

**Manhattan Concrete LLC v Prime Prop. & Cas. Ins.
Inc.**

2022 NY Slip Op 30935(U)

March 21, 2022

Supreme Court, New York County

Docket Number: Index No. 656746/2020

Judge: Arlene Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

MANHATTAN CONCRETE LLC,
Plaintiff,

- v -

PRIME PROPERTY & CASUALTY INSURANCE
INC.,OVATION RISK PLANNERS, INC.,
Defendants.

-----X

PRIME PROPERTY & CASUALTY INSURANCE INC.
Plaintiff,

-against-

SCOTTISH AMERICAN INSURANCE GENERAL AGENCY,
INC.
Defendant.

-----X

INDEX NO. 656746/2020
MOTION DATE 03/18/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596048/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 45, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68 were read on this motion to/for DISMISSAL.

The motion by third-party defendant Scottish American Insurance General Agency, Inc. (“SAM”) to dismiss the third-party complaint is granted in part.

Background

In September and October 2018, two employees of plaintiff were injured while at a construction site in Brooklyn. Plaintiff claims that it purchased a construction contractor liability insurance policy from defendant Prime Property & Casualty Insurance Inc. (“Prime”) for the period from August 1, 2018 through August 1, 2019. Both of the injured employees commenced

lawsuits in Kings County and plaintiff contends that Prime denied coverage for defense and indemnification in both cases. Plaintiff contends that it complied with all the terms and conditions of the policy and asserts that the denial of coverage was improper.

Prime offers a different version of events. It claims that plaintiff withheld critical information in its application for insurance, information which would have caused Prime to not issue the policy. Prime alleges that plaintiff had a previous policy which was cancelled due to plaintiff's non-payment of the premium, among numerous misrepresentations.

In this motion, SAM moves to dismiss the third-party action that Prime brought against it. SAM insists it was a wholesale broker for Prime and that it simply passed along information it received from plaintiff's broker, defendant Ovation Risk Planners, Inc. ("Ovation"). SAM argues that although the first party action is a typical insurance dispute (which concerns an insured, an insurance company and the insured's broker [Ovation]), the third-party action makes no sense. It points out that, as the wholesale broker, it is not a party to the insurance contract at issue here. SAM emphasizes that it is not the agent or representative of Prime pursuant to its agreement with Prime. It analogizes its role in the transaction as akin to the postal service and it merely transmitted information from one party to the other.

SAM acknowledges that it entered into an Independent Producer's Agreement with Prime in 2016, which expressly stated that SAM was an independent agent and not an agent of Prime. The purpose of this agreement was to permit SAM to submit insurance applications to Prime and Prime would then conduct its own underwriting; SAM could not bind Prime under the terms of this agreement. SAM argues that Prime's defense is essentially that plaintiff (and possibly its broker, defendant Ovation Risk Planners, Inc.) made false representations to Prime and that has nothing to do with SAM.

Prime argues, in its counterclaims against plaintiff, that plaintiff made a series of misrepresentations about the insurance policy it had immediately before obtaining a policy with Prime. Specifically, Prime complained about the cancellation of that prior policy due to plaintiff's alleged nonpayment, among other purported misrepresentations. But SAM questions how that gives rise to a claim by Prime against SAM.

SAM also argues that Prime's claims against it are premature because they are contingent on Prime losing the case against plaintiff. It maintains that Prime's claims for aiding and abetting fraud against SAM should be dismissed because they were not pled with particularity by Prime. SAM also argues that the cause of action for the breach of the implied duty of good faith and fair dealing should be dismissed because SAM did nothing that could be construed to violate that duty.

In opposition, Prime alleges that there was a phone call with plaintiff, Ovation, SAM and Prime on August 1, 2018 in which it was represented that plaintiff was insured under a policy issued by non-party Colony Insurance Company ("Colony"). Prime claims it was never discussed that, in fact, Colony had cancelled this insurance policy based on plaintiff's non-payment. Prime also insists that other misrepresentations were made about the Colony policy, including concerns about the effective date and a subsidence exclusion.

Prime contends that SAM forwarded a copy of the Colony policy, which purportedly contained false information about the premium amount and that it contained a subsidence exclusion. It insists that it would not have issued the insurance policy at all if it had known Colony had cancelled the policy it issued to plaintiff prior to its termination date. Prime alleges that SAM played a central role in this fraud because one of its employees forwarded many of the critical documents to Prime.

Prime insists that SAM does not dispute the merits of its claims against plaintiff and that it adequately plead, with the dates and the substance of certain misrepresentations, the fraud claims. Prime argues that it was SAM who approached Prime about providing insurance to plaintiff. It concludes that it has valid causes of action against SAM.

Also offering opposition is plaintiff who argues that SAM has no standing to seek dismissal of any of plaintiff's claims and so this portion of SAM's motion should be denied.

In reply, SAM explains that under any scenario (whether Prime successfully defends itself or whether plaintiff recovers against Prime), SAM cannot be held liable. SAM points out that if Prime loses, that means the insurance policy is enforceable and whatever misrepresentations alleged by Prime are not enough to void the contract. And if Prime wins, that means plaintiff (and possibly Ovation) made misrepresentations that compel rescission of the contract. SAM questions how it could be held liable when it did not make any misrepresentations.

Discussion

“On a motion to dismiss, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Besen v Farhadian*, 195 AD3d 548, 549, 151 NYS3d 31 [1st Dept 2021] [internal quotations and citations omitted]). “[A] motion to dismiss on the ground that the action is barred by documentary evidence . . . may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations,

conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

“In general, insurance brokers 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. The scope of the broker's duty is defined by the nature of the client's request. A claim of liability for a violation of this duty may sound in either contract or tort. To state a claim based upon violation of the insurance broker's common-law duty, the client must demonstrate that the broker failed to discharge its duty either by breaching the agreement with the client by failing to obtain the requested coverage or by failing to exercise due care in obtaining insurance on the client's behalf” (*Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1277 [2d Dept 2021] [internal quotations and citations omitted]).

The Court's analysis begins with the agreement between Prime and SAM, the independent producer's agreement (NYSCEF Doc. No. 42). This agreement emphasizes that SAM “is exclusively an independent agent and not an agent of the Company and the Broker will inform all of its clients of this fact before submitting any risk to [Prime]. The Parties understand, agree, and acknowledge that in no event, nor under any circumstance, will this Agreement be interpreted or construed as authorization for the Broker to bind coverage on behalf of the Company or to act in any capacity on behalf of the Company. The Parties agree that the Broker possesses no implied or apparent authority to act on behalf of the Company” (*id.* at 2).

Prime's third-party complaint alleges that Ovation (plaintiff's broker) turned to SAM to find insurance for plaintiff (NYSCEF Doc. No. 52, ¶ 9). It also details how plaintiff made numerous misrepresentations throughout the process. Prime brings three causes of action against

SAM: for contractual indemnification, for breach of the implied duty of good faith and fair dealing, and for aiding and abetting fraud.

With respect to the contractual indemnity claim, the subject contract provides that SAM “will indemnify and hold [Prime] harmless against any claims, damages, liabilities, or costs (including reasonable attorney’s fees, costs and expenses), which [Prime] may become obligated to pay as a result of any loss to a Client/Insured caused directly or indirectly by any act or omission, misrepresentation, or fraud committed by the Broker” (NYSCEF Doc. No. 42, § J).

Here, the Court finds that Prime failed to articulate how SAM caused it any damages. The allegations in this case by Prime are that *plaintiff* made numerous misrepresentations and there is no evidence showing that SAM had a duty to perform its own investigation into whether plaintiff was a suitable candidate for insurance. In other words, Prime did not explain where in the independent producer’s agreement it states that SAM agreed to undertake an obligation to perform underwriting on Prime’s behalf.

Rather the evidence submitted on this record shows that SAM was supposed to search for potential insureds, which it did, and then Prime was supposed to make its own determination whether to provide insurance. There is no evidence SAM created any documents or made any representations about the veracity of documents it passed along from plaintiff or Ovation. More broadly, this claim fails to state a cause of action because it does not explain how SAM omitted or misrepresented anything or committed fraud. SAM was under no obligation to make representations to Prime about the previous policy with Colony. Basically, SAM provided leads for Prime to evaluate and determine whether to insure. In fact, that is Prime’s job – to determine whether to issue a policy and for how much; nowhere did Prime subcontract that underwriting out to SAM.

For similar reasons, the claim that SAM violated the implied duty of good faith and fair dealing is also without merit. The Court cannot impose on SAM a duty to do its own investigation into plaintiff's representations about past liability policies that it may have procured and then face liability on an unstated contractual provision. There is no dispute that Prime was supposed to do its own underwriting and that SAM was merely supposed to find potential candidates. Here, according to the contract, what should have happened is that Prime evaluated and determined that the lead provided by SAM was not a good fit for Prime.

Similarly, Prime's claim for aiding and abetting fraud is also dismissed. "A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. In turn, the elements of an underlying fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 503, 91 NYS3d 13 [1st Dept 2018] [internal quotations and citations omitted]).

Although Prime sufficiently alleged the underlying fraud, it did not adequately plead how SAM had actual knowledge or how it provided substantial assistance to plaintiff. As stated above, SAM had no obligation in its agreement with Prime to do research into plaintiff's past policies—instead, it claims it was hired so that Prime could take advantage of SAM's contacts to find potential insureds.

That SAM provided information sent to it from plaintiff/Ovation does not mean SAM was necessarily involved in the purported scheme (*see Soho Generation of New York, Inc. v Tri-City Ins. Brokers, Inc.*, 256 AD2d 229, 230, 683 NYS2d 31 [1st Dept 1998] [noting that the

wholesale broker was dismissed because it merely passed on inaccurate information to the insurer]). Again, the issue here is that information from plaintiff/Ovation was allegedly fraudulent. The contract states, and SAM strenuously argues, that SAM was not an agent of Prime. The Court cannot find that SAM was supposed to act as, essentially, an agent of the insured (plaintiff) so that plaintiff's alleged fraud could be imputed to SAM. SAM wasn't an agent for anyone – it provided leads. It had no duty to verify or vouch for information presented by plaintiff – either on behalf of plaintiff or behalf of defendant. That SAM was on a phone call where misrepresentations were made is also not a reason for SAM to face liability especially where there are no sufficient allegations that SAM had actual knowledge of the purported fraud.


The Court emphasizes that to the extent SAM seeks to dismiss plaintiff's claims, plaintiff did not allege any claims against SAM and so SAM has no standing to dismiss any of plaintiff's causes of action.

Accordingly, it is hereby

ORDERED that the motion by third-party defendant Scottish American Insurance General Agency Inc. to dismiss is granted only to the extent that the third-party complaint is severed and dismissed and denied to the extent it sought to dismiss any of plaintiff's claims, and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

Next Conference: 4/21/2022 at 10:30 a.m. (NYSCEF Doc. No. 65).

3/21/2022
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE