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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 102136/2007

GOLDSTEIN, DAVID

VS

MASSACHUSETTS MUTUAL

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 as stated below

FILED
FEB 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/11/08

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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DAVID GOLDSTEIN,

Plaintiff,

-against- Index No.: 102136/07

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendants.

----------x

EMILY JANE GOODMAN, J.S.C.:

Plaintiff David Goldstein commenced this action against defendant Massachusetts Mutual Life Insurance Company seeking, among other things, an order holding defendant in contempt of a prior court order issued in year 2000 (the 2000 Order), and damages for intentional and negligent infliction of emotional distress. Defendant filed a motion (sequence number 1) to dismiss the complaint pursuant to CPLR 3211 (a) (7), and for costs and sanctions against plaintiff pursuant to 22 NYCRR 130-1. In opposition and in response, plaintiff filed a motion (sequence number 2), pursuant to Judiciary Law § 753 (A)(1) and 756, for an order holding defendant in contempt of the 2000 Order.[1]

The parties' motions are consolidated for disposition. For the reasons set forth herein, plaintiff's motion is denied in

[1] Plaintiff's motion was filed in response to defendant's assertion that the specific relief for contempt of court cannot be sought by means of a complaint, but must be sought pursuant to a notice of motion, as required by Judiciary Law § 756.

its entirety, and the various reliefs sought by defendant in its motion are granted in part and denied in part.

Background

According to the complaint (the Complaint), plaintiff, a chiropractor, purchased a disability insurance policy from defendant's predecessor-in-interest in 1992. In 1993, plaintiff was involved in a car accident and sustained nerve damage, which allegedly impaired the use of his left arm. In 1994, defendant began to pay plaintiff disability benefit payments under the policy. In 1995, plaintiff informed defendant that he was diagnosed with Chronic Fatigue Syndrome (CFS) and anxiety disorders commonly associated with CFS. In 1998, a medical examiner appointed by defendant diagnosed plaintiff as having a "severe ulnar neuropathy," and that the injury might be permanent. The Complaint alleges that, even though defendant was aware of the examiner's diagnosis and that plaintiff was suffering from CFS and anxiety disorders, defendant frequently demanded from him progress reports, and occasionally threatened to cut off disability payments if he did not comply.

In 1999, plaintiff filed suit in this court (the 1999 Action) seeking a declaratory judgment that he was "presumptively totally disabled." Under the terms of the policy, "presumptive total disability" means that the insured must have suffered "total loss of speech ... use of both hands; use of both feet; or

use of one hand and one foot." If the insurer deems the disability to be "total and irrecoverable," it may waive the monthly physician's check-ups and progress report requirements. By order dated May 3, 2000 (the 2000 Order), the court (Omansky, J.) dismissed plaintiff's complaint for declaratory judgment, as his one-arm injury did not meet the definition of "presumptive total disability" under the policy. In the 2000 Order, the court noted that the "defendant has agreed to accept yearly physician's reports rather than monthly reports at this time."

In February 2005, plaintiff commenced another action against defendant (based on the same policy) in the Supreme Court of Queens County (the 2005 Action). Plaintiff was represented by Mr. Allen Gold, the same attorney who represented him in the 1999 Action. In the 2005 Action, he again sought a declaration that he was "presumptively totally disabled." The 2005 complaint contained various claims, including fraud, misrepresentation, as well as negligent and intentional infliction of emotional distress. By order dated August 22, 2005 (the 2005 Order), the court (Dollard, J.) denied declaratory relief based on the doctrine of res judicata, and dismissed all other causes of action based on the expiration of the statute of limitations. On September 12, 2006, the Appellate Division, Second Department, affirmed the 2005 Order. In February 2007, plaintiff's new attorney commenced the instant action by filing the Complaint.

Discussion

In considering a CPLR 3211 motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

On the other hand, while factual allegations in a complaint should be accorded "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2nd Dept 2005).

Contempt Of Court

Section 753 (A) (3) of the Judiciary Law provides that

a court may "punish, by fine or imprisonment ... a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action ... may be defeated [or] impaired," in an action where there is "disobedience to a lawful mandate of the court." The Court of Appeals explained that where civil contempt is sought, "a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed." *McCain v Dinkins*, 84 NY2d 216, 226 (1994); *see also Galanos v Galanos*, 406 AD3d 507, 507 (2d Dept 2007)("to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with the contempt violated a clear and unequivocal mandate of the court, thereby prejudicing the movant's rights"); *450 West 14th Street Corp. v 40-56 Tenth Ave., LLC*, 15 AD3d 166, 166 (1st Dept 2005)(noting that the defendant must have violated a "clear mandate" of a court order).

In the instant case, plaintiff argues that defendant "flagrantly violated" a mandate of the 2000 Order that "physician reports be provided on an annual basis," by demanding plaintiff to provide reports on a more frequent basis. Complaint, ¶ 73. The argument is without merit. The 2000 Order did not mandate that defendant was entitled to request or receive only annual reports. The sole and unequivocal mandate of such Order was dismissal of plaintiff's complaint for declaratory relief, because his injury did not meet the "presumptive disability'

definition of the insurance policy. Indeed, the specific sentence in the 2000 Order, which states that "defendant has agreed to accept yearly physician's reports rather than monthly reports at this time," merely reflects the court's recitation of defendant's representation, made during oral argument, that it was agreeable to accept from plaintiff annual reports at that time. Had the court intended to mandate defendant to request and accept only annual reports and for a more permanent or definite period of time, it could have unequivocally ordered defendant to do so, and could have used words other than "at this time" to note defendant's then agreement to accept yearly reports.

Because the 2000 Order did not mandate defendant to limit its request to plaintiff only annual physician's reports, defendant did not violate the Order when it demanded more frequent reports. Hence, plaintiff's motion and complaint seeking "contempt of court" against defendant is denied.

Intentional or Negligent Infliction of Emotional Distress

The Complaint alleges that defendant knew or should have known of plaintiff's CFS and anxiety disorders, and that in spite of such knowledge, defendant engaged in outrageous conduct that caused plaintiff severe emotional distress which, in turn, forced him to withdraw from three professional programs he had commenced or pursued, causing him significant loss of income and rendering him unable to lead a normal life. Complaint, ¶ 76-89.

As noted above, in the 2005 Action plaintiff also asserted claims of intentional and negligent infliction of emotional distress. The 2005 Order dismissed these claims based on statute of limitations grounds. It should also be noted that the bulk of defendant's acts that allegedly caused plaintiff emotional distress was, according to the allegations of the Complaint, committed prior to 2005. Yet, plaintiff argues that the Complaint contains "new facts" that "are not in common with any previous pleading." Plaintiff's Brief, p. 5. Such argument is without merit, because the "new facts" in support of such claims, particularly those known to plaintiff prior to 2005, could have been asserted by plaintiff in the 2000 Action and 2005 Action, and his failure to do so is now barred by the doctrine of res judicata and the prior court orders. *In re Hunter*, 4 NY3d 260, 269 (2005) (the res judicata doctrine "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation").

With respect to the few acts allegedly committed by defendant in 2006 (delaying benefit payments and demanding reports, which were alleged to be continuations of defendant's pre-2006 conduct) that purportedly caused plaintiff emotional distress, (Complaint, ¶ 60-62), these claims can be dismissed on the merits, as follows. The claim for intentional infliction of emotional distress has four elements: (1) extreme and outrageous

conduct; (2) intent to cause severe emotional distress; (3) causal connection between the conduct and the injury; and (4) severe emotional distress. *Howell v New York Post Co.*, 81 NY2d 115, 121 (1993). The Court of Appeals has noted that the first element, outrageous conduct, "serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine." *Id.* (citations omitted). The Court also has observed that "the courts have tended to focus on the outrageousness element, the one most susceptible to determination as a matter of law." *Id.* (citations omitted). Thus, many courts have held that claims for intentional and negligent infliction of emotional distress must allege that the defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *See e.g., Berrios v Our Lady of Mercy Medical Center*, 20 AD3d 361, 362 (1st Dept. 2005), quoting *Sheila C. v Povich*, 11 AD3d 120, 130-131 (1st Dept. 2004).

In this case, defendant's demand of physician's reports on a more-than-annual basis cannot be said to be so outrageous, extreme or beyond all bounds of decency, in light of the fact that the 2000 Order did not limit defendant's right to demand reports from plaintiff on a more frequent basis, and that the

demand in 2006 was made six years after entry of the 2000 Order. Also, the fact that defendant demanded reports from plaintiff, which were required under the disability policy as a condition to the receipt of continued benefit payments, cannot be regarded as so atrocious and utterly intolerable in a civilized community.

Accordingly, plaintiff's claims for intentional and negligent infliction of emotional distressed are dismissed.

Breach of Good Faith and Fair Dealing

The Complaint alleges, among other things, that despite defendant's appointed medical examiner's determination in 1998 that plaintiff's injury was severe and likely permanent, and despite the lack of evidence that plaintiff would recover from such injury, defendant's continued demands for frequent physician and progress reports constituted bad faith in administering the disability policy. Complaint, ¶ 91-100.

The Complaint does not allege that defendant violated the contractual terms of the disability policy by requiring plaintiff to submit reports more frequently than on an annual basis. Indeed, plaintiff acknowledges that defendant's rights to request more frequent reports were "technically" given to it by the terms of the insurance policy. Complaint, ¶ 98. Yet, plaintiff argues that defendant's "blind insistence on subjecting [plaintiff] to monthly mental trauma is irrational, arbitrary, mean-spirited and not a good faith exercise of [its] discretion

under the Policy." Plaintiff's Brief, p. 12.

Under New York law, "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." *Dalton v Educational Testing Service*, 87 NY2d 384, 389 (1995). To sustain a breach of the implied covenant claim, the claimant must allege that defendant "exercised a right malevolently, for its own gain as a part of a purposeful scheme designed to deprive [claimant] of the benefits" of the contract. *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 (1st Dept 2003). However, the implied covenant claim is not without limit, and no obligation can be implied or imposed upon a party that "would be inconsistent with other terms of the contractual relationship." *Murphy v American Home Products Corp.*, 58 NY2d 293, 304 (1983).

The Complaint does not allege that plaintiff has been deprived of the benefits of the insurance policy (i.e. that he did not receive disability payments). Instead, plaintiff alleges that he has been required by defendant to submit "entirely unnecessary" reports, which were "at the heart of [his] anxiety, mental anguish, and inability to lead a normal life." Plaintiff Brief, p. 12. The record, on the whole, does not support plaintiff's breach of the implied covenant claim, because it cannot be said that requiring him to perform what is required by the terms of the policy is bad faith on the part of defendant.

Thus, the breach of good faith and fair dealing claim must be dismissed. *Triton Partners LLC v Prudential Securities Inc.*, 301 AD2d 411 (1st Dept 2003)(breach of the implied covenant claim was properly dismissed because it was merely a substitute for a non-viable breach of contract claim).

Costs and Sanctions Against Plaintiff

In its motion seeking to dismiss the Complaint, defendant also seeks to impose costs and sanctions against plaintiff pursuant to 22 NYCRR 130-1. The motion argues that plaintiff's claims are frivolous and completely without merit, and that plaintiff is attempting to relitigate claims that have been previously dismissed.

While it is true that the bulk of plaintiff's claims can be dismissed under the doctrine of res judicata, his breach of the implied covenant claim asserted in this action was never raised or litigated in prior actions, and a few alleged acts were committed in 2006. Although such claim can be dismissed (as explained above), arguably it was not unreasonable for plaintiff to take the position (and the Complaint so alleges) that defendant's insistence in requiring him to repeatedly submit "entirely unnecessary" reports was arbitrary, mean-spirited and irrational, inasmuch as such reports would be no different from the prior reports, and his disability had remained unchanged for the past nine years. In such regard, even though plaintiff's

claim is unavailing, it is "not so utterly meritless as to be 'frivolous' within the meaning of [Rule 130]." *Vinci v Northside Partnership*, 250 AD2d 965, 966 (3d Dept. 1998); *see also Adelaide Productions, Inc. v BKN International AG*, 38 AD3d 221, 227 (1st Dept. 2007)(in reversing the trial court's order that granted plaintiff's cross motion for costs and sanctions, the appellate court noted that defendant's affirmative defense "was not so utterly lacking in merit as to qualify as frivolous conduct" within the meaning of Rule 130). Thus, that branch of defendant's motion, made pursuant to Rule 130, seeking to impose costs and sanctions against plaintiff is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss the Complaint (motion sequence number 1) is granted, and the Clerk is directed to enter judgment in favor of defendant dismissing the Complaint, without costs to the parties; and it is further

ORDERED that plaintiff's motion to hold defendant in contempt of court (motion sequence number 2) is denied.

This constitutes the Decision and Order of the court.

Dated: February 11, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN