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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 111869/2004

RING, SHIRLEY J.

vs

AXA FINANCIAL

Sequence Number : 003

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ were read on this motion to/for Compel

	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 IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUN 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUN 10 2009

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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

Plaintiffs,

-against-

AXA Financial, Inc. and
AXA Equitable Life Insurance Company,

Defendants.

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Decision/Order
Index No.: 111869/04
Seq. No. : 003

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

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

Papers	**Numbered**
Pltf's n/m [§3124] w/RP affid, exhs	1
Defs' opp w/JFC affirm, exhs	2
Pltf's reply w/EL affirm, exhs	3
Transcript OA 4/30/09	4

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

***GISCHE, J.*;**

This action is by plaintiff Shirley J. Ring, a policy holder, on behalf of herself and others similarly situated. Defendants AXA Financial, Inc. and AXA Equitable Life Insurance Company[1], are collectively the insurer ("defendants") with whom she has the subject policy. A previous motion to dismiss the complaint was denied for the reasons stated in the court's decision and order of February 6, 2008 ("prior order" or "decision denying dismissal").

The court now has before it plaintiff's motion to compel responses to her discovery

[1]Plaintiff has served an amended complaint and also amended the caption.

demands dated March 5, 2009 which includes interrogatories and requests for document production ("interrogatories" and "document demands"). Defendants objected to these discovery requests and they oppose this enforcement motion. Defendants' cross motion for an order compelling plaintiff to respond to their discovery demands was previously resolved.

Summary of the dispute

In 1982, plaintiff purchased an Adjustable Whole Life Policy on her own life in the face amount of $10,000 from the defendants ("policy"). The annual premium for the policy was $206.50 for life. At the same time, plaintiff 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 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 the date on which plaintiff turned 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). After that date, however, defendants continued to send plaintiff quarterly unitemized bills in the amount of $98, an amount which was not only the premium for the basic policy, but also included the premium for the child term rider.

Plaintiff claims that because defendants collected premiums on an expired policy, and the bills they sent were unitemized, defendants' practice of deducting the child term rider premiums was concealed, undisclosed, and therefore, not easily ascertainable by the average consumer. Thus, according to plaintiff, defendants engaged in consumer

fraud. GBL § 349.

In their defense, defendants contend the premiums were amortized over a 29 year period, coinciding with plaintiff's age at the time (36) and the expiration date of the child term rider (age 65). They contend further that the amortization and payment structure is fully disclosed in the plaintiff's policy.

Discovery sought and arguments presented

Plaintiff seek full disclosure of all documents and information defendants have about the collection of premiums for the child term riders, as defined in the subject policy. It is plaintiff's position that not only do defendants' actions violate GBL § 349, thereby affecting an estimated 49,000 New Yorkers, but out of state policy holders are affected as well because the policy accounts of policy holders occurred in New York state.

The following factual allegations are made and relied upon by plaintiff:

Although plaintiff Ring paid her premiums as she was billed, in more recent years defendants allowed their policy holders to have premiums deducted from their individual "policy accounts." Briefly, a policy account consists of the accumulated value in excess of the premiums charged and invested. Regardless of the method selected, the balance remaining in each policy account can be invested by the policy holder in a number of ways. According to plaintiff, more than 95% of the policies sold by defendants in recent years provide the policy holder with these investment options.

Plaintiff reasons that defendants are New York based, and therefore, any premiums processed, whether paid directly, deducted from policy accounts, or invested by a policy holder, etc., have a nexus to New York state, regardless of where the policy

holder actually resides. Put differently, no matter where the policy holder with a child term rider actually resides, deceptive transactions within the meaning of GBL § 349, took place in New York state because this is where the policy accounts are managed, debited, etc. Consequently, plaintiff seeks unredacted copies of defendants' electronic records showing information about "all putative class members," their policies, child term riders, and records of notices sent to them about their policies. By "all class putative class members," plaintiff means insureds who have the superannuated child term rider, including non-New York State residents.

The parties' discovery dispute centers on where the policy accounts are debited and whether this bears upon the applicability of GBL § 349. Plaintiff contends that defendants have a nationwide operation, but the deceptive acts took place in New York, where defendants have their principal place of business. Plaintiff argues further that following the court's decision, denying defendants' motion to dismiss, defendants sent out notices from New York to the "the rest of the country" about the child term rider premiums being charged.

Defendants argue that all their life insurance products (accounting, billing, etc.) are handled at their national operations center in Charlotte, North Carolina (responses to interrogatory #32 and 39). Defendants contend further that policy holders who pay by check send their payments to Pittsburgh, Pennsylvania or Charlotte, North Carolina. When a policy holder pays by electronic transfers, debits, or wire transfer, those payments are handled through an account at Bank of America or Chase. At oral argument on this motion, defendant conceded that plaintiff is free to pursue a deposition

on the subject of defendants' billing practices, including asking questions about where billing for the policies take place.

Discussion

CPLR § 3101 (a) provides that "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." is discoverable. Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 (1968). The words, material and necessary," are interpreted liberally so as to require disclosure of any facts bearing on the controversy which will assist in the preparation for trial by "sharpening the issues and reducing delay and prolixity." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d at 407. The test is one of "usefulness and reason" (Allen v. Crowell-Collier Pub. Co., *supra*) and the burden of showing that the disclosure sought is improper is upon the party seeking a protective order against production. Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1st Dept 1994).

It is undisputed that plaintiffs are entitled to limited pre-certification discovery to establish the pre-requisites for class certification. Chimenti v. American Express Company, 97 AD2d 351 (1st Dept 1983) *app dism* 61 NY2d 669 (1983); Meraner v. Albany Medical Center, 199 AD2d 740 (3rd Dept 1993); Scott v. Prudential Ins. Co. of America, 112 AD2d 714 (4th Dept 1985). The pre-requisites for class certification are that: (1) the class must be so numerous that joinder of all members is impracticable; (2) common questions of law or fact must predominate; (3) the claims of the representative plaintiff must be typical of all members of the class; (4) the representative party must fairly and adequately protect the interests of the class; and (5) a class action must be the

most fair and efficient means of resolving the controversy. Casey v. Prudential Securities Inc., 268 A.D.2d 833 (3rd Dept 2000).

To establish a violation of GBL § 349, the conduct complained of must be consumer-oriented and have a broad impact on consumers at large. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 (1995). A prima facie case also requires a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof. Id.

Although the General Business Law analysis "does not turn on the residency of the parties," to qualify as a prohibited act under the statute, the transaction in which the consumer is deceived and the deception of the consumer must occur in New York. GBL § 349 (h); Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324, 325 (2002). This is because the statute is not intended to police the out of state transactions of companies. Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d at 325. Consequently, potential class members from outside the state, who were victimized by defendants' practices, have no viable claim under our statute, unless the deception can be found to have occurred in New York state. Drizin v. Sprint Corp., 12 NY3d 245 (1st Dept 2004).

The phrase "deceptive acts or practices" under the consumer protection act (GBL § 349) refers to something more than just "the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d at 325 (*internal citations omitted*). A representation or act is "deceptive" within the meaning of GBL § 349 if it is likely to

mislead a reasonable consumer acting reasonably under the circumstances. Boule v. Hutton, 320 F. Supp 2d 132 (2004).

Here, plaintiff has established (and defendants apparently agree) that plaintiff is entitled to information about New York state residents that have a policy with the child term rider in dispute. Defendants have provided information to plaintiff about the bills sent to New York residents who have the child term rider that is in dispute. Defendants have also disclosed how invoices are generated and where they are mailed from. They contend that bills for the child term rider are sent from North Carolina. Defendants have provided copies of the notices sent to policyholders with a child term rider when the youngest child attains age 25 and identified policyholders with a child term rider who purchased their policies in New York. Defendants even invite plaintiff to conduct deposition so she can ask questions about (and verify the information defendants provide) their billing practices, such as where the bills emanate from, what the function is of their Syracuse office, etc. *See* Transcript p. 18.

Notwithstanding this disclosure by defendants, particularly their representation that all billing takes place in North Carolina, plaintiff still seeks access to defendants' electronic databases containing information about policy holders throughout the country. Plaintiff has not, however, made a prima facie showing that she is entitled to such information with respect to out of state policy holders, or that such persons have a claim against the defendants under the New York state consumer protection laws for the reasons that follow. Goshen v. Mutual Life Ins. Co. of New York, *supra*.

The deceptive act or practice that plaintiff alleges defendants engaged in is

charging her a premium which not only allowed her to maintain life insurance for the benefit of her beneficiaries (i.e. on her own life), but also applied to payments for a "child term rider." The child term rider, by its terms, expired once her daughter Stacey attained the age of 25 or plaintiff reached age 65, whichever occurred first.

According to the complaint, this deceptive practice was effectuated, perpetuated, or otherwise accomplished through defendants' deceptive practice of sending unitemized bills. Plaintiff contends she paid the premiums she was being billed for without realizing that she was no longer deriving benefits from having the superannuated insurance policy (the child term rider) for her daughter once Stacey turned 25. Thus, plaintiff's claim is that she was paying to insure her daughter, well after the child term rider had expired, and defendants kept this information from her, concealed it, and otherwise misled her into paying these premiums by not disclosing this important fact to her[2].

This practice -- of paying money to defendants for her child to be covered by the child term rider, after her daughter reached age 25 - - is the consumer-oriented wrongful act plaintiff (ostensibly a "reasonable consumer" within the meaning of the consumer protection laws), claims she fell prey to. Goshen v. Mutual Life Ins. Co. of New York, *supra*; Siotakas v. Labone, Inc., 2009 WL 691967 (E.D.N.Y. 3/12/09).

While CPLR § 3101 et seq., on the one hand provides a wide arsenal of discovery tools, preparation for class action certification places a heavy burden on plaintiffs to show

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[2]The complaint expressly states as follows: "defendants do not notify their insured when the Children's Term Insurance Rider stops providing coverage [yet] defendants continue to bill and collect the Child Rider premiums from their insureds" and "defendants do not notify their insureds they are collecting and keeping premiums for a Child Term Rider that does not provide a benefit." Complaint ¶ 24, 25.

(at the appropriate time) that the factors warranting such certification (*i.e.* numerosity, predominance of common issues, typicality etc.) are present, the court must also weigh whether the information plaintiff seeks sharpens the issues that the court will be considering in connection with the upcoming motion to certify the class. As a general rule, the amount of discovery granted on class certification issues is left to the trial court's considerable discretion and the only limitation is that the court receive "enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196 (C.A. 2 [NY] 2008).

There is nothing presented by plaintiff that would contradict defendants' representation, that the billing, accounting, etc., of all their life insurance products is handled at defendants' national operations center in Charlotte, North Carolina. They have invited her to depose persons with knowledge about these billing practices, but plaintiff has not accepted that invitation. There is simply no evidence in this record that bills are sent from defendants' New York headquarters, and not North Carolina, even though the operations in North Carolina are smaller in size and not the company's principal place of business. Other claims by plaintiff that the New York office is really the mastermind or base of defendants' operations, is unavailing. It is the transaction in which the consumer is deceived that must occur in New York. Goshen v. Mutual Life Ins. Co. of New York, *supra*. The generation of an idea that is executed elsewhere will not suffice.

Other arguments that notices defendants reportedly sent out to policy holders after the court's decision denying dismissal of this action are evidence the deceptive acts

"actually" took place in Syracuse, New York is speculative and offered without any basis. Nor are plaintiff's arguments persuasive that residents of all states are harmed because their policy accounts are debited in New York. Not only do these arguments sharply veer from the allegations made in the complaint, the deceptive practice alleged is not how policy accounts are debited.

The court has examined the document demands and interrogatories that defendants have objected to and now oppose. To the extent that plaintiff's document demands and interrogatories seek information and records from defendants about policy holders nationwide, the objections are sustained, plaintiff's demands are stricken and plaintiff's motion to enforce is denied.

The issue of whether Robert Jay Perkins, Esq. was admitted pro hac vice is moot in light of the stipulation of the parties so-ordered April 2, 2008.

Conclusion

Plaintiff's motion to enforce her document demands and interrogatories is hereby denied for the reasons stated in the foregoing decision.

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
June 10, 2009

So Ordered:

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