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

CDL, INC.	:	JULY TERM, 2009
Plaintiff,	:	NO. 00758
v.	:	COMMERCE PROGRAM
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, et al.,	:	
Defendants.	:	

OPINION

Plaintiff CDL, Inc. ("CDL") and defendant Certain Underwriters at Lloyd's London ("Lloyd's") subscribing to Commercial General Liability Policy No. 289583, which was issued to CDL (the "Policy"), have cross-appealed from this court's April 25, 2011 Order (the "04/25/11 Order"). In that Order, this court granted in part and denied in part Lloyd's Motion for Partial Summary Judgment, dismissed CDL's claims for tortious interference with contract and injunctive relief, and allowed CDL's claim for bad faith to proceed.[1] Lloyd's has also appealed from this court's November 14, 2011 Order (the "11/14/11 Order"), in which this court denied Lloyd's Motion for Summary Judgment with respect to CDL's claims for breach of the Policy and for bad faith.[2]

On appeal, CDL complains that this court improperly dismissed its tortious interference claim, which was based on Lloyd's refusal to renew CDL's Policy. In its Complaint, CDL alleged that Lloyd's failure to renew the Policy caused CDL to lose customers because those

[1] In the Motion upon which the 04/25/11 Order was based, Lloyd's did not ask the court to dismiss CDL's claim for breach of the Policy, so that claim proceeded to trial alongside the claim for bad faith.

[2] The parties have also appealed from subsequent orders entered in this action by Judge Snite to whom this case was later reassigned. Judge Snite has issued a separate appeal opinion with respect to his rulings.

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customers required CDL to carry general liability coverage such as that provided to it under the Policy.

> The necessary elements of the cause of action [for tortious interference with existing contractual relations] are (1) the existence of a contractual relationship between the complainant and a third party; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage as a result of defendant's conduct.[3]

CDL failed to point to any evidence of record to satisfy element 4. Specifically, CDL failed to show that Lloyd's non-renewal of the Policy caused CDL's claimed harm, *i.e.*, the loss of its clients who required it to carry insurance. Instead, CDL's inability to procure a new policy from any other insurer was the cause of its alleged loss of clients. Therefore, the court's grant of summary judgment with respect to CDL's claim for tortious interference was proper.

In its cross-appeal, Lloyd's complains that the court should have dismissed CDL's claim for bad faith, upon which claim the court ultimately entered judgment in favor of Lloyd's after trial. In the 04/25/11 Order, this court stated that "Count IV for Bad Faith is not dismissed because evidence that non-renewal of the subject insurance policy was in retaliation for [CDL] filing a claim under the policy may serve as evidence of [Lloyd's] bad faith conduct with respect to the policy." The issue of whether Lloyd's breached the policy in bad faith could not be decided in the 04/25/11 Order because Lloyd's did not move for summary judgment on the breach of contract claim underlying the bad faith claim. So long as the possibility existed that Lloyd's could be found liable for breaching its duties to CDL under the Policy, there was also the possibility that it had done so in bad faith. Therefore, this court properly denied Lloyd's motion for partial summary judgment with respect to the bad faith claim.

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[3] Walnut St. Associates, Inc. v. Brokerage Concepts, Inc., 982 A.2d 94, 98 (Pa. Super. 2009) *aff'd*, 610 Pa. 371, 20 A.3d 468 (2011).

Judge Snite, after trial, entered judgment for CDL on its breach of contract claim against Lloyd's, but entered judgment for Lloyd's on CDL's claim for bad faith. In doing so, he found that:

> CDL failed to show that the decision not to renew CDL's CGL Policy was made in bad faith. The representative of Lloyd's involved in that decision exercised his business judgment not to continue to insure truck driver placement companies because they could give rise to claims, such as the Richards', that did not fit neatly into the separate CGL, auto, and professional liability insurance categories. Making a reasonable business decision is not the same thing as being motivated by improper self-interest, and does not constitute bad faith.[4]

In reaching this conclusion, the trial court made credibility determinations regarding the testimony of Lloyd's representative. This court was not in a position to make such determinations at the summary judgment stage.[5]

Lloyd's also appeals from this court's 11/14/11 Order denying Lloyd's second Motion for Summary Judgment. For the reasons set forth in the Opinion accompanying that Order, a copy of which is attached hereto, this court properly refused to grant summary judgment in favor of Lloyd's on CDL's claim that Lloyd's breached the Policy by failing to provide a defense of the underlying action. Likewise, the court properly denied summary judgment with respect to CDL's claim that Lloyd's decision not to renew the Policy was made in bad faith retaliation for CDL's submission of a claim under the Policy.

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[4] May 24, 2013 Findings of Fact, p. 7.

[5] *See* DeArmitt v. New York Life Ins. Co., 73 A.3d 578, 595 (Pa. Super. 2013) ("In determining the existence or non-existence of a genuine issue of a material fact, courts are bound to adhere to the rule of *Nanty–Glo* which holds that a court may not summarily enter a judgment where the evidence depends upon oral testimony.")

CONCLUSION

For all the foregoing reasons, the court respectfully requests that its 04/25/11 and 11/14/11 Orders be affirmed on appeal.

BY THE COURT,

MARK I. BERNSTEIN, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

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CIVIL ADMINISTRATION

CDL, INC.	:	JULY TERM, 2009
Vs.	:	
CERTAIN UNDERWRITERS AT LLOYDS, LONDON, et al.	:	NO. 758

Control No. 11071107

ORDER AND OPINION

Defendant Certain Underwriters at Lloyd's of London insured plaintiffs herein on policy number 289583 through their agent defendant Burns and Wilcox. Plaintiff CDL is in the business of leasing truck drivers to its clients. On January 10, 2007, a truck driven by David Martin a driver leased by plaintiff CDL to "Ready Pac" collided with a school bus. As result of that collision in July, 2007, CDL was sued by Vickie and Kevin Richards in the Court of Common Pleas of Philadelphia County for personal injuries, loss of consortium and punitive damages.

As to CDL, the underlying complaint alleged that the co-defendant David Martin was their "agent, servant, workman, and/or employee…acting within the course and scope of their employment." The complaint further alleged that defendant CDL provided driver placement services and that they had placed defendant David Martin as an operator of a truck on behalf of Ready Pac Produce, Inc. The complaint further alleges that the accident was due to the reckless and negligent manner in which David Martin operated the tractor trailer. With respect to defendant CDL the complaint alleges that in addition to David Martin being their agent and employee CDL was directly negligent, careless, and acting in gross wanton and reckless conduct by:

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1. placing David Martin as a tractor trailer driver "when it knew or should have known that David Martin lacks sufficient skill, judgment, and prudence in the operation of a tractor trailer;
2. Failed to adequately ascertain that David Martin lacked the ability to safely operate a tractor trailer prior to placing him as a tractor trailer driver;
3. Representing that David Martin was able to operate a tractor trailer safely when it knew or should have known that he was not able to do so;
4. Failing to conduct a background check of the driving record of the David Martin;
5. Failing to maintain David Martin's DOT Certification filed as required by Federal law;
6. Failing to insure that David Martin would operate the tractor trailer in compliance with federal regulations prior to assisting him in finding employment;
7. Failing to conduct background check of David Martin's driving record in violation of federal law and failing to train David Martin in how to operate a tractor trailer safely.

Before the Court is defendants Motion for Summary Judgment. In their response, defendant attached the affidavit of Mr. Todd Horner. Mr. Todd Horner testified that plaintiff was in the business of leasing truck drivers to clients. He further testified that the truck driver are not employees of CDL and CDL does not supply any vehicles. He testified that pursuant to "personnel lease agreement" claims against the driver would be primarily covered by the customer under the customer's automobile liability policy. He further testified that upon receipt of the lawsuit he reported the claim and lawsuit to defendants herein, who denied insurance coverage. He further states that after the lawsuit against CDL was terminated in their favor this lawsuit was filed seeking the costs of defense from the CDL. Plaintiff only leased truck drivers. They did not supply any vehicles nor did they rent or operated at any trucks.

On July 25, 2009 CDL received a "Notice of Non-Renewal of Insurance" The reason set forth in that letter for non-renewal was "company is no longer writing this class of business."

The policy issued by defendants to plaintiff herein specifically precluded "bodily injury" or "property damage." "arising out of the...use...of any...'auto'." That exclusion goes on to state "this exclusion applies even if claim against any insured alleged negligence or other wrong doing in the supervision, hiring, employment, training, or monitoring of others by that insured, if the 'occurrence' which caused the 'bodily injury' or 'property damage' involved the ...use...of any...'auto'." This exclusion however in both sections limits the operation of this exclusion to auto "owned or operated by or rented or loaned to any insured." The facts in this case clearly demonstrate the plaintiff CDL did not own or operate or rent or loan, any vehicle and that the accident did not arise from any auto owned or operated by or rented or loaned to any insured. Accordingly, Summary Judgment as to cost of defense on the basis of this exclusion is denied.

The evidence presented as part of the Motion for Summary Judgment and subsequent filings with exhibits reveals testimony which if accurate demonstrates that the reason for non-renewal as set forth in the mailed letter of July 24, 2009 rejecting renewal of the policy may be pretextual. The evidence may demonstrate that the company may be in fact still writing insurance in the class of business. \

According to the evidence the decision to not renew this policy was made solely by Mr. Kermit Shaulis, defendant representative. However it appears defendants did renew the insurance policy of "Total Drivers Solutions, Inc.," a company with a business model comparable to plaintiff herein. Mr. Shaulis admits that other offices of defendant Burns and Wilcox may still be writing this "class of business" on behalf of co-defendant Certain Underwriters. In fact with one limited exception no other underwriters were even informed of the decision to terminate "this class of business."

Accordingly, Summary Judgment is DENIED on this basis as well.

BY THE COURT

11/14/11
DATE

MARK I. BERNSTEIN, J.