

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

PRIMA DONNA, INC. t/a PRIMA DONNA,	:	JUNE TERM, 2004
	:	
Plaintiff,	:	NO. 02005
	:	
v.	:	COMMERCE PROGRAM
	:	
ACONO-RATE INSURANCE AGENCY, INC.,	:	
JOHN J. PERTILLO, and THE FIRE &	:	
CASUALTY INSURANCE COMPANY OF	:	
CONNECTICUT,	:	
	:	
Defendants.	:	

OPINION

Plaintiff Prima Donna, Inc. (“Prima Donna”) appeals from this court’s Orders entered on April 12, 2006 and April 21, 2006. In the April 12th Order, the court granted the Motion for Summary Judgment of defendants, Acono-Rate Insurance Agency and John J. Pertillo (collectively “Acono-Rate”). In the April 21st Order, the court denied Prima Donna’s Motion for Leave to file a Motion for Summary Judgment. For the reasons that follow, both Orders should be affirmed on appeal.

Prima Donna is the lessee of certain commercial space in Philadelphia, which it improved for use as a restaurant. Under the terms of its lease, Prima Donna is required to maintain insurance, including “fire and casualty insurance, with extended coverage, written on an ‘all risk, replacement cost basis’ equal to the replacement costs of [Prima Donna’s] improvements on or to the Demised Premises.”¹ Prima Donna apparently asked Acono-Rate, an insurance agent, to obtain such coverage for it. Acono-Rate obtained a commercial property and general liability insurance policy, which was issued by defendant The Fire & Casualty Insurance Company of

¹ Complaint, Ex. A (Lease), Art. 8(d).

Connecticut (“Fire & Casualty”) to Prima Donna covering the period from February 14, 2002 through February 14, 2003 (the “Policy”).²

During the term of the Policy, there was a fire at the leased premises which destroyed a portion of the improvements made by Prima Donna. Prima Donna submitted a claim to Fire & Casualty for \$81,626.17 in business personal property loss and \$155,986.94 in damages to the building. Fire & Casualty allegedly denied the building damage claim on the grounds that the damages claimed were to improvements made by Prima Donna. Fire & Casualty apparently took the position that the improvements constituted business personal property for which there was only \$40,000 in coverage, rather than part of the building for which there was \$250,000 in coverage.³

In June, 2004, Prima Donna filed the present action in which it asserted claims against Fire & Casualty for breach of contract and bad faith and against Acono-Rate for professional negligence. Subsequently, Prima Donna settled with Fire & Casualty. As a result of the settlement, the only claim remaining in this action was Prima Donna’s professional negligence claim against Acono-Rate. Acono-Rate moved for summary judgment on that claim on the grounds that Prima Donna had been made whole as a result of its settlement with Fire & Casualty, so there was no basis for proceeding further with its claim against Acono-Rate.

Because Prima Donna refused to divulge the particulars of the settlement to Acono-Rate, the court entered the following Order:

. . . it appearing that plaintiff in part defends against defendant’s Motion for Summary Judgment based on the nature and amount of the settlement entered into with Defendant The Fire & Casualty Insurance Company of Connecticut, plaintiff

² See Complaint, Ex. C (Policy).

³ Fire & Casualty paid Prima Donna the coverage limit of \$40,000 on the business personal property loss claim.

is directed to produce to Acono-Rate Insurance Agency, Inc., all documents relevant to the questions of what claims have been settled and the amount of settlement for each such claim within ten (10) days hereof. Supplemental memoranda may be submitted within ten (10) days thereafter.⁴

As a result of this Order, Prima Donna revealed that it had received \$370,000 from Fire & Casualty in settlement of its claims.⁵

Prima Donna also filed a Motion for Leave to File a (late) Motion for Summary Judgment. In its proposed summary judgment motion, Prima Donna claimed as follows:

The policy, as procured by Aconorate, indicates that the damage to the betterments and improvements are only covered pursuant to the provisions in the policy relating to the building content which had listed a policy limit of \$40,000. As a result of this, Prima Donna was uninsured for the damages to the building in the amount of \$155,986.94.⁶

The court denied Prima Donna's Motion for Leave to File Summary Judgment because Prima Donna could have filed such a motion in a timely fashion before the January 16, 2006, cut-off for the filing of all pre-trial motions.⁷ In addition, Prima Donna's proposed Motion for Summary Judgment was futile since the \$370,000 it received in settlement from Fire & Casualty is significantly greater than, and must necessarily include, the \$155,986.94 in damage to improvements that Prima Donna demands from Acono-Rate in its proposed motion for summary judgment.⁸ For this same reason, the court granted Acono-Rate's Motion for Summary Judgment on the professional negligence claim.

⁴ Order dated February 15, 2006.

⁵ See Supplemental Memorandum of Law in Support of Acono-Rate's Motion for Summary Judgment , Ex. C (General Release), p. 1.

⁶ Motion for Leave to File a Motion for Summary Judgment, Ex. G, ¶¶ 19-20.

⁷ See Revised Case Management Order dated November 30, 2005.

⁸ The settlement amount is also sufficient to cover the remaining \$41,626.17 in business personal property loss that Prima Donna originally claimed from Fire & Casualty.

The primary issue in this action was whether there was coverage under the Policy for the fire damage to the improvements that Prima Donna made to its leased premises. Fire & Casualty apparently initially took the position that any such damages over \$40,000 were not covered because they constituted personal property rather than fixtures. As a result, Prima Donna was compelled to bring suit against its insurer to have a court determine whether Fire & Casualty's restrictive interpretation of the coverage afforded by the Policy was correct. In the event that the court agreed with Fire & Casualty's reading of the Policy, then Prima Donna would be left without the coverage that it alleges it asked Acono-Rate to obtain for it. Therefore, Prima Donna asserted a claim in the alternative for professional negligence against Acono-Rate.

As a result of its settlement with Fire & Casualty, Prima Donna obtained the coverage amounts to which it claims it was entitled, plus additional funds for its troubles. Since Prima Donna has been made whole, it has not suffered any damage due to non-coverage for which Acono-Rate could be liable. Therefore, its claim against Acono-Rate for professional negligence in obtaining too little coverage from Fire & Casualty was properly dismissed for lack of damages.

To the extent that Prima Donna's claims sounded in tort,⁹ under the Uniform Contribution Among Tortfeasors Act,

a release by [Prima Donna] of [Fire & Casualty] . . . does not discharge [Acono-Rate] unless the release so provides, but reduces the claim against [Acono-Rate] in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.¹⁰

⁹ Prima Donna's claims against Fire & Casualty were for breach of contract and the statutory quasi-tort of bad faith. Its professional negligence claim against Acono-Rate sounds in tort.

¹⁰ 42 Pa. C. S. § 8326.

The coverage damages that Prima Donna demanded from Fire & Casualty are the same ones that it sought in the alternative from Acono-Rate. The total coverage claim was \$155,986.94 or at most \$197,613.11,¹¹ whereas the settlement was for \$370,000, significantly more than the actual damages claimed. Therefore, to the extent that the Uniform Act applies, it required that Prima Donna's alternate claim against Acono-Rate be reduced by the amount of Prima Donna's settlement of its primary claim against Fire & Casualty. Since the settlement was for more than the damages Prima Donna demanded from Acono-Rate, Prima Donna's damage claim against Acono-Rate was extinguished. Since Prima Donna no longer had any damages to claim, it could not sustain its burden of proving that Acono-Rate was professionally negligent.¹²

Likewise, under the common law applicable to contract actions,¹³ Prima Donna was required to plead and prove damages resulting from any alleged breach of contract.¹⁴ "When there has been a breach of contract, damages are awarded in order to place the aggrieved party in the same economic position he would have been in had the contract been performed. The theory behind this philosophy is based on an attempt to make the non-breaching party whole again, not to provide him with a windfall."¹⁵ In this case, Prima Donna would receive a windfall if it was

¹¹ The latter total includes the \$155,986.94 in fire damage to the improvements made by Prima Donna, and the remaining \$41,626.17 in business personal property loss that was not initially paid by Fire & Casualty. It is unclear from the pleadings and motion papers whether Prima Donna seeks to hold Acono-Rate liable for both amounts or not.

¹² "In Pennsylvania, the elements of a cause of action based upon negligence [include] actual loss or damage resulting to the plaintiff." R. W. v. Manzek, 585 Pa. 335, 346, 888 A.2d 740, 746 (2005).

¹³ Contract law is relevant because Prima Donna's primary claim against Fire & Casualty was for breach of contract, and its claim against Acono-Rate, while sounding in negligence, was based on an alleged contractual undertaking by Acono-Rate.

¹⁴ "Three elements are necessary to plead properly a cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." J. F. Walker Co. Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. 2002).

¹⁵ Bellefonte Area School Dist. v. Lipner, 81 Pa. Commw. 334, 338, 473 A.2d 741, 744 (1984).

permitted to recover its damages again from Acono-Rate, after already having received them from Fire & Casualty in settlement. Therefore, Prima Donna's claim against Acono-Rate was properly dismissed.

For all the foregoing reasons, the court's April 12th and April 21st Orders, in which the court denied Prima Donna's request to file a late Motion for Summary Judgment and granted Acono-Rate's Motion for Summary Judgment, should be affirmed on appeal.

Dated: October 24, 2006

MARK I. BERNSTEIN, J.