STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2016-CP-10-4984

Bouchelle Incorporated,

Plaintiff,

vs.

Canopius US Insurance, Inc., Seneca Specialty Ins. Co., the Brinson Agency and John Brinson.

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS THE BRINSON AGENCY AND JOHN BRINSON

This matter came before me on the Motion of the Defendants the Brinson Agency and John Brinson (collectively "Brinson"), who asked the Court to grant summary judgment as to Plaintiff's claims via Motion filed February 14, 2018. A hearing took place on June 18, 2018, in Charleston, South Carolina. Counsel for Plaintiff and Defendants John Brinson and the Brinson Agency attended and presented oral argument. Upon considering the parties' pleadings and the lawyers' arguments, I grant the Motion for Summary Judgment.

CONCLUSIONS OF FACT

Plaintiff Bouchelle, Inc. ("Bouchelle") is a contracting firm based in North Charleston that has operated as a commercial general contractor for approximately twenty years. John Brinson owns and operates the Brinson Agency, an insurance agency on Folly Road on James Island. From 2008 – 2014, Bouchelle purchased commercial liability insurance from Canopius US Insurance, Inc. ("Canopius") through Brinson, Bouchelle's insurance agent. Each policy covered Bouchelle for Carpentry artisan services, not general contracting services. Bouchelle received the declarations pages and policies

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every year but admittedly never read any of them. Each policy showed coverage for carpentry services, not general contracting services.

Such a policy was in effect in July 2015 (effective policy dates August 11, 2014 – August 11-2015), Canopius policy # OUS009069353. In the Commercial General Liability Coverage Part, Supplemental Declarations, the "Description of Business" is listed as "CARPENTRY." The extension of Supplemental Declarations lists the class description as "CARPENTRY," and the premium was based on that classification. The policy does not list or classify any other type of work.

In July 2015, Bouchelle was serving as general contractor for a project at 7350 Industry Dr. in North Charleston. Bouchelle retained a subcontractor, Charleston Wrecking, Inc. ("Charleston Wrecking"), to perform demolition work at the project. Charleston Wrecking had a commercial liability policy which Seneca Specialty Ins. Co. ("Seneca") issued. On or about July 14, 2015, Charleston Wrecking was performing demolition work at the Project when a portion of the structure being demolished fell and caused damage to a wall of a pre-existing building that was not scheduled to be demolished. Bouchelle made a claim under its Canopius policy for damages. Canopius rejected the claim because (a) the policy did not cover Bouchelle for "general contractor" services, but instead for "carpentry services," and (b) Bouchelle was acting as the general contractor for the Project. Plaintiff also made a claim with Seneca on Charleston Wrecking's policy. Seneca rejected that claim too.

Bouchelle then filed this lawsuit against Canopius, Seneca, Mr. Brinson and the Brinson Agency. Judge Lee granted Seneca's Motion for Judgment on the Pleadings via an Order entered January 9, 2018. Judge Nicholson granted Canopius' Motion for Summary Judgment via Order

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entered March 19, 2018, thus leaving Ms. Brinson and the Brinson Agency (collectively "Brinson") as the only remaining Defendants in the case.

The Complaint contains four causes of action: (1) Breach of Contract against "Defendants;" (2) Declaratory Judgment; (3) Statutory Attorney's Fees under S.C. Code § 38-59-40 and (4) Breach of Contract, the only cause of action specifically alleged against Brinson. This first cause of action is for bad faith breach of contract against the insurance carrier Defendants, Canopius and Seneca. The Declaratory Judgment claim is not a claim for damages against Brinson, who is an insurance agent/agency, not an insurer. This cause of action is a request for a ruling from the Court that the claim at issue is covered by the subject policy/policies. The Orders on Canopius' Motion for Summary Judgment and Seneca's Motion for Judgment on the Pleadings dispose of the first Breach of Contract cause of action (against the insurance carrier Defendants) and the Declaratory Judgment claim. These Orders establish that the subject policies do not provide coverage for Bouchelle's loss as claimed and that Canopius and Seneca are not liable to Bouchelle for Bad Faith Breach of Contract. This leaves Bouchelle's Breach of Contract cause of action (specifically against Brinson) and claim for attorney's fees under S.C. Code § 38-59-40 as the only remaining causes of action.

RULINGS OF LAW

1. As a Matter of Law, Bouchelle's Breach of Contract Claim Against Bouchelle Fails.

The elements of a Breach of Contract cause of action are: (a) a binding contract entered into by the parties; (b) breach or unjustified failure to perform the contract; and (c) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). "Generally, any claim or suit by a party to an insurance contract

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must be based on the terms of the policy as issued." Carolina Bank & Trust Co. v. St. Paul Fire & Marine Co., 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983) *citing* Home Indemn. Co. v. Harleyseville Mut. Ins. Co., 252 S.C. 452, 166 S.E.2d 819 (1960).

The contract at issue is the insurance policy Canopius issued to Bouchelle. According to the contract document (the policy), the only parties to it are Canopius and Bouchelle, Inc. Brinson, an insurance agent, is a not a party to the insurance contract. An insurance agent is not a party to an insurance contract, and no contractual duties extend to a person (insurance agent) who is not a party to the contract. Carter v. Amer. Mut. Fire Ins. Co., 279 S.C. 368, 307 S.E.2d 227 (1983) and Nichols v. State Farm Mut. Auto Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983). There is no evidence Brinson did anything other than act in his capacity as Bouchelle's insurance agent. As a matter of law, Brinson is not a party to the contract for insurance between Bouchelle and Canopius.

Bouchelle also alleges there was a contract between Bouchelle and Brinson whereby Brinson agreed to sell it general contracting coverage. Bouchelle alleges Brinson knew Bouchelle was operating as a general contractor and intended to obtain general contracting coverage. Bouchelle says Brinson breached the contract by failing to obtain insurance coverage under the correct classification, which led to Canopius' denial of Bouchelle's claim.

An insurance agent has no duty to advise an insured at the point of application absent an express or implied undertaking to do so. Gordon v. Fid. & Cas. Co. of N.Y., 238 S.C. 438, 120 S.E.2d 509 (1961) (no relationship of trust and confidence exists between the insurance applicant and the insurance agent). Brinson, as Bouchelle's agent, procured coverage for Bouchelle as an independent contractor for TAPCO, an MGA (managing general agent). Bouchelle submitted its premiums to Brinson, who passed them along to TAPCO. The record is devoid of any evidence that

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a separate contract existed between Bouchelle and Brinson. The record is also devoid of evidence of special trust and confidence between Brinson and Bouchelle.

Further, in order to have a binding contract between two parties, there must be the exchange of valuable consideration. Connor v. Renneker, 25 S.C. 514 (1886); *see also* Hunter v. Mills, 29 S.C. 72, 6 S.E. 907 (1888). Valuable consideration for a contract may consist of some forbearance given or detriment suffered. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). The only exchange of value with respect to Bouchelle's purchase of insurance coverage, was the payment of the subject insurance premium(s). These went to the insurance carrier. There is no evidence that Bouchelle gave anything of value to Brinson that could constitute consideration necessary to show the existence of some separate contract between Bouchelle and Brinson. As a matter of law, no contract existed between Bouchelle and Brinson that could serve as a basis for a breach of contract claim.

Finally, one cannot complain of fraud in the misrepresentation of contents of a written instrument in his possession when the truth could have been ascertained by reading the instrument. Reid v. George Washington Life Ins. Co., 234 S.C. 599, 109 S.E.2d 577 (599). One entering into a contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning. Id. In a case with facts similar to this one, the South Carolina Supreme Court dismissed an insured's claims against an insurance carrier for allegedly selling the wrong coverage where the "plaintiff has 18 months to inform himself as to the terms, conditions and exclusions of the written contract to which he was a party. He made no effort to do so, and never read the contract." Doub v. Weathersby-Breeland Ins. Agency, 268 S.C. 319, 233 S.E.2d 111 (1977).

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Here, Bouchelle applied for and obtained general liability coverage for carpentry services through Brinson as the insurance agent from 2008 – 2014, including the Canopius policy that was in effect in July 2015. Bouchelle received the policies, including the declarations pages, which all listed the classification of coverage as being for carpentry services, not general contracting. This specifically includes the policy in effect in 2015. Bouchelle is an experienced contractor, and its corporate representative, David Bouchelle, is a college-educated gentleman who had the ability to read and comprehend the basis terms of the subject insurance policy. Despite receiving the policies, Bouchelle failed to read any of them over the years or notify Brinson that something was wrong with the coverage. The law precludes Bouchelle from now making a claim against Brinson, the insurance agent, based on the alleged failure to procure the proper policy.

Evidence on record shows that Brinson would submit annual renewal applications for Bouchelle's insurance coverage and that Brinson would sign the applications for David Bouchelle, the company's owner. Mr. Bouchelle maintains he never gave Brinson specific permission to sign Mr. Bouchelle's name for him on the applications. Plaintiff argues this creates a scintilla of fact precluding summary judgment. This is incorrect.

Regardless of whether Mr. Bouchelle gave Brinson specific permission to sign Mr. Bouchelle's name on the applications, Bouchelle knew Brinson was submitting renewal applications on the company's behalf annually. Further, as discussed above, Bouchelle received these policies annually, including one in effect in 2015. Whether Mr. Bouchelle gave Brinson specific permission to sign his name on the applications is not a material fact. Even if the Court accepts as true that Brinson did not have specific permission to sign Mr. Bouchelle's name on the renewal applications, this does nothing to create a basis for a breach of contract claim by Bouchelle against Brinson.

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As a matter of law, Bouchelle's claim for breach of contract against Brinson fails.

2. Bouchelle Cannot Recover Attorney's Fees Against Brinson Under S.C. Code § 38-59-40.

Bouchelle's remaining cause of action, which refers to "the Defendants," is a claim for attorney's fees under S.C. Code § 38-59-40. This Code section provides for liability of an insurer for attorney's fees when the insurer in bad faith refuses to pay a claim. Via the prior Orders entered in this case, Bouchelle's claims for bad faith against the insurance carrier Defendants fail and have been dismissed. Without a claim for bad faith refusal to pay insurance benefits, there can be no claim for attorney's fees under S.C. Code § 38-59-40. Further, the Complaint does not allege Brinson is an insurer. It clearly is not, as Brinson is merely the insurance agent through which Bouchelle purchased the subject policy. Therefore, Brinson cannot be liable for bad faith refusal to pay insurance benefits or for attorney's fees under S.C. Code § 38-59-40. As a matter of law, this claim against Brinson fails as well.

CONCLUSION

Bouchelle's claims against Brinson fail as a matter of law. Therefore, I hereby GRANT Brinson's Motion for Summary Judgment, that ending this case in total.

IT IS SO ORDERED.

June 28, 2018
Charleston, South Carolina

Hon. Jennifer B. McCoy
At Large Circuit Court Judge

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COUNTRYMAN LAW FIRM

LITIGATION ♦ MEDIATION

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July 2, 2018

VIA EMAIL AND MAIL
Karen M. DeJong, Esq.
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Re: Bouchelle v. Brinson, et al.
C/A No.: 2016-CP-10-49844
CLF: 00008 – 00012

Dear Karen:

I enclose a filed copy of the Order granting my Motion for Summary Judgment in this case.

Sincerely,

Andrew W. Countryman

AWC/sgc
Enclosure