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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

ROBERT SCHIRMER and DIANA SCHIRMER,

Plaintiff(s),

-against-

ROBERT A. PENKERT,

Defendant(s).

INDEX No. 364/97

MOTION DATE: 5/3/04

ACTION No. 1

MOTION SEQ. No. 4-MD
5-MG

ROBERT A. PENKERT,

Third-Party Plaintiff(s),

-against-

M & R MARCUS CO. EAST MEADOW LTD.,

Third-Party Defendant(s).

ROBERT SCHIRMER and DIANA SCHIRMER,

Plaintiff(s),

-against-

UTICA FIRST INSURANCE COMPANY,

Defendant(s).

INDEX No. 22366/98

ACTION No. 2

MOTION SEQ. 5-MG

UTICA FIRST INSURANCE COMPANY,

Third-Party Plaintiff(s),

-against-

ROBERT A. PENKERT,

Third-Party Defendant(s).

ROBERT A. PENKERT d/b/a WOODCRAFT CABINET CO.,

Plaintiff(s),

INDEX No. 22464/99

-against-

ACTION No. 3

UTICA FIRST INSURANCE COMPANY, ROBERT SCHIRMER and DIANA SCHIRMER,

Defendant(s).

The following papers read on this motion:

Penkert Notice of Motion/Affirmation/Exhibits
Schirmer Opposition/Exhibits
M&R Affirmation in Opposition/Exhibits
Penkert Replys
Utica Notice of Cross Motion/Affirmation/Exhibits
Penkert Opposition
Utica Reply
M&R Notice of Cross Motion/Affirmation/Exhibits
Penkert Affirmation in Opposition
M&R Reply

In the above captioned actions defendants ROBERT PENKERT, UTICA FIRST and M&R MARCUS CO. all seek Orders granting them summary judgment.

The underlying claim in these cases involves a personal injury action which occurred on October 11, 1996. Plaintiff SCHIRMER contends that on that date he docked his boat at the premises known as

26 Dock Drive, Freeport, New York. He claims that he rented this dock space for a fee from defendant ROBERT PENKERT. SCHIRMER alleges that as he climbed a ladder from the boat to the dock, it broke, causing him to fall backwards and suffer numerous injuries.

At the time of the accident WOODCLEFT CABINET, a business operating at this location and wholly owned by PENKERT, had an insurance policy with defendant UTICA FIRST. UTICA contends that it first learned of SCHIRMER's accident in February 1997 when it received a copy of SCHIRMER's Summons and Complaint. UTICA claims that it disclaimed coverage for the incident by disclaimer letter dated February 14, 1997.

Thereafter, on or about August 24, 1998, the SCHIRMERS brought their action against UTICA FIRST. On August 30, 1999 a separate action was commenced by ROBERT PENKERT d/b/a WOODCLEFT CABINET, against UTICA FIRST and SCHIRMER. In those actions both SCHIRMER and PENKERT sought Orders directing UTICA to provide insurance coverage for the incident.

In the first action as noted above, ROBERT SCHIRMER seeks to recover monetary damages for injuries sustained when he fell from a bulkhead ladder on PENKERT's premises. PENKERT brought an action for indemnification and/or contribution against his insurance broker M&R MARCUS alleging that M&R MARCUS was negligent in failing to procure proper insurance from UTICA FIRST. SCHIRMER thereafter brought an action against UTICA FIRST directly seeking declaratory relief stating UTICA had to provide coverage, arguing that its disclaimer was invalid. In turn, UTICA FIRST brought an action against PENKERT seeking a declaratory judgment stating that the disclaimer was valid, and further seeking reimbursement from PENKERT for costs and fees arising out of the first action.

In the current applications, defendant ROBERT PENKERT seeks summary judgment dismissing the claims of both plaintiff SCHIRMER and third-party plaintiff UTICA FIRST, as asserted against him. He also seeks summary judgment on his third-party claims asserted against M&R MARCUS, his insurance broker and UTICA FIRST. M&R MARCUS and UTICA FIRST seek Orders dismissing the claims against them.

PENKERT testified at deposition that prior to the date of the accident he would look at the slip ladders every day, and that when one required repair he would either replace it or repair it. He further testified that as of 1996 he had replaced all three ladders twice since owning the premises. He testified that he believed he replaced the ladder from which SCHIRMER fell in the year prior to the accident. PENKERT also testified

that he had received no complaints regarding the ladder or any ladders at the dock space prior to the incident.

The plaintiff SCHIRMER testified that the ladder had approximately seven rungs, with the lowest in the water. SCHIRMER testified that the ladder was old, made of wood and was secured to the bulkhead by screws. He testified that he used his boat approximately once per month and that he had last used it a couple of weeks prior to the accident. He testified that on that occasion he did not have any difficulties or notice any problems with the ladder. He also testified that on the date of the incident he failed to notice any problems with the ladder prior to his fall. SCHIRMER testified that he had traveled up and down the ladder a few times prior to his fall without incident.

SCHIRMER testified that on the last occasion he was on the ladder he was on his way to his truck. When he reached the next to top rung of the ladder, the entire ladder gave way to the sides from the bottom and all of the rungs separated and fell out. He testified that the top remained attached to the bulkhead, causing him to fall five to six feet landing onto the swim platform of his boat.

PENKERT denies seeing all of the rungs out of the ladder, and testified that immediately after the accident he observed that only the left vertical portion of the ladder was broken, and that it was broken in the middle.

PENKERT testified that prior to his fall SCHIRMER had approached him to fake an accident to collect insurance money. He testified that he rejected the offer.

Counsel for the defendant PENKERT argues that his client should be granted summary judgment dismissing SCHIRMER's Complaint as there is no evidence that PENKERT created or knew of and failed to repair a dangerous or defective condition.

Plaintiff SCHIRMER opposes, contending that there is evidence that PENKERT knew or should have known of rot in the ladder. He notes that it is undisputed that the ladder was made of wood and partially submerged, and thus it can be argued that the defendant had at a minimum constructive knowledge of woodrot problems. He provides photographs of the ladder purportedly as it appeared immediately after his fall. The photos depict a wooden ladder, with the lower rungs out, askew. The wood depicted is not smooth at points, somewhat discolored and part of the ladder is clearly submerged. (Schirmer Opposition, Exh. A)

In order to succeed on a premises liability action, a plaintiff must establish that a defendant either created a condition, or had actual or constructive notice it existed, and failed to correct it in a reasonable time. To be considered constructive notice, a defect must be visible and apparent and must exist for a sufficient

length of time prior to an accident to permit the defendant to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986). PENKERT argues that SCHIRMER has offered no evidence he had notice of a defective condition, and therefore that plaintiff has not established that he breached any duty to plaintiff.

Plaintiff admits that he did not notify either defendant or anyone else of its existence of a problem with the ladder, despite using it, prior to his fall. However, the photographs presented demonstrate some evidence to argue that the defect was visible and apparent and existed for a sufficient length of time prior to the accident to permit the landlord to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986); *Rojas v. Supermarkets General Corp.*, 238 AD2d 393 (2nd Dept. 1997).

Although summary judgment is a drastic remedy which otherwise deprives a litigant of his or her day in Court, it is to be granted where it is clear that there is no triable issue of fact. The mere fact that plaintiff fell, does not impose liability or blame on the owner of the premises. There must be some demonstration that the defendants were at fault, either creating or having constructive notice of the defective condition. *Gordon, supra*; *Eddy v. Tops Friendly Markets*, 91 AD2d 1203 (4th Dept. 1983).

There is evidence, in plaintiff's and defendant's deposition and the photographs presented, to establish that the defendant may have created the condition or had notice that it existed. Further, there is a question of fact regarding whether the defect was visible and apparent and existed for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986); *Rojas v. Supermarkets General Corp.*, 238 AD2d 393 (2nd Dept. 1997); *Eddy v. Tops Friendly Markets*, 91 AD2d 1203 (4th Dept. 1983).

The affidavit of the purported expert hired by PENKERT, submitted for the first time only in Reply, is not properly considered as part of PENKERT's application. However, addressing it on the merits, the Court finds that the statements do not establish as a matter of law that the ladder could not have broken in the manner described by the plaintiff, and thus cannot form the basis for summary judgment. (Reply Affid., Exh. A)

The Court finds that the discrepancies in the testimony of SCHIRMER and PENKERT as well as the photos of the ladder after the accident and opinion of the purported expert, taken together raise a triable issue

of fact for a jury. *Leventhal v. Forest Hills Gardens Corp.*, 308 AD2d 434 (2nd Dept. 2003). Upon the evidence presented, the Court will not find, as a matter of law, that the defendant did not create, know of or have constructive notice of a dangerous condition with respect to the ladder from which the plaintiff fell.

UTICA FIRST seeks summary judgment dismissing all claims against it. Counsel for PENKERT opposes and seeks summary judgment declaring that UTICA FIRST must defend and indemnify him for any recovery in the SCHIRMER action under his commercial policy with UTICA.

UTICA notes the deposition testimony of SCHIRMER who testified that he rented the dock space from PENKERT personally. UTICA also notes that in its original Complaint, WOODCLEFT was not a named defendant. It also notes that insurance application made by PENKERT in October 20, 1995 wherein PENKERT, on behalf of WOODCLEFT, stated that the nature of its business was woodcrafting and cabinetry and that it was seeking insurance for the building occupied by the cabinet maker. On that application the applicant checked that there were no watercrafts, docks or floats owned hired or leased. WOODCLEFT also indicated that there was no "watercraft/aircraft' exposure. As part of this application PENKERT signed a statement stating that no statements were made in the application to knowingly defraud the insurance company.(Utica Motion, Exh A)

UTICA claims that PENKERT's representations on the application for insurance for WOODCLEFT were material and if notified that the business rented dock space, it would have resulted in a higher premium. UTICA claims that its agent, insurance broker, Anthony Mangiacapre, asked PENKERT if he were in the docking or boat business or whether he rented out space, and on all three occasions PENKERT reasserted that he was solely in the cabinetry business.

UTICA claims that based on the foregoing it is entitled to summary judgment as it provides no insurance coverage for this incident.

Counsel for PENKERT opposes contending that UTICA cannot establish a material representation was made by his client. He also argues that since WOODCLEFT is sole proprietor of PENKERT, it need not be named as a party defendant in the original action by SCHIRMER. He also argues that the disclaimer letter sent from UTICA to PENKERT is somehow defective.

The Court disagrees. As to the Disclaimer letter, the fact that it did not specifically deny coverage due to alleged material misrepresentations of the applicant does not render the Disclaimer ineffective. It has been previously held that this letter was adequately specific, by Order dated June 28, 2001.

The Court further finds that based on all of the testimony, including that of PENKERT and SCHIRMER, the statements of PENKERT with respect to his business being conducted at the location of the dock materially misrepresented his entire business. He clearly states that the premises was to be used for 100% cabinetry and represents that there was no dock or watercraft leasing, and no watercraft exposure. (Motion, Exh. E, G)

An application for insurance is bound to deal fairly with the insurer in the disclosure of facts material to the risk which is being insured against. *Wageman v. Metropolitan Life Insurance Co.*, 24 AD2d 67 (1st Dept. 1965), aff'd 18 NY2d 777 (1966). The insured is not free to withhold information of an important and material matter on the subject of which he or she has particular knowledge. *Polachek v. New York Life Insurance Co.*, 147 Misc.16, 263 NYS 230 (1913); aff'd 240 AD 1028. The insurer is free to select its risks and it makes inquiry of matters which it deems material to the risk. *Vander Veer v. Continental Consulting Co.*, 34 NY2d 5 (1974); *Smirlock Realty Corp. v. Title Guarantee Co.*, 70 AD2d 455 (2nd Dept 1979). The undisputed testimony presented reveals that when applying for the commercial insurance policy Mr. PENKERT was specifically asked whether the business owned or rented dock space, and he stated that WOODCLEFT was "100%" in the business of "cabinetry". The fact that after this suit UTICA FIRST learned of the dock rental and did not immediately rescind the policy, but charged a surcharge, does not render PENKERT's statements immaterial.

Third party defendant M&R MARCUS, the insurance broker used by PENKERT in purchasing the commercial policy from UTICA FIRST also seeks an Order granting it summary judgment. In the alternative it seeks an Order severing the actions against it and UTICA from the underlying negligence action.

Counsel for PENKERT argues that M&R MARCUS committed broker malpractice in failing to procure adequate or proper insurance coverage for him, and in failing to submit a truthful and complete application on his behalf to UTICA FIRST.

Counsel for M&R seeks dismissal of the claims against it for generally the same reasons stated above on behalf of UTICA FIRST. In addition, counsel argues for dismissal and against the application of PENKERT noting that its representative testified that Mr. PENKERT was specifically asked if there was watercraft exposure for his business and denied such. M&R MARCUS thus argues that PENKERT's claims of broker malpractice must fail.

M&R MARCUS further notes that PENKERT testified he did not recall anything, thus he did not contradict M&R's evidence. In addition PENKERT acknowledged his signature on the insurance application, which contained the representations noted above, and testified that while he did not actually recall filling out

the application he would not have signed it unless it was filled out. (M&R Motion, Exh. F).

Counsel for PENKERT argues that the M&R's representative filled in various forms that it relies upon and thus cannot form the grounds for summary judgment. He does not, however, note that his client does not actually deny that the he gave the responses noted on the forms. (Motion, Exh. F). Further, he does not contest that PENKERT was in possession of the policy in place and voiced no objection to it nor sought to amend it to add the dock rentals.

The law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage.

Insurance agents or brokers are not personal financial counselors and risk managers. Insureds are in a better position to know their personal assets and abilities to protect themselves. Permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation.

The defendant M&R MARCUS met its obligations when it procured the coverage requested for the cabinetry business by PENKERT. In any event, it is apparently undisputed that PENKERT received the policy in effect for the period of October 26, 1995 through October 26, 1996, with a stated list of exposures not including any "Watercraft/Aircraft exposure" and voiced no objection. He is conclusively presumed to have known, understood and assented to the policy's terms. *See, Busker on the Roof Limited Partnership Co. v. M.E. Warrington*, 283 AD2d 376; *Nicholas J. Masterpol, Inc. v. Travelers Ins. Cos.*, 273 AD2d 817, *but see, Reilly v. Progressive Ins. Co.*, 288 AD2d 365; *Kyes v. Northbrook Property and Cas. Inc. Co.*, 278 AD2d 736.

Based on the foregoing, the motions of UTICA and M&R MARCUS seeking summary judgment dismissing the claims against them are Granted. That portion of PENKERT's motion seeking summary judgment against UTICA FIRST and M&R MARCUS, is Denied.

It is, SO ORDERED.

Dated: June 4, 2004

HON. GEOFFREY J. O'CONNELL, J.S.C.