

Levi v Utica First Insurance Co.

2003 NY Slip Op 30097(U)

September 9, 2003

Supreme Court, New York County

Docket Number:

Judge: Marcy S. Friedman

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

PRESENT: HON. MARCY S. FRIEDMAN
Justice

PART 57
(FMS)
122948/02

D. Levi

INDEX NO.

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

- v -
Utica First Ins.

The following papers, numbered 1 to _____ were read on this motion ^{of motion} to/for dismiss

PAPERS NUMBERED

- | |
|-------------------|
| 1 |
| 2, 3, 4 |
| 5, 6, 7, 8 |
| 9, 10, 11, 12, 13 |
| 14-17 |

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Notice of Cross-Motion
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Memos of Law

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ~~is granted~~ and cross-motions are decided in accordance with accompanying decision/ order dated 9/9/03.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/9/03

[Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcv S. Friedman, JSC

DANIELLA LEVI and HAIM LEVI,
Plaintiffs,

x

Index No.: 122948/2002

- against -

UTICA FIRST INSURANCE COMPANY and
MORSTAN GENERAL AGENCY, ERIC DERZIE
AND ASSOCIATES, INC., and ERIC DERZIE

DECISION/ORDER

Defendants.

x

In this action, plaintiffs sue for damages arising out of defendants' denial of insurance claims made after a fire destroyed their home. Defendant Morstan General Agency, Inc. ("Morstan") moves, and defendants Eric Derzie and Associates, Inc. and Eric Derzie (collectively "Derzie") cross-move, to dismiss the complaint against them, pursuant to CPLR 3211, for failure to state a cause of action. Utica First Insurance Company ("Utica") cross-moves for summary judgment dismissing plaintiffs' complaint against it. Plaintiffs cross-move for partial summary judgment as to liability against defendant Utica on their first cause of action, and against defendants Morstan and Derzie as to liability on their second cause of action.

The complaint alleges that plaintiffs purchased a home in Jamaica Estates, Queens, in August 2001, and contacted Derzie, an insurance broker, to obtain coverage for the home. (Complaint, ¶¶ 3, 7, 13.) The complaint further alleges that Derzie was an authorized agent of Morstan and Utica, and possessed binding authority to bind insurance of behalf of Morstan and

Utica (id., ¶¶ 8, 9); that plaintiffs issued a payment for a policy to Utica, through Derzie (id., ¶ 19); and that an insurance binder was then issued by Derzie to plaintiffs on behalf of Utica. (Id., ¶ 20.) In December, 2001, plaintiffs' home was destroyed by fire. All defendants have disclaimed liability for insurance coverage to plaintiffs. In the papers submitted in connection with these motions, plaintiffs acknowledge that Derzie was their insurance broker (Aff. of Eitan Ogen, Esq. In support of P's Cross-Motion, ¶ 4), and that Utica was the insurer from which Derzie sought to procure coverage. (Id., ¶ 5.) Plaintiffs also claim that Derzie advised them that it was an agent for Utica and Morstan. (Aff. of Daniella Levi In Support of P's Cross-Motion, ¶ 4.) Plaintiffs do not dispute Morstan's contention that it was a wholesale broker which Derzie contacted to procure the Utica policy, and that plaintiffs themselves had no direct contact with Morstan.

The complaint alleges a first cause of action against Utica for breach of contract; a second cause of action against Morstan and Derzie for negligence - in particular, breach of a duty of care to plaintiffs "to properly bind the insurance coverage for [plaintiffs'] home through UTICA FIRST"; a third cause of action against all defendants for breach of a duty of good faith; a fourth cause of action against all defendants for breach of a duty of fair dealing; a fifth cause of action against all defendants for deceptive business practices; a sixth cause of action against Derzie for violation of General Business Law § 349; a seventh cause of action against all defendants for negligent misrepresentation; an eighth cause of action against all defendants for intentional misrepresentation; a ninth cause of action against Derzie for fraud based on a misrepresentation to plaintiffs that they were "fully insured and covered by UTICA"; and a tenth cause of action against all defendants for "forgery with intent to defraud," based on the allegation that defendants

altered plaintiffs' application for insurance by inserting information which would result in lack of coverage.

Morstan's and Derzie's Motions to Dismiss

The standards for determination of a motion to dismiss are well settled:

The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." In furtherance of this task, we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference. Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law."

(511 W. 232nd Owners Corp. v Jennifer Realtv Co., 98 NY2d 144, 152 [2002] [internal citations omitted].)

Negligence & Misrepresentation Claims

Morstan moves to dismiss plaintiffs' claims against it for negligence and for negligent and intentional misrepresentation, on the ground that it was not in privity with plaintiffs and therefore cannot be liable to them as a matter of law.

There is substantial authority that **an** insurance broker has no duty to a plaintiff that may serve as a predicate for liability for negligent misrepresentation, unless the broker had a contractual relationship, or was otherwise in privity, with the plaintiff. (See Glynn v United House of Prayer, 292 AD2d 319,323 [1st Dept 2002]. See also Sinclair's Deli. Inc. v Associated Mut. Ins. Co., 196 AD2d 644 [2d Dept 1993].) To establish "a relationship sufficiently approaching privity" (id.), the plaintiff must demonstrate:

- (1) an awareness by the maker of the statement that it is to be used for a particular purpose;
- (2) reliance by a known party on the statement in furtherance of that

purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.

(Point O'Woods Assn. v Those Underwriters at Lloyd's, London, 288 AD2d 78, 81 [1st Dept 2001])[internal citations and quotation marks omitted], lv denied 98 NY2d 611 [2002].)

Here, Morstan correctly asserts that the complaint fails to allege that its relationship with plaintiffs approached privity. The complaint does not allege a contractual relationship between Morstan and plaintiffs. Nor does the complaint allege any contact between plaintiffs and Morstan, any representation by Morstan to plaintiffs, or any acts of Morstan that otherwise link it to plaintiffs, or evince Morstan's understanding that plaintiffs would rely on its acts. (See Point O'Woods Assn., 288 AD2d at 81.) Although the complaint alleges that Derzie issued the binder for coverage "with the full authority and consent of Morstan and Utica" (Complaint, ¶22), and that plaintiffs relied upon Derzie's representation that coverage was obtained (id., ¶25), this allegation is insufficient to plead privity. (See Sinclair's Deli. Inc. v Associated Mut. Ins. Co., 196 AD2d 644, supra [rejecting dissent's holding that representation by wholesale broker to plaintiffs insurance agent was sufficient to establish privity or relationship approaching privity between plaintiff and wholesale broker].) To the extent that plaintiffs allege that Derzie was Morstan's agent (see Complaint, ¶9), this allegation is wholly conclusory and is contradicted by the undisputed facts on this motion. Such allegation therefore need not be taken as true for purposes of this motion to dismiss (see Acquista v New York Life Ins. Co., 285 AD2d 73 [1st Dept 2001]; Elsky v KM Ins. Brokers, 139 AD2d 691 [2d Dept 1988]), and is accordingly also insufficient to plead privity between plaintiffs and Morstan. For these reasons, plaintiffs' causes of action for negligence and negligent and intentional misrepresentation against Morstan must be dismissed.

As to Derzie, it moves to dismiss the negligence causes of action on the ground that the evidence demonstrates that Mr. Derzie “performed all of his duties in accordance with the applicable laws.” (See Aff. of Melissa Zoldan, Esq. In Support of Derzie’s Cross-Motion, ¶8.)

As it is well settled that “a broker who negligently fails to procure a policy stands in the shoes of the insurer and is liable to the insured” (Soho Generation of New York, Inc. v Tri-City Ins. Brokers, Inc., 256 AD2d 229,231 [1st Dept 1998]; Tucci v Hartford Cas. Ins. Co., 167 AD2d 387 [2d Dept 1990]), the complaint sufficiently pleads Derzie’s negligence based on the allegation that Derzie failed “to properly bind the insurance coverage” for plaintiffs’ home through Utica. (Complaint, ¶ 49.) The complaint also sufficiently pleads Derzie’s negligent and intentional misrepresentation based on the allegations that Derzie advised plaintiffs that they were “ ‘fully insured and covered by UTICA,’ as confirmed by the aforesaid binder and invoice,” and that this conduct was intentional. (Complaint, ¶¶ 24, 72.)

To the extent that Derzie seeks dismissal based not merely on deficiencies in the pleadings but on the merits of the complaint, Derzie in effect seeks summary judgment. The court declines to convert the motion, as Derzie fails to submit evidence sufficient to establish as a matter of law that it took all necessary steps to procure a policy on plaintiffs’ behalf. This is particularly so, given Derzie’s failure to respond to plaintiffs’ attestations that, after issuance of the binder, they contacted Derzie without success in an effort to obtain the original policy. (See Aff. of Daniella Levi In Support of P’s Cross-Motion, ¶¶ 11-12.)

Thus, the branch of Derzie’s motion seeking to dismiss plaintiffs’ negligence and

negligent and intentional misrepresentation claims against it must be denied.’

Breach of Duties of Good Faith and Fair Dealing

Morstan and Derzie each move to dismiss the claims against them for breach of the duties of good faith and fair dealing. As defendants argue, these duties arise out of contract:

Within every contract is an implied covenant of good faith and fair dealing. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff.

(Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce, 265 AD2d 513,513-514 [2d Dept 1999].)

Plaintiffs allege a cause of action for breach of contract only against defendant Utica. (See Complaint, First Cause of Action.) Absent a breach of contract claim against Morstan and Derzie, plaintiffs fail to state a claim against these defendants for breach of the duties of good faith and fair dealing. (See Seidel v National Life Ins. Co., NYLJ, June 10, 2002, at 21, col 2 [Sup Ct New York County].)

Deceptive Business Practices

Defendants Morstan and Derzie each move to dismiss plaintiffs’ causes of action for deceptive business practices, on the ground that the complaint does not allege consumer oriented conduct.

General Business Law (“GBL”) §349 provides a private right of action to consumers for

‘While Derzie purports to adopt all of Morstan’s arguments, Morstan’s claim of lack of privity is plainly inapplicable to Derzie.

injuries resulting from deceptive business practices. A claim brought pursuant to GBL 9349 “must be predicated on a deceptive act or practice that is ‘consumer oriented’.” (Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 344 [1999], citing Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 [1995].) To be consumer oriented, “conduct need not be repetitive or recurring but defendant’s acts or practices must have a broad impact on consumers at large.” (New York Univ. v Continental Ins. Co., 87 NY2d 308, 320 [1995]; Oswego Laborers’ Local 214 Pension Fund, 85 NY2d at 25.)

While “[p]rivate contract disputes, unique to the parties * * * would not fall within the ambit of the statute” (New York Univ., 87 NY2d at 320), claims involving the issuance and handling of an insurance policy may constitute such consumer oriented conduct under GBL § 349 where the insurer’s conduct is aimed at policyholders besides the plaintiff and therefore has a “broader impact on consumers at large.” (Acquista, 285 AD2d at 82 [internal citation and quotation marks omitted]. See also Seidel, NYLJ, June 10, 2002, supra; Riordan v Nationwide Mut. Fire Ins. Co., 977 F2d 47 [2d Cir 1992].)

Plaintiffs’ complaint fails to plead that defendants engaged in deceptive acts pursuant to the statute. While it has been held that an “allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability” states a cause of action under GBL § 349 (Acquista, 285 AD2d at 83), the complaint in the instant case fails to allege that defendants’ denial of their insurance claims involved a practice or conduct directed at consumers besides plaintiffs. Plaintiffs’ causes of action against defendants for deceptive practices and/or violation of GBL § 349 must accordingly be dismissed.

Fraud

In order to plead a prima facie case for fraud, “a plaintiff must allege misrepresentation of material fact, falsity, scienter, deception and injury, and each element must be pleaded with particularity.” (LaSalle Nat. Bank v Ernst & Young, L.L.P., 285 AD2d 101, 109 [1st Dept 2001][internal citation omitted].)

Plaintiffs fraud cause of action against Derzie is based on the claim that Derzie falsely represented to plaintiffs that they had valid insurance on their home. The allegations of fraud (see Complaint, ¶¶ 75-82) are sufficient to withstand Derzie’s motion to dismiss.

Forgery with Intent to Defraud

Plaintiffs’ tenth cause of action against all defendants alleges “forgery with intent to defraud.” The complaint alleges that defendants altered plaintiffs’ application for insurance. The papers submitted in connection with the instant motions indicate, more specifically, that plaintiffs claim that Derzie instructed them to leave blank certain items on their application for insurance; that one or more of the defendants subsequently inserted untrue information in the blanks that plaintiffs were occupying and not renovating their home; and that defendant Utica then relied on these misrepresentations in claiming that plaintiffs were not entitled to coverage.

A civil cause of action for forgery is defined as “the fraudulent making of **an** instrument in writing to the prejudice of another’s rights.” (See Marden v Dorothy, 160NY 39, 54 [1899]; Piedra v Vanover, 174AD2d 191 [2d Dept 1992].) Plaintiffs’ complaint, as supplemented by the affidavits submitted on this motion (see Rovello v Orofino Realty Co., 40 NY2d 633 [1976]), adequately pleads a claim for forgery against defendants.

Cross-Claims

To the extent that Morstan's and Derzie's motions seek dismissal of cross-claims against them, the motions must be denied based on the failure of defendants' moving papers to address the bases for dismissal of the cross-claims.

Utica's and Plaintiffs' Cross-Motions for Summary Judgment

Utica moves for summary judgment dismissing the first cause of action against it for breach of contract, primarily on the grounds that it did not receive plaintiffs' application prior to the loss, and that plaintiffs' application was incomplete or contained material misrepresentations that the premises was occupied and not undergoing renovation - "untruths" which, according to Utica, "avoid coverage ab initio." (Aff. of Ellen Lefkowitz, Esq. In Support of Utica's Cross-Motion, at 6.) Plaintiffs move for *summary* judgment against Utica on their first cause of action, on the ground that a binder was issued to them, through Derzie, by Utica.

Neither party is entitled to summary judgment on the first cause of action. Contrary to Utica's assertion, it may not avoid liability on the basis that it was not advised by Morstan of the binder. Even absent such knowledge, Utica's liability may be premised on Morstan's actual or apparent authority to bind it. (See Lenox Realty, Inc. v Excelsior Ins. Co., 255 AD2d 644 [3d Dept 1998], lv denied 93 NY2d 807 [1999]; Niagara Mohawk Power Corp. v Skibeck Pipeline Co., 270 AD2d 867 [4th Dept 2000].)² Contrary to plaintiffs' apparent assertion, however, the mere fact that Morstan issued a binder to them does not demonstrate their entitlement to coverage as a matter of law. Utica is not barred by the issuance of a binder, any more than it

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Nor is Utica entitled to summary judgment based on its further assertion that the binder expired 30 days after issuance. The binder itself does not so state, and Utica submits no other evidence in support of the contention.

would be by the issuance of a policy, from seeking to disclaim coverage based on alleged wrongdoing on plaintiffs' part. Moreover, neither party eliminates triable issues of fact as to whether plaintiffs wrongfully failed to submit a complete insurance application, or whether plaintiffs made material misrepresentations as to the occupancy status of their home.

Utica also moves to dismiss plaintiffs' remaining causes of action against it. For the reasons stated in connection with the determination of Morstan's and Derzie's motions, the branch of Utica's motion for dismissal of the fifth cause of action for deceptive business practices should be granted. The third and fourth causes of action, for breach of the duties of good faith and fair dealing, are maintainable, as the complaint pleads a breach of contract claim against Utica. The seventh and eighth causes of action, for negligent and intentional misrepresentation, must be dismissed. Utica's liability, if any, can be established only through the acts of its agent. However, the claims against Morstan for misrepresentation have been dismissed due to lack of privity. The tenth cause of action for forgery must also be dismissed. The affidavit of Utica's President, Richard Zick, makes a prima facie showing that Morstan did not send Utica a copy of plaintiffs' application for insurance prior to the loss. (Zick Aff. in Support of Utica Cross-Motion.) In addition, Derzie acknowledges that the blanks in the application concerning occupancy and renovation were filled in as of the time Derzie received the binder from Morstan. (See Aff. of Eric Derzie In Support of Derzie Cross-Motion, ¶ 4, and Exhibit B thereto.) This assertion is not disputed by either plaintiffs or Morstan. Thus, Utica correctly argues that no triable issue is raised as to whether it was the party which made the insertions in the blanks of the application.

Plaintiffs also move for summary judgment against Morstan and Derzie on their second

cause of action for negligent failure to procure insurance. The motion must be denied as to Morstan based on this court's above holding dismissing the second cause of action against Morstan for lack of privity. As to Derzie, plaintiffs fail to demonstrate as a matter of law that there was any negligence on Derzie's part or that such negligence resulted in the failure to procure an insurance policy. The motion must accordingly also be denied as to Derzie.

Punitive Damages and Attorney's Fees Claims

Morstan, Derzie and Utica all move to dismiss plaintiffs' punitive damages and attorney's fees claims. Plaintiffs seek punitive damages in connection with their third and fourth causes of action for breach of the duties of good faith and fair dealing, their eighth cause of action for intentional misrepresentation, their ninth cause of action for fraud, and their tenth cause of action for forgery.

The claim for punitive damages on the third and fourth causes of action is not maintainable because the complaint does not allege a public wrong, as required where punitive damages are sought in connection with a breach of contract. (See Rocanova v Equitable Life Ass. Socy., 83 NY2d 603 [1994].)

The claims for punitive damages in connection with the misrepresentation and fraud claims are also not maintainable, as it is well settled that punitive damages are not available for ordinary fraud. (See Chase Manhattan Bank, N.A. v Each Individual Underwriter [Lloyd's], 258 AD2d 1 [1st Dept 1991]; Mom's Bagels v Sig Greenebaum Inc., 164 AD2d 820 [1st Dept 1991], appeal dismissed 77 NY2d 902 [1991].)

The claim for punitive damages in connection with the forgery claim is maintainable, as it sufficiently pleads conduct "evinced a 'high degree of moral turpitude'" or "demonstrating

‘such wanton dishonesty as to imply a criminal indifference to civil obligations’.” (See Rocanova, 83 NY2d at 613.)

Finally, plaintiffs’ claims for attorney’s fees must be dismissed. It is the settled rule in New York that fees are not recoverable against an insurer where, as here, it is the insured who has initiated legal action to determine its rights to coverage. (See Mighty Midgets, Inc. v Centennial Ins. Co., 47 NY2d 12 [1979]; Mazzuocolo v Cinelli, 245 AD2d 245 [1st Dept 1997].) Similarly, attorney’s fees are not recoverable in an action to determine coverage brought against an insurance broker for negligent failure to procure insurance. (See Chase Manhattan Bank, N.A. v Each Individual Underwriter [Lloyd’s], 258 AD2d 1, supra.)

It is accordingly hereby

ORDERED that defendant Morstan’s motion to dismiss is granted to the extent of dismissing all causes of action set forth in plaintiffs’ complaint against it, except the tenth cause of action (forgery), and the punitive damages claim pleaded in connection with the tenth cause of action; and defendant Morstan’s motion to dismiss is further granted to the extent of dismissing plaintiffs’ claim for attorney’s fees against it; and it is further

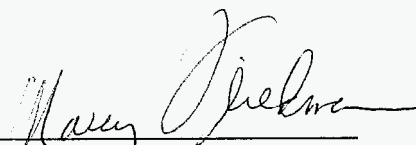
ORDERED that the Derzie defendants’ cross-motion is granted to the extent of dismissing the following causes of action set forth in plaintiffs’ complaint against them: third and fourth causes of action (breach of the duties of good faith and fair dealing); fifth and sixth causes of action (deceptive business practices and GBL § 349); and the Derzie defendants’ cross-motion is further granted to the extent of dismissing the punitive damages claims in connection with the eighth and ninth causes of action, and plaintiffs’ claim for attorney’s fees against the Derzie defendants; and it is further

ORDERED that defendant Utica's cross-motion for summary judgment is granted to the extent of dismissing the following causes of action set forth in plaintiffs' complaint against it: fifth cause of action (deceptive business practices); seventh cause of action (negligent misrepresentation); eighth cause of action (intentional misrepresentation); and tenth cause of action (forgery); and defendant Utica's cross-motion is further granted to the extent of dismissing plaintiffs' claims for punitive damages and attorney's fees against it; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 9, 2003



MARCY FRIEDMAN, J.S.C.