

Houck v Allstate Ins. Co.

2011 NY Slip Op 33313(U)

September 20, 2011

Supreme Court, Queens County

Docket Number: 30232/10

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

WILLIAM HOUCK,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY and
CARMINE DESTEFANO,

Defendants.

Index No. 30232/10

Motion
Date August 16, 2011

Motion
Cal. No. 14 and 15

Motion
Sequence No. 1 and 2

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Upon the foregoing papers it is ordered that the motion by defendant Carmine DeStefano and the motion by defendant Allstate Insurance Company for dismissal of plaintiff's Verified Complaint pursuant to CPLR 3211(a) (7) or alternatively, pursuant to CPLR 3211(c) and or 3212 are hereby consolidated solely for purposes of disposition of the instant motions only.

Those branches of the motion by defendant, Carmine DeStefano and the motion by defendant, Allstate Insurance Company for an order dismissing plaintiff's Verified Complaint pursuant to CPLR 3211(a) (7), along with any and all claims, cross claims, counter claims and any other claims that were or could not have been brought against defendant Carmine DeStefano, and against defendant, Allstate Insurance Company, are hereby decided as follows:

Plaintiff alleges causes of action against both defendants sounding in breach of contract and negligence. Pursuant to the Verified Complaint: Carmine DeStefano was a licensed agent and broker for defendant Allstate Insurance Company, on or about December 14, 2007, plaintiff and defendants entered into a contract for motor vehicle insurance coverage for a particular automobile registered to plaintiff's mother [i.e., a 1998 Toyota Camry], defendants failed to perform their obligations in that they failed to file and/or erroneously filed the insurance coverage period on the policy on the vehicle with the Department of Motor Vehicles, that as a result of the defendants' negligence, on December 14, 2007, plaintiff was driving the motor vehicle with his mother's consent and was stopped and arrested by the Nassau County Police Department, strip searched and detained in the Nassau County Correctional facility, and as such, suffered severe and permanent personal injuries.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608; Leon v. Martinez, 84 NY2d 83). Moreover, the Court must determine whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose and Kiernan, Inc., 260 AD2d 770-771 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159).

"The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages" (Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd., 801 NYS2d 243 [Sup Ct, NY County 2004][internal

citations omitted]). Plaintiff must plead "the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant" (Furia v. Furia, 116 AD2d 694 [2d Dept 1986]).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (see, Gordon v. Muchnick, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability (Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et. al., 1 AD3d 578 [2d Dept 2003]).

Applying these principles in this case, the court decides as follows:

(1) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the cause of action for breach of contract is denied, as the complaint adequately states a cause of action for breach of contract. In the instant case, all of the elements for the establishment of a cause of action for breach of contract are proffered in Paragraphs 9-15.

(2) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the cause of action for negligence is denied, as the complaint adequately states a cause of action for negligence. In the instant case, all of the elements for the establishment of a cause of action for negligence are proffered in Paragraphs 9-15.

Defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra).

Those branches of the motion by defendant, Carmine DeStefano and defendant, Allstate Insurance Company motion for an order dismissing the Verified Complaint pursuant to CPLR 3212 along with any and all claims, cross claims, counter claims and any other claims that were or could not have been brought against defendant Carmine DeStefano and defendant, Allstate Insurance Company are granted with regard to the negligence cause of action.

In support of the 3212 motion, defendants contend that they did not enter into any contract or agreement with plaintiff and/or plaintiff's mother, and so a breach of contract claim cannot be maintained. Defendants also maintain that defendants

procured the type of requested coverage, and a policy was in effect at the time plaintiff was pulled over and ticketed. Furthermore, defendants maintain that the evidence reveals that the policy was requested for, and issued to, plaintiff's mother, not to plaintiff, and as such, plaintiff has no standing to bring suit against them.

In opposition to the 3212 motion, plaintiff asserts that: defendants' affidavit references that Angela Houck, the mother of the plaintiff requested that defendant procure an automobile policy of Insurance with Allstate, and in or around April 10, 2000, such policy was issued. As such, a contract was created. Plaintiff also maintains that he has standing to bring suit against defendants as plaintiff is an "insured" of the subject policy of insurance, and as such, defendants owed him a duty of care and breached said duty.

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company, 70 NY2d 382 [NY 1987][internal citations omitted]; see also, Rich v. The New York Central & Hudson River Railroad Company, 87 NY 382 [NY 1882]). The Verified Complaint merely alleges that defendants were "duly obligated to perform the contracted obligations in that they failed to perform their obligations under the contract" (see, Paragraph 12 of the Verified Complaint). The plaintiff has failed to establish that there has been a violation of any legal duty independent of the contract itself.

Those branches of the motion by defendant, Carmine DeStefano and the motion by defendant, Allstate Insurance Company for an order dismissing the Verified Complaint pursuant to CPLR 3212 along with any and all claims, cross claims, counter claims and any other claims that were or could not have been brought against defendant Carmine DeStefano and defendant, Allstate Insurance Company are denied with respect to the breach of contract claim, without prejudice with leave to renew. As it is undisputed that the parties have not completed discovery, and that the depositions of defendants are outstanding, defendants' motions for summary judgment pursuant to CPLR 3212 are denied without prejudice as they are premature (see, CPLR 3212[f]; Groves v. Lands End Housing Co., Inc., 80 NY2d 978 [NY 1992]; Ramos v. DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH, 2007 NY Slip Op 1714 [2d Dept 2007]; Yadgarov v. Dekel, 2 AD3d 631 [2d Dept

2003]; George v. New York City Transit Authority, 306 AD2d 160 [1st Dept 2003]). Accordingly, defendants' motions for summary judgment regarding the breach of contract cause of action pursuant to CPLR 3212 are hereby denied "with leave to renew when discovery . . . is complete" (see, Ramos, supra).

Defendants' argument that the breach of contract action is barred by the statute of limitations is unavailing, as the statute of limitations period for a breach of contract action is six years pursuant to CPLR 213. In New York, a breach of contract action accrues at the time of the breach (Ely-Cruikshank, Co., Inc. v. Bank of Montreal, 81 NY2d 399 [NY 1993]). As plaintiff established that if there was a breach, it occurred in 2007, the statute of limitations would not run out until 2013.

This constitutes the decision and order of the Court.

Dated: September 20, 2011

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Howard G. Lane, J.S.C.