

Gucciardo v Charles J. Sellers & Co.

2006 NY Slip Op 30763(U)

October 5, 2006

Supreme Court, New York County

Docket Number: 105387/05

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOAN A. MADDEN

PART 11

Justice

GUCCIARDO, JAMES,

Plaintiff,

INDEX NO. : 105387/05
Motion Seq. 002 ,003

- v -

**CHARLES J. SELLERS & COMPANY;
HARTFORD INSURANCE COMPANY
& CONTINENTAL CASUALTY CORPORATION,**

Defendants.

FILED
OCT 17 2006
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In motion sequence 002, defendants, Hartford Insurance Company, (“Hartford”) moves and Charles J. Sellers & Company Inc., (“Sellers”) cross-moves pursuant to CPLR §3211(a)(1) to dismiss plaintiff’s first cause of action for breach of contract and in addition move to dismiss plaintiff’s causes of actions two through five pursuant to CPLR §3211(a)(7) for failure to state a claim . Defendant, Sellers, cross-moves to dismiss plaintiff’s first cause of action as time barred pursuant to CPLR §3211(a)(5). In motion sequence 003, defendant, Continental Casualty Company, (“CNA”) moves pursuant to CPLR §3211(a)(1) to dismiss plaintiff’s first cause of action for breach of contract and seeks dismissal of plaintiff’s second through fifth causes of action pursuant to CPLR §3211(a)(5) and CPLR §3211(a)(7). Plaintiff, James Gucciardo, (“Gucciardo”) opposes both motions and cross-motions, which are consolidated for disposition.

It is undisputed that Gucciardo purchased a disability insurance policy in 1994 from Hartford’s predecessor-in-interest, CNA, and that Sellers was the agent through which plaintiff purchased the policy. It is further undisputed that plaintiff filed for disability benefits in July 1997, when he was under 60 years of age, and received benefits of \$2000 per month, and after seven years

Hartford terminated the benefits. Based on Hartford's termination of benefits, Gucciardo commenced this action on May 9, 2005 seeking damages.

In his first cause of action, Gucciardo contends that Hartford breached the contract for disability benefits, which he alleges provided for benefits until age 65, but which benefits, as intended above, were terminated after seven years, when he was 62 years of age. In the second through fifth causes of actions, Gucciardo alleges defendants, Hartford and CNA released his confidential medical and psychiatric records without his permission to various unauthorized third parties, including the Medical Insurance Bureau ("MIB") and Equifax, that such releases were a violation of his right to privacy as guaranteed under state and federal constitutions and various other statutes, including the New York State Insurance, Public Health, and Civil Rights Laws, and the Federal Health Insurance Portability and Accountability Act of 1996, ("HIPAA").

To succeed on a motion to dismiss, based on a defense founded on documentary evidence, pursuant to CPLR §3211(a)(1) "the documentary evidence that forms the basis for the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Teitler v. Pollack*, 288 AD2d 302 [2nd Dept. 2001]; *see also Goshen v. Mutual Life Insurance Co.*, 98 NY2d 314, [Ct. App. 2002]; *see also 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [Ct. App. 2002]; *Leon v. Martinez*, 84 NY2d 83 [Ct App. 1994]; *Richbell Information Services, Inc. v. Jupiter Partners, L.P.*; 309 AD2d 288, 289 [1st Dept. 2003]; *Walton Management, LLC v. Walton Apartments, LLC*, 298 AD2d 277 [1st Dept. 2002]).

In support of dismissal, defendants submit a copy of plaintiff's July 27, 1994 application for Disability Income Insurance issued by CNA, which shows that plaintiff had selected an "L-7" plan. Also, submitted is a copy of the CNA policy schedule related to plaintiff's coverage for an "L-7" plan, which clearly states under the section marked "Maximum Period Payable" that coverage for sickness under 60 years is for 7 years or to age 65, whichever occurs first. These documents when read together sufficiently establish the terms of plaintiff's disability coverage entitled him to disability benefits based on illness for a period of seven years or until age 65, whichever occurred first. Based on the plaintiff's policy application and schedule the court finds sufficient documentary proof to establish that the defendants complied with the terms of the policy.

Furthermore, this court finds plaintiff's affidavit is insufficient to raise an issue of fact

regarding the documentary evidence. (*Sung v. Hong*, 254 AD2d 271 [2nd Dept.1998]). Plaintiff's carefully drafted affidavit does not challenge the validity of the documents nor contest receipt of the certificate of insurance and schedule; instead plaintiff argues that defendants failed to submit an affidavit that the certificate of insurance and schedule were sent to him.¹ In any event, that plaintiff was aware of the terms of the policy is demonstrated in the three page facsimile submitted by defendant in reply. The cover sheet indicates the facsimile was sent by Sellers to plaintiff at plaintiff's request. The facsimile includes a comparison of premiums and other relevant information, between plaintiff's present policy, which it indicates provides benefits for seven years or until age 65, whichever occurs first, and a policy which would provide benefits until age 65, without the seven year limitation. Based on the foregoing, this court concludes that plaintiff's claims are belied by the documentary evidence and defendants, Hartford, Sellers and CNA, are entitled to dismissal pursuant to CPLR §3211(a)(1). (*See Topel v. Realiastar Life Insurance Company of New York*, 6 AD3d 608 [2nd Dept. 2004]).

This court also finds that the breach of contract cause of action against Sellers, is time barred. Sellers sold the policy to plaintiff in 1994 and in 1997 was involved in communications to increase the policy terms to age 65. Even if this court accepts all of plaintiff's contentions as true and finds Sellers failed to properly execute the policy, the breach of contract claim against Sellers must be dismissed, since a breach of contract cause of action has a six-year statute of limitations, which begins to "accrue when the alleged wrongdoing occurs, not when the wrongdoing is

¹ Plaintiff argues that this court should not consider Hartford's explanatory affidavit as to the documentary evidence. However, the affidavit is not necessary for this court's determination, since the documentary evidence is sufficient on its face to establish the terms of the policy. Even if this court considered plaintiff's argument that the affidavit should be rejected as it lacks a certificate of authenticity, such an argument is without merit. In *Citibank (South Dakota) N.A. v. Santiago*, the Appellate Term, 1st Department, held that "[w]hen the person administering the oath for an out of state affidavit is a notary, the affidavit does not require a certificate authenticating the notary's authority."(*Citibank (South Dakota) N.A. v. Santiago*, 788 NYS2d 343 [1st Dept 2004] citing *Firstcom Broadcast Services v. New York Sound*, 184 Misc.2d 524 [2000]). In *Firstcom Broadcast Services v New York Sound*, Judge L. Billings, explained that "[s]ince RPL §299(3) designates a notary public as eligible to acknowledge a deed outside the state, under RPL §311(4) and (5), a separate authentication is not required for a notary public. Similarly, under CPLR §2309(c), acknowledgments by out-of-state notaries are permissible without separate authentication. (*Id* at 329-330). Accordingly, this court finds no defect in form and authentication of the affidavit.

discovered.” (*National Life Insurance Co v. Hall*, 111 Ad2d 681, 682 [1st Dept. 1985]; see also CPLR §213, subd.2). The documentary evidence shows defendant, Sellers, sold disability insurance to plaintiff in 1994, and in 1997 had correspondences regarding possible policy changes. As to Sellers, clearly any the cause of action based on an accrual date in July 1994, when the policy agreement was made is barred. Even if it is assumed that plaintiff’s cause of action accrued as of the June 1997 correspondence, since plaintiff did not commence this action until 2005, it is likewise time barred. Accordingly, plaintiff’s breach of contract cause of action against Sellers is dismissed pursuant to CPLR §3211(a)(5).

CPLR 3211(a)(7)

Defendants, Hartford, Sellers and CNA, seek dismissal of plaintiff’s remaining causes of action based on privacy violations, contending plaintiff failed to state a cause of action pursuant to CPLR §3211(a)(7).

On a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must liberally construe the complaint, accept as true the facts as alleged in the complaint and any submissions in opposition to the motion, and accord plaintiff the benefit of every possible favorable inference. (*See 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [Ct. App. 2002]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [Ct. App.1994]; *Gorelik v. Mount Sinai Hospital Center*, 19 AD3d 319 [1st Dept 2005], *lv app den* 6 NY3d 707 [2006]). The motion must be denied if from the four corners of the complaint, “factual allegations are discerned which taken together manifest any cause of action cognizable at law.” (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, *supra* (quoting *Polonetsky v. Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]); *see also Gorelik v. Mount Sinai Hospital Center, supra*).

As previously stated, plaintiff alleges that, Hartford and CNA released his confidential medical and psychiatric records to unauthorized third parties, including the Medical Insurance Bureau (“MIB”) and Equifax without his permission, and that such releases violated of his rights to privacy as guaranteed under state and federal constitutions and various other statutes including the New York State Insurance, the Public Health, and Civil Rights Laws and the Federal Health Insurance Portability and Accountability Act of 1996, (“HIPAA”).

First, as to Sellers, the complaint fails to set forth any factual allegations regarding the alleged disclosure. (*See Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [Ct. App.1977]). The complaint and plaintiff's affidavit in opposition to the motion, simply allege that Hartford and CNA made the disclosures. In addition, plaintiff's facsimile regarding unauthorized disclosures, dated July 14, 1999, accuses CNA of the unauthorized disclosures and further states that "[w]hen the matter was handled by Charles Sellers, it was handled in a professional and proper manner." Therefore, Sellers' motion pursuant to CPLR §3211(a)(7) is granted and second through fifth causes of actions are dismissed as against Sellers.

Defendant, Hartford and CNA argue that plaintiff has failed to state any facts in support of his allegations that they released his records, and that he fails to identify sections or provision of the statutes he cites. However, in the complaint and his affidavits, plaintiff alleges that Hartford and CNA disclosed health information to a third-party, Work Up, LLC, M.I.B. and Equifax. The record includes letters from agents of Hartford's subsidiary CNA stating that plaintiff's files were forwarded to a Work Up, LLC., as well as reply a correspondence from plaintiff stating his disapproval of the disclosures.² Thus, contrary to defendant's arguments, plaintiff has alleged facts in support of his allegations.

Furthermore, at this stage of the pleadings, where the particulars of any disclosures are within defendants' knowledge and where once the particulars are ascertained through discovery, plaintiff's pleadings can be amplified, defendants' motion to dismiss on this ground must be denied. In doing so, this court makes no determination as to the viability of the claims nor applicability of the statutes which plaintiff cites.

Accordingly, it is

ORDERED that the motion of defendant, Hartford Insurance Company is granted only to the extent of dismissing the first cause of action as asserted against Hartford Insurance Company, and the remainder of the motion is denied; it is also

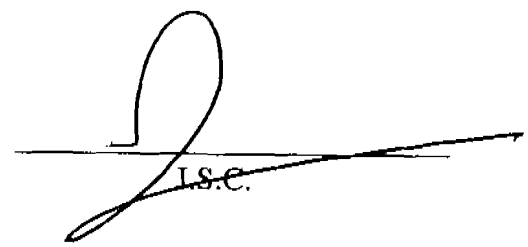
2

The letters from CNA dated June 11, 1999 and June 16, 1999 referencing the release of plaintiff's records to WorkUp, LLC., as well as plaintiff's letter expressing his disapproval of the disclosures. [Hartford Affidavit Exh. 6 & 7, 8]

ORDERED that the motion of defendant, Continental Casualty Company is granted only to the extent of dismissing the first cause of action as asserted against Continental Casualty Company, and the remainder of the motion is denied; also

ORDERED that the cross-motions of defendant, Charles J. Sellers & Company, Inc., are granted and the complaint is dismissed in its entirety as to defendant, Charles J. Sellers & Company Inc.

Date: October 5, 2006



I.S.C.

FILED
OCT 17 2006
NEW YORK
COUNTY CLERK'S OFFICE