

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

ALBERT LEGER, and CARLEEN LEGER, Plaintiffs/Appellants	)	
	)	
v.	)	A.C. No. 94-P-908
	)	
INSURANCE COMPANY OF NORTH AMERICA, and CLIFFORD BOMBARD, d/b/a BOMBARD INSURANCE AGENCY, Defendants/Appellees	)	
	)	

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ON APPEAL FROM A JUDGMENT  
OF THE SUPERIOR COURT

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BRIEF OF THE DEFENDANT/APPELLEE,  
CLIFFORD BOMBARD, d/b/a  
BOMBARD INSURANCE AGENCY

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EDITORIAL NOTE

Party Names

"Plaintiffs" shall refer to the Plaintiffs/Appellants, Albert Leger and Carleen Leger.

"INA" shall refer to the Defendant/Appellee, Insurance Company of North America/Aetna Insurance Company.

"Bombard" shall refer to the Defendant/Appellee, Clifford Bombard, d/b/a Bombard Insurance Agency.

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ISSUES PRESENTED FOR REVIEW

1. Whether the Court erred in granting summary judgment on Plaintiffs' breach of contract claim against Bombard?
2. Whether Bombard, an insurance agent, could be liable to Plaintiffs for an insurance company's breach of contract?
3. Whether any estoppel on account of an insurer's conduct may be imputed to an insurance agent?

STATEMENT OF THE CASE

The Appellee, Bombard, being dissatisfied with the Appellant's Statement of the Case, submits as follows:

The Complaint contained identical allegations against both INA and Bombard: among them that (1) "plaintiffs contracted with the defendants . . . for a policy of insurance," (2) a policy was issued on INA paper, and (3) the defendants hired a fire investigator, (4) and the law firm of Morrison, Mahoney & Miller. [App. 4-5, 7, 12, 22; App. 9]. Further, both INA and Bombard allegedly (5) pressed for Albert Leger's deposition while he was under indictment, and (6) refused to pay on the

insurance policy, (7) constituting a breach of contract by the defendants. [App. 6-7, 23, 28, 45].

The record does not contain any suggestion that Bombard was involved in pressing for Albert Leger's deposition or delaying adjustment of Plaintiffs' claim. The record is clear that the law firm of Morrison, Mahoney & Miller represented INA, and not Bombard. [App. 10-14, 43, 46, 48, 56, 81].

Finally, when challenged by Bombard's motion for summary judgment,<sup>1</sup> Plaintiffs waived their claims proceeding against Bombard for violation of G.L. c. 93A, interference with civil rights, and intentional infliction of emotional distress. [App. 159].

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<sup>1</sup> By a motion referred to this panel, Bombard seeks attachment of two pages to the Appendix: an excerpt of Bombard's memorandum in support of his motion for summary judgment and an affidavit filed herewith. These documents are appended hereto as SA-1 and SA-2.

## ARGUMENT

### I. AN AGENT IS NOT LIABLE FOR THE ALLEGED BREACH OF CONTRACT OF HIS PRINCIPAL: A CLAIM CANNOT BE MAINTAINED AGAINST BOMBARD ON FOR BREACH OF A CONTRACT BETWEEN PLAINTIFFS AND INA

It is hornbook law that an agent is not exposed to liability to a third party for his principal's breach of contract. Restatement (Second) of Agency, Secs. 320, 328. See Rayden Eng'g Corp. v. Church, 337 Mass. 652, 659-660 (1958) (employee not individually liable for breach of contract between third party and known principal); Porshin v. Snider, 349 Mass. 653, 655 (1965) (same); Brennan v. Carvel Corp., 929 F.2d 801, 810 (1st Cir. 1991) (applying Mass. law). In this case, Bombard is simply not responsible for any breach of contract by INA.

The Plaintiffs' breach of contract claim is based on a single contract: the INA insurance policy obliging INA to pay under certain conditions. The essence of Plaintiffs' breach of contract claim that INA failed to pay their claim. Bombard was not a

party to that contract, and is not answerable to the Plaintiffs for the breach of contract of INA, its principal.<sup>2</sup>

Bombard's role, as alleged in the Plaintiffs' complaint, was as "an authorized agent of INA." [App. 4, 7]. This is a judicial admission, and is binding upon the Plaintiffs, G.L. c. 231, Sec. 87; Adiletto v. Brockton Cut Sole Corp., 322 Mass. 110, 112 (1947), and precludes a factfinder from concluding otherwise. DeNunzio v. City Manager of Cambridge, 341 Mass. 420, 421 (1960).

The Plaintiffs' admission notwithstanding, Bombard was in fact and in law acting as an agent for INA in filling out INA's application form [App. 26] and in accepting the Plaintiffs' premium payment on the policy. See J.A. Appleman, Insurance Law and Practice, Sec. 8697 (West 1981) at 276, and G.L. c. 175, Secs. 162 (person soliciting insurance on behalf of insurer or transmits an application to a company is an agent of company), 169

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<sup>2</sup> The case of Carter v. Empire Mut. Ins. Co., 6 Mass. App. Ct. 114 (1978), does not hold otherwise. Although the insurance agent in that case was liable, it was for tortious interference with the insured's contract with the insurer, a claim not asserted against Bombard herein. Id., at 123.

(agent negotiating insurance policy, for purpose of receiving premium, is held to be the agent of the insurer).

The legal proposition that Bombard, as a soliciting agent taking the Plaintiffs' application, was an agent for INA, is proven by John Hancock Mutual Life Ins. Co. v. Schwarzer, 354 Mass. 327 (1968). In that case, the insurance applicant gave true answers to application questions posed by the insurance agent, however those answers were falsely recorded by the agent. The insurer was held to the contract, because correct answers were in fact given by the applicant to the insurer, by and through its authorized agent. Id., at 329, citing Sullivan v. John Hancock Mutual Life Ins. Co., 342 Mass. 649 (1961) (correct answer given by applicant to insurer's agent, an examining physician, incorrectly recorded by him).

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If, in Schwarzer, the soliciting insurance agent was considered to be the applicant's agent, then the false answers given by her (through her agent) would have relieved the insurer of its obligation to pay. The holding and result of the Schwarzer case establish the opposite -- an insurance agent

taking an application for insurance does so as an agent of the insurer, and not as an agent of the applicant. Therefore, the applicant's only remedy in contract is against the agent's principal.

For all the foregoing reasons, summary judgment was correctly entered in Bombard's favor.

**II. ANY ESTOPPEL ON ACCOUNT OF INA'S CONDUCT<sup>3</sup> IS NOT IMPUTABLE TO BOMBARD**

Since there is no hint of Bombard's involvement in INA's conduct allegedly constituting estoppel, any estoppel is not imputable to Bombard. Bombard did not participate in the investigation of the Plaintiff's fire loss. He did not hire the fire investigator or any law firm, and played no role in pressing for Albert Leger's deposition.

To the extent that INA's own conduct relieved the Plaintiffs of strict compliance with the two-year suit limitation, such

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<sup>3</sup> Bombard offers this argument in the alternative, in the event its first argument is not dispositive.

conduct does not excuse the Plaintiffs from delaying commencement of their suit against Bombard.

First, any excuse that the filing of the suit was delayed on account of the Plaintiff's compliance with the jurisdictional prerequisites to maintaining a G.L. c. 93A claim is inapplicable to Bombard. No G.L. c. 93A demand was ever made upon Bombard.<sup>4</sup> There is no reason why Plaintiffs could not have commenced their breach of contract action against Bombard within the contractual limitations period. Therefore, any delay from INA's denial of Plaintiffs' claim on July 28, 1987 until December 24, 1987 is simply not excusable as against Bombard.

Second, the Plaintiffs' argument that there is some ambiguity in INA's policy which excuses their late filing of this claim is inapplicable against Bombard. Bombard did not write the text of the insurance policy, so the familiar rule of construing an ambiguity against its author does not apply.

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<sup>4</sup> See documents appended hereto as SA-1 and SA-2, and Note 1, above. In the event Bombard's motion to append these documents is not allowed, this point should be disregarded as unsupported by the record.

Third, the suit limitations period in the policy should be enforceable to the extent it does not offend public policy. Hence, the Plaintiffs' suit, initiated more than two years after the fire occurred, is barred. Massachusetts has allowed contracts be severable or divisible in appropriate circumstances. Edgecomb v. Edmondson, 257 Mass. 12, 19-20 (1926) (enforcing so much of contract as not void against public policy), and Novelty Bias Binding Co. v. Shevrin, 342 Mass. 714, 718 (1961) (same). See Restatement (Second) of Contracts, Secs. 183, 184; E.A. Farnsworth, Contracts, Sec. 5.8 (Little, Brown & Co., 1982) at 361. In this instance, the Plaintiffs must be deemed to have known the law provided them two years to sue. It defies logic for them to claim a shorter period contained in their policy gives them additional time to sue.

The theory of estoppel advocated by the Plaintiffs allows them to benefit by their ineptitude. If they are permitted an additional period to sue after "full compliance," they would be encouraged to submit an incomplete proof of loss and otherwise fail to perfect their claim. It

would allow the Plaintiffs, by their conduct, to unilaterally decide when the limitations period could be extended. This theory should not be accepted; it would create a wholly unworkable and unpredictable scheme for the processing of first party insurance claims.

The fact is that the Plaintiffs did not file this action in advance of December 24, 1986, the two year anniversary date of the fire. They must be charged with knowledge of the law, including the two year suit limitation embodied in G.L. c. 175, Sec. 99. The Plaintiffs have made no showing that would justify an estoppel against Bombard, and the conduct of INA cannot be imputed to Bombard to suffice.

#### CONCLUSION

For all the foregoing reasons, the Defendant/Appellee, Clifford Bombard, d/b/a Bombard Insurance Agency, respectfully requests the Court to affirm the judgment of the Superior Court below.

CLIFFORD BOMBARD, d/b/a  
BOMBARD INSURANCE AGENCY,  
Defendant/Appellee

By \_\_\_\_\_  
JOHN B. STEWART (BBO #551180)  
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AFFIDAVIT OF MAILING

I hereby certify that 7 (seven) copies of the Appellee, Clifford Bombard's, brief were mailed to the Clerk of the Appeals Court on September 6, 1994, and that the day of mailing was within the time fixed for filing.

AFFIDAVIT OF SERVICE

I hereby certify that 2 (two) copies of the Appellee, Clifford Bombard's, brief were served by mailing upon same to Stewart T. Graham, Jr., Two Chestnut Street, Springfield, MA 01103, and Daniel Dilorati, 250 Summer Street, Boston, MA 02110-1181, on September 6, 1994.

Signed under the pains and penalties of perjury, this 6th day of September, 1994.

John B. Stewart (BBO #551180)