IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MILL TECH, INC.,	:	NO. 06 – 00,834
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
HARLEYSVILLE MUTUAL INSURANCE CO. and	:	
RONALD R. ENDERS, t/d/b/a RONALD R. ENDERS	:	
AND SONS, INC.,	:	
Defendants	:	Motion for Summary Judgment

OPINION AND ORDER

Before the Court is the Motion for Summary Judgment filed by Defendant Ronald R. Enders, t/d/b/a Ronald R. Enders and Sons, Inc. (hereinafter "Enders") on March 7, 2008. Argument on the motion was heard May 2, 2008.

Plaintiff, Mill Tech, Inc., (hereinafter "Mill Tech") was brought into a personal injury suit in New York based on its role in designing a feed mill system for Agway Feed Mill (hereinafter "Agway") in Guilderland, New York. When Mill Tech requested of Harleysville Mutual Insurance Company (hereinafter "Harleysville"), the company which provided its liability insurance, that Harleysville provide a defense, Harleysville determined that the alleged basis for Mill Tech's liability fell within the policy exclusions and denied coverage. Mill Tech then brought the instant action against Harleysville and Enders, the agent from whom Mill Tech obtained the Harleysville policy, contending first that Harleysville should not have denied coverage and second, that if indeed the policy does not cover the alleged liability, Enders is at fault for having sold the wrong type of policy to Mill Tech. In the instant motion for summary judgment, Enders contends that Mill Tech has failed to produce prima facie evidence of its claims against him and that he is thus entitled to a dismissal of those claims.[1]

[1] The motion also contains a request for summary judgment on Harleysville's cross-claim against Enders but at argument, counsel indicated that request was being withdrawn.

Initially, it is noted that by Order dated May 14, 2008, this Court granted the motion for summary judgment filed by Harleysville after determining that the policies in question did not cover the alleged liability and Harleysville was thus within its rights to deny coverage. The claims against Enders must, therefore, be viewed with that determination in mind.

Enders seeks summary judgment on all four of Mill Tech's claims: breach of fiduciary duty, breach of duty of good faith and fair dealing, breach of duty to investigate insurance needs and breach of duty to provide appropriate insurance (ordinary negligence). Each will be addressed in order.

First, Enders contends there was no fiduciary duty owed to Mill Tech in this instance. The Court agrees. Ordinarily, the relationship between insurance broker and client is an arm's length business relationship. Wisniski v. Brown & Brown Insurance Company of PA, 906 A.2d 571 (Pa. Super. 2006). Mill Tech alleges, however, that Enders' level of expertise and John Merrifield's[2] trust in Enders created a "confidential" relationship which supports the imposition of a fiduciary duty. While there can be circumstances where such a relationship is created, *See e.g.* Basile v. H&R Block, Inc., 777 A.2d 95 (Pa. Super. 2001)(evidence sufficient to establish, prima facie, the elements of a confidential relationship between the parties in this case), the Superior Court has made it clear that such a relationship does not arise merely because one party relies on and pays for the specialized skill or expertise of the other party. Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10 (Pa. Super. 2002). Rather,

> The critical question is whether the relationship goes **beyond** mere reliance on superior skill, and into a relationship characterized by "overmastering influence" on one side or "weakness, dependence, or trust, justifiably reposed" on the other side. *Basile v. H&R Block*, 777 A.2d 95, 101 (Pa. Super. 2001). A confidential relationship is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power.

Etoll, *supra* 811 A.2d at 23 (emphasis in original). In Basile, supra, the Court found a genuine issue of material fact as to whether a confidential relationship existed between H&R Block and customers seeking Rapid Refund loans, based on evidence that the customers tending to use

2 John Merrifield is the President of Mill Tech and the individual who purchased the insurance policies in question through the Enders agency.

those services were in a position of "pronounced economic and intellectual weakness", that they completely trusted H&R Block to act in their best interests, that H&R Block had, through advertising, encouraged those customers to "repose a high level of trust in the company" and, finally, that H&R Block had recognized its customers' confusion and "exploited 'a corresponding opportunity to abuse [their] trust for personal gain.'" Basile, *supra*, 777 A.2d at 106. Mill Tech has offered no such evidence in the instant matter. While there is indeed evidence that Mr. Merrifield relied on Enders' superior skill and expertise in the insurance industry, and that he trusted him, there is nothing here that goes beyond mere reliance on superior skill and shows "overmastering influence" on one side or "weakness, dependence or trust, justifiably reposed" on the other.[3] There is, therefore, insufficient evidence to establish a claim of breach of fiduciary duty and Enders is entitled to summary judgment on this claim.

Second, Enders contends the duty of good faith and fair dealing does not apply to a claim based on the purchase of an insurance contract. Again the Court agrees. The duty of good faith and fair-dealing applies only to the enforcement and performance of insurance contracts and not to their formation and a claim which arises from the purchase of an insurance contract is thus outside the scope of that duty. Weisblatt v. Minnesota Mutual Life Insurance Company, 4 F.Supp.2d 371 (E.D. Pa. 1998). Enders is therefore entitled to summary judgment on this claim as well.

Third, Enders contends Mill Tech has produced no evidence that he failed to investigate Mill Tech's insurance needs. Once again, the Court agrees. The evidence produced by Mill Tech shows the opposite, that Enders *did* investigate Mill Tech's insurance needs; Mr. Merrifield testified in his deposition that Mr. Enders came to his place of business and interviewed him and was informed of what Mill Tech did. The application for insurance actually states that the company "does drawings for construction work on feed mills and manufacturing customers and coordinates the construction work" and in response to the question "nature of business/description of operations" states: "Engineering/Architects/

3 Mr. Merrifield testified in his deposition that he informed Mr. Enders that he was "counting on" him to interpret things and place the policy, John Merrifield deposition at p. 253, but also admitted that Mr. Enders "never walked in and said John, I'm the answer to all of your problems and I am an expert." Id. at p. 251. Rather, Mr. Merrifield indicated that "*my impression* was Ron accepted that responsibility and understood it and that is what I do, John, you've come to the right place." Id. at p. 253 (emphasis added).

Consulting."[4] While it appears the real issue in this case revolves around the fact that professional liability insurance was not included in the policy issued, it cannot be alleged that the failure to include such was due to a lack of investigation into Mill Tech's insuance needs. Therefore, this claim must also fail and Enders is entitled to summary judgment thereon.

Finally, with respect to the ordinary negligence claim, that Enders breached his duty to provide the appropriate insurance,[5] Enders contends he cannot be liable on such a claim because Mr. Merrifield testified in his deposition that he does not believe that his company engaged in the types of activities excluded from coverage by the policies. Specifically, the policies exclude professional services as an engineer, architect or surveyor, and although Mr. Merrifield admitted that he performed "engineering services" in his work on the Agway project, he believes that since he is not a licensed engineer, his services were not "professional services." The Court believes Mr. Merrifield's interpretation of "professional services" is not relevant to a claim of negligence against Enders, however. What is relevant, and what has been produced, is evidence that Mr. Merrifield communicated to Enders his wish to be "bulletproof", that is, to "have 100 percent insurance coverage", John Merrifield deposition at pp. 99-100, and that the Court has found that Mill Tech ended up taking a bullet. Whether the evidence produced at trial will sustain Mill Tech's claim remains to be seen, but as there are issues of material fact, Enders is not entitled to dismissal of the negligence claim.

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4 *See* Exhibit L attached to Harleysville's Motion for Summary Judgment.

5 In a claim of simple negligence, an insurance agent owes to his insurance buyer the duty to obtain the coverage that a reasonable and prudent professional insurance agent would have obtained under the circumstances. Fiorentino v. Traveler's Insurance Company, 448 F. Supp. 1364, 1369-70(E.D. Pa. 1978)(citing Rempel v. Nationwide Life Ins. Co., Inc., 323 A.2d 193 (Pa. Super. 1974), aff'd, 370 A.2d 366 (Pa. 1977).

ORDER

AND NOW, this 14th day of May 2008, for the foregoing reasons, the motion for summary judgment filed by Defendant Ronald R. Enders, t/d/b/a Ronald R. Enders and Sons, Inc. is hereby GRANTED in part and DENIED in part. The negligence claim will proceed to trial.

BY THE COURT,

Dudley N. Anderson, Judge

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