

**New Hampshire Ins. Co. v Fresh Direct Holdings,
Inc.**

2014 NY Slip Op 31192(U)

May 1, 2014

Supreme Court, New York County

Docket Number: 651320/10

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 45

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NEW HAMPSHIRE INSURANCE COMPANY,	:	
AMERICAN HOME ASSURANCE COMPANY,	:	
INSURANCE COMPANY OF THE STATE OF	:	Index No. 651320/10
PENNSYLVANIA and NATIONAL UNION FIRE	:	
INSURANCE COMPANY,	:	DECISION & ORDER
	:	
Plaintiffs,	:	Motion Sequence No. 002
	:	
-against-	:	
	:	
FRESH DIRECT HOLDINGS, INC.,	:	
	:	
Defendant.	:	
-----X		

MELVIN L. SCHWEITZER, J.:

Defendant Fresh Direct Holdings, Inc. (Fresh Direct) moves, pursuant to CPLR 3025 (b), for leave to serve an amended answer in order to assert a new counterclaim premised on allegations of negligence and insurer’s errors and omissions. Plaintiffs (collectively referred to as Chartis) oppose the amendment, arguing that the motion fails to establish that the proposed new counterclaim is meritorious or that Fresh Direct sustained any cognizable damages as a result of the alleged wrongdoing.

Factual Allegations

Chartis brings this action to recover premiums primarily due on two workers’ compensation insurance policies Chartis issued to Fresh Direct in effect from January 28, 2008 through January 28, 2009 (Policy No. WC 984-39-64) and from January 28, 2009 through January 28, 2010 (Policy No. WC 009-84-3964). Although there are additional policies at issue in this lawsuit, these two workers’ compensation policies constitute the bulk of Chartis’s

damages and the proposed counterclaim relates only to additional premiums Chartis seeks to collect for these policies.

The policies were issued upon a quoted estimated premium, with the final premium to be determined after the policy period, upon completion of an audit to determine if the assumptions upon which the estimated premium was based were borne out. Among the things that might vary from the assumptions on which the estimated premium was based, were the proper job codes assigned to Fresh Direct workers. In 2002, the New York Compensation Insurance Rating Board (CIRB) assigned a particular job code to a certain class of Fresh Direct's employees. Fresh Direct provided this job code to Chartis, which used that job code to calculate the estimated premium for the 2008 policy.

According to Fresh Direct, on or about April 1, 2008, the CIRB directed Chartis to issue an endorsement to the 2008 policy, to change job code 8033 (grocery retail) to job code 8034 (grocery wholesale), based on a CIRB inspection of Fresh Direct's operations that had occurred in August 2007. CIRB's letter stated:

"This classification change requires an amendment to this employer's policy effective 01/28/08. In accordance with the provisions of the Administrative Rules and Procedures Section of the New York Manual, you must issue an endorsement to show this correction. A copy of the endorsement must also be sent to my attention no later than 05/01/08"

(Craco Reply Affirm., Ex. D). Application of the new job code allegedly resulted in a significantly higher premium, reflecting the greater risk associated with the types of tasks performed by the workers at issue. However, Chartis did not issue the endorsement at that time and Fresh Direct, and its insurance broker, Frank Crystal & Co. (Crystal), remained unaware of the order to change job codes.

Still unaware of job code change, Fresh Direct accepted Chartis's offer to renew coverage for 2009. Again, however, Chartis quoted an estimated premium using the 8033 job code. On March 10, 2009, CIRB allegedly sent a second directive to Chartis instructing it again to change the job code from 8033 to 8034 and to certify its compliance within 30 days. While Chartis claims to have issued such an endorsement on March 31, 2009, neither Fresh Direct nor Crystal have any record of ever having received any such endorsement. Indeed, on May 12 and June 18, 2009, CIRB allegedly sent Chartis further correspondence noting the insurer's ongoing failure to comply with the March 10 directive.

Fresh Direct claims it only became aware of the issue in late May 2009, and then only because a Chartis auditor, who was at Fresh Direct's facility to do the audit for the previous year, mentioned to a Fresh Direct officer that a job code change had been ordered. Fresh Direct claims it immediately asked Crystal about the impact of the change, and that Crystal's response was the first time Fresh Direct learned of the magnitude of the problem. Although Chartis, working with Crystal, undertook to appeal the code change with the CIRB, that appeal was not successful.

On October 13, 2009, Chartis issued an "Audit Invoice" for Fresh Direct's insurance under the 2008 policy, seeking an additional payment of \$1,226,694. On May 21, 2010, Chartis sent a second invoice charging Fresh Direct for additional premiums in the amount of \$2,113,527 for the 2009 policy. The evidence suggests that CIRB did not mandate that Chartis charge these additional premiums, and that the decision to do so was in the sole discretion of Chartis.

This litigation ensued. Chartis claims that the additional premiums it seeks are proper, because job code changes are to be taken into account in computing the final premiums for the policies. Fresh Direct disputes that it has any obligation to pay more, because of what it terms

the egregious failure of Chartis to comply with CIRB's repeated directives to issue an endorsement to the policies reflecting the job code change. Fresh Direct argues that this failure violates the plain terms of the policies themselves, as well as CIRB's governing manuals, which are incorporated by reference in the policies. It also allegedly deprived Fresh Direct of its right, for well over a year, to cancel the policies, and to acquire more affordable replacement coverage. In its original answer to the complaint, Fresh Direct asserted counterclaims against Chartis based on theories of fraud in the inducement, negligent misrepresentation, and breach of contract.

Fresh Direct contends that, as a result of the extensive discovery undertaken in this case, the reason why Chartis did not issue the endorsement as CIRB directed in a timely fashion was due to gross and endemic negligence at both the individual and institutional levels. Fresh Direct thus seeks to add a new counterclaim that is titled "Negligence/Insurer's Errors and Omissions."

The proposed counterclaim alleges that Chartis:

"owed a duty of ordinary care to their insured, which included the duty to timely issue endorsements when required by the pertinent policies or by regulatory authorities, and to comply with lawful directives of CIRB, to maintain systems and train and supervise its workforce to ensure and track compliance with its contractual and regulatory duties . . ."

(Craco Affirm., Ex. B: Proposed Amended Answer With Counterclaims, ¶ 81). Fresh Direct maintains that Chartis breached this duty

"by failing to issue timely endorsements relating to the code change, by failing to establish, maintain and operate systems, procedures and protocols to ensure compliance with such duties and to prevent such failures, errors and omissions; by failing to properly train and supervise their employees to avoid such failures, errors and omissions; by failing, clearly and promptly to communicate to Fresh Direct and its representatives, the fact and consequences of the code change; by failing promptly to appeal the code change; by failing to promptly and accurately inform Fresh Direct and its broker about the process for appealing the code change and by misleading them about it . . ."

(*id.*, ¶ 82).

In opposition to the motion, Chartis contends that Fresh Direct’s moving papers fail to establish that the proposed counterclaim has any basis in law, because it is based on allegations that Chartis has violated unspecified provisions of the 2008 and 2009 policies and unidentified regulatory provisions claimed to be incorporated into the policies by reference. Chartis further argues that a cause of action for the negligent performance of a contract is legally insufficient absent the allegation of a duty owed by Chartis independent of the contract itself. Finally, Chartis contends that Fresh Direct has not presented any evidence that less expensive insurance existed or demonstrated how it was damaged.

On reply, Fresh Direct’s counsel submits a reply affirmation by which he identifies the relevant policy and regulatory provisions on which the proposed new counterclaim is based.

“Part Five” of both policies provide that:

A. Our Manuals

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis *by endorsement to this policy* [emphasis added].”

(Sande Affirm., Exs. A & B, at 5). Fresh Direct further contends that the “manuals of rules, rates, rating plans and classifications” referred to above is a voluminous manual that is produced and copyrighted by CIRB from time to time (the CIRB Manual) and which governs the

underwriting of workers' compensation insurance in New York. The CIRB Manual allegedly requires that every endorsement showing a classification or rate change promulgated by CIRB be filed with CIRB within 30 days, and that any policy not in compliance with the manual must be cancelled and rewritten or corrected by endorsement as may be required by CIRB (*see Craco Reply Affirm.*, Exs. A & B). Also offered is an affirmation from a lawyer and licensed insurance broker who is an alleged expert on workers' compensation insurance. According to this proposed expert, had Fresh Direct been timely informed of the code change, it "could have chosen from an array of alternative policies, all of which would have been more economically attractive than the [Chartis] guaranteed cost policy with the premiums dramatically increased by the code change" (Craco Reply Affirm., Ex. G; Gnesin Affirm. ¶ 10).

Motions for leave to amend a pleading pursuant to CPLR 3025 (b) are "freely granted, so long as there is no surprise or prejudice to the opposing party." *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 (1st Dept 2011). "On a motion for leave to amend a pleading, [the] movant need not establish the merit of the proposed new allegations, but must 'simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit'." *Miller v Cohen*, 93 AD3d 424, 425 (1st Dept 2012), quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010).

Chartis argues that Fresh Direct's motion is deficient, because it is not supported by an affidavit of merits and evidentiary proof, citing such cases as *Nichols v Curtis*, 104 AD3d 526 (1st Dept 2013), *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107 (1st Dept 1998), *Nab-Tern Constructors v City of New York*, 123 AD2d 571 (1st Dept 1986), and *Cushman & Wakefield v John David, Inc.*, 25 AD2d 133 (1st Dept 1966). However, each of these cases dealt

with requests to replead a claim in response to a motion to dismiss the pleading and stem from a former requirement of CPLR 3211 (e), which had stated:

“Where a motion [to dismiss the complaint or a defense] is made [under CPLR 3211 (a) (7) or (b)] . . . if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers *and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading*; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave [emphasis in original])”

Notably, CPLR 3211 (e) was amended in 2005 to delete this requirement (L 2005, c 616, § 1, eff. Jan. 1, 2006). As the Second Department has noted, “[t]he elimination from CPLR 3211 (e) of the leave to replead provisions, saps these cases of their vitality, both as applied to CPLR 3211 (e) and as applied to motions for leave to amend a pleading under CPLR 3025 (b).” *Lucido v Mancuso*, 49 AD3d 220, 229 (2d Dept 2008). And *Lucido* was cited by the First Department in *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d at 500.

Accordingly, the motion must be granted unless the proposed new counterclaim is palpably insufficient or Chartis will suffer some prejudice as a result of the amendment. Whether or not there is any evidence that Chartis was negligent or whether Fresh Direct sustained actual damages is not at issue on this motion, and the court need not consider the affirmation of Fresh Direct’s alleged expert witness submitted on reply. The court has, however, considered the remainder of Fresh Direct’s reply papers since they merely address the arguments raised by Chartis’s opposition to the motion.

The Court of Appeals has explained the difference between tort and contractual obligations as follows:

“A tort obligation is a duty imposed by law to avoid causing injury to others. It is ‘apart from and independent of promises made and therefore apart from the manifested intention of the parties’ to a contract (Prosser and Keeton, Torts § 92, at 655 [5th ed.]). Thus, defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations. The very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim.”

New York Univ. v Continental Ins. Co., 87 NY2d 308, 316 (1995). “A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship.”

Sommer v Federal Signal Corp., 79 NY2d 540, 551 (1992). Where a party “is essentially seeking enforcement of the bargain, the action should proceed under a contract theory” (*id.* at 552).

Fresh Direct argues that this is not simply an instance of negligent performance of a contract, but a course of negligence flowing from a total abdication by Chartis of compliance with its regulatory and statutory duties to Fresh Direct and other insureds. Notably, Fresh Direct is not seeking the benefit of its contractual bargain, i.e., insurance coverage for workers' compensation claims. Rather, it is seeking to avoid having to pay an increased premium for such insurance due to the alleged negligence of Chartis in failing to comply with specific directives of the CIRB, and the CIRB Manual in general, to timely issue an endorsement to the policies to change the job code for Fresh Direct's employees. That this was also an alleged breach of provisions of the policies does not necessarily render the claim nonactionable under a negligence theory. See e.g. *Rodin Props.-Shore Mall v Ullman*, 264 AD2d 367, 368 (1st Dept 1999).

Accordingly, since the counterclaim is not palpably insufficient and there is no claim of prejudice or surprise to Chartis, the motion is granted.

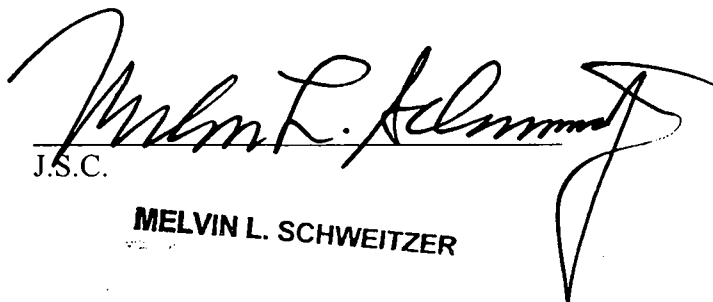
Accordingly, it is hereby

ORDERED that the motion of defendant Fresh Direct Holdings, Inc. for leave to amend its answer is granted and defendant is directed to electronically file the Amended Answer With Counterclaims, in the form annexed to the moving papers; and it is further

ORDERED that plaintiffs shall serve and file a reply to the counterclaims within 20 days of said filing.

Dated: May 1, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER