

Seidel v National Life Ins. Co.

2002 NY Slip Op 30144(U)

April 17, 2002

Sup Ct, NY County

Docket Number: 120877/01

Judge: Shirley Werner Kornreich

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

PRESENT: Shirley Werner Koozeck
Justice

PART 54

Seidel, Barry

- v -
Nat'l Life Ins. Co
(et al)

INDEX NO. 120877/01
MOTION DATE 3/8/02
MOTION SEQ. NO. 007
MOTION CAL. NO. 145

The following papers, numbered 1 to 5 were read on this motion to/for

partial - judgment	
PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>3, 4</u>
Replying Affidavits	<u>5</u>

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendants for partial summary judgment, and cross-motion by plaintiff for leave to amend his second cause of action, are decided in accordance with the annexed Decision, Order and Judgment.

FILED
APR 23 2002

Dated: 4/17/02

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF **NEW YORK**
COUNTY OF **NEW YORK**: **PART 54**

..... **X**
BARRY SEIDEL,

Plaintiff,

Index No.: 120877/01

-against-

**DECISION, ORDER AND
JUDGMENT**

**NATIONAL LIFE INSURANCE COMPANY, FIRST UNUM
LIFE INSURANCE COMPANY, UNUMPROVIDENT
LIFE INSURANCE COMPANY, PROVIDENT COMPANY,
INC., PROVIDENT LIFE AND CASUALTY INSURANCE
COMPANY, and UNUMPROVIDENT CORPORATION**

Defendants.
-----**X**

KORNREICH, SHIRLEY WERNER, J.:

I. Facts:

Beginning on June **30,1983**, plaintiff Barry Seidel, a trial attorney, began purchasing private, “**own** occupation,” long-term disability policies **from** the predecessors of defendant National Life Insurance Company (“National Life”) and of defendant First Unum Life Insurance Company (“First Unum”). According to the **terms** of the policies purchased by plaintiff, in the event that he became “totally disabled,” he would receive benefits of **\$3,500 a month for as long as** his total disability lasted, or, if need be, for life. In January **1993**, plaintiff purchased additional Overhead Expense Coverage of \$2,000 per month for the first twelve months of any “total disability.”

“Total disability” commences, according to the policy, when an insured becomes **unable** “to **perform** the material and substantial duties of [his] ‘regular occupation’.” In a letter to

plaintiff dated July 1, 1983, the insurer's agent wrote:

We consider 'regular occupation' for professionals such as you to be their professionally recognized specialties. We understand that you currently specialize in trial law. If you were unable to perform the material and substantial duties of this specialty due to a covered accident or sickness, we would consider you to be totally disabled even though you might be able to teach or engage in another professional specialty.

On March 20, 2000, plaintiff was hospitalized with an acute myocardial infarction, which, according to plaintiff's doctors, caused him serious heart damage. Over the next several weeks, plaintiff was hospitalized twice more for congestive heart failure.

On April 17, 2000, plaintiff submitted a claim under his disability policies. In the claim, plaintiff explained that he was weak, dizzy, and short of breath, and that he could no longer conduct his practice, which had consisted of 25 hours a week of court appearances, plus 25 hours a week of office work.

By letter dated April 24, 2000, defendant First Unum informed plaintiff that his claim would have to be reviewed by a "Benefits Representative," and then by a "Disability Benefits Analyst."

In another letter, dated May 5, 2000, First Unum demanded that plaintiff's doctors supply medical "updates" and fill out a form - all for submission to and review by the insurer's "Medical Department." First Unum also expressed confusion about the nature of plaintiff's occupation. It sent plaintiff a questionnaire to fill out regarding his professional duties, and requisitioned copies of all of his billing records broken down by month from June 1, 1999 to the present. These were to be reviewed by the insurer's "Vocational Case Management Unit." Then, the company explained that plaintiff's business overhead expense benefits could not be paid until after the

insurer's "Financial Services Unit" had inspected proof of his monthly expenses. A "Schedule of Expenses Form" was supplied for plaintiff's convenience. A preliminary check was enclosed for \$2,733.33, to cover plaintiff's documented business expenses for the period March 20-May 1, 2000.

Under cover of a letter dated May 20, 2000, plaintiff sent First Unum the requested information, and described his business. He and his five to **six** associates provided a "court coverage service" for other attorneys at both Supreme Court and Civil Court in Queens County. Before his heart attack, plaintiff himself used to make approximately ten court appearances per day. **Plaintiff** had also spent most of his afternoons conducting his separate legal practice in personal injury and real estate **law**.

In letters dated July 25, 2000 and August 16, 2000, First Unum responded that plaintiff's occupation was really "comprised of three distinct duties, each of which contributes to your overall income stream." Even assuming that plaintiff could no longer make court appearances, First Unum's "Lead Customer Care Specialist" wrote, he could continue to conduct the remaining two-thirds of his business - **i.e.**, his supervision of his office staff and junior associates, **and** his private personal injury and real estate law practice. In addition, First Unum's unnamed "physician" had reviewed plaintiff's most recent medical records, and had concluded that "there is no ongoing evidence of a cardiac **impairment**" - notwithstanding a recent ejection fraction of 28%. Otherwise, First Unum claimed, it **did** not dispute plaintiff's physician's diagnosis.

First Unum enclosed a check with the July 25th letter, but, in light of its doubts about plaintiff's claim, offered to "settle" it by paying **him** a total of \$7,000 in additional disability benefits and **\$8,133.33** in business overhead expense benefits, **while** waiving certain future

premiums. When plaintiff accepted this offer, First Unum withdrew it.

The August 16, 2000 letter contained a check for \$3,000, representing “partial disability benefits for the period. July 1, 2000 to October 1, 2000.” With this, First Unum declared plaintiff’s **file** to be closed.

Plaintiff protested the discontinuation of his benefits. He continued to document **his** disability **with** updated physician’s statements, recent medical test reports, and descriptions of the impact of his condition on **his** ability to practice law. First Union responded in letters in which it **minimized** plaintiff’s physician’s findings, while it deflected plaintiff’s demands for an explanation of its rejection, and insisted that he and his doctors supply more and more information. For example, in a letter dated October 10, 2000, First Unum’s “Customer Care Specialist” wrote to plaintiff that his abnormal echocardiogram findings did “not provide objective evidence of your current functional capacity.” She required plaintiff and his physician to **fill** out more forms, and she indicated that any reconsideration of plaintiff’s application **was** contingent upon his writing “a detailed ... explanation of [**his**] occupational status,” containing descriptions of specific duties and how his heart condition prevented **him** from performing each of them. Exchanges of this sort continued through November 2001.

During this period, First Unum replaced the claims examiner who **was** handling plaintiff’s **file**, and changed the **address** to which plaintiff was required to forward his information. First Unum only belatedly informed **plaintiff** of these changes, and in doing so did not identify **his** new representative. The insurer intimated that consideration of plaintiff’s claim would be delayed because **all** of his paperwork had been sent to the wrong **office**. At the same time, First Unum began sending its correspondence to plaintiff at the wrong **address**.

First Unum does not deny that it has rejected plaintiff's demand for benefits without ever having had him examined by a physician, nor does it deny that its policy does not require "objective evidence" of functional incapacity before it is obliged to pay disability benefits.

In November 2001, plaintiff commenced the instant lawsuit against National and First Unum, as well as against several affiliated businesses. In his two causes of action, plaintiff seeks to recover first party benefits pursuant to his breach of contract claim, and, under a theory alleging deceptive acts and business practices under General Business Law ("GBL") 349, plaintiff also seeks both compensatory and punitive damages.

Defendants now move for summary judgment dismissing plaintiff's second cause of action against all defendants, and dismissing plaintiff's first cause of action insofar as it is asserted against parties with whom plaintiff did not expressly contract. Plaintiff has cross-moved to amend his complaint to amplify his second cause of action.

II. Discussion:

A. Plaintiff's Breach of Contract Claim (First Cause of Action):

That branch of defendants' motion which seeks to dismiss plaintiff's breach of contract claim insofar as asserted against UnumProvident Life Insurance Company, Provident Company, Inc., Provident Life and Casualty Insurance Company, and UnumProvident Corporation is granted, without opposition from plaintiff.

Defendants have presented evidence establishing that UnumProvident Corporation is the parent of the holding company that owns First Unum. Provident Companies, Inc. (s/h/a "Provident Company, Inc.") was UnumProvident Corporation's predecessor. Plaintiff may not recover breach of contract damages, nor damages for breach of the implied obligation of good

faith and fair dealing implicit in every contract, from these parties, with whom he **has** no contract. See, Levine v. Yokell, 258 A.D.2d 296,297 (1st Dept. 1999).

Plaintiff **has** nowhere alleged that he was insured under any policies issued by Provident Life and Casualty Insurance Company, with the result that **his** complaint should be dismissed insofar **as asserted** against that entity **as well**. **Finally**, “UnumProvident Life Insurance Company” is not a separate entity, but is another name for First Unum.

B. Plaintiff’s General Business Law 349 Claim (Second Cause of Action):

The second branch of defendants’ motion is denied, and plaintiff’s cross-motion is granted to **the** extent that his complaint is deemed amended, nunc pro tunc, to include the additions to his second cause of action contained in **his** Proposed Amended Complaint insofar **as asserted** against all named defendants.

GBL 349 allows an individual consumer to sue for compensatory and punitive damages when he has been injured by a fraudulent, deceptive or **materially** misleading practice aimed against consumers who purchase defendant’s products or **services**. In order to state a claim under GBL 349, a plaintiff must charge that a defendant has engaged in deceptive conduct that is consumer oriented, causing injury to plaintiff. To be “consumer oriented,” defendant’s conduct **need** not be repetitive or recurring, but defendant’s acts or practices must have **a** broad impact on consumers at large. See New York University v. Continental Insurance Company, 87 N.Y.2d 308,320 (1995); Oswego Laborers’ Local 214 Pension v. Midland Bank, N.A., 85 N.Y.2d **20, 25** (1995). The sale of a standard form insurance policy **has** been held to constitute such consumer oriented conduct under this statute. See Riordan v. Nationwide Mutual Fire Ins. Co., 977 F.2d 47, 51-53 (2d Cir. 1992).

Plaintiff's amplification of his second cause of action consists of allegations, supported by documentary evidence, reflecting that in March 1996, Provident Life and Accident Insurance Company ("Provident Life and Accident") - traditionally the **lead** company in the Provident group of insurance companies - completed a plan of reorganization. The result was that a Delaware-based, non-insurance-vending holding company - Provident Companies, Inc. ("Provident Companies," s/h/a "Provident Company, Inc.") replaced Provident Life and Accident **as** the parent of the organization. Thereafter Provident Life and Accident and its two former subsidiaries, Provident Life and Casualty Insurance Company and Provident National Assurance Company, **all** became wholly-owned subsidiaries of Provident Companies. In **April** 1996, Provident Companies bought The Paul Revere Corporation for **\$1.2** billion, thereby becoming the largest writer of individual disability income insurance in the U.S. Subsequently, Provident Companies **was** taken over by UnumProvident Corporation, which is currently the parent of the holding company that owns First Unum. According to defendants' evidence, defendant UnumProvident Corporation (formerly Provident Companies) is the sole stockholder of Provident Life and Casualty Insurance Company (a Tennessee insurer), **as well as** the sole stockholder of Unum Holding Company. Unum Holding Company is in turn the sole stockholder of First Unum - a New York insurer, formerly known **as** Unionmutual Stock **Life** Insurance Company **of** New York.

Contemporaneous with **this** reorganization, according to plaintiff's evidence, the Provident insurance companies undertook to streamline their disability policy divisions, in order to increase profitability for their investors. They discontinued non-cancellable own-occupation policies, and stopped offering lifetime benefits. The old disability policies were **replaced** by new contracts that

compensated the insured only for “lost earnings,” with emphasis on occupational rehabilitation and a rapid return by the **insured** to gainful employment. Plaintiff **has** also adduced evidence of the companies’ simultaneous institution of review processes and employee incentive programs **aimed** at identifying grounds for denying disability claims and for discontinuing payments of previously approved benefits.

Defendants oppose plaintiff’s application to amend and continue his **GBL 349** claim, arguing that their failure to provide benefits in accordance with a policy of insurance constitutes at worst a breach of a private contract of insurance, which is remediable only by conventional contract damages. They insist that the broader, **GBL 349** concerns regarding fraudulent practices committed upon consumers at large have no place here.

The defendants are correct that an **insured** is limited to contract damages where his dispute with his insurer concerns facts of policy coverage that are **unique** to the parties, such as, for example, where the sole disagreement between the parties relates to **the** sufficiency of a particular proof of loss. See *New York Univ. v. Continental Ins. Co.*, *supra*, at 320; *Security Mutual Life Ins. Co. of New York v. DiPasquale*, 283 A.D.2d 182 (1st Dept. 2001), *lv. dismissed* 97 N.Y.2d 653,700; *Korn v First UNUM Life Ins. Co.*, 277 A.D.2d 355,356 (2d Dept. 2000); *Pellechia & Pellechia v. American National Fire Ins. Co.*, 244 A.D.2d 395 (2d Dept. 1997).

However, contrary to defendants’ further assertion, **GBL 349** is not necessarily inapplicable in all ostensibly “private” insurance disputes. See *New York Univ. v. Continental Ins. Co.*, *supra*, at 321. Here there is evidence that the practices of which **the** plaintiff complains were part of a systematic program aimed at policyholders generally, with the result that they were likely to have an “impact on consumers at large.” Accordingly, the plaintiff **has** adequately stated

a claim of an unfair or deceptive practice under GBL 349. See Gaidon v. G _____
 94 N.Y.2d 330 (1999); Acquista v. New York Life Ins. Co., 285 A.D.2d 73 (1st Dept. 2001);
Batas v. Prudential Ins. Co. of America, 281 A.D.2d 260 (2001).

It is worthy of note that even before the Proposed Amendment, plaintiff's complaint articulated an adequate GBL 349 claim under the standards enunciated in Acquista, supra. An "unfair or deceptive practice" has been defined as a pattern of representations or omissions 'likely to mislead a reasonable consumer acting reasonably under the circumstances.' See Karlin v. IVF Am., 93 N.Y.2d 282,294 (1999). Plaintiff originally alleged that the defendants made a practice of indefinitely delaying his claim, requiring duplicative information from him and his physicians, unilaterally changing the contract terms, and ultimately denying him benefits without reference to his claim's viability. The "unfair and deceptive practices" he describes are orchestrated, and cannot reasonably be supposed to have been devised to apply to his claim alone. See, e.g., Provident Life and Casualty Ins. Co. v. Brittenham, (2d Dept. 2001); see also Wiener v. Unumprovident Corporation, WL #334468 (S.D.N.Y. February 28,2002).

Plaintiff's Proposed Amended Complaint merely fleshes out his GBL 349 claim with additional facts tending to prove that, indeed, defendants' unfair policies were directed at most if not all of their private, long-term disability policy holders after the mid-1990's. The new information serves to satisfy plaintiff's burden of proving that the conduct complained of was not unique to him, but would "have a broad impact on consumers at large." See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank. N.A., supra.

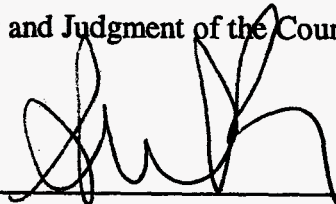
Leave to amend a pleading should be freely given. CPLR 3025(b). The rule is particularly applicable where, as here, no discovery has yet been held. See also, Acquista v. New York Life

Ins. Co. *supra*. The defendants are not prejudiced, inter alia because the amendment consists merely of the addition of recently-discovered facts to plaintiff's originally-pleaded legal *theory*.

See Silvin v. Karwoski, 242 A.D.2d 945 (4th Dept. 1997).

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: April 17, 2002
New York, New York



SHIRLEY WERNER KORNREICH