



STATE OF NEW YORK  
**SUPREME COURT**  
LEWIS COUNTY COURTHOUSE  
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Lowville, New York 13367-1396  
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**HON. CHARLES C. MERRELL**  
Supreme Court Justice

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March 5, 2020

Mark J. Wagner, Jr., Esq.  
Rivkin Radler, LLP  
66 South Pearl Street, 11<sup>th</sup> Floor  
Albany, NY 12207

Re: Valley View NY Realty Inc. v. Alan Jacoby, d/b/a A J & Associates Public  
Adjustors v. Mid-Hudson Co-operative Insurance Company  
Index Number 2019-105539; RJI Number 21-19-421

Dear Counselor:

Enclosed for filing please find the original Order granting the November 21, 2019 motion in regard to the above referenced matter. Please note that the act of signing the enclosed Order does not constitute entry or filing under CPLR 2220. Parties are not relieved of the applicable provisions of the rule with regard to serving Notice of Entry.

Concurrently, and by copy of this letter, the Court is conveying to the Herkimer County Clerk any original papers on the motion that were received by Chambers along with a copy of the Order. This is in accordance with the Memorandum of the Chief Administrative Judge, Ann Pfau, dated July 1, 2009.

Very truly yours,

A handwritten signature in black ink, appearing to read "Teresa M. Warcup", written over a large, stylized flourish.

Teresa M. Warcup  
Secretary to Hon. Charles C. Merrell

/tmw

Enclosure

cc: Michael A. Castle, Esq.  
Craig A. Blumberg, Esq.  
Sylvia M. Rowan, Herkimer County Clerk  
Herkimer County Supreme Court Clerk's Office

At a Term of the Supreme Court of the State of New York, held for the County of Herkimer at Herkimer, New York on the 21<sup>st</sup> day of November, 2019.

PRESENT: HON. CHARLES C. MERRELL  
Justice of the Supreme Court

STATE OF NEW YORK  
SUPREME COURT COUNTY OF HERKIMER

Valley View NY Realty Inc.,

Plaintiff,

v.

Alan Jacoby, d/b/a A J & Associates Public  
Adjustors,

Defendant.

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Alan Jacoby, d/b/a A J & Associates Public  
Adjustors,

Third-Party Plaintiff,

v.

Mid-Hudson Co-Operative Insurance Company,

Third-Party Defendant.

APPEARANCES:

CASTLE LAW FIRM  
MICHAEL A CASTLE, Esq.  
Attorneys for Plaintiff

LAW OFFICE OF CRAIG A. BLUMBERG  
CRAIG A. BLUMBERG, Esq.  
Attorneys for Defendant and Third-Party Plaintiff

RIVKIN RADLER, LLP  
MICHAEL WELCH, Esq.  
MARK J. WAGNER, JR., Esq.  
Attorneys for Third-Party Defendant

**Merrell, C. C., J.S.C.**

Third-Party Defendant, Mid-Hudson Co-Operative Insurance Company ("Mid-Hudson"), has moved, pursuant to CPLR §3211(a)(1), (3) and (7), for an Order dismissing the Third-Party Complaint of Alan Jacoby d/b/a AJ & Associates Public

**DECISION AND ORDER**

Index No. 2019-105539  
RJI No. 21-19-421

Adjustors' ("Jacoby"), based on documentary evidence, lack of standing, and the failure to state a cause of action.

This action arises out of Mid-Hudson's denial of a property loss claim filed by its insured, Valley View, as a result of damage from a windstorm and flooding. Jacoby was retained by Valley View to provide public adjusting services with regard to the loss.

Valley View's complaint alleges Jacoby breached the parties' contract by failing to submit a timely and complete statement of loss of Valley View's property damage claim to Plaintiff's insurer, Mid-Hudson. Jacoby thereafter commenced a third-party action against Mid-Hudson, alleging that if the contract between Jacoby and Valley View was breached, such breach was due to the acts of Mid-Hudson in denying the claim under the insurance policy. Jacoby alleges that, if he is found liable to Valley View in the underlying action for breach of their contract, Mid-Hudson would have liability to him for any damages owed Valley View.

#### **Standard of Review**

A defendant may move to dismiss a complaint under CPLR §3211(a)(1) "on the ground that...a defense is founded upon documentary evidence". A motion on this ground may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83, 88 [1994])).

Materials that clearly qualify as "documentary evidence" include "documents reflecting out-of-Court transactions such as mortgages, deeds, contracts, and any

other papers, the contents of which are ‘essentially undeniable’” (Midorimasu v. Huifat Co., 99 AD3d 680, 682 [2<sup>nd</sup> Dept. 2012], [citations omitted]).

Under CPLR §3211(a)(3) a party may also move for dismissal on the ground that “the party asserting the cause of action has not legal standing to sue”.

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) the Court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Shah v. Exxis Inc., 138 AD3d 970, 971 [2<sup>nd</sup> Dept. 2016]; Goshen v. Mutual Life Ins Co. of N.Y., supra, 98 NY2d at 326).

Thus, “a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all the facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (Clarke v. Laidlaw Tr. Inc., 125 AD3d 920 [2<sup>nd</sup> Dept. 2015], citing Shayla B. Pacific LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38 [2<sup>nd</sup> Dept. 2006]).

A motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action should not be granted unless, within the four corners of the pleading, liberally construed, the pleader fails to state a cause of action or unless documents and other submissions establish conclusively that plaintiff has no cause of action. See Schwaner v. Collins, 17 AD3d 1068 (4th Dept 2005). However, when the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one

(McCarthy v. Shah, 162 AD3d 1727 [4<sup>th</sup> Dept. 2018]; Olszewski v. Waters of Orchard Park, 303 AD2d 995, 995 [4<sup>th</sup> Dept. 2003]). “Every favorable inference must be afforded the facts alleged in the complaint and in the various motion papers submitted by [plaintiff]” (Held v. Kaufman, 91 NY2d 425, 432 [1998]). The issue “whether a plaintiff can ultimately establish its allegation is not part of the calculus in determining a motion to dismiss” (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY 3d 11, 19 [2005]).

It is well settled that “the primary function of a pleading is to apprise an adverse party of the pleader’s claim” and to prevent surprise (Cole v. Mandell Food Stores, 93 NY2d 34, 40 [1999]). To fulfill this purpose, a complaint must be sufficiently detailed “to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” (CPLR 3013). When examining the facial sufficiency of the complaint, it must be construed liberally, and any technical defects may be ignored in the absence of prejudice to the opposing party (see CPLR 3026; Siegel, NY Prac § 208 at 392 [6<sup>th</sup> Ed. 2018]; Foley v. D’Agostino, 21 AD2d 60 [1<sup>st</sup> Dept. 1964]).

Nonetheless, bare legal conclusions with no factual specificity or which do not support an element of the claim will not suffice to withstand a motion to dismiss (Mid-Hudson Valley F.C.U. v. Quartararo & Lois PLLC, 155 AD3d 1218 [3<sup>rd</sup> Dept. 2017] aff’d 31 NY3d 1090 [2018]).

#### Discussion

In support of its motion Mid-Hudson has submitted a certified copy of the Commercial Insurance Policy it issued to Valley View, and a copy of agreement between Valley View and Jacoby dated May 10, 2018 for adjusting Plaintiff’s claim. In

opposition to the motion Jacoby has submitted his affidavit, a copy of Mid-Hudson's denial of Valley View's claim dated September 6, 2018, and a copy of correspondence from Mid-Hudson's adjuster dated May 14, 2018.

Although not specifically alleged in the Third Party Complaint, Jacoby contends he is a third-party beneficiary of the insurance policy issued by Mid-Hudson to Valley View and has stated a cognizable legal theory and cause of action for breach of the insurance policy. Jacoby further contends that Mid-Hudson's motion is premature in that no discovery has been undertaken with regard to Mid-Hudson's compliance with Insurance Law §3407 in the handling of Plaintiff's claim, including the provision of claim forms.

For the purpose of this analysis the Court accepts the facts alleged by Jacoby as true and assumes that Mid-Hudson breached its insurance policy with Valley View. Thus, the issue before the Court is not whether Jacoby has stated a cause of action but whether he can assert any cognizable legal theory to support a breach of contract claim against Mid-Hudson.

Jacoby is not a named insured or party to the subject insurance policy and has not established in the third party complaint direct standing to sue for breach thereof (e.g. Burdett Radiology Consultants v. Samaritan Hosp., 158 AD2d 132, 135 [3<sup>rd</sup> Dept. 1990]). The Court can find no authority to support a theory of contract liability based solely on Jacoby's status as Valley View's adjuster.

Nor is Jacoby a third-party beneficiary of the insurance policy, assuming such a theory of recovery is alleged in the Third-Party Complaint. "In order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to

insure the interest of [the third party] who seeks to recover on the policy.” (Stainless Inc. v. Employers Fire Ins. Co., 69 AD2d 27, 33 [1979] Aff’d 49 NY2d 924 [1980]. See also State of N.Y. v. Liberty Mutual Ins. Co., 23 AD3d 1084, 1085 [4<sup>th</sup> Dept. 2005]). As a third party seeking to enforce a contract, third party plaintiff had to establish he was the intended beneficiary of the contract rather than merely an incidental beneficiary (Cole v. Metropolitan Life Ins. Co., 273 AD2d 832, 833 [4<sup>th</sup> Dept. 2000] [internal citations omitted]). “An incidental beneficiary is a third party who may derive a benefit from the performance of the contract though he is neither the promisee nor the one to whom performance is to be rendered.” (Airco Alleys Div. v. Niagara Mohawk Power Corp., 76 AD2d 68, 79 [4<sup>th</sup> Dept. 1980]).

“The identity of a third-party beneficiary need not be set forth in the contract of, for that matter, even be known at the time of its execution.” (Encore Lake Grove Homeowners Assoc. v. Cashin Assoc., 111 AD3d 881, 883 [2013]). However, Jacoby must show that the benefit to him is “sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost” (Burns Jackson Miller Summitt & Spitzer v. Lindner, 59 NY2d 314, 336 [1983]). The intent of the promisee controls in determining whether a stranger to a contract qualifies as an intended third party beneficiary (DeLine v. CitiCapital Commercial Corp., 24 AD3d 1309, 1311 [4<sup>th</sup> Dept. 2005]).

Here the undisputed documentary evidence shows this to be a standard commercial insurance policy, containing no provisions addressing the rights of a public adjuster retained to handle future claims. Jacoby’s subsequent contract with Valley View was to “advise and assist in the preparation, presentation and adjustment” of the

wind and water damage claim. Valley View agreed to assign and direct payment to Jacoby, for his services, a contingency fee of 8% of the loss paid. Based on the documentary evidence, Jacoby was no more than an incidental beneficiary in the contract, based on his contingent fee agreement. Taking as true that Mid-Hudson violated Insurance Law §3407 and breached the policy of insurance by denying the claim, there remains no cognizable theory of recovery in contract based on Jacoby's claim that he is a third-party beneficiary of the insurance policy.

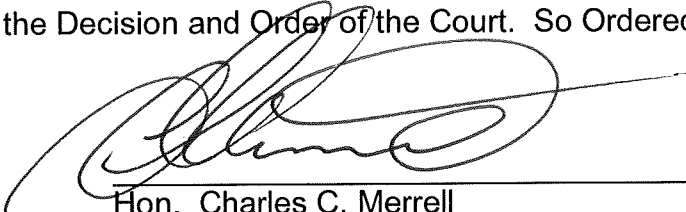
Jacoby contends that Mid-Hudson's CPLR 3211 motion is in effect a motion for summary judgment, and that discovery will disclose facts substantially different than those alleged by Mid-Hudson with regard to compliance with Insurance Law §3407 or the policy. As previously noted, even assuming Mid-Hudson breached the insurance contract with Valley View there is no cognizable theory of recovery for Jacoby, who is at best an incidental beneficiary of the policy. Jacoby has failed to demonstrate that further discovery would salvage his claims. See e.g. Hoheb v. Pathology Assoc. of Albany, 146 AD3d 919, 921 (3<sup>rd</sup> Dept. 1989). Nor has any authority been cited to support a claim by Jacoby against Mid-Hudson for violation of the Insurance Law as alleged in this matter.

In conclusion, the motion of Third Party Defendant Mid-Hudson dismissing the third party complaint is granted.

The foregoing constitutes the Decision and Order of the Court. So Ordered.

ENTER

Dated: March 4, 2020

  
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Hon. Charles C. Merrell  
Justice of the Supreme Court



Papers received and considered:

1. Notice of Motion dated October 8, 2019; Affirmation of Mark J. Wagner, Jr., Esq. dated October 8, 2019; Memorandum of Law dated October 8, 2019;
2. Opposition Affirmation of Craig A. Blumberg, Esq. dated November 7, 2019; and Affidavit of Alan Jacoby sworn to November 6, 2019;
3. Reply Affirmation of Mark J. Wagner, Jr., Esq. dated November 19, 2019; Reply Memorandum of Law dated November 19, 2019.