

12-0044

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PSYCHOLOGICAL ASSESSMENT
& INTERVENTION SERVICES, INC.,

Plaintiff,

Civil Action No.: 10-C-1443
Judge Louis H. Bloom

FILED
2011 DEC 13 AM 11:52
KATHLEEN S. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY, d/b/a BRICKSTREET
MUTUAL INSURANCE COMPANY

Defendant.

**FINAL ORDER GRANTING THE MOTION FOR SUMMARY JUDGMENT BY
BRICKSTREET MUTUAL INSURANCE COMPANY**

Plaintiff Psychological Assessment & Intervention Services, Inc. ("PAIS") brings this civil action against its workers' compensation insurer, West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet"), alleging generally that BrickStreet's settlement of PAIS' employee Marcia Radabaugh's ("Ms. Radabaugh") workers' compensation claim constituted a breach of BrickStreet's contractual duties to PAIS, as set forth in PAIS' policy of workers' compensation insurance issued by BrickStreet. PAIS alleges that, at the time of the settlement of the workers' compensation claim, Ms. Radabaugh had a pending "deliberate intent" lawsuit against PAIS, brought pursuant to West Virginia Code § 23-4-2(d)(2)(ii), for which PAIS had no liability insurance coverage. Accordingly, PAIS argues, BrickStreet should not have settled the underlying workers' compensation claim filed by the same employee, because in doing so BrickStreet "exposed the assets" of PAIS to Ms. Radabaugh's claims for future wage loss and future medical expenses in Ms. Radabaugh's deliberate intent civil lawsuit. Based on these facts, PAIS brings Counts

against BrickStreet for Breach of Contract, Common Law Bad Faith, and violations of the Unfair Trade Practices Act, West Virginia Code § 33-11-4(9).

After limited discovery, on October 17, 2011, BrickStreet filed its Motion for Summary Judgment and Memorandum in Support (“BrickStreet’s Motion”), arguing that Plaintiff’s allegations of wrongful conduct by BrickStreet are based solely on BrickStreet’s alleged failure to permit PAIS to participate in and object to the settlement of Ms. Radabaugh’s workers’ compensation claim. BrickStreet argues that West Virginia Code of State Regulation § 85-12-4 and the applicable policy, when read together, make clear that PAIS has no right to participate in or object to the settlement of the claims brought by its employee, and therefore, there is no breach of the applicable policy based on this alleged omission.

Plaintiff responded on October 31, 2011, and, borrowing from the language of Syllabus 3 of *Shamblin v. Nationwide Mutual Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990), argued generally that the issue in the case is whether BrickStreet “accorded its own interests and rights” over and above that of PAIS by settling Ms. Radabaugh’s workers compensation claim. By its Reply memorandum of November 7, 2011, BrickStreet argued that it fully protected PAIS’ interests by settling the workers’ compensation claim of Ms. Radabaugh, and that “there remains simply no contractual duty owing to PAIS that BrickStreet has not fully and completely fulfilled.” By Sur-Reply of November 9, 2011, PAIS argues again that BrickStreet failed to comply with a duty to “accord the rights of its insured at least as much deference as it accorded its own” in settling Radabaugh’s workers compensation claim.

After reviewing and considering BrickStreet’s Motion, PAIS’ Response, BrickStreet’s Reply, the PAIS’ Sur-Reply, supporting memoranda, legal authority and the oral

arguments of counsel, the Court finds that the matter is ripe for disposition and makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1. As of July 22, 2006, PAIS was insured by a Workers' Compensation and Employers' Liability Insurance Policy, issued by Defendant BrickStreet ("the Policy"), which covered workers compensation claims made pursuant to and under the authority of West Virginia's workers' compensation laws. *Complaint*, ¶¶ 3, 4.

2. The Policy issued by BrickStreet expressly reserves the exclusive right to investigate and settle workers' compensation claims to BrickStreet, and provides no right of participation or control in the settlement of claims to the insured PAIS. The Policy states:

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

Exhibit A, p. 4, *Memorandum of Law in Support of Motion for Summary Judgment by BrickStreet Insurance Company*.

3. The Policy also states:

This insurance does not cover:

Bodily injury caused by your intentional, malicious or deliberate act, whether or not the act was intended to cause injury to the employee injured, or whether or not you have actual knowledge that an injury was certain to occur, or any bodily injury for which you are liable arising out of West Virginia Annotated Code § 23-4-2.

Id. at 13.

4. PAIS did not purchase from BrickStreet an insurance policy which provided liability coverage for deliberate intent liability arising out of West Virginia Code § 23-

4-2. Accordingly, PAIS did not have deliberate intent liability coverage through BrickStreet. *Id.*; *Complaint*, ¶ 15.

5. On July 22, 2006, Ms. Radabaugh sustained a work-related injury. *Complaint*, ¶ 8.

6. On August 9, 2006, BrickStreet authorized Claim No. 2006048030, covering PAIS for the workers' compensation claim of Ms. Radabaugh. *Complaint*, ¶ 9.

7. On May 10, 2007, Ms. Radabaugh filed a deliberate intent civil action in the Circuit Court of Wood County, West Virginia, against her employer PAIS, arising out of the same work-related injury which occurred on July 22, 2006. *Complaint*, ¶ 10.

8. Because PAIS had no coverage through BrickStreet for civil deliberate intent liability, BrickStreet denied PAIS coverage for the defense and indemnification of Ms. Radabaugh's deliberate intent liability claim against PAIS. *Complaint*, ¶ 12, 15.

9. On October 21, 2008, Ms. Radabaugh and BrickStreet negotiated and settled Radabaugh's workers' compensation claim arising out of the work-related injury of July 22, 2006 for \$50,000.00. *Complaint*, ¶ 14. Pursuant to the Full and Final Settlement Agreement executed by Ms. Radabaugh, the parties settled "any and all issues [including future medical benefits] that have existed or do now exist between the parties as a result of claimant's filing of the claim..." Exhibit D, ¶ 3, *Memorandum of Law in Support of the Motion for Summary*

Judgment by BrickStreet Mutual Insurance Company. (emphasis added). Also, pursuant to the Full and Final Settlement Agreement, Ms. Radabaugh had five (5) days to revoke said agreement. *Id.* at ¶ 13.

10. BrickStreet did not consult with anyone at PAIS regarding the settlement terms prior to settling Ms. Radabaugh's workers compensation claim. *Complaint*, ¶ 14.

11. After the settlement of Ms. Radabaugh's workers' compensation claim, Ms. Radabaugh also settled with PAIS her deliberate intent action pending in Wood County Circuit Court for \$50,000.00. Representing Ms. Radabaugh in her deliberate intent case against PAIS was the Ranson Law Offices, PLLC, the same firm that now brings this case against BrickStreet. As part of the consideration supporting the settlement of Ms. Radabaugh's civil deliberate intent claim, PAIS assigned to Ms. Radabaugh its right to bring a first-party claim, based on an alleged breach of duties arising under the Policy, against BrickStreet. *Complaint*, ¶ 19; *Deliberate Intent Complaint*, Civil Action No. 07-C-266 in the Circuit Court Wood County, West Virginia; Settlement Agreement and Assignment between PAIS and Ms. Radabaugh, executed February 17, 2010.

CONCLUSIONS OF LAW

Based on these findings of fact, the Court makes the following conclusions of law:

1. Under West Virginia law, "[t]he controlling policy consideration underlying the law of contracts is the protection of expectations bargained for."¹ "Where the terms of a contract are clear and unambiguous, they must be applied and not construed."² Further, in Syl. pt. 5, of *Dan's Carworld, LLC v. Serian*,³ the Court stated that "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different

¹ *Silk v. Flat Top Const., Inc.*, 192 W.Va. 522, 526, 453 S.E.2d 356, 360 (1994)(quoting *Sensenbrenner v. Rust et. al.* 374 S.E.2d 55 (Va. 1988)).

² Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969).

³ 223 W.Va. 478, 677 S.E.2d 914 (2009) (quoting Syl. Pt. 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962).) Syl. Pt. 1, *Hatfield v. Health Management Associates of West Virginia*, 223 W.Va. 259, 672 S.E.2d 395 (2008) (per curiam)).

contract for them.” The clear language of the Policy provided BrickStreet with the right to settle Ms. Radabaugh workers’ compensation claim on October 21, 2008.

2. “An insured employer is permitted to participate in the settlement of a claim only to the extent that the employer is permitted to do so under the terms of the applicable Workers’ Compensation insurance policy.” W. Va. C.S.R. § 85-12-4. BrickStreet had no duty to allow PAIS to participate in or object to the settlement of Ms. Radabaugh’s workers’ compensation claim since the Policy did not provide PAIS with the right to participate in the settlement process. The Policy states:

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

Consequently, BrickStreet’s settlement of the Radabaugh workers’ compensation claim on October 21, 2008 was proper and was done in accordance with the Policy and West Virginia law.

3. Because PAIS did not purchase insurance coverage for deliberate intent liability from BrickStreet, BrickStreet had no duty to defend or indemnify PAIS in the deliberate intent lawsuit brought by Ms. Radabaugh in the Circuit Court of Wood County, West Virginia.

4. Under West Virginia’s Deliberate Intent Statute, W. VA. CODE § 23-4-2(c), damages available to a plaintiff in a deliberate intent civil claim are for “any excess of ~~damages over the amount received or receivable in a claim for benefits under this chapter,~~ whether filed or not.” As stated above, in the Full and Final Settlement agreement with BrickStreet regarding Ms. Radabaugh’s workers’ compensation claim, Ms. Radabaugh settled and released “any and all issues, [including future medical benefits],” that did exist, both prior to and at the time of the settlement agreement, as a result her claim. Thus, such agreement by Ms. Radabaugh clearly was a defense available to PAIS in the deliberate action, in regards to any

claims by Ms. Radabaugh for future medical expenses. Accordingly, the settlement of Ms. Radabaugh's workers' compensation claim cannot and did not "expose the assets" of PAIS to claims in Radabaugh's deliberate intent civil action. W. Va. CODE § 23-4-2(c).⁴

5. In accepting and settling the workers' compensation claim brought by Ms. Radabaugh, BrickStreet satisfied all duties owed to PAIS, arising under West Virginia law and the Policy issued to PAIS. PAIS has failed to provide any evidence that BrickStreet breached any duty owed to it under the Policy. Consequently, BrickStreet's Motion, as to the breach of contract claim, is **GRANTED**.

6. Notwithstanding PAIS' generalized claims that BrickStreet accorded its own interests and rights over and above that of PAIS, PAIS has failed to provide evidence of any act or omission on the part of BrickStreet which may constitute a breach or violation of a common law tort duty owed to PAIS. Specifically, PAIS has failed to show any basis for recovery under West Virginia's common law bad faith jurisprudence, as expressed in *Miller v. Fluharty*, 201 W.Va. 685, 500 S.E.2d 310 (1997) and *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986), because PAIS has not and cannot "substantially prevail in enforcing the insurance contract." Syl. Pt. 4, *Miller v. Fluharty*, 201 W.Va. 685, 500 S.E.2d 310 (1997). Consequently, BrickStreet's Motion, as to the common law bad faith claim, is **GRANTED**.

7. Similarly, PAIS has failed to provide evidence that BrickStreet's dealing with PAIS constituted a single violation of any provision of West Virginia Code § 33-11-1 *et.*

⁴ Although not specifically alleged in the Complaint, PAIS argues and alleges that such settlement agreement between Ms. Radabaugh and BrickStreet was a result of misrepresentations made by BrickStreet to Ms. Radabaugh regarding her ability to collect future medical expenses from PAIS. PAIS's Response to BrickStreet's Motion for Summary Judgment, unnumbered p. 3. Such actions by BrickStreet, if true, would give Ms. Radabaugh a cause of action against BrickStreet to void the settlement agreement, based upon generally applicable contract defenses, but does not allow PAIS to collaterally attack said agreement in the present action.

seq, let alone a business practice, as required by the statute. Consequently, BrickStreet's Motion, as to the claim of violations of the Unfair Trade Practices Act, is **GRANTED**.

WHEREFORE, the Court **ORDERS** that all claims in the above-styled civil action be **DISMISSED**, with prejudice, and that the above-styled action be **STRICKEN** from the docket.

The Court hereby notes the objections and exceptions of PAIS to any and all adverse rulings.

The Clerk is **DIRECTED** to submit a certified copy of this Order to counsel of record.

ENTERED this 12 day of December, 2011.


The Honorable Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS
DAY OF 12 2011.

C. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


12/14/11
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