IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff, v. Reliance Insurance Company, Defendants.	:	NO. 269 M.D. 2001

ORDER

AND NOW, this __ day of _____, 2005, upon consideration of the Liquidator's Preliminary Objections to Golder Associates Corporation's Petition to Intervene in the above captioned action, said preliminary objections are SUSTAINED.

JAMES GARDNER COLINS, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff, v. Reliance Insurance Company, Defendant.	:	NO. 269 M.D. 2001

MEMORANDUM OF LAW IN SUPPORT OF
PRELIMINARY OBJECTIONS OF M. DIANE KOKEN

M. Diane Koken, in her official capacity as Statutory Liquidator of Reliance Insurance Company (In Liquidation) ("Liquidator), pursuant to Pennsylvania Rule of Civil Procedure 1028 and Pennsylvania Rule of Appellate Procedure 106, hereby submits her Memorandum of Law in Support of Preliminary Objections of M. Diane Koken to the Petition to Intervene of Golder Associates Corporation ("Golder").

I. INTRODUCTION

The sole issue raised by Golder's Petition to Intervene is whether Golder should be permitted to intervene into the Reliance liquidation proceeding nearly four years after Reliance was placed in liquidation to assert a right to direct access to reinsurance, as opposed to proceeding under the proof of claim or direct access processes already in place.

As described below, any right that Golder asserts that it may have to reinsurance proceeds can be resolved under the procedures established by this Court's Liquidation Order and Direct Payment Order and Guidelines, pursuant to which Golder can assert any legal arguments

it chooses to advance in support of its position, including, for example, that it has rights by virtue of a novation. Pursuant to 40 P.S. § 221.5(a), this Court has the authority to order such discovery and motion practice as may be necessary to safeguard Golder's rights, if any, through the established procedures without intervention. *See* 40 P.S. § 221.5(a). Golder should not be permitted to circumvent the legal procedures available and required for all claimants.

In addition, as the Liquidator's Preliminary Objections set out more fully below, Golder's Petition is not legally sufficient. In fact, Golder failed to meet any of the tests necessary to establish cut-through rights under either the statute or the case law.

For these reasons, Reliance's Preliminary Objections should be granted, and Golder's Petition should be stricken in its entirety.

II. STATEMENT OF FACTS

A. The Underlying Policy and Claim

Effective December 31, 1997 to December 31, 2000 Reliance Insurance Company of Illinois, a former subsidiary of Reliance which has been merged with Reliance (referred to collectively as "Reliance") provided Golder with consultants environmental liability coverage on a claims-made and reported basis under Reliance Policy No. NTF250958705 ("Reliance Insurance Policy"). On August 12, 1999 Golder made a claim under the Reliance Insurance Policy for potential claims asserted against it by the Lummi Nation related to a 1999 archeological investigation for the City of Blaine, Washington's proposed wastewater treatment plant expansion ("Lummi Claim"). On September 15, 1999, Reliance, through ECS Claims Administrator, Inc. assumed its duty to defend the Lummi Claim under a reservation of rights.

B. The Reinsurance Agreements

Golder's Petition, which incorporates its Application for Relief, seeks direct access to a single reinsurance agreement under which XL Reinsurance America ("XL Re")

formerly known as NAC Reinsurance Corporation allegedly assumed 100% of the risk under the Reliance Insurance Policy. In fact, no such reinsurance agreement with XL Re exists, but the Liquidator identifies those reinsurance agreements under which she believes Golder is seeking, or would seek, direct access.

1. ECS Reinsurance Agreement

Effective from October 1, 1987, Reliance entered into a reinsurance agreement with ECS Reinsurance Company, Ltd. ("ECS Re") for liabilities with respect to policies written by Reliance through its agent Environmental Compliance Services, Inc. ("ECS Reinsurance Agreement").[1] Over the years ECS Re's participation under the ECS Reinsurance Agreement varied, but with respect to the Lummi Claim, ECS Re's participation was 30% of each loss not to exceed $2 million plus allocated claims expenses. Excess of $2 million, Reliance's liabilities were reinsured to approximately 19 reinsurance companies and 14 Lloyd's Syndicates. XL Re wrote 2% of the layer of coverage for $7.5 million excess of $5 million.

2. XL Quota Share Agreement

Effective June 1, 1999 through December 2000, Reliance entered into a quota share reinsurance agreement with XL Re, with respect to policies incepting on or after June 1, 1999 and providing for 100% reinsurance of Reliance's net retained liabilities—i.e., that portion of the risk retained by Reliance that was not ceded to reinsurers—on business written through ECS Underwriting, Inc. or affiliated ECS companies ("XL Quota Share Agreement"). Other reinsurance agreements already in place for this business were not affected by XL Quota Share Agreement.

[1] Beginning in 1987, Reliance entered into an agency agreement with Environmental Compliance Services, Inc. ("ECS Services") under which ECS Services acted as Reliance's agent for the purpose of producing and underwriting certain policies issued by Reliance.

3. XL Portfolio Transfer Agreement

Effective October 1, 1999, Reliance entered into a portfolio transfer reinsurance agreement with XL RE ("XL Portfolio Transfer Agreement"). Pursuant to the XL Portfolio Transfer Agreement, XL Re assumed 100% of Reliance's net retained liability with respect to policies in force as of June 1, 1999, but only with respect to claims occurring or reported after October 1, 1999. Other reinsurance agreements already in place for this business were not affected by the XL Portfolio Transfer Agreement.

C. **The Liquidation Proceeding**

On October 3, 2001 Reliance was placed in liquidation by Order of this Court ("Liquidation Order"), pursuant to Article V of the Insurance Act.

1. Proof of Claim Process

Both the Pennsylvania Insurance Act and this Court's Liquidation Order provide that all claims against Reliance must be resolved through a proof of claims process under the supervision of the Commonwealth Court. 40 P.S. §§ 221.37-221.46. Consistent with that requirement, on February 8, 2002, this Court entered an order establishing preliminary procedures for the selection of referees and masters to hear claims against the Estate and later supplemented its February 8, 2002 Order by establishing a comprehensive procedure under its September 9, 2002 Order for the resolution of all claims against Reliance and the Liquidator. On August 20, 2003, Golder submitted "contingent" proofs of claim. Golder made the proofs of claim "contingent" on the outcome of litigation related to the Lummi Claim. In response, the Liquidator advised Golder that it could not evaluate the claim until Golder notified the Liquidator of the outcome of the underlying litigation.

2. Direct Payment Order and Guidelines

When Reliance was placed in liquidation, this Court also assumed jurisdiction over all assets of the Reliance estate. Order of Liquidation at ¶ 5. Reinsurance proceeds are assets of the estate that are to be paid to the estate. *Id.* at ¶ 9. The statutory exception to the general rule is found at 40 P.S. § 221.34. The statute provides:

> Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate except when the reinsurance contract provided for direct coverage of an individual named insured and the payment was made in discharge of that obligation.

40 P.S. § 221.34 (emphasis supplied).

The Liquidator developed Guidelines for the Enforcement of 40 P.S. § 221.34, which establish an orderly process involving both the Liquidator and the Court, to consider, on a "case-by-case basis," depending upon the unique facts and circumstances of this transaction, whether an insured is entitled to a direct payment of reinsurance proceeds ("Direct Payment Guidelines"). On April 26, 2002, the Commonwealth Court issued an Order approving the Direct Payment Guidelines proposed by the Liquidator. The Direct Payment Guidelines allow an informal investigation and discussion between the parties in an effort to relieve the Court of significant involvement in the process while allowing the Court to retain ultimate approval authority. Golder has not exhausted the process established by the Direct Payment Guidelines.

3. Common Law Application of 40 P.S. § 221.34

The Commonwealth Court has also considered when an insured may be entitled to direct payments from a reinsurer under 40 P.S. § 221.34. Under a trilogy of cases, *Koken v. Legion Insurance Company*, 831 A.2d 1196 (Pa. Commw. Ct. 2003), *aff'd*, No. 204 MAP 2003, 2005 Pa. LEXIS 1479 (Pa., July 19, 2005)("Legion"), *Koken v. Reliance Insurance Company*, 846 A.2d 167 (Pa. Commw. 2004) ("SCIPIE"), and *Koken v. Reliance Insurance Company*, No. 269

M.D. 2001, (Pa. Commw. October 5, 2005) ("Lexington"), Memorandum Opinion and Order, the Commonwealth Court has delineated specific circumstances under which the conduct of the parties may create contractual privity to the original reinsurance contract, even where the specific requirements of 40 P.S. § 221.34 are not met. These cases are discussed more fully below, in connection with demonstrating the inadequacy of Golder's pleading. Briefly stated, unlike in Golder's situation, the Court identifies situations in which the policyholder and the reinsurer establish a direct relationship, without the insurer's participation, and the reinsurer knowingly and deliberately becomes the ultimate risk taker through specific agreement with the policyholder. That is not the case presented here.

III. ARGUMENT

The Liquidator preliminarily objects to the Intervention Petition on the following three grounds:

First, under Pa. R.Civ.P. 1028(4), the Liquidator preliminarily objects in the nature of a demurrer because Golder has failed to state a legally enforceable interest in the XL Quota Share Agreement or the XL Portfolio Transfer Agreement (collectively "XL Reinsurance Agreements"). Golder has not (and cannot) establish that the Lummi Claim falls within the coverage of the XL Reinsurance Agreements and even if the Lummi Claims fall within the coverage of the XL Reinsurance Agreement or any of Reliance's other reinsurance agreements, Golder does not have rights to direct payment. Without waiver of Reliance's right to dispute any of the facts averred by Golder in its Intervention Petition or the accompanying "Application for Relief," the XL Reinsurance Agreements do not cover Golder's claim for the Lummi Claim as set forth below.

Second, under Pa.R.Civ.P. 1028 (a)(2), the Liquidator preliminarily objects because Golder's Petition failed to conform to law or rule of this Court. To the extent that

Golder seeks direct access to reinsurance proceeds, Golder was obligated to comply with this Court's Direct Payment Guidelines.

Third, under Pa.R.Civ.P. 1028 (a) (7), the Statutory Liquidator preliminarily objects on the grounds that Golder failed to exhaust its statutory remedies under the Insurance Act.

A. **Preliminary Objection in the Nature of a Demurrer**

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure permits the filing of preliminary objections for legal insufficiency of a pleading in the nature of a demurrer. Golder moved to intervene under Rule 2327(4), alleging that it has a "legally enforceable interest" which "may be affected." As the party seeking intervention, Golder must present a prima facie case for intervention. *Egenrieder v. Ohio Casualty Group*, 581 A.2d 937, 942 (Pa. Super. 1990).

1. **Golder's Allegations in Support Of Its Claims Are Unsupported**

(a) **Golder Has Not Supported Its Claim That It Has a Legally Enforceable Interest in the Reinsurance Agreements**

In ruling on a petition for intervention, this Court need not accept unproven factual allegations. Pa. R. Civ. P 2329; *Egenrieder v. Ohio Casualty Group*, 581 A.2d 937, 942 (Pa. Super. 1990). Golder has not alleged any facts which support its claims that Golder has a legally enforceable interest in the XL Reinsurance Agreements. Although Golder has alleged, based on hearsay, that Golder was "informally advised" that "XL Capital [the ultimate parent of NAC Re] was assuming 100% of the risk under the Reliance Insurance Policy," Golder nevertheless acknowledges that it received confirmation only that "reinsurance agreements existed between XL Capital, itself or through its subsidiaries, and Reliance of Illinois." Application for Relief, ¶ 29. In fact, while two reinsurance agreements exist between Reliance and XL Re for the business underwritten by ECS Services for Reliance, those reinsurance

agreements do not cover the Lummi Claim, since the Lummi Claim falls outside the coverage period and the terms of those agreements. To the extent that Golder's Petition and Application for Relief can be read to seek direct access to other Reliance reinsurance agreements, such as the ECS Reinsurance Agreement, and not the XL Reinsurance Agreements, that may cover the Lummi Claim, Golder has not established any entitlement to those other Reliance reinsurance agreements.

(b) Golder Has Not Supported Its Claim That There Was a Novation Or That It Is a Third Party Beneficiary

The right of a policyholder to circumvent Reliance and seek direct access to the reinsurers of Reliance for recovery under its insurance policy (as opposed to proceeding under a proof of claim in the estate) is grounded in two sources: either the insolvency statute of Pennsylvania, 40 P.S. § 221.34 (which enforces the express terms of the reinsurance contract), or the case law that has developed in the Legion and the Reliance estates relating to the limited instances in which a policyholder not meeting the statute are permitted a "cut through."

As reflected in its Petition, and addressed below, Golder has not followed the procedures for triggering the first method, the application for direct access under 40 P.S. § 221.34 by following the Guidelines. This, in and of itself, warrants dismissal of Golder's Petition in favor of the Court-designated process. However, it should also be noted that the reinsurance contract to which Golder seeks third-party rights negates Golder's position. Golder is nowhere identified or included as a party entitled to any rights under the Reliance Reinsurance Agreements. Indeed, the Third Party Beneficiary clauses of the XL Reinsurance Agreements specifically exclude any such rights by any one other than Reliance or XL Re. *See Koken v. Legion,* 831 A.2d 1236-1237 ("a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless, the

circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance" (citations omitted)); *Villanova, Ltd. v. Covergys*, No. 01-1213, 2001 U.S. Dist. LEXIS 11647, *5 (E.D. Pa. Apr. 24, 2001) (attached hereto as Exhibit A) (when parties to a contract explicitly provide that there are no third party beneficiaries, there are no third party beneficiaries). Accordingly, Golder cannot establish the threshold contractual legal basis upon which to base a request for intervention.

In addition, neither has Golder alleged any facts sufficient to support its claim that it is entitled to a cut through outside of the Guideline process. The allegations of the Intervention Petition and the Application for Relief are devoid of any allegations which establish a direct relationship between Golder and Reliance's reinsurers. At best, the pleadings merely allege that an agent of Reliance (ECS Services) acted on Reliance's behalf in its dealing with Golder.[2] There are no allegations that any reinsurers of the Reliance Reinsurance Agreements "actively participated" with Golder on the Lummi Claim. Further, Golder is neither identified nor included as a party entitled to any rights under the Reliance Reinsurance Agreements.

Because of the absence of these allegations (and the facts which would support the allegations), Golder has failed to establish a legal basis for a common law cut-through. Measured against *Legion*, *SCPIE* and *Lexington*, Golder's Petition falls short. In *Legion*, the Court allowed a cut-through where the policyholder itself set out to create a specific insurance framework which deliberately contemplated the use of reinsurance as the real insurance and the

[2] ECS Services was later acquired by XL Capital. However, at all relevant times, ECS was acting in its capacity as Reliance's agent.

reinsurer as the ultimate risk-taker on the specific deal. In *SCPIE*, this Court permitted direct access when the subsequent conduct of the policyholder and the reinsurer with respect to the risk at issue created an actual direct insurance relationship sufficient to "novate," *i.e.*, substitute and replace, the reinsurer as the insurer. Neither circumstance is present in respect to the Lummi Claim, nor have they been pled, and as this Court emphasized in its recent decision *Lexington*, absent such a direct relationship, direct access is not permitted. *Lexington*, Memorandum Opinion and Order at 8.

Unquestionably, Golder does not plead any basis on which to assert that the so-called "*Legion*" factors are present. In *Legion*, the Honorable Judge Hannah Leavitt made clear that several specific factors were the *sine qua non* of her decision. Judge Leavitt expressed four key facts: 1) fronting; "where the reinsurer, not Legion, bears 100% of the underwriting risk, 2) "the reinsurer was chosen by the policyholder"; 3) the policyholders, "through their consultants and agents," chose their reinsurer as "the intended source of their coverage, and 4) "the fronting company was not even known until after the reinsurance was placed and all material terms decided by the Policyholder Intervenors and their reinsurers." *Legion* at 1238.[3] Judge Leavitt underscored these factors: "This was the case with all the Policyholder Intervenors." *Id.* Golder has alleged none of these factors in its Petition because they do not exist. Even Golder concedes that Reliance selected its reinsurers; Golder knew nothing about them until Golder "heard" about their existence from Reliance's agent.

Likewise, Golder cannot meet the novation standard. In reaching its conclusion that the actions of the parties amounted to a novation of the XL Reinsurance Agreements, and for the creation of a direct insurance relationship with XL Re, Golder is mistaken in its reliance on

[3] Elsewhere, Judge Leavitt notes that participation in the claims handling function is also a factor.

SCIPIE. In *SCPIE* and *Lexington*, this Court sought factual markers evidencing that the relationship between reinsurer and policyholder was sufficiently direct, specific and different from that of the typical policyholder to warrant diversion from the ordinary proof of claim process. In holding that direct access was appropriate in *SCPIE*, this Court emphasized (1) that the reinsurer requested to assume the direct liability of the original insured; (2) that the insured had little or no contact with the insurer; and (3) that the insured dealt exclusively with the reinsurer. Conversely, in holding the direct access was inappropriate in *Lexington*, this Court emphasized that if the insured has not established a direct relationship between itself and the reinsurer, there is no novation so as to permit direct access. Golder has not provided, and cannot produce, any evidence of a direct relationship with XL Re.

SCPIE and *Lexington* recognize the essential elements of a novation, which are the deliberate displacement and extinction of a valid contract, the substitution for it of a valid new contract, either between the same parties or by the introduction of a new creditor or debtor, a sufficient legal consideration for the new contract, and the consent of the parties. *See Yoder v. T.F. Scholes, Inc.*, 404 Pa. 242 (1961). Here, the actions of ECS Services, XL Capital, and Reliance did not extinguish the reinsurance agreements already in place for the reinsured business. Without this essential element, i.e., the extinguishment of the old contract, there can be no novation. *See Advanced Management Research, Inc. v. Emanuel*, 439 Pa. 385, 391 (1970).

(c) Golder's Interests, If Any, Are Adequately Represented By The Proof Of Claim And/Or Direct Payment Process

Moreover, under Rule 2329, even if a potential intervener meets the requirements of Rule 2327, a petition for intervention can be denied, if:

> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
>
> (2) the interest of the petitioner is already adequately represented; or
>
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice, the trial or the adjudication of the rights of the parties.

Pa. R. Civ. P. 2329; *See also, Township of Radnor v. Radnor Recreational*, LLC, 859 A.2d 1 (Pa. Commw. 2004). Rule 2329(2) provide grounds for denying the Petition because Golder's interests, if any, are adequately represented by the proof of claim and/or direct payment process. *See Pennsylvania Ass'n Rural and Small Schools v. Casey*, 613 A.2d 1198 (Pa. 1992) (affirming denial of petition to intervene in school funding dispute because petitioners legally enforceable interest to maintain state subsidies was already adequately represented). Golder must assert a right of direct payment of Reliance's reinsurance proceeds through the direct payment process approved by this Court.

Additionally, the proof of claim process remains available to Golder even if Golder is unsuccessful in asserting its right to direct payment. Indeed, on August 20, 2003, Golder submitted a contingent proof of claim seeking coverage under the Reliance Insurance Policy for the Lummi Claims (Attached as Exhibit E to the Liquidator's Preliminary Objections). Once Reliance receives additional information requested of Golder regarding payment of the Lummi Claim, Reliance will issue a notice of determination in the ordinary course.

B. **Preliminary Objection for Failure to Conform to Law or Rule of Court Pursuant to Pa.R.C.P. 1028(a)(2) to Golder's Petition**

Rule 1028(a)(2) permits the filing of preliminary objections for failure to conform to law or rules of court. In its Petition, Golder seeks leave to intervene so that it can assert a right of direct payment of Reliance's reinsurance proceeds. As such, Golder's Petition falls directly within the scope of this Court's Order of April 26, 2002 adopting the Direct Payment Guidelines pursuant to 40 P.S. § 221.34. The Guidelines provide, inter alia, that:

> Where a binding written contract document creating the reinsurance relationship between Reliance and a reinsurer contains a provision relating to the direct payment of the claims of an insured by the reinsurer, and the reinsurer or insured desires that such direct payment be made by the reinsurer, the reinsurer or insured must first submit a written request to the Liquidator seeking approval of direct payment by the reinsurer.

Direct Payment Order and Guidelines at ¶ 3. If the Liquidator approves the request for direct access, the Liquidator submits to this Court its recommendation for approval which the Court will respond to within twenty days of submission. Direct Payment Order and Guidelines at ¶ 5. If the Liquidator denies the request for direct access, objections to that denial may be filed with this Court within thirty days of receipt of the notice of denial of a direct payment request. Direct Payment Order and Guidelines at ¶ 7.

Golder has failed to follow this Court's Direct Payment Guidelines. A request for direct payment must be in compliance with the Court's Direct Payment Guidelines. Golder may not seek to intervene in lieu of following the Court-dictated process. The "desire to pursue a preferred litigation strategy or defense theory [is] not an interest entitling [policyholders] to intervene." *Pennsylvania Ass'n of Rural and Small Schools v. Casey,* 613 A.2d 1198 (Pa.

1992).[4] Accordingly, the Intervention Petition should be stricken because Golder failed to comply with this Court's Direct Payment Guidelines.

C. Preliminary Objection For Failure To Exhaust A Statutory Remedy Pursuant to Pa.R.C.P. 1028(a)(7)

Pa.R.Civ.P. 1028(a)(7) permits the filing of preliminary objections for failure to exercise or exhaust a statutory remedy. 40 P.S. § 221.34 provides a statutory basis for direct access to reinsurance.

As stated previously, the Direct Payment Guidelines were adopted to enforce this right under statute. Pennsylvania courts have uniformly held that where a remedy or method of procedure is provided by statute, such as here, the statutory remedy or procedure must be strictly pursued and exclusively applied. *Bartron v. Northampton County*, 342 Pa. 163, 168, 19 A.2d 263, 265 (Pa. 1941); *Concerned Taxpayers of Beaver County v. Beaver County Bd. of Assessment Appeals*, 75 Pa. Cmwlth. 443, 446-47, 462 A.2d 347, 349 (Pa. Cmwlth. 1983); *Department of Environmental Resources v. Williams*, 57 Pa. Cmwlth. 8, 11, 425 A.2d 872-73 (1981). Golder has not exhausted the Direct Payment Guidelines and is barred from seeking relief outside of the prescribed procedures.

[4] To the extent that Golder asserts that it followed the Guidelines by informally contacting Reliance on December 14th, 2004, Golder's failure to object to Reliance's advice that Golder did not meet the Guidelines, on December 21st, 2004, likewise precludes its present request for intervention.

IV. CONCLUSION

For the foregoing reasons, M. Diane Koken, in her official capacity as Statutory Liquidator of Reliance (In Liquidation) respectfully requests that this Court deny the Petition to Intervene.

Dated: November 14, 2005

Respectfully Submitted,

Deborah F. Cohen, Esquire
Michael Olsan, Esquire
Isla Luciano, Esquire
PEPPER HAMILTON LLP
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2799
215-981-4470
215-981-4750 (fax)

Attorneys for Plaintiff

M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania in her official capacity as Statutory Liquidator of Reliance Insurance Company (In Liquidation)

EXHIBIT A

LEXSEE 2001 US DIST LEXIS 11647

VILLANOVA, LTD. d/b/a NOVA INTERNATIONAL SERVICES v. CONVERGYS

CIVIL ACTION NO. 01-1213

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2001 U.S. Dist. LEXIS 11647

April 24, 2001, Decided
April 24, 2001, Filed, Entered

DISPOSITION: [*1] Motion of defendant Convergys Customer Management Group Inc. (incorrectly denominated "Convergys") to dismiss plaintiff's complaint GRANTED.

LexisNexis(R) Headnotes

COUNSEL: For VILLANOVA, LTD., PLAINTIFF: STEPHEN E. SKOVRON, BOCHETTO & LENTZ, P.C., BRYAN R. LENTZ, BOCHETTO & LENTZ, PHILADELPHIA, PA USA.

For CONVERGYS, DEFENDANT: JOHN T. SALVUCCI, T. JAMES BROOKS, COZEN AND O'CONNOR, PHILADELPHIA, PA USA.

JUDGES: Harvey Bartle, III, J.

OPINIONBY: Harvey Bartle, III

OPINION:

MEMORANDUM

Bartle, J.

April 24, 2001

Plaintiff Villanova, Ltd. d/b/a Nova International Services ("Nova") has sued defendant Convergys Customer Management Group Inc. n1 ("Convergys") for damages (1) for negligence and (2) as the third party beneficiary of a contract between Convergys and Bently Myers International ("BMI"). Before the court is Convergys' motion under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* to dismiss for failure to state a claim upon which relief can be granted or in the alternative to dismiss due to a forum selection clause in the Convergys-BMI contract. Since Nova has now withdrawn its negligence claim, we focus on the third-party beneficiary claim.

n1 Defendant was apparently incorrectly denominated in the complaint simply as "Convergys."

[*2]

For purposes of the pending motion to dismiss, we accept as true all well pleaded facts in the complaint. See *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*. We may also consider the undisputed written contract between Convergys and BMI even though it was not attached to the plaintiff's pleading. See *In re Rockefeller Ctr. Props., Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999)*.

Nova, a marketing company which specializes in membership discount services, alleges that it contracted with BMI, a company that telemarkets health and fitness products, to have BMI promote Nova's discount membership program with BMI's customers. According to the complaint, BMI subcontracted with Convergys to conduct the telemarketing campaign for Nova. Convergys erroneously sent Nova a list of 34,238 customers who Convergys had identified as having requested a Nova membership kit. As a result, Nova sent out these kits to people who were not interested and lost a significant amount of money.

The parties apparently agree that the law of Pennsylvania applies to the issue of third party beneficiaries since they cite only Pennsylvania [*3] cases. In Pennsylvania, the Supreme Court has adopted the Restatement (Second) of Contracts which provides:

Intended and Incidental Beneficiaries

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions of the parties and either
>
> > (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> >
> > (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1979); n2 see *Scarpitti v. Weborg, 530 Pa. 366, 609 A.2d 147, 150 (Pa. 1992); Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744, 751 (Pa. 1983).* Examining the scope of the Restatement and its previous decision in Guy, the Pennsylvania Supreme Court explained in Scarpitti:

> We hold that a party becomes a third party beneficiary only where both parties to the contract [*4] express an intention to benefit the third party in the contract itself, ... *unless,* the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

609 A.2d at 150-51 (internal citation omitted).

> n2 *Section 315 of Restatement (Second) of Contracts* provides: "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee."

Thus, we must look to the explicit or implicit intent of the contractual parties, either within the contract or in the surrounding circumstances, in order to determine who, if anyone, is an intended third party beneficiary. Unfortunately for Nova, the contract between Convergys and BMI, of which it claims to be a third party beneficiary, states, [*5] "The representations, warranties, covenants and agreements of the parties set forth in this Agreement are not intended for, nor shall they be for the benefit of or be enforceable by, any person not a party hereto." Consequently, because the parties to the contract explicitly provided that there were to be no third party beneficiaries, Nova cannot successfully claim to be one.

Finally, we note that there seems to be no reason why Nova cannot obtain redress by suing BMI, the party with whom it contracted. See *Scarpitti, 609 A.2d at 151.*

We will dismiss plaintiff's complaint.

ORDER

AND NOW, this 24th day of April, 2001, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant Convergys Customer Management Group Inc. (incorrectly denominated "Convergys") to dismiss plaintiff's complaint is GRANTED pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure.*

BY THE COURT:

Harvey Bartle, III

J.

CERTIFICATE OF SERVICE

I hereby certify that, on November 14, 2005, a true and correct copy of the Memorandum of Law in Support of the Preliminary Objections of M. Diane Koken was served by first class mail, postage prepaid, to the following:

John N. Ellison, Esquire
Shruti D. Engstrom, Esquire
Anderson Kill & Olick, P.C.
1600 Market Street
25th Floor
Philadelphia, PA 19103

Attorneys for Golder Associates Corporation

I hereby certify that, on November 14, 2005, a Notice of Filing, in compliance with the Commonwealth Court's Order of April 1, 2004 was faxed to the Master Service List

Michael Olsan