

Ring v AXA Fin., Inc.

2008 NY Slip Op 30637(U)

February 6, 2008

Supreme Court, New York County

Docket Number: 0111869/2004

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Justice

Index Number : 111869/2004
RING, SHIRLEY J.
VS.
AXA FINANCIAL, INC.,
SEQUENCE NUMBER : # 002
DISMISS (AMENDED) COMPLAINT

INDEX NO. 111869-04
MOTION DATE
MOTION SEQ. NO. #002
MOTION CAL. NO.

Here 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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
FEB 20 2008
NEW YORK COUNTY CLERK'S OFFICE

Dated: Feb 6, 2008

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

Shirley J. Ring, *on behalf of herself and
others similarly situated*

Plaintiffs,

-against-

AXA Financial, Inc. and
Equitable Life Insurance Company,

Defendants.

Decision/Order

Index No.: 111869/04

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

FILED
FEB 20 2008

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Defs n/m (§ 3211), w/JFC affirm, exhs	1
Plt's opp w/ET affirm, exhs	2
Transcripts 11/15 and 11/28/07	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

This action is by plaintiff Shirley J. Ring, an insurance policy holder, on behalf of class of insureds who purchased whole or variable life policies with an appended children's term insurance rider.¹ The defendants are collectively the insurer ("Equitable") with whom she has the subject policy. Now before the court is Equitable's pre-answer motion to dismiss the First Amended Complaint ("complaint") filed October

¹This is a putative class action, but it has not yet been certified as one.

17, 2007 based upon documentary evidence and because plaintiff has failed to state a cause of action. CPLR §§ 3211 (a) (1) and (7). Plaintiff opposes the motion in all respects.

In deciding Equitable's motion the court will consider whether accepting all of the plaintiff's facts, they support the causes of action she has asserted against Equitable. Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976). Moreover, the court will also decide whether the policy definitively and unequivocally disposes of plaintiff's claims, as defendant claims. CPLR § 3211 (a) (1); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

The court's decision and order is as follows:

Factual Allegations and Arguments Presented

It is undisputed that in 1982 plaintiff purchased from Equitable an Adjustable Whole Life Policy on her own life in the face amount of \$10,000 ("policy"). The annual premium for the policy was \$206.50 for life. At that time plaintiff also obtained insurance coverage ("child term rider") for her daughter Stacey, then 12 years old. That child term rider provided a death benefit of \$2,000 to the child's beneficiary in the event the child died "before the earlier of: (a) the child's 25th birthday; or (b) the Expiry Date of this rider." By definition, the "expiry date" is when plaintiff turns age 65. The premium for the child term rider was \$10.50 a year "for 29 years." Stacey turned age 25 in 1994, and, therefore, her coverage ended on her birthday (March 28, 1994).

It is undisputed that after March 28, 1994 Equitable continued to charge not only the premium for the basic policy insuring plaintiff's life, but also the premium for the

child term rider insuring Stacey's life. Plaintiff claims that this practice of collecting premiums on an expired policy, is a deceptive practice aimed at consumers and therefore subject to the protections of the General Business Laws aimed at protecting consumers ("GBL § 349"). Defendants argue that plaintiff has failed to state a cause of action, and in any event, the plain terms of the policy disprove her claims. According to Equitable, the declarations page of the plaintiff's policy clearly states that premiums are \$10.50 a year for 29 years. Equitable argues that this duration coincides with the plaintiff's age at the time (36) she purchased her policy and the number of years remaining before she turned age 65, that being the furthest date the child term rider could be effective. Thus, defendants contend that because the duration of the premium payments was disclosed in plaintiff's policy, and she is presumed to have read her policy and know its contents, then as a matter of law, the practice is not deceptive

Equitable alternatively argues that plaintiff's claims are time barred because the applicable statute of limitations for an action under GBL § 349 is three (3) years, running when the first premium was charged by the defendants (and paid by plaintiff), following her daughter's 25th birthday.

In opposition to that argument, plaintiff urges the court to apply the "continuous wrong doctrine" which is based upon allegations that the defendant concealed its fraud and the statute of limitations should be tolled so that the defendant is not rewarded for its wrongdoing. Plaintiff argues that each time she was billed for the premiums after Stacey turned age 25, the defendants engaged in a deceptive act because she was being charged premiums for a policy that had expired.

This case was originally brought in Supreme Court, New York County in August 2004. Equitable removed the action to Federal Court based upon its claim that the child term rider was a "covered security," within the meaning of the Securities Litigation Uniform Standards Act (SLUSA), and therefore an area of law preempted by Federal Law. Ring et al v. AXA Financial, Inc. et al, District Court, SDNY 04 Civ. 07381 (GBD). Plaintiff moved to have the case remanded to this court. Judge Daniels denied plaintiff's motion and instead dismissed the case (Order, Daniels J., 1/25/05). That decision was reversed on appeal, the complaint reinstated, and the matter remanded to this court by the Court of Appeals (Ring v. AXA Financial, Inc., 483 F.3d 95 [C.A. 2 NY 2007]).

In relevant part, the Court of Appeals held that "[I]nsurance has traditionally been regulated by the several states, and the regulatory scheme relating to securities has steered clear of impinging on this state province. Thus, insurance products subject to state regulation are exempt from regulation by the SEC." Ring v. AXA, *supra* at 98. The Court of Appeals also noted that the child term rider and the plaintiff's policy, to which it is appended, should have been considered separately, but the District Court had considered them together².

Discussion

In determining whether a complaint is sufficient so as to withstand a motion to

²No argument is made by either side that the Court of Appeals' decision is decisive of the present motion to dismiss, despite the court's extensive analysis. Since the decision by the Court of Appeals only resolved the issue of whether the child term rider was a security, within the meaning of applicable Federal Law, it was not a final determination on the merits of plaintiff's claims, or whether she has pled a cause of action. *Compare: Sudarsky v. City of New York*, 220 A.D.2d 353 (1st Dept 1995).

dismiss pursuant to CPLR § 3211 “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept 1997). Moreover, where the basis for the motion to dismiss is the purported failure to state a cause of action (CPLR § 3211 [a] [7]), the court's attention “should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one.” Rovello v. Orofino Realty Co., *supra*. Although bare conclusions will not suffice, affidavits and other evidence may be freely relied upon to preserve inartfully pleaded but potentially meritorious claims. Id. Where a motion to dismiss is premised upon the existence of documentary evidence, the document(s) relief upon by the moving party must definitively and unequivocally dispose of the claims asserted by the plaintiff. CPLR § 3211 (a) (1); Bronxville Knolls Inc. v. Webster Town Center Partnership, *supra*.

Accepting plaintiff's facts, she has set forth a cognizable claim against Equitable for a deceptive practice under The Consumer Protection Act (GBL § 349), thereby defeating this motion to dismiss. The court also finds that the claims are timely, and not time barred, as claimed by Equitable.

A plaintiff under GBL § 349 must plead and prove three elements in connection with a deceptive practices cause of action: 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, 95 N.Y.2d 24, 29 (2000) (*internal citations omitted*); *See also*, Gaidon v. Guardian Life Ins. Co., 94 N.Y.2d 177 (1999) ("Gaidon I")

It is not disputed that the practice being challenged by plaintiff is "consumer oriented," within the meaning of the statute. Plaintiff alleges further that defendant's practice of sending her quarterly unitemized bills in the amount of \$98 is a deceptive practice because child term rider premiums are deducted from that lump sum payment. According to plaintiff this is concealment or an undisclosed fact that is not easily ascertainable by the average consumer who would have to examine the original policy to discover this information. It is also not disputed that this practice of collecting premiums for the child term rider continued even after plaintiff's daughter's 25th birthday in 1994, even though Stacey was no longer insured (or qualified to be insured) under that rider. These allegations support plaintiff's claim that Equitable's practice is "misleading in a material way." Stutman v. Citibank, *supra* at 29.

Plaintiff sets forth as damages the payments she has faithfully made each quarter to Equitable, beginning immediately following her daughter attaining age 25. These payments were retained by Equitable and have not be repaid to plaintiff. These statements easily satisfy the third and final requirement of a properly stated claim under GBL § 349. *Id.*; *See also*: Relativity Travel, Ltd v. J.P. Morgan Chase Bank, 13 Misc. 3d 1221 (A) (Sup Ct, N.Y. Co. 2006).

The court has considered whether, as defendant argues, the disclosure of the

child term rider payments in the declarations page is documentary evidence that definitively contradicts the plaintiff's factual allegations and conclusively disposes of her claims. The court concludes that it does not. Disclosure of the "practice" alleged to be deceptive in the insurance policy does not disprove its deceptiveness, within the meaning of the consumer protection laws. See: Goshen v. Mutual Life Insurance Co., New York, 98 N.Y.2d 314 (2002).

Although claims under GBL § 349 are subject to a three (3) year statute of limitations pursuant to CPLR § 214 (2), and plaintiff's daughter turned age 25 in 1994, there is legal precedent in the First Department that supports the application of the "continuing wrong" doctrine to the facts of this case. Harvey v. Metropolitan Life Insurance Company, 34 A.D.3d 364 (1st Dept 2006) ("Harvey"). This doctrine tolls the three year statute of limitations for two years from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered. CPLR § 203 (g). Plaintiff presents a persuasive argument for the application of the doctrine because she was billed for \$98 each quarter, without any itemization, and even though her daughter no longer qualified for insurance under the rider.

Efforts by defendant to limit the precedential value of Harvey, are unpersuasive. Like Ms. Ring, the plaintiff in Harvey had an insurance policy with a child term rider. Like plaintiff, Mr. Harvey commenced his action beyond the applicable statute of limitations. The First Department found the action was nonetheless timely because the insurer had continued to bill, and Mr. Harvey (like plaintiff) had continued to pay the quarterly premiums. The court in Harvey concluded that the doctrine of the continuous

[* 9]

wrong doctrine was applicable because plaintiff's cause of action accrued on the date of the last wrong. Harvey v. Metropolitan Life Insurance, Co., N.Y., supra. Since plaintiff continued to be billed and she has continued to pay, the statute has not expired on her claim. The analysis and conclusion in Harvey is wholly reconcilable with the earlier Court of Appeals' decision in Gaidon v. Guardian Life Ins., Co., 96 N.Y. 2d 201, 210 (2001) ("Gaidon II"), which defendants rely upon. In Gaidon II, plaintiffs did not allege a continuing violation, therefore the court held that because the cause of action had accrued "when they were required to pay premiums beyond the projected date by which they were assured that the premiums would be fully covered by their policy dividends," the action was time barred. Gaidon II, supra at 211.

Finally, while other courts, including the Second Department, have decided differently when faced with similar issues, not only are those cases distinguishable on their facts, this court is, in any event, bound to follow the precedent of the First Department which is consistent with Gaidon II. Compare: Beller v. William Penn Life Insurance, 8 A.D.3d 310 (2nd Dept 2004).

Since this case is timely, and plaintiff has stated a cause of action under GBL § 349, Equitable's motion to dismiss must be, and hereby is, denied. Equitable's time to serve its answer is hereby extended to Ten (10) Days after service of this decision and order with Notice of Entry.

The court hereby schedules the preliminary conference in this case. It will be held on **April 3, 2008 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122**. No further notices will be sent.

Conclusion


Defendants' motion to dismiss is denied and their time to answer is hereby extended. The preliminary conference will be held on **April 3, 2008 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.**

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 6, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C

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