WFB Realty LLC v R & W Brokerage, Inc.
2022 NY Slip Op 35206(U)
August 15, 2022
Supreme Court, Nassau County
Docket Number: Index No. 601458/2022
Judge: Christopher G. Quinn
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 18

Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court

WFB REALTY LLC,

Plaintiff,

-against-

R & W BROKERAGE, INC.,

Defendant.

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MOTION SEQ. No. 001 - Decided

R & W BROKERAGE, INC.,

Third-Party Plaintiff,

-against-

HULL & COMPANY OF NEW YORK, INC.
d/b/a MORSTAN GENERAL AGENCY and
BLACKBOARD INSURANCE COMPANY,

Third-Party Defendants.

The following papers were read in connection with this motion:

NYSCEF Nos. 10 - 28

Defendant/Third-Party Plaintiff R & W BROKERAGE, INC. ("RW") has moved this Court for an Order dismissing the First, Third and Fourth Cause of Action, as well as a dismissal of paragraph 6 of the *ad damnum* as it seeks the recovery of attorney's fees incurred by plaintiff. Plaintiff WFB REALTY LLC ("WFB") opposes the application.

The action arises out of an alleged breach of contract where as a result of defendant RW's alleged error, plaintiff WFB was without insurance coverage for a wrongful death action that occurred on the highway in front of plaintiff WFB's premises.

Defendant RW asserts that the First Cause of Action must be dismissed as there was no "special relationship" between defendant RW and plaintiff WFB beyond the common law duty to obtain the requested insurance coverage by plaintiff WFB. Defendant RW further argues that the Fourth Cause of Action must be dismissed because the fraud claim by WFB is duplicative of a breach of contract claim in which RW allegedly induced WFB into an agreement to procure insurance on WFB's behalf and then did not perform the agreement. Defendant RW further asserts that the Third Cause of Action must be dismissed because the doctrine of equitable estoppel will not lie where the claim is based upon the same facts as a breach of contract. Lastly, defendant RW asserts that a successful litigant may only recover attorney's fees when there is an agreement between the parties or Court rule or statutory provision, which is not present here and that this portion of the verified complaint must be dismissed.

In regard to the First Cause of Action, plaintiff WFB argues that there is indeed a "special relationship" between defendant RW and plaintiff WFB through their thirteen-year period of continuous insurance coverage that RW provided to WFB. Plaintiff WFB argues that this "special relationship" was created when plaintiff WFB relied on defendant.

RW's brokers expertise over an extended period of time which would have "put an objectively reasonable insurance agent on notice that its advice was being sought and relied upon." In regard to the Fourth Cause of Action, plaintiff WFB asserts that defendant RW induced plaintiff WFB into believing that plaintiff WFB was covered by liability insurance during the insurance period including May 24, 2019. Plaintiff WFB further argues that pursuant to the special relationship between plaintiff and defendant, and the defendant broker representing to the insured that the plaintiff had been provided with liability insurance for the period including May 24, 2019, failed to procure that insurance, in breach of their special relationship and that plaintiff WFB has been damaged thereby. In regard to the Third Cause of Action, where plaintiff is seeking equitable estoppel, plaintiff maintains that but for WFB's reasonable reliance on the inaccurate representation of defendant RW, being that RW had procured liability insurance for plaintiff WFB, WFB would have procured such liability insurance covering the period including May 24, 2019, from another source and/or insurance company.

As to Defendant's application to dismiss the First Cause of Action as duplicative of the Fifth Cause of action, the motion is Granted. No special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer, the relationship is legal rather than equitable [See *Batas v. Prudential Ins. Co. of Am.*, 281 AD2d 260 (1st Dept 2001)]. While the relationship between an insurance agent and an insured is generally not the type of special relationship giving rise to advisory duties, "[e]xceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law" [See *Chai-Chen v. Metropolitan Life Ins. Co.*, 190 AD3d 635 (1st Dept 2021)]. Plaintiff WFB's assertion that a "special relationship" existed between WFB and defendant RW through a "long-standing interaction as broker of record and insured for a period of thirteen continuous years is not persuasive. The Court finds that no such "special relationship" existed here.

As to Defendant's application to dismiss the Third Cause of Action as duplicative of the Second Cause of Action, the motion is Granted. To state a cause of action to recover damages for fraud, which must be pleaded with requisite particularity, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by the 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. CPLR § 3016(b) [See *DeMartino v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 189 AD3d 774 (2nd Dept 2020)]. Here, plaintiff alleges that RW induced WFB into an agreement to procure insurance and did not perform the agreement. Plaintiff does not allege with particularity how RW had pre-formed the intent to never perform its contract. Accordingly, the Court finds that the Fourth Cause of Action alleging fraud in the inducement must be dismissed.

As to defendant's application that plaintiff WFB's claim of Equitable Estoppel is duplicative of the breach of contract claim, the motion is Granted. Plaintiff is claiming that but for WFB's reasonable reliance on the "inaccurate representation" of RW that RW had procured insurance, WFB would have procured such liability insurance from another source. In their Second Cause of Action, the plaintiff pleads that RW breached its brokerage contract by failing to provide liability insurance during the period of October 2018 through to October 2019, including May 24, 2019. The Court finds that the Second Cause of Action for Breach of Contract and the Third Cause of Action for recovery under Equitable Estoppel is duplicative.

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As to defendant RW's application that the claim for attorney's fees in this action must be stricken, the application is Denied.

It is **SO ORDERED.**

HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: AUG 15 2022

ENTERED
Aug 17 2022
NASSAU COUNTY
COUNTY CLERK'S OFFICE