

McDaniel v Selvaggi

2009 NY Slip Op 33328(U)

March 2, 2009

Supreme Court, New York County

Docket Number: 108260/2007

Judge: Charles E. Ramos

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART _____

Index Number : 108260/2007
MCDANIEL, JOHN
 VS.
SELVAGGI, FRANK
 SEQUENCE NUMBER : 003
 DISMISS

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
 MAR 06 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

is decided in accordance with accompanying memorandum decision and order.

Dated: 3/2/09



HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
JOHN McDANIEL and GLENN DANIELS,

Plaintiffs,

Index No. 108260/07

-against-

FRANK SELVAGGI, ALTMAN, GREENFIELD &, SELVAGGI, and ALTMAN, GREENFIELD & SELVAGGI, LLP,

Defendants.

-----X
FRANK SELVAGGI, and ALTMAN, GREENFIELD & SELVAGGI, LLP,

Third-Party Plaintiffs,

-against-

MSA ADJUSTMENT CO., INC. and MARK S. ADLER,

Third-Party Defendants.

FILED

MAR 06 2009
Third-Party
Index No. 590459/08
COUNTY CLERK'S OFFICE
NEW YORK

-----X

Charles Edward Ramos, J.S.C.:

The primary action arises out of an insurance policy obtained by the defendants/third-party plaintiffs Frank Selvaggi, Altman, Greenfield & Selvaggi, and Altman, Greenfield & Selvaggi, LLP ("AG&S") for the plaintiffs John McDaniel and Glen Daniels (collectively, "McDaniel"). Thereafter, AG&S commenced a third-party action against the third-party defendants MSA Adjustment Co., Inc. and Mark S. Adler ("MSA").

In motion sequence 003, MSA moves to dismiss the third-party complaint filed by AG&S. This decision only relates to the third-party action between AG&S and MSA.

The First-Party Action

As alleged in the complaint, AG&S was the business manager

for McDaniel and was responsible for providing financial, banking, insurance, and accounting services. As a part of its representation of McDaniel, AG&S undertook a review of all of their current insurance policies.

In 1999, upon the recommendation of AG&S, McDaniel switched insurance brokers and obtained a new replacement cost insurance policy¹ (the "Policy") from Chubb Indemnity Insurance Company ("Chubb"). The Policy was purchased to insure the building and the contents, located at 123 Cliff Road West, Wading River, New York (the "Premises"). The Policy set different coverage limits for the building and the contents.

As a part of its management services, AG&S obtained and maintained the Policy for McDaniel. AG&S assured McDaniel that it understood the amount of coverage that was required to sufficiently insure the Premises and represented that it would procure adequate insurance coverage for the Premises. In maintaining the Policy for McDaniel, AG&S received all renewals, documentation, and correspondence related to the Policy on McDaniel's behalf. McDaniel alleges it never received the renewals, documentation, or correspondence related to the Policy from AG&S, therefore it could not have discovered that the coverage was inadequate.

On January 31, 2005, the Premises suffered a loss of contents covered by the Policy in an amount exceeding \$600,000. Chubb informed McDaniel that they were under-insured and that

¹ The policy number for the subject policy is 11771747-01.

[* 4]

recovery was limited to \$270,000 of loss for the building and \$135,000² of loss for the contents.

Thereafter, McDaniel retained MSA, a public adjuster, to adjust the insurance claim with Chubb. MSA was responsible for compiling and submitting the insurance claim, as well as negotiating with Chubb for a full recovery. After negotiations between MSA and Chubb, McDaniel was able to recover \$579,634 for loss of the building and \$289,817 for the loss of their contents. The first-party action seeks over \$600,000 of additional losses to contents not covered by the Policy alleging contract and tort claims.

The Third-Party Action

Subsequently, AG&S commenced a third-party action against MSA, alleging in the amended third-party complaint that MSA's negligence in adjusting the insurance claim contributed to McDaniel's damages.

In the instant motion, MSA moves to dismiss the amended third-party complaint arguing that it has sufficiently fulfilled its obligations to McDaniel and that it owed no duty to AG&S.

In assessing MSA's motion to dismiss, this Court must afford AG&S a liberal reading of the amended third-party complaint (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

It is undisputed that MSA was contracted by McDaniel, not AG&S. Therefore, if there was issue with MSA's performance, that

² Unless otherwise requested, the limit for the contents policy is half the limit of the building policy.

cause of action would properly be asserted by McDaniel. "Merely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 390 [1987]).

However, AG&S has alleged that MSA was negligent in its handling of the insurance claim, which is the same claim plaintiff asserts against it in the primary action. It would be illogical to now determine that a claim of indemnification/contribution based on negligent performance is unavailable, when counsel for MSA, who is also representing the plaintiff in the negligence claim against AG&S, asserts that the plaintiff's negligence claim, which is still pending, is viable. So long as there is a pending claim of negligence against AG&S, the possibility of indemnification and/or contribution exists. This Court must await the motion by AG&S to dismiss the negligence claim. In the event that claim is dismissed, MSA may renew this motion.

Accordingly, it is

ORDERED, that the motion by third-party defendants MSA Adjustment Co., Inc. and Mark S. Adler's to dismiss the amended third-party complaint in its entirety is denied as premature.

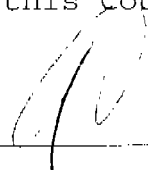
This constitutes the decision and order of this Court.

Dated:

FILED

MAR 06 2009

COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.

HON. CHARLES E. RAMOS