Marbury v Chaucer Synidicates, Ltd.
2012 NY Slip Op 33904(U)
December 19, 2012
Supreme Court, Westchester County
Docket Number: 59532/2011
Judge: Sam D. Walker
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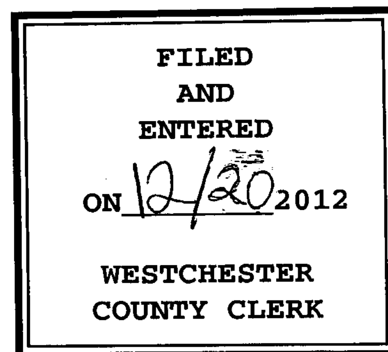
To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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LATASHA MARBURY

Plaintiff,

-against-

CHAUCER SYNDICATES, LTD., THE CCL PARTNERSHIP, LLP, ARGENTA HOLDINGS, PLC, LIBERTY SYNDICATES, TALBOT UNDERWRITING LTD, AON RISK SERVICES NORTHEAST, INC., NAVIGATORS INSURANCE COMPANY, AON, LTD., and DAVID SHIMUNOV

Defendants.

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Decision & Order
Motion Sequence 2

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CHAUCER SYNDICATES, LTD., THE CCL PARTNERSHIP, LLP, ARGENTA HOLDINGS, PLC, LIBERTY SYNDICATES, TALBOT UNDERWRITING, LTD., and NAVIGATORS INSURANCE COMPANY,

Third-Party Plaintiffs,

-against-

DAVID SHIMUNOV

Third-Party Defendant.

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Defendants/Third-Party Plaintiffs (hereinafter "Defendants"), move this Court for an Order pursuant to CPLR 3211(a)(7) to dismiss Plaintiff's second cause of action, asserted in her second amended complaint, for failure to state a cause of action. The following papers were received and considered in deciding the present motion:

PAPERS	**NUMBERED**
Notice of Motion/Affirmation in Support/ Exhibits/Memorandum of Law in Support	1-4
Affirmation in Opposition/Exhibits	5-6
Affirmation in Reply/Exhibit	7-8

Plaintiff subscribed to a Personal Jewelry Collection type policy of insurance, policy no. S11JB2005100 (herinafter "the Policy") issued to Plaintiffs for the period of May 23, 2011 to May 22, 2012. In or about May of 2011, Plaintiff Marbury owned and possessed certain items of fine jewelry valued at approximately $2,500,000.00, which included a pair of diamond earrings and diamond pendant. The combined value of the earrings and pendant was approximately $900,000.00. Plaintiff alleges that pursuant to the insurance policy, Plaintiff was advised that if her jewelry was stolen or damaged while it was "out of a safe," that she would recover $750,000.00 per loss, and that she was being insured by Lloyd's of London. Plaintiff further alleges that she complied with the terms of the insurance policy and made premium payments totaling $30,000.00. Plaintiff alleges she began communicating with Defendant Shimunov in or around May 2011, when she began contemplating selling her jewelry. Defendant Shimunov allegedly made representations that he had a buyer for Plaintiff's jewelry when in fact, Mr. Shimunov intended to steal, embezzle or otherwise permanently deprive Plaintiff of her jewelry without paying for it. Plaintiff surrendered physical possession of her jewelry so it could be sold, and instead, Mr. Shimunov stole and converted the jewelry for his own use.

As a result, in or about August 2011, Plaintiff Marbury filed an insurance claim for the loss of two items allegedly insured under the Policy; a pair of diamond chandelier earring valued at $458,300.00 and a pear shaped diamond pendant valued at $434,400.00. Defendants allegedly refused to pay Plaintiff's claim. Plaintiff's second amended complaint alleges, *inter alia*, first a cause of action for breach of insurance contract, and second, a cause of action for "Tort-Bad Faith Breach of an Insurance Policy". Defendants now move to dismiss Plaintiff's second cause of action for failure to state a claim.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We 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 N.Y.2d 83, 87(1994), *citing*, *Morone v. Morone*, 50 N.Y.2d 481, 484(1980); *Rovello v Orofino Realty Co.*, 40 N.Y.2d 633, 634(1976). On a motion for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "[the Court's] well-settled task is to determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated'" *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307,318 [1995] [internal citations and quotation marks omitted]. In performing that task, the Court "[is] required to accord plaintiff the benefit of all favorable inferences which may be drawn from [its] pleading, without expressing [any] opinion as to whether [it] can ultimately establish the truth of [its] allegations before the trier of fact" (*ibid.*).

Plaintiff's second cause of action alleges that Defendants acted in bad faith, and their refusal and delay in paying Plaintiff's claim was intentional and resulted in damages separate from and in

addition to the policy coverage. Defendants argue that the claim must be dismissed because it is duplicative of Plaintiff's first cause of action, and because New York law does not recognize a tort of bad faith breach of an insurance contract. In support of their motion, Defendants cite *New York University v. Continental Insurance Company*, 87 N.Y.2d 308 (1995). In *New York University v. Continental Insurance Company*, plaintiffs asserted a bad faith claim against the defendant insurer, seeking compensatory damages. 87 N.Y.2d 308 (1995). The New York Court of Appeals held that plaintiffs' "bad faith" allegations were "nothing more than a claim based on the alleged breach of the implied covenant of good faith and fair dealing" and concluded that plaintiffs' allegations were "duplicative" of the breach of contract claim and should have been dismissed. *New York Univ.*, 87 N.Y.2d at 319-20.

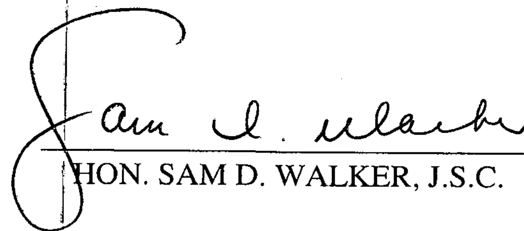
In opposition to Defendants claims, Plaintiffs argue that the second cause of action should not be dismissed because Defendants have mischaracterized New York law. Plaintiffs argue that the bad faith of an insurer gives rise to a cognizable cause of action which may entitle Plaintiff to compensatory damages in excess of the policy limit. In support Plaintiffs cite *DiBlasi v. Aetna Life & Casualty Ins. Co.,* 147 A.D.2d 93(2nd Dept. 1989) and *Acquista .v N.Y. Life Ins. Co.*, 285 A.D.2d 73 (1st Dept. 2001). The facts of *DiBlasi* are distinguishable from the present facts in that the analysis in *DiBlasi* involved an insurer's bad faith refusal to settle a case where there was a high probability that the verdict would exceed policy limits. *DiBlasi,* 147 A.D.2d 93, 99-101 (Proper standard for determining whether insurer's refusal to settle within policy limits was made in bad faith is whether it was "highly probable" that insured would be subjected to personal liability if severity of victim's injuries resulted in verdict in excess of policy limits.) Here, Plaintiffs offer no evidence that they have attempted to settle with Defendants, nor have they shown a high probability that the

verdict would exceed policy limits. Instead, Plaintiffs assertions of Defendants' bad faith indicate their "...dissatisfaction with defendants' performance of the contract obligations." *New York Univ. v. Cont'l Ins. Co.*, at 319.(Court found that Plaintiffs allegations did not state a tort claim, they merely raised a question for the fact finder determining the breach of contract claim). As such, the *DiBlasi* holding is not applicable to the present facts.

Plaintiffs also cite *Acquista .v N.Y. Life Ins. Co.*, 285 A.D.2d 73 (1st Dept. 2001). *Acquista* has generally been criticized as being in opposition to New York law. *See e.g. Core-Mark Int'l Corp. v. Commonwealth Ins. Co.,* 2005 U.S. Dist. LEXIS 14312 (S.D.N.Y 2005)("Acquista, conflicts with New York Court of Appeals decisions because it creates a separate extra-contractual damages claim for the bad faith denial of insurance coverage."). This Court similarly finds that Plaintiffs cannot sustain a separate tort cause of action as alleged in their second cause of action, and that said cause of action is duplicative of their first cause of action for breach of contract. As such, Defendants are entitled to the relief they seek.

Accordingly, Defendants' motion is hereby GRANTED, and Plaintiffs' second cause of action is hereby DISMISSED. To the extent any relief requested in Motion Sequence 2 were not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
December 19, 2012



HON. SAM D. WALKER, J.S.C.