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

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice PART 10

Hersch, D

INDEX NO. 601675/05

MOTION DATE

- v -

MOTION SEQ. NO. 003

DeWitt

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.

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

Dated: Feb 15, 2007

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

DENNIS S. HERSCH,

Plaintiff,

-against-

DEWITT STERN GROUP, INC.,

Defendant.

----------x

Decision/Order
Index No.: 601675/05
Seq. No. : 003

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 motion [§3212] w/SBF affirm, exhs	1
Exhs "F" & "H" (unsealed per agreem't on steno record 10/26/06)	2
Pltf's x-motion (compel), w/MTA affirm in opp and support, exhs	3, 4
Exhs 2, 9-22 & 27-38 (unsealed per agreem't on steno record 10/26/06)	5
Def's affirm in further support (SBF)	6
Interim Order dated October 12, 2006	7

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

Plaintiff has asserted seven causes of action against defendant DeWitt Stern Group, Inc., an insurance broker ("DeWitt"). The first three causes of action (1st - negligence, 2nd -breach of contract and 3rd -breach of fiduciary duty) all seek as a measure of damages, the difference between the payment that his insurance company ("Chubb") made on his claim and the actual losses he claims he sustained as a result of a fire in his coop apartment ("the shortfall"). The remaining four causes of action arise from plaintiff's claim that the defendant had an undisclosed contingency commission arrangement with Chubb. As per that agreement, Chubb paid defendant a commission

for each insurance policy it wrote insuring a client that defendant referred to that insurance company. The causes of action arising from the alleged undisclosed relationship are: misrepresentation (4th cause of action), breach of contract (5th cause of action), breach of fiduciary duty (6th cause of action) and deceptive trade practices (7th cause of action).

DeWitt and the previously individually named defendants (e.g. Bertam Fisher, Carol Lipnik, David Paige and Jolyon F. Stern) brought a pre-answer motion to dismiss this action. CPLR § 3211. That motion granted in part, and the claims against the individually named defendants were severed and dismissed. Plaintiff's false advertising claim against defendant DeWitt was also dismissed. Decision/Order, Gische J., 9/21/05. In all other respects, however, the remaining causes of action were preserved for trial or dispositive motions.

Issue has now been joined and defendant has moved for summary judgment dismissing all the remaining causes of action against it. Plaintiff has cross moved to compel certain outstanding discovery from defendant. He argues that defendant's failure to comply with his demands makes it difficult for him to present his case in opposition to the summary judgment motion because the information necessary for him to do so remains within the defendant's control. CPLR 3212 (f).

For the reasons that follow, the court finds that defendant has not proved it is entitled to summary judgment, therefore there is no reason to go any further to consider whether CPLR 3212 (f) should be applied, and this motion denied on the basis of it being premature. The separate issue of whether Mr. Stern has to appear for his deposition is addressed later in this decision and order.

Since issue has been joined, these motions are brought timely, and as indicated above, defendant's motion is not premature, the motion and cross motion will be considered by the court. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision and order is as follows:

Background

Plaintiff alleges in his complaint that in 1992 he sought out DeWitt because of its reputation as an insurance broker and expertise in risk management program design. He sought DeWitt's advice about what kind of insurance coverage he should have to protect his coop apartment, a house in Watermill, New York, and their contents. Plaintiff's claims, stated in broad terms, are that he was misled about his insurance coverage either due to DeWitt's negligence, or because of an undisclosed arrangement DeWitt had with the insurance company which issued the policy to him ("Chubb"), a non-party to this action. Plaintiff claims that due to the insufficiency of the policy DeWitt recommended (and his reliance on its expertise), he sustained monetary damages in excess of $572,000 because many of the items he put in a claim for following a fire in his coop apartment were, in fact, considered "additions and alterations" to his apartment, and therefore subject to a 10% maximum cap on recovery. Moreover, plaintiff contends that because DeWitt received compensation for consultation apart from payment of premiums ("contingency commissions"), the advice DeWitt imparted to him when he made specific questions about the type of coverage he should get, and their extended period of dealings (12 years), he and DeWitt had a "special relationship" which brings along with it a duties of care to him.

At his examination before trial ("EBT"), plaintiff testified that in 1992 he met with

Betram B. Fisher ("Mr. Fisher"), an account representative with DeWitt (also known internally as a "producer"), to discuss his insurance needs. Plaintiff testified that at that time he described the contents of his apartment (and house) in general terms, but explained that he wanted sufficient coverage in the event of their damage or loss. Plaintiff testified that Mr. Fisher ordered an appraisal of both properties, including (plaintiff believes) their contents. No copy, however, of the appraisal is provided by either side.

Thereafter DeWitt obtained, and plaintiff accepted, a policy with Chubb. He has continued to renew this policy each year since 1992. The renewal policy in question is effective May 19, 2004 through May 19, 2005. Following a fire in his coop apartment, plaintiff put in a claim with Chubb. At that time he learned that items such as bookcases, painted walls, flooring, carpeting, and window treatments were considered "additions and alterations" to the apartment, and therefore subject to a 10% cap, as per the following clause in his policy:

> "Additions and Alterations:
> We cover your building additions, alterations, fixtures, improvements, installations or items of real property that pertain to your unit. This includes breakage of glass or safety glazing material in the building or a storm door or window. But the loss must be for that part of your cooperative in which you have an insurable interest.
>
> For a covered loss to these items, we will pay up to 10% of the amount of contents coverage or any higher amount listed in the Coverage Summary for Additions and Alterations. The same payment basis applies to Additions and Alterations as to contents."

The policy also contains this language: "READ YOUR POLICY CAREFULLY, INCLUDING THIS COVERAGE SUMMARY, FOR A COMPLETE DESCRIPTION OF

YOUR COVERAGE." The "Coverage Summary" page of the policy states that the coop apartment is insured for "replacement cost;" the contents are listed at "$731,000;" and it is designated a "Deluxe Cooperative" policy. The "Coverage Renewal Summary" page indicates that the coop apartment coverage is for "CONTENTS, LIABILITY, ADDITIONS AND ALTERATIONS" it further provides that there is the following "additional coverage or conditions" - "You have in addition to the standard 10% of your contents value $720,00 of Additions and Alterations coverage for your residence at 31 E. 79th St., New York, NY"

Plaintiff testified at his EBT that although he read the policy when he received it, he thereafter called to confirm the scope of his insurance coverage with Mr. Fisher. Plaintiff testified that he took the words "additions and alterations" to have their plain meaning, and that he did not believe things like paint, flooring, carpeting, window treatments, and fixtures, would be subject to that 10% cap, because there was nothing in the policy to define them as "additions and alterations."

Plaintiff argues that defendant's motion must be denied because it is premature. He argues that although he notified DeWitt that he wanted to depose Jolyon Stern, DeWitt's CEO and President, Mr. Stern has never been produced. Plaintiff argues that Mr. Stern's deposition is important to his defense against this motion for summary judgment, and that he believes Mr. Stern is in possession of facts that will support his position in this litigation, particularly on his claims about "steerage."

Mr. Fisher testified at his EBT that he never met with plaintiff, does not recall him, nor did he have any personal involvement with him. He acknowledges, however, that he and another account representative or "producer," by the name of Gary Granata

serviced and were responsible for plaintiff's account.

Mr. Fisher testified further that it is standard procedure for DeWitt account representatives to raise the issue of additions and alterations - more commonly referred to as "improvements and betterments" - with a client who owns a coop apartment. He also testified that 75% of his clients who have Chubb insurance have "additional additions and alterations" coverage to compensate for the 10% cap. The 25% who do not have it, expressly decline it. He also testified that under "no circumstances" would he recommend that a coop owner similarly situated to plaintiff decline additional "additions and alterations" coverage.

Mr. Fisher also testified that he would have asked such a client "what additions have been made to your unit since it . . . became a cooperative. Not only what you have done to it, but what the previous owner might have done with it." Mr. Fisher also testified he did this because it would factor into the type of insurance necessary, and that some companies - like Chubb - would require separate coverage for such betterments. Mr. Fisher testified that Chubb provides an "automatic 10 percent with whatever the building - - the contents value is. So if you got $100,000 contents policy, you would automatically get $10,000 additional for -- for alterations, additions and alterations."

At his EBT Mr. Granata could not recall the plaintiff or interviewing him about insurance. He too testified, however, that he would have recommended that plaintiff obtain "additions and alterations coverage" so that certain things, floors, bathroom fixtures, light fixtures, etc., would be covered. Both Messrs Fisher and Granata expressed surprise that plaintiff did not have additional insurance, because both

believed it was so important for a person similarly situated to plaintiff to have.

Ms. Lipnik, a senior account executive at DeWitt testified that Chubb defines "additions and alterations" to include "improvement made by the owner, flooring and wallpaper. They don't go into detail. It is not in detail in the policy." When questioned about whether the scope of coverage was determined by looking at the coop shareholder's proprietary lease and the policy to determine the scope of coverage, Ms. Lipnik replied affirmatively ("Right.") Ms. Lipnik acknowledged that the policy details were not clear.

DeWitt contends that the negligence (1st) and breach of contract (2nd) causes of action must be dismissed because plaintiff admits he received and read the Chubb policy and this is a complete defense, not only because plaintiff is a practicing, and seasoned attorney, but because, as a matter of law, plaintiff is conclusively presumed to know the terms, conditions, and limits of his policy. Busker on the Roof Limited Partnership Co., v. M.E. Warrington, et al and DeWitt Stern Group, 283 AD2d 376 (1st Dept 2001).

DeWitt further contends that plaintiff never made a specific request for the coverage that is the subject of this dispute, and that his vague and generalized request for "adequate" insurance coverage does not establish a duty that it (DeWitt) breached. Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 NY3d 132 (2006); Murphy v. Kuhn, 90 NY2d 266 (1977). DeWitt separately contends that any claim that the Chubb policy is vague, unclear, or in any way misleading, is best directed to Chubb (a non-party) because it wrote the policy, not DeWitt, therefore plaintiff has no cause of action against DeWitt.

In support of its motion to dismiss the breach (3rd) of fiduciary duty claim, DeWitt maintains that it did not have a "special relationship," with plaintiff, therefore it had no duty beyond mere procurement of a policy for him.

DeWitt argues that plaintiff's misrepresentation (4th), breach of contract (5th) and breach of fiduciary duty (6th) causes of action should each be dismissed because plaintiff sustained no damages as a result of the policy he selected. As for plaintiff's 7th cause of action under the Deceptive Trade Practices Act, DeWitt alleges that plaintiff is agreement with Chubb neither illegal nor deceptive. Moreover, DeWitt contends that plaintiff is asserting the alleged deception as the act giving rise to liability and the injury he sustained. DeWitt separately contends that plaintiff cannot prove damages because his claim, that he subsequently obtained (through a new broker) a better policy (also with Chubb), and that the premiums were less expensive, is incorrect. DeWitt contends the new policy was, in fact, more expensive.

In support of its motion for summary judgment, dismissing plaintiff's "steering" claims, DeWitt argues that contingent commission agreements are part of the normal course of business between insurers and insurance brokers, therefore such agreements are upheld by courts.

Discussion

The proponent of a motion for summary judgment has the initial burden of tendering sufficient evidence to eliminate any material issues of fact from the case by evidentiary proof in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden will then shift to the party opposing the

motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, *supra* 560. The party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist.

While plaintiff argues that defendant's motion is nothing more than a thinly veiled reargument of its already decided motion to dismiss, the court's decision, that plaintiff's claims withstood a pleading stage dismissal motion, does not constrain the court from now finding that any one of those claims have to be dismissed if defendant proves its entitlement to summary judgment as a matter of law. Gay v. Farella, 5 AD3d 540 (2nd Dept 2004). Whereas on the motion to dismiss the court accepted all of plaintiff's facts as true, the burden is now on defendant to prove its defenses, and disprove plaintiff's facts. Only if it meets this burden, will plaintiff then be required to prove his case. For the reasons that follow, the court holds that defendant has not met its burden for summary judgment on any of plaintiff's causes of action, and also that there are numerous factual disputes that require the denial of its motion for summary judgment, and a trial in this case.

It is black letter law that a broker has a common law duty either to obtain the coverage that a customer specifically requests or to inform the customer of an inability to do so. Murphy v. Kuhn, 90 NY2d 266 (1997); Hoffend & Sons v. Rose & Kiernan, Inc., 19 AD3d 1056 *aff'd on other grounds* 7 NY3d 152 (2006). Where it is proved that the insured made a specific request for a certain type of coverage, or that it had a "special relationship" with the broker, and therefore the broker had a special level of

advisory responsibility to the insured, then under such exceptional circumstances (determined on a case by case basis), a broker may be said to have assumed or acquired duties in addition to those fixed at common law. Murphy v. Kuhn, *supra* at 272.

Generally, an insured is presumed to know the contents of the policy that is issued to him or her. Hoffend & Sons v. Rose & Kiernan, Inc., 19 AD3d 1056 *aff'd on other grounds* 7 NY3d 152 (2006). This general rule, however, may be overcome where an insurance broker or agent affirmatively misrepresents policy coverage or fails to obtain the insurance requested. Hoffend & Sons v. Rose & Kiernan, Inc., *supra*.

There is a significant and material factual dispute about what happened when plaintiff met with a DeWitt agent for the first time. The dispute is over the insurance that DeWitt secured for him after meeting with him was commensurate with the insurance needs he identified or requested at his meeting or "interview" with the account representative or "producer" assigned to his account. The two producers that testified on DeWitt's behalf (i.e. Messrs Fisher or Granata) could not recall meeting with plaintiff, let alone what kind of insurance needs he had that they discussed. DeWitt's argument, that because plaintiff himself cannot recall the specifics of that (or any other), plaintiff cannot his case against DeWitt, impermissibly shifts the burden on its motion to plaintiff. It is DeWitt's burden on this motion for summary judgment to prove that plaintiff only made a general request for insurance, not a specific one, and that plaintiff did not (as he contends) shift the decision-making responsibility to the broker he met with (i.e. Messrs Fisher or Granata) because those "insurance experts" knew insurance better than he did. Scansarole v. Madison Square Garden, L.P., 33 AD3d 517 (1st Dept

2006).

Moreover, defendant's report of what plaintiff's testimony was at his EBT is not accurate. Plaintiff testified that he was direct about his insurance needs and that he described his coop apartment's contents as being valuable. Plaintiff also testified that Mr. Fisher ordered the coop apartment, the Watermill house, and their contents appraised to gauge plaintiff's insurance requirements. Although no one has produced a copy of such an appraisal, plaintiff has testified a copy of the report was never provided to him, but was used by Mr. Fisher or others to make insurance recommendations to him thereafter.

Despite Mr. Fisher's testimony that none of his clients with coop apartments would ever turn down additional coverage, and that he would never counsel a client to do so, plaintiff has testified that no one ever advised him that he needed to buy more insurance because of what he owned, or that the Chubb policy only provided minimal (10%) coverage in the event of loss. There is, therefore, a factual dispute about whether plaintiff was improperly counseled about the insurance he needed. Defendant has not met its burden on this motion, which is not only to prove that plaintiff did not articulate the need for specific insurance, but that it did not make any material misrepresentations to plaintiff about the insurance he obtained. McGarrity v. Judd, Assoc. Ltd., 108 AD2d 734 (2nd Dept 1985).

Plaintiff has also raised factual disputes whether the Chubb policy fairly identified and apprised him of the scope of coverage for furnishings in his apartment, and what DeWitt's agents did or said when plaintiff called to discuss the policy after he had received it and read it. Moreover, where, as here, a broker handles an insured's

personal account for an extended period of time, such course of dealing puts the broker on notice that his or her advice is being sought and specially relied on. Murphy v. Kuhn, *supra* at 272. In such situations, the issue of whether the insured read the policy may constitute comparative negligence, but does not bar a claim against the broker. Baseball Office of Com'r v. Marsh & McLennan, Inc., 295 AD2d 73 (1st Dept 2002). The issue of whether the insured delegated its insurance decision-making responsibility to the broker is an issue for the trier of fact to decide. Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., *supra*.

Although defendant contends that no extraordinary circumstances are present that would warrant the imposition of liability upon it for the breach of a special or fiduciary duty, plaintiff's claims about his prior dealings with DeWitt account representatives, the advice he claims they provided, and alleged assurances by defendant that the insurance being recommended would meet plaintiff's insurance needs, set forth disputed facts that require the denial of defendant's motion to dismiss the breach of contract (5th), and breach of fiduciary duty (6th) causes of action.

Plaintiff has also asserted a cause of action for negligent misrepresentation (4th cause of action). This claim survives defendant's motion for summary judgment as well. Plaintiff has raised factual disputes about whether DeWitt used reasonable care to impart correct information to him about his insurance coverage and whether there was a "special relationship" between the parties. Fresh Direct LLC v. Blue Martini Software Inc., 7 AD2d 487 (2nd Dept 2004); Korea First Bank of New York v. Noah Enterprises, 12 AD2d 321 (1st Dep't 2004); Water Street LLC v. Delloite & Touche LLP, 19 AD3d 183 (1st Dep't 2005); See: Murphy v. Kuhn, *supra* (facts of that case did not

rise to the level required to recognize special relationship).

Plaintiff has also asserted a cause of action for deceptive trade practices under General Business Law § 349 (h) ("GBL § 349"). GBL § 349 is a broad, remedial statute which provides a private right of action for injuries to consumers resulting from deceptive practices. Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 NY3d 200, 205 [2004] (internal quotes omitted). To properly plead a cause of action under GBL § 349, plaintiff must allege that the challenged act or practice was consumer-oriented, materially misleading and that plaintiff suffered injury as a result of the deception. Stutman v. Chemical Bank, 95 NY2d 24, 29 (2000); Blue Cross and Blue Shield of New Jersey, *supra* at 205-206. "Consumer-oriented," means that the defendant's acts or practices have a broader impact on consumers at large. Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 344 (1999); Cruz v. NYNEX Info. Resources, 263 AD2d 285, 290 (1st Dept 2000). Whether the alleged act or practice is a representation or omission, it must be "likely to mislead a reasonable consumer acting reasonably under the circumstances. . ." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20 at 25 (1995). The threshold requirement of consumer-oriented conduct is met by a showing that the acts or practices have a broad impact on the consumer at large in that they are directed to consumers or potentially affect similarly situated consumers. Cruz v. NYNEX Info. Resources, *supra*.

Although plaintiff at trial, will have the burden of proving that DeWitt's challenged acts or practices were misleading in a material way, on this motion it is defendant's burden to prove that, as a matter of law, it did not engage in a deceptive business

practice. Defendant has not met its burden, and it is for the jury to decide whether defendant committed a deceptive act. Stutman v. Chemical Bank, supra at 31. Therefore, defendant's motion for summary judgment dismissing the 7th cause of action is denied as well.

DeWitt's separate argument, that plaintiff cannot prove his damages, also fails. There is a factual dispute whether the old policy plaintiff obtained through DeWitt with Chubb did, in fact, have higher premiums than the policy he subsequently obtained through the new broker. Plaintiff appears to have increased his limits and his coverage, therefore a dollar-for-dollar comparison, as urged by defendant, is impossible, presenting a factual dispute for trial.

DeWitt's argument, that contingency agreements are routinely upheld by the courts, is correct and directly supported by the legal authority it cites. Rudolph E. Bucci, Inc. v. Greater New York Mut. Ins. Co., 69 Misc2d 465 (NY Sup 1972); Amusement Business Underwriters v. American International Group, Inc., 66 NY2d 878 (1985). It is, however, also well established in New York that an insurance broker is the agent of the insured. Incorporated Village of Pleasantville v. Calvert Ins. Co., 204 AD2d 689 (2nd Dept 1994). Under certain circumstances and for certain purposes, however, an insurance broker may represent either the insured or the insurer, or both; the question is one of fact and the test usually applied is whether the broker at the time of effecting the insurance was actually or ostensibly affiliated with and employed by the insurer or whether he was acting independently of the insurer. NY Jur 2d, Ins § 380; Paramount Ins. Co. v. Brown, 205 AD2d 464 (1st Dept 1994).

In the case at bar, the issue is not whether, as between the insurance company

and the insurance broker a contingent commission is owed and payable. The issue is whether this undisclosed arrangement: 1) should have been disclosed to plaintiff; and 2) whether the arrangement was a breach of DeWitt's duties to the plaintiff. There are disputed facts about whether DeWitt was acting as the agent of the plaintiff or Chubb's agent when it recommended the Chubb policy to plaintiff. Since defendant has not proved its defense, that as a matter of law, the undisclosed contingency commission agreement did not cause plaintiff damages, in this regard DeWitt's motion for summary judgment must be denied as well.

As for plaintiff's cross motion for an order compelling Mr. Stern to appear for his examination before trial, it is granted. There is correspondence between Mr. Stern and Chubb about its "incentive plan" (e.g. contingency commission arrangement) with DeWitt. The plan, which provided DeWitt with commissions "as motivation for future success," directly bears on plaintiff's "steering" claims. Not only did defendant not move for a protective order (it only seeks such relief in opposition to plaintiff's cross motion), defendant has not set forth arguments that would support such an order: unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. CPLR § 3103. DeWitt's argument that it has produced a number of individuals already, therefore Mr. Stern's EBT is extraneous, does not defeat plaintiff's cross motion. The individuals who have already been deposed all hold (are previously held) different jobs with DeWitt. DeWitt shall produce Mr. Stern for his deposition within fifteen (15) days of service of a copy of this order with notice of entry.

Summary and Conclusion

Having failed to prove that it is entitled to summary judgment, as a matter of law,

dismissing any of plaintiff's claims, defendant's motion for summary judgment is denied. There are material issues of fact that require a trial of this action. To the extent that plaintiff has cross moved to enforce its demand that Mr. Stern appear for his examination before trial, it is granted.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
February 15, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.