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

PRESENT: HON. JUDITH J. GISCHE PART 8

Index Number : 601675/2005

HERSCH, DENNIS S.

VS

DEWITT STERN GROUP

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 7/21/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ **motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.**

FILED
SEP 27 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: SEP 21 2005

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

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DENNIS S. HERSCH,

Plaintiff,

-against-

DeWITT STERN GROUP, INC., BERTRAM FISHER, CAROL LIPNIK, DAVID H. PAIGE and JOLYON F. STERN,

Defendants.

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DECISION/ORDER
Index No.: 601675/05
Seq. No. 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's N/M, w/Exhs	1[1]

Upon the foregoing papers, the decision and order of the court is as follows:

This is defendants' pre-answer motion to dismiss the complaint. CPLR §§ 3211 [a] [5] and [7]. In addition defendant seeks sanctions for frivolous litigation pursuant to 22 NYCRR Part 130. The motion is opposed in all respects.[2]

Discussion

Defendant DeWitt Stern Group ["DeWitt"] is an insurance brokerage firm that matches people seeking insurance coverage with insurers that provide the actual coverage. Defendant Bertram Fisher is the vice president of DeWitt's sales division, defendant Carol Lipnik is a broker at DeWitt, defendant David H. Paige is DeWitt's

[1]The court considered the parties law memoranda, although they are not listed as part of the papers considered and would not be part of any record were this decision to be appealed.

[2]An earlier request by plaintiff to have this case re-assigned to a commercial part was denied by the Hon. Jacqueline W. Silbermann for the reasons set forth in her administrative order dated July 29, 2005.

CEO, and defendant Jolyon F. Stern is DeWitt's President [collectively the "defendants"].

Plaintiff seeks to recover monetary damages that he alleges were sustained after a fire occurred at his Manhattan coop apartment that destroyed its contents. He further alleges that the insurance company ("Chubb"), recommended to him by defendant, disallowed most of his claim as uncovered under the policy of insurance. Chubb only covered 10% of his loss. Plaintiff asserts seven causes of action against defendants (more completely addressed below), including negligence, breach of contract, breach of fiduciary duty, and deceptive business practices. Defendants seek dismissal of the entire complaint, claiming that plaintiff has failed to state a cause of action (CPLR § 3211 [a] [7]), and his claims are time barred (CPLR § 3211 [a] [5]).

Discussion

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). Moreover, where the basis for the motion to dismiss is the purported failure to state a cause of action (CPLR § 3211 [a] [7]), the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976). Although bare conclusions will not suffice, affidavits and other evidence may be freely relied upon to preserve inartfully pleaded but potentially meritorious claims. Rovello v. Orofino Realty Co., *supra*.

Since defendants also contend that plaintiff's claims are time barred (CPLR § 3211 [a] [5]), the court must consider, as well, whether his claims are within the relevant statutes of limitations.

Plaintiff alleges the following facts:

In 1992 he sought out DeWitt to help him obtain insurance coverage for his two residences. He chose DeWitt because of its fine reputation as an insurance broker. He sought defendants' advice about the kind of insurance he needed to protect his residential property and the contents therein. DeWitt agreed to assume that advisory capacity and acted as plaintiff's agent when it accepted that task. He dealt directly with defendant Fisher, Vice President of DeWitt's sales. Later, defendant Fisher turned the turned the account over to people, including defendant Lipnik, who acted as sales representatives.

In exchange for such advice and guidance, plaintiff paid DeWitt an advisory fee or commission that was deducted from his insurance premiums. In discussions with defendant Fisher, plaintiff described the contents of his apartment (i.e. furnishings, floor coverings, etc.) and requested coverage therefore. He received explicit assurances from defendants Bertram, Fisher and Lipnik that the coverage obtained for him was sufficient to cover all risk of loss at the coop including the contents, furnishings and alterations. Plaintiff alleges that the language of the policy itself does not clearly articulate the exclusions for the contents of the coop apartment. Plaintiff alleges he only learned of this limitation only when he filed a claim following the fire in his apartment in November 2004.

Defendants recommended only Chubb, and assured plaintiff this was adequate coverage. They proposed no other policies or options. They did not tell plaintiff that the coverage was less than what he requested. They did not disclose that they were

receiving additional compensation from Chubb directly for placing policies with that company.

The original coverage was obtained in 1992. Each year plaintiff renewed the same policy. He last renewed the policy in May 2004, a few months before the fire. Since Chubb has only covered 10% of his property damage, he claims the defendants are responsible for the shortfall of $574,672.68.

After the fire, plaintiff first learned that Chubb and DeWitt had an undisclosed arrangement whereby Chubb paid defendants a contingent commission for the clients they referred. At that time the Attorney General was investigating Chubb's compensation arrangements with insurance brokers, including DeWitt.

Based upon these factual allegations, plaintiff claims he has the following causes of action against all the defendants: (1) negligence, (2) breach of contract, and (3) breach of fiduciary duty. The first three causes of action are based upon plaintiff's claim that defendant failed to obtain the insurance coverage expressly requested by plaintff. He asserts additional causes of against DeWitt; CEO Paige and President Stern for: (4) negligent misrepresentation, (5) breach of contract, (6) breach of fiduciary duty, and (7) deceptive trade practices. The last four causes of action are based upon defendants' undisclosed practice of collecting additional payments for steering customers to Chubb.

A. Statute of Limitations

As a preliminary matter, the court addresses defendants' claims that plaintiff's actions are all time barred. CPLR § 3211 [a] [5]. The gravamen of this dispute does not involve the governing limitations period for each cause of action, but rather when the applicable statute of limitations began to run.

The statute of limitations for the causes of action for negligence, breach of fiduciary duty[3] and deceptive trade practices is 3 years. The statute of limitations for the breach of contract and misrepresentation causes of action is 6 years. In this regard plaintiff acknowledges that while the allegations cover a longer period of time, the claims asserted in the fourth, sixth and seventh causes of action are limited to recovery for damages incurred in the three years preceding the bringing of the action. Likewise plaintiff acknowledges that the claims in cause of action number five are limited to the damages incurred in the six years preceding the bringing of this action.

Statute of limitations begin to run when a cause of action accrues. CPLR 203(a). In this case defendants contend that all the causes of action accrued in 1992, when plaintiff obtained the original policy of insurance. Plaintiff contends that the causes of action accrued – at the soonest – on May 2004, the date of the renewal of the policy that was in effect when his apartment was damaged by fire. Alternatively, he contends that the causes of action accrued when he suffered the uninsured loss, or November 2004.

A claim against a broker based on inadequate insurance coverage accrues when the plaintiff suffers the uninsured loss. Chase Scientific Research Inc. v. NIA Group Inc., 96 NY2d 20 (2001); Kronos Inc v. AVX Corp., 81 NY2d 90 (1993); Blanco v. American Tel. & Tel. Co., 90 NY2d 757 (1997); Video Corp. V. Flatto Assoc., 85 AD2d 448 (1st dept. 1982) mod. 58 NY2d 1026 (1983). Here the loss occurred in November 2004 and the action was commenced on May 10, 2005, well within the applicable limitation periods.

Even were this court to find that the cause of action accrued when the inadequate insurance coverage was procured, the operative date would have been May

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[3]The three year statute applies to a claim for breach of fiduciary duty when the remedy sought is monetary damages. Kaszirer v. Kaszirer, 286 AD2d 598 (1st dept. 2001).

2004 when the insurance was renewed and not 1992 when the original policy was first procured because each renewal is really a "new" contract. Moore v. Metropolitan Life Ins Co., 75 Misc2d 168 aff'd 41 AD2d 601 (1st dept. 1973). In this regard defendants' reliance upon Muro v. Newmann Agency, Inc., 303 AD2d 468 (2nd dept. 2003) is misplaced. While the court in Muro found that the cause of action accrued when the policy was first issued, it is wholly unclear whether there were subsequent renewals and the court did not address the effect policy renewals would have on the accrual date.

Under these circumstances the court holds that all causes of action have been brought comfortably within the applicable statutes of limitation.

B. Presumptive Knowledge of the Insurance Policy

Defendants argue that all causes of action fail, as a matter of law, because plaintiff is conclusively presumed to know and understand the contents of the insurance policy that was actually issued. Since the policy by its terms excluded coverage for certain apartment contents, defendants argue that plaintiff cannot assert any cause of action that is based upon a contention that the procured coverage was inadequate.

In general, a policy holder is presumed to have read and understood a policy of insurance duly issued to him or her. McGarr v. Guardian Life Insurance, 19 AD3d 254 (1st dept. 2005); Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 19 AD3d 1056 (4th dept. 2005). This presumption ordinarily defeats a cause of action against a broker based on procuring inadequate insurance coverage, regardless of whether the policy holder actually read the policy or not. Laconte v. Bashwinger Ins. Agency, 305 AD2d 845 (3rd dept. 2003); Busker on the Roof Ltd.Partnership, v. ME Warrington, 283 AD2d 376 (1st dept. 2001).

Although the presumption is considered "conclusive", it may still be overcome if there is fraud or other wrongful conduct on the part of the broker. Laconte v. Bashwinger Ins. Agency, *supra*. Such wrongful conduct may include circumstances

where: an insurance agent affirmatively misrepresents policy coverage, (Kyes v. Northbrook Property and Casualty Insurance Co., 278 AD2d 736 [3rd dept. 2000]); or where the broker creates a clear mis-impression about the scope of coverage (Arthur Glick Truck Sales, Inc. v. Spadaccia-Ryan -Hass Inc., 290 AD2d 780 [3rd dept. 2002]); or where the insured made an explicit request for coverage in a specific amount (Hoffend & Sons v. Rose & Kiernan, Inc. 19 AD3d 1056 [4th dept. 2005]); Reilly v. Progressive Insurance Company, 288 AD2d 365 [2nd dept. 2001]); or where a broker simply failed to procure the requested coverage (Baseball Office of the Commissioner v. March & McLennan, Inc., 295 AD2d 73 [1st dept. 2002). See also: PJI 4:45 (2004).

At bar, the pleadings related to defendants' failure to procure adequate insurance coverage (causes of action first through third) are sufficient to withstand dismissal at this juncture. While plaintiff acknowledges that he read the policy, he also alleges that it is not apparent from the contractual language that certain contents, furnishings and alterations in his coop apartment were excluded from coverage. The actual policy is not part of the motion and/or the pleadings. The court, therefore accepts as true his contentions about the language in the policy. In addition plaintiff alleges that he made explicit requests that the coverage extend to certain personal property and that DeWitt, through its officers and agents expressly represented that the coverage was per request.

C. Breach of Fiduciary Duty

Defendants separately argue that an insurance broker owes no fiduciary duty to its customers and, therefore, the third and sixth causes of action should be dismissed.

In general, the law is well settled that insurance agents have a common law duty to obtain the requested coverage for their clients within a reasonable time or to notify the clients that they are unable to do so. There is, however, no continuing duty to advise, guide or direct a client to obtain additional coverage. Murphy v. Kuhn, 90 NY2d

266 (1977). Courts have recognized, however, that there may be exceptional circumstances which may create a special duty beyond the common law duty. Hoffend & Sons, Inc., *supra*. Fortino v. Hersch, 307 AD2d 899 (1st dept. 2003).

The third cause of action alleges that defendants breached their duty to plaintiff by not advising him to procure additional insurance to cover his contents, furnishings and alterations to the apartment. While ordinarily the failure to advise is not actionable, where an insured has made an explicit request for certain coverage, a special duty may arise. Here the pleadings allege that plaintiff expressly asked for coverage for the contents of the coop and the specific items of personality. This allegation is sufficient to withstand dismissal at the pleading stage. Reilly v. Progressive Insurance Company, *supra*.

The sixth cause of action alleges that DeWiit, Stern and Paige breached their duty to get the best available coverage at the best available price and failed to deal with them fairly and/or disclose that they were receiving commissions from Chubb at the same time they were acting as his agent. He alleges that because they were receiving commissions from Chubb they steered him to a policy that did not meet his expressed needs. This cause of action is not premised upon a continuing duty to advise, but rather upon the failure to obtain the requested insurance because of an undisclosed conflict of interest. At the time defendants procured insurance for plaintiff with the Chubb, they acted as plaintiff's agent. They failed to disclose to him a conflict that affected their ability to faithfully serve plaintiff. Such conduct is actionable. See: Guice v. Charles Schwab & Co., 89 NY2d 31, 45 (1996); Constant v. University of Rochester, 111 NY 604 (1889); American Map Corp. v. Stone, 264 AD2d 492 (2nd dept. 1999); TPL Associates v. Helmsley-Spear, Inc., 146 AD2d 468 (1st dept. 1989).

D. Breach of Contract

Defendants argue that the third and sixth causes of action for breach of contract must be dismissed because they fail to specifically plead the material elements of the alleged contract. In fact oral contracts between an insured and insurance broker are enforceable. Polly Esther's South, Inc. v. Bogdanoff, __ Misc2d ___, 2005 WL 2216961 (NY Co. Sup. Ct. 2005). The allegations are sufficient to withstand a motion to dismiss the pleadings.

E. Deceptive Practices

In his seventh cause of action plaintiff alleges that defendants engaged in deceptive business practices in violation of General Business Law sections 349 and 250. GBL § 349 deals with deceptive business practices while GBL § 350 pertains to false advertising.

The gravamen of plaintiff's claim for deceptive business practices is that defendant never disclosed to plaintiff that it was collecting fees from Chubb for steering its customers to that company. He alleges that he was such a "steered" customer and that as a consequence he did not obtain otherwise available insurance coverage to meet his expressed needs.

In order to assert a cause of action under GBL § 349 the plaintiff must allege that the challenged act or practice was consumer oriented; that it was misleading in a material way and the plaintiff suffered injury as a result of the deceptive act. Stutman v. Chemical Bank, 95 NY2d 24 (2000). The allegations, which the court accepts as true, meet this legal standard. Defendant's failure to disclose its relationship with Chubb was not limited to this particular consumer, but impacted the insurance buying public at large. In such regard the allegations pertain to consumer oriented practices. NYU v.

Continental Insurance, 87 NY2d 308 (1995). Here the allegation is that the failure to disclose was misleading and leading plaintiff to believe that the insurance from Chubb was the best insurance available that met his specified needs. The damage requirement is met by the allegation that Chubb insurance was not the best insurance available to meet plaintiff's needs and that consequently he was under insured for losses he sustained at the time of the fire. These allegations are sufficient to withstand a pre answer motion to dismiss.

The claim for false advertising, however, requires independent analysis. The allegation rely upon generalized advertising by defendants regarding the high quality of services that are provided to insureds. There is no allegation of specifically false advertisements and/or references to expressly false representations causing plaintiff injury. Generalized advertisements and/or puffery are not sufficient to support a cause of action for false advertising. Verizon Directories Corp. v. Yellow Book USA, 309 FSupp2d 401 (EDNY 2004). The claim for false advertising under GBL § 350 is, therefore, dismissed.

Both sides acknowledge that plaintiff's claim for attorneys fees is ancillary to his claim based upon deceptive trade practices. Because the claim for deceptive trade practices under GBL § 349 survives this motion to dismiss, so too does the claim for attorney's fees. GBL § 349 (h); Riordan v. Nationwide Mutual fire Ins. Co., 977 F2d 47 (1992).

F. Liability of Agents

The individual defendants urge the court to dismiss the causes of action in the complaint to the extent plaintiff seeks to impose personal liability on them. They contend they were merely acting as employees of DeWitt, a principal known to the

plaintiff. In general agents will not be personally responsible for acts undertaken on behalf of a disclosed principal. An exception to this broad rule exists where an employee engages in "independent tortious conduct." Murtha v. Yonkers Child Care Assn. Inc., 45 NY2d 913, 914 (1978).

The allegations in the complaint do not support a conclusion that any one of these defendants engaged in independent tortious conduct. Plaintiff's argument that he has not yet had discovery and that he may learn information that would make these defendant's personally liable is not persuasive to keep the court from dismissing a patently defective pleading. If during discovery plaintiff learns of facts that would make these individually named defendants personally liable, he may seek to add them at that time.

G. Sanctions

The motion for sanctions must be denied. Inasmuch as the court found that the complaint validly sets forth certain causes of action, the court necessarily finds that the claims are not frivolous as that term is defined in Part 130 of the Rules of the Court.

Conclusion

In accordance with this decision, defendant's motion to dismiss is granted only to to the extent that: the causes of action asserted against the individual defendants are severed and dismissed and to the extent the seventh cause of action is premised upon false advertising, it is also severed and dismissed. In all other respects the motion is denied. Defendants shall serve their answer within 10 days of service with a copy of this decision with notice of entry.

A preliminary conference is hereby scheduled for **October 20, 2005 at 9:30 a.m.** in Part 10, Room 122, 80 Centre Street, New York County.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
September 21, 2005

SO ORDERED:

HON. JUDITH J. GISCHE, J.S.C.