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

M. DIANE KOKEN, in her official capacity as Insurance Commissioner of the Commonwealth of Pennsylvania, as Liquidator of RELIANCE INSURANCE COMPANY (IN LIQUIDATION),	:	APRIL TERM, 2004
	:	NO. 5968
	:	(Commerce Program)
Plaintiff,	:	Control No. 101209
v.	:	
COMMONWEALTH PROFESSIONAL GROUP, INC.,	:	
Defendant.	:	

O R D E R

AND NOW, this 9th day of February, 2006, upon consideration of plaintiff's Motion for Summary Judgment, the response in opposition, the briefs in support and opposition, all other matters of record, and in accord with the simultaneously issued Opinion, it is **ORDERED** that the Motion is **Granted, in part**, and defendant's defenses based upon an exclusive agency arrangement are **Dismissed.**

It is further **ORDERED** that the remainder of the Motion is **Denied**, and plaintiff's claims for conversion and punitive damages are **Dismissed**.

The parties shall appear in Courtroom 513, City Hall, on March 6, 2006 at 12:30 a.m. for a Pre-trial Conference pertinent to the determination of the premiums due and owing to plaintiff.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ……..…… February 9, 2006

Plaintiff Reliance Insurance Company ("RIC")[3] brought this action against its former agent Commonwealth Professional Group, Inc. ("CPG") for breach of an Agency Agreement under which CPG was authorized to solicit applications for insurance and to collect premiums for RIC. Specifically, RIC claims that CPG failed to remit $427,815.53 in premiums due to RIC under the Agency Agreement. In addition to the breach of contract claim, RIC has asserted claims for breach of fiduciary duty and conversion. RIC demands punitive, as well as actual, damages.

[3] RIC is in liquidation, so this action was brought by M. Diane Koken in her official capacity as Insurance Commissioner of the Commonwealth of Pennsylvania as Liquidator of RIC.

In its Answer, CPG raised the defenses of recoupment and estoppel. CPG alleges that RIC breached the exclusivity provisions of the Agency Agreement and incorrectly calculated the premiums due. RIC has moved for summary judgment.

I. Plaintiff's Claim For Conversion Must Be Dismissed.

CPG argues that RIC's claim for conversion of the premiums due under the contract should be dismissed under the gist of the action doctrine.

> The "gist of the action" doctrine operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims. . . .Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. . . . In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts. . . .[T]he doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.

Hart v. Arnold, 884 A2d 316, 339-340 (Pa. Super. 2005). Where the claim is that the defendant failed to pay money that was due to plaintiff under a contract (for example, insurance proceeds) the gist of the action doctrine bars a claim for conversion. *See* Pittsburgh Contr. Co. v. Griffith, 834 A.2d 572, 584 (Pa. Super. 2003). Since RIC is claiming that CPG converted money that it was contractually obligated to pay to RIC, RIC's conversion claim must be dismissed.

II. There Are Genuine Issues Of Material Fact Concerning Whether Defendant Breached Its Contract With, And Its Fiduciary Duty To, Plaintiff.

RIC claims that CPG failed to deliver $427,815.53 in premiums due to RIC under the Agency Agreement. CPG does not dispute that it was bound to remit premiums to RIC under the Agreement. Instead, it disputes the amount claimed outstanding by RIC. RIC bears the burden of proving its damages. However, once it offers sufficient proof of the amount it claims, CPG must then come forward with evidence to support its defense that the amount claimed is incorrect due to some accounting or processing error on IRC's part.

RIC proffers as evidence of its damages a Final Statement that it generated and sent to CPG on June 6, 2003, as well as several follow up letters, all of which reflect an amount due of $427,815.53. *See* Motion for Summary Judgment, Exs. 13, 14. RIC also submitted the affidavit of Deborah Hatfield, its Director of Premium Accounting, who "directed the reconciliation of the accounting under the Agreement." *Id.*, Ex. 11, ¶ 5. She states that the premiums unpaid by CPG "were calculated by deducting CPG's net allowable commissions from the premiums it collected from policyholders on behalf of [RIC]." *Id.*, ¶ 6.

In opposition, CPG offers the affidavit of Joseph A. Maurer, its President and CEO. Maurer claims that "CPG's accounts do not show that any money is still owed to [RIC]." Response to Motion for Summary Judgment, Ex. B, ¶ 31. He describes four instances in which RIC failed "to properly account for and credit [certain] endorsements" when compiling the Final Statement. As a result, he claims in excess of $150,000 in credits are due to CPG. *Id*. ¶ 29, Exs. 11-14.

Since both parties rely upon affidavits to support their positions regarding whether premiums are due from CPG to RIC under the Agreement, this issue is not susceptible to summary judgment. *See* Borough of Nanty-Glo v. American Surety Co. of New York, 309 Pa. 236, 238, 163 A. 523, 524 (1932) (it is for the finder of fact to assess the credibility of witnesses). Therefore, the parties must proceed to trial on CPG's breach of contract and breach of fiduciary duty claims.

III. Plaintiff's Request For Punitive Damages Must Be Dismissed.

RIC demands punitive damages based upon CBG's alleged breach of its fiduciary duty to remit premiums to RIC. "Punitive damages are awarded for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." Viener v. Jacobs, 834 A.2d 546, 560-1 (Pa. Super. 2003). RIC has offered no evidence that CBG's alleged failure to pay was prompted by a bad motive or by reckless indifference. Instead, CBG's failure to pay is apparently based upon its belief that it was being overcharged due to an error on the part of RIC. In addition, RIC's claim against CPG for breach of fiduciary duty is identical to its breach of contract claim for which no punitive damages may be assessed. *See* Standard Pipeline Coating Co. v. Solomon & Teslovich, Inc., 344 Pa. Super. 367, 375, 496 A.2d 840, 844 (1985) ("Punitive damages will not be assessed for a mere breach of contractual duties, where no recognized trespass cause of action, pleaded by the plaintiff, arose out of the same transaction.") Therefore, RIC's claims for punitive damages must be dismissed.

IV. Defendant Is Not Entitled To Recoup Any Commissions Allegedly Due To It As Exclusive Agent For Plaintiff.

In opposition to RIC's claims for damages, CPG raises the defenses of estoppel and recoupment. CPG claims it had an exclusive right to originate public entity business in the Eastern half of Pennsylvania for RIC and that RIC breached the exclusive agency agreement by allowing other agents to sell such insurance without paying CPG a commission on such other agent's public entity business. CPG bears the burden of proving its affirmative defenses of recoupment and estoppel. *See* Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432, 436, 457 A.2d 502, 504 (1983) ("It is well established that the burden rests on the party asserting the estoppel to establish such estoppel by clear, precise and unequivocal evidence."); Household Consumer Discount Co. v. Vespaziani, 490 Pa. 209, 224, 415 A.2d 689, 697 (1980) (defendant permitted to present evidence of her recoupment counterclaim).

CPG cannot point to any express term of the Agency Agreement that makes the parties' arrangement exclusive. Nor does CPG seriously argue that the Agency Agreement is ambiguous on the issue of exclusivity. In fact, the Agreement clearly is not ambiguous; instead, it sets forth a fairly standard insurance agency arrangement. *See* Motion for Summary Judgment, Ex. 2. However, CPG argues that, both before[4] and after the Agreement was entered into, RIC promised CPG an exclusive agency, and, for the first approximately 2 years of the parties' relationship, CPG acted as RIC's exclusive agent with respect to public entity business in Eastern Pennsylvania.

[4] The Agreement provides that it "merges with, replaces and supersedes all agency agreements, written or oral, which may have existed between [CPG] and [RIC]. It constitutes the full agreement of the parties." Motion for Summary Judgment, Ex. 2, p. 9. Since the Agreement is not ambiguous on the issue of exclusivity and it contains a merger clause, CPG may not rely upon parole evidence of prior oral agency agreements and discussions to vary, modify or supersede the fully integrated Agreement. *See* Myers v. McHenry, 398 Pa. Super. 100, 580 A.2d 860, 863 (1990).

The Agency Agreement states that it "may be supplemented, amended or revised only in writing by mutual agreement of Agent and Company." Motion for Summary Judgment, Ex. 2, p. 8.[5] "Our law generally upholds the validity and sanctity of no-oral modification clauses." Leasing Service Corp. v. Benson, 317 Pa. Super. 439, 449-450, 464 A.2d 402, 450 (1983).

> Otherwise, written documents would have no more permanence than writings penned in disappearing ink, [and] contractual obligations would become phantoms, solemn obligations would run like pressed quicksilver, and the whole edifice of business would rest on sand dunes supporting pillars of rubber and floors of turf. Chaos would envelop the commercial world.

C. I. T. Corp. v. Jonnet, 419 Pa. 435, 438, 214 A.2d 620, 622 (1965). However, the requirements of a written modifications clause may be waived. Such a

> condition is considered waived when its enforcement would result in something approaching fraud. Thus the effectiveness of a non-written modification in spite of a contract condition that modifications must be written depends upon whether enforcement of the condition is or is not barred by equitable considerations . . .

Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 560, 244 A.2d 10, 13 (1968). *See also* Restatement (Second) Contracts, § 150 (1981) ("Where the parties to an enforceable contract subsequently agree that all or part of a duty need not be performed or of a condition need not occur, the Statute of Frauds does not prevent enforcement of the subsequent agreement if reinstatement of the original terms would be unjust in view of a material change of position in reliance on the subsequent agreement.")

[5] This written modifications clause contains exceptions based on two sections of the Agreement that do not apply in this case.

The waiver of a written modification clause may be found in the parties' course of performance under the Agreement.

> Where there are repeated occasions for performance by one party and the other has knowledge of the nature of the performance and opportunity to object, a course of performance accepted or not objected to may be relevant to show the meaning of the contract, or a modification of it, or a waiver.

Restatement (Second) Contracts, § 150. *See also* Douglas v. Benson, 294 Pa. Super. 119, 128, 439 A.2d 779, 783 (1982) ("a party by conduct may modify a written agreement without a writing if and when his conduct clearly shows an intent to waive the provision prohibiting non-written modification.") However, CPG has failed to demonstrate that RIC, by its actions, waived the requirement that modifications of the Agreement be in writing.

The evidence of the parties' course of performance offered by CPG shows that, both prior to and after the execution of the Agency Agreement, the parties attempted to negotiate the terms of a written exclusive agency agreement, but they never reached an agreement on terms. *See* Response to Motion for Summary Judgment, Ex. 2, ¶¶ 11-20. These continued negotiations do not demonstrate a waiver of the no-oral modifications clause of the Agreement; instead, the evidence shows that the parties tried to produce a writing to satisfy the Agreement's requirements. CPG cannot now employ estoppel principles to enforce an agreement that the parties never finalized. Nor can CPG claim to have relied to its detriment[6] on the existence of an agreement that it was still negotiating with RIC.

[6] CPG does not claim any reliance damages, but instead claims the benefit of its alleged bargain, namely the commissions due to it as exclusive agent based on the policies originated by other agents.

Even if the parties' discussions of their exclusive relationship somehow constituted a contract binding upon RIC, there is no evidence that such relationship was not terminable at will by RIC. Once RIC informed CPG that RIC did not desire an exclusive relationship, any such arrangement RIC had with CPG was terminated. *See id.* ¶ 18. There is no evidence that CPG was not paid commissions on relevant policies originated by others prior to any such termination. Once the exclusive agency was terminated (to the extent that it ever existed), CPG was not entitled to receive commissions based on other agents' subsequent public entity business. Therefore, CPG's claim for recoupment based on commissions allegedly due to it under an exclusive agency agreement with RIC must be dismissed.

CONCLUSION

For these reasons, RIC's Motion for Summary Judgment as to the contract claim is denied and its claims for conversion and punitive damages are dismissed. CBG's defenses based on an exclusive agency arrangement are also dismissed. A hearing is necessary to determine the amount of the premiums due and owing to RIC.

An Order consistent with the Opinion will be contemporaneously entered.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.