DOCKET NO: FST-CV16-6027990 : SUPERIOR COURT

KELLOGG, SALLY : JUDICIAL DISTRICT OF

v. : STAMFORD/NORWALK

MIDDLESEX ASSURANCE COMPANY : OCTOBER 17, 2022

MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT # 151

FACTS

The present action, commenced on March 7, 2016, is part of a long-standing dispute between the plaintiff, Sally Kellogg, and the defendant, Middlesex Mutual Assurance Company, concerning an insured loss caused by a tree falling on the plaintiff's home. The following facts, as set forth by our Appellate Court in a decision resolving an appeal in the present action, our Supreme Court in a prior decision addressing a separate matter involving the parties, and procedural history are relevant to the resolution of the defendant's motion for summary judgment. The plaintiff is the owner of an historic property in the city of Norwalk (property). The property was insured through a "restorationist" policy issued by the defendant. In 2010, while the restorationist policy was in effect, the property was damaged when a four and one-half ton tree fell onto the roof and chimney during a storm. Shortly after the incident, the plaintiff filed a claim under her restorationist policy. Because the plaintiff's and the defendant's adjusters were unable to agree on the amount of the loss, the defendant invoked the policy's appraisal provision. That provision required the loss amount to be determined through an unrestricted arbitration proceeding, with the parties each appointing one appraiser to serve as an arbitrator, and these two appraisers choosing a neutral third arbitrator to act as an umpire.

"The appraisers each independently set the loss and submitted their valuations to the umpire. . . . The appraisers fundamentally disagreed on two issues: the extent of the damage

caused by the tree, and the cost to repair the covered damage. . . . The umpire evaluated the differences between the two appraisers' submissions and set the loss, which was an amount between the two submissions. Before setting the loss, the umpire visited the property seven times to evaluate the damage to the building and its contents. The umpire also reviewed and considered more than 300 pages of the plaintiff's submissions. He conducted hearings with multiple witnesses, including two asbestos abatement experts and a property damage expert. He also reviewed written submissions from other experts and consultants, all of which he considered in determining the award. On certain items, the umpire agreed with the valuations of the plaintiff's appraiser, and on other items he agreed with the defendant's appraiser. He then gave both appraisers his preliminary assessment of the loss and gave them an opportunity to challenge his assessment and to advocate for their respective positions.

"The defendant's appraiser accepted the umpire's valuation, which became the appraisal panel's decision on the amount of the loss, and the panel issued its arbitration award in two parts: first, it awarded $578,587.64 for replacement or restoration cost of the building on the property, which the panel depreciated to its actual cash value of $460,170.16, with the difference withheld until the plaintiff completed repairs, and, second, the panel later awarded an additional $79,731.68 for the actual cash value loss to the plaintiff's personal property. . . .

"In September, 2013, the plaintiff filed in the Superior Court an application to vacate the arbitration award pursuant to General Statutes § 52-418. . . . On February 5, 2016, following eight days of trial, the trial court, *Hon. Kevin Tierney*, judge trial referee, granted the application to vacate the award and remanded the matter for a new arbitration hearing on the basis of its conclusion that the award violated § 52-418 (a) in two ways." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Kellogg* v. *Middlesex Mutual Assurance Co.*, 211

Conn. App. 335, 338-40, 272 A.3d 677 (2022). The defendant appealed from Judge Tierney's decision, and while that appeal was pending, the plaintiff commenced the present action. The defendant moved to dismiss, claiming that, in light of the pending appraisal appeal, the action was (1) not ripe, or alternatively, (2) barred pursuant to the prior pending action doctrine. On November 7, 2016, the court, *Heller, J.*, denied the motion to dismiss, concluding that the plaintiff's claims were ripe, and that a pending appeal is not a prior pending action.

On August 22, 2017, our Supreme Court issued a decision in the appraisal appeal concluding that Judge Tierney had improperly substituted his judgment for that of the appraisal panel, and therefore improperly vacated the arbitration award. See *Kellogg* v. *Middlesex Mutual Assurance Co.*, 326 Conn. 638, 647-51, 165 A.3d 1228 (2017). Accordingly, our Supreme Court reversed Judge Tierney's decision and remanded the case with direction to deny the plaintiff's application to vacate the award. Id., 651. In the present action, on August 17, 2018, the plaintiff filed a second revised and amended complaint raising claims of breach of contract, a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., arising from a violation of the Connecticut Unfair Trade Practices Act (CUIPA), General Statutes § 38a-815 et seq., and promissory estoppel.

