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

METHODIST HOME FOR CHILDREN, and BENNETT AND SIMPSON ENRICHMENT SERVICES d/b/a BASES, Plaintiffs,	: APRIL TERM, 2001
	: No. 3510
	: Commerce Program
v.	
	: Control No. 060044
BIDDLE & COMPANY, INCORPORATED, Defendant.	:

O R D E R

AND NOW, this 9th day of October 2002, upon consideration of the Motion for Summary Judgment of defendant, Biddle & Company, Incorporated, to the Complaint of plaintiffs, Methodist Home for Children and Bennett and Simpson Enrichment Services d/b/a BASES, the respective responses and memoranda and all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

1. The Motion for Summary Judgment as to plaintiffs' negligence claim is **Denied**;

2. The Motion for Summary Judgment as to plaintiffs' misrepresentation, breach of contract, and breach of fiduciary duty claims is **Granted**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... October 9, 2002

This case involves a dispute between the two plaintiffs, Methodist Home for Children and BASES, a day camp for children funded by Methodist Home For Children ("collectively plaintiffs"), and defendant Biddle & Company, Inc., an insurance broker ("defendant"), over sexual misconduct liability coverage insurance.

In 1995, the plaintiffs purchased a policy for sexual misconduct liability coverage with limits of $100,000 per occurrence, and $300,000 in the aggregate. In the summer of 1997, several of the plaintiffs' campers were sexually assaulted by another minor who was a "counselor-in-training." Six of the victims settled with plaintiffs for six million dollars, while a seventh suit remains pending. Since the settlement amounts were well in excess of the insurance policy, the plaintiffs were required to make good this substantial difference.

In April 2001, plaintiffs brought suit alleging four causes of action against the broker defendant. Count I avers that defendant negligently failed to place proper the insurance coverage for sexual misconduct liability. Count II alleges breach of contract in failing to properly place the insurance coverage. Count III alleges negligent misrepresentations by defendant regarding the availability of higher limits for the sexual misconduct insurance coverage. Finally, Count IV alleges that defendants breached their fiduciary duty to plaintiffs in not providing the highest available limits for coverage.

In June 2002, defendants filed this Motion for Summary Judgment.

DISCUSSION

A proper grant of summary judgment depends upon an evidentiary record that either: (1) shows the material facts are undisputed, or (2) contains insufficient facts to make out a prima facie cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95 (Pa. Super Ct. 2001). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. In sum, "[s]ummary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, 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." Horne v. Haladay, 728 A.2d 954 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id. (citations omitted).

I. The Motion for Summary Judgment is Denied as to Plaintiffs' Negligence Claim.

Defendant argues that plaintiffs failed to produce sufficient evidence of record to create a genuine issue of material fact as to their claim of negligence. Def.'s Mem. of Law at 7. In order to state a cause of action for negligence, a plaintiff must establish a duty on the defendant, a breach of that duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. Petrongola v. Comcast Spectator, L.P., 789 A.2d 204, 209 (Pa.Super. 2001).

Here, plaintiffs assert that defendant was negligent in failing to obtain adequate sexual misconduct liability coverage. Specifically, plaintiffs argue that defendant owed a duty to plaintiffs "'to exercise the care that a reasonably prudent businessman in the brokerage field would exercise under similar circumstances . . . '" Pl.s' Mem. of Law at 3 (citing Def.'s Mem. of Law at 7 (citing Consolidated Sun Ray, Inc. v. Lea, 401 F.2d 650 (3d Cir. 1968))). Plaintiffs argue that defendant breached its duty by compromising the search for adequate insurance coverage because of its concern for earning commissions from those companies with which it then had relationships. Pl.s' Mem. of Law, Ex. A (Callow Depos. 61-64); Ex. B (Frank Report).

Defendant disputes this and asserts that it "made a good faith effort to obtain higher limits of sexual misconduct liability coverage without success." Def.'s Mem. of Law at 10. Specifically, defendant argues that it went into the marketplace to find higher limits but could not find anything beyond the $100,000/$300,000 limit. Def.'s Mem. of Law at 7-10; Ex. H (Insurance Proposal 1995); Def.'s Reply Mem. of Law at 2 - 5. This court believes that whether this broker acted negligently, as plaintiffs claim, or made a good faith effort to obtain insurance must be resolved by the finder of fact. Miller v. Checker Yellow Cab Co. of Bethlehem, Inc., 348 A.2d 128, 130 (Pa. 1975) (holding that "it is a long standing

maxim that a trial court must submit questions of negligence to the jury"). Therefore, the Motion for Summary Judgment as to the plaintiffs' negligence claim must be denied.

II. The Motion for Summary Judgment is Granted as to Plaintiffs' Misrepresentation Claim.

Defendant argues that plaintiffs are unable to prove the elements of misrepresentation. In order to succeed on a misrepresentation claim, a plaintiff must prove the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citations omitted).

In their Complaint, plaintiffs allege that defendant misrepresented that "it had surveyed the insurance marketplace and ascertained the available insurance products to Plaintiff's needs," and that defendant "represented to Plaintiffs that the sexual misconduct coverage amounts proposed in the CGL policies were the maximum available in the marketplace." Complaint, ¶¶ 35, 36. However, this court finds that the plaintiffs have failed to provide evidence of such a misrepresentation.

Plaintiffs rely on an expert opinion to show that there exist insurers who would have provided higher term limits of sexual misconduct coverage, and therefore argue that this report "establishes an issue of fact with regard to the availability of coverage." Pl.s' Mem. of Law at 6. However, plaintiffs fail to provide, nor can this court find evidence that shows that this particular defendant "informed Plaintiffs, on at least two occasions after searching the marketplace, that higher limits for sexual misconduct liability coverage were not available." Pl.s' Mem. of Law at 6 (citing Ex. B, Frank Report). Not only do the plaintiffs fail to

demonstrate when these alleged misrepresentations took place, but when Charles Taylor, plaintiffs' board member with nearly forty years of insurance experience, was asked by counsel whether Eileen Callow (the defendant's broker) made "any representation one way or another as to whether other markets, other than the markets that she had access to, could provide higher coverage for sexual misconduct liability," Taylor's answer was "She did not." Def.'s Mem. of Law, Ex. M (Taylor Depos. 42:7-14.)

Further, as defendant points out, it is undisputed that Callow "explored the market available to her and was unable to find higher limits." Def.'s Reply Mem. of Law at 7; Def.'s Mem. of Law, Ex. E. (Callow Depos. 26 -28). Thus, defendant points to deposition testimony which reveals that upon discovering that she was unable to obtain higher limits, Callow contacted Doug Cummings and informed him that the $250,000/500,00 coverage limit was not available. Def.'s Mem. of Law, Ex. E (Callow Depos. 62:1-3.). Thereafter, Callow testified that upon learning that the higher limit was not available, Doug Cummings responded:

A. "Fine."

Q. And what happened?

A. After that I, Mike Reynolds called me back and said the company said no, the limit still is 100/300 and that was it. I called Doug back and I told him 100/300, that was all they would do.

Q. And what did Doug say, if anything?

A. He said, "Could you try and get other limits, higher limits," and I said, "Yes."

Q. And did you try?

A. Yes.

Q. And what did you try to do? What did you do in trying?

A. I went out to the marketplace.

Q. Again, the marketplace as you described?

A. As I described originally.[1] Called, told them I had 100/300, could they go over it. Everyone declined.

Id. (Callow Depos. 62:5 - 63:22).

In fact, the record reveals not only several unsuccessful attempts by Callow to obtain higher limits, but also her subsequent communication back to plaintiffs about her inability to obtain such higher limits. Id., Ex. E (Callow Depos. 67:1-74:1); Ex. D (Cummings Depos. 152:23 - 153:24). Simply put, the record reflects that Callow obtained the coverage that she actually represented she would obtain, namely the $100,000/$300,000 limit policy that the plaintiffs actually paid for. Thus, her conduct will not support an action for misrepresentation. See Weisblatt v. Minnesota Mutual Life Ins. Co., 4 F.Supp. 2d 371, 379 (E.D. Pa. 1998) (granting summary judgment on a claim of negligent misrepresentation when broker obtained coverage for insured that he actually represented he would obtain).

Since plaintiffs provide no evidence, other than mere allegations of a misrepresentation, this court finds that plaintiffs would be unable to prove their claim of misrepresentation at trial. Accordingly, the Motion for Summary Judgment is granted as to this Count.[2]

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[1] Callow explained, and plaintiffs do not dispute that the "marketplace available to her" was comprised of carriers found in her "marketeer guide" as well as those providers with whom the defendant had contacts. Def's Mem. of Law, Ex. E (Callow Depos. 26:1 - 30:20).

[2] Although defendant does not raise the issue, plaintiffs' Complaint fails to conform to Pa.R.C.P. 1020(a) which reads that although "[t]he plaintiff may state in the complaint more than one cause of action against the same defendant... [e]ach cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Although Count III is entitled "Misrepresentation," plaintiffs allege the elements of both misrepresentation and negligent misrepresentation in one claim. Complaint, Count III; ¶41. Although similar elements must be proven to succeed on these causes of action, they are, in fact, separate and distinct causes of action, and therefore, should be stated in separate counts. Pa.R.C.P. 1020(a).

III. The Motion for Summary Judgment is Granted as to Plaintiffs' Breach of Contract and Breach of Fiduciary Duty Claims.

Defendant asserts that plaintiffs do not provide sufficient evidence to succeed on a breach of contract claim and further, are "unable to muster proof of the existence of a fiduciary duty," and that therefore, the Motion for Summary Judgment as to this Count should also be granted. Def.'s Mem. of Law at 14.

In Pennsylvania "[a] cause of action for breach of contract must be established by pleading (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 v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super.1999) (citation omitted). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." Id. (citation omitted). Further, it is well settled that, in order to determine the obligations of contracting parties, a reviewing court must find them from the language written within the four corners of the contract. Volunteer Firemen's Insurance Services Inc. v. Cigna Property and Casualty Insurance Agency, 693 A.2d 1330 (Pa. Super. 1997). Here, the Motion for Summary Judgment as to plaintiffs' breach of contract claim is granted because there is no evidence of a written contract between the parties. Although the Complaint alleges that "Plaintiffs and Biddle entered into a contract pursuant to which Biddle agreed to act as the insurance broker for Plaintiffs and to provide services relating thereto," there is simply no evidence on the record identifying the terms of this alleged contract. Complaint at ¶31.

Defendants also urge that plaintiffs failed to produce evidence to support the existence of a fiduciary duty. Our Superior Court has recognized that "[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line."

Basile v. Block, 777 A.2d 95, 101 (Pa. Super. 2001) (citing In re Estate of Scott, 455 Pa. 429, 316 A.2d 883, 885 (1974). "The essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." Id. Therefore, "[a confidential relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed[.]" Frowen v. Blank, 493 Pa. 137, 425 A.2d 412, 416-17 (1981).

As a result of this confidential relationship, a fiduciary duty arises which represents "the law's expectation of conduct between the parties and the concomitant obligations of the superior party." Basile, 777 A.2d at 101. "[T]he party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage." Young v. Kaye, 443 Pa. 335, 279 A.2d 759, 763 (1971). Furthermore, the resulting fiduciary duty may attach "wherever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest." Basile, 777 A.2d at 102. Moreover, those offering business advice may have created a confidential relationship "if others, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel." Id. (citations omitted).

Here, plaintiffs contend that "the disparity in knowledge, expertise and contacts establishes the confidential relationship between the parties." Pl.s' Reply Mem. of Law at 8. However, this court submits that there is no evidence on the record that a fiduciary duty arose between the parties. On the contrary, there is ample evidence supporting the finding that there clearly was no disparity of expertise between the plaintiffs and the defendant. In fact, deposition testimony demonstrates that in their dealings with other

insurance brokers and the defendant, the plaintiffs created a "de facto insurance subcommittee." This subcommittee consisted of, among others Charles Taylor, plaintiffs' board member with forty-four years of experience in the insurance business, and Doug Cummings, with about 10 years experience in purchasing insurance for the plaintiffs. Def.'s Mem. of Law, Ex. D. (Cummings Depos. 46:15 - 49:10); Ex. C (Taylor Depos. 11:8-13). Further, Cummings testified that it was his responsibility to present proposals from various insurance brokers, and the committee would then discuss and choose the policy that was most appropriate for purchase. Id., Ex. D (48:5 - 49:10, 50:13-17). Indeed, Taylor testified that before renewing its policy with defendant, the plaintiffs' subcommittee would request either a re-quote from defendant or they would solicit quotes from other brokers. Def.'s Mem. of Law, Ex C (Taylor Depos. 68:15-69:4). Moreover, when told that defendant was unable to provide for the higher limits as requested by the subcommittee, Cummings testified that he would "[t]alk to our associations to find out what they knew, if they knew generally if higher limits were available generally." Id., Ex D. (Cummings Depos. 148:19 - 149:3).

This court submits that the plaintiffs' were well-versed in the methods of obtaining insurance for its business, and it is disingenuous for them to now argue, for purposes of surviving a motion for summary judgment, that they were on anything but on a equal footing with defendant. The Motion for Summary Judgment as to the breach of fiduciary claim is granted.

CONCLUSION

For the reasons stated, defendant's Motion for Summary Judgment is denied as to plaintiffs' negligence claim, but granted as to plaintiffs' misrepresentation, breach of contract and breach of fiduciary claims. A contemporaneous Order consistent with this Opinion will be entered.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.