Konstantin v Certain Underwriters at Lloyd's London
2018 NY Slip Op 30209(U)
January 24, 2018
Supreme Court, New York County
Docket Number: 652897/2013
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

RUBY KONSTANTIN, as executor of the Estate of David J. Konstantin, deceased,

Plaintiff,

-against-

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

Defendants.

Index No.: 652897/2013
DECISION/ORDER
Motion Seq. 002

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant Resolute Management, Inc.'s motion to dismiss.

Papers	**Numbered**
Defendant's Notice of Motion to Dismiss	1
Defendant's Memorandum of Law in Support of Motion	2
Affidavit of Thomas P. Ryan in Support of the Motion	3
Plaintiff's Memorandum of Law in Opposition to Motion	4
Plaintiff's Affirmation of Elisa J. Lee in Opposition to Motion	5
Defendant's Reply Memorandum of Law in Support of Motion to Dismiss	6
Second Affidavit of Thomas P. Ryan in Support of Motion	7

McKool Smith, P.C., New York (Robin L. Cohen, Adam S. Ziffer, and Elizabeth A. Sherwin of counsel), for plaintiff.
Squire Patton Boggs (US) LLP, New York (John M. Nonna and Suman Chakraborty of counsel), for defendant Resolute Management, Inc.

Gerald, Lebovits, J.

Plaintiff is the executor of the estate of David J. Konstantin, a victim of mesothelioma resulting from exposure to asbestos. Plaintiff sued Tishman Realty & Construction Co., Inc., and its related entities, including Tishman Liquidating, for damages for injuries sustained as a result of asbestos exposure. Konstantin was exposed to asbestos while working as a carpenter in buildings where Tishman Realty had acted as the general contractor.

Plaintiff received a jury verdict in the litigation, adjusted post-trial, with a final judgment entered on November 29, 2012, for $7,195,738.57. (*Konstantin v 630 Third Avenue Assocs. et al.*, Index No. 190134/10 [Sup Ct, NY County 2012].)

Plaintiff alleges that in February 2013, plaintiff served notice of the judgment on each of the insurers, demanding that they provide coverage pursuant to the terms and conditions of their policies. (Amended complaint, ¶ 50).

On August 19, 2013, plaintiff filed this action under Insurance Law § 3420 to recover the trial-judgment damages against 13 insurance companies that allegedly issued policies to predecessors or affiliates of Tishman corporations. Those insurance companies are the following: Lloyd's London; Commercial Union Insurance Company (a/k/a OneBeacon 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 Casualty and Surety Company; The Travelers Indemnity Company; Westchester Fire Insurance Company. Several of these companies provided Tishman with commercial general liability insurance policies for the period between 1974 and 1986 (North River, Westchester, Lloyds, Landmark). (Amended complaint, ¶ 41.) The others issued excess commercial general liability insurance policies to Tishman (Commercial Union, Continental Casualty, Fireman's Fund, First State, Interstate, Lloyds, Landmark, Westchester, National Union, Transamerica, Travelers Casualty, Travelers Indemnity). (Amended complaint, ¶ 43.)

In July 2014, the Appellate Division, First Department, affirmed the judgment in plaintiffs' favor (the "Tishman judgment"). (*See In re New York City Asbestos Litig.*, 121 AD3d 230 [1st Dept 2014].) In June 2016, the New York Court of Appeals affirmed the Appellate Division decision. (*See In re New York City Asbestos Litig.*, 27 NY3d 1172 [2016].)

Plaintiff claims that each of the insurers has continued to refuse paying any portion of the 2012 judgment. (Amended complaint ¶ 50.) Plaintiff seeks an award of damages against the defendant insurers in the full amount of the 2012 judgment, a declaratory judgment declaring the defendant insurers jointly and severally liable for the 2012 judgment, and an award of damages specifically against defendant Resolute Management Inc. for a claim of tortious interference. (Amended complaint, at 19.)

Defendant Resolute is one of the defendants that issued primary or excess insurance policies to Tishman. Resolute is a third-party claims administrator for its insurance company

clients, including the following defendants: Commercial Union, Landmark, Lloyd's, National Union and OneBeacon. (Amended complaint, ¶ 24.) Resolute performs several litigation-related functions: (i) identifying and retaining defense counsel; (ii) approving payment of defense costs incurred by policyholders of the defendant insurers, including Tishman; (iii) approving settlement of claims asserted against the defendant insurers' policyholders, including Tishman; and (iv) paying settlement expenses on behalf of defendant insurers' policyholders, including Tishman. (Defendant's memorandum of law in support, at 5).

Resolute is a wholly owned subsidiary of National Indemnity Company (NICO), which is a wholly owned subsidiary of Berkshire Hathaway, Inc, a conglomerate holding company owned by Warren Buffet. National Indemnity Company has issued "a finite reinsurance policy to affiliates of the Resolute Defendants covering their 'long tail' environmental, asbestos and product liability losses." (Amended complaint, ¶ 24.)

Plaintiff brings one cause of action against Resolute — tortious interference. (Amended complaint, ¶ 54.) Plaintiff alleges that defendant has directed its insurer clients to refuse paying any amount of the judgment against Tishman, interfering with and delaying payment of the claim "as part of a business plan designed and intended to maximize the 'float' resulting from the delay between the policyholder's payment of premiums and the date of payment of covered claims." (Amended complaint, ¶¶ 9, 54.) Plaintiff argues that Resolute acted "not in the interests of the insurers, but of NICO in maximizing their profits from float," and thus is liable for tortious interference. (Plaintiff's memorandum of law in opposition, at 25.)

Plaintiff claims that Resolute is not entitled to the immunity an agent may use against a tortious interference claim because either (1) Resolute was not an agent of Lloyd's London, OneBeacon, and/or AIG Insurers; or because (2) in exercising its sole discretion to delay or deny the claims, Resolute was not acting as the Insurers' agent, but "in its own interests or in the interests of its corporate parents." (Amended complaint, ¶ 9.)

Resolute claims that plaintiff's allegations are conclusory and lack any factual support. (Defendant's reply memorandum, at 11.) Further, Resolute argues that the contracts plaintiff uses as evidence of Resolute's relationships with defendant insurers establish only that Resolute was an agent of NICO and OneBeacon. (Defendant's reply memorandum, at 4-5.)

Resolute now moves, pre-answer, to dismiss the amended complaint under CPLR 3211 (a) (1) and 3211 (a) (7). In the alternative, defendant asks the court to dismiss plaintiff's tortious-interference claim against Resolute and to dismiss Resolute from this action. (Defendant's memorandum of law in support, at 3.)

LEGAL STANDARD

In considering a motion to dismiss under CPLR 3211 (a) (7), a court must afford the pleadings a liberal construction, accept the allegations in the complaint as true, and give the plaintiff every possible favorable inference. (*Chanko v Am. Broad. Companies Inc.*, 27 NY3d 46, 52 [2016].) A plaintiff must have "at least pleaded a viable cause of action at common law." (*Miglino v Bally Total Fitness of Greater New York, Inc.*, 20 NY3d 342, 351 [2013].)

If plaintiff's pleadings sufficiently state all of the necessary elements of a cognizable cause of action, plaintiff is at liberty to stand on plaintiff's pleadings alone and may not be penalized for failing to make an evidentiary showing to support a complaint that states a claim on its face. (*Miglino*, 20 NY3d at 351; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976].)

CPLR 3013 explains what is required for a sufficiently particular pleading: "notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

A plaintiff need submit only a facially sufficient pleading and is thus "not obligated to come forward with claim-sustaining proof in response to a motion to dismiss unless the court treats the motion as one for summary judgment and so advises the parties." (*Miglino*, 20 NY3d at 351.) The focus is that "the narrow question presented for review is not whether the plaintiff should ultimately prevail in this litigation, but whether the complaint states cognizable causes of action." (*Washington Ave. Assocs., Inc. v Euclid Equip., Inc.*, 229 AD2d 486, 487 [2d Dept 1996].)

To avoid dismissal of a tortious-interference claim for failure to state a cause of action, a plaintiff must support its claim with more than mere speculation, even though on a motion to dismiss, the allegations in a complaint should be liberally construed. (*Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC*, 920 NYS2d 123, 125 [2d Dept 2011].)

Under New York law, to sustain a claim of tortious interference with prospective economic advantage, a plaintiff must prove (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of the breach of that contract; and (4) damages. (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006].)

In its pleadings, a plaintiff must "specifically allege that the contract would not have been breached but for the defendant's conduct." (*Ferrandino & Son, Inc.*, 82 AD3d at 1036, quoting *Burrowes*, 25 AD3d at 373.)

A claim for tortious interference cannot "lie against an agent acting within the scope of its duties on behalf on the principal." (*One Beacon Am. Ins. Co. v Colgate-Palmolive Co.*, 123 AD3d 222, 228-29 [1st Dept 2014].) If an agent is alleged to have induced its principal to breach a contract, the agent cannot be found liable unless it does not act in good faith and commits independent torts or predatory acts directed at another. (*Buckley v 112 Cent. Park S., Inc.*, 285 AD 331, 334 [1st Dept 1954].)

Under CPLR 3211 (a) (1), a motion to dismiss will be granted if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010].)

PLAINTIFF HAS SUFFICIENTLY PLEADED TORTIOUS INTERFERENCE

Plaintiff claims that Resolute has handled defendants' policies "in a manner whose sole purpose is to delay payment of millions of dollars, so that its parent National Indemnity Company [NICO] would not have to pay out some of their reinsurance funds owed for the Resolute Defendants' losses." (Amended complaint, ¶ 54.) Plaintiff claims that Resolute has directed defendants to refuse to make any payments toward the Tishman judgment, thus tortiously interfering with, or causing or inducing the breach of the defendants' liability insurance policies for Resolute's sole benefit. (Amended complaint, ¶ 54.)

In support of its claims, plaintiff has submitted letters written by Warren Buffet, the chairman of Berkshire Hathaway, Inc., to Berkshire Hathaway shareholders, discussing the company's growth in "float" — money generated by insurance customers paying the required premiums, and then held or invested by the reinsurer until claims are paid. (Plaintiff's memorandum of law in opposition, at 4-5; Affirmation of Elisa J. Lee, Exs. 1 and 2.) Plaintiff argues that these letters show Resolute's motive to delay or withhold payments of the Tishman judgment, "by taking control of the claims-handling functions" of the companies it and its parent companies reinsure, thereby increasing the float period and returns on float investments. (Plaintiff's memorandum of law in opposition, at 5.)

Defendants claim that "[p]laintiff has raised absolutely no facts suggesting that Resolute's claims handling decisions with respect to this claim were in any way motivated by self-interest, by the shareholder letters (which do not describe anything beyond standard insurance practices), or by any improper motive." (Defendant's reply memorandum, at 2.) Further, defendants state that the obligation for reinsurer Resolute to pay has not been triggered, because the obligation for the other defendants — the primary insurers — to pay the Tishman judgment has not been established. (Defendant's memorandum of law in support, at 13-14.)

Resolute argues that plaintiff has not provided "any factual explanation for how Resolute wrongfully handled the claim, or what specific conduct was wrongful." (Defendant's reply memorandum, at 14.) Resolute states that it is simply "not handling the claim in the way Plaintiffs wants it to." (Defendant's reply memorandum, at 6.) Resolute claims that this action lacks merit because plaintiff has brought it only because she is "unhappy with coverage decisions made by Resolute." (Defendant's reply memorandum, at 1.)

The court at this juncture need not resolve the case as a matter of law, and the plaintiff has at least pleaded a viable cause of action at common law. Plaintiff has a facially sufficient pleading.

Applying the test for the proper pleading of tortious interference, the court need determine only whether plaintiff has provided some cognizable claim to give notice to the defendants of the occurrence in question and give notice of the material elements of each cause of action.

First, plaintiff alleged that it had a contract with the third-party, defendant insurers through Tishman. Second, plaintiff alleged that Resolute knew about these contracts because

Resolute is the claims-handler for NICO and because its clients include defendant insurers Commercial Union, Landmark, Lloyd's, National Union and OneBeacon. Third, plaintiff alleged that Resolute has handled claims under the insurer defendants' policies whose purpose is to "delay the payment of millions of dollars, so that [Resolute's parent company] would not have to pay out some of their reinsurance funds owed for [the insurer defendants'] policies." (Amended complaint, ¶ 54.)

Further, although Resolute admits to being responsible for paying settlement expenses on the insurer defendants' behalf, Resolute has not given the court a persuasive explanation about why the Tishman judgment has not yet been paid. Resolute argues that a "reinsurer is not liable to pay any claims unless the primary insurer first has an obligation to a pay a loss." (Defendant's memorandum of law in support, at 13, citing *Matter of Midland Ins. Co.*, 79 NY2d 253, 258 [1992].)

Resolute's arguments are unavailing. Plaintiff has set out in the amended complaint the specific wrongful conduct: a judgment gone unpaid by defendants. (Amended complaint, ¶¶ 38, 50-51.) The primary insurers already have an obligation to pay for this judgment and have failed to do so. Plaintiff has presented evidence in the form of Buffet's letters, which describe that the nature of the insurance contracts Resolute enforces is such that they will "*never* be subject to immediate or near-term demands for sums that are of significance to [their] cash resources." (Affirmation of Elisa J. Lee, Ex. 2 at 8 [emphasis in original].) Plaintiff has — with this language and the fact of the delay in the Tishman judgment payment — sufficiently pleaded that the defendants intentionally procured the breach of that contract. Plaintiff has sufficiently pleaded that but for Resolute's delay in paying out to its insurer clients, plaintiff would have the money from the Tishman judgment.

Both parties spend copious time arguing whether Resolute is an agent for the purposes of determining liability. The court will not engage in a lengthy analysis on agency immunity. By its agreement with NICO, Resolute is an agent of the NICO company and a sub-agent of OneBeacon. That Resolute is an agent of NICO does not, however, make Resolute immune from liability. Plaintiff has sufficiently pleaded in the alternative in the amended complaint that Resolute, even as an agent of NICO, has acted in bad faith and in a predatory manner by withholding funds owed to plaintiff. (Amended complaint, ¶ 54.)

Resolute's motion to dismiss under CPLR 3211 (a) (1) is denied. Resolute submits its contracts with NICO as its "documentary evidence" in attempting to establish that Resolute is an agent of each of the other insurer defendants, and that the acts plaintiff complains of are within the scope of Resolute's authority. The evidence Resolute presents, however, does not refute the plaintiff's claim that Resolute intentionally procured a breach of contract. Even if Resolute is an agent of the defendant insurers, plaintiff has a facially sufficient pleading not to allow for Resolute's immunity under a theory of agency.

Accordingly, it is

ORDERED that defendant Resolute Management Inc.'s motion to dismiss is denied; and it is further

ORDERED that defendant Resolute Management Inc. to serve and file its answer within 20 days from service of this decision and order; and it is further

ORDERED that plaintiff serve a copy of this decision and order on all parties.

Dated: January 24, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.