SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x	**TRIAL PART: 19**
MARGARET MANSOURI and MICHAEL MANSOURI	**NASSAU COUNTY**
Plaintiff,	**INDEX NO: 7499/08**
-against-	**MOTION SEQ. NO: 1,2**
MERCURY INSURANCE GROUP and MERCURY CASUALTY COMPANY	
Defendant.	**SUBMIT DATE: 6/4/09**
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The following papers having been read on this motion:

Notice of Motion 1
Opposition 2
Cross-Motion.....3
Opposition.....4
Reply.....5

The motion by defendant Mercury Casualty Co. ("Mercury") and the cross-motion by plaintiffs are decided as hereinafter indicated. Plaintiffs have indicated that they have signed a Stipulation of Discontinuance against Mercury Insurance Group (see plaintiffs' affirmation in opposition, ¶ 3 dated March 26, 2009).

The plaintiffs commenced this action for declaratory action against Mercury in connection with a water damage claim that occurred in their premises located at 11 Syosset Circle, Syosset, N.Y. on or about October 20, 2007. Plaintiff had an insurance policy with Mercury. Mercury allegedly received a phone report from plaintiffs' insurance broker that plaintiffs had allegedly sustained water damage from an overflowing toilet bowl. Mercury alleges there were numerous "red flags" as to the validity of plaintiffs' claim–the individual plaintiffs had different versions on how the claim occurred, the damage report was for extensive damage beyond what would be caused by a toilet overflowing for a few minutes, and a prior report with another insurer which involved a toilet overflow with similar and expensive items being damaged.

Thus, Mercury seeks summary judgment as to plaintiffs' complaint and a declaration that Mercury has no duty or obligation to indemnify plaintiffs. In the alternative Mercury seeks to dismiss the first and second causes of action, pursuant to CPLR 3211(a)(7).

The branch of Mercury's motion for summary judgment must be denied.

An insured's failure to comply with the provisions of an insurance policy requiring an insured to submit to an examination under oath (hereinafter referred to as E.U.O.) and provide other relevant information is a material breach of the policy precluding recovery of policy proceeds (*Argento v Aetna Casualty and Surety Co.*, 184 AD2d 487).

Here, plaintiffs stated that they were willing (and contend they are still willing) to take an E.U.O. at anytime. Plaintiffs note their dispute involved discovery items plaintiffs felt they were entitled to, i.e., they wanted certain items before the plaintiffs would agree to an E.U.O.

The court notes that the plaintiffs did sit down with a Mercury employee for an extensive recorded session in which many questions were asked and answered by plaintiffs. (Plaintiffs' Cross Motion, Exhibit 2). Based on plaintiffs' version of events, plaintiffs did allegedly cooperate extensively with Mercury.

The insured is required to furnish written proof of loss as required by the insurance contract and demanded by defendant insurer (*Lentini Brothers Moving and Storage v New York Property Insurance Underwriting Ass'n.*, 76 AD2d 759). Here, the plaintiffs note Mercury never demanded written proofs of loss from them.

Also, Mercury cannot rely on plaintiffs' failure to timely respond to Mercury's Notice to Admit. The purpose of the Notice to Admit is to eliminate from dispute matters about which there can be no controversy (*Webo v Tire and Brake Distributor, Inc.*, 13 AD3d 835). The Notice to Admit submitted by Mercury contains many facts at the heart of the controversy. Mercury's reliance on plaintiffs' failure to timely respond to its Notice is unavailing.

Mercury's motion to dismiss the first cause of action of the plaintiffs' complaint (Defendants' Notice Motion, Exhibit B) for emotional distress as well as the second cause of action for alleged breach of "good faith" by Mercury is granted.

Absent an independent duty on which liability can be based, there is no right or recovery for emotional distress resulting from a breach of a contract related duty (*Wehringer v Standard Security*

Life Insurance co. of New York, 57 NY2d 757).

The court's have held that damages for emotional distress were not recoverable by an insured in an action against an insurer for an alleged breach of contract (*Rakylar v Washington Mutual Bank*, 51 AD3d 995; *Korona v Statewide Insurance Co.*, 122 AD2d 120).

Allegations that an insurer had no good faith basis for denying coverage are redundant to a cause of action for breach of contract based on the denial of coverage and they do not give rise to an independent tort cause of action (*Royal Indemnity Co. v Solomon Smith Barney, Inc.*, 308 AD2d 349; *see also Aquista v New York Life Insurance Co.*, 285 AD2d 73).

Allegations by plaintiff that a defendant insurance company engaged in persistent unfair claims settlement practices (Insurance Law § 2601) are better brought before the Superintendent of Insurance rather than by private actions (*see Kapeleris v Colonial Penn Ins. Co.*, 163 AD2d 918).

Thus, a cause of action for an alleged violation of Insurance Law § 2601 is not viable since New York State law does not currently recognize a private cause of action under Insurance Law § 2601 (*Rocanova v Equitable Life Assurance Society of U.S.*, 83 NY2d 603).

In plaintiffs cross-motion, they seek summary judgment, attorneys' costs, treble damages pursuant to General Business Law § 349 and Insurance Law § 216.6(?) to compel Mercury to accept plaintiffs 'response to Mercury's notice to admit, strike Mercury's answer for failing to supply plaintiffs with the appraiser/engineer's report or, in the alternative, preclude Mercury from offering any evidence on this matter at trial, grant plaintiffs summary judgment on the issue of Mercury's alleged bad faith and finally, grant plaintiffs' costs/fees pursuant to CPLR 8106 for Mercury's frivolous motion.

Plaintiffs request an appraiser/engineer's report from Mercury. Mercury has refused to offer the report since Mercury alleges the report was made solely in contemplation of trial and not in the regular course of business.

Where the investigation is not conducted solely in anticipation of litigation and the documents were prepared during the processing of an insured's claim, the documents are not protected from disclosure (*see 148 Magnolia, LLC v Merrimack Mutual Fire Ins. Co.*, 62 AD3d 486).

Documents made to see if coverage should be provided are not excludable; if documents

were prepared for settlement purposes, litigation should have been commenced and it should be after a coverage decision has been made (*see Brooklyn Union Gas Co. v American Home Assurance Co.*, 23 AD3d 190).

Accident reports made in the regular course of business are generally not privileged from disclosure so long as they are not proposed solely for the purpose of litigating and the burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing the discovery (*Sigelakis v Washington Group, LLC*, 46 AD3d 800).

Written statements of accidents prepared exclusively for litigation, but not in the regular course of business operations or practices are conditionally exempt from disclosure (*Matos v Akrom & Jamal Meat Corp.*, 99 AD2d 527).

The report in question, an engineer's report, was requested by Mercury especially to determine whether the incident could have possibly occurred as reported or whether the plaintiffs had improperly (fraudulently?) reported the incident and loss to Mercury. Mercury alleges the engineer was hired in anticipation of litigation (see Exhibit A annexed to Mercury's affirmation in opposition to plaintiffs' cross motion, the supplemental affidavit of A. Paul Hoffman, a senior casualty/property adjuster with Mercury).

As to the report given to Mercury by its expert, the court would like to examine it *in camera* so that it might fully evaluate it. It is impossible on the record now before the court to determine whether the document demanded, or any portion thereof, is privileged as argued by Mercury or discoverable as argued by the plaintiffs. Thus the document for which Mercury claims a privilege must be produced for *in camera* inspection by the court.

The court shall examine Mercury's engineer's report to determine if all or part thereof is excludable from discovery as a product made exclusively for trial. At that point, should Mercury so desire, an examination under oath of plaintiffs can be scheduled.

As noted on plaintiffs' main summary judgment request (as well as that of Mercury) and as previously discussed in the court's dismissing plaintiffs' cause of action for "bad faith," this branch of plaintiffs' motion cannot be granted.

Clearly, from an objective standard, Mercury's motion is not frivolous (*see generally Chardavoyne v Cohen*, 56 AD3d 508).

An insured may not recover expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12). Thus, that branch of plaintiffs' request for costs is denied.

As noted in the court's prior discussion of Mercury's request for summary judgment, there are many triable issues of fact that preclude the court from granting summary judgment in any parties' favor.

Also, the plaintiffs have not set forth allegations that would support viable allegations under General Business Law § 349 (*see Smith v Chase Manhattan Bank, USA*, 293 AD2d 598).

If plaintiffs are actually referring to Insurance Law § 2601, the court has already discussed this section, *supra*. Otherwise, the court has not idea what Insurance Law § 216.6 plaintiffs are referring to. There is no current Insurance Law § 216.6 in New York.

As to that branch of the plaintiffs' motion to have Mercury accept plaintiffs' response to Mercury's Notice to Admit, the court agrees to this request.

Here, plaintiffs seek to respond to Mercury's Notice to Admit. Plaintiffs contend that they failed to respond due to law office error or failure. Plaintiffs note and the court agrees that many of the facts are in dispute.

As the court noted earlier, the underlying purpose of the Notice to Admit is to eliminate from dispute those matters about which there can be no controversy (*see Webb v Tire & Brake Distributor, Inc., supra*). The issues in the Notice to Admit contain much controversy.

Here, plaintiffs' failure to respond was an inadvertent error, the allegations contained in the request are at the heart of the controversy and the allegations are contrary to plaintiffs' prior pleadings (*see Riner v Texaco, Inc.*, 222 AD2d 571).

Finally, plaintiffs have touched on "punitive damages" in their discussion.

Punitive damages are not recoverable for ordinary breach of contract as their purpose is not to remedy private wrong, but to vindicate public rights (*NYU v Continental Insurance Co.*, 87 NY2d 308; *Rocanova v Equitable Life Assurance Society of U.S., supra*). 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 and the standard for awarding punitive damages in the first party insurance action is a strict

one (*NYU v Continental Insurance Co., supra*; *Rocanova v Equitable Life Assurance Society of U.S., supra*).

A complaint does not state a claim for punitive damages by alleging merely that the insurer engaged in a pattern of bad faith conduct; the compliant must first state a claim of egregious tortious conduct directed at the insured claimant (*Rocanova v Equitable Life Assurance Society of U.S., supra*). Clearly, the plaintiffs have not offered anything in the private contract dispute that would permit this court to look favorably on any cause of action that would include a request for punitive damages.

Here, from an objective point of view, the conduct of Mercury cannot be deemed criminal in nature nor that amounting to an attack upon a fundamental public interest. Again, the plaintiffs have not shown at this point that Mercury's conduct toward plaintiffs was in any way directed at the public (*see Suffolk Sports Center, Inc. v Billie Construction Corp.*, 212 AD2d 241; *Muhlfield v Bak*, 174 Misc2d 396).

Clearly, there is no basis stated on the record herein that has shown the viability for an amendment of the complaint to state a claim for punitive damages (*see Queensbury UFSD v Jim Walter Corp.*, 101 AD2d 992, *aff'd.* 64 NY2d 964).

Accordingly, Mercury's request for summary judgment is denied. Its request in the alternative to dismiss the first and second causes of action of plaintiffs' complaint is granted, and those causes of action shall be deemed dismissed upon service of a copy of this order on plaintiff or plaintiffs' counsel.

As to plaintiffs' cross motion, Mercury shall supply to the court Mercury's engineer's report in issue for an *in camera* inspection within twenty (20) days from the date of this order. Upon the court's determination, Mercury may schedule an E.U.O. of plaintiffs. Mercury shall also accept plaintiffs' response to Mercury's Notice to Admit. The plaintiffs' cross motion is denied in all other respects.

This constitutes the decision and order of this Court.

DATED: July 13, 2009

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

To:

Attorney for Plaintiffs
MILENE MANSOURI, ESQ.
108-18 Queens Blvd.
Suite 6, 6th Floor
Forest Hills, N.Y. 11375
(718) 793-2426

Attorney for Defendant
KENNETH F. WHITMAN, ESQ.
FEENEY & ASSOCIATES
503 Route 111
Hauppauge, New York 11788
(631) 366-3300