

0

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

DB INSURANCE CO., LTD (U.S. BRANCH),

Decision and Order

Interpleader-Plaintiff,

MOTION SEQUENCE:01,02
INDEX NO.:603147/2018

-against-

**HICKORY HOUSE TENANTS CORP., NATIONAL
BILLING AND FUNDING, LLC, PRESTIGE
REALTY GROUP INC., and CONSUMER
PROTECTION RESTORATION LLC,**

Interpleader-Defendants.

NATIONAL BILLING AND FUNDING LLC,

Third-Party Plaintiff,

-against-

STERN AGENCY INC. and ADAM STERN

Third-Party Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Opposition	2
Affirmation in Opposition	3

Reply Affirmation	4
Notice of Motion	5
Affirmation in Support	6
Affidavit in Support	7
Memorandum of Law in Support	8
Memorandum of Law in Opposition	9
Affirmation in Opposition	10
Reply Memorandum of Law	11

Stern Agency Inc. and Adam Stern move for an order pursuant to CPLR 3211(a)(7) dismissing the third-party complaint asserted against them (motion sequence number 1).

DB Insurance Co., Ltd moves, *inter alia*, for an order: "pursuant to CPLR 3211(a) dismissing all counterclaims" asserted against it; and pursuant to CPLR 1006(f) permitting it to pay into court the insurance proceeds pursuant to a policy it issued on behalf of Hickory House Tenants Corp. (motion sequence number 2).

Factual Background

DB Insurance Co., Ltd ("DB Insurance") issued to Hickory House Tenants Corp. ("Hickory House"), as named insured, a policy insuring commercial property at the Hickory House apartment complex located in Spring Valley, New York (the "Policy"). The policy period was from September 20, 2016 to September 20, 2017 (Complaint at ¶¶ 15-16). The Stern Agency was the insurance broker retained by Hickory House to obtain the requested coverage. As a mortgage lender for the property, Capital One, N.A. ("Capital One") as mortgagee, was named as the "loss payee" and as an "additional insured" on the mortgage endorsement. On January 8, 2018, Capital One assigned its rights, title and interest under the mortgage to Defendant National Billing and Funding, LLC ("National Funding").

On March 11, 2017, a fire occurred in one of the buildings (Building A) and indirectly caused damage to an adjacent building (Building B); both buildings are located within Hickory House. That same day, Hickory House retained Defendant Consumer Protection Restoration, LLC ("CPR") to perform mitigation work relating to the loss and Defendant Prestige Realty Group Ins. ("Prestige") to perform construction work relating to the loss.

As a result of the fire, Hickory House asserted claims against the policy (Complaint at ¶ 17). DB Insurance acknowledged its obligations to make payment of an undisputed amount of

\$3,442,453.16 against the applicable policy limits.¹

Main Action

In January 2018, DB Insurance became aware of a dispute between Hickory House, Prestige and National Funding concerning distribution of the insurance proceeds. In light of the disputed claims and the conflicting positions on the distribution of insurance proceeds, DB Insurance stopped payment on outstanding checks made payable to Hickory House, Prestige and Capital One because they were “not able to issue payment without risk of potential liability from the adverse claimant” (Complaint at ¶¶ 23 -28).²

DB Insurance commenced the instant interpleader action on March 8, 2018 naming Hickory House, its contractors (Prestige and CPR) and National Funding, as interpleader Defendants

Prestige, CPR and National Funding filed a joint answer with cross claims and counterclaims on April 9, 2018.

Hickory House filed its own answer with cross claims and counterclaims on April 24, 2018.

Third-Party Action

On April 11, 2018, National Funding filed a third-party complaint against insurance broker Stern Agency Inc. and its principal Adam Stern (collectively “Stern” or the “Stern Defendants”), alleging that the Policy was “negligently procured by the Stern Defendants.”

¹ The amount of \$3,442,453.16 includes the policy limits of \$3,150,000 for Building A, a \$10,000 policy limit for debris removal for Building A, and \$282,453.16 against the policy limits for Building B.

² At the time DB Insurance issued the checks, it was “operating under the belief that Hickory House had authorized direct payment to Prestige of all insurance proceeds and that Capital One was the then current mortgagee (Complaint at ¶ 24).

The Instant Motions

The Stern Defendants move for an order dismissing the third-party complaint asserted against them (motion sequence number 1).

DB Insurance moves for an order: (1) pursuant to CPLR 1006(f) permitting it to pay into the court the amount of \$3,442,453.16, or to retain such sum to the credit of this action, and discharging DB Insurance from all liability to any of the interpleader Defendants with respect to such insurance policy proceeds; (2) pursuant to CPLR 1006(f), awarding DB Insurance its costs, disbursements and attorney's fees incurred in connection with this action and directing that the same be distributed to DB Insurance from the insurance proceeds; (3) pursuant to CPLR 3211(a) dismissing National Funding and Hickory House's counterclaims asserted against DB Insurance.

The Court's Determination

Motion to Dismiss Third-Party Complaint Motion Sequence Number 1

According to National Funding's third-party complaint:

180. At all times relevant to this action, National Funding, as the successor-in-interest to Capital One (and thus, an additional insured on the DBIC Policy), had a special relationship with Stern Agency and Adam Stern; relied upon Stern Agency and Adam Stern's expertise and superior knowledge in, *inter alia*, identifying risks and procuring insurance; and relied upon Stern Agency and Adam Stern, specifically, to procure appropriate commercial property insurance for the Mortgaged Property.

181. Stern Agency and Adam Stern had a duty to Hickory House, and National Funding, as the successor-in-interest to Capital One (and thus, an additional insured on the DBIC Policy) to, *inter alia*, recommend and procure commercial property insurance that was adequate to the needs of the Mortgaged Property. . . .

* * *

183. However, Stern Agency and Adam Stern failed to exercise due care in procuring the DBIC Policy, and in doing so, neglected to, *inter alia*, perform any inspections of the Mortgaged Property, or to ascertain the correct materials with which the Mortgaged Property was constructed.

* * *

184. Likewise, Stern Agency and Adam Stern failed to exercise due care in procuring the DB Insurance Policy, and in doing so, procured a policy that, *inter alia*, erroneously insured the Mortgaged Property in amounts that are grossly inadequate to fully repair, rebuild, and restore the Mortgaged Property to its prior condition in the event that a significant casualty befell and/or destroyed the Mortgaged Property.

185. Furthermore, Stern Agency failed to exercise due care in procuring the DB Insurance Policy insofar as, *inter alia*, it reflected policy limits that did not correspond to the appropriate sections of the Mortgaged Property, and belied common sense with respect to the square footage of same.

186. In failing to, among other things, perform the proper inspections with respect to the Mortgaged Property, and procure an insurance policy that insured the Mortgaged Property for the correct building materials, for the correct sections, and for the sufficient policy limits, Stern Agency and Adam Stern handled the procurement of insurance for the Mortgaged Property in a negligent manner.

* * *

189. Additional funds are needed in order to fully rebuild 248 North Main Street a/k/a Section A, and in order to repair 260 North Main Street a/k/a Section B, and thus, the purported limits of the DBIC Policy, as alleged by DBIC and procured by Stern Agency and Adam Stern, are grossly inadequate. Specifically, DBIC has disclaimed coverage for any amount over \$3,150,000 for 248 North Main Street a/k/a Section A, and for any amount over \$4,725,000 for 260 North Main Street a/k/a Section B as exceeding the DBIC Policy limits.

190. As a result of Stern Agency's and Adam Stern's negligence . . . the Mortgaged Property has been unable to be fully repaired, rebuilt, and restored to its prior condition - i.e., before the March 11, 2017 fire occurred.

The Stern Defendants move for an order pursuant to CPLR 3211(a)(7) dismissing National Funding's third-party complaint asserted against them, arguing, as the bases for dismissal, that Stern owned no duty to National Funding and National Funding was not in privity with Stern; there was no special relationship between National Funding and Stern; and National Funding was not an intended third-party beneficiary of the Policy.

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; *see also Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691 [2d Dept 2010]). In determining such a motion, “the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail” (*RBE N. Funding, Inc. v Stone Mtn. Holdings, LLC*, 78 AD3d 807, 808 [internal quotations omitted]; *Leon v Martinez*, 84 NY2d 83 [1994]).

Duty and Privity

The law is well settled that an insurance agent has a common-law duty to obtain requested coverage for a client within a reasonable time or inform the client of the inability to do so (*Erwig v Edward F. Cook Agency, Inc.*, 173 AD2d 439 [2d Dept 1991]). An insurance broker who undertakes to procure insurance for another is chargeable with a duty of reasonable skill and ordinary diligence in procuring and effecting the insurance policy (*Stevens v. Hickey- Finn & Co.*, 261 AD2d 300, 301 [1st Dept 1999]; *Tucci v Hartford Cas. Ins. Co.*, 167 AD2d 387 [2d Dept 1990]; 68A NYJur 2d, Insurance §§ 455, 459). Where such insurance broker breaches this duty, it is rendered liable to its principal for any negligence on its part and for the resulting loss (*Martini v Lafayette Studios Corp.*, 273 AD2d 112,114 [1st Dept 2000]; *Gorgone v Regency Agency*, 238 AD2d 265 [1st Dept 1997]; *Tucci v Hartford Cas. Ins. Co.*, 167 AD2d at 388, *supra*).

Moreover, the duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract with the broker (*see Federal Ins. Co. v Spectrum Ins. Brokerage Servs.*, 304 AD2d 316, 317 [2d Dept 2003]; *American Ref-Fuel Co. v Resource Recycling*, 248 AD2d 420, 424 [2d Dept 1998] [broker owed no duty to additional insured under

policy to whom it owed no duty]; *Arredondo v City of New York*, 6 AD3d 328 [1st Dept 2004]).³

Special Relationship

Stern further argues that National Funding's alleged status as an additional insured (as Capital One's successor-in-interest) did not create a "special relationship between it and Stern pursuant to which Stern would owe National Funding a duty of care, nor does National Funding plead in its third-party complaint any of the three exceptions which would give rise to a special relationship between Stern and National Funding.

As noted earlier, insurance brokers "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; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012] [internal quotations and citations omitted]).

An insurance broker may nevertheless be found liable for failing to provide appropriate advice regarding insurance coverage where it is determined that a special relationship has been established with his or her client (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014]; *Murphy v Kuhn*, 90 NY2d 266, 272 [1997]). Whether such a special relationship exists is best determined on a case-by-case basis upon consideration of such factors as: 1) whether the broker received compensation for his or her consultation services distinct from the payment of

³ Stern further argues that merely because the Certificate of Insurance lists National Funding as an "additional insured" cannot be read as a "contract to insure and does not create privity of contract" (Affirmation in Support at ¶ 21) (*see St. George v Barney Corp.*, 270 AD2d 171 [1st Dept 2000] [internal citations omitted] ["The certificate of insurance . . . is not a contract to insure . . . nor is it conclusive proof, standing alone, that such a contract exists"]; *Buccini v 1568 Broadway Assocs.*, 250 AD2d 466, 469 [1st Dept 1998]; *BRT Realty Trust v AHI Agency*, 2009 WL 1905168 [Sup Ct New York County 2009] [certificate of insurance ordinarily found insufficient to give rise to privity necessary to form a duty on the party of a broker toward any part, other than its client]).

Notably, the Policy fails to identify Capital One (and thus National Funding as successor-in-interest) as an additional insured on the Policy between DB Insurance and Hickory House. Rather, National Funding bases its "additional insured" status on the Certificate of Insurance and Evidence of Insurance, both of which are annexed to its opposition papers. However, neither the Certificate of Insurance nor Evidence of Insurance reflect the relevant policy in issue, to wit, policy number NCP 1320152 03, with an effective policy period of 9/20/2016 to 9/20/2017. Instead, both the Certificate of Insurance and Evidence of Insurance refer to policy number NCP 1320152 00, with an effective policy period of 9/20/2015 to 9/20/2016.

premiums; 2) whether the broker and the client had a specific interaction with respect to the insurance coverage such that it was apparent that the client was relying on the advice of the broker; or 3) whether there existed a course of dealing over an extended period of time that would have put an objectively reasonable insurance broker on notice that his or her advice and/or expertise were being relied upon (*Murphy v Kuhn*, 90 NY2d 266 at 272, *supra*; *see also Voss v Netherlands Ins. Co.*, 22 NY3d at 735, *supra*). It is the burden of the insured to establish that a special relationship existed (*Murphy v Kuhn*, 90 NY2d at 272-273, *supra*).

Here, National Funding failed to plead, in anything other than conclusory fashion (see Complaint at ¶¶ 180-186), that it had a special relationship with Stern (*see Moutafis Motors, Ltd. v MRW Group, Inc.*, 144 AD3d 1000 [2d Dept 2016]). Furthermore, National Funding did not offer any evidence which would distinguish its relationship with Stern from the typical mortgagee-broker relationship (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158 [2006]; *Murphy v Kuhn*, 90 NY2d at 271, *supra*; *Duratech Indus., Inc. v Continental Ins. Co.*, 21 AD3d 342, 345 [2d Dept 2005]; *compare JT Queens Carwash, Inc. v JDW & Associates, Inc.*, 144 AD3d 750 [2d Dept 2016] [complaint sufficiently alleged that there was a course of dealing between the broker and the plaintiffs over an extended period of time which may have given rise to a special relationship between them]).

Based on the foregoing legal principles, the court concludes that Stern owed no duty to National Funding, and there was no special relationship between Stern and National Funding giving rise to a duty of care for which liability may arise (*see Arredondo v City of New York*, 6 AD3d 328, 329 [1st Dept 2004]).

Third-Party Beneficiary

Nor has National Funding alleged sufficient facts demonstrating that it was an intended beneficiary of the Policy such that it could maintain its claim for negligence against Stern. “Third persons who are covered under a liability insurance policy and are thus entitled to maintain an action on the policy must be ascertained from the intention of the parties to the policy, as determined from the four corners of the policy itself” (*Binasco v Break-Away Demolition Corp.*, 256 AD2d 291 [2d Dept 1998]).

In order for a third party to enforce a policy of insurance:

[I]t must be demonstrated that the parties intended to insure the interest of him who seeks to recover on the policy. As with other contracts, unless it is established that there is an intention to benefit the third party, the third party will be held to be a mere incidental beneficiary, with no enforceable rights under the contract. The intention to benefit the third party must appear from the four corners of the instrument. The

terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions.

The intention to cover the third party must be that of both parties to the insurance contract

But in order for a third party to maintain an action against an insurer, an intent to make the obligation inure to the benefit of such person must clearly appear in the contract of insurance, and if any doubt exists, the contract should be construed against such intent.

In order to be a third-party beneficiary entitled to recover on an insurance contract, it is not enough that it be intended by one of the parties to the contract and the third person that the latter should be a beneficiary. Both parties to the contract must so intend and must indicate that intention in the contract . . . (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27 [1st Dept 1979] [internal citations and quotations omitted]).

Noticeably absent from National Funding's third-party complaint is any allegation that Stern was aware at the time Hickory House contacted it about procuring coverage that Capital One (and thus National Funding as Capital One's successor-in-interest) was the intended beneficiary of the coverage. Nor did National Funding plead that Capital One participated on its own behalf, or discuss with Stern or Hickory House, about the coverage to be provided (*see Leavitt-Berner Tanning Corp. v American Home Assur. Co.*, 129 AD2d 199 [3d Dept 1987]; *compare Dominion Financial Corp. v Asset Indem. Brokerage Corp.*, 60 AD3d 461 [1st Dept 2009] [lender stated a claim for negligence where it alleged sufficient facts in complaint to demonstrate that it was "an intended beneficiary not only of the surety coverage procured by" the insurance broker, in which it was so named, but also of the insurance broker's agreement with its client to procure the surety coverage" where it was alleged that insurance broker "was aware, from the moment its client contacted it about procuring coverage," that the lender was the intended beneficiary of coverage" and the lender "participated on its own behalf in discussions with" the broker and its client about the coverage to be provided"]).

In the absence of any duty, special relationship, or third-party beneficiary status, National Funding's third-party complaint must be dismissed.

Interpleader Motion
Motion Sequence Number 2

DB Insurance moves for an order: 1) pursuant to CPLR 1006(f) permitting it to pay into the court the amount of \$3,442,453.16, or to retain such sum to the credit of this action, and discharging DB Insurance from all liability to any of the interpleader Defendants with respect to such insurance policy proceeds; 2) pursuant to CPLR 1006(f), awarding DB Insurance its costs, disbursements and attorneys' fees incurred in connection with this action and directing that same be distributed to DB Insurance from the insurance proceeds; and 3) pursuant to CPLR 3211(a) dismissing Hickory House and National Funding's counterclaims asserted against it.

The interpleader statute, CPLR 1006, provides, in pertinent part:

(a) Stakeholder; claimant; action of interpleader. A stakeholder is a person who is or may be exposed to multiple liability as the result of adverse claims. A claimant is a person who has made or may be expected to make such a claim. A stakeholder may commence an action of interpleader against two or more claimants.

On the facts presented, DB Insurance has established that it is a mere stakeholder with respect to the insurance proceeds at issue. Specifically, the instant action seeks the determination of competing and conflicting claims submitted to DB Insurance by the Defendants for the payment of insurance proceeds pursuant to the insurance policy DB Insurance issued to Hickory House.⁴ DB Insurance is unable to determine the validity of the conflicting demands and positions taken by the Defendants, each of whom have threatened litigation against DB Insurance directly if DB Insurance does not adhere to their respective demands as to the direction of payment of the insurance proceeds.⁵

⁴ National Funding and Prestige maintain that they are entitled to the entirety of the insurance proceeds and are concerned that if the insurance checks are sent directly to Hickory House, Hickory House will not release the proceeds. On the other hand, Hickory House contends that it is entitled to the entirety of proceeds and is concerned that if DB Insurance issues the checks to National, Prestige and CPR, that Hickory House will not receive any of the insurance proceeds to rebuild the damaged premises and, further, that issuance of the proceeds to Prestige and CPR "would constitute gross negligence, breach of contract and unjust enrichment" (Complaint at ¶¶ 44-50).

⁵ In opposition to interpleader, National Funding argues that it has "articulately set forth its entitlement" to the undisputed insurance proceeds based upon the mortgage documents and direct pay agreements with Prestige and CPR (where Hickory House "twice signed away any" claim or interest to the insurance proceeds) and that, in contrast, Hickory House "set forth absolutely no basis for its adverse claim" to the undisputed insurance proceeds. Rather, Hickory House's claim of the insurance proceeds is "patently without substance" and DB Insurance is "not truly exposed to multiple liabilities" (Memorandum of Law in Opposition at pp 23-24 [Motion Seq. No. 2]).

DB Insurance's commencement of this interpleader action "comports with the spirit and intendment of CPLR 1006 that an interpleader action by a stakeholder is to be encouraged in order to protect such a party from multiple adverse claims to the fund[s]" at issue (*Merrimack Mut. Fire Ins. Co. v Moore*, 91 AD2d 759, 761 [3d Dept 1982]). Therefore, DB Insurance is entitled to costs, disbursements and reasonable attorneys' fees for bringing and prosecuting this interpleader action.

Notwithstanding, National Funding argues that an order discharging DB Insurance from liability, (and dismissing National Funding's counterclaims asserted against DB Insurance) pursuant to CPLR 1006(f) is inappropriate because DB Insurance is independently liable to National Funding. According to National Funding, its "counterclaims are not just based upon the \$3,442,453.16 in 'undisputed insurance proceeds' that are the subject of the interpleader. Rather, [National Funding] and Hickory House both assert claims against [DB Insurance] for additional monies over and above these sums."

Pursuant to CPLR 1006(e) and (f):

(e) Issue of independent liability. Where the issue of an independent liability of the stakeholder to a claimant is raised by the pleadings or upon motion, the court may dismiss the claim of the appropriate claimant, order severance or separate trials, or require the issue to be tried in the action.

(f) Discharge of stakeholder. After the time for all parties to plead has expired, the stakeholder may move for an order discharging him from liability in whole or in part to any party. The stakeholder shall submit proof by affidavit or otherwise of the allegations in his pleading. The court may grant the motion and require payment into court, delivery to a person designated by the court or retention to the credit of the action, of the subject matter of the action to be disposed of in accordance with further order or the judgment The court shall impose such terms relating to payment of expenses, costs and disbursements as may be just and which may be charged against the subject matter of the action

While the court has discretion to award expenses, costs and disbursements "as may be just" to the stakeholder upon discharge (CPLR 1006[f]), it is nevertheless an improvident exercise of discretion to deny such an award where it is warranted (see *American International*

Life Assurance v Ansel, 273 AD2d 421,422 [2d Dept 2000] [Where the party seeking interpleader is a neutral stakeholder, with no interest in the disputed matter, and forced to participate in a dispute between two defendants, it is an “improvident exercise of discretion” and reversible error to deny the interpleading party's request for an award of costs, disbursements, and reasonable attorney's fees]; Republic National Bank v Lupo, 215 AD2d 467 [2d Dept 1995] [court's denial of the branch of the bank's motion which was for attorney's fees and costs was an improvident exercise of discretion where the bank, a neutral stakeholder with no interest in the disputed accounts, was forced to participate in a tortuous litigation between a father and his daughter]). Under the circumstances at bar, the court concludes that DB Insurance should be awarded statutory expenses, costs and disbursements (CPLR 1006[f]).

It is well settled that courts have consistently declined to discharge interpleading stakeholders where such parties are potentially independently liable to the interpleaded defendants (*Inovlotska v Greenpoint Bank*, 8 AD3d 623, 624–625 [2d Dept 2004]; *Birnbaum v Marine Midland Bank, N.A.*, 96 AD2d 776, 777 [1st Dept 1983]).

DB Insurance's purported “independent liability” is set forth in National Funding's counterclaims asserted against DB Insurance. As noted, DB Insurance seeks dismissal of the counterclaims.

In its first counterclaim, National Funding alleges that DB Insurance breached its contractual obligations under the Policy to make payment to National Funding, as the loss payee; that despite demand, DB Insurance has refused to pay to National Funding the \$3,442,453.16 in “undisputed insurance proceeds;” DB has denied payment of the proceeds to National Funding because “Hickory House has made a conflicting demand” for payment of the same insurance proceeds, “to which conflicting demand [DB Insurance] erroneously gives credence”; that National Funding, as mortgagee, additional insured, and loss payee under the Policy, is entitled to receive the insurance proceeds; and National Funding seeks a judgment directing DB Insurance to pay the undisputed insurance proceeds exclusively to National Funding, as well as costs and attorneys' fees in connection with the action.

National Funding's first counterclaim does not allege any independent liability on the part of DB Insurance nor does it open this interpleader action to matters beyond the scope of DB Insurance's coverage and liability under the Policy (*see Jackson National Life Insurance Co. Of New York v Vita*, 2014 WL 1333962 [Sup Ct Suffolk County 2014]; *Praetorian Ins. Co. v DMHZ Corp.*, 2011 WL 2011669 [Sup Ct New York County 2011]; *Transamerica Fin. Life Ins. Co. v Simmonds*, 21 Misc3d 1101[A] [Sup Ct Kings County 2008]). Rather, the counterclaim seeks nothing more than the Policy benefits that are the subject of the interpleader action (*see Bankers Life Insurance Co. Of New York v Somraj*, 2008 WL 412608 [Sup Ct Queens County 2008]). In this regard, the counterclaim stems from National Funding's contention that it is

entitled to the insurance proceeds, which are the facts and issues properly before the court and being litigated by the interpleader Defendants. The first counterclaim is “adverse to the purpose of the interpleader state, and should be dismissed as not properly interposed in this interpleader action” (*Id.*).

In the second counterclaim, National Funding seeks a declaratory judgment directing that DB Insurance pay \$5,241,999 in additional insurance proceeds jointly to National Funding, Prestige, and CPR for repair and renovation work performed by Prestige and CPR on the damaged premises. Specifically, Prestige allegedly performed \$3,694,746 in services to the damaged premises and CPR performed \$1,547,253 in services to the damaged premises; that those amounts are due under the Policy; Prestige and CPR filed mechanics’ liens against the premises; and that National Funding, as mortgagee, additional insured, and loss payee under the Policy, is entitled to recover the additional insurance proceeds in the amount of \$5,241,999 for the work that Prestige and CPR performed, as well as costs and attorneys’ fees in connection with the action.

In its third counterclaim, National Funding alleges that additional work is necessary to restore the premises, the cost of which is covered under the Policy “up to the policy limits”; DB Insurance owes additional insurance proceeds in the amount of the cost of the additional work; and that the court issue a judgment declaring that DB Insurance is responsible for paying additional insurance proceeds in the amount of the cost of additional work, as well as costs and attorneys’ fees in connection with the action.

Inasmuch as the Policy does not provide coverage beyond its stated limits (*see GuideOne Specialty Ins. Co. v Admiral Ins. Co.*, 57 AD3d 611 [2d Dept 2008]; *see also U.S. Fidelity and Guaranty Co. v Copfer*, 48 NY2d 871 [1979]), the second and third counterclaims, seeking in excess of the Policy limits, are dismissed (*see Hosp. for Joint Diseases v. Hertz Corp.*, 22 AD3d 724, 725 [2005], *quoting Presbyterian Hosp. in City of N.Y. v Liberty Mut. Ins. Co.*, 216 AD2d 448 [1995] [“where as here, an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease”])).

In the fourth counterclaim, National Funding alleges that DB Insurance breached its obligations under the mortgage documents by wrongfully denying payment to National Funding of the undisputed insurance proceeds and by failing to “settle and adjust the Claim without the consent of Hickory House, and to pay all insurance proceeds on said Claim solely to [National Funding].”

In the fifth counterclaim, National Funding alleges that as the mortgagee, additional insured and loss payee under the Policy, as well as a third-party beneficiary under the mortgage documents, DB Insurance is obligated to pay National Funding all of the insurance proceeds

issued by DB Insurance (including \$3,442,453 in undisputed insurance proceeds, \$5,241,999 in additional insurance proceeds for work already performed by Prestige and CPR, and additional insurance proceeds for the cost of additional work that is needed to complete the repair and rebuild of the premises); despite DB Insurance's obligations under the mortgage documents, DB Insurance has failed to investigate in good faith and pay the covered claim under the Policy, and has wrongfully delayed and improperly denied payment of all insurance proceeds to National Funding, all of which constitute DB Insurance's breach of the covenant of good faith and fair dealing to National Funding.

The fourth and fifth counterclaims, for breach of contract and breach of the implied covenant of good faith and fair dealing, respectively, must be dismissed inasmuch as National Funding is not a party to the Policy, and is neither in privity with a party to the Policy nor an intended beneficiary of the Policy (*see* discussion *supra*) (*see Taggart v State Farm Mut. Auto Ins. Co.*, 272 AD2d 222 [1st Dept 2000] [a party who is not the insured of an insurance company has no standing to sue for breach of an insurance policy]).

Dismissal of Hickory House's Counterclaims

DB Insurance also moves to dismiss Hickory House's five counterclaims asserted against DB Insurance in its answer.

In the first counterclaim, Hickory House seeks a "declaratory judgment declaring ALL proceeds necessary to reconstruct the premises of [Hickory House] belongs to [Hickory House] and should issue to it." Hickory House pleads that it is entitled to the insurance funds in order to fulfill the purpose of insurance policy, which is to rebuild the destroyed and damaged structures.

The first counterclaim is dismissed inasmuch as, under the circumstances here, an insured cannot recover more than the policy limits (*see* discussion *supra*).

In the second counterclaim, sounding in breach of contract, Hickory House alleges that DB Insurance has failed and refused to provide coverage to Hickory House; Hickory House "has been unable to complete reconstruction of the premises"; and, as a result, Hickory House "has been damaged in the sum equal to the total policy limits."

The third counterclaim, also sounding in breach of contract, alleges that DB Insurance "did wrongly issue checks payable to co-defendants CPR and Prestige" and did so without authorization from Hickory House; that DB Insurance has failed to provide any insurance proceeds to Hickory House; and that the checks should have been issued to Hickory House notwithstanding any claims by the co-defendants; such actions constituted a breach of its Policy

with DB Insurance; and, as a result, Hickory House “has been damaged in the sum of \$3,442,453.16”.

The second and third counterclaims are dismissed inasmuch as they do not allege independent liability on the part of DB Insurance but allege a claim to the undisputed insurance proceeds, which is the subject of the interpleader action (*see discussion supra*).

In the fourth counterclaim, Hickory House alleges that DB Insurance violated its duty of good faith and fair dealing by: failing to pay Hickory House the undisputed insurance proceeds of \$3,442,453.16; and by failing to pay additional proceeds which are due in order to reconstruct the premises.

A cause of action based on a breach of the implied covenant of good faith cannot be sustained where, as here, the counterclaimant (Hickory House) failed to plead that DB Insurance “injured [Hickory House’s] right to receive the benefits of [the] agreement” (*Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2d Dept 2010] quoting *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 22 [2005]).

In its fifth counterclaim, Hickory House alleges that the sum acknowledged to be due by DB Insurance is less than the amount due Hickory House; that “said sum acknowledged to constitute the total proceeds available is inaccurate and a result of error and negligence in the issuance of the policy of insurance,” that based upon criteria for limits of coverage, Hickory House is entitled to more coverage and proceeds; and that the “calculation as to limits was in error.”

However, Hickory House had knowledge of the terms and limits of the Policy for at least a year prior to the fire (*see Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Wausau Underwriters Ins. Co. v St. Barnabas Hosp.*, 145 AD2d 314 [1st Dept 1988]; *Rogers v Urbanke*, 194 AD2d 1024 [3d Dept 1993]) and that coverage was similar to the coverage afforded under the prior policy (as evidenced by the Certificate of Insurance and Evidence of Insurance which refer to policy number NCP 1320152 00, with an effective policy period of 9/20/2015 to 9/20/2016). In this regard, and as mentioned earlier, DB Insurance had no duty to “advise, guide [or] direct” Hickory House to obtain coverage other than that requested (*Harnish v Naples & Assocs.*, 181 AD2d 1012, 1013 [4th Dept 1992]; *Erwig v Cook Agency*, 173 AD2d 439 [2d Dept 1991]; *Blonsky v Allstate Ins. Co.*, 128 Misc2d 981, 491 [Sup Ct New York County 1985]) (*see discussion supra*).

The fifth counterclaim is, therefore, dismissed.

Conclusion

The court concludes that DB Insurance is a neutral stakeholder with no interest in the insurance proceeds of the Policy and the interpleaded Defendants have failed to raise an issue of independent liability on the part of DB Insurance.

Accordingly, it is hereby

Ordered that the motion of DB Insurance is granted to the extent that DB Insurance shall be entitled to an order directing it, pursuant to CPLR 1006(f), to retain \$3,442,453.16 to the credit of the action; and it is further

Ordered that pursuant to CPLR 1006(f), DB Insurance is discharged of liability and the counterclaims asserted by National Funding and Hickory House are dismissed; and it is further

Ordered that pursuant to CPLR 1006(f), DB Insurance is granted its expenses, costs, disbursements and attorneys' fees which may be charged against the subject matter of the action; and a hearing shall be held on a date fixed by the court to determine the reasonable amounts to be awarded DB Insurance for these items; and it is further

Ordered that the attorneys for the parties shall participate in a telephone conference on Tuesday, October 16, 2018, at 2:30 P.M.

This constitutes the decision and order of the court.

Dated: September 27, 2018



Hon. Vito M. DeStefano, J.S.C.

ENTERED
OCT 02 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE