

**Orient Overseas Assoc. v XL Ins. Am., Inc.**

2014 NY Slip Op 31121(U)

April 24, 2014

Supreme Court, New York County

Docket Number: 652292/2013

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

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ORIENT OVERSEAS ASSOCIATES, :

Plaintiff, :

-against- :

XL INSURANCE AMERICA, INC., ACE :

AMERICAN INSURANCE CO., ARCH :

INSURANCE CO., WESTPORT INSURANCE :

CORP., and CUSHMAN & WAKEFIELD, INC. :

Defendants. :

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Index No. 652292/2013

DECISION AND ORDER

Motion Sequence No. 005

**MELVIN L. SCHWEITZER, J.:**

Cushman & Wakefield, Inc. (Cushman), moves for an order, pursuant to CPLR 3211 (a) (1), and (7), to dismiss the plaintiff's sixth cause of action.

**Facts**

This case involves allegedly inadequate casualty insurance coverage for property damage caused by Superstorm Sandy to a building in lower Manhattan, 88 Pine Street. Orient Overseas Associates (Orient), a New York partnership, is the owner of 88 Pine Street. Cushman, a New York corporation, is in the business of managing commercial real estate, including 88 Pine Street. XL Insurance American, Inc., Ace American Insurance Co., Arch Insurance Co., and Westport Insurance Corp. (Westport) separately insured 88 Pine Street.

For the fifteen years prior to Superstorm Sandy, Cushman acted as Orient's manager of 88 Pine Street pursuant to a Leasing and Management Agreement (Agreement).

The Agreement provides, in relevant part, as follows:

ARTICLE III  
Management

Agent shall perform or cause to be performed the following management services pertaining to the Building for the maintenance and operation of the Building as a first-class non-institutional office building similar to other first-class non-institutional office buildings located in downtown Manhattan.

14. Agent shall carry out the directions of Owner with respect to the placing or administering of insurance, the seeking of insurance recoveries and, subject to the provisions of Article VII, Section 1, the restoration of insured damage.

Orient alleges that, pursuant to the Agreement, Cushman was engaged by Orient to manage 88 Pine Street, including obtaining the appropriate property and liability insurance policies to protect the interest of Orient. It also alleges that at no time did it instruct Cushman to purchase limited insurance which would not reasonably fully compensate Orient for losses sustained to 88 Pine Street for any cause, including . . . those losses and damages caused by windstorms, floods, storm surges and other like nature occurrences. To the contrary, Orient says it placed no limitation on the type and scope of the casualty insurance to be purchased for 88 Pine Street.

Although Cushman procured insurance for 88 Pine Street, it never provided Orient with the actual insurance policies it procured. Instead, Cushman summarized the insurance coverages and provided that summary to Orient in an outline dated April 26, 2011 (the Policy Summary). Orient alleges the only source of information available to it regarding the essential terms and conditions of the insurance policies covering 88 Pine Street was derived solely from the Policy

Summary Cushman prepared and provided to Orient. As a result, Orient relied upon Cushman's Policy Summary and did not purchase different insurance policies or additional coverages.

### Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

### Breach of Contract

The standard for breach of contract under New York law is “the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligation, and damages resulting from the breach.” *Dee v Rakower*, 112 AD3d 204 (2013). The complaint must allege the provisions of the contract upon which the claim is based. *Atkinson v Mobil Oil Corp.*, 205 AD2d 719, 720 (1994). Orient has not sufficiently pled a cause of action for breach of contract.

There is no dispute that there was a valid management contract and that the only provision relevant to the purchase of insurance obligates Cushman to carry out the instructions of Orient with respect to the placing or administering of insurance. Orient has pled that it did not instruct Cushman to purchase limited insurance which would not reasonably compensate Orient for losses for any cause. In fact, Orient says it placed no limitation on the type and scope of the casualty insurance to be purchased.

To successfully plead a cause of action for breach of contract here, Orient must plead what its instructions were, and that Cushman did not follow them. Awarding plaintiff’s complaint every favorable inference, which the court must do, the court still cannot find any directions given by Orient to Cushman. The complaint says Cushman was engaged pursuant to the Agreement to obtain appropriate policies to protect Orient’s interest. That may well have been the intent of the contract, but it is not its wording. The statement is conclusory, and has nothing to do with directions issued by Orient to Cushman. Insurance was purchased, so at some point directions were probably given to Cushman. The court must know what they were in order to evaluate the claim for breach. Knowing what they were *not* is insufficient in this case.

Orient's cause of action for breach of contract is dismissed.

### Tort

A breach of contract will give rise to a tort claim when "a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987).

In a famous case relating to the Beatles contract with Capitol Records, *Apple Records v Capitol Records*, 137 AD2d 50, 55 (1st Dept 1988), the court explained the task of sorting out liability in tort for conduct constituting a breach of a contract.

"Courts have long grappled with the difficulty of formulating a precise test to determine under what circumstances a party to a contract may be held liable in tort to another party thereto as a result of some clash in the contractual relationship. While no precise test has ever evolved, it has at least been established that the focus is not, as the motion court misapprehended, on whether the tortious conduct is separate and distinct from the defendants' breach of contractual duties, for it has long been recognized that liability in tort may arise from and be inextricably intertwined with that conduct which also constitutes a breach of contractual obligations. (*See Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382, 397.) Rather, the focus is on whether a non-contractual duty was violated; a duty imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contractual agreement. Thus, "unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated" (*supra*, at 394).

"An oft used example is when a special relationship of "trust and confidence" exists between the contracting parties (such as is typically found between bailor and bailee, lawyer and client, principal and agent, public carrier and passenger or innkeeper and guest), so that born of this relation is a special duty, which, when betrayed, is made actionable in tort (*supra*, at 394; *see also Charles v. Onondaga Community Coll.*, 69 AD2d 144, 146, *appeal dismissed* 48 NY2d 605). These socially imposed legal duties are not, however, exclusive to relationships of trust and confidence, but may also arise from special extraneous circumstances and from the "legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading

them by force or fraud.” (*Rich v New York Cent. & Hudson Riv. R.R. Co.*, *supra*, at 398; *see also Albemarle Theatre v Bayberry Realty Corp.*, 27 AD2d 172, 176.)”

The court does not find Orient’s position here, that there is a duty independent of the mere contract obligation, to have merit. Its cited cases are inapposite. Cases dealing with professional appraisers, banks, and fire alarm companies do not present the circumstances of a building manager for a significant commercial real estate property.

Nor does the court find convincing Orient’s position that an extra-contractual duty of care arose out of the parties enduring business relationship. It is well established that “the number of years or transactions undertaken by two business entities does not create [the] relationship of trust” that gives rise to extra-contractual duties. *MBIA Ins. Co v GMAC Mort. LLC*, 30 Misc 3d 856, 864 (NY Sup Ct NY Cnty 2010) (parties that engaged in “securitization transactions” over a six-year period “were not in a relationship of trust and confidence”) (citing *Sheridan v Trustees of Columbia Univ.*, 296 AD2d 314, 316, 745 NYS2d 18 (1st Dept 2002)); *see also Huntington Dental & Med. Co. v 3M*, No. 95 Civ. 10959, 1996 U.S. Dist. LEXIS 13350, at \*10-11 (SDNY Sept. 11, 1996) (fifteen-year course of dealing did not create a special relationship).

Orient has identified no basis from which the court can infer that Cushman assumed any extra-contractual obligation to Orient in procuring insurance for 88 Pine Street.

Orient’s claim for Cushman’s allegedly negligent performance of its contractual obligations is dismissed.

#### Negligent Misrepresentation

In order to successfully plead a negligent misrepresentation claim, Orient must allege the existence of a “special relationship” between Orient and Cushman. Lacking any other relationship between itself and Cushman than their status as parties to a common contract, Orient

is forced to suggest that all parties in “contractual privity” have a sufficiently plead “special relationship” to support a negligent misrepresentation claim. That is incorrect.

Orient bases its position almost entirely on case law that addresses claims asserted against professionals, specifically, accountants and lawyers. Such contractual relationships will support a negligent misrepresentation claim not merely because the parties are in privity, but because “professionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients” that may give rise to a duty “to speak with care.” *Murphy v Kuhn*, 90 NY2d at 270 (1997) (quoting *Kimmel v Schaefer*, 89 NY2d 257, 260 (1996) and citing cases involving accountants, engineering consultants and public weighers).

New York law is equally clear, however, that contractual privity does not establish a “special relationship” in cases – such as this one – which do not involve a professional-client relationship. As the New York Court of Appeals explained in *Kimmel*: “The analysis in a commercial case . . . is necessarily different from . . . cases [addressing claims against professionals] because of the absence of obligations arising from the speaker’s professional status.” 89 NY2d at 264 (emphasis added); *see also Murphy*, 90 NY2d at 270 (quoting and following *Kimmel*). Rather, in the non-professional context, “there must be some identifiable source of a special duty of care . . . [i]n order to impose tort liability.” *Kimmel*, 89 NY2d at 264; *see also Murphy*, 90 NY2d at 270. More particularly, such a duty will arise only in those commercial arrangements where (among other things) “the person making the representation held or appeared to hold unique or special expertise” and “a special relationship of trust or confidence existed between the parties.” *Kimmel*, 89 NY2d at 264; *see also Murphy*, 90 NY2d at 270.

*Kimmel, Murphy*, and their progeny compel the rejection of Orient's argument that actual privity suffices to establish recovery in tort for negligent misrepresentations. In fact – as Cushman has already shown – New York courts routinely dismiss negligent misrepresentation claims where the allegations disclose nothing more than ordinary business relationships that are governed by commercial contracts.

Equally unavailing is Orient's claim that whether the Management Agreement constitutes an "arms-length commercial contract" presents "a question of fact." The only allegation that Orient mentions in this connection – the duration of Cushman's and Orient's contractual arrangement (*id.*) – is legally irrelevant. A commercial relationship does not become a "special relationship" merely because it continues over time.

There is no merit to Orient's assertion that the relationship between Cushman and Orient justified Orient's reliance on the Policy Summary as its only "source of information" regarding the flood insurance arrangements for 88 Pine Street. Under black-letter New York law, a plaintiff "will not be heard to complain" of an asserted misrepresentation "[i]f the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation." *Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 278-79 (2011) (quoting *DDJ Mgt., LLC v Rhone Grp., L.L.C.*, 15 NY3d 147, 154 (2010)).

Here, Orient has neither alleged nor shown that information regarding the policy coverage was "peculiarly within [Cushman's] knowledge" or that Orient had no "means available" for obtaining this information. In fact, Orient identifies no effort that it made to obtain additional

information about the flood insurance that was available to 88 Pine Street, such as by requesting copies of the Policies from Cushman or the insurance broker who placed the Policies.

Orient's claim against Cushman for negligent misrepresentation is dismissed.

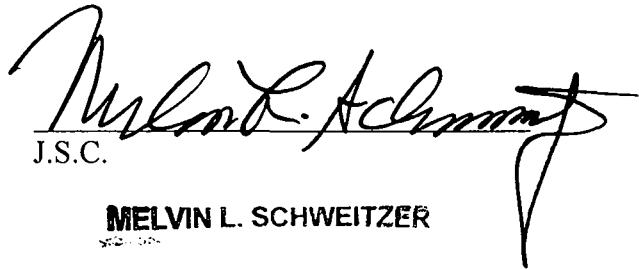
Accordingly, it is

ORDERED that defendant Cushman's motion to dismiss Orient's sixth cause of action is granted; and it is further

ORDERED that Orient is granted leave to replead its sixth cause of action.

Dated: April 24, 2014

ENTER:

  
J.S.C.  
**MELVIN L. SCHWEITZER**