SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI
J.S.C. **TRIAL/IAS PART 21**

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RICHARD BENNETT and MARY WENDELL BENNETT, **Index No. 602582/2014**

Plaintiffs,

-against-

Mot. Seq. #001
Mot. Seq. #002
Mot. Date: 9-4-14
Submit Date: 9-4-14

STATE FARM FIRE AND CASUALTY COMPANY, HOLZMACHER, MCLENDON & MURRELL, LLC, MILRO ASSOCIATES, INC.,

Defendants.

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The following papers were submitted on this motion:

Amended Notice of Motion, dated 8-4-14.....1
Affidavit in Support of Motion to Dismiss, dated 8-4-14.....2
Defendant's Memorandum of Law, dated 8-4-14.....3
Notice of Cross Motion, dated 8-27-14.....4
Affidavit in Opposition to Motion to Dismiss, dated 8-28-14.....5
Plaintiff's Memorandum of Law, dated 8-28-14.....6
Affirmation in Further Support of Motion, Opposition to Cross Motion, dated 9-3-14.....7

The motion by the defendant State Farm Fire and Casualty Company (State Farm, or defendant) (seq. 001) pursuant to CPLR 3012(b) and CPLR 3211(a)(1) and (a)(7) for an order dismissing the complaint as to it is granted pursuant to CPLR 3211(a)(1) and (7) and the complaint is dismissed as against this defendant. [1]

The plaintiff's cross motion (seq. 002) pursuant to CPLR 3012(d), in effect, for an extension of time to serve and to compel acceptance of the complaint is denied as academic.

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[1] The Court has determined that oral argument is unnecessary here in view of the complete sets of papers submitted by the parties, and thus plainitffs' request therefor is denied. The Court also declines to defer a decision because another motion to dismiss has been made by State Farm's co-defendant Milro Associates, Inc.

This case is a companion action to *Bennett v State Farm Fire and Casualty Company, Creative Landscaping by Cow Bay, Inc., Lewis Oil Company, Star Net Insurance Company and John Doe Insurance Company* (Index no. 10385/13). [2] The plaintiffs and State Farm parties are the same, as are the facts and circumstances. All stem from an underground heating oil spill of some 1,200 gallons at plaintiffs' residential premises in May of 2011, and the attempts at remediation that followed. By Decision and Order dated April 21, 2014 ("Prior Order") this Court, *inter alia,* granted partial summary judgment to State Farm and declared that it had no additional financial obligation to plaintiffs under its insurance policy beyond the payments it already had made to defend and indemnify the plaintiffs from the claim made against plaintiffs by the New York State Department of Environmental Conservation ("DEC") as a result of the spill. To prevent needless repetition, the Court hereby incorporates the Prior Order as if fully set forth herein.

Initially, the Court rejects State Farm's argument that the complaint in this present action should be dismissed as against it because the pleading was not served within 20 days of State Farm's notice of appearance and demand therefor, pursuant to CPLR 3012(b). Although it cannot be deemed to have waived the issue of late service by its retention of the complaint given its prompt motion to dismiss on that ground (service of complaint July 15, 2014, present motion made August 4, 2014) (*see Bennett v Patel Catskills, LLC,* 120 AD3d 458 [2d Dept. 2014]; *Abele Tractor & Equipment*

[2] By order dated July 14, 2014, this first action was joined for purposes of pre-trial discovery only with a separate subrogation action brought by State Farm against the Cow Bay and Lewis Oil defendants.

Co., Inc. v RJ Valente, Inc., 94 AD3d 1270 [3d Dept. 2012]), State Farm does not deny that it had not yet been served with the summons with notice before it served the demand for the complaint. Specifically, it is undisputed that service of the summons with notice was effected by plaintiffs on State Farm on June 17, 2014, but the notice of appearance and demand for the complaint had been served the day before, on June 16, 2014.

Both CPLR 320 and CPLR 3012(b) measure the time periods for responding to a complaint or to a summons served without a complaint from the time of service by the plaintiff, not from the time the summons and complaint or summons with notice is filed. In short, it is service, and not commencement, that matters. The defendant's notice of appearance and demand for the complaint therefore was premature, and it cannot thereby alter the statutory scheme and artificially shorten the time periods set forth therein.

Its citation to that portion of CPLR 3012(b) that recites that service of the complaint must be made within 20 days of the demand does not address the absence of service of the summons with notice in the first instance, which is the trigger for a defendant's time to serve that demand within the period for an appearance set forth in CPLR 320(a). State Farm advances no authority holding that it may elect to make its demand, and thus start the plaintiff's time to serve the complaint running, prior to initial service of the summons with notice upon it. [3] As all these CPLR time periods are

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[3] The Court notes that State Farm cannot rely on the fact that this is an e-filed case and that the summon with notice was filed on June 6, 2014, as court rules contemplate electronic service of the initiating documents only where the plaintiff seeks to do so and obtains consent of the defendant, which is not mentioned by either party here. *See* 22 NYCRR § 202.5-b(f)(1).

creatures of statute, and no provision is to be found in those statutes for the act taken by defendant, the Court holds the demand to be a nullity, and the complaint timely served, as without such a valid demand made *after* service of the summons with notice plaintiff's time to serve the complaint pursuant to CPLR 3012(b) never began to run. However, for the reasons that follow the plaintiff's motion must be denied as academic, as the complaint must be dismissed pursuant to CPLR 3211.

As noted, plaintiffs commenced their action against State Farm on June 6, 2014, by way of the filing of a summons with notice. Pursuant to the contract of insurance between the parties, any action against State Farm by its insured must be commenced "within two years after the occurrence causing loss or damage." Bopp Aff., Ex. 1, at p. 14 [Section 1 - Conditions, ¶ 6]. In this Court's Prior Order it was found that the DEC had declared itself satisfied with the remediation at the plaintiffs' home in December, 2011. Plaintiffs had contended and indeed had proved that as of December 23, 2011, State Farm served a letter notifying plaintiffs that it would refuse to pay for further remediation because the DEC was satisfied with the cleanup, and that this ended State Farm's obligation under the policy, even though plaintiffs contended that State Farm previously had promised to plan and complete all needed work (Prior Order at 6,10). The Court held that State Farm was correct. Pursuant to the Prior Order, the only claim remaining against State Farm in the other action was based on an alleged separate agreement, outside the terms of the written insurance policy, made between

plaintiffs and this defendant to restore the premises to its pre-spill condition. [4]

By its advancement of the Prior Order State Farm raises an estoppel argument that there already has been a finding that it was free of any further responsibility to plaintiffs as of December, 2011, when it relied on the DEC's closure of the spill case in notifying plaintiffs that it would no longer provide additional monies for the cleanup.

Defendant has shown that this material issue in the related case – State Farm's obligation to plaintiffs – is identical to one that is raised in the present action and motion, and plaintiffs have not demonstrated that they were deprived of a full and fair opportunity to contest the issue of policy coverage decided against them earlier. Plaintiffs are thus bound as a matter of collateral estoppel from relitigating the issue of their rights under the policy, or, relatedly, the date of December 23, 2011 as the time at which State Farm had refused any further payment to plaintiffs. *See, e.g., D'Angelo v State Insurance Fund,* 48 AD3d 400 (2d Dept. 2008); *303 Realty Corp. v Albert,* 154 AD2d 590 (2d Dept. 1989). As this was the date plaintiffs were adversely affected by State Farm's refusal to pay any more money for the cleanup, as they themselves had argued in the motion leading to the Prior Order, a claim against State Farm regarding payment for remediation of the oil spill arose at that time. Accordingly, any action against State Farm had to have been commenced within two years of December 23, 2011. As the present action was not commenced until June, 2014, it is barred under the policy.

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[4] Nothing in this present decision should be construed as altering the holding of the Prior Order regarding the adequate pleading of such claim.

This would include a claim for water damage, not separately addressed in the Prior Order. On a motion to dismiss pursuant to CPLR 3211(a)(1), documents may be submitted to demonstrate that no claim exists, but the documentary proof must resolve all factual issues as a matter of law in the defendant's favor, and conclusively dispose of the plaintiff's claim. *Tougher Indus. v Northern Westchester Joint Water Works,* 304 AD2d 822 (2d Dept. 2003). By attaching the Prior Order and a copy of the policy, State Farm has demonstrated that the limitations period would include an alleged wrongful denial of coverage under the policy for water damage connected to the remediation, allegedly caused by a failure of State Farm's contractors to property protect the lower structures of plaintiffs' home from a heavy rain in August, 2011. This is because, as noted, plaintiffs were advised in December of 2011 that no further payments under the policy would be forthcoming. CPLR 3211(a)(1).

Further, even assuming this action timely, no claim is stated other than breach of contract, concerning which plaintiffs are estopped from re-litigating here. As held by this Court in the Prior Order, there was no direct first-party coverage for an oil spill on plaintiffs' property, but only for a liability incurred by plaintiffs as a result of that spill, which was satisfied by the DEC's determination. Thus, all claims for coverage are barred.

Nor can plaintiffs escape the rulings made in the Prior Order, including the limitations period, by claiming that their theories now are based not on contract under the policy, but rather on tort. It is well established that where a relationship is one based on contract, a claim sounding in tort must be based on a duty independent of

those arising from the contract. *See Clark-Fitzpatrick, Inc. v Long Island R. Co.,* 70 NY2d 382 (1987); *Board of Managers of SoHo North 267 West 124th Street Condominium v NW 124 LLC,* 116 AD3d 506 (1st Dept, 2014). No such duty has been demonstrated here.

All the tort allegations against State Farm contained in plaintiffs' lengthy complaint concern State Farm's hiring of and payment to co-defendant Holzmacher, Mclendon & Murrell, LLC (("H2M"), an environmental engineering firm, and co-defendant Milro Associates, Inc. ("Milro"), the contractor which was to perform the actual remediation work under H2M's supervision. Under the section of their complaint entitled "Nature of the Action" plaintiffs stated that after the retention of H2M and Milro, "What followed were a series of events which resulted in an already bad situation being turned into a more devastating loss, due to the efforts fo H2M and State Farm to limit the cost and expense of the investigation and remediation work, and the failure of Milro to render its services professionally, competently, safely, and for the exclusive benefit of Plaintiffs." As indicated above, this includes allegations that their home was left unprotected because of improperly performed excavation work, and during heavy rains in August 2011 flooded, leading not only to property damage but also to the further spread of the oil contamination. However, upon an examination of the complaint the Court concludes that the allegations made do not amount to a cognizable legal claim against State Farm beyond a breach of contract, concerning which this Court already has ruled.

The law regarding dismissals for failure to state a cause of action are well established. In evaluating a motion made pursuant to CPLR 3211(a)[7], the Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom

the motion should fail. *See, e.g., Guggenheimer v Ginzburg,* 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Konidaris v Aeneas Capital Mgt., LP,* 8 AD3d 244 (2d Dept. 2004); *Leon v Martinez,* 84 NY2d 83 (1994). That does not extend to mere legal conclusions, however, which are not entitled to the presumption of truth and are not to be accorded every favorable inference. *Morris v Morris,* 306 AD2d 449, 451 (2d Dept. 2003). Nevertheless, inartfully drawn complaints may be supplemented by affidavits on such a motion in order to sustain a claim. *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 (1976).

Six causes of action are alleged. Five are pled against against State Farm. The first sounds in negligence. The second alleges, in effect, tortious interference with the contract under which Milro was engaged. The third sounds in aiding Milro's breach of fiduciary duty. The fourth alleges fraud. The sixth is for punitive damages.

The negligence claim cannot be sustained because the factual allegations against State Farm are 1) that it had a history of improper influence over the experts it retained to assist in settling claims, and 2) that State Farm engaged H2M for the specific purpose of saving it money by "attempting to address the situation without first characterizing and completely delineating the spill" (Complaint, ¶ 150) – *i.e.,* failing to accurately and fairly assess what had to be done to properly remediate the pollution. The rest of the allegations concern how H2M improperly directed and oversaw the job Milro was doing. Thus, all the allegations against State Farm, at base, concern how it failed to fulfill its contractual duty to settle the claim fairly

– the charge is that its primary objective was to save money. That, however, does not affect the finding in the Prior Order that there was no coverage for the spill other than to satisfy the DEC, and that was accomplished. Thus, even assuming that these allegations about State Farm's cost-cutting approach are true, there is no duty expressed in this cause of action except a contractual duty. Thus, the critical element of a separate, non-contractual duty flowing from State Farm to these plaintiffs is missing, and this cause of action is therefore subject to dismissal. *Board of Managers of SoHo North 267 West 124th Street Condominium, supra.*

As to the second cause of action, the elements of tortious interference with contract are: 1) the existence of a valid contract between the plaintiff and a third party; 2) the defendant's knowledge of that contract, 3) the defendant's intentional procurement of a breach of that contract, and 4) damages. *Flushing Expo, Inc. v New World Mall, LLC,* 116 AD3d 826 (2d Dept. 2014); *Sutton v Hafner Valuation Group, Inc.,* 115 AD3d 1039 (3d Dept. 2014). Here, although the plaintiffs arguably were a third-party beneficiary of a contract between H2M and Milro, thus giving them standing to assert a claim based upon Milro's alleged breach as procured by State Farm (*cf., LoPresti v Massachusetts Mut. Life. Ins. Co.,* 30 AD3d 474 [2d Dept. 2006]), there are no factual allegations of a breach of a contractual duty or promise flowing from Milro to H2M upon which to ground the claim, let alone that State Farm's role in causing such a breach was malicious (as opposed to being motivated by financial concerns), a necessary element of the tort. *See AJW Partners, LLC v Admiralty Holding Co.,* 93 AD3d 486 (1st Dept. 2012).

Even if one were to read the complaint generously, and take the allegations together

to mean that the breach was a failure to restore the plaintiffs' premises to pre-spill conditions, the Prior Order renders that claim untenable. The allegations of the present complaint assert that H2M was hired by State Farm, and H2M then hired Milro with State Farm's approval, to do the actual remediation work that was State Farm's obligation. Thus, Milro could have no greater contractual obligation to plaintiffs than State Farm itself had, absent some separate agreement between Milro and H2M, or between Milro and plaintiffs, which is not pled here. As found in the Prior Order, the sole obligation State Farm had – and thus those who were hired to do the actual work in furtherance of that obligation – was to satisfy the DEC that the spill was remediated to its satisfaction.

Indeed, given the facts alleged about the relationship between State Farm and H2M and H2M and Milro, the plaintiffs are in effect asserting a claim that State Farm interfered with its own contractual obligation to plaintiffs, which is untenable. *See Buller v Giorno,* 28 AD3d 258, 259 (1st Dept. 2006). In any event, there is no allegation that the DEC was not satisfied because of a breach by Milro, caused by State Farm. Accordingly, there is no viable assertion of a breach of contract by Milro in its contract with H2M, and thus a viable claim of tortious interference of contact by State Farm is not stated. It should be noted that the removal of Milro from the job and its replacement with another contractor is not proof of a breach, as the papers clearly indicate that it was the plaintiffs' dissatisfaction with Milro, not H2M's, that led to the change.

The third cause of action alleges an aiding and abetting by State Farm of an alleged breach of fiduciary duty by Milro. It is well established that to state a claim for breach of fiduciary duty a plaintiff must show the existence of a fiduciary relationship, misconduct by the defendant fiduciary, and damages caused by that misconduct. *Faith Assemply v Titledge*

of N.Y. Abstract, LLC, 106 AD3d 47, 61 (2d Dept. 2013); *Parekh v Cain,* 96 AD3d 812, 816 (2d Dept. 2012). It must be pleaded with particularity as required by CPLR 3016(b), and a claim that a defendant aided another in breaching that duty cannot be sustained if the party committing the alleged wrongful act owed no fiduciary duty to the plaintiff in the first instance. *See Palmetto Partners, LP v AJW Qualified Partners, LLC,* 83 AD3d 804, 808-809 (2d Dept. 2001).

Here, there are no factual allegations from which one might infer a fiduciary relationship between Milro and plaintiffs. A fiduciary relationship is one "grounded in a higher level of trust than is normally present in the marketplace" in arm's length business transactions, and if the parties to such a business relationship do not create between them that higher level of trust, "courts should not ordinarily transport them" to that realm and fashion the stricter duty that comes with it. *Oddo Asset Mgmt. v Barclays Bank PLLC,* 19 NY3d 584, 593 (2012), quoting *EBC I, Inc. v Goldman, Sachs* & Co., 5 NY3d 11, 19 (2005) and *Northeast Gen. Corp. v Wellington Adv.,* 82 NY2d 158, 162 (1993).

The complaint does not set forth factual allegations of dealings between Milro and plaintiffs that can even arguably indicate the existence of a fiduciary relationship. Plaintiffs acknowledge that Milro was selected by H2M, which had itself been selected by State Farm, and thus plaintiffs had no relationship with Milro at all before the work at their premises began. At best, as indicated above, they were intended beneficiaries of the contract between Milro and H2M, or between Milro and State Farm, assuming such a direct contract existed. There are also no allegations from which one might discern the growth of a fiduciary relationship during the course of the work; indeed, the allegations point to a growing mistrust of this company by plaintiffs, ultimately leading to its replacement on the job and this law suit.

This is confirmed by Richard Bennett's own affidavit, in which he complains about having no contract, no control, and little contact with Milro personnel. Accordingly, what ever damages were allegedly suffered by plaintiffs at the hands of Milro, it was not the result of a breach of a fiduciary relationship, and thus the claim against State Farm for inducing such a breach is not stated.

The fourth cause of action against State Farm sounds in fraud. This is based, first, on the hiring of Milro, which State Farm represented would be in plaintiffs' best interests, when plaintiffs clearly believe it was not, and that State Farm defended Milro after plaintiffs raised issues about its performance. Plaintiffs also allege that three excavations at the site performed by Milro were dangerous, and after the August, 2011 flood State Farm failed to acknowledge responsibility, notwithstanding DEC's advices that H2M and Milro were responsible for the flood and that excavations were not in compliance with OSHA regulations. Plaintiffs further allege that State Farm, together with H2M, were "secretly lobbying the DEC" to have the agency determine that the premises were sufficiently cleaned, especially since the heavy rains and flooding in August, which would require substantial additional work. [5]

To plead a sustainable cause of action in fraud, the complaint must allege 1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, 2) that the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, 3) justifiable reliance of the plaintiff on the

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[5] The Court notes that attached to Mr. Bennett's affidavit as Exhibit "R" is a letter to him from Peter A. Scully, Regional Director of Region One of the DEC, dated January 18, 2012. In that letter, which was a response to Mr. Bennett's request that the DEC spill case be reopened, Scully stated that "I have consulted the Regional Spill Engineer... and have been advised that the spill has not yet been closed... I trust this is welcome news". While this appears to be contrary to other evidence submitted to the Court in the related case, the Court takes no position here as to the possible meaning of this letter insofar as it might have affected that other matter.

misrepresentation or material omission, and 4) injury resulting from said reliance. *See New York Univ. v Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995); *Channel Master Corp. v Aluminum Ltd. Sales*, 4 N.Y.2d 403 (1958). The allegations here are insufficient, as the key element of some justified behavior by plaintiffs directly induced by State Farm's misrepresentation is absent. Although the complaint and the Bennett affidavit may point to venal self-interest on State Farm's part and certain acts and omissions in the service of that interest, as well as a deliberate failure to inform plaintiffs of certain actions it took to save money, none point to any misrepresentation to plaintiffs that caused them to act in reliance on that misrepresentation, which then caused injury. Accordingly, the fraud claim must be dismissed. *See also Mariano v Fiorvante,* 118 AD3d 961 (2d Dept.

Finally, New York does not recognize a separate common law claim for punitive damages. *Rocanova v Equitable Life Assur. Socy. of U.S.,* 83 NY2d 603 (1994); *Stein v Doukas,* 98 AD3d 1024 (2d Dept. 2012). Thus, the dismissal of all underlying claims against State Farm here obviates the basis for such relief, and the claim must therefore be dismissed.

To the extent plaintiffs argue that recent cases decided by the Court of Appeals have changed the legal landscape of claims against insurance companies, both decisions cited concern claims for extra-contractual consequential damages resulting from a bad-faith breach of the insurance contract. As this Court in the Prior Order held that there had been no breach of State Farm's obligation to defend and indemnify plaintiffs regarding the DEC's claim, and that no other coverage existed, the holdings of those cases are without significance here. *See Bi-Economy Market, Inc. v Harleysville Ins.*

Co., 10 NY3d 187 (2008); *Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200 (2008).

Accordingly, the complaint is dismissed in its entirety as against State Farm. CPLR 3211(a)(1); CPLR 3211(a)(7). The cross motion to compel acceptance of the complaint is denied as academic in view of this determination.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: September 23, 2014

HON. DANIEL PALMIERI
Supreme Court Justice

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