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| <b>Travelers Prop. Cas. Co. of Am. v ICCO Cheese Co.,<br/>Inc.</b>   |
| 2017 NY Slip Op 30730(U)   |
| April 11, 2017   |
| Supreme Court, New York County   |
| Docket Number: 652787/2016   |
| Judge: Anil C. Singh   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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TRAVELERS PROPERTY CASUALTY COMPANY  
OF AMERICA, THE TRAVELERS INDEMNITY  
COMPANY and THE CHARTER OAK FIRE  
INSURANCE COMPANY,

DECISION AND  
ORDER

Index No.  
652787/2016

Plaintiffs,

-against-

ICCO CHEESE COMPANY, INC., and WAL-MART  
STORES, INC.,

Defendants.

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HON. ANIL C. SINGH, J.:

At issue here is whether defendants in a coverage dispute with an insurer may seek consequential damages based on breach of the implied covenant of good faith and fair dealing.

This declaratory judgment action brought by plaintiffs Travelers Property Casualty Company of America, the Travelers Indemnity Company and the Charter Oak Fire Insurance Company (collectively, "Travelers") has its genesis in a series of class action lawsuits commenced by third parties alleging that Wal-Mart Stores Inc.'s ("Wal-Mart") brand "100% Grated Parmesan Cheese" is not 100% Parmesan cheese and allegedly contains cellulose. The cheese was allegedly

manufactured by ICCO Cheese Company, Inc. ("ICCO"). Travelers issued a number of policies to ICCO. Wal-Mart tendered to its defense and indemnification to ICCO under a supplier agreement. In turn, ICCO tendered and demanded coverage from Travelers in connection with Wal-Mart's demands. Wal-Mart maintains that it is an additional insured under the policies and that Travelers has a duty to defend and indemnify it in the class action cases.

Travelers commenced this action by filing a complaint on May 24, 2016, seeking a declaration of the rights, duties and obligations of the parties under the insurance policies issued by plaintiffs to ICCO. The complaint seeks a declaration, *inter alia*, that plaintiffs have no duty to defend ICCO or to defend Wal-Mart on behalf of ICCO or otherwise against the class action claims.

Wal-Mart and ICCO have interposed substantially similar counterclaims, which have now been amended. The amended counterclaims allege that Travelers has breached the terms of the policies as well its duty of good faith and fair dealing by denying coverage. Wal-Mart contends that Travelers has a conflict of interest with it as some of the claims are covered and others may not. However, Travelers refuses to assume its defense obligations. Defendants maintain that based on Travelers' breach of its duty of good faith and fair dealing, they are entitled to "extra-contractual cosequential damages [which] may include attorneys'

fees, attorneys' fees for this litigation and other damages..." (Wal-Mart's brief in opp. at p. 7).

Implicit in all contracts is a covenant of good faith and fair dealing (Dalton v. Educational Testing Service, 87 NY2d 384 (1995)). However, a claim for breach of implied covenant of good faith and fair dealing may not be raised if "it is premised on the same conduct that underlies the breach of contract cause of action and is 'intrinsically tied to the damages allegedly resulting from breach of the contract'" (MBIA Ins. Corp v. Merrill Lynch, 81 AD3d 419, 420 (1<sup>st</sup> Dept. 2011)) quoting Hawthorne Group v. RRE Ventures, 7 AD3d 320, 323 (1<sup>st</sup> Dept. 2004). Where a claim for breach of implied covenant of good faith and fair dealing is duplicative of a breach of contract claim, it should be dismissed (see, Netologic, Inc. v. Goldman Sachs Group, Inc., 110 A.D.3d 433, 434 (1<sup>st</sup> Dept. 2013); Logan Advisors, LLC v. Patriarch Partners, LLC, 63 A.D.3d 440, 443 (1<sup>st</sup> Dept. 2009)).

Wal-Mart relies on Bi-Economy Market, Inc. v. Harleystown Insurance Co. of New York, 10 NY3d 187 (2008), for the principle that consequential damages as extra-contractual relief may be sought by policyholders for breach of the implied covenant of good faith and fair dealing. It argues that Travelers breached its duty of good faith by failing to assume its responsibilities under ICCO's insurance policies, by failing to advise Wal-Mart that independent counsel was

necessary, by failing to pay for independent counsel and by suing Wal-Mart and ICCO instead of providing coverage.

In Bi-Economy, plaintiff/insured sustained a loss of its inventory and structural damage to its building as a result of a catastrophic fire. Plaintiff had purchased business interruption insurance which required the insurer to pay for the actual loss of business income. It filed a claim for lost business income. The insurer only made a partial payment. Plaintiff did not resume its business operations. It later brought an action alleging, *inter alia*, bad faith seeking consequential damages for the loss of its business based on the insurer's failure to make timely payment on its business interruption claim.

The Court of Appeals noted that "unusual or extraordinary" consequential damages may be sought, provided they are within the contemplation of the parties at the time they enter into the contract (Bi-Economy, 10 NY3d at 192).

Business interruption coverage serves to allow a business to continue its operations in the event of a disaster. "Thus, the very purpose of business interruption coverage would have made Harleysville aware that if it breached its obligations under the contract to investigate in good faith and pay covered claims it would have to respond in damages to Bi-Economy for the loss its business as a result of the breach (citation omitted)" (*id.* at 195). Accordingly, based on the

insurer's breach of its duty to act in good faith to timely investigate and pay the business interruption claim, the insured could seek consequential damages for loss of the insured's business.

Wal-Mart's reliance on Bi-Economy is misplaced. The consequential damages sought by the insured was for the loss of its business as a result of the insured's failure to comply with the business interruption provision. Here, the damages sought by defendants are the attorneys' fees incurred as a result of Traveler's refusal to provide coverage (pp. 6-7 of Wal-Mart's brief in opp.). Wal-Mart does not point to any provision in the insurance policies that provide a basis to recoup attorneys' fees or other consequential damages that are reasonably foreseeable or contemplated at the time of the contracting in the event Travelers refused to provide coverage in suits brought by third parties.

The same set of facts – namely, that Travelers breached the policy terms as well its duty of good faith and fair dealing by denying coverage, by failing to provide a defense and appoint independent counsel – give rise to both counterclaims. Wal-Mart contends that it “is entitled to a defense, indemnification, compensatory damages, pre- and post-judgment interest, and attorneys' fees and costs based on Travelers conduct” (Wal-Mart's Amended Answer and Counterclaim at para. 37). The damages for both breach of contract

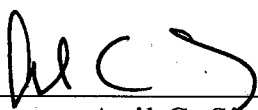
and breach of the implied covenant of good faith and fair dealing are intertwined.

This is in contrast to Bi-Economy, where plaintiff was seeking extra-contractual damages for loss of its business.

For these reasons, Travelers motion to dismiss ICCO and Wal-Mart's counterclaims for breach of the implied covenant of good faith and fair dealing and for consequential damages is granted.<sup>1</sup>

The foregoing constitutes the decision and order of the court.

Date: April 11, 2017  
New York, New York

  
Anil C. Singh

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<sup>1</sup>Plaintiffs' have withdrawn the branch of their motion for a more definite statement of ICCO's counterclaims pursuant to CPLR 3024(a).