Brenner v Hartford Life Ins. Co.
2007 NY Slip Op 32552(U)
August 8, 2007
Supreme Court, New York County
Docket Number: 0601630/2004
Judge: Walter Tolub
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 8/17/2007
[* 1]

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

PRESENT: WALTER B. TOLUB

PART

Index Number : 601630/2004

BRENNER, STEPHEN L., M.D.

vs

HARTFORD LIFE INSURANCE

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

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 is DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/8/07

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

---x

STEPHEN L. BRENNER, M.D.,

Plaintiff,

Index No. 601630/04

-against-

Mtn No. 003

HARTFORD LIFE INSURANCE COMPANY,

Defendant.

---x

FILED
AUG 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

Plaintiff moves for summary judgment in this declaratory judgment action wherein plaintiff seeks an order (1) that he is totally disabled within the meaning of the disability income insurance contract issued by defendant, (2) that plaintiff is entitled to receive continuing disability benefits under that policy, and (3) that any premiums due under the policy are waived during the period of plaintiff's disability. For the reasons stated below, plaintiff's motion is denied.

Background

On January 29, 1993, defendant issued disability income policy # P4004423 (the policy) to plaintiff, a doctor licensed to practice medicine in both New York and New Jersey. Under the policy, payments were to be made to plaintiff in the event that he became totally disabled. According to plaintiff, despite the fact that he paid all the premiums due under the policy, and

[* 3]

complied with all of the other policy terms and conditions, defendant has failed to pay plaintiff's ongoing disability claim.

Specifically, plaintiff alleges that, on September 24, 1999, he was involved in a four-car accident that caused him to become totally disabled. It is undisputed that at the time of this accident, the policy was in force, and that benefits were paid to plaintiff under the policy for a period of four years after the claim was submitted by plaintiff. However, on June 30, 2004, defendant, through its agent Trustmark Insurance Company, sent plaintiff a letter formally denying the disability claim at issue and demanding that plaintiff return $595,840 of the sums paid under the claim. See Plaintiff's Affidavit, Exh. C.

The June 30, 2004 declination letter (the disclaimer) denied plaintiff's claim based upon (1) material misrepresentations made on the 1992 insurance application (including a failure to disclose the true amount of disability insurance plaintiff had acquired prior to making the application at issue), and (2) the fact that plaintiff's injuries did not result from a covered sickness, as defined in the policy.

Prior to receipt of the disclaimer, plaintiff initiated the instant action seeking the declaration requested herein. Soon thereafter, defendant sought removal of the action to the Southern District of New York (SD NY) federal court, based upon diversity of the parties. See 28 USC § 1441. However, by

[* 4]

September 23, 2005 order of Southern District of New York Judge Deborah Batts, the action was remanded to this court, based upon the failure to satisfy the court's jurisdictional amount in controversy requirements. See Plaintiff's Affidavit, Exh. D.

Upon remand, defendant sought to dismiss this action based upon forum non conveniens. That motion was denied in an August 9, 2006 Decision and Order of this court. See Plaintiff's Affidavit, Exh. E. Contemporaneous with seeking dismissal of this action, defendant initiated a federal court action in New Jersey against both plaintiff and Ronald Rosenfeld (Rosenfeld), the insurance broker that sold plaintiff the policy.[1] That action is still pending, awaiting this court's decision and order on plaintiff's instant motion.

Discussion

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the

[1] The District of New Jersey federal court action is entitled Hartford Life Insurance Company v Rosenfeld, Civil Action No. 05-5542 (KSH).

existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Choice of Law

This court must first address whether New York or New Jersey law applies to this action, and "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." Matter of Allstate Ins. Co. (Stolarz), 81 NY2d 219, 223 (1993).

The importance of this issue cannot be overstated, as the application of each state's law mandates a differing conclusion both in the instant motion and in this action. The wording of both New York and New Jersey's applicable statutes are almost identical, however, each state has interpreted its own statute differently, such that the resolution of the choice of law issue will greatly affect the outcome in this matter.

In New York, Insurance Law section 3216 (d) (1) (B) sets forth the applicable time limits for insurers' defenses to misstatements made in disability income policy applications. In New Jersey, the applicable provision is NJSA section 17B:26-5. Under both statutes, an insurer is given a choice of two incontestability clauses that must be included in an issued disability insurance policy. Both states require either a provision that essentially reads either "[a]fter two years from

the date of issue of this policy[,] no misstatements, except for fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or deny a claim for loss incurred or disability ... commencing after the expiration of such two year period[,]" or "[a]fter this policy has been in force for a period of 2 years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application."

In New York, incontestability provisions are required to ensure that policy holders receive their bargained-for benefit.[2] The required provisions allow a reasonable amount of time to investigate statements made by the insured in procuring the policy. See Simpson v Phoenix Mut. Life Ins. Co., 24 NY2d 262 (1969). However, "once the incontestability period is over, a carrier may not deny coverage by claiming that the applicant knew (by manifestation) of any symptom or condition related to the eventual cause of the disability." New England Mutual Life Ins. Co. v Doe, 93 NY2d 122, 129 (1999).

In contrast, "[u]nder New Jersey law, an insurer may rescind

---

[2] The legislative intent in requiring incontestability clauses was "to encourage insurance buyers to purchase insurance with confidence that after the contestable period has passed they are assured of receiving benefits if they are disabled." Fischer v Massachusetts Casualty Ins. Co., 458 F Supp 939, 944 (SD NY 1978).

[* 7]

a policy for equitable fraud on the grounds of false statements in the application which materially affect the acceptance of the risk or hazard assumed by the insurer." Hartford Life and Accident Ins. Co. v Nittolo, 955 F Supp 331, 333 (D NJ 1997). Where an insurer seeks to deny a claim based upon fraud on the insured's application relating only to that claim, declination of coverage made beyond the incontestability period has been upheld. The court stated, "[w]e doubt that the Legislature, when enacting NJSA 17B:26-5b, contemplated that it was authorizing insureds to conceal a known disability and then reap the benefit of their deception by recovering for the disability that was so concealed. ... If we were to permit a dishonest insured to recover, insurers would include the cost of that risk in premiums charged to honest insureds." Paul Revere Life Ins. Co. v Haas, 137 NJ 190, 207, 209, 644 A2d 1098 (1994).

While coverage in New York rests upon which of the two statutory incontestability provisions an insurer includes in its policy (see Dwyer v First Unum Life Ins. Co., 14 Misc 3d 1202(A) [Sup Ct, New York County 2006], affd as mod 41 AD3d 115 [1st Dept 2007]), in New Jersey the courts do not so distinguish. See Paul Revere Life Ins. Co. v Haas, supra; see also Massachusetts Mutual Life Ins. Co. v Orenyo, 1998 WL 1297799 (D NJ 1998); Scalia v Lafayette Life Ins. Co., 1995 WL 631841 (D NJ 1995), affd 114 F2d 1173 (3rd Cir 1997).

"Under New York's 'center of gravity' or 'grouping of contacts' approach to choice-of-law questions in contract cases, [a court is] required to apply the law of the state with the 'most significant relationship to the transaction and the parties.'" Certain Underwriters at Lloyd's, London v Foster Wheeler Corp., 36 AD3d 17, 21 (1st Dept 2006) (quoting Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 84 NY2d 309, 317 [1994]). Under this approach, the traditional factors of the parties' intent and/or the place of contracting are still given great weight in considering which jurisdiction has more significant contacts with the disputed claim. See Security Mut. Life Ins. Co. of New York v Harpaul, 11 Misc 3d 1083(A) (Sup Ct, New York County 2006). Additionally, "the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties are also to be considered." Kaszak v Liberty Mut. Ins. Co., 192 Misc 2d 168, 169 (App Term, 2d Dept 2002).

Here, there is no question that the policy application was completed in New Jersey,[3] that plaintiff provided a New Jersey address to defendant on all forms that he completed (including requests for an increase in coverage, claim forms, and claim continuation forms), the benefits checks were sent to plaintiff's

[3] In fact, the application states that it was signed in Emerson, New Jersey. See Steven P. DeMauro Affidavit, Exh. S.

New Jersey address and his drivers' license, accident report address, voter registration card and relevant tax forms all contained New Jersey addresses.

Despite proffering an affidavit claiming residency in both New York and New Jersey, plaintiff has provided no supporting documents for the claim that he was a resident of the State of New York. Nor has he proffered any evidence that the policy in question was, as he claims, delivered in New York or that the policy application was completed in this state.

New York District Court Judge Deborah Batts has previously stated that plaintiff was a New Jersey resident (see Plaintiff's Affidavit, Exh. D), and this court has stated that "[d]efendant has supplied sufficient documentary evidence to establish that the plaintiff is a resident of New Jersey." See Plaintiff's Affidavit, Exh. E.

In the instant motion papers, plaintiff has provided no documentary evidence that his residence is New York or that New York has the most significant relationship to the transaction and the parties. Bald, conclusory statements to stave off a court holding carry no weight. See Federal Republic of Germany v Elicofon, 536 F Supp 813 (ED NY 1978), affd sub nom Kunstsammlungen Zu Weimar v Elicofon, 678 F2d 1150 (2d Cir 1982).

Therefore, this court holds that plaintiff is a New Jersey resident, and that New Jersey law is applicable to this action.

Summary Judgment

Applying New Jersey law requires this court to deny plaintiff's summary judgment motion seeking a declaration of entitlement to coverage for the disability claim at issue. There are material questions of fact regarding plaintiff's claim that require trial.

The policy issued to plaintiff contains a section entitled "Section 9. Other Important Provisions." The following provision, headed by the words "Misstatements in the Application" is included:

> We rely on the statements you make in your application. We will not contest those statements after this policy has been in effect for 2 years during your lifetime. Any length of time you are totally ... disabled is excluded in computing this 2 year period.

However, directly below the "Misstatements in the Application" provision is one entitled "Pre-Existing Conditions Limitations." It states as follows:

> If a disability starts or a loss is incurred more than 2 years after the Date of Issue, we will not reduce or deny the claim on the ground that a sickness or physical condition existed before this policy's effective date. This does not apply to any sickness or physical condition excluded from coverage by name or specific description.

A "pre-existing condition" is defined as "a physical condition or sickness misrepresented or not revealed in the application which prior to effective date of this policy caused you: to have received medical advice or treatment; or to have had symptoms

which would have led an ordinary prudent person to seek medical advice or treatment."

Defendant asserts that plaintiff had a degenerating condition that pre-existed both his accident and his application for coverage under the policy. According to defendant, the failure to reveal this degenerating physical condition constitutes at least a material misrepresentation and possibly fraud. Because discovery has not been completed in this action (i.e., plaintiff has not undergone an EBT), and it is, therefore, not known the extent of plaintiff's knowledge of his own deteriorating physical condition, the instant motion is premature.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that for the purposes of this action, plaintiff is deemed to be a resident of the state of New Jersey.

Counsel for the parties are directed to appear for a pre-trial conference October 19, 2007 at 11:00 am in room 335 at 60 Centre Street.

Dated: 8/6/07

ENTER:

WALTER B. TOLUB J.S.C.

FILED
AUG 17 2007
COUNTY CLERK'S OFFICE
NEW YORK