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

M&M HIGH INC.,		: July Term, 2001
		:
	Plaintiff,	: No. 0997
		:
v.		:
		:
ESSEX INSURANCE CO., et al		: **Commerce Program**
		:
	Defendants.	: Control No. 081242

ORDER and MEMORANDUM

AND NOW, this 18th day of November 2002, upon consideration of the Motion for Summary Judgment ("Motion") of Defendant JMAR Insurance Agency, Inc. ("JMAR") on all counts against it (Counts I and V), plaintiff's Opposition to the Motion ("Opposition"), and all matters of record, and in accord with the contemporaneous Memorandum Opinion, it is **ORDERED** that said motion is **GRANTED**, and Counts I and V of plaintiff's M&M High, Inc.'s Complaint against defendant JMAR are **DISMISSED**.

BY THE COURT,

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GENE D. COHEN, J.

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MEMORANDUM OPINION

Presently before the court is the Motion for Summary Judgment ("Motion") of defendant JMAR Insurance Agency, Inc. ("defendant" or "JMAR") on all counts against them (Counts I and V) and plaintiff's Opposition to the Motion ("Opposition"). For the reasons that follow, this court is issuing a contemporaneous Order granting defendant JMAR Summary Judgment on all counts against it.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff M&M High, Inc. ("M&M") operates a boarding home. Complaint, ¶ 2. Plaintiff M&M was insured, at all relevant times, for general commercial liability in its property and business operated therein. Id., ¶¶ 13, 20. M&M had first sought such insurance through defendant JMAR, an insurance agent, in September of 1997. Id., ¶¶ 11-12. Through an insurance wholesaler, defendant Jimcor, JMAR obtained insurance for M&M from American Equity Insurance Company ("American Equity") through September 12, 1998. Id., ¶¶ 4, 12. M&M then sought to renew its insurance coverage, which JMAR provided, this time from defendant Essex

Insurance Company ("Essex"), through September 12, 1999. Id., ¶ 20.

Plaintiff alleges that the first insurance policy it had obtained, American Equity, committed to paying any damages M&M became legally bound to pay, even where they arose out of negligence on behalf of M&M in its rendering of professional services. Id., ¶ 14. Further, American Equity had an exclusion from coverage for assault and battery but, plaintiff alleges, not where such acts were committed by residents of the home. Id., ¶¶ 15-16.

Plaintiff alleges that, when it approached JMAR to renew its insurance policy in September of 1998, it requested "coverage identical to that provided by the American Equity Policy." Id., ¶ 17. JMAR purportedly represented to M&M that the Essex policy was indeed identical. Id., ¶ 21.

At all relevant times, individuals Kevin Clinkscales ("Clinkscales") and Justin Seamen ("Seamen") were residents of M&M. Id., ¶ 25. On January 21, 1999, Seamen physically attacked Clinkscales, and Clinkscales lost vision in one eye as a result of Seamen's assaulting him. Id., ¶¶ 25, 27. On February 17, 2000, Clinkscales submitted a claim to Essex for damages resulting from the attack. Id., ¶ 28. Shortly thereafter, on March 7, 2000 according to the Complaint, Essex contacted M&M and informed it that there was no coverage for the Clinkscales claim because the Essex policy does not cover damages from assault and battery committed by any person, including patrons. Id., ¶¶ 29-30. A clause excluding damages resulting from negligent supervision by M&M was also cited by Essex as grounds for rejecting coverage. Id., ¶ 30.

On May 18, 2000, Clinkscales sued M&M for damages arising from Seamen's attack upon him. Id., ¶ 34. Over a year later, on June 11, 2001, M&M requested that Essex undertake its defense in that litigation (the "Clinskales Litigation"). Id., ¶ 34. Essex reiterated that it would not

assume any of the costs or ensuing damages of the Clinskales Litigation. Id., ¶ 37. Plaintiff instituted this Complaint on July 10, 2001.

The Complaint embodies two claims against JMAR, one for negligence (Count I) which, in essence, is a claim for professional malpractice, and one for bad faith pursuant to 42 Pa. C.S. § 8371 (Count V) for disclaiming coverage. Both counts rest upon the same factual allegation that JMAR owed a duty to M&M, which it breached, namely that of obtaining coverage identical in nature and extent to the coverage provided by American Equity. Defendant filed an Answer with New Matter to M&M's Complaint on August 30, 2001.

The parties have answered each other's written discovery requests and depositions have been completed. Defendant JMAR moves for summary judgment claiming that plaintiff fails to present the necessary facts to make out any cause of action against it. Motion, p.6. Indeed, defendant argues, discovery did not reveal any facts supporting the allegations that the two insurance policies at issue offered different coverage. Motion, ¶¶ 28-29, 37-38. Defendant also argues in support of its Motion that M&M was required to provide expert testimony in this, a professional negligence, action and failed to do so. Motion, ¶¶ 45-46, 62. Furthermore, defendant contends that 42 Pa. C.S. § 8371 provides a remedy against insurers and not insurance agents. Motion, ¶ 72. Because JMAR is alleged to be the agent and broker but not insurer of plaintiff, Count V, the claim of bad faith against it must therefore, according to defendant, be dismissed. Id., ¶ 73.

Last but not least, defendant argues that plaintiff's claims are barred by the statute of limitations. Motion, p. 7. To that effect, defendant submits deposition testimony stating that M&M was notified of the potential Clinkscales litigation as early as March 29, 1999. Motion, ¶¶

20-21. In addition, defendant submits that, as early as April 6, 1999, about one year earlier than alleged in the Complaint and more than two years prior to the filing of the Complaint, Essex notified plaintiff that it would not assume coverage for the Clinkscales claim. Id., ¶ 22.

LEGAL ANALYSIS

The Applicable Statute of Limitations

As a threshold analysis, this Court will assess whether plaintiff's claims are barred by the statute of limitations. Defendant contends that the statute of limitations governing both counts against it is the two-year statute of limitations applicable to negligence claims. Motion, p. 17. The court notes that while clearly Count I is a negligence claim to which the two-year statute of limitations for tort-based claims applies, such is not the case for Count V, which is a statutorily created claim. See 42 Pa. C. S. § 5524(7); 42 Pa. C.S. § 8371. Section 8371 (the bad faith statute) itself, however, is silent on the applicable statute of limitations. 42 Pa. C.S. § 8371.

In March v. Paradise Mutual Insurance Company, the Superior Court held that the one-year contractual statute of limitations contained in the insurance policy to which an allegation of bad faith pertained did not control. 435 Pa. Super. 597, 646 A.2d 1254 (1994). While the court stated that an action under Section 8371 was a separate claim in that case, it did not indicate what the applicable statute of limitations might be. Id. Indeed, we are without any guidance from our appellate courts on this issue. It will not be necessary, however, for this Court to rule on that issue because the court finds, as will be discussed below, that even a two-year statute of limitations application, as defendant assumes to be the case, does not bar any of plaintiff's claims against JMAR.

Defendant cites to Pocono International Raceway, Inc. v. Pocono Produce, Inc. for the

proposition that the statute of limitations begins to run as soon as "the right to institute and maintain a suit arises." 503 Pa. 80, 84, 468 A.2d 468, 471 (1983). In this case, the cause of action is professional negligence, more particularly, defendant JMAR's misrepresentation as to the extent and scope of the insurance policy's coverage. Plaintiff is correct when stating that the right to institute and maintain such a suit arises only when all the elements of the claim have occurred, including the damages ensuing from that misrepresentation. Opposition, p. 14.

> The four elements of negligent misrepresentation are: 1) actual negligence in the representation of the type or extent of insurance coverage; 2) substantial reliance by the insured on the representation in deciding whether or not to purchase the insurance; 3) *the misrepresentation must result in some harm or loss*; and 4) there must be justifiable reliance on the agent's representations.

Fiorentino v. Travelers Ins. Co., 448 F.Supp. 1364, 1369 (1978) (citing Avondale Cut Rate v. Associates Excess Indemnities, 406 Pa. 493, 178 A.2d 758 (1962) (emphasis added).

The court agrees that the third element of plaintiff's cause of action had not occured prior to the Clinkscales litigation because plaintiff had not yet suffered any damages due the misrepresentation about the coverage.

Defendant nonetheless argues that, under the "discovery rule" as articulated in Pocono, plaintiff's cause of action arose as soon as it had notice of a potential claim against defendant. Motion, pp. 16-17; Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, (1983). According to defendant, that was when JMAR notified plaintiff in the April 1999 letter that it would not cover the Clinkscales litigation.[1] Id.. In fact, the discovery rule necessitates the existence of an injury. Whether discovered or not, and whether and when it

[1] The court notes that the actual letter differs from the way defendant cites it, indeed the letter attached reflects language which conveys merely the likelihood that coverage may not be offered.

should have been discovered then affects when the statute of limitations is triggered. "We hold, therefore, that the 'discovery rule' exception arises from the inability, despite the exercise of diligence, to determine the *injury* or its cause, not upon retrospective view of whether the facts were actually ascertained within the period." Pocono International Raceway, at 472, 86 (emphasis added).

Because plaintiff's cause of action includes an actual damages element, plaintiff's cause of action did not arise, even under the discovery rule and its diligence requirement, until plaintiff was sued and required insurance to cover the costs of the Clinkscales litigation. Indeed, plaintiff could not have discovered its injury however diligently it may have applied itself to the task. Accordingly, this Court holds that plaintiff's action did not arise before May 18, 2000, the date of filing of the Clinkscales complaint against M&M. Plaintiff's complaint, which was commenced on July 10, 2001, is well within the two-year statute of limitation.[2]

Summary Judgment in Counts I and V

> Summary judgment is proper only where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits on file support the trial court's conclusion that no genuine issue of material fact exists and [that] the moving party is entitled to judgment as a matter of law.

Redevelopment Authority of Cambria County v. International Ins. Co., 454 Pa. Super. 374, 387, 685 A.2d 581, 587 (1996) (citations omitted).

As plaintiff itself acknowledges, "the ultimate issue for this Court to resolve is whether the

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[2] Had plaintiff pressed a complaint in equity for declaratory relief as to its rights as an insured, the cause of action would have accrued when there was "imminent and inevitable litigation." Wagner v. Apollo Gas Co., 399 Pa. Super. 323, 327, 582 A.2d 364, 366 (1990). Arguably, such action may have accrued at the time plaintiff first got notice of Essex rejecting coverage. In any event, had plaintiff pressed a complaint with a claim for declaratory relief as to the insurance coverage, the statute of limitations for that claim would have been four years. Id.

terms of the initial policy would have afforded M&M coverage for the assault committed by a third party." Opposition, p. 3. Such issue is not for the jury. "The interpretation of an insurance policy is a question of law for the court to determine." Acceptance Insurance Co. v. Seybert, 757 A.2d 380, 382 (Pa. Super. 2000).[3]

A careful review of both of the insurance policies leads this Court to hold that even the initial policy would not have covered the damages resulting from the assault at issue here. The aforementioned damages are based upon a finding in Clinkscales' favor in his case, whereas he would establish that M&M was negligent in failing to protect him from Seamen's assault. See Motion, Exhibit O, the Clinkscales Complaint. Indeed, the Clinkscales litigation arises from plaintiff's (defendants in the Clinkscales litigation) alleged negligence. See Id., Count II.

Such negligence was excluded from coverage in both policies. To wit, the American Equity policy states in its "Exclusions" section:

> a. "Bodily Injury" or "property damage":
> (1) Expected or Intended from the standpoint of any insured; or
> (2) Arising out of an assault or battery, provoked or unprovoked, or out of any act or omission in connection with prevention or suppression of an assault or battery, committed by any Insured or an employee or agent of the Insured.

Motion, Exhibit E. The Essex policy, in turn, states in its "Exclusions" section:

> ASSAULT AND/OR BATTERY:
> Assault and/or Battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of any Insured, Insured's employees, patrons or any other person.

Motion, Exhibit H. The pertinent language covering negligence, namely "omission in prevention

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[3] The court disagrees with defendant that an expert should have been deposed to interpret the policies as the plain language of the policies is simple, accessible to the comprehension of a lay person, and not beyond the grasp of this Court. See Motion, pp. 12-16.

or suppression" of an assault and battery, is identical in both policies. Thus, "the terms of the initial policy" would have excluded, as did the subsequent policy, coverage for the assault committed by Clinkscales. Opposition, p. 3.

Furthermore, the record reveals undisputed facts which support defendant's position that it did not mislead plaintiff as to the insurance coverage under either of the policies. As evidenced by the deposition transcripts, Mary Taylor and Marian Hawkins are the sole shareholders and principal managers of M&M. Motion, Exhibit D, Hawkins Deposition, p. 8. Marian Hawkins, for one, never had any communication with any of the insurance companies or brokers/agents. Id., pp. 14, 26-27, 30. As for Mary Taylor, she testified that she did not give specific instructions about the insurance coverage at the time M&M renewed it, nor did JMAR represent to her that the coverage would be the same. Motion, Exhibit C, Taylor Deposition, pp. 46, 54, 85-88, 89-90.

Plaintiff expands upon the fact that while the Essex policy excludes any assault or battery damages, the American Equity policy only excludes assault and battery carried out by the insured or an agent of the insured but not a patron or third party. See Opposition, pp. 11-12; Opposition, Exhibit A, Deposition of Michelle McDowell, p. 106, 127-128. While that may be true, it is not dispositive of this case. The inquiry into whether the American Equity policy would have excluded an assault does not end with determining who committed the assault itself. The policy also requires that the assault and ensuing damages did not arise out of "any act or omission in connection with prevention or suppression of an assault or battery." Motion, Exhibit E. Plaintiff can hardly, nor does it, argue with the fact that both policies, as cited above, exclude any assault or battery which the insured or its agent may have prevented or suppressed.

The court notes that the claims against the M&M principals in the Clinkscales litigation more directly mirror a separate exclusion in the Essex policy on negligent hiring and supervision. See Motion, Exh. O, ¶ 15. Such an exclusion is not articulated separately in the American Equity policy. See Opposition, p. 6; Opposition, Exhibit A, pp. 124-125. Nonetheless, the language of the American Equity policy covering assault and battery also undoubtedly excludes the Clinkscales claims, including the claims of negligent hiring and supervision. Indeed, negligent hiring or supervision is an "act or omission in connection with prevention or suppression of an assault or battery, committed by any Insured or an employee or agent of the Insured." Motion, Exhibit E.

The court thus finds that there are no material facts in the record sufficient to make out any cause of action and grants summary judgment in favor of defendant JMAR. For the sake of judicial economy, the court does not address the argument that a bad faith claim cannot be asserted against JMAR because it is not an insurer as such claim is moot. See Motion, p. 18.

CONCLUSION

For the reasons stated, the court grants JMAR's Motion for Summary Judgment . A contemporaneous Order consistent with this Opinion will be entered of record.

BY THE COURT,

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GENE D. COHEN, J.

Dated: November 18, 2002