

<b>Genis v Transamerica Life Ins. Co.</b>
2021 NY Slip Op 32504(U)
November 29, 2021
Supreme Court, New York County
Docket Number: Index No. 652130/2020
Judge: Kathy J. King
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHY J. KING PART 34V**

*Justice*

-----X

ROBERT GENIS,

Plaintiff,

- v -

TRANSAMERICA LIFE INSURANCE COMPANY,  
TRANSAMERICA FINANCIAL LIFE INSURANCE  
COMPANY, TRANSAMERICA CASUALTY INSURANCE  
COMPANY, AMERICAN BENEFITS ASSOCIATION

Defendant(s).

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for

DISMISS

Upon the foregoing papers, Defendants Transamerica Life Insurance Company, Transamerica Financial Life Insurance Company, Transamerica Casualty Insurance Company, and American Benefits Association (collectively “Defendants”) move, pursuant to CPLR 3211(a)(7), for partial dismissal of the complaint of Robert J. Genis individually and as the proposed executor of the Estate of Sherri Sonin. Plaintiff opposes.

Plaintiff, the designated beneficiary under an insurance policy issued by Defendants, commenced the underlying action based on Defendants’ failure to payout on the policy as a result of the death of non-party Sherri Sonin (“the decedent”). The policy purportedly had a \$10,000 primary death benefit and a \$90,000 supplemental death benefit. Sherri Sonin passed away on September 16, 2017. In October of 2017, Plaintiff notified the Defendants of the death of Sherri Sonin in order to submit a claim for death benefits under the insurance policy. Defendants notified Plaintiff that the life insurance payout would be \$20,000, representing \$10,000 from the primary

policy and \$10,000 from the supplemental policy. Plaintiff claims that Defendants unilaterally reduced the supplemental death benefit from \$90,000 to \$10,000 and seeks to recover \$80,000 in accordance with the terms of the supplemental insurance policy. Defendants now move to dismiss the third, fourth, fifth, sixth, and seventh causes of action, together with the demand for attorney fees and costs, in Plaintiff's complaint.

### DISCUSSION

When reviewing a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), a court must "accept the facts as alleged in the complaint as true." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, "conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss." *Barnes v. Hodge*, 118 A.D.3d 633, 633 (1st Dept 2014) (quoting *Godfrey v. Spano*, 13 N.Y.3d 358, 373 [2009]) It is well settled that "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Id.* at 88).

### PLAINTIFF'S THIRD CAUSE OF ACTION

Plaintiff's third cause of action seeks specific performance based on Defendants' failure to payout on Plaintiff's claim.

Specific performance is an equitable remedy that "has been held to be a proper remedy in actions for breach of contract for the sale of real property or when the uniqueness of the goods in question makes calculation of money damages too difficult or too uncertain" (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]).

Upon review of the Plaintiff's third cause of action, the Court finds that the alleged breach of contract is not for the sale of property nor are there goods in question that are unique. Indeed, it is well settled that "specific performance will not be ordered where money damages would be

adequate to protect the expectation interest of the injured party" (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 [2001]). Applying the facts to the law in this case, the Court finds that Plaintiff fails to set forth allegations to support a cognizable legal claim for specific performance under CPLR 3211(a)(7). Accordingly, Defendants' motion to dismiss Plaintiff's third cause of action is granted.

#### PLAINTIFF'S FOURTH CAUSE OF ACTION

Plaintiff's fourth cause of action seeks unjust enrichment based on Defendants' failure to pay the full death benefit pursuant to the supplemental insurance policy. To establish unjust enrichment, a Plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016]). Defendants argues that the Court should dismiss the fourth cause of action for unjust enrichment for failure to state a claim because a written contract governs the parties' relationship (*see IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 [2009]).

A review of the moving papers establishes that the decedent made payments pursuant to the contract of supplemental insurance and Defendants failed to make payment in accordance therewith. Plaintiff, in opposition, has demonstrated that "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute at issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract and will not be required to elect his or her remedies" (*Kramer v Greene*, 142 AD3d 438, 441-442 [1st Dept 2016]).

Thus, the Court finds that the facts as alleged in Plaintiff's complaint sufficiently state a cause of action for unjust enrichment, since Plaintiff may plead alternative pending the court's

determination of the existence of a valid contract between the parties. Accordingly, Defendants' motion to dismiss Plaintiff's fourth cause of action is denied.

#### PLAINTIFF'S FIFTH CAUSE OF ACTION

Plaintiff pleads breach of the implied covenant of good faith and fair dealing as the fifth cause of action. Both parties concede that in New York, all contracts imply a covenant of good faith and fair dealing to ensure "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 153 [2002]; see also *Elhanani v Kuzinez*, 172 A.D.3d 590, 591 [1st Dept 2019]).

A review of the Plaintiff's fifth cause of action indicates that both the breach of contract claim, and the breach of the implied covenant of good faith and fair dealing claim arise from the alleged failure to pay the purported \$100,000 death benefit. The conduct giving rise to the alleged breach of the implied covenant flows directly from the policy itself, and therefore, the Court finds the two claims are based on the same facts and circumstances. It is well settled that allegations that an insurance company denied Plaintiff's claim in bad faith "do not allege conduct giving rise to an independent tort duty of care flowing to plaintiff insured separate and apart from the insurance contract." (*Handy & Harman v. Am. Intern. Group, Inc.*, No. 0115666/2007, 2008 WL 3999964 [N.Y. Sup. Ct. Aug. 25, 2008]) Consequently, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract." (*The Hawthorne Group, LLC v. RRE Ventures*, 7 A.D.3d 320, 323 [1st Dept 2004]).

Accordingly, the Court finds that Plaintiff has failed to set forth allegations to state a cause of action for implied covenant of good faith and fair dealing and, Defendants' motion to dismiss Plaintiff's fifth cause of action pursuant to CPLR 3211(a)(7) is granted.

#### PLAINTIFF'S SEVENTH CAUSE OF ACTION

Plaintiff seventh cause of action pleads unfair and deceptive business practices. To establish a prima facie violation of General Business Law (GBL) 349, a plaintiff must demonstrate that the defendant is engaging in consumer-oriented conduct, which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it (*St. Patrick's Home for the Aged & Infirm v Laticrete Intl.*, 264 AD2d 652, 655 [1st Dept 1999]). A claim for deceptive business practices in violation of General Business Law § 349 cannot arise from a private contract dispute involving coverage under an insurance policy (*Zawahir v. Berkshire Life Ins. Co.*, 22 A.D.3d 841, 842 [2nd Dept 2005]). Under GBL 349, the offending conduct must be "conduct which affects the consuming public at large." (*New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 321 [1995]).

Based on a review of the claims contained in the Plaintiff's seventh cause of action, the Court finds the Plaintiff has not set forth allegations to support a cause of action for unfair and deceptive business practices on two grounds. Firstly, the life insurance policy is a private contract dispute and secondly, the conduct doesn't impact the consuming public at large, the impact of the dispute is confined to the beneficiary on this individual policy. Additionally, the attorney's fees as prescribed by GBL 349(h), provide that the Court may award reasonable attorney's fees to a prevailing plaintiff. The Court finds Plaintiff has failed to set forth allegations to support a cause of action for unfair and deceptive business practices, and therefore, is not

entitled to attorney's fees. Accordingly, Defendants' motion to dismiss Plaintiff's seventh cause of action pursuant to CPLR 3211(a)(7) is granted.

#### PLAINTIFF'S SIXTH CAUSE OF ACTION

Plaintiff's sixth cause of action is for punitive damages. The pleading elements required for a punitive damages claim as an additional and exemplary remedy arising from a breach of contract are: (1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally (*NY Univ. v Cont. Ins. Co.*, 87 NY2d 308, 316 [1995]) (internal citations omitted).

Based on a review of the Plaintiff's sixth cause of action, the Court finds Plaintiff fails to allege conduct to demonstrate that Defendants' behavior was a part of a pattern directed at the public generally. "[A] claim for punitive damages against an insurance company requires a showing of morally reprehensible conduct directed at the general public, i.e., a public wrong as opposed to a mere private wrong " (*Samovar of Russia Jewelry Antique Corp. v. Generali the Gen. Ins. Co. of Trieste & Venice*, 102 A.D.2d 279, 281 [1st Dept 1984]). Additionally, New York does not sustain punitive damages as an independent cause of action.

Accordingly, Defendants' motion to dismiss as to Plaintiff's sixth cause of action is granted.

As to Plaintiff's demand for attorney's fees and costs, the Court finds that Plaintiff has made no showing of entitlement to such fees. The case law is well settled " that attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award

is authorized by agreement between the parties, statute or court rule." Baker v. Health Mgmt. Sys., Inc., 98 N.Y.2d 80, 88 (2002).

Based on the foregoing, it is hereby,

**ORDERED** that the Defendants' partial motion to dismiss is granted to the extent of dismissing the third, fifth, sixth, seventh causes of action cause of action within Plaintiff's complaint, together with the demand for attorney's fees and costs. In all other respects, Defendants' motion to dismiss is denied; and it is further,

**ORDERED** that Plaintiff shall file an answer within twenty days of the date of this order, and it is further,

**ORDERED** that the parties shall appear for a virtual preliminary conference on March 1, 2022, at 12 pm.

<u>11/29/2021</u> <b>DATE</b>	<u><i>151 Kathy J. King</i></u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE