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

PART 3

Index Number : 601222/2010

46TH STREET DEVELOPMENT, LLC

vs.

MARSH USA INC.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 601222/10

MOTION DATE 5/23/11

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	2
Replying Affidavits _____	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying memorandum decision.

Dated: 8-15-11

_____ J.S.C.

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

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 3

----------X

46th STREET DEVELOPMENT, LLC,

Plaintiff,

- against -

MARSH USA INC.,

Defendant.

----------X

Index No. 601222/10
Motion Date: 5/23/11
Mot. Seq. No.: 001

BRANSTEN, J.:

Defendant Marsh USA Inc. moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Alternatively, defendant moves, pursuant to CPLR 3126, for an order dismissing the complaint with prejudice as a sanction for willful inclusion of false material in the complaint, or for an order compelling plaintiff to amend the complaint.

Background

Defendant is an insurance broker. Defendant procured two builder's risk insurance policies covering plaintiff 46th Street Development, LLC's construction of a luxury condominium building (the "Project"). The dispute in this case is whether plaintiff instructed defendant to obtain a certain kind of insurance.

Prior to August 2006, plaintiff allegedly advised defendant that the insurance it required must indemnify plaintiff in the event of occurrences that delayed plaintiff's receipt of temporary certificates of occupancy ("TCOs") for condominium units at the Project. Plaintiff alleges that the receipt of TCOs is vital because the sale of units cannot not be closed without them.

On March 29, 2008, a fire occurred at the Project's construction site. The fire caused a delay in plaintiff's receipt of TCOs for condominium units and in plaintiff's closing on sold units.

Insurance coverage was provided for the delay that the fire caused in completing the Project. Coverage was denied for the delay in obtaining TCOs for individual condominium units. Plaintiff thus commenced this action to recover $1.19 million, allegedly the difference between the insurance payment which plaintiff received and the payment Plaintiff would have received if the insurance had paid for the delay in receiving TCOs. Plaintiff asserts causes of action for breach of contract, breach of fiduciary duty and negligence.

Defendant contends that it procured insurance according to plaintiff's instructions. Defendant argues that it was not told to procure insurance coverage that covered delays in obtaining TCOs. The complaint does not specify how plaintiff allegedly advised defendant to obtain TCO insurance. Thus, after Defendant answered the complaint, it posited interrogatories and document requests seeking to discover how plaintiff had requested defendant to procure TCO coverage.

Plaintiff responded to defendant's fourth interrogatory by stating that before August 2006, plaintiff provided defendant with, inter alia, a Construction Schedule that included the dates by which plaintiff expected to receive the TCOs for the condominium units. Plaintiff apparently contends that upon this basis it relied on defendant's expertise in the insurance industry, and expected to be fully indemnified as regards losses connected with the TCOs. Affidavit of Allen Goldman in Opposition to Defendant's Motion Dismissing Plaintiff's Verified Complaint ("Rosen Aff."), Ex. K, p. 6.

Plaintiff's response to the interrogatory further states that defendant forwarded the construction schedule to two prospective insurers. According to plaintiff, defendant thus acknowledged the critical importance of the TCO schedule. Plaintiff alleges that defendant promised to obtain the requested insurance and later represented that it had done so. Plaintiff argues that Defendant neglected to inform plaintiff that the insurance it obtained did not provide the allegedly requested TCO coverage. Plaintiff does state in its answer that it directly requested coverage for TCO delay.

Allen Goldman, a member of plaintiff, states that plaintiff is associated with SJP Properties ("SJP"). Goldman asserts that defendant acted as SJP's insurance consultant and broker for more than ten years before defendant provided the policies at issue here, and that defendant previously advised and guided SJP on proper insurance coverage for numerous construction projects. Goldman Aff., ¶ 3. Goldman makes no statements as to if or how defendant advised SJP on TCO-delay coverage.

Defendant contends that the complaint fails to state a cause of action and that plaintiff's responses to defendant's interrogatories contradicts the allegations in the complaint. Plaintiff states that it has alleged enough facts to withstand defendant's motion to dismiss the complaint.

Analysis

On a motion pursuant to CPLR 3211 (a) (7), the court presumes that the allegations in the complaint are true and accords them every favorable inference. *WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259 (1st Dep't 1992). The court determines only whether the facts as alleged fit within any cognizable legal theory, (*Leon v. Martinez,* 84 N.Y.2d 83, 87-88 [1994]) and

does not inquire whether the plaintiff can ultimately establish its allegations. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). Nonetheless, the presumption of truth does not operate where the factual claims are inherently incredible. *Beattie v. Brown & Wood,* 243 A.D.2d 395, 395 (1st Dep't 1997). To survive a motion to dismiss, the complaint must not consist of mere conclusory assertions of the alleged wrong and must allege facts in support of the causes of action. *Kamhi v. Tay,* 244 A.D.2d 266, 266 (1st Dep't 1997); *Caniglia v. Chicago Tribune–New York News Syndicate Inc.,* 204 A.D.2d 233, 233 (1st Dep't 1994).

"Generally, the law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so ...." *Murphy v. Kuhn,* 90 NY2d 266, 270 (1997). An insurance broker bears no continuing duty to advise, guide, or direct a client to obtain additional coverage, unless the insurance broker's client makes a specific request for coverage not already in its policy or there exists a special relationship between broker and client. *Id.*

A broker's common-law duty (where no special relationship exists) is defined by the nature of the client's request. The oft-stated requirement is that the client must make a "specific request" for a certain type of coverage; a general request is not sufficient to inform the broker of the client's wishes. *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 157-158 (2006); *American Bldg. Supply Corp. v. Petrocelli Group*, 81 A.D.3d 531, 531 (1st Dep't 2011); *Hersch v. DeWitt Stern Group, Inc.,* 43 A.D.3d 644, 646 (1st Dep't 2011). A request for the "best and most comprehensive coverage" is not a specific request. *L.C.E.L. Collectibles, Inc. v. American Ins. Co.,* 228 A.D.2d 196, 197 (1st Dep't 1996). Also insufficient is a request for a "top of the line" policy that will "fully" cover the clients. *Chaim v. Benedict,* 216 A.D.2d 347, 347 (2d Dep't 1995).

The complaint provides only plaintiff's bare allegation in support for its claim that the Construction Schedule constitutes a specific request. Neither the affidavit nor the interrogatory response, *supra*, provide further support. Plaintiff does not allege that defendant was directed to take note of any part of the Schedule, that defendant noticed the part about the TCOs, or that plaintiff or SJP ever advised defendant of their insurance requirements via a Construction Schedule (assuming that the terms of the relationship between SJP and defendant, as alleged by plaintiff, could extend to plaintiff). Plaintiff says nothing about any communication with defendant that involved TCOs. Plaintiff merely states that defendant advised it that defendant had procured the proper insurance. Plaintiff's allegation is vague and is insufficient to support a claim that defendant informed plaintiff that defendant procured TCO insurance.

While affidavits opposing a defendant's motion to dismiss may serve to correct or amplify the allegations in the complaint, such submissions may also demonstrate that the plaintiff has no cause of action. *Held v. Kaufman,* 91 N.Y.2d 425, 430 (1998), citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976). Plaintiff's affidavits do not make up for the deficiency in the complaint and fail to show that plaintiff made a specific request for TCO-delay coverage. Without a specific request, defendant had no duty to procure the TCO insurance. Therefore, plaintiff cannot maintain causes of action for negligence and breach of contract. *See Hersch,* 43 A.D.3d at 645.

In addition, the presumption that a policy holder has read and understood a duly issued policy of insurance precludes recovery. *American,* 81 A.D.3d at 532; *cf. Cunningham v. Insurance Co. of N. Am.*, 521 F. Supp. 2d 166, 175-176 (E.D.N.Y. 2006). Although the policy holder can overcome the presumption by sufficiently alleging wrongful conduct on the part of the broker, no such allegation is made here. *See American,* 81 A.D.3d at 532.

Breach of Fiduciary Duty

The court must reach the same conclusion as to plaintiff's claim for breach of fiduciary duty. Absent a special relationship between an insured and its broker, a claim for breach of fiduciary duty does not lie. *Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 A.D.3d 865, 867 (1st Dep't 2009). Where a special relationship exists, the broker's duty goes beyond procuring insurance; it has a duty to advise and guide. *Murphy*, 90 N.Y.2d at 273. Under *Murphy*, three circumstances that may give rise to a special relationship: (1) the client pays the agent for consultation apart from paying the premiums; (2) the client and the broker have some interaction regarding coverage, with the insured relying on the expertise of the broker; or (3) 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. *Id.* at 272. Plaintiff does not allege any of these bases for a special relationship.

The complaint fails to state a cause of action, under CPLR 3211 (a) (7). There is no need for the court to consider defendant's statute of limitations or other arguments.

(Order on following page.)

ORDER

Accordingly, it is

ORDERED that the part of the motion by defendant Marsh USA Inc. to dismiss the complaint pursuant to CPLR 3211 (a) (7) is granted and the complaint is hereby dismissed in its entirety with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly, and the rest of said defendant's motion is denied.

Dated: New York, New York
August 15, 2011

ENTER

Hon. Eileen Bransten