SHORT FORM ORDER **INDEX NO. 038799/2008**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

STEPHEN VACCARO and MAURA LYNCH

Plaintiff(s),

-against-

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY and DAYTON & OSBORNE

Defendant(s).

ORIG. RETURN DATE: February 17, 2009
FINAL RETURN DATE: March 3, 2009
MTN. SEQ. #: 001-MotD
MTN. SEQ. #: 002-MG

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Upon the following papers numbered 1 to 43 read on these two motions to dismiss: First Notice of Motion and supporting papers 1 - 13; Second Notice of Motion and supporting papers 14 - 20; Affirmation In Opposition to both motions 21 - 31; Reply Affirmation on First Motion 32 - 38; Reply Affirmation on Second Motion 39 - 43; it is,

ORDERED that these two motions (001 and 002) are considered together in this single decision, judgment and order for purposes of judicial economy and efficiency; and it is further

ORDERED and ADJUDGED that the motion (001) by the defendant Dayton & Osborne to dismiss the Fourth and Fifth Causes of Action as to it pursuant to CPLR 3211(a)(5) and (7) is granted pursuant to CPLR 3211(a)(7) and the Fourth and Fifth Causes of Action are dismissed as to the defendant Dayton & Osborne; and it is further

ORDERED that that part of the motion (001) by the defendant Dayton & Osborne requesting the Court to treat this motion as a motion for summary judgment pursuant to CPLR 3211(c) is denied; and it is further

ORDERED and ADJUDGED that the defendant Dayton & Osborne is severed from the caption and that this action shall continue only as against the remaining defendant; and it is further

ORDERED that the motion (002) by the defendant New York Central Mutual Fire Insurance Company to dismiss the Fifth Cause of Action as to it is granted and the Fifth Cause of Action is dismissed and all references to punitive damages in the complaint are deemed removed; and it is further

ORDERED that the moving defendants are directed to serve copies of this Decision, Judgment and Order upon the plaintiffs parties pursuant to CPLR 2103(b) within 45 days of the date of entry of the decision, judgment and order with the Clerk of the Court; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on June 24, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action arising out of an insurance claim based upon a residential fire which completely destroyed the plaintiffs' home on December 20, 2004. The plaintiffs are the insured home owners; the defendants are the insurance company which issued the applicable homeowners' policy, New York Central Mutual Fire Insurance Company (hereinafter NYC), and the insurance agency, Dayton & Osborne (hereinafter D&O) which obtained the insurance coverage with NYC.

It is not disputed that the plaintiffs utilized the services of D&O to obtain homeowners' insurance, effective February 16, 2000, from NYC. The policy was renewed annually with a copy of each year's policy being directly mailed to the plaintiffs by NYC and a declarations page being sent to D&O.

On the day of the fire, NYC was immediately notified and over a period of about seven months, paid $451,000 toward the loss with a written commitment to pay another $104,000. Subsequently, by way of a letter dated August 27, 2007, NYC notified the plaintiffs that it was denying any further payments and coverage for the loss. The basis for this denial, according to NYC, was a provision in the policy which prohibited any "action brought against us" unless such an action "is started within two years after the date of loss." NYC went on to say that since "the two year statue [sic] has expired, we must respectfully deny payment on your claim" (as quoted in the Complaint, §17). The Court notes, incidentally, that no party provides a copy of the policy in question or of the August 27, 2007 letter. Nevertheless, no party on these motions submits any denials, controverts or takes issue with these representations. In addition, at the time the "no action may be brought" letter was dated, no action had been commenced; the matter was simply in the claim stage.

The complaint contains five causes of action. The first three causes of action are against NYC and allege breach of contract (First) and claims based upon estoppel theories (Second and Third). The fourth and fifth causes of action are alleged against both NYC and D&O and contain claims of negligence (Fourth) and intentional breach along with tortious interference (Fifth).

D&O brings its pre-answer motion to dismiss (001) the fourth and fifth causes of action against it on the basis of this action being brought beyond the applicable three-year statute of limitations (*see* CPLR 3211[a][5]) and based upon the failure to state a cause of action (*see* CPLR 3211[a][7]). In addition, D&O asks the Court to convert the motion to one for summary judgment pursuant to CPLR 3211(c).

The Court will first consider the argument that the fourth and fifth causes of action fail to state causes of action against D&O.

In general, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the Court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

Affidavits submitted by the moving party (as contrasted to affidavits by the opposing party) in support of such a motion which,

> "Do no more than assert the inaccuracy of plaintiff's allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint [*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314], and do not otherwise conclusively establish a defense to the asserted claims as a matter of law [*see Leon v Martinez,* 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 (1994)]" (*Tsimerman v Janoff,* 40 AD3d 242, 835 NYS2d 146, 147 [1st Dept 2007]).

Conversely, if affidavits in support of the motion to dismiss "conclusively establish a defense to the asserted claims as a matter of law, then such proof may be considered on such a motion (*id.; see also Godfrey v Spano,* 13 NY3d 358, 374, 892 NYS2d 272 [2009]; *Lawrence v Miller,* 11 NY3d 588, 595, 873 NYS2d 517 [2008]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 315 [1976]).

Moreover, as a matter of law, in order to make a claim for tortious interference with a contract, there must be allegations alleging (1) an agreement between the plaintiffs and a third party, (2) this defendant's knowledge of that agreement, (3) the intentional inducement of the third party to breach or otherwise render performance impossible and (4) an actual breach with damages resulting therefrom (*see White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426, 835 NYS2d 530 [2007]; *New York Merchants Protective Co., Inc. v Rodriguez,* 41 AD3d 565, 837 NYS2d 341 [2d Dept 2007]). It must also be alleged that the breach would not have occurred but for the actions of the defendant (*see Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204, 749 NYS2d 249 [1st Dept 2002], *ly denied* 99 NY2d 508, 757 NYS2d 819 [2003]).

(*Rocanova v Equitable Life Assur. Soc'y.,* 83 NY2d 603, 613, 612 NYS2d 339 [1994]). Here, there are no such allegations.

In opposition, the plaintiffs simply put forth the conclusory assertions that the complaint "does" assert a "cognizable claim" as to each of the two subject causes of action and, in any event, further discovery is required in order to explore the possibility that the actions of the defendants constituted a "pattern" of improper behavior detrimental to the public (as pertains to the fifth cause of action).

In conclusion, in searching within the four corners of the complaint as well as reviewing the affidavit of the plaintiff Maura Lynch, the Court finds that the plaintiffs fail to state causes of action against D&O for negligence (Fourth Cause of Action) and intentional, tortious interference (Fifth Cause of Action). In addition, the affidavit submitted in support of this motion (001) was considered as it conclusively established defenses to the two causes of action at issue (*see Lawrence v Miller,* 11 NY3d 588, 595, 873 NYS2d 517 [2008]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634, 389 NYS2d 314, 315 [1976]).

Accordingly, the fourth and fifth causes of action are dismissed as to the defendant D&O. In view of this dismissal, the Court will not address the argument based upon the ground of statute of limitations as such argument is now moot. Similarly, the request to treat this motion as one for summary judgment pursuant to CPR 3211(c) is denied as moot.

Turning now to the second motion (002) which is to dismiss only the fifth cause of action as to the defendant NYC, this motion is granted.

As to NYC, the plaintiffs allege in the fifth cause of action that the intentional acts of NYC in refusing to abide by the terms of their policy and to pay the plaintiffs completely for the fire damage, provided the basis for punitive damages.

A claim for such punitive damages, however, must be strictly pleaded (*Rocanova v Equitable Life Assur. Soc'y.,* 83 NY2d 603, 613, 612 NYS2d 339 [1994 Rocanova) and mere allegations of wrongfully refusing to pay an insurance claim or intentionally committing acts to avoid paying a valid claim, even if true, do not rise to the level of justifying punitive damages (*id.*). While such allegations might support a breach of contact claim, unless "wanton" or "egregious" conduct is alleged, a claim for punitive damages does not lie (*see New York Univ. v Cont'l. Ins. Co.,* 87 NY2d 308, 316, 639 NYS2d 283 [1995]; *Flores-King v Encompass Ins. Co.,* 29 AD3d 627, 818 NYS2d 221 [2d Dept 2006]).

As to the plaintiffs' assertion that more discovery is needed to support the claim for punitive damages, such an argument is not sufficient to oppose a motion brought pursuant to CPLR 3211(a)(7) to dismiss a cause of action seeking punitive damages where the plaintiffs failed to sufficiently plead such a cause of action and the dispute is simply a private breach of contract issue such as here (*see Varveris v Hermitage Ins. Co.,* 24 AD3d 537, 538, 806 NYS2d 688 [2d Dept 2005]). Accordingly, the fifth cause of action is dismissed as to NYC and any references to punitive damages in the complaint are deemed removed from said complaint.

In support of this motion (001), D&O contends that the complaint, on its face, is insufficient to support the negligence and tortious interference claims and that this contention is conclusively supported in an affidavit from its "Personal Lines Manager," Diana Darrell.

In reviewing the fourth cause of action in the complaint (sounding in negligence), the plaintiffs allege that D&O "failed to advise the Plaintiffs as to the existence of the abbreviated limitations period set forth in the New York Central Policy or the effect thereof" (¶32); and, "failed to offer to the Plaintiffs any alternative to said policy or provision and undertook to assist in the pursuit of the claim in a manner in which the Defendant New York Central could take advantage of said abbreviated limitations period" (¶33).

D&O contends, and the Court agrees, that an insurance agent, after having obtained the insurance coverage requested by the client, has no continuing duty to advise, guide or direct the client to obtain any additional coverage (*see Chase Sci. Research v NIA Group,* 96 NY2d 20, 30, 725 NYS2d 592 [2001]; *Murphy v Kuhn,* 90 NY2d 266, 273, 660 NYS2d 371 [1997]). Here, according to the affidavit of Diana Darrell, which conclusively establishes a defense to the fourth cause of action as a matter of law (*see Lawrence v Miller,* 11 NY3d 588, 595, 873 NYS2d 517 [2008]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634, 389 NYS2d 314, 315 [1976]); *Tsimerman v Janoff,* 40 AD3d 242, 835 NYS2d 146, 147 [1st Dept 2007]), Ms Darrell states that the original policy was procured in 2000 and that D&O took no further actions, and was not asked to take any further actions, with regard to the provision providing coverage for fire damage or the provision limiting actions to two years after the date of loss.

Indeed, the complaint contains no allegations that D&O failed to procure the requested coverage or that a special relationship existed between the plaintiffs and D&O. The complaint does state that D&O failed to "advise" the plaintiffs regarding the subject limiting provision but, as stated herein, there is no duty under the facts of this case to "advise"; just to procure that which is requested.

In addition, D&O argues that the limiting provision was in the policy, that the policy was in the possession of the plaintiffs and that another copy of the policy was sent directly to the plaintiffs by NYC with each annual renewal. Accordingly, D&O contends, and the Court agrees, that the plaintiffs, having possession of the subject policy, had presumptive knowledge of the terms of their own policy (*see Greater N.Y. Mut. Ins. Co. U.S. Underwriters Ins. Co.,* 36 AD3d 441, 443, 827 NYS2d 147 [1st Dept 2007]; *J.R. Adirondack Enters. v Hartford Cas. Ins. Co.,* 292 AD2d 771, 739 NYS2d 795 [4th Dept 2002]) and D&O, thus, had no duty to advise the plaintiffs of what they merely had to, and should have, read themselves.

Moreover, as to intentionally procuring the breach of the policy by NYC so as to support a claim for punitive damages, there must be "sufficient evidentiary allegations of ultimate facts of a fraudulent and deceitful scheme in dealing with the general public as to imply a criminal indifference to civil obligations" (*Valis v Allstate Ins. Co.,* 132 AD2d 658, 518 NYS2d 153 [2d Dept 1987]; *see also Ross v Louise Wise Servs., Inc.,* 8 NY3d 478, 489, 836 NYS2d 509 [2007]; *Rocanova v Equitable Life Assur. Soc'y.,* 83 NY2d 603, 613, 612 NYS2d 339 [1994]). Indeed, the complaint must also contain allegations that the defendant's conduct involved a high degree of moral turpitude and the complaint must provide evidentiary allegations supporting the conclusion that the defendant's actions displayed "such wanton dishonesty as to imply a criminal indifference to civil obligations [citation and internal quotation marks omitted]"

In conclusion, this action is dismissed in its entirety as to the defendant D&O; and, as to NYC, the fifth cause of action is dismissed and only the first four causes of action remain as against NYC.

This constitutes the decision, judgment and order of the court.

Dated: 6/22/10

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.