New York Supreme Court Decisions Impart Lessons for Insurance Agents and Brokers

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A November 2023 decision from the Supreme Court, Appellate Division of New York, affirmed an order dismissing a complaint against an insurance company and an independent agent. In *Ewart v. Allstate Insurance Company*, 221 A.D.3d 968, (App. Div. 2d Dep't 2023), the court affirmed an order granting the motion of the defendants, Allstate Insurance Company and Larry Darcey, for summary judgment dismissing the complaint.

In *Ewart*, the plaintiff had contacted Larry Darcey, an independent agent for Allstate, to purchase a landlord insurance policy. Darcey provided quotes to the plaintiff for various policies and then left for vacation without binding the coverage. The plaintiff did not select a policy and made no payment. Shortly thereafter, before Darcey returned from vacation, a fire damaged the property, and the plaintiff submitted a claim to Allstate, which disclaimed coverage based on there being no policy in force on the date of loss.

The court considered that, generally, insurance agents "have no continuing duty to advise, guide, or direct a client to obtain additional coverage." *MAAD Constr., Inc. v. Cavallino Risk Mgt., Inc.*, 178 A.D.3d 818 (App. Div. 2d Dep't 2019). However, a broker may be held liable under breach of contract or negligence upon a showing by the insured that the agent failed to discharge duties imposed by an agreement to obtain insurance either by breach of the agreement or by failing to exercise due care in the transaction. *Da Silva v. Champ Constr. Corp.*, 186 A.D.3d 452, (App. Div. 2d Dep't 2020); *see Bedessee Imports, Inc. v. Cook, Hall & Hyde, Inc.*, 45 A.D.3d 792, 793–794 (App. Div. 2d Dep't 2007). The defendants here argued that there was no agreement in place as they did not discuss the amount of coverage or the cost of a landlord insurance policy.

The court then recognized that, "[A]n insurance agent or broker has a 'common-law duty to obtain requested coverage for a client within a reasonable amount of time, or to inform the client of the inability to do so.'" *Verbert v. Garcia*, 63 A.D.3d 1149 (App. Div. 2d Dep't 2009); *see Broecker v. Conklin Prop.*, LLC, 189 A.D.3d 751, 752 (App. Div. 2d Dep't 2020).

Here, Darcey established that he had communicated multiple quotes to the plaintiff and the plaintiff had failed to respond. His failure in responding or following up demonstrated a lack of initiative or personal indifference, which then resulted in the failure to obtain coverage. *Murphy v. Kuhn*, 90 N.Y.2d 266, 271 (1997).

This case demonstrates that while insurance agents and brokers in New York have a duty to obtain coverage for a client within a reasonable amount of time, and should

exercise due care in transactions involving the client, inaction or indifference on the part of the client does not implicate the duty of the agent or broker in obtaining insurance coverage.

Wesco Ins. Co. v. LuLove, LLC

In another recent decision, the New York Supreme Court considered a motion to dismiss an insured's third-party complaint against its insurance broker. In *Wesco Ins. Co. v. LuLove, LLC*, 2023 WL 6812179 (2023), the plaintiff insurer brought an action to obtain a declaratory judgment that a commercial policy that was issued to the defendant, LuLove, LLC, limited its coverage for a fire loss on a property based on square footage. LuLove answered the complaint and commenced a third-party complaint against its insurance broker, P&G Brokerage, Inc., which had submitted the application and procured the policy on behalf of the insured.

LuLove argued that its damaged property was larger than the square footage in the coverage that P&G procured and, therefore, was inadequate. LuLove argued that P&G provided the incorrect property description in order to obtain the policy and, if incorrect information was provided, that P&G should have corrected the information or made changes to the application prior to it being submitted. LuLove asserted causes of action for negligence, breach of contract, and negligence and special relationship, and sought damages in excess of $1 million.

In response, the broker argued that it reported the premises' square footage to the insurer accurately, as to the information that was provided and approved by LuLove.

The court then held that an insured is not precluded from bringing an action against its broker and that there is well established law that, in executing an insurance broker transaction, an agent or broker must exercise due care to obtain the requested coverage. *Wesco* citing *Cosmos, Queens Ltd. v. Matthias Saechang IM Agency*, 74 A.D.3d 682, 683 (1st Dep't. 2010). A party is entitled to recover damages from the broker if the policy obtained does not cover a loss for which the broker contracted to provide and the insurance company refuses to cover the loss. *Bruckmann, Rosser, Sherrill & Co. v. Marsh USA Inc.*, 65 A.D.3d 865, 866 (1st Dep't. 2009).

The court then stated that an insurance agent or broker can be held liable in negligence for the failure to exercise due care in a transaction, and in order to plead a case for negligence or breach of contract, a plaintiff must establish that a specific request was made that was not provided for in the policy. *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 15 (2006). Here, LuLove did not allege that it made a specific request, and a general request for coverage does not satisfy the requirement. Therefore, the court dismissed the negligence and breach of contract claims.

The court then turned to the third cause of action and negligence arising from a "special relationship." "[A] special relationship may develop between an insurance broker and his client that may impose on the broker additional duties beyond those imposed by common law, and that one situation that may give rise to such a special relationship is where there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent. *See*, *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 734-35 (2014), citing *Murphy v. Kuhn*, 90 N.Y.2d 266, 272-73 (1997). The court held that the complaint failed to allege a special

relationship and, therefore, dismissed the case of action.

Finally, the court reviewed the complaint regarding the insured's failure to find the purported errors in the insurance applications or policy. In doing so, the court held that once an insurance policy has been received, it constitutes presumptive knowledge of its terms and limits. *Greater N.Y. Mu. Ins. Co. v. United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 (1st Dep't. 2007). The court considered that New York courts have held that, while it is the better practice for the insured to read its policy, the failure to do so does not bar an action against a broker. *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 736-737 (2012; *see West 70th Owners Corp. v. Hiram Cohen & Son, Inc.*, 166 A.D.3d 507 (1st Dep't. 2018)).

The Wesco Ins. Co. case again establishes and sets forth the duty of an insurance agent and broker to exercise care in its transactions with a client in obtaining coverage. The case further demonstrates that insurance agents and brokers are exposed to liability in situations in which the client relies on their expertise. Finally, the case reiterated that in New York, an insured's failure to read its policy does not prevent the insured from bringing an action against its broker. ☐

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