

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

KVAERNER US INC.,
KVAERNER HOLDINGS, INC.

: APRIL TERM, 2003

: No. 0940

v.

: Commerce Program

ONEBEACON INSURANCE COMPANY,
KEN RANDALL AMERICA, INC., and
ACE INA HOLDINGS, INC.

:

: Control No. 071507

O R D E R

AND NOW, this 29th day of September 2003, upon consideration of defendant Ken Randall America, Inc.'s Preliminary Objections, plaintiffs' response in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion being filed of record, it is **Ordered** that:

1. Defendant Randall America, Inc.'s Preliminary Objections to Counts IV and V of plaintiffs' Amended Complaint are **Sustained**.
2. Defendant Randall America, Inc.'s Preliminary Objection asserting lack of personal jurisdiction is held in abeyance to permit the parties to engage in discovery to determine if Ken Randall America, Inc. regularly conducts business in Pennsylvania. The parties are directed to complete necessary discovery on this issue within forty-five (45) days (November 14th) and to submit supplemental briefs on this issue within sixty days. (December 1, 2003).

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. September 29, 2003

Before this court are the Preliminary Objections of defendant Ken Randall America, Inc. For the reasons discussed, this court is issuing a contemporaneous Order **sustaining** the Preliminary Objections to Counts IV and V, and directing the parties to conduct discovery on the issue whether Ken Randall America, Inc. regularly conducts business in Pennsylvania.

FACTUAL AND PROCEDURAL BACKGROUND

Kvaerner U. S. Inc. and Kvaerner Holdings, Inc. (“Kvaerner”) instituted this Declaratory Judgment action seeking a finding that insurance policies issued to plaintiffs from 1964 to 1986 obligate the defendants to defend Kvaerner against asbestos related bodily injury claims (Count I) and indemnify Kvaerner for all sums it pays as damages with respect to the asbestos claims (Count II). Ken Randall America, Inc. (“Randall”) is the third party administrator responsible for handling claims made under policies issued to plaintiffs by OneBeacon Insurance Company (“OneBeacon”).

Plaintiffs' Amended Complaint also asserts causes of action against Randall for: Count III -breach of contract, Count IV - bad faith in failing to provide coverage, and Count V- negligent misrepresentation.

DISCUSSION

Randall filed Preliminary Objections on three grounds: (1) lack of personal jurisdiction, (2) legal insufficiency (Count IV), and (3) legal insufficiency (Count V).

I. Discovery is Necessary to Determine Whether the Court Lacks Personal Jurisdiction over Ken Randall America, Inc.

Randall is a Delaware Corporation with a principal place of business in Cambridge, Massachusetts. It argues that it should be dismissed from the action because this court lacks personal jurisdiction. The Amended Complaint alleges that Randall does business in this Commonwealth of Pennsylvania and that the claims asserted against it arose from Randall's business in and contacts with this Commonwealth, including its contractual, agency and other relationships with OneBeacon and its conduct in connection with the General Policies. (Plts. Amended Complaint ¶ 7).

Randall argues that plaintiffs fail to allege any facts demonstrating actual contacts with Pennsylvania in connection with plaintiffs' claims for coverage for the underlying Asbestos Claims or the extent to which Randall's general business is allegedly devoted to Pennsylvania claims. Since issues of fact exist concerning whether the court has personal jurisdiction over Randall, the parties should conduct discovery to determine Randall's contacts with Pennsylvania. The court directs the parties to complete desired discovery within forty-five (45) days and to submit supplemental briefs addressing the jurisdiction issue within sixty (60) days (December 1st).

II. Count IV of Plaintiffs' Amended Complaint Fails To Set Forth A Cause of Action For Bad Faith Against Randall.

Count IV purports to state a claim for bad faith against defendants. Randall demurs on the ground that it is not an “insurer” under 42 Pa. C.S. A. § 8371, and therefore, cannot be liable for bad faith.

Bad faith actions against an insurance company in Pennsylvania were established and are governed by 42 Pa. C.S. A. § 8371. Margaret Auto Body, Inc. v. Universal Underwriters Group, 2003 WL 1848560 * 1 (January 10, 2003) (Jones). There is no common law remedy in Pennsylvania for bad faith on the part of insurers. Terletsky v. Prudential Property and Cas. Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (Pa. Super. 1994)(citing D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 494 Pa. 501, 507, 431 A.2d 966, 970 (Pa. 1981) and Romano v. Nationwide Mut. Fire Ins. Co., 435 Pa. Super. 545, 552, 646 A.2d 1228, 1232 (Pa. Super. 1994)). Thus, plaintiffs' argument that a common law cause of action exists for bad faith is incorrect.

Section 8371 contains no definition of an “insurer” and the courts of this Commonwealth have yet to clearly address the issue. Margaret Auto Body, Inc. v. Universal Underwriters Group, supra. However, it is generally recognized that an “insurer issues policies, collects premiums and in exchange assumes certain risks and contractual obligations.” Id. (quoting Ihnat v. Pover, 35 Pa. D. & C. 4th 120 (1997)), see also T & N PLC v. Pennsylvania Ins. Guar. Ass'n, 800 F. Supp. 1259, 1261 (E.D. Pa. 1992).

In the Amended Complaint, Randall is described as acting or holding itself out as the third-party claims administrator responsible for handling claims made on the General

policies for OneBeacon and for discharging certain obligations of the insurer under these policies. (Amended Complaint ¶ 7)

Defendant Randall is not an insurer as contemplated by 42 Pa. C.S. A. §8371. Plaintiffs identify Randall as an agent of OneBeacon. In the capacity of a third party administrator, demurring defendant does not issue the policies, collect the premiums or assume any risks or contractual obligations in exchange for the payment of premiums. Accordingly, Randall cannot be found liable under Section 8371 and the demurrer to Count IV is Sustained.

II. The Economic Loss Doctrine Bars Kvaerner's Negligent Misrepresentation Claim.

Randall objects to Count V of plaintiffs' Amended Complaint (alleging misrepresentation) arguing that: (1) plaintiffs' Amended Complaint fails to assert a claim for intentional misrepresentation, and (2) plaintiffs' cause of action for negligent misrepresentation is barred by the economic loss doctrine. In response, plaintiffs argue that Count V solely asserts a claim for negligent misrepresentation and that the claim is not barred by the economic loss doctrine since the negligent misrepresentation claim is separate and apart from the contractual coverage obligations imposed by the policies themselves.¹(Plts. Memo p. 10).

The purpose of the economic loss doctrine, as adopted in Pennsylvania, is “maintaining the separate spheres of the law of contract and tort.” JHE, Inc. v. ,

¹ Plaintiffs' argument that the economic loss doctrine does not bar its claim for negligent misrepresentation since plaintiffs' claim for negligent misrepresentation is separate and apart from the breach of contract claim confuses the doctrine of economic loss with the gist of the action doctrine. The gist of the action doctrine requires an inquiry into the nature of the cause of action. Economic loss focuses on the injury sustained by the plaintiff.

Southeastern Pennsylvania Transportation Authority, November Term No. 1790 (May 17, 2002) (Sheppard)² (quoting New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (Pa. Super. 1989)). In its current form, the doctrine precludes recovery for economic losses in negligence and strict liability where the plaintiff has suffered no physical injury or property damage. Id. (citing Moscatiello v. Pittsburgh Contractors Equip. Co., 407 Pa. Super. 378, 385-86, 595 A.2d 1198, 1201 (Pa. Super. 1991)).

Here, there is no allegation of any physical injury or property damage incurred by plaintiffs. Plaintiffs' negligent misrepresentation seeks damages for administrative, clerical and legal expenses as well as other costs, expenses and losses. Such damages are purely economic. This court concludes that the economic loss doctrine bars plaintiffs' negligent misrepresentation claim. Count V should be dismissed.

² <http://courts.phila.gov>.

CONCLUSION

For these reasons, this court Orders that:

1. Defendant Randall's Preliminary Objections to Counts IV and V of plaintiffs' Amended Complaint are **Sustained**.
2. Defendant Randall's Preliminary Objection asserting lack of personal jurisdiction will be held in abeyance to permit the parties to engage in discovery to determine if Randall regularly conducts business in Pennsylvania. The parties are directed to complete any desired discovery within forty-five (45) days (November 14th), and to submit supplemental briefs on this issue within sixty days (December 1, 2003).

This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.