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

TREMCO, INCORPORATED, etal. Plaintiff,	: JUNE TERM, 2000
	: No. 0388
v.	: Commerce Program
PENNSYLVANIA MANUFACTURERS' INSURANCE COMPANY, Defendant.	:Control Nos. 040125, 040232

O R D E R

AND NOW, this 27th day of June 2002, upon consideration of the cross-Motions for Summary Judgment filed by plaintiff, Tremco, Incorporated ("Tremco"), and defendant Pennsylvania Manufacturers' Insurance Company ("PMAIC"), the respective responses in opposition, the memoranda of law, and all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** and **DECREED** that:

1) PMAIC's Motion for Summary Judgment is **Granted** and Tremco's claims against PMAIC are dismissed;

2) Tremco's Motion for Summary Judgment is **Denied**.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... June 27, 2002

Presently before this court are cross Motions for Summary Judgment filed by plaintiff, Tremco, Incorporated ("Tremco"), and defendant, Pennsylvania Manufacturers' Insurance Company ("PMAIC"). For the reasons discussed, this court grants PMAIC's Motion for Summary Judgment and denies Tremco's Motion for Summary Judgment.

BACKGROUND

In April 1993, Tremco a manufacturer of roofing products, contracted with Gooding, Simpson and Mackes, Inc. ("GSM")[1], a roofing contractor, to provide materials for construction of a roof at Eyer Junior High School in Lower Macungie, Pennsylvania. Pursuant to the contract ("Tremco/GSM contract"), GSM agreed, inter alia, to properly install Tremco's roofing products and indemnify Tremco for any loss or damage incurred by Tremco arising out of GSM's actions. Further, pursuant to the Tremco/GSM contract, GSM was required to provide a certificate of general liability insurance, adding Tremco as an additional insured. Although GSM provided a certificate of insurance to Tremco evidencing GSM's coverage under a policy provided by PMAIC ("PMAIC/GSM policy"), GSM did not add Tremco as an additional insured until after April 1995.

In the Fall of 1994, during the construction of the roof, students and teachers at Eyer Junior High School were exposed to toxic fumes, gasses and vapors, and as a result experienced headaches, blurred vision, nausea, and respiratory problems. On September 6, 1996, these students and teachers filed suit in the Lehigh County Court of Common Pleas alleging negligence, breach of warranty and strict liability against several parties, including GSM and Tremco. Clark, etal. v. E.R. Stuebner, etal., Lehigh County Court of Common Pleas, Civil Action No. 96-C-2110 ("Clark litigation"). Tremco asserted cross-claims against GSM arguing that it should be indemnified pursuant to the Tremco/GSM contract. By the end of 2001, the plaintiffs in the Clark litigation had settled their claims against all the defendants. However, there is currently a stay on Tremco's claims against GSM based on the indemnification clause of the

[1] GSM is not a named party in this action.

Tremco/GSM contract.

On June 5, 2000, while the Clark litigation was on-going, Tremco filed this action seeking a declaratory judgment and damages for breach of contract against PMAIC. Specifically, Tremco seeks coverage under the PMAIC/GSM policy and requests that this court determine liability based on the indemnity clause in the Tremco/GSM contract. In October 2000, after preliminary objections were filed by PMAIC, Tremco filed an Amended Complaint. In April 2002, Tremco and PMAIC filed these cross Motions for Summary Judgment.

DISCUSSION

I. This Court Has Jurisdiction to Hear Tremco's Breach of Contract Claims Against PMAIC Because All Interested Parties Have Been Joined.

Tremco has filed this declaratory judgment action against PMAIC seeking indemnification for the costs of defending and settling the underlying Clark litigation. PMAIC argues that, as an initial matter, GSM is an indispensable party and since Tremco has not joined GSM, this court lacks jurisdiction. This court disagrees.

In Pennsylvania, declaratory judgment actions are frequently initiated to resolve disputes concerning an insurance company's duty to defend or indemnify an action brought against an insured. Harleysville Mutual Ins. Co. v. Madison, 415 Pa.Super. 361, 365, A.2d 564, 566 (1992). Our Supreme Court recently set forth the procedure for a declaratory judgment action:

> A court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until

> such time that the claim is confined to a recovery that the policy does not cover. The duty to defend also carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy. Although the duty to defend is separate from and broader than the duty to indemnify, both duties flow from a determination that the complaint triggers coverage.

General Accident Insurance Co. v. Allen, 692 A.2d 1089, 1095 (Pa. 1997) (citations omitted).

Before reaching the substantive merits, however, there is a requirement that all indispensable parties with an interest in the action be joined. The Declaratory Judgment Act provides:

> General rule.--When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding.

42 Pa.C.S.A. section 7540(a).

The defense of failure to join an indispensable party may not be waived. Pa.R.C.P. 1032(a). Indeed, under Pennsylvania precedent, failure to join an indispensable party to a declaratory judgment action deprives a court of subject matter jurisdiction. Vale Chemical Co. v. Hartford Accident and Indemnity Company, 512 Pa. 290, 292, 516 A.2d 684, 685 (1986); Insurance Co. of Pa. v. Lumberman's Mutual Casualty Co., 405 Pa. 613, 616, 177 A.2d 94, 95 (1962).[2] As the Vale court explained:

> [E]ssential to the adversary system of justice and one of the basic requirements of due process is the requirement that all interested parties have an opportunity to be heard. Thus all parties whose interest will necessarily be affected must be present on the record.

Vale, 512 Pa. at 296, 516 A.2d at 688. Consequently, Pennsylvania appellate courts will reverse a trial court that rules on the substance of a declaratory judgment action where it lacks jurisdiction to do so.

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[2] For a general discussion of declaratory judgment actions, see Howard, "Declaratory Judgment Coverage Actions: A Multistate Survey and Analysis," 21 Ohio N.U.L.Review 13, 18 (1994)(observing that "Pennsylvania is perhaps the state that most stringently adheres to the mandatory joinder requirement").

Moreover, a court may raise this issue of subject matter jurisdiction sua sponte if the parties do not raise it. See, e.g., Erie Insurance Group v. Cavalier, 380 Pa.Super. 601, 602, 605, 552 A.2d 705,707 (1989) ("Finding the trial court lacked subject matter jurisdiction over this action as a result of appellant's failure to join the insureds as party defendants, we vacate the trial court's order and dismiss the action"); PIGA v. Schreffler, 360 Pa.Super. 319, 322 n. 4, 323, 520 A.2d 477, 479, n. 4 (1987) (42 Pa .Cons.Stat.Ann. 7540 "constitutes a jurisdictional requirement with respect to joinder of indispensable parties").

"[T]he basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party...." CRY, Inc. v. Mill Service, Inc., 536 Pa. 462, 640 A.2d 372, 375 (1994). The determination of indispensability involves "at least" the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

Centolanza v. Lehigh Valley Dairies, Inc., 540 Pa. 398, 658 A.2d 336, 338- 39 (1995) (quoting CRY, supra) (quoting Mechanicsburg Area School District v. Kline, 494 Pa. 476, 431 A.2d 953, 956 (1981)). The party seeking a declaratory judgment has the burden of proving that all interested parties have been made parties. Moraine Valley Farms, Inc. v. Connoquenessing Woodlands Club, 296 Pa.Super. 277, 281, 442 A.2d 767, 769 (1982).

Here, Tremco has met its burden of showing to this court that all interested parties have been made parties in this action. As an initial matter, Tremco explains that after PMAIC filed its preliminary objections arguing that indispensable parties had not been joined in the case, Tremco amended its complaint to include the “Involuntary Plaintiffs,” the students and teachers involved in the Clark litigation. Pl’s Response to Def’s

Mot. for Summ. Judg. at 11. Further, Tremco urges that GSM's rights are not connected to this litigation. Specifically, Tremco maintains that this lawsuit seeks determination of its coverage under the PMAIC/GSM policy and therefore does not involve any conclusions as to GSM's rights or interests under the same policy. Tremco also emphasizes that "there is no redress sought against [GSM] and justice can be afforded without violating its due process rights." Id. at 12.[3] Although GSM is a named insured under the PMAIC/GSM policy, none of the allegations in the Amended Complaint indicate that GSM's rights are so affected that a disposition on the merits would be void absent GSM's presence. In summary, this court finds that GSM is not an indispensable party to this action whose rights and interests would otherwise be so intimately connected with Tremco's claims that no relief could be granted without infringing upon GSM's rights. The objection for failure to join an indispensable party is overruled.

II. PMAIC's Motion for Summary Judgment is Granted and Tremco's Motion for Summary Judgment is Denied Because Tremco is Not a Named Insured, Involuntary Named Insured, or Intended Third Party Beneficiary of the PMAIC/GSM Policy[4]

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of 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.

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[3] Moreover, this case does not involve the concern espoused in Vale. Unlike the indispensable party in Vale, here the persons who had brought personal injury claims against Tremco had been already added as indispensable parties in this declaratory judgment action. See Vale, at 294, 516 A.2d at 686-87 (holding that a personal injury plaintiff has an obvious interest in seeing that the insurance company pays any judgment eventually obtained against its insured. Where the personal injury plaintiff has not been joined, the court lacks jurisdiction to enter a declaratory judgment.).

[4] Both Motions for Summary Judgment address similar issues. For purposes of economy, the court will address both motions together.

1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entrance 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. When the plaintiff is the non-moving party, "summary judgment is improper if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory [he] has pled." Id. However, "[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).

Here, all three Counts of the Amended Complaint sound in breach of contract. Amended Complaint, Counts I-III. PMAIC urges that there is **no** contract with Tremco in thatTremco is not covered by the PMAIC/GSM policy. Tremco argues that there is a contract since it is covered as an "involuntary named insured" and an intended third party beneficiary of the PMAIC/GSM policy.

Thus, as a threshold matter, this court must determine whether Tremco is a named insured or intended third party beneficiary of the PMAIC/GSM policy.

A. Tremco is Not a Named Insured or "Involuntary Named Insured" of the PMAIC/GSM Policy

PMAIC urges that Tremco is not a named insured or involuntary named insured under the PMAIC/GSM policy. The proper construction of an insurance policy is a matter of law, which a court may properly resolve when ruling on a motion for summary judgment. Fisher v. Harleysville Ins. Co., 621 A.2d 158 (Pa.Super.Ct. 1993). In interpreting an insurance policy, the court must ascertain the intent of the parties as manifested by the language of the written agreement. When the policy language is clear and unambiguous, the court will give effect to the language of the contract. Paylor v. Hartford Ins. Co., 640 A.2d 1234 (Pa.1994) (citations omitted). However, a provision is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 390 (Pa. 1986) (citations omitted). In such cases, it is well-settled that any ambiguity is to be resolved against the insurer. Koenig v. Progressive Ins. Co., 599 A.2d 690 (Pa.Super.Ct. 1991) (citation omitted).

Here, it is undisputed that Tremco is not a named insured under the PMAIC/GSM policy. The Declarations page of CGL Form CG 00-01 (10/93) unambiguously lists "Gooding, Simpson & Mackes, Inc." as the only "Named Insured". Def's Mot. for Summ. Judg., Exh. D. Although, the policy also lists several GSM entities as "Additional Named Insureds," Tremco is **not** listed in the "Additional Named Insured Endorsement." Id. at Exh. E. Moreover, deposition testimony reveals that Tremco was not an additional named insured until April 1995, after the events of the Clark litigation had already occurred. Def's Mem. of Law, Exh G. In fact, Tremco concedes that not only was it "not specifically listed as a named insured on the PMAIC policy Designation, issued to [GSM,]" but that Tremco "cannot claim that

it was specifically listed as additional insured in 1994." Pl's Response to Def's Mot. for Summ. Judg. at 5, 9. Thus, not being a named insured to the PMAIC/GSM policy, Tremco cannot maintain a breach of contract action against PMAIC on this basis.

Tremco further argues that it is an "involuntary named insured" to the PMAIC/GSM policy. Amended Complaint ¶16. According to "Section II - Who Is An Insured" of the PMAIC/GSM policy, a party is an "insured":

> 1. If you are designated in the Declarations as:
>   a. An individual, you and your spouse are insureds...
>   b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
>   c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
> 2. Each of the following is also an insured:
>   a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you...
>   b. Any person (other than your "employee") or any organization while acting as your real estate manager.
>   c. Any person or organization having proper temporary custody of your property if you die...

Def's Mot. for Summ. Judg., Exh. C.

A review of this unambiguous language reveals that the PMAIC/GSM policy does not provide coverage for an "involuntary named insured." Thus, Tremco's contention that it is an "involuntary name insured" must fail. Without a contract between Tremco and PMAIC, there can be no breach. Therefore,

PMAIC is entitled to summary judgment as a matter of law on the issue whether Tremco is an "involuntary named insured".[5]

B. Tremco is Not an Intended Third Party Beneficiary of the PMAIC/GSM Policy

Alternatively, Tremco asserts that it is an intended third party beneficiary of the PMAIC/GSM policy. Specifically, Tremco argues that since there is an enforceable indemnity agreement in the Tremco/GSM contract and the PMAIC/GSM policy expressly provides GSM with insurance for such an indemnification agreement,Tremco is an intended beneficiary of the PMAIC/GSM policy and thus entitled to indemnification from PMAIC.

The Tremco/GSM contract contains an indemnification agreement which reads, in pertinent part:

> The Roofing Contractor [GSM] agrees to indemnify and hold [Tremco],... harmless from any and all losses, costs, expenses (including court costs, attorney's fees, interest and profits), claims, demands and suits for any bodily injury, illness or death of any person... and from any and all claims or suits of employees of the Roofing Contractor caused in whole or in part by any negligent act or omission on the part of the Roofing Contractor..., whether such claims may be based upon the Roofing Contractor's alleged passive or active negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of the Roofing Contractor.

Pl's Mot. for Summ. Judg., Exh.B. Tremco argues that based on this language, "Tremco is entitled to this indemnification even if a jury would have determined that Tremco itself was negligent."[6] Id. at 6.

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[5] Since this court has determined that Tremco is not a named insured of the PMAIC/GSM policy, it need not address PMAIC's argument that Tremco is estopped from seeking coverage because of late notice.

[6] Although both parties argue extensively as to whether Tremco, as an indemnitee, has a right to recover for its own negligence, this court need not reach this issue because resolution of the threshold issue whether Tremco is party to the PMAIC/GSM policy is dispositive.

The PMAIC/GSM policy provides GSM with insurance for indemnification agreements, in particular "insured contracts." Thus, Section I - Coverages, reads in pertinent part:

> 2. Exclusions-
> This insurance does not apply to:
>
> ***
>
> b. Contractual Liability
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
>
> (2) That the insured would have in the absence of the contract or agreement.

Pl's Mot. for Summ. Judg., Exh C. Thus, PMAIC provides coverage to its insured, if the insured is party to an "insured contract." Section V. 8F of the PMAIC/GSM policy explains that an "insured contract" is:

> [t]hat part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means liability that would be imposed by law in the absence of any contract or agreement.

Id. Tremco asserts that these provisions "entitle[it] to prevail because it is an intended beneficiary of the policy between [PMAIC] and [GSM]." Id, at 11. This court disagrees.

In Pennsylvania, "[i]n general, the duty of a title insurance company runs only to its insured, not to third parties who are not party to the contract." Hicks v. Saboe, 555 A.2d 1241, 1243 (1989). As an exception to this rule, third parties may bring claims based on an insurance contract if they are intended third party beneficiaries. See McKeeman v. CoreStates Bank, N.A., 751 A.2d 655, 659 (Pa.Super.Ct. 2000) ("an intended third party beneficiary may have a limited cause of action under [an insurance]

contract"). However, insurance carriers's liabilities are "governed solely by the contract they enter into with their insured." Township of Springfield v. Ersek, 660 A.2d 672, 675 (Pa.Commw.Ct. 1995) (citations omitted).

Pennsylvania has adopted Section 302 of the Restatement (Second) of Contracts for defining the term "intended beneficiaries":

> Intended and Incidental Beneficiaries
> (1) Unless otherwise agreed ... a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Kooby v. Local 13 Prods., 751 A.2d 220, 222 (Pa.Super.Ct. 2000). Once a third party has established its status as a third party beneficiary, its rights and liabilities under a contract "are the same as those of the original contracting parties." Miller v. Allstate Ins. Co., 763 A.2d 401, 404 n. 1 (Pa.Super.Ct.2000) (citing General Accident Ins. Co. of Amer. v. Parker, 445 Pa.Super. 300, 665 A.2d 502 (1995)).

Here, application of this standard to the PMAIC/GSM policy for the relevant period of April 1, 1994 - 1995[7] reveals that Tremco is not an intended third party beneficiary. Although there is evidence that PMAIC and GSM intended and agreed to benefit certain companies other than GSM, as is evidenced by the additional insureds listed in the "Additional Named Insured Endorsement," no evidence exists of a similar intent to benefit Tremco. (Def's Mot. for Summ. Judg., Exh. E (listing the additional named insured

[7]PMAIC submits, and Tremco does not disagree, that the PMAIC/GSM policy from 4/1/95-96 is not applicable to this claim.

of policy)). In fact, there is no indication on the record that, at the time PMAIC and GSM entered into their contract, a promise of insurance was made to satisfy any obligation GSM had to Tremco or that any benefit to Tremco was intended by either GSM or PMAIC. Admittedly, had GSM, pursuant to its obligations under the Tremco/GSM contract, timely added Tremco as an additional insured to the PMAIC/GSM policy, then clearly, Tremco would have been an intended third party beneficiary of the policy. However, GSM failed to do so until April 1, 1995.[8] Thus, Tremco cannot be said to be an intended third party beneficiary of the PMAIC/GSM policy.[9]

While this court has not found any Pennsylvania cases squarely on point, courts in other jurisdictions support such a finding. In Alex Robertson Co. v. Imperial Casualty & Indemnity Co., 10 Cal.Rprt.2d 165 (Cal.Ct.App.1992), the court was faced with the question of "whether, under a contractual liability

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[8]As a result of GSM's failure to timely add Tremco as an additional insured, PMAIC's suggestion that Tremco should have pursued a claim for breach of the Tremco/GSM contract against GSM has arguable merit.

[9]Tremco contends that the fact that it is a party to an "insured contract," in and of itself, confers insured status uponTremco under the PMAIC/GSM policy. Pl's Mot. for Summ Judg. at 11. However, none of the cases cited by Tremco, hold that a party, who is not a named insured to a policy, is somehow conferred insured status by the very existence of an "insured contract" provision in a policy to which it is not a party. Instead, while these cases involve "insured contracts," unlike here, all these cases address an insurer's refusal to defend and/or indemnify a named insured of its policy. See York v. Vulcan Material Co., 63 S.W.3d 384 (Tenn 2001) (pursuant to a specific contractual endorsement covering the liability of a subcontractor to a named contractor, subcontractor's insurer had duty to defend general contractor); Michael Nichols, Inc. v. Royal Insurance Co. of America, 748 N.E.2d 786 (Ill.App. 2001) (pursuant to an "insured contract" provision in subcontractor's policy with its insurer, court ordered that insurer was estopped from denying coverage to subcontractor); Getty Oil Co. v. Insurance Company of North America, 845 S.W.2d 794 (Tx. Super.Ct 1992) (holding that while res judicata barred buyer's claims against seller; it did not precluded buyer from bringing claims against insurers. Further, an additional insured provision in a purchase order was not prohibited by Oilfield Anti-Indemnity Statute as it was a separate covenant from the indemnity agreement.). Since Tremco is not a named insured on the PMAIC/GSM policy, these cases do not apply.

coverage endorsement, defendant owed a duty to defend plaintiff in an action by a third party and whether defendant presently owes plaintiff a duty to indemnify it for loss under the judgment rendered in favor of the third party." Id. at 165. In Robertson, although the general contractor was not the named insured on the policy between the insurance company and the architectural firm, with whom the general contractor had an indemnification agreement, the general contractor maintained that it was an insured under the policy as an intended beneficiary. Unpersuaded, the Robertson court held:

> A Contractual Liability Coverage Endorsement does not make the person an insured whose liability is assumed by the party insured under the policy. Rather, as the endorsement clearly states, it extends the insurance afforded under the policy to include coverage for liability assumed by contract by the person insured. Here, the effect of the endorsement is to extend coverage, within the limits specified in the endorsement, to the liability assumed by [the architectural firm] in its contract with [the general contractor].

Id. at 168. Similarly, in the present matter, the effect of Section I, 2b(1) of the PMAIC/GSM policy is to provide liability coverage to GSM when GSM has, by contract, assumed the liability of Tremco. While Tremco is a potential indemnitee of GSM under the indemnification clause of the Tremco/GSM contract, Tremco is not an insured under the PMAIC/GSM policy.[10]

To support its contention that it is an intended third party beneficiary of the PMAIC/GSM policy, Tremco cites Guy v. Leiderbach, 459 A.2d 744 (Pa.1983). However, this decision does not help Tremco. In Guy, a testator retained the services of an attorney to draft a will. The intended third party beneficiary

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[10] This is also supported by several decisions from New York. See Jefferson v. Sinclair Refining Company, 179 N.E.2d 706 (N.Y. Ct. App. 1961) (oil company was not a third party beneficiary of a general liability policy issued to a contractor by an insurance company naming only the contractor as an insured); see also McKenzie v. New Jersey Transit Rail Operations, 772 F.Supp. 146 (S.D.N.Y. 1991) (insurer owed no coverage to railroad according to policy terms, despite insurance certificate issued to railroad by local broker, and as stranger to policy, since it was not a named insured, railroad lacked standing to sue insurer.).

was the sole legatee under the will. The entire legacy failed because, at the attorney's instruction, this legatee witnessed the will, despite a statute which voided an entire legacy to a person who has attested a will. It was very clear to the Guy court that the testator intended to confer a benefit directly upon his one and only legatee at the time he retained his attorney to prepare his will. Applying the principles set forth in the Restatement (Second) of Contracts, the Guy court permitted a restricted cause of action for an intended third party beneficiary who was not in privity with the professional whose malpractice harmed the beneficiary. For the Guy court, "it was critical that the beneficiary was an intended beneficiary, that is, one intended by the promisee to receive the benefit of the promised performance." Hicks v. Saboe, 555 A.2d 1241, 1244 (Pa. Super Ct. 1989).

Here, it is clear that GSM entered into the insurance policy with PMAIC for the benefit of GSM, only. With the inclusion of the "insured contract" provision in the PMAIC/GSM policy, GSM sought protection from claims by third parties. As noted there is no evidence to support the contention that the provision was included with the specific intent of benefitting Tremco. Thus, Tremco cannot now enforce an provision in a contract to which it was not a party.[11] In re Mushroom Transportation Co., 247 B.R. 395, 399 n.4 (E.D. Pa 2000) ("It stretches logic and reason to assert that non-party parties with absolutely no rights or obligations under a contract (indeed, who were nowhere in the picture when the contract was signed) should be allowed to enforce a clause against a party to the contract in later litigation.").

[11] A similar conclusion was reached in Fizz v. Kurtz, Dowd & Nuss, Inc., 619 A.2d 1037 (Pa.Super.Ct 1987) where the court held that a deceased motorist, killed by a driver who had become intoxicated at a tavern, was not a third party beneficiary of an insurance contract between the general liability carrier and the tavern owners.

In summary, since Tremco is not an intended third party beneficiary of the PMAIC/GSM policy, PMAIC is entitled to summary judgment. Accordingly, PMAIC does not have a duty to defend or to indemnify Tremco.[12]

CONCLUSION

For the reasons discussed, PMAIC's Motion for Summary Judgment is granted, and the claims of Tremco against PMAIC are dismissed. The cross Motion for Summary Judgment filed by Tremco is denied.

This court will enter an Order consistent with this Opinion.

BY THE COURT:

ALBERT W. SHEPPARD., JR., J.

[12] Having determined that as a matter of law, Tremco is not an named insured, involuntary named insured, or intended beneficiary of the PMAIC/GSM policy, this court also holds that Tremco cannot maintain a bad faith action, under 42 Pa.C.S.A. § 8371, against PMAIC. Klinger v. State Farm Mut. Auto.Ins. Co., 895 F.Supp. 709, 715 (M.D. Pa. 1995) ("the [bad faith] statute provides a cause of action against an insurer who acts in bad faith with respect to an "insured", and the language means precisely what it says: the duty runs to one covered under the insurer's policy of insurance.").