IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2008 Session

TIG INSURANCE COMPANY AND FAIRMONT SPECIALTY GROUP v. TITAN UNDERWRITING MANAGERS, LLC

Appeal from the Chancery Court for Williamson County
No. 28181 R.E. Lee Davies, Chancellor

No. M2007-01977-COA-R3-CV - Filed November 7, 2008

Defendant-underwriter appeals the dismissal of its amended counter-complaint against Plaintiff-insurance company for failure to state a claim upon which relief can be granted pursuant to Tenn. R. Civ. P. 12.02(6). The trial court first dismissed the counter-complaint but granted Defendant leave to amend in order to remedy the sufficiency of its pleading. After review of the amended counter-complaint, the court again dismissed the action on Plaintiff's Rule 12.02 motion to dismiss. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M. S., not participating.

Tyree B. Harris IV and Katherine A. Brown, Nashville, Tennessee, for the appellant, Titan Underwriting Managers, LLC.

Timothy L. Warnock and Katharine R. Cloud, Nashville, Tennessee, for the appellee, Fairmont Specialty Group.

OPINION

Standard of Review

This is an appeal from the dismissal of Defendant's counter-complaint for failure to state a claim pursuant to Tennessee Rule of Civil Procedure 12.02(6). The purpose of a Rule 12.02(6) motion to dismiss is to test only the legal sufficiency of the complaint, not the strength of the complainant's proof. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999). In determining whether to grant the motion or whether the pleading states a claim upon which relief can be granted, the court should not consider matters outside the pleadings. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). In reviewing a motion to dismiss based on Rule 12.02(6), we must

liberally construe the pleading, presuming all factual allegations are true and drawing all reasonable inferences in favor of the complainant. *Trigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31 (Tenn. 2007); *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 37 (Tenn. Ct. App. 2006). A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" but will not be sustained by allegations of pure legal conclusions. Tenn. R. Civ. P. 8.01; *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000). "It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief." *Trau-Med*, 71 S.W.3d at 696; *see also Doe*, 2 S.W.3d at 922. This determination is a conclusion of law which is reviewed de novo on appeal with no presumption of correctness. *Trau-Med*, 71 S.W.3d at 696-97; *Kincaid*, 221 S.W.3d at 37. For purposes of this appeal, we take as true the following facts alleged in the counter-complaint.

Background

On October 1, 2000, TIG Insurance Company ("TIG")[1] entered into an agreement with Titan Underwriting Managers, LLC ("Titan") by which Titan would solicit and procure policies for health and life insurance on behalf of TIG. Titan is a managing general underwriter, licensed in various states to provide underwriting services for stop-loss policies of insurance, which provide coverage to self-insured employer groups for medical expenses incurred in excess of a predetermined amount. Pursuant to the agreement with TIG, Titan was to perform the underwriting services for the policies it placed on behalf of TIG and to handle premium collections and claims services. According to the agreement, Titan was also responsible for obtaining a policy of reinsurance to cover the stop-loss policies it wrote for TIG. Reinsurance is essentially insurance for insurance companies. It is a contract between an insurer and a third-party insurer to protect against the risk of loss associated with the original policy of insurance. Titan procured a policy of reinsurance for TIG with Chubb Re, Inc. The policy was issued to TIG by Chubb Re on November 17, 2000, and covered only TIG's liability under stop-loss policies Titan issued on its behalf. The policy provided that TIG would be entitled to receive a percentage of the ceding commission[2] of the gross premiums ceded to Chubb Re, a portion of which would go to Titan.

On April 25, 2001, TIG gave Titan notice that it was terminating the Titan / TIG employer stop-loss program, effective immediately. TIG instructed Titan to stop soliciting, underwriting, and binding TIG business and to rescind all outstanding quotes. TIG also cancelled the policy of

[1]TIG Insurance Company was dismissed from this action after Fairmont Specialty Group, TIG's successor in interest, was added as a party plaintiff and the claims in TIG's complaint were settled. Fairmont Specialty Group is defending the action on appeal but, for purposes of this appeal and to be consistent with the record, we refer to the appellee as TIG.

[2]Ceding commissions are typically paid by the reinsurer to the primary insurer as compensation for placing business with the reinsurer and to cover the insurer's acquisition expenses, taxes, and fees.

reinsurance with Chubb Re. On August 24, 2001, TIG filed suit against Titan seeking a declaratory judgment regarding the terms of their relationship and asserting claims of breach of contract and fraud. Titan filed its answer and counter-complaint on February 21, 2002, alleging claims of tortious interference with business and contractual relationships and defamation.

TIG moved to dismiss Titan's counter-complaint on March 18, 2002, based on Tenn. R. Civ. P. 12.02(6). Specifically, TIG alleged the counter-complaint made conclusory statements but failed to plead specific facts to support the claims. The trial court granted the motion to dismiss on May 9, 2002. Titan filed a motion to alter or amend the order or, in the alternative, permission for interlocutory appeal. The court treated Titan's motion as one for leave to amend its counter-complaint which the court granted.[3] TIG's opposition to Titan's motion was treated as a motion to dismiss the amended counter-complaint. After review of the amended pleading, the trial court dismissed Titan's amended counter-complaint for failure to state a claim by memorandum opinion on May 7, 2003. Titan appeals.[4]

ANALYSIS

Tortious Interference with Contract v. Breach of Contract

Titan first argues that the court erroneously interpreted its amended counter-complaint to include a claim for tortious interference with a contract instead of a breach of contract claim. The contract at issue is the reinsurance policy between TIG and Chubb Re, which was attached to the counter-complaint as Exhibit A. A "basic principle under Tennessee law [is] that a party to a contract cannot be liable for tortious interference with that contract." *Cambio Health Solutions, LLC v. Reardon*, 213 S.W.3d 785, 789 (Tenn. 2006); *see also Ladd v. Roane Hosiery, Inc.*, 556 S.W.2d 758, 760 (Tenn. 1977) (dismissing action for failure to state claim for wrongful procurement of breach of contract because "a party to a contract cannot be held liable for procuring its own breach"). Consequently, a claim by Titan against TIG for tortious interference with the TIG/Chubb Re contract must fail.

As for the breach of contract claim, contracts are generally presumed to be executed for the benefit of the parties to the contract, not third parties. *Owner Operator Indep. Drivers Ass'n, Inc. v. Concord EFS, Inc.*, 59 S.W.3d 63, 68 (Tenn. 2001). Traditionally, a stranger to a contract has no right to sue for its breach, but an intended third-party beneficiary may enforce a contract provided the benefit flowing from the contract to that party was intended, not merely incidental. *Id.*; *Moore Constr. Co., Inc. v. Clarksville Dep't of Elec.*, 707 S.W.2d 1, 9 (Tenn. Ct. App. 1985). Therefore, Titan must present facts to establish that it was an intended third-party beneficiary entitled to enforce

[3]This order was entered on May 2, 2003, even though it required Titan to submit its amendment no later than April 15, 2003, and TIG to reply by April 21, 2003.

[4]The order dismissing Titan's counter-complaint was entered on July 17, 2003. Thereafter, litigation continued with respect to TIG's complaint and the matter of attorney's fees. TIG and Titan reached a settlement on the remaining claims. The final order of dismissal from which Titan timely appeals was entered on July 27, 2007.

the contract since it was not a party to the contract. *See Owner Operator*, 59 S.W.3d at 68; *Moore Constr.*, 707 S.W.2d at 9.

In order to establish itself as an intended third-party beneficiary, a party must show: "(1) a valid contract made upon sufficient consideration between the principal parties and (2) *the clear intent* to have the contract *operate for the benefit* of a third party." *Owner Operator*, 59 S.W.3d at 68-69 (emphasis added); *First Tennessee Bank Nat'l Ass'n v. Thoroughbred Motor Cars, Inc.*, 932 S.W.2d 928, 930 (Tenn. Ct. App. 1996). The Tennessee Supreme Court reiterated that the primary consideration in evaluating third-party beneficiary claims is the intent of the contracting parties, which must be established by clear and direct evidence. *Owner Operator*, 59 S.W.3d at 69, 70. Thus, it must appear "that the contract was made and entered into directly and primarily for the benefit of such third person." *Id*. at 69 (quoting *Abraham v. Knoxville Television, Inc.*, 757 S.W.2d 8, 11 (Tenn. Ct. App. 1988)).

Titan avers that, because it was entitled to receive a percentage of the ceding commission pursuant to the express terms of the contract between Chubb Re and TIG, it was an intended beneficiary of the contract. According to the counter-complaint, Titan "could have been entitled to a bonus of an additional amount based on the loss ratio, including all interest accrued on the [escrow] account" had TIG maintained the policy of reinsurance with Chubb Re. Although the contract referred to Titan regarding possible ceding commissions, the policy contained an express provision against third party beneficiaries:

> ARTICLE XXIII – THIRD PARTY BENEFICIARY
> Except as expressly provided for in ARTICLE XXVI – INSOLVENCY, the provisions of this Contract are intended solely for the benefit of the Company [TIG] and the Reinsurer [Chubb Re]. Nothing in this Contract shall in any manner create or be construed to create any obligations to or establish any rights against any party to this Contract in favor of any other persons not party to this Contract.

After careful review of the amended counter-complaint and the reinsurance contract attached thereto, we do not find direct and clear evidence that the primary intent of the contracting parties, TIG and Chubb Re, was that the contract benefit Titan. We agree with the chancellor that any commissions Titan may have earned pursuant to the contract between TIG and Chubb Re were merely incidental to the purpose of that contract, which was to secure reinsurance policies for TIG. Titan failed to establish that it was an intended beneficiary of the contract and, therefore, failed to state a claim for breach of contract.

Tortious Interference with Business Relationships

Next, we examine whether Titan's amended counter-complaint states a cause of action for tortious interference with business relationships. Expressly adopting the tort of intentional

interference with business relationships in *Trau-Med*,[5] the Supreme Court of Tennessee set forth the necessary elements to impose liability:

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and finally, (5) damages resulting from the tortious interference.

Trau-Med, 71 S.W.3d at 701 (internal citations omitted).

In the instant case, the amended counter-complaint specifically alleged that TIG "engaged in a systematic, wilful [sic], intentional and tortious course of conduct and interfering with the business relationships of . . . Titan Underwriting, with its clients for whom it had written policies of insurance with TIG . . . ." Titan further alleged that TIG intended to cause the breach or termination of Titan's business relationships with improper motive or improper means and cited the following "willful and conscious" conduct to support its claim:

> a) failing to adjust and otherwise complete the administration of claims submitted to it by Titan;
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> b) withholding benefits due and owing to beneficiaries of policies issued by Titan;
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> c) attempting to appropriate Titan's clients with the goal of terminating its relationships with those clients, and dealing with those clients directly in an attempt to circumvent using Titan's services and to put Titan out of business; and
>
> d) failing to pay the premiums on the policy of reinsurance, with the goal of putting Titan out of business.

Applying the elements in *Trau-Med* to this case, we have determined that Titan failed to sufficiently state a claim against TIG for intentional interference with its business relationships. Titan failed to establish it had existing relationships with the specific clients with whom it claims TIG interfered. Titan acted as TIG's agent. The policies of insurance were between TIG and the policy holders; therefore, TIG owed a duty under those policies directly to the policy holders. We agree with the trial court that Titan further failed to establish TIG had an improper motive or used improper means to interfere. In order to sufficiently plead the fourth element, Titan was required

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[5]In *Trau-Med*, the Court reviewed the historical and jurisdictional development of the tort and noted that Tennessee first recognized that liability should be imposed for improperly interfering with noncontractual business relationships in 1915. *Trau-Med*, 71 S.W.3d at 698 (citing *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915)). Nevertheless, Tennessee courts had never had occasion to expressly uphold a claim based on intentional interference with business relationships. *Id*. at 699.

to demonstrate that TIG's *predominant purpose* was to injure Titan. *See Trau-Med*, 71 S.W.3d at 701 n.5 (emphasis added). Simply stating that TIG's conduct was "willful and conscious" and that TIG's goal was to put Titan "out of business" does not demonstrate that TIG's predominant purpose in terminating the relationship with Titan, withholding benefits to policy beneficiaries, and cancelling the reinsurance policy with Chubb Re was to injure Titan.

Defamation

After TIG filed the initial lawsuit, it attempted to obtain its underwriting, claim and premium files from Titan. Titan claimed the files contained proprietary information specific to Titan and the court agreed, denying TIG's multiple requests. In January 2002, TIG sought to obtain this information from various state departments of insurance. Titan's claim for defamation is based on letters TIG sent to the Commissioner of Insurance for the State of Wisconsin and the Kentucky Department of Insurance.

"To establish a *prima facie* case of defamation, the plaintiff must prove that (1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Hibdon v. Grabowski*, 195 S.W.3d 48, 58 (Tenn. Ct. App. 2005) (citing *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999)); *see also* Restatement (Second) Torts §§ 558, 580B (1977).[6] Whether a communication is capable of being understood as defamatory is a question of law for the court. *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978). When making this determination, courts construe "the allegedly libelous words in their 'plain and natural' import." *Id*. n.7. Furthermore:

> [f]or a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element 'of disgrace.'

McWhorter v. Barre, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003) (quoting *Stones River Motors, Inc. v. Mid-South Publ'g Co., Inc.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983)).

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[6]Pursuant to the Restatement, the publisher of a false and defamatory communication concerning a private person will be subject to liability if, but only if, he:

> (a) knows that the statement is false and that it defames the other,
> (b) acts in reckless disregard of these matters, or
> (c) acts negligently in failing to ascertain them.

Restatement (Second) Torts § 580B (1977).

In this case, the trial court first dismissed Titan's claim for defamation because the counter-complaint failed to plead the substance of the slanderous statements and contained "nothing more than conclusions without a single fact." After reviewing Titan's amended counter-complaint, the court determined that the letters did not support a claim for defamation because their purpose was to secure information in order to service claims on TIG stop-loss policies. Lastly, the court explicitly noted that "it now has required Titan to produce this information from its files."

In support of its claim, Titan alleged that TIG's letters mischaracterized the status of the litigation to third parties which damaged Titan's business reputation and interfered with its business relationships:

> 10. That the Plaintiff/Counter-Defendant, TIG, has knowingly sent letters to various state insurance regulatory agencies which contain false and malicious statements, knowing that the statements were false and with reckless disregard for the truth of the statement[s], or with negligence in failing to ascertain the truth of the statements, including but not limited to incorrect statements that Titan Underwriting has been withholding information and documentation necessary for TIG to process claims, and blatantly mischaracterizing the status of this litigation. The letters falsely infer that a restraining order against Titan Underwriting has been issued, and completely omits any reference to the fact that this Court ruled three times that TIG was not entitled to access to the reference files and issued a protective order to that effect.
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> . . . .
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> Upon information and belief, similar malicious and false oral statements have been made to beneficiaries of the policies issued by Titan Underwriting on behalf of TIG, particularly in response to inquiries as to why benefits have not been paid. Said malicious and false statements were made by the Plaintiff/Counter-Defendant in a conscious effort to interfere with the lawful and appropriate business practices of Titan Underwriting, and were overtly designed to compromise its ability to service its clients, the business relationship it enjoyed with its clients, and to cause economic losses and damages.

Titan attached as exhibits to its amended counter-complaint copies of TIG's letters to Wisconsin and Kentucky and letters from the Wisconsin and Kentucky agencies referencing TIG's "complaint" and "letter of concern." We cannot conclude that the statements in TIG's letters rise to the level necessary to sustain a claim for defamation. No statement or representation referenced in the amended counter-complaint or found in the letters can be reasonably construed to disgrace or injure Titan's reputation in the community or to subject Titan to public ridicule and contempt. Titan therefore failed to state a claim for defamation upon which relief can be granted.

Negligence

Lastly, Titan claims it sufficiently pled a cause of action for negligence. Titan relies on the following paragraphs in the amended counter-complaint to support its claim for negligence:

> 13. That TIG has breached its duty to the Defendant/Counter-Plaintiff, Titan Underwriting, by failing to use ordinary care in the administration, processing and payment of claims in a timely manner, and by negligently failing to perform its contractual duties.
>
> 14. That the Defendant/Counter-Plaintiff charges and avers that as the direct and proximate result of the aforestated acts of the Plaintiff/Counter-Defendant, it has incurred loss of business, lost profits, loss of reputation and good will, and other damages.

As Titan points out, the trial court made no direct reference to a claim for negligence in the orders dismissing the counter-complaint. However, the July 17, 2003 order dismissed Titan's "amended counterclaims," which included any purported claim for negligence. "No claim for negligence can succeed in the absence of any one of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause." *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). Titan failed to establish that TIG owed it a duty of care in administering its own policies. As previously noted, TIG owed a duty to its clients and policy holders, not Titan.

CONCLUSION

After carefully reviewing the facts as alleged in the amended counter-complaint, we have concluded that Titan failed to state a claim upon which relief could be granted for breach of contract or tortious interference with contract, for intentional interference with business relationship, for defamation, and for negligence. We affirm the order of dismissal pursuant to Tenn. R. Civ. P. 12.02(6). Costs of appeal are assessed against the appellant, Titan Underwriting Managers, LLC, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE