Jackson Natl. Life Ins. Co. of N.Y. v Vita
2014 NY Slip Op 30806(U)
March 24, 2014
Sup Ct, Suffolk County
Docket Number: 13-25530
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 13-25530

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MotD
002 - XMG

----------X

JACKSON NATIONAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

- against -

JESSICA VITA, ARTHUR VITA, PETER VITA and CHARLES VITA,

Defendants.

----------X

WINGET, SPADAFORA & SCHWARTZBERG
Attorney for Plaintiff
45 Broadway, 19th Floor
New York, New York 10006

GERALD L. LOTTO, ESQ.
Attorney for Defendant Jessica Vita
3330 Vets Memorial Highway
Bohemia, New York 11716

THE ZUPPA FIRM
Attorney for Defendants Arthur Vita, Peter Vita & Charles Vita
1205 Franklin Avenue, Suite 340
Garden City, New York 11530

Upon the following papers numbered 1 to 39 read on this motion for discharge and cross motion to compel; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 21 - 37; Answering Affidavits and supporting papers 16 - 20; Replying Affidavits and supporting papers 38 - 39; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order 1) pursuant to CPLR 1006(f) discharging it from liability to the defendants, directing the deposit of certain monies into Court, and permitting it to recoup its costs and expenses, including reasonable attorney's fees, incurred in commencing this action and filing this motion and to subtract same from the amount to be deposited into Court, and 2) pursuant to CPLR 3211(a)(6) dismissing all counterclaims against it, is granted to the extent that the counterclaim asserted against the plaintiff by the defendant Jessica Vita is dismissed and is otherwise denied; and it is further

ORDERED that this cross motion by the defendants Arthur Vita, Peter Vita and Charles Vita for an order pursuant to CPLR 3012(d) compelling the plaintiff and the defendant Jessica Vita to accept their previously served late answer is granted.

The plaintiff commenced this "action of interpleader" (CPLR 1006) to determine who is entitled to the death benefits of a variable annuity policy No. 1200015849 (policy) issued by the plaintiff to James Vita on or about November 30, 2009. It is undisputed that James Vita (James) was the owner of the policy, and that he died on May 27, 2013. The following facts also appear to be undisputed: the defendants Arthur Vita, Peter Vita and Charles Vita (the Brothers), were the initial beneficiaries under the policy, and the brothers of James. The defendant Jessica Vita (Vita) was James' wife at the time of his death, and she filed a Variable Annuity Death Benefit Claim (Claim) under the policy with the plaintiff on or about June 3, 2013 further to a change in beneficiary allegedly signed by James on May 18, 2012. In a letter dated May 29, 2013 the Brothers informed the plaintiff that they wished to contest any change in beneficiary on the policy and asked the plaintiff not to "release any money until this matter is litigated." On or about June 10, 2013 the plaintiff received a letter from an attorney representing the Brothers informing it that a lawsuit would be commenced on behalf of James' children," and demanding that any withdrawals from the policy cease.

The plaintiff commenced this action by filing of a summons and complaint dated September 10, 2013. In its complaint, the plaintiff alleges that it "has no interest in the property in question and here merely occupies the position of a stakeholder, having no interest in the controversy between the named Defendants herein." The plaintiff now moves pursuant to CPLR 1006(f), for an order discharging it from liability to the defendants herein, directing the deposit of the death benefit proceeds of $217,746.11 into the Court less its reasonable costs and expenses, including attorney's fees. The Court will address the Brother's cross motion before it reviews the plaintiff's motion as the cross motion directly affects the outcome of the plaintiff's motion.

The Brothers cross-move for an order compelling the plaintiff and Vita to accept their previously served answer. It is undisputed that the plaintiff served the summons and complaint on the Brothers pursuant to CPLR 308(4) "affix and mail service" on September 27, 2013, that affidavits of service were filed on October 13, 2013, and that the Brothers served their answer with counterclaims and cross claims on November 18, 2013. By letter dated November 21, 2013, the plaintiff notified the Brothers that it was rejecting their answer. It appears that Vita did not act to reject the Brother's answer. In support of their motion, the Brothers submit, among other things, the affirmation of their attorney, an affidavit from Charles Vita, a copy of their answer, and e-mails between their attorney and the attorney for the plaintiff.

It is well settled that "a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when ... moving to extend the time to answer or to compel the acceptance of an untimely answer" (see Maspeth Fed. Sav. & Loan Assn. v McGown, 77 AD3d 890, quoting Lipp v Port Auth. of N.Y. & N.J., 34 AD3d 649, 649; see also Karalis v New Dimensions HR, Inc., 105 AD3d 707; Swedbank, AB v Hale Ave. Borrower, LLC, 89 AD3d 922; Community Preservation Corp. v Bridgewater Condominiums, LLC, 89 AD3d 784; Midfirst Bank v Al–Rahman, 81 AD3d 797; Deutsche Bank Natl. Trust Co. v Rudman, 80 AD3d 651). The showing of reasonable excuse that a defendant must make to be entitled to serve a late

answer under CPLR 3012(d) is the same as the showing a defendant must make to be entitled to the vacatur of a default under CPLR 5015[a][1] (see Integon Natl. Ins. Co. v Norterile, 88 AD3d 654; Stephan B. Gleich & Assocs. v Gritsipis, 87 AD3d 216; Ennis v Lema, 305 AD2d 632). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (see Maspeth Fed. Sav. & Loan Assn. v McGown, supra; Star Indus., Inc. v Innovative Beverages, Inc., 55 AD3d 903; Segovia v Delcon Constr. Corp., 43 AD3d 1143; Matter of Gambardella v Ortov Light., 278 AD2d 494).

In his affirmation in support of the cross motion, counsel for the Brothers states that he contacted the attorney for the plaintiff on October 23, 2013, that he informed said attorney that the Brothers allege that Vita stole money from the policy and forged the change in beneficiary form, and that the plaintiff "was complicit in this theft and could be counterclaimed against." He indicates that he offered counsel a deal that the Brothers would not counterclaim against the plaintiff if it waived its legal fees in this action. Counsel for the Brothers references a number of e-mails indicating an ongoing dialogue with counsel for the plaintiff regarding this issue, and contends that he relied on those negotiations in delaying the service of the Brothers' answer. Counsel for the Brothers further contends that the service of the Brothers' answer was only six days late, as the plaintiff did not complete service until October 13, 2013, and that there is no prejudice to the plaintiff due to the six-day delay in serving an answer. He points out that the statute of limitations is not an issue herein, and that a separate action against the plaintiff could be commenced by the Brothers.

In his affidavit, Charles Vita swears that the money to purchase the policy came from an inheritance left to the four brothers by their mother, and that his brother James "lacked mental capacity due to a number of health related issues including heart problems; depression/anxiety/manic-depression; heavy medication for his ailments including his heart condition, various injuries; drug addiction; and alcohol addiction." He states that the Brothers set up the policy with James' share of the inheritance, and named themselves as beneficiaries to safeguard the funds for James' two children should James pass away "before regaining his full mental capacity." He indicates that James had little knowledge of, or access to, the policy. Charles Vita further swears, among other things, that James did not have the capacity to marry Vita, that Vita manipulated James, supplied him with drugs, and otherwise took control over James and his finances in an effort to obtain the funds in the policy. He states that Vita forged the form necessary to give her access to the funds in the policy and to change the beneficiaries, and that Vita has admitted to being convicted of larceny, forgery and breaking and entering in the past. He indicates that Vita stole approximately $225,000 from the policy prior to her application for the death benefits thereunder. Charles Vita further swears that the plaintiff recklessly allowed Vita to change the beneficiary on the policy to herself with a telephone call after it misread her handwriting on the relevant form that she had forged, that the plaintiff's agent succumbed to Vita's threats to keep the change of beneficiary a secret, and that the plaintiff breached the policy contract "by allowing [Vita] to withdraw approximately $225,000 dollars from the Policy without the required authorization and thereby failing to safeguard, protect and invest the subject monies."

Here, the detailed and corroborated averment by counsel for the Brothers in his affirmation in support of the cross motion establishes a reasonable excuse for the Brothers' default. A review of the relevant e-mails indicates that counsel for the plaintiff was contacted before the time for the Brothers to

appear expired, that the parties engaged in potentially mutually beneficial negotiations regarding the nature of the Brother's answer, and that a portion of the delay in resolving the issues involved was attributable to the plaintiff.

It has been held that, under certain circumstances, a good faith belief in negotiations, supported by substantial evidence, constitutes a reasonable excuse for default (see Performance Constr. Corp. v Huntington Bldg., LLC, 68 AD3d 737; Armstrong Trading, Ltd. v MBM Enters., 29 AD3d 835; Scarlett v McCarthy, 2 AD3d 623, 768 NYS2d 342 [2d Dept 2003]; Lehrman v Lake Katonah Club, 295 AD2d 322, 744 NYS2d 338 [2d Dept 2002]; Wells Fargo Bank, N.A. v Chateau, 36 Misc 3d 280).

In addition, the Brothers have demonstrated that the delay in serving their answer was brief and the existence of a potentially meritorious defense to this action. CPLR 308(4) provides in pertinent part:

> Personal service upon a natural person shall be made by ... affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by [a] mailing ... indicating ... that the communication ... concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing ..."

It is undisputed that the plaintiff served the summons and complaint upon the Brothers pursuant to CPLR 308 (4), that the requisite mailing was completed, and that proof of service was filed on October 3, 2013. It is well settled that a defendant's time to answer does not run until the filing of proof of substituted service pursuant to CPLR 308[4] (see Wiley v Lipset, 140 AD2d 336; Bank of New York v Schwab, 97 AD2d 450; Marazita v Nelbach, 91 AD2d 604). Thus, ten days after said filing, service was complete on October 13, 2013, and the Brothers' answer was due on or before November 12, 2013 (CPLR 320[a]). It is also undisputed that the Brothers served their answer on November 18, 2013, six days after it was due. The plaintiff's contentions that the Brothers' answer was due by October 28, 2013, and that the Brothers' default was wilful are without merit.

The Brothers have demonstrated both a reasonable excuse for their brief delay in serving the answer and the existence of a potentially meritorious defense to this action (see CPLR 3012 [d]; Methal v City of New York, 50 AD3d 654; Stuart v Kushner, 39 AD3d 535. As discussed below, allegations that a stakeholder is independently liable to a claimant is sufficient to defeat an application for discharge. Here, approval of the Brothers' cross motion is supported by the brief nature of the delay, the lack of prejudice to the plaintiff, a reasonable excuse for the delay, evidence of meritorious defenses, the lack of evidence of a willful default or intent to abandon any defenses to the action, and the public policy favoring the resolution of cases on the merits (Ciccone v Kendal on Hudson, 72 AD3d 726; City Line Auto Mall, Inc. v Citicorp Leasing, Inc., 45 AD3d 716; Harcztark v Drive Variety, Inc., 21 AD3d 876).

Vita has not opposed the Brothers' cross motion. In addition, the plaintiff has not submitted any evidence regarding the issue of prejudice, and the Court cannot discern that there is any prejudice to the plaintiff. Accordingly, the Brothers' cross motion to compel plaintiff and Vita to accept late service of their answer is granted.

The Court now turns to that branch of the plaintiff's motion which seeks an order discharging it from liability to the defendants and directing the deposit of the death benefit proceeds into Court. An interpleader action is designed to protect an entity from multiple liability when faced with two or more claims which are related in such a way that recovery on one claim should exclude or limit recovery on the other (see Isacowitz v Isacowitz, 17 Misc 2d 29, revd on other grounds, 8 AD2d 837; Leventhal v Roslyn Manor, Inc., 142 NYS2d 478; see eg. American Intern. Life Assur. Co. of N.Y. v Ansel, 273 AD2d 421). That is, where the same thing, debt or duty is claimed by more than one person (Matter of Estate of Harris, 8 Misc 2d 541). Generally, the remedy of interpleader is only available to a stakeholder (Bankers Trust Co. v Hogan, 196 AD2d 469; Nathan v Bernstein, 252 AD 497; Brown v Arbogast & Bastian Co., 162 AD 603). Here, the plaintiff has established its entitlement to bring this action. However, whether the plaintiff is entitled to be discharged from this action is a separate issue (CPLR 1006 [e], [f]; Nelson v Cross & Brown Co., 9 AD2d 140, revd on other grounds 11 AD2d 981; cf. Credito Italiano, N.Y. Branch v Cellulose Converting Equips., 173 AD2d 350).

It has been held that a stakeholder is not entitled to be discharged as a "mere stakeholder" when it has been charged with an independent liability (see Inovlotska v Greenpoint Bank, 8 AD3d 623; Birnbaum v Marine Midland Bank, 96 AD2d 776; American Motorists Ins. Co. v Oakley, 172 Misc 319; *cf.* Mahon, Mahon, Kerins & O'Brien, LLC v Moskoff, 85 AD3d 738 [claimant failed to raise an issue whether stakeholder had any independent liability]; Sun Life Ins. and Annuity Co. of N.Y. v Braslow, 38 AD3d 529 [no claimant raised issue of independent liability of insurer]; but see Transamerica Fin. Life Ins. Co. v Simmonds, 21 Misc 3d 1101[A] [claimant suffered no damages as result of alleged independent liability of stakeholder]).

"The proof offered by [a stakeholder] to support a discharge should be as weighty on the single-liability issue as the proof needed to support a summary judgment motion under CPLR 3212. The effect of an order of discharge is essentially the same as the grant of summary judgment: it is the equivalent of a trial. If the court has any doubt about whether [the movant] is just a stakeholder, or for any good reason feels that [the stakeholder] should remain in the action as a party, it will deny [the stakeholder's] motion to be discharged" (Siegel, NY Prac. § 149 [5th ed 2011] citing Nelson v Cross & Brown Co., supra). In addition, pursuant to CPLR 1006(f) governing the discharge of an interpleader stakeholder, a court's determination of a stakeholder's application for discharge from liability is discretionary (Merrimack Mut. Fire Ins. Co. v Moore, 91 AD2d 759; Watts v Swiss Bank Corp., 30 AD2d 791).

In their answer dated November 18, 2013, the Brothers allege, among other things, that the plaintiff negligently permitted Vita to withdraw funds from the policy, and to change the beneficiaries of the policy by forgery and/or with a telephone call. Here, the Brothers have raised issues of fact requiring a trial regarding the actions or inactions of the plaintiff and whether it is a mere stakeholder without any independent liability. Accordingly, the plaintiff's motion for an order discharging it from liability to the

defendants, directing the deposit of certain monies into Court, and for its costs and expenses, is denied without prejudice to renewal upon the completion of discovery and/or the trial herein should the plaintiff deem it appropriate.

The Court now turns to that branch of the plaintiff's motion which seeks to dismiss any and all counterclaims against it. A party may move to dismiss a cause of action pursuant to CPLR 3211(a)(6) on the ground that "with respect to a counterclaim, it may not properly be interposed in the action." Said statute is "used primarily when a counterclaim has been interposed in violation of the 'capacity' rule. A counterclaim may be interposed by or against a party only in the capacity in which that party is present in the case. If the plaintiff is a partnership, for example, the defendant may interpose only a counterclaim that lies against the partnership as such ... there is no authority under the CPLR to dismiss an otherwise valid counterclaim merely because it is not convenient to have it present in the case" (Siegel, NY Prac § 264 [5th ed 2011]; see also MCC Funding LLC v Diamond Point Enters., LLC, 36 Misc 3d 1206[A]).

Other situations where CPLR 3211(a)(6) comes into play is where the party asserting a counterclaim is expressly barred from recovery thereunder (cf. Matter of Bernstein, 156 AD2d 683 [counterclaim for punitive damages invalid to extent based merely upon insurer's commencement of interpleader action to resolve competing claims]; Bankers Sec. Life Ins. Socy. v Shakerdge, 55 AD2d 568 [no basis for an award of punitive damages based upon refusal to pay over proceeds and commencement of interpleader action]; National Med. Mgt. v Midland Emergency Assoc., 102 AD2d 883 [counterclaim barred by stipulation between the parties]; Ain v Vasquez, 40 Misc 3d 1202[A] [counterclaim generally barred as written lease between parties contained a "no counterclaim" provision]).

The plaintiff's motion is initially directed at the first of two counterclaims set forth in Vita's answer. The second counterclaim set forth is directed against the Brothers only. The first counterclaim entitled "As And For A Counterclaim" includes allegations against the Brothers and the plaintiff. The gravamen of said counterclaim is that the Brothers have no claim as to the death benefit proceeds, that the plaintiff has refused to make the appropriate payment to her, and that it has no valid reason to withhold said payment. Vita's counterclaim does not allege any independent liability on the part of the plaintiff, and would not defeat an application for discharge herein. Accordingly, said counterclaim is dismissed.

To the extent that the plaintiff's motion can be read to seek dismissal of the first, second, third, and fifth causes of action/counterclaims set forth in the Brothers' answer, it is denied. Said claims sound in breach of contract, negligence, conversion, and declaratory judgment respectively. The fourth cause of action/cross claim is asserted against Vita and is not relevant to a determination herein. As set forth above, the Brothers allege independent liability on the part of the plaintiff. The plaintiff does not contend that the subject counterclaims are barred on any of the grounds generally recognized on a motion pursuant to CPLR 3211(a)(6). Rather, the plaintiff contends that said counterclaims are "retaliatory" and barred by public policy. A review of the plaintiff's authority for this proposition reveals that the two cases cited do not support such a result. In both matters, the courts were considering counterclaims sounding in prima facie tort where there was a danger that the claim was intended to

intimidate the party opponent with the possibility of having to pay its adversary's legal fees or otherwise obscuring the merits of the plaintiff's claim. "New York courts have consistently refused to allow retaliatory law suits based on prima facie tort predicated on the malicious institution of a prior civil action" (Cunningham v Merchant Sterling Corp., 148 Misc 2d 52, quoting Curiano v Suozzi, 63 NY2d 113). Here, the Brother's allegations set forth a basis for finding independent liability on the part of the plaintiff, for finding that the Brothers are entitled to a recovery in excess of the death benefit under the policy, and, should they lose, the possibility that they will be required to pay the costs and expenses of the plaintiff in litigating some or all of these issues.

In addition, the plaintiff contends that the Brothers state that they "were named as beneficiaries to safeguard and intelligently distribute the funds for James Vita's two children," and, thus, will not suffer any damages regarding its request to deposit funds into court or the result of this litigation and lack standing. With respect to standing, it is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria (see Society of Plastics Indus., Inc. v County of Suffolk, 77 NY2d 761). That is, the party alleges an injury in fact within his or her zone of interest, and that he or she has a sufficiently cognizable stake in the outcome of the case so that the dispute is capable of judicial resolution (Silver v Pataki, 96 NY2d 532; Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148; Society of Plastics Indus., Inc. v County of Suffolk, supra). Here, the Brothers have adequately established their standing to seek recovery of the death benefit proceeds and that portion of the funds that they allege was improperly released by the plaintiff. It is undisputed that the Brothers were the original beneficiaries under the Policy.

Dated: March 24, 2014

HON. JOSEPH C. PASTORESSA, J.S.C.

____ **FINAL DISPOSITION** X **NON-FINAL DISPOSITION**