

Humphries v Metropolitan Prop. & Cas. Ins. Co.

2016 NY Slip Op 30053(U)

January 8, 2016

Supreme Court, New York County

Docket Number: 152521/15

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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JACQUELINE HUMPHRIES and CHARLES OUSLER,

Plaintiffs,

Index No. 152521/15

-against-

METROPOLITAN PROPERTY AND CASUALTY
INSURANCE COMPANY dba METLIFE AUTO &
HOME, CAMBRIDGE MUTUAL FIRE INSURANCE
COMPANY, HASKELL BROKERAGE CORP., JLNY
GROUP, LLC and FULTON ASSOCIATES, LLC,

Defendants.

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MILLS, J.:

Defendant JLNY Group, LLC (JLNY) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the complaint, as well as all cross claims, asserted against it. Plaintiffs Jacqueline Humphries and Charles Ousler oppose, as does defendant Economy Premier Assurance Company s/h/a Metropolitan Property and Casualty Insurance Company d/b/a Metlife Auto & Home (Metlife).

FACTS

In this action, plaintiffs seek to recover damages for breach of contract, failure to insure and negligence in relation to damage sustained as a result of two fires which occurred on March 17, 2014 and March 18, 2014. The fires occurred in the building located at 140 Fulton Street, New York, New York, and allegedly caused damage to units four and five in the building

next door, 138 Fulton Street. Plaintiffs own unit five, and are 69% owners of unit four. They are members of the building's condominium association (Condominium Association), and assert its interests in this action as well as their own.

At the time of the fires, plaintiffs had an insurance policy issued by Metlife. Allegedly, although plaintiffs suffered \$525,000.00 in damages, Metlife paid only \$77,000.00 under the policy. The Condominium Association had an insurance policy with co-defendant Cambridge Mutual Fire Insurance Company (Cambridge). Allegedly, Cambridge also failed to pay what was due under its policy.

The fifth cause of action in the complaint avers that JLNY was retained by the Condominium Association to obtain appropriate insurance, and that JLNY breached its common-law duty to obtain proper coverage by failing to obtain the maximum coverage available.

At the time this motion was filed, co-defendant Fulton Associates, LLC (Fulton Associates) had not yet answered or appeared, but since that time it has filed its answer, and all defendants have now answered and appeared in the action. Cambridge, Metlife and Fulton Associates assert cross claims against each other and the other defendants. Cambridge and Fulton Associates seek contribution, common-law indemnification and contractual indemnification. Metlife seeks contribution.

JLNY moves to dismiss the complaint and all cross claims against it based upon the fact that it is an insurance wholesaler that acts as an intermediary between insurance agents and insurance companies. It maintains that it is not an insurance agent, and does not get involved in insurance coverage or insurance limits decisions for insureds, nor does it provide recommendations to either insurance agents or insureds.

JLNY maintains that it was contacted by an insurance agent from Fairmont Insurance Brokers LTD. (Fairmont) on behalf of the Condominium Association. JLNY has a longstanding contractual business relationship with Fairmont, whereby JLNY provides wholesale insurance services to Fairmont so that Fairmont can obtain insurance coverage for its clients. See Berger aff, exhibit 1. JLNY contends that it received an application on behalf of the Condominium Association from Fairmont in 2006. *Id.*, exhibits 2, 3. It eventually resulted in Cambridge issuing the subject policy, which has been renewed annually by Fairmont on behalf of the Condominium Association.

JLNY asserts that it was never hired by the Condominium Association or by plaintiffs, nor did it ever provide any advice or recommendations. It is listed as "agent" on the Cambridge policy premium invoices because it is the entity that is in contact with Cambridge, and, according to JLNY, that is the customary way such a delineation is handled in the industry.

The only cause of action asserted against JLNY in the complaint avers that JLNY was retained by the Condominium Association to obtain appropriate requested coverage, and that JLNY breached its duty by failing to obtain the maximum coverage available. Exhibit A, ¶¶ 72.

DISCUSSION

JLNY maintains that the affidavit and documentary evidence submitted on this motion demonstrate that it was not retained by the Condominium Association and had no dealings with it. Therefore, JLNY concludes that no cause of action lies against it, and the complaint must be dismissed.

JLNY relies on the affidavit of Ely Berger (Berger), a member and insurance wholesaler at JLNY, who explains the role that JLNY plays in the insurance industry, and who provides various documents to support his explanation. However, affidavits are not documentary evidence that can be used on a motion to dismiss under CPLR 3211. The affidavit can be used to introduce the exhibits, but the allegations in the affidavit are not documentary evidence. *Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d 563 (1st Dept 2015).

The documents submitted by Berger demonstrate that JLNY had an ongoing relationship with Fairmont. They also demonstrate that Fairmont submitted an application on behalf of the Condominium Association. However, they do not preclude the

possibility that JLNY had direct contact with the Condominium Association, especially since JLNY is named as the insurance agent on the policy invoice. DeLaurentis affirmation, exhibit A. While it is true that plaintiffs do not offer any assertions in opposition to counter JLNY's assertions, it does submit the 2012-2013 invoice that names JLNY as insurance agent, and, in any event, at this stage of the litigation, the burden is on JLNY to prove that there was no contact, not on plaintiffs to prove that there was contact. Further, unlike on a summary judgment motion, Berger's affidavit to that effect cannot be used on a motion to dismiss to prove its position. Thus, unless JLNY can produce documentary evidence that "utterly refutes" plaintiffs' allegations (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014]), the complaint's assertion that JLNY was retained by the Condominium Association suffices to plead a cause of action, even if it appears unlikely that plaintiffs can prove that assertion. Here, the documentary evidence does not utterly refute plaintiffs' claims, thus, the motion is denied with respect to the cause of action based on CPLR 3211 (a) (1).

JLNY contends that, even assuming that it owed a duty to plaintiffs, plaintiffs fail to allege any concrete facts regarding a specific request for a certain type of insurance that was not provided in the policy. JLNY further maintains that

plaintiffs fail to allege that JLNY requested coverage different from that which Fairmont sought on behalf of the Condominium Association.

The cases upon which JLNY relies, *Levi v Utica First Ins. Co.* (12 AD3d 256 [1st Dept 2004]) and *Shteiman v Those Certain Underwriters at Lloyd's of London, England* (180 AD2d 521 [1st Dept 1992]) were both motions that sought summary judgment, pursuant to CPLR 3212, not dismissal, pursuant to CPLR 3211. The burden on a summary judgment motion is different from that on a motion to dismiss. Here, plaintiffs have no obligation to set forth any evidence, but need only set forth allegations which, viewed liberally and taken together, and combined with any possible favorable inferences, can support a cause of action. *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326. Thus, plaintiffs' allegation that JLNY was obligated to provide appropriate insurance, and failed to meet that obligation, suffices to state a cause of action at this juncture (CPLR 3211 [a] [7]), and JLNY's motion to dismiss the complaint must be denied.

JLNY also seeks dismissal of Metlife and Cambridge's cross claims against it. It relies on its professed lack of duty owed to plaintiffs. However, JLNY has not proven, through documentary evidence, that no such duty exists. Consequently, the cross claims cannot be dismissed at this time.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant JLNY Group, LLC, to dismiss the complaint and cross claims as asserted against it is denied.

Dated: 1-8-16

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.