

Ehrenspeck v Spear, Leeds & Kellogg

2007 NY Slip Op 31163(U)

May 3, 2007

Supreme Court, New York County

Docket Number: 0600337/2002

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49m

Robert S. Ehrenspeck

INDEX NO.

606337 102

MOTION DATE

3/12/07

MOTION SEQ. NO.

004

MOTION CAL. NO.

- v -

Spear, Leeds & al

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

MAY 10 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/3/07

Hen Cal

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
ROBERT S. EHRENSPECK,

Plaintiff,

-against-

Index No.: 600337/02

SPEAR, LEEDS & KELLOGG, SPEAR,
LEADS & KELLOGG-FUTURES DIVISION,
SPEAR, LEEDS & KELLOGG LONG
TERM DISABILITY INCOME PLAN and FIRST
UNUM LIFE INSURANCE COMPANY,

Defendants.

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MAY 10 2007
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HERMAN CAHN, J.:

Defendants Spear, Leeds and Kellogg, L.P. (now known as Goldman Sachs Execution & Clearing, L.P.) and Spear Leeds & Kellogg-Futures Division Long Term Income Disability Plan (together, Spear, Leeds & Kellogg) move for leave to reargue the court's decision and order dated January 27, 2007, denying the motion for summary judgment dismissing the first and second causes of action and dismissing Spear, Leeds & Kellogg's cross claim against First Unum Life Insurance Company (First Unum), CPLR 2221.

Spear, Leeds & Kellogg argues that the order was "clearly erroneous" in three respects: (1) the court overlooked the law concerning Spear, Leeds & Kellogg's duty, as administrator of the group disability insurance plan, to plaintiff, who was not an employee of the firm; (2) the court overlooked the lack of evidence that Spear, Leeds & Kellogg breached the implied agreement allegedly created in 1993, when plaintiff first began clearing trades through Spear, Leeds & Kellogg; and (3) in sua sponte dismissing Spear, Leeds & Kellogg's cross claim against First Unum, the court misapprehended the nature of the cross claim and overlooked several bases

for the cross claim.

The motion is denied.

Spear, Leeds & Kellogg has not demonstrated that the court overlooked any relevant facts, misapprehended the applicable law or, for any other reason, mistakenly arrived at its prior determination denying summary dismissal of plaintiff's contract-based claims against Spear, Leeds & Kellogg and the cross claim against First Unum. CPLR 2221(d); Spinale v 10 West 66th Street Corp., 193 AD2d 431, 432 (1st Dept 1993); William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 (1st Dept), lv dismissed in part, denied in part, 80 NY2d 1005 (1992). A motion to reargue is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. Rubinstein v Goldman, 225 AD2d 328, 328-29 (1st Dept), lv denied, 88 NY2d 815 (1996).

While it is law of the case that Spear, Leeds & Kellogg was not plaintiff's employer (Ehrenspeck v Spear, Leeds & Kellogg, et al., 389 F Supp 2d 485, 490 [SD NY 2005]), the court did not misapprehend the law by imposing upon Spear, Leeds & Kellogg the implied contractual duties of an employer to its employees to administer the group insurance plan according to certain legal standards of care. In Lipton v Unumprovident Corp. (10 AD3d 703 [2d Dept 2004]), the court held that Spear, Leeds & Kellogg, in its role as policyholder and administrator of the same group disability plan, owed a commodities trader who, like plaintiff, was not an employee, but cleared his trades through Spear, Leeds & Kellogg, a common-law duty of good faith in administering the plan.

Again, Spear, Leeds & Kellogg makes the argument that no valid consideration existed

for any implied agreement to procure long-term disability coverage for plaintiff. The court previously ruled that:

Valid consideration for an implied contract was created when Spear, Leeds & Kellogg offered services to plaintiff, including a reduced commission rate and a full line of insurance coverage, as an inducement for him to trade with Spear, Leeds & Kellogg rather than any other clearing firm. See Antinora v Nationwide Life Ins. Co., 76 Misc 2d at 605 (“real consideration” for contributory group health insurance was employee working for the defendant employer).

Spear, Leeds & Kellogg now argues in its reply papers on this motion for reargument that plaintiff’s brother testified at his deposition that the disability insurance was offered to “everybody. It wasn’t limited to Spear, Leeds & Kellogg customers, brokers that cleared through them” (David Ehrenspeck Dep. at 45).

This testimony was not submitted on the prior motion.¹ Even if it was and even if it was not presented for the first time in Spear, Leeds & Kellogg’s reply papers to this motion (Batista v Santiago, 25 AD3d 326 [1st Dept 2006] [party seeking summary judgment cannot introduce new evidence in reply papers]), it does not effect the court’s prior decision. Regardless of plaintiff’s brother’s belief as to who the insurance was being “offered to” by Ms. Jordan, coverage under the policy, by its terms, was only available to two classes of people: (1) “Owners,” and (2) “All Other Employees including Brokers who clear through SPEAR, LEEDS & KELLOGG - FUTURES DIVISION” (see Kennedy Reply Affirm., Exh. E at p. 3: Policy, § I[1]).

With respect to whether an implied agreement was created in 1993 and subsequently breached, that is a question of fact for trial.

¹ Only pages 22 to 31 of the deposition testimony of David Ehrenspeck were submitted by the plaintiff in opposition to the defendants’ motions for summary judgment (see Conway 8/28/06 Affirm., Exh. 8).

The court dismissed, sua sponte, Spear, Leeds & Kellogg's cross claim against First Unum on the ground that the cross claim was based on a finding of coverage under the policy, by estoppel or otherwise, and First Unum's motion for summary judgment dismissing the plaintiff's claim for coverage under the policy and his claim that First Unum should be estopped from denying coverage, was being granted (see Order at p. 16).

Spear, Leeds & Kellogg argues that its cross claim does not depend on a finding of coverage under the policy for two reasons. First, if it is found liable to the plaintiff for breach of an implied contract, Spear, Leeds & Kellogg argues that it will have a clear claim for unjust enrichment against First Unum, because First Unum has refused to return plaintiff's premium payments. Secondly, it makes the argument that if Spear, Leeds & Kellogg were held liable to plaintiff due to its alleged failure to properly enroll him in the long-term disability plan, it would be entitled to relief from First Unum if First Unum did not properly inform it as to how to enroll prospective insureds.

The cross claim does not state a claim for unjust enrichment. There is no allegation in the amended complaint or any of the pleadings that First Unum has refused to return the premiums or that its retention of the premiums is unjust in any way. First Unum proffers documentary evidence showing that plaintiff's counsel was directed, on two occasions in writing, to contact Spear, Leeds & Kellogg's human resources or payroll department to request that they process a refund of the premiums. It contends that because the policy was "self-accounting," First Unum will need documentation from Spear, Leeds & Kellogg showing the amount of the premium it transmitted on plaintiff's behalf. If a valid claim for unjust enrichment arises in the future, then Spear, Leeds & Kellogg is free to commence a plenary action against First Unum at that time.

As for the second basis for a cross claim against First Unum, again, the existing cross claim makes no allegation that First Unum failed to properly inform or educate Spear, Leeds & Kellogg as to how to enroll its employees and traders. More importantly, Spear, Leeds & Kellogg cites no provisions of the plan or the policy or any common law or statutory duty to support such a claim.

For the foregoing reasons, the motion for reargument is denied in all respects.

This constitutes the decision and order of the court.

Dated: May 3, 2007

ENTER:



J.S.C.

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