 FILED May 08 2012 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 5M

3

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

ALLSTA INC

Index No. 306489/11

-against-

Hon. Alison Y. Tuitt Justice.

CNA Commercial Ins.

The following papers numbered 1 to 9 Read on this motion, TRO
Noticed on 11/7/11 and duly submitted as No. ____ on the Motion Calendar of 11/21/11

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3	
Answering Affidavit and Exhibits	4, 5, 6	
Replying Affidavit and Exhibits	7, 8, 9	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion is decided in accordance with the Memorandum decision dated May 2, 2012

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 5, 2, 12

Hon. A Y Tuitt J.S.C.

ALISON Y. TUITT

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

ALLSTA, INC.,

Plaintiff,

-against-

CNA COMMERCIAL INSURANCE and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,

Defendants.

INDEX NUMBER: **306489/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1-9.

Read on this Plaintiff's Orders to Show Cause and Defendants' Motion to Dismiss

On Calendar of **11/21/11**

Orders to Show Cause/Notice of Motion-Exhibits, Affirmations, Affidavits 1, 2, 3

Affirmations in Opposition 4, 5, 6

Reply Affirmations 7, 8, 9

Upon the foregoing papers, plaintiff's Orders to Show Cause dated July 21, 2011 and November 2, 2011, and defendants' motion to dismiss are consolidated for purposes of this decision. For the reasons set forth herein, plaintiff's Orders to Show Cause are both denied and the temporary restraining orders are hereby lifted; and, defendants' motion to dismiss the complaint is granted.

Plaintiff Allsta, Inc. (hereinafter "Allsta") brings the instant Order to Show Cause seeking a temporary restraining order (hereinafter "TRO"), preliminary injunction, and specific performance which was signed by Justice Mark Friedlander on July 21, 2011. The Order to Show Cause contained a TRO restraining and prohibiting defendants from terminating, cancelling, modifying or consummating any transaction involving its insurance coverage of Allsta. The restraining order was to remain in effect until the oral argument of the

Order to Show Cause which was scheduled for August 1, 2011 but was thereafter adjourned to August 22, 2011.

On August 18, 2011, counsel for defendants served opposition to plaintiff's Order to Show Cause and filed a Motion to dismiss the complaint pursuant to C.P.L.R. §3211 and/or §3212. On August 22, 2011, September 12, 2011, October 12, 2011, the parties appeared before the Court. During the conferences, counsel for National did not advise that on August 17, 2011, it had submitted to the Department of Motor Vehicle (hereinafter "DMV") cancellation notifications advising that the insurance for the Allsta vehicles should be cancelled effective October 4, 2011. On October 23, 2011, Allsta learned that National cancelled the insurance policy. Consequently, DMV suspended the registration of Allsta's 79 vehicles.

Thereafter, plaintiff filed a second Order to Show Cause for contempt of court and a further TRO, which sought, pending a hearing on the motion, to temporarily restrain and preliminarily enjoin defendants from "further violating the July 21, 2011 Order" and directing defendants to "immediately... reinstate each and every insurance policy" of plaintiff "which was the subject to [sic] the July 21, 2011 Order". This Court signed the Order to Show Cause with TRO on November 2, 2011, pending oral argument on the motion which was scheduled for November 7, 2011 but was adjourned to November 21, 2011.

There are currently three motions before the Court. The first two are plaintiff's Order to Show Causes with TRO's. The third is defendants' motion to dismiss the complaint. The Court will address all three motions here.

In support of its first Order to Show Cause, plaintiff submits the affidavit of Dan Silverman, the insurance broker for plaintiff, who brokered an insurance policy between plaintiff and defendant CNA Commercial Insurance (hereinafter "CNA"). Mr. Silverman states that on September 24, 2010, he accepted from plaintiff a check in the amount of $13,941.00 as a deposit for insurance coverage for the vehicles used in its limousine business. An application for such coverage was accepted by defendants. At the time of the writing of the policy, plaintiff had placed 27 cars on the policy. The policy was placed with defendant National Fire Insurance Company of Hartford (hereinafter "National"), a subsidiary of defendant CNA and assigned Policy Number 4028641242. Both CNA and National are insurance companies licensed to conduct business in the State of New York.

Mr. Silverman further states that during the life of the policy, plaintiff added approximately 52 cars for which additional premiums were charged and paid. Mr. Silverman states that over the course of the

policy, plaintiff made timely payments as required under the policy agreement and paid additional premiums due on the added vehicles. Mr. Silverman alleges that from the policy's inception it was known to the defendants that the subject vehicles were garaged at the plaintiff's place of business located at 69-20 48th Avenue, in Woodside, Queens, New York. Mr. Silverman states that he personally visited the garage and noted the presence of the subject vehicles inside the garage. Mr. Silverman alleges that defendants were aware that plaintiff's mailing address was located in Amenia, New York.

The policy issued to plaintiff by defendants contains a standard provision which states that "[w]hen this policy is in effect less than 60 days we may cancel the entire policy for any reason provided we mail you notice within this period." Further, the policy also states that after the policy has been in effect for more than that same 60 day period the policy may only be cancelled for a reason that is provided in an exhaustive list. Those reasons are limited to failure to pay a due premium, the expiration, suspension or revocation of the licenses of the various drivers, the defendant replaces the policy with one that is substantially similar, the policy has no expiration date, or the policy was obtained under a fraudulent premise or fraudulent claims were made.

Plaintiff argues that defendants were afforded ample opportunities to conduct due diligence during the initial 60 day period and did not raise any question or exercise any right of cancellation during that period. The 60 day period is purportedly a national standard recognized in the insurance industry. Plaintiff contends that none of the conditions for cancellation after the expiration of the 60 day period exist and the plaintiff has substantially performed its obligations under the insurance contract and has paid the premiums due for the entire year on all covered vehicles.

In opposition to plaintiff's first Order to Show Cause, defendants argue that it had multiple compelling reasons for canceling plaintiff's policy. Defendants' counsel also represents Continental Insurance Company (hereinafter "Continental"), a separate company from National, but the entities are related. Defendant states that Continental filed suit two years ago, represented by defendants' law firm herein, in the United Stated District Court for the Eastern District of New York against numerous entities and persons including first two named defendants Securi Enterprises, Inc. (hereinafter "Securi") and Scott Sanders (hereinafter "Sanders") for alleged fraud and RICO violations relating to fraudulent automobile insurance schemes.

In or about November 2010, defendants Securi and Sanders filed a motion to stay Continental's

suit in order to prevent Sanders from providing deposition testimony due to a pending criminal investigation of him by the United States Attorney for the Southern District of New York. A copy of the affidavit of Jeffrey Hoffman, Esq. (hereinafter "Hoffman Affidavit") sworn to on November 11, 2010 shows that one target of the U.S. Attorney's investigation, and connected to Sanders, is Prime Services Enterprises, Inc. (hereinafter "Prime Services") located at 69-20 48th Avenue, in Woodside, Queens, New York, the address of plaintiff herein.

The Continental complaint against Sanders and other details a fraudulent scheme relating to the procurement of insurance coverage for Securi, a "computer sales and service company in New Jersey" when, in fact, Sanders was operating a taxi service, or vehicles for hire service in or about New York City. It is alleged that the true nature of Securi was not discovered until third party claims were submitted. None of the claims were reported by Securi itself. Defendants argue that here, after National issued an insurance policy to plaintiff, numerous accidents began to "surface", none of which were reported to National by plaintiff Allsta and none of which Sanders, the supervisor for plaintiff, updated with any information even after National asked Sanders for information. Even more troubling, argue defendants, is that plaintiff's address on the National policy, also admitted to be the Allsta's address by plaintiff's insurance agent, Mr. Silverman, is the same address for Prime Services, which per the Hoffman Affidavit, was subpoenaed by the U.S. Attorney in March 2009, and which is the entity that issued a multitude of premium payment checks for plaintiff Allsta.

Defendants ask the Court to take judicial notice that Mr. Silverman admits that plaintiff's mailing address is in Amenia, New York, also the address of targets of the U.S. Attorney per the Hoffman Affidavit. National also asks this Court to consider the affidavit of Rebecca J. Larson, a consulting underwriting director for National, which details a "dizzying, non-stop array of premium non-payments and policy changes" after National issued this policy, such that Allsta, which began by asking National to issue a policy for only 27 vehicles, ultimately wanted coverage for 79 vehicles, which defendant argues clearly constitute a material change in the policy more than justifying cancellation even without the "alarming" involvement of Sanders, as plaintiff's principal. National also requests that this Court take into account the December 28, 2010 order of Judge Mary Cooper, United States District Court, District of New Jersey, which reflects that the Securi defendants, including Sanders, may or may not be indicted and are the subject of a criminal investigation. Defendants argue that this Court was unaware of plaintiff Allsta's connections to Sanders when, by order dated July 26, 2011, the Court granted temporary relief to Allsta, restraining National from terminating,, canceling or

modifying its insurance coverage for Allsta until the return date of the Order to Show Cause.

With reference to the material changes that defendants argue fully justified the cancellation of the policy, the following is the relevant history: National issued a business auto policy to Allsta with effective dates of October 4, 2010 to October 4, 2011. National argues that it had no basis to know at the time of the issuance of the policy of the connections between Allsta and Sanders and others purportedly involved in criminal insurance scheme activity. The Allsta policy was cancelled effective July 24, 2011. As stated by Ms. Larson in her affidavit, the reason for the cancellation was "material change in the nature and extent of the risk beyond that originally contemplated. Defendants argue that even without the fraud issues, there is no question that as a matter of law, it is "material" to have a policy change from covering 75 automobiles instead of 27, i.e. a change in the size of the risk by 300%, not even taking into account the manner of the sometimes almost weekly changes in the additions and subtractions of vehicles for which coverage was sought.

Ms. Larson sets forth that Allsta began adding vehicles to the policy while repeatedly not paying the premium due in full, and purportedly using a potential criminal entity, Prime Services, to make payments. The dates and number of vehicles added are:

October 22, 2010 - 5 vehicles

January 14, 2011 - 10 vehicles

March 16, 2011 - 15 vehicles

April 1, 2011 - 15 vehicles (deleted 1 vehicle)

May 26, 2011 - 7 vehicles

With each addition of vehicles, the premium was recalculated and submitted to Allsta. However, due to the fact that Allsta elected to remit premium payments on an installment basis, Allsta was constantly in arrears with its premium payments. Consequently, National issued six cancellation notices for nonpayment of premiums as follows:

January 18, 2011 - effective cancellation date: February 6, 2011

February 16, 2011 - effective cancellation date: March 7, 2011

March 16, 2011 - effective cancellation date: April 4, 2011

April 19, 2011 - effective cancellation date: May 6, 2011

May 24, 2011 - effective cancellation date: June 12, 2011

June 23, 2011 - effective cancellation date: July 12, 2011

Premium payments were made against the first five notices which reinstated the policy. On June 30, 2011, National issued a cancellation notice, effective July 24, 2011 pursuant to New York Department of Insurance Regulation 2.e. as to a "material change in the nature and extent of the risk beyond that originally contemplated." Ms. Larson states that the material change that caused the cancellation of the policy was a tripling of the amount of vehicles from the time the policy was issued to May 26, 2011, the last date Allsta added automobiles. National argues that it would not have issued this policy if it had known that the automobiles would be added over the life of the policy resulting in the insuring of 79 automobiles. National further argues that the additional involvement of persons and/or entities who have been or are being investigated for insurance fraud are grounds to deny plaintiff's request for an injunction, since plaintiff's contention that Sanders, its apparent principal, shows that there is a high risk to National, in that forcing National to continue to cover plaintiff, this will help in the continuation of the fraudulent insurance scheme.

In its second Order to Show Cause, plaintiff argued that defendants wrongfully, and contrary to this Court's Order dated July 21, 2011, terminated plaintiff's insurance policy on October 4, 2011, the date the policy was to end. Plaintiff argues that as a result, it has been forced to remove approximately 79 limousines from service in New York City and its business is failing. Additionally, the DMV is fining the plaintiff $8.00 per day per vehicle, or $642.00 per day, as a penalty for being uninsured. Plaintiff argues that it is also unable to obtain insurance because of defendants' failure to provide plaintiff with documents legally necessary to acquire other insurance coverage. Plaintiff claims to be suffering actual losses of $25,000 per day as a result of not being able to legally have the 79 vehicles on the road.

Plaintiff argues that National's cancellation of the policy while the TRO was in effect from the first Order to Show Cause is subject to civil and criminal contempt. Plaintiff further argues that National wilfully and deliberately violated the TRO and requests that the Court direct National to immediately reinstate plaintiff's insurance policies retroactive to the date of cancellation.

In opposition, defendants argue that the objective of plaintiff's first Order to Show Cause and the Order issued was to preserve the status quo with respect to Allsta's coverage under the policy and to enjoin National from taking any steps in furtherance of its planned July 24, 2011 mid-term cancellation of the policy. Defendants further argue that Allsta's second Order to Show Cause attempts to misconstrue the true nature of the policy's October 4, 2011 expiration by suggesting that National "cancelled" the policy. However, by its

terms, the policy was scheduled to expire on October 4, 2011. As alleged in Allsta's own complaint, the policy was to have "a policy effective date of October 4, 2010 and termination date of October 4, 2011." Defendants contend that while Allsta's complaint ultimately seeks to compel specific performance of the policy's terms, Allsta's second Order to Show Cause now seeks extra-contractual relief in the form of insurance coverage for periods beyond that which were contract for and for which premiums were paid under the policy.

