Tower Ins. Co. of N.Y. v Artisan Silkscreen & Embroidery, Inc.
2017 NY Slip Op 30046(U)
January 9, 2017
Supreme Court, New York County
Docket Number: 157754/2015
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

ARTISAN SILKSCREEN AND EMBROIDERY, INC., CASTRO REALTY CORPORATION, and CLAUDIO ABELINO,

Defendants.

INDEX NO. 157754/2015
MOTION DATE 11/16//2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

ARTISAN SILKSCREEN AND EMBROIDERY, INC.,

Third-Party Plaintiff,

-against-

ALL RISK BROKERAGE, INC., CEE JAY L AGENCY, LTD., and BZ LEVOVITZ,

Third-Party Defendants.

Third-Party Index No.: 595746/2015

The following papers, numbered 1 to 17 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5; 6 - 8
Answering Affidavits — Exhibits	9 - 11; 12 - 13
Replying Affidavits	14 - 15; 16 - 17

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Third-Party Defendant All Risk Brokerage, Inc.'s (herein "Defendant All Risk") motion under Motion Sequence No. 001, and Defendants Cee Jay L Agency, LTD (herein "CJ") and BZ Levovitz (herein "Levovitz") (herein collectively "Defendants CJL"), (All Risk and CJL collectively referred to herein as "Third-Party Defendants") motion under Motion Sequence No. 002, to dismiss the Third-Party Complaint, is granted.

Plaintiff Tower Insurance Company of New York (herein "Plaintiff Tower") commenced this action seeking a declaration that it has no obligation to defend or indemnify Defendants Artisan Silkscreen and Embroidery, Inc. (herein "Artisan") and Castro Realty Corporation (herein "Castro") in an underlying personal injury action brought by Defendant Claudio Abelino (herein "Abelino"), in Queens County Supreme

Court. Tower asserts that the general commercial liability insurance policy no. CPC00138133, and commercial umbrella policy no. CUC00005610301 effective from August 10, 2014 through August 10, 2015 (herein "the Policy"), does not cover the claims submitted by Artisan in the Abelino action.

Non-party Howard Schwab formed S. Tee's, Inc. (herein "S. Tee's") in 1986 under which t-shirts, and other memorabilia, were designed and manufactured at a factory in Jamaica, New York (herein "the Jamaica Location"). S. Tee's obtained a policy in 2011 from Tower through its insurance broker Levovitz, an employee of CJ, that was procured through All Risk. The policy was renewed each year with the named insured being S. Tee's, and the insured scheduled location being the Jamaica Location.

Mr. Schwab formed Artisan in July of 2014 as a successor company to operate S. Tee's business. In September of 2014, Mr. Schwab entered into a lease with Defendant Castro for 50 Nassau Terminal Road, New Hyde Park, New York (herein "the Premises"), and thereafter moved his manufacturing operations to the Premises from the Jamaica Location. In the underlying action, Abelino claims to have been injured while working construction at the Premises for Artisan on December 26, 2014.

Subsequent to the commencement of Abelino's suit, Artisan submitted a claim for defense and indemnification to Tower. Initially, Tower denied Artisan's claim on the basis that Artisan was not named on the Policy at the time of loss. (Mot. Exh. G). Tower later agreed to defend and indemnify Artisan in the Abelino action under a reservation of rights. (Mot. Exh. H). In the instant declaratory action Tower contends that Artisan was not a named insured or additional insured on the Policy, that the premises where the accident occurred was not a scheduled location on the Policy, and that the Employee Exclusion under the Policy bars coverage for Abelino's claims.

Artisan commenced a Third-Party action against the Third-Party Defendants, for breach of contract, negligence, and breach of fiduciary duty. The Third-Party Complaint alleges that Mr. Schwab requested from both Levovitz and All Risk that S. Tee's Policy be updated to add Artisan as an insured, that the Premises be added as a scheduled location, and that Castro be added as an additional insured (as required by the lease for the Premises). That both Levovitz and All Risk informed Mr. Schwab that the changes to the Policy would be made, that Tower is disclaiming coverage because as of the date of Abelino's accident the Policy had not been updated, and that the Third-Party Defendant's failure to update the policy was a breach of their duties causing Artisan damages.

All Risk now moves under Motion Sequence No. 001 to dismiss the Complaint pursuant to CPLR §§3211(a)(1), (3), and (7). CJL also moves under Motion Sequence No. 002 to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7).

All Risk argues that it was not the retail broker for S. Tee's Policy, and that even if it is considered to have been the retail broker, there was a lack of privity between All Risk and Artisan as brokers only have a duty to their clients. That it owed no duty to Artisan because there is no right of an additional insured to sue the broker of the named insured due to a lack of privity. That this Third-Party action is premature and not ripe for adjudication as Artisan has not incurred any defense cost damages because Tower is defending Artisan in the Abelino action, and that there are no indemnification damages either because Artisan has not settled or been the subject of a judgment. That regardless the issues in the Third-Party Complaint are moot because even if Artisan had been added to the Policy, the Employee Exclusion under the Policy still supports Tower's denial, and therefore a lack of coverage in the Abelino action would not have been caused by All Risk. Lastly, All Risk argues that even if Artisan had standing to sue, New York does not recognize a fiduciary duty owed by insurance brokers to its policyholders.

CJL also argues that Artisan lacks standing to sue as there was no privity between Artisan and CJL, as S. Tee's was its client, and not Artisan. That Artisan cannot sue as an additional insured, and that Artisan has no damages as Tower is defending it in the underlying personal injury action and has not been subject to settlement or a judgment. CJL also argues that the Employee Exclusion provision in the Policy bars coverage, and that there was no fiduciary relationship. Lastly, CJL argues that the claims as against Levovitz, personally, must be dismissed because as a corporate officer of CJL he is not subject to personal liability without any allegations that he personally entered into an agreement with Artisan to perform brokerage services.

Artisan opposes both motions arguing that the allegations of privity between All Risk and Artisan, and CJL and Artisan, have been sufficiently plead in the Complaint. That there is privity because the Policy invoices received from Tower identify All Risk as the "producer" on the Policy and as the contact for any questions or changes to the Policy. (Opp. Exh. A). That there is also privity because All Risk, and CJL undertook to alter the Tower Policy, after Mr. Schwab's request to add Artisan as a named insured (not just as an additional insured), and to add the Premises as a scheduled location. That All Risk and CJL failed to do so, and also failed to name Castro as an additional insured thereby breaching its duties to Artisan. Artisan also argues that as the successor corporation to S. Tee's, there was privity between CJL and Artisan. Finally, Artisan contends that the claims against Levovitz personally should remain as it is unclear whether he was acting as an owner or employee of CJL, or in his capacity as an independent licensed insurance broker.

Artisan further argues that the Employee Exclusion does not render the Third-Party action moot because the Third-Party Defendants' failure to add Castro as an additional insured gives rise to secondary liability on Artisan's behalf because of its Lease with Castro, and that such a liability is not excluded under the Employee Exclusion to the Policy. That the question of whether a fiduciary relationship existed

is a fact-driven question that cannot be dismissed at the pleading stage as through discovery it may be revealed that there were special circumstances present in the parties' relationship. Finally, Artisan argues it has been damaged as a result of the Third-Party Defendants' failures because Tower has disclaimed coverage, thus exposing Artisan to Castro's cross-claims in the Abelino action for indemnity and defense costs, and having incurred costs for its own defense in both actions.

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim (Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]). "In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable (Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668 [2nd Dept., 2010] citing to, Fontanetta v. John Doe 1, 73 AD3d 78, 84 [2010]). To qualify as documentary evidence, printed materials "must be unambiguous and of undisputed authenticity" (Fontanetta v. John Doe 1, 73 AD3d 78, 86, 98 N.Y.S.2d 569, 575 [2nd Dept., 2010], see Flushing Sav. Bank, FSB v. Siunykalimi, 94 AD3d 807, 808, 941 N.Y.S.2d 719, 721 [2d Dept., 2012]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one," and if it is "...shown that a material fact as claimed by the pleader to be one is not a fact at all"... and no significant dispute exists regarding it, dismissal is warranted. (Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17 [1977]).

All Risk provides the New York State Department of State's Division of Corporations entity information for both S. Tee's and Artisan showing them as separate entities. (Mot. Exhs. A and B respectively). All of the policies that S. Tee's received through Tower name only S. Tee's as the insured and the Jamaica Location as the scheduled location. (Mot. Exhs. C - F). Artisan is not listed as a named insured, or as an additional insured, nor is the Premises listed as the scheduled location on the Policy. The documentary evidence shows that Artisan was not covered by the Policy, however, it does not utterly refute Artisan's claims that the Third-Party Defendants had a duty to procure coverage if they in fact undertook to make the requested changes to the Policy.

"Insurance agents and brokers have a common law-law duty to obtain the coverage requested by a client within a reasonable time after the request is made or if unable to procure the requested coverage, to promptly notify the client (Hoffend & Sons, Inc. V. Rose & Kiernan, Inc., 7 N.Y.3d 152, 818 N.Y.S.2d 798, 851 N.E.2d 1149 [2006]). In executing the insurance brokerage transaction, an agent or broker must exercise due care; thus, when an insurance policy does not cover a loss for which the broker was contracted to obtain coverage, the party who engaged the broker is entitled to recover damages." (Cosmos, Queens Ltd. v. Matthias Saechang IM Agency,

74 A.D.3d 682, 904 N.Y.S.2d 386 [1st Dept. 2010]).

However "[i]t is well settled that a broker who negligently fails to procure a policy stands in the shoes of the insurer and is liable to the insured, with said liability being limited to that which would have been borne by the insurer had the policy been in force." (Soho Generation of N.Y. v. Tri-City Ins. Brokers, 256 A.D.2d 229, 683 N.Y.S.2d 31 [1st Dept. 1998]). Here, even if the Third-Party Defendants had a duty to add Artisan as either an insured or an additional insured, their liability would be limited to the extent that the Policy was enforceable. Here, Abelino was found to be an employee of Artisan (Mot. Exh. I), so even if the Third-Party Defendants had made the requested changes, the Employee Exclusion under the Policy would bar coverage of Abelino's claims. (See Employee Exclusion provision, Mot. Exh. E, Form CG 00 01 12 07, Section I).

Artisan's argument that All Risk's omission to add Castro as an additional insured gives rise to secondary liability on Artisan's behalf that is not excluded under the Employee Exclusion to the Policy, is unavailing. "New York courts have held that employee exclusionary clauses containing the same or similar language are plain and unambiguous and that such a clause applies to exclude coverage to an additional insured where, as here, the main action is brought against such additional insured by the employee of a named insured." Moleon v. Kreisler Borg Florman General Const. Co., Inc., 304 A.D.2d 337, 758 N.Y.S.2d 621 [1st Dept. 2003]). To the extent Castro had been named as an additional insured, the Employee Exclusion under the Policy would have also barred coverage to Castro. Therefore, the claims for breach of contract and negligence must be dismissed.

Finally, the cause of action for breach of a fiduciary duty must also be dismissed. "In the absence of a special relationship, a claim against an insurance agent or broker for breach of fiduciary duty does not lie" (Cathy Daniels, Ltd. v. Weingast, 91 A.D.3d 431, 936 N.Y.S.2d 44 [1st Dept. 2012]), as "there is no continuing duty to advise, guide or direct..." (Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc., 65 A.D.3d 865, 885 N.Y.S.2d 276 [1st Dept. 2009]; see Cathy Daniels, Supra- a breach of fiduciary duty claim is properly dismissed where the complaint establishes that the parties had nothing more than a typical insurance agent-customer relationship; see also Hersch v. Dewitt Stern Group, Inc., 43 A.D.3d 644, 841 N.Y.S.2d 516 [1st Dept. 2007]- even a long standing relationship between the parties, or an assurance that insurance needs are being met do not amount to circumstances so exceptional as to support imposition of a fiduciary duty).

ACCORDINGLY, it is ORDERED, that Defendant All Risk Brokerage, Inc.'s motion under Motion Sequence No. 001, and Defendants Cee Jay L Agency LTD., and BZ Levovitz's motion under Motion Sequence No. 002, to dismiss the Third-Party Complaint, is granted, and it is further,

ORDERED, that the Third-Party Complaint is dismissed, and it is further,

ORDERED, that the caption is amended and the action shall bear the following caption:

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,
-against-

ARTISAN SILKSCREEN AND EMBROIDERY, INC., CASTRO REALTY CORPORATION, and CLAUDIO ABELINO,

Defendants.

and it is further,

ORDERED, that the moving parties within 20 days from the date of entry of this Order serve a copy of this Order with Notice of Entry on all parties, and it is further,

ORDERED, that the moving parties within 20 days from the date of entry of this Order serve a copy of this Order with Notice of Entry on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly, and it is further,

ORDERED, that the remaining parties appear for a Compliance Conference, at IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, on March 15, 2016, at 9:30 a.m.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: January 9, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE