When a So-Called Good Deal Goes Bad

By Eugene McDonald, J.D.

During a casual conversation with my client (a marina operator), he informed me his tenant was being sued and that he too would probably be brought into the case as an additional defendant, but not to worry as the tenant was insured and "would take care of everything." My client didn't quite understand why he was being brought into a law suit of which he knew nothing about as his tenant was quite vague in explaining the details. All I could do was to advise my client that if and when he was served with the complaint to immediately forward it to his underwriters.

Prior to being introduced to my client, his underwriters had assigned me as defense counsel on his and the marina's behalf in a prior matter. I was successful in getting that matter dismissed and he apparently was "smitten by my talent." And so began our relationship.

But before our association began, my client had entered into an agreement with a boat broker to lease a portion of the marina's offices and property from which the broker would run his operation. The deal seemed to be a good fit. The broker needed a new base of operation as he was losing his old one. The agreement would provide additional work to the marina's service department, the marina had some excess office space and yard space to store brokerage boats, and my client didn't want to act as a broker anyway for various reasons. My client thought he hit a home run! He could make a tidy sum without lifting a finger, or so he thought. Their agreement was contained in four short paragraphs on one side of a piece of paper and never vetted by an attorney. My client believed he was protected since the agreement required the tenant would have insurance. But how could my client become embroiled in a law suit? The answer, as always, is in the details. Their agreement did not state what type of insurance the tenant/broker was to have or the circumstances upon which, if any, the tenant's underwriters would protect, defend, and indemnify the marina if it was subsequently sued by a third party.

The tenant, acting as a broker, arranged to have a boat under a brokerage agreement for sale to be delivered to the marina's property. The boat, a center console model approximately 12 years old and under 30' with twin inboard engines, had been on the marina's premises for almost two years without being protected from the elements. A prospective buyer retained the services of a surveyor who subsequently opined that the boat had serious structural damage, rendering it a total loss. He concluded that the damage must have been caused by the vessel being "dropped."

Needless to say, the sale fell through. When the seller was informed by the broker, he went to the vessel's underwriters armed with the survey report demanding that his vessel be considered a total loss and that he be paid the face amount of the policy.

Underwriters did exactly that. They subsequently filed a subrogation suit against the tenant acting as broker and my client to recover what they had paid out to the seller. My client maintained he did nothing wrong. He did not even know the seller or the facts surrounding the claim. He was aware that the vessel was on his property in the brokerage area. My client was subsequently absolved of any wrongdoing, but that's not the point of this story. The point is how such litigation could have been avoided in the first place.

During the defense of the case, the tenant was not cooperative with my client. In fact, by the time the case

had been dismissed as against the marina, the parties were not on speaking terms.

I removed the case from State Court to the Federal Court based upon maritime jurisdiction. I engaged the services of a competent naval architect/marine engineer, and then went about some investigation.

When the seller engaged the tenant to broker his boat, the tenant made arrangements through a boat hauler to have the vessel transported some 200 miles from the seller's home to my client's marina. When the boat hauler arrived at the marina it was after hours and consequently no yard personnel were available, nor was the tenant/broker or any of his personnel. That was the second mistake; the first was the agreement. The boat hauler off-loaded the vessel, but he placed it in the wrong area. So here comes the third mistake; the marina used its TraveLift to move the vessel to the brokerage area. The marina personnel were the last to touch it, so they must have damaged it. The tenant/broker, being the stand-up guy that he was, gave a statement that he knew nothing about it, i.e. the vessel being delivered and subsequently moved, as he was not present.

I found it odd, in fact very strange, that the seller did not engage the brokerage services at the marina where he rented a slip during the summer season and which was near his home. We could prove that the vessel had been run hard, very hard, to the point where she had been abused. We could also prove that she had been run aground on several occasions and that the seller had been paid by other underwriters for previous damage. The reason the seller engaged my client's tenant was because he knew the true condition of his boat. When he "suddenly learned" that his vessel had been damaged, he played possum – acting surprised and shocked – and he was rewarded for his fraudulent behavior with payment of his claim.

After my client was sued, why didn't the tenant's underwriters protect, defend, indemnify, and otherwise "take care of everything" as promised by the tenant? Because the tenant, while he had insurance, didn't have the proper coverage and even his underwriters declined to defend him because he was not insured for the activities he engaged in, i.e., contracting with a boat hauler and his failure to be present for the delivery of the boat. In short, his conduct voided the policy. It was apparent he never read the policy, and it was proven that he had been offered additional coverage but didn't want to pay for it and he didn't care. He wanted the cheapest policy he could get. It's like going to McDonald's. You want the Big Mac, the fries, and the large coke, that's one price. If you want to supersize it, you have to pay for it. So the tenant found himself having to pay a substantial settlement and the legal costs from his own resources.

Needless to say, when the option to renew the brokerage lease came due, my client refused to renew and requested the broker vacate the premises.

This episode was a good education for my client. The lesson to be learned is that there is no substitute for sound legal advice. Had my client sought the advice of an attorney prior to his "deal" with the tenant, he could have avoided the whole mess and not jeopardized his experience rating with another lawsuit, which would be reflected in increased insurance premiums by his underwriters. Now my client knows to call me before he signs his name to anything, which is as it should be. The world has changed and all is not as simple as it used to be. When I want my boat repaired, I take it to reputable marine facility. Business owners need to recognize that they are not lawyers, and they need to consult with one before entering into legally-binding agreements. MBJ

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