SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BEAUTYKO, USA, INC, BEAUTYKO, LLC., LINOI, LLC, BENNOTI, LLC, SHOPFLASH, INC.

Plaintiffs,

- v -

P&G BROKERAGE, INC., BENJAMIN HIRSCH, AM TRUST, NORTH AMERICA, TOWER INSURANCE COMPANY,

Defendants.

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INDEX NO. 653451/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion for SUMMARY JUDGMENT.

In this case, Plaintiffs Beautyko, USA, Inc., Linnoi, LLC, Beautyko, LLC, Shopflash, Inc. and Bennoti, Inc. (collectively, "Plaintiffs") are suing their former insurance brokers, Defendants P&G Brokerage, Inc. ("P&G") and Benjamin Hirsch (collectively, "Defendants"), for negligence in failing to procure insurance coverage. Plaintiffs allegedly sought coverage to shield themselves against "[a]ll [l]aw suits," including claims for breach of contract, and believed Defendants had procured such a policy for them. That policy, however, did not cover Plaintiffs when they were faced with a $3.6 million judgment against them, following a jury trial, for breach of contract.

Defendants now move for summary judgment dismissing the Complaint, arguing, *inter alia*, that the coverage Plaintiffs allegedly sought could not have been obtained and that

Plaintiffs' request for coverage was not specific enough to impose a duty on Defendants. For the reasons discussed below, Defendants' motion is granted.

BACKGROUND

Plaintiffs are in the "direct to retail business," selling items ranging from health and beauty products to furniture, and the bulk of that business comes from online sales through large retailers (Affidavit of Avi Sivan ["Sivan Aff."] ¶5). As relevant here, Plaintiffs sold consumer goods to Amazon Fulfillment Services, Inc. ("Amazon"), who in turn resold the goods through Amazon's online platform, Amazon.com (Defendants' Statement of Undisputed Facts ["SUF"] ¶1).[1] The owner and managing partner of the Plaintiff entities is Avi Sivan (*id.* ¶2). Defendant Benjamin Hirsch was, at all relevant times, an insurance broker, first with his own brokerage and then with Defendant P&G (*id.* ¶¶4, 9).

Beginning around 2012, Hirsch procured a commercial general liability and a commercial property policy for Plaintiff Beautyko on an annual basis (*id.* ¶6). In 2015, Hirsch obtained, on behalf of "Beautyko USA Inc. DBA Bennotti USA," a commercial general liability and commercial property policy from Tower Insurance Company of New York, Policy Number CPP 1300804-15, Policy Period April 15, 2015 to April 15, 2016 (the "Policy") (*id.* ¶7). Beautyko accepted the Policy with its payment of premium (*id.* ¶8).

[1] Plaintiffs' opposition fails to specifically dispute the material facts set forth in Defendants' Rule 19-a statement, meaning those facts are admitted as true (*see* Commercial Division Rule 19-a [c] [noting that unless a statement of material fact is "specifically controverted by a correspondingly numbered paragraph in the statement," it "will be deemed to be admitted for purposes of the motion"]). The Court will consider the specific evidence submitted by Plaintiff in connection with this motion, *see infra* at 6-10, but any assertion in Defendants' Rule 19-a statement that is not directly disputed will be deemed admitted.

Also in 2015, Plaintiffs became embroiled in a dispute with Amazon over purchase orders (*id.* ¶10; *see* Sivan Aff. ¶5). Amazon claimed that Plaintiffs breached their Vendor Agreements with Amazon and engaged in "a pattern of fraudulent activity misrepresentations" which "induced [Amazon] to purchase large quantities of inventory that [Amazon] did not want and caused [Amazon] to incur significant costs as [Amazon's] fulfillment centers" (SUF ¶10). As the dispute with Amazon progressed, Beautyko told Hirsch that it would like the submit a claim for insurance to cover the legal fees Beautyko was incurring in the arbitration proceeding that Amazon had initiated (*id.* ¶14). Hirsch responded by relaying what the insurer's claims department had advised *him* – that Plaintiffs' "claim would be denied since Amazon is claiming you did fraudulent activity" (NYSCEF 68). Plaintiffs did not respond in writing to Hirsch's email, and no insurance claim was submitted in connection with the arbitration (SUF ¶¶16-17).

In March 2016, Plaintiffs commenced an action against Amazon in the United States District Court for the Western District of Washington (the "Amazon Litigation"), asserting breach of contract and other claims (*id.* ¶19). Amazon then filed counterclaims against Plaintiffs, alleging breach of contract and fraud, among other claims (*id.* ¶20). In April 2016, Sivan sent an email to Hirsch stating: "You were going to send us a copy of the insurance policy that might cover the proceeding if the fraud claim is unsuccessful. Please send that to us no later than Friday" (*id.* ¶21). Meanwhile, the Amazon Litigation continued. After some of Plaintiffs' claims against Amazon were dismissed on summary judgment, Sivan asked Hirsch to confirm that the Policy would "cover all claims and lawsuits" against his companies (*id.* ¶23). Hirsch responded that that the Policy would cover claims only against named insureds, and would *not* cover "intentional" conduct (*id.* ¶24).

The Amazon Litigation went to a jury trial. The jury rendered a verdict in favor of Amazon against Plaintiffs, and the Court issued a Judgment against Plaintiffs on November 22, 2017, for $3.6 million (*id.* ¶¶29-30).

The next month, in December 2017, Plaintiffs filed a claim with their insurer for the legal fees incurred by Plaintiffs and for the amount of the judgment (*id.* ¶31). The insurer advised Plaintiffs that Amazon's claims and the judgment were not covered under Beautyko's Policy for multiple reasons, including the ground that no coverage was available for injury arising out of breach of contract (*id.* ¶32). The insurer thus disclaimed coverage under the Policy (*id.* ¶33). Subsequently, on June 25, 2018, Amazon and Plaintiffs reached a settlement of the Judgment for $1.1 million, and the District Court issued a Satisfaction of Judgment the following month (*id.* ¶34).

Plaintiffs filed a Summons and Verified Complaint (the "Complaint") dated April 10, 2018, asserting one cause of action for negligence against Defendants (*id.* ¶36; NYSCEF 1). After approximately two years of discovery, on July 20, 2020, Defendants moved for summary judgment dismissing the Complaint (NYSCEF 27).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012]). If the moving party crosses that threshold, the party opposing the motion "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for

his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562; *see Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017] ["[D]efendant's vague and unsubstantiated allegations . . . [were] insufficient to raise an issue of fact"]).

Defendants' motion is granted on several independent grounds. *First*, to the extent Plaintiffs are alleging negligent failure to procure insurance, Defendants make a prima facie showing that the insurance coverage Plaintiffs purportedly sought could not have been procured. "[I]t is well established in this State that a broker may be held liable, based upon either breach of contract or tort, 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 insured event (*Rodriguez v Investors Ins. Co. of Am.*, 201 AD2d 355, 356 [1st Dept 1994], citing *Am. Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 346 [1st Dept 1984] ["[I]n order to support a recovery, it must be demonstrated that coverage could have been procured prior to the occurrence of the insured event"] [granting summary judgment based on "total absence of proof on the part of the insured to establish the availability of such coverage"]; *see also Colaio v United Med. Examiners, P.C.*, 277 AD2d 416, 417 [2d Dept 2000] ["The respondents may be liable to the plaintiff if he establishes that insurance could have been obtained but for their alleged conduct."]).

Defendants' insurance expert, Thomas Ahart, states in his report that "a commercial general liability policy provides no coverage for losses like the financial loss suffered by Beautyko resulting from its breach of contract with Amazon" and "[f]urthermore, Beautyko's loss resulting from its breach of contract would be uninsurable even under other types of insurance such as management liability policies" (Ahart Report at 4 [NYSCEF 63]; *see id.* at 7

["There is no insurance policy available that I am aware of that would provide coverage to an insured for its own financial loss resulting from its own actions, such as a breach of contract."]; SUF ¶49). Plaintiffs adduced no evidence (expert or otherwise) in response to Ahart's conclusions, and failed to raise a fact issue about the availability of coverage for breach of contract liability (*see Am. Motorists Ins. Co.*, 102 AD2d at 346 [granting summary judgment based on "total absence of proof on the part of the insured to establish the availability of such coverage"]). Ultimately, Plaintiffs cannot establish proximate cause, a necessary element of their negligence claim, without evidence showing that such coverage was available.

Second, Plaintiffs fail to advance a concrete chain of causation to connect Defendants' alleged negligence to the damage borne by Plaintiffs (*Phillips-Smith Specialty Retail Group II, L.P. v Parker Chapin Flattau & Klimpl, LLP*, 265 AD2d 208, 210 [1st Dept 1999] [relying on "hypothetical course of events on which any determination of damages would have to be based . . . constitutes a chain of gross speculations on future events" that cannot support a negligence claim]). In his Affidavit opposing this motion, Sivan frames the cause-and-effect as follows:

> Were it not for the assurances I received from Mr. Hirsch I would have settled the lawsuit [with Amazon]. I could have paid as little as $250,000.00 and gotten my goods back. Had I known I was unprotected by insurance I would surely have considered some settlement and if nothing else saved over one million dollars in legal fees.

(Sivan Aff. ¶26).

But Plaintiffs refused to accept a return of their goods from Amazon about five months *before* Defendants are alleged to have misled them about insurance coverage (*compare* SUF ¶¶12-13; NYSCEF 44 ¶13 [Amazon's Amended Detailed Statement of Claims and Amendment of Demand for Arbitration]; *with* NYSCEF 33 [Bill of Particulars] ¶¶13, 15). Moreover, Sivan testified that, prior to trial, he did not receive any settlement offers in writing from Amazon and

did not recall the last settlement demand that was made (NYSCEF 37 at 54-55 [Sivan Dep.]). And Plaintiffs' counsel stated that during the trial, "there were no settlement discussions" (SUF ¶28). The recoverable portion of Plaintiffs' legal fees is also speculative. Even accepting Plaintiffs' view, they proceeded with the Amazon Litigation accepting the risk that at least one of the claims asserted against them – the fraud claim – would not be covered by insurance. In sum, Plaintiffs' conclusory statements are insufficient to raise issues of fact about whether, and to what extent, Defendants' actions proximately caused them harm.

Third, Plaintiffs' claim is dismissed because their alleged request for coverage was insufficient, as a matter of law, to impose a duty on Defendants to procure the insurance now claims it wanted. "[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," and "[a] general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage" (*Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157-58 [2006] [client's "recollection 'that we are covered' is insufficient to impose liability on [insurance broker]"]; *Polly Esther's S., Inc. v Setnor Byer Bogdanoff*, 10 Misc. 3d 375, 396 [Sup Ct, N.Y. County 2005] [requesting an "appropriate policy" insufficient to create contractual duty on part of broker]; *see also Empire Indus. Corp. v Insurance Cos. of N. Am.*, 226 AD2d 580, 581 [2d Dept 1996] [request for "'best' available insurance coverage" insufficient]; *Madhvani v Sheehan*, 234 AD2d 652, 654 [3d Dept 1996] [a request for "full coverage" did not constitute a specific request for coverage]).

Here, as stated in Plaintiffs' deposition testimony and Bill of Particulars, the request for insurance coverage was broad. Plaintiffs state they made a general request for "every insurance possible to protect the company and the employees and the product" (NYSCEF 37 at 55:16-24)

and coverage for "[a]ll [l]aw suits" (NYSCEF 33). Only in opposition to this motion did Plaintiffs come forward with an allegation about a more specific request. Sivan's Affidavit states that he "specifically told [Hirsch] I wanted protection from breach of contract claims and legal fees incurred if I became involved in litigation with one of these big customers" (Sivan Aff. ¶19). But these belated and self-serving statements are insufficient. "It is axiomatic that statements made by a party in . . . a deposition that are not denied by the party constitute an admission, and that later, conflicting statements containing a different version of the facts are insufficient to defeat summary judgment, as the later version presents only a feigned issue of fact" (*Estate of Mirjani v DeVito*, 135 AD3d 616, 617 [1st Dept 2016]; *Schiavone v Brinewood Rod & Gun Club*, 283 AD2d 234, 235-236 [1st Dept 2001] ["A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]).

Fourth, there was no special relationship between Plaintiffs and Defendants on this record as a matter of law. When a special relationship exists between an insurance broker and a client, the broker is charged with an "additional duty of advisement" beyond the limited duties imposed by common law (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 735 [2014]). Ordinarily, insurance brokers "have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*id.* at 734). But special relationships – which "are the exception, not the norm," when it comes to insurance brokers – arise in "three exceptional circumstances":

> (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.

(*Voss*, 22 NY3d at 736; *see Murphy v Kuhn*, 90 NY2d 266, 272 [1997] [describing special relationships as arising only in "[e]xceptional and particularized situations"]).

While the existence of a special relationship usually presents a fact question (*see STB Investments Corp. v Sterling & Sterling, Inc.*, 178 AD3d 413 [1st Dept 2019]), here it does not (*see, e.g.*, *MAAD Constr., Inc. v Cavallino Risk Mgt., Inc.*, 178 AD3d 816, 820 [2d Dept 2019] [affirming "determination that the plaintiff failed to raise a triable issue of fact as to whether a special relationship existed"]). Plaintiffs' argument for the existence of a special relationship here is predicated on: (1) the parties' "ongoing broker/insured relationship for at least 6 years", and (2) Sivan's allegation that Hirsch "assured him he was Covered" [sic] and told him "don't worry, I know what I'm doing" and "Don't ask so many questions" (NYSCEF 66 at 14-15 [Pls.' Opp. to S.J.]). Neither of these contentions, however, creates a genuine issue of fact.

"A longstanding relationship alone is insufficient to establish a special relationship" (*Dae Assocs., LLC v AXA Art Ins. Corp.*, 158 AD3d 493, 494 [1st Dept 2018]; *see Murphy*, 90 NY2d at 271 [13-year relationship "present[ed] only the standard consumer-agent insurance placement relationship, albeit over an extended period of time"]). And while an "interaction regarding a question of coverage, with the insured relying on the expertise of the agent," can provide the basis for a special relationship, Plaintiffs fail to submit admissible evidence in support of this theory. The statements attributed to Hirsch are largely conveyed through the affidavit of Plaintiffs' counsel, who does not have personal knowledge of the facts (*Israelson v Rubin*, 20 AD2d 668 [2d Dept 1965]). The deposition testimony by Sivan – alleging, for example, that Hirsch "said . . . rest assured you don't have to worry about it" (NYSCEF 37 at 66-67) – referred to whether the Policy covered "all of [Plaintiffs'] companies," not to whether the Policy would reimburse them for breach of contract claims (*see id.*). While a special relationship can arise

when an insurance broker takes an active role in "determining" or "recommend[ing]" appropriate insurance coverage (*see STB Investments Corp.*, 178 AD3d at 413 [denying summary judgment where broker discussed coverage with plaintiffs "in the larger context of determining the appropriate level of coverage to obtain for plaintiffs"]; *NWE Corp. v Atomic Risk Mgt. of New York, Inc.*, 25 AD3d 349 [1st Dept 2006] [finding evidence of special relationship where "defendants agreed to recommend adequate coverage"]), no such evidence is presented here. Further undercutting Plaintiffs' case are statements made by Hirsch himself – informing them, for example, that the Policy would not cover "intentional" conduct (SUF ¶24).[2]

Finally, despite Plaintiffs' repeated recriminations that Hirsch defrauded or otherwise intentionally deceived them (*see, e.g.*, Sivan Aff. ¶¶28-29), Plaintiffs have not pleaded a cause of action for fraud or intentional misrepresentation; the one and only claim in the Complaint alleges negligence. In any event, they have not submitted evidence, in admissible and non-conclusory form, to suggest that Hirsch made any statements with the intent to defraud or mislead Plaintiffs.

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Therefore, it is

ORDERED that Defendants' motion for summary judgment is granted, and the Complaint dismissed.

This constitutes the decision and order of the Court.

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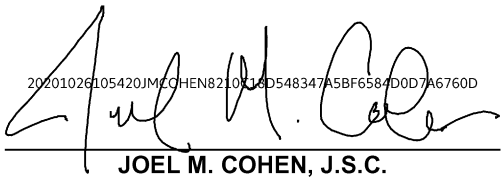
[2] What's more, even if a special duty of advisement did exist as between Plaintiffs and Hirsch, the negligence claim still fails for lack of proximate causation as discussed above. Moreover, Plaintiffs have not proffered an expert to testify about the specific contours of Hirsch's professional duty, so it is not clear that Plaintiffs could carry their burden of proving a breach of that duty at trial (*see Schadoff v Russ*, 278 AD2d 222, 223 [2d Dept 2000] [granting summary judgment dismissing attorney malpractice claim because "the plaintiff failed to oppose the motion with an expert affidavit delineating the appropriate standard of professional care and skill that the defendants were required to adhere to under the circumstances"]).



10/26/2020
DATE

JOEL M. COHEN, J.S.C.

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