NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JEANETTE GRIFFENKRANZ,

Plaintiff,

- against-

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION,

Defendant.

Index No. 704909/13

Motion Date October 5, 2015

Motion Cal. No. 75

Motion Seq. No. 2

The following papers numbered EF20 to EF37, 1-2 read on this motion by plaintiff for leave to file a Second Amended Complaint, pursuant to CPLR 3025[d].

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF20 - EF27
Affirmation in Opposition - Exhibits.....	EF28 - EF37
Reply Affirmation.....	1 - 2

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff in this breach of contract action, is a homeowner seeking payment under an insurance policy with defendant, New York Property Insurance Underwriting Association ("NYPIUA"). The complaint alleges that on or about October 29, 2012, while the insurance policy was in full force and effect, plaintiff's home (located at 163 Oceanside Avenue, in Breezy Point NY 11697 "premises"), sustained damages from Superstorm Sandy. Plaintiff properly notified defendant of the loss, and an inspection of the premises was performed. Plaintiff submits, that despite satisfying all conditions and obligations under the Policy, defendant failed to properly adjust the loss by denying, delaying or otherwise underpaying plaintiff's claims.

On October 30, 2013, plaintiff filed a verified complaint alleging, *inter alia*, that defendant's failure to indemnify plaintiff for the full loss under the Policy constitutes a breach of contract. On November 13, 2013, plaintiff filed an amended verified complaint. The Amended Complaint included a first cause of action for breach of contract, a second cause of

action for bad faith and breach of implied warranty of good faith and fair dealing, and a third cause of action for violation of New York General Business Law § 349.

On June 24, 2014, defendant moved to dismiss the second and third causes of action and any claims for attorneys fees. On July 21, 2014, the parties stipulated to dismissal of the second and third causes of action and all claims for attorneys' fees, consequential damages, extra-contractual damages, punitive damages and treble damages, without prejudice. After the stipulation, the only cause of action which remained was the breach of contract claim.

At some point, defendant commenced a subrogation action against Long Island Power Authority and National Grid, for reimbursement of the sums it paid to, *inter alia*, plaintiff ("the subrogation complaint"). In the subrogation complaint, defendant stated that it was "responsible for payment to [plaintiff] in the amount of . . . $500,000." Defendant submits that there is no correlation between the subrogation suit and the present action. The $500,000 indicated in the subrogation action is not an indication that plaintiff is owed $500,000 by defendant. In fact, defendant sent plaintiff a letter indicating that there was a "mistake" in the subrogation complaint; "the correct amount paid to the insured (plaintiff) by defendant was $20,096.00. Defendant indicated that the dollar figure ($500,000) was used in the subrogation complaint simply because it was equal to the policy limit. Defendant also indicated that it would be amending the subrogation complaint. Indeed, the parties to the subrogation action clarified this fact by filing a stipulation with the court stating that,

> "the amount of damage [NYPIUA] can seek to recover in this matter pursuant to the subrogation rights of the subrog[or] Jeanette Griffenkranz with Property located at 163 Oceanside, Breezy Point, NY 11697, is hereby limited to the $20,000 that [NYPIUA] paid to their insured for the damages sustained in the aforementioned property."

Nonetheless, on August 14, 2016, plaintiff moved this court for leave to file a second amended verified complaint to reinstate its second cause of action for bad faith, and a modified version of its third cause of action for breach of General Business Law § 349, in light of statements made in the subrogation complaint. Defendant opposes the motion.

Discussion

Applications for leave to amend pleadings should be freely granted except when the delay in seeking leave to amend would directly cause undue prejudice or surprise to the opposing party, or when the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025[b]; *Ramos v. Baker,* 91 AD3d 930, 932, 937 N.Y.S.2d 328; *Lucido v Mancuso,* 49 AD3d 220, 222, 851 NYS2d 238). The sufficiency or underlying merit of the proposed amendment is to be examined no further (*see Gomez v State*, 106 AD3d 870, 871 [2013]; *Lucido v Mancuso,* 49 AD3d at 227, 851 NYS2d 238; *Sample v Levada,* 8 AD3d 465, 467–468, 779 NYS2d 96).

Plaintiff argues that defendant's misrepresentations, delayed efforts and untenable refusal to pay fully on the claim to plaintiff, creates a separate action distinct from its breach of contract claim, and that New York law recognizes a separate cause of action for bad faith claims handling and breach of contract. Defendant, on the other hand argues that there is no independent cause of action sounding in tort for breach of an insurance contract in New York State.

"[T]here is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations" under an insurance contract (*Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841, 842 [2d Dept 2005], citing *Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353, 354-355 [2005]; *see Royal Indem. Co. v Salomon Smith Barney*, 308 AD2d 349, 350 [2003]; *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2002]). While some cases have held that there is (*see, e.g., Orman v GEICO Gen. Ins. Co.*, 964 NYS2d 61 [Sup Ct Kings Cty 2012]), many more have held to the contrary (*Zawahir v Berkshire Life Ins. Co., supra*; *Continental Cas. Co. v Nationwide Indem. Co., supra*; *Royal Indem. Co. v Salomon Smith Barney*; *Bettan v Geico Gen. Ins. Co.*; *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]).

In addition, the second cause of action arises from the same set of core facts involving the property loss. Thus, the second cause of action is duplicative of the breach of contract cause of action. Therefore, the proposed second cause of action lacks merit.

The proposed third cause of action, for violation of New York General Business Law § 349, also lacks merit. General Business Law § 349 declares unlawful all "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (General Business Law § 349 [a]). "Section 349 governs consumer-oriented conduct and, on its face, applies to virtually all economic activity" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002]; *Karlin v IVF Am.*, 93 NY2d 282, 290-291 [1999]).

To successfully assert a claim under General Business Law § 349 (h), "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; *see Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). "Private contract disputes, unique to the parties . . . [do] not fall within the ambit of the statute" (*N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 11–12 [2d Dept. 2012], citing *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25; *see New York Univ. v Continental Ins. Co.*, 87 NY2d at 320).
This instant lawsuit involves a private contract dispute involving coverage under the subject policy, in contrast to the consumer-oriented, deceptive conduct aimed at the public at large that

General Business Law § 349 is designed to address (*see Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841, 842 [2d Dept 2005]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320-321 [1995]; *Goldblatt v MetLife, Inc.*, 306 AD2d 217 [2003]; *Korn v First UNUM Life Ins. Co.*, 277 AD2d 355, 356 [2000]).

Finally, although delay alone will not be sufficient cause to deny a party's motion to amend, delay coupled with significant prejudice to the non-moving party should mandate the denial of the belated motion to amend the pleading *(see, Edenwald Contr. Co. v City of New York, supra).* Moreover, where an action has long been certified as ready for trial and the moving party had full knowledge of the new cause of action, in the absence of good cause for the failure to move to amend at an earlier date, the motion should be denied on the ground of gross laches alone (*see, Felix v Lettre*, 204 AD2d 679, 680; *Bertan v Richmond Mem. Hosp. & Health Ctr.,* 106 AD2d 362). Here, plaintiff makes the instant motion on the eve of trial and defendant has established that it would be prejudiced by the late amendment.

Accordingly, as there is no merit to the proposed amended complaint and to permit the same would be highly prejudicial to defendant on the eve of trial, the motion for leave to file a second amended complaint, is denied.

Dated: February 8, 2017

DARRELL L. GAVRIN, J.S.C.