



In the Court of Common Pleas
Cuyahoga County, Ohio

IRSHAD MALONE,
Plaintiff,

v.

TOT ENTERTAINMENT LLC, et al.
Defendants/Third-Party Plaintiffs,

v.

YERT INSURANCE AGENCY, et al.
Third-Party Defendants

) CASE NO. CV 12-788200
) (*Consolidated with CV 12-790101*)
)
) JUDGE PAMELA BARKER

)
) **Journal Entry:**
) Decision and Order on Third-Party
) Defendants Motions for Summary
) Judgment

This matter is before the Court on the Motion for Summary Judgment of Third-Party Defendants James Yert and the Yert Insurance Agency (hereinafter "Yert"), filed on September 25, 2013 in Case Number CV 12-788200 (consolidated with CV 12-790101). Third-Party Plaintiff T.O.T. Entertainment LLC and Terry Howell (hereinafter "T.O.T.") filed their Brief in Opposition to Yert's Motion for Summary Judgment on October 25, 2013. Plaintiffs Rodney J. Williams and Irshad Malone also jointly filed a Brief in Opposition on October 25, 2013, which mirrored the arguments in T.O.T.'s brief. Yert filed their Reply on November 6, 2013. Upon consideration of the arguments raised and the evidence provided by the parties, the court finds as follows:

Yert filed a Motion for Summary Judgment in both consolidated cases, CV 12-790101, involving Plaintiff Rodney J. Williams; and CV 12-788200, involving Plaintiff Irshad Malone. These cases center around the shooting of both Plaintiffs at the Olive

Twyst Nightclub on September 14, 2011¹ by Devonte Campbell (hereinafter "Campbell").²

Plaintiffs brought suits in two separate cases against T.O.T., as owners of Olive Twyst bar. Plaintiffs' primary allegation is that their injuries were caused by T.O.T.'s failure to provide adequate security on the night in question.³

On 9/14/11, Campbell was trying to enter Oliver Twyst with a bulletproof vest, but was stopped from entry by security at the club upon discovery of his vest. Once Campbell took off the vest, however, he was permitted entry to Olive Twyst. Both Plaintiffs and other individuals at the club, including Campbell, were involved in an altercation on the dance floor on September 14, 2011. Security intervened to stop the brawl, but Plaintiffs argue that security failed to continue to monitor the situation. After the incident in the club, Campbell shot both Plaintiffs in the parking lot of Olive Twyst, causing serious physical harm.⁴

T.O.T. obtained security for Olive Twyst through a separate entity, Strong Arm Security (hereinafter "Strong Arm"), which is owned by Defendant Rusty Miller. Strong Arm had a verbal contract to provide security services for T.O.T.'s club, and T.O.T. had used Strong Arm for two years prior to the shootings.⁵

After the shootings, T.O.T. submitted Plaintiffs' claims to its insurance carrier, Mount Vernon, which denied coverage in part because of a "firearm exclusion

¹ See *Complaint* for CV 12-788200, ¶5; See *Deposition of Irshad Malone, Exhibit A*, Yert's Motion for Summary Judgment, p.88.

² Campbell was convicted for both shootings in *The State of Ohio v. Devonte Campbell*, Cuyahoga County Criminal Case No. 12-563469.

³ See *Complaint* for CV 12-788200, ¶¶5-9

⁴ See *Complaint* for CV 12-788200, ¶¶5-9

⁵ See *Deposition of Terry Gardner, Exhibit B*, Yert's Motion for Summary Judgment, p. 18; See *Deposition of Terry Howell, Exhibit C*, Yert's Motion for Summary Judgment, p. 35.

clause" in the policy.⁶ As a result of this denial, T.O.T. filed a Third-Party Complaint against Yert, as their insurance agent. In its Third-Party Complaint, T.O.T. asserts that liability coverage for these types of altercations was requested from Yert, but that Yert failed to supply what T.O.T. requested.

T.O.T., through manager Terry Gardner, first contacted Yert about a policy in 2009, but T.O.T. did not execute a policy at that time.⁷ T.O.T. renewed this coverage discussion with Yert in April of 2010. In this April 2010 discussion, T.O.T. told Yert that they wanted insurance coverage to include physical fights.⁸ Again, Yert gave T.O.T. a policy proposal, but for a second time, T.O.T. did not act on it.⁹ One year later, T.O.T. did purchase coverage with Yert, who placed the policy through Mount Vernon Fire Insurance Co. (which included commercial general liability and liquor liability).¹⁰ According to T.O.T., before the procurement of coverage, it made inquiry of Yert regarding providing firearms coverage, and Yert responded that he was going to look into it;¹¹ and when Yert dropped off the policy, Yert was asked "is everything in there" and "we're covered" and Yert responded "yes".¹² In a letter provided with the policy delivered to T.O.T., Yert advised T.O.T. to "look this over to be sure it includes all the coverage you requested" and to "advise us immediately in writing if you have any changes."¹³ While Yert never reviewed the policy with

⁶ *Exhibit H*, Yert's Motion for Summary Judgment, Letter Denying Coverage from Mount Vernon.

⁷ *See Deposition of Terry Gardner, Exhibit B*, Yert's Motion for Summary Judgment, p. 18; and *Exhibit D*, Yert's Motion for Summary Judgment, Copy of 2009 Policy Proposal.

⁸ *See Deposition of Terry Gardner, Exhibit B*, Yert's Motion for Summary Judgment, pp. 32-33, 38, 44, 54; *See Deposition of Terry Howell, Exhibit C*, Yert's Motion for Summary Judgment, pp. 37-39.

⁹ *Exhibit E*, Yert's Motion for Summary Judgment, Copy of 2010 Policy Proposal

¹⁰ *Exhibit F*, Yert's Motion for Summary Judgment, Copy of Policy from Mount Vernon.

¹¹ *Deposition of Terry Gardner, Exhibit C*, at page 40.

¹² *Id.* at pages 48-49.

¹³ *Exhibit G*, Yert's Motion for Summary Judgment, Correspondence from James Yert.

T.O.T., T.O.T. admits it never reviewed the policy and never contacted Yert to discuss any changes or additions to the coverage.¹⁴

In Yert's Motion for Summary Judgment on the Third-Party Complaint of Defendant/Third-Party Plaintiff T.O.T. Entertainment, Yert argues that they are entitled to judgment in their favor since: 1.) T.O.T.'s negligence claims are barred by the "Economic Loss Doctrine";¹⁵ 2.) T.O.T. and Yert do not have a fiduciary relationship, and thus T.O.T. cannot claim breach of that fiduciary duty;¹⁶ 3.) there is no record or evidence that Yert made false statements to T.O.T.'s representatives to support T.O.T.'s negligent misrepresentation claim;¹⁷ and 4.) T.O.T. had a duty to review the coverage policy procured, and they failed to act on that duty since they did not review the policy or notify Yert if it was not adequate.¹⁸

Yert also argues for judgment as matter of law because: 1.) T.O.T. is not liable for the negligence of its independent contractor, Strong Arm; and 2) T.O.T. cannot be held liable for unforeseeable criminal acts of a third party (Campbell).¹⁹

Summary Judgment shall be granted when the moving party can demonstrate that: 1.) there is no genuine issue of material fact; 2.) the moving party is entitled to judgment as a matter of law; and 3.) reviewing the evidence most strongly in the non-moving party's favor, reasonable minds can come to but one conclusion. *Horton v. Harwick Chem. Corp* (1995), 73 Ohio St.3d 679. Once the moving party has satisfied its burden, the non-moving party must then set forth

¹⁴ See *Deposition of Terry Gardner, Exhibit B*, Yert's Motion for Summary Judgment, pp. 48-50; See *Deposition of Terry Howell, Exhibit C*, Yert's Motion for Summary Judgment, pp. 64-65.

¹⁵ Yert's Motion for Summary Judgment, p. 9

¹⁶ Yert's Motion for Summary Judgment, pp. 10-12

¹⁷ Yert's Motion for Summary Judgment, pp. 12-13

¹⁸ Yert's Motion for Summary Judgment, pp. 13-15

¹⁹ Yert's Motion for Summary Judgment, pp. 15-21

specific facts showing that there is genuine issue for trial. *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385.

The court in *Momentive Spec. Chem., Inc. v. Chartis Spec. Ins. Co.*, 2012 U.S. Dist. LEXIS 32211, 11-12 (S.D. Ohio Mar. 12, 2012), explained the "Economic Loss Doctrine" in Ohio as follows:

The economic-loss doctrine holds that "absent tangible physical harm to persons or tangible things there is generally no duty to exercise reasonable care to avoid economic losses to others." *J.F. Meskill Enterprises, LLC v. Acuity*, No. 05-cv-2955, 2006 U.S. Dist. LEXIS 41491 (N.D. Ohio Apr. 7, 2006)(citing *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 73 Ohio St. 3d 609, 1995 Ohio 285, 653 N.E. 2d 661, 667-68 (Ohio 1995)). [*12] The economic loss rule therefore "generally prevents recovery in tort of damages for purely economic loss." *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 2005 Ohio 5409, 835 N.E.2d 701, 704 (Ohio 2005). That is, "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.*, 42 Ohio St. 3d 40, 537 N.E.2d 624, 630 (Ohio 1989) (citations omitted). This is because "tort law is not designed *** to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Corporex Dev. & Constr. Mgmt Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 414, 2005 Ohio 5409, 835 N.E.2d 701 (2005). The only damages that the plaintiffs seek are economic.

It is well settled under Ohio law that the "Economic Loss Doctrine" bars Third-Party Plaintiff T.O.T.'s negligence or negligent procurement claims or causes of action set forth in the First, Second, Third and Fifth Counts of the Third-Party Complaint since T.O.T. is seeking defense and indemnity expenses or pecuniary

losses through tort.²⁰ Therefore, summary judgment is granted in favor of Yert and against T.O.T. on these claims or causes of action.

T.O.T. has asserted that they have a fiduciary relationship with Yert, establishing duties Yert owed to it that were breached. But it is well settled law in Ohio that, "the relationship between an insured and the agent that sells the insurance is, without proof of more, an ordinary business relationship, not a fiduciary one". *Slovak v. Adams*, 141 Ohio App. 3d 838, 846 (Ohio Ct. App., Lucas County 2001).²¹ The party who is asserting that a fiduciary relationship exists bears the burden of proving its existence and must also show that this relationship is not unilateral and that both parties understood that a special trust or confidence was reposed.²²

The record before this Court fails to demonstrate that both T.O.T. and Yert understood there to be a special trust or confidence reposed or a deeper association between them. The interactions between T.O.T. and Yert associated with requesting policies or discussing coverage fall short of establishing any fiduciary bond between

²⁰ See *Potts v. Safeco Ins. Co.*, 2010-Ohio-2042, P20 (Ohio Ct. App., Richland County May 3, 2010), holding: "As noted by the trial court, "inability to recover under an insurance policy for injury or damage is an economic loss... [E]nding up with an insufficient insurance policy cannot be considered personal injury or property damage and must, therefore, be characterized as an economic loss". See Also *Momentive Spec. Chem., Inc.*, at * 12-13, holding: "It has been repeatedly held that regardless of the general duty owed by an insurance broker to an insured to exercise diligence in obtaining insurance, the economic loss doctrine bars pure negligence claims (and professional negligence claims) against insurance companies, agents or brokers. See, *Long v. Time Ins. Co.*, 572 F. Supp. 2d 907, 912 (S.D. Ohio 2008)(economic loss doctrine bars plaintiff from pursuing negligence or professional negligence claims against insurer); *Burke v. Time Insurance Co.*, No. 3:10 cv 00478, 2011 U.S. Dist. LEXIS 69614 (S.D. Ohio June 9, 2011)(it is well established that negligence claims against insurers are barred by the economic loss doctrine)."

²¹ See Also *Nichols v. Schwendeman*, 2007-Ohio-6602, P15 (Ohio Ct. App., Franklin County Dec. 11, 2007), holding that "while the law has recognized a public interest in fostering certain professional relationships, such as the doctor-patient and attorney-client relationships", the same recognition has not been given to the insurance agent-client relationship.

²² *Craggett v. Adell Ins. Agency*, 92 Ohio App. 3d 443, 451-452 (Ohio Ct. App., Cuyahoga County 1993).

the parties.²³ T.O.T. fails to meet their burden on this claim and fails to demonstrate any mutual understanding of the parties as to a deeper relationship. Therefore, summary judgment is granted in favor of Yert and against T.O.T. on T.O.T.'s breach of fiduciary duty claim set forth in Count Four of its Third-Party Complaint.

The remaining claim or cause of action of T.O.T. against Yert is one for negligent misrepresentation. In order to establish a claim of negligent misrepresentation, a party must demonstrate that one who, in the course of business, 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.²⁴ "A negligent misrepresentation does not lie for omissions; there must be some affirmative false statement."²⁵

According to T.O.T., prior to the procurement of coverage it had inquired of Yert through Mr. Gardner regarding firearms coverage, and Yert had said he would look into it.²⁶ Also, when Yert dropped off the policy, Mr. Gardner asked "is everything in there" and "we're covered" to which Yert replied "yes".²⁷ A letter Yert delivered with the policy reads in relevant part: "We recommend that you look this

²³ See *Deposition of Terry Gardner, Exhibit B*, Yert's Motion for Summary Judgment, p. 18, 32-33, 38, 44, 54; See *Deposition of Terry Howell, Exhibit C*; Yert's Motion for Summary Judgment, pp. 37-39.

²⁴ Emphasis added by bold print. *Johnson v. Am. Gen. Life Ins. Co.*, 6th Dist. No. E-06-004, 2006-Ohio-5771, ¶25. Stated differently, "[i]n order to prove a claim of misrepresentation, a plaintiff must show (1) a false representation by another, (2) made intentionally or negligently, (3) on which the plaintiff **reasonably** relied (4) to his loss and detriment." (Emphasis added.) *Roberts v. Maichl*, 1st Dist. No. C-040002, 2004-Ohio-4665, ¶18.

²⁵ *Snowville Subdivision Joint Venture Phase I v. Home S&L of Youngstown*, 8th Dist. No. 96675, 2012-Ohio-1342, ¶31.

²⁶ *Gardner deposition*, at page 40.

²⁷ *Id.* at pp. 48-49.

over to be sure it includes all the coverage you requested. Please advise us immediately in writing if you have any changes."²⁸ T.O.T. did not follow up with Yert to discuss the policy or coverages after it was delivered.²⁹ And, T.O.T. did not read the policy.³⁰

Certainly, then, there is a genuine issue of material fact as to whether or not Yert made a false representation intentionally or negligently to T.O.T.'s loss or detriment. In other words, as to three of the four elements of a negligent misrepresentation claim, T.O.T. has presented sufficient evidence to withstand summary judgment in favor of Yert. However, as a matter of law, the fourth element - T.O.T.'s justifiable or reasonable reliance on the false representation - has not and cannot be proven by T.O.T. so as to require a trial on its negligent misrepresentation claim.

Yert correctly notes that under Ohio law T.O.T. had a duty to read the policy procured, and the violation of this duty precludes recovery for T.O.T.³¹ In the context of T.O.T.'s negligent misrepresentation claim, T.O.T.'s undisputed failure to read the policy, to include the existence of the firearms exclusion first noted at page

²⁸ Yert's Motion for Summary Judgment, Exhibit G.

²⁹ *Gardner deposition*, at pp. 49-50.

³⁰ See *Deposition of Terry Gardner, Exhibit B*, Yert's Motion for Summary Judgment, pp. 48-49; See *Deposition of Terry Howell, Exhibit C*, Yert's Motion for Summary Judgment, pp. 64.

³¹ See *Mbe Collection v. Westfield Cos.*, 2002-Ohio-1789, P35 (Ohio Ct. App., Cuyahoga County Apr. 18, 2002) (holding "a person has a duty to examine the coverage provided and is charged with knowledge of the contents of his or her own policy"); See *Nationwide Mut. Ins. Co. v. Pragotrade, Inc.*, 2008-Ohio-5125 (Ohio Ct. App., Cuyahoga County Oct. 2, 2008) (holding that a person is charged with knowledge of the contents of their own insurance policies and that "An agent or broker is not liable when a customer's loss is due to the customer's own act or omission." Citing *Craggett v. Adell Ins. Agency* (1993), 92 Ohio App.3d 443, 453, 635 N.E.2d 1326). See Also *Danny Boy Farm Mkt. v. Coniglio Agency*, 1996 Ohio App. LEXIS 1686, 10-11 (Ohio Ct. App., Cuyahoga County Apr. 25, 1996) (also holding that a person has a duty to examine the coverage provided and the agent or broker is not liable when a customer's loss is due to the

2 thereof, means that T.O.T. could not have justifiably or reasonably relied on Yert's representation.

In *Roberts v. Maichl, supra*, at ¶18, and relying upon the Eighth District Court of Appeals' decision in *Craggett v. Adell Ins. Agency*, the First District Court of Appeals rejected the insured's negligent misrepresentation claim on this very basis, explaining:

Moreover, while SKS had a duty to obtain the requested insurance coverage, appellants had a corresponding duty to examine the coverage provided, and they were charged with knowledge of the contents of their own insurance policies. In this case, Roberts could not argue that he had justifiably relied upon the representation by SKS that the companies were adequately insured, where Roberts himself admitted he had not read his insurance dishonesty coverage. Accordingly, we hold that the trial court properly granted summary judgment in favor of SKS on appellants' claim for negligent misrepresentation.

Accordingly, summary judgment is granted in favor of Yert and against T.O.T. on the negligent misrepresentation claim set forth in Count Three of the Third Party Complaint.

Based upon the above, any further analysis of the merits of the case is unnecessary for purposes of deciding Yert's Motion for Summary Judgment. The Court does not need to evaluate the possible negligence of the independent contractor or evaluate whether T.O.T. can be held liable for unforeseeable criminal acts of Campbell.

COURT'S ORDER:

IT IS HEREBY ORDERED that Third Party Defendants James Yert and the Yert Insurance Agency's Motion for Summary Judgment is **GRANTED** as to the Third Party Complaint and that it is **DISMISSED** with prejudice.

DATED THIS 13th day of December, 2013.

Pamela A. Barker
JUDGE PAMELA A. BARKER

2013 DEC 13 A 10:36
CLERK OF COURTS
CUYAHOGA COUNTY

FILED