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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

NATIONAL FIRE INSURANCE COMPANY,
Plaintiff,

-against-

JAMES WRYNN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS ADMINISTRATOR OF THE NEW YORK PROPERTY/ CASUALTY INSURANCE SECURITY FUND AND AS ANCILLARY RECEIVER OF RELIANCE INSURANCE COMPANY and THE NEW YORK LIQUIDATION BUREAU,
Defendants.

INDEX NO. 100526/2010

MOTION SEQ. NO. 001

The following papers were read on the motion by defendants to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

BACKGROUND

Reliance Insurance Company (Reliance) was a Pennsylvania-based insurance company that was placed in liquidation on October 3, 2001, pursuant to an order of the Pennsylvania Superior Court (Motion, exhibit B). On December 14, 2001, the New York State Supreme Court, New York County, entered an order appointing the Superintendent of Insurance of the State of New York (Superintendent) as ancillary receiver of Reliance (Motion, exhibit C).

On October 21, 1999, Charles Lanza (Lanza), an employee of Westchester Waste Services, was struck by a truck owned by A-1 Compaction, Inc. (A-1) that was being operated by Paul G. Troy (Troy). A-1 was a subsidiary of Waste Management, Inc. (Waste Management), which was insured by Reliance. On or about February 8, 2002, Lanza and his wife instituted a personal injury action in the New York State Supreme Court, Westchester County, against A-1 and Troy (the underlying action).

The Reliance policy was a commercial auto/truckers insurance policy, with a $1 million comprehensive single limit of coverage and a $5,000.00 deductible (Motion, exhibit A). Transcontinental Insurance Company (Transcontinental) insured Waste Management and its subsidiaries with a commercial liability excess insurance policy, effective November 1, 1998 to January 1, 2000, with limits of $25 million each accident and in the aggregate (*id.*). Plaintiff is the successor-in-interest to Transcontinental.

The New York Property/Casualty Insurance Security Fund (P/C Fund)[1] provided a defense to A-1 and Troy in connection with the underlying matter, which, eventually, went to trial on the issue of liability. The jury in the underlying action found A-1 and Troy 100% liable for Lanza's injuries. At the damage portion of the trial, the jury awarded Lanza $2.5 million (*id.*).

The underlying action was appealed, and the parties agreed to settle the matter for $1,842,000.00, of which the P/C Fund agreed to pay $995,000.00 ($1 million less the $5,000.00 deductible), upon allowance by the ancillary receivership court, and plaintiff agreed to pay $842,000.00 (Motion, exhibit D).

On February 23, 2010, plaintiff served a summons and verified complaint on the NYLB,

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[1]The P/C Fund is a statutory fund created under New York Insurance Law (Ins. Law) Article 76 (Article 76) to protect insureds and injured third parties who are detrimentally affected as the result of the insolvency of insurance companies licensed to do business in New York (*see* Ins. Law § 7603 [a] [1]; *Matter of Reliance Ins. Co.*, 35 AD3d 191 [1st Dept 2006]). The New York State Commissioner of Taxation and Finance (Commissioner) is the custodian of the P/C Fund (*see* Ins. Law § 7607 [a]; *Alliance of Am. Insurers v Chu*, 77 NY2d 573 [1991]).

Under Ins. Law § 7603 (a)(1), the P/C Fund may be used only for the payment of "allowed claims remaining unpaid, in whole or in part, by reason of the inability due to insolvency of an authorized insurer to meet its insurance obligations under policies." In order to be entitled to receive payment from the P/C Fund, a claimant must meet the requirements set forth in Article 76 (*see Matter of Reliance Ins. Co.*, 35 AD3d 191 [1st Dept 2006]: (1) the claimant must be insured with an authorized insurer that cannot be paid because the insurer is insolvent; (2) the claim arises out of a policy recognized under Ins. Law § 7603 (a)(1); and (3) the claimant resides or the risk is located in New York.

Pursuant to Ins. Law, once a claim is submitted, it is reviewed and handled by New York Liquidation Bureau (NYLB), which performs claims handling on behalf of the P/C Fund administrator. If NYLB determines that the claim is eligible for payment from the P/C Fund, NYLB submits the claim to court for allowance within the receivership proceedings of the insolvent insurance company. If the claim is allowed by the court, NYLB is required to submit a request for payment to the Commissioner, who authorizes disbursement from the P/C Fund (Ins. Law § 7608 [a]).

and on July 12, 2010, the complaint was amended to include the other defendants (Motion, exhibits E and A). The amended complaint asserts only one cause of action for bad faith claim handling with respect to defendants' failure to settle the underlying action. Defendants now move, pursuant to CPLR 3211 (a)(2) and (7), to dismiss plaintiff's amended complaint.

It is defendants' position that they are immune from suit, pursuant to the doctrine of sovereign immunity, because they are, or represent, a State agency. Defendants assert that, if plaintiff wishes to pursue P/C Funds, it must either commence a proceeding pursuant to CPLR Article 78, seek relief in the Court of Claims, or submit a claim in the Reliance ancillary receivership proceeding, pursuant to Articles 74 and 76. It is noted that plaintiff has not submitted a claim pursuant to Article 76. As an alternative argument, defendants assert that there is no cause of action under New York law for "bad faith" lawsuits asserted against the Superintendent or NYLB.

Defendants also claim that, pursuant to the ancillary receivership order, plaintiff's action is enjoined. The ancillary receivership order states, in pertinent part, that all persons who have claims against Reliance:

> "are hereby enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said company or estate, the Superintendent and his successors in office, as Ancillary Receiver thereof, or the New York State Insurance Department–Liquidation Bureau with respect to claims against [Reliance], or from making or executing any levy upon the property or estate of said company, or the Superintendent as Ancillary Receiver, or the New York State Insurance Department–Liquidation Bureau, or from in any way interfering with the Superintendent or his successors in office, in his or their possession, control or management of the property of said company, or in the discharge of his or their duties as Ancillary Receiver thereof, or in the liquidation of the business of said company (Motion, exhibit C)."

In opposition to the instant motion, plaintiff maintains that, despite several offers to settle

the underlying action within the limits of the policy (Opp., exhibits E, H, I, L, N, O, P, Q, T, U), defendants refused to settle the matter, thereby engendering liability on the part of plaintiff. The court notes that the various exhibits provided by plaintiff indicate that Lanza was initially willing to settle the case for $875,000.00, but that NYLB was offering between $100,000.00 and $175,000.00, and that it never wavered from those amounts.

Furthermore, plaintiff contends that, acting in the role of liquidator, defendants are acting in a private capacity in the role of the insolvent insurer and, hence, are amenable to suit. In addition, plaintiff points out that defendants have failed to provide a single New York judicial authority that prohibits "bad faith" claims from being asserted as against the named defendants.

In reply, defendants argue that the complaint always refers to the Superintendent in his capacity as administrator of the P/C Fund, not as the ancillary receiver, and the law distinguishes the role of administrator from receiver; in the former function, the Superintendent is providing a public function and is immune from suit. Moreover, defendants argue that the Superintendent is not the receiver because Reliance is not a New York domestic insurer, and that the Pennsylvania court appointed the Pennsylvania Commissioner of Insurance as Reliance's liquidator. Defendants aver that the Superintendent's sole function is to administer claims for Reliance under the P/C Fund, and that the Superintendent holds no assets and processes no claims for Reliance.

Defendants assert that the complaint alleges a mishandling of the underlying action, which was handled by the Administrator, whereas the Superintendent, as ancillary administrator, does not handle or settle claims, and is only responsible for submitting claims to court for allowance. The Court notes that, in some of the submissions provided by plaintiff, the NYLB is, in fact, making settlement offers, as noted above. However, defendants say that, even if they did play a role in the settlement negotiations in the underlying action, plaintiff is still enjoined from pursuing this matter, based on the court injunctive restraints previously imposed

and noted above.

Defendants also argue that public policy disfavors permitting the P/C Fund to be sued for bad faith, because it is intended to make payments only for the limited circumstances appearing in Article 76.

MOTION TO DISMISS STANDARD

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> (2) the court has not jurisdiction of the subject matter of the cause of action; or
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> * * *
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> (7) the pleading fails to state a cause of action; . . ."

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999].)

DISCUSSION

In sum and substance, defendants argue three theories in support of their motion to dismiss: (1) they are immune from suit as a state agency; (2) New York law does not provide for a "bad faith" cause of action against them; and (3) the suit is prohibited by the injunction placed on claims asserted against Reliance. The Court finds all of these arguments unpersuasive and therefore defendants' motion to dismiss is denied.

It has long been held that the Superintendent of Insurance serves in two distinct capacities: one, as supervisor and regulator of New York's insurance industry; and two, as a court-appointed receiver on behalf of distressed insurers (*see Matter of Dinallo v DiNapoli*, 9 NY3d 94, 97 [2007]). When acting as a court-appointed receiver, as in the instant matter, the Superintendent is serving a private function, and is charged with rehabilitating, liquidating and conserving the assets of insolvent insurance companies (*id.*). Further, as liquidator and receiver, the Superintendent is responsible for dealing with the insolvent insurer's assets in his own or the insurer's name, and stands in the shoes of the insurer (*see* Ins. Law § 7405; *Matter of Midland Ins. Co.*, 79 NY2d 253 [1992]). As Reliance's ancillary receiver, the Superintendent occupies a legal personality separate and distinct from his role as public regulator, and may be sued for his own negligence in the handling of an insolvent estate (*see generally Matter of Ideal Mut. Ins. Co.*, 140 AD2d 62 [1st Dept 1988] [negligence claim was denied because it was asserted against Superintendent for his actions in his regulatory role before he was appointed receiver]).

In the case at bar, the cause of action asserted against defendants alleges malfeasance in their private, non-public, role. Under these circumstances, defendants may not assert a defense of sovereign immunity, which is reserved for public functions.

Further, the fact that the complaint refers to the Superintendent as the administrator of the P/C Fund, his title, does not override the factual assertions, which all concern his function

as receiver and liquidator of Reliance. The Court is not swayed by this argument of form over substance.

Lastly, the Court does not agree with the defendants' argument that the Superintendent is not the receiver because Reliance was a Pennsylvania-based insurer and a receiver was appointed by the Pennsylvania court. The Superintendent was appointed Reliance's ancillary receiver to deal with New York assets and claims, and hence is the receiver for all New York purposes.

Defendants' second theory, that of preclusion of this suit based on the injunctive language quoted above in the order issued when the Superintendent was appointed ancillary receiver, is a misreading of the order. The order only enjoins claims against Reliance; this suit is a claim against defendants for their own malfeasance, not an insurance claim against Reliance. Hence, the restriction on suits previously imposed by the court does not bar the present action.

Finally, defendants have presented no New York judicial authority to support their contention that a claim for "bad faith" against the Superintendent does not exist in this state and, consequently, they have failed to meet their burden with respect to this argument.

A cause of action for bad faith in failing to settle claims is permitted to be asserted against insurers who accept the obligation to defend an action asserted as against their insureds (*see Pavia v State Farm Mutual Automobile Insurance Company*, 82 NY2d 445 [1993]; *Federal Ins. Co. v North Am. Specialty Ins. Co.*, 83 AD3d 401 [1st Dept 2011]). As noted above, in his position as ancillary receiver, the Superintendent is standing in the shoes of the insurer (*see Matter of Ideal Mutual Insurance Company*,140 AD2d 62, *supra*), and is in no better position that the insurer would be (*see Matter of Midland Ins. Co.*, 79 NY2d at 265). Therefore, if a cause of action may be maintained against an insurer for failing to settle a claim in good faith, that cause of action may be asserted as against the receiver who is standing in

the shoes of the insurer.

Furthermore, defendants' argument that it is only authorized to present claims to the court for approval is a mischaracterization of their function. The Superintendent, the P/C Fund and NYLB are charged with reviewing claims to determine their legitimacy, and then to present them to the court (*Matter of Midland Ins. Co.*, 16 NY3d 536 [2011]). As part of this obligation, receivers may attempt to settle claims so as to minimize the reduction of the insurer's assets, before submitting the claims to the court for approval. Court approval is needed only for payment of claims that fall within the purview of the insurance law; defendants have never alleged that Lanza's claim was not a legitimate claim. In addition, the fact that defendants engaged in settlement negotiations in the instant matter underscores their function as Reliance's ancillary receiver. However, whether or not defendants acted in good faith in refusing to settle the claim remains a question of fact which cannot be resolved in a motion to dismiss.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is denied; and it is further,

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that all parties are directed to appear for a preliminary conference at 60 Centre Street, New York, New York, Room 341, on March 28, 2012 at 11:00 a.m.

This constitutes the Decision and Order of the Court.

Dated: 12/30/11

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**