

All Is. Credit Corp. v Popular Brokerage Corp.
2020 NY Slip Op 32470(U)
July 27, 2020
Supreme Court, New York County
Docket Number: 653145/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

ALL ISLAND CREDIT CORP.,
Plaintiff,

INDEX NO. 653145/2019
MOTION DATE 01/17/2020
MOTION SEQ. NO. 008

- v -

POPULAR BROKERAGE CORP., POPULAR BROKERAGE CORPORATION, J.J. FARBER-LOTTMAN CO. INC., AMTRUST NORTH AMERICA INC., AMTRUST FINANCIAL SERVICES, INC., WESCO INSURANCE COMPANY, ROCHDALE INSURANCE COMPANY, DAVID NELSON, ESQ. AS ADMINISTRATOR OF THE ESTATE OF MIGUEL J. PERIBANEZ, SCOTT FARBER,

DECISION + ORDER ON MOTION

Defendant.

-----X

PREMCO FINANCIAL CORPORATION
Plaintiff,

Third-Party
Index No. 595965/2019

-against-

ALL ISLAND CREDIT, POPULAR BROKERAGE CORP, THE ESTATE OF MIGUEL J. PERIBANEZ, POPULAR BROKERAGE CORPORATION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for DISMISS

Upon the foregoing documents, AmTrust North America, Inc., AmTrust Financial Services, Inc., and Wesco Insurance Company's (collectively, the AmTrust Defendants) motion to dismiss the causes of action in the amended complaint asserted against them (the fifth through eighth causes of action), pursuant to CPLR 3211(a)(1) and (a)(7), is granted and the claims against the AmTrust Defendants are dismissed.

All Island Credit Corp. (AICC), a premium finance company engaged in the business of financing insurance premiums for individual insureds, brings this action to recover damages

sustained as a result of an alleged financial fraud perpetrated by Popular Brokerage Corp. (**PBC**), an insurance broker (NYSCEF Doc. No. 118).

The Amended Complaint alleges that PBC sought out premium financing services from AICC for commercial lines on behalf of insureds and AICC has provided such financing to PBC's customer since 2007 (*id.*, ¶¶ 19-20). For each insured, PBC would issue a premium finance agreement (**PFA**) using AICC's website, which would be signed and dated by Miguel J. Peribanez on behalf as president of PBC on PBC's behalf, as well as by the insured (*id.*, ¶ 21). The PFAs were also personally guaranteed by the insured. Among other things, the PFAs included "the name of the insurance company and the name of the policy-issuing Agent, the type of policy, the policy term, policy number, and effective date" (*id.*, ¶ 24).

According to the Amended Complaint, between March and February 2019, PBC "created at least 2989 fake insurance policies" for which "they requested AICC to finance the policy premiums" (*id.*, ¶ 55). AICC claims that PBC's scheme involving these insurance policies could not have been perpetrated without the actual knowledge and substantial assistance of, among others, defendants JJ Farber and Scott Farber (*id.*, ¶ 56). AICC, allegedly unaware that the policies at issue were fake, financed the premiums owed for these policies after PBC represented to AICC that the relevant insured had tendered the down payment (*id.*, ¶ 57). However, instead of forwarding the premium amount received from AICC to the managing general agent on the specified insurance company on the PFAs, PBC took the funds advanced by AICC for its own use, including the issuance of installment payments to AICC on the PFAs for the fake policies in order to perpetuate the alleged fraudulent scheme and shield said scheme from discovery by AICC (*id.*, ¶ 58).

In February of 2019, AICC refused to accept any new PFAs from PBC based on its "increasing concern" about the validity of the insurance placements being made by PBC and Mr. Peribanez following "an increasing number of defaults" on the PFAs generated by PBC.

The Amended Complaint alleges that, in fact, as part of their scheme, PBC and Mr. Peribanez did remit premiums to the various insurance companies directly, i.e., that "frequently the insureds under the actual policies issue were the same insureds on the fake [] policies identified in [the] PFAs submitted by [PBC] and/or Peribanez to AICC and pursuant to which premium financing was provided by AICC" (*id.*, ¶ 68). Alternatively, "a significant number of such policies were subject to premium financing agreement with licensed premium insurance finance companies other than AICC" (*id.*, ¶ 69).

The Amended Complaint further alleges that the AmTrust Defendants were presented with evidence of this fraudulent scheme but chose not to act upon that evidence despite their purported obligation to do so. Specifically, the Amended Complaint alleges that Wesco and AmTrust received 2,989 Notice of Financed Premium letters (the **Notice Letters**) from AICC between in 2018 and 2019 with their names listed as "insurance company" for policies that they did not issue and which did not exits (*id.*, ¶¶ 95, 141). The Notice Letters expressly asked the AmTrust Defendants to:

PLEASE ADVISE AICC IMMEDIATELY IF:

1. The premium shown is not for the exact policy term shown above.
2. The policy(s) is not in full force and effect.
3. The description of the policy(s) differs from your records.
4. You wish the premium paid other than as indicated.

(*id.*, ¶¶ 96, 142).

All of the Notice Letters and their attended PFAs were for policies that had been cancelled (*id.*, ¶¶ 97, 99). The Amended Complaint alleges that AmTrust Defendants had actual knowledge at the time they received the Notice Letters and PFAs from AICC that the fraudulent activity was occurring with respect to these policies but that they nevertheless failed to report the insurance fraud or suspicion of insurance fraud as AICC claims they were required to do under Insurance Law § 405 and Banking Law § 577-a (further discussed below; *id.*, ¶¶ 101-104, 143-147). AICC argues that by failing to report, the AmTrust Defendants provided substantial assistance to PBC and Mr. Peribanez in their alleged fraudulent scheme.

The Amended Complaint alleges claims against the AmTrust Defendants for (i) aiding and abetting fraud (the fifth cause of action as against Wesco [NYSCEF Doc. No. 118, ¶¶ 194-206]) and the seventh cause of action as against AmTrust and AFSI [*id.*, ¶¶ 220-232]), and (ii) negligence (the eighth cause of action; *id.*, ¶¶ 233-242).

DISCUSSION

A claim for aiding and abetting fraud requires (i) the existence of an underlying fraud, (ii) knowledge of the fraud by the aider and abettor, (iii) and, critically, substantial assistance by the aider and abettor in the achievement of the fraud (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 504 [1st Dept 2018]). Here, fatally, the Amended Complaint alleges no facts to suggest that AmTrust Defendants took any affirmative steps to perpetuate the fraudulent scheme alleged. Rather, AICC bases its claim entirely upon “the intentional silence and inaction” of the AmTrust Defendants (Opp. Brief at 8, NYSCEF Doc. No. 122). However, inaction by an alleged aider and abettor constitutes substantial assistance *only* if the defendant owes a fiduciary duty directly to the plaintiff (*Markowitz v Friedman*, 144 AD3d 993, 996 [2d Dept 2016]). AICC does not allege that the AmTrust Defendants owed it a fiduciary duty, nor can it (*see Travelers Ins. Cos. v Robinson*, 79 AD2d 1022, 1022 [2d Dept 1981] [“there exists no special relationship of trust between the insurer and the premium financing agency”])

Inasmuch as AICC seeks to overcome this lack of fiduciary duty based upon an alleged statutory duty under Insurance Law § 405 and New York State Banking Law § 577-a(2)(b) by arguing that the distinction between fiduciary duties and statutory ones is solely a “semantic” one “lacking in any substance,” AICC not cite any authority in support of its argument (Opp. Brief at 13, NYSCEF Doc. No. 122) and the court has not located any.

In any event, New York State Banking Law § 577-a(2)(b) only applies to premium financing agents like AICC, and does not apply to the AmTrust Defendants (NY Banking Law § 577-a[2][b] [“The premium finance agency shall notify, in writing, the wholesale producer and the

insurance company of the gross premium, the borrower's name and address, and, if available, the policy number, within ten (10) business days of acceptance of the agreement”).

Insurance Law § 405, in turn, requires insurers who have:

... reason to believe that an insurance transaction or life settlement act may be fraudulent, or [who have] knowledge that a fraudulent insurance transaction or fraudulent life settlement act is about to take place, or has taken place shall, ***within thirty days after determination by such person that the transaction appears to be fraudulent, send to the superintendent on a form prescribed by the superintendent, the information requested by the form and such additional information relative to the factual circumstances of the transaction and the parties involved as the superintendent may require....***

(NY Ins Law § 405 [emphasis added]).

The Amended Complaint does not allege the AmTrust Defendants ever made the determination that “the transaction[s at issue] appear[] to be fraudulent” so as to trigger the reporting duty, and, in any event, any reporting duty under this statute would be to “the superintendent” and not to AICC as the premium financing agency. AICC’s attempt to manufacture a statutory duty to act in its favor simply fails.

Similarly, inasmuch as AICC premises it aiding and abetting fraud claims against the AmTrust Defendants on the inaction of Scott Farber as the AmTrust Defendants’ purported agent (and putting aside whether Mr. Farber may be deemed such an agent), absent a fiduciary duty owed by Mr. Farber to AICC, which AICC does not allege, his inaction is also insufficient. Put another way, AICC premises Mr. Farber’s obligation to notify it of the fraud on the same inapplicable provisions discussed above (i.e., NY State Banking Law § 577-a[2][b] and NY Ins Law § 405) and they are insufficient for the reasons discussed *infra*.

Negligence

A claim for negligence requires (1) the existence of a duty by the defendants, (2) a breach of that duty, and (3) damages (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]). AICC’s negligence claim fails as a matter of law as the AmTrust Defendants owed no duty to AICC (*Travelers Ins. Cos., supra*, 79 AD2d at 1022). Nor can AICC impose an affirmative duty on the AmTrust Defendants to investigate by sending out unsolicited Notice Letters to the AmTrust Defendants on policies that they never issued. While AICC attempts to use the Notice Letters to create a duty from the AmTrust Defendants where none existed, AmTrust simply never agreed to provide any information to AICC nor requested the Notice Letters on the non-existent policies.

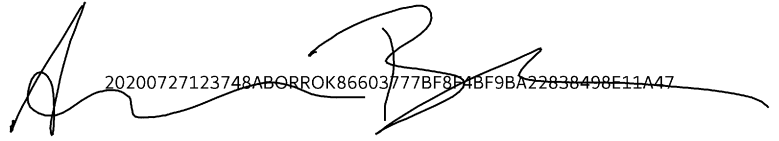
Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is hereby dismissed as against AmTrust North America, Inc., AmTrust Financial Services, Inc., and Wesco Insurance Company; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly, and to amend the caption to reflect the dismissal of these defendants from this action upon the service upon on the Clerk's Office of a copy of this decision, together with notice of entry.

7/27/2020

DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE