

**Myers v Bass**

2010 NY Slip Op 34086(U)

January 25, 2010

Supreme Court, New York County

Docket Number: No.108631/2009

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
ASHLEY MYERS, individually, as Administrator of the  
ESTATE OF PETER J. CHAPMAN, and on Behalf of  
her Minor Daughter, ANNABELLE CHAPMAN,

DECISION AND  
ORDER

Index No. 108631/2009

Plaintiffs,

-against-

RYAN J. BASS, NORTHWESTERN MUTUAL  
INVESTMENT SERVICES, LLC. and  
NORTHWESTERN MUTUAL LIFE INSURANCE  
COMPANY,

Defendants.

-----X  
O. PETER SHERWOOD, J.:

This is an action to recover damages, *inter alia*, for professional negligence of defendant insurance agent Ryan J. Bass ("Bass") in the structuring of a life insurance policy procured by the plaintiff's decedent Peter Chapman ("Chapman"). Bass moves for an order dismissing the complaint pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action (Motion Sequence No. 001).<sup>1</sup>

Defendants Northwestern Mutual Investment Services, LLC and Northwestern Mutual Life Insurance Company (collectively "Northwestern") separately move for an order pursuant to CPLR § 3211 (a) (7) dismissing the complaint and therein adopt the arguments advanced by Bass in support of his motion to dismiss (Motion Sequence No. 002). Plaintiff opposes the motions.

Motion Sequence Nos. 001 and 002 are consolidated for purposes of disposition. For the reasons that follow, defendants' respective motions are granted.

**Background**

This action arises out of Chapman's purchase of a life insurance policy from defendant Northwestern through Bass as its registered representative. Chapman first consulted with Bass in or about October 2007 after being referred to Bass by one of his colleagues at Lehman Brothers Holdings, Inc. ("LBH"). At that time, Chapman, a 28-year-old LBH investment banker, was

<sup>1</sup>This action was transferred to this Part 61 from the Commercial Division by order dated November 9, 2009 (Bernard J. Fried, J.) as not within the scope of the commercial actions designated to such part as defined by the Uniform Rules of Trial Courts § 202.70 (b).

expecting the birth of his daughter, Annabelle Chapman ("Annabelle"), with his fiance, plaintiff Ashley Meyers ("Ashley") (Amended Compl. ¶¶ 11, 14, 18). Although Chapman owned certain life insurance policies as part of his employment package with LBH, he was seeking additional coverage in order to provide for Annabelle and Ashley in the event he were to die unexpectedly (Amended Compl. ¶¶ 12, 18). Annabelle was born on November 4, 2007. Based upon information Chapman supplied to Bass, including that he and Ashley were not married, that he had other life insurance policies through his employment, the nature and extent of his assets, and his goal of providing for Ashley's and Annabelle's financial needs, Bass prepared a Personal Needs Analysis, dated November 7, 2007, recommending that Chapman obtain additional life insurance in the amount of \$2,350,759.00 (Amended Compl. ¶¶ 19-22; PI's Opp. Ex. "A"). Thereafter, Bass prepared a second Personal Needs Analysis, dated January 22, 2008, in which he increased the amount of additional life insurance which he recommended Chapman purchase to the sum of \$3,703,608.00 (Amended Compl. ¶ 25; PI's Opp. Ex. "B"). Bass and Chapman met on January 23, 2008, at which time Chapman executed an insurance application form for the purchase of term life insurance in the amount of \$3,500,000.00, and gave Bass a check for the initial payment of the premium on the policy (Amended Compl. ¶ 26). While the application was pending, a Conditional Life Insurance Policy ("the Conditional Policy") in the sum of \$3,000,000.00 was issued in Chapman's name listing Ashley as sole beneficiary (Amended Compl. ¶¶ 27, 30). Chapman died unexpectedly on February 11, 2008, while on vacation. Northwestern paid Chapman's Estate the sum of \$3,000,000.00 pursuant to the Conditional Policy (Amended Compl. ¶ 35).

Plaintiffs commenced this action in June 2009 claiming that Bass was negligent in failing to structure the policy in a manner that would have insured that the full amount of proceeds paid on the policy would be exempt from state and federal estate taxes. Plaintiffs contend that Bass advised and counseled Chapman concerning the means of accomplishing his goal of providing financial security for Ashley and their newly born daughter and that he failed to properly consider Chapman's and Ashley's unmarried status when he structured the policy naming Chapman as owner and Ashley as beneficiary, resulting in a state and federal tax liability of \$1,344,168.00.

The amended complaint alleges two causes of action. The first cause of action asserts a claim of negligence and professional negligence based upon the alleged breach of Bass' duty of care to

Chapman, and to Ashley and Annabelle as beneficiaries, to structure the policy so that the full proceeds payable thereunder would reach Ashley and Annabelle and also asserts a derivative claim against Northwestern, as Bass' employer, upon the doctrine of *respondeat superior* and for its failure to properly train and/or supervise Bass in the performance of his duties as its representative. The second cause of action alleges a claim for breach of fiduciary duty claiming that Chapman justifiably relied upon Bass' and Northwestern's judgment in the structuring of the policy, specifically, in minimizing or eliminating state and federal tax obligations to insure that his goal of providing financial security for his fiancé and infant daughter would be met.

In lieu of answering, Bass moves to dismiss the complaint on the ground that he did not owe a duty to Chapman's Estate or to the individual plaintiffs and that he did not have a fiduciary relationship with Chapman. Northwestern does not assert any arguments on its own behalf but simply joins in the arguments advanced by Bass.

In opposition, plaintiffs contend that the amended complaint sufficiently alleges that Bass breached his duty to exercise due care in the structuring of the policy in a manner that would accomplish Chapman's expressed goals and is, therefore, liable in negligence. While recognizing that insurance brokers do not owe a general fiduciary duty to an insurer or its insured customers, plaintiffs contend that sufficient facts are alleged to assert a special relationship between Chapman and Bass based upon Bass' asserted expertise, his misrepresentations and Chapman's alleged reliance on his advice to make out a claim for breach of fiduciary duty. Plaintiffs contend further that whether such special relationship exists and whether Chapman justifiably relied on Bass' misconduct and misrepresentations are ultimately questions of fact which cannot be resolved on a motion to dismiss.

### *Discussion*

#### **1. Negligence**

When deciding a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must "accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable theory" (*see, Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Phillips v City of New York*, 66 AD3d 170, 174 [1<sup>st</sup> Dept 2009]). Thus, the court's role is limited to determining whether the pleading states a cause of

action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, factual allegations that do not state a viable cause of action, consist of bare legal conclusions, or are inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*see, Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1<sup>st</sup> Dept 2003]; *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 [1<sup>st</sup> Dept 1994]).

It is axiomatic that a cause of action predicated upon negligent conduct must allege: (1) a duty of reasonable care owed by the defendant to the plaintiff, (2) breach of such duty, and (3) injury proximately caused by the breach (*see, e.g., Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]; *Pulka v Edelman*, 40 NY2d 781, 782 [1976]). Thus, the threshold question in any negligence action is whether the defendant owes a duty of care to the injured parties (*see, Sheila C. v Povich*, 1 AD3d 120 [1<sup>st</sup> Dept 2004]). The existence of a duty of reasonable care is a legal issue for the courts (*see Eiseman v. State of New York*, 70 NY2d 175, 187 [1987]). Once the nature of the duty has been established, whether a particular defendant owes a duty to a particular plaintiff is a question of fact (*see Kimmell v. Schaefer*, 89 NY2d 257, 263 [1996]). Under New York Law, insurance agents and brokers are not in a special relationship with an insured and generally owe the insured no more than a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *see, People ex rel. Cuomo v Liberty Mut. Ins. Co.*, 52 AD3d 378 [1<sup>st</sup> Dept 2008]; *Barco Auto Leasing Corp. v Montano*, 215 AD2d 617, 618 [2d Dept 1995]). In this regard, an insurance broker's procurement duty is ordinarily defined by the nature of the customer's request for coverage (*see, Hersch v DeWitt Stern Group*, 43 AD3d 644, 646 [1<sup>st</sup> Dept 2007]; *State Ins. Fund v Richard Anderson Trucking Inc.*, 281 AD2d 838, 839 [3d Dept 2001]). An insurance broker may, therefore, be liable in negligence for a failure to discharge the duty to obtain insurance, either by proof that it breached the agreement or that it failed to exercise due care in the transaction (*see, Bruckmann, Rosser, Sherrill & Co.*, 65 AD3d 865 [1<sup>st</sup> Dept 2009]; *Bedessee Imports v Cook, Hall & Hyde*, 45 AD3d 792, 793-794 [2d Dept 2007]; *Mickey's Rides-N-More v Anthony Viscuso Brokerage*, 17 AD3d 328 [2d Dept 2005]).

Viewing the allegations of the complaint as true and giving plaintiffs every favorable inference, plaintiffs have not sufficiently stated a legally cognizable cause of action in negligence

and “professional malpractice”. Although the complaint alleges that Bass held himself out as an expert “financial planning consultant and insurance agent” and owed Peter Chapman “a duty to structure the ownership and beneficiary designations of the policy in a manner that would accomplish the intended purpose of providing [his child and fiancé] with the full amount [of insurance] recommended by Boss” (Complaint ¶43), the plaintiff has not identified any case in this State - - and the court has found none - - that imposes on an insurance broker who has no special relationship with the client a duty to provide the most tax efficient possible life insurance coverage. Bass was not engaged by Chapman as a tax or investment advisor. The complaint alleges that Bass served as an insurance agent and provided advice as to life insurance only (*see, e.g.* Complaint ¶¶15 [“Peter relied upon Bass’ stated expertise of life insurance products in selecting Bass as his insurance agent”]; ¶18 [“Peter contacted Bass to discuss obtaining additional life insurance coverage”]; ¶26 [“[A]s directed by Bass, Peter signed an insurance application...”]). Plaintiffs maintain that Bass failed to exercise due care in structuring the policy in a way that was appropriate given the information supplied by Chapman and Chapman’s asserted goals. Under the law in New York, an insurance broker may be held liable for “a failure to obtain requested coverage for their client within a reasonable time or inform the client of the inability to do so” (*Murphy*, 90 NY2d at 270). Insurance agents are not personal financial counselors and risk managers. Ordinarily, they have no duty to provide additional advisement to clients (*see id.* at 273). Plaintiffs have neither alleged facts nor identified cases suggesting an exception to this well established rule.

## 2. Breach of Fiduciary Duty

In order to establish breach of a fiduciary duty, plaintiff must first establish that a fiduciary relationship existed between the parties. As discussed above, absent a special relationship, a claim for breach of fiduciary duty does not lie against an insurance broker (*see Bruckmann, Rosser, Sherrill & Co. L.P.*, 65 AD3d at 867. In *Murphy* (*id.* at 272), the Court of Appeals recognized that “[e]xceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law”. Whether such additional duties undertaken by an insurance agent or broker create a special relationship is governed by the particular relationship and is determined on a case-by-case basis (*id.*).

Here, plaintiffs have alleged no facts tending to show the existence of a special relationship between Chapman and Bass sufficient to establish a fiduciary relationship. Accepting the truth of the allegations in the amended complaint (1) that Bass stated his mission “as a Northwestern Mutual Financial Network Representative [was] to help [Chapman] identify [Chapman’s] current financial picture with [Chapman’s] financial goals” and to “provide innovative solutions using world-class insurance services and internationally recognized investment products,” (Amended Compl. ¶ 16) (2) that Chapman advised Bass of his goal to provide financial security for his fiancé and infant daughter (*id.* ¶¶ 19-22) and (3) that Chapman relied upon Bass’ judgment and expertise that the policy he purchased would accomplish such goal (Amended Compl. ¶ 57), those facts are insufficient to establish the special relationship needed to trigger a possible fiduciary duty to plaintiffs (*see Hersch*, 43 AD3d at 645). The claim of breach of fiduciary duty must be dismissed.

**Conclusion**

Based upon the foregoing, it is hereby

**ORDERED**, that the respective motions of defendant Ryan J. Bass (Motion Sequence No. 001) and defendants Northwestern Mutual Life Investment Services, LLC and Northwestern Mutual Life Insurance Company (Motion Sequence No. 002) to dismiss the amended complaint are granted and the amended complaint is dismissed without costs or disbursements; and it is further

**ORDERED**, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

**DATED: January 25, 2010**

**ENTER,**



**O. PETER SHERWOOD**

**J.S.C.**