Max Jewelry, Inc. v Those Certain Interested Underwriters at Lloyds London Subscribing to Certificate No. JB14/3995
2017 NY Slip Op 31976(U)
September 15, 2017
Supreme Court, New York County
Docket Number: 654117/2016
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MAX JEWELRY, INC.,

Plaintiff,

-against-

THOSE CERTAIN INTERESTED UNDERWRITERS AT LLOYDS LONDON subscribing to CERTIFICATE NUMBER JB14/3995,

Defendant.

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Index No.: 654117/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendant Certain Interested Underwriters of Lloyd's London Subscribing to Certificate Number JB14/3995 (Underwriters) move, pursuant to CPLR 3211(a)(1), (2), and (7), to dismiss the amended complaint (the AC). Plaintiff Max Jewelry, Inc. (Max Jewelry) opposes the motion. For the reasons that follow, Underwriters' motion to dismiss is granted in part and denied in part.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 13) and the documentary evidence submitted by the parties.[1]

Max Jewelry is a New York corporation owned by Bobby Yashaya that manufactures and sells platinum and diamond jewelry. AC ¶¶ 1, 3, 12. Because insurance coverage is a precondition to doing business in the jewelry industry, Max Jewelry has historically maintained a jewelers' block insurance policy on a year-to-year basis to protect it in case of damage to, or loss of, merchandise. ¶¶ 4, 6. In August 2014, in consideration for a $17,750 premium, Max Jewelry contracted with Underwriters for jewelers' block insurance coverage, effective September 1,

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

2014 to September 1, 2015. ¶ 8; Dkt. 19 (the Policy) at 4.[2] For the life of the Policy, Max Jewelry "ma[de] full and timely insurance premium payments and never had a lapse of insurance coverage." AC ¶ 9.

The Policy insured Max Jewelry's stock, including "precious and semi-precious stones, jewels, [and] jewelry" up to $2,000,000. Policy at 5-6, Clauses 1, 3. The Policy required Max Jewelry to "maintain a detailed and itemized inventory of [its] property, including records of purchases and sales . . . in such manner that the exact amount of loss or damage [could] be accurately determined therefrom by the Underwriters." *Id.* at 8, Condition 8(a). Similarly, the Policy's "Loss Settlement and Records Clause" stated that, in the event of a claim for loss, the value of the claim would be determined based on Max Jewelry's private books and records, provided that:

> [S]aid records: (1) are kept in such a manner as to enable Underwriters to determine and substantiate the amount of any claim for loss or damage hereunder and record all transactions of the Assured's business for the property insured . . . and (2) shall be made available to Underwriters and/or Underwriters representative(s) for inspection upon request.

Id. at 13.

The Policy required Max Jewelry to give Underwriters immediate written notice of a loss, along with a complete list of the lost property, stating the market value and cost of each item and the amount claimed thereon. *Id.* at 8, Condition 13. Additionally, within sixty days from the loss, Max Jewelry was obligated to provide proof of loss as to:

> The time and cause of the loss or damage; the interest of the Assured and of all others in the property affected; the cash value of each item thereof, the amount of loss of or damage thereto; all encumbrances thereon; all other contracts of insurance, whether valid or not, and covering any of such property, and shall furnish

[2] Citations to the Policy refer to the pdf pagination on the NYSCEF system.

> a copy of all the descriptions and schedules in all such insurance Policies if required.

Id. Condition 14 set forth Max Jewelry's obligations with respect to Underwriters' investigation of a claim. It provided, as relevant here, that:

> The Assured . . . shall submit . . . to examinations under oath by any person named by the Underwriters and subscribe the same; and, as often as may be reasonably required, shall produce for examination all writings, books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Underwriters or their representative, and shall permit extracts and copies thereof to be made.

Id. at 8. Finally, the Policy stated that "the amount of loss or damage for which the Underwriters may be liable shall be payable thirty (30) days after satisfactory proof of loss, as herein provided, is received by the Underwriters." *Id.* at 8, Condition 15.

On or around May 22, 2015, Yashaya was packing merchandise and other items at Max Jewelry's premises in New York in preparation for a trade show in Las Vegas, Nevada. AC ¶ 12. Max Jewelry alleges, upon information and belief, that while Yashaya was packing for the trade show, a box containing four loose diamonds and a pair of diamond earrings with a combined value of $864,100 was mistakenly taken to the garbage by maintenance workers at its premises. ¶¶ 14-15, 18. Yashaya discovered the box missing when he arrived at the trade show and checked his inventory. ¶ 16. He immediately called Underwriters to advise them of the loss and, on May 29, 2015, submitted a written notice of loss. ¶¶ 17, 19; Dkt. 20 (Notice of Claim).

Within a day of receiving notice, Michael Tocicki, CPA, Executive General Adjustor for Premier Insurance Services, LLC, arrived at Max Jewelry's booth at the Las Vegas trade show and began investigating the claim. AC ¶ 20. Upon returning to New York on June 2, 2015, Yashaya met Tocicki at Max Jewelry's premises, where he searched Max Jewelry's booth and safe under Tocicki's observation to see if the missing diamonds could be located. Yashaya and

Tocicki also contacted the owner of the building to inquire where the garbage was kept in order to potentially inspect the garbage. ¶¶ 21-23.

At Tocicki's request, Yashaya produced credit card, bank, and phone record statements. ¶ 24. Tocicki also requested invoices for the purchase of the missing diamonds, but was told that those records had been destroyed in a prior flood. ¶ 25. "However, as most of the diamonds at issue had been obtained via an exchange of goods, Yashaya was able to contact the individuals with whom the exchanges were conducted and received paperwork supporting the exchange. This paperwork was produced." *Id.* "Tocicki also made direct contact with the individuals from whom Max Jewelry had procured the lost diamonds [and] confirm[ed] that they had, in fact, provided the stones in question to [Max Jewelry]." ¶ 26. Based on these factual allegations, Max Jewelry claims that it "provided proper and timely notice of loss, furnished a complete list of the loss, and provided proof of loss to [Underwriters] in a timely manner, pursuant to the terms of the policy." ¶ 27.

Nevertheless, on October 26 and November 11, 2015, Yashaya was examined under oath regarding his business, personal background, and the loss in question. ¶ 28. On January 21, 2016, despite Yashaya's continued cooperation, Underwriters demanded additional documentation that Max Jewelry alleges was "frivolous to the investigation." These included:

> [C]opies of information to verify that Yashaya's wife does not contribute to household income, copies of statements and information relating to all of Yashaya's personal credit and debit cards including his credit limit, and a list of every trade show attended by Yashaya or Max Jewelry from 2012-2015 specifying such things as the name, date, location, armored car company that conveyed stock to the show and copies of armored car receipts.

¶ 30. Max Jewelry alleges that these additional document requests were "an attempt to avoid honoring [Max Jewelry's] insurance policy," [*id.*], and states that "[t]o date, [Underwriters] have

neither paid [Max Jewelry] for the insured property for which they are liable pursuant to the policy, nor resolved the matter." ¶ 33. Instead, "[Underwriters] continue to carry on an unreasonably lengthy and frivolous investigation," which has left Max Jewelry "with a pending and/or open loss claim for an unreasonable amount of time." ¶¶ 36-37.

When the Policy lapsed on September 1, 2015, Max Jewelry maintained its coverage on a month-to-month basis. However, in December 2015, Underwriters cancelled Max Jewelry's month-to-month coverage and denied its application to renew its insurance. ¶ 39. This left Max Jewelry uninsured and allegedly unable to secure alternative insurance because "potential carriers rarely provide a policy to an applicant with a pending loss claim." ¶ 41. "As a result, Max Jewelry's ability to conduct business has been compromised as few individuals will do business or provide merchandise to an uninsured vendor." ¶ 42.

On August 4, 2016, Max Jewelry commenced this action by filing its summons and initial complaint. Dkt. 1. It subsequently filed the AC on October 17, 2016. Dkt. 13. The AC asserts three causes of action for: (1) breach of contract, based on Underwriters' failure to pay for the insured property within the required thirty days of receiving proof of loss; (2) breach of the implied covenant of good faith and fair dealing, based on Underwriters' alleged unreasonably lengthy and frivolous investigation; and (3) tortious interference with business relations, based on the same allegations underlying the good faith and fair dealing claim. Max Jewelry seeks $864,100 in damages for breach of contract, and consequential damages of no less than $2,000,000 for lost profits on its remaining claims. AC ¶¶ 45-59. Underwriters moved to dismiss on November 16, 2016. Dkt. 15. The court reserved on the motion after oral argument. *See* Dkt. 33 (5/4/17 Tr.).

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, 1 AD3d at 250, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

1. Breach of Contract

"The elements of . . . a claim [for breach of contract] include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Here, there is no

dispute regarding the existence of a contract. Max Jewelry alleges that it completed performance by making full and timely premium payments, timely submitting satisfactory proof of loss, submitting to repeated examinations under oath, and complying with all reasonable requests for additional documentation. AC ¶¶ 9, 17-19, 23-28, 47-48. It contends that Underwriters breached the contract by failing to pay for the lost diamonds within the required thirty days after receiving proof of loss, resulting in damages in the amount of the unpaid claim. ¶¶ 32-34, 49-50; *see* Policy at 8, Condition 15 (30-day payment requirement). These allegations suffice to state a claim for breach of contract.

Underwriters principally argue that the cause of action for breach of contract must be dismissed because Max Jewelry has not completed performance of its contractual obligations, and, thus, Underwriters are not in breach. Specifically, Underwriters contend that Max Jewelry has failed to provide satisfactory proof of loss, or to fully comply with Conditions 8 (record proof of loss), 13 (timely notice of items lost and their value), 14 (cooperation with investigation), and the "Loss Settlement and Records Clause" of the Policy. They assert that this alleged noncompliance prevents them from substantiating the claimed loss, and that, because they continue to investigate and have yet to deny the claim, they cannot be deemed to have breached the contract.

Neither the terms of the Policy itself, nor the correspondence submitted along with the present motion "utterly refute[]" Max Jewelry's factual allegations with respect to its performance under the contract. *Goshen*, 98 NY2d at 326. Max Jewelry alleges that it gave timely and appropriate written notice of the claimed loss on May 29, 2015. AC ¶ 19; *see* Dkt. 20 (Notice of Claim). Although the initial notice of claim does not detail the items lost, the manner in which they were lost, their value, or the exact amount of the claim, it can be reasonably

inferred from the facts alleged, as well as from the Reservation of Rights letter submitted along with the present motion, that these details were duly provided once Tocicki began his investigation. Dkt. 20; *see* AC ¶¶ 14-15, 18, 20-23; Dkt. 21 (Reservation of Rights Letter) at 1-2. It is further alleged that Yashaya produced credit card, bank, and phone record statements at Tocicki's request, and that, although he could not provide invoices for the purchase of the missing diamonds because these had been destroyed in a flood, he did provide alternative documentation demonstrating his receipt of the diamonds. AC ¶¶ 24-25. Moreover, Tocicki was allegedly able to independently contact the same individuals who provided this alternative documentation and confirm Yashaya's receipt of the diamonds at issue. ¶ 26. Thereafter, Yashaya twice submitted himself to examination under oath, and alleges that he complied with all reasonable requests for additional documentation, producing all of the requested documents that he "had in his possession and/or could reasonably produce." ¶¶ 28-29, 31.

In short, Max Jewelry alleges that it: (1) kept inventory lists and records, including invoices for its purchase of the diamonds at issue, in accordance with the record-keeping provisions of the contract; (2) complied with the contract's notice and proof of loss requirements by giving immediate written notice of claim, duly providing a detailed description of the manner in which the loss occurred and the value of the lost property, and furnishing alternative documentation—in place of the invoices that were destroyed by flood—that was sufficient to allow Underwriters to substantiate its receipt of the lost diamonds; and (3) satisfied its contractual obligations with respect to Underwriters' ongoing investigation of its claim by submitting to repeated examinations under oath and complying, as best it could, with all reasonable requests for additional documents.

Although Underwriters dispute the adequacy of Max Jewelry's performance, they do not conclusively establish that it fell short of what was contractually required. In particular, none of the documents on which Underwriters rely conclusively demonstrate that the records and proof of loss that Max Jewelry provided were insufficient to substantiate its claim. At best, the correspondence submitted by Underwriters establishes that Max Jewelry has not provided *all* of the additional documentation requested of it, but the reasonableness of those additional document requests is itself a matter of dispute.

Underwriters also contend that they cannot be deemed to have breached the contract because they continue to investigate and have not denied Max Jewelry's claim. This argument is specious. So too is Underwriters' assertion that the breach of contract claim is not yet ripe for adjudication. The contract required Underwriters to pay loss claims within thirty days after receipt of satisfactory proof of loss. Policy at 8, Condition 15. Max Jewelry contends that it provided satisfactory proof of loss no later than November 11, 2015, after Yashaya's second examination under oath. Dkt. 29 (Opp.) at 7. Underwriters did not make payment within the thirty days allotted, and have not conclusively established that Max Jewelry's proof of loss was insufficient under the Policy. The court, therefore, finds that the facts pleaded in the AC suffice to state a claim for breach of contract.

2. Breach of Implied Covenant of Good Faith & Fair Dealing

Implicit in every contract is an implied covenant of good faith and fair dealing. *See Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 (2d Dept 2012). The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such

conduct. *See Moran v Erk,* 11 NY3d 452, 456 (2008); *511 West 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 153 (2002); *Atlas El. Corp. v United El. Group, Inc.,* 77 AD3d 859, 860 (2d Dept 2010). Such a cause of action is not necessarily duplicative of a cause of action alleging breach of contract. *See Elmhurst Dairy*, 97 AD3d at 784.

"An insurance carrier has a duty to 'investigate in good faith and pay covered claims.'" *Gutierrez v Gov't Employees Ins. Co.*, 136 AD3d 975, 976 (2d Dept 2016), quoting *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 195 (2008). "Damages for breach of that duty include both the value of the claim, and consequential damages, which may exceed the limits of the policy, for failure to pay the claim within a reasonable time." *Id.* at 976-77, citing *Panasia Estates v Hudson Ins. Co.*, 10 NY3d 200, 203 (2008); *Bi-Economy.*, 10 NY3d at 195. "Such a cause of action is not duplicative of a cause of action sounding in breach of contract to recover the amount of the claim." *Id.*, citing *Michaan v Gazebo Hort., Inc.*, 117 AD3d 692, 985 (2d Dept 2014); *Genovese v State Farm Mut. Auto. Ins. Co.*, 106 AD3d 866, 868 (2d Dept 2013). "Such consequential damages may include loss of earnings not directly caused by the covered loss, but caused, instead, by the breach of the implied covenant of good faith and fair dealing." *Id.*, citing *Mutual Assn. Adm'rs, Inc. v National Union Fire Ins. Co. of Pittsburgh,* PA, 118 AD3d 856, 857-58 (2d Dept 2014).

Max Jewelry alleges that Underwriters conducted an unreasonably lengthy and frivolous investigation, thereby saddling it with a perpetually open-ended loss claim that prevents it from securing alternative insurance to replace the now-cancelled Policy. AC ¶¶ 35-36, 39-41. It seeks to recover consequential damages in excess of the policy limit for lost profits, alleging that its inability to secure new insurance coverage has compromised its business. ¶¶ 38, 42-43.

Underwriters' motion to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing repeats the same arguments concerning Max Jewelry's allegedly inadequate performance of its contractual obligations. As already discussed, Underwriters do not conclusively establish that Max Jewelry's performance under the contract was inadequate.

Underwriters also argue that they are not liable for Max Jewelry's lack of insurance coverage because the Policy did not obligate Underwriters to renew or reissue insurance to Max Jewelry, and Underwriters are not responsible for the business decisions of other insurers not to provide Max Jewelry with alternative coverage. To recover consequential damages, Max Jewelry is required to show that the damages sought were reasonably foreseeable and proximately caused by Underwriters' alleged breach of the implied covenant of good faith and fair dealing. *See Bi–Economy*, 10 NY3d at 193 ("Consequential damages [are] designed to compensate a party for reasonably foreseeable damages, must be proximately caused by the breach and must be proven by the party seeking them.") (quotation marks and citation omitted); *Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200, 203 (2008) ("[C]onsequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.") (internal quotation marks omitted). Max Jewelry alleges that insurance coverage is a prerequisite to conducting business in the jewelry industry, that it contracted for coverage on a year-to-year basis, and that insurance is typically unavailable to those with pending loss claims. AC ¶¶ 4, 6, 41. These allegations are sufficient, at this stage of the litigation, to support Max Jewelry's claim for consequential damages on the theory that Max Jewelry's inability to secure alternative insurance

and its resulting loss in business opportunities, was the foreseeable consequence of Underwriters' alleged unreasonably lengthy investigation.

3. Tortious Interference with Business Relations

To state a claim for tortious interference with business relations, the plaintiff must plead "1) that it had a business relationship **with a third party**; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) **that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort**; and 4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009) (emphasis added). Malice in this context means "that the conduct by defendant that allegedly interfered with plaintiff's prospects [] was undertaken for the **sole purpose** of harming plaintiff." *Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 (1st Dept 2004) (emphasis added), citing *Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 969 (1986). If malice is not alleged, the plaintiff must plead that "the defendant's conduct [amounts] to a crime or an independent tort." *Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004). Normal economic self-interest, by itself, is not sufficient to support the claim. *Id.* at 190-91. Moreover, the wrongful conduct necessary to establish the claim must be directed at the plaintiff's customers. *Id.* at 192.

Max Jewelry's tortious interference claim is based on the same factual allegations as its cause of action for breach of the implied covenant of good faith and fair dealing—that its present lack of coverage and inability to secure alternative insurance is the result of Underwriters' unreasonably lengthy investigation coupled with the cancellation of the Policy. These allegations are insufficient to state a claim for tortious interference with business relations. Max Jewelry does not identify a specific third party with which it had prospective business relations

and at which Underwriters directed their alleged interference. All that is alleged is that the pending loss claim associated with Underwriters' ongoing investigation has deterred unnamed insurers from providing Max Jewelry with insurance coverage, and that the lack of such insurance has compromised Max Jewelry's business relations with other unspecified individuals in the jewelry industry.

In addition, there is no allegation that Underwriters used "wrongful means," or acted with the sole purpose of harming Max Jewelry. Underwriters' actions—conducting a lengthy investigation and cancellation of the Policy—were neither criminal nor independently tortious, and their alleged purpose in taking these actions was "to avoid honoring [Max Jewelry's] insurance policy." AC ¶ 40. It served Underwriters' legitimate economic self-interest, but was not the type of wrongful conduct necessary to establish tortious interference with prospective economic advantage. *See Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 (1st Dept 1999) (to establish interference with prospective economic advantage plaintiff must demonstrate wrongful means—physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure). Accordingly, it is

ORDERED that Underwriters motion is granted only to the extent of dismissing the third cause of action for tortious interference with business relations, and the remaining causes of action are severed and shall continue; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on November 2, 2017,

at 11:00 a.m., and the parties' pre-conference joint letter shall be e-filed and faxed to Chambers at least one week beforehand.

Dated: September 15, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.