

**Rutgers Cas. Ins. Co. v GEO-Tech Indus.
Corp.**

2007 NY Slip Op 32070(U)

July 1, 2007

Supreme Court, New York County

Docket Number: 0106584/2005

Judge: Leland G. DeGrasse

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

PRESENT: LELAND DeGRASSE
Justice

PART 25

Rutgers Casualty Ins Co
- v -
Geo-Tech Industrial Corp

INDEX NO. 106584/05
MOTION DATE _____
MOTION SEQ. NO. 01
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

_____ be granted/withheld/modified/with
accompanying Memoranda Decision.

FILED
JUL 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

JUL 01 2007

Dated: _____

HON. LELAND DeGRASSE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
RUTGERS CASUALTY INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 106584/05

GEO-TECH INDUSTRIAL CORP. and IDI
CONSTRUCTION CORP.

Defendants.

----- X
GEO-TECH INDUSTRIAL CORP.,

Third-Party Plaintiff,

-against-

T/P Index No. 590397/06

ROBERT P. BRADY AGENCY, INC., BUCKINGHAM
BADLER ASSOCIATES, INC. and BUCKINGHAM OF
LONG ISLAND, LLC,

Third-Party Defendants.

----- X

DeGrasse, J.:

Motion sequences one and two are consolidated. Third-party defendants Buckingham Badler Associates, Inc. (BBA) and Buckingham of Long Island, LLC (BLI) move for a dismissal pursuant to CPLR 3212 of the third-party complaint filed against them by defendant / third-party plaintiff, Geo-Tech Industrial Corp. BLI also invokes CPLR 3211. Plaintiff, Rutgers Casualty Insurance Company, has brought this action for a judgment rescinding a commercial general liability policy it issued to Geo-Tech and declaring that it is not obligated to defend and indemnify Geo-Tech with respect to claims arising out of an accident which occurred on October 24, 2003.

By letter dated January 10, 2005, Rutgers notified Geo-Tech of its disclaimer with respect to the accident. The letter cites alleged material misrepresentations in Geo-Tech's insurance application as the basis for the disclaimer. According to Rutgers, Geo-Tech described its work as that of a painting contractor while concealing the fact that its operations included soil stabilization. Geo-Tech has brought third-party claims sounding in negligence, malpractice and breach of contract against BBA, BLI and the broker of record, third-party defendant Robert P. Brady Agency, Inc. It is alleged in the third-party complaint that BBA, BLI and Brady negligently prepared its application for insurance and failed to provide Rutgers with proper information.

BLI is a subsidiary of BBA and both are wholesale insurance brokers. Each asserts that summary judgment dismissing the contract cause of action should be granted because privity is lacking. BLI submits the affidavit of its principal, Jeffrey Berkowitz, who states that his agency had no contact with Geo-Tech and took no part in the preparation of its application. Jane Dalli, a vice president of BBA, makes similar assertions in her affidavit. Movants' papers also include a copy of a fax cover sheet which recites Brady's transmission of Geo-Tech's completed application to BLI on April 4, 2002. Accordingly, BLI and BBA also argue that the negligence cause of action should be dismissed because they owed no duty to Geo-Tech. Geo-Tech asserts that the motions should be denied so that it can be afforded the opportunity to conduct discovery concerning the preparation and signing of the application. The answers of BLI and BBA are dated June 20 and July 7, 2006 respectively. Geo-Tech does not claim to have served a single discovery notice between joinder of issue and December 12, 2006, the date on which BLI made its motion. A summary judgment motion cannot be defeated on the ground that discovery is

needed where the party advancing the argument has failed to ascertain the facts due to its own inaction (*Sloane v Repsher*, 263 AD2d 906, 907 [1999]). Moreover, Geo-Tech has made no showing pursuant to CPLR 3212 (f) that facts essential to justify opposition may exist but cannot be stated at this time (*see Ewing v ADF Const. Corp.*, 16 AD3d 1085, 1087 [2005]). John Farmer, Geo-Tech's President, states in his affidavit that no one from his company completed or signed the application. The affidavit is, however, conspicuously silent on the question of whether there was ever any contact between Geo-Tech and movants. The absence of contact between an insured and a wholesale broker has been found sufficient to support a finding that the wholesale broker made no representations to the insured and did not alter its insurance application. In *Shteiman v Those Certain Underwriters At Lloyd's of London, England* (180 AD2d 521 [1992]), the Court grant summary judgment dismissing a complaint which included negligence and contract causes of action by an insured against a wholesale broker. In rendering its decision the Court observed:

“Second, plaintiff himself admits that he had no contact with any representative of [the wholesale broker] when completing the application or throughout the whole process, thus making it clear that [the wholesale broker] issued no warranties, nor made any misrepresentations to plaintiff. Finally, it is undisputed that [the wholesale broker] did not alter any of plaintiff's responses on the proposal, in particular the three answers ultimately found to constitute material representations warranting the voiding of Lloyd's policy” (*id.* at 522-523).

Notwithstanding its claim that discovery is needed, Geo-Tech could have submitted an affidavit setting forth the contacts, if any, upon which it bases its claims against BBA and BLI. Its failure to do so is unexplained. Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for its failure to do

so (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). BBA and BLI are therefore entitled to summary judgment.

Insurance brokers are not professionals and, thus, claims against them do not sound in professional malpractice (*Busker on the Roof Ltd. Partnership v Warrington*, 283 AD2d 376 [2001]). Therefore, a malpractice cause of action has not been stated. BBA and BLI also assert that the negligence cause of action is time-barred. Here movants cite *Cappelli v Berkshire Life Insurance Company* (276 AD2d 458 [2000]) and other cases for the proposition that an insured's negligence claim against a broker accrues upon the issuance of the policy. An issue of fact, however, is raised by Farmer's sworn assertion that the policy was never delivered to Geo-Tech. Such factual issues preclude dismissal under CPLR 3211 (*see e. g. Sarasota, Inc. v Kurzman & Eisenberg, LLP*, 28 AD3d 237 [2006]). For the foregoing reasons the motions for summary judgment are granted. The Clerk shall enter judgment dismissing Geo-Tech's third party complaint as against BBA and BLI. BLI's motion is granted to the further extent that Geo-Tech's malpractice cause of action is dismissed as against BLI for failure to state a cause of action. The motions are denied in all other respects. The action is severed and continued with respect to the remaining parties.

Dated: July 1, 2007


J. S. C.

HON. LELAND DeGRASSE