2018 WL 1747310 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
Part 56
New York County

37 WEST 24TH STREET LLC, Plaintiff,
v.
SENECA INSURANCE COMPANY, INC., Defendant.

No. 150104/2017.
April 6, 2018.

Decision and Order

Scott E. Agulnick, Esq., Greenblatt & Agulnick, P.C., for the plaintiff.

Katherine M. Maguire, Esq., Ken Maguire & Associates, PLLC, for the defendant.

Hon. John J. Kelley, J.S.C.

***1** This action concerns a dispute over the plaintiff's insurance claims for water damage and loss of business. The plaintiff is a commercial tenant that operates a nightclub at 40 West 8 th Street, New York, NY. The defendant is the nightclub's insurer. On January 8, 2015 and February 16, 2015, the plaintiff submitted two claims to the defendant, alleging that the club's dancefloor was damaged by a burst sprinkler. After a rather lengthy and contentious investigation, the defendant denied the claims because the plaintiff failed to provide all necessary documents and information concerning the claimed losses. The defendant also maintains that its investigation revealed that the claimed damages to the dancefloor actually had occurred as a result of a prior incident that the building owner reported in early 2014. This action followed.

The plaintiff's complaint asserts three causes of action. In the first and third causes of action, the plaintiff alleges that the defendant breached the insurance contract by refusing to pay the amounts due to the plaintiff for their claims. In the second cause of action, the plaintiff alleges that the defendant violated General Business Law § 349. Essentially, the plaintiff is claiming that the law firm hired by the insurance company to investigate the claims acted in bad faith, and that it unfairly delayed the investigation by asking for documents totally unrelated to the claimed loss. They claim that the sole purpose of the law firm's actions were to delay the resolution of the claim until after the two-year period to commence an action against the insurer had passed. The defendant is moving to dismiss the claims brought under the General Business Law and the plaintiff's claims for consequential and punitive damages. The defendant also seeks an order, pursuant to CPLR §3024(b), striking the allegations made against defense counsel on the ground that defense counsel is not a party to the action, and that the allegations are irrelevant and scurrilous. [1]

In determining a CPLR § 3211 (a)(7) motion to dismiss, "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 [1977]). Whether the plaintiff will ultimately be able to prove its claims plays no role in the determination of a pre-discovery CPLR 3211 motion to dismiss (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

The defendant claims that the plaintiff has failed to adequately plead a cause of action under General Business Law § 349. The Court disagrees. To state a cause of action under General Business Law § 349, the complaint must allege: (1) that the defendant engaged in a deceptive act or practice; (2) that the challenged act or practice was consumer-oriented; and (3) that the plaintiff suffered an injury as a result of the deceptive act or practice." (*Stutman v. Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 25 [1995]). In this case, the subject policy provides that an insured is not permitted to bring a legal action against the defendant pursuant to the policy unless the action is brought within two years from the date of loss. In essence, the plaintiff is alleging that the defendant intentionally prolonged and/or delayed the investigation of the plaintiff's insurance claims in order to force the plaintiff into an unfavorable settlement or a costly lawsuit before the statute of limitations expired. Several cases have held that such a claim falls within the parameters of the General Business Law (*see Ural v. Encompass Ins. Co. of Am.*, 97 AD3d 562, 565 [2d Dept 2012]; *Wilner v. Allstate Ins. Co.*, 71 AD3d 155, 161 [2d Dept 2010]; *Acquista v. New York Life Insurance Co.*, 285 AD2d 73, 82 [1st Dept 2001]). Accepting the plaintiff's allegations as true, it has successfully plead that the defendant's conduct was materially misleading and/or deceptive.

***2** The defendant maintains that the alleged misconduct attributed to it is not consumer -oriented, but rather involves a private contractual dispute. Where the provision at issue is contained in every insurance policy issued by the defendant, any consumer holding that policy is affected, and it has a "broad impact on consumers at large" (*see Wilner*, 71 AD3d at 164). The plaintiff has alleged that the subject provision is contained in every policy of this type that the defendant issues. Assuming this allegation is true, the conduct complained of has a broad impact on consumers at large, and thus is "consumer-oriented" within the statute's meaning statute (*see New York Univ. v. Continental Ins. Co.*, 87 NY2d 308, 320 [1995], *Wilner*, 71 AD3d at 164, *Acquista*, 285 AD2d at 82-83).

The plaintiff also has adequately pled its entitlement to consequential damages resulting from the defendant's breach of contract. Consequential damages resulting from a breach of an insurance contract may be asserted, so long as the damages were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting (*Bi-Economy Mkt, Inc. v. Haleysville Ins. Co. of N.Y*, 10 NY3d 187, 192 [2008]). Here, the plaintiff is alleging that the defendant breached its duty to investigate the plaintiff's claims in good faith. The plaintiff's claims for consequential damages, including loss of business, are reasonably foreseeable and contemplated by the parties. They cannot be resolved on a motion to dismiss (*see id.*). The defendant's motion argues that the investigation was properly conducted in good faith and without inordinate delay merely argues a factual issue that cannot be resolved on a motion to dismiss. The plaintiff has also adequately stated a claim for punitive damages. (*see Wilner*, 71 AD3d at 167).

Finally, the defendant is not entitled to an order striking from the complaint the allegations made against their counsel. CPLR §3024(b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." In reviewing a motion made pursuant to CPLR 3024(b), "the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v. Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]). Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to the defendants should be stricken from the pleading (*see Irving v. Four Seasons Nursing and Rehabilitation Center*, 121 AD3d 1046, 1048 [2d Dept 2014]). Since it was the defendant's counsel who conducted the investigation the plaintiff complains of, the allegations are sufficiently relevant and necessary, even though counsel for the defendant is not an actual party to the lawsuit. Accordingly, the motion to strike must be denied.

The defendant's motion is denied. The parties shall appear for a preliminary conference on May 15, 2018 at 10:30 am in Room 311, 71 Thomas Street, New York, New York.

Dated: April 5, 2018

ENTER

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HON. JOHN J. KELLEY, J.S.C.

Footnotes

1 Plaintiff's cross-motion to disqualify defense counsel has been withdrawn.