Galindo v State Farm Fire & Cas. Co.
2012 NY Slip Op 33608(U)
July 3, 2012
Sup Ct, Bronx County
Docket Number: 307291/11
Judge: Kibbie F. Payne

SUPREME COURT OF THE STATE OF NEW YORK
OF THE BRONX COUNTY: PART 1

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EDIXON A. GALINDO,

Plaintiff,

-against-

Decision/Order
Index No. 307291/11

STATE FARM FIRE AND CASUALTY COMPANY, and
HICKORY HOMES AND PROPERTIES, INC.,

Defendants.

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KIBBIE F. PAYNE, J.:

Defendant State Farm Fire and Casualty Company (State Farm) moves for an order directing a change of venue from an alleged improper county to Suffolk, dismissal of the second and third causes of action and sanctions against plaintiff's counsel. Plaintiff's counsel now concedes that venue in Bronx County is improper and cross-moves for a change of venue to Westchester County and sanctions.

The underlying action concerns an insurance policy dispute between State Farm and its insured Edixon A. Galindo. On June 9, 2011, plaintiff's counsel commenced this action under Index Number 305137/11. State Farm had the matter removed to federal district court. The federal action was terminated when plaintiff's counsel filed a notice of voluntary dismissal. On July 13, 2011, plaintiff's counsel filed an amended complaint adding Hickory Homes and Properties, Inc. as a defendant. A judge of this court dismissed the amended complaint upon plaintiff's default for plaintiff's failure to commence a new

action following his voluntary discontinuance. Thereafter for the third time, counsel with a new index number commenced this action in Bronx County. Pursuant to CPLR 511(a), State Farm served plaintiff with a written demand that venue be changed to Suffolk County. Rather than serve a response, pursuant to CPLR 511(b), with a consent to change venue or an affidavit showing either the county chosen by plaintiff was proper or that the county sought for transfer was improper, plaintiff inexplicably chose to serve State Farm with a demand to change venue to Westchester County. Thereafter, counsel for State Farm timely filed the instant motion seeking a change of venue and related relief.

State Farm has an office in Suffolk County and plaintiff's counsel concedes that his client does not reside in Bronx County. Since neither State Farm nor Galindo resided in Bronx County when this action was commenced, the initial placement of venue was improper (CPLR 503[a])[1]. In this case, plaintiff has forfeited his right to select venue since he chose an improper venue and failed to file an affidavit in response to the defendant's demand, either showing that the county designated by the defendant was improper or that the county designated by plaintiff was proper (*Montilla v River Park Associates*, 282 AD2d 389 [1st

[1] Hickory Homes and Properties, Inc., did not appear in this action.

Dept 2001]; *Lynch v Cyprus Sash & Door Co., Inc.*, 272 AD2d 260 [1st Dept 2000]; *Kelson v Nedicks Stores, Inc.* 104 AD2d 315 [1st Dept 1985]). Accordingly the motion to change venue to Suffolk County is granted.

State Farm further moves to dismiss the second and third actions in the complaint on the ground that each fails to state a cause of action. The second cause of action specifically alleges that State Farm violated General Business Law §349 and counsel for defendant asserts the complaint fails to state a cause of action under General Business Law §349 as a matter of law.

General Business Law §349 prohibits deceptive business practices. The statute makes actionable conduct which does not arise to the level of common law fraud (*Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]). The elements of a claim under this law are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from that act (*Gaidon v Guardian Life Ins. Co. of America* at 334-345; *Andre Strishak & Assoc. P.C. v Hewlett Packard Co.*, 300 AD2d 608 [2nd Dept 2002]; *also see Soloman v Bell Atlantic Corp.*, 9 AD3d 49 [1st Dept 2004]). The practices of a violator of General Business Law §349 must have a broad impact upon consumers at large. Here, the complaint does not assert State Farm employed re-occurring deceptive and/or misleading practices with the consuming public but rather alleges

plaintiff's dissatisfaction with the State Farm's deceptive and undervalued assessment of the property damages that plaintiff allegedly sustained during a March 13, 2010 storm. Such claims are not addressed to consumers at large but constitute a private contract dispute. These allegations do not constitute a violation of General Business Law §349 and therefore must be dismissed.

State Farm further seeks dismissal of Plaintiff's third cause of action on the ground that it fails to state a cause of action. Counsel argues the third cause of action is redundant of the first cause of action. In the third cause of action, plaintiff alleges that State Farm was negligent by its failure to complete inspection of the plaintiff's premises before issuing payment to its vendor. Both allegations allege negligence on the part of State Farm with respect to its obligations as an insurer under the policy. Inasmuch as the third cause does not identify a violation of duty independent of the breach of contract State Farm argues this cause of action must be dismissed as repetitious.

When deciding a motion made pursuant to CPLR 3212(a)(7), the court must determine whether the pleader has a cognizable cause of action and not whether the action has been properly plead (*Guggenheimer v Ginzberg*, 43 NY2d 268 [1977]; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). Accepting plaintiff's

allegations in the most favorable light to be true (*see 511 West 232rd Street Owners Corp. v Jennifer Realty co.* 98 NY2d 144 [2002]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]) plaintiff has stated a claim for relief. Implied in every contract is a covenant of good faith and fair dealing (*Dalton v Educational Testing Serv.*, 87 NY2d 384 [1995]. If the allegation is true and State Farm failed to complete inspection before paying the vendor then plaintiff may have been wrongfully deprived of adequate compensation for his property loss. Accordingly, that branch of the motion seeking to dismiss the third cause of action is denied.

With respect to counsel's joint applications for an order to impose sanctions, the court at this time is unpersuaded that counsel's allegations warrant a hearing on the issue of frivolous conduct. Counsel's motion and cross-motion seeking an order to impose sanctions is, in all respects, denied. Accordingly, defendant State Farm's motion and plaintiff's cross-motion are decided in accordance with the foregoing decision and it is hereby

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Suffolk, and upon service by movant of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the

Clerk of the Supreme Court, County of Suffolk.

Dated: July 3, 2012
Bronx County

ENTER:

KIBBIE F. PAYNE
J.S.C.