IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

January 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

UNIGARD SECURITY INSURANCE COMPANY	)	WASHINGTON COUNTY
	)	03A01-9508-CV-00261
Plaintiff-Appellee	)	
v.	)	
SCOTT HICKMAN and wife SUSAN DENISE HICKMAN, and MAKATO'S OF TENNESSEE, INC.	)	
Defendants-Appellants	)	
AND	)	HON. G. RICHARD JOHNSON, CHANCELLOR
MAKATO'S OF TENNESSEE, INC.	)	(Sitting by Interchange)
Third-Party Plaintiff, Appellant	)	
v.	)	
THE MACKORELL GROUP, INC. JAMES T. MACKORELL and wife WENDY L. MACKORELL	)	
Third-Party Defendants, Appellees	)	AFFIRMED AND REMANDED

VANCE W. CHEEK, JR., OF JOHNSON CITY FOR MAKATO'S OF TENNESSEE, INC.

J. DAVID MILLER OF KINGSPORT FOR SCOTT HICKMAN AND WIFE SUSAN DENISE HICKMAN

JACK M. VAUGHN OF KINGSPORT FOR UNIGARD SECURITY INSURANCE COMPANY

DAVID S. HAYNES OF BRISTOL FOR THE MACKORELL GROUP, INC., JAMES T. MACKORELL and wife WENDY L. MACKORELL

O P I N I O N

Goddard, P.J.

Scott Hickman and wife Susan D. Hickman and Makato's of Tennessee, Inc., hereinafter referred to as the Defendants, appeal a declaratory judgment entered by the Circuit Court for Washington County which found that a liability policy issued by Unigard Security Insurance Company to Makato's did not cover an injury to Mr. Hickman because Makato's had not complied with the notice requirement of the policy. Makato's also appeals dismissal of its third-party action against the Mackorell Group, Inc.,[1] and James T. Mackorell and wife Wendy L. Mackorell. James T. Mackorell and Wendy L. Mackorell owned the capital stock of Makato's at the time of Mr. Hickman's injury, but shortly thereafter sold it to Thomas Mackorell and wife Julie A. Mackorell and David LeVeau.

The Defendants as to the original action insist that the evidence preponderates against the Chancellor's finding that Makato's did not comply with the "as soon as practicable" notice requirement under the policy, that their delay in notice was excusable because of the trivial nature of Mr. Hickman's injury and that Unigard was not prejudiced by the delay.

[1] It is unclear why the Mackorell Group was made a third-party Defendant.

Makato's appeals dismissal of its third-party action, complaining of the Trial Court's dismissing the third-party complaint "without a motion to dismiss," and that the preponderance of the evidence supports its third-party complaint.

The first notice Unigard received of the injury to Mr. Hickman, which occurred on September 1, 1991, and resulted from a chair in which he was sitting at Makato's restaurant collapsing, was on July 30, 1992, some 16 days after suit was filed by the Hickmans.

According to Mr. Hickman, upon leaving the restaurant he gave a business card to the cashier with his name, address and phone number and asked to be contacted "ASAP," which he testified meant "as soon as possible." This card, along with other material incident to the business, was delivered to Ted Mackorell by Kenneth Ashley, an assistant manager of the restaurant.[2] Mr. Ashley's testimony regarding delivery of the card, which was denied by Mr. Mackorell, is as follows:

> Q. You said you put the note that you got from Ms. Ma [the cashier] in a box or a container...
>
> A. Right.
>
> Q. ...that you eventually took to Mr. Ted Mackorell.
>
> A. Right.
>
> Q. Is that correct?

[2] Mr. Ashley's wife was the manager.

A. Yes.

Q. What were your instructions from Mr. Mackorell, Mr. and Mrs. Mackorell with regard to information such as that?

A. They just told me to get anything like that and bring it to them.

Q. All right.

A. They, they'd do it ever so often.

Q. All right. Did they -- would Mr. Mackorell call you on a weekly basis to bring that over, or was it some time longer than that?

A. It depended on his needs, whenever he would need something. Sometimes it was quarterly, and sometimes it was weekly.

Q. All right. Do you know when after this incident you took this note and the other information to Mr. Mackorell?

A. No.

Q. Fair enough. Do you recall taking it to him?

A. Yes.

Q. Did you, in fact, take it to him..

A. Yes.

Q. ...is what I'm asking you? And when you took it to him, did he see the note?

A. Yes.

Q. And how do you know he saw the note?

A. Because he asked me about it. He was going through the papers, and he asked me what it was, and I explained to him what it was.

Q. Okay. and the note we're talking about is the note that Ms. Ma...

A. That Ms. Ma gave me.

Q. ...gave you?

A. Yes.

Q. And did -- what did you relate to Mr. Mackorell at that time?

A. I just explained to him what Ms. Ma had told me - that he had fell out of the chair and was complaining of back pain.

Q. Okay. And did he give you any instructions that you were supposed to do anything about this incident?

A. No, he didn't.

Our review of the record persuades us that as to the first contention--that of failure to give notice--it is appropriate that the Trial Court be affirmed in accordance with Rule 10(a) of this Court. Our conclusion is based upon our agreement with the Trial Court's characterization of the video deposition of Kenneth Ashley, which we have reviewed, as creditable, and our deferring to the Chancellor's characterization of Ted Mackorell's testimony, which he observed, as not creditable.

We also conclude that the evidence does not preponderate against the Trial Court's finding that the occurrence was such as to put a reasonable person on notice that Mr. Hickman's injuries were sufficiently serious to anticipate a claim being made. Rule 13(d), Tennessee Rules of Appellate Procedure. Indeed, in addition to the foregoing testimony, there is also testimony in the record that another assistant manager in the restaurant told Ted Mackorell when reporting the accident to him that "this guy is going to sue."

With regard to the Defendants' last issue, since the case of Phoenix Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, 205 S.W. 128 (1918), appellate courts of this state have consistently held that notice provisions of a policy are valid conditions precedent to coverage, and in the absence of notice no coverage is afforded even though (1) the policy does not contain a forfeiture clause, and (2) the insurer has not been prejudiced by the delay. In accord: Osborne v. Hartford Accident & Indemnity Co., 63 Tenn.App. 518, 476 S.W.2d 256 (1971); Barfield v. Insurance Company of North America, 59 Tenn.App. 631, 443 S.W.2d 482 (1968); Foreman v. Union Indemnity Co., 12 Tenn.App. 89 (1928).

While the Defendants concede that this is the present state of the law, they urge us to overrule even Supreme Court cases on the subject and to hold that the insurance carrier must show prejudice before the defense of lack of notice is available.

It is not the prerogative of an intermediate appellate court to disregard settled law, and any such change should come at the hands of the Legislature or the Supreme Court.

Makato's third-party issues, which are predicated upon the contract of the sale of Makato's stock between James T. Mackorell, Jr., and Wendy L. Mackorell, sellers, and Thomas Mackorell, Julie A. Mackorell and David LeVeau, purchasers. We do not perceive that where the proof has been concluded it is

necessary that a motion be made before the Court can act upon pending issues. Indeed, it is the Court's duty to do so.

In disposing of the third-party complaint, the Court found as follows:

> This Court is aware of the third party suit which the Court now has a view that perhaps it was just filed as a, some kind of tactic; that, in fact, the parties and the attorneys have not taken this so-called third party suit very seriously as allegations were made in the third party suit about the contract and the allegation of the contract of sale or purchase between Ted and Wendy Mackorell, sole stockholders, to Tom and Julie Mackorell and David LeVeau. And the Pleading, the Third Party Complaint, makes a couple of references to this Contract of Sale and purchase and makes a couple of references to there not being a provision in there that reads substance to the effect in the contract that the substance of is that there are no pending litigation. And, of course, on the date of sale, November '91, there was no pending litigation. This litigation was not pending then. And the fact that they will indemnify, the sellers will indemnify the buyers for any unknown debts. The Court does not think that counsel takes that Third Party Complaint seriously as no one offered to introduce the Contract of Sale for this Court to examine and I don't know what the contract says. I've never seen it. I've never read it. I only know what is, what is alleged that the contract says in the Third Party Complaint. The Court dismisses the Third Party Complaint finding that the theories of recovery advocated in that Third Party Complaint have not been proven by a preponderance of the evidence.

We fully concur in the Court's evaluation of the third-party complaint and observe that there was little or no advocacy relative thereto. Finally, we question whether Makato's would be a proper party to seek indemnity and suggest that if there is a

viable claim therefor it is by the purchasers, who were parties to the contract, not the corporation.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Defendants and their surety.

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Houston M. Goddard, P.J.

CONCUR:

_____
Herschel P. Franks, J.

_____
Don T. McMurray, J.