Control Nos. 060393 & 060394

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

TJS BROKERAGE & CO., INC.	:	DECEMBER TERM, 1999
	:	
	:	
v.	:	COMMERCE PROGRAM
	:	
HARTFORD CASUALTY INSURANCE	:	
COMPANY and PETERMAN COMPANY	:	NO. 2755

MEMORANDUM OPINION IN SUPPORT OF ORDERS GRANTING HARTFORD'S MOTION FOR ADDITIONAL BOND, DENYING HARTFORD'S MOTION FOR STAY PENDING APPEAL AND DENYING TJS'S MOTION FOR CIVIL CONTEMPT AND SANCTIONS

On April 24, 2000, the court issued a preliminary injunction ordering defendant Hartford to process TJS's business personal property claims expeditiously and in good faith. In accordance with that order, TJS posted a $25,000 bond. Since the issuance of that Order, Hartford has paid none of TJS's claims. Hartford states that it is ready to pay the following claims, but cannot do so until TJS posts additional bond: (1) the depreciation holdback on the phone switch ($52,745.92), (2) the remaining ACV of the copiers ($8426.40 as corrected by the court's July 6, 2000 order), and (3) the ACV of the automatic dispatchers less the $5047 already paid ($32,380.00). These payments would total $93,552.32. Hartford requests a stay of the injunction as applied to all other items of business personal property and as applied to the valuable papers coverage.

TJS argues that Hartford has failed to comply with the injunction by not processing TJS's

claims expeditiously and in good faith. TJS requests that the court make a finding of civil contempt and impose sanctions on Hartford.

The court grants only the motion for additional bond.

I. THE COURT GRANTS HARTFORD'S MOTION FOR ADDITIONAL BOND.

The court grants Hartford's motion for additional bond. Because TJS has posted a bond of $25,000, there is no impediment to Hartford's immediate payment of claims up to that amount. The court orders that payments beyond $25,000 be conditioned on TJS's posting of bond of $68,552.32 in accordance with Pa.R.C.P. 1531(b)(1).

II. THE COURT DENIES HARTFORD'S MOTION FOR A STAY PENDING APPEAL.

The court may grant a stay only if (1) Hartford makes a strong showing that it is likely to prevail on the merits; (2) Hartford shows that without the requested relief, it will suffer irreparable injury; (3) a stay will not substantially harm other interested parties in the proceedings; and (4) a stay will not be adverse to the public interest. Maritrans G.P., Inc. v. Pepper Hamilton & Scheetz, 524 Pa. 415, 573 A.2d 1001, 1003 (1990); Pennsylvania Public Utilities Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805, 808-09 (1983). Because Hartford has not satisfied these requirements, the court denies Hartford's Motion for a Stay Pending Appeal.

A. Hartford Has Not Made A Strong Showing that It Will Prevail on the Merits.

Hartford's argument that it will succeed on the merits essentially asks the court to reconsider

the conclusions supporting the injunction order. According to Hartford, (1) TJS had no clear right to relief because Hartford presented a "viable argument" that TJS committed fraud; (2) the court applied an incorrect burden of proof to TJS's fraud defense; (3) the court wrongly decided the valuable papers coverage issue; and (4) TJS failed to show irreparable harm.

Hartford first argues that, under Anglo-American Insurance Co. v. Molin, 547 Pa. 504, 691 A.2d 929 (1997), the defendant need only present a "viable argument" to avoid a preliminary injunction, and that Hartford's fraud defense is such a viable argument. The court disagrees that Hartford's fraud defense is viable or that the scant evidence of fraud that Hartford presented is sufficient to defeat TJS's clear right to relief. In Anglo-American, the insured directors and officers of a failing life insurance corporation sought a preliminary injunction ordering their liability insurer to pay the costs of defending against claims of mismanagement asserted in an action by the Pennsylvania Insurance Commissioner. The Pennsylvania Supreme Court held that the plaintiffs had failed to establish a clear right to relief because the insurer had presented a "viable" and "plausible" argument that an exclusion in the insurance contract precluded coverage.

Contrary to Hartford's assertion, the Supreme Court did not hold in Anglo-American that a defendant could defeat a preliminary injunction merely by raising an unsupported defense. The extensive factual analysis in Anglo-American shows that the court carefully evaluated the evidence as to the plaintiffs' entitlement to coverage and determined that the evidence in support of the insurer's defense was sufficient to make the plaintiffs' right to relief unclear. See also Shenango Valley Osteopathic Hospital v. Department of Health, 499 Pa. 39, 451 A.2d 434, 439 (1982) (stating that petitioner for preliminary injunction need not establish its claim absolutely but "must be likely to prevail

on the merits . . .”). Hartford would have the court skip the evidentiary analysis, ignore the paucity of evidence supporting Hartford’s fraud defense, and deny the injunction merely by labeling that defense as “viable.”[1]

Second, Hartford argues that the court applied an incorrect burden of proof to Hartford’s fraud defense. In the discussion supporting the injunction order, the court stated that Hartford must prove its fraud defense by clear and convincing evidence. Findings of Fact, Discussion and Conclusions of Law In Support of Order Granting In Part Plaintiff-Petitioner’s Petition for Preliminary Injunction at 31. Though Hartford is correct that this was the incorrect burden of proof, applying the correct burden of proof -- preponderance of the evidence -- to the evidence would yield the same result.

In Pennsylvania, a party must generally prove fraud by evidence that is “clear, precise and convincing.” Snell v. Commonwealth, 490 Pa. 277, 416 A.2d 468, 470 (1980); O’Callahan v. Wietzman, 291 Pa.Super. 471, 436 A.2d 212, 214-215 (1981); Laughlin v. McConnel, 201 Pa.Super. 180, 191 A.2d 921, 923-24 (1963). Courts have repeatedly applied some version of the clear and convincing standard to an insurer’s claims of fraudulent misrepresentations by the insured in the making of an insurance contract. New York Life v. Brandwene, 316 Pa. 218, 172 A. 669, 670

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[1] Dictionary definitions of viable include “capable of working, functioning or developing adequately” and “having a reasonable chance of succeeding.” Definitions of plausible -- the other term used in Anglo-American -- include “superficially fair, reasonable or valuable but often specious,” “superficially pleasing or persuasive,” and “appearing worthy of belief.” Merriam Webster’s Collegiate Dictionary (10th ed. 1996). As the terms viable and plausible could easily support placing a comparatively heavy burden (“reasonable chance of succeeding”) or a lighter burden (“superficially fair” or “reasonable” but “specious”) on the defendant, it would be difficult to apply “viable” and “plausible” as an evidentiary standard.

(1933) ("clear and satisfactory"); Tudor Ins. Co. v. Township of Stowe, 697 A.2d 1010, 1017 (Pa.Super. 1997) ("clear and convincing"). See also Ratay v. Lincoln Nat'l Life Ins. Co., 405 F.2d 286, 289-90 (3d Cir. 1968) ("clear, precise and convincing"). The application of a clear and convincing standard seems to derive from the rule that, to rescind or reform a written instrument, the claimant must establish fraud or mistake by clear and convincing evidence. Id.

As Hartford argues, the insurer need only prove by a preponderance of evidence that the insured made a fraudulent claim of loss under a insurance contract. Greenberg v. Aetna Ins. Co., 427 Pa. 494, 235 A.2d 582, 584 (1967). See also Majestic Box Co. v. Reliance Ins. Co. of Illinois, 1998 WL 720463 at *2-*3 (E.D.Pa.); Ratay, 405 F.2d at 289-90 (explaining Greenberg). Application of this lighter burden of proof would not have affected the court's conclusion that TJS has a clear right to relief, however, because there was scant evidence to support Hartford's fraud defense. See Findings of Fact ¶ 37, 134, 135.

Hartford's third argument is that the Court erred in relying on Peterman's testimony in deciding the valuable papers coverage issue. As the court found Peterman's testimony to be credible, the court disagrees.

Hartford's fourth argument is that TJS failed to show irreparable harm. The court relied on Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 499-500 (4th Cir. 1981) as persuasive authority that a court may order an insurer to process insurance claims expeditiously and in good faith if the insured's business is threatened. Hartford argues that the decision in In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137 (3d Cir. 1982) forecloses such an order. The court disagrees. The court in Arthur Treacher's expressly recognized, without rejecting, the holding in

Federal Leasing that an injunction ordering an insurer to process claims in good faith may be appropriate. See also Dover Steel Co. v. Hartford Accident & Indem. Co., 806 F.Supp. 63, 65-66 (E.D.Pa. 1992) (denying injunction for monetary relief but harmonizing its holding with that of Federal Leasing). Thus Federal Leasing, Arthur Treachers' and Dover Steel are persuasive authority that a court may issue an injunction ordering the good faith and expeditious processing of claims when the insured's business is threatened.[2] As the court concluded, such a threat exists in this case.

B. Denial of the Stay Will Not Irreparably Harm Hartford and, As the Court Has Already Concluded, Failure to Process the Claims Would Irreparably Harm TJS.

Hartford argues that it will be irreparably harmed if a stay is not granted, because it might lose the money it pays to TJS after processing the claims. Any loss of this money is not irreparable, however, because Hartford may look to the bond to recover the payments. On the other hand, a stay would further delay the expeditious and good faith processing of TJS's claims, thus causing irreparable harm to TJS.

III. THE COURT DENIES TJS'S MOTION FOR CIVIL CONTEMPT & SANCTIONS

TJS urges the court to find Hartford in contempt and to sanction Hartford for failing to process the claims. To support a finding of civil contempt, TJS must show by a preponderance of the evidence

[2] The preliminary injunction that the Pennsylvania Supreme Court reversed in Anglo-American Ins. Co. v. Molin directed the insurer to pay money. In reviewing the injunction, the Supreme Court did not hold that injunctive relief is improper in an insurance coverage action. Had the court felt that there is such an absolute rule, the court could have reversed on that ground alone without performing such an extensive factual analysis. That the court felt it necessary to analyze the plaintiff's clear right to relief shows that injunctive relief might be appropriate in an insurance coverage action.

that (a) Hartford had notice of the injunction order, (b) the injunction order was sufficiently definite to put Hartford on notice of what it would be violating, (c) Hartford volitionally committed an act in violation of the order, and (d) Hartford acted with wrongful intent. Marian Shop, Inc. v. Baird, 448 Pa.Super. 52, 670 A.2d 671, 673 (1996).

The court denies TJS's motion for civil contempt and sanctions. It is not clear that Hartford has yet volitionally violated the injunction order. Hartford has expressed its willingness to begin paying some claims. In a May 25, 2000 letter to counsel for TJS, counsel for Hartford stated that Hartford would pay $94,310.72 to TJS if TJS voluntarily posted a bond of $69,310.72.[3] That letter appears to have been a good faith attempt to comply with the order, but TJS's refusal to post additional bond prevented compliance. See Mueller v. Anderson, 415 Pa.Super. 458, 609 A.2d 842, 843 (1992) ("There is no contempt if the alleged contemnor, without fault on his part is unable to comply with the order, and has in good faith attempted to comply."). The court's granting of the motion for additional bond will remove this obstacle to compliance. The court notes that Hartford's bond request covers only a portion of the claims that the court has ordered Hartford to process. The court's granting of that request and Hartford's payment of the bonded claims will not relieve Hartford of its obligation to continue to process all of TJS's property and valuable papers claims expeditiously and in good faith. The court anticipates that Hartford will desire additional bond as it processes those claims. The court

[3] In its May 25, 2000 letter, counsel offered to pay for 5 of the 9 dispatchers. The court does not believe that Hartford would make so specious an argument that, after a good faith adjustment of TJS's claims, Hartford is obligated to pay for some but not all of the dispatchers. Instead, the court strongly suspects that counsel meant to pay for all 9 dispatchers, for the $33,380 offered exceeds the ACV of 5 dispatchers, and appears to correlate with the ACV of 9 dispatchers minus the $5047 already paid.

strongly suggests that, if Hartford so requests, TJS voluntarily post bond for those claims. Such cooperation will prevent the need for additional bond motions and will quicken the relief that TJS seeks.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: July 21, 2000

Control No. 060394

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CIVIL TRIAL DIVISION

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COMPANY and PETERMAN COMPANY	:	NO. 2755

ORDER

AND NOW, this 21st day of July 2000, upon consideration of the Motion of plaintiff TJS Brokerage & Co. for Civil Contempt and Sanctions, and in accordance with the contemporaneously filed Memorandum Opinion in support of this Order, IT IS HEREBY ORDERED that the Motion is DENIED.

BY THE COURT:

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John W. Herron, J.

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ORDER

AND NOW, this 21st day of July 2000, upon consideration of the Motion of defendant Hartford Casualty Insurance Company ("Hartford") for Additional Bond and for Stay Pending Appeal and the response thereto by plaintiff TJS Brokerage & Co. ("TJS"), and in accordance with the contemporaneously filed Memorandum Opinion in support of this Order, IT IS HEREBY ORDERED that:

(1) Hartford's Motion for Additional Bond is GRANTED. TJS shall file additional bond in the amount of $68,552.32 in accordance with Pa.R.C.P. 1531(b)(1) within ten (10) days of this Order.

(2) Hartford's Motion for Stay Pending Appeal is DENIED.

BY THE COURT:

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John W. Herron, J.