

Lovell Safety Mgt. Co., LLC v Cardinal Tank Corp.
2009 NY Slip Op 31129(U)
May 19, 2009
Supreme Court, New York County
Docket Number: 113848/06
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Edmead
Justice

PART 35

Lovell Safety Management

INDEX NO. 113848/06

cardinal Tank

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion to dismiss the counterclaim against it is granted; and it is further

ORDERED that the action in all other respects continues; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within 20 days of entry on counsel for defendants.

That constitutes the decision and order of the Court.

FILED
MAY 20 2009
COUNTY CLERKS OFFICE
NEW YORK

Dated: 5/19/09

[Signature]
HON. CAROL EDMEDAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
LOVELL SAFETY MANAGEMENT CO., LLC,

Plaintiff,

Index No.: 113848/06

-against-

DECISION AND ORDER

CARDINAL TANK CORP., CARDINAL BOILER
& TANK CORP., MANHATTAN BOILER &
EQUIPMENT CORP., and LEONARD REALTY
CORP.,

Defendants.

-----x
CAROL ROBINSON EDMEAD, J.:

FACTUAL BACKGROUND

Plaintiff, Lovell Safety Management Co., LLC (Lovell), moves, pursuant to CPLR 3212, for summary judgment to dismiss defendants' counterclaim against it, with prejudice. In the underlying action, Lovell, manager of a state fund safety group, seeks to recover group manager's fees allegedly owed to it by defendants, affiliated companies, who signed a group affiliation form when it joined Lovell's group. Lovell represents members of its group in obtaining Workers' Compensation insurance from the State Insurance Fund (SIF). In the counterclaim, defendants seek indemnification for what they allege are inflated premiums they had to pay SIF based on SIF's allegedly inaccurate employment classification of defendants' companies for the period April 1, 2004 to November 17, 2005. Although not specifically articulated in the counterclaim, in the memoranda submitted in conjunction

with this motion, the parties have identified four theories under which defendants seek recovery of the premiums: (1) breach of contract; (2) breach of fiduciary duty; (3) negligence; and (4) fraud.

This case is a companion case to *The Commissioners of the State Insurance Fund v Cardinal Tank Corp. et al.*, Index No.: 403868/08, which was decided by this court on August 7, 2007. In that decision, granting summary judgment to SIF for the recovery of the premiums from defendants for the period under scrutiny, this court ruled that SIF's classification was substantiated by defendants own records, and that the court could not re-examine SIF's position, because such review must be handled, at the first instance, by administrative review. This court also stated that defendants' reliance on Lovell to secure that review was not a defense to the action instituted by SIF, and further stated that defendants' assertion that Lovell's failure to pursue administrative review because Lovell was coopted by SIF is speculative.

The fees sought by Lovell in the instant action are based on a percentage of the premiums defendants pay to SIF. In the amended verified answer, defendants assert that Lovell failed, despite assertions to the contrary, to fulfill its promise that it would diligently pursue a re-audit of defendants' more costly classification by SIF, and would file and challenge a review of

the disputed classifications on defendants' behalf. Defendants maintain that Lovell failed to file for a review of the classification in a timely manner, thereby causing defendants to pay a higher premium based on, what they assert, is an incorrect classification of their operations.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Lovell's motion for summary judgment dismissing the counterclaim against it is granted.

In order to recover for breach of contract, the allegedly injured party must be able to articulate damages that it suffered due to the opposing party's breach. In the instant action,

defendants are alleging as damages the difference between the higher premiums that they had to pay SIF based on what they maintain is an inaccurate classification, and the lower premiums that they should have paid based on an accurate classification. However, this argument is premised on the internal administrative review by SIF's rating board agreeing with defendants.

"To be recoverable damages must be not merely speculative, possible and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract They may be so uncertain, contingent and imaginary as to incapable of adequate proof, and then they cannot be recovered because they cannot be proved [internal quotation marks and citations omitted]."

Najjar Industries, Inc. v City of New York, 87 AD2d 329, 334 (1st Dept 1982), *affd* 67 NY2d 602 (1986).

The damages "must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." *Wenger v Alidad*, 265 AD2d 322, 323 (2d Dept 1999); see *Rakylar v Washington Mutual Bank*, 51 AD3d 995 (2d Dept 2008).

In the instant matter, defendants' theory of recovery is based on the speculation that SIF's rating board would have agreed with their assessment, but there is no proof that such would have been the case. As this court stated in its decision in the companion matter, SIF's determination was based on an audit of defendants' own records, the same records the rating board would have used. Under these circumstances, the court

cannot conclude, as a matter of law, that defendants' alleged damages are so certain as to be able to support a breach of contract claim.¹

Similarly, with respect to defendants' second theory of recovery, "the proponent of a claim for breach of fiduciary duty must, at a minimum, establish that the offending parties' actions were a substantial factor in causing an identifiable loss [internal quotation marks and citations omitted]." *Greenberg v Joffe*, 34 AD3d 426, 427 (2d Dept 2006). As reasoned above, defendants' alleged loss, based on a favorable administrative review, is too speculative to sustain this theory. This situation is distinguishable from the case cited by defendants, *Cristallina S.A. v Christie, Mason & Woods International, Inc.* (117 AD2d 284 [1st Dept 1986]), in which an auction house deliberately misled a consignee as to the value of the consignee's paintings, which was objectively discernable by reference to recently sold similar works.

Defendants' third theory of recovery is based on the alleged negligence of Lovell in not pursuing a re-audit and administrative review of defendants' employment classification.

"As a general rule, to recover damages for tort in a

¹The court notes that Lovell argues against there being a written contract between the parties covering the issue at bar, but, based on the court's evaluation of the uncertainty of defendants' claim of damage, the court does not need to address this point.

contract matter, it is necessary that the [movant] plead and prove a breach of duty distinct from, or in addition to, the breach of contract.

...
[Defendants] did not allege that [Lovell] breached any duty owed to [them] separate and apart from the contractual duty when [Lovell] misrepresented [its] intent to perform as promised [internal quotation marks and citations omitted]."

Non-Linear Trading Company, Inc. v Braddis Associates, Inc., 243 AD2d 107, 118 (1st Dept 1998).

In the case at bar, defendants are alleging, under a supposed theory of negligence, that Lovell failed to fulfill its contractual obligation to represent them by not adequately demanding an administrative review of defendants' employment classification. Since this is no more than an allegation of breach of contract, this theory, too, must fail as providing support for defendants' requested relief.

The case cited by defendants to support their theory of negligence does not address the issue at hand. In *Brown v Poritsky* (30 NY2d 289 [1972]), the court discussed the liability of a special agent to his principal. In that case, the special agent failed to obtain insurance for properties owned by the principal, which were eventually destroyed by fire. The court did not address any contractual aspect of the relationship between the parties, nor was a breach of contract alleged. The *Brown* court simply stated that an agent may be liable to his principal for negligence. However, that does not affect the

reasoning of the more recent decisions referenced above.

Lastly, defendants' allegations of fraud on the part of Lovell, in Lovell's purported statement that it would seek a re-audit and review of defendants' employment classification, is also unavailing to provide recovery to defendants.

"The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury. [Defendants] must show that [Lovell] knowingly uttered a false statement with the intention of depriving [defendants] of a specific benefit, thereby deceiving and damaging [them][internal quotation marks and citations omitted]."

Friedman v Anderson, 23 AD3d 163, 166 (1st Dept 2005).

Defendants have failed to demonstrate that Lovell knowingly misrepresented to them when it, Lovell, said it would argue for a re-audit of defendants' classification. The court also notes that Lovell did, in fact, initiate a re-audit of defendants' classification.

"It is not clear that the alleged fraud is any more than a restatement of [defendants'] claim for contract damages. Nor has it been shown that the asserted misrepresentations constitute anything more than the reciprocal obligation imposed on [Lovell] to apply good faith best efforts to achieve the purpose of the contract. ... [T]he best efforts requirement provides no ground for affirmative relief unless it has been made the basis of an independent promise to perform the condition [internal quotation marks and citations omitted]."

Syllman v Calleo Development Corp., 290 AD2d 209, 211 (1st Dept 2002).

Furthermore, "a cause of action for fraud does not arise

when the only fraud charged relates to a breach of contract claim." Briand Parenteau Associates, Inc. v HMC Associates, 225 AD2d 874, 876 (3d Dept 1996).

Based on the foregoing, defendants are not entitled to be indemnified by Lovell for the premiums it had to pay SIF based on defendants' more costly employment classification.

CONCLUSION

It is hereby

ORDERED that plaintiff's motion to dismiss the counterclaim against it is granted; and it is further

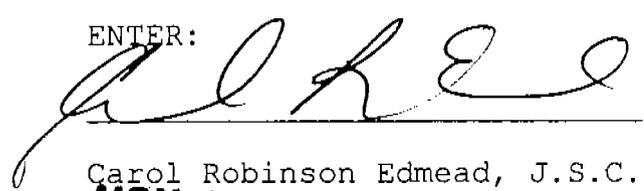
ORDERED that the action in all other respects continues; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within 20 days of entry on counsel for defendants.

That constitutes the decision and order of the Court.

Dated: May 19, 2009

ENTER:



Carol Robinson Edmead, J.S.C.
HON. CAROL EDMED

FILED

MAY 20 2009

COUNTY CLERK'S OFFICE
NEW YORK