IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

REDSTONE INTERNATIONAL, INC.,

Plaintiff,

v.

Civil Action No. 5:18-CV-175
Judge Bailey

LIBERTY MUTUAL FIRE INSURANCE COMPANY and **THE INSURANCE MARKET, INC.,**

Defendants.

ORDER GRANTING THE INSURANCE MARKET, INC.'S
MOTION FOR SUMMARY JUDGMENT

Pending before this Court is Defendant, the Insurance Market, Inc's, Motion for Summary Judgment [Doc. 85]. The Motion has been fully briefed and is ripe for decision.

Background

Plaintiff, Redstone International, Inc. ("Redstone") operates and conducts business primarily as a contractor in geotechnical projects such as foundations and retaining walls. In September of 2014, Redstone was awarded a portion of a contract, as a subcontractor, to perform work on a large retaining wall project at Mobley, Wetzel County, by the general contractor, J.F. Allen Company, with an approximate base value of $6.5 million for Plaintiff's portion of the work.

Redstone was hired to build a Beam and Lagging Wall made of steel and concrete, secured by tieback anchor bars, at the base of the main retaining wall. J.F. Allen Company

was to perform the remaining work on the wall, including backfilling the soldier wall and building a separate reinforced soil slope (RSS) wall on top of the soldier pile wall. The project was designed by engineers at AMEC Foster Wheeler. The backfill for the wall was cut and prepared by Lane Construction Corporation. Inspection services were provided by Civil Environmental Consultants, Inc., and additional work was performed by Coastal Drilling. The project's site is owned by MarkWest Liberty Midstream and Resources, LLC, which is now called MPLX, (MarkWest) and is owned by Marathon Oil.

The project's purpose was to dispose of earth and rock cut from a hill during construction of the fifth natural gas processing plant at the site, and the surface area above the wall additionally provides approximately seven acres of ground which MarkWest intended to build additional structures on but has not due to concerns with the wall.

Ultimately, problems arose with the integrity of the wall resulting in actions being filed for which Redstone is asserting a claim for insurance coverage.

Redstone seeks a declaration that Liberty Mutual owes it a defense and indemnification in the underlying cases and, if not, makes a claim against The Insurance Market, Inc. ("TIMI") for breach of contract and/or negligence for failing to obtain appropriate coverage.

In its Motion, TIMI seeks summary judgment on the ground that the claims against it require expert testimony, and the plaintiff has not designated an expert witness.

This Court must agree with TIMI that the claim against it for failure to procure appropriate insurance is, in reality, a claim for professional negligence. *See* ***Whiting v.***

Butch, 2016 WL 1047082 (S.D. W.Va. March 10, 2016) (Goodwin, J), citing ***Hall v. Nichols***, 184 W.Va. 466, 469, 400 S.E.2d 901, 904 (1990).

In affirming Judge Goodwin's decision, the Fourth Circuit held that "[u]nder West Virginia law, 'legal malpractice actions may sound either in tort or in contract.' ***Hall v. Nichols***, 184 W.Va. 466, 400 S.E.2d 901, 903 (1990). However, regardless of how the claim is characterized, the same principles underlie a legal malpractice action. *See* ***Keister v. Talbott***, 182 W.Va. 745, 391 S.E.2d 895, 898 n.3 (1990)." ***Whiting v. Butch***, 671 Fed.Appx. 110, 111 (4th Cir. 2016).

"As other courts have recognized '[a]n action against an agent or broker for failure to properly procure insurance coverage can generally be brought either as a negligence action or as an action for breach of a contract to procure insurance, and the theory on which the action is brought will ordinarily make little or no practical difference for the purpose of establishing a prima facie case.'" ***White v. BB & T Ins. Services***, 2012 WL 3018048, * 5 (W.D. Va. July 23, 2012), quoting ***Stewart v. W. Va. Employers' Mut. Ins. Co.***, 2007 WL 4300595, No. 2:07–0168, 2007 U.S. Dist. LEXIS 89377, at *4 (S.D. W.Va. Dec. 5, 2007) (Copenhaver, J). *See also* ***Prince v. Royal Indem. Co.***, 541 F.2d 646, 650 (7th Cir.1976) (noting that "[w]hether the action against the broker sounds in tort based on negligence . . . or in contract for failure to perform the agreement to procure . . . makes little difference").

As the Fourth Circuit held in affirming Judge Goodwin in ***Whiting***, Whiting was required to establish that Butch neglected a reasonable duty and that Butch's negligence proximately caused his loss. ***Id***. at 898–99. Whiting conceded that expert testimony was

necessary for him to establish that Butch's representation failed to meet the appropriate standard of care and that he did not have such testimony to support his claim. *See* ***Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC***, 209 W.Va. 318, 547 S.E.2d 256, 272 (2001); *see also* ***First Nat'l Bank of Bluefield v. Crawford***, 182 W.Va. 107, 386 S.E.2d 310, 314 n.9 (1989) ("It is the general rule that want of professional skill can be proved only by expert witnesses." (internal quotation marks omitted)). ***Whiting***, 671 Fed.Appx. 110, 111 (4th Cir. 2016).

Redstone contends that expert testimony in not required "in such an obvious breach," and argues that "insurance brokers face liability if 'they fail to exercise the care that a reasonably prudent businessman in the brokerage field would exercise under similar circumstances and if the broker fails to exercise such care and if such care is the direct cause of loss to his customer.'" citing ***Berenato v. Seneca Spec. Ins. Co.***, 240 F.Supp.3d 351 (E.D. Pa. 2017), in turn citing ***Al's Cafe, Inc. v. Sanders Ins. Agency***, 820 A.2d 745, 750 (Pa. Super. Ct. 2003).

The plaintiff adds that under Pennsylvania law "[i]f all the primary facts can be accurately described to a jury and if the jury is as capable of comprehending and understanding such facts and drawing correct conclusions from them as are witnesses possessed of special training, experience or observation, then there is no need for the testimony of an expert." ***Reardon v. Meehan***, 424 Pa. 460, 465, 227 A.2d 667, 670 (1967).

According to Redstone, there is no requirement, under either West Virginia or Pennsylvania law, for Plaintiff to hire an expert. Plaintiff's case against TIMI is both legally

and factually simple and well within the grounds of understanding of a lay person jury. Plaintiff hired TIMI to find it the insurance it was contractually obligated to have for the Mobley project. Plaintiff pointed out the specific insurance provisions in the Building Contract to TIMI. TIMI, without bothering to review the exclusions and coverages in either the Kinsale or Liberty Mutual policies, informed Plaintiff (and MarkWest and JF Allen) that plaintiff had the contractually required coverages over a period of several months, even when plaintiff asked about exclusions and coverage gaps. To the extent the Court ultimately rules that Liberty Mutual has no obligation to indemnify plaintiff (and if there is an adverse liability finding in the underlying action) based upon exclusions that were never disclosed by TIMI to plaintiff before the policy was purchased, TIMI is responsible.

This Court cannot agree. West Virginia Courts have previously recognized "[i]t is the general rule that want of professional skill can be proved only by expert witnesses." *See* ***First Nat'l Bank of Bluefield v. Crawford***, 182 W.Va. 107, 111, 386 S.E.2d 310, 314 n.9 (1989). While West Virginia has not expressly addressed the need for an expert witness to testify as to the conduct and duty of an insurance agent or broker who undertakes to procure insurance for another, multiple other courts have addressed the issue. In ***Delaney v. State Farm & Fire & Cas. Ins. Co.***, 375 Mont. 117, 324, 324 P.3d 1211 (2014), the granting of summary judgment for defendants was proper when plaintiff failed to establish the standard of care through expert testimony. *See also* ***Celina Mut. Ins. Co. v. Harbor Ins. Agency***, 332 S.W.3d 107, 112 (Ky. Ct. App. 2010) (finding that the trial court did not abuse its discretion in finding that an expert witness was necessary to establish an insurance agent's professional duty); ***Nahmens v. Zimmermann***, 372 Wis.2d

185, 888 N.W.2d 23 (Wis.App. 2016) (concluding that expert testimony was required to establish the professional standard of care for an insurance broker to support the negligence action); ***Loomcraft Textile & Supply Co. v. Schwartz Bros. Ins. Agency, Inc.***, 2017 Il.App(2d) 160557-U (Ill. App. 2017) (finding proper granting of summary judgment as third-party plaintiffs claim of professional negligence required expert witness testimony to establish the applicable standard of care for an insurance broker); ***Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc.***, 512 N.W.2d 573, 575 (Iowa 1994) citing ***Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.***, 366 N.W.2d 271, 279 (Minn. 1985) (expert testimony required when issue centered around professional judgment); ***Todd v. Malafronte***, 3 Conn.App. 16, 19, 484 A.2d 463, 466 (1984) (sale of insurance requires specialized knowledge and corresponding proof).

In ***151 First Side Associates, L.P. v. Hostetler***, 2015 WL 6675370 (Pa. Super. Aug. 21, 2015), the Superior Court of Pennsylvania stated:

> The standards of practice and skills of an insurance broker are not necessarily matters of common knowledge. *See* Storm [v. Golden], [371 Pa. Super. 368], 538 A.2d at 64–65 [1988]. *See also* ***Industrial Valley Bank and Trust Co. v. Dilks Agency***, 751 F.2d 637, 640 (3d Cir. 1985) (under Pennsylvania law, insurance broker under a duty to exercise care that reasonably prudent businessperson in brokerage field would exercise under similar circumstances); *cf.* ***Al's Café, Inc. v. Sanders Insurance Agency***, 820 A.2d 745, 752 (Pa.Super. 2003) (court reversed summary judgment where plaintiff's expert reports raised genuine issue of material fact as to

> whether insurance agent deviated from "knowledge and skill required of an insurance agent or broker in procuring [liquor liability] insurance coverage for a client."). An insurance broker possesses expertise in the insurance industry, particularly where the insurance sought is specialized insurance, such as a builder's risk policy. Because 151 First Side's failed to provide an expert report sufficient to support its negligence claim, its claim fails.

2015 WL 6675370 at *7.

In this case, expert testimony would be required to address the following issues:

1. The Mobley contract requires completed operations coverage. It appears that such coverage was provided by the policy in question. Was it provided?

2. The Mobley contract also requires contractual liability coverage. Again, it appears that such coverage was provided by the policy in question. Was it provided?

3. Was there coverage that was reasonably available that would have protected Redstone against it's own failure (if proven) to fulfill its obligations under the Mobley contract?

4. If such coverage was available, was it available at a reasonable price?

5. Completed operations coverage is "not intended to cover damage to the insured's products or work project out of which an accident arises. The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some

capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." Roger C. Henderson, Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know, 50 Neb.L.Rev. 415, 441 (1971).

"The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." ***J.Z.G. Res. v. King***, 987 F.2d 98, 103 (2d Cir.1993). Under what theory would completed operations coverage have been of benefit to Redstone?

6. Similarly, how would contractual liability coverage have been applicable to the loss in this case.

These issues are important, in fact vital, to plaintiff's case. Plaintiff has the burden of proof to establish the standard of care, a breach thereof, and damages proximately occasioned. *See, e.g.*, Syl. pt. 3, ***Keister v. Talbott***, 182 W.Va. 745, 391 S.E.2d 895 (1990) ("Damages arising from the negligence of an attorney are not presumed, and a plaintiff in a malpractice action has the burden of proving both his loss and its causal connection to the attorney's negligence."); Syl. pt. 2, ***Walton v. Given***, 158 W.Va. 897, 215 S.E.2d 647 (1975) ("The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate

cause of the injury."). Plaintiff has not identified the type of insurance that should have been procured to provide coverage for the underlying West Virginia State Court claims; if such insurance was even available at the time of the Plaintiffs insurance renewal, or if Plaintiff would have been approved for such insurance. *See* ***White v. BB&T Insurance Services, Inc.***, 2012 WL 3018049, *6 (W.D. Va. July 23, 2012) (Accordingly, it is incumbent on the plaintiffs to prove that an insurance policy was generally available that "would have covered the loss incurred.", quoting, ***SMI Owen Steel Co. v. Marsh USA, Inc.***. 520 F.3d 432, 439 (5th Cir. 2008)).

As other courts have recognized in the context of claims asserted for alleged failure to procure proper insurance coverage, the instant claim may be "likened . . . to one for legal malpractice, which requires, in order to prove causation, evidence that better legal representation would have resulted in a more favorable outcome." *See* ***Tri-Town Marine, Inc, v. J.C. Milliken Agency, Inc.***, 924 A.2d 1066,1069 (2007). As the Court in ***Tri-Town Marine*** explained:

> [T]he vast majority of other jurisdictions require such proof [that the coverage which was not procured would have covered the loss] in failure to procure cases. *See* ***Bangor-Brewer Bowling Lanes***, 2001 WL 1719238, *5-6 (Me.Super. July 3, 2001): *see also* ***Bayly, Martin & Fay, Inc, v. Pete's Satire, Inc.***, 739 P.2d 239, 244 (Colo.1987) (holding that "[wjhere ... a claim for relief is predicated on the negligent failure of an insurance broker or agent to procure a particular type of insurance coverage sought by the plaintiff," the plaintiff must prove "as an aspect of causation and damages,

> that such insurance was generally available in the insurance industry when the broker or agent obtained insurance coverage for the plaintiff'); ***Am. Motorists Ins. Co. v. Salvatore***, 102 A.D.2d 342, 476 N,Y.S.2d 897, 900 (N.Y. App.Div. 1984) (holding that liability for failure to procure insurance may be based on contract or tort principles, but that "in order to support a recovery, it must be demonstrated that coverage could have been procured prior to the occurrence of the insured event"); ***State v. Warren Star Theater***, 84 Ohio App.3d 435, 616 N.E.2d 1192, 1196 (1992) (determining that the plaintiff failed to establish negligent failure to procure insurance because "[tjhere was no evidence presented that, had the [requested] coverage been in place, [the] plaintiffs would have been protected by said policy"); ***Johnson & Higgins of Ala. Inc, v. Blomfield***, 907 P.2d 1371, 1374 (Alaska 1995) (noting that the majority rule requires the plaintiff to prove that "coverage was commercially available for the loss sustained").

924 A.2d at 1069-70.

Inasmuch as the plaintiff has not put forward an expert to cover these areas and inasmuch as the time to designate an expert witness is long past, this Court will grant summary judgment to TIMI.

For the reasons stated above, Defendant, the Insurance Market, Inc's, Motion for Summary Judgment **[Doc. 85]** is **GRANTED** and The Insurance Market, Inc. is **DISMISSED** from this action with prejudice.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: October 20, 2020.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE