[Cite as *S.L. & M.B., L.L.C. v. United Agencies, Inc.*, 2021-Ohio-2780.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

S.L. & M.B., L.L.C., ET AL.,	:	
Plaintiffs-Appellees,	:	No. 109540
v.	:	
UNITED AGENCIES, INC., ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 12, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-910072

Appearances:

Mazanec, Raskin & Ryder Co., L.P.A., Joseph F. Nicholas, Jr., and Frank H. Scialdone, *for appellees*.

Whipple Law, L.L.C., and Douglas P. Whipple, *for appellants*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} This case is about whether an insurance broker owes a duty of care to investigate and ultimately protect a third-party lienholder's interest in a property despite the customer's specific instructions otherwise. Ohio law does not

recognize such a duty, and we affirm the trial court's judgment granting summary judgment in favor of appellees, United Agencies, Inc., d.b.a. United Agencies Insurance Group (hereinafter "United Agencies") and Joann M. Justus.

I. PROCEDURAL HISTORY AND FACTS

{¶ 2} In 2011, appellants, S.L. & M.B., L.L.C., sold a horse farm in Kirtland, Ohio to Denver Barry and Oryann, Ltd. (hereinafter "Oryann"). In the sale of the property, Denver Barry and Oryann executed a "Note and Security Agreement" in which they were required to "maintain adequate insurance" on the farm to protect the security interest of S.L. & M.B., L.L.C., and name S.L. & M.B., L.L.C., as a loss payee. At the time of the sale of the farm, Oryann and Denver Barry also purchased the business assets of appellant, Patriot Partners, a partnership d.b.a. Dorchester Farms (hereinafter "Patriot Partners"). The purchase documents were executed by Denver Barry, individually, and Tracy Barry, Denver Barry's daughter, as the managing member of Oryann. After the sale of the farm, an insurance policy providing coverage for the property was purchased from Westfield Insurance that named S.L. & M.B., L.L.C., as holding an additional interest. Appellants were aware in October 2012, that the policy lapsed.

{¶ 3} In November 2012, S.L. & M.B., L.L.C., Oryann, and Denver Barry were involved in litigation over nonpayment of the note and security agreement. The facts underlying the dispute are contained in *Oryann, Ltd. v. S.L. & M.B., L.L.C.*, 11th Dist. Lake No. 2014-L-119, 2015-Ohio-5461. A judgment for $460,000

was eventually entered in favor of S.L. & M.B., L.L.C., and Patriot Partners in 2017 against Oryann and Denver Barry.

A. INSURANCE POLICY AT ISSUE

{¶ 4} In 2015, Tracy Barry was residing at the farm. She contacted United Agencies to purchase insurance on the farm. United Agencies is an insurance broker that works with different insurance companies to obtain policies for its clients. United Agencies had its employee, Joann Justus, work with Tracy Barry. In May 2016, in an email, Tracy Barry asked Joann Justus to name S.L. & M.B., L.L.C., as a loss payee on the insurance policy. Two days later in another email, she rescinded that request, indicating her attorney advised her not to name S.L. & M.B., L.L.C., on the policy. United Agencies eventually procured a policy for Tracy Barry from Westfield Insurance in June 2016. The policy did not name S.L. & M.B., L.L.C., as a loss payee.

{¶ 5} While United Agencies and Justus were working with Tracy Barry to obtain insurance, neither S.L. & M.B., L.L.C., or its representatives had any contact or communication with United Agencies or its employees. In September 2016, a fire occurred at the residence on the farm where Tracy Barry resided. Westfield Insurance and Kirtland authorities investigated the fire, and Westfield Insurance eventually paid a claim to Tracy Barry.[1]

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[1] Westfield Insurance paid the claim totaling $458,675.39 comprised of $371,375.96 to Tracy Barry, $62,000 to the city of Kirtland, and $25,299.43 to the Lake County Treasurer.

{¶ 6} In January 2019, appellants, S.L. & M.B., L.L.C., and Patriot Partners, filed the instant lawsuit against United Agencies and its employee, Joann Justus, for breach of legal duties, tortious interference with contractual relationship, and fraud and misrepresentation, as well as seeking punitive damages.

{¶ 7} On November 4, 2019, appellees, United Agencies and Joann Justus, filed a motion for summary judgment. They alleged they owed no duty to S.L. & M.B., L.L.C., and that Patriot Partners did not have standing to bring an action because it had no interest in the property. They further argued that there was no evidence that Tracy Barry was a party to the note and security agreement that S.L. & M.B., L.L.C., presented as evidence of their interest in the property. As to the fraud claims, they argued that there was no evidence of a knowing misrepresentation that S.L. & M.B., L.L.C., and/or Patriot Partners justifiably relied on because there was no evidence of any communication or statements between United Agencies and Justus and S.L. & M.B., L.L.C., Patriot Partners, or their representatives.

{¶ 8} As to the claim for tortious interference with a contractual relationship, they argued that there was no evidence that they interfered with Oryann's contract with S.L. & M.B., L.L.C., and Patriot Partners. They further argued that there was no proximate cause established for the claimed loss because S.L. & M.B., L.L.C., and Patriot were not third-party beneficiaries of the insurance policy.

{¶ 9} Appellants, S.L. & M.B., L.L.C., and Patriot Partners, filed a brief in opposition to the motion for summary judgment. They argued that United Agencies and Joann Justus knew of the existence of a mortgage but did not investigate the details of that mortgage. As such, S.L. & M.B., L.L.C., claimed that United Agencies and its employee made representations to Westfield Insurance that circumvented the lien it held on the farm by not disclosing the lien to Westfield Insurance. They further argued that there was a genuine issue of material fact as to whether United Agencies and its employees actively committed fraud with Tracy Barry against Westfield Insurance in obtaining an insurance policy in order to circumvent their interest.

{¶ 10} The trial court granted summary judgment to United Agencies and Joann Justus without a written opinion.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW OF SUMMARY JUDGMENT

{¶ 11} This is an appeal of a grant of summary judgment. Under Civ.R. 56, the grant of a motion for summary judgment is appropriate where:

> (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his or her favor.

Carter v. Officer Hymes, 8th Dist. Cuyahoga No. 108523, 2020-Ohio-3967, ¶ 20-23, citing *Harless v. Willis Day Warehousing Co., Inc.,* 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 12} Civ.R. 56(C) provides that summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A trial court's grant of summary judgment is reviewed de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

B. DUTY OF CARE OWED BY AN INSURANCE AGENT TO THIRD PARTIES

{¶ 13} In this appeal, appellants raise six assignments of error. Appellants' first assignment of error alleges appellees owed a duty to include them as an insured in the insurance policy and reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the issue of whether they owed a duty to Plaintiffs.

{¶ 14} With regard to appellants' allegations, the following causes of action were alleged in their complaint: 1) breach of legal duties, 2) tortious interference with contractual relationship, and 3) fraud and misrepresentation, as well as seeking punitive damages. The primary issue underlying these causes of action is whether appellees owed appellants a duty of care. *See, e.g., Lu-An-Do, Inc. v. Kloots*, 131 Ohio App.3d 71, 75-76, 721 N.E.2d 507 (5th Dist.1999).

{¶ 15} It is undisputed that the note and security agreement that forms the basis of the complaint was executed by Oryann and Denver Barry. In 2016, Tracy Barry purchased an insurance policy from Westfield Insurance through United Agencies. That policy did not name either S.L. & M.B., L.L.C., or Patriot Partners as a loss payee. When applying for that policy, Tracy Barry indicated to United Agencies and Justus that she wished to include S.L. & M.B., L.L.C., as a loss payee but then rescinded that request, stating it was done upon the advice of her attorney.

{¶ 16} In order to establish a claim of breach of legal duty, it is axiomatic that appellants establish that appellees owed them a legal duty. In general, an insurance agent owes no duty to third parties. *Lu-An-Do, Inc.* at 76. The court in *Lu-An-Do, Inc.* held an insurance agent does not owe a duty to a third party to make sure they are insured for a particular type of coverage when there is no oral or written obligation to do so. In *Lu-An-Do, Inc.*, when Lu-An-Do, Inc. sold a restaurant and its contents to Timothy Kloots, it retained a lien on the real property and a U.C.C. security interest in the personal property in the restaurant. *Id.* at 73. Lu-An-Doc, Inc. was listed as a loss payee for real property coverage. *Id.* The insurance policy purchased by Kloots did not list Lu-An-Do, Inc. as a loss payee for personal property coverage. *Id.* After a fire, Lu-An-Do, Inc., sued the insurance agency that procured the policy for Kloots for failing to identify Lu-An-Do, Inc. for personal property coverage. *Id.* The court declined to impose such a duty on the part of the insurance agent or agency, finding that "[a]n insurance

agent, however, owes no duty to ensure that a party is named as an insured on a policy when there was no oral or written agreement to obtain insurance coverage between the party and the agent and when the party never contacted the agent or any other insurance agent about procuring coverage." *Id.* at 76.

{¶ 17} In this case, appellees procured an insurance policy on behalf of the named insured, Tracy Barry. Moreover, Tracy Barry specifically instructed the appellees to not name a loss-payee in the insurance policy. Appellants argue that an insurance agent has a duty to protect the interests of third parties, such as a mortgagee, where a person seeking insurance has an obligation to do so. While appellants may have had a contractual agreement with Oryann and Denver Barry to name appellants as a loss payee in any policy insuring the property, they had no such contract with appellees. Appellants have not shown that without a contractual obligation or other relationship with appellees, appellees owed them any duty of care upon which to base tort claims.

{¶ 18} Appellants cite several cases that they claim impose duties upon an insurance agent and agency that would entitle them to maintain the causes of action in their complaint. However, these cases do not extend any legal duty to parties not in a relationship with the insurance agent or agency. Appellants cite *Stuart v. Natl. Indemn. Co.*, 7 Ohio App.3d 63, 454 N.E.2d 158 (8th Dist.1982), for the proposition that an insurance agent and agency can be held liable for tortious misconduct where misrepresentations are made. However, in *Stuart*, the case resolved whether a customer could sue an insurance agent and agency, not

whether a third party with whom the agent or agency had no contact or relationship with could sue for breach of a duty. *Id.* Appellants cite to *Roberts v. State Farm Mut. Auto.*, 8th Dist. Cuyahoga Nos. 43388 and 43449, 1982 Ohio App. LEXIS 11698 (Jan. 7, 1982), and argue that an insurance agent and agency may be found to act in a fiduciary manner to their client. However, *Roberts* does not extend any liability to third parties. *Id.*

{¶ 19} Appellants cite to *Arlington Bank v. United Ohio Ins. Co.*, 5th Dist. Muskingum No. CT11-0024, 2011-Ohio-5938, ¶ 27, to argue appellees owe them a legal duty. In *Arlington Bank*, the court found that a bank could bring an action against an insurer for failing to jointly pay the insured and the bank because

> [t]he policy * * * issued * * * recognized [an] obligation to the Bank with the home as collateral. The policy also acknowledged, in the event of a loss, the Bank's collateral might be impaired; therefore, the Bank was contractually made a payee of any benefits to be paid under the policy.

Id. In contrast, in this case, appellants were not named in the insurance policy and therefore no rights inured on their behalf.

{¶ 20} Appellants' citation to *Robson v. Quentin E. Cadd Agency*, 179 Ohio App.3d 298, 2008-Ohio-5909, 901 N.E.2d 835 (4th Dist.), is also misplaced. In *Robson*, the court determined that "[a]n insurance agency has a duty to obtain the coverage its insured requests." *Id.* at ¶ 31. However, the court found that the plaintiff, who was not the named insured, was not entitled to bring suit where he "did not have any discussions with [agent] regarding insurance coverage, and did not request [agent] to procure insurance coverage." Again, this case is inapposite

to the facts in this case where no relationship was shown to exist between appellants and appellees. Appellants further cite *Minor v. Allstate Ins. Co.*, 111 Ohio App.3d 16, 675 N.E.2d 550 (2d Dist.1996), to argue an insurance agent has a duty to third parties. However, in *Minor*, there was evidence the customers requested the agent include a third party as an insured person when procuring the policy. *Id.* at ¶ 21. This case is distinguishable because Tracy Barry instructed that appellees not be included on the policy.

{¶ 21} Appellants have cited two cases from the state of Texas that they argue stand for the proposition that an insurance agent has a duty to act to protect a mortgagor or beneficiary of an insurance policy. In *Westchester Fire Ins. Co. v. English*, 543 S.W.2d 407 (Tex.Civ.App.1976), the court held that a mortgagee is entitled to insurance proceeds where the customer/mortgagor instructed the insurance agent to include the mortgagee on the policy. Appellants' argument to extend the holding in *Westchester Fire Ins. Co.* to impose a duty on the insurance agent simply because the agent was aware of a mortgage was later rejected in *Clare v. Richards*, 992 F.Supp. 891, 895 (E.D.Tex.1998) ("Further, there is no claim that the insurance agent in this case negligently failed to follow instructions to include Defendant.").

{¶ 22} Appellants also cite *Fid. & Guar. Ins. Corp. v. Super-Cold Southwest Co.*, 225 S.W.2d 924 (Tex.Civ.App.1949), which recognized an equitable interest by a mortgagee in Texas. However, that interest was later noted to be codified in Texas law. *See Std. Fire Ins. Co. v. United States*, 407 F.2d 1295, 1300 (5th

Cir.1969) ("'[T]he statute involved is in effect a legislative adoption of the interpretation placed upon the 'Union Mortgage Clause' by the courts of the country * * *.'"[2]), quoting *Camden Fire Ins. Assn. v. Harold E. Clayton & Co.*, 117 Tex. 414, 6 S.W.2d 1029 (1928). However, Ohio law requires such interest to be expressed in the policy. *See, e.g., Pittsburgh Natl. Bank v. Motorists Mut. Ins. Co.*, 87 Ohio App.3d 82, 85, 621 N.E.2d 875 (9th Dist.1993) (discussing the types of loss payee clauses in insurance contracts).

{¶ 23} Appellants have not cited applicable Ohio statutes, regulations, or jurisprudence that establishes they were owed a duty of care by appellees where they were not named in the insurance policy and there was no relationship between appellants and appellees. Because appellants did not establish that appellees owed them a legal duty, the trial court did not err in entering summary judgment in appellees' favor on appellants' claims for breach of legal duties and tortious interference with a contractual relationship.

{¶ 24} Appellants' first assignment of error is overruled.

C. A CLAIM OF FRAUD OR MISREPRESENTATION REQUIRES A SHOWING OF RELIANCE ON A STATEMENT OR A DUTY TO DISCLOSE INFORMATION

{¶ 25} Appellants allege they were the victims of fraud or misrepresentation by appellees. Their second assignment of error provides:

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[2] A "standard" or "union mortgage clause" is an industry term for a policy section defining the rights of persons with additional interests who may be named as loss payees. *See Arkwright Mut. Ins. Co. v. Lexington Ins. Co.*, 1st Dist. Hamilton No. C-990347, 2000 Ohio App. LEXIS 4468, at 6 (Sept. 29, 2000).

> The Trial court's judgment was in error because Defendants were not entitled to summary judgment as to Plaintiffs' claims for fraud, misrepresentation and punitive damages.

{¶ 26} Appellants argue that they presented evidence that created a material issue of fact as to their claims of fraud, misrepresentation, and damages. In order to maintain an action for fraud or misrepresentation a plaintiff must demonstrate:

> (1) a representation or, where there is a duty to disclose, omission of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.

Morgan Stanley Credit Corp. v. Fillinger, 2012-Ohio-4295, 979 N.E.2d 362, ¶ 23 (8th Dist.), citing *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 462 N.E.2d 407 (1984).

{¶ 27} In resolving appellants' first assignment of error, we found that appellants have not identified a legal duty owed to them by appellees. There is no dispute that appellees had no contact with appellants regarding the insurance policy. Further, appellants did not establish that there was any duty to disclose information to them or that a representation was made to them.

{¶ 28} Appellants argue that the fraud and/or misrepresentations they relied upon were fraudulent statements and/or misrepresentations made by appellees to Westfield Insurance. However, even if those communications were fraudulent or were misrepresentations made to Westfield Insurance, appellants have not shown they were aware of the statements and thus cannot show they

relied on those statements made to Westfield Insurance. Further, where there is no ability to maintain an action for fraud or misrepresentation, appellees' arguments for punitive damages are moot.

{¶ 29} Because appellants have not shown they can establish appellees owed them a duty, or that appellees made any statements to appellees that could be relied upon, the trial court properly granted summary judgment. Accordingly, appellants' second assignment of error is not well taken.

D. IMPLIED THIRD PARTY BENEFICIARY OF INSURANCE POLICY

{¶ 30} Appellants' fourth assignment of error reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the issue of whether Plaintiffs are third-party beneficiaries or, alternatively, parties to an implied contract with Defendants.

{¶ 31} Appellants argue that they are a third party beneficiary of an implied contract, citing *Waterfield Mtge. v. Buckeye State Mut. Ins. Co.*, 2d Dist. Miami No. 93-CA-53, 1994 Ohio App. LEXIS 4343 (Sept. 30, 1994). However, in *Waterfield Mtge.*, the court found that implied beneficiary status to a contract is premised upon a showing that there was an intention by the contracting parties to confer third party beneficiaries' rights under the contract. *Id.* at 10. Appellants have not shown there was an intention on appellees' or Tracy Barry's part to make them beneficiaries of the insurance contract. Instead, the evidence presented expressed the opposite. Appellants also cite case law discussing the union mortgage clause in insurance contracts in Ohio to argue they have an equitable

interest in the insurance contract. *See Union Cent. Life Ins. Co. v. Clinton Mut. Ins. Assn.*, 51 Ohio App. 20, 199 N.E. 223 (12th Dist.1935). As discussed above, Ohio courts require the insurance contract to expressly provide protection to third parties in order for an action to be maintained in Ohio. *See Pittsburgh Natl. Bank*, 87 Ohio App.3d, at 85. Accordingly, we overrule appellants' fourth assignment of error.

III. CONCLUSION

{¶ 32} In resolving the first and second assignments of error, we determined that there was no legal duty owed appellants and that appellants cannot maintain their causes of action against appellees. Appellants raise three additional assignments of error in this appeal.[3] Because we find the trial court properly granted summary judgment, the issues raised in the remaining assignments of error, whether proximate cause could be established, whether Patriot Partners had standing, and whether the economic loss doctrine would

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[3] Appellants' third assignment of error reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the alleged absence of proximate cause.

Appellant's fifth assignment of error reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the issue of whether Plaintiff Patriot Partners has standing to bring claims against defendants.

Appellant's sixth assignment of error reads:

> The trial court's judgment was in error because defendants were not entitled to summary judgment on the economic loss doctrine.

apply to the claims, are moot. Accordingly, we decline to address appellants' remaining assignments of error. *See* App.R. 12(A)(1)(c). The trial court properly entered summary judgment in favor of appellees.

{¶ 33} Judgment affirmed.

It is ordered that appellees recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MICHELLE J. SHEEHAN, JUDGE

MARY J. BOYLE, A.J., and
LARRY A. JONES, SR., J., CONCUR