

Liberty Mut. Ins. Co. v Raia Med. Health, P.C.

2015 NY Slip Op 32587(U)

January 26, 2015

Supreme Court, Nassau County

Docket Number: 14240/13

Judge: James P. McCormack

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SUPREME COURT - STATE OF NEW YORK

RESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

x

LIBERTY MUTUAL INSURANCE COMPANY,
LIBERTY MUTUAL FIRE INSURANCE COMPANY,
LIBERTY INSURANCE CORPORATION, THE FIRST
LIBERTY INSURANCE CORPORATION, LM
INSURANCE CORPORATION, LIBERTY MUTUAL
MID-ATLANTIC INSURANCE COMPANY, LIBERTY
COUNTY MUTUAL INSURANCE COMPANY, LM
PROPERTY AND CASUALTY INSURANCE
COMPANY, AMERICAN STATES INSURANCE
COMPANY, GENERAL INSURANCE COMPANY OF
AMERICA, SAFECO INSURANCE COMPANY OF
ILLINOIS, SAFECO INSURANCE COMPANY OF
INDIANA, 21ST CENTURY INSURANCE COMPANY,
21ST CENTURY CASUALTY COMPANY , 21ST
CENTURY PACIFIC INSURANCE COMPANY, 21ST
CENTURY INSURANCE COMPANY OF THE
SOUTHWEST, 21ST CENTURY ADVANTAGE
INSURANCE COMPANY f/k/a/ AIG ADVANTAGE
INSURANCE COMPANY, 21ST CENTURY ASSURANCE
COMPANY f/k/a AMERICAN INTERNATIONAL
INSURANCE COMPANY OF DELAWARE, 21ST
CENTURY AUTO INSURANCE COMPANY OF NEW
JERSEY, f/k/a AIG AUTO INSURANCE COMPANY OF
NEW JERSEY, 21ST CENTURY CENTENNIAL
INSURANCE COMPANY f/k/a AIG CENTENNIAL
INSURANCE COMPANY, 21ST CENTURY INDEMNITY
INSURANCE COMPANY f/k/a AIG INDEMNITY
INSURANCE COMPANY, 21ST CENTURY NATIONAL
INSURANCE COMPANY f/k/a AIG NATIONAL
INSURANCE COMPANY, 21ST CENTURY NORTH
AMERICA INSURANCE COMPANY f/k/a AMERICAN
INTERNATIONAL INSURANCE COMPANY, 21ST
CENTURY PINNACLE INSURANCE COMPANY f/k/a
AIG INTERNATIONAL INSURANCE COMPANY OF
NEW JERSEY, 21ST CENTURY PREFERRED
INSURANCE COMPANY f/k/a AIG PREFERRED
INSURANCE COMPANY, 21ST CENTURY PREMIER
INSURANCE COMPANY f/k/a AIG PREMIER
INSURANCE COMPANY, 21ST CENTURY SECURITY
INSURANCE COMPANY, f/k/a NEW HAMPSHIRE
INDEMNITY COMPANY, INC, FARMERS
INSURANCE COMPANY OF ARIZONA, FARMERS
NEW CENTURY INSURANCE COMPANY, FARMERS
INSURANCES EXCHANGE, MID-CENTURY
INSURANCE COMPANY, , TRUCK INSURANCE
EXCHANGE, FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN, FOREMOST
PROPERTY & CASUALTY INSURANCE COMPANY,

TRIAL/IAS, PART 40
NASSAU COUNTY

Index No.: 14240/13

Motion Seq. No.: 003
Motion Submitted: 12/18/14

**LIBERTY MUTUAL SIGNATURE INSURANCE, BRISTOL
WEST CASUALTY INSURANCE COMPANY, BRISTOL
WEST INSURANCE COMPANY and any and all of their
subsidiaries, affiliates and/or parent companies,**

Plaintiff(s),

-against-

**RAIA MEDICAL HEALTH, P.C. and NEW IMAGING
AND DIAGNOSTIC SERVICES, P.C.**

PC Defendant(s),

**JOSEPH A RAIA, M.D. and HELEN T. MOREHOUSE,
M.D.,**

Nominal Owner Defendant(s),

**STANLEY SONN, AVRAM MAYER SHAPIRO,
MARCUS RUIZ, NEW IMAGING SERVICES, INC. and
NEW IMAGE MANAGEMENT CORP.,**

Management Defendant(s).

x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....	X
Affirmation in Opposition/ Supporting Exhibits.....	X
Reply Affirmation.....	X

Plaintiffs, Liberty Mutual Insurance Company et. al. (Liberty Mutual) move this court for an order dismissing Defendants Joseph A Raia, M.D. and Raia Medical Health, P.C.'s (collectively Raia) counterclaim, pursuant to CPLR §3211(a)(7). Defendants oppose the motion.

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Plaintiffs brought an action against all defendants seeking Declaratory Judgments and alleging fraud and unjust enrichment. Plaintiffs' commenced this action by service of a summons and complaint dated November 12, 2013. Raia submitted an answer and counterclaim dated September 26, 2014.

By short form order dated June 30, 2014, this court granted Plaintiffs' motion for a preliminary injunction preventing Defendants from filing any further claims or further pursuing any claims currently pending before a court or arbitrator.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 AD3d 814, 815 [2d Dept. 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept. 2010]). "The [pleading] must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*Hense v Baxter*, 79 AD3d 814, 815 [2d Dept. 2010], *supra*; see *Leon v Martinez*, 84 NY2d 83, 87 [1994], *supra*; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept. 2010], *supra*; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept. 2008]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to

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CPLR § 3211(a)(7), the court is to accept all facts alleged in the pleading as being true, accord proponent of the pleading the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see generally Delbene v. Estes*, 52 AD3d 647 [2d Dept. 2008]; *see also 511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]). Pursuant to CPLR § 3026, the pleading is to be liberally construed (*see Leon v. Martinez*, 84 NY2d at 83). It is not the court's function to determine whether proponent of the pleading will ultimately be successful in proving the allegations (*see Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2d Dept. 2008]; *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005]).

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference (*see 511 W. 323rd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept. 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept. 2006]).

The counterclaim herein alleges that Plaintiffs abused the examination under oath (EUO) process and used it to ask questions and obtain documentation unrelated to the subject claims. This was a "pattern of abuse" solely intended to withhold payment from Raia. The counterclaim also asserts the underlying action is an egregious attempt by Plaintiffs to "convert" monies already paid to Raia, or owed to Raia, for its own personal use and gain.

Plaintiffs argue it is unclear what cause of action the counterclaim is attempting to describe. Raia counters that it is prima facie tort. Though the court also finds the cause of action unclear in the counterclaim, the court will interpret the counterclaim and Plaintiff's CPLR §3211 motion from the perspective of a prima facie tort cause of action.

“The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (*Curiano v. Suozzi*, 63 N.Y.2d 113, 117, 480 N.Y.S.2d 466, 469 N.E.2d 1324; *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 332, 464 N.Y.S.2d 712, 451 N.E.2d 459)”. *Freihof v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985). Prima facie tort is not intended to be a “catch-all” for a cause of action that is otherwise without merit, nor is it to be used as a stand-in for a conventional tort that fails to state a cause of action. *Id.* The special damages must be specific and measurable (*Id.*) and the underlying action must have been commenced with “disinterested malevolence”. *Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). “...New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action (see *Drago v. Buonagurio*, 46 N.Y.2d 778, 413 N.Y.S.2d 910, 386 N.E.2d 821, revg. 61 A.D.2d 282, 402 N.Y.S.2d 250, *supra*; *Howard v. Block*, *supra*; *Ginsberg v. Ginsberg*, *supra*; *Scully v. Genesee Milk Producers' Coop.*, 78 A.D.2d 982, 434 N.Y.S.2d 48 *app. dsmd.* 52 N.Y.2d 969, 437 N.Y.S.2d 972, 419 N.E.2d 875; *Belsky v. Lowenthal*,

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62 A.D.2d 319, 405 N.Y.S.2d 62, *affd.* 47 N.Y.2d 820, 418 N.Y.S.2d 573, 392 N.E.2d 560; *Knapp Engraving Co. v. Keystone Photo Engraving Corp.*, 1 A.D.2d 170, 148 N.Y.S.2d 635”.

Raia’s counterclaim appears to contain two different theories. One is that the EUO process was abused, and the second is that the underlying action was brought as a form of harassment and intended to allow Plaintiffs to keep money they allegedly owe Raia. Paragraph 12 of the counterclaim states: “Plaintiffs have brought this lawsuit solely to intimidate and harass and disrupt the business operations of [Raia]...”. This allegation sounds in retaliation for Plaintiffs’ underlying action is not a proper ground for prima facie tort. (*Curiano v. Suozzi, supra; Muro-light v. Farley*, 95 A.D.3d 846 [2nd Dept. 2012]). Further, as Raia asserts there was a financial motivation to Plaintiffs’ actions, to wit: to avoid paying Raia so they could keep the money for themselves, the counterclaim fails to meet the criteria requiring a disinterested malevolence. (*Crown Assoc., Inc. v. Zot, LLC*, 83 A.D.3d 765 [2nd Dept. 2011]). As such, an essential element of prima facie tort is missing.

In reviewing the counterclaim and assuming all facts contained therein to be true, giving the pleading every favorable inference and has determining whether the allegations contained in the pleading fits into any cognizable legal theory (*Delbene v. Estes, supra*), the court finds the counterclaim fails to state a cause of action.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion to dismiss the counterclaim is GRANTED.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 26, 2015
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED

JAN 29 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE