

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

CARL STAPLES and PATRICIA STAPLES, h/w and CLASSIC MARBLE & STONE RESTORATION, INC.,	:	OCTOBER TERM, 2003
	:	No. 1088
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control No. 050178
ASSURANCE COMPANY OF AMERICA, ZURICH INSURANCE COMPANY, and ZURICH GROUP,	:	
Defendants.	:	

ORDER

AND NOW, this 14th day of June 2004, upon consideration of defendants' Preliminary Objections, the response in opposition, the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously, it is **ORDERED**:

- (a) that said Preliminary Objections are **SUSTAINED, in part**;
- (b) that Counts III, IV, and V, and the request for attorneys' fees in Count I of the Complaint are dismissed;
- (c) that, upon agreement of the parties, Zurich Insurance Company and Zurich Group are dismissed as party defendants;
- (d) that the remaining Preliminary Objections are **OVERRULED**; and
- (e) Assurance Company of America shall file an Answer to the remaining counts of the Complaint within twenty-two (22) days of the date of entry of this Order.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

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CARL STAPLES and PATRICIA STAPLES, h/w	:	OCTOBER TERM, 2003
and CLASSIC MARBLE & STONE		
RESTORATION, INC.,	:	No. 1088
	:	
Plaintiffs,	:	COMMERCE PROGRAM
	:	
v.	:	Control No. 050178
	:	
ASSURANCE COMPANY OF AMERICA,	:	
ZURICH INSURANCE COMPANY, and	:	
ZURICH GROUP,	:	
	:	
Defendants.	:	

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OPINION

Albert W. Sheppard, Jr., J. June 14, 2004

Defendant, Assurance Company of America (“Assurance”), has filed Preliminary Objections to plaintiffs’ Complaint.¹ Plaintiffs claim to be insureds under a commercial policy of insurance issued by Assurance (the “Policy”). Plaintiffs allege that they suffered a theft loss covered by the Policy, but that Assurance unnecessarily delayed paying under the Policy. Plaintiffs brought claims for breach of contract, bad faith, breach of fiduciary duty, violation of the Unfair Insurance Practices Act and violation of the insurance regulations, to all of which claims Assurance has objected.

¹ Defendants Zurich Insurance Company and Zurich Group have also objected on the basis that they are not proper parties to this suit, which plaintiffs have conceded. Accordingly, the court will dismiss them as defendants.

I. Defendant's Preliminary Objections to Counts I (Breach of Contract) and Count II (Bad Faith) Are Overruled.

Assurance objects that plaintiffs' claims for breach of contract and bad faith are not pled with sufficient specificity. However, Assurance has waived any such objections because it did not raise them in its Preliminary Objections, but only in its Memorandum of Law in support of its Preliminary Objections. *See* Statewide Building Maintenance, Inc. v. Pennsylvania Convention Center Authority, 635 A.2d 691, 698, n.13 (Pa. Commw. 1993).

Even if these objections had been properly raised, the court finds them to be without merit. Plaintiffs have sufficiently pled their claims for breach of contract and bad faith by describing the insurance policy, its terms, a loss that appears to be covered, and Assurance's failure to pay on that loss. The court cannot, at this stage in the proceedings, determine whether Assurance was justified in conducting its investigation of plaintiffs' claim and in delaying payment.

II. Defendant's Preliminary Objection to Count III (Breach of Fiduciary Duty) Is Sustained.

Assurance objects that plaintiffs have not sufficiently pled their claim for breach of fiduciary duty. This court agrees. Where the wrong allegedly committed by the insurer is its failure to pay on a claim, "there is no separate tort-law cause of action against an insurer for . . . breach of fiduciary duty; such claims must be brought in contract." Ingersoll-Rand Equipment Corp. v. Transportation Ins. Co., 963 F. Supp. 452 (M.D. Pa. 1997). "The breach of fiduciary duty and the [contractual] breach of the duty of good faith are . . . treated synonymously in the insurance context." Pennsylvania Chiropractic Assoc. v. Independence Blue Cross, 2001 WL

1807781 (Phila. Co. July 16, 2001).² Here, plaintiffs' claim for breach of fiduciary duty is based upon the same allegations of misconduct as their claims for breach of contract and bad faith. The fiduciary duty claim will be dismissed as redundant.

III. Defendant's Preliminary Objections to Count IV (Violation of Unfair Insurance Practices Act) and Count V (Violation of Insurance Regulations) Are Sustained.

Assurance properly objects to plaintiffs' claims that Assurance violated the Unfair Insurance Practices Act ("UIPA") and certain unspecified insurance regulations. "It is clear that the UIPA and the Department of Insurance Regulations can only be enforced by the State Insurance Commissioner and not by way of private action." Romano v. Nationwide Mut. Ins. Co., 435 Pa. Super. 545, 552, 646 A.2d 1228, 1232 (1994). Therefore, plaintiffs' claims based on the UIPA and the regulations will be dismissed.

IV. Defendant's Preliminary Objection to the Request For Attorneys' Fees In Count I Is Sustained.

Assurance objects to plaintiffs' request for attorneys' fees for Assurance's alleged breach of contract. Under the "American Rule," a party may not recover attorneys' fees from its adversary absent an express statutory or contractual provision allowing for such a recovery. *See Mosaica Academy Charter School v. Commonwealth Dept. of Education*, 572 Pa.191, 206-7, 813 A.2d 813, 822 (2002). Since plaintiffs have not identified any applicable provision in the

² The existence of a cause of action for statutory bad faith in refusal to pay cases apparently makes a separate claim for breach of fiduciary duty unnecessary. *See Romano v. Nationwide Mut. Ins. Co.*, 435 Pa. Super. 545, 552, 646 A.2d 1228, 1232 (1994) (equating the contractual duty of good faith with the insurer's fiduciary duty in a bad faith case). However, Pennsylvania courts do allow insureds to bring separate fiduciary duty claims in those instances where the insurer has assumed the role of handling or settling claims under a liability insurance policy. *See id.*; Rader v. Travelers Indemnity Co. of Illinois, 2000 WL 33711045 (Phila. Co. Sept. 25, 2000).

Policy that permits them to recover attorneys' fees from Assurance, plaintiffs' request for such relief in Count I will be dismissed.³

CONCLUSION

For the reasons discussed, defendant's Preliminary Objections are sustained, in part, and overruled, in part. An Order consistent with this Opinion will be entered of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

³ Assurance does not dispute that plaintiffs may be able to recover punitive damages if they prevail on their bad faith claim.