

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 11, 2008 Session

**URBAN HOUSING SOLUTIONS, INC., v. ASSURANCE COMPANY OF
AMERICA ARTECH, INC., AND SIGNATURE PROPERTIES, LLC v.
ZANDER INSURANCE AGENCY, INC., D/B/A ZANDER INSURANCE
GROUP AND ASSURANCE COMPANY OF AMERICA**

**Direct Appeal from the Chancery Court for Davidson County
No. 05-1755-IV Hon. Richard H. Dinkins, Chancellor**

No. M2008-00252-COA-R3-CV - Filed March 16, 2009

Plaintiff entered into an agreement with defendant Artech for renovation of plaintiff's building. The agreement provided that Artech would obtain builder's risk insurance naming Artech and plaintiff as the insured under the policy. Artech procured insurance through defendant Zander Insurance Agency, but the policy did not name plaintiff as an additional insured. A loss occurred and the insurance company refused to pay plaintiff's claim because plaintiff was not named as an insured on the policy. A consent Judgment was entered in favor of plaintiff against Artech (which had become insolvent) and Artech assigned its cause of action against the insurance agency to plaintiff. The Trial Court granted Zander Insurance Agency summary judgment and plaintiff has appealed. On appeal, we hold that there is a disputed issue of material fact as to whether Artech asked the insurance agency to add plaintiff as an additional insured under the policy which was procured through the agency. We vacate the summary judgment and remand for further proceedings.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Vacated.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and THOMAS R. FRIERSON, II., SP.J., joined.

Matthew R. Zenner and Malcolm L. McCune, Nashville, Tennessee, for Appellant, Urban Housing Solutions, Inc.

J. Frank Thomas, Nashville, Tennessee, for Appellee, Zander Insurance Agency, Inc.

OPINION

Plaintiff, Urban Housing Solutions, Inc., filed a Complaint against Zurich Insurance Company of America, Artech, Inc., and Signature Properties, LLC., alleging that it owned an apartment building at 331 Plus Park Boulevard in Nashville, and that it entered into an AIA contract with Artech to renovate the building for a price of \$587,922.00. Plaintiff alleged that pursuant to the terms of the contract, Artech was to purchase and maintain property insurance written on a builder's risk, all risk, or equivalent policy form in the amount of the initial contract sum, plus the value of materials supplied by others. The insurance was to include the interests of plaintiff and contractor.

Plaintiff alleged that Artech, through its affiliate, Signature Properties, purchased builder's risk insurance through Zurich, but did not name plaintiff as an insured or beneficiary as required by the contract, and that on September 30, 2003, a fire destroyed the building prior to completion of the project by Artech. The building was a total loss, and plaintiff had already paid \$350,000.00 toward the contract price. Plaintiff averred that Artech submitted a proof of loss to Zurich, but Zurich did not provide coverage for the loss, and Zurich was taking the position that it only owed for the balance due under the contract, which Zurich calculated to be \$91,000.00. Plaintiff alleged claims of breach of contract by Artech/Signature and by Zurich, under which plaintiff claimed to be a third party beneficiary, and bad faith.

Assurance Company of America answered, stating that Zurich was not a proper party, and that plaintiff lacked standing, and that the Complaint failed to state a claim. Assurance denied all liability. Plaintiff Amended its Complaint and substituted Assurance in place of Zurich. Artech answered and denied liability, and Signature likewise denied liability.

Artech filed a Complaint against Zander Insurance Agency, Inc. and a Cross-claim against Assurance Company of America. Artech alleged that Zander was an insurance agent which undertook to procure a policy for Artech after Artech told Zander that it needed a builder's risk policy for the project. Artech alleged that Zander was told that the policy needed to cover both Artech and Urban's interests. Artech alleged that it completed the paperwork to procure such a policy, and was promised that the policy would provide the needed coverage, but that unbeknownst to Artech, Zander obtained insurance coverage in the name of Signature Properties and not Artech. Artech asserted that Signature was a wholly distinct corporate entity which only shared one officer and office space with Artech. Artech further asserted that it paid all premiums for the policy, and then after the fire, submitted a claim for the loss, which Zurich denied. Artech sought indemnification from Zander for any damages awarded to Urban.

Assurance answered the Cross-claim and asserted that Artech failed to state a claim against Assurance, and Zander answered, denying any negligence.

Assurance then filed a Motion for Summary Judgment against plaintiff, asserting that

plaintiff lacked standing to assert a claim for breach of contract because plaintiff was not in privity with Assurance and was not a third party beneficiary.

Signature filed a Motion to Dismiss, and stated that plaintiff was not in privity with Signature, and Signature owed no duty to plaintiff, and had asserted no claim against Signature. Plaintiff then entered a voluntary dismissal as to Signature, and Zander then filed a Motion to Dismiss Third Party Complaint for Failure to Prosecute.

The parties engaged in mediation, and plaintiff and Artech reached an agreement that a consent judgment would be entered in favor of plaintiff in the amount of \$347,157.40, and that since Artech was now insolvent, Artech's claims against Zander and Assurance would be assigned to plaintiff. A Consent Judgment was entered in favor of plaintiff for the agreed upon amount, and Zander then filed a Motion for Summary Judgment against Artech.

Numerous depositions were then taken and filed in the record. The Court held a hearing on January 16, 2008, on Zander's Motion for Summary Judgment, which he granted. In the transcript of the hearing, the Court found that under the AIA contract, it was Artech's responsibility to have Urban listed as an additional insured under the policy, and the Court found that there was nothing in the record to show that Mrs. Malakouti, who worked for Artech and Signature, and procured the coverage from Zander, to show she had asked for that specific coverage. Urban has appealed.

Urban insists that the Trial Court erred in granting summary judgment to Zander, because Zander had a duty to procure the proper insurance coverage for Artech and it failed to do so.

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56. This Court is required to view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-movant's favor. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83 (Tenn. 2000).

Urban insists that it established that Mrs. Malakouti asked for Urban to be listed as an additional insured, but Zander failed to take the proper steps to effectuate that request, thus breaching its duty as an insurance agency. The representatives from Zander who testified stated that Mrs. Malakouti did not ask for Urban to be listed, as was evidenced by the form she filled out and sent to Zurich. Mrs. Malakouti testified in parts of her deposition that she did ask for Urban to be listed and that she was seeking coverage for the structure itself in addition to the work being done by Artech, but in other parts of her deposition stated that she only sought coverage for Artech's work, and admitted that she told them that the owner had other insurance. She also admitted she filled out the form and did not list Urban, but stated that she filled out the form the way she was instructed to by someone at Zander. She testified that she never read the AIA contract and did not know what it required regarding insurance.

Mrs. Malakouti testified that she called Zander and gave them the project information, such as the address and the amount of coverage. She testified that she spoke with Alicia at Zander. Mrs. Malakouti testified that she would have definitely told her that it was for Artech, because they did not call for policies for Signature, they simply filled out a form and sent in a check. Ms. Malakouti testified that she would have given her the information about the project and the owner's name, and Zander would take care of it from there. She testified that she was faxed a form by either Alicia or Tammy at Zander, and she filled it out and sent it back and they had to send her another clean form because the only one she had was for Signature, and so they sent a new form that she assumed was for Artech. She didn't notice if it still said Signature. She testified she filled out the form and sent it in with an Artech check. She testified that she told them she needed coverage for the owner as well, and that was a common procedure. She testified that she intended to have coverage for the building. She specifically testified that she did give Alicia the name of the owner (Urban) and that Alicia instructed her regarding filling out the form and that she did what Alicia told her to do.

While Mrs. Malakouti's deposition testimony is contradictory, the Court in *Helderman v. Smolin*, 179 S.W.3d 493 (Tenn. Ct. App. 2005) at page 505 observed:

When the testimony of a witness is susceptible of multiple interpretations, one of which would produce no inconsistency, we are reluctant to apply the "cancellation rule". See *Gambill v. Middle Tenn. Med. Ctr., Inc.*, 751 S.W.2d 145, 151 (Tenn. Ct. App. 1988). Instead, "the meaning of relevant oral statements made by or to a party . . . is a fact question for a jury to consider in weighing the possible contradictions in and credibility of the testimony of the witness, rather than a law question for determination by the Trial Judge on motion for summary judgment or directed verdict." (Citing *Ark. River Packet Co., v. Hobbs*, 105 Tenn. 29, 58 S.W. 278 (1900)); see also *Ledford v. Francis*, 1988 WL 132686, at *4-5, 1988 Tenn. App. LEXIS 813, at *13-14 (Tenn. Ct. App. Dec. 14, 1999).

We hold that Mrs. Malakouti's testimony created a material issue of disputed fact as to whether she requested coverage for Urban under the policy that was procured by Zander.

We vacate the summary judgment of the Trial Court and remand, with the cost of the cause assessed to Zander Insurance Agency, Inc.

HERSCHEL PICKENS FRANKS, P.J.
