

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

PENN'S MARKET I, PENN'S MARKET II,	)	February Term, 2005
KURT L. Mc LAUGHLIN and	)	
HERBERT J. FARBER ASSOCIATES, INC.	)	
	)	
<i>Plaintiffs</i>	)	
	)	
v.	)	No. 000557
	)	
HARLESYVILLE INSURANCE COMPANY,	)	COMMERCE PROGRAM
HARLESYVILLE MUTUAL INSURANCE	)	
COMPANY and	)	
HARLESYVILLE GROUP, INC.	)	Motion Control Nos. 011740, 011770
	)	
<i>Defendants</i>	)	

**ORDER**

**AND NOW**, this 3<sup>RD</sup> day of May, 2006, upon consideration of the parties' Cross-Motions for Summary Judgment, all responses in opposition, the Memoranda of Law, the Joint Stipulation of Facts for Cross-Motion for Summary Judgment and all matters of record, and in accord with the attached Opinion, it is **ORDERED**:

1. Defendants' Cross Motion for Summary Judgment is **granted**.
2. Plaintiffs' Cross Motion for Summary Judgment is **denied**.

**BY THE COURT,**

---

**HOWLAND W. ABRAMSON, J.**

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

PENN’S MARKET I, PENN’S MARKET II,	)	February Term, 2005
KURT L. Mc LAUGHLIN and	)	
HERBERT J. FARBER ASSOCIATES, INC.	)	
	)	
<i>Plaintiffs</i>	)	
	)	
v.	)	No. 000557
	)	
HARLESYVILLE INSURANCE COMPANY,	)	COMMERCE PROGRAM
HARLESYVILLE MUTUAL INSURANCE	)	
COMPANY and	)	
HARLESYVILLE GROUP, INC.	)	Motion Control Nos. 011740, 011770
	)	
<i>Defendants</i>	)	

**OPINION**

***ABRAMSON, J.***

Before this court are the Cross-Motions for Summary Judgment filed by Plaintiffs (collectively, Penn’s Market), and Defendants, (collectively, “Harleysville”), stemming from an underlying action filed by Chanda Enterprises, Inc. (“Chanda”).<sup>1</sup> The only issue before this Court is whether Harleysville had a duty to defend Penn’s Market in the underlying Chanda litigation.<sup>2</sup>

**BACKGROUND**

On February 17, 1997, Chanda, a Corporation once engaged in the business of ice cream and retail food sales, entered into a five-year Lease Agreement with Penn’s Market,

---

<sup>1</sup> Chanda filed three separate but related complaints in Bucks County: (1) Chanda Enterprises, Inc. v. Penn’s Market I and Penn’s Market II, control No. 00-06051-26-1, filed September 22, 2000; (2) Chanda Enterprises, Inc. v. Kurt L. McLaughlin, control No. 01-002477-26-2, filed April 17, 2001; and (3) Chanda Enterprises, Inc. v. Herbert J. Farber Associates, Inc., control No. 04-03630-31-2, filed July 15, 2004. These three complaints were later consolidated into a single action (the “Chanda litigation”).

<sup>2</sup> See Joint Stipulation of Facts for Cross-Motions for Summary Judgment, ¶ 31(January 23, 2006).

owner and operator of a retail shopping complex located in Lahaska, Pennsylvania. At some point, the tenant-landlord relationship between Chanda and Penn's Market soured. Allegedly, after Chanda changed the name of its retail store from "Petrucci's Dairy Barn" to Planet Ice Cream," Penn's Market refused to post the new name on the advertising signs, removed all of Chanda's existing signs throughout the shopping center, blocked Chanda from using the shopping center's trash dumpsters, and excluded Chanda from the shopping center's directories and common promotional and marketing efforts. Chanda sued Penn's Market and later vacated the store before the end of the lease. The Chanda complaint against Penn's Market contained three counts: Breach of Contract (Count I), Breach of Covenant of Good Faith and Fair Dealing (Count II), and Tortious Interference with Plaintiff's Business Relations (Count III).

In June 2004, Penn's Market tendered its defense of the Chanda litigation to its insurance carrier, Harleysville. Harleysville refused to defend.

## **DISCUSSION**

### **I. Standard of Review**

The law on motions for summary judgment is settled. In Pennsylvania, once the pleadings have closed, any party may move for summary judgment. Pa. R.C.P. 1035.2. Pennsylvania law "provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." Rauch v. Mike-Mayer, 2001 Pa. Super 270; 783 A.2d 815, 821 (2001) (citing Capek v. Devito, 564 Pa. 267; 767 A.2d 1047, 1048 (2001)). "In determining whether to grant a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party and resolve

all doubts against the moving party when determining if there is a genuine issue of material fact.” Potter v. Herman, 2000 Pa. Super 345; 762 A.2d 1116, 1118 (2000). “Summary judgment is proper only where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. at 1117. In other words, “... only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment.” Rauch, supra at 821.

**II Harleysville had no duty to defend Count I of the underlying Chanda complaint.**

Count I of the underlying Chanda complaint asserted breach of contract against Penn’s Market. Harleysville refused to defend this count on grounds that the law in Pennsylvania does not recognize the applicability of a general liability insurance policy to a claim based on breach of contract. This court agrees.

The law in Pennsylvania does not recognize the applicability of a general liability policy to a claim based on breach of contract because the purpose and intent of such a policy is to protect the insured from liability for essentially accidental injury to the person or property of another, not to provide coverage for disputes arising out of contractual relationships. Redevelopment Authority of Cambria County v. International Insurance Company, 454 Pa. Super. 374; 685 A.2d 581, 589 (1996). In substance, under Redevelopment, to allow a general liability insurance policy to provide coverage for contractual disputes would turn the insurer into a “silent business partner subject to the risk in the economic venture [of the insured] without any prospects of sharing in the economic benefit.” Id. at 590.

In Redevelopment, Barr Township and Redevelopment Authority of Cambria County (“RACC”) entered into contract whereby RACC agreed to own, improve and manage the local water system on behalf of Barr Township. Id. at 584. Subsequently, Barr Township sued RACC for breach of contract, negligence and unjust enrichment, and RACC requested its insurer to defend that suit. Id. The insurer refused. RACC sued the insurer for failure to defend the underlying suit, and the trial court decided in favor of RACC. Id. The insurer appealed. Id.

To decide whether the insurer had a duty to defend RACC in the underlying suit, the Superior Court determined the scope of the insurance policy in light of the allegations contained in the underlying complaint. Id. at 589. To determine the scope of the general liability insurance policy, the Redevelopment court focused on the term “occurrence” contained within that policy, and reasoned that such a term connoted an event of an accidental nature. Id. at 587-88. Based on that reasoning, the Superior Court concluded that the insurer had no duty to defend because the underlying suit arose not out of an accidental occurrence, but out of a breach of contract claim. Id. at 589. Finally, the Superior Court noted that RACC, by suing its insurer for failure to defend the underlying breach of contract claim, was “... seeking to convert a general liability policy into a professional liability policy or performance bond.” Id. at 592. In short, the Redevelopment court held that the provisions of a general liability insurance contract “... do not provide coverage for the claims in the underlying action which arise out of and relate to the [insurance] contract between the parties.” Id. Thus, the Redevelopment court, finding no duty to defend, reversed and remanded. Id. at 594.

Similarly here, to decide whether Harleysville had a duty to defend Penn's Market in the Chanda action, this court must ascertain the scope of the pertinent general liability insurance policies and analyze the allegations in the underlying complaint. At the onset, this court notes that the task of interpreting an insurance contract belongs to the court:

[t]he task of interpreting an insurance contract is generally performed by a court rather than by a jury.... The purpose of that task is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy.... When the language of the policy is clear and unambiguous, a court is required to give effect to that language.... When a provision in the policy is ambiguous, however, the policy is to be construed in favor of the insured to further the contract's prime purpose or indemnification and against the insurer, as the insurer drafts the policy and controls coverage.

401 Fourth Street, Inc. v. Investors Insurance Group, 538 Pa. 445; 879 A.2d 166, 171

(2005).

In the case at hand, the relevant language in the general liability insurance policies provides as follows:

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance policy applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury" or "advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "**occurrence**" or offense and settle any claim or "suit" that may result....<sup>3</sup>

Commercial General Liability policy ("CGL"), No. MPA3D4735, 00.01.01.96 at 4.

Plaintiff's Cross-Motion for Summary Judgment, Exhibit F.

---

<sup>3</sup> The insurer provided two Commercial General Liability Policies, Nos. MPA3D473 and MPA3D4735, and two Commercial Umbrella Policies, Nos. BEC3D4732 and BEC3D4735.

## Section V—Definitions

12. “**Occurrence**” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.<sup>4</sup>

Id. at 12.

Based on the relevant language in the insurance policies, this court concludes that Harleysville had no duty to defend Penn’s Market in the underlying Chanda action. It is clear from both the averred facts and the joint stipulation that Chanda and Penn’s Market had engaged in a contractual relationship as tenant and landlord. It is also clear that after the tenant–landlord relationship deteriorated, Chanda sued Penn’s Market and averred in Count I that Penn’s Market had breached the lease agreement. It is also clear from the plain language of the insurance contract that Harleysville could investigate at its discretion any “occurrence,” and that the term “occurrence” means an accident. Id. at 4, 12. Based on the foregoing, there is no reason why a general liability insurance policy, designed to provide coverage for personal injury arising out of an occurrence of an accidental nature, should extend also to provide coverage for claims arising out of contractual disputes. As in Redevelopment, where the insured was not allowed to extend the scope of a general liability policy to a breach of contract claim, here Penn’s Market, having been similarly sued, may not compel Harleysville to defend. In short, Penn’s Market may not turn Harleysville into a silent partner by extending the scope of a general liability policy beyond its limits. Consequently, Harleysville had no duty to defend the breach of contract claim in Count I of the underlying Chanda complaint.

### **III. Harleysville had no duty to defend Count II of the underlying Chanda complaint.**

---

<sup>4</sup> See also Umbrella policy No. BEC3D4732, Section V.12 at 15. Plaintiff’s Cross-Motion for Summary Judgment, Exhibit F.

Count II of the underlying Chanda complaint against Penn's Market asserted breach of the covenant of good faith and fair dealing. Harleysville refused to defend on grounds that a party may not maintain concurrently a claim for breach of the contractual covenant of good faith and fair dealing and one for breach of contract, because the former encapsulates entirely the elements of the latter. This court agrees.

In Pennsylvania, an insurer has a contractual duty of good faith and fair dealing toward its insured Gray v. Nationwide Mutual Insurance Co., 422 Pa. 500; 223 A.2d 8, 12 (1996) (citing Cowden v. Aetna Casualty and Surety Company, 389 Pa. 459; 134 A.2d 223 (1957)). This duty of good faith and fair dealing stems from the fiduciary position that the insurer assumes toward the insured. Gedeon v. State Farm Mutual Automobile Insurance Co., 410 Pa. 55; 188 A.2d 320, 322 (1963). However, the existence of a contractual duty of good faith and fair dealing does not necessarily trigger a party's right to maintain simultaneously a claim for breach of that duty and one for breach of contract. See JHE, Incorporated v. Southeastern Pennsylvania Transportation Authority, No. 1790, 2002 Phila. Ct. Com. Pl. LEXIS 78, at \*13 (Phila. Ct. Com. Pl. May 17, 2002).

In JHE, the court concluded that a claim based on "... breach of the covenant of good faith and fair dealing is subsumed in a breach of contract claim." Id. at \*17. The court reached this conclusion by acknowledging the sound explanation articulated by the U.S. District Court for the Eastern District of Pennsylvania:

Pennsylvania law would not recognize a claim for breach of covenant of good faith and fair dealing as an independent cause of action separate from the breach of contract claim since the actions forming the basis of the breach of contract claim are essentially the same as the actions forming the basis of the bad faith claim.



McHale v. NuEnergy Group, No. 01-4111, 2002 U.S. Dist. LEXIS 3307, at \*23 (E.D. Pa. Feb. 27, 2002).

In light of the rationale above, this court concludes that a claim based on breach of the covenant of good faith and fair dealing, when embedded within a complaint that also alleges breach of contract, is nothing more than a carbon copy of the breach of contract claim.

Based on the foregoing, Chanda could not maintain a claim for breach of the covenant of good faith claim concurrently with a breach of contract claim; consequently, Harleysville had no duty to defend Count II of the underlying Chanda complaint.

**IV. Harleysville had no duty to defend Count III of the underlying Chanda complaint.**

Count III of the underlying Chanda complaint against Penn's Market averred tortious interference with plaintiff's business relations. Harleysville refused to defend on grounds that this tort-based count was nothing more than a replication of the breach of contract claim. This court agrees. Based on the gist of the action doctrine, this court concludes that Chanda's attempt to recast a mere breach of contract claim into a claim grounded in torts, did not trigger Harleysville's duty to defend Penn's Market.

In Pennsylvania, the gist of the action doctrine precludes a plaintiff from recasting plain breach of contract claims into tort-based claims. Hart v. Arnold, 2005 Pa. Super. 328; 884 A.2d 316, 339 (2005). However, a breach of contract may give rise to an actionable tort if the alleged tort is the gist of the action, and the breach of contract is only collateral. Id. at 340. Thus, the courts in Pennsylvania have barred tort claims "... (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a

contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.” Id. In short, the courts in Pennsylvania allow a plaintiff to maintain a cause of action in tort only if any related contractual dispute is itself collateral to the main claim.

Applying this test to the facts in the underlying Chanda complaint, this court concludes that the gist of the action doctrine excused Harleysville from its duty to defend Count III: the claim for tortious interference in that count arose “solely” from the lease agreement between Chanda and Penn’s Market; the duties allegedly breached were “created” by, and “grounded in,” the contract itself; the liability, if any, would have “stemmed” from the lease agreement alone; and the tortious claim essentially “duplicated” a breach of contract claim.

Based on the foregoing application of the law, Harleysville had no duty to defend Count III in the underlying Chanda complaint.

**V. Penn’s Market’s actions as alleged in the underlying Chanda complaint did not trigger Harleysville’s duty to defend under “constructive eviction.”**

In support of its motion, Penn’s Market argues that Harleysville’s duty to defend arose as soon as certain factual allegations demonstrated a potentiality for coverage. To bolster this argument, Penn’s Market states that Chanda suffered personal injury when it was constructively evicted by Penn’s Market, and that the underlying Chanda complaint established this claim. Penn’s Market backs-up this position by exhibiting a letter stating that McLaughlin, an employee of Penn’s Market, had acted in a way that “clearly indicates an ongoing campaign to wrongfully evict...” Chanda.<sup>5</sup> In addition, according to Penn’s Market, other averments in the underlying complaint might be read as implying the

---

<sup>5</sup>Letter dated May 24, 1999, from Chanda’s counsel to Kurt McLaughlin. See Plaintiff’s Response to Defendant’s Cross Motion for Summary Judgment, Exhibit C at 1.

personal injury of constructive eviction. For example, Penn’s Market points out the allegation that it or its agent removed Chanda from the common area signs, and excluded it from the store directories in the shopping center.<sup>6</sup> Also, Penn’s Market underscores the averment that it or its agent suspended Chanda’s use of the shopping center trash dumpsters.<sup>7</sup> Finally, Penn’s Market emphasizes the allegation that McLaughlin, as agent of Penn’s Market, “... sought to drive Chanda out of business and enter into a lease with [a] Dairy Queen franchisee so that McLaughlin might realize additional payments ... that he might not otherwise receive by permitting Chanda to continue as a tenant.”<sup>8</sup> In other words, Penn’s Market argues that these factual allegations implied the “personal injury” of “constructive eviction,” and that they should be read as triggering the potentiality for coverage under the insurance policies.

To determine whether the factual allegations above triggered coverage under the policies, this court must ascertain the meaning of the phrase “constructive eviction.” The pertinent language of the insurance policy states:

1. Insuring Agreement.

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “**personal injury**” ... to which this insurance applies.... We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “**personal injury**” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” or offense and settle any claim or “suit” that may result....

- b. This insurance applies to:

---

<sup>6</sup> Chanda Enterprises, Inc. v. Penn’s Market I and Penn’s Market II, ¶26; Chanda Enterprises, Inc. v. Kurt L. McLaughlin, ¶ 23.

<sup>7</sup> Chanda v. Penn’s Market at ¶ 30; Chanda McLaughlin at ¶ 25.

<sup>8</sup> Chanda v. McLaughlin at ¶ 28.

- (1) “**Personal injury**” caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by you or for you....

CGL policy No. MPA3D4735, 00.01.01.96 at 4. Plaintiff’s Cross Motion for Summary Judgment, Exhibit F.

The insurance policy also states:

12. “**Personal injury**” means injury, other than “bodily injury”, arising out of one or more of the following offenses:
  - a. False arrest, detention or imprisonment;
  - b. Malicious prosecution;
  - c. **The wrongful eviction from, wrongful entry into, or invasion of the right to private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor....**

Id. at 12; See also Umbrella policy No. BEC3D4732, Section V.12 at 16. Plaintiff’s Cross-Motion for Summary Judgment, Exhibit F.

Here, the insurance policies neither define “wrongful eviction,” nor contain the phrase “constructive eviction.” As a result, this court will look at other sources to glean the meaning of the pertinent phrase, and will adhere to the well-established rule of construction and interpretation stating that words and phrases not defined in the contract “be given their plain and ordinary meaning whenever possible.” Toombs NJ Inc. v. The Aetna Casualty & Surety Company, 404 Pa. Super. 471; 591 A.2d 304, 307 (1991). Webster’s New Twentieth Century Dictionary, Second Edition, defines the verb “to evict” as follows: “to put (a tenant) out by a judicial process or course of legal proceedings....” Black’s Law Dictionary, Seventh Edition, defines “constructive eviction” as the “landlord’s act of making the premises unfit for occupancy, often with the result that the tenant is compelled to leave.” Most importantly, the Pennsylvania Superior Court states

that “[t]o constitute a constructive eviction, the interference by a landlord with the possession of his tenant or with the tenant’s enjoyment of the demised premises must be of a substantial nature and so injurious to the tenant as to deprive him of the beneficial enjoyment of a part or the whole of the demised premises, ... to which the tenant yields, abandoning the possession within a reasonable time.” Kuriger v. Cramer, 345 Pa. Super. 595; 498 A.2d 1331, 1338 (1985).<sup>9</sup>

Applying these definitions of constructive eviction to the factual allegations in the Chanda complaint, this court concludes that the potentiality for coverage was not triggered, and that Harleysville had no duty to defend. There was no allegation in the underlying complaint that the actions by Penn’s Market or its agent put out Chanda by means of a judicial process or legal proceedings. Similarly, there was no allegation in the underlying complaint that Penn’s Market or its agent constructively evicted Chanda by making the premises unfit for occupancy. Most importantly, even though the underlying Chanda complaint did allege that Penn’s Market or its agent had removed all the Chanda signs, had excluded Chanda’s name from the shopping center’s directories, had blocked Chanda from using the shopping center’s trash dumpsters, and had excluded Chanda from the shopping center’s marketing efforts, this court does not construe that the actions above were injurious to the tenant in a way that could constitute loss of the beneficial enjoyment of a part or the whole of the demised premises. Stated simply, nothing in the underlying complaint showed that the alleged actions by Penn’s Market or its agent deprived Chanda of the beneficial enjoyment of the leased premises for the purpose of selling ice cream.

---

<sup>9</sup> In Kuriger, the tenant lived in a mobile home whose heating system operated erratically during the winter months of 1982. Twice, the home’s water pipes froze as the heating system failed to function. Once, after the landlord made repairs, the heating system performed for only a few hours before spewing fumes that filled the home. Often, throughout the winter months, the tenant fought the cold by wearing heavy clothing and by keeping a kerosene heater. Kuriger, supra, at 1132-33.

Based on the foregoing, Harleysville Cross motion for Summary Judgment is granted and Penn's Market Cross Motion for Summary Judgment is denied. Harleysville had no duty to defend Penn's Market in the underlying Chanda complaint.

An order consistent with this opinion will be entered contemporaneously.