On August 24, 2018, the defendant filed a motion for summary judgment accompanied by a supporting memorandum of law and exhibits. The court, *Hernandez, J.*, denied the motion on February 4, 2019, and the defendant appealed to the Appellate Court. On appeal, the Appellate Court reversed the denial, concluding that the court committed error in denying the motion for summary judgment by improperly relying on Judge Heller's denial of the defendant's motion to dismiss and Judge Tierney's findings in his decision granting the plaintiff's application to vacate the arbitration award. See *Kellogg* v. *Middlesex Mutual Assurance Co.*,

supra, 211 Conn. App. 352-57. Accordingly, the Appellate Court remanded the case for a proper consideration of the motion for summary judgment. Resolution of the defendant's motion for summary judgment is now before this court.

In count one of the second revised and amended complaint, the plaintiff alleges that the defendant breached the restorationist policy by, inter alia, failing to adequately compensate the plaintiff for the damage to the property and its contents, providing adjusters who were unfamiliar with the reconstruction and restoration of historic homes, refusing to recognize structural damages, and failing to carry out the terms of the restorationist insurance policy. In count four, the plaintiff alleges that the defendant misrepresented the benefits of the restorationist policy and used a title of the policy that misrepresented the true nature of the policy, in violation of § 38a-816 (1) (A) and (E) and, therefore, violated CUTPA. In count six, the plaintiff asserts a promissory estoppel claim, alleging that the defendant made certain promises and representations about the restorationist policy and what it would cover, and that the plaintiff paid the premiums on the policy in reliance on these promises and representations. The plaintiff further alleges that because of these promises set forth in the policy and supporting literature, the defendant cannot deny its responsibility for the repair, restoration and replacement of the property or the plaintiff's furniture and personal property.[1]

The defendant moves for summary judgment on counts one, four, and six of the second revised and amended complaint. With respect to count one, the defendant moves for summary judgment on the grounds that the breach of contract claim is barred pursuant to (1) the doctrine of res judicata, (2) the defendant's proper request for appraisal under the restorationist policy,

[1] Counts two, three, five, and seven have been intentionally left blank and not repleaded to preserve the plaintiff's rights for appellate review.

and (3) the one year suit limitation provision in the restorationist policy. With respect to count four, the defendant moves for summary judgment on the grounds that (1) the plaintiff's CUTPA/CUIPA claim was time barred pursuant to § 42-110g (f), and (2) there is no genuine issue of material fact that the defendant did not make any misrepresentations regarding coverage afforded under the policy. With respect to count six, the defendant moves for summary judgment on the grounds that (1) the promissory estoppel claim is barred by the one year suit limitation provision in the policy, (2) the claim is barred because the policy constituted a written enforceable contract between the parties, and (3) there is no genuine issue of material fact that the plaintiff cannot establish the elements of promissory estoppel. On October 12, 2018, the plaintiff filed a memorandum of law in opposition to the motion for summary judgment. The defendant filed a reply memorandum on October 25, 2018. The matter was heard by remote hearing on August 1, 2022.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 191–92, 177 A.3d 1128 (2018).

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). Importantly, "[t]he test [for summary judgment] is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 673, 259 A.3d 1239 (2021).

I. COUNT ONE: BREACH OF CONTRACT

The defendant argues that the appraisal award constitutes a binding judgment and res judicata bars the breach of contract claim.[2] The plaintiff counters that there is a genuine issue of material fact concerning whether the defendant properly carried out the terms of the agreement. Additionally, the plaintiff argues that the doctrine of res judicata only applies if claims at issue are identical.

[2] Because the motion for summary judgment is being granted on count one based on res judicata, the court need not address the defendant's arguments concerning the appraisal request, or the one year suit limitation provision contained in the policy.

"[U]nder the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim . . . or any claim based on the same operative facts that *might have been made*. . . ." (Emphasis in original; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 651, 164 A.3d 731 (2017), aff'd, 332 Conn. 67, 208 A.3d 1223 (2019). "We have adopted a transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata. . . . What factual grouping constitutes a transaction, and what groupings constitutes a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Id., 650-51.

Our courts have diminished the distinction between arbitration and appraisal. See *Covenant Ins. Co.* v. *Banks*, 177 Conn. 273, 279, 413 A.2d 862 (1979). The Supreme Court "has previously concluded that the doctrine of res judicata applies to the decisions of an arbitration panel, especially in a case in which the decisions are made for a purpose similar to those of a court and in proceedings similar to judicial proceedings." *Fink* v. *Golenbock*, 238 Conn. 183, 195, 680 A.2d 1243 (1996). In *Fink*, the plaintiff and the defendant entered an unrestricted arbitration regarding an employment contract. Id., 193. The court agreed with the defendant that the plaintiff could have raised the tort and CUTPA claims during the arbitration rather than in suit because the claims involved the same underlying conduct that formed the basis of the arbitration. Id., 193. That court reasoned that the "claims that were actually decided in the arbitration proceeding and those that could have been decided because they were within the

scope of the submission persuades us that the claims asserted in the present action are barred by res judicata." Id., 196.

Importantly, "arbitration and its scope remain dependent on the contract . . . [and] no one may be compelled to arbitrate a dispute outside the scope of the agreement, which constitutes the charter of the entire arbitration proceeding and defines and limits the issues to be decided by the arbitrators." Id., 195. For the purposes of res judicata, "the appropriate inquiry with respect to claim preclusion is whether the party had an adequate opportunity to litigate the matter in the earlier proceeding." (Emphasis omitted; internal quotation marks omitted.) *Joe's Pizza Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 872, 675 A.2d 441 (1996).

In the present case, it is undisputed that the parties entered an unrestricted arbitration involving arbitrators who were empowered to decide issues of law and fact, and that the arbitration award was confirmed by the Supreme Court. See *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 326 Conn. 638. Crucially, for the purposes of res judicata, the arbitration process included issues related to the dwelling and the plaintiff's personal property. Kellogg Aff., ¶ 44. The plaintiff and the defendant each appointed an appraiser, and the appraisers subsequently chose a neutral umpire. *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 641-42. The umpire visited the property seven times, reviewed over 300 pages of the plaintiff's submissions, conducted hearings with multiple witnesses, and reviewed written submissions from other experts. Id., 642. The Supreme Court found that the appraisal umpire "considered all of the evidence [the plaintiff's appraiser] wanted to present to them." Id., 648.

There is nothing in the record to indicate that the appraisal panel did not consider everything in the agreement and everything that occurred. The plaintiff could have raised the breach of contract action in the arbitration. Thus, the defendant's motion for summary judgment

as to count one of the second revised complaint is granted because there is no genuine issue of material fact that res judicata precludes the breach of contract action based on the confirmed unrestricted arbitration award.

II. COUNT FOUR: CUTPA/CUIPA

The defendant argues that the statute of limitations under § 42-110g (f) bars the plaintiff's CUTPA/CUIPA claim because whether the statute began to run when the alleged misrepresentations took place in 2002, the date of loss in 2010, or the date it rejected the plaintiff's proof of loss submissions in 2011, all were more than three years before the action was commenced in 2016.[3] The plaintiff counters that the statute of limitations under § 42-110g (f) does not bar her claim because it did not begin to run until the appraisal process was completed on August 23, 2013, or the Supreme Court's decision regarding the appraisal award in August of 2017.[4] Alternatively, the plaintiff argues that the statute of limitations was either tolled or extended by a continuing course of conduct by the defendant.

It is well established that a plaintiff can bring an action under CUTPA pursuant to a violation of CUIPA. *Nazami* v. *Patrons Mutual Ins. Co.*, 280 Conn. 619, 625, 910 A.2d 209 (2006). A CUTPA/CUIPA claim is different from a contract action because "[t]he factual inquiry focuses, not on the nature of the loss and the terms of the insurance contract, but on the conduct of the insurer." *Lees* v. *Middlesex Ins. Co.*, 219 Conn. 644, 653, 594 A.2d 952 (1991).

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[3] The defendant's argument that there were no misrepresentations as a matter of law is not considered here because the statute of limitations bars the CUTPA/CUIPA claim.

[4] The plaintiff also argues that there are genuine issues of material fact concerning the misrepresentations and advertisements of the defendant in violation of § 38a-816 (1) (A) and (E) because the misrepresentations and advertising materials emphasized the historic and unique nature of the plaintiff's home in selling the restorationist policy as a product that is specifically designed for consumers owning antique and historic homes. This argument is not considered here as the statute of limitations bars the CUTPA/CUIPA claim.

The statute of limitations for a CUTPA/CUIPA claim is set forth in § 42-110g (f) which provides: "An action under this section may not be brought more than three years after the occurrence of a violation of this chapter." This statute of limitations is an occurrence statute that "begins to run as of the date the complained of conduct occurs, and not the date when the plaintiff first discovers [her] injury." *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 311, 94 A.3d 553 (2014). Further, the Appellate Court has held that the continuing course of conduct doctrine does not apply to CUTPA claims. *Flannery* v. *Singer Asset Finance Co., LLC.*, 128 Conn. App. 507, 514, 17 A.3d 509 (2011), aff'd, 312 Conn. 286, 94 A.3d 553 (2014);[5] see *Pastrana* v. *Johnson & Johnson*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X06-CV-16-6031748-S (May 20, 2019, *Bellis, J.*) (68 Conn. L. Rptr. 659, 664).

In support of their argument, the defendant has submitted a sworn deposition taken from the plaintiff. The plaintiff purchased the policy in 2002. Kellogg Dep. 50:20-24, June 6, 2018. After the plaintiff met with a Middlesex authorized insurance agent, Middlesex sent an antique home specialist to inspect the home either before the plaintiff purchased the policy, shortly

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[5] There is some controversy over the applicability of the continuing course of conduct doctrine to CUTPA claims because although the Supreme Court affirmed the Appellate Court's holding in *Flannery* on appeal, it declined to address the Appellate Court's determination that the doctrine does not apply to CUTPA. *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 298. Three dissenting justices, however, expressly faulted the Appellate Court's interpretation and argued that the continuing course of conduct doctrine does apply to CUTPA claims. Id., 342 (*Norcott, J.*, dissenting). As a result, trial courts have split, with some applying the Appellate Court's view and others adopting the view of the dissenting Supreme Court justices. See *Pastrana* v. *Johnson & Johnson*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X06-CV-16-6031748-S (May 20, 2019, *Bellis, J.*) (68 Conn. L. Rptr. 659, 664 n.6) (exploring spit in trial court jurisprudence over applicability of continuing course of conduct doctrine to CUTPA claims). Nevertheless, the Appellate Court's determination remains binding precedent and our Supreme Court has continued to decline to address this issue. See *Normandy* v. *American Medical Systems, Inc.*, 340 Conn. 93, 112 n.18, 262 A.3d 698 (2021).

thereafter, or around the same time. Id., 51:8-52:12, June 6, 2018. The alleged misrepresentations took place in the form of statements from the agent, brochures and letters from the home inspector, and from the Middlesex website. All of which are alleged to have taken place in 2002. Thus, the statute of limitations started to run from that moment. See *Szynkowicz* v. *Bonauito-O'Hara*, 170 Conn. App. 213, 228, 154 A.3d 61 (2017) (trial court did not error granting summary judgment on CUTPA count as alleged wrong occurred in 2008 and suit was filed in 2012). Therefore, because the alleged misrepresentations occurred fourteen years before the present action was commenced in 2016, the CUTPA claim is time barred and the continuing course of conduct doctrine does not apply to toll the CUTPA claim.

For the foregoing reasons, the court grants the defendant's motion for summary judgment as to count four because the claim is barred by the statute of limitations.

III. COUNT SIX: PROMISSORY ESTOPPEL

The defendant argues that the promissory estoppel claim fails because the parties had a valid and enforceable contract.[6] The plaintiff counters that there is a genuine issue of material fact concerning the defendant's representations and promises during and after the purchase of the restorationist insurance policy.[7]

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[6] The defendant also argues that the policy's one year suit limitation provision precludes promissory estoppel, and that the plaintiff is unable to establish the elements of promissory estoppel. The court declines to address these arguments given that the parties had a valid and enforceable contract.

[7] The plaintiff also argues that the defendant waived the one-year suit limitation provision through their conduct. The court declines to address that argument as the parties had a valid and enforceable contract.

"[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all." (Internal quotation marks omitted.) *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, 202 Conn. 206, 213, 520 A.2d 217 (1987).

"An action for promissory estoppel generally lies when there is no written contract, or the contract cannot be enforced for one reason or another." *Reynolds, Pearson & Co., LLC* v. *Miglietta*, Superior Court, Docket No. CV-00-0801247 (March 27, 2001, *Berger, J.*) (29 Conn. L. Rptr. 481, 482). Additionally, "when an enforceable contract exists . . . parties cannot assert a claim for promissory estoppel on the basis of alleged promises that contradict the written contract. Put differently, a plaintiff cannot use the theory of promissory estoppel . . . to add terms to a contract that are entirely inconsistent with those expressly stated in it." *Kent Literary Club of Wesleyan University* v. *Wesleyan University*, 338 Conn. 189, 210, 257 A.3d 874 (2021).

It is undisputed that the parties had a contract for insurance. The plaintiff's complaint avers purchasing an insurance agreement in count six under the promissory estoppel claim and the factual allegations are the same as those contained in the breach of contract claim. See *Corrado* v. *Hofmiller*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-12-5010880-S (March 15, 2016, *Stevens, J.*) (plaintiff's promissory estoppel claim unavailable where valid contract and plaintiff incorporated all factual allegations contained in breach of

contract claim into promissory estoppel claim). The alleged promises made by the defendant relate to the repair, restoration, and replacement of the historic home that include terms that would alter the written contract. "The existence of a contract does not create an absolute bar to a promissory estoppel claim when that claim addresses aspects of the parties' relationship that are collateral to the subject matter, and does not directly vary or contradict the terms, of the written agreement." *Kent Literary Club of Wesleyan University* v. *Wesleyan University*, supra, 338 Conn. 211. It is also undisputed that the parties entered appraisal on the same insurance agreement which resulted in a binding arbitration award pursuant to the contract.

Therefore, because there was a valid written contract, the court grants the defendant's motion for summary judgment on the sixth count claiming promissory estoppel.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted on all counts.

GOLGER, J

DECISION ENTERED IN ACCORDANCE WITH THE FOREGOING ON 10/19/22. JDNO SENT 10/19/22. Dec