Thill 13014, LLC v Finger Lakes Fire & Cas. Co.
2021 NY Slip Op 32020(U)
June 17, 2021
Supreme Court, Erie County
Docket Number: 800744/2021
Judge: Emilio Colaiacovo
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THILL 13014, LLC d/b/a THUNDERHILL SELF STORAGE and CAL 2626, LLC d/b/a WNY EMPIRE STORAGE, for themselves And on behalf of a class of similarly Situated policyholders,

Plaintiffs,

vs.

FINGER LAKES FIRE & CASUALTY COMPANY,

Defendant.

Decision & Order
Index #: 800744/2021

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Colaiacovo, J.

Defendant seeks to dismiss Plaintiffs' complaint pursuant to CPLR 3211(a)(7) for failure to state a claim upon which relief can be granted and requests an award of attorney's fees, costs, disbursements. In their complaint, Plaintiffs assert two causes of action – breach of contract and violation of §349 of New York's General Business Law. More specifically, Plaintiffs contend that Defendant, an insurance company, issued substantially similar insurance policies to the respective defendants. See Complaint ¶¶15-17. The Plaintiffs assert that the exclusions or limitations contained in the policies "do not restrict, limit, or preclude coverage for losses resulting directly

or indirectly from a virus." Complaint ¶¶32-33. Plaintiffs allege that they suffered " a direct physical loss of or physical damage to Covered Property, including the BI Losses, as a result of the Virus, CV-19, and the CA Orders ("Loss")." Complaint ¶67. Plaintiffs allege that Defendant "refused to make payment to Plaintiffs for damages from the Loss which constitutes a breach of the Policy." Complaint ¶91. Plaintiffs commenced this action seeking coverage for their losses pursuant to the terms of their insurance policies. In their motion to dismiss, Defendant argues that Plaintiffs have failed to state a claim upon which relief can be granted and more particularly argues that "Plaintiffs' complaint does not quote all policy language Plaintiffs claim entitles them to coverage." Mura Affirmation ¶11. In its discretion, the Court has waived oral argument pursuant to NYCRR §202.8. The Court's decision is as follows.

DECISION

Plaintiffs commenced this action seeking coverage for the loss pursuant to the terms of their insurance policies. Specifically, Plaintiffs sued the Defendant alleging breach of contract and asserting a claim for relief under New York General Business Law §349(a). Defendant maintains that Plaintiffs' complaint must be dismissed because the "policies only provide coverage for a 'covered cause of loss,' which means 'Direct Physical Loss.' As such, if the complaint fails to plead facts of 'Direct Physical Loss,' the complaint must be dismissed under CPLR Rule 3211(a)(7) for failure to state a claim upon which relief can be granted." Mura Affirmation ¶14. Defendant argues that the "subject policies only provide coverage for '*Loss of Income* when *your*

income is interrupted by a covered cause of loss." The Defendant maintains that because the complaint "fails to allege that the Plaintiffs' income was interrupted "by a covered cause of loss", the complaint must be dismissed under CPLR Rule 3211(a)(7) for failure to state a claim upon which relief can be granted." Mura Affirmation ¶15. Plaintiffs argue that the motion to dismiss should be denied because Defendant cites no policy definition indicating a narrow reading of "direct physical loss", cannot reconcile the restrictive definition with other policy exclusions for circumstances that do not cause physical alteration, and "offer no explanation for the existence of a specific exclusion for losses resulting from the presence of a virus and the simultaneous omission of any virus exclusion in Plaintiffs' policies." Berloth Affirmation ¶50.

Motion to Dismiss

Generally, on a CPLR 3211 motion to dismiss, "[w]e accept the facts as alleged in the complaint as true, accord plaintiff 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 (1994). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." Simkin v. Blank, 19 N.Y.3d 46 (2012). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an

enforceable right of recovery. See generally Basis Yield Alpha Fund [Master] v. Goldman Sachs Group, Inc., 115 A.D.3d 128 (1st Dept. 2014).

The Court may or may not grant a CPLR 3211(a)(7) motion "if the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action". Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137 (2017); Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Christ the Rock World Restoration Church Intl., Inc. v. Evangelical Christian Credit Union, 153 A.D.3d 1226 (2nd Dept. 2017). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." Rabos v. R&R Bagels & Bakery, Inc., 100 A.D.3d 849 (2nd Dept. 2012).

The Court agrees with Defendant that there are no facts, only conclusions, to support Plaintiffs' claims. As such, the Court finds that Plaintiffs have failed to meet their burden and that dismissal is required. The complaint is void of any evidence to support the bald conclusion that the coronavirus caused an actual covered loss (physical or otherwise) under the subject policies. The complaint fails to include any intentional or culpable conduct to justify alleging this cause of action. Instead, Plaintiff would have the Court engage in speculation regarding the parties' intent

with respect to the language of the subject insurance policy and to fill in the blanks with respect to missing facts to buttress Plaintiffs' allegations. This is simply not the proper role for the Court as noted below.

"The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court" (citation omitted). However, "[t]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert" (citations omitted). "Extrinsic evidence will be considered only if the contract is deemed ambiguous" (citations omitted). Maser Consulting, P.A. v. Viola Park Realty, LLC, 91 A.D.3d 836, 837 (2d Dept. 2012).

"When construing insurance policies, the language of the 'contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured' (citations omitted). "Furthermore, 'we must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' (citation omitted)." "Moreover, while 'ambiguities in an insurance policy are to be construed against the insurer' (citations omitted), a contract is not ambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion (citation omitted)." In Re Viking Pump, Inc., 27 N.Y.3d 244, 257-58 (2016).

Here, the subject policy language is specific, clear, and unambiguous. The insurance company covers losses "directly resulting from interruption of your business operations because of a business property loss insured under this policy." Mura Affirmation at ¶ 13. "Physical loss" and "business property" are not ambiguous terms. Those are the terms included in the Policy and the Court will not now, as noted above, "rewrite the contract or impose additional terms which the parties failed to insert." Supra.

Although the Complaint's second cause of action asserts a claim under §349 of New York's General Business Law, the Defendant does not touch on the issue in its motion to dismiss and Plaintiff similarly does not address the issue in its opposition. So as not to leave any loose ends, the Court will address the §349 cause of action.

In their complaint, Plaintiffs allege that "Defendant's statements in the DFS Response sent to policyholders were inaccurate and misleading." Furthermore, Plaintiffs allege that "Defendant did not make coverage determinations based on particular facts and circumstances presented by Plaintiffs' claims." Complaint at ¶¶ 126 and 128.

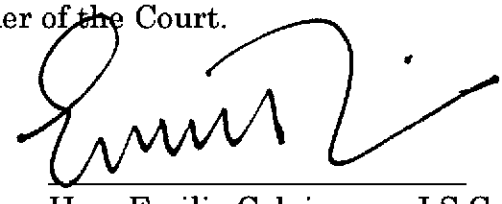
"It is well settled that, although the [alleged] conduct need not be repetitive or recurring to qualify as consumer-oriented, a plaintiff 'must demonstrate that the acts or practices have a broader impact on consumers at large' and, thus, '[p]rivate contract disputes, unique to the parties, ... [do] not fall within the ambit of the statute.'" (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 (1995); see New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 321

(1995)); JD & K Associates, LLC v. Selective Ins. Group, Inc., 143 A.D.3d 1232 (4th Dept. 2016).

In JD & K Associates, the defendant insurance company disclaimed coverage "on the particular facts concerning the nature of plaintiff's property damage and the language in the policy (citations omitted)." Id. at 1233. The Fourth Department concluded that "[d]efendants established that the conflict here stems from "a 'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large" (citation omitted). Id. The case before this Court likewise stems from a private dispute outside the ambit of §349 of the General Business Law.

Based on the foregoing, Defendant's motion to dismiss is hereby GRANTED in its entirety. However, the Court, in its discretion, DENIES Defendant's motion for costs and attorney's fees.

This shall constitute the Decision and Order of the Court.



Hon. Emilio Colaiacovo, J.S.C.

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Buffalo, NY
June 17, 2021