

Winkle v Certain Underwriters at Lloyds London

2014 NY Slip Op 33360(U)

December 17, 2014

Supreme Court, New York County

Docket Number: 160302/13

Judge: Paul Wooten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

WILLIAM WINKLE and RUTH WINKLE,

Plaintiffs,

- against -

INDEX NO. 160302/13

MOTION SEQ. NO. 001

CERTAIN UNDERWRITERS AT LLOYDS LONDON.
Subscribing to Policy Number W1459912PNYH.,

Defendants.

The following papers were read on this motion by the defendant to dismiss the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Reply Affidavits — Exhibits (Memo)

PAPERS NUMBERED

Cross-Motion: Yes No

This is an action commenced by William and Ruth Winkle (plaintiffs) against Certain Underwriters at Lloyds London (defendants) for damages as a result of Hurricane Sandy, including, inter alia, defendants' failure to reimburse plaintiffs for items claimed to be lost or destroyed, for damage to their residence, and for loss of use of their residence. Plaintiffs' complaint asserts five causes of action for breach of contract (first), breach of fiduciary duty (second), declaratory judgment (third), bad faith (fourth), and for attorneys' fees, costs, and expenses (fifth). Before the Court is a motion by the defendants, pursuant to CPLR 3211(a)(7), to dismiss the second, fourth, and fifth causes of action. Plaintiffs are in opposition to this motion.

STANDARD

CPLR 3211(a) provides that:

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

[7] The pleading fails to state a cause of action.

When determining a CPLR 3211(a) motion, “we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). “We also accord plaintiffs the benefit of every possible favorable inference” (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414). The court “accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency” (*O’Donnell, Fox & Gartner, P.C. v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the “question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts ‘can be fairly gathered from all the averments’” (*Foley v D’Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (see *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

DISCUSSION

A. Breach of Fiduciary Duty

In their complaint plaintiffs allege, *inter alia*, that defendants failed to properly investigate

and analyze plaintiffs' claims, failed to provide plaintiffs with proper information regarding their claim, failed to advise plaintiffs regarding what personal property needed to be maintained or photographed to properly preserve their claim, and failed to provide timely and appropriate claims handling and insurance payments.

A breach of fiduciary duty is a tort and the Court of Appeals has stated:

“Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract” (*Rich v New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382, 390 [1882]).

However, other than in exceptional cases, a cause of action sounding in tort, whether for fraud or otherwise, cannot depend upon a fiduciary or other character of the relationship created by the contract alone, for no such relationship exists (*id.* at 395; see *Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260 [1st Dept 2001]).

Normally, insurance companies do not owe a fiduciary duty to their insured absent a “special relationship” (see *Edelman v O’Toole-Ewald Art Assoc., Inc.*, 28 AD3d 250 [1st Dept 2006]; *Murphy v Kuhn*, 90 NY2d 266 [1997]). “No special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer; the relationship is legal rather than equitable” (*Batas*, 281 AD2d at 264). Here, as in *Batas*, the plaintiffs make no showing that their relationship with defendants is unique or differs from that of a reasonable consumer and offer no reason to depart from the general rule that the relationship between the parties to a contract of insurance is strictly contractual in nature (*id.*). As such, this Court finds that plaintiffs’ second cause of action for breach of fiduciary duty must be dismissed.

B. Bad Faith

It is plaintiffs’ contention that once they submitted their claim to the defendant, the

defendant maliciously and unreasonably withheld payment of claims for loss of personal property, and that such actions were done in bad faith with the intent to harm plaintiffs (see Complaint, ¶¶ 50, 53). New York law does not recognize an independent tort cause of action for an insurer's alleged failure to perform its contractual obligations under an insurance policy (see *Acquista v New York Life Ins. Co.*, 285 AD2d 73 [1st Dept 2001]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]). Moreover, "the use of familiar tort language in the pleading does not change the cause of action to a tort claim in the absence of an underlying tort duty sufficient to support a claim for punitive damages" (*Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002] [citations omitted]). As such, the fourth cause of action shall be dismissed.

C. Attorneys' Fees, Costs & Expenses

In New York, "a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]). Moreover, it has been held that an insured may recover such fees incurred in defending against a declaratory judgment lawsuit initiated by an insurer (see *id.*). However, this lawsuit was initiated by the plaintiffs and is not a declaratory judgment action commenced by the defendants. Moreover, "it is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York University v Continental Ins. Co.*, 87 NY2d 308 [1995]). Plaintiffs have failed to identify any statute, agreement or court rule which would entitle them to recover attorneys' fees, costs, and expenses. As such, plaintiffs are not entitled to recover attorneys' fees, costs, and expenses based on the circumstances herein, and the fifth cause of action is hereby dismissed.

CONCLUSION

For the foregoing reasons, it is hereby


ORDERED that defendant's motion to dismiss the second, fourth, and fifth causes of action is granted and these causes of action are hereby dismissed; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference on January 28, 2014 at 11:00 a.m. in Part 7, 60 Centre Street, Room 341; and it is further,

ORDERED that defendant is directed to serve a copy of this order with notice of entry upon the plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: 12/17/14



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE