Sanders v Trotta
2008 NY Slip Op 31080(U)
April 2, 2008
Supreme Court, Queens County
Docket Number: 0017849/2007
Judge: Patricia P. Satterfield
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[* 1]

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

---X
SARAH SANDERS

Plaintiff,

-against-

NICHOLAS CARMEN TROTTA, M.D.
and PENINSULA HOSPITAL,

Defendants.
---X
NICHOLAS CARMEN TROTTA, M.D.,

Third-Party Plaintiff,

-against-

CONVENTUS INTER-INSURANCE EXCHANGE,

Third-Party Defendant.
---X

Index No.: 17849/07
Motion Date: 2/6/08
Motion Cal. No.: 28
Motion Seq. No.: 1

TP Index No.: 350601/07

The following papers numbered 1 to14 read on this motion by third party defendant Conventus Inter-Insurance Exchange for an order, pursuant to CPLR § 3211(a)(1) and (7), dismissing the Third Party Complaint in this action on the grounds that it fails to state a cause of action against Conventus and the claims against Conventus are barred by documentary evidence.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits..	1 - 6
Memorandum of Law in Support...	7 - 8
Affidavit of Third-Party Plaintiff-Exhibits-Memorandum of Law........	9 - 12
Reply Memorandum of Law..	13 - 14

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action for medical malpractice commenced by plaintiff Sarah Sanders ("plaintiff") against defendants Nicholas Carmen Trotta, M.D. ("Trotta") and Peninsula Hospital, to recover damages based upon their alleged medical malpractice in the care and treatment of plaintiff commencing on February 5, 2006, when eye surgery was performed, and subsequent follow-up care, treatment and surgeries. Upon receipt of the summons and complaint, defendant Trotta submitted the papers to Conventus Inter-Insurance Exchange ("Conventus"), his insurance carrier. Upon its denial of coverage, defendant Trotta commenced a third party action against Conventus alleging breach of contract. Conventus now moves to dismiss the third party complaint, pursuant to CPLR 3211(a)(1) and (7), on the grounds that it fails to state a cause of action against it and the claims are barred by documentary evidence.

Pertinent Facts

Third-party defendant Trotta, an ophthalmologist who has been insured professionally by Conventus since 2003, purchased a professional liability insurance policy covering the policy period from January 1, 2007 to January 1, 2008, at a premium cost of $14,999.99, that was being paid in nine (9) month installments. Upon Trotta's failure to submit the July 1, 2007 premium payment in the amount of $1,383.00, Conventus, on July 30, 2007, sent Trotta a notice of cancellation with a cancellation date of August 10, 2007, and an advisory that Trotta could avoid cancellation by submitting payment prior to the cancellation date. Conventus cancelled the policy on August 10, 2007, and on August 14, 2007, Conventus received Trotta's July premium, which it returned on August 22, 2007. Earlier, in August 16, 2007, Conventus refunded to Trotta $1,776.11, which represented return payment of his unearned premium. In that same August 16, 2007 letter, Conventus advised Trotta that, notwithstanding the cancellation of the policy, he was eligible to purchase an additional extended reporting period endorsement, referred to as tail insurance, that would provide coverage for any claims reported after August 10, 2007; Trotta's policy of insurance provided a 30-day extended reporting period following cancellation to report any claims made against him for which he sought coverage under the policy, which expired on September 10, 2007. To purchase the tail insurance, Trotta was required to submit a premium payment no later than September 16, 2007. Trotta did not purchase the tail insurance.

By letter dated August 30, 2007, Trotta requested reinstatement of his policy; the request was denied by letter dated September 6, 2007, and again, upon reconsideration, by letter dated September 12, 2007. The denials of Trotta's request for reinstatement followed a review of his payment record that revealed a pattern of late or non-payments. On September 11, 2007, Trotta filed a complaint against Conventus with the New Jersey Department of Banking and Insurance, alleging that the policy was improperly cancelled; resolution of that complaint is pending. On September 14, 2007, Conventus received from Trotta a copy of the summons and complaint served by plaintiff. On September 26, 2007, Conventus disclaimed coverage. The third party breach of contract action against Conventus was filed thereafter.

Conventus moves for dismissal of the third party complaint, pursuant to CPLR 3211(a)(1), on the ground that documentary evidence defeats Trotta's claim. It further contends, and Trotta

agrees, that while New York governs the procedural aspects of this motion, the substantive issues, pursuant to the terms of the policy, are governed by New Jersey law. Thus, Conventus further moves for dismissal, pursuant to CPLR 3211(a)(7), on the ground that the third party complaint fails to state a cause of action due to Trotta's failure to exhaust all administrative remedies.

Discussion

Generally on a motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Leon v. Martinez, 84 N.Y.2d 83 (1994); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept.2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, supra, 84 N.Y.2d at 88; International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005).

Here, Conventus contends that as a result of its cancellation of the subject insurance policy, Trotta filed an administrative complaint with the New Jersey Department of Banking and Insurance ("DOBI") on September 11, 2007, alleging that it "engaged in unfair practices by improperly cancelling and refusing to reinstate his policy." Referencing Title 17 of the New Jersey Statutes Annotated, which governs unfair methods of competition and unfair or deceptive acts by corporations and institutions for finance and insurance, Conventus alleges that by virtue of the aforementioned filing with DOBI, Trotta must await a final determination by the administrative agency's commissioner on his claim before he is entitled to maintain an action in the courts against Conventus. It alleges that the statute provides "that Trotta must await a determination by the commissioner of [DOBI]," and since DOBI has not made such determination, "the third party complaint is not ripe for adjudication by this Court as Trotta has not exhausted his administrative remedies."

In opposition, Trotta contends, inter alia, that persons aggrieved by a purported violation of Title 17, may, in their discretion, file a DOBI complaint, and upon the receipt of same, "the commissioner shall investigate an insurer to determine whether the insurer has violated any provision [thereof]." Trotta further contends that "there is nothing in the act that prohibits lawsuits from being commenced while an administrative action is pending, nor is there a requirement that an administrative action be commenced as a prerequisite to filing a lawsuit." He avers that there are

no contractual or statutory mandates which would require a DOBI complaint determination prior to the commencement of an action at law, stating that the fact that he "chose to file a complaint with DOBI is of no moment as there is no statutory or contractual prohibition against commencing a lawsuit for breach of contract while a DOBI complaint is pending or even after a finding of no violation by DOBI." Consequently, Trotta asserts that as this matter is ripe for adjudication, Conventus is not entitled to dismissal pursuant to CPLR § 3211(a)(7).

Although Trotta makes correct assertions with respect to the discretionary nature of a DOBI complaint filing by an aggrieved party, as well as the lack of contractual or statutory mandates which would require an administrative determination prior to the commencement of an action at law, these assertions run counter to the longstanding tenets found in New Jersey and New York jurisprudence which discourage judicial intervention prior to the conclusion of administrative adjudication. Indeed Trotta contends that Conventus' reliance upon N.J.S.A. § 17:29B-10 is misplaced, notwithstanding the implicit language stated therein. The statutory section, entitled "Intervenor; action to enjoin violations," states in pertinent part, the following:

> If the determination of the commissioner does not charge a violation of this act, then any intervenor in the proceedings before him may, within thirty days after the service of such determination, institute an action, notwithstanding the determination, in the Superior Court to enjoin and restrain any method of competition, act or practice. The court may proceed in the action in a summary manner or otherwise and may make an adjudication on the record and evidence before the commissioner and such additional evidence taken before it as it deems advisable and may enjoin any method, act or practice which it finds to be a violation of this act.

Notwithstanding Trotta's contentions to the contrary, although there is no compulsory language in the statute which would prohibit judicial intervention prior to the rendering of a final determination by DOBI, implicit is the necessity that a final determination of the commissioner be made prior to the institution of an action. Furthermore, as a matter of New Jersey law, "[e]xhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle (citations omitted). This principle requires exhausting available procedures, that is, 'pursuing them to their appropriate conclusion and, correlatively [] awaiting their final outcome before seeking judicial intervention'(citations omitted)." Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 558-559 (1979) . "The doctrine of exhaustion of remedies requires that parties pursue available internal proceedings to conclusion before seeking judicial intervention (citation omitted). That policy discourages premature judicial intervention in administrative proceedings." Hernandez v. Overlook Hosp., 149 N.J. 68, 73 (1997). As set forth in Magliochetti v. State by Com'r of Transp., 276 N.J.Super. 361, 647 A.2d 1386 (N.J. Super.L.,1994): "The doctrine of exhaustion of administrative remedies serves three primary goals: (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may

satisfy the parties and thus obviate resort to the courts." "The third goal requires the parties to pursue available procedures to their appropriate conclusion and correlatively awaiting their final outcome before seeking judicial intervention (citation omitted). This is so because interruption of the administrative process is not justifiable to any greater extent than interference with the trial process by interlocutory appeals. Id. The expertise of an administrative agency may not be exercised or known until it renders its final decision and usually due deference is accorded such expertise upon judicial review." Magliochetti v. State by Com'r of Transp., 276 N.J.Super. 361, 375, 647 A.2d 1386, 1393 (N.J. Super.L.,1994) Although the exhaustion rule is not absolute, absent certain exceptions not present here, application of this rule is proper. See, Playcrafters Members v. Teaneck Board of Ed. of Teaneck Tp., 177 N.J.Super. 66, 424 A.2d 1192 (N.J.Super.A.D., 1981); Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 558-559 (1979). Consequently, as Trotta has failed to exhaust his administrative remedies by awaiting the final determination of the complaint that he chose to file with DOBI, that branch of the motion for dismissal of the action upon the ground that the complaint fails to state a cause of action, pursuant to CPLR § 3211(a)(7), is granted.

Arguendo, even if the exhaustion rule is inapplicable in this matter, which this Court finds such rule is germane and appropriate under the circumstances, the complaint must still be dismissed under CPLR § 3211(a)(1). It is well settled that "'[a] motion pursuant to CPLR 3211(a)(1), to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted)." Ruby Falls, Inc. v. Ruby Falls Partners, LLC, 39 A.D.3d 619 (2nd Dept. 2007). "In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the document relied upon must conclusively dispose of the plaintiff's claim [see, Sammarco Garden Ctr. v. Sammarco, 173 A.D.2d 456, 570 N.Y.S.2d 80 (2nd Dept. 1991); Greenwood Packing Corp. v. Associated Tel. Design, 140 A.D.2d 303, 527 N.Y.S.2d 811 (2nd Dept. 1988)]." Mest Management Corp. v. Double M Management Co., Inc., 199 A.D.2d 479, 480 (2nd Dept. 1993); see also, Goshen v Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); Montes Corp. v Charles Freihofer Baking Co., 17 A.D.3d 330 (2nd Dept. 2005); New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2nd Dept. 2003).

Here, the main action was commenced by plaintiff against Trotta and defendant Peninsula Hospital, to recover damages for their alleged medical malpractice in the ophthalmological care and treatment of plaintiff. On September 14, 2007, Conventus received from Trotta a copy of the summons and complaint served by plaintiff. In December 2007, Trotta served Conventus with the subject third-party complaint, which alleges, in pertinent part, the following:

> On or about February 1, 2005, plaintiff in the underlying action [] is alleged to have been injured after having eye surgery, which plaintiff contends was a result of professional negligence by [Trotta], and co-defendant Peninsula Hospital. [Plaintiff] filed suit [] on or about July 17, 2007.
>
> [Trotta] promptly requested insurance coverage from [Conventus]

> pursuant to the aforementioned policy of insurance.
>
> On or about August 10, 2007, [Conventus] cancelled the policy of insurance covering [Trotta], alleging non-payment of premium.
>
> [Conventus] did not provide lawful and proper Notice of Cancellation and/or improperly rejected the premium payment tendered by [Trotta], in breach of the contract with [Conventus], and otherwise breached the contract with [Trotta].
>
> As a result of the breach of contract by [Conventus] in failing and refusing to provide the aforesaid coverage, [Trotta] has suffered and will continue to suffer damages.

The record in the instant matter reveals that Trotta, an ophthalmologist who has been insured professionally by Conventus since 2003, purchased a professional liability insurance policy covering the policy period from January 1, 2007 to January 1, 2008, at a monthly premium cost of $1,383.00. Upon Trotta's failure to submit the July 1, 2007 premium payment, by certified letter on July 30, 2007, Conventus sent Trotta a Notice of Cancellation of Insurance with a cancellation date of August 10, 2007, and a curative proviso indicating that cancellation could be avoided by submitting the July payment prior thereto. By certified letter dated August 16, 2007, Conventus stated that Trotta's policy was cancelled for nonpayment on August 10, 2007, and advised that he was eligible to purchase tail insurance that would provide coverage for any professional claims reported after the August 10, 2007 cancellation, upon the remittance of all previous premiums due and a single premium payment of $29,999.97 by September 16, 2007. In that letter, Conventus also refunded to Trotta $1,776.11, which represented return payment of his unearned premium. By further certified letter dated August 22, 2007, Conventus returned Trotta's July premium, which it received on August 14, 2007, indicating that the policy had been cancelled for nonpayment on August 10, 2007, and a notice of cancellation letter and tail terms were sent on July 30 and August 16, 2007, respectively.

By letter dated August 30, 2007, Trotta indicated that he received the unearned premium and July premium checks, which he would return to Conventus upon its immediate reinstatement of his policy. He further advised that his July premium was receive four days after the August cancellation date due to the fact that he was out of town when notification was sent, and an error in his online banking account. By certified letter dated September 6, 2007, Trotta's request for reinstatement of his policy was denied, and upon a second letter from Trotta dated September 11, 2007 whereby he requested reconsideration, Conventus, by letter dated September 12, 2007, again denied such request for reinstatement. Thereafter, by certified letter dated September 26, 2007, Conventus, upon receipt of the underlying complaint on September 14, 2007, which was dated July 17, 2007, disclaimed coverage. The letter stated in relevant part:

> I regret to inform you that the claim is <u>not</u> covered under the terms

and conditions of your policy with Conventus and Conventus has authorized [] this disclaimer of coverage. Specifically we note that the following terms and conditions of the captioned policy as being applicable to our review of the coverage in connection with the claim:

II. Insuring Agreement

The Company shall defend the insured and pay damages on the insured's behalf in any claim from an incident which occurs on or after the retroactive date specified in the Declarations, provided the claim (a) is first made against the insured during the policy period; and (b) is reported to the company during the policy period or any applicable extended reporting period.

VII. Extended Reporting Period

If this policy is canceled or non-renewed for any reason, the Company will extend the time during which a claim may be reported for thirty (30) days after such cancellation or non- renewal takes effect, without any additional premium charge. Any claim arising from an incident which occurs on or after the retroactive date specified in the Declarations and prior to the expiration of the policy period, which claim is first made against the insured during the policy period and is reported to the company during this thirty (30) day extension is subject to all the other terms and conditions of the policy [].

The letter further indicates that as Trotta's policy was cancelled on August 10, 2007, and the policy was extend for an additional thirty (30) days pursuant to the aforementioned provision of the policy, the underlying claim had to be reported to Conventus by September 10, 2007. "As the matter was not reported to Conventus until September 14, 2007, no coverage is afforded to [Trotta]. Moreover, the letter asserts that an offer was made to Trotta to purchase an Extended Reporting Period Endorsement by letter dated August 16, 2007, with a proviso stating that "non-payment [of the single premium payment] shall be deemed a rejection of the offer." As a result of Trotta's failure to remit payment, Conventus stated the following:

[We] have been informed by the underwriting department that no premium payment for the Tail Endorsement was received in your behalf on or before September 16, 2007. Therefore, there was no

> election on your part to obtain coverage pursuant to the Tail Endorsement and no additional coverage was available to you by Conventus after September 10, 2007.
>
> In view of the foregoing, Conventus must deny and disclaim coverage to you under the above policy of insurance. Conventus will not assign counsel to defend you in this action, nor will it indemnify you for any judgment, settlement or award rendered against you or any expenses incurred by you in connection with this action.

Here, the record is replete with a litany of documents which defeats Trotta's breach of contract claim, and establishes a complete defense to the third party action. New Jersey Administrative Code § 11:1-20.2, the statute governing renewals, nonrenewals and cancellation notice requirements for commercial and homeowners insurance policies, states in relevant part:

> (e) A policy shall not be cancelled for nonpayment of premium unless the insurer, at least 10 days prior to the effective cancellation date, has mailed or delivered to the insured notice as required in this subchapter of the amount of premium due and the due date. The notice shall clearly state the effect of nonpayment by the due date. No cancellation for nonpayment of premium shall be effective if payment of the amount due is made prior to the effective date set forth in the notice.

The statute further provides that "no nonrenewal or cancellation shall be valid unless notice thereof is sent by certified mail or by first class mail []." Moreover, N.J.A.C. § 11:1-20.4, entitled "cancellation and nonrenewal underwriting guidelines," states, in pertinent part, the following:

> (a) No insurer may cancel or nonrenew a policy based upon underwriting guidelines which are arbitrary, capricious or unfairly discriminatory.
>
> (b) The following guidelines are approved for use by insurers:
>
> 1. Nonpayment of premium

Further, the insurance policy likewise states under the cancellation section, provision 8(E)(2), that "the company may cancel this policy for any reason, subject to the laws of the State of New Jersey, by delivering a minimum of 30 days, but not more than 120 days, written notice to the named insured at the named insured's last known mailing address, unless cancellation is due to non-payment of premium, in which case the company shall provide a minimum 10 days written notice []." As Conventus sent a certified letter to Trotta on July 30, 2007, cancelling his policy by August 10, 2007 unless the July premium was received prior thereto, and subsequently cancelling said policy based

upon nonpayment, Conventus was in full compliance with the statutory requirements. Moreover, upon Conventus' receipt of the underlying complaint on September 14, 2007, it timely disclaimed coverage by a comprehensive letter to Trotta dated September 26, 2007. Further, notwithstanding Trotta's numerous contentions with respect to the manner in which Conventus handled the cancellation of the subject policy, and the subsequent disclaimer of coverage, this Court finds no such impropriety. Indeed, Trotta contends that he was mislead into noncompliance, and "set up for cancellation," due to Conventus' prior acceptance of his delinquent payment pattern over the years, as well as Conventus' failure to advise him of the terms of his contract. These allegations this Court finds incredulous, lacking in merit and less than probative on the issue of whether dismissal based upon a defense founded upon documentary evidence is warranted. Interestingly enough, Trotta makes much ado about being misled into not proffering the underlying pleadings within the thirty day extension period, while ignoring the well settled tenet that the insured shall give notice of such claim as soon as practicable. The record is devoid of information which would indicate when Trotta was served with the underlying complaint dated July 27, 2007, nevertheless, his contention that if he would have known about the free extension period, he would have submitted the complaint before it elapsed on September 10, 2007, clearly indicates that Trotta withheld information from Conventus during the period whereby he sought to have the policy reinstated. Consequently, as the documentary evidence utterly refutes Trotta's factual allegations, a defense is conclusively established as a matter of law, and Conventus is likewise entitled to dismissal on this additional basis, pursuant to CPLR § 3211(a)(1).

Accordingly, the motion by third party defendant Conventus Inter-Insurance Exchange for an order, pursuant to CPLR § 3211(a)(1) and (7), dismissing the third party complaint in this action on the grounds that it fails to state a cause of action against it and the claims are barred by documentary evidence is granted in its entirety, and the third-party complaint hereby is dismissed as against third party defendant Conventus Inter-Insurance Exchange.

Dated: April 2, 2008 ....

J.S.C.