IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PC SPECIALITIES, INC. and GARY RUSSELL t/a PC SPECIALITIES	:	CIVIL ACTION
Plaintiff	:	No. 97-2189
v.	:	
STATE AUTO MUTUAL INS. CO.,	:	
Defendant	:	

MEMORANDUM AND ORDER

HUYETT, J. **JUNE , 1997**

Defendant, State Auto Mutual Insurance Co. ("State Auto") has filed a Motion to Dismiss the Amended Complaint of plaintiffs, PC Specialities, Inc. ("PC") and Gary Russell ("Russell"). For the reasons the follow, the Motion will be **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

The Court draws these facts from plaintiffs' complaint and assumes their truth. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989).

In July of 1994, State Auto issued a business personal property and income loss policy ("Policy") to Russell t/a PC. By inadvertence or mutual mistake, PC was not designated the insured in the Policy. In September of 1995, State Auto issued an amended declaration to Russell t/a PC, increasing the Policy liability limits for the business personal property coverage. Throughout

these coverage periods, PC -- not Russell -- made all premium payments to State Auto.

In March of 1995, a fire burned through the property insured by Russell t/a PC, causing loss in excess of Policy limits. After Russell notified State Auto of the fire and attendant damage, State Auto refused to advance monies to Russell and PC. Instead, State Auto embarked upon an extensive investigation of Russell's claim. After cooperating within the limits of his ability, and receiving no payment, Russell filed this suit.

In their Amended Complaint Russell and PC seek reformation of the Policy to name PC as an insured (Count I); the Policy limits and damages for breach of contract along with attorneys' fees for State Auto's vexatious pre-litigation conduct in investigating and refusing to pay Russell's claim (Count II); and, damages for State Auto's bad faith refusal to pay the Policy limits (Count III).

II. DISCUSSION

The purpose of a Federal Rule 12(b)(6) motion is to test the legal sufficiency of the claims raised in the complaint. Fed. R. Civ. P. 12(b)(6). Accordingly, the Court will not dismiss a complaint pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Jordan v. Fox, Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994).

1. Reformation (Count I)

State Auto seeks dismissal of Count I of the Amended Complaint contending that plaintiffs have failed to state a claim for reformation because they omitted to plead a mutual mistake of fact. In this vein, State Auto reasons that Russell t/a PC is the insured, not PC, and any mistake was unilaterally Russell's.

Reformation is appropriate under Pennsylvania law where a contract fails to capture the actual agreement of the parties. Courts, in the exercise of their equitable powers, reform contracts that incorrectly or imperfectly express the parties' understanding. H. Prang Trucking Co. v. Local No. 469, 613 F.2d 1235, 1239 (3d Cir. 1980). Reformation will be ordered where "it [is] established that the parties had a precedent common intent that is not reflected by the instrument. . . [and] the actual intent of the parties . . . is shown." Three-O-One Market, Inc. v. Dept. of Pub. Welfare, 439 A.2d 909, 911 (Pa. Commw. 1982)(citing Miller v. Houseworth, 127 A.2d 742 (Pa. 1956); Hassler v. Mummert, 364 A.2d 402 (Pa. Super. 1976)).

State Auto points out that Russell did not plead that he "was mistaken as to the existence of the corporation [PC]" because PC was formed two years prior to the Policy's effective date. (Def. Mem. at 4). Of course Russell was not mistaken about the existence of PC, rather he was mistaken about the identity of the insured under State Auto's Policy. Russell believed he was insuring his business -- PC -- and purchased a policy shielding personal business property and income loss. Indeed, as State Auto suggests in its brief, it seems that Russell t/a PC had no

insurable interest in PC business property and income (Def. Mem. at 7). If Russell had no insurable interest in PC's property and income, what was State Auto insuring in return for Russell's premiums?

The facts as plead in the complaint, coupled with favorable inferences, are sufficient to establish the basis for reformation based upon mutual mistake: Russell intended to name PC as the insured and mistakenly designated 'Russell t/a PC' and State Auto was itself mistaken in naming Russell t/a PC. (Amend. Compl. ¶¶ 5-7.)[1]

Moreover, Russell may be entitled to reformation on the basis of estoppel: "a mistake by one party and knowledge of the mistake by the other party justifies reformation relief the same as mutual mistake." Twin City Fire Ins. Co. v. Pittsburgh Corning Corp., 813 F. Supp. 1147, 1150 (W.D. Pa. 1992)(citing Line Lexington Lumber & Millwork Co. v. Pennsylvania Publishing Corp., 301 A.2d 684, 687 (Pa. 1973)), affirmed, 6 F.3d 780 (3d Cir. 1993). Plaintiffs have adequately pled that State Auto knew that Russell meant to insure PC and that State Auto accepted premium payments from PC.

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1. Defendant argues that plaintiffs must plead that they advised State Auto's agent of the desired coverage and all associated risks. (Def. Mem. at 6 (citing Line Lexington Lumber & Millwork Co., Inc. v. Pennsylvania Publishing Corp., 301 A.2d 684 (Pa. 1973)). Reliance on Line Lexington is misplaced. That case stands for the proposition that where the agent is advised of the desired coverage and risk he may not disavow coverage by alleging mistake. See id. at 687. Here, plaintiffs must merely plead facts sufficient to establish the grounds for reformation.

Such facts and inferences state a claim for reformation based upon unilateral mistake and knowledge of the non-mistaken party. Beeman t/a Mill Stream Deli v. Millville Mut. Ins. Co., No. 95-1698, Slip op. at 5 (W.D. Pa. April 1, 1996)(McClure, J.)(12(b)(6) motion denied where the (inadvertently unnamed) entity had the insurable interest and made premium payments). See L.F. Driscoll Co. v. Carley Capital Group, No. 85-1199, 1986 WL 1988 *3-4 (E.D. Pa. Feb. 5, 1986)(refusing to reform policy to name additional entities as insureds where mistake was unilateral and unknown to non-mistaken party).

Plaintiffs' have stated a claim for reformation.

2. Attorneys' Fees for Vexatious Conduct (Count II)

Defendant moves to dismiss plaintiffs claim for attorneys' fees pursuant to 42 P.S. § 2503(9) reasoning that Pennsylvania's vexatious litigation statute applies only to conduct occurring after the commencement of litigation.[2] Defendant is correct. Since all the events complained of in the Amended Complaint transpired prior to the commencement this action, § 2503(9) cannot apply. Norris v. Commonwealth, 634 A.2d 673, 676 (Pa. Commw. 1993); Cher-Rob, Inc. v. Art Monument Co., 594 A.2d

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2. Defendant also contests plaintiffs' right to commence an action for attorneys' fees in view of their purported non-compliance with State Auto's investigation, a prerequisite to bringing suit under the Policy. Because this Court holds that § 2503(9) does not encompass pre-litigation conduct, the compliance issue need not be reached.

362, 364 (Pa. Super. 1991). Accordingly, the claim in Count II seeking attorneys' fees under § 2503(9) shall be dismissed. [3]

3. Recovery for Emotional Distress (Count III)

Plaintiffs concede that they have not sought damages for emotional distress relating to State Auto's conduct. Indeed, plaintiffs are not entitled to damages for emotional distress suffered as a result of an insurers bad faith conduct. (Plf. Mem. at 4); see 42 P.S. 8371 (Actions on insurance policies--bad faith insurance practices); D'Ambrosio v. Pennsylvania National Mut. Cas. Ins. Co., 431 A.2d 966 (Pa. 1981). The claim for emotional distress will be dismissed and the allegations of paragraph 22 of the Amended Complaint will be stricken to the extent they seek recovery for emotional distress.

III CONCLUSION

Plaintiffs have stated a claim for reformation based upon mutual mistake and estoppel. Plaintiffs may not recover attorneys' fees for State Auto's pre-litigation conduct. Plaintiffs' claim for emotional distress will not lie against an insurer for bad faith conduct.

An appropriate Order follows.

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3. Plaintiffs invite this court to follow the decisions of the Pennsylvania intermediate appellate courts only to the extent they are "persuasive in [their] reasoning." (Plf. Mem. at 5) Plaintiffs are mistaken: this Court will follow these decisions because plaintiffs have not offered "persuasive data that the highest court of the state would decide otherwise." West v. A.T.&T. Co., 311 U.S. 223, 237 (1940).

HUYETT, J.

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ORDER

HUYETT, J. **JUNE , 1997**

For the reasons stated in the foregoing Memorandum, the Motion of Defendant, State Auto Mutual Ins. Co., is **GRANTED IN PART AND DENIED IN PART**. The claim for attorneys' fees in Count II of the Amended Complaint is dismissed. The claim for emotional distress in Count III is dismissed. The allegations of paragraph 22 of the Amended Complaint are stricken to the extent they seek recovery for emotional distress. The Motion is otherwise **DENIED.**

IT IS SO ORDERED.

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HUYETT, J.