

Gillen v Utica First Insurance Co.

2007 NY Slip Op 34306(U)

December 28, 2007

Supreme Court, Suffolk County

Docket Number: 0001967/2004

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 1967/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 THOMAS J. GILLEN, as trustee of the
 Gillen Living Trust,

Plaintiff,

-against-

UTICA FIRST INSURANCE CO.,

Defendant.

ORIG. RETURN DATE: AUGUST 16, 2007
 FINAL SUBMISSION DATE: SEPTEMBER 27, 2007
 MTN. SEQ. #: 006
 MOTION: MOT D

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Upon the following papers numbered 1 to 6 read on this motion _____
TO REARGUE AND RENEW

Notice of Motion and supporting papers 1-3 ; Addendum 4 ; Answering Affidavits and
 supporting papers 5 ; Replying Affidavits and supporting papers 6 ; it is

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 2221, granting plaintiff leave to reargue a prior motion by defendant to dismiss plaintiff's second and third causes of action, which was granted by Order dated October 5, 2006 (Werner, J.), is hereby **GRANTED**. Upon reargument, the Court adheres to the determinations in the Order of October 5, 2006 (Werner, J.), and as such, plaintiff's application is **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that the branch of plaintiff's application for an Order, pursuant to CPLR 2221, granting plaintiff leave to renew the aforementioned motion by defendant to dismiss based upon a subsequent decision and Order of the Appellate Division in this matter dated June 19, 2007 (*Gillen v Utica First Ins. Co.*, 41 AD3d 647), is hereby **GRANTED**. Upon renewal, the Court adheres to

the determinations in the Order of October 5, 2006 (Werner, J.), and therefore this branch of plaintiff's application is **DENIED**.

The instant application has come before this Court following the retirement of Justice Werner (see CPLR 9002).

The complaint in this action alleges causes of action sounding in breach of contract and deceptive business practices (General Business Law § 349). Plaintiff alleges in his first cause of action that defendant breached its obligations under a business insurance policy issued by defendant. Specifically, plaintiff alleges that following a heavy snowstorm on or about February 17, 2003, the insured premises located in Freeport, New York was damaged when the weight of snow and ice on the roof caused at least four of the roof trusses to fracture and the roof to sag. The damage to the roof resulted in the tenant, a beauty salon, vacating the premises. The subject policy covered both the cost of repairs to the roof and damages from business interruption.

Plaintiff alleges that the damages for repair to the roof, less the policy deductible was \$55,000.00 and that he made a prompt claim to defendant and that defendant not only initially disclaimed coverage, but "subsequently and in a protracted manner offered to pay \$12,828.33 then \$15,000 and finally \$23,821.54." Plaintiff further alleges that defendant's refusal to pay the amount due under the policy caused additional damage in the amount of \$25,000.00, and that: "Utica directly or through its agents and employees repeatedly sought to manipulate plaintiff to his detriment with information it knew to be false, including the following: (a) that plaintiff was required to repair the damage within 180 days of the loss, whereas there is no such requirement in the policy; (b) that plaintiff had two years from the loss to commence an action against Utica, whereas the policy requires that any such action be commenced within one year of the loss; (c) that a release to be signed by plaintiff was in return for the cost of repair, whereas it also covered income loss, thereby waiving same; (d) that a proposed payment was to be an 'advance' whereas the paper to be signed was a full release."

In his second cause of action for deceptive business practices under General Business Law § 349, plaintiff sought statutory damages in the amount of \$1,000.00 alleging that the conduct of defendant "was pursuant to a practice of intentionally deceiving policyholders about their rights and offering a policyholder a payment that the insurer knows is substantially less than is due under the

policy, thereby compelling the policyholder to institute a lawsuit to recover the amount lawfully due.”

By his third cause of action, plaintiff sought damages in the amount of \$10 million as punitive damages for an “egregious fraud on the public,” alleging defendant violated the “duty of insurers to exercise due care in adjusting the claims of their policyholder because the nature of such coverage makes policy holders extraordinarily dependent upon the timely, fair and equitable settlement of such claims.”

Defendant had previously filed a motion to dismiss plaintiff’s second and third causes of action. Defendant argued that the allegations of the complaint failed to state a cognizable claim under General Business Law § 349, as plaintiff failed to allege: (1) a consumer oriented act or practice; (2) which is misleading in a material respect; and (3) which results in injury to the plaintiff (see *Stutman v Chemical Bank*, 95 NY2d 24 [2000]). Defendant further argued that plaintiff failed to state a claim for punitive damages as he had not demonstrated: (1) that defendant’s conduct was actionable as an independent tort; (2) was of an egregious nature; (3) was directed to plaintiff; and (4) was part of a pattern directed at the public generally (see *New York University v Continental Ins. Co.*, 87 NY2d 308 [1995]).

By Order dated October 5, 2006 (Werner, J.), the Court granted defendant’s motion and dismissed plaintiff’s second and third causes of action. The Court held that plaintiff’s complaint recited only conduct on the part of defendant relative to the “private dispute” between the parties regarding the amount of damages due under the policy as a result of the snowstorm on or about February 17, 2003, and failed to present allegations of any scheme in dealing with the general public. The Court further held that plaintiff failed to provide any sworn allegations of facts to support a finding of “good ground” to permit him to replead his second and third causes of action. Plaintiff had submitted an affirmation of counsel in support of his request to replead, but failed to include an affidavit of someone with direct knowledge of the relevant facts.

In support of that branch of plaintiff’s instant motion for an Order, pursuant to CPLR 2221(d), granting leave to reargue the prior motion by defendant to dismiss, plaintiff argues that the Court: (1) impermissibly placed on plaintiff a burden of proof of a motion for summary judgment; (2) failed to consider that no businesses are exempt from General Business Law § 349; (3) failed to

consider that there was other egregious conduct on the part of the defendant aside from defendant's "bad faith" refusal to pay; (4) failed to consider that a material omission from the policy, i.e., that an insured must sue defendant to collect, supports a fraud cause of action; (5) failed to consider that this is not a case in which a general intention to perform a contract was misrepresented, but rather, there was a fraudulent omission, i.e., that the insured would have to sue defendant to collect; and (6) on plaintiff's prayer for leave to plead again, failed to consider an affidavit of plaintiff inadvertently omitted from the opposition papers but filed in support of a prior motion by plaintiff to strike defendant's answer. Upon reargument, plaintiff seeks an Order denying defendant's motion to dismiss in its entirety.

Plaintiff further seeks an Order, pursuant to CPLR 2221(e), granting leave to renew defendant's motion to dismiss in light of the Appellate Division's subsequent decision and Order in this matter dated June 19, 2007 (*Gillen v Utica First Ins. Co.*, 41 AD3d 647). Upon renewal, plaintiff seeks an Order denying defendant's motion to dismiss in its entirety.

A motion for leave to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the original motion, but shall not include any matters of fact not offered on the prior motion (see CPLR 2221[d]; *Cruz v Masada Auto Sales, Ltd.*, 41 AD3d 417 [2007]; *Barrett v Jeannot*, 18 AD3d 679 [2005]). In contrast, a motion for leave to renew must be based upon new material facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination (see CPLR 2221[e]).

With respect to that branch of plaintiff's motion seeking leave to reargue, upon reargument, the Court finds that Justice Werner, in her Order of October 5, 2006, did not overlook or misapprehend matters of fact or law when dismissing plaintiff's second and third causes of action. The Court found that the record established a "private dispute" between the parties regarding the amount of damages due under the policy of insurance as a result of the snowstorm on or about February 17, 2003, and failed to present allegations of any scheme in dealing with the general public. As such, the Court dismissed plaintiff's second cause of action alleging a violation of General Business Law § 349, and third cause of action for punitive damages as a result of defendant's alleged "egregious fraud on the public."

The Court finds that plaintiff has not met the threshold requirement of charging conduct that has a broad impact on consumers at large so as to state a cause of action for deceptive acts or practices under General Business Law § 349 (see *New York University v Continental Ins. Co.*, 87 NY2d 308, *supra*). The Court finds, as did the Court in its Order of October 5, 2006 (Werner, J.), that this is essentially a “private” contract dispute over the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large (see *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20 [1995]; *Breen Belgium BVBA v International Foreign Currency, Inc.*, 37 AD3d 633 [2007]; *Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841 [2005]; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141 [1995]). Moreover, courts have repeatedly held that disputes between policy holders and insurance companies are nothing more than private contractual disputes that lack the consumer impact necessary to state a claim pursuant to General Business Law § 349 (see *New York University v Continental Ins. Co.*, 87 NY2d 308, *supra*; *Perfect Dental, PLLC v Allstate Ins. Co.*, 2006 US Dist LEXIS 62226 [EDNY 2006]; *Lava Trading, Inc. v Hartford Fire Ins. Co.*, 326 F Supp 2d 434 [SDNY 2004]; *DePasquale v Allstate Ins. Co.*, 179 F Supp 2d 51 [SDNY 2002]). Accordingly, the second cause of action was properly dismissed.

With respect to plaintiff’s third cause of action, punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as “gross” and “morally reprehensible,” and of “ ‘such wanton dishonesty as to imply a criminal indifference to civil obligations’ ” (*Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603 [1994], quoting *Walker v Sheldon*, 10 NY2d 401 [1961]). As discussed, the pleading elements required to state a claim for punitive damages as an additional and exemplary remedy when the claim arises from a breach of contract are: (1) defendant’s conduct must be actionable as an independent tort; (2) the tortious conduct must be of an egregious nature; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally (*New York University v Continental Ins. Co.*, 87 NY2d 308, *supra*). Here, plaintiff failed to establish any egregious or fraudulent conduct on defendant’s part that would warrant the imposition of punitive damages (see *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, *supra*; *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, *supra*; *KSW Mech. Servs., Inc. v American Protection Ins. Co.*, 40 AD3d 709 [2007]). Therefore, plaintiff’s third cause of action was properly dismissed.

Plaintiff also now argues that the Court should have considered an affidavit of plaintiff, which was filed on a previous motion to strike defendant's answer, in support of plaintiff's request for leave to plead again pursuant to CPLR 3211(e). Counsel acknowledges that plaintiff's affidavit was omitted, but alleges that the omission was "inadvertent and clerical." Plaintiff has now attempted to rectify his deficiency in proof by submitting the aforementioned affidavit, which was sworn to on August 10, 2005. The Court has reviewed plaintiff's affidavit and finds that the recitation of facts therein relate to plaintiff's property damage claim following the snowstorm of February 17, 2003, and the alleged failure of defendant to timely pay the full amount of the claim under the subject policy of insurance. The affidavit fails to allege any facts establishing "good ground" for granting leave to replead plaintiff's causes of action for deceptive business practices on the part of defendant or for punitive damages in the amount \$10 million for an "egregious fraud on the public" (*Vigiletti v Sears, Roebuck & Co.*, 42 AD3d 497 [2007]; *Island Surgical Supply Co. v Allstate Ins. Co.*, 32 AD3d 824 [2006]; *Lesesne v Lesesne*, 292 AD2d 507 [2002]). Accordingly, upon reargument, plaintiff's request for leave to replead his second and third causes of action pursuant to CPLR 3211(e) is **DENIED**.

Further, plaintiff seeks leave to renew based upon the Second Department's decision and Order in this matter dated June 19, 2007 (*Gillen v Utica First Ins. Co.*, 41 AD3d 647), arguing that the Order bears on the merits of defendant's position that the two causes of action asserted in the complaint are not viable. Upon renewal, the Court finds that plaintiff's reliance on the Second Department's holdings is misplaced. In the aforementioned Order, the appellate court merely held that the trial court providently exercised its discretion in denying defendant's motion for a protective order regarding certain interrogatories interposed by plaintiff. The Court found that the sought-after information was relevant to plaintiff's then-existing cause of action alleging a violation of General Business Law § 349. However, the Court did not pass on whether the claim was viable or sufficiently pleaded. Plaintiff informs the Court that the aforementioned appeal was perfected on September 26, 2006; at that juncture the cause of action was still pending as it had not yet been dismissed by the Order of October 5, 2006 (Werner, J.). Accordingly, upon renewal, plaintiff's application for an Order denying defendant's motion to dismiss based upon the decision and Order of the Appellate Division in this matter, is **DENIED**.

Finally, the Court finds that contrary to plaintiff's contention, the dismissal Order was not inconsistent with two prior Orders in this matter dated

November 2, 2005 and April 14, 2006 (Hudson, J.), and the decision and Order of the Appellate Division dated June 19, 2007. Although Justice Hudson found in his Order of November 2, 2005 that the material sought by plaintiff concerning other customer files is relevant, he made his finding based upon the fact that “[p]laintiff’s GBL Sec. 349 claim ha[d] not been disturbed thus far.” Moreover, as discussed hereinabove, the decision and Order of the Appellate Division did not pass on the merits of plaintiff’s then-existing claim, but rather found that the sought-after information was relevant to that claim premised upon General Business Law § 349. As such, the Orders are not inconsistent as they addressed discovery issues relative to the cause of action while it was still pending.

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court