Key Fat Corp. v Rutgers Cas. Ins. Co.
2017 NY Slip Op 30476(U)
March 10, 2017
Supreme Court, Queens County
Docket Number: 7568/15
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

KEY FAT CORP. AND SENECA INSURANCE CO.,

Index No: 7568/15

Plaintiff,

Motion Date: 10/14/16

-against-

Motion Seq. No.: 2

RUTGERS CASUALTY INSURANCE CO.,

Defendant.

The following papers numbered 1 to 13 read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7) and, alternatively, for summary judgment pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 8
Answering Affidavits - Exhibits.....	9 -11
Reply Affidavits	12-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs in this, inter alia, declaratory judgment action, seek to recover a portion of the approximately $4.3 million Seneca Insurance Company ("Seneca") paid to satisfy a judgment entered against its insured Key Fat Corp. (Key Fat), in a personal injury action captioned *Manuel Guallpa v Key Fat Corp*., under Index Number 19005/2006, that was filed in Supreme Court, Queens County. After it exhausted its appellate remedies relating to the coverage issues raised by the *Guallpa* action, Rutgers Casualty Insurance Company ("Rutgers") paid to Seneca, the limits of its policies of insurance applicable to that claim. Prior to the payment by Rutgers, plaintiffs commenced the instant action for, inter alia, consequential damages based on defendant's alleged "bad faith" action[s]. Defendant moves to dismiss the complaint on the grounds of failure to state a cause of action and or

documentary evidence; and, alternatively, for summary judgment in its favor. Plaintiffs oppose the motion.

Facts

As pertaining to the underlying action, while working as a construction worker for his employer, Bando Construction, Inc. (hereinafter Bando), at a property Bando leased from the plaintiff Key Fat Corp. (hereinafter Key Fat), on June 30, 2006, Manuel Guallpa allegedly fell from a ladder, sustaining injuries. He commenced an action to recover damages for personal injuries against Key Fat (hereinafter the underlying action), which instituted a third-party action against Bando. Key Fat's insurer, Seneca Insurance Company (hereinafter Seneca), informed Bando and its insurer, Rutgers Casualty Insurance Company ("Rutgers"), that although it was providing defense and indemnification for the underlying action, it was requesting that Rutgers immediately assume those obligations. On March 26, 2007, Rutgers informed Bando that it was disclaiming coverage based upon a certain exclusion in the commercial general liability insurance policy it had issued to Bando (hereinafter the Policy). By letter dated April 17, 2007, Rutgers informed Seneca of the disclaimer. Key Fat was not so informed. A judgment was ultimately entered in favor of Guallpa and against Key Fat, awarding damages for his injuries, and Key Fat was awarded summary judgment on its third-party claims against Bando for common-law and contractual indemnification. Following an inquest, the Supreme Court entered a judgment on September 16, 2011, in favor of Key Fat and against Bando.

Plaintiffs in this action assert that the *Guallpa* action alleged that Manuel Guallpa was injured on or about June 30, 2006, while at premises owned by Key Fat that had been leased to defendant's insured and Guallpa's employer, Bando. Plaintiffs also allege that the lease required Bando to indemnify and hold Key Fat harmless for liability arising out of Bando's use and occupancy of the property. The complaint in this action further alleges that Key Fat was granted summary judgment on its contractual indemnity claim against Bando for the judgement entered against Key Fat in the *Guallpa* action.

Prior to filing the instant action, plaintiffs filed a similar action with this court, also captioned *Key Fat Corp. and Seneca Insurance Company v Rutgers Casualty Insurance Company*, under Index Number 977/2012 ("the prior coverage action"). One of the issues litigated in the prior coverage action was whether defendant had provided Key Fat with notice of its disclaimer of coverage under the policies of insurance issued to Bando for the claims asserted in the *Guallpa* action. Defendant asserted in that prior coverage action that its disclaimer of coverage, based on an exclusion in its policies, barred coverage for injuries to an insured's employees, and was valid as to any claim asserted by plaintiff Key Fat. By Order entered February 5, 2013, the court disagreed and determined that Rutger's disclaimer was not valid as against Key Fat because a copy of the disclaimer letter had not been

provided directly to Key Fat. Rutgers appealed the decision, to no avail. The Appellate Division, Second Department upheld the motion court's determination (Key Fat Corp. v Rutgers Cas. Ins. Co., 120 AD3d 1195, 1197 [2d Dept. 2014]). Defendant's motion to reargue the Appellate Division's decision was denied, as was defendant's motion to the Court of Appeals for leave to appeal the Appellate Division's decision.

After the motion for leave to appeal to the Court of Appeals was denied, plaintiffs and defendant entered into a series of discussions, through counsel, regarding defendant's obligation to pay any portion of the $4.3 million that Seneca paid to indemnify Key Fat in the *Guallpa* action. Notably, the primary policy issued to Bando by defendant provided limits of liability of $1 million per occurrence. The umbrella liability policy issued by defendant to Bando also provided limits of $1 million per occurrence. The discussions eventually led to a payment by defendant to Seneca of the limits of its policies plus interest up to that point, totaling $2,434,465.65, and Seneca provided a partial release. The settlement post-dated the filing of the instant lawsuit, and the filing of the answer in this matter, and was allegedly intended as a resolution of at least part of the instant lawsuit.

The instant lawsuit asserts three causes of action. The first seeks a declaration that Bando is insured under the excess liability policy issued to it by Rutgers. The second cause of action seeks a declaration that Rutgers is estopped from asserting that an "injury to employee" exclusion bars coverage to Bando. The third cause of action seeks to assert a bad faith claim against defendant.

By the instant motion, defendant moves to dismiss the complaint for failure to state a cause of action and on the ground of documentary evidence; and, alternatively, for summary judgment in its favor. Plaintiffs oppose the motion.

Discussion

To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 [2002]; *Jesmer v. Retail Magic, Inc.,* 55 AD3d 171, 180 [2008]; *Prudential Wykagyl/Rittenberg Realty v. Calabria–Maher,* 1 AD3d 422 [2003]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v. John Doe 1,* 73 AD3d 78, 86 [2010]). "Dismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' " (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 NY2d 144, 152, quoting *Leon v. Martinez,* 84 NY2d 83, 88 [1994]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez,* 84 NY2d at 87–88). Such a motion should be granted where, even viewing the allegations as true, the plaintiff cannot establish a cause of action (*see Morales v. Copy Right, Inc.,* 28 AD3d 440, 441 [2006]; *Hartman v. Morganstern,* 28 AD3d 423, 424 [2006]).

The branch of the motion which is to dismiss count one of the complaint pursuant to CPLR 3211[a][1], is granted. "[W]here as here, an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease" (*Hosp. for Joint Diseases v. Hertz Corp*., 22 AD3d 724, 725 [2005], *quoting Presbyterian Hosp. in City of N.Y. v Liberty Mut. Ins. Co.,* 216 AD2d 448 [1995]; *see Hospital for Joint Diseases v State Farm Mut. Auto. Ins. Co.,* 8 AD3d 533, 534 [2004]; *New York & Presbyt. Hosp. v Progressive Cas. Ins. Co.,* 5 AD3d 568, 570 [2004]).

The second cause of action is rendered moot since the declaration plaintiff seeks was decided by the Appellate Division in the prior litigation (*see Key Fat Corp. v Rutgers Cas. Ins. Co.*, 120 AD3d 1195 [2014]). There is no basis to re-litigate the second cause of action.

As to the remaining cause of action, any cause of action against an insurer for "bad faith" would sound in contract; the common law duty of good faith is one that arises from the insurance contract (*see Gordon v Nationwide Mut. Ins. Co.,* 30 NY2d 427 [1972], *cert denied* 410 US 931 [1973]). Under New York law, once an insurer has assumed the defense of a claim asserted against its insured, "it has a duty ... to act in 'good faith' when deciding whether to settle such a claim, and it may be held liable for breach of that duty" (*Pinto v. Allstate Ins. Co.,* 221 F.3d 394, 398 [2d Cir. 2000]).

At the outset, plaintiffs lack standing to assert a claim for breach of the implied covenant of good faith and fair dealing against Rutgers. Plaintiffs are not parties to the insurance contracts issued by Rutgers to Bando. As such, they do not have contractual privity with defendant and cannot bring an action which asserts a claim for bad faith against Rutgers in their own right. Under New York law, a party such as plaintiffs who are not in privity of contract with the insurer lacks standing to assert a claim for breach of the duty of good faith and fair dealing *(see Continental Cas. Co. v. Nationwide Indemnity Co.*, 16 AD3d 353, 354 [2005] (Defendants' counterclaim for breach of the implied covenant of good faith and fair dealing ... was properly dismissed since there is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations under an insurance policy ..., and until they obtain a judgment against the insulation contractor that goes unsatisfied, defendants lack standing to enforce insurance policies to which they were not parties);

Cinderella Holding Corp. v. Calvert Ins. Co., 265 AD2d 444, 444 [1999] (holding, among other things, that cause of action for breach of the insurance carrier's duty of good faith and fair dealing should have been dismissed insofar as asserted by corporation's sole shareholder, who in the absence of privity of contract, lacked standing to assert such a cause of action); *cf., Plaisir v Royal Home Sales,* 81 AD3d 799 [2011]; *CDJ Builders Corp v Hudson Group Construction,* 67 AD3d 720 [2009]; *Grinnell v Ultimate Realty, LLC,* 38 AD3d 600 [2007]; *M. Paladino, Inc. v Lucchese & Son Contracting Corp.,* 247 AD2d 515 [1998]). Thus, the absence of contractual privity between plaintiffs and Rutgers bars any claim for bad faith.

Even if plaintiffs had standing, the strict standard for alleging a bad faith claim under New York law has not been met. There is "a strong presumption in New York against a finding of bad faith liability by an insurer," (*Gelfman v Capitol Indem. Corp.,* 39 F. Supp. 3d 255, 274 [E.D.N.Y. 2014], *citing Hugo Boss Fashions, Inc. v. Federal Ins. Co.,* 252 F.3d 608, 624 [2d Cir.2001]), which can be "rebutted only by evidence establishing that the insurer's refusal to defend was based on 'more than an arguable difference of opinion' and exhibited 'a gross disregard for its policy obligations,' "(*id.* at 625 quoting *Sukup v. New York,* 19 NY2d 519, 521[1967]); *see also All State Vehicles v. Allstate Ins. Co.,* 620 F.Supp. 444, 447 (S.D.N.Y.1985) (holding that insurer's refusal to settle, and failure to file answer, without "morally culpable or dishonest conduct on the part of [the insurer,] ... are insufficient to establish bad faith").

In order to establish a prima facie case of bad faith, the 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 interests of its insured with its own interests when considering a settlement offer *(Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453–54[1993]; *see, Lozier v Auto Owners Ins. Co.,* 951 F2d 251 [9th Cir 1992]). None of plaintiff's arguments are sufficient to overcome the presumption against bad-faith liability. Even viewed in the light most favorable to plaintiffs, the existing record does not support a finding that Rutgers' decision to disclaim coverage evidences bad faith.

The record indicates that defendant relied on an otherwise valid policy exclusion to disclaim coverage for Key Fat's claim. Various courts have upheld the validity of the same or similar policy language in an appropriate case (*see Utica First Ins. Co. v. Santagata*, 66 AD3d 876 [2009]; *see* e.g., *Beach 20th Realty LLC v U.S. Liability Ins. Group*, NYLJ, September 24, 2009, p. 27, col. 1 [Sup Ct, Queens Co 2009] (decedent was an employee of the electrical contractor hired by the insured to perform work at the premises); *York Hunter Constr. Servs. v. Great Am. Custom Ins. Servs., Inc*., 2008 WL206950 [Sup Ct, NY Co 2008] (injured worker was employed by a subcontractor of insured); *Alcon Bldrs. Group, Inc v U. S. Underwriters Ins Co*, 20 Misc3d 1115(A) [Sup.Ct, NY Co 2008] (injured worker was an

employee of electrical subcontractor hired by insured). Here, Rutgers was denied the exclusion on the ground that it to satisfy the technical requirements of Insurance Law §3420.

That defendant could have acted more expeditiously does not convert inattention into a gross disregard for the insured's rights, particularly where, as here, there is no contention that the insurer failed to carry out an investigation, to evaluate the feasibility of settlement *(cf., Knobloch v Royal Globe Ins. Co.,* 38 NY2d 471, 480 [1976]*),* or to offer the policy limits before trial after the weakness of the insured's litigation position was clearly and fully assessed *(see e.g. DiBlasi v. Aetna Life & Cas. Ins. Co.*, 147 AD2d 93, 105 [1989]).

By any view of the evidence, the record lacks any pattern or indicia of reckless or conscious disregard for the insured's rights upon which the court could uphold a bad-faith judgment (*see Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 456 [1993]).

Accordingly, the motion to dismiss is granted.

Dated: March 10, 2017

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J.S.C.