

Bitterman v Metropolitan Life Ins. Co.

2007 NY Slip Op 33733(U)

November 14, 2007

Supreme Court, New York County

Docket Number: 0118689/2006

Judge: Richard F. Braun

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

PRESENT: HON. RICHARD F. BRAUN
J.S.C.
Justice

PART 23

Irwin Bitterman, M.D.,
Plaintiff,
Metropolitan Life Insurance
Company, Defendants.

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INDEX NO. _____
MOTION DATE Sept. 20, 2007
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for Dismiss, and
cross motion for leave to serve an amended complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits
Notice of Cross Motion and
Answering Affidavits — Exhibits

FILED
NOV 20 2007

PAPERS NUMBERED

1
2

Replying Affidavits _____

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, It is ordered that this motion is granted to the
extent of dismissing the punitive damages claim in the
sixth cause of action and the claim "under the common
law in paragraph 7) of the wherefore clause of the complaint,
and it is further

ORDERED that the Clerk shall enter judgment
accordingly, and the remaining claims are severed and
shall continue and it is further

ORDERED that the cross motion was
withdrawn by September 20, 2007 stipulation.

This constitutes the decision and order of
the Court. See separate Opinion.

ENTER:

Dated: New York, New York November 14, 2007 [Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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 23

----- X
STUART BITTERMAN, M.D.

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,

Defendants.
-----X

RICHARD F. BRAUN, J.:

In this action based on an insurance policy and under General Business Law § 349, defendant moves to dismiss, or stay the action, pursuant to CPLR 3211 (a) (4); or dismiss the sixth cause of action, its claims for consequential and punitive damages, and the claim "under the common law" contained in paragraph 7 of the wherefore clause of the complaint in this action. Plaintiff cross-moved for leave to serve an amended complaint. The cross motion was withdrawn by stipulation.

On a motion pursuant to CPLR 3211, a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). To grant a motion pursuant to CPLR 3211 (a) (4), the causes of action in the two pending actions must be the same (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]). Where, as here, there are significant differences in at least some causes of action (see *Borden Chem., Inc. v Growth Prods., Inc.*, 28 AD3d 337, 338 [1st Dept 2006]), and there is not a complete identity of the issues involved

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OPINION

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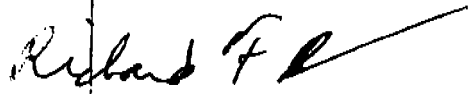
in the two actions (*Security Mut. Life Ins. Co. of N.Y. v DiPasquale*, 271 AD2d 268, 269 [1st Dept 2000]), this action should not be dismissed, although possibly the actions should be consolidated, but a motion for that relief was not made (CPLR 602 [a]).

The sixth cause of action under General Business Law § 349 does plead a claim (see *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205-206 [2004]). However, the statute specifies that the damages recoverable for a violation thereof are “actual damages or fifty dollars, whichever is greater”, and the court may triple the actual damages if the violation was done knowingly or willfully. Consequential damages are actual damages, and thus are recoverable (*cf. Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 56 [1999] [the complaint did not allege actual harm, such as an effect on the cost of cigarettes or injury to health]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995] [in denying summary judgment to defendant, the court stated that a plaintiff must demonstrate “actual, although not necessarily pecuniary, harm.”]). Punitive damages are not provided for in the statute, and thus they are not recoverable (see *City of Rochester v Campbell*, 123 NY 405, 414 [1890]; *Rosin v Lidgerwood*, 89 App Div 245 [2nd Dept 1903]; *In re United States Pipe-Line Co.*, 16 App Div 188 [1st Dept 1897]). The wherefore clause request for damages under the common law is seemingly raised as part of the sixth cause of action and thus unrecoverable thereunder. To the extent that this damages claim is not asserted thereunder, such a broad and conclusory claim is nowhere justified in the other causes of action and does not state a claim (see *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept 1987]; *117 East 24th St. Assoc. v Karr*, 95 AD2d 735 [1st Dept 1983]).

Therefore, by this court's separate decision and order, the motion was granted to the extent

of dismissing the claim under the sixth cause of action for punitive damages, and the claim for damages under the common law. The other claims have been severed and shall continue.

Dated: New York, New York
November 14, 2007



RICHARD F. BRAUN, J.S.C.

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NEW YORK