

NOT DESIGNATED FOR PUBLICATION

**VIC TUSA, D/B/A TUSA
ENTERPRISES**

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NO. 2002-CA-0200

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**COLONIA INSURANCE
COMPANY AND THERIOT,
DUET AND THERIOT, INC.**

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STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-4517, DIVISION "A-5"
HONORABLE CAROLYN GILL-JEFFERSON, JUDGE**

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JUDGE MAX N. TOBIAS, JR.

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**(COURT COMPOSED OF JUDGE JOAN BERNARD ARMSTRONG,
JUDGE STEVEN R. PLOTKIN, AND JUDGE MAX N. TOBIAS, JR.)**

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AFFIRMED.

Plaintiff/Appellant, Vic Tusa d/b/a Tusa Enterprises (“Tusa”), appeals the trial court’s grant of summary judgment in favor of the defendant/appellee, Theriot, Duet and Theriot, Inc. (“Theriot”), and the resulting dismissal, with prejudice, of his claims against Theriot. Based upon our *de novo* review, we affirm.

Tusa filed suit against Colonia Insurance Company (“Colonia”) and Theriot, an insurance agency, following Colonia’s denial of a claim that Tusa made as a result of losses incurred when a tree fell on premises during a windstorm on 8 May 1995 that Tusa owned. The premises in question are located at 200 Chartres Street in New Orleans and house several apartments and Messina’s Oyster House, Inc. (“Messina’s”), a seafood restaurant.

In March of 1993, Tusa asked Theriot to procure various insurance coverages pertaining to several businesses that he owned. Pursuant to that request, Theriot applied for commercial lines coverage for Messina’s. Messina’s was the named insured. In all, Theriot procured four policies for Messina’s for yearly terms from March 1993 until February 1997.

The 8 May 1995 windstorm blew a tree into the roof of the premises, rendering the apartments unlivable and thereby depriving Tusa of their rental value until the damage could be repaired. Colonia's policy was in effect at the time of the loss. That policy, identified as number CPP 22 80 35, listed "Messina's Oyster House, Inc." as the sole named insured and described the business as a "seafood restaurant and apartment building." The policy covered the period from 9 February 1995 until 9 February 1996 and provided both "contents" and "business income" coverage. Following the windstorm, Tusa submitted a claim for business income loss, including loss of rents, to Colonia. Messina's received a letter from Colonia, dated 29 August 1996, in reference to its claim. The letter stated that an investigation revealed that the contents of the insured premises did not sustain any damage. The letter then referred to language found in the CP0030 (10/91) Business Income Coverage Form, and stated that Messina's "claim for Business Income Loss is not recoverable under Policy CPP228035, for lack of physical damage to personal property." Thereafter, Tusa filed the instant lawsuit several months later.

Theriot answered Tusa's petition and filed a cross-claim against Colonia seeking indemnification and/or contribution should it be cast in judgment. Colonia answered both the plaintiff's petition and Theriot's

cross-claim. In May 2001, Colonia filed a motion for summary judgment against Tusa and Theriot, seeking to have Tusa's suit against it dismissed on the grounds that the policy in question was issued to Messina's Oyster House, Inc., rather than to Vic Tusa d/b/a Tusa Enterprises, and that none of the circumstances enumerated in R.S. 22:655, Louisiana's direct action statute, existed so as to allow Tusa to sue the insurer, Colonia, alone without naming the insured as well. The motion was denied; that ruling is not before the court at this time.

Theriot subsequently filed a motion for declaratory relief and summary judgment against Tusa, claiming (1) that it had placed the proper coverages and could not be held liable to Tusa for Colonia's denial of his claim pursuant to the terms and conditions of the policy, and (2) that only the named insured, Messina's, had standing to sue an insurance agent for allegedly not writing the proper coverages.

Tusa filed a written opposition to the defendants' motions on 28 June 2001, the day before the scheduled hearing on 29 June 2001. The trial court granted Theriot's motion and a written judgment was signed on 29 June 2001 in favor of Theriot and dismissing all claims against it. The trial court found that the agent had procured the coverages for the proper persons requested by Tusa, including that for business loss and rental value.

Tusa thereafter filed a timely Motion for Appeal.

Tusa claims that the trial court committed reversible error by granting Theriot's motion for summary judgment. In support, he relies solely on *Karam v. St. Paul Fire & Marine Ins. Co.*, 281 So.2d 728 (La. 1973). That case stands for the proposition that a client may recover from an agent any loss he sustains when the agent fails to procure the coverage requested by the client, if the agent's actions gave the client the reasonable belief that he was properly insured for the amount of the desired coverage. *Id.* at p. 730-31.

The trial court explicitly found that the insurance agent procured the coverage requested by Tusa, including coverage for the loss of rental value. We have examined the policy at issue and agree with the trial court's finding of fact in this regard. Tusa's reliance on *Karam* is thus misplaced as that case does not stand for the imposition of agent liability under these circumstances.

Tusa next argues that Theriot's motion for summary judgment should have been denied because it failed to file any supporting affidavits in conjunction with its motion. However, Tusa ignores the first sentence of La. C.C.P. art. 966(A)(1), which provides that "[t]he plaintiff or defendant in the principal ... action, **with or without supporting affidavits**, may move for a

summary judgment in his favor for all or part of the relief for which he has prayed.” (Emphasis supplied.) His assignment is without merit.

Finally, Tusa argues that Theriot attached a copy of an insurance policy to its motion for summary judgment, but failed to verify that it was the policy in question or a true copy thereof. However, Tusa failed to raise the argument at the trial court level and is thus precluded from raising it for the first time on appeal. Rule 1-3, Uniform Rules, Courts of Appeal; *Morris v. St. Bernard Parish Council*, 95-0685 (La. App. 4 Cir. 10/26/95), 663 So.2d 533.

For the foregoing reasons, we affirm the trial court’s grant of summary judgment in favor of defendant/appellee, Theriot, Duet and Theriot, Inc., and the resulting dismissal, with prejudice, of all claims against it.

AFFIRMED.