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Mashantucket Pequot Tribal Court.
WHITE MOUNTAIN APACHE TRIBE
v.
PEQUOT HEALTH CARE, et al.

No. MPTC–CV–GC–2009–212.
May 27, 2011.

M. John Strafaci, Esq., for the Plaintiff.

Amanda Wiley, Esq., for the Defendants.

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT TWO OF THE COMPLAINT

EDWARD B. O'CONNELL, Judge.

The Plaintiff, the White Mountain Apache Tribe, alleges that it entered into an agreement with the Mashantucket Pequot Tribal Nation and its wholly owned subsidiaries, Pequot Health Care and Pequot Plus Health Benefits, to serve as the "third party administrator" of the Plaintiff's self-funded tribal health plan. The plaintiff also alleges that it entered into the agreement based on the Defendants' representations that it had the knowledge, skill, experience and expertise necessary to serve as a third party administrator of the Plaintiff's health plan, and that it would achieve costs savings for the plan. The Plaintiff further alleges that the Defendants negligently and improperly administered the plan, failed to disclose to the Plaintiff that it had or was negligently and improperly administering the plan, and that as a result of the Defendants' conduct, the Plaintiff suffered substantial losses to its self-insured benefits plan.

The Plaintiff brings this action in three counts, alleging breach of contract (Count One); negligence (Count Two); and negligent misrepresentation (Count Three). Invoking Rule 12(c) of the Mashantucket Pequot Rules of Civil Procedure, the Defendants move for judgment on the pleadings on Count Two. The Defendants contend that the duty alleged to be breached in the negligence count arises solely out of the agreement which is the subject of the breach of contract count, not from a duty imposed by law independent of the agreement. They assert that both the breach of contract count (Count One) and the negligence count (Count Two) are premised on the allegation that the Defendants breached the terms of the agreement and because the negligence count does not sufficiently plead a separate, independent action in tort, judgment on the pleadings should enter in favor of the Defendants on Count Two.

Alternatively, the Defendants contend that the Plaintiff's tort claim sounding in negligence "seeks pure economic damages and therefore must be dismissed in accordance with the economic loss rule."

The Plaintiff responds that Count Two alleges that the Defendants owed the Plaintiff a duty to exercise the care, skill and diligence required of a qualified third party administrator of health insurance plans, and that this constitutes a distinct and independent legal duty which is different from the Defendants' obligations under the agreement. The Plaintiff also contends that a third party administrator of a health benefits plan may owe a heightened duty of care imposed by the nature of the Defendants' position as administrator of the plan, which is separate and distinct from the duty imposed under the agreement. In these circumstances, says the Plaintiff, a cause of action in negligence has been properly pleaded and the economic loss rule does not apply.

A. STANDARD OF REVIEW. "The legal standards governing the court's consideration of a motion for judgment on the pleadings are the same as those standards governing the court's consideration of a Rule 12(b)(6) motion to dismiss." *Schock v. Mashantucket Pequot Gaming Enterprise,* 3

Mash.Rep. 129, 133 (1999). The Court is required to accept the material facts alleged in the complaint as true. All doubts and inferences are resolved in the plaintiff's favor, and the pleading is viewed in the light most favorable to the plaintiff. *Id.* "However, 'the plaintiff must still allege facts, either directly or inferentially, that satisfy each element required for recovery under some actionable legal theory.' " *Id.*

B. ADEQUACY OF ALLEGATIONS IN COUNT TWO. The Defendants assert that the allegations in Count Two constitute "a mere restatement of [the plaintiff's] breach of contract claim," and that the Plaintiff's "tort claim for negligence is solely predicated on the contractual relationship between [the plaintiff] and the defendant Pequot Plus." The Defendants contend that because Count Two fails to allege any independent tort for which Pequot Plus may be liable, and has not alleged a duty separate from its contractual duties as alleged in Count One, the allegations in Count Two do not support a claim of negligence and a judgment on the pleadings should enter in the Defendants' favor on Count Two.

The Plaintiff counters that Count Two sets forth the essential elements of a cause of action sounding in negligence. More particularly, the Plaintiff alleges that the Defendants undertook to exercise the care, skill and diligence required of a qualified third party administrator of a health insurance plan. In the Plaintiff's view, a breach of this duty is separate and distinct from a breach of the Defendants' duty to adhere to the contract, and constitutes a sufficient allegation of negligence. Moreover, says the Plaintiff, these pleadings could support a cause of action claiming that the Defendants failed in their duty to exercise the care required of a fiduciary under federal and tribal ERISA laws.

> The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury.... Duty is a legal conclusion about relationships between individuals, made after the fact, and [is] imperative to a negligence cause of action.... Thus, [t]here can be no actionable negligence ... unless there exists a cognizable duty of care.

Mazurek v. Great American Ins. Co., 284 Conn. 16, 29, 930 A.2d 682 (2007) (internal quotation marks omitted).

Count Two of the Complaint alleges that "Pequot Plus had a duty to exercise the care and skill required of the third-party administrator in administrating the [plaintiff's] plan" (¶ 46); that "Pequot Plus breached that duty" (¶ 47); that "as a direct and proximate result" of that breach of duty, the Plaintiff sustained damages" (¶ 48); "including interest" (¶ 49); "and attorney's fees." (¶ 50) These allegations contain the "essential elements" of a cause of action in negligence.

In *Shetucket Plumbing Supply, Inc. v. S.C. S Agency, Inc.*, 570 F.Supp.2d 282 (D.Conn.2008) the plaintiff brought suit against its insurance agent alleging, *inter alia*, a breach of contract and negligence. The Defendant in that case claimed that it did not owe the plaintiff an independent duty of care. The *Shetucket Plumbing* court, however, distinguished the plaintiff's breach of contract claim from its negligence claim, noting that a breach of contract claim is based on a defendant's alleged failure to perform a specific agreement, while a negligence claim is based on a defendant's alleged failure to exercise the reasonable care, skill and diligence required of an insurance broker. *Id.* at 287. Applying this distinction to the case at bar, it is found that Count Two alleges that the Defendants breached a duty to exercise the care, skill and diligence required of an administrator of a health insurance plan, which is different from an allegation that the Defendants breached their obligations under a contract. Count Two sets out a cause of action in negligence that is distinct and independent of the breach of contract claim in Count One.

The Defendant points out that the actions or failure to act alleged in support of a claim of negligence in Count Two are the same as the actions or

failures to act alleged in support of the breach of contract claim in Count One (¶ 41, incorporated by reference into Count Two by way of ¶ 47). This, however, is not dispositive. The same actions or failures to act can be pleaded in support of more than one cause of action, especially in jurisdictions allowing alternate theories of liability, such as Mashantucket.

The Plaintiff also contends that the allegations of Count Two can be construed as a claim that the Defendants violated the standard of care applicable to plan administrators under the tribal ERISA law ("TERISA"), 15 M.P.T.L. § 1, *et seq.*, which adopts the rights and protections of the federal ERISA law. Id. The Plaintiff asserts that ERISA imposes a duty on the part of a health plan administrator "to discharge [its] duties ... with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. 29 U.S.C. § 1104(a)(1)(B)." (Pl's Opp'n to Def's Mot. for J. at 6.)

Count Two does not contain an explicit reference to the duties imposed by TERISA or ERISA, but it does allege in broad terms that the Defendants breached "a duty to exercise the care and skill required of a third-party administrator" in administering the Plaintiff's health insurance plan. The court must keep in mind the liberal standard of review when considering a motion for judgment on the pleadings, which requires the court to resolve all doubts and inferences in the plaintiff's favor and to view the pleading in the light most favorable to the plaintiff. *Schock v. Mashantucket Pequot Gaming Enterprise, supra* at 133. Applying these principles to the Plaintiff's pleading in Count Two, the Court finds that the Plaintiff has pleaded a cause of action based on a violation of the duties imposed by TERISA or ERISA.[FN1]

> FN1. The court expresses no opinion on whether the Plaintiff can prove facts at trial which would support a conclusion that TERISA or ERISA applies or that any duties imposed by those Acts were breached.

The Defendants' Motion for Judgment on the Pleadings on Count Two on the grounds that it fails to state a cause of action is denied.

C. ECONOMIC LOSS DOCTRINE. The Defendants move for judgment on the pleadings in Count Two, asserting that the Plaintiff's tort claim for negligence seeks "pure economic damages" and is barred by the economic loss rule.

"The economic loss doctrine is a judicially created principle which prohibits recovery in tort when the claim only seeks to recover economic damages and arises from a contract between the parties." *Ulbrich v. Groth,* 50 Conn.L.Rptr. 822, 824, 2010 Conn.Super LEXUS 2834 at *8. The Defendants contend that this rule is particularly appropriate "in regard to sophisticated entities such as [the plaintiff and the defendants]; such parties should be free to negotiate agreements which allocate the risks and insure against the potential losses," citing *Dart Chart Systems v. Kettle Brook Care Center, LLC,* 2009 Conn.Super. LEXIS 1562 at *10. The Defendants argue that:

> ... allowing tort claims for what is essentially a breach of contract claim would cause tort law to swallow up the body of common law surrounding contracts, including the appropriate measure of damages. Because virtually every breach of contract is the result of intentional or negligent conduct which could be classified as one tort or another, breach of contract law would be considered superfluous...."

Cocchiola Paving v. Peterbilt of Southern Connecticut, 2003 Conn.Super. LEXIS 589 at *13–14.

The Plaintiff responds that the economic loss doctrine has never been expressly adopted by the appellate courts of our neighboring jurisdiction in Connecticut, and that trial court decisions on this issue are split, some refusing to recognize the doc-

trine and others applying it in whole or part under particular factual scenarios.

The cornerstone Connecticut case on the economic loss rule is *Flagg Energy Development Corp. v. General Motors Corp.*, 244 Conn. 126, 709 A.2d 1075 (1998), which involved a dispute between the buyers and sellers of gas turbine engines that allegedly failed to operate economically and efficiently. The buyers brought an action alleging breach of contract and, *inter alia*, negligent misrepresentation. The Connecticut Supreme Court affirmed the trial court's decision granting the defendant's motion to strike the plaintiff's claims based on negligent misrepresentation, stating that "[w]e agree with the holdings of cases in other jurisdictions that commercial losses arising out of the defective performance of contracts for the sales of goods cannot be combined with negligent misrepresentation." *Id.* at 153.

> The scope and application of the Supreme Court's decision in *Flagg* have caused much division and dispute among the trial courts.... Most Superior Court cases hold that *Flagg* applies the economic loss doctrine broadly to preclude tort claims seeking economic loses emanating from any contractual transactions involving commercial or "sophisticated" parties.... [T]he minority view [is] that *Flagg* applies the economic loss doctrine more narrowly ... in cases involving the sale of goods governed by the provisions of the Uniform Commercial Code.

Ulbrich v. Groth, *supra* at 824, 25, 2010 Conn.Super LEXUS 2834 at *10.

The applicability of the economic loss doctrine in Mashantucket was considered by the Mashantucket Pequot Tribal Court in *Mashantucket Pequot Tribal Nation v. Kenneth Castellucci & Assoc., Inc.*, 4 Mash.Rep. 21 (2002), where the tribe had filed a complaint alleging, *inter alia*, both a breach of contract count and a negligence count in a dispute concerning the alleged defective installation of marble tiles in the Grand Pequot Hotel. The defendant moved to dismiss the negligence count, invoking the economic loss doctrine.[FN2] After reviewing Connecticut case law,[FN3] the tribal court concluded that the law on this subject was "unsettled." *Id.* at 33. As illustrated by the summary and analysis of current Connecticut case law set forth in *Ulbrich v. Groth*, *supra*, the applicability of the economic loss doctrine remains unsettled to this day. In these circumstances, this Court will adopt the reasoning of the *Castellucci* court: "The court finds that the [plaintiff] has alleged facts sufficient to support a claim of negligence. The court will decide after a trial on the merits whether any damages sought by the [plaintiff] fall within the rubric of the 'economic loss' doctrine and whether or not the Court will adopt the doctrine...." *Id.* at 33–34.

> FN2. In *Castellucci* the tribe was the plaintiff and urged the Court to not adopt the economic loss rule. In this case, the tribal Defendants urge the Court to adopt the rule. Such are the vagaries of litigation.
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> FN3. At that time, tribal law required the Court to follow Connecticut law in tort matters. That requirement no longer applies.

The Defendants' Motion for Judgment on the Pleadings on Count Two on the ground that violates the economic loss rule is denied.

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