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

PRESENT: Hon. PAUL G. FEINMAN PART 7

Justice

TORTOSO, JOHN

INDEX NO. 118035/01

MOTION DATE 1/28/04

- v -

MOTION SEQ. NO. 002

METLIFE AUTO

MOTION CAL. NO. 113

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Memo	1, 2
Notice of Cross Motion - Affidavits - Exhibits, Memo	3, 4
Answering Affidavits — Exhibits	5
Replying Affidavits	6

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Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with annexed memorandum decision and order.

FILED
MAR 24 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: 3/16/2004

Paul G. Feinman
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

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JOHN TORTOSO, VIRGINIA TORTOSO, and MATTHEW TORTOSO,

Plaintiffs,

against

METLIFE AUTO & HOME INSURANCE COMPANY, METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, and METLIFE FINANCIAL SERVICES, INC.,

Defendants.

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Index Number 118035/01
Motion Date Jan. 28, 2004
Motion Seq. No. 001

DECISION & ORDER

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Papers considered in review of this motion for summary judgment and dismissal and cross motion for partial summary judgment and to strike answer:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Memorandum of Law	2
Notice of Cross Motion	3
Memorandum of Law	4
Affirmation in Opposition	5
Reply Affirmation	6
Stipulation Restoring Motion	7

PAUL G. FEINMAN, J.:

Motion and cross motion previously filed under motion sequence number 001 are restored pursuant to the January 24,2004 stipulation of the parties and are consolidated for purposes of decision.

Introduction

This is an action for a declaratory judgment and other relief in connection with a

homeowner's policy issued for a Westchester County home owned by plaintiffs John and Virginia Tortoso. The Tortosos seek to have the defendants provide them and their son Matthew Tortoso, a defense and to indemnify them in both a federal court action and a state court action. Both of the underlying actions arise out of a course of conduct engaged in by Matthew Tortoso, when he was employed at Le Bar Bat Restaurant in Manhattan. All of Matthew's wrongful conduct is alleged to have occurred in connection with that employment, and, of course, did not in any fashion involve an incident, occurrence or accident, as those terms are commonly understood and as defined in the contract, at or near the home of Mr. and Mrs. Tortoso. As is more fully explained below, the underlying lawsuits allege conduct by Matthew that is best characterized as part of a course of sexual harassment, defamation and libel engaged in by Matthew's employer, Le Bar Bat, against some of its former female employees.

Defendants' now move for summary judgment and dismissal of the complaint on the grounds that Matthew's alleged conduct is not covered by his parents' homeowner's policy. The plaintiffs cross move for partial summary judgment, for a declaration that defendants breached their duty to defend and indemnify, and to strike the defendants' answer.

Factual** and **Procedural Background

In **April 1999,** Matthew Tortoso was named as a defendant in a civil lawsuit commenced in the United States District Court for the Southern District of New York ***(Angela** Boggs, **et al. v Die***

'For purposes of this decision, the defendants are grouped together. According to defendants' counsel only the second named defendant, Metropolitan Property and Casualty Insurance Company, is a valid defendant. The first named defendant, MetLife Auto & Home Insurance Company, is actually named MetLife Auto & Home and is not an insurer but a "brand name." (Not. of Mot. Morrison Aff. at 1; Cogliandro Aff. at 1). The third defendant, MetLife Financial Services, Inc., does not exist, however "MetLife Financial Services" is a department within Metropolitan Life Insurance Company, a non-party (Not. of Mot., Morrison Aff. p. 4).

Fliedermaus, LLP, et al., Docket No. 99 Civ. 2451). The federal civil complaint alleges a course of conduct by the restaurant Le Bar Bat and Die Fliedermaus, LLC, along with several of its employees including Matthew, who acted jointly and severally in a manner designed to intimidate and retaliate against the six female plaintiffs, former employees of Le Bar Bat. While the allegations of that complaint need not be set forth in great detail, it suffices to note that the 73-page complaint consists of eleven causes of action which include unlawful discriminatory practices such as sexual harassment, hostile work environment, race discrimination, constructive discharge, retaliation, and intentional infliction of emotional distress, conspiracy, defamation and libel, It describes a course of degrading and derogatory conduct, including but not limited to physical contact and demands for sex.

The conduct described in the federal civil complaint allegedly began in 1997 and culminated in the night of April 4, 1998 when Matthew and three other defendants allegedly leafleted in various neighborhoods with fliers that contained defamatory statements about the plaintiffs. They also allegedly mailed copies of the fliers to "residences, superintendents, landlords and/or others" (Complaint ¶¶ 290-299). Attached as exhibits to the federal civil complaint are copies of the fliers and a copy of an envelope postmarked April 4, 1998. The envelope is apparently addressed to the parents of one of the female plaintiffs in Illinois and contained a short typed unsigned note and a copy of the flier. The fliers, in the form of a neighborhood watch alert, contain disturbing allegations, including accusations that the former female employees of Le Bar Bat had engaged in sexual relations with young boys.

Also attached to the federal civil complaint as Exhibit 7 is a copy of a sealed federal criminal complaint alleging that Matthew and the other individuals distributed the fliers in violation of Title

18 U.S.C. § 1512(b)(1). That criminal complaint further alleges that Matthew violated **U.S.C.§** 1001 by telling an investigator employed by the United Stated Attorney's Office for the Southern District of New York that he had no knowledge concerning the distribution of the fliers.[2] In addition to the Title VII claims, the federal civil complaint sets forth a claim pursuant to 42 **U.S.C.§** 1981, a claim under the New York State Human Rights Law, and one under the New York City Administrative Code, and alleges that Tortoso and the other committed the torts of intentional infliction of emotional distress and defamation and libel (Not. of Mot. **Ex.** E).

After the federal court lawsuit was commenced, plaintiffs sought to have Matthew defended **and** indemnified through their homeowner's insurance policy issued by defendants. It is undisputed defendants were timely notified of the first lawsuit, the federal civil lawsuit, By letter dated August **13,** 1999, defendants disclaimed liability protection and refused to defend on the ground that plaintiffs' homeowner's policy did not cover the type of claims alleged against Matthew (Not. of Mot. **Ex.** D). Plaintiffs subsequently hired attorneys to represent Matthew in the federal civil action. In December **1999,** three of the four claims in the federal lawsuit were dismissed as against Matthew, two on jurisdictional grounds and the third, the claim alleging intentional infliction of emotional distress, as duplicative of the fourth remaining claim for defamation (Not. of Cross Mot. **Ex.** 1, ***EEOC v Die Fliedemaus, LLC, et*** *al.,* ***and Angela Boggs, et al. v Die Fliedemaus, LLC,*** Dec. & Ord., United States Dist. Ct., Southern Dist. of New York **[Sweet,** J.], at unnumbered pp. 9-

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[2] While the precise status of the sealed criminal complaint is unclear, given that there is no certificate of disposition or transcript provided, Matthew denies that he **was** ever convicted of any crime or offense (Not. of Cross Mot., Tortoso M. **Aff.,** ¶ 3[d]). Neither side raises any issue in their papers regarding the confidentiality of the allegations in the sealed criminal complaint, and it is presumed that Matthew by placing his alleged conduct in issue in this lawsuit has waived any continuing right to keep those allegations confidential.

10). Plaintiffs renewed their request for defense and indemnification, but defendants did not change their position.

In June 2000, the plaintiffs in the underlying federal civil action commenced a state court civil action ***(Angela Boggs, et al. v*** *Tortoso,* ***et*** *al.*, Supreme Court, New **York** Count, Index No. 112336/00). Many of the factual allegations from the federal civil action are repeated in the state court action. Plaintiffs do not contend that they gave separate notice to defendants concerning the initiation of the state cause of action.[3] Because of the financial burden, Matthew has represented himself in the state court civil action and is currently representing himself in the federal civil action as well. He appears by counsel in this declaratory judgment action which he brings with his parents as co-plaintiffs.

In this action, plaintiffs seek a declaration and determination of their rights under the homeowner's policy, including as to whether they should be provided with a defense in the two pending civil lawsuits and indemnity coverage for any loss therefrom. They also bring claims of breach of contract, deceptive business practices, bad faith breach of contractual obligations, and false and negligent misrepresentation by the insurance broker.

Defendants' *Motion for* ***Summary Judgment***

Defendants move for *summary* judgment and dismissal of the complaint pursuant to CPLR **3212.** To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor (*GTF Mtkg, Inc. v Colonial* ***Aluminum Sales, Znc., 66*** NY2d **965,967** [1985]). Once this burden is met, the

[3]This decision will not address the issue of whether defendants can be presumed to have received adequate notice of the state court action ***(see,*** Not. of Cross Mot. Cocca Aff. ¶¶ 17-18).

burden shifts to the opposing **party** to submit proof in admissible form sufficient to create **a** question of fact requiring a trial (*Zuckerman* ***v City*** *of New* ***York,*** **49** NY2d 557,563 [1980]).

It is well established that the duty of an insurer to defend its insured is broader than the duty to indemnify, **and** that the duty to defend arises "whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" ***(Fitpatrick v American Hondu Motor Co.,*** **78** NY2d **61, 65 [19911).** If the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend *(Town of Massena* ***v Healthcare Underwriters Mut. Ins. Co.***, 98 NY2d 435,443 [2002]). The duty to defend will arise "'whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer ... [and, it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its **exclusory** provisions'" (*Id.* at 443-444, quoting ***Seaboard Surety Co. v Gillette Co.***, **64** NY2d 304, 3 **10** [19841). When determining whether there exists an obligation to defend, the court will examine the policy in question and, as well, **look** to "the status of the pleadings as they were at the time plaintiff called upon the insurer to defend in the underlying action and the insurer tendered its disclaimer." ***(George Muhlstock & Co. v American Home Assur. Co.,*** **117** AD2d **117,123 [1st** Dept. 19861). The court is to assume that what is alleged actually occurred ***(Allstate Ins.*** Co. v ***Mugavero,*** 79 NY2d 153, **159** [1992]).

According to defendants, coverage was denied to plaintiffs based on the terms of plaintiffs' policy, the Metropolitan's Valuable Insurance Protection Ultra Homeowner's Policy (Not. of Mot. **Ex.** C ["Policy"]). Specifically, in Section **II,** under "Losses **We** Cover. . . Personal Liability,'' the policy states defendants "will pay all sums for ***bodily injury and property damage*** to others for

which the law holds you responsible because of an ***occurrence,"*** and that defendants "will defend you, at our expense. . . against **any** suit or claim seeking these **damages"** (Policy at 16, emphasis added). The term "bodily injury" is defined as "any bodily harm, sickness or **disease,"**[4] while "occurrence" means "***an accident*** including continuous or repeated exposure to substantially the same general harmful conditions, resulting in bodily injury or property damage during the term of the policy." (policy at **1, 2,** emphasis added). In addition, the policy expressly excludes, under "Losses We Do Not Cover," any "bodily injury or property **damage** which is reasonably expected or intended by you **or** which is the result of your ***intentional*** and criminal acts," and applies "even if you lack the mental capacity, for whatever reason, to govern your conduct" (Policy at **17,** emphasis added).

When interpreting an insurance policy at issue, it is "fundamental" that it be read "in light of 'common speech' and the reasonable expectations of a business person" ***(Belt Painting Corp. v TIG Ins. Co.,*** 100 NY2d 377,383 [2003]; citing ***Ace Wire & Cable*** Co. ***v Aetna Cas. & Sur. Co.,*** **60** NY2d **390,398** [1983]; ***Northville Indus. Corp. v National Union Fire Ins. Co.,*** **89** NY2d **621, 633** [19971). It is also fundamental that an insurer "'establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case"' (***Belt Painting*** *Corp.,* **at 383,** quoting ***Continental Cas. Co. v Rapid-Am.*** *Corp.,* ***80*** NY2d 640 [1993]). Policy exclusions are to **be** given a strict, narrow construction and ambiguities **are** resolved against the insurer ***(Belt Painting Corp.,*** at **383,** citing, ***Thomas J. Lipton Znc. v Liberty Mut. Ins.*** **Co., 34** NY2d **356,361** [1974]).

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[4] **Bodily** injury has been interpreted to include purely emotional distress ***(see, Lavanant v General Accident Ins.*** Co. ***of America,*** **79** NY2d **623,630-631 [19921).**

