

Ashkenazi v AXA Equit. Life Ins. Co.

2008 NY Slip Op 30419(U)

February 8, 2008

Supreme Court, New York County

Docket Number: 0115034/2007

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Ashkenazi, Alexander

INDEX NO.

115034/07

MOTION DATE

1/25/08

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

AXA Equitable Life Ins.

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

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant AXA Equitable Life Insurance Company for an Order, pursuant to CPLR 3211, dismissing the Second Cause of Action of the Complaint and the demand for punitive and consequential damages, of plaintiff Alexander Ashkenazi, as Trustee of the Zablidowsky Life Insurance Trust, is **granted in its entirety**; and it is further

ORDERED that the parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, 60 Centre Street, Room 438 on Tuesday, April 1, 2008 at 3:00 p.m.; and it is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 2/8/08

[Signature]
J.S.C.

FILED
FEB 14 2008
NEW YORK
COUNTY CLERK'S OFFICE

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: PART 35

_____ x
ALEXANDER ASHKENAZI as Trustee of the
ZABLIDOWSKY LIFE INSURANCE TRUST,

Plaintiff,

-against-

AXA EQUITABLE LIFE INSURANCE COMPANY,

Defendant.

_____ x
EDMEAD, J.S.C.

Index No. 115034/07

DECISION/ORDER

FILED
FEB 14 2008
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Defendant AXA Equitable Life Insurance Company ("AXA") moves for an Order, pursuant to CPLR 3211, dismissing the Second Cause of Action of the Complaint and the demand for punitive and consequential damages, of plaintiff Alexander Ashkenazi ("Trustee"), as Trustee of the Zablidowsky Life Insurance Trust (the "Trust" and/or "Plaintiff") on the ground that said Cause of Action and demands fail to state a cause of action.

The Trustee of the Trust has brought suit against AXA alleging that AXA breached two life insurance contracts - totaling \$8 million - by failing to pay the Trust's claims as the purported beneficiary of both policies, upon the death of the insured, Estelle Zablidowsky.

The Alleged Scheme

According to plaintiff, for too long, life insurance companies would sell high value life insurance policies that have high premiums to individuals with the hope that the individual would at some point no longer be able to pay the premiums, allowing the policy to lapse and the insurer to keep the premiums paid up until that point. When the "death bond" market began to flourish, individuals would sell their policies to the investors who would make timely payments

until the death of the insured. The insurers, whose actuarial practices did not take the investors into account, were left paying out millions of dollars on these high value life insurance policies that were written initially with the hope that the policies would lapse or that the insured would eventually surrender the policy for the "cash surrender value," a fraction of its face value.

In turn, the insurers began seeking ways to escape their policy obligations. The insurers who were willing to do anything to sell these policies originally were now looking for any excuse, valid or not, to escape the actuarial nightmare in which they found themselves.

Plaintiff alleges that AXA issued hundreds, if not thousands, of high value insurance policies without regard to the net worth of the insured person. As these policies were turned into death bonds, AXA sought relief from its obligation by pointing at the net worth portion of the application.

The Complaint

The Second Cause of Action essentially alleges the following:

- Over the past few months, AXA has systematically and wrongfully been denying life insurance benefits to rightful beneficiaries in cases where the benefits owed exceed \$1 million;
- AXA's actions have been intentionally designed to harass the Trust and other beneficiaries similarly situated and/or to deny benefits to such beneficiaries that AXA knew were rightfully owed.
- AXA encouraged and/or instructed its employees and/or agents to engage in a broad practice of denying or failing to provide life insurance benefits with full knowledge that said claims were meritorious.

Defendant's Contentions

This case involves a straight-forward dispute over whether AXA properly rescinded two life insurance policies, within the contestability period, based on its findings that the applications

for the two policies were rife with fraudulent representations.

AXA denied the Trustee's claim, and rescinded the policies, because its investigation revealed that the applications for insurance contained multiple material misrepresentations and omissions concerning, *inter alia*, Mrs. Zablidowsky's net worth, assets and income. The Trust and the insured procured \$8 million in life insurance from AXA by, *inter alia*:

- claiming the insured had a net worth of \$10.1 million, while in truth and fact she had no material net worth at all;
- claiming that the insured had annual investment income of \$825,000. While in truth and fact she had no material investment income at all;
- claiming that the insured had real estate holdings of \$6 million, while in truth and in fact she had no material real estate holdings at all;
- claiming that the insured had liquid assets of \$4 million, while in truth and in fact she had no material assets at all;
- claiming at the time of the application that the insured had not applied for life insurance policies from any other companies, while in truth and fact she had so applied for millions of dollars in other coverage; and
- failing to disclose that the Trust had no insurable interest in the life of the insured, but was seeking an ill-gotten windfall on Mrs. Zablidowsky's death.

