

Manes v Encompass Home & Auto Ins. Co.
2019 NY Slip Op 34138(U)
September 16, 2019
Supreme Court, Rockland County
Docket Number: 035028/2018
Judge: Thomas P. Zugibe
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To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
ROCKLAND COUNTY

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AVROHOM MANES,

Index No. 035028/2018

Plaintiff,

-against-

DECISION AND ORDER

ENCOMPASS HOME AND AUTO INSURANCE COMPANY, MICHAEL CATALAFANO, MICHAEL ROTH, GLENN FUTTERSON, FIRE AND RESTORATION APPRAISALS, LLC, VICTOR CUSANO, PRISM GENERAL SERVICES CO., EFI GLOBAL ENGINEERING OF NEW YORK, P.C., PETER DELANO and HAROLD L. ORNSTEIN,

Defendants.

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Zugibe, J.

Upon considering the papers filed in this case (Motion Sequence **002 AND 003**, Documents 29-62), the Court decides the motions as follows:

ENCOMPASS HOME AND AUTO INSURANCE COMPANY ("Encompass"). Defendant MICHAEL CATALAFANO is an insurance adjuster allegedly affiliated with Encompass. Defendant MICHAEL ROTH is a public adjuster. Defendant GLENN FUTTERSON is an insurance appraiser for defendant FIRE AND RESTORATION APPRAISALS ("Appraisals"). Defendant VICTOR CUSANO is an insurance appraiser for defendant PRISM GENERAL SERVICES CO. ("Prism").

What might have been a simple contract matter has been turned into a conspiracy thriller. Very briefly, in February 2017, plaintiff suffered apparent damage to his home from two incidents involving water; a “massive” internal leak, and roof damage that led to further water damage. He initiated a claim with his insurer, Encompass. According to plaintiff, Encompass waited a (too long) period to process his claims. It then sent a (un-named) adjuster who allegedly concurred with plaintiff’s contractor as to the scope and cost of the work required to settle both claims.

According to plaintiff, Encompass, unsatisfied with this initial assessment, sent defendant Catalafano to review the claim, ostensibly to “delay and frustrate” the claim. In turn, Catalafano hired EFI GLOBAL ENGINEERING OF NEW YORK, P.C., PETER DELANO and HAROLD L. ORNSTEIN (together, the “EFI defendants”) to issue a false report. Ornstein and Delano are licensed professional engineers in EFI’s employ. Delano and Ornstein visited and inspected plaintiff’s home. They then issued a report as to the damage so that Encompass could determine how much to pay. According to plaintiff, Catalafano then used this false report to threaten plaintiff for insurance fraud. This delay in paying the claim – and doing the required work – led to further damage from black mold.

At some point, plaintiff hired Roth to assist in getting Encompass to agree to pay what plaintiff believed it owed him. Roth suggested and plaintiff agreed to an appraisal of the damage. Encompass appointed Prism to conduct the appraisal, and it sent Cusano. Roth, on plaintiff’s behalf, hired Appraisals and they sent Gutterson. They all conspired to leave out the roof claim. Then, Encompass did not pay for plaintiff’s relocation costs during the renovations.

Plaintiff apparently knew about the appraisal conspiracy, fired his appraiser, defendants Appraisals and Gutterson, then told Encompass through Catalafano and their appraisers that they

were not to proceed. According to plaintiff, despite Catalafano's written assurance that the appraisal was a dead issue, the applicable defendants issued the appraisal report anyway. Of course, that report ignored the roof and relocation issues, and "seriously undervalued" the cost for the work in plaintiff's home. This lawsuit followed.

In addition to bringing a standard breach of contract action (Count 1), plaintiff added these additional causes of action: 2) breach of duty of good faith and fair dealing (Encompass); 3) declaratory judgment (Encompass); 4) breach of fiduciary duty (Roth); 5) negligence and gross negligence (Encompass, Catalafano, Roth, Appraisals, Gutterman, Prism and Cusano); 6) tortious interference with contract (Catalafano, Roth, Appraisals, Gutterman, Prism, Cusano, EFI, Delano and Ornstein) and 7) reckless and/or negligent infliction of emotional distress (all defendants). Ultimately, Encompass apparently paid out hundreds of thousands of dollars to plaintiff. Plaintiff seeks declaratory judgment, compensatory and punitive damages, interest and costs and attorneys fees.

The Court **Grants** the motion to dismiss made by the EFI defendants. To begin, despite the EFI defendants' claim, a court need not automatically grant an unopposed motion to dismiss. *See Yu Chen v. Kupoint (USA) Corp.*, 160 A.D.3d 787, 787-789 (2d Dep't 2018). Nevertheless, the Court grants the EFI defendants' motion as to both the tortious interference and the emotional distress claims.

Plaintiff has failed to set forth a valid tortious interference claim. In order to do so, he must demonstrate 1) a valid contract; 2) the defendant(s) knew about the contract; 3) the defendant(s) caused a breach of the contract; and 4) that the plaintiff suffered damages. *Oddo Asset Mgt. v. Barclays Bank PLC*, 19 N.Y.3d 584, 594 (2012); *White Knight of Flatbush, LLC v. Deacons of the Dutch Congregation of Flatbush*, 159 A.D.3d 939, 940 (2d Dep't 2018). As the

Second Department noted, “Further, the plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct.” *White Knight* (citations and internal quotation marks omitted). The complaint does not explain how the EFI defendant knew about the contract or how they caused the breach. Plaintiff does not allege why or how EFI induced the breach. Indeed, he avers that Encompass sought to avoid paying by, in part, seeking out EFI. Plaintiff has put the cart before the horse. Ultimately, the complaint is long on conjecture and very short on facts.

In the alternative, plaintiff failed completely to flesh out his actual malice claim. When a complaint alleges malice, the pleadings must demonstrate that the interfering party is motivated “solely by malice.” *Klapper v. Graziano*, 129 A.D.3d 674, 675 (2d Dep’t 2015). Plaintiff alleges nothing that amounts to actual malice. Indeed, the stated reason was the EFI defendants’ economic interest as an engineering firm to help Encompass avoid paying plaintiff. Thus, the Court dismisses the sixth cause of action against the EFI defendants.

The Court also dismisses the emotional distress claim against the EFI defendants. Plaintiff fails to allege any actions the EFI defendants took, what duty they owed to plaintiff, or any damages at all, merely speculating that black mold is “dangerous to the health.” Plaintiff does not particularize any damage to his own health at all, either physically or emotionally.

The Court also grants the dismissal cross-motion made by Encompass and Catalafano as to this action on documentary evidence grounds and instead to proceed to appraisal on plaintiff’s two damage claims. Cross-movants have invited the Court to either confirm the prior award in the internal water damage case or to order a new appraisal pursuant to the contract and the law (given plaintiff’s demand for same). They have also demanded an appraisal, as is their right, for the roof damage claim. Plaintiff’s other claims are either insufficient or are subsumed into any

contract claim that must by contract and law be Appraised instead. The Court notes that if plaintiff was concerned with the (lack of) speed with which Encompass was moving, he could have moved to compel Appraisal himself. The Court therefore also dismisses all claims as to Encompass and Catalfano.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 16, 2019
New City, New York

ENTER



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