

Licht v Empire Off. Inc.

2008 NY Slip Op 31200(U)

April 15, 2008

Supreme Court, New York County

Docket Number: 0601951/2004

Judge: Marcy S. Friedman

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

PRESENT: **MARCY S. FRIEDMAN**

Justice

PART **57**

Index Number : 601951/2004

LICHT, LLOYD

VS.

EMPAIRE OFFICE

SEQUENCE NUMBER : # 002

DISMISS

INDEX NO. 601951-04

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO.

read on this motion to/for business

PAPERS NUMBERED

1

2

3

M1, M2, M3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Memos of Law

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

APR 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4-15-08



MARCY S. FRIEDMAN 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
NEW YORK COUNTY - - PART 57

LLOYD LICHT and ELIOT LICHT MD,
as attorneys-in-fact for FREDA LICHT and
ESTATE OF EMANUEL M. LICHT,

Plaintiff(s),

against

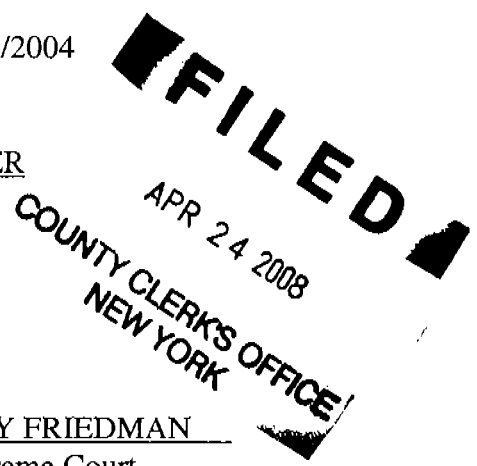
EMPIRE OFFICE INC. (f/k/a EMPIRE
OFFICE EQUIPMENT, INC.),

Defendant(s).

Index No.: 601951/2004

DECISION/ORDER

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court



In this breach of contract action, plaintiffs allege that Freda Licht, following the death of her husband Emanuel Licht, was wrongly denied health insurance benefits promised in a written agreement between defendant Empire Office Inc. ("Empire") and Emanuel Licht. Defendant Empire now moves for summary judgment dismissing plaintiffs' damages claim to the extent that it seeks recovery beyond reimbursement of the premiums paid by plaintiff for replacement insurance.¹

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851,853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing

¹By stipulation dated July 17, 2006, the action was discontinued against defendant Lawrence Gaslow.

party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])."

(Zuckerman v City of New York, supra, at 562.)

The underlying facts which gave rise to this case are essentially undisputed. In August 1995, defendant Empire entered into an agreement with Emanuel Licht, a long-time employee of defendant, to pay him an annual consulting fee of \$25,000 for five years and to continue to provide health insurance benefits to him and his wife, Freda Licht. The agreement also provided that if Mr. Licht died prior to the expiration of the five year period of the agreement, "the consulting fee shall continue to be paid to his Estate, and all insurance coverage shall continue to the end of the expiration period if spouse survives him. At the end of the five year period if either EML or spouse still survives Empire Office Equipment, Inc. shall continue all health insurance coverage." (Agreement, Ex. I to Ortado Aff. in Support.) The agreement was amended in 1998 to increase the annual fee to \$35,000 but in all other respects remained the same. Emanuel Licht died on June 18, 1998. Defendant continued to provide health insurance to Freda Licht, including coverage for prescription drugs and dental care, until June 2001, at which time coverage for her was terminated. After defendant discontinued coverage for Freda Licht, she obtained insurance through a plan offered by AARP, which did not include coverage for prescription medications or for dental care. Freda Licht died on September 10, 2005. Plaintiffs seek approximately \$51,000 in damages, including the cost of the premiums paid for replacement insurance, as well as out-of-pocket expenses for prescription drugs, dental treatment, and music therapy.²

²Although the complaint also seeks specific performance of the contract, neither party addresses that claim, apparently in view of the death of Freda Licht subsequent to the commencement of this action.

Defendant concedes that it is liable for the premiums paid by or on behalf of Freda Licht for substitute insurance in the amount of \$10,468.82. Defendant argues, however, that plaintiffs cannot seek recovery of any other out-of-pocket expenses because, as a matter of law, plaintiffs' damages claim for breach of an agreement to provide insurance is limited to the cost of the premiums paid for insurance.

In any breach of contract action, the basic principle of damages is "to put the injured party in as good a position as he would have been put by full performance of the contract." (Freund v Washington Sq. Press, Inc., 34 NY2d 379, 382 [1974][internal quotations and citation omitted]. See Inchaustegui v 666 5th Ave. Ltd. Partnership, 96 NY2d 111, 116 [2001], affg Inchaustegui v 666 5th Ave. Ltd. Partnership, 268 AD2d 121.) In cases involving a breach of an agreement to procure insurance, the breaching party is liable for "all the resulting damages." (Inchaustegui, 96 NY2d at 115; Kinney v G.W. Lisk Co., 76 NY2d 215, 219 [1990].) Courts have held – chiefly in cases arising in the construction and landlord/tenant context – that where a plaintiff seeking insurance coverage has "procured its own insurance which covers the plaintiff's claims," defendant's liability is limited to the cost of the replacement insurance. (Maldonado v Kissm Realty Corp., 306 AD2d 328, 329 [2d Dept 2003], lv denied 5 NY3d 709 [2005].) However, courts have declined to strictly limit the damages to the cost of the premiums, extending the right to seek damages to include other out-of-pocket expenses "arising out of the liability claim and not covered by the substitute insurance procured." (Inchaustegui, 268 AD2d at 127-128.)

Here, in a starkly different context involving the denial of health insurance benefits to the surviving spouse of an employee, defendant has not shown as a matter of law that plaintiffs cannot recover for the out-of-pocket expenses not covered by the replacement insurance.

Notably, plaintiffs have raised questions of fact as to whether plaintiff Freda Licht, 84 years old at the time that defendant discontinued her insurance coverage, could reasonably have obtained comparable insurance to that provided by defendant. Nor has defendant demonstrated that plaintiffs did not properly seek to mitigate their damages.

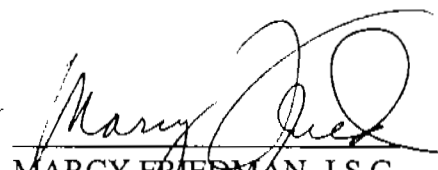
Further, on the record before it, the court cannot say that plaintiffs' claim for music therapy is excluded from coverage. Defendant's conclusory assertion that the policy did not cover this therapy is patently insufficient to warrant a finding as to the scope of the policy's coverage. Defendant identifies no specific language in the policy and nothing stated by defendant's witness, an employee of the insurance company issuing defendant's policy, establishes that the policy excluded coverage for the music therapy.

To the extent that plaintiffs seek to assert a claim for a tax "gross up," that claim should be dismissed in the absence of any authority to support the assertion of such a claim in this case.

Accordingly, it is ORDERED that defendant's motion is granted solely to the extent of dismissing plaintiffs' claim for a tax gross up, and in all other respects is denied; and it is further

This constitutes the decision and order of the court.

Dated: New York, New York
April 15, 2008



MARCY FRIEDMAN, J.S.C.

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NEW YORK