

**Pesce Brothers, Inc. v Cover Me Ins. Agency of NJ,
Inc.**

2014 NY Slip Op 32088(U)

July 14, 2014

Sup Ct, Richmond County

Docket Number: 150066/14

Judge: Kim Dollard

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

PESCE BROTHERS, INC. d/b/a CAR CRAFT
TRUCK WORKS,

Plaintiff,

-against-

COVER ME INSURANCE AGENCY OF NJ, INC.,
NATIONAL INDEPENDENT TRUCKERS INSURANCE
COMPANY, RRG, HILLS ADJUSTMENT BUREAU,
INC. and MICHAEL J. POLLER,

Defendants.

DCM PART 4

Present:

HON. KIM DOLLARD

DECISION AND ORDER

Index No. 150066/14

Motion Nos. 1130-001
1553-002

The following papers numbered 1 to 6 were fully submitted on the 6TH day of June, 2014.

Papers	Numbered
Notice of Motion to Dismiss by Defendant Hills Adjustment Bureau, Inc., with Affirmation in Support.....	1
Plaintiff's Memorandum of Law in Opposition.....	2
Reply Memorandum of Law in Support of Motion.....	3
Defendants' Notice of Motion to Dismiss with Affirmation, Memorandum of Law and Exhibits in Support.....	4
Plaintiff's Affirmation in Opposition.....	5
Defendants' Memorandum of Law in Reply to Plaintiff's Affirmation in Opposition.....	6

Upon the foregoing papers, defendants' respective motions to, *inter alia*, dismiss the complaint pursuant to CPLR 3211(a)(1), (7) and (8) are decided as follows:

This action arises out of plaintiff's claim that the moving defendants have been and continue to work in concert to unlawfully "steer" insureds with claims for damages to their

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commercial vehicles away from plaintiff's body shop, contrary to the provisions of section 2610 of the Insurance Law and in violation of General Municipal Law § 349¹. In addition, it is claimed that as a result of this pattern of, e.g., fraudulent misrepresentations, injurious falsehoods and tortious interference with its business prospects, plaintiff has sustained unliquidated damages in the form of lost business which necessitates a trial. In addition, plaintiff requests that defendants be enjoined from engaging in the commission or continuation of such unlawful practices which, if permitted to continue, would produce immediate and irreparable loss or damage to plaintiff's business. By way of identifying the respective parties: (1) plaintiff is a New York corporation doing business as "Car Craft Truck Works", a truck repair business; (2) defendant Cover Me Insurance Agency (hereinafter "Cover Me") is a New Jersey insurance broker registered to do business in New York, which is engaged in the placement of property damage and liability insurance for various trucking companies and/or independent truckers; (3) National Independent Trucker's Insurance Co., RRG (hereinafter "NITIC") is a South Carolina insurer with a principal place of business in New Jersey; (4) Michael J. Poller is a resident of New Jersey and the president of both NITIC and "Cover Me"; and (5) Hills Adjustment Bureau, Inc.

¹Insurance Law § 2610 provides, in subdivision(a) that "[w]henver a motor vehicle collision or comprehensive loss shall have been suffered by an insured, no insurer providing [such] ... coverage ... shall require that repairs be made ... in a particular place or shop ..." Subdivision (b) provides that "[i]n processing any such claim ..., the insurer shall not, unless expressly requested by the insured, recommend or suggest repairs be made to such vehicle in particular place or shop or by a particular concern.

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(hereinafter “Hills”) is a New York corporation retained by “Cover Me”, NITIC and possibly others to investigate and adjust claimed insurance losses².

It is familiar law, that a motion to dismiss on the basis of CPLR 3211(a)(1) should be granted only where the documentary evidence that forms the basis of the defense is such that it refutes the plaintiff’s factual allegations or conclusively disposes of them” (Tannenbaum v Molinoff, ___ AD3d ___, 2014 NY Slip Op 4186 [internal quotation marks omitted]; see Goshen v Mutual Life Ins. Co. of NY, 98 NY2d 314, 326). Thus, under CPLR 3211(a)(1) , a pleading may not be dismissed unless the documentary evidence proffered by the movant conclusively establishes a defense to the claims asserted in the complaint as a matter of law (see Leon v Martinez, 84 NY2d 83, 88). On a motion to dismiss pursuant to CPLR 3211(a)(7), however, the complaint is to be afforded a liberal construction (see CPLR 3026), the facts alleged therein are assumed to be true, the plaintiff is to be accorded the benefit of every possible favorable inference, and the Court is enjoined solely to determine whether the facts as alleged fit within any cognizable legal theory (*id.* at 87). Nevertheless, the Court on such a motion is free to consider affidavits submitted by plaintiff to remedy any defects in the complaint, and when this occurs, the issue to be determined is “whether the proponent of the pleading has a cause of action, not whether he has stated one” (Guggenheim v Ginzburg, 43 NY2d 268., 275 [emphasis

²It is further alleged “upon information and belief” that Poller, “Cover Me” and NITIC are “affiliated” with Hills, which is purported to engage in unfair settlement practices. In its separate motion to dismiss, defendant Hills relies exclusively on CPLR 3211(a)(7).

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supplied]). Applying these principles, it is the opinion of this court that defendants' motions to dismiss pursuant to CPLR 3211(a)(1) and (7) must be denied.

Beginning with a consideration of CPLR 3211(a)(1), it is unclear whether any of the documents submitted by the "Cover Me" defendants (*i.e.*, all of the defendants other than Hills), conclusively establishes their right to judgment as a matter of law. In any event, their failure to plead this defense in their answer or to lodge a pre-answer motion to dismiss on this ground constitutes a waiver of this defense pursuant to CPLR 3211(e). In addition, although these defendants have labored mightily by affirmation and otherwise to prove that plaintiff does not have a viable cause of action against them, case law dictates that when evidentiary material is considered on a motion to dismiss, the pleading should not be dismissed "unless it has been shown that a material fact as claimed by the pleader ... is not one at all and unless it can be said that no significant dispute exists regarding it" (Guggenheim v Ginzburg, 43 NY2d at 275). Conclusory allegations or speculative assertions will not suffice. Here, no such evidence has been adduced. To the contrary, the gist of the moving papers appears to be that the acts cited by plaintiff are either irrelevant or not in violation of section 2610 of the *Insurance Law*. If this be so, defendants further argue that these same allegations provide an insufficient factual basis for plaintiff's causes of action predicated on the alleged violation of sections 349 and 350 of the *General Business Law*³. Although this may, in fact, be true; defendants have yet to show

³To the extent relevant, these sections of the General Business Law represent a legislative declaration that "deceptive acts and practices and false advertising in the conduct of any business [is] unlawful" (Guggenheimer v Ginzburg, 43 NY2d at 272).

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it. Neither have they yet to establish that a material fact alleged in the complaint is false.

The same is essentially true of defendants' apparent inability to respond substantively to plaintiff's claim of an observable pattern of false or misleading statements attributed to these defendants in the complaint, which plaintiff alleges were calculated to and did dissuade at least some of defendants' clients from taking their vehicles to plaintiff's body shop for repair. As alleged in the complaint, among the litany of disincentives allegedly employed by defendants to "steer" these insureds away from plaintiff are (1) express and/or implied threats of policy cancellation; (2) direct or indirect promises of rate increases; (3) claims of plaintiff's exclusion from a "preferred list" of body shops which did not exist; and (4) representations that they could/would refuse to work with plaintiff in adjusting their damage claims. From all of the foregoing, it is evident to this Court that the allegations in the complaint are legally sufficient to sustain plaintiff's causes of action for fraud, negligent misrepresentation, injurious falsehood, tortious interference with prospective business and violations of General Business Law §§ 649 and 650. The lone exception is plaintiff's sixth cause of action for injunctive relief, as all of defendants' wrongdoing is capable of remediation by an appropriate award of money damages (see Matter of Rice, 105 AD3d 962, 963; Dana Distribs., Inc. v Crown Imports, LLC, 48 AD3d 613; Ed Cia Corp. v McCormack, 44 AD3d 991, 994).

So, too, must the Court reject that branch of the motion by the "Cover Me" defendants which is to strike as scandalous and prejudicial paragraphs 30 through 43 of the complaint ("Example[s] of defendants' steering"). At this early stage of the litigation,

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this Court is not prepared to strike these factual allegations as “unnecessarily inserted” in the complaint for the sole purpose of engendering prejudice and are irrelevant to plaintiff’s causes of action. This is so even if, as defendants’ claim, some or all of these same allegations are contained in a similar complaint filed in New Jersey against a related company (see CPLR 3024[6]; Souomayah v Minnelli, 41 AD3d 390, 392; cf. Chowaiki & Co. Fine Art Ltd. v Lacher, 115 AD3d 600, 601).

Finally, given his official designation as the sublicense by and through whom the Cover Me Insurance Agency, Inc. “is licensed as an insurance broker” in the certificate filed with the New York State Department of Financial Services (“Cover Me’s” Exhibit “E”), it is the opinion of this Court that it cannot be successfully argued that Michael J. Poller neither “does” nor “transacts” business within this state for purposes of CPLR 301 and 302. In fact, it is claimed by the “Cover Me” defendants that co-defendant Hills, a New York Corporation, is regularly retained by Pollard to investigate and adjust insurance losses on behalf of both “Cover Me” and NITIC. As a result, so much of defendants’ motion as is predicated on the purported lack of personal jurisdiction over the individual defendant (CPLR 3211[a][8]) is denied⁴.

Accordingly, it is

⁴To whatever extent, plaintiff’s opposing papers have been challenged for a paucity of factual detail, it is worthy of note that discovery in this matter is far from complete (cf. CPLR

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ORDERED that defendants' respective motions, *inter alia*, to dismiss the complaint are granted to the extent that plaintiff's sixth cause of action for injunctive relief is hereby severed and dismissed; and it is further

ORDERED that the balance of their motions are denied; and it is further

ORDERED that the Clerk shall enter judgment and mark his records accordingly.

ENTER,


KIM DOLLARD, A.J.S.C.

Dated: July 14, 2014

GRANTED
JUL 15 2014
STEPHEN J. FIALA CLERK