

Ronald D. Coleman
BRAGAR, WEXLER & EAGEL, P.C.
One Gateway Center – Suite 2600
Newark, New Jersey 07102
(973) 471-4010
Attorney for Third-Party Defendant
Stone Insurance Agencies

EXPRESS COURIER SYSTEMS, INC., Plaintiff, - vs. - UIC, INC. and SAFE HARBOUR GROUP, LTD., Defendants / Third Party Plaintiffs - vs. - STONE INSURANCE AGENCIES, Third Party Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NUMBER BER-L-0057-06 CIVIL ACTION
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**MEMORANDUM OF LAW IN SUPPORT OF
STONE INSURANCE AGENCIES' MOTION FOR
SUMMARY JUDGMENT PURSUANT TO N.J.S.A. 4:46-2**

Third party defendant Stone Insurance Agencies (“Stone Insurance”) through its attorneys, Bragar, Wexler & Eagel, PC, submits this memorandum of law in support of its motion for an order granting summary judgment to Stone Insurance against third party plaintiff UIC, Inc. (“UIC”) pursuant to N.J.S.A. 4:46-2 and dismissing the Third Party Complaint with prejudice.

A. THIRD PARTY PLAINTIFF UIC HAS FAILED TO STATE A CLAIM AGAINST STONE INSURANCE

When deciding a motion for summary judgment, the motion judge must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party..., are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523, 666 A.2d 146, 147 (1995). Where the evidence is “so one-sided that one party must prevail as a matter of law...the trial court should not hesitate to grant summary judgment.” *Id.*

Here, summary judgment for Stone Insurance and dismissal of the Third Party Complaint is warranted because UIC has failed to adequately state a claim against Stone Insurance in the Third Party Complaint. The Third Party Complaint lacks any substantive or specific factual allegations regarding Stone Insurance’s involvement with UIC’s attempt to procure insurance for Express Courier Systems, Inc. (“Express Courier”). Indeed, the Third Party Complaint does not allege specific causes of action against Stone Insurance – merely a broad claim of Stone Insurance’s liability on unspecified grounds. No cognizable cause of action is named; no factual or legal elements sufficient to put Stone Insurance on notice of the theory of liability it is defending is set out; in short, the “claim” itself is no more than a “Hail Mary” attempt to spread the blame for UIC’s gross failure in this case. *See* Exhibit B to Certification of Ronald D. Coleman (“Coleman Cert.”). UIC has certainly not elucidated matters in discovery, which is now closed; hence there is no basis for it to claim that it should be allowed merely to amend its claims.

In *Oakley v. Wianecki*, the court affirmed dismissal of plaintiff's complaint alleging discrimination against her employer where plaintiff's claim was "devoid of facts and based on unsubstantiated inferences and feelings." 345 N.J.Super. 194, 201, 784 A.2d 727, 731 (App. Div. 2001). The court further stated that viewing the claims in the light most favorable to the plaintiff "but bearing in mind her inability to particularize the claims and present them in anything resembling a detailed, specific and rational manner, whatever evidence exists is so one-sided that plaintiff cannot possibly prevail at trial." *Id.* Here, too, the Third Party Complaint fails to allege facts and particularize UIC's claims against Stone Insurance. And this is not merely a failure of draftsmanship: As demonstrated in the emails exchanged between UIC and Stone Insurance, the evidence clearly shows that UIC does not have a cognizable claim against Stone Insurance because Stone Insurance never agreed to procure coverage for Express Courier. *See* Exhibits E-G to Coleman Cert. This is discussed in greater detail in the following section.

As set forth in *Brill*, if the Court sends this case to trial, knowing that a rational jury can only find in favor of Stone Insurance, it would be "worthless" and "serve no useful purpose." *Brill*, 142 N.J. at 541, 666 A.2d at 156. Accordingly, the Third Party Complaint should be dismissed and summary judgment should be awarded to Stone Insurance.

B. UIC CANNOT PROVE A CLAIM FOR NEGLIGENT MISREPRESENTATION

The Court may, in an abundance of charity, indulge UIC and choose to overlook the factual deficiencies in the Third Party Complaint, going far beyond the standard of *Brill* in speculating what UIC's claim is here. Engaging in such a tea-leaf-reading exercise may well result in a guess that the claim is based on negligent misrepresentation

by UIC. Even then, granting summary judgment in favor of Stone Insurance is appropriate because UIC does not have a claim for negligent misrepresentation. Negligent misrepresentation requires “proof that an ‘incorrect statement was negligently made and justifiably relied upon’ and that the injury was sustained as a consequence of that reliance.” *Saurino v. Senatore*, 2006 WL 2346300 at *3 (App. Div. 2006).

The record is barren of any evidence that Stone Insurance agreed to UIC’s request that it provide coverage for Express Courier or that it could have left any reasonable person with the impression that it had done so:

- In an email exchange on December 9, 2003, between Mr. Rosenthal, UIC’s President and Susan Stone, a representative of Stone Insurance, Ms. Stone stated that Stone Insurance would not be able to provide Express Courier with insurance because “This is not a class of business that Westport wants to write.” *See* Exhibit E to Coleman Cert.
- Ms. Stone again reiterated Stone Insurance’s position in an email dated December 16, 2003, when she stated that “Westport’s Reinsurance Treaty prohibits this class of business. They will not endorse the policy.” *See* Exhibit F to Coleman Cert.
- In what is by all indications the final email exchange between the parties, Mr. Rosenthal indicated that he was “confused” about whether there was a workers’ compensation policy in effect for Express Courier. *See* Exhibit G to Coleman Cert.
- Mr. Rosenthal admitted that procuring the insurance policy was his company’s responsibility (*See* Exhibit D at 147:9-148:23) and, when

asked “Isn’t it the case that Susan Stone advised you that . . . Westport would not write the policy,” he answered, “That is correct” and, when pressed as to what other subsequent communication may have caused him to believe that Stone Insurance had actually procured a policy, he answered, repeatedly, “I don’t recall” (*id.* at 149:10-152:24).

- Mr. Rosenthal nonetheless suggested that he still believed that Stone Insurance may have purchase a policy but that he was “confused” on the matter at the time; yet he himself could not recall at his deposition whether he ever resolved his “confusion” with Ms. Stone, which confusion, by all indications, continues to this day. *See Exhibits G and D* at 152:13-154:18.

Without any evidence that UIC relied on a representation by Stone Insurance that it had procured an insurance policy for Express Courier or that Stone Insurance’s conduct injured UIC in any way – much less that such reliance was reasonable, given the absence of any substantive policy information, confirmation, payment, or anything besides a hope and a prayer – UIC cannot assert a viable claim against Stone Insurance and there is clearly no material issue of fact which would preclude summary judgment against UIC. *See Martin v. Rutgers Casualty Ins. Co.*, 346 N.J.Super. 320, 323, 787 A.2d 948, 949 (App. Div. 2002) (summary judgment appropriate where record is barren of evidence except for plaintiff’s own self-serving assertions); *Demas v. Nat’l Westminster Bank*, 313 N.J.Super. 47, 54, 712 A.2d 693, 698 (App. Div. 1998) (in a retaliation case, summary judgment appropriate where no reasonable jury could find that defendant’s CEPA protected conduct was proximate cause of plaintiff’s injury).

Not only is there no evidence of an affirmative representation by Stone Insurance that UIC could rely, and not only did UIC fail to allege in the Third Party Complaint that Stone Insurance negligently made an incorrect statement that UIC relied upon to its detriment, the evidence also shows that Stone Insurance repeatedly told Mr. Rosenthal that it could **not** procure a workers' compensation policy for Express Courier. Further, Mr. Rosenthal's own testimony that he was "confused" and that he can't recall whether he ever clarified his confusion with Stone Insurance proves that, even if Stone Insurance made any negligent misrepresentations, which it did not, UIC did not justifiably rely upon such statements. *See* Exhibit D at 152:11-24. *See also Kuhnel v. CNA Ins. Co.*, 322 N.J.Super 568, 581 731 A.2d 564, 571 (App. Div. 1999) (in a worker's compensation class action against insurance companies, no claim for negligent misrepresentation where plaintiffs made no showing of detrimental reliance).

UIC has failed to offer any proof that Stone Insurance negligently made an incorrect statement of fact that UIC justifiably relied upon that resulted in UIC's injury. Accordingly, summary judgment in favor of Stone Insurance is appropriate.

CONCLUSION

For the foregoing reasons, third party defendant's motion for summary judgment pursuant to N.J.S.A. 4:46-2 should be granted in its entirety and the Third Party Complaint in this matter dismissed with prejudice.

BRAGAR WEXLER & EAGEL, PC

By: _____
Ronald D. Coleman
One Gateway Center, Suite 2600
Newark, NJ 070102
(973) 471-4010
Attorneys for Defendants

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New York, New York