

Financial Servs. Veh. Trust v Saad

2008 NY Slip Op 33404(U)

December 12, 2008

Supreme Court, Nassau County

Docket Number: 002279/08

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
FINANCIAL SERVICES VEHICLE TRUST,
Plaintiffs,

- against -

Index No. 002279/08
Sequence #001 002 003
#004 005 006

Part 40
11/21/2008

ANDRE H. SAAD,
Defendant.

.....
ANDRE H. SAAD,
Third-Party Plaintiff,

- against -

GOVERNMENT EMPLOYEES INSURANCE
COMPANY, KAY & GRAY, O'CONNOR,
MCGUINNESS, CONTE, DOYLE & OLESON,
WILLIAM WATSON, BELLAVIA, GENTILE &
ASSOCIATES, LLP, JOHN GENTILE,
SCHOEN & STRASSMAN, LLP, JOSEPH
AND MAYER J. SAAD, P.C.,
Third-Party Defendants.

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Before this Court is a motion to dismiss the complaint and several motions to dismiss the third-party compliant pursuant to CPLR §3211(a) for failure to state cause of action. Since dismissal of the complaint will render the other applications moot, the Court shall address defendant Saad's motion first (Seq. #005). The underlying facts of the case are as follows:

On July 10, 2003, defendant/third party plaintiff Andre Saad was involved in an automobile

accident with another vehicle driven by Valery Frumpkin which resulted in the deaths of two pedestrians, Sharon Rivers and Caprice Bush.

Defendant was driving a vehicle leased from Rallye Motors on December 20, 2003. The lease agreement contains the lessor's subsequent assignment of all right, title and interest in the vehicle and lease to Financial Services Vehicle Trust (FSVT), plaintiff herein, subject to the provisions of the dealer's agreement with BMW Financial Services NA, LLC (BMW).

Paragraph 33 provides for reimbursement for any monetary loss, liability or other expenses, including attorney's fees, by defendant Saad to the lessor, now FSVT, caused through use of the vehicle, i.e., by an automobile accident. In 2003, lessors were accountable to claims made under the strict liability legal doctrine.

Ultimately, the wrongful death actions were settled in the Surrogate's Court, County of Bronx (File Numbers 242M2007 and 2014 A 2003), through compromise orders dated May 8, 2007 and August 13, 2007. Under the former, administratrix Augusta Rivers was to receive \$800,000.00, \$250,000.00 from BMW and \$250,000.00 from defendant Saad and BMW or their insurance company, Zurich. GEICO paid \$100,000.00, the policy limit, on behalf of defendant Saad.

As to the latter compromise, administratrix Sharon Bush was to receive \$150,000.00 from FSVT and \$100,000.00 from GEICO.

Defendant's motion to dismiss is based upon his assertion that FSVT is not a proper party because it did not suffer a loss for which reimbursement is required under the lease agreement. In support of his position he submits copy of a check in the amount of \$150,000.00 from BMW to administratrix Bush.

In opposition to defendant's application, plaintiff submits an affidavit from BMW's Collection Team Leader who explains that BMW administers the lease on behalf of assignee FSVT, the owner on the certificate of title. BMW issued settlement checks solely as an agent of FSVT.

The language employed in the complaint refers to the contributions made to settle the two actions for a total of \$750,000.00. Although plaintiff does not use the word "loss", it is implied from its reference to the lease agreement that plaintiff is seeking indemnification and reimbursement for all monies it paid pursuant to the settlements (*cf.*, *Foley v. D'Agostino*, 21 AD2d 60).

Accordingly, plaintiff's complaint states a cause of action under the contract. Disclosure as to the nature of the corporate entities and their relationships ultimately may support defendant's theory, but at this juncture the complaint is sufficient. In any event, plaintiff's opposition provides an agency

explanation (see *Cron v. Hargo Fabrics*, 91 NY2d 362; CPLR §3211(a)(1)). Defendant's motion is denied (Seq. #005).

Turning now to the third-party complaint, there are five pre-answer applications to dismiss pursuant to CPLR §3211(a)(7). The first is from Government Employees Insurance Company (GEICO), defendant Saad's insurance company (Seq. #001), as well as four by the various law firms that represented defendant (Seq. #002 #003 #004 and #006). Third-party defendant Mayer J. Saad, P.C. has not filed a motion.

The third-party complaint against GEICO essentially asserts that by assigning his defense to the law firms of Kay & Gary and then O'Connor, McGuinness, Conte, Doyle & Oleson (William Watson, individually), GEICO fraudulently caused defendant/third-party plaintiff Saad to be subject to the instant improper and/or unlawful third-party claim.

Third-party plaintiff Saad asserts that GEICO, pursuant to the contract, had a fiduciary duty to ensure that he had proper representation at all proceedings emanating from the underlying wrongful death lawsuits and that William Watson, on behalf of the O'Connor firm, breached his fiduciary duty, which was independent of any other relationship he and/or the O'Connor firm had with GEICO or any other client.

Saad also asserts fraud, negligence, contract and fiduciary claims against the other moving third-party defendants, two of which, Bellevia, Gentile & Associates, LLP with John Gentile, individually and Schoen & Strassman, LLP with Joseph P. Strassman, individually, were his personal attorneys.

GEICO maintains that the third-party complaint against it should be dismissed since both wrongful death claims had the potential to exceed policy limits even with a minimal finding of fault against defendant Saad. Defendant Saad had lost a motion for summary judgment made after discovery was completed in the Supreme Court, County of Bronx based on credibility issues that were raised regarding the cause of the accident (Index #6034/04, Barry Salman, J.S.C., January 4, 2006).

At a subsequent mediation held with participants from all parties and insurers, GEICO proffered its policy limits.

The insurance contract provides "we [GEICO] may investigate and settle any claim or suit". GEICO argues that, therefore, it was not obligated to wait until after trial to offer its policy. The fact that its

insured was driving a leased vehicle which exposed him to an indemnification suit was beyond

GEICO's control.

With one exception, GEICO's application is denied.

The gravamen of the complaint is that GEICO failed to provide defendant Saad with a meaningful defense and to protect its insured when the O'Connor firm hired by GEICO also undertook to represent FSVT, the vehicle leasing company and owner, who had a potential indemnification claim against Saad, a fact of which GEICO was aware.

According to defendant Saad, he had a viable defense that the other automobile involved in the accident entered the intersection against the red light when the driver apparently suffered some sort of seizure.

In any event, defendant's position is also that the mediation settlement should not have taken place in the absence of his personal attorney, Bellvaia, Gentile.

The Court finds that defendant/third-party plaintiff has submitted an affidavit which "preserve[s] inartfully pleaded, but potentially meritorious claims" (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635; *Cron v. Hargo Fabrics*, *supra*, at 366).

The possibility that GEICO hired a firm that may have acted under a conflict of interest states causes of action based in fraud, contract and breach of fiduciary duty. Moreover, defendant's allegations go beyond ordinary negligence and support a failure of GEICO to act in its insured's best interests (*compare Pavia v. State Farm Insurance Company*, 82 NY2d 445).

However, third-party plaintiff's claim pursuant to General Business Law §349 is dismissed as against all third-party defendants. There is no support for the element that GEICO's hiring one firm to represent both defendants was a consumer oriented practice in 2003 (*see Stutman v. Chemical Bank*, 95 NY2d 24).

For the same reasons, the motion to dismiss by third-party defendant O'Connor, McGuinness, Conte, Doyle and Oleson, with William Watson individually is denied as premature (Seq. #003). The Court understands that movant represented FSVT as owner of the vehicle. However, the issue remains of whether, under the specific circumstances of this case, movant acted in the best interests of defendant Saad when it also represented FSVT.

Turning to the motion to dismiss by Kay & Gray the first firm to represent defendant Saad on behalf

of GEICO, the only assertion against them is that they failed to appear at a Department of Motor Vehicles' hearing when defendant Saad's private attorney appeared on his behalf.

It is undisputed that Kay & Gray was substituted out as counsel for defendant Saad on November 16, 2004 after interposing an answer in the first underlying wrongful death suit and never appeared on his behalf in the second action.

Accordingly, any complaint against movant Kay & Gray sounding in legal malpractice is dismissed as time barred.

Moreover, the third-party complaint fails to support any claim that this firm was involved in the settlement that lead to the instant action by FSVT for indemnification or reimbursements. The allegation that they failed to appear at a Department of Motor Vehicle hearing in no way establishes a causal connection as a matter of law (see *Hwang v. Bierman*, 206 AD2d 360; *Franklin v. Winard*, 199 AD2d 220; see also, *Volpe v. Canfield*, 237 AD2d 282).

Accordingly, third party defendant Kay & Gray's motion to dismiss is granted (Seq. #006).

The final two motions to dismiss are brought by defendant/third-party plaintiff's personal attorneys. The third-party complaint also includes causes of action for unjust enrichment against these firms.

Concerning the application by the Bellavia firm, the only causes of action left after defendant Saad's withdrawal of certain counts are the ones for breach of contract, breach of fiduciary duty, unjust enrichment and attorney's fees. These all sound in legal malpractice.

The basis of the complaint against Bellavia is that the firm negligently failed to appear at the mediation conference, thereby taking no action to protect him from a bad faith settlement stemming from a conflict of interest. Defendant Saad adds that Bellavia also failed to investigate other sources of insurance coverage, such as the disclaimer of third-party defendant Mayer J. Saad, P.C.'s insurance carrier.

The third-party complaint as amplified does not allege that Bellavia's inactions were the sole proximate cause of his potential loss but a cause, since, if Bellavia refused to allow the settlement on his behalf, the underlying actions could have proceeded to trial where defendant Saad would have been able to demonstrate no liability on his part.

Again, as with Bellavia's co-movants, it is simply premature to dismiss the action at this juncture.

Accordingly, the motion by third-party defendant Bellavia, Gentile & Associates, LLP with John Gentile individually is denied (Seq. #002).

Finally, the motion by third-party defendant Schoen & Strassman, LLP with Joseph P. Strassman individually to dismiss the claim for unjust enrichment and the return of the \$5,000.00 retainer fee (004) is determined as follows:

The Strassman firm was retained by defendant Saad between June 28, 2004 and April 22, 2005. The underlying actions were settled about twenty-two months later.

While the Strassman firm had the case, they attended the DMV hearing, communicated with the various other firms involved in the lawsuits and attended several examinations before trial at a fee of \$250.00 per hour.

Although allegations concerning fraud, legal malpractice, etc., have been withdrawn by defendant/third-party plaintiff, defendant Saad disputes that \$5,000.00 of the retainer was expended. His statement that "*arguably [he] did not receive the benefit of that which he paid for*" is discounted by the Court. The retainer agreement dated June 28, 2004 contains no such assurance of success.

Accordingly, the remaining cause of action for unjust enrichment is severed from the third-party complaint and a hearing is required to determine the issue of attorneys' fees.

Accordingly, this matter is referred to the Calendar Control Part (CCP2), for a hearing on the issue of Schoen & Strassman, LLP attorneys' fees to be held on FEBRUARY 17, 2009. The defendant/third-party plaintiff shall file and serve a note of issue, together with a copy of this order on defendant *pro se* and the Calendar Clerk of this Court including proof of payment, within twenty (20) business days of the entry of this order. The directive with respect to a hearing is subject to the right of the justice presiding in CCP 2 to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Should defendant/third-party plaintiff Saad fail to file a note of issue, the cause of action against third-party defendant Schoen & Strassman, LLP and Joseph P. Strassman shall be dismissed with prejudice without further order of the Court.

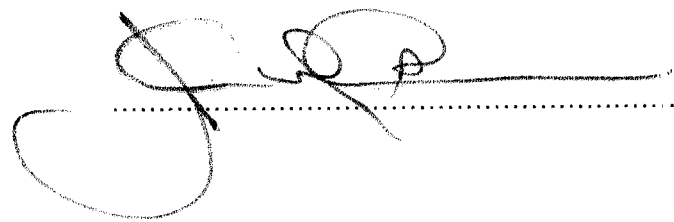
Since the first-party action must be resolved first, that contract action is severed from the third-party complaint and the third-party complaint shall remain in stay status.

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Should it be determined that defendant Saad is liable for damages, the stay will be lifted automatically without further order of the Court and, upon notification to and all remaining parties, the third-party defendants shall interpose their answers. Afterwards, third-party plaintiff Saad shall schedule a Preliminary Conference.

Dated: December 12, 2008


.....J.S.C.

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