IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RAIMO CORPORATION and/or ISAAC LEIZEROWSKI	:	November Term 2003
Plaintiffs,	:	No. 611
v.	:	Commerce Program
INDIAN HARBOR INSURANCE COMPANY, BROKERS SURPLUS AGENCY, INC., LS&L INCORPORATED, and HERBERT J. RIFE, AGENT	:	Control Nos. 022073, 022074
Defendants.	:	

O R D E R

AND NOW, this 15th day of July, 2005, upon consideration of Defendant Brokers Surplus Agency, Inc.'s Motion for Summary Judgment (Control No. 022073), Defendant Indian Harbor Insurance Company's Motion for Summary Judgment (Control No. 022074), Plaintiffs' Response, and Defendant's Sur-Reply, and in accordance with the attached memorandum, it is hereby **ORDERED** and **DECREED** that:

1) The Motion for Summary Judgment of Defendant Brokers Surplus Agency, Inc. is **GRANTED** and Count II of the Complaint is **DISMISSED** against this Defendant; and

2) The Motion for Summary Judgment of Defendant Indian Harbor Insurance Company is **GRANTED** and Count I of the Complaint is **DISMISSED.**

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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MEMORANDUM

Presently before the court are two motions for summary judgment, one brought by Defendant Brokers Surplus Agency, Inc. ("Brokers Surplus") and the other brought by Defendant Indian Harbor Insurance Company ("Indian Harbor"). Plaintiffs Raimo Corporation ("Raimo") and/or Isaac Leizerowski challenge the motion of Indian Harbor but did not respond to Brokers Surplus' motion.

BACKGROUND

The genesis of this litigation is an accident that occurred at the Dragon Inn Restaurant (the "Restaurant") in Philadelphia. The Restaurant is operated by Raimo and Isaac Leizerowski is Raimo's sole shareholder. As a "glatt kosher" restaurant, the Restaurant requires certification from a rabbinical authority. A moshgiach is a trained individual who performs the task of certification.

On April 11, 2002, Asher Klein was serving as a moshgiach at the Restaurant. While performing his duties, Asher Klein was injured in an accident. Asher Klein filed

suit against Raimo alleging that he was injured in the course of his duties as an employee. Following withdrawal of this lawsuit, Asher Klein brought a second lawsuit against Raimo alleging that he was injured in the course of his duties as an independent contractor.

Several months before Asher Klein was injured, in conjunction with a planned move of the Restaurant, Isaac Leizerowski sought to reduce the Restaurant's insurance costs. He asked his brother, Abraham Leizerowski ("Leizerowski"), to get a new quote for the insurance policy. Leizerowski had previously used Defendant LS&L Incorporated ("LS&L") and contacted Herbert J. Rife ("Rife") of LS&L about the Restaurant's insurance needs.

On September 14, 2001, Rife informed Leizerowski he had found an insurance carrier that would provide fire and liability coverage for less than the prior insurance company and bound the coverage as of that date. Rife gave further payment and coverage information to Leizerowski which revealed that Indian Harbor was providing the fire and liability insurance (the "Policy") via Brokers Surplus on September 18. Also, on this date, Rife informed Leizerowski that he had not placed the workers' compensation insurance for the Restaurant. Following further communications between Leizerowski and Rife, Plaintiffs believed that workers' compensation coverage had been acquired.

When Plaintiffs notified Defendants Rife, LS&L, and Indian Harbor of the accident involving Asher Klein, however, they learned that no worker's compensation coverage had been obtained. Indian Harbor denied coverage under the Policy for Plaintiffs' claim arising out of the accident.

In their Complaint, Plaintiffs bring a single count against Indian Harbor seeking a declaratory judgment that Indian Harbor must defend, reimburse, and provide coverage to Plaintiffs in the Asher Klein lawsuits (Count I). Plaintiffs also bring a single count against Rife, LS&L, and Brokers Surplus alleging negligence for failure to obtain proper insurance coverage (Count II).

DISCUSSION

Pursuant to Pa. R.C.P. 1035.2, a party may move for summary judgment when (1) there is no genuine issue of material fact as to a necessary element of the cause of action or defense or (2) an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense. The court must review the entire record in the light most favorable to the nonmoving party and resolve all genuine issues of material fact against the moving party. Basile v. H & R Block, Inc., 563 Pa. 359, 365, 761 A.2d 1115, 1118 (2000).

In its motion for summary judgment, Brokers Surplus asserts that it owed no duty of care to Plaintiffs with respect to the insurance policies. Since the primary element in a negligence cause of action is the defendant' duty of care to the plaintiff, Althaus v. Cohen, 562 Pa. 547, 552, 756 A.2d 1166, 1168 (2000), the lack of such a duty will result in dismissal of any negligence claims.

The Althaus court identified several discrete factors to determine whether a duty of care exists in a particular instance. These factors are the relationship between the parties, the social utility of the actor's conduct, the nature of the risk imposed and foreseeability of the harm incurred, the consequences of imposing a duty upon the actor, and the overall public interest in the proposed solution. Id., at 553, 1169. In certain

instances, a single factor may be determinative. See Atcovitz v. Gulph Mills Tennis Club, Inc., 571 Pa. 580, 812 A.2d 1218 (2002) (analysis based upon single Althaus factor); Brisbine v. Outside In Sch. of Experiential Educ., Inc., 799 A.2d 89 (Pa. Super. 2002) (same).

The first Althaus factor considers the relationship between the parties. According to the Complaint, Plaintiffs used Leizerowski to find a new insurance policy, Cmpl., ¶¶26, 35, and he only communicated with Rife, not Brokers Surplus, Cmpl., ¶¶28 – 36. Testimony confirms this lack of communication between the parties as Brokers Surplus had no contact with Leizerowski, Leizerowski Dep., 6/3/04, at 44-45, or Isaac Leizerowski, Isaac Leizerowski Dep., 6/30/04, at 58-59. Thus, the record reveals that there was no relationship between the Plaintiffs and Brokers Surplus.

The third component of the Althaus analysis examines whether the defendant could have foreseen the plaintiff's injury. The record shows that Brokers Surplus was only asked to provide information about property and liability coverage for the Restaurant. Leizerowski spoke with Rife about obtaining property and liability coverage for the Restaurant. Rife Dep., 1/4/05, at 12-13. Rife contacted Brokers Surplus to get the requisite pricing information. Rife Dep., 1/4/05, at 13-15. Brokers Surplus provided Rife what he requested. Rife Dep., 1/4/05, at 19. Brokers Surplus was not asked to provide information about workers' compensation insurance for the Restaurant, Rife Dep., 1/4/05, at 16-17, and Plaintiffs knew this to be the case, Compl., ¶¶32, 33. Clearly, the evidence shows that Brokers Surplus could not have foreseen the injury to Plaintiffs.

The lack of relationship between Plaintiffs and this Defendant, coupled with this Defendant's inability to see the injury suffered by Plaintiffs, leads to the conclusion that this Defendant owed no duty of care to Plaintiffs under Althaus. Therefore, Defendant

Brokers Surplus' motion for summary judgment on Count II of the Complaint will be granted.

In its motion for summary judgment, Defendant Indian Harbor contends that Asher Klein's claims against Raimo are not covered by the Policy. Plaintiffs argue that the exclusion cited by this Defendant does not apply and coverage should be provided.[1]

To determine whether a claim is covered by an insurance policy, the court first determines the scope of coverage. Biborosch v. Transamerica Ins. Co., 412 Pa. Super. 505, 509-10, 603 A.2d 1050, 1052 (1992). The insurance policy should be read to avoid ambiguities and the language should not be tortured to create an ambiguity. Curbee, Ltd. v. Rhubart, 406 Pa. Super. 505, 509, 594 A.2d 733, 735 (1991). Under the Policy, the relevant coverage exclusion states: "EXCLUSION – INDEPENDENT CONTRACTORS/SUBCONTRACTORS You are not covered for claims, loss, costs or expense arising out of the actions of independent contractors/subcontractors for or on behalf of any insured." Def. Ex. A. Plaintiffs contend this clause "excludes claims that only arise from an 'action' of an independent contractor/subcontractor which caused harm to another party." Pls. Br., at 6. This reading of the clause strips the words of their ordinary meaning. By contrast, a straightforward reading of the clause excludes coverage when the independent contractor acts for the insured.

After determining the scope of coverage under the Policy, the court examines the allegations in the Complaint. Biborosch, at 509-10, at 1052. According to the Complaint, Asher Klein was an independent contractor at the time of his injury. Compl., ¶¶15, 23; Pls. Br., at n.1. In addition, under Pa. R.C.P. 4014, Plaintiffs' failure to respond

[1] Plaintiffs also argue that Rife is Indian Harbor's agent, but there is no evidence in the record to support this allegation. The Complaint does not allege that Rife is an agent of Indian Harbor, but does allege that Rife is the agent of the other two Defendants, Compl., ¶7. Rife's testimony reveals that he works for LS&L, Rife Dep., 1/4/05, at 11.

to Defendant's request for admissions means that Asher Klein was an independent contractor at the time of his injury.[2] At the time of his injury, Asher Klein was serving as a moshgiach, performing a task required by the Restaurant to maintain its "glatt kosher" status. Compl., ¶¶10, 17, 19. Thus, Asher Klein was an independent contractor acting for Plaintiffs at the time of his injury. Under the Policy exclusion, there is no coverage in such situations. Without coverage under the Policy, Indian Harbor has no duty to defend or indemnify Plaintiffs. Mutual Ben. Ins. Co. v. Haver, 555 Pa. 534, 538, 725 A.2d 743, 745 (1999). Summary judgment will be granted to Defendant.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

[2] Eleven months after Defendant made its request for admission, Plaintiff admitted that Asher Klein was an independent contractor. Pls. Br., Ex. 1.