SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ALLSTATE INSURANCE COMPANY A/S/O ROSELA A. MILANEZ and ROMMEL R. MILANEZ,

Plaintiff,

- against –

JOSE MOROCHO and CARLOS MOROCHO,

Defendants.
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DECISION and ORDER
Index No. 800211/2021E

**HON. DORIS M. GONZALEZ**

Upon the foregoing papers, the defendants Jose Morocho ("Jose") and Carlos Morocho ("Carlos") (collectively, "Defendants") move for an order dismissing the complaint of the plaintiff Allstate Insurance Company, a/s/o Rosela A. Milanez and Rommel R. Milanez ("Plaintiff") for failure to state a cause of action pursuant to CPLR 3211(a)(7). Plaintiff opposes the motion and cross-moves for an order granting it leave to serve an amended complaint pursuant to CPLR 3025(b). Defendants opposes the cross-motion.

The motion and cross-motion have been transferred to the undersigned due to the unavailability of Justice Mary Ann Brigantti.

Plaintiff alleges that it is the insurer of Rosela R. Milanez and Rommel R. Milanez (hereinafter the "Insureds") under a homeowners insurance policy covering the Insureds' property located at 1648 Radcliff Avenue, Bronx, New York (the "Property"). Plaintiff alleges that they are entitled to claim and pursue subrogation rights against third parties for losses paid out under the policy. Plaintiff alleges that on November 16, 2019, a fire occurred at the Property while non-party City Wide General Construction, Inc. ("City Wide") and its principal and employees, these defendants, were performing roofing work. The complaint alleges that the resulting property damage caused solely caused by Defendants' negligence in *inter alia* operating a blow torch in an unsafe manner and failing to properly supervise employees performing the roofing work. Plaintiff remitted a total of $60,587.87 to the Insureds for the damage to the Property, and Plaintiff now seeks a judgment against Defendants in that amount.

Defendants move to dismiss the complaint, alleging that it fails to cause of action. Plaintiff opposes, and cross-moves for leave to serve an amended complaint with additional facts concerning Defendants' negligent conduct.

Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 AD2d 205 [1st Dept. 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]; *see also M.H.B. v. E.C.F.S.*, 177 A.D.3d 479, 480 [1st Dept. 2019]["[I]n the context of this motion to dismiss, the Court does not assess the relative merits of the complaint's allegations against defendant's contrary assertions or to determine whether or not plaintiffs can produce evidence to support their claims"]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (CPLR 3026). The court must "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 into any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 AD2d 98 [1st Dept. 1992]).

Defendants here assert that, as per Plaintiff's allegations, this matter arises from construction work in which Plaintiff's Insureds had a contract with non-party City Wide, and Defendants are the principal and employee of City Wide. Defendants contend that persons may not be held individually liable on contracts of their corporations absent certain circumstances, and "[o]fficers, directors or employees of a corporation do not become liable to one who has contracted with the corporation for inducing the corporation to breach its contract merely because they have made decisions and taken actions that resulted in the corporation's breaching its contract" (Defs. Memo. of Law at 4-5, citing *Stern v. H. DiMarzo, Inc.*, 77 A.D.3d 730, 730-

31 [2d Dept. 2010]). Defendants, further assert: "[W]hen an officer or director acts on behalf of his [or her] corporation, he [or she] may not be held liable for inducing [the] corporation to violate its contractual obligations unless his [or her] activity involves separate tortious conduct or results in personal profit" (*id.*, citing *Stern*, 77 A.D.3d at 730-31). Defendants therefore argue that Plaintiff's complaint is deficient because "there are no allegations of intentional torts" or that Defendants "had purported to bind themselves individually to this construction contract," and "[t]here are no allegations stating that the defendants' tortious conduct resulted in personal profit."

Plaintiff, however, is not asserting a breach of contract claim against Defendants. Plaintiff instead alleges that the Defendants engaged in "separate tortious conduct" (*id.*), that they were affirmatively negligent in using a blow torch on the Insureds' roof thus starting a fire and causing property damage. With respect to Carlos, an alleged employee of City Wide, it is well-settled that an agent is liable to a third party harmed by the agent's tortious conduct, regardless of whether the agent was acting "as an agent or an employee, with actual or apparent authority, or within the scope of employment" (Restatement [Third] of Agency §7.01 [2006]; *see, e.g., DePetris & Bachrach LLP v. Srour*, 71 A.D.3d 460, 463 [1st Dept. 2010]). Plaintiff thus adequately stated a negligence claim against Carlos.

With respect to Jose, the alleged principal of City Wide, "it has long been held by [the First Department] that a corporate officer who participates in the commission of a tort may be held individually liable… regardless of whether the corporate veil is pierced" (*Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 49 [1st Dept. 2012]; *see also Ramos v. 24 Cincinatus Corp.*, 104 A.D.3d 619, 620 [1st Dept. 2013]). Here, Plaintiff's complaint alleged that Jose actively participated in the tort by negligently operating a blow torch on the subject roof and/or for failing to properly supervise employees performing the roofing work at the property (*see, e.g., Peguero v. 601 Realty Corp.*, 58 A.D.3d 556, 558-59 [1st Dept. 2009][personal liability may be imposed on a corporate officer for an affirmative tortious act]).

In light of the foregoing, Defendants' motion to dismiss pursuant to CPLR 3211(a)(7) is denied.

Cross-Motion to Amend

Plaintiff cross-moves for leave to serve an amended complaint to assert additional facts as to the negligent conduct and liability of Defendants. It is "fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502 [1st Dept 2011] *citing* CPLR 3025[b]). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations…but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit…" (*MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499 [1st Dept. 2010]). Plaintiff's proposed amended complaint includes additional facts, and the cross-motion is supported by a report from its fire investigator. The report notes, among other things, that after this incident occurred, Jose Morocho was arrested for reckless endangerment due to his company using a torch on a combustible roof. Plaintiff's submissions satisfy its minimal burden of showing that the proposed amended complaint is not "is not palpably insufficient or clearly devoid of merit" (*see Brummer v. Wey*, 187 A.D.3d 566 [1st Dept. 2020]). Defendants do not allege that they will suffer any prejudice because of the proposed amendments. Furthermore, Plaintiff's failure to "red-line" the proposed amended complaint may be overlooked since Plaintiff's affirmation of counsel sufficiently highlighted the proposed amendments (*see Berkeley Research Group, LLC v. FTI Consulting, Inc.*, 157 A.D.3d 486, 490 [1st Dept. 2018]).

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss is denied, and it is further,

ORDERED, that Plaintiff's cross-motion for leave to serve an amended complaint is granted, and a supplemental summons and amended complaint, in the form annexed to the cross-motion papers, shall be served, in accordance with the CPLR, upon the parties in this action within 30 days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of this Court.

ENTER

Dated: 12/30/2021

Doris M. Gonzalez, J.S.C.