Catskills Sales Stats, Inc. v Oxford Health Plans (NY), Inc.
2013 NY Slip Op 32554(U)
October 10, 2013
Sup Ct, Suffolk County
Docket Number: 11264-13
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 11264-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/13/13
ADJ. DATES
Mot. Seq. #003-MG
CDISP Y ✔ NO

CATSKILLS SALES STATS, INC., CUSTOM SURVEY GROUP, PREFERRED MARKET DATA CORP., AMERICAN MONEY SERVICES INC. ET ALS, Plaintiffs, -against- OXFORD HEALTH PLANS (NY), INC., UNITED HEALTH GROUP INCORPORATED and UNITED HEALTHCARE OF NEW YORK, INC., Defendants.	KENNETH L. ROBINSON, ESQ. Atty. For Plaintiffs 35 Roosevelt Ave. Syosset, NY 11791 SEDGWICK, LLP Attys. For Defendants 225 Liberty St. New York, NY 10281

Upon the following papers numbered 1 to 12 read on this motion by the defendants for an order dismissing the complaint; Amended Notice of Motion and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ; Answering papers: 4-6; Reply papers 7-8; Other 9-10 (defendants' reply memorandum); 11-12 (defendants' memorandum in support); (NOT CONSIDERED ~ the affidavit of Leonard Slutsky dated September 25, 2013 by plaintiff in further opposition) it is,

ORDERED that this motion (#003) by the defendants for an order dismissing this action and for a permanent injunction is considered under CPLR 3211 and 6301 and is granted.

Plaintiff, American Money Services, Inc. "(ASMI") is in the business of compiling, analyzing and marketing customer surveys generated by the remaining 73 plaintiffs (hereinafter Employer Group Plaintiffs or EGP"), each of whom are solely owned by ASMI. Each plaintiff allegedly provides health insurance to their employees under a program endorsed by the State of New York known as the Healthy New York Program. Each plaintiff obtained such group health insurance after

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qualifying under the Program's "small employer group" provisions and by payment of an initial binder. The coverage afforded thereunder is available only to employees who qualify for the Program under its income and other standards and who pay monthly premiums. The defendants are the insurers of eligible EGP employees under contracts issued by such defendants (*see* Complaint attached as Exhibit A to moving papers ¶¶ 1-25).

In March of 2013, the defendants undertook to re-examine the eligibility of the plaintiffs as "single employer" as that term is defined under Program rules and in conjunction therewith issued notices requiring the plaintiffs to complete common-ownership certificates. The defendants advised that coverage would terminate on June 1, 2013 under all contracts issued to plaintiffs who failed to substantiate their eligibility. Three non-party affiliates of the plaintiffs had allegedly been deemed ineligible as of the April 12, 2013, the date of the complaint filed herein, and the plaintiff alleged that all of the plaintiffs were about to be likewise deemed ineligible (*see id.*, at ¶¶ 26-31).

On April 24, 2013, the plaintiffs commenced this action. In their complaint, the plaintiffs charge the defendants with breaching their insurance contracts with the plaintiffs due to improper cancellation (*see id* at ¶ 36), for which, they singularly demand the remedy of a permanent injunction prohibiting any such cancellation by the defendants (*see id* at ¶¶ 37-44). The plaintiffs immediately sought a preliminary injunction enjoining the defendants from terminating the coverages in accordance with the notices of cancellation issued by the defendants. That motion (#001) was heard and determined by the Honorable Peter H. Mayer, J.S.C., to whom this case was then assigned. By order dated May 24, 2013 issued in open court, Justice Mayer granted a preliminary injunction to the plaintiffs (*see* Order of record in transcript dated 5/18/13 [Mayer, J.]). Underlying such grant were perceived defects in the notices of cancellation issued by the defendants which purportedly ran afoul of one or more statutory and/or regulatory provisions governing the cancellation of the policies. Shortly thereafter, the defendants served notices by which they rescinded their previously issued cancellation notices.

Following the defendants' rescission of the cancellation notices at issue, the defendants moved to vacate the preliminary injunction granted to the plaintiffs (*see* motion seq #002 renumbered #004 upon transfer to Justice Mayer). That motion remains pending as submitted before Justice Mayer. The defendants then served this motion to dismiss (#003) the complaint pursuant to CPLR 3211(a)(2),(a)(4) and (a)(7), on the grounds, among others, of mootness and legal insufficiency. The plaintiff opposed the motion, to which the defendants replied in papers containing a withdrawal of their demands for dismissal under CPLR 3221(a)(4). Following submission of this motion on September 13, 2103, the plaintiffs submitted a "supplemental" affidavit dated September 25, 2013 by one of their principals. This "sur-reply" submission has not been considered by the court since it was not authorized by the rules governing motion submissions set forth in CPLR Article 22 and is prohibited by the rules of the Commercial Part set forth in 22 NYCRR 202.70, *et. seq*. The defendants' objection thereto are thus sustained.

Upon review of the papers properly before the court and for the reasons stated below, the instant motion (# 003) by the defendants for dismissal is granted.

Considered drastic in its nature (*see* ***Sybron Corp. v Wetzel***, 46 NY2d 197, 204, 413 NYS2d 127 [1978]), the remedy afforded by injunctive relief is "to be invoked only to give protection for the future ... [t]o prevent repeated violations, threatened or probable, of the [plaintiffs'] property rights" (***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, 873 NYS2d 148 [2d Dept 2009] *quoting* ***Exchange Bakery & Rest. v Rifkin***, 245 NY 260, 264–265, 157 NE 130 [1927]). It is available only to those who demonstrate that they will suffer irreparable harm absent the issuance of injunctive relief (*see* ***Parry v Murphy***, 79 AD3d 713, 913 NYS2d 285 [2d Dept 2010]; ***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, *supra*; ***Forest Close Assn., Inc. v Richards***, 45 AD3d 527, 529, 845 NYS2d 418 [2d Dept 2007]; ***Icy Splash Food & Beverage, Inc. v Henckel***, 14 AD3d 595, 596, 789 NYS2d 505 [2d Dept 2005]), and are without other available remedies (*see* ***Severino v Classic Collision, Inc***., 280 AD2d 463, 719 NYS2d 902 [2d Dept 2001]). "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient (*see* ***L&M 353 Franklyn Ave., LLC v S. Land Dev., LLC***, 98 AD3d 721, 950 NYS2d 484 [2d Dept 2012]). Harm is considered irreparable where it adversely affects rights and/or interests that are considered unique under the law or are otherwise deserving of the protection the drastic remedy a permanent injunction affords (*see* ***Poling Transp. Corp. v A&P Tanker Corp***., 84 AD2d 796, 443 NYS2d 895 [2d Dept 1981]). In such cases, the inadequacy of money damages is clearly apparent (*see* ***L&M 353 Franklyn Ave., LLC v S. Land Dev., LLC***, 98 AD3d 721, *supra*; ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, 880 NYS.2d 647 [2d Dept 2009]).

"Although it is permissible to plead a cause of action for a permanent injunction, ... permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (***Weinreb v 37 Apts. Corp***., 97 AD3d 54, 943 NYS2d 519 [1st Dept 2012] *quoting* ***Corsello v Verizon N.Y., Inc***., 77 AD3d 344, 368, 908 NYS2d 57 [2010], *mod. on other grounds* 18 NY3d 777, 944 NYS2d 732 [2012]). To sufficiently plead a cause of action for a permanent injunction, one must allege facts of a "violation of a right presently occurring, or threatened and imminent; that the plaintiff has no adequate remedy at law; that serious and irreparable injury will result if the injunction is not granted; and that the equities are balanced in the plaintiff's favor" (*see* ***Elow v Svenningsen***, 58 AD3d 674, 873 NYS2d 319 [2d Dept 2009]). Where it appears that the plaintiff has an adequate remedy at law, a claim for permanent injunctive relief is subject to dismissal (*see* ***Regini v Board of Mgrs. of Loft Space Condominium***, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013]).

The legal standard which measures the legal sufficiency of a pleading under CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist College v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d at 314, 326,

746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]); ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]; ***Parola, Gross & Marino, P.C. v Susskind***, 43 AD3d 1020 [2d Dept 2007]).

The test to be applied is thus "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (***Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC***, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009], *aff'd* 16 NY3D 775, 919 NYS2d 496 [2011]).

Here, the allegations advanced in the complaint charge the defendants only with conduct that purportedly constitutes a breach of their obligations to the plaintiffs under the terms of the insurance policies issued by the defendants. The customary remedy available for this simple breach of contract claim is money damages, the existence of which, is ordinarily sufficient and precludes the issuance of injunctive relief, provisional or permanent in nature (*see* ***L&M 353 Franklyn Ave., LLC v S. Land Dev., LLC***, 98 AD3d 721, *supra*; ***306 Rutledge, LLC v City of New York***, 90 AD3d 1026, 935 NYS2d 619 [2d Dept 2011]). No irreparable harm of the type necessary to warrant issuance of permanent injunctive relief is discernable from the four corners of the complaint since the allegations with respect thereto and those relating to the inadequacy of money damages are bare legal conclusion unsupported by factual averments. The court thus finds that the complaint, even when viewed in a light most favorable to the plaintiffs is simply insufficient to state facts constituting each and every element of a cognizable claim for permanent injunctive relief, which is the sole claim asserted in the complaint.

Moreover, the complaint fails to state a legally sufficient claim for breach of contract or any other claim cognizable under New York law. The defendants' purportedly wrongful conduct in issuing procedurally irregular cancellation notices, if any, was ameliorated by such defendants' rescission of those cancellation notices. The allegations advanced in the complaint do not reveal that such procedural irregularities are not curable by the issuance of new notices, and that if so cured, the defendants are without any bona fide legal right to cancel the coverages they now afford to the plaintiffs' employees due to the ineligibility of such plaintiffs under the Healthy New York Program or otherwise. In this regard, the court notes that an insurer's right to cancel contracts of insurance are governed principally by the law of contracts and/or by the statutes and regulations governing the

conduct of insurers with respect cancellation as may be applicable (*see generally* ***Government Employees Ins. Co. v Allen***, 95 AD3d 1322, 944 NYS2d 761 [2d Dept 2012]; ***Security Mut. Life Ins. Co. of New York v Rodriguez***, 65 AD3d 1, 880 NYS2d 619 [1st Dept 2009]; *see also* 31 NY PRAC - NY Insurance Law § 11.8). The complaint here is devoid of factual allegations regarding conduct on the part of the defendants that may be considered an actionable wrong under the law governing contracts or any controlling statutes or regulatory framework.

In view of the foregoing, the instant motion (#003) by the defendants for a dismissal of the complaint served in this action is granted and such complaint is dismissed pursuant to CPLR 321(a)(7).

DATED: 10/10/13

THOMAS F. WHELAN, J.S.C.