

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEXSON SUPPLY, INC. : CIVIL ACTION
: :
v. : :
: :
TONGUE, BROOKS & CO., INC., et al : NO.: 93-3450

O'Neill, J March , 1998

MEMORANDUM

This breach of contract and fraudulent misrepresentation action concerns two insurance policies issued to plaintiff Alexson Supply, Inc. by defendant Maryland Casualty Insurance Company through Alexson's broker, defendant Tongue, Brooks & Company. Plaintiff alleges that defendants conspired to defraud it by concealing the availability of cheaper insurance and charging grossly excessive premiums. In addition, plaintiff alleges that both parties breached their contracts and that Maryland Casualty breached a statutory duty of good faith. Defendants move for summary judgment contending that the record does not support any of plaintiff's claims.

I. Factual Background

Alexson sells and rents construction supplies and equipment to contractors and, during the time period relevant to this case, was owned and operated by various members of the McGough family. From 1977 until January, 1992, it obtained all of its insurance from Maryland Casualty through its insurance broker, Tongue Brooks. The coverage included a general business liability package and a commercial automobile package.¹ At issue here are the business and automobile policies issued to Alexson for the policy years July 1, 1990 - June 30, 1991 ("July 1990 policy") and

¹ A third policy issued by Maryland Casualty to Alexson covered workers' compensation. This policy is not at issue.

July 1, 1991 - June 30, 1992 (“July 1991 policy”).

On April 12, 1990 Maryland Casualty informed Alexson through Tongue Brooks that it intended to cancel both the business and automobile policies. Maryland Casualty stated that it was canceling the automobile policy because of a poor loss history. It is undisputed that Alexson had a poor loss history for its automobiles. Automobile insurance premiums are based in large part on the insured’s “auto loss ratio” which compares losses to premiums. In 1987, 1988 and 1989 Alexson’s auto loss ratios were 411%, 154% and 202% respectively.

Maryland Casualty stated in its April 12, 1990 notification that it was canceling the business coverage because of Alexson’s failure to implement loss control recommendations. The record contains three different letters recommending certain loss control procedures, and it is unclear from the record whether Alexson implemented all of these recommendations.

On behalf of Alexson, Mr. Raymond Brooks, Alexson’s contact at Tongue Brooks, discussed the renewal of both insurance packages directly with Maryland Casualty. After these discussions, he stated in a letter to Mr. Dennis McGough of Alexson dated April 27, 1990 that Maryland Casualty would be willing to renew the automobile and business packages if it received Alexson’s full cooperation in establishing a Drivers and Maintenance Safety Program. Also in that letter, Mr. Brooks stated that “since I spoke to you in a recent meeting, I have been in touch with no less than 12 insurers in the marketplace and there is not one that is willing to look at your Business Automobile Policy and prefer not to look at your account in general because of the horrible Business Automobile experience and the property losses that occurred in 1988.” According to Mr. McGough, Mr. Brooks also stated in various conversations in 1990 and 1991 that Alexson could not go anywhere else to obtain insurance and that Alexson had to get its insurance from Maryland Casualty

no matter what it charged.

Also in that April 27, 1990 letter, Mr. Brooks suggested that Alexson not deal with Liberty Mutual Insurance Company. He stated that “their financial stability might well be questioned in that they have now, during this year of 1990, lost an additional ½% point on their Bests financial rating. I believe that this is not a company that you want to be involved with at this time nor in the near future.”

On May 30, 1990 Maryland Casualty notified Alexson of an increase in the premium for the automobile policy from Maryland Casualty to \$46,361, which was later reduced to \$41,750, from the previous year’s premium of \$20,671. This quotation was based on Alexson’s auto loss ratio for 1987, 1988 and 1989 which caused Alexson to no longer be considered a “preferred customer” eligible for lower rates offered by Maryland Casualty subsidiary, Northern Insurance Company. The coverage was thus offered by Maryland Casualty rather than Northern.

Maryland Casualty also offered to renew the business insurance package at a significantly higher premium of \$48,750 as compared to the \$21,911 premium for the previous year. According to Maryland Casualty, this increase was due to Alexson’s loss history and new classifications of general liability risks instituted by the Pennsylvania Insurance Services Office.

On the advice of Mr. Brooks, Mr. McGough wrote two letters to the Insurance Department of the Pennsylvania complaining about the increased premiums. Nonetheless, after Mr. Brooks gave up half of his agency commission, Alexson agreed to be insured by Maryland Casualty for the July 1990 policy year. Alexson paid the premiums and Maryland Casualty provided the insurance as agreed. Alexson had no losses in either its automobile or business packages for the July 1990 policy year.

Alexson claims that its willingness to pay the greatly increased premium amount was due in large part to Mr. Brooks' representations that no other carrier would insure Alexson. In addition, it did not seek to place its insurance with Liberty Mutual because of Mr. Brooks' concerns about Liberty Mutual's financial stability. In fact, according to plaintiff's insurance expert, Jay Frank, "Liberty Mutual was then [1990-1991] and still is one of the leading underwriters of property casualty insurance in the USA." Plaintiff, however, produced no evidence that Mr. Brooks' statement about the reduction in Liberty Mutual's Bests rating was false or that the lowered rating was not a reasonable cause for concern.

In setting the premium for the July 1990 business liability policy, Maryland Casualty misclassified Alexson's revenue. The business liability coverage is based in part on the source of Alexson's revenue. From Alexson's point of view, the more revenue classified as sales as opposed to rentals the better because the sales category has a lower premium rate. It is estimated that between 70-85% of Alexson's revenues are sales and between 30-15% is rental. While performing an audit of the July 1990 policy year, an auditor at Maryland Casualty discovered that all Alexson's revenue had been classified as rental revenue. The misclassification led to an overcharge of approximately \$12,000.

Maryland Casualty corrected this classification error for the July 1991 policy year, but did not refund the \$12,000 and did not inform Alexson of the previous year's misclassification. For the July 1991 policy year, Maryland Casualty quoted Alexson a premium of \$75,067 for both the automobile and business packages as compared to the previous year's total of \$90,500. While Alexson was again dissatisfied with the premium amount, it nonetheless agreed to place its insurance coverage with Maryland Casualty. Again, Alexson contends that it placed its insurance with

Maryland Casualty in reliance on Mr. Brooks' oral representations that no insurance carrier other than Maryland Casualty would be willing to provide it with coverage.

In December 1991, Alexson began to look for insurance coverage from other carriers and found that at least two companies, Liberty Mutual and Zurich American Insurance Company, were willing to insure Alexson for premiums lower than what Maryland Casualty had charged for the July 1990 and July 1991 policy years. In January 1992, Alexson canceled its policy with Maryland Casualty, obtained coverage from Liberty Mutual, and soon thereafter initiated this suit.²

II. Summary Judgment Standard

In reviewing a motion for summary judgment, I must consider whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). To determine whether there is a genuine issue of material fact, I must ask whether a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). I must draw all reasonable inferences in favor of the nonmovant. Id. at 256. Where, as here, the nonmoving party bears the burden of proof at trial, the moving party bears the initial burden of showing an absence of factual issues. Once this burden is met, the nonmoving party must then establish sufficient evidence for each element of its case. J.F. Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986)).

² From July 1991 to January 1992 Alexson had no losses on either its automobile or business policies.

III. Discussion

Plaintiff's complaint enumerates three difference counts, but each count is based on the same alleged course of conduct -- that defendants conspired to charge plaintiff excessive premiums by intentionally misclassifying revenue and by concealing the availability of cheaper insurance. Therefore, before listing the counts and the elements plaintiff must prove to prevail on those counts, I examine the evidence in the record in support of plaintiff's allegations that the misclassification and Mr. Brooks' representations were part of a conspiracy to extract excessive premiums from plaintiff. I then review the individuals counts in light of this evidence and the parties' arguments for and against summary judgment.

Plaintiff contends that the misclassification was intentional and part of defendants' conspiracy to defraud. In support of this contention plaintiff points to the testimony of Ms. Gibbons, the Maryland Casualty underwriter who was involved in pricing the business package policy for the July 1991 policy year. She testified that whenever premiums increased by more than 20%, as the premiums did here, the company was supposed to check to see if it made a mistake. One of the things that they would check was whether the insured's revenues were properly classified. An auditor for Maryland Casualty wrote a report dated September 5, 1991 concerning the July 1990 policy year, which included a review of the revenue classification. The audit showed rental receipts of \$316,072 and sales receipts of \$1,992,957, but the auditor classified all of the receipts as rental (#11208), the category with the higher premium rate. The report also stated that classification of the receipts as rental was "requested" by an unnamed person at Maryland Casualty. After receiving this information from its auditor, Maryland Casualty issued a premium notice to Alexson reporting

receipts of \$2,309,029 all categorized as rental, #11208. From this evidence a reasonable juror could conclude that not only did Maryland Casualty know about the classification error, but that someone at Maryland Casualty directed that all the receipts be classified in the rental category, the one with the higher premium rate, to maximize profits.

Plaintiff also contends that Mr. Brooks was aware of the misclassification and did not inform plaintiff. The record, however, does not support such a conclusion. Plaintiff points to a letter that Mr. Brooks sent the insurance commissioner where he failed to make any mention of Maryland Casualty's misclassification error. This letter provides no support for plaintiff's contention that Mr. Brooks was aware of the misclassification. In support of its argument that Mr. Brooks was aware of the misclassification, plaintiff also refers me to the testimony of Anjanette Owen, a district manager for Liberty Mutual, and Theresa M. Adriani, who testified as a designee for defendant Maryland Casualty. Ms. Owen and Ms. Adriani testified that normally the sales representative provides the classification information to the insurer. In addition, plaintiff points to two letters: the first is a letter to an underwriter for Maryland Casualty from Ms. Ann L. Fingles, an employee of Tongue Brooks, stating that only 15% of that Alexson's receipts should be classified as rentals; and the second was written by Mr. Brooks to Dennis McGough and conveyed the importance of separating sales revenue from rental revenue on the financial records.

This evidence does not support an inference that Mr. Brooks was aware of the misclassification. On the contrary, this evidence establishes that Mr. Brooks knew the importance of the classifications, told Alexson to classify its revenue on their financial records, and informed Maryland Casualty that only 15% of Alexson revenues should be classified as rentals. In addition, Mr. Brooks denied knowing about the misclassification and cut his commission in half to appease

Alexson. Therefore, while plaintiff produced evidence from which a reasonable juror could conclude that Maryland Casualty intentionally misclassified its receipts, it failed to produce any evidence that Mr. Brooks knew that Maryland Casualty misclassified the revenues, much less participated in a conspiracy to conceal the misclassification.

Plaintiff also alleges that Mr. Brooks and Maryland Casualty conspired to conceal the availability of cheaper insurance. Plaintiff alleges that Mr. Brooks lied to plaintiff by telling it that no other insurance carrier would insure it and that it had to accept Maryland Casualty's price no matter what it charged. In addition, it contends that Mr. Brooks' statement about Liberty Mutual's financial instability was part of defendants' plan to conceal the availability of cheaper insurance.

In conversations with various members of the McGough family, Mr. Brooks represented that no one other than Maryland Casualty would be willing to insure plaintiff and that Alexson had to get its insurance from Maryland Casualty whatever it charged. Plaintiff, however, was able to get insurance from Liberty Mutual in January 1992 and also received a quote from Zurich-American Insurance Company in December 1991. Alexson eventually selected Liberty Mutual because it offered cheaper coverage.

