

Water Pro Lawn Sprinklers, Inc. v Mt. Pleasant Agency, Ltd.

2014 NY Slip Op 32994(U)

April 15, 2014

Supreme Court, Westchester County

Docket Number: 55382/12

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
WATER PRO LAWN SPRINKLERS, INC., and
GIUSEPPE GANGEMI,

Plaintiffs,

-against-

MT. PLEASANT AGENCY, LTD., and
KEITH B. SHALAND,

Defendants.

-----X
HUBERT, A.J.S.C.

DECISION AND ORDER

Index No.: 55382 / 12
Motion Date: 4 / 3 / 13

The following documents numbered 1 to 30 were read on this motion by defendants pursuant to rules 3211(a)(1), (a)(2) and (a)(7) of the Civil Practice Law and Rules to dismiss the amended complaint:

Notice of Motion - Affirmation - Exhibits -	
Memorandum of Law - Affidavit of Service	1-11
Affirmation and Affidavit in Opposition - Exhibits -	
Memorandum of Law	12-29
Reply Affirmation	30

Upon consideration of all of the foregoing, and for the following reasons, the motion is denied.

This is an action by an insured for negligent misrepresentations allegedly made by its insurance agent. Plaintiff, Giuseppe Gangemi ("Gangemi"), is the president of plaintiff, Water Pro Lawn Sprinklers, Inc. ("Water Pro"), which is in the business of installing in-ground lawn sprinkler systems. Defendant, Keith B. Shaland ("Shaland"), is a representative of defendant,

[* 2]

Mt. Pleasant Agency, Ltd. (“Mt Pleasant”), which is a licensed insurance broker. In June 2005, Gangemi sought to obtain a policy with adequate liability insurance protection for the newly formed, Water Pro. Shaland advised Gangemi of an insurance carrier with a policy adequate to Water Pro’s needs, and Water Pro purchased such a policy from said carrier. The policy was renewed several times. The policy at issue herein contained a Total Pollution Exclusion clause which excluded coverage for any property damage caused by pollutants.

Water Pro is a defendant in a related action (*see One Beacon Insurance Company, et al v Water Lawn Pro Lawn Sprinklers, Inc., et al*, Supreme Court, Westchester County, Index No. 55759/11 [hereafter, the “One Beacon Action”]) for the negligent installation of an in-ground lawn sprinkler system that allegedly resulted in damage to, and the discharge of fuel oil from, an underground storage tank. Water Pro provided its insurer with timely notification of the claim on which the One Beacon Action would later be based. In the instant action, plaintiffs allege that, in reliance upon assurances and representations made by Shaland to Gangemi that said claim – including its insurer’s obligation to defend – was covered, Water Pro refrained from undertaking certain actions while its insurer was investigating the claim.

The complaint in the One Beacon Action contained, inter alia, a cause of action against Water Pro under section 181 of the Navigation Law – which provides that “[a]ny person who has discharged petroleum shall be strictly liable . . . for all cleanup and removal costs and all direct and indirect damages” – and a cause of action against Water Pro’s insurer under Navigation Law 190 – which provides that “any claim for damages by an injured person, may be brought directly against . . . the insurer” of the discharger. Shortly after the One Beacon Action was commenced, Gangemi was notified that Water Pro’s insurer had disclaimed coverage, citing the Total

Pollution Exclusion clause in Water Pro's policy. The One Beacon Action is still pending.

In the instant action, plaintiffs assert a single cause of action for negligence based upon defendants' "fail[ure] to exercise competence in the advice that was given to Plaintiffs" concerning Water Pro's claim on the policy at issue, its insurer's disclaimer and its response to the complaint in the One Beacon Action. (See Verified Amended Complaint, a copy of which is annexed to the Notice Of Motion as Exhibit B, at ¶62). Defendants move to dismiss on the grounds that the amended complaint fails to state a cause of action or, alternatively, that such cause of action is not justiciable because damages in the instant action can not be determined unless and until Water Pro is found liable in the One Beacon Action.¹ The motion was deemed fully submitted upon the filing of defendants' reply affirmation on April 3, 2013.

The motion to dismiss is denied.

[O]n a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211(a)(7), the complaint must be construed in the light most-favorable to the plaintiff and all factual allegations must be accepted as true. Moreover, where a motion to dismiss is not converted to a summary judgment motion, . . . affidavits may be received for the limited purpose of remedying defects in the complaint and, thus, to preserve inartfully pleaded but potentially meritorious claims.

Rotanelli v Madden, 172 AD2d 815, 816 (2d Dept 1991) (internal citations omitted) *appeal denied* 79 NY2d 754 (1992).

Generally, while insurance agents and brokers have a common-law duty to obtain coverage for their clients, they have no continuing duty thereafter to advise, guide or direct a

¹In their notice of motion, defendants state that they also request relief pursuant to CPLR 3211(a)(1). However, it is unclear from the affirmation and memorandum of law submitted in support thereof what, if any, documentary evidence constitutes the foundation for a defense, or indeed, what that defense might be.

client as to questions concerning the limits or adequacy of, or exclusions from, such coverage. *See Am. Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730 (2012) *rearg denied* 20 NY3d 1044 (2013); *Murphy v Kuhn*, 90 NY2d 266 (1997). However, plaintiff's claim in the instant action is based not upon a common-law theory of liability, but the existence of a special relationship between Gangemi/Water Pro and Shaland/Mt Pleasant. Where a special relationship develops between an agent and an insured for whom the agent has procured a policy, an additional duty of advisement is created pursuant to which the agent may be liable for negligent misrepresentations concerning the policy; such a special relationship may arise where, *inter alia*, "there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent." *Voss v The Netherlands Ins. Co.*, ___ NY3d ___, 2014 WL 696528 (2014) (quoting from *Murphy v Kuhn*, 90 NY2d at 272).

Presuming the truth of the allegations made in the amended complaint and Gangemi's affidavit submitted in opposition to the instant motion, plaintiffs have alleged sufficient facts to establish that Shaland/Mt Pleasant created a special relationship between itself and plaintiffs, thereby assuming an additional duty of advisement and justifying plaintiffs' reliance upon its representations concerning the actions plaintiffs should have undertaken or refrained from undertaking in the face of the insurer's delay in disclaiming coverage. *See, e.g., South Bay Cardiovascular Assoc., P.C. v SCS Agency, Inc.*, 105 AD3d 939, 941-42 (2d Dept 2013) (holding that, despite insured's admitted failure to read notice of policy change, agent's summary judgment motion was properly denied because there was triable issue of fact as to existence of special relationship creating additional duty to advise as to said change); *Lynch v Mc Queen*, 309 AD2d 790, 791-92 (2d Dept 2003) (holding that motion to dismiss for failure to state cause of

action was properly denied). Therefore, that branch of defendants' motion to dismiss pursuant to CPLR 3211(a)(7) is denied.

Moreover, the claim asserted in the instant cause of action is justiciable. Plaintiffs seek damages measured by "the expenses incurred in defense of the actions that have been brought against Water Pro" (Verified Amended Complaint at ¶63); for example, expenses incurred as a consequence of Water Pro's failure to act in the expectation that its insurer would not disclaim coverage, and in Water Pro's defense of the One Beacon Action once its insurer did so.

Defendants' contentions to the contrary notwithstanding, plaintiffs have alleged damages which may be recovered on their negligent misrepresentation claim regardless of the outcome of the One Beacon Action. *Cf. Lynch v Mc Queen*, 309 AD2d at 792 (affirming denial of motion to dismiss cause of action seeking attorney's fee). Therefore, that branch of defendants' motion to dismiss pursuant to CPLR 3211(a)(2) is denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of Mt. Pleasant Agency, Ltd., and Keith B. Shaland to dismiss the amended complaint is in all respects denied, and it is further

ORDERED that within ten days of the date of entry of this Decision and Order plaintiffs shall serve upon defendants a copy of this Decision and Order with notice of entry, and it is further

ORDERED that defendants' time to serve a pleading responsive to the cause of action in the amended complaint is extended to ten days after service upon them of this Decision and Order with notice of entry (*see* CPLR 3211[f]), and it is further

ORDERED that counsel for the parties shall appear in the Preliminary Conference Part,

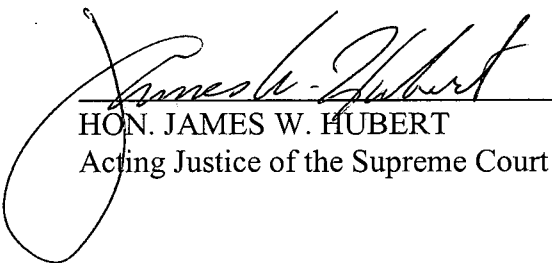
Courtroom 800, Westchester County Courthouse, on Monday, June 9, 2014, at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York

April 15, 2014

ENTER:


HON. JAMES W. HUBERT
Acting Justice of the Supreme Court