

Rick Friedman Enters., Ltd. v Travelers Indem. Co.

2017 NY Slip Op 30077(U)

January 9, 2017

Supreme Court, New York County

Docket Number: 652949/13

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

RICK FRIEDMAN ENTERPRISES, LTD. d/b/a
ARTVALE,

Plaintiff,

-against-

Index No: 652949/13
DECISION/ORDER
Motion sequence 2

THE TRAVELERS INDEMNITY COMPANY,
INTERMARKET INSURANCE AGENCY, INC. and
8TH STREET PASSAIC, LLC,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant Intermarket Insurance Agency Inc.'s CPLR 3212 motion for summary judgment.

Papers	Numbered
Defendant's Notice of Motion	1
Defendant's Memorandum of Law	2
Plaintiff's Affirmation in Opposition.....	3
Defendant's Memorandum of Law in Reply	4
Defendant's Affirmation in Reply	5

Halperin & Halperin, P.C., New York (Jeffrey Weiskopf of counsel), for plaintiff.
Keidel, Weldon & Cunningham, LLP, White Plains (Jeffrey A. Lesser of counsel), for defendant
Intermarket Insurance Agency.

Gerald Lebovits, J.

This is a commercial-insurance action. Plaintiff, Rick Friedman Enterprises, Ltd. d/b/a Artvale (Artvale), is a New York corporation engaged in the business of wholesale fabric and textile sales. (See notice of motion, exhibit A, complaint, ¶ 1.) Defendant Intermarket Insurance Agency, Inc. (Intermarket), is Artvale's insurance agent; co-defendant, the Travelers Indemnity Company (Travelers), is Artvale's insurer. (*Id.*, ¶¶ 2-3.) Co-defendant, 8th Street Passaic, LLC (8th Street), is the owner of a commercial warehouse located at 100 8th Street in Passaic, New Jersey (the warehouse), in which Artvale had stored a portion of its inventory. (*Id.*, ¶ 4.) This action arises out of a flood in the warehouse that occurred on August 27, 2011, as a result of Hurricane Irene, which caused damage to Artvale's inventory. (*Id.*, ¶ 15.) Artvale discontinued this action against 8th Street. (*Id.*; Lesser aff, ¶ 4.)

Intermarket states that it has served as Artvale's insurance broker since 2005. (See notice of motion, Lesser aff, ¶ 8.) With respect to this action, Intermarket states that at the time Artvale had moved its inventory into the warehouse on August 1, 2011, it notified Intermarket about this move and requested that Intermarket amend its existing Travelers business personal property policy to cover the inventory kept at the warehouse. (*Id.*, ¶ 9.) Intermarket states that it did so and

has presented a quantity of email correspondence between itself and Artvale that shows that it made the requested change at some point in early August 2011. (*Id.*, ¶ 18; exhibits H, I, J, K, L.) Neither party has presented the court with a copy of either the preexisting policy or of any new policy obtained after Artvale's request, although both parties were deposed regarding that request. (*Id.*; exhibits D, E, F.) The court also notes that, after the flooding from Hurricane Irene on August 27, 2001, damaged Artvale's inventory, Travelers disclaimed coverage in a letter that stated, in pertinent part, as follows:

"We refer you to the following applicable policy language from the CPT108 (01/03) Causes of Special Loss Form which states in relevant part:

A. Covered Causes of Loss

When special loss is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:

1. Excluded in Section B, Exclusions; or
2. Limited in Section C, Limitations; that follow

* * *

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

* * *

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) mudslide or mudflow;
- (3) Water or sewage that backs up or overflows from a sewer, drain or sump; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) foundations, walls, floors or paved surfaces;
 - (b) basements, whether paved or not; or
 - (c) doors windows or other openings;

All whether naturally occurring or due to man made or other artificial causes.

But if Water, as described in g (1) through g (4) above results in fire, explosion or sprinkler leakage, we will pay for the damage caused by that fire, explosion or sprinkler leakage

* * *

C. Limitations

Damage to the interior of a building or structure or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not unless:

(1) the building or structure first sustains damage by a Covered Loss of Cause to its roof and walls through which the rain enters.’

The claimed water damage is excluded by the above quoted language. Unfortunately, the policy does not cover this loss. Please accept our assurances that we have given due consideration for this claim. We regret that we cannot be of assistance.” (*Id.*; exhibit G.)

Artvale thereafter commenced this action on August 20, 2013, by filing a summons and complaint with causes of action for: (1) breach of contract against Travelers; (2) negligence against Intermarket; (3) breach of fiduciary duty against Intermarket; (4) breach of contract against 8th Street; and (5) negligence (against 8th Street). (*See* notice of motion, exhibit A.) Intermarket filed an answer with a cross-claim against Travelers for indemnification on November 4, 2013. (*Id.*; exhibit B.) Travelers filed an answer on December 23, 2013. (*Id.*; exhibit C.) Intermarket now moves for summary judgment to dismiss Artvale’s second and third causes of action.

Intermarket’s summary-judgment motion is granted.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002].) Once the moving party makes this showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish that material issues of fact exist requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003].)

This motion seeks summary judgment dismissing Artvale’s second and third causes of action against Intermarket. The court will consider each of them in turn.

Artvale’s second cause of action alleges negligence:

“[Intermarket], by its agents, servants and/or employees, was careless, negligent and reckless in the discharge of its duties by, inter alia, procuring a policy of insurance that was encumbered by numerous exceptions rendering plaintiff effectively uninsured; failing to notify plaintiff of the alleged exceptions to the policy; failing to apprise plaintiff of the fact that the new warehouse location at 100 Passaic Street, Passaic, NJ 07055 was situated in a flood zone; failing to apprise plaintiff that the policy would not insure plaintiff’s inventory against flooding and/or sewage backup; failing to procure a policy of flood coverage for plaintiff; or recommending that plaintiff procure such coverage from third parties or the federal government; and failing to diligently and competently represent plaintiff’s interests in connection with the procuring of the policy.” (*See* notice of motion, exhibit A, complaint, ¶ 29.)

Under New York law, to prove negligence, the movant must show “duty, breach, damages, causation and foreseeability.” (*Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 [1st

Dept 2005].) Here, Intermarket attacks the duty element of Artvale’s negligence claim, arguing that “the limited duty of an insurance broker is only to obtain coverage specifically requested.” (Defendant’s memorandum of law at 3-4 [pages not numbered].) Intermarket cites the Court of Appeals’ decision in *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.* (7 NY3d 152, 157 [2006]) for the proposition that “a broker has a common-law duty either to obtain the coverage that a customer specifically requests or to inform the customer of an inability to do so.” Artvale responds by citing the Court of Appeals’ decision in *Voss v Netherlands Ins. Co.* (22 NY3d 728, 734-735 [2014]), which further analyzed that rule and held that:

“As a general principle, insurance brokers ‘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; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage.’”

* * *

“Where a special relationship develops between the broker and client, we have also indicated that the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage. . . .”

* * *

“We identified three exceptional situations that may give rise to a special relationship, thereby creating an additional duty of advisement:

‘(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on’ [internal citations omitted].”

Artvale argues that “a combination of the second two exceptions from *Voss* . . . apply herein” to create a duty of advisement. (See Weiskopf affirmation in opposition, ¶ 12.) With respect to “relying on the expertise of the agent,” Artvale argues that “Intermarket marketed itself as a flood insurance agent.” (*Id.*, ¶ 8.) Artvale, however, acknowledges the examination before trial (EBT) testimony of Intermarket’s vice president, Anthony Giaccone, that Intermarket did not have any means to determine whether a specific property sat within a flood zone and thereby to advise a prospective client that flood insurance might be required. (*Id.*; notice of motion, exhibit E at 70.) Artvale, thus, has undercut its own claim that it reasonably relied on Intermarket’s expertise, and the court must discount Artvale’s argument.

With respect to a “course of dealing leading to reasonable notice,” Artvale argues that “a reasonable insurance agent must assume that every call they received . . . would put them on notice that their advice was being sought and specially relied on.” (*Id.*, ¶ 9.) This argument, however, misconstrues that the burden is on Artvale to demonstrate a course of dealing between

it and Intermarket giving rise to an inference that Intermarket would reasonably understand to be on notice that Artvale was seeking specific advice or service. To meet this burden, Artvale alleges only that Intermarket has been its insurance agent since 2001, and presents printouts from Intermarket's website that advertise its commitment to service and its ability to obtain business and flood insurance. (*Id.*, ¶ 6; exhibits A, B, C.) This evidence is insufficient to demonstrate anything beyond a longstanding business relationship. The court also finds unpersuasive Artvale's "reasonable notice" argument and determines that Artvale has failed to meet its burden of showing that a "special duty" exists that would support its negligence claim. Therefore, Intermarket is entitled to summary judgment dismissing Artvale's second cause of action.

Artvale's third cause of action alleges breach of a fiduciary duty:

"[Intermarket], by its agents, servants and/or employees, breached its fiduciary duties to plaintiff by, inter alia, procuring a policy of insurance that was encumbered by numerous exceptions rendering plaintiff effectively uninsured; failing to notify plaintiff of the alleged exceptions to the policy; failing to apprise plaintiff of the fact that the new warehouse location at 100 Passaic Street, Passaic, NJ 07055 was situated in a flood zone; failing to apprise plaintiff that the policy would not insure plaintiff's inventory against flooding and/or sewage backup; failing to procure a policy of flood coverage for plaintiff, or recommending that plaintiff procure such coverage from third parties or the federal government; and failing to diligently and competently represent plaintiff's interests in connection with the procuring of the policy." (Notice of motion, exhibit A, complaint, ¶ 35.)

The proponent of a claim for breach of a fiduciary duty must demonstrate that a fiduciary relationship exists, that defendant breached that duty, and that this resulting damages. (*Kurtzman v Bergstol*, 40 AD3d 588 [2d Dept 2007].) Here, Intermarket attacks the first element of Artvale's claim, arguing that "there exists no fiduciary duty between agent and insured." (*See* defendant's memorandum of law at 4-5 [pages not numbered].) Intermarket relies on *Edelman v O'Toole-Ewald Art Assoc., Inc.* (28 AD3d 250, 251 [1st Dept 2006]), holding that "[n]ormally, insurance companies do not owe a fiduciary duty to their insureds, absent a showing of some special relationship." Artvale responds that "for the same reasons Intermarket owed plaintiff a duty to advise, so too was Intermarket plaintiff's fiduciary." (Weiskopf aff in opposition, ¶ 14.) The court has already determined that Artvale's "duty to advise" argument fails. The court also concludes that Artvale has failed to meet its burden to show that a fiduciary relationship existed. Intermarket is entitled to summary judgment dismissing Artvale's third cause of action. Accordingly, the court grants Intermarket's motion in its entirety.

Accordingly, it is hereby

ORDERED that the motion, under CPLR 3212, of defendant Intermarket Insurance Agency, Inc. for summary judgment to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that Intermarket Insurance Agency, Inc. must serve a copy of this decision with notice of entry on all parties and on the County Clerk's Office.

Dated: January 9, 2017



J.S.C.

HON. GERALD LEBOVITS
J.S.C.