywell which is imposed by law as a matter of social policy. Insurers, and insurance brokers, do not have a general affirmative social duty to undertake risk assessments and to provide insurance coverage to members of the public or their indemnitees with whom they have no other relationship.[4]

Such a tort duty could have been undertaken gratuitously by the insurer or insurance broker. However, Honeywell cannot avail itself of this scenario. A claim for negligent performance of a gratuitous duty is only available where the damages alleged are for physical harm. Restatement (Second) of Torts ¶ 323 (1965). In this case, Honeywell asserts only pecuniary loss (and potential pecuniary loss) as its damages.

[4] This is not to say that insurers and insurance brokers are immune from tort liability. Such entities can be liable for, *inter alia*, negligent or fraudulent misrepresentation, tortious interference with contract, and myriad intentional torts, none of which pertain to this action.

Since there exists no social policy that imposes a tort duty upon ECBM and St. Paul to provide insurance to indemnify Honeywell, that duty, if any, must arise out of a contract. Here, the only contract out of which ECBM's and St. Paul's duties to Honeywell could arise is the contract between Eastern and ECBM/St. Paul, in which ECBM/St. Paul allegedly undertook to inspect the premises for risks, to recommend risk reducing alterations and insurance against risks - - such as Eastern's duty to indemnify Honeywell - - and to obtain/provide insurance coverage for those risks. These are the only allegations in the Joinder Complaint (and proposed Amended Joinder Complaint) that describe a connection between Honeywell and ECBM/St. Paul that could give rise to a duty by ECBM/St. Paul to indemnify Honeywell.

Since the only duty alleged in the Complaint arises out of a contract, by alleging that ECBM/St. Paul negligently breached this duty, Honeywell is, of necessity, claiming that ECBM/St. Paul negligently breached the contract which imposed the duty. "Pennsylvania does not recognize a cause of action for negligent breach of contract." Harbor Hosp. Services v. Gem Laundry Services, L.L.C., 2001 WL 1808556, *4 (Pa. Com Pl. July18, 2001). The gist of the action "doctrine bars tort claims . . . where the duties allegedly breached were created and grounded in the contract itself. . .[or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Etol, Inc., 811 A.2d at 19. To the extent that Honeywell has any viable cause of action against ECBM and St. Paul for their failure to provide insurance to cover Eastern's indemnification obligation to Honeywell, Honeywell's "proper redress belongs in contract, not in tort, pursuant to the gist of the action doctrine." Harbor Hosp. Services, 2001 WL 1808556, *4.

II. Honeywell Has Not Asserted a Valid Cause of Action Against ECBM and St. Paul For Breach of Contract.

In order to maintain a claim against ECBM/St. Paul for breach of the contract between Eastern and ECBM/St. Paul, Honeywell must have enforceable rights under that contract. Honeywell does not allege that it was a party to that contract. Instead, Honeywell claims that it "was a third party beneficiary of the risk assessment and resulting [insurance] contracts." Proposed Amended Joinder Complaint, ¶ 68.

"[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself . . . unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Scarpitti v. Weborg, 530 Pa. 366, 370, 609 A.2d 147, 149 (1992) *citing* Restatement (Second) of Contracts § 302 (1981).

"The first part of this test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third-party beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third-party beneficiaries. If a party satisfies both parts, a claim may be asserted under the contract." Id. *citing* Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983). *See also* Fizz v. Kurtz, Dowd & Nuss, Inc., 360 Pa. Super. 151, 154, 519 A.2d 1037, 1039 (1987) (It is up to the Court to determine "whether recognition of a beneficiary's right to performance is appropriate to effectuate the intention of the parties.")

Honeywell's breach of contract claims fails this test because Honeywell has no basis for claiming that the parties, particularly ECBM and St. Paul, intended Honeywell to be a beneficiary of their contract(s) with Eastern. Since Honeywell was **not** named as an additional insured under the insurance contract between Eastern and St. Paul, the court cannot conclude that the parties intended to make Honeywell a beneficiary of that contract. *See* Fizz, 360 Pa. Super. at 154, 519 A.2d at 1039 (where insurance broker failed to recommend and obtain dram shop insurance for tavern, estate of person killed by drunk driver was not third-party beneficiary of tavern's contract with insurance broker to recommend and obtain appropriate insurance for tavern); Tremco, Inc. v. Pennsylvania Manufacturers' Insurance Co., 2002 WL 1404767 *7 (Pa. Com. Pl. June 27, 2002) (roof manufacturer whom roof installer had agreed to indemnify was not a beneficiary of roof installer's insurance contract where manufacturer was not listed as additional insured under insurance contract).

Further, there is no evidence that the parties intended to make Honeywell a beneficiary of the related risk assessment contracts between Eastern and ECBM/St. Paul. In Eastern's Complaint in the Coverage Action, upon which Honeywell relies for the terms of the alleged contract, Eastern does not claim that it intended to benefit Honeywell by entering into the contract, nor that it intended for ECBM/St. Paul to obtain/provide coverage for Eastern's indemnification obligation to Honeywell. In fact, Eastern does not even include in its requests for relief in the Coverage Action a demand that ECBM/St. Paul pay any judgement on the indemnification claim asserted against it by Honeywell, although Eastern does demand that ECBM/St. Paul pay any judgments rendered in favor of plaintiffs in this action. Coverage Action, Fourth Amended Complaint, Counts II, V.

Furthermore, since Eastern's obligation was simply to indemnify Honeywell in the event of any claims, "[t]here was no obligation running from [Eastern to Honeywell] to pay money for an existing debt when the contract [between ECBM/St. Paul and Eastern] was made." Fizz, 360 Pa. Super. at 154, 519 A.2d at 1039 (emphasis added). Therefore, Honeywell is not an intended third-party beneficiary of the alleged contracts between Eastern and ECBM/St. Paul, and it has no standing to bring claims against ECBM/St. Paul for breach of those contracts.

III. Honeywell's Motion for Leave to File an Amended Joinder Complaint Must be Denied.

The proposed Amended Joinder Complaint suffers from the same defects as the original Joinder Complaint, which will be dismissed for the reasons discussed. Although leave to amend is normally freely granted, here it would not be fruitful to grant the Motion to Amend, in that ECBM and St. Paul would be entitled to file the same Preliminary Objections. "A court is not required to allow amendment of a pleading if a party will be unable to state a claim on which relief will be granted." Werner v. Zazyczny, 545 Pa. 570, 584, 681 A.2d 1331, 1338 (1996). "Leave to amend will be withheld where the initial pleadings reveal that the *prima facie* elements of the claim cannot be established and that the complaint's defects are so substantial that amendment is not likely to cure them." Roach v. Port Auth. of Allegheny County, 380 Pa. Super. 28, 30, 550 A.2d 1346, 1347-8 (1988) (where plaintiff had no possible cause of action against insurer, claims were dismissed without leave to amend.)

Moreover, even if Honeywell could eventually set forth a viable cause of action against ECBM and St. Paul, it would be inappropriate to allow Honeywell to join what is in essence a coverage cause of action with this case which involves disputes over liability for the fire. "The evidence that would establish [St

Paul's and ECBM's] obligation to insure is distinct from the evidence that would establish [Eastern's and Honeywell'] liability [in tort]." Stokes v. Loyal Order of Moose Lodge #696, 502 Pa. 460, 467, 466 A.2d 1341, 1345 (1983) (Complaint for wrongful denial of coverage under a general policy of insurance should not be joined with underlying tort action.) "The evidence which will establish [Honeywell's and Eastern's] duty to [plaintiffs] is separate and distinct from the type of evidence which will determine the type of coverage provided to [Eastern] by its insurer." Garrett Electronics Corp. v. Kampel Enterprises, Inc., 382 Pa. Super. 352, 355, 555 A.2d 216, 218 (1989) (dismissing joinder complaint where lessor-defendants' joined tenant-plaintiff's insurer and insurance agent as additional defendants.)

CONCLUSION

For the foregoing reasons, this court sustains third-party defendants' Preliminary Objections to and dismisses the Joinder Complaint. Further, the court denies the third-party plaintiffs' Motion for Leave to File Amended Joinder Complaint.

This court will issue a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.