

Martha Barotz 2006-1 Ins. Trust v Barotz

2020 NY Slip Op 35604(U)

December 2, 2020

Supreme Court, Westchester County

Docket Number: Index No. 53912/2020

Judge: Mary H. Smith

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

MARTHA BAROTZ 2006-1 INSURANCE TRUST,

Plaintiff(s),

- against -

PETER BAROTZ, as Executor of the Estate of Martha Barotz,

Defendant(s).

DECISION & ORDER

Index No.: 53912/2020

Defendant moves to dismiss.

The following papers were read:

Notice of Motion, Affirmation, Exhibits (5), and Memo of Law	1-8
Affirmation in Opposition, Exhibits (13), and Memo of Law	9-33
Affirmation in Reply, Exhibits (4), and Memo of Law	34-39
Affirmation in Sur-reply	40
Supplemental Affirmation and Exhibit	41-42

By way of background, on March 10, 2020, plaintiff commenced this action with the filing of a summons with notice. The notice provides that this case arises out of the payment of the proceeds of a \$5,000,000 life insurance policy (Policy) issued on the life of Martha Barotz to Plaintiff, the owner of the Policy. The notice also provides that:

“Plaintiff seeks a judgment that Defendant, as executor of the estate of Martha Barotz, cannot maintain an action to recover, and has no right to, the proceeds of the Policy received by Plaintiff. Alternatively, Plaintiff seeks a judgment that Defendant relinquished to Plaintiff any right to the proceeds of the Policy and that Defendant therefore owes to Plaintiff any such proceeds that it may recover.”

On June 1, 2020, defendant filed a demand for a complaint. On June 22, 2020, plaintiff filed a complaint. The complaint alleges in relevant part that:

“7. This case presents a justiciable controversy because, before Plaintiff commenced this action, Plaintiff was in receipt of copies of correspondence, dated . . . January 24, 2020, from the law firm Cozen O’Connor PC stating, inter alia, that it represents Ms. Barotz’ estate and that it intended to file a lawsuit to recover the death benefit paid to Plaintiff, in express contravention of the agreements that both Ms. Barotz and her Husband signed in exchange for being paid \$150,000.

* * * *

39. On January 7, 2020, Defendant’s counsel sent a letter to Wells Fargo Bank, N.A. (“Wells Fargo”), which acts as securities intermediary for the owners of many life insurance policies, stating that it represents Ms. Barotz’ estate and requesting certain non-public information about the Policy. Specifically, it requested information concerning (a) the identity of the Policy’s owner, (b) whether Wells Fargo had received the Policy’s death benefit as securities intermediary for the owner, (c) the identity of the final recipient of that death benefit, and (d) contact information for the Policy’s beneficiary.

40. Similarly, on January 24, 2020, Defendant’s counsel sent an email to counsel for several securities intermediaries and/or the beneficiaries of other life insurance policies stating that it “intend[s] to commence actions” relating to policies on the lives of seven insureds, including the Policy on Ms. Barotz’ life.”

The complaint further alleges that, when defendant did not commence an action against plaintiff after more than six weeks from the January 24, 2020 email, plaintiff commenced the instant action. Defendant now moves, pre-answer, to dismiss the action.

In support of the motion, defendant notes that it commenced an action with the filing of a summons and complaint in Delaware Superior Court on April 15, 2020, seeking to recover the death benefit of the Policy (Delaware Action). Defendant notes the plaintiff in this action is only one of the defendants in the Delaware Action and asserts that the Delaware Action is a “more comprehensive” action between the parties. Based hereon, defendant sets forth several arguments. First, defendant contends that the instant action and the Delaware Action are between the same parties, involving the same subject matter and remedies, and the instant action is the second-filed as plaintiff did not file the complaint

until June 22, 2020. Second, defendant contends that the instant action is an improper anticipatory declaratory judgment action. Third, defendant contends that it has standing to pursue its claims in Delaware and the Delaware Superior Court may adjudicate the entire controversy, including plaintiff's equitable defenses or claims it may assert.

In opposition, plaintiff sets forth several arguments. First, plaintiff contends that the case is properly placed in New York because action involves the Policy, which insured the life of a New York resident, who signed the Policy application and all relevant forms in New York, including a release of any right to the Policy's death benefit in exchange for a payment of \$150,000, and who passed away in New York and whose New York-registered estate is represented by defendant, a New York resident. Second, plaintiff asserts that defendant delayed the time for plaintiff to file its complaint by unsuccessfully attempting to remove the action to federal court and by waiting until June 1, 2020 (after the Court's shutdown due to the COVID-19 health emergency) and contends that defendant should not be rewarded for these tactics. Third, plaintiff contends that the Delaware Superior Court cannot adjudicate the equitable issues raised in the instant action. Plaintiff notes that in Delaware, the courts of law and equity remain separate. Plaintiff notes that its third cause of action seeks a declaration that "defendant is equitably estopped or is barred by the equitable doctrines of, *inter alia*, unclean hands or *in pari delicto* from recovering the Policy's death benefit" (Complaint ¶ 71). Fourth, plaintiff contends that this action should be considered the first-filed. Fifth, plaintiff contends that this action is not an anticipatory declaratory judgment action. Plaintiff notes that it only commenced this action after defendant took no action for six weeks. Moreover, plaintiff notes that defendant did not commence the Delaware Action until April 15, 2020. Sixth, plaintiff contends that the presence of the additional parties in the Delaware Action does not make it more comprehensive as those entities have been defunct and voluntarily cancelled since December 13, 2010. In addition, plaintiff notes that, as defendant's relief is limited to the \$5,000,000 death benefit and it is undisputed that that death benefit was paid to plaintiff, it is not clear what relief defendant could hope to win from those entities.

In reply, defendant initially contends that this action does not present a justiciable controversy. Defendant notes that the complaint merely alleges that defendant's counsel emailed someone other than the plaintiff and stated that it intended to commence an action relating to the Policy. Next, defendant concedes that New York has an interest in this action, but asserts that Delaware's interests are greater. Defendant notes that the Policy was applied for in Delaware by a Delaware trust with a Delaware trustee, that it was manufactured by Delaware promoters, and that a Delaware-based trust owns the Policy and received the disputed Policy proceeds. Defendant asserts that the Policy, which it terms a "illegal human-life wager," is subject to Delaware law and is violative of Delaware's Constitution and public policy.¹ Defendant reiterates its position that the Delaware

¹ Subsequent to the return date of the motion, defendant filed a supplement affirmation, which presented a letter (Doc. Nos. 61-62). Defendant notes that the letter was sent by plaintiff to the Policy's producer to solicit an insurance policy. Defendant notes that the letter contained the following language, "The subject policy must be issued and delivered to

Superior Court may adjudicate the entire controversy, including plaintiff's equitable defenses or claims it may assert. Defendant then contends that the instant action is not entitled to first-filed priority as there was nothing untoward about its unsuccessful attempt to remove the action to federal court or the timing of its demand for a complaint. Defendant notes that it was plaintiff's decision to commence by summons with notice rather by summons and complaint. Defendant further contends that, where, as here, an action brought for a declaration that the true plaintiff in interest cannot bring a lawsuit, it is not entitled to first-filed priority.

In response, plaintiff notes, among other things, that the complaint alleges that defendant's counsel had threatened to sue to recover the Policy's death benefit in an email dated January 24, 2020.

CPLR 3001 provides in relevant part that 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." The Court does not provide advisory opinions to resolve issues that depend on future events that may never occur and are outside the control of the parties (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]; *Enlarged City School Dist. of Middletown v City of Middletown*, 96 AD3d 840, 842 [2d Dept 2012]; *Matter of United Water New Rochelle, Inc. v City of New York*, 275 AD2d 464, 466 [2d Dept 2000]; *Hollandale Apartments & Health Club, LLC v Bonesteel*, 173 AD3d 55, 59 [3d Dept 2019]). "A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights" (*Zwarycz v Marnia Const., Inc.*, 102 AD3d 774, 776 [2d Dept 2013]).

Here, the complaint alleges initially that this action presents a justiciable controversy because plaintiff was "in receipt" of correspondence, dated January 24, 2020, wherein defendant's counsel indicated that it intended to file a lawsuit to recover the death benefit paid to plaintiff. Later in the complaint, it is alleged that the correspondence, dated January 24, 2020, was an email sent by defendant's counsel to someone other than plaintiff, which merely stated that defendant intended to commence an action relating to the Policy. Although a threat to commence an action to recover the death benefit that plaintiff received under the Policy would probably provide sufficient notice that defendant had repudiated plaintiff's rights, it is not necessarily so. Moreover, the complaint, although cleverly worded, does not allege that the notice was given by defendant directly to plaintiff, but to certain non-parties to this action. As a result, the complaint does not present a justiciable controversy. Accordingly, defendant's motion is granted and the instant action is dismissed.

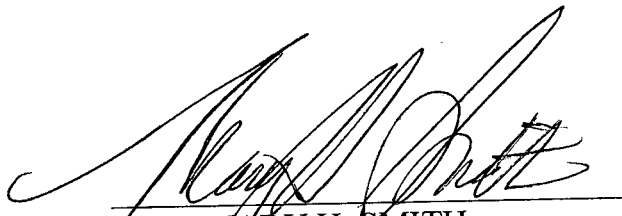
the Trustee in Delaware, through a Delaware-licensed producer, on a form approved by the Delaware Department of Insurance; such transaction and the subject policy must be governed by Delaware law." Defendant asserts that this letter is further evidence of the strong connection this dispute has to Delaware.

Even if the complaint presented a justiciable controversy, the Court finds that this action should be dismissed in favor of the Delaware Action. CPLR 3211 (a) (4) provides that a party may move to dismiss an action where “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.” Here, there is no dispute between the parties that the two actions are between the same parties over the same subject matter. There is a dispute as to which action was filed first for purposes of CPLR 3211 (a) (4) and whether there are factors that, notwithstanding the first-filed priority, mitigate in favor of dismissing the first-filed action in favor of the second-filed action.

As noted above, plaintiff commenced this action with the filing of a summons with notice on March 10, 2020. On April 15, 2020, defendant commenced the Delaware Action with the filing of a summons and complaint. On June 1, 2020, defendant filed a demand for a complaint in this action and on June 22, 2020, plaintiff filed a complaint. For purposes of CPLR 3211 (a) (4), the filing of a summons with notice, absent the service of the complaint, does not constitute the commencement of an action (*Wharton v Wharton*, 244 AD2d 404, 405 [2d Dept 1997]; *San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [1st Dept 2003]). Thus, the Delaware Action is entitled to the first-filed priority. However, priority is simply a factor to be considered (*see Flintkote Co. v Am. Mut. Liab. Ins. Co.*, 103 AD2d 501, 505 [2d Dept 1984], *affd*, 67 NY2d 857 [1986]; *San Ysidro Corp.*, 1 AD3d at 186). Here, although, as defendant concedes, New York has an interest in this action, the interests of Delaware predominate as the underlying transaction is clearly centered in Delaware.

To the extent not specifically addressed herein, the Court finds plaintiff’s remaining arguments to be without merit. Based on the foregoing, defendant’s motion to dismiss is granted and the action is dismissed.

Dated: December 2, 2020
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court