

Desai v Provident Mut. Life Ins. Co. of Phila.
2008 NY Slip Op 32632(U)
September 23, 2008
Supreme Court, New York County
Docket Number: 0604229/2005
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 604229/2005
DESAI, PANKAJ
vs.
PROVIDENT MUTUAL LIFE
SEQUENCE NUMBER : 002
AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.
*case stayed until December 11, 2008
at which time there will be a
status conference*

Dated: Sept 23 2008

HON. JUDITH J. GISCHE S.C.

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 10**

-----X
Pankaj T. Desai,
Plaintiff

-against-

Provident Mutual Life Insurance
Company of Philadelphia, Nationwide
Life Insurance Company of America,
Inc., *successor in interest to*
Provident Mutual Life Insurance
Company of Philadelphia,
Nationwide Financial Services, Inc.,
Life Insurance Company of Boston &
New York, CNA Financial Corp.,
Continental Casualty Company,
UNUM Life Insurance Company of
America, First UNUM Life Insurance
Company and Paul Revere Life
Insurance Company,

Defendants.
-----X

DECISION/ORDER

Index No.: 604229/2005
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Papers	Numbered
Defs' CNA & CCC n/m (§§3025, 3212) w/CS affid (sep back),	
MHB affirm (sep back), exhs	1, 2, 3
Defs PMLICP, NWLICA et al x/m (§§3025, 3212) w/MJK affirm,	
GMT affid, exhs	4
Pltf's x/m (stay) w/PTD affid,	5
Defs' PMLICP, NWLICA et al reply to pltf's x/m w/MJK affirm . . .	6

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

GISCHE J.;

This is an action by plaintiff for breach of contract based upon claims that the defendants, all insurance companies, denied plaintiff benefits he was entitled to under several disability insurance policies. Issue has been joined by the moving and cross moving defendants who seek leave to serve amended answers, and the grant of summary judgment to each of them dismissing plaintiff's action based upon lack of standing to maintain it. Plaintiff has not yet filed the note of issue. He opposes the motion and cross motion; he has also cross moved for a stay of this action so he can return to Bankruptcy Court and obtaining a clarifying order.

Since the motions by the defendants are timely, they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The decision and order of the court is as follows:

Arguments

Plaintiff Pankaj T. Desai is a medical doctor whose license to practice medicine (plastic surgery) in the state of New York has been revoked. The Department of Health, State Board for Professional Medical Conduct ("DOH") issued a statement of charges dated October 9, 2002 ("charges"). His license to practice medicine was suspended pending the hearing on the charges. The hearing began October 18, 2002 and lasted several days into February 2003. *In the matter of Pankaj T. Desai, M.D.*, BPMC # 03-162 ("the disciplinary action"). DOH revoked plaintiff's medical license on June 23, 2003.

At the time he was brought up on charges in October 2002, plaintiff had several disability income policies in effect with the defendants. He had one policy with CNA

Financial Corporation and Continental Insurance Company (collectively "CNA") [policy number 03-A-1940] and four (4) policies with the other named defendants to wit: Provident Mutual Life Insurance Company, Nationwide Life Insurance Company of America, Nationwide Financial Services, Inc., Unum Life Insurance Company of America, First Unum Life Insurance Company, and Paul Revere Life Insurance Company (the "cross moving defendants").

After his suspension, CNA notified plaintiff (on October 18, 2002) that his disability policies were cancelled as of that date. Plaintiff, however, filed a claim dated October 27, 2002 stating that he was physically disabled as of September 2, 2002, a date before his suspension.

On that claim form plaintiff stated that he had worked a reduced schedule for the 6 month period preceding his claim, that his disability was "diminishing vision [in] both eyes." He stated he had been treated for this condition for the past 6 years by one doctor and 4-5 years by another doctor.

CNA investigated plaintiff's claim and obtained his medical records from those doctors. CNA also contacted plaintiff's hospital where he worked. The documents were all reviewed by CNA's own examiner, an ophthalmological surgeon who determined that plaintiff's record did not show the disabling condition claimed. CNA disclaimed coverage on January 29, 2003. The disclaimer states that although plaintiff has a family history of glaucoma, and therefore the propensity to possibly himself develop this disease, his vision was fine. In the letter, CNA stated that plaintiff had done two surgeries during the period he claimed he had stopped working.

After he was suspended, and had filed for disability benefits plaintiff filed for Chapter 7 bankruptcy protection (*In re Desai*, U.S Bankruptcy Ct, N.D.N.Y., Case No. 02-67354-6-SDG). In his bankruptcy petition dated December 5, 2002, plaintiff identified 14 malpractice actions pending against him, as well as other claims by creditors. Among his assets he listed a life insurance policy, but not the disability policies at issue here, nor did he amend his filing to reflect that CNA had disallowed his claim.

The moving and cross moving defendants present several arguments why plaintiff lacks standing to bring this action to enforce the payment of disability benefits. They argue that the failure to disclose the policies in the bankruptcy petition rendered the petition incomplete because the policies were an asset, within the meaning of the Bankruptcy code. 11 U.S.C.A. § 541 [a] [1]. Defendants further argue that the disability policies became assets of the trustee in bankruptcy once plaintiff filed his petition, even though he failed to actually disclose them. Bromley v. Fleet Bank, 240 A.D. 2d 611 (2nd Dept 1997). Though defendants acknowledge that under the New York State Insurance Law (§ 3212) disability policies can be exempt property, they argue that plaintiff had to apply for such exemption. Thus, according to defendants, plaintiff's failure to disclose the policies means they have not been exempted, but remain an asset of the bankrupt estate and therefore, under the control of the trustee in bankruptcy. Defendants contend they first learned that plaintiff had filed for bankruptcy in December 2007, after this case was brought. They contend there is no prejudice to plaintiff in allowing them to amend their answers because he has known these facts all

along.

Plaintiff admits that he did not disclose the disability policies in his bankruptcy petition, but contends he did not think he had to include them. He argues that he followed the advice of his attorney, who did not list them on the form. Plaintiff argues that defendants are misguided and rely upon cases that predate the change in the law which exempts disability policies from being assets available to satisfy the debtor's obligations to his or her creditors. Legg v. St. John, 296 U.S. 489 (1936).

Plaintiff argues that at most there are only two months' worth of disability payments at issue, because when he filed the petition he had no right to future payments. Moreover, he claims that his breach of contract claim against the defendants did not ripen until after they denied him benefits, and so there was no pending "claim" to disclose.

Plaintiff has cross moved for a stay of this action so he can re-open his case in Bankruptcy court and allow the trustee to decide whether the policies had/have any value to the estate. He argues that the motions for summary judgment on the issue of standing should be denied because he has a valid overarching claim regarding and there is an unresolved issue of fact whether he is "disabled" within the meaning of the policies. He contends that he has been diagnosed with Attention Deficit Disorder, Antisocial Personality Disorder and Schytzotypical Personality Disorder, and this explains some of what led to his license being revoked.

Discussion

The court first has to decide whether defendants should be allowed to amend

their respective answers to assert the proposed defense that plaintiff lacks standing to bring this action. Generally, leave to amend a pleading shall be freely given by the court upon such terms as may be just, including the granting of costs and continuances, unless patently devoid of merit. CPLR § 3025 (b).

The issue of whether the plaintiff has standing to bring an action for the relief requested is a threshold determination that the court has to make in every case once raised. Society of Plastics Industry v. County of Suffolk, 77 NY2d 761 (1991) (internal citations omitted). If the defendants can prove that plaintiff lacks standing to bring this action, then their motions for summary judgment, dismissing the complaint ought to be granted [Santori v. Met Life, 11 A.D.3d 597 (2nd Dept 2004)], unless plaintiff raises triable issues of fact that have to be decided before the applicable law can be applied.

Although plaintiff opposes the motion, he admits that he did not disclose these disability policies and he also acknowledges that he may have made a mistake in not doing so. He attributes the error, however, to his lawyer's advice. Regardless of the reason why he did not disclose this information, defendants have raised a viable affirmative defense. Their motions to amend their respective answers are granted. Moreover, since plaintiff has addressed the proposed affirmative defense in his cross motion, the answers are deemed to have been served.

The court will proceed to decide the balance of defendants' motion which is for summary judgment on the issue of standing.

In connection with their motion and cross motion for summary judgment, the defendants have the initial burden of making a *prima facie* showing of entitlement to

judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, the burden shifts to plaintiff who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them, without the need for a testimonial hearing. See: Hindes v. Weisz, 303 AD2d 459 (2nd Dept 2003).

Defendants have proved, and it is unrefuted, that plaintiff did not disclose any of these disability policies when he filed for bankruptcy. They have also proved, and it is unrefuted, that plaintiff had all these policies in effect at the time he filed for bankruptcy protection. The defendants agree that they denied plaintiff the benefits he now seeks to enforce. Both sides, however, disagree whether the failure to disclose the policies impacts upon whether they are "exempt" within the meaning of the debtor creditor law. They also disagree whether the policies continue to be under the control of the trustee, since the policies were never addressed in bankruptcy court.

Any assets the debtor has at the time the bankruptcy petition is filed are part of his or her estate. In re Waxman, 128 B.R. 49 (Bankr. E.D.N.Y. 1991). There are, however, certain exemptions identified by statute, which if proved, are also exempt under the Bankruptcy Code. In re Herald, 294 B.R. 440 (Bkrcty.W.D.N.Y.,2003). Disability insurance policies are exempted under New York law, along with certain other kinds of insurance policies. Debtor and Creditor Law § 282; N.Y. Ins Law § 3212; In re

Herald, supra. Subject to these exemptions, debtors have an absolute duty to report whatever interests they hold in property, even if they believe those interests are worthless. In re Coombs, 193 B.R. 557 (Bankr S.D.Cal. 1996).

Although plaintiff indicates that future disability benefits payments were not assets of his estate, the policies should have been disclosed to the trustee. It is not up to the debtor to decide what to disclose, even if the non-disclosure is not motivated by an intent to defraud. See In re Colvin, 288 B.R. 477 (Bankr E.D. Mich 2003).

Therefore, a debtor's failure to list, for example, a legal claim as an asset on the petition precludes the debtor from pursuing that claim on his or her own behalf because it remains the property of the bankruptcy estate that has not been discharged. Santori v. Met Life, 11 A.D.3d at 599. Even if plaintiff is correct, that the trustee will decide in his favor and exempt the disability policies, it was plaintiff's burden to disclose the policies so that any objecting party (including the trustee) could challenge and prove that the exemption was incorrectly claimed. In re Bentley, 237 B.R. 10 (Bkrcty.W.D.N.Y. 1999).

Plaintiff proposes that this case be stayed and he be permitted to return to Bankruptcy court. He intends to reopen his Bankruptcy case by filing a supplemental petition so that the unresolved issue about the policies can be decided by the trustee. He contends this is a relatively simple process, and defendants do not refute this. However, they argue that this case should be dismissed, not stayed even though they agree that only the Bankruptcy court can grant plaintiff an exemption, if he is entitled to one. Terry v. Terry, 56 B.R. 713, 715 (WDNY 1986).

As a general matter, the party seeking a stay must establish that it is necessary

to prevent some serious harm, injustice, prejudice, loss, etc. Merola v. Bell, 47 N.Y.2d 985 (1979) (stay to address issues about press coverage). Plaintiff persuasively argues that only the assets he had at the time he filed for bankruptcy are part of his (the debtor's) estate, and arguably not encompassed within the final order of discharge. In re Waxman, *supra*. This means only some of the money being claimed as past due in this action is the property of the trustee; other claims, however, apparently belong to the plaintiff since the payments were due after he filed for bankruptcy. Santori v. Met Life, *supra*. The wholesale dismissal of this action is unwarranted and a stay is appropriate. The court has also taken into account that there is the overarching dispute (not the subject of these motions) whether plaintiff is "disabled," within the meaning of the subject policies.

In accordance with the court's decision, the court will stay this action for SIXTY (60) DAYS from the date hereof so that within that time plaintiff can take the necessary steps to reopen the bankruptcy action and resolve the issue of whether the disability policies are (or remain) the property of the trustee in bankruptcy, whether the disability policies are exempt, and whether plaintiff is free to pursue his claims to enforce the disability policies in this court. Both motions for summary judgment on the basis that plaintiff does not have standing to bring this action are, therefore, denied without prejudice.

This case will appear on the court's calendar on **December 11, 2008 at 9:30 a.m.** in Part 10, 80 Centre Street, Room 122 for a status conference.

Conclusion

* 11]

The motion and cross motion by defendants for leave to amend their respective answers is granted. Plaintiff's cross motion for a stay is also granted and this case is hereby STAYED in the manner provided. This case will appear on the court's calendar on **December 11, 2008 at 9:30 a.m.** in Part 10, 80 Centre Street, Room 122 for a status conference.

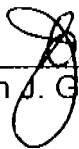
The motion and cross for summary judgment on the issue of standing is denied, without prejudice.

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
 September 23, 2008

So Ordered:



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

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK