

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MARY JO SAMUEL, Individually and as the	:	DOCKET NO. 12-01,139
Administrator of the Estate of NANCY DOUGHERTY,	:	
Plaintiff,	:	CIVIL ACTION
vs.	:	
	:	
The Estate of WILLIAM H. HAWKES, III; MIDLAND	:	
NATIONAL LIFE INSURANCE CO.; NORTH	:	
AMERICAN COMPANY FOR LIFE AND HEALTH	:	
INSURANCE; NATIONAL WESTERN LIFE	:	
INSURANCE COMPANY; OM FINANCIAL LIFE	:	
INSURANCE COMPANY; AMERICAN EQUITY	:	
INVESTMENT LIFE INSURANCE COMPANY,	:	PRELIMINARY
EQUITRUST LIFE INSURANCE COMPANY,	:	OBJECTIONS TO FIRST
Defendants.	:	AMENDED COMPLAINT

OPINION AND ORDER

This matter comes before the Court on three (3) sets of preliminary objections filed by Defendants National Western Life Insurance Company (National), EquiTrust Life Insurance Company (EquiTrust), and American Equity Investment Life Insurance Company (American) and three (3) sets of preliminary objections to preliminary objections filed by Plaintiff. On May 3, 2013, the Court heard oral argument on these objections. Following a review of Plaintiff's Amended Complaint and attachments thereto, along with the applicable case law and considering the procedural posture of this matter, the Court SUSTAINS Plaintiff's preliminary objections and OVERRULES Defendants' preliminary objections, without prejudice, at this point.

The Court will address Plaintiff's objections first.

I. Plaintiff's Preliminary Objections

On March 1, 2013, Plaintiff filed preliminary objections to Defendants National, EquiTrust, and American's respective preliminary objections. In Plaintiff's objections, Plaintiff alleges that Defendants improperly raised a statute of limitations argument within their preliminary objections; Plaintiff argues that pursuant to Pa. R.C.P. 1028 and 1030 the statute of

limitations defense may only be raised in a responsive pleading. *See Scavo v. Old Forge Borough*, 978 A.2d 1076, 1078 (Pa. Cmwlth. Ct. 2009). In the alternative, Defendants argue that if a statute of limitations defense is clear on the face of the pleading, the Court may address the defense in the preliminary objections phase. *See id.* at 1079. The Court agrees with Plaintiff.

In *Scavo*, our Commonwealth Court quoted its opinion in *Borough of Nanty Glo v. Fatula*, 826 A.2d 58 (Pa. Cmwlth. Ct. 2003), providing:

it is improper to raise a statute of limitations defense in preliminary objections...[h]owever, where a party erroneously asserts substantive defenses in preliminary objections rather than to [sic] raise these defenses by answer or in new matter, the failure of the opposing party to file preliminary objections to the defective preliminary objections, raising the erroneous defenses, waives the procedural defect and allows the trial court to rule on the preliminary objections.

Scavo, 978 A.2d at 1078 (citing *Nanty Glo*, 826 A.2d at 64). The Court reads both *Scavo* and *Borough of Nanty-Glo* as instructing the Court to address the statute of limitations defense as raised in preliminary objections *only if* Plaintiff fails to raise preliminary objections to the preliminary objections. In this matter, Plaintiff properly raised preliminary objections to all of the Defendants' statute of limitations preliminary objections. Therefore, the Court **SUSTAINS** Plaintiff's preliminary objections.

Additionally, the Court notes Defendants arguments that it is an exercise in futility to sustain Plaintiff's preliminary objections now, only to address them at a later date. The Court does not agree. The Court believes that the parties may wish to engage in some discovery prior to the Court ruling on the statute of limitations defense which will be ultimately raised by Defendants as the Court believes that not all of the pertinent facts are presently before it at this juncture.

II. Defendants' Preliminary Objections

i. Pennsylvania Commercial Code

Similar to its statute of limitations defense, American also claims that Plaintiff's actions are barred by 13 Pa. C.S. § 4406 of the Pennsylvania Commercial Code. American cites to *Estate of Hollywood v. First National Bank*, 859 A.2d 472 (Pa. Super. Ct. 2004), *appeal denied*, 876 A.2d 396 (Pa. 2005), for the proposition that Plaintiff's claims should be barred as untimely as a matter of law. The Court does not believe that it is the appropriate stage to address this argument. Essentially, American cites to the *Hollywood* case for the proposition that the discovery rule should not apply in this matter. *See id.* at 481-82. However, as stated previously, this Court will not address any statute of limitation defenses at this stage in the proceeding. *Hollywood* was appealed to our Superior Court after the grant of a summary judgment; additionally, *Hollywood* specifically provides that "extensive discovery" occurred in that matter prior to the trial court's ruling on those defendants' statute of limitations defenses. *Id.* at 475. Again, this Court notes that this matter is presently in the preliminary objections phase. The Court does not believe it to be appropriate to rule on such issues with such limited discovery. Therefore, the Court **OVERRULES** American's objections in that regard.

ii. Gist of the Action Doctrine

a. Legal Standard

Pursuant to Pa. R.C.P. 1028(a)(4), a party may file preliminary objections based upon the legal insufficiency of a pleading, i.e. a demurrer. A demurrer tests the legal sufficiency of a complaint. *Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 714 (Pa. Super. Ct. 2005). A demurrer should be sustained only when the court is satisfied that the complaint cannot stand on its face. *Sullivan*, 873 A.2d at 714. If doubt or uncertainty exists as to whether the pleading can

stand on its face, the court should overrule the demurrer. *Id.* A demurrer should be granted only in cases that are free from doubt. *Bourke v. Kazaras*, 746 A.2d 642, 642 (Pa. Super. Ct. 2000). In this matter, the objecting Defendants allege that a demurrer should be granted on Plaintiff's breach of fiduciary duty claims; Defendant American also alleges that a demurrer should be granted on Plaintiff's respondeat superior claim against it. For the reasons stated below, the Court **OVERRULES** Defendants' demurrer requests.

b. Breach of Fiduciary Duty Claims

Each of the objecting Defendants alleged in their pleadings that Plaintiff's breach of fiduciary claims should be dismissed as barred by the gist of the action doctrine. The Court does not agree with Defendants objections at this time. In *Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10 (Pa. Super C.t. 2002), our Superior Court outlined the gist of the action doctrine, providing:

the doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims. As a practical matter, the doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. *Id.* The *Bash* Court explained the difference between contract claims and tort claims as follows:

although they derive from a common origin, distinct differences between civil actions for tort and contract breach have developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. . . . To permit a promisee to sue his promisor in tort for breaches of contract inter se would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.

811 A.2d at 14 (citing *Bash v. Bell Tel. Co.*, , 601 A.2d 825, 829 (Pa. Super. 1992) (citing *Iron Mountain Sec. Storage Corp. v. American Specialty Foods, Inc.*, 457 F. Supp. 1158, 1165 (E.D. Pa. 1978))). Yet, the *Etoll* Court also noted that federal authority exists “holding that fiduciary duties extend beyond contractual duties and, thus, are not barred by the gist of the action doctrine.” *Id.* at 24 n.13 (citing *Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 104-05 (3d Cir. 2001), *petition for writ of certiorari denied*, 534 U.S. 1162 (2002)).

In *Etoll*, the trial court dismissed, by grant of summary judgment, appellant’s fraud claim by relying on the gist of the action doctrine. 811 A.2d at 14. Again, this Court notes that Defendants objections are in the form of a demurrer at the preliminary objections phase. At this point in the proceeding, based upon Plaintiff’s Amended Complaint and the *Etoll* opinion, this Court cannot grant Defendants’ demurrer request. Therefore, the Court OVERRULES Defendants’ gist of the action objections to Plaintiff’s breach of fiduciary duty claims without prejudice to raise these objections after the pleadings are closed.

c. Respondent Superior Claims

Solely Defendant American objects to Plaintiff’s respondent superior claim as barred by the gist of the action doctrine. Again, at this stage of the proceeding, the Court does not agree and OVERRULES Defendant American’s gist of the action objection to Plaintiff’s respondent superior claim.

iii. Failure to Plead with Specificity

a. Legal Standard

Pursuant to Pa. R.C.P. 1028(a)(3), a party may file preliminary objections based upon the insufficient specificity of a pleading. In *Rambo v. Greene*, 906 A.2d 1232 (Pa. Super. Ct. 2006), our Superior Court provided:

[t]he pertinent question under Rule 1028(a)(3) is whether the complaint is sufficiently clear to enable the defendant to prepare his defense, or whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.

Id. at 1236 (citations omitted). In the instant matter, the objecting Defendants raise factual insufficiency objections to Plaintiff's respondeat superior and fiduciary duty claims. Upon consideration of Plaintiff's Amended Complaint, the Court **OVERRULES** Defendants' objections.

b. Respondeat Superior Claim

American, EquiTrust and National Western each claim that Plaintiff failed to plead the requisite facts to sustain a respondeat superior claim. In support of this argument, Defendants cite to *Taylor v. Crowne*, 282 A.2d 682 (Pa. 1971) (citing *Taylor v. Liverpool & London & Globe Ins. Co.*, 68 Pa. Super. Ct. 302, 304 (1917)), for the proposition that:

[w]here a person desiring to have his property insured applies not to any particular company or its known agent, but to an insurance broker, permitting him to choose which company shall become the insurer, a long line of decisions has declared the broker to be the agent of the insured; not of the insurer.

Crowne, 282 A.2d at 683; *Liverpool*, 68 Pa. Super. Ct. at 304. The Court agrees that the *Taylor* decisions accurately reflect the law of the Commonwealth. However, at this stage in the proceedings, the Court does not agree that the decisions are dispositive on the present issue before the Court.

An action in respondeat superior requires a principal-agent relationship. *Hamay v. County of Washington*, 435 A.2d 606, 608 (Pa. Super. Ct. 1981). In respondeat superior claims, liability extends to the principal because the principal has the right to control the agent. *Id.* at

609. Throughout Plaintiff's Amended Complaint, Plaintiff alleges that Mr. Hawkes was an agent of American (¶¶ 81-82), EquiTrust (¶¶ 127-28) and National (¶¶ 56-57), and acted on behalf of these institutions. The Court believes that these allegations are sufficiently clear to enable Defendants to prepare their defenses. Therefore, the Court OVERRULES Defendants' sufficiency objections.

c. Breach of Fiduciary Duty

Solely American alleges that Plaintiff failed to plead the requisite facts to demonstrate American's fiduciary duty to Plaintiff. American argues that Plaintiff's allegations that American had a "special relationship" with Plaintiff that spurred her "trust and confidence" being placed in American is legally insufficient. At this stage in the proceeding, the Court does not agree.

In *Etoll*, our Superior Court summarized the parameters of a fiduciary relationship, providing:

The law is clear in Pennsylvania that the three basic elements of agency are: "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." "Agency results only if there is an agreement for the creation of a fiduciary relationship with control by the beneficiary." The burden of establishing an agency relationship rests with the party asserting the relationship. "An agency relationship is a fiduciary one, and the agent is subject to a duty of loyalty to act only for the principal's benefit." Thus, in all matters affecting the subject of the agency, the agent must act with the utmost good faith in furthering and advancing the principal's interests, including a duty to disclose to the principal all relevant information.

Etoll, 811 A.2d at 21 (citing *Basile v. H&R Block, Inc.*, 761 A.2d 1115, 1120 (citations omitted)). In Plaintiff's Amended Complaint, it is alleged that Plaintiff, through Mr. Hawkes,

made financial investments with American, American accepted Plaintiff's investments, and that Plaintiff placed her trust and confidence regarding those financial investments with American. *See* Am. Compl., ¶¶ 62-63. At this stage of the proceeding and under the demurrer standard, the Court finds that Plaintiff properly pleaded her fiduciary claim. However, this cause of action may be subject to further review at a later stage. Therefore, the Court **OVERRULES** Defendant American's objection.

iv. Failure to Conform to Law or Rule of Court

a. Legal Standard

In this matter, all objecting Defendants raised 1028(a)(2) objections to Plaintiff's breach of contract claims. Pa. R.C.P. 1028(a)(2) permits a party to file preliminary objections based upon the failure of a pleading to conform to law or rule of court. Specifically, Defendants alleged that Plaintiff failed to comply with Pa. R.C.P. 1019(i); this rule provides:

[w]hen any claim... is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance of the writing.

Id. (emphasis added). The Court believes that Plaintiff complied with Pa. R.C.P. 1019(i) and **OVERRULES** Defendants' objections for the reasons stated below.

b. American

Exhibits C and D of Plaintiff's Amended Complaint contains two (2) American annuity applications completed by Ms. Samuel. Also, Exhibits C and D contain a benefit summary and disclosure forms that pertain to these two (2) American annuity accounts. The Court finds that these attachments complies with Pa. R.C.P. 1019(i), and, therefore, **OVERRULES** American's objection.

c. EquiTrust

In Exhibit E, Plaintiff attached a letter from EquiTrust regarding the contracts that Plaintiff applied for with the company. Exhibit E provides that EquiTrust records show that Plaintiff chose to close her EquiTrust contracts and that the company returned the funds to her. The exhibit also contains copies of four (4) checks between Plaintiff and EquiTrust. The Court finds that Exhibit E is sufficient to overcome Defendant's objection pursuant to Pa. R.C.P. 1019(i), and, therefore, OVERRULES EquiTrust's objection.

d. National

Exhibit A of Plaintiff's Amended Complaint contains Ms. Samuel's an application for annuity with National. Also, Exhibit A contains the policy specifications of Ms. Samuel's annuity with National. The Court finds that this attachment complies with Pa. R.C.P. 1019(i), and, therefore, OVERRULES National's objection.

The Court enters the following Order.

ORDER

AND NOW, the 27th day of June, 2013, for the reasons stated above, it is hereby ORDERED and DIRECTED as follows:

1. Plaintiff's preliminary objections are SUSTAINED.
2. Defendants' preliminary objections are OVERRULED without prejudice.
3. Defendants shall file an answer to Plaintiff's Amended Complaint within twenty (20) days of this date.

This matter shall be scheduled for the undersigned's April 2014 Trial Term. The parties' scheduling order is attached hereto.

BY THE COURT,

Date

Richard

A. Gray, J.

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