

Aviv v Amaden Gay Agencies, Inc.

2024 NY Slip Op 34901(U)

September 23, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 630419/2023

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 630419/2023

CAL. No. _____

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**

P R E S E N T:

MOTION SUBMIT DATE: 08/06/24
MOT. SEQ. # 2 - MD

HON. LINDA KEVINS
Justice of the Supreme Court

-----X

OREN R. AVIV and KATHERINE LOCKE
AVIV,

Plaintiffs,

- against -

AMADEN GAY AGENCIES, INC. and
PRIVILEGE UNDERWRITERS RECIPROCAL
EXCHANGE,

Defendants.

-----X

Upon the following papers e-filed (documents # 44 through # 52); it is,

ORDERED that defendant Amaden Gay Agencies, Inc.’s motion for an order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing plaintiff’s amended complaint and pursuant to CPLR § 3016(b), dismissing the third cause of action in the amended complaint regarding negligent misrepresentation, is **DENIED**; and it is further

ORDERED THAT ALL COUNSEL (ATTORNEYS OF RECORD-HANDLING ATTORNEYS), AND IF NO COUNSEL, THEN THE PARTY UNLESS THE PARTY IS A CORPORATION AND THEREFORE MUST APPEAR BY COUNSEL [SEE CPLR § 321 (A)] ARE DIRECTED TO APPEAR, IN PERSON, before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, **on October 30, 2024, 2024, at 9:30 a.m., for a Preliminary Conference;** and it is further

ORDERED that prior to the scheduled conference date, counsel of record shall confer and complete a Preliminary Conference Stipulation and Proposed Order, which is available on

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the Court's website: <http://www.nycourts.gov/courts/10jd/suffolk/index.shtml>. Counsel shall upload a fully executed Preliminary Conference Stipulation and Proposed Order to NYSCEF no less than one business day prior to the scheduled conference. If the parties cannot agree on the terms of a Preliminary Conference Stipulation and Proposed Order, then the parties and counsel of record, if any, must appear as scheduled above, and **if the parties have uploaded a fully executed Preliminary Conference Stipulation and Proposed Order to NYSCEF, the Preliminary Conference shall be deemed unnecessary**; and it is further

ORDERED that non-appearance will not be countenanced by the Court and may subject the non-appearing party to one or more of the sanctions provided pursuant to Uniform Rules for Trial Courts (22 NYCRR § 202.27) and Rules of the Chief Administrator of the Courts (22 NYCRR § 130-2.1); and it is further

ORDERED that at the call of the calendar, if either party does not appear or proceed or announce their readiness to proceed, the court shall consider an order pursuant to 22 NYCRR § 202.27 as follows: (a) if the plaintiff appears but the defendant does not, the court shall consider granting judgment by default and order an inquest; (b) if the defendant appears but the plaintiff does not, the court shall consider a dismissal of the action and order a severance of counterclaims or cross claims; and (c) if no party appears, the Court shall make such order as appears just; and it is further

ORDERED that appearances by persons with knowledge of the facts and vested with authority to make binding dispositions are required on all court dates unless excused by the Court. (See also 22 NYCRR 202.1) Counsel and parties shall bring with them to all court appearances copies of all relevant documents including courtesy copies of all pleadings, settlement offers, pending motions and affidavits of service comporting with Part 29 Court Rules which may be found in Part 29 and at: www.nycourts.gov/courts/10jd/suffolk/sc_justices.shtml and, if an e-filed case, the e-filed document numbers of same ; and it is further

ORDERED that counsel for the parties are directed to confirm that all parties have complied with the Uniform Rules for Trial Courts (22 NYCRR § 202.11 Consultation prior to Preliminary and Compliance Conferences). Please advise the Court of the date of the consultation and what issues were resolved and what is left to be resolved after such consultation, by uploading such information to the e-filing system with notice to all parties and copying the Court by email to sufkevins@nycourts.gov; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiffs commenced this action for recovery of in excess of \$2,000,000.00 in damages for alleged lack of insurance coverage or shortfall after a fire loss to the insured property located at 144 Edge of Woods Road, Southampton, New York (the "Residence").

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“A motion to dismiss pursuant to CPLR 3211 (a)(1) will be granted only if the ‘documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” (*Fontanetta v Doe*, 73 AD3d 78, 83, 898 NYS2d 569, 573 [2d Dept 2010]; *Melnicke v Brecher*, 65 AD3d 1020, 886 NYS2d 406 [2d Dept 2009]).

Here, movant’s documentary evidence such as the subject homeowner’s insurance policy and insurance policy change summary with insurance policy attached to this motion fails to resolve all factual issues as a matter of law (*see generally VIT Acupuncture, P.C. v State Farm Automobile Ins. Co.*, 28 Misc 3d 1230(A), 958 NYS2d 64[Civ Ct, Kings County 2010]; *see E.g. Magee-Boyle v Reliastar Life Co of N.Y.*, 173 AD3d 1157, 105 NYS3d 90 [2d Dept 2019])[letters, emails and affidavits fail to meet requirements for documentary evidence as per CPLR 3211(a)(1)]; *see Siegel, Practice Commentaries, McKinney’s Cons. Law of NY*, Book 7B, CPLR C3211:10 at 21-22). Therefore, defendant Amaden Gay Agencies, Inc.’s motion, pursuant to CPLR 3211(a)(1), is denied.

In regard to the motion to dismiss pursuant to CPLR 3211(a)(7), “on a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated” (*Board of Educ. of City School Dist of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562, 724 NYS2d 422 [2d Dept 2001]; *Delbene v Estes*, 52 AD3d 647, 860 NYS2d 612 [2d Dept 2008])[In reviewing a motion to dismiss under CPLR 3211(a)(7), “the court must accept the facts alleged in the complaint as true, grant the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.”)].

Additionally, no matter how inartistically drawn the pleading is, the pleader should be given the benefit of any cognizable cause of action that can be manifest therefrom (*Rich v Lefkovits*, 56 NY2d 276, 452 NYS2d 1 [1982]). Here, defendant Amaden Gay Agencies, Inc. does not establish conclusively that the plaintiffs have no cause of action.

With respect to dismissing the negligent misrepresentation cause of action, in *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180, 919 NYS2d 465, 470 (2011) the Court of Appeals sets forth the elements of a claims for negligent misrepresentation, which are: 1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; 2) that the information provided was incorrect; and 3) reasonable reliance on the information (*see also Voss v Netherlands Ins. Co.*, 22 NY3d 728, 985 NYS2d 448 [2014])[“Where a special relationship develops between the broker and client, we have also indicated that the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage.”)].

Here, a review of the amended complaint and the cause of action for negligent misrepresentation evidences that such amended complaint and cause of action has all of the elements set forth in *Mandarin Trading Ltd.* Additionally, whereas here, a negligent

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misrepresentation cause of action, unlike a fraudulent misrepresentation cause of action, need not comply with CPLR § 3016(b) (see *High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). Movant’s reliance upon *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 (2009) for the proposition that CPLR § 3016 is applicable to the negligent misrepresentation cause of action is without merit, as that case involves a fraudulent misrepresentation cause of action. Therefore, movant’s request for relief is denied.

Considering all of the above, movant’s motion to dismiss is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.



LINDA KEVINS, JSC

Dated: 9.23.24

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION