Houston Cas. Co. v Cavan Corp. of NY, Inc.

2016 NY Slip Op 31979(U)

October 17, 2016

Supreme Court, New York County

Docket Number: 651981/2014

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

HOUSTON CASUALTY COMPANY,

Plaintiff,

-against-

CAVAN CORPORATION OF NY, INC., NEW PUCK, LLC, PUCK RESIDENTIAL ASSOCIATES, LLC, and KUSHNER COMPANIES, LLC,

Defendants,

Index No.: 651981/2014
DECISION/ORDER
Motion Seq. No. 005

CAVAN CORPORATION OF NY, INC.,

Third-Party Plaintiff,

-against-

THE DUCEY AGENCY, INC.

Third-Party Defendant.

Third-Party Action
Index No.: 595609/2014

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant/ third-party plaintiff Cavan Corporation of NY, Inc.'s (Cavan) motion to amend its answer and to amend its third-party complaint and in reviewing third-party defendant The Ducey Agency, Inc.'s (Ducey) motion to dismiss the third-party action.

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DLA Piper LLP, New York (Aidan M. McCormack and Cyril E. Smith of counsel), for plaintiff.

Wilkofsky, Friedman, Karel & Cummins, New York (Mark L. Friedman of counsel), for defendant/third-party plaintiff Cavan Corporation of NY.
Keidel, Weldon & Cunningham, LLP, New York (Howard S. Kronberg of counsel), for third-party defendant Ducey.

Gerald Lebovits, J.

On or about October 24, 2013, Richard Wilson was allegedly injured while working for J.D. Wilson Construction Corp. (Wilson Corp.). On or about November 19, 2013, Wilson commenced an action seeking damages because of the alleged accident: *Richard Wilson v New Puck, LLC, Puck Residential Assoc., LLC, Kushner Companies, LLC, Cavan Corp. of NY, Thistle Contracting, Inc. d/b/a TCI Contracting*, Index No. 160849/2013, New York State Supreme Court, New York County. The complaint alleges that New Puck, LLC, Puck Residential, LLC, Kushner Companies, LLC, and/or defendant Cavan hired Wilson Corp.; that Wilson was employed by Wilson Corp. at the time of the accident; and that Cavan was the general contractor and/or construction manager for the project. The contract between Puck Residential LLC and Cavan labeled Cavan a construction manager.

Third-party defendant Ducey was the insurance broker for Cavan. Through Ducey, Cavan obtained commercial general-liability insurance from plaintiff Houston Casualty Company (HCC), with a policy period of April 1, 2013, to April 1 2014. HCC's policy had a construction-manager exclusion and did not cover construction manager work. On or about June 30, 2014, plaintiff HCC brought this declaratory judgment action against Cavan for an order that HCC had no duty to defend or indemnify Cavan in the Wilson action (HCC action.) On or about December 5, 2014, Cavan brought a third-party action against Ducey for breach of contract, negligence, and breach of special duty.

During disclosure in the HCC action, Cavan allegedly learned that (1) HCC did not provide the policy or its terms to Cavan or Ducey until after the Wilson accident; (2) Ducey did not timely provide the policy to Cavan or notify Cavan of the construction manager exclusion of the policy; (3) Ducey failed to convey timely the notice of loss to HCC after Cavan notified Ducey; and (4) Ducey and HCC had email exchanges about coverage issues for Cavan but never disclosed the issues to Cavan.

Defendant/third-party plaintiff Cavan moves for leave to amend its answer in the HCC action by adding new affirmative defenses and counterclaims. Cavan also moves for leave to amend its third-party complaint by amending the existing causes of action and adding a new cause of action. Third-party defendant Ducey cross-moves under CPLR 3211 (a) (1) and (7) to dismiss the third-party complaint.

I. Third-Party Defendant Ducey's Cross-Motion to Dismiss the Third-Party Complaint and Third-Party Plaintiff Cavan's Motion for Leave to Amend its Third-Party Complaint

Ducey's cross-motion is dispositive of the issues. The court will address Ducey's cross-motion to dismiss the third-party complaint before addressing Cavan's motion.

Ducey's cross-motion to dismiss the third-party complaint is granted in part and denied in part. Third-party plaintiff Cavan's motion to amend its third-party complaint is granted in part and denied in part.

a. Ducey's Cross-Motion to Dismiss the Third-Party Complaint

Ducey cross-moves under CPLR 3211 (a) (1) and (7) to dismiss the third-party complaint. On a CPLR 3211 (a) (7) motion, the court must "give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference." (*Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5 [2013].) When a moving party in a CPLR 3211 (a) (7) motion introduces extrinsic evidence, the criterion is whether the non-moving party "has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].)

Insurance brokers have "a common-law duty to obtain requested coverage for [a] client[] within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage." (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997].) In either a negligence or a breach-of-contract case against an insurance broker, a "general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage." (*Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158 [2006].) A special relationship between an insurance broker and its client may exist when "there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on." (*Voss v Netherland Ins. Co.*, 22 NY3d 728, 735 [2014].) When a special relationship exists between a broker and its client, "the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage." (*Id.*)

In its third-party complaint, Cavan alleges three causes of action. In its first cause of action, for negligence, Cavan alleges that (1) Ducey had a common-law duty to obtain adequate and proper insurance for Cavan; (2) Ducey agreed and understood Cavan's request; and (3) Ducey negligently breached its duty by failing to obtain adequate and proper insurance. In its second cause of action, for breach of contract, Cavan alleges that Ducey breached its contractual duty to obtain adequate and proper insurance. In the third cause of action, for breach of special duty, Cavan alleges that Ducey breached the special duty owed to Cavan that arose from the long-term relationship between the two parties.

Ducey cross-moves to dismiss the third-party complaint on the grounds that it procured adequate and proper insurance for Cavan and that no special relationship exists between the parties.

Cavan's first and second causes of action are dismissed. Ducey introduces extrinsic evidence, such as emails and affidavits, to challenge Cavan's allegation that Ducey failed to obtain adequate and proper insurance. Because Ducey has introduced extrinsic evidence, the issue is whether Cavan has a cause of action, not whether it has stated one. Cavan fails to state a

cause of action for negligence and breach of contract. Ducey alleges that Cavan never stated to Ducey that it is working as a construction manager and that Cavan never told Ducey to obtain an insurance policy that covers construction managers. Cavan does not address these allegations. Ducey obtained a general contractor policy, and even though it was aware of the construction manager exclusion, it did not consider Cavan to be a "true construction manager." (Affidavit of Tom Torpey at ¶ 21.) Cavan made only a general request for coverage of its practice. That does not satisfy the requirement of a specific request for construction manager coverage. (*See Hoffend*, 7 NY3d at 158.) Ducey's common-law duty and contractual duty were therefore limited to obtaining a general contractor insurance. As an insurance broker, Ducey did not have a "continuing duty to advise, guide or direct a client to obtain additional coverage." (*Murphy*, 90 NY2d at 270.) Cavan's first cause of action, for negligence, and second cause of action, for breach of contract, are dismissed.

For its third cause of action, Cavan alleges that the long relationship between the parties created a special relationship. In *Voss*, the Court of Appeals distinguished between an insurance broker's common-law duty and the broker's special duty and found that even when a broker's client did not specifically request a certain type of insurance, a broker may be liable if a special relationship exists between them. (*See* 22 NY3d at 735.) In its third-party complaint, Cavan alleges the following: (1) a special relationship existed between the parties because of their 20-year relationship; (2) Ducey owed a special duty to Cavan; and (3) Ducey breached its special duty by failing to inform Cavan of the construction-manager exclusion. Rather than challenge Cavan's allegations, Ducey contends that New York courts do not recognize special relationships and that a breach of special duty equals negligence. The *Voss* Court, however, found that a special relationship between a broker and its client may exist in certain exceptional circumstances. (*Id.* at 736.) The court cannot tell at this preliminary phase whether Ducey and Cavan had a special relationship. Ducey's motion to dismiss Cavan's third cause of action is denied.

Accepting Cavan's allegations as true and drawing all inferences in plaintiff's favor, Ducey's motion to dismiss the third-party complaint is granted to the extent that Cavan's first and second causes of action are dismissed under CPLR 3211 (a) (7) but denied as to Cavan's third cause of action.

b. Cavan's Motion to Amend the Third-Party Complaint

Cavan's motion to amend the third-party complaint is granted in part and denied in part. Cavan seeks leave to amend its first, second, and third cause of action and to add a fourth cause of action, for negligent misrepresentation. The proposed amendment for the first and second causes of action does not cure Cavan's failure to state a cause of action. Because Cavan's first and second causes of action are dismissed as discussed above, Cavan's motion to amend the first and second causes of action is denied as academic. Ducey does not challenge Cavan's motion to amend the third cause of action. Cavan's motion to amend the third cause of action, for special relationship, is granted.

Under a CPLR 3025 (b) motion, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in

merit." (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015].) Ducey does not allege that it is prejudiced by the proposed amendments. The court must decide whether Cavan's proposed amendment has merit.

Cavan seeks to add a new cause of action for negligent misrepresentation. Similar to its negligence cause of action, Cavan alleges that Ducey represented to Cavan that it will procure adequate and proper insurance coverage but failed to do so. As discussed above, Ducey fulfilled its common-law duty to procure adequate and proper insurance coverage for Cavan. Cavan's motion for leave to add the fourth cause of action is denied.

II. Defendant Cavan's Motion for Leave to Amend the Answer

Defendant Cavan's motion to amend its answer in the HCC action is granted in part and denied in part. On a CPLR 3025 (b) motion, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit." (*Davis*, 26 NY3d at 580.) Plaintiff does not allege that it is prejudiced by the proposed amendments. The court will determine whether Cavan's proposed amendments have merit.

a. Whether Defendant Knew the Terms of the Contract Through Ducey

Cavan seeks leave to amend its answer in the HCC action by adding new affirmative defenses and counterclaims based on plaintiff's alleged failure timely to deliver the policy. In opposition, plaintiff argues that this court should deny Cavan's motion in its entirety because Cavan knew about the construction-manager exclusion through its agent Ducey.

An insured is "bound, as principal, by notice to or knowledge acquired by the agent." (*Ribacoff v Chubb Group of Ins. Cos.*, 2 AD3d 153, 154 [1st Dept 2003].) Cavan does not dispute that Ducey was its agent. Also undisputed is that neither Ducey nor Cavan received the policy until after the Wilson accident. The emails between Ducey and plaintiff show that Ducey was aware of the construction-manager exclusion in the HCC policy. As the principal, Cavan,is bound by this knowledge and is deemed to have known about the exclusion. The extent of Cavan's knowledge, however, is unclear from the documents before this court. This court agrees with Cavan that "knowing of the existence of an exclusion is not the same as seeing its precise terms and conditions." (Cavan's Affirmation in Reply at 10.) Plaintiff and Ducey used terms such as "true construction manager" and "actual CM" in the emails. These terms show that plaintiff and Ducey had different interpretations of the exclusion. Although Cavan knew about the exclusion through its agent, no evidence shows that Ducey had the entire policy in its possession and knew the precise terms of the exclusion until after the Wilson accident.

Plaintiff argues that Cavan knew the contract's terms because it sought the benefits of the contract. This case is distinguishable from *Busker on the Roof LP v Warrington*, on which plaintiff relies, because in *Busker*, "plaintiff received the subject policy months before the accident at issue." (283 AD2d 376, 377 [1st Dept 2001].)

Cavan's proposed amendment has merit. Cavan's motion for leave to amend its first counterclaim for illusory coverage and to add the nineteenth affirmative defense of untimely delivery is granted.

b. Negligence

Cavan seeks leave to amend its answer to add a new counterclaim for negligence, the second counterclaim. Even when a breach-of-contract claim is raised, a "[d]efendant may be liable in tort when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations." (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 317 [1995].) Cavan's counterclaim is for plaintiff's alleged negligence, which is unrelated to plaintiff's obligations under the insurance contract. Cavan's claim is that plaintiff breached its duty to deliver the insurance policy before its inception date. This alleged duty is separate and apart from plaintiff's contractual obligations. Cavan also alleges new damages for legal fees and costs from this declaratory-judgment action. Cavan's motion for leave to amend its answer to add a counterclaim for negligence, the second counterclaim, is granted.

c. Detrimental Reliance and Estoppel

Cavan seeks leave to add affirmative defenses and counterclaims for detrimental reliance (twentieth affirmative defense and third counterclaim) and estoppel (twenty-second affirmative defense and fourth counterclaim). A 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." (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987].) When a pleader is "essentially seeking enforcement of the bargain, the action should proceed under a contract theory." (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 552 [1992].)

Unlike Cavan's counterclaim for negligence, the detrimental-reliance and estoppel claims are tortious conduct that are not separate and apart from plaintiff's failure to fulfill its contractual obligation. In its proposed amendment, Cavan alleges that plaintiff made a promise to cover Cavan if Cavan is not a true construction manager and that Cavan was injured by relying on this promise. In both its original and proposed answer, Cavan asserts that it is not a true construction manager and should therefore be covered by HCC policy. In the proposed amendment for detrimental reliance and estoppel, Cavan is essentially seeking to enforce the contract. Cavan does not assert that plaintiff violated plaintiff's legal duty independent of the contract. The proposed amendment is meritless.

The court denies Cavan's motion for leave to add the twentieth and twenty-second affirmative defenses as well as third and fourth counterclaims.

d. Waiver

Cavan seeks to add a twenty-first affirmative defense and fifth counterclaim for waiver. A waiver "is voluntary and intentional relinquishment or abandonment of a known existing legal

right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed." (*Davison v Klaess*, 280 NY 252, 261 [1939].) It "may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage." (*Hadden v Consol. Edison Co. of N.Y.*, 45 NY2d 466, 469 [1978].) The "intent to waive is generally a question of fact." (*Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 448 [1984].)

Cavan argues that plaintiff intentionally and voluntarily waived the right to "deny coverage based on allegedly erroneous labeling of Cavan as a construction manager if it [were] found that [Cavan] was acting as a general contractor." (Cavan's Affirmation Exh. 4, at 17.) Cavan argues that plaintiff waived this right in plaintiff's email from July 3, 2013, which states that "if Cavan has some work where they are acting as a true [construction manager], we can review and consider scheduling on their practice policy." (Affidavit of Tom Torpey, at ¶ 22.) Plaintiff argues that it never voluntarily and intentionally waived any of its rights because it never represented that construction management risks were covered. The alleged waiver, however, is not that plaintiff waived the right to exclude construction management risks. Cavan alleges, rather, that plaintiff waived the right to deny coverage if Cavan is a general contractor. The intent to waive is generally a question of fact, and therefore Cavan's proposed amendment has merit. Cavan's motion for leave to add its twenty-first affirmative defense and fifth counterclaim for waiver is granted.

e. Bad Faith

Cavan seeks to add a sixth counterclaim for bad faith. Although a cause of action for bad faith may not stand as an independent tort action in New York, allegations of bad faith "may be employed to interpose a claim for consequential damages beyond the limits of the policy for the claimed breach of contract." (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 82 [1st Dept 2001].)

In opposition, plaintiff argues that no evidence of bad faith exists here because it did not misrepresent the policy; Cavan was a construction manager, not a general contractor; and plaintiff immediately provided a courtesy interim defense under a reservation of rights.

Cavan disputes plaintiff's arguments. First, plaintiff argues that it never represented to Cavan that the policy covered construction management work, but Cavan argues that the emails misled Cavan to believe that it was covered. The second issue — whether Cavan was a construction manager or general contractor — goes to the heart of the case. This court cannot deny Cavan's counterclaim for bad faith based on plaintiff's allegation that Cavan was a construction manager. Third, Cavan argues that because plaintiff reserved the right of reimbursement and seeks judgment that Cavan must reimburse plaintiff for the interim defense, plaintiff's interim defense does not show good faith.

Cavan's counterclaim for bad faith has merit. The court grants defendant leave to add the sixth counterclaim.

f. Unfair Practice under General Business Law § 349

Cavan seeks leave to add a seventh counterclaim for a violation of GBL § 349. A party asserting a violation of this section must prove three elements: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000].) A party claiming unfair practice under GBL § 349 must show that "the acts or practices have a broader impact on consumers at large." (*Oswego Laborer's Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995].)

In opposition, plaintiff argues that because the insurance contract was a private contract between the parties, the challenged act or practice here is not consumer-oriented, and that because HCC did not misrepresent the construction manager exclusion to Cavan, HCC did not engage in a deceptive act or practice that was misleading.

For the first element, Cavan argues that the HCC policy is consumer-oriented. The HCC policy between the parties was a standard policy that plaintiff generally provides to its insured. It is not a private contract for which the parties negotiated, nor is it a unique policy customized for Cavan. Cavan sufficiently shows that there is merit as to the first element of the § 349 claim.

For the second element, Cavan alleges that the exclusion itself is deceptive, not that HCC misrepresented the exclusion. Cavan alleges that the exclusion "defines the term 'construction manager' in such a way as to deprive a general contractor of meaningful coverage." (Cavan's Affirmation in Reply at 18.) Cavan's argument that plaintiff's act or practice was misleading in a material way has arguable merit. The court grants defendant leave to add the seventh counterclaim.

Accordingly, it is ORDERED that third-party defendant Ducey Agency, Inc.'s cross-motion against third-party plaintiff is granted in part and denied in part, in that the first and second causes of action in the third-party complaint are dismissed; dismissal of the third cause of action is denied and it shall continue; and it is further

ORDERED that third-party plaintiff Cavan Corporation of NY, Inc.'s motion to amend the third-party complaint against third-party defendant Ducey Agency, Inc. is granted in part and denied in part, in that amending the third cause of action is granted while amending or adding the first, second, and fourth causes of action is denied; and it is further

ORDERED that defendant Cavan Corporation of NY, Inc.'s motion to amend its answer is granted in part and denied in part, in that amending or adding the first, second, fifth, sixth, and seventh counterclaims along with nineteenth and twenty-first affirmative defenses are granted, while adding or amending third and fourth counterclaims along with twentieth and twenty-second affirmative defenses are denied; and it is further

ORDERED that third-party defendant Ducey Agency, Inc. is directed to serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office,

which is directed to enter judgment accordingly and dismiss the first and second causes of action in the third-party complaint; and it is further

ORDERED that defendant Cavan Corporation of NY, Inc. is directed to serve a copy of its amended answer on all parties and on the County Clerk's Office, which is directed to amend its records accordingly; and it is further

ORDERED that defendant Cavan Corporation of NY, Inc. is directed to serve a copy of its amended third-party complaint on all parties and on the County Clerk's Office, which is directed to amend its records accordingly; and it is further

ORDERED that the parties are directed to appear for a status conference on November 9, 2016, at 10:00 a.m., in Part 7 at 111 Centre Street, room 583.

Dated: October 17, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.