

<b>Fensterman v Janklowicz</b>
2018 NY Slip Op 31035(U)
May 3, 2018
Supreme Court, Kings County
Docket Number: 500193/16
Judge: Larry D. Martin
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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> day of May, 2018.

PRESENT:

HON. LARRY D. MARTIN,  
Justice.

-----X  
HOWARD FENSTERMAN and FLR & ASSOCIATES, LLC,

Plaintiffs,

- against -

DAVID JANKLOWICZ,

Defendant.

-----X

The following e-filed papers read herein:

**DECISION AND ORDER**

Index No. 500193/16

Mot. Seq. Nos. 1 and 2

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2, 3-4</u>
Opposing Affidavits (Affirmations) _____	<u>5</u>
Reply Affidavits (Affirmations) _____	<u>6</u>
Memoranda of Law _____	<u>7</u>

Upon the foregoing papers in this action by plaintiffs Howard Fensterman (Fensterman) and FLR & Associates, LLC (FLR & Associates) against defendant David Janklowicz (defendant) for fraud and declaratory relief relating to an escrow agreement entered into between the parties, defendant moves, in motion sequence number 1, for an order dismissing (1) the first cause of action, pursuant to CPLR 3211 (a) (7) and 3016 (b), for failing to state a cause of action for fraud and (2) the second cause of action, pursuant to CPLR 3211 (a) (2), for lack of subject matter jurisdiction.

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Defendant moves, in motion sequence number 2, for an order restoring its motion to dismiss to the court's calendar, on the grounds that the motion was inadvertently marked off the motion calendar. The parties entered into a stipulation to restore defendant's motion to the calendar. Accordingly, the court grants defendant's motion to restore its motion to dismiss, and now turns to the merits of said motion.

### **Facts and Procedural Background**

According to the complaint, in on or about April/May 2008, Union Central life Insurance Company issued Life Insurance Policy No. U000042883 (the Policy) under which Agnes Freidman was the insured. The owner and beneficiary of the Policy was the Agnes Freidman 2008 Insurance Trust (the Trust), and defendant was trustee of the Trust. In October 2010, defendant transferred and assigned all rights, title and interest to and under the Policy to plaintiff FLR & Associates. According to the amended complaint, at the time of the transaction, defendant verbally misrepresented to plaintiff Fensterman and Benjamin Landa, as members of FLR & Associates, that he was a licensed insurance broker pursuant to Insurance Law § 2104. Plaintiffs further allege that, based upon this misrepresentation, FLR & Associates entered into an escrow agreement with defendant whereby as compensation defendant would receive a five percent (5%) share of the net proceeds from the death benefit of the Policy. Plaintiffs contend that, at the time defendant's services were provided, defendant was not licenced by the State of New York as an insurance agent, pursuant to Insurance Law § 2104.

Plaintiffs initially commenced a declaratory judgment action against defendant under Kings County Supreme Court index number 504004/2015, seeking a declaration that defendant is not entitled to a share of the net proceeds of the Policy, and awarding plaintiffs the costs and disbursements of the action. Defendant moved to dismiss the action, which the court (J. Knipel) granted on December 2, 2015 via a short form order.

Plaintiff commenced this action asserting two causes of action: a cause of action for fraud, seeking two hundred thousand dollars (\$200,000) damages and a cause of action seeking a declaration that defendant is not entitled to a fee or commission or share of the net proceeds of the Policy upon the death of Agnes Friedman.

On May 24, 2016, defendant served the current motion to dismiss the complaint herein on the grounds that plaintiffs failed to state a valid cause of action for fraud and that plaintiffs' second cause of action for declaratory judgment is premature.

Subsequent to the filing of defendant's present motion to dismiss, plaintiffs, on August 26, 2016, served an amended complaint, pursuant to CPLR 3025 (a). The amended complaint asserts one cause of action seeking a declaratory judgment, pursuant to CPLR 3001. Specifically, the amended complaint seeks a declaration that section 3.1 of the escrow agreement, whereby plaintiffs agreed to compensate defendant for his services as a purported licensed insurance broker, was illegal at the time of execution and therefore unenforceable. According to the amended complaint, it is anticipated that defendant will seek or otherwise make claim to a fee or commission representing five (5%) of the net

proceeds of the death benefit of the Policy, which sum, upon information and belief, will be in the amount of two hundred thousand dollars (\$200,000).

### **Defendant's Motion**

Defendant moves to dismiss the first cause of action, which seeks damages in connection with an alleged fraudulent misrepresentation, on the grounds that plaintiff fails to state of a cause of action for fraud and also fails to state it with particularity. However, this portion of defendant's motion to dismiss is rendered moot as plaintiffs' amended complaint no longer pleads a cause of action for fraud.

Next, defendant moves to dismiss the remaining cause of action, seeking a declaration that defendant is not entitled to receive 5% of the future death benefit of the Policy, on the grounds that the court does not have subject matter jurisdiction. Defendant contends that the declaration sought in the complaint is for a remote future claim, which may or may not come into being, and which, therefore, does not create a "justiciable controversy," pursuant to CPLR 3001, sufficient to confer subject matter jurisdiction on the court. In this regard, defendant notes that Agnes Friedman, whose life is insured, is alive and there is no claim that she is expected to die in the near future. According to defendant, although the insured will inevitably die, depending on maintenance of the life insurance policy and the payment of premiums through the date of death there may or may not be a death benefit by the time Agnes Friedman dies. Defendant maintains that the complaint prematurely seeks a declaration for a contingency which may or may not be relevant at some

unknown time in the future, and accordingly, the court does not have subject matter jurisdiction to grant a declaration pursuant to CPLR 3001. Further, defendant argues that the controversy is not ripe for judicial determination, as it involves a hypothetical, contingent prejudice to plaintiffs and does not have a direct and immediate effect upon plaintiffs.

In opposition, plaintiffs contend that defendant's motion to dismiss must be denied as moot as it only addresses the causes of action in the original complaint, which have been replaced by the sole cause of action pled in the amended complaint. Plaintiffs maintain that the sole cause of action in the amended complaint seeks a declaration relating to the enforceability of section 3.1 of the escrow agreement in which plaintiffs agreed to provide defendant with compensation for his services.

To the extent that this court finds defendant's motion related to the original complaint is still relevant, plaintiffs argue that the amended complaint asserts a meritorious and valid cause of action for declaratory relief. Plaintiffs maintain that, contrary to defendant's contention, the cause of action for declaratory relief involves a justiciable controversy that is ripe for adjudication, this court has subject matter jurisdiction and defendant's motion should be denied.

According to plaintiffs, as defendant was not a licensed insurance broker, section 3.1 of the escrow agreement was illegal and unenforceable at the time of execution pursuant to

Insurance Law §§ 2102<sup>1</sup> and 2104. Plaintiffs assert a declaratory judgment action is the appropriate vehicle for deciding cases, like this one, that relate to the enforceability of contracts. Moreover, plaintiffs maintain that this action is not premature, as the decision of this court will have a direct and present impact upon plaintiffs' current ability to dispose of their interest in the Policy under the terms of the escrow agreement. According to plaintiffs, based on the terms of the escrow agreement, plaintiffs need not wait until the future death of the insured, Agnes Friedman. Rather, plaintiffs assert that they are entitled to receive payment under the escrow agreement in the event that the LLC sells its interest in the Policy, which could occur at any time prior to Ms. Friedman's inevitable death. In support, plaintiffs cite 3.1 of the escrow agreement, which states, in pertinent part:

3.1 Allocation of Proceeds. Each party shall be entitled to its/his share of the Proceeds in accordance with the following allocations:

- i. To LLC: The sum of the Investment plus ninety-five percent (95%) of the Net Proceeds.
- ii. To Janklowicz: Five percent (5%) of the Net Proceeds.

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<sup>1</sup> Insurance Law 2102, entitled "Acting without a license," states, in pertinent part:  
(3) Unless licensed as an insurance agent, insurance broker or insurance consultant with respect to the relevant kinds of insurance, no person, firm, association or corporation shall receive any money, fee, commission or thing of value for examining, appraising, reviewing or evaluating any insurance policy, annuity or pension contract, plan or program or shall make recommendations or give advice with regard to any of the above.

\* \* \*

(5) (e) (1) No person shall accept any commission, service fee, brokerage or other valuable consideration for selling, soliciting or negotiating insurance in this state if that person is required to be licensed under this article and is not so licensed.

As per the terms of the escrow agreement, "Proceeds" is defined as the "funds actually received by Escrow Agent from the Insurer or from any third party upon a 'Qualifying Event,'" which, in turn, is defined as "the death of the Insured or the sale of LLC's interest in the Policy (whether by transfer of the Policy or of membership interests)."

Here, plaintiffs argue that the only contingency is whether or not defendant will choose to seek payment under the escrow agreement, which action is entirely within defendant's control. Accordingly, plaintiffs state that, unless defendant admits that he will not seek payment, any claim that there is no actual controversy is merely a pretense designed to delay the adjudication of the parties' obligations and rights under the escrow agreement. In this regard, they maintain that defendant's inevitable suit for payment under the escrow agreement is an actual, ripe controversy creating a cloud over the marketability of the subject policy.

In reply, defendant contends that, even after the amended complaint, there remains no cause of action asserted by plaintiff Fensterman. Specifically, defendant states that Fensterman appears to have no claim or direct interest in his individual capacity. Further, defendant reiterates its position that the possibility of there being a dispute in the future, when the insured dies, is too remote to confer upon this court subject matter jurisdiction at this time. According to defendant, the issue here is whether 5% of the insurance proceeds, if and when it is paid, should be paid to the defendant. Defendant argues that, as to the issue of present marketability, plaintiff has not alleged that it intends to try the sell the policy.



## Discussion

At the outset, the court notes that defendant's motion to dismiss was made prior to the amended complaint, which supersedes the original complaint, and is now the only complaint in the action (*see D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 957 [4th Dept 2014]). Accordingly, that portion of defendant's motion to dismiss the original complaint with respect to plaintiff's cause of action in the prior complaint alleging fraud is rendered moot, as the cause of action has been removed from the amended complaint.

The court now turns to the remaining aspect of defendant's motion, which seeks to dismiss plaintiff's cause of action in the original complaint seeking declaratory relief on the grounds that there is no actual controversy raising a justiciable question in this action. Here, the amended complaint asserts a cause of action for declaratory relief similar to that asserted in the second cause of action of the original complaint. Plaintiff's cause of action in the prior complaint sought a declaration by the court that defendant is not entitled to a fee or commission or share of the net proceeds of the Policy upon the death of Agnes Friedman. The amended complaint seeks a new cause of action seeking a declaratory judgment relating to the enforceability of section 3.1 of the escrow agreement, whereby plaintiffs agreed to provide defendant with compensation for his services rendered as a licensed insurance broker. The court finds that both the second cause of action in the previous complaint, and the superseding sole cause of action in the amended complaint, are sufficiently similar as they relate to whether defendant is entitled to compensation pursuant to the escrow agreement. Accordingly, the court now turns to the merits of defendant's motion to dismiss on the grounds that the court does not have subject matter jurisdiction. A motion to dismiss

for lack of subject matter jurisdiction is granted when there is no present justiciable controversy before the court in which the court could properly render a declaratory judgment (*Matter of New York State Inspection, Sec. and Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 238 [1984]). Pursuant to CPLR 3001, the court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” “A declaratory judgment action ‘requires an actual controversy between genuine disputants with a stake in the outcome . . . [and may not be used as] a vehicle for an advisory opinion’ (see *Watson v Aetna Cas. & Sur. Co.*, 246 AD2d 57, 62 [2d Dept 1998] citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:3, at 433; see also *Fragoso v Romano*, 268 AD2d 457 [2d Dept 2000]). Thus, if the court has jurisdiction over the subject matter, and if the dispute is genuine, and not academic, the dispute will be deemed “justiciable” and CPLR 3001 will be satisfied in that regard (*Watson*, 246 AD2d at 62). Declaratory judgment should not be rendered where such a declaration would have no immediate effect (*B’Nai Jacob v Park Slope Jewish Ctr.*, 199 AD2d 296, 297 [2d Dept 1993]; *Remsen Apts. v Nayman*, 89 AD2d 1014, 1015 [2d Dept 1982], *affd* 58 NY2d 1083 [1983]).

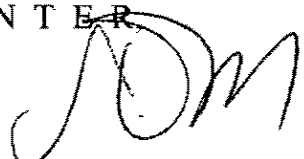
The court finds that an actual, justiciable controversy exists here, as plaintiffs have properly asserted a declaratory judgment cause of action as it relates to the enforceability of the section 3.1 of the escrow agreement. Although a request for declaratory judgment is premature if the future event may never occur, if the future event is an act contemplated by one of the parties, the court’s determination will have the immediate, practical effect of

influencing their conduct (*40-56 Tenth Ave. LLC v 450 W. 14<sup>th</sup> St. Corp.*, 22 AD3d 416, 417 [1st Dept, 2005]). In his reply, defendant states that, with respect to the issue of whether he is entitled to compensation when the insured dies, plaintiffs “are simply trying to rely on technicalities of one type or another to avoid paying an obligation that they freely and clearly undertook.” Defendant has thereby indicated that he is, fact, entitled to compensation pursuant to the escrow agreement, and that he is likely to seek said compensation under the terms of the escrow agreement upon the death of the insured. Accordingly, this matter does not involve “a future event beyond control of the parties which may never occur” (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]), but rather one where the probability of occurrence of the contingent event is likely (*see also, Remsen Apts.*, 89 AD2d at1015). Rather, declaratory judgment here would have an immediate impact on the parties’ conduct. Moreover, declaratory judgment has a direct and present impact upon plaintiffs’ ability to dispose of their interest in the policy under the terms of the escrow agreement (*see Buller v Goldberg*, 40 AD3d 333, 333 [1st Dept 2008]). The declaratory judgment therefore has the immediate and practical effect on influencing the parties’ conduct.

As the court’s jurisdiction to render a declaratory judgment has been properly invoked, defendant’s motion to dismiss must be denied.

This constitutes the decision and order of the court.

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ENTER  


HON. BARRY MARTIN  
 JUSTICE OF THE SUPREME COURT

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