Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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RAMJOHN HANIFF a/k/a RAMJOHN A. HANIFF,

Plaintiff,

Index No.: 15423/07
Motion Date: 11/14/07
Motion Cal. No.: 12
Motion Seq. No.: 3

-against-

INDIAN HARBOR INSURANCE COMPANY,
JLN INTERNATIONAL CORP.,
WKF&C AGENCY, INC., and
DINEGAR-SCHNEIDER-REACCUGLIA
AGENCY, INC.,

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendant Dinegar-Schneider-Reaccuglia Agency, Inc., for an order pursuant to CPLR §3211(a)(7), dismissing plaintiff's complaint in its entirety.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affidavits-Exhibits..... | 1 - 4 |
| Affirmation-Affidavit-Exhibits..... | 6 - 9 |
| Reply Affirmation..... | 10 - 11 |

Upon the foregoing papers, it hereby is ordered that the motion is decided as follows:

This is an action to recover on an insurance claim for injury to commercial property located at 103-01 37th Avenue, Corona, New York, which was damaged on June 20, 2005, as a result of a yellow school bus crashing into the building owned by plaintiff Ramjohn Haniff ("plaintiff"). The building was insured for $225,000.00; the value of the building, as alleged by plaintiff, was $1,200,000.00 and the property damage incurred was $830,000.00. The policy of insurance was obtained by defendant Dinegar-Schneider-Reaccuglia Agency, Inc. ("DSR") and issued by defendant Indian Harbor Insurance Company. DSR moves to dismiss the complaint insofar as asserted against it on the grounds that it fails to state a cause of action against it for either (a) breach of contract; (b) failure to make prompt payment or settlement; (c) breach of duty of good faith and fair dealing; (d) unfair insurance claim practices; (e) declaratory judgment or (f) negligence.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference[]." Jacobs v Macy's East, Inc., 262 A.D.2d 607, 608 (2nd Dept. 1999). See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder &Steiner, 96 N.Y.2d 300, 303, (2001); Leon v Martinez, 84 N.Y.2d 83 (1994); Kempf v. Magida, 37 A.D.3d 763 (2nd Dept. 2007); Gallagher. Kucker & Bruh, 34A.D.3d 419, 419 (2nd Dept 2006). Indeed, on a motion to dismiss the complaint for failure to state a cause of action, the focus is on whether a plaintiff has a cause of action; the court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 N.Y.2d 272 (1977); Jacobs v Macy's East Inc., supra). In assessing such a motion, a court properly may freely consider affidavits submitted by the plaintiff for the limited purpose of ascertaining whether they may remedy defects in the complaint or they establish conclusively that plaintiff has no cause of action. See, Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976). Such "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." Id., 40 N.Y.2d at 636; see, Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Gershon v. Goldberg, 30 A.D.3d 372, 817 N.Y.S.2d 322, 323 (2nd Dept. 2006); see, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Operative Cake Corp. v. Nassour, 21 A.D.3d 1020 (2nd Dept. 2005). Where evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, dismissal is warranted only where the evidence conclusively establishes that a material fact alleged by plaintiff is not a fact at all and that plaintiff has no cause of action. See, Guggenheimer v Ginzburg, supra; Rovello v Orofino Realty Co., 40 N.Y.2d 633 (1976); Allstate Ins. Co. v Raguzin, 12A.D.3d 468 (2nd Dept. 2004).

Although "any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582, 591 (2005), bare legal conclusions as well as factual claims that are flatly contradicted by the record are not presumed to be true on a motion to dismiss for failure to state a cause of action, and are not entitled to any such consideration." Mayer v. Sanders, 264 A.D.2d 827, 828 (2nd Dept. 1999); see, Morone v. Morone, 50 N.Y.2d 481 (1980). Moreover, where, the plaintiff's submissions conclusively establish that there is no cause of action, the cause of action should be dismissed." Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 636 (1976). Thus, allegations that are impermissibly vague and conclusory fail to state a cause of action. See, Island Surgical Supply Co. v. Allstate Ins. Co., 32 A.D.3d 824 (2nd Dept.2006); Levin v. Isayeu, 27 A.D.3d 425 (2nd Dept. 2006); Lester v. Braue, 25 A.D.3d 769 (2nd Dept. 2006); Hart v. Scott, 8 A.D.3d 532 (2nd Dept. 2004); Becker v. University Physicians of Brooklyn, Inc., 307 A.D.2d 243, 245 (2nd Dept. 2003); Stoianoff v. Gahona, 248 A.D.2d 525 (2nd Dept. 1998), appeal dismissed 92 N.Y.2d 844 (1998), cert. denied 525 U.S. 953, 670 N.Y.S.2d 204 (1998).

Here, the causes of action set forth in the complaint are alleged against all defendants collectively, including DSR, the insurance broker. DSR moves to dismiss the complaint insofar as asserted against it on the ground that it fails to state a cause of action against it for either (a) breach

of contract; (b) failure to make prompt payment or settlement; (c) breach of duty of good faith and fair dealing; (d) unfair insurance claim practices; (e) declaratory judgment or (f) negligence, which is the only cause of action specifically addressing DSR. DSR alleges that pursuant to plaintiff's instructions, it procured a policy insuring, inter alia, plaintiff's three story frame building for a one year term commencing February 12, 2005, up to a limit of $225,000.00. In opposition to the motion, plaintiff alleges in his affidavit that he had engaged DSR for the purpose of obtaining insurance for a period of over eleven years, and that DSR, when first contacted in 1994, "performed the calculation of the coverage limits, the fair market value and replacement costs for damages. He further alleged:

> That each year thereafter, I would receive a renewal notice from DSR based on DSR's calculations of adequate coverage of $300,000. The policy coverage remained at $300,000.00 for the following eight or nine renewal periods. At no time did the policy renewals reflect the amount of coverage or even appreciate in coverage due to rising costs or an increase in fair market value.

He concluded:

> DSR should be held liable for damages. I relied on its expertise and its advice with respect to the insurance they obtained for me. They calculated the policy limits and they determined the fair market value without ever asking me for any additional information regarding the building such as tax bill or NYC's Annual Notice of Value. DSR should have performed its duty reasonably and accurately in order to issue a proper policy of insurance.

The legal argument asserted in opposition to the motion addresses only the issue of negligence, the sixth cause of action, contending that "[p]laintiff has made enough factual allegations to sustain this cause of action at this pre-discovery phase of litigation." As plaintiff's papers submitted in opposition to the motion set forth specific allegations of negligence on behalf of DSR that arguably tend to remedy the defects in the complaint, this Court will consider the motion to dismiss solely with respect to the negligence cause of action, and deems that plaintiff has abandoned the other causes of actions obstensibly asserted against DSR.

It is well settled that "[a]n insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time or to inform the client of the inability to do so (citations omitted). Absent a specific request for coverage not already in a client's policy, or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage." KT Const., Inc. v. U.S. Liability Ins. Group, 39 A.D.3d 594 (2nd Dept. 2007). Murphy v. Kuhn, 90 N.Y.2d 266, 270 (1997)[insurance brokers have "no continuing duty to advise, guide or direct a client to obtain additional coverage."]; Fremont Realty, Inc. v. P & N Iron Works, Inc., 39 A.D.3d 586 (2nd Dept. 2007)["Absent a specific request for coverage not already in a client's policy, or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise,

guide, or direct a client to obtain additional coverage."]; Loevner v. Sullivan & Strauss Agency, Inc., 35 A.D.3d 392 (2nd Dept. 2006)["Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage."]; Duratech Industries, Inc. v. Continental Ins. Co., 21 A.D.3d 342 (2nd Dept. 2005)["an insurance agent does not owe a common-law continuing duty to advise, guide, or direct its client in terms of proper insurance coverage, absent some kind of special relationship of trust and confidence."]. The facts as alleged in the complaint, as supplemented by plaintiff's affidavit, are sufficient to state a cause of action for negligence and to raise the possible inference that the relationship between DSR and plaintiff was more than a long term insurance broker-customer relationship, but was a special relationship, pursuant to which DSR assumed a duty of care upon which plaintiff justifiable relied. See, Lynch v. McQueen, 309 A.D.2d 790 (2nd Dept. 2003). Based upon the foregoing, the motion is granted solely to the extent that the first, second, third, fourth and fifth causes of action are dismissed insofar as asserted against defendant DSR. The motion for dismissal is denied with respect to the sixth cause of action for negligence.

Dated: January 7, 2008

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J.S.C.