McBride v New York Prop. Ins. Underwriting Assoc.
2015 NY Slip Op 32728(U)
December 3, 2015
Supreme Court, Suffolk County
Docket Number: 15-3121
Judge: Joseph Farneti
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ORIGINAL

SHORT FORM ORDER

INDEX No. 15-3121

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-5-15
ADJ. DATE 7-30-15
Mot. Seq. #001- MotD

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ELIZABETH McBRIDE and YORKE E. RHODES, III,

Plaintiffs,

- against -

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION and COOK MARAN & ASSOCIATES, INC., f/k/a COOK, HALL & HYDE, INC.,

Defendants.

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Upon the following papers numbered 1 to 11 read on this motion to dismiss the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 8 - 9; Replying Affidavits and supporting papers 10 - 11; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of the motion by defendant New York Property Insurance Underwriting Association for dismissal of the first, sixth, and seventh causes of action as asserted against it is denied; and it is further

ORDERED that the branch of the motion by defendant New York Property Insurance Underwriting Association for dismissal of the second, and third causes of action as asserted against it is granted.

Plaintiffs commenced this action to recover for property damage which allegedly occurred at their residence located at 15 Osprey Road in Amagansett, New York on February 23, 2013. Plaintiffs allege that a nor'easter known as "Winter Storm Nemo" caused a failure of the electrical system and the loss of all electric power. It is alleged that the loss of electrical power caused water pipes on the second

floor to freeze and/or burst, causing flooding to the first and second floors. Plaintiffs allege there was both interior and exterior damage to the premises, mold contamination, and destruction of personal property. Following the loss, plaintiffs submitted a claim to their insurer New York Property Underwriting Association. New York Property denied coverage alleging, "the loss or damage was caused by or resulted from pipe burst which is not a peril insured against." Plaintiffs' complaint, in relevant part, alleges as a first cause of action that New York Property breached the insurance contract by disclaiming coverage. The second cause of action alleges unjust enrichment. The third cause of action alleges nuisance. The sixth cause of action alleges fraud against all defendants, including the insurance broker. The seventh cause of action alleges breach of the implied covenant of good faith and fair dealing.

New York Property now moves for dismissal of the first cause of action pursuant to CPLR 3211 (a) (1) and the second, third, sixth, and seventh causes of action pursuant to CPLR 3211(a) (7). In support of the motion, New York Property submits, among other things, an affidavit of claims director Heeralall Persaud, the insurance policy, the disclaimer letter, and plaintiffs' second amended complaint. In opposition, plaintiffs submit an affirmation from their counsel.

A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; ***Granada Condominium III Assn. v Palomino***, 78 AD3d 996, 996, 913 NYS2d 668 [2d Dept 2010]; ***Fontanetta v John Doe 1***, 73 AD3d 78, 83, 898 NYS2d 569 [2d Dept 2010]). New York Property maintains that plaintiffs' insurance policy does not provide coverage for "the bursting of pipes" and that based upon the express language of the insurance contract, the first cause of action must be dismissed. New York Property contends that while the insurance policy does cover the peril of "explosion," explosion, as defined in the policy, specifically excludes the breakage of water pipes. Therefore, New York Property argues that the breach of contract cause of action must be dismissed based upon the express language of the insurance contract.

Plaintiffs maintain that the disclaimer of coverage is improper because the insurance contract covers other perils. Specifically, the contract covers a loss to property caused by windstorm. The policy does contain a general exclusion for "power failure." That section, however, provides, "power failure means the failure of power or other utility service if the failure takes place off the described location. But if the failure of power or other utility service results in a loss, from a Peril Insured Against on the described location, we will pay for the loss caused by that Peril Insured Against." Plaintiffs assert that the peril insured against is windstorm, not explosion, and therefore neither the specific exclusion which applies to "explosion" nor the general exclusion for "power failure" apply.

Here, plaintiffs' complaint, which states that New York Property breached the terms of the insurance policy, states a valid cause of action for breach of contract (*see* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]; ***Furia v Furia***, 116 AD2d 694, 498 NYS2d 12 [2d Dept 1986]). The specific exclusion term, breakage of water pipes, applies to the peril insured against of explosion. It does not apply to the peril of windstorm. Moreover, the general exclusion of power failure specifically includes coverage by expressly providing, "we will pay for loss

caused by that Peril Insured Against." As windstorm is a peril insured against, the general exclusion of power failure does not apply. In fact, the unambiguous language of the contract expressly provides coverage. New York Property's reliance on ***Elefky Enterprises, Inc. v Utica First Insurance Company*** (2008 NY Slip Op 30056[U] [Sup Ct, New York County 2008]) is misplaced as the property loss there was caused by a ruptured water pipe, not as here, an allegedly burst pipe that froze from a loss of power caused by a covered peril, namely a windstorm. Accordingly, the motion to dismiss the first cause of action is denied.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see* ***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; ***Hense v Baxter***, 79 AD3d 814, 815, 914 NYS2d 200 [2d Dept 2010]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (***Hense v Baxter***, *supra* at 815). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus on a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *see* ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]).

Defendant is entitled to dismissal of plaintiffs' claims for unjust enrichment and nuisance. It is well established that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement" (***Clark-Fitzpatrick, Inc. v Long Island R Co.***, 70 NY2d 382, 388, 521 NYS2d 653 [1987]; *see* ***A. Montilli Plumbing & Heating Corp. v Valentino***, 90 AD3d 961, 935 NYS2d 647 [2d Dept 2011]; ***Scott v Fields***, 85 AD3d 756, 925 NYS2d 135 [2d Dept 2011]). Likewise, a cause of action alleging a nuisance cannot be utilized simply as another means to attempt to collect under a disputed contract. "To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct" (***Kaplan v Incorporated Vil. of Lynbrook***, 12 AD3d 410, 413, 784 NYS2d 586 [2d Dept 2004]; *see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 569, 394 NYS2d 169 [1977]). Here, the conduct alleged by plaintiffs is a denial of the insurance contract, failure to take necessary action, and a failure to provide coverage. Accordingly, the branch of defendants' motion seeking dismissal of plaintiffs' claims for unjust enrichment and nuisance is granted.

The sixth cause of action alleges fraud. The elements of fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (*see* ***Eurycleia Partners, LP v. Seward & Kissel, LLP***, 12 NY3d 553, 883 NYS2d 147 [2009]). A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained when the plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract (***McKernin v Fanny Farmer Candy Shops***, 176 AD2d 233, 574 NYS2d 58 [2d Dept 1991]; *see also* ***Heffez v L & G General Construction, Inc.***, 56 AD2d 526, 391 NYS2d 418 [2d Dept 2008]).

Here, plaintiffs allege that the fraud stemmed not from defendants knowingly misrepresenting an intention to pay the plaintiffs the amounts due and owing under the parties' agreement, but rather false representations that a property loss from electrical failure, water, or breakage of pipes was covered under the policy. It is also alleged that plaintiffs were fraudulently induced into entering the insurance contract, that they relied upon the intentional misrepresentation, and suffered damages. Plaintiffs have alleged a misrepresentation or material omission by defendant, on which it relied, that induced plaintiffs to purchase the policy of insurance (***New York University v Continental Ins. Co***., 87 NY2d 308, 639 NYS2d 283[1995]). Plaintiffs' fraud claim, which is based on defendants' alleged misrepresentation of facts used to induce the homeowner to obtain defendants' insurance policy, is not duplicative of plaintiffs' breach of contract claim (***Batas v Prudential Ins. Co. of Am.***, 281 AD2d 260, 724 NYS2d 3 [1st Dept 2001]).

The seventh cause of action alleges a breach of the implied covenant of good faith and fair dealing. Turning to that cause of action, and accepting plaintiffs' allegations as true and affording them the benefit of every possible inference, plaintiffs have properly pled an alleged breached of the contractual obligation of good faith and fair dealing. In every contract, there is an implied obligation of good faith and fair dealing (***Dalton v Educational Testing Serv***., 87 NY2d 384, 389, 639 NYS2d 977 [1995]; ***Rowe v Great Atl. & Pac. Tea Co.***, 46 NY2d 62, 68, 412 NYS2d 827 [1978]; ***Legend Autorama, Ltd. v Audi of Am., Inc.***, 100 AD3d 714, 954 NYS2d 141 [2d Dept 2012]; ***Jaffe v Paramount Communications***, 222 AD2d 17, 644 NYS2d 43 [1st Dept 1996]). Implied in such duty, each party to the contract pledges not to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (***Kirke La Shelle Co. v Paul Armstrong Co.***, 263 NY 79, 87 [1933]). Thus, the obligation of good faith is breached when a party to a contract acts in manner that, while not expressly forbidden under the terms of the contract, would deprive the other party of the right to receive the benefits of the agreement (*see* ***Legend Autorama, Ltd. v Audi of Am., Inc.***, 100 AD3d 714, 954 NYS2d 141 [2d Dept 2012]; ***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 697 NYS2d 128 [2d Dept 1999]). Viewing all of the allegations in the complaint in the light most favorable to plaintiff, the Court finds the allegations that, among other things, defendant failed to fairly, timely and accurately adjust the claimed loss and deceptively misrepresented coverage for the loss are sufficient to state a cause of action for breach of the implied covenant of good faith and fair dealing, as these alleged facts are different, and are properly interposed in addition to the breach of contract claim (*see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]).

Dated: December 3, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**