As discussed below, it is unclear from the evidence in the record whether Mr. Brooks' statements about the unavailability of insurance from other carriers was incorrect. See infra note 4. The evidence, however, even after allowing for all reasonable inference in plaintiff's favor, is insufficient to support a reasonable finding that Mr. Brooks' representations were factual as opposed to opinion, that Alexson justifiably relied on Mr. Brooks' statements, or that Mr. Brooks either knew about the falsity of the statement or was reckless with regard to its truth. In addition, there is no evidence from which a reasonable juror could infer the existence of an agreement between Maryland

Casualty and Tongue Brooks to conceal the availability of cheaper insurance or charge Alexson excessive premiums. In short, plaintiff has made broad allegations of conspiracy, fraud and a course of bad faith conduct, but with the exception of the misclassification by Maryland Casualty, it failed to present sufficient evidence in support of these allegations to warrant their submission to a jury.

C. Count I - Breach of Statutory Duty of Good Faith - Maryland Casualty

In Count I plaintiff alleges a “bad faith” action against Maryland Casualty pursuant to 42 Pa.

C.S.A. § 8371, which provides:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

Actions arising under this statute have usually arisen where an insurer failed to pay insurance proceeds, but by its plain language, § 8371 is sufficiently broad to encompass claims based on fraudulent pricing practices. Rosengarten, Richmond & Hevnor, P.C. v. United States Fire Ins. Co., 1996 WL 75891, *3 (E.D. Pa. 1996) (citing Turner Constr. Co. v. First Indem. of Am. Ins. Co., 829 F. Supp. 752, 763 (E.D. Pa. 1993), aff'd, 22 F.3d 303 (3d Cir. 1994)).³

³ Defendants correctly argue that the statute has no retroactive effect and therefore does not provide relief for conduct prior to its effective date of July 1, 1990. See Boyce v. Nationwide Mut. Ins. Co., 842 F. Supp. 822, 825 (E.D. Pa. 1994) (collecting authority). Therefore, unless there is evidence of bad faith conduct by defendants occurring after July 1, 1990, 42 Pa. C.S.A. § 8371 provides no relief. It is not the contract date, however, that is critical. The critical date is when the insurer is alleged to have committed the bad-faith conduct. Colantuno v. Aetna Ins. Co., 980 F.2d 908, 910 (3d Cir. 1992). As discussed above, the evidence of bad faith, including the September 5, 1990 audit report, is after July 1, 1990, and thus defendants’ argument that because § 8371 has no retroactive effect it cannot be the basis for relief is unavailing.

Section 8371 does not define bad faith, but the Pennsylvania Superior Court adopted Black's

Law Dictionary definition of bad faith:

“Bad faith” on part of insurer imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

PolSELLI v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994) (citing Black's Law Dictionary, 139 6th ed. 1990)); Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228, 1232 (Pa. Super. Ct. 1994) (same); Hyde Athletic Industries, Inc. v. Continental Cas. Co., 969 F. Supp. 289, 306 (E.D. Pa. 1997) (same); see also Reading Tube Corp. v. Employers Ins. of Wausau, 944 F. Supp. 398 (E.D. Pa. 1996); Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co., 882 F. Supp. 1468 (E.D. Pa. 1994).

Under this statute, plaintiff must prove that insurer acted in bad faith by clear and convincing evidence. Hofkin v. Provident Life & Acc. Ins. Co., 81 F.3d 365, 375 (3d Cir. 1996). Under Anderson v. Liberty Lobby, 477 U.S. at 252, a summary judgment determination must be made in light of the evidentiary standard to be applied at trial. See also Fort Washington Resources, Inc. v. Tannen, 858 F. Supp. 455, 459 (E.D. Pa. 1994). Therefore, I must decide, after allowing all reasonable inferences in plaintiff's favor, whether plaintiff presented sufficient evidence from which a reasonable juror could conclude by clear and convincing evidence, that Maryland Casualty acted in bad faith.

As discussed above, plaintiff presented evidence from which a reasonable jury could conclude that Maryland Casualty intentionally misclassified Alexson's revenue into the higher premium category for the purpose of maximizing profits. A reasonable juror could conclude that this evidence supports an inference that Maryland Casualty acted in bad faith in violation of § 8371

and defendant's motion for summary judgment on Count I is therefore denied.

D. Count III - Fraudulent Misrepresentation - Both Defendants

In Count III Alexson alleges a fraudulent misrepresentation claim against Tongue Brooks and Maryland Casualty based on Ray Brooks' alleged representations to Alexson that no insurance from other carriers was available during the 1990 and 1991 policy years. Under Pennsylvania law, fraudulent misrepresentation requires proof by a standard higher than the preponderance of the evidence standard usually applied to civil cases. Step-Saver Data Systems, Inc. v. WYSE Technology, 752 F. Supp. 181, 189 (E.D. Pa. 1990). The Supreme Court of Pennsylvania has held that fraud must be proven by "evidence that is clear, precise and convincing." Shell v. State Examining Bd., 416 A.2d 468, 470 (Pa. 1980). Like the § 8371 claim, the summary judgment determination must be made in light of this evidentiary standard to be applied at trial. See Anderson v. Liberty Lobby, 477 U.S. at 252; Tannen, 858 F. Supp. at 459. Thus, I must decide whether plaintiff's evidence is sufficiently clear, precise and convincing for a reasonable jury to find for plaintiff. Bearshall v. Minuteman Press Int'l, Inc., 664 F.2d 23, 26 (3d Cir. 1981); Tannen, 858 F. Supp. at 459.

Under Pennsylvania law, plaintiff must prove the following elements to maintain a cause of action for fraudulent misrepresentation: 1) defendant made a false representation of fact; 2) materiality of the statement; 3) defendant had either actual knowledge of the falsity of the representation or acted with reckless indifference to the truth; 4) plaintiff's justifiable reliance on the misrepresentation; and 5) plaintiff suffered damages proximately resulting from the misrepresentation. Wittekamp v. Gulf & Western, Inc., 991 F.2d 1137, 1141 (3d Cir. 1993)

(citations omitted). Even after allowing plaintiff all reasonable inferences, Alexson failed to present clear, precise and convincing evidence of the existence of several of these five elements.

The parties have spent considerable efforts arguing about whether plaintiff produced evidence that Brooks' statement that no other insurance carriers would cover plaintiff, if taken literally as a factual statement and without regard to its context, was false.⁴ A jury, however, would view Mr. Brooks' statements in context, and that context includes Mr. Brooks' June 6, 1990 letter to Alexson, in which he stated that, "there is no company that I have researched since I last met you that is willing to even look at your account because of those automobile losses and secondarily the theft losses of property that were sustained during that 1988 period as well." The context also includes the April 27, 1990 letter to Alexson in which Mr. Brooks stated that, "I have been in touch with no less than 12 insurers in the market place and there is no one that is willing to look at your Business Automobile Policy and prefer not to look at the account in general because of the horrible Business

⁴ The only evidence that plaintiff presented to establish the falsity of representation was that it was able to obtain insurance in January 1992 from Liberty Mutual, and it received an additional quote from Zurich-American in late 1991. Defendants contend that this evidence is insufficient because plaintiff's account was much less appealing to a potential insurer in 1990 and early 1991 than in late 1991 and early 1992. As of July 1990 plaintiff had suffered three consecutive years where the losses exceeded the premiums on the automobile policy by a significant margin and it had just received a nonrenewal notice. By late 1991 and early 1992, plaintiff had gone approximately a year and a half without any losses on either its automobile or business insurance packages, and many of the Maryland Casualty's loss control had been implemented. Therefore, defendants argue that the situations when Mr. Brooks allegedly made the representations about the unavailability of insurance from other carriers are simply not comparable to the situation in late 1991 and early 1992. Defendants also point to plaintiff's failure to present evidence from an insurance expert concluding that plaintiff could have gotten insurance from other carriers or testimony from a representative of Liberty Mutual or Zurich American concluding that it would have insured plaintiff for the July 1990 and July 1991 policy years. Plaintiff counters by arguing that two of the four insurance carriers that plaintiff contacted were willing to insure plaintiff in late 1991 and early 1992 and that the temporal proximity of the other carrier's willingness to insure plaintiff supports an inference that Mr. Brooks' alleged representations were false.

Because I conclude that plaintiff failed to present sufficient evidence on several of the other elements to its fraudulent misrepresentation claim, I need not decide whether it presented sufficient evidence of the falsity of Mr. Brooks' representations.

Automobile experience and the property losses that occurred in 1988.” Plaintiff failed to present any evidence that Mr. Brooks’ statements in these letters were false. Rather, Mr. Brooks testified that he performed the investigation by contacting the other carriers, but none of them were willing to insure plaintiff.

In light of this context, a jury could not reasonably conclude either that Mr. Brooks’ statements were assertions of fact or that plaintiff justifiably relied on them as such. A seller of a product may give subjective opinions as to a product without making a factual representation if the representation involve individual judgment that, “even though made absolutely, the hearer must know that they can be based only on the speaker’s opinion.” 12 Williston § 1491 p. 349 (3d Ed. 1970); see also Berkenbile v. Brantly Helicopter Corp., 337 A.2d 893, 903 (Pa. 1975); Step-Saver, 752 F. Supp. at 190. Plaintiff would not be justified in believing that Mr. Brooks researched all insurance carriers before expressing this conclusion; only that he researched other carriers and none of those carriers were willing to insure plaintiff. Plaintiff thus could reasonably conclude only that Mr. Brooks was expressing his opinion that no other carriers would insure plaintiff. All of the evidence submitted by the parties suggests that Mr. Brooks’ statements were his opinion of the insurance market at the time based on his research. In addition, as discussed above, there is significant evidence in the record suggesting that Mr. Brooks’ opinion about the unavailability of alternative insurance may have been correct because of the negative response from the insurance carriers he contacted, the extensive loss history, and Maryland Casualty’s issuance of a nonrenewal notice. See supra note 4. I thus conclude that none of the alleged representations were factual, and

therefore plaintiff cannot sustain his fraudulent misrepresentation claim against Tongue Brooks.⁵

Relatedly, plaintiff failed to present evidence from which a reasonable juror could conclude that plaintiff justifiably relied on these representations by Mr. Brooks. As defendants correctly argue, it defies logic that an insurance broker would research every possible insurance carrier before concluding that no other carrier would insure plaintiff. Rather, a reasonable person would view Mr. Brooks' representations not literally but as hyperbole, used to make the point that Alexson's insurance options were limited. Plaintiff would be justified in concluding only that Mr. Brooks' research did not reveal any other insurance carriers willing to insure plaintiff and that in his opinion, no other insurance carrier would. By all accounts Mr. Brooks' performed that investigation to no avail and came to the conclusion that no other insurance carrier would be willing to insure plaintiff because of the significant loss history and the nonrenewal notice. In addition, plaintiff would not be justified to expect Mr. Brooks' research to include Liberty Mutual because, as plaintiff was aware, Liberty Mutual is a direct marketer of insurance and does not use insurance brokers like Mr. Brooks.

Finally, plaintiff has also failed to present sufficient evidence which would allow a reasonable juror to conclude by clear and convincing evidence that Mr. Brooks had either actual

⁵ Plaintiff also claims that the following statement by Mr. Brooks contained in an April 27, 1990 letter to Alexson were also a misrepresentation:

Liberty Mutual[']s] . . . financial stability might well be questioned in that they have now, during the year of 1990, lost an additional ½ % point on their Best financial rating. I believe that this is not a company that you want to be involved with at this time nor in the near future.

The above quoted statement contains mainly Mr. Brooks' opinions. The only factual representation is that Liberty Mutual lost an additional ½ % point on the Best financial rating. Plaintiff presented no evidence of the falsity of that representation, and therefore plaintiff cannot base its fraud claim on the above-quoted statement.

knowledge or reckless indifference to the truth of his alleged statement about the unavailability of other insurance carriers. Plaintiff points to the fact that Mr. Brooks had a financial interest in maintaining Alexson's insurance with Maryland Casualty, and claims that he engaged in a "bad faith course of conduct" with Maryland Casualty to conceal the availability of cheaper insurance and charge Alexson exorbitant premiums. As previously discussed, however, plaintiff has failed to present evidence from which a reasonable juror could conclude that Mr. Brooks participated in any bad faith course of conduct. There is insufficient evidence to establish that Mr. Brooks was aware of Maryland Casualty's misclassification of Alexson's revenues into the rental category, and no evidence from which any agreement between Maryland Casualty and Tongue Brooks could be inferred. In fact, in correspondence with Alexson, Mr. Brooks suggested that Alexson file complaints against Maryland Casualty with the Pennsylvania Insurance Commissioner because of the claimed excessive premiums. Mr. Brooks also cut his own commission in half to appease Alexson, which undercuts plaintiff's allegation that he conspired with Maryland Casualty for his own financial benefit. I therefore conclude that plaintiff failed to present sufficient evidence from which a reasonable juror could conclude that Mr. Brooks had either actual knowledge of the falsity of his representation or reckless indifference to the truth of his representation. As plaintiff failed to present sufficient evidence of a fraudulent misrepresentation claim, Tongue Brooks' motion for summary judgment on Count III is granted.

Plaintiff's fraud claim against Maryland Casualty is based on the same claimed misrepresentation by Mr. Brooks about the unavailability of other insurance carriers willing to insure plaintiff. See Compl. para. 27-33. Plaintiff contends that Mr. Brooks was acting as an agent for Maryland Casualty when he made those misrepresentations. Because this claim is wholly derivative

of plaintiff's claim against Tongue Brooks, and because I granted Tongue Brooks' motion for summary judgment above, Maryland Casualty's motion for summary judgment on Count III is also granted.⁶

E. Count II - Breach of Contract - Tongue Brooks

In Count II plaintiff alleges that Tongue Brooks violated its contractual duties to plaintiff by failing to obtain insurance coverage at a fair and reasonable price. Plaintiff does not contend that Tongue Brooks failed to notify plaintiff about the premium. Rather, plaintiff contends that Tongue Brooks conspired with Maryland Casualty to charge excessive premiums and conceal the availability of cheaper insurance. Assuming arguendo that Tongue Brooks had a contractual duty to obtain insurance for Alexson at a fair and reasonable price,⁷ as discussed above, plaintiff failed to present sufficient evidence to support an inference that Tongue Brooks conspired with Maryland Casualty to either charge excessive rates or to conceal the availability of cheaper insurance. Plaintiff therefore failed to present sufficient evidence from which a juror could conclude that Tongue Brooks violated that contractual duty, and Tongue Brooks' motion for summary judgment on Count II is therefore granted.

⁶ Plaintiff did not allege a claim of fraud against Maryland Casualty based on the misclassification of its revenues.

⁷ The parties did not have a written agreement which so provided.

UNITED STATES DISTRICT COURT
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 TONGUE, BROOKS & CO., INC., et al :

ORDER

AND NOW this day of March, 1998, upon consideration of defendants' motions for summary judgment, Maryland Casualty's motion for payment of expenses, Maryland Casualty's motion to adopt by reference portions of the motion for summary judgment of defendant Tongue Brooks and the parties' filings related thereto, it is hereby ORDERED that:

1. Maryland Casualty's motion to adopt by reference portions of the motion for summary judgment of defendant Tongue Brooks is GRANTED.
2. Defendants' motions for summary judgment is GRANTED as to Counts II and III and DENIED as to Count I; and
3. Maryland Casualty's motion for payment of expenses is DENIED as withdrawn.

THOMAS N. O'NEILL, JR. J.