Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: **ESCV2010-00992-A**

RE: Degeorge et al v Holden Oil Company et al

TO: Heather K. Rowell, Esquire
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NOTICE OF DOCKET ENTRY

You are hereby notified that on **01/29/2013** the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT HOLDEN OIL COMPANY'S COUNTERCLAIM -Arbella's motion for summary judgment on Holden's Chapter 93A counterclaim is ALLOWED, and judgment of dismissal shall enter thereon in Arbella's favor. (Timothy Feeley, Justice). Copies mailed 1/29/13
Dated at Salem, Massachusetts this 29th day of January, 2013.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY: Carlotta McCarthy Patten
Assistant Clerk

Telephone: (978) 744-5500

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2010-00992-A

ARBELLA MUTUAL INSURANCE COMPANY,
As Subrogee of Dwight DeGeorge and Lisa DeGeorge,
Plaintiff

vs.

HOLDEN OIL COMPANY and
BOB MCGEE PLUMBING AND HEATING COMPANY,
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT HOLDEN OIL COMPANY'S COUNTERCLAIM

BACKGROUND

The amended complaint in this action [D. 7] is brought by plaintiff Arbella Mutual Insurance Company ("Arbella"), as subrogees of Dwight and Lisa DeGeorge (the "DeGeorges" or the "insureds"). Arbella carried a homeowners' insurance policy insuring the DeGeorges and their Lynnfield residence (the "residence") during the time the policy was in effect. It is alleged in the amended complaint that defendant Bob McGee Plumbing and Heating Company ("McGee") installed a new oil burner at the DeGeorges' residence on February 8, 2007, and that McGee and defendant Holden Oil Company ("Holden") were engaged by the DeGeorges to perform service,

inspection, maintenance and repair of the oil burner heating system at the DeGeorges' residence. It is further alleged that on February 21, 2008 and April 7, 2008, two soot "puff backs" occurred at the residence, causing significant damages to the residence and personal property therein, and requiring alternative housing for the DeGeorges. Arbella claims to have paid its insureds in excess of $682,527 under the homeowners' insurance policy. As subrogees of the DeGeorges, Arbella alleges negligence and failure to warn claims against Holden (as well as McGee).

Holden's answer includes a Chapter 93A counterclaim against Arbella. [D. 8]. Holden alleges that Arbella is in the business of insurance and is subject to G. L. c. 9A, § 11. Holden further alleges that Arbella filed the negligence claims against Holden knowing that there is no factual or legal basis for liability against Holden. Holden further alleges that by authorizing this action against Holden in disregard of its own expert's opinion Arbella violated G. L. c. 93A, § 11. Holden seeks treble damages and costs and fees, including attorneys' fees incurred in defending Arbella's claims.

Now before the court, with leave granted to file late [D. 25], is Arbella's motion for summary judgment on Holden's Chapter 93A counterclaim. [D. 31]. A non-evidentiary hearing was held on January 22, 2013. For reasons discussed below, Arbella's motion for summary judgment is **ALLOWED**.

DISCUSSION

A motion for summary judgment should be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). The moving party, here Arbella, bears the burden of affirmatively demonstrating the absence of a triable issue and that the record entitles it to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16–17 (1989). A party who does not bear the burden of proof at trial, like Arbella, may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 714 (1991). Here, Arbella contends that the acts complained of by Holden did not occur while the parties were engaged in the conduct of trade or commerce, as required by G. L. c. 93A, § 11. Once the moving party "establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact." *Pederson*, 404 Mass. at 17. The nonmoving party cannot defeat a motion for summary judgment by resting on the pleadings and mere assertions of disputed facts. *LaLonde* v. *Eissner*, 405 Mass. 207, 209 (1989). In

deciding motions for summary judgment, the court may consider pleadings, deposition transcripts, answers to interrogatories, admissions on file, and affidavits. Mass. R. Civ. P. 56(c). The court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 370-371 (1982).

There are no material facts in dispute. A business relationship of some sort existed between the DeGeorges, as consumers, and Holden, as a servicer of oil heating systems. Arbella insured the DeGeorges and paid them monies under a homeowners' insurance policy, and is now seeking reimbursement of the monies it paid to its insureds by means of the subrogation claims asserted in the amended complaint. No business relationship existed, and no business was transacted, between Arbella and Holden. The only relationship between Arbella and Holden is that of plaintiff and defendant in this subrogation action.

The question for decision by this court is strictly a legal one: whether the pursuit of an allegedly meritless subrogation claim falls within the boundaries of Chapter 93A and permits the Chapter 93A counterclaim brought by Holden against Arbella.[1] "Although whether a particular set of acts, in their factual setting , is unfair

[1]The merit or lack of merit of Arbella's negligence and failure to warn subrogation claims are not before the court, and this court's ruling herein does not suggest any view this court might take someday, if the issue is presented for decision, on that issue. The only question for decision is

or deceptive is a question of fact, *Spence* v. *Boston Edison Co.*, 390 Mass. 604, 616 (1983), the boundaries of what may qualify for consideration as a [Chapter] 93A violation is a question of law. See *Mechanics Nat'l Bank of Worcester* v. *Killeen*, 377 Mass. 100, 108-110 (1979)." *Chervin* v. *The Travelers Insurance Company*, 448 Mass. 95, 112 (2006), citing *Schwanbeck* v. *Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 414 (1991); *S.C.*, 412 Mass. 703 (1992).

Chapter 93A makes unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce unlawful. G. L. c. 93A, § 2. Chapter 93A contains consumer protection remedies that are not available to Holden. G. L. c. 93A, § 9 ("[a]ny person, other than a person entitled to bring action under section eleven of this chapter, . . . "). Persons engaged in business are authorized to being actions under Section 11 of Chapter 93A. That provision provides in pertinent part:

> Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of any unfair method of competition or any unfair or deceptive act or practice declared unlawful by section two . . . "

Holden has pled its counterclaim under Sections 2 and 11 of Chapter 93A. As

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whether among possible responses to an allegedly meritless subrogation claim, Holden has a claim against Arbella that is cognizable under Chapter 93A.

provided in Section 2, Holden must allege and ultimately show that Arbella engaged in unfair methods of competition, or unfair or deceptive acts or practices, **in the conduct of any trade or commerce.** The law of this Commonwealth establishes beyond doubt that a Section 11 claim requires more than two parties, each of whom engages in trade or commerce. The alleged unlawful conduct must take place, as Section 2 requires, in the conduct of trade or commerce. To violate Section 2 of Chapter 93A, the acts or practices complained of must be "perpetrated in a business context." *Arthur D. Little, Inc.* v. *East Cambridge Savings Bank*, 35 Mass. App. Ct. 734, 743 (1994), citing *Lantner* v. *Carson*, 374 Mass, 606, 611 (1978) ("where the Legislature employed the terms 'persons engaged in the conduct of any trade or commerce,' it intended to refer specifically to individuals acting in a business context"). In *Arthur D. Little*, where the only relationship between the parties was their contact in the context of litigation, the court found there could be no Chapter 93A violation. The same is true here. Where no relationship exists between Arbella and Holden outside of this litigation, there can be no Chapter 93A violation by Arbella.

In *First Enterprises, LTD.* v. *Cooper*, 425 Mass. 344 (1997), a dispute arose among three founding members of a closely held business ("First Enterprises") that operated a Dunkin' Donuts franchise. The written shareholder agreement provided

for an exclusive process for redeeming shares of stock. Shortly thereafter, one of the founding members left the business and retained a lawyer, the defendant Cooper, to provide legal services regarding the termination of the member's relationship with First Enterprises. Negotiations broke down between First Enterprises and Cooper, and Cooper filed a lawsuit on behalf of his client alleging that First Enterprises breached a promise to pay his client a lump sum, in lieu of the installment payments called for in the share redemption agreement. Cooper's client ultimately represented himself *pro se* in the litigation and dismissed the action, with prejudice. First Enterprises then sued Cooper for allegedly filing a baseless lawsuit on behalf of his client. The Supreme Judicial Court reversed the trial court's refusal to dismiss the Chapter 93A (Section 11) claim brought by First Enterprises against Cooper. The Court, relying on *Arthur D. Little,* agreed that "the mere filing of litigation does not of itself constitute 'trade or commerce.'" *Id.* at 347. The Court found that First Enterprises did not show that Cooper had a commercial relationship with it or that Cooper's actions interfered with "trade of commerce." *Id.* Here, the same can be said. No commercial relationship existed between Arbella and Holden, and Arbella's actions in filing this subrogation action did not interfere with trade or commerce.[2]

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[2]In *Refuse & Environmental Systems, Inc.* v. *Industrial Services of America, Inc.*, 932 F. 2d 37 (1st Cir. 1991), the First Circuit did not question the trial court's finding that by "bringing the state lawsuit in spite of the evidence," the defendants willfully committed an unfair and deceptive practice

If the above authority were not enough to dispose of Holden's counterclaim as a matter of law, the Supreme Judicial Court's decision in *Chervin*, 448 Mass. at 112-113, unequivocally establishes that Holden's Chapter 93A counterclaim cannot stand as a matter of law. *Chervin* involved an allegedly meritless subrogation claim brought by an insurance company against a physician, alleging medical malpractice. The insurance company paid worker's compensation benefits to an injured person, and the subrogation claim alleged that the work related injuries (and the payments to the injured person) were caused by the malpractice of the physician. Judgment for the physician entered when the injured party refused to cooperate with the insurance company and judgment of dismissal entered for failure to respond to interrogatories. The physician then commenced a suit against the insurance company and its lawyer asserting that the filing of the malpractice subrogation action constituted malicious prosecution, abuse of process, and a violation of Chapter 93A, Sections 2 and 11.

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under 93A. However, that case did not involve a subrogation claim. It involved a competitive relationship between two companies, a previously existing company and a new company that was created by three former employees of the first company. The first company sued the new company and its officers with the intent to discourage the loss of its customers to the new company. After a trial, the first company and/or two of its officers were found liable for an antitrust violation, interference with the new company's prospective contractual relations, slander, and abuse of process. Among other conclusions reached by the First Circuit, it found that the jury could reasonably have inferred that an officer found liable for abuse of process knowingly and intentionally used a baseless lawsuit to attempt to drive the new company out of business. Thus, in that federal case, defendants used a baseless lawsuit against a direct competitor to attempt to drive that competitor out of business. Obviously, the conduct in that federal case, including the baseless lawsuit, was perpetrated in a business context, and interfered with trade or commerce. The same cannot be said on the facts now before this court.

After summary judgment was granted to the insurance company and its lawyer, the physician appealed the dismissal of the malicious prosecution and Chapter 93A claims. The Court held that summary judgment on the malicious prosecution claim should not have been granted. *Id.* at 102. The Court also found that the trial court's dismissal of the Chapter 93A claim could be upheld with "only brief discussion." *Id.* at 112. The Court stated:

> While the plaintiff correctly maintains that part of the defendant's business is litigating subrogation claims, he cannot establish that he had any relevant business transaction with the defendant which would serve as a predicate for liability under G. L. C. 93A, §§ 2 and 11. [internal citations omitted] In that regard, a business relationship was not created by the defendant's filing of the subrogation action that only asserted a medical malpractice claim. CF. *First Enters., Ltd.* v. *Cooper*, 425 Mass, 344, 348 (1997). Dismissal of the plaintiff's claim under G. L. c. 93A was proper.

Chervin, 448 Mass. at 112-113.

Only one final point needs to be made. Holden claims that Arbella, as subrogee, stands in the shoes of the DeGeorges, and the DeGeorges and Holden had a commercial relationship based on the service contract for the oil heating system. That is true, but it does not permit Holden's Chapter 93A counterclaim against Arbella. Standing in the shoes of the Degeorges permits Arbella to assert the DeGeorges' claims against Holden, and permits Holden to assert against Arbella any defenses it has against the claims of the DeGeorges. The court will assume it also

permits Holden to assert against Arbella any counterclaims it has against the DeGeorges. Standing in the shoes of the subrogor does not permit Holden to assert against Arbella a Chapter 93A claim that it could not assert against the DeGeorges, and Holden clearly has no such claim. The DeGeorges are consumers and not engaged in trade or commerce for purposes of Section 11 of Chapter 93A, and the counterclaim makes no allegations of any Chapter 93A violations by the DeGeorges. Thus, as Holden has no Chapter 93A claim that could be asserted against the DeGeorges, and makes no allegations that the DeGeorges violated Chapter 93A, the fact that Arbella stands in the shoes of the DeGeorges does not permit Holden to assert a Chapter 93A counterclaim against Arbella. The Chapter 93A counterclaim against Arbella is based on Arbella's actions only, and not on any commercial relationship or transaction with the DeGeorges. The decision of the Supreme Judicial Court is *Chervin* is dispositive of the summary judgment issue before this court.

ORDER

Arbella's motion for summary judgment on Holden's Chapter 93A counterclaim [D. 31] is **ALLOWED**, and judgment of dismissal shall enter thereon in Arbella's favor.

Timothy Q. Feeley
Associate Justice of the Superior Court

January 24, 2012