

Union Mut. Fire Ins. Co. v 205 Cent. LLC

2021 NY Slip Op 31442(U)

April 21, 2021

Supreme Court, Kings County

Docket Number: 504719/2020

Judge: Reginald A. Boddie

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At an I.A.S. Commercial Term 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 21st day of April 2021.

PRESENT:

Honorable Reginald A. Boddie
Justice, Supreme Court

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UNION MUTUAL FIRE INSURANCE COMPANY,

Plaintiff,

Index No. 504719/2020
Cal. No. 30 MS 1

against

DECISION AND ORDER

205 CENTRAL LLC, BIG DREAM DEVELOPERS LLC,
SHULEM HERMAN, S&s ARCHITECTURAL DESIGN
LLC, CHARLES SOLANO and AIDA ESTHEL SOLANO,

Defendants.
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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers Numbered
MS 1 Docs. # 8-27

Upon the foregoing cited papers, plaintiff's motion to dismiss the counterclaim of defendants 205 Central LLC and Shulem Herman, pursuant to CPLR 3025 (a) and CPLR 3211 (a) (7), is decided as follows:

Plaintiff Union Mutual Fire Insurance Company (Union Mutual) transacts insurance business, including issuance of commercial property and liability policy insurance. Defendant 205 Central LLC (205 Central) is the owner of real property located at 205 Central Avenue, Brooklyn, New York (the insured property). Plaintiff alleged that on or about June 8, 2018, 205 Central gave it notice of an action which arose out of property damage caused by construction

taking place on 205 Central's property. Plaintiff alleged 205 Central requested that Union Mutual defend it in that action and indemnify it for any resulting damages. In that action, it was alleged that 205 Central tore down a fence between the insured property and adjoining property located at 207 Central Avenue, Brooklyn, New York. It is also alleged that construction at the insured property negligently caused interior and exterior damage to the adjoining property.

Plaintiff alleged it issued a commercial property and liability policy to 205 Central, effective May 22, 2015 to May 22, 2017, which does not provide coverage for bodily injury or property damage that is the result of intentional conduct of an insured. By correspondence dated June 21, 2018, Union Mutual disclaimed coverage for the underlying claim. Plaintiff further disclaimed coverage on the ground of late notice of occurrence since 205 Central first became aware of complaints and possible claims arising from the construction work occurring at the subject premises in August 2017, and did not notify plaintiff until June 5, 2018. Plaintiff averred it provided a defense to 205 Central while it conducted investigations into the facts of the underlying action, but further investigation confirmed that the claims made by 205 Central were excluded from coverage under the policy.

Plaintiff initiated this action on February 25, 2020, for an order declaring that it has no obligation to defend or indemnify 205 Central in the underlying action and it may withdraw its defense. In addition to naming 205 Central as a defendant in this action, plaintiff also sued Big Dream Developers LLC, Shulem Herman (Herman), S&S Architectural Design LLC and Charles and Aida Esthel Solano, parties in the underlying action.

Defendants 205 Central and Herman filed their answer, pursuant to a stipulation extending their time to answer, on June 15, 2020, and asserted counterclaims pursuant to General Business Law § 349. On August 18, 2020, without leave of court, defendants 205 Central and

Herman filed an amended answer and amended counterclaims to include claims that plaintiff engaged in deceptive practices and bad faith marketing tactics. Defendants also sought to amend to include a counterclaim for anticipatory breach of contract. Plaintiff moved to dismiss the counterclaim and the amended pleading as untimely and improper.

As a preliminary matter, a party may amend its pleading once without leave of court within twenty days after service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it (*see* CPLR 3025 [a]). Otherwise, “a party may amend his or her pleading . . . by leave of court or by stipulation of all parties” (CPLR 3025 [b]). Service of an amended pleading without leave of court or a stipulation of the parties when the 20-day period has expired is a nullity (*see Sackett v Estate of Konigsberg*, 74 AD3d 777, 778 [2d Dept 2010]; *Jaramillo v Asconcio*, 151 AD3d 947, 949 [2d Dept 2017]; *Nikolic v Fedn. Empl. and Guidance Serv., Inc.*, 18 AD3d 522, 524 [2d Dept 2005]; *Peterkin v City of New York*, 293 AD2d 244, 249 [2d Dept 2002]).

Here, the parties agreed by stipulation to extend the time for defendants 205 Central and Herman to answer the complaint to June 17, 2020. On June 15, 2020, defendants answered the complaint and asserted a counterclaim pursuant to General Business Law § 349. Defendants thus had 20 days thereafter or until July 6, 2020, to amend their counterclaim without leave of court. On August 18, 2020, defendants filed their amended answer and counterclaims, without leave of court or stipulation of all parties. The untimely amendment of the answer and counterclaim without leave of court or stipulation of the parties is a nullity (*see Nikolic*, 18 AD3d at 524).

Turning to the merits of plaintiff’s motion to dismiss the underlying counterclaim in the original answer. Plaintiff alleged defendants did not assert facts sufficient to maintain a claim under General Business Law § 349. Pursuant to CPLR 3211 (a) (7), “the sole criterion is whether

the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see *Pacific Carlton Dev. Corp. v 752 Pac., LLC*, 62 AD3d 677, 679 [2009]).

In their original answer, defendants asserted a single counterclaim pursuant to General Business Law § 349. General Business Law § 349 (a) provides that it is unlawful to engage in “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state” (General Business Law § 349 [a]). To state a cause of action under General Business Law § 349, a party must allege: (1) the other party engaged in an act that was directed at consumers, (2) the act engaged in was materially deceptive or misleading, and (3) the party was injured as a result. With respect to the first prong, courts will permit a cause of action pursuant to General Business Law § 349 where the conduct being complained of is not “a private contract dispute as to policy coverage” but instead “involve[s] an extensive marketing scheme that ha[s] ‘a broader impact on consumers’ ” (see *Wilner v Allstate Ins. Co.*, 71 AD3d 155, 163 [2d Dept 2010][citations omitted]; *Oswego Laborers’ Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]).

Here, in paragraphs 22-23 of defendants’ Answer and Counterclaim, defendants alleged that plaintiff “commenced this action to create pressure on 205 Central to accept a compromise on Union Mutual’s coverage of the underlying action, both with respect to the cost of a legal defense and the payment of damages that may be awarded in settlement.” Defendants further alleged that “this bad faith tactic is regularly employed by Union Mutual when insureds seek to exercise their respective rights to coverage as an illicit way to not cover or pay legitimate claims.” In essence, defendants alleged their dispute with plaintiff is not merely a contract

dispute unique to the parties but concerns a regularly employed tactic by Union Mutual that has a broader impact on coverage of other insureds. Defendants have thus pled sufficient facts alleging that plaintiff engaged in consumer-oriented conduct (*see Oswego*, 85 NY2d at 25).

As for the second prong, the test is whether the allegedly deceptive practice is “likely to mislead a reasonable consumer acting reasonably under the circumstances” (*Wilner*, 71 AD3d at 165). In *Benjaminov v Republic Ins. Group*, when the defendant insurer refused to pay the plaintiff the proceeds of her fire insurance policy, the plaintiff sued, and added to her complaint a cause of action under General Business Law § 349, alleging that the defendant routinely engaged in “deceptive and misleading” practices in that it “ma[de] a practice of not paying claims in good faith and with reasonable diligence” (241 AD2d 473 [2d Dept 1997]). The court determined that the plaintiff failed to maintain a cause of action under General Business Law § 349 because she failed to identify any materially deceptive act (*Benjaminov*, 241 AD2d at 474).

Here, too, defendants failed to identify any materially deceptive act. In paragraphs 24-26 of their Answer and Counterclaim, defendants alleged plaintiff engaged in deceptive acts by commencing actions against insureds who are entitled to full coverage to force them “to take responsibility for the payment of a portion of the costs and expenses related to the defense of an action . . . even though the insured are entitled to full and complete coverage. . .” Defendants have not alleged facts that demonstrate the alleged tactic was a representation or an omission likely to mislead a reasonable consumer of insurance (*see Wilner*, 71 AD3d at 165). Rather, defendants’ allegations amounting to a denial of coverage in and of itself does not constitute a deceptive and misleading practice (*see Benjaminov*, 241 AD2d at 474). Therefore, the defendants failed to plead sufficient facts to establish a cause of action pursuant to General Business Law § 349 (*see Wilner*, 71 AD3d at 166).

Accordingly, plaintiff's motion to dismiss defendants' counterclaim and the amended answer and amended counterclaims is granted.

ENTER:

RAB

Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.

AMENDED
FILED
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KINGS COUNTY CLERK