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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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TLM REALTY CORPORATION, a Delaware Corporation, RONALD J. OEHL, an Individual, SALISBURY GENERAL CORPORATION, a New York Corporation, DOVER DE REALTY LLC, a Delaware Limited Liability Corporation, R.O. & S.W. MANAGER CORPORATION, a Delaware Corporation,

Plaintiffs,

Index No.: 603870/2008

-against-

**DECISION AND ORDER**

PHIL GLICK, an individual, HUB INTERNATIONAL PENNSYLVANIA LLC, a Pennsylvania limited liability company as successor in interest to CITIZENS CLAIR INSURANCE GROUP, CITIZENS CLAIR INSURANCE AGENCY LLC, a Pennsylvania Limited Liability Corporation, HUB INTERNATIONAL LIMITED, a Delaware Corporation, CLAIR ODELL INSURANCE AGENCY LLC, a Pennsylvania limited liability corporation, and CLAIR ODELL GROUP, a Pennsylvania corporation,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract and negligence in connection with insurance coverage obtained by defendant insurance brokers, defendants move for summary judgment dismissing the complaint.

Plaintiff Ronald J. Oehl ("Oehl") is the president and sole owner of plaintiff TLM Realty Corporation ("TLM Realty"), the president and controlling shareholder of plaintiff Salisbury General Corporation ("Salisbury"), and the president of plaintiff R.O. & S.W. Manager Corporation ("R.O."). TLM Realty is the manager of plaintiff Dover DE Realty LLC, or Delaware LLC, ("DDE Realty").

Defendant Phil Glick ("Glick") is an individual residing in Pennsylvania,[1] who was employed as an insurance broker by defendant Citizens Clair Insurance Agency, LLC ("Citizens Clair"). Defendant HUB International Pennsylvania LLC ("HUB") is a division of HUB International Northeast LLC. HUB purchased the assets and liabilities of Citizens Clair Insurance Group and/or the Citizens Clair Insurance Agency, LLC. Defendants Clair Odell Insurance Agency LLC and Clair Odell Group were, according to the complaint, "operating entities used by Citizens Clair and were involved in the brokering of the insurance and provision of risk management advice that are the subject of this action."

Glick and Citizens Clair were the brokers for TLM Realty's purchase of a "D&O [Director and Officer] corporate liability and employment practices liability" insurance policy, from American International Specialty Lines Insurance Company ("AISLIC"). TLM Realty originally purchased the D&O Policy in or around 2002, and subsequently renewed it for the subject period of December 20, 2004 to December 20, 2005. The D&O

[1] By stipulation of discontinuance, dated July 29, 2009, plaintiff discontinued, with prejudice, all claims asserted against Glick.

Policy provided $2,000,000 of coverage to the employees and executives of TLM Realty, and for TLM Realty itself.

In the D&O Policy, coverage was described in part as follows:

> "This policy shall pay the Loss of each and every Director, Officer, Outside Entity Executive and Employee of the Company arising from a Claim first made against such Individual Insureds during the Policy Period or the Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act in their respective capacities as Directors, Officers . . ."

According to the policy, a "claim" was defined as, among other things, "a civil . . . proceeding for money, non-monetary or injunctive relief which is commenced by . . . (I) service of a complaint or similar pleading . . .." A "wrongful act" was defined under the D&O Policy as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act . . . with respect to individual Insureds . . .." Under the D&O Policy, TLM Realty was required to report any claim by written notice to the insurer:

> "as soon as practicable and either: (1) anytime during the Policy Period or during the Discovery Period (if applicable); or (2) within 30 days after the end of the Policy Period or the Discovery Period (if applicable), as long as such Claim was first made against an Insured within the final 30 days of the Policy Period or the Discovery Period (if applicable)."

In 2004, at around the same time the policy was issued, TLM Realty and Citizens Clair entered into a written agreement, whereby Citizens Clair agreed to serve "as an outsourced risk and claim management department for TLM Realty for an annual fee"

("the Agreement").[2] TLM Realty paid Citizens Clair $50,000 for these services from November 1, 2004 to November 1, 2005. As alleged in the complaint, Oehl was an intended third-party beneficiary of the Agreement.

The Agreement set forth the responsibilities of Citizens Clair as outsourced risk manager for TLM Realty:

> "*Reviewing the insurance related provisions of any contracts entered into by TLM Realty Corp.;
> * An in-depth review of the insurance provisions of construction, maintenance, supply and services contracts and leases;
> * Conducting review meetings to keep you apprised of the current status of claims;
> * Claim processing to your insurance carriers;
> * Review of paid and reserved claims;
> * Review of insurance certificates from any third party
> * Prompt issuance of insurance certificates on your behalf
> * Meeting with you on a frequent basis to discuss any new exposures which may exist and provide appropriate insurance coverage for those exposures as may be needed;
> * Monitoring and aggressively following-up on claims;
> * Providing pre-printed claims forms; and
> * Acting as a monitor and liaison with each insurance company in providing loss control and safety services."

According to TLM Realty, Citizens Clair owed a duty to obtain insurance for all entities that were "affiliated, owned or controlled by TLM Realty," including Salisbury, R.O., and DDE Realty. TLM Realty alleges that "Citizens Clair failed to take appropriate

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[2] The Agreement was initially between Citizens Clair Insurance Group and TLM Realty, and subsequently between HUB and TLM Realty. In 2001, Citizens Financial Group purchased the membership interest in Clair Odell Insurance Agency, LLC, changing the name of the company to Citizens Clair Insurance Agency, LLC. In 2006, HUB U.S. Holdings, Inc. entered into a purchase and sale agreement with Citizens Clair, pursuant to which it acquired all of the issued and outstanding membership equity interests in Citizens Clair. The name of the company was subsequently changed to HUB International Pennsylvania, LLC ("HUB").

steps to assure that [Salisbury, R.O. and DDE Realty] would be insured under the Policy or otherwise be protected from claims of the type insured by the Policy."

On October 18, 2002, in an email exchange between Max Abrams ("Abrams") of Clair Odell Group and Laura Hackel, the CFO of TLM Realty ("Hackel"), Abrams asked:

> "As to the D&O application you completed, many of the entities you listed, [sic] as subsidiaries are obviously partnerships that own the shopping center properties. Coverage for these partners requires General/Limited Partnership Liability coverage that your form does not provide. We can obtain this protection but additional premium [sic] will be charged and partnership financial data will be required."

Hackel responded: "Let me talk to Ron [Oehl] about this."

With respect to the question concerning insuring "affiliated" companies, Abrams also asked:

> "In addition, your application lists a number of corporate entities on [sic] which you requested D&O coverage. The only corporate entity currently listed on your policy is TLM. Coverage is extended to subsidiaries that are more than 50% owned by TLM. If Ron or other entities but not TLM legally own the entities you listed, there is no D&O coverage for these entities. If you want coverage for these corporate entities, I need to have ownership data, financial data and a description of what these entities are or do. Should you decide to pursue General/Limited Partnership and additional corporate entity coverage, the premium increase over your current policy will be significant."

On behalf of TLM Realty, Hackel responded: "Ron [Oehl] owns 99% of the LLC's, TLM owns 1%, Ron owns 100% of TLM. I don't think we need D&O coverage for all of the LLC's, only TLM."

On September 23, 2005, a complaint was filed against TLM Realty, Oehl, Salisbury, the TLM Realty affiliated owner of the mall, and others, by several limited partner investors in a real estate project, a mall, in the Delaware Court of Chancery ("the underlying action"). The complaint alleged that those defendants sold the assets of the mall for less than fair value, and due to the failure of Oehl, and others, to exercise due care, the representations and disclosures made to the investors by TLM Realty, as part of the sale, were not complete. The underlying complaint alleged several causes of action, including breach of fiduciary duty, fraudulent misrepresentation, and improper dissolution of a limited partnership.

In October 2005, TLM Realty and others were served with the summons and complaint in the underlying action. Hackel stated that she did not read the complaint "in depth" and when she reviewed it, "it did not strike [her] as the type of claim that might be covered by any insurance policy purchased by TLM. [She] forwarded the suit papers to Mr. Oehl and took no further action with respect to it."

In an affidavit, Hackel states that she did not report the underlying action to Citizens Clair when TLM Realty was served, because she was uncertain as to whether this type of claim was covered by the insurance. On this point, Hackel claims that Glick explained that D&O insurance covered her for "mistakes that [she] could possibly make in connection with preparation of financial statements" and that defendants did not provide TLM Realty with "examples of the types of claims that D&O and Employment

Practices coverage was designed to respond to." Hackel states that, although she "received a copy of the D&O and Employers' Liability insurance policy" in late 2003 or 2004, "because of our relationship with Mr. Glick and the fact that we were relying on his expertise, I did not think it was necessary to read it at the time."

In her affidavit, Hackel avers that although Glick and his staff met at TLM Realty's offices two or three times per year to review claims, "these meetings dealt exclusively with slip and fall cases and property damage cases."

Hackel further states that around the time the D&O policy was set to expire, in December 2005, Citizens Clair did not "conduct any type of aggressive search to determine the existence of claims, or threatened lawsuits that might be covered by the D&O or Employment Practices liability insurance policies, before they officially lapsed . . . . For example, at no time did Mr. Glick . . . contact TLM's office to come in to look at files or talk to employees."

TLM Realty's D&O Policy was set to expire on December 28, 2005. In an email dated October 28, 2005, TLM Realty informed Citizens Clair that it did not wish to renew the D&O Policy upon its expiration. With respect to this renewal, Citizens Clair sent an email on December 21, 2005 to Hackel which offered descriptions and examples of claims for the D&O Policy. The attachment to the email, containing the heading "Directors and Officers Liability," lists examples of claims against directors and officers,

which include: fraud and misrepresentation, breach of fiduciary duty, and loss of opportunity for growth or profit.

Immediately after the D&O Policy expired, on December 30, 2005, Citizens Clair sent TLM an email requesting an answer as to whether TLM Realty wanted to exercise the Discovery Clause in the D&O Policy. TLM Realty declined.

It is undisputed that TLM Realty did not notify the insurer, AIC, Glick, or Citizens Clair, about the underlying action until at least February 2007. In March 2007, Hackel sent Glick an email about the existence of the underlying action, providing:

> "We have a question about our insurance coverage. We are involved in a lawsuit with TM Dover Realty LP and the investors. They are suing RJO, Salisbury General Corp, Dover, DE Realty LLC, Dover, DE Retail LLC and RO & SW Realty LLC (besides for the partnership). Do we have coverage that indemnifies the following companies?"

At the time that TLM Realty gave notice to Hub of the underlying action, TLM no longer had D&O coverage. Moreover, the time within which to give its previous insurer notice of the underlying action had long since passed. Accordingly, plaintiffs retained counsel to defend against the underlying action, and incurred in excess of $750,000.00 in defense costs, and paid $1.45 million to settle the action[3]. Plaintiffs then commenced this

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[3] In its answer in the underlying action, Salisbury included a footnote that states: "All claims previously asserted against TLM Realty . . . , R.O.& S.W. Manager Corporation, and TLM Property Investments LLC . . . have been voluntarily dismissed as to those defendants." During oral argument on this motion, the parties informed the court that, despite being voluntarily dismissed from the underlying action, TLM Realty paid the settlement. Plaintiffs' attorney explained that because Oehl remained in that action, and because he is the 100% owner of TLM Realty, and he guaranteed all the payments in the underlying transaction personally, he had "his company . . . actually cut the checks." The absence of a finding of liability against TLM Realty in the underlying action does not preclude this lawsuit, as, for example, TLM Realty alleges that it incurred defense costs arising from that action.

action, asserting that they did not notify defendants about the underlying action earlier, because neither Citizens Clair, nor Glick, made adequate efforts to educate personnel at TLM Realty regarding the full scope of the coverage afforded under the D&O Policy, the protection the D&O Policy provided to TLM Realty or Oehl, as insureds, or the need to report claims against the insureds such as the underlying action, within proscribed time limits, in order to obtain coverage.

According to plaintiffs, if Citizens Clair and Glick had fulfilled their contractual duties, and those at common law, all of the plaintiffs would have been named as insureds under the D&O Policy and the existence of the underlying action would have been discovered and identified as a claim to be properly reported and submitted to AISLIC. Plaintiffs allege causes of action for breach of contract and negligence.

Defendants, except Glick, against whom the case was previously discontinued, now move for summary judgment. They argue that the sole proximate cause of the plaintiffs' potential loss of coverage was plaintiffs' own failure to inform Citizens Clair of the underlying action. Specifically, defendants argue that Citizens Clair did not breach the Agreement because: (1) plaintiffs failed to notify Citizens Clair as to the underlying action; (2) Citizens Clair properly advised and educated plaintiffs, and recommended the appropriate insurance coverage to plaintiffs; and (3) the Agreement does not provide a basis for plaintiffs' claims.

The moving defendants further argue that plaintiffs' negligence claim fails, because: (1) TLM Realty opted not to renew its D&O coverage; and (2) Citizens Clair procured the requested insurance for plaintiffs. Finally, defendants argue that even if plaintiffs had timely notified defendants of the underlying action, and had renewed the D&O policy, it is pure speculation whether AISLIC would have provided coverage.

In opposition, plaintiffs argue that pursuant to a special relationship between TLM Realty and Citizens Clair, as created by the Agreement, defendants had an additional duty of advisement with respect to the scope of the D&O Policy and the reporting of claims, which defendants breached, leading to plaintiffs' failure to timely report the underlying action and get coverage. Additionally, plaintiffs argue that defendants breached their duty of care by failing to procure coverage for all affiliates of TLM Realty that were at risk, and to otherwise guide plaintiffs on all insurance issues.

**Discussion**

The elements of a claim for breach of contract "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010).

> "Under New York law, a party who has engaged a person to act as an insurance broker to procure adequate insurance is entitled to recover damages from the broker if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss."

*Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 A.D.3d 865, 866 (1st Dept. 2009)(internal quotation marks and citation omitted).

Plaintiffs allege that Citizens Clair breached the Agreement in that it failed to make the appropriate employees of TLM Realty aware of the purpose and function of the various insurance policies purchased by TLM Realty, and/or develop practices and procedures to ensure that claims and potential claims made against TLM Realty and the other plaintiffs were centrally reported and collected. Plaintiffs additionally allege and argue that the Agreement created a special relationship between TLM and Citizens Clair, which created a duty of advisement on the part of Citizens Clair.

The parties' Agreement is solely between TLM Realty and Citizens Clair. Thus, only TLM Realty, and not the other plaintiffs, may assert a breach of contract claim. Also, the terms of the Agreement go beyond Citizens Clair's obligation to procure insurance coverage for TLM Realty, its client. The Agreement enumerates in detail Citizens Clair's responsibilities in exchange for a "Risk Management Service Fee" from TLM Realty, which include conducting review meetings and discussing new exposures that might exist, and providing coverage for those exposures.

With respect to the breach of contract claim, I find that TLM fails to raise an issue of material fact with respect to any breach of the Agreement by Citizens Clair. TLM's allegations concerning Citizens Clair's breach are vague and conclusory, and do not undermine the undisputed fact that insurance coverage was denied because TLM Realty

failed timely to report the claim to either its insurance broker or to the insurer. TLM Realty's explanations for its own failure to report the claim to either Citizens Clair or its insurance carrier, and its attempts to shift responsibility for this failure onto the defendants, are inapposite.

