At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of May, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

----------X

1015 70TH STREET, LLC,

Plaintiff,

- against -

Index No. 508378/13

M&S INSURANCE AGENCY, INC., LEADING INSURANCE GROUP INSURANCE CO., LTD., LEADING INSURANCE SERVICES, INC., AND INTERNATIONAL UNDERWRITING AGENCY, INC.,

Defendants.

----------X

The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	88-115, 186 159-179 230-235 126-141
Opposing Affidavits (Affirmations)	118-120, 122-125, 188, 228, 243 195-206 184-185, 189-194, 207-212, 214-217 218-223
Reply Affidavits (Affirmations)	241 237 246
Surreply	245
Memoranda of Law	116, 121, 242 180, 244 157, 183, 213, 239 224

Upon the foregoing papers, in this action by plaintiff 1015 70th Street, LLC (plaintiff) against defendants M&S Insurance Agency, Inc. (M&S), Leading Insurance Group Insurance Co., Ltd. (LIG), Leading Insurance Services, Inc. (LIS), and International Underwriting

Agency, Inc. (International Underwriting) (collectively, defendants), for a declaratory judgment that defendants must pay it policy benefits, to have its insurance claim paid, or to recover damages for the alleged failure to procure insurance coverage, International Underwriting moves, under motion sequence number five, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint and all cross claims as against it. M&S moves, under motion sequence number six, for an order, pursuant to CPLR 3212, granting it partial summary judgment dismissing plaintiff's third cause of action for gross negligence, plaintiff's fourth cause of action for breach of fiduciary duty, and all claims by plaintiff for consequential damages, lost profits, loss of rents, and net losses on the sale of plaintiff's property. LIG and LIS[1] (collectively, LIG) move, under motion sequence number seven, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint and all cross claims as against them. Plaintiff moves, under motion sequence number eight, for an order, pursuant to CPLR 3212, granting it partial summary judgment on the issue of liability as against M&S.

Facts and Procedural Background

M&S is a retail insurance brokerage firm, which is owned by Mendel Lustigman (Lustigman), and his wife, Sima Lustigman (Sima). M&S had a Brokerage Agreement, dated January 12, 2012, with International Underwriting, which is a wholesale insurance brokerage firm. Under this Brokerage Agreement, M&S was authorized to submit risks for coverage

[1]LIS and LIG's answer states that LIS is the U.S. Manager for LIG.

to International Underwriting, which would submit applications for insurance coverage to insurance companies. Pursuant to a Broker Agreement, dated January 5, 2010, International Underwriting, as a wholesale insurance broker, had a contractual relationship with LIG, an insurance company, which allowed International Underwriting to submit applications for coverage via LIG's online portal. The LIG underwriter would generate quotes for insurance coverage through the online portal.

On Wednesday, October 16, 2013, plaintiff requested a quote from M&S regarding obtaining insurance coverage for commercial real property located at 1015 70th Street, in Brooklyn, New York (the property), which it was in contract to purchase. The property was a three-story, three-family rental building. Lustigman then sent an email that same day at 4:04 p.m. to Julia Minji Seo (Seo), an associate underwriter for International Underwriting, in which he requested that International Underwriting provide a quote for lessor's risk coverage for the property, informing her that plaintiff was going to close on the property the next morning and that plaintiff wanted a binder that night if possible. At 4:28 p.m., Lustigman stated to plaintiff that he would make sure that plaintiff had a binder by 9:00 a.m. the next day. Seo, in response to Lustigman's request, submitted the required information in the portal of LIG's website and generated a quote from LIG, which she forwarded to M&S at 4:55 p.m., noting that the quote was for basic form coverage since special form coverage was not available absent further information regarding renovation dates.

At 1:10 p.m. on Thursday, October 17, 2013, plaintiff stated to Lustigman that the binding of insurance was urgent and needed to be completed as soon as possible, and plaintiff requested the paperwork to bind the insurance. By an email to Seo sent the same day at 2:51 p.m., M&S provided supplemental information regarding renovations to the property and requested special form coverage. Later that day, Seo forwarded a special form quote from LIG to M&S. At 3:40 p.m. on October 17, 2013, Lustigman sent plaintiff a paid receipt by an email. The paid receipt, which is signed by Sima, is dated October 17, 2013, and stated that this is to confirm that the insurance policy for the property is paid in full for the year in the amount of $2,240.92. Lustigman admits that he gave plaintiff a binder on October 17, 2013 to use at the closing.

On October 17, 2013, plaintiff closed on the purchase of the property, as reflected by a deed dated October 17, 2013. At the closing, plaintiff presented the binder to its lender for the purchase of the property as evidence of having insurance coverage. The purchase price paid by plaintiff for the property was $447,500.

By an email dated Friday, October 18, 2013 at 11:02 a.m., Lustigman advised plaintiff that the policy was approved for special form coverage, but the premium had increased to $2,387.83, and he attached a revised binder and revised paid receipt. The insurance binder, dated October 17, 2013, which was sent by email from Lustigman to plaintiff on October 18, 2013, listed the insurer as LIG, stated that the insurance policy was effective from October 17, 2013 through October 17, 2014, and specified the amounts of coverages and the policy

limits. The binder was solely generated by M&S. Plaintiff paid for the insurance policy by a check for $2,387.83, made payable to M&S, dated October 18, 2013. Lustigman deposited this check, and it cleared. According to Lustigman, payment of the premium for insurance is due to International Underwriting within two weeks.

By an email at 12:48 p.m. on October 18, 2013, M&S attached an application and quote to an email to plaintiff, requesting plaintiff to sign where indicated and return by fax or email. Plaintiff immediately executed and returned the application and quote. By an email to Seo dated October 18, 2013 at 1:35 p.m., Lustigman requested that International Underwriting bind coverage effective October 17, 2013 as per an attached signed application. By an email dated October 18, 2014 at 3:35 p.m., Seo responded that she realized the binding request date was the day before (i.e., October 17, 2017), and not the present date (i.e., October 18, 2017). Seo stated that she was not sure if the date could be backdated because International Underwriting did not receive the request on October 17, 2017. Seo also stated that she could try to ask the underwriter if it could be backdated one day, but she could not guarantee the approval. Lustigman, by an email on October 18, 2013 at 3:37 p.m., stated "try for yesterday, [if] not approved let it be today." Seo, by an email dated October 18, 2013 at 4:32 p.m., stated that the underwriter approved to backdate to October 17, 2013, but it needed a no loss letter from October 17, 2013 to the present date, i.e., October 18, 2013. Seo asked Lustigman to "confirm if [it was] okay to proceed to bind," and informed him that International Underwriting's office was closing at 5:00 p.m. that day. Lustigman, by an

email dated October 18, 2013 at 5:41 p.m., after International Underwriting's office had already closed for the day, apologized for not seeing Seo's email earlier, and stated that International Underwriting should "go ahead and bind," and since it was a Friday, he would provide the no loss letter to her on Monday.

Lustigman did not ask plaintiff to provide the no loss letter on October 18, 2013 because it was "after work hours" (Lustigman's deposition tr at 65, lines 11-14), and he did not inform plaintiff about the need for the no loss letter during the weekend. Lustigman admitted, at his deposition, that he did not communicate with plaintiff about the no loss letter until Monday (*id.* at 64, lines 13-22).

On Sunday, October 20, 2013, a fire occurred at the property, causing significant damage to the structure of the building and its contents. M&S was informed of the fire by an email, dated Monday, October 21, 2013 at 10:04 a.m., to Lustigman. On October 21, 2013, Yisroel Shenkman (Shenkman), who is a member and principal of plaintiff, called Lustigman regarding insurance coverage for the fire, and Lustigman told him that "there should be coverage," and that "[t]here [wa]s no reason why" there would not be coverage (Lustigman's deposition tr at 70, lines 15-16). M&S did not seek a no loss letter from plaintiff until after the fire. M&S did not inform International Underwriting about the fire at that time, but, instead, continued in its efforts to obtain binding insurance coverage dating back to before the fire occurred.

By an email dated Monday, October 21, 2013 at 10:58 a.m., Seo reminded Lustigman that International Underwriting was waiting for the no loss letter, confirming no losses from October 17, 2013 to the then current date, i.e., October 21, 2013. At 12:03 p.m. that day, Lustigman responded that plaintiff had not sent the no loss letter yet, and Lustigman requested that International Underwriting bind effective Friday, October 18, 2013, instead of Thursday, October 17, 2013 since he believed that a no loss letter would not be needed for October 18, 2013. At 1:24 p.m., Seo responded that binding coverage on Friday, October 18, 2013 was, at that point, still backdating because International Underwriting did not bind coverage on that Friday. Seo stated that International Underwriting must, therefore, receive a no loss letter for October 18, 2013 to October 21, 2013 (that day) either way. Seo further stated that she would "go ahead and bind this," and that she would submit the no loss letter upon receipt. By an email dated Tuesday, October 22, 2013 at 5:47 p.m., Seo advised Lustigman that International Underwriting did not issue the policy yet, and that LIG could backdate to October 18, 2013, but LIG needed to receive a no loss letter from plaintiff, confirming that there were no losses from that date to the current date.

According to the deposition testimony of James Lee (Lee), an underwriting supervisor for LIG, and Joseph Chang (Chang), an assistant vice-president of underwriting, a policy effective October 17, 2013 was tentatively issued on October 18, 2013 based upon Lee's willingness to backdate the policy, but such issuance was conditioned on receiving a no loss letter (Lee's deposition tr at 34-37; Chang's deposition tr at 58-61, 80-81, 95). However, a

no loss letter certifying that there were no losses to the current date could not be provided by plaintiff at that point because of the fire.

Since M&S was no longer seeking a policy backdated to October 17, 2013, Seo, by an email dated Friday, October 25, 2013 at 1:45 p.m., told Lee to flat cancel the policy dated as of October 17, 2013 and reissue it with an effective date of October 18, 2013. Lee replied, by an email at 2:29 p.m. that day, that if M&S did not send the no loss letter signed by plaintiff by that day, he could not backdate the account effective October 18, 2013. At 4:53 p.m., Seo forwarded to Lee the no loss letter that she had just received from M&S. The no loss letter, received by International Underwriting on October 25, 2013, certified that plaintiff was not aware of any losses, accidents, or circumstances that may give rise to a claim under the insurance policy from October 17 to October 18, 2013.

By an email dated October 25, 2013 at 5:02 p.m., Lee informed Seo that this no loss letter was unacceptable, and that he had to receive an updated no loss letter signed by plaintiff that day to backdate the account to October 18, 2013, and that if he did not receive it that day, he could only bind insurance effective October 25, 2013. Seo sent an email dated October 25, 2013 at 5:05 p.m., stating that the LIG underwriter had stated that the no loss letter was unacceptable, and that unless it received an updated no loss letter, LIG could only bind effective October 25, 2013. Lustigman then requested that Seo bind the policy for October 25, 2013 (Lustigman's deposition tr at 86, lines 19-20). By an email dated October 25, 2013 at 5:37 p.m., Seo informed Lee that M&S wanted to bind coverage effective that

day. Insurance coverage was bound on October 25, 2013, and Seo sent an email, dated Monday, October 28, 2013 at 1:46 p.m., which informed M&S that due the fact that the no loss letter was not submitted on Friday, October 18, 2013, LIG was only able to bind coverage for October 25, 2013. An insurance policy was issued to plaintiff, effective October 25, 2013 to October 25, 2014.

On October 29, 2013, M&S, on behalf of plaintiff, first provided a notice of loss to LIG, giving LIG notice of the fire and requesting coverage under the policy. By a letter dated October 29, 2013 to LIG, M&S requested that LIG honor the claim for the fire that occurred on October 20, 2013 on the basis that "coverage was requested and approved" on Friday, October 18, 2013. By a letter dated November 15, 2013, LIG denied coverage for the fire loss to the property on the ground that the policy was not effective until October 25, 2013 and was not in effect on October 20, 2013, the date of the fire.

Following the fire, plaintiff did not make any repairs or replacements on the property. On January 21, 2014, plaintiff sold the property. The purchaser paid $530,000 for the property.

On December 31, 2013, plaintiff commenced this action against defendants by filing a summons with notice. On February 19, 2014, plaintiff filed a complaint. Plaintiff's complaint asserts a first cause of action for negligence against M&S, a second cause of action for negligence against International Underwriting, a third cause of action for gross negligence against M&S and International Underwriting, a fourth cause of action for breach

of fiduciary duty against M&S, a fifth cause of action for breach of contract against M&S, a sixth cause of action against LIG for a declaratory judgment that LIG must investigate and pay the policy benefits for its claim to it, a seventh cause of action for breach of contract against LIG, and an eighth cause of action against all defendants for a declaratory judgment that it is entitled to recover all costs, fees, and expenses incurred in connection with this action, including reasonable attorney's fees. Discovery has been completed. Defendants have interposed their respective answers and have asserted cross claims against each other. Discovery, including depositions and document production, has been completed. On April 6, 2017, plaintiff filed its note of issue. Thereafter, International Underwriting, M&S, LIG, and plaintiff filed their instant motions.

Discussion

LIG's Motion

In support of its motion, LIG contends that the only policy that was in effect for the property was the one effective on October 25, 2013, after the fire occurred. LIG asserts that, as evidenced by the emails and deposition testimony, its acceptance of M&S' request for coverage to be bound on October 17, 2013 was conditioned on the receipt of a current up-to-date no loss letter, which could not be provided because the fire loss had occurred before the no loss letter was given to it.

In opposition, plaintiff argues that the binder and a revised binder issued to it by M&S serves as an estoppel to LIG's denial of coverage on the basis that M&S had apparent

authority to issue these binders. Plaintiff asserts that the binders that Lustigman sent to it all indicate that the purported insurance policy was in effect from October 17, 2013 through October 17, 2014 and that the policy was bound by LIG. While it is undisputed that neither M&S nor International Underwriting had authority to bind coverage on behalf of LIG, plaintiff contends that M&S had the apparent authority to issue the binders on behalf of LIG because the function of a retail broker is to issue a binder on behalf of an insurance agency. Plaintiff maintains that the authority of M&S to issue a binder proves that M&S had apparent authority to act to some extent on LIG's behalf.

"Although an insurance broker is generally considered to be an agent of the insured, a broker will be held to have acted as the insurer's agent where there is some evidence of 'action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred'" (*Rendeiro v State-Wide Ins. Co.*, 8 AD3d 253, 253 [2d Dept 2004], quoting *Bennion v Allstate Ins. Co.*, 284 AD2d 924, 925 [4th Dept 2001]; *see also U.S. Delivery Sys. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 265 AD2d 402, 402 [2d Dept 1999]; *U.S. Underwriters Ins. Co. v Manhattan Demolition Co.*, 250 AD2d 600, 600 [2d Dept 1998]; *Incorporated Vil. of Pleasantville v Calvert Ins. Co.*, 204 AD2d 689, 689 [2d Dept 1994]; *Kamyr, Inc. v St. Paul Surplus Lines Ins. Co.*, 152 AD2d 62, 66 [3d Dept 1989]). "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into the transaction" (*Meade v Finger Lakes-Seneca Co-op Ins. Co.*, 184 AD2d 952,

953 [3d Dept 1992]). "The agent cannot by his [or her] own acts imbue himself [or herself] with apparent authority" (*Indian Country v Pennsylvania Lumbermens Mut. Ins. Co.*, 284 AD2d 712, 715 [3d Dept 2001], quoting *Meade*, 184 AD2d at 953). Here, there were no communications between plaintiff and LIG. The binders issued were solely created by M&S, which wrote LIG's name on them. Plaintiff points to no words, conduct, or act by LIG which could have imbued M&S with apparent authority. Thus, the doctrine of apparent authority does not apply here.

Plaintiff and M&S further argue that LIG's motion must be denied because Chang and Lee's deposition testimony show that a policy was issued by LIG on October 17, 2013 and was later flat cancelled after the fire. They assert that a policy could only be cancelled if it was, in fact, issued, and that this shows that a policy existed which was then improperly cancelled. M&S further asserts that the policy was improperly cancelled because plaintiff was not given 20 days formal written notice of the cancellation pursuant to Insurance Law § 3426 (b).

However, no insurance contract was formed on October 18, 2013. Rather, according to Lee's deposition testimony, LIG's agreement to provide an insurance policy effective October 17, 2013 was conditioned upon the receipt of an acceptable no loss letter (Lee's deposition tr at 28, lines 7-12; at 32, lines 2-7; at 44, lines 10-12). Chang testified, at his deposition, that the insurance policy effective October 17, 2013 was merely in the system as a placeholder contingent upon the receipt of a no loss letter and "was issued just for [LIG's]

convenience," and that "the hard copies were never printed (Chang's deposition tr at 65, lines 24-25; at 66, line 2; at 115, lines 17-23). Chang further testified that LIG would not bind insurance coverage for that effective date because there was no compliance with the requirement of a no loss letter (*id.* at 59). Thus, since there was never a binding policy of insurance in effect, there was no need to comply with Insurance Law § 3426 (b) to cancel it. Consequently, summary judgment dismissing plaintiff's complaint and all cross claims as against LIG must be granted (*see* CPLR 3212 [b]).

International Underwriting's Motion

International Underwriting asserts that it is entitled to summary judgment dismissing plaintiff's claims as against it because there was no privity between it and plaintiff. It is undisputed that plaintiff never had any contact with International Underwriting, that no representation by International Underwriting was made to plaintiff, and that plaintiff relied solely on M&S to obtain insurance for the property. Shenkman, who, as noted above, is the principal of plaintiff, testified at his deposition that there was no direct contact between plaintiff and International Underwriting (Shenkman's deposition tr at 118, lines 13-15).

Absent privity of contract or a relationship approaching privity, a claim for negligence cannot be maintained (*see Levi v Utica First Ins. Co.*, 12 AD3d 256, 257 [1st Dept 2004]). Plaintiff has failed to demonstrate the existence of privity between it and International Underwriting or that it and International Underwriting were in a relationship sufficiently approaching privity (*see Utica First Ins. Co. v Floyd Holding*, 294 AD2d 351, 352 [2d Dept

2002], *lv dismissed* 98 NY2d 764, [2002]; *Sinclair's Deli v Associated Mut. Ins. Co.*, 196 AD2d 644, 646 [2d Dept 1993]). International Underwriting has established that it, as a wholesale broker, had no contact with plaintiff, issued no warranties to plaintiff, and made no misrepresentations to plaintiff (*see Shteiman v Those Certain Underwriters at Lloyd's of London, England*, 180 AD2d 521, 522-523 [1st Dept 1992]). Since International Underwriting did not owe a duty to plaintiff, it may not be held liable to it in tort (*see Levi*, 12 AD3d at 257; *Point O'Woods Assn. v Those Underwriters at Lloyd's, London Subscribing to Certificate No. 6771*, 288 AD2d 78, 79 [1st Dept 2001], *lv denied* 98 NY2d 611[2003]). Thus, International Underwriting is entitled to summary judgment dismissing all of plaintiff's claims as against it, namely, plaintiff's second cause of action for negligence and third cause of action for gross negligence as against it (*see* CPLR 3212 [b]).

With respect to M&S' three cross claims as against International Underwriting seeking indemnification and contribution based on alleged negligence and negligent misrepresentations by International Underwriting, M&S argues that it confirmed the binding of coverage with International Underwriting on October 18, 2013. International Underwriting, however, points to the fact that none of the emails between Lustigman of M&S and Seo of International Underwriting disclose any communication that could reasonably be characterized as "confirming the binding of coverage." On Friday, October 18, 2013, Seo, by email, informed M&S that the underwriter would approve a policy backdated to October 17, 2013 only on the condition that a no loss letter was provided. In

the email after the close of business on Friday, October 18, 2013, Lustigman, on behalf of M&S, requested that the policy be bound and that he would provide the no loss letter on Monday, October 21, 2013. The response to this e-mail by Seo, on behalf of International Underwriting, dated Monday, October 21, 2013 stated: "Just a reminder that we are waiting for the no loss letter, confirming no losses from 10/17/13 to current date." This did not confirm the binding of coverage, and there is no record of any intervening communication from which it could reasonably be inferred that M&S confirmed the binding of coverage. In fact, on October 21, 2013, Lustigman requested that International Underwriting bind coverage effective on October 18, 2013, and Seo replied that this would still require a no loss letter because, at that point, making the policy effective on October 18, 2013 required backdating.

Furthermore, International Underwriting points out that, pursuant to its Brokerage Agreement with LIG, it did not have the authority to bind coverage on behalf of LIG, and that only LIG could bind coverage. International Underwriting states that there was never any binder issued by LIG, and that the only document issued on LIG letterhead before the date of loss was a Business Owners Policy Quote Proposal, dated October 17, 2013 (the Quote), which bore the prominent boldface heading "Subject to Binding" on page 7 thereof, and further stated, in pertinent part: "This is for informational purposes only. It does not represent an offer of coverage." It is well settled that an insurance document issued for "informational purposes only" is insufficient in itself to confirm coverage for the entity

named therein (*see American Motorist Ins. Co. v Superior Acoustics*, 277 AD2d 97, 98 [1st Dept 2000]). Thus, the Quote, which, on its face, stated that it was for informational purposes only and that it was subject to binding, was insufficient to confirm the binding of coverage by LIG. M&S has admitted that the only binders issued to plaintiff, prior to the fire, were issued unilaterally by it. Since the binders were issued by M&S before coverage was bound and there is no basis for International Underwriting to be held liable, M&S' cross claims against International Underwriting must be dismissed (*see* CPLR 3212 [b]).

LIG's cross claim as against International Underwriting is rendered moot due to the dismissal of plaintiff's complaint against LIG. Therefore, summary judgment dismissing LIG's cross claim as against International Underwriting must be granted.

M&S' Motion and Plaintiff's Motion

Plaintiff, in its motion, seeks partial summary judgment on the issue of liability with respect to its first cause of action for negligence and third cause of action for gross negligence as against M&S. M&S, in its motion, seeks summary judgment dismissing plaintiff's third cause of action for gross negligence, fourth cause of action for breach of fiduciary duty, and plaintiff's claims for consequential damages, lost profits, loss of rents, and net losses on the sale of the property.[2]

---

[2]Neither plaintiff nor M&S have moved with respect to plaintiff's fifth cause of action for breach of contract against M&S. However, that cause of action seeks the same relief as plaintiff seeks in its negligence cause of action based upon a theory of breach of the agreement to procure insurance, rather than upon the theory of breach of the duty to exercise due care in procuring insurance.

It is well established that "an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain [specifically] requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so" (*Waters Edge @ Jude Thaddeus Landing, Inc. v B & G Group, Inc.*, 129 AD3d 706, 707 [2d Dept 2015], quoting *Hjemdahl-Monsen v Faulkner*, 204 AD2d 516, 516 [2d Dept 1994]; *see also Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *Freundlich v Pacific Indem. Co.*, 137 AD3d 967, 968 [2d Dept 2016]; *Core-Mark Intl. v Swett & Crawford Inc.*, 71 AD3d 1072, 1073 [2d Dept 2010]; *Reilly v Progressive Ins. Co.*, 288 AD2d 365, 365 [2d Dept 2001]; *Chaim v Benedict*, 216 AD2d 34, 347 [2d Dept 1995]; *Wied v New York Cent. Mut. Fire Ins. Co.*, 208 AD2d 1132, 1133 [3d Dept 1994]; *Erwig v Cook Agency*, 173 AD2d 439, 439 [2d Dept 1991]). A broker may be held liable for negligence in failing to procure insurance where the broker failed to exercise due care in the transaction (*see Femia v Graphic Arts Mut. Ins. Co.*, 100 AD3d 954, 955 [2d Dept 2012]; *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792, 793-794 [2d Dept 2007]; *Katz v Tower Ins. Co. of N.Y.*, 34 AD3d 432, 432 [2d Dept 2006]; *Mickey's Rides-N-More, Inc. v Anthony Viscuso Brokerage, Inc.*, 17 AD3d 328, 329 [2d Dept 2005]; *Structural Bldg. Prods. Corp. v Business Ins. Agency*, 281 AD2d 617, 620 [2d Dept 2001]). Liability will also be found where the broker falsely informs the party seeking insurance that the insurance has been obtained (*see Joseph, Inc. v Alberti, Carleton & Co., Inc.*, 225 App Div 115, 116 [1st Dept 1928], *affd* 251 NY 580 [1929]).

Lustigman explains, in paragraphs 6 and 7 of his affidavit, that plaintiff engaged M&S to procure insurance and that the closing was scheduled for the next day, i.e., October 17, 2013, and "thus, time was of the essence." M&S did not inform plaintiff that it could not timely procure a policy, but accepted the assignment from plaintiff to timely procure an insurance policy by the date of the closing. The emails submitted show that Lustigman, on behalf of M&S, never indicated to plaintiff that he could not timely procure an insurance policy. Rather, M&S represented to plaintiff that M&S did obtain an insurance policy for plaintiff by October 17, 2013 by providing a binder to plaintiff that showed an effective date of October 17, 2013, when no policy was actually in place.

M&S argues that the presentation of a binder to plaintiff did not constitute a representation that it had procured an insurance policy for plaintiff. However, Insurance Law § 2118 (f) (2) (B) defines a "binder" as "written evidence of a temporary insurance contract." Thus, by providing a binder to plaintiff, M&S affirmatively represented to plaintiff that plaintiff had insurance coverage.

M&S further argues that the binder sent to plaintiff was merely a "sample binder" based on a quoted estimate, and that plaintiff knew that coverage was not yet bound at the time that it received the binder. M&S claims that "plaintiff was well aware that the policy was in the process of being bound, but not yet bound." However, nowhere in the emails did Lustigman ever inform plaintiff that the insurance policy was not bound despite M&S' providing of a binder to plaintiff or that the binder was just a "sample." Lustigman admitted,

at his deposition, that there was no email or other written document showing that he told plaintiff that the binder was a sample binder, or that insurance coverage was not bound (Lustigman's deposition tr at 127, lines 10-22; at 130, lines 13-18). Lustigman even admitted, at his deposition, that an insurance binder demonstrates that "insurance is in effect" (Lustigman's deposition tr at 32, lines 22-25; at 33, lines 1-2). There is no evidence which supports M&S' argument that M&S informed plaintiff that the binder was a sample binder or that the binder did not evidence an actual insurance policy. Furthermore, it is noted, as plaintiff points out, that M&S' claim that the binder was not an actual binder, but only a "sample binder," would mean that M&S intended to defraud plaintiff and plaintiff's lender by intentionally and falsely representing that there was insurance in place when there was no such insurance.

M&S additionally argues that revisions were made to the policy after the closing on October 17, 2013 and a second binder was issued on October 18, 2013, showing that the first binder was never intended by it or plaintiff to bind insurance coverage. This argument must be rejected. In the emails on October 18, 2013, the day after the closing, Lustigman did not mention to plaintiff that he had not yet completed the process to provide insurance to plaintiff for the property. In an email dated October 18, 2013, plaintiff informed Lustigman that there was a typographical error that needed to be corrected in that M&S misspelled plaintiff's name. Later that day, Lustigman indicated that he was able to get a better special form policy with an increased premium. Lustigman never disclosed, however, that the other, basic form

coverage policy was never bound. Plaintiff asserts that Lustigman made it seem as if a policy was in effect and that the special form policy would replace the prior basic form policy. In any event, the second binder, which was backdated to October 17, 2013, evidencing the existence of insurance coverage, was provided to plaintiff prior to the fire.

Lustigman contends that he did not disclose that there was no policy bound because M&S was not told that the policy had not been secured by International Underwriting until October 21, 2017. However, based upon the emails, Lustigman, in the exercise of due care, should have been aware of the fact that the policy was not bound on October 17 or October 18, 2013.

M&S, citing *Springer v Allstate Life Ins. Co. of N.Y.* (94 NY2d 645, 649 [2000]), additionally contends that since "a binder does not constitute part of an insurance policy," the binders given by it to plaintiff did not show that there was insurance coverage. M&S' reliance upon *Springer*, however, is misplaced. In *Springer* (94 NY2d at 649), the Court of Appeals held that "an insurance binder is a temporary or interim policy until a formal policy is issued," and that "[a] binder provides interim insurance, usually effective as of the date of application, which terminates when a policy is either issued or refused." *Springer* (94 NY2d at 649-650) stands for the principle that a binder does not create rights that do not otherwise exist based on the common terms of an insurance policy. Here, in contrast, plaintiff is claiming that M&S provided a binder to it as evidence that M&S had timely procured an insurance policy for it when no insurance was bound.

M&S asserts that it had stated, in its October 18, 2013 email to International Underwriting, that International Underwriting should try to have the policy made effective as of October 17, 2013, but if it could not accomplish this, then International Underwriting should bind coverage with LIG on October 18, 2013. After contacting LIG to try to accomplish this, International Underwriting informed M&S that the policy could be backdated to October 17, 2013 if a no loss letter was provided that day. M&S, however, did not ensure that the policy was actually bound on October 17, 2013 by providing the no loss letter on that day. Lustigman responded, by an email dated October 18, 2013 at 5:41 p.m., that he would provide a no loss letter on Monday (i.e., October 21, 2013). While it was reasonably foreseeable that an occurrence requiring insurance coverage could occur over the weekend, M&S took no precaution to ensure that coverage was in place. Lustigman did not attempt to immediately contact plaintiff and request that it provide the no loss letter so that it could be emailed to International Underwriting that day. Rather, as discussed above, M&S did not provide the no loss letter to International Underwriting until October 25, 2013, which was after the fire had already taken place.

Lustigman also did not further seek to bind the policy for an effective date of October 18, 2013 on October 18, 2013, at which time it would not have required backdating or providing a no loss letter. The policy was not bound on either October 17, 2013 or October 18, 2013, and M&S did not ensure that the policy was issued prior to the fire on October 20, 2013. Plaintiff has demonstrated that coverage could have been procured prior to the

occurrence of the fire. Thus, M&S was negligent in failing to timely procure an insurance policy for plaintiff and for failing to inform plaintiff of its inability to do so.

Based on the above, the court finds that plaintiff has satisfied its burden of making a prima facie showing that M&S was negligent as a matter of law and M&S has failed to raise any bona fide triable issue of fact. Therefore, summary judgment in plaintiff's favor on the issue of liability with respect to plaintiff's negligence claim must be granted (*see* CPLR 3212 [b], [e]).

Plaintiff also seeks summary judgment on the issue of liability with respect to its third cause of action for gross negligence as against M&S, and M&S seeks dismissal of this cause of action. While plaintiff had established its first cause of action for ordinary negligence as against M&S, gross negligence "differs in kind as well as degree from ordinary negligence" (*Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency*, 297 AD2d 430, 431 [3d Dept 2002]; *see also Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]). "It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A.*, 81 NY2d at 823-824, citing *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). Plaintiff has not shown that there was conduct by M&S of such an aggravated character (*see Sutton Park Dev. Corp. Trading Co.*, 297 AD2d at 431). Rather, the evidence establishes that M&S did not intentionally fail to procure insurance coverage or act in reckless disregard for plaintiff's rights, and even continued to try to obtain insurance for the property which covered the fire after the fire took place. Thus,

plaintiff's motion, insofar as it seeks summary judgment in its favor on its third cause of action for gross negligence, must be denied, and M&S' motion, insofar as it seeks dismissal of plaintiff's third cause of action for gross negligence against it, must be granted (*see* CPLR 3212 [b]).

M&S seeks summary judgment dismissing plaintiff's fourth cause of action for breach of fiduciary duty. Plaintiff's breach of fiduciary claim is based on M&S' failure to procure an insurance policy for it which covered its loss. However, absent a special relationship, a claim for breach of fiduciary duty cannot be maintained (*see Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 623 [1st Dept 2011], *lv denied* 19 NY3d 806 [2012]; *Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 867 [1st Dept 2009]). With respect to determining whether the requisite special relationship exists to support the imposition of a fiduciary duty, it is well established that if the parties "'do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them'" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 [2012], *rearg denied* 19 NY3d 1065 [2012], quoting *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1993]; *see also Multibank, Inc. v Access Global Capital LLC*, 54 Misc 3d 1208[A], 2017 NY Slip Op 50048[U], *13 [Sup Ct, NY County 2017], *affd* 158 AD3d 458 [1st Dept 2018]).

Plaintiff has failed to adequately allege the existence of a special relationship above and beyond the ordinary broker-client relationship (*see Voss*, 22 NY3d at 735; *Hoffend &*

Sons, Inc. v Rose & Kiernan, Inc., 7 NY3d 152, 158 [2006]; *Murphy*, 90 NY2d at 272; *Waters Edge @ Jude Thaddeus Landing, Inc.*, 129 AD3d at 708). Rather, the facts alleged herein establish nothing more than that the relationship between plaintiff and M&S was "a common consumer-insurance broker relationship" (*Sutton Park Dev. Corp. Trading Co.*, 297 AD2d at 432). Plaintiff had no special relationship with M&S.

Although plaintiff alleges that M&S acted as the broker for its principals on numerous other occasions and Lustigman chose the type of policy and policy limits, these are not exceptional circumstances that rise to the level of a special relationship. M&S was not paid an additional fee for consulting services above and beyond the commissions earned on the placement of polices, and there is no showing that plaintiff was relying upon M&S' advice in deciding the type and amount of coverage to be obtained and the adequacy of such coverage (*see Scotto Princeton LLC v Felsen Assoc., Inc.*, 11 Misc 3d 378, 382 [Sup Ct, Nassau County 2005]). While M&S represented that it had procured timely insurance coverage for plaintiff when it had not, these circumstances are not so exceptional as to support the imposition of a fiduciary duty upon M&S (*see Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [1st Dept 2007]). Consequently, summary judgment dismissing plaintiff's fourth cause of action for breach of fiduciary duty against M&S must be granted (*see* CPLR 3212 [b]).

With respect to M&S' motion, insofar as it seeks summary judgment dismissing plaintiff's claims for consequential damages, lost profits, loss of rents, and net losses on the

sale of the property, it is well established that "a broker who negligently fails to procure coverage stands in the shoes of the insurer as concerns liability to the insured" (*Macon v Arnlie Realty Co.*, 207 AD2d 268, 270 [1st Dept 1994]; *see also Andriaccio v Borg & Borg*, 198 AD2d 253, 253 [2d Dept 1993]). Thus, a "broker may be held liable [for neglect] in failing to procure insurance, with liability limited to that which would have been borne by the insurer had the insurance been procured" (*Brian Fay Const., Inc. v Morstan Gen. Agency, Inc.*, 90 AD3d 796, 798 [2d Dept 2011]; *see also Milgrim v Royal & SunAlliance Ins. Co.*, 75 AD3d 587, 589 [2d Dept 2010]; *DeLorenzo v Bac Agency*, 256 AD2d 906, 907 [3d Dept 1998]; *Soho Generation of N.Y. v Tri-City Ins. Brokers*, 256 AD2d 229, 231 [1st Dept 1998]; *Andriaccio*, 198 AD2d at 253; *Island Cycle Sales v Khlopin*, 126 AD2d 516, 518 [2d Dept 1987]; *American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 346 [1st Dept 1984]). "[A] broker, standing in the shoes of the insurer, has the right to compel a plaintiff to prove its actual damages" (*Soho Generation of N.Y.*, 256 AD2d at 231).

Plaintiff asserts that it suffered consequential damages due to its "fire sale" of the property at lower than market value, rather than holding the property for an extended period of time as an investment property. Section 1 (B) (2) (b), at page 17, of the policy which would have been issued (which was the same policy issued to plaintiff on October 25, 2013) stated that "consequential losses," including "loss of market [value]," are excluded from the policy. Thus, the consequential damages sought by plaintiff were not within the

contemplation of the parties and were excluded from coverage. Therefore, plaintiff is not entitled to recover consequential damages consisting of net losses on the sale of the property.

The loss payment provision of the policy, which would have been procured, provided that LIG would have paid the value of lost or damaged property, and that plaintiff could make a claim on an actual cash basis, instead of on a replacement basis. M&S concedes that pursuant to the policy terms, plaintiff is entitled to recover the value of the fire damaged property on an actual cash basis, the cost to clean up and secure the property, and lost profits for the time period that plaintiff was unable to rent the property. Thus, M&S' motion, insofar as it asserts that plaintiff cannot recover for lost profits for the time period that plaintiff was unable to rent the property, must be denied. Plaintiff is not entitled to recover counsel fees in connection with this action as sought by it in its eighth cause of action (*see Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]).

M&S argues that plaintiff has failed to prove its actual damages. While plaintiff must prove its actual damages, this is an issue to be proven at an inquest on damages.

Conclusion

Accordingly, International Underwriting's motion for summary judgment dismissing plaintiff's complaint and all cross claims as against it is granted. M&S' motion, insofar as it seeks partial summary judgment dismissing plaintiff's third cause of action for gross negligence, plaintiff's fourth cause of action for breach of fiduciary duty, and plaintiff's consequential damages claim with respect to net losses on the sale of the property, is granted,

and M&S' motion is denied with respect to plaintiff's claims for lost profits for the time period that plaintiff was unable to rent the property. LIG's motion for summary judgment dismissing plaintiff's complaint and all cross claims as against it is granted,[3] and it is declared that LIG is not required to pay policy benefits to plaintiff on its insurance claim. Plaintiff's motion for partial summary judgment as against M&S on the issue of liability is granted on its first cause of action for negligence and is denied on its third cause of action for gross negligence. An assessment of plaintiff's damages shall be scheduled and held by the court. The action is severed accordingly.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL

[3]Summary judgment dismissing plaintiff's complaint and all cross claims as against it is also granted to LIS, which, as noted above, has been referred to collectively with LIG as LIG.