

**Consolidated Scrap Processing, Inc. v New
Hampshire Insurance Co.**

2006 NY Slip Op 30135(U)

March 17, 2006

Supreme Court, Cayuga County

Docket Number: 0007922/0051

Judge: Mark H. Fandrich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CAYUGA

CONSOLIDATED SCRAP PROCESSING, INC.,

Plaintiff,

vs

NEW HAMPSHIRE INSURANCE COMPANY,
and AMERICAN INTERNATIONAL GROUP, INC.,

Defendants.

DECISION
Index No. 05-0792

Assigned Justice:
HON. MARK H. FANDRICH

Appearances:

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Fandrich, Mark H., Acting Justice

Plaintiff started this action for damages resulting in the non-payment of a loss arising from a fire, under an insurance policy issued by defendants. Plaintiff alleges that defendants breached their contract of insurance by failing to pay the full amount of the loss, which includes loss of business income.

On September 22, 2003, a fire destroyed a portion of plaintiff's facility and caused plaintiff to close down operations. According to plaintiff, the parties initially agreed to the total amount of the property loss and income loss. However, defendants did not pay the amount that plaintiff demanded and claimed that plaintiff was underinsured. Plaintiff then made a written demand for an appraisal as provided for under the policy.

Under the policy in question, when there is a dispute as to the amount of net income and operating expense or the amount of loss, either party may make a written demand for an appraisal of the loss. Thereafter, an umpire can be selected to help in making a final decision.¹ Plaintiff served such a demand upon the defendants, but the defendants refused to enter into the process.

As part of its lawsuit against the defendants, plaintiff seeks consequential damages for defendants' failure to enter into the appraisal process. Plaintiff alleges that consequential damages are awardable because defendants breached their obligation for an appraisal and an umpire -- an obligation set up to expeditiously avoid disputes -- and that

¹ The appraisal clause provides, in part, the following: "If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either party may make written demand for an appraisal of the loss. In this event each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of Net Income and operating expense or amount of loss. If they fail to agree they will submit their differences to the umpire. A decision agreed to by any two will be binding."

as a consequence of such a breach, plaintiff had to commence this action and incur attorney's fees and costs.

Defendants brought the instant motion for dismissal of plaintiff's claims for consequential damages, attorney's fees and punitive damages pursuant to CPLR 3211 (a) (7).² Defendants argue that consequential damages of the kind demanded by plaintiff are not recoverable in New York. Defendants further claim that since plaintiff did not allege in the complaint that consequential damages were either foreseeable or within the contemplation of the parties at the time of the contract, the claim for consequential damages should be dismissed. Also, defendants argue that claims for attorney's fees should be dismissed since an insured cannot recover expenses against an insurer for merely bringing an action against the insurer to settle its rights under a policy of insurance.

Plaintiff moved to amend its Complaint to allege that the demanded consequential damages were within the contemplation of the parties or otherwise reasonably foreseeable by the parties at the time of contracting.

Defendants' motion for dismissal should be granted. Consequential damages of the kind alleged by plaintiff are not recoverable under the facts of this case since they were not contemplated by the parties when the insurance contract was made. "It is well established that in actions for breach of contract, the non-breaching party may recover general damages which are the natural and probable consequence of the breach. '[In] order to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach], i.e., in the ordinary course of things, arising

² Plaintiff now concedes that it is not entitled to punitive damages. (see Affirmation of plaintiff's counsel, Thomas C. Buckel, Esq.).

from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.’ ” (*Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 31, quoting *Chapman v Fargo*, 223 NY 32, 36.; *Hadley v Baxendale*, 9 Exch 341, 156 Eng Rep 145; *Sabbeth Industries, Ltd. v. Pennsylvania Lumbermens Mutual Insurance Company*, 238 A.D.2d 767, 3rd Dept., 1997). “In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered... as well as ‘what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.’ ” (*Kenford Co. v County of Erie*, *supra*, at 319, quoting *Globe Ref. Co. v Landa Cotton Oil Co.*, 190 US 540, 544; *Sabbeth Industries, Ltd. v. Pennsylvania Lumbermens Mutual Insurance Company*, *supra*).

In the instant case, plaintiff cannot recover damages -- such as attorney’s fees -- for defendants’ refusal to enter into an expedited process to determine plaintiff’s claim so as to limit plaintiff’s costs when enforcing its rights under the insurance policy in question. Such expenses are inherent in any lawsuit but are not the type of “consequential” damages contemplated by the parties when they entered into the insurance contract. That is not to say that in certain defined circumstances involving a breach of an insurance policy, consequential damages of the kind sought by the plaintiff herein have not been allowed. Recovery of attorney’s fees was held to be the natural consequence of a health insurer’s wrongful failure to pay hospital bills when the patient’s estate was sued for those bills. (*Estate of Coppersmith v. Blue Cross Blue Shield of*

Greater New York, 177 A.D.2d 373, 1991, First Dept.). And, in Williams v. Associated Mut. Ins. Co., (211 A.D.2d 865, 3rd Dept., 1995), an insured was entitled to attorney's fees incurred to vacate a default judgment when the insurer failed to provide a defense to a claim, although the insured was not entitled to attorney's fees in an action to compel the insured to provide a defense. These cases are dissimilar to plaintiff's lawsuit and thus are not applicable to plaintiff's lawsuit.

Plaintiff cites Acquista v. New York Life Ins. Co., (285 A.D.2d 73, 1st Dept., 2001), in support of its claim for consequential damages. In Acquista, the Appellate Division, First Department, ruled that allegations of an insurer's bad faith avoidance of valid insurances claims under an insured's disability insurance policies, could be support the insured's claim for consequential damages in the context of a breach of contract cause of action.³ The Court reasoned that this approach would give the insured an adequate remedy to redress an insurer's bad faith in settling a valid claim.

The Acquista case, however, appears to conflict with long standing precedent in New York State that damages for breach of contract are generally limited to damages required to remedy the breach. New York does not recognize an independent tort, outside of the contract, for bad faith conduct in avoiding payment of insurance claims or disclaiming coverage. (New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308; Rocanova v. Equitable Life Assur. Soc'y, 83 N.Y.2d 603; Makuch v. New York Central Mutual Fire Insurance Company, 12 A.D.3rd 1110, Fourth Dept., 2004; Brown v. The Paul Revere Life Insurance Company, 2001 U.S. Dist. LEXIS 16626, S.D.N.Y.; Core-Mark Int'l

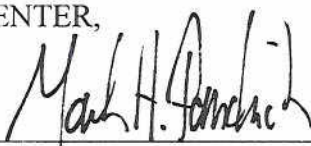
³ The Court refrained from adopting a tort cause of action for bad faith with respect to a first party claim. The Court noted that to do so "would constitute an extreme change in the law of this State."

Corp. v. Commonwealth Ins. Co., 2005 U.S. Dist. LEXIS 14312, S.D.N.Y). Therefore, plaintiff's claim for consequential damages and attorney's fees should be denied.

By reason of the foregoing, defendants' motion is granted and plaintiff's motion is denied, without costs.

SUBMIT ORDER.

Dated: March 17, 2006
At Auburn, New York

ENTER,


HON. MARK H. FANDRICH
Acting Supreme Court Justice