

**Social Life Mag., Inc. v Hudson Val. Agency Alliance,
LLC**

2023 NY Slip Op 31573(U)

May 10, 2023

Supreme Court, New York County

Docket Number: Index No. 152298/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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SOCIAL LIFE MAGAZINE, INC.,

Plaintiff,

- v -

HUDSON VALLEY AGENCY ALLIANCE, LLC, KATHRYN
E. MURPHY INSURANCE AGENCY, INC.

Defendant.

INDEX NO. 152298/2022

MOTION DATE 10/11/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23

were read on this motion to/for DISMISS.

In this action alleging negligence and negligent misrepresentation, Defendant Kathryn E. Murphy Insurance Agency, Inc. (“Murphy”) moves for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Complaint against it in its entirety, with prejudice. Plaintiff Social Life Magazine, Inc., opposes the motion.

Plaintiff is a commercial business operating in Manhattan. Defendants Murphy and Hudson Valley Agency Alliance, LLC (“Hudson Valley”) (collectively “Defendants”) are insurance brokers used by Plaintiff beginning in 2009. Plaintiff alleges that in April and May of 2019, it worked with Defendants to secure an insurance policy. Plaintiff sought a policy that would cover “all risks that were beyond [its] control” including “business interruption from any and all catastrophic events” (NYSCEF Doc. No. 1, Complaint ¶¶ 14-15). Plaintiff alleges that it expected Defendants would advise it of “substantial uncovered risks (such as a pandemic) which had the potential to ruin [its] business but that were not insured” (*id.* ¶ 16). However, Plaintiff claims that Defendants did not inform it about coverage deficiencies related to pandemics.

Defendants informed Plaintiff that they had procured it the best available policies in around August 2019. Plaintiff contends that Defendants informed it that these policies included “complete coverage for business interruption resulting from any and all catastrophic events” (*id.* ¶ 19). Based on these representations, Plaintiff allegedly purchased an insurance policy issued by nonparty Sentinel Insurance Company Limited (“Sentinel”) covering the period from August 4, 2019 to August 4, 2020.

Plaintiff alleges that in 2020 its business activities were disrupted by the Covid-19 pandemic and resulting public health measures, causing it damages. It purportedly requested that Sentinel cover its losses under the policy; Sentinel allegedly declined to do so in April 2020 because the policy did not cover pandemic-related losses. Plaintiff then brought this action in March 2022.

In its complaint, Plaintiff alleges that Defendants were negligent in advising it to purchase the Sentinel policy. And that they negligently misrepresented the extent of coverage provided by the Sentinel policy. Murphy now moves to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7). On a motion to dismiss, courts must accept as true the facts as alleged in the complaint and grant plaintiffs every possible inference (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). Although favorable inferences are presumed to be true, they “may be properly negated by affidavits and documentary evidence” (*Whilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

CPLR § 3211(a)(1) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence.” Dismissal under § 3211(a)(1) is warranted “where the documentary

evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also 511 W. 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d 144, 152 [2002]).

In support of its motion, Murphy submits a "Business Owners Application" from Plaintiff dated August 5, 2010, two summaries of Plaintiff's insurance claims, and a letter from Sentinel to Plaintiff that sets forth its reasons for disclaiming coverage. This purported documentary evidence does not "utterly refute[]" the factual allegations in the Complaint (*Goshen*, 98 NY2d at 326). Murphy fails to submit any documents that pertain to any representations it made to Plaintiff about the scope of coverage under the Sentinel policy or any documentation related to Plaintiff's purported request for an insurance policy that would cover "any and all catastrophic events." It is therefore unable to establish defenses as a matter of law to Plaintiff's negligence and negligent misrepresentation claims, respectively, and this branch of the motion is accordingly denied.

Murphy further seeks to dismiss Plaintiff's Complaint for failure to state a cause of action under CPLR 3211(a)(7). When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, "factual allegations which fail to state a viable cause of action" or "that consist of bare legal conclusions . . . are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

Murphy's motion is denied as to the first cause of action for negligence. "An insurance agent or broker can be held liable in negligence if [it] fails to exercise due care in an insurance brokerage transaction" (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 866 [1st Dept 2009]). A broker fails to exercise due care "when an insurance policy does not cover a loss for which the broker was contracted to obtain coverage" (*Cosmos, Queens Ltd. v Matthias Saechang Im Agency*, 74 AD3d 682, 683 [1st Dept 2010]). Here, the Court finds that Plaintiff sufficiently alleges that Murphy breached its duty of care by failing to procure an insurance policy "with complete coverage for business interruption resulting from any and all catastrophic events" (Complaint ¶ 15) and that this breach caused it damages when its business activities were interrupted by the Covid-19 pandemic.

The Court also denies the motion with respect to Plaintiff's second cause of action for negligent misrepresentation. The elements of negligent misrepresentation cause of action are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011], citing *JAO Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). "In exceptional circumstances a cause of action for negligent misrepresentation exists where there is a special relationship between the customer and the insurance broker and the customer reasonably relies upon the broker's representations" (*Houston Cas. Co. v Cavan Corp. of NY*, 161 AD3d 427, 428 [1st Dept 2018]). A plaintiff must allege more than a "longstanding relationship" to plead a special relationship with an insurance broker (*Dae Assoc., LLC v AXA Art ins. Corp.*, 158 AD3d 493, 494 [1st Dept 2018] [affirming dismissal of negligent misrepresentation claim against broker where complaint contained "no specific allegations that

plaintiff would meet with its broker every year to discuss the types of policies purchased, the limits to purchase, or what optional coverages should be purchased”]).

Here, Plaintiff sufficiently alleges the elements of negligent misrepresentation. The Complaint adequately pleads that a special relationship existed between Plaintiff and Murphy based on their ten years of prior dealings during which it purportedly consulted with Murphy “on multiple occasions . . . regarding the adequacy of [its] insurance coverage” (Complaint ¶ 22); Murphy’s knowledge that Plaintiff was relying on it to protect against business risks based on “express conversations and past course of dealings” (*id.* ¶ 23); and that, in the course of these communications, Plaintiff asked Murphy “to procure . . . the best available policy with complete coverage for catastrophic events” (*id.* ¶ 24). Plaintiff adequately pleads a special relationship with Murphy by specifically alleging that it regularly consulted with Murphy about its insurance needs during their decade-long relationship (*cf. Dae Assoc., LLC*, 158 AD3d at 494).

The Complaint further alleges that Murphy gave Plaintiff incorrect information about the scope of coverage under the Sentinel policy and that Plaintiff reasonably relied on this incorrect information based upon. Taking, as it must, the allegations in the Complaint as true, the Court finds the Plaintiff adequately states a cause of action for negligent misrepresentation (*Vig*, 67 AD3d at 144-145; *see Houston Cas. Co.*, 161 AD3d at 428 [holding that plaintiff stated cause of action for negligent misrepresentation where against insurance broker where it “alleged that it 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”]).

Accordingly, it is hereby:

ORDERED that the motion is denied; and it is further

ORDERED that counsel for parties shall appear for a Preliminary Conference on June 20, 2023 at 9:30 a.m., in person at 60 Centre Street, Room 212.

5/10/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>				<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE