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

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BENJAMIN WEISMAN,

Plaintiff,

-against-

MONY LIFE INSURANCE COMPANY ( a wholly subsidiary of AXA FINANCIAL, INC) and MANAGEMENT SERVICES, INC.,

Defendants.

Index # 111957/2010

DECISION/ORDER

**Present:**
Hon. Geoffrey D. Wright

----------x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion for Summary Judgment.

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion and Affidavits Annexed..... | 1 |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits..... | 2 |
| Replying Affidavits..... | 3 |
| Exhibits..... | |
| Other.....memoranda..... | 4 |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants, MONY Life Insurance Company (a wholly owned subsidiary of AXA Financial, Inc.) ("MONY") and Disability Management Services, Inc. ("DMS"), moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint.

Plaintiff, Benjamin Weisman, commenced this action seeking to recover disability benefits from defendants. The following facts are gleaned from the submissions of the parties. Plaintiff, a former pulmonologist, obtained two Disability Income/Residual Income Loss insurance policies, Policy No(s). 88x2-16-54 and 89x0-08-52, from MONY. DMS is the third-party servicer for the policies.

Policy No. 88x2-16-54 took effect on June 13, 1988, and is guaranteed to continue until plaintiff reaches age 65, with the option to extend past age 65 (*see* Policy, Johnson Affid., Exh B). Similarly, Policy No. 89x0-08-52 took effect on July 7, 1989, and is

guaranteed to continue until plaintiff reaches ages 65, with an option for further extension (*id.*, Exh C). Each policy provides for basic monthly disability income of $2,000.00 (*id.*, Exhs. B, C).

The policies insure plaintiff for "Covered Loss," which is defined to mean "Incapacity, a Residual Income Loss, or a combination of both" (*id.*, ¶¶2, 4). "Incapacity" is defined to mean "due to the Injury or Sickness, you are not able to perform the substantial and material duties of your Regular Occupation, and you are under the Regular Care of a Physician because of that Injury or Sickness" (*id.*, ¶2). The policies define "Injury" to mean "accidental bodily injury sustained while this Policy is in force" (*id.*). The term "Sickness" is defined to mean "sickness or disease which first manifests itself while the Policy is in force" (*id.*). In addition, "Regular Occupation" is defined as "the occupation in which you were most recently engaged at the start of your Incapacity" (*id.*). "Residual Loss Income" is defined to mean "although you are engaged in a gainful occupation, you have a Percent of Earnings Loss of 20% or more due solely to the Injury or Sickness" (*id.*).

The policies require plaintiff to give notice of a claim "by the end of 30 days, or as soon as reasonably possible from: (a) the start of a Covered Loss; or (b) the occurrence or start of any other loss covered by this Policy (*id.*, ¶12). The policies also state:

> "At least once every 12 months after notice has been given, you must give us notice that the loss has continued. Unless you are legally impaired, we will not accept either notice after one year. If notice us given late, your right to any benefits for the 12 months before the date when notice was given shall not be affected. Any notice will suffice if it identifies you and is given to us at our Home Office or to any of our agents"

(*id.*). The policies further state:

> "Written proof of loss must be given to us at our Home Office within 90 days after the end of the Excluded Period. If such timely proof cannot reasonably be given, it will have no effect on your claim if proof is sent as soon as is reasonably possible. Unless you are legally impaired, proof

must be given no more than one year from the time otherwise due"

(*id.*). The "Excluded Period" is defined to mean:

"the period of time during which the injury or Sickness must exist before [the insurer] will pay an income benefit for a Covered Loss. This period may consist of (a) days of Incapacity, (b) periods of Residual Income Loss, or ( c) a combination of "a" and "b". [The insurer] will allow a break in the Excluded Period of six months or less.

Your Excluded Period is shown on page 1 ..."

(*id.*, ¶2). Plaintiff's policies state that the Excluded Period id 90 days.

In addition, the policies state that "No action at law or in equity will be brought: (a) until 60 days after you give written proof of loss as required by this Policy; and (b) more than 3 years from the date written proof of loss must be given" (*id.*, ¶12).

On July 30, 2007, plaintiff filed with DMS an Initial Disability Statement listing his occupation as a "physician" and his principal duties as "pulmonologist" (Olin Affid, Exh A). The Initial Disability Statement also notes that plaintiff's disability was caused by a "motor vehicle accident in 1992," and lists Dr. Abraham Mintz as the attending physician with whom he consulted for his disability within the last two years (*id.*). The statement also notes that plaintiff's symptoms include neck pain, numbness in his arm, and inability to sleep (*id.*).

By letter, dated July 20, 2007, DMS, among other things, acknowledged receipt of plaintiff's notice of claim and requested that plaintiff complete an Occupational Duties Profile form (*id.*, Exh B).

On July 25, 2007, plaintiff completed the Occupational Duties Form, which outlines, among other things, plaintiff's duties as a pulmonologist, the percentage of time spent for each duty, and the duties he is unable to perform as a result of his disability (*id.*, Exh C.). The Attending Physician's Disability Statement, dated July 31, 2007, describes plaintiff's condition as "cervical spondylosis," rendering plaintiff "unable to extend or

move neck;" states that the condition has existed for 10 years; and certifies that plaintiff has been partially disabled since March 9, 2007 (*id.*, Exh G).

By letter, dated September 16, 2007, plaintiff, among other things, notified DMS that he had undergone shoulder surgery on September 10, 2007 and would be out of work for four weeks after the surgery (id., Exh E). An Attending Physician's Initial Disability Statement was prepared following plaintiff's surgery to repair a tear in his right rotator cuff (*id.*, Exh F). Another Attending Physician's Supplemental Disability Statement, prepared following plaintiff's surgery for carpal tunnel syndrome on March 3, 2008, states that plaintiff was partially and totally disabled from March 3, 2008 to March 24, 2008 (*id.*, Exh Q).

By letter, dated October 15, 2008, upon review of plaintiff's submissions, including certain financial information relating to his medical practice, DMS informed plaintiff, as follows:

> "Based on the information provided to date, it appears you have had two separate periods of Total Disability of approximately 3 weeks each in duration. Unfortunately, based on our review of the information received to date in connection with your claim, it does not appear you suffered a Total Disability or Residual Income Loss that exceeded [your] 90-day Excluded Periods in your policies. Accordingly, it appears that you are not currently eligible for benefits under your MONY coverage. However, it there is additional information that you wish to submit that you feel will have bearing on our determination we would be pleased to review it"

(*id.*, Exh T). Additional submissions by plaintiff prompted similar responses from DMS by letters, dated February 24, 2009 (*id.*, Exh R), and January 25, 2010 (*id.*, Exh X). Plaintiff commenced this action in September 2010.

The Complaint alleges causes of action against defendants for breach of contract based on the denial of plaintiff's claim for total disability benefits (first cause of action); breach of contract based on the denial of plaintiff's claim for residual or partial disability benefits (second cause of action); violation of General Obligations Law §349 (third cause

of action); and fraud, fraudulent misrepresentation, and deceptive advertising practices (fourth cause of action). Plaintiff claims that he has been totally disabled as a pulmonologist since 2002, and that defendants have wrongfully denied him disability benefits under the Disability Income/Residual Income Loss insurance policies. He seeks compensatory and punitive damages, as well as attorney's fees.

By order entered June 23, 2011, this Court (Singh, J.) granted defendants' motion to dismiss the third and fourth causes of action, as well as the claim for punitive damages and attorney's fees (Order, Tolle Affirm, Exh B). In addition, by Stipulation, dated May 2, 2012, plaintiff agreed to discontinue the second cause of action (Stipulation, Tolle Affirm, Exh C).

Defendants answered generally denying the allegations in the Complaint and asserting several affirmative defenses.

Defendants now seek summary judgment dismissing the remaining cause of action for damages for breach of contract based on the denial of plaintiff's claim for total disability benefits.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, plaintiff's remaining cause of action seeks damages for breach of contract based on the denial of plaintiff's claim for total disability benefits. In order to establish entitlement to judgment on his breach of contract claim, plaintiff must show the existence of a valid, enforceable agreement with defendant, the consideration, the performance by plaintiff, and the basis of the alleged breach by defendants, resulting in damages (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Here, a review of the submissions reveals nothing to substantiate plaintiff's assertions that in 2007, he filed a claim with defendants based on his total disability as a

pulmonologist since 2002. Rather, the submissions establish that plaintiff obtained Disability Income/Residual Income Loss insurance policies from MONY in 1988 and 1989; that plaintiff sustained neck injury, a torn rotator cuff, and carpal tunnel syndrome following a 1992 automobile accident; that plaintiff submitted a claim for disability benefits in July 2007; and that plaintiff's attending physician diagnosed plaintiff as partially disabled since March 9, 2007, and partial and total disability only from March 3, 2008 to March 24, 2008.

Contrary to plaintiff's position, the Initial Disability Statements, Occupational Duties Form, and Attending Physician's Initial and Supplemental Disability Statements do not support a claim for total disability, as contemplated by the policies. Nor do they support plaintiff's novel assertion that defendants should have considered his claim as one for occupational disability under the policies. Thus, dismissal of the remaining cause of action of action, for breach of contract based on the denial of plaintiff's claim for total disability benefits, is warranted.

Plaintiff's contention that he duly paid for the insurance policies is simply unavailing. Furthermore, the conclusory assertion that plaintiff did, in fact, become totally disabled as a pulmonologist in 2002 contradicts the submissions of his attending physician, and is otherwise patently insufficient to establish the breach of contract claim.

Accordingly, it is

ORDERED that the summary judgment motion is granted and the Complaint is dismissed.

GEOFFREY D. WRIGHT
AJSC

Dated: August 25, 2015

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court