Defendants contend that none of the claims in the federal court complaint constitute an "occurrence" as that term is defined in the homeowners policy and that, moreover, the policy specifically excludes intentional and criminal actions from coverage. They cite several cases concerning insurance coverage in which the definition of "occurrence" involves an "accident," and which concerned the same types of claims alleged in the underlying federal complaint, and all of which found that the insurer had no duty to defend. (See, Def. Memo. of Law, 9-12, citing ***Sidney Frank Importing Co.,*** *Inc.* ***v Farmington Cas. Co.,*** 97 Civ. **9324, 1999 U.S.** Dist. Lexis **3956,** ***aff'd*** **199** F.3d 1323 [1999] [sexual harassment]; ***Board of Educ. of the East Syracuse-Minoa Centr.*** *School* ***Dist. v Continental Ins.*** Co., 198 AD2d 816 [4th Dept. **19931** [sexual harassment, retaliatory discharge]; ***Green Chimneys School*** *for* ***Little Fold v National Union Fire Ins.*** Co., 244 AD2d 387 [2d Dept. 1997] [same]; ***Shapiro*** v ***Glens Fulls Ins.*** Co., 39 NY2d 204 [1976] [slander]; ***Hodgson*** v ***USAA,*** *262* AD2d **359** [2d Dept. **1999]** [slander]; ***Brooklyn*** *Law* ***School v Aetna Cas. & Surety*** Co., 849 F.2d 788 [2d Cir. 19881 [conspiracy]; ***Tranchina*** v ***Government Empl. Ins. Co.,*** **235** AD2d **471** [2d Dept. 1997] [intentional infliction of emotional distress]).

Plaintiffs argue that despite the allegations in the complaint, Matthew did not ***intend*** to commit any wrongdoing, and that defendants failed to take into account that the complaint contains certain assertions that amount to reckless or negligent conduct which could be construed as "accidental" and covered under the policy, and also failed to investigate to learn Matthew's version of the facts.[5] Plaintiffs proffer part of Matthew's deposition testimony and an affidavit in which

[5]For example, in the Eighth Count of the complaint, at paragraph 281, concerning violation of New York City Administrative Code § 8-107(1)(a), states that Matthew, as well as the other defendants, acted "willfully, maliciously and ***with reckless disregard*** to Plaintiffs' statutory rights." (Not. of Mot. Ex. E, emphasis added).

avers:

- he and two other part-time employees of Le Bar Bat were requested by their boss during the night of April 3-4, 1998 to assist in distributing fliers under car windows and in doorways;
- his boss would not explain what they were doing or why;
- his boss ordered him not to read the contents of the fliers;
- he did not know what the fliers contained;
- he did not know the women in question or that they had filed charges of discrimination against the restaurant;
- he did not mean to damage the women's reputations; and
- when he had an opportunity to read the contents of one flier after distributing them at three different locations, he disposed of the remainder of them.[6]

Neither in the sections of the proffered deposition testimony nor in his affidavit, does Matthew discuss the mailing of fliers (Not. of Cross Mot., Tortoso, M., Aff.; Ex. 5, Tortoso, M., EBT at 256-259; 314-316; 340-356; 860-861).

Plaintiffs urge the court to follow *Spielfogel v North River Ins. Co.*, 148 AD2d 696 (2d Dept.), *app. dismissed* 74 NY2d 841 (1989), which held that where an insurer has knowledge of facts which potentially bring the claim within the coverage of the policy, it has a duty to defend even though the allegations fail sufficiently to allege all of the facts. *Spielfogel* was a personal injury action in which sworn deposition testimony of the defendant indicated that his acts as well as the

[6]He stated in separate answers that he threw most of them away and walked back to the car (Tortoso EBT at 367), and that he threw them away and went to a bodega and bought a cider (Tortoso EBT at 316).

damages were unintended. Plaintiffs contend that similarly, Matthew's actions were unintentional. Moreover, although defamation is an intentional tort, the elements of a claim of defamation on the facts here do not require proof of intentionality (see, PJI 3:34B), and it is possible that Matthew will be found liable for the tort even if, as he claims, he did not leaflet with the intention of defaming anyone.

Plaintiffs argue that the policy and the complaint must be examined through the light of decisions such as ***McGroarty v Great Amer. Ins. Co.***, 36 NY2d 358,363 (1975), and progeny, which hold that issues of coverage should be based on the "transaction as a whole," because it is possible "to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional." (*Id.* at 364). *McGroarty* concerned a question of insurance coverage where the plaintiffs building gradually cracked, settled and was damaged over a period of several months due to the continuing excavation and construction on certain adjacent property owned by the defendant's insured. *McGroarty* held coverage should have been given, as defendant's intentional actions had unintended results. "Calculated risks can result in accidents," it states, giving as an example the decision to run a red light, followed by a collision with another car (***Id.; see also, Fitpatrick v American Honda*** *Motor Co.*, 78 NY2d at 64-65 [requiring insurer to defend when it has actual knowledge of the facts establishing a reasonable possibility of coverage, rather than applying "wooden" application of the "four corners of the complaint" rule]).

Defendants counter that pursuant to ***Allstate*** *Ins. Co.* ***v Mugavero,*** 79 NY2d 153, there is no obligation to provide a defense because the complaint alleges a series of acts that together form very serious charges where the injury is inherent in the nature of the wrongful act. In ***Mugavero,*** the

defendant had been sued for physical and emotional injuries sustained by two children upon whom he had committed acts of sodomy and sexual abuse. Despite the fact that the complaint contained allegations both of intended as well as of negligent and unintended injuries from the intentional conduct, the Court ruled that sexual abuse of a child fell into the category of intentional actions not covered under the defendant's insurance policy because the harm was inherent in the act ***(Mugavero,*** at160, **162).** In contrast to ***Muguvero*** is *Slayko* ***v Security Mut. Ins.*** Co., **98** NY2d **289** (2002), concerning an insurer's refusal to defend a tortfeasor who accidentally shot his friend while playing with what he presumed was an unloaded gun. Although the insurer based its decision to refuse to defend the negligence action on the grounds that the defendant's act was inherently dangerous and he undisputably intended to point the gun and pull the trigger, the Court ruled the tortfeasor acted recklessly rather than intentionally because the gun "could have been empty," and the insurance policy's "intentional act exclusion could **apply** only if the injury were 'inherent in the nature' of the wrongful act," *(Id.* at **293,** citing ***Mugavero,*** **79** NY2d at **161).**

The complaint at bar, similar to ***Mugavero,*** consists of allegations the injuries of which are inherent in the nature of the acts. Examining the "status of the pleadings as they were" when the plaintiffs called upon defendants to defend ***(George*** *Muhlstock & Co.* ***v American Home Assur. Co.,*** 117 AD2d at 123), and assuming the truth of the allegations ***(Mugavero,*** 79 NY2d at 159), the court finds that the complaint sets **forth** allegations of intentional actions that simply are not accidental in nature. Defendants had no obligation to undertake an independent investigation ***(Fitpatrick*** v ***American Honda Motor Co.,*** **78** NY2d at **67,** n. **2).** Analysis of whether the allegations in the complaint fall within categories excluded from coverage "depends on the facts which are pleaded, not the conclusory assertions" ***(Allstate Ins. Co. v Mugavero,*** **79** NY2d at 162). Notably, even

following the dismissal of certain of the claims, including three of the four against Matthew, the one remaining claim alleges that he and other defendants not only leafleted in various neighborhoods, but ***mailed*** copies **of** the fliers to various individuals (Complaint ¶ **292). "[A]** defamation cause of action **is** not transformed into one for negligence merely by casting it **as** a negligence cause of action" (***Iafallo v Nationwide Mut. Fire Ins. Co.,*** **299** AD2d **925,927** [4th Dept. **2002]**).[7] Where a policy sets forth clearly what it will and will not cover, and excludes certain types of actions, "the insurer is entitled to rely on **the** exclusion as a matter of contract law" (***Bingham*** v ***Atlantic Mut. Ins. Co.***, 215 AD2d 315,316 [1st Dept. 1995] [insurer not obliged to provide defense where its insured sought coverage for a lawsuit containing allegations of blackmail, a death threat and malicious prosecution, and claimed that **he** had not intended any injury; ruled that although mental suffering can be based on both intentional and unintentional causes of action, what **was** "material" was that the acts alleged were all intentional and the policy excluded coverage of intentional actions]).

Based on the terms of the insurance policy itself which clearly state what kind of accidental actions are covered, the court finds that the defendants have no legal or contractual obligation to defend Matthew Tortoso in the underlying federal or state civil litigations. Moreover, the court notes that such **an** interpretation comports with what a reasonable person purchasing a homeowner's policy would understand these contractual terms to mean. Accordingly, defendants' motion for summary judgment and dismissal of the causes of actions seeking a declaration that it must defend and indemnify the plaintiffs is granted.

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[7]**For** cases involving intentional conduct on the **part** of the insured where there was no duty to defend despite the fact that the complaint in the underlying action contained allegations of negligence, see ***Atlantic Mut. Ins. Co. v Terk Technologies Corp.***, 309 AD2d 22, 31-32 (1st Dept. **2003).**

Defendants' Motion to Dismiss for Failure to State a Cause of Action

The complaint contains five causes of action. In addition to moving for summary judgment pursuant to CPLR **3212,** defendants move to dismiss them **all** pursuant to **CPLR** 3211(a)(7). The first cause of action, for a declaratory judgment that defendants must defend and indemnify plaintiffs, and the second cause of action, for breach of contract for failing to defend and indemnify, are dismissed for the reasons previously stated.

The third cause of action alleges deceptive business practices in violation **of** General Business **Law § 349,** and the fourth cause of action alleges "bad faith" breach of contract. The verified complaint alleges that defendants engaged in a fraudulent scheme designed to deceive its policyholders from receiving coverage for valid claims, as evidenced in the fact that name of the policy "Valuable Insurance Policy [VIP] Ultra Homeowners," implies it is an all-risk policy, offering "ultra" protection and because the policy terms and definitions are complicated and misleading and designed intentionally to mislead consumers. John Tortoso avers that he **was** told by defendant's insurance agent, Joe O'Brien, that the **VIP** Ultra Policy was an "'all-risk' type of policy," and a better policy than the Allstate policy then owned by the Tortosos. According to Tortoso, the parents of one of Matthew's co-defendants have the same Allstate policy as Tortoso had, **and** the co-defendant is being covered by Allstate in the federal and state courts litigations (Tortoso, J. Aff. **¶¶ 7-8).**

GBL **§ 349** makes unlawful deceptive acts or practices in conducting a business or furnishing a service. To assert a claim alleging violation of GBL **§ 349,** the conduct alleged must be consumer oriented and defendants' alleged acts or practices must have a broad impact on consumers at large; "[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of the

statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [19951). If this threshold is met, then plaintiffs may establish a prima facie case by showing that defendant is engaging in an act or practice that is deceptive in a material way and that plaintiff has been injured by it (*id.*; *Varela* v *Investors Ins. Holding Corp.*, 81 NY2d 958 [1993]). Here, plaintiffs do not make out a cognizable cause of action of a violation of GBL § 349. They fail to sufficiently establish that the words "VIP Ultra" suggests that the homeowner's policy is "all risk," or that its name is designed intentionally to deceive consumers, or that the agent misrepresented the type of policy or its terms.' Similarly the claim of bad faith breach of contract must fail, given that defendants had no duty to defend Matthew (*cf.*, *Acquista* v *New York Life Ins. Co.*, 285 AD2d 73, 79-82 [1st Dept. 20011).

The fifth cause of action names "MetLife Broker, an insurance brokerage company," who is not named as a co-defendant. The fifth cause of actions claims that the company falsely counseled and represented to plaintiffs that the VIP Ultra policy was an all-risk policy and the equivalent of the Allstate policy previously owned by plaintiffs, and that plaintiffs relied on this misrepresentation and purchased and renewed the policy based on those misrepresentations. Were this a claim against Joe O'Brien, defendants' agent, it might be cognizable given that plaintiffs allege O'Brien told John Tortoso that the policy was an "'all-risk type policy," However, the fifth cause of action is against a company which is not even named as a defendant, Accordingly, the fifth cause of action must also be dismissed.

Plaintiffs' Cross Motion

'Defendants state the policy purchased by the Tortosos did not contain optional liability coverages and was not a personal excess liability policy (Not. of Mot, Cogliandro Aff. p. 2).

Plaintiffs' cross motion for partial summary judgment pursuant to CPLR 3212 and a declaration that defendants have breached their duty to defend, and ordering defendants to defend and indemnify Matthew Tortoso, are denied in toto for the reasons previously stated. Plaintiffs' cross motion to strike the answer or to compel based on defendants' failure to provide certain discovery is denied as academic.

Conclusion

The defendants' motion for summary judgment and dismissal of the complaint is granted in its entirety. The plaintiffs' cross motion for partial summary judgment is denied, as is the branch of their cross motion seeking an order striking the defendants' answer or compelling disclosure. It is therefore,

ORDERED that defendants' motion for summary judgment and dismissal of the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that plaintiffs' cross motion for partial summary judgment is denied in its entirety and the cross motion to strike the answer or compel disclosure is denied as academic.

ORDERED that the clerk of the court is to enter judgment accordingly.

This constitutes the decision and order of the court. The court has mailed courtesy copies to counsel.

Dated: March 16, 2004
New York, New York

Paul G. Feinman
J.S.C.