

Books for Less, LLC v Arm-Capacity of N.Y., LLC
2013 NY Slip Op 33698(U)
January 28, 2013
Sup Ct, New York County
Docket Number: 652031/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART _____

Index Number : 652031/2012
BOOKS FOR LESS, LLC
vs
ARM- CAPACITY OF NEW YORK, LLC
Sequence Number : 006
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):Dated: 1/28/13OK, J.S.C.CYNTHIA S. KERN
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
BOOKS FOR LESS, LLC and BOOK OUTLET,
LLC,

Plaintiffs,

Index No. 652031/12

-against-

DECISION/ORDER

ARM-CAPACITY OF NEW YORK, LLC, LOVULLO
ASOCIATES, INC. and CERTAIN UNDERWRITERS
AT LLOYD'S LONDON,

Defendants.
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action against defendants seeking to recover under an insurance policy issued by defendant Certain Underwriters at Lloyd's, London ("Lloyd's").

Lloyd's now moves for an Order pursuant to CPLR § 3211 (a)(7) dismissing plaintiffs' (a) fifth cause of action for breach of the covenant of good faith and fair dealing; (b) sixth cause of action for tortious interference with prospective business relations; and (c) seventh cause of action for attorney's fees. In their opposition, plaintiffs have conceded that their sixth cause of action for tortious interference with prospective business relations should be dismissed. For the reasons set forth below, Lloyd's motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiffs obtained a commercial general liability policy from Lloyd's for the policy period of December 13, 2010 to December 13, 2011 (the "Policy")

for their wholesale book warehouse located at 540 N. Laurel St., Bridgeton, New Jersey (the “subject property”). On August 18, 2011, the subject property sustained a loss as a result of a windstorm and plaintiffs filed a claim with Lloyd’s in the amount of \$727,010.98. On November 3, 2011, Lloyd’s made a partial payment to plaintiffs in the amount of \$200,000 pending completion of its investigation of the claim. Lloyd’s alleges that during its investigation of the claim, it learned that the subject property experienced a prior loss in February 2009, which plaintiffs failed to identify in their application for insurance. Additionally, Lloyd’s alleges that in the application for insurance, plaintiffs identified the amount of business personal property in their warehouse as \$2,080,000 but that the true value was approximately 50% higher when the application was submitted. Thus, on or about May 29, 2012, Lloyd’s sent plaintiffs a Notice of Rescission in which Lloyd’s rescinded the Policy, denied coverage for the claim and demanded the return of their partial payment of \$200,000.

On or about June 12, 2012, plaintiffs filed the instant action seeking to recover for the loss to the subject property from Lloyd’s under the Policy. Lloyd’s filed a pre-answer motion to dismiss plaintiffs’ complaint in its entirety. On October 23, 2012, this court granted Lloyd’s motion to the extent that it dismissed plaintiffs’ fifth and sixth causes of action for breach of the covenant of good faith and fair dealing and tortious interference with prospective business relations. On October 22, 2012, one day before the court issued its decision, plaintiffs filed an amended complaint. Lloyd’s now moves for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint’s fifth, sixth and seventh causes of action.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when

plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956).

Lloyd's motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint's fifth cause of action for breach of the covenant of good faith and fair dealing is denied. "As in all contracts, implicit in contracts of insurance is a covenant of good faith and fair dealing, such that 'a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims.'" *Bi-Economy Mkt., Inc.*, 10 N.Y.3d at 194, citing *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995). Although courts have routinely dismissed claims for breach of the implied covenant of good faith and fair dealing as being duplicative of a breach of contract claim, the Court of Appeals has allowed separate causes of action for breach of an insurance contract and breach of the covenant of good faith and fair dealing to proceed simultaneously in the context of an insurance dispute when a plaintiff sufficiently alleges "bad faith claims handling" as such bad faith allows an insured to recover consequential damages. *See Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 194 (2008)

In the present case, Lloyd's motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint's fifth cause of action for breach of the covenant of good faith and fair dealing is denied. The amended complaint's fifth cause of action alleges that Lloyd's "acted in bad faith and failed to deal fairly by withholding full payment of the loss of personal property Claim and denying compensation to Plaintiffs for a loss covered by the Policy without

proper cause.” It further alleges that “Lloyd’s rescinded the Policy based upon a prior loss which was in bad faith because Lloyd’s had prior knowledge of the prior loss before it entered into the insurance agreement with Plaintiffs.” Assuming these allegations to be true for the purposes of a motion to dismiss, this court finds that these allegations are sufficient to state a claim for breach of the covenant of good faith and fair dealing. Plaintiffs are not merely alleging that Lloyd’s failed to pay under the Policy because of a difference of opinion regarding coverage but rather that Lloyd’s did not handle the claim in good faith by denying coverage under the Policy for an improper reason. Further, the fact that plaintiffs have not pled a separate and distinct cause of action titled “bad faith claims handling” is immaterial as the Court of Appeals has equated such a claim with a breach of the covenant of good faith and fair dealing. *See Bi-Economy Mkt., Inc.*, 10 N.Y.3d 187.

Additionally, Lloyd’s motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint’s seventh cause of action for attorney’s fees is denied. Although generally, the prevailing party of a litigation may not collect attorney’s fees from the loser unless an award is authorized by agreement between the parties, by statute or by court rule, in the context of an insurance dispute, an insured is entitled to recover his attorney’s fees if he establishes that the carrier engaged in “bad faith” in denying coverage under an insurance policy. *See Sukup v. State of New York*, 19 N.Y.2d 519 (1967); *see also Exim, Inc. v. Innogarant, LLC*, 2011 WL 240130 (S.D.N.Y., Jan. 19, 2011)(awarding attorney’s fees to insured based on carrier’s bad faith refusal to pay under the policy where the purpose of the denial of coverage was “to delay and/or avoid payment on a valid and legitimate claim under the Policy.”) The bad faith must be such “that no reasonable carrier would, under the given facts, be expected to assert it.” *Sukup*, 19 N.Y.2d 519, 522 (1967).

In the present case, Lloyd's motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint's seventh cause of action for attorney's fees is denied as plaintiffs have sufficiently alleged that Lloyd's acted in bad faith in denying coverage under the Policy. As this court has already stated, plaintiffs' allegation that Lloyd's knew about the prior loss to the subject property before issuing the Policy but denied coverage on the basis that it did not know about the prior loss is sufficient to state a claim for bad faith. If plaintiffs are ultimately successful on their bad faith claim, they will be entitled to attorney's fees in this action. Thus, as plaintiffs have sufficiently stated a claim for bad faith against Lloyd's, plaintiffs also state a claim for attorney's fees.

Accordingly, defendant Lloyd's motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint's sixth cause of action is granted. However, that portion of Lloyd's motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing the amended complaint's fifth and seventh causes of action is denied. The amended complaint's sixth cause of action is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated:

1/28/13

Enter:

CK
J.S.C.

CYNTHIA S. KERN
J.S.C.