Lab, LLC v Travelers Prop. Cas. Co.
2020 NY Slip Op 34290(U)
December 23, 2020
Supreme Court, New York County
Docket Number: 650827/2014
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. O. PETER SHERWOOD** **PART** **IAS MOTION 49EFM**

Justice

---X

THE LAB, LLC,

Plaintiff,

-against-

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA and NATHAN BUTWIN COMPANY, INC.,

Defendants.

---X

INDEX No.: 650827/2014

MOT. DATE: 9/9/2020

MOT. SEQ. No.: 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58
were read on this motion to/for SUMMARY JUDGMENT

Defendant Nathan Butwin Company, Inc. ("NBCI") moves for summary judgment pursuant to CPLR 3212(a) to dismiss the second claim asserted against it in the complaint on the ground that it breached no duty of care owed to plaintiff, The Lab, LLC, as it procured the insurance coverage requested by plaintiff. For the following reasons, defendant's motion (motion sequence number 001) is denied.

I. BACKGROUND

As plaintiff did not oppose this motion, the following facts are taken exclusively from defendant's Rule 19-a Fact Statement (Doc. No. 50). NBCI was predominantly in the business of selling property and casualty insurance, with Nathan Butwin (Butwin) acting as NBCI's President and CEO (Fact Statement ¶¶ 1-2; Ex. F, at 6, 41 [Doc. No. 56]). Plaintiff was a client of NBCI (Fact Statement ¶ 3; Ex. G, at 17 [Doc. No. 57]). On April 30, 2008, plaintiff leased a portion of a building at 637 West 27th Street, New York, New York (the "Premises"), occupying the 8th floor and using the basement for their communications systems (Fact Statement ¶¶ 4-5; Ex. A, ¶ 17 [Doc. No. 51]). Plaintiff alleges that on October 29, 2012, plaintiff sustained an interruption and loss of business due to Hurricane Sandy (Fact Statement ¶ 6; Ex. A, ¶¶ 18, 19). Several years before Hurricane Sandy, Butwin and David Coopersmith (Coopersmith), an NBCI

account executive, met with Thomas Conti (Conti), plaintiff's partial owner and CEO who handled procurement of plaintiff's insurance policies with NBCI, to discuss takeover of the plaintiff's existing insurance policies with Travelers and plaintiff's insurance needs (Fact Statement ¶¶ 7, 11-12; Ex. F, at 22, 29-30). During their initial meeting, plaintiff did not pursue or request coverage from NBCI (Fact Statement ¶ 8; Ex. E, at 24, 72).

Two years after the initial meeting, in 2007 or 2008, NBCI took over plaintiff's existing policies with Travelers from plaintiff's prior insurance broker (Fact Statement ¶ 9; Ex. E, at 72-73; Ex. G, at 38). At that time, plaintiff's business interruption insurance coverage was already in place having been procured by the previous insurance broker (Fact Statement ¶ 10; Ex. G, at 68). During the second meeting between NBCI and plaintiff, Conti advised Butwin and Coopersmith that plaintiff "needed to protect themselves in case anything went wrong" (Fact Statement ¶ 13; Ex. E, at 31). Conti could not recall whether this request for business interruption insurance was a general or specific request (Fact Statement ¶ 14; Ex. E, at 35). Conti further asked Coopersmith to go over plaintiff's policies to determine if those in place would cover interruptions to plaintiff's business beyond its control (Fact Statement ¶ 15; Ex. E, at 41). Conti requested that NBCI obtain business interruption coverage for plaintiff to protect it from "anything that can happen" (Fact Statement ¶ 16; Ex. E, at 96). Plaintiff did not specifically request that NBCI obtain flood coverage. Similarly, the complaint alleges that plaintiff "required insurance coverage for business interruption arising from any loss of use or occupancy of the Premises" (Fact Statement ¶¶ 17-18; Ex. A, ¶ 25; Ex. E, at 95; Ex. G, at 70). Conti testified that he performed only an "ancillary" review of NBCI's policies (Fact Statement ¶ 19; Ex. E, at 86). Further, Conti testified that plaintiff did not have a separate written service contract with NBCI and could not recall if plaintiff compensated NBCI to provide insurance services or consultation (Fact Statement ¶ 20; Ex. E, at 91).

II. ARGUMENTS

A. Defendant's Memorandum in Support

Defendant asserts that it fulfilled any common law duty owed to plaintiff by procuring the insurance specifically requested and, consequently, plaintiff's claim for failing to procure insurance must be dismissed (Def. Br. at 2 [Doc. No. 58]). To establish a prima facie negligence claim, plaintiff must demonstrate that NBCI owed it a duty of due care, breached that duty, and the breach proximately caused injury to plaintiff (*id.*; *Turcotte v Fell*, 68 NY2d 432 [1986]).

Defendant argues that while insurance brokers have a common law duty to obtain requested coverage for their clients, they have no continuing duty to advise, guide or direct a client to obtain additional coverage (Def. Br. at 2; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). Defendant further argues that, in the ordinary broker-client setting, "the client may prevail in a negligence action only where it can establish that it made a particular request to the broker and the requested coverage was not procured" (Def. Br. at 3; *Voss v Netherlands Ins., Co.*, 22 NY3d 728, 734 [2014]).

Defendant argues that, although NBCI took over administration of plaintiff's then existing insurance policies, the business interruption coverage under which plaintiff alleges its loss was first procured by plaintiff's previous insurance broker, not NBCI (Def. Br. at 3-4; Ex. G, at 68). Conti, who handled the insurance procurement, did not specifically request NBCI procure flood insurance, testifying that: "I don't . . . really don't remember a whole lot more . . . with the exception of saying that, you know, we needed additional protection. We needed to protect ourselves in case anything went wrong" (Arbitrio Aff. ¶ 25; Ex. E, at 31, lines 11-19). Conti further testified that he requested coverage and understood that the plaintiff was protected for "some sort of disruption that was beyond [plaintiff's] control" (Arbitrio Aff. ¶ 27; Ex. E, at 41). Conti has admitted that he only recalls reviewing the limits of the insurance policies procured by NBCI for plaintiff, that plaintiff did not have a separate written contract with NBCI, and that he could not recall if plaintiff paid NBCI separate fees for insurance services or consulting (Arbitrio Aff., ¶ 37; Ex. E, at 81, lines 1-8).

Defendant argues that while it owed plaintiff a duty to obtain the specifically requested insurance covering plaintiff for business interruption, plaintiff did not specify which perils it sought to have covered by the insurance (Def. Br. at 4). Defendant argues it is undisputed that plaintiff had business interruption insurance coverage and that NBCI obtained or continued to maintain plaintiff's business interruption insurance policy in accordance with plaintiff's general request (*id.*). Further, Conti admitted he could not recall whether his request for business interruption insurance coverage was general or specific, however, his testimony shows that all of his requests to NBCI for insurance were general in nature (*id.*). Defendant argues it is well settled that a general request for a type of insurance does not impart a duty on a broker or agent to obtain all potentially available types of insurance (*id.*; *Hoffend & Sons, Inc. v Rose & Kiernan,*

Inc., 7 NY3d 152, 158 [1st Dept 2006]; *L.C.E.L. Collectibles, Inc. v Am. Ins. Co.*, 228 AD2d 196, 196-197 [1996]).

Conti further admitted receiving the policies procured and maintained by NBCI before the loss, and that there is no indication in the record that he questioned the policy or made any complaint about the coverage provided before the loss (Def. Br. at 5; *Nafash v Allstate Ins. Co.*, 137 AD3d 1088, 1090 [2d Dept 2016] ["[A]n insured is conclusively presumed to have read and assented to the terms of an insurance policy that he or she has received"]; *see also Loevner v Sullivan & Strauss Agency, Inc.*, 35 AD3d 392 [2d Dept 2006]; *Busker on the Roof Ltd. Partnership Co. v Warrington*, 283 AD2d 376 [1st Dept 2001]). Defendant argues that, in the absence of a specific request for coverage, plaintiff's receipt and acceptance of the policies procured and maintained by NBCI precludes plaintiff's purported negligence and breach of contract claim as a matter of law (Def. Br. at 5).

Defendant next argues that plaintiff's claim for allegedly failing to procure insurance must be dismissed because plaintiff has not made out a *prima facie* claim based on a special relationship between plaintiff and NBCI (*id.*). In the absence of a special request, plaintiff must show a special relationship existed between plaintiff and NBCI (*id.*; *Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014]). Three exceptional relationships may give rise to a special relationship creating an additional duty of advisement: (i) the agent receives compensation for consultation apart from premium payments, (ii) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent, or (iii) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied upon (Def. Br. at 5-6; *Voss*, 22 NY3d at 734). Insurance agents or brokers are not personal financial counselors and risk managers (*see Murphy v Kuhn*, 90 NY2d 266, 273 [1997]).

Defendant argues that it is undisputed that NBCI did not receive compensation for consultation apart from the payment of premiums (Def. Br. at 6). While there were general interactions regarding plaintiff's policies, there is no indication that plaintiff retained NBCI for a determination of questions of coverage where plaintiff relied on NBCI's expertise after the policy was issued (*id.*). Further, plaintiff has not established a course of dealing with NBCI over an extended period of time which would put an objectively reasonable insurance agent on notice that the advice being sought was relied on (*id.*).

III. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment has the burden to establish a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra*; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

The elements of a negligence claim are "first, the existence of a duty owing by the defendant to the plaintiff; second, defendant's failure to discharge that duty; third, injury to

plaintiff proximately resulting from such failure" (*Peresluha v City of New York*, 60 AD2d 226, 230 [1st Dept 1977]).

Here, defendant NBCI has failed to carry its burden to show entitlement to summary judgment as a matter of law. NBCI has shown, through plaintiff's own testimony, that the requests made of NBCI were general, not specific, in nature and did not impart a responsibility on NBCI to search out every possible relevant insurance (Arbitrio Aff., Ex E, at 35; *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158 [1st Dept 2006]; *L.C.E.L. Collectibles, Inc. v Am. Ins. Co.*, 228 AD2d 196, 196-197 [1996]). Even in the absence of such a specific request, however, a special relationship between the parties can give rise to an additional duty of advisement (*see Voss*, 22 NY3d at 734). As noted above, there are three exceptional scenarios which would give rise to said special relationship: (i) the agent receives compensation for consultation apart from premium payments, (ii) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent, or (iii) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied upon *(id.)*.

Here, just as the court in *Voss* found, Conti's testimony suggests, that there was some interaction regarding a question of coverage with plaintiff relying on NBCI (*see id.*, at 735-736). Specifically, plaintiff's representative, Conti, asked Coopersmith, a representative of NBCI, to look over plaintiff's insurance policies to see if plaintiff had coverage for disasters (Arbitrio Aff., Ex. E, at 41, lines 5-21). With regards to this exceptional scenario, NBCI argues that the interactions were general, with no indication that plaintiff retained NBCI for a determination of questions of coverage after the policy was issued (Fact Statement ¶ 15; Def. Br. at 6). Defendant's arguments, however, mischaracterize Mr. Conti's testimony and misstate the applicable standard as nothing in *Voss* suggests the interactions need be specific or that a separate retainer is required. Just as the court in *Voss* held, the complaint here cannot be dismissed on the basis that no special relationship arose between the parties. However, to prevail on its claim, plaintiff must carry the ultimate burden of proving the special relationship did arise (*id.*, at 736).

Accordingly, it is hereby

ORDERED that defendant NBCI's motion for summary judgment is **DENIED**.

12/23/2020
DATE

O. PETER SHERWOOD, 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