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SHORT FORM ORDER

INDEX No. 09-7651
CAL No. 12-01847-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4/9/13 (#010)
MOTION DATE 4/23/13 (#008, #009 & #011)
MOTION DATE 7/9/13 (#012)
ADJ. DATE 8/6/13
Mot. Seq. #008 - MD
Mot. Seq. #009 - MD
Mot. Seq. #010 - MD
Mot. Seq. #011 - MD
Mot. Seq. #012 - MD

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THE LEXINGTON VILLAGE CONDOMINIUM, individually and on behalf of all unit owners in Building #5,

Plaintiff,

- against -

SCOTTSDALE INSURANCE COMPANY, BAGATTA ASSOCIATES, INC., INSURANCE INTERMEDIARIES, INC., OVERLAND SOLUTIONS, INC. d/b/a SAFETY RESOURCES, and LIMS, INC.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant Insurance Intermediaries, Inc., dated March 13, 2013, and supporting papers (including Memorandum of Law); (2) Notice of Motion by defendant Overland Solutions, Inc., dated March 15, 2013, and supporting papers (including Memorandum of Law); (3) Notice of Motion by defendant Scottsdale Insurance Company, dated March 14, 2013, and supporting papers; (4) Notice of Motion by defendant LIMS, Inc., dated March 13, 2013, and supporting papers (including Memorandum of Law); (5) Notice of "Cross-Motion" by the plaintiff, dated June 24, 2013, and supporting papers; (6) Affidavit in Opposition by defendant Overland Solutions, Inc., dated April 16, 2013, and supporting papers (including Memorandum of Law; #008); (7) Affirmation in Partial Opposition by defendant Bagatta Associates, Inc., dated June 24, 2013, and supporting papers (#008); (8) Affirmation in Opposition by defendant Bagatta Associates, Inc., dated June 24, 2013, and supporting papers (#009); (9) Affirmation in Partial Opposition by defendant Bagatta Associates, Inc., dated June 24, 2013, and supporting papers (#011); (10) Affirmation in Partial Opposition by defendant Bagatta Associates, Inc., dated July 12, 2013, and supporting papers (#012); (11) Memorandum of Law in Opposition by the plaintiff, dated June 24, 2013 (#008); (12) Memorandum of Law in Opposition by the plaintiff, dated June 24, 2013 (#009); (13) Memorandum of Law in Opposition by the plaintiff, dated June 24, 2013 (#010); (14) Memorandum of Law in Opposition by the plaintiff, dated June 24, 2013 (#011); (15) Reply Affirmation by defendant Insurance Intermediaries, Inc., dated July 11, 2013, and supporting papers; (16) Reply Affirmation by defendant Insurance Intermediaries, Inc., dated July 12, 2013, and supporting papers; (17) Reply Affirmation by defendant Insurance Intermediaries, Inc., dated July 16, 2013, and supporting papers (including Reply Memorandum of Law); (18) Reply Memorandum of Law by defendant Overland Solutions, Inc., dated July 18, 2013, and supporting papers; (19) Reply Affirmation by defendant Scottsdale Insurance Company, dated July 19, 2013, and supporting papers; and (20) Reply Memorandum of Law by defendant LIMS, Inc., dated July 17, 2013, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Insurance Intermediaries, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against it, and in its favor on its cross claims against defendants Bagatta Associates, Inc. and Overland Solutions, Inc. d/b/a Safety Resources, is denied; and it is further

ORDERED that the motion by defendant Overland Solutions, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing all claims against it, is denied; and it is further

ORDERED that the motion by defendant Scottsdale Insurance Company for an order pursuant to CPLR 3212, granting summary judgment dismissing all claims against it, is denied; and it is further

ORDERED that the motion by defendant LIMS, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against it, or, alternatively, in its favor on its cross claim for common-law indemnification against defendant Bagatta Associates, Inc., is denied; and it is further

ORDERED that the motion by the plaintiff (incorrectly denominated as a cross motion; *see* ***Mango v Long Is. Jewish-Hillside Med. Ctr.***, 123 AD2d 843, 507 NYS2d 456 [1986]) for an order

pursuant to CPLR 3212, granting summary judgment in its favor and against the defendants on the issue of liability, is denied as untimely.

This is an action to recover damages arising out of a fire on March 1, 2008 which destroyed Building #5 at the Lexington Village Condominium in Bay Shore, New York.

The salient facts are largely undisputed. The plaintiff is the owner of the condominium complex. LIMS, Inc. is the managing agent for the property. Pursuant to paragraph THIRD (S) of the management agreement, LIMS was obligated to place and keep in force all types of insurance coverage required by law, subject to the approval of the plaintiff's board of managers.

> THIRD: Under the direct supervision of one of its principal officers, the MANAGEMENT COMPANY shall render management services and perform management duties as follows:
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> (S) When authorized by the BOARD, cause to be reviewed annually by an insurance consultant named by the BOARD, place and keep in force, all forms of insurance required by law or as needed to adequately protect the BOARD, and its BOARD as their respective interest appear, including, but not limited to, workers' compensation, public liability and Officers and Directors liability insurance. Results of the annual review of insurance shall be forwarded to the BOARD in writing. All of the various types of insurance required shall, with the approval of the BOARD, be placed with such companies, in such amounts and with such beneficial interest, as shall be acceptable to the BOARD.

In 2002, the plaintiff, through LIMS, contacted Bagatta Associates, Inc. ("Bagatta"), an insurance broker, and requested quotes for commercial property insurance. At that time, LIMS provided Bagatta with a copy of the plaintiff's offering plan. Bagatta subsequently obtained a quote from Harleysville Insurance Company ("Harleysville") and coverage was placed with Harleysville in or about July 2002. Coverage was then renewed on an annual basis each year until 2007 when, following an October 2006 fire at the property, Harleysville advised of its intention not to renew the policy. In or about July 2007, Bagatta submitted an application for replacement coverage to Scottsdale Insurance Company ("Scottsdale"). The application was submitted through Insurance Intermediaries, Inc. ("III"), the brokerage division of Nationwide Insurance Company ("Nationwide") which acts as a general agent for Scottsdale. As the result of an error dating back to the 2002 application for insurance and perpetuated every year thereafter, the application misstated the square footage of each of the buildings on the property; according to Bagatta, the error was its failure to multiply by two the square footages reported in the offering plan, which did not list the total area of each building but rather the area of each building *by floor*. Coverage was bound on July 22, 2007 and the policy was issued effective that date. At or about the same time, III contacted representatives at Overland Solutions, Inc. d/b/a Safety Resources ("Overland"), which provides a variety of property inspection services, to conduct a survey of the property. According to

Overland, the survey was conducted on August 1, 2007, and Overland's inspection report was subsequently transmitted to III. On March 1, 2008, during the policy period, the property was severely damaged by fire. Upon the ensuing investigation, not only was Bagatta's error revealed but it was also determined that Overland's survey had even more egregiously understated the square footage of the buildings, including Building #5. Since the property was underinsured, and after assessing a co-insurance penalty, Scottsdale paid a total of $528,919.68 for the loss to Building #5, which the plaintiff claims is significantly less than 50% of its true replacement value.

The plaintiff pleads five causes of action in its complaint, all of which ostensibly sound in breach of contract, negligence, or both. The first is against Scottsdale; the plaintiff alleges that Scottsdale failed to pay for the full replacement value of the damaged property as required under the policy. The second is against Bagatta; the plaintiff alleges that Bagatta failed to provide accurate underwriting information to Scottsdale in that it failed to list the proper square footage of Building #5 and, as a result, that the plaintiff's property was not fully insured within the meaning of the policy's co-insurance clause. The third is against III; the plaintiff alleges that III failed to confirm the information provided by Bagatta. The fourth is against Overland; the plaintiff alleges that Overland likewise failed to confirm the information provided by Bagatta. The fifth is against LIMS; the plaintiff alleges that LIMS failed to submit accurate information to Scottsdale and breached its contractual duty to keep the property fully insured against fire loss. As to each cause of action, the plaintiff seeks damages of at least $1,325,082.44, representing the full replacement value of the damaged property, plus consequential damages in the amount of $5 million resulting from nonpayment of the claim.

In their respective answers, III pleads cross claims for contribution, common-law indemnification, and contractual indemnification against Bagatta, Overland, and LIMS, LIMS pleads cross claims for contribution, common-law indemnification, and contractual indemnification against each of its codefendants, and Scottsdale pleads cross claims for contribution and contractual indemnification against Bagatta, Overland, and LIMS. Scottsdale also pleads a counterclaim for judgment declaring that it is not obligated to defend or indemnify the plaintiff in connection with the loss at issue in this action. Bagatta and Overland do not plead any cross claims or counterclaims.

Now, discovery having been completed and a note of issue having been filed, each of the parties (except for Bagatta) separately moves for summary judgment.

III's motion is denied. Rather than address the question whether it owed a duty of care to the plaintiff and, if so, the nature and scope of that duty, III contends that it cannot be held liable to the plaintiff because fault for Building #5 being underinsured lies solely with Bagatta, Overland, or both. Assuming, for purposes of this motion, that III may be found to owe a duty of care to the plaintiff, *e.g.*, to verify the information contained in the 2007 application for insurance, the court is unable to conclude that III's negligence, if any, was not a substantial factor in causing the plaintiff's damages. While the duty of an insurance agent at common law is generally quite limited, "[e]xceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law" (***Murphy v Kuhn***, 90 NY2d 266, 272, 660 NYS2d 371, 374 [1997]). To the extent III seeks summary

judgment in its favor on its cross claims for common-law indemnification, it is not entitled to such relief, as it failed to establish prima facie that it was not actively negligent. Common-law indemnity "runs only in favor of a party not actively at fault against a party actively at fault" (***Colyer v K Mart Corp.***, 273 AD2d 809, 811, 709 NYS2d 758, 760 [2000]), and summary judgment on such a claim "is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (***La Lima v Epstein***, 143 AD2d 886, 888, 533 NYS2d 399, 401 [1988]). Nor, contrary to III's claim, does Scottsdale's partial payment for the loss operate to absolve III from liability for its own negligence, if any. As to III's further claim that consequential damages are unwarranted because Scottsdale adjusted the loss in good faith and because III is not an insurer, the court disagrees, noting that the plaintiff may recover lost profits if it is ultimately determined that III's conduct amounted to gross negligence (*see* ***Sanwep Rest. Corp. v Consolidated Edison Co. of N.Y.***, 204 AD2d 71, 611 NYS2d 177 [1994]; ***Levine v American Fed. Group***, 180 AD2d 575, 580 NYS2d 287 [1992]).

Overland's motion is likewise denied. Overland contends, in principal part, that no one relied on its inspection report, however inaccurate it may have been–rather, by the time it was prepared, other parties had determined the value of the property and stated its square footage, coverage had already been bound, and the policy had already been issued–so that even if it were negligent, its negligence was not a proximate cause of the plaintiff's loss. But evidence in the record suggests otherwise. According to the deposition transcript of Christina Marie Kaufman, a commercial underwriter employed by Nationwide, she testified that she reviewed the inspection report after it was provided to III, that her review consisted of comparing the information in the inspection report with the information in the insurance application, including the square footage of the buildings, and that because the square-footage numbers listed in the application were larger than those listed in the inspection, she determined that the property was adequately insured, *i.e.*, within the (90%) co-insurance percentage stated in the policy. She also testified that, had it been revealed in the inspection report that the square footage was, in actuality, far greater than the square footage listed in the application, III either would have endorsed the policy to reflect the appropriate coverages and additional premiums or would have sent out a notice of cancellation. Accordingly, there remains a triable issue of fact, sufficient to defeat summary judgment, whether Overland's negligence, if any, was a substantial factor in causing the plaintiff's damages. A defendant's negligence does not have to be the sole cause of the injury, but merely a substantial factor in bringing it about (*e.g.* ***DeBartolo v Coccia***, 276 AD2d 663, 714 NYS2d 742 [2000]). As to Overland's claim that the loss might have been avoided had the plaintiff or LIMS taken the time to read the policy, it suffices to note that an insured's failure to read its policy may give rise to a defense of comparative negligence but is not a superseding cause precluding liability as a matter of law (***American Bldg. Supply Corp. v Petrocelli Group***, 19 NY3d 730, 955 NYS2d 854 [2012]; ***Reilly v Progressive Ins. Co.***, 288 AD2d 365, 733 NYS2d 220 [2001]). And while Overland claims entitlement to summary judgment on the plaintiff's claim for "punitive damages," it does not appear upon review of the complaint that the plaintiff seeks such damages.

Scottsdale's motion is denied. In response to Scottsdale's prima facie showing that it paid the proceeds due under the policy, the plaintiff contends that the policy should be reformed by reason of a mutual mistake, *i.e.*, a belief that the property was insured above the co-insurance requirement. A written agreement may be reformed for mutual mistake if it does not accurately express the parties'

agreement (***Chimart Assoc. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]), although a court cannot under the guise of reformation make a new contract for the parties (***North Atl. Life Ins. Co. of Am. v Rothman***, 151 AD2d 731, 542 NYS2d 795 [1989]). Typically, reformation is granted in cases involving property insurance to correct mistakes in identifying the actual insureds (*see e.g.* ***Court Tobacco Stores v Great E. Ins. Co.***, 43 AD2d 561, 349 NYS2d 8 [1973]) or the address of the insured property (*see* ***Abulaynain v New York Merchant Bakers Mut. Fire Ins. Co.***, 128 AD2d 575, 513 NYS2d 5 [1987]), so long as the property itself is otherwise properly described. There is also, however, limited appellate support for allowing reformation in property insurance cases where, as here, the insured's property is not as described in the policy but the insurer has not shown that it would not have insured the property had it known the true facts (***Testa v Utica Fire Ins. Co.***, 203 AD2d 357, 610 NYS2d 85 [1994]). In ***Testa***, the Appellate Division affirmed an order denying the insurer's motion for summary judgment, noting that reformation of a fire insurance policy might be permitted notwithstanding the insured's failure to reveal that the property did not have a sprinkler where the insurer's senior vice president admitted that for a higher premium the insurer would have issued coverage for the property without a sprinkler system. Thus, while the court acknowledges it would be affecting the risk–and, effectively, rewriting the policy–by "correcting" the mistake in the manner requested by the plaintiff, it is constrained to find a triable issue of fact whether the policy was issued under a mutual mistake regarding the description of the property.

LIMS's motion is also denied. LIMS rests its claim for summary judgment on the argument that all it did was to put the plaintiff's board of managers in contact with Bagatta in 2002 and to provide Bagatta at that time a copy of the offering plan; consequently, it contends that there is no causative link between it and the erroneous square-foot number reported for Building #5. It is the plaintiff's claim, however, that LIMS breached a contractual duty to keep the property adequately insured. While LIMS contends that it was the responsibility of the insurance broker, not LIMS, to obtain proper insurance, this is not borne out on review of the management agreement. Indeed, it cannot be said–much less determined as a matter of law–that paragraph THIRD (S) even authorizes LIMS to employ a broker to place insurance policies and keep them in force; contrary to its contention, the reference to "insurance consultant" in that paragraph appears to pertain to the performance of an annual review of insurance, not to the placement of insurance. Even if such responsibility were validly delegated to Bagatta, LIMS might be liable to the plaintiff on the theory that an agent is generally responsible to its principal for the conduct of a subagent with reference to the principal's affairs entrusted to the subagent (Restatement [Second] of Agency §§ 5, 406, as cited in ***Whalen v DeGraff, Foy, Conway, Holt-Harris & Mealey***, 53 AD3d 912, 863 NYS2d 100, *lv dismissed* 11 NY3d 885, 873 NYS2d 258 [2008]; *accord* ***Demian, Ltd. v Charles A. Frank Assoc.***, 671 F2d 720 [2d Cir 1982]). And again, since the plaintiff seeks to hold LIMS accountable for its own alleged wrongdoing, LIMS's request for common-law indemnification is at best premature (*see* ***Nesterczuk v Goldin Mgt.***, 77 AD3d 800, 911 NYS2d 367 [2010]).

The plaintiff's motion is denied as well. Pursuant to CPLR 3212 (a), a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." While a court may consider an untimely motion for summary judgment if the issues raised are "nearly identical" to those raised on a timely, pending motion (***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2007]), it is by no means obligated to do so, any

more than it is obligated to search the record and award summary judgment to a nonmoving party (*see* CPLR 3212 [b]). "A trial court has discretion in determining whether to consider a motion for summary judgment made more than 120 days after the filing of a note of issue" (***Joson v G & S Realty 1***, 68 AD3d 1061, 890 NYS2d 351, 351-352 [2009]; *accord* ***Gonzalez v 98 Mag Leasing Corp.***, 95 NY2d 124, 711 NYS2d 131 [2000]). Here, the note of issue was filed on September 26, 2012, and the parties' time to move for summary judgment was subsequently extended to March 15, 2013 by stipulation "so ordered" by the court. The plaintiff's motion, however, was not made until June 25, 2013, the date upon which it was served (*see* CPLR 2211). Accordingly, as the motion was made more than three months after the court-imposed deadline and without any showing of "good cause" for the delay, the court deems it appropriate to deny the motion as untimely (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]).

Dated: 11/29/13

PETER H. MAYER, J.S.C.

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