STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MASS FACTORY, INC.,

Plaintiff, DECISION AND ORDER

v.

Index #2005/05807

WALTER C. TAYLOR AGENCY, INC.,

Defendant.

WALTER C. TAYLOR AGENCY, INC.,

Third-Party Plaintiff,

v.

ERIE & NIAGARA INSURANCE ASSOCIATION,

Third-Party Defendant.

This case comes before the court on several pending motions. The initial motion was made by plaintiff, Mass Factory, Inc., seeking an order granting it leave to amend its complaint to add causes of action against third party defendant, Erie Niagara Insurance Association. Defendant/ third party plaintiff, Walter C. Taylor Agency, Inc., then submitted a motion seeking summary judgment pursuant to CPLR 3212 as to plaintiff and/or the third party defendant. Defendant/ third party plaintiff also seeks preclusion as against third party Defendant. That motion was followed by yet another motion filed by plaintiff, a cross motion seeking summary judgment as to liability, an order denying

defendant's motion for summary judgment, or in the alternative, an order denying all motions based upon the presence of questions of fact. Finally, third party defendant, Erie & Niagara Insurance Association, cross moves for summary judgment, for an order denying plaintiff's motion to amend and Defendant/third party plaintiff's motions for summary judgment and preclusion.

Plaintiff's complaint alleges three causes of action against defendant: negligence, breach of contract, and breach of fiduciary duty. The complaint's allegation arise out of a fire which occurred on December 27, 2004, damaging an eight unit boarding house located at 676 Jay Street, Rochester, New York and owned by plaintiff. Plaintiff's complaint alleges that several months prior to the December 27, 2004 fire, plaintiff's property manager and owner of the plaintiff corporation, Patti Billard, approached defendant through Keith A. Reynolds and applied for insurance coverage for the property. Complaint, ¶7. Prior to December, 2004, defendant had a business relationship with Patti Billard and had served other companies owned by her. Id. at ¶6. There is no allegation, however, that defendant ever had a prior relationship with plaintiff. Plaintiff alleges that, over the course of nearly a year, Billard endeavored to provid[e] "provided all necessary information to the defendant as requested by the defendant in order to have in effect the appropriate commercial property insurance coverage for the subject property."

It is further alleged that on December 6, 2004, Billard was told she was "all set" and that third party defendant Erie Niagara had "picked up" coverage on the property and that coverage would be in place by December 25, 2004. Id. at ¶¶9-10.

Defendant contends that plaintiff never requested specific coverage specifying her needs, nor was she informed that she would have coverage by any particular time. Defendant acknowledges, however, that an application and request for a quote was submitted by it to Erie & Niagara, specifying particulars of coverage for plaintiff immediately after Billard's phone call on December 6, 2004. The request sought a quote no later than December 20, 2004. When no response to this request was received from Erie Niagara by December 20, 2004, Mr. Reynolds sent a second request for a quote. This request also was also allegedly not answered by Erie Niagara until January 5, 2005, after the fire.

On December 27, 2004 the property sustained damages as a result of a fire on the premises caused by a third party. Complaint at ¶¶12-13. Shortly after the fire, Billard was notified that insurance on the property had not been secured prior to the loss. Plaintiff alleges that it was not notified at any time between December 6, 2004 and the date of the fire that insurance coverage could not be obtained on the property. Plaintiff relies on Billard's testing that she was told by

defendant's agent that she was "all set" and that Erie Niagara would "pick up" the coverage.

On January 5, 2005 third party defendant responded for the first time to the request for a quote. Affirmation of S. Atwater, ¶52. That letter states as follows, in relevant part:

> You are questioning whether we would be offering a quote. A quote is available but has not been forwarded to your office due to new policy management rating issues. We are currently trying to resolve the issue and apologize for the delay.

Erie Niagara then stated that coverage could not be provided. Defendant alleges that the delay on Erie Niagara's part caused the December 6, 2004, request for a quote to not be acknowledged in a timely fashion. A third party action was commenced against Erie & Niagara seeking indemnification in the event defendant is deemed liable.

Summary Judgment

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of

fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted). Each party herein has moved for summary judgment.

Mass Factory, Inc. v. Walter C. Taylor Agency

Both plaintiff and defendant in the initial action have moved for summary judgment; plaintiff's motion seeks summary judgment as to liability only. The first cause of action sounds in negligence and alleges that "Defendant, through its' employees, agents, and/or representatives promised and represented to Plaintiff (through Patti Billard) that the appropriate property insurance coverage would be solicited, obtained, procured and in effect on o before December 25, 2004." Complaint, ¶20. Despite this, plaintiff alleges defendant "did

nothing to timely and properly obtain and secure the requested insurance coverage from December 6, 2004 up to and until the time of said fire." Id. at 22. Thus, plaintiff's negligence cause of action concludes that defendant was negligent and careless in failing to obtain the insurance, failing to notify plaintiff that the property was not insurable, and by waiting more than three weeks to procure coverage. Id. at ¶¶24-26.

A cause of action in negligence requires the following elements: "(1) the existence of a duty on defendant's part as to plaintiff, (2) a breach of this duty, and (3) injury to the plaintiff as a result thereof." Akins v. Glens Falls City Sch. Dist., 53 N.Y.2d 325, 332 (1981). "An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time or to inform the client of the inability to do so." Loevner v. Sullivan & Strauss Agency, Inc., 35 A.D.3d 392, 393 (2d Dept. 2006). See also, Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 N.Y.3d 152, 157 (2006). It is oft-stated that an insurance agent's duty is defined by the nature of the request made by the customer. Id. 7 N.Y.3d at 157; Frost v. Mayville Tremaine, Inc., 299 A.D.2d 839 (4th Dept. 2002); Chase's Cigar Store, Inc. v. Stam Agency, Inc., 281 A.D.2d 911, 912 (4th Dept. 2001); Kyes v. Northbrook Property and Cas. Ins. Co., 278 A.D.2d 736 (3d Dept. 2000). Generalized requests for coverage that lack specificity are insufficient. Hoffend &

Sons, 7 N.Y.3d at 158; Catalanotto v. Commercial Mut. Ins. Co., 285 A.D.2d 788 (3d Dept. 2001).

> As a general rule, "insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of their inability to do so" (Murphy v. Kuhn, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371; see, Chaim v. Benedict, 216 A.D.2d 347). An agent may be held liable for neglect in failing to procure the requested insurance (see, Island Cycle Sales v. Khlopin, 126 A.D.2d 516). An insured "must establish that [the agent] failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction" (Associates Commercial Corp. of Delaware v. White, 80 A.D.2d 570, 571).

Santaniello v. Interboro Mut. Indem. Ins. Co., 267 A.D.2d 372 (2d Dept. 1999). See also, Katz v. Tower Ins. Co. Of New York, 34 A.D.3d 432 (2d Dept. 2006).

The two theories of recovery are not identical in their elements:

> Upon proof of the contract and its breach, plaintiffs would establish a Prima facie case for damages with respect to the breach of contract action. However, so far as the negligence action is concerned, the mere fact that a policy was not procured would not relieve plaintiffs of the burden of proving the negligence of defendant or require the latter to show affirmatively that it had exercised due care in the transaction. Moreover, if negligence were established, plaintiffs would be required to show that such negligence was the proximate cause of their damages. In this context, plaintiffs would be required to show that prior to the fire they could have procured the insurance which they sought.

MacDonald v. Carpenter & Pelton, Inc., 31 A.D.2d 952, 953 (2d Dept. 1969). See Mott v. New York Property Ins. Underwriting

Ass'n, 209 A.D.2d 981 (4th Dept. 1994). The element of availability has not been challenged by defendant in its motion papers, despite the fact that Erie Niagara denied coverage in mid December on another of Billiard's properties, and on the ground that she was a professional landlord.

Here, plaintiff meets her initial burden to show that it made, through Billard, a continuing effort throughout 2006 to obtain coverage for the building, that in November she received a preliminary quote of $3,555 for coverage that she normally received in connection with her other properties, Billiard deposition, at 98-101 ("I kind of had a pattern with them of what I used before and I didn't ask questions, no. I left it up to them basically"), and that on December 6th she was told that she was "all set," that Erie Niagara had "picked up" the requested coverage, and that she would be insured by Christmas if not "way before then." Defendant's contention that plaintiff failed to meet its initial burden on summary judgment by reason of the lack of particularity of plaintiff's request for coverage is without merit. First, I agree that the particularity or "specific request" cases defendant relies on usually, if not always, comes up in the context of a claimed failure to provide a particular or specialized type of additional insurance, such as SUM coverage or some other insurance supplement or coverage out of the ordinary of the parties' past practices. Plaintiff contends, I think with

support in the case law, that the specificity cases relate to the doctrine that a broker has no continuing duty to recommend, advise, guide or direct unless a specific request is made. The specificity cases have a more limited application to the general duty of a broker to provide requested insurance within a reasonable time or inform the client of an inability to do so. Defendant faults Billiard for her most recent affidavit specifying that she asked for "property and liability insurance coverage," but the obvious question is, what else would she be seeking in the circumstances, or rather would it not be natural for her to have requested the same? Her request for insurance for a boarding house does not make sense if she did not request property damage insurance at least by reason of fire, the loss she ultimately sustained. Defendant cites no case holding in these circumstances that plaintiff's request for insurance for the boarding house must be so particular as to specify the precise deductible, the precise policy limit when the value of the building was known (as it was by the December 6th conversation), or the specifics of liability coverage. The proof on this motion is that, in November and in early December, Reynolds was endeavoring to obtain valuation and other information appropriate to Billiard's request for insurance. Such an undertaking in the face of a request for "proper and adequate" coverage triggers the broker's duty. Stevens v.

Hickey-Finn & Co., Inc., 261 A.D.2d 300 (1st Dept. 1999).

In any event, defendant sent to Erie Niagara on the day of Billiard's December 6th conversation, a detailed quote request with all of these particulars, and more, which serves as circumstantial evidence of the specificity of plaintiff's request, particularly in light of the November premium quote plaintiff alleges (without contradiction) that Reynolds gave her of $3,555,[1] and in view of plaintiff's contention that she wanted by way of coverage the same that she customarily got for other properties. No issue has been raised that the terms of the policy coverages Reynolds sought from Erie Niagara was at variance with plaintiff's requests of defendant. While it is true that plaintiff, in support of its motion, did not detail the prior relationship for the purpose of fleshing out the details of what Billiard customarily procured by way of insurance for her various properties, defendant did not, in response to the motion, contend that the prior practice with respect to insurance procured did not constitute a "pattern," nor did defendant otherwise contend that the pattern that existed was insufficiently established to provide notice to Reynolds of what she wanted. In other words, given the lack of dispute that the prior practice existed, defendant failed on its motion to

[1] The actual quote worked up by Erie Niagara on the day of the fire was only slightly less than this figure.

establish as a matter of law that the "pattern" of coverage Billiard testified about was insufficiently particular to put Reynolds on notice of what Billiard sought by way of coverage. It will be for the jury upon proof of the prior practice to make the determination whether the requisite specificity was met and whether the particulars of coverage may be ascertained with the requisite definiteness.

There also is a question of fact presented as to the nature of the conversation between Billard and Reynolds on December 6, 2004: Billard asserts that she was told that she was "all set" and that Erie & Niagara had "picked her up" for insurance. Billiard deposition, at 51. Reynolds, on the other hand, represents that when Billiard first called in March 2004, that none of the companies defendant did business with would insure a boarding house. Reynolds deposition, at 60. He maintained that he never agreed to bind coverage for plaintiff and that, instead, he was just supposed to get a quote for insurance. Reynolds deposition, at 80, 130, 186. As such, there is a question as to whether defendant's duty was to procure insurance (as alleged by Billard) or to merely obtain a quote for insurance (as alleged by Reynolds). Reynolds deposition, at 41, 81, 132, 185-86. Reynolds unequivocally denied that he ever told her that Erie Niagara had "picked her up," and also denied that he promised her coverage by Christmas or "way before that." Reynolds also

testified that, after his initial conversation with Billiard in March 2004, that she did not return his phone calls, and that he closed his file because they never had contact thereafter until November 22, 2004. This contradicts Billiard's claim that they spoke monthly about the Jay Street property. After the November 22nd call, he sent her a letter request for additional information, which was not responded to until 14 days later in the December 6th call, according to Reynolds' account.

The nature of defendant's duty to plaintiff hinges upon what Billard and Reynolds discussed on December 6, 2004, and that cannot be determined based upon their contradictory deposition testimony. Such a disparity in the versions of an issue causes a credibility issue which cannot be resolved on a summary judgment motion. See Dallas-Stephenson v. Waisam, 833 N.Y.S.2d 89 (1st Dept. 2007); Auble v. Doyle, 38 A.D.3d 1264 (4th Dept. 2007). If defendant represented to plaintiff that it would procure insurance coverage, then he had a duty to do so, or to inform plaintiff that he could not. See Loevner, 35 A.D.3d at 393; Hoffend & Sons, Inc., 7 N.Y.3d at 157.[2] Plaintiff and

[2] There is documentary evidence tending to demonstrate that defendant merely referred a quote request to Erie Niagara. The Commercial Insurance Application attached to plaintiff's cross motion for summary judgment as Exhibit D sets forth in the "Status of Transaction" section that the application is in "quote" status. However, this application is not signed by Billard, and there is no indication that she ever saw it before it was sent. But this evidence contrasts with Billard's testimony that she already had a quote from Reynolds as to the

defendant's contradictory versions on what defendant was to obtain for plaintiff based upon the December 6th conversation between Billard and Reynolds precludes an award of summary judgment. Both parties' motions for summary judgment are denied on the first cause of action.

The third cause of action alleges breach of fiduciary duty, alleging that defendant agreed to act as "an agent, trustee and/or fiduciary... with respect to obtaining and securing" insurance and that it breached its fiduciary responsibilities by failing to do so. Complaint, ¶¶37-38. "Although the parties' relationship lasted a considerable period of time and defendant [allegedly] assured plaintiff that h[er] insurance needs were being met, these circumstances are not so exceptional as to support imposition of a fiduciary duty upon defendant." Hersch v. DeWitt Stern Group, Inc., __ A.D.3d __ (1st Dept. Sept. 6, 2007). Accordingly, summary judgment is awarded dismissing the third cause of action. Murphy v. Kuhn, 90 N.Y.2d 206, 272-73.

The second cause of action alleges breach of contract, alleging that defendant breached an agreement by failing to procure insurance on or before December 25, 2004. Defendant seeks summary judgment on the breach of contract cause of action alleging that any alleged contract lacked the required

---

premium payments. Billiard deposition, at 98-99. This added conflict further supports the need for a trial.

specificity mandated by New York courts. Defendant's motion, however, is directed to the particulars of what might be an enforceable insurance contract between insured and insurer. By contrast, the second cause of action is directed only to the alleged agreement by Reynolds to procure insurance for Billiard on the Jay Street property. Plaintiff may establish liability either in contract or negligence for a breach of the broker's common law duty to procure requested insurance. Plaintiff "must establish that [the agent] failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction." Associates Commercial Corp. of Delaware v. White, 80 A.D.2d 570 at 571. Resolution of this cause of action depends upon a determination of the questions of fact identified above. Both motions for summary judgment on the second cause of action are denied.

Walter C. Taylor Agency v. Erie & Niagara Insurance Association

In the third party complaint defendant seeks indemnification based on both common law indemnification and contractual indemnification. "[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a 'separate duty owed the indemnitee by the indemnitor.'" Raquet v. Braun, 90 N.Y.2d 177, 183 (1997), *citing* Mas v. Two Bridges Assoc., 75

N.Y.2d 680, 690 (1990).

Defendant predicates both the common law claim and the contractual claim on Erie Niagara's alleged failures to adhere to its internal procedures for handling Reynold's submission on December 6th, not on any independent statutory or common law duty. Defendant relies exclusively on Erie Niagara's delaying in processing Reynolds request for a quote and on what it contends as an admission by Erie Niagara's underwriting manager, Debbie Kinkle, who acknowledged, contrary to Erie Niagara's position on these motions, that the latter indeed had an obligation to respond to Reynolds quote request. She testified that, because Reynolds' cover e-mail requested a response by December 20th, that normal procedure would be to "bump [it] up to the top of the pile of applications" for swift processing, and that Reynolds' second request on December 20th would normally result in special attention:

> Usually that would be pulled from the file, especially a second request . . . an agent will be called, where it would be acted on [by an underwriter].

Kunkle acknowledged that neither of Erie Niagara's customary ways of dealing with Reynolds' initial and follow up requests occurred. Kunkle also testified that if there had been no fire, issuance of a policy in response to Reynolds' submissions would be retroactive to December 20th "[d]ue to the error in our processing system . . . our error in delaying the quote."

In fact, Kelley Klemann, now Kelley Shaver, of Erie Niagara prepared a "Quotation - valid for 30 days" by memorandum to defendant dated 12/27/2004, at 11:50 a.m., the day of the fire, which included a commercial fire policy. But the quote was not forwarded to defendant until sometime in January. Shaver acknowledged in a letter to Reynolds dated January 5, 2005:

> You are questioning whether we would be offering a quote. A quote is available but has not been forwarded to your office due to new policy management rating issues. We are currently trying to resolve the issue and apologize for the delay.

See Exhibit FF of defendant's motion papers.

From this, defendant seeks to shift the entire blame for the delay onto Erie Niagara via common law and contractual indemnification principles. Common law indemnification is unavailable. "A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification (see, Trustees of Columbia University v. Mitchell/Giurgola Assocs., 109 A.D.2d 449, 453-454 (1st Dept 1985)." Mathis v. Central Park Conservancy, Inc., 251 A.D.2d 171 (1st Dept. 1998). In the Amended Third Party Complaint, defendant asserts that Erie Niagara (1) was negligent in failing timely to respond to defendant's "requests for insurance for plaintiff Mass Factory, Inc.," (2) breached the agency agreement between the two parties by failing timely to respond in accordance with its internal

procedures and in accordance with its obligation to act in good faith and in fair dealing, and (3) is contractually bound to indemnify defendant by reason of delaying the quote in violation of the procedures for handling requests that were made a part of the agreement by reference. These theories of recovery are not available to plaintiff.

> Since its liability toward the insured is predicated on its own fault, Principe cannot seek common-law indemnification from Sterling (Mathis v. Central Park Conservancy, 251 A.D.2d 171, 172 [1998]). Nor may it seek contribution, which is not available for economic loss resulting exclusively from breach of contract (see Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2d 21 [1987]; Trump Vil. Section 3 v. New York State Hous. Fin. Agency, 307 A.D.2d 891, 897 [2003], lv. denied 1 N.Y.3d 504 [2003]).

Bleecker Street Health & Beauty Aids, Inc. v. Granite, 38 A.D.3d 231, 233 (1st Dept. 2007). Here, as in Granite, the court must "recogniz[e] that the negligence and breach of contract causes of action were only couched as such, and were actually for contribution and indemnification." Id. 38 A.D.3d at 232-33. Accordingly, summary judgment is denied to defendant on its motion insofar as the third party complaint is based on common law contribution and indemnification principles, and granted to Erie Niagara on its motion dismissing the third party complaint insofar as it is based on common law contribution and indemnification principles. See also, Trump Village Section 3, Inc. v. New York State Housing Finance Agency, 307 A.D.2d 891 (1

Dept. 2003); American Ref-Fuel Co. Of Hempstead v. Resource Recycling, Inc., 281 A.D.2d 574, 575 (2d Dept. 2001).[3]

That leaves for consideration defendant's claim for contractual indemnification. Tri-Delta Aggregates, Inc. V. Chautauqua County, 237 A.D.2d 880, 880-81 (4th Dept 1997). Defendant alleges that Erie Niagara violated the agency agreement because the agency agreement, in §1, refers to an appointment of defendant as agent and makes reference to "the procedures, bulletins, regulations, underwriting instructions and binding rules of the company." Section 1, however, does not bind Erie Niagara to follow its internal procedures, and no other provision of the agency agreement may be interpreted as imposing an obligation on Erie Niagara to follow what in this case are, at best for defendant's position, unwritten and loosely defined procedures for processing requests for premium quotes. The language of §1 relied on in the Atwater affidavit, at ¶32, in fact obligates defendant as agent to "promis[e] and agre[e], in accordance with the terms of this agreement and the procedures, bulletins, regulations, underwriting instructions and binding

[3] This renders it unnecessary to consider the applicability of Erie Niagara's contention that no common law indemnification, or liability in negligence, is available by reason of a failure to follow internal company rules. Gibson v. Metropolitan Opera, 5 N.Y.3d 547, 577 (2005); Sherman v. Robinson, 80 N.Y.2d 843, 849 n.3 (1992); Dambois v. N.Y. Central R.R. Co., 12 N.Y.2d 234 (1963); Lesser v. Manhatten and Bronx Surface Transit Op. Auto, 157 A.D.2d 352 (1st Dept. 1990).

rules of the company: (a) to actively solicit applications for insurance . . .” This language places no obligation on Erie Niagara. The only language in §1 that does place an obligation on Erie Niagara is the provision obligating “[t]he company . . . [to] provide the agent with its underwriting instructions, binding authority rules, and all other company information, procedures, bulletins, catalogs, regulations and guidelines . . . [and to provide 15 days notice of changes in the same],” but this language cannot be interpreted as placing any obligation on Erie Niagara to create timely response procedures or to invariably follow them or otherwise incur liability for breach of contract.

Defendant also invokes the obligation of all contracting parties to carry out their duties under a contract in good faith and fair dealing. Defendant contends that Erie Niagara’s representatives admitted in deposition that they had some duty to respond to defendant’s request for a quote even if not spelled out in the agency contract. But a party suing for breach of contract must allege a provision of the contract allegedly breached. Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dept 2003). As Erie Niagara contends, “[w]hile the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively . . . to create independent contractual rights.” Fesseha v. TD Waterhouse Inv. Serv., 305 A.D.2d 268 (1st Dept 2003). There is, accordingly,

merit to Erie Niagara's position that no provision in the contract required it to comply with what Kunkle and Shaver described as the company's normal manner of processing submissions such as Reynolds made that December.

Erie Niagara also contends that it is not liable as a matter of law because defendant had binding authority to issue policies for fire loss and property damage at any time without any action by Erie Niagara. This issue need not be reached in light of the disposition of the Third Part Complaint set forth above.

Arbitration

The agency agreement contains the following arbitration clause:

> 15. **ARBITRATION -** The parties hereto shall exert their best efforts to resolve any dispute under or arising out of this Agreement, the interpretation of this Agreement, or any party's performance, non-performance, rights or obligations under this Agreement. In the event that any dispute cannot be resolved between the parties, the aggrieved party shall submit the dispute to arbitration in accordance with the rules of the American Arbitration Association for commercial disputes subject to the following requirements....

Erie Niagara argues that the arbitration clause requires dismissal of the third party complaint. The court notes that third party defendant merely moves to dismiss based upon the arbitration clause and does not submit a motion under Article 75 seeking to compel arbitration or stay the action pending arbitration.

In determining whether a party has waived his right to arbitrate, a court must assess the facts of the case presented and discern whether "'the defendant's actions are consistent with an assertion of the right to arbitrate.'" Spatz v. Ridge Lea Assoc., LLC, 309 A.D.2d 1248 (4th Dept. 2003), *quoting* DeSapio v. Kohlmeyer, 35 N.Y.2d 402 (1974). See also, Zack Assocs., Inc. v. Setauket Fire Dist., 12 A.D.3d 439 (2d Dept. 2004); Les Construction Beauce-Atlas, Inc. v. Tocci Bldg. Corp. of New York, Inc., 294 A.D.2d 409 (2d Dept. 2002). A defendant will be deemed to have waived arbitration where the court finds that there was "an intention to waive arbitration." Utica First Ins. Co., 2 Misc.3d 1008(A), *citing* DeSapio v. Kohlmeyer, 35 N.Y.2d 402 (1974) and In re Zimmerman, 236 N.Y. 15 (1923). See also, Lodal, 309 A.D.2d at 634; Greater Miami Baseball Club Ltd. Partnership v. Nat'l League of Professional Baseball Clubs, 193 A.D.2d 513 (1st Dept. 1993); Riggi v. Wade Lupe Constr. Co., Inc., 176 A.D.2d 1177 (3d Dept. 1991). The Court of Appeals has observed:

> In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory.

DeSapio v. Kohlmeyer, 35 N.Y.2d 402, 405 (1974). "Once waived, the right to arbitrate cannot be regained." Tengtu Intern. Corp.

v. Pak Kwan Cheung, 24 A.D.3d 170,172 (1st Dept. 2005). While most reported cases involve waiving the right to arbitrate by participating in judicial proceedings (see e.g., Zack Assoc., Inc. v. Setauket Fire Dist., 12 A.D.3d 439 (2d Dept. 2004); In re Michel, 12 A.D.3d 1189 (4th Dept. 2004)), there are instances in New York case law where a waiver is effected as a result of actions taken by a party in an arbitration. See e.g., Nachman v. Nachman, 12 Misc.2d 551 (Sup.Ct. N.Y.Cty. 1958).

Here, Erie Niagara has participated fully in these proceedings since the commencement of the action in 2005, including depositions. Erie Niagara has waived the right to arbitrate the claims set forth in the third party complaint.

Motion to Amend

CPLR §3025(b) states: "A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." Leave to amend should be granted absent "surprise or prejudice." Comsewogue Union Free School Dist. v. Allied-Trent Roofing Sys., Inc., 15 A.D.3d 523 (2nd Dept. 2005). Siegel has noted:

> Almost everything parties seek to add to their pleadings is designed to prejudice the other side. That's what litigation is all about. So, the showing of prejudice that will defeat the amendment must be traced

> right back to the omission from the original pleading of whatever it is that the amended pleading wants to add- some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one now wants to add.

David D. Siegel, N.Y. Practice, §237. The decision whether to grant such a motion lies in the court's discretion. See C-Kitchens Assoc., Inc. v. Travelers Ins. Companies, 15 A.D.3d 905 (4th Dept. 2005), *citing* Edenwald Contr. Co. v. City of New York, 60 N.Y.2d 957, 959 (1983). A proposed amendment may be denied where it is apparent that the proposed amendment patently lacks merit. See Water Club Homeowners Assoc., Inc. v. Town Bd. of the Town of Hempsted, 16 A.D.3d 678 (2d Dept. 2005); McFarland v. Michel, 2 A.D.3d 1297, 1300 (4th Dept. 2003). "[A] court will not ordinarily consider the merits of the proposed new matter unless it is so obviously lacking in merit as to have no chance of success whatever...." N.Y. Practice, §237.

Evidentiary support for the proposed amended pleading is required. See Farrell v. K.J.D.E. Corp., 244 A.D.2d 905 (4th Dept. 1997). A verified pleading provides sufficient evidentiary support to support a motion to amend. See McFarland v. Michel, 2 A.D.3d 1297 (4th Dept. 2003). Cf. Mohan v. Hollander, 303 A.D.2d 473 (2d Dept. 2003). Where a motion to amend is supported solely by an attorney affirmation that does not indicate personal knowledge of the facts, it is within the court's discretion to

deny the motion. See Pacheco v. United Med. Assoc., P.C., 305 A.D.2d 711, 714 (3d Dept. 2003); Morgan v. Prospect Park Assoc. Holdings, L.P., 251 A.D.2d 306 (2d Dept. 1998).

The proposed amended complaint seeks to add a fourth cause of action against Erie Niagara alleging negligence because it failed to timely respond to defendant's application requests. This proposed fourth cause of action also alleges that defendant was an agent of Erie Niagara and "acted within its general or apparent scope of authority" when it is alleged that defendant "promised plaintiff and told plaintiff that it would procure, obtain and secure property insurance for plaintiff's property." Id. at ¶50. Plaintiff concludes that Erie Niagara is liable on a vicarious liability theory, or in the alternative that Erie Niagara was affirmatively negligent.

The proposed amendment does not patently lack merit. Neil Plumbing & Heating Const. Corp v. Providence Washington Insurance Co., 125 A.D.2d 295, 297 (2d Dept. 1986)(insurer may be held vicariously liable for the negligence of its agent committed in the course of the agency "and a principal that is vicariously cast in damages as the result of its agent's negligence may be entitled to full indemnification from the agent, who was the actual wrongdoer"), 298 (insurer's recovery from agent by way on indemnification under this theory does not depend on a showing of proximate cause). As the amendment does not patently lack merit, the motion to amend is granted.

Motion to Preclude

Defendant also moves to preclude Erie Niagara from producing Sandy Corey either by affidavit or testimony and from denying that the quote for plaintiff could and should have been presented by December 14, 2004. Defendant seeks to depose Sandy Corey, the author of a December 15, 2004, letter regarding a request for quote with respect to other properties owned by Billard that was submitted on the same day as the application at issue herein. Plaintiff and defendant deem her testimony relevant because that application was addressed by Erie Niagara, whereas the application regarding the boarding house property on Jay Street was not addressed until after Erie Niagara was notified that the property had suffered a fire. No previous order to compel Ms. Corey's deposition has been made to the court.

CPLR §3124 states: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." As a penalty for refusal to comply with discovery demands, CPLR §3126 permits a court to issue various forms of relief. The circumstances presented justify granting a conditional order of preclusion. While both plaintiff and defendant have requested the scheduling of this deposition several times, guidance or instruction from the court was not sought prior to the making of this motion. The circumstances

presented do not warrant issuing a preclusion order at this time. As such, Erie Niagara is directed to produce Ms. Corey for a deposition within 45 days, or it will be precluded from offering testimony denying that plaintiff's application should have been responded to by December 13, 2004.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: September 28, 2007
Rochester, New York