Endurance Am. Ins. Co. v Burbridge
2019 NY Slip Op 31230(U)
April 25, 2019
Supreme Court, New York County
Docket Number: 654130/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN**
Justice

PART **IAS MOTION 3EFM**

---X

ENDURANCE AMERICAN INSURANCE COMPANY,

Plaintiff,

- v -

MATTHEW BURBRIDGE, NANCY BURBRIDGE, JOHN DOES 1-100, ABC ENTITIES 1-100

Defendants.

---X

INDEX NO. 654130/2018

MOTION DATE 10/04/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 55

were read on this motion to DISMISS COUNTERCLAIM.

Upon the foregoing documents:

In this action, Plaintiff Endurance American Insurance Company ("Endurance") alleges that Defendants Matthew Burbridge and Nancy Burbridge (together, "Defendants") fraudulently conveyed over $600,000 in violation of Debtor and Creditor Laws §§ 273 and 276. (Verified Complaint ("Compl.") ¶¶86-125) (NYSCEF 1). Defendants answered the Complaint on September 14, 2018 (the "Answer"), asserting several affirmative defenses and a counterclaim. (NYSCEF 37).

Endurance now moves to dismiss Defendants' counterclaim for failure to state a cause of action. (*See* NYSCEF 46). No opposition to the motion has been filed. The counterclaim, which is labeled "First Counterclaim" and melds at least two different legal theories, reads as follows:

> 12. Plaintiff alleges that it entered into an indemnification agreement with Nancy Burbridge.
>
> 13. In every contract, there is an implied obligation of good faith and fair dealing.
>
> 14. Plaintiff has breached its obligation of good faith and fair dealing, by, among other things, abusively and unnecessarily restraining all of Nancy Burbridge's

> assets and property and also attempting to abusively and unnecessarily restrain all of Matthew Burbridge's assets and property.
>
> 15. Upon information and belief, Plaintiff has engaged in such bad faith on a large scale basis with many of its other customers.
>
> 16. Plaintiff s bad faith constitutes an unlawful deceptive act and/or practice under NYS GBL § 349.

(NYSCEF 37).

Endurance's unopposed motion is granted. Even "accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Indeed, the counterclaim fails the basic task of "giv[ing] the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3013 (describing notice pleading requirements). And "[p]leadings that are not particular enough to provide the court and the parties with notice of the transaction or occurrences to be proved must be dismissed." *Sibersky v. New York City*, 270 A.D.2d 209, 209 (1st Dep't 2000).

Moreover, whether the counterclaim is read as alleging breach of the implied covenant of good faith and fair dealing, or alleging violations of General Business Law (GBL) § 349, it fails to articulate "any cognizable legal theory." *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980).

The counterclaim fails to allege the elements of a claim for breach of the implied covenant of good faith and fair dealing. "Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance," which includes "a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). To begin with, "[a] cause of action based upon a breach of a covenant of good faith and fair dealing requires

a contractual obligation between the parties." *Duration Mun. Fund, L.P. v. J.P. Morgan Sec., Inc.*, 77 A.D.3d 474, 474–75 (1st Dep't 2010). The counterclaim alleges only that Defendant Nancy Burbridge—and not Defendant Matthew Burbridge—entered into a contract with Endurance. (Answer ¶12). In any event, because Defendants do not describe the agreement in any detail, it is unclear what "fruits of the contract" they were allegedly meant to receive, nor is it clear how Endurance allegedly "destroy[ed] or injur[ed]" their rights to receive them. *See Forman v. Guardian Life Ins. Co. of Am.*, 76 A.D.3d 886, 888 (1st Dep't 2010) (denying motion to dismiss where complaint "allege[d] that [defendant] frustrated the basic purpose of the parties' contracts").

Similarly, the counterclaim's assertion under GBL § 349 is legally insufficient. That statute prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." As a threshold matter, the statute's private right of action is available to Defendants only if they can "demonstrate that the acts or practices [at issue] have a broader impact on consumers at large"—"[p]rivate contract disputes . . . would not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). Defendants' conclusory allegations fail to demonstrate that Endurance's conduct "fall[s] within the ambit of the statute," as they fail to describe the conduct with anything close to particularity.

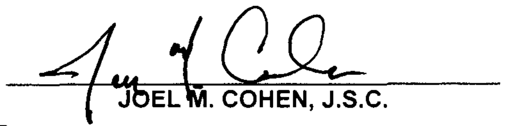
Therefore, it is:

ORDERED that Endurance's motion to dismiss Defendants' counterclaim is GRANTED.

This constitutes the Decision and Order of the Court.

[SIGNATURE ON FOLLOWING PAGE]

4/25/2019
DATE



JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE