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

PRESENT: EDWARD H. LEHNER PART 19

Justice

Index Number : 108627/2006
LIBERTY MUTUAL INS. CO.
VS
G & E EXPRESS, INC.
Sequence Number : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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 is decided in accordance with accompanying memorandum decision

FILED
JUN 08 2007
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JUN 06 2007
IAS MOTION
SUFFOLK COUNTY

Dated: JUN 04 2007

_____
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MDAF

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

Index No.
109932/06

NORTH-SOUTH LIMO LLC, RAMI SEGAL, LARGE AUTO BROKERAGE, INC. and LEON GAVRIEL d.b.a. LARGE AUTO BROKERAGE,

Defendants.

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

Index No.
108627/06

-against-

G & E EXPRESS, INC., LARGE AUTO BROKERAGE, INC. and LEON GAVRIEL d.b.a. LARGE AUTO BROKERAGE,

Defendants.

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

Index No.
109785/06

-against-

JAMEEL ALI INC., JAMEEL ALI, LARGE AUTO BROKERAGE, INC. and LEON GABRIEL d.b.a. LARGE AUTO BROKERAGE,

Defendants.

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

ROCKAWAY EXPRESS, INC., KENNETH BAILEY, LARGE AUTO BROKERAGE, INC. and LEON GAVRIEL d/b/a. LARGE AUTO BROKERAGE,

Defendants.

Index No. 110342/06

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

MAYRENI CAR SERVICE INC., MAYRENI PEREZ, NELSON PEREZ, LARGE AUTO BROKERAGE, INC. and LEON GAVRIEL d.b.a. LARGE AUTO BROKERAGE,

Defendants.

Index No. 109933/06

LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

ABC AIRPORT TRANSPORTATION INC., HENG DE OH-YANG, LARGE AUTO BROKERAGE, INC. and LEON GAVRIEL d/b/a. LARGE AUTO BROKERAGE,

Defendants.

Index No. 109934/06

EDWARD H. LEHNER, J.:

Before the court are motions to dismiss pursuant to CPLR 3211 in six separate actions all of which were commenced by Liberty Mutual Insurance Company ("Plaintiff") and in each of which actions Large Auto Brokerage, Inc. ("Large Auto") and Leon Gavriel ("Gavriel") (jointly the "Broker Defendants") are defendants and the movants on these motions. It was stipulated that the issues before the court are the same in each case (tr. pp. 6-7). The complaint in each action alleges a cause of action for breach of contract against other defendants (the "Insured"), and causes of action for both negligent misrepresentation and fraud against the Broker Defendants.

In its complaints, Plaintiff alleges that the Insureds submitted applications to the Assigned Risk Plan (the "Plan") through Large Auto, which contained false information as to the number and use of the vehicles, thereby obtaining lower insurance premiums, and it seeks herein the proper amount of premiums, punitive damages and attorneys' fees.

Dismissal of the first cause of action for breach of contract is denied since said claim is asserted only against the Insured and not the moving Broker Defendants.

The Broker Defendants contend: that "the plan supplants (rather than) supplement(s) the common law, and the carrier's remedy for fraud in the application is cancellation of the policy" (tr. p. 29-30); and that Plaintiff's claim for

misrepresentation requires "reliance by a known party" (Broker Defendants' Memorandum of Law, ¶17) and actual privity of contract or the functional equivalent thereof (id. ¶ 13), and since Plaintiff cannot make such a showing its complaint must be dismissed.

On a motion to dismiss pursuant to CPLR 3211:

> "... the pleading is to be afforded a liberal construction ... . (The Court must) accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" [Leon v. Martinez, 84 NY2d 83, 87-88 (1994)].

The Broker Defendants contend that the Court of Appeals in Aetna Casualty and Surety Company v. O'Connor, 8 NY2d 359 (1960) ("Aetna"), held that "the Assigned Risk Plan has established a detailed set of regulations governing the rights and liabilities of parties ... which supplant (emphasis as set forth by movants) not supplement common law rules regarding insurance contracts" (Broker Defendants' Memorandum of Law, ¶2). In Aetna, the Court of Appeals stated that the fact that "a number of individual provisions of the Plan imply an intention to limit the insurer, if fraud and misrepresentation be charged, to the right to cancel on 10 days' notice ... (indicates) an intention to abrogate the common law right to rescind on the ground of fraud or misrepresentation" (p. 363). However, the court stated that the specific issue before it was whether the Plan "which in explicit terms provides only for prospective cancellation (abrogates) the insurer's common-law right to void a policy from its

inception on the ground that it had been obtained through fraud or misrepresentation" (p. 361), and concluded that the "right to cancel was designed as a substitute for, not an addition to, the common-law right of rescission" (p. 364). While it noted that the "very range of subjects included (in the Plan) reflects a design to supply an exclusive and comprehensive scheme of regulation of the contractual relationship concerned" (p. 363), the court did not address the issue before this court as to whether the Plan affected common-law claims for damages against a broker.

In Reliance Insurance Companies v. Daly, 38 AD2d 715 (2nd Dept. 1972), the court, in indicating that a suit by an insurer against its insured to recover for damages paid to an injured third party may be viable based on a fraudulent application submitted by the insured, stated:

> "(H)owever, nothing in the applicable law precludes a suit for damages after the insurer's responsibilities to a third party have been satisfied. The statutory scheme preventing rescission *ab initio* is a recognition that there is a public interest in the insurance policy which may exceed the interest of the parties to the contract.... That public interest is unaffected by a suit for damages which in no way impinges upon the injured party's recovery."

Based on the foregoing principle, the court in Insurance Company of North America v. Kaplan, 274 AD2d 293, 298 (2nd Dept. 2000), held that "(a)n insurance carrier that is precluded from rescinding a policy retroactively due to fraud is not without means of redress. For example, if the insurer is required to pay benefits under the policy to a third party, it may bring an action against its insured to recover such losses." See also,

Mooney v. Nationwide Mutual Insurance Company, 172 AD2d 144, 149 (3rd Dept. 1991). Thus, the decision in Aetna in no way precludes this action for damages.

The Broker Defendants also contend that Plaintiff's complaint must be dismissed since "before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract or a relationship so close as to approach that of privity" [Parrott v. Coopers & Lybrand, L.L.P., 95 NY2d 479, 483 (2000)], and "Plaintiff must demonstrate by proof (1) an awareness by the declarant that the statement would be used for a particular purpose, (2) reliance by the recipient of the statement, and (3) some conduct by the declarant linking the statement to the recipient and evincing an understanding of that reliance" [164 Mulberry Street Corp. v. Columbia University, 4 AD3d 49, 59 (1st Dept. 2004)]. Plaintiff has alleged that Large Auto submitted applications containing false information to the Plan on behalf of the Insured for the purpose of obtaining coverage from an insurer under the Plan at an artificially low premium. This adequately alleges "the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff" [J.A.O. Acquisition Corp. v. Stavitsky, 8 NY3d 144, 148 (2007)].

In considering the identical issue in an action commenced by Plaintiff in federal court, Judge Gleeson ruled in Liberty Mutual Insurance Company v. Grand Transportation, Inc., 2007 WL 764542 (E.D.N.Y.), that "Aetna nowhere holds that an

insurer lacks a right of action in tort when the subject matter of the tort happens to be a Plan-assigned policy" (emphasis in original), and he rejected "Large Auto's position that the Plan's failure to mention that insurers can recover in tort for misrepresentations by brokers implies that such recovery is unavailable in this case." Regarding the privity issue, Judge Gleeson found that "Liberty's allegations establish a functional equivalent of privity (in that) Large Auto submitted an application on behalf of (the Insured) to the Plan, with the expectation that a Plan carrier would use it to issue a policy at an estimated premium rate calculated from the information in the application (and that) Large Auto knew or should have known that the rating information on the application was false." Large Auto's additional argument that there was "no reliance by a known party" was also found wanting, as the court held that such "argument mistakenly supposed that the test for functional privity requires the defendant to know ahead of time which specific individual or entity will rely on its statement." This court agrees with such conclusions.

A similar ruling denying dismissal was issued by Judge Korman in Liberty Mutual Insurance Company v. Ben's Luxury Car & Limousine Service, Inc. , 06 Civ. 3430 (E.D.N.Y. 2007).

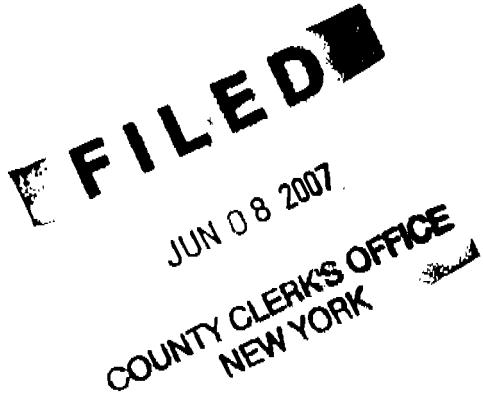
The claim for punitive damages lacks merit since Plaintiff has not alleged conduct that warrants such relief. Recently in Ross v. Louise Wise Services, Inc., ___ NY3d ___, NYLJ May 4, 2007, p. 22, c. 1, the Court of Appeals wrote:

> "Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations .... In Prozeralik v. Capital Cities Communications, Inc. (82 NY2d 466, 479 [1993]), the Court wrote that punitive damages may be sought when the wrongdoing was deliberate and has the character of outrage frequently associated with crime. The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness ... or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights." (Internal citations omitted.)

The claim for attorneys' fees is dismissed since "attorneys fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or by court rule" [A.G. Ship Maintenance Corp. v. Lezak, 69 NY2d 1, 5 (1986)], and the complaint does not allege any basis for such award.

In view of the foregoing, the Broker Defendants' motion is granted solely to the extent of dismissing the claims for punitive damages and attorneys' fees, and is otherwise denied. This decision constitutes the order of this court.

Dated: June 4, 2007



J.S.C.