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

PRESENT: Edmead HON. CAROL EDMEAD PART 35

Index Number : 110098/2007

KVEST LLC

vs

COHEN, MITCHELL

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/4/10

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted; and it is further

ORDERED that defendants shall 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: 6/29/10

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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

KVEST LLC,

Index No. 110098/07

Plaintiff,

- against -

MITCHELL COHEN and THE COHEN AGENCY,

Defendants.

----------X

HON. CAROL R. EDMEAD

MEMORANDUM DECISION

Mitchell Cohen ("Cohen" or "defendant") and the Cohen Agency (collectively, "defendants"), move for summary judgment dismissing the complaint of the plaintiff, Kvest LLC ("plaintiff").

Factual Background

Plaintiff seeks damages based upon the defendant's alleged failure to give timely notice of a personal injury claim to plaintiff's insurance company.

Plaintiff owned an apartment building at 145 South 4th Street, Brooklyn, New York ("subject premises"). In June 2002, plaintiff requested that Cohen, a licensed insurance agent and broker procure a commercial insurance policy for the subject premises. Cohen obtained insurance with Virginia Surety Company ("VSC"), which was renewed by Tower Risk/Combined Specialty Insurance Company (the "policy").

Defendants contend that on or about May 3, 2004, plaintiff faxed Cohen an attorney letter, dated April 26, 2004, which stated that Janitza Morel was making a claim against plaintiff for personal injuries she allegedly sustained a year prior on July 23, 2003 at the subject premises.

On May 6, 2004, Cohen mailed the letter to The Heffner Agency (the "Heffner Agency"), the agent for VSC, with a cover memo.

On September 13, 2004 plaintiff faxed to Cohen a summons and complaint in a personal injury action commenced by Morel (the "Morel action"). Cohen mailed the summons and complaint to the Heffner Agency on October 2, 2004 with an Acord notice of loss form.

By letter dated November 4, 2004, Tower Risk Management, the claims administrator for VSC, advised plaintiff that it was disclaiming coverage for the Morel action, stating:

> . . . you were notified of this claim on or about the date of loss, July 30, 2003. Neither Virginia Surety nor we were notified of the incident until October 6, 2004. Accordingly, you breached the policy conditions set forth above by failing to notify us of the incident as soon as practicable.

VSC then commenced an action in the Supreme Court, New York County captioned *Virginia Surety Company v Kvest LLC and Janitza Morel* ("VSC action") seeking a declaration that it did not have an obligation to defend and indemnify plaintiff in the Morel action based upon plaintiff's and Morel's failure to provide it with timely notice of the occurrence giving rise to the Morel claim. After trial, VSC's disclaimer was found proper. Thus, VSC was not obligated to defend or indemnify plaintiff.

Plaintiff then commenced this action against defendants, alleging that as a result of defendants' negligence and failure to timely notify VSC of Morel's claim (1) plaintiff has lost its insurance coverage and must provide its own defense of the Janitza Morel claim (first cause of action); (2) plaintiff incurred substantial damages in defending VSC's action (second cause of action); (3) plaintiff paid substantial insurance premiums without receiving the benefit therefrom (third cause of action); and (4) defendants breached their fiduciary duty to the plaintiff (fourth

In support of dismissal, Cohen argues that his alleged acts or omissions were not the cause of plaintiff's alleged damages. VSC's disclaimer letter denied coverage on the ground that plaintiff was aware of the Morel claim on or about the date of loss, July 30, 2003, and allegedly failed to provide VSC with notice of such claim until October 6, 2004. Cohen was not advised of Morel's alleged claim on July 30, 2003, but was advised of Morel's claim on May 3, 2004 when the attorney letter was faxed. And, plaintiff does not allege that Cohen had any duty to notify the insurance carrier earlier.

Moreover, VSC's action alleged that plaintiff provided VSC with late notice of the occurrence of which it was aware on July 30, 2003, and did not seek a declaration based upon the alleged breach of a policy provision requiring timely notice of claim or suit or plaintiff's alleged failure to timely forward the attorney's letter. Notice of an occurrence is distinct from notice of a lawsuit, in which an insurer demands that it receive timely notice of a claimant's commencement of litigation in order for the insurer to defend against a claim or exercise its right to settle the matter. Further, as VSC failed to specify that it was disclaiming coverage based on a failure to provide notice of the attorney claim letter, notice of claim or late notice of the Morel suit in either the disclaimer letter or its complaint, it was precluded from disclaiming coverage on either theory as a matter of law in its action. Accordingly, such grounds were waived by VSC and could not be used in the VSC action to deny coverage to plaintiff, leaving only the late notice of occurrence ground cited in the VSC suit as a possible ground for denying coverage. However, VSC failed to timely disclaim coverage on the grounds of late notice of occurrence in accordance with Insurance Law §3420(d). VSC delayed 73 days from when it received the Morel summons and

complaint on October 6, 2004 until it raised the ground of late notice of occurrence for the first time in its declaratory judgment action. Therefore, VSC's disclaimer was untimely as a matter of law and ineffective, and coverage for the Morel action was provided by the policy.

Since the plaintiff's only alleged bases for asserting a claim against Cohen are Cohen's alleged failure to forward (1) the attorney's letter to VSC and (2) the legal papers in the Morel action to VSC in a timely manner, and since neither alleged failure was the basis for VSC's denial of coverage, Cohen is entitled to judgment dismissing all claims. Additionally, since the grounds in VSC's disclaimer letter were abandoned, and the ground raised in its complaint was untimely, VSC is obligated to provide coverage to plaintiff for the Morel complaint.

Cohen further contends that while VSC claims that it did not learn of Morel's occurrence until October 6, 2004, the record shows that Cohen mailed the attorney's letter to the Heffner Agency in May 2004 at the correct address with Cohen's return address preprinted on the envelope and with the appropriate postage affixed; and the letter was never returned. Cohen's affidavit describing the mailing of the letter raises a presumption that the notice was properly mailed and received. VSC's conclusory claim of nonreceipt is insufficient to rebut the presumption that the Heffner Agency received the attorney letter, given that VSC admits receiving the Morel summons and complaint from the Heffner Agency that were mailed to the same address and in the same manner as the attorney letter. Therefore, there is a presumption that this letter was received by the Heffner Agency and notice to the Heffner Agency constitutes notice to VSC under Insurance Law § 3420.

It is further argued that Cohen timely mailed Morel's summons and complaint to VSC's agent on October 2, 2004, within 19 days of receiving it from plaintiff. VSC acknowledges that

it received the summons and complaint on October 6, 2004 and did not allege the 19-day interval was grounds for the disclaimer. Thus, plaintiff's claim that such interval was a sufficient delay to constitute negligence has no basis in law. Accepting, *arguendo*, that plaintiff faxed the summons and complaint to Cohen as early as September 13, 2004 as alleged, no more than 19 days elapsed before Cohen mailed the legal papers to the Heffner Agency on October 2, 2004. Plaintiff's principal Jimmy Kwong testified that the insurance company had not raised late notice of suit as a grounds for disclaimer. As the insurer has not specified that this 19-day lapse of time was the grounds for disclaiming coverage, thereby waiving any such claim, plaintiff cannot establish a *prima facie* negligence claim.

Cohen also argues that since he did not owe a fiduciary duty to plaintiff, no fiduciary duty was breached. Plaintiff testified it first began doing business with Cohen in 1997 and that Cohen procured property casualty and liability insurance for five different locations. Although plaintiff claims that Cohen "agreed to act as plaintiff's agent with respect to the insurance company with whom he placed the policy" there is no evidence in the record that this was anything but a typical consumer- insurance relationship. Cohen's procurement of insurance for plaintiff, a sophisticated business entity, did not create a special relationship with plaintiff and did not impose any fiduciary duty upon Cohen. Thus, plaintiff's breach of fiduciary duty fails.

Further, argues Cohen, plaintiff is not entitled to attorney's fees in defending the VSC declaratory judgment action. An insured who commences an action against an insurance carrier to determine its rights under an insurance policy may not recover his costs, expense or attorneys fees incurred in bringing the action. Thus, the fees, costs and expenses incurred in the defense of the VSC action would not have triggered the defensive provisions of the insurance policy

regardless of when VSC received notice of the claim. Additionally, in the absence of specific contractual or statutory authority, an award for attorneys fees, costs and expenses incurred in defending this action will not be inferred.

Plaintiff opposes the motion and cross moves for summary judgment, arguing that VSC's action was tried before Justice Walter Tolub and the very issues raised in defendants' instant motion were raised and decided in the VSC action. In the VSC action, this Court determined that defendants' "egregious delay" in notifying the Heffner Agency of plaintiff's claim rendered VSC's disclaimer of coverage "proper." Justice Tolub made a finding of fact that due to the "time lag," Cohen, acting on behalf of plaintiff, did not timely notify the Heffner Agency of Morel's claim, and that Cohen did not dispatch his duties accordingly. The three-week lag between the time plaintiff notified Cohen of the service of a summons and complaint, and the time that Cohen notified the Heffner Agency of the summons and complaint, was "an egregious, egregious delay," and Cohen did not notify the Heffner Agency in a prompt manner with respect to the underlying attorney letter. Justice Tolub ruled that "the disclaimer was proper." Thus, argues plaintiff, there has already been a judicial determination that it was Cohen's actions which led to the denial of insurance coverage by VSC. Justice Tolub expressly considered and rejected defendants' current argument that the July 30, 2003 notice should control. Plaintiff also contends that it is the specificity of the grounds for the disclaimer upon which the insurer relies, not the specific dates within the cited grounds. And, since Cohen and the plaintiff were united in interest in the VSC action and trial, Cohen, in the instant action, is bound by Justice Tolub's prior decision. Every argument made by defense counsel in the instant motion for summary judgment, was made before Justice Tolub and rejected. Thus, defendants are estopped from denying that

plaintiff was damaged as a result of Cohen's conduct.

Further, the cases cited by defendants stand for the proposition that facts can create special circumstances which expand the typical consumer-broker relationship. Justice Tolub decided that Cohen was acting on behalf of plaintiff. Plaintiff's principal testified at his deposition that he was not allowed to speak directly with the insurance agency, but could only communicate through his agent, Cohen. Cohen, admitted that it is his job to report claims on behalf of his insured. Thus, under those circumstances, Cohen had, and breached, a fiduciary duty to plaintiff.

Finally, while an insured may not recover its expenses incurred in bringing an affirmative action against an insurer, plaintiff herein is seeking to recover its damages incurred as a result of the now judicially determined fault of Cohen.

In reply, defendants oppose plaintiff's cross-motion for summary judgment and argue that plaintiff failed to raise any evidentiary facts rebutting Cohen's proof of his entitlement to judgment.

Defendants argue that collateral estoppel does not apply. Justice Tolub's ruling that VSC's disclaimer was proper is not binding on Cohen as the issues in the case at bar were not necessarily decided in that litigation and Cohen was neither a party nor in privity with a party to the VSC action. Cohen was merely an unwitting subpoenaed witness attempting to cooperate - without benefit of an attorney - and therefore did not have a full and fair opportunity to be heard and contest the issues plaintiff now deems to be controlling or subsequently to appeal Justice Tolub's decision. Further, gratuitous findings are not subject to estoppel. And, in the context of collateral estoppel, privity is "an amorphous concept not easy of application and includes those

who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and those who are co-parties to a prior action." Courts must analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate. Mere succession to the same liability is not sufficient to find privity in an estoppel inquiry. In an insurance context, courts have permitted a disclaimer found to be valid in a declaratory judgment action to be challenged in subsequent litigation by a party that did not have a full and fair opportunity to be heard in the initial action. Plaintiff fails to demonstrate that Cohen was in privity with a party to that action.

Further, plaintiff failed to demonstrate that the issues raised in Cohen's summary judgment motion were actually litigated and necessarily decided in the VSC action. The case at bar is in essence a negligence action against Cohen. The VSC action was brought to determine the respective rights of VSC as against plaintiff and Morel. The issues raised by Cohen are different from the issues raised in the VSC action. Justice Tolub raised issues not properly raised in the pleadings nor material or relevant to that proceeding - most notably the issue of Cohen's allegedly egregious "three week delay" in mailing notice of the Morel suit to the Heffner Agency in October 2004. Justice Tolub noted this alleged "delay" caused him to disbelieve Cohen's testimony that he had timely mailed the initial attorney letter to the Heffner Agency where this "delay" was neither the ground for disclaimer in VSC's disclaimer letter nor properly raised in its pleadings. At most 19 days elapsed from when Cohen received the attorney letter from plaintiff

and when he sent it to Heffner on October 2, 2004 - a period of time that is simply not as a matter of law "egregious" as characterized by Justice Tolub and was never raised by VSC as a ground for disclaiming coverage. Nevertheless, Justice Tolub used this perceived "egregious" delay to hold Cohen had not promptly notified the Heffner Agency of the attorney claim letter despite documentation and testimony that it was mailed on May 6, 2004 and it was not returned. Justice Tolub did not consider the timeliness of VSC's disclaimer on the ground of late notice of occurrence, that VSC waived its late notice of claim ground when it failed to include it in the complaint, or that there was no claim for late notice of the summons and complaint, either in the disclaimer letter or the pleadings. These issues were simply not litigated in the VSC action and are not enumerated in Justice Tolub's findings. Therefore there is no identity of issues supporting collateral estoppel.

And, Justice Tolub's ruling that the alleged three-week delay in sending the legal papers to Heffner was egregious was a gratuitous finding as it was never raised by VSC and was not necessary to a determination of the validity of the disclaimer. The "three week delay" in forwarding the summons and complaint to the Heffner Agency was neither material nor relevant to deciding the matter and therefore not "necessarily decided" in the VSC action; Cohen is therefore not precluded from arguing in this action that he notified the Heffner Agency of the claim and the suit in a timely manner and coverage was wrongly withheld.

In any event, argues defendants, Cohen may challenge VSC's disclaimer because he was not a party to the VSC action nor was he in privity with a party to that action. As he is not a successor in interest to a party in the VSC action, lacked control over the VSC proceeding and did not have his interests protected there, he cannot be said to have been privy to a party to the

action. Therefore he did not have a full and fair opportunity to be heard, and estoppel cannot apply as a matter of law.

Cohen was deposed as a nonparty without benefit of an attorney by counsel for all parties to the VSC action. There is no evidence that VSC's attorney or the other attorneys present advised Cohen that he had a right to object to questions posed to him or the right to have an attorney present. It was clear at the deposition that Cohen was not united in interest with either plaintiff or VSC, when Cohen testified that his relationship with plaintiff ended when VSC denied plaintiff's claim. At trial, Cohen was again unrepresented by counsel and none of the counsel present represented his interests. That he was called as a witness for VSC after being excluded from the courtroom indicates his complete lack of control over the proceedings. Moreover, as a nonparty unrepresented by an attorney he was unprepared, unassisted, and accordingly did not launch a vigorous defense. As a nonparty responding to a subpoena, Cohen could not have foreseen that he would later be sued by plaintiff and barred from challenging the validity of the disclaimer. As a nonattorney, Cohen had no notice that he should review his files and hire an attorney to protect his interests and launch a vigorous defense of his own conduct particularly with respect to the mailing of a notice of summons and complaint to the Heffner Agency, when late notice of suit was not a stated ground for disclaimer of coverage. The very existence of the instant litigation demonstrates that Cohen was not united in interest with either and was not represented by either.

Cohen and plaintiff cannot be construed as privies in the VSC action simply because they both might have benefitted from a ruling against VSC or faced the mere potential for damages subsequent to a ruling in favor of VSC. And, plaintiff fails to present one case for the

proposition that it can use collateral estoppel against a party it claims to have been united in interest with in the prior litigation.

Plaintiff filed a notice of appeal of Justice Tolub's ruling but failed to perfect the appeal. In so doing, plaintiff failed to mitigate its damages. As a nonparty, Cohen was precluded from appealing the decision on his own. Therefore he cannot be precluded from challenging the disclaimer now.

Plaintiff fails to raise any issues of fact or law on the issue of Cohen's alleged fiduciary duty to plaintiff. Justice Tolub made no finding of fact that Cohen had a fiduciary duty to plaintiff in the VSC declaratory judgment action and based on the above analysis would not have been binding. A special relationship giving rise to a fiduciary duty is not found simply because plaintiff's principal testified that the Heffner Agency advised him on an unrelated matter that he had to deal directly with Cohen or because Cohen "admitted" it was his job to report claims on behalf of his insured. Nor is Justice Tolub's statement that Cohen was acting on behalf of plaintiff in anyway dispositive or controlling or sufficient to support a fiduciary duty. There is no evidence that Cohen reviewed plaintiff's operations and the services rendered were neither exceptional nor unique and did not rise to the level of a special relationship. Plaintiff never compensated Cohen for the procurement of the policy or any other insurance, and Cohen's only payment came from a commission on the premiums for these policies. In the absence of a special relationship, defendant did not owe any fiduciary duty to plaintiff. As plaintiff did not raise a question of fact on this issue, the misrepresentation or negligence claims premised upon an alleged fiduciary duty must be dismissed.

In further support of its cross-motion, plaintiff argues that defendants fail to explain how

Cohen's testimony herein would differ in any way whatsoever from his testimony in the VSC action.[1]

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (CPLR 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild*

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[1] Plaintiff's contends that the prior action is inextricably intertwined with the instant case, and that the motion and cross-motion should be referred to Justice Tolub for decision for reasons of consistency and judicial economy. However, Justice Tolub retired from the bench at the time the motion and cross-motion were under consideration.

for the Blind, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

VSC's disclaimer letter indicates that VSC's investigation revealed that plaintiff was aware of the "claim on or about the date of loss, July 30, 2003" and that VSC was not notified of the incident until October 6, 2004." By later stating that plaintiff "breached the policy conditions . . . by failing to notify us of the *incident* as soon as practicable," the denial of coverage was in fact attributable to plaintiff's failure to timely notify VSC of the "incident." (Emphasis added). Consistent with its disclaimer letter, VSC's Complaint in the action before Justice Tolub simply alleged that:

> *That Kvest was aware of the occurrence* giving rise to the underlying action *on or about July 30, 2003*, or soon thereafter.
> That *Kvest failed to notify Virginia Surety of the occurrence* as soon as practicable, thereby breaching the policy. . . .
> That Virginia Surety is entitled to a judgment declaring that it has no duty to defend or indemnify Kvest in the underlying action.
> (Complaint ¶¶ 8-11).

Therefore, VSC disclaimed coverage based on plaintiff's knowledge of the "occurrence" on or about July 30, 2003, and its failure to notify VSC as soon as practicable thereafter.

However, here plaintiff alleges that on May 3, 2004, it sent by facsimile a copy of the attorney letter to Cohen, and that shortly thereafter, Jimmy Kwong, a principal of the plaintiff, called Cohen to confirm receipt of the transmission and to request that Cohen forward this letter to VSC. According to the Complaint, Cohen agreed to do so, but "never sent notice of the personal injury claim to Virginia Surety Company." (Complaint ¶12). Allegedly, on September 13, 2004, plaintiff received Morel's summons and complaint and forwarded same by facsimile transmission to Cohen on the same day. Once again, Jimmy Kwong called Cohen to confirm receipt of the transmission and to request that Cohen immediately forward the Summons and Complaint to VSC; once again, although he said he would comply, "Cohen did not forward the Summons and Complaint to [VSC] until October 6, 2004, some three (3) weeks after his receipt." (Complaint ¶15). It is alleged that Justice Tolub held that VSC did not have to defend or indemnify plaintiff the Morel action, and found that although Cohen received the Summons and Complaint from plaintiff on September 13, 2004, he did not mail it to The Heffner Agency until October 6, 2004. Justice Tolub regarded that three (3) week period " . . . to be an egregious, egregious delay which leads me to believe that the Cohen Agency did not notify the Heffner Agency in a prompt manner. . ." Thus, it is alleged, Justice Tolub ruled that VSC's disclaimer was proper and that plaintiff would be neither indemnified nor defended in the Morel action. As a result of these failures, and Cohen's breach of fiduciary duty, plaintiff sustained damages.

By plaintiff's own Complaint, plaintiff did not notify defendants of the occurrence until May 2004, and thus, it is undisputed that defendants first became aware of Morel's occurrence in May 2004. Therefore, the disclaimer letter, premised on plaintiff's purported knowledge of the occurrence in July 2003, predates any actions taken by Cohen. It cannot be said that Cohen's

alleged failure to timely send the attorney letter in May 2004 and alleged failure to timely send Morel's summons and complaint in October 2004, was the basis of VSC's disclaimer of coverage.

Plaintiff's contention that defendants are estopped from denying that plaintiff was damaged as a result of Cohen's conduct, due to Justice Tolub's decision, lacks merit. Collateral estoppel, or issue preclusion, is invoked when the cause of action in the second proceeding is different from that in the first and applies to a prior determination of an issue which was actually and necessarily decided in the earlier case (*DaimlerChrysler Corp. v Spitzer, supra)*. It is confined to the point actually determined and applies only to issues which were actually litigated, not to those which could have been litigated (*id.*). In order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: the party seeking the benefit of the doctrine must prove that the identical issue was decided in the prior action and is decisive in the current action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*DaimlerChrysler Corp. v Spitzer*). The opponent, on the other hand, has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the administrative hearing (*Ryan v New York Telephone Co.*, 62 NY2d 494, 501; *Capital Telephone Co., Inc. v Pattersonville Telephone Co., Inc.*, 56 NY2d 11, 18).

Plaintiff seeks damages alleging that it lost its ability to obtain defense and indemnification from VSC, due to defendants' established failure to timely notify VSC of the occurrence. The issue before Justice Tolub was whether plaintiff provided timely notice of the "occurrence" as soon as practicable, which required an assessment of Cohen's actions, imputed to plaintiff, in notifying VSC of the occurrence. Justice Tolub rejected VSC's allegation that

plaintiff was aware of the incident in July 2003 ("I don't think there was an incident that Mr. Herbert was aware of that would have risen to the level of having to report it to either his boss and, in turn, to Mr. Cohen, and in turn, to the Heffner Agency, and in turn, to Virginia Surety. . . I do not believe it was a reportable incident") (Trial transcript, page 149). Then, turning to the May 2006 attorney letter sent from Cohen to VSC, Justice Tolub did "not believe" that Cohen timely notified the Heffner Agency "of this claim." (*Id*). Justice Tolub found that the delay between the time plaintiff notified Cohen of the service of a summons and complaint, and the time that the Cohen agency notified the Heffner Agency "of that outstanding summons and complaint" was regarded "an egregious, egregious delay, which [led Justice Tolub] to believe also that the Cohen agency did not notify the Heffner Agency in a prompt manner with respect *to the underlying letter from the law firm* of Campos & Pavlides" (emphasis added). Thus, held Justice Tolub, the disclaimer (based on the failure to "notify [VSC] of the *incident* as soon as practicable") was proper. Based on Justice Tolub's decision, there has been a judicial determination that Cohen's actions caused the denial of insurance coverage by VSC.

However, plaintiff failed to establish that defendants had a full and fair opportunity to contest and litigate the issue of whether plaintiff, through defendants, timely notified VSC of the occurrence. It is undisputed that defendants were not parties to the VSC action, nor successors in interest to any of the parties to that action. Further, it cannot be said that defendants were in privity with a party to that action. Defendants lacked control over the VSC action, and their interests were not represented or protected in the VSC action. While Cohen's actions were imputed to plaintiff for purposes of determining whether notice was given to VSC as soon as practicable, Cohen's actions were not assessed as to his liability to plaintiff in that action.

Cohen's interests herein are diametrically opposed to the interests of plaintiff, and Cohen's interest in this regard was not protected in the VSC action. Therefore, Justice Tolub's decision, including findings of fact and law, do not collaterally estop defendants from contesting whether their actions were the proximate cause of plaintiff's damages.

Apart from relying on Justice Tolub's decision, plaintiff failed to dispute defendants' showing that days after its receipt of the attorney letter, Cohen mailed the attorney's letter to the Heffner Agency at the correct address with Cohen's return address preprinted on the envelope and with the appropriate postage affixed, and the letter was never returned. Therefore, based on the above, dismissal of complaint, which is premised on the claim that defendants failed to timely notify VSC of Morel's claim, is warranted.

Further, dismissal of plaintiff's claim for costs in defending the VSC action is warranted on a separate ground. A plaintiff is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]; *Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [2d Dept 1998]). It is undisputed that no agreement between the parties, statutory authorization, or court rule permits plaintiff to recover attorneys' fees incurred by plaintiff in its defense in the VSC action. Therefore, the second cause of action cause of action for costs in defending the VSC action is dismissed on this second ground.[2]

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[2] As to defendants' claim that it owed no fiduciary duty to plaintiff, as stated in *Polly Esther's South, Inc. v Setnor Byer Bogdanoff* (10 Misc 3d 375, 807 NYS2d 799 [Sup Ct Bronx County 2005]), "while strictly limiting the common law duty of insurance brokers," the court in *Murphy v Kuhn* (90 NY2d 266, 270 [1997]) "acknowledged

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted; and it is further

ORDERED that defendants shall 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 29, 2010

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

HON. CAROL EDMEAD

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that heightened duties may arise in the context of special relationships. . . *Murphy* extracts three circumstances that may give rise to a 'special relationship'": (1) where the agent receives compensation for consultation apart from payment of premiums, (2) interaction between the agent and the insured regarding specific questions of coverage, and (3) an extended period of dealings. Defendants' claim that the mere procurement of insurance for plaintiff does not create a special relationship is insufficient to establish that plaintiff and defendants

footnote 2 cont'd.

did not enjoy a special relationship. Further, the record indicates that plaintiff was not allowed to speak directly with the insurance agency, and could only communicate through Cohen and that it was Cohen's job to report claims on behalf of his insured. Therefore, dismissal of the breach of fiduciary duty claim on the ground that no duty existed, is unwarranted.