

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA PART 2

EBRO RESTORATION CORP., x

Plaintiff,

- against -

FRANK J. MANTOVI INSURANCE
BROKERAGE COMPANY, LAWRENCE J.
MANTOCI AGENCY and
LAWRENCE J. MANTOVI,

Defendants.
_____ x

Index
Number 22886 2005

Motion
Date August 22, 2007

Motion
Cal. Number 17

Motion Seq. No. 1

The following papers numbered 1 to 11 read on this motion by defendants Lawrence J. Mantovi and the Lawrence J. Mantovi Agency or an order granting summary judgment dismissing the complaint, and all cross claims and counterclaims.

	<u>Papers Numbered</u>
Amended Notice of Motion-Affirmation- Affidavit-Exhibits(A-N, 1-6).....	1-4
Opposing Affirmation- Affidavits-Exhibit(A)....	5-7
Reply Affirmation.....	8-11

Upon the foregoing papers this motion is determined as follows:

At the outset the court notes that this motion is timely, as it was originally made returnable on July 10, 2007 in compliance with the so-ordered stipulation of April 23, 2007.

On May 31, 2001, plaintiff Ebro Restoration Corp. (Ebro) entered into a construction contract with Inglesia Ni Cristo (Inglesia) to erect a new chapel and function hall located at 70-71 112th Street, Forest Hills, New York. The contract price was \$5,493,483.00, and provided that the work was to commence no later than June 25, 2001 and to be completed on or before December 31,

2002. The contract required that Ebro obtain commercial general liability insurance and that it name Inglesia as an additional insured.

Defendant Lawrence Mantovi is a licensed insurance agent and a licensed insurance broker. Mr. Mantovi was an agent of Nationwide Insurance Company (Nationwide), and if that insurer did not insure a particular risk, he would procure coverage through a wholesale insurance broker. Lawrence Mantovi does business as the Lawrence J. Mantovi Agency.

On May 13, 2002, Ramon Calvo, the president and sole shareholder of Ebro went to the offices of the Lawrence J. Mantovi Agency, and inquired about obtaining commercial automobile, commercial general liability and umbrella insurance for Ebro. Mr. Mantovi directly placed the automobile insurance and umbrella insurance with Nationwide, and through the Heffner Agency obtained a general liability policy with Rutgers Casualty Insurance Company (Rutgers), who issued a policy for the period of May 13, 2002 to May 13, 2003, to Ebro Restaurant. On June 27, 2002, Mr. Mantovi received the original Rutgers policy, which he reviewed and noted that Ebro's name was not correct on the policy. He sent an electronic message to the Heffner Agency, requesting the correction of the insured's name, and Rutgers issued an amended policy to Ebro Restoration, which was hand delivered to Mr. Calvo in Mantovi's office in July 2002. On July 1, 2002, Mantovi received a request from Ebro for a certificate of insurance naming Inglesia as an additional insured on the Rutgers policy. The Mantovi Agency issued said certificate of insurance, after allegedly receiving authorization from the Heffner Agency to do so, and a copy of said certificate was faxed to the Heffner Agency. Inglesia, however, was not added to the Rutgers policy as an additional insured.

Nationwide, in a letter dated July 11, 2002, informed Ebro that it could not provide umbrella insurance, as its underwriting guidelines required that the general liability insurance be placed with Nationwide, and stated that the binder for coverage for the umbrella insurance would terminate on August 18, 2002. Ebro did not seek any other umbrella insurance.

On September 21, 2002, Ebro's employee Joaquin Martinez was fatally injured in a work related accident. On October 8, 2002, Ebro reported the accident to the defendants, who reported the claim to the Heffner Agency on the same day. The Heffner Agency reported the claim to Rutgers on October 9, 2002. Rutgers in a letter dated October 21, 2002, declined coverage to Ebro, pursuant to the policy's exclusion for bodily injury, including death, to the insured's employees. A copy of said letter was apparently

sent to the Heffner Agency, and Rutgers' underwriting department. Plaintiff's counsel sent a letter and motion papers to Rutgers dated November 4, 2002, informing the insurer that there was an application by the proposed administrator of the Estate of Joaquin Martinez pending in the Supreme Court, Bronx County, for pre-action disclosure. On February 19, 2003, Ingelsia provided notice to Rutgers tendering the claim asserted against it by the Estate of Joaquin Martinez, for defense and indemnification. Rutgers, in a letter dated February 26, 2003 denied Inglesia's request, stating that there was no coverage for the claim and enclosed a copy of the Ebro disclaimer letter.

On October 9, 2003, Jose Toledo, as Administrator of the Estate of Joaquin Martinez commenced an action in the Supreme Court, Bronx County entitled Jose Luis Toledo as Administrator of the Estate of Joaquin Martinez, a/k/a Joaquin Martinez Vargas, deceased v Inglesia Ni Cristo for violations of the Labor Law, the decedent's conscious pain and suffering, and wrongful death. Inglesia brought a third party action against Ebro, and its employee Juan Santamaria, who is alleged to have caused the accident which resulted in Martinez' death. Rutgers has not provided a defense to either Ebro or Inglesia in the Bronx County action. Ebro has been provided with a defense by its Workers' Compensation Insurance carrier, the State Insurance Fund. Ebro and Inglesia entered into an agreement dated October 17, 2003 whereby the parties agreed to settle certain claims arising out of a mechanics' lien, and Ebro agreed, inter alia, to hold harmless, defend and indemnify Inglesia from all demands, claims, suits, actions, liens and encumbrances, including attorneys' fees by the Martinez estate. Inglesia tendered its defense to Ebro in the Toledo action on November 27, 2003. Inglesia apparently has its own insurance policy, and has been provided with counsel in the Toledo action.

Ebro commenced this action on October 21, 2005, and alleges that it entered into the contract with Inglesia on May 31, 2001, and that it sought to obtain insurance from the defendants on, or before, May 13, 2002, which would insure it against liability claims, including those made by its employees against third-parties, that could trigger third-party claims arising out of its construction business for contractual defense and indemnification. Ebro alleges that the defendants failed to procure such insurance, and asserts a claim against the defendants for breach of contract and breach of fiduciary duty, arising out of the alleged failure to procure insurance. Plaintiff seeks to recover the full amount of defense costs to Inglesia in the Toledo action; the full amount of Ebro's defense costs in the third-party action commenced by Inglesia; the full amount of any settlement, or

judgment, award or distribution in said actions; and the full amount of all damages including lost business opportunities, with interest as a result of Inglesia's withholding a payment bond. Defendants Lawrence J. Mantovi and Lawrence J. Mantovi Agency served an answer, and interposed 12 affirmative defenses.

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

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 (see Murphy v Kuhn, 90 NY2d 266, 270 [1997]; Loevner v Sullivan & Strauss Agency, Inc., 35 AD3d 392, 393 [2006], lv denied, 8 NY3d 808, 865 [2007]; Tappan Wire & Cable v County of Rockland, 305 AD2d 665, 666 [2003]; Reilly v Progressive Ins. Co., 288 AD2d 365 [2001]; Storybook Farms v Ruchman Assoc., 284 AD2d 450, 450 [2001]; Chaim v Benedict, 216 AD2d 347 [1995]). Thus, the duty is defined by the nature of the client's request (see Loevner v Sullivan & Strauss Agency, Inc., supra; Kyes v Northbrook Prop. & Cas. Ins. Co., 278 AD2d 736, 737 [2000]; Empire Indus. Corp. v Insurance Cos. of N. Am., 226 AD2d 580, 581 [1996]; Wied v New York Cent. Mut. Fire Ins. Co., 208 AD2d 1132, 1133 [1994]). Absent a specific request for coverage not already in a client's policy, or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage (see Murphy v Kuhn, supra at 270-271; Loevner v Sullivan & Strauss Agency, Inc., supra at 393; Duratech Indus. v Continental Ins. Co., 21 AD3d 342, 345 [2005]; Reilly v Progressive Ins. Co., supra at 366).

Here, defendants Lawrence J. Mantovi and Lawrence J. Mantovi Agency have demonstrated their prima facie entitlement to summary judgment by presenting evidence that it procured the specific insurance coverage the plaintiff requested, namely, a general liability policy (see JKT Constr., Inc. v United States Liab. Ins. Group, 39 AD3d 594 [2007]; Empire Indus. Corp. v Ins. Cos. of N. Am., supra). There is no evidence that Ebro requested that defendants procure insurance which would provide coverage in the event that it was sued by Inglesia, or any other contractor, for defense or contractual indemnification. Nor is there any evidence

that Ebro informed defendants of the terms of the contract with Inglesia, or the scope of work it was performing for Inglesia. Plaintiff received the subject policy prior to the accident at issue, and is conclusively presumed to have known, understood and assented to its terms (see, Stone v Rullo Agency, Inc., 40 AD3d 1185 [2007]; Busker on the Roof Ltd. P'ship v Warrington, 283 AD2d 376, 377 [2001]; M & E Mfg. Co. v Frank H. Reis, Inc., 258 AD2d 9, 12 [1999]; Brownstein v Travelers Cos., 235 AD2d 811, 813 [1997]).

It is undisputed that after the Rutgers policy was issued, Ebro requested that defendants add Inglesia to this policy as an additional insured. It is well settled that "an agent or broker may be held liable for neglect in failing to procure insurance, with liability limited to that which would have been borne by the insurer had the policy been in force" (Kinns v Schulz, 131 AD2d 957, 959 [1987]; see also Andriaccio v Borg & Borg, 198 AD2d 253 [1993]; Island Cycle Sales v Khlopin, 126 AD2d 516, 518 [1987]; American Motorists Ins. Co. v Salvatore, 102 AD2d 342, 346 [1984]). A broker who negligently fails to procure a policy stands in the shoes of the insurer, and is liable to indemnify the plaintiff for any judgment which would have been covered by the policy (see, Island Cycle Sales v Khlopin, supra). Here, the evidence presented establishes that defendants promptly relayed Ebro's request to add Inglesia to the policy to the Heffner Agency, the agent for Rutgers. Defendants were not able to deal directly with Rutgers, as they are not an agent of Rutgers, and thus, could only deal with the Heffner Agency. Defendants assert that the Heffner Agency agreed to the add Inglesia, and authorized them to issue a certificate of insurance to Inglesia. Regardless of whether defendants could issue a binding certificate of insurance, it is undisputed that Inglesia was not added to the Rutgers policy. However, even if Inglesia had been added to that policy, the employee exclusion would have been applicable, so that Inglesia would not have been insured for the Martinez accident under the Rutgers policy. The court, therefore, finds that defendants properly conveyed Ebro's request to the Heffner Agency to add Inglesia to the Rutgers policy. The court further finds that as Inglesia would not have been covered by the Rutgers policy, defendants are not be liable to the plaintiff for the failure to add Inglesia to said policy.

Finally, plaintiff's claim for breach of fiduciary duty is without merit, as there is no evidence of a special or fiduciary relationship that would give rise to the potential for a continuing duty on defendants' part to advise the plaintiff to obtain additional coverage as regards the third-party claims, such as those asserted in the Toledo action (see Murphy v Kuhn, supra at 270-271; Fremont Realty, Inc. v. P & N Iron Works, Inc., 39 AD3d

586 [2007]; Loevner v Sullivan & Strauss Agency, Inc., supra; Chaim v Benedict, supra; Curiel v State Farm Fire & Cas. Co., 35 AD3d 343 [2006]; Tappan Wire & Cable v County of Rockland, supra at 666; Storybook Farms v Ruchman Assoc., supra; M & E Mfg. Co. v Frank H. Reis, Inc., supra; cf. Reilly v Progressive Ins. Co., supra at 366).

Plaintiff's affidavit in opposition is insufficient to demonstrate the existence of a triable issue of fact because it contradicts his earlier deposition testimony and is clearly designed to avoid the consequences of his earlier admissions (see Mestric v Martinez Cleaning Co., 306 AD2d 449 [2003]; Hartman v Mountain Val. Brew Pub, 301 AD2d 570 [2003]; Marcelle v New York City Tr. Auth., 289 AD2d 459 [2001]; Garvin v Rosenberg, 204 AD2d 388 [1994]).

In view of the foregoing, defendants Lawrence J. Mantovi and Lawrence J. Mantovi Agency's motion for summary judgment dismissing the complaint is granted.

Dated: October 22, 2007

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J.S.C.