THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

ANTHONY RUGER	:	**TRIAL DIVISION- CIVIL**
Appellant	:	
	:	**JUNE TERM, 2010**
v.	:	**No. 3906**
	:	
METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY and QBE INSURANCE COMPANY	:	**Superior Court No. 3226 EDA 2011**
Appellees	:	

OPINION

PROCEDURAL HISTORY

Plaintiff appeals this Court's Order dated August 22, 2011 granting the Motion for Summary Judgment submitted by Defendant QBE Insurance Company, thereby dismissing Plaintiffs' Complaint.

FACTUAL BACKGROUND

Plaintiff is the owner of a condominium located at 116 East Moreland Avenue, B-3, Hatboro, Pennsylvania. Plaintiff maintained an insurance policy with Metropolitan Property and Casualty Insurance Company covering the Hatboro property. (Plaintiffs' Amended Complaint, ¶ 4). Plaintiff alleges in his Amended Complaint that the townhome was also covered under a policy of insurance issued by QBE Insurance Company (hereinafter "QBE") to Moreland Crossing Townhomes, Inc. (Plaintiffs' Amended Complaint, ¶ 4).

On or about July 11, 2009, Plaintiff's property sustained smoke damage due to a fire in the basement of the adjoining unit. (Defendant's Motion for Summary Judgment, ¶¶ 33-34). Plaintiff testified in his deposition that he notified SBC Management, the management company for the homeowners' association, of the smoke damage. (Plaintiff's Deposition attached as Exhibit "F" to Defendant's Motion for Summary Judgment, pg. 26-29). In April 2010, Catherine Joyce, Secretary to the Board of Moreland Townhomes Association, signed a Sworn Statement in Proof of Loss for the QBE Insurance policy in the amount of $3300.74 for damage to Plaintiff's unit, based on an estimate prepared by Metropolitan Property and Casualty Insurance Company (hereinafter "Metropolitan") (Plaintiff's Deposition attached as Exhibit "F" to Defendant's Motion for Summary Judgment, pg. 55-56). In contrast, an estimate prepared by Alliance Adjustment Group, Inc. quoted Plaintiff's total loss as $50,672.89. (Exhibit "A" to Plaintiff's Amended Complaint).

Plaintiff received a check for $2500 from Metropolitan and a check from SBC Management for $3300.74. (Plaintiff's Deposition attached as Exhibit "F" to Defendant's Motion for Summary Judgment, pg. 41). ServPro of Society Hill charged Plaintiff $5736.74 to clean the condominium. (Exhibit "A" to Plaintiff's Amended Complaint).

Plaintiff's Complaint alleges claims for Breach of Contract and Bad Faith on the basis that Defendants failed to pay benefits in the full amount of Plaintiff's loss and mishandled Plaintiff's insurance claims. (Plaintiff's Amended Complaint, ¶31).

Plaintiff commenced this action by Writ of Summons on July 2, 2010. (See Docket). Plaintiff thereafter filed his Complaint on November 22, 2010. (See Docket). Metropolitan filed an Answer to the Complaint with New Matter on December 22, 2010,

and Plaintiff filed a Reply to Metropolitan's New Matter on January 13, 2011. (See Docket). QBE filed Preliminary Objections to Plaintiff's Complaint on December 27, 2010. (See Docket).

Plaintiff filed an Amended Complaint on January 7, 2011. (See Docket). QBE filed an Answer to Plaintiff's Amended Complaint with New Matter on January 26, 2011. (See Docket). Metropolitan filed an Answer to Plaintiff's Amended Complaint with New Matter on January 27, 2011. (See Docket). Plaintiff filed a Reply to QBE's New Matter on March 7, 2011. (See Docket).

QBE filed a Motion for Summary Judgment on July 5, 2011. (See Docket). Plaintiff filed an Answer to QBE's Motion for Summary Judgment on August 3, 2011. (See Docket). This Court granted QBE's Motion for Summary Judgment on August 24, 2011, thereby dismissing Plaintiff's Complaint as to QBE. (See Docket). Plaintiff appealed on September 6, 2011. (See Docket).

After Plaintiff and Metropolitan reached a settlement, Plaintiff filed a second appeal to this Court's August 24, 2011 Order dismissing QBE. (See Docket).[1] On December 1, 2011, this Court ordered Plaintiff to file a Concise Statement of Errors Complained of on Appeal. (See Docket). Plaintiff filed his Concise Statement of Errors on December 13, 2011. (See Docket).

The sole issue to be addressed on appeal is whether this Court erred in granting Summary Judgment to QBE Insurance Corporation after finding that Plaintiff was not an insured or an intended third party beneficiary under the policy issued by QBE Insurance Corporation to Moreland Crossing Townhomes, Inc.

[1] Plaintiff's first appeal at 2537 EDA 2011 was quashed by Order of the Superior Court because at the time the Order was entered, it was not final and appealable. Upon the settlement between Plaintiff and Metropolitan, the August 24, 2011 Order became final.

LEGAL ANALYSIS

Summary Judgment is governed by Pennsylvania Rule of Civil Procedure 1035.2, which states,

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Pa. R.C.P. 1035.2

In determining whether summary judgment is proper, the record is viewed in the light most favorable to the non-moving party, and all doubts as to whether a genuine issue of material fact exists are resolved against the moving party. *Pennsylvania State Univ. v. County of Centre*, 532 Pa. 142, 615 A.2d 303, 304 (Pa. 1992). The appellate court's scope of review is plenary. *O'Donoghue v. Laurel Savings Ass'n*, 556 Pa. 349, 728 A.2d 914, 916 (Pa. 1999). A trial court's decision to grant or deny a motion for summary judgment will only be reversed where the lower court committed an error of law or abused its discretion. *Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245, 248 (Pa. 1995).

Plaintiff alleges that this Court erred when it concluded that Plaintiff was not an insured under the policy issued by QBE Insurance Corporation to Moreland Crossing Townhomes, Inc.

However, the Named Insured on the QBE Condominium Policy is Moreland Crossing Townhomes, Inc. (Exhibit "4" to Defendant's Motion for Summary Judgment,

pg. 1 of 10). Additionally, the Condominium Policy states, "Throughout this policy the words 'you' and 'your' refer to the Named insured shown in the 'Declarations.'" (Exhibit "4" to Defendant's Motion for Summary Judgment, pg. 1 of 59). As Plaintiff is not designated as the Named Insured, the Court did not err when it concluded that he was not an insured under the QBE Condominium Policy.

Second, Plaintiff alleges that this Court erred in concluding that Plaintiff was not an intended third party beneficiary under the policy issued by QBE Insurance Corporation to Moreland Crossing Townhomes, Inc.

In *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983), the Pennsylvania Supreme Court adopted the Restatement (Second) of Contracts § 302 (1979) for third party beneficiary claims in which the parties to the contract have not explicitly stated an intention to benefit the third party in the contract itself. It states,

Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between promisor[2] and promisee[3], a beneficiary of a promise[4] is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions 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.

Restatement (Second) of Contracts § 302 (1979). *See also Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147, 150-51 (1992).

First, Plaintiff asserts in his Response to QBE's Motion for Summary Judgment that in entering into the contract, the intention of the parties was to benefit the unit

[2] QBE
[3] Moreland Crossing Townhomes, Inc.
[4] Plaintiff, Anthony Ruger

owners. The language in the policy expresses a contrary intention. It states: "No Benefit to Bailee. No person or organization, other than you, having custody of 'covered property' will benefit from this insurance." (Exhibit "4" to Defendant's Motion for Summary Judgment, pg. 11/59). As stated previously, "you" refers to the Named Insured, Moreland Crossing Townhomes. The policy thus explicitly states that it is not intended to benefit the unit owner, in this case, Plaintiff.

Furthermore, both the Condominium Declaration and the Public Offering Statement require Moreland Crossing Townhomes to maintain property insurance on the common elements and units.

Section 7.1 of the Condominium Declaration, "Casualty Insurance to be Carried by Association" provides:

> [T]he Association shall maintain, to the extent reasonably available, property insurance on the Common Elements and Units exclusive of improvements and betterments installed in Units by Unit Owners insuring against fire and extended coverage perils in such amount as the Association may determine, but in no event less than Eighty (80%) percent of the actual cash value of the insured property, exclusive of land, foundations and other items normally excluded from property policies…. The insurance proceeds shall be used by the Association for the repair or replacement of the property for which the insurance was carried. (Declaration: Moreland Crossing Townhomes, A Condominium attached as Exhibit "2" to Defendant's Motion for Summary Judgment).

Section 7.3 of the Condominium Declaration, "Unit Owner May Obtain Insurance," further provides,

> An Insurance policy issued to the Association does not prevent a Unit Owner from obtaining insurance for his own benefit. (Declaration: Moreland Crossing Townhomes, A Condominium attached as Exhibit "2" to Defendant's Motion for Summary Judgment).

Moreland Crossing Townhomes is also required to maintain insurance under the terms of the Public Offering Statement, the terms of which mirror those of the Declaration. The "Insurance Coverage" section of the Public Offering Statement sets forth,

> The Executive Board will obtain insurance to protect the Association, and to a certain limited extent the Unit owners as individuals. The cost of this insurance will be part of the Common Expenses. Since the insurance to be obtained by the Executive Board does not protect Unit Owners against liability for accidents occurring within their units, or cover loss or damage to Unit improvements, furniture and other personal property installed by Unit Owners, Unit Owners are advised to purchase their own condominium homeowners insurance. (Exhibit "F" to Defendant's Motion for Summary Judgment, M217).

Therefore, both the Condominium Declaration and the Public Offering Statement require Moreland Crossing Townhomes to maintain an insurance policy on the common elements and units and also advise unit owners to purchase their own policies of insurance. Plaintiff heeded this warning and purchased a policy with Metropolitan Property and Casualty Insurance Company.

Following the fire in the adjoining unit, Plaintiff received a check for $2500 from Metropolitan in satisfaction of his claim. In addition, Plaintiff received a check from SBC Management for $3300.74. ServPro charged Plaintiff $5736.74 for fire cleanup and restoration, which is $64 less than the insurance proceeds Plaintiff recovered under the Metropolitan and QBE policies.

Second, the promisee, Moreland Crossing Townhomes did not have an obligation to pay money to the beneficiary, Plaintiff Anthony Ruger; therefore, Restatement (Second) of Contracts § 302(1)(a) is not met, and Plaintiff is not an intended third party beneficiary.

The Condominium Policy issued by QBE gives QBE the authority to pay money directly to the unit owner in the event of loss, but does not require it. The "LOSS PAYMENT" portion of the Property Coverages section states that,

> We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the 'covered property.' (Exhibit "4" to Defendant's Motion for Summary Judgment, pg. 18/59).

Contrary to Plaintiff's assertions, this section does not express an intention to make the unit owners beneficiaries under the policy, but merely gives QBE the option of paying the owners directly in satisfaction of QBE's obligation to Moreland Crossing Townhomes in the event of loss.

The case law supports the Court's decision to grant QBE's Motion for Summary Judgment. First, "Condominium Law and Practice: Forms" describes the state of the law regarding individual unit owners as third party beneficiaries. It states,

> Individual unit owners have generally been unsuccessful in asserting that they are third party beneficiaries of their association's master policy. When addressing who qualifies as a third party beneficiary, courts often apply the test found in the Restatement (Second) of Contracts § 302(1)….
>
> Typically, the master policy and the condominium's documents will support finding that the association acquired the insurance in order to satisfy the association's obligations under the applicable statutes and the project's documents. These documents typically will not support a finding that an individual unit owner is an intended third party beneficiary. 1Apt1-47 Condominium Law and Practice: Forms § 47.04.

In the instant matter, applying the Restatement (Second) of Contracts § 302(1), this Court concluded that Plaintiff was not a third party beneficiary. Moreland Crossing Townhomes purchased the policy with QBE in order to satisfy their obligations under the Condominium Declaration and the Public Offering Statement, undermining Plaintiff's

argument that he is an intended third party beneficiary of the contract between QBE and Moreland Crossing Townhomes.

The above-quoted section of "Condominium Law and Practice: Forms" ends with a footnote, which cites to a Pennsylvania case. 1Apt1-47 Condominium Law and Practice: Forms § 47.04, fn. 17. In *Hebrew School Condominium Association v. DiStefano*, 2005 Phila. Ct. Com. Pl. LEXIS 609 (2005), Plaintiffs claimed that they were third party beneficiaries of the contract between the Hebrew School Condominium Association and Republican-Franklin Insurance Company. The Court disagreed, concluding that the individual unit owners did not have standing to bring claims as third party beneficiaries under the contract because they did not meet the requirements of Restatement (Second) of Contracts § 302(1). *Hebrew School Condominium Association v. DiStefano*, 2005 Phila. Ct. Com. Pl. LEXIS 609, P5-P6 (2005). The Court concluded that, by entering into the contract, the parties intended to comply with the provisions of the Uniform Condominium Act, not to provide a benefit to the unit owners. *Id.* at P6.

In contrast to both the instant set of facts and those set forth in *Hebrew School Condominium Association v. DiStefano*, in *Myloradowycz v. The Hartford Fire Insurance Company*, 1989 U.S. Dist. LEXIS 5688 (1989), the Court concluded that Plaintiff, an individual unit owner, had standing to sue under the insurance policy issued to the Sea Winds Condominium Association. *Myloradowycz v. The Hartford Fire Insurance Company*, 1989 U.S. Dist. LEXIS 5688, P3 (1989). In addition, the Court concluded that the language of the insurance policy in question clearly supported the intention of the Sea Winds Condominium Association and Hartford Fire Insurance Company to benefit the Plaintiff. *Id.*

The Court based its decision on the fact that in addition to the Sea Winds Condominium Association, "condo owner" was also listed as a named insured on the DECLARATIONS page of the policy. *Id.* at P2. In addition, the insurance policy covered not only the common areas, but also "fixtures, improvements and alterations comprising a part of the building and refrigerators, air conditioners, cooking ranges, dishwashers and clothes washers and dryers, contained within units, and owned by the named insured or unit-owner." *Id.*

In contrast, the only named insured on the QBE policy is Moreland Crossing Townhomes, and the QBE policy "does not protect Unit Owners against liability for accidents occurring within their units, or cover loss or damage to Unit improvements, furniture and other personal property installed by Unit Owners." (Exhibit "F" to Defendant's Motion for Summary Judgment, M217).

Therefore, Plaintiff has failed to satisfy his burden of showing that he was a named party to the QBE contract or that he was an intended third party beneficiary of the contract negating any claim that QBE was obligated to pay money directly to the Plaintiff. Therefore, Plaintiff cannot meet the requirements of Restatement (Second) of Contracts § 302(1) and does not have standing to sue under the insurance policy issued by QBE.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to grant Defendant QBE Insurance Company's Motion for Summary Judgment be **AFFIRMED**.

BY THE COURT:

7/2/2012

DATE	**ALLAN L. TERESHKO, J.**

cc:
Joseph Alan Zenstein, Esq.,for Appellant Ruger
Kathryn Ann Dux, Esq., for Appellee QBE Insurance Co.
Pamela Ann Carlos, Esq., for Appellee Metropolitan Property & Casualty Ins.Co.