SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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WESCO INSURANCE COMPANY,

Plaintiff,

- v -

LULOVE LLC,

Defendant.

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INDEX NO. 654927/2021

MOTION DATE 6-29-23

MOTION SEQ. NO. 001

LULOVE LLC

Third-Party Plaintiff

- v –

P&G BROKERAGE, INC.

Third-Party Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 59, 60 were read on this motion to/for DISMISSAL.

I. BACKGROUND

The plaintiff insurer, Wesco Insurance Company (Wesco), commenced this action seeking a judgment declaring that the commercial policy issued to the defendant, Lulove LLC (Lulove), an owner of three contiguous properties in Queens County, limited its coverage for a fire loss on one property to $429,200.00, based on the square footage of the. Lulove had made a claim arising from a fire at premises #3, located at 107-08 Jamaica Ave. in Queens County on February 14, 2021, on which Lulove operated a dollar store. The claim was denied in part by Wesco which limited the coverage to a premises of 2146 square feet.

Lulove answered the complaint and commenced a third-party action against its insurance broker, P&G Brokerage, Inc., which had submitted the application and procured the policy on behalf of Lulove. Lulove maintains that its damaged property, on which it operated a

dollar store, was larger than 2146 square feet and thus the coverage procured for it by P&G was inadequate. Lulove argues that P&G provided an incorrect property description to Wesco in procuring the policy, and that, even if Lulove provided incorrect information to P&G, P&G should have corrected or made changes in the application and claim before submitting them to Wesco. Lulove asserts three causes of action against P&G - negligence, breach of the contract and "negligence and special relationship" - and seeks damages in excess of $1 million.

More specifically, in the negligence cause of action, Lulove alleges that P&G owed it "a duty to exercise reasonable skill, care and diligence in procuring the insurance and rendering advice and information in response to specific requests for coverage" but P&G made "blatant errors" and "negligent acts and omissions." In the breach of contract cause of action, Lulove alleges that P&G agreed to procure an insurance policy "and to give accurate descriptions for the property." In the third cause of action, Lulove alleges that P&G "assumed a special relationship with [Lulove] by, *inter alia*, agreeing to procure an insurance policy for [Lulove] and/or to make the appropriate changes to the policy, by advising and consulting with [LuLove]" and that Lulove "justifiably relied upon [P&G's] unique and specialized expertise with regard to insurance" …" to give accurate descriptions for the property."

P&G now moves, pre-answer, to dismiss the third-party complaint pursuant to CPLR 3211(a)(1), a defense based on documentary evidence, and CPLR 3211(a)(7), failure to state a cause of action. P&G maintains that it reported the square footage of the insured premises to Wesco accurately, as 2,146 square feet, as this was the information provided by Lulove, approved by Lulove and reflected in public records, and asserts that any additional square footage was due to unlawful additions constructed by Lulove, which are not acknowledged by or reflected in the records of the New York City Department of Buildings or New York City Department of Finance. P&G submissions include (1) an amended application for commercial general liability and property insurance dated August 13, 2020, which lists all three properties and states that the "total building area" of 107-08 Jamaica Avenue is 2,146 square feet, (2) a commercial insurance policy proposal dated August 14, 2020, which P&G prepared for Lulove for the "proposed policy period 8/16/2020 – 8/16/2021", and (3) the subject policy issued by Wesco showing a policy premium of $9,369.00.

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Lulove opposes P&G's motion. Lulove's submissions include a 2017 application for commercial property and liability insurance which reflects a square footage for 107-08 Jamaica

Avenue as 2,072 square feet of commercial space and curiously indicates that there are also two residential apartments on the premises. In regard to its assertion that it relied on P&G to procure "adequate" insurance, LuLove also submits an email from Yosef Ariel of P&G to Matty Green of Lulove from August 14, 2020, stating "we are pleased to present the attached quote from Amtrust offering adequate coverage at a competitive rate. Annual premium $9,397.66 …. Sign pages 13, 16, 20, 21, 22" and asking if direct billing was acceptable, with a response from Green stating "Yes. Please make it."

In reply, P&G submits Property Shark report on 107-08 Jamaica Avenue, and New York City Department of Buildings (DOB) or New York City Department of Finance records which show square footage of 2,146. This included two documents, one dated August 9, 2018, and another dated November 21, 2019, the first showing that the DOB denied an application by Lulove to expand the subject property, represented there to be 2146 square feet, by an additional 1,647 square feet and the second showing that the DOB denied an application by Lulove to expand the subject property, represented there to be 2,195 square feet, by an additional 1,647 square feet, at a proposed project cost of $190,000.00

Lulove filed a sur-reply in which it argues that the documents submitted by P&G do not qualify as documentary evidence under CPLR 3211(a)(1) and do not resolve all issues in dispute. Lulove appears to be relying primarily upon the 2017 policy application which contains inaccuracies in its favor by reflecting a square footage greater than 2,146.

II. DISCUSSION

Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014). Here, contrary to the arguments of Lulove, P&G's submissions meet that standard and warrant dismissal of all three causes of action of the third-party complaint.

. To be sure, an insured is not precluded from bringing an action against its broker. The law is well settled that "[i]n executing the insurance brokerage transaction, an agent or broker must exercise due care" to obtain the coverage requested (Cosmos, Queens Ltd. V Matthias

Saechang IM Agency, 74 AD3d 682, 683 [1st Dept. 2010]) and if the insurer does not cover a loss, an insurer may seek damages against the broker under a theory of negligence or breach of contract. "'Under New York law, a party who has engaged a person to act as an insurance broker to procure adequate insurance is entitled to recover damages from the broker [under a breach of contract theory] if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss. (Bruckmann, Rosser, Sherrill & Co. v Marsh USA Inc., 65 AD3d 865, 866 [1st Dept. 2009]). Moreover, '[a]n insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction." Id.'" Houston Casualty Co. v Cavan Corp. of N.Y., 161 AD3d 427, 428 (1st Dept. 2018). "To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that s specific request was made to the broker for the coverage that was not provided in the policy (see Hoffend & Sons, Inc. v Rose & Kiernan, Inc., 7 NY3d 152, 15 [2006]). 'A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage' Id., at 158)." American Bldg. Supply Corp. v Petrocelli Group, Inc., 19 NY3d 730, 735 (2012).

Lulove does not even allege that it made a specific request for coverage in regard to 107-08 Jamaica Avenue for an area of more than 2,146 square feet or that P&G did not procure adequate coverage for a property of 2,146 square feet, see Hoffend & Sons, Inc. v Rose & Kiernan, Inc., 7 NY3d 152, 15 [2006]). Essentially, Lulove relies upon a reference in a 2017 insurance application to establish the square footage of the subject property to be greater than 2,146. However, that reliance is misplaced since the document itself is unclear as to the square footage attributed to 107-08 Jamaica Avenue and any error made therein does not support a claim for common law negligence negligence, breach of contract or negligence arising from a "special relationship" in regard to the 2020 policy. Nor does August 14, 2020, email in which Yosef Ariel states that P&G procured "adequate" coverage, submitted in opposition to the motion, warrant denial of the motion as it does not support a breach of contract or negligence claim. Indeed, it shows that P&G procured a policy as requested by Lulove.

The third cause of action must also be dismissed pursuant to CPLR 3211(a)(7). On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State

of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Even applying this liberal standard, the third-party complaint fails to allege a cause of action of negligence arising from a "special relationship."

"[A] special relationship may develop between an insurance broker and his client that may impose on the broker additional duties beyond those imposed by common law, and that one situation that may give rise to such a special relationship is where there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent. See Voss v Netherlands Ins. Co., 22 NY3d 728, 734-35 (2014), citing Murphy v Kuhn, 90 NY2d 266, 272-73 (1997). However, nothing more is alleged here beyond the "typical insurance brokerage-customer relationship." Florence Capital Advisors, LLC v Thomas Flanagan & Co., 214 AD3d 498, 500 (1st Dept. 2023); Dae Assoc., LLC v AXA Art Ins. Corp., 158 AD3d 493, 494 (1st Dept. 2018). The third-party complaint includes only brief and conclusory allegations of any relationship between P&G and Lulove. As stated above, Lulove merely alleges that P&G "assumed a special relationship with [Lulove] by, *inter alia*, agreeing to procure an insurance policy for [Lulove] and/or to make the appropriate changes to the policy, by advising and consulting with [LuLove]" and that Lulove "justifiably relied upon [P&G's] unique and specialized expertise with regard to insurance" …" to give accurate descriptions for the property." To the extent Lulove is claiming that P&G did not give an accurate description of the property as 2,146 square feet and was contractually obligated to enlarge the square footage of the property on the policy application, such a claim is clearly untenable.

Nor does the complaint contain any allegation in regard to its own failure to find the purported errors in the 2017 and 2020 applications or the subject policy. "[O]nce an insurance policy has been received, it constitutes presumptive knowledge of its terms and limits." Greater N.Y. Mu. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d 441, 443 (1st Dept. 2007). In that regard, the Court of Appeals has held that "[w]hile it is certainly the better practice for an insured to read its policy, an insured should have a right to 'look to the expertise of its broker with respect to insurance matters… The failure to read to policy, at most may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker." American Bldg. Supply Corp. v Petrocelli Group, Inc., supra 736-737 [internal citations and quotations omitted]; see West 70th Owners Corp. v Hiram Cohen & Son, Inc., 166 AD3d 507 (1st Dept .2018). Here, however, since there was no allegation to support a claim of negligence on the part of P&G, it cannot be held liable under a theory of comparative negligence.

Finally, the court notes that in its sur-reply, Lulove does not object on procedural grounds to P&G's asserting new arguments or filing of additional documents on reply, including the DOB documents, but merely makes the meritless argument that the documents do not qualify as documentary evidence under CPRL 3211(a)(1). Notably, Lulove does not deny that it represented to the DOB in 2018 and 2019 that the subject premises were 2,146 square feet or claim that the number it submitted was in error.

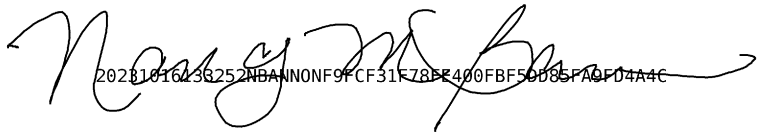
III. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the motion of third-party defendant P&G Brokerage, Inc. to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted and the third-party complaint is dismissed in its entirety, and

ORDERED that the remaining parties shall proceed with discovery as per this court's order dated June 1, 2023, and appear for a status conference on November 2, 2023, at 12:00 pm. as scheduled therein.

This constitutes the Decision and Order of the court.



10/12/2023
DATE

NANCY M. BANNON, J.S.C.

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