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

ERIE INSURANCE EXCHANGE		
Plaintiff	:	JANUARY TERM 2008
	:	
	:	No. 4100
v.	:	
	:	COMMERCE PROGRAM
	:	
	:	Control Number: 030890
STEVEN SZE and K.S. AUTOTEK, INC.		
Defendants		

ORDER

AND NOW, this 4TH day of August, 2008, upon consideration of Plaintiff Erie Insurance Exchange's Preliminary Objections to Defendants Steven Sze and K.S. Autotek's New Matter and Counterclaims, the response thereto, all other matters of record, and in accordance with the Opinion being contemporaneously filed with this Order, it hereby is **ORDERED** that said Objections are **SUSTAINED in part** as follows:

1. Paragraphs 51 and 52 of Defendants' New Matter are **STRICKEN**.

2. Paragraph 84 of Defendants' Counterclaims is **STRICKEN in part**;

3. Count II of Defendants' Counterclaim (incorrectly identified as Count III), Violation of Pennsylvania's Unfair Trade Practices & Consumer Protection Law, is **DISMISSED**.

FURTHER, all other Preliminary Objections are **OVERRULED**.

BY THE COURT,

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HOWLAND W. ABRAMSON J.

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OPINION

Plaintiff alleges that on December 31, 2006, Steven Sze (Sze), an adult citizen authorized to acquire insurance policies on behalf of K.S. Autotek (K.S.), applied for two commercial insurance policies through Erie Insurance Exchange (Erie).[1] In two different places, the insurance applications asked whether the applicant was "ever arrested for ANY reason" and to provide the "date, place of arrest, conviction and penalty."[2] Sze answered "No" to these questions.[3] Plaintiff alleges that in reliance upon defendants' representations, Erie subsequently issued two commercial policies of insurance to K.S., an "Ultraflex policy" and a "Pioneer Garage/Auto policy."[4]

On or about June 7, 2007, K.S. placed Erie on notice of a claim arising out of an alleged break-in and theft that occurred on that date at the company's 4977 Lancaster Avenue location.[5] As a result of said break-in, K.S. completed a Proof of Loss alleging

[1] Plaintiff's Complaint, at ¶¶ 6, 7.
[2] Id. at ¶ 11.
[3] Id. at ¶ 12.
[4] Id. at ¶ 13.
[5] Id. at ¶ 14.

damages in excess of $87,833.81.[6] Pursuant to the policy terms, Erie conducted an investigation, part of which was an examination of Sze under oath, on October 17, 2007.[7] During his examination, Sze testified that he had been arrested on at least three or four prior occasions.[8]

On January 31, 2008, Erie filed a declaratory judgment complaint seeking the court to declare the relative rights, liabilities, and obligations, if any, of Erie, Sze, and K.S., under the two commercial policies that Sze acquired with Erie on behalf of K.S. On February 28, 2008, Sze and K.S. filed an answer with New Matter and the following three Counterclaims against Erie: breach of contract (Count I), violations of Pennsylvania's Unfair Trade Practices & Consumer Protection Law (Count II),[9] and bad faith (Count III). Presently before the court are Erie's Preliminary Objections to Sze and K.S.'s New Matter and Counterclaims. For the reasons set forth below, the Preliminary Objections are sustained in part and overruled in part.

I. Erie Insurance Exchange's Preliminary Objections in the Nature of a Demurrer to Strike Paragraphs 51 and 52 of Sze and K.S.'s New Matter are Sustained.

In considering preliminary objections, "[a]ll material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review."[10] "The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible."[11] Any doubts

[6] Id. at ¶ 15.
[7] Id. at ¶ 16.
[8] Id. at ¶ 17.
[9] Sze and K.S. incorrectly denominated Count II (Violation of Pennsylvania Unfair Trade Practices & Consumer Protection Law, 73 P.S. § 201-2) as Count III within their counterclaims.
[10] Employers Ins. Of Wausau v. Penn. Dept. of Trans., 581 Pa. 381, 388, 865 A.2d 825, 829, n.5 (2005) (citations omitted).
[11] Id.

as to whether a demurrer should be sustained shall be resolved in favor of overruling it.[12] "The test on preliminary objections is whether 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 his right to relief."[13]

Paragraph 51 of Sze and K.S.'s New Matter states that "Plaintiff's [Erie's] claims are barred by Klopp v. Keystone Insurance Companies, 528 Pa. 1, 595 A.2d 1 (1991), wherein the grace period within which an insurance company is required to formally notify a consumer that there is a problem with his application for insurance is sixty (60) days."[14] Sze and K. S. allege that Erie accepted premium payments for six months before it notified them that there was a problem with their application.[15]

Accepting the facts as set forth by Sze and K.S. as true, the law says with certainty that the Klopp decision does not bar Erie's claim. The Klopp decision was based on 40 P.S. § 1008.1, a statute that was repealed in 1998. Additionally, 40 P.S. § 1008.1 specifically related to automobile insurance. The case at bar does not involve automobile insurance, as defined under the statute, but instead involves two commercial policies. Thus, even if the principles and policies of the Klopp decision remained good law despite the repealed status of 40 P.S. § 1008.1, it would do so in relation to automobile insurance. Accordingly, Erie's Preliminary Objection in the Nature of a Demurrer to Strike paragraph 51 of Defendants' New Matter is sustained.

Paragraph 52 of Sze and K.S.'s New Matter states that "Plaintiff has failed to notify Defendants that there was a problem with Defendants' applications for insurance

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[12] Id.
[13] Bourke v. Kazaras, 2000 Pa. Super. 29, 746 A.2d 642, 643 (2000).
[14] Defendants' Answer to Plaintiff's Complaint with New Matter and New Matter in the Nature of a Counterclaim Pursuant to Pa.R.C.P. 1031, ¶ 51.
[15] Id. at ¶ 86.

within sixty (60) days, and therefore, Plaintiff is precluded from declaring the contracts for insurance void prior to Defendants' insurance claims." The purported claim of Paragraph 52 is based on the Klopp decision cited in Paragraph 51, which states that the grace period within which an insurance company is required to formally notify a consumer that there is a problem with his application for insurance is sixty (60) days. Again, because Klopp is based on a repealed statute which related specifically to automobile insurance, the claim set forth in Paragraph 52 is invalid. Accordingly, Erie's Preliminary Objection in the Nature of a Demurrer to Strike paragraph 52 of Defendants' New Matter is sustained.

II. Erie Insurance Exchange's Preliminary Objection in the Nature of a Demurrer to Strike Paragraphs 58 of Sze and K.S.'s New Matter is Overruled.

Paragraph 58 of Sze and K.S.'s New Matter states that "[p]laintiff [Erie]failed to send formal notice of cancellation to Defendants, as required under both contracts, at any time prior to the filing of the present Declaratory Judgment Complaint." Accepting these facts as true, the law does not say with certainty that Sze and K.S. cannot recover. There is a question of fact as to whether Erie cancelled Sze and K.S.'s insurance policies. If in fact Erie cancelled Sze and K.S.'s policies without first sending a cancellation letter, Sze and K.S. could have a valid claim. Accordingly, Erie's Preliminary Objection in the Nature of a Demurrer to Strike paragraph 58 of Defendants' New Matter is overruled.

III. Paragraph 84 of Count III (Bad Faith) of Sze and K.S.'s Counterclaims is stricken in part.

Paragraph 84 of Sze and K.S.'s Counterclaim alleges that Erie acted in bad faith. It states that "[as] a consequence of Counterclaimants' claim, Erie Insurance denied Counterclaimants' claim, began a post-hoc investigation to avoid coverage, and

subsequently filed a lawsuit against Counterclaimants, seeking various damages, despite its awareness of the controlling law under Klopp v. Keystone Insurance Companies, 528 Pa. 1, 595 A.2d 1 (1991)." As previously stated, Klopp is based on a repealed statute which specifically related to automobile insurance and thus cannot be the controlling law in this case. Accordingly, only the following portion of the allegation is stricken: "despite its awareness of the controlling law under Klopp v. Keystone Insurance Companies, 528 Pa. 1, 595 A.2d 1 (1991)."

IV. Erie Insurance Exchange's Preliminary Objection in the Nature of a Demurrer to Dismiss Count II - Violation of Pennsylvania Unfair Trade Practices & Consumer Protection Law, 73 P.S. § 201-2, of Sze and K.S.'s Counterclaims is Sustained.

Count II of Sze and K.S.'s Counterclaim purports to state a claim for violation of Pennsylvania's Unfair Trade Practices & Consumer Protection Law (UTPCPL). Without reaching the merits of defendants' contentions, the court finds that the UTPCPL claim must be dismissed because the counterclaimants lack standing to raise said claim. The limited circumstances under which a private person may bring a claim under the UTPCPL are specifically set forth in Section 9.2 (a), which, in relevant part, provides that:

> Any person who leases or purchases goods or services primarily for **personal, family or household** purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater.[16]

The UTPCPL unambiguously permits only persons who have purchased or leased goods or services primarily for personal, family or household purposes to sue.

[16] 73 P.S. § 201-9.2 (a) (2008).

Here, Sze and K.S.'s allegations fail to establish that they have standing to bring a claim against Erie pursuant to the UTPCPL. Sze and K.S. purchased insurance from Erie for business purposes, not for "personal, family or household purposes," as intended by the UTPCPL. Sze and K.S. are statutorily precluded from bringing a claim under the UTPCPL. Accordingly, Erie's Preliminary Objection in the Nature of a Demurrer to Dismiss Count II - Violation of Pennsylvania Unfair Trade Practices & Consumer Protection Law, 73 P.S. § 201-2, is sustained and this claim is dismissed.

V. Erie's Preliminary Objection in the Nature of a Demurrer to Dismiss Count III of Sze and K.S.'s Counterclaims is Overruled.

Count III of Sze and K.S.'s Counterclaim alleges that Erie acted in bad faith. To prove bad faith, a plaintiff must show by clear and convincing evidence that the insurer (1) did not have a reasonable basis for denying benefits under the policy and (2) knew or recklessly disregarded its lack of a reasonable basis in denying the claim. Bad faith claims are fact specific and depend on the conduct of the insurer *vis a vis* the insured.[17]

Sze and K.S. allege that Erie acted in bad faith by permitting six (6) months to elapse without exercising due diligence and investigation relative to the accuracy of their applications for commercial insurance.[18] Specifically, Sze and K.S. allege that Erie, in denying the June 7, 2007 claim, acted with "reckless disregard and without a reasonable basis," because it accepted "insurance premiums under both policies and denied coverage immediately upon learning that a claim was made by the insured."[19]

Accepting these facts as true, Sze and K.S. may be able to prove by clear and convincing evidence that Erie denied their claim knowing that it lacked a reasonable

[17] Greene v. United Serv. Auto. Ass'n, 2007 Pa. Super. 344, 936 A.2d 1178, 1188-1189 (2007).
[18] Defendants' Answer to Plaintiff's Complaint with New Matter and New Matter in the Nature of a Counterclaim Pursuant to Pa.R.C.P. 1031, ¶ 80.
[19] Id. at ¶ 85.

basis. Accordingly, Erie's Preliminary Objection in the Nature of a Demurrer to Dismiss Count III Bad Faith is Overruled.

CONCLUSION

For the foregoing reasons, Plaintiff's Preliminary Objections are sustained in part and overruled in part. An order will be issued consistent with this Opinion.

BY THE COURT,

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HOWLAND W. ABRAMSON J.