

Dipasquale v Berkshire Life Insurance Co.

2003 NY Slip Op 30108(U)

January 23, 2003

Supreme Court, New York County

Docket Number:

Judge: Michael J. Obus

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

PRESENT: PAULA J. OMANSKY
Justice

PART 47

Christopher E. DiPasquale
- v -
Bershire Life Insurance

INDEX NO. 120721/01
MOTION DATE 6/7/02
MOTION SEQ. NO. 001
MOTION CAL. NO. 6

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Motion denied in accordance with
accompanying memorandum*

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE _____

Dated: 1/23/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X

CHRISTOPHER E. DIPASQUALE,
Plaintiff,

-against-

Index No.
120721/01

BERKSHIRE LIFE INSURANCE COMPANY,
SECURITY MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, THE ESTATE OF
MELVIN B. DUNN, JAMES S. BROCK,
BRUCE E. HODSOLL, JOHN T. TERRENZI
AND DAVID L. KALIB,

Defendants.

-----X

OMANSKY, J. :

The instant action arises out of a long-running dispute between plaintiff Christopher E. DiPasquale (DiPasquale) and defendants Security Mutual Life Insurance Company of New York (Security Mutual) and Berkshire Life Insurance Company (Berkshire), over the discontinuance of DiPasquale's partial disability benefits. This same dispute was at the center of two prior actions against Security Mutual and Berkshire, which were recently disposed of by this court (see Security Mutual Life Insurance of New York v Christopher E. DiPasquale, July 10, 2001, Index No. 601780/1998).

In the current action, DiPasquale asserts seven causes of action against Security Mutual, Berkshire, and five named individual defendants who either are, or were, employed by Security Mutual or Berkshire. Defendants all move for dismissal of these causes of action on the grounds that they are time

barred, barred by the doctrines of res judicata and collateral estoppel, and/or, are legally insufficient (CPLR 3211 [a][1], [5] and [7])). The estate of Melvin Dunn additionally seeks dismissal of the complaint for lack of personal jurisdiction (CPLR 3211 [a][8])). As part of their motion, all of the defendants seek sanctions against DiPasquale (pursuant to 22 NYCRR §130 et seq.), and costs and disbursements in this action.

DiPasquale cross-moves for leave to file a second amended complaint.

BACKGROUND

DiPasquale, a licensed insurance agent, is an insured under two disability income policies issued to him by defendant Security Mutual. Pursuant to a Services Agreement that was entered into by Security Mutual and Berkshire in June 1995, defendant Berkshire became claims administrator on both policies. Defendants Dunn and Terrenzi are, or were, employees of Security Mutual. Defendants Brock, Hodsoll and Kalib are, or were, **employees** of Berkshire.

DiPasquale alleges that, as a result of serious injuries that he suffered in an automobile accident in 1992, Security Mutual paid him monthly partial disability payments under the two policies until October 23, 1995. Thereafter, on November 2, 1995, Security Mutual terminated plaintiff's benefits, based upon his refusal to provide certain additional and updated financial

information, to which Security Mutual claimed that it was entitled under the policies. Over the next several years, DiPasquale sent numerous letters to different individuals at Security Mutual in an unsuccessful campaign to have his benefits reinstated. During that time, however, DiPasquale never submitted the specific information that had been requested by Security Mutual, contending that he had no such obligation.

In an attempt to resolve this dispute, Security Mutual commenced a declaratory judgment action against DiPasquale in the Supreme Court, New York County in April 1998 (Security Mutual Life Insurance of New York v Christopher E. DiPasquale, Index No. 601780/1998). In that action, Security Mutual sought, inter alia, a judicial determination as to whether DiPasquale had adequately complied with the conditions of his policies, and as to whether Security Mutual was entitled to continue withholding disability income benefit payments from him.

In June 1998, shortly after commencement of the New York' County action, DiPasquale commenced his own action against Security Mutual and Berkshire in the Supreme Court, Broome **County** (Christopher E. DiPasquale v Security Mutual Life Insurance Company and Berkshire Life Insurance Company, Index No. 001268/1998). In that action, DiPasquale asserted the following seven causes of action: (1-2) breach of contract against Security Mutual, (3) tortious interference with contract against

Berkshire, (4) civil conspiracy/unfair claims handling/and deceptive acts and practices against Security Mutual and Berkshire, (5) breach of the implied covenant of good faith and fair dealing against Security Mutual, (6) intentional infliction of emotional distress against Security Mutual and Berkshire, and (7) prima facie tort against Security Mutual and Berkshire.

Briefly, DiPasquale alleged that Security Mutual had breached its contractual obligations by terminating his disability benefits without legal or factual basis. DiPasquale further alleged that Security Mutual had been induced to breach its obligations by the tortious interference of Berkshire, which became the administrator of DiPasquale's claim upon execution of the 1995 Services Agreement. Allegedly, Berkshire's tortious conduct was motivated by provisions of the Services Agreement that awarded incentive payments to Berkshire for reducing the amount of benefits paid to policyholders. DiPasquale further alleged that, following execution of this agreement, Security Mutual **and Berkshire schemed to deny benefits to policyholders** with valid claims, and engaged in unfair and deceptive claims handling practices in violation of various provisions of the Insurance Law and General Business Law § 349.

In March 1999, after a series of motions by both sides in both actions, it was determined that the New York County and Broome County actions should be consolidated in this court.

Shortly thereafter, DiPasquale served an answer, followed by an amended answer, to Security Mutual's New York County complaint. In that answer, DiPasquale asserted the following eleven counterclaims against Security Mutual: (1) unlawful activity in claims adjustment and handling, (2) improper statements and violation of FOIL requirements, (3) negligent entrustment, (4) negligence, (5) negligent infliction of emotional distress, (6-7) breach of contract, (8) abuse of process, (9) fraud, misrepresentation and concealment, (10) filing a frivolous lawsuit, and (11) an award of attorneys' fees.

Expanding on his earlier allegations, Dipasquale claimed that the Services Agreement between Security Mutual and Berkshire was unlawful, because neither Berkshire nor any of its employees were licensed as Independent Adjusters, as required under New York State's Insurance Law. Additionally, DiPasquale alleged that Security Mutual was negligent in failing to investigate Berkshire's claims handling background and history before entrusting policyholders' claims to Berkshire, and in failing to compel Berkshire to adjust claims fairly.

Security Mutual subsequently moved to dismiss all but the fifth, sixth and seventh of DiPasquale's counterclaims. In response, DiPasquale cross-moved to file a second amended complaint, in which he proposed to assert only a first counterclaim alleging breach of contract, and a second

counterclaim alleging unlawful claims handling/adjustment and deceptive business practices, in violation of GBL § 349 and various provisions of New York's Insurance Law.

By order dated January 12, 2000, this court denied, as moot, Security Mutual's motion to dismiss DiPasquale's first, second, third, fourth, eighth, ninth, tenth and eleventh counterclaims, since these claims had been withdrawn, and granted DiPasquale's cross motion for leave to serve an amended answer, but only to the extent of allowing DiPasquale to assert the first proposed counterclaim, alleging breach of contract. The court found that DiPasquale's second proposed counterclaim, alleging violations of GBL § 349, was insufficient in that it involved only a private contract dispute over coverage and the processing of a claim, which was unique to the parties, rather than conduct that affected consumers at large. The court formally consolidated the New York County and former Broome County actions in January 12, 2000 order.

Following consolidation, Security Mutual and Berkshire moved to dismiss the third through seventh causes of action that had been asserted against them in DiPasquale's original Broome County complaint. In response, DiPasquale moved to amend that complaint to plead a first and second cause of action for breach of contract against Security Mutual, a third cause of action for breach of the implied covenant of good faith and fair dealing

against Security Mutual, and a fourth and fifth cause of action for intentional interference with contract against Berkshire. This complaint alleged, inter alia, that Security Mutual had breached its contract and the covenant of good faith and fair dealing by allowing an unlicensed Berkshire to adjust DiPasquale's claim without his knowledge and consent, and by allowing Berkshire and its employees to misrepresent themselves as employees or agents of Security Mutual.

By order dated December 8, 2000, this court granted the motion to dismiss made by Security Mutual and Berkshire, to the extent of dismissing the third through seventh causes of action asserted in DiPasquale's original complaint, noting that DiPasquale had offered no substantive opposition to this motion. The court denied DiPasquale's cross motion to amend the complaint, holding that the proposed causes of action were merely rehashes of previously dismissed causes of action. In any event, the court held that DiPasquale's two proposed tortious interference of contract claims, which alleged that Berkshire's status as an unlicensed adjuster rendered its actions on behalf of Security Mutual illegal, failed to state a cause of action. The court also held that the causes of action sought to be alleged under GBL § 349 and Insurance Law §§ 2106, involved only a private breach of contract claim, and thus did not fall within the ambit of either statute.

Thereafter, Security Mutual moved for summary judgment seeking a declaration that it was not obligated to pay partial disability payments to DiPasquale, and striking his remaining causes of action and counterclaims. DiPasquale cross-moved for summary judgment in his favor. In a decision dated June 29, 2001, this court granted Security Mutual's motion in its entirety, finding that DiPasquale's consistent refusal to provide the requested financial information to substantiate his claim, as required under his insurance contract, precluded him from collecting further disability benefits under the policy. The court also held that the unlicensed status of Berkshire, which DiPasquale alleged had violated various Insurance Law sections and rendered its actions on behalf of Security Mutual illegal, was irrelevant to Security Mutual's legitimate compliance request, which was at issue under the policy.

On November 5, 2001, prior to perfecting his appeal of this court's June 29, 2001 summary judgment decision, DiPasquale commenced the instant action asserting the following seven causes of action: (1) fraud and (2) civil conspiracy against all defendants, (3) negligent entrustment against Security Mutual, Terrenzi and Dunn, (4) unjust enrichment against Berkshire, Brock, Hodsoll and Kalib, (5) malpractice against Dunn, Hodsoll and Kalib, (6) violations of public policy against all of the defendants, and (7) anticipatory breach of contract against

Security Mutual.

Defendants now move to dismiss this complaint in its entirety. Defendants argue that plaintiff's new claims are based on the same conduct which was alleged as the basis of his claims in the prior consolidated action, and that plaintiff is merely attempting to resurrect previously rejected claims by camouflaging the similarities in new language, and by the gratuitous inclusion of past and present employees of Security Mutual and Berkshire. Defendants contend that the current action is based on the same grievances regarding the 1995 Services Agreement between Security Mutual and Berkshire, and that any liability based on that agreement, or the alleged illegality thereof, has already been litigated in this court.

In any event, defendants argue that since all of DiPasquale's claims would have accrued no later than November 2, 1995, the date when his benefits were terminated, all of his causes of action are time-barred by the relevant statutes of limitations. Moreover, defendants argue **that** dismissal is warranted since all of plaintiff's claims are deficient as a matter of law. In addition to dismissal of the complaint, defendants seek the imposition of substantial sanctions, pursuant to 22 NYCRR § 130-1.1-1.5, for DiPasquale's continuing flow of repetitious and frivolous claims.

DiPasquale counters that the allegations contained in the

instant amended complaint, and in his proposed second amended complaint, represent new and legally distinct claims that are entitled to proceed in their own right. DiPasquale further argues that dismissal is not warranted, as the merits of several of his previously asserted claims were never reached in the prior litigation, as these claims were withdrawn, and that the doctrines of res judicata and collateral estoppel have no application to the causes of action asserted against the individual defendants.

DiPasquale further argues that his claims for fraud, negligent entrustment, unjust enrichment and anticipatory breach of contract are not time-barred, and that each is sufficient as a matter of law. However, and without conceding the arguments made by defendants, plaintiff seeks to file a proposed second amended complaint that excludes the fifth and sixth causes of action for malpractice and violation of public policy, and combines the second cause of action for conspiracy with the first cause of action for fraud. Plaintiff also seeks to add, as defendants, the Guardian Life Insurance Company and Berkshire Life Insurance Company of America, as successors to Berkshire; John Doe or Jane Doe, as the personal representative of the Estate of Melvin Dunn; and John Does or Jane Does, as officers and directors of Security Mutual. In addition, plaintiff proposes to add a new fifth cause of action seeking an accounting from Security Mutual and its

officers/directors.

DISCUSSION

Defendants' motion to dismiss the complaint is granted; plaintiff's motion to for leave to file a second amended complaint is denied.

In support of his claims, DiPasquale alleges that Security Mutual, and individual defendants Dunn and Terrenzi, failed to disclose the change in Security Mutual's claims-paying philosophy and misrepresented the identity of Berkshire and its employees by not disclosing the Services Agreement. DiPasquale further contends that Berkshire and/or individual defendants Brock, Hodsoll and Kalib failed to disclose that they were administering his claim pursuant to the allegedly invalid Services Agreement; that they had no legal authority to adjust claims on Security Mutual's behalf, as neither Berkshire nor its employees were licensed as Independent Adjusters in New York State; and that they received incentive compensation for reducing disability benefits to policyholders. DiPasquale also asserts that these individual defendants misrepresented that they were Security Mutual employees, through their use of Security Mutual letterhead in their correspondence with DiPasquale.

DiPasquale contends that, in reliance on these purported misrepresentations and omissions, he continued to supply Berkshire and its employees with personal and confidential

medical information after his benefits were terminated.

DiPasquale maintains that had he known of the alleged omissions and misrepresentations, he would not only have withheld such information, but would have contacted the appropriate regulatory authorities. DiPasquale contends that, as a result of this fraud, he has suffered unspecified damages in amount to be determined at trial.

Fraud

Defendants first seek dismissal of DiPasquale's fraud cause of action on statute of limitations grounds. Causes of action for fraud must be brought within six years of the commission of the alleged fraud, or within two years of the actual or imputed discovery of the facts supporting a cause of action, whichever is longer (see CPLR 203[g] and 213[8]; Rostuca Holdings, Ltd. v Pole, 231 AD2d 402 [1st Dept 1996]). Defendants contend that plaintiff's fraud claim accrued no later than November 2, 1995, the date Berkshire began to adjust plaintiff's claim, as any **alleged transfer of confidential information would have preceded** that date. However, plaintiff contends that his cause of action is based upon his own subsequent provision of confidential information to Berkshire, and thus accrued no earlier than November 14, 1995, the date when he first submitted such confidential information directly to Berkshire. Since it is plaintiff's allegations of reliance and injury that are

determinative for statute of limitations purposes, this cause of action cannot be dismissed as time-barred because plaintiff's claim would not have accrued until sometime after November 14, 1995.

However, defendants' motion to dismiss this cause of action for failure to state a claim is granted. A cause of action for fraud must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413 [1996]). Each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) (Lanzi v Brooks, 54 AD2d 1057, 1058 [3^d Dept 1976]), affd, 43 NY2d 778 [1977]); the claim is subject to dismissal if not supported by specific and detailed allegations of fact (Callas v Eisenberg, 192 AD2d 349 [1st Dept 1993]).

As defendants note, DiPasquale has not identified any provision in his insurance policies that prevents Security Mutual from utilizing a third party to administer its claims. Nor has DiPasquale alleged the existence of any particular representation or confidential relationship, which might have required Security Mutual, or Berkshire, to have disclosed the Services Agreement,

or the terms thereof, to DiPasquale. It is well established that the relationship between policyholders and a mutual life insurer is generally one of contract, involving an ordinary arm's-length transaction rather than a relationship of trust and confidence, and does not give rise to a fiduciary relationship (see, Rabouin v Metropolitan Life Ins. Co., 182 Misc 2d 632 [Sup Ct, NY County 1991, affd, 282 AD2d 381 [1st Dept 2001]; see also, Greeff v Equitable Life Assur. Soc. of the United States, 160 NY 19 [1899]).

Further, this action arises out of what is essentially a private breach of contract dispute between DiPasquale and Security Mutual. The allegations that Security Mutual improperly allowed an unlicensed Berkshire to adjust DiPasquale's claim without his knowledge and consent, and allowed Berkshire and its employees to misrepresent themselves as employees or agents of Security Mutual, were previously raised and rejected by this court in dismissing DiPasquale's contract claims in the former consolidated action.

Additionally, under the 1995 Services Agreement, Berkshire and its employees were contractually obligated to use Security Mutual letterhead when corresponding with claimants.' In using

'According to defendants, the State of New York's Insurance Department requires that claims administration services be performed in a manner that demonstrates to insureds that insurance company remains the insurer, and remains contractually liable on such policies (see Kalib Aff., **Exs. B and F**).

the letterhead, and in requesting confidential financial information from DiPasquale in the name of Security Mutual, Berkshire was merely fulfilling its contractual obligations to Security Mutual. This court has previously determined that the licensure status of Berkshire was irrelevant to DiPasquale's obligation to provide such confidential information to Security Mutual.

Therefore, DiPasquale's fraud cause of action is dismissed.

Civil Conspiracy

DiPasquale's second cause of action for civil conspiracy is also dismissed. This cause of action merely rehashes previously dismissed claims.

Negligent Entrustment

Defendants' motion to dismiss the cause of action for negligent entrustment as time-barred is granted. The complaint alleges that Security Mutual's failure to investigate Berkshire's status and history before permitting it access to policyholder files constituted negligent entrustment. According to plaintiff's complaint, Berkshire adjusted DiPasquale's claim and notified DiPasquale that his benefits had been terminated on November 2, 1995; thus, Security Mutual entrusted DiPasquale's claim to Berkshire, and DiPasquale sustained injury thereby, no later than November 2, 2001. Claims for negligent entrustment have a three-year statute of limitations (see CPLR 214). Because

the instant action was not commenced until November 5, 2001, more than six years after plaintiff's claim accrued, the claim is time-barred. DiPasquale's allegation that Security Mutual continued to use Berkshire as an independent adjuster, despite its unlicensed status, is insufficient to extend the statute of limitations with respect to DiPasquale's claim.²

This court additionally notes that in the prior consolidated action, plaintiff previously withdrew a claim of negligent entrustment. Plaintiff's practice of withdrawing a claim which could have been litigated in one action, only to reassert the same claim in a subsequent action, is a waste of judicial resources and will not be countenanced.

²In any event, the tort of negligent entrustment is inapplicable to the circumstances present here. "The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" (Hamilton v Beretta U.S.A. Corp., 96 NY2d 222 [2001]). Under this doctrine, the owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others (id., see also Rios v Smith, 95 NY2d 647 [2001]; Restatement [Second] of Torts § 390).

Most of the case law invoking this doctrine relates to the entrustment of guns or motor vehicles to children, incompetents or intoxicated persons. Although plaintiff argues that there is nothing to bar application of the doctrine to entrustment of a disability insurance policy, this court can find no authority which suggests that such an extension would be appropriate under New York law. Nor has plaintiff provided any legal basis or rationale to support such an extension, other than to contend that as an issue of first impression, the claim should not be dismissed.

Unjust Enrichment

Plaintiff's claim alleging unjust enrichment is dismissed as time-barred under the six year statute of limitations governing quasi-contract actions (CPLR 213 [2]).

Plaintiff alleges that the payment of compensation to Berkshire, especially insofar as it was based on incentives for denying DiPasquale his benefits, constituted unjust enrichment by virtue of Berkshire's unlicensed status. Berkshire's denial of DiPasquale's benefits occurred on November 2, 1995; therefore, Berkshire's right to any incentive payment would have accrued on ~~that~~ that date. Because more than six years elapsed before the instant action was filed, this claim is time-barred.

In any event, as stated, DiPasquale's claim is insufficient to state a cause of action. A cause of action for unjust enrichment requires that plaintiff assert that a benefit was bestowed by it, and that defendants will obtain such benefit without adequately compensating plaintiff therefore (Wiener v Lazard Freres & Co., 241 AD2d 114 [1st Dept 1998]; Tarrvtown House Condominiums, Inc. v Hainje, 161 AD2d 310 [1st Dept 1990]). "What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it'" (Simonds v Simonds, 45 NY2d 233, 242 [1978]), quoting Miller v Schloss, 218 NY 400, 407 [1916]).

Here, all of the benefits alleged to have been bestowed on

the Berkshire defendants were obtained pursuant to their contract with Security Mutual, not by DiPasquale. Given that this court has determined that plaintiff was owed no further disability payments after November 2, 1995, the complaint fails to identify what benefit, bestowed on Berkshire, would in equity and good conscience have belonged to DiPasquale.

Malpractice and Violation of Public Policy

Defendant's motion to dismiss DiPasquale's fifth and sixth causes of action, alleging malpractice and violation of public policy, will be granted. Plaintiff has offered no opposition to dismissal of either of these claims, except to state that he does not does not concede defendants arguments in favor of dismissal. Since plaintiff's only direct response is to seek leave to file a proposed second amended complaint which excludes these causes of action, these causes of action are appropriately dismissed.

Anticipatory Breach of Contract

Plaintiff's cause of action for anticipatory breach of contract is dismissed as time-barred. In the complaint, DiPasquale alleges that Security Mutual committed an anticipatory breach of contract by using the unlicensed Berkshire to reduce disability payments to policyholders, including plaintiff, and by abandoning its pre-Berkshire claims-paying philosophy without disclosure. As alleged, this cause of action would have accrued no later than November 2, 1995, the date when DiPasquale's

benefits were terminated. As this date occurred more than six years before the instant action was commenced, the cause of action is time-barred.

In response, plaintiff seeks to amend this claim to add an allegation that Security Mutual failed to respond to DiPasquale's efforts to supply additional proof of loss information subsequent to the termination of his benefits, thereby evidencing an intent not to pay further benefits pursuant to DiPasquale's policies. However, even with this amendment, plaintiffs cause of action would still be barred by the doctrine of res judicata. In granting defendants' summary judgment in the earlier consolidated action, this court determined that Security Mutual was not obligated to provide further benefits to DiPasquale after November 2, 1995, due to plaintiff's persistent refusal to substantiate his claim by providing the relevant financial information required by his insurance policy. In so holding, the court determined that the documentation and proof of loss forms that plaintiff sought to submit, in lieu of the requested documents, were insufficient to meet his contractual obligations.

Leave to File a Second Amended Complaint

Plaintiff's cross motion for leave to file a second amended complaint is denied. Although leave to amend pleadings is to be freely granted absent prejudice or surprise resulting from delay (CPLR 3025{b}), leave should be denied where the proposed claim

is palpably insufficient (~~Tishman Const. Corp. v City of New York~~, 280 AD2d 374 [1st Dept 20011]). Other than as indicated above, plaintiff's proposed first through fourth causes of action are indistinguishable from the causes of action asserted in plaintiff's first amended complaint. DiPasquale's only proposed additional cause of action, which seeks an accounting, cannot succeed as this court has previously held that no fiduciary relations existed between the parties (see Adam v Cutner & Rathkopf, 238 AD2d 234 [1st Dept 1997] [the right to an accounting is premised on the existence of a confidential or fiduciary relationship]).

Personal Jurisdiction over Estate of Melvin Dunn

In light of this court's dismissal of all of the causes of action against all of defendants, this court need not address the additional issue of whether this court lacks personal jurisdiction over the Estate of Melvin Dunn.

Sanctions

Defendants motion for sanctions against DiPasquale, pursuant to 22 NYCRR 130, et seq., is granted.

Pursuant to 22 NYCRR 130-1.1(a), "the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct" For the purposes of 22 NYCRR 130-1.1, conduct is considered frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material or factual statements that are false.

(22 NYCRR 130.1[c]).

As indicated throughout this decision, a significant number of the allegations asserted in the instant complaint were either fully litigated in the prior consolidated action, or were raised and then withdrawn, only to be resurrected in current action. Further, plaintiff has not legitimately alleged any damages herein apart from those previously raised. Repeatedly filing actions by alleging the same claims worded differently, or by adding inappropriate parties, is exactly what the legislature had in mind when it enacted 22 NYCRR 130.

Therefore, sanctions in the amount of \$250 will be granted. Accordingly, it is

ORDERED that defendants' motion to dismiss is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that plaintiff's motion seeking leave to file a second amended complaint is denied; and it is further

ORDERED that defendants' motion for sanctions is granted, and the plaintiff, Christopher E. DiPasquale, shall pay the sum

of \$250.00, to the Lawyers' Fund for Client Protection by depositing said amount (in the form of cash or certified check payable to the New York County Clerk) with the Clerk of the Court, together with a copy of this order, for transmittal to the New York Commissioner of Taxation and Finance; and it is further

ORDERED that written proof of such payment be provided to the Clerk of Part 47 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 1/23/87

ENTER: 