Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
WINDWARD BUILDERS, LLC, Individually and on Behalf of All Others Similarly Situated,	**NASSAU COUNTY**
Plaintiff,	
-against-	**Index No: 015214-09** **Motion Seq. No: 1** **Submission Date: 12/9/09**
DELOS INSURANCE GROUP, f/k/a SIRIUS AMERICA INSURANCE COMPANY and INTER-RECO, INC.,	
Defendants.	
----------x	

Papers Read on this Motion:

Notice of Motion, Affidavit in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affidavit in Support and Exhibits.....x

This matter is before the court on the motion by Defendants Delos Insurance Group, f/k/a Sirius America Insurance Company ("Sirius") and Inter-Reco, Inc. ("Inter-Reco") (collectively "Defendants"), filed September 21, 2009 and submitted December 9, 2009, following oral argument. For the reasons set forth below, the Court 1) denies Defendants' motion to dismiss the first cause of action; 2) grants Defendants' motion to dismiss the second cause of action; and 3) denies, as moot, Defendants' motion to dismiss the third cause of action in light of Plaintiff's voluntary withdrawal of the third cause of action.

BACKGROUND

A. Relief Sought

Defendants move, 1) pursuant to CPLR §§ 3211(a)(1) and (7), for an Order dismissing the first and second causes of action in the Class Action Complaint ("Complaint"); and, 2) pursuant to CPLR § 3211(a)(5), dismissing the third cause of action in the Complaint.

In his Affirmation in Opposition, counsel for Plaintiff Windward Builders, LLC, Individually and on Behalf of All Others Similarly Situated ("Windward" or "Plaintiff") "voluntarily withdraws the third cause of action in the Complaint without prejudice to any right to add another plaintiff and amend the Complaint to reassert that claim" (Aff. in Opp. at n. 2). Accordingly, this Decision will address only Defendants' motion to dismiss the first and second causes of action in the Complaint.

Plaintiff opposes Defendants' application.

B. The Parties' History

Windward, a general contractor and residential home builder, brings this putative class action [1] seeking actual damages and injunctive relief arising from Sirius' alleged breach of a general liability policy of insurance that Sirius issued, for the period March 22, 2004 to March 22, 2005, in connection with Windward's construction of residential homes at South Hampton Hills Court and West Hills Court, Southampton, New York ("Policy"). Inter-Reco is the Managing General Agent of Sirius.

At the inception of the policy period, Windward paid an initial premium of $49,961. After a premium audit [2] was conducted at the end of the Policy period, Windward was advised, on or about December 9, 2005, that an additional sum of $1,729 remained due and owing, and Windward paid that sum.

---

[1] The papers submitted for the Court's consideration do not include a certification order allowing the action to proceed as a class action. Pursuant to CPLR § 902, "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." This filing deadline is mandatory. *Shah v. Wilco Systems, Inc.*, 27 A.D.3d 169, 173, *lv. to app. dism. in part, den. in part*, 7 N.Y.3d 859 (2006).

[2] The Premium Audit Endorsement (Form CG 01 04 12 01) attached to the Policy provides that the deposit or initial premium was subject to audit, to be completed within 180 days after expiration of the Policy.

According to the Complaint, Sirius and Inter-Reco knowingly charged Plaintiff, and the proposed class, for coverage specifically excluded under the terms of the Policy and refused to refund premiums and commissions to which they were not entitled. Plaintiff further maintains that Sirius erroneously calculated [3] the amount of the insurance premium owed under the Policy resulting in Inter-Reco's receipt of an inflated commission for collecting that premium on Sirius' behalf.

While Plaintiff does not dispute that Sirius was entitled to exclude coverage for subcontractors who did not provide Plaintiff with a hold harmless indemnity agreement and certificate of insurance indicating liability limits at least equal to those set forth in the Sirius policy of insurance, it maintains that Sirius was required to refund that portion of the estimated premium charged at the outset of the Policy period for subsequently excluded coverage. [4] Instead, Plaintiff contends, Sirius not only retained the unearned premium but also demanded an additional premium amount after the premium audit was conducted at the end of the Policy period.

Defendants counter that there was no breach of contract given the express language of Form SA1C 022 (12/03) (part of Ex. 4 to Aff. In Support), which was brought to the attention of the insured before coverage was bound, which specifically provides that Sirius did not insure Plaintiff's subcontractors, each of which was, *inter alia*, to have its own liability insurance and to provide Plaintiff with a written hold harmless/indemnity. The provision reads, in pertinent part, as follows:

> A. This insurance does not apply to "bodily injury," "property damage" or "personal injury" and "advertising injury" arising out of work performed on behalf of the Named Insured by a contractor, subcontractor and/or sub-subcontractor of the Named Insured that provides labor, services and/or materials with respect to any construction, alteration, demolition or repair of real property or any structures or mobile equipment thereon:

---

[3] Defendants allegedly charged Plaintiff for coverage of excavation and insulation work subcontractors as if such entities were actually Plaintiff's employees, rather than independent subcontractors, thus classifying them in pure payroll class codes when, in fact, no coverage was provided under the Policy for the subcontractors.

[4] Plaintiff does not point to a specific policy provision in support of this argument.

i. when there is no prior written and signed contract entered into between the Named Insured and the contractor, subcontractor and/or sub-subcontractor requiring the contractor, subcontractor and/or sub-subcontractor to indemnify and hold harmless the Named Insured to the fullest extent permitted by applicable law in the event of a loss, including, but not limited to, any claim, suit, cost or expense arising out of any loss suffered by an employee of the contractor, subcontractor and/or sub-subcontractor, regardless of whether the Named Insured is partially negligent and excluding only liability created by the Named Insured's sole and exclusive negligence; or

ii. when the Named Insured's contractor, subcontractor and/or sub-subcontractor fails to have in force commercial general liability insurance including contractual liability coverage for the benefit of the contractor, subcontractor and/or sub-subcontractor, as well as the Named Insured for indemnification and/or contribution claims to the fullest extent permissible by applicable law in the event of a loss, including, but not limited to, any claim, suit, cost or expense arising out of any loss suffered by an employee of the contractor, subcontractor and/or sub-subcontractor, regardless of whether the Named Insured is partially negligent and excluding only liability created by the Named Insured's sole and exclusive negligence.

B. In the event this insurance does not apply pursuant to Paragraph A(i) or (ii) above, without limitation this policy will not provide coverage for "bodily injury" to the employees, agents or principals of the Named Insured's contractor's [sic], subcontractors and/or sub-subcontractors.

In short, Sirius insured Plaintiff for its potential liability arising out of the operation of a subcontractor who provided Plaintiff with a certificate of insurance and a written hold harmless/indemnity agreement.

In response to Plaintiff's allegation that Sirius miscalculated the premiums due and failed to issue a refund for coverage excluded under the policy, Sirius maintains that it properly charged Plaintiff a premium for the risk it assumed in connection with Plaintiff's construction

project based on rates and rating plans filed and approved by the New York Superintendent of Insurance and Insurance Law § 2301, *et seq.*

C. The Parties' Positions

Defendants move to dismiss the first cause of action, based on breach of contract, on the grounds, *inter alia*, that 1) Plaintiff does not identify any specific provision of the Policy that Sirius allegedly breached; 2) the premium charged was based on rates and rating plans filed with and approved by the New York Superintendent of Insurance; 3) Sirius calculated the premium properly, pursuant to the terms of the Policy, by conducting an audit after the expiration date of the Policy; and 4) the Policy does not prohibit Sirius from calculating the premium based on Windward's total payment to its subcontractors, whom Sirius did not insure.

Defendants move to dismiss the second cause of action, based on unjust enrichment, on the grounds that this action may not proceed where, as here, the parties have entered into a valid contract governing the subject matter at issue.

Plaintiff opposes Defendants' motion, submitting, *inter alia*, that 1) while Defendants were permitted to exclude coverage for any liability arising from the conduct of subcontractors that did not provide the required hold harmless indemnity agreement and certificate of insurance, Defendants were required to refund that portion of the estimated premium they charged Plaintiff at the outset of the Policy for the subsequently excluded coverage; and 2) assuming, *arguendo*, that Defendants were authorized to charge premiums for excluded coverage, Defendants used an improper method for calculating the premium amount that resulted in their overcharging Plaintiff.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the

factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994).

B. The Court Sustains the First Cause of Action Based on Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, (2) consideration, 3) performance by the plaintiff, (4) breach by the defendant, and (5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). The Court concludes that the Policy at issue is a clear and complete document, which the Court must enforce according to its terms.

While Defendant insurer was entitled under the policy to exclude certain coverage, and did so *vis a vis* certain subcontractors who failed to provide the required certificate of insurance and written hold harmless/indemnity agreement, the Court concludes that the Complaint states a cause of action for breach of contract in light of the allegations, *inter alia*, that Sirius breached the Policy by incorrectly categorizing various subcontractors and using incorrect rates in calculating the earned premium.

C. The Existence of the Policy Requires Dismissal of the Unjust Enrichment Claim

A quasi contract only applies in the absence of an express agreement, and is not really a contract, but rather a legal obligation imposed to prevent a party's unjust enrichment. *Clark-Fitzpatrick Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Where, as here, there exists an express agreement between plaintiff and defendant, the contents of which govern the subject matter underlying the claims for unjust enrichment, the plaintiff is precluded from maintaining an action in quasi-contract. *Metropolitan Electric Mfg. Co. v. Herbert Constr. Co.*, 183 A.D.2d 758 (2d Dept. 1992). As the express terms of the Policy govern Defendants' obligations to

Plaintiff, the Court dismisses Plaintiff's unjust enrichment claim, which is the second cause of action in the Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Preliminary Conference on March 8, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
February 5, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.