

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

SHEKU MANSARAY and ALLEN FEINGOLD	:	
	:	CIVIL TRIAL DIVISION
	:	
Appellants/Plaintiffs	:	FEBRUARY TERM, 2006
	:	No. 3640
	:	
v.	:	Superior Court Docket No.
	:	318 EDA 2007
	:	
GEROLAMO, McNULTY, DIVIS & LEWBART: BRIANNA LEAHY AND RAY POWELL JOSEPH BERNSTEIN AND THE PRIME NETWORK, SHAER-PADILLA MEDICAL IMAGING CONSULTANTS, LLC AND ANDREW SHAER AND ALLSTATE INSURANCE COMPANY	:	
	:	
	:	
Appellee/Defendant	:	
	:	
	:	

TERESHKO, J.

OPINION

PROCEDURAL HISTORY

Plaintiffs appeal from the Order dated December 21, 2006, wherein the lower court granted the Defendant's Preliminary Objections and Dismissed the Plaintiffs' Amended Complaint.

FACTUAL BACKGROUND

On January 9, 2004, Plaintiff Skeku Mansaray (Mansaray) allegedly sustained serious personal injuries as a result of an automobile accident, which occurred when Defendants Brianna Leahy (driver) and Raymond Powell (owner) operated their motor vehicle in a negligent manner in striking the vehicle driven by Mansaray at or around the

University Avenue Ramp to I-76.¹ (Complaint, December Term, 2004, No. 1520, ¶ 6-7) (hereinafter Underlying Complaint). Mansaray hired attorney Allen Feingold (Plaintiff Feingold) to represent him in Mansaray's underlying cause of action against defendants Leahy and Powell. The Complaint in this case was filed on December 16, 2007. (See Docket, December Term, 2004, No. 1520). The Complaint alleged claims for negligence, property loss and punitive damages against Defendants Leahy and Powell. (Underlying Complaint, ¶9-27). Defendants Leahy and Powell were insured by Defendant Allstate Insurance Company (Allstate). (Mansaray Second Amended Complaint, February Term, 2006, No. 3640, ¶28) (hereinafter Second Amended Complaint). Defendant Allstate retained the law firm of Gerolamo, McNulty, Davis & Lewbart (Gerolamo McNulty) to defend Leahy and Powell in this matter. In addition to seeking examination and treatment by his own medical personnel, Plaintiff Mansaray underwent independent medical examinations by Dr. Joseph Bernstein at Prime Network and Andrew Shaer at Shaer-Padilla Medical Imaging Consultants, LLC. (Feingold Complaint, ¶28-34). On June 8, 2006, the Honorable Gary DiVito dismissed Mansaray's underlying action with prejudice. (See Docket, Underlying Action).

On March 2, 2006, Plaintiffs Mansaray and Feingold² filed separate actions against all the aforementioned parties in the underlying matter, alleging fraud and bad faith on the part of Gerolamo McNulty, the individual defendants, the defense medical examiners and their employers. (Second Amended Complaint). On March 3, 2006, The Supreme Court of Pennsylvania suspended Allen Feingold from practicing law in

¹ The injuries sustained by Plaintiff were not specifically alleged in his underlying Complaint. (December Term, 2004, No. 1520).

² The court term and number of Plaintiff Mansaray's action Plaintiff Feingold's was the same, February Term, 2006, No. 3640.

Pennsylvania for three (3) years. By Order dated March 7, 2006, Honorable C. Darnell Jones removed Feingold as the attorney for the party for whom his appearance was entered. (Memorandum of Law in Support of Preliminary Objections of Leahy and Powell to Amended Complaint, pg. 3).

On May 16, 2006, separate Amended Complaints were filed by both Mansaray and Feingold. (February Term, 2006, No. 3640, See Docket). In June 2006, Defendants filed their respective Preliminary Objections to Plaintiffs' Amended Complaints and as a result the Court Ordered Plaintiffs to file an Amended Complaint. Plaintiffs then filed separate Second Amended Complaints on August 29, 2007. (See Docket).

It is contended by Plaintiffs that Defendant Allstate denied liability for Plaintiff Mansaray's claim and refused to enter into discussions concerning settlement of Mansaray's underlying matter. (Mansaray Second Amended Complaint, ¶30). It is also alleged that the defense medical experts and their employers fraudulently conspired with defendants to arrive at the decision that Mansaray was not seriously injured in the accident.

In October 2006, Defendants filed their Preliminary Objections to Plaintiffs' Second Amended Complaints and Plaintiffs responded. (See Docket). By Orders dated December 21, 2006, this Court sustained preliminary objections as to all Defendants and dismissed Plaintiffs' cases with prejudice.

On January 29, 2007, Plaintiffs filed their Notice of Appeal with the Superior Court and issued its Statement of Matters accordingly.

The issue to be addressed on appeal is whether the Trial Court committed an error of law or abused its discretion in granting Defendants' Preliminary Objections where Plaintiffs failed several times to plead their case with sufficient specificity.

LEGAL ANALYSIS

Pa.R.C.P. 1028(a)(3) allows for Preliminary Objections to be raised against a complaint for failure to plead with sufficient specificity. The purpose of Rule 1028(a)(3) is to ensure that an adverse party's rights and ability to answer and defend will not be unduly impaired by the pleader's lack of clarity in stating the grounds of the suit. *Miketic v. Barron*, 675 A.2d 324, 450 Pa. Super. 91 (1996). The rules governing pleadings require even stricter adherence to when a cause of action involves fraud as is asserted in Plaintiffs' Second Amended Complaint.

Pa.R.C.P. 1019(b) requires that "[a]verments of fraud or mistake shall be averred with particularity."

To establish a claim for fraud, a plaintiff must allege: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. *Bortz v. Noon*, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

The reason for the "particularity" requirement was articulated by the Supreme Court in *Bata v. Central-Penn National Bank of Philadelphia*, 423 Pa. 373, 224 A.2d 174 (1966):

Averments of fraud are meaningless epithets unless sufficient facts are set forth which will permit an inference

that the claim is not without foundation nor offered simply to harass the opposing party and to delay the pleader's own obligations... For this reason our rules require that fraud in either a complaint or reply must be 'averred with particularity.' Pa.R.C.P. 1019(b). Admittedly [**344] the line between pleading facts and evidence is not always bright; therefore, we frequently condone the inclusion of statements, which except for this requirement, would be considered impertinent... While it is impossible to establish precise standards as to the degree of particularity required in a given situation, two conditions must always be met. The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge.

Id. at 379-80, 224 A.2d at 179.

The gravamen of Plaintiffs' instant actions are that the aforementioned Defendants defrauded Mansaray of a fair adjudication in his underlying action.

Specifically, Plaintiffs allege:

1). That the Gerolamo McNulty, Dr. Schaer and his associated medical facility Schaer-Padilla, Dr. Bernstein and his associated medical facility Prime Network and defendants Powell and Leahy were part of a scheme designed by Allstate to minimize Mansaray's injuries he suffered in his automobile accident thereby making more costly and difficult for his attorney, Allen Feingold to represent him. (Mansaray Second Amended Complaint, ¶11-14).

2.) That Allstate participated in the fraud to increase profits and lower costs by limiting the payout in auto accident cases (Mansaray Second Amended Complaint, ¶16).

3.) That Allstate sought out and contracted with Drs. Bernstein and Schaer and their medical facilities that would write reports misrepresenting the medical conditions

and injuries of claimants so as to minimize their claim in exchange for additional business. (Mansaray Second Amended Complaint, ¶22-23).

4.) That Allstate employed Gerolamo McNulty as counsel to ensure that Plaintiff would be examined by Drs. Bernstein and Schaer and their facilities. (Mansaray's Second Amended Complaint, ¶23).

5.) That Defendants Leahy and Powell assisted in the scheme to evade Mansaray's claim and thereby impliedly assented to the actions of the parties in procuring the fraudulent scheme. (Mansaray's Second Amended Complaint, ¶33).

Plaintiffs in their Second Amended Complaints fail to provide particular facts to substantiate what representation by Defendants was allegedly false (with knowledge of its falsity or recklessness as to whether it is true or false); the conduct that intentionally misled the Plaintiffs; or who justifiably relied on the alleged misrepresentation. They also generally allege damages as "needless litigation costs; expend needless litigation effort; and was denied the payment of any damages..."

The Plaintiffs have failed to provide the Court and Defendants with specific assertions that any reports, tests, or findings by the doctors or their facilities misrepresented what other medically qualified experts in the same field would have concluded. Plaintiffs' never state the injuries that Mansaray suffered in the underlying action or disclose his injuries as diagnosed by Plaintiff's own physicians.

Plaintiffs do not specify the details of Gerolamo McNulty's relationship with Allstate, which would indicate that it is anything more than a law firm with a contractual obligation to Allstate to handle its outsourced litigation cases. They also fall short of pleading any specific facts indicating a fraudulent relationship between Gerolamo

McNulty and Drs. Bernstein and Schaer. The Plaintiffs pleadings lack any specific facts, which would confirm the ongoing referral of business by Gerolamo McNulty to Drs. Bernstein and Schaer in exchange for a favorable medical diagnosis. Thus, a claim for fraud cannot survive without specific facts to show an inducement to make false representations about Mansaray's injuries was made by the Defendants, either collectively or individually.

Lastly, Plaintiffs cannot allege any specific evidence that would connect Defendants Leahy and Powell to any other Defendant as part of the alleged fraud.

Plaintiffs made several attempts to establish alleged fraudulent conduct and conspiracy through their pleadings, but have done nothing more than present self-serving and harassing accusations.

Plaintiffs fail on several accounts to establish, with specificity, any elements for fraud. As this action failed to comply with Pa. R.C.P. 1019(b) this count was stricken with prejudice.

It is unclear whether, Plaintiffs are also making a claim for civil conspiracy. A review of either Second Amended Complaint reveals an extremely vague set of allegations against all Defendants, in a single Count, without detail as to the type of claim or claims made.

To prove a civil conspiracy, it must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 472 (1972). Proof of malice, is essential in proof of a conspiracy. *Id.* However, “[a]bsent a civil cause

of action for a particular act, there can be no cause of action for civil conspiracy.”

Pelagatti v. Cohen, 370 Pa.Super. 422, 432, 536 A.2d 1337, 1342 (1987).

Regardless of whether Plaintiffs pled a claim for civil conspiracy, for the reasons stated in the above-mentioned analysis, the claim for civil conspiracy to commit fraud should be dismissed because Plaintiffs fail to assert specific facts which would establish, through their pleadings, a cause of action for fraud.

CONCLUSION

For the foregoing reasons this Court believes that it did not commit an error of law or abuse its discretion in granting Defendants Preliminary Objections to Plaintiffs' Second Amended Complaints. Thus, this court respectfully requests that the Orders of December 2006 be affirmed.

BY THE COURT:

9-18-2007

Date

ALLAN L. TERESHKO, J.

cc:
Dora R. Garcia
Daniel S. Doyle
Philip A. Ryan
Frank A. Gerolamo, III
Robert David Charleston
Douglas Evan Ress

