SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD *Justice* PART 49

MAJOR LEAGUE SOCCER, L.L.C.,

Plaintiff,

-against-

FEDERAL INSURANCE COMPANY,

Defendants.

INDEX NO. 652639/2013

MOTION DATE May 14, 2014

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss action.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: May 20, 2014

O. PETER SHERWOOD, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

MAJOR LEAGUE SOCCER, L.L.C.,

Plaintiff,

DECISION AND ORDER
Motion Sequence Number: 001

-against-

Index No.: 652639/2013

FEDERAL INSURANCE COMPANY,

Defendant.

----------X

O. PETER SHERWOOD, J.:

Federal Insurance Company ("FIC") moves, pursuant to CPLR 3211(a)(7) to dismiss the Complaint. For the reasons set forth below the motion must be DENIED.

Background

Major League Soccer, L.L.C. ("MLS") entered into a "ForeFront Portfolio" insurance policy, number 5042-2227 (the "Policy"), with FIC, covering the period from August 1, 2005 to August 1, 2006 (Connuck affirmation Ex. 2). The Policy contains a Directors and Officers Liability Coverage Section, which provides for a maximum aggregate limit of $5,000,000 with an additional $1,000,000 limit for "Defense Costs Only." The Policy also contains an antitrust exclusion (the "Antitrust Exclusion") at Section III(D)(8) which reads:

> No coverage will be available under [the Corporate Liability Clause] for any Insured Organization Claim . . . based upon, arising from, or in consequence of allegations of price fixing, restraint of trade, monopolization, unfair trade practices or any actual or alleged violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, or any other federal statutory provision involving anti-trust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, and any amendments thereto or any rules or regulations promulgated thereunder or in connection with such statutes; or any similar provision of any federal state, or local statutory law or common law anywhere in the world.

On May 2, 2006, nonparty ChampionsWorld LLC ("ChampionsWorld") sued nonparty the United States Soccer Federation ("USSF") and MLS in federal court (the "Underlying Complaint"). The first three causes of action in the complaint accused USSF and MLS of various antitrust violations. These causes of action are undisputedly within the antitrust exclusion and not at issue here. The general thrust of the complaint is that although USSF was vested with the authority to

charge sanctioning fees for amateur events, it unjustly asserted itself in the sanctioning "business" for professional events and drove ChampionsWorld out of business through anticompetitive practices to benefit MLS. As MLS and USSF had frequently overlapping management, ChampionsWorld alleged that MLS was also involved in this scheme.

The Fourth and Fifth Causes of Action accuse MLS of racketeering activities. According to ChampionsWorld, "MLS directed the operation and management of USSF's sanctioning fee decision-making against MLS's competitors" (Underlying Compl. ¶ 178). MLS also allegedly "committed federal extortion as defined by the Hobbs Act . . . by the wrongful use of fear through economic threats and by color of official right" (*id.* ¶ 180). ChampionsWorld also alleged that MLS "orchestrated a scheme to defraud [ChampionsWorld] of money through the employment of the material misrepresentation that USSF had the exclusive legal authority to sanction all professional soccer matches in the United States" (*id.* ¶ 184). The Seventh Cause of Action is for Unjust Enrichment against MLS, and incorporates all previous allegations in the Underlying Complaint.

MLS timely gave notice to FIC of the lawsuit. By Letter dated July 17, 2006, FIC denied coverage, relying on the Antitrust Exclusion.

On July 21, 2010, the District Court for the Northern District of Illinois denied MLS and USSF's motions for judgment on the pleadings (*ChampionsWorld LLC v United States Soccer Federation*, 726 F Supp 2d 961 [ND Ill 2010]). The matter was stayed pending arbitration. Following the arbitration, on August 17, 2012, the District Court granted summary judgment in favor of MLS and USSF confirming the arbitration award and dismissing the complaint (*ChampionsWorld LLC v United States Soccer Federation*, 890 F Supp 2d 912 [ND Ill 2012])[1]. MLS alleges that its defense costs exceeded the $6,000,000 Policy limit.

MLS brought this action on July 29, 2013. The Complaint contains a single cause of action for breach of contract seeking the $6,000,000 Policy limit. FIC now moves to dismiss.

---

[1]ChampionsWorld withdrew the Fourth Cause of Action prior to the filing of the summary judgment motions. ChampionsWorld withdrew the Seventh Cause of Action in response to the filing of the summary judgment motions.

Discussion

A. CPLR 3211 (a) (7) Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005] [citation omitted]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]). Indeed, "[s]o liberal is the standard under these provisions that the test is simply whether the proponent of the pleading has a cause of action, not even whether he has stated one" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [internal quotation marks omitted]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York,* 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no cause of action" (*Lawrence v Miller,* 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.,* 40 NY2d at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

B. Construction of Exclusion Provisions

In New York, if an insured's claims "fall within the polic[y's] exclusions . . . insurance companies are relieved of their obligations to defend and indemnify" (*Zandri Constr. Co. v Stanley H. Calkins, Inc.*, 54 NY2d 922 [1981]). However, the "duty to defend is liberally construed and is

broader than the duty to indemnify, 'in order to ensure [an] adequate . . . defense of [the] insured, without regard to the insured's ultimate likelihood of prevailing on the merits of a claim" (*Fieldston Prop. Owners Ass'n, Inc. v Hermitage Ins. Co.*, 16 NY3d 257, 264 [2011], quoting *General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]). "[T]he insurer's duty to defend its insured 'arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy'" (*id.*, quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]). "[I]f '*any* of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action'" (*id.*, quoting *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002]). "It is 'immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage'" (*id.* at 265, quoting *Massena*, 92 NY2d at 444). The "duty to defend is at least broad enough to apply when the 'four corners of the complaint' suggest the reasonable possibility of coverage'" (*Fitzpatrick*, 78 NY2d at 66).

The dispute in this case centers on whether the RICO and unjust enrichment claims "arise from" anticompetitive conduct. If so, there is no coverage under the language of the Policy. Although the RICO and unjust enrichment claims incorporate by reference other causes of action that allege excluded anticompetitive conduct, the RICO and unjust enrichment claims do not depend on a finding of such conduct to succeed. As such, the exclusion does not apply. FIC owed a duty to defend MLS. There being evidence that FIC may have breached the Policy by denying coverage, the motion to dismiss must be denied.

Relying on *Mount Vernon Fire Insurance Co. v Creative Housing* (88 NY2d 347 [1996]), FIC argues that denial of coverage is appropriate where any of the "operative act[s] giving rise to any recovery" are subject to exclusion from coverage. In *Mount Vernon*, the Court of Appeals discussed its holding in *U.S. Underwriters Ins. Co. v Val-Blue Corp.* (85 NY2d 821 [1995]), noting that, where the policy excluded assaults, a negligent hiring claim "could not be established without proving the underlying assault." For this reasoning to apply here, FIC would have to show that it would be impossible for ChampionsWorld to have succeeded on any of its claims without proving anticompetitive conduct. An examination of the Underlying Complaint reveals that this is not the case. The Fourth and Fifth Causes of Action specifically allege mail and wire fraud (18 USC 1341,

1343) and Hobbs Act extortion (18 USC 1951) as predicate acts for violations of 18 USC 1962(c) (Underlying Compl. ¶¶ 180, 184)[2]. This claim could plausibly stand in the absence of any anticompetitive behavior. Merely because these causes of action also incorporate by reference the First through Third Causes of Action (as is customary in drafting complaints), it does not follow that the racketeering causes of action "arise from" anticompetitive conduct.

Tartaglia v Home Insurance Co. (240 AD2d 396 [2d Dept 1997]), cited by FIC supports this reasoning. In that case, the Second Department held that when "the *only* theory of liability requires proof of [behavior] encompassed by the exclusion, the insurance carrier has no duty to indemnify and is therefore relieved of the obligation to defend" (*id.* at 398 [emphasis added]). Here, antitrust violations appear to predominate but nonetheless are merely among multiple bases of liability.

FIC also asserts that *The Saint Consulting Group, Inc. v Endurance American Specialty Insurance Company, Inc.* (699 F3d 544 [1st Cir 2012]) is directly on point and persuasive authority. *Saint* also involved a RICO claim and an antitrust exclusion. The First Circuit upheld the antitrust exclusion. However, that case was decided under Massachusetts law, which is more insurer friendly than New York, prompting the First Circuit to reason that "the phrase 'arising out of' must be read expansively" (*id.* at 552). In addition, the RICO claims in that case depended centrally on the existence of an anticompetitive scheme. The facts of the Underlying Complaint are distinguishable in this regard. FIC cites to several out-of-state cases, all of which stand for the unremarkable proposition that *if* all the claims in the underlying complaint were based on allegations of anticompetitive conduct, the antitrust exclusion would apply. Because the Underlying Complaint can be read fairly to allege behavior independent of the alleged anticompetitive conduct, these cases do not support the motion to dismiss under New York law.

FIC also cites *Maroney v New York Cent. Mut. Fire Ins. Co.* (5 NY3d 467 [2005]) for the proposition that New York requires "arising out of" clauses to be read broadly. However, in interpreting *Maroney*, the First Department has consistently rejected the argument that "that the term 'arising out of' in the contract liability exclusion is so broad as to comprehend any loss with even the slightest 'causal relationship' to a breach of contract and that each cause of action in the

---

[2]The RICO statute defines Racketeering at 18 USC 1961(1), and incorporates by reference *inter*

underlying complaint stands in such a relationship to a breach of contract and is therefore excluded from coverage" *Westpoint International, Inc. v American International South Insurance Co.*, 71 AD3d 561 (1st Dept 2010).

FIC's motion to dismiss must be denied. Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint of defendant, FEDERAL INSURANCE COMPANY is DENIED; and it is further

ORDERED that defendant shall answer the complaint within twenty (20) days of the date of this decision and order; and it is further

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Tuesday, July 22, 2014 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: May 20, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.