SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

RICHARD HOBISH AS TRUSTEE OF THE HOBISH IRREVOCABLE TRUST, DATED 1/22/96, and TOBY HOBISH,

Plaintiffs,

-against-

AXA EQUITABLE LIFE INSURANCE COMPANY,

Defendant.

Index No.: 650315/2017

Mot. Seq. No.: 001

Decision and Order

Masley, J.:

Defendant AXA EQUITABLE LIFE INSURANCE COMPANY (AXA) moves pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7) to dismiss the complaint of plaintiffs RICHARD HOBISH AS TRUSTEE OF THE HOBISH IRREVOCABLE TRUST, DATED 1/22/96 (the Trust), and TOBY HOBISH (Ms. Hobish).

This action involves a $2 million Athena Equitable Flexible Premium Universal Life II Policy (the Policy or Athena Policy), of which Ms. Hobish was the insured person, that was issued by AXA to the Trust in 2007. Plaintiffs allege that defendant improperly changed Ms. Hobish's classification as the insured person, resulting in the increase of cost of insurance ("COI") rates and the premium payments required to maintain the Policy. In their complaint, which contains claims of breach of contract and violation of GBL § 349, plaintiffs also allege that they were forced to surrender the Policy due to the inequitable imposition of increased COI rates.

Background

In 1996, Ms. Hobish and her now-deceased husband purchased a $1.8 million Lincoln life insurance policy and established, as grantors, the Trust to hold that policy. Ms. Hobish's three children were named as the beneficiaries of the Trust, and Jaqueline Diamond was appointed the original trustee. Ms. Hobish's son, plaintiff-trustee Richard Hobish, succeeded Ms. Diamond as trustee in January 2016.

The Athena Policy

According to plaintiffs, an agent of AXA "presented Ms. Hobish with life insurance policy options" from various insurance providers in 2007, and misrepresented "to Ms. Hobish that the [AXA] Athena Policy contained more favorable terms relating to premiums than the Lincoln policy." Plaintiffs allege that, in reasonable reliance on the agent's misrepresentations, the Lincoln policy was surrendered, and the Athena Policy was purchased from defendant with the proceeds for $653,351. They also assert that, "[t]hrough 2016, Ms. Hobish made additional payments totaling an additional $249,468," and her payments for the Athena Policy amounted to $913,804.

Documentary evidence submitted in support of defendant's motion, however, demonstrates that the Trust—not Ms. Hobish—owned and surrendered the Lincoln policy in 2007, purchased the Athena Policy with the proceeds, and made the initial premium payment. That evidence also demonstrates that 19 Policy payments were made variously by the Trust and its beneficiaries, not by Ms. Hobish personally.

Pages 3 and 11 of the Policy, respectively, identify Ms. Hobish as belonging to "RATING CLASS: STANDARD NON-SMOKER," and provide that "[c]hanges in policy cost factors (interest rates we credit, cost of insurance deduction and expense charges) will be on a basis that is equitable to all policyholders of a given class."

A sales illustration signed on June 18, 2007 by then-trustee Ms. Diamond, as the Policy-applicant, and AXA's representative listed the surrender value and death benefit value of the Policy under guaranteed and non-guaranteed scenarios, based upon Ms. Hobish's age. The $34,560 annual premium rate guaranteed Ms. Hobish a death benefit of $2 million until she reached 90-years old; however, once Ms. Hobish reached 90 years of age, the death benefit and surrender values were no longer guaranteed at that premium price. Additionally, page 3 of the Policy indicates that AXA has the "right to change [COI] or other expense charges . . . which may require more premium to be paid than was illustrated or cause the [death benefits and surrender] values to be less than illustrated." Ms. Hobish was 92-years old in January 2017 when the complaint was filed.

The COI Increase and Surrender of the Policy

Prior to notifying the Trust of the COI increase, and the resulting premium increase, defendant apparently submitted a COI increase proposal to the New York Department of Financial Services ("DFS"). According to DFS's October 5,

2015 letter,[1] the proposal indicated that it would affect only those policies with "issue ages 70 and above with face amounts of $1,000,000 or more." DFS stated that it was "satisfied that the increase in the [COI] charges did not reflect an increase in profit goals, but instead was based on changes in [AXA's] future expectations as to mortality and investment earnings from those that were used in the original pricing of [the proposed affected] policies." As of October 2015, the annual premium owed was $63,665; however, AXA notified the Trust by letter dated October 5, 2015 that a COI rate increase would be implemented, effective in March 2016. As a result of that increase, the Trust's annual premiums would be increased to "more than $164,300" in order to maintain the Policy.

Plaintiffs' allege in paragraph 29 of the complaint that the Trust surrendered the Policy "under protest" in July 2016 because they determined that "paying the increased annual premiums . . . made no financial sense, as the value of the Policy would be quickly approached by the new premium." While plaintiffs had paid $913,804 to maintain the Policy through the surrender date in July 2016, the surrender value was only $448,274.50, less the "SURRENDER CHARGES" of $35,586.49; thus, the Trust received $412,688.01.

Defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7) on the grounds that, among other things, plaintiffs have not sufficiently pleaded the elements of either a breach of contract claim or a claim pursuant to GBL § 349. The motion is granted in part and denied in part.

[1] Notably, AXA does not submit the proposal itself or any of the documents that it provided to DFS.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord [complainant] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

1. The Breach of Contract Cause of Action

Defendant argues that the breach of contract claim must be dismissed as to Ms. Hobish for lack of standing and as to both plaintiffs for failure to sufficiently plead a breach of the Policy, which defendant contends is unambiguous. Plaintiffs respond that Ms. Hobish has standing as a third-party beneficiary to the Policy, and that the breach of contract claim is adequately pleaded.

a. Ms. Hobish's lacks standing to maintain her breach of contract claim

Specifically, defendant asserts that Ms. Hobish lacks standing because she did not purchase, own, or surrender the Policy. Plaintiff responds that Ms. Hobish, the insured person, has standing as a third-party beneficiary in that the Policy facilitated the planning of her estate.

Plaintiffs cite no case law to support their contention that Ms. Hobish—or any insured person who did not purchase, own, or expect a contractual benefit from an insurance policy—has standing to sue as a third-party beneficiary. The Policy identifies Ms. Hobish as only the insured person, and makes clear that the Trust is the owner of the Policy, and the beneficiaries of the Trust—Ms. Hobish's

three children—are the recipients of any pecuniary benefit derived from the Policy itself.

In the absence of any support to the contrary, the court agrees with defendant that Ms. Hobish lacks standing to maintain a breach of contract claim, particularly where, as here, Ms. Hobish could expect no tangible benefit issuing from the Policy under any circumstance (*see e.g. Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1049 [2d Dept 2010] [dismissing breach of contract claim brought by person who did not own or contractually benefit from insurance policies at issue]). Accordingly, Ms. Hobish's breach of contract claim is dismissed for lack of standing.

b. Issues of fact preclude dismissal of the Trust's breach of contract claim

Defendant contends that the Policy is unambiguous as to the terms relating to Ms. Hobish's "class," as well as defendant's rights to raise the COI rates, and that no breach can be established by plaintiffs. Plaintiffs agree that the provisions are unambiguous, but the allegations in the complaint establish that defendant breached the Policy's express terms. Specifically, plaintiffs contend that the provision permitting defendant to raise COI rates for persons of a "given class" refer to only the "rating class" identified in the agreement, of which Ms. Hobish is listed as "STANDARD NON-SMOKER," and that defendant breached the Policy by reclassifying Ms. Hobish into a group of persons 70-years of age and older with policies valued at $1 million or greater to inequitably impose increased COI rates.

At best, the Policy's terms regarding the insured's "class" are ambiguous, and the issue cannot be resolved against the plaintiffs on a motion to dismiss (*see Brach Family Found., Inc. v AXA Equit. Life Ins. Co.*, 2016 US Dist LEXIS 175158, at *7-8 [SDNY Dec. 19, 2016, No. 16-CV-740 (JMF)] [denying motion to dismiss breach of contract claim involving nearly identical facts]). The agreement does not define the terms "a given class" for which defendant is contractually permitted to raise COI rates; further, as to classifying Ms. Hobish, the Policy mentions only her "rating class" of "STANDARD NON-SMOKER," and does not address whether, when, or how an insured person can be classified/reclassified.

Accordingly, defendant's motion to dismiss the breach of contract cause of action is granted as against Ms. Hobish, but denied as against the Trust.

2. The GBL § 349 Cause of Action

GBL § 349 (h) creates a cause of action for "any person who has been injured by reason of any violation" of § 349 (a), which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." "To successfully assert a section 349 (h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]).

Defendant argues that plaintiffs have not adequately pleaded, and cannot demonstrate, the requisite elements of deception, injury, or consumer-oriented conduct. Defendant further contends that Ms. Hobish lacks standing as to the

GBL claim due to her lack of injury stemming from the alleged deceptive practices. Plaintiffs respond that the claim is adequately pleaded in all respects, and that Ms. Hobish has standing as a third-party beneficiary of the agreement who was involved in the sales transaction.

For the reasons below, the court finds that plaintiffs have adequately pleaded the GBL § 349 claim.

a. Consumer-oriented conduct

Defendant contends that the alleged conduct is not consumer-oriented because the conduct, framed by defendant as "a unique interaction specific to the Hobish Family," did not affect the public at large. Plaintiffs respond that their allegations span not only the sales transaction, but defendant's "deceptive practices that targeted its elderly insureds that had policies with face values of $1 million or more."

The court agrees with defendant that the sales transaction itself—that is, the sales pitch and policy purchase transaction involving defendant's representative, the Trust, and Ms. Hobish—does not alone constitute consumer-oriented conduct (*see e.g. Berardino v Ochlan,* 2 AD3d 556, 556 [2d Dept 2004] [dismissing GBL § 349 claim for failure to allege consumer-oriented conduct where plaintiff's pleadings claimed only that insurance agent induced exchange of existing policy without disclosing lower cash value of new policy]).

However, plaintiffs have adequately pleaded consumer-oriented conduct in that they allege that defendant engaged in a nation-wide scheme which targeted and raised the COI rates and premiums for the policies insuring 1,700

elderly persons, including Ms. Hobish, in contravention of identical form policy agreements. Therefore, "plaintiffs have satisfied the threshold test in that the acts they allege are consumer-oriented in the sense that they potentially affect similarly situated consumers" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 26-27 [1995]; *see Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330, 344 [2d Dept 1999] [finding conduct consumer-oriented where "the practices . . . involved an extensive marketing scheme that had a broader impact on consumers at large"]; *see also Wilner v Allstate Ins. Co.*, 71 AD3d 155, 164 [2d Dept 2010] [finding misconduct relating to standard homeowner's insurance provision "has a 'broad impact on consumers at large' and is thus consumer-oriented"]).

Furthermore, the court notes that there are numerous ongoing matters against defendant AXA, including a putative class-action in federal court, involving the same or similar facts, form policy, and rate increases that are at issue in this case (*see generally e.g. Brach Family Found., Inc.*, 2016 WL 7351675). Accordingly, it cannot be said that the conduct alleged in this complaint reflects a singular, unique transaction affecting only the Hobish family and trust.

b. Deceptive practices

Defendant contends that plaintiffs cannot establish that they were deceived by any of defendant's acts or practices because the possibility that COI rates would be increased was disclosed in the Policy and the sales illustrations signed by Ms. Hobish and then-trustee Ms. Diamond. Plaintiffs do no contest

that the possibility of increased COI rates was disclosed; rather, they respond that defendant engaged in deceptive practices by failing to disclose that it would reclassify Ms. Hobish (and the other insureds over age 70 with policies of $1 million or greater), then inequitably increase that new group's COI rates.

"A prima facie [GBL § 349] case requires . . . a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way" (*Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25). "[D]eceptive acts and practices, whether representations or omissions, [are] those likely to mislead a reasonable consumer acting reasonably under the circumstances," and the existence of the same may be decided as a matter of law or fact as the circumstances dictate (*id.* at 26).

Here, the issue of whether the COI rate increase and the attendant circumstances constitute a materially misleading act or omission is an issue of fact because the form Policy neither defines "a given class," nor discloses whether or when defendant can alter the insured's classification; thus, that issue survives the motion to dismiss (*see Gaidon*, 94 NY2d at 344 [finding allegations that insurer's practice of "lur[ing]" customers "into purchasing policies by using illustrations that created unrealistic [premium rate] expectations" materially misleading]). None of the cases cited by defendant compel an alternative result.

c. GBL § 349 injury and standing

Defendant next contends that plaintiffs have failed to properly plead an injury because they state in the complaint that Ms. Hobish, not the Trust, "was deceived and injured by AXA's deceptive acts and practices." Defendant further

argues that Ms. Hobish lacks standing to maintain the GBL § 349 claim because she did not purchase or own the Policy, or suffer any economic injury from its surrender. Plaintiffs respond that the Trust adequately pleaded an injury that directly resulted from the alleged deceptive practices. They further respond that Ms. Hobish sustained an injury in that she was deprived of the benefit of planning her estate.

A GBL § 349 claim is adequately pleaded only where the injuries alleged are direct in nature, though the harm need not be pecuniary (*see North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 16–17 [2d Dept 2012]). "[A] plaintiff lacks standing to bring an action pursuant to General Business Law § 349 (h) when the claimed loss 'arises solely as a result of injuries sustained by another party' " (*id.* at 17, quoting *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 207 [2004]).

Here, there is no doubt that the Trust, which purchased, owned, and paid premiums to maintain the Policy, has adequately pleaded an injury that directly resulted from the claimed deceptive practices in that it alleges that it suffered pecuniary harm and was forced to surrender the Policy.

Further, the court declines to conclude that Ms. Hobish lacks standing to maintain her GBL § 349 claim. As alleged in the complaint, Ms. Hobish was a participant in the transactions through which the Trust acquired the Policy, and the "sole purpose" of those transactions was to enable Ms. Hobish "to plan her own estate and financial affairs." Moreover, although documentary evidence demonstrates that many of the payments that were made to purchase and

maintain the Policy were issued by the Trust and the Trust's beneficiaries, plaintiffs allege that Ms. Hobish also made premium payments to maintain the Policy.

As a third-party payer only, Ms. Hobish would lack a qualifying injury (*see Blue Cross & Blue Shield of N.J., Inc.*, 3 NY3d at 206 [noting in GBL § 349 action by health insurer against cigarette company alleged to have mislead consumers regarding health risks of smoking, that "third-party payers (health insurers) cannot recover derivatively" for harms to policy holders]). However, a plaintiff need not be the actual consumer to maintain a GBL § 349 (h) cause of action (*see id.* at 207).

The court agrees with plaintiffs that Ms. Hobish alleges a sufficiently direct injury resulting from the purported deceptive practices in that her right and ability, as a consumer, to plan and maintain her estate were harmed (*see* Compl. ¶ 41 ["AXA's deceptive acts and practices . . . designed to mislead elderly consumers into believing that they would not be targeted for premium increases that would be both substantial and not applied generally and equitably to all members of a designated class."]). Apart from the pecuniary loss of premium payments she alleges, Ms. Hobish claims that she was deceived by defendant throughout her participation in the sales transactions and the maintenance of the Policy, and that she sustained injuries to her estate planning interests as a result. Plaintiffs allege that "AXA's deceptive acts and practices . . . were designed to mislead elderly consumers into believing that they would not be targeted for premium

increases that would be both substantial and not applied generally and equitably to all members of a designated class" (Compl. ¶ 41).

Thus, Ms. Hobish's alleged loss does not "arise[] solely as a result of injuries sustained by another party" (*North State Autobahn, Inc.*, 102 AD3d at 17 [citation and quotation marks omitted]). Instead, the conduct is here alleged to have "undermine[d] a consumer's ability to evaluate his or her market options and to make a free and intelligent choice" (*id.* at 13).

The cases cited by defendant do not require a different result. Briefly, in *Berardino v Ochlan* (2 AD3d 556 [2d Dept 2013]), the plaintiff-trustee exchanged an existing life insurance policy for the Policy at issue in that case, "allegedly with [the insured's] approval;" in support of his GBL § 349 claim, the plaintiff alleged that he was deceived by the insurer as to the value of the new policy during the sales transaction (*see generally id.*). The documentary evidence submitted in that case, however, demonstrated that the insurer disclosed the lesser cash value to both the plaintiff-trustee and the insured person (*id.* at 557). In any event, that court found that the plaintiff-trustee failed to allege conduct impacting "consumers at large," requiring dismissal of the GBL § 349 claim (*id.*). Accordingly, *Berardino* has no application here.

d. The GBL § 349 claim is not duplicative of the breach of contract claim

Defendant contends that plaintiffs' GBL § 349 claim is duplicative of their breach of contract claim because they put forth no loss that is independent of that associated with alleged breach of contract. Plaintiffs respond that they allege distinct losses in that they paid increased premiums as a result of the

breach of contract, and they surrendered the Policy due to defendant's "engineer[ing] through its deceptive practices that targeted its elderly insured." With respect to Ms. Hobish, plaintiffs respond that her ability to plan her estate was harmed by the alleged deceptive practices.

The court finds that the GBL § 349 claim is not duplicative of the breach of contract claim.

A GBL § 349 (h) loss must be distinct from the breach of contract loss (*see Spagnola v Chubb*, 574 F3d 64, 66-73 [2d Cir 2009] ["[A]lthough a monetary loss is a sufficient injury to satisfy the requirement under § 349, that loss must be independent of the loss caused by the alleged breach of contract."]). Here, plaintiffs assert two distinct injuries: (1) the payment of inequitably increased premiums in violation of the Policy (the contract injury), and (2) the surrender of the Policy under protest caused by the alleged deceptive practices. As alleged, those injuries are sufficiently distinct to survive this motion (*see Orlander v Staples*, 802 F3d 289, 292-302 [2d Cir 2015] [finding GBL § 349 claim not duplicative where "plaintiff has alleged both a monetary loss stemming from the deceptive practices and the defendant's failure to deliver contracted-for services"]). Furthermore, Ms. Hobish's alleged injuries, discussed above, represent harms distinct from those pertaining strictly to the breach of the Policy itself.

Accordingly, it is

ORDERED that the motion of defendant AXA EQUITABLE LIFE INSURANCE COMPANY to dismiss the complaint herein is granted in part and denied in part; and it is further

ORDERED that plaintiff TOBY HOBISH's first cause of action for breach of contract is dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 242, 60 Centre Street, on February 21st, 2018, at 10 AM/PM.

Dated: 2/5/18

ENTER:

HON. ANDREA MASLEY
J.S.C.