

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D80944

Q/

_____AD3d_____

Argued - November 10, 2025

HECTOR D. LASALLE, P.J.
WILLIAM G. FORD
HELEN VOUTSINAS
JAMES P. MCCORMACK, JJ.

2023-03902

DECISION & ORDER

Kevin W. Gruber, etc., et al., appellants,
v Donaldsons, Inc., et al., respondents.

(Index No. 613224/18)

Clare M. Sproule, Wantagh, NY, for appellants.

LaBonte Law Group, PLLC (Charles E. Holster III, Garden City, NY, of counsel),
for respondent Donaldsons, Inc.

Kelly, Rode & Kelly, LLP, Mineola, NY (Eric P. Tosca of counsel), for respondents
GEICO General Insurance Company, Inc., and Russo & Tambasco.

In an action, inter alia, to recover damages for fraud and legal malpractice, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Francis D. Ricigliano, J.), dated March 24, 2023. The order granted that branch of the motion of the defendants GEICO General Insurance Company, Inc., and Russo & Tambasco which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them, denied the plaintiffs' motion for summary judgment on the issue of liability on the causes of action to recover damages for fraud, breach of the covenant of good faith and fair dealing, and legal malpractice, granted that branch of the cross-motion of the defendants GEICO General Insurance Company, Inc., and Russo & Tambasco which was for summary judgment dismissing the complaint insofar as asserted against them, and granted that branch of the cross-motion of the defendant Donaldsons, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof granting that branch of the motion of the defendants GEICO General Insurance Company, Inc., and Russo & Tambasco which was pursuant to CPLR 3211(a) to dismiss the cause of action

to recover damages for legal malpractice, and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provision thereof granting that branch of the cross-motion of the defendants GEICO General Insurance Company, Inc., and Russo & Tambasco which was for summary judgment dismissing the cause of action to recover damages for legal malpractice, and substituting therefor a provision denying that branch of the cross-motion; as so modified, the order is affirmed, with one bill of costs to the defendant Donaldsons, Inc., payable by the plaintiffs.

On October 6, 2014, a vehicle registered to the plaintiff Kevin W. Gruber and being driven by the plaintiff Thomas E. Difolco was involved in an accident with a motorcycle. The motorcycle driver allegedly suffered serious injuries and subsequently commenced a personal injury action against Gruber and Difolco (hereinafter together the plaintiffs). The defendant Russo & Tambasco (hereinafter the GEICO attorneys) represented the plaintiffs in connection with the personal injury action. The motorcycle driver obtained summary judgment on the issue of liability, and Gruber was ultimately liable for so much of the settlement award as exceeded the insurance policy limits.

On September 30, 2018, the plaintiffs commenced the instant action against Donaldsons, Inc. (hereinafter Donaldsons), the dealership where the vehicle involved in the accident was purchased, GEICO General Insurance Company, Inc. (hereinafter GEICO), and the GEICO attorneys. The complaint, inter alia, asserted causes of action to recover damages for fraud against Donaldsons and GEICO, a cause of action alleging breach of the covenant of good faith and fair dealing against GEICO, and a cause of action alleging legal malpractice against the GEICO attorneys. The plaintiffs alleged that Donaldsons fraudulently induced Gruber to purchase and become the registered owner of the vehicle, which was intended for Difolco's use, by misrepresenting that only the person named in the insurance policy for the vehicle, and not the registered owner of the vehicle, had any liability for the vehicle. The complaint also alleged that Donaldsons fraudulently secured insurance coverage for the vehicle through GEICO in Difolco's name, even though Gruber was not named as an insured on the policy. Further, the plaintiffs alleged that GEICO breached the covenant of good faith and fair dealing by issuing a New York State insurance identification card to Gruber that misrepresented that GEICO had issued an owner's policy of insurance to him. The complaint also alleged that the GEICO attorneys committed legal malpractice, among other things, in failing to meaningfully oppose the motorcycle driver's motion for summary judgment in the personal injury action.

On November 15, 2018, the GEICO attorneys moved to dismiss the cause of action to recover damages for legal malpractice pursuant to, inter alia, CPLR 3211(a)(2) and (8), on the ground that the GEICO attorneys did not constitute a separate entity from GEICO. On November 21, 2018, Donaldsons moved, among other things, pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it. By order entered April 5, 2019, the Supreme Court, inter alia, denied the GEICO attorneys' motion and denied that branch of Donaldsons's motion which was to dismiss the cause of action to recover damages for fraud insofar as asserted against it. Donaldsons appealed, and this Court affirmed the denial of that branch of Donaldsons's motion (*see Gruber v Donaldsons, Inc.*, 201 AD3d 887, 888).

On April 21, 2021, GEICO and the GEICO attorneys (hereafter together the GEICO

defendants) moved, inter alia, pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them. While that motion was pending, on June 1, 2021, the plaintiffs moved for summary judgment on the issue of liability on the causes of action alleging fraud, breach of the covenant of good faith and fair dealing, and legal malpractice. On August 9, 2021, the GEICO defendants opposed the plaintiffs' motion and cross-moved, among other things, for summary judgment dismissing the complaint insofar as asserted against them. On September 13, 2021, Donaldsons opposed the plaintiffs' motion and cross-moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it.

In an order dated March 24, 2023, the Supreme Court granted that branch of the GEICO defendants' motion which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them, granted that branch of the GEICO defendants' cross-motion which was for summary judgment dismissing the complaint insofar as asserted against them, granted that branch of Donaldsons's cross-motion which was for summary judgment dismissing the complaint insofar as asserted against it, and denied the plaintiffs' motion. The plaintiffs appeal.

Initially, we are unpersuaded by Donaldsons's contention that the appeal should be dismissed on the ground that no appeal lies from a decision. "Decisions may not be appealed, although appeals may be taken from orders and final judgments" (*Charalabidis v Elnagar*, 188 AD3d 44, 47 [citations omitted]; see CPLR 5501[a]; 5512[a]). Here, the paper appealed from meets the criteria for an order set forth in CPLR 2219(a) and determined the respective motions and cross-motions (see *Bellizzi v Bellizzi*, 82 AD3d 1541, 1542-1543).

The Supreme Court should have denied that branch of the GEICO defendants' motion which was to dismiss the cause of action to recover damages for legal malpractice pursuant to CPLR 3211(a)(1) and (7) pursuant to the single motion rule (see *id.* § 3211[e]; *Eustache v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 236 AD3d 590, 591; *Oakley v County of Nassau*, 127 AD3d 946, 947). The GEICO defendants did not provide a sufficient reason for not including the argument to dismiss the cause of action to recover damages for legal malpractice pursuant to CPLR 3211(a)(1) and (7) as an alternative basis for relief in the GEICO attorneys' prior motion to dismiss (see *Oakley v County of Nassau*, 127 AD3d at 947).

Contrary to the plaintiffs' contention, the complaint failed to state a cause of action to recover damages for breach of the covenant of good faith and fair dealing against GEICO. "Implicit in every contract is an implied covenant of good faith and fair dealing" (*East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal*, 199 AD3d 881, 884, quoting *25 Bay Terrace Assoc., L.P. v Public Serv. Mut. Ins. Co.*, 194 AD3d 668, 671-672). "The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct" (*id.* [internal quotation marks omitted]; see *Moran v Erk*, 11 NY3d 452, 456; *Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976-977). "No obligation may be implied that would be inconsistent with other terms of the contractual relationship" (*East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal*, 199 AD3d at 884, quoting *Celauro v 4C Foods Corp.*, 187 AD3d 836, 838). "In the context of an insurance-related dispute, the implied covenant of good faith and fair dealing means that the insurer

must investigate claims for coverage in good faith, must not manufacture factually incorrect reasons to deny insurance coverage, must not deviate from its own practices or from industry practices, and must not act with ‘gross disregard of the insured’s interests’” (*id.* [internal quotation marks omitted], quoting *Smith v General Acc. Ins. Co.*, 91 NY2d 648, 653; see *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453).

The complaint alleged not that GEICO failed to fulfill its obligations under the policy of insurance, but rather that GEICO acted in bad faith in issuing the policy. Such allegations fall outside the scope of the implied covenant of good faith and fair dealing, which “is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract” (*Gutierrez v Government Empls. Ins. Co.*, 136 AD3d at 976).

The Supreme Court also properly granted those branches of the cross-motions of the GEICO defendants and Donaldsons which were for summary judgment dismissing the causes of action alleging fraud, because the defendants demonstrated, *prima facie*, that the plaintiffs’ reliance on Donaldsons’s misrepresentation was unreasonable as a matter of law (*see ISS Action, Inc. v Tutor Perini Corp.*, 170 AD3d 686, 689). “[I]f the facts represented are not matters peculiarly within the party’s knowledge, and the other party has the means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he [or she] must make use of those means, or he [or she] will not be heard to complain that he [or she] was induced to enter into the transaction by misrepresentations” (*id.* at 688 [internal quotation marks omitted]). Gruber’s liability as a registered vehicle owner pursuant to section 388 of the Vehicle and Traffic Law is not a matter peculiarly within the defendants’ knowledge, and the plaintiffs could have easily made an inquiry as to whether Gruber would be liable under the arrangement (*see R. Vig Props., LLC v Rahimzada*, 213 AD3d 871, 872; *DeFilippo v Hidden Ponds Assoc.*, 146 AD2d 737, 737). In opposition to the defendants’ *prima facie* showing, the plaintiffs failed to raise a triable issue of fact as to whether their reliance on the alleged misrepresentation was justified (*see ISS Action, Inc. v Tutor Perini Corp.*, 170 AD3d at 689). For the same reasons, the court properly denied that branch of the plaintiffs’ motion which was for summary judgment on the issue of liability on the causes of action alleging fraud.

In an action to recover damages for legal malpractice, “a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney’s breach of this duty proximately caused [the] plaintiff to sustain actual and ascertainable damages” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [internal quotation marks omitted]). Here, the plaintiffs’ evidentiary submission failed to establish, *prima facie*, that Gruber would not have been personally liable for the settlement award beyond the insurance policy but for the GEICO attorneys’ negligence (*see id.* at 443; *Kennedy v H. Bruce Fischer, Esq., P.C.*, 78 AD3d 1016, 1018).

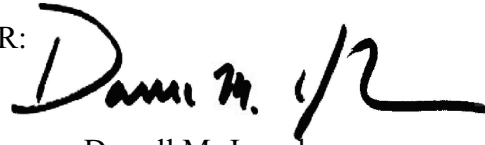
However, “[a] defendant seeking summary judgment dismissing a legal malpractice cause of action has the burden of establishing *prima facie* that he or she did not fail to exercise such skill and knowledge, or that the claimed departure did not proximately cause the plaintiff to sustain damages” (*Bakcheva v Law Offs. of Stein & Assoc.*, 169 AD3d 624, 625). Contrary to their

contention, the GEICO defendants failed to meet this burden (*see Gardner v Sacco & Fillas, LLP*, 216 AD3d 1139, 1140). Accordingly, the Supreme Court erred in granting that branch of their motion which was for summary judgment dismissing the cause of action to recover damages for legal malpractice.

In light of our determination, the parties' remaining contentions need not be reached.

LASALLE, P.J., FORD, VOUTSINAS and MCCORMACK, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a long horizontal flourish.

Darrell M. Joseph
Clerk of the Court