While TLM Realty claims it did not understand the scope of coverage under the D&O Policy, it submits no evidence, beyond its own conjecture, to establish that TLM's lack of understanding was based upon an identified failure on the part of Citizens Clair.

Hackel admits that she reviewed the summons and complaint in the underlying action in 2005. Inexplicably, Hackel did not report the underlying action at the time it was received by TLM Realty, despite Hackel's assertion in her affidavit on this motion that TLM Realty had no motive to withhold information about a claim it understood was covered and "every motive to report and tap its insurance coverage and to respond to the claim."

Hackel states that she did not report the claim because she was either uncertain about whether it was covered, or she made a unilateral decision, without seeking any consultation from Glick, that it did not seem like the kind of claim for which Citizens Clair procured coverage.

Hackel acknowledges that she made the decision not to report the claim without consulting Glick, even though she states that she did not read the D&O Policy, because of TLM Realty's "relationship with Mr. Glick and the fact that we were relying on his

expertise." in her affidavit, Hackel expresses her complete reliance on Glick to handle all of TLM Realty's insurance issues. She states, "we believed that Mr. Glick was putting into place programs designed to capture every conceivable claim covered by our insurance."

Oehl testified at his deposition that he was essentially relying on Hackel to handle insurance matters, and therefore did not report the claim. Oehl also testified that Hackel did not report the claim because of Citizens Clair's failure to properly educate her, but he was unable to identify anything education that Citizen Clair failed to impart. At his deposition, Oehl repeatedly testified as follows:

> Q: I'm asking why didn't [Hackel] submit?
> A: It's because she wasn't properly trained and educated.
> Q: What was improper about her training and education?
> A: I don't know.

None of Hackel's amorphous complaints about Citizens Clair's conduct supports a finding of a breach by Citizens Clair of its duties to TLM Realty. There are no allegations that Citizens Clair procured inadequate or inappropriate coverage. TLM Realty's allegations that Citizens Clair failed to explain the Policy or attend meetings with TLM Realty, consistent with its obligations under the Agreement, have no support in the evidence presented.

Hackel states that the "coverage summary" for the D&O Policy provided by Glick did not include anything about what types of claims were covered, other than that it served as "mistake" insurance for directors and officers of corporations. According to

Hackel, "I never understood that the D&O coverage purchased by TLM provided coverage for claims by investors who were unhappy with the return on their investment" and that, as far as she was aware, TLM never had a D&O claim filed against it.

Yet, the December 21, 2005 email shows that TLM Realty received a description of the claims covered by the D&O Policy from Citizens Clair, before the D&O Policy expired. Further, Hackel admits that Citizens Clair fulfilled its contractual obligations by meeting with TLM Realty, at its office, on a regular basis, despite Hackel's statements that the discussions focused on personal injury claims, as those were the claims that had been coming in.

Although there is a general rule that an insured is presumed to know the contents of a policy in its possession, it is not without exceptions. *Arthur Glick Truck Sales v. Spadaccia-Ryan-Haas, Inc.*, 290 A.D.2d 780, 782 (3d Dept. 2002). To overcome the presumptive knowledge of the terms of a policy, an insured may establish either: (1) an affirmative misrepresentation of coverage by an insurance agent; or (2) a failure to correct a clear misimpression created by a broker's conduct. *Id.*

Plaintiffs have not alleged that Citizens Clair engaged in an affirmative misrepresentation of coverage, or failed to correct a clear misimpression created by its conduct, in order to overcome the presumption that, as the insured, it had read the policy. Indeed, Hackel's admission that she did not read the policy, coupled with the title of the insurance at issue here, "directors and officers corporate liability" further undermine the

already nebulous allegations that plaintiffs' loss was caused by defendants' material failure to advise TLM Realty.

In sum, in light of TLM Realty's acknowledged failure to notify Citizens Clair or its insurer of the underlying lawsuit, and its inability to state more than vague and conclusory allegations regarding Citizens Clair's breach of duties of "education and training," TLM Realty has failed to raise an issue of fact for trial as to whether Citizens Clair breached the Agreement.

TLM Realty alleged in its complaint, and the parties argue at length in their papers, the possible existence of a "special relationship," creating "a duty of advisement." In *Murphy v. Kuhn*, 90 N.Y.2d 266 (1997), the Court of Appeals recognized that, under certain circumstances, the court will find that a special relationship exists between an insurance broker and its client. The Court identified three "exceptional" situations that may give rise to a special relationship, thereby creating a duty of advisement. *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 735 (2014), citing *Murphy*, 90 N.Y.2d at 272. The first such situation, which is applicable here, is where: "(1) the agent receives compensation for consultation apart from payment of the premiums . . .." *Voss*, 22 N.Y.3d at 735.

Even if the parties' dealings here could be identified as a "special relationship" by virtue of the agreed upon exchange of monies, beyond the premiums, for consultation,

this finding would not in any way alter or enhance Citizens Clair's duties as set forth in the very detailed list of its responsibilities in the Agreement.

Plaintiffs further allege that Citizens Clair breached its duty of care to TLM Realty in that it: (1) failed to name the appropriate entities as insureds under the Policy; and then (2) failed to ensure that claims under the Policy were timely tendered to their insurance companies. Plaintiffs claim that Citizens Clair breached this duty when investigating options for renewing the Policy that would have required Citizens Clair to identify any outstanding claims or potential claims under the Policy. Specifically, TLM Realty, through Hackel, claims that Citizens Clair had a duty to come to TLM Realty's office to search its files for potential claims against TLM Realty.

As stated above, TLM Realty admits that Citizens Clair did regularly appear at the offices of TLM Realty to discuss claims. Moreover, there is nothing in the Agreement that required Citizens Clair to search through TLM Realty's files to uncover claims that might be covered by insurance. The existence of a special relationship between TLM Realty and Citizens Clair did not relieve TLM Realty of its own responsibility with respect to timely reporting claims to Citizens Clair, nor is there anything in these papers to support a finding that TLM Realty's abdicated all of its own responsibilities under the Agreement.[4]

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[4] Hackel doesn't claim that she failed to report the subject lawsuit to Citizens Clair because she expected Citizens Clair would learn this information from its own investigation. Rather, Hackel did not think the underlying action was covered by insurance .

Additionally, based upon the October 18, 2002 email exchange between Abrams and Hackel, in which Hackel affirmatively stated: "Ron owns 99% of the LLC's, TLM owns 1%, Ron owns 100% of TLM. I don't think we need D&O coverage for all of the LLC's, only TLM," I find that there are no questions of fact pertaining to plaintiffs' allegations that Citizens Clair negligently failed to name appropriate entities as insureds under the policy. Thus, with respect to the negligent failure to procure insurance allegations, these allegations are conclusively refuted by the evidence submitted on this motion.

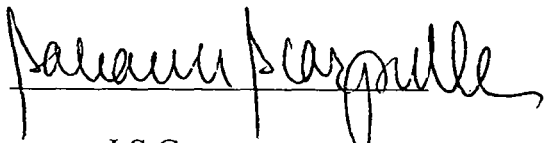
In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment of defendants HUB International Pennsylvania LLC, Citizens Clair Insurance Group, Citizens Clair Insurance Agency LLC, HUB International Limited, Clair Odell Insurance Agency LLC and Clair Odell Group (motion sequence no. 004) is granted; and it is further;

ORDERED that the complaint is dismissed and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
January 16, 2015



J.S.C. HON. SALIANN SCARPULLA