

**ORIGINAL**

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU  
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....  
NEW YORK 786, INC.,

Plaintiff,

Index No. 602448/2018  
Sequence # 001, 002,  
003, 004

- against -

Part 18  
8/30/18

OCEAN HARBOR CASUALTY INSURANCE c/o  
COMPLEX COVERAGE INC., SMART APPLE  
INSURANCE AGENCY, INC., and SIMON  
AGENCY NY, INC.,

Defendant.

.....	
Amended Notice of Motion (Seq. 001).....	1
Notice of Cross-Motion (Seq. 002).....	2
Notice of Cross-Motion (Seq. 003).....	3
Notice of Cross-Motion (Seq. 004).....	4

Upon the foregoing papers, the motion of the defendant, Simon Agency, NY, Inc. (Seq. #001), and the cross-motion of defendant Smart Apple Insurance Agency, Inc. (Seq. #002), each seeking an order dismissing the plaintiff's complaint, pursuant to CPLR § 3211; and the cross-motions of the plaintiff, New York 786, Inc., each seeking leave to amend the complaint pursuant to CPLR § 3025, as to defendant, Simon Agency, NY, Inc. (Seq. #003) and defendant Smart Apple Insurance Agency NY, Inc. (Seq. #004), are determined as set forth below.

This is an action in which plaintiff seeks damages against defendants for negligence and breach of fiduciary duty concerning the cancellation, on October 31, 2017, of a homeowner's insurance policy dated September 11, 2017 through September 11, 2018, concerning the premises located at 160-18 108<sup>th</sup> Avenue, Jamaica, New York 11433 (hereinafter "subject premises"), and involving a property damage claim due to a fire that occurred at the aforementioned premises on November 23, 2017. Plaintiff's complaint alleges that these defendants were negligent and breached a duty by failing to notify plaintiff of cancellation of the policy.

In support of its application, Simon submits, *inter alia*, copies of the plaintiff's summons and complaint, Simon's policy prohibiting direct contact with insureds, and plaintiff's dwelling insurance policy application dated September 8, 2017. Defendant, Simon Agency, NY, Inc. (hereinafter "Simon") contends that it could not have been negligent or owe any duty to plaintiff, because a wholesale insurance broker such as Simon does not have any contact with insureds, including the plaintiff. Simon asserts that its role as a whole sale insurance broker is limited to processing insurance applications forwarded by retail insurance brokers and binding coverage. This defendant also asserts that plaintiff failed to detail specific allegations against Simon.

Defendant, Smart Apple Insurance Agency, Inc. (hereinafter "Smart Apple") who submits, copies of the pleadings in support of its cross-motion for dismissal, contends that it had no continuing duty to advise, guide or direct plaintiff, and that defendant Ocean Harbor Casualty Insurance C/O Complex Coverage Inc.'s (hereinafter "Ocean Harbor") policy for the subject property was cancelled as a proximate cause of plaintiff's material misrepresentation on his application for insurance rather than any negligence on the part of Smart Apple. Smart Apple also contends that plaintiff's complaint makes no allegations setting forth the existence of any special relationship between plaintiff and Smart Apple.

Plaintiff opposes the motions of defendants Simon and Apple Smart and seeks leave to amend the complaint in the alternative. With regard to Simon's instant application plaintiff contends that the complaint alleges that each of the defendants Smart Apple and Simon failed to act with due care by not forwarding to defendant Ocean Harbor, plaintiff's new mailing information for plaintiff's mortgagor Indus Bank, and as such plaintiff was not informed of the cancellation of this policy.

Plaintiff opposes the motion of Smart Apple contending that there existed a special relationship between the parties based upon eight years of prior business between the parties, and that the complaint sufficiently alleges a valid cause of action for Smart Apple failing to apply prudent care in the ordinary course of its business by failing to inform Simon of plaintiff's change in its mailing address.

In reviewing a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; *Rochdale Vil. v. Zimmerman*, 2 A.D.3d 827, 769 N.Y.S.2d 386). "[T]he criterion is whether the proponent of the pleading has a cause of action, not

whether he [or she] has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). *Lupski v. County of Nassau*, 32 A.D.3d 997, 822 N.Y.S.2d 112 [2d Dept. 2006]. In addition, “[a] court is, of course, permitted to consider evidentiary material...in support of a motion to dismiss pursuant to CPLR 3211(a)(7)” and “the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’” See, *Nasca v. Sgro*, 130 A.D.3d 588, 13 N.Y.S.3d 188 [2d Dept. 2015], citing *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153.). “Indeed, a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it” *Id.* [citations omitted].

Applied herein, “[t]he common-law rule is that “an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain [specifically] requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so, [but] the agent owes no continuing duty to advise, guide or direct the customer insured to obtain additional coverage” (*Hjemdahl–Monsen v. Faulkner*, 204 A.D.2d 516, 517, 611 N.Y.S.2d 309 [internal quotation marks omitted]; see *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 985 N.Y.S.2d 448, 8 N.E.3d 823; *Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972). However “[w]here a special relationship develops between the broker and client, ... [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” (*Voss v. Netherlands Ins. Co.*, 22 N.Y.3d at 735, 985 N.Y.S.2d 448, 8 N.E.3d 823; see *Murphy v. Kuhn*, 90 N.Y.2d at 272–273, 660 N.Y.S.2d 371, 682 N.E.2d 972). The Court of Appeals has identified three “exceptional situations” which may give rise to such a special relationship: “ ‘(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on’ ” (*Voss v. Netherlands Ins. Co.*, 22 N.Y.3d at 735, 985 N.Y.S.2d 448, 8 N.E.3d 823, quoting *Murphy v. Kuhn*, 90 N.Y.2d at 272, 660 N.Y.S.2d 371, 682 N.E.2d 972).” *JT Queens Carwash, Inc., v. JDW Associates, Inc.*, 144 A.D.3d 75045 N.Y.S.3d 100 [2d Dept. 2016].

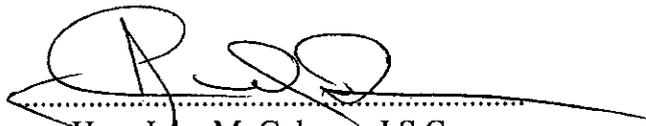
Upon this Court’s review of the parties’ submissions, the facts as alleged in plaintiff’s complaint are insufficient to establish the existence of a fiduciary relationship between Simon or Smart Apple and the plaintiff, or that these defendants owed a duty to plaintiff to advise its banking institution of a change of mailing address. Plaintiff’s complaint fails to allege any extended course of dealing between these defendants and plaintiff that would give rise to a special relationship between them.

In as much as plaintiff's cross-motions for leave to amend the complaint fail to include any proposed amended or supplemental pleading clearly showing changes or additions to be made to the pleading, in contravention of the requirements of CPLR § 3025, plaintiff fails to present what proposal(s) it seeks to amend in its pleading. *See, Haller v Lopane, 305 AD2d 370 [2nd Dept 2003]* (failure to attach proposed amended complaint deemed procedural defect warranting denial of motion).

Accordingly, the defendants' motion to dismiss for failure to state a cause of action (Seq. #001 and #002) are granted, and plaintiff's instant applications (Seq. #003, #004) seeking leave to amend the plaintiff's complaint are denied.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

October 31, 2018



Hon. John M. Galasso, J.S.C.

**ENTERED**  
NOV 02 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE