IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TURKEY RUN PROPERTIES, LP, Plaintiff	:	NO. 11 – 02,404
vs.	:	
	:	CIVIL ACTION
SENECA SPECIALTY INSURANCE COMPANY, GLEASON AGENCY, INC. and SOCCER DOME, LLC, Defendants	:	Motion to Dismiss Cross-Claim

OPINION AND ORDER

Before the court is the Motion of Defendant Seneca Specialty Insurance Company to Dismiss the Cross-Claim filed by Co-Defendant Gleason Agency, Inc., filed March 11, 2014. Defendant Gleason's response to the motion was filed April 3, 2014.[1]

The background of the matter was detailed in this court's Opinion and Order of February 13, 2014, which addressed a similar motion filed by Defendant Soccer Dome, LLC., to dismiss Gleason's cross-claim against it, as follows: Plaintiff, Turkey Run Properties, LP, owns certain real estate on which was situated a dome structure which was leased by Defendant Soccer Dome, LLC. Turkey Run purchased insurance on the dome from Defendant Seneca Specialty Insurance Company, using Gleason Agency, Inc. to effectuate the purchase. In February 2011 the dome collapsed. Turkey Run made a claim with Seneca and, after an investigation, Seneca denied the claim, for two reasons: the application for insurance had misrepresented that there had been no losses in the previous five years when in fact there had been a partial collapse in 2007, and faulty or inadequate maintenance (in temperature and pressure levels) excluded the loss from coverage under the policy.

In the instant suit, Turkey Run claims that (1) Seneca breached the insurance contract by failing to diligently investigate the claim and by failing to pay it, (2) Gleason was negligent in filling out the insurance application, and (3) Soccer Dome was negligent in its maintenance of the temperature and pressure in the dome. Turkey Run also seeks a declaration that the

[1] Defendant Seneca filed a response to that response, on April 10, 2014, and Defendant Gleason submitted a response to the response to the response, on April 18, 2014.

damage to the dome "arises out of or is related to use" by Soccer Dome (which would make Soccer Dome liable under its lease with Turkey Run).

All defendants answered the Complaint and filed cross-claims against all other defendants; Seneca and Soccer Dome also filed counterclaims against Turkey Run. With the assistance of mediation, Turkey Run settled with both Seneca and Soccer Dome. The claim against Gleason is scheduled for trial. In the instant motion, Seneca seeks to dismiss the cross-claim brought by Gleason, contending there is no basis in law for such claim.

It appears that only claims of contribution and indemnity have been made by Gleason, as follows:

> **NEW MATTER PURSUANT TO RULE 2252(D) IN THE FORM OF A CROSS-CLAIM AGAINST CO-DEFENDANT, SENECA SPECIALTY INSURANCE COMPANY**
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> 112. Gleason avers that if Plaintiff sustained any compensable injuries or damages as alleged in Plaintiff's Complaint, said injuries or damages were caused by Co-Defendant, Seneca Specialty Insurance Company, for the reasons set forth in Plaintiff's Complaint or otherwise, which allegations are hereby incorporated by reference as if each of said allegations were more fully set forth herein at length.
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> 113. As a result, Gleason avers that Co-Defendant, Seneca Specialty Insurance Company, is jointly or severally liable, or liable over to Gleason for contribution or indemnity on any recovery obtained by Plaintiff.
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> **WHEREFORE**, Defendant, Gleason Agency, Inc. respectfully avers that Co-Defendant Seneca Specialty Insurance Company, is liable, jointly or severally liable, or liable over to Gleason Agency, Inc. for contribution or indemnity on any recovery obtained by Plaintiff.

Seneca argues that there was no contract between Gleason and Seneca and thus no basis for an indemnification claim, and that Gleason and Seneca were not joint tort-feasors and thus there is no basis for a contribution claim. Gleason argues that the motion should be denied as an untimely dispositive motion, and, further, that it would be premature for this court to conclude that Gleason could not possibly have a claim against Seneca "while it is still unclear under what theory of liability, if any, Gleason may be liable to Plaintiff, specifically in connection with Plaintiff's claim for lost rents."

With respect to timeliness, since the latest version of the Scheduling Order in this matter required dispositive motions to have been filed by August 5, 2013, the instant motion *is* untimely. The court will not dismiss the motion on that basis, however, as it has been represented to the court that in connection with Turkey Run's settlement with Seneca, Seneca and Gleason had been discussing the dismissal of the cross-claim until recently. Further, as will be explained, as the cross-claim has no basis in law, to require Seneca to remain in the case even though it has settled with Turkey Run would be placing form over substance.

The claim for indemnification is not supported by the evidence. As was the case between Gleason and Soccer Dome, there is no legal relationship between Gleason and Seneca, nor is there any other basis on which to conclude that Gleason is "secondarily" liable, such that it would be entitled to indemnity from Seneca. In other words, indemnity is available only where fault is imputed or constructive, *see* Builder's Supply Co. v. McCabe, 77 A.2d 368, 370 (Pa. 1951), but here, any fault will be direct, based on Gleason's alleged negligence.

The claim for contribution is also not supported by the evidence. Gleason and Seneca cannot be "joint tort-feasors", as defined by the Uniform Contribution Among Tort-feasors Act. 42 Pa.C.S. Section 8322. Even if the court were to ignore the word "tort" in the definition,[2] the Act defines "joint tort-feasors" as "two or more persons jointly or severally liable in tort *for the same injury* to persons or property" …. Id. (emphasis added). Here, Turkey Run has alleged that Gleason was negligent in filling out the application for insurance, resulting in denial of the claim. If Gleason is found liable on this basis, it necessarily leads to the conclusion that Seneca was justified in denying the claim (i.e., the negligence caused the claim to be denied).[3] If Seneca was justified in denying the claim, Gleason and Seneca cannot possibly be responsible for the same injury.

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[2] Turkey Run has brought only a breach of contract claim against Seneca. Gleason states that"[n]othing in the statute requires that Plaintiff assert a tort cause of action against Seneca in order for Seneca to actually be a joint tort-feasor", and, curiously, cites United States v. Sunoco, Inc., 501 F.Supp. 2d 656 (E.D. Pa. 2007), in support of that proposition. In that case, however, prior to declaring that a violation of the Tank Act is a type of tort claim, the Court declared that the Uniform Contribution Among Tort-feasors Act "requires an underlying tort because it applies only to parties 'liable in tort.'" Id. at 660.

[3] Indeed, Turkey Run's first count is against Seneca for breach of contract, and the second count, against Gleason, is "negligence, *in the alternative*".

The court cannot agree with Gleason that it is unclear "under what theory of liability, if any, Gleason may be liable to Plaintiff". Turkey Run has alleged that Gleason was negligent in filling out the insurance application and that such negligence led to Seneca's denial of the claim. Turkey Run alleges that as a result of Gleason's negligence it suffered an uninsured loss and consequential damages. As explained above, there is no theory under which Seneca could be found liable *and* Gleason can be held responsible for Seneca's liability. Accordingly, Seneca is entitled to dismissal of the cross-claim filed against it by Gleason.

ORDER

AND NOW, this 22nd day of April 2014, for the foregoing reasons, Seneca's Motion to Dismiss the Cross-Claim filed by Co-Defendant Gleason Agency, Inc. is hereby GRANTED. The cross-claim filed by Gleason Agency, Inc. against Seneca Specialty Insurance Company is hereby DISMISSED.

BY THE COURT,

Dudley N. Anderson, Judge

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