SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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JACQUELINE HUMPHRIES, CHARLES OURSLER,

Plaintiff,

- v -

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY DBA METLIFE AUTO & HOME, CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY, HASKELL BROKERAGE CORP., JLNY GROUP, LLC, FULTON ASSOCIATES, LLC, FAIRMONT INSURANCE BROKERS, LTD.,

Defendant.

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INDEX NO. 152521/2015

MOTION DATE 04/29/2019

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 228, 253, 257, 258, 266, 270, 273, 274, 275, 276, 277, 284, 286, 288, 291

were read on this motion to/for JUDGMENT - SUMMARY.

In this action, plaintiffs seek to recover money allegedly due to them from their home and condominium association insurance policies. Among other things, they assert claims against Haskell Brokerage Corp. (Haskell), who obtained their condominium's insurance policy. In motion sequence number 007, Haskell seeks summary judgment dismissing all claims against it.

The court already has set forth the background to this case at length in its decision and order resolving motion sequence numbers 004 and 008 (NYSCEF Doc. No. 295). In brief, plaintiffs Jacqueline Humphries and Charles Oursler own 138 Fulton Street (138 Fulton) unit 5 and own 69% of the former unit 4 (unit 4). Former defendant Fulton Associates, LLC owns the neighboring building, 140 Fulton Street (140 Fulton) (NYSCEF Doc. Nos. 90, 91). According to the condominium declaration, their units include "the floors of the Building above the wooden floor joist located between the first and second floors of the building together with the ground floor

entrance and stairs leading to the second and higher floors, all as shown on the Plans and, including, without limitation all exterior walls of the Residential Units" (NYSCEF Doc. No. 97, § 3). Plaintiffs lived in unit 5 with their son part-time, and they rented unit 4. Humphries also used unit 5 as a studio space and had paintings there.

As is relevant here, plaintiffs purchased insurance coverage for unit 5 from Metropolitan Property and Casualty Insurance Company (MetLife) through their insurance broker, Haskell. The MetLife Policy covered fire, smoke, heat, and water damage to the apartment (NYSCEF Doc. No. 1 ¶¶ 27, 29). The policy provided the following coverage per occurrence: (A) $60,750 for the dwelling, (B) $3,750 for private structures, (C) $75,300 for personal property, (D) $45,180 for loss of use and an additional $4,000 for damage to business property (NYSCEF Doc. No. 98 [MetLife Policy], Declarations, at **1). Under the policy, "'[o]ccurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the term of the policy" (*id.*, at **2). Business property is differentiated from other personal property in that it is "used or intended for use in a business" (*id.*, Policy, at **C-1). The policy provides coverage for loss of use, which includes additional living expenses or fair rental value, at the insured's option. Pursuant to an endorsement, the general definitions for these categories are:

> 2. Under SECTION I – ADDITIONAL COVERAGES:
> A. Item 1. Loss of Use:
> 1. Item A, the first paragraph [in the original policy] is deleted and replaced by:
> A. Additional Living Expense/ Fair Rental Value. This applies upon loss to covered property resulting from a covered cause of loss. When a covered property loss makes that part of the residence premises where you reside not fit to live in, we will pay, at your choice, either of the following. However, if the residence premises is not your

> principal place of residence, we will not provide the option under paragraph 2, below.
>
> 2. In form[] . . . HP2200, Item B., the first paragraph is deleted and replaced by:
>
> B. Loss of Rental Income. This applies upon loss to covered property resulting from a covered property resulting from a covered cause of loss. We will pay your loss of rental income resulting from a covered property loss less charges and expenses which do not continue, while the part of the residence premises you rent to others, or hold for rental, is uninhabitable. Payment will be the shortest time required to repair or replace the rented part. We do not cover the loss or expense due to cancellation of a lease or agreement (NYSCEF Doc. No. 98 [Endorsement, **1]).

