

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

In Re: ASOUSA PARTNERSHIP : CIVIL ACTION

ASOUSA PARTNERSHIP : NO. 05-5719
v. :
MANUFACTURERS ALLIANCE :
INSURANCE CO., et al. :

SURRICK, J.

SEPTEMBER 29, 2006

MEMORANDUM & ORDER

Presently before the court is Debtor Asousa Partnership's appeal from the Order of the Bankruptcy Court dated September 23, 2005, entering judgment in favor of Defendants in *Asousa Partnership v. Manufacturers Alliance Insurance Co.*, Adv. No. 03-1005 (Bankr. E. D. Pa. 2005) (Doc. Nos. 1, 4). For the following reasons, we will affirm the decision of the Bankruptcy Court, and the appeal will be dismissed.

I. BACKGROUND

This matter arises out of a dispute regarding insurance coverage. The relevant and undisputed facts are as follows. Asousa Partnership ("Debtor") is a Pennsylvania general partnership that owns the land and buildings at 980 Glasgow Street, Pottstown, Montgomery County, Pennsylvania ("the Premises"). On February 20, 2001, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Eastern District of Pennsylvania. On September 11, 2003, Debtor initiated an adversary action against Manufacturers Alliance Insurance Company ("MAICO"), Chapel Insurance Associates, Inc. ("Chapel"), and Kaminsky Insurance Agency, Inc. ("Kaminsky," and together with Chapel,

“C&K”). The adversary action arose out of Debtor’s ownership of the Premises. In 2000, Debtor entered into a lease for the Premises with Pennexx Foods, Inc., formerly known as Pinnacle Foods, Inc. (“Pinnacle”). Pinnacle vacated the Premises in July 2002, leaving significant damage and rendering the Premises unrentable.

Pinnacle had procured an insurance policy for the Premises through C&K (the “CGU Policy”). This policy ran from September 1, 2000 through September 1, 2001 and named Debtor as an additional insured under the policy. Pinnacle did not renew the policy when it expired and instead, obtained a new policy with a different insurer (“MAICO Policy”), for the period from September 1, 2001 through September 1, 2002. C&K, acting as an insurance agent, obtained the MAICO Policy for Pinnacle. The MAICO Policy provided both property damage insurance for the Premises and liability insurance for Pinnacle. Chapel had a written Agent Agreement with MAICO at all relevant times.

On October 10, 2001, Wayne McFarland, an employee of Chapel, faxed to Debtor documents entitled Evidence of Property Insurance and Certificate of Liability Insurance (the “Certificates”). McFarland did this on his own initiative, as Debtor had made no inquiries to Pinnacle or to C&K after the expiration of the CGU Policy. The Certificates are dated October 10, 2001. The Certificates indicate that Debtor is an additional insured under the MAICO Policy. C&K did not seek MAICO’s prior approval to issue these documents and, in fact, failed to notify MAICO once it had issued them. McFarland was subsequently fired from C&K because of his failure to notify MAICO that Debtor was added to the Policy as an additional insured. After Pinnacle vacated the Premises in 2002, Debtor submitted a claim to MAICO for the damages to

the property.¹ MAICO informed Debtor that it was not listed as an additional insured under the Policy. Even after Debtor submitted copies of the Certificates to MAICO it did not change its position.

In its adversary action against Defendants, Debtor sought coverage as an additional insured under the MAICO Policy. Debtor has since settled with MAICO. (Apr. 8, 2005 Trial Tr. at 172.) Its remaining claims against C&K are alternative theories of recovery. Count Three of Debtor's Complaint alleges breach of contract against C&K, Count Four alleges negligence, and Count Five alleges negligent misrepresentation. (Compl. at 8-9.) By Memorandum Opinion and Order dated September 23, 2005, the Bankruptcy Court found in favor of Chapel and Kaminsky on all three claims. *Asousa P'ship v. Mfr. Alliance Ins. Co.*, Adv. No. 03-1005, 2005 WL 2857983 (Bkrcty. Ed. Pa. Sept. 23, 2005).

Debtor has filed an appeal from the Bankruptcy Court's decision with respect to Counts Four and Five.

II. LEGAL STANDARD

This court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158(a)(1). The Court reviews the Bankruptcy Court's "legal determinations de novo, its factual findings for clear error and its exercise of discretion for abuse thereof." *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998) (citation omitted); *see also* Fed. R. Bankr. P. 8013. "A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Casey*

¹ Debtor has obtained a judgment against Pinnacle for damage Pinnacle caused to the Premises.

v. Kasal, 223 B.R. 879, 883 (E.D. Pa. 1998) (internal quotations and citations omitted). “In a mixed question of law and fact, the bankruptcy court’s decision is subject to a mixed standard of review; historical or narrative facts are accepted unless clearly erroneous, but the choice of legal precepts and the application of those precepts to the historical facts are subject to plenary review.” *In re Marks*, 174 B.R. 37, 39 (E.D. Pa. 1994) (citing *Mellon Bank, N.A. v. Metro Commc’ns, Inc.*, 945 F.2d 635, 641 (3d Cir. 1991)).

III. DISCUSSION

A. Debtor’s Negligence Claim

Debtor’s first contention is that the Bankruptcy Court erred as a matter of law when it held that Debtor did not have a negligence claim against C&K. “In order to prevail on a cause of action in negligence under Pennsylvania law, a plaintiff must establish: (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another.” *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1366 (3d Cir. 1993) (citing *Morena v. S. Hills Health Sys.*, 462 A.2d 680, 684 n.5 (Pa. 1983)). “The duty owed by an insurance agent to an insured is to obtain the coverage that a reasonable and prudent professional insurance agent would have obtained under the circumstances.” *Fiorentino v. Travelers Ins. Co.*, 448 F. Supp. 1364, 1369-80 (E.D. Pa. 1978). In its Complaint, Debtor alleged that C&K owed Debtor a duty “to exercise reasonable care to obtain insurance coverage for the Debtor” under the MAICO Policy, that if Debtor was not an additional insured under the MAICO Policy then C&K “breached their duty to Debtor,” and that as a result of C&K’s negligence, “the Debtor has been damaged and is entitled

to recover[] compensatory damages against said Defendants” (Bankr. Rec., Doc. No. 6 at 8-9.)

The Bankruptcy Court concluded that Debtor had failed to prove both “actual injury, and a causal connection between the negligence and the injury.” (Bankr. Rec., Doc. No. 19 at 13.) Debtor contends that the Bankruptcy Court erred as a matter of law when it held that Debtor had not established a causal connection between C&K’s negligence and Debtor’s injury. (Doc. No. 4 at 25.) According to the Bankruptcy Court, while MAICO’s treatment of Debtor’s claim was initially caused by C&K’s failure to notify MAICO of its undertaking, the record demonstrated that Debtor had provided MAICO with the Certificates. The Court concluded that once MAICO became aware of the Certificates, which indicated that Debtor was an additional insured under the Policy, it was obligated to acknowledge Debtor’s additional insured status. Thus, the Bankruptcy Court found that “[a]ny negligence by C&K in failing to provide the notice to MAICO no longer was the cause of Debtor’s injury.” (Bankr. Rec., Doc. No. 19 at 13-14.) According to Debtor, the Bankruptcy Court should have analyzed whether C&K’s conduct was a “substantial factor” in causing Debtor’s injury. (Doc. No. 4 at 25.) Debtor argues that the Bankruptcy Court was wrong in concluding that MAICO’s conduct—refusing to acknowledge Debtor as an additional insured—superseded the wrongdoing by C&K. (*Id.* at 29.)

As the Bankruptcy Court noted, the harm alleged in Count Four of Debtor’s Complaint is that Debtor was not an additional insured and therefore could not recover from MAICO for the damage to the Premises. (Bankr. Rec., Doc. No. 19 at 23; Compl. ¶¶ 48-49.) Although Debtor contends that this harm was a result of C&K’s negligence, the Bankruptcy Court concluded that there was no injury at all because MAICO was legally bound to treat Debtor as an additional

insured. The Bankruptcy Court examined the Pennsylvania law of agency as well as the content of the documents issued to Debtor, the Certificate of Liability Insurance and Evidence of Property Insurance. The Court concluded that, under Pennsylvania law, once MAICO was aware of the issuance of the Evidence of Insurance, MAICO was legally obligated to treat Debtor as an additional insured. (Bankr. Rec., Doc. No 19 at 6-12.) *See* Restatement (Second) of Agency § 329 (1958); *Serventi v. N.Y. Fire Ins. Co.*, 253 F. Supp. 670 (W.D. Pa. 1966); *Aiello v. Ed Saxe Real Estate, Inc.*, 499 A.2d 282, 285 (Pa. 1985); *Passarelli v. Shields*, 156 A.2d 343, 346 (Pa. Super. Ct. 1959); *Pa. Nat.'l Mut. Cas. Ins. Co. v. Ins. Comm'r*, 551 A.2d 368, 373 (Pa. Commw. Ct. 1988). The Bankruptcy Court determined that “Pennsylvania law binds MAICO to treat Debtor as an additional insured, notwithstanding that C&K may have exceeded its authority.” (Bankr. Rec., Doc. No. 19 at 13.) This conclusion has not been challenged by Debtor. Moreover, we find no fault with the Bankruptcy Court’s analysis regarding MAICO’s obligation to Debtor.

In addition, and as the Bankruptcy Court explained, even if the harm alleged was not simply that Debtor was not an additional insured, but also harm arising from MAICO’s refusal to acknowledge Debtor as an additional insured, such injury or harm had no causal connection to C&K’s negligence. C&K’s misconduct was their failure to notify MAICO regarding the status of Debtor as an additional insured as indicated on the Certificates. Once MAICO was aware of the issuance of the Certificates, MAICO should have treated Debtor as an additional insured. In refusing to do so, MAICO disregarded its obligation under Pennsylvania law. The Bankruptcy Court found that any harm resulted from MAICO’s actions, not C&K’s conduct. (Bankr. Rec.,

Doc. No. 19 at 14.)² We agree with the Bankruptcy Court. The only period during which C&K's misconduct could have caused harm was the time period occurring after the Certificates were issued but before MAICO received a copy of the Certificates as part of Debtor's claim. Nothing in the Complaint nor in the record before us indicates that Debtor suffered any actual harm during this period.³

² According to Debtor, the Bankruptcy Court "found that MAICO's denial of coverage was foreseeable in light of the Insurance Agent Defendants' failure to notify MAICO that they had bound coverage." (Doc. No. 4 at 24.) In support of this contention, Debtor cites to the Bankruptcy Court's opinion, which states:

The outcome of this lack of communication [between C&K and MAICO] is painfully predictable. . . . Debtor . . . submitted a claim with MAICO. MAICO conducted an investigation of its records and informed Debtor that it was not listed as an additional insured under the MAICO Policy. Asousa submitted copies of the Certificates to MAICO, but MAICO did not change its position. MAICO has at all times in the course of this litigation taken the position that Debtor is not an additional insured.

(Bankr. Rec., Doc. No. 19 at 4-5) (internal citations omitted). Debtor argues that MAICO was presented "with a colorable basis upon which to deny coverage" due to C&K's conduct. As noted, once MAICO became aware of the issuance of the Certificates, it was MAICO's refusal that caused the harm to Debtor. Moreover, contrary to Debtor's argument, MAICO had no colorable defense for its actions. Thus, there is no basis for Debtor's argument.

³ Debtor makes the argument that it was not an additional insured until the Bankruptcy Court's ruling on September 23, 2005, which "belatedly conferred additional insured status on Debtor." (Doc. No. 4 at 37.) Debtor is mistaken in its belief that Pennsylvania law only recognized Debtor as an additional insured once the Bankruptcy Court stated as much. Since Pennsylvania's law on agency bound MAICO once it was aware of the issuance of the Certificates, Debtor had a claim against MAICO at the time of injury. *See, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 152 (3d Cir. 1998) (in the context of applying statute of limitation, "[a] claim under Pennsylvania law accrues at 'the occurrence of the final significant event necessary to make the claim suable'"); *Erdely v. Hinchcliffe & Keener, Inc.*, 875 A.2d 1078, 1085 (Pa. Super. Ct. 2005) ("As with any tort claim, a cause of action does not accrue until there is an injury.").

Debtor's reliance on *Consolidated Sun Ray, Inc. v. Lea*, 401 F.2d 650 (3d Cir. 1968), is misplaced. In *Consolidated Sun Ray*, the insurance broker failed to procure the insurance policy requested by the plaintiffs. The trial court found that the broker had breached its duty as an insurance broker by failing to obtain the proper coverage for its client and that this breach was a direct cause of the plaintiffs' injury. *Id.* at 656-57. As Debtor recites in its pleadings here, the trial court in *Consolidated Sun Ray* noted that the broker's breach of duty gave rise to all of the insurer's colorable defenses. *Id.* at 656-57. The Third Circuit affirmed the trial court, noting that "[n]ot a single one of [the insurer's] defenses would have been available to it if [the broker] had done what should have been done." *Id.* at 659. The *Consolidated Sun Ray* court held that an insurance broker may be liable for negligence in procuring inadequate insurance coverage. *See id.* at 657-59; *see also ACandS, Inc. v. Aon Risk Svcs.*, Civ. A. No. 01-3277, 2004 WL 2601035, at *2 (E.D. Pa. Nov. 10, 2004) (plaintiff has to prove only that insurer "possessed a colorable defense in its case in chief because otherwise there is no liability by the broker").⁴ Debtor argues

⁴ We further note that in *Consolidated Sun Ray*, the Supreme Court of Pennsylvania addressed the obligations of an insurance broker, not an insurance agent. Logically, the obligations of a broker and an agent differ. An agent is a person authorized to solicit insurance and negotiate policies on behalf of any insurer. A broker is a person who acts on behalf of another person to obtain insurance. *See Antimary v. Workmen's Comp. Appeal Bd.*, 655 A.2d 659, 662 n.6 (Pa. Commw. Ct. 1995); *see also Kearns v. Minn. Mut. Life Ins. Co.*, 75 F. Supp. 2d 413, 422 n.12 (E.D. Pa. 1999); 75 Pa. D. & C. 2d 621, 623 (Pa. Ct. Comm. Pl. 1975); *Turko v. Pa. Threshermen & Farmers' Mut. Fire Ins. Co.*, 6 Pa. D. & C. 2d 70, 74-75 (Pa. Ct. Comm. Pl. 1955); 3 Lee R. Russ, *Couch on Insurance* § 45:1 (3d ed. 2006). *But see* 40 P.S. §§ 231, 251, *repealed by* Dec. 6, 2002 P.L. 1183, No. 147 § 1 (repealing statute which made explicit the broker/agent distinction). Sometimes a broker acts as a middle man and can be an agent for the insured in some respects and for the insurer in other respects. *Rich Maid Kitchens, Inc. v. Pa. Lumbermens Mut. Ins. Co.*, 641 F. Supp. 297, 303 (E.D. Pa. 1986); *see also Benevento v. LifeUSA Holding, Inc.*, 61 F. Supp. 2d 407, 415 (E.D. Pa. 1999) (where person applies to broker seeking property insurance, broker is usually deemed to be agent of the insured, not the insurer). As Debtor noted in its pleadings before the Bankruptcy Court, C&K was an insurance agent with

that C&K's negligence gave MAICO "a colorable defense to the Debtor's claim that it was an additional insured." (Doc. No. 4 at 27.) However, C&K provided documentation to Debtor indicating that Debtor was an additional insured. As discussed above, under the law of agency in Pennsylvania, this act bound MAICO to honor Debtor's status as an additional insured.

Passerelli, 156 A.2d at 347; *Pa. Nat'l. Mut. Ins.*, 551 A.2d at 373. Accordingly, MAICO had no colorable defense to Debtor's claim. Moreover, unlike the plaintiffs in *Consolidated Sun Ray*, Debtor in fact procured the type of coverage that it desired.⁵

The case law on causation upon which Debtor relies similarly has no application here, where there is no causal connection between Debtor's alleged injury and the conduct of C&K.

Debtor cites to the Bankruptcy Court's statement that

[w]hile MAICO's treatment of Debtor's claim was no doubt initially caused by C&K's failure to notify MAICO of its undertaking, this record shows that Debtor provided the Evidence of Insurance to MAICO as part of its claim. . . . Any negligence by C&K in failing to provide the notice to MAICO no longer was the cause of Debtor's injury.

a written agent agreement with MAICO at all relevant times. (Bankr. Rec., Doc. No. 18 at 2; *id.*, Doc. No. 19 at 3.) Indeed, Todd Asousa, Debtor's principal, testified that he had no financial relationship with C&K. (Apr. 8, 2005 Trial Tr. at 230.) While the broker in *Consolidated Sun Ray* represented the interests of the plaintiffs-insurers, here C&K, as an agent for MAICO, arguably represented the interests of MAICO in the transaction with Debtor. In any case, as discussed above, C&K fulfilled its obligation to Debtor by issuing the Certificates, which indicated that Debtor was an additional insured.

⁵ The other case on which Debtor relied is also distinguishable. In *County Forest Products, Inc. v. Green Mountain Agency, Inc.*, 758 A.2d 59 (Me. 2000), the insured sued an insurance agency for failure to procure increased coverage limits from the insurer. The Supreme Judicial Court of Maine upheld the trial court's finding that the agency was liable to the insured, noting that "when an insurance broker or agent undertakes to provide insurance for another but fails to do so, the agent is liable in the amount that would have been due if the policy had been obtained." *Id.* at 70. As we have already noted, Debtor obtained the coverage it sought from C&K.

(Bankr Rec., Doc. No. 19 at 13-14; Doc. No. 4 at 29.) According to Debtor, the Bankruptcy Court “concluded that MAICO’s conduct superseded the Insurance Agent Defendants’ negligence as the causal factor of harm to the Debtor” (Doc. No. 4 at 29.) Debtor misreads the Bankruptcy Court’s statement. Upon examination of the record, we understand the Bankruptcy Court’s statements to mean that C&K’s actions may have delayed the point at which MAICO became aware of the issuance of the Evidence of Insurance, but it was MAICO’s refusal to adhere to Pennsylvania law on agency that actually caused all of the injury alleged by Debtor. As the Bankruptcy Court indicated, MAICO’s refusal to acknowledge Debtor’s additional insured status was experienced “without regard to whether Debtor could have ultimately enforced its right as an additional insured in a court of law.” (Doc. No. 19 at 13.) Thus, at the time that Debtor experienced the alleged harm of being denied additional insured status, it was MAICO, not C&K, that was the source of that harm. Based upon the record before us, we are satisfied that C&K’s conduct was simply not a substantial factor in causing the harm. *See* Restatement (Second) Torts § 431(a) (1965) (an actor’s negligent conduct is a legal cause of harm if “his conduct is a substantial factor in bringing about the harm”); *see also Chicano v. Gen. Elec. Co.*, Civ. A. No. 03-5126, 2004 WL 2250990, at *10 (E.D. Pa. 2004) (“The act or omission need not be the only cause of the injury, but it must be a discernible cause.”); *Whitner v. Von Hintz*, 263 A.2d 889, 894 (Pa. 1970) (“[I]f the harmful result would have come about even had the actor not been negligent, the negligent conduct, even though contributory, is not a substantial factor; hence no legal causation, and no liability.”). Because C&K’s conduct was not a substantial factor in causing the alleged harm, whether MAICO’s conduct was an intervening act or not, as described in § 447 of the Restatement (Second) of Torts, is irrelevant. *See* Restatement (Second) Torts §

447 (1965) (in analysis of negligence of intervening acts, initial actor's negligence must be a substantial factor in causing harm); *see also Grainy v. Campbell*, 425 A.2d 379, 381 (Pa. 1981) (§ 447 adopted as Pennsylvania law).

The harm alleged—MAICO's denial of additional insured status to Debtor—turned not on C&K's conduct but on MAICO's decision to ignore Pennsylvania law. We agree with the Bankruptcy Court that C&K's conduct in this matter might give rise to a cause of action by MAICO, but not Debtor. (Bankr. Rec., Doc. No. 19 at 14.)⁶

Debtor contends that the Bankruptcy Court should not have addressed the issue of whether there were actual damages, because the parties had stipulated that actual damages were presumed for the liability phase of the trial. (Doc. No. 4 at 33.) The Amended Joint Pretrial Statement On Liability Only states that the parties agreed that “Debtor need not establish compensable harm (since such harm shall be deemed presumed for purposes of phase one only).” (Bankr. Rec., Doc. No. 16 at 1.) However, the Statement also indicates that Debtor would seek to prove at trial that “[a]s a direct and proximate result of C&K's negligence, the Debtor has been damaged” and that “[t]he Debtor justifiably relied on the misrepresentation(s) made by Defendants C&K and suffered harm as a result thereof.” (*Id.* at 8-9.) At trial, Todd Asousa testified that the Premises was damaged after Pinnacle was evicted, that MAICO did not honor the claim for property damage, and that Debtor obtained insurance coverage for the Premises from another insurance company. (Apr. 8, 2005 Trial Tr. at 217-19.) There is no reason for the

⁶ Because we affirm the Bankruptcy Court's opinion on the basis of a lack of causal connection and actual injury, we need not reach the issue raised by C&K on appeal as to whether a duty existed between C&K and Debtor. (Doc. No. 6. at 18-19.)

Bankruptcy Court not to have addressed the issue of actual harm as it related to the issue of whether C&K caused Debtor's alleged harm.

B. Debtor's Negligent Misrepresentation Claim

Debtor also contends that the Bankruptcy Court erred when it concluded that Debtor had not proven its negligent misrepresentation claim against C&K. (Doc. No. 4 at 35.) "Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." *Bortz v. Noon*, 729 A.2d 555, 561 (Pa. 1999); *see also Puchalski v. Sch. Dist. of Springfield*, 161 F. Supp. 2d 395, 404 (E.D. Pa. 2001). The Complaint alleges that "[i]n the event that the Debtor was not (and is not) an additional insured under the Policy, then Defendants Chapel and Kaminsky misrepresented to the Debtor the fact that the Debtor was an additional insured under the Policy, which fact was material." (Bankr. Rec., Doc. No. 6 at 9.) According to Debtor's Complaint, C&K either knew of the misrepresentation or negligently made the representation to Debtor, intended the representation to induce Debtor to act such that Debtor would believe it was an additional insured under the MAICO Policy, and that Debtor "was injured as a result of its justifiable reliance on the misrepresentation." (*Id.*)

The Bankruptcy Court found that the Evidence of Property Insurance "was an unequivocal assertion that Debtor was a named insured." (Bankr. Rec., Doc. No. 19 at 15.) Thus, there was no misrepresentation by C&K because the communications by C&K to Debtor regarding the latter's insured status were entirely truthful. (*Id.*) Since we have concluded that the Bankruptcy Court's application of the Pennsylvania law of agency to this matter was correct,

we agree with the Court's conclusion that there was no misrepresentation as a matter of law. Debtor insists that "implicit" in C&K's issuance of the Certificates to Debtor "was a representation by them that they had taken all actions necessary and appropriate to cause MAICO to add the Debtor as an additional insured under the Policy." (Doc. No. 4 at 36.) However, Debtor's Complaint alleges no such misrepresentation by C&K. *Cf. Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 945 (9th Cir. 2005). Moreover, Debtor offers no authority to support its assertion that we should find an implicit representation by C&K in the issuance of the Certificates. Instead Debtor relies solely on *Livid Holdings*, 416 F.3d at 952, which does not address whether a cognizable claim for negligent misrepresentation exists based on an implied representation by an insurance agent in the issuance of insurance documents. Instead, *Livid Holdings* addresses the adequacy of an investor's complaint alleging, *inter alia*, negligent misrepresentation by a promoter of stock. *Id.*

In addition, the Bankruptcy Court found that, even if there was a misrepresentation, there was no evidence that Debtor had relied upon the Evidence of Property Insurance except for the "self-serving trial testimony" of Todd Asousa, Debtor's principal, which the Court found contradictory to "his other testimony and his actions at the relevant time" and thus not credible. (Bankr. Rec., Doc. No. 19 at 4, 15; Apr. 8, 2005 Trial Tr. at 216-17.) According to the Bankruptcy Court, the trial record demonstrated that while Debtor and its counsel were concerned with insurance in February and March 2001, at the start of the bankruptcy proceedings "nothing on this record indicates that Debtor followed up to ensure that the CGU Policy was renewed or replaced." (Bankr. Rec., Doc. No. 19; Apr. 8, 2005 Trial Tr. at 191-92, 194-95.) The Court found that Debtor knew that the CGU Policy expired on September 1, 2001, but that

Asousa had not requested the Certificates that were sent by McFarland in October of that year, nor did Asousa adequately review the Certificates. (Bankr. Rec., Doc. No. 19 at 15-16; Apr. 8, 2005 Trial Tr. at 217, 224.) Indeed, according to Asousa's own testimony, he initially assumed that the Certificates related to the CGU Policy and not the MAICO Policy, and did not have the underlying MAICO Policy. (Apr. 8, 2005 Trial Tr. at 222-23; 229.) Even Debtor's bankruptcy counsel did not request a copy of the MAICO Policy. (*Id.* at 200.) The Court found it unbelievable that "receipt of these documents affected Debtor's action or inaction with respect to insurance on the Premises." (Bankr. Rec., Doc. No. 19 at 16.) The Court also found it relevant that although Asousa testified that if he had not received the Certificates, he would have taken affirmative action to protect the Premises, this alleged reliance was refuted by the fact that Debtor had already instituted an adversary action to evict Pinnacle due to its breach of the lease for the Premises and by the fact that Asousa had not even requested the Certificates. (*Id.* at 4; Apr. 8, 2005 Trial Tr. at 184-85, 216-17.)

With respect to the Bankruptcy Court's factual determinations, "the clearly erroneous standard is stringent: 'It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either is completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data.'" *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1223 (3d Cir. 1995) (quoting *Hoots v. Pennsylvania*, 703 F.2d 722, 725 (3d Cir. 1983)). Additionally, as an appellate court we must "give 'due regard' to the opportunity of that court to judge first-hand the credibility of witnesses." *Id.* (citing Fed. R. Bankr. 8013). We have reviewed the record and conclude that Debtor has failed to demonstrate how the Bankruptcy

Court's findings regarding a lack of reliance were clearly erroneous. Accordingly, we will affirm the Bankruptcy Court's order entering judgment for C&K with respect to Count Five of the Complaint.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASOUSA PARTNERSHIP : CIVIL ACTION

ASOUSA PARTNERSHIP : NO. 05-5719
v. :
MANUFACTURERS ALLIANCE :
INSURANCE CO., et al. :

ORDER

AND NOW, this 29th day of September, 2006, upon consideration of the Brief of Appellant Asousa Partnership (Doc. No. 4), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that the judgment of the Bankruptcy Court is AFFIRMED, and the appeal is DENIED. The Clerk of Court is directed to close this case.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick
U.S. District Court Judge