

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DONALD COSENTINE,	:	NO. 19 - 0638
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION
	:	
SETH BURCH, THE SMITH-BURCH	:	
AGENCY, LLC t/d/b/a SMITH	:	
BURCH AGENCY and THE	:	
FARMERS FIRE INSURANCE	:	
COMPANY,	:	<i>Motion to Amend the Complaint /</i>
Defendants	:	<i>Motion for Summary Judgment</i>

OPINION AND ORDER

AND NOW, following argument held December 14, 2020 on *Plaintiff’s Motion to Amend the Complaint* and on *Defendant, the Farmers Fire Insurance Company’s Motion for Summary Judgment Pursuant to Pa.R.C.P. 1035.2*, the Court hereby issues the following OPINION AND ORDER.

Background

Plaintiff, Donald Cosentine (“Plaintiff”), initiated this action on April 22, 2019 by the filing of a Complaint. Pursuant to the facts alleged in the Complaint, Plaintiff owns three rental properties in Williamsport, Pennsylvania: (1) 4 Grafius Street, Williamsport, Pennsylvania 17701; (2) 533 Market Street, Williamsport, Pennsylvania 17701; and (3) 673 2nd Avenue, Williamsport, Pennsylvania 17701 (“Williamsport Properties” or “Properties”). Plaintiff contacted Defendant, Seth Burch (“Mr. Burch”), employee of Defendant, The Smith-Burch Agency, LLC t/d/b/a Smith Burch Agency (“Smith-Burch Agency,” collectively “Burch Defendants”), to obtain insurance coverage for the Williamsport Properties. On December 28, 2017, Mr. Burch issued an insurance binder for each of the three properties.¹ The effective date for each binder was December 29, 2017 and the expiration date was December 29, 2018. The insurance company listed on each binder was Defendant, The Farmers Fire Insurance

Company (“Farmers Fire Insurance” or “Farmers”). Mr. Burch signed each binder as the authorized representative. On December 29, 2017, Farmers issued insurance Policy Number 10-2017-102913 to Plaintiff covering the three Williamsport Properties.²

On July 6, 2018, Plaintiff purchased a property at 1524-1526 Memorial Avenue, Williamsport, Pennsylvania 17701 (“Memorial Avenue Property”). Plaintiff contacted Mr. Burch to obtain insurance coverage for the Memorial Avenue Property. On July 5, 2018, Mr. Burch issued an insurance binder for the Memorial Avenue Property.³ The effective date of the binder was July 6, 2018, and the expiration date was December 29, 2018. The insurance company listed on the binder was Farmers Fire Insurance. Mr. Burch signed this binder as the authorized representative.

On December 2, 2018, a fire occurred at the Memorial Avenue Property, causing extensive damage to the building. Estimated repairs range from \$357,900 to \$475,000. On December 5, 2018, Plaintiff submitted a Loss Notice to Farmers Fire Insurance. By letter dated December 21, 2018, Farmers denied the claim for coverage on the basis that the Memorial Avenue Property had not been added to Policy Number 10-2017-102913, nor had been insured under a separate policy.⁴ On January 24, 2019, Plaintiff sent Farmers a letter, along with the July 5th insurance binder, again requesting coverage for the damage caused by the December 2nd fire at the Memorial Avenue Property.⁵ On February 11, 2019, Farmers sent a responsive letter reiterating that the Memorial Avenue Property was not subject to coverage under Policy Number 10-2017-102913, and asserting that Mr. Burch did not have the authority to issue the binder on behalf of Farmers.⁶

The Complaint offers two alternate theories of negligent liability. The first theory is that Mr. Burch submitted an endorsement request to Farmers Fire Insurance to have the Memorial Avenue Property added to Policy Number 10-2017-102913, but Farmers

¹ The first pages of these binders are attached as Exhibits 1A through 1C to the Complaint.

² Insurance Policy Number 10-2017-102913 is attached as Exhibit 2 to the Complaint.

³ The first page of this binder is attached as Exhibit 3 to the Complaint.

⁴ The December 21, 2018 letter is attached as Exhibit 4 to the Complaint.

⁵ The January 24, 2019 letter is attached as Exhibit 5 to the Complaint.

⁶ The February 11, 2019 letter is attached as Exhibit 6 to the Complaint.

took no action on this request and Mr. Burch failed to conduct any follow-up. The second theory is that Mr. Burch failed to submit an endorsement request to Farmers.

The Complaint Counts I and II respectively allege claims of Negligence and Negligent Misrepresentation against Mr. Burch. The Complaint specifically avers that Mr. Burch was negligent for representing that he had authority to issue insurance binders on behalf of Farmers Fire Insurance; for failing to submit proper documentation; for failing to engage in appropriate follow-up; and for failing to inform Plaintiff that the Memorial Avenue Property was not covered by insurance. Count III is a Vicarious Liability claim against the Smith-Burch Agency. Count IV is a Breach of Contract claim against Farmers Insurance Company for Farmers' failure to honor the policy memorialized by the July 5, 2018 insurance binder. Count V is a Bad Faith claim against Farmers Fire Insurance for Farmers' failure to promptly investigate and honor Plaintiff's insurance claim.

By Answer filed on June 10, 2019, Farmers Fire Insurance denied that Mr. Burch and the Smith-Burch Agency were agents of Farmers, contending that they were instead insurance brokers who worked as intermediaries for various companies. Farmers further asserted that in the instant case, Mr. Burch and the Smith-Burch Agency functioned as the agents of Plaintiff, and lacked permission or unilateral authority to issue the type of insurance binder identified in the Complaint.⁷ Farmers also denied ever issuing coverage to the Memorial Avenue Property under Policy Number 10-2017-102913, or under any other policy. Within New Matter, Farmers averred that, as Mr. Burch had no authority to unilaterally authorize an insurance policy on behalf of Farmers, no policy was ever issued covering the Memorial Avenue Property. Farmers therefore asserted that without a policy agreement, there was no legal basis for Plaintiff's Breach of Contract claim. Farmers further averred that without the prerequisite breach, there could be no basis for Plaintiff's Bad Faith claim. Farmers then pled various Cross-Claims against Mr. Burch and the Smith-Burch

⁷ See Defendant, The Farmers Fire Insurance Company's Answer, New Matter and Cross-Claims ¶ 10 (June 10, 2019) ("Farmers' Answer, New Matter and Cross-Claims").

Agency, including counts for Negligence, Negligent Supervision, Breach of Contract, and Contractual Indemnification.

The Burch Defendants jointly filed an Answer to the Complaint on June 13, 2019. Within this Answer, the Burch Defendants asserted that they had received an email confirmation on July 5, 2018 from Farmers communicating that the endorsement to add the Memorial Avenue Property to Policy Number 10-2017-102913 had been successfully received by their underwriting department. In New Matter, Burch Defendants raised various affirmative defenses, in particular asserting that Plaintiff's own negligence in failing to confirm that the Memorial Avenue Property was covered by a Farmers policy was greater than their own, and therefore Plaintiff's recovery would be barred under the Pennsylvania Comparative Negligence Act. The Burch Defendants then filed a Cross-Claim for indemnity or contribution against Farmers. On June 18, 2019, Plaintiff filed a Reply to Farmers' New Matter and a Reply to Burch Defendants' New Matter. Farmers filed a Reply to Burch Defendants' New Matter and Cross-Claims on June 28, 2019. Burch Defendants belatedly filed a Reply to Farmers' Cross-Claims on December 2, 2019.

On October 30, 2020, following the close of discovery, and consistent with the dispositive motion deadline set by this Court's Amended Scheduling Order, Farmers filed a Motion for Summary Judgment, accompanied by a supportive brief. Farmers in this Motion for Summary Judgment asserted, pursuant to the uncontested testimony of both its own witnesses and the admissions of the opposing party, that although its underwriting department received the endorsement request forwarded by Mr. Burch on July 5, 2018, an underwriter never reviewed this endorsement or generated a premium quote for coverage.⁸ Farmers further asserted that had it reviewed the endorsement request when it was submitted, it could not have offered a quote without first obtaining additional underwriting material necessary to perform a risk assessment.⁹ By Order

⁸ See Defendant, the Farmers Fire Insurance Company's Motion for Summary Judgment Pursuant to Pa.R.C.P. 1035.2 ¶¶ 20-21 (Oct. 30, 2020) ("Farmers' Motion for Summary Judgment").

⁹ See Farmers' Motion for Summary Judgment ¶ 22.

issued November 10, 2020, the Court scheduled argument on the Motion for Summary Judgment and ordered Plaintiff to file an answer and responsive brief.

Prior to filing a response to the Motion for Summary Judgment, Plaintiff filed a Motion to Amend the Complaint on November 12, 2020. Within this Motion, Plaintiff requested leave to amend the Complaint to add a Negligence claim against Farmers, and to amplify damages resulting from the December 2nd fire. On November 25, 2020, Farmers filed a Brief in Opposition to Plaintiff's Motion to Amend the Complaint. Within this Brief in Opposition, Farmers argued that Plaintiff's Motion to Amend the Complaint should be denied, as the proposed Negligence claim is against a positive rule of law and is barred by the applicable statute of limitations. Plaintiff further argued that allowing Plaintiff to add a new cause of action and damages request would be unduly prejudicial at this late juncture in the case.

On November 30, 2020, Plaintiff filed both a Response in Opposition and Brief in Opposition to Farmers' Motion for Summary Judgment. Within Plaintiff's Brief in Opposition, Plaintiff acknowledged that Mr. Burch and Farmers Insurance entered into a General Agency and Sub-Agency Agreement ("Agreement") pursuant to which Mr. Burch was permitted to solicit business on behalf of Farmers, but was expressly not permitted to issue policies and bind coverage on behalf of Farmers, except for personal lines of coverage.¹⁰ However, Plaintiff argued that notwithstanding this Agreement, Mr. Burch's general course of conduct would be to call an underwriter to ask about adding a policy, at that time verbally providing all necessary information. If the underwriter determined that Farmers would add the policy, then the underwriter would tell Mr. Burch to issue an insurance binder for the property. Plaintiff averred that Farmers does not personally issue insurance binders, but leaves that task to insurance brokers such as Mr. Burch.¹¹ Plaintiff averred that Mr. Burch did in fact call Farmers and received authority to issue an insurance binder in this instance.

¹⁰ See Plaintiff's Brief in Opposition to Defendant, the Farmers Fire Insurance Company's Motion for Summary Judgment Pursuant to Pa.R.C.P. 1035.2 at pg. 3 (Nov. 30, 2020) ("Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment"). The General Agency and Sub-Agency Agreement is attached as Exhibit 1 to Plaintiff's Brief in Opposition.

¹¹ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment at pgs. 4-5.

On December 4, 2020, the Burch Defendants filed a Response in Opposition to Farmers' Motion for Summary Judgment. In this Response, Burch Defendants argued that following the December 2nd fire, Farmers did briefly add the Memorial Avenue Property to Plaintiff's existing policy, but quickly rescinded this addition when Farmers realized that the loss was not a small loss but a near total loss. Burch Defendants emphasized that this contradicts the argument in Farmers' Motion for Summary Judgment, predicated on the deposition testimony of Stacy Hivner, a commercial underwriter for Farmers, that Farmers could not have added the Memorial Avenue Property to the existing insurance policy based only on the materials provided in Mr. Burch's endorsement request. Finally, on December 11, 2020, Plaintiff filed a Brief in Support of its Motion to Amend the Complaint, countering the various arguments raised in the Brief in Opposition to Plaintiff's Motion to Amend the Complaint.

The Court held argument jointly on Plaintiff's Motion to Amend the Complaint and Farmers' Motion for Summary Judgment. With leave of Court, on December 21, 2020 Farmers filed a Reply to Plaintiff's Brief in Opposition to Summary Judgment. In this Reply, Farmers cited the deposition testimony of Mr. Burch himself to demonstrate that Mr. Burch never received express authority to issue a binder offering coverage for the Memorial Avenue Property.

The Court will address Farmers' Motion for Summary Judgment and Plaintiff's Motion to Amend the Complaint below.

Analysis

A. Defendant Farmers Fire Insurance's Motion for Summary Judgment

Farmers Fire Insurance seeks summary judgment dismissing Plaintiff's count for Breach of Contract on the basis that the pleadings and materials produced in discovery fail to establish that Mr. Burch had authority to issue an insurance binder for the Memorial Avenue Property. Farmers therefore maintains this binder could not form the basis of a valid contract between Plaintiff and Farmers, noting that no other contract for insurance was ever created between Plaintiff and Farmers for the

Memorial Avenue Property. Farmers further argues that Plaintiff's Bad Faith claim must be dismissed on summary judgment, as the Pennsylvania courts have traditionally held that bad faith claims arising under 42 Pa.C.S.A. § 8371¹² are limited to an insurer's bad faith denial of benefits under an existing policy.¹³ Plaintiff in his Reply and Brief in Opposition, and Burch Defendants in their Reply, both assert that there is sufficient probative evidence on the record that Mr. Burch issued the insurance binder with the authorization of a Farmers underwriter to preclude summary judgment.

When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party.¹⁴ The party moving for summary judgment bears the burden of proof in establishing both the absence of an issue of material fact and its right to judgment as a matter of law.¹⁵ Once the moving party has met its burden, if the non-moving party fails to produce sufficient evidence on an issue on which that party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law.¹⁶ However, the Court will only grant summary judgment "where the right to such judgment is clear and free from all doubt."¹⁷

The Court is satisfied, pursuant to the caselaw cited in Plaintiff's Brief in Opposition, that an insurance binder alone may constitute a valid contract of insurance, even if a loss occurs before the formal policy is issued or before the insured's payment of the premium.¹⁸ The validity of the binder will continue until either

¹² 42 Pa.C.S.A. § 8371 ("In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions: (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%. (2) Award punitive damages against the insurer. (3) Assess court costs and attorney fees against the insurer.").

¹³ See Farmers' Motion for Summary Judgment ¶¶ 94-96 (summarizing relevant caselaw).

¹⁴ *Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. 2011).

¹⁵ *Holmes v. Lado*, 602 A.2d 1389, 1391 (Pa. Super. 1992).

¹⁶ *Id.* (citing *Young v. Pa. Dept. of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000)).

¹⁷ *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

¹⁸ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment at pg. 18 (citing *Peele v. Atl. Exp. Transp. Grp., Inc.*, 840 A.2d 1008, 1011 (Pa. Super. 2003) ("A preliminary contract of insurance, evidenced by a written memorandum or binder, is valid and effective, even though a loss

the policy is issued or the risk is declined and notice is given thereof.¹⁹ Therefore, the fact that Farmers never issued a formal policy and Plaintiff never paid a premium is not determinative to the issue of whether there was a valid contract. The determinative question then is whether Mr. Burch, acting as an agent of Farmers, had the authority to issue the insurance binder.

An agency relationship may be created by any of the following: (1) express authority, (2) implied authority, (3) apparent authority, and/or (4) authority by estoppel. Express authority exists where the principal deliberately and specifically grants authority to the agent as to certain matters. Implied authority exists in situations where the agent's actions are "proper, usual and necessary" to carry out express agency. Apparent agency exists where the principal, by word or conduct, causes people with whom the alleged agent deals to believe that the principal has granted the agent authority to act. Authority by estoppel occurs when the principal fails to take reasonable steps to disavow the third party of their belief that the purported agent was authorized to act on behalf of the principal.²⁰

As discussed *supra*, The General Agency and Sub-Agency Agreement, entered into between Mr. Burch and Farmers Fire Insurance on January 1, 2013, grants Mr. Burch authority to receive and solicit applications for insurance, deliver Farmers policies, and to collect premiums. The Agreement expressly reserves from Mr. Burch the right, "to issue [Farmers] Company policies and bind coverage with the Company except with respect to personal lines of coverage."²¹ However, as is evidenced in the deposition testimony of Ms. Hivner, Farmers does not provide temporary proof of insurance in the form of insurance binders. Instead, a broker will call and speak to a Farmers underwriter, who, if the terms are acceptable, will give verbal permission for the broker to issue a binder:

occurs before a formal policy is issued."); *Strickler v. Huffine*, 618 A.2d 430, 433 (Pa. Super. 1992) ("The validity of a binder is not dependent upon payment of the premium.").

¹⁹ *Strickler*, 618 A.2d at 433 (citing *Harris v. Sachse*, 52 A.2d 375, 378 (Pa. Super. 1947)).

²⁰ *Walton v. Johnson*, 66 A.3d 782, 786 (Pa. Super. 2013) (internal citations omitted).

²¹ Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 1 - The General Agency and Sub-Agency Agreement § 1.1).

Q: If Farmers makes the decision, okay, we're providing coverage for this property, is there a document that you, or anybody else at Farmers, generates to let the bank, the agent and/or the homeowner know that Farmers is providing insurance on a given property?

A: No, we do not provide binders here.

Q: Okay. How is the agent supposed to know – how does the agent know whether or not you've agreed to insure the property?

A: If they would call in and speak with us, we would – if it was acceptable, we would tell them it was acceptable and they could provide a binder to the bank.

. . . .

Q: Assuming Farmers accepted the risk, Farmers doesn't issue a binder, the agent issues a binder to the bank to confirm that a property is insured with Farmers; is that correct?

A: Yes, it would be the agent issuing the binder.²²

Mr. Burch testified at deposition that he called and spoke with a Farmers underwriter on July 5, 2018 about adding the Memorial Avenue Property to Policy Number 10-2017-102913.²³ Phone records evince that on July 5, 2018, Mr. Burch made two brief phone calls from his phone to Farmers, the first call lasting approximately 2 minutes and 43 seconds, the second lasting only 36 seconds.²⁴ Mr. Burch initially provided in his deposition testimony that he had called and received express approval from a Farmers underwriter to issue the binder for the Memorial Avenue Property, elaborating that he would not issue a binder in any case without approval.²⁵ However, later in his deposition Mr. Burch conceded that during his phone call he had not discussed issuing a binder for the Memorial Avenue Property, instead stating that it was his understanding that once the underwriting department

²² Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 8 – Deposition Testimony of Stacy Hivner at pgs. 39-40).

²³ Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pgs. 131-132, 163-164).

²⁴ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 9 – Seth Burch Phone Records at pg. 33).

²⁵ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pgs. 26-27).

successfully received the endorsement request, that would mean that Farmers was bound and temporary proof of insurance could be issued.²⁶

Elaborating upon his business dealings with Farmers, Mr. Burch explained that he has conducted business with Farmers since 1992.²⁷ He testified that, typically, his first step in establishing a new commercial policy with Farmers has been to discuss with the prospective insured the desired terms of the policy. Mr. Burch then calls Farmers and communicates to an underwriter the location of the property and the limit of coverage sought. If the underwriter provisionally accepts the risk, then the underwriter will provide a premium quote, which Mr. Burch then relays to his client. If his client accepts this quote, then Mr. Burch emails an endorsement request to the Farmers underwriter.²⁸ Mr. Burch acknowledged that once he emails the endorsement request, it would be Farmers responsibility to process the request and it could, at its discretion, accept the risk and issue binding coverage or reject the risk and deny the application.²⁹ Mr. Burch indicated that in certain instances when Farmers was still processing the request, he would issue a binder to client, which would operate as a temporary proof of insurance, often necessary for a property closing.³⁰ Mr. Burch testified that he would generally get approval from Farmers to issue the binder.³¹

Interpreting this testimony in the light most favorable to the Plaintiff, the Court finds that there remains an outstanding question of material fact as to whether Mr. Burch had express or implied authority from a Farmers underwriter to issue the insurance binder for the Memorial Avenue Property. It is uncontested that Farmers underwriters could authorize brokers to issue to their clients temporary proofs of

²⁶ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pg. 104).

²⁷ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pg. 11).

²⁸ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pgs. 74-85).

²⁹ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pg. 88).

³⁰ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pgs. 88-90).

insurance in the form of insurance binders. It is also uncontested that Mr. Burch called Farmers twice on July 5, 2018, prior to submitting the endorsement request. The Court is satisfied that it remains a question for the jury whether during these calls Mr. Burch was provided express authority to issue an insurance binder, or whether he had implied authority to issue the binder based on Farmers' customary business practice of allowing brokers to issue binders after an underwriter had accepted an endorsement request.³² The Court also finds that Farmers' arguments that had the endorsement request been timely processed, it would have denied coverage because the request lack sufficient underwriting information or because the request contained unacceptable proposed terms, collateral to the question of whether Mr. Burch had authority to issue the binder, which itself could form a binding contract.³³

Pursuant to the foregoing, the Court finds that there is sufficient evidence to support Plaintiff's *prima facie* claim against Farmers for Breach of Contract. As the Court finds that Plaintiff may proceed on the Breach of Contract claim, there is no basis to find that the Bad Faith claim could not also proceed. Farmers Motion for Summary Judgment is thereby DENIED.

³¹ See Plaintiff's Brief in Opposition to Farmer's Motion for Summary Judgment (Exhibit 2 – Deposition Testimony of Seth Burch at pgs. 89-90).

³² Implied authority may include "powers [that] are all implied or inferred from the words used, from customs and from the relations of the parties." *Hous. & Redevelopment Ins. Exch. v. Cty. of Lackawanna*, No. 867 C.D. 2015, 2016 WL 1276278, at *15 (Pa. Commw. Mar. 31, 2016) (quoting *The Restatement (Second) of Agency* § 7, cmt. c (1958), adopted by the Pennsylvania Supreme Court in *Reutzel v. Douglas*, 870 A.2d 787, 790 (Pa. 2005)).

³³ The parties have not raised this issue, and so the Court does not rule on this basis, but there may be a statutory question of whether, assuming *arguendo* that Mr. Burch did have authority to issue the binder, the binder remained effective at the time of the fire. 40 P.S. § 636(d) holds: "[b]inders or other contracts for temporary insurance, including fire insurance. . . may be made orally or in writing, for a period which shall not exceed thirty days[.]" There has been no definitive ruling as to whether insurance binders become automatically invalid thirty days after issuance. The Pennsylvania Superior Court in *Mears, Inc. v. Nat'l Basic Sensors, Inc.*, 337 A.2d 1335, 1338 n.4 (Pa. Super. 1984), held that this provision did not automatically invalidate all contracts for temporary insurance thirty days after they were issued, on the theory that the provision was intended to protect consumers and not insurance companies. However, on appeal the Pennsylvania Supreme Court reversed this decision on other grounds. While the Supreme Court did not definitively rule on this issue, it did provide that the Superior Court's ruling was in error, and stated that section 636(d) "raises an obvious question, not an assurance, as to coverage." *Mears, Inc. v. Nat'l Basic Sensors, Inc.*, 507 A.2d 32, 38 (Pa. 1986).

B. Plaintiff's Motion to Amend the Complaint

Plaintiff asks leave of Court to amend the Complaint to include a cause of action of Negligence against Farmers, and to add lost rent to the damages request. Farmers oppose this Motion. Plaintiff's proposed Negligence claim would be predicated on Farmers failure to timely process the endorsement request.³⁴

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.³⁵

"[A]mendments to pleadings are liberally granted to secure a determination of cases on their merits whenever possible."³⁶ However, "[d]espite this liberal amendment policy, Pennsylvania appellate courts have repeatedly ruled that an

³⁴ The Amended Complaint count of Negligence would specifically allege that Farmers "owed Plaintiff Donald Cosentine a duty to provide reasonable and professional services in connection with obtaining and providing insurance coverage for the 1524-1526 Memorial Avenue property" and "breached this duty, was negligent, caused injury, and/or increased the risk of harm, in that it:

- a. failed to process the endorsement request to have the. 1524-1526 Memorial Avenue property added to policy number 10-2017-102913;
- b. failed to have policies, procedures, and systems in place to properly process endorsement requests;
- c. failed to follow the policies and procedures that were in place to properly process endorsement requests;
- d. failed to use the systems in place to properly process endorsement requests;
- e. failed to adequately train individuals responsible for the proper processing of endorsement requests;
- f. failed to supervise individuals responsible for processing endorsement requests to ensure that endorsement requests were processed in an appropriate and timely manner; and
- g. failed to inform Plaintiff Donald Cosentine, Defendant Seth Burch, and/or Defendant The Smith-Burch Agency, LLC, t/d/b/a Smith Burch Agency, what additional documents or information was needed to process the endorsement request.

As a proximate cause of this negligence, Plaintiff lacked insurance coverage for the Memorial Avenue Property at the time of the December 2nd fire. See Plaintiff's Motion to Amend the Complaint at pgs. 3-4 (Nov. 12, 2020).

³⁵ Pa.R.C.P. 1033(a).

³⁶ *Beckner v. Copeland Corp.*, 785 A.2d 1003, 1006 (Pa. Super. 2001) (citing *Rosmondo v. Life Insurance Co.*, 606 A.2d 1172 (Pa. 1992)).

amendment will not be permitted where it is against a positive rule of law, or where the amendment will surprise or prejudice the opposing party.”³⁷ Additionally, “[w]here the statute of limitations has run, amendments will not be allowed which introduce a new cause of action or bring in a new party or change the capacity in which [a party] is sued.”³⁸ Farmers, within its Brief in Opposition to Plaintiff’s Motion to Amend the Complaint, asserts that Plaintiff’s proposed addition of a Negligence claim against Farmers would violate a positive rule of law, would fall outside the applicable statute of limitations, and would unduly prejudice Farmers.

The Court first addresses Farmers’ argument that Plaintiff’s proposed Negligence claim would be against a positive rule of law. “If the proposed amendment is against a positive rule of law, its allowance would be futile. It would cause delay and waste the resources of the court and the opposing party in having to defend against the proposed amendment.”³⁹

To establish a negligence claim, “a plaintiff must allege facts which establish the breach of a legally recognized duty or obligation of the defendant that is causally connected to actual damages suffered by the plaintiff.”⁴⁰ “The task of determining the existence of a duty for purposes of assigning liability in a negligence action is for the court, not the jury.”⁴¹ The Pennsylvania Supreme Court in *Althaus ex rel. Althaus v. Cohen* provided a Five-Factor Test for determining whether a duty of care exists:

[T]he legal concept of duty of care is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice and society. The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the

³⁷ *Horowitz v. Universal Underwriters Ins.*, 580 A.2d 395, 398 (Pa. Super. 1990).

³⁸ *Blaine v. York Fin. Corp.*, 847 A.2d 727, 729 (Pa. Super. 2004) (quoting *Girardi v. Laquin Lumber Co.*, 81 A. 63, 64 (Pa. 1911)).

³⁹ *Tanner v. Allstate Ins. Co.*, 467 A.2d 1164, 1167 (Pa. Super. 1983) (citing *Otto v. Am. Mut. Ins. Co.*, 393 A.2d 450 (Pa. 1978)).

⁴⁰ *Scampone v. Highland Park Care Ctr., LLC*, 57 A.3d 582, 596 (Pa. 2012) (citation omitted).

⁴¹ *Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 66 (Pa. Super. 2005).

consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.⁴²

Farmers argues in its Brief in Opposition that the Pennsylvania courts have generally held that absent a special relationship between the parties, nonfeasance, which is to say non-action, will not provide a basis for a Negligence claim.⁴³ Farmers asserts that it had no special relationship with Plaintiff that would impose upon it a duty to process, let alone approve, the endorsement request sent on Plaintiff's behalf by Mr. Burch to Farmers.

In addressing the *Althaus* factors in his Brief in Support of the Motion to Amend the Complaint, Plaintiff asserts that he and Farmers were in a special relationship, namely that of insurer and insured, due to Plaintiff's preexisting policy with Farmers. Plaintiff further contends that insurance coverage provides a social utility by enabling individuals who have suffered loss or injuries to receive compensation. Plaintiff elaborates that imposing a duty on an insurer to process endorsement requests quickly would only further this social utility by expediting the application process and ensuring more properties are covered. Plaintiff argues that the risk resulting from a lack of coverage is both foreseeable and potentially severe. Plaintiff expands that in situations where an insured party seeks to add a property to a preexisting policy with its insurer, the risk from a lack of coverage is even more foreseeable, as the insured would be less likely to seek out new providers due to the insurer's delay in processing. Plaintiff argues that the imposition of a duty to quickly process endorsement requests upon insurance companies would be minimal and further notes that the insurer would

⁴² *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000) (citations omitted).

⁴³ See *Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 564 A.2d 1244, 1248 (Pa. 1989) ("Before a person may be subject to liability for failing to act in a given situation, it must be established that the person has a duty to act; if no care is due, it is meaningless to assert that a person failed to act with due care. Certain relations between parties may give rise to such a duty. Although each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act."); see also *Troxel v. A.I. Dupont Inst.*, 675 A.2d 314, 320 n.4 (Pa. Super. 1996) ("As set out in § 314 of the Restatement, absent special circumstances, 'The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.' Restatement (Second) of Torts, § 314 (1965).").

see a monetary benefit from timely processing the endorsement request. Plaintiff finally asserts that requiring insurance companies to timely process endorsement requests would serve the public good by ensuring that the populace at-large has insurance coverage.

The Court knows of no statutory duty obligating insurance companies to quickly process endorsement requests and Plaintiff has cited none. The Court is also unaware of any Pennsylvania court addressing at common law whether an insurance company's failure to timely process an endorsement request constitutes negligence. The Supreme Court has cautioned that, "[c]ourts should not enter into the creation of new common law duties lightly because the adjudicatory process does not translate readily into the field of broad-scale policymaking."⁴⁴ The Court will therefore only find that such a duty exists if the equities weigh strongly in its favor.

However, the Court finds that several *Althaus* factors weigh heavily in favor of a finding that *no* duty exists. The first factor, the relationship between the parties, does not support a finding that Farmers owed Plaintiff a duty to process the endorsement request. The fact that Farmers had issued insurance Policy Number 10-2017-102913 covering Plaintiff's Williamsport Properties did not consequently create a relationship under which Farmers had an obligation to approve, or even accept for review, additional endorsement requests relating to Plaintiff's other properties. Moreover, Plaintiff was without constraint to submit endorsement requests for the Memorial Avenue Property to other insurance providers, or to seek insurance coverage for the Williamsport Properties with other providers once the term of his policy with Farmers expired. That the Plaintiff, or others similarly situated, might prefer to deal with insurers with which they have had previous dealings, or might desire to add properties to preexisting policies, does not afford particular protections or privileges. Further, the Court finds that Plaintiff severely understates the burden that would be imposed upon insurance companies upon a finding that they have a duty to "quickly" process endorsement requests. As a consequence, companies would be unfairly exposed to

⁴⁴ *Feleccia v. Lackawanna Coll.*, 215 A.3d 3, 13 (Pa. 2019) (quotations and citations omitted).

lawsuits for mere administrative oversights or normal processing delays. Further, the benefit to the parties seeking insurance coverage is overstated. In most instances where insurance companies fail to timely process an endorsement request, it will be evident to the broker or prospective insured, who could choose to simply follow-up on their request, or elect to take their business elsewhere.

Having found that Plaintiff cannot establish a valid duty supportive of its proposed Negligence claim against Farmers, Plaintiff's request to amend its Complaint to add such a claim is DENIED. Having ruled on this basis, the Court will not address Farmers' arguments regarding the statute of limitations or prejudice.

Lastly, the Court addresses Plaintiff's request to amend the Complaint to add a damages claim for lost rent. Farmers opposes this request on the basis that it is untimely, falling outside the close of discovery, and therefore its addition would be unduly prejudicial. The Court notes that while Plaintiff could have included lost rent as a damages claim within its original Complaint, or could have petitioned to amend the Complaint to include such a claim much earlier, "[d]enial of a petition to amend, based on nothing more than unreasonable delay, is an abuse of discretion."⁴⁵ "The timeliness of the request to amend is a factor to be considered, but it is to be considered only insofar as it presents a question of prejudice to the opposing party, as by loss of witnesses or eleventh hour surprise."⁴⁶ It is not atypical for a court to allow an amendment to a damages claim that does not change a cause of action, but only accounts for damages accruing to time of trial.⁴⁷

While Plaintiff's damages claim for lost rent is untimely, the Court does not find that Farmers would suffer undue prejudice from its addition, particularly since the parties have agreed to a continuance of trial from the April/May 2021 trial term to the August/September 2021 trial term.⁴⁸ The Court therefore GRANTS Plaintiff's Motion to

⁴⁵ *Capobianchi v. BIC Corp.*, 666 A.2d 344, 347 (Pa. Super. 1995) (citations omitted).

⁴⁶ *Id.* (citation omitted).

⁴⁷ See e.g., *Goldsmann v. Litman*, 68 Pa. D. & C. 313, 318 (Phila. Cty. 1949) (permitting amendment to pleading to include damages accruing after the filing of the complaint)

⁴⁸ This is per Defendants', Seth Burch and the Smith-Burch Agency, LLC t/d/b/a Smith Burch Agency, Concurred in and Stipulated Motion for Continuance to Trial, filed on February 16, 2021. The Court is in the process of drafting an Amended Scheduling Order.

Amend the Complaint to add a damages request for lost rent. The Court will allow the parties to engage in additional discovery through March 31, 2021, specifically limited to Plaintiff's lost rent damages claim. Only materials provided through discovery will be admissible as evidence at trial.

Conclusion

Pursuant to the foregoing, Plaintiff's Motion to Amend the Complaint is GRANTED IN PART and DENIED IN PART. Specifically, Plaintiff's request to add a request for lost rent to his damages claims is GRANTED. Plaintiff's request to add a count of Negligence against Defendant Farmers Fire Insurance is DENIED. Plaintiff shall file the Amended Complaint within ten (10) days of the date of this Opinion and Order. Defendants shall not be required to file any additional response to this Amended Complaint.

Further, the Farmers Fire Insurance's Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED this 25th day of February 2021.

BY THE COURT,

Eric R. Linhardt, Judge

cc: Thomas Waffenschmidt, Esq.
Mark T. Sheridan, Esq. / Daniel D. Stofko, Esq., Margolis Edelstein
220 Penn Avenue, Suite 305, Scranton, PA 18503
Jennifer A. Artman, Esq., Andracki, Sysak & Artman, PC
428 Forbes Avenue, Suite 600, Pittsburgh, PA 15219
Gary Weber, Esq. / Lycoming Reporter