

**1000 Dean LLC v Bergen Projects, LLC**

2023 NY Slip Op 33328(U)

September 26, 2023

Supreme Court, New York County

Docket Number: Index No. 652064/2019

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

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1000 DEAN LLC,

Plaintiff,

- v -

BERGEN PROJECTS, LLC, and HOUSTON SPECIALTY  
INSURANCE COMPANY,

Defendants.

-----X

**INDEX NO.** 652064/2019

**MOTION DATE** 03/10/2021

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, and 108

were read on this motion to

AMEND CAPTION/PLEADINGS

Plaintiff's motion for leave to amend the complaint (NYSCEF Doc. No. 1) in the form of the proposed amended complaint (NYSCEF Doc. No. 100) is DENIED for the reasons set forth in the opposition papers, in which the court concurs, including the opposition points summarized hereinafter.

Background

This insurance coverage dispute arises out of a personal injury action brought by non-party Ricardo Caceres ("Caceres") against plaintiff 1000 Dean LLC ("Dean") captioned *Caceres v 1000 Dean, LLC*, (index No. 504666/2016 [Sup Ct, Kings County]) (the "Underlying Action"). The complaint in this action alleges that Dean is the lessor, and defendant Bergen Projects, LLC ("Bergen"), is the lessee, of premises located at 899 Bergen Street in Brooklyn, New York. Said complaint alleges that the lease requires Bergen to indemnify plaintiff for any damages resulting from injuries occurring at said premises. Said complaint further alleges that, pursuant to that

lease requirement, plaintiff was named as an additional insured on a policy of general liability insurance purchased by Bergen from defendant Houston Specialty Insurance Company (“HSIC”). In the Underlying Action, Caceres alleges that he was caused to sustain personal injuries as a result of an accident involving a ladder on the sidewalk abutting said premises while working as a Bergen employee and alleges negligence on Dean’s part in said regard. The complaint in this action alleges that Dean notified HSIC of the accident and of the Underlying Action and demanded HSIC to provide a defense to, and indemnify, Dean; but that HSIC has wrongly declined to do so. This action seeks a declaratory judgment finding that HSIC must provide Dean with such defense and indemnification.

The complaint in this action asserts what is, essentially, a cause of action for breach of the policy contract (cast as “a first cause of action”). The other two causes of action seem redundant, asserting the need for a declaratory judgment (second cause of action) and “bad faith” (third cause of action).

Plaintiff now moves to amend its complaint to add additional causes of action, including a seventh under General Business Law § 349 (“deceptive acts and practices”). Defendants oppose the motion insofar as that seventh cause of action is concerned on the grounds that no such cause of action could possibly be sustained in connection with this action which basically boils down to an alleged failure by HSIC to comply with its policy responsibilities to Dean.<sup>1</sup>

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<sup>1</sup> Defendants’ opposition is also directed at proposed new allegations that HSIC’s breach of policy constitutes “a violation of Insurance Law § 3420(d)(2)” (NYSCEF Doc. No. 100 [Proposed Amended Complaint] ¶ 32). However, no independent cause of action is asserted under that section. Therefore, this court considers this motion to be directed, in actuality, solely to the proposed seventh cause of action asserted under GBL 349.

## Discussion

“Although leave to amend is within the discretion of the court, where the proposed amendment lacks merit, leave should be denied” (*Dua v New York City Dept of Parks & Recreation*, 176 AD3d 91, 106 [1st Dept 2019]).

Plaintiff cannot amend to add a cause of action pursuant to GBL 349 because HSIC’s alleged failure to “promptly and fairly settle business loss claims” (NYSCEF Doc. No. 100 [Proposed Amended Complaint] ¶ 89) simply does not constitute a “deceptive business practice” under General Business Law § 349. GBL section 349 claims against insurers have been dismissed where those claims “at the threshold, [do not] charge conduct that is consumer-oriented” or do not “have a broad impact on consumers at large” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). “In connection with the character of General Business Law § 349 as a broad consumer protection statute and the requirements that the complained of conduct have a ‘broad impact on consumers at large,’ the statute does not apply to private contract disputes unique to the parties” (*Wilner v Allstate Ins. Co.*, 71 AD3d 155, 163 [2d Dept 2010]).

The motion seeking leave to amend to add a cause of action under GBL 349 must be denied because the conduct complained of is not consumer-oriented and does not have a broad impact on consumers at large; but rather, involves a private dispute between the parties (*see also*, *Tam v Metropolitan Life Ins. Co.*, 79 AD3d 484 [1st Dept 2010]; *Camacho v. IO Practiceware, Inc.*, 136 AD3d 415, 416 [1st Dept 2016] [“Plaintiff’s conclusory allegations regarding the effect on consumers at large are insufficient to sustain the cause of action under General Business Law § 349 because this is essentially a private contract dispute relating to the specific facts at hand”).

Accordingly, it is

ORDERED that plaintiff’s motion to amend the complaint is denied insofar as the proposed seventh cause of action under General Business Law § 349 is concerned; and it is further

ORDERED that the plaintiff may re-file its proposed amended complaint, but without any cause of action under General Business Law § 349, within 20 days of the date of filing hereof; and it is further

ORDERED that an answer to any such re-filed amended complaint be filed within 20 days of the date of filing of such amended complaint.



<u>9/26/2023</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE