(FILED – AUGUST 17, 2005)
STATE OF RHODE ISLAND AND PROVIDENC PLANDATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
TRITON REALTY LIMITED PARTNERSHIP and TRITON REALTY, INCORPORATED	:	
VS.	:	**C.A. No. 04-2335**
GEORGE ALMEIDA, JR. d/b/a GEORGE ALMEIDA INSURANCE, SEAN LENNON, BURLINGTON INSURANCE CO. and GRESHAM & ASSOCIATES OF RHODE ISLAND, INC.	:	

DECISION

GIBNEY, J. In this negligence action brought by the owners of the property involved in the tragic Station fire, the plaintiffs seek recovery of damages resulting from the defendants' alleged failure to ensure that their property was insured in accordance with the terms of the plaintiffs' lease with their tenants. Presently before the Court are a motion to dismiss filed by Defendant Burlington Insurance Company ("Burlington") and a motion to intervene filed by Gina Gauvin ("Gauvin").

Triton Realty, Inc. is a Rhode Island corporation with an office in Cranston, Rhode Island. It is the corporate general partner of Triton Realty Limited Partnership, a Rhode Island limited liability partnership also operating out of Cranston, Rhode Island. These parties shall be referred to collectively as "Triton" or "the plaintiffs." George Almeida, Jr., doing business as George Almeida Insurance ("Almeida"), deals in commercial liability, property, and fire insurance in Rhode Island. Sean Lennon ("Lennon") is an insurance agent licensed by the State

of Rhode Island and was employed by Almeida at the time of the events giving rise to the present litigation.

According to the complaint filed by Triton, Derco, LLC, Michael Derderian, and Jeffrey Derderian (collectively referred to as "Derco"), who are not parties to the instant action, leased Triton's property at 211 Cowesett Avenue, West Warwick, Rhode Island ("Station property"), where they operated the Station nightclub. The lease allegedly required that Derco maintain adequate property damage and liability insurance for the Station property and that Derco have Triton named as additional insureds under those policies. (Compl. ¶¶ 11-12.) The plaintiffs allege that Derco did procure property and liability insurance covering the Station, through Lennon acting as an agent of Almeida, and charge that these defendants were aware that Derco was a lessee of the Station property, but did not review the lease agreement between Triton and Derco to ascertain the terms of Derco's insurance obligations. Id. at ¶ 13. At some point, the plaintiffs allege, Lennon did request that Triton be named as an additional insured on the policies, but the broker for the relevant insurance company, Gresham & Associates, negligently failed to inform the insurance company of the request. Id. at 23-25. Triton was never named as an additional insured under the liability policies purchased by Derco. Id. at ¶ 26. The plaintiffs claim that this failure was the result of negligence on the parts of Almeida, Lennon, and Gresham & Associates, and caused them great financial damage.

In a separate count, the plaintiffs maintain that Burlington, from which Derco had purchased a property insurance policy covering the Station property, negligently failed to properly inspect the insured property, and therefore insured it for less than its full value, which caused Triton financial losses when the property was destroyed. Id. at ¶ 28. The plaintiffs do not allege that they were named insureds on the Burlington policy.

Burlington's Motion to Dismiss

In lieu of an answer to the plaintiffs' complaint, Burlington has moved to dismiss the one claim asserted against it pursuant to Super R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be granted. In support of its motion, Burlington advances three arguments. Burlington first asserts that because the plaintiffs were not named insureds on the property insurance policy it issued, it owed no duties to the plaintiffs with respect to that policy. Second, even had the plaintiffs been insured under the policy, Burlington argues that Triton has failed to assert a claim because it would have owed no duty to verify that an insured's policy provides adequate coverage for the property being insured. Third, Burlington argues that the plaintiffs' claim should be dismissed because the plaintiffs cannot, as a matter of law, recover for purely economic losses in a negligence cause of action. The plaintiffs assert that this Court should find as a matter of law that Burlington did owe them a duty of care in issuing a policy to the plaintiffs' tenants.

In ruling upon a motion to dismiss pursuant to Rule 12(b), for failure to state a claim upon which relief may be granted, this Court must assume the allegations contained in the complaint to be true and view the facts in the light most favorable to the plaintiffs. Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001) (citing St. James Condominium Ass'n v. Lokey, 676 A.2d 1343, 1346 (R.I. 1996)). A motion to dismiss should not be granted "unless it appears to a certainty that the plaintiffs will not be entitled to relief under any set of facts which might be proved in support of their claim." Id. (citing Bragg v. Warwick Shoppers World, Inc., 102 R.I. 8, 12, 227 A.2d 582, 584 (1967)).

After review of the pleadings and relevant law, the Court concludes that the claim asserted by the plaintiffs is not one upon which relief may be granted in this State. There is no

question that the parties presently before the Court are sophisticated commercial entities. Assuming the plaintiffs' allegations to be true, as the Court must in considering a motion to dismiss, Triton had contractually arranged for its tenant to procure property and liability insurance covering the Station property. (Compl. at ¶ 12.) Burlington issued the required property damage policy. Id. at ¶ 5. The plaintiffs neither allege that they were named insureds on the policy issued by Burlington, nor that any contractual relationship existed between Burlington and the plaintiffs. The plaintiffs allege that Burlington had a duty to properly inspect the insured property to adequately evaluate replacement costs and that it breached this duty by negligently failing to inspect the property and therefore undervaluing the replacement costs.[1] Id. at ¶¶ 29-31. The plaintiffs have alleged a purely financial loss. Their claim therefore fails under a well established maxim of the common law, that plaintiffs are precluded "from recovering purely economic losses in a negligence cause of action."[2] Boston Investment Property No.1 State v. E.W. Burman, Inc., 658 A.2d 515, 517 (R.I. 1995).

The Rhode Island Supreme Court has explicitly recognized and applied the doctrine. In Boston Investment Property, the Rhode Island Supreme Court addressed a question certified by a federal district judge: "[i]n the absence of privity of contract with the general contractor, is the subsequent purchaser of a commercial office building . . . entitled to recover economic damages which it is alleged were proximately caused by the negligence of the general contractor?" Id. at 515. The court answered the question in the negative, reasoning that where commercial parties

[1] Burlington accurately notes that the plaintiffs have not alleged that the duty purportedly owed by Burlington flowed to Triton, but under the liberal pleading rules of this State, Andrade v. Perry, 863 A.2d 1272, 1279 (R.I. 2004), the Court infers that such meaning was intended.

[2] The economic loss doctrine is incorporated in into § 324A of the Restatement (Second) of Torts, upon which the plaintiffs rely to establish the existence of a duty owed by Burlington. That section provides that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care. . . ." Accordingly, the plaintiffs' reliance on the section is misplaced, as they have alleged no physical harm resulting from Burlington's alleged negligence.

with equal bargaining power have contracted to protect against potential economic liability, contract principles should override tort principles. Id. Where the purpose served by imposing a tort duty of care - protecting society's interest in remaining free from harm - is not implicated, and the relevant parties did or could have addressed the possibility of harm in their agreement, no cause of action lies for purely economic damages. Id. at 517-18. But see Forte Brothers, Inc. v. Nat'l Amusements, Inc., 525 A.2d 1301, 1303 (R.I. 1987) (holding that where no privity of contract existed but "circumstances establish[ed] a direct and reasonable reliance by [a] contractor on the contractual performance of [an] architect who knew, or should have known of that reliance," the contractor had stated a cause of action); Rousseau v. K.N. Construction, Inc. 727 A.2d 190, 192 (R.I. 1999) (holding that the economic loss doctrine does not apply in a consumer transaction in accordance with the court's established policy of providing increased protection to consumers conducting transactions with commercial entities).

The policies underlying the doctrine justify its application in the instant case. As between sophisticated commercial entities in commercial real estate transactions "contract law is the proper device to allocate economic risk." Boston Investment Property, 658 A.2d at 517. Application of contract rather than tort law principles puts the onus on the party which is better able to anticipate the nature and extent of risks to protect itself. See All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865 (7th Cir. 1999) (Posner, C.J.); Rodman Indus. v. G&S Mill, 145 F.3d 940, 945 (7th Cir., 1998) (citing Daanen & Janssen, 573 N.W.2d 842, 49 (Wis. 1998); Rardin v. T & D Mach. Handling, Inc., 890 F.2d 24, 26-27 (7th Cir. 1989) (Posner, J.)). See also Thomas C. Galligan, Jr., Contortions Along the Boundary Between Contracts and Torts, 69 Tul. L.Rev. 457, 515 (1994) (discussing the policies behind the application of contract law in economic loss situations).

Assuming that Burlington did undervalue the property and did write a policy insuring the Station property for less than it was worth, such eventuality is one that could have been contractually addressed by the plaintiffs and their tenants at the time of contracting. It may be that Derco knowingly chose to insure the property at less than full value and chose to self-insure as to a deficiency in policy coverage in order to pay a lower premium. Alternatively, the plaintiffs could have calculated for the risk that the property would be underinsured by not relying solely on the tenants to fulfill their obligation to insure the property. Whether any of these steps were taken by Triton, or whether any contractual remedy is available to Triton, is not here at issue. Because the plaintiffs' claim is one that is more appropriately addressed using contract principles, the application of the economic loss doctrine is proper in the instant case.[3] Taking the facts pled to be true, viewed in the light most favorable to the plaintiff, the Court concludes that the plaintiffs' cause of action against Burlington for negligence resulting in purely economic harm does not state a claim as a matter of law, and should be dismissed.

Motion to Intervene

The Court next addresses a motion to intervene filed by Gauvin, an individual injured in the Station fire and a plaintiff in a civil lawsuit pending in federal district court against the present plaintiffs and others. Gauvin moves to intervene in the present suit as a matter of right. Only Burlington, which is no longer a party to this action, has objected. The Court must

[3] One court has noted that the doctrine could also be termed the "commercial loss" doctrine, explaining that a major justification of the doctrine

> "is the desirability of confining remedies for contract-type losses to contract law. Suppliers injured in their pocketbook because of a fire at the shop of a retailer who buys and distributes their goods sustain the kind of purely business loss familiarly encountered in contract law, rather than the physical harm, whether to person or to property, with which tort law is centrally concerned. These suppliers can protect themselves from the loss caused them by the fire by buying business-loss insurance, by charging a higher price, or by including in their contract with the retailer a requirement that he buy a minimum quantity of goods from the supplier, regardless. The suppliers thus don't need a tort remedy." All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865 (7th Cir. 1999).

nevertheless determine whether the movant has met the standard for intervention as a matter of right as set forth at Super. R. Civ. P. 24(a).

To intervene as a matter of right, an applicant must demonstrate that its application is timely, that it has a legally protectable interest relating to the property or transaction that is the subject of the action, that the applicant is situated such that a disposition of the action may impede or impair its ability to protect that interest, and that the applicant's interest is not adequately represented by the parties to the suit.[4] Super. R. Civ. P. 24(a)(2); In re Healthsouth Corp. Insurance Litigation, 219 F.R.D. 688, 691 (S.D. Ala. 2004).

As the instant litigation is still in early pretrial proceedings and discovery is ongoing, the Court finds that Gauvin's application is timely. Marteg Corp. v. Zoning Bd. of Review, 425 A.2d 1240, 1243 (R.I. 1981) (holding that the determination of timeliness is left to the discretion of the trial justice). The Court will therefore examine the other factors to determine whether Gauvin must be permitted to intervene as a party plaintiff.

Gauvin asserts that she has a protectable interest in the instant action because she is presently pursuing a personal injury action against Triton in federal court and it is likely that the judgments obtained in that suit will exceed Triton's insurance coverage and assets. Without alleging any specific facts, Gauvin further asserts that "[b]ased upon the number of plaintiffs and the nature and extent of their injuries, applicant's interest in any damage award rendered in the instant action can hardly be said to be speculative or conjectural."

An applicant must have a "direct, significant, and legally protectable interest in the outcome of the litigation in which he seeks to intervene. In re Healthsouth Corp., 219 F.R.D. at

[4] Rule 24 was amended to its present formulation in order to track the federal intervention rule. The Rhode Island Supreme Court has construed Rule 24 only twice since the amendment, but because the wording of the Superior Court Rule and the federal one is substantially the same, this Court may also look to the decisions of federal courts in interpreting it. See Credit Union Central Falls v. Groff, 871 A.2d 364, 366-67 (R.I. 2005).

692 (citing, inter alia, Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1251 (11th Cir. 2002)). However, "the mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene." Central Union Credit Falls, 871 A.2d at 367 (citing Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc. 72 F.3d 361, 366 (3d Cir. 1995)). A contingent economic interest in an insurance policy, for example, does not constitute a legally protectable interest and is insufficient to support an intervention as of right in a declaratory judgment suit to determine coverage. In re Healthsouth Corp., 219 F.R.D. at 691; see also Midwest Employers Cas. Co. v. E. Alabama Health Care, 170 F.R.D. 195, 198 (M.D. Ala. 1996); Redland Ins. Co. v. Chillingsworth Venture, Ltd., 171 F.R.D. 206, 208 (N.D. Ohio 1997). Furthermore, the weight of authority indicates that a bare economic interest, without some form of concomitant ownership interest, cannot constitute a legally protectable interest. In re Healthsouth Corp., 219 F.R.D. at 691-92 (reviewing authorities and denying an applicant's motion to intervene because the applicant's "purely economic [and] theoretical interest in proceeds of an insurance policy before it had obtained any judgment against the insured," was not a protectable interest).

Gauvin's interest in the present litigation can similarly be characterized as a purely speculative, contingent, economic interest in a judgment that has not been and may never be rendered. The claims remaining after the dismissal of Burlington are negligence claims against Almeida, Lennon, and Gresham & Associates for failing to ensure that Triton was named as an additional insured on Derco's liability insurance policy. Gauvin's interest in any recovery resulting from those claims is so tenuous as to be almost nonexistent. There is no certainty that the plaintiffs' claims are meritorious, or that if found so, any damages can be proven. If they were to recover some damages, the funds could be available to tort plaintiffs proceeding against

Triton in other venues, but again, there is no certainty that Gauvin would be found to be entitled to damages from Triton for her claimed injuries.

Gauvin has expressed concern that if the plaintiffs recover damages in the instant suit, such funds will no longer be available by the time the personal injury actions against the plaintiffs are resolved. Such a concern, however, is not a legally protectable interest. "[T]he 'mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give that party a right to intervene.'" In re Healthsouth, 219 F.R.D. at 692 (quoting TIG Specialty Ins. Co. v. Fin. Web.com, Inc., 208 F.R.D. 336, 337 (M.D. Fla. 2002)); see also Ace American Ins. Co., v. Paradise Divers, Inc., 216 F.R.D. 537, 538 (S.D. Fla. 2003); Independent Petrochemical Corp. v. Aetna Cas. & Surety Co., 105 F.R.D. 106, 110-11 (D.C. Cir. 1985); General Star Indemnity Co. v. Virgin Islands Port Authority, 224 F.R.D. 372, 375 (D.V.I. 2004); compare LMI Ins. Co. v. Precision Millwork Co., No. 2:98-CV-2-BO(1), 1998 U.S. Dist. LEXIS 15387 *4 (July 24, 1998) (holding that where proposed intervenors had an interest in a specific fund of insurance proceeds rather than "merely a generalized interest that [the defendant] have sufficient resources to satisfy a favorable judgment," intervention should be permitted). This Court concludes that Gauvin has not demonstrated a direct, significant, and legally protectable interest in the outcome of the litigation. The Court cannot reach the remaining factors of the analysis, as both are dependent on the existence of a protectable interest. See Independent Petrochemical Corp., 105 F.R.D. at 110 (noting that the existence of a protectable interest is a threshold requirement).

In addition to the foregoing, the Court finds that policy concerns also militate against allowing the plaintiff's proposed intervention. Allowing Gauvin to intervene here would frustrate the efficient disposition of the plaintiffs' claims against the remaining defendants in this lawsuit.

As Gauvin notes in her memorandum, there are hundreds of claimants in federal court asserting personal injury claims against the plaintiffs. Allowing Gauvin to intervene would open a floodgate to any and all of those individuals who might wish to intervene as well. See id. at 111. Furthermore, so enlarging the scope of the present litigation could have the practical effect of further draining the plaintiff's assets. As Gauvin has only the most attenuated, hypothetical interest in the outcome of this litigation, her motion to intervene as a matter of right is denied. She has not moved the Court to allow her intervention permissively, so the Court will not address the issue. General Star Indemnity Co., 224 F.R.D. at n.1.

CONCLUSION

After reviewing the pleadings and relevant authority, the Court concludes that the plaintiffs' claim against Burlington must be dismissed for failure to state a claim upon which relief may be granted. Gina Gauvin's motion to intervene as a matter of right is denied as she has no legally protectable interest in the matter before the Court. The remaining parties shall submit an order for entry, consistent with this opinion.