IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CITY OF WILLIAMSPORT,	:	
Plaintiff	:	
	:	
vs.	:	**NO. CV-16-0521**
	:	
HENRY DUNN INCORPORATED and	:	
RUTH MORASKI and ZIGMUND CO., LTD,	:	
Defendants	:	**CIVIL ACTION - LAW**

OPINION

I. Factual History

In 2014, Plaintiff contracted with Defendant, Zigmund Co., Ltd (hereinafter "Zigmund") for "insurance advice, recommendations, and consulting services regarding [Plaintiff's] insurance needs . . . ." *See Complaint at Paragraph 7*. Defendant, Ruth Moraski (hereinafter "Moraski") was the President of Zigmund at that time who also worked with Plaintiff to obtain insurance policies. Plaintiff, Moraski, and Zigmund worked with Defendant, Henry Dunn Incorporated (hereinafter "Dunn"), an insurance broker, "to determine the appropriate types, amounts, and policies of insurance to procure for [Plaintiff's] insurance needs . . . ." *See Complaint at Paragraph 9*. Relevant to this action, Plaintiff had an automobile policy and a law enforcement policy from January 2014 through January 2015.

On January 12, 2014, a collision occurred between James Robinson, a civilian, and Officer Jonathan Deprenda, a police officer employed by Plaintiff, while Office Deprenda was acting within the course and scope of his employment. The collision resulted in the death of Mr. Robinson and a settlement between Mr. Robinson's estate and Plaintiff's insurance companies, CNA

Insurance Companies and National Fire Insurance Companies (hereinafter "insurers"), was reached for $1,000,000. However, the insurers claimed that the law enforcement policy did not apply due an exclusion and the automobile policy did not apply to claims in excess of $500,000. Therefore, the insurers refused to pay more than $500,000 of that settlement, leaving Plaintiff responsible for the balance. Plaintiff was able to recover $200,000[1] of the amount paid from a declaratory action it filed against the insurance company. Plaintiff now claims if the Defendants would have "fulfilled their duties, under the contract and/or as required by law . . . [Plaintiff] would have had coverage in place for the entire sum."

II. Procedural History

This matter was initiated by Writ of Summons filed April 7, 2016. After being ruled to file, Plaintiff filed its Complaint on November 20, 2020. The Complaint contains three counts: Count I is a Breach of Contract Claim against Defendant Zigmund; Count II is a Negligent Breach of Fiduciary Duty against all Defendants; and Count III[2] is a Negligence claim against all Defendants. Defendant Dunn and Defendants Moraski and Zigmund filed Preliminary Objections to Plaintiff's Complaint on December 14, 2020 and December 21, 2020, respectively. Plaintiff filed a brief in response on February 16, 2021 and argument was held on March 1, 2021.

[1] As admitted to by Counsel for Plaintiff during oral argument.

III. Legal Analysis

a. Standard of Review

Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:

(3) insufficient specificity in a pleading;

(4) legal insufficiency of a pleading (demurrer) . . . .

Pa.R.C.P. 1028(a)(3) and (4).

Because Pennsylvania is a fact-pleading state, a complaint must "formulate the issues by summarizing those facts essential to support the Plaintiff's claim as well as give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests." *Lerner v. Lerner,* 954 A.2d 1229, 1235 (Pa. Super. 2008). "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). Pursuant to the rules of civil procedure, the Court has the authority to allow the Plaintiff to file an amended complaint if the preliminary objections are sustained. Pa.R.C.P. 1028(e).

[2] This count is also listed as "Count II," but the since it is the third of three total counts, the Court

b. Defendant, Henry Dunn Incorporated's Preliminary Objections

Defendant Dunn sets forth the following three (3) preliminary objections and supporting arguments:

i. Fiduciary Duty

Defendant first argues that Plaintiff's claim for Breach of Fiduciary Duty in Count II of Plaintiff's Complaint is not well pled and therefore, improper, because the Complaint contains no facts to support such a claim. The Supreme Court of Pennsylvania has recently addressed the issue of whether a fiduciary duty arose in an insured's suit against a financial advisor and financial services corporation in *Yenchi v. Ameriprise Financial, Inc.*, 161 A.3d 811 (Pa. 2017). Although *Yenchi* was decided in the summary judgment stage of pleadings, the case is instructive regarding the facts necessary to sufficiently plead a breach of fiduciary duty as it relates to insurance brokers and agents.

A fiduciary duty is the highest duty implied by law and requires a party to act with the utmost good faith in advancing another party's interest. *Id.* at 819-20. When a fiduciary duty does not exist as a matter of law, Pennsylvania courts recognize the existence of a confidential relationship in circumstances where the parties do not deal on equal terms. *Id.* at 820. Cases involving fiduciary relationships are necessarily fact specific. *Id.* at 821. However, a fiduciary duty *does not* arise "merely because one party relies on and pays for the specialized skill of the other party." *Id.* at 822, c*iting eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 23 (Pa. Super. 2002). "The superior knowledge or expertise of

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believes this to be an oversight.

a party does not impose a fiduciary duty on that party or otherwise convert an arm's-length transaction into a confidential relationship . . . . '[T]he critical question is whether the relationship goes **beyond mere reliance on superior skill, and into a relationship characterized by "overmastering influence" on one side or "weakness, dependence, or trust, justifiably reposed" on the other side,'** which results in the effective ceding of control over decision-making by the party whose property is being taken . . . . A fiduciary duty may arise in the context of consumer transactions only if one party **cedes decision-making control to the other party."** *Id.* at 823 (emphasis added), *citing eToll, Inc.*, 811 A.2d at 23.

Yenchi claimed that a fiduciary duty existed because Defendant had a "vastly superior" position to him with respect to knowledge of insurance products and that he came to trust the Defendant and "repose confidence in his advice to them." *Yenchi*, 161 A.3d at 822. However, as stated above, the Court ultimately concluded that a fiduciary duty could exist only when a consumer of financial services cedes control over the decision to purchase, either explicitly or implicitly because of over-mastering or undue influence. *Id.* at 824.

In its Complaint, Plaintiff pleads that it was "dependent upon the defendants' advice and counseling regarding insurance matters and appropriate coverage," that it "completely relied upon the defendants and were not advised by the defendants of a need for additional insurance coverage." *See Plaintiff's Complaint at Paragraph 37.* Defendant argues that the Complaint fails to allege that it had authority to purchase the policy in question, or that it acted in bad faith, that Plaintiff ceded control of the decision making process.

At this state of the proceedings, the Court will not decide whether or not a fiduciary duty exists between the parties. Rather, the Court's duty is to determine whether the Plaintiff has properly pled that a fiduciary duty existed and that such fiduciary duty was breached. However, the Court agrees with the Defendant that Plaintiff has failed to plead facts sufficient to establish a claim for breach of fiduciary duty. It is undisputed that the relationship between an insurance broker/agent and the insured does not create an automatic confidential relationship, such as that of an attorney/client relationship. Additionally, nowhere in the Complaint does Plaintiff plead, for example, that Defendant had "overmastering influence" of Plaintiff, that Plaintiff was weak and dependent, or that Plaintiff ceded it decision making control to Defendant. For these reasons, Defendant Dunn's preliminary objection is **SUSTAINED**. Plaintiff shall have twenty (20) days from the date of the below Order to file an Amended Complaint.

ii. Amount of Damages

Defendant argues that Plaintiff's Complaint lacks specificity regarding the damages demanded, specifically regarding its request for "consequential" and "incidental" damages. At oral argument, Plaintiff conceded it will seek only $300,000 and no consequential or incidental damages. Defendant then argued that since Plaintiff conceded that its claim is limited to $300,000, then Count II, Breach of Fiduciary Duty, becomes moot since it is a separate tort from the negligence claim pled in Count III.

The Court disagrees. Plaintiff is free to plead causes of action in the alternative. Pa.R.C.P. 1020(c). Plaintiff's claim for $300,000 may be recovered under either, or both, of the claims for Breach of Contract or Breach of Fiduciary

Duty. The Wherefore Clauses set forth in Plaintiff's Complaint after each Count asks for "judgment in its favor, plus costs, interest, and consequential and incidental damages, as provided by law, and any other relief deemed appropriate by the Court." This issue is moot, as Plaintiff has conceded that its damages are limited to $300,000 and therefore, this preliminary objection is **OVERRULED**.

iii. "Catch-All" Allegations

Finally, Defendant argues that the language Plaintiff uses in Paragraphs 36(f) and 41(g) of its Complaint are vague and "catch-all" allegations. Paragraph 36(f) states that the "defendants breached their fiduciary duty by: (f) in otherwise failing to use that degree of still and knowledge normally possessed by insurance brokers and/or consultants acting in a fiduciary capacity" and Paragraph 41(g) states that the "Defendants were negligent in the follow [sic] particulars, thereby breaching their duty to the City: (g) In otherwise failing to exercise that degree of skill and knowledge normally possessed by members of the insurance profession in good standing as it relates to the specific facts set forth in this case." Defendant argues that these Paragraphs should be stricken because, due to the vague terminology, he will be unable to prepare a defense and because it gives Plaintiff an opportunity to assert new theories later on.

Defendant relies on the case of *Connor v. Allegheny Hosp.*, 461 A.2d 600 (Pa. 1983) which "places the burden on the defendant to preliminarily object to such boilerplate language in order to prevent the plaintiff from asserting new theories of negligence or other claims beyond the running of the statute of limitations." *Id.* at 602 n. 3. *American States Insurance Co. v. State Auto Insurance Co.* clarified *Connor* and stated the following:

> The only reference to objecting to allegations is in footnote three. Footnote three makes it clear that if a defendant does not understand what an allegation means, it could file preliminary objections and move for a more specific pleading or move to strike that portion of the complaint. The court went on to state that "the [plaintiff's statement] may not be a statement in a concise and summary form of the material facts upon which the plaintiff relied . . . [and, in that case,] a defendant may move to strike out an insufficient statement, or, if it is too indefinite, may obtain a rule for one more specific.

721 A.2d 56, 61 n. 2.

Additionally, the Rules of Civil Procedure require a Plaintiff to set forth the material facts of a cause of action. Pa.R.C.P. 1019(a). In *Liquori v. Wind Gap Chiropractic Center*, the following "boilerplate" language was struck: "Failure to possess the degree of care and skill ordinarily exercised in similar cases by other chiropractors," "Failure to exercise the requisite degree of care and skill," and "Failure to possess the degree of knowledge and skill ordinarily possessed by other chiropractors." *Liquori v. Wind Gap Chiropractic Center*, 75 Pa.D&C.4th 106, 112 (C.P. Northampton 2005).

Defendant further argues that the negligence allegations are identical as to each Defendant in violation of Pa.R.C.P. 1020 which states that the plaintiff "may state in the complaint more than one cause of action cognizable in a civil action against the same defendant" but that "[e]ach cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Pa.R.C.P. 1020(a). In the case of *Fritts v. Fregly*, the Court struck the following "catch-all" language used by Plaintiff: "the factual allegations apply to all three newspaper Defendants, as if each were the subject of a separate count or cause of action." *Fritts v. Fregly*, 15 Pa.D.&C.3d 708, 717 (C.P. Northumberland 1980).

Here, the allegations that Plaintiff sets forth in Paragraphs 36(f) and 41(g) are unsubstantiated by any facts. For example, Plaintiff fails to identify what degree of skill and knowledge Defendant failed to possess. Therefore, as there are no specific facts pled to support these allegations, this preliminary objection is **SUSTAINED** and Paragraphs 36(f) and 41(g) of Plaintiff's Complaint are **STRICKEN**.

c. Defendants', Zigmund Co., Ltd. and Ruth Moraski, Preliminary Objections

Defendants, Zigmund and Moraski, set forth the following three(3) preliminary objections and supporting arguments:

i. Gist of the Action

Defendants first argue that Plaintiff's negligence claim at Count III[3] is barred because it alleges the same breach of duty as in the breach of contract claim at Count I.[4] In support of their argument, Defendants rely on the *Bruno v. Erie Ins. Co.* case in which the Pennsylvania Supreme Court identifies a breach of contract action as a "nonfeasance" and a tort action as a "misfeasance." 106 A.3d 48, 63 (Pa. 2014). The nature of the duty alleged to have been breached is the basis for classifying the action. *Id.* "[W]henever a plaintiff's complaint sets forth allegations which substantially constitute assertions of a defendant's complete failure to perform duties originating from a contract—a nonfeasance—the plaintiff's action will be deemed to be a breach of contract; whereas, if the allegations substantially concern the defendant's negligent breach of a duty

[3] Against both Zigmund and Moraski.
[4] Against Zigmund only.

which exists independently and regardless of the contract—a misfeasance—then the action will be regarded as one in tort." *Id.*

The underlying averments set forth in the complaint are the "critical determinative" factors in deciding whether the claim is one of contract or tort. *Id.* at 68. "If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort." *Id.*

Plaintiff argues that it has alleged sufficient facts to show that the Defendants have breached duties imposed by law as a matter of social policy. Plaintiff relies on the case of *Mirizio v. Joseph* in support of its argument. "[T]the [gist of the action] 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." *Mirizio v. Joseph*, 4 A.3d 1073, 1079 (Pa. Super. 2010). The Court recognizes that non-performance of a contract may give rise to an actionable tort but that in doing so, "the wrong ascribed to defendant must be the gist of the action, the contract being collateral. The important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by

mutual consensus. In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts. *Id.* at 1080 (emphasis added).

In Count I, Breach of Contract, Plaintiff alleges that it was under contract with Defendant Zigmund such that Defendant would provide advice and recommendations regarding its policies and endorsements and that Defendant breached its obligations when it "failed to recommend and/or procure . . . policies and endorsements that would have fully covered claims like those made in the Underlying Action." *See Plaintiff's Complaint at Paragraphs 32 and 33*. Plaintiff alleges that Defendants failed to do something that they were supposed to do under the contract.

In Count III, Negligence, Plaintiff alleges that Defendants Zigmund and Moraski owed it a duty to "exercise the skill and knowledge normally possessed by the members of the insurance profession," that it relied on the Defendants to properly execute "their duties in recommending adequate and appropriate types and levels of insurance," and that the Defendants breached that duty in seven (7) enumerated ways. *See Plaintiff's Complaint at Paragraphs 40 and 41.* Plaintiff claims that a duty existed, without any reference to a contract, and that Defendants breached that duty.

Plaintiff is simply pleading in the alternative in case the fact finder determines that the terms of the contract were not breached. As explained in Section III(b)(ii), alternative pleading is permitted and therefore, this preliminary objection is **OVERRULED**.

ii. Fiduciary Duty

Defendants assert that Plaintiff failed to pled facts sufficient to establish a claim for breach of fiduciary duty. As the arguments are the same as those set forth in Section III(b)(i), the Court will not restate it here and will refer to its analysis and reasoning set forth above. This preliminary objection is **SUSTAINED**. Plaintiff shall have twenty (20) days from the date of the below Order to file an Amended Complaint.

iii. Failure to Specify What Policies/Endorsements Could Have Been Recommended

Finally, Defendants claim that Count I of Plaintiff's Complaint, Breach of Contract, fails to specific which policies or endorsements the Defendants could or should have advised Plaintiff to purchase that would have covered it for claims such as those made in the underlying lawsuit. Without this information, Defendants argue, they are unable to prepare an adequate defense.

To prove a claim for a breach of contract cause of action, the Plaintiff must prove the following elements:

(1) the existence of a contract, including its essential terms;

(2) a breach of the contract; and

(3) resultant damages.

Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C., 137 A.3d 1247, 1258 (Pa. 2016).

There is no element that requires a Plaintiff to prove what the Defendant *should have* done, only that the Defendant did not do what was promised to be done in the contract. Plaintiff pled that Defendants breached their contract with

Plaintiff by failing to recommend a policy that covered this type of exposure. The Court finds that Plaintiff sufficiently pled an act or omission by Defendants which it identifies as the breach of the contract and therefore, this preliminary objection is **OVERRULED**. This issue may be more appropriately raised after discovery is complete at the summary judgment stage of proceedings.

IV. Conclusion

For the reasons set forth above, Defendant Dunn's first and third preliminary objections are sustained and Defendants Zigmund and Moraski's second preliminary objection is sustained. All others are overruled.

ORDER

AND NOW this **1st** day of **May**, **2021**, upon consideration of Defendants' Preliminary Objections and Plaintiff's response thereto, the Court enters the following Order:

1. Both Preliminary Objections regarding Plaintiff's breach of fiduciary duty are **SUSTAINED**. Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint.
2. Plaintiff's damages are limited to $300,000.
3. Defendant, Henry Dunn Incorporated's Preliminary Objection relating to catch-all allegations is **SUSATINED**. Paragraphs 36(f) and 41(g) of Plaintiff's Complaint are hereby **STRICKEN**.
4. All other Preliminary Objections raised by Defendants are overruled.

BY THE COURT,

_____
Hon. Ryan M. Tira, Judge

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