NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

MICHELLE GRAY,

Plaintiff,

- against-

TRI-STATE CONSUMER INSURANCE COMPANY,

Defendant.

Index No. 705510/13

Motion Date March 27, 2014

Motion Cal. No. 55

Motion Seq. No. 1

The following papers numbered EF5 to EF18 read on this motion by defendant, Tri-State Consumer Insurance Company (Tri-State), to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF5-EF8
Affirmation in Opposition - Exhibits.....	EF10-EF16
Reply Affirmation.....	EF17-EF18

Upon the foregoing papers, it is ordered that defendant's motion is determined as follows:

Defendant, in this action by plaintiff seeking damages for, *inter alia*, breach of contract and fraud based upon an alleged underpayment by defendant on an insurance policy for losses sustained in a fire, moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Plaintiff opposes the motion.

Facts

On March 10, 2012, a fire occurred at premises insured by defendant. Plaintiff filed a claim under the policy issued by defendant, seeking proceeds of the policy for repair of the premises, replacement of personal property contained at the premises, and additional funds needed due to loss of use of the premises. Defendant commenced making emergency payments on the claims and further undertook continued adjustment of the claims through investigation,

providing interim payments, conducting an examination under oath and procuring loss estimates. Tri-State submits that, to date, it has made payments in the amount of $398,835.48 to plaintiff under the policy. However, according to the allegations in the complaint, plaintiff alleges that there is still $34,790.49 in disputed loss, which plaintiff believes should have been paid on the policy and defendant disputes.

Plaintiff commenced this action based upon the disputed amount, and alleges causes of action for breach of contract, fraud, conversion, violation of General Business Law § 349, estoppel and intentional infliction of emotional distress. Defendant moves to dismiss the complaint on the grounds of documentary evidence and failure to state a cause of action. Defendant also argues that the insurance policy contains a "condition precedent" to commencing a lawsuit, which plaintiff did not meet, namely, that plaintiff should have submitted to an appraisal process, as provided in the insurance policy, prior to commencing a lawsuit on the disputed amount.

Discussion

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez,* 84 NY2d 83, 88 [1994]; *see Matter of Chin,* 79 AD3d 867, 868 [2d Dept 2010]). Here, the insurance policy submitted in support of the motion does not resolve all the factual issues as a matter of law and conclusively dispose of plaintiff's contentions (*see Leon v Martinez,* 84 NY2d at 88).

Furthermore, defendant failed to demonstrate that plaintiff did not comply with a condition precedent to the lawsuit, under its insurance policy (*see Matter of County of Rockland v Primiano Constr. Co.,* 51 NY2d 1, 7 [1980]; *Government Employees Ins. Co. v Estate of Sosnov*, 275 AD2d 322 [2d Dept 2000]). Terms of a contract are to be interpreted in accordance with their plain meaning (*Computer Associates International, Inc. v U.S. Balloon Manufacturing Co., Inc.,* 10 AD3d 699 [2d Dept 2004]; *Tikotzky v New York City Transit Auth.,* 286 AD2d 493 [2d Dept 2001]). The Court is to give "... practical interpretation to the language employed and the parties reasonable expectations" (*Slamow v Del Col,* 174 AD2d 725, 726 (2d Dept 1991), *aff'd.,* 79 NY2d 1016 [1992]; *see also AFBT–II, LLC v Country Village on Mooney Pond, Inc.,* 305 AD2d 340 [2d Dept 2003]; *Del Vecchio v Cohen,* 288 AD2d 426 [2d Dept 2001]). The arbitration clause at issue states that if the parties fail to agree on the amount of loss, either "may" demand an appraisal of the loss. The term "may" is permissive; not mandatory or exclusive (*see Marro v Bartlett,* 61 AD2d 729 [3d Dept 1978], *affd.,* 46 NY2d 674 [1979]; *Bordet v 21 Club, Inc.,* 11 Misc.3d 1069 (A), [Sup.Ct. N.Y. Co.2006]; *Greystone Staffing, Inc. v Vincenzi*, 7 Misc.3d 1024 (A), [Sup.Ct.2005]. Thus, an appraisal is optional; not mandatory. Accordingly, the branch of the motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (1), is denied.

In determining whether a pleading is sufficient to withstand a motion to dismiss pursuant

to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]). "The [pleading] must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*Hense v Baxter,* 79 AD3d 814, 815 [2d Dept 2010]; *see Nonnon v City of New York,* 9 NY3d 825, 827 [2007]; *Leon v Martinez,* 84 NY2d at 87 ; *Kopelowitz & Co., Inc. v Mann,* 83 AD3d 793, 796–797 [2d Dept 2011]). In addition, a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects (*see* CPLR 3211 [c]; *Quinones v Schaap,* 91 AD3d 739, 740 [2d Dept 2012]; *Ryan v Cover,* 75 AD3d 502, 503 [2d Dept 2010]).

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (*Blanchard v Blanchard,* 201 NY 134, 138; *see also,* 66 Am Jur 2d, Restitution and Implied Contracts, § 6, at 949). A "quasi contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment *(Parsa v State of New York,* 64 NY2d 143, 148; *Farash v Sykes Datatronics,* 59 NY2d 500, 504; *Bradkin v Leverton,* 26 NY2d 192, 197; *Smith v Kirkpatrick,* 305 NY 66, 73; *Grombach Prods. v Waring,* 293 NY 609, 615; *Miller v Schloss,* 218 NY 400, 407; *see also,* 1 Williston, Contracts § 3A [3d ed]; Calamari and Perillo, Contracts § 1-12, at 19 [2d ed]; 1 Corbin, Contracts § 19). Here, it is undisputed that the relationship between the parties was defined by a written contract, fully detailing all applicable terms and conditions.

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 (*Meyers v Waverly Fabrics,* 65 NY2d 75, 80, n 2; *North Shore Bottling Co. v Schmidt & Sons,* 22 NY2d 171, 179; *Rich v New York Cent. & Hudson Riv. R. R. Co.,* 87 NY 382, 390). 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 *(see Rich v New York Cent. & Hudson Riv. R. R. Co.,*87 NY 382, 398, *supra).* Here, plaintiff has not alleged the violation of a legal duty independent of the contract.

The branch of the motion which seeks to dismiss plaintiff's claim pursuant to General Business Law, § 349 (h), is granted. The complaint fails to allege any of the elements of a General Business Law § 349 claim in connection with defendant's disbursement of proceeds under the insurance policy (*see Lucker v Bayside Cemetery,* 114 AD3d 162, 174 [1st Dept 2013]). It alleges, in substance, that defendant failed to pay plaintiff the entire amount which plaintiff feels is due under the insurance loss policy. In so doing, defendant was not engaging in the requisite "consumer-oriented conduct" (*id.*). The conduct complained-of was "specific to [plaintiff]" (*see Silverman v Household Fin. Realty Corp. of New York,* 979 F.Supp.2d 313, 318 [E.D.N.Y.2013]); it had no "broader impact on consumers at large"

(*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 25 [1995]).

The branches of the motion which are to dismiss the cause of action for conversion is granted. Accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83 [1994), the complaint fails to state a cause of action to recover damages for conversion against defendant. "Although plaintiff alleged a contractual right to payment under the insurance policy, she never had ownership, possession, or control of" the funds allegedly converted by defendant (*Castaldi v 39 Winfield Assoc.,* 30 AD3d 458, 458–459 [2d Dept 2006]; *see Daub v Future Tech, Enters., Inc.,* 65 AD3d 1004, 1005 [2d Dept 2009]; *Fiorenti v Central Emergency Physicians,* 305 AD2d 453, 454 [2d Dept 2003]).

Further, plaintiff's cause of action alleging fraud is also dismissed. To properly plead a cause of action to recover damages for fraud, the plaintiff must allege that (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance (*see Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553 [2009]; *New York Univ. v Continental Ins. Co.,* 87 NY2d 308 [1995]; *Selechnik v Law Off. of Howard R. Birnbach,* 82 AD3d 1077 [2d Dept 2011]; *Cerabono v Price,* 7 AD3d 479 [2d Dept 2004]). A cause of action alleging fraud must be pleaded with the requisite particularity pursuant to CPLR 3016 (b). "[T]he purpose underlying [CPLR 3016 (b)] is to inform a defendant of the complained-of incidents" (*Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d at 559). While there is no requirement that there be "unassailable proof at the pleading stage," the basic facts constituting the fraud must be set forth (*id.* [internal quotation marks omitted]). "CPLR 3016 (b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct" (*id.* [internal quotation marks omitted]).

Here, plaintiff's allegations with respect to the fraud cause of action are merely a recitation of the breach of contract cause of action, plus the conclusory allegation that defendant knowingly made false representations to plaintiff with respect to the actual cash value of the property (*see Ford v Sivilli,* 2 AD3d 773, 775 [2d Dept 2003]; *Cohen v Houseconnect Realty Corp.,* 289 AD2d 277, 278 [2d Dept 2001]). As such, the plaintiff failed to plead the fraud cause of action with particularity. In any event, the fraud cause of action is duplicative of the breach of contract claim, warranting its dismissal on that ground as well (*see Betz v Blatt,* 116 AD3d 813, 813 [2d Dept 2014]; *Palmieri v Biggiani,* 108 AD3d 604, 609 [2d Dept 2013]; *Woss, LLC v 218 Eckford, LLC,* 102 AD3d 860, 862 [2d Dept 2013]).

Similarly, the causes of action for estoppel and intentional infliction of emotional distress are also based on the alleged breach of contract for failure to pay the disputed $34,790.48, and as such are dismissed as duplicative (see *Orok Edem v Grandbelle Intern.*, Inc., 118 AD3d 848 [2d Dept 2014]; *Betz v Blatt, supra; Palmieri v Biggiani, supra*).

Finally, the branch of the motion which is to dismiss the breach of contract cause of action is denied. On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), 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 within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87–88 [1994]; see *Green v Gross & Levin, LLP,* 101 AD3d 1079, 1080–1081 [2d Dept 2012]; *Granada Condominium III Assn. v Palomino,* 78 AD3d 996 [2d Dept 2010]). The test to be applied is "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.,* 69 AD3d 802, 803 [2d Dept 2010] [internal quotation marks omitted]). Applying these principles to the instant matter, the complaint adequately alleges all of the essential elements of a cause of action to recover damages for breach of contract against defendant (*see id.*).

Conclusion

The branches of defendant's motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) are denied. The branches of the motion seeking to dismiss the remaining causes of action are granted.

Dated: August 8, 2014

DARRELL L. GAVRIN, J.S.C.