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

JOHN J. DOUGHERTY & SONS, INC., and DEANNA DOUGHERTY	:	JANUARY TERM, 2004
	:	No. 00560
Plaintiffs,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 010102
HARLEYSVILLE INS. CO., and HOLMAN ENTERPRISES,	:	
Defendants.	:	

ORDER

AND NOW, this 8TH day of March, 2005, upon consideration of defendant Harleysville Insurance Company's Motion for Summary Judgment, plaintiffs' response thereto, the memoranda in support and opposition, and all other matters of record, and in accord with the Memorandum Opinion filed contemporaneously herewith, it is hereby **ORDERED** that said Motion is **GRANTED**, all of plaintiffs' claims against Harleysville Insurance Company are **DISMISSED** with prejudice, [and Harleysville Insurance Company shall refund to plaintiffs the premiums they paid with respect to the 2000 Jaguar.]

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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MEMORANDUM OPINION

Plaintiffs claim to have been defrauded of a Year 2000 Jaguar automobile (the "2000 Jaguar") that was listed as a covered vehicle on plaintiff John J. Dougherty & Sons, Inc.'s (the "Corporation's") commercial automobile insurance policy (the "Policy") issued by defendant Harleysville Insurance Company ("Harleysville"). Plaintiff Deanna Dougherty is the wife of John J. Dougherty, who is a non-party and a principal of the Corporation. *See* Harleysville's Motion for Summary Judgment ("HMSJ"), Ex. A, p. 10. Mrs. Dougherty is an employee of the Corporation, and she is listed as a scheduled operator under the Policy. *See id.*, Ex. G; Amended Complaint, ¶¶ 2, 11.

Mrs. Dougherty was the record owner of the 2000 Jaguar, which she purchased in or about October, 2001 and received sometime on the Spring of 2002, from non-party Melvin Shaw. *See* Amended Complaint, ¶¶ 6, 9. After the vehicle was purchased, the Corporation leased the 2000 Jaguar from Mrs. Dougherty for $1.00, and Mrs. Dougherty operated it. *See id.*, ¶¶ 9, 12. In addition, the Corporation requested that Harleysville add the 2000 Jaguar to the list of covered vehicles under the Policy. *See id.*, ¶ 11. On or about May 13, 2002, the 2000 Jaguar

was added to the Policy as a listed commercial vehicle owned by the Corporation. *See* HMSJ, Ex. G, Declarations, p. 5. The Corporation paid premiums to Harleysville for coverage of the 2000 Jaguar. *See* Amended Complaint, ¶ 14.

In or about April, 2003, the Corporation notified Harleysville that the 2000 Jaguar had been stolen in or about September 2002, which was during the coverage period of the Policy. *See id.*, ¶ 34. Harleysville initially disclaimed coverage on the basis that the vehicle had not been stolen, but rather had been willingly consigned by plaintiffs to Shaw. *See, id.*, Ex. J. However, Shaw was later arrested for fraud, and Harleysville decided that the Corporation had "been the victim of a theft that was covered under" the Policy and commenced an investigation of plaintiffs' claim. *See id.*, Ex. K. Ultimately, Harleysville never paid plaintiffs any money on their claim for theft of the 2000 Jaguar. *See id.*, ¶ 39.

As a result of Harleysville's failure to pay, plaintiffs brought this action, alleging that Harleysville breached its contract with plaintiffs, breached the implied duty of good faith and fair dealing,[1] acted in bad faith, and violated the Unfair Trade Practices and Consumer Protection Law (the "UTPCPL"). Harleysville now claims in its Motion for Summary Judgment that plaintiffs' claims should be dismissed because: 1) the 2000 Jaguar was not properly listed as a covered vehicle under the Policy; 2) plaintiffs suffered no loss because they traded in the 2000

[1] Plaintiffs' claim for breach of the duty of good faith and fair dealing must be dismissed as duplicative of their breach of contract and statutory bad faith claims. *See* Murphy v. Duquesne Univ. of the Holy Ghost, 565 Pa. 571, 598, 777 A.2d 418, 434 (2001)("This obligation of good faith is tied specifically to and is not separate from the duties a contract imposes on the parties."); Toy v. Metro. Life Ins. Co., 863 A.2d 1, 14 (Pa. Super. 2004) (Pennsylvania "has not recognized a private cause of action, in tort, for alleged breaches of the duty of good faith and fair dealing.")

Jaguar for a 2003 Jaguar; and 3) plaintiffs turning over the 2000 Jaguar to Shaw does not constitute a theft.[2]

> Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999).

The Schedules that form part of the Policy list the 2000 Jaguar as a covered commercial auto owned by the Corporation. *See* HMSJ, Ex. G., 5/13/02 Schedules, p. 5. The Schedules further provide that the corporation has "Comprehensive" coverage for auto types "2" and "8". *Id*. Auto type "2" consists of "only those 'autos' you[3] own." *Id.*, Policy, p. 1. Auto type "8" consists of "only those 'autos' you lease, hire, rent or borrow. This does not include any 'auto' you lease, hire, rent or borrow from any of your 'employees' . . . or members of their households." *Id.* Autos that fall within categories "2" and "8" are "covered autos" under the Corporation's "Comprehensive" coverage, which includes coverage "for 'loss' to a covered 'auto' . . . caused by . . . Theft." *Id.*, p. 5. However, since Mrs. Dougherty held title to the 2000 Jaguar and leased it to the Corporation, and since she is both an employee of the Corporation and a member of the household of an employee (Mr. Dougherty), the 2000 Jaguar is expressly excluded from coverage for theft under the Policy.

[2] The last two arguments are without merit because plaintiffs paid Shaw $45,000 for the 2000 Jaguar and $70,000 for the 2003 Jaguar, which were, apparently, the full prices for those vehicles, but plaintiffs ended up with possession of only one of the vehicles, the 2003 Jaguar. Furthermore, Shaw allegedly promised to sell the 2000 Jaguar and to refund to plaintiffs the $45,000 they paid for it, but he never gave them the money. If he never intended to refund their money, then he may be guilty of theft of the 2000 Jaguar.

[3] "You" as used in the Policy means the insured Corporation. *See* HMSJ, Ex. G, Declarations, p. 1.

The Policy also contains an Endorsement entitled "Lessor – Additional Insured and Loss Payee," (the "Lessor Endorsement") which provides that

> Any "leased auto" designated or described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire or borrow. . . . "Leased auto" means an "auto" leased or rented to you . . . under a leasing or rental agreement that requires you to provide direct primary insurance for the lessor.

HMSJ, Ex. G, Lessor Endorsement, p. 2. However, neither the 2000 Jaguar nor Mrs. Dougherty are listed on that Endorsement or the corresponding Schedule; only GMAC is listed as an "Additional Insured – Lessor" with respect to a Chevy Trailblazer. *See id.*, 5/13/02 Schedules, p. 7. Because the 2000 Jaguar does not fit the definition of a covered auto under the Policy, there is no theft coverage for it. The fact that it was listed incorrectly in the Policy as a commercial auto owned by the Corporation does not create coverage for it.

Plaintiffs claim that Harleysville should be estopped from disclaiming coverage because it allowed the 2000 Jaguar to be listed on the Schedules as a commercial vehicle owned by the Corporation, accepted the premiums the Corporation paid with respect to it, and thereby lulled plaintiffs into thinking that they had coverage for the 2000 Jaguar. However, it was the Corporation's duty to submit complete and accurate information to Harleysville in applying for insurance and in applying for a modification of the insurance policy to add the 2000 Jaguar. Harleysville had no independent duty to double check the title information provided by the insured. *See* Lehman v. Lancaster County Mut. Ins. Co., 45 Pa. Super. 375, 376 (1911) ("It was [the insured's] duty clearly to inform the [insurer] in regard to [the insured's] title to the property on which [the insured] sought insurance, and no duty rested on [the insurer] to investigate the title [the insured] described in [the] application. If there was a misstatement made, or a fact concealed in regard to that important matter, the consequences must be borne by the one on whom the responsibility rested," namely the insured.)

If the Corporation wished to obtain coverage for the 2000 Jaguar, it should have submitted information about both the vehicle and the owner/lessor, Mrs. Dougherty, to Harleysville, and Harleysville would then have had an opportunity to inform plaintiffs whether it viewed the vehicle as insurable under the Lessor Endorsement or as precluded under the terms of the main Policy denying coverage for employee-owned vehicles. Instead, the Corporation made a material omission with respect to who held title to the 2000 Jaguar, and that omission entitles Harleysville to disclaim coverage for the 2000 Jaguar [and entitles the Corporation to receive a refund of the premiums it paid that are attributable to the 2000 Jaguar.] *See* Restatement (Second) of Contract § 164 (1981) ("If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."); Duda v. Home Ins. Co. of N.Y., 20 Pa. Super. 244, 249-50 (1902) (where "the interest of the insured in the property was not truly stated in the policy . . . there was a misrepresentation or concealment in regard to a material fact or circumstance concerning the subject matter of the insurance.").

CONCLUSION

Since no disputed issues of material fact exist as to the lack of coverage for the 2000 Jaguar under the Policy, Harleysville is entitled to judgment as a matter of law on plaintiffs' claims.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.