

Mirabelli v Merchants Insurance Co. of New Hampshire
2005 NY Slip Op 30418(U)
May 9, 2005
Supreme Court, Suffolk County
Docket Number: 020998/2004
Judge: Edward D. Burke
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SHORT FORM ORDER

INDEX No. 020998 / 2004

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY**

PRESENT:

Hon EDWARD D. BURKE
Justice of the Supreme Court

MOTION DATE 1/18/05
ADJ. DATE 3/16/05
Mot. Seq. # 001 - MG
002 - XMD

ROBERT MIRABELLI and JOSEPH BRANDT,

Plaintiff(s),

- against -

ROBERT J. ZYSK, ESQ.
Attorneys for Plaintiff(s)
629 Route 112, Suite 2
Patchogue, New York 11772

**MERCHANTS INSURANCE COMPANY OF NEW
HAMPSHIRE a/k/a MERCHANTS MUTUAL
INSURANCE COMPANY a/k/a MERCHANTS
INSURANCE GROUP and GRAPHIC ARTS
MUTUAL INSURANCE CO.,**

Defendant(s).

**FELDMAN, RUDY, KIRBY
& FARQUHARSON, PC**
Attorneys for Defendant(s) MERCHANTS
INSURANCE COMPANY OF NEW HAMPSHIRE
1400 Old Country Road, Suite 301
Westbury, New York 11590

Upon the following papers numbered 1 to 31 read on this motion for dismissal and cross motion for declaratory judgment and damages; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers 7 - 14; Answering Affidavits and supporting papers 15 - 31; Replying Affidavits and supporting papers _____; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3211 (a)(7) dismissing the second, third, fourth and sixth causes of action of the complaint and all claims seeking punitive damages, treble damages, exemplary damages, extra-contractual damages and attorney's fees is granted; and it is further

ORDERED that this cross motion by plaintiffs for a declaratory judgment directing defendant to pay the full amount of the claim with interest and for an award of damages and attorney's fees is denied.

On September 30, 1996, plaintiffs purchased from defendant a policy insuring commercial property located at 3732 Route 112, in Coram, New York. On December 21, 2003 a fire severely damaged the office building on the property. Plaintiffs notified defendant of the fire and sought to recover under the policy so as to rebuild the building.

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By their complaint, plaintiffs allege that they informed defendant that they had a one-year time limitation within which to rebuild in order to maintain the building's prior non-conforming use zoning status and that defendant nevertheless delayed its response, breached its fiduciary duties, acted in bad faith and failed to timely process and pay plaintiffs' claim, thereby breaching the subject policy. The first cause of action alleges breach of contract; the second cause of action alleges fraud in the inducement; and the third cause of action alleges that defendant's practice of failing to pay plaintiffs as well as other insureds under its policies constitutes deceptive business practices under General Business Law § 349. The fourth cause of action alleges violations of Insurance Law § 2601 relating to unfair claim settlement practices; the fifth cause of action requests a declaratory judgment declaring that plaintiffs have coverage under the subject policy for said fire loss and that defendant must pay plaintiffs under the policy to enable plaintiffs to rebuild the building before the end of 2004 to preserve the building's zoning status; and the sixth cause of action alleges that defendant's self-serving unilateral interpretation of the subject policy to deny coverage constitutes a breach of fiduciary duty.

In all but their fifth cause of action for a declaratory judgment, plaintiffs seek to recover damages for loss of business, attorney's fees, costs and disbursements and interest from the date of filing of the proof of loss. In their second cause of action for fraud they also seek exemplary damages, and in their third cause of action under General Business Law § 349, plaintiffs seek treble damages.

By its answer defendant asserts 14 affirmative defenses, including that plaintiffs breached conditions precedent for recovery by failing to comply with policy provisions requiring plaintiffs to return executed examination under oath transcripts to defendant, to produce material records and documents, and to have a central station fire alarm system; that the policy does not provide coverage for damages caused by the enforcement of zoning laws or acts or decisions of a zoning board, or for consequential damages due to delay or loss of use; and that the second, third, fourth, and sixth causes of action as well as plaintiffs' claims for extra-contractual, punitive, and/or exemplary damages and attorney's fees fail to state a cause of action.

Defendant now moves for dismissal pursuant to CPLR 3211 (a)(7) of the second, third, fourth and sixth causes of action of the complaint and all claims seeking punitive damages, treble damages, exemplary damages, extra-contractual damages, and attorney's fees. In support of its motion, defendant submits the summons, the verified complaint, and the answer.

Plaintiffs now cross-move for a declaratory judgment, directing defendant to pay the full amount of the claim with interest and for an award of damages and attorney's fees. In support of the cross motion, plaintiffs submit the affidavit of plaintiff Robert Mirabelli; the declarations pages of a Businessowners Insurance Policy issued by Merchants Insurance Group covering the subject premises for the policy period September 11, 2003 to September 11, 2004 with a \$500,000.00 fire coverage limit and the application for insurance; a State of New York Standard Fire Claim Form; the summons and verified complaint; and a letter

dated June 3, 2004 from plaintiffs' attorney to defendant's attorney informing of the building's prior nonconforming use status. In his affidavit, plaintiff Robert Mirabelli states that plaintiffs have been advised by officials of the Town of Brookhaven that since they did not rebuild within one year to preserve their prior existing use zoning status, plaintiffs must locate any new building further back from the highway, which would invade an environmentally protected wetland and that as a result the property cannot be developed.

In reply, defendant contends that plaintiffs' request for a declaratory judgment is premature pursuant to CPLR 3212 (f) inasmuch as discovery is incomplete and there remain numerous issues of fact as to whether plaintiffs materially breached conditions precedent provisions of the subject insurance policy. Defendant points out that plaintiffs never filed a proof of loss with respect to this claim and that prior to any determination by defendant of whether coverage existed, plaintiffs commenced the instant action. With its reply defendant submits, among other things, the affidavit of Douglas Galenza, the property claim representative of Merchants Mutual Group who processed plaintiffs' claim; a complete copy of the subject policy; and portions of plaintiffs' examinations under oath.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine, accepting as true the factual assertions of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated (*Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2d Dept 2002]).

With respect to the second cause of action alleging fraud in the inducement, to establish a prima facie case of actual fraud, a plaintiff must present proof that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations (*see, Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403, 407, 176 NYS2d 259 [1958]; *113-14 Owners Corp. v Gertz*, 123 AD2d 850, 851, 507 NYS2d 464 [2d Dept 1986], *appeal denied* 70 NY2d 604, 519 NYS2d 1027 [1987]). Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016 (b) (*Black v Chittenden*, 69 NY2d 665, 668, 511 NYS2d 833 [1986]; *Priolo Communications v MCI Telecommunications Corp.*, 248 AD2d 453, 454, 669 NYS2d 376 [2d Dept 1998]; *Michaelson v Scaduto*, 205 AD2d 507, 508, 612 NYS2d 659 [2d Dept 1994]).

Here, the second cause of action must be dismissed, since the mere allegation that defendant induced plaintiffs to enter into a contract and purchase a policy that defendant did not intend to honor does not state a cause of action in fraud (*see, New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 [1995]; *Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 785 NYS2d 236 [4th Dept 2004]). In addition, neither the complaint nor plaintiffs' submissions in opposition to the motion set forth the affirmative misrepresentations that supposedly induced plaintiffs to purchase a policy from defendant (*see, National Union Fire Ins. Co. of Pittsburgh, P.A. v Red Apple Group, Inc.*, 273 AD2d 140, 710 NYS2d 48 [1st Dept 2000]).

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Regarding the third cause of action, under General Business Law §349 (a), deceptive acts or practices in the conduct of any business in this state are unlawful (*see, Karlin v IVF Am.*, 93 NY2d 282, 690 NYS2d 495 [1999]; *New York Univ. v Continental Ins. Co.*, *supra*). The essential elements of a cause of action alleging consumer fraud in violation of General Business Law §349 are that the defendant engaged in a consumer-oriented misleading practice and that the plaintiff was injured thereby (*New York Univ. v Continental Ins. Co.*, *supra*; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 623 NYS2d 529 [1995]; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 630 NYS2d 769 [2d Dept 1995], *appeal dismissed* 87 NY2d 937, 641 NYS2d 596 [1996]).

Here, plaintiffs' allegations, liberally construed, at best show a private contract dispute over policy coverage and the processing of plaintiffs' claims, not conduct affecting the consuming public at large, and thus do not state a cause of action under General Business Law § 349 (*see, New York Univ. v Continental Ins. Co.*, *supra*; *Continental Cas. Co. v Nationwide Indem. Co.*, ___ NYS2d ___, 2005 WL 729187, 2005 NY Slip Op 02546 [NYAD 1 Dept Mar 31, 2005]). Therefore, the third cause of action alleging deceptive business practices under General Business Law § 349 is dismissed.

With respect to the fourth cause of action, the law of this state does not currently recognize a private cause of action under Insurance Law § 2601 (*see, Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339 [1994]; *see also, New York Univ. v Continental Ins. Co.*, *supra*; *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 745 NYS2d 545 [2d Dept 2002], *lv dismissed* 99 NY2d 552, 754 NYS2d 204 [2002]). If the statute does not permit a private right of action in favor of an insured, a fortiori, it cannot be construed to impose a tort duty of care flowing to the insured separate and apart from the insurance contract (*see, New York Univ. v Continental Ins. Co.*, *supra*). Therefore, the fourth cause of action alleging violations of Insurance Law § 2601 is dismissed.

Regarding the sixth cause of action for breach of fiduciary duty based on defendant's alleged self-serving unilateral interpretation of the subject policy, said cause of action is essentially duplicative of the breach of contract cause of action (*see, New York Univ. v Continental Ins. Co.*, *supra*; *Hassett v New York Cent. Mut. Fire Ins. Co.*, 302 AD2d 886, 753 NYS2d 788 [4th Dept 2003]). Thus, the sixth cause of action must be dismissed.

As for plaintiffs' request for punitive damages which plaintiffs variously characterize as exemplary and treble, "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights" (*see, Rocanova v Equitable Life Assur. Socy. of the United States*, *supra*). "Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally" (*id.* at 613, 612 NYS2d 339). Allegations against an insurer for breach of an insurance contract, even a breach committed willfully, and without justification, as is alleged in the instant complaint, are insufficient for recovery of punitive damages

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(*Valis v Allstate Ins. Co.*, 132 AD2d 658, 518 NYS2d 153 [2d Dept 1987]). In addition, since the Court has determined that plaintiffs' complaint fails to allege a tort independent of the contract and has dismissed the second, third, fourth and sixth causes of action, plaintiffs' claims for punitive damages must also be dismissed (*see, New York Univ. v Continental Ins. Co., supra*).

Moreover, courts have uniformly dismissed claims for consequential damages premised upon an insurer's alleged failure to timely pay on its insured's claim because "[s]uch consequential damages neither arose from defendant's breach of the insurance contract, nor were they within the contemplations of the parties when the policy was issued" (citations omitted) (*see, Grand Metro Transit Mix Corp. v Michigan Mut. Ins. Co.*, 170 Misc2d 872, 652 NYS2d 691 (Sup Ct, Nassau County, Nov 14, 1996), *lv dismissed* 92 NY2d 1000, 684 NYS2d 186 [1998]). Here, since the parties specifically contemplated and contracted for coverage for the loss of operation of plaintiffs' business under Section 5 "Additional Coverages" subsection f "Business Income" of the policy and did not contract for consequential damages beyond that endorsement, plaintiffs cannot recover consequential damages based on defendant's failure to timely process and pay plaintiffs' claim which allegedly resulted in the loss of their prior non-conforming use zoning status (*see, id.*).

Furthermore, plaintiffs' extra-contractual damage claims for attorney's fees must be dismissed inasmuch as "an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy [of insurance]" (*New York Univ. v Continental Ins. Co., supra* at 324; *see also, Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21, 416 NYS2d 559 [1979]; *Gold v Nationwide Mut. Ins. Co.*, 273 AD2d 354, 709 NYS2d 203 [2d Dept 2000]). Therefore, defendant's motion to dismiss is granted in its entirety.

As for the cross motion, the Court initially notes that plaintiffs' requested relief is essentially in the nature of summary judgment on their complaint. An insurer has the right to investigate an incendiary loss, and the insured is required to cooperate in that investigation (*see, 2423 Mermaid Realty Corp. v N.Y. Prop. Ins. Underwriting Assn.*, 142 AD2d 124, 534 NYS2d 999 [2d Dept 1988], *appeal denied* 74 NY2d 607, 545 NYS2d 103 [1989]). Nowhere in his lengthy affidavit does plaintiff Robert Mirabelli address defendant's assertions in their motion that plaintiffs failed to comply with express conditions precedent in the policy requiring plaintiffs to return executed examination under oath transcripts to defendant, to produce material records and documents, and to have a central station fire alarm system in effect at the time of the fire (*see, Fulton v Allstate Ins. Co.*, 14 AD3d 380, 788 NYS2d 349 [1st Dept 2005]). Nor do plaintiffs respond to defendant's assertions that plaintiffs never submitted a proof of loss. In addition, plaintiffs failed to provide in support of their cross motion a complete copy of the subject policy indicating the express policy provisions and instead submitted only the declarations pages stating the limits of insurance, an endorsement, and the application for insurance. In any event, defendant supplied a complete copy of the subject policy with its reply papers. Nevertheless, plaintiffs' motion for summary judgment must be denied since they failed to sufficiently establish their cause of action for breach of contract which would entitle

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them to judgment as a matter of law (*see, Pellechia & Pellechia, Inc. v American Natl. Fire Ins. Co.*, 244 AD2d 395, 665 NYS2d 565 [2d Dept 1997]). All other relief requested by plaintiffs is denied.

Accordingly, the instant motion is granted and the second, third, fourth and sixth causes of action of the complaint and all claims seeking punitive damages, treble damages, exemplary damages, extra-contractual damages and attorney's fees are dismissed. The instant cross motion for summary judgment on the remaining first cause of action for breach of contract and fifth cause of action for a declaratory judgment is denied.

Dated: May 9, 2005.

EDWARD D. BURKE, A.J.S.C.