

Hankook Tire Am. Corp. v Samsung Fire & Mar. Ins. Co.

2021 NY Slip Op 32798(U)

December 3, 2021

Supreme Court, New York County

Docket Number: Index No. 653948/15

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 42

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HANKOOK TIRE AMERICA CORP.,

Plaintiff,

Index No. 653948/15

-against-

SAMSUNG FIRE & MARINE INSURANCE CO., LTD.
(U.S. BRANCH) and SAMSUNG FIRE & MARINE
MANAGEMENT CORPORATION,

DECISION and ORDER

Defendants.

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HON. NANCY M. BANNON:

Motion sequence numbers 007 and 008 are hereby consolidated for disposition.

This is an action, inter alia, to recover damages for breach of an insurance policy and breach of the implied covenant of good faith and fair dealing. Plaintiff moves, pursuant to CPLR 3212, for summary judgment on the complaint (motion sequence number 007) and defendants Samsung Fire & Marine Insurance Co. Ltd. (U.S. Branch) and Samsung Fire & Marine Management Corporation move, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence number 008).

I. BACKGROUND

This insurance dispute arises from the alleged theft of 5,353 truck and bus radial tires. According to the complaint, plaintiff markets and distributes tires to more than 400 dealers in the United States and Canada (Complaint at ¶ 7 [NYSCEF Doc. No. 2]). It stores the tires at warehouses throughout the United States, including a facility consisting of two warehouses located in Rancho Cucamonga, California (the Warehouse Facility) (*id.* at ¶ 23). The tires are kept at the Warehouse Facility until they are loaded onto trucks for distribution to plaintiff's customers. At all relevant times, plaintiff utilized non-party Kann Enterprises, Inc. (Kann) to

unload the tires from containers, place them on storage racks, and load them onto delivery trucks for distribution (*id.* at ¶ 24).

On or about February 26, 2015, plaintiff learned of an attempted theft of 46 tires from the Warehouse Facility. A security guard observed Kann employees perpetrating the theft (*id.* at ¶ 26). Although the thieves drove off with the tires, the Kann supervisor on duty persuaded the thieves to return to the warehouse, allowing plaintiff to recover the 46 tires (*id.* ¶ 27). The incident was later reported to the police. A police investigation concluded that Kann employees were responsible (*id.* at ¶ 28).

The attempted theft prompted plaintiff to conduct a selective physical inventory check on March 7, 2015, which revealed that 2,500 tires were missing from the Warehouse Facility (*id.* at ¶ 30). On or about March 14, 2015, plaintiff conducted a full inventory check and determined that 5,353 tires were missing since the last full inventory on December 14, 2014 (*id.*). After confirming that none of its employees were involved in the disappearance, plaintiff concluded that the 5,353 tires were stolen by Kann employees (*id.* at ¶ 33). Plaintiff based this conclusion on the fact that Kann employees attempted to steal the 46 tires in February 2015 and the fact that Kann employees handled all of the loading and unloading of tires at the Warehouse Facility (*id.*).

On or about March 17, 2015, plaintiff submitted a claim in the amount of \$1.35 million¹ for the missing tires under a Marine Open Cargo policy issued by defendants, covering the period from January 1, 2015 to January 1, 2016 (the Policy) (Marine Open Cargo Policy, Policy No. OMC 0000494 [NYSCEF Doc. No. 3, Exh A]). The Policy is a renewal of one covering the period of October 11, 2013 to January 1, 2015 (Marine Open Cargo Policy, Policy No. OMC

¹Plaintiff explains that it based this figure on the total cost of the lost tires, plus a 10% advance pursuant to the terms of the Policies (citing Policy at HAN00072, HAN00074 [NYSCEF Doc. No. 242]).

0000494 [NYSCEF Doc. No. 3, Exh B]) (together referred to as the Policies). The Policies cover “[a]ll lawful goods and or merchandise, incidental to” plaintiff’s business, including tires, and contain the following “All Risk Clause”:

“Unless otherwise specified below, *this policy insures against physical loss or damage from any external cause*, except those risks that may be excluded by [the] warranties or exclusions specified in this policy, unless specifically covered elsewhere herein by endorsement, irrespective of percentage”

(*id.* at § II.1 [emphasis added]). The Policies also include the following “Infidelity Warranty”:

“Warranted free of claims for loss or damage caused by or resulting from misappropriation, secretion, conversion, infidelity, theft or any dishonest act done by or at the instigation of the Assured, the consignee, shipper, supplier or other party at interest in the insured transit or their employees of agents (carriers for higher excepted)”

(*id.* at § IV.11).

On November 13, 2015, defendants issued a letter denying plaintiff’s claim (Denial of Coverage Letter [NYSCEF Doc. No. 3, Exh J]). As a basis for denying coverage, the letter asserted that the claim was not within the scope of the All Risk Clause because there was no proof establishing that the loss was the result of an “external cause.” In this regard, the letter explained that defendant’s investigation revealed that to the extent a loss occurred, “which is not clear given glaring deficiencies uncovered in [plaintiff’s] internal systems, [it] was very likely the result of internal causes” (*id.*). The letter noted that other than the attempted theft of the 46 tires in February 2015, there was no evidence that the tires were stolen and that given the number of tires unaccounted for, it was not feasible that so many tires could have been stolen by an outside source during such a short period of time.

The letter further stated that the evidence uncovered during defendants’ investigation revealed “systemic internal bookkeeping deficiencies and a lack of appropriate controls” and

therefore, “to the extent that theft of tires actually occurred, it was likely by employees of [plaintiff] and/or Kann” (*id.*).

Defendants contended that coverage was also precluded by the Infidelity Warranty inasmuch as it was apparent “based on the number of tires involved,” “the number of trailers that would be necessary to move the tires, and the difficulty involved in transporting such a large quantity of tires in such a short amount of time,” “that, to the extent any of the alleged lost tires were indeed stolen, such theft could have only been carried out by employees of [plaintiff] or a party at interest in the insured transit, such as Kann . . . who had access to the tires over an extended period of time” (*id.*).

Additionally, defendants asserted that plaintiff did not establish that the tires were “actually lost, as opposed to being in another [one of plaintiff’s warehouses] or in the possession of a customer” (*id.*). In this regard, the letter asserted that defendants’ investigation revealed that plaintiff had “significant bookkeeping issues which precluded an accurate representation of the inventory on hand” (*id.*).

As a final basis for denying coverage, defendants asserted that plaintiff offered no proof that the alleged loss occurred during the policy period. The letter noted that “the number of tires involved, the number of trailers required to move the [tires], and the difficulty involved in the movement, all indicate that whatever happened at the Warehouse took place over an extended period of time. However, [plaintiff] has not provided any evidence that the entirety of the claimed loss occurred between January 1, 2015 and March 17, 2015” (*id.*).

Plaintiff thereafter commenced this action to recover damages for breach of contract, alleging that the disappearance of the tires was a covered loss. Plaintiff claims that defendants’ denial of coverage was unreasonable and issued in bad faith and that they engaged in dilatory

tactics which resulted in an eight-month delay before issuing a final coverage determination. In the complaint, plaintiff also seeks a judgment declaring that defendants are obligated to provide coverage for the loss of the tires, as well as consequential and punitive damages for breach of the implied covenant of good faith and fair dealing and the alleged bad faith handling of its claim.

Defendants filed a pre-answer motion to dismiss, pursuant to CPLR 327 (a), on forum non conveniens grounds. The motion was denied in an order dated March 17, 2017 (NYSCEF Doc. No. 38). Defendants then submitted an answer and protracted discovery ensued.

Based on the defendant's failure to produce requested discovery and comply with a discovery order, plaintiff moved, pursuant to CPLR 3126 to strike defendants' answer, preclude the defendants from offering evidence at trial based on their failure to produce such discovery, or for an adverse inference charge concerning the withheld documents. This court issued an order, dated July 10, 2020, inter alia, granting plaintiff's motion to the extent of precluding defendants from introducing "evidence at trial or on any dispositive motion that relates to or concerns the same subject matter as the discovery that was demanded or ordered and not timely produced by defendants, including any discovery provided after April 16, 2019" (*Hankook Tire Am. Corp. v Samsung Fire & Mar. Ins. Co. Ltd.*, NY 2020 Slip Op 32451[U] [Sup Ct, NY County, 2020][NYSCEF Doc. No. 215]).

Plaintiff now moves for summary judgment on the complaint. Defendants oppose the motion and move for summary judgment dismissing the complaint. While the parties argue over whether certain evidence falls within the scope of the July 10, 2020 order, thereby precluding defendants from offering it on these motions, such arguments are inconsequential to the court's ultimate determination on these motions.

II. DISCUSSION

On a motion for summary judgment, the movant “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” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citations omitted]). If the moving party fails to make such a showing, the motion must be denied “regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Matter of New York City Asbestos Litig.*, 176 AD3d 506, 506 [1st Dept 2019]). However, where “the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). On the motion, the facts must be viewed in the light most favorable to the non-moving party (see *Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 179 [2020]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Breach of the Insurance Contract

In determining a dispute over insurance coverage, the court first looks to the language of the policy (see *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). “[A]lthough the insurer has the burden of proving the applicability of an exclusion, it is the insured’s burden to establish the existence of coverage” (*Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015] [citations omitted]).

In order “[t]o prove that an all-risk policy covers its claim, the insured [must demonstrate] (1) the existence of an all-risk policy, (2) an insurable interest in the subject of the insurance contract, and (3) the fortuitous loss of the covered property” (*North American*, 499 F

Supp 2d 361, 374 [SD NY 2007] [internal quotation marks and citations omitted]; *see Nussbaum Diamonds, LLC v Hanover Ins. Co.*, 64 AD3d 488, 491 [1st Dept 2009]). Under an all-risk policy, the insured need not establish the precise cause or “prove the exact nature of the accident or casualty which, in fact, occasioned [the] loss” (*Simplexdiam, Inc. v Brockbank*, 283 AD2d 34, 39 [1st Dept 2001] [internal quotation marks and citations omitted]; *see Nussbaum Diamonds, LLC v Hanover Ins. Co.*, 64 AD3d at 491). However, in general terms, it still has the burden of proving that a loss occurred (*see UnitedStates Dredging Corp. v Lexington Ins. Co.*, 99 AD3d 695, 952 [2d Dept 2012]; *Moneta Dev. Corp. v Generali Ins. Co. of Trieste & Venice*, 212 AD2d 428, 429 [1st Dept 1995]; *International Multifoods Corp. v Commercial Union Ins. Co.*, 309 F3d 76, 84 [2d Cir 2002] [“the issue largely relates to whether (the insured) has demonstrated a loss, rather than to whether such loss should be characterized as fortuitous”]).

Here, the parties agree that the policies at issue are “all-risk” policies. There is also no dispute that the policies cover tires, and that plaintiff had an insurable interest in the tires. The dispute lies in whether plaintiff demonstrated a loss of the tires. In this regard, defendants contend that plaintiff cannot meet this burden because the tires were not actually missing or stolen from the Warehouse Facility, but rather inaccurately or untimely entered into plaintiff’s inventory system, thereby giving the erroneous appearance that they were stolen. Therefore, defendants contend, plaintiff is not entitled to summary judgment on the complaint, and defendants are entitled to summary judgment dismissing the complaint.

Contrary to defendants’ contention, plaintiff demonstrated that a loss occurred sometime between December 2014 and March 2015, when one of the policies was in effect. Plaintiff proffers a comparison between a physical inventory conducted on March 14, 2015 and its SAP

inventory management program data² (NYSCEF Doc. No. 262). In support of its motion, it also submits a report prepared by forensic accountants Matson Driscoll & Damico LLP (MDD), dated July 2, 2015, as well as the deposition testimony of Hannah McCannell, the individual who prepared the report and performed the underlying forensic analysis (MDD Report [NYSCEF Doc. No. 247]; McCannell EBT Tr at 73-74 [NYSCEF Doc. No. 236]). McCannell testified that MDD was retained by WK Webster, a third-party claims administrator hired by defendants to investigate the claim. McCannell's report concludes that the accounting documentation provided by plaintiff (which included the physical inventory count as of March 14, 2015, an inventory report as of December 13, 2014, year-end December 31, 2014 Consolidated Financial Statements, and Monthly SAP Inventory and Inventory Value Reports for January 2015 through March 2015) validated 90% of the claim and substantiated the loss of 4,807 tires, with a value of \$1,191,981.00.³ McCannell also testified that the documents she received and described in her report were sufficient to substantiate 90% of the claim (McCannell EBT Tr at 95, 97 [NYSCEF Doc. No. 236]).

Defendants contend that it is not plausible for someone to steal so many tires in such a short period of time. Defendants also argue that if such a large number of tires were stolen, the

² Plaintiff uses the SAP inventory software system "to manage its supply chain and keep track of the flow of tires into and out of the existing inventory at the Warehouse facility" (Maggio Affidavit at ¶ 13 [NYSCEF Doc. No. 272]).

³ Plaintiff claimed the loss of 5,353 tires, while MMD found that the data substantiated the loss of only 4,807 tires. On its motion, plaintiff states that "in light of the analysis and determination rendered by" MDD, it is seeking "summary judgment on its claim for coverage of 4,807 tires representing a loss of \$1,191,981, not the full 5,353" (Mem of Law in Further Support of Plaintiff's Motion for Summary Judgment, n3 [NYSCEF Doc. No. 366]). It is also noted that in arriving at the \$1,191,981.00 figure, the MDD Report explains: "As per the policy, there is a 10% advance that is to be applied to the unit cost. Utilizing the average unit costs and applying the 10% advance, we calculate a net unit cost per each type of tire claimed" (MDD Report at 3 [NYSCEF Doc. No. 247]).

theft would have been captured by the surveillance cameras or detected by the security personnel monitoring the Warehouse Facility 24 hours a day. Yet, plaintiff does not offer any surveillance video or eyewitness testimony to support its assertion that the tires were stolen. This, defendants assert, demonstrates that the tires were not stolen.

However, it is not plaintiff's burden to prove that the tires were stolen. As already noted, the insured "need not explain the precise cause of the loss" (*International Multifoods Corp. v Commercial Union Ins. Co.*, 309 F3d at 84). Indeed, "[t]he very purpose of an all risks policy is to protect the insured in cases where it is difficult to explain the disappearance of the property" (*Simplexdiam, Inc. v Brockbank*, 283 AD2d at 39 [internal quotation marks and citations omitted]).

Furthermore, the policies at issue do not include a "mysterious disappearance" exclusion. "It is generally held . . . that [absent a policy exclusion for mysterious disappearance,] where goods have mysteriously disappeared, all that an all risk insured need show is that loss occurred, or furnish the insurer with such explanation as it has in good faith received concerning the cause of loss" (*Farr Man Coffee v Chester*, 1993 WL 248799, * 28, 1993 US Dist LEXIS 8992, *90 [SD NY 1993] [internal quotation marks and citation omitted]). If defendants wished to exclude mysterious losses from coverage, they could have done so by incorporating such an exclusion into the policies (*see id.* ["Carriers which do not wish to insure against this broad risk customarily incorporate an exclusionary clause in their policies exempting from coverage unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory"] [internal quotation marks and citation omitted]; *North American Foreign Trading Corp. v Mitsui Sumitomo Ins. USA, Inc.*, 499 F Supp 2d at 374 ["Absent an exclusion for mysterious disappearance, all risk policies cover the mysterious disappearance or fortuitous loss

of the goods insured”] [internal quotation marks and citations omitted]). Accordingly, the policies cover an unexplained or mysterious loss of tires.

It is noted that while the Policies insure “against physical loss or damage from any *external cause*,” the addition of this phrase to an “all risks clause constitutes no real limitation on the scope of the [clause]. If the loss did not result from inherent defect, ordinary wear and tear, or intentional misconduct [-- the elements of fortuitous loss --] its cause was necessarily external” (*Farr Man Coffee v Chester*, 1993 WL 248799, *30, 1993 US Dist LEXIS 8992, *95 [internal quotation marks and citation omitted]). Where the loss is fortuitous, it is necessarily produced by an external cause (*see id.* at *95-96). Here, the disappearance of the tires did not result from an inherent defect or ordinary wear and tear, and there is no indication that the tires were missing as a result of plaintiff’s own intentional misconduct. In this regard, John Maggio, plaintiff’s Director of Supply Chain Management during the relevant time frame, stated in his affidavit that plaintiff interviewed its own employees and determined that none of its employees were involved in the disappearance of the tires and that despite conducting a formal investigation which also included employee interviews, the authorities were unable to determine the cause of the loss (Maggio Affidavit at ¶¶ 31-32). Indeed, on these motions, defendants no longer invoke the Infidelity Warranty on the theory that the tires were stolen by plaintiff’s employees. Rather, defendants’ argument is aimed at the integrity of plaintiff’s inventory records and counts.

Defendants assert that plaintiff’s physical inventory count is unreliable because there is evidence, including commentary in the MDD report, that due to overcrowding at the facility, inventory sometimes remained on the loading dock for weeks before being transferred to one of the warehouses or a trailer. Defendants contend that plaintiff’s count is unreliable because it is not clear whether such tires were counted during the physical inventories. However, plaintiff

established through Maggio's affidavits, that such tires were not recorded into the SAP system (*see* Maggio Affidavit at ¶¶ 14-15, 16 [NYSCEF Doc No. 272]) and were not part of any physical counts (*see* Maggio Affidavit at ¶ 16 [NYSCEF Doc No. 365]). Since these tires were not entered into the SAP system, it was appropriate for such tires to be excluded from the physical inventory taken for the purpose of comparison with the SAP data. In the event they were included in the physical inventory, this would have undercounted the number of tires missing from the Warehouse Facility. There is also no evidence supporting defendants' contention that the December 2014 physical inventory count may have included the tires not yet entered the SAP system or contradicting Maggio's statement that such tires were not part of any physical counts (*see id.*).

The expert affidavit proffered by defendants, even if properly submitted, does not raise an issue of fact. Nor is it sufficient to satisfy defendants' prima facie burden. While the expert references several documents, his conclusions are purely speculative. For example, the expert concludes that "[i]t appears unlikely that over 59 tires per day were removed for over two months straight from the property without [plaintiff's] security providers' noticing" and that "[t] is possible that the 5,353 tires were never missing" (Kinsel Report at 11 [NYSEF Doc. No. 354] [emphasis added]). These speculative assertions are insufficient to raise an issue of fact (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] ["Where the expert's ultimate assertions are speculative . . . the opinion should be given no probative force"]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover, his opinion is largely premised on concerns over the delay in entering certain inventory into the SAP system after it arrives at the Warehouse Facility, which as previously noted, is insignificant for the purpose of evaluating the data relied upon by plaintiff in establishing the disappearance of the tires.

Defendants' expert also notes that there is no evidence that the post-loss inventory count on March 14, 2015, used the same protocols as those employed during plaintiff's year-end inventories, which included instructions to stop all receiving and shipping of tires. However, Maggio stated in an affidavit that plaintiff adhered to these same protocols when conducting the March 2015 inventory (*see* Maggio Affidavit at ¶ 11 [NYSCEF Doc No. 365]).

Defendants assert that plaintiff's "reliance upon the affidavit of Maggio - an interested party - . . . to establish that [plaintiff's] SAP system and its physical counts were reliable are insufficient to rebut" the opinion of defendants' expert (Defendants' Reply Mem of Law at 3 [NYSCEF Doc. No. 362]). In so arguing, defendants rely upon case law holding that "a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded" (*Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [2d Dept 2002]). However, Maggio's affidavit is not being offered for this purpose. There is no direct contradiction between Maggio's deposition testimony and his affidavits in this regard inasmuch as Maggio testified during his deposition that such protocols were followed in this case (Maggio EBT Tr, at 30-31 [NYSCEF Doc. No. 28]).

Defendants further contend that plaintiff has proffered no explanation for how 5,553 tires could have illicitly disappeared from the Warehouse Facility and that the only plausible explanation is that the tires went missing, if at all, over an extended period. Therefore, defendants assert, plaintiff has not demonstrated that the loss occurred sometime within the periods covered by the Policies. This contention lacks merit. One of the Policies covered the period from October 11, 2013 to January 1, 2015, and the renewal policy covered the period from January 1, 2015 through January 1, 2016. MDD reconciled plaintiff's physical inventory as

of December 13, 2014 with the SAP quantity totals as of that same date, indicating that the loss occurred between December 13, 2014 and March 14, 2015.

Finally, defendants argue for the first time in their reply papers that the policy covering the period from October 11, 2013 to January 1, 2015 is unavailable to indemnify plaintiff for the loss because it contains a one-year contractual suit limitation clause. This clause provides that as a condition of the policy, no action for the recovery of any claim is sustainable unless it is commenced within one year of the calendar date of the physical loss out of which the claim arose (Marine Open Cargo Policy at § 13, Policy No. OMC 0000494 [NYSCEF Doc. No. 3, Exh B]). Defendants assert that since plaintiff commenced this action on November 30, 2015, any loss that occurred prior to November 30, 2014 is “time barred” under this clause. However, as just noted, plaintiff demonstrated that the loss occurred after December 13, 2014.

Thus, plaintiff is entitled to summary judgment on its cause of action seeking damages for breach of contract insofar as plaintiff sought coverage under the Policies for the loss of 4,807 tires, representing a loss of \$1,191,981.00.

Declaratory Judgment

“A declaratory judgment action should be not be entertained where it parallel[s] a breach of contract claim, and merely seek[s] a declaration of the same rights and obligations” (*Colfin SNP-1 Funding, LLC v Security Natl. Props. Servicing Co., LLC*, __ AD3d __, 2021 NY Slip Op 06032, *1 [1st Dept 2021] [internal quotation marks and citation omitted]; see *Tiffany Tower Condominium, LLC v Insurance Co. of the Greater N.Y.*, 164 AD3d 860, 863 [2d Dept 2018]). Here, the cause of action for a declaratory judgment is unnecessary because plaintiff’s breach of contract claim addresses the same rights and obligations.

Thus, the cause of action seeking a declaratory judgment is dismissed.

Breach of the Covenant of Good Faith and Fair Dealing and Bad Faith Handling of Claim

Plaintiff alleges that defendants breached the covenant of good faith and fair dealing by engaging in dilatory conduct and in failing to issue a final coverage determination for eight months. Based on the same factual allegations, plaintiff alleges that defendants acted in bad faith in handling and denying its claim. In addition, plaintiff alleges that defendants' denial of coverage rested on speculative and unreasonable grounds which were refuted by information already provided to them.

On this motion, plaintiff addresses these two causes of action together, asserting that the evidence in the record demonstrates that within four months of receiving the claim, defendants had sufficient information to issue a coverage decision in its favor and violated their own internal claim handling guidelines and policies. Plaintiff further contends that the record evinces that defendants disregarded reports and coverage recommendations made by their own outside adjuster and forensic accountant and continued to make unreasonable and burdensome requests for documents even after these third-party professionals recommended coverage. Plaintiff maintains that the record also shows that defendants failed to engage in good faith settlement negotiations and acted in bad faith during the instant litigation.

As defendants correctly assert, “[t]here is no independent cause of action for bad faith breach of insurance contract arising from an insurer’s failure to perform its obligations under an insurance contract” (*Head v Emblem Health*, 156 AD3d 424, 425 [1st Dept 2017]; *Acquista v New York Life Ins. Co.*, 285 AD2d 73, 82 [1st Dept 2001]), and a cause of action for the breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative when a breach of contract claim, based on the same facts, is also pled (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]). However, plaintiff

contends that the allegations in the complaint go beyond defendants' alleged failure to fulfill their contractual obligations under the Policies and asserts, relying on *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.* (10 NY3d 187 [2008]) and *Panasia Estates, Inc. v Hudson Ins. Co.* (10 NY3d 200 [2008]), that an insured is entitled to foreseeable consequential damages resulting from the insurer's bad faith handling of a claim. Plaintiff contends therefore, that the court should award it its legal fees as a reasonably foreseeable consequence of defendants' conduct.⁴

In *Bi-Economy* and *Panasia*, the Court of Appeals held that "consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting" (*Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d at 203 [internal quotation marks omitted]). However, "[n]othing in *Bi-Economy* or *Panasia* alters the common-law rule that, absent a contractual or policy provision permitting the recovery of an attorney's fee, '[a]n insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy'" (*Stein, LLC v Lawyers Tit. Ins. Corp.*, 100 AD3d 622, 622-623 [2d Dept 2012], quoting *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 [1995]; see *Pandarakalam v Liberty Mut. Ins. Co.*, 137 AD3d 1234, 1236 [2d Dept 2016]). Since plaintiff cites no provision in the Policies permitting

⁴ In connection with these two causes of action, the complaint states that plaintiff is not only seeking to recover for the loss of the tires, but is also seeking "consequential damages, attorney's fees in connection with its efforts to establish, judicially that [defendants are] obligated to pay the Claim under the Policy, and punitive damages" (Complaint at ¶¶ 94 & 107 [NYSCEF Doc. No. 2]). However, on these motions plaintiff argues that it is entitled to attorney's fees as a foreseeable consequence of defendant's bad faith handling of the claim without specifying that is entitled to any other form of consequential damages resulting from defendants' alleged breach of the covenant of good faith and fair dealing or the alleged bad faith handling of its claim. Nor does plaintiff mention punitive damages.

the recovery of an attorney’s fee, plaintiff is not entitled to recover the expenses incurred in this litigation.

Thus, the causes of action for breach of the covenant of good faith and fair dealing and for the bad faith handling of plaintiff’s insurance claim are dismissed.

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiff’s motion is granted to the extent that plaintiff is awarded summary judgment on the cause of action for breach of contract insofar as it alleges that defendants breached their obligation under the Policies by denying coverage for the loss of 4,807 tires representing a loss of \$1,191,981.00, and plaintiff shall have judgment against defendants for that amount; and plaintiff’s motion is otherwise denied (motion sequence number 007); and it is further

ORDERED that defendants’ motion for summary judgment dismissing the complaint is granted to the extent that the causes of action for a declaratory judgment, breach of the implied covenant of good faith and fair dealing, and for bad faith handling of plaintiff’s insurance claim are dismissed, and defendants’ motion is otherwise denied (motion sequence number 008); and it is further

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the Court.

Dated: December 3, 2021

ENTER:


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON