

**Udell v Economic Growth Group, Inc.**

2005 NY Slip Op 30246(U)

August 1, 2005

Supreme Court, New York County

Docket Number: 0600385/2005

Judge: Richard B. Lowe

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

PRESENT: RICHARD B. LOWE III

PART 52

Index Number : 600385/2005

UDELL, GLENN

vs  
ECONOMIC GROWTH GROUP INC

Sequence Number : 1

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 10/14/05

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered \_\_\_\_\_ 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  
AUG 08 2005  
COUNTY CLERK'S OFFICE  
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED  
MEMORANDUM DECISION.

Dated: 8/1/05

RICHARD B. LOWE III  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X  
GLENN UDELL and AFGO MECHANICAL SERVICES, INC.,

Plaintiffs,

Index No.: 05-600385

-against-

ECONOMIC GROWTH GROUP, INC. and RONALD M. ROTH;

Defendants.  
-----X

**RICHARD B. LOWE, III, J.**

Defendant Ronald M. Roth ("Roth") moves pursuant to CPLR §§3211 (a)(1), (a)(5), and (a)(7), to dismiss plaintiff Glenn Udell's ("Udell") complaint.

**BACKGROUND**

Udell alleges that Roth served as his broker/consultant in applying for multiple disability insurance policies issued by: 1) The Equitable Assurance Society of the United States ("Equitable"), and 2) The Berkshire Life Insurance Company of America ("Berkshire"). When plaintiff later made claims for disability benefits, the claims were denied by both companies. The Equitable policies had lapsed because of failure to make premium payments. The Berkshire policies were declared null and void because of failure to disclose the complete medical history of the policy holder.

In 1995, the Equitable policies changed from a method of directly debiting premium payments from a designated bank account ("System-Matic"), to a system where quarterly bills were mailed to the plaintiff. Udell asserts that Roth's failure in informing him of this change led to non payment of premiums, and that, in turn, induced cancellation of the Equitable policies.

The Berkshire policies were issued by the insurance company in the year 2000 upon receipt of the application. However, in light of additional information received when Udell filed a total disability claim in 2002, the policies were revoked and declared null and void as of the date of issue. The Berkshire insurance company stated that they had relied on the statements furnished on the application in granting the policies. Specifically, statements by the applicant indicating that he had no previous medical conditions and had not received treatment for previous illnesses or injuries. When Udell filed the total disability claim, the insurance company made requests for the Udell's medical records from other sources. The records revealed that Udell had undergone numerous medical treatments (including at least five surgeries) before the insurance application, and that there was no mention of these on the medical history portion of the application form. The Berkshire insurance company rescinded the policies, maintaining that had the medical history been disclosed at the time of application, the policies would never have been issued. The company also alleged that Udell intentionally withheld the information in order to deceive the company.

Udell contends that Roth is responsible for inadequately completing the medical portion of the application, and thus, is responsible for the cancellation of the policies as a result of failing to disclose the complete medical history of the applicant at the time of making the application. As proof of Roth's involvement in completing the medical forms, Udell provides an affidavit affirming he was never examined by a doctor with respect to the Berkshire policies. He also affirms that he did not fill out the medical portion, that he signed the Berkshire medical forms in blank, and trusted Roth to complete the application. Moreover, Udell suggests that in addition to completing the medical forms fraudulently, Roth might have worked in collusion with a doctor to persuade insurance companies to issue insurance policies to persons who were essentially un-insurable.

## DISCUSSION

Defendant Roth moves to dismiss the complaint in its entirety. He claims the Equitable policies are barred under CPLR § 3211(a)(5) which states that a “cause of action may not be maintained because of . . . collateral estoppel, . . . [and] res judicata.” Roth also asserts that he has documentary evidence disproving plaintiff’s allegations under the Berkshire policies, and accordingly those claims should be barred pursuant to CPLR 3211(a)(1). Furthermore, Roth contends that since all claims under the Equitable and Berkshire policies should be barred, any other claim that the plaintiff might have should be dismissed for failing to state a cause of action (CPLR § 3211(a)(7)).

