

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

JEROME O. HERLIHY  
JUDGE

NEW CASTLE COUNTY  
COURT HOUSE  
WILMINGTON, DE 19801-3733

*Submitted: April 13, 2010*

*Decided: April 16, 2010*

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RE: *Mass Electric Construction Co. v.*  
*Siemens Building Technologies, et al*  
*Civil Action No. 09C-01-138-JOH*  
*Motion to Strike - GRANTED*

Dear Counsel:

This letter is in response to defendant, Gerling America Insurance Company's, motion to strike subpart D of plaintiff, Mass. Electric Construction Co.'s, response to Gerling's Motion for Summary Judgment. For the below reasons, the motion is **GRANTED**.

Mass. Electric filed its complaint on January 16, 2009. Its four part complaint alleges that Siemens Building Technologies, Inc. and Gerling are liable to it for costs associated with a personal injury suit commenced in Pennsylvania relating to the

installation of security cameras for a bridge crossing the Delaware River connecting Pennsylvania and New Jersey. Mass. Electric claims that Siemens is liable based on a subcontractor agreement and that Gerling is liable as Siemens' insurer. The four-count complaint seeks a declaratory judgment that both Gerling and Siemens are responsible for defense costs and damages in that they must reimburse Mass. Electric for fees it already spent defending the underlying personal injury suit in Pennsylvania and for expenses accrued in prosecuting this action.

Mass. Electric's complaint does not allege bad faith, nor does it demand punitive damages or statutory damages under the Pennsylvania Consolidated Statutes. It simply alleges that both Siemens and Gerling breached their contractual obligations. On June 10, 2009, the Court entered a scheduling order that required all amendments to pleadings be filed by July 1, 2009. To date, Mass. Electric has made no effort to amend its complaint.

On March 8, 2010, Mass. Electric filed a motion for summary judgment against Gerling. In that motion it states that a choice of law provision is not necessary because all of the potentially applicable jurisdictions apply the same general principles to contract interpretation.<sup>1</sup> At no point in that motion does Mass. Electric contend that Pennsylvania law should apply in this dispute. Curiously, on the same day, in its motion for summary judgment against Siemens, Mass. Electric argues that Pennsylvania law governs this dispute.<sup>2</sup> To date, the Court has made no ruling concerning choice of law.

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<sup>1</sup> Mass. Elec.'s Br. Mot. for Summ. J. (against Gerling) at 7.

<sup>2</sup> Mass. Elec.'s Mot. for Summ. J. (against Siemens) at 24.

On April 5, 2010, for the first time in this litigation, Mass. Electric argues that it is entitled to statutory damages, including fees, costs, interest and punitive damages. This application is presented as part of its response to Gerling's motion for summary judgment. It claims that under 42 Pa. C.S.A. § 8371, the Court is authorized to award such damages when the defendant insurer acts in bad faith toward its insured.<sup>3</sup>

Gerling now seeks to strike subpart D because neither bad faith nor statutory damages were pled in Mass. Electric's complaint. In response, Mass. Electric that Gerling, "has still failed to provide any factual or legal support for its bad faith refusal to honor its defense obligations."<sup>4</sup> It also cites Delaware law that allows this Court to award counsel fees in certain situations. At no point does it support its application for an award of punitive damages.

The Court views this additional bad faith claim allegation as untimely and it is stricken. Instead of exhausting the usual channels of amending a complaint, Mass. Electric has attempted to "sneak in" the allegation of bad faith. When called to respond to the motion to strike, Mass. Electric simply states that Gerling's actions were in bad faith and questions why it has never defended its actions or explained why they were not in bad faith. It is hardly surprising that Gerling has never addressed why its actions were not in bad faith. That is because no allegation of bad faith was ever brought against it. A contract can be breached under some circumstances without its actors operating in bad

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<sup>3</sup> See Mass. Elec.'s Resp. to Gerling's Mot. for Summ. J. at 22 (subpart D).

<sup>4</sup> Resp. to Gerling's Mot. to Strike at 2.

faith. While the Court is not implying that this was the case at hand, such a result is possible. Therefore, bad faith must be specifically alleged in the plaintiff's complaint. Without it, the defendant was never put on notice that it must defend a bad faith allegation.

Because of the prejudice of injecting what is essentially a new cause of action in a response to an adverse party's motion for summary judgment, the Court grants Gerling's motion to strike subpart D of Mass. Electric's response. Mass. Electric is not permitted to argue that Gerling acted in bad faith unless it amends its complaint, subject to the rules of procedure and *with leave of the Court*, to include such an allegation. Furthermore, because the claim for punitive damages, interest and statutory damages stem from the applicable Pennsylvania statute, which is only applicable upon a finding of bad faith, they are stricken as well. The claim for fees associated with the underlying Pennsylvania personal injury litigation and this suit have been properly pled and are not affected by this ruling. The motions for summary judgment will proceed as scheduled on April 21, 2010.

Sincerely,

JOH/krb  
cc Prothonotary