O&S Mgt. Corp. v DeWitt Stern Group, Inc.
2005 NY Slip Op 30597(U)
December 30, 2005
Supreme Court, New York County
Docket Number: 104781/04
Judge: Carol R. Edmead

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

O&S MANAGEMENT CORP., C. UPTOWN REALTY, INC. a/k/a UPTOWN REALTY CORP., 2785 UNIVERSITY CORP., 125 WEST TREMONT AVENUE LLC a/k/a WEST TREMONT REALTY ASSOC. LLC, WEST TREMONT REALTY ASSOC., L.P., 2055 CRESTON AVENUE LLC, CRESTON AVENUE REALTY ASSOC. L.P., 3280 REALTY CORP., BUZA-BUZA HOLDING CORP., 2810 MORRIS AVENUE CORP., 212 EAST 182 REALTY CORP. a/k/a 212 EAST 182ND STREET REALTY CORP., 209 HULL REALTY CORP., 2477 GRAND AVENUE CORP., 1990 ELLIS AVENUE CORP., EDITH OPPENHEIMER, STUART OPPENHEIMER, BEVERLY OPPENHEIMER LOBELL, STEVEN HOFFMAN, LENORA PANES and AIR PANES,

Plaintiffs,

-against-

DEWITT STERN GROUP, INC.,

Defendant.

Index No. 104781/04

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant DeWitt Stern Group, Inc. ("defendant") moves for an order, (a) pursuant to CPLR 3211(a)(5), dismissing all causes of action for alleged negligence, breach of implied contract and breach of fiduciary duty, on the grounds that all of the causes of action asserted in the Amended Complaint are barred by the Statute of Limitations; (b) pursuant to CPLR 3211(a)(7), dismissing the cause of action for breach of implied contract on the ground that plaintiffs fail to state a legally sufficient cause of action for breach of implied contract in the Amended Complaint; and (c) pursuant to CPLR 3211(a)(7) dismissing the cause of action for breach of fiduciary duty on the ground that plaintiffs fail to state a legally sufficient cause of

action for breach of fiduciary duty, as under New York law, an insurance broker is not the fiduciary of its clients.

The Amended Verified Complaint

On or about March, 1998, plaintiffs retained defendant to perform insurance borkerage services for them. Plaintiff O & S Management Corp. obtained a Commercial General Liability Policy through defendant as insurance broker, effective 12:01 a.m. on March 23, 1998. From approximately December 31, 1997 to March 28, 1998, plaintiffs were insured for lead paint exposure liability under a claims made policy issued by InterState Fire & Casualty Company. On or about March 28, 1998 and thereafter, plaintiffs entered into discussions and relied upon the expertise of defendant, specifically Leslie Katz, a broker employed with defendant, as to whether plaintiffs needed to obtain tail a/k/a sunset insurance for the claims made policy in effect approximately between December 31, 1997 and March 28, 1998. Defendant advised plaintiffs against obtaining the tail insurance, representing to plaintiffs that they otherwise had appropriate and sufficient coverage for the time period. Due to defendant's failure to recommend and procure tail insurance on plaintiffs' behalf, plaintiffs do not have insurance coverage for lead paint claims for the time period December 31, 1997 to March 28, 1998, and are left susceptible to present and future claims. There is presently a case pending, alleging lead exposure-related injuries in which both O & S Management, Uptown Realty and 2477 Grand Avenue corp. may be exposed to personal liability as the result of the failure of defendant to recommend and procure tail coverage.

Procedural History

Plaintiffs filed the original Summons and Verified Complaint against defendant on March 26, 2004. Thereafter, on April 15, 2004, plaintiffs filed their Amended Verified Complaint. Defendant served its answer to the Amended Complaint on or about August 26, 2004.

Defendant's Contentions

Defendant argues that all of plaintiffs' claims are barred by the Statute of Limitations. The Amended Complaint asserts causes of action for negligence, breach of implied contract, and breach of fiduciary duty. The policy that was procured for plaintiffs had a policy period commencing on March 23, 1998, and the original Complaint is dated March 26, 2004, over six years later.

The cause of action asserting breach of fiduciary duty must be dismissed. The Amended Complaint asserts claims for breach of fiduciary duty. However, under New York law, an insurance broker is not a fiduciary of its customer, and thus, a claim for breach of fiduciary duty may not lie against an insurance broker.

The allegation asserting breach of an implied contract must be dismissed. This cause of action does not allege a specific undertaking, or any particular promise to do anything at all. Thus, the cause of action for breach of implied contract is duplicative of the causes of action for negligence in the Complaint, and must be dismissed as a matter of law.

Plaintiffs' Contentions

Plaintiffs argue that the two tasks performed by defendant are distinct and result in separate claims. First, defendant obtained a new policy for plaintiffs on a going forward basis. And second, several days after the new policy was obtained, and continuing for several years

thereafter, defendant advised plaintiffs against obtaining a separate tail policy on plaintiffs' old insurance policy. It was during this period after March 28, 1998 and continuing for years thereafter, rather than in conjunction with the initiation of the prospective policy, that defendant negligently advised plaintiffs against obtaining the tail policy.

The breach by defendant of the implied contract with plaintiffs did not begin to accrue until, at the earliest, March 28, 1998, and more accurately, many years after that, when Beverly Lowell, acting on behalf of O & S Management, entered into an oral contract with defendant pursuant to which defendant agreed to provide insurance brokerage services to plaintiffs. Plaintiffs' claim was filed on or about March 26, 2004. As such, plaintiffs' claim is cognizable and timely and should not be dismissed.

Further, defendant's motion is premature. Discovery has barely commenced, depositions have not been held and a preliminary conference has yet to be conducted. And, the evidence necessary to prove plaintiffs' claims would be in the possession of defendant and its employee Mr. Katz. His testimony is critical because defendant argues that the statute of limitations began to accrue on March 23, 1998, the date of the policy and plaintiffs argue that the trigger date is March 28, 1998 when Mr. Katz began advising plaintiffs against the tail policy.

With respect to their claim for breach of fiduciary duty, plaintiffs claim that a fiduciary relationship was created when Mr. Katz agreed to review the insurance coverage in place prior to March, 1998 and advised plaintiffs against getting tail insurance. Mr. Katz went beyond his customary duty be agreeing to determine for plaintiffs the adequacy of both past and future insurance and causing them to rely wholly on his expertise as an insurance expert. Establishing this special relationship creating a fiduciary duty can only be ascertained through depositions and

further discovery.

Defendant's Reply

In reply, defendant argues at the outset that plaintiffs did indeed have insurance coverage for lead paint claims as of March 23, 1998. Therefore, if plaintiffs were not covered for lead paint claims at any period, the uncontroverted documentary evidence illustrates that this period ended on March 23, 1998. Plaintiffs claim that defendant should have gotten them a tail insurance policy that ended on March 28, 1998 is baseless and a clear attempt to circumvent the applicable Statute of Limitations. Plaintiffs had coverage for lead paint claims via the first policy procured for plaintiffs by defendant commencing on March 23, 1998.

DISCUSSION

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 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 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare 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.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint

(*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank,i* 301 AD2d 373, 375 [2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

CPLR 3211(a)(5): Statute of Limitations

CPLR 3211(a)(5) provides for dismissal of a cause of action barred by the Statute of Limitations. Actions against insurance brokers are governed by the limitations periods applicable to negligence and breach of contract actions (*see, Chase Scientific Research, Inc. v NIA Group, Inc.*, 96 N.Y.2d 20, 725 N.Y.S.2d 592, 749 N.E.2d 161 [2001]; *see also, Santiago v 1370 Broadway Associates, L.P.*, 96 N.Y.2d 765, 725 N.Y.S.2d 599, 749 N.E.2d 168 [2001]).

A cause of action for breach of contract accrues and the Statute of Limitations commences to run when the contract is breached (*see, Ely-Cruikshank Co. v Bank of Montreal,* 81 N.Y.2d 399, 599 N.Y.S.2d 501, 615 N.E.2d 985). Knowledge of the occurrence of the wrong on the part of plaintiff is not necessary to start the Statute of Limitations running in a breach of contract action (*see, Varga v Credit-Suisse,* 5 A.D.2d 289, 292, 171 N.Y.S.2d 674, *affd.* 5 N.Y.2d 865, 182 N.Y.S.2d 17, 155 N.E.2d 865).

The Statute of Limitations for breach of an implied contract is subject to a six-year

Statute of Limitations (*see, Board of Educ. of the Sachem Cent. School Dist. at Holbrook v Jones*, 205 A.D.2d 486, 614 N.Y.S.2d 23; *see also, Matter of First Nat. City Bank v City of New York Finance Admin.*, 36 N.Y.2d 87, 365 N.Y.S.2d 493, 324 N.E.2d 861).

A cause of action sounding in negligence must be brought within three years of the accrual of a claim (*see,* CPLR 214[4]).

A claim accrues when an injury is sustained. *See, Snyder v Town Insulation, Inc.,* 81 N.Y.2d 429, 599 N.Y.S.2d 515, 615 N.E.2d 999 (1993). It is the date of injury, "rather than the wrongful act of defendant or discovery of the injury by plaintiff[, that] is the relevant date for marking accrual." *Kronos, Inc. v AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289 (1993).

The Statute of Limitations for a breach of fiduciary duty is either three or six years, depending on the substantive remedy sought (*Kaufman v Cohen,* 307 A.D.2d 113, 118 [1st Dept 2003]; *Yatter v William Morris Agency, Inc.,* 256 A.D.2d 260, 261 [1st Dept 1998]).

Breach of Implied Contract Claim:

It has long been recognized that, even in the absence of written or otherwise overt expression, a true, valid and enforceable implied-in-fact contract may be inferred from the conduct of the parties. *Parsa v State of New York,* 64 N.Y.2d 143, 148, 485 N.Y.S.2d 27, 474 N.E.2d 235 (1984); *Jemzura v Jemzura,* 36 N.Y.2d 496, 503-504, 369 N.Y.S.2d 400, 330 N.E.2d 414 (1975); *Miller v. Schloss,* 218 N.Y. 400, 406, 113 N.E. 337 (1916); *Wells v Mann,* 45 N.Y. 327, 331 (1871). However, "in order to infer the existence of a contract from the actions of the parties it must appear that they actually intended to form a contract." *Matter of Estate of Argersinger,* 168 A.D.2d 757, 758, 564 N.Y.S.2d 214 (3d Dep't, 1990), *quoting European*

American Bank v Cain, 79 A.D.2d 158, 163, 436 N.Y.S.2d 318 (2d Dep't, 1981). "[A] contract implied in fact contemplates not assurances or promises but conduct." *Zimmer v Town of Brookhaven*, 247 A.D.2d 109, 114, 678 N.Y.S.2d 377 (2d Dep't, 1998), *quoting Parsa v State of New York, supra*, 64 N.Y.2d at 148, 485 N.Y.S.2d 27, 474 N.E.2d 235. Although the intent to commit to an agreement may be inferred from the conduct of a party, an enforceable contract implied-in-fact still requires the elements of consideration, mutual assent, legal capacity and legal subject matter. *Maas v Cornell University*, 94 N.Y.2d 87, 699 N.Y.S.2d 716, 721 N.E.2d 966 (1999). The burden rests upon the party seeking to enforce the contract to prove the existence and validity of such contract, as well as its terms. *Matter of Estate of Argersinger, supra*, 168 A.D.2d at 758, 564 N.Y.S.2d 214.

In the instant action, the motion to dismiss this cause of action is premature. Plaintiffs sufficiently *state* a claim to overcome the CPLR 3211 motion at this juncture. The specific promise or undertaking stated in the Amended Complaint is the promise to review the existing claims made policy in effect approximately between December 31, 1997 and March 28, 1998, and to advise as to whether plaintiffs needed a tail policy for the existing policy. Depositions are needed in order to flesh out the claim or to establishment a sufficient basis to dismiss this cause of action.

The Negligence Claim:

The allegations of negligence against defendant in the performance of their contractual obligations are governed by the six year Statute of Limitations (*see*, CPLR 213[2]; *National Life Ins. Co. v Hall & Co.*, 67 N.Y.2d 1021, 503 N.Y.S.2d 318, 494 N.E.2d 449), which began to run

from the date plaintiff requested defendants to obtain the additional insurance and defendants' alleged failure to take steps to procure said insurance (*see, Kronos, Inc. v AVX Corp.*, 81 N.Y.2d 90, 595 N.Y.S.2d 931, 612 N.E.2d 289; *Brownstein v Travelers Cos.*, 235 A.D.2d 811, 652 N.Y.S.2d 812; *T & N PLC v Fred S. James & Co. of New York*, 29 F.3d 57 [2d Cir.1994]).

Inasmuch as plaintiffs indicate that they requested said additional coverage on or about March 28, 1998 and since this cause of action for negligent performance of contract was commenced on March 26, 2004, said cause of action is not time-barred, based on the facts before the court at this point, and the motion to dismiss is premature, at this juncture.

The Breach of Fiduciary Claim:

Where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging "injury to property," to which a three-year statute of limitations applies. CPLR 214(4); *Kaufman*, 307 A.D.2d at 118; *Yatter*, 256 A.D.2d at 261. Breach of fiduciary duty claims, like breach of contract claims, generally accrue upon the alleged breach. *Kaufman*, 307 A.D.2d at 121, n 3.

In the instant case, since the only relief sought by plaintiffs is money damages, a three-year statute of limitations bars this claim. The court does not reach the remaining arguments concerning breach of fiduciary duty.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant DeWitt Stern Group, Inc. for an order, (a) pursuant to CPLR 3211(a)(5), dismissing all causes of action for alleged negligence, breach of

implied contract and breach of fiduciary duty, on the grounds that all of the causes of action asserted in the Amended Complaint are barred by the Statute of Limitations; (b) pursuant to CPLR 3211(a)(7), dismissing the cause of action for breach of implied contract on the ground that plaintiffs fail to state a legally sufficient cause of action for breach of implied contract in the Amended Complaint; and (c) pursuant to CPLR 3211(a)(7) dismissing the cause of action for breach of fiduciary duty on the ground that plaintiffs fail to state a legally sufficient cause of action for breach of fiduciary duty, as under New York law, an insurance broker is not the fiduciary of its clients is granted to the extent that the cause of action of plaintiff for breach of fiduciary duty is dismissed. It is further

ORDERED that counsel for all parties shall appear in Part 35, Room 543, 60 Centre Street, for a Preliminary Conference on Tuesday, February 14, 2006 at 2:15p.m. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

Dated: December 30, 2005

Carol Robinson Edmead

CAROL EDMEAD
J.S.C.