

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

RITA AGHADIUNIO,

Plaintiff,

DECISION AND ORDER

Index No. 80004/19

-against-

NEW YORK PROPERTY INSURANCE  
UNDERWRITERS ASSOCIATION,

Defendant.

The following papers were read on Defendant's motion to dismiss:

NOTICE OF MOTION  
AFFIRMATION IN SUPPORT  
EXHIBITS A - B  
MEMORANDUM OF LAW IN SUPPORT

AFFIRMATION IN OPPOSITION

REPLY AFFIRMATION  
REPLY MEMORANDUM OF LAW

Plaintiff commenced this action based on a dispute that arose with the defendant insurance company after her boiler and pipes froze resulting in significant water damage. The incident occurred in late December 2017. Defendant New York Property Insurance Underwriters Association had issued Plaintiff a homeowner's insurance policy in effect at the time of the incident. Plaintiff's complaint alleges that Defendant failed to make payments due under the insurance policy and seeks additional damages under theories of negligence, fraud along with attorney's fees and punitive damages. Defendant moves to dismiss the negligence and fraud causes of action and the claims for punitive damages and attorney's fees.

To determine whether dismissal is warranted for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept as true the facts alleged therein and accord Plaintiff the benefit of every possible inference. Leon v. Martinez, 84 NY2d 83 (1994). The court's function is to determine only whether the facts, as alleged, fit within any cognizable legal theory. A motion to dismiss pursuant to CPLR 3211(a)(1) based on

documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. Ralex Services, Inc. v. Southwest Marine & General Ins. Co., 155 AD3d 800 (2<sup>nd</sup> Dept 2017). An insurance contract qualifies as documentary evidence. Id.

A cause of action for breach of contract does not give rise to a separate cause of action for negligence unless the defendant breached a legal duty separate and apart from its contractual obligations. Clark-Fitzpatrick v. Long Island Rail Road Co., 70 NY2d 382 (1987). A claim of negligent misrepresentation requires proof of the existence of a special relationship of trust or confidence. See Wright v. Selle, 27 AD3d 1065 (4<sup>th</sup> Dept 2006). Plaintiff asserts that the defendant breached a duty to timely pay for repairs and accommodation expenses. The foregoing fails to state a cause of action for negligence. The facts underlying Plaintiff's negligence claim stem entirely from Defendant's contractual obligations under the insurance policy. Plaintiff fails to allege breach of a duty separate and apart from that policy or the existence of a special relationship of trust or confidence between the parties. Wherefore, it is

ORDERED that Defendant's motion to dismiss Plaintiff's second cause of action sounding in negligence pursuant to CPLR 3211(a)(7) is granted.

Plaintiff's fraud claim is also duplicative of her breach of contract claim. Plaintiff merely alleges that the defendant fraudulently represented that it would make payment under the contract in a timely manner. Any damages Plaintiff could recover based upon a failure to make timely payments due under the policy are precisely the same damages she can recover on her breach of contract claim. See generally Fin. Guar. Ins. Co., v. Morgan Stanley ABS Capital I Inc., 164 AD3d 1126 (1<sup>st</sup> Dept 2018). To the extent that Plaintiff alleges Defendant fraudulently misrepresented that the policy would cover accommodations for up to twelve months to induce her to sign the policy, this also fails to state a claim for fraudulent inducement. The plain language of the policy states that Defendant would "cover any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living. Payment will be for the shortest time required to repair or replace the Described Location...." As the policy did not state a specified period of coverage for alternative accommodations, any reliance on a representations as to a specific amount of time was not reasonable. Moreover, Plaintiff fails to state her fraud claim with the particularity required under CPLR 3016(b). In a pleading asserting a cause of action for fraud, "the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). Plaintiff's failure to state who made the statement, when it was made or what specific words were spoken fails to satisfy this requirement. Based on the foregoing, it is

ORDERED that Defendant's motion to dismiss Plaintiff's third cause of action sounding in fraud is granted. Based on the dismissal of Plaintiff's negligence and fraud causes of action, it is further

ORDERED that Plaintiff's claim for punitive damages and attorney's fees is dismissed. There is no provision in the contract providing for attorney's fees. Thus, Plaintiff is not entitled to

recover attorney's fees should she prevail on her breach of contract cause of action. Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights. See Rocanova v. Equitable Life Assur. Society, 83 NY2d 603 (1994). Plaintiff fails to allege conduct involving a high degree of moral turpitude that was aimed at the public generally. Id. Thus, she may not recover punitive damages in this action.

The foregoing constitutes the decision and order of the Court. The parties are reminded that a compliance conference is scheduled for January 22, 2020 at 9:15 a.m.

Dated: January 3, 2020  
Poughkeepsie, New York

ENTER:

  
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MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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