On both March 17, 2013 and March 18, 2013, there were fires at 140 Fulton (NYSCEF Doc. Nos. 93, 94) which caused heat, smoke, and water damage to 138 Fulton in its entirety, including unit 4 and unit 5 (NYSCEF Doc. No. 1 ¶¶ 16, 24-25). The March 17 fire started on the second floor of 140 Fulton, and the March 18 fire started on the third floor.[1] Due to the smoke and water damage to 138 Fulton and its foundational instability, the Department of Buildings (DOB) issued a mandatory vacate order for the building. The residents were unable to reenter their units from March 17, 2013 until October 2, 2013, while the DOB vacate order was in effect (NYSCEF Doc. No. 95). According to Humphries, the lease they were about to issue for the fourth floor unit did not go forward because the unit was uninhabitable (NYSCEF Doc. No. 192, at **20, line 16 - **21 line, 13).[2] In addition, plaintiffs were preparing to rent the fifth floor unit,

[1] MetLife and plaintiffs dispute whether these fires are separate "occurrences" within the meaning of the policy. The court discusses this issue below.

[2] The court relies on the full transcripts which MetLife has provided, as plaintiffs only submitted excerpts from the transcripts without proper context. For example, plaintiffs provided pages 18, 21, 25, 49, 101, and 223-224 of the Humphries' transcript (NYSCEF Doc. No. 99), while MetLife submitted the entire 287 pages along with the index (NYSCEF Doc. Nos. 192, 193).

but did not execute the lease because of the fire (*see* NYSCEF Doc. No. 233 [correspondence and unsigned lease]).

Plaintiffs retained an architect and contractor and made extensive repairs to both units. According to plaintiffs' counsel, plaintiffs spent $330,000 repairing Unit 5 and $18,000 repairing Unit 4 (NYSCEF Doc. No. 39 ¶¶ 24-25). Prior to the fires, Humphries had been in the process of moving her art studio to Brooklyn (*see, e.g.*, NYSCEF Doc. No. 192, p 27 lines 15-20), and she had moved the bulk of her artwork to the new studio and to various storage units (*see, e.g.*, *id.*, at **35, line 23 – **36, line 5 [regarding the move]; **151, line 2 – **152, line 15 [listing her storage units]). However, two of Humphries' paintings remained in the apartment and sustained smoke and water damage. On June 24, 2014, Jeffrey Rowledge, director of the Greene Naftali Gallery, which has worked with Humphries extensively, valued each painting at $85,000, for a total of $170,000 *(see* NYSCEF Doc. No. 100; NYSCEF Doc. No.116). Plaintiffs allege that the damages to their apartment units totaled at least $525,000, an amount which includes the value of the paintings (NYSCEF Doc. No. 1 ¶ 31). Plaintiffs state that MetLife ultimately paid them only $77,500 under the policy (NYSCEF Doc. No. 1 ¶¶ 31-32). In addition, plaintiffs note that they had no coverage for unit 4.

Prior Decision concerning MetLife

In motion sequence 004, plaintiffs argued that March 2017 fires constituted two separate occurrences. Plaintiffs also stated MetLife was liable for walls-in coverage for the costs plaintiffs incurred in the renovation of unit 5, that plaintiffs were owed an additional $146,600 for the paintings, which should have been deemed personal rather than business property, and that MetLife owed plaintiffs an additional $60,000 in loss of use damages. The court concluded that the two fires were separate occurrences within the meaning of the policy. The court denied the

prong of plaintiffs' motion challenging the characterization of the painting as business rather than personal property, finding that triable issues of fact existed (*see also Kennedy v Lumbermen's Mut. Cas. Co.*, 190 AD2d 1053, 1053-1054 [4th Dept 1993] [factual dispute as to whether camera was used for business purpose precluded summary judgment on coverage issue]). It found that summary judgment as to liability for loss of use was appropriate, but the amount of damages, if any, had to be determined at trial.

Current motion by Haskell

Plaintiffs' complaint asserts as its second cause of action that Haskell did not advise them properly when it obtained the MetLife Policy for them. The complaint states that Haskell had "a legal common law duty" to obtain proper coverage (NYSCEF Doc. No. 1 [Complaint] ¶ 38). According to the complaint, Haskell breached this duty because it did not obtain a policy that covered unit 4, and because it did not provide plaintiffs with "appropriate coverage" for unit 5 (*id.* ¶ 41). Haskell's answer denied all the complaint's contentions (NYSCEF Doc. No. 12).

Haskell submitted its motion for summary judgment before the court decided MetLife's motion, sequence number 4. Haskell notes that Humphries leased her apartment from 1998 to 2003 (NYSCEF Doc. No. 142 [Humphries Dep], at **141 lines 5-9) and had a renter's insurance policy from MetLife at that time. It notes that after plaintiffs purchased unit 5, they acquired a homeowner's policy instead. At her deposition, Humphries indicated that she did not recall whether she ever informed Haskell about the acquisition of unit 4 (*see id.*, at **167, line 28 – **168, line 4). Oursler had virtually no recollection of the insurance arrangements for units 4 and 5 (*see generally* NYSCEF Doc. No. 144 [Oursler Dep], at **22-32). Haskell notes that Jaime Facio-Lince, a Haskell account executive, testified at deposition that plaintiffs did not inform Haskell that valuable paintings were in unit 5, and that Haskell also was unaware of plaintiffs'

ownership of unit 4 (NYSCEF Doc. No.145, at **76, line 18 – **77, line 8). Haskell also has filed a document showing that after the fire, on March 21, 2013, plaintiffs sought to extend their coverage so as to include unit 4, and that Haskell informed them it could not accommodate the request because of the outstanding damage claim (NYSCEF Doc. No.146). They note that, as this court stated in its prior order, Vincent Policano of MetLife did not examine the damage to unit 4 because plaintiffs had not insured the unit and he was otherwise unaware of its existence.

As indicated, the complaint states that Haskell breached its common-law duty to plaintiffs. Based on the above, however, Haskell argues that it did not breach this duty. It contends that it acquired the policy and type of coverage plaintiffs had requested, and therefore its job was completed satisfactorily (citing, inter alia, *Murphy v* Kuhn, 90 NY2d 266, 270 [1997]). Because there was no special relationship between plaintiffs and Haskell, Haskell states, it had no "continuing duty to advise, guide, or direct a client to obtain additional coverage" (*id.*; *see Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 867 [1st Dept 2009]). Further, plaintiffs did not make a specific request for specific policy limits or specific types of coverage (citing *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157 [2006] [*Hoffend*]). Haskell stresses that plaintiffs neither notified them about unit 4 nor about the paintings in unit 5, and it argues that it had no duty to suggest coverage for possessions about which it lacked knowledge. It argues that, because of the above, and because MetLife paid plaintiffs in accordance with the policy's terms, Haskell did not proximately cause any loss.[3] Haskell also contends that plaintiffs' claims against them are undermined by their own inability to recall any discussions with a Haskell representative, including about unit 4 and about the artwork, or to provide any

[3] The court notes that a breach of the policy by MetLife would not be proximately caused by Haskell.

evidentiary support for their cause of action against it (citing NYSCEF Doc. Nos. 142, 144 [Humphries and Oursler Deps]).[4] In contrast, Haskell's representative, Facio-Lince, affirmatively stated that Haskell was never told about unit 4 or the valuable paintings stored in unit 5 (NYSCEF Doc. No. 145 [Facio-Lince Dep], at **76, line 18 – **77, line 25). According to Haskell, because plaintiffs have stated they do not remember asking Haskell for more extensive coverage and have not provided any documents supporting their allegations against Haskell, they have not provided sufficient evidence to show negligence.

In opposition, plaintiffs contend that, even though there may not be a common law violation, questions of fact exist as to whether a special relationship existed between plaintiffs and Haskell.[5] They cite *Voss v The Netherlands Ins. Co.* (22 NY3d 728, 735 [2014]), which states that a special relationship creates a duty if, on the facts before the court, 1) the broker receives an additional payment for consultation; 2) the client and broker interacted on a coverage issue, and the client clearly relied on the broker's expertise; or 3) the long-term relationship between the client and broker would put a reasonable broker on notice that the client was specially relying on its advice (citing *id.*). Principally, plaintiffs argue that because they used the same broker for 23 years, Haskell had an affirmative duty to advise plaintiffs that their insurance was insufficient. They claim that Haskell did not give them a copy of the MetLife Policy, citing Haskell's customer log (NYSCEF Doc. No. 274). They claim that because Haskell advised Humphries that other

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[4] Haskell frequently contends that plaintiffs' depositions reveal that they did not inform Haskell of the additional unit or the paintings and that they did not request specific coverage for them. More accurately, plaintiffs repeatedly stated that they had no recollection of any conversations with or requests to Haskell.

[5] In their papers, plaintiffs stated that if they prevailed in full on their partial summary judgment motion, motion sequence 004, as against MetLife, "then [p]laintiffs seemingly will have little or no claim against the brokers because they did their respective jobs to obtain the proper amount of insurance coverage" (NYSCEF Doc. No. 277, at *5).

coverage limits could be increased, Humphries clearly relied on Haskell's expertise. They state that the title of plaintiffs' coverage plan, the "platinum" plan, was misleading in that it suggested they had the best coverage available. They add that because Humphries was unsophisticated when it came to the nuances of insurance policies, there is a "reasonable inference of a special relationship" (NYSCEF Doc. No. 277, at **9). Alternatively, plaintiffs argue that because there is a "reasonable inference" that MetLife paid a commission to Haskell, the first situation the *Voss* Court described may have existed here. Finally, plaintiffs argue that Haskell has not definitively shown that it provided them with the policy they requested.

In reply, Haskell reiterates that it satisfied its common law duty, which is the breach that plaintiffs have alleged in their pleadings. Haskell states that plaintiffs have not raised an issue of fact supporting their argument that they may not have requested the policy Haskell acquired for them because they cannot recall any of their conversations with Haskell or assert that they made any specific requests. Haskell additionally points out that plaintiffs' complaint is bereft of allegations that a special relationship existed between itself and plaintiffs, and there is no claim based on such relationship. It contends that plaintiffs cannot assert a special relationship argument for the first time in their opposition papers to this summary judgment motion (citing *Palka v Village of Ossining*, 120 AD3d 641, 643 [2d Dept 2014]). Therefore, Haskell argues, the entire argument is improper.

Even if the court were to consider plaintiffs' arguments, Haskell states, special relationships between clients and their insurance brokers are not the norm, and that plaintiffs have not shown that one of the exceptions apply. Even viewing the allegations in the complaint in their most favorable light, they do not raise an inference that such a relationship existed. Haskell argues that plaintiffs misstate the rule as to additional compensation. To create a special relationship on

this basis, the added compensation would have to come from plaintiffs themselves, not from the insurance company (citing *Hoffend*, 7 NY3d at 158). Haskell states that all plaintiffs' arguments relating to the issue of compensation are completely speculative. According to Haskell, plaintiffs have not shown a course of dealing between the parties sufficient to impose a special relationship because the length of the relationship, by itself, is not sufficient (citing, inter alia, *Wender v Gilberg Agency*, 304 AD2d 311, 311-312 [1st Dept 2003], *lv denied* 100 NY2d 507 [2003]; *M & E Mfg. Co. v Frank H. Reis, Inc.*, 258 AD2d 9, 12-13 [3d Dept 1999]).

Summary judgment

On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1985]). The facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*Voss*, 22 NY3d at 734). Once the moving party "produces the requisite evidence, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40, 49 [2015] [internal quotation marks and citation omitted]). The court's task in deciding a summary judgment motion is to determine whether there are bona fide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

After careful consideration, the court grants Haskell's motion in its entirety. First, the motion is not rendered moot by the order in motion sequence number 004. The issues of Haskell's purported failure to obtain additional coverage for unit 4 and for the paintings are unique to the claims against Haskell. Moreover, the issue of whether the paintings were personal property or business property remains unresolved.

Second, through the testimony of its witness and through its business records, Haskell has shown that it complied with its common law responsibilities. "Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act" (*Murphy*, 90 NY2d at 273). Therefore, Haskell was not obliged to ask whether plaintiffs stored valuable paintings in unit 5 or owned other apartments in the building. Haskell's representative, Facio-Lince, stated that there is no record that plaintiffs sought additional coverage for the paintings and for unit 4, or that plaintiffs even mentioned these things to the broker. Plaintiffs' contention, in opposition, that it is possible they asked for a different type or degree of coverage which Haskell failed to provide it is speculative, and it is unaccompanied by sworn statements by Humphries or Oursler or other evidentiary support. Moreover, even if plaintiffs had raised an issue of fact on this issue, the retention and renewals of their policy for years would have waived their right to object on this basis (*see Trans High Corp. v Pollack Assoc., LLC*, 74 AD3d 489, 489 [1st Dept 2010]).

Third, plaintiffs' opposition primarily relies on the argument that there is an issue of fact as to whether they had a special relationship with Haskell which heightened Haskell's obligations to them. As Haskell asserts, plaintiffs cannot raise this argument, as they have not alleged it in the complaint (*see Fidelity Natl. Tit. Ins. Co. v. NY Land Tit. Agency LLC*, 121 AD3d 401, 403 [1st Dept 2014]). Indeed, plaintiffs improperly raise the argument for first time in their current

opposition to Haskell's summary judgment motion (*see Biondi v Behrman*, 149 AD3d 562, 563-564 [1st Dept 2017], *lv dismissed in part, lv denied in part* 30 NY3d 1012 [2017]). Therefore, this argument cannot prevail.

Even if the court reached the substance of plaintiffs' argument, it would find insufficient evidence that a special relationship existed. The general rule is "that agents have no continuing duty to advise, guide, or direct a client to obtain additional coverage" and that a special relationship triggering a heightened duty only exists in "exceptional situations" (*Murphy*, 90 NY2d at 273, 272). As Haskell notes, the duration of the client-broker relationship alone does not create a special relationship (*Kaufman v BWD Group LLC*, 127 AD3d 433, 434 [1st Dept 2011] [concerning 20-year client-broker relationship]). This is true even where the long-standing broker assures the client its needs are being met (*see Dae Assoc., LLC v. AXA Art Ins. Corp.*, 158 AD3d 493, 494 [1st Dept 2018]). Plaintiffs have not alleged the sort of close relationship courts have found sufficient to raise an issue of fact (compare *Voss*, 22 NY3d at 735-736 [parties allegedly discussed business interruption insurance and broker allegedly assured client it would seek greater coverage when business expanded]; *Houston Cas. Co. v Cavan Corp. of NY*, 161 AD3d 427, 428 [1st Dept 2018] [allegation that plaintiff "met annually with its broker, in the course of their 20–year relationship, to discuss its insurance needs, and that it relied on the broker's advice" sufficed]). Despite the long-standing relationship between plaintiffs and Haskell, plaintiffs' failure to recall any discussions with Haskell employees demonstrates that the necessary circumstances did not exist.

The court also rejects plaintiffs' contention that because Haskell may have received a commission from MetLife, a special relationship between Haskell and plaintiffs may exist. As Haskell notes, that is not the type of additional compensation that creates a special relationship. *Voss*, on which both parties rely, explains that payment is only an issue where the "plaintiffs [hire

a broker] to give advice and paid it for doing so" (*Voss*, 22 NY3d at 738 [stating that this creates a "duty of advisement"]).

Accordingly, it is

ORDERED that Haskell's motion for summary judgment, motion sequence number 007, is granted, and the claims and any counterclaims asserted against Haskell are severed and dismissed. The amended caption will be noted in this court's decision resolving motion sequence number 009.

9/29/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE