SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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DEFOE CORP.,

Plaintiff,

-against-

USI INSURANCE SERVICES, LLC and HARTAN BROKERAGE,

Defendants.

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Index No.: 151597/2013

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

This action arises out of the broker defendants' alleged failure to secure and provide insurance policies required by plaintiff DeFoe Corporation in conjunction with plaintiff's bid on a construction project to rehabilitate the "Kew Garden Interchange" for the New York State Department of Transportation (the "Project").

Plaintiff moves, pursuant to CPLR 3212, for summary judgment in its favor and against defendants USI Insurance Services, LLC ("USI") and Hartan Brokerage ("Hartan") on all counts of the complaint. After the filing of this motion, plaintiff reached a settlement with USI, and by stipulation dated June 10, 2015, plaintiff discontinued this action with prejudice as against USI.

Hartan cross-moves for summary judgment dismissing the complaint.

FACTS

Plaintiff is a contractor performing new construction, and major rehabilitation and reconstruction projects, on key highways

and bridges located throughout the New York Metropolitan tri-state area (Joseph W. Giardino Aff., plaintiff's CFO and Treasurer, ¶ 2). Plaintiff's major clients include The New York State Department of Transportation, The Port Authority of NY & NJ, and the NYS Thruway Authority (Id.). Plaintiff contends that it does not have employees that possess specialized experience or knowledge concerning procurement and pricing of commercial insurance policies (Id., ¶ 3)

USI is a retail insurance broker. Plaintiff contends that it relied exclusively on USI between January 2008 and September 2012 to price and procure appropriate and applicable insurance policies that are required by law and/or by contract for plaintiff to perform its construction work (Id., ¶ 4; see EBT of Carmine D'Angelo of USI, at 21, 25 [declaration of John Berringer, Ex. 1]).

Hartan is a wholesale insurance broker. Its clients are retail insurance brokers, like USI. A retail broker deals directly with the insured. Plaintiff was USI's client (Edward Pray Aff., Hartan's president, ¶ 2).

In conjunction with preparing its bid for the Project, plaintiff asked USI to obtain and secure prices for (1) a project-specific commercial general liability ("CGL") policy with liability limits of $1 million per occurrence, $2 million aggregate; (2) an Owners and Contractors Protective ("OCP")

policy with liability limits of $1 million per occurrence and $2 million aggregate; and (3) an umbrella liability policy with a $50 million liability limit (Giardino Aff. ¶ 5). The specifically requested policies were for the entire anticipated five-year duration of the Project (Id.). Plaintiff contends that USI agreed to secure the requested coverage and to provide a price for the policies (Id.).

On March 12, 2012, USI asked Hartan to obtain an indication for the CGL primary general liability policy for the Project. USI advised Hartan that the Project had a contract value of approximately $143 million. USI also asked Hartan to obtain an indication for excess liability insurance for the Project of $50 million (Pray Aff., ¶ 3). Hartan asserts that it had no direct communications with plaintiff regarding its request for liability insurance for the Project, and that all of its communications were with USI (Id., ¶8).

An "indication" is a term of art in the insurance industry and among insurance brokers (Pray Aff., ¶ 4). An "indication" is an estimate of the premium an insurance company may ultimately charge for a policy (EBT of Doreen DiCicco, plaintiff's insurance broker, at 92 [Kovner declaration, Ex. 4]). An "indication" is different than a "quote," which is also a term of art in the insurance industry and among insurance brokers. A "quote" is a specific premium at which the insurance company is willing to

issue a policy (Id. at 93-95). Thus, if the insured accepts a quote, there is a meeting of the minds with respect to issuance of the policy for the quoted premium. By contrast, a broker never guarantees that the insurance company which provided an "indication" will be able to issue the policy for a premium based on that indication (Pray Aff., ¶ 4).

Hartan obtained an indication for the primary policy for the Project from First Mercury Insurance Company under its trade name, CoverX, an insurance company with which Hartan did business. On March 13, 2012, Hartan provided USI with an indication for the primary policy, as follows:

> Carmine [D'Angelo of USI],
>
> As per our conversation, please see the following indication:
>
> $15-$18 Rate
> $2M/$4M limits
> $25,000 Deductible
> Term of Job
>
> This is non-bindable and subject to additional details on the job.
>
> Good luck!
>
> Tim [Goettelman of Hartan]

(3/13/12 email [Kovner declaration, Ex. 1]).

Hartan obtained an indication of $2 million for the excess policies totaling $50 million for the Project from Starr, Ace and Liberty. Hartan also obtained an indications of $350,000 for an

additional $50 million in excess coverage. On March 14, 2012, Hartan provided USI with an indication for the excess policies, as follows:

> Carmine,
>
> The excess indications are as follows:
>
> Lead $10 mil (Starr) $1,000,000
> $15 mil X $10 mil (ACE) $650,000
> $25 mil X $25 mil (Liberty) $350,000
> $25 mil X $50 mil (Endurance) $200,000
> $25 mil X $75 mil (C&F) $150,000
>
> This is excess of an underlying 2/4/4 with annual reinstatement of the General Aggregate.
>
> I know they look high. My underwriters are being very conservative with giving indication in this market.
>
> Please let me know if you have any questions.
>
> Rich [Kyasky of Hartan]

(3/13/12 email [Kovner declaration, Ex. 2]).

On March 14, 2012, through multiple email communications, USI provided an indication to plaintiff of $16 per $1,000 for the primary policy, $.87 per $1,000 for the OCP policy, and $1.40 per $100 for the umbrella policy (3/13/12 email from Carmine D'Angelo to Charles Androsiglio and Peter Nardone of Defoe [Kovner declaration, Ex. 11]). USI did not inform plaintiff that the indication was non-bindable and subject to additional details on the job (Id.). Hartan contends that the provision of this indication was without Hartan's knowledge, and that Hartan had no

direct communications with plaintiff regarding the indications (Pray Aff., ¶ 8).

On March 20, 2012, USI informed Hartan that plaintiff was the successful bidder for the Project. Hartan then sought to obtain the additional details on the job or other information which was necessary to obtain a quote for the policies from CoverX and the excess insurers (Id., ¶ 7). Later that same day, plaintiff provided the requested information to USI, which forwarded it to Hartan (3/27/13 email from Carmine D'Angelo to Richard Kyasky of Hartan [Kovner declaration, Ex. 7]). Hartan asserts that it had no direct communications with plaintiff regarding the additional information for CoverX to provide a quote for the primary liability insurance policy (Pray aff., Ex. 8).

On May 1, 2012, Hartan advised USI that CoverX could not write the primary liability policy within the indication (i.e., $15-$18 per $1,000). As a result, Hartan also advised USI that it could not provide the excess coverage (Id., ¶ 7). USI then informed plaintiff that the insurance policies that were the subject of the CoverX indications could not be obtained by USI at the prices previously indicated (/1/12 letter from Dominic Scotto of USI to Charles Androsiglio [Berringer declaration, Ex. 11]).

On May 7, 2012, USI informed Hartan that Travelers had provided a specific quote for the policy for the Project effective October 1, 2012, at a rate of $19.47 per $1,000.

Plaintiff alleges that, as a result of the failure to obtain the primary and excess liability policies within the indications, it was forced to add the Project to its existing corporate general liability insurance program, and to purchase additional excess coverage for its existing program, thus resulting in the payment of higher premiums (Giardino Aff., ¶ 10). Charles Androsiglio, plaintiff's former executive vice president, who oversaw all of plaintiff's bids, however, admitted that the premium charged by Travelers, based upon a rate of $19.47 per $1,000, was the best deal available, and plaintiff could not get a better rate anywhere in the insurance market (Androsiglio EBT at 93-94 [Kovner declaration, Ex. 3]; see also DiCicco EBT at 143 [same]).

Plaintiff asserts two claims for negligence and negligent misrepresentation against Hartan based on Hartan's actions from January 2012 to June 2012 in relation to the Project.

DISCUSSION

Negligent Misrepresentation

Plaintiff contends that Hartan is liable for negligent misrepresentation in providing indications to plaintiff for

bidding on the Project without informing plaintiff that the indications were not, in fact, reliable.

The elements of negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to plaintiff; (2) that the information was incorrect; (3) reasonable reliance on the information; and (4) damages (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 180 [2011]; see also Matlin Patterson ATA Holdings LLC v Federal Express. Corp., 87 AD3d 836, 840 [1st Dept 2011]).

Here, plaintiff cannot establish the first element of the negligent misrepresentation claim. The record is clear that as a wholesale broker Hartan had no direct communications with plaintiff regarding plaintiff's request for liability insurance for the Project, or the indications, or the additional information necessary for CoverX and the excess insurers to provide a quote for the policies. Indeed, there is no dispute that Hartan had no direct communications with plaintiff at any time regarding the issues in this litigation. In fact, Joseph Giardino, plaintiff's chief financial officer, admitted in his affidavit in support of plaintiff's motion for summary judgment that plaintiff "relied exclusively upon USI ... to price and procure appropriate and applicable insurance policies" (Giardino Aff., ¶ 4). Thus, there is no special relationship, privity of

contract, or a relationship approaching privity (Levi v Utica First Ins. Co., 12 AD3d 256, 257 [1st Dept 2004] [dismissing a negligent misrepresentation claim against a wholesale insurance broker because there were no direct communications between the insured and the wholesale broker, and the insured dealt strictly with the retail broker]; see also Sea Trade Maritime Corp. v Marsh, 41 Misc 3d 1215[A], 2013 NY Slip Op 51704[U], *4 [Sup Ct, NY County 2013], aff'd 120 AD3d 1153 [1st Dept 2014]).

Nor can plaintiff establish that the indications that Hartan provided to USI were false (Brown v Wolf Group Integrated Communications, Ltd., 23 AD3d 239, 239-240 [1st Dept 2005] ["Although plaintiff alleged that defendants 'deliberately misrepresented the fact that an agreement had been reached,' he failed to specify how defendants misrepresented that fact, i.e., the words or actions used to 'deceive' him and 'deprive him of the benefit of his compensation package'"] [citations omitted]).

Here, Hartan provided only an "indication," not a "quote." An indication is an estimate of the premium that an insurance company may ultimately charge for a policy. Hartan did not guarantee that CoverX or the excess insurers would be able to issue the primary and excess policies within the indications (see DiCicco EBT at 92-95; Pray Aff., ¶ 4).

Plaintiff's failure to address the difference between an indication and a quote is fatal to its motion for summary relief. In addition, plaintiff does not even attempt to show that the indications were incorrect at the time that they were made, but, rather, only that the actual procured rate was higher than the estimate. That, however, is the very nature of estimates -- they are not exact. Plaintiff has not presented any evidence that Hartan's estimate was not its actual opinion, only that Hartan's opinion turned out, in hindsight, to be on the low side. That is not falsity. At most, the indication was merely a starting point, which cannot constitute negligent misrepresentation (Sheth v New York Life Ins. Co., 273 AD2d 72, 74 [1st Dept 2000] ["[t]he purported misrepresentations relied upon by plaintiff may not form the basis of a claim for ... negligent misrepresentation since they are ... opinions of value or future expectations"]).

In addition, plaintiff cannot establish that it relied upon the indications provided by Hartan, let alone that such reliance was reasonable. Plaintiff's claim of reliance is based on the assertions that:

1. Hartan knew that the indications it provided to USI would be utilized in connection with plaintiff's bid for the Project (plaintiff's Rule 19-a Statement, ¶ 6);

2. Hartan understood plaintiff's need for insurance pricing certainty in preparation of the bid (Id., ¶ 7); and

3. Hartan failed to inform plaintiff of any conditions or subjectivities to binding of the requested coverage at the indications (Giardino Aff., ¶ 7).

Plaintiff's claim of reliance fails for several reasons. First, as Giardino admitted, plaintiff did not rely on Hartan at all, but, rather, exclusively relied on USI. Second, the indication specifically stated that it was "non-bindable and subject to additional details on the job." Finally, USI, not Hartan, provided the indication to plaintiff, and without Hartan's knowledge, but did not inform plaintiff that the indication was non-bindable and subject to additional details of the job (3/14/12 email from D'Angelo to Androsiglio).

Plaintiff's claim of reasonable reliance fails for other reasons as well. The record demonstrates that the cost of the insurance does not appear as a line item anywhere in plaintiff's bid for the project. Androsiglio admitted that he assumed that the cost for the premium of the primary policy would be similar to what plaintiff was paying at that time for other policies (Androsiglio EBT at 89-90).

Based on the foregoing, plaintiff cannot establish that it relied on any statements by Hartan, let alone that any such reliance was reasonable.

Plaintiff has also failed to demonstrate that it suffered any damages. In order for an insured to recover for an insurance

broker's failure to procure requested coverage, the insured must affirmatively prove that the coverage sought was available, and could have been purchased (Rodriguez v Investors Ins. Co. of Am., 201 AD2d 355, 356 [1st Dept 1994] [although an insurance broker may be held liable for neglect in failing to procure insurance, "in order to support such a recovery it must be demonstrated that the coverage sought could have been procured prior to the" loss]; see also Herdendorf v GEICO Ins. Co., 77 AD3d 1461, 1463 [4th Dept 2010] [same]; see e.g. JKT Constr., Inc. v United States Liab. Ins. Group, 39 AD3d 594, 595 [2d Dept 2007] [broker "demonstrated that a specific exclusionary clause later sought by the plaintiff was not available at the time the policy was procured"]; Mott v New York Prop. Ins. Underwriting Assn., 209 AD2d 981, 981 [4th Dept 1994] [broker not liable for failure to procure insurance because plaintiffs "presented no proof to establish the availability of fire insurance coverage for their premises"]).

Plaintiff's current insurance broker, Doreen DiCicco, admitted that the $19.47 rate provided by Travelers was the best available rate. She stated that the rate was "excellent," and that no other cover available in the market "would match or come close to the premiums Travelers is charging" (DiCicco EBT at 143). Charles Androsiglio, plaintiff's former executive vice-

president, who oversaw all of plaintiff's bids, including the bid for the project, testified that the Travelers premium rate of $19.47 "was better than anything else you could have gotten on the street," and that the "broker tried every single avenue and there weren't that many avenues at that time" (Androsiglio EBT at 93-94). Under these circumstances, plaintiff has failed to set forth any evidence demonstrating that it could have obtained the primary policy for a lower premium rate than the Travelers policy. Accordingly, the claim for negligent misrepresentation must be dismissed.

Negligence

Plaintiff alleges that Hartan did not take the necessary steps to ensure that the requested coverage was procured, and never informed plaintiff about any issues with the indications which were provided. Accordingly, plaintiff asserts that Hartan failed to exercise due care in its transaction and was negligent, resulting in plaintiff's extensive financial damages.

The elements of negligence are that the defendant owed the plaintiff a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (Elmaliach v Bank of China Ltd., 110 AD3d 192, 199 [1st Dept 2013]). "The scope of any such duty of care varies with the forseeability of the possible harm and takes into consideration the reasonable

expectations of the parties and society in general (Elmaliach, 110 AD3d at 200). "[T]he injured party must show not only that the defendant owed a general duty to society but a specific duty to the plaintiff; without a duty running directly to the injured person there is no liability in damages, however foreseeable the harm" (Id.).

Here, plaintiff cannot establish the elements of its negligence cause of action against Hartan. Contrary to plaintiff's arguments, the record is clear -- Hartan did not undertake a duty to procure insurance policies within the indications. As a wholesale broker, Hartan's client was USI, not plaintiff. The record indicates that Hartan communicated entirely with USI, and had no direct contact or contract with plaintiff. Thus, Hartan provided the indications only to USI, and not to plaintiff. Moreover, Hartan specifically advised USI that the indication, which is merely an estimate, was non-bindable and subject to additional details on the job. The fact that USI did not inform plaintiff of that qualification does not change the fact that Hartan had no duty to plaintiff.

On this record, plaintiff fails to present any evidence that Hartan ever undertook any obligation to plaintiff. Although plaintiff relies on Evvtex Co., Inc. v Hartley Cooper Assocs. Ltd., 911 F Supp 732 [SDNY 1996], aff'd 102 F3d 1327 (2d Cir

1996) for the proposition that Hartan had a duty to send the indications directly to plaintiff, its reliance is misplaced because that case is factually distinguishable from the facts herein. In Evvtex, the London insurance broker communicated directly with the insured regarding the insured's payment of the premium, as well as the insured's receipt of the proceeds of a settlement of its claim for a theft loss. Here, in contrast, Hartan received no instructions from plaintiff, and never communicated directly with plaintiff.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant Hartan Brokerage's cross-motion for summary judgment is granted, and the amended complaint is dismissed as against defendant; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/15/16

HON. JEFFREY K. OING, J.S.C.