ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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MARC A. PERGMENT, ESQ., AS CHAPTER 7 TRUSTEE OF THE ESTATE OF MELISSA GACE BRYANT,

Plaintiff,

- against -

GOVERNMENT EMPLOYEE INSURANCE COMPANY ("GEICO"), PICCIANO & SCAHILL, LLP, and GILBERT J. HARDY, ESQ.,

Defendant.

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Index No. 609083/2018
Sequence #s 001, 002, 003

Part 16
4/18/19

MOT. 001: MD
MOT. 002: MD
MOT. 003: MD

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Upon the foregoing papers, the motion of the defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq. **(Seq. #001)**, seeking an Order granting dismissal of the complaint of plaintiff, Marc Pergment, Esq., as Chapter 7 Trustee of the Estate of Melissa Gace Bryant, in its entirety, pursuant to CPLR 3211(a)(1),(3) and (7) is denied; the motion of defendant, Government Employees Insurance Company ("GEICO") **(Seq. #002)**, seeking an Order granting dismissal of the First, Second and Third causes of action in plaintiff's complaint, for failure to state a claim upon which relief may be granted, pursuant to CPLR 3211(a)(1) and (7) is denied; and the cross-motion of the plaintiff **(Seq. #003)**, seeking summary judgment against the defendants pursuant to CPLR 3211(a), is denied, as set forth below.

In this action, plaintiff, Marc Pergment, Esq., as Chapter 7 Trustee of the Estate of Melissa Gace Bryant (hereinafter "plaintiff Trustee"), asserts four causes of action as follows: bad faith (First Cause of Action), breach of implied warranty (Second Cause of Action) and punitive damages (Third Cause of Action) as and against defendant, GEICO; and legal malpractice (fourth Cause of Action) as and against defendants Picciano & Scahill, LLP and Gilbert J. Hardy, Esq., concerning these defendants' representation of Melissa Gace Bryant (hereinafter "Bryant") against claims arising from a motor vehicle accident in which she was involved on December 7, 2009, in which she was a defendant in the matter entitled *Anna Bedard v. Melissa Gace, Nassau Count Supreme Court Index No. 17555/2011* (hereinafter "underlying

action"). The verified complaint alleges that GEICO failed to inform Bryant of all the facts and/or explain the impact and importance of the likelihood that plaintiff in the underlying action would win a verdict in excess of GEICO's maximum policy amount of $300,000.00, and hold the insured (Bryant) personally liable for any damages that exceeded the policy. The verified complaint alleges, *inter alia,* that defendant GEICO breached its settlement obligations to Bryant and encouraged and advised her in bad faith to file a petition for federal bankruptcy protection to discharge any excess judgment debts entered against her. As to defendants, Picciano & Scahill and Gilbert J. Hardy, Esq., the complaint sets forth allegations, *inter alia*, that these defendants breached their duty to represent Bryant's interests in the underlying action, competently and ethically, and above the financial and business of the interests of GEICO.

By way of background, by the Order of United States Bankruptcy Judge, Robert E. Grossman, dated December 6, 2018, did not restrict or limit the authority of the plaintiff Trustee to have commenced, filed and prosecute the instant matter while denying this Trustee's retention of counsel. Accordingly, it has been determined that plaintiff herein has legal capacity and standing to maintain the instant action.

Defendants in Seq. #001, Picciano & Scahill, LLP and Gilbert J. Hardy, Esq., contend that the instant action must be dismissed because plaintiff has failed to set forth the requisite proof required to allege a legal malpractice claim and fails to state a cause of action. Specifically, these defendants contend that the although plaintiff alleges that the law firm failed to advise GEICO to offer the full policy limit to settle the motor vehicle action before trial, the complaint also contains allegations that the decision to settle the underlying action rested solely and exclusively with defendant GEICO. These defendants contend that documentary evidence exists, in the form of two letters it sent to Bryant on November 24, 2014 and November 9, 2015, advising her that plaintiff in the underlying action demanded the entire policy amount of $300,000, that GEICO did not believe the injuries properly valued at $300,000, and recommending that she retain her own personal counsel to advise with regard to her rights, responsibilities and personal exposure to any possible excess verdicts and/or judgment.

Defendant in Seq. #002, GEICO, contends that documentary evidence demonstrates that the underlying action was defensible on the issue of damages; that bad faith cannot be demonstrated because plaintiff in the underlying action continually maintained that the settlement demand was in excess of GEICO's applicable policy limits prior to the commencement of trial; that a difference of opinion as to case value exits precluding a 'bad faith' action against the insurer;

and that GEICO offered plaintiff in the underlying action a 'high/low' trial agreement, guaranteeing said plaintiff the full policy limits if awarded prior to trial.

In opposition and by cross-motion in Seq. #003, plaintiff Trustee, contends that GEICO failed to take into account all of the information it possessed, or information it lacked but should have had, and lost an actual opportunity to settle the case within its contract of insurance and save its insured from the verdict obtained against Bryant. Plaintiff Trustee contends that GEICO's assertion of damages being defensible at trial is not supported by their own doctors, nurses, experts and lawyers of which the documentary evidence provided by plaintiff Trustee alleges to show otherwise. With regard to defendants Picciano & Scahill LLP and Gilbert J. Hardy, Esq., plaintiff Trustee contends that these defendants failed to properly represent

their interests by not advising GEICO to settle the underlying action for the policy limits, and violated their obligations which were primarily to the insured and not the carrier. Plaintiff Trustee asserts that the actions of Picciano & Scahill, LLP and Gilbert J. Hardy, Esq., post-trial/verdict on the underlying action, and after being disqualified by the trial court post-trial/verdict, and these defendants' selection of the replacement firm that Bryant should seek counsel prior to filing a petition for federal bankruptcy were improper.

A motion to dismiss pursuant to CPLR 3211(a)(1) "may appropriately be granted only where 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 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231). Cervini v. Zononi, 95 A.D.3d 919, 944 N.Y.S.2d 574 [2d Dept. 2012]*. "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" *Fontanetta v. John Doe 1, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569 [2d Dept. 2010]*.

In reviewing a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory *(see Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Morone v. Morone, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; Rochdale Vil. v. Zimmerman, 2 A.D.3d 827, 769 N.Y.S.2d 386)*. "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" *(Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). Lupski v. County of Nassau, 32 A.D.3D 997, 822 N.Y.S.2d 112 [2d Dept. 2006]*. In addition, "[a] court is, of course, permitted to consider evidentiary material…in support

of a motion to dismiss pursuant to CPLR 3211(a)(7)" and "the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one'" *See, Nasca v. Sgro, 130 A.D.3d 588, 13 N.Y.S.3d 188 [2d Dept. 2015], citing Sokol v. Leader, 74 A.D.3d 1180, 904 N.Y.S.2d 153.)*. "Indeed, a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" Id. [citations omitted].

The facts alleged in the complaint and the affidavits in opposition to the motion to dismiss are deemed true and must be construed in the light most favorable to the plaintiff, with all doubts resolved in the plaintiff's favor *(Global Marine Power, Inc. v Kuston Engines & Performance Engineering, LLC, 108 AD3d 501) [2d Dept 2013]; Weitz v Weitz, 85 AD3d 1153 [2d Dept 2011]; Cornely v Dynamic HVAC Supply, LLC, 44 AD3d [2d Dept 2007]; Brandt v Toraby, 273 AD2d 429, 430 [2d Dept 2000])*.

To establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a "gross disregard of the insured's interests—that is, a deliberate or reckless failure to place on equal footing the interests of its insureds with its own interests when considering a settlement offer." *See, Pavia v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 453–454, 605 N.Y.S.2d 208, 626 N.E.2d 24 (1993)*

Regarding a claim for breach of implied warranty, even if a party is not in breach of its express contractual obligations, it may be in breach of the implied covenant of good faith and fair dealing when it exercises a contractual right as part of a scheme to deprive the other party of the benefit of its bargain and technically complying with the terms of a contract while depriving the plaintiff of the benefit of the bargain may constitute a breach of the covenant of good faith and fair dealing. *See, Ahmed Elkoulily, M.D., P.C. v. N.Y.S. Catholic Healthplan, Inc., 153 A.D.3d 768, 61 N.Y.S.3d 83 (2d Dep't 2017) (citations omitted).*

"To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care *(see Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442, 835 N.Y.S.2d 534, 867 N.E.2d 385; Siracusa v. Sager, 105 A.D.3d 937, 938, 963 N.Y.S.2d 364; Markowitz v. Kurzman Eisenberg Corbin Lever & Goodman, LLP, 82 A.D.3d 719, 917 N.Y.S.2d 683)*. To establish proximate cause, it must be demonstrated that a plaintiff would have prevailed in the underlying action but for the attorney's negligence *(see Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d at 442, 835 N.Y.S.2d 534, 867 N.E.2d 385)*." *Grant v. La Trace, 119 A.D.3d 646, 990 N.Y.S.2d 227 [2d Dept. 2014].*

Upon this Court's review of the relevant submissions and affidavits associated therewith, plaintiff Trustee has sufficiently stated a cause of action for bad faith, breach of implied warranty and legal malpractice. In as much as the allegations contained in the complaint allege that defendant/Bryant in the underlying action may have been able to settle the underlying action prior to verdict and without necessity of filing a petition for federal bankruptcy, there exists allegations that Bryant was able to obtain a favorable outcome but for the actions of the instant defendants.

Applied herein, the documentary evidence submitted by all movants herein does not utterly refute the allegations contained in plaintiff Trustee's complaint nor does it qualify for summary judgment as a matter of law. Issues of fact exist as to the actions of the moving defendants prior to and post-verdict of the underlying action that require further discovery including completion of all depositions and other relevant discovery in this matter.

Accordingly, motion Seq. #001 #002 and #003 are denied.

This constitutes the decision and Order of the Court. Any relief not expressly granted herein is denied.

Dated: June 28, 2019

Hon. John M. Galasso, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE