

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

HEBREW SCHOOL CONDOMINIUM	:	MAY TERM, 2004
ASSOCIATION, CRAIG MARTIN, DON	:	
FOSTER, WILLIAM HARRIS, PATRICE	:	No. 01886
RAMES, DAVIT MESULAM & LISA	:	
FITZGERALD, JIM BAUTZ & JIM LEMMA,	:	COMMERCE PROGRAM
CYNTHIA BROWN, ALBERT ZEPP &	:	
NATALIE ZEPP, h/w, LAURA DERIGGI,	:	Control No. 04082869
MIGHUEL RODRIGUEZ & EMILY PARKER,	:	
THOMAS SOKOL, and GRACE LABOUCHERE,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
ENRIQUE DISTEFANO a/k/a "RICK	:	
DISTEFANO" & HOLLY FARLEY h/w, and	:	
REPUBLIC-FRANKLIN INSURANCE	:	
COMPANY,	:	
	:	
Defendants.	:	

ORDER AND OPINION

AND NOW, this 21st day of October, 2004, upon consideration of defendant Republic-Franklin Insurance Company's Preliminary Objections to plaintiffs' Amended Complaint, plaintiffs' response thereto, the briefs in support and opposition, and all other matters of record, upon hearing the oral arguments of counsel on October 14, 2004, and in accord with the Memorandum Opinion entered simultaneously herewith, it is hereby **ORDERED** that said Preliminary Objections are **SUSTAINED** in part and the Fourth Cause of Action and Counts II through XIII of the Second Cause of Action in the Amended Complaint are **DISMISSED** with prejudice.

It is further **ORDERED** that plaintiffs' counsel shall provide the verifications of the remaining individual plaintiffs to defense counsel and the court within twenty (20) days of the date of entry of this Order.

It is still further **ORDERED** that the remaining Preliminary Objections are **OVERRULED**.

Defendant Republic-Franklin Insurance Company is **ORDERED** to file an answer to the remaining averments within twenty (20) days of the date of entry of this Order.

BY THE COURT,

GENE D. COHEN, J.

Defendant Republic-Franklin Insurance Company (“RFIC”) issued a property insurance policy to HSCA that allegedly covered some portion of the units,¹ as well as the common areas of the Condominium, from loss by fire and other peril (the “Property Policy”). *See* Amended Complaint, Exhibit A. Plaintiffs claim that they gave notice to RFIC of the fire loss, but that RFIC has refused to pay them benefits under the Property Policy. As a result, HSCA and each of the Individual Plaintiffs have brought claims against RFIC for breach of contract, bad faith, and specific performance of the Property Policy. RFIC has filed Preliminary Objections to all such claims.

I. RFIC’s Preliminary Objection to the Individual Plaintiffs’ Breach of Contract Claims Must Be Overruled.

RFIC objects to the Individual Plaintiffs’ breach of contract claims against it because the Property Policy was between RFIC and HSCA, and the Individual Plaintiffs were not parties thereto. The Individual Plaintiffs claim that they have standing to assert claims against RFIC under the Property Policy because their units were insured under the policy. The court cannot decide the issue at this stage in the proceedings.

A. HSCA Is A Proper Party to Assert Claims Against RFIC Under the Property Policy.

As an unincorporated condominium unit owners’ association, HSCA is empowered by statute to “make contracts and incur liabilities,” subject to any limitations on such powers set forth in the declaration of condominium.² 68 Pa. C.S. § 3301(a)(5). Specifically, HSCA is

¹ Coverage for the units was apparently only for such property as was specified in the Condominium’s original plans and did not cover “improvements and betterments made to units.” Amended Complaint, Ex. A p. 2 of 51. At oral argument, it became clear that there is a dispute between the parties as to the meaning and extent of this coverage. RFIC apparently believes that nothing within the individual units is covered, whereas plaintiffs believe that at least the walls, ceilings, and floors are covered. Such a dispute is best resolved by way of motion for judgment on the pleadings and not preliminary objections.

² The court has not been apprised of any such limitations in this case.

required to enter into contracts of “property insurance on the common elements and units exclusive of improvements and betterments installed in units . . . against fire and extended coverage perils.” 68 Pa. C.S. § 3312(a)(1). “Any loss covered by the property policy . . . shall be adjusted with the association, but the insurance proceeds for that loss shall be payable to any insurance trustee designated for that purpose or otherwise to the association . . . [which] shall hold any insurance proceeds in trust for unit owners and lienholders as their interest may appear.” 68 Pa. C.S. § 3312(d).³

In the event that the insurer refuses to pay on the policy, HSCA is empowered to “institute . . . litigation . . . in its own name on behalf of itself or two or more unit owners⁴ on matters affecting the condominium.” 68 Pa. C.S. § 3302(a)(4).⁵ It would appear that there is, therefore, no need for the individual unit owners to prosecute duplicative claims against the insurer with which HSCA contracted.

B. The Court Cannot Yet Determine If The Individual Plaintiffs Are Third Party Beneficiaries of the Property Policy.

The Individual Plaintiffs claim that they have standing to bring their own breach of contract claims because they are third party beneficiaries of the Property Policy. “[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself . . . unless the circumstances are so compelling that recognition of the beneficiary’s right is appropriate to effectuate the intention of the parties, and

³ Such proceeds shall be used for repair or replacement of the damaged portions of the Condominium or shall be disbursed to the appropriate unit owners in accordance with the applicable provisions of the Uniform Condominium Act. *See* 68 Pa. C.S. § 3312(g).

⁴ This rule differs from that governing unincorporated associations generally, under which “[a]n action prosecuted by an association shall be prosecuted in the name of a member or members thereof as trustees *ad litem* for such association.” Pa. R. Civ. P. 2152.

⁵ Similarly, “an action arising from a contract made by or on behalf of the association, shall be brought against the association” and not the individual unit owners. 68 Pa. C.S.A. § 3311(a)(2).

the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” Scarpitti v. Weborg, 530 Pa. 366, 370, 609 A.2d 147, 149 (1992).

In this case the parties did not expressly make the unit owners third party beneficiaries of the Property Policy by naming them as additional insureds or loss payees. However, the Individual Plaintiffs claim that at least some portion of their individual units is covered under the Property Policy, so they could be viewed as intended third party beneficiaries of the Property Policy between RFIC and HSCA. Therefore, the court will not dismiss the Individual Plaintiffs’ breach of contract claims at this juncture.

II. RFIC’s Preliminary Objection To The Individual Plaintiffs’ Bad Faith Claims Must Be Sustained.

RFIC objects to the Individual Plaintiffs’ claims for bad faith on the grounds that they are not insureds under the Property Policy. Only the insured under a contract of insurance can bring a cause of action for bad faith. *See* 42 Pa. C.S. § 8317. Therefore, the Individual Plaintiffs’ bad faith claims against RFIC must be dismissed.

III. RFIC’s Other Preliminary Objections to the Breach of Contract and Bad Faith Claims Must Be Overruled.

RFIC objects to plaintiffs’ claims for bad faith because RFIC believes that the references in those claims to actions in trespass, at common law, for breach of the duty of good faith, for breach of fiduciary duty, and for violation of the Unfair Insurance Practices Act (“UIPA”) are confusing and improper. As RFIC correctly points out, Pennsylvania does not recognize a cause of action for common law bad faith or bad faith arising in trespass. *See* D’Ambrosio v. Penna. National Mut. Casualty Ins. Co., 494 Pa. 501, 431 A.2d 966 (1981). Nor does Pennsylvania recognize a cause of action for breach of the implied covenant of good faith and fair dealing

separate and apart from a cause of action for breach of contract. *See* JHE, Inc. v. SEPTA, 2002 WL 1018941 (Phila. Co. May 17, 2002).

In addition, a claim that an insurer has breached its fiduciary duty to its insured is subsumed within a claim for bad faith. *See* The Birth Center v. The St. Paul Companies, Inc., 567 Pa. 386, 787 A.2d 376 (2001); Romano v. Nationwide Mut. Fire. Ins. Co., 435 Pa. Super. 545, 550, 646 A.2d 1228, 1231 (1994). Furthermore, there is no private right of action under the UIPA, although the requirements of the UIPA can be considered in determining if an insurer has acted in bad faith. *See* 40 P.S. § 1171.11; Romano, 435 Pa. Super. at 554, 646 A.2d at 1233. As a result, the court finds that, although plaintiffs properly asserted claims for statutory bad faith under 42 Pa. C.S. § 8371, they have not pled any other viable claim in their Second Cause of Action. However, the court does not find that the manner in which plaintiffs pled their claims is so confusing as to warrant dismissal and/or amendment of those claims.

RFIC also objects that the plaintiffs' breach of contract claims are not sufficiently specific. "A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). Plaintiffs have pled that RFIC contractually obligated itself to insure the Condominium property, that such contract required RFIC to compensate plaintiffs for damage by fire to such property, that RFIC has refused to compensate plaintiffs, and that plaintiffs have thereby been damaged. Amended Complaint, ¶¶ 17-21. Therefore, plaintiffs have pled all the necessary elements of their breach of contract claims against RFIC.

IV. RFIC's Preliminary Objection to Plaintiffs' Claim for Specific Performance of the Property Policy Must Be Sustained.

RFIC properly objects that plaintiffs' claim for specific performance of the Property Policy is unnecessary and inappropriate.

A decree of specific performance is a matter of grace and not of right. Specific performance should only be granted where the facts clearly establish the plaintiff's right thereto, where no adequate remedy at law exists, and where justice requires it. An action for damages is an inadequate remedy when there is no method by which the amount of damages can be accurately computed or ascertained.

Clark v. Penna. State Police, 496 Pa. 310, 313, 436 A.2d 1383, 1385 (Pa. 1981). In this case, plaintiffs' damages, i.e. the amount of their fire loss that is covered under the Property Policy, is certainly ascertainable, and specific performance of the policy would give plaintiffs nothing more than what they will receive if they prevail on their other claims.

V. RFIC's Preliminary Objection Based On A Lack of Proper Verifications Must Be Overruled.

RFIC objects that the only verification attached to the Amended Complaint is that of plaintiffs' counsel, which is improper under Pa. R. Civ. P. 1024(c). However, plaintiffs have subsequently provided verifications by 10 of the 17 Individual Plaintiffs, all of which are members of plaintiff, HSCA. Since an unincorporated association such as HSCA must necessarily act, if at all, through one or more of its members, the court finds that the verifications of numerous members are more than sufficient to serve as a verification by HSCA. *See* Pa. R. Civ. P. 1024(c). With respect to the remaining Individual Plaintiffs, plaintiffs' counsel must provide their verifications forthwith or suffer dismissal of their claims.

CONCLUSION

For all the foregoing reasons, defendant's Preliminary Objections are sustained in part and overruled in part.

BY THE COURT,

GENE D. COHEN, J.