Tishman Constr. Corp. v American Safety Indem. Co.
2008 NY Slip Op 32881(U)
October 16, 2008
Supreme Court, New York County
Docket Number: 600310/06
Judge: Shirley Werner Kornreich
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SCANNED ON 10/21/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH HON. SHIRLEY WERNER KORNREICH Justice

PART 54

Index Number : 600310/2006

TISHMAN CONSTRUCTION

vs

AMERICAN SAFETY INDEMNITY

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 6/2/08

MOTION SEQ. NO.

MOTION CAL. NO.

Is motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED OCT 21 2008 COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 10/16/08

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK
----------X
TISHMAN CONSTRUCTION CORPORATION and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Plaintiffs,

-against-

AMERICAN SAFETY INDEMNITY COMPANY and JOHN JOSEPH INSURANCE AGENCY,

Defendants.
----------X

Index No. 600310/06

DECISION and ORDER

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.

In this action for fraud and misrepresentation in the issuance of a certificate of insurance, defendant John Joseph Insurance Brokerage, Inc., sued herein as John Joseph Insurance Agency (Broker), moves for summary judgment dismissing the complaint.[1] The Broker also moves for an award of costs engendered by this motion on the ground that plaintiffs continued the action after it became apparent that it was frivolous.

Background

The gravamen of the action is the allegation that the Broker issued a false certificate of insurance, dated August 27, 2002, naming Manhattan Structures, Inc. (Manhattan), as insured, and Tishman Construction Corporation of New York[2], as additional insured (Certificate). The

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[1] On January 4, 2007, this court granted defendant American Safety Indemnity Company's motion for summary judgment, dismissed the action against it and severed the action against the Broker.

[2] Plaintiff Tishman Construction Corporation is the parent of Tishman Construction Corporation of New York (collectively, Tishman).

Certificate stated that Manhattan was insured under policy number 10APGL000 issued by American Safety Indemnity Company (American) for the period January 2, 2002 through January 2, 2003. It is undisputed that the policy number on the Certificate was incorrect and that Tishman was not an additional insured under the policy issued by American to Manhattan during the relevant period. The Certificate contains the following disclaimer in the top right-hand corner:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

This action arises out of an underlying action for personal injuries[3] allegedly sustained by William Molloy, on December 4, 2002, while working for Manhattan Concrete Structures, Inc. (Manahattan) or one of its subcontractors. Manhattan was working at a construction site located at 35-39 West 33rd Street, New York, NY (Premises), pursuant to a contract, dated June 6, 2002 (Contract) with Tishman, the construction manager for the owner of the Premises. The Contract required Manhattan to indemnify Tishman, and its parent and subsidiary companies, and to procure insurance naming them as additional insureds.

The Broker denies that it issued the Certificate or that Manhattan requested that Tishman be named as additional insured on a policy issued by American. The Broker's vice-president, Christine Calabrese, submitted an affidavit stating that the Broker procured from American a policy of insurance for Manhattan bearing the number 10 AP-GL-00383. Ms. Calabrese denied that the Broker ever issued or was requested to issue the Certificate. She stated that she has

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[3] *William Molloy v. Tishamn Construction Corporation of New York, Tishman Construction Corp. and Manhattan Concrete*, Sup. Ct. N.Y. Co., Index No. 100101/04.

never seen an insurance policy with three zeros in the policy number and that when the Broker issues a certificate of insurance, it is signed with the name of an individual broker, not the name of the agency. Finally, she averred that there has never been an individual with the name John Joseph associated with the Broker. John and Joseph are the first names of the husbands of the co-owners of the Broker.

Tishman relies on the Certificate itself to prove misrepresentation and fraud. It points to a box at the top left hand corner of the Certificate, where the Broker is listed as the "Producer" and to a box for the signature of an authorized representative at the bottom, where someone signed the name John Joseph. In addition, Tishman predicates its case on language at the top of the Certificate, which contains the name "John Joseph" and a fax number. Tishman also points to Manhattan's application form for the American policy, on which someone signed the name "John Joseph" in the bottom right-hand corner, which was reserved for the producer's signature.

Tishman has not come forward with proof that it received a verbal representation from the Broker, or that the Broker provided the Certificate to Tishman. The Broker's witness, Daniel Sullivan, testified, without contradiction, that the fax number on the Certificate is not the number of the Broker's fax. EBT Daniel Sullivan, pp. 15-16. Tishman presents no evidence that it had a relationship with the Broker.

