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

PRESENT: HON. MILTON A. TINGLING J.S.C., Justice PART 44

INDEX NO.

Index Number : 602738/2005
BRUCKMANN, ROSSER, SHERRILL

MOTION DATE 7/25/08

MOTION SEQ. NO.

VS
MARSH USA

MOTION CAL. NO.

Sequence Number : 002
SUMMARY JUDGMENT

In 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 is decided in accordance with annexed decision.

FILED
DEC 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/15/08

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44 HON. MILTON A. TINGLING J.S.C.

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BRUCKMANN, ROSSER, SHERRILL & CO., L.P. BRS PARTNERS, L.P., BRSE ASSOCIATES, INC., Bruckmann, ROSSER, SHERRILL & CO., INC., BRUCE R. Bruckmann, HAROLD O. ROSSER, II, and STEPHEN C. SHERRILL,

Index No. 602738/05

Plaintiffs,

-against-

MARSH USA, INC., MARSH, INC. and MARSH & MCLENNAN COMPANIES, INC.,

Defendants.

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MILTON TINGLING, J.:

This is a motion by the defendants Marsh USA, Inc., Marsh, Inc., and Marsh & McLennan Companies, Inc. (collectively, Marsh) pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

The plaintiffs Bruckmann, Rosser, Sherrill & Co., L.P., BRS Partners, L.P., BRSE Associates, Inc., Bruckmann, Rosser, Sherrill & Co., Inc., Bruce R. Bruckmann, Harold O. Rosser, II and Stephen C. Sherrill (collectively, Bruckmann) are a private equity firm that buys controlling interests in various businesses (the portfolio companies). The defendant Marsh was Bruckmann's insurance broker.

The complaint sets forth causes of action to recover damages for Marsh's alleged acts and omissions in advising Bruckmann regarding the purchase of excess directors and officers insurance. It is alleged that in 1997, Bruckmann and the portfolio companies engaged Marsh to

provide insurance consulting and brokerage services, and to procure primary directors and officers insurance. In 2001, Bruckmann, through Marsh, purchased $20,000,000 of private equity protector insurance (the protector policy) from American International Speciality Lines Insurance Company (American International). American International is an American Insurance Group (AIG) family company. The protector policy contains the following tie-in provision:

> in the event other insurance is provided to an Outside Entity, a Portfolio Entity, a leasing company or an independent contractor referenced in the above paragraphs of this Clause 14, or is provided under any pension trust or employee benefit plan fiduciary liability insurance policy, and such other insurance is provided by the Insurer or any member company of American International Group, Inc. (AIG) (or would be provided but for the application of the retention amount, exhaustion of the limit of liability or failure to properly submit a notice of a Claim) then the Insurer's maximum aggregate Limit of Liability for all Losses combined in connection with a Claim covered, in part or in whole, by this policy and such other insurance policy issued by AIG shall not exceed the greater of the limit of Liability of this policy or the limit of liability of such other AIG insurance policy.

According to the complaint, the tie-in provision reduces the protector policy limits from $20,000,000 to $5,000,000. Bruckmann allegedly reasonably relied on Marsh's expertise, both in structuring the directors and officers and the excess insurance programs, specifically for private equity funds, and their portfolio companies, and in identifying potential issues regarding gaps or overlapping coverage such as those presented by the tie-in provision. Marsh allegedly failed to identify potential issues regarding gaps or overlapping coverage, and never alerted Bruckmann that the tie-in provision could reduce the limits of the protector policy, and never attempted to negotiate the removal of the tie-in provision from the policy.

The tie-in provision became an issue in the following manner. In 1996, Bruckmann acquired a supermarket chain, Jitney-Jungle Stores of America, Inc. (Jitney-Jungle). In 1997, Jitney Jungle purchased $15,000,000 in primary directors and officers insurance from National

Union Fire Insurance Company (National Union). National Union is an AIG family company. Jitney-Jungle issued $200,000,000 of debt securities and then went bankrupt and was liquidated. As a result, in 2001, Jitney-Jungle's unprotected creditors, led by Wells Fargo, brought an action for breach of fiduciary duty against, inter alia, the plaintiffs in this action. The Wells Fargo action settled for the sum of $33,500,000. The defense costs totaled the sum of $6,900,000. National Union contributed the full limits ($15,000,000) of the Jitney-Jungle primary policy. American International refused to pay anything more than $5,000,000, leaving a shortfall of $20,400,000, which Bruckmann paid.

In 2004, in a separate action attacking the tie-in provision, Bruckmann sued American International (the coverage action) seeking to recover the difference between the $5,000,000 of coverage actually provided by American International for the Wells Fargo claim, and the $20,000,000 limit that Bruckmann believed that it had purchased. Bruckmann's coverage action against American International settled for the sum of $9,000,000.

In 2005, Bruckmann brought this action against Marsh as broker, seeking to recover the total sum of $6,375,000, representing the $6,000,000 shortfall between the $29,000,000 of insurance coverage Bruckmann received, and the $35,000,000 of insurance coverage that Bruckmann allegedly was led to believe that it had purchased, plus $375,000 in counsel fees expended by Bruckmann in its action against American International. The complaint also seeks punitive damages and attorneys' fees.

The complaint also alleges that an action brought against Marsh by the New York State Attorney General, alleging that Marsh engaged in a secret practice of taking payments (contingent commissions) from insurers, was settled by Marsh.

The complaint sets forth causes of action for negligence (first), breach of contract (second), breach of duty of loyalty (third), and breach of fiduciary duty (fourth).

In support of its motion for summary judgment, Marsh makes the following arguments. Marsh cannot establish either any breach of duty, or proximate cause. Marsh owed neither a fiduciary duty, nor a duty of loyalty to Bruckmann. Bruckmann's punitive damages claims are unsupported.

In opposition to the motion, the plaintiff Bruckmann makes the following arguments. Under New York law, policyholders can sue insurance brokers after settling with the insurance company. Bruckmann's suit against Marsh is consistent with the alternative pleading permitted under the CPLR. The issues of proximate cause, and the existence of a special relationship which gives rise to a fiduciary duty, are disputed issues of fact. Whether or not Marsh received contingent commissions for placing the Bruckmann policy, is a question of fact. Punitive damages are warranted by Marsh's wanton negligence.

In reply, Marsh argues that an insurer's broker's only duty is to obtain the specific coverage requested by the insured, and Marsh, as broker, is not required to act as a guarantor against the insurer taking a bad-faith coverage position.

The 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 eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The defendant Marsh makes 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. In opposition, the plaintiff Bruckmann fails to produce evidentiary proof to establish the existence of a material issue of fact which requires a trial.

Absent a special relationship, "insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so,. . . they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). The duty owed by an insurance broker to a customer is ordinarily defined by the nature of the request the customer makes (*Hoffend & Sons, Inc. v Rose & Kiernan*, 7 NY3d 152 [2006]). However, an insured has a right to look to the expertise of its broker with respect to insurance matters (*Baseball Office of Commr. v Marsh & McLennan*, 295 AD2d 73 [1st Dept 2002]). To hold a broker liable for a negligent failure to procure insurance, an insured must show that the broker failed to discharge the duties imposed by the agreement to obtain insurance, by proof either that the broker breached the agreement, or that it failed to exercise due care in the transaction. However, an insured may only enforce its rights to the extent that it could have done so against the insurer (*Chase Manhattan Bank, N.A. v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 AD2d 1 [1st

Dept 1999]).

Bruckmann's counsel states, in opposition to Marsh's motion, that Marsh failed to identify or discuss with Bruckmann the potential implications of the tie-in provision, and encouraged Bruckmann to rely on Marsh to take care of all Bruckmann's insurance needs. Thus, contrary to Marsh's contention, Bruckmann alleges sufficient facts establishing that Marsh may have created a special relationship between itself and the plaintiff Bruckmann, thereby assuming a duty of care and justifying Bruckmann's reliance on Marsh (*Kimmell v Schaefer*, 89 NY2d 257 [1996]; *Lynch v McQueen*, 309 AD2d 790 [2d Dept 2003]).

However, Bruckmann fails to offer proof as to Marsh establishing causation, an essential element of its claim (*Dunn v State of New York*, 29 NY2d 313 [1971]). When faced with a motion for summary judgment on proximate cause grounds, a plaintiff need only raise a triable issue of fact regarding whether or not the defendant's conduct proximately caused the plaintiff's injury (*Carmen P. v PS&S Realty Corp.*, 259 AD2d 386 [1st Dept 1999]).

In *Resource Financing, Inc. v National Casualty Company* (219 AD2d 627 [2d Dept 1995]), the insureds, a mortgagee and its successor, first sued their insurer for failing to name the mortgagee and its assignees as beneficiaries under a fire insurance policy. The insurer's motion to dismiss the underlying suit to reform the policy was denied. Notwithstanding this legal victory, the insureds never pursued the matter by moving for summary judgment against the insurer. Rather, they settled their claim against the insurer for a greatly reduced amount, and then sued their agent for her role in procuring the policy. The Second Department dismissed the subsequent lawsuit against the agent, because the insureds could not demonstrate that their damages were proximately caused by the agent's actions. Instead, the Second Department held

that the insureds' loss was caused solely by their action in settling the case with the insurer, rather than proceeding to seek a full recovery, either in a trial against the insurer, or by a motion for summary judgment. The settlement action by the insureds superseded any alleged negligence by the agent.

In the instant case, Bruckmann does not meet its burden merely by alleging that Marsh's negligence in procuring coverage caused the coverage dispute. Rather, Bruckmann's loss was proximately caused solely by its settlement with American International. The plaintiff Bruckmann litigated, and settled its claim that it was entitled to recover the full amount of its loss pursuant to American International's excess insurance policy. Summary judgment is appropriate because proximate cause is not only an element of negligence, but also an element of breach of contract. A plaintiff must establish a causal relationship between the breach of contract and the damages claimed because proximate cause is an element of breach of contract (*Cangro v Noah Builders, Inc.*, 52 AD3d 758 [2d Dept 2008]; *Jorgensen v Century 21 Real Estate Corp.*, 217 AD2d 533 [2d Dept 1995]). The settlement for a lesser amount was the proximate cause of the damages, and supersedes any purported breach on the part of Marsh. Because Bruckmann's loss was caused by its action in settling the case with American International rather than proceeding to seek a full recovery against American International, the motion to dismiss the complaint must be granted.

Finally, a prevailing party may not recover attorneys' fees from the losing party unless an award of attorneys' fees is authorized by agreement between the parties, statute, or court rule (*Baker v Health Management Systems, Inc.*, 98 NY2d 80 [2002]). Bruckmann's claim for attorneys' fees and punitive damages must be dismissed, as attorneys' fees are not recoverable

from an insurance broker where, as here, they would not have been recoverable from the insurer (*Busker on Roof Ltd. Partnership Co. v Warrington*, 283 AD2d 376 [1st Dept 2001]). While an insured is allowed to recover its legal fees in an action brought against it by an insurer in an effort to free itself from its policy obligations, recovery of counsel fees may not be had in an affirmative action by the insured to settle its rights (*Chase Manhattan Bank, N.A. v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 AD2d at 573). Additionally, Bruckmann may not seek punitive damages, as its claim is a private, rather than a public, wrong (*Rocanova v Equitable Life Assurance Soc. of United States*, 83 NY2d 603 [1994]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 12/15/08

ENTER:

HON. MILTON A. TINGLING
J.S.C.