

Tower Ins. Co. of N.Y. v PMI Contrs., Inc.

2012 NY Slip Op 32124(U)

August 3, 2012

Supreme Court, New York County

Docket Number: 117686/09

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

TOWER INSURANCE COMPANY OF NEW YORK,
Plaintiffs,

-against-

PMI CONTRACTORS, INC., JORGE GUILLERMAO,
ALAIN REALTY, LLC, and MIGUEL ARADILLAS,
Defendants.

ALAIN REALTY, LLC,
Third-Party Plaintiff,

- v -

PROFESSIONAL BROKERAGE SERVICES CO.,
and WORLDWIDE INSURANCE BROKERAGE LTD.,
Third-Party Defendants.

INDEX NO. 117686/09
41700/06
MOTION DATE 06-20-2012
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

FILED

AUG 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 18 were read on this motion to/for summary judgment and cross-motions for summary judgment and to amend the complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____ cross motion _____

Replying Affidavits _____

PAPERS NUMBERED

1 - 4 , 7 - 9 , 13 -15

5 - 6 , 10 , 11 -12

16, 17, 18

Cross-Motion: X Yes No

Upon a reading of the foregoing papers cited papers, It is ordered that PROFESSIONAL BROKERAGE SERVICES CO.'s motion pursuant to CPLR §3212, for summary judgment dismissing the third-party complaint and all cross-claims against it, is granted. ALAIN REALTY, LLC's cross-motion pursuant to CPLR §3025[b], to amend the complaint, is denied. WORLDWIDE INSURANCE BROKERAGE LTD.'s motion pursuant to CPLR §3212, for summary judgment dismissing the third-party complaint and all cross-claims against it, is granted.

The underlying declaratory judgment action was brought by Tower Insurance Company of New York (hereinafter referred to as "Tower") based on an action brought in Supreme Court, Bronx County, by Miguel Aradillas for negligence and labor law violations. Miguel Aradillas claims that on August 4, 2008, he was injured while working for Jorge Castillo and PMI Contractors, Inc., performing floor renovations on the premises owned by Alain Realty, LLC (hereinafter referred to as "Alain"), located at 800 East 12th Street, Brooklyn, New York. Tower Insurance Company, alleges in the underlying action, that Alain was not named as an assured or additional insured under its policy and it has no duty to defend or indemnify. Alain brought the third-party action against Professional Brokerage Services Co. (hereinafter referred to as "Professional") -

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

Jorge Guillermo and PMI Contractors Inc.'s Insurance broker - and against Worldwide Insurance Brokerage Services Ltd. (hereinafter referred to as "Worldwide"), its own broker. The third-party complaint asserts one cause of action against Professional, alleging breach of oral contract and negligence. The third-party complaint asserts causes of action against Worldwide for breach of fiduciary duty, negligence and negligent misrepresentation.

The underlying declaratory judgment action brought by Tower Insurance Company was settled and on March 22, 2012, the "so ordered" stipulation was filed with the county clerk's office. The third-party action has been severed and continued with the underlying action's Index number.

Third-Party defendant, Professional makes this motion pursuant to CPLR §3212, for summary judgment dismissing the third-party complaint and all cross-claims against it.

Alain cross-moves pursuant to CPLR §3025[b], to amend the third-party complaint to conform to the evidence adduced during discovery, and to add more comprehensive theories of recovery, claiming there is no prejudice to the third-party defendants.

Third-Party defendant, Worldwide cross-moves pursuant to CPLR § 3212, for summary judgment, dismissing the third-party complaint and all cross-claims against it.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

A party that is not named as an additional insured on the face of a policy is not entitled to coverage. A certificate of insurance that includes a disclaimer that it is for information purposes only, does not confer coverage, or establish as conclusive proof that coverage exists (*Buccini v. 1568 Broadway Assoc.*, 250 A.D. 2d 466, 674 N.Y.S. 2d 398 [N.Y.A.D. 1st Dept., 1998]). An insurance broker cannot be found liable for breach of contract to an additional named insured because privity of contract only runs from a broker to its customer (*Arrendondo v. City of New York*, 6 A.D. 3d 328, 775 N.Y.S. 2d 150 [N.Y.A.D. 1st Dept., 2004]). An insurance broker cannot be found liable for fraud or negligence based on the unreasonable reliance on information contained in a certificate of insurance that has a disclaimer. A claim of negligent misrepresentation against an insurance broker based on a certificate of insurance that has a disclaimer, is invalid because it is unreasonable to rely on them for coverage and there is no privity, which is a prerequisite to establishing liability (*Greater Mutual Ins. Co. v. White Knight Restoration, Ltd.*, 7 A.D. 3d 292, 776 N.Y.S. 2d 257 [N.Y.A.D. 1st Dept., 2004] and *Benjamin Shapiro Realty Co. v. Kemper Nat. Ins. Companies*, 303 A.D. 2d 245, 756 N.Y.S. 2d 45 [N.Y.A.D. 1st Dept., 2003]).

An insured is presumed to have read, known, understood and assented to the terms of the insurance policy after it has been retained, therefore, a claim of negligence and breach of contract cannot be sustained against the broker (*Busker on The Roof Ltd. Partnership Co. v. Warrington*, 283 A.D. 2d 276, 725 N.Y.S. 2d 45 [N.Y.A.D. 1st Dept.,

2001]). A claim of fraudulent inducement cannot be sustained unless there is a fiduciary or special relationship between the parties (*Golub v. Tanenbaum-Harber Co., Inc.*, 88 A.D. 3d 622, 931 N.Y.S. 2d 308 [N.Y.A.D. 1st Dept., 2011]).

Insurance brokers do not have a, "...continuing duty to advise, guide, or direct a client to obtain additional coverage." (*Murphy v. Kuhn*, 90 N.Y. 2d 266, 682 N.E. 2d 972, 660 N.Y.S. 2d 371 [1997]). A claim of breach of fiduciary duty against an insurance broker requires proof of extraordinary circumstances giving rise to a special relationship beyond mere procurement of insurance. Extraordinary circumstances are found where the broker or agent, has been asked to advise based on professional expertise and inform the client concerning coverage; receives compensation for consultation separate from payment of premiums; and has had an extended period of dealings with the client (*Murphy v. Kuhn*, 90 N.Y. 2d 266, *supra*).

Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (*McCaskey, Davies & Associates, Inc. v. New York City*, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend should be granted as long as there is no surprise or prejudice to the opposing party. Delay alone is insufficient to defeat a motion for leave to amend. To establish prejudice there must be a showing of hindrance in preparation of the case or the prevention from taking measures in support of a party's position (*Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [N.Y.A.D. 1st Dept., 2011] and *Loomis v. Clivetta Corinno Constr. Corp.* 54 N.Y. 2d 18, 429 N.E. 2d 90, 444 N.Y. S. 2d 571 [1981]). Leave to amend a pleading will be denied where the proposed pleading fails to state a cause of action or is patently insufficient as a matter of law (*Davis & Davis, P.C. v. Morson*, 286 A.D. 2d 584, 730 N.Y.S. 2d 293 [N.Y.A.D. 1st Dept. 2001] and *Bishop v. Maurer*, 83 A.D. 3s 483, 921 N.Y.S. 2d 224 [N.Y.A.D. 1st Dept. 2011]).

Professional seeks summary judgment claiming that there are no issues of fact and it is not liable to Alain because there is no privity of contract and no proximate cause. Professional provides the affidavit of Ann Marie Miranda, its president, she states that the liability policy with Tower Insurance Company was procured by its clients, PMI Contractors, Inc. and Jorge Castillo and that at no time was there established any kind of contractual relationship or agreement with Alain. The two payments of premiums by Alain, were made on behalf of PMI Contractors, Inc. and Jorge Castillo. Professional claims it is not liable to Alain for breach of contract because the certificate of insurance has a disclaimer (Professional Mot. Exh. 1); Michael Rosen, the member of Alain responsible for obtaining insurance admitted he did not read the certificate of insurance in its entirety (Professional Mot. Exh. F, p. 30); and there was no contractual duty or obligation to obtain liability insurance coverage for Alain. Professional claims that Alain cannot establish proximate cause for negligence because Tower disclaimed for multiple reasons including an employee exclusion.

Alain opposes Professional's motion for summary judgment, claiming that there remain issues of fact based on whether there was, a "special relationship" creating a fiduciary duty; privity of contract; an oral agreement, and direct communication to Professional of its needs as a third-party beneficiary of the insurance contract. Alain claims that the payments made to Professional are proof of the oral agreement and that Professional made multiple false representations which led Alain to reasonably believe it possessed the appropriate coverage. Worldwide opposes Professional's motion

claiming that the deposition testimony of Ann Marie Miranda concerning conversations with Michael Rosen a member of Alain, raises issues of fact concerning privity of contract and negligence (Worldwide Opp. Exh. A, pp. 22-25, 34-35, 143-144, 149).

Professional has met its burden of proof and established a prima facie basis to obtain summary judgment. The disclaimer on the certificate of insurance states it is for, "information purposes only," (Professional Mot. Exh. 1), Michael Rosen on behalf of Alain failed to read the entire certificate and learn of its contents. Alain failed to request a copy of the insurance policy and was unaware of its contents. Professional's customer is PMI and Jorge Castillo, there was no privity of contract with Alain, a proposed additional named insured. Alain's claim of an oral contract as a third-party beneficiary and its terms have not been established, and the two payments were made on behalf of PMI Contractors, Inc. and Jorge Castillo, not Alain. Michael Rosen contacted Professional and spoke to individuals over the telephone but there is insufficient proof that those conversations gave rise to a contractual relationship. Reliance on potential coverage based on the certificate of insurance is not sufficient to establish privity. Alain has not established that there was a fiduciary duty on the part of Professional, there was no duty to advise or separate payment of consultation fees. Claims of negligence are not properly asserted by Alain, they can be asserted by PMI Contractors, Inc. and Jorge Castillo. Alain has not established a basis to sustain its claims of negligence based on reliance on the certificate of insurance.

Worldwide's cross-motion seeks summary judgment claiming that Alain did not pay for insurance consultation services related to liability coverage and there was no special relationship or fiduciary duty based on Alain's request for advice regarding coverage from another broker. Worldwide states that it only placed one casualty policy at Alain's request for the property involved prior to the incident and that policies obtained for other properties owned by Alain should not be considered in this action. Worldwide claims that proposed additional liability coverage was rejected and Mr. Rosen, a member that testified on behalf of Alain, admitted he ultimately made the decision regarding purchase of coverage (Worldwide Mot. Exh. G, pp. 105-106). Worldwide claims Professional was retained and is liable for its negligence and failure to obtain liability coverage and that Alain cannot establish proximate cause.

Alain opposes Worldwide's motion claiming that it had a special relationship based on ten years of brokerage advice for insurance coverage and purchase related to other properties. Alain claims it relied on Worldwide's advice that the coverage provided in the Tower insurance policy as indicated in the certificate of insurance was sufficient and based the decision not to procure further coverage on that advice. Alain and Professional oppose Worldwide's motion claiming that Worldwide had a long standing relationship providing insurance coverage, having reviewed the certificate of insurance and suggesting amendments, Worldwide was under a duty to advise that the certificate was not the actual coverage, seek a copy of the full policy and protect its client.

Worldwide has met its burden of proof and established a prima facie basis to obtain summary judgment. Worldwide has established that there was no fiduciary duty. Worldwide was not required to provide advice concerning coverage obtained from another broker. Worldwide advised Alain that it should be named an additional insured in PMI Contractors Inc. and Jorge Castillo's policy and suggested the purchase of additional liability coverage which was rejected. There was no continuing obligation to

advise, direct or guide Alain to purchase additional liability coverage. Alain did not pay Worldwide for its consultation services and only sought and paid for casualty coverage. Worldwide has also established that the disclaimer should have been read by Michael Rosen and that he unreasonably relied on the certificate of insurance to establish coverage. Alain has not established Worldwide's negligence or negligent misrepresentation, it unreasonably relied on the certificate of insurance. Alain and Professional did not raise an issue of fact, or establish a special relationship concerning the liability coverage that was purchased from Professional by PMI Contractors Inc. and Jorge Castillo. Alain did not purchase or contract to purchase liability coverage from Professional or Worldwide, and made its own decision to only purchase casualty coverage from Worldwide.

Alain's cross-motion seeks to amend the complaint and assert additional causes of action against Professional for breach of contract as third-party beneficiary, negligence, negligent misrepresentation, fraud and breach of the covenant of good faith and fair dealing. Alain also seeks to amend and clarify the asserted causes of action against Worldwide and add an ad damnum provision. Alain claims that there is no prejudice or surprise to the third-party defendants and although depositions are complete, the note of issue has not been filed, and further discovery including depositions could be obtained.

Professional opposes Alain's cross-motion claiming that the proposed amendment is both prejudicial and a hindrance in the preparation of its case. Professional claims that Alain's motion was made almost a year after depositions were taken, and after the summary judgment motions were filed with no explanation for the delay. Professional and Worldwide claim that the motion to amend should be denied because the amended causes of action have no merit.

Alain's proposed amendments as to Professional are an expansion of its claim of breach of oral contract and negligence, also seeking relief under quasi-contract theories. Professional has sufficiently established that there is no merit to those claims in its motion for summary judgment. Alain's proposed amendments as to Worldwide further expand on claims that have been established to have no merit based in Worldwide's motion for summary judgment.

Upon review of the papers submitted this Court finds that Professional has established a prima facie basis to obtain summary judgment on the cause of action for breach of contract for lack of privity and negligence and the cross-claims for indemnification and contribution. Plaintiff and Worldwide have not raised an issue of fact. Worldwide has established its prima facie basis to obtain summary judgment on the causes of action for breach of fiduciary duty, negligence and negligent misrepresentation and cross-claim for indemnification and contribution. Plaintiff and Professional have not raised an issue of fact. The third-party defendants have established a basis to obtain summary judgment and Alain's proposed amended pleadings are without merit.

Accordingly, it is ORDERED that PROFESSIONAL BROKERAGE SERVICES CO.'s motion pursuant to CPLR §3212, for summary judgment dismissing the third-party complaint and all cross-claims against it, is granted., and it is further,

ORDERED, that ALAIN REALTY, LLC's cross-motion pursuant to CPLR §3025[b], to amend the complaint, is denied

ORDERED, that WORLDWIDE INSURANCE BROKERAGE, LTD. 's motion pursuant to CPLR §3212, for summary judgment dismissing the third-party complaint and all cross-claims against it, is granted, and it is further,

ORDERED, that the Third-Party Complaint against defendants, PROFESSIONAL BROKERAGE SERVICES CO. and WORLDWIDE INSURANCE BROKERAGE, LTD, is dismissed.

This constitutes the decision, order and judgment of this court.

ENTER:



MANUEL J. MENDEZ,
J.S.C. MANUEL J. MENDEZ
J.S.C.

Dated: August 3, 2012

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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