

**Steier v Todd Pallack Ins.**

2010 NY Slip Op 30585(U)

March 10, 2010

Supreme Court, New York County

Docket Number: 104995/09

Judge: Emily Jane Goodman

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3-22-10  
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 104995/2009  
**STEIER, SUSAN F.**  
VS.  
**TODD PALLACK INSURANCE**  
SEQUENCE NUMBER : # 001  
SUMMARY JUDGMENT

*Justice*

INDEX NO. 104995-09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

were read on 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 denied*

*attached*

**FILED**

MAR 22 2010

NEW YORK  
COUNTY CLERK'S OFFICE

*3/10/10*

Dated: \_\_\_\_\_

J.S.C.

**EMILY JANE GOODMAN**  
NON-FINAL DISPOSITION

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
SUSAN F. STEIER et al.,

Plaintiffs,

-against-

TODD PALLACK INSURANCE , et al

Defendants.

-----  
EMILY JANE GOODMAN, J.S.C.:

Index No. 104995/09

**FILED**  
MAR 22 2010  
NEW YORK  
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Defendants Todd Pallack Insurance and Tod Pallack move to dismiss plaintiffs' complaint for failure to state a cause of action for breach of contract, for negligence, and for breach of fiduciary duty and for failure to state a cause of action against Todd Pallack individually. In opposition, plaintiffs agree with defendants' arguments that the law provides that an insurance agent or broker does not have a continuing duty to advise, guide or direct a customer to obtain additional coverage, but only has a duty to obtain coverage specifically requested (*see Hoffend & Sons, Inc. v Keirnan*, 7 NY3d 152 [2006]). Citing to its complaint, plaintiffs maintain that the action is based on an insurance broker's failure to obtain coverage specifically requested by the insured, although as defendants' note, the complaint supports no such argument. However, as is permitted for opposing motions, plaintiffs may amplify the pleadings and have submitted the affidavit of Susan Steier, which states that she specifically requested defendants to procure "a policy, covering all acts of malpractice prior the effective date of the policy, irrespective of the date such acts occurred, and irrespective of the date the claim stemming from such acts of malpractice is first interposed." In reply, defendants complain that the affidavit should be disregarded as contradictory to the complaint. Further, defendants note

that plaintiffs appear to complain that defendants did not effectuate the purchase of “Nose” coverage (prior to 2003) as opposed to “Tail” coverage. For the first time, defendants argue that this action is barred by a three year statute of limitations for negligence. The court permitted plaintiff to submit a sur-reply. The sur-reply maintains that the six year statute of limitations applies to the breach of contract claim and that the negligence cause of action is not time barred because the policy was renewed for three consecutive years and therefore, the negligence was “ongoing in nature, occurring each time the policy was renewed.”

On a motion to dismiss pursuant to CPLR 3211 (a) (7), 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 within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99 [1st Dept 2004]). However, “bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference” (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks omitted]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review “is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks omitted]). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Biondi*, 257 AD2d at 81 [“[t]he motion should be granted where the essential facts have been negated beyond

substantial question by the affidavits and evidentiary matter submitted”] [internal quotation marks omitted]).

The court grants the motion to the extent that the complaint is dismissed against the individual, and, the cause of action for breach of fiduciary duty is dismissed (*see Scotto Princeton LLC v Felson Associates, Inc*, 11 Misc3d 378 [Nassau Co 2005] and cases cited therein). Although plaintiffs complain that they need discovery related to the nature of the corporate structure, plaintiffs have failed to indicate anything in their complaint or affidavit which would show that Todd Pallack was acting as an individual or that he acted outside the scope of his employment (*see Hussian Ali v Marc Agency, Inc.*, 19 AD3d 439 [2d Dept]). Plaintiffs’ complaint and the affidavit lumps together allegations against the corporate defendant and the individual defendant and contains bare legal conclusions. The court cannot give plaintiffs the benefit of all favorable inferences, when the pleading make no specific allegations against the individual sufficient to support individual liability, and when plaintiffs make those same allegations against the corporate defendant.

The court does not reach the issue of the statute of limitations because the issue has not been sufficiently briefed by both sides. Accordingly, the court denies the motion to dismiss the breach of contract and negligence claims with leave to renew. On renewal the parties shall brief the following issues, and assume for purposes of the motion that a specific request by the insured was made to the broker to obtain additional coverage: (1) whether such a claim is more properly considered one for breach of contract or one for negligence, or can be considered both, and (2) if more properly considered one for negligence (or both), whether a broker has a continuing duty to procure requested insurance, if the insured does not continually request that the coverage be

procured..

Based upon the foregoing, it is

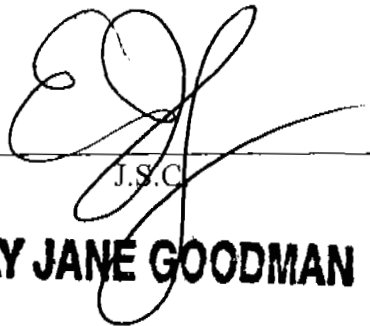
**ORDERED** that the motion is decided in accordance with the terms of this Decision and Order; and it is further

**ORDERED** that the Clerk of the Court is directed to sever the action and enter judgment in favor of Defendant Todd Pallack dismissing the complaint against him, without costs and disbursements.

**This Constitutes the Decision and Order of the Court.**

Dated: March 10, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
MAR 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE