SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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JACQUELINE HUMPHRIES, CHARLES OURSLER,

Plaintiff,

- v -

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY DBA METLIFE AUTO & HOME, CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY, HASKELL BROKERAGE CORP., JLNY GROUP, LLC, FULTON ASSOCIATES, LLC, FAIRMONT INSURANCE BROKERS, LTD.,

Defendant.

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INDEX NO. 152521/2015

MOTION DATE 05/08/2019

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 229, 237, 238, 239, 240, 254, 259, 260, 267, 271, 278, 279, 280, 281, 282, 283, 285, 287, 289, 292

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

In this action, plaintiffs seek to recover money allegedly due to them from their home and condominium association insurance policies. In motion sequence number 009, Fairmont Insurance Brokers, Ltd. (Fairmont) seeks summary judgment dismissing all claims against it. The court set forth the background to this case at length in its decision and order resolving motion sequence numbers 004 and 008 (NYSCEF Doc. No. 295), which it incorporates by reference.

In brief, plaintiffs Jacqueline Humphries and Charles Oursler own 138 Fulton Street (138 Fulton) unit 5 as well as a portion of the former unit 4 (the rental apartment). Humphries and Oursler, both of whom are artists, lived in unit 5 part-time with their son, and they rented the rental apartment to longstanding tenants. Humphries also used unit 5 as a studio space and had paintings there. Former defendant Fulton Associates, LLC owns the neighboring building, 140 Fulton Street (140 Fulton) (NYSCEF Doc. Nos. 90, 91). On March 17, 2013 and March 18,

2013, there were fires at 140 Fulton (NYSCEF Doc. Nos. 93, 94) which caused heat, smoke, and water damage to unit 4 and unit 5 (NYSCEF Doc. No. 1 ¶¶ 16, 24-25). Due to extensive damage to 138 Fulton, the Department of Buildings (DOB) issued a mandatory vacate order for the building. The DOB order prevented access from March 17, 2013 until October 2, 2013 (NYSCEF Doc. No. 95).

The condominium declaration required the board of 138 Fulton to obtain insurance. In particular, the board had to insure

> "the Building and the Common Elements . . . against loss by fire or other casualty, water damage, vandalism and malicious mischief, lightning, natural disaster and extended coverage together with all heating, air conditioning and other service machinery contained therein but not including wall, ceiling or floor decorations or coverings of furniture, furnishings, fixtures, equipment or other personal property supplied or Installed by Unit Owners, or Occupants"

(NYSCEF Doc. No. 97, § 21 [a] [i]).

Fairmont procured insurance on behalf of The 138 Fulton Condominium (the Condominium). Specifically, it obtained policy number SBP 2454332 from Cambridge Mutual Fire Insurance Company (Cambridge) ***(id.* ¶ 44).** The policy defines the building to include each unit's fixtures, improvements, and alterations if they are part of the building, and appliances including refrigerators, dishwashers, laundry machines "if [the] Condominium Association Agreement requires you to insure it" and the items are not covered by another policy (NYSCEF Doc. No. 96 [BP 17 01 01 97]). Plaintiffs hired an architect and contractor and repaired both units. According to plaintiffs' counsel, plaintiffs spent $330,000 repairing unit 5 and $18,000 repairing unit 4 (NYSCEF Doc. No. 39 ¶¶ 24-25). Plaintiffs allege that a portion of their loss should have been covered by the Cambridge policy, but that Cambridge improperly denied their

claim in its entirety on the ground that plaintiffs are not eligible for recovery under the building policy.

Motion Sequence Number 004

To the extent that is relevant here, plaintiffs argued in motion sequence number 004 that Cambridge was liable for "walls out" coverage – that is, coverage for the exterior walls and the exterior framing of plaintiffs' fourth and fifth floor units. They also argued that summary judgment was appropriate against Cambridge as to its bad faith administration of plaintiffs' claim. In response, in motion sequence number 008, Cambridge moved for summary judgment dismissing the claims against it. Cambridge sought declarations that it is an excess carrier with respect to plaintiffs' damages claims and that plaintiffs are not insured under the Cambridge policy. The court found that the Cambridge policy, viewed as a whole, covered damage to the walls, ceilings, and floors of the units as long as they were in their original form; that certain appliances and fixtures were covered if either they were installed as part of the original unit or the association required the unit owners to install them. The court noted that even Cambridge implicitly conceded that there was some coverage when it stated that it was responsible solely for excess coverage. It denied summary judgment in either party's favor because neither plaintiffs nor Cambridge provided evidence as to how much, if anything, MetLife paid for these covered expenses, and how much, if anything, Cambridge owed on its excess. In addition, the court stated that based on the parties' submissions, it was unclear which of the asserted costs were attributable to improvements or to fixtures or appliances plaintiffs voluntarily added.

Litigation with Fairmont

Initially, plaintiffs commenced a separate action against Fairmont (NYSCEF Doc. No. 200 [Complaint]). The complaint asserts that because plaintiffs are members of the condominium

association, they share the interests and rights of the association (*id.* ¶ 8). It alleges that Fairmont breached its common law duty when it procured the allegedly inadequate Cambridge policy (*id.* ¶¶ 22-24). It suggests, on information and belief, that there were more comprehensive fire insurance policies available and that Fairmont did not tender them to the association (*id.* ¶¶ 25-26). The complaint seeks a minimum of $500,000 in damages, an amount which includes $447,000 for the damages to plaintiffs' property as well as attorney's fees (*id.* ¶¶ 27 *et. seq.*).

The current motion argues that Fairmont is entitled to dismissal of all claims against it. Fairmont claims that it did not owe a common law duty to plaintiffs, but rather to the building. It relies on deposition testimony from both plaintiffs, in which they repeatedly state that they either did not know or did not recall anything about the Cambridge policy or the underlying relationship between the association and Fairmont (*e.g.*, NYSCEF Doc. No. 142 [Humphries Dep], at *232 line 12 - *244 line 13; NYSCEF Doc. No. 144 [Oursler Dep] at *41 line 12 - *43 line 14). Quoting *Pressman v Warwick Ins. Co.* (213 AD2d 386, 387-388 [2d Dept 1995]), it argues that it "cannot be held liable for damages sustained by an injured third party . . . as the third party is not in privity with the agent and is not an intended beneficiary of the insurance contract."

Fairmont also states that, although plaintiffs allege that "claims were filed by Plaintiffs (or on their behalf) against the Cambridge policy" and plaintiffs did not receive coverage, they do not indicate whether plaintiffs themselves filed a claim or whether the building's claim was treated properly (NYSCEF Doc. No. 198 [Sklar Aff] ¶ 12-13). Further, plaintiffs state they were damaged $447,500 by Cambridge but they do not explain why all the uncovered expenses should have been included in the Cambridge Policy – or how, by extension, this is the fault of Fairmont. Here, too, Fairmont states, plaintiffs' depositions do not provide elucidation.

In addition, Fairmont points to the deposition of its president, Moishe Mishkowitz (NYSCEF Do. No. 205). According to Mishkowitz, he did not negotiate or have direct contact with Cambridge. Instead, Cambridge required that Fairmont act through Cambridge's appointed agent, JLNY Group LLC (JLNY). Mishkowitz also stated that the Cambridge Policy extended to the raw materials of the apartment – including the unvarnished floors, the unpainted walls, plumbing necessary for the toilets, sinks, and other utilities to operate – while the apartment's other elements and enhancements were not covered by the policy. Fairmont did not consider plaintiffs, as unit owners, to be its clients.

Plaintiffs respond by asserting that a special relationship existed between the association and Fairmont, and that, as they are beneficiaries under the policy,[1] Fairmont's duty to the association also applies to plaintiffs. In support, they cite to the Mishkowitz affidavit, which states, in part, that "Fairmont had discussions with Guy Morris, who was the representative of the building itself (that is, originally, the Sponsor of the building's conversion and then the Board.)" (NYSCEF Doc. No. 206 ¶ 5). At deposition, plaintiffs note, Mishkowitz explained that "Guy Morris and I have a relationship, so we speak often on multiple different issues. I can't pinpoint the dates when we spoke about the 138 Fulton Condominiums but since the date that he purchased the property throughout the rehab, through the condominium, etcetera, etcetera, we have had multiple conversations" (NYSCEF Doc. No. 205, at **38, lines 5-13). Plaintiffs emphasize that the relationship between Morris and Mishkowitz was a longstanding one. They further note that paragraph 21 (a) of the condominium association's declaration makes clear that the unit owners were to be covered by the policy (NYSCEF Doc. No. 282 ¶ 21 [a]). In addition, plaintiffs argue

[1] Plaintiffs assert that they are listed as "additional interests" at page 8 of Fairmont's insurance application. The court cannot locate the page to which plaintiffs refer, but does see that two units on the second floor and one unit on the fourth floor are listed on page 12 (NYSCEF Doc. No. 281).

that they have an insurable interest under the Real Property Law and that a portion of their monthly maintenance charges go toward the cost of the Cambridge policy. Finally, they contend that they have derivative standing to assert claims on behalf of the association, including those for the unpaid claims asserted here (citing *Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 559 [1st Dept 2017]; *see generally Caprer v Nussbaum*, 36 AD3d 176 [2d Dept. 2006]).

In reply,[2] Fairmont states that plaintiffs improperly assert a special relationship argument for the first time in their opposition papers. Fairmont further states that, even if the court considered the argument, it would find that it lacks merit. It argues that plaintiffs cannot allege the type of breach of duty which would enable them to assert a derivative claim (citing *Abrams v Donati*, 66 NY2d 951, 953-954 [1985]). Furthermore, Fairmont argues, plaintiffs are not alleging derivative claims on behalf of all the building's unit owners, but instead only seek damages on their own behalf. Finally, Fairmont contends that plaintiffs do not explain how Fairmont failed in any alleged duty.

Summary judgment

On a motion for summary judgment, the moving party has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1985]). The facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18

[2] Fairmont includes documents that relate to plaintiffs' alleged failure to comply with discovery (NYSCEF Doc. Nos. 207-209) and includes a reply that purportedly further supports its cross-motion to strike the note of issue and obtain further discovery (NYSCEF Doc. No. 229). However, although the affirmation in support of the motion mentions these alleged discovery failures (NYSCEF Doc. No. 198 ¶¶ 34-37), the notice of motion seeks summary judgment only (NYSCEF Doc. No. 197). Further, plaintiffs' papers here do not discuss the alleged discovery issues (NYSCEF Doc. Nos. 278-279). Therefore, the court does not address any discovery arguments. Either they were misfiled and relate to another motion, or Fairmont's documents here do not provide adequate notice of the discovery argument to plaintiffs (*see* CPLR § 2214 [a]).

NY3d 335, 339 [2011]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). Once the moving party "produces the requisite evidence, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40, 49 [2015] [internal quotation marks and citation omitted]). The court's task in deciding a summary judgment motion is to determine whether there are bona fide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]; *see Long Is. Sport Dome v Chubb Custom Ins. Co.*, 5 Misc 3d 1028 [A], 2004 NY Slip Op 51593 [U]. *2 [Sup Ct, Suffolk County 2004], *affd* 23 AD3d 441 [2d Dept 2005]).

As this court ruled in its order resolving motion sequence number 007, plaintiffs cannot argue that a special relationship exists, as they did not allege it in the complaint (*see Fidelity Natl. Tit. Ins. Co. v. NY Land Tit. Agency LLC*, 121 AD3d 401, 403 [1st Dept 2014]). Indeed, plaintiffs improperly raise the argument for first time in their current oppositions to Haskell and Fairmont's summary judgment motions (*see Biondi v Behrman*, 149 AD3d 562, 563-564 [1st Dept 2017], *lv dismissed in part, lv denied in part* 30 NY3d 1012 [2017]). Absent this argument, plaintiffs have offered no substantive opposition to the motion.

In addition, plaintiffs misconstrue the applicable law. For one thing, as Fairmont points out, their claims are not asserted derivatively on behalf of all unit owners and renters in the building. *Caprer v Nussbaum* (36 AD3d 176 [2d Dept 2006]), one of the cases upon which

plaintiffs rely, relates to the plaintiff's right to assert a derivative claim for waste and mismanagement on behalf of all unit owners and against a member of the association's board of directors and the building's managing agent. Thus, it is distinguishable from the situation at hand. For another, there is no privity. Instead, the First Department has ruled that "the duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract for the imposition of liability" (*Arredondo v City of New York*, 6 AD3d 328, 329 [1st Dept 2004]). Thus, the complaint against Fairmont must be dismissed for lack of privity.

The court has considered all arguments the parties asserted, even if not discussed. It does not discuss the issue of prematurity of this motion, as the court already issued its decision against Cambridge. Accordingly, and for the reasons above, it is

ORDERED that motion sequence number 009, by Fairmont, is granted and all claims against Fairmont are severed and dismissed; and it is further

ORDERED that, based on this court's orders in motion sequence numbers 006, 008, and 009, the caption of this action is amended to read:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 58

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JACQUELINE HUMPRHIES and CHARLES OURSLER,

Plaintiffs,

-against-

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY dba METLIFE AUTO & HOME, and CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY,

Defendants.

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The County Clerk and Trial Support Clerk shall amend the caption accordingly, and the parties shall use the amended caption in all future papers.

9/29/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

HON. DAVID B. COHEN
J.S.C.