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

CONSOLIDATED RAIL CORP.,	:	SEPTEMBER TERM, 2004
Plaintiff,	:	NO. 02638
v.	:	COMMERCE PROGRAM
ACE PROPERTY & CASUALTY INSURANCE CO., et al.,	:	Control Nos. 14061731, 14061732 14061733, 14061734, 14061735, 14061737, 14061739, 14061740, 14061919
Defendants.	:	

ORDER

AND NOW, this 30th day of December, 2014, upon consideration of Lloyd Italico & Ancora's ("Lloyd Italico") eight Motions for Summary Judgment, Consolidated Rail Corp.'s ("Conrail") single Cross Motion for Summary Judgment, the responses thereto, and all other matters of record, it is **ORDERED** as follows:

1. In accord with the Opinion issued simultaneously, Lloyd Italico's Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy is **GRANTED** and **JUDGMENT** is **ENTERED** in favor of Lloyd Italico and against Conrail on all of Conrail's claims.

2. Lloyd Italico's remaining Motions for Summary Judgment and Conrail's Cross Motion for Summary Judgment are **DISMISSED** as **MOOT**.[1]

BY THE COURT:

PATRICIA A. McINERNEY, J.

[1] For the reasons set forth in the court's site-specific summary judgment Opinion entered on October 28, 2014, even if Conrail could show that the Lloyd Italico Policy existed, that Policy would not cover the costs incurred by Conrail at the Hollidaysburg, Beacon, Paoli, and Elkhart sites. In light of the Pennsylvania Supreme Court's recent decision in Pa. Mut. Cas. Ins. Co. v. St. John, 2014 WL 7088712 (Pa. Dec. 15, 2014), the Lloyd Italico Policy might not cover the Conway or Douglassville sites either.

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ACE PROPERTY & CASUALTY INSURANCE CO., et al.,	:	Control No. 14061731
Defendants.	:	

OPINION

This opinion addresses the third round of summary judgment motions filed in this complex environmental contamination insurance coverage case. In this action, plaintiff Consolidated Rail Corp. ("Conrail") claims that defendant Lloyd Italico & Ancora ("Lloyd Italico") issued a $1,000,000 Umbrella Excess Liability Policy to Conrail for the April 1, 1978 through April 1, 1979 policy period. Lloyd Italico denies that it issued any such policy to Conrail.[1] Due to the passage of time (36 years), many relevant records have been lost or destroyed, memories have dimmed, and witnesses can no longer be found, so the court must determine which party must bear the consequences of this lack of evidence.

The court starts with the basic premise that "[t]he burden is on the plaintiff to prove by a preponderance of the evidence the existence of the contract to which the defendant is a party."[2]

In support of its claim that Lloyd Italico issued an insurance contract to Conrail, Conrail proffers a single page that purports to be an "Umbrella Excess Liability Policy Issued By Lloyd

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[1] Lloyd Italico does not appear to exist any longer. Its business was transferred to other entities and run-off by them. *See* Conrail's Opposition to Lloyd Italico's Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy ("Response"), Ex. 36, 37, 44.

[2] Viso v. Werner, 471 Pa. 42, 46, 369 A.2d 1185, 1187 (1977). Conrail bears this burden of proof at trial. Lloyd Italico's burden at summary judgment is to show that Conrail has failed to produce evidence of facts essential to its cause of action, such as the existence of the Policy. Pa. R. Civ. P. 1035.2(2)

Italico & L'Ancora – Genua" (the "Lloyd Italico Policy").[3] It is signed by "Joseph F. Ambriano" on behalf of "PLAR GROUP." There is also a second page that purports to be "Endorsement No 1" to the Lloyd Italico Policy, which increases the coverage provided by the Policy from $500,000 to $1,000,000.[4] That Endorsement is signed by "R.A. Browing" on behalf of the "Independence Marine Group." A third page purports to be "Endorsement No. 2" to the Policy.[5] It sets forth a computation of the earned premium based on Conrail's revenues during the Policy year, which results in an additional premium payment due. Endorsement No. 2 was issued in July 1979, after the Policy period ended, and is signed "Richard H. Byron for Plar."

