

Bird v Washington Mutual Bank, FA

2013 NY Slip Op 32238(U)

September 10, 2013

Sup Ct, Suffolk County

Docket Number: 10-27015

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8/8/12 (#011)
MOTION DATE 9/26/12 (#012)
ADJ. DATE 5/14/13
Mot. Seq. #011 - MG
Mot. Seq. #012 - MG

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JEANINE BIRD n/k/a JEANINE HART,

Plaintiff,

JAMES G. PRESTON, ESQ.
Attorney for Plaintiff
118A Jackson Avenue
Syosset, New York 11791

- against -

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White Plains, New York 10604

WASHINGTON MUTUAL BANK, FA, JP
MORGAN CHASE BANK, NATIONAL
ASSOCIATION as successor to interest to
WASHINGTON MUTUAL BANK, FA, JP
MORGAN CHASE & CO., KATHY O'REILLY,
LOVULLO ASSOCIATES, INC., CAPELL &
ASSOCIATES, INC., and MALPIGLI &
SALVAGGIO INSURANCE AGENCY, INC.,

KENNEY SHELTON LIPTAK NOWAK LLP
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Defendants.

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Upon the following papers numbered 1 to 101 read on these motions for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1-29; 30-73; Notice of Cross Motion and supporting papers _____; Answering
Affidavits and supporting papers 74-82; 83-93; Replying Affidavits and supporting papers 94-96; 97-99; 100-101; Other
_____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Kathy O'Reilly for an order pursuant to CPLR 3212, granting summary judgment dismissing the amended complaint against her, is granted; and it is further

ORDERED that the further request by defendant Kathy O'Reilly for an order pursuant to 22 NYCRR Part 130 awarding sanctions against all parties, which request was not specified in her notice of motion (*see* CPLR 2214 [a]), is denied; and it is further

ORDERED that the motion by defendant Price, Capell & Associates, i/s/h/a Capell & Associates, Inc., for an order pursuant to CPLR 3212, granting summary judgment dismissing the third, fifth, and twelfth causes of action in the amended complaint and all cross claims against it, is granted.

This is an action to recover damages allegedly sustained by the plaintiff arising, in part, from the negligent procurement of a homeowner's insurance policy which did not provide customary coverage for risk of loss related to water damage.

In her original complaint, the plaintiff alleged that she purchased a homeowner's policy issued by Scottsdale Insurance Company ("Scottsdale") covering the period October 31, 2007 through October 31, 2008, that on or about February 15, 2008, the property suffered a "catastrophic" loss from water damage, rendering it uninhabitable, and that on or about March 19, 2008, the insurer disclaimed coverage for the loss, advising that water damage was not a covered peril under the policy. The plaintiff further alleged that Kathy O'Reilly was the insurance agent who procured the policy on her behalf, and that at the time she did so, she was acting as an employee or agent of Capell & Associates, Inc. ("Capell").

Of the twelve causes of action in the original complaint, only the first, alleging negligent procurement of the policy, and the twelfth, alleging that due to each defendant's negligence, the plaintiff suffered "severe financial and personal hardship" as well as "severe emotional and psychological injuries and distress resulting in physical pain, injury and discomfort," were pleaded against O'Reilly; only the third, alleging negligent training and supervision in connection with the procurement of the policy, the fourth, alleging negligent procurement of the policy and negligent misrepresentation that the policy provided customary homeowner's coverages, including risk of loss caused by or relating to water damage, and the twelfth were pleaded against Capell.

Following the commencement of this action, the plaintiff learned that O'Reilly was, in fact, employed by Malpigli & Salvaggio Insurance Agency, Inc. ("M & S") in 2007 at the time the plaintiff applied for and obtained the policy. Based on that information, the plaintiff commenced a separate action against M & S (Sup Ct, Suffolk County, Index No. 10-32017) to recover damages relating to her loss.

By order of former Justice Peter Fox Cohalan dated February 29, 2012, the court, *inter alia*, (i) granted the plaintiff's motion to consolidate this action with the related action against M & S, (ii)

granted O'Reilly's motion for summary judgment, and (iii) denied Capell's motion for summary judgment, noting that it had failed to support its application, as required under CPLR 3212 (b), with a complete set of the pleadings. As to O'Reilly, the court made the following findings:

O'Reilly cross-moves * * * for summary judgment dismissing the complaint against her. O'Reilly contends, in part, that she cannot be held individually liable because, at all relevant times, she was employed by either Capell or Malpigli and was acting within the scope of her employment.

Based on her supporting affidavit, the Court finds that O'Reilly established her prima facie entitlement to summary judgment by demonstrating that she acted solely within the course and scope of her employment in procuring the subject insurance and, as such, that she cannot be held liable in her individual capacity (*Ali v Pacheco*, 19 AD3d 439, 797 NYS2d 101 [2005]; *Mendez v City of New York*, 259 AD2d 441, 687 NYS2d 346 [1999]; *Urbach, Kahn & Werlin v 250/PAS Assoc.*, 176 AD2d 151, 574 NYS2d 36 [1991]). The plaintiff, in opposition, failed to raise a triable issue of fact.

Noting, however, that the plaintiff had already amended her complaint as of right and that O'Reilly's motion was directed only to the original complaint, the court indicated that it would "allow a second, timely motion for summary judgment addressing the claims added in the amended complaint."

In the amended complaint, as in the original complaint, only the first and twelfth causes of action are pleaded against O'Reilly, and only the third, fifth,¹ and twelfth causes of action are pleaded against Capell. However, it now appears that the first and fifth causes of action are based not only in negligence but also on a theory of breach of contract. The plaintiff also alleges for the first time in the amended complaint that the defendants breached their respective duties to obtain requested coverage with respect to a prior homeowner's policy issued by Scottsdale Insurance Company covering the period October 31, 2006 through October 31, 2007, in addition to the subject policy.

Now, the defendants all having filed their respective answers to the amended complaint in April 2012, O'Reilly and Capell separately move for summary judgment.

Upon review, the court finds that O'Reilly is entitled to summary judgment relative to the causes of action pleaded against her in the amended complaint. To the extent that the plaintiff continues to press her claims of negligent procurement, it is law of this case that O'Reilly was acting within the scope of her employment, whether with Capell or Malpigli, in procuring insurance on the plaintiff's behalf. The law of the case doctrine "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165, 371 NYS2d 687, 689 [1975]), and it applies, as here, "to the same questions presented in the same case" (*RPG Consulting v Zormati*,

¹ Except to the extent described below, and insofar as it is pleaded against Capell, the fifth cause of action essentially mirrors the fourth cause of action in the original complaint.

82 AD3d 739, 740, 917 NYS2d 897, 898 [2011]). Consequently, she cannot be held liable in her individual capacity for any alleged negligence. The plaintiff's breach of contract theory is equally unavailing. Even presuming the facts pleaded to be true and construing the allegations of the amended complaint in a light most favorable to the plaintiff (*see Andre Strishak & Assoc. v Hewlett Packard Co.*, 300 AD2d 608, 752 NYS2d 400 [2002]), it is not alleged that O'Reilly entered into any contract with the plaintiff in her individual capacity, nor that O'Reilly purported to bind herself under any such contract (*see Maranga v McDonald & T. Corp.*, 8 AD3d 351, 777 NYS2d 732 [2004]; *Westminster Constr. Co. v Sherman*, 160 AD2d 867, 554 NYS2d 300 [1990]). "[P]ersons may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts" (*Wiernik v Kurth*, 59 AD3d 535, 537, 873 NYS2d 673, 675-676 [2009]). Summary judgment is granted, therefore, dismissing the amended complaint against O'Reilly, and O'Reilly's own cross claim for common-law indemnification is dismissed as academic.

O'Reilly's further request for an award of sanctions against all parties pursuant to 22 NYCRR Part 130 is denied. Even were the court to excuse O'Reilly's failure to explicitly request such relief in her notice of motion—and the court notes that only the plaintiff responded to the request in her answering papers (*see J.A. Valenti Elec. Co. v Power Line Constructors*, 123 AD2d 604, 506 NYS2d 769 [1986]; *cf. Fox Wander W. Neighborhood Assn. v Luther Forest Community Assn.*, 178 AD2d 871, 577 NYS2d 729 [1991])—the court does not find the plaintiff's claims against O'Reilly or the parties' refusal to execute a stipulation discontinuing those claims so frivolous as to merit such an award.

As to Capell, the court finds that it established its prima facie entitlement to summary judgment by demonstrating, through the affidavit of Joseph P. Price and by relevant documentary evidence, that it was not involved in the procurement of the subject policy, that it was not the broker of record with respect to that policy because it was procured after O'Reilly left its employ and moved all of her customer accounts to M & S and, hence, that it owed no duty to the plaintiff, contractual or otherwise, relative to the procurement of that policy.² "In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782, 390 NYS2d 393, 395 [1976]). The plaintiff, in opposition, failed to raise a triable issue of fact. Although the plaintiff asserts that summary judgment is premature and should not be granted until discovery is complete, she offers no evidentiary proof that discovery may lead to relevant evidence (*see Lambert v Bracco*, 18 AD3d 619, 795 NYS2d 662 [2006]), nor that she attempted to seek relevant discovery or to otherwise ascertain material facts before this motion was made, despite ample opportunity to do so (*see Meath v Mishrick*, 68 NY2d 992, 510 NYS2d 560 [1986]). Accordingly, Capell is entitled to summary judgment dismissing each of the causes of action in the amended complaint pleaded against it. Since this conclusion necessarily defeats the cross claim for common-law indemnification pleaded by M & S against Capell, it is dismissed as well (*see Stone v Williams*, 64 NY2d 639, 485 NYS2d 42 [1984]); as to the remaining cross claims pleaded against Capell, the court notes that they were all discontinued by stipulation of the parties dated

² Although the parties do not expressly address the issue in their papers, it is evident that any alleged negligence or breach of contract on the part of Capell in procuring the prior policy (covering the period October 31, 2006 through October 31, 2007) was not a proximate cause of the plaintiff's damages, as that policy had been replaced and was no longer in effect on the date of loss.

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The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: September 10, 2013

W. Gerard Asher
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION