

**Three Monkeys Rest. Inc. v Cortland Ins. Agency,
Inc.**

2014 NY Slip Op 32962(U)

November 18, 2014

Supreme Court, New York County

Docket Number: 150339/11

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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THREE MONKEYS RESTAURANT INC.,

Plaintiff,

- against -

Index No. 150339/11
Subm. Date: August 27, 2014
Mot. Seq. Nos.: 003 and 004

DECISION AND ORDER

CORTLAND INSURANCE AGENCY, INC. and
BERNARD ROSENBERG,

Defendants.

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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Defendants' Memoranda of Law in Support.....	<u>2</u>
Plaintiff's Affirmations in Opposition.....	<u>3</u>
Defendants' Reply Affirmations.....	<u>4</u>

ELLEN M. COIN, A.J.S.C.:

Plaintiff Three Monkeys Restaurant Inc. brings the instant action against insurance broker-defendants, Bernard Rosenberg (Rosenberg) and Cortland Insurance Agency, Inc. (Cortland), to recover for damages after plaintiff's insurer declined coverage following a fire that destroyed plaintiff's restaurant at 99 Rivington Street, New York, NY 10002 (Restaurant). Based on defendants' alleged failure to procure appropriate coverage, plaintiff's amended

complaint asserts three causes of action: (1) negligence; (2) breach of contract; and (3) breach of a special duty of care.

Rosenberg now moves (in motion sequence number 003) for summary judgment, seeking dismissal of the amended complaint or, in the alternative, for partial summary judgment as to plaintiff's comparative negligence.¹ Cortland also moves (in motion sequence number 004) for summary judgment dismissing the amended complaint. Motion sequence numbers 003 and 004 are consolidated for disposition.

Background

According to Itai Afek (Afek), who owns Three Monkeys Restaurant Inc., when he opened the Restaurant, he installed a grill and a deep fryer. Afek testified that he did not install a fire suppression system, such as an ansul system, based upon the advice of an unidentified fire department inspector, who allegedly told Afek that because the deep fryer was electric, a fire suppression system was not required.

On November 9, 2009, Afek sent Rosenberg the following email:

"I would like an insurance that will be as follow:

- 1) Insurance for fire. lets say 50k.
- 2) liability.
- 3) land lord is requesting \$1,000,000 for injuries and death and \$300000 for damage.
- 4) working and disability insurance."

McAleavey affirmation, exhibit L. Afek testified that the November 9, 2009 email accurately reflected the type of policy he wished to obtain, and that he could not recall asking Rosenberg to obtain any coverage beyond what was contained in the email.

¹ Although not specified in the parties' papers, Rosenberg's request for partial summary judgment appears to relate to his seventh affirmative defense, which is based upon plaintiff's alleged "comparative negligence and assumption of risk." Document number 42 at 5.

According to Baila Greenberg (Greenberg), a customer service representative at Cortland, on November 11, 2009, Rosenberg contacted her for assistance in obtaining a policy quote for the Restaurant. Cortland, in turn, contacted another wholesale broker, Morstan General Agency, Inc. (Morstan), which contacted Leading Insurance Group Insurance Company, Ltd. (Leading). According to Greenberg, upon receiving two quotes from Morstan, each indicating that the policy was contingent upon the Restaurant having a functional ansul system, Cortland emailed the quotes to Rosenberg.

On December 1, 2009, Rosenberg emailed Afek stating:

“I found a quote. Premium is \$2,743 a year. But this is subject favorable inspection and to a having a safe guard system in the cooking area such as an Wet Ainsle system. Do you have some kind of a safety device incase the cooking area gets on fire such as the oil getting ignited?”

Id., exhibit M. Afek responded that he had a hood, but no safety system. Rosenberg replied: “I will ask the underwriter.” *Id.* Afek testified that, outside of this exchange, he never requested that Rosenberg obtain a policy that did not require an ansul system.

By email dated December 2, 2009, Rosenberg sent Afek two “Commercial Package Policy Quote[s].” *Id.*, exhibits M and N. In the body of the email, Rosenberg stated:

“Attached please find 2 quotes.
 One is with Liquor Liability - Annual Premium without Terrorism is \$3,535.19
 One is without Liquor Liability – Annual Premium without Terrorism is \$\$2,743.19
 If you serve beer, then you need Liq Liability
 Please advise”

Id., exhibit M. Each quote stated: “PROTECTIVE SAFE GUARD IS ATTACHED (P-9 WET ANSUL SYSTEM).” *Id.*, exhibit N. According to Afek, he never opened the attachments and, instead, forwarded the email to his accountant for advice on which policy to choose.

Afek ultimately chose the policy without the liquor liability. By email dated December 3, 2009, Rosenberg instructed Cortland to bind the quote without liquor liability. Leading issued policy number 01CPS022786, covering the Restaurant for the period of December 9, 2009 to December 9, 2010 (Policy). The Policy contained a “PROTECTIVE SAFEGUARDS” endorsement, which required the insured to maintain an “ANSUL SYSTEM” as a condition of coverage (Endorsement). *Id.*, exhibit P at IL 04 15 0498. Plaintiff renewed the Policy, including the ansul system requirement, for the policy period December 9, 2010 through December 9, 2011.

Afek testified that he read only “the application and the first page” of the Policy. *Id.*, exhibit H at 67. Afek conceded that the Policy satisfied the criteria of the November 9, 2009 email, but stated that he did not realize that the Policy required an ansul system. Likewise, he admitted that, at the time of renewal, he did not make any requests for new or different coverage.

On January 21, 2011, plaintiff informed Cortland that a fire took place at the Restaurant on January 20, 2011. Cortland’s records indicated that this was the first time anyone at Cortland had direct contact with plaintiff. Prior to that, “[a]ll communication with [plaintiff] was via Rosenberg.” Aszkazy aff, ¶ 59; *see also* Feinzeig affirmation, exhibit E at 43 (Afek testified that he could not recall speaking to Cortland before that day).

Leading’s investigation determined that the fire was caused by hot oil discharged from the deep fryer. By letter dated July 26, 2011, Leading disclaimed coverage, because the restaurant did not have an ansul system as required by the Endorsement.

Analysis

Rosenberg argues that because he did not have a special relationship with plaintiff, he did not have a duty beyond satisfying plaintiff’s specific request for coverage. He contends that he is entitled to summary judgment, because he fulfilled this limited duty. In addition, Rosenberg

argues that plaintiff's claims must be dismissed because a restaurant insurance policy, without the fire suppression system requirement, was unavailable for a restaurant using a deep fryer. Rosenberg argues that at a minimum plaintiff was comparatively negligent in failing to read the Policy. Cortland contends that in addition to Rosenberg's arguments, it should be granted summary judgment because it merely conveyed information provided by Rosenberg and never had any direct contact with plaintiff prior to the fire. Plaintiff counters that both defendants knew that the Restaurant did not have an ansul system, and breached their duty in binding a policy that required one and in failing to correct plaintiff's "misimpression" that an ansul system was not required. *Aboulafia* affirmation, ¶¶ 16, 24. Plaintiff also argues that Cortland's motion should be denied because as the broker of record, it had a duty to ensure that all information used in procuring the Policy was complete and accurate.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Upon such a showing, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.*, quoting *Alvarez*, 68 NY2d at 324. On a motion for summary judgment, all of the evidence is viewed "in the light most favorable to the opponent of the motion." *People v Greenberg*, 95 AD3d 474, 484 (1st Dept 2012), *aff'd* 21 NY3d 439 (2013).

"[I]nsurance 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). Absent a specific request for coverage or the existence of a special relationship with the client, "agents have no continuing duty to advise, guide, or direct a

client to obtain additional coverage.” *Id.* at 270-271; *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158 (2006) (“[a] general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage”). A special relationship does not exist where there is no payment for additional insurance advice and no delegation of “insurance decision-making responsibility,” even where the consumer-insurance broker relationship is a long-standing one. *See Hoffend & Sons, Inc.*, 7 NY3d at 158; *see also Murphy*, 90 NY2d at 271 (finding that defendant insurance agent did not have a duty to advise plaintiff, because despite a broker-client relationship that spanned several decades, “[a]s a matter of law, this record [did] not rise to the high level required to recognize the special relationship threshold”). To set forth a claim for negligence or breach of contract against an insurance broker requires a showing “that a specific request was made to the broker for the coverage that was not provided in the policy.” *American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 (2012).

Here, defendants have demonstrated their prima facie entitlement to summary judgment by establishing that that they satisfied plaintiff’s specific request for coverage and that they did not have a special relationship with plaintiff. Afek admits that the Policy satisfied the specific request for coverage he made in his November 9, 2009 email to Rosenberg. McAleavey affirmation, exhibit H at 69. Afek also admits that he made no other requests for coverage. *Id.* at 48, 70. Moreover, in the December 1, 2009 email, Rosenberg made clear that the insurer required an ansul system as a condition of coverage (*id.*, exhibit M) and Afek admits that Cortland never told him that he did not need an ansul system. Feinzeig affirmation, exhibit E at 52-53. Therefore, in procuring the Policy, defendants satisfied their duty to plaintiff. *See Hoffend & Sons, Inc.*, 7 NY3d at 157-158 (affirming dismissal of complaint where policyholder did not establish specific request for coverage or special relationship and finding that policyholder’s later vague recollections about exchanges with broker could not establish specific

request for additional coverage in light of earlier unambiguous letter from insurance broker, in which broker made clear the limits of coverage); *Murphy*, 90 NY2d at 273 (defendant insurance agent did not have a duty to advise plaintiff, where plaintiff did not make specific request to increase liability limits).

Furthermore, in selecting the Policy, plaintiff sought the advice of Afek's accountant (McAleavey affirmation exhibit H at 56 and exhibit O) and there is no indication that defendants received any compensation to provide additional insurance advice. Therefore, as a matter of law, no special relationship existed between defendants and plaintiff, and defendants did not have a "continuing duty to advise, guide, or direct [plaintiff] to obtain additional coverage." *Murphy*, 90 NY2d at 270-271.

In opposition, plaintiff argues that because defendants knew that the Restaurant did not have an ansul system at the time they bound the Policy, they sold a void policy in breach of their duties. Plaintiff points to Rosenberg's deposition, in which he admitted that at the time he bound the Policy, he knew that plaintiff did not have the required ansul system and testified that he would have informed Cortland of this fact. McAleavey affirmation, exhibit J at 65, 77, 143. Plaintiff also points to the transcript of a conversation between Afek and Rosenberg, which Afek secretly recorded shortly after the fire. In it, Rosenberg stated:

"I told you that you would need an Ansul system. So you told me that you did not. You have all electric and the Fire Department does – did not require it.

"So I said, listen, as far as I know, insurance company requires it. If you don't need it, we will see with the insurance company when the insurance company inspects, but I have no idea. I have no – I don't know their requirement."

Aboulafia affirmation, exhibit C at 7. In addition, plaintiff submits an expert's affidavit, which states that in binding a policy they knew was void, defendants breached their duty as insurance

brokers. However, none of this evidence raises an issue of fact with respect to whether plaintiff ever made a specific request for a policy that did not require an ansul system or had a special relationship with defendants.

Plaintiff also contends that defendants had a duty to correct Afek's misimpression about the need for an ansul system and that he relied on their expertise. However, "there is no indication that [Afek] ever inquired or discussed with [defendants] any issues involving" a fire suppression system. *Murphy*, 90 NY2d at 271. "Such lack of initiative or personal indifference cannot qualify as legally recognizable or justifiable reliance. Therefore, there was no evidence of reliance on the defendant agent's expertise . . ." *Id.* (holding no special relationship existed between insurance broker and plaintiff). Accordingly, defendants' motions for summary judgment are granted. *See Hoffend & Sons, Inc.*, 7 NY3d at 158; *Murphy*, 90 NY2d at 273.

The motions for summary judgment are granted on the independent ground that plaintiff could not have obtained coverage without the fire suppression system requirement. The New York City Fire Code (Fire Code) provides, in relevant part:

"904.11 Commercial cooking systems. The automatic fire-extinguishing system for commercial cooking systems shall be of a type recognized for protection of commercial cooking equipment and exhaust systems of the type and arrangement protected. . . . The system shall be installed in accordance with this code, its listing and the manufacturer's installation instructions.

...

"904.11.5.1 Unlawful operation. It shall be unlawful to operate commercial cooking equipment that generates smoke or grease-laden vapors or fumes under any of the following conditions:

1. Without a permit for the operation of a commercial cooking system.
2. Without a lawfully installed fire extinguishing system.
3. Without a lawfully installed exhaust system.
4. While its fire extinguishing system or exhaust system is out of service."

NY City Fire Code (Administrative Code of City of NY tit 29, ch 9). Consistent with these Fire Code requirements, Rosenberg's experts confirm that a policy without a fire suppression system requirement was not available. David Paige, a licensed insurance broker in New York and New Jersey, and an attorney admitted to practice law in New York (Paige affirmation, ¶ 2), states:

“[The Endorsement] is a common requirement imposed by insurance companies as a condition for property insurance coverage for restaurants, due to the risk of fire from grills and deep fryers. I am not aware of an insurer during this period that would not have imposed such a requirement as a condition of coverage.”

Id., ¶ 17. Rosenberg's other expert, Andrew R. Yarmus, a licensed professional engineer and a New York State certified code enforcement official (Yarmus aff, ¶ 1), states: “[plaintiff] was required under building code section 904.11 to have a fire extinguishing system in place. By failing to have such a system at the restaurant, [plaintiff] was in violation of the New York City Building Code and was operating unlawfully pursuant to sections 904.11 and 904.11.5.1.”² *Id.*, ¶ 10. Likewise, Joseph Aszknazy, the president of Cortland, explains that “because of the illegality [under the Fire Code] and high risks associated with maintaining such cooking facilities without a fire suppression system, all the insurance companies and brokers that Cortland dealt with have represented to [him] that they have no known insurance market that could provide insurance coverage for an entity like [plaintiff] unless it had a functioning fire suppression system.” Aszknazy aff, ¶ 38.

Plaintiff does not dispute that it was legally required to maintain a fire suppression system. Instead, plaintiff argues that Rosenberg's experts should not be considered on the instant motion because the note of issue was filed on December 4, 2013 and Rosenberg moved for summary judgment on April 12, 2014, without previously disclosing his experts. A party's

² Yarmus mistakenly cites the New York City Building code. Sections 904.11 and 904.11.5.1, which he quotes in his affidavit, are found in the New York City Fire Code.

failure to disclose an expert pursuant to CPLR 3101 (d) (1) (i) prior to the filing of a note of issue “will not divest a trial court of the discretion to consider an affirmation or affidavit submitted by that party’s experts in the context of a timely motion for summary judgment.” *Rivers v Birnbaum*, 102 AD3d 26, 37 (2d Dept 2012). Here, while Rosenberg has not previously disclosed his experts, plaintiff is not prejudiced by this omission. Neither expert has testified to anything beyond what is already in the record through the Fire Code and Aszknazy’s affidavit, to which plaintiff does not object. In fact, “Plaintiff does not contest that it was required to have a fire extinguishing system in place pursuant to [Fire] Code Section 904.11. Moreover, Plaintiff is not arguing that it could have obtained the policy at issue without first installing an ansul system.” Aboulafia affirmation, ¶ 32. Therefore, because defendants have demonstrated that a policy that did not require a fire suppression system could not have been procured, their motions for summary judgment are granted. See *Rodríguez v Investors Ins. Co. of Am.*, 201 AD2d 355, 356 (1st Dept 1994) (vacating judgment and dismissing complaint following jury determination that insurance broker was negligent and breached contract in failing to procure sufficient coverage, where “no evidence was adduced to show that plaintiff could have obtained insurance to replace the cancelled policy”); *American Motorists Ins. Co.*, 102 AD2d at 346 (granting summary judgment sustaining insurer’s disclaimer of coverage where “[t]he only proof in the record reflect[ed] . . . that [the insurer] did not issue such coverage and that it was not obtainable from any other insurer in the State”).

Cortland’s motion is granted for the additional, independent reason that Cortland and plaintiff did not have any contact, except through Rosenberg, during the procurement of the Policy. Here, the evidence demonstrates that “Cortland was just a conduit of the Information in the procurement of the policy.” Aszknazy aff, ¶ 9. Plaintiff does not deny this fact, but argues that it previously procured insurance policies from Cortland. In support of this argument,

plaintiff submits an ACORD form, which appears to be an application for a commercial insurance policy for plaintiff for the period of September 25, 2007 to September 25, 2008. Aboulafia affirmation, exhibit A. However, the form is dated February 7, 2009. *Id.* Even overlooking this discrepancy, there is no evidence that the ACORD form was ever submitted to Cortland or that a policy was issued. In any event, this evidence does not raise issues of fact with respect to Cortland's role in procuring the Policy, which admittedly satisfied plaintiff's specific request for coverage, but relates to some other insurance policies and communications with Cortland.

The record does not support a claim against Cortland any more than it does against Morstan. Plaintiff contends that Cortland, as the "broker of record," owed plaintiff a duty to ensure the accuracy of all information used to procure the Policy. *Id.*, ¶ 12. However, plaintiff does not cite any legal authority to support this contention and the Court's independent research could not locate any. Moreover, Morstan is listed as the "Agent" on the Policy (McAleavey affirmation, exhibits P and Q), yet plaintiff admits it does not have a claim against Morstan, because Morstan "merely generated a quote based on information provided by Cortland." Feinzeig affirmation, exhibit D, ¶ 11. Here, the evidence demonstrates that Cortland merely procured a quote based on information provided by Rosenberg. Because plaintiff cannot demonstrate that it made a specific request for coverage to Cortland, Cortland's motion for summary judgment is granted. *See American Bldg. Supply Corp.*, 19 NY3d at 735; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 257 (1st Dept 2004) (affirming dismissal of negligence claim against insurance broker, where complaint did not allege any contacts between plaintiff and broker).


In accordance with the foregoing it is hereby

ORDERED that defendants' motions for summary judgment (motion sequence numbers 003 and 004) are granted and the amended complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: Nov. 18, 2014

ENTER:



Ellen N. Coin, A.J.S.C.