

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CASSIDY PUBLIC ADJUSTMENT,P.C.	: No. 02-00056
Plaintiff	:
	:
vs.	:
	:
DIANE L. CAPRIO,	:
SANDRA J. ALLEN, and	:
LEBANON MUTUAL INSURANCE CO.	:
Defendants	:
	:
vs.	:
	: Plaintiff's Motion for
PATRICK AND KIMBERLY CASSIDY,	: Summary Judgment
Third Party Defendants	:

**ORDER**

AND NOW, this \_\_\_\_ day of May 2003, upon consideration of Plaintiff's Motion for Summary judgment, it is **ORDERED** and **DIRECTED** as follows:<sup>1</sup>

A. Plaintiff's Motion for Summary Judgment as to Count I of the Complaint, Breach of Contract against Defendant Caprio is **DENIED**. Several factual issues remain to be decided in this case including whether Plaintiff has adequately performed under the contract and whether the contract was orally modified by the parties.

B. Plaintiff's Motion for Summary Judgment as to Count II of the Complaint, Breach of Contract against Defendant Allen is **DENIED** for the reasons alluded to in Section A.

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<sup>1</sup> Patrick and Kimberly Cassidy's Motion for Summary Judgment against the Defendants' Third Party

C. Declaratory Judgment Counts 3-5 of Plaintiff's Complaint. The Court reserves ruling on all the Declaratory Judgment Counts in Plaintiff's Complaint and the Defendants' Counterclaim. The Court will rule on the Declaratory Judgment issues in a separate Order.<sup>2</sup>

D. Plaintiff's Motion for Summary Judgment as to the Defendants' Counterclaim 1-Rescission is **GRANTED**. This portion of Defendants' Counterclaim is based upon their claim that the written contract dated September 24, 2001 was a result of fraud in the inducement before the Defendants signed and agreed to the contract.

The Defendants' averments of fraud in the inducement are detailed in the New Matter of their Answer and Counterclaim averment 36 a-h. The Court will briefly comment on these averments.

In Averment 36a Defendants claim that Patrick Cassidy told the Defendants he would "bury the insurance company in paperwork." The Court feels this is a classic example of puffing and a statement of future effort or performance. This would not constitute fraud. See Huddleston v. In Fertility Center of America, 700 A.2d 453 (Pa.Super. 1997); Shoemaker v. Commonwealth Bank, 700 A.2d 1003 (Pa.Super. 1997).

In Averment 36 b, the Defendants claim Mr. Cassidy told them he would demand \$25,000 up front for living expenses and that he would have the money within a

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Complaint has been ruled upon by separate Order.

<sup>2</sup> The Declaratory Judgment issue raised by all the parties concerning construction of the contract between the parties is whether the Defendants had the right to unilaterally terminate the public adjustor contract between the Plaintiff and Defendants at will, or whether the Defendants could only terminate the

week. The Court believes these statements would be examples of puffing and a promise of future effort or performance and would not be fraud.

In Averment 36 c, the Defendants claim Mr. Cassidy told them that he and his father would promptly prepare detailed drawings and floor plans, and replacement cost details including graphs, charts, spread sheets and photos covering real estate and personalty, which was damaged or lost in the fire. The Court believes this is a promise of future performance is not fraud.

In Averment 36 d, the Defendants' allege Mr. Cassidy said he would promptly prepare and present estimates for property to the insurer. Once again, the Court believes this is a promise of future performance and is not fraud.

In Averment 36 e, the Defendants claim that Mr. Cassidy told them he would only handle a few cases while he worked their case, and therefore, he would "devote a substantial amount of time, immediately" on this claim. The Court believes this a promise of future performance or effort and is not fraud.

In Averment 36 f, the Defendants contend that Mr. Cassidy said he would pay for his attorney, Richard Vanderlin, to assist in the claim. Once Again, the Court believes this statement goes more toward performance or effort and is not fraud.

In Averment 36 g, the Defendants allege that Mr. Cassidy told them that the insurer could be sued for bad faith under the Unfair Trade Practices Act, which could yield additional damages for the Defendants. The Court believes this would also be a subjective legal **opinion** of the Plaintiff and would no be fraud.

Finally, in averment 36 h, the Defendants claim that Mr. Cassidy told them that his contingency fee would not apply to money paid by the insurance company for personal property or for loss of use coverage recovery. The Defendants claim Mr. Cassidy told them this did not have to be written down because the written contract form was mandated by the State, and only covers the dwelling. This statement would not appear to be fraud in the inducement, but might arguably be construed as fraud in execution. However, fraud in the execution requires evidence that the alleged oral representation was fraudulently omitted from the written contract or was omitted from written contract by accident or misstate. See Contractors v. Liberty Place Hotel Assoc., 539 Pa. 395, 652 A.2d 1278, 1995. The Defendants seem to acknowledge that they consented to not adding this provision to the written contract. However, the Court notes this raises an issue of whether the written contract was a fully integrated contract. The contract itself is a short form document. It does not go into any significant detail concerning the duties of Cassidy Public Adjustment. There is also argument by the Defendants in their brief in opposition to Plaintiff's Motion for Summary Judgment that Plaintiff in his deposition and in a letter by his attorney dated February 8, 2002, acknowledges that the Plaintiff's fee in the written contract would not include any money paid by the insurance company to the Defendants for additional living expenses. See Exhibit A and Exhibit B to Defendants' brief. These factors would point toward a credible argument that the written contract, which did not contain any integration clause, was not an integrated contract. In light of the above, while the Court will not permit the statement in Averment 36 h to be offered under a fraud theory, it will permit the

Defendants to offer evidence of the statements in Averment 36 h on the issue of whether the parties orally agreed to not include personal property in the fee that would be paid to Plaintiff.

In summary, the Court **GRANTS** Plaintiff's Motion for Summary Judgment in regards to the Defendants' Rescission Count, which is predicated on a theory of fraud. However, at trial the Court will permit the Defendants to offer evidence of the statements contained in Averment 36 for the above-stated reasons. The Court will also permit the Defendants to offer into evidence at trial the statements in averments a through g, not to prove fraud or to otherwise modify the written agreement, but rather, to allow the jury to assess Mr. Cassidy's credibility and his performance on the issue of whether the Plaintiff breached the contract or adequately performed under the contract.<sup>3</sup>

E. Plaintiff's Motion for Summary Judgment as to Counterclaim 2, Breach of Contract, is **DENIED**. There are fact issues concerning the performance of the contract. The Court notes Defendants' counsel has acknowledged at argument that the Count is not truly a counterclaim, but rather, is part of the defense to Plaintiff's Complaint.

F. Plaintiff's Motion for Summary Judgment as to Counterclaim 3 – Termination Contract, is reserved. This Count is a declaratory judgment count and will be addressed in a separate order. See also this Court's Order on Preliminary Objections dated August 16, 2002, where the Court indicates Counterclaim 3 is a request for Declaratory Judgment.

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<sup>3</sup> Likewise, evidence of the Plaintiff's solicitation brochure may be relevant, not for the theory of fraud,

G. Plaintiff's Motion for Summary Judgment on Counterclaim 4 – Unfair Trade Practices and Consumer Protection Law is **GRANTED**. The Unfair Trade Practice and Consumer Protection Law, 73 P.S. §201-1 to 201-9.2, which permits an individual to file a Private Cause of Action under the Act (Section 201-9.2) is the focal point of the Defendants' fourth Counterclaim against the Plaintiff. However, in order to recover under the Prohibition on Fraudulent Conduct under the Act, §201(2)(4)(xvii), the elements of common law fraud must be proven. See Prime v. Yochim, 619 A.2d 769 (Pa.Super. 1993). Earlier in this Order, the Court ruled against Defendants, finding their allegations and evidence insufficient to prove common law fraud. In the Defendants' brief, however, they argue that sections other than the fraudulent conduct section apply to this case. They point to §202-2(4)(v),(ix), and (xi) as being applicable to this case. The Court has reviewed these additional sections of the Act and it does not believe they have application to the facts submitted in this case. Being dissatisfied with the performance of a public adjustor does not in and of itself turn a case in an Unfair Trade Practice Act case. The Court sees no basis for the Defendants' expansive views of §201-2(4)(xi) ("making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions") to their allegation that Plaintiff allegedly orally told them his fee would not indicate any recoveries for personal property. As discussed previously in this Order, the Court will permit the Defendants to raise this issue at trial for the jury to determine whether the Plaintiff's oral agreement not to include additional living expenses in his fee also applied to monies recovered by

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but on the issue of Plaintiff's performance of contract.

Defendants for personal property. This will allow the contested issue regarding this matter to be fairly determined at trial. The Court does not believe, however, that this issue invokes the Unfair Trade Practices and Consumer Protection Act.

Also, it is noted that §202-9.2(a), which permits a private party to file an action under the Act, requires the consumer who purchases goods or services to suffer an ascertainable loss of money or property before invoking the damages provisions of the Act. While the Defendants were obviously dissatisfied with the Plaintiff's efforts and performance under the Public Adjustor Contract, the Court does not discern in the material provided as ascertainable loss of money or property. Rather, the Defendants were, in fact, paid by the insurance company on their claim after the insurance company completed its investigation of the Defendants' house fire. Not every claim against a business entity invokes the Consumer Protection Act.

H. Plaintiff's Motion for Summary Judgment on the issue of Oral Modification of the Contract is **DENIED**. While it is true that any oral modification to a contract must be proven in evidence that is clear, precise and convincing, See In Re Estate of Bohmar, 797 A.2d 973 (Pa.Super. 2002), there appear to be factual issues here that are best resolved by hearing testimony from the parties. Thus, the Court will allow this issue to be decided as part of the trial process.

By The Court,

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Kenneth D. Brown, Judge