1470 Bruckner Blvd. Corp. v Aon Risk Servs. Northeast, Inc.
2014 NY Slip Op 30756(U)
February 18, 2014
Sup Ct, Bronx County
Docket Number: 302377/2011
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

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1470 BRUCKNER BLVD. CORP.,

Plaintiff,

-against-

DECISION / ORDER
Index No. 302377/2011

AON RISK SERVICES NORTHEAST, INC., et als.,

Defendants

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The following papers numbered 1 to 5 read on the below motions noticed on April 30, 2013 and duly submitted on the Part IA15 Motion calendar of **October 28, 2013**:

Papers Submitted	Numbered
Defs. Notice of Motion, Exhibits	1,2
Allied's Aff. in Opp., Exhibits	3,4
Def.'s Memo of Law in Reply	5

Upon the foregoing papers and oral argument, third-party defendants CS Bridge Corp., Peter O'Farrell, Jr., and Michael O'Farrell (collectively "Third-Party Defendants") move, pre-answer, to dismiss the third-party complaint of AON Risk Services Northeast, Inc. and Allied North America Insurance Brokerage of New York, Inc. (collectively "Allied"), pursuant to CPLR 3211(a)(1), (5), and (7). Allied opposes the motion.

I. Background

Landmark Insurance Company and New Hampshire, both of whom fall under an "AIG" umbrella, (collectively referred to as "AIG") issued a comprehensive general liability insurance policy (the "Policy") to Colgate Scaffolding & Equipment Corp. ("Colgate"). The policy was renewed for the period of April 1, 2006 through April 1, 2010. In 2010, Colgate became insolvent and was dissolved. At the time, there were several other entities insured under the Policy including Colgate's landlord, 1470 Bruckner Blvd. Corp.

Allied consists of the entities comprising the "broker," which had procured the Policy for Colgate and the other insured entities. The plaintiff in the main action, 1470 Bruckner Blvd. Corp., ("Plaintiff") is the owner of a commercial building and leased the building to Colgate for

its scaffolding operations. In the main action, Plaintiff claims that Allied negligently made Plaintiff jointly liable for the insurance debts of the defunct Colgate. Colgate had requested that Plaintiff be made a beneficiary of the Policy for the limited purpose of receiving premises liability insurance protection for the scaffolding facility. Allied, however, instead of listing Plaintiff as an "additional insured," made Plaintiff a "named insured" under the policy, which made Plaintiff jointly/severally liable with Colgate to pay for all costs associated with the Policy. When Colgate defaulted, AIG demanded from Plaintiff (as a "named insured") to pay $1.2 million in self-insured retentions and other costs that Colgate failed to pay. Ultimately, Plaintiff agreed to settle AIG's claim for the amount of $300,000. Plaintiff then commenced this action to recoup that amount against the broker, Allied.

Thereafter, Allied commenced this third-party action. The first two causes of action in the Third-Party complaint are for contribution and common law indemnify against CS Bridge and its principals Peter O'Farrell, Jr. and Michael O'Farrell, the alleged successors in interest to Colgate. The complaint asserts that Allied procured the insurance as instructed by Colgate, and thus any losses incurred by Plaintiff as a result of the default must be incurred by the Third-Party Defendants, as Colgate's successor. The third and fourth causes of action allege fraud and deceit against the Third-Party Defendants. These causes of action allege *inter alia* that the Third-Party Defendants concocted a "sham transaction" which undermines Plaintiff's claim for damages against Allied in the main action.

Defendants argue that none of these causes of action may stand because they are based upon the enforcement of a duty to pay "self insured retention" or "deductibles" to AIG, a duty that never ran to benefit of the Broker, and even so, the duty that was released in writing by AIG. The third-party action allegedly arose out of the non-payment of amounts due to an insurance company for deductible billings under an insurance contract. Allied was never a beneficiary of this insurance contract. The duty to pay deductibles ran only to AIG and not to Allied. With respect to the fraud claim, the Third-Party Defendants argue that "a fraud claim may coexist with a breach of contract cause of action only where the alleged fraud constitutes a breach of a duty separate and apart from the duty to abide by the terms of the contract." (*Verizon N.Y., Inc. v. Optical Comm. Group, Inc.*, 91 A.D.3d 176 [1st Dept. 2011]). Here, again, the movants argue

that the fraud claims are intertwined with a breach of contract claim, and any duty to pay the self-insured retentions and deductibles was only owed by Colgate/its successors to AIG, and never to Allied, the broker.

In opposition, Allied contends that the Third-Party Defendants "hatched" a "scheme" to pay the $300,000 to AIG, the amount sought in the main action. The various O'Farrell family members admitted at deposition that they each paid $100,000 to their father, Plaintiff's principal owner, who then paid the $300,000 to AIG to achieve a global settlement. Allied now makes the assertion that if there is a finding of any liability due and owing to Plaintiff due to the fact that Plaintiff "paid" $300,000 to resolve the AIG claims, such liability flowed from the actions of Colgate (and thus the third party defendants CS Bridge Corp., Peter O'Farrell, Jr., and Michael O'Farrell through piercing of the corporate veil). Allied is asserting that the "fraud" was done so for the sole purpose of "creating damages on the part of Plaintiff" in the main cause of action to be asserted against Allied.

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory"(*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept.

1992]).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence (CPLR 3211[a][1], *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 [1st Dept. 2005]). Indeed, such a motion may be granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law *(Id.*, citing *Leon v. Martinez., supra.)* Evidentiary material may also be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint (*Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 [2nd Dept. 2001]). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7) (*Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 [1st Dept. 1983]).

III. Analysis

At the outset, Allied's causes of action seeking common law contribution must be dismissed. Where, as here, the underlying claim seeks purely economic damages, a claim for common-law contribution is not available (*Children's Corner Learning Center v. A. Miranda Contracting Corp.*, 64 A.D.3d 318, 323 [1st Dept. 2009], citing *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21 [1987])

The causes of action seeking indemnification against the Third-Party Defendants must also be dismissed. "The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.'" (*Raquet v. Braun*, 90 N.Y.2d 177, 183 [1997]; *Mas v. Two Bridges Assoc.*, 75 N.Y.2d 680, 690 [1990]). Here, the third-party complaint does not allege the existence of any duty owed by the Third-Party Defendants to Allied. Rather, the third-party complaint asserts that the Third-Party Defendants owed a duty to *Plaintiff* (1470 Bruckner) to purchase commercial general liability insurance and instructed Allied to list Plaintiff as a named insured. Allied's assertions that it did what Colgate had asked of them to do in this transaction

constitutes a defense to the main action, not a basis for a third-party action against CS Bridge and the O'Farrell's for common law indemnification.

The Court now turns to the causes of action sounding in fraud and deceit. A cause of action for fraud requires a plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486 [2008], citing *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]). *Nicosia v. Board of Managers of Weber House Condominium*, 77 A.D.3d 455 (1st Dept. 2010). Here, Allied's fraud claims are centered on the fact that the Third-Party Defendants created a "scheme" for the "sole purpose of creating damages on the part of Plaintiff, which could then be claimed against the defendants/ third-party plaintiffs. The "sham transactions" in fact gave "birth to the lawsuit" of Plaintiff in the main action. There are no allegations that the Third-Party Defendants made false, material representations that Allied justifiably relied upon. The allegations in the third-party complaint that Colgate (and by extension, the Third-Party Defendants) had "no intention of paying the self-insured retentions and deductibles" are seemingly abandoned in the opposition affirmation (Aff. In Opp., at Par. 25). Even if not abandoned, such a claim demonstrates a misrepresentation of an intent to perform under a contract, which is insufficient to allege fraud (*see Zachariou v. Manios*, 50 A.D.3d 257 [1st Dept. 2008]; *Sokol v. Addison*, 293 A.D.2d 600 [2nd Dept. 2002]). Third-party plaintiffs claim instead that "the third-party claims have everything to do with the $300,000 amount which plaintiff 140 Bruckner Blvd. Corp. claims it is entitled to recoup from defendants/third-party plaintiffs." Notably, Allied cites no case law in its opposition papers.

Upon review of the pleadings, Plaintiff is alleging that it was compelled to pay the AIG insurers $300,000 to achieve a global settlement because Plaintiff was improperly listed as a "named insured" under the insurance policy procured by Allied. While Allied is challenging whether Plaintiff actually sustained the losses that it is seeking to recoup, these challenges appear to constitute an affirmative defense to the main action rather than an independent cause of action against the Third-Party Defendants for fraud and deceit. Even without the allegedly tortious conduct of CS Bridge and its principals, Allied would remain the subject of Plaintiff's lawsuit based on its alleged malfeasance in securing the Policy. Accordingly, there is no causal

connection between this allegedly fraudulent/tortious conduct and the damages (in the form of Plaintiff's lawsuit) that Allied is allegedly incurring (*see Lama Holding Corp. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 [1996]). Accordingly, the third and fourth causes of action must be dismissed.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the Third-Party Defendants' motion to dismiss is granted, and Allied's third-party complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 2/18/14

Mary Ann Brigantti

Hon. Mary Ann Brigantti-Hughes, J.S.C.