RAYMOND CHARLES ELDER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 03-01,267
	:	
GOOD'S INSURANCE AGENCY, INC., and BRIAN O. KLINK,	:	
	:	
	:	
Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: June 28, 2004

OPINION and ORDER

Before the Court for determination is Defendants Good's Insurance Agency, Inc. and Brian Klink's Motion for Summary Judgment filed April 23, 2004.

Raymond Elder ("Elder") owns and operates a transportation/hauling business. As part of that business, Elder owns and operates the tractor and trailer components of a truck. Brian Klink ("Klink") is an employee and agent of Good's Insurance Agency, Inc ("Good's Insurance"). Both Klink and Good's Insurance (collectively "Defendants") are licensed by the Commonwealth as insurance agents.

In 2001, Klink contacted Elder to inform him about the possibility of obtaining insurance on his truck for a lower premium then he was currently paying. Klink prepared and submitted an insurance proposal to Elder. The proposal itemized the coverage that was to be provided. The proposal included a term regarding rental reimbursement coverage. The proposal provided that there would be rental reimbursement for Elder's tractor and trailer for thirty days at one hundred dollars per day. Based on the proposal, a total of $6,000 would be available for rental reimbursement coverage ($3,000 for the tractor, $3,000 for the trailer).

Elder accepted the terms of the insurance proposal and authorized Defendants to prepare an application for insurance coverage corresponding with the proposal.

Klink prepared the application and submitted it to Elder for him to review and execute. The application prepared by Klink did not contain the rental reimbursement coverage. Elder signed the application as submitted by Klink, and Old Guard Insurance Group issued Elder an insurance policy effective March 1, 2001. Elder then renewed the policy for an additional year on March 1, 2002.

On June 24, 2002, Elder was involved in a single vehicle accident in Vermont. The tractor and trailer sustained damage to such a degree that they could not be used for hauling. Elder informed Defendants of the accident the following morning. Elder was able to return the tractor and trailer back to Muncy, Pennsylvania. Elder met with an insurance adjuster and got an estimate from a body shop so that repairs to the vehicle could get under way. At this point, Elder was not engaged in any hauling work.

During a July 2, 2002 telephone conversation, Klink recommended to Elder that he should take advantage of the rental reimbursement coverage and rent a tractor and trailer during the time that his were undergoing repairs. Elder inquired about whether he was restricted to renting the tractor and trailer from certain authorized rental businesses or if he was free to do so anywhere. Klink told Elder that it was his belief that Elder could rent them anywhere, but he would have to verify that with the insurance broker. On July 3, 2002, Klink informed Elder that the rental coverage was not in the insurance policy issued to Elder as Klink failed to include the rental reimbursement coverage in the insurance application.

At the time of the accident, Elder owned and operated a 99 Kenworth tractor and a 01 Trinity self-loading hydraulic conveyor belt trailer. Elder was engaged in the business of hauling agricultural products. Elder made inquiries about renting a trailer with the hydraulic conveyor belt capability, but was unable to find an acceptable one. Elder also made inquiries into renting another type of tractor and trailer, specifically an insulated box trailer for hauling potatoes. Elder did not rent this type of trailer because he could not be guaranteed potato hauling work. Elder did not rent a tractor and trailer during the time frame that his truck was being repaired. The Old Guard Insurance Group paid for the repairs to the tractor and trailer, but no authorization was made for rental reimbursement.

Defendants argue that they are entitled to summary judgment because Elder has not produced sufficient proof of the necessary elements of his causes of action. Specifically, Defendants submit that Elder cannot demonstrate that he suffered any damages as a result of Klink's failure to include the rental reimbursement provision in the insurance application.

Defendants' argument centers on the proposition that if the rental reimbursement provision had been in the insurance application, then Elder would still have been in the same position he was without the provision. Defendants assert that the rental reimbursement provision would have required Elder to have actually incurred expenses as a result of renting a tractor and trailer as a condition precedent to triggering coverage under the policy. Defendants argue that the failure to include the rental reimbursement provision did not harm Elder as he did not rent a tractor and trailer, thereby incurring expenses, and would not have been entitled to reimbursement under the policy. Defendants argue that the failure to include the rental

reimbursement provision did not harm Elder because even if it had been included Elder would not have been able to reap its benefits.

Defendants further argue that Elder suffered no injury from the failure to include the rental reimbursement provision in the application because even if it was there Elder was unable to rent a tractor and trailer. In essence, it was the state of the trucking industry that prevented Elder from renting a tractor and trailer, not the absence of the rental reimbursement provision. Defendants assert that Elder was unable to rent a trailer with a hydraulic conveyer belt as no such trailer was available. Defendants also assert that Elder could not rent another type of trailer, in this case an insulated box trailer to haul potatoes, because he was not guaranteed work with this new type of trailer. As such, Defendants argue that Elder suffered no damage from the failure to include the rental reimbursement provision.

In response, Elder argues that he has suffered damages as a result of Defendants' failure to include the rental reimbursement coverage in the insurance application. Initially, Elder argues that Defendants' failure to satisfy a condition precedent argument is not applicable to this case. Elder argues that the argument might have some validity if his claims were based on a failure to provide rental reimbursement as part of the underlying insurance policy. In that situation, the claims would be against Old Guard Insurance Group for not abiding by the insurance policy. In the present case, the damages are not any un-reimbursed rental expenses. The damages are based on what Defendants did not provide, the rental reimbursement coverage.

Elder contends that the failure of Defendants to include the rental reimbursement coverage in the insurance application did injury him. Elder asserts that if the

coverage had been included in the application and provided for by the insurance policy, then he would have rented a tractor and trailer. Elder argues that the availability of rental reimbursement was a factor in whether or not it would be financially feasible to rent a tractor and trailer. Elder contends that the lack of such coverage made any such endeavor economically impractical. As such, Elder argues that the failure to include the rental reimbursement coverage injured him as it prevented him from renting a tractor and trailer and getting back to work.

The crux of Klink and Good's Insurance's argument is that the failure to include the rental reimbursement coverage in the application did not cause any damages to Elder. The Court upon examining the contentions as to how this failure caused any damages under the breach of contract and negligence causes of action, finds that Elder has produced enough evidence that raises an issue as to whether the failure to include the rental reimbursement coverage in the application injured Elder.

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " 'in the light most favorable to the non-moving party accepting as true all well pleaded

facts in its pleading and giving that party the benefit of all reasonable inferences.'" ***Godlewski***, 597 A.2d at 107 (quoting ***Hower v. Whitmak Assoc.***, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that "are free and clear from doubt" and any "doubt must be resolved against the moving party." ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Preliminarily, the Court will address Defendants' condition precedent argument. A condition precedent is an event that must occur before performance under a contract becomes due. ***Shovel Transfer and Storage v. Pennsylvania Liquor Control Bd.***, 739 A.2d 133, 139 (Pa. 1999). "Where a condition has not been fulfilled, the duty to perform the contract lays dormant and no damages are due for non-performance." ***Ibid***. An event is a condition precedent if it qualifies a duty under an existing contract. ***Ibid***. "No particular form of words is necessary to make a term of an agreement a condition of a duty…." ***American Leasing***, 454 A.2d 555, 559 (Pa. Super 1982). An act or event designated in a contract will not be construed as a condition precedent unless it was clearly the intention of the parties. ***Shovel Transfer and Storage,*** 739 A.2d at 139; ***American Leasing***, 454 A.2d at 559.

The condition precedent argument is not relevant to the issues in this case. If incurring rental expenses is a condition precedent, then it is a condition precedent to receiving the reimbursement coverage that would have been included in the insurance policy. It would have been an event that was necessary before someone was obligated to pay Elder the reimbursement coverage. That someone would have been Old Guard Insurance Group, not Defendants. The incurring of rental expenses would have gone to Old Guard Insurance Group's duty to pay the reimbursement coverage under the insurance policy. The incurring of

rental expenses has nothing to do with Defendants' duty to include the rental reimbursement coverage in the insurance application. Defendants had a duty to include the rental reimbursement coverage in the insurance application. The incurring of rental expenses was not an event that was necessary to occur before Defendants fulfilled their obligation. The condition precedent is relevant to Old Guard Insurance Group paying the policy coverage, nothing else. As such the condition precedent argument fails, and Defendants are not entitled to summary judgment on that basis.

The remainder of Defendants' argument goes to causation under both the breach of contract and negligence claims. The key to Defendants' argument in this regard is that there was no trailer available with a hydraulic conveyor belt and that Elder did not rent an insulated box trailer because he was not guaranteed work. Defendants contend that is why Elder did not rent a trailer, not the lack of the rental reimbursement coverage. However, Elder has presented evidence that could cast doubt on Defendants' argument and creates a genuine issue of fact that precludes entry of summary judgment.

Elder testified at his deposition that he needed a self-unloading hydraulic conveyor belt trailer to continue in the same line of hauling he had done. Deposition of Raymond Elder (March 26, 2004), 21. He wanted to rent a truck with the hydraulic conveyor belt because the alternative was not palatable. Elder could have had the hydraulic line taken off his truck and placed on a rental truck, but that would have cost $1,500 and four days of down time. ***Id***., 21. Elder initially testified that he made some phone calls to inquire about renting such a trailer, and these proved unsuccessful as no one seemed to have one. ***Id***., 23. Elder later testified that some places he called did have such a trailer, but when he got there the truck was

not there or they wanted twice as much to rent it. ***Id***., 29. Elder also testified that the potato hauling broker told him that he could not guarantee Elder work if he rented the insulated box trailer to haul potatoes. ***Id***., 27. Elder stated that if he had the rental reimbursement coverage he would have rented the insulated trailer, but the fact that he would be footing the bill for the rental and the uncertainty of the work dissuaded him. ***Id***., 25-26, 27, 29. Elder further testified that if he was able to get a rental, then he would have been able to use it for thirty days and keep working. ***Id***., 29. Elder also estimated that he would have been able to make about $8700 for the two months that he did not have a truck.

Elder's testimony creates an issue of fact and would lend credence to his theory that the breach of duty caused him harm. Basically, the argument follows: Elder lost income because he had no truck. Elder had no truck because he had no rental insurance to cover the cost of the rental or at least defer some of the expenses. Elder had no insurance to cover the rental because Defendants failed to include the rental reimbursement coverage in the insurance application. Therefore, Elder lost income because Defendants failed to include the rental reimbursement coverage in the insurance application.

Taking Elder's testimony as true, that he would have rented a tractor and trailer if he had the coverage, the Court will apply this testimony to the breach of contract and negligence causes of action to determine whether the evidence could establish the causes of action.

In order to maintain a cause of action for a breach of contract, a plaintiff must plead: (1) the existence of a contract including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. ***Presbyterian Med. Ctr. v. Budel***, 832

A.2d 1066, 1070 (Pa. Super. 2003); ***Gorski v. Smith***, 812 A.2d 683, 692 (Pa. Super. 2002). "In a breach of contract action, damages are awarded to compensate the injured party for loss suffered due to the breach." ***Empire Properties, Inc. v. Equireal, Inc.***, 674 A.2d 297, 304 (Pa. Super. 1996). "The policy behind contract law is to protect the parties' expectation interests by putting the aggrieved party in as good a position as he would have been had the contract been performed." ***Reformed Church of the Americas v. Hoover & Sons, Inc.***, 764 A.2d 1100, 1109 (Pa. Super. 2000). "'Where one party to a contract without legal justification, breaches the contract, the other party is entitled to recover, unless the contract provided otherwise, whatever damages he suffered provided (1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract.'" ***Ferrer v. Trustees of the Univ. of Pennsylvania***, 825 A.2d 591,610 (Pa. 2002) (quoting ***Taylor v. Kaufhold***, 84 A.2d 347, 351 (Pa. 1951); *see also*, ***John B. Conomos, Inc. v. Sun Co.***, 831 A.2d 696, 708 (Pa. Super. 2003).

Elder has produced evidence that could establish causation in his breach of contract claim. The breach of contract was the failure to include the rental reimbursement coverage in the insurance application. The injury was the loss of income occasioned by not having a truck to engage in hauling. The loss of income is the type of injury that would normally flow from this failure. If the rental reimbursement coverage had been in the insurance application, then Elder could have rented a truck and continued working. If Elder's testimony is believed, there were hydraulic conveyor belt equipped trailers available, but they were too expensive to rent without rental reimbursement coverage. Had there been rental reimbursement coverage, he could have rented those trailers with the cost thereof partially or fully covered,

thereby making the rental of the trailer feasible. The same is true with respect to the insulated box trailer. If the rental coverage paid for the rental, then renting such a trailer, despite the less then certain availability of work, would not have been such a financial gamble. As Elder testified in his deposition, if he had the rental insurance he would have rented the insulated box trailer.

The loss of income would also be a reasonably foreseeable injury stemming from the breach. The inclusion of the rental reimbursement coverage was to permit Elder to rent a truck and keep working. It was designed to avoid the type of situation that Elder encountered here. The very purpose of the rental reimbursement coverage is provide a way for Elder to limit any loss of income since he could rent a truck and keep working. Therefore, Elder has presented evidence that could establish that his lose of income was caused by the alleged breach of contract.

The Court will now turn to the negligence claim. A plaintiff must prove four elements to make out a negligence cause of action. A plaintiff must establish: "(1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant. ***Atcovitz v. Gulph Mills Tennis Club***, 812 A.2d 1218, 1222 (Pa. 2002); ***Rabutino v. Freedom State Realty Co.***, 809 A.2d 933, 938 (Pa. Super. 2002). Causation involves two distinct concepts, cause in fact and legal causation/proximate cause. ***Summers v. Giant Food Store, Inc.***, 743 A.2d 498, 509 (Pa. Super.

1999), *app. denied*, 764 A.2d 1071 (Pa. 2001); *see also*, ***Vattimo v. Lower Bucks Hosp., Inc.***, 465 A.2d 1231, 1233 (Pa. 1983).

Cause in fact (factual causation) exists when "the harmful result would not have come about but for the negligent conduct…." ***Summers***, 743 A.2d at 509; ***First v. Zem Zem Temple***, 686 A.2d 18, 21 (Pa. Super. 1996), *app. denied*, 700 A.2d 441 (Pa. 1997). Proximate cause is established if the defendant's negligent act was a substantial factor in bringing about the harm suffered. ***Jones v. Montefiore Hosp***., 431 A.2d 920, 923 (Pa. 1981); ***Gutteridge v. A.P. Green Servs.***, 804 A.2d 643, 655 (Pa. Super. 2002). A substantial factor is "'conduct [that] has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense…'" ***Jeter v. Owens-Corning Fiberglass Corp.***, 716 A.2d 633, 636 (Pa. Super. 1998) (quoting Restatement (Second) of Torts, §431, comment a (1965)) (change in original). A cause is substantial if it is significant or recognizable; it does not have to be quantified as considerable or large. ***Ibid***. A cause is not a substantial factor if the harm would have been sustained even if the defendant had not been negligent. ***Id***. at 637.

Elder has presented evidence that could establish causation under the negligence claim. Again, the breach was the failure of Defendant to include the rental reimbursement coverage provision in the insurance application and the injury was the loss of income. Taking Elder's testimony as true, factual causation could be established because but for the failure to include the rental reimbursement coverage Elder could have rented a truck and continued working. Elder could have rented a trailer with a hydraulic conveyor belt or an insulated box trailer. The rental coverage would have defrayed the costs and allowed him to pursue this option and continue to earn income. The failure to include the rental reimbursement coverage

was also a substantial factor in causing the loss of income because the lack of coverage was a significant factor in Elder's decision of whether to rent a trailer. In either the hydraulic or insulated box trailer scenario, the lack of rental reimbursement coverage made either option a financial gamble and would cost Elder. Elder would have lost money on the deal because his income would not cover the expense of the rental. As such, the failure to include the rental reimbursement coverage could be found to have been a substantial factor in Elder incurring the lost income.

Accordingly, Defendants' Motion for Summary Judgment is DENIED.

O R D E R

It is hereby ORDERED that Defendants Good's Insurance Agency, Inc. and Brian Klink's Motion for Summary Judgment filed April 23, 2004 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: J. Howard Langdon, Esquire
Christopher M. Reeser, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)