

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

CERTAIN UNDERWRITERS AT LLOYD’S LONDON	:	September Term, 2009
	:	No. 01347
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
PAWEL WOJDALSKI et al.	:	
	:	Control Nos. 1011932,
<i>Defendants</i>	:	10112201

OPINION

The Cross-Motions for Summary Judgment require this Court to determine whether certain statements contained in an application for insurance amounted to a material misrepresentation. For the reasons below, this Court finds that the statements contained in the application did amount to a material misrepresentation.

Background

Plaintiff, Certain Underwriters at Lloyd’s London (“Underwriters,”) is an insurance company based in London, England. Defendant, Pawel Wojdalski (“Wojdalski,”) is a Pennsylvania individual engaged in construction and remodeling work. At all times relevant to this action, Wojdalski’s business was covered under insurance policy No. 0637X/ATR049 issued by Underwriters.¹ Kramer Financial (“Kramer Financial,”) a non-party, was at all times relevant to this action the insurance agent of Wojdalski. Robb H., Inc. (“Robb,”) a non-party,

¹ Exhibit 1 to the Motion for Summary Judgment of Plaintiff Underwriters.

owns a building located at 2900 Orthodox Street, #7, in Philadelphia, Pennsylvania. Defendant Seneca Insurance Company, Inc. (“Seneca,”) is a New York Insurance company. At all times relevant to this action, Seneca insured the building owned by Robb.

On 24 March 2008, Wojdalski applied for commercial liability insurance with Underwriters.² Wojdalski provided his agent with all the information necessary to fill-out an insurance application (the “Application,”) with Underwriters. The Application contained the following language:

ARTISAN CONTRACTORS GENERAL LIABILITY
SUBJECTIVITIES:
(Check box below confirming applicant meets
subjectivities)

* * *

Confirm NO Roofing operations.
 Confirm NO Liquid propane gas work....³

Wojdalski checked the two boxes confirming “NO Roofing operations and NO Liquid propane gas work,” signed the document, and forwarded the signed Application to Underwriters through his insurance agent, Kramer Financial.

In consideration for the signed Application, Underwriters sent Wojdalski a Commercial Lines Insurance Quotation (the “Quotation.”) The Quotation contained the following language:

ADDITIONALLY, THE FOLLOWING IS ALSO REQUIRED
PRIOR TO BINDING:

* * *

—ROOFING OPERATIONS ARE INELIGIBLE

² Motion for Summary Judgment of Plaintiff Underwriters, ¶ 7; Admission of Defendant Seneca in its Answer in Opposition to the Motion for Summary Judgment of Underwriters, ¶ 7.

³ Artisan Contractor Application, Exhibit 3 to the Motion for Summary Judgment of Underwriters.

—LIQUID PROPANE GAS WORK IS INELIGIBLE...⁴

Underwriters also forwarded Wojdalski a Conditional Binder of Insurance (the “Binder.”)⁵ The Binder identified the types of coverage provided to Wodjalski, the premium payable thereunder, and all activities ineligible for insurance.

Specifically, the Binder stated:

THE POLICY APPLIED FOR WILL BE CONSIDERED AS
HAVING BEEN IN FORCE FROM THE DATE OF THE
EXECUTION OF THIS CONDITIONAL BINDER,
PROVIDED THAT ALL OF THE FOLLOWING CONDITIONS
PRECEDENT TO COVERAGE ARE SATISFIED AND UPON
REVIEW AND ACCEPTANCE OF THESE ITEMS:

* * *

—ROOFING OPERATIONS ARE INELIGIBLE
—LIQUID PROPANE GAS WORK IS INELIGIBLE...⁶

Finally, Underwriters issued a Commercial General Liability Insurance Policy naming Wodjalski as the insured. The policy provided coverage to Wojdalski’s business for a period beginning 24 March 2008 and ending 24 March 2009.⁷ The policy did not address coverage for roofing or liquid-propane gas work.

On 30 October 2008, Wojdalski entered into a contract to perform roofing work on “Building # 7,” located at 2900 Orthodox Street, Philadelphia, Pennsylvania. Pursuant to the “Roof Replacement” contract, Wodjalski agreed to “remove all existing roofing materials where necessary,” and “install a new rubber

⁴ Commercial Lines Insurance Quotation, Exhibit 2 to the Motion for Summary Judgment of Underwriters, p. 3.

⁵ Motion for Summary Judgment of Underwriters, ¶ 10; Admission of Defendant Seneca in its Answer in Opposition to the Motion for Summary Judgment of Underwriters, ¶ 10.

⁶ Conditional Binder of Insurance, Exhibit 4 to the Motion for Summary Judgment of Underwriters.

