Catanzano v Warren Rosen Co.

2005 NY Slip Op 30189(U)

June 17, 2005

Supreme Court, New york County

Docket Number: 0122525/2002

Judge: Herman Cahn

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SCANNED ON 6/20/2005

[*1]

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

PRESENT: Cahn Justice

PART 49m

Kerry Catenzano

INDEX NO. 122525/02

MOTION DATE 3/2/05

- v -

MOTION SEQ. NO. 004

Warren Rosen & Co.,

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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

FILED
JUN 20 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/17/05

Hon. Cahn
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

KERRY CATANZANO,

Plaintiff,

-against- Index No. 122525/02

WARREN ROSEN CO., and WARREN ROSEN, individually and in his capacity as Owner of WARREN ROSEN & CO., INC.,

Defendants.

WARREN ROSEN CO., and WARREN ROSEN, individually and in his capacity as Owner of WARREN ROSEN & CO., INC.,

Third-Party Plaintiffs,

-against- Third-Party Index No. 591103/04

UNUMPROVIDENT CORPORATION, FIRST UNUM LIFE INSURANCE COMPANY, and UNUM LIFE INSURANCE COMPANY OF AMERICA,

Third-Party Defendants.

Herman Cahn, J.

Defendants Warren Rosen Co. and Warren Rosen (collectively, Rosen) move for summary judgment dismissing the complaint, CPLR 3212.

Facts:

Warren Rosen is an insurance broker who sold two long-term disability group insurance policies issued by third-party defendant First Unum Life Insurance Company. Plaintiff Kerry Catanzano was the insured on each policy. One of the policies (no. 461128-011) was issued to Pioneer Futures, Inc., and the

[* 3].

other (no. 461607-041) was issued to the New York Mercantile Exchange (NYMEX).

The Pioneer policy was issued to various NYMEX clearinghouses. Catanzano was eligible to participate in that policy, and did so, because he cleared his NYMEX trades through Pioneer.

The NYMEX policy was issued automatically as a benefit through NYMEX. Plaintiff did not himself pay the premiums for this policy.

Catanzano alleges that Rosen represented to him that should he become disabled, the benefits of the policies would not be offset against each other.

Catanzano suffered a heart attack in April of 2000, and various other disabling conditions, including a second heart attack, thereafter. According to the complaint, Catanzano initially received the proper benefits due under the policies. However, the benefits were eventually reduced and offset, because, contrary to Rosen's alleged representations, such an offset was permitted under the policies.

Catanzano originally brought causes of action for: (i) violation of Insurance Law § 2123 (a) (1); (ii) violation of General Business Law § 349; and (iii) negligent and fraudulent misrepresentation. On a prior motion to dismiss, the first cause of action, and so much of the third cause of action as sought

recovery for negligent misrepresentation, were dismissed, by decision dated May 17, 2004.

Under the remaining causes of action, Catanzano seeks damages from Rosen for: (i) the long-term disability benefits not paid under the applicable policies; (ii) attorneys' fees as a prevailing party; and (iii) compensatory, consequential, and punitive damages.

Concurrent with bringing this action, Catanzano also brought an action in the United States District Court, Eastern District of New York, entitled *Catanzano v UnumProvident Corp., et al.* (Feuerstein, J., 02 CV 05460). In the federal action, Catanzano sought, among other relief, payment under the same policies as are at issue herein. By a Settlement Agreement and Mutual Release dated May 2004 (O.S.C. Ex. F), that action was settled for $1,850,000 in exchange for a release of "all claims, demands, actions, rights, causes of action, obligations and/or liabilities of any kind or nature known or unknown, arising out of the . . . Policies."

Discussion:

To be entitled to summary judgment, Rosen must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557

[1980]).

Among other things, defendants argue that summary judgment must be granted because the federal settlement bars Catanzano from further recovery related to the policies as a matter of law. However, Rosen was not a party to the federal action, nor a signatory of the Settlement Agreement and Mutual Release entered into by the parties thereto, i.e., Catanzano and the third-party defendant insurers (O.S.C. Ex. F). The Settlement expressly provides that it is exclusive of any claims against "Warren Rosen & Co., Inc. and Warren Rosen, individually and in his capacity as owner of Warren Rosen & Co., Inc. and assigns . . . ." (*Id.*, at 1.)[1]

A party may enter into a settlement with one of two potentially joint obligors, with express reservation of the right to pursue the non-settling obligor (General Obligations Law [GOL] § 15-104). In such event, the non-settling obligor is entitled to a credit for any amounts received by the obligee from the settling obligor (*id.*, 15-103). Therefore, a cause of action may only be asserted against the non-settling obligor for remaining damages exceeding the settlement amount, if any (*id.*, 15-103, 15-104; *Winkelmann v Hockins*, 204 AD2d 623 [2d Dept 1994]; *cf.*, *Krichmar v Krichmar*, 42 NY2d 858 [1977]; *Milks v McIver*, 264 NY

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[1] The Settlement (¶ 6) similarly obligates Catanzano to indemnify the insurers against any claims made by Rosen.

267, 270 [1934] ["The law does not permit a double satisfaction for a single injury"]; *Metropolitan Dry Cleaning Mach. Co., Inc. v Hirsch*, 38 AD2d 558 [2d Dept 1971]).

Rosen posits that Catanzano has suffered no damages beyond the settlement sum of $1,850,000 he received in the federal action. However, the Settlement Agreement expressly qualifies that sum as attributable to "the contract claims" only, i.e., Catanzano's claims to disability benefits from the insurers; not "to any claims for . . . extra-contractual damages . . . ." (Settlement Agreement ¶ 1.) Thus, Catanzano's fraud claims against Rosen were never a subject of the settlement between Catanzano and the insurers. Those claims are distinct from the ones asserted in the federal action.

Catanzano brings this action for Rosen's alleged misrepresentation of the nature of the offset provisions contained in the policies. He contends that Rosen represented that there would be no offset under the policies, and since there was an offset applied, he did not recover the benefits to which he was entitled. Catanzano, therefore, asserts that he has retained the right to pursue Rosen for the balance of proceeds he would have been entitled to, beyond the $1,850,000 sum he has already received from the insurers, if the policies were non-offsetting.

The NYMEX policy was payable at $6,000 per month; the

Pioneer policy at $10,000 per month (Catanzano Aff. ¶¶ 16, 21). Catanzano became disabled in his late thirties, due to two heart attacks and complications therefrom (*id.*, ¶¶ 3-7). If the court perceives Catanzano's damages theory correctly, he is seeking the balance of the sum he should have collected as benefits, if he could not work for the rest of his working life, in excess of the $1,850,000, from Rosen, on the force of the reservation of rights clause contained in the Settlement Agreement, and under color of GOL 15-104.

Whether or not plaintiff can prove any damages beyond the settlement amount remains in issue. While his counsel maintains that he can, asserting entitlement to disability benefits until age 65 (Opp. Mem. at 8), Rosen's counsel contends, on the basis of medical opinions commissioned by the insurers, that plaintiff was only diasabled for approximately eleven months, rendering him ineligible for any further payout under the policies (Devack Aff. ¶ 13, Exs. H-J). This issue of fact, i.e., the extent of residual damages, if any, precludes summary judgment of dismissal of the fraud claims against Rosen.

In addition, as explained, Rosen is not entitled to summary judgment as a matter of law, on the basis of the federal settlement, as it expressly reserved plaintiff's right to pursue Rosen for any possible residual damages.

Accordingly, the motion for summary judgment dismissing the

fraud claims against Rosen is denied.

The contrary is true, however, with respect to plaintiff's claim for deceptive practices under GBL 349. That section permits a cause of action for "actual damages," which may be trebled. Distinct of the outstanding issue concerning the existence and/or quantum of damages, treated above, plaintiff has not stated a claim under GBL 349, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . . ."

"The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising" (*Genesco Entertainment, A Division of Lymutt Indus., Inc. v Koch*, 593 F Supp 743, 751 [SD NY 1984]).

In order to state a prima facie case under GBL 349, a plaintiff must: (i) charge conduct of the defendant that is consumer oriented; (ii) demonstrate that the defendant's acts or practices have a broader impact on consumers at large; (iii) show that defendant is engaging in an act or practice that is deceptive or misleading in a material way, and that plaintiff has been injured by reason thereof; and (iv) show that defendant engaged in a material deceptive act or practice that caused actual harm (*Oswego Laborers' Local 214 Pension Fund v Marine*

Midland Bank, N.A., 85 NY2d 20 [1995]).

The cause of action under GBL must be dismissed. In order to be actionable, Rosen's claimed acts or practices must have a broad impact on consumers at large (*Oswego Laborers' Local 214 Pension Fund, supra; see also, Agency Dev., Inc. v MedAmerica Ins. Co.*, 327 F Supp 2d 199 [WD NY 2004]). "The statute was intended to empower consumers[,] to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses. It was not intended to supplant an action to recover damages for breach of contract between parties to an arm's length contract." (*Exxonmobil Inter-America, Inc. v Advanced Info. Eng'g Servs., Inc.*, 328 F Supp 2d 443, 448 [SD NY 2004].)

Here, there is no implication that Rosen's representations have a broad impact on consumers at large. Rosen allegedly made specific representations as to offsetability under the NYMEX and Pioneer policies issued specifically to Catanzano. Catanzano contends that the representations were fraudulent. He has not alleged that they were made to any other person. A private right of action for fraud does not automatically indicate a right of action under GBL 349 (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995] ["Private contract disputes unique to the parties . . . would not fall within the ambit of the statute"] [citation and internal quotation marks omitted]; *Fekete v. GA*

Ins. Co., 279 AD2d 300 [1st Dept 2001] ["Private contract disputes regarding policy coverage and the processing of a claim that is unique to the parties does not fall within the ambit of General Business Law § 349"] [citation omitted]).

Accordingly, the motion for summary judgment dismissing the claim under GBL 349 is granted.

Accordingly, it is

ORDERED that the motion by defendants Warren Rosen Co. and Warren Rosen for summary judgment dismissing the complaint is granted only to the extent of dismissing the claim brought under General Business Law § 349, and is otherwise denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: June 17, 2005

E N T E R :

J.S.C.

FILED
JUN 20 2005
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