The Trust has filed a purported claim under New York GBL § 349, alleging that AXA has engaged in deceptive business practices by denying claims made in connection with other unnamed and unspecified policies. Not only are the Trust's claims in this regard utterly false and baseless, but the cause of action alleging that AXA has engaged in deceptive practice fails as a matter of law.

The Trust improperly attempts to transform a garden variety breach of contract claim into a claim for deceptive practices. In so doing, it fails to allege facts sufficient to set forth a claim

under Section 349. In fact, even a cursory reading of the Complaint lays bare that the Trust has not offered any factual allegations to support its claim that AXA has engaged in deceptive practices. The problem is that the Trust offers no facts to support these allegations of wrongdoing on the part of AXA. Instead, the Complaint relies entirely on nonspecific, conclusory allegations of wrongdoing in the hopes that the court will permit the Trust to engage in a classic fishing expedition through expansive and protracted discovery.

With respect to GBL §349, the Trust has failed to allege facts sufficient to satisfy the threshold requirement that the alleged conduct is “consumer oriented.” Since this section is directed at wrongs against the consuming public, a plaintiff must show that the defendant’s practices are not merely private contract disputes. Here, the Trust has failed sufficiently to plead facts to satisfy this requirement.

Second, the Trust has failed to allege any deceptive act, representation or omission likely to mislead a reasonable consumer. Moreover, no deceptive claim may survive when the deceptive act alleged is the denial of a claim in accordance with the express terms of the underlying contract.

If the court dismisses the second cause of action, as requested above, then the Trust’s demand for damages contingent upon the Section 349 claim should likewise be dismissed.¹

Plaintiff’s Opposition

Plaintiff’s opposition to this motion focuses on the validity of the damages sought.

Plaintiff argues that AXA arbitrarily and baselessly denied the Trust’s rightful claim, perhaps hoping that plaintiff would just quietly go away. Plaintiff has adequately alleged a

¹ In light of this court’s dismissal of the Second Cause of Action, *infra*, the court does not reach this issue.

pattern of conduct by AXA directed to plaintiff and to policy holders at large. Essentially, the allegation is that AXA would collect premiums for its policies, yet when claims were made under those policies, AXA would knowingly deny meritorious claims. Such conduct constitutes a deceitful scheme in dealing with the public that warrants the imposition of punitive damages.

In conclusion, plaintiff requests that if the Second Cause of Action of the Complaint is inadequately and/or inartfully pled against defendant, that the court grant leave, pursuant to CPLR 3025(b) to serve an Amended Complaint in accordance with this court's directives.

Defendant's Reply

Plaintiff fails to contest the essential facts set forth in AXA's moving papers. Rather than even claim that these statements were true, plaintiff argues solely that these misrepresentations were somehow not material to issuance of the policies and that AXA, therefore, had no basis to rescind these policies upon discovery of the true facts. Plaintiff's opposition essentially is a diatribe against the insurance industry. And, the scenario portrayed by plaintiff is not even applicable in this case, since plaintiff was the owner and beneficiary of the policies from their inception.

Although plaintiff argues that the Second Cause of Action is not entirely based on GBL, Section 349, plaintiff never states what the cause of action is.

The Trust in its opposition to this motion does not attempt to defend its Section 349 claim. Plaintiff does not point to any factual allegations that support its claim. It appears from the Trust's conclusory statement in opposition that the Trust is alleging a pattern of conduct by AXA directed to plaintiff and to policyholders at large. Such conclusory allegations cannot stand in the place of facts supporting the claim that policyholders at large have been affected. Further,

the Trust has not identified a single deceptive act by AXA.

The Trust implicitly acknowledges that it does not set forth any independent tort or substantive claim in its Second Cause of Action. Instead, the Trust attempts to press forward on a demand for damages without any underlying legal claim. In New York, there is no independent cause of action for punitive damages or consequential damages.

With respect to the Trust's request to amend the Complaint, said request should be denied because the Trust has not properly moved to amend, has not stated how it would amend the Complaint, has not demonstrated the merit of its proposed amendment, and has not submitted a proposed amended Complaint.

And, because the Complaint, at bottom, alleges that AXA breached its contract of insurance, the Trust has an adequate avenue of redress and no amendment should be permitted.

Further, any amendment of the Second Cause of Action would be futile. The Trust has not specified how it would seek to amend the Complaint or what cognizable legal theories it would present, and has not demonstrated the merit of its proposed amendment. And, the Trust has not identified a single fact that could resurrect its failed section 349 claim.

Analysis

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause

of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Blondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff’s counsel which flatly contradicted plaintiff’s current allegations of prima facie tort]).

General Business Law §349

A Cause of Action pursuant to GBL § 349, requires a plaintiff to allege “three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act” (*Stutman v Chemical Bank, N.A.*, 95 N.Y.2d 24, 29 [2000] [citations omitted]; *see also Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 [1995]).

With respect to the first element, a party claiming the benefit of the section must, at the outset, allege conduct that is consumer oriented. As the Court of Appeals noted in *Oswego* (85 N.Y.2d at 27), acts which are the subject of the statute must be “consumer-oriented in the sense that they potentially affect similarly situated consumers ... [The test is] whether a reasonable consumer in plaintiff’s circumstances might have been misled by the ... conduct.” As has been observed: The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising.

Conceivably, the plaintiff’s claim herein could meet the first prong of GBL 349, in that plaintiff could arguably demonstrate that the acts or practices have a broader impact on consumers at large. However, plaintiff herein fails to sufficiently allege the “similarly situated” claim other than in broad, sweeping generalities. At best, what plaintiff asserts is a private contract dispute unique to the parties herein (“[p]rivate contract disputes, unique to the parties [such as the one involved here], would not fall within the ambit of the statute” *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d at 25).

And, plaintiff’s proffered “grand scheme” of the insurance industry is not even applicable

in the instant case, since plaintiff was the owner and beneficiary of the policies at issue herein from their inception.

In short, a review of the complaint reveals a series of general legal conclusions and speculation, rather than concrete facts from which this court could infer an injury to consumers at large.

Further, General Business Law § 349 prohibits deceptive business practices (*Andre Strishak & Assocs., P.C. v Hewlett Packard Co.*, 300 A.D.2d 608, 609 [2002]). “In determining whether a representation or omission is a deceptive act, the test is whether such act is likely to mislead a reasonable consumer acting reasonably under the circumstances” (*Andre Strishak & Assocs. P.C.*, 300 A.D.2d at 609, quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 N.Y.2d 20, 26 [1995]).

Conclusory allegations of deceptive practices, namely that AXA has systematically and wrongfully been denying life insurance benefits to rightful beneficiaries in cases where the benefits owed exceed \$1 million, without providing any factual basis whatsoever for this sweeping allegation of pervasive wrongdoing, cannot sustain a cause of action under GBL section 349 (*see Soule v Norton*, 299 A.D.2d 827, 829 [2002]).

In short, the Trust fails to allege deceptive acts or practices, that is, a representation or an omission likely to mislead a reasonable consumer acting reasonably under the circumstances. And, conclusory allegations that the insurer engaged in a pattern of refusing certain claims does not meet the minimum standards required to maintain a claim.

Leave to Amend

Plaintiff requests that if the Complaint does not adequately plead the Second Cause of Action against defendant, that the court grant leave, pursuant to CPLR 3025(b) to serve an Amended Complaint in accordance with this court's directives.

It is well settled that leave to amend pursuant to CPLR §3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st Dept 1995]).

Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

To conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Where no cause of action has been stated to begin with, leave to amend will be denied (*see Nab-Tern Constructors v City of New York*, 123 A.D.2d 571 [1986]). In the instant case, the application to amend is denied. First, there is no apparent basis to conclude that an amended complaint would articulate a viable cause of action. Second, no proposed amended complaint has been provided to support the viability of the proposed amended arguments.

In light of this court's dismissal of plaintiff's second cause of action, the Trust's demand for damages contingent upon the Section 349 claim are likewise dismissed.

And, New York does not recognize an independent cause of action for punitive damages. Instead, "[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 616, 612 N.Y.S.2d 339, 634 N.E.2d 940).

Conclusion

In light of the foregoing, it is hereby

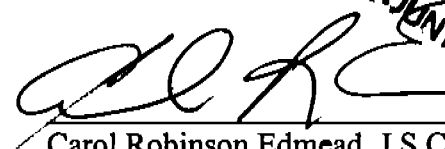
ORDERED that the motion of defendant AXA Equitable Life Insurance Company for an Order, pursuant to CPLR 3211, dismissing the Second Cause of Action of the Complaint and the demand for punitive and consequential damages, of plaintiff Alexander Ashkenazi, as Trustee of the Zablidowsky Life Insurance Trust, is **granted in its entirety**; and it is further

ORDERED that the parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, 60 Centre Street, Room 438 on Tuesday, April 1, 2008 at 3:00 p.m.; and it is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: February 8, 2008


Carol Robinson Edmead, J.S.C.

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