

**Collyer v Lavigne**

2021 NY Slip Op 33641(U)

February 1, 2021

Supreme Court, Tompkins County

Docket Number: Index no. EF2020-0162

Judge: Joseph A. McBride

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 30<sup>th</sup> day of October 2020.

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF TOMPKINS  
HON. JOSEPH A. MCBRIDE

BARBARA U. COLLYER, AND THE FRANK F.  
AND BARBARA U. COLLYER, III REVOCABLE  
INTER VIVOS TRUST,

Plaintiffs,

vs.

**DECISION AND ORDER**

Index No.: EF2020-0162

DANIELLE M. LAVIGNE, NEW YORK CENTRAL  
MUTUAL FIRE INSURANCE COMPANY,  
CFCU COMMUNITY CREDIT UNION,  
AND THE TOWN OF LANSING, NEW YORK,

Defendants.

DANIELLE M. LAVIGNE,

Cross-Claimant,

vs.

CENTRAL MUTUAL FIRE INSURANCE COMPANY,  
NEW YORK CENTRAL MUTUAL INSURANCE  
COMPANY D/B/A NYCS INSURANCE D/B/A NYCM  
CENTRAL MUTUAL FIRE INSURANCE COMPANY,

Cross-Defendant

CFCU COMMUNITY CREDIT UNION,

Cross-Claimant,

vs.

DANIELLE M. LAVIGNE AND NEW YORK  
CENTRAL MUTUAL FIRE INSURANCE COMPANY,

Cross-Defendants

APPEARANCES:

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**JOSEPH A. MCBRIDE, J.S.C.**

This matter follows a lawsuit initiated by Plaintiffs, Barbara U. Collyer, and the Frank F. and Barbara U. Collyer, III Revocable Inter Vivos Trust, (collectively “Plaintiffs”) against Danielle M. LaVigne (“Lavigne”), New York Central Mutual Fire Insurance Company (“NYCM”), CFCU Community Credit Union (“CFCU”), and the Town of Lansing, New York (“Lansing”). Subsequently, Lavigne filed a crossclaim against NYCM and CFCU filed a crossclaim against NYCM and Lavigne. Currently before the Court are four motions: 1) Plaintiff’s Motion to Strike the Answer of NYCM and grant a Default Judgment, 2) CFCU’s Motion for Summary Judgment against NYCM including a request for sanctions,<sup>1</sup> 3) Lavigne’s Motion for Summary Judgment against NYCM including a request for sanctions, and 4) NYCM’s Motion to Dismiss Plaintiff’s Complaint. The case was heard at oral argument via Teams on October 30, 2020. Court received and reviewed said motion and decided; as discussed below.<sup>2</sup>

**BACKGROUND FACTS**

While the basic facts are undisputed, the issue here revolves around liability of each of the parties. Lavigne’s father was convicted and sentenced to a prison term for crimes connected to fraud. Essentially, in his role as a CPA he stole millions of dollars from several clients, including Plaintiffs.<sup>3</sup> It is alleged that Lavigne’s father, in-part, bought and paid for Lavigne’s house, the subject of this litigation. Plaintiffs initiated a lawsuit against Lavigne in 2018 for unjust enrichment. In 2020, Plaintiffs initiated the current lawsuit adding the various other parties, in which the original 2018 lawsuit was consolidated. The subject house, that was occupied by Lavigne perished in a fire. The house was insured by NYCM, had a remaining mortgage held by CFCU, and was located in Lansing, the municipality that was responsible for some of the clean-up costs as a result of the fire. NYCM refused to pay the claim value for the

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<sup>1</sup> After oral argument, this motion was withdrawn.

<sup>2</sup> All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

<sup>3</sup> In 2018, Plaintiffs obtained a judgment for over \$6 million against Lavigne’s father.

loss of the house in the fire. While CFCU has since been paid, NYCM still refuses to release any additional claim value.

In October 2015, Lavigne contracted for the construction of a “new build” residence at 25 Sperry Lane, Lansing, NY. When purchased, Lavigne’s father paid a portion of the purchase price in cash, Lavigne paid a portion, and there was also a mortgage taken for the remaining. The construction was set to be completed in May 2018. On May 13, 2018, the property was destroyed by a fire, in which Lavigne promptly made a claim for loss. The property was insured by NYCM. The original policy for the house, was over \$400,000 dollars. Lavigne now seeks somewhere around \$500,000 in damages inclusive of additional personal property. NYCM offered Lavigne approximately \$30,000 (indicating the amount she personally paid for the purchase price). At the time of the fire, there was a remaining mortgage on the property of over \$100,000 held by CFCU. Further, Lansing has a lien of approximately \$32,000 on the property for clean-up costs as a result of the fire. After an investigation by NYCM, there is no evidence of wrongdoing in connection with the fire that would render the policy void. Two year later, NYCM still refuses to pay the claim and has failed to provide a reason for their refusal to pay.<sup>4</sup>

On October 7, 2020, Plaintiffs filed a motion seeking the following relief: 1) strike the pleading of NYCM, 2) granting to Plaintiffs, Lavigne, CFCU, and Lansing a judgment of default against NYCM, 3) and setting an inquest for damages. Plaintiffs claim that NYCM’s refused to comply with various discovery demands, payment demands, and court orders. Plaintiffs allege that NYCM failed to answer subpoenas and turn over demanded relevant discovery that NYCM reportedly had in hand. Plaintiffs argue that NYCM’s actions were deliberate and therefore a drastic remedy such as striking the pleadings is necessary. Plaintiffs claim that NYCM knowingly refused to pay a valid insurance claim because they are not pleased to find out that a convicted felon used illegally obtained funds to purchase the property, irrespective that the fact does not void the policy. Throughout this case the Court has held several conferences. Each time, NYCM has indicated to the Court, they are aware of their obligation to pay, but could not give a reason why payment had not occurred.

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<sup>4</sup> After the case was submitted for consideration, NYCM reportedly paid CFCU only for the outstanding mortgage.

On October 21, 2020, Lavigne filed a cross-motion for partial summary judgment seeking the following relief: directing NYCM to immediately pay 1) CFCU for the unpaid mortgage, 2) pay Lansing, 3) pay attorney's fees to Lavigne's attorney, 4) pay Lavigne for her loss of property, and 5) sanctions. Lavigne argues that NYCM acted in bad faith by failing to pay the entire claim payment and has no justified reason to offer such a low amount given the circumstances. Further, Lavigne argues that regardless of the circumstances that led to financing the property, a matter that will be litigated in Lavigne's unjust enrichment lawsuit, NYCM's job is to pay for a fire loss claim, not to determine that she is not entitled to a valid claim because the property may have been purchased with fraudulently obtained funds. Finally, Lavigne seeks sanctions in the form of attorney's fees claiming that NYCM's refusal to pay is a deliberate and unconscionable act that has led to additional financial loss.

On October 23, 2020, NYCM filed a cross-motion against Plaintiffs seeking to dismiss the Plaintiffs' complaint against NYCM pursuant CPLR §3211. NYCM argues Plaintiffs cannot file suit against NYCM because Plaintiffs lack standing, capacity, and privity of contract.

The matter was scheduled for oral argument on October 30, 2020 via Microsoft Teams. It has come to the Court's attention that at some point after oral argument and before this Decision an Order, NYCM issued payment to CFCU only and CFCU's motion was withdrawn. On November 30, 2020, the Court received a fully executed Stipulation of Discontinuance signed by all parties on November 24, 2020 discontinuing the crossclaim action between CFCU and NYCM. On January 5, 2021, the Court received a fully executed Stipulation of Discontinuance for the crossclaim of CFCU against Lavigne.

## LEGAL DISCUSSION AND ANALYSIS

### Plaintiff's Motion to Strike NYCM's Pleadings

While striking a party's pleadings for disobeying a court order, or for willful nondisclosure pursuant CPLR §3126, is in the broad discretion of the trial court, "absent a showing that the noncomplying party's conduct was willful or contumacious, the harsh sanction of dismissal of a [pleading] will generally not be warranted." Sawh v. Bridges, 120 A.D.2d 74, 78 (2<sup>nd</sup> Dept. 1986).

Here, the Court is perplexed as why NYCM did not pay the claim payments to CFCU, Lansing, and Lavigne. Despite NYCM's failure to provide a reason for non-payment, the Court is unwilling to find that NYCM's conduct was willful or contumacious. The Court is not going to order the harsh sanction of striking NYCM's pleading and therefore, the motion to strike NYCM's pleadings is DENIED. The Court will institute a conditional Order compelling NYCM to comply or in the alternative preclude. Moreover, in light of Lavigne's motion as discussed below, Plaintiff's argument may be rendered moot.

#### Lavigne's Motion for Summary Judgment

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. When seeking summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985); Zuckerman v. New York, 49 N.Y.2d 557 (Ct of App. 1980). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [Ct. of App. 1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." Boston v. Dunham, 274 AD2d 708, 709 (3<sup>rd</sup> Dept. 2000); see, Boyce v. Vazquez, 249 AD2d 724, 726 (3<sup>rd</sup> Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." Haner v. DeVito, 152 AD2d 896, 896 (3<sup>rd</sup> Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1<sup>st</sup> Dept. 2013). Mere conclusions and expressions of hope are insufficient to conquer a motion for summary judgement and the defendant must submit admissible evidence when stating their defense. See Zuckerman, 49 N.Y.2d 557. Finally, it "is not the function of a

court deciding a summary judgment motion to make credibility determinations or findings of fact.” Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (Ct. of App. 2012).

Here, the Court finds that Lavigne has met her burden for a *prima facie* case to order payment on behalf of NYCM against the outstanding claimants. Based on the records, there is no question of fact that remains as to why NYCM has not paid the insurance claim. NYCM, on their own, concede that there is no finding of wrongdoing that would void the policy. NYCM’s attorney provided at several Court conferences that he was aware that the claim should have been paid and reiterated the unjustifiable response that the claim just was not paid. Under these facts and circumstance, NYCM should have paid the claim years ago. NYCM provides no question of fact as to why the claim is outstanding or should not be paid to each of the remaining co-defendants.

Therefore, Lavigne motion for partial summary judgment is GRANTED. NYCM is ordered to pay Lansing, in full, for their clean-up costs. NYCM is ordered to pay Lavigne, in full, her claim under the policy, including the cost of loss and personal property. The proceeds from Lavigne’s claim shall be held in an Escrow account until further order of this Court.

Although the court not willing make a finding of bad faith, the Court is at a lack of understanding of reasons of denial of this clam. Based on the forgoing, counsel’s application of reasonable attorneys is granted in the amount of \$1,500.00 for the cost of this motion.

#### NYCM’s Motion to Dismiss Complaint

When reviewing an action in the scope of a motion to dismiss for failure to state a claim, “a complaint is liberally construed, the facts as alleged are accepted as true and the plaintiff is accorded the benefit of every favorable inference.” Murray Bresky Consultants, Ltd v New York Compensation Manager's Inc., 106 A.D.3d 1255, 1258 (3<sup>rd</sup> Dept. 2013). It is up to the Court to then determine, “whether the facts as alleged fit within any cognizable legal theory.” Id. To that extent, “the Court must grant the motion if plaintiff has failed to state a cause of action.” Monaco v. Saint Mary’s Hospital of Troy, Inc., 184 A.D.2d 985 (3<sup>rd</sup> Dept. 1992).

Here, Plaintiffs file suit against NYCM under the legal theory of constructive trust. “A constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest...The

requirements are (1) a confidential fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment.” Sharp v. Kosmalski, 40 N.Y.2d 119, 121 (Ct of App. 1976). Absent a written contract, “a promise may be implied or inferred by the very transaction itself.” Id. at 122. In Sharp, the Court of Appeals held that a constructive trust must be determined from the circumstances of the transfer and the court of equity should intervene to scrutinize the transaction that has the opportunity for abuse and unfairness. Id. at 123. “Although the factors [in Sharp] are useful in many cases constructive [sic.] trust doctrine is not rigidly limited.” Simonds v. Simonds, 45 N.Y.2d 233, 241 (Ct. of App. 1978). It should be recognized that “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” Id. at 241. “A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.” Id. at 243. Finally, [an] unjust enrichment claim does not require that the party enriched take an active role in obtaining the benefit. Aetna Casualty & Sur. Co. v. LFO Constr. Corp., 207 A.D.2d 274, 277 (1<sup>st</sup> Dept, 1994).

The Court finds that Plaintiffs have alleged a cognizable legal theory sufficient to defeat a motion to dismiss. Accepting the Plaintiffs’ allegations as true, the Court is persuaded that Plaintiffs have sufficient standing to make a claim as a third-party beneficiary under the theory of constructive trust and unjust enrichment. Therefore, NYCM’s motion to dismiss is DENIED.

## CONCLUSION

Based on the foregoing discussion, Plaintiff’s Motion to Strike the Pleadings is DENIED. Plaintiff’s converted Motion for Summary Judgment is GRANTED. Lavigne’s Motion for partial Summary Judgement is GRANTED. NYCM’s Motion to Dismiss is DENIED.

It is hereby

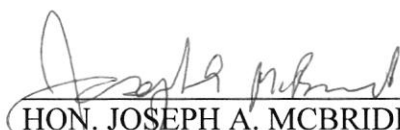
ORDERED, that NYCM pay the Town of Lansing for the total requested amount for clean-up costs associated with the subject fire claim, it is further,

ORDERED, that NYCM pay to Lavigne the remaining balance in connection with her subject fire claim and the proceeds shall be held in an escrow account, it is further

ORDERED, that NYCM answer the complaint within 20 days of this Order and further provide all requested discovery within 30 days of the Order, and it is further ORDERED, that NYCM pay to Attorney Lama, \$1,500.00 in Attorney's Fees.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this DECISION AND ORDER by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 2/1, 2021  
Norwich, New York

  
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HON. JOSEPH A. MCBRIDE  
Supreme Court Justice

Entered 02/01/2021