

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

OLGA MALDONADO, *et al.*,

**Plaintiffs**

**v.**

DAMAS FOUNDATION, INC., *et al.*,

**Defendants**

CIVIL NO. 12-1042 (JAG)

**OPINION & ORDER**

GARCIA-GREGORY, D.J.

Before the Court is defendant Banco Popular de Puerto Rico's ("Banco Popular" or "Defendant") motion to dismiss (Docket Nos. 42). For the reasons set forth, the Court **GRANTS** Banco Popular's motion.

**FACTUAL AND PROCEDURAL BACKGROUND**

On January 20, 2012, Olga Maldonado, by herself an in representation of her minor son, Josued Narvaez-Maldonado (collectively "Plaintiffs"), filed a complaint against Damas Foundation, Inc. ("Damas Foundation"), individually and as settlor of the Hospital Damas Self Insurance Trust Fund ("Damas Trust"), Banco Popular, as trustee of the Damas Trust, and several members of the Board of Directors of Damas Foundation (collectively "Defendants"). (Docket No. 1) Plaintiffs allege Defendants incurred in several violations of the Insurance Code

of Puerto Rico in connection with the misuse of the funds created as a self-insurance fund for the payments of medical malpractice claims against Hospital Damas, Inc. ("Hospital Damas"). According to Plaintiffs, Damas Foundation and Banco Popular depleted the Damas Trust's funds, impairing Plaintiff's capacity, as beneficiaries of the trust, to collect a judgment obtained against Hospital Damas.<sup>1</sup> Plaintiffs also assert that Damas Foundation is liable for the payment of the judgment because they are the entity that operates and administers the Hospital Damas. In addition to the judgment amount, Plaintiffs request an accounting in regard to the use of the funds and that Defendants replenish the Damas Trust. (See Docket No. 4, Amended Complaint).

On November 20, 2012, Banco Popular filed a motion to dismiss alleging, *inter alia*, that this Court did not have primary jurisdiction to resolve this case (Docket nos. 42). Plaintiffs timely opposed said motion (Docket No. 62).

## **ANALYSIS**

### Primary Jurisdiction

Defendant request that this case be dismissed because the Office of the Insurance Commissioner has primary jurisdiction to entertain the claims brought forth in the complaint. (See Docket

---

<sup>1</sup> The previous case was Civil No. 09-1240 (CCC); Judgment was entered on June 13, 2011, (docket no. 61).

No. 42, p. 14). Their argument for dismissal relies heavily on a recent decision from the state court, Narvaez-Maldonado v. Banco Popular de Puerto Rico, Case No. KLCE201200944. (See docket no. 59-1).<sup>2</sup> Defendant argues that Plaintiffs' allegations in this case mirror those in Narvaez<sup>3</sup>; specifically, that Banco Popular and Damas Foundation violated the Insurance Code, which in turn affected their rights to collect the full judgment against Hospital Damas. It posits that the Court must, as the state court did, dismiss the claims without prejudice of them being filed before the Office of the Insurance Commissioner. We turn to the Court's reasoning in Narvaez, and then examine its applicability in the case at bar.

The state court in Narvaez first maintained that, although governed under the provisions of the Civil Code, the Damas Trust was created pursuant to article 41.050 of the Insurance Code. Said article establishes that a hospital, in order to comply with its financial responsibility to pay for medical malpractice claims, may establish a guarantee trust. (See Docket No. 59-1, pp. 16-17) The Trust must comply with certain requirements, and

---

<sup>2</sup> Because this is a diversity jurisdiction case, the Court must apply substantive state law. Hanna v. Plumer, 380 U.S. 460, 471 (1965)

<sup>3</sup> The state case was brought by Emifer Narvaez-Maldonado, son and brother of plaintiffs in the instate case, Olga Maldonado and Josue Narvaez-Maldonado, respectively. Emifer Narvaez-Maldonado is also creditor of Hospital Damas pursuant to a judgment entered in Civil No. 09-1240 (CCC). He sought the removal of said bank as trustee of Damas Fund, and the annulment of Banco Popular's actions as trustee.

in no case, may funds be withdrawn without the prior authorization of the Commissioner. PR Laws Ann. tit. 26 § 4150.

The court in Narvaez relied on Jimenez Lopez, et al v. SIMED, 180 D.P.R. 1, 8 (2010) to dismiss that action.

In our jurisdiction, the insurance industry is invested with a great public interest due to its importance, complexity, and effect on the economy and society. For these reasons, it is regulated extensively by the State through the . . . Insurance Code of Puerto Rico . . . and the Civil Code serving as a source of supplemental law. (...) Furthermore, it is the Insurance Commissioner who oversees compliance with the dispositions of the Insurance Code . . . The high public interest is even more palpable insofar as medical-hospital liability insurance is concerned. (citations omitted)(our translation).

The local court held that because the Insurance Commissioner has been delegated the power to authorize and oversee compliance of the medical-hospital responsibilities in cases of malpractice, (see Docket No. 59-1, p. 17)<sup>4</sup>, the Office of the Insurance Commissioner was the proper forum to attend the dispute. The guarantee trust in this case, the Damas Trust, is the same that was in controversy in Narvaez; and it is, as the court local court explained, governed by special legislation which provides a forum for the disposition of related cases. Though the Narvaez

---

<sup>4</sup> The Commissioner shall have the authority to settle controversies on violations of the Insurance Code or the regulations thereunder, pursuant to the procedure set forth in the Uniform Administrative Procedure Act. PR Laws Ann. tit. 26 § 235.

decision is not binding precedent, the state court's reasoning is persuasive, and moves the Court to dismiss this case in favor of a resolution by the Insurance Commissioner.<sup>5</sup>

Plaintiffs raise just one defense against Defendant's position: since Plaintiffs are seeking damages, unlike the plaintiffs in state court, the court cannot dismiss this case. They contend that local courts prohibit it, quoting the following:

In short the general rule is that a court shall apply the doctrine of primary jurisdiction in any case where the expertise of an agency is indispensable to resolve the controversy', Ortiz v. Panel F.E.I., supra, page 247. 'By way of exception, if the issue involved is strictly of law'(as in this case which deals with a counterclaim based on a cause of action for damages pursuant to Article 1802 of the Civil Code), the court will retain jurisdiction. Condominio Victoria Plaza v. Gomez-Estremera, 184 D.P.R. 407, 431 (2012)(citing Ortiz v. Panel F.E.I., 155 D.P.R. 219, 246 (2001)).

Unfortunately, we find that the exception discussed in Gomez-Estrera is not applicable in this case. Plaintiffs' complaint

---

<sup>5</sup> Of similar nature is the case when a guarantee fund is liquidated. In those proceedings, local courts have held that a consolidation of claims in the administrative forum is proper, "to prevent and avoid somebody from obtaining any type of preference, judgment, embargo or privilege, in detriment to the rest of the creditors." A.I.J. Co. v. San Miguel, 161 DPR 589, 609 (2004). This concern leads courts to dismiss cases of this nature, in favor of their resolution before the Office of the Insurance Commissioner. San Jose Realty S.E. v. El Feniz de PR, 157 DPR 427, 441-442 (2002). Here, Plaintiffs are but two of many creditors of Hospital Damas pursuant to the Judgment entered in Civil No. 19-1240 (CCC). Thus, the Court is inclined to follow the Court's reasoning in San Miguel. Id.

alleges a series of violations to the Insurance Code by the Banco Popular, as Trustee, and Damas Foundation, as Settlor of the Damas Fund; among them: that funds were withdrawn from the trust without prior authorization from the Commissioner; that Banco Popular invested more than 5% (the legally allowed amount) of funds in shares issued by a corporation; and that the balance of the fund was below the legal minimum. (See Docket No.1, p. 6-9) We understand that the expertise of the Office of the Insurance Commissioner will be necessary in the factual findings and legal conclusions that will be made regarding the compliance issues with the Insurance Code. Plaintiffs also seek restitution of the funds and removal of Banco Popular, which the state court already held should be sought before the Commissioner.<sup>6</sup> To hold that this Court has primary jurisdiction over this case simply because Plaintiffs allege damages (curiously equal to the amount obtained in the judgment) is not persuasive. The need for the expertise of the Insurance Commissioner in a suit of this nature heavily weighs in favor of dismissal.

We conclude that the Office of the Insurance Commissioner, as opposed to the Court, has primary jurisdiction to resolve the dispute before us. Therefore, Plaintiffs' First, Second, and

---

<sup>6</sup> The supplementary nature of the Civil Code in these cases, allow the Commissioner to attend a claim using the summary proceeding of Article 858 and 870. Narvaez, Case No. KLCE201200944; docket no. 59-1, p. 21.

Third Cause of action shall be dismissed.<sup>7</sup> Lastly, considering the Court's ruling on the issue of primary jurisdiction, the rest of the arguments presented by Banco Popular are moot.

**CONCLUSION**

In light of the foregoing, the Court hereby **GRANTS** Banco Popular's motion to dismiss. (Docket Nos. 42). Accordingly, Partial Judgment shall be entered dismissing Plaintiffs' First, Second and Third cause of action, and dismissing this case against Banco Popular *without prejudice*.

**IT IS SO ORDERED.**

In San Juan, Puerto Rico, this 8th day of May, 2013.

S/ Jay A. Garcia-Gregory  
JAY A. GARCIA-GREGORY  
United States District Judge

---

<sup>7</sup> Plaintiffs' First, Second, and Third Cause of Action all depend on whether defendants violated the Insurance Code. .