SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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MARC BARADEL,

Plaintiff,

- v -

ASHER EDELMAN, *et al.*,

Defendants.

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INDEX NO. 653717/2019

MOTION DATE 03/26/2020

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document numbers (Motion 005) 90-103, 163, 212-17, 227, and document numbers (Motion 006) 104-20, 151, 155-61, 164, 176-211, 228,

were read on these motions to DISMISS.

Motion sequence numbers 005 and 006 are consolidated for disposition.

In motion 005, defendants Asher Edelman (Asher) and Edelman Arts, Inc. (Arts, Inc.) (together, Edelman Defendants) move for an order dismissing the amended complaint as against them, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action and, pursuant to CPLR 3211 (a) (1), based on a defense founded upon documentary evidence.

In motion 006, defendant Those Interested Underwriters at Lloyd's, London (Underwriters), subscribing to the policy of insurance/certificate numbered Redacted 5082, move for an order, pursuant to CPLR 3211, dismissing the complaint.

Plaintiff Marc Baradel cross-moves, pursuant to CPLR 3211 (c), for an order granting pre-answer summary judgment and/or an immediate trial or assessment of damages based upon documentary evidence.

Plaintiff and defendant HUB International Northeast Limited (HUB) stipulated to the discontinuance of the action as against HUB (NYSCEF Doc. No. 230).

Background

This action arises out of a "Consignment Agreement," dated July 3, 2018 (Consignment Agreement), between plaintiff, as consignor, and either or both Edelman Defendants, as consignees, pertaining to a stone sculpture by Constantin Brancusi, titled "Le Poisson" (the Art). Allegedly, the Art was not returned in its original, undamaged, condition.

The amended complaint alleges the following: HUB was the broker for the Underwriters' policy that covered the claim at issue in this action (Policy), and it issued a "Certificate of Insurance" (COI) naming Underwriters as the underwriter and plaintiff as an insured under the Policy (amended complaint ¶ 13). The Edelman Defendants were to insure the Art in the amount of $20 million, but incorrectly obtained insurance from HUB in the "temporary" amount of $5 million (*id.* ¶ 18). The Edelman Defendants had agreed to increase the insurance amount to $20 million (*id.* ¶ 19). The claim adjuster for Underwriters stated, however, that HUB had no authority to change the terms of the Policy (*id.* ¶ 13). The Policy referred to in the COI covered the insurance value of the Art, $5 million, plus 10%, not the actual market value of $22.5 million or the Policy-defined value of $5 million, plus 10% (*id.* ¶ 24).

According to the Consignment Agreement, the insurance was to remain in effect until the Art was either returned to plaintiff in its original condition, or until payment was received by plaintiff in the amount of $22.5 million; the Art has not been returned and was

damaged (*id.* ¶ 21). The Edelman Defendants had control of the Art while in their possession, and it was damaged in the premises which Asher owned, operated and controlled as his gallery (*id.* ¶ 35).

The amended complaint contains five causes of action for (1) breach of contract, against the Edelman Defendants; (2) negligence, against the Edelman Defendants; (3) declaratory relief, against HUB and Underwriters; (4) breach of the covenant of good faith and fair dealing, against HUB and Underwriters; and (5) bad faith, against Underwriters.

For the reasons discussed below, motion 005 is granted to the extent of dismissing the first cause of action as against Asher and dismissing the second cause of action as against both Edelman Defendants. Motion 006 is granted to the extent of dismissing the fifth cause of action against Underwriters. Plaintiff's cross motion is denied.

As noted above, plaintiff and HUB stipulated to the discontinuance of the action as against HUB.

Motion 005

First Cause of Action (Breach of Contract)

The complaint alleges that the Consignment Agreement required the Edelman Defendants to ensure the Art for $5 million from the time they took possession of the Art to the time they redelivered possession of the Art to plaintiff. Allegedly, the Consignment Agreement was prepared erroneously, because plaintiff had requested insurance coverage of $20 million, which change was in progress when the loss occurred. Additionally, plaintiff alleges that the Edelman Defendants failed to pursue all remedies available to

them pursuant to the Consignment Agreement, and failed to make payment for the damaged Art.

In support of their motion, the Edelman Defendants argue that the Consignment Agreement upon which plaintiff bases this action did not obligate either of them to protect the Art from physical damage. They contend that the Consignment Agreement required only that one of the Edelman Defendants (Arts, Inc.) insure the piece against loss and damage, which obligation Arts, Inc. satisfied. They argue: because the only duty (to secure insurance coverage) was satisfied, plaintiff has no cause of action for breach of contract against the Edelman Defendants. They contend that a clause encompassing possible damage or loss was unnecessary, because the parties had agreed that the insurance on the Art would suffice as a remedy.

Notwithstanding these contentions, the amended complaint validly states a cause of action for breach of contract. "The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The amended complaint sets forth these elements: the existence of the Consignment Agreement, the delivery of the Art pursuant thereto, the obligation to insure the Art, and the failure of payment for the allegedly damaged Art.

As for CPLR 3211 (a) (1), dismissal may only be granted where "the documentary evidence conclusively refutes plaintiff's ... allegations" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]; *Held v Kaufman*, 91 NY2d

425, 430-31 [1998]). On this pre-answer motion, the court cannot find that Arts, Inc. cannot be liable because of the insurance contingencies.

At a minimum, under the Consignment Agreement, the "Consignee" warranted that the Art would be insured under the terms of the Policy, and the insurance would remain in effect until the Art "is either returned to 'Consignor' or his designate, in its original condition, or until payment is received in full by 'Consignor.'" The documentation relied upon by the Edelman Defendants—the COI and the Consignment Agreement—does not dispose of the breach of contract claim because, among other allegations, the payment has not been received.

To the extent that the motion seeks dismissal as to Asher, the motion is granted.

"[A]n agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd [its] personal liability for, or to, that of [its] principal" (*Savoy Record Co., Inc. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964] [internal quotation marks and citation omitted]; *Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673 [1st Dept 2010]). Here, the only two parties to the Consignment Agreement are plaintiff and Arts, Inc. Asher's signature appears on the agreement, but only because he signed it on behalf of Arts Inc.

Plaintiff cites Asher's affidavit as an admission that he meant to be personally liable with Arts. This assertion is without merit. Although Asher stated that "or about July 3, 2018, I signed a document entitled 'CONSIGNMENT AGREEMENT,'" he also stated that he "signed the consignment not on my own behalf but solely as agent on behalf of Arts Inc.

I never intended to be personally bound in any way by the consignment agreement" (NYSCEF Doc. No. 214, ¶ 5). He elaborates:

> The consignment agreement appears to have been signed twice because this was what plaintiff requested, not because I signed the document on my own personal behalf. The consignment agreement was generated with a computer printed facsimile of my signature. This was unacceptable to plaintiff. He asked me to actually sign the document in my own hand. I did. The alleged 'second signature,' then, is nothing more than my compliance with plaintiff's request. It is definitely not a representation that I intended to be personally bound by or liable on the consignment agreement. The alleged second signature was placed on the document solely in my role as an agent of Arts Inc. which is the only consignee according to the consignment agreement.

(*Id*.)

The plain language of the agreement supports that assertion. The Consignment Agreement states that the Work is "consigned" to "Edelman Arts, Inc. Consignee." There is only one signature line for the "Consignee" (*cf. Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd*., 97 AD3d 444, 447 [1st Dept 2012] [contract contained a separate signature line personally guaranteeing a portion of the loan document]).

Second Cause of Action (Negligence)

The amended complaint alleges that the Edelman Defendants were negligent because they "failed to locate the Art in a stable protected location or negligently handled the Art while Plaintiff was not present; or negligently directed the placement of the Art in an unstable location" (amended complaint ¶ 121).

The Edelman Defendants argue that plaintiff has not alleged all the elements of a cause of action for negligence; the amended complaint does not state how the purported

damage occurred, or show a nexus between the supposed acts or omissions of the Edelman Defendants and what allegedly caused harm to the Art.

The Edelman Defendants argue further that regardless of the adequacy of the pleading, the negligence cause of action cannot co-exist with the breach of contract cause of action. There is nothing alleged in the amended complaint indicating that any duty was owed to plaintiff other than those set forth in the Consignment Agreement.

Plaintiff does not assert any legal arguments in opposition.

The cause of action is dismissed because, as is the situation here, an alleged breach of contract "may not be converted into a tort action absent the violation of a legal duty independent of that created in the contract" (*Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220, 221 [1st Dept 2001]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*id*. quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). The amended complaint does not allege that the Edelman Defendants assumed a duty extraneous to the Consignment Agreement.

Motion 006

Third cause action (declaratory judgment)

The third cause of action is based on the assertion that Underwriters claimed that HUB had no authority to issue a changed policy and that HUB issued the COI apparently without authority to change it. Allegedly, the adjuster for Underwriters (G.J. Smith & Associates) wrote to the former attorney for plaintiff by letter of January 12, 2019:

> First, in connection with your letter of October 5th, you enclosed a "Certificate of Insurance" dated July 3rd 2018 which apparently was issued by HUB International ('HUB'). That certificate issued by HUB purports to designate your client as an "Additional Insured / Loss Payee" and also states "WAIVER OF SUBROGATION AS RESPECTS TO CERTIFICATE HOLDER." Please be advised that HUB was the broker for Edelman Art [sic] and was not an agent of Underwriters. Hub had no authority to act on behalf of Underwriters or to change the terms of the policy in any way. In all respects, the handling of this claim will be governed by the terms of the policy and any applicable law.

(Amended complaint ¶ 125.) Plaintiff seeks a declaratory judgment determining whether the COI and Policy were changed, and, if so, whether the change was authorized.

Underwriters argue that documentary evidence consists of the COI which states, among other things, that it "is not a policy of insurance but is furnished as evidence of coverage," it "does not increase the amount of insurance provided by said contract(s)" and that the Policy is "SUBSCRIBED" by Underwriters and "arranged by" HUB. Underwriters argue that there is no justiciable controversy because documentary evidence establishes that both Underwriters and HUB agree that HUB was not acting on behalf of Underwriters, and plaintiff alleges no facts to contravene that point.

Underwriters cite in support, the affirmation of Lauren Elizabeth Boulbol, exhibit E, amended complaint, exhibits 2 and 4, for the proposition that both documents show that HUB and Underwriters agree that HUB was not an agent of Underwriters, but they fail to substantiate this assertion.

Fourth cause of action (breach of the implied covenant of good faith)

The request for a pre-answer dismissal of the fourth cause of action is denied.

The fourth cause of action in the amended complaint alleges that the Policy provides:

28. SETTLEMENT OF LOSS

All adjusted claims shall be paid or made good to the Insured within sixty (60) days after presentation and acceptance or satisfactory proof or interest and loss at the office of the Company. No loss shall be paid or made good if the Insured has collected the same from others.

Plaintiff alleges that the COI was written for his benefit based upon the insurable interest that the Edelman Defendants have in the Policy. The "Basis of Valuation Clause," according to the Policy, is defined as the total loss in respect of consigned pieces at an agreed net consigned value ($5 million plus 10%) which initially fixes the calculation limit of the liability of Underwriters; but does not make that applicable to the Edelman Defendants.

Allegedly, in the event of "Partial Loss" under the Policy, Underwriters shall not be liable for more than the insured value of the property, unless they are acting in bad faith in not paying. Plaintiff asserts that he demanded payment before, and now demands judgment to enforce the Policy and requires a payment of $5 million.

The fourth cause of action alleges further that HUB was the agent for the Policy and it issued the COI naming Underwriters, resulting in the Policy, but Underwriters' claim adjuster stated that HUB had no authority to change the Policy terms of the Policy. Plaintiff is demanding a judgment against Underwriters in the event they falsely raised an issue that the Policy was changed without their authorization. Plaintiff claims that Underwriters thereby breached the implied covenant of good faith and fair dealing by failing to honor the obligation to pay the full amount owed (estimated at $24,875,000).

Underwriters assert that plaintiff seeks to recover under the Policy as a beneficiary, but he has not alleged that he has satisfied the conditions precedent to coverage. They

argue that the amended complaint fails to demonstrate what actions the Underwriters have taken that "destroy[ed] or injur[ed]" plaintiff's right to recovery under the Policy.

Furthermore, they argue that their inability to conclude their investigation results from plaintiff's failure to provide information to the Underwriters that is necessary to adjust plaintiff's claim. Allegedly, Underwriters have attempted to investigate plaintiff's claim, as allowed under the Policy, and plaintiff has not pled his compliance with the conditions precedent to coverage.

As a preliminary matter, the amended complaint adequately alleges that plaintiff is a third-party beneficiary of the Policy, able to bring a breach of contract claim, by alleging "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [his] benefit, and (3) that the benefit to [him] is sufficiently immediate … to indicate the assumption by the contracting parties of a duty to compensate [him] if the benefit is lost" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]).

To recover under an insurance policy, a plaintiff must satisfy the conditions precedent to coverage to trigger an insurer's obligation to make payment (*SP & S Assocs., LLC v Insurance Co. of Greater N.Y.*, 80 AD3d 529, 529 [1st Dept 2011]). This requirement extends to third-party beneficiaries (*De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 56 AD3d 365, 366 [1st Dept 2008]).

Underwriters argue that plaintiff is required to demonstrate that he satisfied all conditions precedent to coverage, which, they contend, the amended complaint fails to do.

They argue that the amended complaint fails to allege that plaintiff complied with the "Examination Under Oath Clause" (EUO Clause) and the "Settlement of Loss Clause."

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law"; if so, a motion for dismissal will fail (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Leader v Steinway, Inc*., 180 AD3d 886, 888 [2d Dept 2020]).

Underwriters do not dispute that plaintiff is a third-party beneficiary of the Policy (*see Five Star Elec. Corp. v A.J. Pegno Constr. Co., Inc./Tully Constr. Co., Inc.*, 187 AD3d 635, 636 [1st Dept 2020]). As such, the claim is viable (*see Williams v Sidley Austin Brown & Wood, L.L.P.*, 38 AD3d 219, 220-221 [1st Dept 2007] [allegation that the defendant to which a lender technically extended a loan was a mere conduit for the individual plaintiff, supported the inference that the individual plaintiff was an intended third-party beneficiary of the loan]). Although, in *Five Star Elec. Corp., supra*, the Appellate Division, First Department, determined that the contractual notice provision at issue was not a condition precedent to commencing the lawsuit, that determination was made in the context of a summary judgment motion; not a pre-answer motion to dismiss. Hence, Underwriters' argument—that the court can dispose of the issue as to whether plaintiff failed to cooperate with their investigation, and whether that would constitute a breach of a Policy condition—is unavailing on a pre-answer motion to dismiss. Similarly unavailing are the decisions that Underwriters rely upon involving summary judgment motions (*see e.g. Security Mut. Life Ins. Co. v DiPasquale*, 302 AD2d 267, 267 [1st Dept 2003] [summary judgment

granted to insurer because throughout the parties' seven-year dispute, the insured never complied with the requirement that it submit unredacted federal tax returns]).

Fifth cause of action (Bad Faith)

The fifth cause of action purports to state a claim against Underwriters for "bad faith." Allegedly, the Underwriters withheld payment by engaging in conduct that may be characterized as "gross" and "morally reprehensible," and of "such wanton dishonesty as to imply a criminal indifference to civil obligations by nonpayment of the claim." Allegedly, Underwriters, after paying the loss, expected to inherit the right of the Edelman Defendants to recoup the payment from plaintiff, yet they waived the right to seek subrogation against plaintiff. The theory goes: by willfully refusing to make payment under the Policy, Underwriters acted in bad faith and exposed the Edelman Defendants to the full damage claim of $22.5 million which is in excess of the policy coverage.

"[T]here is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations under an insurance policy" (*Continental Casualty Co. v Nationwide Indem. Co.*, 16 AD3d 353, 355 [1st Dept 2005]). That said, "while plaintiff's cause of action alleging bad faith conduct on the part of the insurer cannot stand as a distinct tort cause of action ... its allegations may be employed to interpose a claim for consequential damages beyond the limits of the policy for the claimed breach of contract" (*Acquista v N.Y. Life Ins. Co.*, 285 AD2d 73, 82 [1st Dept 2001]).

Plaintiff's Cross-Motion

Plaintiff cross-moves, pursuant to CPLR 3211 (c), for an order granting pre-answer summary judgment and/or an immediate trial or assessment of damages based on

documentary evidence. Plaintiff argues that the Policy and the COI are sufficient on their face to grant judgment to plaintiff because the waiver of the right to subrogation is incorporated in these documents and makes Underwriters' defense unavailing.

Plaintiff's argument—that the waiver of the right to the subrogation clause as it applies to Underwriters "is res judicata in interpretation"—is unconvincing. Plaintiff cites decisions from other jurisdictions which pertain to the interpretation of the waiver of the right to subrogation clauses without arguing, let alone demonstrating, why the doctrine relied upon is res judicata in this action.

Moreover, plaintiff is not entitled to judgment based on the waiver of subrogation clause in the COI because there are issues of fact as to whether the clause is applicable here and because payment regarding the alleged damage to the Art has not been made (*The Gap, Inc. v Red Apple Companies*, 282 AD2d 119, 123 [1st Dept 2001] ["Absent coverage and payment of an insured loss, there is no right to subrogation and, thus, the waiver clause has no application"]).

Nor has plaintiff shown that the court should convert the pre-answer motion to one for summary judgment (*see Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987] ["Unless the court gives express notice of its intention to do so, either party should be able to rest assured that, no matter the quantity or quality of the nondocumentary evidentiary material submitted by the other party, there will be no fact finding or framing of factual issues for trial on a CPLR 3211 (a) (7) motion"]).

"There are, however, three exceptions to the requirement of notice. If the action involves no issues of fact, but only issues of law fully appreciated and argued by both sides,

it is proper for the court to grant summary judgment to either side without first giving notice of its intention to do so"; "when a request for CPLR 3211 (c) treatment is specifically made by both" and "when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course" (*id.*). Such procedural posture is not the case here.

Accordingly, it is

ORDERED that the motion (005) by defendants Asher Edelman and Edelman Arts, Inc., is granted to the extent that the second cause of action is dismissed, and the complaint in its entirety is dismissed as against defendant Asher Edelman; and it is further

ORDERED that motion (006) by defendant Those Interested Underwriters at Lloyd's, London, is granted only to the extent of dismissing the fifth cause of action; and it is further

ORDERED that the cross-motion by plaintiff Marc Baradel is denied; and it is further

ORDERED defendants are directed to serve and file their answer within 20 days of the entry of this decision and order on NYSCEF.

This shall constitute the decision and order of the court.

ENTER:

2/5/2021				**LOUIS L. NOCK, J.S.C.**			
DATE							
CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**