

COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 92-1832

JOHN MOCCIA, Plaintiff)
)
v.)
)
PELLEY CONSTRUCTION CO., INC.,)
and NORMAN A. PELLEY, Defendants)
and Third Party Plaintiffs)
)
v.)
)
AETNA CASUALTY AND SURETY COMPANY,)
and FIELD, EDDY & BULKLEY, INC.,)
Third Party Defendants)

MOTION FOR SUMMARY JUDGMENT
OF THE THIRD PARTY DEFENDANT,
FIELD, EDDY & BULKLEY, INC.

Now comes the Third Party Defendant, Field, Eddy & Bulkley, Inc., and moves the Court, pursuant to Mass.R.Civ.P. 56, for summary judgment the third party claim against it. As grounds, the undisputed facts of record require judgment as a matter of law in its favor. A memorandum and appendix substantiating this motion is filed herewith.

WHEREFORE, the Third Party Defendant, Field, Eddy & Bulkley, Inc., respectfully requests the Court to enter summary judgment in its favor.

FIELD, EDDY & BULKLEY, INC.,
Defendant

By _____
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MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
OF THE THIRD PARTY DEFENDANT,
FIELD, EDDY & BULKLEY, INC.

I. STATEMENT OF THE CASE

In the first party action, an injured employee (Moccia) sues his employer for a personal injury that occurred at work. The employer (Pelley) was alleged to lack statutorily-mandated workers' compensation insurance. The undisputed facts of record establish the following:

1. The employer purchased a policy of workers' compensation insurance from Aetna Casualty & Surety Company, effective April 5, 1990;
2. The employer's policy with Aetna was cancelled for non-payment on August 8, 1990;
3. Aetna sent notice of termination to the Massachusetts Department of Industrial Accidents on November 13, 1990;^{1/}
4. The employee's accident occurred on November 20, 1990.

^{1/} Attached hereto as Exhibit A are true copies of documents produced by Aetna in response to a discovery request for "all copies of termination and/or cancellation notices sent by Aetna to any state agency regarding Pelley from March 1, 1990 through and including July 31, 1991."

The employer brought a third party claim against its insurance agent, Field, Eddy & Bulkley, Inc. ("Agency"), alleging it was uninsured for its employee's workers' compensation claim as a result of the Agency's negligence. The Agency now moves for summary judgment on the grounds that the employer's third party claim must fail for want of causation and damages, since the employer's workers' compensation policy was in effect at the time of the employee's injury.

II. ARGUMENT AND AUTHORITY

THE EMPLOYER'S CLAIM AGAINST THE AGENCY MUST FAIL AS
A MATTER OF LAW, SINCE THE UNDISPUTED FACTS OF RECORD
ESTABLISH THE EMPLOYER'S INSURANCE REMAINED IN FORCE
UNTIL THE DATE OF THE EMPLOYEE'S ACCIDENT

Although the insurance contract afforded to the employer by Aetna elapsed on August 8, 1990, for non-payment, coverage continued in force until cancellation was effectuated in accordance with the governing law. Between August and November, 1990, G.L. c. 152, §63 (as amended through St. 1986, c. 662, §41) provided as follows:

Insurance companies insuring employees under this chapter shall, at the request of the department, furnish it in writing any information required in connection with the administration by said department of this chapter, including any statistics and the names of all employers insured by them. Notice of issuance of a policy of insurance insuring employers under this chapter shall be given to the department of industrial accidents by the company issuing the policy within five days after the date of issuance thereof. No further notice need be filed in case such insurance is renewed, extended or otherwise continued by such company. Such insurance shall not be cancelled or shall not be otherwise terminated until ten days after written notice of such cancellation or termination be given to the department or until a notice has been received by said department that the employer has secured insurance from another insurance company or has otherwise insured the payment of compensation provided for by this chapter.

* * *

In Frost v. David C. Wells Ins. Agency, Inc., it was conclusively decided that notice pursuant to G.L. c. 152, §63 was required to terminate a policy of workers' compensation insurance, notwithstanding the lapse of the contract of insurance between an employer and its insurer. Citing Brewer's Case, 335 Mass. 601, 604 n.1 (1957), the appellate panel noted the rights of the employee cannot be narrowed by the contract of insurance between the employer and the insurer. Id., at 307. Ultimately, the court held that workers' compensation "coverage continues despite the cancellation of the policy where there has been no compliance with the statutory notice requirement." Id., at 309.

The applicable statutory notice requirement, G.L. c. 152, §63, provided that the employer's coverage would not terminate until ten days after the notice was given by the insurer or received by the department. The earliest either of these events could have occurred is November 13, 1990; termination of the policy would therefore not take place until, at the earliest, November 23, 1990. Since the employee's accident occurred on November 20, 1990, Aetna's coverage was still in effect.

Pursuant to Kourouvacilis v. General Motors Corp., 411 Mass. 706, 716 (1991), summary judgment is appropriately granted against a party when there is no reasonable expectation of proving an essential element of that party's case. In this case, the undisputed facts of record demonstrate that the employer will not be able to prove that it was without workers' compensation coverage on the date of the employee's injury. As such, the employer's third party claim that any conduct of the Agency caused it to be uninsured or to incur damages as a result thereof must fail as a matter of law.

III. CONCLUSION

For all the foregoing reasons, the Agency, Field, Eddy & Bulkley, Inc., respectfully requests the court enter summary judgment in its favor on the third party claim against it asserted by Pelley Construction Company, Inc. and Norman A. Pelley.

FIELD, EDDY & BULKLEY, INC.,
Defendant

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