

Helen's Kitchen, LLC v American Eur. Ins. Co.

2024 NY Slip Op 34123(U)

November 21, 2024

Supreme Court, New York County

Docket Number: Index No. 650368/2024

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

Justice

-----X

HELEN'S KITCHEN, LLC D/B/A SAIGON SOCIAL,

Plaintiff,

- v -

AMERICAN EUROPEAN INSURANCE COMPANY, DAVID
J. LOUIE, INC.

Defendant.

-----X

INDEX NO. 650368/2024

MOTION DATE 02/29/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 61, 62, 63, 64, 65, 66

were read on this motion to/for DISMISS.

The instant action arises out of allegations of breach of contract, among other allegations, based on plaintiff being denied insurance coverage for a fire at its premises. Defendants both move to dismiss the complaint, pursuant to CPLR § 3211(a)(1) and (7); this decision will solely address defendant David J. Louie, Inc. (“DJL”). Plaintiff opposes the motion. For the reasons set forth below, the motion to dismiss is denied.

*Background*¹

Plaintiff, a restaurant business named Saigon Social in the lower east side of Manhattan, was insured by carrier AEIC. AEIC provided plaintiff a general business policy, with an initial policy period of March 2020 to March 2021. Plaintiff renewed and fully prepaid all premiums for the policy, and it went into effect from May 26, 2021, to May 26, 2022. On May 2, 2022, a fire caused extensive damage to both the premises and plaintiff’s business. Plaintiff timely submitted

¹ As previously recited by this Court in NYSCEF Doc. 69.

a claim to AEIC for the loss arising from the fire, however, AEIC denied the claim on the grounds that the policy had been canceled for non-payment of premiums.

Plaintiff's insurance broker, defendant David J. Louie, Inc., obtained additional liquor coverage (the "liquor endorsement") to plaintiff's policy, causing plaintiff to incur an additional premium payment of \$275. Plaintiff alleges it was not aware that it owed this additional premium, nor did it have a liquor license and the instruction to its broker was simply to obtain a quote from AEIC. Plaintiff contends that AEIC wrongly canceled both the liquor endorsement and plaintiff's original policy, instead of severing and cancelling just the liquor endorsement. The cancellation of the policy caused plaintiff to be uninsured at the time of the fire.

Standard of Review

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. "The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Id.*

"In a motion to dismiss pursuant to CPLR §3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further,

dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

Discussion

Plaintiff asserts that DJL was without authority to obtain and bind plaintiff to the additional liquor endorsement. Further, plaintiff asserts that DJL was negligent in procuring the liquor endorsement without getting authorization from the plaintiff.

While the issue of DJL’s apparent authority to bind plaintiff to an insurance policy, as it relates to defendant American European Insurance Company, is not at issue, the issue is whether DJL was granted the authority by plaintiff. At this juncture, for the purposes of the motion to dismiss, the allegations in the complaint survive the instant motion.

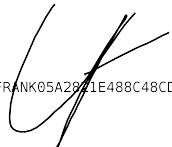
Plaintiff alleges that before the email was sent directing DJL to obtain the insurance, a conversation occurred that explicitly limited the authorization as one to obtain a quote. Further, DJL’s continued communication seeking confirmation from plaintiff is sufficient for plaintiff’s complaint to survive the instant motion to dismiss.

The Court is not persuaded that the email to add the coverage establishes a defense to DJL as a matter of law based on the request for insuring for a license that plaintiff does not have. This at the very least is a question of the broker’s diligence, the repeated description of plaintiff’s beer and wine license as a liquor license ostensibly provided plaintiff with a higher premium for license that plaintiff did not possess.

As to the argument that the breach of contract claim is duplicative of the negligence claim, the Court declines to dismiss either cause of action at this juncture as plaintiff is permitted

to plead alternative theories. The Court has reviewed the movant’s remaining contentions and finds them unavailing. Accordingly, it is hereby,

ADJUDGED that the motion to dismiss is denied.


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11/21/2024
DATE

LYLE E. FRANK, J.S.C.

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