

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DR. RICHARD TROXLER, DMD, : No. 06-02133
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 v :
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 ERIE INSURANCE GROUP : CIVIL ACTION - LAW

OPINION

This Opinion and Order comes as a result of Plaintiff's Motion to Amend Complaint and Defendant's Preliminary Objections to Defendant's Amended Complaint. Oral argument was held on August 18th, 2009.

The Court first notes that Defendant filed their Preliminary Objections to Plaintiff's First Amended Complaint not the Second Amended Complaint that is now before the Court. However, after granting Plaintiff's Motion to Amend Complaint during oral argument, Defendant offered their Preliminary Objections to the First Amended Complaint as a response to Plaintiff's Second Amended Complaint. Therefore the Court will consider Defendant's Preliminary Objections to Plaintiff's First Amended Complaint as if they were filed in response to Plaintiff's Second Amended Complaint.

Defendant first argues that Count II of Plaintiff's Complaint for Bad Faith must be dismissed with prejudice. The Court finds that Plaintiff has sufficiently pled bad faith. The Court further finds that Defendant's Objection is not appropriate at this time and would be more akin to an argument made in favor of summary judgment. Defendant is well apprised of the claims against which they must defend. Therefore Defendant's Preliminary Objection to Count II of Plaintiff's Complaint is OVERRULED.

Defendant next argues that Count III of Plaintiff's Complaint for Unfair Trade Practices should be dismissed for failure to state a claim upon which relief may be granted. Defendant first asserts that Plaintiff has failed to identify which of the sub-sections of the UTPCL Defendant allegedly violated. Defendant's argument has been deemed moot in light of Plaintiff's Second Amended Complaint which does identify sub-sections allegedly violated by Defendant.

Defendant next asserts that Plaintiff has failed to sufficiently plead facts necessary to support a UTPCPL claim. Furthermore, Defendant asserts that Plaintiff's UTPCPL claim must be dismissed for failure to plead all elements of fraud. Defendant cites to the Toy case in their assertion that all the elements of fraud must be pled in order to maintain a cause of action under the UTPCPL. The Pennsylvania Supreme Court in Toy held that UTPCPL claims required Plaintiff's to prove the traditional elements of common law fraud in *all* of their claims. Toy v. Metropolitan Life Insurance Company, 928 A.2d 186 (Pa. 2007). The Court, in referring to a previous opinion, stated that, "...the consumer protection law's underlying foundation is fraud prevention" and "nothing in the legislative history [of the consumer protection law] suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation." Id. at 202.

Defendant wishes this Court to accept the above stated language as proof positive of Plaintiff's obligation to plead fraud when asserting a cause of action under the UTPCPL. After the decision of Toy however, the United States District Court for the Eastern District of Pennsylvania decided the case of Chiles v. Ameriquest Mortgage Co. Et Al, 551 F. Supp. 2d 393 (E.D.Pa. 2008) which has not been overruled. In that case, the Plaintiff alleged several violations of sub-sections of the UTPCPL, including a violation of Section 201-2(4)(xxi), the catch-all provision. The Court stated that, "...the Court recognizes that the requirements for fraud under the catch-all provision

are in flux in Pennsylvania state and federal courts. Several courts require a Plaintiff to prove all elements of common law fraud when asserting a claim under the catch-all provision.” Id. at 398. In finding that a Plaintiff need not prove all elements of common law fraud under the catch-all provision, the Court stated that, “The Pennsylvania Supreme Court has not yet addressed this issue”. Id. at 399. Furthermore, “the UTPCPL must be construed liberally”. See Keller v. Volkswagen of Am., Inc., 733 A.2d 642 (Pa. Super. 1999). The Court concluded by saying that Plaintiff’s other claims under the UTPCPL were also unsupported by the evidence. 551 F. Supp. 2d at 399. The Court in Weiler held that “...the purpose of the 1996 amendment [to the UTPCPL] was to eliminate the requirement that a plaintiff plead all the elements of fraud to sustain a claim under the catch-all provision.” Weiler v. SmithKline Beecham Corp., 53 Pa. D.&C.4th 449 (Phila. 2001). The version of the catch-all provision of the UTPCPL that was in effect prior to the 1996 amendment provided a cause of action against a Defendant who was “Engaging in any other fraudulent conduct which creates a likelihood of confusion or misunderstanding.” The 1996 amendment to the UTPCPL added the words “or deceptive” conduct. The United States District Court for the Southern District of Florida, in a still valid (but not controlling) opinion, in interpreting the UPTCPL which was applicable to the case before it, stated that, “...there is a split in Pennsylvania’s law regarding the elements required to state a claim under the “catch-all” provision of the Pennsylvania UTPCPL...”. Prohias v. Pfizer, Inc., 490 F. Supp.2d 1228 (S.D.Fl. 2007). The Court went on to say that it believed the current state of Pennsylvania law to be that a Plaintiff was not required to prove the elements of fraud for a claim under the catch-all provision of the UTPCPL.

The original language of the catch-all, “in any other fraudulent conduct” infers that all of the other sub-sections of the UTPCPL were fraud based and therefore required a Plaintiff to prove

the elements of fraud. The addition of “or deceptive” appears to be in attempt by the legislature to relax the standard for putting forth a claim under the UTPCPL which is not specifically spelled out in the statute.

This Court finds that the UTPCPL was created for consumer fraud protection, that the legislature added relaxing language in the 1996 amendment to the UTPCPL and that the Courts have held that all claims under the UTPCPL must prove fraud and have also held that a Plaintiff need not prove fraud for the catch-all provision of the UTPCPL. The Court holds that the current state of the law in Pennsylvania is that a Plaintiff’s claim under the UTPCPL must plead the elements of fraud except when proceeding under the UTPCPL’s catch-all provision. In so holding, the Court relies on our Supreme Court’s holding and language in Toy, supra. The Supreme Court has not modified or altered their direction at this point in time.

Therefore, in light of the fact that Plaintiff has failed to sufficiently plead fraud with particularity and has failed to plead a cause of action under the catch-all provision, Plaintiff’s Count III is hereby DISMISSED.

ORDER

AND NOW, this __ of August, 2009, Plaintiff’s Motion for Leave to File Second Amended Complaint is GRANTED. Defendant’s Preliminary Objections to Plaintiff’s Second Amended

Complaint are SUSTAINED in part and OVERRULED in part. Defendant's Preliminary Objection to Count II of Plaintiff's Second Amended Complaint is OVERRULED and Defendant's Preliminary Objection to Count III of Plaintiff's Complaint is SUSTAINED and Count III is hereby DISMISSED without prejudice.

BY THE COURT,

Judge Richard A. Gray

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