City of New York v Crum & Forster Ins. Brokers, Inc.
2019 NY Slip Op 31630(U)
June 6, 2019
Supreme Court, New York County
Docket Number: 450300/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 450300/2018

THE CITY OF NEW YORK and LORELEI SALAS, as Commissioner of the New York City Department of Consumer Affairs,

MOTION DATE 07/20/2018, 07/20/2018

Plaintifsf,

MOTION SEQ. NO. [redacted], 002

- v -

CRUM & FORSTER INSURANCE BROKERS, INC., EVERGREEN NATIONAL INDEMNITY COMPANY, FINANCIAL CASUALTY & SURETY, INC., ROCHE SURETY AND CASUALTY CO., INC., CUTTING EDGE BAIL BONDS, LLC, STEVEN KRAUSS, C.E. PARISH GENERAL AGENCY, INC., CYRIL PARISH, WILLIAMS NATIONAL SURETY CORP., SOUTHEAST NATIONAL BANK, and MARVIN MORGAN

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 71, 72, 73, 74

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 60, 61, 62, 63, 64, 65, 66, 67, 68, 75, 76, 80, 82, 83

were read on this motion to DISMISS.

NYC Department of Consumer Affairs (Nicole Lester Arrindell and Glenna Bryne Goldis of counsel), for plaintiffs, City of New York and Lorelei Salas.
Mcelroy, Deutsch, & Mulvane, Carpenter, LLP (Adam R. Schwartz of counsel), for defendants, Crum & Forster Insurance Brokers, Inc. and Williams National Security Corporation.
Foley & Lardner LLP (Anne B Sekel and Sara Pamhidzai Mavado of counsel) and *Law Office of Evan D. Prieston, P.C.* (Evan D. Prieston of counsel), for defendants, Evergreen National Indemnity Company, C.E. Parish General Agency, Inc., and Cyril E. Parish.
Shiryak, Bowman, Anderson, Gill, & Kadochnikov LLP (Dustin B. Bowman of counsel), for defendants, Financial Casualty & Surety, Inc., Cutting Edge Bail Bonds, LLC, and Steven Krauss.
Foley & Lardner LLP (Anne B Sekel and Sara Pamhidzai Mavado of counsel) for defendant, Roche Surety & Casualty Inc.
Fox Rothschild LLP, (Daniel A. Schnapp of counsel) for defendant, Southeast National Bank.

GERALD LEBOVITS, J.:

In this action, plaintiffs the City of New York and Lorelei Salas, as Commissioner of the New York City Department of Consumer Affairs (DCS), seek to hold numerous defendants liable for alleged violations of the Administrative Code § 20-700, et seq., and 6 RCNY § 5-01 et seq., also known as the Consumer Protection Law (Consumer Law). Defendant Roche Surety and Casualty Co., Ins. (Roche) moves, pursuant to CPLR 3211 (a) (1), (5) and (7), for an order dismissing the complaint as against it. Defendants Cyril Parish and C.E. Parish General Agency, Inc. (collectively, Parish), cross-move, pursuant to CPLR 3211 (a) (1), (5) and (7), for an order dismissing the complaint as against them. As set forth below, both the motion and the cross motion to dismiss are granted.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiffs filed a complaint against various defendants involved in the bail bond process. They explain that the bail bond process, in pertinent part, is as follows: A judge may impose several conditions on a person facing criminal charges. One of the conditions may be the requirement to pay bail in order to be released from custody. If the incarcerated person, or his/her family members cannot afford the full amount of bail, they may rely on a bail bond agent to secure surety bonds from large insurance companies. These insurance companies, or "sureties, issue the bonds posted by bail bond agents, and control the conduct of the bail bond business through managers or general agents, with whom the sureties contract to supervise the work of the bail bond agent." Complaint, ¶ 31.[1] Sureties must be licensed by the New York State Department of Financial Services (DFS). The surety then appoints a bail bond agent, who also needs a license from DFS.

Bail bond agents, among other things, pay the surety and manager a portion of the bond amount. The person requiring the surety to post the bond fills out an application with the bail bond agent, posts collateral and pays a compensation fee to the bail bond agent. Pursuant to Insurance Law § 6804, this is a "one-time fee, capped by statute and based on the size of the bond. . . . A bail bond agent may not create additional services to charge consumers as a way to circumvent the Compensation Cap." Complaint, ¶ 36. The bail bond agent then executes a bond and an undertaking and files them with the court. If the incarcerated person is released and then appears in court when required, "bail is 'exonerated' and all posted collateral should be returned to the consumer." *Id.*, ¶ 39.

In the instant action, Marvin Morgan, individually and d/b/a Around the Clock Bail Bonds, Marvin Morgan Bail Bond Agency, Marvin's Fianzas, and Marvin's Bail Bonds (collectively, Morgan), owned and operated bail bond businesses located near courthouses in Brooklyn, the Bronx and Manhattan. Morgan's bail bond license was revoked by DFS on January 8, 2018.

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[1] *See also Gevorkyan v Judelson*, 29 NY3d 452, 457 (2017) (internal citation omitted) ("A 'surety' is someone other than the principal of the bond - that is, other than the criminal defendant - 'who executes a bail bond on behalf of a principal and thereby assumes the undertaking described therein.'").

As relevant for this motion, Roche is an insurance company that insures bail bonds. Pursuant to a contract, Roche appointed Morgan as a bail bond agent on July 26, 2012, with Parish serving as manager. The complaint states that "Roche underwrote approximately 1,800 bonds sold by Morgan under Parish's management." *Id.*, ¶ 64. Parish "served as Morgan's manager on behalf of Roche." *Id.*, ¶ 14. Specifically, the contract indicates that Morgan is acting as an independent contractor to Roche and Parish and that the contract "is not intended to create an employee/employer relationship" between Morgan, Roche and Parish. Parish's cross motion, exhibit D, ¶ 1. Morgan himself was authorized to underwrite bonds with a cumulative liability of $25,000 or less. However, pursuant to the contract, Morgan needed prior approval from Parish prior to executing bail bonds with a cumulative liability in excess of $25,000. Parish's exhibit D at 12.

The complaint alleges that Morgan engaged in several deceptive practices while acting as a bail bond agent and that the sureties and managers were aware and complicit in Morgan's actions. For example, Morgan illegally charged fees to his customers that were above the statutory compensation cap. In one situation, Morgan charged a "courier fee," even though a bail bond agent is not allowed to separately charge any add-on fees above the compensation cap. As another example, when customers sought the return of their collateral, Morgan "would charge them a $100 'refund service charge.' Since such a charge would also exceed the Compensation Cap, it was illegal for Morgan to represent that such a fee was a condition of release of the consumers' collateral." Complaint, ¶ 77. In addition, according to plaintiffs, Morgan failed to return collateral to some customers or used stall tactics regarding the status of their collateral refunds. Morgan also allegedly refused to provide copies of executed bail bond documents and provided misleading or inaccurate receipts to customers.

According to plaintiffs, each named defendant is liable to at least one consumer for the above alleged deceptive practices. Plaintiffs provide charts with the relevant deceptive practice, the consumer/transaction involved and proposed penalties, for each named defendant. As set forth in the chart, there are three bonds sold by Morgan that were underwritten by Roche and managed by Parish: Denise Richardson (Richardson) (May 2014), Lucia Rosas (Rosas) (undated) and Debra Smith (Smith) (July 2015). Plaintiffs allege that Richardson sought a $250 refund for the courier fee (but there is no allegation that she paid the courier fee and received a "faulty" receipt), that she was deceived about the status of a refund and that she requested copies of signed documents but her request was denied. Complaint at 33. Rosas allegedly paid a courier fee and received a faulty receipt (with no amount of refund listed) and was deceived about the status of her refund. Finally, plaintiffs allege that Richardson paid a courier fee, received a faulty receipt and is seeking a courier fee refund of $640. There are no allegations that Morgan retained collateral in any of these bonds associated with Roche and Parish, or that he provided inaccurate information on a premium receipt.

Plaintiffs allege that Roche and Parish are liable for Morgan's illegal activity, whether they knew about it or not, because they used Morgan as their agent. They continue that, "even with a tiny bit of oversight," Morgan's illegal practices would have been revealed. Complaint, ¶ 113.

The complaint contains three causes of action. In the first cause of action, plaintiffs allege that defendants engaged in deceptive trade practices in violation of Administrative Code § 20-700. According to plaintiffs, Morgan illegally charged customers above the compensation cap when he charged a "courier fee." Further, he misrepresented to customers that they were required to pay a "refund service charge" prior to receiving their collateral. In pertinent part, on at least two or three occasions, Roche and Parish "were complicit in the charging of the illegal courier fee" and, at least three times, were complicit in the illegal "refund service charge." Complaint, ¶ ¶ 119, 120. In addition, at least two times, Roche and Parish were complicit in the inaccurate statements made by Morgan about the status of the collateral funds. According to plaintiffs, Roche and Parish are liable for civil penalties and plaintiffs are seeking to establish an account for customer restitution. The complaint states, "[f]or each violation, the relevant Defendants are jointly and severally liable for a $350 penalty, or $500 if the violation was knowing." *Id.*, ¶ 125.[2]

In the second cause of action, plaintiffs claim that Morgan violated 6 RCNY § 5-32 (c) by providing false and misleading receipts to customers. In pertinent part, Roche and Parish are liable for Morgan's violations and were complicit in this deceptive practice on at least two occasions.

The third cause of action sets forth that Morgan refused to provide copies of executed documents to customers, despite their requests, in violation of 6 RCNY § 5-32 (f). The complaint states that Roche and Parish were complicit in this violation on at least one occasion.

Roche's motion to dismiss and Parish's cross motion to dismiss

In its dismissal motion, Roche argues that a surety cannot be held liable for the acts of its bail bond agents on an agency theory unless it had actual knowledge of the misconduct. Parish states that, as plaintiffs allege liability of both Roche and Parish pursuant to the same contract, many of the same reasons for dismissal apply. As a result, Parish cross-moves to dismiss the complaint on the same grounds as Roche and adopts Roche's arguments in its memorandum of law. Any additional arguments will be noted.

As will be discussed below, Roche provides an informal opinion issued by the Office of General Counsel, New York State Insurance Department. The Opinion advises that a bail bond insurer may be subject to potential discipline by the New York State Insurance Department if the insurer "had actual knowledge that the bail bond agent acted beyond the authority given by the insurer . . . ." According to Roche, there are no allegations that it committed any wrongful conduct or that it even had any contact with the indemnitors associated with the bonds.

In addition, Roche argues that an agency theory of liability is not applicable, as, among other things, the contract indicates that Morgan is an independent contractor. Roche claims that it did not control Morgan's daily activities, nor was it aware of any of Morgan's misconduct.

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[2] Plaintiffs are seeking the same penalties for each violation listed in the remaining causes of action.

Roche continues that, on the day that DFS revoked Morgan's license, Roche terminated its contract with Morgan.

Parish adds that it and Roche are located in Florida and that it was never aware of Morgan's conduct, either by participating in it or by any complaints received. Parish states that it reviewed proposed bail bonds for Roche to see if they were good investments. It states, in relevant part:

> "To be precise: Morgan, or his designee would send to Defendants bail bond paperwork, in Florida. Defendants would review said paperwork and decide if they and Roche would underwrite the bond. Nothing more than that. [Parish was] never present in Morgan's office, had no communication or interaction with Morgan's clientele, and did not, in any way, 'manage' Morgan's operation."

Parish's memo of law at 2.

Among other reasons in support of dismissal, Roche states that the relevant statute of limitations for the asserted claims is three years. Out of the three bonds allegedly associated with Roche, one was issued in May 2014 and one was undated. As a result, Roche argues that these, and any other claims predicated on violations that occurred prior to February 15, 2015, must be dismissed as time-barred.

In opposition, citing Administrative Code § 20-703 (c), plaintiffs argue that a five year statute of limitations applies to the claims. Administrative Code § 20-703 (c), which the court notes is applicable only to repeated violations, states, in pertinent part: "Restitution under this subdivision shall not apply to transactions entered into more than five years prior to commencement of an action by the commissioner."

Roche maintains that, as bail bonds are not consumer goods, the Consumer Law is inapplicable. Roche continues that the use of the Consumer Law to regulate bail bond agents or sureties is unsupported and overreaching. Nonetheless, according to Roche, the claims must be dismissed because Morgan's conduct cannot be imputed to Roche. Roche adds that, in any event, plaintiffs' allegations are vague and cannot state a claim.

Plaintiffs assert that the Consumer Law is a broad statute, applicable to all consumer goods and services, including bail bond services.

DISCUSSION

Dismissal

"[O]n a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as alleged fit within any cognizable legal theory." *D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 (1st Dept 2019). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). Under CPLR 3211 (a) (1), dismissal is appropriate "only

if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v Martinez*, 84 NY2d 83, 88 (1994).

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016).

As noted in the complaint, DFS is the state agency responsible for monitoring the bail bond industry. Sureties are licensed through DFS and DFS also facilitates the appointment of the bail bond agent to the surety. Insurance Law § 6804 provides the statutory formula for the amount a bail bond agent may be compensated. After notice and a hearing, the superintendent is authorized to suspend or revoke the license of a bail bond agent who engages in, among other things, "any fraudulent or dishonest practices or other misconduct or malfeasance." Insurance Law § 6802 (k) (3). Furthermore, the attorney general may bring an action against a bail bondsman who is "guilty of fraudulent or dishonest conduct . . . and either recover the full amount of the penalty or recover for the use and benefit of the person or persons aggrieved, the amount of loss or injury sustained by such person or persons by reason of such misconduct." Insurance Law § 6802 (j). The recovery may not exceed "five thousand dollars, exclusive of interest and costs." *Id.*

The Court of Appeals has recently reiterated that "Insurance Law article 68 [are] the statutory provisions regulating the bail bond industry . . . ." *Gevorkyan v Judelson*, 29 NY3d at 457. It explained that the legislature originally enacted the statute due to the concern that "bondsmen, in some cases, had been taking advantage of criminal defendants as to the compensation charged." *Id.* at 460. Further, "[t]he law today now deems entities engaged in the bail business to be 'doing an insurance business' (Insurance Law § 6801 [a] [1]). It is therefore appropriate to look to principles of insurance law for guidance." *Id.* at 461.

As noted above, in response to a question, the New York State Insurance Department issued an informal opinion, "representing the position of the New York State Insurance Department." 2002 NY Insurance GC Opinions LEXIS 309, New York Department of Insurance General Counsel Opinion, October 15, 2002.[3] In relevant part, the following question had been presented :

> "Would the licensed bail bond agent's overcharge for the initial posting of the bail bond and the subsequent demand for an additional $ 6,000 compensation subject the bail bond insurer to potential discipline by the Insurance Department?
>
> *Id.* at *1.
>
> "[Answer]:

[3] Additionally found here: https://www.dfs.ny.gov/insurance/ogco2002/rg021016.htm. The Department of Financial Services' website also states that it supervises all insurance companies who conduct business in New York, including bail bond agents.

> "If the bail bond insurer had actual knowledge that the bail bond agent acted beyond the authority given by the insurer, the Department could allege a determined violation pursuant to N.Y. Ins. Law Article 24 (McKinney 2000) and request a penalty not exceeding $ 500 for each offense pursuant to N.Y. Ins. Law 109 (c) (1) (McKinney 2000).

Id. at *13.

Plaintiffs argue that the subject disciplinary guidelines are inapplicable, as the powers of DFS under the Insurance Law are not exclusive. They continue that Roche and Parish are being charged under the Consumer Law, which is intended to have a broad reach, penalizing all entities responsible for deceptive conduct. Further, "any actual knowledge test would conflict with the common law principles of knowledge, which establish that agents' knowledge may be imputed to principals." Plaintiffs' memo of law at 20. In addition, even applying the actual knowledge test, plaintiffs should be allowed to take additional discovery, as they have already "shown that at least some defendants knew that Morgan was deceiving consumers." *Id.* at 21.

The court sees no reason why plaintiffs, in general, would be prevented or preempted from charging bail bond defendants such as bondsmen, sureties and managers for violations of the consumer protection law. However, as noted by defendants, DFS is the state agency responsible for monitoring the bail bond industry and is the authority on the statutes that it promulgates. In opposition to the motion, as relevant for this situation only, plaintiffs have not provided any supporting caselaw for why the guidelines indicated in the DFS opinion would not be applicable.[4]

Moreover, plaintiffs have not provided any support for the argument that Roche and Parish should be liable for Morgan's deceptive conduct that they were not aware of. Plaintiffs have identified three bonds written by Morgan where Roche acted as a surety and Parish acted as manager. Aside from a potential statute of limitations issue for two of the three bonds, there are no allegations that Roche or Parish had any knowledge of Morgan's charged misconduct. Further, while plaintiffs pled that some defendants allegedly knew about Morgan's misconduct, Roche and Parish were not identified as being among these defendants. Instead, plaintiffs have only made conclusory allegations that cannot survive a motion to dismiss. *See e.g. Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, LLC*, 155 AD3d 1218, 1219 (3d Dept 2017), *affd* 31 NY3d 1090 (2018) ("Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss").

Citing *Reynolds v Snow* (10 AD2d 101, 109 [(1st Dept 1960)] citations omitted), plaintiffs claim that "[g]enerally, an agent's knowledge, and even fraud, is imputed to his principal." However, the remainder of that paragraph states, "[a]t least such knowledge is imputed so long as the agent is not acting antagonistically to the interest of his principal." *Id.* (citations omitted). Here, under the terms of the agreement, Morgan was appointed as an "executing agent of the

[4] For example, *Financial Cas. & Sur., Inc. v Zouvelos* (2017 US Dist LEXIS 46868, 2017 WL 1184106 [ED NY 2017]) one of the cases cited by plaintiffs, involved breach of contract and does not address alleged violations of the Consumer Protection Law.

Company in and for the soliciting and writing of bail bonds." Parish's exhibit D, ¶ 1. Morgan agreed to "carefully observe all rules and regulations of the Insurance Department of the State . . . ." *Id.*, ¶ 14. However, instead, he was "acting antagonistically" to Roche and Parish's interests and to what the parties had agreed to when he engaged in misconduct. *Reynolds v Snow*, 10 AD2d at 109. Nothing in the contract authorized Morgan to charge fees above the statutory compensation cap listed in the Insurance Law.

Plaintiffs reiterate that the complaint alleges actual, and not apparent, authority. "Actual authority . . . is created by direct manifestations from the principal to the agent, and . . . is interpreted in the light of all the circumstances attending these manifestations, including the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware." *New York Community Bank v Woodhaven Assoc., LLC*, 137 AD3d 1231, 1233 (2d Dept 2016) (internal quotation marks and citations omitted); *see also Minskoff v American Express Travel Related Servs. Co.*, 98 F 3d 703, 708 (2d Cir 1996) (Express or implied authority "exists only where the agent may reasonably infer from the words or conduct of the principal that the principal has consented to the agent's performance of a particular act").

In the instant situation, Roche and Parish claim that Morgan was acting for himself and that they were unaware of his misconduct. In opposition, plaintiffs have not sufficiently pled that Morgan was granted actual authority to bind Roche or Parish for his actions. Plaintiffs have not provided any allegations Morgan was acting within the scope the parties' agency agreement when he, for example, refused to provide copies of executed documents upon a customer's request or when he charged an illegal courier fee.

In light of the Opinion, the parties' relationship and the factual allegations, plaintiffs have not sufficiently pled that any of Morgan's purported violations of the Consumer Law can be imputed to Roche or Parish.[5] Therefore, both Roche's motion to dismiss and Parish's cross motion to dismiss are granted.

CONCLUSION

Accordingly, it is

ORDERED that the motion of Roche Surety and Casualty Co., Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the cross motion of C.E. Parish General Agency, Inc., and Cyril E. Parish to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

[5] As a result of this determination, the parties' remaining arguments need not be addressed.

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

6/6/2019
DATE

GERALD LEBOVITS, J.S.C.

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