

<b>Central Amusement Intl. LLC v Lexington Ins. Co.</b>
2017 NY Slip Op 32233(U)
October 19, 2017
Supreme Court, New York County
Docket Number: 651654/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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CENTRAL AMUSEMENT INTERNATIONAL LLC

Plaintiff,

- v -

LEXINGTON INSURANCE COMPANY,

Defendant.

INDEX NO. 651654/2014

MOTION DATE 3/2/2017

MOTION SEQ. NO. 004

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this application to/for RENEWAL

HON. SALIANN SCARPULLA:

In this insurance coverage dispute, plaintiff Central Amusement International LLC (“Central Amusement”) moves to renew a December 6, 2016 decision and order, in which I granted the motion of defendant Lexington Insurance Company (“Lexington”) to amend its answer to the complaint. Central Amusement also seeks leave to file an amended complaint.

**Renewal of Lexington’s Motion to Amend**

In the original motion Lexington moved to amend its answer to assert a separate, additional ground for denial of insurance coverage, which ground was indirectly raised in its previous denial of insurance, and was later edified in the report of its expert, Ronald

Bova. Lexington averred that it was not able to assert this defense prior to its expert reaching his conclusions as to the cause of the damage for which Central Amusement sought insurance coverage. I permitted the amendment, but also gave Central Amusement an opportunity to seek additional discovery from the expert.

In support of its motion to renew, Central Amusement submits the expert's deposition testimony, and again argues that the expert could have come to his conclusion earlier in the litigation. Lexington opposes Central Amusement's motion to renew, arguing that its expert's testimony does not constitute new information that would change the outcome of its motion to amend. Lexington further argues that Central Amusement's motion is an untimely motion to reargue, and that Central Amusement's arguments in support of renewal are the same arguments it made in opposition to the original motion to amend the answer.

Upon review, most of Central Amusement's arguments here are the same as those Central Amusement made in its opposition to Lexington's original motion to amend. In fact, Central Amusement really seeks to reargue the December 6, 2016 decision and order, in the guise of a motion to renew.

To the extent that Central Amusement seeks to reargue the December 6, 2016 decision and order, its request for relief is untimely. Moreover, Central Amusement has not shown that I misunderstood the facts or applicable law. To the extent that Central Amusement seeks renewal, I deny the motion, as the new information submitted, Bova's expert deposition testimony, does not lead me to conclude that I should have denied Lexington's motion to amend its answer.

### Central Amusement's Proposed Amendments to the Complaint

Central Amusement also seeks to amend its complaint to allege two new causes of action. In the first complaint, Central Amusement pled a breach of contract claim for Lexington's failure to pay under Central Amusement's insurance policy. Central Amusement sought money damages, interest, and the cost and disbursement of the action.

In the proposed amended complaint, Central Amusement again pleads its breach of contract cause of action and adds two additional causes of action. The second cause of action alleges Lexington's breach of the covenant of good faith and fair dealing. In this cause of action Central Amusement alleges that Lexington denied Central Amusement's insurance claim in bad faith.

Central Amusement supports the proposed second cause of action with more than thirty paragraphs of citations to portions of witness deposition testimony. Some of these paragraphs cite the deposition testimony verbatim, other paragraphs paraphrase testimony and draw conclusions as to the meaning of the testimony.<sup>1</sup> Central Amusement alleges that, because Lexington denied insurance coverage in bad faith, Central Amusement has suffered "damages, including consequential damages," from Lexington's breach of the covenant of good faith and fair dealing. Central Amusement seeks the same damages on this cause of action as the breach of contract cause of action.

In the third cause of action Central Amusement alleges a claim for violation of GBL § 349. Central Amusement alleges that Lexington has "engaged in misleading and

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<sup>1</sup> See, e.g., paragraphs 31 and 32 of the proposed amended complaint, which are simply long, verbatim recitations of deposition testimony.

deceptive conduct by failing to adequately investigate and assess [Central Amusement’s] claims, requiring [Central Amusement] to retain counsel and commence litigation, and asserting the applicability of policy exclusions without evidence therefor.” In the proposed third cause of action Central Amusement seeks “treble damages up to One Thousand Dollars (\$1,000.00), plus reasonable attorneys’ fees.”

Lexington opposes Central Amusement’s motion to amend, on the ground that New York does not recognize a separate cause of action for breach of the covenant of good faith and fair dealing in the context of denying a claim for insurance coverage. Lexington further contends that the breach of the covenant of good faith and fair dealing cause of action is duplicative of the breach of contract cause of action. As to the proposed third cause of action, Lexington argues that a private, unique dispute between an insurance company and its insured does not fall within the ambit of GBL § 349.

Leave to amend a complaint is freely granted “upon such terms as may be just[.]” CPLR 3025 (b). “In determining whether to grant a motion to amend [the complaint], the court should consider the merit of the proposed [cause of action] and whether the plaintiff will be prejudiced by the delay in raising it” *Lanpont v Savvas Cab Corp., Inc.*, 244 A.D.2d 208, 209–10 (1st Dep’t 1997) (citations omitted).

Central Amusement’s proposed second cause of action asserts breach of the covenant of good faith and fair dealing based on alleged bad faith claims handling. A separate cause of action for bad faith insurance claim handling is not recognized in New York, in the absence of independent, tortious conduct. *See New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 (1995) (Court of Appeals held that “Plaintiff’s

claim amounts to nothing more than a claim based on the alleged breach of the implied covenant of good faith and fair dealing, and the use of familiar tort language in the pleading does not change the cause of action to a tort claim in the absence of an underlying tort duty sufficient to support a claim for punitive damages"); *Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 N.Y.2d 603, 615 (1994) (same); *Orient Overseas Assocs. v. XI Ins. Am., Inc.*, 132 A.D.3d 574, 576-77 (1<sup>st</sup> Dept 2015) (First Department held that "there is no compelling authority indicating that a separate, non-contractual claim exists for "bad faith claims handling.").

New York does, however, permit an insured to claim consequential damages for breach of contract in those instances where the insured alleges that the insurance companies' bad faith handling of the insured's claim resulted in foreseeable, additional damages, other than damages measured by the amount of insurance coverage. *See Bi-Economy Mkt., Inc. v. Harleystown Ins. Co. of N.Y.*, 10 N.Y.3d 187, 196 (2008); *Acquista v. New York Life Ins. Co.*, 285 A.D.2d 73, 82 (1<sup>st</sup> Dept. 2001) (First Department held that "while plaintiff's cause of action alleging bad faith conduct on the part of the insurer cannot stand as a distinct tort cause of action, we conclude that its allegations may be employed to interpose a claim for consequential damages beyond the limits of the policy for the claimed breach of contract").

Here, Central Amusement's second cause of action for breach of the covenant of good faith and fair dealing cannot stand as a separate claim because the only tortious conduct it alleges concerns Lexington's alleged breach of its obligation to timely investigate and pay under the insurance contract. Moreover, while Central Amusement

states the words “consequential damages,” the damages sought in the breach of the covenant of good faith and fair dealing cause of action are entirely duplicative of the damages sought in the breach of contract cause of action. Central Amusement has not alleged, with any clarity or specificity, any foreseeable consequential damages it suffered by the alleged bad faith handling of Central Amusement’s insurance claim, other than having to litigate this action. For these reasons, the proposed second cause of action lacks merit.

Central Amusement’s proposed third cause of action, in which it alleges Lexington’s breach of GBL § 349, also lacks merit. A plaintiff asserting a claim under GBL § 349 must allege conduct that is “consumer oriented. The conduct need not be repetitive or recurring but defendant’s acts or practices must have a broad impact on consumers at large; ‘[p]rivate contract disputes unique to the parties... would not fall within the ambit of the statute.’” *New York Univ.*, 87 N.Y.2d at 320, quoting *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995).

Central Amusement’s purchase of a highly specific insurance policy and Lexington’s alleged bad faith handling of its insurance claim do not amount to “consumer oriented” conduct covered under GBL § 349. See *New York Univ.*, 87 N.Y.2d at 320.

For the foregoing reasons, Central Amusement’s motion to amend its complaint is denied.<sup>2</sup>

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<sup>2</sup> Central Amusement, perhaps recognizing the deficiencies in its proposed amended complaint, submitted an alternative proposed amended complaint in its reply papers. I did not consider this alternative proposed amended complaint because it was submitted on reply and Lexington did not have the opportunity to oppose or even review it.

In accordance with the foregoing, it is  
ORDERED that plaintiff Central Amusement International LLC's motion to  
renew and to amend its complaint is denied in its entirety.

This constitutes the decision and order of the Court.

10/19/17  
DATE

Saliann Scarpulla  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE