Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

LOGAN BUS CO., INC, et al.

- against -

FLEMING & HALL ADMINISTRATORS, INC., et al.

Index Number 22744 2004

Motion Date December 13, 2006

Motion Cal. Numbers 41, 42 & 43

The following papers numbered 1 to 32 read on this motion by defendant Arch Insurance Company, sued herein as Arch Insurance Group, Inc. seeks an order granting summary judgment dismissing the complaint, and granting summary judgment on its cross-claim for contractual indemnification against Fleming & Hall Administrators Inc. Defendant the Connecticut Indemnity Company separately moves for an order granting summary judgment dismissing the complaint with prejudice, and granting summary judgment on its cross-claim for contractual indemnification against Fleming & Hall Administrators Inc. Defendant Fleming & Hall separately moves for an order granting summary judgment dismissing the complaint.

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Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of a single decision and are

determined as follows:

The Pleadings:

Plaintiffs allege that they operate in excess of 1000 school buses, and that there are a limited number of insurance companies that provide insurance for such large fleets. Plaintiffs were insured by The Connecticut Indemnity Company (Connecticut) from November 15, 2000 through January 1, 2002. Connecticut entered into a claims service agreement dated March 1, 2000 with Fleming & Hall Administrators, Inc. (Fleming & Hall), whereby Fleming & Hall would act as the third-party administrator of insurance benefits.

Plaintiffs were insured by First American Insurance Company (First American) pursuant to a commercial general insurance policy and a commercial automobile policy effective January 1, 2002 through January 1, 2003. These policies were renewed on January 1, 2003 and were cancelled by the plaintiffs effective April 1, 2003. First American entered into a written claim service agreement with Fleming & Hall, effective June 1, 2001 through May 31, 2002, pursuant to which it acted as the insurer's third-party administrator with respect to claims under the policies. Fleming & Hall handled, investigated, settled or resolved all claims made against the insured plaintiffs under the insurance contracts at issue. First American terminated its agreement with Fleming & Hall, effective February 28, 2002, and entered into a new claim services agreement with another entity. In November 2002, First American became known as Arch Insurance Company (Arch).

Plaintiffs commenced this action on November 10, 2004 and allege that their premiums dramatically increased after November 2000, when Fleming & Hall became the third-party administrator. It is alleged that between September 13, 1997 and November 15, 2000, the third-party administrator for the insurance policies they purchased was provided Zurich Financial Services, at which time their premiums ranged from $1,426,000.00 and $1,659,000.00. It is asserted that during the period that plaintiffs were insured by Connecticut and Arch, Fleming & Hall was the third-party administrator and their premiums increased to $2,458,958.00.

Plaintiffs, in their first cause of action, allege that Fleming & Hall inflated the claims investigation charges, loss reserves, and loss payments relating to claims the plaintiffs submitted to Connecticut and Arch/First American. It is asserted that Fleming & Hall unnecessarily changed adjustors or investigators, opened and closed files, and used related entities

to provide unnecessary services at above market prices. It is also asserted that Fleming & Hall obtained higher fees by placing artificially inflated reserves on claims filed and made unnecessarily high settlements. Plaintiffs alleged that as a result of Fleming & Hall's actions they paid higher premiums to cover Fleming & Hall's costs to the insurers, and that they will continue to pay higher premiums at an artificially increased rate.

In the second cause of action, plaintiffs allege that Connecticut and Arch owed them a common-law and contractual duty to handle claims fairly and in a commercially reasonable manner, and that they breached this duty by failing to exercise proper oversight over Fleming & Hall. It is further alleged that "the insurance company defendants knowingly conspired with Fleming & Hall to charge plaintiffs, and thus collect inflated premiums for insurance. Accordingly, the insurance company defendants are liable for the wrongful conduct of Fleming & Hall."

Plaintiffs seeks to recover from all defendants more than $7 million dollars in compensatory and more than $14 million dollars in punitive damages.

Defendant Arch served an answer and interposed seven affirmative defenses, as well as cross claims against Fleming & Hall for common-law and contractual indemnification, contribution, and for breach of the service contract based upon the failure to provide a defense and indemnification, and seeks to recover attorneys fees incurred in the defense of the action.

Defendant Connecticut served an answer and interposed affirmative defenses, as well as cross-claims against Fleming & Hall for common-law and contractual indemnification, contribution and to recover attorneys fees based upon the service contract's indemnification clause.

Defendant Fleming & Hall has served an answer and interposed six affirmative defenses.

Defendant Arch and defendant Connecticut and Fleming & Hall's motions for summary judgment dismissing the complaint the grounds that it fails to state a cause of action:

It is well settled that "'[i]n considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleadings must be liberally construed (see CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2003]; see

also Bovino v Village of Wappingers Falls, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see Morone v Morone, 50 NY2d 481 [1980]; Gertler v Goodgold, 107 AD2d 481 [1985], affd 66 NY2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'(Guggenheimer v Ginzburg, supra at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (see Guggenheimer v Ginzburg, supra at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)." (Gershon v Goldberg, 30 AD3d 372, [2006]; Hispanic Aids Forum v Estate of Bruno, 16 AD3d 294, 295 [2005]; Sesti v N. Bellmore Union Free Sch. Dist., 304 AD2d 551, 551-552 [2003]; Mohan v Hollander, 303 AD2d 473, 474 [2003]; Doria v Masucci, 230 AD2d 764, 765 [1996]; Rattenni v Cerreta, 285 AD2d 636, 637 [2001]; Kantrowitz & Goldhamer v Geller, 265 AD2d 529 [1999]; Mayer v Sanders, 264 AD2d 827, 828 [1999]; Sotomayor v Kaufman, Malchman, Kirby & Squire, 252 AD2d 554 [1998].)

Plaintiffs' first cause of action does not state a claim against the insurers, and therefore is dismissed as to Connecticut and Arch.

Plaintiffs' second cause of action alleges that Arch and Connecticut breached a common-law and contractual duty of good faith and fair dealing, in that Fleming & Hall's handling of their claims resulted in their paying higher premiums. It is further asserted as their premiums are based upon the amounts paid in 2003, they will continue to increase at an artificially high rate.

New York does not recognize a cause of action for breach of an insurer's implied covenant of good faith and fair dealing where it is alleged that an insurer's failure to reasonably investigate claims made against the insured resulted in increased retrospective premiums. (Comm'rs of the State Ins. Fund v Beyer Farms, Inc., 15 AD3d 273, 274 [2005]; Insurance Co. of Greater New York v Glen Haven Residential Health Care Facility, 253 AD2d 378, 379 [1988].) Here, although the premiums charged to the plaintiffs were not calculated on a retroactive basis, the court finds that no cause of action exists to recover damages for the payment of experience rated premiums, based on the manner in which a third-party administrator investigated and settled claims, or set the amounts of reserves for the payment of claims, and calculated the premiums. (See Commissioner of the State Ins. Fund v J.D.G.S., 253 AD2d 368 [1998]; Hovsepian v Allstate Ins.

Co., 5 Misc 3d 10107A [2004].) An insurance carrier is not obligated to consult with its insured in regard to settlement of a claim. (See Knobloch v Royal Globe Ins. Co., 38 NY2d 471, 479 [1976].) Indeed, a cause of action alleging a breach of the insurer's duty of good faith will not lie where the insurer settled claims within the monetary limits of the insured's policy. (Feliberty v Damon, 129 AD2d 207, 210 [1988].) Here, the policies delegated to the insurers the exclusive authority to investigate and settle claims, and the manner in which the insurers performed this function was a matter of business judgment within the discretion of its management. (Insurance Co. of Greater N.Y. v Glen Haven Residential Health Care Facility, supra at 379.) It is noted that plaintiffs do not allege that they ever objected to the settlement of any claims, or that the settlements exceeded the monetary limits of the policy. Having accepted the benefit of the policies issued by Connecticut and Arch, plaintiffs cannot now raise the question as to whether the rates charged were unreasonable or exorbitant.

Plaintiffs' claim that the Arch and Connecticut knew of Fleming & Hall's alleged misconduct and permitted it to continue because the increase premiums would, over time, exceed the amount it paid out in increased fees and settlements, is flatly contradicted by the record. Plaintiffs' do not allege that they ever objected to the calculation of the premiums they paid during the time they were insured by either Arch or Connecticut. Rather, plaintiffs complaints only arose after they were required to become self-insurers for school buses operated in New York City. As regards the premiums paid under the policies issued by Connecticut, these policies state on their face that the premiums are based upon the square footage of the insured premises and the number of insured vehicles. Connecticut has submitted an affidavit from Mark Svirchev, the Business Transition Manager of the underwriting department of an affiliated insurance company, in which he states that any increase or decrease in the premiums charged to the plaintiffs were based upon an increase or decrease in the number of vehicles and square footage, and not upon plaintiffs' loss history, or the amounts paid for claims and losses. In a reply affidavit, Mr. Svirchev states that this policy was an experienced rated policy, and that although the loss history was one of the factors considered in determining the premium, the premium is not a direct result of the loss history. He states that in analyzing the loss history, the focus is the frequency of the losses, and not on the severity or amount of the loss. Mr. Svirchev further states that for an experience rated policy, a cap of $25,000.00 is placed on each loss in calculating the modification formula, regardless of the total losses of any particular insured. Since Connecticut only insured plaintiffs for 13 and ½ months, the premium was based upon the loss

experience incurred during the policy period, and the loss experience of the prior insurer. Finally, he states that the unallocated loss adjustment expenses (costs associated with internal claims handling) were not included in the experience rating formula.

Arch's policy went into effect on January 1, 2002 and plaintiffs do not allege that there was any increase in premiums when the policy was renewed on January 1, 2003. The commercial general liability insurance policies issued by Arch/First American, by its terms, states that the premiums were based upon the amount of "square feet" at each location, which included automobile repair or service shops, private parking, administrative offices, buildings or other premises, and additional insured's. The commercial automobile insurance policies issued by Arch/First American, by its terms states, that the premiums were based upon the vehicles. Arch also states that the premiums charged were based upon, among other things, the plaintiffs' claims loss history, loss and claim expenses experience, and reserves assigned to claims. It is undisputed that an insurer may consider the insured's loss history, as well as other factors, in setting rates. Arch was charged a flat rate premium that was calculated prior to January 1, 2002. Therefore, the amount charged for these premiums could not have been affected by Fleming & Hall's alleged actions during the time plaintiffs were insured by Arch.

Plaintiffs' in opposition to the motions to dismiss have submitted an affidavit from Joel Auerbach, the president of Jaybach Associates, Inc., and an insurance broker. Mr. Auerbach states that the insurance premiums paid by the plaintiffs were experience rated, and merely reiterates the allegations set forth in the complaint as regards Fleming & Hall and the payment of allegedly inflated premiums. This affidavit is insufficient to establish a meritorious claim against the insurers, or Fleming & Hall.

Plaintiffs assert that Fleming & Hall's conduct has caused them to pay high insurance premiums "whether such conduct is considered to be a breach of contract, a breach of the implied covenant of good faith and fair dealing, negligence or some other cause of action ...." Plaintiffs, however, concede that they are not in privity with Fleming & Hall, and therefore may not maintain a claim for breach of contract. In addition, even if plaintiffs were to be considered a third-party beneficiary of Fleming & Hall's service agreement with the insurers, they may not, for the reasons stated above, maintain a claim against Fleming & Hall based upon the investigation and settlement of claims under the insurance policies. The court further finds that the complaint fails to state a claim against Fleming & Hall

for negligence or for any intentional tort.

Finally, although plaintiffs now assert that they have not alleged that the insurers entered into a conspiracy with Fleming & Hall, this claim is flatly contradicted by the plain language of the complaint. Therefore, to the extent that the second cause of action alleges a cause of action for conspiracy, it is well settled that "a mere conspiracy to commit a [tort] is never of itself a cause of action." (Brackett v Griswold, 112 NY 454, 467 [1889]; Alexander & Alexander, Inc. v Fritzen, 68 NY2d 968, 969 [1986]; Ward v City of New York, 15 AD3d 392,392 [2005]; Multiloan Mortg. Co., LLC v Asian Gardens Ltd., 303 AD2d 658, 661 [2003]; Daly v Messina, 267 AD2d 345 [1999].) Furthermore, no cause of action exists, in either contract or tort, for conspiracy to breach a contract to which a plaintiff is a party. (North Shore Bottling v Schmidt & Sons, 22 NY2d 171 [1968]; Bereswill v Yablon, 6 NY 301 [1959]; Labow v Para-Ti Corp., 272 AD2d 890 [1947]; Miller v Vanderlip, 285 NY 116 [1941].)

In view of the foregoing, those branches of defendant Arch's motion and defendant Connecticut's motion which seek to dismiss the complaint, are granted. Fleming & Hall's motion to dismiss the complaint is also granted.

Connecticut's request for summary judgment against Fleming & Hall on its cross motion for contractual indemnification:

The moving papers do not indicate that Fleming & Hall served a reply or an answer to Connecticut's cross claims. Therefore, although Fleming & Hall appears to have defaulted on the cross claims, Connecticut is required to establish its right to summary judgment on its cross-claim for breach of contract. This cross-claim is based upon the indemnification provisions set forth in Section Six of its agreement with Fleming & Hall, and seeks to recover attorneys' fees and costs expended in the defense of plaintiffs' action. Section Seven, C of said agreement, however, provides that "[a]s a condition precedent to any suit brought by either party, any controversy or claims asserted by either party, including but not limited to claims of negligence or breach of contract, shall be submitted to non-binding mediation," and sets forth the method for selecting a mediator, and the time frame for conducting such mediation. Connecticut does not assert, nor has it established, that it sought mediation of its indemnification claim prior to interposing the subject cross-claim against Fleming & Hall for breach of contract. The court therefore finds that as Connecticut has not complied with the contractual condition precedent to suit, it cannot maintain its cross claim breach of the contract's indemnification provision. Connecticut's request for summary judgment on this cross claim therefore is denied,

and the cross claim is dismissed. Inasmuch as the remaining cross claims are dependent upon a finding of liability against Connecticut, they are also dismissed (CPLR 3212[a]).

Arch's request for summary judgment against Fleming & Hall on its cross motion for contractual indemnification:

The moving papers do not indicate that Fleming & Hall served a reply or an answer to Arch's cross claims. Therefore, although Fleming & Hall appears to have defaulted on the cross-claims, Arch is required to establish its right to summary judgment on its cross-claim for breach of contract. Arch's claim for breach of contract is based upon the provisions set forth in section " XII" of the parties' agreement entitled "Indemnity," and seeks to recover attorneys fees and costs expended in defending the plaintiffs' action. This agreement, however, also contains an arbitration clause in section "XIV" which provides that "[a]ll disputes or differences arising out of the performance of or the interpretation of this Agreement must be settled by Binding Arbitration" and sets forth the method for selecting the arbitrators, the qualifications of the arbitrators, and where and how arbitration is to proceed. The agreement further provides " This Section will apply whether that dispute arises before or after termination of this Agreement." The court therefore finds that Arch is required to arbitrate its claim for breach of the contract's indemnification clause. Arch's request for summary judgment on this cross-claim therefore is denied, and the cross claim is dismissed. Inasmuch as the remaining cross-claims are dependent upon a finding of liability against Arch, they are also dismissed. (CPLR 3212[a].)

Conclusion:

Defendant Arch's motion to dismiss the complaint is granted, and its request for summary judgment against Fleming & Hall on its cross-claim for contractual indemnification is denied, and the cross-claims are dismissed. Defendant Connecticut's motion to dismiss the complaint is granted, and its request for summary judgment against Fleming & Hall on its cross-claim for contractual indemnification is denied, and the cross-claims are dismissed. Fleming & Hall's motion to dismiss the complaint is granted.

Dated: March 26, 2007

J.S.C.