Millin v Allstate Indem. Co.
2015 NY Slip Op 31797(U)
September 21, 2015
Supreme Court, New York County
Docket Number: 156318/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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GARY MILLIN and LAINIE MILLIN,

Index No. 156318/2014

Plaintiffs,

-against-

DECISION/ORDER

ALLSTATE INDEMNITY COMPANY, QBE INSURANCE COMPANY and FFILIATED FM INSURANCE COMPANY,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

In this action, plaintiffs seek to recover under a policy of insurance issued by defendant Allstate Indemnity Company ("Allstate") for damages to plaintiffs' condominium unit located at 250 East 53rd Street, Unit 807, in Manhattan (the "Premises"). Allstate now moves for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's second and third causes of action, including all claims for punitive damages and attorney's fees. For the reasons set forth below, Allstate's motion is granted in part and denied in part.

The relevant facts are as follows. Sometime prior to July 5, 2012, defendant Allstate issued to plaintiffs a policy of insurance insuring the Premises against risks of loss and damage for a term commencing June 3, 2012 and ending June 12, 2013 (the "Policy"). On July 5, 2012, while the Policy was in full force and effect, there was water damage to the Premises due to a

water leak in another apartment. Thereafter, plaintiffs sought coverage for the incident under the Policy. Allstate partially disclaimed coverage for the loss. Thus, plaintiffs have commenced the instant action against Allstate, among others, asserting claims for breach of contract, bad faith and violation of General Business Law § 349 ("GBL § 349"). Under these claims, plaintiffs seek damages in the amount of $73,237.00, plus consequential damages, punitive damages and attorney's fees.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the present case, as an initial matter, Allstate's motion for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiffs' third cause of action for violation of GBL § 349 on the ground that it fails to state a claim is granted. GBL § 349 declares unlawful any "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." "[P]arties claiming the benefit of the section must, at the threshold, charge conduct that is consumer oriented." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 (1995); *see also Oswego Laborers' Local 24 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). "The conduct need not be repetitive or recurring but defendant's acts or practices

must have a broad impact on consumers at large; private contract disputes unique to the parties . . . would not fall within the ambit of the statute." *Id.* (internal quotations and citations omitted); *see also Cruz v. NYNEX Information Resources*, 263 A.D.2d 285, 290 (1st Dept 2000).

Here, plaintiffs have not met the threshold requirement to maintain a claim under GBL § 349 as Allstate's partial disclaimer of coverage does not constitute consumer-oriented conduct. Allstate's partial disclaimer of coverage does not have a broad impact on consumers at large. Rather, the dispute between plaintiffs and Allstate is unique to these two parties. In other words, this action involves only a private contract dispute. Thus, plaintiffs cannot maintain a claim under GBL § 349 as a matter of law.

Additionally, Allstate's motion to dismiss plaintiffs' claim for punitive damages is granted. "Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." *Racanova v. Equitable Life Assur. Socy.*, 83 N.Y.2d 603, 618 (1994). In fact, punitive damages are only available "where the breach of contract also involves a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations" and the conduct was "'aimed at the public generally.'" *Id.* (quoting *Walker v. Sheldon*, 10 N.Y.2d 401 (1961)).

In the present case, plaintiffs cannot seek punitive damages as they allege only an ordinary breach of contract between private parties. On its face, the complaint is devoid of any allegations that Allstate's alleged breach of the Policy involved fraud or any wanton dishonesty as to imply criminal indifference. Rather, plaintiffs' claim involves only an ordinary breach of contract claim based on Allstate's partial disclaimer of coverage. Further, the complaint fails to

allege facts demonstrating that Allstate's conduct was aimed at the public generally. Thus, plaintiffs' claim for punitive damages must be dismissed as a matter of law.

Additionally, Allstate's motion to dismiss plaintiffs' demand for attorney's fees, costs and disbursements is granted. "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 Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 324 (1995) (citing *Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21 (1979)). Thus, as this is an action brought by an insured against its insurer to settle its rights under the Policy, plaintiffs cannot seek attorneys' fees, costs and disbursements as a matter of law.

However, Allstate's motion to dismiss plaintiffs' claim for consequential damages is denied. It is well settled that New York does not recognize an independent bad faith tort cause of action for an insurer's alleged failure to perform its contractual obligations. *See Acquista v. New York Life Ins. Co.*, 285 A.D.2d 73, 78 (1st Dept 2001); *Racanova,* 3 N.Y.2d at 603; *New York Univ.*, 87 N.Y.2d at 308. However, "consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were 'were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.'" *Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200, 203 (quoting *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 192 (2008)). Specifically, consequential damages are permitted when they derive from an insurer's bad faith refusal to pay an insured's claim and such damages were reasonably contemplated by both parties at the time of the contract's execution. *See Bi-Economy Mkt., Inc.*, 10 N.Y. 3d at 192; *see also Goldmark, Inc. v. Catlin Syndicate Limited*, 2011 WL 743568 at *6

(E.D.N.Y. 2011).

In the present case, plaintiffs' complaint sufficiently states a claim for consequential damages as it alleges that plaintiffs' have suffered consequential damages based on Allstate's bad faith. Specifically, the complaint alleges that Allstate "misrepresented facts on some or all of communications and claims decisions, willingly and/or intentionally misrepresented available coverages and otherwise acted in bad faith." The complaint further alleges that as a result of this bad faith, plaintiffs suffered consequential damages. Thus, as plaintiffs allege that Allstate acted in bad faith in denying their claim, they may seek consequential damages in this action.

Accordingly, based on the foregoing, Allstate's motion is granted in part and denied in part and it is hereby

ORDERED that plaintiffs' claim for punitive damages and demand for attorney's fees, costs and disbursements are hereby dismissed; and it is further

ORDERED that plaintiffs' third cause of action for violation of GBL § 349 is hereby dismissed. This constitutes the decision and order of the court.

Dated: 9/21/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.