

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

ROLLINS ENTERPRISES, INC. d/b/a LEFT
RIGHT LEFT,

Plaintiff(s),

MOTION DATE: 10/07/08

INDEX NO.: 14446/07

-against-

SEQ. NO. 1 & 2

THE PROVIDENCE MUTUAL FIRE INSURANCE COMPANY,
CRAWFORD & COMPANY, DAC INSURANCE AGENCY, INC.,
MYLES MACCHIO and SUSAN MACCHIO,

Defendant(s)

The defendants The Providence Mutual Fire Insurance Company, Crawford & Company and DAC Insurance Agency's respective motions, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiff's complaint as against them are determined as hereinafter provided.

The plaintiff is (or was) a sports memorabilia and collectibles shop located at 74 Covert Avenue in Stewart Manor. The store occupies the ground floor of premises leased from the defendants Myles Macchio and Susan Macchio. In or about February, 2005 the plaintiff obtained a Commercial Fire and General Liability Policy which its broker, the defendant DAC Insurance Agency, procured from the defendant The Providence Mutual Fire Insurance Company (see DAC's Exhibit J). On or about February 16, 2006 a renewal policy was issued (see DAC's Exhibit K) for which the plaintiff paid an annual \$1,927.00 premium.

During the pendency of the renewal policy, on July 22, 2006 a portion of the plaintiff's inventory sustained damage from "water entering the leased premises from a broken skylight on the roof" (see September 5, 2008 affidavit of the plaintiff's president, John A. Rollins, para.6). The plaintiff subsequently submitted a claim for \$17,000.00 in damages which Providence disclaimed on August 21,

2006.

More specifically, its third-party administrator, the defendant Crawford & Company, notified the plaintiff that damage due to "rain water seeping through a skylight on the roof was not covered by the policy" (see DAC's Exhibit G). Endorsement CP1020 "Cause Of Loss-Broad Form" explicitly declares, inter alia, that coverage for "[l]oss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not" is excluded "unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dust enters" (see DAC's Exhibit J).

On August 16, 2007 the plaintiff filed this breach of contract action against Providence Mutual. Separate causes of action for negligence are also pleaded as against the defendants Myles Macchio and Susan Macchio and DAC Insurance. No identifiable claim is interposed as against Crawford & Company. Following joinder of issue by each defendant, Providence, Crawford & Company and DAC Insurance have moved for summary judgment dismissing the case as against them.

DAC's president, Donald A. Cacchioli, avers, in sum, that both the original and the renewal policy simply do not cover the plaintiff's claim (see DAC's Exhibit L).

"As a general rule, insurance agents and brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time, or to inform the clients of their inability to do so. A broker may be held liable for neglect in failing to procure the requested insurance. An insured must show that the broker failed to discharge the duties imposed by the agreement to obtain insurance either by proof that the broker breached the agreement or that it failed to exercise due care in the transaction" (Reilly v Progressive Insurance Co., 288 AD2d 365). Moreover, "[a]bsent a specific request for coverage not already in a client's policy, or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide or direct a client to obtain additional coverage" (JKT Construction, Inc. v United States Liability Ins. Group, 39 AD3d 594; see Loevner v Sullivan & Strauss

Agency, 35 AD3d 392; Busker On the Roof Ltd. Partnership Co. V.M.E. Warrington, 283 AD2d 376).

Here, Mr. Cacchioli's affidavit coupled with the plaintiff's applications for coverage (see DAC's Exhibit L) and the remaining documentary evidence is sufficient to demonstrate DAC's prima facie entitlement to summary judgment because it procured the specific insurance the plaintiff requested (see Loevner supra at 394; JKT Construction supra at 594-595). Mr. Rollins September 5, 2008 affidavit in opposition asserts, to the contrary, that despite its \$1,927.00 annual premium, the plaintiff "contacted DAC Insurance Agency, Inc. to obtain insurance from all perils with respect to its merchandise (and equipment), with [a] specific understanding that the merchandise would be insured against all losses occasioned by fire, water, theft and other damages" (emphasis added).

However, "[plaintiff] received the subject policy months before the accident at issue, and is conclusively presumed to have known, understood and asserted to its terms" (see Busker supra at 377). Indeed, even assuming, arguendo, that Mr. Rollins neglected to read the initial policy, the identical endorsement is contained in the renewal policy. Therefore, the plaintiff "has no action against its insurance broker for having procured such coverage, even though the coverage was [allegedly] not entirely in accord with what plaintiff had requested" (id; cf. Trizzano v Allstate Ins. Co., 7 AD3d 783; Reilly v Progressive Ins. Co., 288 AD2d 365).

Providence Mutual likewise relies upon the aforementioned policy provision in support of its contention that the plaintiff's claim is not covered. Mr. Rollin's September 29, 2008 conclusory assertion that coverage is provided under alternative provisions of the policy because the leak was purportedly either "the direct result of the breaking apart or cracking of any part of a system or appliance containing water or steam" e.g., the rupture of a water or steam pipe associated with the heating or plumbing system, or "caused by collapse of a building or any part thereof" due to the "[w]eight of rain that collects on a roof" is, however, inadequate to create a triable issue of fact. His more recent characterizations of the cause of the leak appear to conflict with his earlier (i.e., September 5, 2008) description of the accident and, in any event, are belied by Providence's contemporaneous photographs of, inter alia, the roof (see Exhibit A to Providence's

reply). As previously noted, despite its inclusion in the caption, no cause of action is asserted against Crawford & Company.

Accordingly, the defendants Providence Mutual Fire Insurance Company, Crawford & Company and DAC Insurance Agency's respective motions, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them are granted.

Dated: 12-1-08



J.J.S.C.

ENTERED

DEC 03 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**