

Paulicelli v First Am. Tit. Ins. Co.

2020 NY Slip Op 33602(U)

October 26, 2020

Supreme Court, New York County

Docket Number: 654132/2018

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

LUCIA EUGENIA PAULICELLI,
Plaintiff,

- v -

FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendant.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS

By this pre-answer motion, defendant First American Title Insurance Company ("Defendant") moves to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7) on the basis of documentary evidence and for failure to state a cause of action. Plaintiff Lucia Eugenia Paulicelli ("Plaintiff") opposes. For the reasons set forth below, the motion is granted.

This action arises from plaintiff Lucia Eugena Paulicelli's ("Plaintiff") purchase of a timeshare interest in an apartment from non-party The Manhattan Club on January 29, 2011 (complaint ¶ 3). In connection with the timeshare purchase, Plaintiff purchased a title insurance policy (the "Policy") from Defendant. Plaintiff also signed a power of attorney, which she alleges "transferr[ed] any and all powers of ownership" (complaint ¶ 5) to the Board of Directors of The Manhattan Club Timeshare Association, Inc. (NYCEF Doc No 7). The complaint does not specifically enumerate any causes of action, but alleges various wrongdoing on the part of Defendant in connection with the timeshare purchase and issuance of the Policy, including that

Defendant failed to disclose the effect of the power of attorney at the time of the purchase and that “Defendant did not represent the Plaintiff in the required fiduciary provisions in the sale of useless title insurance, [sic] are policies in effect that covers nothing.” The complaint also alleges that Defendant “knew or should have known” that “the [P]olicy did not give coverage to items it claimed to give coverage to,” and that “an Irrevocable Power of Attorney is invalid in the State of New York” (*id.* ¶¶ 18, 20-21). Plaintiff also alleges that “the principals of the timeshare” were indicted by the New York State Attorney General for fraud (*id.* ¶ 15). Finally, Plaintiff alleges that she has suffered damages in excess of \$100,000 and that she cannot sell the timeshare.

As a threshold matter, the complaint filed in this action, which consists of twenty-two consecutively numbered paragraphs, nineteen of which are alleged “upon information and belief,” does not meet the pleading requirements of CPLR 3014 because the causes of action alleged are not “separately stated” (CPLR Rule 3014) or even identified. The allegations set forth in the complaint are instead presented in a vague and scattershot fashion, from which the court is unable to discern, on the basis of the factual allegations, what causes of action Plaintiff seeks to allege. In opposition to Defendant’s motion to dismiss, Plaintiff asserts that the complaint “charges breach of fiduciary duty, fraud and bad faith to sell her a policy causing her the loss of ability to sell her timeshare due to the New York State Attorney Generals indictments for criminal behavior by the Club Manhattan [sic].” (Croman aff in opposition ¶ 3; NYSCEF Doc No 11). To the extent that one could possibly presume plaintiff’s intent to assert causes of action for breach of fiduciary duty, fraud or bad faith, she fails to state a cause of action under any of those theories, as follows.

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages

directly caused by the defendant's misconduct" (*Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 A.D.3d 47, 61 [2d Dept 2013]). "A breach of fiduciary duty cause of action must be pleaded with the requisite particularity under CPLR 3016 (b)" (*id.*). At the outset, the complaint does not state a cause of action for breach of fiduciary duty with particularity, as required by CPLR 3016 (b). The only allegation in the complaint that references a fiduciary duty states, in full, "[u]pon information and belief, the Defendant did not represent the Plaintiff in the required fiduciary provisions in the sale of useless title insurance, are [*sic*] policies in effect that covers nothing" (complaint ¶ 18). The complaint does not identify the purported "required fiduciary provisions" which it seeks to enforce, nor does it otherwise plead the existence of a fiduciary duty between the parties or plead factual allegations sufficient to support an inference of a fiduciary duty. The complaint states that Defendant failed to disclose the effect of the power of attorney to her, but does not plead that Defendant had a fiduciary or other duty to make such a disclosure, or plead any factual allegations that support a finding that any such duty existed. The complaint also does not plead how any purported misconduct by Defendant directly caused her to suffer damages. Plaintiff's opposition to the motion argues that she suffered damages "[a]s a result of the criminal behavior of the timeshare organization and its owners" and that "[a]n agreement with the [New York] Attorney General bars the Manhattan Club from buying and selling timeshares but it allows the timeshare to continue to collect dues and fees from owners under threat of foreclosure" (Croman aff in opposition ¶¶ 7-8). Whereas Plaintiff attributes her alleged damages to the actions of The Manhattan Club or to involvement by the Attorney General, rather than Defendant, the complaint lacks the essential element of causation. For these reasons, the complaint fails to state a cause of action for breach of fiduciary duty.

The complaint similarly fails to state a cause of action for fraud. To state a claim for fraud, the Plaintiff must allege “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotation marks and citation omitted]). Pursuant to CPLR 3016 (b), “where a cause of action is based in fraud, ‘the circumstances constituting the wrong shall be stated in detail’” (*Mandarin Trading*, 16 NY3d at 178, *quoting* CPLR 3016 [b]). The complaint not only fails to identify any specific misrepresentations or material omissions made by any representative of Defendant, it fails entirely to allege intent, justifiable reliance, or causation. The complaint alleges the Policy “covers nothing” or “did not give coverage to items it claimed to give coverage to,” but does not identify any item or items that the Policy purported to cover but did not. With regard to the element of causation, the “plaintiff must show both that defendant’s misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)” (*see Laub v. Faessel*, 297 AD2d 28, 31 [1st Dept 2002]; *see also Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 86 [1st Dept 2017]). Plaintiff alleges neither. As such, the complaint fails to state a cause of action for fraud.

Finally, the complaint fails to state a cause of action for bad faith. It is well-settled that no separate cause of action exists in tort for an insurer’s alleged bad faith in failing to perform its contractual obligations (*New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]). Moreover, the Policy specifically excludes causes of action arising from the power of attorney from coverage. Schedule B of the Policy provides, in pertinent part, as follows:

EXCEPTIONS FROM COVERAGE

This Policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

* * *

6. Timeshare Power of Attorney to the Board of Directors of The Manhattan Club Timeshare Association, Inc, and their successor in office dated 02/24/2011 and being duly recorded in the office of the Register, New York County.

(complaint, exhibit 1 [Policy page 8]). Insurance “[p]olicy exclusions are subject to strict construction and must be read narrowly, and any ambiguities in the insurance policy are to be construed against the insurer. However, unambiguous provisions of insurance contracts will be given their plain and ordinary meaning” (*Country-Wide Ins. Co. v. Excelsior Ins. Co.*, 147 A.D.3d 407, 408-409 [1st Dept 2017]). “In the context of a policy exclusion, the phrase arising out of is unambiguous, and is interpreted broadly to mean ‘originating from, incident to, or having connection with’ (*id.*). To determine the applicability of an “arising out of” exclusion, the Court of Appeals had adopted a “but for” test (*id.*, citing *Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 N.Y.2d 347, 350 [1996]). This test is defined as follows:

“[I]f the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling within such an exclusion, and none of the causes of action that he or she asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action”

(*id.*). Applying the “but for” test adopted by the Court of Appeals, all causes of action arising from the power of attorney clearly fall within the subject policy exclusion and Defendant is under no obligation to defend Plaintiff for these claims. Defendant has, therefore, a defense to a claim of bad faith as a matter of law.

For all of the reasons discussed here, and because the complaint fails to allege facts which, taken together, manifest any cause of action cognizable at law, the complaint is dismissed.

Accordingly, it is

ORDERED that Defendant's motion to dismiss the complaint is granted and the case is dismissed.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>10/26/2020</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE