

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

HUA DA REMODELING, INC., and 928	:	JUNE TERM, 2008
RACE STREET DEVELOPMENT, L.P.,	:	
	:	NO. 03390
Plaintiffs,	:	
	:	COMMERCE COURT
v.	:	
	:	Control Nos. 09082196, 09082234,
THE UNITED STATES FIDELITY &	:	09082349
GUARANTY INSURANCE COMPANY,	:	
MCMANUS SERRA & KLEIN	:	
INSURANCE BROKERS, INC., and	:	
JAMES WALL,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 7th day of December, 2009, it is **ORDERED** that plaintiffs' Motion for Summary Judgment is **DENIED**, United States Fidelity & Guaranty Insurance Company's Motion for Summary Judgment is **GRANTED**, McManus Serra & Klein Insurance Brokers, Inc.'s Motion for Summary Judgment is **GRANTED**, and plaintiffs' claims are **DISMISSED**.

BY THE COURT:

MARK I. BERNSTEIN, J.

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	:	
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OPINION

Plaintiff 928 Race Street Development, L.P. (“928”) is the owner of certain property in Philadelphia upon which construction occurred in 2005 (the “Project”). 928 contracted with plaintiff Hua Da Remodeling, Inc. (“Hua Da”) as general contractor on the Project. Hua Da sub-contracted with non-party Joseph Lee & Sons, Inc. (“JL&SI”) to do ironwork on the Project.

Under the sub-contract between JL&SI and Hua Da, JL&SI was obligated to obtain insurance with respect to its work on the Project.¹ In February, 2005, JL&SI requested that its insurance broker, defendant McManus, Serra & Klein (the “Broker”) add Hua Da and JL&SI as “Additional Insureds” on its existing insurance policies. The Broker issued a Certificate of Insurance listing 928 and Hua Da as “Additional Insureds” on JL&SI’s Commercial General

¹ The following is the only written contract language that any party has pointed to requiring JL&SI to obtain insurance with respect to the Project:

[928] to carry fire, tornado and other necessary insurance upon above work. Workmens’ Compensation and Public Liability Insurance on above work to be taken out by [JL&SI].

Defendants cite to this language from a proposal between Hua Da and JL&SI. Plaintiffs do not cite to any other evidence of a contract.

Liability (“CGL”) Policy with effective dates from 02/01/2005 through 04/15/2005. The CGL Policy was issued by defendant United States Fidelity & Guaranty Insurance Co. (the “Insurer”).

That CGL Policy expired on April 15, 2005 (the “First CGL Policy”). The Broker procured, and the Insurer issued, a subsequent policy effective April 15, 2005 through April 15, 2006 (the “Renewal CGL Policy”). There is no evidence that JL&SI ever requested that Hua Da and 928 be added as “Additional Insureds” on the Renewal CGL Policy. The Broker did not issue any Certificate of Insurance naming Hua Da and 928 as “Additional Insureds” under the Renewal CGL Policy, and the Renewal CGL Policy did not otherwise list 928 and Hua Da as “Additional Insureds.”

In November, 2005, JL&SI’s employee, nominal defendant James Wall, was allegedly injured on the Project. Wall subsequently brought a personal injury action against Hua Da and 928 (the “Underlying Action”). His claim was ultimately resolved. Hua Da and 928 sought defense and indemnification in the Underlying Action from JL&SI’s Insurer, USF&G. The Insurer denied coverage to Hua Da and 928.

Hua Da and 928 filed this action against JL&SI’s Insurer and Broker seeking coverage for the Underlying Action.² Plaintiffs assert breach of contract and negligence actions against both defendants. All parties have moved for summary judgment on plaintiffs’ claims. For the reasons that follow, all of plaintiffs’ claims must be dismissed.

I. Plaintiffs’ Breach of Contract Claim Against The Broker Is Dismissed Because The Broker Did Not Breach Any Contractual Duty To Plaintiffs.

Plaintiffs allege that they are third party beneficiaries of the Certificate of Insurance the Broker issued to JL&SI.³ Plaintiffs further allege that the Certificate of Insurance constitutes or

² JL&SI is not a party to this action.

³ Complaint, ¶¶ 41-47. The Certificate of Insurance is attached to the Complaint as Exhibit A.

contains a promise by the Broker, upon which plaintiffs relied, to obtain from the Insurer an endorsement to the CGL Policy adding plaintiffs as “Additional Insureds.”⁴ In other words, plaintiffs claim the Certificate imposed on the Broker a duty to instruct the Insurer to add Hua Da and 928 as “Additional Insureds” on JL&SI’s CGL Policy, and the Broker breached this duty.

The Certificate of Insurance expressly states that the policy it modifies expires on “04/15/2005.” To the extent this imposes any duty on the Broker to obtain an endorsement, the Certificate only does so with respect to the First CGL Policy issued by the Insurer to JL&SI. It cannot create any obligations concerning the later Renewal CGL Policy.

Mr. Wall’s accident occurred in November, 2005, more than six months after any duties imposed by the Certificate of Insurance, and the coverage afforded by the First CGL Policy, terminated. Had the Broker listed plaintiffs as “Additional Insureds” on the First CGL Policy, plaintiffs would still not be covered under the Renewal CGL Policy. The Certificate did not require the Broker to obtain any coverage for plaintiffs after April 15, 2005. Since any breach of the Certificate could not have effected plaintiffs’ coverage for the Underlying Action, plaintiffs’ claim for breach of contract based on the Certificate is dismissed.

II. Plaintiffs’ Negligence Claim Against The Broker Is Dismissed Because The Broker Did Not Breach Any Duty In Tort.

Plaintiffs allege that the Broker was negligent in failing to honor a request that the plaintiffs be added as “Additional Insureds” to JL&SI’s CGL Policy.⁵ For the Broker to be found liable, plaintiffs have the burden of proving the Broker breached a duty to plaintiffs.⁶ Any

⁴ Complaint, ¶¶ 43-47.

⁵ *Id.*, ¶ 50.

⁶ *Martin v. Evans*, 551 Pa. 496, 502, 711 A.2d 458, 461 (1998) (“To establish a cause of action in negligence, the plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff.”)

failure of the Broker to add plaintiffs to JL&SI's First CGL Policy is irrelevant because the First CGL Policy expired before, and therefore did not cover, Mr. Wall's accident.

In support of their claim that the Broker should have added plaintiffs to the Renewal CGL Policy, plaintiffs offer an expert report in which their expert opines as follows:

The need for additional insured status by certificate holders could extend beyond the expiration of the policy and continue during the term of the renewal policy(ies). As part of the policy renewal process, brokers should ascertain the nature and extent of continuing business relationships and obligations of their clients, including the determination whether additional insureds on the expiring policy should be endorsed to the new policy. They should also ask their clients about the need to issue certificates evidencing additional insured status that is endorsed to the renewal policy.

* * *

Brokers must ascertain what written or oral agreements their clients made to add additional insureds to their policy and to procure appropriate policy wording or endorsement to provide the necessary coverage for additional insureds.

* * *

[The Broker] failed to obtain a copy of the contract between [JL&SI] and Hua Da and did not even ask [JL&SI] whether or not there was a written contract;

There is no evidence whether [the Broker] learned what contractual obligations [JL&SI] had agreed upon with Hua Da;

[The Broker] did not know the duration of [JL&SI's] subcontracts that lasted over over [sic] longer periods or at least those that were continuing beyond the expiration of any one policy period, such as the subcontract with Hua Da.

* * *

[The Broker] should have ascertained whether certificate of insurance was needed for the [Renewal CGL Policy] and procured additional insured endorsement to [the Insurer's] policies and, by failing to do so, [the Broker] breached its duty to [JL&SI] and therefore to [plaintiffs].⁷

In forming his opinion that the Broker "breached its duty to [JL&SI] and therefore to [plaintiffs]", plaintiffs' expert relies upon the deposition testimony of Marvin Klein, the agent of the Broker who worked with JL&SI on the Renewal CGL Policy and on prior policies. Mr. Klein testified as follows:

⁷Expert Report of Akos Swierkiewicz, pp. 4-9, attached as Exhibit A to plaintiffs' Response to the Broker's Motion for Summary Judgment.

A. Okay. The primary information that was gathered for the [R]enewal [CGL Policy], of course, had nothing to do with the certificates.

Second of all, many of the projects for [JL&SI] could have been one week, could have been one day. We were never informed about the contract. We were never informed about the length of time, the need for certificates. When [JL&SI] needed a certificate they would send it to us.

During this particular renewal, like other renewals, they would also send us information and say "And when we renew the policy we need to add these following - - or we need these following certificates." If we were not given those instructions then, of course, we had no idea whether the project is continuing, not continuing, what the responsibility is of [JL&SI] towards any of their clients.

Q. So you rely on them to give you that information?

A. Absolutely.

Q. You don't ask them follow-up questions - - not follow-up, but you don't go back and look at what you've done the past year and ask them if those projects have continued?

A. No. Excuse me. The nature of [JL&SI's] business was short-term. He was a sub-contractor in this particular job. So most of his jobs or [sic] were short term, okay.

Q. Sure. Just so we sort of can complete that. How do you know most of his jobs were short term? Was that information he'd given you?

A. No. Just over the years I knew his business well enough to know the type of projects he was involved in.

[Exhibit marked. No question asked.]

A. At renewal Certificates of Insurance were never just automatically continued from one year to the next.

Q. When you say that, do you mean the Certificate of Insurance itself isn't renewed the way a policy is for - - well, let me ask you this. What do you mean by that?

A. Well, the policy would be renewed. Unless we were given specific instructions by the insured that he needed or wanted certain Certificates to start at that renewal year, they were not provided. We only provided those which we were instructed to provide.⁸

Mr. Klein testified that JL&SI asked him to add other entities as "Additional Insureds" on the Renewal CGL Policy.⁹ His testimony does not support plaintiffs' expert's claim that the Broker failed to ascertain whether Certificates of Insurance were needed for the Renewal CGL

⁸ Deposition of Marvin Klein, pp. 41-43, attached as Exhibit C to the Broker's Motion for Summary Judgment.

⁹ At this stage, the court does not determine that this evidence is credible, but the court can determine that it is insufficient, if believed, to support plaintiffs' claims.

Policy. Mr. Klein also testified that he knew the nature of JL&SI's business was short-term contracts. His testimony does not support plaintiffs' expert's claim that the Broker failed to ascertain the nature of JL&SI's contract with Hua Da. Since JL&SI never told the Broker that plaintiffs needed to be added to the Renewal CGL Policy, plaintiffs' claim that the Broker was negligent in failing to obtain an endorsement or amendment of the Renewal CGL Policy is without merit.¹⁰

Plaintiffs also allege that the Broker was negligent in failing to obtain policy changes reflected in the Certificate of Insurance.¹¹ Any policy changes which should have been made pursuant to the Certificate related to only the irrelevant First CGL Policy and not to the Renewal CGL Policy. Plaintiffs' claim that the Broker was negligent in issuing a misleading Certificate of Insurance is without merit.¹² The Certificate expressly stated that the policy it amended expired on "04/15/2005".

Plaintiffs further allege the Broker was negligent in failing to tell JL&SI and plaintiffs that plaintiffs were not listed as "Additional Insureds" under the Renewal CGL Policy.¹³ There has been no evidence presented that the Broker had ever been told that plaintiffs should be added to the Renewal CGL Policy. The Broker had no duty to tell them that they were not added.

Plaintiffs' final claim is that the broker negligently supervised its employees.¹⁴ Plaintiffs have not shown that any of the Broker's employees did anything wrong. The only acts complained of are, as set forth above, not wrongful acts. This claim is also without merit.

¹⁰ Complaint, ¶ 53(c), (d).

¹¹ *Id.*, ¶ 51-52, 53(a), (b), (e).

¹² *Id.*, ¶ 53(i).

¹³ *Id.*, ¶ 53(f), (g).

¹⁴ *Id.*, ¶ 53(h).

III. Plaintiffs' Claim For Declaratory Judgment Against The Insurer Is Dismissed Because The Insurer Did Not Breach Any Contractual Duty To Plaintiffs.

Plaintiffs claim that the Insurer is liable as principal for its agent, the Broker's, issuance of the Certificate of Insurance making the plaintiffs "Additional Insureds."¹⁵ As set forth above, the policy that the Certificate modifies expired on "04/15/2005". Therefore, any contractual duties created by the Certificate can refer only to the irrelevant First CGL Policy and not the Renewal CGL Policy.

Plaintiffs further claim that the Insurer had a duty to defend and indemnify them in the Underlying Litigation. The accident occurred in November, 2005, more than six months after any contractual duty the Insurer may have had to plaintiffs under the Certificate of Insurance expired. Plaintiffs' contractual claims against the Insurer are dismissed.

IV. Plaintiffs' Claim For Negligence Against The Insurer Is Dismissed Because The Insurer Did Not Breach Any Tort Duty To The Plaintiffs.

Plaintiffs claim that the Insurer was negligent in failing to issue a policy endorsement or amendment to correspond to the Certificate of Insurance.¹⁶ Any endorsement or amendment it did or did not issue under the Certificate could effect only the irrelevant First CGL Policy. This claim is without merit.

Plaintiffs also claim that the Insurer was negligent in failing to supervise/train the Broker.¹⁷ Since plaintiffs have not shown that the Broker did anything wrong, this claim also fails.

¹⁵ Complaint, ¶ 27-30.

¹⁶ *Id.*, ¶ 38(a), (b).

¹⁷ *Id.*, ¶38(c), (e), (f).

Plaintiffs' final claim is that the Insurer was negligent in issuing the Renewal CGL Policy without ascertaining whether "Additional Insureds" had been added to policy.¹⁸ Plaintiffs have not presented any expert testimony or other evidence to establish any such duty on the part of the Insurer. The fact that plaintiffs were not added as "Additional Insureds" to the Renewal CGL Policy does not alone prove that the Insurer or its alleged agent, the Broker, breached a duty to plaintiffs.

V. If Plaintiffs Had Been Additional Insureds Under The Renewal CGL Policy, There Would Have Been No Coverage.

The Renewal CGL Policy contains an exclusion for injuries to employees of the insured, such as Mr. Wall.¹⁹ There is an exception in the Policy for "insured contracts" in which the insured by "contract or agreement" has assumed "the 'tort liability' of another person or organization to pay damages because of 'bodily injury'."²⁰ Plaintiffs have failed to produce evidence of any "insured contract" between them and JL&SI in which JL&SI assumed plaintiffs' tort liability for Mr. Wall's bodily injuries.

Plaintiffs assert a right to submit evidence of such a contract at trial, but they neglect to mention what that evidence is.²¹ At the summary judgment stage, the non-moving party must point to "evidence in the record establishing the facts essential to [his/her] cause of action or defense which the motion cites as not having been produced."²² Plaintiffs have failed to do so.

Since there is no evidence of an "insured contract," the employee injury exclusion

¹⁸ Complaint, ¶ 38(d).

¹⁹ Insurer's Motion for Summary Judgment, Exhibit B (Renewal CGL Policy), Liability Coverage Part, p. 3 of 32.

²⁰ *Id.*, p. 27 of 32.

²¹ See Plaintiffs' Response to the Insurer's Motion for Summary Judgment, ¶ 16; Plaintiffs' Memorandum of Law in Opposition to the Insurer's Motion for Summary Judgment, p. 9.

²² Pa. R. Civ. P. 1035.3.

applies. The Renewal CGL Policy does not cover plaintiffs' liability to Mr. Wall in the Underlying Action.

CONCLUSION

For all the foregoing reasons, the Broker's Motion for Summary Judgment is granted, the Insurer's Motion for Summary Judgment is granted, and plaintiffs' Motion for Summary Judgment is denied.

BY THE COURT:

MARK I. BERNSTEIN, J.