### *Claims Under the Equitable Policies*

With respect to the Equitable policies, defendant Roth asserts that all claims should be barred under the doctrines of collateral estoppel and res judicata (CPLR § 3211(a)(5)). Collateral estoppel and res judicata are related doctrines that limit re-litigation of matters, where the parties have had a “full and fair opportunity to present their case in earlier proceedings (*People v Evans*, 94 NY2d 499, 502 (2000)). Collateral estoppel, or issue preclusion, has two basic requirements for its application: (1) the issue sought to be precluded is identical to a material issue decided in a prior action, and (2) that there was a full and fair opportunity to contest the issue in the prior action (*Jeffreys v Griffin*, 1 NY3d 34, 39 (2003)).

Roth points to a prior action filed by the plaintiff in the Supreme Court of the State of New York, Nassau County, where Roth was granted summary judgment against Udell (hereinafter “prior action”) (*see Udell v Equitable Life Assurance Society of the US*, Sup Ct, Nassau County, June 10, 2004, Martin, J., Index No. 003585/03).

In the prior action, Udell alleged that Roth had breached his obligation as an agent or representative of Equitable (*id.*). The Nassau County Court dismissed the complaint as time barred under Insurance Law §3211 (d), but also stated that “even if the action were timely, the complaint must be dismissed on the merits” (*id.*). The Court found that “[t]he contention that plaintiff [Udell] was never made aware of the change in premium payment mode, and assumed that payments continued to be deducted automatically under the System-Matic method, flies in the face of documentary evidence before the court . . .” (*id.*). It was established that, from November 1998 up to early 2000, plaintiff received quarterly bills from Equitable and issued checks in payment (*id.*). Accordingly, the Nassau County Court found that there was no evidence that Roth breached a duty to properly service the Equitable policies, and plaintiff’s claims against Roth relating to improper cancellation of the Equitable policies was untenable (*id.*). Udell has since then appealed the summary judgment decision in the prior action and the matter is now pending before the Appellate Division Second Judicial Department.

Roth, in the suit before this court, alleges that all plaintiff’s claims based on the Equitable policies should be barred under collateral estoppel and/or res judicata as the prior action in Nassau County involved that same set of facts and similar issues.

Plaintiff Udell, in opposition to the motion to dismiss, asserts that the decision in the prior action was limited to the issue of whether defendant Roth had a duty to service the Equitable policies. It involved a question of liability based on defendant’s alleged responsibility in the termination of the Equitable policies. Udell argues that, in contrast to the prior action, the complaint in the present case alleges breach of obligation arising from the special relationship that was formed on Roth’s serving as a consultant. Since the allegations in the present complaint are different, based

on the alleged wrongful conduct of the defendant in context of serving as the plaintiff's risk management consultant, plaintiff contends that collateral estoppel does not apply.

Even if this court accepts the plaintiff's argument that the issues are different, the Equitable claims are still barred under the doctrine of res judicata. The Court of Appeals has recently stated that:

Under the doctrine of res judicata, [or claim preclusion,] a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again.

(*In re Hunter*, 4 NY3d 260, 269 (2005); see also *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347-48 (1999)). Under the New York transactional analysis approach, when a claim has been brought to a final conclusion "all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*In re Hunter*, 4 NY3d at 269 (internal citations omitted)).

Udell's present claims under the Equitable policies, involve the exact same set of facts as the prior matter filed in Nassau County. Plaintiff was given a "full and fair opportunity" to litigate claims under the Equitable policies in the Nassau County Court. The awarding of summary judgment in favor of defendant Roth in the prior action amounts to a "final conclusion" for the purposes of this court, even though plaintiff can still appeal and litigate the matter further in Nassau County. Since all the requirements for invoking res judicata are met, under New York's transactional analysis approach, plaintiff is barred from filing other claims under new legal theories based on the same facts. Therefore, all allegations based on the Equitable policies are barred under

the doctrine of res judicata and the complaint is dismissed as to these causes of action.

### ***Claims Under the Berkshire Policies***

Roth moves to dismiss all allegations in the complaint based on the Berkshire claim pursuant to CPLR §3211(a)(1). A party may move to dismiss a cause of action on the grounds that “a defense is founded upon documentary evidence” (*see* CPLR §3211(a)(1)). The defendant purports he was not involved with completing the medical portion of the Berkshire form, and offers documentary evidence consisting of the actual Berkshire policy application. Roth points out that, firstly, the medical form does not contain his signature. Secondly, the handwriting on the financial portion of the Berkshire application, which Roth acknowledges he completed, is different from the medical portion. To counter plaintiff’s allegation that he was never examined by a doctor, Roth provides an affidavit by a doctor who affirms that he examined Udell in connection with the Berkshire disability application, and the medical form from the purported examination. The doctor also states that he filled out the medical portion of the Berkshire application based on Udell’s answers to the questions on the form.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026).” (*Leon v Martinez*, 84 NY2d 83, 87-88 (1994).) A court is to accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.*).

However, under CPLR §3211(a)(1), the court is “not required to accept factual allegations that are plainly contradicted by the documentary evidence” (*Robinson v Robinson*, 303 AD2d 234, 235 (1st Dept 2003)). The defendant has the burden of demonstrating that the documentary

evidence resolves all factual issues and that the complaint fails as a matter of law (*id.*). “A dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

In the present case, both sides have submitted contradicting affidavits as to whether plaintiff Udell was examined by a doctor in relation to his Berkshire claims. It is not for the court to determine which party’s affirmation has more merit. Generally, opposing affidavits do not qualify as conclusive documentary evidence to support a dismissal under CPLR §3211(a)(1) as their contents are not essentially undeniable. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 (1st Dept 2004)).

But here, along with the doctor’s affidavit, the defendant also submitted as evidence a medical examination form, from the purported examination conducted for the Berkshire policy application. This adds credence to the defendant’s contention that Udell was examined by a doctor in relation to his Berkshire application, and would generally amount to conclusive documentary evidence in his favor. However, in the present situation the plaintiff alleges fraudulent behavior by the defendant and suggests “that defendant Roth worked with a physician to induce Berkshire to issue policies to uninsurable applicants . . . .” (§ 20, *Affirmation of Glenn Udell, May 16, 2005,*) Consequently, the doctor’s affirmation even though supported by a medical examination form does not amount to conclusive documentary evidence here. The court notes that additional discovery, resulting in production of the reports for the alleged blood tests performed during the medical examination, would amount to conclusive evidence.

The absence of Roth’s signature on the medical portion of the Berkshire application, and the difference in hand writing between the financial and medical portions, are also not conclusive

documentary evidence defeating plaintiff's allegations. "In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248, 248 (1st Dept 1995)). The court notes that the Berkshire medical form consisted mainly of questions that required a check mark to be placed next to the correct answer, and the limited hand writing on the form involved, mainly, naming the plaintiff and giving details about his personal physician. Therefore, there still exist questions of facts about who completed the Berkshire medical policy.

Consequently, the defendant has failed to resolve conclusively all factual issues as a matter of law and has not met his burden of demonstrating that his documentary evidence conclusively refutes all of plaintiff's allegations. Accordingly, the motion to dismiss as to these claims is denied.

**CONCLUSION**

Accordingly, it is hereby

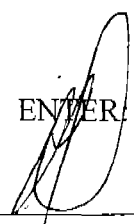
ORDERED that all claims based on the Equitable policies are dismissed.

ORDERED that the motion to dismiss claims based on the Berkshire policies is denied.

This constitutes the decision and order of the court.

DATED: August 1, 2005

**FILED**  
 AUG 08 2005  
 COUNTY CLERK'S OFFICE  
 NEW YORK

ENTER  


RICHARD S. ...