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

THE BRICKMAN GROUP, LTD.,	:	JULY TERM, 2000
Plaintiff	:	No. 0909
v.	:	
CGU INSURANCE COMPANY,	:	
Defendant	:	Control No. 091866

MEMORANDUM OPINION

Presently before this court are the preliminary objections of defendant CGU Insurance Company ("CGU") to the amended complaint of plaintiff The Brickman Group, Ltd. ("Brickman"). For the reasons set forth in this Opinion, the court is issuing a contemporaneous Order sustaining the preliminary objections in part, and overruling the objections in part.

BACKGROUND[1]

Brickman engages in the business of providing professional landscaping services. Am.Compl. at ¶ 2. CGU sells commercial insurance to various businesses and is the successor to General Accident Insurance Company of America ("General Accident") and has assumed all of its previous contractual obligations.[2] Id. at ¶¶ 3-4.

On June 25, 1997, General Accident allegedly agreed orally to sell Brickman a full program of Brickman's choice of liability insurance, including workers' compensation insurance, automobile liability

[1]These background facts were gleaned from Brickman's amended complaint.

[2]Hereafter, references to General Accident and/or CGU may be understood to mean "CGU".

insurance, general liability insurance and umbrella liability insurance, in five consecutive one-year policies subject to the same terms, conditions and premium rates (the "5 Year Contract"). Id. at ¶ 6. On that same date, General Accident sent a letter to Brickman via its insurance broker, Porter & Curtis, LLC. ("Porter & Curtis"), which purportedly confirmed the terms of the 5 Year Contract (the "1997 Letter"). Id. See Am.Compl., Exhibit A.[3] Pursuant to the 5 Year Contract, CGU sold Brickman insurance policies for the first and second year, commencing respectively on July 1, 1997 and July 1, 1998. Am.Compl, at ¶¶ 8-9. In addition, after the renewal of the insurance policies for the first year, CGU allegedly orally promised to extend the 5 Year Contract for an additional year, guaranteeing the same terms, conditions and premium rates for a sixth year from July 1, 2002 through June 30, 2003 (the "6 Year Contract"). Id. at ¶ 10. Further, CGU sold Brickman insurance policies for the third year, commencing July 1, 1999 through June 30, 2000. Id. at ¶ 14. See Am.Compl, Exhibit E.

In a letter dated June 10, 1999 ("1999 Letter"), addressed to Porter & Curtis, CGU purportedly acknowledged the existence of the 5 Year Contract and CGU's obligations thereunder. Id. at ¶ 12. See Am.Compl., Exhibit D. The 1999 Letter, in pertinent part, stated the following:

> The 5 year agreement, which GA accepted in 1997, did not seem to make a difference last year, when CGU was required to re-quote the account because of the competition from

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[3]The letter of June 25, 1997 ("1997 Letter") begins by stating the following:

> Confirming our discussions of this AM as respects to the rolling 2 yr 10 month account performance review. [General Accident] agrees that beginning 5/1/98, and every 12 months thereafter, we will complete an account performance review, that will include all lines written by [General Accident], and cover an experience period beginning 2 yr and 10 months prior to the review date.

Am.Compl., Exhibit A.

> the broker's for the new owners . . . .Because of these changes, we did not assume that the 1997 guaranteed rates were still applicable or that the 1998 rates then became the new guaranteed rates . . . . that being said, CGU is agreeable to renewing based on our 1997 agreement. . . .

Am.Compl., Exhibit D. In addition, CGU's underwriter allegedly acknowledged the existence of the 5 Year and 6 Year Contracts. Am.Compl. at ¶ 13.

Allegedly, during a meeting on or about June 1, 2000, CGU's new underwriter denied the existence of the 5 Year Contract, the 6 Year Contract and CGU's obligations thereunder, but CGU's managing field executive stated that CGU would honor such agreements if they existed. Id. at ¶ 16. In a letter dated June 2, 2000 (2000 Letter), less than thirty (30) days prior to the date of renewal for the fourth year, CGU purportedly informed Porter & Curtis that it was not going to comply with the 5 Year and 6 Year Contracts but was offering a non-specific renewal policy seeking better terms and premium rates to CGU including changing the premium basis from a guaranteed cost basis to a loan sensitive basis. Id. at ¶ 17. See Am.Compl., Exhibit F. Between June 5, 2000 and July 1, 2000, Porter & Curtis, on Brickman's behalf, and CGU disputed each other's respective positions. Am.Compl. at ¶ 20. Specifically, Brickman continued to insist upon CGU's compliance with the 5 Year and 6 Year Contracts and CGU continued to insist upon a renewal on revised terms despite the Contracts. Id. Then, on June 16, 2000, CGU sent Porter & Curtis a copy of the specific renewal terms, which were allegedly more beneficial to CGU. Id. at ¶ 21. See Am.Compl, Exhibit D. Brickman allegedly would have endured additional risk and increased costs if it had accepted this offer. Am.Compl. at ¶ 21. Further, on June 26, 2000, CGU issued a formal notice of "non-renewal," purportedly pursuant to 40 Pa.C.S.A. §§ 3401 et seq. that it was not renewing the insurance policies. Id. at 22.

Based on this factual background, Brickman filed its original complaint against CGU on July 10, 2000. CGU filed its first set of preliminary objections on August 2, 2000. Then, on August 23, 2000, Brickman filed its amended complaint, setting forth counts for breach of contract (Counts I [specific performance] and II [monetary damages]), breach of fiduciary duty, and bad faith insurance practices in violation of Pa.C.S.A. § 8371. Brickman primarily asserts that CGU wrongfully refused to abide by the 5 Year Contract and 6 Year Contract to sell Brickman various insurance policies under the same terms and conditions, including premium rates, for a six year period between 1997 and 2003.

Defendant CGU filed preliminary objections ("Objections") to the Amended Complaint based primarily on two grounds. First, CGU asserts a demurrer against each count of the amended complaint and demurs to the prayer for attorney fees in Counts I, II and III. CGU also contends that Counts II, III and IV should be dismissed for insufficient specificity and that plaintiff should file a more specific complaint.

As discussed below in greater detail, the Objections are overruled in part and sustained in part.

DISCUSSION

I. Legal Standard

A. Demurrer

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows for preliminary objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 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. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000)(citation omitted). Moreover,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa.Super.Ct. 1999). 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.Ct. 1999), aff'd. 559 Pa. 283, 739 A.2d 1052 (1999), cert. denied, 121 S.Ct. 307 (U.S. 2000). In addition, it is not necessary to accept as true averments in the complaint which conflict with exhibits attached to the complaint. Philmar Mid-Atlantic, Inc. v. York Street Associates II, 389 Pa.Super. 297, 300, 566 A.2d 1253 (1989).

B. Insufficient Specificity

Rule 1028(a)(3) of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] permits preliminary objections based on insufficient specificity in a pleading. Rule 1019(a) requires the plaintiff to state "[t]he material facts on which a cause of action . . . is based . . . in a concise and summary form." Pa.R.C.P. 1019(a). Further, under Pa.R.C.P. 1019(b), allegations of fraud must be pled with particularity. See also, Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992)(an allegation of fraud must "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and be "sufficient to convince the court that the averments are not merely subterfuge."). In addition, "[a]verments

of time, place and items of special damage shall be specifically stated." Pa.R.C.P. 1019(f).

To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the facts alleged are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa.Super. 316, 319, 588 A.2d 1308, 1310 (1991)(citation omitted). See also, In re The Barnes Foundation, 443 Pa.Super. 369, 381, 661 A.2d 889, 895 (1995)("a pleading should formulate the issues by fully summarizing the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [the] cause of action is based.").

This court will address together CGU's Objections, arguing both legal insufficiency and insufficient specificity, since CGU's arguments often overlap one another.

II. CGU's Objections to Each Count of the Amended Complaint

A. CGU's Objection that Counts I and II fail to Establish the Existence of a Valid and Enforceable Contract

CGU argues that Brickman mischaracterizes the 1997 Letter where Brickman purports that this letter contains the terms of the 5 Year Contract when, in fact, it does not amount to any kind of enforceable promise and does not show consideration or return promise from Brickman. Therefore, CGU argues that Brickman has failed to establish the existence of either the 5 Year or the 6 Year Contract as valid and enforceable contracts, and that the breach of contract counts, Counts I (specific performance) and II (monetary damages) must be dismissed. Def. Mem. of Law, at 6-8. This court does not agree with CGU's characterization of these two counts or with its assertion that the 1997 Letter encompasses the contract in its entirety.

To establish a cause of action for breach of contract, the plaintiff must allege (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999)(citations omitted). Further, "[w]hile not every term of a contract must be stated in complete detail, every element must be specifically pleaded." Id. at 1058. In order to form a contract, there must be an offer, acceptance, and consideration or mutual meeting of the minds. Jenkins v. County of Schuylkill, 441 Pa.Super. 642, 648, 658 A.2d 380, 383 (1995). An informal or oral contract may be enforced even though the parties have not formalized their agreement in writing, provided that the parties have agreed on the essential terms and have a meeting of the minds. See Mazzella v. Koken, 559 Pa. 216, 224, 739 A.2d 531, 536 (1999); GMH Assocs., Inc. v. The Prudential Realty Group, 752 A.2d 889, 900 (Pa.Super.Ct. 2000). In addition, to ascertain the parties' intent, the court may consider the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject matter of the agreement. Greene v. Oliver Realty, Inc., 356 Pa.Super. 534, 552, 526 A.2d 1192, 1200-01 (1987)(quoting Price v. Confair, 366 Pa. 538, 542, 79 A.2d 224, 226 (1951)).

Here, Brickman does allege the existence of a contract, which consists of both oral and written components. Specifically, Brickman alleges that CGU agreed to sell Brickman a full program of Brickman's choice of liability insurance in five consecutive one-year policies subject to the same terms, conditions and premium rates. Am.Compl. at ¶ 6. Brickman also alleged that CGU sent it a letter on June 25, 1997 confirming the terms of the 5 Year Contract. Id. The 1997 Letter did make reference to a morning conversation regarding the performance review of Brickman's account and referred to certain things upon which the parties had agreed. Am.Compl., Exhibit A. However, neither the 1997 Letter nor

the amended complaint when read in its entirety purport that the 5 Year Contract or the 6 Year Contract were based only upon the terms in the 1997 Letter. Rather, Brickman alleged that CGU acknowledged the existence of the 5 Year Contract in the 1999 Letter. Am.Compl. at ¶ 12. Further, Brickman explicitly alleged that "CGU orally promised to extend the 5 Year Contract an additional year, unconditionally guaranteeing the same terms, conditions, and premium rates for a sixth year from July 1, 2002 through June 30, 2003." Id. at ¶ 10. Accepting these allegations as true, as this court must for purposes of a demurrer, Brickman clearly alleges the existence of an agreement to sell insurance policies to Brickman for five to six consecutive years on the same terms, conditions and premiums.

Moreover, Brickman sufficiently alleged the elements for promissory estoppel, as a substitute for consideration. It is well-established that promissory estoppel may serve as a substitute for consideration. Kreutzer v. Monterey County Herald Company, 560 Pa. 600, 605, 747 A.2d 358, 361 (2000); GMH Assocs., 752 A.2d at 904 (citations omitted)("[a] party seeking to establish a cause of action based on promissory estoppel must establish that: '(1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise'."). Here, Brickman alleged that each year since the commencement of the 5 Year and 6 Year Contract(s), it relied upon CGU's promises contained in these contracts and passed up other opportunities to purchase insurance policies from other insurance companies on similar or better terms and refrained from actively seeking more opportunities in the marketplace. Am.Compl. at ¶¶ 7, 11.

In addition, Brickman sufficiently averred the existence of CGU's breach and the resultant damages. In its Objections, CGU asserted that Brickman failed to provide the nature of its damages and

did not differentiate between general and special damages. Objections, at ¶ 4. CGU also argued in its memorandum of law that Brickman failed to specify all of the alleged breaches of the purported contract or the terms and conditions of the contract. Def. Mem. of Law, at 2. Despite CGU's Objections, this court finds that Brickman did plead sufficient facts to enable CGU to prepare its defense to the breach of contract claim, regarding the terms of the contract, the alleged breaches and the consequent damages.

As noted above, the 5 Year and 6 Year Contract(s) in question here involved the agreement to sell Brickman insurance policies on the same terms, conditions and premium rates over a 5 to 6 year period. Brickman did not have to allege exactly what the terms, conditions and premium rates of the underlying policies were since they are collateral to the present action. Further, the terms, conditions and premium rates can be ascertained by simply examining the policies themselves. Here, Brickman clearly alleged that CGU failed and/or refused to renew the insurance policies for the fourth year upon the same terms, conditions and premium rates, as required by the 5 Year and 6 Year Contract(s). Am.Compl. at ¶¶ 17, 23, 27, 33. Brickman also alleged that CGU, instead, offered to Brickman a non-specific renewal policy, seeking more beneficial terms, conditions and premium rates, including changing the premium basis from a guaranteed cost basis to a loss sensitive basis. Id. at ¶ 17. Further, Brickman alleged that CGU's actions constitute anticipatory repudiation of its future years' obligations under the 5 Year and 6 Year Contract. Id. at 23, 28, 33. "Anticipatory breach of a contract occurs whenever there has been a definite and unconditional repudiation of a contract by one party communicated to another. A statement by a party that he will not or cannot perform in accordance with the agreement creates such a breach." Oak Ridge Construction Co. v. Tolley, 351 Pa.Super. 32, 38, 504 A.2d 1343, 1346 (1985)(citations omitted). See also, Restatement (Second) of Contracts § 250 (1981). CGU's alleged failure to renew the policies in the

fourth year and its counter-offer for a non-specific renewal policy with a different premium basis would constitute a breach of its contractual duties. Therefore, Brickman sufficiently stated how CGU allegedly breached the purported contract.

In addition, Brickman alleged that "[a]s a direct an proximate result of CGU's breach, Brickman has been seriously injured in an amount in excess of $50,000." Am.Compl. at ¶ 34.
It is true that Pa.R.C.P. 1019(f) requires that items of special damage are specifically pleaded. However, in a breach of contract action, a party who is injured may recover only those damages that "naturally and ordinarily flow from the breach, as were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and as can be proven with reasonable certainty." Thorsen v. Iron & Glass Bank, 328 Pa.Super. 135, 141-42, 476 A.2d 928, 931 (1984); Taylor v. Kaufhold, 368 Pa. 538, 545, 84 A.2d 347, 351 (1951). Here, it seems clear that Brickman is alleging general damages, even though it contends that it cannot replace the integrated insurance program which it purportedly had with CGU. Am.Compl. at ¶¶ 24, 30. Through discovery and a comparison of insurance competitors in the same market, the parties should be able to reach a figure of exactly what damages Brickman had allegedly suffered. It is not for this court to determine at this time. Therefore, at this juncture, the court finds that Brickman sufficiently stated its alleged damages.

For the above stated reasons, this court concludes that Brickman sufficiently pled a cause of action for breach of contract. CGU's demurrer to Counts I and II is therefore overruled. CGU's Objections that Brickman insufficiently stated the nature of its damages are also overruled.

B. CGU's Objections that Count I Fails to Establish a Claim for Specific Performance

CGU asserts that Brickman failed to allege facts to support that the insurance policies are unique or facts to support the conclusion that it has no adequate remedy at law. Therefore, CGU contends that Brickman fails to state a claim for specific performance and must be stricken. Def. Mem. of Law, at 9. This court must now disagree with CGU's argument.

The Pennsylvania Supreme Court noted the general principles for specific performance in Cimina v. Bronich, 517 Pa. 378, 537 A.2d 1355 (1988). It stated as follows:

> [s]pecific performance compels the surrender of a thing in itself, because that thing is unique and cannot by its nature be duplicated. . . .The value of the object sought transcends money because it has no peer of location, antiquity, artistry or skill. Thus, when two persons want only what one can have, only the clearest right can prevail, and it cannot be decided by reasons other than the most careful discrimination of long precedent and careful scrutiny of the equities arising from the facts. A Chancellor must at last be relied upon to perceive them, and if the facts can support his decision, we are bound to follow it. . . . Mindful of this caution, specific performance should only be granted where the facts clearly establish the plaintiff's right thereto, where adequate remedy at law does not exist, and where justice requires it.

Id. at 383, 537 A.2d. at 1357-58 (citations omitted). In Cimina, the court held that the tenant was entitled to specific performance of an option to purchase leased property even though the tenant had failed to pay the real estate taxes, since such failure was an immaterial breach of his obligations under the lease. Id. at 386-87, 537 A.2d at 1359-60. See also, Wagner v. Estate of Rummel, 391 Pa.Super. 555, 561, 571 A.2d 1055, 1058 (1990)(noting that "[a] decree of specific performance of a contract is not a right, but is a matter of grace, and will not be granted unless the party seeking such relief is clearly entitled to it, and the Chancellor believes justice requires such a decree.").

Here, Brickman alleged that "[t]he terms, conditions and other aspects of the 5 Year Contract and 6 Year Contract as they relate to the Insurance Policies are unique property of Brickman which is not

replaceable as an integrated insurance program for Brickman." Am.Compl. at ¶ 24. Brickman also alleged that "the Insurance Policies . . . cannot be duplicated in the market place [and] monetary damages will not adequately compensate Brickman for CGU's breach." Id. at ¶ 30.

For purposes of a demurrer, this court must accept these allegations as true and now overrule CGU's Objections to Count I since Brickman has sufficiently averred that the 5 Year and 6 Year Contract(s) cannot be replicated in the marketplace.[4]

C. CGU's Objection to Count III that Brickman Failed to Establish a Breach of a Fiduciary Duty

CGU asserts that the alleged facts do not support the existence of any fiduciary relationship between the parties, and that Pennsylvania case law has not extended an insurer's fiduciary duty beyond situations involving the defense or settlement of third party claims against the insured. CGU also argues that a fiduciary relationship could only arise between CGU and Brickman through the triggering of the underlying insurance policies, which is not the alleged breach in the present case. Def. Mem. of Law, at 10-11. Brickman responds that Pennsylvania courts have found that an insurance company owes its policyholder a fiduciary duty in first party claims as well, and that CGU has misstated the law and not shown with absolute certainty that Brickman will not prevail. Pl. Mem. of Law, at 16-17.

This court disagrees with Brickman's argument and finds that Pennsylvania law does not recognize a cause of action for breach of fiduciary duty for failure to renew an insurance policy.

Under Pennsylvania law, "[a fiduciary] relationship exists where one person has reposed a special

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[4]However, these allegations might ultimately not succeed under a motion for summary judgment or other subsequent motion.

confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Commonwealth Dept. of Transp. v. E-Z Parks, Inc., 153 Pa.Commw. 258, 267, 620 A.2d 712, 717 (1993). Black's Law Dictionary (6th ed. 1990) defines fiduciary duty as "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of any duty implied by law." Id.

In the insurance context, the mere fact that an insurer and an insured enter into an insurance contract does not automatically create a fiduciary relationship. 2A Couch on Insurance 2d, § 23.11 (1984); 1A Long, The Law of Liability Insurance, § 5A.07. See also, Connecticut Indemnity CO. v. Markman, 1993 WL 304056, at *5 (E.D.Pa. Aug. 6, 1993)(applying Pennsylvania law). An insurer's fiduciary status and duty to act with the "utmost good faith" arise by virtue of the policy provisions which give the insurer the right to handle claims and control settlement. Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 59, 188 A.2d 320, 322 (1963); Birth Center v. St. Paul Companies, Inc., 727 A.2d 1144, 1155 (Pa.Super.Ct. 1999), app. granted in part, 560 Pa. 633, 747 A.2d 858 (2000); Gilderman v. State Farm Ins. Co., 437 Pa.Super. 217, 226, 649 A.2d 941, 945-46 (1994). Therefore, an insurer's voluntarily assumed fiduciary duty is a contractual duty. Under the insurance contract, "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." Birth Center, 727 A.2d at 1155 (citing Gedeon, 410 Pa. at 59, 1888 A.2d at 322). The insurer's fiduciary duty or duty to act in good faith "is said not to arise under the terms of the contract, but because of the contract, and to flow from the contract." Id. (citing Gray v. Nationwide Mut. Ins. Co.., 422

Pa. 500, 508, 223 A.2d 8, 11 (1966)).

Pennsylvania case law has recognized a fiduciary duty in situations involving the defense, handling or settlement of claims, whether third party or first party claims. See Dercoli v. Pennsylvania Nat'l. Mut. Ins. Co., 520 Pa. 471, 477-78, 554 A.2d 906, 909 (1989); Gedeon, 410 Pa. at 59-60. 188 A.2d at 322; Birth Center, 727 A.2d at 1155-56; Gilderman, 437 Pa.Super. at 226-27, 649 A.2d at 945-46; Strutz v. State Farm Mut. Ins. Co., 415 Pa.Super. 371, 375, 609 A.2d 569, 571 (1992); Hall v. Brown, 363 Pa.Super. 415, 420, 526 A.2d 413, 415 (1987). Neither Brickman nor CGU cited a case which addressed a breach of fiduciary duty in the context of a failure to renew an insurance policy. However, two federal cases do address this situation. Guthrie Clinic, Ltd. v. The Travelers Indemnity Co. of Illinois, 2000 WL 1853044, *3 (M.D.Pa. Dec. 18, 2000); Belmont Holdings Corp. v. Unicare Life & Health Ins. Co., 1999 WL 124389, *4 (E.D.Pa. Feb. 5, 1999). Though federal cases are not binding on this court and are only cited for persuasive value, these two cases reach inconsistent results and are both distinguishable from the present case since both these cases also involved alleged misconduct in the handling or payment of claims or benefits under the insurance policies. .

First, in Belmont Holdings Corp., the insured instituted an action against its insurer for breach of contract, bad faith under 42 Pa. C.S.A. § 8371 and breach of fiduciary duty, arising out of the insured's alleged actions in changing the policy from a minimum premium plan to a guaranteed cost dividend program, allegedly forcing it to agree to a new policy renewal date, and allegedly forcing the insured to pay additional premiums or threatening to cancel the policy. 1999 WL 124389, **1-2. The court reasoned that Belmont's breach of fiduciary duty claim was based primarily on the failure to act in good faith under the insurance policy. Id. at *4. It also stated that "[a]lthough the duty of good faith and fair dealing closely

resembles the duty owed by a fiduciary, Pennsylvania law does not establish a fiduciary duty based on the duty of good faith and fair dealing." Id. (citation omitted). Therefore, the court dismissed the breach of fiduciary claim as redundant of the breach of contract claim. Id. at *4. Nonetheless, the court did allow the claim for bad faith to stand since Belmont's Complaint also alleged "inadequate claims handling under the policy," but the court also concluded that the breach of fiduciary duty would be redundant of the claim for bad faith. Id. at ** 3-4.[5]

Likewise, in Guthrie Clinic, the court examined an action involving the insurer's actions in the renewal of liability insurance policies and its declination of excess coverage with respect to its insured's claim. 2000 WL 1853044, *1. The court concluded that the breach of fiduciary duty claim and the breach of the common law duty of good faith are separate from the breach of contract claim and could withstand the motion to dismiss. Id. at **3-4 (relying on Birth Center, 727 A.2d at 1155 and distinguishing Belmont Holdings Corp., 1999 WL 124389, *4). The Guthrie court also held that the allegations involving the renewal of the policy would not be stricken where they were intertwined in plaintiff's overall claim of bad faith in the denial of benefits. Id. at *4.

Here, Brickman, in Count III, alleges that CGU breached its fiduciary duty by refusing to abide by the 5 Year and 6 Year Contract(s), which purportedly required that CGU renew the insurance policies under the same terms and conditions over the term of the contract. Am.Compl. at ¶¶ 6, 10, 37. Brickman

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[5]In Belmont Holdings, the court based much of its reasoning on the case of Kurtz v. American Motorists Ins. Co., 1997 WL 117008, **2-3 (E.D.Pa. March 12, 1997), which addressed an insurer's alleged bad faith under 42 Pa.C.S.A. § 8371 for non-renewal of an automobile policy. This court will address these cases more extensively when it analyzes the Objections to Brickman's claim for bad faith under § 8371.

based the existence of the fiduciary relationship by virtue of the fact that CGU was its insurance company. Id. at ¶ 36. Specifically, it alleged that "[i]n connection with its acting as an insurance company of Brickman, CGU occupied a position of utmost trust and confidence with Brickman, naming CGU a fiduciary of Brickman." Id. However, Brickman does not allege that CGU's breach involved a breach of the insurance policy, itself, or derived directly therefrom. Unlike Birth Center, Guthrie Clinic or Belmont Holdings Corp., none of Brickman's claims involve the handling of benefits, settling or defending insurance claims, or denial of coverage. Therefore, this court must conclude that Count III is legally insufficient to state a claim for breach of fiduciary duty. This court, thus, sustains the demurrer to Count III.[6]

D. CGU's Objections that Count IV Fails to State a Cause of Action for Bad Faith under 42 Pa.C.S.A. § 8371

CGU argues on several grounds that Brickman's claim under 42 Pa.C.S.A. § 8371 is legally deficient. First, CGU primarily asserts that Pennsylvania law does not recognize a cause of action for bad faith failure or refusal to renew an insurance policy. CGU also argues that § 8371 does not create an independent cause of action for bad faith but only authorizes a court to increase the damage award in any action under an insurance contract where there is a finding of bad faith. Further, CGU argues that Brickman's allegations with regard to the Pennsylvania Unfair Insurance Practices Act, 40 Pa.C.S.A. §§ 1171.1 et seq. ("UIPA") are legally insufficient. In this regard, CGU asserts that the UIPA does not create a private cause of action for violations of the act, the alleged violations of the UIPA in paragraph 46 of the

[6]If the court had not sustained the demurrer to Count III, it would have sustained CGU's Objection that Brickman had insufficiently pled any facts to support the existence of a fiduciary relationship.

amended complaint do not involve the denial of claims or benefits, the investigation of claims or lack of communication regarding claims, and that the alleged violations are not unfair insurance practices as defined by 40 P.S. § 1171.5. Def. Mem. of Law, at 12-14. Moreover, CGU contends that Brickman failed to plead the substance of the alleged misrepresentations and false statements which constitute part of Brickman's bad faith claim in Count IV and the alleged violations of the UIPA. Id. at 3-4.

The gravamen of Count IV is that CGU's refusal to comply with the 5 Year and 6 Year Contract(s), which required that CGU sell Brickman liability insurance on the same terms, conditions, and premium rates over the contracts' term, constituted bad faith under § 8371 and was accomplished without a reasonable basis. Am.Compl. at ¶¶ 42-44. In this respect, Brickman alleged *inter alia* that CGU violated the UIPA; that CGU had made statements that misrepresented the terms of the Insurance Policies; had made false statements with respect to its business of insurance; had knowingly made an agreement as to a contract of insurance which directly contradicted that which was expressed in the agreement; had failed to deal fairly with Brickman and had engaged in unreasonable, frivolous or untenable positions regarding the 5 Year and 6 Year Contract(s). Id. at ¶¶ 45-46.

There is no common law tort remedy in Pennsylvania for a failure by an insurer to act in good faith toward its insured. D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company, 494 Pa. 501, 507, 431 A.2d 966, 970 (1981)(holding that insured could not recover punitive damages for bad faith conduct in connection with the nonpayment of a claim for damage to his property. See also, Romano v. Nationwide Mutual Fire Ins. Co., 435 Pa.Super. 545, 552, 646 A.2d 1228, 1232 (1994). However, in defending a covered claim, an insurer has a contractual duty, by virtue of the insurance policy, to represent the interests of an insured "in good faith and with due care." Gray v. Nationwide Mut. Ins. Co., 422 Pa.

500, 507-08, 223 A.2d 8, 11 (1966); Gedeon, 410 Pa. at 59, 188 A.2d 322.

Further, in response to the D'Ambrosio decision, the Pennsylvania Legislature created a statutory remedy for bad faith in 42 Pa.C.S.A. § 8371. The statute provides that:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. S 8371. Courts have since held that § 8371 is the only basis for a private action for bad faith against the insurer. See, e.g., Adamski v. Allstate Ins. Co, 738 A.2d 1033, 1039 n.5 (Pa.Super.Ct. 1999), app. denied sub nom. Goodman v. Durham, 759 A.2d 387 (2000)(noting "[a] bad faith action under section 8371 is neither related to nor dependent on the underlying contract claim against the insurer."); Terletsky v. Prudential Property and Cas. Ins. Co., 437 Pa.Super. 108, 124, 649 A.2d 680, 688 (1994).

In the insurance context, the term "bad faith" has acquired a particular meaning:

> "Bad faith" on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Black's Law Dictionary 139 (6th ed. 1990) (citations omitted). See also, Adamski, 738 A.2d at 1036; Rottmund v. Continental Assurance Company, 813 F.Supp. 1104, 1108-09 (E.D.Pa.1992)(applying Pennsylvania law). To establish bad faith under § 8371, the Pennsylvania Superior Court has set forth the following two-part test which must be established by clear and convincing evidence: "(1) the insurer lacked

a reasonable basis for denying coverage; and (2) the insurer knew or recklessly disregarded its lack of a reasonable basis." Adamski, 738 A.2d at 1036 (citing Terletsky, 437 Pa.Super. at 124, 649 A.2d at 688). As the above-authorities show, bad faith claims under § 8371 are limited to actions under an insurance contract and normally involve the handling of claims or denial of benefits. Adamski, 738 A.2d at 1036-40; Terletsky, 437 Pa.Super. at 124; 649 A.2d at 688; Romano, 435 Pa.Super at 551-55, 646 A.2d at 1231-33..

This court agrees with CGU's argument that a bad faith claim under § 8371 does not involve a failure to renew an insurance policy, unless such failure involves the denial of benefits or the handling of a claim, which is a situation not implicated on the present facts. See Guthrie Clinic, 2000 WL 1853044, at *4 (allowing bad faith claim where it involved both the denial of benefits and the renewal of the policy). This court also finds that Kurtz v. American Motorists Ins. , 1997 WL 117008 (E.D. Pa. March 12, 1997) and Sabugo-Reyes v. Travelers Indemnity Co. of Illinois, 2000 WL 62627 (E.D.Pa. Jan. 14, 2000), two cases relied on by CGU, are persuasive since the courts refused to hold the insurance companies liable under § 8371 for an alleged bad faith failure to renew the insured's policies. In Kurtz, the court relied on the traditional notions of bad faith in the insurance context, the purpose of § 8371 to provide a remedy for bad faith conduct in connection with the nonpayment of a claim, and alternative regulations for the non-renewal of automobile insurance policies. 1997 WL 117008, at **2-3. In Sabugo-Reyes, the court examined Pennsylvania decisions, which interpreted § 8371 to apply only in the context of a denial of benefits or the handling of claims. 2000 WL 62627, at *2 (citations omitted). The court, therefore, applied the limited scope of § 8371, and dismissed the bad faith claim for refusal to renew the plaintiffs' insurance policy. Id. See also, General Accident Ins. Co. v. Federal Kemper Ins. Co., 452 Pa.Super. 581, 587,

682 A.2d 819, 822 (1996)("[t]he purpose of section 8371 was to provide a statutory remedy to an insured when the insurer denied benefits in bad faith."); Terletsky, 437 Pa.Super. at 124-25, 649 A.2d at 688.

Brickman argues that the Pennsylvania Superior Court's decision in O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906-07 (Pa.Super.Ct. 1999) undermined these two decisions because it expanded the scope of bad faith suits under § 8371. In examining the scope of § 8371, the O'Donnell court agreed that the bad faith statute was not restricted to the denial of claims but may extend to the misconduct of an insurer during the pendency of litigation. 734 A.2d at 906. It stated that "the broad language of section 8371 was designed to remedy all instances of bad faith conduct by an insurer, whether occurring before, during or after litigation." Id. However, the O'Donnell court was addressing a bad faith claim for failure to pay for a burglary loss and the insured's alleged bad faith in investigating her claim during the discovery process and in refusing to settle the claim. 734 A.2d at 903-04, 909. Moreover, the court ultimately held that Allstate's behavior during litigation did not, as a matter of law, rise to the level of bad faith under section 8371. Id. at 910. This court is unconvinced that the O'Donnell decision expands the scope of § 8371 to include a bad faith claim for failure to renew a contract for insurance, despite an alleged agreement providing for such renewal. The present action is not based on the insurance policies, themselves, but implicates an agreement to renew the policies. This court finds that § 8371 was not designed to provide a remedy for the present situation; instead, it is covered by the breach of contract claim. See Belmont Holdings, 1999 WL 124389, at *3 ("A dispute over the increase in premium rates, the related threat to cancel the policy and the contractual dispute over the payment of a dividend is not conduct that relates to the handling or payment of claims or benefits under an insurance policy. Therefore, those disputes should be decided as part of Belmont's breach of contract claim and not as a bad faith claim under § 8371.").

Therefore, the court sustains CGU's demurrer to Count IV.[7]

E. Demurrer to Brickman's Prayer for Attorney Fees

Finally, CGU sets forth a demurrer to the prayer for attorneys' fees under Counts I-III, arguing that there is neither contractual nor statutory authority for such an award. Def. Mem. of Law, at 14. Under the general rule, attorney fees' cannot be recovered from an adverse party, "absent an express statutory authorization, a clear agreement by the parties or some other established exception." Merlino v. Delaware County, 728 A.2d 949, 951 (Pa. 1999). Counsel fees may be awarded "as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." 42 Pa.C.S.A. § 2503(7). Here, the only claims which remain are the breach of contract claims in Counts I (specific performance) and II (monetary damages). Brickman does not assert that its contract with CGU allowed for attorneys fees and attorney fees are generally not recoverable for a mere breach of contract action. Gorzelsky v. Leckey, 402 Pa.Super. 246, 251, 586 A.2d 952, 955 (1991). Further, punitive damages are not available for a mere breach of contract. Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 370

[7]CGU also asserts that there is no independent right of action under the UIPA, but such violations can be evidence of bad faith. See Romano, 435 Pa.Super. at 552-53, 646 A.2d at 1232-33(noting that UIPA violations can provide a basis for recovery under § 8371). Nonetheless, this court finds that Brickman's allegations in paragraph 46 of the amended complaint are legally insufficient to constitute unfair insurance practices as defined by 40 P.S. § 1171.5 of the UIPA since the alleged misrepresentations do not relate to the terms of the insurance policies or statements regarding the defendant's business. Further, these commercial insurance policies would not be covered by subsection (9) of § 1171.5 which relates to the cancellation or refusal to renew any policy covering "owner-occupied private residential properties or personal property of individuals." 40 P.S. § 1171.5(9). Therefore, this court concludes that Brickman has failed to state evidence of bad faith under either the UIPA or independently under § 8371.

Pa.Super. 461, 469-70, 536 A.2d 1357, 1367 (1987). Brickman has not sufficiently set forth any facts that would demonstrate how this action was more than a breach of contract action or how it is entitled to attorneys fees. Therefore, this court sustains the demurrer to the prayer for attorneys fees and strikes them from Counts I and II without prejudice.

CONCLUSION

For the reasons set forth above, the court sustains the preliminary objections to Counts III and IV and dismisses those counts. The court sustains the preliminary objections to the prayer for attorney fees in Counts I and II and strikes this demand from those counts. The remainder of Counts I and II must stand. The court will enter a contemporaneous order in accordance with this memorandum opinion.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: January 8, 2001

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

THE BRICKMAN GROUP, LTD.,	:	JULY TERM, 2000
Plaintiff	:	No. 0909
v.	:	
CGU INSURANCE COMPANY,	:	
Defendant	:	Control No. 091866

ORDER

AND NOW, this 8th day of January, 2001, upon consideration of the Preliminary Objections of defendant, CGU Insurance Company, to the Amended Complaint of plaintiff, the Brickman Group, Ltd., plaintiff's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

(1) the Preliminary Objections to Counts III and IV are **SUSTAINED** without prejudice and Counts III and IV are stricken in their entirety;

(2) the Preliminary Objections to Counts I and II are **OVERRULED**;

(3) the Preliminary Objections to the demand for attorneys' fees are **SUSTAINED** without prejudice and said demand in Counts I and II is hereby **STRICKEN**;

(4) defendant shall file an Answer to Counts I and II of the Amended Complaint within twenty (20) days of the date of entry of this Order.

BY THE COURT:

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JOHN W. HERRON, J.