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IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

J. SMITH LANIER & CO.,)	
)	
Appellant,)	Case No. A04A2138
)	
v.)	On Appeal from the Superior
)	Court of Gwinnett County
ACCEPTANCE INDEMNITY)	Civil Action File No.
INSURANCE COMPANY,)	02-A-10795-7
)	
Appellee.)	

SUR-RESPONSE BRIEF OF APPELLEE
ACCEPTANCE INDEMNITY INSURANCE COMPANY

COMES NOW Appellee Acceptance Indemnity Insurance Company (“Acceptance”) and files this, its Sur-Response Brief in Response to Appellant J. Smith Lanier & Co.’s (“JSL”) Reply Brief. In support thereof, Acceptance shows this Honorable Court the following:

I. INTRODUCTION.

Acceptance files this Sur-Response Brief to correct certain errors in JSL’s Reply Brief. JSL mischaracterized the facts and Acceptance’s argument, necessitating this response. The basic logic underpinning the lower court’s grant of summary judgment to Acceptance, however, remains unchanged: the liability of

Acceptance and JSL to Plaintiff Southeastern Forge, Inc. (“SEF”) is mutually exclusive and consequently, Acceptance and JSL cannot, as a matter of law, be joint tortfeasors.

II. ARGUMENT AND CITATION OF AUTHORITY.

A. The Loan Receipt and Subordination Agreement.

JSL mischaracterizes both the Loan Receipt and Subordination Agreement, contracts entered into between Southeastern Forge and Acceptance. JSL incorrectly states that, “[t]hrough a Loan Receipt agreement, Acceptance ‘loaned’ SEF \$2.15 million to pay the judgments against it, yet SEF is in no way obligated to repay the money.” (JSL Reply Brief at 3). The clear language of the Loan Receipt, however, contradicts JSL’s mischaracterization, stating explicit terms under which the loan is repayable:

“Received from [Acceptance] ... the sum of ... \$2,150,000.00 as a loan, with ... 2% accruing simple interest from the date of this Receipt, repayable only in the event of and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the damages sustained by the undersigned arising from any failure to

procure excess insurance on behalf of [SEF].” (Loan Receipt, R-VII-116-3604-06).

In mischaracterizing the Subordination Agreement, JSL also incorrectly states that in that document, “SEF also authorized Acceptance to proceed under SEF’s name and prosecute any colorable claim against third parties – namely, JSL.” (JSL Brief at 3). The Subordination Agreement does not speak to this issue. (See Subordination Agreement, R-VII-116-3607-11). Rather, the clear language of the Loan Receipt contradicts JSL’s mischaracterization, confirming that SEF retained sole ownership over the right to bring suit and over the claims to be brought:

“The undersigned hereby agrees to cooperate fully with [Acceptance], to promptly present said claim and, if necessary, to commence, enter into and prosecute with all due diligence and in its name any suit against such person or persons, corporation or corporations, or other entities which had duties, obligations, or responsibilities to [SEF]. ... In further consideration of said loan, the undersigned (SEF) hereby guarantees that it is the sole owner of the aforesaid rights and claims... .” (Loan Receipt, R-VII-116-3406-08).

SEF, of course, then brought the underlying action against JSL. (See Complaint, R-I-3-8).

B. The collateral estoppel effect of the prior federal action.

When discussing the prior federal action,¹ JSL omits the central holding of that court as related to JSL and mischaracterizes Acceptance's argument concerning that action. The United States District Court for the Middle District of Georgia held, inter alia, that JSL did not have an interest in the subject matter of the litigation – the insurance policy between Acceptance and SEF – sufficient to litigate the policy's terms, and consequently dismissed JSL from the suit. Id. Acceptance argues that this determination is the judgment that collaterally estops JSL from attempting exactly the same thing in this case. (See generally Acceptance's Appellee Brief in Response to JSL's Appeal). Acceptance does not

¹ Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D 697 (M.D. Ga. 2002). (R-III-96-1286).

claim, but it does not follow that a person injured by the insured and who is not a party to the insurance contract may complain of the negligence or bad faith of the

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argue, contrary to JSL's repeated assertions,² that the federal court's determination that the Acceptance insurance policy was void ab initio collaterally estops JSL from bringing its own contribution and indemnity claim.³

As a consequence of the federal judgment, however, JSL is collaterally estopped from litigating "whether there was a material omission from the application, whether the policy was void ab initio, and whether Acceptance waived any right of rescission." (JSL Reply Brief at 8). Because the federal court ruled that JSL, as a third-party⁴ stranger to the insurance policy between Acceptance and

² "Acceptance contends that JSL's claims for contribution and indemnity fail as they were either directly or implicitly adjudicated in the prior litigation." (JSL Reply Brief at 4).

³ JSL's ensuing arguments concerning the collateral estoppel effect of the federal judgment on JSL's ability to bring a Third-Party Complaint alleging contribution and indemnity are therefore irrelevant.

⁴ Independent of the holding of the Middle District Court in Acceptance Indem. Ins. Co., 209 F.R.D. 697, JSL, as a third-party stranger to the insurance policy, is precluded from attempting to enforce that policy. See Capitol Indem. Corp. v.

Brief at 12). While that question is still at issue,⁵ the scope of Acceptance's duty is not. The basic logic underpinning the Trial Court's holding remains unchanged: if JSL breached a fiduciary duty to SEF by failing to properly and accurately complete the insurance application, then JSL failed to obtain a valid policy of insurance, the policy is void, and Acceptance is not a joint tortfeasor with JSL. If JSL fulfilled its fiduciary duties to SEF and obtained a valid policy of insurance, then JSL will have no liability, and therefore no liability to share with Acceptance by virtue of either contribution or indemnity.

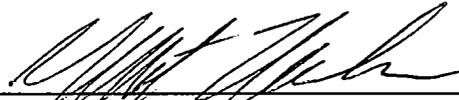
⁵ JSL incorrectly states that "[i]t appears that whether an insurance broker has a fiduciary duty to protect and indemnify its clients is a novel issue before Georgia Courts." (JSL Reply Brief at 11-12). See Nash v. Ohio Nat'l Life Ins. Co., 266 Ga. App. 416, 420, 597 S.E.2d 512, 517 (2004) (An insurance agent who undertakes to identify and procure insurance on its client's behalf has certain fiduciary duties to that client.).

III. CONCLUSION.

For the foregoing reasons, Acceptance respectfully requests that this Court AFFIRM the lower court's grant of summary judgment to Acceptance and DENY J. Smith Lanier & Co.'s appeal.

Respectfully submitted this 25th day of October, 2004.

BUDD LARNER, P.C.



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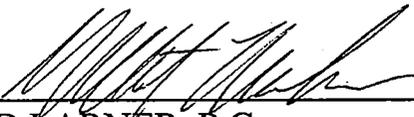
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