

Pearl v Green Flea, Inc.
2012 NY Slip Op 33941(U)
January 19, 2012
Supreme Court, New York County
Docket Number: 108192/11
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
MELISSA PEARL, :
: :
Plaintiff, :
: :
-against- :
: :
GREEN FLEA, INC., PENN-AMERICA INSURANCE :
COMPANY, GLOBAL INDEMNITY GROUP, INC., :
PENN-STAR INSURANCE COMPANY and :
UNITED AMERICA INSURANCE GROUP, :
: :
Defendants. :
-----X

Index No. 108192/11
DECISION AND ORDER
Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This is an action to recover damages allegedly suffered by plaintiff after she failed to reach a settlement of her negligence claim against defendant, Green Flea, Inc. (Green Flea) with its insurance carriers. The defendant carriers are alleged to be affiliated entities, as follows: Penn-America Insurance Company, Global Indemnity Group, Inc., Penn-Star Insurance Company and United America Insurance Company (collectively, Penn-Star). They move, pursuant to CPLR 3211 (a) (7), to dismiss the fourth cause of action of the complaint, which is the portion of the claim brought directly them.

Background

Plaintiff was a vendor at a flea market operated by Green Flea where she sold vintage art posters. She claims that, on July 26, 2009, the negligent act of a Green Flea employee caused numerous posters belonging to her to be irreparably damaged by rain water.

Plaintiff commenced negotiations with Penn-Star to settle her claim against Green Flea for the losses she sustained. Apparently, an investigation and appraisals were conducted for both

sides of the dispute, but plaintiff was not able to come to a satisfactory settlement with Penn-Star. As a result, plaintiff's fourth cause of action here claims the insurance carriers "owed plaintiff a duty of good faith and fair dealing in the adjustment of her claim," and failed to conduct themselves consistent with that duty in the settlement negotiations. Complaint, Not. of Mot., Ex. A, ¶ 54.

Specifically, plaintiff alleges that Penn-Star "worked with Green Flea to obtain false testimony" from other vendors at the flea market, and made threats to one witness (*id.*, ¶ 55); "refused to provide pertinent information" in the form of an appraisal report Penn-Star obtained appraising her loss at \$90,000 (*id.* ¶ 56); "refused to give weight to" testimony of a witness (*id.*, ¶ 57); and "failed to bargain in good faith" in ignoring the \$90,000 valuation. *Id.*, ¶ 58. Essentially, plaintiff claims that the totality of Penn-Star's conduct constituted "bad faith." *Id.*, ¶ 59. She asserts that a finding of bad faith on Penn-Star's part would entitle her to "treble damages," based on the insurer's \$90,000 appraisal valuation. *Id.*, ¶ 61.

In plaintiff's opposition papers to the insurer's motion to dismiss, she maintains that her complaint states causes of action for "fraud, misrepresentation, frustration of purpose and conspiracy," although none of these claims is expressly alleged in plaintiff's complaint itself. *Aff. of Frederic H. Aaron, Not. to Mot.*, at 3.

Discussion

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994).

As pleaded in the complaint, it is clear Penn-Star had no contractual relationship with plaintiff. Its policy of liability insurance was solely with Green Flea. Plaintiff also does not suggest that she is a third-party beneficiary of the policy, nor would such an argument, if made, prevail on the facts alleged in any event.

Penn-Star simply had no duty to negotiate with plaintiff. There is no contractual relationship between these parties which would create a duty of good faith and fair dealing running from the insurers to the plaintiff. *See e.g. Schorr v Guardian Life Insurance Company of America*, 44 AD3d 319, 319 (1st Dept 2007) (to plead a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must demonstrate “the existence of a valid contract from which such a duty would arise”).

Not only does plaintiff’s fourth cause of action fail to expressly allege fraud, misrepresentation or conspiracy, there are no facts pleaded which would give rise to these claims. A cause of action for fraud or misrepresentation requires allegations of “representation of material fact, falsity, scienter, reliance and injury.” *Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 (1999). Further, under CPLR 3016, “the circumstances constituting the alleged wrong must be stated in detail.” *Daly v Kochanowicz*, 67 AD3d 78, 89 (2d Dept 2009).

Plaintiff does not allege materially false representations made to her by Penn-Star upon which she relied to her detriment. Plaintiff’s allegations that Penn-Star, among other things, tampered with a witness or did not give a copy of an appraisal to her, in no way satisfy the pleading requirement for fraud. Nor does plaintiff explain what “frustration of purpose” means

in the context of this action. Again, there simply is no contractual relationship between plaintiff and Penn-Star.

Finally, without a properly alleged underlying tort, there can be no cause of action for conspiracy. “[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort [internal quotation marks and citation omitted].” *Abacus Federal Savings Bank v Lim*, 75 AD3d 472, 474 (1st Dept 2010). In any event, it is not clear who plaintiff claims conspired with whom, or for what purpose. Her supposition that the Penn-Star entities might be alter egos is irrelevant to any of her claims.

There does not appear to be any basis to deny dismissal of the fourth cause of action under CPLR 3211 (d) either, as plaintiff has not asserted that any “facts essential to justify opposition may exist, but cannot now be stated [internal quotation marks and citation omitted].” *See e.g. Copp v Ramirez*, 62 AD3d 23, 31-32 (1st Dept 2009).

Accordingly, it is

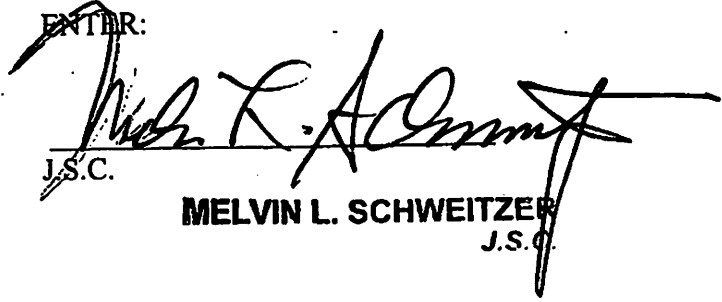
ORDERED that the motion brought by defendants Penn-America Insurance Company, Global Indemnity Group, Inc., Penn-Star Insurance Company and United America Insurance Company for an order dismissing the fourth cause of action in the complaint as to them is granted; and it is further

ORDERED that the fourth cause of action is dismissed as to defendants Penn-America Insurance Company, Global Indemnity Group, Inc., Penn-Star Insurance Company and United America Insurance Company, with costs and disbursements to these parties as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 19, 2012

ENTER:



J.S.C.

MELVIN L. SCHWEITZER
J.S.C.