

386 3rd Ave. Partners Ltd. Partnership v Alliance Brokerage Corp.
2017 NY Slip Op 31484(U)
July 11, 2017
Supreme Court, Kings County
Docket Number: 500074114
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of July, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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386 3RD AVENUE PARTNERS LIMITED PARTNERSHIP,
8112-8124 18TH AVENUE REALTY CORP.,
RIBELLINO FAMILY LIMITED PARTNERSHIP,
MASERATI REALTY LLC, and RICHARD RIBELLINO,

Plaintiffs,

- against -

ALLIANCE BROKERAGE CORP.,

Defendant.
-----X

DECISION AND ORDER

Index No. 500074/14

Mot. Seq. #1-2

The following e-filed papers read herein:

NYSCEF#:

Notice of Motion, Affirmations (Affidavits), Statements of
Material Facts, Memoranda of Law, and Exhibits Annexed _____
Affirmations (Affidavits) in Opposition, Responses to Statements of
Material Facts, Memoranda of Law, and Exhibits Annexed _____
Reply Affirmations (Affidavits), Memoranda of Law, and
Exhibits Annexed _____

21-39, 40-50

58-61, 62, 63, 64, 65

66-70, 71, 72

In this action, inter alia, to recover damages for negligence, the defendant Alliance Brokerage Corp. (defendant) moves in Seq. No. 1 for summary judgment dismissing the complaint. Plaintiffs 386 3rd Avenue Partners Limited Partnership, 8112-8124 18th Avenue Realty Corp., Ribellino Family Limited Partnership, Maserati Realty LLC, and Richard Ribellino (collectively, plaintiffs) move in Seq. No. 2 for partial summary judgment on liability on their complaint and, if such request is granted, for an inquest on damages.

Background

Plaintiffs are a group of associated partnerships, corporations, limited liability companies, and one individual, Richard Ribellino, Sr. (Ribellino), that maintain ownership interests in over a dozen of commercial properties in Brooklyn, New York, including the three commercial properties at issue: 386 Third Avenue, 94 Ninth Street, and 22 Second Avenue (collectively, the subject properties).

Defendant is a retail insurance brokerage firm which contracted with, among others, nonparty Travelers Excess and Surplus Lines Company (Travelers) to act as a broker of commercial insurance policies to be underwritten by Travelers.

In or after 2002, defendant, on plaintiffs' behalf, obtained from Travelers a blanket insurance policy covering various risks of loss (other than the risk of loss from flood damage) to plaintiffs' commercial properties, including the subject properties. In or about 2007, defendant offered plaintiffs the opportunity to expand their coverage to cover the risk of flood damage to, inter alia, the subject properties (Ribellino tr at 31:21-32:14). Plaintiffs instructed defendant to obtain quotes regarding flood coverage (Ribellino tr at 32:5-7). After reviewing the quotes, plaintiffs instructed defendant to obtain flood coverage for, inter alia, the subject properties (Ribellino tr at 32:7-8). The additional insurance coverage for risk of flood damage to, inter alia, the subject properties was added to the Travelers policy (Ribellino tr at 33:12-16). Pursuant to its express terms, however, the Travelers policy insured plaintiffs for flood damage only with respect to those of their Brooklyn commercial properties which were *not* located within one or more of the specified flood zones (the zone-based exclusion). Because each of the subject properties was located within one or more of the specified flood zones, the

Travelers policy did not insure any of the subject properties for flood damage. Thereafter, plaintiffs annually renewed the Travelers policy without changing the scope of their flood coverage for the subject properties.

In Oct. 2011, which was approximately one year before Hurricane Sandy, plaintiffs requested that defendant advise them in writing “if any of the[ir] Brooklyn commercial properties have the flood coverage.” Defendant responded, stating, in relevant part, that “[a]ll of the commercial properties have . . . a \$1 million limit for flood. . . .” The following year, plaintiffs again renewed the Travelers policy without changing the scope of their flood coverage for the subject properties. When the flood from Hurricane Sandy in Oct. 2012 damaged each of the subject properties, Travelers denied plaintiffs flood coverage, citing the zone-based exclusion in its policy.

In Jan. 2014, plaintiffs instituted this action. Their complaint asserts tort claims sounding in negligence, breach of fiduciary duty, and misrepresentation. Defendant joined issue. After discovery was completed and a note of issue was filed, the instant motions for summary judgment ensued.

Analysis

As a general rule, insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time, or to inform their client of the inability to do so (*see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). “A broker may be held liable for neglect in failing to procure the requested insurance” (*Reilly v Progressive Ins. Co.*, 288 AD2d 365, 365 [2d Dept 2001]). “An insured must show that the . . . broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it

breached the agreement or because it failed to exercise due care in the transaction” (*Gagliardi v Preferred Mut. Ins. Co.*, 102 AD3d 741, 741 [2d Dept 2013]).

There are triable issues of fact precluding summary judgment to either party as to: (1) whether plaintiffs requested from defendant specific coverage for flood damage to their commercial properties, including the subject properties, and whether defendant failed to obtain an insurance policy as requested; (2) whether an alternative flood insurance policy for the subject properties was available from the FEMA; and (3) whether plaintiffs’ reliance on defendant’s unqualified representation in its Oct. 2011 email that all of their Brooklyn commercial properties had flood coverage was justified¹ (*see American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 737 [2012], *rearg denied* 20 NY3d 1044 [2013]; *Kimmell v Schaefer*, 89 NY2d 257, 264; *Republic Long Is., Inc. v Andrew J. Vanacore, Inc.*, 29 AD3d 665, 666 [2d Dept 2006]; *Reilly*, 288 AD2d at 366; *Santaniello v Interboro Mut. Indem. Ins. Co.*, 267 AD2d 372, 373 [2d Dept 1999]; *Mets Donuts, Inc. v Dairyland Ins. Co.*, 166 AD2d 508, 509 [2d Dept 1990]; *cf. Femia v Graphic Arts Mut. Ins. Co.*, 100 AD3d 954, 956 [2d Dept 2012]; *Verbert v Garcia*, 63 AD3d 1149, 1150 [2d Dept 2009]; *Trizzano v Allstate Ins. Co.*, 7 AD3d 783, 786 [2d Dept 2004], *lv dismissed in part, denied in part* 3 NY3d 696 [2004]).

Plaintiffs’ admitted failure to read the Travelers policy is not a superseding cause precluding defendant’s liability as a matter of law. “In the absence of any showing that an

¹ In determining whether justifiable reliance exists in a particular case, a factfinder “should consider [1] whether the person making the representation held or appeared to hold unique or special expertise; [2] whether a special relationship of trust or confidence existed between the parties; and [3] whether the speaker was aware of the use to which the information would be put and supplied it for that purpose” (*Kimmell*, 89 NY2d at 264).

insured is aware of the discrepancy between the coverage it claims to have requested and that actually obtained by the insurance [broker], an insured has a right to rely upon the [broker's] presumed obedience to his or her instructions" (*Mets Donuts*, 166 AD2d at 509; *see also American Bldg. Supply*, 19 NY3d at 736-737 ["The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker."]; *cf. Lasner v Massachusetts Mut. Life Ins. Co.*, 140 AD3d 1023, 1026 [2d Dept 2016] ["Where the terms of the policy were provided to the plaintiff in writing, any reliance by him on an alleged misrepresentation by (the insurance broker) that the policy would pay the plaintiff lifetime benefits even if he was working at another job was not reasonable or justifiable"], *lv denied* 28 NY3d 908 [2016]).

Conclusion

Based on the foregoing, it is hereby

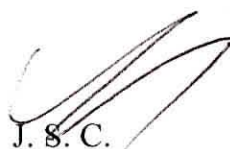
ORDERED that defendant's motion in Seq. No. 1 and plaintiff's motion in Seq. No. 2, in each instance, for summary judgment, are denied in their entirety; and it is further

ORDERED that plaintiffs' counsel shall electronically serve a copy of this Decision and Order with notice of entry on defense counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk.

The parties are reminded of their next scheduled appearance in Jury Coordinating Part 1 on July 19, 2017.

This constitutes the Decision and Order of the Court.

ENTER FORTHWITH,



HON. LAWRENCE KNIPEL