

Konstantin v Aetna Cas. & Sur. Co.
2017 NY Slip Op 31490(U)
July 5, 2017
Supreme Court, New York County
Docket Number: 652897/2013
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

RUBY KONSTANTIN,
as Executor for the Estate of David J. Konstantin, Deceased,

Plaintiff,

Index No.: 652897/2013
DECISION/ORDER
Motion Seq. No. 001

-against-

AETNA CASUALTY & SURETY COMPANY
(a/k/a TRAVELERS CASUALTY & SURETY COMPANY);
CERTAIN UNDERWRITERS AT LLOYD'S LONDON;
COMMERCIAL UNION INSURANCE COMPANY
(a/k/a ONEBEACON AMERICA INSURANCE COMPANY);
CONTINENTAL CASUALTY COMPANY;
FIREMAN'S FUND INSURANCE COMPANY,
FIRST STATE INSURANCE COMPANY;
INTERSTATE INDEMNITY COMPANY;
LANDMARK INSURANCE COMPANY;
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA;
NORTH RIVER INSURANCE COMPANY;
TRANSAMERICA INSURANCE COMPANY;
TRAVELERS INDEMNITY COMPANY;
WESTCHESTER FIRE INSURANCE COMPANY;
and JOHN DOE(S) 1-100,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for leave to amend the complaint.

Papers	Numbered
Plaintiff's Notice of Motion.....	1
Plaintiff's Memorandum of Law in Support.....	2
Plaintiff's Affirmation in Support.....	3
Resolute Defendants' Opposition.....	4
Plaintiff's Memorandum of Law in Reply.....	5

McKool, Smith, P.C., New York (Elizabeth A. Sherwin and Robin L. Cohen of counsel), for plaintiff.

Graham Curtin, PA, New Jersey (Stephen V. Gimigliano of counsel), for defendants Aetna Casualty & Surety Company and Travelers Indemnity Company.

Mendes & Mount, LLP, New York (Eileen T. McCabe and Jaimie H. Ginzberg of counsel), for defendants Continental Casualty Company, Landmark Insurance Company, National Union Fire Insurance Company, North River Insurance Company (to Policy JU0942), and certain underwriters at Lloyd's, Commercial Union Insurance Company.

Rivkin Radler, LLP, New York (Lawrence Levy of counsel), for defendants Fireman's Fund Insurance Company and Interstate Indemnity Company.

Schaeffer Venaglia Handler & Fitzsimmons, LLP, New York (W. Patrick Downes of counsel), for defendant First State Insurance Company.

Carroll, McNulty & Kull, LLC,¹ New York (Christopher Carroll of counsel), for defendants North River Insurance Company (as to certain policies), Transamerica Insurance Company, and Westchester Insurance Company.

Gerald Lebovits, J.:

According to the complaint, David Konstantin, plaintiff's spouse, worked as a carpenter from 1974 to 1977 on buildings and was exposed to asbestos that resulted in his diagnosis of mesothelioma of tunica vaginalis. (Plaintiff's Affirmation in Support at ¶ 4.) He died from the mesothelioma on June 6, 2012. (Plaintiff's Affirmation in Support, Exhibit A ¶ 7.) Tishman Realty & Construction Co., Inc. (Tishman Realty), supervised and controlled the construction sites on which David Konstantin worked. (Plaintiff's Affirmation in Support at ¶ 4.)

Konstantin had brought an earlier action against Tishman Liquidating Corporation (Tishman Liquidating), alleging that it was responsible for Tishman Realty's failure to supervise and control the construction sites. (*Id.* ¶¶ 5-6.) Justice Joan Madden found for Konstantin for \$7,195,738.57 in a final judgment entered on November 28, 2012. (*Id.* ¶ 7.) The Appellate Division affirmed in 2014, and the New York State Court of Appeals affirmed on June 28, 2016. (*Id.* ¶ 7.)

Plaintiff commenced this action on August 19, 2013, and named the insurance companies of Tishman Liquidating as defendants who issued several different insurance policies covering liability for asbestos-related injuries for the period of at least 1974 through 1985. (*Id.* ¶ 8.) The complaint asserts one cause of action: that defendants breached the insurance contract between them and Tishman Liquidating by delaying and denying payment to plaintiff. (*Id.* ¶ 8.) After defendants filed their answer, the parties agreed to await the outcome of the appeal in the underlying action before proceeding further with plaintiff's breach-of-contract claim. (*Id.* ¶ 9.)

Plaintiff alleges that Resolute Management, Inc. (Resolute) is a third-party administrator that handles, administers, makes coverage decisions, and processes insurance claims for insurance companies for some of the defendants in this action — Commercial Union, Landmark, Lloyd's, National Union, and One Beacon (the Resolute Defendants). (Plaintiff's Affirmation in Support, Exhibit A ¶ 24.) According to plaintiff, defendants have not paid plaintiff any portion of

¹ Now known as *Kennedys CMK, LLP*.

the judgment that Konstantin had obtained against Tishman Liquidating. (Plaintiff's Affirmation in Support at ¶ 10.)

Plaintiff now moves for leave to amend the complaint under CPLR 3025 (b) for various reasons: (1) to reflect the correct party name of Interstate Indemnity Company instead of Interstate Indemnity Insurance Company and voluntarily to discontinue the case against Zurich American Insurance Company and American Guarantee & Liability Insurance Company; (2) to add a second cause of action against all insurer defendants to reflect developments in New York Allocation Law and seek a declaratory judgment against them; (3) to add a third cause of action against the Resolute Defendants under GBL § 349; and (4) to add a fourth cause of action against proposed additional defendant Resolute for tortious interference with a contract.

The Resolute Defendants oppose plaintiff's motion to amend the complaint to add the second, third, and fourth cause of actions.

I. Plaintiff's Unopposed Motion

One aspect of plaintiff's motion is unopposed: CPLR 3025 (b) motion to amend the complaint to reflect the correct party name of Interstate Indemnity Company instead of Interstate Indemnity Insurance Company and voluntarily to discontinue the case against Zurich American Insurance Company and American Guarantee & Liability Insurance Company. This aspect of plaintiff's motion is granted without opposition.

II. Plaintiff's CPLR 3025 (b) Motion

That aspect of plaintiff's motion for leave to amend the complaint to add a third cause of action against the Resolute Defendants under GBL § 349 is denied, and the remaining aspects of plaintiff's motion is granted.

CPLR 3025 (b) provides that parties may amend their pleadings and that courts shall freely grant leave. A motion for leave to amend should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit." (*MBA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].) The First Department has established that motions for leave to amend should be freely granted as a matter of discretion absent prejudice or surprise, unless "the amended pleading plainly fails to state a cause of action and, thus, lacks merit." (*Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990].) Defendants do not allege that they are prejudiced by the proposed amendments. The court will determine whether plaintiff's proposed amendments have merit.

A. Proposed Amendment to Add a Cause of Action for Declaratory Judgment against All Insurer Defendants

Plaintiff's proposed amendment to add a second cause of action for declaratory judgement against all insurer defendants is granted. Insurance Law § 3420 gives a party the right to sue a tortfeasor's insurer under limited circumstance — the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment, and

await payment for 30 days. (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 354 [2004].) Once the injured party meets the statutory prerequisites, the injured party steps into the shoes of the tortfeasor and can assert any right of the insured tortfeasor against the insurance company. (*Id.* at 355.) Parties to an insurance contract may bring a declaratory judgment action against each other when “an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract.” (*Id.* at 353.)

Plaintiff’s motion to add a second cause of action for declaratory judgment against defendants that they are jointly and severally liable for the judgment against Tishman is palpably sufficient. Plaintiff sufficiently alleges that plaintiff has met the prerequisites of Insurance Law § 3420 with an underlying judgment and that declaratory relief is available to the insured tortfeasor. (Plaintiff’s Memorandum of Law in Reply, at 5.) And Resolute Defendants do not dispute that plaintiff has met the prerequisites under Insurance Law § 3420. (Defendants’ Opposition, at 7-8.)

Plaintiff also alleges that an actual controversy exists between the parties concerning their liabilities under the insurance policy. (Plaintiff’s Affirmation in Support, Exhibit A, ¶¶ 67-68.) The First Department has held that a tort claimant may not bring a declaratory judgment action to declare rights to the tortfeasor’s insurance company under an insurance policy between the tortfeasor and the insurer. (*See Clarendon Place Corp. v Landmark Ins. Co.*, 182 AD2d 6, 10 [1st Dept 1992] [holding that the injured plaintiffs had no standing to bring any direct action against the tortfeasor’s insurance company when they had no judgment against the tortfeasor].) But *Clarendon Place Corp.* is different from this case because plaintiff here has secured a judgment against the tortfeasor, Tishman Liquidating. (*See id.* at 10.) Therefore, plaintiff’s proposed amendment for a declaratory judgment has merit.

Resolute Defendants’ argument that no future disputes exist in which a declaration could apply between plaintiff and defendants is insufficient to rebut the presumption that plaintiff’s amendment has merit.

B. Proposed Amendment to Add a Cause of Action against the Resolute Defendants under GBL § 349

Plaintiff’s proposed amendment to add a third cause of action against the Resolute Defendants under GBL § 349 is denied. An individual or corporate plaintiff under GBL § 349 must prove three elements: “first, that the challenged act or practice is consumer-oriented; second, that it is misleading in a material way; and third, that the plaintiff suffers injury as a result of the deceptive act.” (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995].) Consumer-oriented conduct does not require a repetition or pattern of deceptive behavior, but it requires a plaintiff to show that the acts or practices have a broader impact on consumers at large. (*See Oswego*, 85 NY2d at 25.) It is not consumer-oriented when (1) the parties facing the complex insurance coverage and proof of loss are both sophisticated parties that receive expert representation and advice; and (2) the policies are negotiated and particularly tailored. (*See New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 321 [1995].)

Plaintiff's proposed amendment is palpably insufficient. Because plaintiff has met the statutory prerequisites of Insurance Law § 3420, plaintiff now may assert any right that Tishman Liquidating has against the insurance companies. (*See Lang*, 3 NY3d at 355.) As in *New York Univ. v Cont. Ins. Co.*, the transactions between Tishman Liquidating and Resolute Defendants are not the modest type of transactions that the statute is primarily intended to reach. (87 NY2d at 321, citing *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 143 [2d Dept 1995].) Both Tishman Liquidating and Resolute Defendants are sophisticated and knowledgeable; plaintiff does not demonstrate that any standard policy is involved here; the policies provide millions of dollars in coverage for the stated risk of asbestos-related injuries; and the policies were placed through multiple brokers and sub-brokers. (Defendants' Opposition, at 14.)

Plaintiff alleges that Resolute Defendants' delaying and denying of plaintiff's claims is consumer-oriented because it is part of the Resolute Defendants' business model and their general practice inordinately to delay and deny claims without merit.² (Plaintiff's Memorandum of Law in Reply, at 10.) Plaintiff relies on *Acquista v New York Life Ins. Co.*, which states that the practice of the insurers inordinately to delay and deny a claim without merit goes beyond a private contract dispute based on policy coverage. (*See* 285 AD2d 73, 82 [1st Dept 2001].) But *Acquista* is different from this case; *Acquista* involves a dispute between a private individual and a sophisticated party in disparate positions. Here, because plaintiff has met the statutory prerequisites of Insurance Law § 3420, plaintiff now stands in the shoes of Tishman Liquidating. (*See Lang*, 3 NY3d at 355.) Plaintiff's and Resolute Defendants' dispute involves no disparate positions of the parties. Therefore, plaintiff's proposed amendment to add a cause of action against the Resolute Defendants under GBL § 349 is palpably insufficient and lacks merit.

C. Proposed Amendment to Add a Cause of Action against Resolute as Additional Defendant for Tortious Interference with a Contract

Plaintiff's proposed amendment to add a fourth cause of action against Resolute as additional defendant for tortious interference with a contract is granted.

To assert a tortious interference claim, a plaintiff must allege the following four elements: (1) a valid contract exists between plaintiff and a third party; (2) defendant knows about the contract; (3) defendant intentionally procures the third party's breach of the contract without justification; and (4) breach of the contract and damages resulting from the breach. (*See Artwear, Inc. v Hughes*, 202 AD2d 76, 85 [1st Dept 1994].) An intended beneficiary of a contract may maintain an action as a third party, but an incidental beneficiary may not maintain an action. (*Alicea v City of New York*, 145 AD2d 315, 317 [1st Dept 1988].) Complying with Insurance Law § 3420 gives an injured party the right to litigate coverage issues as though the injured party were a third-party beneficiary under the contract. (*Clarendon Place Corp.*, 182 AD2d at 9, citing *Tuzinska v Ocean Acc. & Guar. Corp., Ltd.*, 241 AD 598, 599 [4th Dept 1934].) Because the

² Plaintiff relies on this court's decision in *Houston Cas. Co. v Cavan Corp. of NY, Inc.* to argue that Resolute Defendants' practice of denying and delaying of plaintiff's claim is consumer-oriented. (2016 NY Slip Op 31979 [U], *8, 2016 WL 6083859, at *6 [Sup Ct, NY County 2016].) Plaintiff has moved to reargue this court's decision and that motion is *sub judice*. The court need not decide at this time whether this case is similar to *Houston Cas. Co.*

insured tortfeasor injured plaintiff, plaintiff becomes the actual beneficiary contemplated when the insured and insurer contract for the benefit of the then-unidentified and unidentifiable third party. (See *Tuzinska*, 241 AD at 599-600.)

Here, plaintiff has sufficiently asserted a tortious interference claim. Because plaintiff has met the prerequisites of Insurance Law § 3420, plaintiff has the right to proceed as a third-party beneficiary under the insurance policies between Tishman Liquidating and Resolute Defendants. Plaintiff now stands in the shoes of Tishman Liquidating. (See *Lang*, 3 NY3d at 355.) Plaintiff, in its proposed amendment, alleges that (1) a valid contract exists between Tishman Liquidating and Resolute Defendants; (2) Resolute knows about the contract; (3) Resolute has caused or induced Resolute Defendants to breach the agreements for the sole purpose of delaying payment to benefit its parental company; and (4) plaintiff has suffered damages resulting from the breach. (Plaintiff’s Affirmation in Support at ¶ 25.) Therefore, plaintiff’s proposed amendment to add a cause of action against Resolute as additional defendant for tortious interference with a contract has merit.

Resolute Defendants’ argument that plaintiff is not the parties’ intended third-party beneficiary is insufficient to rebut the presumption that plaintiff’s amendment has merit.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for leave to amend is granted in part and denied in part: that aspect of plaintiff’s motion to reflect the correct party name of “Interstate Indemnity Company” instead of “Interstate Indemnity Insurance Company” and voluntarily to discontinue the case against Zurich American Insurance Company and American Guarantee & Liability Insurance Company is granted; that aspect of plaintiff’s motion to add a cause of action against all insurer defendants for a declaratory judgment, and that aspect of plaintiff’s motion to add a cause of action against the proposed additional defendant Resolute for tortious interference with a contract are granted, and the motion is otherwise denied; and it is further

ORDERED that plaintiff must serve a copy of this decision and order with notice of entry on all parties; and it is further

ORDERED that plaintiff shall settle order.

Dated: July 5, 2017


J.S.C.

HON. GERALD LEBOVITS
J.S.C.