ORDER
SUPREME COURT OF THE STATE OF NEW YORK
Present: HON. TAMMY S. ROBBINS, Acting Justice

TRIAL/IAS, PART 47

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J.J.A.J. RESTAURANT CORP.,

Plaintiff,

- against -

Index No.4139/04
Motion Seq. 002, 003
Motion submission: 1/05/06

QBE INSURANCE CORPORATION and
LIBARDI SERVICE AGENCY, INC.,

Defendants,

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Defendant, Libardi Service Agency, Inc. (LSA) has moved this court, pursuant to Civil Practice Law and Rules (CPLR) § 3212, for an order granting summary judgment and dismissing all claims against it. Defendant QBE Insurance Corporation (QBE) has cross-moved pursuant to Civil Practice Law and Rules (CPLR) § 3212, for an order granting summary judgment and dismissing all claims against it. Plaintiff has filed opposition papers to defendant LSA's motion and Defendant QBE's motion. LSA filed a reply in partial opposition to defendant QBE's cross- motion to the extent that such motion seeks relief against LSA. In opposition to LSA's reply, QBE filed a sur-reply.

On October 3, 2005, the parties entered into a stipulation setting forth the motion schedule for this action. The stipulation does not provide for sur-reply papers. Additionally,

QBE never requested permission of this court to file a sur-reply. In deciding this motion the court will not consider the sur-reply papers submitted by QBE.

James Day is the president and sole shareholder of the corporation, J.J.A.J. Restaurant Corp. (JJAJ) which owns Villa Maria Restaurant (Villa Maria). In or around 2001, JJAJ obtained insurance through an insurance broker, LSA. LSA obtained a commercial policy for JJAJ through Utica First Insurance Company (Utica) from December 18, 2001 through December 18, 2002. Utica informed LSA of recommendations which were needed to improve the risk for insurance purposes (*see* LSA's motion papers, pg. 4, *see* JJAJ's opposition papers, pg. 5). Utica's policy was renewed for the period of December 18, 2002 to December 18, 2003. On April 13, 2003, Utica's coverage was cancelled due to non-payment of premiums (*see* LSA's motion papers, pg. 5, *see* JJAJ's opposition papers, pg. 5). LSA then obtained coverage for plaintiff from QBE for the period of May 30, 2003 to May 30, 2004 (*Id.*). The producer of the policy was Specialty Insurance Agency (Specialty), the third-party administrator for QBE (*Id.*). On July 16, 2003, Specialty sent plaintiff a letter which was copied to LSA, informing plaintiff of three recommendations (*see* LSA's motion papers, pg. 5). Specialty informed plaintiff that it would notify QBE of the recommendations (*Id.* at pg. 6). The letter stated that if Specialty did not hear from plaintiff or its agent within thirty days, it would inform QBE of non-compliance and a letter of cancellation may be issued at that time (*Id.*). QBE claims that it sent a Notice of Cancellation to plaintiff dated July 24, 2003 advising plaintiff that the policy would be cancelled on August 25, 2003 *based on the discovery of a violation of a policy condition which occurred subsequent to inception of the current policy period* (*Id.*, Exhibit P (*emphasis added*)). QBE claims that it mailed the Notice of Cancellation on July 24, 2003. On January 21, 2004, Villa

Maria was destroyed by a fire which was found to be the result of a malfunctioning heater in the premises (*see* plaintiff's motion, pg. 4).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v. New York University Medical Center*, 64 NY2d 851 *citing Zuckerman v. City of New York*, 49 NY2d 557.) Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*). Once a defendant establishes a prima facie showing entitling him to judgment as a matter of law, "the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact" *(Johnson v. Queens-Long Island Medical Group*, 2005 WL 3118028).

LSA claims that the Notice of Cancellation was not valid since the indicated reason for cancellation was not applicable (or, in the alternative that the pertinent subparagraph in the Notice of Cancellation was not referenced (*see* New York Insurance Law (NY Ins. Law) §3426(h)). A representative of QBE, Ms. Conrad, testified that she determined the basis for cancellation (*see* LSA's Memorandum of Law in Support of its Motion for Summary Judgment (LSA's Memo.), pg. 15). The indicated reason for cancellation was that the acts/violations which increased the hazard insured against occurred subsequent to inception of the current policy period (*Id.* at pgs. 14-15, *see also* NY Ins. Law § 3426 (c)(1)(D)). Ms. Conrad stated at her deposition that she did not know when the acts/violations which increased the hazard insured against occurred (*see* LSA's Memo. pg. 15). LSA maintains that because Ms. Conrad could not state when the hazardous condition arose, there is no question of fact. (*Id*). On a motion for summary judgment, this court is required to look at the facts in the light most favorable to the non-moving

party who must be afforded the benefit of every reasonable inference (*see Negri v. Stop and Shop, Inc.*, 65 NY2d 625 (1985). With that view, this court finds that a jury could find, irregardless of Ms. Conrad's recollection of the events, that the acts/violations occurred after the current policy period commenced. Therefore, this court finds that there is a question of fact as to the validity of the Notice of Cancellation.

LSA further contends that even if this court finds the notice of cancellation was valid, there was insufficient proof that it was mailed to the insured. QBE submitted a Notice of Cancellation, dated July 24, 2003 with proof of mailing dated the same day, from Specialty to Villa Maria (QBE's Motion for Summary Judgment (QBE's motion), Exhibit B, C). Joyce Pannetta of LSA testified that she received the Notice of Cancellation (QBE's motion, Exhibit N). However, she was vague and ambiguous as to whether or not plaintiff was informed of the cancellation by her office (*see* plaintiff's motion, pg. 6, QBE's motion, Exhibit N, O). Plaintiff denies receiving the Notice of Cancellation (*see* plaintiff's motion, pg. 6). This court finds that an issue of fact exists as to whether the Notice of Cancellation was mailed by QBE to both the plaintiff and Libardi. Conclusory, vague and ambiguous statements are insufficient to warrant the drastic remedy of summary judgment on this issue (*see Roscoe Macon v Arnlie Realty Co. et al.*, 207 AD2d 268). This court need not decide LSA's remaining claims (that its acts or omissions were not the proximate cause of plaintiff's loss and QBE is not entitled to indemnification or contribution from LSA) as there has been no factual determination regarding the validity of the policy.

QBE moves for summary judgment on all of plaintiff's causes of action and on QBE's cross-claim against LSA. Based upon this court's review of the record before it, as outlined

above, there exists a dispute as to the facts regarding plaintiff's causes of action for negligence and breach of contract and as to the facts regarding QBE's cross-claim against LSA.

QBE has also moved for dismissal of plaintiff's causes of action for fraud and attorney fees. On November 9, 2004, Judge Dunne issued an order dismissing plaintiff's cause of action for fraud and his cause of action for attorney fees as to defendant LSA. QBE asserts, as did LSA, that plaintiff's cause of action for fraud lacks specificity. Plaintiff has not set forth any facts opposing this branch of QBE's motion. In plaintiff's complaint, he alleges that defendants acted together to defraud him and entice him to pay insurance coverage which defendants did not intend to provide. As Justice Dunne stated in his prior decision, "[a]n alleged intention not to perform the terms of a contract alone is insufficient to sufficiently allege fraud" (*citing N.Y. University v. Continental Ins. Co.*, 87 NY2d 308; *Rocanova v. Equitable Life Assurance Society of U.S.*, 83 NY2d 603). This court agrees that plaintiff's allegations regarding his cause of action for fraud lack the necessary specificity and find that said allegations are duplicative of his breach of contract and negligence claims (*citing Appian States v. Mastroddi*, 24 AD2d 366). Therefore, plaintiff's third cause of action alleging fraud is dismissed as against QBE.

As to plaintiff's cause of action for attorney's fees as against QBE, plaintiff had previously conceded that there is no provision or agreement either written or oral providing for attorney's fees (*see* Order of Justice Dunne, 11/09/04). Ordinary damages arising from the breach of a contact will be limited to the contract damages necessary to redress the private wrong (*Id., citing Rocanova supra*). Plaintiff's cause of action for attorney fees as against QBE is hereby dismissed.

Based upon the foregoing, LSA's motion for summary judgment is hereby denied in its entirety; QBE's cross-motion for summary judgment as to plaintiff's negligence and breach of contract claims is hereby denied; QBE's cross-motion for dismissal of plaintiff's fraud and attorney's fees cause of action is hereby granted; QBE's cross-motion for summary judgment as to its cross-claim against LSA is hereby denied.

It is So Ordered

Tammy S. Robbins

Honorable Tammy S. Robbins

Dated: January 30, 2006