

Eurotech Constr. Corp. v QBE Ins. Corp.

2016 NY Slip Op 31246(U)

March 29, 2016

Supreme Court, New York County

Docket Number: 653776/2015

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART 35

Index Number : 653776/2015
EUROTECH CONSTRUCTION CORP.
vs
QBE INSURANCE CORP.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 2/26/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this action arising out of an insurance policy, defendant QBE Insurance Corp. ("QBE") moves pursuant to CPLR 3211(a)(7) to dismiss Eurotech Construction Corp.'s ("Eurotech") breach of covenant of good faith and fair dealing and negligence claims, and claim for attorneys' fees for failure to state a cause of action.

Eurotech cross moves for summary judgment on its first cause of action for breach of contract.

Factual Background

In February 2007, Structure Tone, Inc. ("Structure Tone"), the construction manager for certain work being performed at 7 World Trade Center, subcontracted with Eurotech to perform carpentry work thereat. In accordance with the subcontact, Eurotech obtained primary liability insurance from QBE for an amount of \$1,000,000 and named Structure Tone as additional insured (the "QBE Policy"). Eurotech also obtained excess insurance coverage from Illinois National Insurance Company ("Illinois National") for \$10,000,000.

In April 2007, Eurotech's employee, Thomas McGinty ("McGinty"), was injured while working at the construction site; the QBE and Illinois National policies were in effect.

More than a year later, on September 11, 2008, McGinty's counsel advised Structure Tone's claims Manager Veronica Lewis ("Lewis") about McGinty's claim. Lewis forwarded the letter to AIG Domestic Claims, Inc. ("AIG"), representative of Structure Tone's primary insurer, New Hampshire Insurance Company. On October 2, 2008 AIG informed QBE of McGinty's accident and requested QBE to indemnify Structure Tone for the claim.

McGinty sued Structure Tone on October 1, 2008, and Structure Tone commenced a third party action against Eurotech in August 2009. Structure Tone also filed a declaratory judgment action against Eurotech, QBE and Illinois National. However, the Court later held that QBE was

Dated: _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
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had no duty to provide coverage to and indemnify Structure Tone.

On February 8, 2012, Eurotech reported the incident to Illinois National, which denied coverage based on untimely notice.

In September 2013 QBE advised Eurotech of the potential for an excess insurance trigger.

In February 2014, Eurotech commenced a declaratory judgment action against Structure Tone and Illinois National, asserting, *inter alia*, Illinois National's failure to defend and indemnify Eurotech for McGinty's action. However, on January 29, 2015, Illinois National was granted summary judgment dismissing Eurotech's complaint.

Consequently, plaintiff alleges that although QBE was aware of McGinty's action on June 6, 2011, and knew that McGinty's claim would exceed QBE's primary coverage, QBE did not advise Eurotech of the potential excess insurance trigger until September 2013. Eurotech was unaware of the quantum of damages which McGinty would claim against Eurotech in the personal injury action. Thus, QBE breached the policy requirement that QBE indicate to Eurotech, "as soon as practicable," that the claim under the policy might/would exceed primary coverage. Because of QBE's late notice, Eurotech could not timely inform Illinois National of Illinois National's excess insurance obligations before February 8, 2012.

Eurotech filed this action against QBE for breach of contract, negligence, and breach of covenant of good faith and fair dealing. Eurotech essentially claims that QBE failed to timely notify Eurotech that the QBE insurance policy limits were likely to be "used up" by QBE's payments of settlement and/or judgments in an action against Eurotech, and that such failure prevented Eurotech from timely notifying Eurotech's excess insurer, Illinois National, of the action. Eurotech claims it would be liable for an amount decided by a jury in favor of McGinty, premised on the fact that QBE did not timely notify Eurotech of its inability to indemnify under the primary coverage and Eurotech could not timely notify Illinois National.

Now, in support of dismissal of the negligence and breach of covenant of good faith and fair dealing claims, QBE argues that the claims are duplicative and thus not recognizable in a breach of contract action under New York law. Eurotech does not allege any duty on the part of QBE independent of the policy. QBE is defending Eurotech in the McGinty action, and the per occurrence limits have not been "used up." Further, attorneys' fees are unavailable to a plaintiff such as Eurotech, which affirmatively brings litigation against its insurer for relief under a policy.

