

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

TOWER INVESTMENTS, INC., LIBERTY	:	MAY TERM, 2007
HOMES PHILADELPHIA, INC., and BART	:	
BLATSTEIN,	:	NO. 03291
	:	
Plaintiffs,	:	COMMERCE PROGRAM
	:	
v.	:	Control Nos.: 09010337, 09010338
	:	
RAWLE & HENDERSON, LLP, ZURICH	:	
AMERICAN INSURANCE COMPANY, and	:	
ASSURANCE COMPANY OF AMERICA,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 8th day of June, 2009, it is hereby **ORDERED** that defendants' Motions for Summary Judgment are **GRANTED**. Plaintiffs' claim are **DISMISSED** for the reasons set forth in the Opinion issued simultaneously.

BY THE COURT,

MARK I. BERNSTEIN, J.

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OPINION

Plaintiff Liberty Homes Philadelphia, Inc. (“Liberty”) is the owner of certain improved real property in the Northern Liberties section of Philadelphia that was formerly the home of the Ortlieb Brewery (the “Ortlieb Site” or “Plaintiffs’ Property”). Liberty is an affiliate of plaintiff Tower Investments, Inc. (“Tower”). Plaintiff Bart Blatstein (“Blatstein”) is president and sole shareholder of both Tower and Liberty. Liberty, Tower, and Blatstein are collectively referred to as “Plaintiffs.”

Plaintiffs intended to develop the Ortlieb Site for residential and commercial use. Prior to development, plaintiffs hired non-party Philadelphia Building Group, Inc. (“Plaintiffs’ Demolition Company”) to demolish certain buildings on the Ortlieb Site. One of the buildings on Plaintiffs’ Property shared a common wall and structural steel beams with a building on an adjacent site owned by non-party Ray King (“King”). After demolition commenced in June, 2002, King claimed that Plaintiffs’ Demolition Company caused significant structural damage to

King's building, and demolition was halted. At the time that demolition ceased, a large pile of debris was left by Plaintiffs' Demolition Company on Plaintiffs' Property.

In March, 2003, King sued Plaintiffs and Plaintiffs' Demolition Company for \$1.4 million in damage to his property (the "King Action"). Plaintiffs gave notice of the King Action to their commercial liability insurer, defendant Assurance Company of America ("Assurance"). Assurance provided Plaintiffs with a defense in the King Action under a reservation of rights letter. Specifically, Assurance reserved its right to withdraw coverage because Plaintiffs entered into a settlement agreement, in August 2002, with Plaintiffs' Demolition Company in which Plaintiffs "absolved the demolition subcontractor from further liability."¹

Assurance retained defendant law firm Rawle & Henderson ("R&H") to defend Plaintiffs in the King Action. Blatstein's personal attorney, non-party Daniel Bernheim, entered his appearance in the King Action as well. Plaintiffs' Demolition Company was also insured, and its insurer provided it with a defense in the King Action.

According to the engineers' reports prepared in connection with the King Action, three events had to occur in the following order to avoid further damage to King's building:

1. King's building first had to be braced and shored from the inside.
2. Only then could the remaining demolition debris be removed from Plaintiffs' Property.
3. Finally, the repairs to King's exterior wall could be made from Plaintiffs' Property.

Trial of the King Action was scheduled to begin on April 4, 2005. In November, 2004, R&H, King's counsel, and the Demolition Company's counsel negotiated a settlement of \$1.1 million. Assurance agreed to contribute \$400,000 and the Demolition Company or its insurer agreed to pay the remaining \$700,000. In January, 2005, the parties exchanged proposed

¹Reservation of Rights Letter, p. 2, attached to R&H's Motion for Summary Judgment as Exhibit G.

releases. Blatstein's counsel, Bernheim, drafted a release (the "Blatstein Release"), the terms of which King found objectionable, and King's counsel drafted a release (the "King Release") to which Blatstein objected. The relevant differences between the two releases are as follows:

Blatstein Release

1. Settlement funds to be held in escrow and disbursed only after work is done by King.
2. King had 30 days to submit an Expert's Plan for the work to Plaintiffs for Plaintiffs' approval.
3. King's wife, who was not a party to the King Action, required to sign release.
4. Anti-disparagement provision.
5. Confidentiality provision.

King Release

1. Self-executing upon receipt of settlement funds by King.
2. King had 120 days from receipt of funds to brace and shore his property from the inside.
3. Plaintiffs had 60 days after bracing and shoring to remove debris and provide flat level surface.
4. King granted access to Plaintiffs' Property to repair exterior of King building.
5. If Plaintiffs breached, then release would be void and King could keep the settlement funds as part of his damages.

Despite Plaintiffs' objection to the King Release, in February 2005, Assurance issued a check for \$400,000 to R&H with instructions to forward it to King's counsel. R&H did so, thereby "executing" the King Release. In June 2005, King completed the interior bracing and shoring of his building, which was less than 120 days after his receipt of the settlement funds. Plaintiffs then refused to remove the demolition debris from their Property, which would have

been the next necessary step under the engineers' reports and the King Release. In August, 2005, King filed a Motion to Enforce Settlement based on the King Release.

Litigation continued through the following year. In May 2006, Plaintiffs contracted to have the demolition debris removed from Plaintiffs' Property.² In August 2006, King and Plaintiffs entered into an Amendment to the King Release that addressed many of the other issues Plaintiffs had with the King Release.³ Since then Plaintiffs have not developed the Ortlieb Site further.

In May, 2007, Plaintiffs filed this action against Assurance⁴ and R&H for wrongful settlement of the King Action. Plaintiffs have asserted a contractual attorney malpractice claim against R&H⁵ and a claim for breach of the contractual duty of good faith and fair dealing against Assurance. R&H and Assurance have moved for summary judgment on both claims.

Plaintiffs argue that "[t]he debris remaining on the Ortlieb site significantly interfered with Plaintiffs' ability to move forward with development."⁶ Plaintiffs claim that, if King and Plaintiffs had "reached a resolution in 2005, Plaintiffs could have started the zoning permit process immediately after settlement," and could have completed the development project within approximately 9 months, *i.e.*, late 2005 or early 2006.⁷

² See Central Salvage Contract, attached to Assurance's Motion for Summary Judgment as Ex. 64.

³ Plaintiffs' Response to R&H's Motion for Summary Judgment, p. 17.

⁴ Zurich American Insurance Company, Assurance's parent corporation, was also named as a defendant in this action. For purposes of this Opinion, "Assurance" shall include its parent.

⁵ The court previously dismissed Plaintiffs' tort malpractice claims against R&H on statute of limitations grounds.

⁶ Plaintiffs' Response to R&H's Motion for Summary Judgment, p. 18.

⁷ *Id.* at pp. 20-21.

Since the debris was not removed until Spring 2006, Plaintiffs claim they lost their “window of opportunity” to develop the Ortlieb Site because “the current real estate market has diminished, [while] the costs of construction have markedly increased.”⁸ As a result for this 18 month delay, Plaintiffs claim the following damages:

1. Litigation costs incurred after King filed his Motion to Enforce Settlement.
2. \$400,000 to maintain the Ortlieb Site.
3. \$2 million in increased construction costs between April 2005 and September 2006.
4. \$4-6 million in lost profits due to Plaintiffs’ inability to complete development in 2006.

In order to prove that defendants breached their respective contracts with Plaintiffs, Plaintiffs must show: 1) the existence of a contract, including its essential terms; 2) a breach of a duty imposed by the contract; and 3) resultant damage.⁹ Plaintiffs have failed to show that their claimed damages resulted from, or were caused by, defendants’ wrongful execution of the King Release. Instead, Plaintiffs have shown that Plaintiffs’ year long failure to remove the demolition debris that Plaintiffs’ Demolition Company left on Plaintiffs’ Property prevented Plaintiffs from developing Plaintiffs’ Property and caused Plaintiffs’ delay damages. The evidence establishes that Plaintiffs, not defendants, caused Plaintiffs’ loss. Since Plaintiffs have suffered no damages resulting from defendants’ breach of contract, their claims against defendants must be dismissed.¹⁰

Plaintiffs have also failed to show that Assurance breached its contractual duty of good faith and fair dealing. The insurance contract under which Assurance tendered a defense to

⁸ *Id.* at pp. 21-22.

⁹ Church v. Tentarelli, 953 A.2d 804, 808 (Pa. Super. 2008).

¹⁰ “When it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action, whether the action be denominated in assumpsit or trespass, is proof of actual loss.” Rizzo v. Haines, 520 Pa. 484, 504, 555 A.2d 58, 68 (1989); Duke & Co. v. Anderson, 418 A.2d 613, 617 (Pa. Super. 1980).

Plaintiffs expressly provides that Assurance “may at [its] discretion investigate any occurrence and settle any claim or suit that may result.”¹¹ The terms of the policy do not require Assurance to obtain Plaintiffs’ consent to any settlement. In this case, Assurance exercised its discretion and settled the King Action within Policy limits without causing any loss to Plaintiffs. Therefore, Assurance performed, not breached, its obligations to Plaintiffs under the policy. Plaintiffs’ breach of contract claim against Assurance must be dismissed.¹²

CONCLUSION

For all the foregoing reasons, defendants’ Motions for Summary Judgment are granted, and Plaintiffs’ claims are dismissed.

BY THE COURT,

MARK I. BERNSTEIN, J.

¹¹ Commercial General Liability Coverage Policy, Section I, ¶ 2(a), attached to R&H’s Motion for Summary Judgment as Exhibit F.

¹² See Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828 (1995) (vacating injunction voiding settlement entered into by insurer where policy gave insurer right to settle suit and did not require insured’s consent to settlement).