

Fiala v Metropolitan Life Insurance Co.

2006 NY Slip Op 30067(U)

March 29, 2006

Supreme Court, New York County

Docket Number: 0601181/1812

Judge: Herman Cahn

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

~~METROPOLITAN~~ **CAHN**

PART 49

PRESENT.
Index Number : 601181/2000
FIALA, EUGENIA J.

INDEX NO.

INDEX NO. _____

VS
METROPOLITAN LIFE INSURANCE

MOTION DATE

9/26/05

Sequence Number : 010

MOTION SEQ. NO.

010

CONFIRM/REJECT REFEREE REPORT

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

APR 03 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/29/06 Mc Q 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: IAS PART 49

-----X
EUGENIA J. FIALA, PAULETTE BELIUNAS
TERESA HAZEN, VIJAY J. SHAH, JOHN T.
BROPHY, IRA J. GELB, JUNE A. GELB, and
MARK D. SMILOW, on behalf of themselves and
All other similarly situated policyholders of Metropolitan
Life Insurance Company, and PAUL HAZEN and
RICHARD SCHWEINBERG, individually, as

Index No. 601181/00

Plaintiffs,

- against -

METROPOLITAN LIFE INSURANCE COMPANY,
METLIFE, INC., ROBERT H. BENMOSCHE,
CURTIS H. BARNETTE, GERALD CLARK, JOAN
GANZ COONEY, BURTON A. DOLE, JR., JAMES
R. HOUGHTON, HARRY P. KAMEN, HELENE L.
KAPLAN, CHARLES M. LEIGHTON, ALLEN E.
MURRAY, STEWART G. NAGLER, JOHN J.
PHELAN, JR., HUGH B. PRICE, ROBERT G.
SCHWARTZ, RUTH J. SIMMONS, AND WILLIAM
C. STEERE, JR.,

Defendants.
-----X

Herman Cahn, J.

Non-party Credit Suisse Group (CSG) moves (seq. no. 010) to vacate the
discovery order made by Special Referee Leslie S. Lowenstein on July 28, 2005, CPLR 3104(d).

The issue here is whether the disclosures that plaintiffs seek are material and necessary for the
prosecution of the action, and if so, whether plaintiff should be required to comply with the
Hague Convention practices in obtaining document production from CSG.

Background:

The factual background of this matter is fully set forth in the court's decision and order dated February 21, 2003, entitled *Shah v Metropolitan Life Ins. Co.*, Index Nos. 108887/00, 601181/00, as well as in the Appellate Division's partial affirmation of that decision, *Fiala v. Metropolitan Life Ins. CO*, 6 AD3d 320 [1st Dept 2004]. Familiarity therewith is presumed. The facts are repeated here only to the extent necessary for the within disposition.

In April of 2000, MetLife, previously a mutual life insurance company, entered into a "demutualization" proceeding whereby its policyholders received either cash or shares of MetLife, Inc., (MLI), a newly formed publicly traded company. MLI then participated in an Initial Public Offering whereby it sold shares to the public. Movant, CSG's subsidiary Credit Suisse First Boston (CSFB), along with Goldman Sachs, served as financial advisors to MetLife in connection with the demutualization and as co-lead-underwriters in the IPO. Additionally, CSG concurrently bought MLI shares in a private placement. Two of MetLife's and MLI's officers, defendants Robert Benmosche and Gerald Clark, were members of the CSG board.

This action was brought by a group of MetLife policyholders who objected to the terms of the demutualization, and essentially argued, that those terms were unfair to them. Additionally, plaintiffs alleged that MetLife's directors and senior officers breached their fiduciary duties by going forward with the demutualization. CSFB and Goldman Sachs were joined as defendants, upon the claim that they aided and abetted a breach of fiduciary duty.

The only reference to CSG's private placement is in the context of the alleged breach of fiduciary duty.

All defendants moved to dismiss. On February 21, 2003, this court granted the

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motions, and dismissed the claims. On April 27, 2004 the Appellate Division affirmed the dismissal of the claims, except for the claim that there was a discriminatory allotment of MLI shares to Armstrong Tire and Rubber, a large policyholder that had complained about the demutualization, and the claim that there was a failure to disclose to policyholders a purported plan to buy back MLI shares after the IPO, in the open market. All claims alleging breaches of fiduciary duty were dismissed, including the claims against CSFB and Goldman Sachs.¹ Currently, neither CSFB nor CSG is a party to the action.²

In 2004, Fiala served CSFB with a *subpoena duces tecum*, seeking production of documents. On April 27, 2005, Special Referee Leslie Lowenstein³ issued a discovery order directing CSFB to produce documents relating to its role in MetLife's demutualization. CSFB

¹ The Appellate Division summarized what issues remained in the action, in *Fiala v Metropolitan Life Insurance Company*, *supra*, 6 AD3d 320, 323 (1st Dept 2004) as follows:

Because the Fiala plaintiffs' primary claims for breach of fiduciary duty were properly dismissed, their claim against the advisor defendants for aiding and abetting a breach of fiduciary duty cannot stand (*see, e.g. Renner v Chase Manhattan Bank*, 2000 WL 781081, *20-21, 2000 US Dist LEXIS 8552 *63). The only fraud claims that survive are the ones based on the discriminatory allocation of shares to Armstrong and on the non-disclosure of the stock buy-back plan. However, since the complaint does not allege that the advisor defendants had anything to do with the complained-of allocations or with the non-disclosure of the buy-back plan, the claim against the advisor defendants for aiding and abetting fraud was properly dismissed (*see Kaufman v Cohen*, 307 AD2d 113, 126, 760 NYS2d 157).

² Subsequent to the April 27, 2004 decision, plaintiffs filed a Second Amended Consolidated Complaint, again adding CSFB as a defendant. However, on August 5, 2004, the parties stipulated to dismissal of CSFB as a party.

³ Special Referee Leslie Lowenstein was designated by this court to preside over discovery matters.

produced more than 165,000 documents.

On January 25, 2005, plaintiffs served CSG with a separate *subpoena duces tecum* seeking documents which stem from the relationship between CSG and two officer defendants Benmosche and Clark. Plaintiffs seek documents that CSG may have stemming from this relationship, regarding the MetLife demutualization and CSG's role in the demutualization. On February 18, 2005, CSG objected on the grounds that the document demands were overbroad, as well as irrelevant. However, CSG never actually moved to quash or vacate the subpoena. Subsequently, Benmosche and Clark were deposed pursuant to the April 27, 2005 discovery order. At their depositions, they gave no testimony regarding any connection between CSG, as opposed to CSFB, and this action, with the exception of the private placement by CSG.

On July 28, 2005, the Special Referee issued a discovery order directing CSG to search for and produce such documents as are material and relevant to the litigation. The Special Referee based his ruling on the rationale that “[CSG] *may* be possessed of documentation that is material and necessary with respect to the prosecution of the action. . .” (Kraus Aff., Ex. A at 20, *emphasis added*). The Special Referee did not cite any factual basis for this rationale. In fact, he stated that in the end this might be “nothing more than a fishing expedition” (*id.*). Subsequently, CSG filed this motion to vacate.

Discussion:

Material and Necessary

Non-Party CSG argues that the documents sought by plaintiffs, and whose demand for production was granted by the Special Referee, are not material and necessary to prosecution of the action. CPLR 3101 (a) requires full “disclosure of all matters material and

necessary in the prosecution or defense of an action. . .” (CPLR 3101 (a). This rule applies as well to disclosure by a non-party, “upon notice stating the circumstances or reasons such disclosure is sought are required” (CPLR 3101 (a)(4)).⁴ Courts have wide discretion in deciding whether disclosure is material and necessary (*Allen v Crowell–Collier Publishing Company*, 21 NY2d 403, 407 [1968]). The test is one of “usefulness and reason.” In other words, the disclosure sought must be “sufficiently related to the issues in the litigation to make the effort to obtain it in preparation for trial reasonable (*id.* at 406-407). The need for discovery must be weighed against the burden on the opposing party.

Plaintiffs seek disclosures from CSG after extensive disclosures have already been obtained from CSFB. As stated above, the only connection that CSG has to the matters at issue, besides Clark and Benmosche serving on CSG’s board, is CSG’s participation in the private placement. However, the cause of action relating to the private placement has been dismissed. It is CSFB, which served as MetLife’s financial advisor in the demutualization, that has a connection to the demutualization, not CSG. In fact, neither the depositions of Clark or Benmosche, nor the discovery hearing held before the Special Referee, revealed any facts that suggest that CSG is in possession of any documents related to the demutualization.⁵ Thus, the

⁴ Unlike the Second Department, the First Department no longer requires the party seeking disclosure to establish that there are “special circumstances.” *Schroeder v Consolidated Edison Company of New York, Inc.*, 249 AD2d 69, 70 [1st Dept 1998].

⁵ It is in fact “the better practice” to first depose witnesses, in order to determine whether there are relevant documents and what those documents are, so that the document request can be narrow (*Williams Real Estate Co., Inc. v Viking Penguin, Inc.*, 216 AD2d 27, 28 [1st Dept 1995]). Here, plaintiffs did depose witnesses, but as noted here, these depositions did not give them any factual basis to believe that CSG is in possession of relevant documents.

disclosure sought is not sufficiently related to the litigation to make the effort and cost necessary to obtain it, reasonable. Rather, since document disclosure has already been extensive, further attempts to obtain disclosure from CSG, on the present record, are unduly onerous, and outweigh the need for the document disclosure. The court also notes the argument advanced on behalf of CSG, that the search of its records ordered by the Special Referee as a necessary prelude to the production would be very expensive.

In view thereof, the motion is granted, and the subpoena is quashed.

Failure of CSG to Move to Quash the Subpoena Duces Tecum:

Plaintiffs argue that the motion should be denied because CSG failed to move to quash the subpoena. It is true that under the old rule a party’s sole method for objecting to a *subpoena duces tecum* was by motion to quash. However, in 1993, CPLR 3122 was amended to require only that the recipient of such a subpoena serve a response within 20 days (CPLR § 3122(a)). Then, the burden shifts and the party seeking disclosure may file a motion to compel pursuant to CPLR 3124 (*id.*). This amendment was specifically enacted by the legislature to “reduce the volume of motion practice” (*Ashley v City of New York*, 240 AD2d 352, 353 [2nd Dept 1997]).

Here, CSG sent detailed responses and objection on February 18, 2005. While it is true that CSG’s response was twenty three days from when the CSG executive was served and 21 days from when CSG’s counsel accepted service, the court excuses this brief delay. (*Stopnik v Rose Nederlander Associates, Inc.*, 690 NYS2d 563, 565 [1st Dept 1999]; *Fogelson v Barst & Mukamal*, 192 AD2d 321 [1st Dept 1993]). This is particularly the kind of situation where such discretion is appropriate, as CSG’s letter accepting service specifically states that the deadline for

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responding would be extended to February 18, 2005. Additionally, CSG's letter accepting service stated that CSG reserved its right to object, thus notifying plaintiffs that CSG might make such objections. As the court holds that CSG properly objected to the subpoena, it fulfilled its burden under CPLR 3122(a), and there was no need for it to file a motion to quash.

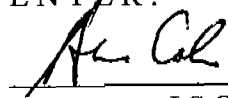
Consequently, the motion to vacate is granted.

Accordingly, it is

ORDERED that the motion to vacate is granted and the subpoena is quashed.

Dated: March 29, 2006

ENTER:



J.S.C

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