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

UNIVERSAL TELESERVICES ARIZONA, LLC, Florida Limited Liability Company, THE DEVELOPMENT CENTER, LLC, a Florida Limited Liability Company and JOANNE RUSSELL, Plaintiffs,	:	November Term 2002
	:	No. 001670
	:	Commerce Program
v.	:	Control Numbers 121132/121221
ZURICH AMERICAN INSURANCE COMPANY, a New York Corporation and COLLEGEVILLE FINANCIAL GROUP, LLC, a Pennsylvania Limited Liability Company, Defendants.	:	

ORDER

AND NOW, this 4TH day of March , 2004, upon consideration of the parties Cross Motions for Summary Judgment, responses in opposition, memorandum, all matters of record, oral argument and in accordance with the Memorandum Opinion filed in this matter, it is hereby **ORDERED** and **DECREED** that

1. Zurich American Insurance Company's Motion for Summary Judgment is **Granted**. Plaintiffs' complaint is dismissed with prejudice against Zurich American Insurance Company only.

2. Universal Teleservices Arizona, LLC, The Development Center, LLC and Joanne Russell's Motion for Summary Judgment is **Denied**.

BY THE COURT:

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GENE D. COHEN, J.

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MEMORANDUM OPINION

COHEN, J……

Presently before the court are Plaintiffs Universal Teleservices Arizona, LLC, The Development Center, LLC, Joanne Russell and Defendant Zurich American Insurance Company's ("Zurich") cross motions for Summary Judgment. For the reasons that follow, this court grants Zurich's motion for summary judgment and denies Plaintiffs' motion for summary judgment.

BACKGROUND

Joanne Russell, the managing member of Universal Teleservices Arizona, LLC (hereinafter "UTA") and The Development Center (hereinafter "TDC"), submitted a policy application for a Private Directors, Officers and Employees Liability Coverage to Zurich. The policy application indicated that "Universal Teleservices Arizona, LLC d/b/a Direct Marketing Services and The Development Center, Inc." were applying for insurance. Zurich issued a Directors, Officers and Employees Liability Policy

(hereinafter "D&O Policy") to Universal Teleservices Arizona Corp. d/b/a Direct Marketing Services (hereinafter "UTAC") for the policy period November 27, 2001 to November 27, 2002. UTAC ceased to exist on December 28, 2000 when it merged into Universal Teleservices Arizona, LLC. The policy was issued by Zurich on March 7, 2002. (Plaintiffs' Exhibit H- deposition Bruce Lander p. 29).

The policy provides that Zurich "shall pay on behalf of the Insured Persons all Loss for which the Insured Persons are not indemnified by the Company and which the Insured Persons become legally obligated to pay on account of any Claim first made against them, individually or otherwise, during the Policy Period or, if exercised, during the Extended Reporting Period, for a Wrongful Act taking place before or during the Policy Period." (Plaintiffs' Exhibit B at I.A.).

Insured Persons are defined under the policy as any person who has been, now is or shall become a duly elected director or duly elected or appointed officer or Manager of the Company; any elected or appointed officer or Manger of the Company while serving in an Outside position. (Plaintiffs' Exhibit B at III.I.).

Endorsement No. 4 amends the definition of Insured Persons to include, "one or more natural persons who were or shall hereafter be duly elected or appointed directors and officers of the company, or one or more natural persons who are assigned titles or positions which are functionally equivalent to directors or officers with respect to wholly owned foreign operation of the company. (Id. Endorsement No. 4).

The Zurich Policy contains a prior and pending litigation exclusion. The exclusion excludes from coverage any claim

> based upon, arising out of, attributable to, or in any way directly or indirectly related to any demand, suit or proceeding pending, or order, decree or

> judgment entered against the company or any Insured Person on or prior to the respective Pending or Prior Date set forth in Item 8 of the Declarations, or the same or substantially the same fact, circumstances or situation underlying or alleged therein.
>
> (Id. at IV. A 2.).

The applicable Pending or Prior date for the Zurich D&O Policy is September 28, 2000.

On March 7, 2002, Joannne Russell, UTA and TDC were named in a proceeding filed in the Circuit Court of the Twelfth Judicial Circuit in Sarasota County, Florida. (Florida Proceeding). (Plaintiffs' Exhibit "E"). The purpose of the proceeding was to require Douglas R. Colkitt (hereinafter "Colkitt"), Joanne Russell's husband, to appear before the court as a defendant in execution and to join UTA, TDC and Joanne Russell Colkitt a/k/a Joanne Russell as well as other holding companies as supplemental defendants to conduct proceedings in aid of execution and to ascertain whether assets were fraudulently transferred to them. (Plaintiffs' Exhibit E.).

According to the Florida Proceeding, on April 4, 1997, GFL commenced an action against Colkitt in the United States District Court for the Middle District of Pennsylvania to recover the amounts due and owing from Colkitt after he failed to repay advances of funds. On July, 2000, judgment was entered in favor of GFL and against Colkitt in the sum of $21,121,989.39. (Plaintiffs' Exhibit E ¶¶ 3-4.). On August 15, 2000, Colkitt appealed the judgment to the Third Circuit Court of Appeals which affirmed the judgment in full. Colkitt's subsequent Petitions for Rehearing and Rehearing En Banc were denied. (Id. ¶ 5.).

Plaintiffs submitted the Florida Proceeding to Zurich under the D&O Policy for defense and indemnification. On April 10, 2002, Zurich denied the claim based upon the

prior or pending litigation exclusion of the policy since the suit was pending and judgment was entered prior to the pending or prior date, September 28, 2000. (Plaintiffs' Exhibit "K"). Zurich also noted additional exclusions within the policy to deny coverage such as the Personal Profit Exclusion and the Dishonesty Exclusion. (Id.).

Thereafter, Plaintiffs initiated this lawsuit against Zurich and Collegeville Financial Group, LLC. In the complaint, Plaintiffs allege that Zurich breached its contract with Plaintiff for failing to honor its obligation to defend Plaintiffs under the D&O Policy (Count I) and that Zurich acted in bad faith in handling the D&O Policy (Count IV). Plaintiffs now seek summary judgment on two grounds: 1) that plaintiffs are entitled to summary judgment since Zurich's application of the prior and pending litigation exclusion is erroneous and 2) that plaintiffs are entitled to summary judgment with respect to the Count IV- Bad Faith since Zurich owes plaintiff a duty to defend. Zurich filed a cross motion for summary judgment.

DISCUSSION

I. STANDARD OF REVIEW

According to Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, after the pleadings are closed any party may move for summary judgment where (1) there is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) after completion of discovery, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Pa. R. Civ. P. 1035.2.

A proper grant of summary judgment depends upon the evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the jury. Behringer Saws, Inc. v. Travelers Indem.Co. of Illinois, 2003 WL 21962949, *2 (Pa. Com. Pl. June 30, 2003)(McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938 (Pa. Super. 1998). If the non moving party fails to come forward with sufficient evidence to establish or contest a material issue to the case, the moving party is entitled to judgment as a matter of law. Id.

II. Zurich's Prior and Pending Litigation Exclusion Bars Coverage for the Florida Proceeding.

The standards to be applied in reviewing insurance contracts are well settled. The proper focus regarding issues of coverage under insurance contracts is the reasonable expectation of the insured. Britamco Underwriters, Inc. v. Weiner, 431 Pa. Super. 276, 636 A.2d 649, 651 (Pa. Super. 1994)(citing Dibble v. Security of America Life Ins, Co., 404 Pa. Super. 205, 210, 590 A.2d 352, 354 (Pa. Super. 1991). In determining the reasonable expectation of the insured, courts must examine the totality of the insurance transaction involved. Id. While reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous. Id. Where a provision of an insurance policy is ambiguous, the provision is construed in favor of the insured and against the insured. Id.

Where an insurer relies on a policy exclusion as the basis for the denial of coverage, it has asserted an affirmative defense and the insurer must show the policy exclusion precludes coverage. Lehigh Valley Health Network v. Executive Risk

Indemn., Inc., 2001 WL 21505 * 6 (E.D. Pa. 2001)(citing Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100,106). Accordingly, the insurer bears the burden of proof on that issue. Id.

Plaintiffs maintain that the prior and pending exclusion does not apply because Colkitt is not an insured person under the policy. The basis for Plaintiffs contention is that the Zurich Policy should have issued to UTA, TDC and Russell rather than UTAC. Plaintiffs argue that since the policy should have issued to UTA, TDC and Russell and since Colkitt would not be considered an insured person under the Policy if issued to UTA, TDC and Russell, the exclusion was erroneously applied. Whether the Zurich Policy was issued to UTA, TDC and Russell or UTAC is immaterial since Colkitt is an insured person under both scenarios.

A. Colkitt is an Insured Person Under the Policy.

Insured Persons under the Policy are defined as any person who has been, now is or shall become a duly elected director or duly elected or appointed officer or Manager of the company; any elected or appointed officer or Manger of the Company while serving in an Outside position. (Plaintiffs' Exhibit B at III.I.).

Endorsement No. 4 amends the definition of Insured Persons to include, "one or more natural persons who were or shall hereafter be duly elected or appointed directors and officers of the company, or one or more natural persons who are assigned titles or positions which are functionally equivalent to directors or officers with respect to wholly owned foreign operation of the company. (Id. Endorsement No. 4).

The facts of record demonstrate that Colkitt is an insured person under the policy whether it was issued to UTAC or UTA and TDC. With respect to UTAC, Colkitt has

served as Director, President and Secretary. (Defendants' Exhibit 3, Articles of Merger of UTA Corp. into UTA; Defendants Exhibit 4- American International Companies and Directors Officers and Private Company Liability Insurance Policy and Application). Colkitt was also the initial President for UTA. (Defendants' Exhibit 27, 4.1 (b) the Operating Agreement; Exhibit 28, 4.1 (b) the Amended Operating Agreement for UTA). Since Colkitt was a duly elected director and/or officer of UTAC and UTA, he is an insured person as defined under the policy notwithstanding whether the policy was issued to UTAC or UTA.

B. The Prior and Pending Exclusion Contained within the Zurich Policy Precludes Coverage for the Florida Proceeding.

The prior and pending exclusion contained within the Zurich policy is clear and unambiguous. By its terms, the policy excludes coverage for **Loss** on account of any Claim made against any **Insureds** based upon, arising out of, attributable to, or in any way directly or indirectly related to (1) any demand, suit or proceeding pending, or order, decree or judgment entered against the **Company** or **Insured Person** on or prior to the respective Pending or Prior Date set forth in Item 8 of the Declarations, or (2) the same or substantially the same fact, circumstance or situation underlying or alleged therein.(Plaintiff's Exhibit B- Zurich Insurance Policy).

Zurich argues that the Florida Proceeding is based upon, arose out of, is attributable to and is directly related to the 1997 action since without the 1997 action there would be no Florida Proceeding. The court agrees. On April 14, 1997, GFL commenced an action against Colkitt in the United States District Court for the Middle District of Pennsylvania to recover amounts due and owing from him after he failed to repay advances of funds. (Plaintiffs' Exhibit "E" ¶ 3.) On July 17, 2000, judgment was entered in the District

Court Proceedings in favor of GFL and against Colkitt in the sum of $21,121,989.39. (Id. ¶ 4.). Since entry of the judgment, GFL has instituted proceedings before the Supreme Court of the State of New York in aid of enforcement of its judgment, recorded its judgment against Colkitt in the State of Florida pursuant to the Uniform Enforcement of Judgments Act, FLA. STAT. §55.50, et. seq., and filed Ex Parte Orders to Show Cause to serve subpoenas duces tecum on nine financial institutions. (Id. ¶¶ 7-8.).

On March 7, 2002, GFL filed the Florida Proceeding seeking to supplement its execution proceedings against Colkitt. (Id.). The Florida Proceeding alleges Colkitt fraudulently transferred assets to UTA, TDC and Russell, as well as others, in an effort to avoid execution of the judgment entered in the District Court for the Middle District of Pennsylvania. (See Plaintiffs' Exhibit "K" ¶¶ 29-32, 35-36, 59-61). GFL also alleges that UTA and TDC are a continuation of Colkitt's business to defraud Colkitt's creditors. (Id. ¶ 64). GFL seeks to declare the transfers void and levy upon them to satisfy the judgment entered against Colkitt. (Id.).

The Florida Proceeding arises, is based upon and is directly related to the 1997 action. The Florida Proceeding constitutes an extension of the 1997 action. The Florida Proceeding is an enforcement mechanism to collect from Colkitt and satisfy the judgment which was entered against him prior to the applicable prior and pending date of September 28, 2000 set forth within the Policy.

The prior and pending exclusion also applies because the Florida Proceeding is based upon, arises out of, is attributable to and is directly related to the same circumstance or situation alleged within the 1997 action. The District Court in Bensalem Tp. v.

International Surplus Lines Ins. Co., 1992 WL 142024 (E.D. Pa. 1992)[1] interpreted a similarly worded pending litigation exclusion as the one at issue. The court stated:

> The language of the policy exclusion is clear and unambiguous: any claim in any way involving the same fact, circumstance, or situation as is the subject of pending litigation is to be excluded from coverage. By the unambiguous use of words as broad as "fact", "circumstance" or "situation", it is clear that coverage does not depend upon the pleader's art but rather upon the "underlying facts".

Thus, the pending and prior litigation exclusion looks to the underlying facts rather than the legal theories plead. As demonstrated above, comparing the April 1997 lawsuit with the Florida Proceeding reveals that a strong factual nexus exists. The Florida Proceeding is based upon and arises from the April 1997 lawsuit. The Florida Proceeding is an attempt to execute upon the judgment entered in the April 1997 lawsuit and is an extension of the April 1997 suit. The language of the policy exclusion is clear and unambiguous, any claim in any way involving the same circumstance or situation. Here, the 1997 action and the Florida Proceeding involve the same situation.

Plaintiffs argue that the exclusion does not apply because the April 1997 lawsuit and the Florida Proceeding involve different parties. Plaintiffs maintain that the April 1997 lawsuit was solely against Colkitt in his individual capacity. Nothing in the Policy however, requires that a claim involve the same parties. The Policy provides that the underwriter shall not be liable for a loss on account of any Claim made against any insured. The term insured is modified by the word any which supports the conclusion that similarity of parties is not required.

[1] The Third Circuit reversed the District Court's order dismissing Bensalem Township lawsuit against its directors and officers' liability insurer. See 38 F.3d at 1315. The Third Circuit did so to allow the parties to conduct discovery on the issue of whether the insurer changed the language of the pending litigation exclusion without the insured's consent. Notwithstanding the district court's reversal, the Third Circuit adopted the district court's exclusion by stating that "in our view, the policy unambiguously excludes coverage for claims such as the ones at issue here." Id.

Accordingly, Defendants' Motion for Summary Judgment is Granted and Plaintiffs Motion for Summary Judgment is Denied. The complaint is dismissed against Zurich only with prejudice.

II. Zurich did not act in Bad Faith in Denying Coverage for the Florida Proceeding.

Plaintiff's complaint includes claims for bad faith pursuant to 42 C.S.A. § 8371. Plaintiffs contend that Zurich acted in bad faith by misrepresenting pertinent facts or policy or contract provisions relating to coverage at issue, denying coverage without conducting a reasonable investigation based upon all available information and that Zurich did not attempt in good faith to effectuate a prompt, fair and equitable settlement of the insured's claim for defense costs under the policy for which Zurich's Policy had become clear.[2]

Generally, success in bringing a claim of bad faith requires the insured to present clear and convincing evidence that "the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." MGA Ins. Co. v. Bakos, 699 A.2d 751, 754 (Pa. Super. 1997). Section 8371 is not restricted to an insurer's bad faith in denying a claim. An action for bad faith may also extend to the insurer's investigative practices. O'Donnell ex. rel. Mitro v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. 1999).

[2] Plaintiffs recitation of Zurich's conduct which allegedly constitutes bad faith is taken from the Unfair Insurance Practice Act. In Romano v. Nationwide Mut. Fire Ins. Co., 435 Pa. Super. 545, 646 A.2d 1228 (Pa. Super. 1994), the court noted that conduct which constitutes a violation of the Unfair Insurance Practice Act may also be considered when determining whether an insurer acted in bad faith under the bad faith statute.

Based on the prior and pending exclusion, this court granted summary judgment for Zurich on the coverage issue. Since this court found that the denial of coverage was proper and reasonable, there is no bad faith in that denial and summary judgment on all Plaintiffs' bad faith claims relating to the denial of coverage is appropriate. Hyde Athletic Insustries, Inc. v. Continental Cas., Co.., 969 F. Supp. 289, 307 (E.D. Pa. 1997), see also Kiewit Eastern Co. Inc. v. L & R Constr. Co., Inc., 44 F.3d 1194, 1206 n. 39 (3d Cir. 1995)(awarding fees and costs for common law bad faith claim only against the insurer which had a duty to defend and indemnify, not against those insurers who had been found to be free of those duties).

With respect to Plaintiffs' alleged claims of bad faith related to Zurich's alleged failure to investigate Plaintiffs' claim, this court also finds that there is no bad faith. In asserting bad faith, Plaintiffs rely heavily upon the actions taken by the insurers claim representatives upon their receipt of Plaintiffs notice of the Florida Proceeding and the standards utilized in investigating the claim. What constitutes a reasonable set of business practices for the investigation and evaluation of claims is a question properly left to the Pennsylvania Insurance Commission, and not a judge or a jury. Id. The bad faith statue only addresses whether the insurer acted recklessly or with ill will in a particular case, not whether its business practices are reasonable in general. Id. Moreover, Plaintiffs have cited no support for their allegation that the investigation conducted by Zurich was conducted in bad faith. The bad faith statute addresses only whether insurers acted recklessly or with ill will in a particular case, here no such evidence was presented. Accordingly, this court denies Plaintiffs' Motion for Summary Judgment and grants Plaintiffs' Motion for Summary Judgment.

CONCLUSION

For the above reasons, Plaintiffs' Motion for Summary Judgment is Denied, Zurich's Motion for Summary Judgment is Granted and the Complaint is dismissed against Zurich only with Prejudice.

BY THE COURT

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GENE D. COHEN, J.

Dated: March 4, 2004