

Cox v Restoration Mgt. Plus Inc.
2022 NY Slip Op 32662(U)
July 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 518417/21
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 518417/21
Motion Date: 3-28-22
Mot. Seq. No.: 1, 2, 3

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EDITH COX,

Plaintiff,

-against-

DECISION/ORDER

RESTORATION MANAGEMENT PLUS INC.
STEPHEN L. RIVERS, STEVEN LIBAL, NEW YORK
ADJUSTMENT BUREAU INC., STATE FARM FIRE
AND CASUALTY COMPANY, PATRICK A.
HAMMOND and HAMMOND ARCHITECTURE
PLLC.,

Defendants.
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FILED
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Upon the following papers, listed on NYSCEF as document numbers 2-7, 10-14, 15-38 were read on these motions:

In Motion Seq. # 1, defendant STATE FARM FIRE AND CASUALTY COMPANY (“State Farm”) moves for an Order: (i) pursuant to CPLR 3211(a)(7) dismissing plaintiff’s complaint as alleged against State Farm; or (ii) in the alternative, pursuant to CPLR § 603, severing any surviving cause(s) of action asserted against State Farm from any causes of action asserted against the other defendants in this action, with a direction that Plaintiff commence a separate action against State Farm, along with such other and further relief as this Court deems just and proper.

In Motion Seq. # 2, New York Adjustment Bureau, Inc. and Steven Libal move for an Order pursuant to CPLR 3211(a)(2), (3) and (7) dismissing the Complaint in its entirety against New York Adjustment Bureau, Inc. and plaintiff’s Eighth Cause of Action against Steven Libal, and for such other, further and different relief as to this Court may seem just and proper.

In Motion Seq. # 3, defendant Steven Libal moves for an Order dismissing plaintiff’s complaint in its entirety in favor of defendant Steven Libal, and for such other, further and different relief as to this Court may seem just and proper.

The three motions are consolidated for disposition.

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Background:

This action arises out of a fire loss that occurred at Plaintiff's home, located at 1433 E. 48th Street, Brooklyn, New York on December 28, 2017. State Farm insured the Property pursuant to a policy of insurance. Plaintiff hired and engaged the services of defendant New York Adjustment Bureau, Inc. ("NYAB") through its agent, defendant Steven Libal ("Libal"), to assist her in presenting and negotiating her claim against State Farm. NYAB negotiated a settlement of claim with State Farm and on January 24, 2018, State Farm released settlement funds in the amount of \$252,764.79 to the plaintiff.

In March 2018, plaintiff hired Rivers and Restoration to restore and renovate her Property in consideration for the release of settlement funds in the amount of \$245,126.68. In August of 2018, Plaintiff hired defendant Patrick. A. Hammond and his company Defendant Hammond Architecture PLLC to present a design plan for the restoration of the Property. Plaintiff alleges Rivers, Hamond, and their agents performed deficient work and supplied defective materials and did not complete the renovation of the Property. Plaintiff claims she has incurred tens of thousands of renal costs and maintenance fees and has lost the use of the Property.

Plaintiff further alleges Restoration, through Rivers, misappropriated her settlement funds from State Farm for Rivers' personal use, rather than using them to restore the Property and that State Farm failed to supervise, inspect, and monitor the completion of the restoration project at the Property before releasing any funds to Rivers, Libal, and Hammond (although she does not allege State Farm ever released any funds to Libal or Hammond), and State Farm released the settlement funds to "Defendants" without rigorously evaluating and assessing the purported work done by Rivers and Hammond.

Finally, Plaintiff alleges all defendants failed to supervise, inspect, and monitor the completion of the restoration project at the Property before releasing any funds, and failed to complete such restoration project, thus causing Plaintiff to suffer physical and psychological trauma.

The Complaint alleges fifteen causes of action; (1) breach of contract against Rivers and Restoration; (2) breach of the implied covenant of good faith and fair dealing against Rivers and Restoration; (3) gross negligence against Rivers and Restoration; (4) breach of the implied warranty of workmanlike performance against Rivers and Restoration; (5) violation of N.Y. Gen. Bus. Law § 349 against Rivers and Restoration; (6) fraud against Rivers and Restoration; (7) violation of N.Y. Ins. Law § 2110 against Rivers; (8) violation of N.Y. Ins. Law § 2110 against Libal and NYAB; (9) breach of contract against Libal and NYAB; (10) negligence against Libal and NYAB; (11) breach of contract against Hammond; (12) breach of the implied covenant of good faith and fair dealing against Hammond; (13) gross negligence against Hammond; (14) negligence against State Farm; and (15) negligent infliction of emotional distress against all defendants

Motion Seq. # 1

As stated, in the fourteenth cause of action, plaintiff alleges a cause of action against State Farm sounding in negligence. In the fifteenth cause of action, plaintiff alleges a cause of action against State Farm sounding in negligent infliction of emotional distress.

The elements of a cause of action alleging common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty proximately caused injury to the plaintiff (*see Turcotte v. Fell*, 68 N.Y.2d 432, 437, 510 N.Y.S.2d 49, 502 N.E.2d 964; *Kraut v. City of New York*, 85 A.D.3d 979, 980, 925 N.Y.S.2d 624; *Jiminez v. Shahid*, 83 A.D.3d 900, 901, 922 N.Y.S.2d 123; *Ruiz v. Griffin*, 71 A.D.3d 1112, 1114, 898 N.Y.S.2d 590). “The existence and scope of an alleged tortfeasor’s duty is, in the first instance, a legal question for determination by the court” (*Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 679 N.E.2d 616; *see Sanchez v. State of New York*, 99 N.Y.2d 247, 252, 754 N.Y.S.2d 621, 784 N.E.2d 675; *Eiseman v. State of New York*, 70 N.Y.2d 175, 187, 518 N.Y.S.2d 608, 511 N.E.2d 1128; *Mauskopf v. 1528 Owners Corp.*, 102 A.D.3d 930, 932, 958 N.Y.S.2d 759; *Demshick v. Community Hous. Mgt. Corp.*, 34 A.D.3d 518, 519–520, 824 N.Y.S.2d 166; *Alvarez v. Tele-Mechanics Inc.*, 276 A.D.2d 513, 514, 713 N.Y.S.2d 765). As State Farm contends, there is no legal authority supporting plaintiff’s claim that an insurance company has a common law duty to supervise, inspect, and monitor restoration work performed

by a contractor hired by an insured to restore his or her property before issuing payment of insurance benefits under a Policy of Insurance, or to evaluate and assess the work done by the insured's contractor. Plaintiff failed to cite any authority that supports such a duty. Since the plaintiff did not allege facts from which it can be said that State Farm owed a legal duty to the plaintiff to supervise, inspect, and monitor subject restoration work and to condition payment for such work on its proper performance, plaintiff's cause of action sounding in negligence must be dismissed.

Since an essential element of a cause of action for negligent infliction of emotional distress is the breach of a legal duty owed by the plaintiff to the defendant, plaintiff's cause of action against State Farm for negligent infliction of emotional distress also fails (*A. R. v. City of New York*, No. 2019-10616, 2022 WL 2058018, at *2 (N.Y. App. Div. June 8, 2022) ["A cause of action to recover damages for negligent infliction of emotional distress... generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety"]. Motion Seq. # 1 is therefore granted in its entirety.

Motion Seq. # 2 & 3

The plaintiff does not have a viable negligence claim against Libal and NYAB sounding in negligence (see *Manes Org., Inc. v. Meadowbrook Richman, Inc.*, 2 A.D.3d 292, 293, 770 N.Y.S.2d 27, 28; *Youngs v. Security Mut. Ins. Co.*, 3 Misc.3d 244, 775 N.Y.S.2d 800 (Sup.Ct., Seneca County, 2004), (see *M.V.B. Collision Inc. v. Allstate Ins. Co.*, 56 Misc. 3d 238, 254, 49 N.Y.S.3d 837, 848 (N.Y. Dist. Ct. 2017)). Plaintiff's claim that these defendants negligently performed the contract with NYAB does not encompass the breach of any recognized common law duty that is independent of the contract and, therefore, fails to state a claim in tort (*Cappelletti v. Unigard Ins. Co.*, 222 A.D.2d 1029, 1031, 636 N.Y.S.2d 958, 960 (1995)).

Plaintiff does not have a viable cause of action against these defendants under Insurance Law § 2110. There is no language in the statute reflecting a legislative intent to create a private right of action under the statute and in the court's view, an implied private right of action would

be inconsistent with the legislative scheme to provide administrative remedies for prohibited behavior (*see Ader v. Guzman*, 135 A.D.3d 671, 672–73, 23 N.Y.S.3d 292, 294–95).

Again, and as stated above, an essential element of a cause of action for negligent infliction of emotional distress is the breach of a legal duty owed to a plaintiff by a defendant. Since the plaintiff failed to allege such a duty, plaintiff's cause of action against Libal and NYAB for negligent infliction of emotional distress also fails.

With respect to plaintiff breach of contract claim against Libal, an agent acting within the scope of his authority, as agent for a known principal, is not liable to a third person for breach of contract by the principal (*see Clearview Assocs. v. Clearview Gardens First Corp.*, 285 A.D. 969, 970, 139 N.Y.S.2d 81, 85 (App. Div. 1955)). Here, the contract at issue was between the plaintiff and NYAB. Since the plaintiff clearly knew that Libal was at all times acting on behalf of NYAB, the cause of action sounding in breach of contract against Libal must be dismissed.

With respect to plaintiff's breach of contract claim against NYAB, plaintiff alleges *inter alia* that NYAB "through its agent, LIBAL agreed to engage in services with experts that would eventually restore Plaintiff's home and compensate her for all incidental losses that occurred as a result of the fire", that NYAB breached this provision, and that she was damaged as a result. The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of an enforceable contract, (2) the plaintiff's performance pursuant to that contract, (3) the defendant's breach of the contract, and (4) damages resulting from that breach (*see Hausen v. North Fork Radiology, P.C.*, 171 A.D.3d 888, 892, 98 N.Y.S.3d 224; *De Guaman v. American Hope Group*, 163 A.D.3d 915, 917, 83 N.Y.S.3d 253; *Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc.*, 84 A.D.3d 122, 127, 921 N.Y.S.2d 329).

On a motion to dismiss for failure to state a cause of action 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[,] a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *see Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Sokol v. Leader*, 74 A.D.3d 1180, 1180–1181, 904 N.Y.S.2d 153). The

complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*see Leon v. Martinez*, 84 N.Y.2d at 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Sokol v. Leader*, 74 A.D.3d at 1181, 904 N.Y.S.2d 153). Here, accepting the facts as alleged in the complaint as true, and according the plaintiff the benefit of every favorable inference (*see Leon v. Martinez*, 84 N.Y.2d at 87, 614 N.Y.S.2d 972, 638 N.E.2d 511), the complaint alleges a cause of action against NYAB sounding in breach of contract

ORDERED that Motion Seq. # 1 is **GRANTED** in its entirety; and it is further

ORDRED that Motion Seq. # 2 and # 3 are **GRANTED** solely to the extent that plaintiff's eighth, tenth and fifteenth causes of action are dismissed as alleged against defendants Libal and NYAB in their entirety. Plaintiff's ninth caused of action is dismissed only as alleged against defendant Libal.

This constitutes the decision and order of the Court.

Dated: July 8, 2022

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FILED

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020