Through discovery, Conrail has established that, at the time this transaction allegedly occurred, the following relationships existed:

1. Conrail's broker was Marsh & McLennan ("Marsh") in New York, New York.
2. Marsh worked with a sub-broker East West International ("EWI") in Geneva, Switzerland.[6]
3. EWI negotiated with Mr. Ambriano of Davis, Dorland & Co. ("Davis Dorland") in New York, New York.[7]
4. Mr. Ambriano and George B. McNeill International had some authority to act on behalf of the Pool Latino Americano de Reaseguros ("PLAR") in Panama.[8]

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[3] Response, Ex. 13.

[4] *Id.*

[5] Lloyd Italico's Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy ("SJM"), Ex. 1.

[6] *Id.* Exs. 12, 13.

[7] Response, Ex. 12.

[8] SJM, Exs. 8, 9; Response, Ex. 16. Their authority appears to be limited to reinsurance contracts only. *See* SJM, Ex. 9.

5. Lloyd Italico was a member of PLAR.[9] In February, 1977, Lloyd Italico expressly authorized PLAR's Administrator, Estudio Consultivo De Seguros S.A. "to accept shares in Reinsurance[10] transactions" on behalf of Lloyd Italico up to a limit of $10,000.[11]

Based on these facts, Conrail argues that Mr. Ambriano's signature on the $500,000 Lloyd Italico Excess Policy binds Lloyd Italico because Mr. Ambriano had express or apparent authority to act on behalf of Lloyd Italico.

> Agency cannot be assumed from the mere fact that one does an act for another. Whether an agency relationship exists is a question of fact. The party asserting an agency relationship has the burden of proving it by a fair preponderance of the evidence. Agency is created where there exists a manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. Before a factfinder can conclude that an agency relationship exists and that the principal is bound by a particular act of the agent, the factfinder must determine that one of the following exists:
>
> 1) express authority directly granted by the principal to bind the principal as to certain matters; or
> 2) implied authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority; or
> 3) apparent authority, i.e. authority that the principal has by words or conduct held the alleged agent out as having; or
> 4) authority that the principal is estopped to deny.[12]

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[9] PLAR apparently no longer exists; it was dissolved and "run-off" in the mid-1980s. *See* SJM, Ex. 6.

[10] "Reinsurance" is "Insurance of all or part of one insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium. 'The term 'reinsurance' has been used by courts, attorneys, and textwriters with so little discrimination that much confusion has arisen as to what that term actually connotes. Thus, it has so often been used in connection with transferred risks, assumed risks, consolidations and mergers, excess insurance, and in other connections that it now lacks a clean-cut field of operation. Reinsurance, to an insurance lawyer, means one thing only — the ceding by one insurance company to another of all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer is solely to the reinsured, which is the ceding company, and in which contract the ceding company retains all contact with the original insured, and handles all matters prior to and subsequent to loss.'" Black's Law Dictionary (9th ed. 2009) *citing* 13A John Alan Appleman & Jean Appleman, Insurance Law and Practice § 7681, at 479–80 (1976).

[11] SJM, Ex. 7.

[12] Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 412 Pa. Super. 140, 146-47, 602 A.2d 1348, 1351-52 (1992).

"The burden of establishing an agency relationship rests with the party asserting the relationship."[13]

Conrail has not been able to discover any document giving PLAR or Mr. Ambriano express authority to bind Lloyd Italico with respect to the issuance of excess[14] policies in the amount of $500,000, such as the one at issue here.[15] Instead, the evidence shows only that PLAR's and thereby Mr. Ambriano's, express authority to act on behalf of Lloyd Italico was limited to reinsurance policies up to $10,000.[16]

Conrail obtained an affidavit from Mr. Ambriano, who stated as follows with respect to the Lloyd Italico Policy:

> I do not recognize the policy number or the form of such number. I have no recollection of signing this document. However, the signature that appears on [it] is a photocopy of my signature.
>
> Although I have no specific recollection of signing [it] or the 1978 transaction to which it refers approximately 36 years ago, I recall that Lloyd Italico was a member of PLAR and I wrote business on behalf of PLAR. I understood I was authorized to sign [it] in May 1978. I would not have signed [it] if I did not believe I was authorized by PLAR to sign it on behalf of Lloyd Italico.

Even when the court views this statement in the light most favorable to Conrail, Mr. Ambriano's vague, artfully written, recollection is not evidence that he had express authority to execute the excess Policy for Lloyd Italico. At best, it is evidence that he believed he was authorized to sign the Policy by PLAR.

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[13] Basile v. H&R Block, Inc., 563 Pa. 359, 367-8, 761 A.2d 1115, 1120 (2000).

[14] "Excess insurance" is "An agreement to indemnify against any loss that exceeds the amount of coverage under another policy." Black's Law Dictionary (9th ed. 2009). Excess policies are usually between an insurer and an insured that is not also an insurer, unlike reinsurance where both parties are insurance companies.

[15] Conrail has also not produced any evidence that Lloyd Italico expressly authorized R.A. Browing, Independence Marine Group, or Richard H. Byron to act for Lloyd Italico with respect to the Endorsements to the Policy.

[16] SJM, Ex. 7.

Conrail next argues that Mr. Ambriano had apparent authority to act on behalf of Lloyd Italico with respect to the Policy.

> Apparent authority exists where a principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent the authority he or she purports to exercise. Therefore, in determining the apparent authority of an agent, the court must look to the actions of the principal, not the agent. An agent cannot, simply by his own words, invest himself with apparent authority. Such authority emanates from the action of the principal and not the agent.[17]

There is no evidence that Lloyd Italico did anything to lead Conrail, or Conrail's brokers, to believe that PLAR or Mr. Ambriano had authority to issue the excess Policy on behalf of Lloyd Italico.[18]

There is evidence that Mr. Ambriano and other PLAR representatives represented in 1978 to Conrail's brokers that they were acting on behalf of Lloyd Italico.[19] However, at the time the parties' entered into the Policy, Conrail and its brokers could not rely upon only the agent's declaration of authority; they needed some manifestation from the principal upon which to base their reliance. There is no evidence of earlier or contemporaneous act(s) by Lloyd Italico, as principal, that were witnessed by Conrail or someone acting on behalf of Conrail, which act(s) appeared to cloak Mr. Ambriano with the authority to act for Lloyd Italico. There is no evidence that Lloyd Italico misled or confused Conrail as to Mr. Ambriano's authority.

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[17] Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 412 Pa. Super. 140, 149, 602 A.2d 1348, 1353 (1992).

[18] There is also no evidence that Lloyd Italico did anything to lead Conrail, or Conrail's brokers, to believe that R.A. Browing, Independence Marine Group, or Richard H. Byron had authority to act for Lloyd Italico with respect to the Endorsements to the Policy.

[19] *See* SJM, Exs. 10, 11, 13, 14, 15, 16; Lloyd Italico's Reply to SJM, Ex. 5 Interestingly, the premium checks, which no one disputes that Conrail paid, were not made out directly to "Lloyd Italico," but appear to have been made out to "George B. McNeill Int'l", "Independence Marine Service, Inc." and "National Brokerage Agencies, Inc." *See* SJM, Exs. 14, 17, 25; Response, Ex. 13.

The lack of any evidence of acts by Lloyd Italico distinguishes this case from the two upon which Conrail relies for its argument that conduct of the agent can serve as evidence of the agent's authority. In Turner Hydraulics, Inc. v. Susquehanna Construction Corp.[20] the principal delegated to his agent so much authority for a construction project that the court found it was reasonable for the third party to believe the agent also had the authority to promise payment for additional work. In Leidigh v. Reading Plaza Gen., Inc.,[21] the principal engaged in affirmative acts that confirmed the authority of the agent to make the purchase in question.[22] Here, there is no evidence that Lloyd Italico knew Mr. Ambriano was acting for it in any capacity, nor that Lloyd Italico participated or acquiesced in, or benefited from, any of Mr. Ambriano's actions.

The much later, incomplete, recollection of the purported agent, Mr. Ambriano, is not evidence of apparent authority that would bind Lloyd Italico to honor the Policy. It is true that "[t]he authority of an agent can always be proven [at trial] by the agent himself."[23] If Mr. Ambriano had testified that he recalled a specific statement made, a document executed, or some other act by Lloyd Italico that gave him authority to execute the Excess Policy on behalf of Lloyd Italico, then the court would be required to send the issue of his credibility to trial. However, he did not so testify. He testified only that he believed PLAR had authorized him to

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[20] 414 Pa. Super. 130, 606 A.2d 532 (1992).

[21] 431 Pa. Super. 310, 636 A.2d 666 (1994), relying upon Turner Hydraulics. In Leidigh, an advisory jury "found that the general partner of [the principal] was aware of [the limited partner agent's] participation in the negotiation and purchase of the dining car." *Id.* 636 A.2d at 667. As a result, the principal was, in effect, estopped from denying the agent's authority to purchase the rail car.

[22] Specifically, the principal sent the seller a check for moving expenses for the railcar after the agent negotiated the purchase of the railcar.

[23] *See* Stern v. Dekelbaum, 153 Pa. Super. 452, 455-56, 34 A.2d 272, 273 (1943) (Explaining "the well-known rule that agency cannot be established by the declarations of the alleged agent. . . .[T]he 'declarations' as used in the rule, means evidence of hearsay statements made by the alleged agent out of court to some person who is called as a witness. It does not exclude the testimony of the alleged agent himself, appearing as a witness in court. . . The rule excludes an agent's declarations to prove agency when offered by a third person, but authority may be shown by the agent's own testimony [at trial].")

sign on behalf of Lloyd Italico. Unfortunately, there is no evidence that PLAR itself had the authority to deputize him to execute a $500,000 excess policy for Lloyd Italico.

Where there is no evidence, testimonial or otherwise, that Lloyd Italico expressly, or even apparently, authorized PLAR or Mr. Ambriano to issue this large Excess Policy in Lloyd Italico's name, then there is no issue of fact for the jury. In order to find for Conrail, the jury would have to engage in improper speculation to find that Mr. Ambriano had authority and that the Policy is valid. Instead, the court must conclude that Conrail has failed to proffer evidence to prove that the Lloyd Italico Policy exists and is enforceable.

Conrail claims that Lloyd Italico should be estopped from denying Mr. Ambriano's agency because it failed promptly to deny the existence of the Policy when Conrail attempted, in the 1990s, to notify Lloyd Italico of its claims under the Policy. "Authority by estoppel occurs when the principal fails to take reasonable steps to disavow the third party of their belief that the purported agent was authorized to act on behalf of the principal."[24] However, by the time Conrail presented its claims to Lloyd Italico, there was nothing Conrail could have done to correct the problem even if it had immediately been informed of the problem. The Policy had been issued and had run its course more than ten years earlier. Even if Lloyd Italico had promptly responded to the first notice of claim it received from Conrail, in 1995, and had told Conrail that Mr. Ambriano was not authorized to issue the Policy, Conrail could not at that point have obtained substitute coverage for the 1978-1979 Policy year.[25]

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[24] *See* Walton v. Johnson, 66 A.3d 782, 786 (Pa. Super. 2013).

[25] Conrail makes much of the fact that Lloyd Italico did not expressly dispute the authority of Mr. Ambriano and the validity of the Policy until 2010, when it filed its first pleading in this action, rather than in 1995 when Conrail sent Lloyd Italico's successor some documents purporting to represent the Policy. However, at least part of that delay was caused by Conrail, who did not file this suit until 2004, and who may never have made proper service on Lloyd Italico.

There is no evidence that Lloyd Italico was on notice of the Policy at or about the time Mr. Ambriano signed it in 1978 and that Lloyd Italico chose to remain silent about his lack of authority. If such evidence existed, then an estoppel argument might prevail.

CONCLUSION

For the reasons set forth above, Lloyd Italico's Motion for Summary Judgment Regarding the Non-Existence of the Insurance Policy must be granted.

BY THE COURT:

PATRICIA A. McINERNEY, J.