IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GEORGE TAYLOR, III, Defendant Below/Appellant, v. MICHAEL McCUSKER, Plaintiff Below/Appellee. GEORGE TAYLOR, III, Appellant/Third-Party Plaintiff v. L & W INSURANCE AGENCY, a Delaware corporation, Third Party Defendant.	)	C.A. No. 2004-06-113

Submitted: July 15, 2005
Decided: October 20, 2005

Joseph M. Bernstein, Esquire
800 N. King Street, Suite 302
Wilmington, DE 19801
Attorney for Defendant
Below/Third Party Plaintiff

Michael Arrington, Esquire
Parkowski, Guerke & Swayze
800 King Street, Suite 203
Wilmington, DE 19801
Attorneys for Appellees

Edward Curley, Esquire
33 South State Street
Dover, DE 19901
Attorney for Third-Party
Defendant

DECISION FOLLOWING TRIAL

Nature and State of Proceedings

Plaintiff Below, Michael McCusker, brings this action to recover the value of a motorcycle he placed on consignment for sale with defendant George Taylor, III, on October 20, 2003. Defendant George Taylor, III, third-party plaintiff, brings an action against L & W Insurance agency on the basis they failed to provide insurance coverage for his business.

Facts

Michael C. McCusker the owner of a 1998 Harley-Davidson motorcycle with 3,100 miles, testified that as a result of an injury, he was not riding the motorcycle and decided to sell. To facilitate the sale, he gave the motorcycle to his brother James McCusker, who lived in Wilmington. James indicated he knew a guy in Wilmington who operated a motorcycle shop under name of "TNT Cycles" which sell the motorcycles. Michael McCusker testified he informed his brother that the motorcycle was not insured, and was informed, that the person who wanted to sell the motorcycle, sold motorcycles all the time and had previously sold six motorcycles. He told his brother he wanted to sell the motorcycle for $18,800.00 and anything the seller got in excess of that amount, he could keep. During the time that the motorcycle was with "TNT Cycles," Michael McCusker testified, he was assured by George Taylor, the owner of TNT Cycles, that there was a buyer who was working with the Credit Union. He got busy around Christmas and was unable to follow upon this matter. After there was no sale, he asked his brother James to go by and get the motorcycle on Friday. He was told, when his brother spoke with the defendant George Taylor, he was informed, a buyer was coming

over the weekend to purchase the bike. On the following Monday, he got a call from George Taylor about 2:30 p.m., informing him the bike had been ripped off. There is some confusion in the record; however, Michael testified he called his brother James, who went to the business.

Michael McCusker testified that during a conversation with Taylor, he was informed that he sells between 40 and 50 bikes per year. After the bike was stolen, he learned that the defendant did not have insurance for consignment, but only motorcycle repairs. Michael testified that he has incurred approximately $3,000.00 in attorney fees and $700.00 in loss employment.

On cross examination, Michael testified he purchased the motorcycle January 1998 for $17,145.00, but no longer had the bill of sale. He determined the sale price based upon advertisements for motorcycles in the newspaper. He further testified that he never visited Taylor's place of business, and all transactions took place by telephone. He further testified Taylor picked up the bike from his brother's house. After learning of the break-in at Taylor's business, his brother went to inquire about the theft.

On cross-examination by L & W Insurance, Michael testified the alleged theft took place approximately Monday, January 5, 2004. He further testified that his brother spoke to the police officer. After the theft, he was informed Taylor stated he did not have insurance coverage for consignment motorcycle sales. Michael testified the defendant got paid for alleged loss of front-end sales. He further testified that he called at approximately 2:00 p.m. on Monday, and was told that his motorcycle was the only motorcycle stolen.

James McCusker testified he put an ad in the News Journal and got a call from TNT Cycles operated by Taylor who indicated, he sold bikes on consignment and he had previously sold between 30 and 40 bikes. James testified that he told Taylor of TNT Cycles that the bike was not insured, and Taylor stated that he was insured. James further testified Taylor came and took possession of the motorcycle, they signed an agreement of sale, and he gave him the title.

While Taylor had possession of the bike, James testified he spoke with him 8 or 9 times, and Taylor stated he had a buyer. After the contract expired, Taylor told him he had a buyer, and it was a definite sale. James testified he spoke with Taylor 4 or 5 additional times around Christmas and was assured the bike was sold. After Christmas, he went to TNT's place on Friday to pick up the bike and was told by Taylor there was a buyer and asked to keep it to complete the sale. He told him he would speak to Michael. The following Monday, he was called by Michael and informed that the bike was stolen. He went to the shop and spoke to Taylor and was informed the motorcycle was stolen over the weekend.

James testified Taylor told him the back door was broken in and the bike was taken out the front door. James testified when he observed the door, there did not appear to be any new damage. He called the State Police to report the theft. On cross-examination, James testified that prior to the bike being delivered to the property, he visited the defendant's property but did not expect, nor did he ask about inspection. The shop consisted of a small area in an industrial park with a steel door on the rear. After the theft he went into the back alley to look for tracks. He further testified the bike had a

locking device on the steering wheel, but does not recall if it had the device on the steering column at the time the theft took place.

James further testified that while he was there, he did not know if any other item was taken other than the bike. He spoke with Taylor regarding insurance and Taylor stated he had business insurance that covered everything. On cross-examination by L & W's attorney, James testified that he called Taylor and offered to put the bike for sale on consignment. He asked Taylor about insurance after the bike was stolen on January 5, 2004, but never heard Taylor say he did not have insurance. Taylor stated he was not liable.

The defendant, George Taylor, testified he has a business operation selling after market parts and accessories. Occasionally he sells bikes on consignment. His business is located at 233 South DuPont Highway, New Castle, Delaware in a business park. The building has a steel door on the rear and an overhead door on the front. He first occupied the building around November or December 2002. The landlord required $1 million in insurance coverage. L & W was recommended and he told the insurance representative that he needed a policy for business. The policy cost was $1,100.00 for which he paid $300.00, and the insurance binder was faxed to the landlord. He never got a receipt nor policy certificate from the insurance company. (See defendant Exhibit 1). He received a copy of the insurance certificate after the burglary from the landlord's secretary.

Taylor testified at the time of the burglary, he was away for the weekend and came in around noon on Monday and discovered the theft. The front door was not damaged, he walked in, turned on the light, which did not work, and saw the broken back door which was ajar. The electrical switch was off. The back door had a pad lock on the

outside and a dead-bolt on the inside. The lock was cut with a bow cutter and crow bar used to remove the deadbolt. The bike was taken out the front door. He called Michael and left a message on his answering machine and called his brother. James came within 15 minutes thereafter.

Taylor testifies he tried to contact the insurance company, making several calls but never got a call back from the insurance company regarding coverage. It took three weeks to get a hold of Doug Wood, his insurance agent, who stated that he would have to justify the loss. He never got any other documents from L & W Company. Eventually, he got a check from L & W for the loss in the amount of $3,200.00.

On cross-examination, Taylor testified the policy expired on August 8, 2003, but did not see the policy until after the theft. He did not recall discussing the value of the bike with the insurance carrier at his office. However, he got a letter from the Insurance Commission Office indicating that the value of the bike was $15,000.00.

Taylor testified on the morning of the theft, the locks on the front door were in place. He does not recall whether the police found anything. Further, he testified that he did not have an alarm system and that Michael McCusker did not inquire about the security system when the bike was left for sale. He testified he did not know the name of the person who had agreed to purchase the motorcycle. He further testified McCusker was the only bike stolen that night. The garage door was unlocked when he arrived on Monday, and every bike in the back of the garage had triple locks on them. The plaintiff's bike was the only bike without a lock and it was taken from the rear and the thief left the other bikes untouched.

On cross-examination by L & W's attorney, Taylor testified he did not have a business license to sell motorcycles, nor did he have a business license to operate a repair shop. The business license had lapsed. He testified that he operated the business from November 2002 and believed, moved into his present location March 2003. He contacted L & W Insurance Company in July 2003, and had no insurance prior to that date. He contacted L & W because the landlord wanted insurance and also needed insurance for inventory. He spoke to Doug Wood of L & W Insurance three to four times before the insurance was purchased. He did not speak to Wood between July 2003 and the theft of the motorcycle January 2004. The landlord required insurance, and he paid $300.00 to Wood for insurance coverage by check.

On cross by Michael's counsel, defendant testified he never said that he regularly sold motorcycles and that he never sold between 40 or 50 motorcycles. He sold between four and five motorcycles per year.

L & W Insurance Agency, Inc. called Andrew Cousins, Vice President and owner of L & W Insurance Agency, Inc. as of January 1, 2005 as a witness. He testified he worked for the predecessor agency "L & W Insurance" since 1971. He testified that during the fall of 2003, Wood worked as an agent in their company with approximately eight other agents. He reported to Davis H. Wood. However, Doug Wood no longer worked for his company as of June 2004. Cousins testified he first became aware of Doug Wood's involvement regarding this policy when he received a letter of March 26, 2004 from the Insurance Department inquiring about coverage for Taylor's business. He pulled the file and referred it to Doug Wood. When he reviewed the file, there was no receipt for payment in the paper file. The computer file showed a payment of $180.00.

There was application which was submitted to the company and the company responded with a quotation, issued a certificate of insurance, but did not issue a policy. The certificate of insurance was issued August 8, 2003, which is normally good for 30 days. There was an application for a policy, but no binder, and no policy issued.

Cousins testified it was his understanding that Wood took a down payment and no additional payment was made. However, his company did pay Taylor for the loss on February 24, 2004 in the amount of $3,207.00. However, there is no record of what this payment represents, or whether it represents the loss to the defendant for the theft. There is no deductible or exclusions on the policy. (Defendant's Exhibit 2, Id. "B" &"C")

On cross-examination, Cousins testified that L & W has been in the insurance business since 1980 and they sell general liability to cover business premises occupied by the owner. He further testified a landlord would want this type of coverage. He testified that a garage policy would be needed to cover sales of vehicles. He testified that they had not spoken to McCusker regarding this claim. On re-cross, he testified that general liability would not cover the loss of a motorcycle. He did not know why the claim was partially paid.

Doug Wood was called by L & W Insurance Company as one of its witnesses. He testified that he had been employed by L & W for six or seven years; however, the employment ended a year ago. He testified his duties included commercial sales, he reported to himself and attended sales meetings. His duties included calling on clients, filling out applications and selling insurance. He testified that All Risks Insurance Company is a brokerage house which issues re-insurance.

Wood testified July 2003, he had dealings with George Taylor. Taylor called several times to obtain commercial insurance, and he submitted an application. He testified that he received a deposit but did not issue a receipt. The application was sent to All Risks and he received a quote. He sent the quote and faxed a binder to the landlord with an invoice. He did not have made a copy of the bill. The quote is good for 10 days, then there is 25 percent payment due by the policy holder. He testified there is no record that the insurance was canceled for non-payment. The signature at the bottom of the binder is David Wood, as authorized, for the agency.

Wood could not explain the letter dated March 26, 2004 from All Risks Insurance Company regarding their denial to back date coverage. (Defendant's Ex. Id. "B"). He testified that he did not request backdated coverage. However, due to the circumstances and the lack of follow up to cancel coverage, they decided to pay the claim. The defendant was interested in obtaining commercial liability coverage. When asked about the letter of April 16, 2004 from the Insurance Department (Exhibit C for identification), Wood testified that it was following the burglary and indicated they paid the claim.

On cross-examination Wood testified general insurance coverage would not cover the sale of bikes on consignment. He further testified Taylor did not have coverage for general sale of vehicles. On follow-up questions by counsel, Wood testified that coverage was requested to get the landlord off Taylor's back. There were several calls by Taylor requesting coverage. Taylor stated that the nature of the business was selling after market parts. The coverage did not include the sale of bikes on consignment. Wood further testified that he was involved in the decision regarding the claim. Taylor did not have receipts for the items stolen or where the items were purchased. The claims of the

defendant were gathered on several occasions as to the number of items claimed and their value. Wood indicated that he informed Taylor that he did not have coverage for items taken which were held for sale on consignment. Wood testified that as he recalled, Taylor only paid $170.00 of the $300.00 alleged. Wood testified it was his mistake for failing to issue a policy cancellation notice. He further testified that it was his practice to go over the type of coverage with the individual when they purchase insurance.

Wood testified that when he visited the shop, he saw only one motorcycle. He did not see any motorcycles outside during that visit. He testified that Taylor's payment indicates a business liability and personal liability policy.

Analysis

McCusker alleges several theories for recovery against Taylor. First, he argues that under the provisions of 21 *Del. C.* § 6303, Taylor was in the business of selling automobiles and must meet the statutory requirements. Secondly, McCusker alleges breach of contract in that Taylor failed to exercise the standard of care for items received for sale on consignment. Finally, McCusker argues Taylor is liable on the basis of fraud because Taylor represented he was insured against loss of items taken for consignment sale.

Taylor brings a third-party complaint against L & W Insurance Agency, Inc. on the basis he purchased insurance coverage for his business to cover the loss of McCusker's motorcycle and L & W's agent represented to Taylor that motorcycles were insured against loss by theft. L & W Insurance Agency denies liability on the basis that the policy purchased by Taylor was for general liability, which does not cover loss of motorcycles. Further, L & W raises an affirmative defense of lack of consideration for

Taylor's failure to pay the required premiums. Thirdly, L & W raises as an affirmative defense of insufficiency of service of process.

The provisions of 21 *Del. C.* § 6301, "Definitions" provides in subsection (4) that a dealer is any person or corporation or legal entity who in a 12-month period sells, buys, or exchanges 5 or more vehicles. James McCusker testified that after he placed the motorcycle for sale in the News Journal newspaper, he received a call from Taylor. Taylor told him he sold bikes on consignment and that he previously sold between 30 and 40 bikes. Taylor testified he operates a business selling after market parts but does sell motorcycles occasionally. Additionally, he signed an agreement with Michael and James McCusker to sell their motorcycle on consignment. Therefore, it is fair to conclude from this testimony that Taylor represented he sold more than five (5) vehicles within a 12-month period. Once a business comes within the definition of 21 *Del. C.* § 6301, the provision of 21 *Del. C.* § 6303(a)(4) requires such business to have adequate liability insurance as required by § 2118. Therefore, under these provisions, Taylor was required to have the amount of liability coverage as provided under the statute.

Secondly, McCusker seeks recovery on the basis of negligence, arguing that Taylor breached the standard case in failing to safeguard the motorcycle in his care on consignment. The testimony in the record supports the conclusion that McCusker and Taylor entered into an agreement for Taylor to take custody of the motorcycle for sale on consignment. Additionally, there is a signed agreement as required by 21 *Del. C.* § 6306; therefore, the relationship of the parties is in the nature of bailment.

A bailment is a consensual relationship which includes in its broadest context any delivery of personal property in trust for a lawful purpose, under which the control and

possession of the property passes to the bailee. The duty of care owed by the bailee differs depending upon the nature of the bailment. Where the bailment is for the sole benefit of bailor, the law requires a minimum level of care. Where the bailment is for the mutual benefit of both parties, the law requires reasonable diligence and the bailee is responsible for ordinary negligence.

The facts in this instance indicate that both McCusker and Taylor would receive proceeds from the sale of the motorcycle; therefore, the bailment was for the mutual benefit of both parties. Taylor testified he stored the motorcycle in his place of business and secured it with a metal front door and a bolted rear door, but all the other motorcycles in his custody he installed additional locking devices. When he returned on the day in question, McCusker's motorcycle was the only vehicle stolen with other miscellaneous items. The other motorcycles were not stolen. Further, he did not put a locking device on McCusker's motorcycle. Thus, the question is whether Taylor, as bailee exercised reasonable care under the circumstances to protect McCusker's motorcycle from theft?

The general rule is that proof of delivery of goods to bailee and failure of bailee to return them, make out a prima facie case and the burden of proof then is cast upon the bailee to proceed with evidence rebutting the inference of negligence. *Catafano v. Higgins*, Del. Super., 191 A.2d 330 (1963). Here, McCusker testified the items were delivered to Taylor. He inquired about insurance and was informed that Taylor had insurance on his business. Taylor testified he was in the business of selling motorcycles on consignment. Therefore, he must have been aware of the risk of theft. The failure to immobilize the vehicle while in a garage without an alarm system was negligent and the direct result of failure to prevent theft. This is especially evident when Taylor testified all

the other bikes had disabling devices installed. Thus, Taylor is liable to McCusker for the value of the motorcycle.

McCusker also alleges fraud as a basis for recovery. The provisions of Court of Common Pleas Civil Rule 9(b) require, all allegations of fraud be pled with particularity. *Margenthaler v. Asbestos Corp. of America*, Del. Supr., 480 A.2d 647 (1984). McCusker states in the complaint that Taylor committed fraud by representing he was insured at the time of loss. This pleading is not sufficient under the rule to make out a claim for fraud, and as such this claim must fail.

Taylor brings a third-party claim against L & W Insurance for amounts he is found liable to McCusker. Taylor argues he purchased insurance for his business to insure against motorcycle theft. The agent for L & W, Wood, testified he wrote a binder for Taylor's business for liability insurance, but not for the vehicle coverage.

L & W Insurance argues that they are not liable for the claim on the basis there was no policy issued for the coverage. They point to the letter from All Risks, and the fact that the defendant testified that he only purchased a general liability policy which does not cover the sale of vehicles. Thirdly, they argue that there is a credibility issue with respect to the testimony of George Taylor in the record which does not support his claim he purchased insurance for the items in question. Finally, L & W points to the issue of back dating the policy as an indication that there is no insurance on the date that the loss occurred. This testimony points to a relationship of questionable reliability.

There was no policy introduced in the record and there was no record of a receipt issued to Taylor for payment, but the record supports payment by Taylor, thus there was consideration. Moreover, there is a letter in the record of L & W attempting to back date

coverage after the motorcycle was stolen. When Wood, the agent for L & W testified he could not provide any explanation or basis for why part of the claim was paid and other parts denied. Further, there is no cancellation notice to Taylor terminating coverage under the policy. When all these factors are taken collectively, it points to a business transaction where Taylor purchased insurance relying upon the expertise of Wood, agent for L & W Insurance Agency, and there was no exclusion.

During trial, there was no testimony regarding service; therefore, I find L & W abandoned this defense.

Based upon the testimony and the documents in the record, I can only conclude there was coverage on the date of the loss, and L & W Insurance Agency, Inc. is liable to Taylor on his claim in the amount of the value of the motorcycle.

Accordingly, judgment is entered for McCusker against Taylor in the amount of $13,800.00, cost and post-judgment interest at the legal rate. Judgment is entered for Taylor against L & W Insurance Agency in the amount of $13,800.00, cost and post-judgment interest at the legal rate.

SO ORDERED this 20th day of October

_____

Alex J. Smalls
Chief Judge

McCusker-OP Oct 05