

**872 Broadway Equities Assoc. v Hudson
Ins. Co.**

2009 NY Slip Op 31038(U)

April 29, 2009

Supreme Court, New York County

Docket Number: 115606/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

872 BROADWAY EQUITIES ASSOCIATES, and
TRANS WORLD EQUITIES, INC.,
Plaintiffs,

Index No.: 115606/07

Motion Date: 11/18/08

Motion Seq. No.: 02

Motion Cal. No.: 109

- v -

HUDSON INSURANCE COMPANY, BROOKS INSURANCE
AGENCY, INC., CENTURY COVERAGE CORP.,
QBE INSURANCE CORP., DAVID ROSEN, CHAYA
LEVIN, SOL ROSS, JOSEPH ROSS, and WILLIAM
LIEBER,
Defendants.

FILED
MAY 11 2009
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 8 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1, 2
3 - 6
7 - 8

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants Brooks Insurance Agency and David Ross move to
dismiss plaintiffs' complaint pursuant to CPLR 3211.

Plaintiff 872 Broadway is the owner of the premises at that
address and Trans World is the Managing Agent. Plaintiffs'
complaint alleges that plaintiffs retained retail insurance
broker Century Coverage to procure commercial general liability
(CGL) and other coverages for its properties including 872

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):

Broadway. Century Coverage allegedly then contracted with Brooks Insurance to place coverage with various carriers including defendants QBE and Hudson.

The court shall deny the movants' application to dismiss this action based upon CPLR 3211 (a) (4) as the other action is currently pending as a companion action to this case before this same Justice (872 Broadway Equities Assocs. v Hudson Ins. Co., Index No.: 113602/2006) and seeks declaratory relief different from the monetary relief sought in this action. The court is open to considering further consolidation of these actions upon appropriate application of the parties.

FILED

MAY 11 2009

The court must similarly deny the motion to dismiss plaintiffs' negligence claim on the grounds of statute of limitations because the First Department has held in a case involving an insurance broker that "the proposed negligence claim accrued not at the time of the alleged breach of duty but, subsequently, at the time of injury, i.e., in June 2001 when [the insurer] disclaimed." Lavandier v Landmark Ins. Co., 26 AD3d 264 (1st Dept 2006) (citation omitted); see, e.g. Chase Research v NIA Group, 96 NY2d 20, 26 (2001) and 20 Clarke Place Realty Corp. v Rudhes and Co., 267 AD2d 141 (1st Dept 1999) affd as mod 96 NY2d 767, 768 (2001).

Movants' argument that the plaintiff's third and fourth causes of action for breach of duty of fair dealing and breach of

duty of good faith must be dismissed because there are no such causes of action is incorrect as such causes of action can be independently maintained. See Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc., 41 AD3d 269, 270 (1st Dept 2007) (breach of duty of good faith cause of action not dismissed where it is alleged that defendant exercised discretion under the contract arbitrarily or irrationally). However, such causes of action cannot exist independently of an underlying contract and none is alleged here as to the movants and therefore the third and fourth causes of action shall be dismissed. See Murphy v American Home Products Corp., 58 NY2d 293, 304 (1983) (no obligation of good faith and fair dealing can be implied that would be inconsistent with other terms of the contractual relationship).

As to plaintiffs' claims for negligent misrepresentation and fraud, those claims are adequately pled against the movants. Movants are correct that third parties have no claim against an insurance broker who fails to have the third parties named as insureds under a policy of insurance because no duty is owed by the broker to the third parties. See Greater New York Mut. Ins. Co. v White Knight Restoration, Ltd., 7 AD3d 292, 293 (1st Dept 2004) (broker was under no duty to third parties regardless of whether the broker acted recklessly with respect to the negligent misrepresentation claim, because of the absence of a relationship approximating privity). Furthermore, the "special relationship"

requirement as an element of a negligent misrepresentation cause of action is not met by an allegation that an insurance broker/agent failed to advise an insured of additional coverages. Murphy v Kuhn, 90 NY2d 266, 270 (1997) (insurance agents have no continuing duty to advise, guide or direct a client to obtain additional coverage). However, the Court in Murphy did recognize that "[g]enerally, the law is reasonably settled on initial principles that 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." Id. The claim in this case is of the type cognizable at common law: to wit, that the movants failed to procure the insurance requested by the plaintiffs and that the movants misrepresented or failed to represent the coverage obtained although aware of the plaintiffs' request. While such facts may be sufficient to support a cause of action for negligence against an insurance broker, they are insufficient to support a cause of action for negligent misrepresentation in the absence of a special relationship between the parties. The court shall therefore dismiss the fifth cause of action against the movants.

However, the common law duty cited in Murphy is sufficient to sustain a fraud cause of action against an insurance broker where the broker, as is alleged here, knowingly failed to procure the requested insurance. As there is no breach of contract claim

asserted against the movants, the fraud cause of action cannot be said to be duplicative.

Accordingly, it is

ORDERED that the motion by defendants Brooks Insurance Agency and David Ross pursuant to CPLR 3211 is GRANTED only to the extent that the court DISMISSES plaintiffs' third, fourth, and fifth causes of action against these defendants; and it is further

ORDERED that the motion is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend a status conference on May 19, 2009, at 11:00 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: April 29, 2009

ENTER:

Debra A. James
J.S.C.
DEBRA A. JAMES
J.S.C.

FILED
MAY 11 2009
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