SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

SORBARA CONSTRUCTION CORP.,

Plaintiff,

-against-

JOSEPH ROMEO, SR., MICHAEL ROMEO, INDUSTRIAL COVERAGE CORP., and INDUSTRIAL COVERAGE, LLC,

Defendants.

INDEX NO.: 001238/2008
MOTION DATE: 10/21/2010
MOTION SEQUENCE: 003 and 004

INDUSTRIAL COVERAGE CORP., JOSEPH ROMEO, SR. and MICHAEL ROMEO,

Third-Party Plaintiffs,

-against-

AMERICAN WHOLESALE INSURANCE GROUP, INC., STEWARD SMITH EAST and STEWARD SMITH GROUP,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion(Seq. No. 3) 1
Notice of Motion(Seq. No. 4) 2
Third-Party Plaintiffs' Affirmation in Opposition to Motion for Summary Judgment 3

PRELIMINARY STATEMENT

Defendants moved (Mot. Seq. No. 4) for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint, in its entirety, as against defendants. Third-Party Defendants moved for an Order pursuant to CPLR 3212, granting summary judgment and dismissing third-party plaintiffs complaint, in its entirety.

BACKGROUND

Plaintiff, Sorbara Construction Corp.("Sorbara"), operates a concrete installation business. Inherent in this business are risks related to employee injuries. Beginning in 1995, Sorbara began its relationship with defendants Industrial Coverage Corp. and Industrial Coverage, LLC, (collectively "ICC"), Joseph Romeo, Sr., and Michael Romeo. ICC acted as Sorbara's retail insurance broker. Pursuant to this relationship, ICC procured insurance for Sorbara from insurance carriers directly, as well as indirectly through wholesale insurance brokers. ICC's actions on behalf of Sorbara extended beyond procurement of insurance. ICC took on the responsibility of notifying insurers of claims.

Datello

Datello, an employee of Sorbara, was seriously injured in an accident at a construction site in January 1998. Under the Labor Law, Datello sought damages from the construction

manager of the project("HRH") and the general contractor("Rockrose") in an action commenced in January 2001. Pursuant to Sorbara's subcontract, Sorbara was obligated to procure insurance for HRH and Rockrose. Sorbara procured insurance for this project with a primary liability insurance policy from Investors Insurance Company("Investors") and an excess liability policy from AIU Insurance Company("AIU"). The Investors policy had a coverage limit of $1 million dollars and the AIU excess policy had a limit of $10 million dollars. ICC procured the policy with Investors through American Wholesale Insurance Group("Amwins"), a wholesale insurance broker, which at the time of procurement, was known as Stewart Smith East("SSE"), or Stewart Smith Group. In contrast, ICC did not use Amwins to procure the AIU excess policy.

Investors was properly notified of the Datello accident, and Investors provided a defense to HRH and Rockrose in Datello's action. However, AIU was not timely notified of the accident, and AIU disclaimed coverage and asserted that it had "no obligation to defend or indemnify Sorbara, [HRH], or [Rockrose], for claims asserted in [Datello's] action."(see Disclaimer Letter, Notice of Motion, Exhibit R, pg. 1, lines 21-24). Datello's action was settled in October or November 2005 for $3.5 million dollars. The first $1 million dollars was paid by Investors. HRH and Rockrose, which had filed an indemnity action against Sorbara, thereafter obtained a $2.5 million dollar judgment against Sorbara.

AIU's disclaimer of coverage was ultimately upheld by the Court of Appeals.(*Sorbara Const. Corp. v. AIU Ins. Co.*, 11 N.Y.3d 805, [2008]). Sorbara's notice to AIU 5 ½ years after the accident, once it was sued in a third-party action, was unreasonable notice as a matter of law.*Id.* Accordingly it was determined that AIU was relieved of its obligation to defend or indemnify.

In the instant action, ICC does not dispute that it took on the responsibility to notify Sorbara's insurance carriers of claims. However, Sorbara and ICC disagree on many important facts related to communications with Sorbara's insurers. Sorbara claims that it did not know that AIU had not been properly notified until 2005, when it asserts it learned, for the first time, of AIU's disclaimer of coverage. There is disagreement on the extent to which ICC acted as an intermediary for communications between Sorbara and the Insurance Carriers. Sorbara asserts it never received several letters, addressed to Sorbara, because they were sent to ICC directly. ICC

disputes these assertions. One of these letters dated September 22, 2003, addressed to Sorbara's primary insurer Investors and "cc'd" to Sorbara(and not addressed to ICC in any manner), made clear that AIU was disclaiming coverage.(See Notice of Motion, Exhibit R). A February 1, 2001 letter from Investors to Sorbara and "cc'd" to Amwins, suggested that the amount of the lawsuit could exceed the primary policy and therefore Sorbara may want to notify its excess carrier of the lawsuit. The third party action seeks to hold Amwins(formerly known as SSE) liable under the theory that Amwins had a duty to forward letters, such as the February 1, 2001 letter, which was "cc'd" to Amwins. The excess coverage policy discussed in said letter was not procured by Amwins, rather it was procured by ICC directly from the Insurer.

White

White, an employee of Sorbara, was injured on or about May 1, 2006, while working on a project for Sorbara. White commenced an action seeking damages against Avalon Bay Community Corp.("Avalon Bay"). Avalon Bay then commenced a third-party action against Sorbara seeking, inter alia, defense and indemnity from Sorbara in White's action. ICC, on Sorbara's behalf, procured a primary general liability policy and an excess liability policy from Illinois Union Insurance Company("Illinois Union"). Illinois Union disclaimed excess liability coverage on the basis of untimely notice.

Sorbara claims that due to the failure to properly notify Illinois Union, Sorbara is now exposed to potential liability should Sorbara's liability from White's action exceed the coverage of Sorbara's primary policy. ICC argues, in part, that Sorbara's causes of action relating to White's claim are moot because Avalon Bay has discontinued the third-party action against Sorbara.(see ICC Memorandum of Law in Reply, pg. 2, lines 15-20). Sorbara's sur-reply does not address the issues related to the White causes of action, nor whether Avalon Bay discontinued a third-party action.

First-Party Action

Sorbara's amended verified complaint asserts 13 causes of action against the defendants. In an affirmation in opposition to defenants' motion, plaintiff has withdrawn several causes of action.(See Regan Affirmation in Opposition, para. 4; see also Memorandum of Law in Opposition, pg. 2, para. 1). Sorbara's remaining causes of action are:

1. Negligence(Datello)
3. Negligence(White)
5. Breach of Contract(Datello)
7. Breach of Contract(White)
9. Breach of Duty of Good Faith and Fair Dealing(Datello)
10. Breach of Duty of Good Faith and Fair Dealing(White, (other claims withdrawn)
12. Fraud
13. Declaratory Judgment

Third-Party Action

Third-party plaintiffs have asserted the following causes of action against third-party defendants:

1. Common-Law Indemnification(Datello)
2. Contribution(Datello)

DISCUSSION

Summary judgment is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept.1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept.1965]). It will only be granted if it is clear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). The court's function is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449-450 [1st Dept.1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]). The evidence is considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept.1964]).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact."(*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers."*Id.* The non-movant must "come forward to lay bare his proof" (*S & H Bldg. Material Corp. v Riven*, 176 AD2d 715, 717 [2d Dept 1991]), and the failure to do so may lead the court to believe that there is no triable issue of fact.(*Zuckerman v. City of*

New York, 49 N.Y.2d 557, 562 [1980]).

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance."(*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 [2002]). Implicit in the covenant is a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"*Id.* If a cause of action based on a breach of the implied duty of good faith is duplicative of a cause of action based on a breach of contract, the good faith and fair dealing claim should be dismissed.(*New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, [1995]).

Here, plaintiff's ninth and tenth causes of action for breach of the implied duty of good faith and fair dealing are premised on defendants' failure to notify plaintiff's insurers of claims in accordance with the defendants' contractual obligations.(See Notice of Motion, Exhibit B, First Amended Verified Complaint, ¶ 171 to 173, 180 to 182). These causes of action are plainly duplicative of plaintiff's fifth and seventh causes of action for breach of contract. Plaintiff's ninth and tenth causes of action for breach of the duty of good faith and fair dealing are hereby dismissed.

To state a cause of action for breach of contract, the plaintiff must plead the terms of the contract, the consideration, the performance by the plaintiff, and the breach by the defendant causing plaintiff to sustain damages. (*Furia v. Furia*, 116 A.D.2d 694 [2nd Dept 1986]).

"The elements of common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty constituted a proximate cause of the injury."(*Ruiz v. Griffin*, 71 A.D.3d 1112, [2d Dept 2010]). "[T]he scope of the duty owed by the defendant is defined by the risk of harm reasonably to be perceived."*Id.* "[E]ven when no original duty is owed to the plaintiff, once a defendant undertakes to perform an act for the plaintiff's benefit, the act must be performed with due care for the safety of plaintiff."*Id.*

"[T]o recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, [1996]).

Generally, causes of action for breach of contract must be brought within six years.(CPLR 213(2)). Actions for negligence generally must be brought within three years.(CPLR 214). CPLR 214[4] provides the statute of limitations for negligence actions against insurance brokers and agents. (see *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20 [2001]). Generally, the limitations period is "computed from the time the cause of action accrued to the time the claim is interposed."(CPLR 203(b)). CPLR 203(g) provides, in part, that "where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, ... whichever is longer."

In certain circumstances, the doctrine of equitable estoppel can be invoked to prevent the statute of limitations from barring a cause of action. "Where a defendant's misrepresentation was intended to forestall a plaintiff from commencing a timely action and the plaintiff justifiably relied upon that misrepresentation, the defendant will be estopped from raising the defense of the Statute of Limitations."(*Campbell v. Chabot*, 189 A.D.2d 746, [2d Dept 1993]). The doctrine "is only available to a plaintiff who commences an action within a reasonable time after the facts giving rise to the estoppel have ceased to be operational."*Id.* In *Putter v. North Shore University Hosp.*, 7 N.Y.3d 548, [2006], the Court of Appeals determined equitable estoppel was inappropriate as a matter of law, in part because the plaintiff had sufficient information that required further investigation into whether there was a basis for filing a medical malpractice action. Thus, when it is no longer reasonable for the plaintiff to rely on the defendant's misrepresentation, perhaps because the plaintiff acquired information that required further inquiry and the plaintiff did not make the required inquiry, the facts giving rise to the estoppel cease to be operational.

"A person charged with performing work under a contract must exercise reasonable skill and care in performing the work and negligent performance of the work may give rise to actions in tort and for breach of contract."(*International Fidelity Ins. Co. v. Gaco Western, Inc.*, 229 A.D.2d 471, [2d Dept 1996]). "A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals, common carriers and

bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties."(*Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, [1992]). In *Abetta Boiler & Welding Service, Inc. v. American Intern. Specialty Lines Ins. Co.*, 76 A.D.3d 412, [1st Dept, 2010], the First Department found a special relationship existed between the retail broker and Abetta Boiler & Welding Service, Inc.("Abetta") that imposed a duty on the retail broker to "exercise reasonable care in notifying the appropriate primary or excess insurer of any claim reported to it" by Abetta. In that case, there was evidence that "as a matter of routine Abetta referred all questions regarding its insurance claims to [the retail broker] and [the retail broker] handled all of Abetta's insurance needs, including referring its claims to insurers". *Id* at 413. It was further determined that the retail broker breached its duty to Abetta because it failed to follow up with either the wholesale broker or the insurance carrier to "ascertain that [the excess carrier] actually received notice of the claim and the action."*Id* at 413.

Examining the facts in a light most favorable to the non-movant plaintiff, the Court finds questions of fact remain that are necessary to the determination of plaintiff's remaining causes of action as against defendants. The most important questions of fact concern issues of what ICC and Sorbara knew or should have known between the date of the accident and the date when Sorbara first became aware that the excess carrier disclaimed coverage, a question of fact in itself. Likewise, Sorbara's assertion that letters addressed to Sorbara actually went to ICC, creates questions of fact as to whether that in fact was true, and if it was true, when Sorbara learned of the contents of those letters. Assuming a fact finder determines Sorbara learned, for the first time, of the disclaimer of coverage on or around January 28, 2005, the date on a letter Sorbara acknowledges receiving from the excess carrier, then that would be the start date for applying equitable estoppel, if the facts otherwise warrant its application. This also assumes that the fact finder does not find that Sorbara should have learned of the untimely notice or disclaimer at an earlier time. Assuming January 28, 2005 was the date Sorbara learned of the disclaimer, Sorbara should not have learned of the disclaimer sooner, and equitable estoppel is applicable based on the facts, then the statute of limitations would not bar any of plaintiff's remaining causes of action. The parties entered a tolling agreement, which tolled the statute of limitations for "one year beginning January 24, 2007 and ending January 24, 2008.(See Notice of Motion,

Exhibit Y, pg. 2, para 1)

In the instant matter ICC was the retail broker for Sorbara. As to the disclaimed policy from the excess insurer, ICC was the only broker, because ICC contracted with AIU directly on Sorbara's behalf. Nevertheless, the relationship between Sorbara and ICC is analogous to the relationship between Abetta and its retail broker. Here, it's undisputed that ICC, the retail broker, took on the responsibility to notify Sorbara's insurance carriers of claims. Based on all the facts of the relationship, the Court finds a special relationship could be found between Sorbara and ICC, such that there was a duty imposed on ICC to exercise a reasonable degree of care in notifying the excess insurer, AIU, of any claim reported to ICC by Sorbara.

It is undisputed that ICC took on the responsibility to notify Sorbara's insurers of claims, and that ICC failed to timely notify Sorbara's excess carrier AIU. This failure caused Sorbara to accept liability that would have otherwise been covered by the excess carrier. There is no question that Sorbara was damaged because the excess insurer was not timely notified of the claim. Defendants' motion for summary judgment as to the first, fifth and twelfth causes of action are denied.

White

Defendants argue that Plaintiff's causes of action, which arise out of the White claim, should be dismissed. Specifically, defendants argue that no party in the White Case(Index No. 5367/07), which is pending in Suffolk County, is asserting a claim against Sorbara. Sorbara did not respond to this argument in its sur-reply. Moreover, in that same case, there had been a third-party action which did assert claims against Sorbara, but was discontinued as against Sorbara. At this time, Sorbara is not a party to the White Case pending in Suffolk County and, as of yet, has not been damaged due to a failure to notify the excess carrier. Sorbara may have no liability, direct or indirect, arising from the White Case. Plaintiff's third and seventh causes of action are dismissed without prejudice.

In response to defendants' motion for summary judgment, plaintiff has not put forth arguments in its papers as to why the Thirteenth Cause of Action for a declaratory judgment should not be dismissed. Defendants' motion for summary judgment is granted as to the Thirteenth Cause of Action.

Third-Party Action

CPLR 1401 provides, in part, that "two or more persons who are subject to liability for damages for the same personal injury [or] injury to property ... may claim contribution among them". It follows that a person cannot be liable for a claim for contribution where they could not be subject to liability for damages from the underlying injury.(See also, *Aragundi v. Tishman Realty & Const. Co., Inc.*, 68 A.D.3d 1027, [2d Dept 2009]).

Plaintiff's second cause of action sounds in contribution. For the third party defendant SSE to be liable under a contribution theory, SSE would have to be liable for the underlying injury, which in this case, are the damages resulting from the untimely notice provided to AIU, the excess carrier. Here SSE had very little connection to the AIU excess policy. Importantly, SSE did not act as a wholesale broker for Sorbara or ICC for that policy. Nor has ICC directed the Court to a contractual provision that obligated SSE to forward all correspondence to ICC. SSE's connection to the AIU excess policy in question largely boils down to SSE's receipt of "carbon copied" correspondence directed to ICC or Sorbara.(See Third-Party Defendants' Memorandum of Law In Opposition, pg. 3, lines 28, 29, pg. 4, lines 1-5) SSE did not have a special relationship with ICC or Sorbara, such that SSE could be found to have had an obligation to forward all correspondence, including "carbon copied" documents, to ICC or Sorbara. Moreover, SSE did not act as a broker or agent in the procurement of the excess policy in question. The Court is not persuaded by third-party defendants arguments that SSE and ICC established a course of dealing that would support the existence of a broad duty owed by SSE to forward to ICC and Sorbara every piece of correspondence received by SSE. In sum, SSE did not owe a duty to ICC or Sorbara, and therefore SSE could not be liable for damages from Sorbara's underlying injury. Third party plaintiffs' Second Cause of Action for contribution is hereby dismissed.

"Common-law indemnification is predicated on "vicarious liability without actual fault," which necessitates that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." (*Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, [1st Dept 2006]).

Third party plaintiffs' first cause of action sounds in common law indemnification. For SSE to be liable under this theory it must be proven that SSE's negligence contributed to the damages sustained by Sorbara. As discussed, ICC failed to show that SSE owed a duty to ICC or Sorbara with respect to the forwarding of the "carbon copied" correspondence in question which did not concern a policy that SSE procured on behalf of ICC or Sorbara. SSE did not owe a duty to ICC or Sorbara and cannot be found to have negligently contributed to the damages sustained by Sorbara. Third party plaintiffs' first cause of action is dismissed.

To recap, the Court partially granted defendants' motion for summary judgment. Except for plaintiff's First, Fifth and Twelfth Causes of Action, all of plaintiff's Causes of Action were dismissed. Third-party defendants' motion for summary judgment was granted in its entirety.

This constitutes the Decision and Order of the Court.

Dated: December 8, 2010

J.S.C.