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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 115377/2006
SILK & HALPERN REALTY
vs.
WALTER & SAMUELS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 115377/06
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4, 5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JAN 31 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JAN 26 2011

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

SILK & HALPERN REALTY ASSOCIATES, JAMES HALPERN, RICHARD HALPERN, BARBARA KASHUK, RICHARD KASHUK, HELEN WEINSTEIN, JAMIE WEINSTEIN, ILENE WEINSTEIN, JAMES HILFORD, ANDREW HILFORD and JEFF HILFORD,

Plaintiffs,

-against-

WALTER & SAMUELS, INC., TANNENBAUM-HARBER COMPANY, INC., and QBE SPECIALTY INSURANCE COMPANY,

Defendants.

INDEX NO.115377/2006

DECISION & ORDER

Motion Seq. 001, 002 & 003

MARTIN SHULMAN, J.:

Defendant QBE Specialty Insurance Company ("QBE") moves for summary judgment in its favor dismissing the complaint as against it (Mot. Seq. 001). Plaintiffs oppose. Defendant Tannenbaum-Harber Company, Inc. ("Tannenbaum") moves for summary judgment in its favor dismissing the complaint and all cross claims as against it (Mot. Seq. 002). Plaintiffs oppose and cross-move for summary judgment in their favor on the complaint as against Tannenbaum. Defendant Walter & Samuels, Inc. ("W&S") moves for summary judgment in its favor dismissing the complaint as against it (Mot. Seq. 003). Plaintiffs oppose.

Factual Background

On February 17, 2005, Suso Pinzolo commenced an action on behalf of her infant son, Nicolo Pinzolo, for damages allegedly resulting from lead paint poisoning. See, *Pinzolo v Kashuk*, New York County Index No. 102367/2005 (the "Pinzolo action").

The child resided in Apartment 3R, 33 West 8th Street, New York County (the "Property"), from about March 2003 through the date of commencement of the Pinzolo action. The amended complaint therein (Ex. A attached to Mot. Seq. 001) claimed that: Barbara Kashuk and Richard Kashuk own the Property; James Halpern and Richard Halpern managed the Property from December 8, 1998 to April 23, 2001; Silk & Halpern Realty Associates ("S&H") managed the Property from April 23, 2001 through the date of the Pinzolo action's commencement; and W&S co-managed the Property from April 23, 2001 through the date of commencement of the Pinzolo action. The amended complaint asserted causes of action for the child's alleged serious personal injuries and for his mother's derivative injuries. The Pinzolo action settled in February 2010 for $750,000; S&H paid $187,500 and Greater New York Mutual Insurance Company ("GNY") paid $562,500. Additionally, GNY, which insured the Property from August 2001 through August 2004, paid for S&H's defense in full.

On or about October 13, 2006, the Halperns, Kashuks, Weinsteins and Hilfords as owners of the Property, and S&H as its manager, commenced the instant action against W&S as their insurance agent, Tannenbaum as their insurance broker and QBE as their insurance carrier. The complaint (Ex. E attached to Mot. Seq. 001) asserts various causes of action as against W&S and Tannenbaum for breach of duty and negligence, and two causes of action as against QBE for a declaratory judgment for defense and indemnity in the Pinzolo action.[1]

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[1] In light of the settlement of the Pinzolo action in February 2010, with S&H being the only party who contributed to the settlement in the amount of $187,500, the Kashuks and the Halperns do not seem to have any standing to maintain claims against the defendants with the possible exception of unreimbursed defense costs, if they were represented by separate counsel from S&H. As for the Weinsteins and Hilfords, they do not appear to have any standing whatsoever.

As of the Pinzolo action's commencement in February 2005, the Property was insured by QBE for primary premises liability, Chubb Group of Insurance Companies ("Chubb") for excess coverage and American International Specialty Lines Insurance Company ("AI") for umbrella coverage. QBE replaced GNY on August 30, 2004. The QBE and AI policies had explicit lead paint exclusions; the Chubb policy referred back to the terms of the underlying insurance and thereby excluded lead paint claims.

QBE's Motion for Summary Judgment - Mot. Seq. 001

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the movant proffering evidence establishing a prima facie case, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

If the liability policy was in effect at the time of the loss, there would be no coverage for the loss under its lead-based paint exclusion coverage. *3405 Putnam Realty Corp. v Insurance Corp. of N. Y.*, 36 AD3d 565 (1st Dept), *lv denied* 8 NY3d 813 (2007). Where there is a rebuttable presumption that the landlord had received notice of the lead-poisoning exclusion in the renewal certificate, the insurer is not obligated to

indemnify or defend the landlord. *Morales v Yaghoobian*, 13 AD3d 424, 425 (2d Dept 2004), *lv denied* 4 NY3d 708 (2005).

QBE argues that since its policy on the Property has no lead paint exposure or ingestion coverage, and it covers only S&H and W&S, not any of the named individual plaintiffs,[2] it is not obligated to defend or indemnify any other party in regard to the Pinzolo action, and it is not obligated to reimburse Plaintiffs for any counsel fees in regard to the Pinzolo action. The policy (attached as Ex. A to Marr Aff.) includes a one-page endorsement headed "Exclusion – Lead Liability." The endorsement states that "the insurance does not apply to . . . 'Bodily injury' arising out of the presence, ingestion, inhalation, absorption . . . or exposure to lead in any form or any product containing lead." It precludes indemnification or defense of any suit or claim against the insured alleging bodily injury resulting from lead. Therefore, QBE claims that Plaintiffs cannot claim coverage from QBE in the Pinzolo action, which dealt with the child's serious personal injuries from "ingestion and/or exposure to lead based paint" (Amended Complaint, ¶¶ 15-16).

Rockville Risk Management Associates ("Rockville"), QBE's claims administrator, wrote to W&S on December 27, 2004, advising it that QBE's lead liability endorsement excluded coverage of "a potential claim stemming from lead found in apartment #3R, located at 33 west 8th street, New York, NY." Ex. D attached to Mot. Seq. 001. The letter recognized that "no claim has been presented."

Plaintiffs contend that "in direct contravention of Insurance Law § 3420 (d), defendant QBE failed to acknowledge and disclaim liability or defense for the Pinzolo

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[2] QBE is incorrect. Richard Halpern is an additional insured on the policy. He also owns S&H. Halpern Transcript at 5, Ex. B attached to Mot. Seq. 002.

claim and/or the Pinzolo lawsuit," citing *Mid City Constr. Co., Inc. v Sirius Am. Ins. Co.* (70 AD3d 789 [2d Dept 2010]). Rudy Affirm., ¶ 9. In *Mid City* an insurance company was obliged to defend and indemnify its insured because it "did not disclaim coverage 'as soon as is reasonably possible,'" pursuant to Insurance Law § 3420 (d) (2). 70 AD3d at 789. In the instant action, Plaintiffs do not dispute the sending or receipt of Rockville's letter, but challenge its validity because it pre-dated the date of the filing of the Pinzolo action. They argue that ineffective or untimely disclaimer will serve to act as a waiver on QBE's reliance upon an exclusion in the insurance policy. *Metropolitan Prop. & Cas. Ins. Co. v Pulido*, 271 AD2d 57, 60 (2d Dept 2000) ("the issue of a timely disclaimer is irrelevant if, in the first instance, the policy never provided coverage for the particular claim at issue").

In response, QBE contends that the Insurance Law obligated it "to timely deny coverage for a claim or a prospective claim." Altman Reply Affirm., ¶ 7. It argues that, while QBE was aware of the prospective claim and the Pinzolo action itself, without any explanation of how this occurred, there is no evidence that the insured ever gave it notice of the lawsuit. It cites several cases where it was held that the insurer had no obligation to disclaim coverage until and unless the insured itself provided notice. *See Ocean Partners, LLC v North River Ins. Co.*, 25 AD3d 514 (1st Dept 2006); *Travelers Ins. Co. v Volmar Constr. Co., Inc.*, 300 AD2d 40 (1st Dept 2002); *see also Webster v Mount Vernon Fire Ins. Co.*, 368 F3d 209 (2d Cir 2004). Plaintiffs state that "[t]here is no dispute that the claim and certainly the lawsuit brought by the Pinzolos were brought to the attention of the defendant QBE and no argument has been made by defendant QBE's attorneys that they were not aware of the underlying Pinzolo claim or the Pinzolo lawsuit." Rudy Affirm., ¶ 8.

However, this reasoning is insufficient to meet the notice requirement when there is no evidence that the insured itself provided notice. As the Appellate Division, First Department, held in *Ocean Partners*, "[the trial] court properly rejected plaintiff's argument that the notice of loss filed by its managing agent – which was listed as a separate insured under the building's insurance policy – satisfied plaintiff's own obligation, as an insured, to supply prompt notice of its particular damage claims." 25 AD3d at 514-515.

QBE's policy's conditions include that insured "must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Policy § IV (2) (a). Occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*, § V (13). Suit is defined separately as a "civil proceeding." *Id.*, § V (18). Claim is undefined.

Each side proposes alternate positions. QBE maintains that once it received notice of the occurrence it timely disclaimed or, in the alternative, there was no notice by the insured and QBE had no obligation to disclaim. Plaintiffs contend that QBE was "aware" of the prospective claim and the lawsuit, but that QBE's disclaimer did not extend to the lawsuit. They ignore the language of the policy about their duty to notify, and eliminate the role of an occurrence as a triggering event. If they insist that QBE was on notice, regardless of the source, then QBE gave written notice of its disclaimer as soon as was reasonably possible, *because notice of an occurrence* was the threshold requirement under the policy, not notice of a lawsuit. Under these circumstances, QBE's motion for summary judgment shall be granted.

Tannenbaum's Motion for Summary Judgment and Plaintiffs' Cross Motion for Summary Judgment - Mot. Seq. 002

Tannenbaum claims that the only remaining issue in this action is whether it has any duty to reimburse S&H for any part of its contribution to the settlement of the Pinzolo action.[3] "[An insurance] broker has a common-law duty either to obtain the coverage that a customer specifically requests or to inform the customer of an inability to do so." *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157 (2006). Normally, "they have no continuing duty to advise, guide or direct a client to obtain additional coverage." *Murphy v Kuhn*, 90 NY2d 266, 270 (1997). However,

> an additional duty of advisement in exceptional situations where . . . the agent receives compensation for consultation apart from payment of the premiums . . . [or] there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on.

90 NY2d at 272 (citations omitted).

At his deposition on August 25, 2008, Richard Halpern, an investor in the Property and owner of S&H, testified that he did not know that the Property contained lead paint. Halpern Transcript at 21. He stated that the hallways were painted at least once every 10 years, and the apartments when the leases required. *Id.* at 22. He claimed that he was unaware of children residing at the Property, and specifically of the

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[3] QBE issued a policy to W&S via Tannenbaum, effective August 30, 2004, naming S&H as one of five entities that are additional insureds. These five presumably had lost coverage by GNY. Halpern is also named as an additional insured.

presence of the Pinzolo child prior to receiving a summons in November 2004.[4] *Id.* at 25, 28.

In or about June 2001, S&H moved into W&S's offices, forming a "strategic alliance."[5] *Id.* at 33. W&S, according to Halpern, provided secretarial, bookkeeping, accounting and asset management services to S&H, while S&H dealt with building repairs and investor relations. *Id.* at 33-34. Specifically, W&S "handled the insurance," for which it received a 15% fee. *Id.* at 33, 70. In late 2001, general commercial liability coverage for the Property was moved to GNY at W&S's suggestion. W&S allegedly had many buildings covered by GNY. *Id.* at 41-43. Before that, S&H used the Signature Group as its insurance broker and had CNA as its carrier. *Id.* at 12. Halpern did not know whether the policies the Signature Group obtained had lead paint exclusions.[6] *Id.* at 13. He said he never reviewed those policies personally. *Id.*

In August 2004 when the Property's insurance coverage was up for renewal, Halpern discussed premium increases with W&S, but nothing else regarding the GNY policy. *Id.* at 44-46. He reviewed only the cost of premiums whenever insurance was renewed, "other people being concerned about other things [regarding insurance] on my behalf." *Id.* at 85. He claims he was never told that the Property's general

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[4] The Pinzolo action actually commenced in early 2005. However, the New York City Department of Health and Mental Hygiene ("DOH") conducted an inspection of the Property for lead paint on November 23, 2004 as a result of a report by the mother and found a lead hazard. Ex. C attached to Mot. Seq. 001.

[5] The two firms evenly divided S&H's management fee of five percent of gross rent collections. Halpern Transcript at 69.

[6] The CNA policy excluded lead paint coverage, as Halpern acknowledges in his affidavit in support of the cross motion. ¶ 9.

commercial liability coverage was removed from GNY and transferred to QBE, entailing a loss of lead paint coverage, until after commencement of the Pinzolo action. *Id.* at 53-54, 83, 102, 104.

Halpern testified that he never requested that W&S or Tannenbaum obtain lead paint coverage for the Property, and was never told that the Property had had lead paint coverage. *Id.* at 52-53, 88. He believed though that the Property "was totally covered." *Id.* at 53. He "relied on their [W&S] expertise" on insurance matters. *Id.* at 55. W&S had its own portfolio of buildings and Halpern's buildings "were included in their coverage. Whatever they had, I had." *Id.* at 96. He alleged that Elena Zweifach, a W&S employee, placed insurance with her husband at Tannenbaum. *Id.* at 80, 88. Once the Pinzolo action was commenced, Tannenbaum told him that it had been unable to secure lead paint coverage for the Property after the latest policy renewal on August 30, 2004. *Id.* at 91. Halpern claims that he "was never informed I was not being covered by Greater New York and I was never informed that I didn't have lead paint coverage and never informed if I had it [that] it was ceasing." *Id.* at 82, 106.

Halpern believed that the excess and umbrella policies "covered any and all contingencies as far as insurance claims." *Id.* at 56. Although he had been in the real estate business since 1967, he knew nothing about the issue of lead paint in residential real estate until November 2004. *Id.* at 61, 63-66. Even after he learned of the Pinzolo incident, he did not seek lead paint coverage for the Property because he thought there were no other children in the building. *Id.* at 58, 107.

Pauline Grant, a secretary at W&S from 1997 through 2005, was deposed on January 12, 2009. Ex. C attached to Mot. Seq. 002. Sometime in July 2004, she was

assigned to administer the S&H portfolio of seven buildings. Grant Transcript at 6, 8-10. She recollected no conversations with Halpern regarding insurance coverage, premiums or another tenant's earlier accident on the Property. Her discussions with Halpern usually focused on rent collections. *Id.* at 26. She received the premium bills, passed them on to Halpern for signature and filed the associated documents. She testified that she never received QBE's binder of insurance, even after being shown a copy at the deposition. *Id.* at 39. Had she, she would have sent it to Halpern. *Id.* at 38. In turn, he denied knowledge of a QBE policy, and was unaware whether Grant ever received a copy of a QBE policy. Halpern Transcript at 52.

Elena Zweifach, president of W&S, was deposed on February 24, 2009. Ex. D attached to Mot. Seq. 002. She is a licensed insurance broker. E. Zweifach Transcript at 6. She serves as "the contact person with the insurance broker [Tannenbaum]." *Id.* at 8. Christine Thomas, an account executive, was her primary contact there.[7] *Id.* at 14. Generally, Elena Zweifach received pricing information from Tannenbaum prior to a policy's renewal and documentation of the policy's contents, a schedule of insurance, after renewal. *Id.* at 15-16. This schedule contained "companies, dates, coverage, premiums, named insureds, mortgagees." *Id.* at 16. While she discussed this material with W&S's owner, she did "not personally" discuss it with the property owners. *Id.* at 18-19. Property owners received schedules and certificates of insurance but not copies of the policy, which was "a master policy" for all W&S-related properties. *Id.* at 28.

Elena Zweifach was not involved with the initial placement of S&H's insurance with Tannenbaum in 2001. *Id.* at 24. Later, QBE became the carrier "for a few of the

[7] Gary Zweifach, her husband, a senior account executive at Tannenbaum, is not mentioned in her deposition transcript.

properties that Greater New York would no longer write." *Id.* at 36. Tannenbaum informed her of GNY's refusal to renew coverage in 2004 on several buildings, including 33 West 8th Street. *Id.* at 36-37. While some of the other buildings lacked a second means of egress, GNY discontinued on the Property because of a serious loss there.[8] *Id.* at 37. She did not remember whether she knew that QBE was to succeed GNY, or of any prospective changes in coverage. *Id.* at 39-40.

Elena Zweifach "really did not deal with Mr. Halpern," except that he "would ask me about his renewal premiums." *Id.* at 9, 10. Robert Weiss and Steve Forest, W&S senior managing directors, usually handled communications of any substance and negotiations with S&H. *Id.* at 10-11. When she learned of GNY's discontinuance of coverage of the Property, she wrote an interoffice memo, likely to Weiss and Forest. *Id.* at 38-39. She did not recall discussions of the matter with anyone else internally, including Grant or Halpern. *Id.* at 39, 44, 45, 55. At first, she did not recall "receiv[ing] anything in writing from Tannenbaum with respect to the fact that there was an exclusion under the QBE policy for lead-based paint." *Id.* at 56. However, when presented with a copy of QBE's binder of insurance, with its lead paint exclusion, she acknowledged its receipt by W&S. *Id.* at 57-58.

Gary Zweifach, a senior account executive with Tannenbaum, was deposed on November 12, 2009. Ex. E attached to Mot. Seq. 002. W&S's account was under his supervision in 2004. G. Zweifach Transcript at 15. Christine Thomas was one of four people working for him full time then. *Id.* at 6. He recalled speaking to Halpern "once or twice in the five-year period" that Tannenbaum sold insurance to S&H. *Id.* at 37.

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[8] The various depositions contain mentions of a scalding accident on the Property that may have been settled for $500,000.

The subject of the conversation was water main damage, as he recalled, but he believed that "Richard [Halpern] looked at bottom-line pricing as most important." *Id.* at 38, 53. After the commencement of the Pinzolo action, Halpern called him at home "extremely agitated" about the suit. *Id.* at 67. Gary Zweifach said that he spoke to Grant at W&S more than twice, but less than six times about insurance coverage. *Id.* They discussed premiums. *Id.* at 38-39.

While Gary Zweifach did not have direct knowledge, he presumed that Christine Thomas informed S&H of GNY's refusal to renew coverage. *Id.* at 54, 55. The communication, not committed to writing, was likely with Grant, but possibly with Elena Zweifach. *Id.* at 55, 38, 63. However, he admitted having no personal knowledge of such a discussion taking place. *Id.* at 73. Once GNY dropped the Property, no other company was going to offer the same pricing for the "full coverage for the GNY terms which included lead [paint coverage] for that building." *Id.* at 54. He did not know that there was lead at the Property and GNY did not cite the presence of lead as a reason to discontinue coverage.[9] *Id.* at 60-61, 69, 62.

When GNY discontinued coverage of the Property, Tannenbaum secured a general liability policy from QBE. *Id.* at 46. "To be blunt, the pricing was right, [and] the

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[9] No one claims to have known about the presence of lead paint at the Property until the DOH inspection. GNY does not appear to have regarded lead paint as a reason to discontinue coverage of the Property. According to James Mannino, executive vice president and a principal of Tannenbaum, testifying on July 21, 2010, the Property had "three strikes against it" in 2004 by GNY's standards: (1) the scalding accident, (2) coverage under the W&S policy when not owned by W&S, and (3) lack of a second means of egress. Ex. B attached to Rudy Opposition Affirm., Mot. Seq. 003, at 26, 39. Elena Zweifach testified that GNY discontinued other W&S properties in 2004 because of lack of a second means of egress. E. Zweifach Transcript at 37; *see also* Mannino Transcript at 34-35.

coverage was sufficient" for W&S's and S&H's purposes, according to Gary Zweifach. *Id.* at 63-64. Tannenbaum did not seek lead paint coverage from QBE. *Id.* at 70. To bind the coverage, Tannenbaum needed the "approval from either Silk & Halpern and/or Elena." *Id.* at 64. That was Christine Thomas' responsibility. *Id.* She knew, as "a fact," that the QBE policy lacked lead paint coverage. *Id.* at 71. Tannenbaum never informed Halpern of this because "Richard didn't have an issue with lead to begin with." *Id.* at 72.

In his own words, Halpern never asked W&S or Tannenbaum for lead paint coverage at any time during their relationship. Until the inception of the Pinzolo action, he never discussed the possible presence and danger of lead paint on the Property. He did not think he needed lead paint coverage for the Property before that suit and he never obtained it even after learning of the hazard at the premises in November 2004. While he talked of water main damage with Gary Zweifach and the scalding accident with Grant, no one recounts any discussion of lead paint with him. He claimed that he relied on W&S and believed that he was fully covered, while admitting he had no sense of the details. Grant and Elena Zweifach confirmed Halpern's testimony that he was only concerned about the cost of premiums.

There is no evidence that W&S, in the face of Halpern's disinterest, requested lead paint coverage from Tannenbaum or, other than Elena Zweifach's interoffice memo, reacted in any fashion to the absence of lead paint coverage in the QBE policy effective August 30, 2004, even though the QBE policy differed in that regard from the previous GNY policy. Elena Zweifach of W&S confirmed receipt of QBE's binder of insurance with its lead paint exclusion, even though Grant denied seeing it. This is

sufficient evidence that W&S waived its right to bring an action against Tannenbaum. *Trans High Corp. v Pollack Assoc., LLC*, 74 AD3d 489, 489 (1st Dept 2010) ("plaintiff's receipt and retention of the policy for three months before the fire without objection to the missing coverage waived any right of action it might have had against defendants"); *Busker on The Roof Ltd. Partnership Co. v Warrington*, 283 AD2d 376, 377 (1st Dept 2001) ("Plaintiff received the subject policy months before the accident at issue, and is conclusively presumed to have known, understood and assented to its terms, and, accordingly, has no action against its insurance broker for having procured such coverage, even though the coverage was not entirely in accord with what plaintiff had requested") (citation omitted). Halpern's denial of seeing the QBE policy or being given any notice of its contents is of little consequence since he readily admitted to taking no interest in any policy details other than the cost of premiums. Further, he makes no claim that any party withheld coverage that he had requested for the Property.

Plaintiffs oppose and ask for summary judgment in their favor on the grounds that: Tannenbaum replaced GNY's policy and its lead paint coverage with the QBE policy lacking lead paint coverage without notice to its insureds; Tannenbaum failed to submit a binder of insurance to W&S; Tannenbaum lacked authority to do business with QBE, a company unlicensed and non-admitted in New York; and the purported binder of insurance Tannenbaum produced was defective and invalid.

Murphy and its progeny impose a duty upon insurance agents and brokers who are unable to meet their customers' requirements. "A broker who agrees to place insurance for a customer must exercise reasonable diligence to do so and if unable to make such a placement must timely notify the customer to afford it the opportunity to

procure the insurance elsewhere." *Baseball Office of Commr. v Marsh & McLennan, Inc.*, 295 AD2d 73, 79-80 (1st Dept 2002), citing *Murphy v Kuhn*, *supra*. Halpern and Grant submit affidavits in support of Plaintiffs' cross motion denying receipt of any notice from Tannenbaum about the change in carriers and the loss of lead paint coverage. Elena Zweifach testified to knowledge of GNY's refusal to renew coverage of the Property, but could not remember whether she knew that QBE was replacing GNY or of any changes in coverage resulting from the change of carriers. Gary Zweifach had no personal knowledge of communication between Tannenbaum and W&S about the change in carriers and coverage.

In itself, the issue of notice might preclude summary judgment if not for the teaching of *Trans High* and similar cases, such as *Busker on The Roof Ltd. Partnership*, *supra*, *Stilianudakis v Tower Ins. Co. of N.Y.* (68 AD3d 973 [2d Dept 2009]), and *Brownstein v Travelers Cos.* (235 AD2d 811 [3d Dept 1997]), where clients did not receive the insurance coverage that they requested or expected, but failed to timely examine the documentation, thus warranting dismissal of their claims. The facts of *Brownstein*, as recited by the court, offer some interesting parallels to the instant action:

> Brownstein's affidavit indicates that while he contends that he requested a homeowner's policy, his belief that the instant type of loss would be covered was not based upon a specific assurance but upon his subjective understanding, culled from the contents of his phone conversation with the Grant Agency, that the type of insurance it would procure for a seasonal or secondary residence would be a multiperil policy. With no evidence that Brownstein was specific in his request to insure against this type of loss or that there was a failure to procure specifically requested insurance, we find that plaintiffs failed to raise a triable issue of fact.

235 AD2d at 813.

In the instant action, Elena Zweifach, president of W&S, recognized QBE's binder of insurance dated September 3, 2004 (Ex. C attached to Cross Motion) when presented at her deposition. Grant's unfamiliarity with this binder is not entirely surprising because "[a]t the times relevant to this lawsuit, August, 2004 through November, 2004, I had just started in this position and I was learning the policies and procedures which Mr. Halpern wished me to follow." Grant Aff., ¶ 2.

Halpern's statement at paragraph 7 of his affidavit in support, that he met annually with a W&S representative "in regard to the *continuing insurance coverage* and premium for that coverage going forward with next year's policy" (emphasis added), does not comport with his testimony that his annual discussions about insurance policy renewals with Elena Zweifach were about premiums only, "because I had other people being concerned about other things on my behalf. I was the landlord and I was interested in what it was going to cost me." Halpern Transcript at 85; *see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 (1st Dept 2000) ("the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment"). Under these circumstances, the testimony of Elena Zweifach, who, at the time of her deposition, had been with W&S over 27 years and its president over five years, is dispositive on the issue of notice. W&S had QBE's binder of insurance for some months before learning of the Pinzolo child's injuries. Its right to pursue an action against Tannenbaum for failure to obtain the proper insurance coverage was thereby waived.

Plaintiffs claim that QBE is a non-admitted carrier in New York whose policies and related documents must prominently display notice that the company is not licensed in New York, not subject to its supervision and not protected by the State's security fund in case of insolvency, pursuant to 11 NYCRR § 27.18. The document shown to Grant and identified by Elena Zweifach as QBE's binder of insurance does not have any such language. Plaintiffs cite *Polly Esther's S., Inc. v Setnor Byer Bogdanoff, Inc.*, (10 Misc 3d 375 [Sup Ct NY County 2005]), to support the invalidity of a binder of insurance lacking the statutory language. This trial court opinion held that since "a binder constitutes an insurance policy, albeit a temporary one, the specified legend must appear on its face, in compliance with 11 NYCRR 27.18 (a)." 10 Misc 3d at 382. Beyond that holding, little else in *Polly Esther's* aids plaintiffs. Plaintiff there, a group of nightclubs, sued its insurance broker after the broker obtained liability coverage with an insurer not registered in New York State which subsequently became insolvent. The complaint alleged failure to comply with the Insurance Law and Insurance Department regulations, specifically those dealing with the same affirmative disclosure requirements at issue in the instant action. Insurance Law § 2118 imposes a statutory duty to use "due care" in selecting an unauthorized carrier, which includes the disclosure requirements at 11 NYCRR §§ 27.17 and 27.18 However, the court dismissed the cause of action because "the statute itself contains no language which confers a private cause of action to enforce its provisions." *Id.* at 386. In fact, it dismissed the entire complaint, which also had causes of action for breach of duty to exercise reasonable care in performance of duties and breach of contract, very similar to the causes of action in the instant action.

By contrast, the QBE policy declaration for the Property has the requisite language. Ex. D attached to Cross Motion. October 24, 2004 is the only date appearing on this document, the date it was recorded with the Excess Line Association of New York, a non-profit industry association facilitating compliance with New York insurance law. This was one month before DOH's inspection confirmed the presence of lead paint on the Property. QBE's actual policy, also correctly noticed, was not delivered until sometime later. Plaintiffs argue that by then they "no longer had any options in regard to insurance coverage to protect themselves against the underlying claim."

Assuming the invalidity of the binder of insurance as notice of the resort to a non-admitted carrier, Plaintiffs' contention that only the absence of timely proper notice deterred them from adequately insuring the Property is belied by the facts. Halpern never knew that the CNA policy excluded lead paint coverage or that the GNY policy included it. His only concern was the cost of insurance, as he acknowledged. He never asked for lead paint coverage because he did not believe it was needed for the Property. While there is no evidence that he refused lead paint coverage if ever offered, he chose not to obtain it even once he knew that the Property presented a danger. The statutory notice regarding QBE that Plaintiffs had from the policy declaration one month before the DOH inspection was of no consequence to them. They took no action about their insurance coverage then, just as they remained immobile after the DOH report of the lead paint hazard on the Property. Had the binder of insurance they received in early September 2004 carried the statutory notice,

plaintiffs' conduct would have been identical to their actual conduct after receiving the properly-noticed policy declaration in late October 2004.

For all the reasons stated above, Tannenbaum's motion for summary judgment is granted and the complaint and all cross claims as against it are dismissed.[10] Plaintiffs' cross motion for summary judgment in their favor on the complaint as against Tannenbaum is therefore denied as moot, and it is unnecessary to discuss the cross-motion's purported untimeliness.

W&S's Motion for Summary Judgment - Mot. Seq. 003

W&S contends that the complaint should be dismissed as against it because it was not plaintiffs' insurance broker or agent, plaintiffs never requested lead paint liability coverage, plaintiffs had notice of the QBE policy's terms and thereby waived the right to sue, and plaintiffs were provided with the best available coverage. W&S ignores two important facts in asserting that it was not Plaintiffs' insurance broker or agent.

First, Elena Zweifach, its president, who had dealings with S&H regarding its properties, is a licensed insurance broker. Second, S&H paid a 15% fee to W&S for handling its insurance; W&S characterizes it as "simply an administrative service charge." Babchik Reply, ¶ 10. While Tannenbaum was indisputably the insurance broker for W&S and S&H, contacts between Tannenbaum and S&H were infrequent and random. On the other hand, contacts between Tannenbaum and W&S and W&S and S&H on insurance matters were regular and organized. In the ordinary course of

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[10] It is unnecessary to determine whether QBE was actually authorized to issue insurance policies in New York, as it maintains in partial opposition to the cross motion, or was only "a non-admitted carrier" subject to certain constraints.

events, Elena Zweifach received information from Tannenbaum and passed it on to Grant, another W&S employee, characterized as S&H's "portfolio manager." Grant sent premium notices and other significant insurance documents to Halpern.

Except for Halpern calling Gary Zweifach at home to complain about coverage once Halpern learned of the Pinzolo action (itself an indication of some familiarity), there is no evidence of business dealings between S&H and Tannenbaum directly. W&S was always in the middle, collecting a fee for its services. Insurance Law § 1101 (b) (1) (C) defines "doing an insurance business in this state . . . [as including] collecting any premium, membership fee, assessment or other consideration for any policy or contract of insurance." The marital connection between the Zweifachs might somewhat cloud the business relationship between W&S and Tannenbaum, but S&H's relationship to W&S was strictly business with W&S operating as S&H's insurance broker. *Robertson v Globe & Rutgers Fire Ins. Co.*, 223 App Div 296, 298 (1st Dept 1928) ("It is settled that brokers act only as agents for clients in securing policies of insurance"). As a result, W&S is exposed to suit by S&H for alleged breach of duty in obtaining insurance coverage.

While many elements in the analysis of Tannenbaum's motion above pertain here, S&H's relationship to Tannenbaum does not parallel its relationship to W&S. Tannenbaum's connection to S&H was attenuated, with W&S almost always in the middle. S&H and W&S, on the other hand, had several close associations: they shared an office for years; Grant, a W&S employee, was devoted to S&H's real estate holdings; S&H received information about its insurance policies from W&S, not

Tannenbaum; S&H paid W&S a fee for insurance coverage, over and above its premium payments to Tannenbaum. Whether this closeness constitutes the "exceptional situation" that entails an additional duty of advisement is a material question of fact, not susceptible to summary judgment. *See Murphy v Kuhn*, 90 NY2d at 272-273; *Abetta Boiler & Welding Serv., Inc. v American Intl. Specialty Lines Ins. Co.*, 76 AD3d 412, 413 (1st Dept 2010). No one questions Halpern's exclusive interest in the cost of insurance, but a fact-finder will have to determine whether W&S was obliged to tell him a little more than he wanted to hear. Additionally, whether the coverage obtained for S&H was, in fact, the best available cannot be established on these papers. Thus, W&S's motion for summary judgment is denied.

Accordingly, it is

ORDERED that QBE Specialty Insurance Company's motion for summary judgment is granted and the complaint as against it is hereby severed and dismissed, with costs and disbursements to QBE Specialty Insurance Company as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly (Mot. Seq. 001); and it is further

ORDERED that Tannenbaum-Harber Company, Inc.'s motion for summary judgment is granted and the complaint and all cross claims as against it are hereby severed and dismissed, with costs and disbursements to Tannenbaum-Harber Company, Inc. as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly (Mot. Seq. 002); and it is further

ORDERED that Plaintiffs' cross motion for summary judgment in their favor on the complaint as against Tannenbaum-Harber Company, Inc. is denied as moot; and it is further

ORDERED that Walter & Samuels, Inc.'s motion for summary judgment is denied and the action shall continue as against it (Mot. Seq. 003).

Any relief not expressly granted is otherwise denied. This is the decision and order of the court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: January 26, 2011

Martin Shulman, J.S.C.