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

GET BUSY LIVING SOLUTIONS, LLC and PHILADELPHIA SHOWCASE LOUNGE, LLC,	:	**FEBRUARY TERM, 2013**
Plaintiffs,	:	**NO. 1822**
vs.	:	**COMMERCE PROGRAM**
MAIN LINE INSURANCE OFFICE, LLC, CHRISTOPHER OIDTMAN, LANDMARK AMERICAN INSURANCE COMPANY, and USG INSURANCE SERVICES, INC.,	:	
Defendants.	:	

Get Busy Living Solutions, Llc Etal Vs Main-OPFLD
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OPINION

April 22, 2014

BY: Patricia A. McInerney, J.

Plaintiffs Get Busy Living Solutions, LLC and Philadelphia Showcase Lounge, LLC ("Plaintiffs") appeal from this court's orders granting Defendants Landmark American Insurance Company ("Landmark") and USG Services, Inc.'s ("USG") motions for summary judgment against Plaintiffs and denying Plaintiffs' motion for partial summary judgment against Landmark.

For several years before December 24, 2012, Plaintiffs operated a bar/restaurant at 4912 Baltimore Avenue, Philadelphia, PA. Algernong Allen ("Allen"), was the principal for both Plaintiffs. As of December 2012, Allen owned and managed ten investment properties in total and was responsible for procuring property insurance for all of the properties.

Three or four years before December 24, 2012, Allen began doing business with Defendant Christopher Oidtman ("Oidtman") who was an insurance agent associated with

insurance broker Defendant Main Line Insurance Office, Inc. ("Main Line"). The first time Allen obtained insurance through Oidtman, Allen handed Oidtman a check on December 24th. Thereafter, the insurance policies Oidtman obtained for Allen had terms running from December 24th to December 24th.

At issue in this case is a commercial property insurance policy issued by Landmark, through its Managing General Agent, USG, to Plaintiff Philadelphia Showcase Lounge, LLC for the 4912 Baltimore Avenue property (the "Policy"). The Policy was effective from December 24, 2011 to December 24, 2012 at 12:01 a.m. Eastern Standard Time.

On November 28, 2012, Landmark, through USG, sent a renewal quotation at the same price and on the same terms to Main Line. Allen and Oidtman, however, made no effort at this time to renew the policy, but rather looked for and secured quotes from other insurance companies in December 2012, including Conifer Insurance Company ("Conifer").

On December 21, 2012, Oidtman sent and Allen received a text message asking Allen if he wanted to renew insurance on the property. On December 24, 2012, at 7:21 a.m., after the 12:01 a.m. expiration for the Landmark policy, Allen responded, "Yes" via text, wanting and intending to bind replacement coverage with Conifer.

On December 24, 2012, at approximately 1:00 p.m., there was a fire at the property. On December 26, 2012, at 11:04 a.m., in response to Allen's previous text and now being informed about the fire by a subsequent text, Oidtman attempted to bind coverage for the property with Landmark. He, however, was told the policy had expired at 12:01 a.m. on December 24, 2012 and a statement of no losses and an application (among other things) would now be required. If Oidtman (or Allen) would have responded any time before 12:01 a.m. on December 24, 2012, an email is all that would have been needed.

In spite of being told the Policy had expired at 12:01 a.m. on December 24, 2012, Plaintiffs sought coverage from Landmark under the Policy for their losses from the fire. Landmark denied coverage on the basis that the policy had expired before the loss and was not renewed.

On February 19, 2013, Plaintiffs commenced the instant action by filing a complaint against Main Line; Oidtman; Landmark; and USG. Plaintiffs' causes of action against Main Line and Oidtman included: breach of contract; negligence; breach of fiduciary duty; fraudulent misrepresentation; and negligent misrepresentation. Plaintiffs' causes of action against Landmark and USG included: breach of contract; breach of statutory/regulatory duty; and negligent misrepresentation. On April 16, 2013, Plaintiffs filed an amended complaint that dropped the cause of action against USG for breach of contract.

Plaintiffs' cause of action for breach of statutory/regulatory duty against Landmark and USG alleged these defendants "breached their duties to [P]laintiffs with respect to non-renewal and/or cancellation as required under statute and regulations … ." (Pls.' Compl. ¶ 79; Am. Compl. ¶ 105.) Regarding this count, Plaintiffs argued these defendants "did not comply with the requirements of 40 P.S. Section 3403 with respect to notice of non-renewal and/or cancellation of [P]laintiffs' policies." (*See* Pls.' Compl. ¶ 58; Am. Compl. ¶ 63.)

Section 3403 is part of a statute known as "Act 86," 40 P.S. § 3401 *et seq*. At section 3403, Act 86 requires insurers provide written notice to insureds 60 days in advance of midterm cancellations or nonrenewals. 40 P.S. § 3403(a)(2)-(3). Until this notice is provided, coverage remains in effect for any midterm cancellation or nonrenewal. 40 P.S. § 3403(b).

Plaintiffs' cause of action for breach of contract against Landmark alleged this defendant "agreed to provide insurance until and unless non-renewal or cancellation in accordance with the

terms of the insurance contract and governing law" and breached its duty and "owe[s] [P]laintiffs indemnity under the contracts for insurance on the policy of insurance in force immediately preceding the [l]oss." (Pls.' Compl. ¶¶ 71-73; Am. Compl. ¶¶ 97-99.) Regarding this count, Plaintiffs alleged "[u]nder the terms of the last policy issued by Landmark to ... [P]laintiffs, there was express language with respect to duties of cancellation and non-renewal that required certain notice provisions of 60 days before non-renewal before the expiration date of the policy ... ." (Pls.' Compl. ¶ 61; Am. Compl. ¶ 74.)

Eventually, motions for summary judgment were filed by all of the parties. Plaintiffs and Oidtman and Main Line filed motions for partial summary judgment against Landmark arguing that although a renewal quotation was sent, because Landmark never sent notice of midterm cancellation or nonrenewal pursuant to section 3403 (or a notice pursuant to the Policy's Pennsylvania Cancellation and Nonrenewal Endorsement, which implements provisions of Act 86, including section 3403), the Policy remained in effect after its expiration time and date and Landmark is obligated to provide Plaintiffs with insurance coverage for the fire.

Landmark and USG, on the other hand, filed motions for summary judgment arguing Plaintiffs were not entitled under section 3403 (or the Policy) to receive notice of nonrenewal or a notice of cancellation because the Policy was neither non-renewed nor cancelled by Landmark. As a preliminary matter, Landmark and USG argued "there is no possible argument that Landmark 'cancelled' the policy within the meaning of" section 3403 because section 3403 "only applied to '<u>midterm</u> cancellations[,]'" and "[a]s the Pennsylvania Insurance Department ... has explained, '[a] midterm cancellation is any policy termination that occurs at any time other than the twelve-month policy anniversary date.'" (Landmark's Mot. for Summ. J. Mem. pp. 6-7 (citations omitted).)

Regarding nonrenewal, these defendants argued:

> Landmark ... did not seek to "non-renew" the Policy. How could it be otherwise? How can an offer of renewal be deemed an attempt to non-renew? To the contrary, Landmark offered to renew the Policy at the same price and on the same terms, and Plaintiffs' declined to accept Landmark's offer before expiration and the [l]oss. A nonrenewal takes place on a policy when the insurer seeks to no longer renew coverage for a specific reason [such as when the insurer decides to stop writing a particular type of policy] [or] *** when the insurer is no longer willing to offer the same coverage on the same terms as the policy that is expiring[, which is] directly contrary to what happened here.

(Landmark's Mot. for Summ. J. Mem. p. 7 (citations and footnote omitted).)

On May 21, 2014, this court entered an order:

- denying Plaintiffs' motion for partial summary judgment;
- denying Oidtman and Main Line's motion for partial summary judgment;
- granting Landmark's motion for summary judgment;
- granting USG's motion for summary judgment; and
- declaring that the Policy "expired by its own terms at 12:01 a.m. on December 24, 2012 and does not cover the fire loss that occurred after its expiration."

(Attach. 1.) On June 6, 2014, Plaintiffs' filed a motion for determination of finality pursuant to *Pennsylvania Rule of Appellate Procedure* 341(c). The motion was assigned to this court on July 2, 2014, and on July 8, 2014, this court granted the motion and determined an immediate appeal of the aforementioned order would facilitate resolution of the entire case.

On July 15th and 16th, Plaintiffs and Defendants Oidtman and Main Line filed their respective appeals and this court subsequently ordered that *Pennsylvania Rule of Appellate Procedure* 1925(b) statements be filed. In September 2014, however, as this court indicated it might, the Superior Court quashed the appeals because the July 8, 2014 order certifying the May

21, 2014 order for immediate appeal was entered on the docket more than 30 days after the original order was entered.

On April 7, 2015, Plaintiffs discontinued this action with prejudice as to Oidtman and Main Line, the sole remaining defendants. Then on April 8, 2015, Plaintiffs again appealed from the May 21, 2014 order denying Plaintiffs' motion for partial summary judgment against Landmark; granting Landmark's motion for summary judgment; and granting USG's motion for summary judgment.

Having reviewed Plaintiffs' previously filed 1925(b) statement, this court concludes that its previous order dated May 21, 2014 and docketed May 22, 2014 adequately (and correctly) addresses and disposes of Plaintiffs' issues and supporting arguments. Accordingly, for purposes of the instant appeal, this court relies upon and should be affirmed on the basis of its previous order, which is attached hereto as "Attachment 1."

BY THE COURT:

McINERNEY, J

Attachment 1

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

GET BUSY LIVING SOLUTIONS, LLC and PHILADELPHIA SHOWCASE LOUNGE, LLC,	**FEBRUARY TERM, 2013**
Plaintiffs,	**NO. 1822**
vs.	**COMMERCE PROGRAM**
MAIN LINE INSURANCE OFFICE, LLC, CHRISTOPHER OIDTMAN, LANDMARK AMERICAN INSURANCE COMPANY, and USG INSURANCE SERVICES, INC.,	
Defendants.	**Control Nos.: 14020722, 14030212, 14041155, and 14041156**

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MAY 22 20[illegible]
C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 21ST day of May, 2014, upon consideration of Plaintiffs' Motion for Partial Summary Judgment Against Defendant Landmark American Insurance Company for Indemnity under the Insurance Policy Issued by Defendant Landmark American Insurance Company (Control No. 14020722); Defendants Main Line Insurance Office, Inc. and Christopher Oidtman's Motion for Partial Summary Judgment Against Defendant Landmark Insurance Company (Control No. 14030212); Defendant Landmark American Insurance Company's Motion for Summary Judgment or, in the Alternative, Referral to the Pennsylvania Insurance Department (Control No. 14041155); and Defendant USG Insurance Services, Inc.'s Motion for Summary Judgment or, in the Alternative, Referral to the Pennsylvania Insurance Department (Control No. 14041156); and all responses, replies, and sur-replies to these motions; it is hereby **ORDERED** and **DECREED** that the motions are **GRANTED** and **DENIED** as follows:

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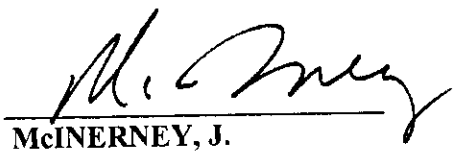
COPIES SENT PURSUANT TO Pa.R.C.P. 236(b) C. HART 05/22/2014

- Plaintiffs' Motion for Partial Summary Judgment Against Defendant Landmark American Insurance Company for Indemnity under the Insurance Policy Issued by Defendant Landmark American Insurance Company (Control No. 14020722) is **DENIED**.
- Defendants Main Line Insurance Office, Inc. and Christopher Oidtman's Motion for Partial Summary Judgment Against Defendant Landmark Insurance Company (Control No. 14030212) is **DENIED**.
- Defendant Landmark American Insurance Company's Motion for Summary Judgment or, in the Alternative, Referral to the Pennsylvania Insurance Department (Control No. 14041155) is **GRANTED**. The Landmark Policy No. LBA 123379 00 expired by its own terms at 12:01 a.m. on December 24, 2012 and the policy does not cover the fire loss that occurred after its expiration. Counts VIII (negligent misrepresentation), IX (promissory estoppel), X (negligence), XI (reformation), XII (unjust enrichment), and XIV (bad faith) of Plaintiff's amended complaint are **DISMISSED** as to Landmark.
- Defendant USG Insurance Services, Inc.'s Motion for Summary Judgment or, in the Alternative, Referral to the Pennsylvania Insurance Department (Control No. 14041156) is **GRANTED** and Counts IV (breach of statutory/regulatory duty), VIII (negligent misrepresentation), IX (promissory estoppel), X (negligence), and XII (unjust enrichment) of Plaintiff's amended complaint are **DISMISSED** as to USG.

(*See* endnote.)[1]

BY THE COURT:



McINERNEY, J.

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[1] In 1986, our state legislature responded to a rising national problem of "indiscriminate cancellation of commercial liability insurance policies" by enacting a group of commercial property and casualty insurance statutes, 40 P.S. § 3401 *et seq.*, known as "Act 86." M. Hannah Leavitt, *Liability Insurance Crisis: The Regulatory Response*, 91 DICK. L. REV. 919, 919-35 (1987). At Section 3403, Act 86 requires insurers provide written notice to insureds 60 days in advance of midterm cancellations or nonrenewals. 40 P.S. § 3403(a)(2)-(3). Until this notice is provided, coverage remains in effect for any midterm cancellation or nonrenewal. 40 P.S. § 3403(b). Upon passage of Act 86, the Pennsylvania Insurance Department adopted regulations to aid compliance with the Act. 31 Pa. Code § 113.81 *et seq.* Within the regulatory definition of "nonrenewal," a renewal policy is described as a policy "provid[ing] [the] types and limits of coverage substantially equivalent to those" of the previous policy. *Id.* at § 113.81.

In this case, Defendant Landmark American Insurance Company ("Landmark") issued a commercial property insurance policy with an expiration time and date of 12:01 a.m. on December 24, 2012 to Plaintiff Philadelphia Showcase Lounge, LLC for a property located at 4912 Baltimore Avenue, Philadelphia, PA. For several years before December 24, 2012, Plaintiffs operated a bar/restaurant at this location. The principal of those businesses was Algernong Allen ("Allen").

On November 28, 2012, Landmark, through its Managing General Agent, Defendant USG Insurance Services, Inc. ("USG"), sent a renewal quotation at the same price and on the same terms to Plaintiffs' insurance broker, Defendant Main Line Insurance Office, Inc. ("Main Line"). In December 2012, Allen and his agent at Main Line, Defendant Christopher Oidtman ("Oidtman"), looked for and secured quotes from other insurance companies, including Conifer Insurance Company ("Conifer").

On December 21, 2012, Oidtman sent and Allen received a text message asking Allen if he wanted to renew insurance on the property. On December 24, 2012, at 7:21 a.m., after the 12:01 a.m. expiration for the Landmark policy, and wanting to bind replacement coverage with Conifer, Allen responded, "Yes" via text. On December 24, 2012, at approximately 1:00 p.m., there was a fire at the property. On December 26, 2012, at 11:04 a.m., Oidtman attempted to bind coverage for the property with Landmark. He, however, was told the policy had expired at 12:01 a.m. on December 24, 2012 and a statement of no losses and an application (among other things) would now be required. If Oidtman would have responded any time before 12:01 a.m. on December 24, 2012, an email is all that would have been needed.

Plaintiffs have sought and continue to seek coverage from Landmark. Landmark denied coverage on the basis that the policy had expired before the loss and was not renewed. Plaintiffs argue that although a renewal quotation was sent, because Landmark never sent a Section 3403 notice of midterm cancellation or nonrenewal (or a notice pursuant to the policy's Pennsylvania Cancellation and Nonrenewal Endorsement, which implements provisions of Act 86), the policy remained in effect after its expiration time and date and Landmark is obligated to provide Plaintiff with insurance coverage for the fire.

This court does not agree. Rather, this court concludes the statutory and contractual notice requirements Plaintiffs (and Defendants Main Line and Oidtman) reference only apply when the insurer seeks to cancel the policy in the middle of the policy's term or to *non*-renew the policy at the end of its term. Here, Landmark never sought to cancel the policy in the middle of its term or non-renew the policy at the end of its term. Rather, Landmark offered a renewal quote to Plaintiffs' broker for identical types and limits of coverage at the same rate as the expiring policy, which Plaintiffs did not timely accept as they shopped for replacement coverage. Neither Section 3403 or the policy's Pennsylvania Cancellation and Nonrenewal Endorsement prescribe a responsibility onto Landmark to send out a nonrenewal notice if Plaintiffs' failed to respond to or rejected the renewal offer, and this court will not graft one on when none is due.

Moreover, the intent of the legislature to provide notice to insureds before policies are cancelled mid-term or not renewed was effectuated here—Plaintiffs knew that coverage was due for renewal and (through their agent) that continuing coverage had been offered by Landmark. Plaintiffs neither responded to the offer nor paid any further premiums before the expiration of the policy. In fact, Plaintiffs looked for and secured quotes from other insurance companies, but failed to obtain coverage by the time of the fire.

Here, the policy expired under its own terms at 12:01 a.m. on December 24, 2012 and coverage did not remain in effect by virtue of either Section 3403 or the policy's Pennsylvania Cancellation and Nonrenewal Endorsement. As such, Plaintiff's are not covered by the policy for a fire loss that occurred after its expiration and Landmark is not obligated to indemnify Plaintiffs for the loss.