

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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:
OAK RIVER COMPANY, :
:
Plaintiff, :
:
-against- : MEMORANDUM DECISION
:
3:01 CV 2047 (GLG)
:
MICHAEL FERRERI, INVATECH, L.L.C., :
INVATECH ASSOCIATES & COMPANY, INC., :
IT INSURANCE PROFESSIONALS, :
and APPLE OIL, INC., :
:
Defendants. :
:
:
-----X

Defendants Michael Ferreri, Invatech, LLC, Invatech Associates & Company, Inc., and IT Insurance Professionals (hereinafter collectively referred to as "defendants") move to dismiss [Doc. #20] Counts Two, Three, Four, Five, Eleven, Twelve, Thirteen and Fourteen of plaintiff's Amended Complaint. For the reasons set forth below, the motion to dismiss is GRANTED in part and DENIED in part.

Standard of Review

In ruling on this motion to dismiss, the Court must accept as true all factual allegations of the Amended Complaint and must draw all reasonable inferences in favor of the nonmoving party, in this case, plaintiff. Ganino v. Citizens Utilities Co., 228

F.3d 154, 161 (2d Cir. 2000). Dismissal is proper only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). However, while the pleading standard in federal court is a liberal one, bald assertions and conclusions of law will not suffice. Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996); see also Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995) (holding that conclusory allegations as to the legal status of defendants' acts need not be accepted as true for purposes of ruling on a motion to dismiss); see generally 2 Moore's Federal Practice § 12.34[1][b] (3d ed. 2001). In ruling on a motion to dismiss, we are limited to the facts of the Amended Complaint, which we must construe most favorably to plaintiff.

Background

Plaintiff is a Nebraska corporation authorized to sell insurance in Connecticut. (Amended Compl. at 1.) Defendant Michael Ferreri is a Connecticut-licensed insurance agent; Defendants Invatech, LLC, Invatech Associates & Company, Inc., and IT Insurance Professionals are all Connecticut-licensed insurance agencies. (Amended Compl. at 2.) Defendant Apple Oil, Inc. is a Connecticut corporation with its principal place of business in West Haven. (Amended Compl. at 3.)

In July 1999, plaintiff entered into an Insurance Agency Agreement with defendants,¹ under which defendants, as plaintiff's agent, were authorized to sell workers' compensation policies issued by plaintiff. (Amended Compl. at 6.) Under the agreement, defendants would submit an application from a potential insured to plaintiff's underwriter. (Amended Compl. at 6.) Naturally, the agreement required defendants to submit applications containing "accurate and truthful information" and to provide any additional information requested by plaintiff so that a complete assessment and evaluation of the risk could be made. (Amended Compl. at 6.) Plaintiff's decision whether to issue an insurance policy was based upon information provided by the potential insured and/or the agent. (Amended Compl. at 6.)

In January 2001, defendants submitted an application to plaintiff's underwriter for worker's compensation insurance for defendant Apple Oil, Inc. (hereinafter referred to as "Apple Oil"); defendants thereafter provided additional information requested by the underwriter. (Amended Compl. at 7-8.) Based upon the application and additional information provided by defendants, plaintiff issued a worker's compensation policy to Apple Oil. (Amended Compl. at 8.)

¹ In order to simplify matters, the individual defendant, Michael Ferreri, and the corporate defendants, Invatech, LLC, Invatech Associates & Company, Inc., and IT Insurance Professionals, are collectively referred to as "defendants." Defendant Apple Oil, Inc. is not party to this motion to dismiss. See Defs.'s Mot. Dismiss at 1.

In March 2001, plaintiff discovered that certain information provided by defendants on behalf of Apple Oil was false, inaccurate, and misrepresented the nature of Apple Oil's business. (Amended Compl. at 8-11.) Plaintiff claims that it relied on this "false, misleading and inaccurate information" and that it would not have issued the policy had it been given true and accurate information. (Amended Compl. at 12-13.) Plaintiff further claims that it did not learn of the material misrepresentations until after claims had been filed under the policy. (Amended Compl. at 13.) Once it learned of these material misrepresentations, plaintiff cancelled the policy. (Amended Compl. at 13.)

Discussion

The Amended Complaint contains fourteen claims against the various defendants. Counts One through Five are directed at the individual defendant, Michael Ferreri, alleging negligent misrepresentation, breach of fiduciary duty, negligence, a violation of the Connecticut Unfair Insurance Practices Act ("CUIPA"), Conn. Gen. Stat. §§ 38a-815 to 38a-819, and a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110a to 42-110q. Counts Ten through Fourteen are directed at Invatech, LLC, Invatech Associates & Company, Inc., and IT Insurance Professionals,

alleging negligent misrepresentation, breach of fiduciary duty, negligence, a violation of CUIPA, and a violation of CUTPA.²

1. Breach of fiduciary duty claims

Defendants argue that Counts Two and Eleven should be dismissed because they were not in a fiduciary relationship with plaintiff. The Amended Complaint alleges the existence of a fiduciary relationship. Counts Two and Eleven allege that defendants entered into an agreement with plaintiff under which they, as plaintiff's agent, were authorized to sell workers' compensation policies issued by plaintiff. The agreement required that defendants submit applications containing "accurate and truthful information" and to provide any additional information requested by plaintiff in order that a complete assessment and evaluation of the risk could be made. Moreover, we can infer from the Amended Complaint that defendants knew or should have known that plaintiff based its decision whether to issue an insurance policy upon information provided by the potential insured and/or the agent.

The issue of whether there was a fiduciary relationship between plaintiff and defendants is not one appropriately considered on a motion to dismiss. In Dunham v. Dunham, 204

² Counts Six through Nine are directed at Apple Oil, alleging negligent misrepresentation, fraudulent misrepresentation, negligence and a violation of CUTPA. Apple Oil has not moved to dismiss any of these claims at this time.

Conn. 303, 320 (1987), the Connecticut Supreme Court said that: "Rather than attempt to define a fiduciary relationship in precise detail and in such a manner to exclude new situations, we have instead chosen to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other." The court went on to say that the determination of whether such a fiduciary relationship exists is one of fact, and therefore not appropriately determined on a motion to dismiss. Id. at 322. Consequently, defendants' motion to dismiss Counts Two and Eleven is denied.

2. Negligence claims

Defendants contend that Counts Three and Twelve should be dismissed because plaintiff has failed to demonstrate that defendants owed plaintiff a duty of care. To prevail in an action for negligence, plaintiff must establish that defendants owed it a duty of care and that that duty was breached. Tarzia v. Great Atlantic and Pacific Tea Co., 52 Conn. App. 136, 148, cert. granted on other grounds, 248 Conn. 920 (1999).

In Counts Three and Twelve, plaintiff alleges that defendants were acting as *Apple Oil's* agent when procuring insurance for Apple Oil. As a result, according to defendants, they owed a duty only to Apple Oil. However, defendants ignore

the fact that those counts incorporate by reference all the general allegations, which include allegations that defendants entered into an Insurance Agency Agreement with plaintiff, under which defendants, as plaintiff's agent, were required to submit applications containing "accurate and truthful information." At a minimum, plaintiff has alleged that defendants were acting as agent both for Apple Oil and for plaintiff while procuring an insurance policy for Apple Oil. The fact that plaintiff failed to use the words "defendants owed a duty to plaintiff to..." does not render the negligence claims legally insufficient. Therefore, defendants' motion to dismiss Counts Three and Twelve is denied.

3. CUIPA claims

Defendants next ask us to dismiss plaintiff's CUIPA claim because there is no private right of action under CUIPA. CUIPA forbids any person engaged in the business of insurance in the State of Connecticut from engaging in any unfair or deceptive act or practice prohibited by the statute. Conn. Gen. Stat. § 38a-815. One of the prohibited practices is "misrepresentation in insurance applications." Conn. Gen. Stat. § 38a-816(8). Plaintiff alleges that defendants' submission of false and misleading information was a violation of section 38a-816(8).

Defendants urge the Court to dismiss Counts Four and

Thirteen on the basis that there is no private cause of action under CUIPA. This Court has already so held. See Martin v. American Equity Ins. Co., 185 F. Supp. 2d 162, 166 (D. Conn. 2002). As we noted in Martin, the issue of whether there is a private cause of action under CUIPA has not yet been conclusively decided by the Connecticut Supreme Court. Id. However, most federal and Connecticut state courts have decided that CUIPA does not provide for a private cause of action. See Lander v. Hartford Life & Annuity Ins. Co., 251 F. 3d 101, 119, n.7 (2d Cir. 2001); Peck v. Public Service Mutual Ins. Co., 114 F. Supp. 2d 51, 57 & n.6 (D. Conn. 2000); Peterson v. Provident Life & Acc. Ins. Co., No. 3:96CV2227 (AHN), 1997 WL 527369, at *2 (D.Conn. July 17, 1997); Thompson & Peck, Inc. v. Reliance Ins. Co., No. CV990267591S, 2001 WL 1178596, at *2 (Conn. Super. Aug. 30, 2001); Chieffo v. Yannielli, No. CV000159940, 2001 WL 950286, at *4 (Conn. Super. July 10, 2001); Chance v. Kulla, No. CV000160537S, 2001 WL 686905 (Conn. Super. May 24, 2001). Moreover, this recent trend among the state courts has been recognized by the Second Circuit as the majority position. Lander, 251 F.3d at 119.

Accordingly, we hold that there is no private right of action under CUIPA and grant defendants' motion to dismiss Counts Four and Thirteen.

4. CUTPA claims

The Connecticut Supreme Court has held that a party may obtain relief for a violation of CUIPA by bringing a CUTPA action alleging the CUIPA violation. Mead v. Burns, 199 Conn. 651, 663 (1986) (holding that it is possible to state a cause of action under CUTPA for a violation of CUIPA). Defendants argue that Counts Five and Fourteen, which allege a violation of CUIPA section 38a-816(8),³ should be dismissed because those claims do not allege purposeful or intentional conduct on the part of defendants.

The Connecticut Supreme Court has not yet analyzed section 38a-816(8) but it has examined section 38a-816(1)(f) which contains similar language.⁴ See Heyman Assocs. No. 1 v. Ins. Co. of Penn., 231 Conn. 756, 795 (1995). In Heyman, the court held

³ Section 38a-816(8) prohibits "[m]aking false or fraudulent statements or representations on or relative to an application for an insurance policy for the purpose of obtaining a fee, commission, money or other benefit from any insurer, producer or individual."

⁴ Section 38a-816(1)(f) prohibits

[m]aking, issuing or circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement, sales presentation, omission or comparison *which . . . is a misrepresentation for the purpose of inducing or tending to induce to the lapse, forfeiture, exchange, conversion or surrender of any insurance policy.*

Conn. Gen. Stat. § 38a-816(1)(f) (emphasis added).

that the statute permitted recovery only if the claimant (the insured in that case) established that the insurer made a *purposeful* misrepresentation. To show such a purposeful misrepresentation, "an insured must necessarily produce evidence that the insurer acted intentionally." Id., citing Wadia Enterprises, Inc. v. Hirschfeld, 224 Conn. 240, 248-49 (1992) (plaintiff must show intentional conduct to establish "dishonest purpose").

We agree with defendants that to properly allege a violation of section 38a-816(8), plaintiff must allege that defendants made a *purposeful* misrepresentation. Counts Five and Fourteen (which incorporates Count Five by reference) do indeed state that "false information was submitted on an insurance application *for the purpose of* obtaining a commission in violation of [Conn. Gen. Stat.] § 38a-816(8)...." (emphasis added). Therefore, those Counts properly allege a CUIPA violation and are sufficient to form the basis of the claim that defendants violated CUTPA. Accordingly, defendants' motion to dismiss Counts Five and Fourteen is denied.

Conclusion

For the reasons set forth above, defendants' motion to dismiss Counts Two, Three, Five, Eleven, Twelve, and Fourteen [Doc. #20] of the Amended Complaint is DENIED. Defendants'

motion to dismiss Counts Four and Thirteen of the Amended
Complaint is GRANTED.

SO ORDERED.

Dated: August 29, 2002
Waterbury, CT

_____/s/_____
Gerard L. Goettel
United States District Judge