

Rosenblum v Fairfield County Bank Ins. Servs.

2015 NY Slip Op 30011(U)

January 9, 2015

Supreme Court, Putnam County

Docket Number: 98/14

Judge: Lewis J. Lubell

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PLC 2/23/15 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X
SAMUEL ROSENBLUM and JENNIFER ROSENBLUM,
Individually, and SAMUEL ROSENBLUM, as
Father and Natural Guardian of ANDREW
ROSENBLUM,

Plaintiff,

-against -

FAIRFIELD COUNTY BANK INSURANCE
SERVICES, and FIREMAN'S FUND INSURANCE
COMPANY,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 98/14

Sequence No. 1-3

Motion Date 12/11/14

The following papers were considered in connection with: **Motion Sequence #1** by defendant Fireman's Fund Insurance Company ("Fireman's Fund") for an Order pursuant to CPLR 3211(a)(7) dismissing the Fifth, Sixth, Seventh, Eighth and Ninth causes of action of plaintiffs' amended verified complaint, and those portions of the amended verified complaint that demand an award of punitive damages, attorneys' fees and costs of suit against Fireman's Fund; **Motion Sequence #2** by defendant Fireman's Fund for an Order pursuant to CPLR 3211(a)(7) to dismiss the cross-claim filed by Fairfield County Bank Insurance Services ("FCBIS"); and **Motion Sequence #3** by defendant FCBIS for an Order (a) denying Fireman's Fund's motion to dismiss FCBIS's cross-claim, or in the alternative, granting FCBIS's motion for leave to serve an amended answer which includes more detail on the cross-claim; (b) granting FCBIS's motion to dismiss plaintiff's claims for attorneys' fees and costs and dismissing plaintiff's first cause of action; and (c) granting to FCBIS such other and further relief as to the Court seems just and proper:

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Plaintiffs, Samuel Rosenblum and Jennifer Rosenblum, bring this action alleging, among other things, negligence and breach of contract, against defendants, Fairfield County Bank Insurance Services ("FCBIS") and Fireman's Fund Insurance Company ("Fireman's Fund"), with respect to a \$250,000 gap in the insurance policies procured by defendants.

Plaintiffs engaged FCBIS to procure insurance which would provide coverage for plaintiffs' automobiles and home, including an umbrella/excess coverage policy. FCBIS obtained (a) an automobile liability insurance policy on plaintiffs' behalf with non-party Mercury Casualty Company (the "Automobile Policy"); and (b) an excess insurance policy with Fireman's Fund (the "Excess Policy"). Plaintiffs allege that, in connection with said policies, FCBIS represented to plaintiffs that the policies afforded complete insurance coverage for all of plaintiffs' insurance needs.

On October 7, 2013, subsequent to the issuance of the Automobile Policy and the Excess Policy, Andrew Rosenblum, a covered driver of an insured vehicle, was involved in an automobile accident (the "accident") with Rose Haklits ("Haklits"). In response, Haklits commenced a personal injury action before this Court (see Haklits v. Rosenblum, Putnam County Index No. 2603/13). The personal injuries action is still pending.

Subsequent to the accident, plaintiffs learned that FCBIS failed to procure insurance coverage sufficient to indemnify plaintiffs for Haklits' claimed damages. Specifically, while the Automobile Policy provided single injury limits of \$250,000, the Excess Policy is, by its terms, triggered at \$500,000, thereby resulting in an insurance gap between \$250,000 and \$500,000.

Plaintiffs further allege that despite FCBIS's communication to Fireman's Fund that the Excess Policy should have been written so as to trigger the coverage at \$250,000, Fireman's Fund wrote its Excess Policy to trigger excess coverage at \$500,000, thus creating the gap in coverage.

Plaintiffs advance nine causes of action. As against FCBIS, plaintiffs allege negligence (first cause of action), breach of contract (second cause of action), breach of fiduciary duty (third cause of action), and breach of duty of good faith and fair dealing (fourth cause of action). As against Fireman's Fund, plaintiffs allege breach of contract (fifth cause of action), breach of contract (sixth cause of action), breach of covenant of good faith (seventh cause of action), and negligence (eighth cause of action). As against both defendants, plaintiffs seek, among other things, attorney's fees by way of their ninth cause of action.

Currently before the Court is (A) Fireman's Fund's motion to dismiss the fifth, sixth, seventh, eighth, and ninth causes of action pursuant to CPLR 3211(a)(7); (B) Fireman's Fund's motion to dismiss FCBIS's cross-claim pursuant to CPLR 3211(a)(7); and (C) FCBIS's motion for an Order denying Fireman's Fund's motion to dismiss FCBIS's cross-claim or, alternatively, granting FCBIS's motion for leave to serve an amended answer, dismissing plaintiffs' claims for attorneys fees and costs, and dismissing plaintiffs' first cause of action.

**Fireman's Fund's Motion to Dismiss Complaint
(CPLR 3211[a][7])**

Fireman's Fund advances several arguments in support of its motion. First, Fireman's Fund contends that the fifth and sixth causes of action for breach of contract fail because plaintiffs cannot establish any provision of the policy that was breached.

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference" (Halliwell v. Gordon, 61 AD3d 932, 933 [2009]; see AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]; Leon v. Martinez, 84 NY2d 83, 87 [1994]; Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]). 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" (Moore v. Johnson, 147 AD2d 621, 621 [1989], quoting Pace v. Perk, 81 AD2d 444, 449 [1981]; see Conroy v. Cadillac Fairview

Shopping Ctr. Props. [Md.], 143 AD2d 726
[1988]).

(JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802, 803
[2d Dept 2010]).

Upon examination of the complaint, Fireman's Fund's motion to dismiss the fifth and sixth causes of action for breach of contract is denied. Plaintiffs' inability to establish any provision of the policy that Fireman's Fund allegedly breached is not dispositive of the issue. Rather, the breach of contract claim arises from Fireman's Fund's alleged failure to underwrite the insurance contract allegedly ordered, with excess coverage triggering at \$250,000. To that extent, the complaint sufficiently states a cause of action for breach of contract.

To the extent plaintiffs' fifth and sixth causes of action seek declaratory relief, Fireman's Fund's motion to dismiss is granted. As Fireman's Fund correctly notes, plaintiffs' claim for declaratory relief rests upon the factual allegations contained in the claims for breach of contract (see Wells Fargo Bank, N.A. v. GSRE II, Ltd., 92 AD3d 535, 536 [1st Dept 2012] [claim for declaratory relief was properly dismissed in light the assertion of the breach of contract claim]; BGW Dev. Corp. v. Mount Kisco Lodge No. 1552 of Benevolent & Protective Order of Elks of U.S. of Am., 247 AD2d 565, 568 [2d Dept 1998] [a declaratory judgment cause of action is "unnecessary and inappropriate when the plaintiff has an adequate alternative remedy in another form of action, such as breach of contract"]).

Fireman's Fund also moves to dismiss plaintiffs' sixth and seventh causes of action, to the extent that they assert causes of action for breach of the covenant of good faith, on the ground that they are redundant of plaintiffs' claim for breach of contract.

The motion is denied. The Court is satisfied from the papers currently before it, that plaintiff has made an adequate showing that facts essential to justify opposition to this aspect of defendant's motion may exist but cannot now be stated (CPLR §3211[d]). Denial, however, is with leave for movant to assert said defense in its responsive pleading (id).

That aspect of Fireman's Fund motion seeking to dismiss plaintiffs' cause of action for negligence on the ground that plaintiffs had presumptive knowledge of the terms of the policy prior to the loss and took no action to close the gap in coverage is also denied.

Keeping in mind the liberal reading that the Court must afford

the complaint, the Court does not agree with Fireman's Fund's assertion that the complaint must be read as "conced[ing] that Fireman's Fund issued the Policy requested." In any event, the complaint states a viable cause of action against Fireman's Fund such as will survive this section 3211 motion (see Reilly v. Progressive Ins. Co., 288 AD2d 365, 366 [2d Dept 2001][allegation that insureds explicitly requested specific amount of coverage precludes grant of summary judgment even where plaintiffs had ample time yet failed to read the policy to discern actual liability limit of a lesser amount]).

The Court has considered and rejects Fireman's Fund's position that plaintiffs' negligence causes of action are barred by the economic loss doctrine. Among other things, Fireman's Fund has failed to establish its applicability to the instant case.

"Pursuant to that doctrine, a plaintiff may not recover in tort against a manufacturer for economic loss that is contractually based, 'whether due to injury to the product itself or consequential losses flowing therefrom' " (Hodgson, Russ, Andrews, Woods & Goodyear v. Isolatek Intl. Corp., 300 A.D.2d 1051, 1052, 752 N.Y.S.2d 767, quoting Bocre Leasing Corp. v. General Motors Corp. [Allison Gas Turbine Div.], 84 N.Y.2d 685, 693, 621 N.Y.S.2d 497, 645 N.E.2d 1195).

(Elec. Waste Recycling Group, Ltd. v. Andela Tool & Mach., Inc., 107 AD3d 1627, 1629 [4th Dept 2013] rearq denied sub nom. Elec. Waste Recycling Group, Ltd. v. Andela Tool & Mach., Inc., 111 AD3d 1366 [4th Dept 2013] and lv to appeal dismissed sub nom. Elec. Waste Recycling Group, Ltd. v. Andela Tool & Mach., Inc., 22 NY3d 1111 [2014])).

That aspect of Fireman's Fund's motion seeking to dismiss plaintiffs' demand for punitive damages is granted for the reasons advanced. In any event, this aspect of Fireman's Fund's motion is not addressed in any manner in plaintiff's opposition papers, nor is that aspect of Fireman's Fund motion to dismiss the ninth cause of action for, among other things, counsel fees. As such, that too is dismissed.

**Fireman's Fund's Motion to dismiss
cross-claim filed by FCBIS (CPLR 3211[a][7]).**

Fireman's Fund's motion to dismiss FCBIS's cross-claim is granted for want of alleged facts in support of the cause of action

therein asserted (see La France Carpets, Inc. v U. S. Rubber Co., 19 AD2d 812 [1st Dept 1963]).

**FCBIS's motion for leave to serve an amended answer;
dismiss plaintiff's claims for attorneys' fees and costs
and dismiss plaintiff's first cause of action.**

FCBIS' motion to serve an amended answer captioned "First Amended Answer to Amended Complaint", as appears as Exhibit "A" to its cross-motion, is granted and, in any event, is unopposed.

That aspect of its motion seeking to dismiss plaintiff's ninth cause of action for, among other things, counsel fees is granted, as unopposed. To any further extent, the motion is denied for the reasons hereinabove otherwise stated.

Based upon the foregoing, it is hereby

ORDERED, the Fireman's Fund's motion to dismiss is granted to the extent that the fifth and sixth causes of action are dismissed to the extent that they seek declaratory relief, the ninth cause of action is dismissed as is plaintiffs' demand for punitive damages; and it is further,

ORDERED, that Fireman's Fund's motion to strike FCBIS' cross-claim against it is granted; and it is further,

ORDERED, that FCBIS's motion for leave to serve an amended answer is granted upon the condition that it be served by January 23, 2015, in the form hereinabove allowed; and it is further,

ORDERED, that, FCBIS's motion to dismiss the ninth cause of action as against it is granted; and it is further,

ORDERED, that, to any further extent, the motions are denied; and it is further,

ORDERED, that, the parties are directed to appear before the Court at 9:30 PM on February 23, 2015, for a Preliminary Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
January 9, 2015

S/

HON. LEWIS J. LUBELL, J.S.C.

James W. Borkowski, Esq.
Attorney for Plaintiff
445 Hamilton Avenue, 15th Fl.
White Plains, New York 10601

Bowitch & Coffey, LLC
By: Daniel W. Coffey, Esq.
Attorneys for Def. FCBIS
17 Elk Street
Albany, New York 12207-1014

Robinson & Cole, LLP
By: Laura A. Torchio, Esq.
Attorney for Def. Fireman's Fund
666 Third Avenue, 20th Fl.
New York, New York 10017