

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES AIRCRAFT)
INSURANCE GROUP,)
)
 Plaintiff,)
)
 v.) Civil Action No. 03-173-SLR
)
DWIGGINS, L.L.C. and)
BOMBARDIER CAPITAL, INC.,)
)
 Defendants.)
)

Donald J. Wolfe, Jr., Esquire and Erica Niezgoda, Esquire, of Potter Anderson & Corroon L.L.P., Wilmington, Delaware. Counsel for Defendant Bombardier Capital, Inc. Of Counsel: Philip Le. B. Douglas, Esquire, Thad T. Dameris, Esquire, Lisa J. Fried, Esquire, and Vincent Morgan, Esquire of Pillsbury Winthrop L.L.P. New York, New York.

Sean J. Bellew, Esquire of Cozen O'Connor, Wilmington, Delaware. Counsel for Plaintiff. Of Counsel: Ann Thornon Field, Esquire, of Cozen O'Connor, Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Wilmington, Delaware
Dated: October 15, 2003

ROBINSON, Chief Judge

I. INTRODUCTION

Presently before the court is the motion of Bombardier Capital, Inc. ("Bombardier") for summary judgment, pursuant to Fed. R. Civ. P 56(b), on Counts I and II of the complaint of United States Aircraft Insurance Group ("USAIG"). (D.I. 6) USAIG filed suit against Dwiggins, L.L.C. ("Dwiggins") and Bombardier on February 5, 2003, seeking rescission or a declaration of invalidity of an insurance policy issued on September 10, 2002 to Dwiggins. Bombardier is named as the beneficiary of a lessor's interest coverage endorsement. (D.I.

1) This court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, as there is complete diversity between the parties and the matter in controversy exceeds \$75,000.

II. BACKGROUND

Dwiggins, a limited liability company organized under the laws of Delaware, was formed by American Virginia Tabacacaos, Industrisa e Comercio, Importacaco e Exportacao de Tabacos Ltda. ("American Virginia") and Luiz A. D. Ferreira, President of American Virginia, for the purpose of purchasing a Learjet 60 aircraft. The aircraft was financed through an aircraft sale lease-back agreement entered into with Bombardier as lessor, and Wilmington Trust Company as owner-trustee. Bombardier, with a lease interest of \$9 million, required Dwiggins to obtain hull

coverage in the amount of \$13 million and liability coverage in the amount of \$100 million. (D.I. 43 at 4)

USAIG is in the business of insuring aviation risks. On August 9, 2002, Heath Lambert Group ("Heath Lambert"), a London-based broker, contacted USAIG seeking hull and liability coverage for the Learjet aircraft. (D.I. 20 at 3) Heath Lambert indicated that Dwiggins would be the named insured and that the aircraft would be for "industrial aid." (Id.) Over the course of the next several days, USAIG requested additional information regarding both Dwiggins and the aircraft, to which Heath Lambert responded. (D.I. 20 at 4) USAIG sought, in particular, information pertaining to the aircraft's primary hangar, international travel, pilot qualifications, and maintenance issues. On August 28, 2002, USAIG faxed to Heath Lambert a quotation for insurance coverage. (D.I. 20, Exh. E) That quotation included a sample "USAIG All-Clear" policy outlining the general terms of insurance. (Id.)

On September 5, 2002, USAIG bound coverage for Policy No. 360AC-344042, with an effective date of September 10, 2002¹ (the "Policy").² Confirmation of the policy occurred in a two page

¹ The initial effective date was September 17, 2002, but it was subsequently amended by the parties.

² It is customary in the industry for an insurer to extend coverage to an insured, before a formal policy can be drafted and issued. Referred to as a "binder," these initial materials concerning the scope, exclusions, and special endorsements of the

fax transmission sent by USAIG to Heath Lambert on September 5, 2000. (D.I. 20, Exh. H) The Policy provides hull and liability coverage for a period beginning on September 10, 2002 and ending on September 10, 2003.

On September 11, 2002, USAIG faxed to Heath Lambert a certificate of insurance for Bombardier. Palmer & Cay, a broker based in Florida, also received a copy of the certificate. On September 19, 2002, USAIG received a call from Palmer & Cay, regarding concerns that Bombardier, as lessor, had over a products exclusion contained in the certificate of insurance. (Id. at 7) The products exclusion, as written, would have degraded the protection that Bombardier, as lessor, contractually required. On September 20, 2002, a new certificate of insurance and endorsement was transmitted to Palmer & Cay. (Id.)

On October 7, 2002, the aircraft, on its inaugural flight, crashed while landing at the Santa Cruz Airport, State of Rio do Sul, SSSC, Brazil. On board the aircraft were Ferreira, Jose Maria Gelsi (corporate counsel for American Virginia), Robert Catao (Ferreira's Brazilian pilot), Sergio Barbosa (American Virginia pilot), and Telmos Goes (the pilot in command). Barbosa was killed in the incident, and the other passengers were

issued policy are consolidated into a single policy document which is transmitted to the insured. In this case, the policy was bound on September 5, and coverage commenced on September 10, notwithstanding the absence of a final formal policy document.

seriously injured.

The October 7 crash occurred before USAIG had issued its formal policy coverage. (D.I. 20 at 8) The coverage summary page of the Policy states that its coverage extends to "[a]ny use approved by the Policyholder." (D.I. 7, Ex. A at 9) The coverage summary page also imposes minimum qualifications for the pilot in command and co-pilot. (Id.) The Policy on its face is clear and unambiguous with respect to the loss payable rights of Bombardier. Endorsement 11 of the Policy states that "[s]hould anyone do anything which makes your coverage invalid, we will still make a payment to that leinholder or lessor."³ (Id. at 29). The only exclusion to the lessor's interest coverage is in the event of "conversion, embezzlement or secretion of the aircraft, by you or anyone having a legal right to possess your aircraft." (Id.)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

³ Endorsement 11 is what is known in the insurance industry as a "standard mortgagee clause." In the absence of such special endorsements, a leinholder's rights to payment under an insurance policy are subject to the same contractual defenses that an insurer might assert against the insured. See Kimberly & Carpenter, Inc. v National Liberty Ins. Co., 157 A. 730, 732 (Del. Super. 1931) ("By the 'standard mortgagee clause' ... no default or breach on the part of the insured-mortgagor affects the right of the mortgagee.").

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249

(1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

In Count I of the complaint, USAIG asks for rescission against all defendants on the basis that it was induced into issuing the Policy based upon material misrepresentations made by the defendants. (D.I. 1 at 5) In its reply brief to Bombardier's motion for summary judgment, USAIG contends that Count I is an action sounding in contract. (D.I. 20 at 22) In Count II of the complaint, USAIG requests declaratory judgment on the issue of coverage owed to either defendant based upon material misrepresentations made during the underwriting process. (D.I. 1 at 6) Count II advances a tort theory of negligent misrepresentation as its basis. (D.I. 20 at 23 (citing Rest. (2d) Torts § 552))

A. Action on the Contract

USAIG alleges that Dwiggins and Bombardier "made material misrepresentations ... during the underwriting process." (D.I. 1 at 5) These misrepresentations, contends USAIG, go to the issue of whether the Policy is void ab initio. USAIG argues that the "character of the misrepresentations--fraudulent, negligent or

innocent--is to be fleshed out during discovery." (D.I. 20 at 22 n.6)

To avoid a contract on the basis of misrepresentation, a party must prove the following elements: "(1) that there was a misrepresentation; (2) that the misrepresentation was either fraudulent or material; (3) that the misrepresentation induced the recipient to enter into the contract; and (4) that the recipient's reliance on the misrepresentation was reasonable." Alabi v. DHL Airways, Inc., 583 A.2d 1358, 1361-62 (Del. Super. 1990) (citing Rest. (2d) Contracts § 164).

For a statement to have been a basis for inducement into the contract, the relevant period for those statements is the underwriting period, which began on August 9, 2002 and ended on September 5, 2002, when USAIG bound coverage.

USAIG's complaint alleges two misrepresentations. First, that Dwiggins stated during the underwriting process that the aircraft was for personal use only when it allegedly intended to sell the aircraft to a third party. (D.I. 1 at ¶ 20) Second, that Dwiggins stated that the plane would be flown by pilots who possessed the qualifications required under the policy's "Limitations on use" clause. (Id. at ¶ 17-18, 25-28)

Taking the facts in the light most favorable to USAIG, it has not pled any facts to support the conclusion that Bombardier directly made either material or fraudulent misrepresentations to

USAIG during the underwriting process. The only statements which USAIG alleges that Bombardier made were those statements pertaining to the products exclusion on the lessor endorsement and made on Bombardier's behalf by Palmer & Cay. (D.I. 20 at 7) These statements occurred on September 19, well after the underwriting process ended. (Id.) Consequently, even if a misrepresentations were made at that time, it could not, as a matter of law, be a basis for inducing USAIG into issuing the Policy.

To overcome this temporal deficiency in the facts, USAIG's advances a theory of agency, in which Bombardier is liable for any material or fraudulent misrepresentations made by Heath Lambert or Palmer & Cay. "When there is an agency relationship between the defendants ... the principal may be found liable for the fraudulent acts of its agent." Sandvik AB v. Advent Intern. Corp., 83 F. Supp. 2d 442, 448 (D. Del. 1999); see also Rest. (2d) Agency § 259.

Agency is a question of fact which normally should not be considered upon summary judgment. Allstate Auto Leasing Co. v. Caldwell, 394 A.2d 748, 750 (Del. Super. 1978). A nonmoving party, however, must provide a sufficient factual basis upon which a reasonable jury could find for the nonmoving party on that issue. See Anderson, 477 U.S. at 249. A principal may be liable for the acts of its agent, either on the basis of an

express or an apparent agency. Rest. (2d) Agency §§ 26-27. An express agency exists when there is an overt authorization by the principal to the agent which causes the agent to believe that he can act on behalf of the principal. Id. at § 26. An apparent agency exists when the conduct of the principal causes a third person to reasonably believe an agency exists between the principal and the apparent agent. Id. at § 27.

In this case, USAIG alleges, inter alia that either Heath Lambert or Palmer & Cay acted as agent for Bombardier in the procurement of the insurance policy. As an initial matter, this court finds that whether Palmer & Cay was an agent of Bombardier is not relevant to USAIG's misrepresentation theory. According to USAIG, the first known communication between Palmer & Cay and USAIG occurred after the Policy had already been bound by USAIG. Consequently, this court concludes that any statements which Palmer & Cay might have made on behalf of Bombardier could not be the basis of USAIG's reliance.

With respect to Heath Lambert, USAIG has not alleged that it acted in reliance upon any apparent agency between Bombardier and Heath Lambert. Liability under an apparent agency theory is grounded on a third party's reasonable interpretation of the conduct of the alleged principal. Id. Consequently, the predicates for this reasonable belief would already be in the control of USAIG, and not facts which would be uncovered through

the course of discovery. See Johnson v. Chilcott, 658 F. Supp. 1213, 1221 (D. Co. 1987). To the extent that USAIG's claim rests upon the existence of an apparent agency by Heath Lambert on behalf of Bombardier, this court concludes that there is an insufficient factual basis to support a finding of apparent agency as to Heath Lambert, and summary judgment, therefore, is proper.

The existence of an express agency between Heath Lambert and Bombardier, however, is a factual question that, at a minimum, should be reserved until the completion of discovery. The court notes that USAIG has not provided even a de minimis factual basis to support the conclusion that an express agency existed between Heath Lambert and Bombardier. Nonetheless, it is possible that through discovery, USAIG may uncover evidence to substantiate its claim that Heath Lambert acted with the express authority of Bombardier during the relevant underwriting period.

This court concludes that with respect to Count I, summary judgment is granted as to whether Bombardier directly or through Palmer & Cay misrepresented material facts to USAIG. With respect to whether Bombardier through its alleged agent Heath Lambert misrepresented material fact to USAIG, summary judgment is denied at this time.

B. Action in Tort

USAIG contends that Bombardier is liable because it may have had knowledge of the alleged intended use of the aircraft and failed to notify USAIG of Dwiggins' alleged misrepresentation in that regard. The essence of USAIG's tort argument is this:

[I]n light of Bombardier's financial relationship with Dwiggins' principals, including an extensive previous business history, that either Dwiggins informed Bombardier of its intentions concerning the aircraft or Bombardier negligently failed to reasonably ascertain that information. Bombardier then failed to exercise reasonable care in obtaining or communicating information to USAIG.

(D.I. 20 at 23) The tort of negligent misrepresentation is predicated upon the existence of a "pecuniary duty" to provide accurate information. Rest. (2d) Torts § 551.⁴ The gravaman of the issue is this: whether a lessor, by virtue of its protection under a standard mortgagee clause of an insurance policy procured by the lessee, owes an independent legal obligation to the insurer.

This court has held that there must be special circumstances

⁴ Neither party has briefed the court with respect to what state law should control. Delaware and Vermont have adopted the Second Restatement approach. See Guardian Const. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1386 (Del. Super. 1990); McGee v. Vermont Federal Bank FSB, 726 A.2d 42, 44 (Vt. 1999). Negligent misrepresentation under New York law varies slightly in its wording but is essentially the same. See Fromer v. Yogel, 50 F. Supp. 2d 227, 242 (S.D.N.Y. 1999). Regardless of the controlling law, because the result would appear to be the same, the court withholds decision on this point.

to justify an "extra-contractual tort duty to exercise due care." See Pig Improvement Co., Inc. v. Middle States Holding Co., 943 F. Supp. 392, 406 (D. Del. 1996); see also Matthews Office Designs, Inc. v. Taub Investments, 647 A.2d 382, 1994 WL 267479, at 2 (Del. 1994) (table case). In Pig Improvement, a dispute arose concerning a transaction involving the sale of genetically-enhanced swine. The buyer alleged, inter alia, that the seller breached a duty by negligently misrepresenting the condition of the porcine stock. This court concluded that the character of the transaction and the parity between the respective parties' business positions did not support the conclusion that a special legal duty was necessary. Id.

The sophistication of the parties is also a factor to be considered. See Banque Arabe Et Int'l D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146 (2d Cir. 1995) (holding that under New York law banking relationships do not invoke a duty to disclose); see also Chase Manhattan Bank v. Iridium Africa Corp., 197 F. Supp. 2d 120, 138 (D. Del. 2002) (applying New York law). In the present case, this dispute arises between an insurer specializing in aviation risks and a financial institution specializing in aircraft financing who are willing participants in a complex transaction. These factors do not weigh in favor of a conclusion that an extra-contractual duty is warranted.

USAIG fails to provide any special circumstances that

support a conclusion that a special legal duty should be imposed upon a lessor. USAIG argues that Citizens State Bank v. American Fire & Casualty Ins., 198 F.2d 57 (5th Cir. 1952), stands for the proposition that a "mortgagee who is aware of the mortgagor's false statements made in procuring a policy of insurance can not collect under the policy." (D.I. 20 at 16) In Citizens State Bank, however, the mortgagee's president was also the express agent of the insurance company. Consequently, he had an existing and independent legal obligation to disclose to the principal, the insurance company, his knowledge with respect to the falsity of the mortgagor's statements.

Through asserting an independent duty to disclose, USAIG attempts to reallocate the risk of ascertaining the truthfulness of an insured's representations to a third-party.⁵ In the absence of actual fraud,⁶ this court is not persuaded that an extra-contractual shifting of that risk is warranted. An insurer stands in a strong position to control and contractually allocate

⁵ Notably, two of the cases upon which USAIG most relies, Rubenstein v. Cosmopolitan Mut. Ins. Co., 61 A.D.2d 1029, 403 N.Y.S.2d 96 (2d Dep't 1978), and Outdoor Tech., Inc. v. Allfirst Fin. Inc., 2001 WL 541472 (Del. Super. Apr. 12, 2001), are decisions involving commercial paper. These cases, however, do not provide appropriate analogies to the present case, as the Uniform Commercial Code imposes extra-contractual duties upon those involved in the passing of negotiable instruments. See U.C.C. §§ 3-401 et seq. (1992).

⁶USAIG admits that it has not pled fraud in this case. (D.I. 20 at 22 n.6)

the risks it underwrites.

Given the sophistication of the parties and the absence of any special circumstances in this case, this court concludes that a mortgagee, protected by a standard mortgage clause, has no independent legal duty of disclosure to the insurer of its mortgagor. Having concluded that Bombardier owed no legal duty to USAIG, the court must grant summary judgment to Bombardier as to Count II.

C. Bombardier's Rights Under the Policy

USAIG contends that summary judgment is not appropriate, as Bombardier has failed to affirmatively prove that it is entitled to receive payment under the Policy. (D.I. 20 at 12-13) USAIG is incorrect in this assertion. First, USAIG has not sought a declaratory judgment that, under the Policy, Bombardier is not entitled to performance; instead it has collaterally attacked the formation of the contract. Second, Bombardier is not seeking to litigate its rights under the Policy in this forum, and Bombardier is not required to do so. Consequently, this court does not decide whether the proof of loss requirements under the Policy has been satisfied or waived.

V. CONCLUSION

For the reasons stated, Bombardier's motion for summary judgment is granted in part and denied in part.

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O R D E R

At Wilmington this 15th day of October, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Defendant Bombardier Capital Inc.'s ("Bombardier") motion for summary judgment (D.I. 6) is granted as to Count I, except to the extent that Heath Lambert Group may have acted as Bombardier's agent during the underwriting process. The court reserves judgment on the motion on that issue pending the completion of discovery.

2. Defendant Bombardier's motion for summary judgment on Count II is granted.

Sue L. Robinson
United States District Judge