STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

ROBERT NICHOLS and
ANITA NICHOLS,

Plaintiffs,

-against-

Index No.: 215802
RJI No.: 41-0636-2006

CITY OF TROY, THE CONNORS AGENCY, LLC, and NATIONAL GRANGE MUTUAL INSURANCE CO., and GLENN COFFMAN,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs commenced the instant action seeking recovery from the City of Troy for damages to their real property allegedly sustained as a result of numerous water main breaks and the operation of heavy equipment to demolish a house in the vicinity of plaintiffs' premises, from The Connors Agency for failing to obtain adequate insurance coverage, from National Grange Mutual Insurance Co. for failing to pay on their casualty insurance claim and from defendant Coffman for misrepresentations in the sale of the premises. Defendant The Connors Agency has moved for summary judgment dismissing the complaint and all cross-claims on the ground that they have no merit.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he 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 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer

Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

The complaint and bill of particulars allege that defendant The Connors Agency failed to obtain adequate insurance coverage, failed to pay plaintiffs' claim and failed to assist them in obtaining payment from the carrier. An insurance agent has a duty to obtain the type and amount of insurance requested by a customer. The general rule is that there is no duty to provide advice, guidance or direction with respect to purchasing additional coverage (see Murphy v Kuhn, 90 NY2d 266, 270 [1997]; Catalanotto v Commercial Mut. Ins. Co., 285 AD2d 788 [3d Dept 2001]). It is only where there is a special relationship between the insurance agent and the customer that an additional duty may be imposed (id.). "New York courts disfavor finding such a relationship, but can recognize an additional duty in exceptional situations, for example where the agent receives compensation for consultation beyond the premium payments, the insured relies

on expertise of the agent regarding a raised question of coverage, or there is an extended course of dealing sufficient to put objectively reasonable agents on notice that their advice was being specially relied upon" (Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, 438 [3d Dept 2003]). A special relationship is not created by general queries as to the adequacy of coverage (W. Joseph McPhillips, Inc. v Ellis, 8 AD3d 782, 784 [3d Dept 2004]), an extended customer - agent relationship with occasional worksheets to determine the extent of appropriate coverage (M & E Mfg. Co. v Frank H. Reis Inc., 258 AD2d 9, 13[3d Dept 1999]), or a request for the "best" or "full" coverage (Catalanotto v Commercial Mut. Ins. Co., 285 AD2d at 790; Empire Indus. Corp. v Ins. Cos. of North America, 226 AD2d 580, 581 [2d Dept 1996]; Chaim v Benedict, 216 AD2d 347 [2d Dept 1996]). A special relationship may be found when the parties engage in specific and precise discussions with respect to coverage (see Kyes v Northbrook Prop. & Cas. Ins. Co., 278 AD2d 736, 736-738 [3d Dept 2000]; Shenorock Shore Club v Rollins Agency, 270 AD2d 330, 330-331 [2d Dept 2000]).

Defendant The Connors Agency has submitted an affidavit from the licensed insurance broker/agent who dealt with the plaintiffs. He avers that the plaintiffs initiated the relationship by contacting him to obtain a quote for homeowner's coverage. There were no specific requests to insure against a particular type of loss or any detailed discussions with respect to coverage (see Brownstein v Travelers Cos., 235 AD2d 811, 813 []3d Dept 1997]; c.f. Reilly v Progressive Ins. Co., 288 AD2d 365 [2d Dept 2001];

Roland v Nationwide Mut. Fire Ins. Co., 286 AD2d 872 [4th Dept 2001]; Kyes v Northbrook Prop. & Cas. Ins. Co., 278 AD2d at 738). The Connors Agency procured the specific coverage requested by plaintiffs. The Connors Agency has therefore made a prima facie showing that there was no special relationship with the plaintiffs and no duty to provide advice, guidance or direction with respect to purchasing additional coverage.

The Connors Agency has also submitted proof that plaintiffs were provided with a copy of the insurance policy which set forth the full extent of coverage as well as any applicable exclusions to coverage. Plaintiffs are therefore conclusively presumed to know the extent of their coverage and whether it was appropriate for their needs, precluding any liability on the part of the agent or broker (see Laconte v Bashwinger Ins. Agency, 305 AD2d 845, 846 [3d Dept 2003]; Catalanotto v Commercial Mut. Ins. Co., 285 AD2d at 790-791). The Connors Agency has also submitted proof that coverage for gradual foundation settling is not even available, and further that it had no contractual duty to pay plaintiffs' claim. Furthermore, it transmitted all information provided by plaintiffs to the carrier, thereby fulfilling any duty to assist plaintiffs with their claim. The Court therefore finds that The Connors Agency has met its burden on the instant motion.

Defendant City of Troy opposes the motion on the ground that defendant The Connors Agency has not offered any proof with respect to the cause of the property damage. However, the cause of the damage is entirely irrelevant to the motion to dismiss,

which is based upon an absence of any duty to plaintiffs on the part of The Connors Agency. Such opposition is therefore without merit.

Defendant National Grange Mutual Insurance Co. opposes the motion on the ground that discovery is necessary with respect to conversations between the plaintiffs and The Connors Agency to determine if a cross-claim exists. In order successfully to oppose the motion to dismiss on such ground, defendant National Grange must make an evidentiary showing that facts essential to justify opposition may exist but can not as yet be stated. Speculation or conjecture are not sufficient to warrant denial or a continuation of the motion (see Green v Covington, 299 AD2d 636 [3d Dept 2002]; Firth v State of New York, 287 AD2d 771, 773 [3d Dept 2001] affd 98 NY2d 365 [2002]; Pank v Village of Canajoharie, 275 AD2d 508, 509 [3d Dept 2000]). It has not offered any factual showing that discovery is likely to reveal any evidence that there may be a viable cross-claim against The Connors Agency. National Grange has not indicated that it could be liable to plaintiffs on any ground other than the fact that the damages were covered by the insurance policy. If the loss is covered, there can be no viable cross-claim. If it is not covered, there will be no liability and thus no basis for a cross-claim. Moreover, this action had been pending for over a year at the time the instant motion was made. Defendant National Grange may not rely upon its own inaction to claim that further discovery is needed (see Meath v Mishrick, 68 NY2d 992, 994-995 [1986]; Fine Arts Enters. v Levy, 149 AD2d 795, 796 [3d Dept 1989]).

Plaintiffs also oppose the motion on the ground that it is premature and that discovery is necessary. As above, they have failed to offer any evidentiary showing that facts essential to justify opposition may exist but can not as yet be stated nor have they offered any excuse for their inaction in failing to pursue discovery. The purported "affidavit" of plaintiff Anita Nichols was not sworn to before a notary and is therefore not in admissible form. It alleges that The Connors Agency renewed the policy and continued to collect policy premiums even though it was aware that the premises were vacant and that therefore certain insurance coverage was excluded by the terms of the policy.

Such claim was neither pleaded nor included in the plaintiffs' bill of particulars. Defendant The Connors Agency contends that an unpleaded cause of action may not be raised in opposition to a motion for summary judgment (see e.g. Pinn v Baker's Variety, 32 AD3d 463, 464 [2d Dept 2006]; Forester v Golub Corp., 267 AD2d 526, 527 [3d Dept 1999]). However, the Court finds that the better rule is that in the absence of prejudice or surprise, an unpleaded cause of action or defense may be considered in opposition to a motion for summary judgment (see Alvord and Swift v Stewart M. Muller Const. Co., Inc., 46 N.Y.2d 276, 281 [1978]; Preferred Capital, Inc. v PBK, Inc., 309 AD2d 1168, [4th Dept 2003]; Tavares v 474 West 150th Street Corp., 210 AD2d 117, [1st Dept 1994]) and may even support an award of summary judgment (see Allen v Matthews, 266 AD2d 782, 784 [3rd Dept 1999]; Weinstock v Handler, 254 AD2d 165 [1st Dept 1998]; Home

Sav. of America, FSB v Coconut Island Properties, Ltd., 226 AD2d 1138 [4th Dept 1996]).

Plaintiffs' new allegations are entirely unrelated to the claims relating to damage to the foundation of the house. All facts relevant to the new claims occurred several months after the damage became apparent and the claim sued upon herein was denied. Moreover, at best, the new facts would support a pro-rated return of the premium, which, based upon the only premium information before the Court, would amount to less than $50.00. In addition, the new claim is still subject to the above stated rule that an insurance agent is not under any duty to provide advice, guidance or direction with respect to insurance coverage. There is no allegation that plaintiffs requested that their insurance be cancelled nor is there any allegation that plaintiffs did not receive some form of insurance coverage, notwithstanding the exclusion for certain coverages based upon the fact that the building was vacant. As such, the new claims do not raise a triable issue of fact with respect to a viable claim against defendant The Connors Agency.

Plaintiffs have failed to address or raise any issue of fact as to whether they requested any specific insurance coverage or with respect to the existence of any special relationship with The Connors Agency. Plaintiffs have therefore failed to meet their burden in opposing the instant motion.

Accordingly it is

ORDERED that defendant's motion to dismiss plaintiff's complaint and all cross-

claims is hereby granted.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendant The Connors Agency, who are directed to enter this Decision/Order without notice and to serve all remaining counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
May 11, 2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated October 23, 2006; Affirmation of Aaron M. Baldwin, Esq. dated October 23, 2006 with Exhibits A-N annexed;
Affidavit of Kevin Connors sworn to October 23, 2006 with Exhibit O annexed;

Affidavit of Charles A. Sarris, Esq. sworn to October [sic] 2, 2006;

Affirmation of Carrie McLoughlin Noll, Esq. dated November 30, 2006;

"Affidavit" of Anita Nichols dated December 13, 2006;

Reply Affirmation of Aaron M. Baldwin, Esq. dated December 14, 2006.