

Starr Indemnity & Liability Co. v U.S. Adjustment Corp.

2020 NY Slip Op 31531(U)

May 18, 2020

Supreme Court, New York County

Docket Number: 653469/2016

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION PARTIAL MOTION

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STARR INDEMNITY & LIABILITY COMPANY,
STARR SURPLUS LINES INSURANCE COMPANY

Plaintiffs,

- v -

U.S. ADJUSTMENT CORPORATION,

Defendant.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO., DECISION + ORDER ON MOTION. Values include 653469/2016, 10/25/2019, 002 003.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 112, 113, 149, 150, 151

were read on this motion for PARTIAL SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 114, 115, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 152, 153, 154, 155, 156, 157, 158, 159, 160

were read on this motion for PARTIAL SUMMARY JUDGMENT .

This is a dispute between Plaintiffs Starr Indemnity & Liability Co. and Starr Surplus Lines Insurance Co., collectively "Starr") and the entity they hired to provide claims adjustment services for "habitational" property insurance business (Defendant U.S. Adjustment Corp., "USAC"). The crux of the dispute is whether USAC's allegedly shoddy performance caused

Starr to make inflated indemnity payments to policy holders and whether USAC paid all Allocated Loss Adjustment Expenses (“ALAE”) that it was required to absorb under the parties’ contract. Each side seeks partial summary judgment.

In Motion Sequence No. 002, USAC seeks to dismiss Count IV (negligence and/or professional negligence) and Count V (breach of contract), which charge USAC with failing to provide competent claims handling service, on the grounds that Starr’s evidence of damages is speculative and its breach of contract claim is duplicative. As set forth below, USAC’s motion is granted and these claims are dismissed.

In Motion Sequence No. 003, Starr seeks summary judgment on Count I (breach of contract), Count III (declaratory judgment) and Count VI (breach of warranty), which charge Defendant with failing to pay ALAE as required by the parties’ agreements. Starr also seeks summary judgment dismissing USAC’s counterclaims. Starr also seeks an award of attorneys’ fees. As set forth below, Starr’s motion is granted with respect to USAC’s counterclaim for unjust enrichment but is otherwise denied.

Background

The Court presumes the parties’ familiarity with the background facts of the case. They will be summarized here only as necessary to resolve the pending motions.

Starr provides a wide range of insurance products to policy holders around the world. One such insurance product was a “Habitational Program” in which Starr (through a managing general agent) issued property and casualty insurance to customers located principally in New York City, New Jersey, and Pennsylvania between October 20, 2009 and February 28, 2015. USAC is in the business of administering property and casualty claims for insurers. USAC

employs adjusters who handle the day-to-day investigation and management of insurance claims from first notice to final disposition.

Pursuant to a 2009 Claim Services Agreement (“CSA”), subsequently amended, Starr retained USAC to perform Claim Management Services, which included: (i) establishing and maintaining claims files; (ii) setting and recommending reserves; (iii) reviewing and preparing loss reports; (iv) providing detailed narrative claims reports to Starr; (v) performing all administrative work associated with the claims; (vi) conducting in-office and field investigations; (vii) supervising all litigation; (viii) reviewing all vendor bills; and (ix) pursuing all subrogation possibilities.

USAC’s Claims Management Service

Starr alleges that USAC was negligent and failed to perform the Claims Management Services required under the CSA in accordance with Starr’s instructions and standard industry practice as would be reasonably expected of an experienced claims adjuster. The alleged deficiencies in USAC’s performance include delayed and poor investigation of claims, inadequate documentation of claims files, inadequate staffing, and inadequate supervision of defense counsel.

Starr asserts that USAC’s conduct caused Starr to overpay in indemnity on those claims, which apparently is defined as “leakage” in the insurance industry. In seeking to quantify such claimed “leakage” in this case, Starr offered an analysis conducted by its expert, Alan Gray. As explained by Starr:

“Gray took a random sample of closed claims from the claims that USAC closed as of March 31, 2016, the date that Starr took USAC’s claims files in-house. Gray randomly selected closed claims from two universes: (1) claims where the indemnity amount paid was greater than \$500,000, and (2) claims where the indemnity amount paid was between \$10,000 and \$499,999. Gray reviewed a total of 231 closed casualty claims files from the universe of 832 pre-March 31, 2016 closed casualty claims. From this audit sample,

Gray found leakage in 19 claims. In calculating the leakage amount, Gray provided a range of 50-100% of the settlement value for the majority of these 19 claims. Gray explained that he took ‘a conservative approach . . . [because it states] a range of outcomes’ and that given the incomplete nature of the files audited, Gray could have easily suggested ‘100% leakage on each of these claims rather than offer a reasonable range of leakage.’ Gray then calculated the percent of the indemnity paid out in the audit sample that constituted leakage, which was 4.69%-8.87%.

From this audit sample, Gray then quantified Starr’s overall damages by extrapolating these audit results over the “Paid Claims Population” as June 24, 2016, the date Starr terminated USAC as Starr’s TPA. The Paid Claims Population consisted of casualty claims that were closed as of June 24, 2016, open casualty claims that had some indemnity paid-out as of June 24, 2016, and re-opened casualty claims that had some indemnity paid-out as of June 24, 2016. Gray extrapolated his leakage analysis onto the Paid Claims Population because USAC’s handling (or mishandling) would have impacted the ultimate resolution of all of these claims. Once Starr took these claims in-house, they were essentially left to ‘triage’ the poor work done by USAC and reach the best outcome possible given that Starr was already starting at a disadvantage. The total indemnity paid from the Paid Claims Population is \$39,953,282 and, accordingly, applying the leakage percentages from the audit, Gray concluded that Starr suffered damages ranging from \$1,874,806 to \$3,542,973 because of USAC’s mishandling of the claims”

(Mem. Op., NYSCEF 150 at 9-10 [citations omitted]).

Gray did not attempt to quantify the amount, if any, by which USAC’s allegedly subpar conduct caused Starr to overpay any specific indemnification claim. He did not, in other words, evaluate what Starr’s indemnity payments would have been in connection with any individual claim *but for* USAC’s negligence in handling the claim.

USAC’s Payment of ALAE

Under the CSA, Starr was responsible for paying all indemnity expenses and USAC was responsible for paying the ALAE “from its service fee.”

The 2009 CSA defined ALAE as “items of expense incurred or authorized by [USAC] as may be reasonable and necessary in connection with its provision of the Basic Services,” including all legal fees. Specifically, the 2009 CSA provided that “[USAC] agrees to make all payments of [ALAE] from its service fee as set forth in Schedule 2.” Schedule 2 of the 2009

CSA states that “[USAC’s] fee shall include all expenses, including all ALAE, as defined in Sec. III (B) of the Agreement.”

The terms were renegotiated, in part because USAC asserted that its service fee was insufficient to cover the ALAE. Accordingly, the service fee was increased. The amended agreement provided that it “is subject to review at the written request of either party at six (6) month intervals” and that a meeting would be held “within 30 days of such written request.”

Starr terminated the CSA, effective March 2015. There ensued substantial disputes with respect to the status of ALAE payments and further attempts to renegotiate the terms of the agreements and also to permit USAC to perform additional work on “run off” business post-termination.

Starr claims that it has been required to pay over \$58 million of ALAE payments that should have been paid by USAC. At a minimum, it seeks to have USAC make ALAE payments up to the full amount of the service fee. USAC disputes those claims, and argues that Starr’s evidence is not sufficient to establish any amount due.

DISCUSSION

A party moving for summary judgment pursuant to CPLR 3212 must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a prima facie showing has been made, the burden then shifts to the opposing party to produce admissible evidence “sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562.)

USAC's Motion for Partial Summary Judgment (Counts IV and V)

For purposes of its motion for summary judgment, USAC does not dispute any of Starr's allegations with respect to negligence or the quality of USAC's work. Instead, its motion focuses on Starr's failure to submit evidence to show actual, ascertainable, and non-speculative damages arising from USAC's conduct.¹

Negligence and/or Professional Negligence (Count V)

In order to survive a summary judgment motion, a plaintiff must submit "nonspeculative evidence in support of its damage claims" (*G & M Realty, L.P. v Masyr*, 96 AD3d 689, 690 [1st Dept 2012] [citation omitted]). It must show that the defendant's negligence, if any, proximately caused plaintiff to sustain "actual and ascertainable damages" (*Dombrowski v Bulson*, 19 NY3d 347, 350 [2012] [quotation marks and citations omitted]; see *Gourary v Green*, 143 AD3d 580 [1st Dept 2016] [defendants "established the absence of proximately caused damages; since 'there is no way to know whether the advice not given . . . would have altered the [outcome],' 'the claim is speculative' " (alteration in original) (citations omitted)]).

In professional negligence cases, plaintiffs must show a causal link between the allegedly negligent conduct and the loss. For example, in legal malpractice cases, a plaintiff must show that but for counsel's negligence the plaintiff would have succeeded on the merits in a lawsuit or

¹ In support of its claims for professional negligence and breach of contract, Starr asserts that "there are facts that show USAC was negligent and breached its duty of providing services according to industry standard and the instructions in the Claims Services Agreement. The deficiencies in USAC's performance under the Claims Services Agreement include, but are not limited to, delayed and poor investigation of claims, inadequate documentation of claims files, inadequate staffing, and inadequate supervision of defense counsel" (Mem. Op., NYSCEF 150 at 1).

otherwise avoided actual and sustainable damages (*see e.g. Gallet Dreyer & Berkey v Basile*, 141 AD3d 405, 405-406 [1st Dept 2016]).

Here, Starr fails to state a prima facie case that it suffered actual and ascertainable damages. As described above, its claim is based principally on the testimony of its expert witness (Alan Gray), who found that USAC's careless documentation and follow-up caused "leakage" in the claims handling process. But rather than attempting to tie that "leakage" to any impact on Starr's indemnity payments to policyholders in specific cases, the expert concluded, based on his general experience in the industry, that USAC's conduct likely increased Starr's payments by "50-100%" across the board.²

Mr. Gray's broad predictions are not sufficient to sustain a claim for damages. Expert testimony as to what "might have" happened in the absence of a defendant's negligence is insufficient (*see Menard Gertler, M.D.P.C. v Sol Masch & Co.*, 40 AD3d 282, 282-283 [1st Dept 2007] ["The damages theory presented by plaintiff's expert was based on assumptions and speculation as to what plaintiff trustee might have done . . . had he been advised by the defendants of the applicable taxes when trading on margin"]).

Starr's attempt to analogize this case to "sampling" that has been accepted in RMBS cases is unavailing (*see generally e.g. Ambac Assurance Corp. v Countrywide Home Loans Inc.*, 179 AD3d 518 [1st Dept 2020]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 30 Misc 3d

² As described by Starr: "Gray calculated the leakage amounts by reviewing more than a quarter of the relevant closed claims, found leakage in 19 claims, and calculated the leakage amount by applying a conservative range of 50-100% of the indemnification paid. (Huttenlocher Aff. Ex. 8, Appendix E.) Gray concluded that the fundamental omissions in USAC's claims handling tainted the files in such a way that the settlements reached were overpriced. (Huttenlocher Aff. Ex. 9.) Gray then extrapolated the results of the audit onto the Paid Claim Population to reach the conclusion that Starr has been damaged in the amount of \$1,874,806-\$3,542,973. (*Id.*)" (Mem. Opp., NYSCEF 150 at 17).

1201(A) [Sup Ct, NY County 2010]). The testimony in those cases provided evidence as to *actual* liability and damages in a representative sample of loans and a scientifically sound statistical basis for extrapolating those conclusions to a portfolio of loans with similar characteristics. By contrast, Mr. Gray did not undertake an analysis of actual damages as to *any* specific cases, let alone offer a scientifically sound statistical justification for extrapolating specific damages from “leakage” in one property insurance claim to a wide range of others involving different facts and circumstances. Accordingly, the RMBS cases are inapposite.

Nor can Starr analogize this case to those finding that damages do not have to be shown with “mathematical precision” (*e.g. Hydro Invs., Inc. v Trafalgar Power Inc.*, 227 F3d 8, 19 [2d Cir 2000]). Here, Gray adopted a broad “range” (50-100%) of what the impact might have been on total claims payments caused by USAC’s failures in documentation and the like. There was no attempt to tie USAC’s conduct to any actual losses. That cannot simply be written off as imprecision.

Accordingly, because Starr has failed to establish with competent evidence a *prima facie* claim for relief, USAC’s motion for summary judgment on Count V of the Complaint is granted.

Count IV (Breach of Contract)

Starr’s claim that USAC failed to comply with the standard of care required under its contract is duplicative of its claim for professional negligence because it is based on the same facts and seeks similar damages (*see e.g. Genet v Buzin*, 159 AD3d 540, 540 [1st Dept 2018]; *Alphas v Smith*, 147 AD3d 557, 558 [1st Dept 2017]; *Rivas v. Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401, 401 [1st Dept 2008]; *InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003]).

Moreover, although damages for breach of contract need only be a foreseeable and probable result of the breach, and need not be shown with mathematical certainty, Starr cannot recover damages that are purely speculative. As noted above, Starr's proof of damages is woefully inadequate to establish a prima facie case.

Accordingly, Count IV is dismissed.

Starr's Motion for Summary Judgment on Counts I, III, and VI

Starr seeks summary judgment on its claim that USAC was contractually required to pay all ALAE incurred in the course of handling Starr's claims, even if such payments exceeded the total amount USAC was being paid for its work.

The CSA provides that USAC "will make all payments of [ALAE] from its service fee." That language can, at a minimum, be reasonably read to cap USAC's obligation at the amount of the service fee. The extrinsic evidence proffered by Starr is insufficient to establish as a matter of law that USAC undertook a broader obligation to pay ALAE without limitation. Therefore, Starr is not entitled to summary judgment on its claim that USAC is liable for \$58 million, which is far in excess of USAC's service fee.

Moreover, Starr has not submitted competent evidence of the amount of ALAE it has been required to pay as a result of USAC's alleged breach of contract. A chart submitted by counsel, based on unverified interrogatory responses, is not sufficient at this stage to render judgment in Starr's favor. In addition, factual disputes remain as to whether USAC has already paid ALAE up to the extent of its service fee and whether USAC's payment of salaries to employees allocable to its work for Starr are properly taken into account in determining ALAE expenses for purposes of the Claim Service Agreement.

Accordingly, Starr's motion for summary judgment on Counts I, III, and VI of its Complaint is denied.

Starr's Motion for Summary Judgment Dismissing USAC's Counterclaims

Finally, Starr seeks to dismiss USAC's counterclaims for breach of contract (failure to negotiate in good faith) and unjust enrichment. Based on the Court's review of the record, factual disputes remain with respect to whether Starr negotiated in good faith. Accordingly, summary judgment is not appropriate.

However, USAC's claim for unjust enrichment must be dismissed. To the extent USAC is entitled to the return of funds, for ALAE expenses or otherwise, that right must derive from the parties' contract. In those circumstances, a separate claim for unjust enrichment is not viable.

The Court has reviewed Starr's remaining arguments in support of partial summary judgment and finds them to be without merit.

Based on the foregoing, it is:

ORDERED that Defendant's motion for summary judgment in its favor on Counts IV and V of the Complaint is **granted** and those claims are hereby dismissed; it is further

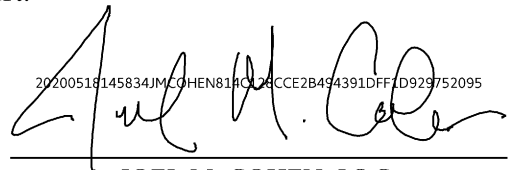
ORDERED that Plaintiffs' motion for summary judgment in its favor on Counts I, III, and VI is **denied**; and it is further

ORDERED that Plaintiffs' motion for summary judgment on Defendant's counterclaims is **granted** with respect to the counterclaim for unjust enrichment but otherwise **denied**.

This constitutes the decision and order of the Court.

5/18/2020

DATE



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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE