

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

BARBARA and LEE LETWIN,	:	August Term 2007
Plaintiffs,	:	
v.	:	No. 2316
RAIN and HALE, LLC, GOETZ	:	
INSURERS, INC., INSURANCE	:	COMMERCE PROGRAM
COMPANY OF NORTH AMERICA, ACE	:	
PROPERTY and CASUALTY	:	Control Number 042652
INSURANCE COMPANY CO. and	:	
INDEMNITY INSURANCE COMPANY	:	
OF NORTH AMERICA,	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 12<sup>th</sup> day of September 2008, upon consideration of Defendant Goetz Insurers, Inc.'s Preliminary Objections to Defendants Rain and Hale, LLC, Insurance Company of North America, Ace Property and Casualty Insurance Co. and Indemnity Insurance Company of North America's Cross Claims (hereinafter Defendant Insurers), all responses in opposition, Memoranda, all matters of record and in accord with the contemporaneous Opinion filed of record, it hereby is **ORDERED** that the Preliminary Objections are **Sustained**.

**BY THE COURT,**

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**ARNOLD L. NEW, J.**

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**OPINION**

This is an insurance coverage claim brought by Plaintiffs Barbara and Lee Letwin (hereinafter “Letwin” or “Plaintiffs”) against Goetz Insurers Inc. (“Goetz”), Rain and Hale, LLC., Insurance Company of North America, Ace Property and Casualty Insurance Co. and Indemnity Insurance Company of North America’s (hereinafter “Defendant Insurers”) for denial of a workers’ compensation claim filed by a person injured on the Letwins’ property. At the time of the injury, the Letwins owned Grist Mill Farms which was insured by a policy of insurance issued by Indemnity Insurance Company of North America and an umbrella policy issued by Ace Property and Casualty Insurance Company. Goetz was the preferred broker for members of USA Equestrian, a membership group for people involved in equestrian arts. Rain and Hale, LLC (hereinafter “Rain and Hale”) was the agent and or claims handling representative for Insurance Company of North America, Ace Property and Casualty Insurance Com and or Indemnity Insurance Company of North America.

Plaintiffs allege that they contacted Goetz to obtain a quote for insurance coverage for their property which would cover them in the event of a claim by anyone living or working at the farm was injured and for claims by the farm manager/lessee for injuries. Plaintiffs were advised by a representative at Goetz that the policy would cover all situations where the person or employee was leasing the premises to operate their own business.

On February 29, 2004, the Letwins leased the property to Rechelle Knapp. The Letwins boarded horses with Knapp and paid her to care for the cats and dogs on the property. On August 23, 2004, Knapp suffered injuries when one of the horses kicked her in the face. The Letwins notified Goetz of the incident who in turn notified Rain and Hale. On September 16, 2004, the lessee filed a petition for workers compensation benefits. Plaintiffs informed Goetz and Rain and Hale that Knapp was not an employee. On September 20, 2004, Rain and Hale informed the Letwins that the insurers were proceeding under a full reservation of their rights under the policies. On October 1, 2004, plaintiffs were advised that the insurers were denying coverage for the claim on the ground that Knapp was an employee.

In August 2007, plaintiffs instituted suit against Goetz and defendant insurers. Goetz and the defendant insurers filed preliminary objections to the complaint which were sustained in part and overruled in part. The claims remaining against defendant insurers are breach of contract and bad faith. The claims remaining against Goetz are fraud, negligent misrepresentation, breach of fiduciary duty, professional negligence and promissory estoppel.

Defendant insurers filed cross claims against Goetz for common law indemnification and contribution (count I), contractual indemnification (count II), breach of contract (count III) and negligent misrepresentation (count IV). Presently before the court is Goetz's preliminary objections to defendant insurers cross claims.

## **DISCUSSION**

In Count I of the cross claim, defendant insurers purport to state a claim for common law contribution and indemnification. Contribution and indemnity are separate and distinct causes of action. The right of contribution arises between joint tort-feasors where a party has paid more than its fair share of liability to a third party.<sup>1</sup> Indemnity, on the other hand, can arise from express contract, implied contract, or by operation of law.<sup>2</sup>

In Pennsylvania, contribution based on joint and several liability is governed by statute and is available only among joint tort-feasors.<sup>3</sup> To determine whether parties are joint tort-feasors, courts generally consider the following factors: "the identity of a cause of action against each of two or more defendants; the existence of a common, or like duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiffs; identity of the facts as to time, place or result; whether the injury is direct and immediate, rather than consequential, responsibility of the defendants for the same injuria as distinguished from damnum."<sup>4</sup>

Here, a review of the allegations contained within the complaint and cross claim demonstrate that Goetz and defendant insurers do not owe a common duty to plaintiffs.

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<sup>1</sup> Swartz v. Sunderland, 403 Pa. 222, 169 A.2d 289, 291 (1961).

<sup>2</sup> Boswell v. Aetna Life Ins. Co., 31 Pa. D. & C.3d 94, 98 (1984).

<sup>3</sup> Kemper Nat'l P & C Cos. v. Smith, 419 Pa. Super. 295, 309, 615 A.2d 372, 380 (1992).

<sup>4</sup> Harka v. Nabati, 337 Pa. Super. 617, 622, 487 A.2d 432, 434 (1985).

As alleged in the complaint, Goetz is the preferred broker for members of the USA Equestrian<sup>5</sup>, while Rain and Hale is an agent and/or claims handling representative for the insurance companies and the other defendant insurers are insurance companies.<sup>6</sup> Goetz and defendant insurers owe different duties to plaintiffs which when breached give rise to different claims. Based on the foregoing, Goetz and defendant insurers are not joint tortfeasors and Goetz's preliminary objection to the common law contribution claim in count I is sustained.

Similarly, defendant insurers have failed to state a claim for common law indemnification. The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another. The difference between primary and secondary liability depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. Secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.<sup>7</sup> Secondary liability has been found to exist where there is a

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<sup>5</sup> Complaint ¶ 17.

<sup>6</sup> Complaint ¶ 2.

<sup>7</sup> Builders v. Supply Co. v. Mc Cabe, 366 Pa. 322, 77 A.2d 368 (1951).

relation of employer and employee, principal or agent or in the case of a pedestrian injured by falling in a hole in the pavement of a street, an abutting property owner and municipality.<sup>8</sup>

Here, as it pertains to the common law indemnification claim, defendant insurers fail to allege any facts to establish any legal or special relationship between Goetz and defendant insurers to hold Goetz secondarily responsible for defendant insurers' actions. Accordingly Goetz's preliminary objection to the common law indemnification claim is dismissed.

Defendant insurers also purport to state a claim for contractual indemnification (count II) and breach of contract (count III). While Rain and Hale allege that they are a party to a contract with Goetz, absent from the complaint and cross claim are any facts regarding whether the contract is written or oral. Also absent are any facts setting forth the terms of the contract, the provisions breached or any explanation as to why the contract is not attached. Based on the foregoing, Goetz's preliminary objection to counts II and III are sustained.<sup>9</sup>

Lastly, defendant insurers also fail to state a claim for negligent misrepresentation (count IV). Negligent misrepresentation requires proof of a misrepresentation of a material fact; made under circumstances in which the misrepresenter ought to have known its falsity; with an intent to induce another to act on it; and which results in injury to a party acting in justifiable reliance on the misrepresentation.<sup>10</sup>

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<sup>8</sup> Id. at 370.

<sup>9</sup> The court recognizes that defendant insurers may amend to attach the alleged contract discussed in counts II and III.

<sup>10</sup> Heritage Surveyors & Engineers Inc. v. National Penn Bank, 801 A.2d 1248, 1252 (Pa. Super. 2002).

Here, defendant insurers allege that they relied upon Goetz's representation that the policies which are the subject of this lawsuit would meet the needs of the plaintiffs/defendant insurers and that they suffered damages in the form of defense costs and costs of any and all settlement or judgments entered against them with regard to plaintiffs' causes of action.<sup>11</sup> The alleged representation by Goetz could not cause defendant insurer's damages. Rather, the claims against defendant insurers are based on their own acts in denying plaintiffs coverage. Accordingly, the court finds that defendant insurers failed to properly allege a claim for negligent misrepresentation and Goetz's preliminary objection to count IV is sustained.

### **CONCLUSION**

Based on the foregoing, defendant Goetz Insurers Inc.'s preliminary objections to defendant insurers cross claims are sustained.

**BY THE COURT,**

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**ARNOLD L. NEW, J.**

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<sup>11</sup> Cross claim ¶¶ 14, 18.