

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SANOMA, INC. T/A TARNOPOL	:	CIVIL ACTION
FURS,	:	
Plaintiff	:	
	:	
v.	:	
	:	
INTERESTED UNDERWRITERS	:	
CONCERNED VIA EWING	:	
INTERNATIONAL MARINE CORP.,	:	
AGF M.A.T., M&G BROKERAGE	:	
INC., SBJ LIMITED, SVENSAKA	:	
INDUSTRIFORSKRINGER AB, and	:	
VAN BREDA & CO. MARINE,	:	
Defendants	:	NO. 00-3880

Newcomer, S.J.

July , 2001

M E M O R A N D U M

Presently before the Court are the following five motions for summary judgment, filed by five of the six parties in this action, and a barrage of briefs in responses thereto: (1) Plaintiff Sanoma, Inc. T/A Tarnopol Furs' ("Sanoma") Motion for Summary Judgment; (2) Defendant M&G Brokerage Inc.'s ("M&G") Motion for Summary Judgment; (3) Defendant SBJ Limited's ("SBJ") Motion for Summary Judgment; (4) Defendant Van Breda & Co. Marine's ("Van Breda") Motion for Summary Judgment; and (5) the Cross-Motion for Summary Judgment or, Alternatively, Voluntary Dismissal by Order of Court of Defendants Interested Underwriters and AGF M.A.T. ("Underwriters"). Despite having filed a Motion to Dismiss for lack of personal jurisdiction, which was denied, the sixth defendant, Svenska Industriforsakringer ("Svenska"), has failed to appear, plead, or otherwise defend itself in this

action. The Court, therefore, entered default against Svenska on March 12, 2001.

For the reasons set forth below, plaintiff's Motion for Summary Judgment, Defendant M&G's Motion for Summary Judgment, and Defendant SBJ's Motion for Summary Judgment will be denied. Defendant Van Breda's Motion for Summary Judgment and Defendant Underwriters' Motion for Summary Judgment will be granted, and Defendants Van Breda and Underwriters will be dismissed from this action.

I. BACKGROUND

Collectively, the parties in this action span across the globe. Plaintiff Sanoma is a Pennsylvania corporation in the business of selling and storing furs. The defendants in this action are insurance carriers Interested Underwriters Concerned via Ewing International Marine Corp. and AGF M.A.T. (from Belgium) (collectively referred to as "Carrier Defendants"), and insurance brokers M&G Brokerage Inc. (from New York), SBJ Limited (from United Kingdom), Svenska Industriforsakringer AB (from Sweden), and Van Breda & Co. Marine (from Belgium) (collectively referred to as "Broker Defendants").

Having a need to insure its furs, Sanoma contacted Defendant M&G, an insurance broker located in New York, in August 1999. As part of the application process, Sanoma was required to provide M&G with all relevant information, including a

description of its storage enclosure, the location and nature of its business, and its prior loss history. Regarding the last requirement, Sanoma attached a one page sheet detailing events which caused a loss in May 1999.

After receiving Sanoma's application materials, in an effort to procure insurance for the plaintiff, M&G faxed Plaintiff Sanoma's information to Defendant SBJ, an insurance broker located in the United Kingdom. M&G, in turn, faxed the information to Defendant Svenska, an insurance broker located in Sweden. Svenska then supposedly faxed Sanoma's information to Van Breda, an insurance broker located in Belgium, who ultimately procured insurance on plaintiff's behalf with AGF M.A.T., an insurance company located in Antwerp, Belgium. On or about August 18, 1999, the Carrier Defendants issued to Sanoma an insurance policy for coverage up to \$400,000.00 for furs stored at Sanoma's property in Bala Cynwyd, Pennsylvania.

Not long after the issuance of the policy, on or about September 16, 1999, a chemical leaked from the dentist's office located directly above Plaintiff Sanoma's property. Sanoma notified M&G of the loss; and shortly thereafter, the insurance carriers retained an adjuster to investigate the loss. Upon completion of this investigation, the Carrier Defendants denied coverage for the loss and voided the insurance policy, alleging inter alia that Sanoma made false representations concerning its

claims history.

Glaringly, it was recognized that the Carrier Defendants had not been informed of the May 1999 loss that Sanoma had initially reported, as required, to M&G. Plaintiff then filed the instant action claiming breach of contract and bad faith against the Carrier Defendants, and negligence against the Broker Defendants. With respect to the Broker Defendants, plaintiff alleges that it provided M&G with all of its prior loss history, and to the extent the Carrier Defendants never received plaintiff's prior loss history information, it was due to the Broker Defendants' negligence and their failure to provide said information to the Carrier Defendants.

On or about December 15, 2000, Defendants SBJ and Svenska responded to plaintiff's Amended Complaint by filing Motions to Dismiss for Lack of In Personam Jurisdiction. An Order was entered by this Court on January 12, 2001, denying defendants' Motions. While SBJ subsequently answered Sanoma's Amended Complaint, Svenska did not. Svenska was then held to be in default on March 12, 2001. Now, after the completion of discovery, Plaintiff Sanoma and Defendants M&G, SBJ, and Van Breda allege that Svenska was the party that failed to pass on plaintiff's complete application because it failed to fax to Van Breda the one page detailing Sanoma's prior loss history.

Plaintiff has now moved this Court for summary

judgment, asserting that the failure of Svenska should be imputed to SBJ and M&G as a matter of law because Svenska was the subagent of these entities. Defendants M&G and SBJ have filed Motions for Summary Judgment arguing that there is no evidence to support Sanoma's allegations set forth in the Amended Complaint that M&G and SBJ were negligent in its procurement of insurance. In response to plaintiff's Motion, Defendant SBJ has also filed a Cross-Motion for Summary Judgment on the issue of agency, claiming that plaintiff's Amended Complaint fails to allege that an agency relationship existed between the parties or that liability should be imputed to M&G and SBJ because of the acts of others.

Defendant Van Breda has also filed a Motion for Summary Judgment, asserting that the undisputed factual evidence establishes that it was not negligent because the pertinent claims history information was never transmitted to Van Breda and Van Breda transmitted all the information it received on Sanoma to AGF M.A.T. Van Breda seeks to dismiss all claims of plaintiff brought against it, as well as all cross-claims brought against it. Plaintiff's counsel has represented to the Court in its letter of June 15, 2001 that "plaintiff does not oppose dismissal against [Defendant Van Breda]." Defendants Interested Underwriters and AGF M.A.T. have filed a Cross-Motion for Summary Judgment or, Alternatively, Voluntary Dismissal by Order of Court

arguing that no basis exists for their liability to plaintiff, and absent liability to plaintiff, there exist no legal or factual grounds for their liability to any co-defendant under indemnification or contribution theories.

II. SUMMARY JUDGMENT STANDARD

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Common, 826 F.Supp. 1506 (E.D. Pa. 1993). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

III. DISCUSSION

A. SANOMA/M&G/SBJ AND THEIR MOTIONS FOR SUMMARY JUDGMENT

As noted above, Plaintiff Sanoma's Motion argues that Svenska's negligence should be imputed to M&G and SBJ as a matter of law because Svenska was the subagent of these entities.

Meanwhile, Defendants M&G and SBJ argue in their respective Motions that there is no evidence to support Sanoma's cause of action for negligence as set forth in the Amended Complaint against M&G and SBJ. As plaintiff points out in its Responses to M&G's and SBJ's Motions, plaintiff's contention is not that the brokers failed to provide another broker with plaintiff's complete insurance application; rather, plaintiff contends that it did not receive proper insurance because of the negligence of a brokering agency retained by the brokers M&G and SBJ.

1. AGENCY AND SUBAGENCY

The Second Restatement of Agency, Section 1¹ defines the terms "Agency; Principal; Agent" as follows:

- (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
- (2) The one for whom action is to be taken is the principal.
- (3) The one who is to act is the agent.

¹As SBJ notes in its Reply to Defendant M&G's Answer to SBJ's Motion for Summary Judgment, M&G contends that New York law should apply, when in fact Pennsylvania law should apply. Under Pennsylvania's choice of law provisions, if a conflict of laws exists, the court must determine which state has the greater interest in the application of its law. LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). In this case, the Court determines that Pennsylvania, and not New York, has the greater interest in this case since plaintiff, its business, the damaged furs, and all the substantive events are located or occurred in Pennsylvania.

The Comment on Subsection (1) in the Restatement further states that "[t]he relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control." Restatement (Second) of Agency § 1 cmt. a (1957). However, agency "does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the [agency] relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow." Restatement (Second) of Agency § 1 cmt. b (1957).

A subagent, as defined in Section 5 of the Second Restatement of Agency, is "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." Restatement (Second) of Agency § 5 (1957). The subagent is "a person for whose conduct the appointing agent is responsible to the principal . .

. and in some cases is responsible to the person with whom the subagent deals." Restatement (Second) of Agency § 5 cmt. b (1957). While a subagent may be an employee of the agent, he may be a person not in the general employment of the agent, but appointed for a specific undertaking. Restatement (Second) of Agency § 5 cmt. c (1957).

Section 401 of the Second Restatement states that an agent "is subject to liability for loss caused to the principal by any breach of duty." In delineating an agent's liability for the conduct of other agents, Section 405 states:

(1) . . . an agent is not subject to liability to the principal for the conduct of other agents who are not his subagents.

(2) An agent is subject to liability to the principal if, having a duty to appoint or to supervise other agents, he has violated his duty through lack of care or otherwise in the appointment or supervision, and harm thereby results to the principal in a foreseeable manner. He is also subject to liability if he directs, permits, or otherwise takes part in the improper conduct of other agents.

(3) An agent is subject to liability to a principal for the failure of another agent to perform a service which he and such other have jointly contracted to perform for the principal.

Restatement (Second) of Agency § 405 (1957). However, Section 406 makes clear that "[u]nless otherwise agreed, an agent is responsible to the principle for the conduct of . . .

a subagent with reference to the principal's affairs entrusted to the subagent, as the agent is for his own conduct; and as to

other matters, as a principal is for the conduct of . . . [another] agent." Restatement (Second) of Agency § 405 (1957). With respect to subagents and their duties, Section 428 of the Second Restatement on Agency provides:

(1) Unless otherwise agreed, a subagent who knows of the existence of the ultimate principal owes him the duties owed by an agent to a principal, except the duties dependent upon the existence of a contract.

(2) Unless otherwise agreed, a subagent owes the agent the duties of an agent to his principal.

Moreover, "one who agrees with the agent to act for the principal in a transaction becomes a subagent, and owes to the principal all the duties of a fiduciary to a beneficiary. . . . Further if he undertakes to act in the principal's affairs . . . and because of reliance upon his performance by the principal or the agent, the principal suffers a loss because of his failure to perform, he is subject to liability to the principal as well as to the agent." Restatement (Second) of Agency § 428 cmt. a (1957).

a. WELL-PLEADED COMPLAINT

In response to plaintiff's contentions against them, Defendants M&G and SBJ claim that plaintiff's Amended Complaint fails to allege that an agency relationship existed between the parties or that liability should be imputed to M&G and SBJ because of the acts of others. As a preliminary matter, therefore, the Court will address the adequacy of plaintiff's allegations in its Amended Complaint of an agency relationship

between the insurance brokers.

The liberal system of "notice pleading" set up by the Federal Rules of Civil Procedure, requires a "short and plain statement of the claim showing that the pleader is entitled to relief." James v. Valley Township, 1998 WL 51292, at *1 (E.D. Pa. 1998)(explaining that a complaint need only contain facts which may be used to support plaintiff's claim); Fed.R.Civ.P. (8)(a)(2). Here, consistent with Rule 8(a), plaintiff's Amended Complaint, when read liberally, does put all defendants on notice of an agency theory of liability. Paragraphs 25 and 26 of the Complaint details the correspondences between M&G, SBJ, Svenska, Van Breda, and Underwriters. In Paragraph 25, plaintiff states that, "Defendant M&G, Inc. claims that it faxed [plaintiff's prior loss history] to defendant SBJ Limited." In Paragraph 26, plaintiff states that, "SBJ Limited claims that it faxed [plaintiff's prior loss history] to defendant Svenska Industriforsakringer AB or defendant Van Breda & Co. Marine."

Therefore, the Court determines that by averring that the various Broker Defendants engaged in correspondences amongst themselves in an effort to procure plaintiff's insurance, plaintiff sufficiently alleges a relationship between each of the defendants to put each defendant on notice of an agency theory of liability.

b. GENUINE ISSUE OF MATERIAL FACT

While the Amended Complaint may have put the defendants on notice of plaintiff's allegations of an agency theory of liability, it is clear to this Court that there are still genuine issues of material fact as to the existence and nature of those agency relationships.

Plaintiff has produced evidence that M&G employed the use of SBJ as an agent to aid in M&G's procurement of insurance on plaintiff's behalf, and that SBJ used Svenska as an agent for furthering the same goals. Plaintiff has produced, inter alia: (1) the Certification of Sheldon Tarnopol, owner of Plaintiff Sanoma, stating that he "believed that M&G dealt directly with the insurance carriers[,] that he "was advised that there was no coverage because one of entities retained by M&G did not provide information concerning the May 1999 loss . . . ," and that he has "never spoken with a representative of SBJ Limited, Svenska Industriforsakringer AB, or Van Breda & Co. Marine;" and (2) correspondences between the insurance brokers whereby SBJ refers to Svenka as SBJ's "agent," and Svenska refers to SBJ as its "principal."

M&G and SBJ have alleged, and produced certifications that claim, there was no agency relationship between the insurance brokers. M&G further argues, and has produced some evidence, that plaintiff was aware of M&G's use of SBJ's services. M&G argues that with such knowledge, plaintiff

acknowledged M&G's relationship with SBJ to the point of absolving M&G of liability as a principal for the negligence of its agents, if in fact SBJ is found to have been an M&G agent.

The Court concludes that Sanoma, M&G, and SBJ have demonstrated conflicting evidence that precludes the Court from making a determination as a matter of law on the issue of agency. Said issue of agency, including any determination that another broker's negligence be imputed to M&G and SBJ, shall be reserved for the fact finder. Accordingly, the Motions for Summary Judgment filed by Sanoma, M&G, and SBJ will be denied.

B. MOTIONS FOR SUMMARY JUDGMENT UNOPPOSED BY PLAINTIFF

1. VAN BREDA

Defendant Van Breda asserts in its Motion for Summary Judgment that the undisputed factual evidence establishes that it was not negligent because the pertinent claims history information was never transmitted to Van Breda and Van Breda transmitted to AGF M.A.T. all the information it received concerning Sanoma. Furthermore, Van Breda argues that because it cannot be found negligent, it cannot be held liable on any cross-claims brought against it by the other defendants.

Van Breda's Motion for Summary Judgment is unopposed by plaintiff, although it is opposed by M&G.² Upon consideration of

²Van Breda alleges that M&G's opposition to its Motion for Summary Judgment clearly violates Rule 11, and that Van Breda

the Motion, M&G's Response, and the exhibits produced therein, the Court concludes there is insufficient evidence for a reasonable fact finder to find Van Breda liable in this action. Accordingly, Van Breda's Motion will be granted, and all claims brought against it by plaintiff, and all cross-claims brought against it by other defendants will be dismissed.

2. UNDERWRITERS

Defendant Underwriters have cross-moved in an effort to dismiss all claims against it, arguing plaintiff has expressly admitted that there exists no basis for Underwriters' liability to plaintiff. Moreover, Underwriters argue that absent Underwriters' liability to plaintiff, there exists no legal or factual grounds for Underwriters' liability to any co-defendant under indemnification or contribution theories.

Similar to Van Breda's Motion, Defendant Underwriters' Motion for Summary Judgment is unopposed by plaintiff. In fact, on May 29, 2001, counsel for plaintiff and Underwriters signed a Stipulation of Dismissal With Prejudice, which was returned unsigned by the Court on May 30, 2001 because it was not signed by all parties who have appeared in the action. Defendants M&G and SBJ oppose the Underwriters' Motion. SBJ raises an argument in its Cross-Motion that Underwriters should be held as the principals of the insurance brokers.

may seek sanctions from M&G at a later date if appropriate.

Upon consideration of Underwriters' Motion and all relevant briefing in response thereto, the Court determines that there is no evidence demonstrating any liability in this action attributable to Underwriters. There is also no evidence to suggest that any of the insurance brokers were agents or independent contractors of Underwriters in the procurement of plaintiff's insurance which could impute any negligence of the brokers to Underwriters. Accordingly, Underwriters' Motion for Summary Judgment will be granted and Underwriters will be dismissed from this action.

An appropriate Order follows.

Clarence C. Newcomer, S.J.

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SANOMA, INC. T/A TARNOPOL	:	CIVIL ACTION
FURS,	:	
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v.	:	
	:	
INTERESTED UNDERWRITERS	:	
CONCERNED VIA EWING	:	
INTERNATIONAL MARINE CORP.,	:	
AGF M.A.T., M&G BROKERAGE	:	
INC., SBJ LIMITED, SVENSAKA	:	
INDUSTRIFORSAKRINGER AB, and	:	
VAN BREDA & CO. MARINE,	:	
Defendants	:	NO. 00-3880

O R D E R

AND NOW, this day of July, 2001, it is hereby

ORDERED as follows:

- (1) Plaintiff's Motion for Summary Judgment (Paper #42) is DENIED.
- (2) Defendant M&G's Motion for Summary Judgment (Paper #43) is DENIED.
- (3) Defendant SBJ's Motion for Summary Judgment (Paper #41) is DENIED.
- (4) Defendant Van Breda's Motion for Summary Judgment (Paper #69) is GRANTED.
- (5) The Cross-Motion for Summary Judgment or, Alternatively, Voluntary Dismissal by Order of Court of Defendants Interested Underwriters and AGF M.A.T. (Paper #57) is GRANTED.

(6) Defendant M&G's Motion for Sanctions (Paper #62) is DENIED as moot, Defendant M&G's counsel having represented to the Court in its letter of June 29, 2001 that it is withdrawing the Motion.

AND IT IS SO ORDERED

Clarence C. Newcomer, S.J.