EFiled: Jan 30 2018 12:57PM EST
Filing ID 61625401
Case Number 401,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE LIMA DELTA COMPANY, TRIDENT AVIATION SERVICES, LLC, And SOCIETE COMMERCIALE ET INDUSTRIELLE KATANGAISE,	)
Plaintiffs below, Appellants,	) No. 401, 2017
v.	) On appeal from the Superior Court of the State of Delaware,
WELLS FARGO INSURANCE SERVICES USA, INC.	) C.A. No. N14C-02-101 JRJ CCLD
Defendant below, Appellee.	)

APPELLANTS' REPLY BRIEF

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Dated: January 30, 2018

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ARGUMENT

In its Answering Brief, Wells Fargo attempts to manufacture support for a clearly erroneous decision by the trial court. In so doing, Wells Fargo misstates the governing law, misstates the facts and claims in Plaintiffs' Second Amended Complaint, engrafts reasoning and findings onto the trial court's decision which do not appear on its face or by reasonable implication, and ultimately fails to acknowledge the procedural posture of the case.

For the reasons set forth below and in Plaintiffs' Opening Brief, Plaintiffs respectfully submit that they have adequately pled a claim for negligence against Wells Fargo; they are entitled to proceed with developing a factual record to support their claim.

A. Wells Fargo's Argument that Plaintiffs Have Failed Adequately to Plead a Negligence Claim Based on a 'Failure to Advise' Regarding a Named Pilot Warranty Term in the Policy Rests on a Misstatement of the Governing Law and a Mischaracterization of Plaintiffs' Claim.

The premise for Wells Fargo's argument that Plaintiffs have failed to plead a failure-to-advise negligence claim is its contention, at page 14 of its Answering Brief, that "*Wells Fargo's duty as an insurance broker was limited to procuring the coverage that Plaintiffs requested.*" Answering Br. at 14 (citing the *Sinex* decision under Delaware law and the *Canales* decision under Georgia law). This is a material misstatement of the law.

While this Court has not passed expressly on the duty (or duties) owed by an agent engaged to procure insurance in this context, the Superior Court has considered this issue, in two decisions.

First, most recently in *Montgomery v. William Moore Agency*, 2015 WL 1056326 (Del. Sup. Ct. Feb. 27, 2015), the Superior Court addressed a fact pattern substantially similar to the facts at issue here, finding that the issue of the agent's negligence in that case was not susceptible to determination on a motion for summary judgment and therefore must be submitted to a jury for determination.

There, the insured, Christmas Tree Shop ("CTS"), through its owners, Mr. and Mrs. Poynter, requested that its insurance agent, the William Moore Agency ("Moore") and its employee Lynn Hitchins, obtain coverage for its business. Moore obtained coverage, but failed to advise CTS and the Poynters about "Hired Auto and Non-Owned Auto Liability" coverage and failed to recommend or obtain such coverage. CTS filed suit against Moore alleging that Moore was negligent in failing to advise of this available coverage and failing to obtain it. After the parties were given the opportunity to develop a factual record through discovery, including serving expert reports (including on the issue of the duty owed by an insurance agent in a failure-to-advise situation), Moore filed a motion for summary judgment arguing, as Wells Fargo does here, that an insurance agent such as Moore

does not have a duty to advise but rather simply must obtain the coverage requested by an insured.

The Superior Court specifically rejected this argument and denied Moore's motion, finding that the issue of Moore's duty and whether it had breached such duty must be submitted to a jury for determination. In so doing, the Superior Court found as follows:

> The court holds that an insurance agent must offer coverage in the way that a reasonably competent agent would under the circumstances. And, generally, an insurance agent has no duty to advise a client. This general rule, however, turns largely on the relationship between the agent and the client and will not apply if 1) the agent 'voluntarily assumes the responsibility for selecting the appropriate policy for the insured' or 2) the insured makes an ambiguous request for coverage that requires clarification.

Montgomery, 2015 WL 1056326, *2 (internal citations omitted).

Recognizing that these issues are fact sensitive, the Superior Court concluded that:

> [t]he record presents issues of material fact as to whether Moore, through Hutchins, breached its duty to the Poynters. First, as mentioned, Plaintiffs' expert opined that it is industry standard to automatically include the Hired Auto and Non-Owned Auto Liability coverage to commercial clients like the Poynters. On this issue, the jury will hear the experts and decide whether failing to 'automatically' include the coverage was a breach of Moore's duty.

Id.

Reinforcing the fact sensitive nature of the duties owned by insurance agents (and whether such duties have been breached), the Superior Court stressed that the relationship of the agent and insured must be examined by a jury to determine whether (and to what extent) the agent owed its insureds a duty and whether the agent breached such duty:

> William Moore Agency has been Mr. Poynter's insurance carrier for more than 60 years. Hitchens bought Moore in 1977, a couple years after the Poynters opened the Christmas Shop. Since then, Hitchens has been Mr. Poynter's insurance agent for both the tree farm and Christmas Shop. Mr. Poynter testified that, relying on Hitchens, 'we bought what we were told we needed.' Poynter further testified ambiguously that the discussions about the insured's coverage needs were 'no more than saying that we needed liability. We needed whatever coverage we thought we needed.' Furthermore, the parties agree that Hitchens said nothing to the Poynters to clarify the ambiguity about what the Poynters wanted. When asked about his discussions with the Poynters, Hitchins testified, also ambiguously, that it was 'a collaborative effort on the part of both parties to arrive at what's best for them.'
>
> If a jury finds that Hitchins should merely have offered the endorsement based on his relationship with the Poynters, as Plaintiffs' expert opines, rather than automatically providing it, as Plaintiffs' expert ultimately opined, then it will have to decide whether the Poynters probably would have purchased the additional coverage.

Id.

That is, the Superior Court recognized the nature of the duty owed by an

insurance agent to its insured is, necessarily, fact sensitive and can be determined only after the development of a factual record (including expert opinions to establish the duty and whether it was breached). In so finding, the Superior Court cited approvingly to this Court's decision in *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962), where the Court recognized that, "[g]enerally speaking, issues of negligence are not susceptible of summary adjudication … [and] [s]imilarly, questions of proximate cause except in rare cases are questions of fact ordinarily to be submitted to the jury for decision." 2015 WL 1056326, *1, n.1.

Thus, in *Montgomery*, the trial court, quite correctly, permitted the parties to develop the record necessary for the court to consider on an informed basis (and at the right time) the question of the duty owed by an insurance agent in the circumstances of that case and whether such duty was breached and, significantly, whether those questions could be answered by the court as a matter of law or must be answered by the jury as a matter of fact.

Second, in a case cited by Wells Fargo in its Answering Brief, the Superior Court in *Sinex v. Wallis*, 611 A.2d 31 (Del. Sup. Ct. 1991), a decision that pre-dates the *Montgomery* case by 24 years, addressed an insurance agent's failure-to-advise on facts much different than ours, finding that summary judgment was warranted under the specific facts of that case.

Wells Fargo cites to *Sinex* for the proposition that, in order for an insurance agent to owe a duty to advise an insured, the agent must have "receiv[ed] compensation apart from the premium(s) paid." Answering Br. at 19. This is a misstatement of Delaware law.

Sinex was a personal injury case arising from an auto accident. The insured, Norgas Sales & Services, Inc. ("Norgas"), filed a third party lawsuit against its insurance agent, W.S.P. Combs Jr. Agency ("Combs"), claiming that Combs breached a duty owed by Combs to Norgas to obtain more than the then-minimum automobile insurance coverage required under Delaware statute. After the development of a factual record through discovery, Combs moved for summary judgment.

The Superior Court granted Combs' motion, finding that "the factual record, read in a light most favorably to Norgas, demonstrated Combs did not breach the duty owed to Norgas to exercise reasonable care, diligence and judgment." *Id*. at 34. In so finding, the Superior Court explained that an insurance agent owes an insured the obligation to use "reasonable care, diligence and judgment" and may owe "a greater duty…when an agent holds himself or herself out as an insurance counselor or specialist *and is receiving compensation apart from the premium(s) paid*." *Id*. at 33 (emphasis added). In so finding, the Superior Court relied on a case decided under Iowa law; it cited to no supporting Delaware law.

Importantly, not since *Sinex* has another Delaware court relied on the "separate compensation" portion of the *Sinex* decision. In fact, the Superior Court in *Montgomery*, a case decided 24 years after *Sinex*, did not even mention this supposed compensation requirement when deciding a case factually similar to our current case. Why? Because the "separate compensation" statement in *Sinex* is not the governing law in Delaware.

Moreover, the Superior Court in *Sinex* recognized that an insurance agent has a baseline duty of care plus a heightened duty of care when the agent holds itself out as an insurance expert. While that scenario was not present in *Sinex*, it is present in our case. *See* Opening Br. at 8 (identifying the facts showing that Wells Fargo held itself out to the public as an expert in aviation insurance and a company that will obtain for its customers a policy specific to each customer's needs).

To be sure, even if applicable or instructive, *Sinex* does not support Wells Fargo's position. To the contrary, unlike in our case, the trial court in *Sinex* did not address the issue of the duties that may be owed by an insurance agent and whether such duties were breached *until after the parties had developed a factual record*. *Sinex* was decided on a motion for summary judgment, not a motion to dismiss. Here, the trial court did not permit Plaintiffs the opportunity to develop a factual record sufficient for the court to answer the questions of the nature of the duty Wells Fargo owed to Plaintiffs under the circumstances and whether such duty was

breached and, most importantly, whether those questions could be decided by the court as a matter of law or must be decided by the jury as a matter of fact.

To be sure, Plaintiffs alleged in their Second Amended Complaint each element of a negligence claim based on Wells Fargo's failure-to-advise regarding the availability and desirability of a Named Pilot Warranty clause and facts to support such claim. Indeed, as explained to the trial court below, Plaintiffs will produce (and did so in the Georgia Action) both fact testimony and expert opinion on this issue establishing that Wells Fargo had a duty to advise Plaintiffs regarding a Named Pilot Warranty and that Wells Fargo had breached this duty. *See* A-213 (explaining that Plaintiffs' aviation insurance expert in the Georgia Action specifically opined that "a reasonably prudent broker would counsel an insured that reliance solely on an open pilot warranty without also specifically naming approved pilots in an aviation insurance policy is highly unusual and places the insured at a much greater risk of possible denial of claims."). That is, and as explained to the trial court, "Plaintiffs are prepared to demonstrate to a jury, through such expert testimony, that a reasonably competent aviation insurance broker would have sought and secured a Named Pilot Warranty in connection with the risk at issue." *Id*. at n.1. This is the very same approach followed and countenanced by the court in *Montgomery*. *See* 2015 WL 1056326, *2 (finding that the jury must hear from the experts and decide whether failing to advise the

insured regarding, and failing automatically to include, a specific insurance term was a breach of the insurance agent's duty). And it is the approach the trial court should have followed here. Failing to permit Plaintiffs the opportunity to develop a factual record and to provide expert opinion on the duty Wells Fargo owed and whether Wells Fargo breached such duty was error.

In further support of its argument that Plaintiffs have failed to plead a claim for negligence based on a duty-to-advise, Wells Fargo argues that Georgia law applies and that, under such law, Wells Fargo owed no such duty to Plaintiffs. Wells Fargo cites specifically to the Georgia appeals court decision in *Canales v. Wilson Southland Insurance Agency*, 261 Ga. App. 529 (2003) in support of this argument.[1]

Canales does not support Wells Fargo's position. *Canales* was a fraud case, not a negligence case based on a duty-to-advise regarding obtaining appropriate insurance coverage. The insured in that case, Canales, alleged that the insurance agent, Wilson, had fraudulently misrepresented the nature and extent of the insurance coverage on Canales' van. Thus, the court was not called upon to (and did not) articulate the duty owed by an insurance agent to its insured; rather, it

[1] In deciding Wells Fargo's motion to dismiss, the trial court did not resolve the issue of which state's law applies, Delaware or Georgia, and did not permit choice-of-law discovery, although it was specifically requested. Plaintiffs' position is that Delaware law applies, but in any event Plaintiffs have adequately pled a negligence claim under both Delaware and Georgia law.

decided whether an agent's fraud or breach of fiduciary duty absolves an insured of his obligation to read and review his insurance policy. Also, *Canales* was decided on a summary judgment motion (after the development of a factual record), not on a motion to dismiss. Indeed, in *Canales*, the insured admittedly "knew what kind of insurance policy he wanted" before he approached his agent and "did not rely on [the agent's] expertise to identify and procure the correct type of insurance for him." *Id*. at 531. These facts are very different than the facts alleged in our current case. *Canales* is simply inapposite.

In fact, contrary to Wells Fargo's current position, Georgia law, like Delaware law, recognizes that an insurance agent may be liable for failing to meet a baseline standard of care, i.e., failing to exercise reasonable care under the circumstances. As explained in *J. Smith Lanier & Co. v. Se. Forge, Inc.*, 630 S.E.2d 404 (Ga. 2006):

> [W]here an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed, and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default.

630 S.E.2d at 406 (internal quotation and emphasis omitted). Indeed, Georgia law makes clear that the general "no duty to advise" rule is inapplicable, and a heightened duty is owed, where, as in our case, the insurance agent "holds himself

out as an expert in the field of insurance and performs expert services on behalf of the insured under circumstances in which the insured must rely upon the expertise of the agent to identify and procure the correct amount or type of insurance." *See Four Seasons Healthcare, Inc. v. Willis Ins. Serv. of Georgia, Inc.*, 682 S.E.2d 316, 319 (Ga. Ct. App. 2009) (internal quotation omitted).[2] Significantly, Georgia law does not recognize the "separate compensation" requirement that Wells Fargo pulled from the *Sinex* decision.

Wells Fargo's default argument that Georgia law applies does not change the outcome. Plaintiffs have adequately pled, in their Second Amended Complaint, a failure-to-advise negligence claim under both Delaware and Georgia law. Plaintiffs alleged the duty owed by Wells Fargo (including its baseline duty and its heightened duty), that it breached such duties and the specific methods and manners by which it breached such duties, and that such breaches proximately caused substantial monetary harm. Wells Fargo may disagree that it owed such duties or that it breached them, but its disagreement – which comes with the right and opportunity to develop facts that Wells Fargo believes will support its defenses – does not mean that Plaintiffs have failed to state a claim or, at the very least, that Plaintiffs should be denied the opportunity to develop the facts necessary to prove

[2] Plaintiffs specifically briefed and argued this issue in their Answering Brief in Opposition to Wells Fargo's Supplemental Brief in Support of Motion to Dismiss. *See* A-210-219.

their claims. The trial court erred in not permitting the development of a factual record and by holding Plaintiffs to a pleading standard far beyond the required notice pleading standard. *See Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) ("To survive a motion to dismiss, the complaint need only give general notice of the claim asserted."). *See also John Doe No. 1 v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (recognizing that factual precision in a complaint is not required; rather, "[a]n allegation, though vague or lacking in detail, can still be well pleaded so long as it puts the opposing party on notice of the claims brought against it.").

B. Wells Fargo's Argument that Plaintiffs Have Failed Adequately to Plead a Negligence Claim Based on Wells Fargo's Failure to Obtain a Written Endorsement Memorializing the Pilot Training Extension Rests on Disputed Facts Not Properly Considered on a Motion to Dismiss and, Indeed, Rests on Demonstrably False Representations Regarding the Record in the Georgia Action.

On Page 20 of its Answering Brief, Wells Fargo argues that Plaintiffs' claim for negligence based on Wells Fargo's failure to document and secure an endorsement memorializing the telephonic approval of a waiver or extension of the recurrent training requirement of the Policy is not well-pleaded. This argument rests on Wells Fargo's representation to the Court that "*No evidence of any such request was found after extensive discovery in the Georgia litigation.*" *See* Answering Br. at 20 (citing to page 8 of the Georgia trial court decision). This is a false statement.

Plaintiffs proffered in the Georgia Action the testimony of their principals attesting that they specifically requested a waiver or extension of the recurrent training requirement from Wells Fargo and that a Wells Fargo representative, Lauren Hanes, advised Plaintiffs that she "had taken care of it." In fact, the Georgia Court of Appeals recognized this evidence in its July 12, 2016 decision, when it noted that "Trident's co-owners testified that they contacted Hanes at Wells Fargo and requested a waiver of this requirement so that both pilots could train together, and that Hanes said that she had taken care of it." *See Lima Delta Co. v. Global Aerospace, Inc.*, 338 Ga. App. 40, 43 (2016).

Indeed, contrary to Wells Fargo's representation to the Court above, the Georgia trial court decision did not state or conclude that "no evidence of [a] request [for a waiver or extension] was found after extensive discovery in the Georgia litigation." Rather, the Georgia trial court's finding on this point was limited to the following recitation:

> Defendants next argue that they approached Wells Fargo seeking a waiver or extension of the training requirement. Neither Global nor Wells Fargo representatives indicated that Global had ever been asked for a waiver or extension and no waiver was ever issued. The Policy requirements under the Open Pilot Warranty are clear and any changes to the Policy were required to be in writing through the issuance of an endorsement by Global. There is no such endorsement in the record.

Global Aerospace, Inc. v. Lima Delta Co., 2015 WL 10384296, *20 (Ga. Super. Ct. August 28, 2015).

That Wells Fargo would misrepresent this fact is telling. In effect, Wells Fargo is making an argument that, if Plaintiffs are permitted the opportunity to develop a factual record as they have requested, such factual record will not be favorable to Plaintiffs and therefore the Court should simply reject Plaintiffs' claims now and affirm the trial court's erroneous decision so as to spare Wells Fargo the effort and expense of defending itself. Such an argument is highly improper on a motion to dismiss. Indeed, the facts will show that Wells Fargo was negligent (grossly so) and that such negligence caused Plaintiffs millions of dollars in harm. Plaintiffs should be given the opportunity to develop its proofs on these claims, and of course Wells Fargo should be given the opportunity to develop facts it believes will support it defenses. But to suggest the Court should look to facts beyond the pleadings – and only to certain facts that Wells Fargo believes support its position – as a shorthand way to summarily decide the merits of Plaintiffs' claims is improper and should be rejected.

This improper argument aside, Wells Fargo goes on to argue that, even if Plaintiffs had in fact requested an extension of the recurrent training requirement, they still cannot state a claim for negligence because "[t]he recurrent training was only one of the requirements, and Plaintiffs do not allege that the pilots would have

met the Open Pilot Clause's required minimum flight hours." *See* Opposition Br. at 20. This argument fails for two reasons.

First, if Wells Fargo had satisfied its duty to advise Plaintiffs to obtain a Named Pilot Warranty, as alleged in the Second Amended Complaint, Plaintiffs may not have been faced with the burdens of the Open Pilot Warranty.

Second, and more importantly for our present purposes, Plaintiffs were not required to allege specifically this fact regarding minimum hours to state a claim for negligence, provided Plaintiffs alleged that they otherwise met the requirements and conditions precedent for coverage for the Accident under the Policy. And they did so allege. Plaintiffs alleged in their Second Amended Complaint, at paragraph 46, that "All conditions precedent to coverage for the Accident under Global's Broad Horizon Aviation Insurance Policy have been satisfied." A-059 at ¶ 46. This includes the minimum flight hours condition.[3]

[3] Wells Fargo also refers the Court to the Georgia trial court's decision rejecting the evidence presented by the DRC's Inspector Anicet Kitenge demonstrating that the pilots met the minimum flight hours requirement because, according to the Georgia trial court, such evidence was hearsay. This reference is inappropriate, as Wells Fargo, again, is trying to make the argument that the factual record, once developed, will not be favorable to Plaintiffs and therefore the Court should summarily decide the merits of Plaintiffs' claims now by simply affirming the trial court's erroneous decision. In this case, Plaintiffs fully expect to present the live testimony of Inspector Anicet Kitenge, which will show that the pilots did in fact meet the minimum flight hours condition of the Policy. For our present purposes, however, it is sufficient to note that this is a fact question not properly considered or decided on a motion to dismiss but which will be part of the factual record that Plaintiffs will develop during discovery.

Indeed, Wells Fargo's arguments confirms one of Plaintiffs' primary points on appeal: The trial court erred by not permitting Plaintiffs the opportunity to develop a factual record before considering the merits of Plaintiffs' negligence claim. *See* Opening Br. at 28-29. Indeed, as this Court has held, such a claim is necessarily fact-intensive, not susceptible to decision on a motion to dismiss. *See Ebersole*, 180 A.2d at 469 (finding that "issues of negligence are not susceptible of summary adjudication…. [and that] questions of proximate case except in rare cases are questions of fact ordinarily to be submitted to the jury for decision").

Plaintiffs have adequately pled, in their Second Amended Complaint, a negligence claim based on Wells Fargo's failure to obtain a written endorsement memorializing its representation to Plaintiffs that the requested waiver or extension of the pilot training requirement was obtained. *See* A-049 at ¶¶ 3(b)(v)-(vii) and A-072-073 at ¶¶ 99(iv)-(vi). *See also* A-216-217 (collecting and citing cases where an insurance agent was found to assume a greater duty to its insured by misrepresenting the policy's terms or extent of coverage). At the very least, Plaintiffs were entitled to develop a factual record on this point before the Court considered the merits of Plaintiffs' claims. The trial court erred when it granted Wells Fargo's motion to dismiss and denied Plaintiffs this opportunity.

C. Plaintiffs Did Not Waive the Remedy of Remand with the Opportunity to Amend Their Second Amended Complaint, and Even if They Did Waive Such Remedy (which they did not), this Court is Fully Empowered to Remand the Case with Instructions that the Trial Court Provide Plaintiffs the Opportunity to File an Amended Complaint.

Wells Fargo argues that Plaintiffs "failed to preserve any request to file a third amended complaint in the Superior Court, and thus, have waived the issue for appeal." *See* Answering Br. at 22. This argument is a red herring. Plaintiffs did in fact preserve the issue before the trial court. *See* A-287 and A-335. But more importantly, this Court is fully empowered to remand this matter with instructions to permit Plaintiffs to file an amended complaint if the Court determines such relief would be warranted under the circumstances. *See e.g. Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 445 (Del. 2005) (reversing and remanding to trial court with instructions to permit plaintiffs to file an amended complaint).

Here, if the Court were to determine that Plaintiffs' Complaint is deficient in some respect, Plaintiffs respectfully submit that the appropriate remedy would be to remand with instructions to permit Plaintiffs the opportunity to amend to correct such deficiencies.

CONCLUSION

For the reasons set forth above, and in Plaintiffs' Opening Brief, Plaintiffs respectfully request that the Court reverse the Opinion and Order of the trial court granting Wells Fargo's Motion to Dismiss the Second Amended Complaint and remand this matter to the trial court either (1) to proceed in the usual course or (2) to permit Plaintiffs the opportunity to amend their Second Amended Complaint to address any deficiencies found therein.

Date: January 30, 2018

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