In response, Eurotech cross moves for summary judgment for breach of contract claim, arguing that the record establishes that QBE failed to notify Eurotech "as soon as reasonably practicable" about the excess insurance trigger. Further, the complaint sufficiently alleges breach of duty of good faith and fair dealing and negligence, based on duties distinct from those contained in the policy. Further, recent caselaw holds that an insurer has a duty to reimburse its insured for attorneys' fees in conjunction with its duty to defend the insured.

In reply, QBE points out that Eurotech's request for summary judgment is procedurally defective as QBE has not yet joined issue and discovery is necessary to refute Eurotech's claims. Further, Eurotech's application for summary judgment lacks merit as the Transfer Endorsement cited by Eurotech refutes plaintiff's claim as a matter of law.

Eurotech replies that its cross-motion is not premature as to the breach of contract claim, as QBE charted a summary judgment course in opposition. CPLR 3211(c) permits the court to treat a motion to dismiss as one for summary judgment upon notice of same, and such notice may

be dispensed with under the circumstances herein where both sides have relied upon the same, dispositive insurance agreement.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "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" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993]).

Where the parties submit extrinsic evidence in connection with a CPLR 3211 (a)(7) motion to dismiss the complaint and the court declines to treat the motion as one for summary judgment under CPLR 3211(c), the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he stated one" (*Leon v Martinez*, 84 NY2d 83, 88 [1994], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Plaintiff's Claim for Breach of Covenant of Good Faith and Fair Dealing

As to defendant's motion to dismiss the breach of covenant of good faith and fair dealing claim, "It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance" (*Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886, 908 NYS2d 27 [1st Dept 2010] *citing 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131, 773 NE2d 496 [2002]). However, a claim for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of a contract claim, where "both claims 'arise from the same facts and seek the identical damages for each alleged breach'" (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 972 NYS2d 33, 2013 NY Slip Op 06320 [1st Dept 2013]; *JFK Holding Co. LLC v City of New York*, 98 AD3d 273, 948 NYS2d 63 [1st Dept 2012]).

Here, QBE established that Eurotech's breach of the implied covenant of good faith and

fair dealing claim (second cause of action) is duplicative of the breach of contract claim (first cause of action). The second cause of action for breach of the implied covenant of good faith and fair dealing states that it is “premised on QBE’s failure to timely notify Eurotech of excess coverage claim in accordance with QBE’s contractual obligation under the Insuring Agreement.” (§39; ¶ 41 “by not timely notifying Eurotech.”). However, such allegation is made in the breach of contract claim (¶¶ 34-35 (“QBE failed to meet their contractual obligations and provide timely notice to Eurotech . . .”; due to the inaction on part of QBE of not timely notifying Eurotech . . .”). Eurotech does not allege in second cause of action any duty apart from the duty alleged in the first cause of action. And, Eurotech’s mere, conclusory claim raised only in opposition that QBE breached the implied covenant of good faith and fair dealing claim by raising meritless defenses in and of itself is insufficient. Therefore, the breach of the implied covenant of good faith and fair dealing claim is dismissed.

Plaintiff’s Claim for Negligence

As to defendant’s motion to dismiss the negligence claim, to state such a cause of action, plaintiff must allege that the defendants owed it a duty of care, and breached that duty, and that the breach proximately caused the plaintiff’s injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]).

Here, QBE established that Eurotech’s negligence claim (third cause of action) is duplicative of the breach of contract claim (first cause of action). As alleged in the first cause of action, the third cause of action states that QBE “had a duty to notify Plaintiff about the excess coverage trigger as soon as practicable” (¶44). Further, the additional allegation that QBE “was obliged to exercise reasonable skill and care in performing its duties” owed to Eurotech under the “Insuring Agreement” (¶45) is a mere restatement of the breach of contract claim (¶¶ 34-35 (“QBE failed to meet their contractual obligations and provide timely notice to Eurotech . . .”; due to the inaction on part of QBE of not timely notifying Eurotech . . .”) (*see Wildenstein v. 5H & Co, Inc.*, 97 A.D.3d 488, 950 N.Y.S.2d 3 [1st Dept 2012] *citing Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987] [internal citations omitted] [(i)t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract”). The mere claims appearing solely in plaintiff’s motion papers pertaining to QBE’s general duty to defend Eurotech in a reasonable manner, which duty also arises from the policy, is insufficient to sustain an independent negligence claim. As Eurotech does not allege in second cause of action any duty apart from the duty alleged in the first cause of action, dismissal of the negligence claim is warranted.

Plaintiff’s Claim for Attorneys’ Fees

“It is well settled in New York that a prevailing party may not recover attorneys’ fees from the losing party except where authorized by statute, agreement or court rule” (*U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 822 N.E.2d 777, 789 N.Y.S.2d 470 [2004] *citing Chapel v Mitchell*, 84 NY2d 345, 349 [1994], *quoting Hooper Assoc., Ltd. v. AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

Notwithstanding the above well-settled rule, an “insured who is cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations, and who prevails on the merits, may recover attorneys’ fees incurred in defending against the insurer’s action” (*Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]; *American Home Assur. Co. v. Port Authority of New York and New Jersey*, 123 A.D.3d 633, 1 N.Y.S.3d 29 [1st Dept 2014] citing *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d at 597–598 (internal quotation marks omitted); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 822 N.E.2d 777, 789 N.Y.S.2d 470 [2004] (in an action by the insurer against its insured and insured successfully defended against the insurer’s summary judgment motion and thereby prevailed in the matter)). It bears noting that the “The reasoning behind *Mighty Midgets* is that an insurer’s duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer’s declaratory judgment action (*U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d at 597-598).

Here, plaintiff failed to establish that it was cast in a defensive posture and failed to cite any caselaw permitting the Court to expand the narrow exception of *Mighty Midgets* to these circumstances. QBE did not sue Eurotech.¹

Therefore, dismissal of plaintiff’s claim for attorneys’ fees is warranted.

Plaintiff’s Breach of Contract Claim

As to plaintiff’s cross-motion for summary judgment on its breach of contract claim, it is first noted that, “CPLR 3212(a) provides that a motion for summary judgment may be made ‘after issue has been joined’” (*Shah v Shah*, 215 A.D.2d 287, 626 N.Y.S.2d 786 [1st Dept 1995]). “The rule requiring joinder of issue is strictly adhered to” (*id.*). It is uncontested that defendant has not yet joined issue.

However, under CPLR 3211(c) and caselaw, “the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment,” and the notice requirement may be dispensed with under the following exceptions “1) where the action in question involves no issues of fact but only issues of law which are fully appreciated and argued by both sides; 2) where a request for summary judgment pursuant to CPLR 3211(c) is specifically made by both sides; and 3) where both sides deliberately lay bare their proof and make it clear they are charting a summary judgment course” (*Shah*, 215 A.D.2d at 289 citing *Four Seasons Hotels Ltd. v. Vinnik*, 127 A.D.2d 310, 320, 515 N.Y.S.2d 1).

Here, the Court has not provided notice to the parties of any intent to treat any motion as one for summary judgment. And, plaintiff failed to establish that the breach of contract claim involves no issues of fact but only issues of law which were argued by both sides, that either party specifically requested summary judgment pursuant to CPLR 3211(c), or that the parties “deliberately [laid] bare their proof and make it clear they are charting a summary judgment course” (*see id.*). Defendant’s motion to dismiss was aimed at the allegations of the complaint, and specifically noted its intent to move solely to dismiss the second and third causes of action and to later move for summary judgment “at the appropriate time” and after discovery is

¹ The Court also notes that QBE is defending Eurotech in the McGinty action and states that it will pay on behalf of Eurotech any covered amounts awarded against Eurotech in the McGinty action up the QBE policy limits (QBE Reply affirmation, ¶39).

complete (Defendant's affirmation in support, ¶3 and reply affirmation, ¶50). Defendant disputes that it breached any duty under the policy. That both parties rely on the policy, and by pointing out the deficiencies in plaintiff's arguments, does not give rise to charting a summary judgment course. This is not an instance where the parties submitted affidavits or deposition testimony in support and against summary relief. And, plaintiff cites no caselaw to support its position that, under the unique factual circumstances, including but not limited to the policy terms and underlying McGinty litigation, raise a purely legal issue that can be decided at this juncture. Plaintiff's remaining arguments in support of summary judgment lack merit.

Therefore, plaintiff's motion for summary judgment is denied, without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion pursuant to CPLR 3211(a)(7) to dismiss Eurotech Construction Corp.'s breach of covenant of good faith and fair dealing claim and negligence claims, and claim for attorneys' fees for failure to state a cause of action is granted; and it is further

ORDERED that plaintiff's second and third causes of action and claim for attorneys' fees are severed and dismissed; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on its breach of contract claim is denied, without prejudice; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry and its Answer upon defendant within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on May 17, 2016, 2:30 p.m.

This constitutes the decision and order of the Court.

DATED: 3/29/16



HON. CAROL R. EDMEAD J.S.C.
J.S.C.

1. CHECK ONE : CASE DISPOSED NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS: GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE : SETTLE ORDER SUBMIT ORDER

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