

**Strujan v State Farm Ins.**

2011 NY Slip Op 32744(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 400526/11

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Elena Strujan,  
Plaintiff (s),

**-against-**

State Farm Insurances,  
John/Jane Doe,  
Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 400526/2011  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
JSC

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
OSC, ES affd. Exhibits. ....	1
Notice of Cross-Motion, MPV affirm, exhibits . . . . .	2
ES reply affd.,exhibits . . . . .	3
MPV reply affirm. . . . .	4
ES sur-reply, exhibits . . . . .	5

*Upon the foregoing papers, the decision and order of the court is as follows:*

Plaintiff, pro se, seeks to have this court disqualify defendants' law firm, Rivkin Radler LLP. Defendant has cross -moved to dismiss the second through ninth causes of action, the demand for punitive damages, and the demand for compensatory damages in excess of policy limits.

**FILED**

**OCT 05 2011**

**Motion for Disqualification**

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The court first considers the motion for disqualification.

Where a party seeks to disqualify the opposing sides law firm, competing concerns are raised. On the one hand, there is an interest in avoiding even the appearance of impropriety. On the other hand, there is a concern that such a motion

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can become tactical "derailment" weapon for strategic advantage in litigation, thereby depriving a party's right to representation by counsel of its choice (S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 443 [1987]). Thus, the party seeking to disqualify opposing counsel has a heavy burden.

Rule 1.7 (a) (1) of the Rules of Professional Conduct prohibit an attorney from representing a client "if the representation will involve the lawyer in representing differing interests..." However, [notwithstanding] the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

In addition, an attorney whose testimony is required, may be prohibited from continued representation. (S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra.). Although plaintiff makes broad legal pronouncements about why disqualification is warranted (eg: "contempt of court" "personal harassment" "verbal abuses" "because the firm is against me and the American Constitution"), she has failed to set forth a factual basis that otherwise supports a legal conclusion for disqualification. She has shown neither a conflict of interest, nor has she shown that the testimony of any attorney at Rivkin Radler LLP is required for her to prove her case.

The fact that Rivkin Radler LLC (or some attorney at the firm) told her that they believe it advisable for her hire an attorney is not a basis for disqualification. It does

not, as plaintiff argues, deprive her of her constitutional right to represent herself, which she continues to do. Having the right to proceed pro se, however, still requires that her claims and arguments be evaluated according to the same laws and legal standards as any claim advanced by someone with legal representation. Plaintiff has not shown that any attorneys behavior at a deposition was hostile or inappropriate. Other than her conclusion, there is no transcript or other objective proof of what happened. The fact that defendant's attorneys have asked her for documents that she claims they know are missing, is also no basis for disqualification. Her other arguments are equally unavailing.

**Cross-motion to Dismiss**

Turning now to the cross-motion, for the reasons more fully explained below, the cross-motion should be granted, except tot he extent that it seeks to limit damages to the policy limits.

The facts underlying the complaint are that plaintiff obtained a policy of insurance from defendant and that she was not paid in full for a claim that she made against the policy. A motion to dismiss, made pursuant to CPLR 3211, requires the court to give the pleadings a liberal construction and accept the facts alleged as true. The court determines whether, affording plaintiff the benefit of every possible favorable inference, the facts as alleged fit within any cognizable legal theory. (Leon v. Martinez, 84 N.Y.2d 83 [1994]). Whether Campbell can ultimately establish her allegations is not part of the calculus. (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 [2005]). To the extent the motion to dismiss is based upon documentary evidence, the documents relied upon must definitively establish a basis for dismissal. (Bronxville Knolls Inc. v.

Webster Town Center Partnership, 221 AD2d 248 [1<sup>st</sup> dept. 1995]).

In the complaint, plaintiff describes the "Nature of the Action" as one for:

1. Breach of Contract
2. Breach of Trust
3. Breach of Standard of Care
4. Negligent Misrepresentation
5. Harassment
6. Fraudulent Misrepresentation
7. Economic Loss
8. Intentional Emotion Distress
9. Violation fo the Columbia Consumer Protection Procedure Act (CPPA)

In her prayer for relief she seeks:

- 1...actual damages resulting from Defendant's wrongdoing in excess of \$450 millions.
2. Punitive damages in an amount to be proven at trial.
3. Such other further relief as this court deem appropriate and equitable.

Defendant acknowledges that the parties had a contractual relationship and is not seeking at this time to dismiss the claims based purely on breach of contract.

The second cause of action states that there is a breach of trust. In order to have a claim for a breach of trust, there must be a legal fiduciary relationship. There is no such relationship between an insured and the insurer arising from an ordinary insurance policy. (Edelman v. O'Toole-Ewald Art Associates, Inc., 28 AD3d 250 [1<sup>st</sup> dept. 2006]); Batas v. Prudential Ins. Co., 281 AD2d 260, 264 [1<sup>st</sup> dept. 2001]). In the

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absence of such relationship, the cause of action is dismissed.

A claim for breach of a standard of care is really one for the tort of negligence. (See: Espinal v. Melville Snow Contractors, Inc. 98 NY2d 136 [2002]); Strauss v. Belle Realty Co., 65 NY2d 399 [1985]). A breach of contract claim cannot be considered a tort unless a legal duty, independent of the contract itself, has been violated and the legal duty must spring from circumstances extraneous to and not constituting the elements of the contract. (C(lark-Fitzpatrick, Inc. v. Long Island R. Co., 70 NY2d 382 [1987])). At bar, the facts claimed by plaintiff all arise out of defendant's alleged failure to pay out a claim under the policy. This is not a tort that arises from legal duty independent of the contract itself. The claim for breach of the standard of care is, therefore, dismissed.

Negligent misrepresentation is not available to plaintiff because it requires, at the outset, that the parties have a fiduciary relationship. (Fab Industries, Inc. v. BNY Financial Corp., 252 AD2d 367 [1<sup>st</sup> dept. 1998]). The court has already determined that as a matter of law, there is no such fiduciary relationship. It also requires that a misrepresentation was made and that the plaintiff detrimentally relied upon it. Ravenna v. Christie's Inc., 289 AD2d 15 (1<sup>st</sup> dept. 2001). There are no facts plead establishing either of these elements. The claim is, therefore, dismissed.

There is no independent common law tort of harassment. Gentile v. Allstate Ins. Co., 288 AD2d 180 (2<sup>nd</sup> dept. 2001). Nor is there a specific statute that creates a claim for harassment under the circumstances as set forth in the complaint. The fifth claim must also be dismissed.

Fraudulent misrepresentation is not available to plaintiff. There are no specific

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allegations of fraud, as otherwise required by CPLR 3013. There is no claim that there was a representation made as an inducement to entering into a contract. (Ventur Group, LLC v. Finnerty, 68 AD3d 638 [1<sup>st</sup> dept. 2009]); Sandra Greer Real Estate, Inc. v. Johnansen Organization, 182 AD2d 468 [1<sup>st</sup> dept. 1992]; Newmark & Co. Real Estate, Inc. v. Gallo Vitucci Klar Pinter & Cogan, LLP, 2010 WL 4682652 [NY Co. 2010]). The facts that are alleged concern events that occurred only after plaintiff made a claim against the policy. In any event, fraud is unavailable where the facts plead only relate to breach of contract. (Heffez v. L & G General Construction Inc., 56 AD3d 526 [2<sup>nd</sup> dept. 2008]).

Economic Loss is a measure of damages that can be proven in connection with the claim for breach of contract. It need not be set forth as a separate claim. It is therefore dismissed without prejudice to plaintiff proving her economic damages at trial in connection with the breach of contract claim.

Plaintiff claims intentional infliction of emotional distress. The elements of this tort are: (1) extreme and outrageous conduct; (2) intent to cause severe emotional distress or a substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and the injury, and (4) severe emotional distress. (Howell v. NY Post Co. Inc., 81 NY2d 115 [1993]). Whether conduct complained of is outrageous, in the first instance is for the court to decide. (Rocco v. Smithtown, 229 AD2d 1034 [4<sup>th</sup> dept. 1996]). Satisfying the element of outrageous conduct is rigorous and difficult. (Roach v. Stern, 252 AD2d 488 [2<sup>nd</sup> dept. 1998]).

At bar the allegations stem from plaintiff's disagreement as to what should have been paid out to her for a claim made. Notwithstanding that plaintiff was dissatisfied

with the decisions made by the insurer, there are no facts plead that the actions taken by defendant were anything other than decisions made in the ordinary course of their business in adjusting claims. Thus, there is no extreme and outrageous conduct supporting this claim.

Plaintiff has not alleged any facts that would require that the court apply the Columbia Consumer Protection Procedure Act in determining the parties rights. The dispute underlying the complaint concerns events occurring in New York between a New York resident and a company doing business in New York. has any relevance to the facts in this case. Plaintiff has not advanced any arguments why such a law applies to the facts in this dispute. (Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp., 36 AD3d 17, 27 [1st Dept 2006] aff'd 9 NY3d 928 [2007] (quoting Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 NY2d 309, 317 [1994])).

To properly plead a claim for punitive damages, also known as exemplary damages," the plaintiff must present facts tending to show the defendant (s) acted with such a high degree of bad faith, and their wrongful act was so wonton, reckless, or malicious, that their actions are intentional, deliberate and therefore reprehensible to society as a whole (See: Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 200 [1990]; Rivera v. City of New York, 40 A.D.3d 334, 344 [1st Dep't 2007]; Freeman v. The Port Authority of New York and New Jersey, 243 A.D.2d 409, 410 [1st Dep't 1997]; Aero Garage Corp. v. Hirschfeld, 185 A.D.2d 775 [1st Dep't 1992]). Thus, the actions alleged must rise almost to the level of a crime (Lieberman v. Riverside Mem. Chapel, 225 A.D.2d 283 [1st Dept 1996])). The facts alleged in this case do not meet the threshold. At its core, the claim is a private contract dispute, which although

alleged to have devastating consequences to plaintiff herself, is not a wrong against society. The claim for punitive damages is, therefore, stricken.

Defendant also seeks to have this court limit any damages recovery in this case to the policy limits. This relief is denied. Where an insurance company wrongfully fails to pay out on a claim, the insured may seek consequential damages. Bj-Economy Market, Inc. v. Harleystown Ins. Co. Of New York, 10 NY3d 187 (2008). There is no basis to limit the damages that plaintiff may try to prove at this juncture of the case.

### **Conclusion**

In accordance herewith it is hereby:

ORDERED that plaintiff's motion to disqualify counsel is denied and it is further

ORDERED that defendants cross-motion to dismiss is granted to the extent that the claims for Breach of Trust, Breach of Standard of Care, Negligent Misrepresentation, Harassment, Fraudulent Misrepresentation, Intentional Emotion Distress, Violation of the Columbia Consumer Protection Procedure Act (CPPA) and punitive damages are dismissed and it is further

ORDERED that defendants cross motion to dismiss the claim for Economic Loss is granted to the extent that it is dismissed without prejudice to seeking damages for economic loss in connection with the breach of contract claims and it is further

ORDERED that defendants cross motion to limit damages to the policy limits is denied and it is further

ORDERED that any requested relief not otherwise expressly granted is denied and it is further


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ORDERED that this constitutes the decision and order of the court and it is  
further

ORDERED that this case is scheduled for a preliminary conference on  
December 1, 2012 at 9:30 am. No further notices will be sent.

Dated: New York, New York

October 4, 2011

SO ORDERED:

  
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J.G. J.S.C.

**JUDITH J. GISCHE, J.S.C.**

**FILED**

**OCT 05 2011**

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