

[Cite as Benjamin v. Ernst & Young, LLP, 2004-Ohio-3811.]

IN THE COURT OF CLAIMS OF OHIO

ANN H. WOMER BENJAMIN, etc. :

Plaintiff :

v. :

ERNST & YOUNG, LLP :

Defendant :

and :

FOLEY & LARDNER, et al. :

Defendants/Counterclaim :

Plaintiffs :

v. :

OHIO DEPARTMENT OF INSURANCE :

Counterclaim Defendant :

: : : : : : : : : : : : : : : :

CASE NO. 2003-08886-PR
Judge Joseph T. Clark

DECISION

{¶1} This action was originally filed in the Franklin County Court of Common Pleas by plaintiff, Ann H. Womer Benjamin, Superintendent (the superintendent) of the Ohio Department of Insurance (ODI), in her capacity as liquidator of the American Chambers Life Insurance Company (ACLIC). The case arises out of liquidation proceedings brought by the superintendent against ACLIC. Defendant Foley & Lardner and Michael H. Woolever (F&L) provided legal representation to ACLIC during the course of the ODI pre-liquidation investigation. Defendant Ernst & Young LLP (E&Y) is an independent accounting firm hired by the

superintendent to conduct a financial audit of ACLIC in connection with the insolvency investigation.

{¶2} In the complaint against F&L, plaintiff alleges that F&L's legal representation of ACLIC fell below generally accepted standards ascribed to the legal community; that F&L breached its fiduciary duty to ACLIC; and that F&L accepted a \$25,000 preferential payment from ACLIC. On July 15, 2003, E&Y filed a motion to dismiss the complaint or, in the alternative, to stay this action and compel arbitration pursuant to the terms of its agreement with ACLIC's parent company. The case was subsequently removed to this court pursuant to R.C. 2743.03(E) when F&L filed a counterclaim against plaintiff, alleging common law indemnity and contribution based upon the negligence of the superintendent in connection with the pre-liquidation investigation. Thereafter, on September 25, 2003, F&L filed a motion to dismiss the counterclaim and to strike certain affirmative defenses. The original papers on removal were filed in this court on January 23, 2004. The parties have briefed the issues and the case is now ripe for review.

{¶3} In construing a complaint upon a motion to dismiss for failure to state a claim, the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190. Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling her to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242. The unsupported conclusions of a complaint are, however, not admitted and are insufficient to withstand a motion to dismiss. *Mitchell*, supra at 193.

{¶4} The standard to apply for a dismissal pursuant to Civ.R. 12(B)(1) is whether plaintiff has alleged any cause of action cognizable by the forum. See *Avco Financial Services Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65.

{¶5} In its counterclaim, F&L asserts claims against the superintendent based upon the alleged breach of the superintendent's statutory duty as regulator/rehabilitator. According to the counterclaim, the superintendent's breach of duty caused or contributed to ACLIC's insolvency and the superintendent is therefore liable to F&L for indemnity and/or contribution. With respect to the alleged preference payment, F&L has asserted claims for negligent misrepresentations and estoppel.

{¶6} As a threshold issue, the court must address its jurisdiction to hear the claims asserted in F&L's counterclaim. Each of F&L's claims and defenses in this case is premised upon the conduct of the superintendent in connection with the insolvency proceedings and subsequent judgment of liquidation entered in the common pleas court. The jurisdiction of the court of common pleas relative to liquidation proceedings is set forth very broadly in R.C. 3903.04 as follows:

{¶7} "(A) No delinquency proceeding shall be commenced under this chapter by anyone other than the superintendent of insurance of this state. No court has jurisdiction to entertain, hear, or determine any delinquency proceeding commenced by any other person.

{¶8} "(B) No court of this state has jurisdiction to entertain, hear, or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or restraining order, preliminary injunction, or permanent injunction, *or other relief preliminary to, incidental to, or relating to delinquency proceedings* other than in accordance with sections 3903.01 to 3903.59 of the Revised Code. ***

{¶9} "(E) All actions authorized in sections 3903.01 to 3903.59 of the Revised Code shall be brought in the court of common pleas of Franklin county." (Emphasis added.)

{¶10} R.C. 3903.18 provides in relevant part:

{¶11} "(A) An order to liquidate the business of a domestic insurer shall appoint the superintendent of insurance and his successors in office as liquidator and shall direct the liquidator forthwith to take possession of the assets of the insurer and to administer them under the general supervision of the court. The liquidator shall be vested by operation of law with the title to all of the property, contracts, and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the entry of the final order of liquidation. ***."

{¶12} Under R.C. 3903.21(A), the liquidator may do any of the following:

{¶13} "***

{¶14} "(6) Collect all debts and moneys due and claims belonging to the insurer, wherever located. For this purpose, the liquidator may do any of the following:

{¶15} "(a) Institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; ***

{¶16} "(13) Prosecute any action which may exist in behalf of the creditors, members, policyholders, or shareholders of the insurer against any officer of the insurer or any other person; ***."

{¶17} As noted above, F&L's counterclaim in this case arises directly from the superintendent's conduct during the pre-liquidation investigation. At first blush, F&L's claims are clearly "related to" the liquidation action in the court of common pleas. However, under the statutory framework set out above, once the order of liquidation is made, the superintendent is appointed liquidator, and it was thus in the superintendent's capacity as the statutory liquidator that this action was brought against F&L in the court of common pleas.

{¶18} In the motion to dismiss, plaintiff argues that because the claims for indemnity and contribution alleged in F&L's counterclaim are directed at the actions

and/or omissions of the superintendent in her capacity as regulator/rehabilitator, the counterclaim fails to state a claim upon which relief can be granted against plaintiff in her capacity as liquidator. The court agrees.

{¶19} Given the statutory framework under which the superintendent is authorized to regulate, rehabilitate, liquidate, and thereafter pursue claims on behalf of insolvent insurers, the superintendent in her capacity as statutory liquidator is not subject to a counterclaim arising from acts or omissions of the superintendent in her capacity as regulator/rehabilitator. In the view of the court, F&L's claim for indemnity and contribution against the superintendent should have been filed as a third-party action in the court of common pleas. The fact that the superintendent is a natural person who may be represented by the same legal counsel in either of her capacities does not relieve F&L of its burden to commence the action against the superintendent.

{¶20} Furthermore, to the extent that the counterclaim seeks an order from this court permitting F&L to retain the \$25,000 paid to it by ACLIC, F&L's allegations are that the superintendent, in her capacity as regulator/rehabilitator made false statements and/or promises to F&L regarding F&L's continued representation of ACLIC; that F&L continued to represent ACLIC in reliance on these representations; that F&L received payments for legal work performed for ACLIC; and that the liquidator should be estopped from seeking return of those payments made to it by ACLIC. Given the factual allegations set forth in plaintiff's complaint, F&L's counterclaim asserts equitable defenses to plaintiff's claim rather than affirmative claims for relief. Moreover, as stated above, the superintendent in her capacity as liquidator has brought this action against F&L. The representations of the superintendent as set forth in the counterclaim were made in respect to her capacity as regulator/rehabilitator. Indeed, the superintendent had not yet been

appointed liquidator at the time the alleged misrepresentations were made. As a separate legal entity, plaintiff is not answerable for that conduct.

{¶21} Additionally, to the extent that F&L's counterclaim can be considered a claim against plaintiff, R.C. 2743.03(A) provides two bases for the jurisdiction of the Court of Claims over claims for equitable relief:

{¶22} "(1) *** The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code ***.

{¶23} "(2) If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action. ***." See *Upjohn Co. v. Ohio Dept. of Human Serv.* (1991), 77 Ohio App.3d 827, 834.

{¶24} In *Santos v. Ohio Bureau of Workers' Compensation*, 101 Ohio St.3d 74, 2004-Ohio-28, the Supreme Court of Ohio held that claims seeking recovery of monies wrongfully collected or held by the state are equitable in nature and may be heard in the courts of common pleas. Similarly, in this case, that portion of F&L's counterclaim against plaintiff which seeks to retain alleged preference payments is the logical equivalent of a claim to recover monies wrongfully held by the state. Thus, the courts of common pleas have jurisdiction to entertain that claim. *Santos*, supra.

{¶25} In short, since the counterclaim seeks indemnity and/or contribution from the superintendent in her capacity as regulator/rehabilitator and since the counterclaim against the liquidator does not seek relief in the form of money damages, this case does not justify removal under R.C. 2743.03(E). Accordingly,

plaintiff's motion to dismiss F&L's counterclaim shall be granted and F&L's counterclaim shall be dismissed.

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For the reasons set forth in the decision filed concurrently herewith, the counterclaim filed by defendants/counterclaim plaintiffs against plaintiff is DISMISSED. Furthermore, the court finds that the state is no longer a defendant in this action. Accordingly, pursuant to R.C. 2743.03(E)(2), this case is REMANDED to the Franklin County Court of Common Pleas and the clerk is directed to return the original papers thereto. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay.

Court costs are assessed against defendants/counterclaim plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

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