

Schorr v Guardian Life Ins. Co. of Am.

2006 NY Slip Op 30813(U)

May 27, 2006

Supreme Court, New York County

Docket Number: 116302/05

Judge: Rolando T. Acosta

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

Jerome Schorr,

Plaintiff,

- against -

The Guardian Life Insurance Company of
America and Itzhak Kadosh,

Defendant.

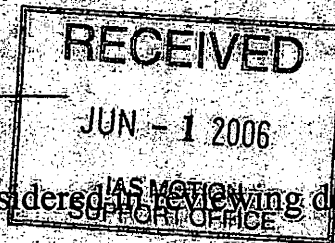
DECISION/ORDER

Index No. 116302/05

Motion Seq. 1

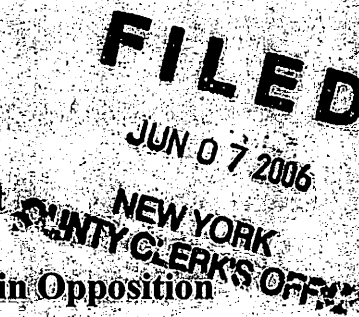
Present:

Hon. Rolando T. Acosta
Supreme Court Justice



The following documents were considered in reviewing defendant's motion to dismiss pursuant to CPLR § 3211(a)(7):

Papers	Numbered
Notice of Motion, Affirmation	1, 2 (Exh. A-F)
Memorandum of Law in Support	3
Affidavit, Memorandum of Law in Opposition	4 (Exh. 1-7), 8



In his Summons and Verified Complaint dated November 22, 2005, plaintiff Jerome Schorr ("Schorr"), an insurance broker, alleges that defendants Guardian Life Insurance Company of America ("Guardian") and Itzhak Kadosh ("Kadosh"), also an insurance broker, wrongfully convinced an insured, Israeli Aircraft

Handwritten signature/initials: C AS [Signature]

[*.2]

Industries International, Inc., and two of its subsidiaries, to obtain from Guardian group life, health, and dental insurance policies through Kadosh as the broker, rather than Schorr. Plaintiff alleges that Guardian issued a separate quote for insurance coverage to Kadosh that was lower than the quotes it had issued to Schorr, which was in contravention of law. Thus, Schorr argues that he was financially injured as a result of defendant's improper conduct, i.e., Guardian's actions prevented him from earning commissions on the sale of insurance to Israeli Aircraft. In his complaint he alleges causes of action for breach of the covenant of good faith and fair dealing, and tortious interference with existing and prospective contracts. ¹ Defendant Guardian in turn moves to dismiss the complaint in its entirety pursuant to CPLR § 3211(a)(7) for failure to state a cause of action.

In evaluating a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350 (1st Dept. 2000); see also Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001)(motion must be denied if "from [the]four

¹ Plaintiff concedes in his Memorandum of Law in Opposition to defendants' motion that he does not have a viable cause of action for tortious interference with existing business relations.

corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"); Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept 1998) ("so liberal is th[is] . . . standard that the test is simply 'whether the pleading has a cause of action,' not even 'whether he has stated one'").

In the instant action, defendants' motion to dismiss plaintiff's complaint is granted. Plaintiff's first cause of action alleges Guardian breached the implied covenant and fair dealing which he argues was created when he and Guardian entered into a Selling Agreement in 1973 ("the agreement"). However, the agreement explicitly states that the only parties to the agreement are Schorr and Spaudler and Warshall, Ltd. ("S&W"), an insurance agency which, pursuant to the terms of the agreement, authorized Schorr to send to Guardian applications for insurance policies. The agreement further provided that Guardian is not a party to the agreement except to the extent of its endorsement. The endorsement provided that the only way in which Guardian could become a party to the agreement was to give written notice to Schorr that S&W's agreement with Guardian was terminated and that Guardian would be continuing the agreement in full force and effect. This was never done. Thus, as there was no contract between Schorr and Guardian, there can be no implied duty of fair dealing between the two. I.S. Sahni, Inc. v.

Scirocco Fin. Group, Inc., 2005 WL 2414762 (S.D.N.Y. Sept. 28, 2005); G&R Moojestic Treats, Inc. v. Maggie Moo's Int'l, 2004 WL 1110423 (S.D.N.Y. May 19, 2004). In any event, even if it could be found that Schorr and Guardian were parties to the 1973 agreement, there would still be no implied duty of fair dealing inasmuch as the agreement expressly states that it may be terminated at any time by either party and thus was terminable at will. Thus the agreement could be terminated by either party at any time for any reason or even for no reason, and thus was not subject to the implied duty of good faith and fair dealing. Murphy v. American Home Products Corp., 58 N.Y.2d 293 (1983); See also Interweb, Inc. v. iPayment, Inc., 12 A.D.3d 164 (1st Dept. 2004) (an agreement that is terminable at will is not subject to the implied duty of good faith and fair dealing); Lipsky v. Guardian Life Ins. Co. Of America, 238 A.D.2d 310 (1st Dept. 2000).

Plaintiff has likewise failed to state a cause of action for tortious interference with prospective business relations. In his complaint, Schorr alleges that as a result of Guardian's actions Israeli Aircraft engaged Kadosh as a broker to purchase insurance rather than Schorr and thus prevented Schorr from earning commissions on those prospective insurance sales. However, what is fatal to plaintiff's claim is that Guardian would be a party to the prospective business relations and "only a stranger to a contract, such as a third party, can be liable for


tortious interference with a contract.” Koret, Inc. v. Christian Dior, S.A., 161 A.D.2d 156, 157 (1st Dept. 1990), lv denied, 76 N.Y.2d 714 (1990). Guardian, as the carrier, is the party in privity with the insured under the insurance policy, and thus cannot be held liable for interference with its own contract. Winicki v. City of Olean, 203 A.D.2d 893 (4th Dept. 1994). Accordingly, based upon the foregoing, it is hereby

ORDERED that defendants’ motion to dismiss the complaint in its entirety is **GRANTED**.

This constitutes the Decision and Order of the Court.

Dated: May 27, 2006

ENTER

SO ORDERED

ROLANDO T. ACOSTA
 Rolando T. Acosta, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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 COUNTY CLERK'S OFFICE

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