SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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| ORIENT OVERSEAS ASSOCIATES,<br><br>Plaintiff,<br><br>-against-<br><br>XL INSURANCE AMERICA, INC., ACE AMERICAN INSURANCE CO., ARCH INSURANCE CO., WESTPORT INSURANCE CORP., and CUSHMAN & WAKEFIELD, INC.<br><br>Defendants. | : | Index No. 652292/2013<br><br>DECISION AND ORDER<br><br>Motion Sequence No. 002 |

**MELVIN L. SCHWEITZER, J.:**

This is a motion to dismiss a bad faith claims handling claim. The plaintiff is the owner of an office building located at 88 Pine Street in New York City (88 Pine). The property was managed by Cushman & Wakefield, Inc. (Cushman), who secured property insurance with Ace American Insurance Company (Ace), Arch Insurance Company (Arch), XL Insurance America, Inc. (XL), and Westport Insurance Corporation (Westport) (collectively, the Quota Share Insurers) through a quota share insurance program (the Program).

Orient Overseas Associates (Orient) alleges that Westport acted in bad faith in resolving its insurance claim for 88 Pine, and seeks recovery for Orient's "extra contractual damages, including legal fees incurred and to be incurred by Orient, in pursuing its claim against Westport and punitive damages."

The facts are as alleged in the complaint.

This litigation is an insurance coverage dispute involving 88 Pine, which was damaged on October 29, 2012 by Superstorm Sandy. Cushman managed 88 Pine, securing property insurance with the Quota Share Insurers through the Program. Westport issued policy number

31-3-74739, effective May 1, 2012 to May 1, 2013, as part of the Program, with its participation limited to 35.714% (the Westport Policy).

On October 29, 2012, Cushman initiated a property claim with the Quota Share Insurers for two locations insured under the Program: 88 Pine, and an office building located at 125 Broad Street, New York (the Claim). Westport contends it immediately began to investigate the claim, and was in regular communication with Cushman and Orient. These alleged communications addressed Westport's investigation of the Claim, including the cause and scope of the claimed damages and the application of the Westport Policy in the context of the Program. They also addressed the fact that any payments by Westport for the claim may be subject to an aggregate limit or sublimit under the Westport Policy, and must be allocated among, and shared between, the claimed losses at 88 Pine and 125 Broad.

Orient brought an action for breach of contract and bad faith claims handling for failure to pay anything under the Westport Policy.

**Discussion**

On a motion to dismiss for failure to state a cause of action [CPLR 3211(a)(7)], the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Orient alleges that under *Bi-Economy Market, Inc. v Harleysville Insurance Co. of New York*, 10 NY3d 187 (2008), with its companion case, *Panasia Estates, Inc. v Hudson Insurance Co.*, 10 NY3d 200 (2008), New York law recognizes a separate cause of action for bad faith claims handling and breach of contract. Orient argues that Westport's misrepresentations and persistence in an untenable refusal to pay anything to Orient, particularly in light of the other Quota Share Insurers payment, creates a separate action distinct from its breach of contract claim.

It is not clearly decided whether there is a separate cause of action for bad faith claims handling in New York. While some courts have held yes (*see, e.g., Orman v GEICO Gen. Ins. Co.*, 964 NYS2d 61 [Sup Ct Kings Cty 2012]), many more have held to the contrary (*see*, e.g., *Mutual Assoc. Adm'r, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 2012 NY Misc LEXIS 4657 [Sup Ct New York Cty 2012], *Jackson v AXA Equitable Life Ins. Co.*, 2011 NY Misc LEXIS 4466 [Sup Ct, New York Cty 2011], *Handy & Harman v American Int't Grp., Inc.*, 2008 NY Misc LEXIS 7522 [Sup Ct, New York Cty 2008]).

This court determines that there is no separate cause of action for bad faith claims handling.

Consequential damages are "designed to compensate a party for reasonably foreseeable damages, [and] must be proximately caused by the breach, and...proven by the party seeking them." *Bi-Economy,* 10 NY3d at 193 (internal citation omitted). Such a claim rests on the breach of contract claim, and "an insured may pursue a claim for consequential damages... based on defendants' claimed breach of the covenant of good faith." *Handy* 2008 NY Misc at *11. Both *Bi-Economy* and *Panasia* support this, as both were breach of contract actions that

allowed for consequential damages after bad faith had been shown in the claims handling process.

In *Bi-Economy Market, Inc. v Harleysville Ins. Co. of New York,* the New York Court of Appeals considered whether an insured could assert a claim for consequential damages in the context of a breach of contract claim against an insurer. This is distinct from the claim in this case, which is separate from the breach of contract claim. Bi-Economy asserted "causes of action for bad faith claims handling, tortious interference with business relations and breach of contract, seeking consequential damages," and that such damages were "reasonably foreseeable and contemplated by the parties at the time of contracting." *Bi-Economy* 10 NY3d at 191. In considering whether Bi-Economy was entitled to consequential damages, the court held that "[i]t is not necessary for the breaching party to have foreseen the breach itself or the particular way the loss occurred, rather, 'it is only necessary that loss from a breach is foreseeable and probable.'" *Id.* at 193, quoting Restatement [Second] of Contracts § 351; 3 Farnsworth, Contracts § 12.14 (2d ed 1990).

Courts must, in determining whether consequential damages were contemplated by the parties, "look to 'the nature, purpose, and particular circumstances of the contract known by the parties...as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to supposed that it assumed, when the contract was made.'" *Id.* (quoting *Kenford Co v County of Erie*, 73 NY2d 312, 319 [1989]). In *Bi-Economy* the Court found that in addition to the contractual purpose of reimbursing after a calamitous event, there was an "additional performance-based component: [that] the insurer agreed to evaluate a claim, and to do so honestly, adequately, and – most importantly – promptly." *Id.* at 195. "When an insured in such a situation [as Bi-Economy] suffers additional

damages as a result of an insurer's excessive delay or improper denial, the insurance company should stand liable for these damages." *Id.* at 195. It is this additional component that grounds the basis for consequential damages within the breach of contract claim, and further requires that the consequential damages sought be both quantifiable and identifiable.

In *Panasia Estates, Inc. v Hudson Ins. Co.*, decided the same day as *Bi-Economy*, Panasia Estates brought a breach of contract claim against Hudson Insurance Company alleging that it failed to properly investigate and denied the claim as not covered under the policy. The Court of Appeals affirmed the Appellate Division, which had stated that "[a]n insured may recover foreseeable damages, beyond the limits of its policy, for breach of a duty to investigate, bargain for and settle claims in good faith." *Id.* at 203 (quoting 39 AD 343 [2007], quoting *Acquista v New York Life Ins. Co.*, 730 NYS2d 272 [1st Dept 2001]).

The rationale for *Bi-Economy* and *Panasia* came from *Acquista v New York Life Insurance Co.*, which though it concerns disability insurance and not property insurance, is analogous to this case. There, the court was concerned with the inability of contractual remedies to make the parties whole, and held "in order to ensure the availability of an appropriate and sufficient remedy...there is no reason to limit damages recoverable for breach of a duty to investigate, bargain, and settle claims in good faith to the amount specified in the insurance policy." *Id.* at 81. Thus, it is possible to recover consequential damages, but they must be alleged as part of the breach of contract claim, and the damages sought must have been within the contemplation of the parties at the time the contract was made.

Even with the potential availability of consequential damages, this claim must fail because the consequential damages being sought are not quantified nor identified, and it is not based upon different facts than the breach of contract claim. In order to recover consequential

damages the harm that occurred beyond the breach of contract must be proven – thus identifying the consequential damages, and none has been shown. Further, the consequential damages must be quantified in some way, which here they are not. In addition, the fourth and fifth causes of action arise from the same set of core facts involving a dispute over whether or not the Westport Policy was part of the Program, and how it applies to the property loss. It is not the time to judge that dispute, rather this court simply determines that the fifth cause of action is duplicative of the fourth, and is dismissed. Had the plaintiff alleged specific loss beyond what is contractually disputed, there may be reason to allow for consequential damages. This is not the case, however. The court will entertain an amended complaint in this respect.

Finally, the plaintiff's claim for attorney's fees "incurred and to be incurred," must also be dismissed. The Westport Policy specifies that "[t]his additional coverage will not include the fees and costs of attorneys." It is the opinion of this court that no unspecified loss can override the contract. Attorney's fees cannot be recovered.

There is no basis for a separate bad faith claims handling claim in New York State law, and the bad faith claims handling cause of action is duplicative of the breach of contract. Accordingly, it is

ORDERED that the motion of defendant Westport Insurance Corp. to dismiss the Complaint is granted as to it alone, and Westport Insurance Corp. is severed from this matter, which shall go forward.

Dated: February 26, 2014

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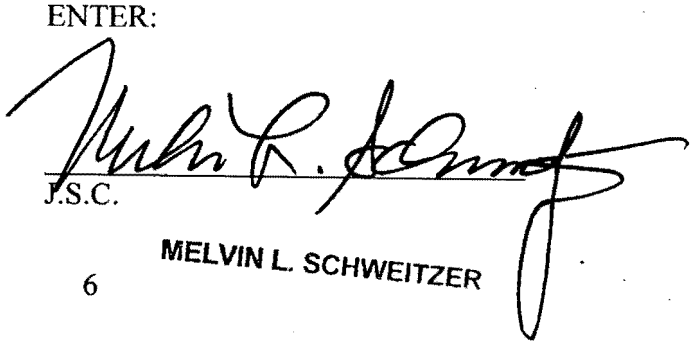

J.S.C.

MELVIN L. SCHWEITZER