⁷ Commercial General Liability Insurance Policy No. 0637X/ATR049, Exhibit 1 to the Motion for Summary Judgment of Underwriters.

roof.”⁸ Wojdalski immediately began work on the roof.

In the early morning of 2 November 2008, a fire broke out at 2900 Orthodox Street. Building # 7 was entirely destroyed by the fire. The local Fire Marshall filed a “Report of Fire Alarm” which concluded that the fire had been ignited by an “Open Flame (Roofer’s Torch).”⁹ In a recorded statement made to a claims underwriter, Wojdalski admitted that he had just finished installation of “a whole new torch down rubber roof,” which required the “use of [a] torch to install the roof caulking, the roof cement, and the roof tape.”¹⁰

After the fire destroyed Building # 7, Robb, as owner of the Building, tendered claim to his insurer, herein Defendant Seneca. Seneca paid the claim and assumed any rights which Robb may have had against Wodjalski. On 4 June, 2009, Seneca filed suit against Wojdalski (the “Underlying Action.”) In the Underlying Action, Seneca seeks to recover from Wojdalski any funds paid by Seneca to satisfy Robb’s claim. In the Underlying Action, Seneca asserts against Wodjalski the claims of negligence and breach of contract.¹¹ As a result of the Underlying Action, Wojdalski tendered claim of defense to his insurer, Plaintiff Underwriters herein.

On 17 September 2009, Underwriters filed the instant Declaratory Judgment Action against Wojdalski, Seneca and other parties. In the Complaint, Underwriters asks this Court to declare that it owes no duty to Wojdalski because Wojdalski’s misrepresentations in the Application effectively voided *ab initio* the

⁸ “Roof Replacement Contract” Exhibit 6 to the Motion for Summary Judgment of Underwriters.

⁹ Report of Fire Alarm, Exhibit 5 to the Motion for Summary Judgment of Underwriters.

¹⁰ Recorded Statement of Wodjalski to Kyle Cheney, underwriter on behalf of Crawford Claims Management Services, Exhibit 7 to the Motion for Summary Judgment of Underwriters, pp. 1-4.

¹¹ Seneca Insurance Company, Inc. v. Pawel Wodjalski, Philadelphia Court of Common Pleas, Case No. 0906-00743.

insurance policy. On 15 December 2009, Defendant Wojdalski filed an Answer with New Matter and Counterclaim to the Complaint of Underwriters. In the Counterclaim, Wojdalski asserts that Underwriters has a duty to defend and indemnify Wojdalski in the Underlying Action, and in any other action that may arise out of the fire that occurred on 2 November 2008 at 2900 Orthodox Street, Philadelphia, Pennsylvania. All other Defendants in the instant action have timely filed their Answers with New Matter to the Complaint of Underwriters.

On 15 November 2010, Plaintiff Underwriters and Defendant Seneca filed Cross-Motions for Summary Judgment. In its Motion for Summary Judgment, Underwriters reiterates its quest to void insurance policy No. 0637X/ATR049 *ab initio*.¹² Underwriters argues that the policy should be voided because Wojdalski obtained the policy through material misrepresentations made in the Application to Underwriters. In the Cross-Motion for Summary Judgment, Seneca asks this Court to rule that Underwriters “is liable” to Wojdalski “under the terms and condition of the insurance policy,” because Wojdalski gave Underwriters no false answers in the Application.¹³ All Defendants timely filed Answers in Opposition to the Motions for Summary Judgment of Underwriters. Underwriters timely filed its Answer in Opposition to the Motion for Summary Judgment of Seneca.

Discussion

The Pennsylvania Rules of Civil Procedure state:

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—

¹² Motion Control No. 10111932.

¹³ Suggested Order of Seneca attached to its Motion; Motion for Summary Judgment of Seneca, Control No. 10112201, ¶¶14-20.

(1) whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report.

* * *

Note: An example of a motion under subparagraph (1) is a motion supported by a record containing an admission. By virtue of the admission, no issue of fact could be established by further discovery or expert report.¹⁴

For purposes of summary judgment, the record includes any pleadings, interrogatory answers, depositions, admissions and affidavits.¹⁵

I. The Application was clear and unambiguous.

The task of interpreting an insurance contract is generally performed by a court rather than by a jury. The goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.¹⁶

In this case, the pertinent section of the insurance Application states:

ARTISAN CONTRACTORS GENERAL LIABILITY
SUBJECTIVITIES:
(Check box below confirming applicant meets
subjectivities)

* * *

Confirm NO Roofing operations.

¹⁴ Pa. R.C.P. 1035.2(1).

¹⁵ Scalice v. Pa. Emples. Benefit Trust Fund, 883 A.2d 429, 435 (Pa. 2005).

¹⁶ Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999).

[] Confirm NO Liquid propane gas work....¹⁷

This language is clear and unambiguous: it asked Wodjalski to confirm that his business would not be involved in roofing or liquid-propane gas work throughout the duration of a policy from Underwriters. Wojdalski confirmed that his business would not engage in such activities throughout the term of the policy, executed the Application by placing his signature thereto, and forwarded the document to Underwriters.

II Wojdalski materially misrepresented the nature of the risk being insured.

In the Motion for Summary Judgment, Underwriters asserts that Wojdaldki “falsely” represented the nature and scope of his business.¹⁸ Underwriters also asserts that Wojdalski’s misrepresentations “were material to the risk being insured.”¹⁹ Underwriters concludes that insurance policy No. 0637X/ATR049 should be declared void *ab initio* because Underwriters would have “rejected” the Application, and “no policy would have been issued” if Wojdalski had not made material misrepresentations in the Application.²⁰

In Pennsylvania,

[t]here are three elements that an insurer must establish to void a policy in the case of misrepresentation. These are:

- (1) the declaration must be false;
- (2) its subject matter must be material to the risk; and
- (3) the applicant must have known it to be false or must have made the statement in bad

¹⁷ Artisan Contractor Application, Exhibit 3 to the Motion for Summary Judgment of Underwriters.

¹⁸ Motion for Summary Judgment of Underwriters, ¶ 15.

¹⁹ Motion for Summary Judgment of Underwriters, ¶ 16.

²⁰ Motion for Summary Judgment of Underwriters, ¶ 18.

faith.²¹

In this case, Underwriter has established all the three elements necessary to successfully void insurance policy No. 0637X/ATR049. First, Wojdalski stated in the Application that his business would not engage in roofing or liquid-propane gas work during the term of a policy issued by Underwriters. Nevertheless, Wojdalski did engage his business in such activities by performing roofing and liquid-propane gas work at 2900 Orthodox Street, Philadelphia, Pennsylvania. Wojdalski's statement on the Application amounted to a misrepresentation because he engaged his business in roofing and liquid-propane gas work despite assuring Underwriters that he would not. Underwriters has established the first element necessary to void insurance policy No. 0637X/ATR049.

Second, Defendants Wojdalski and Seneca effectively admit that the nature of Wojdalski's business was material to the risk being insured by Underwriters. Specifically, the record shows the following:

Motion for Summary Judgment of
Plaintiff Underwriters

* * *

16. There is ... no dispute that the representations at issue were material to the risk being insured.²²

Answer in Opposition of Defendant
Seneca

* * *

- 16 Admitted that the nature of an insured's business is generally material to the risk being insured on a liability policy

²¹ Baldwin v. Prudential Ins. Co., 258 A.2d 660, 661 (Pa. Super. 1969).

²² Motion for Summary Judgment of Underwriters, ¶ 16.

covering that business....²³

Answer in Opposition of Defendant
Wojdalski

Defendant, Pawel Wojdalski ... hereby joins in,
and incorporates by reference defendant, Seneca
Insurance Company Inc.'s Answer to the Motion
for Summary Judgment of plaintiff, Certain
Underwriters at Lloyd's London.²⁴

In this case, Wodjalski effectively asserted in the Application that throughout the term of insurance, the nature of his business would not involve certain operations such as roofing or liquid-propane gas work. However, Wodjalski misrepresented the nature of his business because he did engage his business in such activities at 2900 Orthodox Street, Philadelphia, Pennsylvania. Since Wodjalski misrepresented the nature of his business, and that nature was material to the risk being insured, it follows that Wojdalski's statements in the Application amounted to a material misrepresentation. Plaintiff Underwriters has established the second element necessary to void insurance policy 0637X/ATR049.

Finally, Wojdalski knew that his misrepresentations were made falsely or in bad faith. He knew his misrepresentations were made falsely or in bad faith because he performed roofing and liquid-propane gas work knowing that he had obtained insurance coverage on the assurance that he would not engage in such activities. Plaintiff Underwriters has established the third and last element necessary to void insurance policy 0637X/ATR049.

There is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery. The

²³ Answer of Seneca in Opposition to the Motion for Summary Judgment of Underwriters, ¶ 16.

²⁴ Answer of Wojdalski to the Motion for Summary Judgment of Underwriters.

Motion for Summary Judgment of Plaintiff Underwriters is granted, and insurance policy No 0637X/ATR049 is void. The Counterclaim asserted by Defendant Wojdalski is dismissed. The Motion for Summary Judgment of Defendant Seneca is denied.

The Court will issue contemporaneously two Orders consistent with this Opinion.

By The Court,

Arnold L. New, J.

Dated: April 7, 2011