STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

RONALD J. HERRON & LINDA J. HERRON,
His Wife,

Plaintiffs,

-against-

Index No.: 02-0520
RJI No.: 19-02-0403

GRAND VILLA RESORT, INC., &
HIGH PEAK AGENCY, INC.,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

LEWIS & STANZIONE
Attorneys for Plaintiffs
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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs originally commenced the instant action to recover proceeds under a fire insurance policy issued by former defendant Essex Insurance Company to defendant Grand Villa Resort, Inc. and for reformation of the policy to correctly set forth plaintiffs' status as lender loss payees with regard to the policy. Thereafter plaintiffs served an

amended complaint seeking recovery from High Peak Agency, Inc. for negligence in the application for the insurance policy. By prior decision and order, it was determined that the insurance policy as written did not provide any casualty loss coverage to the plaintiffs because they were listed as mortgagees, rather than owners of the premises.

Plaintiffs have now moved for summary judgment against defendant High Peak Agency. High Peak Agency has cross-moved for summary judgment dismissing the complaint. It is noted that this is High Peak Agency's second motion for summary judgment dismissing the complaint.

The relevant facts are essentially uncontroverted. Plaintiffs had for several years before the issuance of the policy in question owned and operated a golf course and an adjoining resort. In or about 1996 they began obtaining all of their commercial insurance through defendant High Peak Agency. Starting in 1999, they leased the resort premises to a succession of three different corporations. As part of the initial transaction plaintiffs consulted with High Peak Agency with respect to obtaining casualty insurance through the tenant which would protect their ownership interests in the property. The lease, a copy of which was given to High Peak Agency, specifically provided that the tenant must obtain casualty and liability insurance which must be reviewed by plaintiff's insurance agent. Plaintiffs then recommended that the tenant obtain insurance through High Peak Agency, which it did. With respect to each of the tenants' requests for insurance, High Peak obtained much of the relevant information and requests for coverage from the

plaintiffs rather than the tenants.

In November 2001, plaintiffs leased the premises to Grand Villa Resort, Inc., the third corporation to operate the resort. The lease provisions were essentially identical to the first lease, and again plaintiffs recommended that Grand Villa Resort obtain the insurance from High Peak Agency. Defendant High Peak Agency prepared Grand Villa's application to Essex for insurance coverage. Plaintiffs were listed on the application as lender loss payees. The policy provided to Grand Villa Resort included coverage for plaintiffs as mortgagees, rather than as lender loss payees or owners. Plaintiffs inquired as to their coverage and were assured by High Peak Agency that they in fact had casualty coverage through the tenant's policy. In the prior decision and order, it was determined that plaintiffs did not have any casualty coverage as mortgagees, and would not have had any coverage even if named as lender loss payees, as they did not have any security interest in the premises.

High Peak Agency at all relevant times knew that the plaintiffs were the owners of the subject premises, and not mortgagees or other secured parties, and repeatedly informed the plaintiffs that they were covered for casualty losses. Plaintiffs have submitted an affidavit from an expert witness with a background in insurance consulting indicating that High Peak Agency knew or should have known that being designated as a lender loss payee or mortgagee did not provide any casualty loss coverage to the plaintiff owners. Such opinion is uncontroverted.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

An insurance agent has a duty to obtain the type and amount of insurance requested by a customer. A mistake in an application for insurance prepared by the agent which results in a disclaimer of coverage constitutes actionable negligence (see Utica First Ins. Co. v Floyd Holding, 5 AD3d 762, 763 [2d Dept 2004]). While there is a general rule that there is no duty to provide advice, guidance or direction with respect to purchasing additional coverage (see Murphy v Kuhn, 90 NY2d 266, 270 [1997];

Catalanotto v Commercial Mut. Ins. Co., 285 AD2d 788 [3d Dept 2001]), such rule is not applicable to the facts of this case. Plaintiffs do not contend that they were not advised to obtain adequate or additional coverage. Rather, they contend that because of the nature of the application for insurance, they did not receive any casualty insurance coverage at all.

Defendant High Peak Agency contends that because plaintiffs were not their customers with respect to the subject insurance policy, (the tenants were) there can be no liability. Moreover, the leases consistently required the tenant to obtain coverage for the plaintiffs as mortgagees. As such, defendant contends that it obtained the requested coverage. However, the policies on their faces clearly evidence an intent to benefit plaintiffs, thereby giving them the right to seek recovery form High Peak Agency (cf. Bronxville Props. v Friedlander Group, 307 AD2d 245, 247 [2d Dept 2003]; Henry v Guastella & Assoc., 113 AD2d 435, 438 [4th Dept 1985]). Moreover, with respect to both defenses it appears that the plaintiffs enjoyed a special relationship with High Peak Agency, giving rise to additional duties of care.

"New York courts disfavor finding such a relationship, but can recognize an additional duty in exceptional situations, for example where the agent receives compensation for consultation beyond the premium payments, the insured relies on expertise of the agent regarding a raised question of coverage, or there is an extended course of dealing sufficient to put objectively reasonable agents on notice that their advice was being specially relied upon" (Curanovic v New York Cent. Mut. Fire Ins. Co.,

307 AD2d 435, 438 [3d Dept 2003]). A special relationship is not created by general queries as to the adequacy of coverage (W. Joseph McPhillips, Inc. v Ellis, 8 AD3d 782, 784 [3d Dept 2004]), an extended customer - agent relationship with occasional worksheets to determine the extent of appropriate coverage (M & E Mfg. Co. v Frank H. Reis Inc., 258 AD2d 9, 13[3d Dept 1999]), or a request for the "best" or "full" coverage (Catalanotto v Commercial Mut. Ins. Co., 285 AD2d at 790; Empire Indus. Corp. v Ins. Cos. of North America, 226 AD2d 580, 581 [2d Dept 1996]; Chaim v Benedict, 216 AD2d 347 [2d Dept 1996]). However, a special relationship may be found when the parties engage in specific and precise discussions with respect to coverage (see Kyes v Northbrook Prop. & Cas. Ins. Co., 278 AD2d 736, 736-738 [3d Dept 2000]; Shenorock Shore Club v Rollins Agency, 270 AD2d 330, 330-331 [2d Dept 2000]).

The record establishes that there was a longstanding relationship between the plaintiffs and High Peak Agency. There were specific requests to insure against a particular type of loss as well as detailed discussions with respect to coverage (see Reilly v Progressive Ins. Co., 288 AD2d 365 [2d Dept 2001]; Roland v Nationwide Mut. Fire Ins. Co., 286 AD2d 872 [4th Dept 2001]; Kyes v Northbrook Prop. & Cas. Ins. Co., 278 AD2d at 738). High Peak Agency was also aware that the leases entered into by plaintiffs provided that High Peak Agency was being relied upon to review any insurance policy for adequacy of coverage. In addition there were assurances made by High Peak Agency that plaintiffs did have coverage, even though High Peak Agency knew or should have known

that listing plaintiffs as mortgagees effectively eliminated any coverage. Under such circumstances, High Peak Agency had a duty to inform plaintiffs that insurance which strictly complied with the lease language naming them as mortgagees would not provide any coverage. Moreover, they were aware that plaintiffs were requesting casualty coverage. The fact that plaintiffs may have used an incorrect technical term which resulted in an absence of any coverage whatsoever can not excuse High Peak Agency's failure to obtain effective casualty coverage. It is therefore determined that High Peak Agency was negligent in procuring casualty insurance coverage on plaintiffs' behalf and further that plaintiffs may recover for any damages caused by such negligence.

Defendant High Peak Agency also contends that even if it were negligent in procuring such insurance, and even if plaintiffs could recover from them in the absence of any privity, there have been no damages sustained by plaintiffs. Defendant High Peak Agency contends that because the policy provides that all insureds may be examined under oath, the failure to cooperate by the primary insured, Grand Villa Resort, would preclude any recovery by plaintiffs. It therefore argues that even if plaintiffs had been named as additional insureds under the policy, they would not have been able to recover. However, nothing in the copy of the policy provided to the Court supports the claim that an additional insured is subject to all defenses applicable to any other insured. Moreover, it has been held that an additional insured possesses an independent right to recovery regardless of the defenses which may be asserted against a named insured (Circle Bus.

Credit v Lumberman's Mut. Cas. Co., 205 AD2d 728, 729 [2d Dept 1994]). As such, the defense is without merit.

It is therefore determined that plaintiffs are entitled to summary judgment on the issue of liability against High Peak Agency for failure to obtain the requested insurance coverage.

Accordingly it is

ORDERED that plaintiffs' motion for summary judgment on the issue of liability is hereby granted, and it is further

ORDERED that defendant's cross-motion to dismiss is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for plaintiffs, who are directed to enter this Decision/Order without notice and to serve defendant High Peak Agency's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
October 9 , 2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion, undated; Affidavit of Ronald J. Herron sworn to August 11, 2007 with Exhibits A-E annexed;
Affirmation of Ralph C. Lewis,, Jr., Esq., dated August 10, 2007, with Exhibits A-H annexed;

Affidavit of Jo Ann M. Ralph sworn to August 9, 2007, with Exhibit A annexed; Plaintiffs' Memorandum of Law;

Notice of Cross-motion dated September 14, 2007; Affidavit of Thomas M. Hirschen, Esq., dated September 14, 2007, with Exhibits 1-6 annexed;

Reply Affirmation of Ralph C. Lewis, Jr., Esq., dated October 1, 2007;

Reply Affidavit of Thomas M. Hirschen, Esq., dated October 4, 2007.