

Armstrong v United Frontier Mut.

2015 NY Slip Op 32952(U)

November 13, 2015

Supreme Court, Erie County

Docket Number: 808347/2015

Judge: E. Jeannette Ogden

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At a Special Term of the Supreme Court held in the City of Buffalo, County of Erie, and State of New York, on the 20th day of October, 2015.

PRESENT: HON. E. JEANNETTE OGDEN, JSC

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE**

VICTORIA C. ARMSTRONG

Plaintiff

**DECISION AND ORDER
INDEX NO.: 808347/2015**

v.

UNITED FRONTIER MUTUAL

Defendant

Defendant, United Frontier Mutual, moves for an Order, pursuant to CPLR §3211(a) (8), dismissing Plaintiff's Complaint for lack of personal jurisdiction, or in the alternative, an Order dismissing the causes of action in Plaintiff's complaint alleging constructive fraud and negligent misrepresentation, pursuant to CPLR §§3211(a) (1) and (a) (7), and denying Plaintiff's request for attorney fees, costs and disbursements.

Plaintiff opposes Defendant's motion and cross-moves for an Order granting leave to amend the caption of her Summons and Complaint pursuant to CPLR §305, 2001, and 3025, to correct the misnomer of the intended Defendant's true name.

The Court, having reviewed Defendant's Notice of Motion, Attorney Affidavit of Marco Cercone, Esq., with annexed exhibits, Defendant's Memorandum of Law in Support of its Motion to Dismiss and the Reply Affidavit of Marco Cercone, Esq.; Plaintiff's Notice of Cross-

Motion to Amend Complaint Caption, Attorney Affirmation of Kevin T. Stocker, Esq. in Support of Plaintiff's Cross-Motion to Amend Complaint and Opposing Defendant's Motion to Dismiss, with annexed exhibits; and having considered the oral arguments of Counsel and due deliberation having been had thereon, this Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

This is an action to recover damages arising out of an insurance contract between the parties wherein United Frontier Insurance Company (the intended Defendant) contractually agreed to insure real property owned by Plaintiff, against losses outlined in a policy of insurance which included fire loss. A fire occurred on Plaintiff's property while the policy was in full force and effect. Plaintiff filed a claim, pursuant to the policy, with the intended Defendant to recover damages sustained as a result of the fire loss.

Upon filing the claim, Plaintiff was advised by Counsel for the intended Defendant, that there was no need to hire an attorney or an adjuster to protect her interests in the claim and that she had fully complied with policy claim requirements. Plaintiff relied upon the representations made by Counsel regarding her compliance with the terms of the policy and did not retain an attorney or an adjuster to resolve her insurance claim. The intended Defendant subsequently denied Plaintiff's claim for failure to submit the required claim documents.

Thereafter, Plaintiff commenced this action to recover damages for the fire loss by the filing of a summons and complaint that misnamed the intended Defendant, United Frontier Insurance Company, as Defendant, "United Frontier Mutual." On July 21, 2015, Plaintiff properly served her summons and verified complaint alleging breach of contract, constructive fraud and negligent misrepresentation, on the Vice President of the intended Defendant, United

Frontier Mutual Ins. Co. The summons & complaint served contained the name of the misnamed Defendant, United Frontier Mutual. There is no such company as “United Frontier Mutual”.

Defendant hereby moves to dismiss Plaintiff’s Complaint because the named Defendant therein is a non-existent company that was never served and over which this Court lacks jurisdiction. Alternatively, Defendant seeks dismissal of Plaintiff’s causes of action alleging constructive fraud and negligent misrepresentation. Plaintiff opposes Defendant’s Motion and seeks leave to amend the caption of the summons & complaint to include the correct name of the intended Defendant.

CONCLUSIONS OF LAW

This Court disagrees with the position taken by the Defendant. A mistake in a summons and complaint, as well as in the filing process thereof, may be corrected, upon such terms as may be just, provided that a substantial right of a party is not prejudiced. [CPLR §§305(c); 2001]

In addition, an amendment to correct a misnomer in a pleading is permitted where there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought.” [CPLR §305 (c); *Manocchio v. Wohlfeil*, 614 N.Y.S.2d 837, 837 (4th Dept. 1994) (quoting *Ober v. Rye Town Hilton* (citations omitted))].

Defendant does not dispute that service of the summons and complaint upon its Vice President was sufficient to obtain jurisdiction over it pursuant to §CPLR 308 (2), nor does Defendant deny that it received actual notice of the institution of the lawsuit, or assert that it would be prejudiced if the misnomer were corrected. The pleadings also allege facts with sufficient specificity so that the misnomer could not have been misled concerning who it was that the Plaintiff intended to sue.

Accordingly, Plaintiff may amend the caption of her summons and Complaint to correct misnamed Defendant. Defendant's motion to dismiss the complaint, under the circumstances presented, is moot.

Defendant also moves to dismiss the causes of action in Plaintiff's complaint based on constructive fraud and negligent misrepresentation pursuant to CPLR §3211. In the context of a CPLR §3211 motion to dismiss, the pleadings are to be afforded a liberal construction, the Court must accept the facts alleged in the complaint as true and accord plaintiffs the benefit of every possible favorable inference. [*Leon v Martinez*, 84 NY2d 83; *Mandarin Trading Ltd v Wildenstein*, 16 NY 3d 173]

To survive a motion to dismiss, a plaintiff need only plead facts that fall within a cognizable legal theory. A complaint alleging constructive fraud must contain facts that show (1) a fiduciary or confidential relationship between the parties, (2) a misrepresentation or omission of material fact, (3) which was made with the intention of inducing reliance, (4) upon which the plaintiff reasonably relied, and (5) which caused injury to the plaintiff. [*Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 82 (S.D.N.Y. 2010); *Klembczyk v. Di Nardo*, 705 N.Y.S.2d 743, 744 (4th Dept 1999)].

Plaintiff's complaint alleges facts to support all five elements of constructive fraud. The complaint alleges that the Defendant and its legal agent, who also acted as if he was representing Plaintiff's interest, maintained a fiduciary relationship with Plaintiff in which Defendant's legal agent, who possessed superior knowledge of what documentation was required and how noncompliance with certain policy provisions could prove fatal, made misrepresentations of facts to Plaintiff by advising her not to retain an attorney or adjuster to represent her interests. Defendant and its legal agent also instructed Plaintiff that she had complied with the terms of the policy in

the claim process and no other action was required for her claim. Plaintiff justifiably relied upon the representations.

Plaintiff's complaint further alleges that Defendant's legal agent was fully aware of Plaintiff's right and need to retain her own attorney and adjuster when advising her that the same were not needed and that said representations of material facts were made to and did induce Plaintiff to rely upon them regarding her compliance with the claim process. Defendant's agent's inducement of Plaintiff to rely upon his misrepresentations about her policy claim compliance caused injury to Plaintiff as her claim was denied and her property losses were not reimbursed.

A complaint alleging a cause of action for negligent misrepresentation must plead facts that show "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." [*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011);]

Defendant contends that Plaintiff's reliance on the representations of its legal agent was not reasonable. However the Court accepts the facts contained in the verified complaint as true and finds Plaintiff's alleged reliance reasonable at this stage of the action. Therefore, Plaintiff's Complaint also alleges facts sufficient to support a cognizable legal theory for negligent misrepresentation.

Additionally, where a Plaintiff alleges breach of contract, claims for negligent misrepresentation and fraud may be maintained so long as the claims are based on circumstances extraneous to the performance of the contract. [*Auble v. Doyle*, 832 N.Y.S.2d 715, 717 (4th Dept.

2007); *Jan Sparka Travel, Inc. v. Hamza*, 587 N.Y.S.2d 958, 959 (1992)]. Plaintiff's claims for constructive fraud and negligent misrepresentation present circumstances extraneous to the performance of the contract itself.

Accordingly, this Court finds that Plaintiff is entitled to maintain her causes of action for constructive fraud and negligent misrepresentation.

Based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for leave to amend the caption of her Summons and Complaint is **GRANTED**, and it is further

ORDERED that Defendant's motion to dismiss Plaintiff's complaint is **DENIED** without prejudice, and it is further

ORDERED that Defendant's motion to dismiss Plaintiff's causes of action for constructive fraud and negligent misrepresentation is **DENIED**; and it is further

ORDERED that Plaintiff's claim for attorney's fees, costs, and disbursements is **DENIED**.

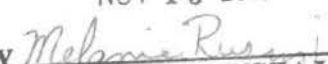

HON. E. JEANNETTE OGDEN, JSC

DATED: November 13, 2015
Buffalo, New York

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GRANTED

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BY 
MELANIE RUSZAJ
COURT CLERK