Horgan v HIP Health Plan of N.Y.

2007 NY Slip Op 33842(U)

November 20, 2007

Supreme Court, New York County

Docket Number: 0604503/2005

Judge: Helen E. Freedman

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SCANNED ON 11/28/2007

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

PRESENT: PART 39

Index Number : 604503/2005

HORGAN, TERESA

vs

HIP HEALTH PLAN OF NEW YORK

Sequence Number : 001

DISMISS ACTION

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
NOV 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/21/07

______ J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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TERESA HORGAN, on behalf of herself and others similarly situated,

Plaintiff,

-against-

Index No. 604503/05

HIP HEALTH PLAN OF NEW YORK,

Defendant.

---------------------------------------X

HELEN E. FREEDMAN, J:

In this case, plaintiff brings an action in behalf of herself and as a class action in behalf of all other similarly situated individuals in the State of New York against the HIP Health Plan of New York ("HIP" or "defendant") claiming price discrimination in premiums charged to sole proprietors and members of small groups in contrast to those charged to members of "Working Today", an association of self-employed independent workers/freelancers. Plaintiff is a member of or represents Associate Business Leaders & Entrepreneurs ("ABLE"), but she claims to bring this action on behalf of all others similarly situated, whether or not they are members of ABLE. Plaintiff claims that the preferential treatment given to Working Today violates New York State's community rating laws, which in turn has caused the rates of ABLE members and other similar group members to be higher. The putative class is described as:

> All individuals who have been overcharged, are being overcharged or will be overcharged by HIP for Small Group and Sole Proprietor health insurance rates in the State of New York, during the period of September 1, 2004 through the date of final disposition of this action.

Plaintiff's causes of action are based on GBL §349, the consumer deceptive acts statute, and

unjust enrichment claims.

Motion

Defendant HIP moves to dismiss the complaint pursuant to CPLR 3211(a)(1),(3) and (7), contending that it was the Department of Insurance (DOI) that issued an order granting Working Today's Class M Status, which, as the Superintendent determined, permitted Working Today to receive large group rates. Defendant avers that plaintiff failed to exhaust her administrative remedies by failing to first file a complaint with the DOI concerning the allegedly improperly reduced rates charged to Working Today, which would have permitted the DOI to review and rule on such a challenge pursuant to its established procedures. Defendant also contends that this plenary law suit circumvents the statutorily prescribed four-month period for bringing Article 78 proceedings challenging administrative determinations. Additionally, defendant states that plaintiff's action is barred by the filed rate doctrine, which prohibits this type of suit because it invites courts to retroactively recompute what the allegedly proper filed rate should have been. Defendant also claims that nominal plaintiff, Teresa Horgan, is no longer insured under any HIP policy, and, thus, lacks standing. Finally, Defendant contends the claims brought here must be dismissed for substantive reasons. Defendant asserts that the GBL § 349 claim is improper because the factual allegations involve classification of intermediaries and are not the type of direct consumer action contemplated by the statute. Defendant claims that the unjust enrichment claim is really a challenge to the DOI classification and does not enrich defendant.

Background

Plaintiff, a self employed photographer, received health insurance from HIP as a member of ABLE, an association of sole proprietors and small groups (a technical insurance company

phrase that means a single small business comprised of 2 to 50 employees). Only a very limited number of health insurers, including HIP, insure small groups and sole proprietors in New York State. Sole Proprietor/Small Group Associations are classified under New York Insurance Law, N.Y. Ins. Law §4235(c)(1) as follows:§4235(c)(1)(B) applies to trade associations; §4235(c)(1)(D) to unions; §4235(c)(1)(H) to associations of common professions, trades or occupations; §4235(c)(1)(K) to associations formed for purposes other than insurance; §4235(c)(1)(L) to customers of a creditor; and §4235(c)(1)(M) to "affinity groups" approved by the New York State Superintendent of Insurance.

Plaintiff's Contentions

According to Plaintiff, insurance law requires all of the associations listed in the above sub-categories of N.Y. Ins. Law must be community rated. Community rating means that health insurance premiums must be calculated so that all members of the community in question are charged a uniform rate. The calculation is based on the experience of the entire pool without regard to age, health status, or occupation. The Sole Proprietor Rate may exceed the Small Group rate by 120%. In contrast, experience rated policies may base premiums on the demographics of the insured members in the group. Plaintiff alleges that in contravention of New York law, N.Y. Comp Codes R. & Regs. Tit. 11§ 360.2(a), which provides that experience rated policies may not be issued to small groups or sole proprietorships, HIP issued experience rated policies to Working Today members. Since September 1, 2004, HIP has been charging Working Today Premium Members experience rated large group rates, which are significantly lower than the community rated Sole Proprietor rates.

Plaintiff contends that HIP is responsible for making sure that their insured groups qualify

as permissible groups under N.Y. Ins. Law §4235(c)(1). In fact, HIP provides Working Today's eligible Premium Members with three plans, with successively more generous benefits, but the most expensive plan is less expensive than the HIP 100 Plan (the least generous plan) offered to members of ABLE. This is borne out by the table provided in plaintiff's papers. According to plaintiff, Working Today's medical loss ratio is approximately 60%, whereas insurance companies often have a medical loss ratios of 92% and HMO's have medical loss ratios that go from 75% to 85%.

Defendant's contentions

Defendant claims that the fact that one insurance intermediary, Working Today, was able to persuade the DOI to grant its application pursuant to which its self-employed clients would be recognized as a distinct class of insureds does not impose liability on it either for discrimination or other charges. In May of 2004 the Superintendent of Insurance (then Gregory Serio) issued a written approval letter granting Working Today "discretionary group" status under Section 4235(c)(1)(M), otherwise known as "Class M" status. The Superintendent found that Working Today, which consists solely of self employed workers, was the type of affinity group that was eligible for Class M classification, and thus was entitled to experience rated policies. The approximately 40,000 Working Today members have a low "medical loss ratio". If its members were included in the community-rated subscriber pool, the premium rates charged to Plaintiff and other ABLE members would be lower, but the rates charged to Working Today members would be higher. ABLE has never applied for Class M status for its members.

Defendant contends that the Filed Rate doctrine warrants dismissal of its claims. The filed rate doctrine is based on N.Y. Ins. Law § 4308 which sets forth requirements for premium rate

changes and § 4308 (b) which vests the Superintendent of Insurance with authority to review health insurance rates. However, in *Matter of Excellus Health Plan, Inc. v. Serio,* 2 N.Y.3d 166, 777 N.Y.S.2d 422 (2004), the Court of Appeals rejected the Superintendent's attempt to delay approval of filed rates while he was reviewing them. The Court held that §4308(g)(1) "unambiguously states that a rate filing or application submitted to the Superintendent 'shall be deemed approved,' provided that it is accompanied by an actuarial document certifying that the anticipated loss ratios fall within the statutorily prescribed range. Thus, once the Superintendent receives a new premium rate filing, accompanied by the requisite actuarial certification, the rates specified in the filing are approved by operation of law." *id.* While the filed rate doctrine is designed to prevent misquoting of rates to purchasers of insurance policies as a means of offering them rebates or discounts, *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 127 (1990), it is also "designed to insulate from challenge the filed rate deemed reasonable by the regulatory agency." *Wegoland Ltd. V. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994). Plaintiff contends that the filed rate doctrine does not bar the claim because it was HIP that determined the rates and filed them, and the *Matter of Excellus Health Plan, Inc. v. Serio,* 2 N.Y.3d 166, 777 N.Y.S.2d 422 (2004), holds that once a rate is filed, the Superintendent has no power to review it before it becomes effective.

Defendant also contends that Plaintiff fails to satisfy the elements of GBL §349 in that a deceptive act must be predicated upon a representation or omission likely to mislead a reasonable consumer acting reasonably. *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y. 2d 20 (1995). Here, defendant avers, all actions that transpired were taken vis a vis sophisticated intermediaries (Working Today and ABLE) and no intention to

mislead or deceive either them or their members is discernible. In *Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095 (2d Dept. 2005) the Court affirmed dismissal of a GBL §349 claim on the ground that the challenged transactions did not involve direct solicitation of consuers, buth rather sophisticated business entities.

Discussion

Although Plaintiff brings this proceeding against HIP charging it with discrimination, it appears that the Class M status that enabled HIP to charge members of Working Today pursuant to an experience rated formula resulted from a classification established by the DOI, some eleven months before the commencement of this proceeding. To challenge a DOI determination, the latter must be a party and an Article 78 proceeding must be commenced within four months of the determination. Even if the proceeding were couched as a discrimination claim rather than a challenge to an administrative determination, the DOI would be a necessary party. In *City of N.Y. v. Aetna Cas. & Sur. Co.*, 264 A.D.2d 304 (1st Dept. 1999) the First Department held that the legislature committed enforcement of the insurance regulatory scheme to DOI, and the sole remedy for claims alleging unfair or excessive premium rates "lies in the administrative proceedings of the Department of Insurance or in CPLR article 78 review of the Superintendent's action or refusal to act." See also *William Iser, Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin*, 26 A.D.2d 662 (2d Dept. 1966). Moreover, since Plaintiff also seeks to affect the premium rates charged to Working Today members, causing their rates to increase and come closer to those charged to community rated associations, Working Today is also a necessary party.

Defendant correctly invokes the filed rate doctrine as an additional reason for dismissing

the claims here, indicating that once the rates are filed, they cannot be reviewed by courts and are only subject to recomputation if the Superintendent finds fault. *Minihane v. Weissman*, 226 A.D.2d 152 (1st Dept. 1996). In *Wegoland v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994), the Second Circuit affirmed a finding that once a filed rate is approved by the governing regulatory agency, it is unassailable, and there is no fraud exception to that principle. That court said courts "are not institutionally well suited to engage in retroactive rate setting." *id at* 20. Thus, any challenge to the filed rate would have to be first determined by DOI, inasmuch as DOI's classification was the basis for the rate scheme. The fact that the rate became effective as soon as it was filed does not mean that the DOI loses control or that challenges to the rate need not be first made to the Department.

Although the procedural points discussed above warrant dismissal, a brief discussion of the substantive claims is in order. The GBL § 349 claim suffers from the same infirmity that the claims in *Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095 (2d Dept. 2005)suffers, namely that there are sophisticated entities involved. The unjust enrichment claim is also questionable as there is no private right of action under Insurance Law through an unjust enrichment claim, *Han v.Hertz Corp.*, 12 A.D.3d 195 (1st Dept. 2004). Since rate regulation rests with the Superintendent of Insurance, such a claim fails. Moreover, if Working Today's large number of members were subject to the higher community rated premiums, HIP would be even further enriched.

Based on the foregoing factors, namely failure exhaust administrative remedies and to challenge the DOI Superintendent's determination pursuant to an Article 78 proceeding, the filed rate doctrine that bars courts from retroactively interfering with rate determinations, the failure to

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name essential parties, and the questionable validity of the causes of action, the Complaint is dismissed.

The Clerk is hereby

ORDERED to dismiss the within action.

Dated: November 20, 2007

Enter:

Helen E. Freedman, J.S.C.

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NOV 28 2007
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