Weisel v Provident Life & Cas. Ins. Co.

2007 NY Slip Op 30024(U)

March 5, 2007

Supreme Court, New York County

Docket Number: 0600759

Judge: Judith J. Gische

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SCANNED ON 3/12/2007

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

PRESENT: JUDITH J. GISCHE PART 10
Justice

RONALD WEISEL,

- v -

PROVIDENT LIFE & CASUALTY INS. CO.,

INDEX NO. 600759/05

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

	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
MAR 12 2007
COUNTY NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: MAR 05 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

RONALD WEISEL,

Plaintiff,

-against-

PROVIDENT LIFE AND CASUALTY INSURANCE COMPANY *et al*

Defendants.

----------x

Decision/Order
Index No.: 600759/05
Seq. Nos. : 002 & 003

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Sequence No. 002	
Defs' NM [§ 3212] RICO claim (sep back)	1
Defs' affid (RJL) w/exhs	2
Pltf's x-motion w/MSH affirm. RW affid	3
Pltf's exhibits in opp & support (sep back)	4
Pltf's affirm in reply & further support (MSH) w/exh	5
Motion Sequence No. 003	
Defs' motion [reargue]	1
Defs' affirm in support (SRM) w/exhs	2

FILED
MAR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff has asserted a number of claims against defendants who are, collectively, entities that provided him with disability insurance. Defendants previously brought a preanswer motion to dismiss ("first motion to dismiss"), and plaintiff cross moved to amend his answer. The court severed and dismissed certain causes of

action that plaintiff had asserted, but permitted plaintiff to amend his complaint to assert a cause of action (6th), alleging a violation of the civil Racketeering Influenced Corruption Organizations Act ("RICO"). The amendment was permitted, notwithstanding arguments by the defendants that plaintiff's claim was time barred, for the reasons set forth in the court's decision and order of February 14, 2006.

The amended complaint has now been served. Defendants did not answer, but instead moved to reargue and renew the court's decision allowing plaintiff to serve the amended complaint asserting the RICO claim. Defendants have also separately moved to dismiss the amended complaint that the court previously gave permission to serve. Plaintiff has now cross moved for permission to serve a second amended complaint to include certain additional factual allegations, largely in response to defendants' reargument motion. After the motions were brought, but before they were submitted to the court, defendants served an "amended partial answer" to the plaintiff's amended complaint. The motions were previously consolidated for consideration and disposition by order of this court dated October 5, 2006.

Motion to reargue

The gravamen of defendants' motion to reargue is that plaintiff's RICO claim is time barred, as a matter of law, and the court misapplied the law when it decided that his RICO action would be timely because it would be brought within four (4) years of plaintiff's discovery of the alleged pattern of racketeering. Defendant contends that the court relied upon New York law [Niagra Mohawk Power Corp. v. Freed, 265 AD2d 938 (4th Dept 1999)], but there is United States Supreme Court precedent [Rotella v. Wood, 528 US 549 (2000)] directly on point, holding that the cause of action accrues at the

time of injury.

As more fully set forth below, the court grants reargument of defendant's original motion to dismiss, and the court's decision that plaintiff could serve an amended complaint to assert a RICO cause of action. The court does so to expressly address what effect, if any, the decision in Rotella has on the decision it made. For the reasons expressed herein, the court finds that the Rotella decision does not affect the outcome of its decision, therefore it adheres to its original decision and order, which allowed plaintiff to amend his complaint to assert the RICO claim.

The decision in Rotella does not preclude plaintiff's RICO claim, as defendants argue. Although Rotella did resolve a split in the circuits about the statute of limitations applicable to claims brought under "RICO," (a RICO claim becomes ripe at the time of the injury), the U.S. Supreme Court also recognized that there are situations where a court might have to apply principles of equitable tolling if "a pattern [of racketeering] remain[ed] obscure in the face of a plaintiff's diligence in seeking to identify it . . ." Rotella v. Wood, *supra* at 560 - 561. In such cases, the limitations period does not begin to run until plaintiff discovers, or should reasonably have discovered, the RICO injury (the doctrine of "equitable tolling"). Rotella v. Wood, supra.; In re Tobacco Litigation (Falise v. American Tobacco Co.), 5/9/2000 NYLJ 38, (col. 2) (*n.o.r.*); *See, also*: "*Supreme Court on Start of RICO Limitations Period*," 4/21/00 NYLJ 1, col 1.; Broad v. King, 7/27/00, 23, col. 4 (Sup Ct, Goodman J.). In light of plaintiff's factual allegations (all of which must be accepted as true), that defendants actively concealed their "scheme," and it was not until a number of lawsuits were initiated against defendant UnamProvident Corp., and other states took steps to investigate their

practices, that he learned about the pattern of wrongful claim denials and terminations of disability policies, even under Rotella, plaintiff's RICO claims make out an equitable tolling claim sufficient to survive a pre-answer motion to dismiss. The factual dispute about whether (and when) plaintiff received information sufficient to alert a reasonable person to the probability that he had been misled, and whether plaintiff responded to such notice with reasonable diligence is not an issue before the court at the present time, but for the trier of fact to decide. *See*: In re Nine West Shoes Antitrust Litigation, 80 F Supp2d 181 (SDNY 2000).

Defendants do not claim that the court misapprehended the law, but claim that there is legal precedent on point that they overlooked. CPLR § 2221 (d); Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979). While it may be, as plaintiff suggests, merely a different legal strategy advanced by defendants, the court finds that these new arguments should be considered to clarify why plaintiff is being allowed to amend his complaint. Thus, the court will exercise its discretion and consider defendant's motion, even though there has been no change in the law in the intervening time. Hutt v. Kidder Peabody & Co., Inc., 243 AD2d 332 (1st Dept 1997).

Given defendants' arguments regarding the the timeliness of plaintiff's RICO action, plaintiff seeks permission to amend his complaint (for the second time) to expressly assert the claim of equitable tolling. Since defendants served a partial amended answer to his (first) amended complaint, he would have the right to do so, even without court order, provided he did so within 20 days of being served with the answer. CPLR § 3025. Defendants have not, however, withdrawn their opposition to plaintiff's motion to amend. Consequently, the court considers the arguments on the

merits and decides to grant the motion to amend. Plaintiff may serve a second amended complaint in the form attached to his papers within Fifteen (15) Days of the date of this decision/order. Although plaintiff did not expressly assert the doctrine of "equitable tolling," he has all along alleged that defendants developed a "scheme" consisting of phony doctors, etc., and that the scheme was concealed and therefore unknown to him for a number of years, until at least 2002, when a flurry of litigation began across the country against the defendants. *For example*: Hangarter v. Paul Revere Life Ins Co., 236 FSupp2d 1069 (N.D. Ca. 2002). There is no prejudice to defendant by permitting plaintiff to serve an amended complaint which further elucidates a claim of which defendant is already aware of, and which comes so early in this case. CPLR § 3025.

For the reasons that follow, the court also grants reargument of its decision to allow plaintiff's punitive damages claim to proceed. The defendants contend that the court misapplied the law when it originally denied that relief in the February 14, 2006 order. They also argue that GBL § 349 (h) not only limits plaintiff to his actual damages, it also places a $1,000 cap on such damages, therefore GBL § 349 cannot form the predicate basis for his punitive damages claim. They argue further that if the court grants their present motion, dismissing plaintiff's RICO claim upon reargument, then the punitive damages claim should be dismissed in its entirety as well because there would be no predicate basis for it. Elsky v. KM Ins. Brokers, 139 AD2d 691 (2nd Dept 1988). Alternatively, defendants contend that plaintiff did not properly plead his punitive damages claim.

Defendants' statement of the law, that punitive damages are not available for

claims that an insurer committed a deceptive act under GBL § 349, is an accurate statement of the law. Makastchian v. Oxford Health Plans Inc., 281 AD2d 197 (1st Dept 2001). Therefore when the court decided that plaintiff GBL § 349 could be a predicate for his punitive damages claim, the court misapplied the law. The language appearing on page 9 of its February 14, 2006 decision ("Plaintiff can however assert his claim for punitive damages on his RICO and deceptive business practices causes of action") is, therefore, modified to read as follows: "Plaintiff can however assert his claim for punitive damages on his RICO cause of action." To the extent, however, that plaintiff urges the court to dismiss the punitive damages claim altogether as not being sufficiently articulated, or without a predicate basis, the arguments are rejected. Since the RICO claim still stands, this surviving claim can be a predicate basis for the punitive damages claim. Nor is the court persuaded that the punitive cause of action is improperly pled.

Motion to Dismiss Amended Complaint

Now that plaintiff has served his amended complaint, defendants raise a number of arguments as to why the RICO, punitive damages and deceptive consumer practices (e.g. GBL § 349) claims should all be dismissed. The arguments they make in support of this new dismissal motion, insofar as the punitive and GBL § 349 claims are concerned, are virtually indistinguishable from defendants' arguments in support of their motion to reargue (*supra*) presented before the court. Those arguments are no more effective in support of their motion to dismiss than they were in support of the reargument motion, and though considered, they are denied as the basis for dismissal of the amended complaint. Therefore, the motion to dismiss the amended complaint

based upon defendants' argument that the RICO claim is time barred, is denied. It is also denied insofar as defendants' argument that there is no predicate basis for the recovery of punitive damages.

Defendant has presented, however, a third argument which sets forth an altogether new theory for why plaintiff's RICO claim should be severed and dismissed. Plaintiff vigorously contends this is nothing more than a thinly veiled attempt to (yet again) reargue the court's February 14, 2006 decision, allowing the RICO claim to withstand pleading stage dismissal. Given, however, the conflicted pleading history of this case, and the importance of the issues raised, the court will address the merits of these arguments.

Defendants argue that plaintiff's RICO claims are barred by McCarran-Ferguson Act ["MFA"] because New York already has comprehensive system in place to address insurance claims handling practices, and they either do not provide for a private cause of action (Ins Law § 2601[c]) or set damages at a very modest level (GBL 349), whereas RICO damages awards can be much greater. Therefore, they contend, allowing the plaintiff to assert a RICO claim would effectively circumvent State law, and impermissibly allow Federal law to intercede into an area expressly left to the state under the MFA. *See*: Humana v. Forsyth, 525 US 299, 304-5 (1999).

In relevant part, the MFA provides that "no Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." *See*: Humana v. Forsyth, 525 US at 313. This effectively reverses the law of preemption, making it so that state law preempts federal law where

insurance is concerned. "Impairment," as used in this context means that the Federal law at issue (e.g. RICO) directly conflicts with or frustrates a state's law or administrative polices or regime. Humana v. Forsyth, *supra* at 310.

Under New York law, punitive damages on a claim that "arises from" or "has its genesis in" a contractual relationship are only recoverable upon a showing that defendant's conduct was directed at the public generally ("public wrong"). Rocanova v. Equitable Life Assurance Society of the U.S., 83 NY2d 603, 613 (1994); New York Univ. v. Continental Ins. Co., 87 NY2d 308, 316 (1995). This is consistent with the black letter law of this state, that where a party to a contract is merely seeking to enforce its bargain, a tort claim will not lie. Rocanova v. Equitable Life, supra; New York University v. Continental Ins. Co., supra.

Defendants also correctly state the insurance laws of this state (Ins Law § 2601 [c]), do not permit a private cause of action against an insurance company for an unfair claim settlement. It is also accurate that section 349 of the General Business Law does not allow for the recovery of punitive damages and caps damages at the relatively modest level of $1,000.

Although this state does not recognize tort claims where all that is involved is merely a private contract dispute as to policy coverage [New York Univ. v. Continental Ins. Co., supra; Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, (1999)], here plaintiff alleges a pattern of activity that may be addressable under RICO [United States Fire Insurance Co. v. United Limousine Service, 303 FSupp2d 432 (SDNY 2005)]. Plaintiff has cited numerous instances were these defendants have, in various states, been sued for their business practices and investigations been undertaken into

their claims practices. These circumstances and allegations state more than a simple contract dispute between plaintiff and defendants about his policy coverage.

Defendant's argument, that private enforcement of plaintiff's claims under RICO would somehow impair New York's policies or administrative regime is hyperbole. New York has a well developed public policy of allowing claims predicated on deceptive acts or practices that are "consumer oriented," to be enforced privately. GBL § 349 [h]. Gaidon v. Guardian Life Ins. Co. of America, *supra*. Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43 (1999). Application of RICO would neither invalidate or supercede any of New York's laws. Humana v. Forsyth, 525 US at 308. Rather, it is simply another statute to combat fraud in any number of situations. *See*: Breslin Realty Development Corp. v. Schackner, 397 F.Supp.2d 390 (EDNY 2005); Ritchie v. Carvel Corp., 180 A.D.2d 786 (2nd Dept 1992); Weizmann Institute of Science v. Neschis, 421 F.Supp2d 654 (S.D.N.Y. 2005). The insurance industry is no exception and the laws in place cannot logically be construed as a policy in New York State of being tolerant of insurance fraud against its citizens. *See*: American Medical Ass'n v. United Healthcare Corp., Slip Copy, 2006 WL 3833440 (S.D.N.Y. 2006.); Baisch v.Gallina, 346 F.3d 366 (2nd Cir 2003); Joseph Mclaughlin, as Executor of the Last Will and Testament of Emanuel A. Morse v. American International Life Assurance Company of New York, 181 AD2d 444 (1st Dept 1992) (RICO claim dismissed because pattern not established). The laws and policies of New York state are not incompatible with the Federal RICO statute, but complementary. Simpson Elec. Corp. v. Leucadia, Inc., 72 NY2d 450 (1988). Accordingly, defendants' motion to dismiss the amended complaint is denied.

Conclusion

Defendants' motion to reargue the court's February 14, 2006 decision is granted only to the extent set forth above and the court modifies that decision in the manner provided. Otherwise, the February 14, 2006 remains unmodified. Plaintiff's cross motion to serve a second amended complaint is granted. Defendants' motion to dismiss the amended complaint is denied in all respects.

Any relief not addressed has nonetheless been considered by the court and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
March 5, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.

FILED
MAR 12 2007
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