Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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BERNARD LANTER, M.D.,

Plaintiff(s),

-against-

ALLSTATE INSURANCE COMPANY and JAMES JEROCKI,

Defendant(s).

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Index No. 13113/11

Motion Submitted: 2/22/12
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

Motion pursuant to CPLR § 3211(a)(1), (5) and (7) by defendants to dismiss the amended complaint is granted. That branch of defendants' motion which seeks the imposition of sanctions against plaintiff and his counsel is denied.

The amended complaint herein asserts three causes of action for breach of contract against defendant Allstate Insurance Company (Allstate); for negligence against defendant Allstate and its employee, defendant James Jerocki; and for *prima facie* tort against the individual defendant.

Plaintiff's 2005 Mercedes Benz SL500 automobile, which was insured under a policy issued by defendant Allstate, sustained substantial damage in an accident on December 27,

2008. Each of the claims asserted in the amended complaint arise out of a dispute between the parties *vis-a-vis* the cost of repairs to restore plaintiff's vehicle to its pre-accident condition. Mid-Island Collision, to which plaintiff took the vehicle, determined that the cost of necessary repairs would be $34,177.36. Defendant Allstate's adjuster inspected the vehicle and offered the sum of $8,457.55 to cover the repair costs. Plaintiff declined the offer.

Since the parties could not agree on another shop to repair the vehicle, the plaintiff invoked the right to an appraisal pursuant to the appraisal clause set forth in the subject policy which states that:

> "Both you and us have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss."

Because the designated appraisers were unable to resolve the dispute, or agree upon an umpire, an umpire was named by the court.[1]

Defendant Allstate seeks dismissal of this action predicated on the contention that the dispute herein has been adjudicated to its final conclusion and the claims asserted are, therefore, barred by the doctrine of *res judicata*. Defendant further argues that the causes of action alleged are not viable in that:

> a) plaintiff has failed to state a specific provision of the contract of which defendant is in breach;
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> b) a claim for negligent breach of contract does not exist; and
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> c) plaintiff's claim for prima facie tort is barred by the statute of limitations.

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[1]Order of the Hon. Daniel Palmieri entered September 21, 2010 in response to petition by Allstate in which Dr. Lanter joined.

Plaintiff counters arguing that defendant Allstate breached the appraisal clause of the insurance policy herein by refusing to accept plaintiff's designated appraiser[2] and by failing to engage in the appraisal process until made to do so by the order of Hon. Daniel Palmieri dated March 30, 2010 declaring that plaintiff was entitled to proceed with the appraisal process.

Even though defendant Allstate did, in fact, participate in the appraisal process, plaintiff maintains that the defendant insurer breached the appraisal provision of the policy by refusing to accept the appraiser of plaintiff's choice. Moreover, plaintiff argues that defendant Allstate's purported unreasonable refusal to accept plaintiff's designated appraiser gives rise to a negligence claim. Plaintiff further contends that the claims asserted in the amended complaint are not subject to *res judicata* inasmuch as the prior action was brought solely to compel defendant Allstate to go through the appraisal process.

To succeed on a motion to dismiss pursuant to CPLR § 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claim. (***Marist Coll. v. Chazen Envtl. Servs., Inc.***, 84 A.D.3d 1180, 1181, 923 N.Y.S.2d 859 (2d Dept., 2011) *lv to app dism* 17 N.Y.3d 893 [2011]).

Notwithstanding plaintiff's assertions to the contrary, the amended complaint fails to state a breach of contract claim, *vis-a-vis* the appraisal provision given that defendant did, in fact, participate in and complete the appraisal process and did, in fact, pay the full amount of the appraisal award of $34,177.36 as well as court awarded interest in the amount of $3,757.41.

The unambiguous language of the provision at issue does not require that defendant accept plaintiff's choice of an appraiser. It provides only that "each will appoint and pay a qualified appraiser." The language does not preclude a party from challenging the choice of an appraiser on the grounds of prejudice as was done here. The provision further anticipates that, in the event that the two appraisers chosen by the parties are unable to agree an umpire would be chosen either by the two appraisers or the court as was necessary in this case.

It is the court's responsibility to determine the rights and obligations of parties under an insurance contract based on the specific language of a policy whose unambiguous

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[2]Allstate apparently rejected plaintiff's choice of an appraiser because of his alleged relationship with Mid-Island Collision, plaintiff's choice of repair shop, as either an employee or consultant. In a decision dated March 30, 2010, the court ruled that Lawrence Montenez could, in fact, serve as a party appointed appraiser. Allstate named Mark Nathan as its appraiser.

provisions must be given their plain and ordinary meaning. (***Cali v. Merrimack Mut. Fire Ins. Co.***, 43 A.D.3d 415, 416-417, 841 N.Y.S.2d 128 [2d Dept., 2007], *lv den* 9 N.Y.3d 818 [2008]. When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract giving a practical interpretation to the language employed and the parties' reasonable expectations. (***Matter of Matco-Norca, Inc.***, 22 A.D.3d 495, 496, 802 N.Y.S.2d 707 [2d Dept., 2005]). The words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties. (***Laba v. Carey***, 29 N.Y.2d 302, 308, 277 N.E.2d 641, 327 N.Y.S.2d 613 [1971]). A court may not write into a contract conditions the parties did not themselves insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as to distort the contract's apparent meaning. (***Petracca v. Petracca***, 302 A.D.2d 576, 577, 756 N.Y.S.2d 587 [2d Dept., 2003]).

Plaintiff's breach of contract cause of action, which flies in the face of the very language of the contract itself, is not viable.

As noted by defendant Allstate, plaintiff's second cause of action alleging that said defendant and its employee, defendant James Jerocki, "failed to act as a reasonably prudent insurance carrier would have acted under the circumstances," by refusing to accept plaintiff's choice of an appraiser, is similarly unavailing.

Plaintiff has not alleged facts that would support the existence of a tort claim for negligence. A tort may arise from the breach of a legal duty independent of the contract. Merely alleging that the breach of contract arose from a lack of due care or failure to act "reasonably" will not transform an alleged simple breach of contract into a tort. (***Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.***, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]). A simple breach of contract will not be considered a tort unless a legal duty independent of the contract has been violated. (***Brown v. Wyckoff Hgts. Med. Ctr.***, 28 A.D.3d 412, 413, 811 N.Y.S.2d 570 [2d Dept., 2006]). This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract although it may be connected with, and dependent on, the contract. Simply alleging a duty of care will not transform an alleged breach of contract into a tort. (***Clemens Realty, LLC v. New York City Dept. of Educ.***, 47 A.D.3d 666, 667, 850 N.Y.S.2d 172 [2d Dept., 2008]). Plaintiff has failed to allege or demonstrate that defendants owed him a legal duty independent of a contractual duty, and that defendants breached that independent duty.

The requisite elements of a cause of action sounding in *prima facie* tort include: intentional infliction of harm; resulting in special damages; without any excuse or justification; by an act or series of acts, which would otherwise be lawful. (***Smith v.***

Meridian Tech., Inc., 86 A.D.3d 557, 558, 927 N.Y.S.2d 141 [2d Dept., 2011]). For purposes of a cause of action to recover damages for *prima facie* tort, "the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another." (***Beardsley v. Kilmer***, 236 N.Y. 80, 90, 236 N.Y. 80, 140 N.E. 203 [1923]).

Plaintiff has failed to state a claim for *prima facie* tort since the allegations asserted in the amended complaint fail to show that defendant acted with disinterested malevolence. There is no recovery in *prima facie* tort unless malevolence is the sole motive for a defendant's otherwise lawful acts. (***DeNaro v. Rosalia***, 59 A.D.3d 584, 588, 873 N.Y.S.2d 697 [2d Dept., 2009]).

Even viewing the allegations of the complaint as true, and affording the plaintiff the benefit of every favorable inference (***Sheridan v. Carter***, 48 A.D.3d 444, 445, 851 N.Y.S.2d 248 [2d Dept., 2008]), the allegations of the complaint are insufficient to state causes of action either for negligence or *prima facie* tort. The second and third causes of action must, therefore, be dismissed pursuant to CPLR § 3211(a)(7).

Additionally, the third cause of action is barred by the one year statute of limitations. (***Casa de Meadows Inc. (Cayman Is.) v. Zaman***, 76 A.D.3d 917, 921, 908 N.Y.S.2d 628 [1st Dept., 2010]).

Inasmuch as plaintiff's claims are dismissed based on documentary evidence and failure to state a cause of action, it is unnecessary to reach the merits of the defense of *res judicata*. The court notes, however, the decision of the Hon. Daniel Palmieri entered March 18, 2011 wherein he states that "the Court agrees that Allstate never breached the contract of insurance to the extent that it never refused to pay on the claim."

The finding is the law of the case. The doctrine seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. (***Brownrigg v. New York City Hous.* Auth.**, 29 A.D.3d 721, 722, 815 N.Y.S.2d 681 [2d Dept., 2006]).

That branch of defendants' motion that seeks to impose costs and sanctions against plaintiff and his counsel is denied.

Pursuant to Rules of the Chief Administrator of the Courts Part 130 as set forth in 22 NYCRR § 130-1.1(a), the court may award to any party or attorney in a civil matter costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney fees, resulting from frivolous conduct.

For the purpose of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (***22 NYCRR 130-1.1[c]***).

The decision as to whether to award sanctions is within the sound discretion of the court. (***Kamen v. Diaz-Kamen***, 40 A.D.3d 937, 837 N.Y.S.2d 666 [2d Dept., 2007]). In order to impose sanctions, the court must find that plaintiff's causes of action assert material falsehoods or are without legal merit and were undertaken primarily to delay or prolong the litigation, or to harass or maliciously injure another. (***Joan 2000, Ltd. v. Deco, Constr. Corp.***, 66 A.D.3d 841, 842, 886 N.Y.S.2d 611 [2d Dept., 2009]). No such conduct has been shown to exist here.

The foregoing constitutes the Order of this Court.

Dated: April 4, 2012
Mineola, N.Y.

J. S. C.
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ENTERED
APR 09 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE