[* 1]

SHORT FORM ORDER

INDEX No. 08-25728

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 12-22-10 (#002)
MOTION DATE 5-4-11 (#003)
ADJ. DATE 11-23-11
Mot. Seq. # 002 - MG
003 - XMG; CASEDISP

---X

SABRINA LAROY,

Plaintiff,

- against -

SECURITY MUTUAL INSURANCE COMPANY and XL BROKERAGE, INC.,

Defendants.

---X

PETER M. ZIRBES, ESQ. & ASSOCIATES
Attorney for Plaintiff
108-18 Queens Blvd., Suite 604
Forest Hills, New York 11375

KNYCH & WHRITENOUR, LLC
Attorney for Defendant Security Mutual
One Park Place
300 South State Street, Suite 404
Syracuse, New York 13202

KEIDEL, WELDON & CUNNINGHAM, LLP
Attorney for Defendant XL Brokerage
925 Westchester Avenue, Suite 400
White Plains, New York 10604

Upon the following papers numbered 1 to 41 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 30 ; Answering Affidavits and supporting papers 31 - 32; 33 - 34; 35 - 36 ; Replying Affidavits and supporting papers 37 - 38; 39 - 41 ; Other defendant's memorandum of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Security Mutual Insurance Company for summary judgment in its favor dismissing the plaintiff Sabrina Laroy's complaint against it is granted; and it is

ORDERED that the cross-motion by the defendant XL Brokerage, Inc. for summary judgment in its favor dismissing Sabrina Laroy's complaint against it is granted.

The plaintiff commenced this action to recover damages related to the alleged breach of a homeowner's insurance agreement she entered with the defendant Security Mutual Insurance Company (hereinafter Security Mutual). The plaintiff's home allegedly was burglarized in January 2008, resulting in the alleged theft of personal property valued at $60,000.00, including jewelry and audio equipment. In her complaint, the plaintiff alleges that

Security Mutual was obligated to provide her insurance coverage for loss of personal property up to the sum of $241,500.00; that she filed a timely claim in relation to her loss; and that Security Mutual only paid her $2,053.00 and wrongfully refuses to pay the balance of $58,000.00 on her claim. The complaint also names as a defendant to the action XL Brokerage, Inc. (hereinafter XL Brokerage), the insurance broker who allegedly sold the plaintiff the subject homeowner's insurance policy. In addition to the breach of contract claim against Security Mutual, the complaint asserts causes of action against the defendants for breach of fiduciary duty, fraud, and deceptive business practices. Security Mutual's answer to the complaint contains general denials, as well as a cross claim against XL Brokerage for common law indemnification. XL Brokerage's answer also contains general denials, but does not assert any cross claims against Security Mutual.

Security Mutual now moves for summary judgment dismissing the plaintiff's complaint because it was only contractually required to provide the plaintiff $1,000.00 worth of liability coverage for stolen jewelry, and that any confusion or misrepresentation concerning the limits of its coverage was caused solely by the negligence of the plaintiff's insurance broker, XL Brokerage. Alternately, Security Mutual requests that it be granted conditional summary judgment on its cross claim for common law indemnification against XL Brokerage. XL Brokerage cross-moves for summary judgment dismissing the complaint, arguing that the plaintiff specifically acknowledged the limitation of coverage for stolen jewelry when she entered into the subject homeowner's insurance agreement. XL Brokerage also asserts that the complaint fails to state valid causes of action against it for breach of fiduciary duty, fraud, and deceptive business practices. In addition, XL Brokerage opposes Security Mutual's request that it be granted conditional summary judgment on its cross claim for common law indemnification, arguing triable issues exist as to whether its conduct in procuring insurance for the plaintiff was negligent. The plaintiff opposes both motions, asserting that a triable issue exists as to whether XL Brokerage was acting as Security Mutual's agent at the time the plaintiff entered into the homeowner's insurance agreement, in which event both entities would be liable for misrepresentations that led her to reasonably believe that she was adequately insured. The plaintiff also contends, inter alia, that the subject homeowner's agreement contains significant ambiguities relating to the amount of coverage it provided for her stolen jewelry.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for her failure to do so (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843

[2d Dept 1989]). The opponent must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her pleading are real and capable of being established at a trial (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party (see CPLR §3212 [b]).

The cover page of the plaintiff's homeowner's insurance policy states, in pertinent part, that "[c]overage is provided where a premium or limit of liability is shown for the coverage. Our Limit of liability for each coverage shall be not more than the amount stated for such coverage, subject to all terms of this policy." Under the heading "Coverages and Limits of Liability," the policy states, among other things, that the plaintiff is insured against loss of personal property up to $241,500.00. Although the policy specifies the above mentioned monetary threshold, it also sets forth a limitation of $500.00 coverage for stolen jewelry. An addendum to the policy executed after the policy was upgraded to the "Ultra Security Homeowner's Policy" further provides that "[t]he Coverage C-Limitations on Certain Property Section of the General Policy Provision is deleted and replaced by the following limitations . . .(c) $1,000.00 for loss by theft, mysterious disappearance or unexplained loss of jewelry, watches, precious and semi-precious stones, gems and furs, but not exceeding $500.00 for any one article . . . (k) $1,000.00 on electric equipment, including accessories and media, used for business or personal purposes." An acknowledgment of limitations form signed by the plaintiff on May 25, 2007, also contains the following declaration:

> I understand that at this time I have not scheduled any jewelry, furs, fine arts, stamps, coins or philatelic material and I further understand that there is a blanket limit on each of the categories included in this policy and no one item is covered individually.

The common law elements of a cause of action for breach of contract are (1) formation of a contract between the plaintiff and the defendant, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damage (*see e.g.* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). Where the provisions of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning (***White v Continental Cas. Co.***, 9 NY2d 264, 267, 848 NYS2d 603 [2007]; ***Marshall v Tower Ins. Co. of N.Y.***, 44 AD3d 1014, 1015, 845 NYS2d 90 [2007]; ***Hiraldo v Allstate Ins. Co.***, 8 AD3d 230, 778 NYS2d 50 [2d Dept 2004], *affd* 5 NY3d 508, 806 NYS2d 451 [2005]). Courts may not vary the terms of an insurance contract to accomplish their notions "of abstract justice or moral obligation, since 'equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against'" (***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *quoting* ***Weinberg & Holman, Inc. v Providence Washington Ins. Co.***, 254 NY 387, 391, 173 NE 556 [1930].

Security Mutual has established its prima facie entitlement to summary judgment dismissing the plaintiff's cause of action for breach of contract by submitting evidence that the

agreement was unambiguous and that it fully complied with its terms (*see* ***Breed v Insurance Co. of N. Am.***, *supra)*; ***Jahier v Liberty Mut. Group***, 64 AD3d 683, 883 NYS2d 283 [2d Dept 2009]; ***Elis v Metlife Sec. Ins. Co. of N. Y.***, 130 AD2d 951, 515 NYS2d 935 [4th Dept 1987]). In opposition, the plaintiff has failed to submit evidence sufficient to raise a triable issue as to whether the limitations set forth in the agreement were ambiguous or whether Security Mutual failed to make payment in accordance with the agreement (*see* ***Zuckerman v City of New York***, *supra*). Accordingly, that branch of Security Mutual's motion for summary judgment in its favor dismissing the plaintiff's cause of action against it for breach of contract is granted.

Security Mutual has also established its entitlement to summary judgment dismissing the plaintiff's claim that it engaged in deceptive business practices in violation of General Business Law (hereinafter GBL) §349. The threshold requirement for a cause of action under GBL §349 is consumer-oriented conduct that threatens the rights of a broad section of the public (*see* ***Weiss v Polymer Plastics Corp.***, 21 AD3d 1095, 802 NYS2d 174 [2005]). Private contractual disputes unique to the parties, such as the one at bar, do not fall within the ambit of the statute (*see* ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892 [2000]; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529 [1995]; *cf* ***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177 [1999]). Therefore, the branch of Security Mutual's motion for summary judgment in its favor dismissing the plaintiff's claim that it engaged in deceptive business practices in violation of GBL §349, is granted.

As to Security Mutual's motion seeking summary judgment in its favor dismissing the plaintiff's claim that it is vicariously liable for alleged fraudulent misrepresentations made by XL Brokerage, to sustain a cause of action for fraudulent inducement a plaintiff must first establish the misrepresentation of some material fact, collateral to the contract, on which he or she reasonably relied (*see* ***Deerfield Communications Corp. v Chesebrough-Ponds Inc.***, 68 NY2d 954, 510 NYS2d 88 [1986]; ***Fresh Direct LLC v Blue Martini Software***, 7 AD3d 487, 776 NYS2d 301 [2d Dept 2004]). Moreover, "[a] party who enters into a written contract is bound by its stipulations and conditions whether or not he or she reads the contract. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his or her contract obligations" (*see* ***Worcester Ins. Co. v Hempstead Farms Fruit Corp.***, 220 AD2d 659, 660, 633 NYS2d 66 [2d Dept 1995]; *see* ***Metzger v Aetna Ins. Co.***, 227 NY 411, 125 NE 814 [1920]).

Here Security Mutual has established its prima facie entitlement to summary judgment dismissing the plaintiff's claim for fraudulent inducement by submitting evidence that the limitations stated in the subject agreement were clear and unambiguous and that no material misrepresentations were made to the plaintiff which allegedly induced her to enter the contract (*see* ***Lambert v Sklar***, 91 AD3d 917, 937 NYS2d 318 [2d Dept 2012]; ***Freiman v JR Motor Holdings NR 125-139, LLC***, 82 AD3d 1154, 920 NYS2d 189 [2d Dept 2011]; ***Mantis Transp., Inc. v T. Lines, Inc.***, 68 AD3d 937, 892 NYS2d 432 [2d Dept 2009]). During her examination before trial, the plaintiff testified that she was aware that her policy contained limitations, and that despite her failure to understand the terms "scheduling" or "blanket limit" when she read the declarations page of the agreement, she did not ask any of the insurance agents to explain

the meaning of the terms to her. She further explained that none of the insurance agents she spoke with during the application process made any affirmative representations to her regarding the limitations, or lack thereof, of coverage for her jewelry or electrical equipment.

In opposition, the plaintiff has failed to raise a triable issue as to whether any of the insurance agents affirmatively misrepresented material facts on which she reasonably relied in deciding to enter the subject agreement (*see* ***Alvarez v Prospect Hospital***, *supra*); ***Winegrad v New York Univ. Med. Center***, *supra*). Although the existence of an agency agreement authorizing XL Brokerage to collect insurance premiums and to issue insurance binders on behalf of Security Mutual raises a triable issue as to whether a general agency relationship existed between the two entities (*see* ***Matter of Temple Constr. Corp. v Sirius Am. Ins. Co.***, 40 AD3d 1109, 837 NYS2d 689 [2d Dept 2007]; ***Bennion v Allstate Ins. Co.***, 284 AD2d 924, 727 NYS2d 222 [4th Dept 2001]), the plaintiff's failure to submit any evidence of a material misrepresentation on which she reasonably relied requires dismissal of the cause of action as a matter of law (*see* ***Schmaker v Mather***, 133 NY 590, 30 NE 755 [1892]; ***Orlando v Kukiella***, 40 AD3d 829, 836 NYS2d 252 [2d Dept 2007]; ***Spencer v Green***, 42 AD3d 521, 842 NYS2d 44 [2d Dept 2007]).

Based upon the foregoing, XL Brokerage's cross-motion for summary judgment dismissing the plaintiff's claim that it fraudulently induced her to enter into the subject agreement is granted (*see* ***Lambert v Sklar***, *supra*; ***Freiman v JR Motor Holdings NR 125-139, LLC***, *supra*; ***Orlando v Kukiella***, *supra*). XL Brokerage's motion seeking summary judgment in its favor dismissing the plaintiff's claim that it violated GBL § 349 also is granted, as the alleged violation relates to a private contractual dispute that does not fall within the ambit of the statute (*see* ***Stutman v Chemical Bank***, *supra*; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, *supra*).

Finally, XL Brokerage's cross-motion seeking summary judgment dismissing the plaintiff's cause of action for breach of fiduciary duty also is granted. The mere purchase of an insurance contract from an insurance agent does not create a fiduciary relationship in favor of the insured (*see* ***Murphy v Kuhn***, 90 NY2d 266, 660 NYS2d 371 [1997]; ***Redford v Peerless Ins. Co.***, 93 AD3d 1354, 941 NYS 2d 430 [4th Dept 2012]; ***Western Bldg. Restoration Co. v. Lovell Safety Mgt. Co., LLC.***, 61 AD3d 1095, 876 NYS2d 733 [3d Dept 2009]; ***Hoffend & Sons, Inc. v Rose & Kiernan, Inc.***, 19 AD3d 1056, 796 NYS2d 790 [4th Dept 2005]). A fiduciary relationship between the broker and the insured only exists where the parties share a special relationship requiring the broker to assume additional duties other than merely procuring coverage for the insured (*see* ***Murphy v Kuhn***, *supra*; ***Sawyer v Rutecki***, 92 AD3d 1237, 937 NYS2d 811 [4th Dept 2012]; ***Hoffend & Sons, Inc. v Rose & Kiernan, Inc.***, *supra*). Such a special relationship may arise where "(1) the agent receives compensation for consultation apart from payment of the premiums . . . (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent . . . or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (***Murphy v Kuhn***, *supra* at 272).

Here XL Brokerage has submitted evidence that it merely sought homeowner's insurance coverage for the plaintiff, and that it did not share any special relationship with her that required it to assume additional duties on her behalf. Moreover, the plaintiff's own deposition testimony indicates that she failed to seek any additional explanation from XL Brokerage at the time she purchased the subject policy, or that a course of dealing existed over a period of time that put XL Brokerage on notice that its advice was being specially relied on. In opposition, the plaintiff has failed to raise any triable issue as to whether she shared any special relationship with XL Brokerage such that it owed her a fiduciary duty (*see* ***Zuckerman v New York***, *supra*).

Accordingly, the motion by the defendant Security Mutual Insurance Company and the cross-motion by the defendant XL Brokerage, Inc. for summary judgment in their favor dismissing the plaintiff's complaint are granted.

Dated: May 17, 2012

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION

HON. PETER FOX COHALAN