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Index No.: 18909-06

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

PAUL PALMIERI,

Plaintiff,

- against -

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION, JAMES H. MASON'S SONS, INC., RWG BROKERAGE, INC., and ROY GUTTMAN,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 2/9/10
SUBMISSION DATE: 12/3/10
MOTION SEQUENCE NO.: 007 MG

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated January 18, 2010; Affirmation dated January 18, 2010; Affidavit dated March 22, 2010; Exhibits A through K annexed thereto; Affirmation in Opposition dated March 8, 2010; Plaintiff's Memorandum of Law; Reply Affirmation dated March 22, 2010; Affidavit dated March 19, 2010; Exhibit A annexed thereto; Defendants Memorandum of Law; and upon due deliberation it is

***ORDERED,*** that the motion by defendants New York Property Insurance Underwriting Association, and James H. Mason's Sons, Inc., pursuant to CPLR 3212 and 3211(a)(7), for an Order (1) dismissing the plaintiff's Second Amended Complaint in its entirety as against defendant James H. Mason's Sons, Inc.; (2) dismissing the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth causes of action in plaintiff's Second Amended Complaint, and



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dismissing all claims for punitive damages and attorney's fees; and (3) dismissing all cross-claims by defendants RWG Brokerage, Inc., and Roy Guttman, is granted.

In the underlying action, the plaintiff seeks to recover under a fire insurance policy issued by the defendant, New York Property Insurance Underwriting Association ("NYPIUA"), to the plaintiff, for alleged damages to a house located at 102 Washington Avenue, Mastic Beach, New York. The alleged cause of the damages is vandalism that occurred to the subject premises on or about July 16, 2004. In addition to NYPIUA, the plaintiff has also commenced this action against James H. Mason's Sons, Inc. ("Mason"), an independent adjusting firm hired by the insurer to investigate and adjust the plaintiff's claim, together with RWG Brokerage, Inc., and Roy Guttman, plaintiff's brokers.

Mason seeks to dismiss the Second Amended Complaint in its entirety as against it, alleging that as an independent insurance adjuster, it has no common law or contractual duty to the insured. The defendant NYPIUA seeks a dismissal of all but the first cause of action, based on breach of contract, alleging that said causes of action fail to state causes of action as a matter of law.

It is undisputed that Mason was retained by NYPIUA to as an independent adjuster to investigate and handle the first-party property claim made by plaintiff. Palmieri submitted his claim under the subject policy issued by NYPIUA, which policy forms the basis of the plaintiff's breach of action against his insurer. It is also undisputed that such contract was solely between Palmieri and NYPIUA, and that Mason was not a party to the contract and had no privity with the plaintiff. There are no allegations that the plaintiff retained the independent adjuster Mason. Absent any privity between plaintiff and Mason, and absent any duty on the part of the independent adjuster to plaintiff, there is no basis for the stated causes of action to stand against Mason. See, Bardi v. Farmer's Fire Ins. Co., 260 A.D.2d 783, 687 N.Y.S.2d 768, *lv. to appeal den.*, 96 N.Y.2d 815, 698 N.Y.S.2d 563; Automatic Findings, Inc. v. Miller, 232 A.D.2d 245, 648 N.Y.S.2d 90. In addition, independent adjusters have no duty towards an insured whose claim is not paid by the insurer, inasmuch as the duty of the adjuster runs exclusively to the insurer and does not extend in the performance of their investigation toward the insured. Goldner v. Kemper Ins. Co., 125 A.D.2d 954, 510 N.Y.S.2d 44. On the basis of the foregoing, the Complaint is dismissed as against defendant, James H. Mason's Sons, Inc.

The Second Amended Complaint sets forth nine causes of action against NYPIUA. With the exception of the First cause of action sounding in breach of contract under an insurance policy, the moving defendant seeks a dismissal of the remaining eight causes of action.

The Second cause of action alleges that NYPIUA was unjustly enriched by its failure to pay the claim. This cause of action is duplicative of the First cause of action, alleging breach of contract, since both causes of action seek damages for events arising from the same subject matter that is governed by an enforceable contract. As such, the claim for unjust enrichment should be dismissed. See, Bettan v. Geico General Ins. Co., 296 A.D.2d 469, 745 N.Y.S.2d 545, lv. to appeal dismissed, 99 N.Y.2d 552, 754 N.Y.S.2d 204; Walter H. Poppe General

Contracting, Inc. v. Town of Ramapo, 280 A.D.2d 667, 721 N.Y.S.2d 248; Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski, 14 A.D.3d 644, 789 N.Y.S.2d 508. Here, there is no dispute that an express written contract exists between plaintiff and the defendant insurer. There is no claim by plaintiff that the contract was rescinded and that he is suing in quasi contract. The damages sought by plaintiff in this action would be recoverable under the written contract should it be determined that the defendant/insurer breached the policy. As such, the Second cause of action for unjust enrichment should be dismissed. See, Clark-Fitzpatrick, Inc. v. LIRR Co., 70 N.Y.2d 382, 521 N.Y.S.2d 653.

The Third cause of action is based upon allegations of tortious negligence. The courts of this state do not recognize causes of action for tort claims alleging the negligent handling of a claim. See, Schunk v. New York Central Mut. Fire Ins. Co., 237 A.D.2d 913, 655 N.Y.S.2d 210; Bardi v. Farmer's Fire Ins. Co., 260 A.D.2d 783, 687 N.Y.S.2d 768. There is no independent duty existing between an insured and his insurer other than the duties set forth in the insurance contract. See, State v. Home Indem. Co., 66 N.Y.2d 669, 671, 495 N.Y.S.2d 969, 970-71. Therefore, a breach of those duties would constitute a claim for breach of contract and not one sounding in negligence. Based on the foregoing the plaintiff's claim for negligence is without merit, not recoverable under law, and must be dismissed.

The plaintiff's Fourth and Fifth causes of action are based on detrimental reliance and fraud by the doctrine of res ipsa loquitor, respectively. In the Fourth cause of action, the plaintiff attempts to suggest that because Mason was hired as an independent contractor by NYPIUA, the former is subject to the terms and conditions of the insurance policy. There is no evidence to suggest that Mason is subject to any of the terms and conditions of the subject insurance policy, which appears to be a matter strictly between NYPIUA and the plaintiff. The claim of detrimental reliance is also duplicative of the breach of contract action alleged in the First cause of action. With regard to the Fifth cause of action sounding in res ipsa loquitor, it appears that this cause of action also echos the breach of contract claim, alleging that Mason breached its duty to plaintiff in failing to comply with certain obligations under the subject policy. A vendor, hired by an insurer, does not have any duty to the insured. A vendor's duty runs to the insurer and cannot form the basis of a breach of contract or negligence claim against the vendor by the insured. If there is an action which is committed by the vendor which caused the insurer to wrongfully deny the claim, the remedy to the insured would be to commence a breach of contract action against the insurer, which the plaintiff has done in the First cause of action, which still survives.

Even if the court were to accept as true the allegations contained within the Sixth cause of action, such claims do not involve consumer oriented conduct, as required under General Business Law §349. To sustain a cause of action under section 349, a plaintiff is required to make a threshold showing that the claim under the statute is predicated upon deceptive acts or practices that are consumer oriented. See, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 334, 704 N.Y.S.2d 177. Inasmuch as the instant Complaint essentially alleges a private policy coverage dispute unique to these parties, and does not involve conduct that affects consumers at large, the plaintiff has failed to state a cause of action pursuant to General Business

General Business Law §349. Korn v. First Unum Life Ins. Co., 277 A.D.2d 355, 717 N.Y.S.2d 606; see also, Zawahir v. Berkshire Life Ins. Co., 22 A.D.3d 841, 804 N.Y.S.2d 405. The Sixth cause of action is dismissed.

The Seventh cause of action essentially alleges that the plaintiff was fraudulently induced into entering into the insurance contract with NYPIUA, who had no intention to honor its claim obligations with plaintiff. "General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim." NYU v. Continental Ins. Co., 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289. The Court further held that "nor is a fraud claim supported by plaintiffs conclusory allegations that defendants were engaged in a scheme to receive premium payments without giving any benefit in return. NYU v. Continental Ins. Co., supra, 87 N.Y.2d at 319, 639 N.Y.S.2d 289. Here, the plaintiff has attempted to bolster its claims of bad faith with conclusory, nonspecific allegations that other policy holders experienced problems similar to Palmieri. A cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract. Breifstein v. P.J. Rotondo Constr. Co., 8 A.D.2d 349, 187 N.Y.S.2d 866; Spellman v. Colombia Manicure Mfg. Co., Inc., 111 A.D.2d 320, 489 N.Y.S.2d 304. The Seventh cause of action is therefore dismissed.

Plaintiff's Eight cause of action sounds in breach of good faith and fair dealing, and repeats the same allegations made against NYPIUA in the other causes of action and is essentially duplicative of the plaintiff's breach of contract action. The bad faith causes of action all allege some type of dissatisfaction on the part of plaintiff with the claim handling and decision by the insurer, where the plaintiff perceived that the insurer failed in its duties to the insured. The alleged activities of NYPIUA as set forth plaintiff merely relate to the issue as to whether or not the insurer breached the underlying contract, and the associated causes of action do not allege duties on the part of the insurer which are recognizable at law. See, Cunningham v. Security Mutual Ins. Co., 260 A.D.2d 983, 689 N.Y.S.2d 290, lv. to appeal dismissed, 94 N.Y.2d 796, 700 N.Y.S.2d 428.

The Ninth cause of action is for loss of profits fails to state a claim as a matter of law. The policy does not provide for loss of profits, except for loss of rents incurred by a covered loss. Plaintiff is making claim for loss of rents in its breach of contract cause of action. The loss settlement provision of the subject policy provides as follows:

> "5. Loss Settlement. Covered property losses are settled at actual cash value at the time of loss but not more than the amount required to repair or replace the damaged property."

A review of the Second Amended Complaint reveals that there are no allegations by plaintiff that any damages, other than those set forth in the written policy of insurance, were contemplated by the parties at the time of the application for insurance. Accordingly, the Ninth cause of action must be dismissed.

Inasmuch as the only surviving cause of action is for plaintiff's breach of contract claim,

the Complaint fails to meet the strict pleading requirements necessary to sustain a cause of action for punitive and/or other extra-contractual damages against a first party insurer. Punitive damages are not recoverable for an ordinary breach of contract, as the purpose of such damages is not to remedy private wrongs, but to vindicate public rights. Rocanova v. The Equitable Life Assurance Society of the United States, 83 N.Y.2d 603, 612 N.Y.S.2d 339. The plaintiff's application for attorneys fees must also fail, in that it "is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insured to settle its rights under the policy." New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308 at 324, 639 N.Y.S.2d 283 at 292. See also, Mighty Midgets, Inc. v. Centennial Ins. Co., 47 N.Y.2d 12, 416 N.Y.S.2d 559; Gold v. Nationwide Mutual Ins. Co., 273 A.D.2d 354, 709 N.Y.S.2d 203.

The foregoing constitutes the Order of this Court.

Dated: March 21, 2011

Hon. Denise F. Molia

HON. DENISE F. MOLIA
J.S.C.