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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 3

-----X
THE ALICART GROUP, LLC, ALICART, INC.,
CARMINE'S BROADWAY FEAST, INC., and TIMES
SQUARE BARBECUE, INC., d/b/a Virgil's BBQ

Plaintiff

- against -

Ind. No.
656134/16

ARC EXCESS & SURPLUS, L.L.C., ARCHER A.
ASSOCIATES, INC., ROBERT LANCIOTTI and
ASSURED SKCG, INC.,

Defendant

-----X
60 Centre Street
New York, New York
May 24, 2017

B E F O R E :
HONORABLE EILEEN BRANSTEN
Justice

A P P E A R A N C E S :

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Kathy Y. Jones
Official Court Reporter

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THE COURT: Set up on the Alicart Group, LLCs. I have The Alicart Group, LLC, Incorporated, Carmine's Broadway Feast, Inc., and Time Square Barbecue, Incorporated, doing business as Virgil's Barbeque. All plaintiffs. And from the Jaroslawicz & Jaros LLC firm Michelle Holman.

MS. HOLMAN: That's correct, your Honor.
Good morning.

THE COURT: For ARC Excess & Surplus LLC, Archer A. Associates, Inc., Robert Lanciotti and Assured SKCG., Inc., I have from the Mound Cotton Wollan & Greengrass LLP, I have Kenneth Labbate.

MR. LABBATE: Yes, your Honor. Good morning, your Honor.

THE COURT: Did I pronounce your name, right?

MR. LABBATE: Mr. Labbate. Thank you.

THE COURT: All right. For Archer A. Associates, Incorporated, I have the Rivkin Radler LLP firm, David Wilck.

MR. WILCK: Yes, your Honor. We also represent Robert Lanciotti.

THE COURT: You have to stand when you talk to the Court.

MR. WILCK: It's Robert Associate, Inc., Robert Lanciotti and Assured SKCG, Inc.

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THE COURT: All right. So, from Rivkin Radler I have David Wilck. Okay.

So, it's defendant's ARC's motion to dismiss the complaint and also the ARC defendants filed an affirmation of possible opposition. We'll get to that at the end of the decision. All right.

So, let me go to the decision on this motion to dismiss and we start with the background.

This is an insurance action arising out of the denial of coverage for certain potential employee claims. Plaintiffs, the Alicart Group LLC, Alicart, Incorporated, Carmine's Broadway Feast, Incorporated and Times Square Barbeque, Incorporated, are owners and managers of several well known restaurants.

Plaintiff alleges that from 2015 to 2016 plaintiffs purchased various insurance policies through defendants and specifically requested that the policies include employment practices liability insurance coverage. Complaint at paragraphs 19 and 22.

Defendants allegedly purchased an insurance policy from the Maxum Indemnity Company, otherwise known as Maxum. Complaint at paragraph 23.

Between 2015 and 2016, plaintiffs were sued by three employees alleging, one, racial and other discrimination claims; two, sexual harassment, hostile

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2 work environment and retaliation claims; and three,
3 Federal Medical Leave Act Claims. Complaint at paragraphs
4 24, 26 and 27.

5 Subsequently, Maxum represented that plaintiff's
6 policies did not cover the alleged claims -- claims
7 alleged against the plaintiffs. Complaint at paragraph 25
8 and 28.

9 Plaintiffs commenced this action by summons and
10 complaint and alleging a single cause of action for
11 professional malpractice.

12 Defendants Archer A. Associates, Incorporated,
13 Robert Lanciotti and Assured SKCG, Incorporated, the
14 Archer defendants submitted a verified answer and
15 crossclaims against ARC Excess and Surplus LLC otherwise
16 known as ARC.

17 Motion sequence number one. Defendant's ARC
18 Excess and Surplus LLC's motion to dismiss the complaint.

19 So, defendant ARC now moves to dismiss a
20 complaint pursuant to 3211(a)(7). ARC maintains that it
21 never had a relationship nor any dealings with any of the
22 plaintiffs and functioned solely as a "wholesale" broker
23 in this transaction. Assisting Archer A. Associates,
24 Incorporated the "retail" broker in the procurement of
25 insurance policies for its clients.

26 Legal standing. On a motion to dismiss pursuant

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2 to CPLR 3211, the motion must be denied if "from the
3 pleadings' four corners factual allegations are discerned
4 which taken together manifest any cause of action
5 cognizable at law". 511 West 232nd Owners Corp versus
6 Jennifer Realty Company, 98 New York 2d page 152, 2002
7 case.

8 Thus the complaint will be liberally construed
9 and plaintiffs afforded the benefit of every possible
10 favorable inference. Again, the same citation.

11 ARC argues plaintiff failed to state a cause of
12 action for negligence because they failed to allege ARC
13 owed a duty to the plaintiffs.

14 To state a cause of action for negligence,
15 plaintiffs must allege facts sufficient to establish, one,
16 the defendant owed the plaintiff a cognizable duty of
17 care; two, the defendant breached that duty of care;
18 three, the plaintiff suffered damage as a proximate result
19 of that breach. Citing to Atkins versus Glen Falls City
20 School District, 53 New York 2d 325 at page 333, 1981
21 case.

22 An insurance broker has no duty to a plaintiff
23 that may serve as a predicate for liability unless the
24 broker has a contractual relationship or was otherwise in
25 privity with the plaintiff. See Glynn versus United House
26 of Prayer 292 AD 2d 319 at page 323, First Department,

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2 2002 case. A party may sustain "a relationship
3 approaching privity" by demonstrating, one, an awareness
4 by the maker of the statement that it is to be used for a
5 particular purpose; two, reliance by a known party on the
6 statement in the furtherance of that purpose; and three,
7 some conduct by the maker of the statement linking it to
8 the relying party and evincing its understanding of that
9 reliance. Citing Point O'Woods Associates versus Those
10 Underwriters at Lloyd's, London, 288, AD 2d 78 at page 81,
11 First Department 2001 case.

12 Here, plaintiff fails to allege any contract
13 between plaintiffs and ARC, any representations by ARC to
14 plaintiffs or any acts that might otherwise link ARC to
15 the plaintiffs.

16 In fact, ARC is not referenced specifically by
17 name even one time in the complaint.

18 In the opposition to the motion, plaintiffs
19 failed to establish the cause of action for professional
20 negligence was adequately pled against ARC and instead
21 rest on the liberal pleading standard of CPLR 3211(a).
22 Plaintiffs failed to allege that the relationship with ARC
23 approached privity and thus failed to allege ARC owed a
24 duty to the plaintiffs. See Levi versus Utica First
25 Insurance Company 12 AD 3d 256 at page 257, First
26 Department, 2004 case.

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Therefore, ARC's motion to dismiss is granted.

However, the Archer defendants filed an affirmation in partial opposition to ARC's motion to dismiss and argued that crossclaim against ARC must survive the motion to dismiss the complaint.

The Archer defendants argued in their crossclaims they are entitled to contribution and indemnification from ARC.

ARC has not moved to dismiss the Archer defendant's crossclaims against it but argues that the crossclaims should be dismissed because the claims are based on negligence. However, dismissal is plainly not warranted here.

A right of apportionment may arise even if the contributing party owed no duty to the insured. See Ruddy versus Lexington Insurance Company 40 AD 3d 733 at page 734, Second Department, 2007 case.

Moreover, there is an indemnification and hold harmless agreement between Archer A. Associates, Incorporated and ARC.

Therefore, the Archer defendant's cross-claims are not dismissed. Not that there was any motion to dismiss them but they're not dismissed.

Conclusion. Accordingly, ARC's motion to dismiss is granted and the complaint against ARC is

1 Proceedings

2 dismissed without prejudice.

3 That constitutes the decision and order of the
4 Court.

5 Now, the next step is this. Two things. One is
6 I have to have a copy of the minutes. I will give you the
7 gray sheet. That's the appealable order with the minutes
8 on the back of it. So, if you want to appeal, that's
9 number one.

10 Number two, the moment that is served with the
11 notice of entry on the -- well, they are dismissed. And
12 you've answered. So, right now the next step is going to
13 be a preliminary compliance -- preliminary compliance
14 order. All right. So, you can schedule that. You can
15 schedule that.

16 MS. HOLMAN: Okay. Thank you.

17 THE COURT: All right. Thank you.

18 You want to say something?

19 MR. LABBATE: Well, I disagree on the crossclaim
20 argument, your Honor.

21 THE COURT: If you want to talk to the Court,
22 you have to stand.

23 MR. LABBATE: Absolutely, Judge.

24 I don't think Ruddy is the right way to go. I
25 don't think it's been followed in the First Department.
26 In fact, I think it's been rejected by the First

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Department.

THE COURT: Guess what. You will get a copy of the minutes. There is a train that is right across the street. You will go on that train.

MR. LABBATE: Up to Madison Park.

THE COURT: Madison Square Park. 25th Street and Madison Avenue.

MR. LABBATE: I do appreciate your Honor's efforts. I don't want it to be misconstrued on the record that I disagree completely with what your Honor did.

THE COURT: I understand.

Actually, here is the thing. I mean, while Archer made this argument, they didn't make -- they were not before the Court on anything that the Court could have moved on one way or the other. You didn't make a motion to dismiss as against Archer. So, that's not before me. So, in fact, you don't have anything that procedurally you can go up on that.

MR. LABBATE: Understood. My question wasn't to the motion, Judge. My question was now procedurally, those crossclaims I guess become third-party claims?

THE COURT: What you have to do is you have to answer -- the crossclaims are against you. So, you are in a position you have to answer those claims.

MR. LABBATE: Correct.

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THE COURT: And then --

MR. LABBATE: Within ten days under the CPLR, I think I've got.

THE COURT: Yes.

MR. LABBATE: Ten days to answer. What are they now?

I'm not the direct defendant. My client is not a direct defendant any more in the case. I assume they get converted into third-party claims.

THE COURT: I really don't know. Let me think. I don't think so. I think they're crossclaims.

Archer has a right to make a third-party claim a crossclaim. They can make crossclaims. They are the plaintiff. So, it would read Archer A. Associates, Incorporated and Lanciotti and Assured SKCG, Incorporated versus ARC Excess and Surplus, LLC.

MR. LABBATE: Agreed. Those will be the context of the third-party action, correct?

THE COURT: Okay. Thank you.

MS. HOLMAN: Your Honor, I just would like to note for the record that plaintiffs disagree with the Court's decision that defendant ARC never made -- other than a representation simply and an attorney's affirmation that they were wholesaler, never provided any documentary evidence.

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THE COURT: Guess what, your client does not mention ARC. It's your fault.

If you had anything of substance to say against ARC, you would have put it in your complaint. You would have said ARC did this and ARC did that and I relied on ARC and ARC told me, whatever you wanted to say. But you said not one word.

You didn't mention ARC. You mentioned Archer very much so but you do not mention ARC.

So, now that you put them in as a defendant, the first defendant and they say you never mentioned me, you know, I'm not -- you know, why are you coming against me. I never -- I never was in privity with the Alicart Group. Never once did I ever talk to them. They win.

MS. HOLMAN: I understand.

THE COURT: All right. You may not agree with me but that's the reality of life. Okay. All right.

Make sure I get a copy of the minutes. After I get a copy of the minutes, I will then go forward and give you a gray sheet and each one upon receipt of the gray sheet, get into their running shoes and run up if you wish. Otherwise, answer.

MR. LABBATE: Absolutely.

THE COURT: Well, you've answered. So, that's good. You have to answer.

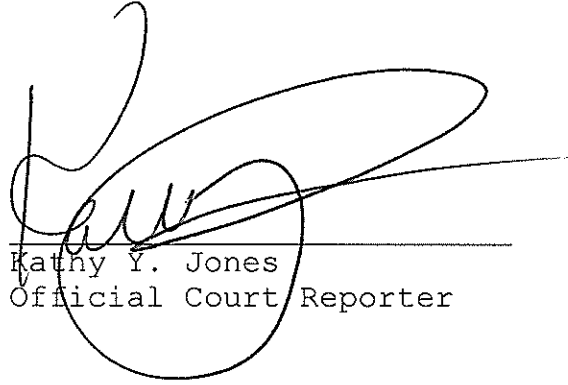
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MR. LABBATE: Understood. Thank you.

C E R T I F I C A T E

Certified to be a true and accurate transcript of the
proceedings.



Kathy Y. Jones
Official Court Reporter