Ting Lin v Mountain Val. Indem. Co.
2022 NY Slip Op 30810(U)
March 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 518077/2020
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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DECISION / ORDER

TING LIN and SHI QUIANG LIN,

Plaintiffs,

Index No. 518077/2020
Motion Seq. No. 5
Date Submitted: 2/10/22

-against-

MOUNTAIN VALLEY INDEMNITY COMPANY, CLERMONT INSURANCE COMPANY, ONE SUNSET PARK CONDOMINIUM, J. WASSER & COMPANY, 4401 PARK LLC and CENTURY MAX, INC.,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Century Max, Inc.'s motion to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation and Exhibits Annexed.....	86-89
Affirmation in Opposition and Exhibits Annexed.....	91-99
Reply Affirmation.....	100-101

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In Motion Seq. #5, defendant Century Max Inc. (hereinafter "Century") moves pre-answer to dismiss plaintiff's Amended Complaint as against it, pursuant to CPLR 3211(a)(5) [statute of limitations] and (a)(7) [failure to state a claim]. For the reasons which follow, the motion is granted.

In plaintiff's amended complaint, other than including Century in the caption and headings, the following is stated with reference to Century, which essentially alleges negligence:

1. "The said MOUNTAIN VALLEY INDEMNITY COMPANY homeowners'

and fire insurance policy was sold to Plaintiffs by CENTURY MAX, INC., an insurance broker licensed by the State of New York to sell homeowners and fire insurance policies."

2. "The Defendant CENTURY MAX, INC. had a duty to advise and sell to Plaintiffs a homeowners and fire insurance policy far in excess of the $100,000 limit said insurance broker selected when it knew or should have known that the said apartment 3A at the subject premises was worth in excess of $600,000."

3. "Because the said CENTURY MAX, INC. failed, neglected, and refused to sell to Plaintiffs an insurance policy in excess of $100,000, the Plaintiffs have been damaged at least $600,000 plus a sum in excess of the jurisdictional limits of all lower Courts which might otherwise exercise jurisdiction in this matter."

Plaintiffs, brother and sister, purchased their condominium apartment in 2011. At that time, they purchased a condominium unit owners' policy of insurance. They renewed the policy each year. In 2019, there was a fire in the building which required all occupants to vacate their apartments. There were fifty-four apartments in the building and the entire building was declared unsafe for habitation by the City of New York. The condominium owners met and voted to not restore the building, but to sell the burnt-out shell and distribute the sales proceeds and the condominium's insurance among the unit owners, pursuant to a partition action, as is required in RPL 339-cc. That action is pending before this court, Ind. 508641/2020. No distributions have been made as yet. There is no indication that plaintiffs will not be made whole once the funds

are distributed.

A condominium owner's fire insurance policy is different than a homeowner's policy, as the building is insured by the condominium association, known as the "master policy" and the unit owners only need to insure their personal property, meaning clothes, furniture, electronics and other items; built-ins, such as bookcases, kitchen cabinets; appliances; and, if the condominium documents specify that the condominium's insurance will not cover them, fixtures, plumbing, wiring, sheetrock, studs, flooring and other items in the interior of a condominium unit. Unit owners' policies can have deductibles and can provide for coverage to pay for the replacement cost or for the cash value, meaning the depreciated value, of these items. A condominium unit owner needs to know what is covered by the master policy on the condominium to know what coverage needs to be provided in their unit owners' policy.

Here, neither Century nor plaintiffs provide a copy of the plaintiffs' policy, or of the master policy, or of the condominium documents. Century argues that a viable claim for insurance broker negligence requires an allegation that the plaintiff requested specific coverage from the broker and it was not obtained, nor was plaintiff advised that it was unavailable, to plaintiff's detriment. Century also argues that it had no continuing duty to advise plaintiffs to increase their coverage in anticipation of inflation, and that it had no special relationship with plaintiffs that would create any additional responsibilities on its part.

Plaintiffs oppose the motion and argue that their unit owners' policy should have been for the fair market value of their condominium, which they estimate to have been $600,000 before the fire. Counsel avers that Century "knew, or should have known that

the subject apartment was worth six times as much, $600,000. My clients relied on them to sell them adequate insurance under these circumstances."

Discussion

The Declaration of condominium for this property states in pertinent part [Doc 61 in the partition action] "the coverage shall be in an amount equal to not less than eighty (80%) percent of the full replacement cost of the Building, exclusive of excavation and foundations, without deduction for depreciation, as approved by the fire insurance company issuing the policy or a qualified appraiser." The master policy here has paid out approximately $8,000,000 to the condominium board, which is being held in trust for the unit owners and their mortgagees, pursuant to the Declaration.

There is an action pending under Ind. 516926/2020 with regard to the master policy of insurance. A number of the unit owners brought the action against the board of managers of the condominium and aver that the board failed to obtain sufficient insurance.[1] The master policy is at Doc 99, and the condominium by-laws are at Doc 97. Section 5.4 of the by-laws addresses the insurance requirements. It states "The Condominium Board shall obtain, and shall maintain in full force and effect, fire insurance policies with all risk extended coverage, vandalism and malicious mischief endorsements, insuring the Building (including all Units, bathroom and kitchen fixtures, but not including appliances or any furniture, furnishings, decorations, belongings, or other personal property supplied or installed by Unit Owners or the tenants of Unit

[1] The complaint states in part "The Board was required to comply with the By-Laws and, accordingly, pursuant to Section 5.4(c) of the By-Laws, the Board was required to maintain fire insurance equal to "not less than" 80% of the full replacement cost of the building. 3. The Board failed to comply with these obligations . . . 4. Upon information and belief, the replacement value of the building is $25,200,000.00 to $26,880,000.00. Therefore, the Condominium should have had fire insurance equal to at least $20,160,000.00, representing 80% of the replacement value of the building (80% of $25,200,000.00)."

Owners) and covering the interests of the Condominium, the Condominium Board, all of the Unit Owners and all Permitted Mortgagees, as their interests may appear." This language thus requires the master policy to cover walls, floors, wiring, plumbing and fixtures in the units, but not the appliances or built-ins. The policy also has a "condominium association coverage form" [Doc 99 of 516926/2020 at page 49] which confirms this coverage. It is also noted that the value of the vacant land under the building is not covered by fire insurance, so the amount of coverage is never the fair market value of the entire property as if it were to be sold. Further, there was additional coverage for expenses incurred in removing debris and stabilizing the building after the fire and protecting it from the elements. See Doc. 64 in the case on e-file for the insurance company's letter of explanation.

While an insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction, and a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract, (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 866 [1st Dept 2009]; *see also Katz v Tower Ins. Co. of New York*, 34 AD3d 432, 432 [2d Dept 2006] [holding that "[a]n insurance agent or broker may be held liable under a theory of negligence for failing to procure insurance"]) when the plaintiff didn't seek coverage until after a loss and then sought the coverage to be retroactive, there is no valid claim against an agent or broker for failing to provide insurance on these terms.

To be clear, "in order for a broker to be held liable, 'a plaintiff must demonstrate that the broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise

due care in the transaction'" (*Katz*, 34 AD3d at 432 [quoting *Mickey's Rides-N-More, Inc. v Anthony Viscuso Brokerage, Inc.*, 17 AD3d 328, 329 (2d Dept 2005)]; *see also Femia v Graphic Arts Mut. Ins. Co.*, 100 AD3d 954, 955 [2012] [same]). Furthermore, "[t]o set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided . . ." (*Am. Bldg. Supply Corp. v. Petrocelli Grp., Inc.,* 19 NY3d 730, 735 [2012]). "[I]nsurance agents 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 . . ." (*id.* [internal quotations omitted]; *see also Femia,* 100 AD3d at 955 [same]).

As plaintiffs have failed to establish that they made a specific and timely request to Century for a specific amount of condominium unit owners' insurance coverage, for items not covered by the master policy, they have failed to state a cause of action for which relief may be granted. As a result, the court has not considered the branch of the motion which alleges that the claims are barred by the statute of limitations.

Accordingly, it is

ORDERED that the motion by defendant Century for summary judgment dismissing the plaintiffs' complaint as against it is granted.

This shall constitute the decision and order of the court.

Dated: March 9, 2022

ENTER:

Hon. Debra Silber, J.S.C.