

**East 115th St. Realty Corp. v Focus & Struga Bldg.
Devs. LLC**

2008 NY Slip Op 33628(U)

October 9, 2008

Sup Ct, NY County

Docket Number: 6041641/07

Judge: Eileen Bransten

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

PRESENT: **HON. EILEEN BRANSTEN**

PART 3

Justice

Index Number : 604164/2007
EAST 115TH STREET REALTY CORP.,
VS.
FOCUS & STRUGA BUILDING DEVELOPERS L
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

4

INDEX NO. 604164-07

MOTION DATE 7/23/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

vered read on this motion to/for dismiss

PAPERS NUMBERED

1
2,3
4

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

RECEIVED
OCT 15 2008
IAS MOTION
SUPPORT OFFICE

**IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM**

RECEIVED
OCT 24 2008
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
OCT 27 2008
CLERK'S OFFICE
NEW YORK

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

Dated: 10-9-08

Eileen Bransten
J.S.C.

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

NO AI

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

-----X
EAST 115TH STREET REALTY CORP.,

Plaintiff,

-against-

Index No. 604164/07
Motion Date: 7-23-08
Motion Seq. Nos.: 001, 002

FOCUS & STRUGA BUILDING DEVELOPERS LLC,
GREAT AMERICAN INSURANCE COMPANY OF
NEW YORK, ABAD CONSULTING (a corporation),
I. ARTHUR YANOFF & CO. LTD., and MAZZOCCHI
WRECKING INC.,

Defendants.

-----X

FILED
OCT 27 2008
COUNTY CLERK'S OFFICE
NEW YORK

PRESENT: EILEEN BRANSTEN, J.

This action concerns alleged property damage to the plaintiff's five-story building located at 1861 Lexington Avenue, New York, New York as a result of allegedly negligent demolition and construction work. Plaintiff East 115th Street Realty Corp. ("Plaintiff") has brought suit against defendants Focus & Struga Building Developers LLC ("Focus & Struga") and Mazzocchi Wrecking Inc., alleging negligence in the performance of their work on the premises. Plaintiff also sues Great American Insurance Company of New York ("Great American") for breach of the builder's risk insurance policy that Great American issued on the premises after Great American disclaimed coverage. Finally, Plaintiff sues Abad Consulting and I. Arthur Yanoff & Co. Ltd. ("Yanoff"), alleging that each was an insurance broker for Plaintiff and that each failed in its duty to obtain the proper and necessary insurance coverage for the work being performed at the premises.

In motion sequence number 001, defendant Yanoff moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint.

In motion sequence number 002, Plaintiff moves, pursuant to CPLR 602, to consolidate this action with Mazzocchi Wrecking's first-filed suit against Plaintiff, entitled *Mazzocchi Wrecking Inc. v. East 115TH Street Realty Corp.*, Index No. 115232/07, in which Mazzocchi Wrecking seeks payment of \$310,000 for its demolition work at the premises. Defendant Abad Consulting cross-moves for the same relief.

The motions are consolidated for disposition and are denied.

Background

On about March 27, 2007, defendant Focus & Struga performed demolition and construction work at the premises in connection with a renovation project. Allegedly, as a result of the work, the building suffered a partial collapse. The Buildings Department determined that the building was structurally unsound and Plaintiff was ordered to completely demolish the remaining structure. An insurance claim was filed with Great American under the Builder's Risk policy that had been procured by defendant Abad Consulting, Plaintiff's broker, through Yanoff, a wholesale insurance broker. On December 13, 2007, Great American denied the claim based on material misrepresentations in the application for insurance.

In its fifth cause of action, Plaintiff alleges that Yanoff breached its duty to properly advise, failed to obtain proper coverage for Plaintiff, failed to properly process the insurance application and failed to follow Plaintiff's instructions in obtaining the policy. Yanoff contends that this claim fails to state a cause of action and should be dismissed based on documentary evidence, arguing that it acted merely as a wholesale insurance broker, was retained by and dealt solely with Abad Consulting, and thus owed no duty and breached no duty to the Plaintiff in the procurement of the Great American policy.

Analysis

Before a complaint can be dismissed pursuant to CPLR 3211(a)(1), the documentary evidence must "conclusively establish[] a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see also AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 590-91 [2005]; *Winick Realty Group LLC v Austin & Assocs.*, 51 AD3d 408 [1st Dept 2008]). Yanoff's showing falls short of this standard.

In support of its motion to dismiss, Yanoff submits an affidavit from Thomas Mannion, Jr. Mr. Mannion, an "Area President" for Yanoff, does not purport to have any personal knowledge of the insurance placement at issue here. Presumably the contents of his affidavit are based on the documentary evidence submitted in support of the motion. The

documentary evidence consists of two e-mails sent by another Yanoff employee, Veronica Kirkham, to Benito Abad of Abad Consulting and e-mail correspondence between Ms. Kirkham and Great American. Mr. Mannion describes Yanoff as an “insurance wholesaler,” which works with insurance brokers to secure coverage for their clients, and “has no direct relationship with the insurance broker’s client and is not paid by the broker’s client” (Mannion Aff., ¶¶ 3, 5).

Based solely on the documentary evidence he submits--four e-mails mentioned earlier and a one-page “Builder’s Risk Renovation Quote” attached to the first e-mail--Mr. Mannion contends that, in about February 2007, Benito Abad contacted Yanoff seeking to secure “Builder’s Risk” insurance coverage for a renovation project at Plaintiff’s building. Notably, Mr. Mannion does not state how Yanoff was provided this information. Mr. Mannion goes on to state that Yanoff then obtained a quotation for the builder’s risk coverage with Great American, and provided it to Mr. Abad in an e-mail dated February 20, 2007. Yanoff argues that the terms and conditions outlined in the one-page quotation came directly from Great American, that Yanoff did not remove or add any terms, and that the e-mail warns both Abad and Plaintiff to review the quotation carefully and contains a disclaimer that the “Coverages, Limits of Liability, Terms and Condition of our quote may differ from those required by you and/or your client” (Mannion Aff., Exh. A).

On February 28, 2007, Yanoff confirmed that Mr. Abad had agreed to accept this quote and bind coverage on behalf of Plaintiff effective on March 1, 2007. Yanoff thus contends that insurance coverage was in place on the date of Plaintiff's loss, that it had nothing to do with Great American's decision to deny coverage and that it merely acted as a conduit between Plaintiff's insurance broker (Abad Consulting) and the insurer (Great American) to obtain and bind coverage in accordance with the broker's request and the insurer's policy.

In opposition to Yanoff's motion, Plaintiff contends that dismissal is premature and that the documentary evidence submitted does not conclusively establish that Yanoff did not owe a legal duty of care to Plaintiff or that it was not in some way responsible for submitting incorrect information about the renovation project to Great American. Plaintiff submits a copy of the written insurance application that was submitted to Great American as well as Great American's disclaimer letter dated December 13, 2007. The latter denies coverage, among other reasons, on the ground that the application misrepresents whether the renovation project included structural alteration and demolition exposure. While Plaintiff's president, Jacob Azoulay, admits that he hired Abad Consulting, not Yanoff, he avers that it was Yanoff who processed this application with Great American. Plaintiff argues that it had put Yanoff on notice regarding the demolition work by submitting several documents during the application process, including the developer's cost breakdown with "demolition

and removal” as the first cost listed. Even though the insurance application included this document and even though it correctly indicates in a “supplemental” section that demolition work would be done, that information was not included in the main “Commercial General Liability Section” section of the application. No party offers any evidence regarding who prepared and/or may have signed off on the application.

Thus, while Yanoff’s counsel argues that the company merely acted as a conduit, passing Plaintiff’s application from Abad Consulting to Great American, the affidavit offered by Mr. Mannion makes no mention of how and when Yanoff received the Plaintiff’s insurance application, whether Yanoff reviewed that application and how Yanoff went about obtaining the quotation from Great American that Ms. Kirkham ultimately e-mailed to Mr. Abad on February 20, 2007. Even if Yanoff merely passed an application prepared by Abad Consulting to Great American, the application in question, on its face, appears to contain inconsistent information about the work to be performed on Plaintiff’s building.

Yanoff cites no law holding that a wholesale broker can never be liable to the Plaintiff for its own negligence in procuring an insurance policy. Mr. Mannion himself admits that Yanoff has a duty to “obtain insurance quotes that fit the needs of the insurance broker and its client” (Mannion Aff., ¶ 3). In *Soho Generation of New York v Tri-City Ins. Brokers, Inc.* (256 AD2d 229 [1st Dept. 1998]), upon which Yanoff relies, the action was dismissed against the wholesale broker at trial, on a directed verdict, because the evidence

showed it “merely passed” on to the insurer information given to it by the retail broker and had no knowledge that the broker omitted prior insurance losses sustained by the insured in the application. Likewise, in *Shteiman v Lloyd’s of London* (180 AD2d 521 [1st Dept 1992]), the insured made material misrepresentations in its insurance application and the court found, on summary judgment, that the wholesale broker had no contact with the insured and no involvement or knowledge of the misrepresentations. Thus, there was no question that the wholesale brokers in those cases were not negligent. Here, in contrast, the documentary evidence does not conclusively establish the absence of negligence by Yanoff

Yanoff also argues that any duty it owed to Plaintiff to request the appropriate insurance coverage was obviated by the legal principle that “an insured has an obligation to read his or her policy and is presumed to have consented to its terms” (*Katz v American Mayflower Life Ins. Co. of New York*, 14 AD3d 195, 198-99 [1st Dept 2004], *affd. sub nom Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005]; *see also Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]). Though true, there is nothing in the documentary evidence that Yanoff relies on that would have put Plaintiff on notice that the Great American policy would not cover losses sustained during demolition and/or structural work. The one-page “Builder’s Risk Renovation Quote” attached to the February 20, 2007 e-mail that Ms. Kirkham sent to Mr. Abad says nothing

about the exclusion of demolition or structural work. Nor is there evidence that Plaintiff or Abad Consulting received a copy of the actual insurance policy prior to the date of the loss.

Yanoff may ultimately be able to establish entitlement to judgment as a matter of law but has not demonstrated that CPLR 3211 dismissal is warranted at this stage before an answer has been served and discovery has been conducted. Accordingly, Yanoff's motion to dismiss is denied without prejudice to renewal, pursuant to CPLR 3212, after joinder of issue.

Although there is no opposition to Plaintiffs' motion and Abad Consulting's cross-motion to consolidate this action with Mazzocchi Wrecking's action for payment, it appears from the pleadings in both actions and the representations of counsel at oral argument that Mazzocchi Wrecking was brought in on an emergency basis after the partial collapse of the building on March 27, 2007, to complete the demolition for the agreed-upon price of \$310,000, and that Mazzocchi performed that work from March 27, 2007 through April 5, 2007, but Plaintiff has refused to pay. Unless payment was contingent on the Plaintiff's recovery of damages from the culpable party and/or insurance proceeds or Mazzocchi Wrecking had some involvement with the work that caused damage to Plaintiff's building, it is entitled to payment now, not later, and there is no need for it to get mired down in this action, the focus of which will be why the building had to be demolished in the first place and/or insurance coverage.

Accordingly, the motion to consolidate the two actions is denied. If the claims between Plaintiff and Mazzocchi Wrecking are not resolved by settlement and/or summary judgment, either party may renew this motion for consolidation.


Accordingly, it is

ORDERED that I. Arthur Yanoff & Co., Ltd.'s motion to dismiss (motion sequence number 001) is denied and I. Arthur Yanoff & Co., Ltd. shall serve an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the motion and cross motion seeking consolidation of this action with *Mazzocchi Wrecking Inc. v East 115th Street Realty Corp.*, Index No. 115232/07 (motion sequence number 02), is denied with leave to renew

This constitutes the Decision and Order of the Court.

Dated: October 9, 2008
New York, N.Y.

FILED
OCT 27 2008
COUNTY CLERK'S OFFICE
NEW YORK
ENTER:

Hon. Eileen Bransten