Discussion

An insurance broker cannot be held liable for a negligent misrepresentation in an insurance certificate to a party with whom the broker has no contractual relationship absent proof of a relationship approaching privity. *Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos.*, 303 A.D.2d 245, 245-246 (1st Dep't 2003); *Superior Ice Rink v. Nescon Contracting Corp.*,

40 A.D.3d 963 (2d Dep't 2007). Moreover, a disclaimer stating that an insurance certificate is for information only bars a negligent misrepresentation claim. *Benjamin Shapiro Realty Co., LLC v. Kemper Nat'l Ins. Cos., supra.* In *Benjamin Shapiro Realty* and *Superior Ice Rink*, there was no dispute that the insurance broker had issued an incorrect certificate, and the Courts still held that a third party could not sue the broker for negligent misrepresentation based upon a certificate issued to its client, the insured. Tishman has failed to come forward with evidence that the Broker was connected to Tishman by either word or deed. *See, Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 94 (1st Dep't 2003) (before law permits negligence claim against professional by non-client third party, there must be "linking conduct" by word or action by professional to non-client).

The other basis of liability asserted by Tishman is intentional fraud or misrepresentation. There are cases which hold that a broker can be held liable for fraud, collusion or other special circumstances in the issuance of an insurance certificate. *See, Griffin v. DaVinci Dev., LLC,* 44 A.D.3d 1001 (2d Dep't 2007); *Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, Inc.*, 18 A.D.3d 590, 592 (2d Dep't 2005)(summary judgment on fraud claim denied for need of discovery where broker allegedly made representations directly to plaintiff); *Superior Ice Rink v. Nescon Contracting Corp., supra.* In order to recover for fraud, a plaintiff must prove the following elements: a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury. *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dep't 2006). In this case, Tishman cannot prove the first element of fraud, a misrepresentation made to it by the Broker. Discovery is now complete. The Broker has come forward with

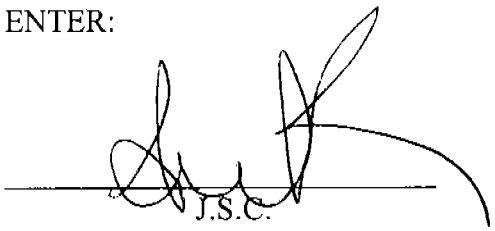
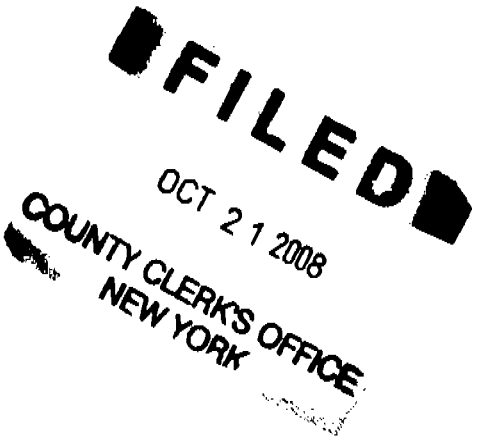
evidence that it did not make a representation to Tishman. Tishman has failed to come forward with contrary evidence sufficient to raise an issue of fact. There is no proof that the Broker made a representation to Tishman or provided it with the Certificate. At most, an inference could be drawn that the Broker gave the Certificate to Manhattan. Hence, the Broker is entitled to dismissal of the complaint.

The court declines to impose sanctions on Tishman for requiring the Broker to make this motion for summary judgment. This is not a case where a party engaged in litigation misconduct or continued to press a claim after it had been rejected by the court. *See*, *Timoney v. Newmark & Co. Real Estate, Inc.*, 299 A.D.2d 201 (2d Dep't 2002)(frivolous claim pursued through appeal and improper use of subpoenas); *De Rosa v. Chase Manhattan Mortgage*, 15 A.D.3d 249 (1st Dep't 2005)(unilateral amendment of caption changing name of party and false certification of appellate record); *Pahl v. Kassis*, 182 A.D.2d 22 (1st Dep't 1992)(frivolous claims reasserted in second complaint after dismissal of first, as well as reargument motion and appeal). Here, the court had denied the Broker's first motion to dismiss and ordered discovery to proceed. While the Broker's attorney did write to Tishman asking it to withdraw the complaint without the necessity of a summary judgment motion, in light of the unexplained etiology of the Certificate, the court does not consider Tishman's conduct to be beyond the pale of legitimate advocacy. Accordingly, it is

ORDERED that the motion for summary judgment by John Joseph Insurance Brokerage, Inc., sued herein as John Joseph Insurance Agency, is granted, the complaint against it by Tishman Construction Corporation and Tishman Construction Corporation of New York is hereby dismissed with prejudice, and the Clerk is directed to enter judgment accordingly; and it

is further

ORDERED that the motion by John Joseph Insurance Brokerage, Inc., sued herein as John Joseph Insurance Agency, for the costs of making this motion is denied.

Dated: October 16, 2008

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