

**Pendill v Furry Paws, Inc.**

2005 NY Slip Op 30015(U)

November 10, 2005

Supreme Court, New York County

Docket Number: 8\_30011/7799

Judge: Rosalyn H. Richter

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_ PART \_\_\_\_\_

Index Number : 117799/2003

PENDILL, MARY LOU

vs

FURRY PAWS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*See annexed decision*

Dated: 11/14/05

*Rosalyn Richter*  
HON. ROSALYN RICHTER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 24

-----X  
MARY LOU PENDILL and MICHAEL R. R.  
PENDILL,

Plaintiffs,

Index No.  
117799/03

-against-

FURRY PAWS, INC.,

Defendant.

-----X  
FURRY PAWS, INC.,  
a/k/a FU PA VI INC.,

Third-party Plaintiff,

Third-Party  
Index No. 590258/04

-against-

TRAVELERS INDEMNITY OF AMERICA,

Third-party Defendant.

-----X  
ROSALYN RICHTER, J.:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Third-party defendant Travelers Indemnity Company of America (Travelers), sued here as Travelers Indemnity of America, moves for summary judgment for a declaration that it has no obligation to defend or indemnify defendant/third-party plaintiff, Furry Paws, Inc., FU PA VI, Inc., or any related or affiliated company in the main action.

Plaintiffs Mary Lou Pendill (Pendill) and Michael R. R. Pendill commenced the main action against defendant Furry Paws, Inc. (Furry Paws), for injuries allegedly sustained by Pendill on April 25, 2003, when she tripped over a piece of plywood at a pet store located at 1038 First Avenue, New York, New York (the

Subject Premises). In October 2003, after the commencement of the main action, Furry Paws notified Travelers of Pendill's accident. In November 2003, Travelers disclaimed coverage to Furry Paws, claiming that it was not timely notified of Pendill's claim in accordance with the Policy's provisions. In March 2004, Furry Paws, "a-k-a FU PA VI Inc." commenced the third-party action seeking defense and indemnification in the main action. Travelers subsequently disclaimed coverage to FU PA VI Inc. (FU PA), claiming that it was not an insured or additional insured on the Policy, and that it failed to timely notify Travelers of the underlying claim.

Now Travelers seeks summary judgment in its favor declaring that it is not obligated to defend or indemnify Furry Paws, FU PA, or any related or affiliated company in the main action. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In support of its motion, Diane Tega, Travelers' Unit

Manager, acknowledges that a commercial general liability policy of insurance (the Policy) was issued by Travelers, effective July 13, 2002 through July 13, 2003, naming as insured Furry Paws, and a few other entities, excluding FU PA. She maintains, inter alia, that FU PA is not covered by the Policy, since it is not named as an insured or additional insured under the Policy, and there is no policy provision or endorsement by which FU PA is included as an insured. Accordingly, Tega argues that Travelers is not obligated under the Policy to defend and/or indemnify FU PA in the main action.

Travelers also argues that, even if FU PA is considered an insured under the Policy, Furry Paws and FU PA failed to provide Travelers with timely notice of the underlying claim in accordance with the Policy's provision, and such failure vitiates coverage thereunder. Travelers relies on excerpts from the depositions of Georgianna Purcell, the manager of the Subject Premises, and Miller to demonstrate that, while FU PA and Furry Paws had notice of the alleged accident on the day it happened, neither provided Travelers with notice until more than six months after its occurrence, and after the commencement of the underlying action.

In opposition, Timothy Miller, the owner and sole shareholder of Furry Paws and FU PA, maintains, inter alia, that, on March 27, 2003, after the lease for the Subject Premises was

negotiated, he and his attorney notified Kenneth Bieber, Inc., his insurance broker (the Broker) of the name of a new corporate entity, FU PA, that would be operating the store thereat. He claims that he assumed that all the necessary endorsements had been made to the Policy. While Miller concedes that FU PA is not named in the Policy, he argues, nonetheless, that FU PA qualifies as an insured under subsection 4 of section II, entitled "Who is an insured," since, under the lease for the Subject Premises (the Lease), Furry Paws, as lessee, could only assign the Lease to "a New York Corporation in which Timothy Miller is the owner," which Furry Paws did, and the incident complained of took place within 90 days of the formation of FU PA, and less than 90 days before the policy was terminated.

Additionally, Furry Paws and FU PA, relying on, inter alia, excerpts from the deposition testimony of Pendill and Purcell, argue that the late notice to Travelers should be excused, since there was good faith belief that Pendill's accident would not result in liability.

In reply, Travelers argues that FU PA does not qualify as an insured under the Policy, since the subsection relied on by Miller would only be applicable if one of the Policy's named insureds "newly" acquired or formed FU PA. Travelers maintains that, because FU PA was formed by Miller, its sole shareholder, and not by Furry Paw or any one of the other entities listed as

an insured under the Policy, FU PA is not entitled to coverage under the Policy.

Travelers also notes that Furry Paws and FU PA do not dispute that they did not provide Travelers with written notice of Pendill's accident until after being served with the pleadings in the main action. It maintains that, based on the deposition testimony of Miller and Purcell, Furry Paws could not have had a reasonable belief that it had no liability, since, inter alia, Purcell witnessed the accident; approximately one hour after the accident, Pendill came back into the store, and advised Purcell that she would be calling her doctor; and Purcell notified Miller of Pendill's accident later that afternoon.

It is well established that the party claiming insurance coverage has the burden of proving entitlement (Moleon v Kreisler Borg Florman General Construction Co., Inc., 304 AD2d 337 [1st Dept 2003]). Further, a party that is not named an insured or additional insured on the face of the policy is not entitled to coverage (id.; see also Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Company, 5 AD3d 198 [1st Dept 2004]).

Here, it is undisputed that the Policy does not name FU PA as an insured or additional insured on the Policy. Further, Miller's argument that FU PA qualifies as an insured under subsection 4 of Section II of the Policy is without merit. This

provision provides as follows:

Any organization that you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However: a) Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier; b) Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and c) Coverage B does not apply to "personal injury" or "advertising injury" arising out of an offense committed before you acquired or formed the organization

(The Policy, Section II - Who is An Insured, subsection 4). As noted by Travelers, the Policy defines "you" as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy" (Travelers' Exhibit A-1, Commercial General Liability Form, at 1). The Named Insured on the Policy is reflected as "Furry Paws, Inc. and as per IL T8 00" (Travelers' Exhibit A, Common Policy Declarations, ¶ 1). Under Endorsement IL T8 00, the Named Insured is amended to include the following entities: "Furry Paws, Inc., All Paw Distributors, Inc., FU PA 3 Inc., F.P. 4, Inc. & F.P.V. Inc., Beastley Bite Inc., & Beastley Pet Supply Inc." (id., General Purpose Endorsement IL T8 00). Thus, under the aforementioned provision, FU PA could qualify as an insured if one of the Policy's named insureds "newly acquire[d] or

form[ed] FU PA (see the Policy, Section II - Who is An Insured, subsection 4).

Although Miller suggests that FU PA qualifies as an insured through Furry Paws, he fails to demonstrate that FU PA was acquired or formed by Furry Paws or any of the other entities listed as a Named Insured under the Policy. Further, as argued by Travelers, in his deposition, Miller testified that he was the sole owner and shareholder of FU PA, and that there was no relationship between FU PA and Furry Paws (Miller's deposition taken on 3/15/05, at 5-6). Therefore, since Miller is not a named insured under the Policy, and his formation of FU PA does not qualify FU PA as an insured, Travelers has no obligation under the Policy to defend or indemnify FU PA in the main action.

Additionally, Travelers' argument, that the failure to give it notice approximately six months after Pendill's accident vitiates coverage under the Policy, is meritorious. With respect to the issue of notice, the Policy required that Travelers be "notified as soon as practicable of an 'occurrence' or an offense which may result in a claim" (Travelers' Exhibit A-1, Commercial General Liability Coverage Form, at 7). "Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time" (Great Canal Realty Corp. v. Seneca Insurance Company, Inc., 5 NY3d 742, 743 [2005]).

The absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract (Argo Corp. v Greater N.Y. Mutual Insurance Co., 4 NY3d 332 [2005]).

Here, it is undisputed that Travelers did not receive notice of Pendill's accident until almost six months after the incident, and after the commencement of the main action. As argued by counsel for Furry Paws and FU PA, there may be circumstances that excuse a failure to give timely notice, such as where the insured has a good-faith belief of nonliability, provided that belief is reasonable (id.), but the insured has the burden of showing the reasonableness of such excuse, given all the circumstances (id.; see also SSBSS Realty Corp. v Public Service Mutual Insurance Co., 253 AD2d 583 [1st Dept 1998]). "[W]here a reasonable person could envision liability, that person has a duty to make some inquiry" (White v City of New York, 81 NY2d 955 [1993]). "The duty to give notice arises when, based on the information available, an insured 'could glean a reasonable possibility of the policy's involvement'" (DiGuaglielmo v Travelers Property Casualty, 6 AD3d 344, 345 [1st Dept 2004], quoting Paramount Ins. Co. v Rosedale Gardens, Inc., 293 AD2d 235, 239-240 [1st Dept 2002]).

It is undisputed that Miller, through Purcell, the manager of the business at the Subject Premises, knew of the

accident on the day it occurred. Based on the depositions of Purcell and Miller, Miller should have gleaned a "reasonable possibility of the policy's involvement" (DiGuglielmo v Travelers Property Casualty, 6 AD3d at 345), in that Purcell testified that she witnessed Pendill's fall in the Subject Premises (Travelers' Exhibit I, Purcell's deposition held on 3/15/05, at 20), that the fall was caused by a plywood board temporarily placed by Furry Paws over the basement opening in the Subject Premises (id. at 22-23), and that Pendill returned to the Subject Premises approximately an hour after her accident to inform Purcell that she felt "a little weird, funny" (id. at 23), and that she would be calling her doctor (id.). She also testified that she spoke to Miller on the day of Pendill's accident and her subsequent return to the store later that day (id. at 51). Further, during his deposition, Miller acknowledged that Purcell called him regarding Pendill's accident (Travelers' Exhibit F, Miller's deposition held on 3/15/05, at 10-11, 14), and that he decided not to notify the Broker or Travelers about it (id. at 25, 29). Thus, the evidence in the record demonstrates that the delay in notifying Travelers of Pendill's accident was not reasonably founded upon a good-faith belief of non liability (see Great Canal Realty Corp. v Seneca Insurance Company, Inc., 5 NY3d 742, supra). Further, contrary to Furry Paws' argument, Travelers need not show prejudice before disclaiming based on the insured's

failure to timely notify it of an occurrence (id.). Thus, Furry Paws and FU PA's failure to timely notify Travelers of Pendill's accident vitiates the Policy as a matter of law (see Argo Corp. v Greater N.Y. Mutual Insurance Co., 4 NY3d 332, supra).

Accordingly, it is

ORDERED that Travelers' motion for summary judgment is granted; and it is further

ADJUDGED AND DECREED that Travelers has no obligation to defend or indemnify defendant/third-party plaintiff Furry Paws, Inc., FU PA VI, Inc., or any related or affiliated company in the main action, Pendill v Furry Paws, Inc., Index No. 117799/03.

Dated:

11/10/03

**UNFILED JUDGMENT**  
This judgment has not been filed with the County Clerk. To obtain entry of this judgment, the person to whom notice is given must appear in person at the County Clerk's Desk (Room 141B).

ENTER:  
*[Signature]*  
J. S. C.