

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

FREEDOM MEDICAL SUPPLY, INC., and SIGMA SUPPLIES CORP., individually and on behalf of others similarly situated,	:	MAY TERM, 2003
	:	No. 03296
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control Nos. 072622, 012382
NATIONWIDE MUTAL INSURANCE CO. a/k/a NATIONWIDE INCURANCE CO., and CONSOLIDATED SERVICES GROUP t/a MED PATH,	:	
Defendants.	:	

ORDER

AND NOW, this 23rd day of April, 2004, upon consideration of the Preliminary Objections of defendant Nationwide Mutual Insurance Company (“Nationwide”) and defendant Consolidated Services Group t/a Med Path (“Med Path”) to the Complaint, the plaintiffs’ responses in opposition, the respective memoranda, and all other matters of record, and in accord with the Opinion being filed contemporaneously, it is **ORDERED** that the Preliminary Objections are **SUSTAINED, in part**, and that:

1. Counts II, III, IV and VII of the Complaint are hereby dismissed;
2. Count V of the Complaint has been withdrawn by plaintiffs;
3. Plaintiffs’ requests for punitive damages are dismissed; and
4. Med Path is dismissed as a party defendant.

It is further **ORDERED** that the remaining Preliminary Objections are **OVERRULED**, and that the caption shall be amended to change defendant Nationwide Insurance Company’s name to “Nationwide Mutual Insurance Company.”

Nationwide shall file an Answer to the remaining counts of the Complaint within thirty (30) days of the date of entry of this Order.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

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OPINION

Before the court are the Preliminary Objections of defendants, Nationwide Mutual Insurance Co. (“Nationwide”) and Consolidated Services Group (“Med Path”), to plaintiffs’ class action Complaint. Plaintiffs provided medical equipment to persons involved in auto accidents. Nationwide was required to pay plaintiffs for the medical equipment under certain auto insurance policies issued by Nationwide.

Plaintiffs allege that they were not paid the full amount to which they were entitled under those policies and the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S. § 1701 *et seq* (“MVFRL”). Plaintiffs further allege that Nationwide hired Med Path to process the bills Nationwide received, including those from plaintiffs, and as requested by Nationwide, Med Path calculated the amounts that Nationwide would agree to pay plaintiffs.

Plaintiffs have brought claims against Nationwide for violation of the MVFRL, breach of contract, bad faith, and breach of the duty of good faith and fair dealing. Nationwide has not objected to the first two claims, but it has raised objections to the latter two. Plaintiffs have

brought additional claims against Nationwide and Med Path for conspiracy, conversion, and unjust enrichment. Defendants have objected to each of those claims. Plaintiffs have withdrawn their claim for unjust enrichment. Nationwide has also objected to venue, to the fact that it was sued under an incorrect name, and to the fact that plaintiffs have requested punitive damages.

I. Defendant’s Preliminary Objection to Its Name Being Misstated in the Caption Is Overruled.

Nationwide objects that it was not sued under its correct corporate name. However, Nationwide has not claimed that it suffered any prejudice as a result of this mistake on plaintiffs’ part. *See* Pa. R. Civ. P. 126. Furthermore, plaintiffs served the entity whom they intended to sue. Therefore, the caption of this action will be changed to reflect the correct name of Nationwide.

II. Defendant’s Preliminary Objection to Venue Is Overruled.

Nationwide objects to the laying of venue in Philadelphia County. However, “a personal action against a corporation . . . may be brought in . . . a county where it regularly conducts business.” Pa. R. Civ. P. 2179(a)(2). Nationwide regularly conducts business in Philadelphia County. Venue is proper here.

III. Defendants’ Preliminary Objections to Count II for Conspiracy to Violate the MVFRL Against Nationwide and Med Path Is Sustained.

