

Rudder v Broome Co-Op. Ins. Co.

2023 NY Slip Op 30879(U)

March 20, 2023

Supreme Court, Broome County

Docket Number: Index No. EFCA2022001548

Judge: Eugene D. Faughnan

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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 Broome County Courthouse, Binghamton, New York, on the 18th day of November 2022.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

BELINDA RUDDER,

Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2022001548

BROOME CO-OPERATIVE INSURANCE
COMPANY,

Defendant.

APPEARANCES:

Counsel for Plaintiff:

Gallagher Law Office
BY: BRIAN R. GALLAGHER, ESQ.
2-8 Hawley Street
Binghamton, NY 13901

Counsel for Defendant:

MARK D. GORIS, ESQ.
5 Mill Street
Cazenovia, NY 13035

EUGENE D. FAUGHNAN, J.S.C.

Defendant Broome Co-Operative Insurance Company (“Broome”) brought the instant motion to dismiss the Complaint pursuant to CPLR 3211(a)(1), (3), (5) and/or (7). The motion has been opposed by Plaintiff Belinda Rudder (“Rudder”). Oral argument was conducted and the attorneys for both parties were present. After due deliberation, this constitutes the Court’s Decision and Order.

BACKGROUND FACTS

The basic facts of this case can be easily summarized. Rudder owned an 11-acre parcel of land in Hallstead, Pennsylvania, which contained standing timber. In September 2015, Rudder entered into a logging agreement with Kevin Decker d/b/a Timber Management (“Decker”) for logging services on Rudder’s land. Decker is not a party to this action. The logging agreement contained a clause that Decker was to provide Rudder with a certificate of liability insurance of \$3 million, and that Decker would hold Rudder harmless for any injury or damages done to neighbors by logging. On the same date, Decker and Rudder also entered into a second contract relating to Decker transporting timber cut from adjacent properties across Rudder’s land. That contract provided that Decker “shall indemnify and defend [Rudder] against any loss, claim, action, damage or expense which [Rudder] may incur by reason of” Decker’s negligence in connection with the logging activities.

In September 2015, Decker obtained a liability policy from Broome which listed Rudder as the certificate holder.¹ On October 14, 2015, Rudder sent a letter to Decker claiming that she had not been properly compensated for the timber Rudder had removed from her property. She advised Decker that he was in breach of the logging agreement.

On October 26, 2015, Rudder filed a claim with Broome to recover for property damages because stumps were left standing and because the roadway was left with ruts.² On August 19,

¹ Although the logging agreement called for a \$3 million policy, the Broome policy was only for \$2 million. The difference in coverage amount does not impact the issues on this motion.

² Plaintiff’s complaint states the claim was filed on October 26, 2016, while Broome indicates the claim was filed on October 26, 2015. In her affidavit in opposition, Plaintiff does not dispute the 2015 date.

2019, Broome issued a letter to Rudder denying the claim and disclaiming coverage for this loss. On October 16, 2019 Rudder sent correspondence to Broome claiming that Broome was barred from disclaiming coverage because it had waited too long to raise disclaimer.

Plaintiff commenced this action by the filing of a Summons and Complaint on August 18, 2022. Among other things, the Complaint alleges that Broome violated New York Insurance Law § 3420(d), and also alleges bad faith claims under Pennsylvania law. Despite the fact that the actions complained of were performed by Decker, Plaintiff did not sue Decker, and has not provided any explanation for not doing so.

Broome brought this pre-Answer motion to dismiss contending that there is no privity of contract between Rudder and Broome, and that Rudder was not a named or additional insured of Broome, so she could have no claim against Broome. Broome also argues that New York Ins. Law § 3420 does not permit a direct action against an insurance company until there has been a judgment entered against the insured, and there has been no judgment entered against Rudder (or Decker for that matter). Further, Broome also argues that NY Ins. Law § 3420(d) does not apply to claims for property damage; and that even if it did, it would not apply to accidents occurring outside of New York State. Next, Broome contends that the action is barred by the Statute of Limitations under the terms of the contract which require an action to be brought within 2 years, or under the general 6-year Statute of Limitations for breach of contract claims. Lastly, Broome argues that Plaintiff has no viable bad faith claim.

In opposition, Plaintiff claims that she was not provided with the insurance contract prior to the motion to dismiss and should be entitled to discovery. Plaintiff also argues that Defendant should be estopped from raising lack of capacity to sue because of Defendant's long delay in disclaiming coverage. With respect to the Statute of Limitations, Plaintiff argues that either the date of Broome's denial letter (August 19, 2019) or the date of last negotiations between Rudder and Broome (October 23, 2019) are both within 3 years of the filing of the action (August 18, 2022), which would make the action timely. Plaintiff also disputes the 2-year Statute of Limitation language in the contract as the contract has not been authenticated. Plaintiff acknowledges that NY Ins. Law § 3420(d) may not be the proper basis for her argument on the untimeliness of Broome's disclaimer but falls back on principles of common law estoppel. Lastly, Plaintiff argues that there is a viable claim for bad faith under Pennsylvania law. Plaintiff

alternatively seeks leave of court to amend her complaint to include a bad faith claim under New York law.

Broome filed a reply affirmation which responds to Plaintiff's arguments. Plaintiff then filed a Sur-Reply affirmation.

LEGAL DISCUSSION AND ANALYSIS

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction". *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, 326 (2002), *see Leon v. Martinez*, 84 NY2d 83, 88 (1994). The Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory". *Goldman v. Metropolitan Life Ins.*, 5 NY3d 561, 570-571 (2005); *see Leon v. Martinez, supra*. The "ultimate criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one." *Schmidt & Schmidt, Inc. v. Town of Charlton*, 68 AD3d 1314, 1315 (3rd Dept. 2009) (*quoting Leon v. Martinez*, 84 NY2d 83, 88).

To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the movant must demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *R.I. Is. House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890, 893 (2nd Dept. 2008), *quoting Goshen v. Mutual Life Ins. Co.*, 98 NY2d at 326; *see HSBC Bank USA, N.A. v. Decaudin*, 49 AD3d 694, 695 (2008); *Kolchins v. Evolution Mkts., Inc.*, 31 NY3d 100 (2018); *see, Fontanetta v. John Doe 1*, 73 AD3d 78 (2nd Dept. 2010); *see also, Leon v. Martinez, supra* at 88. "Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." *Ganje v. Yusuf*, 133 AD3d 954, 956-957 (3rd Dept. 2015); *citing Midorimatsu, Inc. v. Hui Fat Co.*, 99 AD3d 680, 682 (3rd Dept. 2012), *lv dismissed* 22 NY3d 1036 (2013) (internal quotation marks and citations omitted).

The distinction between CPLR 3211(a)(1) and (a)(7) can become blurred in some situations. "When documentary evidence is submitted by a defendant, 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one.'" *Basis Yield Alpha*

Fund (Master) v. Goldman Sachs Group, Inc., 115 AD3d 128, 135 (1st Dept. 2014), quoting John R. Higgitt, CPLR 3211[a][7] and [a][7] Dismissal Motions-Pitfalls and Pointers, 83 NY St. BJ 32, 33 (2011). That is because the documentary evidence is being used to conclusively establish that no cause of action exists. See, e.g. *Maldonado v. DiBre*, 140 AD3d 1501 (3rd Dept. 2016).

An insurance contract is the type of document that may support dismissal under CPLR 3211(a)(1). See, *Goldman v. Metro. Life Ins. Co.*, 5 NY3d 561; *Zeligfeld v. Phoenix Life Ins. Co.*, 39 Misc3d 1213(A) (Sup. Ct., Kings County 2013). Here, contrary to Plaintiff's contention, the Declarations document was properly authenticated. Jackie Boeltz, a claims representative with Broome, submitted an affidavit stating that she was fully familiar with the underlying facts of this action and the contents of the claims file. She stated that Broome issued a Commercial Insurance policy to Decker covering the period from September 15, 2015 to September 15, 2016. She attached the Policy Declaration sheet as an Exhibit to her affidavit. The information was sufficient to authenticate the insurance Policy Declarations. See, *Calhoun v. Midrox Ins. Co.*, 165 AD3d 1450 (3rd Dept. 2018); *Hefter v. Elderserve Health, Inc.*, 134 AD3d 673 (2nd Dept. 2015).

Plaintiff seeks the opportunity to obtain discovery and investigate the authenticity of the Declarations document. However, Rudder only indicates that she has not seen that document prior to this motion despite requesting it; but she does not offer any information or evidence to call into question the authenticity of the document. Her unsubstantiated allegations and assertions are insufficient to raise a question on the motion. See, *First Interstate Credit Alliance, Inc. v. Sokol*, 179 AD2d 583 (1st Dept. 1992); *Calhoun v. Midrox Ins. Co.*, 165 AD3d 1450; *Hefter v. Elderserve Health, Inc.*, 134 AD3d 673. Therefore, the Declarations document authenticated by Boeltz, is admissible and can be used to support the motion to dismiss.

The Declarations document attached to the Boeltz affidavit also refers to form SF-20 (Edition 1/88) as part of the agreement. SF-20 was attached to the affirmation of Mark Goris, Esq., and although he may not have had personal knowledge with respect to that document, it simply supplements the Declarations document authenticated by Boeltz, and therefore, the Court will accept it (although the Court's ultimate determination does not depend on SF-20). Plaintiff's Verified Complaint also attached a Certificate of Liability Insurance as an Exhibit and there has been no challenge to the authenticity of that document.

The Court will now consider whether these documents establish Broome's defense to the action. The Certificate of Liability Insurance lists Decker as the insured and Plaintiff as a "certificate holder". It also states that:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE [POLICY]. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

There is nothing in the Certificate of Liability, the Declarations document or SF-20 that lists Rudder as an insured or additional insured under the policy or bestow any rights to Plaintiff. On the contrary, the Certificate of Liability expressly states that it does not provide the certificate holder with any rights and does not establish a contractual relationship between a certificate holder and the insurance company. Upon examination of the documents, the Court finds that the terms conclusively refute Plaintiff's claim. There is no privity between Plaintiff and Broome. Accepting the allegations in Plaintiff's complaint as true and giving the Plaintiff all favorable inferences, the documentary evidence conclusively disposes of Plaintiff's claim, and Defendant is entitled to dismissal under CPLR 3211(a)(1) and/or 3211(a)(7). *Calhoun v. Midrox Ins. Co.*, 165 AD3d 1450.

Defendant has also raised CPLR 3211(a)(5)-statute of limitations-as a ground for dismissal. A motion to dismiss under CPLR § 3211(a)(5) is appropriately granted if the movant establishes that a cause of action cannot be maintained due to the expiration of the Statute of Limitations. It is the moving "party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed." *Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc.*, 168 AD2d 822, 823 (3rd Dept. 1990), *citing Doyon v. Bascom*, 38 AD2d 645, 645-646 (3rd Dept. 1971). To meet that burden, "the movant is required to support the motion with an affidavit or other competent proof sufficient, if uncontroverted, to establish the defense as a matter of law." *State Higher Educ. Services Corp. v. Starr*, 158 AD2d 771, 771 (3rd Dept. 1990), *citing Doyson, supra*. If the moving party makes that showing, "the burden shifts to the plaintiff to come forward with evidence contrary to that submitted by the movant or

otherwise tending to establish a tolling of the statute.” *Starr* at p. 771; *see also Quinn v. McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085 (2nd Dept. 2016). Defendant has submitted proof that the claim accrued in October 2015 and the suit was not commenced until 2022. A claim based on negligence has a statute of limitations of three-years and a breach of contract claim is subject to a six-year statute of limitations. Plaintiff’s claim brought in August 2022 is beyond the statute of limitations for both theories of recovery.³ Thus, the burden is shifted to Plaintiff. She has failed to meet her burden.

Assuming *arguendo* that Plaintiff was an insured under the policy (thereby establishing her “standing”), her claim is that she suffered some damage by October 2015 as a result of the logging activities. She attempts to transmogrify the analysis to focus on Broome’s denial letter on August 19, 2019 and discussions with Broome in October 2019 as being the relevant events from which to measure the Statute of Limitations. However, Broome’s liability, if any, is based upon the negligence or breach of contract by its insured, Decker. Rudder has also failed to establish that the discussions in October 2019 were negotiations, and even if they were, that they should result in an extension of the Statute of Limitations.

As mentioned above, Plaintiff apparently did not bring an action against Decker. It seems clear that any such action would be barred by the Statute of Limitations since the actions giving rise to a potential claim occurred in September and October 2015. Under a breach of contract theory, any claim against Decker would have to have been brought by October 2021, but Plaintiff’s Complaint was not filed until August 18, 2022. The Court can surmise that Plaintiff’s counsel was aware of that fact, and bringing a direct action against the insurance company was an attempt to somehow circumvent the untimeliness of the claim. Simply casting the insurer as the liable party is ineffective to alter the true issue of the Statute of Limitations being based on the acts giving rise to the underlying claim.

Based upon the discussion above, Defendant has established an entitlement to dismissal under CPLR 3211 (a)(1), (5) and (7) and consideration under CPLR 3211 (a)(3) is technically unnecessary. The Court will still analyze Defendant’s arguments under CPLR 3211(a)(3) as a basis for dismissal. Pursuant to CPLR 3211 (a)(3), dismissal may be granted where “the party

³ Although Defendant also raises an issue that form SF-20 imposes a shorter two-year statute of limitation, a determination on that issue is unnecessary.

asserting the cause of action has not the legal capacity to sue.” Capacity to sue relates to “a litigant’s power to appear and bring its grievance before the court.” *Cnty. Bd. 7 v. Schaffer*, 84 NY2d 148, 155 (1994); see *Matter of New York State Bd. of Regents v. State Univ. of N.Y.*, 178 AD3d 11 (3rd Dept. 2019). Plaintiff’s opposition raises two arguments to the capacity argument. The first is that she is not an infant. However, lack of capacity is not limited to cases of infancy. It can also be utilized in a variety of other situations. See, *Cnty. Bd. 7 v. Schaffer*, 84 NY2d 148. Plaintiff’s second argument is that Broome failed to raise the capacity argument in its August 19, 2019 letter disclaiming coverage and so it should be precluded from doing so now. While a party may be prevented from raising an issue of capacity once an action has been filed (for example, certain defenses, including lack of capacity are waived if not raised in a responsive pleading or motion to dismiss pursuant to CPLR 3211[e]), it does not logically follow that failing to raise it in a pre-action letter constitutes waiver of rights.

Nevertheless, the Court finds the motion under CPLR 3211(a)(3) to be unavailing. Essentially, Defendant’s argument is that Plaintiff cannot succeed in her action because of the lack of privity and lack of standing. It has been observed that “standing” is an element of the larger question of “justiciability” ... [while] “[c]apacity,” in contrast, concerns a litigant’s power to appear and bring its grievance before the court. The concept of a lack of capacity, which has also occasionally been intermingled with the analytically distinct concept of a failure to state a cause of action, does not admit of precise or comprehensive definition.” *Id.* at 154-155 (internal and end citations omitted). There is no legal impediment to Rudder bringing this action, and Defendant’s argument is simply that she does not have standing to maintain it due to a lack of privity. That argument is more appropriately considered under CPLR 3211(a)(7)-failure to state a cause of action. Therefore, CPLR 3211(a)(3) is not a proper ground to grant dismissal.

Plaintiff’s claim under NY Ins. Law § 3420 is also without merit. In certain situations, an injured party may recover from an insurer even though the injured party is not a named or additional insured. Specifically, that section provides “that in case judgment against the insured ... in an action brought to recover damages for injury sustained ... during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of the notice of entry or judgment upon the attorney for the insured ... then an action may ... be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not

exceeding the amount of the applicable limit of coverage under such policy or contract.”

Pursuant to Insurance Law § 3420(a)(2), “an injured claimant has a direct cause of action against an insurer only after the injured claimant first obtains a judgment against the insured.” *Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co.*, 74 AD3d 1751, 1754 (4th Dept. 2010) citing *Lang v. Hanover Ins. Co.*, 3 NY3d 350 (2004); *Catskill v. Kemper Group-Lumbermen’s Mut. Casualty Co.*, 111 AD2d 1011, 1012 (3rd Dept. 1985); *John v. Centennial Ins. Co.*, 91 AD2d 1104(3rd Dept. 1983). Rudder has not alleged she has obtained any judgment that could be utilized against Broome under Ins. Law § 3420(a).

Rudder’s reliance on Ins. Law § 3420(d) fares no better. If the insurer denies coverage or disclaims liability in a case involving death or bodily injury, it must give written notice “as soon as reasonably possible ... to the insured and the injured person or any other claimant.” Insurance Law § 3420(d). This rule “is meant not only to protect the insured but is also intended to aid injured parties in attaining prompt compensation.” *Associated Mut. Ins. Co. v. Samicaban, Inc.*, 178 AD2d 883, 885 (3rd Dept. 1991), citing *Allstate Ins. Co. v. Gross*, 27 NY2d 263 (1970). Furthermore, “[t]he notice of disclaimer must promptly apprise the claimant with a *high degree of specificity* of the ground or grounds on which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully.” *Gen. Acc. Ins. Group v. Cirucci*, 46 NY2d 862, 864 (1979) (emphasis added); *Maroney v. N.Y. Cent. Mut. Fire Ins. Co.*, 10 AD3d 778 (3rd Dept. 2004), *aff’d* 5 NY3d 467 (2005); *John v. Centennial Ins. Co.*, 91 AD2d at 1105. The insurer is “strictly limited to those grounds stated in the notice of disclaimer.” *Maroney v. N.Y. Cent. Mut. Fire Ins. Co.*, 10 AD3d 778, 781, quoting *2540 Assocs. v. Assicurazioni Generali, S.P.A.*, 271 AD2d 282, 284 (1st Dept. 2000); *General Acc. Ins. Group v. Cirucci*, 46 NY2d 862. If the insurer fails to include an exclusion in its disclaimer letter, the insurer waives its right to rely on that ground. *General Acc. Ins. Group v. Cirucci*, 46 NY2d at 864; *Clayburn v. Nationwide Mut. Fire Ins. Co.*, 58 AD3d 990 (3rd Dept. 2009); *Maroney v. N.Y. Cent. Mut. Fire Ins. Co.*, 10 AD3d 778; *Kokonis v. Hanover Ins. Co.*, 279 AD2d 868 (3rd Dept. 2001).

Rudder claims that Broome’s disclaimer was not timely made and that, therefore, Broome is precluded from raising those defenses at this point. Even if Broome did not make a timely

disclaimer, Rudder's claim is not for death or bodily injury, and therefore, Ins. Law § 3420(d) does not apply.

Plaintiff lastly argues that Broome's lengthy delay in disclaiming gives rise to a bad faith claim under Pennsylvania law. However, the insurance contract would be governed under New York Law since the contract was made in New York. *See, McMillan v. State Mut. Life Assurance Co. of America*, 922 F2d 1073 (3rd Cir. 1990). Thus, the claims under Pennsylvania law do not state a cause of action. To the extent that Plaintiff's opposition sought leave to amend her Complaint, she has not made a motion to do so, nor attached a Proposed Amended Complaint. *Lilley v. Greene Cent. Sch. Dist.*, 187 A.D.3d 1384 (3rd Dept. 2020); CPLR 3025. Therefore, leave to amend the Complaint is not properly before the Court. Similarly, in Plaintiff's Sur-Reply, she attempts to argue that Defendant's conduct violated General Business Law § 349, but has not made a motion to add that cause of action. That request suffers from the additional factor that Sur-Reply papers are not authorized under the CPLR.

CONCLUSION


Based on the foregoing discussion, it is hereby

ORDERED, that Defendant's motion to dismiss is GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: March 20, 2023
Binghamton, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The Court has considered all the documents contained in the electronic case file, including these papers submitted in connection with this motion:

- 1) Defendant's Notice of Motion dated September 27, 2022, with Affirmation of Mark D. Goris, Esq., with Exhibits "A" and "B" dated September 27, 2022, and affidavit of Jackie Boeltz, sworn to on September 27, 2022 with Exhibit "A";
- 2) Affirmation Brian R. Gallagher in opposition to Defendant's motion, and affidavit of Plaintiff in opposition to Defendant's motion;
- 3) Reply Affirmation of Mark D. Goris, Esq., dated October 31, 2022, and reply affidavit of Jackie Boeltz with Exhibit, dated October 31, 2022; and
- 4) Sur-Reply affirmation of Brian R. Gallagher, Esq., dated November 16, 2022.