SHORT FORM ORDER

INDEX No. 08-33337

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-4-11
ADJ. DATE 6-27-12
Mot. Seq. # 001 - MotD

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MUTUAL ASSOCIATION ADMINISTRATORS, INC.,

Plaintiff,

- against -

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, LEONARD MANDELBAUM, TOM PEREZ, JACK NEIMAN, ADENA SAMOWITZ,

Defendants.

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KENNETH L. ROBINSON, ESQ.
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Upon the following papers numbered 1 to 61 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 29 - 44 ; Replying Affidavits and supporting papers 46 - 52, 55 - 59, 60 - 61 ; Other memoranda of law 27 - 28, 45, 53 - 54 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant National Union Fire Insurance Company of Pittsburgh, PA for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's first cause of action for breach of contract, dismissing the plaintiff's second cause of action for punitive damages, dismissing any claim that the plaintiff may have for consequential damages, and granting partial summary judgment in its favor limiting its liability to the amount of coverage remaining under a certain policy of insurance, is granted to the extent that the plaintiff's second cause of action for punitive damages is dismissed, and is otherwise denied.

In this action, the plaintiff seeks consequential and punitive damages allegedly suffered as the result of the corporate defendant's breach of contract. It appears that this action was discontinued against the individual defendants by a stipulation dated November 8, 2008. It is undisputed that the plaintiff is a named insured under a Multi-Employer Plan/Trustees ERISA Liability Policy (Policy)

issued by the defendant National Union Fire Insurance Company of Pittsburgh, PA (defendant). In its complaint, the plaintiff alleges that the defendant breached its obligations under the Policy by, among other things, refusing to provide a continuing defense to the plaintiff in an underlying action, *Elaine L. Chao, Secretary of Labor v Slutsky*, U.S. District Court, Eastern District of New York, Case No. 01-7593 (SLT) (ETB) (hereinafter, ERISA action).

In November, 2001, the United States Secretary of Labor (Secretary of Labor) commenced the underlying action against the plaintiff and others alleging, among other things, that the plaintiff had breached its fiduciary duties as the third-party administrator to the FCGA/MEBT Benefit Trust by diverting plan assets. On or about February 21, 2002, the defendant appointed counsel to represent the plaintiff in the ERISA action. In early 2003, the Secretary of Labor proposed a settlement of the ERISA action, which the defendant recommended should be accepted by the plaintiff. The plaintiff rejected the offer of settlement on the grounds, among other things, that the Secretary of Labor would not agree to withdraw press releases which had been distributed concerning the alleged misfeasance by the plaintiff, and the fact that the settlement would leave open the imposition of civil penalties against the plaintiff, which would not be covered by the Policy. On or about February 11, 2003, the defendant notified the plaintiff that it would not pay for any additional defense costs or expenses based on the plaintiff's refusal to consent to the offer of settlement. Thereafter, the plaintiff continued to litigate the ERISA action. However, it could not directly bear the costs and expense of its attorney's fees, which eventually lead to the withdrawal of its counsel, and the entry of a default judgment against it. The defendant continued to negotiate a settlement of the monetary claims in the ERISA action, and settled the matter on terms favorable to the plaintiff, including the waiver of any civil penalties. The plaintiff alleges that the financial burden placed upon it by the defendant's withdrawal of a defense in the ERISA action caused it to go out of business. On September 2, 2008, the plaintiff commenced this action, seeking to recover damages including its loss of income, the loss of its business, and its attorneys' fees in defending the ERISA action and in prosecuting this action .

The defendant now moves for summary judgment 1) dismissing the plaintiff's first cause of action for breach of contract, 2) dismissing the plaintiff's second cause of action for punitive damages, and 3) dismissing any claim that the plaintiff may have for consequential damages and granting partial summary judgment limiting its liability to the amount of coverage remaining under the Policy. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the defendant submits, among other things, the pleadings, a copy of the

stipulation discontinuing the action against the individual defendants[1], various documents from the ERISA action, and a copy of the Policy. In moving to dismiss the first cause of action for breach of contract, the defendant contends that the plaintiff had only two options under the Policy when the defendant recommended that the offer of settlement be accepted. That is, the plaintiff could consent to the offer of settlement, or it could negotiate or defend itself without reimbursement from the defendant. The defendant argues that the plaintiff's contractual options are limited by Policy, Section I (2) (a), which provides, in pertinent part:

> 2. DEFENSE COSTS, CHARGES AND EXPENSES
>
> With respect to such insurance as is afforded by this Policy, the Company shall:
>
> a) Defend in the name of the Insureds any action or suit against the Insureds alleging a Breach of Fiduciary Duty, but the Insureds shall not admit liability for or settle any claim or incur any cost or expense without the written consent of the Company. The Company shall have the right to make such investigation and negotiation, and with the written consent of the Insureds, such settlement or compromise of any claim or suit recommended by the Company, based upon a judgment or a bonafide offer of settlement, the Insureds shall thereafter negotiate or defend such claim or suit independently of the Company and on their own behalf, and in such event, the damages and expenses accruing or determined through litigation or otherwise, in excess of the amount for which settlement could have been made as so recommended by the Company, shall not be recoverable under this Policy.

Courts bear the responsibility of determining the rights and obligations of parties to an insurance contract based on the specific language used in the policy (***Raymond Corp. v National Union Fire Ins. Co.***, 5 NY3d 157, 800 NYS2d 89 [2005]; ***State of New York v Home Indemn. Co.***, 66 NY2d 669, 495 NYS2d 969 [1985]). As a general rule, policies of insurance are construed liberally in favor of the insured and strictly against the insurer (***Government Empls. Ins. Co. v Kligler***, 42 NY2d 863, 397 NYS2d 777 [1977]; ***State Farm Mut. Auto. Ins. Co. v Westlake***, 35 NY2d 587, 364 NYS2d 482 [1974]; *see* ***Matter of New York Cent. Mut. Fire Ins. Co. v Ward***, 38 AD3d 898, 833 NYS2d 132 [2d Dept 2007]), and any ambiguity must be construed against the insurer (***White v Continental Cas. Co.***, 9 NY2d 264, 848 NYS2d 603 [2007]; ***State Farm Mut. Auto Ins. Co. v Glinbizzi***, 9 AD3d 756, 757, 780 NYS2d 434 [2004]; ***Marshall v Tower Ins. Co. of N.Y.***, 44 AD3d 1014, 1015, 845 NYS2d 90 [2d Dept 2007]).

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[1] A review of the the computerized records maintained by the Court do not reflect that the same has been filed with the Clerk of the Supreme Court (*see* CPLR 3217 [a], [b]; Uniform Rules for Trial Cts [22 NYCRR] § 202.28). The computerized records maintained by the Court also indicate that the plaintiff has not, to date, moved to amend the caption of this action to reflect the above-noted discontinuance.

Here, the Court finds that the subject provision of the Policy is ambiguous and it must be construed against the defendant. It is not clear that the plaintiff is left with the cold choice of accepting the defendant's recommendation to accept the offer of settlement in the ERISA action or face the burden of taking on the cost of defending itself in that action. In fact, the Policy speaks to a different result. The Policy provides, in an added endorsement Form END 002:

> NEW YORK AMENDATORY ENDORSEMENT
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> In consideration of the premium charged , it is hereby understood and agreed that Insuring Agreement 2: "Defense Costs, Charges and Expenses" is amended in part by adding the following:
>
> The insured shall have the option to:
>
> * * *
>
> (3) consent to a settlement acceptable to the Company and the claimant, which consent shall not be unreasonably withheld.

The defendant has failed to establish its entitlement to summary judgment herein regarding its contractual right to withdraw its defense of the plaintiff in the ERISA action. The defendant has not submitted any evidence on the question whether the plaintiff's actions in withholding consent to the offer of settlement in the ERISA action were unreasonable. At a minimum, there are issues of triable fact which preclude the grant of summary judgment regarding both of these issues. Accordingly, that branch of the defendant's motion for summary judgment dismissing the plaintiff's first cause of action is denied.

In moving to dismiss the second cause of action for punitive damages, the defendant contends that the New York courts do not recognize an independent cause of action for punitive damages. It is well settled that there is no separate cause of action recognized for punitive damages, rather punitive damages flow from or attach to a substantive underlying cause of action (*see* ***Rocanova v Equitable Life Assur. Socy. of the U.S.***, 83 NY2d 603, 612 NYS2d 339 [1994]; ***Muniz v Mount Sinai Hosp. of Queens***, 91 AD3d 612, 937 NYS2d 244 [2d Dept 2012]; ***Randi A.J. v Long Island Surgi-Center***, 46 AD3d 74, 842 NYS2d 558 [2d Dept 2007]; ***Probst v Cacoulidis***, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; ***Rose Lee Mfg., Inc. v Chemical Bank***, 186 AD2d 548, 588 NYS2d 408 [2d Dept 1992]; ***Diker v Cathray Constr. Corp.,*** 158 AD2d 657, 552 NYS2d 37 [2d Dept 1990]). Generally, exemplary damages are not recoverable in actions for breach of contract where only a private wrong and not a public right is involved ***(Desai v Blue Shield of Northeastern N.Y.***, 178 AD2d 894, 577 NYS2d 932 [3d Dept 1991]; ***Diker v Cathray Const. Corp.***, *supra*; ***High Fashions Hair Cutters v Commercial Union Ins. Co.***, 145 AD2d 465, 535 NYS2d 425 [2d Dept 1988]). However, punitive damages are recoverable in a breach of contract action upon a showing of gross, wanton, or willful fraud or of high moral culpability of the defendant (***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]; ***Reinah Dev. Corp. v Kaaterskill Hotel Corp.***, 59 NY2d 482, 465 NYS2d 910 [1983]; ***Reads Co., LLC v. Katz***, 72 AD3d 1054, 900 NYS2d 131 [2d Dept 2010]; ***99 Cents Concepts, Inc. v Queens***

Broadway, LLC, 70 AD3d 656, 893 NYS2d 627 [2d Dept 2010]; ***Tartaro v Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]; ***Bader's Residence For Adults v Telecom Equip. Corp.***, 90 AD2d 764, 455 NYS2d 303 [2d Dept 1982]).

In the instant case no cause of action has been plead, nor is one available to plead, for punitive damages. The plaintiff does not allege that a public right is involved herein, neither has it alleged any gross, wanton or willful fraud on the part of the defendant. It has been held that an insured is not entitled to an award of punitive damages in an action against an insurer for failure to defend, where the "defendant had an arguable basis for the denial of coverage and there is no suggestion of any action on its part that rose to the level of morally culpable conduct" (***Kramarik v Travelers***, 25 AD3d 960, 808 NYS2d 807 [3d Dept 2006] ; *see also* ***Gordon v Nationwide Mut. Ins. Co.***, 30 NY2d 427, 334 NYS2d 601 [1972]; ***Walker v Sheldon***,10 NY2d 401, 223 NYS2d 488 [1961]). Accordingly, that branch of the defendant's motion for summary judgment dismissing the plaintiff's second cause of action for punitive damages is granted.

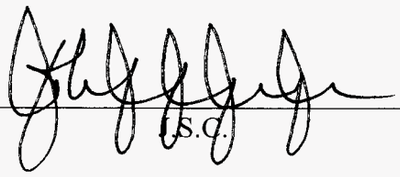
Turning to that branch of the defendant's motion which seeks to dismiss the plaintiff's demand for consequential damages and for partial summary judgment limiting its potential liability, the Court finds that the defendant has failed to establish its entitlement to summary judgment herein. Under New York law, consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context (***Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.***, 10 NY3d 187, 856 NYS2d 505 [2008]; ***Panasia Estate, Inc. v Hudson Ins. Co.***, 10 NY3d 200, 856 NYS2d 513 [2008]). A review of the complaint and bill of particulars reveals that they adequately set forth factual allegations which plead a cause of action that the defendant has breached the implied covenant of good faith and fair dealing, enabling the plaintiff to seek recovery of its consequential damages. The courts generally do not recognize a separate claim for bad faith denials of coverage because such claims are deemed duplicative of claims sounding in breach of contract (***New York Univ. v Continental Ins. Co.***, *supra*; ***Zawahir v Berkshire Life Ins. Co.***, 22 AD3d 841, 804 NYS2d 405 [2d Dept 2005]; ***Bettan v Geico Gen. Ins. Co.***, 296 AD2d 469, 745 NYS2d 545 [2d Dept 2002]). In addition, it has been held that *Bi-Economy's* "reference to [consequential] damages as 'special' ... was not intended to establish a requirement for specificity in pleading" (***Panasia Estate, Inc. v Hudson Ins. Co.***, 68 AD3d 530, 889 NYS2d 452 [1st Dept 2009] *affd* 10 NY3d 200, 856 NYS2d 513 [2008]). Once the plaintiff asserts a breach of the covenant of good faith and fair dealing by the defendant, the Court must then "determine whether consequential damages were reasonably contemplated by the parties," by examining "'the nature, purpose and particular circumstances of the contract known by the parties ... as well as what liability the [insurer] fairly may be supposed to have assumed consciously, or to have warranted the [insured] reasonably to suppose that it assumed, when the contract was made.'" (***Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.***, 10 NY3d at 193, 856 NYS2d at 508, quoting ***Kenford Co. v County of Erie***, 73 NY2d 312, 319, 540 NYS2d 1 [1989]).

Here, the defendant has failed to submit any admissible evidence regarding its alleged failure to act in accordance with the implied covenant of good faith and fair dealing or whether the consequential damages sought by the plaintiff herein were reasonably contemplated by the parties to the Policy. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***,

supra). Thus, the determination whether the plaintiff is entitled to recover the loss of its business, and its loss of income, must await a trial on the issue of the defendant's alleged bad faith in withdrawing its defense of the plaintiff in the ERISA action and what the parties contemplated, if anything, regarding consequential damages. For the same reason, a determination whether the defendant's potential liability herein is limited to the amount available under the Policy would be premature.

In addition, the plaintiff's attempt to recover its attorneys' fees in prosecuting this action must await trial. Generally, an insured is barred from recovering its attorneys' fees in an action against its insurer alleging breach of contract. However, there appears to be a narrow exception to the above rule where an insurer breaches the implied covenant of good faith and fair dealing and in bad faith refuses to pay a claim of its own insured. Under the exception, an insured may bring a claim for litigation costs and attorneys' fees (***Sukup v State of New York***, 19 NY2d 519, 281 NYS2d 28 [1967]; ***U.S. Fire Ins. Co. v Nine Thirty FEF Investments, LLC***, 2011 WL 2552335 [Sup Ct, New York County 2011]; ***Grinshpun v Travelers Cas. Co. of Connecticut***, 23 Misc 3d 1111[A], 885 NYS2d 711 [Sup Ct, New York County 2009]; *see also* ***Liberty Surplus Ins. Corp. v Segal Co.***, 420 F3d 65 [2d Cir 2005]; ***Haym Salomon Home for the Aged LLC v HSB Group***, 2010 WL 301991 [US Dist Ct, ED NY 2010]; ***Chernish v Massachusetts Mut. Life Ins. Co.***, 2009 WL 385418 [US Dist Ct, ND NY 2009]; ***Quick Response Commercial Div., LLC v Travelers Property Cas. Co.***, 2009 WL 3334600 [US Dist Ct, ND NY 2009]; *contra* ***Handy & Harman v American Intern. Group, Inc.***, 2008 WL 3999964 [Sup Ct, New York County 2008]). Accordingly, that branch of the defendant's motion for summary judgment which seeks to dismiss the plaintiff's demand for consequential damages and for partial summary judgment limiting its potential liability, is denied.

Dated: 17 Sept. 2012



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION