

Goldblatt v Metlife, Inc.
2003 NY Slip Op 30132(U)
January 8, 2003
Supreme Court, New York County
Docket Number: 0600295/2002
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 36
Justice

DAVID M. GOLDBLATT,
Plaintiff(s),

INDEX NO. 600295/02

-against-

MOTION DATE

METLIFE, INC., METROPOLITAN LIFE
INSURANCE COMPANY and ALLMERICA
FINANCIAL LIFE INSURANCE AND
ANNUITY COMPANY,
Defendant(s).

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

SCANNED
JAN 15 2002

Defendants move for an order, pursuant to CPLR 3211(a)(7),
dismissing that portion of the first cause of action of the Amended
Complaint which seeks compensatory and future damages, and
dismissing the second cause of action in its entirety.

This is an action for breach of a long term disability
insurance policy, and violation of General Business Law § 349.
Defendants issued a long term disability insurance policy (the
Contract)' to plaintiff, which provided for a minimum of \$6,000 per
month to be paid to the plaintiff, based upon his inability to

engage in his usual duties. Plaintiff claims he suffers from a serious heart condition which prevents him from working in his profession.

Plaintiff alleges that, notwithstanding his being disabled, defendants have refused to pay him his long-term disability benefits. In the first cause of action, plaintiff claims that defendants' wrongful conduct in refusing to pay him his disability benefits constitutes a breach of the Contract. He maintains that, because of defendants' conduct, he is entitled to recover all unpaid benefits under the Contract. He also contends that, upon information and belief, defendants denied the claim in bad faith, and without a reasonable basis. Thus, he argues that he is entitled to recover money damages beyond the face amount of the insurance policy. He alleges that he has suffered mental and emotional distress, as well as monetary damages, as a result of defendants' wrongfully denying him his benefits.

Plaintiff further claims that he is entitled to collect future benefits that would be due under the Policy, in addition to past benefits, because of defendants' repudiation and anticipatory breach of the Contract.

In the second cause of action, plaintiff alleges, upon information and belief, that: (1) defendants never intended to deal with claims fairly and reasonably; (2) defendants made a practice of delaying and then denying claims regardless of their validity; and (3) defendants engaged in a fraudulent and deceptive business

practice by collecting premiums and then refusing to pay benefits, in violation of GBL § 349.

Defendants argue that the branch of plaintiff's first cause of action for breach of contract, which seeks compensatory and future benefits, should be dismissed because plaintiff fails to assert any factual details to support his conclusory statements that defendants' conduct amounted to "**bad faith conduct.**" It is further argued that plaintiff fails to assert any factual details to support his conclusory allegation that he is entitled to future benefits because defendants' conduct was "tantamount to 'calling off' the insurance arrangement," and, thus, "constructively repudiat[ing] the insurance policy." Likewise, defendants argue that plaintiff fails to offer any factual support for any of the conclusory allegations that the defendants engaged in a fraudulent business practice within the ambit of GBL § 349.

The standards for evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well settled. "Such a motion assumes the truth of the complaint's material allegations and whatever can be reasonably inferred therefrom" (Ackerman v 305 East 40th Owners Corp., 189 AD2d 665, 666 [1st Dept 1993]; see also, Leon v Martinez, 84 NY2d 83, 87-88 [1994]). The motion should be denied if, after the benefit of every possible favorable inference, the facts fit within any cognizable legal theory (*id.*).

Even employing this liberal standard, however, plaintiff has failed to state a claim for consequential and/or future damages. Plaintiff cites to Acquista v New York Life Ins. Co. (285 AD2d 73

[1st Dept 2001]], and Wurm v Commercial Insurance Co. of Newark, N.J. (2001 WL 1263363 (Sup Ct, NY County 2001)) to support his claims in the Amended Complaint.

In Acquista, supra, the court found that plaintiff's allegations stated a claim against defendant insurer for consequential damages beyond the disability policy limits. The court noted that plaintiff's claim that defendant insurer acted in bad faith was based upon plaintiff's allegations of the insurer's "ongoing pattern of avoiding the claim, by which it would make multiple requests for additional documentation, upon receipt of which further documentation would be demanded, after which plaintiff's claims file would then be transferred to a new examiner, who in turn would make more requests," (285 AD2d at 78).

In Wurm v Commercial Insurance Co. of Newark, N.J., supra, defendants moved to set aside that portion of a jury verdict which awarded the plaintiff future damages, upon a finding that plaintiff insurer acted in bad faith. The jury found that defendants repudiated the policy, thus entitling plaintiff to a present lump sum judgment representing the future payments to which she was entitled. As noted in Wurm, New York courts do recognize **the** doctrine of repudiation or anticipatory breach in certain circumstances (see, e.g., Romar v Alli, 120 AD2d 420 (1st Dept 1986)). However, it was also noted in Wurm that repudiation cannot be assumed merely because the insurer fails to pay benefits, notwithstanding its continued acceptance of premium payments for the insured (see, Apostolou v Mutual of Omaha Insurance Co., 72 AD2d 781

{2d Dept 19791). Further, repudiation cannot be inferred from an insurer's honest, but mistaken, belief that the insured is not entitled to benefits (Wurm v Commercial Insurance Co. of N.J., supra). "However, where the insurance company 'calls off' the whole arrangement, an insured * * * establishes a claim for repudiation (Id.). In Wurm, the court concluded that there was sufficient evidence to support the jury's finding that defendant insurer repudiated the entire insurance policy. It based its conclusion on testimony by the plaintiff that a claims examiner told plaintiff that she would never receive benefits in the future under the policy, and testimony that the insurance company stopped sending her premium statements for approximately one year.

Here, other than extrapolating conclusory statements found in Acquista and Wurm, there are no pleaded facts which support a claim for either consequential damages or future benefits. Plaintiff provides no details, either in the Amended Complaint or in his affidavit in opposition, which would form any basis for this court to find a viable claim that defendants acted in bad faith and/or "called off" the insurance policy. Accordingly, defendants' motion which seeks to dismiss that branch of the first cause of action which seeks consequential and future damages is dismissed.

Plaintiff's second cause of action for violation of GBL § 349 is likewise dismissed, as failing to set forth any specific factual underpinnings to support said claim. Pursuant to GBL § 349 (a), it is unlawful to perform "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any

service in this state" A cause of action under GBL § 349 must allege (1) that defendant's conduct is "**consumer** oriented"; (2) that defendant engaged in a deceptive act or practice in the conduct of a business that is misleading in a material way, and (3) injury to the plaintiff (New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Gaidon v The Guardian Life Insurance Co. of America, 272 AD2d 60 [1st Dept 20001, affd 96 NY2d 201 [2001]]; Small v Lorillard Tobacco Co., 94 NY2d 43, 55 [1999]).

Unlike the fact pattern in Acquista v New York Life Insurance Co., supra, plaintiff's allegations, all based upon information and belief, do not allege any specific conduct, to support any of the conclusory allegations that defendants engaged in deceptive acts or practices in conducting their business. Accordingly, defendants' motion to dismiss the second cause of action is granted.

Should plaintiff obtain facts in the course of discovery that might provide a basis for a claim for compensatory and/or future benefits and/or violation of GBL § 349, he may move again at that time for leave to amend the pleadings, provided that he does so on proper papers, including a proposed amended complaint containing factual, not conclusory allegations.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and that portion of the first cause of action which seeks consequential and future damages is dismissed; and it is further

ORDERED that defendants' motion to dismiss the second cause of action is granted; and it is further

ORDERED that defendants are directed to serve an answer to the breach of contract cause of action in the Amended Complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 1/6/07

MARILYN SHAFER
J.S.C.

Check one: [] FINAL DISPOSITION

[x] NON-FINAL DISPOSITION