Dr Pension Services v North Am. Professional Liab. Ins. Agency
2011 NY Slip Op 30576(U)
March 14, 2011
Sup Ct, Albany County
Docket Number: 10725-09
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DR PENSION SERVICES,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 10725-09
RJI NO. 01-11-102604

NORTH AMERICAN PROFESSIONAL LIABILITY INSURANCE AGENCY, LLC and THOMAS HENELL,

Defendants.

Supreme Court Albany County All Purpose Term, February 23, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Couch White, LLP
Donald Hillman, Esq.
Attorneys for Plaintiff
540 Broadway
PO Box 22222
Albany, New York 12201

Friedman, Hirschen & Miller, LLP
Thomas Hirschen, Esq.
Attorneys for Defendants
100 Great Oaks Boulevard
Albany, New York 12203

TERESI, J.:

Plaintiff commenced this negligence/breach of contract action against Defendants, seeking to recover the damages it sustained due to Defendants' alleged negligent and wrongful procurement of insurance. Issue was joined by Defendants and discovery is ongoing. Defendants now move for summary judgment dismissing the complaint. Plaintiff opposes the motion. Because Defendants demonstrated their entitlement to summary judgment, and Plaintiff raised no triable issue of fact, Defendants' motion for summary judgment is granted.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law" (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821, 822 [3d Dept. 2010], quoting Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]), "by proffering evidentiary proof in admissible form." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of a genuine issue of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

While "insurance agents 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" (Murphy v. Kuhn, 90 NY2d 266 [1997]), "an insured is conclusively presumed to know the contents of an insurance policy concededly received, even though the insured did not read or review it." (Laconte v. Bashwinger Ins. Agency, 305 AD2d 845, 846 [3d Dept. 2003]; Catalanotto v Commercial Mut. Ins. Co., 285 AD2d 788 [3d Dept. 2001], lv denied 97 NY2d 604 [2001]; Western Bldg. Restoration Co., Inc. v. Lovell Safety Management, 61 AD3d 1095 [3d Dept. 2009]; M & E Mfg. Co. Inc. v. Frank H. Reis Inc., 258 AD2d 9 [3d Dept. 1999]; Madhvani v. Sheehan, 234 AD2d 652 [3d Dept. 1996]). "This conclusive presumptive knowledge of the terms and limits of the policy defeats... causes of action for negligence and breach of contract as a matter of law." (Stone v. Rullo Agency, Inc., 40 AD3d 1185, 1186 [3d Dept. 2007], quoting Catalanotto v

Commercial Mut. Ins. Co., supra). Courts "have recognized exceptions to this presumption only in limited circumstances, such as where the agent failed to correct a clear misimpression created by the binder or policy (see Arthur Glick Truck Sales v Spadaccia-Ryan-Haas, Inc., 290 AD2d 780 [2002]) or where the agent made an affirmative misrepresentation regarding coverage in response to questioning by the client after reviewing the policy (see Kyes v Northbrook Prop. & Cas. Ins. Co., 278 AD2d 736 [2000])." (Catskill Mountain Mechanical, LLC v. Marshall and Sterling, 51 AD3d 1182, 1184-85 [3d Dept. 2008]).

On this record, Defendants demonstrated their prima facie entitlement to judgment as a matter of law. Defendants submitted the insurance policies they obtained for Plaintiff for periods "July 1, 2006 - July 1, 2007", "July 1, 2007 - July 1, 2008", "July 1, 2008 - July 1, 2009"; and Plaintiff's Bill of Particulars acknowledges its receipt of each policy. Additionally, both of Plaintiff's owners acknowledged receipt of the policies at their depositions. From the foregoing, Defendants duly demonstrated that Plaintiff received each yearly policy and is "conclusively presumed to know the contents of [its] insurance policy," thereby defeating Plaintiff's negligence and breach of contract claims as a matter of law. (Laconte v. Bashwinger Ins. Agency, supra; Stone v. Rullo Agency, Inc., supra; Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 19 AD3d 1056 [4th Dept. 2005], aff'd on other grounds 7 NY3d 152).

In opposition, with the burden shifted, Plaintiff failed to raise a triable issue of fact. Plaintiff submits the affidavit of one of its owners (hereinafter "Santa Barbara"). Although Santa Barbara alleges that the policies Defendants procured for Plaintiff negligently excluded "trading errors" from coverage, he does not dispute Plaintiff's receipt of the policies and admitted that Plaintiff "did not review the policies to ensure they provided adequate coverage." Instead he

claims an exception to the conclusive presumption applies. However, on this record, he failed to sufficiently demonstrate the factual basis for either exception to apply.

Considering first the "affirmative misrepresentation" exception (Kyes v Northbrook Prop. & Cas. Ins. Co., supra), Santa Barbara does not particularize a specific "misrepresentation." Rather, he alleges that Defendants' "misrepresentations" occurred in 2006 at or near the time the policy was delivered. Importantly, Santa Barbara does not allege that such unspecified "misrepresentations" were made in connection with Plaintiff's inquiries into the policy's coverage. Instead, his "misrepresentation" claim rests on Defendants not advising Plaintiff of the "trading error" exclusion.

First, Plaintiff's vague and conclusory "misrepresentation" allegations fail to sufficiently particularize a specific "misrepresentation" sufficient to raise a triable issue of fact.

Even assuming a "misrepresentation" was made in 2006, it was made at about the time Plaintiff received the policy but not in response to an inquiry into its limitations. As the Kyes v Northbrook Prop. & Cas. Ins. Co. misrepresentation exception focused on the affirmative misrepresentation that occurred after policy issuance in response to specific coverage limitation questions, such exception is not applicable here. Additionally, Plaintiff's misrepresentation claim is explicitly not "affirmative." Instead, premised upon what was not advised.

Plaintiff similarly did not establish the "failure to correct a clear misimpression" exception (Arthur Glick Truck Sales v Spadaccia-Ryan-Haas, Inc., supra). Plaintiff submits the binder Defendants issued in 2006 (herinafter 2006 binder"). It specifically reads: "[Plaintiff] will be insured, subject to the terms & conditions of the policy, for services they provide as... Record-

Keepers..." Santa Barbara alleges that the term "Record-Keeper" is a term of art within the retirement plan industry. He states that a "Record-Keeper" would, in part, facilitate mutual fund trades. As such, he concludes that the 2006 binder's statement that Plaintiff would be insured for its services as a "Record-Keeper" created a misimpression because the policy specifically excluded "trading errors." Such misimpression, however, is anything but clear.

While variance between a binder's monetary coverage amount and its related policy's coverage amount can "clearly" create a "misimpression" (Id.), here the allegedly implied meaning of the term "Record-Keeper" is not so "clear." Plaintiff offers no proof that such definition was discussed with Defendants; and Santa Barbara testified, at his deposition, that he did not recall discussing his contention that "recordkeeping" included "trading" with Defendants. Nor has Plaintiff offered any proof, testimonial, documentary or expert, to support Santa Barbara's term of art claim. Additionally, because the 2006 binder's coverage for Record-Keepers was specifically "subject to the terms & conditions of the policy" no misimpression could have arisen. As such, on this record, Plaintiff did not raise a triable issue of fact about Defendants' "failure to correct a clear misimpression."

Moreover, Plaintiff's various claims that they relied upon Defendants to comply with their stated insurance needs, set forth in their applications, do not constitute exceptions to the conclusive presumption that precludes liability herein. (American Building Supply Corp. v. Petrocelli Group, Inc., __AD3d__ [1st Dept. 2011]; Laconte v. Bashwinger Ins. Agency, supra).

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit.

Accordingly, Defendants' motion for summary judgment is granted.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 14, 2011
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 3, 2011, Affirmation of Thomas Hirschen, dated Janury 3, 2011, with attached Exhibits A-J.
2. Affirmation of Donald Hillman, dated February 7, 2011, with attached Exhibits A-B; Affidavit of Thomas Santa Barbara, dated February 7, 2011, with attached Exhibits A-F.
3. Affirmation of Thomas Hirschen, dated February 18, 2011.