

American Intl. Ins. Co. v Merchant's Mut. Ins. Co.

2011 NY Slip Op 33725(U)

June 28, 2011

Sup Ct, NY County

Docket Number: 110691/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHÉ
Justice

PART 10

AMERICAN INT. INS.

INDEX NO. 110691/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

- v -

MERCHANTS MUTUAL

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

PAPERS RECEIVED
JUN 27 2011
ORDER SECTION - RM 119A

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and preliminary conference scheduled for Aug 4, 2011 at 9:30 am

Dated: June 28, 2011

HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
AMERICAN INTERNATIONAL INSURANCE
COMPANY, as subrogee of PETER BLUM and
RITA BLUM, and as assignee of FIVE
STAR PAINTING CORP., DANIEL SPECTOR
and DANIEL MALDONADO,
Plaintiffs,

DECISION/ ORDER
Index No.: 110691/10
Seq. No.: 001

-against-

MERCHANT'S MUTUAL INSURANCE COMPANY
a/k/a MERCHANTS INSURANCE COMPANY OF
NEW HAMPSHIRE, INC., D.C. RANIERI
INSURANCE AGENCY and PAUL RANIERI,

Defendants.

PRESENT:
Hon. Judith J. Gische
J.S.C.

-----X
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Defs' n/m (3211) w/SCC, DPB affirm, exhs.	1
Pltfs' x/m (transfer) w/BJM affirm, exhs.	2
Defs' opp w/SCC affirm	3
Pltfs' reply w/BJM affirm	4

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

Defendants, D.C. Ranieri Insurance Agency and Paul Ranieri bring this motion to
dismiss the complaint based upon the expiration of the statute of limitations (CPLR §
3211[a][5]); failure to state a cause of action (CPLR § 3211[a][7]); and a defense
founded on documentary evidence (CPLR § 3211[a][1]). Ranieri seeks the pre-answer
dismissal of this action against it. Although Merchant's Mutual Insurance Company
a/k/a Merchants Insurance Company of New Hampshire, Inc. ("Merchants") has

answered the complaint, it takes no position on this motion. Plaintiffs oppose the motion and have cross-moved for an ordered transferring this action to the Supreme Court, Westchester County

Facts Presented and Arguments Considered

This action is essentially a dispute between insurance companies. Plaintiff American International Insurance Company (“American”) is the insurance company that provided a policy of insurance to Peter Blum and Rita Blum (“Blums”). There was a fire at the Blums’ residence (“premises”) on April 7, 2005 (“date of loss”) and there was extensive property damage, including the loss of valuable artwork apparently owned and/or maintained by their company called “Blumarts.” The Blums filed an insurance claim with American and, after adjusting the claim, American paid the Blums the sum of \$3,925,480.53, thereby becoming subrogated to the Blums’ property damage claim. The fire is alleged to have been caused by work performed for the Blums by Five Star Painting Corp. (“Five Star”), a company hired by the Blums to paint the exterior of the premises.

Litigation ensued in Westchester County against Five Star and its principals, Daniel Spector and Daniel Maldonado. The first action filed was by an insurance company not involved in the present dispute (Those Interested Underwriters v. Five Star Painting Corp., Supreme Court, Westchester Co., Index No. 6018/06). Later, American, as the Blums’ subrogee, brought an action against Five Star as well. Following motion practice, the action by Underwriters and American’s action were consolidated (hereinafter, “Westchester action”). Thereafter, Five Star commenced a third party action against Merchants Mutual Insurance Company a/k/a Merchants

Insurance Company of New Hampshire, Inc. ("Merchants"), D.C. Ranieri Insurance Company and Paul Ranieri. The third party action was for a declaratory judgment that Merchants is obligated to provide Five Star with a defense and indemnification in the Westchester action.

Paul Ranieri, doing business as D.C. Ranieri Insurance Agency ("Ranieri") is the insurance broker who obtained a policy of insurance for Five Star through Merchant. In addition to its claims against Merchant, Five Star alleged that Ranieri was negligent in its procurement of insurance because Ranieri obtained insurance that did not meet Five Star's needs. Ranieri brought a motion to have Five Star's third party action severed from the underlying consolidated negligence action in Westchester and the motion was granted. In his decision/order dated February 4, 2011 granting Ranieri's motion, Hon. Orazio R. Bellantoni wrote the following: "the third-party action is severed from the first-party personal injury¹ actions for purposes of discovery and trial. This matter is scheduled for a trial readiness conference on February 14, 2008..."

Since that decision, American settled its action against Five Star. They agreed that American would enter a money judgment against Five Star and that Five Star and its principals would assign all their rights and causes of action against Merchants and Ranieri to American (Stipulation and Assignment of Rights 7/7/09). A money judgment was entered against Five Star on August 25, 2009 in the total amount of \$5,427,557.03 reflecting unpaid principal, interest, costs and disbursements. The net effect of this agreement is that American can proceed to seek recovery of the money it paid the

¹Possibly, this is a typographical error since the underlying action was for property damage.

Blums directly from Five Star's insurer and the broker, rather than having to pursue its subrogated claim against Five Star.

The action at bar was commenced by American on August 10, 2010. American has asserted three claims against Merchant and Ranieri. The 1st and 3rd causes of action are against Merchants only and they are not the subject of the within motion. The 2nd cause of action, for "breach of contract, breach of fiduciary duty, and negligence" is, however, asserted against Ranieri. Ranieri argues that this cause of action should be dismissed as time barred and, because American has not stated a cause of action and there is documentary evidence warranting such dismissal (Judge Bellantoni's decision in the Westchester action).

In this action, American alleges – just as did Five Star in the Westchester action – that Merchant owed Five Star a defense and indemnification in the underlying property damage action, because Five Star was insured by Merchants under a policy effective that was April 23, 2004 through April 23, 2005 [Policy No CCP9136545], encompassing the date of the fire at the Blums' residence. Thus, essentially American's argument is that it paid the claim for which Five Star's insurance company was actually responsible for.

In this action, American also alleges – as did Five Star in the Westchester action– that Ranieri represented itself to have "extensive experience as an insurance broker, leading [Five Star] to believe that [Ranieri] was capable of competently advising [Five Star] on its insurance needs" but then on "June 29, 2005 [Five Star] was advised that [Merchants] denied coverage and would not defend [nor] indemnify [Five Star]." Thus, according to American, Merchants' denial of coverage is proof that Ranieri

breached its contract with Five Star to obtain insurance for its benefit, evidence of negligence and a breach of its fiduciary duty.

Ranieri argues that the complaint against it should be dismissed because, based upon the applicable statute of limitations (6 years), this action is time barred since it had to have been commenced no later than April 23, 2010. This argument is based upon the commencement date of the Merchant insurance policy issued to Five Star in April 2004. Alternatively, and somewhat confusingly, Ranieri alleges that this action is time barred because Five Star's cause of action against it accrued in June 2004 because of the following events:

Merchant terminated Five Star's coverage on June 14, 2004, because Five Star allegedly made false material representations in its application about its business. The next day, however, Five Star sent Merchants a letter dated June 15th stating "please be advised that we no longer do exterior painting. Please reinstate the policy effective 06/16/04." Merchants complied and reissued the policy. Thus, according to Ranieri, Five Star's (and, therefore, American's) cause of action against it, if any, accrued on June 15, 2004, the date on which Five Star made material misrepresentations to Merchant.

Ranieri argues that defendants' negligence based claims are also time barred as well, since the applicable three (3) year statute of limitations expired either April 23, 2010 or June 15, 2010.

Ranieri argues that American has not stated a cause of action for breach of fiduciary duty because an insurance agent or broker is not a fiduciary and therefore, Ranieri did not owe Five Star a fiduciary duty. Alternatively, Ranieri claims this is time

barred as well because a three (3) statute of limitations applies.

American opposes Ranieri's motion on the basis that this action was timely commenced. According to American, its cause of action against Ranieri for "breach of contract, negligence and breach of fiduciary duty" accrued on April 7, 2005, the date of the fire. Alternatively, and in its cross motion, American argues this case was timely commenced because the third party action in Westchester county was timely brought before the statute of limitations before for any of Five Star's claims expired. Though preferring that this case remain in New York County, American argues that this case should not be dismissed but, if the court is inclined, transferred to Westchester county for consolidation with the 3rd party action that was severed.

Discussion

Regardless of which subsection of CPLR 3211[a] a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]).

Defendants' motion is based upon documentary evidence, expiration of the applicable statute of limitations and failure to state a cause of action (CPLR §§ 3211 [a] 1, 5, and 7). To the extent that defendants also request that the court consider this a pre-answer motion for summary judgment pursuant to CPLR § 3211 [c], the motion is denied. This branch of the motion is not addressed in Ranieri's papers (the request is only set forth in the notice provision) and there can be no summary judgment until issue has been joined (CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 [1st

Dept. 1982]).

The first issue to be decided by the court is whether this action is time barred. This necessitates not only looking at the facts in the complaint of the action at bar, but also the decision of Judge Bellantoni and the status of the Westchester action. Examining the Supreme Court Records On-line Library ("SCOLL") which is the court's official database, reveals that the Westchester action was marked "settled" and "final disposition" by the court on September 9, 2009. Though Judge Bellantoni ordered the third party action severed, the third party plaintiff (i.e. Five Star) did nothing to bring its action to fruition by, for example, purchasing an RJI, thereby obtaining a separate index number for it, or having the case restored to any calendar so the dispute could be scheduled for trial – despite the passage of more than 3 years since Judge Bellantoni's decision. Since the principal action was settled and the third party action was never pursued, there is no presently active action in Westchester county by Five Star for defense and indemnification².

Furthermore, as the plaintiff to which Five Star assigned its claims, American made a decision to commence this action against Merchants and Ranieri in New York county. American has presented no explanation for why it did so, if it believed that there was still an active case in Westchester and the two cases belonged together. Therefore, American's cross motion to have this case transferred to Westchester county is denied.

Any claim by American that this action is timely because the Westchester action

²This court takes no position on whether the severed Westchester action can be restored by the assignee of the third party plaintiff at this late date.

was commenced timely within the applicable statute of limitations, muddles what the relation back principle is. The principle of “relation back” involves an amended pleading and provides that an amended pleading relates back to the time of the claim in the original pleading where the original pleading gives notice of the occurrence or transaction to be proved by the amended pleading (see, Pendleton v. City of New York, 44 A.D.3d 733 [2nd Dept 2007]). This legal principle is completely inapplicable to the facts of this case and not a basis to deny defendants’ motion to dismiss.

Ranieri also presents some confusing (and confused) legal arguments of its own. Regardless of how styled, one aspect of American’s claim against Ranieri is for negligent procurement of insurance, even though American styles or identifies it as a “breach of contract” cause of action which has a longer statute of limitations. The statute of limitations for a negligent procurement of insurance claim is three (3) years from the issuance of the coverage (see, Morse Diesel International v. CNA Insurance, 272 AD2d 455 [2nd Dept. 2000]; Mauro v. Nieman Agency Inc., 303 AD2d 468 [2nd Dept 2003]; Capelli v. Berkshire Life Insurance Co., 276 AD2d 458 [2nd Dept., 2000]). Since Merchants issued the policy at issue in April 2004, American’s claim against Ranieri for negligent procurement of insurance is time barred. Even were the court persuaded by Ranieri’s argument that Five Star’s claim accrued on June 15, 2004, that argument is unhelpful for reasons made clearer later in this decision.

American has failed to state a claim for breach of contract, but even if it has, this claim is also time barred. Ranieri did, in fact, obtain insurance coverage for Five Star. Although Merchant later terminated the policy it had issued upon learning about an (alleged) material misrepresentation in Five Star’s application, Ranieri fulfilled its

obligation to its customer. Even if it did breach its contract to obtain insurance coverage for Five Star, the statute of limitations applicable to a breach of contract action is six (6) years from the date of the breach (CPLR § 213[2]). The breach of contract accrues when the insurance broker first fails to obtain the requested insurance (St. George Hotel Associates v. Shurkin, 12 A.D.3d 359 [2nd Dept 2004]). Therefore, the operative date for the breach of contract action against Ranieri is April 23, 2004. Applying the six (6) year statute of limitations, this action time barred. American's argument, that its cause of action for breach of contract accrued on the date of the fire (i.e. the date of loss) is incorrect and blurs the line distinguishing tort and contract claims. A claim for breach of contract does not accrue when a plaintiff learns of the breach or sustains damages - - unless there is fraud - - and no fraud is alleged by American in its complaint (City School District of City of Newburgh v. Hugh Stubbins & Associates, 85 N.Y.2d 535 [1995]; Ely-Cruikshank Co., Inc. v. Bank of Montreal, 81 N.Y.2d 399 [1993]).

An insurance agent has a common-law duty to obtain requested coverage, but not a continuing duty to advise, guide or direct a client based on a special relationship of trust and confidence (Murphy v. Kuhn, 90 N.Y.2d 266, 273 [1997]). Consequently, American's allegation, that Ranieri breached its common-law duty to obtain the requested insurance coverage, sets forth a claim in tort which requires the application of a three (3) year limitations period (see Santiago v 1370 Broadway Assoc., 96 NY2d 765, 766 [2001]; Chase Scientific Research v NIA Group, 96 NY2d 20, 30 [2001]). The negligence cause of action accrued when Merchants disclaimed coverage and refused to provide Five Star with defense, as this is the date on which "all elements of the tort

can be truthfully alleged in a complaint" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]). Five Star had no claim for damages until coverage was disclaimed in June 2005 (Lavandier v. Landmark Insurance Co., 26 AD3d 264 [1st Dept 2006]). Thus, applying the applicable three (3) year statute of limitations (CPLR § 214 [4]), American's negligence claim is also time barred.

A separate claim by American is for breach of fiduciary duty. While in certain extraordinary circumstances an insurance agent may, through its conduct or by express or implied contract with its customers and clients, assume or acquire duties in addition to those fixed at common law, as a general matter, an insurance broker is not a fiduciary and owes not fiduciary duty to its clients or customers (see, Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 N.Y.3d 152 [2006]; Murphy v. Kuhn, supra; Busker on The Roof Ltd. Partnership Co. v. Warrington, 283 A.D.2d 376 [1st Dept 2001]).

Affording the complaint a liberal construction, it appears that Ranieri only assured Five Star that the insurance provided by Merchant would meet its needs. There are no facts tending to show that Five Star expected, or that Ranieri provided, any exceptional services thereby establishing a fiduciary relationship (Id.; Busker on The Roof Ltd. Partnership Co. v. Warrington, supra). Therefore, American's breach of fiduciary claim must be dismissed as well.

Since none of American's claims against the Ranieri defendants survive their motion to dismiss, all the claims asserted by plaintiffs against D.C. Ranieri Insurance Agency and Paul Ranieri are hereby severed and dismissed. The action continues as to the remaining defendants in New York County.

Conclusion

In accordance with the foregoing,

It is hereby,

ORDERED that the motion by defendants D.C. Ranieri Insurance Agency and Paul Ranieri for the pre-answer dismissal of the complaint against them is granted; and it is further

ORDERED that plaintiffs' cross-motion is denied; and it is further\

ORDERED that the clerk shall enter judgment in favor of defendants D.C. Ranieri Insurance Agency and Paul Ranieri against plaintiffs dismissing this action against them; and it is further

ORDERED that this action shall continue as to the other defendants to this action who have not moved; and it is further

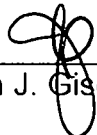
ORDERED that since Merchants has appeared in this action and answered, it is appropriate that a preliminary conference take place; it will be held on **August 4, 2011** at 9:30 a.m. in Part 10, Room 519 at 60 Centre Street; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
 June 28, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.