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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DOREEN RAMSARUP, ROBBIE RAMSARUP, and TRECIA RAMSARUP,

Plaintiffs,

- against -

RUTGERS CASUALTY INSURANCE COMPANY, LYONS GENERAL INSURANCE AGENCY, INC. and ANTHONY KAMMAS,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 18686/09
Motion Seq. No.: 02
Motion Date: 05/20/10

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affidavit, Affirmation and Exhibits	1
Affirmation in Partial Support of Motion for Summary Judgment and Exhibits	2
Affirmation in Opposition and Exhibit	3
Affirmation in Opposition	4
Reply Affirmation and Exhibits	5

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants Lyons General Insurance Agency, Inc. ("Lyons") and Anthony Kammas ("Kammas") move, pursuant to CPLR §3212, for an order granting their motion for summary judgment dismissing plaintiffs' complaint on the grounds that plaintiffs do not have standing to sue defendant Lyons due to the absence of privity. Defendant Rutgers Casualty Insurance

Company ("Rutgers") submitted an affirmation in partial support of defendant Lyons and Kammas' motion for summary judgment. Plaintiffs opposed defendant Lyons and Kammas' motion and submitted an affirmation in opposition to the alleged improper submission of papers by defendant Rutgers.

In the present action, plaintiffs seek relief pursuant to New York State Insurance Law § 3420(a)(2) to recover an unsatisfied judgment obtained against defendant Rutgers' insured - H. Ramjit Home Improvement Inc. and H. Ramjit Home Improvement Corp. (collectively "Ramjit"). In addition, plaintiffs allege causes of action of fraud and negligence against all defendants.

In 2005, defendant Kammas, the President of defendant Lyons, was the insurance broker for Ramjit. Defendant Lyons produced a commercial general liability insurance policy for its client, Ranjit, with defendant Rutgers. On or about February 23, 2006, Ramjit sought to obtain a renewal commercial general liability policy from defendant Rutgers. Rutgers' policy, bearing the Number SKP 310 6793, with effective dates from February 23, 2006 through February 23, 2007, was issued to Ramjit to cover its business activities conducted during that period. Plaintiffs entered into a home improvement contract with Ramjit (defendant Rutgers' insured) in April 2006 to perform extensive renovations of their home situated at 174 Rockmart Avenue, Elmont, New York 11003. On or about August 17, 2006, plaintiffs commenced an action in Nassau County Supreme Court, under index number 13280/2006, against H. Ramjit Home Improvement Inc., H. Ramjit Home Improvement Corp. and Hemchandra Ramjit. On or about March 17, 2009, plaintiffs obtained a judgment against H. Ramjit Home Improvement Inc. and H. Ramjit Home Improvement Corp. in the amount of $815,287.50. On or about September 9,

2009, plaintiffs commenced the present action against defendant Rutgers as insurer for H. Ramjit Home Improvement Inc. and H. Ramjit Home Improvement Corp., as well as against defendants Lyons and Kammas.

Defendants Lyons and Kammas submit that "[a]bsent privity of contract or relationship approaching privity, the plaintiffs do not have a claim for negligence or intentional misrepresentation against the defendant insurance broker whose liability, if any, could be established through the act of the broker. *Glynn v. United House of Prayer*, 292 A.D.2d 319 (1st Dept. 2002). New York courts have routinely held that a party cannot bring a claim against somebody's else's insurance broker with which it is not in privity. *Arredondo v. city of New York*, 6 A.D.3d 328 (1st Dept. 2004)."

Defendants Lyons and Kammas argue that plaintiffs are without privity to sue them. Defendant Kammas is the President of defendant Lyons General Insurance Agency, Inc.. Defendant Lyons was the insurance broker for Ramjit. Defendant Lyons procured an insurance policy for its client Ramjit that was issued by defendant Rutgers. Defendants Lyons and Kammas have no relationship with any of the plaintiffs in this action. None of the plaintiffs are clients of defendant Lyons.

Defendants Lyons and Kammas further submit that "New York courts have held that the existence of either a contractual relationship, a special relationship, or some kind of privity is necessary to impose liable upon an insurance broker. *Murphy v. Kuhn*, 90 N.Y.2d 266 (1997). Accordingly, there being no contractual relationship, no privity of contract and no duty running between the plaintiffs and Lyons, the court is constrained to dismiss the Complaint as to the movant."

Plaintiffs oppose the motion made by defendants Lyons and Kammas by stating that "[n]otably, the instant motion seeks summary judgment, not partial summary judgment. However, the motion seeks dismissal of all of the claims asserted against Lyons and Kammas, but fails to directly address the fraud claim asserted against them in the fourth cause of action in the Complaint....As such, Lyons and Kammas have not even attempted to meet their burden to obtain the dismissal of the fraud claim in the Verified Complaint. Accordingly, the motion should be denied."

Plaintiffs further contend that "[d]efendants' assertion that privity is required to bring a claim of any nature against an insurance broker is contrary to the law. Privity of contract is not required to bring a claim of fraud against an insurance broker."

Plaintiffs additionally argue that "the Court of Appeals has held that absent privity, a professional such as an insurance broker can be held liable for negligent misrepresentation. 'Liability for negligent misrepresentation has been imposed only on persons who possess a unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified.' The Court of Appeals further held that '[w]here the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact.'...Accordingly, the issue of whether there was a special relationship is an issue of fact that is not appropriate for a determination on a motion for summary judgment. The evidence indicates that there was clearly the type of special relationship between the parties required to sustain a claim for negligent misrepresentation against the Defendants."

In reply to plaintiffs' arguments, defendants Lyons and Kammas state that "[i]n this case, plaintiffs have merely alleged fraudulent misrepresentation without supporting proof and

without providing evidence of the requisite casual nexus that must exist between the alleged misrepresentation and the alleged loss for a cause of action for fraud to be maintained." To claim fraud under New York law, a plaintiff must plead with particularity: (1) a misrepresentation or omission of material fact; (2) that the defendant knew to be false; (3) that the defendant made with the intention of inducing reliance; (4) upon which plaintiff reasonably relied; and (5) damages. Additionally, as set forth in CPLR § 3016, where an action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

Defendants Lyons and Kammas assert that "not only should plaintiffs' claims for fraud against Lyons be dismissed on substantive grounds because there is no evidence of fraud, the claims should also be dismissed on procedural grounds..."

Furthermore, defendants Lyons and Kammas reassert their position that plaintiffs are complete strangers to the insurance policy that defendant Lyons and Kammas procured for Ramjit through defendant Rutgers. Defendants Lyons and Kammas were not plaintiffs' customer and, as such, no "special relationship" exists between them.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a

matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

Based upon the evidence and legal argument provided in their motion as detailed above, the Court finds that defendants Lyons and Kammas have established *prima facie* entitlement to judgment as a matter of law.

The Court additionally finds that plaintiffs have offered no evidence to demonstrate the existence of any material triable issue of fact with respect to the liability of defendants for the

loss allegedly sustained by plaintiffs.

Therefore defendant Lyons and Kammas' motion, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing the fourth and fifth causes of action in plaintiffs' complaint against defendants Lyons and Kammas is hereby granted.

Plaintiffs and defendant Rutgers are hereby ordered to appear for a preliminary conference before the Differentiated Case Management Part (DCM) on September 20, 2010 at 9:30 a.m., to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 18, 2010