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SCANNED ON 5/24/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: L. B. York Justice

PART 2

Vissas

-v-

Simon Agency

INDEX NO. 112704/11

MOTION DATE 4/25/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/21/12

Luy, J.S.C.

LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JAMES VISSAS, 14-33/35 ASTORIA BLVD, LLC, AND PARMA TILE MOSAIC & MARBLE CO. INC.,

Index No.: 112704/2011

Plaintiffs,

-against-

DECISION/ORDER

SIMON AGENCY N.Y. INC., HERMITAGE INSURANCE COMPANY, SOUTHWEST MARINE AND GENERAL INSURANCE COMPANY and ST. PAUL FIRE AND MARINE INSURANCE COMPANY a/k/a TRAVELERS,

Defendants.

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LOUIS B. YORK, J.S.C.:

In this action, which arises out of the various defendant insurance companies' and insurance broker's allegedly wrongful decisions to decline insurance coverage to plaintiff, co-defendant Simon Agency N.Y., Inc. ("Simon" or "movant") moves to dismiss under CPLR § 3211(a)(7). Plaintiff opposes the motion. For the reasons below, the Court grants the motion.

According to the Complaint, which this Court accepts in its entirety for the purposes of the motion, plaintiff James Vissas ("Vissas") owns plaintiffs 14-33/35 Astoria Blvd, LLC ("Astoria LLC") and Parma Tile Mosaic & Marble Co. Inc. ("Parma Tile"). Around December 7, 2008, construction work was being performed at Astoria LLC, under the direction of general contractor George's Home Improvement Corporation ("George's"). On this date, Astoria held an insurance policy with U.S.

Underwriters Insurance Company, LLC ("Underwriters"). In addition, Astoria LLC and Parma Tile entered into an oral agreement for the project a few months prior to the start date, and as part of that oral agreement George's allegedly was to insure the project, listing Astoria LLC and Parma Tile as additional insured parties. According to the Complaint, George's obtained an insurance policy through movant Simon. The policy, with defendant Hermitage Insurance Company ("Hermitage"), was effective on the date in question. The complaint also notes that Hermitage was acquired by Tower Group Companies ("Tower").

George's began work on an exterior wall of the building in October 2008, and subcontracted some of the work to Papas Iron Works, Incorporated ("Papas"). Astoria LLC and Parma Tile also entered into a contract with Papas regarding the work in question. The complaint states that Papas also was obliged to obtain insurance and list Astoria LLC and Parma Tile as additional insureds. Papas allegedly obtained a policy through defendant Southwest Marine and General Insurance Company ("Southwest").

On December 7, an exterior wall of the building allegedly collapsed onto a neighboring building. As a result of the collapse, numerous lawsuits were filed, and Astoria LLC and Parma Tile were named as defendants in 10 of them. Underwriters, Astoria's carrier, sought indemnification and coverage from Hermitage and Tower on Astoria's behalf. Hermitage and Tower refused on the ground that Astoria LLC was not an additional insured on the pertinent policy. In addition, Underwriters sought indemnification and coverage from Southwest, which also rejected the request. However, Southwest's determination is not relevant to the current motion.

As is relevant here, the complaint contains four causes of action against Simon.

First, the complaint alleges that Simon materially breached its agreement when it failed to obtain coverage for Astoria, LLC as an additional insured and that Simon is liable to Astoria, LLC as it is a third-party beneficiary of the contract. Second, the complaint alleges that Simon tortiously interfered with the insurance procurement by failing to include Astoria LLC and Parma Tile as additional insureds yet issuing George's a certificate. Third, the complaint alleges that Simon was negligent in its failure to procure a policy which named Astoria LLC and Parma Tile as additional insureds, and thus breached a duty to these two plaintiffs. Fourth, the complaint explains that the certificate to which it referred in the second cause of action certified that Astoria LLC and Parma Tile were additional insureds on the policy. Accordingly, this cause of action alleges, Simon is guilty of fraud.

In the current motion to dismiss, Simon first alleges the causes of action have no merit because Surrey Agency, not Simon, was the insurance broker for George. Simon alleges it was a general insurance which was contacted by either Surrey or Hermitage to procure insurance. Simon alleges it worked with Surrey directly, and thus had no privity with George or with any of the plaintiffs. This argument must fail on a CPLR § 3211 motion, however, as it raises factual issues as to the relationship between Surrey and Simon.

Simon also seeks an order dismissing any cross-claims which have been or might be asserted. As Simon had not received the answers at the time of this motion, it notes that it did not know whether any cross-claims have been or will be asserted. The Court does not issue advisory orders, see, Ostrover v. City of New York, 192 A.D.2d 115, 118-19, 600 N.Y.S.2d 243, 245 (1st Dept. 1993), or, with rare exceptions, issue

orders which bar a party from asserting any claims it deems appropriate. Therefore, the Court denies this part of the motion without further consideration of its substance. If and when cross-claims are asserted, Simon can bring a motion to dismiss them.

As for the remainder of the motion, the Court concludes that, as Simon argues, the first two causes of action must fail. An insurance broker's duty "runs to its customer and not to any additional insureds . . . ." Arredondo v. City of New York, 6 A.D.3d 328, 329, 775 N.y.S.2d 150, 151 (1st Dept. 2004). The broker, "having had no contractual relationship with [plaintiffs], and not having otherwise been in privity with [them,] was under no duty . . . that might serve as a predicate for [their] claims." Glynn v. United House of Prayer, 292 A.D.2d 319, 322, 741 N.Y.S.2d 499, 503 (1st Dept. 2002); see Federal Ins. Co. v. Spectrum Ins. Brokerage Serv., Inc., 304 A.D.2d 316, 317, 758 N.Y.S.2d 21, 22 (1st Dept. 2003).

In addition, Simon moves to dismiss claims based on its alleged fraud with respect to the certificate of insurance. The certificate of insurance is annexed to the complaint. Thus Simon may rely on it in this CPLR § 3211 motion. See Jacobs v. Haber, 133 A.D.2d 739, 740, 520 N.Y.S.2d 28, 29 (2nd Dept. 1987); see also Mondetfiore v. Soja, 292 A.D.2d 241, 242, 738 N.Y.S.2d 839, 839 (1st Dept. 2002)(dismissal under 3211 proper where documentary evidence annexed as exhibits to complaint "flatly contradicted" complaint's material allegations).

Simon is correct that such certificates generally confer no rights upon the holder and/or named parties, and do not impact the provisions of the policy itself (the Court refers to this recitation as "the disclaimer"). See Hargob Realty Associates, Inc. v. Fireman's Fund Ins. Co., 73 A.D.3d 856, 857-858, 901 N.Y.S.2d 657, 659 - 660 (2nd

Dept. 2010). "A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure . . . [or] . . . concluside proof . . . that such a contract exists." Tribeca Broadway Assoc., LLC v. Mount Vernon Fire Ins. Co, 5 A.D.3d 198, 200, 774 N.Y.S.2d 11, 13 (1st Dept. 2004). This conclusion stems from language in the certificates, in particular the "disclaimers that [the certificates] are for information only, they may not be used as predicates for a claim of negligent misrepresentation." The Benjamin Shapiro Realty Co. v. Kemper National Ins. Co., 303 A.D.2d 245, 246, 756 N.Y.S.2d 45, 46 (1st Dept.)("Benjamin Shapiro Realty"), lv dismissed in part, denied in part, 100 N.Y.2d 573, 764 N.Y.S.2d 382 (2003). Thus, "[r]egardless of whether the broker acted recklessly, the causes of action for fraud and negligent misrepresentation, based on the inaccurate certificates, were properly dismissed because it was unreasonable to rely on them for coverage in the face of their disclaimer language . . . ." Greater New York Mut. Ins. Co. v. White Knight Restoration, Ltd., 7 A.D.3d 292, 293, 776 N.Y.S.2d 257, 258 (1st Dept. 2004)("White Knight Restoration").

The certificate here, which is annexed as an exhibit to the complaint, contains the following language: "This certificate is issued as a matter of information only and confers no rights upon the certificate holders. This certificate does not amend, extend or alter the coverage afforded by the policies below." In the cases above and in numerous others, courts have rejected claims based on similar or identical language. Accordingly, based on the prevailing case law, plaintiffs cannot assert fraud or negligence against Simon. See Benjamin Shapiro Realty, 303 A.D.2d at 245-46, 756 N.Y.S.2d at 46.

It appears plaintiffs attempt to argue that fraud or negligent misrepresentation

claims may still exist despite the lack of privity. In Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, 18 A.D.3d 590, 592, 795 N.Y.S.2d 619, 621 (2nd Dept. 2005)("Binyan"), the Second Department found that summary judgment was premature against the insurance broker where the certificate of insurance, issued six months after the insurance policy allegedly became effective, incorrectly claimed that the policy had been paid for and issued. Id. If the plaintiffs could allege fraud, collusion or other applicable circumstances, the Second Department claimed, there could be a triable issue of fact. Id. However, not only is this a CPLR § 3211 rather than CPLR ¶ 3212 motion, but – far more significantly – the First Department has made it clear that neither a fraud nor a negligent misrepresentation claim may lie in such circumstances. See, e.g., White Knight Restoration, 7 A.D.3d at 293, 776 N.Y.S.2d at 258. The Court also does not see the basis for a tortious interference with contract claim, and plaintiffs have not pled an articulate or persuasive argument supporting this cause of action.

The Court has considered plaintiffs' additional arguments and finds them similarly unpersuasive. The Court is not without sympathy for plaintiffs – who, if the allegations in the Complaint are true, are uninsured due to the negligent failure of one contractor or broker or insurer to obtain coverage for them as additional insured, and also due to the negligent failure of the subcontractor or broker or insurer to secure and maintain a valid insurance contract at all. Nonetheless, this does not alter the fact that, as to Simon, the law is not on plaintiffs' side – and plaintiffs have failed to provide a convincing argument to the contrary. Accordingly, it is

ORDERED that the motion to dismiss is granted, and all claims asserted against Simon in the complaint are severed and dismissed; and it is further

ORDERED that the portion of the motion seeking to preempt all possible cross claims is denied; and it is further

ORDERED that the remainder of the action shall continue.

As for plaintiffs' other arguments in opposition, they are not persuasive. Their arguments with respect to a defendant's potential liability to third parties do not involve insurance law, particularly not the type of scenario at hand. Moreover, the cases to which plaintiffs cite for this point are all over 100 years old. Certainly they fail to carry any weight here, in light of the more recent, applicable, and abundant case law. Their arguments as to the duties of insurance agents relies on cases which either involve the duties of agents to their clients or do not pertain to insurance law.

ENTER:

Dated: 5/21/12

FILED

MAY 23 2012

Louis B. York, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK
J.S.C.