

Kessler v Mackoul & Assoc., Inc.

2018 NY Slip Op 30278(U)

January 16, 2018

Supreme Court, New York County

Docket Number: 151396/2017

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

MICHAEL J. KESSLER,

Plaintiff,

-against-

MACKOUL & ASSOCIATES, INC.,

Defendant.

Index No.: 151396/2017

DECISION/ORDER

Motion Sequence No. 01

Gerald Lebovits, J.

Plaintiff, Michael Kessler, retained defendant as his insurance broker for an apartment in Manhattan. Plaintiff purchased property insurance from Travelers Insurance Companies based on his reliance on defendant's advice. Plaintiff later sold this property and purchased a larger apartment located at 130 Jane Street and again contacted defendant for insurance advice. Plaintiff alleges that he informed defendant that he wanted coverage to insure against a catastrophic event in an amount that would cover full demolition and rebuild costs and that plaintiff had no personal knowledge on the subject.

Plaintiff filed suit for three causes of action: (1) breach of contract; (2) negligence; and (3) professional malpractice.

Defendant now moves, pre-answer, under CPLR 3211 (a) (7) motion to dismiss for failure to state a claim for which relief may be granted based on plaintiff's three causes of action.

On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts a plaintiff alleges fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *accord Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014] ["When documentary evidence is submitted by a defendant, the standard morphs from whether the plaintiff has stated a cause of action to whether he or she has one."].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nonnon*, 9 NY3d at 827; *accord Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].)

Defendant's motion is granted in part and denied in part as explained below.

First cause of action: breach of contract

To state a breach of contract claim, plaintiff must establish the following elements: (1) existence of a valid contract; (2) its performance of the contract; (3) defendant's breach of the

contract; and (4) damages. (*Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004].)

Plaintiff contracted with defendant to procure insurance for both apartments. Plaintiff performed his duties of the contract. Plaintiff alleges that defendant breached its duties by failing to procure insurance coverage. Plaintiff alleges that because of defendant’s breach, he suffers and continues to suffer damages in the amount he is underinsured to rebuild his apartment.

Defendant’s motion to dismiss the first cause of action is denied.

Second cause of action: negligence

To state a negligence claim, plaintiff must establish the following elements: “(1) the existence of a duty on defendant’s part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof.” (*Akins v Glens Falls City School District*, 53 NY2d 325, 333 [1981].)

Plaintiff alleges that a special relationship exists because defendant advertised itself as an expert in advising clients in placing insurance coverage. As explained by the Court of Appeals in *Voss v Neth. Ins. Co.* (22 NY3d 728, 736 [2014]), a special relationship is created between insurance brokers and their clients when the brokers hold themselves out as an expert and, “[w]here a special relationship develops between the broker and client . . . 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.” (*Id.* at 735.)

Plaintiff alleges, and defendant does not contest, that defendant provided only a renewal of the original insurance policy and no additional advice, guidance, or direction to obtain additional coverage.

On October 26, 2016, a fire erupted destroying plaintiff’s apartment. The fire constituted a covered loss under the insurance policy. The total cost to rebuild the apartment is estimated at \$450,000 and insurance would cover only \$60,485.25. Plaintiff also received \$28,150 for the loss of use portion of his policy causing him to be underinsured by an additional \$151,850.

Defendant’s motion to dismiss plaintiff’s second cause of action is denied.

Third cause of action: professional malpractice

Defense moves to dismiss the third cause of action because insurance brokers are not “professionals” for purpose of professional malpractice.

The Court of Appeals in *Chase Scientific Research, Inc. v NIA Group, Inc.* (96 NY2d 20, 30 [2001]) concluded that insurance agents and brokers do not fall within the category of individuals that CPLR 214 (6) seeks to bind to a certain standard of conduct:

“[W]e conclude that insurance agents and brokers are not within the ambit of CPLR 214 (6). While agents and brokers must be licensed, they are not required to engage in extensive specialized education and training; rather, a person who has been regularly employed by an insurance company, agent or broker for at least one year during the three years preceding the date of license application may qualify to be a broker. True, lawyers, engineers, architects and accountants also can circumvent the formal education criteria of their respective fields, but they must surmount far higher hurdles. Aspiring attorneys must complete at least one academic year as a matriculated student at an approved law school as well as an aggregate of four years in the supervised study of law in a New York State law office, with credit for law school attendance; engineers, architects and accountants also face extensive work experience requirements.”

“Nor are insurance agents and brokers bound by a standard of conduct for which discipline might be imposed. Moreover, as this Court recently made clear, an insurance agent has a common-law duty to obtain requested coverage, but generally not a continuing duty to advise, guide or direct a client based on a special relationship of trust and confidence. To be sure, insurance agents and brokers are held to high standards of education and qualification, but these criteria are simply not as rigorous as those embraced by what we conclude are the professionals within CPLR 214 (6).” (*Id.* [internal citations omitted].)

Plaintiff fails as a matter of law to allege professional malpractice. Defendant’s motion to dismiss the third cause of action is granted.

Accordingly, it is

ORDERED that defendants’ motion to dismiss is granted in part and denied in part: defendant’s motion to dismiss the third cause of action is granted and the motion is otherwise denied; and it is further

ORDERED that defendant serve a copy of this decision and order with notice of entry on all parties and on the County Clerk’s office, which is directed to enter judgment accordingly; and it is further

ORDERED that defendants must serve and file its answer within 20 days of service with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on April 28, 2018, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: January 16, 2018



J.S.C.

HON. GERALD LBOVITS
J.S.C.