

**Manes Organization, Inc. v Meadowbrook-Richman,  
Inc.**

2004 NY Slip Op 30036(U)

March 15, 2004

Supreme Court, New York County

Docket Number: 7\_30060/4202

Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Richard  
Justice

PART W

MAYES ORGANIZATION INC

INDEX NO. 604202/00

MOTION DATE \_\_\_\_\_

- v -

MEADOWBROOK- RICHMAN INC

MOTION SEQ. NO. 000

MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: 3/15/04

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 24

-----X  
The Manes Organization, Inc.

Plaintiff,

Index No. 604202/2000

-against-

DECISION & ORDER

Meadowbrook-Richman, Inc., Total Dollar Management  
Effort, Ltd., & Polar International Brokerage Corp.,

Defendants.

..... X  
Meadowbrook-Richman, Inc., Total Dollar Management  
Effort, Ltd.,

Third-party plaintiffs,

-against-

The Travelers Insurance Company,

Third-party defendant  
-----X

Richter, J.:

The motion by Travelers, the third-party defendant, to dismiss the complaint against it is granted. The sole remaining claim in the main action is the breach of contract claim brought by plaintiff against defendants, who were public adjusters. The third-party plaintiffs did not have a contract with Travelers and therefore cannot seek indemnification pursuant to any contract. *See SSDW Co. v. Feldman-Misthopoulos Assoc.*, 151 A.D.2d 293 (1st Dept. 1989). The third-party plaintiffs argue that an implied contract existed here because they were negotiating with Travelers, which insured the plaintiff, in an effort to settle the claim. This contention, without more, is insufficient to establish an implied contract either in law or in fact. Moreover, the documentation and facts alleged here are inconsistent with such a finding since there is no basis to conclude that

Travelers conducted itself in a manner such that its assent to such an implied contract could fairly be inferred. *Tjoa v. Butterfield Memorial Hospital*, 205 A.D.2d 526 (2d Dept. 1994).

To the extent that the claims in the third-party complaint seek implied indemnification, they must be denied. No basis exists to find that the third-party plaintiffs were in privity with Travelers or that they had a close relationship with Travelers. See *Parrott v. Coopers & Lybrand, LLP*, 95 N.Y.2d 479 (2000); *Point O' Woods Assoc. v. Those Underwriters at Lloyd's, London*, 288 A.D.2d 78 (1<sup>st</sup> Dept. 2001). The third-party plaintiffs cannot obtain implied indemnification since they are not merely passive wrong-doers. Rather, plaintiff contends that they actively breached their obligations to Marines. See *Bd. Of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21 (1987); see also *Cappelletti v. Unigard Ins. Co.*, 222 A.D.2d 1029 (4th Dept. 1995).

The third-party plaintiffs suggest that Travelers acted in bad faith by delaying settlement of the claim until the time for filing suit on the underlying claim had expired. However, "[a] claim based upon bad faith does not state a separate cause of action but derives solely from the contract." *In re Security Mut. Ins. Co.*, 2004 WL 316513, at \*1 (Sup. Ct. Seneca County Feb. 11, 2004); see also *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445 (1993) (failure to respond to time restricted settlement demand is not, by itself, bad faith). Finally, the argument that Travelers should be estopped from asserting the defenses raised here is unpersuasive. First, no question exists whether plaintiff is precluded from suing Travelers directly since was already a determination that such a claim would be barred because it was not commenced within two years of the claimed loss. The third-party plaintiffs have failed to show why they should be allowed to sue Travelers when the plaintiff itself would not be able to do so.

In any event, the third-party plaintiffs have failed to show detrimental reliance, which is "a

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necessary element of estoppel.” *See Empire Blue Cross & Blue Shield v. Various Underwriters at Lloyd’s, London*, 1 A.D.3d 291 (1st Dcpt. 2003). The third-party plaintiffs do not claim that Travelers specifically asked that they refrain from commencing a lawsuit or indicated that they were definitely going to extend any deadline for filing such a suit. Rather, the documentation shows that Mr. Richman, the public adjuster, was aware of the impending deadline and was frustrated with Travelers’ failure to resolve this **in** an expeditious manner. Given the tone of the correspondence, which included a statement from Travelers that it “was reserving all our rights under the policy requiring prompt notice,” the third-party plaintiffs can hardly complain that they were “duped” into refraining from instituting a lawsuit or having Mannes institute a timely suit. *See Empire Blue Cross*, 1 A.D.3d at 291.

The Court has considered the remaining arguments and is persuaded by the claims made by Travelers. In sum, it is ordered that the motion by the third-party defendant for summary judgment is granted, and the claims in the third-party complaint are hereby severed and dismissed, and the Clerk is directed to enter Judgment in favor of Travelers Insurance Co., and is further ordered that the main action shall continue.

March 15, 2004

  
Justice Rosalyn Richter