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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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AJS AGENCY, INC. and ADAM SLUTSKY,

Plaintiffs,

-against-

EMPIRE HEALTHCHOICE, HMO, INC., f/k/a EMPIRE HEALTH CHOICE, INC., and EMPIRE HEALTH CHOICE ASSURANCE, INC.,

Defendants.

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EMPIRE HEALTHCHOICE, HMO, INCS., f/k/a EMPIRE HEALTH CHOICE INC., and EMPIRE HEALTH CHOICE ASSURANCE, INC.,

Counterclaim/Third Party Plaintiffs,

- against -

AJS AGENCY, INC., ADAM SLUTSKY, LEONARD SLUTSKY, THOMAS R. POMBONYO, AMERICAN MONEY SERVICES, INC., MAIL A MARKET, INC., POSTAL COMMUNICATIONS, INC., MAIL BIZCO, INC., DIRECT MAIL PROMOTIONS CORP., INFOMAIL PROMOTIONS, INC., THE AD MAN, INC., DIRECT INTERNET STATS, INC., MARKET POWER, INC., BUYERS STATS, INC., BUTLER SURVEY COMPANY, INC., MINORITY MARKETING SOLUTIONS, INC., MORGAN INFORMATION BUREAU, INC., BRI-HUD SALES, INC., SURVEY MARKETING CORP., and JOHN DOES 1-20, inclusive,

Counterclaim/Third Party Defendants.

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TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 011440-10
Motion Seq. No: 1
Submission Date: 2/10/11

The following papers having been read on this motion:

Notice of Cross Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affirmation in Further Support and Exhibit.....x [1]
Correspondence dated February 11, 2011.....x [2]

This matter is before the Court for decision on the motion filed by Plaintiffs/Third Party Defendants on December 30, 2010 and submitted on February 10, 2011. For the reasons set forth below, the Court 1) denies the branch of the motion that seeks to dismiss the Third Party Summons, Verified Answer and Counterclaims; 2) denies the branch of the motion that seeks dismissal of the Fourth Counterclaim; and 3) grants the branch of the motion that seeks to strike prejudicial material in the Counterclaims to the extent that the Court directs that all references in the Counterclaims to the phrase "Sham Small Group Companies" shall be substituted with "Small Group Companies" and otherwise denies that branch of the motion.

A. Relief Sought

Plaintiffs/Third Party Defendants move for an Order, 1) pursuant to CPLR §§ 1007, 3011, 3211(a)(7) and 3024(b), dismissing the Third Party Summons, Verified Answer and Counterclaims in their entirety; 2) pursuant to CPLR § 3211(a)(7), dismissing the Fourth Counterclaim; and 3) pursuant to CPLR § 3024(b), striking paragraphs Eighty Three (83) to One Hundred Eighty Three (183) of the Verified Answer and Counterclaims as scandalous and prejudicial.

Defendants/Counterclaim Plaintiffs oppose the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. 1 to Robinson Aff. in Supp.) alleges as follows:

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[1] Plaintiffs/Third Party Defendants submitted a Revised Reply Affirmation which contains minor changes to paragraph 11.

[2] In their letter to the Court, Defendants/Counterclaim Plaintiffs ask the Court to disregard the reply papers. The Court, in its discretion, will consider those reply papers, as well as the arguments set forth in the February 11, 2011 correspondence.

Plaintiff Adam Slutsky ("Slutsky") is the President of Plaintiff AJS Agency, Inc. ("AJS"). Defendants Empire HealthChoice HMO, Inc., (f/k/a Empire Health Choice, Inc.) and Empire Health Choice Assurance, Inc. (collectively "Empire") are domestic corporations that are authorized to conduct a health insurance business in the State of New York.

Empire transacts business in Nassau County, New York under the name Empire Blue Cross Blue Shield. Plaintiffs also transact business in Nassau County, New York by producing insurance contracts in Nassau County for Nassau County residents. AJS and Slutsky are licensed agents for life, accident and health insurance, as well as certain annuities.

Prior to June 1, 2009, each Plaintiff entered into a written Insurance Producer Agreement ("Agreement") with Empire. The Agreements authorized each Plaintiff to, *inter alia*, procure prospective applicants for group insurance coverage and to receive commissions and other compensation from Empire as a result of accounts produced by Plaintiffs.

Empire issued a Healthy New York Small Group Health Insurance Contract ("Contract") to fourteen (14) small groups ("Accounts"), comprised of fewer than fifty (50) employees, secured by Plaintiffs. Plaintiffs received commissions and other compensation for these Accounts, pursuant to the Agreements.

On or about April 8, 2010, Empire mailed to each Plaintiff a Notice of Termination ("Notice") cancelling the Agreements effective immediately. The stated reason for the Notice was Plaintiffs' sale of policies to Accounts that Plaintiffs "knew or should have known were not legitimate"(Compl. at ¶ 18), and the Notice made reference to paragraph 8(G) of the Agreements which set forth the relevant basis for termination of the Agreements (*id.* at ¶ 19). The Complaint alleges that the Notices do not claim that Plaintiffs breached the Agreements, or any relevant rule or regulation. Plaintiffs affirm that, as of the date of the Notices, Empire owed Plaintiffs approximately forty thousand ($40,000.00) dollars in commissions.

The Complaint contains four (4) first causes of action: 1) breach of contract by Empire for improperly terminating the Agreements, 2) Empire's breach of the covenant to act in good faith, 3) malice by Empire in terminating the Agreements, and 4) a request for injunctive relief, directing Empire to withdraw the Notices.

In his Affidavit in Support, Slutsky, affirms the truth of the statements in the Affirmation in Support of his counsel. In his Affirmation in Support, counsel for Plaintiffs affirms as

follows:

In response to the Complaint, Defendants filed a Third Party Summons and Verified Answer and Counterclaims ("Defendants' Response") (Ex. 2 to Robinson Aff. in Supp.), which Plaintiffs' Counsel submits is a defective, unauthorized response to the Complaint that the Court should dismiss. Defendants' Response contains the following Counterclaims: 1) against AJS and Slutsky for breach of the Agreements by knowingly procuring applications for insurance coverage from companies and individuals who were not eligible for that coverage, 2) against AJS and Slutsky for breach of the covenant of good faith and fair dealing for failing to act in good faith and use their best efforts in connection with procuring applications pursuant to the Agreements, 3) against all counterclaim defendants for falsely representing to Empire that the companies named as counterclaim defendants, referred to collectively in the Counterclaims as the "Sham Small Group Companies" (Ds' Resp. at ¶ 83) and allegedly owned by AMS, were eligible to participate in the insurance program at issue, 4) against all counterclaim defendants for conspiracy to commit fraud for their alleged misrepresentations, and 5) against AJS and Slutsky for unjust enrichment in connection with commissions improperly earned pursuant to the Agreements.

Plaintiffs' Counsel submits that none of the Third Party Defendants has any corporate relationship to either of the Plaintiffs. Rather, Empire issued insurance policies to employees of the Corporate Third Party Defendants, which Accounts were procured by Plaintiffs, and benefitted financially by underwriting those policies.

In opposition, counsel for Empire, *inter alia*, 1) provides background regarding the Plaintiffs/Counterclaim Defendants, including facts on which Empire bases its counterclaims that the Counterclaim Defendants engaged in fraud; 2) outlines the circumstances under which the Notices were issued; and 3) provides the procedural history of the filing of the Complaint and Empire's responses.

C. The Parties' Positions

Plaintiffs/Counterclaim Defendants submit that Defendants' Response is not authorized pursuant to CPLR §§ 3011 and 1007, *inter alia*, in light of the fact that 1) the Third Party Defendants are not liable to Empire for all or part of the monies that Plaintiffs seek against the Defendants/Third Party Plaintiffs, and the Third Party Claims do not seek partial or full

contribution for Plaintiffs' claims against Empire; and 2) Defendants failed to include all prior pleadings when they served their Response.

Plaintiffs/Counterclaim Defendants submit, further, that the Fourth Counterclaim, alleging Conspiracy to Commit Fraud, should be dismissed because New York does not recognize a cause of action for civil conspiracy. Finally, Plaintiffs/ Counterclaim Defendants argue that the Court should strike all references to "Sham Small Group Companies," a "Scheme" to defraud Empire and certain other objectionable language.

Empire opposes the motion to strike its Response, contending that CPLR § 3019(a) authorizes a defendant to assert counterclaims against a plaintiff "and other persons alleged to be liable" which, in this action, includes Counterclaim Defendants Leonard Slutsky, Thomas R. Pombonyo and their fifteen corporations.

Empire also opposes the motion to dismiss the Fourth Counterclaim, arguing that this Counterclaim does not assert a claim for civil conspiracy, as argued by Plaintiffs, but rather alleges conspiracy to commit fraud, which is a well recognized cause of action.

Finally, Empire opposes Plaintiffs' motion to strike certain allegedly scandalous material from the Counterclaims, submitting that the allegations that the corporate entities so described are "'sham' companies that engaged in a scheme to defraud Empire" are "plainly relevant to Empire's counterclaims for fraud and conspiracy to commit fraud" (Empire Memorandum of Law in Opp. at p. 7).

In reply, Plaintiffs submit, *inter alia*, that there is no allegation that these Third Party Defendants caused any harm to Empire, or made misrepresentations on which Empire relied and, therefore, the fraud-based causes of action cannot stand. With respect to their motion to strike certain allegedly scandalous material, Plaintiffs note that the Third Party Plaintiffs have not alleged that the Third Party Defendants acted with a specific intent to injure Empire and, therefore, the objectionable language is not relevant to any cause of action and should be stricken. Moreover, the objectionable material is potentially prejudicial to a jury.

Empire, in response, submits, *inter alia*, that the Third Counterclaim alleges the elements of a fraud cause of action by alleging that 1) the Counterclaim Defendants knowingly misrepresented material facts to Empire, including that they were bona fide businesses that employed bona fide employees; 2) the Counterclaim Defendants intended that Empire would

rely on those representations in issuing insurance coverage; and 3) Empire relied on those misrepresentations to its detriment by paying commissions to Counterclaims Defendants to which they were not entitled.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Counterclaims

CPLR §§ 3019(a) and (d) provide as follows:

> (a) Subject of counterclaims. A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.
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> (d) Cause of action in counterclaim or cross-claim deemed in complaint. A cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint, except that separate process, trial or judgment may not be had unless the court so orders. Where a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim or cross-claim. Such defendant shall serve a reply or answer as if he or she were originally a party.

Professor Siegel addresses the procedural situation raised in the matter *sub judice* as follows:

> If D has a claim against P and some other person, X, who is not a party, the CPLR

> allows D to interpose the claim against P while simultaneously joining X as an adverse party on the claim. D just serves the answer containing the counterclaim on both P and X, but with the service on X accompanied by a summons and made by the usual methods of summons service [footnote omitted]. To take advantage of this permission to add X, the counterclaim should exist at least in part against P.
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> David Siegel, New York Practice, § 224 (4th ed.)

C. Motion to Strike Prejudicial Matter in Pleading

CPLR § 3024(b), titled "Scandalous or prejudicial matter," provides as follows:

> A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.

D. Fraud

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to reply upon it, 3) justifiable reliance of the other party on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence Real Estate,* 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007).

E. Conspiracy

Although New York does not recognize civil conspiracy to commit a tort as an independent cause of action, *Levin v. Kitsis*, 2011 N.Y. App. Div. LEXIS 2161 (2d Dept. 2011) ** 3, quoting *Dickinson v. Igoni*, 76 A.D.3d 943, 945 (2d Dept. 2010) and citing *Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969 (1986), a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme. *Id.*, quoting *Litras v. Litras*, 254 A.D.2d 395, 396 (2d Dept. 1998).

F. Application of these Principles to the Instant Action

The Court denies the motion of Plaintiffs/Counterclaim Defendants to dismiss the Third Party Summons, Verified Answer and Counterclaims. In so doing, the Court concludes that these claims were properly interposed against Plaintiffs and other persons alleged to be liable to Empire because the claims involve an allegedly improper scheme to obtain insurance. In essence, then, the claims lie "in some measure against [Plaintiffs/Counterclaim Defendants], or

otherwise so involve [Plaintiffs/Counterclaim Defendants] as to make it appropriate" to adjudicate these claims in the present action. Patrick T. Connors, Practice Commentaries to CPLR § 3019 at C3019:6 (2010).

In addition, the Court grants the motion of Plaintiffs/Counterclaim Defendants to strike the references in the Counterclaims to "Sham Small Group Companies" and directs that all references to that phrase in the Counterclaims shall be substituted with "Small Group Companies." The Court reaches this determination based on its conclusion that the use of the word "Sham" in this context is gratuitous and solely designed to inflame the reader or listener. *See Kinzer v. Bederman*, 59 A.D.3d 496 (2d Dept. 2009) (reversed lower court's denial of motion to strike language that was irrelevant to the viability of dental malpractice cause of action and prejudicial to defendants). The Court denies the remaining applications to strike, concluding that those references are appropriate in the context in which they appear.

Finally, the Court denies Plaintiffs' motion to dismiss the Fourth Counterclaim based on its conclusion that 1) Empire has alleged an actionable cause of action for fraud, based on the Counterclaim Defendants' alleged misrepresentations to Empire and procurement of insurance policies based on those misrepresentations; and 2) the Fourth Counterclaim properly alleges the existence of a conspiracy to connect the actions of the Counterclaim Defendants with the actionable cause of action for fraud, and establish that those actions were part of a common scheme.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on April 26, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
March 29, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.