

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

26 E. OREGON AVE. LP c/o STEIN & SILVERMAN, PC,	:	June Term 2003
	:	
Plaintiff,	:	No. 002383
v.	:	
FIDELITY NATIONAL TITLE INS., CO.	:	Commerce Program
Defendant.	:	
	:	Control Number 051494/051390

ORDER

AND NOW, this 18TH day of September, 2004, upon consideration Plaintiff 26 E. Oregon Ave. L.P. c/o Stein & Silverman, P.C. Motion for Summary Judgment (cn 051494) and Defendant Fidelity National Title Ins. Co.'s Motion for Summary Judgment (cn 051390), the parties responses in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion filed of record, it hereby is **ORDERED** and **DECREED** that

1. Plaintiff's Motion for Summary Judgment is **Denied**.
2. Defendant's Motion for Summary Judgment is **Granted**.

Plaintiff's complaint is dismissed against Defendant in its entirety.

BY THE COURT,

C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J......

Presently before the court are the respective parties' motions for summary judgment. For the reasons that follow, Plaintiff's motion for summary judgment is Denied and Defendant's motion for summary judgment is Granted.

BACKGROUND

On April 3, 1996 Paul Sabelli ("Sabelli") purchased a piece of property from Jack Yamplosky who was acting as a trustee for the Sheriff of Philadelphia. The property Sabelli purchased was located at the southwest corner of Oregon Avenue and Swanson Street and is known as 26 E. Oregon Avenue. The purchase also included the western half of the bed of Swanson Street which abuts 26 E. Oregon Avenue. Title Insurance to the respective properties was purchased by Sabelli from Fidelity National Title Insurance Company ("Fidelity" or "defendant"). The parties do not dispute that Fidelity never issued a final title policy to Sabelli at the time of closing or thereafter.

Subsequent to Sabelli's purchase of the properties, two issues arose regarding title. First an issue arose regarding the failure by the Sheriff to tender a deed to Sabelli. Sabelli's attorney, Elliot Unterberger, Esquire resolved the issue of the unavailable deed

from the Sheriff and Fidelity paid Unterberger his fees under the title policy. Second, Michael J. Driscoll, Jr. and James C. Driscoll (“Driscoll”) claimed ownership to the Swanson Street bed. Driscoll never filed suit and did not object to Sabelli’s use of the property. As a result, Fidelity suggested that Sabelli continue to use the property and if his use was challenged by any form of legal process Fidelity should be contacted immediately. Unterberger submitted his claim for attorney fees and cost with respect to the Driscoll claim which were paid by Fidelity. Thereafter, Fidelity closed its file.

On or about October 6, 1998, Sabelli sold the property to 26 E. Oregon Avenue L.P. (“26 East” or “Defendant”) and transferred the property with two deeds. A fee simple deed transferred all of the property to 26 E. Oregon Avenue with the exception of the bed of Swanson Street. A quitclaim deed from Sabelli to 26 E. Oregon transferred the bed of Swanson Street.¹ Sabelli also executed an Assignment assigning all his claims against Fidelity resulting from the Driscoll challenge in favor of 26 East. Fidelity was not given notice of the Assignment nor did it consent to the Assignment.

After the purchase of the bed of Swanson Street, 26 East leased the bed of Swanson Street to Clear Channel Communications/Media Eller Communications (“Clear Channel”) which erected an outdoor advertising sign on the bed of Swanson Street. Following the construction of the billboard, a dispute developed with the Driscolls.

On December 27, 1999, counsel for 26 East, Elias Stein, Esquire sent a letter to Fidelity notifying Fidelity of a quiet title action he was filing against Driscoll to protect 26 East’s title to the bed of Swanson Street and contending that his fees and costs in bringing the action should be borne by Fidelity. On January 3, 2000, a representative of

¹ A quitclaim deed was required based on the Driscoll claim resulting in 26 East title insurer’s refusing to insure title to the bed of Swanson Street.

Fidelity, Susan Morrison wrote to Elias Stein stating that “it was necessary to review any policy of title insurance issued in connection with the conveyance” and/or “the partnership agreement for 26 East Oregon Ave.” Morrison noted that until review of the foregoing documentation was completed, Fidelity would not be able to accept responsibility for any legal cost incurred. Stein never provided a copy of the Policy or Partnership Agreement as requested by Morrison. Ultimately the quiet title action was withdrawn.

On or about October 11, 2001, Driscoll filed a complaint in ejectment against Clear Channel. (Driscoll I). As the owner of the bed, 26 East was obligated to indemnify Clear Channel and assume the defense of the Driscoll lawsuit. By virtue of an indemnification agreement, 26 East engaged Stein & Silverman P.C. to defend against Driscoll. On November 6, 2001, an attorney from Stein & Silverman, Andrew Lapat, Esquire provided Fidelity with notice of the potential claim, stating that if Driscoll is successful in the action, 26 E. Oregon Ave. would look to Fidelity for indemnification. On November 13, 2001, Lapat forwarded a letter to Morrison essentially repeating the allegations contained within the November 6, 2001 letter and enclosing a copy of the deeds for the properties. On November 30, 2001, Morrison responded by requesting to review the policy of title insurance as well as the partnership agreement prior to accepting liability for any of the cost incurred or for any costs, loss or damage that might result from the situation. 26 East defended the action against Clear Channel in accordance with the indemnification agreement. The information requested by Fidelity was never provided. On November 26, 2002, a voluntary nonsuit was entered dismissing the case without prejudice.

Stein & Silverman notified Fidelity that it had incurred \$95, 307.40 in fees and expenses in the course of defending the litigation and demanded payment. Fidelity refused to pay the claim. In May 2003, Driscoll filed another action seeking ejectment against Clear Channel. (Driscoll II).

In June 2003, 26 East instituted this action against Fidelity alleging claims for breach of contract (Count I), violation of the Unfair Insurance Practices Act (Count II), bad faith, (Count III) and breach of fiduciary duty (Count IV). The parties have now filed motions for summary judgment.

III. Legal Standard

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc. v. Cohen, 2002 WL 1472340,* 2 (Pa. Com. Pl. 2002) (Herron, J.). Under Pa. R.C. P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. The nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the moving party, “summary judgment is proper when if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory he has pled.” Id. (quoting Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999); citing Pa. R. Civ. P. 1035.2). Summary judgment may only be granted in cases where it is “clear and free from doubt that the moving party is entitled to judgment as a matter of law.”

A. 26 East Is Not Entitled to Recover Attorneys' Fees Under the Assignment.

Plaintiff filed the instant motion for summary judgment claiming that Fidelity is liable to it for all cost and expenses incurred by it in Driscoll I and that Fidelity is liable to it for all future costs, expenses and damages for defending all Driscoll claims going forward especially Driscoll II. With respect to plaintiff's contention that Fidelity is liable to it for all future costs, expenses and damages for defending all Driscoll claims going forward, especially Driscoll II, this court finds that plaintiff's future claim for attorney fees is not presently before the court. A review of the allegations within the complaint demonstrates that the only claim currently before the court is a claim for attorney fees incurred as a result of Driscoll I. Accordingly, the court will deny plaintiff's motion for summary judgment and grant defendant's motion for summary judgment on this issue.

With respect to the attorney fees incurred as a result of Driscoll I, plaintiff argues that Sabelli successfully transferred any and all claims he had against Fidelity under the title policy to 26 East through an assignment of rights between Sabelli and 26 East. Before addressing the issue of the validity of the assignment, the court must first determine whether the right to attorney fees was assigned. A review of the Assignment demonstrates that the right to attorney fees was never assigned to 26 East by Sabelli.

To determine whether Sabelli assigned the right to attorney fees under the Assignment to 26 East, the court must look to the general principles of contract interpretation. Mace v. Atl. Ref. Mktg. Corp., 567 Pa. 71,785 A.2d 491, 496 (Pa. 2001) A fundamental rule in construing a contract is to ascertain and give effect to the intent of the contracting parties. Id. at 496. "It is firmly established that the intent of the parties to a written contract is contained in the writing itself." Mace, supra. (quoting Shovel

Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd., 559 Pa. 56, 65, 739 A.2d 133, 137 (Pa. 1999))(citations omitted). When the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the contents alone. Id.

The Assignment made by and between Paul Sabelli and 26 East provides in part as follows:

Background of Agreement

...At the time of execution of the Agreement of Sale it was disclosed to Buyer that there were adverse claims to certain portions of the Property And that there were adverse claims to certain portions of the Property and that there were possible restrictive easements restricting the use of the Property, all of which were insured against by Fidelity. Seller by this agreement intends to convey to Buyer all of Seller's rights against Fidelity...

2. Assignment of Rights. As a material inducement to Buyer to purchase the Property, Seller hereby assigns to Buyer all of its claims against the Fidelity which claims include but are not limited to discrepancies in the boundary lines of the Property, disputed ownership of portions of the Property and claims by others for the right to use certain portions of the Property to the exclusion of the Property owner.
(Assignment)(Emphasis added).

Based on the clear language of the contract, although Sabelli assigned the right to his claims against Fidelity for the Swanson Street property, the Agreement is silent as to whether a right to claim attorney fees was also assigned. Under Pennsylvania law, “a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.” Snyder v. Snyder, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993). Because there is no clear agreement between Sabelli and 26 East as it pertains to the right to claim attorney fees, this court is left with one conclusion, that the right to claim attorney fees was not assigned to 26 East. This conclusion is not only supported by this court's

interpretation of the Assignment but is also supported by the Agreement of Sale between Sabelli and 26 East. The Agreement of Sale between 26 East and Sabelli incorporates the Assignment and provides in part as follows:

2. Sale of the Property.

...Seller shall also assign to Buyer without recourse against Seller any and all claims which Seller has or may have against Fidelity National Title Insurance Company, its agents, affiliates successors or assigns resulting from any policy or policies of title insurance issued to Seller. Buyer agrees to include in such claim Elliot Unterberger, Esquire fees and costs related to Seller's claim to the aforesaid street bed. (Agreement of Sale p. 2 section 2).

The Agreement of Sale specifically provides for Elliot Unterberger, Esquire's fees and cost related to Seller's claim to the Swanson Street bed to be assigned to 26 East. If Sabelli contemplated assigning attorney fees and costs for all other matters related to the property, Sabelli would have specifically made such a provision for same in the Assignment or the Agreement of Sale as was done with Mr. Unterberger's fees and cost.

Since the Assignment between Sabelli and 26 East does not include attorney fees, Fidelity is not liable to 26 East for breach of contract for failure to pay the claimed attorney fee for \$95, 307.40. Accordingly, Defendant's Motion for Summary Judgment is Granted and Plaintiff's Motion for Summary Judgment is Denied. Count I of plaintiff's Complaint is dismissed.²

B. Plaintiff's Remaining Claims Are Also Subject to Summary Judgment.

In addition to the breach of contract claim, plaintiff also alleges claims for bad faith, breach of fiduciary duty and Violation of the Unfair Insurance Practices Act. For

² Since the court has determined that the right to claim attorney fees was not assigned, the court need not address the arguments concerning the validity of the assignment or the failure to supply the Title Policy.

the reasons that follow, Defendant's Motion for Summary Judgment on these claims must also be granted.

1. Bad Faith

In order to state a bad faith claim in Pennsylvania, an insured must establish that the insurer did not have a reasonable basis for denying benefits or engaging in a particular investigative practice and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim. O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. 1999).

As demonstrated above, Fidelity cannot be held liable for breach of contract since the claim for attorney fees was not assigned to 26 East. Since the claim for attorney fees was not assigned, Fidelity cannot be liable for a cause of action sounding in bad faith. Accordingly, Defendant's Motion for Summary Judgment to Count III of plaintiff's complaint is Granted.³

2. Breach of Fiduciary Duty

Count IV of plaintiff's complaint alleges a claim for breach of fiduciary duty. In Basile v. H & R Block, Inc., 777 A.2d 95, 101 (Pa. Super. 2001), the Pennsylvania Superior Court repeated the general concepts for finding a confidential relationship and the resulting fiduciary duty. Pennsylvania Chiropractic Ass'n. v. Independence Blue Cross, 2001WL 1807781 *9 (Pa. Com. Pl. July 16, 2001) (Herron). "The essence of [a confidential] relationship is trust and reliance on the one side, and a corresponding opportunity to abuse that trust for personal gain on the other." Id. at *4 (quoting In re

³ Additionally, Count II of plaintiff's complaint must also be dismissed. Count II alleges violations of the Unfair Insurance Practices Act ("UIPA"), 40 Pa. C. S. A. § 1171.1 et. seq. Although violations of the UIPA may be used as evidence of bad faith, a private cause of action under UIPA does not exist. See Fay v. Erie Ins. Group, 723 A.2d 712 (Pa. Super. 1999). Since this court dismissed the bad faith claim and no independent cause of action exists under UIPA, Count II is also dismissed.

Scott'sEstate , 455 Pa. 429, 434, 316 A.2d 883, 885 (Pa. 1974)). A confidential relationship thus exists where the parties do not deal on equal terms, “but, on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed.” Id (quoting Basile at 4-5). “The party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other’s detriment and his own advantage.” Id(quoting Basile). A confidential relationship and the resulting fiduciary duty may attach ‘wherever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other’s interest.’ Id. Such a relationship may be found as between trustee and cestui que trust, guardian and ward, attorney and client, or principal and agent, or where the facts and circumstances so indicate and are apparent on the record. Id.

In Pennsylvania, a breach of fiduciary duty claim against an insurer by an insured is synonymous with a breach of contractual duty of good faith and fair dealing. Gideon v. State Farm Mut. Auto Ins. Co., 410 Pa. 55, 188 A.2d 320,322 (Pa. 1963). As such, a breach of fiduciary duty claim is redundant of a breach of contract claim against an insurer. Moreover, no fiduciary relationship exists between an insurer and its insured. Instead, the relationship between the insured and the insurer is one of buyer and seller. See, Pennsylvania Chiropractic Association v. Independence Blue Cross, supra.

Here, plaintiff’s breach of fiduciary duty claim is redundant of the breach of contract claim. As such defendant’s motion for summary judgment is Granted to Count IV as well.

CONCLUSION

For all the above reasons, Plaintiff's motion for summary judgment is denied and Defendant's motion for summary judgment is granted. Plaintiff's complaint is dismissed in its entirety.

BY THE COURT,

C. DARNELL JONES, II, J.