[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 602566/2008
BRT REALTY TRUST
VS.
AHI AGENCY
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.
MOTION DATE 4/1/09
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

FILED
JUN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

**Cross-Motion:** ☐ Yes ☒ No

**Upon the foregoing papers, it is ordered that this motion**

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant AHI Agency for an order pursuant to CPLR § 3211(a)(3) and (a)(7) dismissing the Amended Complaint of plaintiff BRT Realty Trust on the grounds that plaintiff lacks standing and failed to state a cause of action, respectively, is denied; and it is further

ORDERED that plaintiff shall serve the Amended Complaint, naming TRB Cumberland LLC as an additional plaintiff in this action within 20 days of the date of this order; and it is further

ORDERED that the parties appear for a Preliminary Conference in Part 35 on September 15, 2009, 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/24/09

HON. CAROL EDMEAD J.S.C.

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

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 35

---------- X

BRT REALTY TRUST,

Plaintiff,

Index No.: 602566/08

-against-

AHI AGENCY and GRANITE STATE INSURANCE COMPANY,

Defendants.

---------- X

GRANITE STATE INSURANCE COMPANY,

Third-Party Plaintiff,

Third-Party Index No.: 590950/0

-against-

BANK OF AMERICA, N.A. and SIGNATURE BANK,

Third-Party Defendants.

---------- X

HON. CAROL ROBINSON EDMEAD, J.S.C.



MEMORANDUM DECISION

Defendant AHI Agency ("AHI") moves for an order pursuant to CPLR § 3211(a)(3) and (a)(7) dismissing the Amended Complaint of plaintiff BRT Realty Trust ("BRT") on the grounds that plaintiff lacks standing and failed to state a cause of action, respectively.

*Factual Background*

According to the Amended Complaint,[1] plaintiff alleges that it provided a loan to Crestbrook Meadows Realty Co., LLC ("Crestbrook"), Lamplighter Realty Co., LLC

[1] According to the client AHI, it has not been served with the Amended Complaint, which differs from the Complaint in no way except for the lowering of the addendum clause; however, counsel has received the Amended Complaint, and the opposition is based on the Amended Complaint.

("Lamplighter") and Archwood Realty Co., LLC ("Archwood Realty") (collectively, the "Borrowers") to refinance an apartment complex (the "apartment complex") and two other properties (collectively, the "Properties"). As a condition to the loan, Lamplighter, the owner of the apartment complex at the time, was required to procure property insurance for the apartment complex and name plaintiff as an additional insured. Lamplighter contacted broker AHI, which procured property insurance from defendant Granite State Insurance Company ("Granite Insurance"). AHI issued an insurance binder entitled "Evidence of Property Insurance," which referenced policy number 1079306. It is alleged that upon the closing of the loan, plaintiff obtained a first-priority security interest in the Properties, including a first-priority security interest in all proceeds of any insurance policies covering the Properties.

In June 2006 a fire occurred, which resulted in damage to the apartment complex and a loss of rents. A claim for benefits was submitted to Granite Insurance, which issued four checks (the "payout"). Although plaintiff was paid under one of the checks, plaintiff was not named as payee on two of the four checks, and it is unclear as to whether plaintiff is named as a payee on a third. Plaintiff was later provided with the policy under which such checks were issued (the "Granite Policy"), which did not name plaintiff as an additional insured. Granite Insurance advised plaintiff that there was no evidence of the policy referenced in the Evidence of Property Insurance.

Having not received further payment under the payout, plaintiff commenced this action for negligence against AHI and Granite Insurance, and for breach of contract against Granite Insurance. As against AHI, plaintiff alleges that AHI owed plaintiff a duty of reasonable care because it issued the Evidence of Property Insurance naming plaintiff as an additional insured,

was aware that Lamplighter would use the Evidence of Property Insurance to obtain the loan, and was aware that plaintiff would rely on the Evidence of Property Insurance to provide the loan. Plaintiff also alleges that AHI breached its duty to plaintiff by failing to procure a policy covering the apartment complex, resulting in plaintiff's inability collect the full amount of the payout.

*AHI's Motion to Dismiss*

In support of dismissal, AHI contends that it had no contract with plaintiff, was not plaintiff's broker, and was not plaintiff's agent, and that AHI was neither an agent nor a producer for Granite Insurance. AHI was the broker for the Borrowers, and under caselaw, the duty of an insurance broker runs solely to its customer and not to any additional insureds since there is no privity of contract for the imposition of liability. Because AHI owes no duty to plaintiff to purchase insurance naming plaintiff as an additional insured under the Granite Policy, plaintiff lacks standing to sue AHI and the Complaint fails to state a cause of action against AHI.

In any event, an "additional insured" has no insurable interest in the Properties and cannot receive first party insurance proceeds. Plaintiff received checks from Granite Insurance, not because it was or was not an additional insured, but because it was a mortgagee that submitted a first party claim. If plaintiff were not a mortgagee, it would not have had standing to submit a claim to Granite Insurance and receive payment. Additionally, that plaintiff has not received all of the insurance proceeds has nothing to do with AHI or its status as an additional insured; AHI did not issue any of the checks, Granite did.

*Plaintiff's Opposition*

Plaintiff argues that it has standing to sue AHI. Even in the absence of privity, an insurance broker's relationship with a third party can be sufficient to impose a duty. As applied

in the insurance broker context, the three-part test governing an accountant's liability to non-contractual third-parties for negligence is met because AHI (1) was aware that the Evidence of Property Insurance would be used by AHI's client, Lamplighter, to obtain the loan from plaintiff, (2) was aware that plaintiff would rely on the Evidence of Property Insurance to provide the loan to Lamplighter, and (3) issued the Evidence of Property Insurance naming plaintiff as an additional insured and as a mortgagee.

Plaintiff also has standing to pursue claims against AHI as a third-party beneficiary, even absent a privity relationship. According to the Amended Complaint, (1) a valid agreement existed between AHI and Lamplighter Realty (the "AHI/Lamplighter Agreement"), (2) the agreement was for the benefit of plaintiff, and (3) the benefit to plaintiff was immediate rather than incidental. AHI provided to plaintiff the "Evidence of Property Insurance," which stated in part: "This is evidence that insurance as identified below has been issued, is in force, and conveys all the rights and privileges afforded under the policy." This document also identified plaintiff as a mortgagee and additional insured.

Plaintiff also argues that it has standing under the theory of assignment. Pursuant to a "Deed of Trust, Assignment of Rents and Leases, Security Agreement and Financing Statement" dated April 11, 2006, Lamplighter assigned to a trustee, *inter alia*, Lamplighter's "interest in all claims and causes of action relating directly or indirectly to the [Properties], whether such claims or causes of action arise in Borrower's name or such claims or causes of action are acquired by Borrower, directly by subrogation or otherwise ("Claims or Causes of Action"). Further, plaintiff contends that pursuant to a Trustee's Deed dated July 7, 2008, the Trustee transferred the Claims or Causes of Action to plaintiff. Since the assignee of a cause of action has standing to bring an

action upon the cause of action in his own name, plaintiff has standing to sue AHI in light of its foreclosure on the Properties and concomitant assumption of the Claims and Causes of Action of AHI's client, Lamplighter.

In any event, whether plaintiff would have received the insurance proceeds had AHI exercised reasonable care should not be resolved at this stage of the case. Caselaw has held that an additional insured was entitled under an insurance policy to be named as a co-payee on insurance proceed checks where the insurance policy at issue named the additional insured and provided that any proceeds thereunder were to be applied first to the payment of the additional insured's note. Here, after the Evidence of Property Insurance was issued, no policy naming plaintiff was ever issued. Therefore, the terms of such a policy, including whether the policy would have required plaintiff to be named as a co-payee on checks containing insurance proceeds, are an issue of fact that cannot be resolved on a motion to dismiss.

Finally, plaintiff argues, the Granite Policy suggests that absent AHI's negligence, plaintiff would have been named as a co-payee on checks containing insurance proceeds. The Granite Policy states that losses or damage shall be paid "jointly to **you** and the Loss Payee, as interests may appear." The "term '**you**' refers to the named insureds per the policy declarations," *i.e.*, Lamplighter and Archwood," and the "Loss Payee shown in the Schedule or in the Declarations is a creditor, including a mortgage holder. . . ." (Emphasis supplied). As the mortgage lender to Lamplighter and Archwood, a formal policy naming plaintiff would likely have named plaintiff as a "Loss Payee," therefore entitling plaintiff to be named as a co-payee on losses paid under such policy.

*AHI's Reply*

AHI argues that plaintiff fails to cite to any case or treatise to support its claim that third parties have standing to sue insurance brokers. Caselaw to which plaintiff cites actually holds that a broker has no duty to third parties and cannot be held liable for negligent misrepresentation or for failing to name parties as additional insureds under a policy of insurance. The cases also dealt with whether certain actions of accountants, not brokers, can give rise to liability to third parties with whom the accountants have no privity to support standing for suit. Finally, the Evidence of Property Insurance notes that it is not evidence of insurance or coverage. As such, it cannot be used to create privity or standing to sue.

Further, argues AHI, plaintiff cannot be considered a third-party beneficiary. First, it is unclear how a party lacking standing to sue brokers can also be said to be a third-party beneficiary deemed to have privity and standing to sue. Second, plaintiff cannot be considered a third-party beneficiary because there is no contract between AHI and the Borrowers, and none has been produced. Indeed, AHI is simply a broker providing the service of finding insurance. Even assuming there was an oral agreement, plaintiff failed to prove that an agreement between AHI and the Lamplighter was intended for the benefit of plaintiff. Plaintiff failed to prove that it is anything other than an incidental beneficiary of the agreement; the Evidence of Property Insurance shows that plaintiff is an incidental party, who did not pay for the policy of insurance.

Furthermore, argues AHI, there is no assignment of rights from the owner that enables plaintiff to pursue a lawsuit against AHI. The "Deed of Trust" fails to note that it is an assignment of the rights of the owners to sue AHI; it is simply as deed of trust mortgage. The Deed of Trust does not name plaintiff, AHI, or the Borrower, but names Marc T. McNamme,

TRB Crestbrook LLC, TRB Cumberland LLC, TRB Archwood (the "New Owners"). It appears that after the foreclosure, the Properties were sold to the New Owners, and plaintiff was paid from the proceeds. Moreover, assuming there was an assignment, that assignment extinguished upon Plaintiff's sale of the property to the New Owners.

AHI also points out that this is not a motion for summary judgment. Thus, questions of fact have no bearing to the fact that plaintiff has no cause of action against AHI, especially where AHI did not create the Granite Policy or have anything to do with issuing the checks. Further, as the Evidence of Property Insurance notes, AHI requested that plaintiff be named as an additional insured, and that Granite Insurance did not so name plaintiff has no bearing on AHI.

Additionally, being an additional insured has nothing to do with plaintiff being entitled to receive first party checks under the Granite Policy. And, the caselaw cited by defendant related to forgeries by co-payees on insurance checks – not brokers. Further, plaintiff's claim that no policy was ever issued and that plaintiff was not named as co-payee on the checks is contradicted by the Granite Policy and the four checks issued by Granite Insurance, two of which note that plaintiff was a co-payee.

*Plaintiff's Further Opposition*[2]

According to the recent Appellate Division case, *Dominion Financial Corp. v Asset Indem. Brokerage Corp.* (874 NYS2d 115 [1st Dept 2009]), privity is not required for a lender to maintain an action against a broker, either on its own behalf or as an assignee of the broker's client's claims, where there is a relationship between the lender and broker sufficient to satisfy

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[2] In light of the New York State Supreme Court Appellate Division's recent decision in *Dominion Financial Corp. v Asset Indem. Brokerage Corp.* (874 NYS2d 115 [1st Dept 2009]) and a missing exhibit referred to in plaintiff's opposition, the Court invited plaintiff and AHI to submit supplemental briefs.

the three-part test or fall under a third-party beneficiary theory. Similar to *Dominion*, plaintiff lent funds to a borrower, and pursuant to plaintiff's requirements, borrower contacted AHI to secure an insurance policy. As in *Dominion*, AHI knew the purpose for which the borrower sought insurance. Further, while plaintiff may not have been directly involved in the procurement process, plaintiff alleges both that AHI was aware that plaintiff would rely on the Evidence of Property Insurance to secure the loan and that AHI issued the Evidence of Property Insurance which named plaintiff as an additional insured in connection with the loan.

Further, pursuant to the Deed of Trust, plaintiff was granted an "interest in all [of Borrower's] claims and causes of action." Following Borrower's default, plaintiff transferred the apartment complex to a wholly owned special use entity, TRB Cumberland LLC, which is wholly owned by plaintiff. Thus, if this Court determines that plaintiff has retained all of its interest in Lamplighter Realty's causes of action against AHI, then plaintiff may pursue any such claims as Lamplighter Realty's assignee. In the event the Court finds that plaintiff assigned to TRB Cumberland LLC all of plaintiff's rights to pursue Lamplighter Realty's causes of action against AHI, then plaintiff, as the managing member and 100% owner of TRB Cumberland LLC, can pursue those rights on behalf of TRB Cumberland LLC. Finally, if the Court finds that such rights were assigned to TRB Cumberland LLC and that said entity is a necessary party, TRB Cumberland LLC can be added as an additional plaintiff.

*AHI's Sur-Reply*

AHI agrees that *Dominion* is directly applicable to the facts herein. However, the Court in *Dominion* declined to dismiss the action because it found privity between the mortgage lender and the broker. AHI argues that unlike the plaintiff in *Dominion*, plaintiff herein failed to

establish any assignment from the Borrowers to plaintiff to support the existence of privity between plaintiff and AHI. The Deed of Trust notes that (1) it is between plaintiff and the former owners of the property, (2) AHI is not a part of this agreement, has not signed this agreement nor is AHI mentioned anywhere in this agreement, and (3) the assignment mentioned in this document is for plaintiff to collect rents from the tenants of the apartment complex in the event of any default by the owners. This assignment has nothing to do with the right to sue the broker for failure to procure insurance. Nevertheless, even assuming that there was such an assignment, a clear reading of the assignment notes that at the time of the present lawsuit the assignment had expired upon the sale of the property during foreclosure. Furthermore, unlike the lender in *Dominion*, plaintiff did not participate or have contact with AHI regarding coverage limits. As there is no assignment, there is no privity between plaintiff and AHI. Assuming that plaintiff demonstrated its standing to sue, plaintiff still failed to receive the remaining two out of the four checks issued by Granite Insurance.

AHI maintains that plaintiff still failed to demonstrate that plaintiff's failure to receive the remaining checks had anything to do with AHI or its status of an "additional insured."

*Analysis*

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept

1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

It is generally accepted that an insurance broker's duty to his or her client does not extend to a purported additional insured on a policy obtained by such a broker, so as to give rise to liability to the purported insured for failure to obtain proper insurance (*see Arredondo v City of N.Y.*, 6 AD3d 328, 775 NYS2d 150 [1st Dept 2004] ["duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract for the imposition of liability"]; *Federal Ins. Co. v Spectrum Ins. Brokerage Servs., Inc.*, 304 AD2d 316, 758 NYS2d 21 [1st Dept 2003] [same]; *Benjamin Shapiro Realty Co. v Kemper Natl. Ins. Cos.* 303 AD2d 245, 756 NYS2d 45 [1st Dept 2003] [holding that insurance broker of tenant was under no duty to landlord and thus, was not liable to landlord for negligent misrepresentation or negligence by reason of broker's issuance of certificates of insurance, which named landlord as an additional insured, contained representations of coverage for landlord's benefit, and contained certain disclaimers]; *Glynn v United House of Prayer for All People*, 292 AD2d 319, 322 [1st Dept 2002] [purported additional insured's claim against broker for negligent misrepresentation properly dismissed, since broker, having had no contractual relationship with purported

additional insured, and not having otherwise been in privity with it, was under no duty to it that might serve as a predicate for claim]). This proposition flows from the notion that there is no privity between the insurance broker and the purported additional insured.

However, plaintiff and AHI both agree that the recently decided First Department case, *Dominion Financial Corp. v Asset Indem. Brokerage Corp.* (874 NYS2d 115 [1st Dept 2009]) is applicable to the motion at hand.

In *Dominion*, a real estate lender commenced an action on its own behalf and as the assignee of the claims of an insurance broker's client against the insurance broker for failure to properly procure insurance. The facts of Dominion, as reflected in the lower court's order, revealed that non-parties Eric and Ian Brown approached plaintiff, Dominion Financial Corporation (the "Dominion"), to borrow $2 million to finance their garage business. Dominion loaned the monies to three corporations that owned the leases to the garages (the "borrowers"), and required security for the funds. The borrowers engaged FB Acquisition Corporation ("FB") to operate the garages and make payments directly to Dominion on the loan. Asset Indemnity (the "broker") assisted FB in procuring surety coverage from United Assurance to secure the loan. When FB defaulted in payments, United Assurance allegedly breached its obligations under the surety bonds by failing to make certain payments to Dominion, and Dominion sued United Assurance. FB later assigned any claims it had against the broker to Dominion. In an affidavit from Eric Brown, Brown stated that FB contracted with the broker for the specific purpose of procuring some type of third party security for Dominion; Brown expressly told the broker that the security was being sought for Dominion's benefit; Brown participated in a three person conference call with the broker to discuss surety coverage for Dominion; and the broker

sent United Assurance's financial statements to Dominion. On appeal, the First Department noted that the insurance broker "was aware, from the moment its client contacted it about procuring coverage," that the lender was the intended beneficiary of coverage. The First Department also noted that the lender "participated on its own behalf in discussions with" the broker and its client about the coverage to be provided. According to the Court, the lender stated a claim for negligence "both on its own behalf and as the assignee" of the broker's client's claims against the broker. Citing, *inter alia*, *Stainless, Inc. v Employers Fire Ins. Co.* (69 AD2d 27, 33-35 [1st Dept 1979]), the Court held that the real estate lender alleged sufficient facts to demonstrate that it was "an intended beneficiary not only of the surety coverage procured by" the insurance broker, in which it was so named, but also of the insurance broker's agreement with its client to procure the surety coverage.[3]

The relevant portions of *Stainless, Inc. v Employers Fire Ins. Co.* (*id*)., to which the *Dominion* Court cited, provide that in order for a third party to enforce a policy of insurance,:

> it must be demonstrated that the parties intended to insure the interest of him who seeks to recover on the policy. As with other contracts, unless it is established that there is an intention to benefit the third party, the third party will be held to be a mere incidental beneficiary, with no enforceable rights under the contract. The intention to benefit the third party must appear from the four corners of the instrument. The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions.
>
> The intention to cover the third party must be that of both parties to the insurance contract, as observed in 18 Couch on Insurance 2d s 74:330:
>
> "Where it clearly appears that a bond was given for the benefit of a third party, he may maintain an action on it in his own name. But in order for a third party to maintain an

[3] The First Department further concluded that the motion to amend the complaint to add causes of action for breach of contract as a third-party beneficiary of the brokerage agreement and as assignee of the broker's client's claim was proper.

> action against an insurer, an intent to make the obligation inure to the benefit of such person must clearly appear in the contract of insurance, and if any doubt exists, the contract should be construed against such intent.
>
> "In order to be a third-party beneficiary entitled to recover on an insurance contract, it is not enough that it be intended by one of the parties to the contract and the third person that the latter should be a beneficiary. Both parties to the contract must so intend and must indicate that intention in the contract. * * * "
>
> In J & J Tile Co., Inc. v. Feinstein, 43 A.D.2d 529, 348 N.Y.S.2d 783, we reversed an order granting summary judgment to plaintiff and directed dismissal of the complaint, finding no intention expressed in a guarantee of payment and performance to confer a benefit upon plaintiff as a third party beneficiary, observing in this connection (43 A.D.2d at 530, 348 N.Y.S.2d at 784):
>
> " * * * Regardless, however, of whether a bond or guarantee is involved, the question remains in each instance as to what the dominant purpose of the instrument was and whether there was an intent to confer a right to sue upon third parties. Here, the language of the instrument itself establishes the dominant purpose was to protect the city and there is no indication of any intent to benefit third parties. Similar language, we note, has previously been construed to deny any right of action by third parties.

Although *Stainless* addressed third-party beneficiary rights in the context of pursuing coverage benefits under an insurance policy, *Dominion* applied the principles of *Stainless* to permit the third-party lender to pursue a claim under a brokerage agreement between the broker and its client.

Here, accepting the allegations in the Amended Complaint as true, the Court likewise finds that plaintiff, a real estate lender, sufficiently states a claim that as an intended beneficiary of the agreement between AHI, the broker, and the broker's client, Lamplighter, AHI failed to procure proper insurance for the benefit of plaintiff. In the Amended Complaint, plaintiff alleges that Lamplighter (the borrower) contacted AHI (the broker) to obtain insurance for the purpose of obtaining the loan from plaintiff and for the purpose of naming plaintiff as an additional insured on a property insurance policy (¶¶15, 18). AHI was aware that the insurance was required by

plaintiff as a condition to plaintiff providing the loan (¶18). AHI obtained the Evidence of Property Insurance, which expressly named plaintiff as an additional insured and mortgagee and expressly insured the apartment complex for building replacement costs and rents (¶¶20, 22). AHI, as agent for Granite Insurance, provided plaintiff with the Evidence of Property Insurance "Acord 27" (¶).

The Evidence of Property Insurance issued in this case is significantly different from the certificates of insurance ordinarily found insufficient to give rise to privity necessary to form a duty on the part of a broker toward any party other than its client. The "Evidence of Property Insurance" ACORD 27, is created by the Association of Cooperative Operations Research and Development, a "collective nonprofit organization subscribed to by most of the insurance carriers in the United States," and does not contain the disclaimers commonly found in certificates of insurance such as "ACORD 24" (*See* Richard R. Goldberg, *Commercial Real Estate Financing: Strategies for Changing Markets and Uncertain Times*, SP008 ALI-ABA 683 (Jan. 2009), *see also In Re Asousa Partnership v Manufacturers All. Ins. Co.*, 2005 WL 2857983 (Bankry. E.D. Pa. 2005). The "ACORD 27 (3/93)" Evidence of Property Insurance carries an "explicit purpose . . . to bind coverage of an existing policy to an additional party" (*In Re Asousa Partnership v. Manufacturers All. Ins. Co.*, 2005 WL 2857983 at *6). As explained in the "ACORD Forms Instruction Guide":

> The Evidence of Property Insurance (ACORD 27) provides a coverage statement for mortgagees, additional insureds and loss payees. Often, the form *replaces the need to send a complete policy to...lenders* [and] other additional insureds. The purpose of the ACORD Evidence of Property Insurance is significantly different from the Certificate of Property Insurance [ACORD 24]. Like the Certificate of Insurance, the [Evidence of Property Insurance] summarizes coverages currently in force on a policy. However, it differs by conveying to the holder of the form *all rights that go with the policy*, including

notice of cancellation.

> Barry S. Marks and Ken Weinberg, *Insurance and Proof of Coverage: Are your Certificates of Insurance Worth Anything?*, 20 No. 6 LJN's Equip. Leasing Newsl. 1 (June 2001), *cited in In Re Asousa, supra*) (emphasis added).

Consequently, the body of caselaw which holds that a certificate of insurance is insufficient to give rise to "the sort of relationship, i.e., one approaching that of privity, requisite to the imposition of liability for negligent misrepresentation" (*Benjamin Shapiro Realty Co. v Kemper Natl. Ins. Cos., supra*; *see also Greater N.Y. Mut. Ins. Co. v White Knight Restoration, Ltd.*, 7 AD3d 292, 293 [1st Dept 2004]; *St. George v W.J. Barney Corp.*, 270 AD2d 171, 171-172 [1st Dept 2000]) is not controlling. Plaintiff was provided with the Evidence of Property Insurance ACORD 27, which provides *evidence* of property coverage and, as stated on the form itself, "conveys all the rights and privileges afforded under the policy" (emphasis supplied), the producer named on such form is identified as AHI. Thus, it may be inferred from the Amended Complaint that AHI represented to plaintiff that it procured insurance for the benefit of plaintiff, and that both AHI and Lamplighter intended and agreed that coverage be provided for the benefit of the plaintiff, the mortgagee (the boxes adjacent to "Additional Insured" and "Mortgagee" sections on the form are checked).

And, the policy annexed to plaintiff's Opposition fails to name plaintiff as an additional insured, loss payee or mortgagee.

With regard to plaintiff's status as an assignee, the Deed of Trust, Assignment of Rents and Leases, Security Agreement and Financing Statement ("Deed of Trust") annexed to plaintiff's brief in further opposition and dated April 11, 2006 between the Borrower and plaintiff states, *inter alia*, as follows:

> . . . in consideration of the premises and of the mutual covenants . . . and in order to secure the payment of the principal of and interest on the [loan] . . . [B]orrower does hereby irrevocably grant, bargain, sell, mortgage, warrant, pledge, *assign*, transfer, and convey to Trustee, and to its successors and assigns . . . the following property:
>
> * * * * *
>
> (f) Borrower's interest in all agreements, contracts, certificates, instruments, and other documents . . . pertaining to the . . . operation or management of any structure or building . . . on the Land . . .
>
> *** *** ***
>
> (I) *Borrower's interest in all claims and causes of action* relating directly or indirectly to the [Properties], whether such claims or causes of action arise in Borrower's name or such claims or causes of action are acquired by Borrower, directly or indirectly, by subrogation or otherwise;
>
> (Deed of Trust pp. 2-3) (Emphasis Added)

Based on a plain reading of the foregoing, AHI's contention that any possible assignment to plaintiff was solely limited to plaintiff's ability to collect rents lacks merit. And, while the Deed of Trust fails to mention AHI specifically, plaintiff alleges that it was nevertheless assigned the Borrower's interest in all claims and causes of action relating to the Properties.

Further, plaintiff also presents a document titled Trustee's Deed, dated July 7, 2008, which, pursuant to a default in payment of the loan by the Borrower, displays plaintiff's transfer of the Properties through the Trustee to the new owners:

> Whereas, default having occurred in the payment of the [loan] and in accordance with the terms of the [loan] and Deed of Trust, [BRT] declared the entire indebtedness due and owing; and
> . . . [BRT], the owner and holder of the indebtedness[,] conveyed its interest in the indebtedness to . . . TRB Cumberland LLC . . . (Trustee's Deed p. 2)

The Trustee's Deed further states that the "Trustee, does hereby transfer, assign, and set over unto . . . TRB Cumberland LLC. . . all of his right, title and interest in the said property as Trustee . . ." (Trustee's Deed p. 6). By virtue of the above, TRB Cumberland LLC, is afforded BRT's interest in, *inter alia*, all the claims and causes of action of Lamplighter.

While arguably plaintiff was not the assignee of the mortgage at the time of service of the Amended Complaint so as to possess standing to commence a proceeding in its own name (*see Lasalle Bank Nat. Assn v Ahearn*, 59 AD3d 911, 875 NYS2d 595 [3d Dept 2009] [assignee of mortgage does not have standing to foreclose unless the assignment is complete at the time the action is commenced] *see also Bankers Trust Co. v Hoovis*, 263 AD2d 937, 938, 694 NYS2d 245 [1999]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 674, 838 NYS2d 622 [2007]), the Court also notes that the affidavit of plaintiff's Vice President states that "BRT . . . is the managing member of TRB Cumberland LLC" and "TRB Cumberland LLC is wholly owned by BRT . . . ." Accordingly, the Court grants plaintiff's request to add TRB Cumberland LLC as an additional plaintiff to pursue claims against AHI.

In light of the above, AHI's contention that plaintiff lacks standing to sue lacks merit. The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution (*Security Pacific Nat. Bank v. Evans*, 31 AD3d 278, 820 NYS2d 2 [1st Dept 2006] *citing Community Bd. 7 v Schaffer*, 84 NY2d 148, 154-155, 615 NYS2d 644 [1994]). The most critical requirement of standing is the presence of "injury in fact-an actual legal stake in the matter being adjudicated" (*Security Pacific Nat. Bank, id.*). The test for determining a litigant's standing is well settled. "A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest (*Silver v Pataki*, 96 NY2d 532 [2001] *citing Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772, 570 NYS2d 778 [1991]). Having concluded that the Complaint sufficiently states a claim for damages plaintiff incurred as a result of AHI's alleged failure to procure proper

insurance in accordance with AHI's agreement with Lamplighter, it cannot be said that plaintiff lacks standing in this action.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by defendant AHI Agency for an order pursuant to CPLR § 3211(a)(3) and (a)(7) dismissing the Amended Complaint of plaintiff BRT Realty Trust on the grounds that plaintiff lacks standing and failed to state a cause of action, respectively, is denied; and it is further

ORDERED that plaintiff shall serve the Amended Complaint, naming TRB Cumberland LLC as an additional plaintiff in this action within 20 days of the date of this order; and it is further

ORDERED that the parties appear for a preliminary conference in Part 35 on September 15, 2009, 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 24, 2009

Hon. Carol Robinson Edmead, J.S.C.