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

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59 SOUTH 4TH LLC,

Index No. 650979/2015

Plaintiff,

-against-

DECISION/ORDER

A-TOP INSURANCE BROKERAGE, INC. and
INESSA NIKOL,

Defendants.

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HON. CYNTHIA S. 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.....	1
Affidavits in Opposition.....	2
Affidavits in Reply.....	3
Exhibits.....	4

Plaintiff commenced the instant action against defendant broker for their alleged failure to procure proper insurance. Defendants now move for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's complaint. For the reasons set forth below, moving defendants' motion is granted in part and denied in part.

The complaint alleges as follows. Plaintiff 59 South 4th LLC ("59 South") is the owner and developer of a real estate development project known as Wythe Lane Townhouses located in Brooklyn, New York (the "project"). 59 South contracted with non-party K-Square Developers Inc. ("K-Square") for K-Square to act as general contractor for the project (the "GC Contract"). Under the GC Contract, K-Square was required to maintain adequate insurance that would cover the project and protect the interests of 59 South and other project stakeholders. Accordingly, K-

Square secured general contractor insurance, including both primary insurance and excess insurance through defendant A-Top Insurance Brokerage, Inc. ("A-Top"). Defendant Inessa Nikol ("Nikol") served as A-Top's representative in communication with K-Square and in securing insurance for K-Square.

When obtaining insurance through the defendants, K-Square made clear to the defendants that its general contracting business involved both work through subcontractors and work that K-Square performed directly. Thus, K-Square made clear to the defendants that it required policies that would provide coverage for jobs in which K-Square was more than a "paper GC." The defendants knew, because K-Square's principal, Rudolf Kalaitchev, told Nikol that K-Square was price sensitive and that the defendants' ability to earn and keep K-Square's business would depend on the defendants' ability to find and secure competitively priced policies. In or about April 2014, defendants obtained both primary and excess insurance for K-Square.

Prior to entering into the GC Contract with K-Square and beginning construction, 59 South sought information about K-Square's insurance. Specifically, before hiring K-Square, 59 South needed to know whether K-Square's insurance would cover the specific work that 59 South and K-Square intended K-Square to perform as general contractor for the project, that the project would be covered by K-Square's policy and that the interests of 59 South and other stakeholders would be included within the coverage. On or about July 10, 2014, Nikol told plaintiff's representative that the policies she had obtained for K-Square permitted K-Square to perform the work at the project and provided coverage for it. Notwithstanding these assurances, plaintiff alleges that Nikol did not actually tell the insurance carriers about the scope of K-Square's work at the project and when the insurance carriers learned of the actual scope of the work that K-Square was performing for the project, they canceled the policies, leaving K-Square

and 59 South without the insurance that the project required.

Plaintiff, thereafter, procured replacement insurance for K-Square when K-Square could not afford to do so itself, so as to permit the project to proceed. Following this, K-square assigned to 59 South all of K-Square's claims relating to insurance, including claims against the defendants asserted herein.

Based on the foregoing, plaintiff commenced the instant action against defendants asserting six causes of action: (1) breach of contract against A-Top; (2) breach of covenant of good faith and fair dealing against A-Top; (3) negligence against both defendants; (4) negligent misrepresentation against both defendants; (5) fraud against both defendants; and (6) violation of New York Consumer Protection Act against both defendants. Furthermore, plaintiff alleges its damages include losses associated with a shutdown of the project, which could not proceed without insurance in place, the costs of replacement insurance, which was even higher than it would have initially been due to the carriers canceling the policies and tarnishing K-Square's ability to secure replacement insurance, and losses associated with plaintiff developing the project's plan and budget based on the misrepresentations of the costs of insurance coverage. Defendants now move to dismiss complaint in its entirety on the ground that it fails to state a cause of action.

On a motion addressed to the sufficiency of the complaint pursuant to CPLR § 3211 (a)(7), the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to

whether it states in some recognizable form any cause of action known to our law." *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

As an initial matter, defendants' motion for an order dismissing plaintiff's first and third causes of action for breach of contract and negligence on the ground that plaintiff has not alleged damages arising from a loss that would have been covered under plaintiff's requested policy had it been in place is denied. Defendants contend that in order to sustain a claim for breach of contract or negligence against a broker, plaintiff must allege, as an essential element of damages, that the insured suffered a loss that, but for the broker's failure to procure insurance, would have been covered under an insurance policy. This argument is without merit as no court has ever limited a breach of contract or negligence claim against a broker in such a way. Defendants correctly acknowledge that under New York law, "a party who has engaged a person to act as an insurance broker to procure adequate insurance is entitled to recover damages from the broker if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refused to cover the loss." *Bruchmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 A.D.3d 865, 866 (1st Dept 2009) (internal citations and quotations omitted). However, defendants incorrectly conclude that the corollary of this principle is that any claim against a broker is limited to these specific circumstances. Nothing in the case law that defendants cite explicitly states or suggests that the court meant to limit a breach of contract or negligence claim against a broker in this way. Thus, defendants' motion to dismiss plaintiff's first and third causes of action is denied.

Further, defendants' motion for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's fourth and fifth causes of action for fraud and negligent misrepresentation on the

ground that plaintiff has not sufficiently plead that defendants were the proximate cause of its injuries is denied. To state a claim for fraud or negligent misrepresentation, plaintiff must allege "that the alleged misrepresentations or other misconduct were the direct and proximate cause of the losses claimed." *Laub v. Faessel*, 297 A.D.2d 28, 30 (1st Dept 2002). "To establish causation, plaintiff must show both that defendant's misrepresentation induced the plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *Id.* at 31 (internal citations omitted). "An essential element of the plaintiff's cause of action for negligence or for . . . any . . . tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *Id.* (internal citations and quotations omitted).

Here, plaintiff's complaint sufficiently alleges a reasonable connection between defendants' alleged misrepresentations and plaintiff's alleged damages. The complaint alleges that Nikol misrepresented to plaintiff the scope of coverage obtained for K-Square and about what disclosures defendants had made to the insurance carriers and, in reliance on these misrepresentations, plaintiff and K-Square agreed to work together on the project and entered into the GC Contract and established a final budget for the project. The complaint further alleges that as a result of these misrepresentations the polices were not written with the proper coverage and, ultimately, once the insurer found out about the proper scope of K-Square's work on the project it canceled the policies resulting in damages to the plaintiff, including losses associated with a shutdown of the project, which could not proceed with insurance in place, and costs of replacement insurance. The court finds these allegations sufficient to allege proximate cause.

However, defendants' motion for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is granted on the ground that the claim is duplicative of the breach of contract claim. It is well settled that New York Law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim based on the same facts is also pled. *See Kaminsky v. FSP Inc.*, 5 A.D.3d 251, 252 (1st Dept 2004). In order to maintain such a claim, plaintiff must allege a "breach of a duty other than, and independent of, that contractually established between the parties." *Id.* Further, a claim for breach of the implied covenant of good faith and fair dealing will be dismissed where the damages alleged by such a breach are "intrinsically tied to the damages resulting from the breach of a contract." *Canstar v. J.A. Jones Construction*, 212 A.D.2d 452, 453 (1st Dept 1995).

Here, plaintiff's claim for breach of the implied covenant of good faith and fair dealing must be dismissed as plaintiff fails to allege a breach of a duty other than, and independent of, one under the alleged contract between the parties. Plaintiff's claim for breach of the implied covenant of good faith and fair dealing rests on the sole allegation that "A-Top has violated the implied covenant of good faith and fair dealing contained in its contract alleged herein when it knowingly provided inaccurate information to those from who it procured the insurance, to K-Square, and to 59th South." This conclusory allegation is identical to that alleged under plaintiff's breach of contract claim and contains no facts demonstrating a duty independent of one present in the alleged contract. Moreover, plaintiff fails to allege any damages separate and apart from those sought in its breach of contract claim. Thus, plaintiff's second cause of action must be dismissed as duplicative.

Additionally, defendants' motion for an order pursuant to CPLR § 3211(a)(7) dismissing

plaintiff's sixth cause of action for violation of General Business Law § 349 ("GBL § 349") on the ground that it fails to state a claim is granted. GBL § 349 declares unlawful any "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." "[P]arties claiming the benefit of the section must, at the threshold, charge conduct that is consumer oriented." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 (1995); *see also Oswego Laborers' Local 24 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). "The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; private contract disputes unique to the parties . . . would not fall within the ambit of the statute." *Id.* (internal quotations and citations omitted); *see also Cruz v. NYNEX Information Resources*, 263 A.D.2d 285, 290 (1st Dept 2000).

Here, plaintiff has not met the threshold requirement to maintain a claim under GBL § 349 because defendants' alleged acts in misrepresenting to plaintiff that the insurance issued for K-Square was adequate and that they had told the insurance companies the scope of K-Square's work on the project does not constitute consumer-oriented conduct. Plaintiff's complaint is devoid of any allegations that defendants' acts have a broader impact on consumers at large. Rather, plaintiff's sole allegation in support of its claim under GBL § 349 is that "[t]hrough the conduct alleged herein, defendant engaged in deceptive acts and practices in the conduct of their business, in violation of General Business Law § 349." This conclusory assertion is clearly insufficient to demonstrate that defendants' acts were consumer-oriented. Indeed, on the face of the complaint, it is clear that this action is essentially a private contract dispute over policy coverage and the procuring of the insurance policy in the first instance, which is unique to these parties and not conduct with affects the consuming public at large. Accordingly, plaintiff's

sixth cause of action must be dismissed.

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's second and sixth causes of action is granted; and it is further

ORDERED that defendants' motion to dismiss plaintiff's first, third, fourth and fifth causes of action is denied. This constitutes the decision and order of the court.

Dated: 8/11/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.