American Med. & Life Ins. Co. v Crosssummit Enters., Inc.

2009 NY Slip Op 31187(U)

May 18, 2009

Supreme Court, Nassau County

Docket Number: 18059-08

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

---x TRIAL/IAS PART: 25

AMERICAN MEDICAL AND LIFE INSURANCE COMPANY,
Plaintiff,

NASSAU COUNTY

-against-

Index No: 018059-08

Motion Seq. No: 2

Submission Date: 5/8/09

CROSSSUMMIT ENTERPRISES, INC., CROSSWALK HOLDINGS INC., RICHARD J. DUNN AND KEVIN DUNN,

Defendants.
---x

Papers Read on this Motion:

Notice of Motion, Affirmation in Support and Exhibits................x
Plaintiff's Memorandum of Law in Support..................................x
Affidavit of K. Aber in Opposition and Exhibits............................x
Defendants' Memorandum of Law in Opposition..........................x [1]
Plaintiff's Reply Memorandum of Law in Support and Exhibit...x

This matter is before the court on the application by plaintiff American Medical and Life Insurance Company ("AMLI") for a preliminary injunction compelling Crosssummit Enterprises, Inc. ("Cross-Summit"), Crosswalk Holdings, Inc. ("Cross Walk") and Richard Dunn (collectively referred to as "defendants"), to place $2.7 million dollars in premium funds into an escrow account pending the resolution of this action. For the reasons expressed in more detail below, the

[1] Defendants' Memorandum of Law is titled "Memorandum in Support" but is, in fact, a Memorandum in Opposition.

Court denies the application.

BACKGROUND

This action involves group limited medical policies underwritten by AMLI. On June 22, 2006, AMLI entered into a managing general underwriting and administrative services agreement ("MGU") with Crosswalk Holdings Corporation ("Crosswalk"), wherein AMLI appointed Crosswalk as its principal agent and representative for the marketing of the policy under a separate agency agreement ("MGA"). Thereafter, Crosswalk was replaced by an affiliated entity, Cross Summit Enterprises, Inc. ("Cross Summit"). Defendants Richard J. Dunn and Kevin Dunn are the Chairman and President, respectively of Cross Summit.

The agreements between the parties required defendants to identify associations who would be interested in becoming policyholders for the benefit of their members. Upon identifying an interested association, Cross Summit was to submit all relevant documentation to AMLI so that AMLI could design a coverage plan for the association, issue appropriate rates, and bind coverage. After coverage was bound, Cross Summit was responsible for the collection of premiums, which would be placed in one of two interest bearing accounts in AMLI's name. Except for certain administrative fees for which Cross Summit was responsible and Cross Summit's own fee, the entirety of the premiums was to be placed in one of these two accounts.

On August 20, 2008, AMLI sent two notices to Crosswalk/Cross-Summit terminating defendants as the exclusive underwriter and agent. In addition, Crosswalk and Cross-Summit were required to "cease and desist any and all marketing, selling and/or binding of, under and pursuant to any policy insured and/or underwritten by AMLI" and to "make available to AMLI any and all records pertaining to the Agreement and the Policies."

On September 30, 2008, AMLI filed a summons and complaint asserting causes of action for fraud, breach of contract, unjust enrichment, breach of fiduciary duty, and conversion. Thereafter, AMLI moved by Order to Show Cause for a preliminary injunction preventing defendants from engaging in any activity related to AMLI, compelling defendants to submit to an audit, and compelling defendants to place premiums into escrow pending the resolution of this matter.

On October 2, 2008, the Court (Austin, J.) heard AMLI's motion and ultimately issued an order (the " '08 order") permanently enjoining defendants from, among other things, marketing, selling or binding any policy underwritten by AMLI, and destroying any records relating to. The '08 Order also stated that defendants would consent to an audit on or before October 6, 2008, and provide all relevant documents to AMLI by that date. On October 27, 2008, the parties entered into a Stipulation stating that AMLI would provide a copy of the audit report performed by its independent auditor SMART by November 25, 2008, and the hearing on the issue regarding the placement of funds into escrow was rescheduled for December 4, 2008.

SMART then conducted a review of Cross America's Premium, Collections, Cash Management processes and reporting to AMLI for the period August 1, 2006 through July 31, 2008. The audit objectives were (1) to ensure that Cross America had adequate procedures and internal controls, (2) to ensure that Cross America had acted in compliance with the terms of the Agency Administration Agreements executed in June and July 2006, and (3) to determine the amount of premiums due.

Plaintiff now seeks an order requiring defendants to place $2.7 million dollars into escrow to enforce compliance with Insurance Law § 2120(a). According to plaintiff, SMART

confirmed that (a) defendants are improperly holding $2.7 million dollars in their own operating account, and (b) defendants engaged in fraud which left thousands of individuals exposed without insurance. Plaintiff further maintains that if injunctive relief is not granted it will be irreparably harmed due to the significant risk that defendant will "hide, spend or otherwise abscond with this premium" (Mealiffe Affirmation ¶ 9).

In opposition to the motion, defendants raise a myriad of issues such as the validity of AMLI's termination of defendants, defendants' alleged entitlement to continued fees post-termination, the validity of SMART's audit, and defendants' claim for money damages arising from a purported conspiracy by AMLI to steal defendants' business. These issues, however, are not before this Court. Rather, the Court's analysis is limited to the merit of the claims relating to the premiums which AMLI seek to have placed in escrow. As to these claims, defendants offer three defenses for retaining the premiums: 1) retention was necessary to avoid bankruptcy; 2) it was the "only commercially reasonable course of action;" and 3) defendants' money damages exceed the amount of the premiums. Specifically, defendants assert that they were "left with the choice of either retaining collected premiums as a direct offset against its unpaid current and near-term fees or, wholly deprived of these fees, being driven into bankruptcy, placing all of its 33 employees out of work" (¶ 9, Aber Affidavit).

<u>RULING OF THE COURT</u>

The fundamental purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. *Gluck v Hoary,* 55 A.D.3d 668 (2d Dept. 2008)*; Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.,* 50 A.D.3d 1072, 1073 (2d Dept. 2008); *EdCia Corp. v McCormack,* 44 A.D.3d 991 (2d Dept.

2007). In order to obtain a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (2005); *Aetna Ins. Co. v Capasso*, 75 N.Y.2d 860, 862 (1990); *Gluck v Hoary*, 55 A.D.3d 668 (2d Dept. 2008); *Ricca v Ouzounian*, 51 A.D.3d 997, 998 (2d Dept. 2008). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Here, the Court finds that plaintiff has neither established a likelihood of success on the merits nor irreparable injury. Thus, the equities do not balance in plaintiff's favor and a preliminary injunction is not warranted.

A. Plaintiff has not demonstrated a likelihood of success of the merits.

Proof of a likelihood of success on the merits requires the movant to "demonstrate a clear right to relief which is plain from the undisputed facts." *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, "while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that 'subvert the plaintiff's likelihood of success on the merits * * * to such a degree that it cannot be said that the plaintiff established a clear right to relief." *Advanced Digital Sec. Solutions, Inc. v*

Samsung Techwin Co., Ltd., 53 A.D.3d 612 (2d Dept. 2008); quoting from *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR 6312[c].

New York Insurance Law § 2120(a) provides that:

> Every insurance agent and every insurance broker acting as such in this state shall be responsible in a fiduciary capacity for all funds received or collected as insurance agent or insurance broker, and shall not, *without the express consent of his or its principal*, mingle any such funds with his or its own funds or with funds held by him or it in any other capacity. (emphasis added)

This fiduciary obligation was reiterated in ¶ 5.1.1 of the MGU, which provided that defendants were to hold collected premiums in its fiduciary capacity in an interest bearing account in AMLI's name. In turn,11 NYCRR §20.3(b) states:

> Every insurance agent and every insurance broker is responsible as a fiduciary for funds received by such agent or broker in such capacity; all such funds shall be held in accordance with the following paragraph.
>
> (1) An agent or broker who does not make immediate remittance to insurers and assureds of such funds shall deposit them in one or more appropriately identified accounts in a bank or banks duly authorized to do business in this State, *from which no withdrawals shall be made except as hereinafter specified.* (emphasis added)

Thus, defendants, as the insurance agent of AMLI, were required either to remit the funds to AMLI as the insurer, or place it in an appropriate account, from which only specified withdrawals could be made. The permissible withdrawals are set forth in Section 20.3(b)(4):

> No withdrawals from a premium account shall be made other than for payment of premiums to insurers, payment of return premiums to assureds, transfer to an operating account of (i) interest, if the principals have consented thereto in writing and (ii) commissions, or withdrawal of voluntary deposits, provided, however, that no withdrawal may be made if the balance remaining in the premium account thereafter is less than aggregate net premiums received but

not remitted.

Indeed, defendants concede that as an insurance agent for AMLI, defendants had a fiduciary duty not only by the terms of the parties' agreements but also under New York Law § 2120(a) to administer properly the premium funds collected.

Defendants maintain, however, that they did not breach any fiduciary duty as plaintiff was well aware of the circumstances surrounding the placement of collected premiums and consented to such placement. Under these circumstances, an issue of fact exists as to whether plaintiff provided "express consent" to the use of a non-conforming single account and hence, whether it technically sanctioned such an account. Hence, plaintiff has not sufficiently demonstrated a likelihood of success on its cause of action for breach of fiduciary duty.

B. Plaintiff has not demonstrated it will suffer irreparable harm absent a preliminary injunction.

"Economic loss, which is compensable by money damages, does not constitute irreparable harm." *EdCia Corp. v McCormack, supra* at 994; *White Bay Enterprises, Ltd. v Newsday Inc.*, 258 A.D.2d 520 (2d Dept. 1999), *app after remand* 277 A.D.2d 223 (2d Dept. 2000); *cf., Valentine v Schembri*, 212 A.D.2d 371 (1st Dept. 1995). Here plaintiff has not demonstrated a sufficient prospect of irreparable harm to warrant injunctive relief. Plaintiff's conclusory allegations are insufficient to satisfy its burden.

"A movant in plaintiff's situation may satisfy the requirement [of irreparable harm] by showing 'a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.' " *Serio v Black, Davis & Shue Agency*, 2005 WL 3642217, *stay denied* 2006 WL 156395 (S.D.N.Y. Jan. 12, 2006) quoting *Brenntag Int'l.*

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Chemicals, Inc. v Bonte of India, 175 F.3d 245, 249 (2d Cir. 1999). In this respect, "[a] serious threat of insolvency by a defendant can constitute such a 'substantial chance' of irreparable harm." *Id; see also Castle Creek Technology Partners LLC v CellPoint, Inc.*, 2002 WL 31958696 (S.D.N.Y. 2002). While plaintiff claims that defendants' threat of impending bankruptcy somewhat supports the need to place the premiums into escrow so that the monies are not exhausted during this litigation, there is not sufficient documentation to show that this threat is likely to become reality. Moreover, it is well settled that money damages alone do not constitute irreparable harm. *EdCia, supra*. Thus, plaintiff has not satisfied the second proof necessary for injunctive relief.

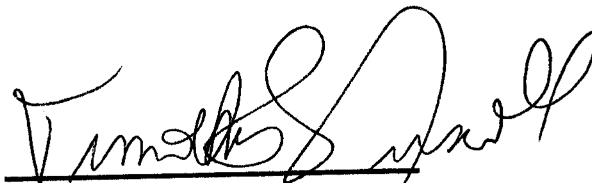
In view of the foregoing, plaintiff has not made a *prima facie* showing of entitlement to injunctive relief and the motion is denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court for a conference on May 29, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 18, 2009



HON. TIMOTHY S. DRISCOLL
J.S.C.

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