**NEW YORK STATE SUPREME COURT**
**NEW YORK COUNTY: PART 7**

HOUSTON CASUALTY COMPANY,

Plaintiff,

-against-

CAVAN CORPORATION OF NY, INC., NEW PUCK, LLC, PUCK RESIDENTIAL ASSOCIATES, LLC, and KUSHNER COMPANIES, LLC,

Defendants.

Index No.: 651981/2014
**DECISION/ORDER**
Motion Seq. No. 006

CAVAN CORPORATION OF NY, INC.,

Third-Party Plaintiff,

-against-

THE DUCEY AGENCY, INC.

Third-Party Defendant.

Third-Party Index No: 595609/2014

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion to renew and reargue.

| **Papers** | **Numbered** |
|---|---|
| Plaintiff's Notice of Motion and Affirmation | 1 |
| Plaintiff's Memorandum of Law | 2 |
| Defendant Cavan Corporation of NY Inc.'s Affirmation in Opposition | 3 |
| Affirmation in Opposition of Defendants New Puck, LLC, Puck Residential Associates, LLC, and Kushner Companies, LLC | 4 |
| Plaintiff's Reply Memorandum of Law | 5 |
| Plaintiff's Reply Affirmation | 6 |

*DLA Piper, LLP,* New York (Aidan M. McCormack of counsel), for plaintiff.
*Wilkofsky, Friedman, Karel & Cummins,* New York (Mark L. Friedman of counsel), for defendant/third-party plaintiff Cavan Corporation of NY.
*Ahmuty, Demers & McManus*, Albertson (William J. Mitchell of counsel) for defendants New Puck, LLC, Puck Residential Associates, LLC, and Kushner Companies, LLC.

Gerald Lebovits, J.

On June 29, 2015, defendant Cavan Corporation of NY, Inc., moved for leave to amend its answer and its third-party complaint. In a decision and order dated October 17, 2016, this court granted defendant's motion in part and denied it in part: The court granted that aspect of Cavan's motion for leave to amend or add the first, second, fifth, sixth, and seventh counterclaims along with the nineteenth and twenty-first affirmative defenses.

Plaintiff, Houston Casualty Company, now moves under CPLR 2221 (d) for leave to reargue that aspect of this court's decision granting defendant's motion to add a proposed sixth counterclaim for bad faith and a seventh counterclaim for GBL § 349 violations. Plaintiff argues that under established New York Law, the sixth counterclaim for bad faith duplicates defendant's breach-of-contract counterclaim and cannot be a separate cause of action. Plaintiff further argues that defendant cannot raise the seventh counterclaim for a GBL § 349 violation because the parties' contract was not a "consumer oriented" contract.

Defendant argues that plaintiff's motion to reargue should be denied because New York permits consequential damages through bad-faith claims and because the contract between the parties was a standard contract and therefore "consumer oriented."

Plaintiff's motion is granted in part and denied in part.

Under CPLR 2221 (d) (2), a motion for leave to reargue "shall be based upon matter of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

**Sixth Counterclaim for Bad Faith**

In its earlier motion, defendant sought leave to add the sixth counterclaim for bad faith or, in the alternative, to amend the first counterclaim by adding the allegations contained in the sixth counterclaim for bad faith. (Defendant's Opposition, at 14.) This court determined that although defendant's counterclaim for bad faith may not stand as an independent tort, the counterclaim may be used to interpose consequential damages. Rather than granting defendant's motion to amend the first counterclaim, this court allowed defendant to add the sixth counterclaim for bad faith. This court relied on the First Department's decision in *Acquista v N.Y. Life Ins. Co.* (285 AD2d 73, 82 [1st Dept 2001]), which found that allegations of bad faith "may be employed to interpose a claim for consequential damages beyond the limits of the policy for the claimed breach of contract."

Plaintiff argues that *Acquista* is inapplicable because the First Department cannot change the Court of Appeals's precedent in *N.Y.U. v Cont. Ins. Co.* (87 NY2d 308, 320 [1995]) and other recent First Department decisions in which courts denied bad-faith claims as duplicative of a breach-of-contract claim.

Plaintiff now cites several First Department decisions — cases on which it did not rely in its original opposition papers — for the proposition that bad-faith claims are duplicative of the

breach-of-contract claims, the same proposition plaintiff asserted in the previous motion. This court already acknowledged plaintiff's proposition that bad-faith claims may not stand as an independent tort in New York. This court allowed defendants' counterclaim for bad faith only to interpose a claim for consequential damages.

The defendant in *Acquista* sought to dismiss plaintiff's bad-faith cause of action as duplicative of plaintiff's breach of contract claim. That defendant also relied on the Court of Appeals's decision in *N.Y.U.*, as plaintiff does here. In *N.Y.U.*, the Court of Appeals dismissed plaintiff's bad-faith claim because the claim

> "amounts to nothing more than a claim based on the alleged breach of the implied covenant of good faith and fair dealing, and the use of familiar tort language in the pleading does not change the cause of action to a tort claim in the absence of an underlying tort duty sufficient to support a claim for punitive damages." (*Id.* at 319-320.)

The First Department in *Acquista*, however, found that an insured may recover damages beyond the policy amount adequately to protect the insured from insurer's bad faith refusals. (*See* 285 AD2d at 81.) The First Department therefore distinguished its case from *N.Y.U.* by allowing plaintiff's bad-faith claim for consequential damages, not punitive damages. (*Id.*)

The Court of Appeals has also held that allegations of bad faith to interpose a claim for consequential damages are allowed in addition to breach-of-contract claims. (*See Bi-Econ. Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 193-194 [2008].) In *Bi-Econ*, the plaintiff brought a claim for consequential damages under both bad-faith and breach-of-contract causes of action. The First Department dismissed the breach of contract claim, finding that the contract expressly excluded coverage for consequential losses. The Court of Appeals, however, distinguished consequential "losses" from consequential "damages" and reversed the First Department's decision, allowing both breach-of-contract and bad-faith claims. (*Id.* at 196.) The Court also distinguished *Bi-Econ. Mkt.* from *N.Y.U.* by pointing out the difference between consequential damages and punitive damages. The dissenting Judges noted that "[w]ith less frankness than the *Acquista* court — indeed, without even citing *Rocanova* or discussing *Acquista* — the majority here reache[d] the same result." (*Id.* at 197.)

Here, this court adhered to New York law that bad-faith claims may not stand as an independent tort. The Court of Appeals in *N.Y.U.* dismissed the bad-faith claim because the claim in *N.Y.U.* was a claim for punitive damages. Both *Acquista* and *Bi-Econ* are distinguishable from *N.Y.U.* because the courts in those cases allowed bad-faith claims for consequential damages. This court granted defendant's amendment only to assert a claim for consequential damages.

Plaintiff's motion to reargue this court's decision to add the sixth counterclaim on the basis that bad-faith claims are duplicative of breach of contract claims is therefore denied. The court did not overlook or misapprehend facts or law in rendering its decision.

**Seventh Counterclaim for GBL § 349**

Plaintiff's motion to reargue this court's decision to add the seventh counterclaim for GBL § 349 on the basis that the insurance contract is not a "consumer-oriented" contract is granted. The issue is whether defendant Cavan Corporation is a consumer that GBL § 349 intends to protect.

Neither party cited, in the current motion to reargue or in its initial motion to amend, a New York decision addressing this issue, *Freefall Express, Inc. v Hudson Riv. Park Tr.* (16 Misc 3d 1135 [A], *1, 2007 NY Slip Op 51702 [U], *1, 2007 WL 2582222, at *1 [Sup Ct, NY County 2007].) This Court finds that decision persuasive. The *Freefall* court found that "while the 'consumer-oriented' prong of the statute does not preclude the application of such statute to disputes between businesses per se, it does severely limit it." (*Id.* *3, 2007 NY Slip Op 51702 [U], *3, 2007 WL 2582222, at *3, citing *Cruz v NYNEX Infor. Resources*, 263 AD2d 285, 290 [1st Dept 2000].) Where "the alleged deceptive practices occur between relatively sophisticated entities with equal bargaining power, such does not give rise to liability under GBL § 349." (*Id.*, citing *Exxonmobil Inter-America, Inc. v Advanced Infor. Eng'g Serv., Inc.*, 328 F Supp 2d 443, 449 [SD NY 2004].) And "the mere fact that Freefall is a business is insufficient to defeat a GBL § 349 claim but, as a threshold matter, for [plaintiff] to claim the benefit of section 349, it must charge conduct of the defendant that is consumer oriented." (*Id.* *4, 2007 NY Slip Op 51702 [U], *4, 2007 WL 2582222, at *4, citing *Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995].) The purpose of GBL § 349 is "to protect the 'consumer at large,' *i.e.*, those 'who purchase goods and services for personal, family, or household use." (*Phoenix Life Ins. Co. v Irwin Levinson Ins. Trust II*, 2009 NY Slip Op 30383[U] [Sup Ct, NY County 2009].)

Here, defendant alleges that the parties' contract contains standard forms and endorsements that insurers use nationwide. But the contract here was between an insurance company and a construction company with equal bargaining powers. Furthermore, defendant Cavan Corporation entered into the contract using an insurance broker. Both parties to the contract were therefore "relatively sophisticated entities with equal bargaining power." (*Freefall*, 16 Misc 3d 1135 [A], *3, 2007 NY Slip Op 51702 [U], *3, 2007 WL 2582222, at *3.) GBL § 349 was intended to protect only smaller businesses and individual consumers who purchase goods and services for personal, family, or household use. Defendant's allegation that the contract contained standard forms and endorsements used by insurers nationwide is not a "consumer oriented" conduct sufficient to maintain the allegation that GBL § 349's protection applies to defendant. Defendant therefore may not raise a GBL § 349 claim.

The court overlooked or misapprehended the law in rendering its decision on this issue. Plaintiff's motion to reargue that aspect of this court's decision granting defendant leave to add the seventh counterclaim for GBL § 349 is therefore granted. Upon reargument, this court's October 17, 2016, decision is amended in that defendants may not add a seventh counterclaim for GBL § 349.

Accordingly, it is hereby

ORDERED that plaintiff's motion to reargue is granted in part and denied in part. Plaintiff's motion to reargue this court's October 17, 2016, decision to add the sixth counterclaim on the basis that bad-faith claims are duplicative of breach of contract claims is denied; the court did not overlook or misapprehend facts or law in rendering its decision. Plaintiff's motion to reargue that aspect of this court's decision granting defendant leave to add the seventh counterclaim for GBL § 349 is granted. And upon reargument, this court's October 17, 2016, decision is amended in that defendant Cavan Corporation of New York Inc. does not have leave to add a seventh counterclaim for GBL § 349; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office, which is directed to amend its records accordingly; and it is further

ORDERED that the parties appear for a status conference on September 27, 2017, at 10:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: June 30, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.