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

Maryann Pietrak	)	December Term, 2004
	)	
Plaintiff	)	
	)	
v.	)	No. 02026
	)	
Certain Underwriters at Lloyd's, London	)	COMMERCE PROGRAM
and City of Philadelphia	)	Motion Control Nos. 012999, 012646
	)	
Defendants	)	

ORDER

AND NOW, this 26th day of May, 2006, upon consideration of the Defendants' Motions for Summary Judgment and Memoranda in Support thereto, the Plaintiff's Responses and the Memoranda in Support thereto, the Reply Brief in Opposition to Plaintiff's Response to the Motion for Summary Judgment of Defendant Certain Underwriters at Lloyd's of London ("Insurers"), all other matters of record, and in accord with the Opinion entered contemporaneously herewith, it is **ORDERED** that:

1. Defendant Insurers' Motion for Summary Judgment is **denied**[1];

[1] The Insurers petitioned for Summary Judgment by arguing that Pietrak's application constituted a material misrepresentation of the insurance risk, and that such a misrepresentation justified not only denial of claim, but that it also requires rescission of the policy *ab initio*. To support their argument, the Insurers state that Pietrak, by failing to state on the application that eleven unrelated men lived on her property at 1501 Orthodox Street (the "Property"), and by representing instead that three families dwelled therein, perverted the assessment of the true insurance risk. To support their argument, the Insurers produced the affidavit of Barbara Weber, of the Weber Insurance Corporation that wrote the policy in question. See Motion for Summary Judgment of Defendant Certain Underwriters at Lloyd's, London, Exhibit B. In this affidavit, Ms. Weber states that "[t]he use of the insured property is material to the issuance of an insurance policy as it determines the premium amount and whether the policy can be written at all." Id. at ¶ 13. However, neither Weber's affidavit, nor any other record at hand, demonstrates that Pietrak's misrepresentation on the insurance application was material. In other words, the Insurers, as moving parties, have failed to demonstrate that insuring the Property under a three-family occupancy posed fewer or less significant risks than insuring the same premises under an occupancy of eleven unrelated adults. In addition, Weber's affidavit in this matter cannot help because "… summary judgment may not be granted on the basis of oral testimony offered on behalf of the moving party…. It has long been the rule in Pennsylvania that where the testimony of the party having the burden of proof is oral, the credibility of that testimony is always for the jury…. However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to

2. Defendant City of Philadelphia's Motion for Summary Judgment is **granted** and Plaintiff's claim for negligence against the City of Philadelphia is **dismissed**.

BY THE COURT

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HOWLAND, W. ABRAMSON, J.

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the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence." Grimes v. The Prudential Insurance Company of America, 401 Pa. Super. 245, 585 A.2d 29, 32 (1990) (citing Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932)).

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OPINION

ABRAMSON, J.

Defendants Lloyd's of London, (the "Insurers"), and City of Philadelphia (the "City"), each filed a Motion for Summary Judgment. The issues before this court are whether Insurers acted in bad faith in denying insurance indemnification to Plaintiff ("Pietrak"), and whether the City was negligent toward Pietrak.

BACKGROUND

Maryann Pietrak once owned a property in Philadelphia, Pennsylvania, at 1501 Orthodox Street (the "Property"). In May 2003, fire destroyed the Property which, at that time, was leased to New Desires, Inc., an entity providing boarding-house accommodations to recovering addicts. Pietrak's husband, now deceased, was the president of New Desires, Inc. when the fire broke out. On the day of the fire, the Property, though insured for a three-family occupancy, boarded eleven unrelated recovering addicts in eight distinct units.[2] Weber Insurance Corporation of Langhorne, Pennsylvania, ("Weber"), provided the policy.[3]

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[2] Exhibits A and E attached to Defendant Lloyd's of London's Motion for Summary Judgment.
[3] Id.

Pietrak filed suit against the two Defendants on December 20, 2004.[4] In her complaint, Pietrak averred that the Insurers acted in bad faith in failing to indemnify without justification, and that the City acted negligently in failing to properly inspect and repair a fire hydrant whose inability to dispense water allowed the spreading flames to destroy the Property. The Insurers, in their Motion for Summary Judgment, argue that the bad faith claim should be barred: by representing that three families occupied the Property, and by failing to disclose that eleven unrelated individuals actually lived on the premises, Pietrak breached the insurance contract and rendered the agreement void from the onset. On the other hand, the City, in its Answer with New Matter, asserted all the defenses, immunities and limitations of damages available to a governmental entity under 42 Pa. C.S.A. § 8451 *et seq*. This court dismisses the Insurers' Motion for Summary Judgment (see footnote No. 1, supra), and grants the City's Motion for Summary Judgment (see discussion, infra).

DISCUSSION

I. Standard of Review

The law on motions for summary judgment is settled. In Pennsylvania, once the pleadings have closed, any party may move for summary judgment. Pa. R.C.P. 1035.2. Pennsylvania law "provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." Rauch v. Mike-Mayer, 2001 Pa. Super 270, 783 A.2d 815, 821 (2001) (citing Capek v. Devito, 564 Pa. 267, 767 A.2d 1047, 1048 (2001)). "In determining whether to grant a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party and

[4] The Complaint contained three counts: Breach of Contract and Statutory Bad Faith against Insurers (Counts I and II), and Negligence against the City (Count III). Only Counts II and III survive.

resolve all doubts against the moving party when determining if there is a genuine issue of material fact." Potter v. Herman, 2000 Pa. Super 345, 762 A.2d 1116, 1118 (2000). "Summary judgment is proper only where the pleadings, depositions, answers to interrogatories, admissions of record 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. Id. at 1117. In other words, "… only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment." Rauch, supra at 821.

II. The City is immune from Pietrak's claim in negligence.

In her complaint, Pietrak averred that the City failed negligently to inspect and repair a broken fire hydrant. Her claim in negligence rests on the premises that the inoperative fire hydrant allowed the flames to spread and destroy her Property. The City, on the other hand, asserted all the defenses, immunities and limitations of damages available to a governmental entity under 42 Pa. C.S.A. § 8451 *et seq*. Specifically, the City asserts its immunity against the claim of negligence on ground that Pietrak failed to satisfy the element of notice required under the statute. This court agrees with the City.

Generally, a government agency enjoys immunity from suits grounded in tort. In fact, the pertinent statute reads:

> **§ 8541. Governmental immunity generally.**
>
> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa. C.S.A. § 8541.

However, governmental agencies enjoy not an absolute immunity, but only a qualified one. Thus, the same statute carves out several exceptions under which a

governmental agency may be liable for injury to persons or property. Based on the facts in our case, it appears that the failure to properly inspect and maintain a fire hydrant could have fallen under one of the exceptions denying immunity to the City, if Pietrak had shown that the City had notice of the damaged hydrant. Indeed, the pertinent section of the statute recites:

> **§ 8542. Exceptions to governmental immunity.**
>
> **(a) Liability imposed. —** A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if … the injury occurs as a result of one of the acts set forth in subsection (b):
>
> *** * ***
>
> **(b) Acts which may impose liability. —** The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
>
> *** * ***
>
> (5) *Utility service facilities*. — **A dangerous condition of** the facilities of steam, sewer, **water**, gas or electric systems owned by the local agency and located within rights-of-way, **except that the claimant to recover must establish** that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and **that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition**.

42 Pa. C.S.A. § 8542 (b)(5) (emphasis added).

Based on the record, Pietrak has failed to show that the City had notice of the dangerous condition of the hydrant before the fire. In her effort to suggest notice, Pietrak relies on the affidavits of two individuals who witnessed that no water came out of the hydrant when the Property burned.[5] However, both testimonies fail to show that the City had notice before the fire. Pietrak attempts to bolster the suggestion of notice by

[5] Exhibits A and B to Plaintiff Pietrak's Response to Defendant City of Philadelphia's Motion for Summary Judgment. This court notes that the two affidavits contain conflicting dates: the affidavit from Joe Ladden, Exhibit A, supra, states that the fire occurred at 1501 Orthodox Street on May 27, 2003; the affidavit from David Monroe, Exhibit B, supra, on the other hand, places that witness at the scene on May 23, 2003.

producing the copy of a Report from the Philadelphia Fire Department. However this document, while narrating some of the firefighting activities conducted at the scene of the blaze, and while stating that the hydrant at 1520 Orthodox Street was "damaged," offers no clue that the City had notice of the dangerous condition before the fire.[6] In essence, despite Pietrak's efforts to imply forewarning, neither the affidavits from the witnesses, nor the Report from the Fire Department, shows that the City had notice of the inoperative fire hydrant before the event. In the absence of any evidence that the City had notice of the broken hydrant before the fire in question, this court concludes that the exception to governmental immunity under § 8542 (b)(5) does not apply. The City's Motion for Summary Judgment is granted.

An order consistent with this opinion will be entered contemporaneously.

[6] Exhibit C to Plaintiff Pietrak's Response to Defendant City's Motion for Summary Judgment.