

Melo v National Benefit Life Ins. Co.

2013 NY Slip Op 32689(U)

October 21, 2013

Sup Ct, New York County

Docket Number: 110158/11

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

ANA MELO,
Plaintiff,

- v -

NATIONAL BENEFIT LIFE INSURANCE COMPANY.
Defendant(s).

INDEX NO. 110158/11

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

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

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

FILED

OCT 29 2013

PAPERS NUMBERED

1, 2

3

4

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Ana Melo (“Plaintiff”) brings this action, as the sole beneficiary of a life insurance policy issued to her deceased son Jose Rodriguez (“Decedent”) by defendant National Benefit Life Insurance Company (“Defendant”), against Defendant for breach of contract in failing to pay life insurance benefits under the policy in the amount of \$300,000 upon the death of her son on October 12, 2009. Defendant denied benefits to Plaintiff on the basis that material misrepresentations were made on Decedent’s insurance application in response to questions pertaining to a history of liver disease or a need for further medical treatments. Specifically, Defendant denied benefits to Plaintiff, claiming that Decedent had made material misrepresentations on his application because he marked “no” to a question on the application that asked about a history of liver disease or a need for further medical treatments.

Plaintiff now moves, pursuant to CPLR §3126, for an Order to strike Defendant’s answer for failure to comply with the demands and notices of Plaintiff, or, alternatively, to preclude Defendant from introducing evidence at trial “with respect to applicants with similar conditions as the deceased in this case, establishing

that it would have rejected the application if the information on the application had been truthful. Defendant opposes.

On November 15, 2011, Plaintiff served a Notice for Discovery and Inspection, which requested copies of any applications for life insurance that were granted coverage by Defendant even though the applicant responded “yes” to the questions on the application regarding a history or liver disease and regarding medical treatment that had not yet been completed for five years prior to June 2007. Plaintiff’s Notice also requested copies of any applications that were denied coverage by Defendant as a result of a response of “no” to the questions.

On November 22, 2011, Plaintiff wrote to Defendant in an effort to schedule depositions. Thereafter, Plaintiff reduced the time frame for obtaining copies of the subject applications from five years to one year and served a Supplemental Notice for Discovery and Inspection requesting all denials of death benefits for three years due to a material misrepresentation on the application of insurance.

On May 10, 2012, Plaintiff moved to compel Defendant to produce applications, as well as the underwriting files, of applicants that were granted or denied coverage based on their answers regarding a history of liver disease on their applications and appear for an examination before trial. Plaintiff’s motion was resolved to the extent that the parties were directed to appear for a preliminary conference on August 14, 2012.

On January 15, 2013, the Plaintiff’s deposition took place. On January 30, 2013, the deposition of Defendant’s witness Debra Walker took place. At the deposition, Plaintiff demanded underwriting files.

On February 26, 2013, Plaintiff and Defendant entered into a So Ordered Stipulation entered by the Court, which directed that the depositions of five specifically identified individuals (the underwriter for the subject policy, Michelle Chu, Gordan Brandau, MD, Michelle Bigham, and Dr. Lorna Dove) be conducted no later than April 19, 2013, and for Defendant to produce eight specific categories of documents within twenty days, including “All documents which evidence denials of insurance applications for 3 years prior to 7-25-07 due to applicant having Hepatitis B, evidence of Hep. B, or elevated SGPT levels.”

Thereafter, Defendant served a Response on March 30, 2013 to Plaintiff's demands. In that Response, Defendant objected to production of all previously agreed upon witnesses for examination before trial with the exception of Nicole Alexander, who it stated was no longer employed by or under the control of Defendant or its affiliates, and claim reviewer, Michelle Bigham which Defendant agreed to produce.

Additionally, Defendant objected to producing all of the underwriting files requested, and continues to do so. Defendant states that there are a total of 16 applications during 2005-2007 where Defendant became aware, during the underwriting process, that the proposed insured had Hepatitis B. Of these sixteen applications, one proposed insured was issued coverage on a Standard underwriting basis, as was Jose Rodriguez, and the remaining fifteen were declined a policy or were rated Sub-Standard. While Defendant has produced the one file on the proposed insured that was issued coverage on a Standard basis, Defendant contends that the remaining fifteen underwriting files are not material and necessary.

On April 17, 2013, Plaintiff served on Defendant a Second Supplemental Notice for Discovery and Inspection for the discovery that it had previously requested.

By letter dated April 30, 2013 and Response to Plaintiff's Supplemental Demand dated May 22, 2013, Defendant reiterated its objections to producing the underwriting files for all sixteen applications.

Plaintiff states that, to date, Plaintiff has not received the underwriting files requested for the remaining fifteen applications and that defendant has still not produced the witnesses that agreed to produced in the February 26, 2013 Order. Plaintiff requests the deposition of Betty Chu, Dr. Gordon Brandeau, and Michelle Bigham. Chu and Brandeau were involved in the underwriting of Decedent's life insurance policy and denial of benefits to Plaintiff. Chu is an underwriter, who Defendant identified as a witness and who appears to have reviewed Plaintiff's claim.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy

which will assist preparation for trial by sharpening the issues and reducing delay and prolixity,” and that “[t]he test is one of usefulness and reason” (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). However, a party is not required to respond to discovery demands which are “palpably improper.” A demand is palpably improper if it seeks information which is irrelevant or confidential, or is overbroad and unduly burdensome (*Gilman & Ciocia, Inc. v. Walsh*, 2007 NY Slip Op 8410, *1 [2nd Dept. 2007]).

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party’s answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407 [1st Dept. 2006]). The moving party must show “conclusively that failure to disclose was willful, contumacious or due to bad faith.” (*Dauria v. City of New York*, 127 AD2d 416 [1st Dept. 1987]).

This Part expects compliance conferences to be meaningful. As set forth in this Part’s Rules, counsel appearing at compliance conferences are expected to be familiar with the case, and to have the authority to discuss all discovery issues and to settle matters. Counsel must further bring all copies of all prior orders and a list of all outstanding discovery. Parties are therefore expected to comply with all provisions of any Stipulation entered at the compliance conference and ordered by the Court.

Here, in light of CPLR §3101(a) which provides that “[t]here shall be full disclosure of all matters material and necessary in the prosecution or defense of an action,” Defendant is directed to produce the underwriting files for all sixteen applicants with a medical history that is similar to Jose Rodriguez’s which Defendant has identified. The Court, however, is sensitive to the privacy and confidentiality of those sixteen applicants, whose own health is not at issue in this case, and therefore all files produced are to be redacted to protect those individuals’ identities and all personal identifiers.

Furthermore, Defendant is directed to produce Betty Chu, Dr. Gordon Brandeau, and Michelle Bigham for a deposition, which Defendant has already agreed to produce in the February 26, 2013 Stipulation. This Stipulation was signed by counsel for both Plaintiff and Defendant and Ordered by the Court, and therefore must be complied with in entirety. To the extent that Nicole Alexander, the alleged

underwriter for the policy issued to Jose Rodriguez, is, Defendant states, "not employed by or under the control of Defendant or its affiliates," Defendant must produce her last known address or contact information. Plaintiff, however, has not demonstrated that the sanction of striking Defendant's answer or preclusion is warranted in this case, as Defendant has produced other categories of documents requested by Plaintiff.

Wherefore, it is hereby

ORDERED that plaintiff Ana Melo's motion to strike Defendant's answer is denied; and it is further

ORDERED that defendant is directed to produce underwriting files for all sixteen applicants in redacted form to remove all personal identifiers of applicants; to produce the last known address or contact information for Nicole Alexander, and to produce Betty Chu, Dr. Gordon Brandeau, and Michelle Bigham for a deposition within thirty days of service of a copy of this Order with notice of entry thereof.

ORDERED that all parties are reminded that they must appear for their scheduled conference at 80 Centre Street, Room 327, on November 19, 2013 at 9:30 a.m.

This constitutes the decision and order of the court. All other relief requested is denied.

FILED

OCT 29 2013

Dated: OCTOBER 21, 2013

NEW YORK COUNTY CLERK'S OFFICE

[Handwritten Signature]
HON. EILEEN RAKOWER J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE