

**Green v Combined Life Ins. Co. of N. Y.**

2008 NY Slip Op 30405(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0118893/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 118893/2006

GREEN ALAN

vs

COMBINED LIFE INS. CO. OF NY

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 Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1, 2</u>
Answering Affidavits -- Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to dismiss the second cause of action for defamation by defendant Robert W. Downer, is granted in accordance with the attached memorandum decision.

**FILED**

FEB 13 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/22/08

[Signature]  
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):

[\*2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

-----x  
ALAN GREEN,

Plaintiff,

Index No. 118893/06

Motion Seq. 001

- against -

COMBINED LIFE INSURANCE CO. OF NEW YORK,  
COMBINED LIFE INSURANCE COMPANY  
OF AMERICA and ROBERT W. DOWNIE,  
Defendants.

-----x  
**HON. DORIS LING-COHAN, J.:**

Defendants Combined Life Insurance Co. of New York, Combined Insurance Company of America s/h/a Combined Life Insurance Company of America (collectively, "Combined"), and Robert W. Downie ("Dr. Downie") move, pursuant to CPLR 3211(a)(7), to dismiss the second cause of action in the Complaint as against defendant Dr. Downie.

**BACKGROUND**

Plaintiff, Alan Green ("Mr. Green"), commenced this action seeking to recover damages from Combined for breach of contract in denying his claim for disability insurance benefits, and from Dr. Downie, a physician used by Combined to examine claimants seeking disability benefits, for defamation and negligence.

The Complaint includes the following factual allegations. On May 15, 2002, Mr. Green procured from Combined an individual disability income insurance policy, Policy No. CHL 200101 1149 (the "Policy"), which went into effect from July 1, 2002 and

[\* 3]

expired on July 1, 2005.<sup>1</sup> Under the terms of the Policy, Combined was obligated to pay plaintiff disability benefits in the amount of \$25,000, beginning on the 90<sup>th</sup> day after the date that plaintiff becomes "totally disabled." The Policy defines the term "totally disabled" to mean "as a result of a covered Injury or Sickness, the Insured is totally unable to perform the substantial and material duties of his occupation as shown on the Schedule for the entire Elimination Period and for each month during which benefits are payable" (Not of Mot, Exh A).

On November 24, 2004, plaintiff experienced sickness, including abdominal distension disorder, pulmonary emphysema, and severe pain in the upper right quadrant of his torso, which caused him to terminate his employment as a bond trader. Plaintiff duly notified Combined and submitted a claim for disability benefits. On February 22, 2005, plaintiff submitted a proof of loss statement, an attending physician statement, and a description of his job duties. Plaintiff was later diagnosed with Meniere's Disease.

On October 23, 2006, at Combined's request, plaintiff submitted to a physical examination by Dr. Downie, one of their designated physicians. On November 10, 2006, Dr. Downie prepared a report of Mr. Green's examination, which stated, in part:

[Mr. Green] has varying symptoms of dizziness and vertigo, some related to his neck, and

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<sup>1</sup>The submissions do not include a copy of the Policy. Thus, the Court relies on the factual allegations in the Complaint.

[\* 4 ]

others related to position changes. He had an episode of acute vertigo with a diagnosis of Meniere's Disease. In my opinion, the vertigo, related to the Meniere's disease, while quite disabling for a few hours when it happens, has not disabled him except during the acute attacks

(Downie Report, Not of Mot, Exh B). On November 22, 2006, Combined denied Mr. Green's claim for disability benefits, citing, *inter alia*, the report of Dr. Downie. This action ensued.

The Complaint alleges causes of action for breach of contract against Combined (first cause of action); defamation against Dr. Downie (second cause of action); and negligence against Dr. Downie (third cause of action).

Defendants now move to dismiss the defamation claim against Dr. Downie.

#### DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"

[\*5]  
(*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

As stated, the second cause of action alleges a claim for defamation against Dr. Downie. Whether a given statement constitutes an expression of opinion or an actionable factual assertion is a question of law for the court (See *Aronson v Wiersma*, 65 NY2d 592, 593-594 [1985]). Such a determination must be made by considering the context of the whole communication, along with its tone and apparent purpose (*600 W. 115<sup>th</sup> St. Corp. v. Von Gutfeld*, 80 NY2d 130, 145 [1990]). An allegedly defamatory statement is not actionable if it is "pure opinion," which is defined as being accompanied by a recitation of the facts upon which it is based (*Steinhilber v. Alphonese*, 68 NY2d 283, 289 [1986]). In contrast, a statement which implies that it is based upon facts to support the opinion but such facts are unknown to those reading it, is deemed a "mixed opinion" and is actionable (*id.*).

Here, Mr. Green asserts that Dr. Downie's report included defamatory statements concerning what transpired during his physical examination, causing Combined to conclude that Mr. Green was exaggerating his illness and deny his claim for disability benefits. Mr. Green further contends that by publishing the alleged defamatory statements, Dr. Downie intended to convey that Mr. Green is healthier than he claims.

However, a review of the full context of the report in which the alleged defamatory statements appear reveals that it contains

a recitation of statements made by Mr. Green about his medical history, as well as observations made by Dr. Downie after a physical examination. As such, the alleged defamatory statements are non-actionable assertions of opinion. Mr. Green fails to identify any statements that are based upon unknown facts so as to constitute an actionable "mixed opinion." Furthermore, the conclusory assertion that Dr. Downie knowingly made false statements in his report to Combined is insufficient to constitute an actionable tort. Thus, the second cause of action must be dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the second cause of action in the Complaint is severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue, and it is further

**FILED**

FEB 13 2008

ORDERED that defendants are directed to serve an answer to the Complaint within 20 days after service of this order with notice of entry; it is further

NEW YORK  
COUNTY CLERK'S OFFICE

ORDERED that within 30 days of entry of this order, movants shall serve a copy upon all parties with notice of entry.

Dated: January 22, 2008



Hon. Doris Ling-Cohan, J.S.C.