

Weinrauch v New York Life Ins. Co.

2021 NY Slip Op 30209(U)

January 25, 2021

Supreme Court, New York County

Docket Number: 153127/2012

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

-----X

WILLIAM WEINRAUCH

Plaintiff,

- v -

NEW YORK LIFE INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 153127/2012

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 108, 109, 111 were read on this motion to/for LEAVE TO FILE AMENDED.

Upon the foregoing documents, it is

In this insurance coverage matter, pro se plaintiff William Weinrauch moves, pursuant to CPLR 3025(b), for permission to file and serve a second amended complaint. Defendant New York Life Insurance Company opposes any proposed amendments except to the first count of the proposed second amended complaint.

BACKGROUND

This matter arises from the denial by defendant of plaintiff's partial disability claim for benefits from 2002 through 2009 for hearing loss (complaint, NYSCEF Doc No. 2). Plaintiff's original complaint and first amended complaint alleged, among other things, breach of contract, fraud, willful misrepresentation to the New York State Department of Insurance, Consumer Service Board, and violation of General Business Law § 349(h) (first amended complaint, NYSCEF Doc No. 28).

On September 9, 2019, the court dismissed all but the first count of plaintiff's first amended complaint, which alleged that defendant misled plaintiff into believing that his

insurance policy did not cover partial disability (September 9, 2019 decision and order, NYSCEF Doc No. 61). Plaintiff now moves to serve a second amended complaint to reinstate counts two (fraud) and three (punitive damages) on different grounds.

ARGUMENTS

The Court previously dismissed plaintiff's fraud and punitive damages claims because plaintiff failed to show his reliance or resulting damages from defendant's alleged misrepresentations to the New York State Department of Insurance, Consumer Service Board (NYSCEF Doc No. 61). Plaintiff now ratifies his fraud and punitive damages claims by alleging his reliance upon defendant's customer service representative, who incorrectly informed him on October 24, 2002 that his insurance policy did not cover partial disability (proposed second amended complaint, NYSCEF Doc No. 88). Plaintiff seeks compensatory damages of \$400,000 (*id.*). Moreover, plaintiff contends that defendant's conduct and bad faith in dealing with his partial disability claim and appeal warrants the imposition of punitive damages (*id.*).

In opposition, defendant argues that the newly proposed claims fail to state a cause of action, and that the fraud claim is time-barred by the statute of limitations (defendant's opposition to plaintiff's motion to amend, NYSCEF Doc No. 108).

DISCUSSION

Pursuant to CPLR 3025 (b), leave should be freely granted to amend a pleading, provided that "the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Belus v Southside Hosp.*, 106 AD3d 765, 766 [2d Dept 2013], quoting *Douglas Elliman, LLC v Bergere*, 98 AD3d 642, 643 [2d Dept 2012]).

Plaintiff's proposed first cause of action is unopposed, and it is not palpably insufficient, prejudicial, or patently without merit. As such, plaintiff's motion seeking permission to amend his first cause of action is granted.

The Court next examines the threshold matter of whether the proposed second cause of action sounding in fraud is time-barred. A fraud claim must be brought either within six years of the commission of the fraud, or within two years from the discovery of the fraud or from when the fraud could have been discovered with reasonable diligence (*Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 180 [1st Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 1000 [1998], citing CPLR 213 [8]; 203 [g]). Under the discovery rule, “[a] plaintiff will be held to have discovered the fraud when the plaintiff has knowledge of facts from which the fraud could be reasonably inferred” (*Cusimano v Schnurr*, 137 AD3d 527, 531 [1st Dept 2016]). “The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was ‘possessed of knowledge of facts from which the fraud could be reasonably inferred’” (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009], quoting *Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 326 [1957]).

Defendant argues that plaintiff's fraud claim is time-barred both under the six-year commission of fraud rule and the two-year discovery rule (NYSCEF Doc No. 108 at 6-7). As plaintiff's proposed fraud claim is premised on the October 24, 2002 phone call with defendant's customer service representative, under the six-year rule, the statute of limitations would have expired on October 24, 2008 (*id.*). As for the two-year from discovery rule, defendant points to plaintiff's meeting with defendant's investigator on May 5, 2009 when the filing of a partial disability claim was first discussed with plaintiff (NYSCEF Doc No. 88 ¶ 5). Defendant argues that plaintiff learned then, contrary to what he was allegedly told in 2002, that the insurance

policies did provide benefits for partial disability. Therefore, defendant argues, under the discovery rule, the statute of limitations would have expired on May 5, 2011 (NYSCEF Doc No. 108 at 6-7).

Plaintiff counters that under the discovery rule, count two is timely. Plaintiff contends that he discovered the fraud based upon plaintiff's receipt of the New York State Department of Insurance, Consumer Service Board June 22, 2010 letter to plaintiff, which included defendant's June 14, 2010 letter indicating to plaintiff that defendant knew its representation regarding partial disability coverage in the October 24, 2002 call was false (plaintiff's reply brief in support of motion to amend, NYSCEF Doc No. 111 at 4). Plaintiff argues that pursuant to the discovery rule, he had until June 22, 2012 to file his claim, and his May 25, 2012 filing is therefore timely (*id.* at 7).

It is clear from plaintiff's own submission of the proposed second amended complaint, however, that plaintiff discovered the 2002 phone call was inaccurate at the time he spoke with defendant's investigator on May 5, 2009 (NYSCEF Doc No. 88 ¶ 5). Therefore, under the discovery rule, plaintiff had until May 5, 2011 to file a fraud claim based on the discovery rule. Plaintiff's summons and complaint were not filed until twenty days after the statute of limitations had expired. "Accordingly, the proposed fraud claim, whether deemed to have been interposed when [plaintiff] moved to amend the complaint in [2020] or to relate back to the commencement of this action in [2012], is time-barred" (*K-Bay Plaza, LLC v Kmart Corp.*, 132 AD3d 584, 590 [1st Dept 2015]). Plaintiff's motion seeking permission to amend his second cause of action is denied.

Finally, plaintiff moves to amend his pleadings to include a count for punitive damages. "In order to recover punitive damages, a plaintiff must show, by clear, unequivocal and convincing

evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives” (*Munoz v Poretz*, 301 AD2d 382, 384 [1st Dept 2003] [internal citations and quotation marks omitted]). When a complaint “lacks the requisite allegations of egregious conduct or moral turpitude necessary to support punitive damages,” it should be stricken (*Denenberg v Rosen*, 71 AD3d 187, 196 [1st Dept 2010], *lv dismissed* 14 NY3d 910 [2010]).

Here, plaintiff has failed to sufficiently state a cause of action for punitive damages. A review of the wrong complained of in plaintiff’s proposed complaint is not “so outrageous as to evince a high degree of moral turpitude” (*see Rosenkrantz v Harriet M. Steinberg, P.C.*, 13 AD3d 88, 88 [1st Dept 2004]; *see also Cohen v Mazoh*, 12 AD3d 296, 297 [1st Dept 2004] [“the facts alleged do not establish gross, wanton or willful fraud or other morally culpable conduct to a degree sufficiently warranting punitive damages”]). Accordingly, the request to permit relief in the form of punitive damages is denied.

CONCLUSION

Based upon the foregoing, it is ordered that plaintiff’s motion is granted to the extent that plaintiff is permitted, via NYSCEF, to file and serve, within 60 days of the date of this order, a second amended complaint containing amendments to his first cause of action, and that defendant will, via NYSCEF, file and serve an answer to the second amended complaint within 30 days from service. This constitutes the decision and order of the Court.

1/25/2021

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN



JAMES EDWARD D'AUGUSTE, J.S.C.

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE