

Myers v Three Hand Realty, LLC
2020 NY Slip Op 31147(U)
May 4, 2020
Supreme Court, New York County
Docket Number: 154870/2016
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS **PART** **IAS MOTION 7EFM**

Justice

-----X

EMILY BROOKE FULTON MYERS, as mother and natural guardian of RM and EM, infants and EMILY BROOKE FULTON MYERS and JONATHAN MYERS, individually

Plaintiffs,

- v -

THREE HAND REALTY, LLC and ONE HAND REALTY, LLC,

Defendants.

-----X

THREE HAND REALTY, LLC and ONE HAND REALTY, LLC,

Third Party Plaintiffs,

- v -

GEO E. PAYNE & SON, INC. and BAYSIDE AGENCY, LTD.,

Third Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 50, 51, 52, 53, 54, 55, 56, 58, 59, 61, 62, 63, 66, 67, 84,

were read on this motion to

DISMISS

Molod Spitz & DeSantis, P.C., New York, NY (Salvatore J. DeSantis of counsel), for defendants/third-party plaintiffs.

Wilson Elser, Moskowitz, Edelman & Dicker, LLP, New York, NY (Joseph L. Francoeur and Tina C. Ma of counsel), for third-party defendants.

Gerald Lebovits, J.:

This motion relates to third-party claims brought by defendants/third-party plaintiffs Three Hand Realty LLC and One Hand Realty, LLC (collectively "Hand Realty") against Hand Realty's insurance agents, third-party defendants Geo E. Payne & Son, Inc. and Bayside Agency, Ltd. (collectively "Agent").

In 2014, Hand Realty retained Agent to obtain property insurance from nonparty Nova Casualty Company for an apartment building owned by Hand Realty and located in midtown Manhattan. The policy obtained by Agent covered the period November 30, 2013 to November 30, 2014. (Insurance Policy, NYSCEF No. 41, at 1). In September 2014, Nova Casualty issued a

notice stating that the policy would expire on November 30, 2014, and that it would not be renewed. (Notice of Nonrenewal of Insurance, NYSCEF No. 42). Hand Realty's property insurance on the building here undisputedly lapsed following the expiration of the initial Nova Casualty policy.

In February 2015, minor children RM and EM allegedly sustained injuries while in an apartment in Hand Realty's building. After the incident, Hand Realty submitted an insurance claim for the incident under its (lapsed) property insurance policy. Nova Casualty denied the request in December 2015, stating among other reasons b that coverage was not available because the incident had occurred after the policy's expiration date.

In June 2016, plaintiffs Emily Brook Fulton Myers (individually and as guardian of RM and EM) and Jonathan Myers (collectively, "Myers") brought a negligence action (the first-party action here) against Hand Realty. In June 2019, Hand Realty brought this third-party action against Agent, alleging that in allowing the Nova Casualty policy to lapse, Agent had breached its contract with Hand Realty and acted negligently. Agent now moves to dismiss Hand Realty's third-party claims under CPLR 3211 (a) (5) and (7).

DISCUSSION

A. Whether Hand Realty's Negligence Claim is Time Barred

Agent argues Hand Realty's claim for negligence must be dismissed as time-barred because it was not brought within the applicable three-year limitations period. Agent contends that Hand Realty's negligence claim accrued on December 2, 2015, when Nova Casualty denied coverage for the incident. And Hand Realty's third-party action was not brought until more than three-and-a-half years later, in June 2019. Thus, Agent maintains, Hand Realty's negligence claim must be dismissed.

Hand Realty does not dispute that its negligence claim is subject to a three-year statute of limitations. Instead, it argues only that this claim did not accrue until June 9, 2016, when Myers brought the first-party action here against Hand Realty. This court agrees with Agent that the claim accrued in December 2015, not June 2016.

Accrual of a tort claim "occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). In particular, "where ... a claim against an insurance agent or broker relating to the failure of insurance coverage sounds in tort, the injury occurred and the plaintiffs were damaged when coverage was denied." (*Bonded Waterproofing Servs., Inc. v Anderson-Bernard Agency, Inc.*, 86 AD3d 527, 530 [2d Dept 2011]; see also *Lavandier v Landmark Ins. Co.*, 26 AD3d 264 [1st Dept 2006] [denying dismissal based on statute of limitations only because the record is "unclear as to the date when [the insurance broker] first received notice of the underlying claims"]).

Here, Nova Casualty sent Hand Realty a notice of denial of coverage by certified mail in December 2015. (See NYSCEF No. 43). Hand Realty's negligence claim arising from the denial

of coverage occurred then. And since Hand Realty did not assert its negligence claim until June 2019, more than three years later, the claim is untimely.¹

B. Whether Hand Realty’s Breach-of-Contract Claim Must Be Dismissed as Duplicative of the Negligence Claim

Agent also argues that Hand Realty’s breach-of-contract claim must be dismissed as duplicative of its negligence claim.² This court disagrees.

To be sure, the general rule is that a plaintiff may not assert simultaneously two causes of action—for example, breach of contract and negligence—that each are premised on precisely “the same facts and seek the same damages.” (*Courtney v McDonald*, 176 AD3d 645, 646 [1st Dept 2019].) As discussed above, though, this court is dismissing the negligence claim as untimely. No duplication will occur, going forward.³

Additionally, the allegations of Hand Realty’s third-party complaint indicate that its contract claim would not impermissibly duplicate its negligence claim in any event. Hand Realty alleges that Agent breached its contractual obligation to obtain property insurance for Hand Realty by letting the insurance coverage lapse (*see* NYSCEF No. 24 at 10, ¶¶ 19-21). The complaint goes on to allege that Agent breached a tort duty to act with reasonable care in discharging this contractual responsibility (*see id.* at 11, ¶¶ 26-27). That is, Hand Realty’s negligence claims effectively derive from the contractual relationship between the parties, not the other way around.⁴ This case thus differs from situations involving, for example, an alleged breach of professional standards, in which plaintiff’s contract cause of action seeks merely to repackage a malpractice claim by asserting that the defendant’s alleged failure to act in accordance with professional standards also constitutes a breach of contract. (*Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38-39 [1st Dept 1998].)

Accordingly, it is

¹ Given this court’s conclusion that any negligence claim would be untimely, the court does not reach Agent’s argument that the allegations of the complaint fail to state a cause of action in negligence.

² Agent does not otherwise challenge the sufficiency of Hand Realty’s breach-of-contract allegations.


³ Agent has not provided any authority—either in its papers or on request at oral argument—for the proposition that where a contract claim is potentially duplicative of a *dismissed* negligence claim, the court must then go on to dismiss the contract claim as well.

⁴ This court need not and does not address whether the (alleged) interactions between the parties involving their contractual relationship also gave rise to a tort duty owed by Agent distinct from, and in addition to, Agent’s obligations under the contract. The point here is simply that Hand Realty’s contract claim came first, analytically speaking—and thus that the contract claim is not impermissibly duplicative of Hand Realty’s negligence claim.

ORDERED that the branch of third-party defendants' motion under CPLR 3211 (a) (5) seeking dismissal of third-party plaintiffs' negligence cause of action is granted; and it is further

ORDERED that the branch of third-party defendants' motion under CPLR 3211 (a) (7) seeking dismissal of third-party plaintiffs' negligence cause of action is denied as academic; and it is further

ORDERED that the branch of third-party defendants' motion under CPLR 3211 (a) (7) seeking dismissal of third-party plaintiffs' breach-of-contract cause of action is denied.

<u>05/04/2020</u> DATE	 HON. GERALD LEBOVITZ J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE