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SHORT FORM ORDER

INDEX No. 10-20175

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-12-12 (#002)
MOTION DATE 5-17-12 (#003)
ADJ. DATE 5-24-12
Mot. Seq. # 002 - MG; CASEDISP
003 - MG

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HANS RICHARD LEHNEIS JR.,

Plaintiff,

- against -

KATHLEEN NEILL, CFP and BAY HARBOUR INSURANCE AGENCY, INC.,

Defendants.

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Upon the following papers numbered 1 to 55 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 28 - 37 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 23; 40 - 50 ; Replying Affidavits and supporting papers 24 - 25; 51 - 53 ; Other memoranda of law 14 - 15; 26 - 27; 38 - 39; 54 - 55 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant Kathleen Neill, CFP for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against her is granted; and it is further

ORDERED that the motion by the defendant Bay Harbour Insurance Agency, Inc. for an order pursuant to CPLR 3212 dismissing the complaint against it is granted.

This is an action sounding in negligence and breach of contract in which the plaintiff seeks to recover damages based on the alleged failure of the defendants to procure umbrella insurance coverage for his benefit. The plaintiff's wife was involved in an automobile accident on July 7, 2004. After she was named as a defendant in an underlying action, the matter was settled for an amount well in excess of the plaintiff's automobile insurance coverage. The plaintiff paid the injured party and commenced this action on June 1, 2010, seeking to recover the amount which he personally paid in settlement of the underlying action. The complaint alleges that the defendants acted as insurance brokers in obtaining homeowner's insurance for the plaintiff during the relevant coverage period, that the plaintiff requested the defendants obtain umbrella insurance coverage on his behalf, and that the defendants failed to obtain said coverage.

The defendant Kathleen Neill, CFP (Neill) now moves for summary judgment on the grounds that she fulfilled her duty to the plaintiff, and that the plaintiff did not rely on her to obtain umbrella insurance coverage. In support of her motion, Neill submits, among other things, the pleadings, the transcript of the plaintiff's deposition, and the transcript of her deposition. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** *supra*).

At his deposition, the plaintiff testified that he purchased his current residence in 1991, and that his insurance broker at the time was Jean Bacon of the JN Mason Agency. In 1996, he "went to" the defendant Bay Harbour Insurance Agency (Bay Harbour) because insurance companies were "pulling out" of insuring waterfront homes. He indicated that he spoke with a person at Bar Harbour during the first year asking for "better insurance coverage ... [b]etter than a basic homeowner's policy in the way of an umbrella." Bay Harbour referred him to Neill, who obtained a homeowner's policy with New York Property Insurance Underwriters (NYPIU) and a liability policy with Allcity Insurance insuring his residence. He stated that Neill produced the subject policies and renewals of the policies for 1997, 1998 and 1999, but that his understanding was that Bay Harbour and Neill provided the policies. In 1999, he spoke with Neill about obtaining "better insurance ... I told her that I was looking for a quality policy that would protect the value of the home, possibly an umbrella policy." Neill told him that she would look into it. In 2000, he dealt more directly with Bar Harbour and, because the market for insuring waterfront homes was "loosening," Neill was able to obtain a single policy covering homeowner's and liability with New York Central Mutual Fire Insurance Company (NYCM). After he received the premium notice for the NYCM policy, he felt that the coverage was inadequate. He spoke with Bay Harbour about "better insurance," but Bay Harbour and Neill said it was the best that they could do, and he did not check to see if that was the case.

The plaintiff further testified that he maintained automobile insurance from the 1990s to 2001 with "Allstate," and that Jean Bacon was his broker during this period. In 2001, when he lost his automobile insurance coverage with Allstate due to claims, Neill referred him to "Windsor," and a broker that he did not recall, because Neill "does not handle auto [insurance]." At that time he also talked to a friend and to a neighbor, both in the insurance business, about obtaining additional homeowner's coverage and/or an umbrella policy. His friend told him that he could not obtain additional coverage, and his neighbor told him that "getting insurance, especially umbrella policies is very, very difficult." He remained insured by Windsor for two years. At all times while insured with Allstate or Windsor, when asked by Neill, he informed her that he had $500,000 of coverage. After the two years insured by Windsor, he searched for automobile insurance on his own, and obtained a policy from Geico. He indicated that he asked Geico for $500,000 of auto coverage. However, he later learned that his policy was for $100,000 of coverage.

In late May or early June of 2003, he called Bay Harbour and asked for information regarding an umbrella policy. In response, Bay Harbour sent him a brochure with information on umbrella coverage. Two weeks later, Bay Harbour informed him that they were unable to obtain umbrella coverage. The plaintiff further testified that he had a number of conversations with Neill, before his conversations with Bay Harbour, regarding better coverage or umbrella coverage and that she told him that she could not get that coverage for him. He acknowledged that he did not call Geico to attempt to increase his automobile insurance coverage. In May 2004, he again spoke with Neill regarding umbrella coverage, and she told him that she could not get such coverage. A couple of days later, he called Bay Harbour for the same reason, and he was told that "they did not believe that they could produce that insurance," and that they would get back to him if they could. Later, he called Bay Harbour back and he was told that they couldn't get him better coverage. The plaintiff testified that he did not have conversations with anyone regarding umbrella coverage in June or July 2004, before his wife's accident on July 7, 2004.

At her deposition, Neill testified that she is a sub-producer for Bay Harbour, that she did not handle automobile insurance, and that she did not have access to surplus or excess carriers for individual clients. She indicated that, if she did not handle a client's automobile insurance, she would tell that client to contact their auto insurance carrier regarding any requests for umbrella coverage. Any carriers that she dealt with required a minimum of $500,000 in automobile coverage, and a minimum of $300,000 in homeowner's coverage to issue an umbrella policy. Neill further testified that she did not mention to clients that there are excess markets, and that she would not tell new clients about every insurance product available when soliciting their business. She stated that she first met the plaintiff in 1985, that the plaintiff was not a client for a number of years, and that she was never the only insurance broker for the plaintiff. From 1998 to 2001, the plaintiff had separate homeowner's and liability policies because NYPIU did not provide liability coverage, and it was the only insurance company available to the plaintiff due to his prior claims history. Neill further testified that she did not have any conversations about umbrella coverage with the plaintiff between 1985 and 2004, and the plaintiff and his wife never asked her if their automobile insurance or homeowner's insurance was "too low."

It is well settled that an insurance broker has a duty to obtain coverage for a client within a reasonable time after he or she is asked to do so, or inform the client of the inability to obtain said coverage (***Murphy v Kuhn***, 90 NY2d 266, 660 NYS2d 371 [1997]; ***Santaniello v Interboro Mut. Indem. Ins. Co.***,

267 AD2d 372, 700 NYS2d 230 [2d Dept 1999]; ***Wied v New York Cent. Mut. Fire Ins. Co.***, 208 AD2d 1132, 618 NYS2d 467 [3d Dept 1994]; ***Erwig v Edward F. Cook Agency***, 173 AD2d 439, 570 NYS2d 64 [2d Dept 1991]). However, an agent has no continuing duty to advise, guide, or direct a client to obtain additional coverage absent the existence of a special relationship with the client (***Verbert v Garcia***, 63 AD3d 1149, 882 NYS2d 259 [2d Dept 2009]; *see also* ***Murphy v Kuhn***, *supra*; ***Sawyer v Rutecki***, 92 AD3d 1237, 937 NYS2d 811 [4th Dept 2012]; ***Curiel v State Farm Fire and Cas. Co.***, 35 AD3d 343, 826 NYS2d 391 [2d Dept 2006]; ***Damask Inc. v CNA Ins. Co.***, 269 AD2d 733, 703 NYS2d 614 [4th Dept 2000]).

It has been held that 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" (***Sawyer v Rutecki***, *supra*; ***Polly Esther's South, Inc. v Setnor Byer Bogdanoff***, 10 Misc 3d 375, 807 NYS2d 799 [Sup Ct, New York County 2005]). However, it is only in "exceptional and particularized situations" when there is a "special relationship" between an insurance broker and its customer that a special level of advisory responsibility may exist (***Murphy v Kuhn***, *supra* at 270-72; *see also* ***Verbert v Garcia***, *supra*; ***Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.***, 65 AD3d 865, 885 NYS 2d 276 [1st Dept 2009]). A special relationship is not established by the fact that the relationship of the parties had lasted a considerable period of time (***Hersch v DeWitt Stern Group, Inc.***, 43 AD3d 644, 841 NYS2d 516 [1st Dept 2007]; ***M & E Mfg. Co. v Frank H. Reis, Inc.***, 258 AD2d 9, 692 NYS2d 191 [3d Dept 1999]).

Here, Neill has established her prima facie entitlement to summary judgment herein. Viewing the evidence in a light most favorable to the plaintiff, the plaintiff's deposition testimony reveals that on every occasion Neill advised him that she was not able to obtain umbrella coverage for him, that he endeavored to obtain such coverage on his own, and that he relied on a number of brokers to meet his insurance needs. Said testimony establishes that Neill performed her common law duty, and that the plaintiff and Neill did not have a special relationship.

In opposition to Neill's motion, the plaintiff submits his affidavit, the affidavit of David Friedberg, the broker who obtained umbrella coverage for the plaintiff after his wife's automobile accident, a copy of the insurance binder indicating said umbrella coverage, and excerpts of Neill's deposition testimony. In his affidavit in opposition to the motion, the plaintiff swears that, with the exception of approximately four or five years, Neill and Bay Harbour were his insurance broker, and that he thought that they were one and the same. He states that they advised him about his insurance needs and, accordingly, he relied on their advice. Based on his prior extended course of dealing with Neill and Bay Harbour, he did not attempt to obtain an umbrella policy from another broker because he did not think it possible. The plaintiff further swears that "[e]ach time I requested Defendant Neill and/or Bay Harbour obtain an umbrella policy, I was subsequently informed that it was not possible for me to obtain such a policy," and that he was never told of the existence of excess/surplus markets, or that he should contact Geico or another broker to obtain umbrella coverage.

Initially, the Court notes that the plaintiff's affidavit fails to raise an issue of fact requiring a trial of this action. A party may not, through an affidavit submitted on summary judgment, contradict his or her

own deposition testimony in order to feign an issue of fact (***Andrew T.B. v Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]; ***Abramov v Miral Corp.***, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]).

In his affidavit, David Friedberg (Friedberg), swears that Neill did not properly advise the plaintiff as to the reasons that she was unable to obtain umbrella coverage, that the proper procedure would have been to advise the plaintiff whether or not it would still be possible for him to obtain the coverage that he requested, and that he would have been able to obtain umbrella insurance coverage for the plaintiff prior to his wife's accident on July 7, 2004. He opines that Neill committed a "severe violation of the broker's duty."

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984] *citing* ***Cassano v Hagstrom***, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; ***Santoni v Bertelsmann Property, Inc.***, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.*** *supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York*** *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2nd Dept 1988]).

Here, to the extent that Friedberg's affidavit attempts to render an expert opinion, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Moreover, Friedberg's assertions that Neill was negligent in failing to advise plaintiff to obtain umbrella coverage elsewhere, in failing to advise the plaintiff regarding certain other matters, or that she was otherwise negligent, do not create a duty where none exists at common law (*see* ***Murphy v Kuhn***, *supra* at 270) and are legal conclusions beyond the proper realm of an expert (*see* ***Colon v Rent-A-Center, Inc.***, 276 AD2d 58, 716 NYS2d 7 [1st Dept 2000]; ***M & E Mfg. Co. Inc. v Frank H. Reis Inc.***, *supra*). Accordingly, Friedberg's expert opinion has failed to raise a triable issue of fact to defeat summary judgment herein.

The plaintiff has failed to raise an issue of fact requiring a trial in this action. Here, the plaintiff has not alleged that Neill was paid for consultation apart from payment of her commission, that the plaintiff relied exclusively on Neill's expertise regarding the question of coverage, or that the relationship with Neill was such that it would have put an reasonable broker on notice that his or her advice was being sought and specially relied upon (***Core-Mark Intern. v Swett & Crawford Inc.***, 71 AD3d 1072, 898 NYS2d 206 [2d Dept 2010]). Instead, a review of the record reveals "only the standard consumer-agent insurance placement relationship, albeit over an extended period of time" (***Murphy v Kuhn***, *supra*).

Accordingly, Neill's motion for summary judgment is granted.

Bay Harbour now moves for summary judgment on the grounds that it fulfilled its duty to the plaintiff, that the plaintiff did not rely on it to obtain umbrella insurance coverage, and that the action is barred by the statute of limitations. In support of its motion, Bay Harbour submits, the pleadings, the transcripts of the deposition testimony of Neill and the plaintiff, as summarized above, and the transcript of one of its employees. At his deposition, Richard Braile, Jr. (Braile) testified that he is the vice president of Bay Harbour. He stated that Bay Harbour would provide products, but no services, to sub-producers with whom they had a contract, and that Neill had a contract as a sub-producer for Bay Harbour. When Neill would call looking to obtain coverage for a client, his company would take the necessary information and provide a quote. If one of Neill's clients would call Bay Harbour seeking to obtain coverage, they would be referred back to the sub-producer. Braile further testified that Bay Harbour was not writing excess lines before 2006, that an individual must have his or her homeowner's and automobile insurance with the same carrier to obtain umbrella coverage, and that he was not aware that anyone from Bay Harbour ever spoke with the plaintiff, or his wife.

For the reasons set forth above, the Court finds that Bay Harbour has established its prima facie entitlement to summary judgment on the issue of its duty to the plaintiff. In opposition to Bay Harbour's motion, the plaintiff submits, among other things, the same documents as those set forth in his opposition to the motion made by Neill. That is, his previously made affidavit, the affidavit of David Friedberg, a copy of the insurance binder indicating his ability to obtain umbrella coverage in 2007, and excerpts of Neill's deposition testimony. In addition, the plaintiff contends that Bay Harbour is foreclosed from making a second motion for summary judgment. That contention is without merit. A review of the record reveals that, as set forth above, the plaintiff has failed to raise an issue of fact requiring a trial in this action. In addition, the Court notes that the Friedberg affidavit does not speak to the action or lack of action by Bay Harbour, and that there is no allegation that Bay Harbour is vicariously liable for the alleged failures of Neill to procure umbrella coverage, or otherwise. Moreover, it appears that the plaintiff's action is barred by the applicable statutes of limitation.

Accordingly, Bay Harbour's motion for summary judgment is granted.

Dated: August 16, 2012

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION