

AXA Equit. Life Ins. Co. v Dobner

2012 NY Slip Op 31961(U)

July 10, 2012

Supreme Court, New York County

Docket Number: 600635/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

AXA EQUITABLE LIFE INSURANCE COMPANY,

Plaintiff,

- against -

SARA DOBNER 2005 LECHAIM IRREVOCABLE
LIFE INSURANCE TRUST; SOLOMON MENCHE,
INDIVIDUALLY AND AS TRUSTEE OF THE SARA
DOBNER 2005 LECHAIM IRREVOCABLE LIFE
INSURANCE TRUST,

Defendants.

INDEX NO. 600635/10

MOTION SEQ. NO. 001

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The following papers, numbered 1 to 5, were read on this motion by the plaintiff to dismiss defendants' second and third counterclaims and request for punitive damages.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

Cross-Motion: Yes No

PAPERS NUMBERED

1,2

3,4

5

FILED

JUL 23 2012

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This is an action regarding a dispute over a life insurance policy issued by Axa Equitable Life Insurance Company (plaintiff) in 2007. Before the Court is a motion by the plaintiff, pursuant to CPLR 3211, to dismiss the defendants' second and third counterclaims and their demand for punitive damages. Defendants submit opposition to plaintiff's motion and plaintiff has filed a reply.

BACKGROUND

On or about September 15, 2006, plaintiff received an application from Sara Dobner (Dobner) for a five million dollar life insurance policy to be payable to her beneficiary, defendant The Sara Dobner 2005 Lechaim Irrevocable Life Insurance Trust (The Trust), upon her death.

As part of the application, a Financial Supplement was filled out which contained, among other things, information regarding Dobner's income, net worth, and assets. On or about January 5, 2007, plaintiff issued the five million dollar life insurance policy. Defendant Solomon Menche (Menche) was the Trustee and allegedly signed the policy as "owner." In February 2008, The Trust filed a claim with the plaintiff, advising the plaintiff of Dobner's death and requesting payment of the proceeds of the policy. According to the plaintiff, the Trust listed the date of death as January 23, 2008, which was within two years of issuance of the policy and during the contestability period pursuant to Insurance Law 3203. After receiving the claim by the Trust for the life insurance benefits, plaintiff conducted an investigation and rescinded all coverage under the policy, finding that Dobner's application and financial supplement contained misrepresentations and omissions. On or about July 29, 2009, plaintiff wrote to Menche advising him of the rescission of the policy and tendered a check, with the letter, for the amount of the premiums and interest paid on the policy. The defendants rejected the rescission of the policy.

On March 11, 2010, plaintiff brought the herein action against the defendants seeking a declaratory judgment that the policy is void ab initio, for rescission of the policy, and for common law fraud, alleging that Dobner made material misrepresentations and omissions in her application and financial supplement which were relied upon by plaintiff in rendering its decision to issue the policy. Defendants filed an answer which asserts counterclaims against the plaintiff for breach of contract, for engaging in unfair and deceptive business practices in violation of General Business Law (GBL) § 349, and for fraudulent inducement. Defendants also seek to be awarded punitive damages on their second and third counterclaims. Plaintiff now moves, pursuant to CPLR 3211(a)(7), to dismiss the defendants' counterclaims for violation of GBL § 349 and fraudulent inducement, and for dismissal of defendants' demand for punitive damages.

STANDARD

CPLR 3211(a) provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action [.]

When determining a CPLR 3211(a) motion, “we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). “We also accord plaintiffs the benefit of every possible favorable inference” (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

Upon a CPLR 3211 (a)(7) motion to dismiss for failure to state a cause of action, the “question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts ‘can be fairly gathered from all the averments’” (*Foley v D’Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]), “However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege ‘whatever can be implied from its statements by fair and reasonable intendment’” (*Foley v D’Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). “[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). However, even if on a motion to dismiss for failure to state a cause of action the Court accepts all pleaded facts as true, “bare and conclusory allegations” are insufficient to state a cause of action (*Stoller v Factor*, 272 AD2d 83, 83 [1st Dept 2000]).

DISCUSSION

GBL § 349(a) provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." In order to state a cause of action under GBL § 349, a plaintiff must allege that the defendant's conduct was: (1) consumer-oriented; (2) deceptive or misleading in a material way; and (3) that plaintiff suffered injury as a result thereof (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]; *Gomez-Jimenez v New York Law School*, 36 Misc3d 230 [Sup Ct, NY County 2012]).

The Court finds that defendants fail to meet the threshold requirement to demonstrate that plaintiff's "acts or practices have a broader impact on consumers at large," and that this is not just a "private contract dispute[], unique to the parties . . . [which] would not fall within the ambit of the statute" (*Oswego*, 85 NY2d at 85). A review of the counterclaim reveals that it contains speculation and conclusory allegations rather than concrete facts upon which this Court could assume that plaintiff's actions in denying coverage affects consumers at large. Defendants fail to state a cause of action under GBL § 349 as they do not allege facts that plaintiff engaged in consumer-oriented conduct that was deceptive or misleading (*see Soule v Norton*, 299 AD2d 827 [4th Dept 2002]), and accordingly, defendants' second counterclaim is hereby dismissed.

It is well-established under New York law that "[a] claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed" (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 941 NYS2d 59, 74 [1st Dept 2012]). "In a fraudulent inducement claim,

the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004] [internal citation omitted]). Thus, "[I]f the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (*id.*).

Plaintiff's motion should be granted as to dismiss defendants' claim for fraudulent inducement, since that claim is not sufficiently distinct from, and is merely duplicative of, defendants' claim for breach of contract (*see Town House Stock v Coby Hous. Corp.*, 36 AD3d 509, 509 [1st Dept 2007]; *Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC*, 74 AD3d 652 [1st Dept 2010]). Further, defendants failed to plead with specificity the allegations underlying their counterclaim for fraudulent inducement (*see* CPLR 3016[b]). The fraud claim seems to allege "nothing more than [plaintiff's] entry into a contract [it] purportedly did not intend to honor" (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [1st Dept 2004]), and "[g]eneral allegations that a party entered into a contract with the intention not to perform it are insufficient to support a claim for fraud" (*Town House Stock*, 36 AD3d at 509).

In looking to the substance of the pleading rather than to its form (*see Foley v D'Agostino*, 21 AD2d at 64), and in viewing the counterclaims in the light most favorable to the defendant and affording the defendant the benefit of every possible inference (*see Leon v Martinez*, 84 NY2d at 87-88), the Court finds that the defendants counterclaims are insufficient to state a cause of action as a matter of law, and accordingly, plaintiff's motion to dismiss the second and third counterclaims is granted.

Moreover, in light of this Court's dismissal of the counterclaims upon which the defendants are seeking punitive damages, the punitive damages are likewise dismissed (*see Rocanova v Equitable Life Assur. Socy. Of U.S.*, 83 NY2d 603, 616 [1994] ["A demand or

request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud").

CONCLUSION

For these reasons and upon the foregoing papers, it is,

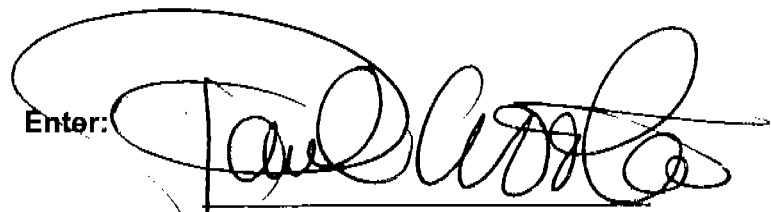
ORDERED that plaintiff's motion to dismiss defendants' second and third counterclaims and demand for punitive damages, pursuant to CPLR 3211(a)(7), is granted; and it is further,

ORDERED that the parties are directed to appear for a preliminary conference in Part 7, 60 Centre Street, Room 341, on October 17, 2012 at 11:00 A.M; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendants and upon the Clerk of the Court who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 7-10-12

Enter: 
Paul Wooten J.S.C.

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