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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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PATRICK and ANNE O'KEEFE,

Plaintiffs,

-against-

ALLSTATE INSURANCE COMPANY, MARK MALENCZAK, DAVID MATEER, and FRIEDA HICKS,

Defendants.

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SCAN

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.:11322/09
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

Papers Read on this Decision:

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In motion sequence number one, Defendants Malenczak, Mateer, and Hicks move by Notice of Motion for an Order pursuant to CPLR§ 3211 (a)(7) dismissing the Plaintiffs' Third Cause of Action as well as those portions of the Plaintiff's complaint which seek punitive damages and attorney's fees and pursuant to CPLR§ 3211 (a)(7) dismissing the Complaint in its entirety as it relates to Defendants Mark Malenczak, David Mateer and Frieda Hicks.

In motion sequence number two, Plaintiffs cross-move for an order, pursuant to CPLR § 3124, to compelling the production of documents for which notice was served on October 28, 2009.

The Plaintiffs commenced this action to recover under a homeowner's insurance policy issued by Defendant Allstate Insurance Company (hereinafter referred to as "Allstate") to Plaintiffs for damage to their real and personal property as a result of a fire which occurred on July 26, 2007 at the Plaintiffs' premises located at 100 Carman Avenue, East Rockaway, New York. The fire was reported to Defendant Allstate, who assigned Defendant Malenczak to be the adjuster for the structure on the real property and Defendant Hicks to be the adjuster for the personal property. The Plaintiffs claim that after the fire, they repeatedly requested a copy of their insurance policy from the Defendants, but it was not provided until June, 2008. Defendant Malenczak determined the replacement cost damages to repair the dwelling as a result of the fine to be $186,330.10 as well as an additional $23,740.15 for the mitigation of mold making total damages for the dwelling to be $210,070.25. The actual cash value of the damage after a deduction for depreciation was determined to be $141,599.56 and $23,440.15 for mitigation of mold. The amount of depreciation, $44,730.54, is referred to as the replacement cost holdback and is to be paid to the insureds upon proof that the repairs have actually been completed.

Allstate determined the Plaintiffs were entitled to the holdback and sent them a check in the amount of $44,730.54. Allstate made a payment to the Plaintiffs in the amount of $165,339.71 after an offer was made and accepted by the public adjuster and Proofs of Loss were signed and submitted. In total, Defendant Allstate paid the Plaintiffs $221,101.09 for the damage to the structure including the mitigation of mold.

There was a dispute between the Plaintiffs and Defendant Allstate as to the cost to repair and/or replace the personal property damaged by the fire. Therefore, in accordance with policy provisions, requiring each side appoint an appraiser, the parties did so and ultimately an award of $88,513.58 at replacement cost and $62,436.41 at cash value was issued by the two appraisers. Defendant Allstate made payment to the Plaintiffs for the actual cash value amount of $62,436.41 and later paid an additional $4,000.00 for the replacement of certain personal property and $15,938.09 in additional living expenses incurred as a result of the fire.

Defendants Malenczak, Mateer, and Hicks argue that the Plaintiff's complaint should be dismissed in its entirety as it relates to them because as employees of Defendant Allstate, they owed no duty of care to the Plaintiffs and are not parties to the contract. They argue that the action must be brought solely against the Defendant Allstate, with whom the Plaintiffs entered into a contract. Since there is no privity of contract with them, they argue, those causes of action put forth as breach of contract actions should not stand against them.

Defendants Malenczak, Mateer, and Hicks also argue that the Plaintiffs' third cause of action lacks the necessary evidentiary allegations because a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract. Furthermore, Defendants Malenczak, Mateer, and Hicks argue that claims for punitive and extra contractual damages against a first-party insurer, such as Allstate, based on bad faith allegations are invalid and without merit. Also, the Defendants argue that the Plaintiffs' claim for attorney's fees does not state a valid claim as a matter of law and should be dismissed because attorney's fees are not recoverable by Plaintiffs in a first party insurance action.

In opposition, the Plaintiffs argue that it is not necessary that there be privity of contract between the parties committing a fraud and the person damaged as a result thereof in order for the injured to be entitled to damages. Also, they argue that the fact that a person sought to be held liable for fraud acted in a representative capacity whether as officer, employee or some other type of agent, does not exonerate that person from individual liability for the false representation, fraud or deceit practiced. The Plaintiffs claim that by failing to disclose or provide the material terms and conditions of the policy, all of the Defendants individually and collectively participated in a scheme to deliberately and intentionally deny the Plaintiffs their rights under the contract.

Furthermore, the Plaintiffs argue that the repeated failures of the Defendants to either produce the insurance policy or advise the Plaintiffs of the material facts contained therein is part of a pattern of similar misconduct. The Plaintiffs argue that the Defendants' failure to provide the policy caused them to be unaware of the material terms and conditions of the policy which affected their bargaining position. They argue that even if viewed initially as innocent neglect, when viewed together with all of

the facts and circumstances presented, and being continued and carried out simultaneously over a long period of time, coupled with the Defendants revealing the material facts only after the Plaintiffs signed a statement of loss and release and after the recoupment period for holdbacks was about to expire, unquestionably and reasonably gives rise to an inference of fraudulent intent.

The Plaintiffs also argue that an insured's common law right to sue an insurer for punitive damages for morally culpable conduct which is also directed at the general public is not preempted by New York Insurance Law §2601 (where no private cause of action exists) where the insured has a viable claim for compensatory damages. In addition, the Plaintiffs argue that where it appears to the court that the fraudulent conduct of an insurer is refusing or delaying to pay legitimate claims under a policy arises out of a duty owed to the Plaintiff separate and apart from any claimed breach of contract, the court may allow the Plaintiff reasonable attorney's fee and include such fee in any judgment that may be rendered in the action as compensation for the separate tort.

In their cross-motion, the Plaintiffs argue that approximately 13 items were requested in the Plaintiffs Notice for Discovery and Inspection, which were to be produced by February 15, 2010 according to the Preliminary Conference Stipulation and Order of January 10, 2010. The Plaintiffs argue that the materials requested from the Defendants were all matter material and necessary in the prosecution of the Plaintiffs' claims, but have not been produced, with the exception of the policy.

The scope of a court's inquiry on a motion to dismiss under CPLR §3211 is narrowly circumscribed. The court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory *Morone v. Morone*, 50 NY 2d 481, 484 (1980); see also *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977). The complaint must be construed "liberally" (CPLR §3026; see *New York Trap Rock Corp. v Town of Clarkstown*, 299 NY 77 [1948]), and the court must accept as true not only "the complaint's material allegations" but also "whatever can be reasonably inferred there from" in favor of the pleader, *McGill v. Parker*, 179 AD2d 98, 105 (1st Dept 1992) ; see also *Cron v Hargro Fabrics,* 91 NY2d 362, 366 [1998]). In ruling on a motion to dismiss, the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. As for the Plaintiffs' third cause of action for fraud, such claim cannot survive because it seeks the same damages as the first and second causes of action for breach of contract. Additionally, CPLR § 3016(b) requires that a cause of action sounding in fraud be pleaded with factual specificity. The Plaintiffs' third cause of action for fraud has not been plead sufficiently and is dismissed.

The Plaintiffs' motion to compel discovery is **denied**. The Defendants have provided proof that they have provided responses to most of the demands set forth in the Plaintiff's Notice for Discovery and Inspection. According to the Defendants, that which has not been provided has been properly objected to and/or determined to be provided when available.

As agents of a disclosed principal whose actions were undertaken at the direction of the insurer, the adjusters cannot be held personally responsible to Plaintiffs (see, *Schunk v New York Cent. Mut.*

Fire Ins. Co., 237 AD2d 913 [4th Dept. 1997]; *Benatovich vPropis Agency*, 224 AD2d 998 [4th Dept 1996]) and all causes of action are dismissed against them.

The Defendants' motion is **granted** to the extent that the Complaint is dismissed in its entirety as it relates to Defendants Mark Malenczak, David Mateer and Frieda Hicks.

"It is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York Univ. v Continental Ins. Co.*,87 NY2d 308, [1995]; *see Mighty Midgets v Centennial Ins.* Co., 47 NY2d 12, 21 [1979]). Thus, the Plaintiffs' request to recover an attorney's fee is improper is dismissed.

ORDERED, that the remaining parties are directed to appear for a compliance conference before the undersigned on September 23, 2010 at 9:30 am.

This Constitutes the Decision and Order of the Court.

DATED: September 10, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

H:\DECISION - DISMISS\O'Keefe v. Allstate.wpd

ENTERED
SEP 16 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE