

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

KEITH KLEINHANS,	:	
Plaintiff	:	NO. CV-20-0678
	:	
vs.	:	
	:	CIVIL ACTION
JOHN DOE, CHUBB LIMITED	:	
INSURANCE COMPANY, and	:	
BANKERS STANDARD INSURANCE	:	
COMPANY,	:	Preliminary Objections and
Defendants	:	Motion to Amend Complaint

OPINION

I. Factual History

This civil action arises out of damages sustained by Plaintiff on July 3, 2016 after allegedly being struck by a hit-and-run vehicle in a Kohl's parking lot in Lycoming County, Pennsylvania.¹ At the time of the incident, Plaintiff's wife² was finishing checking out in Kohl's while Plaintiff pulled around the car, but when she came out of the store, she saw the Plaintiff laying on the ground surrounded by a puddle of blood. A bystander had already called 9-1-1 and Plaintiff was taken by ambulance to a nearby hospital. The identity of the driver who struck the Plaintiff was never discovered and Plaintiff does not remember details of the incident.

At the time of the incident, Plaintiff was insured under an auto policy issued by Defendant, Bankers Standard Insurance Company, which provided for uninsured motorist benefits, personal injury protection benefits, and medical payment benefits.³ Plaintiff, through his attorney, placed Defendant on notice of the incident and submitted three (3) separate demands as well as two (2) applications for personal injury protection benefits.

¹ Plaintiff resides in Texas and was visiting family in Lycoming County at the time of this incident.

² Plaintiff's wife is also his lead counsel in this matter.

³ According to Defendant, Bankers Standard Insurance Company, the named Defendant, Chubb Limited Insurance Company, does not exist.

II. Procedural History

On July 6, 2020, Plaintiff filed a Complaint against the above captioned Defendants. Plaintiff's Complaint consisted of claims for Breach of Contract including benefits for personal injury protection, uninsured motorist, and medical payments, Bad Faith, and Unfair Trade Practices and Consumer Protection. Plaintiff did not attach a police report to his Complaint. Defendant, Bankers Standard Insurance Company, filed Preliminary Objections on July 29, 2020 in the nature of a demurrer on all counts, failure to conform to a rule of court on Plaintiff's breach of contract claim, and lack of specificity on Plaintiff's bad faith claim. Plaintiff filed a response to Defendant's Preliminary Objections as well as a Motion for Leave to Amend the Complaint on September 17, 2020. Argument was held on September 25, 2020.

III. Discussion

a. Standard of Review

"When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." *Richmond v. McHale*, 35 A.3d 779, 783 (Pa. Super. 2012).

When an issue of fact is raised, the Court shall consider evidence by depositions or otherwise when the preliminary objections are raised under 1028(a)(2),⁴ (3),⁵ or (4).⁶ Pa.R.C.P. 1028(2) and *Note*. Pursuant to the rules of civil procedure, the Court has the authority to allow the Plaintiff to file an amended pleading if the preliminary objections are sustained. Pa.R.C.P. 1028(e).

b. Arguments and Analysis

Defendant's primary argument is that Plaintiff's Complaint fails because he fails to attach a police report to his Complaint. Specifically, Defendant argues that it cannot know one way or another whether Plaintiff's injuries were caused by a vehicle, by a seizure, or by some other incident or condition because Plaintiff has failed to provide a police report or any witness statements relating to the alleged hit-and-run incident. Defendant further argues that Plaintiff has not pled his bad faith claim with sufficient specificity and that his breach of contract claim fails because he did not attach the policy in question. The Court will address each Preliminary Objection below.

i. Demurrer as to Plaintiff's Breach of Contract and Bad Faith Claims (Counts I, II, and III)

Preliminary objections in the nature of a demurrer test the legal sufficiency of a complaint and should be sustained only where the pleading is clearly insufficient to establish a right to relief. *Am. Interior Constr. & Blinds Inc. v. Benjamin's Desk, LLC*, 206 A.3d 509, 512 (Pa. Super. 2019); *Jacobs v. Merrymeade Farm, Inc.*, 799 A.2d 980, 983 (Pa. Commw. Ct. 2002). Any doubt must be resolved in favor of overruling the demurrer. *Jacobs*, 799 A.2d at 983.

⁴ Relating to failure of a pleading to conform to a law or rule of court.

⁵ Relating to insufficient specificity in a pleading.

⁶ Relating to legal insufficiency of a pleading (demurrer).

Pursuant to Defendant's auto policy, a claim for uninsured motorist and personal injury protection coverage must arise from a vehicle accident. An uninsured motorist is defined as "an unidentified motor vehicle that causes an accident resulting in injury provided the accident is reported to the police or proper governmental authority and the claimant notifies his insurer within 30 days, or as soon as practicable thereafter, that the claimant or his legal representative has a legal action arising out of the accident." 75 Pa.C.S.A. § 1702.

Defendant correctly states that Plaintiff has not attached a police report to his complaint which, according to Defendant's reading of the above statute, is required by law. Defendant is also correct that Plaintiff's April 11, 2018 demand letter does not specifically reference a hit and run accident and that Plaintiff has no memory of the details of the accident. Defendant argues that for these reasons, and specifically because Plaintiff failed to attach a police report, Defendant cannot know how Plaintiff's injuries arose, Plaintiff is unable to prove that his injuries were caused by a motor vehicle, and therefore, Plaintiff's claims for personal injury protection, uninsured motorist coverage, and bad faith fail.

In support of its position, Defendant mistakenly relies on *Owens v. The Travelers Ins. Co.* In this case, Plaintiff was struck by an unidentified motor vehicle while she was a pedestrian. *Owens v. The Travelers Ins. Co.*, 675 Pa.2d 751, 751-52 (Pa. Super. 1996). Plaintiff reported the incident to her employer who reported it to the Department of Industry and Labor, but the incident was never reported to the police. *Id.* At issue in the *Owens* case was whether the Plaintiff's employer constituted a "proper governmental authority" under the

statute. *Id.* at 752. The Court ultimately held that reporting the incident to the Department of Labor and Industry does not satisfy the requirements of Section 1702 but that reporting the incident to, for example, EMTs does satisfy the requirement. *Id.* at 752-53.

Plaintiff's Complaint states that Plaintiff "was injured when struck by an unknown and therefore, uninsured motorist," that Plaintiff "was approximately 10 feet away [sic] from his vehicle when he was struck by a vehicle driven by an unknown driver . . . knocking [Plaintiff] unconscious and resulting in severe personal injury," and that the driver of the vehicle "subsequently drove away and failed to remain at the scene." See *Plaintiff's Complaint at Paragraphs 8, 10, and 11*. Plaintiff also pleads that he has complied with all relevant requests made by the Defendant and has performed all contractual obligations under the Defendant's auto policy covering the Plaintiff. See *Plaintiff's Complaint at Paragraphs 18 and 26*. As pointed out by the Defendant, one of its requirements for coverage is that the insured notify the police of a hit-and-run accident as soon as possible. It can be reasonably inferred from Plaintiff's Complaint that since Plaintiff complied with all contractual obligations, Plaintiff reported the incident to the police as required by the policy.

Additionally, Plaintiff has provided other documentary evidence in support of his position. In Defendant's letter to the Plaintiff on August 19, 2016, the "accident description" states that the "insured [Plaintiff] was walking in the parking lot and was injured by hit and run accident." Plaintiff's wife sent an email to a representative or employee of the Defendant on August 22, 2016 stating that the Plaintiff was a pedestrian hit by a vehicle and that he was taken by

ambulance to the hospital. In Plaintiff's Application for Benefits submitted to the Defendant, Plaintiff states that he was "walking to his vehicle when an unknown automobile driver struck him." In an email dated August 29, 2016, a representative or employee of the Defendant states that "there was [sic] two police departments on the scene of your husband's [Plaintiff's] accident. I requested the second report from the Williamsport Police and they will not release it to me without a subpoena" Plaintiff produced a statement from a witness who called 9-1-1 and was present when Plaintiff was taken away by ambulance. Finally, an email from Plaintiff's wife on June 16, 2020 provides a police incident report number.

Defendant's interpretation of Pennsylvania law and specifically the reporting requirement of Section 1702 is incorrect. Defendant has pointed to no case law that states that a police report must be *attached* to Plaintiff's Complaint. The plain reading of the statute requires that the accident be *reported* to the police or proper governmental authority, not necessarily that a report be *issued* or *produced*. Additionally, the statute does not specifically require the *Plaintiff* to report the incident himself, just that it be reported. Finally, there is evidence that a witness called 9-1-1 and reported the incident, as evidenced by EMS personnel responded to the scene of the incident. Plaintiff's Complaint is legally sufficient for purposes of surviving a preliminary objection. It is clear from the facts plead in Plaintiff's Complaint as well as the above referenced facts that Plaintiff avers his injuries were caused by a motor vehicle, and that Defendant is being less than forthright concerning its own knowledge that this incident was reported to the

police. For these reasons, Counts I, II, and III of Defendant's Preliminary Objections are overruled.

**ii. Demurrer as to Plaintiff's Unfair Trade Practices
and Consumer Protection Law Claim (Count IV)**

Regarding Plaintiff's UTPCPL claims, Defendant states that Plaintiff does not sufficiently plead fraudulent or deceptive conduct, as required by Pennsylvania law, with his "bald and conclusory allegations" contained in his Complaint. *See Defendant's Preliminary Objections at Paragraph 58.* Despite Defendant's assertions, Pennsylvania courts have determined that "the 1996 amendment of the UTPCPL adding the catchall provision lessened the degree of proof required—that is, a plaintiff need **not** establish common law fraud to prevail on a claim for deceptive conduct under the catchall provision." *McDonough v. State Farm Fire & Cas. Co.*, 365 F. Supp. 3d 552, 562 (E.D. Pa. 2019), *citing Shea v. USAA*, No. 17-cv-4455, (E.D. Pa. July 25, 2018). To state a claim under the UTPCPL's catchall provision, a plaintiff must plead sufficient **facts** showing the following:

1. A deceptive act that is likely to deceive a consumer acting reasonably under similar circumstances;
2. Justifiable reliance; and
3. That the plaintiff's justifiable reliance caused ascertainable loss.

Hall v. Equifax Info. Servs. LLC, 204 F.Supp.3d 807, 810 (E.D. Pa. 2016).

"Pennsylvania is a fact-pleading state; a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but the complaint must also formulate the issues by summarizing those

facts essential to support the claim.” *Lerner v. Lerner*, 954 A.2d 1229, 1235 (Pa. Super. 2008).

In his Complaint, Plaintiff avers generally that Defendant has violated the UTPCPL and provides only legal conclusions as to Defendant’s misleading conduct and Plaintiff’s reliance on that conduct. However, Plaintiff offers no *facts* in support of these allegations. As Pennsylvania is a fact-pleading state, Plaintiff is required to plead at least some facts in support of his allegations. Therefore, Count IV of Defendant’s Preliminary Objections is sustained. Plaintiff is permitted to amend his Complaint within twenty (20) days of the date of this Order.

iii. Failure to Conform to Rule of Court as to Plaintiff’s Claim for Breach of Contract (Count V)

Defendant claims that Plaintiff failed to attach any exhibits to his Complaint, even though several were referenced. Specifically, the Plaintiff failed to attach a copy of the policy at issue. Therefore, Defendant argues, Plaintiff’s Complaint fails to conform to Pa.R.C.P. 1019, which states in relevant part:

(h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.

Note: If the agreement is in writing, **it must be attached to the pleading**. See subdivision (i) of this rule.

(i) When any claim or defense 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 in writing.

Pa.R.C.P. 1019(h)-(i).

Plaintiff argues that he did conform to the above rule because he pled that the writing was not accessible to him and stated that the policy was in the possession and control of the Defendant. However, the Court could find no

averments contained in the Complaint that state that the policy was not accessible to the Plaintiff. Rather, in Paragraph 26 of Plaintiff's Complaint, Plaintiff states that he attached the relevant policy as "Exhibit A," but there is no policy attached. Therefore, Plaintiff has not conformed with Rule 1019 and Count V of Defendant's Preliminary Objections is sustained. Plaintiff is permitted to amend his Complaint within twenty (20) days of the date of this Order.

iv. Lack of Requisite Specificity as to Plaintiff's Bad Faith Claim (Count VI)

Finally, Defendant argues that Plaintiff's allegations of bad faith contained in his Complaint are not fact specific as required by Pennsylvania law and therefore, the claim fails as a matter of law. Plaintiff asserts that this case is supported by *Sowinski v. N.J. Mfrs. Ins. Co.* because the Complaint describes who, what, where, when, and how the alleged bad faith occurred.

Pennsylvania Courts have set forth two elements necessary to prove a bad faith claim:

1. The insurer did not have a reasonable basis for denying benefits under the applicable insurance policy; and
2. The insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim.

Greene v. United Servs. Auto. Ass'n, 936 A.2d 1178, 1189 (Pa. Super. 2007).

In *Sowinski*, a federal case applying federal law, the court held that because the Plaintiff's Complaint contained subparagraphs that describe who, what, where, when, and how the bad faith alleged occurred, the complaint was

specific enough to survive a motion for dismissal. *Sowinski v. New Jersey Manufacturers Ins. Co.*, No. 3:17-CV-02352, 2019 WL 2246805, at *3 (M.D. Pa. May 23, 2019). Here, Plaintiff describes the following actions or inactions on the part of the Defendant: Defendant has made no counter-offer or responses to Plaintiff's three demands, Defendant failed to perform a good faith investigation, and Defendant stalled in the handling of the claim. See *Plaintiff's Complaint at Paragraph 23*.

Plaintiff's basis for his bad faith claim is that the Defendant has entirely failed to act. The nature of Defendant's alleged inaction makes it practically impossible for Plaintiff to plead additional and more specific facts because he does not yet have additional information as to what Defendant did or did not do with his claims. The Court finds that Plaintiff's bad faith claim is sufficiently pled and therefore, Count VI of Defendant's Preliminary Objections are overruled.

IV. Conclusion

For the reasons set forth above, Counts I, II, III, and VI of Defendant's Preliminary Objections are overruled. Counts IV and V of Defendant's Preliminary Objections are sustained and Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint.

ORDER

AND NOW, this 2nd day of **October, 2020**, upon consideration of Defendant, Bankers Standard Insurance Company's Preliminary Objections to

Plaintiff's Complaint and Plaintiff's response thereto, Counts I, II, III, and VI of Defendant's Preliminary Objections are **OVERRULED**. Counts IV and V of Defendant's Preliminary Objections are **SUSTAINED**. Plaintiff's Motion for Leave to File Amended Complaint filed September 17, 2020 is **GRANTED** as set forth above. Plaintiff shall file his Amended Complaint within (20) days of the date of this Order. Plaintiff is also permitted to amend his Complaint relating to issues which Defendant's Preliminary Objections were overruled if he so desires.

BY THE COURT,

Hon. Ryan M. Tira, Judge

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