Trim v New York Prop. Ins. Underwriting Assn.
2020 NY Slip Op 33656(U)
September 15, 2020
Supreme Court, Queens County
Docket Number: 718936/19
Judge: Rudolph E. Greco, Jr.
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RUDOLPH E. GRECO, JR.** IA PART 32
Justice

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SAMUEL ALBERT TRIM,

Index No.: 718936/19
Motion Date: 7/30/20
Motion Cal. No.: 36
Motion Seq. No.: 2

FILED
9/23/2020
11:47 AM
COUNTY CLERK
QUEENS COUNTY

Plaintiff,

-against-

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION,

Defendant.

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The following numbered papers read on this pre-answer motion by defendant to dismiss, pursuant to CPLR 3211(a)(1), (7), and (10).

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits….....	EF 14 - 20
Affirmation in Opposition……..……	EF 21
Replying……..	EF 22

Upon the foregoing cited papers, it is ordered that this pre-answer motion by defendant to dismiss, pursuant to CPLR 3211(a)(1), (7), and (10), is determined as follows:

Plaintiff Samuel Albert Trim commenced this action against insurer, defendant New York Property Insurance Underwriting Association, alleging (i) breach of contract, (ii) negligent misrepresentation, (iii) declaratory judgment, (iv) specific performance, (v) unjust enrichment, (vi) wind, rain and storm damage, and (vii) unfair claims settlement practices.

Now, defendant moves for an order dismissing plaintiff's complaint, pursuant to CPLR 3211 (a)(1), (7) and (10).

CPLR 3211(a)(1):

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's allegations, thereby conclusively establishes a defense as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Phillips v Taco Bell Corp.*, 152 AD3d 806, 806 [2d Dept 2017]). Such evidence must be unambiguous, authentic and undeniable such as judicial records and documents such as a contract, the contents of which are essentially undeniable (*see Phillips*, 152 AD3d at 807). However, e-mails, letters, affidavits, and deposition testimony do not constitute documentary evidence under CPLR 3211(a)(1) (*see Minchala v 829 Jefferson, LLC*, 177 AD3d 866, 867-68 [2d Dept 2019]; *Gawrych v Astoria Federal Savings and Loan*, 148 AD3d 681, 682 [2d Dept 2017]; *Fontanetta v Doe*, 73 AD3d 78, 85-86 [2d Dept 2010]).

In support of its motion, the defendant submits, among other things, the summons and complaint, the subject property insurance policy, checks paid to plaintiff by defendant, and a copy of the recorded deed.

Here, defendant's evidentiary submissions are not dispositive of the claims asserted (*id.*). Therefore, the branch of defendant's motion seeking dismissal on documentary evidence, pursuant to CPLR 3211(a)(1), is denied (*see Magee-Boyle v Reliastar Life Insurance Company of New York*, 173 AD3d 1157, 1159-60 [2d Dept 2019]; *Phillips*, 152 AD3d at 806-07).

CPLR 3211(a)(7):

When considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory (*see Leon*, 84 NY2d at 88; *Travelsavers Enterprises, Inc., v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 [2d Dept 2017]).

Causes of Action—Breach of Contract and Declaratory Judgment:

Here, construing the complaint liberally, accepting the facts alleged in the complaint as true, and according plaintiff the benefit of every possible inference, as required, plaintiff states a cause of action (*see Romanello v Intesa Sanpaolo, S. p.A.*, 22 NY3d 881, 882-83 [2013]; *Mirro v City of New York*, 159 AD3d 964, 966 [2d Dept 2018]; *4777 Food Services Corp. v Anthony P. Gallo, P.C.*, 150 AD3d 1054 [2d Dept 2017]; *Godino v Premier Salons, Ltd.*, 140 AD3d 1118, 1119 [2d Dept 2016]). Whether plaintiff can ultimately prevail on these allegations is not relevant on this pre-answer motion to dismiss (*see Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Litvinoff v Wright*, 150 AD3d 714 [2d Dept 2017]).

Cause of Action—Negligent Misrepresentation:

To recover for negligent misrepresentation, a plaintiff must demonstrate, (1) the existence of a special relationship imposing a duty upon defendant impart correct information to the plaintiff; (2) that the information was incorrect, false or withheld; and (3) that the plaintiff reasonably relied upon the information provided (*see Wallkill Medical Development, LLC v Catskill Orange Orthopaedics, P.C.*, 178 AD3d 987, 990 [2d Dept 2019]; *Reilly Green Mountain Platform Tennis v Cortese*, 59 AD3d 695, 695 [2d Dept 2009]; *Grammer v Turits*, 271 AD2d 644, 645 [2d Dept 2000]). Here, plaintiff failed to state a cause of action to recover for negligent misrepresentation (*id.*). Therefore, plaintiff's cause of action for negligent misrepresentation is dismissed (*id.*).

Cause of Action—Specific Performance:

Plaintiff's cause of action for specific performance is dismissed as duplicative of the breach of contract cause of action (*see* Restatement [Second] of Contracts § 359[1]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]).

Cause of Action—Unjust Enrichment:

As to plaintiff's cause of action for unjust enrichment, plaintiff must plead that, (1) defendant were enriched, (2) at his expense, and (3) that it is against equity and good conscience to permit defendants to retain what is sought to be recovered (*see FoxStone Group, LLC v Calvary Pentecostal Church, Inc.*, 173 AD3d 978, 981 [2d Dept 2019]; *GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2d Dept 2015]). A bare legal conclusion that it is against equity and good conscience to retain an unidentified benefit is insufficient to adequately allege that an asserted enrichment was unjust (*id.; Swartz v Swartz*, 145 AD 3d 818, 830 [2d Dept 2016]). Here, plaintiff failed to state a cause of action to recover for unjust enrichment (*id.*). Thus, plaintiff's cause of action for unjust enrichment is dismissed (*id.*).

Causes of Action—Wind, Rain, and Storm Damage and Unfair Claims Settlement Practices:

There is no private cause of action for unfair claim settlement practices, which is what plaintiff seeks to assert in this cause of action (*see* Insurance Law § 2601; *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603 [1994]; *Bettan v Geico General Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]). Moreover, plaintiff's wind, rain, and storm damage cause of action also relies on Insurance Law § 2601 and must be dismissed (*id.*). Thus, plaintiff's causes of action of wind, rain, and storm damage and unfair claims settlement practices are dismissed.

CPLR 3211(a)(10):

Plaintiff shall join Patricia Bobb-Trim as a necessary plaintiff (*see* CPLR 1001[b]; *Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725 [2008]).

Therefore, the caption shall be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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SAMUEL ALBERT TRIM and **INDEX NO. 718936/2019**
PATRICIA BOB-TRIM,
PLAINTIFFS,
- AGAINST -

NEW YORK PROPERTY INSURANCE
UNDERWRITING ASSOCIATION,

DEFENDANT.
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and it is further

ORDERED that plaintiff shall file and serve the supplemental summons and the amended verified complaint, upon defendant and Patricia Bob-Trim, within thirty (30) days of service of a copy of this order with notice of entry; and it is further

Accordingly, this motion by defendant to dismiss is granted only to the extent that plaintiff's causes of action for negligent misrepresentation, specific performance, unjust enrichment, wind, rain and storm damage, and unfair claims settlement practices, are dismissed, and its motion is otherwise denied and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff, within thirty (30) days of the date of entry.

This constitutes the decision and order of this Court.

FILED
9/23/2020
11:47 AM
COUNTY CLERK
QUEENS COUNTY

Dated: September 15, 2020

RUDOLPH E. GRECO, JR., J.S.C.