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

AVONDALE RENTALS, INC.	:	July Term, 2001
	:	
Plaintiff	:	No. 02563
v.	:	
	:	Commerce Program
ROSER & EINSTEIN, INC., RICHARD S. EINSTEIN, BETTY GORMAN, FIRST UNION NATIONAL BANK, OLD GUARD MUTUAL INSURANCE COMPANY	:	Control Nos. 081270 100057
	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of December, 2002, upon consideration of the separate Motions for Summary Judgment of defendants Old Guard Mutual Insurance Company ("Old Guard"), First Union National Bank ("First Union") and Roser & Einstein, Inc. ("R&E"), all responses in opposition, the respective memoranda, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** as follows:

1. Old Guard's Motion for Summary Judgment as to Count IV of the Complaint is **GRANTED** and plaintiff's breach of contract claim is **DISMISSED**. The remainder of Old Guard's Motion is **DENIED**.

2. First Union's Motion for Summary Judgment is **DENIED**.

3. R&E's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

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GENE D. COHEN, J.

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Defendants.	:	

MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are the separate Motions for Summary Judgment of defendants Old Guard Mutual Insurance Company ("Old Guard"), First Union National Bank ("First Union") and Roser & Einstein ("R&E"). For the reasons fully set forth below, Old Guard's Motion is **granted in part** and **denied in part**; the Motions of First Union and R&E are **denied**.

BACKGROUND

On or about May 30, 1997, Plaintiff Avondale Rentals, Inc. ("Avondale") purchased two apartment buildings in Avondale, Pennsylvania, referred to as Building A and Building B (the "Premises"). At the time of purchase, Avondale obtained a loan from Merrill Lynch Credit Corporation ("MLCC"). As a condition of the loan, Avondale was required to provide certificates of flood insurance. First Union was not involved in the initial transaction, however, sometime before September 1998, First Union undertook mortgage servicing duties on behalf of MLCC. The prior owner of the Premises, Lehigh Rentals, Inc. previously had obtained flood

insurance through R&E. On July 3, 1997, Avondale paid $3,952.00 to R&E for two flood insurance policies which were to be issued by Old Guard for Building A and Building B.

It is disputed among the parties as to what occurred next. Avondale claims that it intended to purchase flood insurance for both properties and that it specifically instructed R&E to this effect. Avondale Mem. at 2. Defendants claim that, before coverage was issued by Old Guard, Richard Walkup, the President of Avondale, instructed R&E that he had obtained flood insurance elsewhere and no longer required same to be purchased from Old Guard. Old Guard Mem. at 2; First Union Mem. at 3. Defendants further contend that a check for $3,952.00 was returned to Walkup by Old Guard. Id. Avondale disputes this. Avondale Mem. at 2.

Approximately one year later, on September 23, 1998, defendant Betty Gorman, an insurance agent for R&E, submitted a flood insurance policy application to Old Guard on behalf of Avondale. The application, signed by Gorman, requested flood coverage for Building A and indicated that the policy type was "new". Old Guard Mem. Ex. C. The application made no mention of Building B. Id. In accordance with Gorman's application request, Old Guard issued policy number 1755804189, listing the insured as Avondale and identifying Building A as the insured's location under the policy. Id. at Ex. E. None of the parties have produced an application, policy, declaration page or any other evidence related to flood insurance coverage for Building B for the 1998-1999 policy period, which would have covered the loss in question.

On or about September 16, 1999, Hurricane Floyd hit the east coast, causing damage to the Premises. When Walkup sought to report the property damage claims, he learned that only Building A was covered and that Building B did not have flood insurance coverage. Thus, Avondale only received insurance reimbursement from Old Guard for repairs to Building A.

Avondale claims that is was forced to pay for the repairs to Building B itself.

As a result of the lack of flood insurance for Building B and the damages relating thereto, Avondale brought suit against R&E, Gorman and Einstein for negligence (Count I) and negligent misrepresentation (Count II); against First Union for negligence (Count III) and Old Guard for breach of contract (Count IV) and negligence (Count V).[1]

DISCUSSION

I. Old Guard's Motion for Summary Judgment

A. The National Flood Insurance Act Is Inapplicable to Avondale's Claims

In support of its Motion, Old Guard argues that, because it is a participating insurance company under the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4129 (the "Flood Act"), this Court must evaluate the instant claims pursuant thereto. However, the Flood Act is inapplicable here. By its own terms, the Act applies to "..claims for proved and approved losses covered by flood insurance..." 42 U.S.C.S. § 4072. Here, it is undisputed that Old Guard never issued a flood insurance policy for Building B and that the losses relating thereto were not covered by flood insurance. Old Guard Mot. at ¶ 12; Avondale Resp. at ¶ 12. The essence of Avondale's complaint relates to the failure to procure flood insurance and not the execution of a federal flood insurance contract. See e.g. Neill v. State Farm File & Casualty Co., 159 F. Supp.2d 770 (E.D. Pa. 2000)(recognizing dichotomy between policy procurement and claims handling and the fact that most courts have left the regulation of the latter to the states).

[1]Avondale has since filed a Motion to Amend the Complaint, which was granted in part by this Court contemporaneously herewith. As a result, the Amended Complaint will add two additional counts: promissory estoppel against First Union (Count VI) and breach of contract against R&E (Count VII). The foregoing amendments will have no bearing on the instant motion.

Accordingly, the Flood Act does not serve as a bar to Avondale's claims against Old Guard.

B. Avondale's Breach of Contract Claim Against Old Guard Fails As A Matter of Law

Old Guard has moved for summary judgment as to Count IV of the Complaint, arguing that Avondale's breach of contract claim fails because Avondale has failed to proffer any evidence of a contractual relationship between itself and Old Guard with respect to the 1998-1999 policy period, the time period at issue. Old Guard Mem. at 13. This Court agrees.

To sustain a claim for breach of contract, plaintiff must prove: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 723 A.2d 1053 (Pa. Super. 1999). Here, Avondale has failed to produce facts sufficient to support existence of a contract between itself and Old Guard with respect to Building B for the 1998-1999 policy period, which would have covered the loss in question. None of the parties have produced a copy of a policy, any declarations, renewals or any other such documents which would support Avondale's breach of contract claim. Clearly, if no contract existed between the parties, as a matter of law, Old Guard can not be liable for breach of same. The issue as to why a policy was not issued and who was responsible for same may be actionable, but not under a breach of contract theory against Old Guard based on the fact presented.

Avondale argues that the "reasonable expectations doctrine" creates a contract between itself and Old Guard by operation of law. The reasonable expectations doctrine applies in circumstances where the insurer accepts payment of the first premium at the time it takes the application. Collister v. Nationwide Ins. Co., 479 Pa. 579, 338 A.2d 1346 (1978); Tonkovic v. State Farm Mutual Ins. Co., 455 Pa. 445, 521 A.2d 920 (1987). The Pennsylvania Supreme Court

has held that, in certain cases, such acceptance gives rise to immediate insurance coverage unless the insurance company can establish by clear and convincing evidence that the insured had no reasonable basis for believing he was purchasing such insurance. Id.

However, even if this doctrine was deemed applicable to the facts at bar, it could serve create a contract only for the original policy period of 1997-1998, not the 1998-1999 policy period and would not have covered the loss that occurred on September 16, 1999. Clearly, the doctrine of reasonable expectations never was intended to extend an insurance policy a full year beyond the expiration of the original policy period, nor has Avondale produced evidence to support such an interpretation.

Because Avondale has produced no evidence of a contractual obligation allegedly breached by Old Guard, then its claim fails as a matter of law and Avondale's breach of contract claim against Old Guard is dismissed.

II. First Union's Motion for Summary Judgment

First Union has moved for summary judgment solely on the ground that Avondale's negligence claim can not succeed because Avondale is barred from recovery by the doctrine of contributory negligence. First Union Mem. at 9. First Union has not raised the merits of Avondale's negligence claims in its Motion, therefore this Court will consider only the issue before it, in this instance, the application of the doctrine of contributory negligence to Avondale's claim against First Union.

The Pennsylvania Comparative Negligence Act[2] (the "Act"), which serves to reduce the

[2]The Pennsylvania Comparative Negligence Act provides:

General Rule.--In all actions brought to recover damages for negligence resulting in death or injury

recovery of the injured party to the extent of their own relative fault, applies only to negligence actions which result in "death or injuries to persons or damage to property." 42 Pa.C.S. § 7102(a). Specifically, for the Act to apply, the plaintiff must demonstrate a "tortious episode which causes damage to tangible real or personal property." Wescoat v. Northwest Sav. Assoc., 378 Pa. Super. 195, 548 A.2d 619 (1988). With facts before it similar to those at bar, the Superior Court in Wescoat held that the Act did not apply to a negligence action where the defendant failed to procure an insurance policy for the plaintiff and also failed to notify the plaintiff that insurance was not obtained.[3] Id. The court held that "a loss to plaintiff's pocketbook" was not the type of injury contemplated by the Act and that, as a result, the doctrine of contributory negligence applied, rather than the Act. Id.. Under the doctrine of contributory negligence, "a plaintiff's whose own negligence, however slight, contributed to the happening of the accident in a proximate way, is barred from recovery." Westcoat, 548 A.2d at 623; Gorski v. Smith, 2002 Pa. Super. 334 (2001). Here, Avondale's claimed damages consist solely of pecuniary losses and, therefore, the doctrine of contributory negligence, rather than the Act, applies.

Contributory negligence is an affirmative defense, thus, the burden of proof rests with the

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> to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the casual negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff. 42 Pa.C.S. S 7102(a).

[3]While the legal principles set forth in Westcoat are applicable to this case, it is important to note that the finding of contributory negligence was deemed to be within the province of the jury and was not determined as a matter of law. Westcoat, 548 A.2d at 623.

party seeking to assert same, in this case, First Union. Brown v. Jones, 404 Pa. 513, 516, 172 A.2d 831 (1961). In order to demonstrate contributory negligence on the part of the plaintiff, it is insufficient for the defendant merely to prove that the plaintiff failed to exercise reasonable care to protect itself; the defendant must also prove that such failure was the proximate cause of plaintiff's injury. Franchetti v. Johnson, 215 Pa. Super. 14, 257 A.2d 261 (1969). Contributory negligence will be declared as a matter of law only where it is so clear that there is "no room for fair and reasonable disagreement to its existence." Westerman v. Stout, 232 Pa. Super. 195, 335 A.2d 741 (1975). The existence of contributory negligence is usually a question to be submitted to the jury and "the trial court should not remove the issue unless the facts leave no room for doubt." E. Texas Motor Freight v. Lloyd, 335 Pa. Super. 464, 484 A.2d 797 (1984).

At this stage of the litigation, First Union has failed to satisfy its burden of proof that Avondale was contributorily negligent as a matter of law. Too many factual issues exist here which render summary judgment inappropriate. Accepting as true all properly pleaded facts, as well as all reasonable inferences drawn therefrom, as is required by this Court, the issue of whether Mr. Walkup's action - or in this case, his alleged inaction- rises to the level of contributory negligence requires a factual determination to be made by the jury, who must weigh the credibility of the witnesses and testimony presented. As such, this Court finds that the issue of Avondale's contributory negligence may not properly be decided on summary judgment, given the extent and nature of the facts which are the subject of dispute.

Accordingly, First Union's Motion for Summary Judgment is denied.

III. Motion for Summary Judgment of R&E Defendants

The R&E Defendants filed a brief joining First Union's Motion for Summary. For the

reasons fully set forth above, R&E's Motion likewise is denied.

CONCLUSION

For the above-stated reasons, this Court hereby **grants in part** and **denies in part** Defendants' Motions for Summary Judgment as follows:

1. Old Guard's Motion for Summary Judgment as to Count IV of the Complaint is **granted** and Avondale's breach of contract claim is **dismissed**. The remainder of Old Guard's Motion is **denied.**

2. First Union's Motion for Summary Judgment is **denied**.

3. R&E's Motion for Summary Judgment is **denied**.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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GENE D. COHEN, J.

Dated: December 18, 2002