| **Lola Roberts Beauty Salon, Inc. v Leading Ins. Group Ins. Co. Ltd.** |
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| 2015 NY Slip Op 31442(U) |
| July 30, 2015 |
| Supreme Court, Queens County |
| Docket Number: 2135 2012 |
| Judge: David Elliot |
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE David Elliot
Justice

IAS Part 14

LOLA ROBERTS BEAUTY SALON, INC.,

Plaintiff,

-against-

LEADING INSURANCE GROUP INSURANCE CO. LTD., et al.,

Defendants.

Index No. 2135 2012

Motion Date June 9, 2015

Motion Cal. No. 91

Motion Seq. No. 5

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment dismissing plaintiff's third cause of action and dismissing those parts of the complaint which seek extra-contractual consequential damages.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits..... | 1-4 |
| Answering Affidavits - Exhibits..... | 5-7 |
| Reply Affidavits..... | |
| Memoranda of Law ..... | 8-9 |

Upon the foregoing papers it is ordered that the motion is granted.

I. The Allegations of the Complaint

Plaintiff owned and operated a beauty salon business at 208-02 Cross Island Parkway, Bayside, New York. On or about November 30, 2009, plaintiff procured from defendant-insurers a business owner's policy effective from November 30, 2009 to November 30, 2010. The policy covered loss of business income due to the necessary suspension of business

operations during a period of restoration caused by or the result of a covered cause of loss. The policy required defendants to pay net income that would have been earned if no loss or damage had occurred and ordinary business expenses.

On January 31, 2010, a fire sprinkler broke at the premises, causing a flood, and requiring plaintiff to cease business operations. Immediately following the flood, plaintiff placed defendants on notice of the occurrence and of its intention to make a claim under the policy, including for loss of business income. As a result of the flood, plaintiff lost business income but still incurred expenses, such as for rent and the repayment of a business loan. Defendants delayed in processing plaintiff's claim and failed to pay sums due under the policy. As a consequence, plaintiff went out of business.

II. Procedural History

Plaintiff began this action by the filing of a summons and a complaint on or about January 31, 2012. The first cause of action is for a judgment declaring that defendants are obligated to indemnify plaintiff in the amount of $400,000, the limit of the policy for business income coverage. The second cause of action is for breach of contract. The third cause of action is for the breach of the implied covenant of good faith and fair dealing. Defendants move only with respect to plaintiff's third cause of action and its claim for extra-contractual consequential damages.

III. The Facts

Plaintiff opened for business in June, 2009, and, about eight months later, on January 31, 2010, a sprinkler pipe burst in a vacant unit above its beauty salon. Plaintiff notified defendants of the flood on February 1, 2010.

Immediately after the flood, defendants retained R. J. Cicero Associates (Cicero), an independent insurance adjuster, to investigate the loss, and plaintiff retained Champion Adjustment Co. LLC (Champion), a public adjuster. On February 3, 2010, Cicero and Champion inspected the salon. During the time that Cicero worked with Champion, in May, 2010, defendants paid plaintiff a $50,000 advance on it total claim for damages.

Plaintiff could not make repairs to the salon because its contractors could not obtain permits. The Fire Department considered the building unsafe because the landlord, Able Motor Cars, failed to bring the sprinkler up to Code standards, and this failure prevented the issuance of permits. Moreover, the building did not have a certificate of occupancy, which also prevented the issuance of permits needed to restore the salon.

Pursuant to a letter dated February 12, 2010, plaintiff's landlord conditionally accepted plaintiff's offer to surrender the premises and terminate the lease. On or about April 2, 2010, plaintiff began an action in the New York State Supreme Court, County of Queens against the landlord, alleging, *inter alia*, that the landlord had been negligent in maintaining the building and that the burst pipe caused plaintiff to go out of business (*Lola Roberts Beauty Salon, Inc. v Able Motor Cars Corp*., Index No. 8312/10).

Due to the delay in repairing the salon, the ten stylists " hosted" by plaintiff (they were independent contractors who split revenue with plaintiff in exchange for work stations at the salon) went elsewhere.

Cicero and Champion found different contractors to prepare cost estimates for the restoration of the salon, and Cicero's contractor arrived at an estimate of $65,314.56 in its March 3, 2010 report, and Champion's contractor arrived at an estimate of $82,965.85 in its March 10, 2010 report.

On April 14, 2010, Champion provided defendants with plaintiff's 2009 income tax return and other documents necessary for the investigation of the claim.

Despite receiving a $50,000 advance from the defendants in May, 2010, plaintiff did not use any of the money to repair the salon. The two owners of the business simply split the money between themselves. On June 30, 2010, plaintiff sold all of its furnishings to another salon for $20,000, and the two owners split the proceeds between themselves.

Defendants did not deny any part of plaintiff's claim, but rather offered a settlement. Defendants offered to settle the claim for business income loss by offering $29,748.95 (representing five months of lost income at the rate of $5,949.75 per month). Defendants offered to settle the improvements and betterments part of the claim for $65,314.56 and the business personal property loss for $14,367.83. Champion, plaintiff's adjuster, found the offers to be fair and reasonable, and Champion advised plaintiff to execute the sworn statement proofs of loss and accept the money. Instead, plaintiff discharged Champion without notice to defendants, whose adjuster made 38 unreturned phone calls to Champion. This action ensued.

## IV. Discussion

### A. The Third Cause of Action

Defendants are entitled to summary judgment dismissing the third cause of action. A breach of the implied covenant of good faith and fair dealing does not raise a claim sounding

in tort, but rather in contract (*see Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629 [2014]). An insured cannot raise a cause of action in tort for an insurer's failure to perform its obligations under an insurance policy in good faith (*see Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841 [2005]).

Insofar as the third cause of action raises a contractual claim based on the implied covenant of good faith and fair dealing, it is duplicative of the cause of action for breach of contract (*see Bostany v Trump Org. LLC*, 73 AD3d 479 [2010]; *Canstar v J.A. Jones Const. Co.*, 212 AD2d 452 [1995]). " A cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract' " (*Deer Park Enters., LLC v Ail Sys. Inc.*, 57 AD3d 711 [2008], quoting *Canstar v Jones Constr. Co.*, 212 AD2d 452 [1995]). Here, both claims allege defendants' failure to, *inter alia*, make a prompt determination of plaintiff's claim, whereby causing damages; as such, the third cause of action must be dismissed.

B. Consequential Damages

"It is well settled that in breach of contract actions the nonbreaching party may recover general damages which are the natural and probable consequence of the breach. Special, or consequential damages, which do not so directly flow from the breach, are also recoverable in limited circumstances" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187 [2008] [internal quotation marks and citations omitted]).

An insured may recover foreseeable consequential damages, beyond the limits of the policy, where the insurer breaches its duty to investigate and settle claims in good faith (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, *supra*). "[A]n insurer is not liable in excess of the policy limits for the breach of an insurance contract absent bad faith " (*STV Group v American Cont. Props.*, 234 AD2d 50 [1996]).

An insurer acts in bad faith when it acts in gross disregard of its insured's interests (*see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445 [1993]; *JLS Indus., Inc. v Delos Ins. Co.*, 127 AD3d 645 [2015]). In order to prove bad faith, the insured must establish that the insurer engaged in a pattern of behavior demonstrating a conscious or knowing indifference to the insured's interests (*State Farm Fire & Cas. Co. v Ricci*, 96 AD3d 1571 [2012]; *Bennion v Allstate Ins. Co.*, 284 AD2d 924 [2001]).

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Defendants successfully carried that burden by offering proof that they did not violate the implied covenant of good faith and fair dealing. Defendants: (1) quickly retained Cicero who conducted an on-site inspection of the salon just two days after plaintiff provided notice of the flood; (2) quickly found a contractor to provide an estimate of the cost of repairs; (3) gave plaintiff a $50,000 advance even before the investigation was completed; (4) made an offer to settle all parts of plaintiff's claim; (5) made a settlement offer that even Champion, plaintiff's own adjuster, advised plaintiff to accept; and (6) continued settlement efforts even after plaintiff rejected defendants' offer.

Defendants further offered proof that: (1) plaintiff could not repair its salon, not because of any action by them, but because plaintiff could not obtain construction permits; (2) plaintiff's landlord conditionally accepted the plaintiff's offer to surrender the premises and terminate the lease as early as February 12, 2010, giving plaintiff the early opportunity to move its business elsewhere; (3) plaintiff delayed in supplying the insurer with tax returns and other documents needed to process the claim; (4) plaintiff did not request an advance (which the insurer provided) until the business was on the verge of termination; and (5) plaintiff did not inform defendants or Cicero that Champion had been fired, resulting in 38 unreturned phone calls to Champion.

In opposition, plaintiff failed to raise a triable issue of fact (*see Dog Day's, Inc. v Hartford Fire Ins. Co.*, 126 AD3d 1332 [2015] [regarding property damage and business interruption coverage, plaintiff failed to raise triable issue of fact as to their claim since, "during the eight months that business interruption payments were made, plaintiff made no effort to rebuild or repair the premises, or to resume business operations, despite receiving an actual cash value payment for the property within 3 ½ months of the loss"]). Defendants' conduct was not a proximate cause of the termination of plaintiff's business, and, moreover, the evidence in this case clearly eliminates any issue of fact pertaining to whether defendants acted in "gross disregard" of plaintiff's interests.

Accordingly, defendants' motion is granted in its entirety. Plaintiff's third cause of action for bad faith is dismissed. Further, any claim plaintiff has for extra-contractual consequential damages is dismissed.

Dated: July 30, 2015

J.S.C.