2018 WL 2322773 (N.Y.Sup.), 2018 N.Y. Slip Op. 30941(U) (Trial Order)
Supreme Court of New York.
Trial/IAS, Part 23
Nassau County

**1 John A. PETRILLI and Carol Petrilli, Plaintiff(s),
v.
ADIRONDACK INSURANCE EXCHANGE and National General Insurance Company, Defendant(s).

No. 600128/18.
May 16, 2018.

Trial Order

Present: Honorable James P. McCormack, Justice.

*1 [This opinion is uncorrected and not selected for official publication.]

Motion Seq. No.: 001

Motion Submitted: 3/21/18

The following papers read on this motion:

Notice of Motion/Supporting Exhibits/Memorandum of Law	X
Affirmation in Opposition	X
Reply Memorandum of Law	X

Defendants, Adirondack Insurance Exchange (Adirondack) and National General Insurance Company (National) move this court, pursuant CPLR §3211(a)(7), dismissing part of the complaint against them. Plaintiffs, John A. Petrilli and Carol Petrilli, (the Petrillis) oppose the motion

The Petrillis commenced this action by service of a summons and complaint dated December 26, 2017. Defendanss brought the within motion in lieu of an answer. The **2 complaint contains five causes of action, to wit: I) Breach of contract against both Defendants, 2) Breach of good faith and fair dealing against both Defendants, 3) Unfair Claims Settlement Act violation against both Defendants, 4) Violation of General Business Law (GBL) 9349 against both Defendants and 5) Fraud against both Defendants.

According to the complain,, the Petrillis purchased a homeowness and automobile insurance policy from Adirondack, and had been insured by Adirondack or its predecessors for 37 years. On or about August 10, 2016, the Petrillis made a claim against the policy due to the collapse of their garage. Two weeks later, Adirondack sent an adjuster to the home, and then on September 3,2016, an engineer, Peter Tauberer, was sent to inspect the garage. Mr. Tauberer allegedly told John Petrilli that more testing was required to determine the cause of the collapse, and then a few days later Mr. Tauberer allegedly called John Petrilli and told him he had submitted his report which indicated more testing was required. Mr. Tauberer then allegedly

contacted John Petrilli and told him Adirondack made him change his report to indicate that "settlemen"" caused the collapse, which would result in Adirondack not having to cover the claim. Subsequently, based upon the report, Adirondack did disclaim coverage. This action ensured.

Defendants now move to dismiss parts of the complaint. In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every **3 possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR S 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

*2 Defendants allege that the breach of contract cause of action cannot lie as against **4 National because there was no privity between the Petrillis and National. In opposition, the Petrillis argue that their complaint alleges that National, as parent of Adirondack, controlled Adirondack to such an extent that National is the actual bad actor herein and Adirondack is essentially the vehicle through which national operates. However, the complaint contains no specifics addressing the manner in which National completely controls Adirondack. (*Pebble Cove Homeowners' Ass'n, Inc. v. Fidelity N.Y. FSB*, 153 AD2d 843 [2d Dept. 1989]). The failure to so allege is fatal to the argument that the parent controls the subsidiary. *Id.* As it is not otherwise alleged that the Petrillis contracted directly with National, the court finds the breach of contract cause of action must be dismissed against National. Similarly, as the court finds no privity, and therefore no contract between the Petrillis and National, there can be no breach of good faith and fair dealing. (*Johnson v. Law Office of Schwartz*, 145 AD3d 608 [1st Dept. 2016]).

Regarding Adirondack, the court finds the cause of action for breach of good faith and fair dealing emanates from the same sets of facts, and seeks identical damages, as the cause of action for breach of contract, rendering it duplicative and insufficient to form the basis of an independent cause of action. (*Paterra v. Nationwide Mut. Fire Ins. Co.*, 38 AD3d 511 [2d Dept 2007]).

The cause of action for Unfair Claims Settlement Act violation must be dismissed against both Defendants as there is no private cause of action under Insurance Law 92601 for unfair claims settlement. (*Bettan v. Geico Gen. Ins. Co.*, 296 AD2d 469 [2d Dept. 2002]). **5

A cause of action pursuant to GBL §349 requires a showing that the defendant has engaged in materially misleading consumer-oriented conduct that results in injury the plaintiff due to the deceptive practice. (*Aracena v. BMW of North America, LLC.* 159 AD3d 664 [2d Dept 2018]). Herein, the complaint fails to allege conduct that impacts consumers at large. (*Korn v. First UNUM Life Ins. Co.*, 277 AD2d 355 [2d Dept. 2000]). Instead, the complaint asserts allegations that are unique to these parties, rendering GBL §349 inapplicable. (*Id.*, *Zawahir v. Berkshire Life Ins. Co.*, 22 AD3d 841 [2d Dept. 2005]).

To sufficienytly plead a cause of action for fraud, a plaintiff must allege: (I) a material misrepresentation was made with knowledge of its falsity, (2) that the misrepresentation was made with intent to induce reliance on the misrepresentation, (3) that the plaintiff justifiably relied on the misrepresentation and (4) that the plaintiff suffered damages as a result. (*Mitchell v. Diji*, 134 AD3d 779 [2d Dept. 2015]). Herein, the complaint does not meet any of the elements of fraud. Plaintiffs do not allege a material misrepresentation was made. Instead, they claim Mr. Tauberer told them a determination could not be made as to the cause of the collapse, but then said he was coerced into changing that opinion. It is not clear how any of those facts

equates to a material misrepresentation being made to Plaintiffs. Next, the complaint does not indicate how Defendants tried to get Plaintiffs to rely on any such misrepresentation. ****6** Finally, the complaint does not indicate what misrepresentation Plaintiffs justifiably relied upon. Instead, the alleged fraud solely relates to a breach of contract, and therefore cannot lie as an independent cause of action. (*Rosen v. Watermill Development Corp.*, I AD3d 424 [2d Dept. 2003]).

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss is GRANTED in its entirety. The First Cause of Action is dismissed against National, and the Second, Third, Fourth and Fifth Causes of Action are dismissed against both Defendants.

The court has considered all other arguments raised by the parties and finds them to be without merit.

This constitutes the Decision and Order of the Court.

***3** Dated: May 10, 2018

Mineola, N.Y.

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Hon. James P. McCormack, J.S.C.

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