

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

FIDELITY NATIONAL TITLE INSURANCE	:	MAY TERM, 2007
CO.,	:	
	:	
Plaintiff,	:	NO. 01642
	:	
v.	:	COMMERCE COURT
	:	
LINEBARGER GOGGAN BLAIR & SAMPSON,	:	Control No. 041466
LLC,	:	
	:	
Defendant,	:	
	:	
v.	:	
	:	
SECURITY SEARCH & ABSTRACT CO., INC.,	:	
	:	
Add'l Defendant.	:	

ORDER

AND NOW, this 9th day of September, 2008, upon consideration of defendant's Motion for Summary Judgment, the response thereto, and all other matters of record, and in accordance with the Opinion issued simultaneously, it is hereby **ORDERED** that said Motion is **DENIED**.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

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OPINION

Plaintiff, Fidelity National Title Insurance Co. (“Fidelity”), asserts a claim against defendant, the law firm of Linebarger Goggan Blair & Sampson, LLC (“Linebarger”), for negligent misrepresentation. Linebarger joined Fidelity’s agent, Security Search & Abstract Co., Inc. (“Security”), as an additional defendant and alleges that Security’s negligence was the sole cause of Fidelity’s claimed harm.

This action arises out of the July 2005 transfer of title to certain real property (the “Property”) against which the City had previously filed a real estate tax lien. Based on that tax lien, Linebarger¹ filed a civil action in 2003 against the titleholders of the Property. In February, 2004, Linebarger obtained a court order to sell the Property (the “Order to Sell”). The Property was sold at Sheriff’s sale on April 28, 2005, but the sale was not entered on the public docket until August, 2005.

¹ Linebarger was acting on behalf of its client, Wachovia, which was acting as a Trustee for certain bondholders and not in its individual capacity. Linebarger’s Motion for Summary Judgment, ¶ 11.

Security, acting as Fidelity's agent, searched the docketed in the Summer of 2005 in connection with a pending sale of the Property. Security found the Order to Sell the Property for delinquent taxes, but, apparently, it did not find the record of the Sheriff's sale because the sale had not been docketed yet. On July 20, 2005, Security contacted Linebarger, as attorney for the party who obtained the Order to Sell, to find out how much was due in taxes, so that the tax lien could be paid off at closing. Linebarger responded with a "Delinquent Real Estate Tax Statement" showing \$13,150.53 due (the "Statement"). Linebarger did not tell Security that the Property had already been sold at Sheriff's sale.

On July 21, 2005, a closing on a "sale" of the Property was held, and Fidelity insured the purchasers' title to the Property. Fidelity claims that it did not then know that the "seller" had lost title almost three months earlier as a result of the Sheriff's sale. Fidelity subsequently had to reimburse the purchasers and their lender for the amounts they paid, and lost, at the closing.

Fidelity claims that on July 20, 2005, when Linebarger provided the Statement to Security, Linebarger knew that a pay-off of the tax lien was no longer possible because of the Sheriff's sale on April 28, 2005. Fidelity further claims that Linebarger had a duty either to tell Fidelity's agent, Security, about the Sheriff's sale or, at least, not to represent that a pay-off of the tax lien was still possible. Fidelity alleges that Linebarger's Statement amounted to a negligent misrepresentation that harmed Fidelity.

Linebarger filed a Motion for Summary Judgment claiming that, under existing Pennsylvania law, it had no duty to inform Security/Fidelity about the Sheriff's sale, but, if it did have such a duty, Fidelity failed to produce an expert witness who can testify to that duty. For the reasons that follow, Linebarger's Motion is denied.

The tort of negligent misrepresentation has long been recognized in Pennsylvania, but only in certain circumstances:

Recovery for incorrect information negligently furnished has been carefully restricted, where, indeed, it is allowed at all. Not every casual response, not every idle word, however damaging the result, gives rise to a cause of action. Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. Accordingly we have held that when it is one's business and function to supply information he is liable, if, knowing that action will be influenced, he supplies it negligently. If, on the other hand, the nature and extent of the transactions that will be regulated by the information is not known, no such liability exists.²

In the case from which that quote is taken, the Supreme Court found that a trust company which supplied the plaintiff with a copy of the wrong Will was not liable for the harm the plaintiff suffered in reliance upon the Will because

[i]t was not in the line of defendant's business to supply copies of wills to anyone. Trust companies are not the official repositories of such documents, not even of those under which they may act. They, as everyone else, must procure their copies from the register of wills on payment of the regular fee. They do not usually make it a practice to prepare copies for others either for a fee or without charge, and it is not alleged that the practice of this defendant was otherwise. It was exceptional and a pure courtesy that it was done in this instance.³

The Restatement of Torts also recognizes the tort of negligent misrepresentation, but it describes it more broadly, so as to encompass any businessperson who supplies misinformation:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.⁴

² Renn v. Provident Trust Co., 328 Pa. 481, 483, 196 A. 8, 9 (1938).

³ *Id.*, 328 Pa. at 483-484, 196 A. at 10.

⁴ Restatement (Second) Torts, § 552 (1977).

Three years ago, the Supreme Court of Pennsylvania adopted this Section of the Restatement as the law of Pennsylvania.⁵ In doing so, the Court held that negligent misrepresentation by a businessperson does not require privity of contract and is an exception to the Economic Loss Doctrine.⁶ The Court continued to limit the tort to actions against persons in the business of supplying information to others, rather than expressly making it applicable to all businesspersons who supply misinformation:

[W]e hereby adopt Section 552 as the law in Pennsylvania in cases where information is negligently supplied **by one in the business of supplying information**, such as an architect or design professional, and where it is foreseeable that the information will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of information. In so doing, we emphasize that we do not view Section 552 as supplanting the common law tort of negligent misrepresentation, but rather, as clarifying the contours of the tort as it applies to those in the business of providing information to others.⁷

Under either the Restatement's more expansive reading, or the Bilt-Rite court's more narrow formulation of the tort of negligent misrepresentation, to the extent that Linebarger undertook to provide information regarding the pay-off of the tax lien to Fidelity/Security, Linebarger also undertook a duty to exercise reasonable care or competence in obtaining or communicating that information.

Linebarger is a law firm in the business of collecting delinquent taxes through foreclosure proceedings and otherwise.⁸ In the course of this business, Linebarger regularly provides Delinquent Real Estate Tax Statements to third parties, such as Fidelity.⁹ Also in the course of

⁵ Bilt-Rite Contrs., Inc. v. Architectural Studio, 581 Pa. 454, 479, 866 A.2d 270, 285 (2005).

⁶ *Id.*

⁷ *Id.*, 581 Pa. at 482, 866 A.2d at 287 (emphasis supplied).

⁸ Motion for Summary Judgment, Ex. 6 (Aldinger Deposition), p. 13

⁹ Response to Motion for Summary Judgment, Ex. 15 (Aldinger Deposition), pp. 42-44; Ex. 16.

its business, Linebarger attends the Sheriff's sale of any property against which it filed a tax foreclosure action.¹⁰ Since Linebarger regularly supplies tax lien information to third parties who are not its direct clients, it is more similar to the architect in Bilt-Rite, who regularly supplied design information for the use of third parties, than to the trust company in Renn, which only supplied a Will to a third party once and as a mere courtesy. Therefore, Linebarger may be found liable if it made a misrepresentation regarding a third party's ability to pay-off one of the tax liens upon which it foreclosed.

In an analogous case, the United States Court of Appeals for the Seventh Circuit found that such a duty existed under similar, Illinois, law.¹¹ In that case, an attorney had supplied a letter to a lender in which the attorney falsely stated that certain machinery, which was to be used as security for a loan, was free and clear of all liens and encumbrances. Applying the logic of the law and economics school, Judge Posner found that

[Defendant] must lose on the issue of liability even if the narrower, ad hoc approach of [an Illinois case abolishing the privity requirement] is used instead of the approach of section 552 of the Restatement. Information about the existence of previous liens on particular items of property is of limited social as distinct from private value, by which we mean simply that the information is not likely to be disseminated widely. There is consequently no reason to give it special encouragement by overlooking carelessness in its collection and expression. Where as in this case the defendant makes the negligent misrepresentation directly to the plaintiff in the course of the defendant's business or profession, the courts have little difficulty in finding a duty of care.¹²

In this action, Fidelity claims that Linebarger, in the course of its business of bringing civil tax actions, falsely represented to Fidelity's agent, Security, that the tax lien against the Property could be paid off. Fidelity claims that it justifiably relied upon this misrepresentation

¹⁰ Response to Motion for Summary Judgment Response to Motion for Summary Judgment, Ex. 15 (Aldinger Deposition), pp. 16-17.

¹¹ Greycas v. Proud, 826 F.2d 1560 (7th Cir. 1987).

¹² *Id.*, 826 F.2d at 1565.

when it insured title to the Property and, as a result, it suffered loss when title turned out to be held by someone else. Fidelity has properly plead a negligent misrepresentation claim against Linebarger.

Fidelity has also proffered sufficient evidence of this claim to create disputed issues of fact for trial. Specifically, it is for the finder of fact to determine whether the information Linebarger supplied to Fidelity/Security was false, whether Linebarger exercised reasonable care or competence in obtaining or communicating that information, and whether Fidelity/Security justifiably relied upon it.

The fact that Fidelity has failed to proffer expert evidence regarding the duty owed by Linebarger to Fidelity/Security is not fatal to Fidelity's negligent misrepresentation claim. The duty at issue – not to tell lies – is one that any lay person can easily comprehend, so there is no need for an expert to testify to it.¹³ Neither is an expert necessary to testify about Sheriff's sale procedures and the impact thereof, since Fidelity intends to call an apparently knowledgeable representative of Linebarger to testify to such facts.¹⁴

For all the foregoing reasons, Linebarger's Motion for Summary Judgment is denied.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

¹³ Storm v. Golden, 371 Pa. Super. 368, 377, 538 A.2d 61, 65 (1988) (“Generally, the determination of whether expert evidence is required or not will turn on whether the issue of negligence in the particular case is one which is sufficiently clear so as to be determinable by laypersons or concluded as a matter of law, or whether the alleged breach of duty involves too complex a legal issue so as to warrant explication by expert evidence.”)

¹⁴ *Id.*, 371 Pa. Super. at 376, 538 A.2d at 64 (“If all the primary facts can be accurately described to a jury and if the jury is as capable of comprehending and understanding such facts and drawing correct conclusions from them as are witnesses possessed of special training, experience or observation, then there is no need for the testimony of an expert.”) Of course, if this testimony does not materialize as Fidelity predicts, the court may grant a nonsuit or other relief at trial.