Femia v Graphic Arts Mut. Ins. Co.
2010 NY Slip Op 33683(U)
December 30, 2010
Sup Ct, Suffolk County
Docket Number: 3069/06
Judge: Jeffrey Arlen Spinner
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.

[* 1]

SHORT FORM ORDER

INDEX No. ~~05-14061~~ 3069/06

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 09-09-09 (#002 & #003)
MOTION DATE 11-18-09 (#004)
MOTION DATE 3-24-10 (#005 & #006)
ADJ. DATE 10-13-10
Mot. Seq. # 002 - MD
003 - XMD
004 - MD
005 - MD
006 - MD

---X
SANDRO FEMIA,

Plaintiff,

- against -

GRAPHIC ARTS MUTUAL INSURANCE CO., BROOKS WATERBURN CORP., and DAYTON & OSBORNE, LLC,

Defendants.
---X

WEG & MEYERS, P.C.
Attorneys for Plaintiff
Federal Plaza, 52 Duane Street
New York, New York 10007

KEIDEL WELDON & CUNNINGHAM, LLP
Attorneys for Defendant Brooks Waterburn Corp.
925 Westchester Avenue, Suite 302
White Plains, New York 10604

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendants Dayton Osborne, LLC
Three Gannett Drive
White Plains, New York 10604

FAUST GOETZ SCHENKER & BLEE, LLP
Attorney for Defendant Graphic Arts Mutual Ins. Co.
Two Rector Street
New York, New York 10006

Upon the following papers numbered 1 to 152 read on these motions and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1- 16; (004) 39-60; (005) 61-74; (006) 75-79 ; Notice of Cross Motion and supporting papers (003) 17-38; 150; Answering Affidavits and supporting papers 80-88; 89-93; 94-95; 96-100; 101-102; 103-116 ; Replying Affidavits and supporting papers 117-119; 120-121; 122-124; 125-126; 127-128; 129-132; 133-135; Other Mem/Law: 136-137; 138; 139; 140; 141-142; 143; 144; 145; 146-147; 148; 149 ; 151-152; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions and cross-motion are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion (002) by order to show cause by the plaintiff pursuant to 3212 for summary judgment against the defendant Graphic Mutual Insurance Co. is denied; and it is further

ORDERED that this cross-motion (003) by defendant E.T. Dayton, Inc., d/b/a Dayton Ritz Osborne Insurance and i/s/h/a/ Dayton & Osborne, LLC, pursuant to 3212 for summary judgment striking the plaintiff's fourth and fifth causes of action in the amended complaint and all cross-claims interposed against it is denied; and it is further

ORDERED that this motion (004; incorrectly denominated as a cross-motion) by defendant Graphic Arts Mutual Insurance Co. pursuant to 3212 and 3001 for summary judgment and declaratory judgment that the insurance policy issued by Graphic Arts Mutual Insurance Co. is void and that Graphic Arts Mutual Insurance Co. owes no duty to provide coverage for the plaintiff's loss is denied; and it is further

ORDERED that this motion (005) by defendant Brooks Waterburn Corp. pursuant to 3212 for summary judgment dismissing the complaint and all cross-claims against it is denied; and it is further

ORDERED that this motion (006; incorrectly denominated as a cross-motion) by defendant Graphic Arts Mutual Insurance Co. pursuant to CPLR 3212 for summary judgment on its cross-claim for contractual and common law indemnification over and against defendant Dayton & Osborne, LLC is denied.

The amended complaint of this action asserts that in January 2004, the plaintiff, Sandro Femia, contacted defendant Brooks Waterburn Corp. (Brooks) to obtain insurance for a bed and breakfast known as Whitehall Mansion, located at Wagner Avenue, Fleischmanns, New York, which he was purchasing and did purchase in January 2004. It alleges the plaintiff advised Brooks that he and his partner would co-own the subject property and that the plaintiff's business partner would occupy the subject property, but that the plaintiff would not. Brooks thereafter contacted defendant Dayton & Osborne, LLC, for the purpose of procuring insurance for the plaintiff's property. Dayton & Osborne, on behalf of the plaintiff, submitted an application for insurance coverage to defendant Graphic Arts Mutual Insurance Co. (Graphic Arts) after the plaintiff advised Dayton & Osborne that his business partner, and not he, would be occupying the subject property. On January 14, 2004, the plaintiff received a copy of an insurance policy's binder. In January 2004, for good and valuable consideration, Graphic Arts issued an insurance policy to the plaintiff effective January 19, 2004. The subject property was covered by this policy against perils, including water damage. On or about March 10, 2004, a water pipe at the subject property burst, causing extensive water and mold damage. Plaintiff asserts that prior to this loss, nether Graphic Arts, Brooks nor Dayton & Osborne provided a copy of the within insurance policy to him. When the plaintiff submitted his claim for damages to the property due to the burst pipe, Graphic Arts denied coverage of the plaintiff's losses on the basis that he allegedly misrepresented on his application for insurance that the property would be occupied. The plaintiff asserts that the portion of the application upon which Graphic Arts based the denial of coverage for the claim upon was completed by Brooks and/or Dayton & Osborne.

A first cause of action is asserted against Graphic Arts for breach of contract based upon the plaintiff complying with all conditions precedent to the coverage and Graphic Art's failure to indemnify the plaintiff for the damages sustained to the building as a result of the burst pipe. A second cause of action is asserted against Graphic Arts for breach of contract premised upon the failure to indemnify the plaintiff for damage to his business personal property caused by the burst pipe. A third cause of action is asserted against defendant

Brooks for failing to exercise reasonable care, technical skill, ability and diligence ordinarily possessed by an insurance broker and insurance agents by making misrepresentations on the insurance application and failing to properly procure insurance for the plaintiff on the property. A fourth cause of action is asserted against Dayton & Osborne sounding in negligence exemplified by its failure to exercise a reasonable degree of care, technical skill and ability and diligence of ordinary insurance brokers and insurance agents for its alleged misrepresentations made in the insurance application. The fifth cause of action asserted against Dayton & Osborne is premised upon the defendant's breach of its agreement with the plaintiff to act as its insurance broker and/or agent in procuring insurance coverage and accurately completing paperwork for submission to the insurance carrier for insurance coverage for the plaintiff's property.

Graphic Arts has asserted a cross-claim against the co-defendants for judgment over against the co-defendants, contribution and contractual indemnification.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065 [2nd Dept 1979]).

In support of motion (002) for summary judgment against defendant Graphic Arts, the plaintiff has submitted, inter alia, an attorney's affirmation; copy of the summons and complaint and amended summons and complaint; answer served by Graphic Arts; copies of the transcripts of the examinations before trial of Anna Marie DeFreytas on behalf of Graphic Arts dated September 23, 2008 (unsigned), and of Sandro Femia dated January 22, 2007 (unsigned) and January 20, 2005; and an unauthenticated copy of an estimate from Antonucci Consulting Corporation by Utica National Insurance Company. It is determined that the unsigned copies of the transcripts are not inadmissible form pursuant to CPLR 3212, and the transcript of Anna Marie DeFreytas is not accompanied by an affidavit pursuant to CPLR 3116. Therefore, the motion fails to comport with the requirements of CPLR 3212. The plaintiff has not provided a copy of the answers served by the co-defendants for this court to determine any cross-claims asserted by the co-defendants. Nor has the plaintiff submitted a copy of the application for insurance, a copy of the insurance policy, an affidavit from the plaintiff's partner, a copy of a partnership agreement, or a copy of a deed or proof of ownership of the subject property, thus creating factual issues. Based upon the foregoing, the plaintiff has not established prima facie entitlement to summary judgment against Graphic Arts.

Accordingly, motion (002) is denied.

In support of cross-motion (003) wherein defendant Dayton & Osborne seeks summary judgment striking the plaintiff's fourth and fifth causes of action in the amended complaint and all cross-claims interposed against it, the submissions consist of, inter alia, an attorney's affirmation; the supplemental summons and amended complaint; the answers of all defendants; the affidavit of Harry W. (Bud) Fritzen dated September 2, 2009; an illegible copy of an application for insurance -Utica National Business Protection Plus Program; a copy of a temporary insurance binder effective January 9, 2004 with one page of conditions; a document from Dayton & Osborne to Utica Mutual Insurance Co., dated January 9, 2004, with a copy of a check annexed, but not the completed application referenced in the communication; a copy of policy with letter dated February 4, 2004 to the plaintiff from Harry W. Fritzen; a communication, dated February 24, 2004, concerning cancellation of the policy of insurance on the basis the unopened business venture is unoccupied and is being "watched" by a realtor in the area; a Notice of Cancellation of Insurance, dated February 25, 2004; the claim form to Utica Mutual, dated March 11, 2004; a claim acknowledgment, dated March 11, 2004; a policy cancellation statement effective March 21, 2004; a partial unsigned transcript of the examination under oath of Sandro Femia, dated November 11, 2004; a partial unsigned transcript of the examination before trial of Sandro Femia, dated January 22, 2007 and February 7, 2008; a partial unsigned transcript of the examination before trial of Anna Marie DeFreytas, dated September 23, 2008; a partial unsigned transcript of the examination before trial of Lawrence Trapani, dated October 7, 2008; and a copy of an unsigned letter, dated May 2, 2005, to Joseph M. Lively.

It is determined that the partial, unsigned copies of the examination under oath and the unsigned excerpts from the aforementioned examinations before trial are not in admissible form pursuant to CPLR 3212, are not accompanied by an affidavit pursuant to CPLR 3116 and are not considered on this motion. The motion, however, is supported with the Fritzen affidavit in compliance with CPLR 3212.

A fourth cause of action is asserted against Dayton & Osborne wherein it is alleged such defendant was negligent as exemplified by its failure to exercise a reasonable degree of care, technical skill and ability and diligence of ordinary insurance brokers and insurance agents for its alleged misrepresentations made in the insurance application. The fifth cause of action asserts Dayton & Osborne breached its agreement with the plaintiff to act as its insurance broker and/or agent in procuring insurance coverage and accurately completing paperwork for submission to the insurance carrier for insurance coverage for the plaintiff's property.

Harry W. (Bud) Fritzen has set forth in his affidavit dated September 2, 2009 that he at all time was vice president with E.T. Dayton, Inc., d/b/a Dayton Ritz Osborne Insurance and s/h/a Dayton & Osborne, LLC, and a licensed insurance agent and broker in the State of New York. He states Dayton was a licensed insurance agent and broker in the State of New York. He avers that on or about January 7, 2004, he received a call from insurance broker Joel Blitzer of Brooks inquiring whether Dayton could procure business insurance coverage for Brooks' customer, Sandro Femia, for a bed and breakfast located upstate New York. He then obtained an online quote from Utica Mutual Insurance Company (Utica) for the bed and breakfast. Dayton, he states, is an agent for Utica and therefore can sell various Utica policies including those of Graphic Arts Mutual Insurance Company (Graphic Arts). Upon advising Blitzer of the quote for the insurance, Blitzer accepted on behalf of Femia. Fritzen forwarded to Blitzer a "mostly blank application"instructing him to have the form filled out and signed by Femia before returning it to Dayton. He believes he may have filled in

the name "Sandro Femia" in the application for the bed and breakfast policy as well as the basic coverage information on page one as provided by Blitzer. This application was used to obtain the quote before faxing the otherwise completely blank seven page application to Brooks. Fritzen then received from Brooks a completed application dated January 7, 2004 and signed by Femia on the third page and seventh pages.

On January 8, 2004, after speaking with Anna Marie DeFreytas, an underwriter for Utica, Fritzen then bound coverage for the bed and breakfast for the period of January 9, 2004 through January 9, 2005. On January 9, 2004, Fritzen claims he mailed the completed application provided by Brooks to Utica with a cover letter requesting that the policy be issued and that he did not make any changes or additions to the application before mailing it. A Dayton check in the amount of $200 to cover the deposit for the premium was enclosed to expedite the issuance of the policy, and he expected to be reimbursed by the referring broker, Brooks. Fritzen avers that he did not have any direct contact with Femia before or during the application process, that the application represented that the building was not "vacant, unoccupied or seasonal," and that he would not have forwarded the application to Utica if he had been informed that the property was vacant. On February 4, 2004, Fritzen claims he received a copy of the declarations pages of the subject policy identified as a"Business Owner's Package Policy #BOP3664638." He claims that Dayton mailed the policy declarations pages to Femia the same day with a cover letter upon which he requested that Femia "review the coverages and contact our office if any changes are necessary" and advised Femia that he would be billed directly by Utica and should direct payments directly to them. He states that the declarations pages mailed to Femia clearly provided property and liability coverage for a bed and breakfast at Whitehall Mansion.

In February 2004, Fritzen avers, he was informed by DeFreytas from Utica that Utica was cancelling the subject policy because the bed and breakfast was unoccupied, it was not operational year round, and it was purportedly only being watched by a realtor, thus failing to meet the insurance carrier's underwriting guidelines. On February 25, 2004, Utica mailed a Notice of Cancellation of Insurance to Femia, cancelling the insurance effective March 21, 2004 because the premises was "unoccupied and not open for business." On or about March 11, 2004, Femia advised Dayton that a pipe burst on the second floor of the premises allegedly causing extensive damage. Dayton immediately sent a Property Loss Notice to Utica, for which Utica made a claim acknowledgment. Utica mailed a Policy Cancellation letter dated March 23, 2004 to Femia advising the subject policy had been cancelled effective March 21, 2004. Fritzen avers that neither Blitzer nor Femia ever contacted him to request any changes to the policy or to inquire about any policy terms or conditions before the alleged loss. Fritzen avers that he relied upon Blitzer to have the Femia application properly completed and signed by his customer. Fritzen claims that Dayton did not make any alleged misrepresentations in the application and merely forwarded the signed application to Utica as a service to Brooks.

An essential element of negligence is the breach of a duty owed to the plaintiff by the defendant. Before a defendant may be held liable for negligence, it must be shown that the defendant owed a duty to the plaintiff. An agent is required to exercise good faith, reasonable diligence and such skill as is ordinarily possessed by persons of common capacity engaged in the same business. An insurance broker may be held liable for failing to obtain insurance coverage. Thus an agent may be held liable for failing to follow his principal's instructing in obtaining coverage, for failing to obtain effective insurance coverage, or for failing to notify the insured of its inability to obtain coverage. An insurance broker, in his capacity as an insurance broker, may be sued only in failing to do what he is required to do (*see*, ***Blonsky v Allstate Insurance***, 128 Misc2d 981, 491 NYS2d 895 [Supreme Court of New York, Special Term, New York County 1985]).

Insurance agents and brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time, or to inform the client of their inability to do so. An agent or broker may be held liable under theories of breach of contract or negligence for failing to procure insurance (***Handras v American Grill Diner***, 2010 NY Slip Op 32975U [Supreme Court, Queens County 2010]). An agent is bound not only to good faith but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. Whether or not he exercises such skill and diligence is usually a question of fact, but its omission is equally a breach of his obligation and injurious to his principal, whether it be the result of inattention or incapacity (***Fleetwood Motors, Inc. v John F. James & Sons, Inc.***, 39 Misc2d 499, 237 NYS2d 668 [Supreme Court, Trial Term, Queens County 1963]).

The fact that an agent acts for a disclosed principal does not relieve the agent of liability for its own negligent acts (***Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.***, 45 AD3d 792 [2nd Dept 2007]). A broker who is employed to secure insurance is the agent for the insured and not for the company (***Wright v American Equitable Assurance Company of New York***, 131 Misc 215, 225 NYS2d 470 [Supreme Court, New York County 1928]).

Based upon a review of the evidentiary submissions and the affidavit submitted by Fritzen, it is determined that Datyon & Osborne has not demonstrated prima facie entitlement to summary judgment dismissing the forth and fifth causes of action. Fritzen's affidavit is conclusory and his arguments are unsupported by admissible evidence. Among other factual issues, there has been no testimony or expert affidavit setting forth the duties, obligations and responsibilities of a licensed broker or agent, or explaining the industry standards for procuring insurance on behalf of another agent or client. There has been no evidentiary submission or testimony submitted by the moving party concerning the substance of the communications between the moving defendant and Blitzer with regard to whether the plaintiff's business was to be operational effective immediately or if there would be a delay in opening the business and, if so, what arrangements would be made for occupancy of the subject building. There has been no testimony as to whether the moving defendant was apprised about whether the building would be occupied or remain vacant for a period of time so that the proper policy could be obtained or the business started. There is no testimony by the moving defendant as to whether or not he made inquiry into these issues. Therefore, the moving defendant has not established that he was not negligent and did not depart from his responsibilities and duties.

It is noted that the plaintiff, in opposing this motion, has submitted, inter alia, the deposition transcript of Fritzen, wherein Fritzen avers that he has been in contract with E.T. Dayton as a consultant since January 1, 2009, which differs from his affidavit dated September 9, 2009 wherein he avers that at all times he has been vice president of E.T. Dayton. Fritzen testified he would work with other insurance brokers in order to place coverage when he had an insurance company that would entertain a certain type of risk the other broker was looking to place. His compensation for that was determined by the president of Dayton, George Yates, and there was generally an agreement to split a commission. When approached by another broker to procure insurance, his company was then the broker of record for that insured. He described the broker of record as the broker with respect to the insured in the eyes of the insurance company. Dayton would then have an application prepared indicating its name on top with the broker number. He was aware in 2003 and 2004 that Dayton had the authority to bind risks on behalf of Utica for property and casualty, but needed approval from Utica before binding. Utica had guidelines for underwriting which he was familiar with, and he was aware they had a market for bed and breakfasts. Graphic Arts Mutual Insurance was an entity that writes paper on behalf of Utica, and does not have any separate underwriting or policy requirements separate and apart from Utica. He had not previously placed a bed and breakfast policy with Utica.

Fritzen testified he received a phone call from Mr. Blitzer of Brooks asking him to procure a quote for him if Utica still had a bed and breakfast program. He did not recall whether or not he read or reviewed the underwriting guidelines for the bed and breakfast policy, and was unsure what the underwriting requirements were, but stated that he would not have forwarded the application to Utica if he had known that the bed and breakfast would be vacant as Utica does not write a vacant building. When Blitzer contacted him, he did not know if Femia would be residing in the bed and breakfast, whether it would be occupied by a prior owner or an existing owner, whether it was a current ongoing concern, and did not know when Femia would be moving into the bed and breakfast. Fritzen testified that "You may obtain a quote on something that is going to be-we quoted it based on the fact that once it was sold it would be occupied." At no time after receiving the application did he ask Blitzer to contact Femia to clarify anything about either the risk or any information that was contained on the application. He checked off the box "NO" for the question "Are building portions vacant, unoccupied, or seasonal?" He received a supplemental application which he did not fill out and did not check with Blitzer to confirm the information or ascertain who completed it. Fritzen agreed with Blitzer to split the commission 50/50 for whatever money they received from Utica.

Fritzen stated he was not permitted by Utica to waive the occupancy requirement, but knew of instances where Utica would permit someone other than the owner to occupy the premises. He had no understanding with Utica whether Femia would be permitted time to occupy the premises after it was purchased. After he submitted the application the Utica, Anne Maria DeFreytas contacted him but made no inquiry that he could recall as to any of the answers set forth in the application. Within about 30-60 days after the policy was bound, he remembered receiving an e-mail from Utica advising that the policy was being cancelled as the bed and breakfast was vacant and unoccupied, and upon phone conversation with Ms. DeFreytas, was advised formal notice was going out. He later learned that Femia sustained a loss and Dayton submitted a claim to Utica on March 11, 2004. On April 2, 2004, a secretary in his office, Colleen, made an entry into their system indicating Richard Stott, a claims examiner from Utica, called about the application process and to see why the policy cancelled on March 21, 2004, but he could not remember the questions asked by Scott. A reserve had been set by Utica which was going to be counted as part of Fritzen's loss history for the purposes of profit sharing calculations.

Thus the plaintiff has raised a factual issue concerning whether or not Fritzen should have apprised either he or Blitzer that a vacant building would not be covered, and whether Fritzen should have made inquiry into the operational status of the bed and breakfast prior to procuring the policy. There are also factual issues concerning the effective date of the policy raised, as the policy was bound on January 9, 2004 and should have been in force on that date rather than January 19, 2004, the date listed on the policy. Further factual issues concern why Fritzen checked off on the application that the bed and breakfast was occupied, how he made that determination, and whether he was negligent in procuring the insurance for Femia.

Accordingly, cross-motion (003) is denied.

In motion (004), defendant Graphic Arts Mutual Insurance Co. (Graphic Arts) seeks summary judgment and a declaration that the insurance policy issued by Graphic Arts Mutual Insurance Co. is void ab initio and that Graphic Arts Mutual Insurance Co. owes no duty to provide coverage for the plaintiff's loss. Graphic Arts alleges that the application submitted to it contained numerous misrepresentations and that had the information been correctly or truthfully provided to Graphic Arts, the policy at issue would never have been provided to the plaintiff. In support of this application, Graphic Arts has submitted, inter alia, an attorney's affirmation; copies of the supplemental summons and amended complaint; copies of the answers of

Graphic Arts, Brooks, and Dayton & Osborne; an unsigned copy of the examination under oath of Sandro Femia, dated November 11, 2004; an unsigned transcript of the examination before trial of Lawrence Trapani, dated October 7, 2008; an affidavit of Harry W. "Bud" Fritzen, dated September 2, 2009; an unauthenticated copy of National Business Protection Plus Program Application; an affidavit of Anna Marie DeFreytas; a transcript of the examination before trial of Anna Marie DeFreytas, dated September 23, 2008; a partial copy of a facsimile transmission, dated February 2, 2005,labeled pages 1-8 but only pages 1-5 provided; underwriting guidelines for Bed and Breakfast and Country Inns; a request for survey-assigned January 5, 2004; an unauthenticated memo to Anna Marie DeFreytas-narrative report; Rewrite policy with line crossed through, dated February 24, 2004; the Notice of Cancellation of Insurance, dated March 21, 2004; a copy of a letter dated, April 16, 2004, to Sandro Femina from Utica National Albany Claim Department; Policy Declaration; an unauthenticated letter, dated May 2, 2005, to Joseph Lively from Hiscock & Barclay; and a copy of a check in the amount of $378.53 marked "void."

The unsigned copy of the examination under oath of Sandro Femia, dated November 11, 2004, the unsigned transcript of the examination before trial of Lawrence Trapani, dated October 7, 2008, and the unauthenticated submissions are not in admissible form pursuant to CPLR 3212. It is noted the transcripts are not accompanied by an affidavit pursuant to CPLR 3116 and, therefore, were not considered in this motion for summary judgment.

Based upon a review of the evidentiary submissions, it is determined that Graphic Arts has not demonstrated prima facie entitlement to summary judgment dismissing the complaint.

Anna Marie DeFreytas set forth in her supporting affidavit that she has been employed by Utica National Insurance Group for sixteen years and that Utica National Insurance Group (Utica) is affiliated with Graphic Arts Mutual Insurance Co. However, she has not set forth the relationship of that affiliation between the Utica and Graphic Arts and whether she has standing to testify on behalf of Graphic Arts. No proof of the affiliation has been submitted or her relationship with Graphic Arts. She also makes reference to the underwriting guidelines of Graphic Arts, but does not state the basis for her knowledge that the guidelines were in effect at the time of the plaintiff's application. She has not established that she is an employee or agent of Graphic Arts.

Ms. DeFreytas set forth at her examination before trial that she has been employed by Utica National Insurance Group as an account underwriter for fifteen years. It has not been demonstrated that she is employed by or is an agent or employee of Graphic Arts. Therefore, this motion (004) does not comport with the requirements of CPLR 3212 in that it has not been demonstrated that it is supported by a deposition of the moving party or an affidavit by the moving party by someone with knowledge. This court cannot speculate as to the relationship of Utica National Insurance Group and the moving defendant Graphic Arts. Therefore, the moving papers raise factual issues. Graphic Arts has not established prima facie entitlement to summary judgment dismissing the complaint against it.

Additionally, even if it were established that Ms. DeFreytas has authority to act on behalf of Graphic Arts, the testimony of Ms. DeFreytas raises factual issues which preclude summary judgment. She testified that Utica does not usually write for new ventures, but she was not sure, then stated that a new venture would fall outside of the underwriting guidelines. However, exceptions may be made for new ventures, but she did not set forth the standards or criteria for exceptions. The application set forth that the bed and breakfast was a new business. She had conversation with Fritzen advising her that it was a new business and she agreed to

write the policy for him as an agency accommodation . There was no further conversation between them, she stated. A supplemental affidavit was required for things that are related to a bed and breakfast, such as recreational activities, and things that are not usual to an average risk. She did not recall having a conversation with Fritzen concerning whether the owner of this new venture had moved into the premises or not. The application came into Utica on January 13, 2004. She received it on January 14, 2004, and it was sent to rating to be issued on January 22, 2004, although the application requested that the policy commence January 9, 2004. The underwriting guidelines, she testified, require that applications be submitted at least five business days prior to it needing to be bound, however, an agency accommodation was made in this case to consider the risk even though the application was coming in after or beyond the date in which the insurance was initially sought. When underwriting approved the application it was approved retroactive to the date requested; however, she did not know if this rating error was corrected to change the effective date of the policy to January 9, 2004 instead of January 19, 2004. She testified that the closing of the business actually took place on January 14, 2004.

Ms. DeFreytas had handwritten notes dated April 14th and 15th of 2005, she believed, as she had sent a notice to cancel the policy as the bed and breakfast did not meet the guidelines when a loss-control survey was initiated. Ms. DeFreytas testified that a Utica employee, Tony Paladino, conducted the loss control survey on or about February 13, 2004 at her request made January 14, 2004. The report for the loss survey was needed by February 27, 2004 since it was a new business. However, Paladino called her to advise that the business was not open and the building was not owner occupied. Paladino was advised not to complete the survey. She thereafter received a narrative writing from Paladino confirming this information, however, she stated, Paladino did not interview Mr. Femia. After the loss came in, they were unsure how to cancel the policy, whether to stay with her recommendation to cancel under the underwriting guidelines or to rescind coverage in full because the situation was not what was presented on the application. Her boss, the underwriting manager, Tom Weigand, advised her to rescind the policy. Scott Todd from legal was also consulted. Both Weigand and Todd were employees of Utica. In her note dated April 18, 2005, she then outlined the procedure for cancelling the policy and stated that a check would be sent to the insured with correspondence regarding denial of the coverage for the claim for water damage to the premises on March 10, 2004. She did not know if the check was sent to the insured; however, a check dated April 28, 2005 returning the premium was produced.

The loss claim or loss caused by a burst pipe and water damage at the bed and breakfast occurred on March 10, 2004. The decision to rescind the policy was not made until April 2005. Ms. DeFreytas then testified that she had documentation indicating the underwriting cancellation was typed February 25, 2004 because the loss-control survey indicated a new business venture which the insured had not yet opened. The underwriting requirement is that the bed and breakfast be operational all year, not seasonally. Then she testified that the occupancy part of the underwriting guideline was not met, as the premises was being "watched" by a local realtor and that was not the same as being occupied. Fritzen was notified by e-mail of the same after a discussion with him before she sent it. Thereafter, the policy then had to be reinstated to rescind it and those procedures did not take place until 2005. It was her assumption that when she bound the risk that the owner was already in the facility.

Further testimony indicates that the underwriting guidelines do not list fire alarms for a bed and breakfast, or burglar alarms, but upon a survey, recommendations could be made by Utica to the insured as to what the underwriter would want. Utica would then have 60 days to cancel the policy if the insured did not fulfill the requirements within that time. When shown a reservation of rights and non-waiver dated April 16,

2004, signed by Russell Phillips, whom she did not know, she testified that she was familiar with the policy provisions which are quoted in the reservation of rights letter. At page 7 of that letter, its is her understanding that the vacancy provisions relating to this property did not take effect unless the building has been vacant for more than 60 consecutive days before the loss. If it was vacant for only 45 days, then the limitations or conditions or exclusions within the vacancy provisions would be effective, and that the provision both refers to the pre-loss application as well as the post-loss investigation.

Based upon the foregoing, there are further factual issues concerning what the guidelines are for Graphic Arts, and its policy or procedure for accepting applications and issuing policies. There are factual issues concerning whether or not Graphic Arts made inquiry into when the new business would be operational. There is no testimony from anyone on behalf of Graphic Arts concerning whether or not its guidelines and policy provisions, with regard to vacancy and the 60 consecutive day period for vacancy before the provision becomes effective, are the same as set forth by Ms. DeFreytas from Utica. Here, it is determined that Graphic Arts has not established prima facie entitlement to summary judgment dismissing the complaint. There are factual and credibility issues concerning the date the policy was issued as the date on the policy is later than the date testified to by DeFreytas.

Accordingly, motion (004) is denied.

In motion (005), defendant Brooks seeks summary judgment dismissing the complaint and all cross-claims against it. The third cause of action is asserted against defendant Brooks and is premised upon Brooks' alleged negligence in failing to exercise reasonable care, technical skill, ability and diligence ordinarily possessed by an insurance broker and insurance agents and negligently making misrepresentations on the insurance application and negligently failing to properly procure insurance for the plaintiff on the property. Brooks claims entitlement to summary judgment on the basis that Brooks would not be responsible for any misrepresentations by the plaintiff not disclosed to Brooks. Brooks claims that the plaintiff, Femia, intended for the property to be occupied on a daily basis, but due to the unusually harsh winter, his intentions changed. In support of this application, Brooks has submitted, inter alia, an attorney's affirmation; copies of the supplemental summons and the answers served by each defendant; a copy of the application to Utica; a copy of the BOP insurance policy prepared for Sandro Femina; an unsigned copy of the transcript of the examination under oath of Sandro Femina, dated November 11, 2004; unsigned copies of the transcript of the examination before trial of Sandro Femia, dated January 22,2007 and dated February 7, 2008; an unsigned copy of the transcript of the examination before trial of Lawrence Trapani dated October 7, 2008; and a copy of a letter, dated April 16, 2004, for "Reservation of Rights and Non-Waiver."

Brooks has not submitted an affidavit on its behalf or a signed copy of the transcript of the examination before trial of Lawrence Trapani as required pursuant to CPLR 3212. No affidavit pursuant to CPLR 3116 has been submitted either. Therefore, the application fails to comport with CPLR 3212, which requires the motion be supported by an affidavit or deposition transcript of a person with knowledge and that evidentiary submissions be in admissible form. Based upon the foregoing, Brooks has not demonstrated prima facie entitlement to summary judgment dismissing the complaint or cross claims. Even if Brooks' submissions were considered, the submissions presented in the moving papers raise factual issues which preclude summary judgment.

Here the reservation of rights letter from Russell Phillips sets forth the policy was issued on January 19, 2001. This creates a factual issue, as Ms. DeFreytas testified that the policy was actually issued January 9,

2004, although she did not receive the application until January 14, 2004. Factual issues and issues of credibility are to be determined by the trier of fact (*see*, ***Lalla v Connolly***, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]). The testimony of Lawrence Trapani raises further factual issues, as his testimony demonstrates that he lacks knowledge of important issues necessary to determine this cross-motion, and no affidavit or transcript of any testimony by Mr. Blitzer has been submitted. Blitzer dealt with Fritzen in providing the applications for the insurance and in procuring the insurance coverage for Femia. Therefore, prima facie entitlement to summary judgment has not been established by Brooks.

Lawrence Trapani testified that he has been the vice president of Brooks Waterburn, an insurance agency. There are two corporate officers other than himself: Joel Blitzer, the vice president, and his father, Rosario Trapani, the president. Lawrence Trapani owns about seventy percent of the stock in the corporation, his father owns twenty percent, and Blitzer owns ten percent. Lawrence Trapani manages his existing accounts and new sales products and is involved with the day-to-day running of the agency operations. He generates leads on new sales production and development, gathers information and presents a quote if quoting an account. Blitzer secures quotes for relatively unique businesses and would be the person to find out whether the agency could write the business or not. If his agency does not write the business, he goes to a wholesale broker to obtain a quote. He stated that wholesale brokers represent many insurance companies and their job is to secure insurance for agencies like his on types of risks that he could not get with his direct representation with carriers he represents directly. He deems Dayton Osborne to be a retail agency which writes insurance directly for a customer whereas a wholesale broker writes insurance for retail agencies. He would only go to another retail broker initially if he did not have a market in which he could write a particular type of insurance. He was not aware of any situations in which his company would have gone to Dayton Osborne instead of going to a wholesale broker to obtain a quote for a client. He was aware that Brooks helped Femia obtain bed and breakfast insurance, however, he was unaware of the circumstances under which Blitzer contacted Dayton & Osborne.

Femia was an existing client of the office for about three years (from about 2001 to 2004), having obtained insurance policies relating to Femia's chiropractic business, personal auto insurance and homeowner's insurance. In late 2003, Femia asked Trapani for a quote for a bed and breakfast and he gave it to Blitzer to procure a quote. He himself had no experience writing or procuring a quote for bed and breakfast insurance coverage. He did not ask Femia any details. Blitzer advised him they had no market for a bed and breakfast. He did not know if Blitzer contacted any wholesale brokers. He advised Femia they had no market, and Femia wanted to know if he could recommend anyone to him, so Trapani spoke to Blitzer who advised him he contacted Bud Fritzen who advised him they had a market with Utica. Trapani did not have binding authority for Utical Mutual or Graphic Arts. He did not ask Blitzer about any details or underwriting requirements or make any other inquiries. He believed that Fritzen then faxed them a blank application which Blitzer forwarded to Femia. He had no reason for not forwarding the application to Femia. This, he said, was done as a courtesy. Trapani testified there was no reason why he did not give Femia Fritzen's name and number. He then testified that he was not sure if the application was blank. He did not know if the application was forwarded with a cover letter and instructions and stated Blitzer would know. At no time did he and Femia discuss any aspect of the risk he was seeking to insure and he did not know if Blitzer knew. He did not know if Femia returned the application to Blitzer or whether it was ever sent to Fritzen, and did not follow up with either Femia or Blitzer. He later learned from Blitzer in January 2004 that Fritzen was able to procure the insurance. He has no recollection of seeing the application after it was filled out in whole or in part.

Tripani testified he never entered into an agreement with Fritzen for a commission in connection with the policy and had an understanding they were not going to receive any commission. He testified that Blitzer never had a discussion with Fritzen concerning a commission on the policy. This was the only referral to Dayton & Osborne ever made through Brooks. He did not know if Dayton & Osborne was informed that Brooks was the broker of record with respect to the insurance policies for Femia. In March 2004, he learned that Femia was submitting a claim for a burst pipe and water damage. He did not know if Brooks submitted a notice of the claim, then stated Brooks did not. He later learned there was an investigation to see if the bed and breakfast was occupied at the time of loss. He was then approached by Femia for a copy of the application which Blitzer then obtained from Fritzen. He gave the application to Femia and pointed out that the application indicated the premises was occupied, but they had no discussion about it. He further testified that Femia checked the box on the application indicating the B and B was occupied. He did not know of any telephone conversations between Femia and Blitzer. There came a time that someone from Utica came to his office. He did not speak with anyone from Utica but believed Blitzer gave a statement, but he could not remember what the statement was about. He learned about that after the fact. Trapani testified that his office never before referred business to Fritzen at Dayton & Osborne, and that Fritzen was incorrect if he stated that.

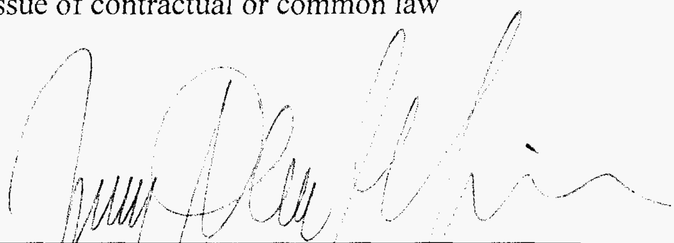
There are factual issues raised in this testimony as there is conflicting testimony concerning who filled out the portions of the application relating to whether or not the premises was occupied, and whether there were conversations among the parties concerning occupancy.

Accordingly, motion (005) is denied.

In motion (006), defendant Graphic Arts Mutual Insurance Co. seeks summary judgment on its cross-claim for contractual and common law indemnification over and against Dayton & Osborne. Aside from the application not being supported by an affidavit by a person with knowledge or copies of the pleadings, or an agreement in admissible form pursuant to CPLR 3212, there has been no admissible evidence submitted demonstrating the relationship between Graphic Arts and Utica. Liability among the parties has not been determined. Therefore, no determination can be made on the issue of contractual or common law indemnification against co-defendant Dayton & Osborne.

Accordingly, motion (006) is denied.

Dated: DEC 30 2010



J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION