

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

PRESENT: Milton A. Tingling
Justice

PART 44

Panasia Estates

INDEX NO. 602472/05

MOTION DATE 6/18/08

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

- v -

Hudson

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

FILED
MAR 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

The plaintiff Panasia Estates, Inc. ("Panasia") moves the court for leave to Amend the Complaint. The defendant Hudson Insurance Company ("Hudson") opposes.

This action involves Panasia seeking to recover damages it alleges it incurred as a direct result of Hudson's breach of its insurance contract, a Commercial Property Insurance Policy, which included a Builder's Risk endorsement, covering commercial property owned by Panasia, by allegedly wrongfully delaying and then denying the insurance claim that Panasia made under the aforementioned policy. In the Complaint Panasia asserted a single cause of action for breach of contract for the wrongful bad faith delay and disclaimer of coverage under the Policy and

Dated: 3/4/09

met

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

PS 1 of 4

sought both general damages and consequential damages.

Hudson filed a motion for partial summary judgment to dismiss the allegations of bad faith and the claim for consequential damages. That branch of the motion seeking to dismiss Panasia's claims for consequential damages was denied. The decision was affirmed by the Appellate Division and on appeal to the Court of Appeals the decision was affirmed. Same resulted in two united decisions from the Court of Appeals: this matter and *Bi-Economy Market, Inc., v. Harleystown Insurance Company of New York, et. al.* 10 N.Y.3d 187. In both cases the Court of Appeals held that an insurance carrier that breaches its insurance contract may be liable for reasonably foreseeable consequential damages or other extra-contractual damages suffered by the insured, even if those damages exceed the policy limits.

The dissent in *Bi-Economy, Id.*, explains the Court's decision as the apparent reversal of the long-standing precedent of not allowing punitive damages to be claimed in a breach of an insurance contract unless the plaintiff shows both "egregious tortious conduct" directed at the insured claimant and a "pattern of similar conduct directed at the public generally." *Rocanova v. Equitable Life Assur. Socy. Of U.S.* 83 N.Y.2d 603. The dissent claims the decision simply changes the labels; Punitive damages are now called "consequential damages," and a bad faith failure to pay a claim is called a "breach of the covenant of good faith and fair dealing."

At first glance it appears the consequential damages referred to in the aforementioned decisions are not the traditional remedial damages but rather punitive damages. However, the difference between consequential damages and punitive damages are that consequential damages address the individual plaintiff's losses as a result of the alleged bad faith breach of an insurance contract.. Punitive damages by contrast 'are not measured by the pecuniary loss or injury of the plaintiff as a compensation' but are 'assessed by way of punishment to the wrongdoer and

example to others.” *Bi-Economy*, citing 11 Perillo, Corbin on Contracts, §59.2, at 550 [revised edition].

In this particular instance “[w]hen an insured suffers additional damages as a result of an insurer’s excessive delay or improper denial, the insurance company should stand liable for those damages. This is not to punish the insurer, but to give the insured its bargained for benefit.” *Bi-economy*, supra. These type of damages are to be called consequential damages and are triggered solely by a breach of contract in bad faith. The court made a fine distinction between punitive damages and consequential damages. To be awarded punitive damages a movant had to demonstrate the There is no need for the two-prong punitive damages litmus test under this new holding. The damages are not meant to punish the insurer but rather to place the insured in the place it would have been had the insurer not acted in bad faith in failing to properly investigate and resolve the insured’s claim.

Consequential damages have traditionally been a method of measuring the harm done when a party fails in some non-monetary performance. In such instances, when there is no agreement on what money is to be paid as a result of said breach, the court must decipher what damages the parties contemplated- what damages they would have agreed to had they contemplated the question when they entered into the contract. *Panasia* and *Bi-Economy*, supra. The awarding of these damages are not before the court at this time. In the case at bar Plaintiff is moving to amend the Complaint to assert a cause of action for consequential damages under the aforementioned holdings. There is no need for the court to examine whether the claim will be successful at this juncture or whether same is viable. The court simply decides whether the plaintiff meets its burden in demonstrating that its proposed amended pleading is sufficient under the current state of the law. The state of the law having been changed to allow claims for

consequential damages, and guidelines concerning the standard of said pleadings' language lacking, the court finds the pleading is sufficient and the motion is granted.

Plaintiff is hereby granted leave to amend the summons and complaint and same is to be served within thirty days.

Parties are to proceed with the scheduled conference.

DATED: February 3, 2009



Judge William A. Fingling

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MAR 06 2009
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