

**Books For Less, LLC v Arm-Capacity of New York,
LLC**

2013 NY Slip Op 30060(U)

January 11, 2013

Sup Ct, New York County

Docket Number: 652031/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
CYNTHIA S. KERN
J.S.C.
Justice

PART _____

Index Number : 652031/2012
BOOKS FOR LESS, LLC
vs.
ARM- CAPACITY OF NEW YORK, LLC
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 1/14/13

CK, J.S.C.
CYNTHIA S. KERN
J.S.C.

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

BOOKS FOR LESS, LLC and BOOK OUTLET,
LLC,

Plaintiffs,

Index No. 652031/12

-against-

DECISION/ORDER

ARM-CAPACITY OF NEW YORK, LLC, LOVULLO
ASOCIATES, INC. and CERTAIN UNDERWRITERS
AT LLOYD’S LONDON,

Defendants.

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

| Papers | Numbered |
|--|-------------|
| Notice of Motion and Affidavits Annexed..... | <u>1, 2</u> |
| Answering Affidavits | <u>3, 4</u> |
| Replying Affidavits..... | <u>5, 6</u> |
| Exhibits..... | <u>7</u> |

Plaintiffs commenced the instant action against defendants seeking to recover under an insurance policy they maintained with defendant Certain Underwriters at Lloyd’s, London (“Lloyd’s”). Defendant ARM-Capacity of New York, LLC (“ARM”) now moves for an Order pursuant to CPLR § 3211 (a)(7) dismissing plaintiffs’ complaint, or, in the alternative, pursuant to CPLR § 2201 staying the instant action pending the outcome of the controversy between plaintiffs and Lloyd’s. Defendant LoVullo Associates, Inc. (“LoVullo”) also moves for an Order pursuant to CPLR § 3211 (a)(7) dismissing plaintiffs’ complaint, or, in the alternative, pursuant to CPLR § 2201 staying the instant action pending the outcome of the controversy between plaintiffs and Lloyd’s. The above motions are consolidated for disposition. For the reasons set

forth below, both ARM's motion and LoVullo's motion are granted.

The relevant facts are as follows. In or about 2008, plaintiffs obtained insurance coverage for their wholesale book warehouse located at 540 N. Laurel St., Bridgeton, New Jersey (the "subject property") from Fireman's Insurance Fund ("Fireman's Fund"). ARM, as the insurance broker on behalf of plaintiffs, filled out the application to obtain the insurance. On or about April 19, 2009, the subject property sustained a loss as a result of a windstorm which resulted in water damage (the "first loss"). ARM prepared and submitted a claim to and negotiated and obtained payment from Fireman's Fund for the first loss. Subsequently, Fireman's Fund issued a Notice of Nonrenewal of the insurance policy, effective December 13, 2010, based on the first loss.

On December 8, 2010, ARM contacted LoVullo, Lloyd's agent, seeking to find replacement coverage for plaintiffs. LoVullo provided ARM with a quote for the requested coverage and an application for insurance was submitted to LoVullo by ARM. Plaintiffs thus obtained a replacement commercial general liability policy from Lloyd's for the policy period of December 13, 2010 to December 13, 2011 (the "Policy"). On August 18, 2011, plaintiffs sustained a loss to the subject property as a result of a windstorm and filed a claim with Lloyd's in the amount of \$727,010.98. On November 3, 2011, Lloyd's made a partial payment to plaintiffs in the amount of \$200,000 pending completion of its investigation of the claim. On or about May 29, 2012, Lloyd's sent plaintiff a Notice of Rescission in which Lloyd's rescinded the Policy, denied coverage for the claim and demanded the return of the partial payment of \$200,000 due to the failure to disclose the first loss on the application for insurance.

On or about June 12, 2012, plaintiffs filed the instant action seeking to recover for the

loss to the subject property from Lloyd's under the Policy. As against ARM, plaintiffs allege that ARM assisted plaintiffs in preparing the application for the Policy and that if there were any misrepresentations in the application that caused Lloyd's to rescind the Policy, ARM is responsible. As against LoVullo, plaintiffs allege that as Lloyd's agent, LoVullo was negligent in not informing Lloyd's of the first loss as it was aware of the first loss as a result of a chain of e-mails between ARM and the LoVullo representative.

Both ARM's motion and LoVullo's motion for an Order pursuant to CPLR § 3211 (a)(7) to dismiss plaintiffs' complaint on the ground that plaintiffs' claims against them are premature and not yet ripe are granted. "A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff." *Ashley Builders Corp. v. Town of Brookhaven*, 39 A.D.3d 442 (2d Dept 2007). "The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination." *Id.* It is well-settled that a cause of action "is not enforceable until damages are sustained." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 140 (2009), citing *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). In the instant action, plaintiffs' claims against ARM and LoVullo do not establish a justiciable controversy as the claims have not yet accrued against these defendants. Plaintiffs' complaint alleges

In the event that Lloyd's is found to have properly rescinded the Policy, to have properly demanded that plaintiffs return the partial payment, and to have properly refused to pay plaintiffs the balance due in the sum of \$527,010.98...any such finding would be because ARM breached its duty to plaintiffs and acted negligently by failing to obtain adequate insurance....

In the event that Lloyd's is found to have properly rescinded the Policy, to have properly demanded that plaintiffs return the partial

[*5]
payment, and to have properly refused to pay plaintiffs the balance due for personal property loss in the sum of \$527,010.98...then plaintiffs shall be entitled to recover from LoVullo...

(emphasis added). As plaintiffs' complaint makes clear, plaintiffs will not have a justiciable controversy against ARM or LoVullo until a judicial determination is made that the Policy was rightfully rescinded by Lloyd's based on the material misrepresentations in the application for insurance. Until such a determination is made, no valid claim against ARM or LoVullo has accrued as plaintiff has sustained no damages.

Plaintiffs' assertion that their allegations against ARM and LoVullo should not be dismissed as they comprise an alternative theory of recovery is without merit. Only if Lloyd's is found to have no obligation under the Lloyd's Policy will plaintiffs have a claim against ARM and LoVullo. Therefore, contrary to plaintiffs' assertion, the allegations against ARM and LoVullo do not establish an alternative theory of recovery, which would permit plaintiffs to recover concurrently from any of these defendants at plaintiffs' election, but rather they establish a contingent claim, which is dependent on the adjudication of the controversy between plaintiffs and Lloyd's. Further, plaintiffs' assertion that ARM and LoVullo's motion to dismiss on the ground that the claims are not yet ripe must be denied because they are confusing liability with damages is without merit. The judicial determination of whether Lloyd's had a legitimate basis to rescind the Policy will decide *whether* plaintiff has a cause of action against ARM and LoVullo in the first place and not *which* of the defendants is liable. If it is found that Lloyd's was not entitled to rescind the Policy, then plaintiffs will be unable to maintain any cause of action against ARM or LoVullo. Thus, as plaintiffs' claims against ARM and LoVullo have not yet accrued, both ARM's motion and LoVullo's motion to dismiss the complaint must be

granted.

Accordingly, defendant ARM's motion and defendant LoVullo's motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing plaintiffs' complaint are granted. The Clerk is hereby directed to dismiss plaintiffs' complaint as against defendants ARM and LoVullo only. This constitutes the decision and order of the court.

Dated:

11/11/13

Enter: _____

CSK

J.S.C.

**CYNTHIA S. KERN
J.S.C.**