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

LEGION INSURANCE COMPANY, Plaintiff	: May Term, 2000
	: No. 3174
v.	:
JAN W. DOEFF, M.D., Defendant	: Motion Control Nos. 051935, 121629 and 121683

O R D E R

AND NOW, this 6th day of June 2001, upon consideration of the Preliminary Objections of plaintiff, Legion Insurance Company, to the Answer and New Matter of defendant Jan W. Doeff, M.D. ("Doeff") and to the Counterclaim of Elizabeth Liss, the Preliminary Objections of Third Party defendants, John S. Bagby, Jr., Esquire and Bagby & Associates, to the Joinder Complaint of Elizabeth Liss and the responses of defendants, Doeff and Elizabeth Liss, the Motion for Reconsideration of John S. Bagby, Jr., Esquire and Bagby and Associates, the respective memoranda and all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that:

1. Legion Insurance Company's Preliminary Objections to the Counterclaim of Elizabeth Liss are **Sustained** and the Counterclaim is **Dismissed**;

2. Legion Insurance Company's Preliminary Objections to Paragraphs 9, 10, 14, 15, 16, 17, 18, 19, 20 and 21 of the New Matter are **Sustained**;

3. John S. Bagby, Jr., Esquire and Bagby & Associates' Preliminary Objections to the Joinder Complaint are **Sustained** and the Joinder Complaint is **Dismissed**;

4. All remaining Preliminary Objections are **Overruled**; and

5. Defendant Doeff may file an amended Answer and New Matter within twenty-two (22) days of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... June 6, 2001

This matter arises out of a prior malpractice action filed by Elizabeth Liss ("Liss") and her husband, Barnett Liss ("Barnett"),[1] against Liss' psychiatrist, Jan W. Doeff, M.D. ("Doeff"). In the present case, Legion Insurance Co. ("Legion"), Doeff's insurer, has filed a complaint against Doeff ("Complaint") in an attempt to recoup costs incurred in its defense of him in the malpractice action. Liss, as Doeff's assignee, has filed a counterclaim against Legion ("Counterclaim") and a Joinder Complaint ("Joinder Complaint") against John S. Bagby, Jr., Esquire ("Bagby") and Bagby & Associates ("Bagby Firm"), Legion's counsel.[2]

For the reasons set forth, Legion's Preliminary Objections ("Legion's Objections") are sustained, in part, and overruled, in part, and the Bagby Defendants' Preliminary Objections ("Bagby

[1] Elizabeth and Barnett are referred to collectively as the "Lisses."

[2] Bagby and the Bagby Firm are referred to collectively as the "Bagby Defendants."

Defendants' Objections") are sustained in their entirety.[3]

BACKGROUND

Doeff is a licensed psychiatrist who during the period in question had several insurance policies with Legion. The policy at issue in the present dispute was a claims made policy for the period of November 1, 1997 to November 1, 1998 with retroactive coverage to May 1, 1996 ("97-98 Claims Made Policy"). Legion asserts that it issued the 97-98 Claims Made Policy in reliance on Doeff's answers in a 1996 renewal questionnaire ("Renewal Questionnaire"). In that Renewal Questionnaire, Doeff represented that he maintained medical records for each patient, including the type and dosage of medicine prescribed, and followed certain patient monitoring procedures.

In August 1992, Doeff began providing psychiatric care to Liss. Liss was subsequently admitted to Friends Hospital ("Friends") three times under Doeff's care and was diagnosed as suffering from bipolar disorder and psychosis. After Liss' discharge from Friends, Doeff continued his care of Liss and prescribed Lithium and Risperdal, an antipsychotic medication. Doeff continued prescribing Risperdal for Liss until March 1997, when he observed symptoms of tardive dyskinesia, a neurologic disorder causing involuntary movements of the face, mouth, tongue and other parts of the body. Liss was subsequently diagnosed as suffering from tardive dyskinesia.

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[3]The court issued an original Opinion on these Preliminary Objections on May 21, 2001. The court subsequently withdrew that Opinion and vacated the accompanying Order, and is now examining the Objections in light of the Motion for Reconsideration submitted by John S. Bagby, Jr., Esquire and Bagby & Associates on May 25, 2001.

On March 26, 1998, the Losses commenced a medical malpractice action against Doeff, alleging that his prescriptions of Risperdal and failure to monitor Liss for symptoms of tardive dyskinesia led to her condition ("Liss Action"). Doeff notified Legion of the Liss Action on April 13, 1998 and requested coverage under the 97-98 Claims Made Policy. Legion initially agreed to defend Doeff in the Liss Action.

Legion subsequently withdrew its defense of Doeff in the Liss Action on April 6, 2000, less than seven weeks before the Liss Action trial was to begin. Legion asserts that its withdrawal was based on Doeff's alleged refusal to cooperate and misrepresentations on the Renewal Questionnaire, while Doeff contends that Legion's action constituted bad faith. Legion's withdrawal was communicated by Bagby, Legion's "coverage" attorney in its dispute with Doeff, directly to Doeff, although Bagby allegedly knew that Doeff was represented by personal counsel.[4]

On May 26, 2000, a jury rendered a verdict of $6,702,939 in the Liss Action, and the Losses filed a petition for delay damages. Legion complains that Doeff did not file post-trial motions, appeal the verdict or oppose the Losses' petition for delay damages. On July 7, 2000, Doeff allegedly consented to entry of judgment in the Liss Action in the amount of $7,286,162.17.

At some point, Doeff had assigned his claim to the Losses. Liss, however, was not named as a defendant in the Legion Complaint and the docket does not reveal that she was formally served in or intervened into the action Legion brought against Doeff. In addition, it does not appear that Doeff assigned Liss any potential obligation he may owe Legion.

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[4] Doeff and Liss assert that this contact violated Rule of Professional Conduct 4.2, which regulates communications between a party represented by counsel and an opposing attorney.

Within this context, Legion brought the instant action against Doeff for expenses incurred in its defense of him in the Liss Action and had him served, allegedly on Bagby's advice, the day the Liss Action trial opened. In its Complaint ("Complaint"), Legion asserts the following claims: breach of contract; declaratory judgment and rescission of the 97-98 Claims Made Policy; declaratory judgment and rescission of all Legion insurance contracts issued to Doeff; negligent misrepresentation; insurance fraud;[5] and reverse bad faith.

Doeff filed an "Answer to Complaint With New Matter and Counterclaim." However, the Counterclaim purports to be brought on behalf of Liss, as an Assignee of Doeff. This counterclaim asserts claims against Legion for breach of contract; breach of the covenant of good faith and fair dealing; breach of fiduciary duty; violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law;[6] statutory bad faith;[7] intentional infliction of emotional distress; and negligent infliction of emotional distress. Liss, again purporting to act as Doeff's assignee, has also filed the Joinder Complaint against Bagby and the Bagby Firm. In it, she asserts claims against the Bagby Defendants for intentional infliction of emotional distress and negligent infliction of emotional distress.

[5] Legion asserts that Doeff violated 18 Pa. C.S. § 4117.

[6] 73 Pa. C.S. §§ 201-1-201-9.3.

[7] Pursuant to 42 Pa. C.S. § 8371.

DISCUSSION

I. Legion's Objections, in Large Part, Must Be Sustained, and the Counterclaim and Portions of the New Matter Must Be Dismissed.

A. Because Liss Is Not a Defendant in this Action, the Counterclaim Against Legion Must Be Stricken Even Though Doeff Has Assigned His Claim to Her.

Legion contends that the Counterclaim is improperly asserted against it because Liss is not a formal party in this action. In Pennsylvania, a "defendant may set forth in the answer under the heading 'Counterclaim' any cause of action heretofore asserted in assumpsit or trespass which the defendant has against the plaintiff at the time of filing the answer." Pa. R. Civ. P. 1031(a) ("Rule 1031(a)"). Here, Doeff, the Defendant, asserts that he has assigned his claims to Liss and that she may therefore assert such claims against Legion as a counterclaim in this matter. This assumption, however, overlooks certain procedural prerequisites.

Under Rule 1031(a), only a defendant may bring a counterclaim against a plaintiff:

> The . . . counterclaim must be such a demand that the defendant or the additional defendant, in his own name, or in the names of the defendants or the additional defendants sued, without bringing in the name of a stranger to the suit, may maintain an action of debt or indebitatus assumpsit on it, against the party, or all the parties suing, as the case may be.

United Nat'l Ins. Co. v. Cozen, Begier & O'Connor, 337 Pa. Super. 526, 541, 487 A.2d 385, 393 (1985) (citation omitted, emphasis added and brackets removed). See also Dickerson v. Dickersons Overseas Co., 369 Pa. 244, 250, 85 A.2d 102, 105 (1952) ("Rule 1031 does not abrogate one of the essential requisites for set-off, namely, that the set-off or counterclaim and the action must be against and between the same parties and between them in the same capacity; and here they are not"); 6 Standard Pa. Practice §29:24 ("[o]nly the defendant may assert a counterclaim; a plaintiff is not permitted to raise a

counterclaim to a counterclaim, and a set off to a set off will not be permitted").

Thus, Liss' counterclaim against Legion is valid only if her position as Doeff's assignee qualifies her as a defendant in this matter. The court cannot so hold. The Pennsylvania Rules of Civil Procedure do not provide a definition of "defendant,"[8] but a "defendant" may be characterized as "[t]he person defending or denying; the party against whom relief or recovery is sought in an action or suit or the accused in a criminal case." Black's Law Dictionary. In the instant case, Liss is not functioning as a defendant. Instead, she has succeeded only to defendant Doeff's claims and not to his liabilities. Since Rule 1031 narrowly restricts the assertion of counterclaims to defendants, Liss cannot assert a counterclaim against Legion without a more formal procedure such as intervention or joinder.[9]

It is also obvious that Doeff cannot assert the Counterclaim. Doeff himself contends that he has assigned the Counterclaim to Liss. Counterclaim at ¶ 40. Once this assignment was made, the Counterclaim was no longer his and became Liss' cause of action. See West Penn Administration, Inc. v. Pittsburgh Nat'l Bank, 289 Pa. Super. 460, 471, 433 A.2d 896, 902 (1981) (assigning party could not bring an action where it had assigned the rights to the action to a third party). It is common sense that a defendant cannot raise a cause of action accruing to another as a counterclaim. See Reeping v. Reeping, 277 Pa. Super. 269, 271, 419 A.2d 766, 767 (1980) ("a defendant cannot use as a set off a demand against the plaintiff in favor of or against a third person not a party to the action."). Cf. Legal Capital, LLC v. Medical Professional Liability Catastrophe Loss Fund, 561 Pa. 336, 341, 750 A.2d 299, 302 (2000)

[8] See Pa.R.Civ. P. 76.

[9] Liss may, of course, become a party to this action by intervening in accordance with Pennsylvania Rule of Civil Procedure 2328. At that point, the court would have reason to examine the substantive arguments in Legion's objections. At present, however, such an exercise is unnecessary.

(an assignment "extinguishes the assignor's right to performance by the obligor and transfers that right to the assignee"). Thus, Doeff cannot assert the Counterclaim, and it must therefore be stricken.[10]

B. Certain Paragraphs of the New Matter Are Not Sufficiently Specific.

Pennsylvania requires that a party state the material facts on which a cause of action or defense is based. Pa. R. Civ. P. 1019(a). To determine if a pleading alleges the material facts with sufficient specificity, a court must ascertain whether the allegations are sufficiently specific so as to enable the answering party to prepare a defense. Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted).

In the New Matter, Doeff sets forth the following defenses:

> 9. Legion failed to mitigate its damages with respect to the losses alleged.
> 10. Legion failed to give proper and adequate notice.
> . . .
> 14. Legion breached its contract with Dr. Doeff.
> 15. Legion's breach of contract precluded Dr. Doeff's performance under the contract.
> 16. Legion's breach of contract excused Dr. Doeff's performance under the contract.
> 17. Legion breached the covenant of good faith and fair dealing.
> 18. Legion breached its fiduciary duty.
> 19. Legion acted in bad faith.
> 20. Legion intentionally inflicted emotional distress upon Dr. Doeff.
> 21. Legion is liable to Dr. Doeff for compensatory damages, interest, punitive damages, attorneys[']fees and costs.

Pennsylvania is a fact pleading jurisdiction. Without more, these bald conclusions do not allow Legion to

[10] Bagby has not raised an argument as the propriety of Liss' filing the Joinder Complaint. A trial court generally may **not** raise the issue of standing sua sponte. Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh. 554 Pa. 249, 255 n.6, 721 A.2d 43, 46 n.6 (1998). As a result, the court cannot consider whether the Joinder Complaint may be dismissed on this basis.

prepare a response. As such, they are insufficiently specific and must be amended to set forth specific facts.

C. Doeff's Allegations of Bad Faith and Emotional Distress In the Answer Are Neither Scandalous Nor Impertinent.

Under Pennsylvania Rule of Civil Procedure 1028(a)(2), a party may object to a pleading's inclusion of "scandalous and impertinent matter." "Scandalous and impertinent matter" is defined as "allegations . . . immaterial and inappropriate to the proof of the cause of action." Common Cause/Pa. v. Commonwealth, 710 A.2d 108, 115 (Pa. Commw. Ct. 1998) (citing Department of Envtl. Resources v. Peggs Run Coal Co., 55 Pa. Commw. 312, 423 A.2d 765 (1980)). Pennsylvania courts have been restrained in striking scandalous and impertinent pleadings, however:

> [T]here is some authority for the proposition that, even if the pleading of damages was impertinent matter, that matter need not be stricken but may be treated as "mere surplusage" and ignored. . . . Furthermore, the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice.

Commonwealth, Dept. of Envtl. Resources v. Hartford Accident & Indem. Co., 40 Pa. Commw. 133, 137-38, 396 A.2d 885, 888 (1979) (citations omitted).

Legion contends that Doeff's inclusion of allegations of bad faith and emotional distress in his Answer to the Complaint and New Matter are scandalous and impertinent. In its Objections and Memorandum, however, Legion has failed to allege, let alone to demonstrate, how the inclusion of these allegations prejudices it in any way. Accordingly, this court will not strike the allegations.

II. The Bagby Defendants' Objections Asserting Legal Insufficiency Are Sustained, and the Joinder Complaint is Dismissed.

In contrast to defendant Legion, the Bagby Defendants did not challenge the propriety of Liss' filing a Joinder Complaint against them. It is therefore necessary to consider the particular objections raised by the Bagby Defendants, which assert that the Joinder Complaint is legally insufficient. When a court is presented with preliminary objections based on legal insufficiency,

> [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).

A. Liss' Claim for Intentional Infliction Of Emotional Distress Is Incomplete.

Although the Pennsylvania Supreme Court has never expressly recognized the tort of intentional infliction of emotional distress,[11] our Superior Court has held that a claim for such a tort will lie

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[11] In Kazatsky v. King David Memorial Park, 515 Pa. 183, 527 A.2d 988 (1987), the Pennsylvania Supreme Court noted that it had "acknowledged but ha[d] never had occasion to specifically adopt" Restatement (Second) of Torts Section 46 ("Section 46"), which sets forth the tort of intentional infliction of emotional distress. 515 Pa. at 185, 527 A.2d at 988. The Kazatsky court ultimately concluded that, "because the evidence adduced in this matter does not establish a right of recovery under the terms of the provision as set forth in the Restatement, we again leave to another day the question of the viability of section 46 in this Commonwealth." 515 Pa. at 185, 527 A.2d at 988-89. See also Hoy v. Angelone, 554 Pa. 134, 151 n.10, 720 A.2d 745, 753 n.10 (1998) (where plaintiff could not establish a right to recovery, even if the tort were recognized, the court would not consider the adoption of Section 46). Cf. Taylor v. Albert Einstein Med. Center, 562 Pa. 176, 181, 754 A.2d 650, 652 (2000) ("[a]lthough we have never expressly recognized a cause of action for intentional infliction of emotional distress, and thus have never formally adopted this section of the Restatement, we have cited the section as setting forth the minimum elements necessary to sustain such a cause of action").

where "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. . . ." Hunger v. Grand Central Sanitation, 447 Pa. Super. 575, 583, 670 A.2d 173, 177 (1996) (quoting Restatement (Second) of Torts § 46 ("Section 46")).[12] Although it did not recognize the tort of intentional infliction of emotional distress, the Pennsylvania Supreme Court in Kazatsky v. King David Memorial Park, 515 Pa. 183, 527 A.2d 988 (1987), considered what type of conduct was extreme and outrageous:

> The term "outrageous" is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct. The Restatement tells us that what is prohibited is conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

515 Pa. at 195-96, 527 A.2d at 994. The Johnson court specifically adopted these last two sentences, which are quotations from Section 46 comment d. 425 Pa. Super. at 412, 625 A.2d at 672.

The Joinder Complaint alleges several bases for Liss' claim for intentional infliction of emotional distress. First, it asserts that Bagby's conduct was done "solely with the intent to harm Dr. Doeff" and that Doeff suffered both emotional distress and bodily harm. Joinder Complaint at ¶¶44-46. It also contends that Bagby's demands were potentially prejudicial to Doeff in defending himself in the Liss Action and were made "solely for the purpose of determining whether Legion could deny coverage and

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[12] In considering claims for intentional infliction of emotional distress, "it is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery." Johnson v. Caparelli, 425 Pa. Super. 404, 412, 625 A.2d 668, 671 (1993) (citations omitted).

were in no way for the purpose of furthering the defense of Dr. Doeff." Id. at ¶¶ 22-23. Finally, the Joinder Complaint asserts that Legion, on Bagby's recommendation, terminated its defense of Doeff seven weeks before trial and served him with notice of the instant suit the day the Liss Action trial began. Id. at ¶¶ 26-27, 30-31.

If Bagby were Doeff's counsel, these allegations could sustain a claim for intentional infliction of emotional distress. In the absence of such an allegation, however, these assertions do not cause a court to exclaim, "Outrageous!" and thus do not satisfy the elements of an action for intentional infliction of emotional distress. Accordingly, the Bagby Defendants' Objections to this claim are sustained.

B. The Bagby Defendants Are Protected From Liability on Liss' Claim for Negligent Infliction of Emotional Distress.

The Bagby Defendants argue that an attorney cannot be held liable for negligent infliction of emotional distress to anyone other than his or her client. Because neither Liss nor Doeff was a client of Bagby or the Bagby Firm, they reason, neither one can bring a negligence claim of any kind against them. This argument is persuasive.

Pennsylvania law limits the right of third parties to bring a negligence action against an attorney:

> In Smith v. Griffiths, 327 Pa. Super. 418, 476 A.2d 22 (1984), we held that an attorney who acts in good faith for the purpose of serving a justifiable and proper interest of the client will not be held liable for unintentional harm caused to third persons, particularly where the third person is an adverse party to litigation. We said:
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> > To impose upon an attorney a duty of care to the adverse party would place the attorney in a position where his own interest would conflict with the interests of his client and prevent him from exerting a maximum effort on behalf of the client. It would place an undue burden on the profession and would diminish the quality of the legal services rendered to and

> received by the client. Where an attorney represents a client in litigation . . . the public interest demands that attorneys in the proper exercise of their functions as such, not be liable to adverse parties for acts performed in good faith and for the honest purpose of protecting the interests of their clients.

Aetna Electroplating Co. v. Jenkins, 335 Pa. Super. 283, 287-88, 484 A.2d 134, 136-37 (1984) (quoting Smith, 327 Pa. Super. at 427, 476 A.2d at 26) (emphasis added and removed). See also Pelagatti v. Cohen, 370 Pa.Super. 422, 441 536 A.2d 1337, 1347 (1988). ("an attorney will be held liable for negligence only to his client and not to anyone else").[13]

There are no allegations in the Joinder Complaint that either Liss or Doeff was ever a client of the Bagby Defendants. Indeed, the Bagby Defendants represented Legion, a party adverse to Doeff in the dispute over insurance coverage. Joinder Complaint at ¶ 19. As a result, the Bagby Defendants are protected from liability for any negligent conduct that may have affected Doeff, and the Joinder Complaint must be dismissed in its entirety.

CONCLUSION

Because the Counterclaim, the Joinder Complaint and portions of the New Matter are procedurally and substantively flawed, the court has sustained Legion's and the Bagby Defendants' Objections to them. Legion's remaining Objections to the Answer, however, are without merit and are overruled.

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[13] It must be noted that this limitation applies only to unintentional torts. With regard to intentional torts or actions motivated by malice, such as intentional infliction of emotional distress, an attorney "may become personally liable for damage suffered by a third person." Smith, 327 Pa. Super. at 427, 476 A.2d at 26 (citations omitted). Cf. Aetna Electroplating Co., 335 Pa. Super. at 287, 484 A.2d at 136 (dismissing third-party claim against attorney because there were no "averments that counsel committed an intentional tort designed maliciously to cause harm").

A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.