SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33M

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THE ROCKEFELLER UNIVERSITY,

Plaintiff,

- v -

AETNA CASUALTY & SURETY COMPANY, THE TRAVELERS INDEMNITY COMPANY, FEDERAL INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, RIUNIONE ADRIATICA DI SICURTA (N/K/A ALLIANZ S.P.A.), ANCIENNE MUTUELLE REASSURANCE (N/K/A COLISEE RE), CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, C.N.A. REINSURANCE OF LONDON LTD. (N/K/A CX REINSURANCE COMPANY LTD.), FIREMAN'S FUND INSURANCE COMPANY, GUARANTY NATIONAL INSURANCE COMPANY, TIG INSURANCE COMPANY (F/K/A RANGER INSURANCE COMPANY), NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, ROYAL INDEMNITY COMPANY (N/K/A ARROWWOOD INDEMNITY COMPANY), TUREGUM INSURANCE COMPANY, UNIONAMERICA INSURANCE COMPANY LTD. (N/K/A RIVER THAMES INSURANCE COMPANY LIMITED), UNITED NATIONAL INSURANCE COMPANY,

Defendants.

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INDEX NO. 654425/2019

MOTION DATE 05/11/2023

MOTION SEQ. NO. 017

DECISION + ORDER ON MOTION

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 017) 224, 225, 226, 227, 228

were read on this motion to/for DISMISS

Upon the foregoing documents, and after oral argument on August 15, 2023 when Natasha Romagnoli Esq. and David A. Thomas, Esq. appeared for Plaintiff the Rockefeller University ("Plaintiff"); John Grossbart, Esq. and Gary Meyerhoff, Esq. appeared for Defendants Aetna Casualty and Surety Company and the Travelers Indemnity Company ("Travelers"); Kelly A. Sherwood, Esq. appeared for Defendant TIG Insurance Company; William A. Accordino Jr., Esq. appeared for Defendant Certain Underwriters at Lloyd's of London; Nora A. Valenza-Frost,

Esq. appeared for Defendants National Union Fire Insurance Company of Pittsburgh and Ancienne Mutuelle Reassurance (N/K/A Colisee Re); Brad C. Westyle, Esq. appeared for Defendant United National Insurance Company; Wylly Killorin, Esq. appeared for Defendant Fireman's Fund Insurance Company; and Daren McNally, Esq. appeared for Defendants Federal Insurance Company and Insurance Company of North America (collectively, "Chubb"), Defendants Chubb and Travelers (collectively, the "Insurer Defendants") motion for an Order dismissing the first cause of action of Plaintiff's Second Amended Complaint for declaratory relief ("First Cause of Action") with respect to the primary policies issued by the Insurer Defendants; fourth cause of action for breach of the Implied Covenant of Good Faith and Fair Dealing ("Fourth Cause of Action"); and fifth cause of action for violation of General Business Law § 349 ("Fifth Cause of Action"), is granted in part and denied in part.

I. Background

In the underlying action, Plaintiff seeks insurance coverage from its insurers for potential liability arising out of claims of sexual abuse and molestation filed under New York's Child Victims Act (the "Underlying Claims") (NYSCEF Doc. 165). Plaintiff's Second Amended Complaint, filed August 10, 2022 (NYSCEF Doc. 165), contends that Defendants have engaged in deceptive business practices, acted in bad faith by delaying in responding to the Underlying Claims, and breached their duty to Plaintiff by, *inter alia,* failing to indemnify and cover Plaintiff's defense costs (NYSCEF Doc. 165).

On October 7, 2022 the Insurer Defendants brought the instant motion to dismiss Plaintiff's fourth and fifth causes of action, as well as Plaintiff's First Cause of Action with respect to the primary policies issued by the Insurer Defendants (NYSCEF Docs. 224, 227).

II. Discussion

a. The Insurer Defendants' Motion to Dismiss Plaintiff's First Cause of Action for Declaratory Judgment as Duplicative, is Granted

The Insurer Defendants argue that Plaintiff's First Cause of Action for declaratory judgment should be dismissed with respect to the primary policies issued by the Insurer Defendants on the grounds that it is duplicative of Plaintiff's second and third causes of action for breach of contract (NYSCEF Doc. 227 at p. 6). The Insurer Defendants further argue that Plaintiff's First Cause of Action should be dismissed on the additional ground that it is a claim for "anticipated" future disputes that may never occur, rendering it premature and not ripe for adjudication (NYSCEF Doc. 227 at p. 7).

It is well settled that "a declaratory judgment action should not be entertained where it 'parallel[s]' a breach of contract claim, and 'merely seek[s] a declaration of the same rights and obligations'" (*Conflin SNP-1 Funding, LLC v Security Natl. Props. Servicing Co., LLC*, 199 AD3d 406, 407 [1st Dept 2021)] (quoting *Apple Records v Capitol Records*, 137 AD2d 50, 54, [1st Dept 1988]). Moreover, a cause of action for a declaratory judgment "is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capitol Records*, 137 AD2d 50, 54, [1st Dept 1988]). A cause of action is duplicative of a breach of contract action "where it alleges a breach of the same obligations based on the same facts and seeks identical damages" (*Astor Ben Sasha LLC v HFZ 235 W. 75th St. Owner LLC*, 215 AD3d 515, 516 [1st Dept 2023]).

Here, Plaintiff's First Cause of Action merely seeks a declaration of the same rights and obligations addressed by Plaintiff's breach of contract claims. Plaintiff's First Cause of Action seeks a declaratory judgment establishing that "Defendants are obligated to pay for all Underlying Claims for damages because of bodily injury, and defense costs and expenses,

pursuant to the insuring agreements of those policies," that "Defendants' obligations under the Policies include the duty to pay on the [Plaintiff's] behalf, all sums that the [Plaintiff] becomes legally obligated to pay as damages…for the underlying claims," and that Defendants' are obligated "to pay for or reimburse defense costs and/or pay for indemnity amounts in the form of judgments or settlements in connection with the Underlying Claims" (NYSCEF Doc. 165 at ¶¶ 106, 107, 111).

Similarly, Plaintiff's second cause of action for breach of contract addresses the Insurer Defendants' duty to defend and to pay defense costs, and centers on Plaintiff's claim that "[b]y failing to provide coverage for all of the Universities defense expenses, Travelers and Chubb have breached the terms of their respective Primary Policies" (NYSCEF Doc. 165 at ¶ 121). Plaintiff's third cause of action for breach of contract addresses the Insurer Defendants' duty to indemnify and asserts that the Insurer Defendants do not intend to provide coverage pursuant to their obligations under the Primary Policies for indemnity amounts (NYSCEF Doc. 165 at ¶ 128).

As Plaintiff's First Cause of Action seeks only a declaration of the same rights and obligations sought in Plaintiff's second and third causes of action for breach of contract, Plaintiff's First Cause of Action is dismissed as duplicative.

b. The Insured Defendants' Motion to Dismiss Plaintiff's Fourth Cause of Action for Bad Faith as Duplicative, is Denied

The Insurer Defendants argue that Plaintiff's Fourth Cause of Action for breach of the Implied Covenant of Good Faith and Fair Dealing should be dismissed on the grounds that it is duplicative of Plaintiff's second and third causes of action for breach of contract (NYSCEF Doc. 227 at p. 6).

The First Department has held that "[w]here a cause of action for breach of the implied covenant of good faith and fair dealing is based on the same operative facts and seeks the same damages as a cause of action for breach of contract, the good faith claim is duplicative and should be dismissed" (*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC*, 214 AD3d 111, 132-133, [1st Dept 2023]). However, "[a] good faith claim…is not duplicative of a breach of contract claim where the complaint alleges conduct that is separate from the conduct constituting the alleged breach of contract and such conduct deprived the other party of the benefit of its bargain" (*Id.*). Further, breach of the Implied Covenant of Good Faith and Fair Dealing can legally support a cause of action independent of claims for breach of contract when the good faith and fair dealing claims "are not wholly duplicative of [the] breach of contract claims" (*Id.*).

Plaintiff's Fourth Cause of Action for bad faith alleges that the Insurer Defendants "have engaged in continued and unjustified delays for years in the course of responding to the Underlying Claims" and that the Insurer Defendants adopted a "wait and see" approach that protected their own interests to the detriment of Plaintiff (NYSCEF Doc. 165 at ¶¶ 133, 135). As Plaintiff's causes of action for breach of contract do not pertain to the alleged delays or the "wait and see" approach upon which Plaintiff's Fourth Cause of Action relies, Plaintiff's Fourth Cause of Action does not arise from the same conduct as Plaintiff's breach of contract claims. Accordingly, Plaintiff's Fourth Cause of Action is not duplicative and should not be dismissed.

c. The Insured Defendants' Motion to Dismiss Plaintiff's Fourth Cause of Action for Bad Faith on the Ground that Plaintiff Fails to Plead a Cause of Action, is Denied

Pursuant to CPLR 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that …the pleading fails to state a cause of action…." In considering a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for

failure to state a cause of action, "the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.* 21 NY3d 324, 334 [2013]). "[T]he sole criterion is whether the pleading states a cause of action, and therefore if from its four corners factual allegations are discerned which if taken together can manifest any cause of action, a motion for dismissal must fail" (*Kusher v King* 126 AD2d 446, 467 [1st Dept 1987]).

The Insurer Defendants contend that Plaintiff's Fourth Cause of Action must be dismissed as Plaintiff's Complaint "does not contain any factual allegations showing a reckless disregard, conscious disregard or a pattern of gross disregard by the [Insurer Defendants]" (NYSCEF Doc. 227 at p. 19).

In *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453 (1993), a case involving alleged bad faith in the settlement and defense of insurance claims, the Court of Appeals held that "in order to establish a prima facie case of bad faith, [a] plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests – that is, a deliberate or reckless failure to place on equal footing the interest of its insured with its own interests...."

Here, Plaintiff's Second Amended Complaint alleges that the "wait and see approach" by the Insurer Defendants was adopted to protect the Insurer Defendants interests "to the serious detriment of Plaintiff" (NYSCEF Doc. 165 at ¶ 135). Affording the pleading a liberal construction and the benefit of every possible favorable inference, the Court finds that Plaintiff's pleadings are sufficient to manifest a cause of action for bad faith. Accordingly, the Insurer Defendants' motion to dismiss Plaintiff's Fourth Cause of Action is denied.

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d. The Insurer Defendants Motion to Dismiss Plaintiff's Fifth Cause of Action for Violation of General Business Law § 349 on the Ground that Plaintiff Fails to Plead a Cause of Action, is Denied

General Business Law § 349 declares that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are…declared unlawful." The First Department has held that "[t]o state a cause of action [under General Business Law § 349], a plaintiff must allege that the defendant's challenged act was consumer oriented and materially misleading and resulted in injury to the plaintiff" (*Kickertz v New York Univ.* 110 AD3d 268, 273 [1st Dept 2013]). The necessary consumer-oriented conduct "need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large" (*New York Univ. v Cont'l Ins. Co.* 87 NY2d 308, 320 [1995]).

Here, Plaintiff's Fifth Cause of Action alleges, *inter alia*, that the Insurer Defendants have;

> taken improper coverage positions and engaged in unjustifiable delays, which they improperly and without a good-faith basis purported to justify as interpretations of the same standard-form insurance policy language that, upon information and belief, [the Insurer Defendants] use in insurance policies sold to many other educational and hospital institutions in New York and elsewhere, in a manner that would affect, apply to, and injure all of their policyholders with similar policy language that suffer losses and bring coverage claims to [the Insurer Defendants] expecting fair and good-faith treatment (NYSCEF Doc. 165 at ¶ 145).

Affording the pleading a liberal construction and the benefit of every possible favorable inference, the Court finds that Plaintiff's pleadings on the Fifth Cause of Action have a broad impact on other educational and hospital institutions conducting business with the Insurer

Defendants, sufficiently alleging the requisite consumer-oriented conduct to state a cause of action under General Business Law § 349.[1]

Accordingly, it is hereby,

ORDERED that the Insurer Defendants' motion for an Order dismissing the First Cause of Action of Plaintiff's Second Amended Complaint with respect to the primary policies issued by the Insurer Defendants, is granted; and it is further

ORDERED that the Insurer Defendants' motion for an Order dismissing the Fourth and Fifth Causes of Action of Plaintiff's Second Amended Complaint, is denied; and it is further

ORDERED that on or before February 6, 2024, the parties are directed to submit a proposed Status Conference Order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed Status Conference Order, the parties are directed to appear for an in-person status conference with the Court in Room 442, 60 Centre Street, on February 7, 2024 at 9:30 a.m.; and it is further

ORDERED that within ten (10) days of entry, counsel for Defendants Federal Insurance Company and Insurance Company of North America shall serve a copy of this Decision and Order, with notice of entry, on all parties to this case; and it is further

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[1] With respect to the alleged requirement that Plaintiff plead independent injuries under General Business Law § 349, Insurer Defendants' argument is unavailing.

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

12/8/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	DENIED	x	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE