IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GREAT NORTHERN INSURANCE COMPANY in its own right and as subrogee of JEFFREY and MEG ARNOLD, Plaintiff, v. ALL PHASE PLUMBING, INC., LEAGUE CUSTOM SECURITY, INC., MIKE WALDECK, and R.M. BONDURANT CONSTRUCTION CO., Inc., Defendants, and GUARDIAN OF GEORGIA, INC., d/b/a ACKERMAN SECURITY SYSTEMS, Defendant/Third-Party Plaintiff, v. R.M. BONDURANT CONSTRUCTION CO., INC., and ALL PHASE PLUMBING, INC., Third-Party Defendants.	)	CIVIL ACTION FILE NO.1:01-CV-2729 CAP

BRIEF IN SUPPORT OF GUARDIAN OF GEORGIA, INC. d/b/a ACKERMAN SECURITY SYSTEMS'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Guardian of Georgia, Inc. d/b/a Ackerman Security Systems (hereinafter "Ackerman"), by and through its undersigned counsel, and files this Brief in support of its Motion for Summary Judgment.

I. INTRODUCTION

Plaintiff Great Northern Insurance Company (hereinafter "Plaintiff") insured the home of Jeffrey and Meg Arnold (the "Arnolds"). On October 17, 2000, a fire severely damaged the house which was under renovation. Plaintiff paid in excess of $5,000,000.00 to restore the home, and now seeks to recover from defendants, including Ackerman, who contracted with the Arnolds to provide certain security and fire alarm systems for the home. Plaintiff's Second Amended Complaint contained two counts of negligence against Ackerman. The first count is by Plaintiff as subrogee of the Arnolds, and the second count is by Plaintiff in its own right. Generally, Plaintiff claims that Ackerman failed to install and monitor temporary heat detection devices, and that, as a consequence, the damage resulting from the fire was greater than would have been had the fire department been notified sooner.

II. STATEMENT OF UNDISPUTED FACTS

In 1999, the Arnolds purchased a home in the Buckhead section of Atlanta, Georgia, known as 281 Blackland Road (hereinafter the "dwelling"). (U.F.3)[1]The Arnolds began an extensive renovation of the existing structure and the addition of other structures, such as a pool house and an auto park. To relieve the Arnolds of the day-to-day problems of the construction work, they conducted business through a number of "filters," including Jack Nichols, Mrs. Arnold's father. (Meg Arnold Depo. at 19-20.) Initially, the Arnolds hired Defendant Bondurant Construction Company (hereinafter "Bondurant") to serve as general contractor for the work;

[1] U.F. refers to the paragraphs in the Statement Of Material Facts As To Which There Exists No Genuine Issue To Be Tried by Ackerman filed herewith. The reference to Appendices is to those attached to the Motion For Summary Judgment filed herewith.

however, Bondurant's contract was terminated and a new contractor, Johnson, Williams & Harris, Inc., replaced Bondurant.

Mr. Nichols, on behalf of the Arnolds, negotiated directly with Ackerman for a permanent security system for the house. On or about January 17, 2000, Mr. Nichols signed a written Purchase Agreement with Ackerman, whereby Ackerman agreed to provide services and materials, including wiring, service panels and devices, for the permanent security system in the house. (Burt Kolker Depo., Ex. 3.) The following terms of the Purchase Agreement are significant for this motion:

> 3. Disclaimer and Limitation of Liability Purchaser [Arnolds] agrees and understands: that neither company [Ackerman] nor its directors, officers, shareholders, employees, successors or assigns (collectively 'representatives') is an insurer; that it is the specific intent of the parties that (i) insurance covering all loss, damage and expense in connection with, as a consequence of, arising out of or from, in connection with or resulting from personnel [sic] injury including, without limitation, medical, disability, and other insurance for physical, mental and emotional conditions, life insurance, and real or personal property insurance, shall be obtained and continuously maintained by the purchaser, (ii) recovery for all such loss, damage and expense shall be limited to any such insurance coverage only, and (ii) company and representatives are released from any and all liability for all such loss, damage and expense; that company and representatives are released for all loss, damage or expense which may occur prior to, contemporaneous with, or subsequent to the execution of this agreement due to the improper operation or non-operation of the alarm system, breach of contract, express or implied, or breach of warranty, express or implied; that should there arise any liability on the part of company representatives for economic losses, personal injury, including death or property damage, real or personal, which is in connection with, arises out of or from, results from is related to or is a consequence of the design, sale or installation of the alarm system, the active or passive sole, joint or several negligence of company or representatives or product or strict liability including, without limitation, any general direct, special, incidental, exemplary, punitive, statutory or consequential damages, irrespective of cause, such liability shall be limited to the maximum sum of $250.00 collectively for company and representatives, and this liability shall be exclusive.

> In the event that the purchaser wishes to increase the maximum amount for the increase of such limit of liability, but this higher limitation shall in no way be interpreted to hold company or representatives as an insurer.
>
> * * *
>
> 6. Waiver of Subrogation No insurance company or its successors or assigns shall have any rights created by a loan agreement, loan receipt or other like document or procedure, or any right of subrogation against Company or Representatives.

(emphasis added.)

During 2000, the dwelling was insured by a property insurance policy issued by Plaintiff, which is a subsidiary of Chubb Group of Insurance Companies (hereinafter "Chubb"). The Arnolds procured the policy through Marsh U.S.A, Inc. (hereinafter "Marsh"), an insurance broker. On two occasions in 2000, Chubb's appraiser, Nicholas Theos, appraised the dwelling. On May 19, 2000, Mr. Theos conducted his appraisal and made three recommendations concerning fire and security measures: (1) additional fire extinguishers, (2) a temporary fire alarm system, and (3) a security guard at night and weekends. As regards the temporary fire alarm, he recommended that the "system should consist of at least one heat sensor on each level of the home, including the basement." (Theos Depo. Ex. No. 1.) (Appendix ____.) In Mr. Theos evaluated the protection and loss prevention measures for the dwelling as inadequate, unless his recommendations were satisfied. Several weeks passed before Chubb sent Mr. Theos' recommendations to Marsh on July 13, 2000. (Martin Depo. Ex. No. 10.)

In July 2000, Ackerman was asked to install temporary heat detection devices in the dwelling in accordance with the appraiser's recommendation. Ackerman prepared another Purchase Agreement, bearing the date July 10, 2000, whereby it agreed to:

> Furnish & install 12 rate of rise-fixed temperature heat detectors as required by insurance company and requested by Scott Teague.
>
> 12 devices and wiring include programming and connection to temporary panel. This work done after wiring run in house.

The price for this work was $1,584.00. Scott Teague, a contract employee of the general contractor, Bondurant, signed the Purchase Agreement for the Arnolds. The Purchase Agreement contained the same terms and conditions as the original Purchase Agreement in regard to limitation of liability and waiver of subrogation. (See infra pages 3 to 4). The Purchase Agreement did not provide a time frame or deadline for completion of the work.

Marsh, the insurance broker, did not formally notify the Arnolds of the insurance company's recommendations until August 2, 2000. (Mary Martin Depo., Ex. 9.) Ms. Martin passed along the recommendations to the Arnolds' construction manager, Mike Waldeck, on August 7, 2000 and gave him three weeks to implement the recommendations. (Depo. of Mary Martin, Ex. 10.) Ackerman's contractor, Greg Underwood, installed twelve (12) heat detector devices on August 25, 2000; however, Mr. Underwood did not connect the wires of the devices to the service panel because he understood that the service panel was going to be relocated due to electrical code conflicts. (Underwood Depo. p. 53-54.)

On October 3, 2000, Mr. Theos made another appraisal of the property. At that time, he noted in his report that the fire detection system was adequate, but he also noted that his recommendation for a security guard at night and on the weekends

had not been implemented. (Theos Depo. Ex. No. 1.)[2] He again concluded that the protection and loss provision measures for the dwelling not adequate, due to non-compliance with his recommendations. Notwithstanding Mr. Theos' recommendations and the attempt to comply with the provision of temporary fire devices, documents produced indicate that Plaintiff's insurance policy on the dwelling was continued and the premiums therefore computed as if there was no fire alarm present. (Mary Martin Depo., Ex. 11; P. 73.)

On October 17, 2000, a plumber had been sweating or soldering a joint on plumbing lines on the second floor of the north wing of the dwelling. The contractor's employees, Harry Stone and Roy Irwin, left the dwelling around 7:20 to 7:30 p.m. (Irvin depo. p. 40; Stone depo. p. 20.) They were the last people to leave the dwelling on that evening and no smoke or fire was evident. (Id.) According to records from the City of Atlanta, a 911 telephone call was received at 8:52 p.m. to report a fire at the dwelling. (Tate depo. p. 14.)

The first unit of the Atlanta Fire Department arrived on the scene at approximately 8:58 p.m. and discovered fire in the north wing of the dwelling. (Tate Depo. p. 14.) The fire was extinguished, but there was property damage. The generally accepted theory is that the fire resulted from the plumber's propane torch; however, the precise cause of the fire is not material to this motion, other than that there is no allegation or evidence that any act or omission by Ackerman or it agents and contractors started the fire.

[2] The Arnold's construction manager had resisted Chubb's recommendation for a security guard at night and on weekends, because, in his opinion, security guards were prone to create more problems, e.g., thefts, than they prevented. Hence, there was no security guard on duty at the time of the fire. (Waldeck Dep., p. 48, 57.)

III. ARGUMENT AND CITATION OF AUTHORITIES

A. Ackerman's Liability To Plaintiff, If Any, Is Limited To Breach Of Contract

As a subrogated insurance carrier, Plaintiff's rights against Ackerman are derived from those of its insureds, the Arnolds, and are limited to the Arnolds' rights. Curles v. U.S.F.&G., 198 Ga. App. 857, 403 S.E.2d 458 (1991). Plaintiff has advanced its claims against Ackerman solely in tort, including negligence. Conspicuously absent is any claim based upon breach of any contract between Ackerman and the Arnolds; presumably Plaintiff in attempting to avoid the operation of the limitation of liability and waiver of subrogation clauses of the agreements. Under Georgia law, which applies to this case, a breach of a duty imposed by contract, even if negligent or willful, does not also give rise to a tort action unless the breach was also a breach of a duty imposed by law, apart from the contract. See A.L. Williams & Assoc. v. Faircloth, 259 Ga. 767, 386 S.E. 2d 151 (1989); Wynn v. Arias, 242 Ga. App. 712, 531 S.E.2d 126 (2000).

> [W]here defendant's negligence ends merely in nonperformance of the contract and where defendant is not under any recognized duty to act apart from the contract, the courts generally see no duty to act affirmatively except the duty based on -- and limited by -- defendant's consent. In those circumstances, an action in tort may not be maintained for what is a mere breach through non-action or through ineffective performance (which is the same thing) of a contract duty -- the duty must arise independent of the contract to constitute a tort.

Servicemaster Co. v. Martin, 252 Ga. App. 751, 756, 556 S.E.2d 517 (2001) (quoting Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363, 365, 203 S.E.2d 587 (1973)).

This principle has been applied other jurisdictions in cases specifically involving fire alarm systems to defeat claims in negligence or gross negligence for failure of the system. Rassa v. Rollins Protective Services Co., 30 F. Supp. 2d 538, 541 (D. Md. 1998) ("defendant's obligation to install, program, and monitor the plaintiff's alarm system arose exclusively from the agreement

between the parties and not from an separate, state-imposed tort duty."); Steiner Corp. v. American District Telegraph, 106 Idaho 787, 791, 683 P.2d 435, 439 (1984) ("Apart from this contract, ADT could not be said to have a duty to maintain" the batteries in the fire alarm system).

In this case, even though Plaintiff has avoided asserting breach of contract, it necessarily depends upon the July 10, 2000 Purchase Agreement to establish the duty. It alleges that, "Ackerman undertook a duty to the Arnolds for consideration, to install properly functioning heat detectors in the house." (emphasis added). (Second Amended Complaint, ¶ 46.) It further alleges that, "the Arnolds engaged Ackerman for the purpose of installing . . . 12 rate of rise fixed temperature heat detectors" in the dwelling. (Id. at ¶ 12.) This allegation is almost verbatim from the scope of work in the July 10, 2000 Purchase Agreement. There is no common law duty to install temporary heat detectors, which would exist independently of a contractual obligation to do so. Plaintiff's claims against Ackerman, if any, are based solely on a breach of contract, which Plaintiff has not alleged.[3]

Ackerman anticipates that the Plaintiff will argue that the July 10, 2000 Purchase Agreement was not binding because Scott Teague, the signator on behalf of the Arnolds, lacked authority. Such an argument, if made, is disingenuous. The basis for any responsibility of Ackerman is the failure to connect the rate of rise heat detectors, which arises solely from the

[3] Even though the heat detector devices were not connected to the service panels, Ackerman does not concede that the omission constitutes a material breach of contract. The Purchase Agreement did not specify a time for Ackerman to complete the work, nor did it state that time was of the essence. "Time is not generally of the essence of a contract; but, by express stipulation or reasonable construction, it may become so." O.C.G.A. § 13-2-2(9). Moreover, the heat detectors were not a matter treated with time urgency by either Plaintiff or the Arnolds. Mr. Theos developed his recommendation at or following his appraisal on May 19, 2000. Yet, it took almost three months, until August 7, 2000, before anyone on behalf of the Arnolds made a definite directive for their installation. (Martin Dep. Ex. No. 10.)

contract. Furthermore, the only reason for the agreement was to comply with the recommendations of Plaintiff, and was something the Arnolds were requested to do. Nevertheless, any issue over Teague's authority is obviated by the ratification of the contract. On March 22, 2001, as the Arnolds and Ackerman were negotiating an overpayment made to Ackerman, Michael Rosenweig, Esq., an attorney on behalf of the Arnolds, wrote a letter in which he acknowledged the existence of the July 10, 2000 Purchase Agreement to install and monitor heat detectors during construction. (Meg Arnold Depo. p. ___.) Mr. Rosenweig concluded that no payment was due to Ackerman on account of that agreement because the work had not been completed. The letter of March 22, 2001 from counsel for the Arnolds was a ratification of the July 10, 2000 Purchase Agreement. See O.C.G.A. § 10-6-52.[4] Furthermore, the authority to sign the agreement is ratified by the Second Amended Complaint, which alleges that Ackerman was engaged to install 12 heat detectors in language that tracks the terms of the Purchase Agreement.

B. The Plaintiff's Subrogation Claims Are Barred By The Waiver Of Subrogation Provisions In The Purchase Agreement

Both the original agreement and the July 10, 2000 Purchase Agreement contained a provision that no insurer would have rights against Ackerman in subrogation. (See infra page 5). It is undisputed that Plaintiff is an insurer seeking to recover payments under the policy by way of subrogation. (Second Amended Complaint ¶ 44). Waiver of subrogation clauses are enforceable in Georgia where it is clear, as here, that the parties to the contract agreed to look

[4] "A ratification by the principal shall relate back to the act ratified and shall take effect as if originally authorized. A ratification may be express or implied from the acts or silence of the principal. A ratification once made may not be revoked." See also Pioneer Concrete Pumping Service., Inc. v. T&B Scottsdale Contractors, Inc., 218 Ga. App. 596, 462 S.E.2d 627 (1995).

solely to insurance coverage to pay any loss. See May Dept. Store v. Center Developers, Inc., 266 Ga. 806, 471 S.E.2d 194(1996); Tuxedo Plumbing v. Lie Nielsen, 245 Ga. 27, 262 S.E. 2d 794 (1980); Glazer v. Crescent Wallcoverings, Inc., 215 Ga. App. 492, 451 S.E. 2d 509 (1994). See also Albany Insurance Co. v. United Alarm Services, Inc., 194 F. Supp. 2d 87 (D.Conn. 2002) (waiver of subrogation provision in fire alarm system contract upheld); Nationwide Mut. Fire. Ins. Co. v. Sonitrol, Inc., 109 Ohio App. 3d 474, 672 N.E.2d 687 (1996) (waiver of subrogation clause in security alarm contract enforced). While a waiver of subrogation clause may not preclude a claim based upon the tort of gross negligence,[5] Ackerman's liability lies, if at all, in failing to perform a contractual obligation, not one based on tort, such as gross negligence. (See infra pages ____ to ____).

C. The Plaintiff's Damages In Subrogation Are Limited By The Limitation Of Liability Clauses Of The Agreements

The agreements limited Ackerman's liability for damages, irrespective of cause to the maximum of $250.00; subject, however, to an increase of the limitation by the customer. (See infra page ____). In general, contractual exculpatory and limitations of liability clauses are not against public policy and are enforced by Georgia courts. See Bradford Square Condominium Association, Inc. v. Miller, ___ Ga. App. ____ note 14, 573 S.E.2d 405 (2002) (exculpatory clause); Brainard v. McKinney, 220 Ga. App. 329, 469 S.E. 2d 441 (1996) (limitation of liability). The United States District Court for the Southern District of Georgia has held that a similar limitation of liability clause in a security system agreement was enforceable. D.L. Lee & Sons, Inc. v. ADT Security Systems, Mid-South, Inc., 916 F.Supp. 1571 (S.D. Ga. 1995) aff'd.

[5] See Colonial Properties Realty L. P. v. Lowder Construction Co., Inc., 256 Ga. App. 106, 567 S.E. 2d 389 (2002).

without opinion, 77 F.3d 498 (11th Cir. 1996) (applying Georgia law). The clause at issue was very similar to the one in Ackerman's agreements. The court noted that "[l]imitation of liability clauses, involving fire and burglar alarms are commonly ruled enforceable by the courts." Id. at 1582. See also Leon's Bakery, Inc. v. Grinnell Corp., 990 F.2d 44, 48 (2nd Cir. 1993) ("it appears that all of the courts that have considered the validity of limitation-of-liability clauses in contracts for the provision of fire alarm systems have found those clauses to be permissible."); E.H. Ashley & Co., Inc. v. Wells Fargo Alarm Services, 907 F.2d 1274 (1st Cir 1990); Nahra v. Honeywell, Inc., 892 F. Supp. 962 (N.D. Ohio 1995); Sommer v. Federal Signal Corp, 79 N.Y.2d 540, 553-54, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992); Fretwell v. Protection Alarm Co., 764 P.2d 149 (Okla. 1998); Schrier v. Beltway Alarm Co., 73 Md.App. 281, 533 A.2d 1316 (1987); Ostalkiewicz v. Guardian Alarm, 520 A.2d 563 (R.I. 1987); St. Paul Fire & Marine Ins. Co. v. Guardian Alarm, 115 Mich.App. 278, 320 N.W.2d 244 (1982); First Financial Ins. Co. v. Puralator Security, Inc., 69 Ill.App. 3d 413, 26 Ill.Dec. 393, 388 N.E.2d 17 (1979); Abel Holding Co. v. American District Telegraph Co., 138 N.J.Super. 137, 350 A.2d 292 (Law Div. 1975); aff'd. 147 N.J.Super. 263, 371 A.2d 111 (App.Div. 1977); Wedner v. Fidelity Security Systems, Inc., 228 Pa.Super. 67, 307 A.2d 429 (1973); Shaer Shoe Corp. v. Granite State Alarm, Inc., 110 N.H. 132, 262 A.2d 285 (1970). The rationale is that the supplier of the equipment or service is being paid only for the equipment and service and the price does not include a sum designed to pay the value of the property which it is intended to protect. Id. See also Annot., Liability of Persons Furnishing, Installing, or Servicing Burglary or Fire Alarm System for Burglary or Fire Loss, 37 A.L.R. 4th 47, § 6(b) (1985). Accordingly, the liability, if any, of Ackerman in this case is limited to $250.00.

D. Ackerman Is Entitled To Summary Judgment As To Plaintiff's Claim, "In Its Own Right"

Plaintiff claims that Ackerman owed it a duty, independent of any agreements with the Arnolds, which gives rise to claim by Plaintiff in its own right. Implicit in this claim is that Ackerman had an obligation regarding the installation of the heat detectors, independent of the Purchase Agreement, and that Plaintiff relied to its detriment that Ackerman had satisfied that obligation.

1. Privity of Contract.

Ackerman's obligations regarding the temporary heat detectors arose solely from the July 10, 2000 Purchase Agreement with the Arnolds. Generally, "an action on a contract, . . . shall be brought in the name of the party in whom the legal interest in the contract is vested . . . " O.C.G.A. § 9-2-20(a). Plaintiff is not that party (except by way of subrogation) and therefore has no other right or standing to sue Ackerman for breach of the agreement regarding the temporary heat detectors.

2. Justifiable Reliance.

Plaintiff's claim "in its own right" seems to be a novel one for which there is a absence of authority in Georgia; however, the claim bears some similarities to the negligent misrepresentation cause of action which may exist, in the absence of privity of contract, under certain circumstances.

See Robert & Company Associates v. Rhodes-Haverty Partnership, 250 Ga. 680, 300 S.E.2d 502 (1983).[6] An essential element of such a claim is justifiable reliance on a misrepresentation by

[6] Ackerman does not concede that Rhodes-Haverty even applies, but raises it by way of analogy only. Rhodes-Haverty recognized hybrid fraud actions based

the defendant. Id. See also Howard v. McFarland, 237 Ga. App. 483, 515 S.E.2d 629, 632 (1999).

First there is no competent evidence either that Ackerman or its agents or contractors misrepresented to Plaintiff the functional status of the heat detectors.[7] The only reliable record of communication to Plaintiff on the subject was an equivocal message from Marsh (Mary Martin) to Chubb (Ms. Arace) that "the contractor has been ordered to have smoke and heat detectors installed in the house but Mike Waldeck has not yet seen this with his own eyes." (Martin Depo. Ex. 12; (emphasis added.)) On October 3, 2000, Chubb's appraiser, Mr. Theos observed the heat detector devices affixed to the ceiling, but he did not test the detectors or otherwise determine that the detectors actually functioned. (Theos Depo. pp. 41-42.) While Mr. Theos concluded that the fire detection system was adequate, he also recorded in his report that the protection and loss prevention measures were inadequate unless his recommendations for

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upon professional negligence, not scienter. The cause of action does not apply in cases where the defendant is not a professional paid to render a statement. See Simpson Consulting, Inc. v. Barclays Bank, PLC., 227 Ga. App. 648, 490 S.E.2d 185 (1997). Ackerman is not a professional (unlike the civil engineer in Rhodes-Haverty) who prepared written reports as a professional. If, however, a cause of action exists in favor of Great Northern in its own right, detrimental reliance or at the very least proximate causation must be an element.

[7] Scott Teague testified that he assumed that the detectors were working, but no one told him they were working. (Scott Teague Dep. pp. 48-49.) Later in his deposition, he said he assumed that someone told him "everything's up and running," (Id., pp. 107-108), but still later he said that he could not swear under oath, that Tony League (Ackerman's contractor) told him that the system was up and running. (Id., p. 134). The testimony shows his lack of knowledge and is not competent. See Fed.R.Evid. 601 and 602; 27 Wright H. Miller, Federal Practice and Procedure: Evidence § 6032 ("No witness would be permitted to testify on the strength of having perceived facts or events in the past if the witness admitted to having no present recollection of the perception.")

a security guard at night and weekends and motion activated lights were satisfied. (Theos Depo. p. 46, Ex. 1.)

Plaintiff's claim against Ackerman is not viable even if Plaintiff should argue that Ackerman is guilty of suppression of the truth of the inoperative condition of the temporary system. Suppression of a material fact is not actionable under Georgia law unless the defendant is under an obligation to communicate from the existence of a confidential relationship of the parties or from the particular circumstance of the case. O.C.G.A. § 23-2-53; Williams v. Dresser Industries, Inc., 120 F.3d 1163 (11th Cir. 1997) (Georgia law). There is no relationship between Plaintiff and Ackerman, and certainly none that can under any circumstance be considered "confidential" under Georgia law. See O.C.G.A. § 23-2-58 (a confidential relationship may exist "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal agent, etc.").

Moreover, the "particular circumstances" of this case do not create a duty by Ackerman to disclose facts to Plaintiff. There was no contract between Plaintiff and Ackerman "regulating the flow of information between them," which might give rise to a duty to disclose. See Williams v. Dresser Industries, Inc., supra, 120 F.3d at 1169. In fact Plaintiff has attempted to avoid making a claim based upon any contract.[8]

[8] A plaintiff must exercise due diligence and use the means available to discover the truth. See Williams v. Dresser Industries, Inc., 120 F.3d 1163, 1171-72 (11th Cir. 1997) (Georgia law). Mr. Theos could have used a heat source, such as a hair dryer, to test the rate of rise heat detectors (U.F.__), but he failed to do so. He assumed that, because they were affixed to the ceiling, they worked. (Nicholas Theos dep. p. ___.)

Even if there was a representation of or suppression of a fact concerning the functioning of the system, the undisputed fact is that Plaintiff did not change its position in reliance upon a representation or suppression of any fact. Plaintiff's insurance coverage for the dwelling (and the premium charged for such coverage) specifically did not contemplate the presence of any fire alarm system at the dwelling. Plaintiff's "Rate Sheet," dated August 7, 2000, shows that the premium amount was computed without any adjustment for either a fire alarm or a burglar alarm, but included a surcharge for the fact that the dwelling was vacant. (Martin Depo. p. 73, Ex. No. 18.) No change was made in the premium calculation at anytime after the August 7, 2000, effective date of the rate sheet, even after the fire. (Martin Depo. Ex. No. 18.) Accordingly, the presence or absence of functioning heat detector had no affect on the risk which Plaintiff agreed to, and did underwrite, and therefore Plaintiff did not rely to its detriment on any representation or impression that the temporary heat detectors were functioning. To the contrary, Plaintiff agreed to and continued insurance coverage on the dwelling despite its appraiser's assessment on October 3, 2000, that protection and loss prevention measures were "inadequate" at that time.

IV. CONCLUSION

Defendant Ackerman moves for summary judgment on all claims. Alternatively, Defendant moves for a partial summary judgment that its liability to Plaintiff shall be limited to $250.00, as provided in the Purchase Agreements.

Respectfully submitted this the _____ day of _____, 2003.

FREEMAN MATHIS & GARY, LLP

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T. Bart Gary
Georgia State Bar No. 287430
Michael W. Horst
Georgia State Bar No. 367837
Attorneys for Defendant and Third
-Party Plaintiff Guardian of Georgia, Inc. d/b/a
Ackerman Security Systems

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 3033-5948
Telephone: (770) 818-0000
Facsimile: (770) 937-9960

RULE 7.1 CERTIFICATION

Counsel for defendant hereby certifies the preceding document was prepared with Courier New font, 12 point pursuant to Northern District Local Rule 5.1.

FREEMAN MATHIS & GARY, LLP

_____

T. Bart Gary
Georgia Bar No. 287430

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
Telephone: (770) 818-0000
Facsimile: (770) 937-9960

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF IN SUPPORT OF GUARDIAN OF GEORGIA, INC. d/b/a ACKERMAN SECURITY SYSTEMS'S MOTION FOR PARTIAL SUMMARY JUDGMENT by depositing a true and correct copy thereof in the United States mail, postage prepaid, properly addressed upon:

Arnold C. Joseph, Esq.
COZEN & O'CONNOR
2200 SunTrust Plaza
303 Peachtree Street, N.E.
Atlanta, Georgia 30308

Frank J. Klosik, Esq.
Robert J. McCune, Esq.
GREER KLOSIK DAUGHERTY & SWANK
4651-A Roswell Road, N.E.
Atlanta, Georgia 30342

Michael C. Kendall, Esq.
Maureen Murphy, Esq. CONOSCIENTI, STORM & KENDALL
115 East Maple Street
Decatur, Georgia 30030

Eve A. Appelbaum, Esq.
Appelbaum & Associates,P.C.
Peachtree Center
500 South Tower
225 Peachtree Street
Atlanta, Georgia 30303-1701

This _____ day of _____, 2003.

FREEMAN, MATHIS & GARY, LLP

_____

T. Bart Gary
Georgia State Bar No. 287430
Attorney for Defendant and Third- Party Plaintiff
Guardian of Georgia, Inc. d/b/a Ackerman Security Systems

100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
Telephone: (770) 818-0000
Facsimile: (770) 937-9960
KWB1172.DOC/365.39343