NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MOHAMMAD ASLAM Appellant v. HIGGINS INSURANCE ASSOCIATES, INC., D/B/A HIGGINS INSURANCE Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 330 MDA 2013

Appeal from the Order Entered February 1, 2013
In the Court of Common Pleas of Schuylkill County
Civil Division at No(s): S-1408-05

BEFORE: BENDER, P.J., LAZARUS, J., and FITZGERALD, J.*

MEMORANDUM BY LAZARUS, J. **FILED DECEMBER 12, 2013**

Mohammad Aslam appeals from the order entered in the Court of Common Pleas of Schuylkill County granting summary judgment in favor of Higgins Insurance Associates, Inc., d/b/a Higgins Insurance ("Higgins"). The issue before us is whether the court abused its discretion in granting summary judgment in an insured's negligence action against an insurance broker for failing to provide expert reports on the duty of care required of the insurance broker. Aslam, the insured, alleged Higgins was negligent when it failed to procure sufficient insurance coverage for his property, failed to warn him that he was underinsured, and failed to explain the 80% co-

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* Former Justice specially assigned to the Superior Court.

insurance clause in the policy. After our review, we affirm the trial court's order granting summary judgment.

Aslam and his wife, Akhter Aslam,[1] were the owners of a multi-unit apartment building in Port Carbon, Schuylkill County, known as the Town Clock Apartments. On behalf of Higgins, insurance agent John Sink procured property insurance for Aslam through Old Guard Insurance Company, now known as Westfield Group, in an amount of coverage in excess of $1,000,000.00. Thereafter, due to excess claims, Old Guard did not renew Aslam's policy.

Aslam, a physician, claimed little knowledge of insurance, and asked Sink to help him obtain coverage. Sink informed Aslam that finding coverage would be difficult, but he eventually did so through the Pennsylvania Fair Plan ("Fair Plan").[2] A representative of Higgins filled out the Fair Plan policy application and gave it Aslam to sign; the policy had a $500,000.00 limit and an 80% co-insurance clause.

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[1] Mohammad Aslam and his wife, Akhter Aslam, filed the original action. During the pendency of the litigation, Akhter Aslam passed away.

[2] ***See*** 40 P.S. § 1600.101 *et seq*. The Pennsylvania Fair Plan Act was enacted to make insurance coverage available to protect property for which basic property insurance was not available through the normal insurance market; it was also intended to create a reinsurance arrangement whereby the responsibility for insuring such properties would be shared by all insurance companies doing business in the Commonwealth. ***See Stallo v. Insurance Placement Facility of Pennsylvania***, 518 A.2d 827 (Pa. Super. 1986); ***see also Richardson v. Pennsylvania Ins. Dept.***, 54 A.3d 420 (Pa. Cmwlth. 2012).

In September 2003, the apartment building sustained considerable roof damage during a windstorm. Fair Plan hired McShea Associates as its adjuster, and McShea calculated the loss to be $95,606.00. McShea also determined that Aslam's coverage should have been closer to $1.5 million, and because the policy was for only $500,000.00, Aslam was subject to a co-insurance penalty and thus received only $28,747.43. Additionally, the Fair Plan policy did not provide coverage for loss of rental income.

Aslam filed a complaint against Higgins alleging breach of fiduciary duty, breach of good faith and fair dealing, breach of fiduciary duty in failing to inform them of risk, and negligence. In its motion for summary judgment, Higgins averred that Aslam admitted in his deposition that he knew the policy limit was $500,000.00, that he knew there was an 80% co-insurance clause, and that he knowingly signed the policy containing these provisions. ***See*** Motion for Summary Judgment, 11/21/2012, at ¶ 12; Deposition of Mohammad Aslam, 2/6/2007, at 27-28. Aslam asserted, however, that Higgins had breached its duty in failing to explain the 80% co-insurance clause to him. The trial court, noting that this fact remained in dispute, denied the summary judgment motion and ordered Aslam to submit expert reports on the duty of care owed by April 30, 2012. ***See*** Order, 12/27/2011. The trial court determined that in order to meet his burden of proof, Aslam needed to present expert testimony to establish an insurance broker's standard of professional care and whether Sink, as an agent of Higgins, breached that standard. ***See*** Trial Court Opinion, 1/9/2013, at 5.

Aslam failed to file an expert report. Higgins filed a motion for summary judgment, which the court granted. Aslam filed this appeal and he raises one issue:

> Whether the lower court committed an error of law or abused its discretion by granting the appellee's motion for summary judgment because of the lack of expert testimony on the issue of whether the appellant insurance agency acted negligently or breached its fiduciary duties when such issues are not so complex as to require the need for opinion testimony from an expert?

Appellant's Brief, at 5.

Our scope of review here is plenary. ***Stanton v. Lackawanna Energy LTD***, 820 A.2d 1256 (Pa. Super. 2003). When reviewing an order granting summary judgment, we examine the record in the light most favorable to the non-moving party and reverse only if there has been an error of law or clear abuse of discretion. ***Toth v. Donegal Companies***, 964 A.2d 413 (Pa. Super. 2009). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. ***Payne v. Commonwealth Department of Corrections***, 871 A.2d 795, (Pa. 2005); ***Fine v. Checcio***, 870 A.2d 850, 857 (Pa. 2005). If a question of material fact is apparent, this Court must defer the question for consideration by a jury. ***Cassell v. Lancaster Mennonite Conference***, 834 A.2d 1185 (Pa. Super. 2003). A court may grant summary judgment only where the right to such judgment is clear and free from doubt. ***Marks v. Tasman***, 589

A.2d 205 (Pa. 1991). However, as the Supreme Court of Pennsylvania recognized in ***Ario v. Ingram Micro, Inc***., 965 A.2d 1194 (Pa. 2009):

> [I]t is worth noting that a non-moving plaintiff bears some evidentiary burden to survive a defense summary judgment motion, as this Court has explained:
>
> > [a] non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Id. at 1207, n.15, quoting ***Ertel v. Patriot–News***, 674 A.2d 1038, 1042 (Pa. 1996).

Aslam has asserted negligence and breach of fiduciary duty claims against Higgins for failing to explain the 80% co-insurance clause. In order for Aslam to prevail on these claims, the fact-finder must find that Higgins breached its professional duty to Aslam. ***See Storm v. Golden***, 538 A.2d 61, 65 (Pa. Super. 1988). Aslam argues the court erred in granting summary judgment based on the lack of an expert report; he contends the issue of whether Sink acted negligently or breached his fiduciary duties can easily be determined based upon "the evidence of record so far as revealed in the depositions of Mr. Sink, Dr. Aslam and the documents produced to date." Appellant's Brief, at 11. Aslam also argues that insurance is not so highly technical a field that the average layperson cannot understand the general nature of an insurance broker's responsibility to its insured. ***Id***.

In ***Powell v. Risser***, 99 A.2d 454 (Pa. 1953), our Supreme Court stated: "[E]xpert testimony is necessary to establish negligent practice in any profession." ***Id***. at 456. In ***Storm v. Golden***, 538 A.2d 61, 64 (1988), this Court stated that although the general statement in ***Powell*** "is not a concrete pronouncement as to any one profession, it exhibits a recognition that when dealing with the higher standards attributed to a professional in any field[,] a layperson's views cannot take priority without guidance as to the acceptable practice in which the professional must operate."

In ***Storm***, the plaintiff alleged that her former attorney breached duties owed to her as part of a real estate transaction. Defendant moved for nonsuit because of plaintiff's failure to produce expert testimony. We rejected plaintiff's contention that expert testimony was unnecessary because of the simplicity of the real estate transaction. We stated:

> Generally, the determination of whether expert evidence is required or not will turn on whether the issue of negligence ***in the particular case*** is one which is sufficiently clear so as to be determinable by laypersons or concluded as a matter of law, or whether the alleged breach of duty involves too complex a legal issue so as to warrant explication by expert evidence. . . . Here, the underlying question of whether legal malpractice occurred revolves around a lawyer's duty and responsibility in connection with representing a client in a real estate transaction. We do not agree with appellant's assertions that the sale of real estate is an elementary and non-technical transaction [that] requires only simple common sense. . . . At issue is not the simplicity of the transaction but the duty and degree of care of the attorney. Whether an attorney failed to exercise a reasonable degree of care and skill related to common professional practice in handling a real estate transaction is a question of fact outside the normal range of the ordinary experience of laypersons.

Id. at 64-65 (emphasis added). "Expert testimony becomes necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary layperson." ***Id***. at 64. The standard of care applicable to a given profession must be determined from the testimony of experts, unless the conduct involved is within the common knowledge of the ordinary layperson.

Here, the trial court determined that Higgins' alleged duty to Aslam, to obtain appropriate property insurance for a multi-dwelling apartment building in a limited market that included Pennsylvania's Fair Plan, following Old Guard's (the prior insurer) notice of non-renewal, was not an elementary and non-technical transaction. The court found the issue of Sink's duty as the broker's agent, and whether he failed to exercise a reasonable degree of care and skill related to common professional practice in obtaining sufficient insurance or breached a fiduciary duty to Aslam, were questions of fact outside the normal range of the ordinary experience of a layperson. We are inclined agree.

The standards of practice and skills of an insurance broker are not necessarily matters of common knowledge. ***See Storm***, ***supra***. ***See also Industrial Valley Bank and Trust Co. v. Dilks Agency***, 751 F.2d 637 (3d Cir. 1985) (under Pennsylvania law, insurance broker must exercise degree of care that reasonably prudent businessperson in brokerage field would exercise under similar circumstances); ***cf. Al's Café, Inc. v. Sanders Insurance Agency***, 820 A.2d 745, 752 (Pa. Super. 2003) (court reversed

summary judgment in insurance agent's favor where plaintiff's expert reports raised genuine issue of material fact as to whether agent deviated from "knowledge and skill required of an insurance agent or broker in procuring [liquor liability] insurance coverage for a client."). An insurance broker (like Higgins) and agent (such as Sink) are viewed as possessing expertise in the insurance industry. Therefore, in this instance, Aslam's failure to produce an expert report as to the standard of care under which Sink should have conducted himself and as to any deviation from that standard that may have occurred renders Aslam's case "defective as a matter of law," and justifies its dismissal. ***Storm***, 538 A.2d at 65. Although we recognize that not all cases of negligence against insurance brokers will require expert testimony on the broker's duty of care, the trial court decision to require such here was not an abuse of discretion. ***Storm***, ***supra***. ***Cf. Bergman v. United Services Auto. Ass'n***, 742 A.2d 1101 (Pa. Super. 1999) (holding, as matter of first impression, expert testimony not required as per se rule in bad faith actions against insurers).

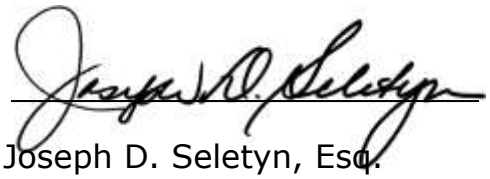
> Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.

Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 429 (Pa. 2001). ***See also Gubbiotti v. Santey***, 52 A.3d 272, 273 (Pa. Super. 2012); Pa.R.C.P. 1035.2.

Having failed to provide expert reports to establish the appropriate standard of care and to establish whether Higgins deviated from that standard, we conclude the trial court properly granted summary judgment. We, therefore, affirm the trial court's order.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/12/2013