Dachner v Progressive Cas. Ins. Co.
2019 NY Slip Op 33154(U)
October 10, 2019
Supreme Court, Kings County
Docket Number: 502260/2019
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN *Justice* **PART** 97

MENACHEM SAMUEL DACHNER,

Plaintiff,

- against -

PROGRESSIVE CASUALTY INSURANCE COMPANY and ASHLEY M. SFORZA,

Defendants.

INDEX NO. 502260/2019

MOT. SEQ NO. 1

In accordance with CPLR 2219(a), the following papers were read on this motion by defendants.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Menachem Samuel Dachner (plaintiff) commenced this action via Summons and Verified Complaint on January 31, 2019 to recover No-fault benefits pursuant to a standard NYS form No-Fault automobile insurance contract issued by defendant Progressive Casualty Insurance (Progressive) to non-party Eluzer Brieger (the Insured). Specifically, plaintiff alleges that on or about February 5, 2018, while the plaintiff was a pedestrian, he was seriously injured when he was struck by a vehicle owed by the Insured. On February 12, 2018 plaintiff filed a No-Fault application seeking no-fault benefits, including lost wages. Plaintiff was in contact with Progressive's employee, defendant Ashley M. Sforza, with regard to his request for benefits. In his first cause of action, plaintiff claims that Progressive has breached the minimum statutory requirements due plaintiff until the law and the insurance policy by refusing to make payments

to plaintiff resulting in damages. Plaintiff's said second cause of action alleges that Progressive follows a pattern of fabricating reasons to deny No-Fault benefits "with the purpose of depriving injured persons of benefits" in violation of General Business Law § 349(h) (the Consumer Protection Claim). Plaintiff's third cause of action alleges that Progressive discriminated against him on the basis of his being an Orthodox Jewish man in violation of New York State's Human Rights Law (NYSHRL) (Executive Law § 290 et seq.) and New York City Human Rights Law (NYCHRL) (Admin. Code § 8-101 et seq.) (the Discrimination Claim).

Before the Court is a motion by defendants for an Order, pursuant to CPLR 3211(a)(7), dismissing the second and third causes of action. Plaintiff's first cause of action, for breach of contract, is not challenged in the instant motion.

DISCUSSION

Defendants argue that plaintiff's second Consumer Protection Claim is not viable because plaintiff is not a "consumer" and that his third Discrimination Claim is not viable because his claims do not relate to one of the Human Rights Law's specified forms of prohibited discrimination. In connection with plaintiff's Consumer Protection Claim, defendants initially relied on two Appellate Division First Department precedents in this Second Department case, but note in their reply that the controlling precedent is *Oswego Laborer's Local 214 Pension Fund v Marine Midland Bank, NA* (85 NY2d 20 [1995]). In *Oswego*, the Court of Appeals noted that:

> "Section 349(a) of the General Business Law [GBL] declares as unlawful '[d]eceptive acts and practices in the conduct of any business, trade or commerce *or in the furnishing of any service in this state,' with no further elaboration of the prohibited conduct* (emphasis added)."

As enacted in 1970, the statute entrusted sole enforcement power to the Attorney General, however, a decade later, the Legislature added a private right of action (*see* GBL § 349[h]). The Court of Appeals noted, however, that as a threshold matter, plaintiffs' section 349

claims must charge that the defendants' conduct is "consumer-oriented" (*Oswego*, 85 NY2d at 25).

Progressive argues, however, that GBL § 349 claims are limited to actions commenced by "consumers," while plaintiff argues that the term "consumer-oriented" is broader, and that it is irrelevant whether plaintiff himself was the consumer. In arguing their respective positions, Progressive relies upon a Cambridge Dictionary definition of "consumer." The better reference, however, is the language of the applicable statutes and judicial precedents. Here, GBL § 349 is directed at wrongs against the "consuming public," which, as noted, includes furnishing "any service" in this State. Whether or not paying out claims to No-fault claimants constitutes such a public service was not expressly briefed by either party. However, in the seminal No-Fault case, *Walton v Lumbermens Mut. Cas. Co.* (88 NY2d 211 [1996]), the Court of Appeals referred to the "economic benefits" of the No-Fault law and stated:

> "Its purposes were to remove the vast majority of claims arising from vehicular accidents from the sphere of common-law tort litigation, and to establish a quick, sure and efficient system for obtaining compensation for economic loss suffered as a result of such accidents. The No–Fault Law assures that every auto accident victim would be compensated promptly without regard to fault, that "the vast majority of auto accident negligence suits" would be eliminated, "freeing our courts for more important tasks," and that "substantial premium savings [would accrue] to all New York motorists." Similarly, the No–Fault Law avoids litigation costs including the burden of attorneys' fees that cut into the amounts ultimately received by accident victims (emphasis added) (internal citations and quotation marks omitted)."

Thus, while the *Oswego* Court noted that the plaintiff seeking GBL § 349 compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, but "not necessarily pecuniary harm," the *Walton* Court made clear that the No-Fault Law is aimed at benefitting both accident "victims"and consumer motorists, whom would otherwise foreseeably bear higher litigation costs and higher consumer insurance premiums. The Court further noted that the statute does not require proof of justifiable reliance,

and distinguished GBL § 349 claims involving private contract disputes involving facts unique to the parties.

With respect to plaintiff's New York State and New York City Human Rights claims, the fundamental underlying issue is similarly whether this State and City's interests in prohibiting discrimination, extends to private rights of action by No-fault insurance claimants.

While defendants cite each of Executive Law § 296's identified unlawful discrimination practices for the negative inference that unlisted practices not covered, plaintiff, in opposition, cites the one case, *Binghamton GHS Employees Federal Credit Union v State Div. of Human Rights* (77 NY2d12 [1990]) for the proposition that the New York State Division of Human Rights has been deemed empowered to investigate and decide insurance discrimination claims under the Human Rights Law. While this Court notes *sua sponte* that Section 4224(a) of the Insurance Law provides its own anti-discrimination provisions, enforceable by the Division of Financial Services as successor to the Insurance Division, the parties tacitly dispute whether the Human Rights Division's broad investigatory and remedial powers with respect thereto translates to private right of action to remedy discriminatory handling of No-Fault claims.

Neither party has expressly analyzed their positions in the context of this State's No-Fault Law and its unique history and considerations, and it is noted that the Human Rights Law provides in its Section 290 "Purpose of article" paragraph 3 that:

> "The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants."

The broad language of the Human Rights Law does not suggest that the stated areas of

"education, training, housing or health care" are the *only* areas in which discrimination is prohibited. Taken together with the State prohibition against discriminatory practices in insurance policies, however, this Court is not prepared to rule on this issue without the parties having an opportunity to more thoroughly brief this Court on yet undiscovered underlying facts and more closely tailored legal precedents that they believe support their respective positions. Similarly, applying the stated General Business Law § 349 principles to the case at hand, Plaintiff's allegation that Progressive followed a pattern of refusing to pay no-fault benefits and fabricating reasons not to do so with the purpose of depriving injured persons of benefits" may fall within the "consumer-oriented" ambit, however, the record is inconclusive as to whether there are any facts supporting or weighing against the conclusion.

CONCLUSION

Based upon on the foregoing, it is hereby

ORDERED that defendants' motion for an Order, pursuant to CPLR 3211(a)(7), dismissing the second and third causes of action is denied, without prejudice to either party's right to bring a CPLR 3212 motion before Part 91, for appropriate relief, upon completion of discovery; and it is further,

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 10/10/19

PAUL WOOTEN J.S.C.

KINGS COUNTY CLERK
FILED
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