

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

WILLIAM A. GAMBLE, JR., GOLDEN TRIANGLE CORPORATION, and WILLIAM GAMBLE CORPORATION,

INDEX NO. 650024/2007

Plaintiffs,

- v -

MOTION DATE 7/13/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 46

J.A. FACCIBENE & ASSOCIATES, INC., ALLSTATE INSURANCE COMPANY, INTERNATIONAL HOME REALTY SERVICES, INC., INTERNATIONAL HOME REALTY, LLC, REDDING PROPERTIES, INC., BEVERLY CHAN, ST. PAUL FIRE AND MARINE INSURANCE COMPANY and MOSSIMO I. SANTI,

Defendants.

The following papers, numbered 1 to 6 were read on this motion to dismiss

Notice of Motion— Affidavits — Exhibits A-F
Answering Affidavits — Exhibits A-D
Replying Affidavits

PAPERS NUMBERED	
	<u>1-2</u>
	<u>3-4</u>
	<u>5-6</u>

Cross-Motion: Yes No

J.S.C. Upon the foregoing papers, it is ordered that this motion to dismiss by defendant St. Paul Fire and Marine Insurance Company is granted, and the second and third causes of action of the complaint against St. Paul Fire and Marine Insurance Company are dismissed.

This action arises from a burglary of the apartment of plaintiff William A. Gamble, Jr., that allegedly occurred on February 20, 2005. The apartment was also the place of business for Golden Triangle Corporation and William Gamble Corp. Plaintiff alleges that, contrary to the terms of a commercial insurance policy, defendant St. Paul Fire and Marine insurance (St. Paul) did not pay plaintiffs the replacement value for stolen computer equipment, and St. Paul denied coverage for Gamble's claim for lost earnings. Plaintiffs also assert causes of action against Gamble's renter's insurance carrier, Allstate Insurance Company (Allstate), which allegedly denied his insurance claims, and against Gamble's insurance broker, the building owner, the managing agent, and an employee of the managing agent who allegedly dealt with Gamble about complaints of locks not working in the building.

As St. Paul indicates, the second cause of action against St. Paul, for breach of the covenant of good faith and fair dealing, is dismissed as duplicative of the first cause of action against St. Paul for breach of contract. Pier 59 Studios L.P. v Chelsea Piers L.P., 27 AD3d 217 (1st Dept 2006); Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320, 324 (1st Dept 2004).

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED:

The third cause of action against St. Paul, alleging intentional infliction of emotional distress because Gamble suffered depression, heart attacks, and contemplated suicide, is dismissed for failure to state a cause of action. "[A]bsent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty." Wehringer v Standard Sec. Life Ins. Co. of New York, 57 NY2d 757, 759 (1982). "The allegations do not assert conduct that was so outrageous and extreme as to support a claim for emotional distress. . ." Acquista v N.Y. Life Ins. Co., 285 AD2d 73, 83 (1st Dept 2001); see Cunningham v Security Mut. Ins. Co., 260 AD2d 983 (3d Dept 1999) (dismissing plaintiff's claim for emotional distress premised on insurer's failure to timely compensate plaintiff, leaving her homeless, and accusing her of arson).

Although Allstate requests that plaintiff's causes of action against it should be dismissed for the same reasons as set forth St. Paul's motion, Allstate did not make a motion. Because Allstate is not the movant, it had no right to submit a reply affirmation.

The parties are directed to appear at a preliminary conference on November 8, 2007 at 9:30 am in IAS Part 7, 111 Centre St Rm 949, New York, New York.

Copies to all counsel

Dated: _____

9/10/07
New York, New York



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

HON. MICHAEL D. STALLMAN