Both defendants object that plaintiffs have not properly stated a claim against them for conspiracy to violate the MVFRL. “In order to state a cause of action for civil conspiracy, plaintiffs must show that two or more persons combined or agreed with intent to do an unlawful act.” *Skipworth v. Lead Industries Assoc., Inc.*, 547 Pa. 224, 235, 690 A.2d 169, 174 (1997). Furthermore, plaintiffs must allege facts to show malice, *i.e.* of each defendant’s intent to injure plaintiffs. *See* *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 211, 412 A.2d 466, 472

(1979). In this case, plaintiffs allege that Med Path assisted Nationwide in violating the MVFRL. However, Med Path is not among the class of entities that may be found liable under the MVFRL. *See* 75 Pa. C.S. § 1797(b)(4) (claims may be brought against “insurers”). Therefore, the conspiracy claim against Med Path must be dismissed. Since there cannot be a conspiracy of one, the claim is also dismissed as to Nationwide.

IV. Defendants’ Preliminary Objections to Count III for Conversion Against Nationwide and Med Path Is Sustained.

Defendants object that plaintiffs have not alleged that defendants converted any of plaintiffs’ property. “Conversion is the deprivation of another’s right of property in, or use or possession of, a chattel, or other interference therewith, without the owner’s consent and without lawful justification. . . . Money may be the subject of conversion, [but] failure to pay a debt is not conversion.” Bernhardt v. Needleman, 705 A.2d 875, 878 (Pa. Super. 1998). *See also* Gregg v. Independence Blue Cross, 2001 WL 1807400 (Phila. Co. Jun. 14, 2001) (failure of insurer to pay medical providers full amount due to them is breach of contract not conversion.) Plaintiffs’ allegation of conversion is in reality a claim for failure to pay plaintiffs what is owed. Thus, plaintiffs’ claim for conversion must be dismissed.

V. Defendant’s Preliminary Objection to Count IV for Bad Faith Against Nationwide Is Sustained.

Defendants correctly point out that medical providers, such as plaintiffs, have no standing to sue under the Bad Faith Statute, and are instead limited to the remedies provided under the MVFRL. *See* Glick v. Progressive Northern Ins. Co. March Term, 2002, No. 01179 (Phila Co. Dec. 30, 2002); Taylor v. Nationwide Ins. Co., 35 Pa. D&C 4th 101 (Alleg. Co. 1997). Therefore, plaintiffs’ bad faith claim must be dismissed.

VI. Defendant’s Preliminary Objection to Count VII for Breach of the Duty of Good Faith & Fair Dealing Against Nationwide Is Sustained.

Nationwide objects that plaintiffs may not assert a claim against it for breach of the duty of good faith and fair dealing. “The implied covenant of good faith does not allow for a claim separate and distinct from a breach of contract claim. Rather, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself.” JHE, Inc. v. SEPTA, 2002 WL 1018941 (Phila. Co. May 17, 2002). Since plaintiffs have already asserted a claim against Nationwide for breach of contract, plaintiffs’ redundant claim for breach of the contractual duty of good faith and fair dealing must be dismissed.

VII. Defendants’ Preliminary Objection to Plaintiffs’ Claims for Punitive Damages Is Sustained.

Defendants object that plaintiffs are not entitled to claim punitive damages. Plaintiffs may not recover punitive damages on their breach of contract and unjust enrichment claims. *See Eighth Floor, Inc. v. Terminal Industrial Corp.*, 2003 WL 23120186 (Phila Co. Dec. 29, 2003). Furthermore, since the MVFRL already provides for the penalty of treble damages, plaintiffs may not also recover punitive damages on their claim for breach of that statute. *See* 75 Pa. C.S. § 1797(b)(4). Since the tort claims have been dismissed, there is no basis for punitive damages.

CONCLUSION

For all the foregoing reasons, defendants’ Preliminary Objections to plaintiffs’ Complaint are sustained in part and overruled in part. An Order consistent with this Opinion will be filed.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

Dated: 4/23/04