

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

PENN MUTUAL LIFE INSURANCE CO.,	:	May Term, 2001
Plaintiff	:	
	:	No. 3661
v.	:	
	:	Commerce Case Program
AJAX MANAGEMENT CORP.,	:	
Defendant	:	Control No. 091270

OPINION

Defendant Ajax Management Corp. (“Ajax”) has filed preliminary objections (“Objections”) to the complaint (“Complaint”) of Plaintiff Penn Mutual Life Insurance Co. (“Penn Mutual”). For the reasons set forth in this Opinion, the Court is issuing a contemporaneous order sustaining the Objections in part and overruling the Objections in part.

BACKGROUND

This case has its origins in the related case of MESNE Properties, Inc. v. Penn Mutual Life Insurance Co. (“MESNE Action”).¹ In the MESNE Action, MESNE Properties, Inc. (“MESNE”) and St. John Holdings, Inc. (“St. John”) have asserted claims against Penn Mutual for its alleged failure to mark a mortgage (“Mortgage”) on property owned by MESNE (“Property”) satisfied.²

In the Complaint, Penn Mutual asserts that any failure to mark the relevant mortgage satisfied was due to the fact that Ajax, acting as MESNE’s property manager, did not properly request that the

¹ July Term, 2000, No. 1483 (C.P. Phila.) (“MESNE Action”).

² Under Pennsylvania law, a mortgagee who improperly refuses to mark a mortgage satisfied within 45 days of being requested to do so can be found liable for damages. 21 Pa. C.S. §§ 681-682.

mortgage be marked satisfied. In addition, Penn Mutual contends that Ajax's services as a property manager were in violation of Pennsylvania law because it failed to obtain a real estate broker's license. On the basis of these allegations, Penn Mutual asserts claims for negligence, negligence per se and indemnification and contribution. The Objections, in response, assert that Penn Mutual's claims are legally insufficient.

DISCUSSION

Penn Mutual's negligence claims are legally insufficient, but the allegations in the Complaint may entitle it to indemnification for damages sustained in the MESNE Action.

I. Penn Mutual's Negligence Claims Are Without Merit

To sustain a claim for negligence, a plaintiff must demonstrate "that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff, and the plaintiff suffered an actual loss or damage." Martin v. Evans, 551 Pa. 496, 502, 711 A.2d 458, 461 (1998) (citation omitted). Under Pennsylvania law, "[t]he concept of negligence per se establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm." Cabiroy v. Scipione, 767 A.2d 1078, 1079 (Pa. Super. Ct. 2001). It is also necessary that "the purpose of the statute . . . be to protect the interest of a group of individuals, as opposed to the general public, and the statute must clearly apply to the conduct of the defendant." J.E.J. v. Tri-County Big Brothers/Big Sisters, 692 A.2d 582, 585 (Pa. Super. Ct. 1997). See also Gravlin v. Fredavid Builders and Developers, 450 Pa. Super. 655, 661, 677 A.2d 1235, 1239 (1996) ("there must be a direct connection between the harm meant to be prevented by the statute, and the injury complained of").

Here, Pennsylvania’s Real Estate Licensing and Registration Act (“RELRA”)³ forms the basis of Penn Mutual’s negligence per se action. RELRA prohibits individuals and corporations from engaging in the business or acting in the capacity of a broker. 63 Pa. C.S. § 455.301. Among the activities ascribed to brokers are managing or attempting to manage real estate. 63 Pa. C.S. § 455.201. Thus, if Ajax managed the Property without a broker’s license, as is alleged in the Complaint, it acted in violation of RELRA.

Penn Mutual’s argument breaks down, however, when one examines the purpose behind RELRA. According to the Commonwealth Court, the principal purpose for RELRA “is to protect buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the business.” Kalins v. Commonwealth, State Real Estate Commission, 92 Pa. Commw. 569, 577, 500 A.2d 200, 203 (1985). Moreover, nothing in RELRA’s legislative history indicates that the act’s purposes include the protection of third-parties with whom a person benefitting from a broker’s services may interact. See 1979 Legis. J.-Senate 669-70 (July 2, 1979) (statement of Sen. Schaefer). Accordingly, Ajax’s alleged breach of RELRA does not support Penn Mutual’s negligence per se claim.

Penn Mutual’s claim based on Section 324A of the Restatement (Second) of Torts (“Section 324A”) is similarly without merit.⁴ Section 324A addresses liability to third persons for negligence performance of an undertaking:

³ 63 Pa. C.S. §§ 455.101-455.902.

⁴ In Cantwell v. Allegheny County, 506 Pa. 35, 483 A.2d 1350 (1984), the Pennsylvania Supreme Court confirmed that “the essential provisions of this section have been the law in Pennsylvania for many years.” 506 Pa. at 40, 483 A.2d at 1353.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Section 324A.

Penn Mutual asserts that Ajax undertook the obligation to MESNE of requesting that the Mortgage be marked satisfied. Even if this is so, the Complaint presents no reason that Ajax should have recognized that its services to MESNE were necessary for Penn Mutual's protection. In addition, Section 324A applies to negligent conduct that "results in physical harm to the third person or his things." Section 324A cmt. b. See also Sound of Market St., Inc. v. Continental Bank Int'l, 819 F.2d 384, 392 (3rd Cir. 1987) (relying on Section 324A to bar liability where the plaintiff suffered no physical harm); Barber v. Williams, 767 P.2d 1284, 1289 (Kan. 1989) (Section 324A "has application only in cases involving physical harm"); American Towers Owners Ass'n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1192 (Utah 1996) (noting that the application of Section 324A is "limited to claims for 'physical harm' to persons or property" and affirming the grant of summary judgment on the plaintiff's claims). There is no indication here that Penn Mutual suffered any physical harm. As a result, Penn Mutual's claim based on Section 324A must fail as a matter of law.

In the absence of a viable negligence per se or Section 324A claim, Penn Mutual cannot show that Ajax breached a duty that was owed to it. Accordingly, each of its negligence claims, regardless of their supposed basis, must be dismissed.

II. The Complaint's Allegations Support Penn Mutual's Claim for Indemnification Against Ajax

The remedy of indemnity allows a party held liable for damages to another to seek complete restitution from the individual or entity responsible:

Indemnity is a common law remedy which shifts the entire loss from one who has been compelled, by reason of some legal obligation, to pay a judgment occasioned by the initial negligence of another who should bear it. . . . [T]he duty to indemnify will be recognized in cases where the community opinion would consider that in justice the responsibility should rest upon one rather than the other.

Willet v. Pennsylvania Med. Catastrophe Loss Fund, 549 Pa. 613, 621-22, 702 A.2d 850, 854

(1997) (citations and quotations omitted). Where a claim for indemnity is not contract-based, a court must apply principles of equity. Compare Embrey v. Borough of West Mifflin, 257 Pa. Super. 168, 185, 390 A.2d 765, 774 (1978) (“[e]quitable principles are applied” to indemnity claims), and McClure v. Deerland Corp., 401 Pa. Super. 226, 585 A.2d 19 (1991) (treating an indemnity cause of action based on contract indemnification provision as an action at law).⁵

Ajax contends that there is no connection between its management obligations to MESNE and Penn Mutual's failure to mark the Mortgage satisfied. If the allegations in the Complaint are accurate, Ajax's assertion is incorrect. The Complaint alleges that Ajax undertook to have the Mortgage satisfied of record. Complaint at ¶ 30. This would necessarily involve contacting Penn Mutual and requesting that the Mortgage be marked satisfied. Penn Mutual also asserts that Ajax failed to properly request that the Mortgage be marked satisfied. Id. at ¶¶ 39-40, 51. If Ajax was, in fact, negligent in

⁵ Modern theories of comparative negligence and contribution have not impaired or superseded the common law right to indemnity under Pennsylvania law. Sirianni v. Nugent Bros., 509 Pa. 564, 569-70, 506 A.2d 868, 870-71 (1986).

making a request to Penn Mutual, Penn Mutual would have had no reason to mark the Mortgage satisfied, and it would be appropriate to find Ajax responsible for damages owed by Penn Mutual to MESNE. On this basis, Penn Mutual's claim for indemnification is legally sufficient, and the Objections thereto are overruled.

CONCLUSION

The Objections to Penn Mutual's negligence claims are sustained, while the Objections to Penn Mutual's request for indemnification are overruled.

BY THE COURT:

JOHN W. HERRON, J.

Dated: November 16, 2001

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

PENN MUTUAL LIFE INSURANCE CO.,	:	May Term, 2001
Plaintiff	:	
	:	No. 3661
v.	:	
	:	Commerce Case Program
AJAX MANAGEMENT CORP.,	:	
Defendant	:	Control No. 091270

ORDER

AND NOW, this 16th day of November, 2001, upon consideration of the Preliminary Objections of Defendant Ajax Management Corp. to the Complaint of Plaintiff Penn Mutual Life Insurance Co. and the Plaintiff's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Objections to Count I - Negligence Per Se, Count II - Negligence and Count Iii - Liability under § 324A of the Restatement of Torts, Second are SUSTAINED, and Counts I, II and III are DISMISSED;
2. All remaining Objections are OVERRULED; and
3. The Defendant is directed to file an answer to the Complaint within 20 days of the date of entry of this Order.

BY THE COURT:

JOHN W. HERRON, J.