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SHORT FORM ORDER

INDEX No. 12-18782

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-31-12 (#001)
MOTION DATE 12-20-12 (#002)
ADJ. DATE 1-10-13
Mot. Seq. # 001 - MotD
002 - MotD

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JT QUEENS CARWASH, INC., and FRANK ROMAN,

Plaintiffs,

- against -

JDW & ASSOCIATES INC. and JAY WEISS,

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion to dismiss and cross motion to amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 19; Answering Affidavits and supporting papers 20 - 21; 22 - 23; Replying Affidavits and supporting papers memoranda of law, 24 - 25; 26 - 27; 28 - 29; 30 - 31; 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 dismissing the complaint against them is determined as follows; and it is

ORDERED that the cross motion by plaintiffs for leave to amend their complaint is granted to the extent that plaintiff may serve an amended complaint that conforms to this order upon defendants' counsel within 30 days of the entry of this order.

On February 22, 2011, Israel Calderon, an employee at a carwash known as JT Queens Carwash which is owned by plaintiff Frank Roman, was injured while working at the subject premises. Calderon commenced an action in Supreme Court, Queens County, assigned index number 9764/2011, against JT Queens Carwash's landlord, 88-16 Northern LLC, which impleaded plaintiffs in the action. Thereafter, plaintiffs learned that their commercial general liability insurer Catlin Specialty Insurance Company disclaimed coverage to 88-16 Northern LLC for the injury on the subject premises because it was not listed

as an additional insured in plaintiffs' policy, and disclaimed coverage to plaintiffs based on the employer's liability exclusion in the policy. On December 5, 2011, 88-16 Northern LLC served a notice of default to cure, stating among other things, that unless plaintiffs produced an insurance policy which listed the landlord as an additional insured, pursuant to their lease agreement, it would serve plaintiffs with a notice of intention to end their lease. On December 16, 2011, JT Queens Carwash filed an action in Supreme Court, Queens County, assigned index number 28362/2011, against its landlord seeking a "Yellowstone Injunction" prohibiting the termination of its tenancy, which was denied by an order dated February 15, 2012. On February 7, 2012, JT Queens Carwash brought an action against Catlin in Supreme Court, Queens County, assigned index number 2638/2012, seeking reformation of the insurance policy so that the policy as reformed names 88-16 Northern LLC as an additional insured and a declaration that Catlin is obligated to defend 88-16 Northern LLC in the Calderon action.

Subsequently, JT Queens Carwash commenced the instant action to recover damages allegedly resulting from the failure of JDW & Associates Inc. and Jay Weiss to procure proper insurance coverage for their benefit. As relevant to the instant motions, the complaint alleges that defendant Jay Weiss, an insurance agent for defendant JDW & Associations secured a commercial general liability insurance for plaintiffs, issued by Catlin on June 8, 2010, which did not name plaintiffs' landlord as an additional insured, as well as a Workers' Compensation Policy from the Chartis Insurance Company for plaintiffs in June 2010. It alleges that by virtue of the analysis and guidance provided by defendants, there was a special relationship between the parties. The first and third causes of action seek damages for negligence and negligent representation, respectively, alleging that defendants breached their duty by failing to name plaintiffs' landlord as an additional insured and issuing a certificate of insurance which falsely stated that their landlord was an additional insured. The second cause of action seeks damages for breach of fiduciary duty, and the fourth cause of action seeks damages for breach of contract. The complaint further seeks a judgment declaring, among other things, that defendants are liable for losses and damages caused by their loss of business, loss of their lease, and damages they sustain as costs to defend and indemnify the landlord.

Defendants now move to dismiss plaintiffs' complaint against them pursuant to CPLR 3211(a)(7) on the ground that the causes of action for negligence and breach of fiduciary duty are duplicative of the cause of action for breach of contract. Defendants argue that the complaint should be dismissed as to defendant Weiss in his individual capacity, as plaintiffs failed to allege an independent tortious act by him. Defendants also argue that the declaratory relief that plaintiffs seek is premature and inappropriate. In support of their motion, defendants submit copies of the pleadings and denial of claim letters from Catlin Insurance and Chartis Insurance.

Plaintiffs oppose the motion, arguing that the causes of action are not duplicative, and that the complaint should not be dismissed as to Weiss, as corporate officers are liable individually for torts which they personally commit while acting in their official capacities. Plaintiffs also cross-move for leave to serve an amended complaint including additional damages and adding a fifth cause of action seeking a declaration that defendants have a duty to defend and indemnify them in the Calderon action. In opposition to defendants' motion and in support of their cross motion, plaintiffs submit, among other things, an affidavit of Roman, copies of the lease agreement between plaintiffs and their landlord, the certificate of liability insurance issued by defendants, denial of claim letters from Catlin Insurance and Chartis Insurance, and a notice of intent to end the lease sent by 88-16 Northern Blvd. LLC sent to plaintiffs.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must afford the complaint a liberal construction, accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Melnicke v Brecher***, 65 AD3d 1020, 886 NYS2d 406 [2d Dept 2009]; ***Fishberger v Voss***, 51 AD3d 627, 858 NYS2d 257 [2d Dept 2008]). If from the four corners of the complaint factual allegations are discerned which taken together manifest any cause of action cognizable at law, the motion will fail, regardless of whether the plaintiff will ultimately prevail on the merits (*see* ***Danna v Malco Realty, Inc***., 51 AD3d 621, 857 NYS2d 688 [2d Dept 2008]; ***Bovino v Village of Wappingers Falls***, 215 AD2d 619, 628 NYS2d 508 [2d Dept 1995]).

An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time or to inform the client of the inability to do so (*see* ***Murphy v Kuhn***, 90 NY2d 266, 270, 660 NYS2d 371 [1997]; ***Verbert v Garcia***, 63 AD3d 1149, 882 NYS2d 259 [2d Dept 2009]; ***JKT Constr. v United States Liab. Ins. Group***, 39 AD3d 594, 835 NYS2d 270 [2007]; ***Fremont Realty. v P & N Iron Works***, 39 AD3d 586, 835 NYS2d 273 [2007]). Therefore, the duty is defined by the nature of the client's request (***Loevner v Sullivan & Strauss Agency***, 35 AD3d 392, 825 NYS2d 145 [2d Dept 2006]; ***Kyes v Northbrook Prop. & Cas. Ins.***, 278 AD2d 736, 717 NYS2d 757 [3d Dept 2000]). An agent or broker may be held liable under theories of breach of contract or negligence for failing to procure insurance (*see* ***Structural Bldg. Prods. Corp. v Business Ins. Agency***, 281 AD2d 617, 722 NYS2d 559 [2d Dept 2001]; ***American Ref-Fuel Co. of Hempstead v Resource Recycling***, 281 AD2d 574, 722 NYS2d 571 [2d Dept 2001]). In order for an agent or broker to be held so liable, a plaintiff must demonstrate that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction (*see* ***Mickey's Rides-N-More, Inc. v Anthony Viscuso Brokerage, Inc.***, 17 AD3d 328, 792 NYS2d 570 [2d Dept 2005]).

The branch of defendants' motion to dismiss the first cause of action for negligence as duplicative of the breach of contract claim is denied. Here, plaintiff has alleged a breach of duty independent of the contract itself, as the complaint states that defendants breached their duty of care by issuing a certificate of insurance falsely stating the plaintiffs' landlord was an additional insured under the Catlin Policy (*see* ***Bruckmann, Rosser, Sherill & Co., L.P. v Marsh United States***, 65 AD3d 865, 885 NYS2d 276 [1st Dept 2009]).

With regard to the branch of defendants' motion to dismiss plaintiff's cause of action for breach of fiduciary duty, in the absence of a special relationship, a claim against an insurance agent or broker for breach of fiduciary duty does not lie (***Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.***, *supra* at 867; ***People v Liberty Mut. Ins. Co.***, 52 AD3d 378, 380, 861 NYS2d 294 [1st Dept 2008]; *see* ***Murphy v Kuhn***, 90 NY2d 266, 660 NYS2d 371 [1997]). However, it is only in "exceptional and particularized situations" when there is a "special relationship" between an insurance broker and its customer that a special level of advisory responsibility may exist (***Murphy v Kuhn***, *supra* at 270-72; ***Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.***, *supra*). A special relationship is not established by the fact that the relationship of the parties had lasted a considerable period of time (*see* ***Hersch v DeWitt Stern Group, Inc.***, 43 AD3d 644, 841 NYS2d 516 [1st Dept 2007]; ***M & E Mfg. Co. v Frank H. Reis, Inc.***, 258 AD2d 9, 692 NYS2d 191 [3d Dept 1999]). Here, the allegations in the complaint establish that the parties had nothing

more than a typical insurance agent-customer relationship. Thus, the branch of defendants' motion to dismiss this cause of action is granted.

As to the branch of defendants' motion to dismiss the complaint as to Weiss in his individual capacity, it is well settled that a corporate officer may not be held liable for the negligence of the corporation merely because of his or her official relationship to it (*see* ***Bernstein v Starrett City***, 303 AD2d 530, 758 NYS2d 658 [2d Dept 2003]; ***Felder v R&K Realty***, 295 AD2d 560, 744 NYS2d 213 [2d Dept 2002]). The general rule is that an officer of a corporation who participates in the commission of a tort by the corporation is personally liable therefor (*see* ***Bridges v Wyandanch Community Dev. Corp.***, 66 AD3d 938, 888 NYS2d 142 [2d Dept 2009]; ***Sisino v Island Motorcross of N.Y., Inc.***, 41 AD3d 462, 841 NYS2d 308 [2d Dept 2007]). For personal liability to be imposed, it must be shown that the officer was a participant in the wrongful conduct (*see* ***PDK Labs, Inc. v G.M.G. Trans W. Corp.***, 101 AD3d 970, 957 NYS2d 191 [2d Dept 2012]; ***Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.***, 64 AD3d 85, 878 NYS2d 97 [2d Dept 2009]; ***Aguirre v Paul***, 54 AD3d 302, 862 NYS2d 580 [2d Dept 2008]). Here, the complaint alleges that Weiss personally participated in the allegedly negligent act by issuing a certificate of insurance which stated that plaintiffs' landlord was an additional insured under the Catlin insurance policy. Thus, the branch of defendants' motion to dismiss the complaint as to Weiss in his individual capacity is denied.

With regard to defendants' motion to dismiss plaintiffs' cause of action for a declaratory judgment, a plaintiff may not seek a declaratory judgment when other remedies are available (*see* ***Wells Fargo Bank, N.A. v GSRE II, Ltd.***, 92 AD3d 535, 939 NYS2d 348 [1st Dept 2012]; ***Singer Asset Fin. Co., LLC v Melvin***, 33 Ad3d 355, 822 NYS2d 68 [1st Dept 2006]). Here, plaintiffs have other remedies available as they have asserted causes of action for negligence, breach of contract and negligent representation. Moreover, plaintiffs seek a declaration that defendants are liable for damages caused by loss of their business and lease, and damages they sustain in defending and indemnifying the landlord in the underlying action, which is premature (*see* ***Kings Park Indus., Inc. v Affiliated Agency, Inc.***, 22 AD3d 466, 802 NYS2d 202 [2d Dept 2005]; ***Hesse v Speece***, 204 AD2d 514, 611 NYS2d 308 [2d Dept 1994]). Thus, defendants' motion to dismiss plaintiffs' cause of action for a declaratory judgment is granted.

As to plaintiffs' cross motion, generally leave to amend a pleading should be freely given (*see* CPLR 3025[b]). However, a court should deny a motion for leave to amend a petition if the proposed amendment is palpably insufficient, would prejudice or surprise the opposing party, or is patently devoid of merit (*see* ***Town of Southampton v Chiodi***, 75 AD3d 604, 606, 907 NYS2d 25 [2d Dept 2010]; ***Ward v Bennett***, 214 AD2d 741, 745, 625 NYS2d 609 [2d Dept 1995]). Here, there is no evidence that defendants will be prejudiced if the requested amendment is permitted. However, the second cause of action for breach of fiduciary duty has been dismissed. Moreover, the fifth cause of action in plaintiffs' amended complaint, which seeks a declaration that defendants are obligated to defend and indemnify plaintiffs and plaintiffs' landlord in the Calderon action has no merit. Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (*see* CPLR 3001; ***Rockland Power & Light Co. v City of New York***, 289 NY 45, 43 NE2d 803 [1942]; ***Chanos v MADAC, LLC***, 74 AD3d 1007, 903 NYS2d 506 [2d Dept 2010]; ***Thome v Alexander & Louisa Calder Found.***, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 906 NYS2d 817 [2010]). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either

as to present or future obligations" (***James v Alderton Dock Yards***, 256 NY 298, 305, 176 NE 401 [1931]; *see* ***Palm v Tuckahoe Union Free School Dist.***, 95 AD3d 1087, 944 NYS2d 291 [2d Dept 2012]; ***Chanos v MADAC, LLC***, *supra*). Plaintiffs' fifth cause of action is inappropriate, as such declaratory relief should be asserted against the insurer, Catlin, and not the insurance broker. As to the portion of the declaratory relief regarding plaintiffs' landlord's rights, plaintiffs' landlord is not a party to the instant action, and, thus, plaintiffs may not seek a declaration as to its rights. Thus, plaintiffs are granted leave to serve an amended complaint which contains the first cause of action for negligence, the third cause of action for negligent representation and the fourth cause of action for breach of contract.

Dated: April 2, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION