

**K2 Promotions, LLC v New York Marine & Gen. Ins.
Co.**

2015 NY Slip Op 31036(U)

June 15, 2015

Supreme Court, New York County

Docket Number: 652737/14

Judge: Jennifer G. Schechter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 57

-----X
K2 PROMOTIONS, LLC and MSG HOLDINGS, L.P., DECISION AND ORDER

Plaintiffs,

-against-

Index No.652737/14

NEW YORK MARINE AND GENERAL INSURANCE
COMPANY,
Defendant.

-----X
JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3211, defendant New York Marine and General Insurance Company (New York Marine) moves to dismiss plaintiffs' third and fourth causes of action. Its motion is granted.

Background

The facts alleged in the complaint are accepted as true for purposes of this motion to dismiss.

K2 Promotions, LLC (K2) purchased primary and excess liability coverage from New York Marine to cover a major card of boxing bouts that it promoted, which took place at Madison Square Garden on November 2, 2013 (Complaint at ¶¶ 5, 8). MSG Holdings, L.P. (MSG) is an additional insured on the policies (Complaint at ¶ 6).

In 2014, a boxer who participated in one of the November 2, 2013 matches commenced an action against plaintiffs in Supreme Court, Kings County (Complaint at ¶ 12). Shortly after the action was commenced, in July 2014, K2 and MSG

contacted New York Marine several times about obtaining coverage.

On August 13, 2014, New York Marine's claims manager emailed K2's counsel:

"I got your secretary's message. I had a crazy couple of weeks but have been working on a response to your letter and will have it to you this week" (Complaint at ¶ 17 and Ex I).

As of that Friday, August 15, 2014, however, counsel for K2 had not received any response (*id.* at ¶ 18).

The following day, on August 14, 2014, New York Marine began an action in Federal Court in Florida (Federal Action), seeking a declaratory judgment that the policies it issued did not afford coverage and that it had no duty to defend or indemnify the plaintiffs in connection with the Kings County litigation (*id.* at ¶ 20 and Ex J). In "a clear manifestation of bad faith despite the lack of diversity jurisdiction, New York Marine improvidently filed its action in Federal Court in Florida to avoid the New York fee-shifting rule which provides that an insurer who is unsuccessful in a declaratory judgment action must pay the fees of the prevailing party" (*id.* at ¶ 24).

On August 15, 2014, after commencement of the Federal Action, New York Marine's claims manager sent backdated

letters to K2 and MSG (dated August 13 and 14 respectively), declining coverage (*id.* at ¶¶ 22-23).

On Monday, August 18, plaintiffs learned through a gossip website that New York Marine had filed suit against them in Florida. They subsequently received the backdated letters, informing that the coverage had been denied.

On September 8, 2014, plaintiffs commenced this action, seeking a declaratory judgment that New York Marine has a duty to defend them in connection with the Kings-County tort action (Complaint at ¶¶ 26-34 [Count I]). They also seek damages for breach of contract (Complaint at ¶¶ 35-37 [Count II]).

Their third cause of action seeks relief for "bad faith." Plaintiffs allege that, with malice, "New York Marine has acted in bad faith in the processing of the claim . . . for coverage, in filing the declaratory action in Florida (forcing this filing as a defensive measure), in misleading K2 and MSG about its intention to respond to notices of claim and lulling K2 and MSG into believing that New York Marine was not going to file suit, and in declining coverage, and for failing to act in accordance with the requirements of NYCRR tit. 11, § 216.4" (Complaint at ¶ 39-40). In addition to other damages, plaintiffs seek punitive damages and an award of those "fees, costs, disbursements and other awards they have incurred and

will incur in defending the [Federal Action]" (*id.* at Count III, Wherefore at ¶¶ 3, 5).*

In their fourth cause of action, plaintiffs maintain the New York Marine committed fraud and they seek, among other things, punitive damages. Plaintiffs assert that:

- They duly presented their claims to New York Marine, expecting a timely, good-faith response (*id.* at ¶ 42). There was no timely response and when "counsel for K2 followed up on behalf of both plaintiffs the claims representative sent an email, quoted earlier herein, that she would provide a response later in the week" (*id.* at ¶ 44).
- "The claims representative of New York Marine had to have known when she sent that email, that New York Marine's counsel was already assigned to file a complaint against the plaintiffs and would do so prior to plaintiffs' receiving any notice of disposition of the claims. The email was designed to lull the plaintiffs into inaction. Additional evidence of intent was the fact that the letter declining coverage was backdated to the day before the complaint was filed by New York Marine, when it was actually sent by mail (and not even emailed) the day after the complaint was filed.
- Plaintiffs were prevented from taking certain actions which could have limited or eliminated costs which they will incur, including but not limited to counsel fees.
- The actions of defendant were intentionally false, with knowledge that plaintiffs would reasonably rely upon those actions, resulting in monetary damage to plaintiffs" (*id.*, at ¶¶ 45-49).

* On October 14, 2014, the Federal action was dismissed based on New York Marine's "notice of voluntary dismissal without prejudice" (see Affirmation in Support, Ex M).

New York Marine moves to dismiss the bad-faith and fraud causes of action.

Analysis

The law is well settled: "defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]). Because plaintiffs have not sufficiently pled any breach of duty distinct from the contract or a viable independent tort, its causes of action for bad faith and fraud are dismissed.

To the extent that plaintiffs claim that New York Marine acted in bad faith in processing their claims--including delaying to answer their inquiries and failing to decline coverage in a timely manner--these duties relate to performance of the parties' contract. Plaintiffs have not set forth any legal authority establishing duties of care distinct from the contract under these circumstances (*New York Univ. v Continental Ins. Co.*, 87 NY2d at 317-318; see also *Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353, 355 [1st Dept 2005] ["there is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations under

an insurance policy"])). Likewise, plaintiffs have not shown any authority for recognition of an independent "bad faith" tort premised on commencement of litigation in an improper forum to obtain a litigation advantage. The third cause of action is therefore dismissed.

Plaintiffs' fraud claim also fails. The fraud cause of action centers on New York Marine's delayed response to plaintiffs and its misleading conduct that lulled the plaintiffs into inaction. Even assuming that New York Marine's claims manager knew of the impending Federal lawsuit when she emailed K2's counsel, plaintiffs have not established that New York Marine had any duty independent of the contract to disclose that information to plaintiffs. Additionally, allegations of fraud based on the backdating of the letters are not sustainable because plaintiffs have not asserted that they justifiably relied on those letters to their detriment (Complaint at ¶¶ 22-23 [the backdated letters were not received until "after MSG and K2 had learned of the filing of the complaint"])).

In the end, plaintiffs' allegations do not support viable causes of action for "bad faith" or fraud, and the third and fourth causes of action are dismissed.

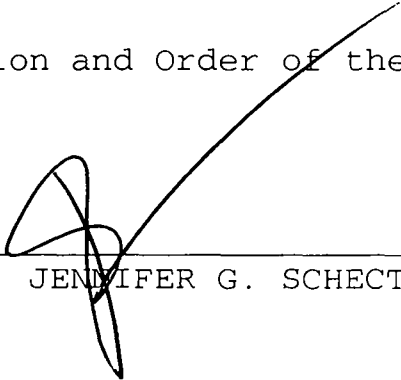
Accordingly, it is ORDERED that defendant's motion is granted and plaintiffs' third and fourth causes of action are dismissed; it is further

ORDERED that defendant is to answer within 10 days after service of notice of entry of this Order (see CPLR 3211[f]); and it is further

ORDERED that the parties are to appear for a preliminary conference on July 29, 2015 at 9:30 a.m. (111 Centre Street, Room 623).

This constitutes the Decision and Order of the Court.

Dated: June 15, 2015



HON. JENNIFER G. SCHECTER