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SHORT FORM ORDER

INDEX No. 03-3017
CAL. No. 09-00910-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/2/09 (#004)
MOTION DATE 11/9/09 (#005)
ADJ. DATE 12/21/09
Mot. Seq. #004 - MotD
Mot. Seq. #005 - MD

BIG COUNTY BROKERAGE CORP., Plaintiff, - against - THE BURLINGTON INSURANCE COMPANY, AIG NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, A CAPITAL STOCK COMPANY, BUCKINGHAM BADLER ASSOCIATES, FRANK SCOTT, as agent for BUCKINGHAM BADLER ASSOCIATES, Defendants.	TORINO & BERNSTEIN, P.C. Attorney for Plaintiff 200 Old Country Road, Suite 220 Mineola, New York 11501 FORD MARRIN ESPOSITO WITMEYER, et al. Attorney for Defendant The Burlington Ins. Co. Wall Street Plaza New York, New York 10005-1875 GRAUB LIEBERMAN STRAUS, et al. Attorney for Defendant Buckingham Badler Assoc. Mid-Westchester Executive Park Seven Skyline Drive Hawthorne, New York 10532

Upon the following papers numbered 1 to 56 read on this motion for summary judgment; motion to strike pleading; Notice of Motion/ Order to Show Cause and supporting papers 1-28; 35-41; 48-54; 55-56 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 29-34, 42-47 ; Replying Affidavits and supporting papers ___ Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant The Burlington Insurance Company for an order granting summary judgment (i) declaring that it is not obligated to defend or indemnify P&T Contracting Corp. or the City of New York in certain personal injury actions, (ii) dismissing the complaint, and (iii) in its favor on its cross claim against defendant Buckingham Badler Associates, is granted to the extent of granting summary judgment declaring that it is not obligated to defend or indemnify P&T Contracting Corp. or the City of New York relative to the eight underlying actions set forth herein, and is otherwise denied: and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendant Buckingham Badler Associates for an order (i) pursuant to CPLR 3126 (3) and 3216 striking the complaint or, in the alternative, (ii) precluding the plaintiff from producing or introducing evidence at trial pursuant to CPLR 3126 (2), is denied.

This is an action in which the plaintiff, a retail insurance broker, seeks a declaratory judgment against the defendants to enforce the terms of a binder allegedly issued by defendant Buckingham Badler Associates (BBA) for a general liability policy to be issued by defendant The Burlington Insurance Company (Burlington). The plaintiff claims that it procured the binder on behalf of its client P&T Contracting Corp. (P&T). At the time the binder was allegedly issued, BBA was a general managing agent for the insurance carrier, Burlington. Neither BBA nor Burlington has any record of the binder being accepted by P&T, of the payment of any premiums paid by P&T, or of the issuance of a policy. At all relevant times, BBA was authorized by Burlington to act on its behalf to receive and review applications for insurance and, where appropriate, to bind and issue Burlington insurance policies. The authority granted to BBA was governed by written agreements and limited by an underwriting manual issued by Burlington.

The plaintiff alleges that, sometime in November 2001, it contacted Frank Scotto (Scotto), an employee of BBA, and submitted an application for insurance. The plaintiff further alleges that, despite deficiencies in the application, Scotto "bound" coverage with Burlington for the period November 30, 2001 through November 30, 2002. The plaintiff's only evidence of the transaction is a quote sheet allegedly issued by Scotto on November 19, 2001 which contains Scotto's notations that the policy was bound but does not contain any indicia of the plaintiff's acceptance of the insurance quote on behalf of P&T.

In August 2002, a personal injury action was commenced naming P&T and the City of New York (the City) as defendants. In November 2002, the City notified Burlington of the action and requested that it defend the action based on the City's being named as an additional insured on the policy allegedly issued to P&T. Burlington alleges that this is the first notice it received that there was a Burlington policy allegedly issued to P&T and that a search of its records revealed that no policy had been issued. Therefore, it denied the City's claim on December 9, 2002.

The plaintiff commenced this action in February 2003 seeking a declaratory judgment and alleging negligence and breach of contract on the part of the defendants. Thereafter, ten other actions were commenced against P&T during the period in which it is alleged that insurance coverage was to be provided by Burlington. In eight of these actions Burlington alleges that, in addition to its other defenses, it is not obligated to defend or indemnify P&T due to the failure of P&T to deliver timely notice of the claims. In addition, in its answer to the complaint, Burlington asserted a cross claim for indemnification against BBA based on an alleged breach of the agency agreement between them.

Initially, the moving defendants point out the failure of the plaintiff to timely serve its opposition to the motions and to timely serve a note of issue pursuant to court order. The Court notes that the

plaintiffs' opposition papers are untimely. However, inasmuch as the moving defendants chose to forgo the opportunity to adjourn the matter to submit reply papers and the record does not reveal any potential prejudice to the defendants, the Court will exercise its discretion and consider the papers submitted by plaintiff, even though they were untimely served pursuant to CPLR 2214 (b) (*see* ***Kavakis v Total Care Sys.***, 209 AD2d 480, 619 NYS2d 634 [2d Dept 1994]). In addition, the Court declines to strike the complaint based on the mere fact that the note of issue was filed eight days after the date set forth in the compliance conference order. A court may not dismiss an action based on neglect to prosecute unless the conditions of CPLR 3216 are met (***Murray v Smith Corp.***, 296 AD2d 445, 447, 744 NYS2d 901 [2d Dept 2002]). Here, the order merely set a date for the filing of a note of issue and did not indicate that the failure to comply with the demand would serve as the basis for a motion to dismiss the action. Thus, the compliance conference order is not deemed a 90-day demand in accordance with CPLR 3216 (***O'Connell v City Wide Auto Leasing***, 6 AD3d 682, 775 NYS2d 543 [2d Dept 2004]).

In addition, Burlington asserts that the plaintiff lacks standing to maintain this action due to its dissolution as a corporation in 1993 and that the complaint should, therefore, be dismissed. The courts of this State have consistently held that the issue is not one of standing but of capacity to sue (***Community Bd. 7 of Borough of Manhattan v Schaffer***, 84 NY2d 148, 615 NYS2d 644 [1994]; ***Harte v Richmond County Sav. Bank***, 224 AD2d 585, 638 NYS2d 684 [2d Dept 1996]). "[T]he issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing. Rather, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived (CPLR 3211 [a] [3]; [e])" (***City of New York v State of New York***, 86 NY2d 286, 292, 631 NYS2d 553 [1995]). A defendant waives the defense of lack of capacity to sue by failing to raise it in its answer, in its amended answer, or in a motion before service of its answer (***Harte v Richmond County Sav. Bank***, *supra*; ***Muchnick v Alcamo Supply & Contr. Corp.***, 169 AD2d 711, 564 NYS2d 198 [2d Dept 1991]). Having failed to raise the issue in a pre-answer motion or its answer, Burlington has waived this ground for dismissal.

On a motion for summary judgment, the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]). Failure of the moving party to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Burlington contends generally that it cannot be held liable to the plaintiff because BBA was without authority to bind the policy. It is undisputed that BBA was a general managing agent for Burlington and that Burlington was, therefore, bound by the actions of its agent within the scope of the authorization given to BBA (***Rose Inn Corp. v National Union Fire Ins. Co.***, 258 NY 51 [1932];

Parlato v Equitable Life Assur. Soc. of U.S., 299 AD2d 108, 749 NYS2d 216 [1st Dept 2002]. In support of its contention that BBA acted beyond the scope of its agency, Burlington submitted the deposition of its employee, Ann Cole, an underwriting specialist. Ms. Cole testified that BBA exceeded the scope of its agency authority when it issued a binder to P&T on its own without submitting the application to Burlington for review. The sole basis for her conclusion is that Burlington's underwriting manual requires the submission of applications for insurance where the premium exceeds $10,000. However, the binder attached as an exhibit to the papers indicates that the premium for the policy is $9,934. While there are additional charges for taxes and an inspection fee on the binder which result in a "Total Policy Cost" of $10,431.36, there is no evidence to suggest that these charges are to be included within the meaning of the term "premium." Burlington, therefore, has failed to establish that BBA lacked authority in this matter.

Burlington also asserts that it is entitled to partial summary judgment against the plaintiff based on the plaintiff's failure to provide timely notice with respect to eight of the underlying actions. The parties have not submitted a copy of the insurance policy allegedly issued in this matter and the Court, therefore, is not able to review a specific notice provision. However, the duty to give reasonable notice as a condition of recovery is implied in all insurance contracts (***Structure Tone v Burgess Steel Prods. Corp.***, 249 AD2d 144, 672 NYS2d 33 [1st Dept 1998]; ***Greater N. Y. Mut. Ins. Co. v Farrauto***, 136 AD2d 598, 523 NYS2d 853 [2d Dept 1988]). Burlington has submitted evidence sufficient to establish that the plaintiff failed to deliver timely notice regarding the eight named cases.[1] The delay in giving notice ranges from a low of 136 days to a high of over five and one-half years.

The plaintiff has failed to raise a reasonable excuse for the failure to give timely notice regarding these actions, asserting only that the giving of notice would have been a futile gesture after Burlington denied the existence of a policy. "[C]ourts consistently hold that an insured's failure to provide required notice is not excused on the basis of the insured's asserted belief that it would have been futile to make a claim because insurers routinely denied coverage for such claims. For example, noting the rejection of the futility argument under New York law, a federal district court found no reported authority for the proposition that 'futility' constituted a valid excuse for an insured's failure to provide timely notice of an occurrence" (***Ogden Corp. v Travelers Indem. Co.***, 739 F Supp 796, 803 [SDNY 1989]). Where there is no excuse for the failure to give timely notice, the issue poses a legal question for the court, and courts have found relatively short periods to be unreasonable as a matter of law (***Rushing v Commercial Cas. Ins. Co.***, 251 NY 302 [1929] [22 days]; ***Hartford Acc. & Indem. Co. v CNA Ins. Cos.***, 99 AD2d 310, 472 NYS2d 342 [1st Dept 1984] *citing* ***Deso v London & Lancashire Indem. Co. of Am.***, 3 NY2d 127,

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[1] The eight underlying actions are *Acosta v The City of New York*, Supreme Court, Bronx County, Index No. 03-15456, *Arroyo v The City of New York*, Supreme Court, Bronx County, Index No. 02-245254, *Calderone v The City of New York*, Supreme Court, Bronx County, Index No. 02-29271, *Castillo v Jodi Bus Co.*, Supreme Court, Bronx County, Index No. 02-25934, *Llodrat v The City of New York*, Supreme Court, Bronx County, Index No. 03-21219, *Morrocho v The City of New York*, Supreme Court, Bronx County, Index No. 03-13367, *Tamas v The City of New York*, Supreme Court, Bronx County, Index No. 03-14534,and *Tapia v The City of New York*, Supreme Court, Bronx County, Index No. 03-15192.

164 NYS2d 689 [1957] [51 days]; *see also* ***Power Auth. of State of New York v Westinghouse Elec. Corp.***, 117 AD2d 336, 502 NYS2d 420 [1st Dept 1986] [53 days]). Therefore, the Court grants partial summary judgment to Burlington declaring that it has no obligation to defend or indemnify the plaintiff relative to the eight named underlying actions.

The essence of Burlington's cross claim is that BBA breached the agency agreement between the parties when it issued a binder based on P&T's incomplete application for insurance and failed to maintain records and correspondence regarding P&T. However, Burlington has failed to establish its prima facie right to summary judgment against BBA and, therefore, summary judgment on the cross claim is denied.

BBA seeks an order striking the complaint and dismissing the action or, in the alternative, precluding the plaintiff from producing certain evidence in support of its claims. Beyond the issues resolved by the Court above, the motion to strike is based solely on the alleged failure of the plaintiff to provide documents which are the subject of certain discovery demands. It is undisputed that responses to those demands have been served. However, the plaintiff claims that many of the requested documents cannot be located.

BBA's request to strike the complaint is denied. Actions should be resolved on their merits wherever possible (*see* ***Traina v Taglienti***, 6 AD3d 524, 774 NYS2d 391 [2d Dept 2004]; ***Bach v City of New York***, 304 AD2d 686, 757 NYS2d 759 [2d Dept 2003]), and the drastic remedy of striking a pleading should not be employed, as here, absent a clear showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith (*see* ***Mendez v City of New York***, 7 AD3d 766, 778 NYS2d 501 [2d Dept 2004]; ***Traina v Taglienti***, *supra*; ***Bach v City of New York***, *supra*; ***Byrne v City of New York***, 301 AD2d 489, 490, 753 NYS2d 132 [2d Dept 2003]). In addition, BBA has failed to establish that it would be prejudiced by the failure of the plaintiff to locate the relevant documents. It is not at all clear that the missing evidence would deprive BBA of the ability to establish its defense (***Iannucci v Rose***, 8 AD3d 437, 778 NYS2d 525 [2d Dept 2004]).

As to BBA's claim that the complaint should be stricken based on the spoliation of evidence by the plaintiff, it is clear that when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126 (*see* ***Holland v W.M. Realty Mgt.***, 64 AD3d 627, 629, 883 NYS2d 555 [2d Dept 2009]; ***Ingoglia v Barnes & Noble Coll. Booksellers***, 48 AD3d 636, 637, 852 NYS2d 337 [2d Dept 2008]). However, striking a pleading as a sanction for spoliation is appropriate only where the missing evidence deprives the moving party of the ability to establish his or her claim or defense (*see* ***Holland v W.M. Realty Mgt.***, *supra* at 629; ***Iannucci v Rose***, *supra* at 438). Again, it is not clear that the missing evidence would deprive BBA of the ability to establish its defense. Therefore, this branch of BBA's cross motion is denied as well. The parties are advised, however, that in the event the plaintiff later discovers some or all of the missing records, the Court retains the discretion to issue any sanction it deems appropriate under the circumstances (***Tavarez v DeLange***, 190 AD2d 568, 593 NYS2d 230 [1st Dept 1993]; ***Rossi v Lin***, 189 AD2d 868, 592 NYS2d 796 [2d Dept 1993]).

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 3/5/10

THOMAS F. WHELAN, J.S.C.