Galvanize Residential Group, LLC v TR Ins. Agency, Inc.
2021 NY Slip Op 30168(U)
January 21, 2021
Supreme Court, New York County
Docket Number: 153626/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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GALVANIZE RESIDENTIAL GROUP, LLC,

Plaintiff,

-against-

TR INSURANCE AGENCY, INC.,

Defendant.
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DECISION AND ORDER

Index Number

153626/2018

FRANK P. NERVO, J.S.C.

Defendant moves for summary judgment in its favor contending that it did not breach any duty to plaintiff, in that it provided insurance policies addressing plaintiff's concerns. Plaintiff opposes, arguing that a special relationship existed between it and defendant, plaintiff relied on defendant's advice, and defendant failed to procure appropriate insurance coverage. Consequently, plaintiff contends issues of fact preclude summary judgment.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact"

(*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a feigned issue of fact will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

The instant dispute arises from water damage to plaintiff's property and the declination of coverage by plaintiff's insurer under a policy obtained from defendant-broker. Plaintiff requested defendant obtain coverage for back-up of sewers, as plaintiff had suffered a previous loss at another property due to sewer back-up, causing flooding. The policy obtained by defendant-broker included an "Added Water Damages Coverage" endorsement covering sewer back-ups. Plaintiff purchased the policy obtained by defendant. Thereafter, plaintiff was notified by a neighbor that the property was flooding or suffering water damage. Upon inspection, the water damage was found to be caused by a water pipe's separation due to poor workmanship, and the insurer declined coverage. Plaintiff brought suit against defendant-broker alleging it owed plaintiff a duty to obtain a policy including coverage for the loss due to water damage.

Insurance brokers owe their clients a common law duty to obtain requested coverage within a reasonable time, or inform the client of the broker's inability to do so (*American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012]). Brokers are under no duty to advise a client to obtain additional coverage, in the absence of a client's particular request (*Voss v. Netherland Ins. Co.*, 22 NY3d 728, 734

[2014]). However, where a special relationship exists between the broker and client, the broker may nevertheless be liable for failing to advise the client to obtain additional insurance, despite the client not specifically requesting such coverage (*id.*; *see also Murphy v. Kukn*, 90 NY2d 266 [1997]). The Court of Appeals has identified three circumstances where a special relationship may be formed and a broker may owe an additional duty of advisement: (1) a broker's receipt of additional compensation for consultation apart from the payment of insurance premiums; (2) the client's reliance on the broker's expertise during an interaction regarding coverage; and (3) a course of extended dealings that would put an objectively reasonable broker on notice that their advise was being sought and relied upon (*id.*; *see also Voss v. Netherland Ins. Co.*, 22 NY3d at 735). The threshold to establish a special relationship in the insurance setting is a burdensome one; not met merely by a lengthy course of dealings between client and broker, a client's general request for coverage, or by a client's later plight (*Murphy v. Kukn*, 90 NY2d at 271; *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 NY3d 152 [2006]).

Here, defendant-broker did not receive additional compensation for consultations or advisement. Defendant's sole compensation in transactions with plaintiff was from plaintiff's payment of policy premiums. A special relationship was not formed on this basis.

Plaintiff claims that a course of dealings between it and defendant over several months establishes a special relationship between the parties. However, plaintiff's principal testified that he had discussed purchasing insurance for the subject property

only a few times with defendant, and paid the premium -binding the policy- during his second conversation with defendant. Furthermore, plaintiff testified that he utilized defendant's services only for the instant transaction, and had insured his other properties using a different broker. To the extent that plaintiff's affidavit claims a lengthy course of dealing, that he relied on defendant-broker's expertise, or that defendant should have been on notice that plaintiff was relying on defendant's expertise, such claims are contradicted by his earlier sworn deposition testimony. Consequently, this feigned issue of fact is insufficient to defeat defendant's summary judgment motion.

Plaintiff is a sophisticated commercial entity and did not delegate insurance decision making to defendant broker (see *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 NY3d at 158). Plainly stated, as with most broker-client relationships, plaintiff informed defendant of the type of insurance it planned to purchased and did not ask defendant what that insurance should be; this is insufficient to form a special relationship (*id.*). As in *Murphy v. Kuhn*, "this record does not rise to the high level required to recognize the special relationship threshold" and therefore, summary judgment in defendant's favor is warranted (90 NY2d at 271).

Accordingly, it is

ORDERED the motion is granted, and the claims against defendant are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant, dismissing the action, with costs and disbursements as taxed by the Clerk.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated: January 21, 2021

Enter:

Hon. Frank P. Nervo, J.S.C.