Defendants argue that the so-called October 4, 2001 "cancellation" was tantamount to Nations's election not to renew Allsta's coverage following scheduled and agreed-upon expiration of the policy at the end of its term. In that respect, contend defendants, the relief now sought by Allsta would not result in a "reinstatement" of the policy, as suggested by Allsta, but the issuance of an entirely new contract to insure Allsta for losses occurring after the October 4, 2011 expiration of the policy. That relief was not sought in plaintiff's complaint and was not contemplated in the Order.

Defendants further argue that the instant dispute revolves around National's planned July 24, 2011 mid-term cancellation. The July 21, 2001 Order enjoined National from carrying out that cancellation until a hearing on the merits could be had. The issue as to the validity of National's August 2011 notices to DMV and its nonrenewal of the policy upon its expiration could not have possibly been in dispute when the Order was issued on July 21, 2011. Defendants contend that the only issue in dispute then, as now, was whether National was entitled to cancel the policy effective July 24, 2011 or whether the policy must have remained in effect for the entire policy period and expire on October 4, 2011. As such, National's nonrenewal of the policy was not the type of conduct contemplated or prohibited by the Order. Alternatively, to the extent that the policy was to expire on October 4, 2011, the notices to DMV indicating that the policy would be cancelled effective October 4, 2011 were a nullity and had no effect on Allsta's rights and obligations under the policy.

Insurance Law §3426(c)(1)(E) states:

> (c) After a covered policy has been in effect for 60 days unless canceled pursuant to subsection (b) of this section, or on or after the effective date if policy is a renewal, no notice of cancellation shall become effective until fifteen days after written notice is mailed or delivered to the first – named insured and to such insured's authorized agent or broker, and such cancellation is based on one or more of the following:

> a. With respect to covered policies:
>
> (E) ... or material change in the nature or extent of the risk, occurring after issuance or last annual renewal anniversary date of the policy, which causes the risk of loss to be substantially and materially increased beyond that contemplated at the time the policy was issued or last renewed;...

Plaintiff argues that even if the Court were to find that its Order related only to the midterm cancellation, National ignored Insurance Law §3426 and the policy provisions regarding nonrenewal and nonrenewal notice. Insurance Law 3426(11)(D)(2)(e)(1) provides:

> A covered policy shall remain in full force and effect pursuant to the same terms, conditions and rates unless written notice is mailed or delivered by the insurer to the first-named insured, at the address shown on the policy and to such insured's authorized agent or broker, indicating the insurer's intention: (A) not to renew such policy...

Plaintiff further argues that both the Insurance Law and the terms of the insurance policy regarding nonrenewal and notice of nonrenewal required National to give Allsta notice of its intent not to renew Allsta's policy at least 60 days prior to the end date of that policy. Insurance Law §3426(11)(c)(3); McCleavey v. Physicians Reciprocal Insurers, 648 N.Y.S.2d148 (2d Dept. 1996)("Contrary to the plaintiffs' contentions, the defendant provided them with adequate notice of non-renewal (see, Insurance Law §3426(g)(2); (e)(3). The plaintiffs received notices of non-renewal more than 60 days prior to the expiration of the policies and the notices indicated that the policies were being canceled due to their claim histories. The defendant did not breach an implied covenant of good faith and fair dealing. Notably, the defendant provided notice to the plaintiffs that they had suffered unacceptable losses thereby providing objective credible evidence that non-renewal of the policies was based on underwriting criteria.")(citation omitted). Moreover, argues plaintiff, by its express terms, Insurance Law §3426(e)(2) provides that all notices of nonrenewal must contain the specific reason or reasons for non-renewal.

Plaintiff argues that National was required to provide notice of nonrenewal and the loss experience regarding policies to Allsta prior to the October 4, 2011 cancellation. Since no notice of nonrenewal or loss experience was provided to Allsta, plaintiff contends that the policy remains in full force and effect under Insurance Law §3426(11)(c)(3)(d)(1). Plaintiff further argues that National's August 17, 2011 notification to the DMV to cancel Allsta's insurance violated Insurance Law §3426(11)(c)(3)(d)(1) and this

Court's July 21, 2011 Order. Furthermore, plaintiff alleges that National violated Vehicle and Traffic Law §313(1)(a) (hereinafter "VTL") because no notice was received by Allsta or its broker/agent Mr. Silverman. VTL §313(1)(a) provides:

> No contract of insurance for which a certificate of insurance has been filed with the commissioner shall be terminated by cancellation by the insurer until at least twenty days after mailing to the named insured at the address shown on the policy a notice of termination by regular mail, with a certificate of mailing, properly endorsed by the postal service to be obtained.

Preliminary Injunction

In order to obtain a preliminary injunction, plaintiff must demonstrate: 1) a probability of ultimate success on the substantive merits of the action; 2) irreparable harm will occur if the preliminary injunction is not granted; and, 3) a balancing of the equities in favor of plaintiff's position. Aetna Insurance Co. v. Capasso, 75 N.Y.2d 860 (1990); U.S. Reinsurance Corp. v. Humphreys, 618 N.Y.S.2d 270, 273 (1st Dept. 1994). Evidence demonstrating a likelihood of success on the merits need not be conclusive. Terrell v. Terrell, 719 N.Y.S.2d 41 (1st Dept. 2001) citing Demartini v. Chatham Green, Inc. 565 N.Y.S.2d 712 (1st Dept. 1991). It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive. Four Times Square Associates, L.L.C. v. Cigna Investments, Inc., 764 N.Y.S.2d 1 (1st Dept. 2003) citing Ma v. Lien, 604 N.Y.S.2d 84 (1st Dept. 1993). "As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings." Terrell, *supra*, quoting McLaughlin, Piven, Vogel v. W.J. Nolan & Co., 498 N.Y.S.2d 146 (2d Dept. 1986). With respect to establishing irreparable harm, the plaintiff must show that the alleged harm is "imminent, not remote or speculative." Golden v. Steam Heat, Inc., 628 N.Y.S.2d 375, 377 (2d Dept. 1995). With respect to the balancing of the equities, the First Department has held that "[w]hile the existence of some wrongdoing may impel a result for one side, the "balancing of the equities" usually simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." Ma, 604 at 84.

"Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant'". Id *citing* Nalitt v. City of New York, 526 N.Y.S.2d 162 (2d Dept.

1988) *quoting* First National Bank v. Highland Hardwoods, 471 N.Y.S.2d 360 (3d Dept. 1983). Courts have denied motions for preliminary injunctions where the offending conduct has ceased and there is no proof that it was likely to occur again. See, Greenfield v. Schultz, 660 N.Y.S.2d 624, 628 (Sup. Ct. N.Y. Cty. 1997), *aff'd in part*, 673 N.Y.S.2d 684 (1st Dept. 1998); Greilsheimer v. Berber, Chan & Essner, 1998 WL 547092 (S.D.N.Y. 1998)("A suit for injunctive relief is moot when the offending conduct ceases and the court finds 'that there is no reasonable expectation that it will resume.'") (citations omitted); People by Lefkowitz v. Alexanders Dept. Store, Inc., 344 N.Y.S.2d 719 (1st Dept. 1973); Nann v. Raimist, 255 N.Y. 307 (1931)(A preliminary injunction is not to be used to punish past wrongdoing, but as protection for the future).

Plaintiff's application for a preliminary injunction is denied for several reasons. At this juncture, a preliminary injunction is moot. The subject policy terminated by its natural terms on October 4, 2011. The policy was a one year policy, effective from October 4, 2010 and ending on October 4, 2011. Putting aside the issue of whether the policy was effectively terminated on July 24, 2001, the insurance policy was set to expire on October 4, 2011. Thus, the alleged "wrongdoing" here is a past act because the policy is no longer in effect. Consequently, the "offending conduct" has ceased and since National has elected not to renew the policy, there is no reasonable expectation that the conduct will resume. In any event, plaintiff fails to meet the criteria for a preliminary injunction; plaintiff fails to show a probability of ultimate success on the substantive merits of the action and a balancing of the equities in plaintiff's favor.

Termination of the Policy

Defendants claims of alleged insurance fraud and/or criminal activity by Allsta's principal, the Continental action and the investigation into alleged criminal activity by the U.S. Attorney's Office are irrelevant as neither Sanders nor any other entities have been criminally charged. Nevertheless, National effectively terminated the policy mid-term on July 24, 2011. there is no question that, as a matter of law, there was a material change in the nature and extent of the risk occurring after issuance of the policy beyond what was originally contemplated. The "material change" is that the policy went from covering 27 vehicles to covering 75 automobiles, a change in the size of the risk by 300%. This change presented a risk to National far beyond what was originally contemplated. In addition, after National issued the insurance policy to plaintiff, numerous accidents began to surface, none of which were reported to National by plaintiff Allsta as was

required. Consequently, since the policy was effectively terminated on July 24, 2011, there was no requirement that National provide Allsta notice of its intent not to renew the policy at least 60 days prior to the October 4, 2011 end date of that policy.

Plaintiff's Second Order to Show Cause

The objective plaintiff's first Order to Show Cause and the Order issued was to preserve the status quo with respect to Allsta's coverage under the policy and to enjoin National from taking any steps in furtherance of its planned July 24, 2011 mid-term cancellation of the policy until the Court had an opportunity to hear oral arguments and issue a decision. The question there was whether National was entitled to cancel the policy effective July 24, 2011 or whether the policy must have remained in effect for the entire policy period and expire on October 4, 2011. The second Order to Show Cause which seeks to "reinstate each and every insurance policy" of plaintiff which was the subject of the July 21, 2011 Order must be denied. The relief now sought by Allsta would not result in a "reinstatement" of the policy, as suggested by Allsta, but the issuance of an entirely new contract of insurance.

The October 4, 2001 "cancellation" was tantamount to Nations's election not to renew Allsta's coverage following the scheduled and agreed-upon expiration of the policy at the end of its term. As such, National's nonrenewal of the policy was not the type of conduct contemplated or prohibited by the July 24, 2011 Order. Thus, National did not violate the July 24, 2011 TRO. Accordingly, plaintiff's application for civil and criminal contempt against defendants must be denied.

Defendants' Motion to Dismiss

Defendants move to dismiss plaintiff's complaint pursuant to C.P.L.R. §3211(a) on the grounds of defense found upon documentary evidence: and/or C.P.L.R. §3211(a)(7) on the grounds of failure to state a cause of action; and/or C.P.L.R. §3211© allowing this Court to treat this motion as a motion for summary judgment pursuant to C.P.L.R. §3212 on the grounds that there are no triable issues of fact.

When a defendant moves to dismiss the complaint pursuant to C.P.L.R. §3211(a)(7), based on legal insufficiency, plaintiff has no obligation to show evidentiary facts to support the allegations of the complaint. Generally, on a motion to dismiss made pursuant to C.P.L.R. §3211, the court must "accept the facts

as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to C.P.L.R. §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979). Furthermore, on a motion to dismiss for legal insufficiency, it is proper to consider the facts in plaintiff's affidavit for the limited purpose of sustaining the pleading. Ackerman v. Ackerman, 462 N.Y.S.2d 657 (1st Dept.1983). A plaintiff sufficiently states a cause of action where (1) the pleading states any cause of action (and not whether there is evidentiary support of the complaint). Rovello, *supra.*

However, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference, Biondi v. Beekman Hill House Apt. Corp., 692 N.Y.S.2d 304 (1st Dept. 1999), *affd.* 94 N.Y.2d 659 (2000); Kliebert v. McKoan, 643 N.Y.S.2d 114 (1st Dept. 1996), *lv. denied* 89 N.Y.2d 802, the criterion becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one'". Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); see also Leon, *supra*; Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 730 N.Y.S.2d 48 (1st Dept. 2001).

On a motion to dismiss pursuant to C.P.L.R. §3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law". Leon, 84 N.Y.2d at 88. A motion to dismiss based on documentary evidence requires that the document relied upon must definitely dispose of plaintiff's claim. Philips South Beach, LLC v. ZC Specialty Ins. Co., 867 N.Y.S.2d 386 (1st Dept. 2008).

Plaintiff filed its complaint for a TRO, a permanent injunction and for specific performance. The gravamen of plaintiff's complaint is that National had no basis to cancel the policy it issued. However, defendants have shown that it did not default on its contractual obligations to plaintiff. Here, the insurance policy could be terminated pursuant to the "material change" that the policy went from covering 27 vehicles to covering 75 automobiles. This change presented a risk to National far beyond what was originally contemplated. In addition, after National issued the insurance policy to plaintiff, National learned of numerous accidents of the vehicles it insured, none of which were reported to National by plaintiff Allsta as was required.

Accordingly, National cannot be compelled to specific performance or to continue insuring Allsta. Thus, the plaintiff's complaint is dismissed pursuant to C.P.L.R. §3211(a)(7).

This constitutes the decision and order of this Court.

Dated: ~~April 9, 2012~~
May 2, 2012

Hon. Alison Y. Tuitt