

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

GIOVANNA CANNIZZARO and	:	
GAETANO GERMANO,	:	C.A. No: K09C-11-009 RBY
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CONSOLIDATED HOME	:	
INDUSTRIES, INC., t/a MASTERS	:	
PEST CONTROL and ATILIO'S	:	
CONSTRUCTION, LLC.,	:	
	:	
Defendants,	:	
	:	
v.	:	
	:	
ARCH INSURANCE COMPANY,	:	
WILGUS ASSOCIATES, INC. and	:	
JOSEPH M. POLICHETTI, JR.,	:	
	:	
Third-Party Defendants.	:	

Submitted: October 7, 2011
Decided: January 9, 2012

*Upon Consideration of Third-party Defendant
Arch Insurance Company's
Motion for Summary Judgment*
DENIED

ORDER AND OPINION

Giovanna Cannizzaro v. Consolidated Home Industries, et al.
C.A. No: 09C-11-009 RBY
January 9, 2012

Craig T. Eliassen, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Plaintiff.

Tasha Marie Stevens, Esq., Fuqua, Yori and Willard, P.A., Georgetown, Delaware for Defendant Atilio's Construction, LLC.

Larry Fifer, Esq., Lewes, Delaware for Defendant Consolidated Home Industries, Inc.

Dennis Mason, Esq., Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, Wilmington, Delaware for Third Party Defendant Arch Insurance Company.

Young, J.

SUMMARY

_____Arch Insurance Company (Arch) moves for summary judgment of Consolidated Home Industries, Inc.’s (Consolidated) third-party complaint, on the basis that Arch did not receive contractually timely notice of the claim for coverage. Whether Consolidated notified Wilgus Associates (Wilgus) of its insurance claim is a question of fact. Further, whether Wilgus was Arch’s agent is a question of fact. Accordingly, Arch’s motion for summary judgment is **DENIED**.

FACTS

_____Consolidated is engaged in the business of home pest inspection.¹ Consolidated procured an insurance policy from Arch providing Consolidated with “pest inspection damage” coverage. Specifically, the policy insures Consolidated for property damage caused by pest infestations visible at the time Consolidated conducts an inspection, but not indicated on Consolidated’s final report. The policy requires Consolidated to notify Arch of any claims within one year of the pest inspection at issue. Wilgus and Brownyard Group (Brownyard) assisted in the procurement and administration of the policy between Consolidated and Arch.

_____On September 29, 2008, Consolidated performed a home pest inspection on the structure located at 18 Lexington Drive, Milford, Delaware 19963. Giovanna Cannizzaro and Gaetano Germano (Plaintiffs) relied, at least in part, on Consolidated’s report in their decision to purchase the property. Subsequent to

¹ Ron Simonson is the owner of Consolidated Home Industries, Inc. The business operates under the trade name “Masters Pest Control.”

purchasing the property, Plaintiffs discovered an existing pest infestation in the home. Because of that discovery, Plaintiffs retained a lawyer, who, in turn, sent Consolidated a letter on April 21, 2009 notifying it of the potential litigation.

Consolidated claims to have notified Wilgus of Plaintiffs' letter by faxing a copy of it to Wilgus on April 23, 2009. Consolidated claims to have spoken that day with Joe Polichetti (Polichetti), the agent who handled Consolidated's account with Wilgus. Consolidated claims that it instructed Wilgus to forward the notice to Arch. Arch disputes these facts. It admits receipt of Consolidated's fax, but claims that the fax did not instruct Wilgus to forward it to Arch. Further, Arch claims that Simonson never spoke with Polichetti on the phone. Rather, Arch contends that Simonson left Polichetti a message that was returned by another Wilgus employee the following day. According to Arch, Simonson did not instruct Wilgus to contact Arch when the employee returned his call.

On November 9, 2009, Plaintiffs filed suit against Consolidated. Plaintiffs allege that Consolidated performed the 2008 inspection negligently, thereby causing injury to Plaintiffs. On November 23, 2009, Consolidated sent the complaint and summons to Wilgus by fax. Wilgus forwarded the information to Brownyard. Brownyard forwarded the information to Arch. Arch denied coverage, citing the notice requirement in the contract. Specifically, Arch stated that it did not receive notice on April 23, 2009. Rather, Arch claims to have received notice on November 23, 2009, over one year after the September 29, 2008 inspection.

STANDARD OF REVIEW

____ Summary judgment is appropriate where the record exhibits no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.² “Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.”³ The record is to be considered in the light most favorable to the non-moving party.⁴ _____

DISCUSSION

____ Arch’s summary judgment motion contests that Consolidated is not covered for Plaintiffs’ claim because it failed to provide notice of the claim within one year of the September 29, 2008 inspection. Accordingly, Arch argues that there is no genuine issue of material fact. In opposition, Consolidated argues that it provided Wilgus with notice of the claim on April 23, 2009, within the one year window prescribed by contract, because Wilgus is Arch’s agent, notice is imputed from Wilgus to Arch. Consolidated does not argue that it notified Arch directly.

____ Timely notice to an agent of an insurer operates as sufficient notice to the insurer itself.⁵ Thus, summary judgment is appropriate only if Wilgus was not, in fact, Arch’s agent; or if Consolidated did not, in fact, notify Wilgus of the claim on _____

² *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

³ *Id.*

⁴ *Id.*

⁵ *Old Guard Ins. Co. v. Jimmy’s Grille, Inc. et al.*, 860 A.2d 811 (Del. 2004) (TABLE).

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April 23, 2009.

Whether an agency relationship exists is a question of fact for a jury.⁶ Accordingly, it is not a determination appropriate for summary judgment. Sufficient evidence exists to submit the issue to a jury. Among other things, the fact that Consolidated forwarded Plaintiffs' complaint and summons to Wilgus which, in turn, forwarded the claim to Brownyard and, ultimately, Arch, could support an agency relationship is in existence.

Significantly and additionally, there is a question of fact as to whether Consolidated notified Wilgus of the claim on April 23, 2009. The parties debate the nature and occurrence of the correspondence between Simonson and Wilgus. Consolidated claims that Simonson instructed Wilgus to submit the claim to Arch. Arch contends that Simonson made no such instruction. In fact, the parties dispute the extent of the contact between Simonson and Wilgus' employees.

The existence of an agency relationship between Wilgus and Arch and the extent of the communications between Wilgus and Simonson both present genuine issues of material fact. Accordingly, summary judgment is not appropriate.

CONCLUSION

Arch's motion for summary judgment is **DENIED**.

SO ORDERED.

/s/ Robert B. Young
J.

cc: Opinion Distribution
File

⁶ *Billops v. Magness Construction Co.*, 391 A.2d 196 (Del. 1978).