Index No. 603133/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 – SUFFOLK COUNTY

PRESENT:

AMENDED

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 07-07-17
ADJ. DATE 08-29-17
Mot. Seq.# #001 MD

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AB OIL SERVICES LTD. D/B/A AB ENVIRONMENTAL, ABLE ENVIRONMENTAL SERVICES, INC. AND FAIRWAY ENVIRONMENTAL LLC,

Plaintiffs,

-against-

TCE INSURANCE SERVICES, INC. AND ANTHONY DeFEDE,

Defendants.

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Upon the following papers numbered 1 to 47 read on this motion to dismiss; Notice of Motion/Order to Show cause and supporting papers 1-26; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 27-39; Replying Affidavits and supporting papers 41-47; Other____; (~~and after hearing counsel in support and opposed to the motion~~) it is;

ORDERED that the motion by defendants, for an order, pursuant to CPLR 3211(a)(7), dismissing the verified complaint against them is granted.

This is an action by plaintiffs for a declaratory judgment related to an insurance policy procured by Defendant TCE Insurance Services, Inc. ("TCE"), with Defendant Anthony DeFede ("DeFede") acting as the broker, and issued by Starr Companies ("Starr"), and to recover damages for injuries allegedly sustained by plaintiffs as a result of defendant's alleged breach of contract and/or misrepresentations related to the policy. According to the verified complaint, plaintiff AB Oil Services Ltd., d/b/a AB Environmental ("AB Oil"), *via* the defendants, obtained an insurance policy for work plaintiff was performing with Consolidated Edison ("Con Ed"). The insurance was procured for the period on or about October 2015 through June 2016 (the "2015-2016 Policy"). Plaintiffs claim that defendants represented the 2015-2016 Policy covered the gas main repair work which plaintiffs sought to perform with Con Ed. Plaintiffs further allege that based on a subsequent conversation with Starr, they learned the insurance coverage

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would not have covered claims for injuries resulting from gas main repair work. There is no dispute that no claims have been submitted with respect to the 2015-2016 Policy. Plaintiffs also allege that they received a quote from defendants with respect to the subsequent one-year period for similar coverage (the "2016-2017 Quote"). Plaintiffs claim they sought prices from other vendors and ended-up procuring a policy from a new broker, Vanguard, a nonparty to this action. Plaintiff contents defendants are responsible for the difference in price between its defendants' 2016-2017 Quote and the price plaintiffs paid to Vanguard. For the ensuing reasons, plaintiffs' claims are premature and/or without merit.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]; ***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Scoyni v Chabowski***, 72 AD3d 792, 898 NYS2d 482 [2d Dept 2010]; ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Ofman v Katz***, 89 AD3d 909, 933 NYS2d 101 [2d Dept 2011]; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]. Upon a motion to dismiss, such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***AGS Marine Insurance Company v Scottsdale Insurance Company***, 102 AD3d 899, 958 NYS2d 753 [2d Dept 2013]; ***Chan Ming v Chui Pak Hoi et al***, 163 AD2d 268, 558 NYS2d 546 [lst Dept 1990]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC 1, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19,799 NYS2d 170 [2005]; *see* ***Rovello v Orofino Realty Co***; 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). However, conclusory allegations, which fail to adequately allege the material elements of a cause of action, will not withstand a motion to dismiss (***Peterec-Tolino v Harap***, 68 AD3d 1083, 1084 [2d Dept 2009]). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (***Mark Hampton, Inc. v Bergreen***, 173 AD2d 220, 570 NYS2d 799 [lst Dept 1991], *lv, denied* 80 NY2d 788, 587 NYS2d 284, [1992]).

Plaintiff's first cause of action, at paragraph 33 of the verified complaint, asks this Court to declare that "if a claim is made or an action is commenced against [plaintiffs] for repair work done during the period that it was not insured, defendants are obligated to defendant and indemnify [plaintiffs] for any such claim or action." "The sole consideration in determining a pre-answer motion to dismiss a declaratory judgment action is whether a cause of action for declaratory relief is set forth, not whether the plaintiff is entitled to a favorable declaration" (***Palm v. Tuckahoe Union Free Sch. Dist.***, 95 AD3d 1087, 1089 [2d Dept 2012] [internal quotations omitted]). A party "may bring a declaratory judgment action against an insurer 'when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract' " (***Kassis v Ohio Cas. Ins. Co.***, 12 NY3d 595, 599 [2009], *citing* ***Lang v. Hanover Ins. Co.***, 3 N.Y.3d 350, 353, 787 N.Y.S.2d 211, 820 N.E.2d 855

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[2004]). "In addition to the requirement that the controversy be genuine or ripe, the declaratory judgment may be used only for a 'justiciable' controversy. If the court has jurisdiction over the subject matter, and if the dispute is genuine, and not academic, 'the dispute will be deemed 'justiciable' and CPLR 3001 will in that regard be satisfied' " (***Watson v Aetna Cas. & Sur. Co.***, 246 AD2d 57, 62 [2d Dept 1998]). Here, plaintiffs' action for a declaratory judgement is not ripe as there is no underlying action or claim against them with respect to the 2015-2016 Policy. As no genuine dispute exists, plaintiffs are impermissibly seeking an advisory opinion as to future issues which have not and may not ever arise (***Town of Riverhead v Cent. Pine Barrens Joint Planning and Policy Com'n***, 71 AD3d 679, 681 [2d Dept 2010] ["the petitioners have not incurred an actual, concrete injury"]; ***Fragoso v Romano***, 268 AD2d 457, 457 [2d Dept 2000]; ***Staten Is. Hosp. v All. Brokerage Corp.***, 137 AD2d 674, 676 [2d Dept 1988]). Therefore, plaintiffs' cause of action seeking a declaratory judgment is premature.

In light on the above, Plaintiffs' second, third and fourth causes of action sounding in negligent misrepresentation, breach of contract and negligent procurement related to the 2015-2016 Policy must similarly all be dismissed as premature for failure to allege a cognizable injury which is a *sin qua non* of all claims alleged against defendants (*see* ***Bonded Waterproofing Services, Inc. v Anderson-Bernard Agency, Inc.***, 86 AD3d 527, 530 [2d Dept 2011] ["damages are a necessary element of a negligence cause of action"]; ***PFM Packaging Mach. Corp. v ZMY Food Packing, Inc.***, 131 AD3d 1029, 1030 [2d Dept 2015] [a breach of contract action requires "damages resulting from the breach"]).

Read liberally, the second cause of action in the verified complaint (in an artfully manner) also seeks to allege a cause of action against defendants for negligent misrepresentation with respect to a quote that defendants provided to plaintiffs for similar insurance for the period July 2016 to June 2017 (the "2016-2017 Quote" referred to *supra*). "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (***J.A.O. Acquisition Corp. v Stavitsky***, 8 NY3d 144, 148 [2007]). Here, paragraph 20 of plaintiffs' verified complaint acknowledges that when it came time to renew the contract with Con Ed, plaintiffs sought quotes for insurance coverage from other vendors and informed defendants it would be seeking other quotes for coverage. According to paragraph 17 of the verified complaint, plaintiffs requested these quotes for 2016-2017 related to an "additional bid" plaintiff AB Oil was submitting to Con Ed. In paragraph 23 of the verified complaint, plaintiffs acknowledge that in June 2016, prior to the effective date of the quoted policy, it learned the 2015-2016 Policy and the 2016-2017 Quote did not cover the gas main repair work plaintiffs were performing. In light of the above facts, as plead by plaintiffs and accepted as true herein, a cause of action for negligent misrepresentation (or estoppel) cannot lie as against defendants based upon the 2016-2017 Quote. Even if the requisite duty to plaintiffs existed when defendants provided the 2016-2017 Quote (which the facts, as alleged, do not establish), it is clear under any favorable inference afforded to plaintiffs, that plaintiffs did not act in reasonable reliance on the 2016-2017 Quote. (*see* ***Ramsarup v Rutgers Cas. Ins. Co.***, 98 AD3d 494, 496 [2d Dept 2012]; ***J.A.O. Acquisition Corp.***, 8 NY3d at 148 [2007]; *see generally* ***First Union Nat. Bank v Tecklenburg***, 2 AD3d 575, 577 [2d Dept 2003]). As such, the second cause of action against defendants must be dismissed in the entirety.

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Plaintiffs have not cross-moved or sought leave to amend the verified complaint.

Accordingly, defendants motion to dismiss the verified complaint pursuant to CPLR 3211(a)(7) is granted in the entirety.

Dated: Dec. 11, 2017

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

X FINAL DISPOSITION ___NON-FINAL DISPOSITION

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