Elmowitz v Guardian Life Ins. Co. of Am.
2009 NY Slip Op 32666(U)
November 10, 2009
Supreme Court, New York County
Docket Number: 116152/08
Judge: Walter B. Tolub
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SCANNED ON 11/16/2009

[* 1]

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

PRESENT: WALTER B. TOLUB

PART ______

Index Number : 116152/2008

ELMOWITZ, DENNIS

VS.

GUARDIAN LIFE INSURANCE

SEQUENCE NUMBER : 001

DISMISS

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 **IS DECIDED**

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/12/09

WALTER B. TOLUB, J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

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DENNIS ELMOWITZ

Plaintiff,

Index No. 116152/08
Motion Seq. 001

-against-

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA and BERKSHIRE LIFE INSURANCE COMPANY OF AMERICA

Defendants.

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FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

TOLUB, J.:

Defendants, The Guardian Life Insurance Company of America (Guardian) and Berkshire Life Insurance Company of America (Berkshire) (together defendants) move pursuant to CPLR 3212 for summary judgment to dismiss the verified complaint in this action brought to recover disability benefits plaintiff is allegedly entitled to under certain disability insurance policies held with defendants. Plaintiff Dennis Elmowitz (Elmowitz) opposes the motion and cross moves pursuant to CPLR 3025 (b), for permission to amend the verified complaint.

BACKGROUND

Plaintiff Elmowitz, purchased three professional disability insurance policies (the Policies) from defendants between 1992 and 1996 (Policies, annexed as Ex A, B, C to Affidavit of Brian Donnelly, Director of Claims at Berkshire dated March 24, 2009). The Policies provided for varying monthly indemnities, totaling approximately $9,000, in the event the plaintiff became "totally disabled" "because of sickness or injury" and "unable to perform the

major duties of (his) occupation" (V Compl, ¶¶ 4-6). Plaintiff was required to provide defendants with notice of his claim for disability benefits within 30 days of the onset of "total disability"(Policies at 6).

In January 2000 plaintiff allegedly stopped working as a manager of medical facilities as result of "neurological/neuropathy, carpal syndrome type symptoms, heart disease, diabetes, right shoulder pain/lack of movement, sleep problems, constant pain" (Disability Claimant's Statement annexed to Plaintiff's Cross Motion as Ex D; V Compl, ¶¶ 7-8).

Almost two years later, on December 7, 2001, Elmowitz contacted defendants and verbally notified them that he was "totally disabled" and intended to make a claim. The following month, Elmowitz submitted a Disability Claimant's Statement dated January 4, 2002 (Claimant's Statement), whereby he claimed to be "totally disabled" based upon the above mentioned ailments and explained that he first experienced neurological problems in "1997" and had surgical "decompression fusion" in 1999, he had diabetes and esopagitis within the past five years and was treated for a heart attack back in August 1996 (*id.*).

In a letter dated October 7, 2003 defendants denied Elmowitz's claim (October 2003 Denial), annexed as Ex H to Donnelly Aff). It stated in, pertinent part:

> Mr Elmowitz's ability to perform on a day-to-day basis, based upon the functional requirements of his job, is not impaired [and] 'from a neurological standpoint, Mr Elmowitz is capable of returning to work as manager of medical facilities, without restrictions in relation to his reported complaint of right hand pain.'
>
> ***
>
> Based on the above, ... we find that there are no benefits payable under the terms of your client's policies. **Our decision is based on the information presently available. We would be pleased to review any additional information Mr. Elmowitz would care to submit which he feels would have an impact on our decision.**

It is undisputed that after the October 2003 Denial was sent to plaintiff's attorney,

defendants did not receive any additional evidence or documentation that supported Elmowitz's claim.

In November 2008, defendants received another claim for benefits under the Policies from Elmowitz which claim is currently being investigated.

In December 2008, plaintiff filed the instant breach of the contract claim against Defendants seeking disability benefits. In his verified complaint plaintiff alleges that

> [d]uring November or December of 1992, plaintiff suffered from sickness classified and diagnosed as heart disease, later followed by cervical and lumbar nerve impingement, carpal tunnel syndrome symptoms, nerve injury, neuropathy and the need for surgery, along with dependence on pain medication, lethargy which illness prevented him from performing the major duties of his then occupation as an office manager from December 1992 to date ... . (V Compl, ¶¶ 11, 14, 19-21).

Defendants move for summary judgment dismissing the complaint as untimely within the clear terms of the Policies. Defendants also argue that Berkshire is the wrong party (Policies, annexed as Ex A-C, to Donnelly Aff).

Plaintiff now cross moves for permission to file an amended verified complaint which changes the onset of plaintiff's total disability from "November or December 1992" to January 2000 (Proposed Am Verified Complaint, ¶ 7, annexed to Bluestone Affirmation dated May 15, 2009 as Ex C). The proposed amendment should be permitted, according to plaintiff's counsel, because it was a mere "scrivener's error" (Plaintiff's Cross motion ¶ 15), there was no prejudice to defendants and there is a sufficient evidentiary showing of the merit of the amendment (Plaintiff's Affirmation in Reply). The court notes, however, that there appears to be some additional confusion on plaintiff's part because the supporting attorney affirmation "asks (for) leave to amend the complaint to change the year from 1992 to '2002" yet the proposed amended verified complaint alleges that the disability began in "January 2000." Plaintiff also opposes the

motion arguing that his claims are not time-barred (see, *Panepinto v New York Life Insurance Company*, 90 NY2d 717 [1997]).

In reply, defendants argue that they detrimentally relied on November or December 1992 as the onset of plaintiff's alleged total disability for six months of litigation, and, in any event, even if plaintiff did not become totally disabled until January 2000, his claim must be still be dismissed as late within the clear terms of the Policies.

DISCUSSION

A court may grant summary judgment upon finding that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The court's responsibility in assessing the merits of a summary judgment motion is thus not to try issues of fact, but rather to determine whether there are issues of fact to be tried (*Miller v Journal-News*, 211 AD2d 626 [2d Dept 1995]). The moving party bears the burden of demonstrating that there is no genuine issue as to any material fact and the evidence presented will be construed liberally in favor of the party opposing the motion (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Once the moving party has met this burden of demonstrating the absence of a disputed issue of material fact, the burden then shifts to the nonmoving party to present specific facts showing that there is a genuine issue of fact for trial and not mere conclusory allegations (*Alvarez v Prospect Hosp.*, 68 NY2d 320, supra).

It is well established that the burden is on the insured, in an insurance dispute, to prove all facts necessary to demonstrate that a claim falls within the terms and conditions of coverage (*Chase Manhattan Bank, NA v Travelers Group, Inc.*, 269 AD2d 107 [1st Dept 2000]). At the

threshold, the determination of the meaning of language used in an insurance policy is a question of law for the court. If the provision is "plain and unambiguous, the court's role is simply to enforce the common and ordinary meaning of it" (*Paul Revere Life Ins Co v Bavaro*, 957 F Supp 444, 447 [SD NY 1997]).

The plain words of the Policies are, in fact, dispositive of this claim. The Notice of Claim provision in the Policies directs that an insured "must give us notice of claim within 30 days after any loss which is covered by our policy occurs or starts, or as soon after that as is reasonably possible (see The Policies, at 6, annexed to Donnelly Affidavit as Exs A-C). Compliance with a notice of claim provision in an insurance policy is a foundational condition precedent to maintaining an insured's action on a policy against an insured (*Mecurio v Northwestern Mutual Insurance Co,* 298 AD2d 567 [2nd Dept 2002]). Moreover, "absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy"(*Security Mut Ins of New York v Acker-Fitzsimons Corp*., 31 NY2d 436, 440 [1972][finding a 19 month delay in giving initial notice unreasonable, thus vitiating the policy]). It is the burden of the insured to prove that the delay in notifying the insurance company was excusable (*Olin Corp. v Insurance Co of North America*, 966 F2d 718, 724 [2d Cir 1992]).

Here, as noted earlier, in response to defendants' motion to dismiss on the ground that the action is not timely, plaintiff seeks permission to amend the complaint, claiming that his original verified statement, averring that he first became aware of his disability in "November or December 1992", repeated several times throughout his verified complaint, was a mere clerical error .

While plaintiff is correct that "leave to amend should be freely granted in the absence of prejudice or surprise," it will not be granted unless the moving party also demonstrates that the

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proposed amendment has merit *(Centrifugal Associates, Inc. v Highland Metal Industries, Inc.*, 193 AD2d 385 [1st Dept 1993]; *Murray v City of New York*, 43 NY2d 400, 404-405 [1977], rearg dismissed, 45 NY2d 966 [1978]) and plaintiff has clearly failed to do so in this case.

Assuming that plaintiff was mistaken, and the date of onset of his illness was in fact "January 2000," that would still not resolve the fact that plaintiff undisputedly delayed notifying defendants of the onset of his illness for 23 months, despite the fact that plaintiff admittedly stopped working in January 2000. Recognizing that no notice "within 30 days" of the covered loss had been given (i.e., by February 2000), plaintiff argues that his 23 month delay in giving such notice could be construed to be "as soon as is reasonably possible" in light of the fact that defendants cannot demonstrate that they were prejudiced by the delay, as they are required to do as a matter of law. Plaintiff is incorrect.

Contrary to plaintiff's argument, the "no prejudice" rule applies in actions seeking to recover disability benefits (*Gresham v American Gen. Life Ins. Co. of New York*, 135 AD2d 1121 [4th Dept 1987] [holding that plaintiff's unexcused delay in serving notice of claim precluded recovery on the disability policy notwithstanding a failure to show prejudice]; *Steinberg v Paul Revere Life Ins. Co.*, 73 F Supp 2d 358, 361 [SDNY 1999], affd 210 F3d 355 [2d Cir 2000]). Compliance with notice of claim provisions promotes the important policy goal of enabling insurers to make a "timely investigation of relevant events and exercise early control over a claim" *(Commercial Union Ins Co v International Flavors & Fragrances, Inc*, 822 F2d 267, 271 [2d Cir 1987]). Here, plaintiff clearly fails to submit a valid excuse for his 23 month delay in notifying defendants of his illness.

Furthermore, "nothing in *Panepinto [v New York Life Insurance Company*, 90 NY2d 717, supra]," relied upon by defendants to oppose the motion, "suggests that the Court of Appeals

intended to abandon the 'no prejudice' rule with regard to initial notices of claim" (*Steinberg v Paul Revere Life Insurance Company*, 73 F Supp 2d 358, 362). Rather, unlike in the case herein, the plaintiff filed a timely notice of claim for disability benefits and the plaintiff received benefits on the claim from the insurance company for three years. However, after a certain period of time, plaintiff's benefits were terminated because of the insurance company's determination that plaintiff was no longer totally disabled. Plaintiff commenced an action for continuation of disability benefits three and a half years after her benefits were terminated. On a motion to dismiss for failure to commence a timely action and submit timely proof of loss, the Court of Appeals interpreted a statutorily mandated three year statute of limitations clause in the insurance policy, saying that the period did not commence until "the termination of the disability as an objective medical fact (id.)" The Court noted that in those situations where an insurer is actually prejudiced by a long delay in filing suit, the claim may be "barred by principles similar those underlying the doctrine of laches"(id at 388).

Thus, as is revealed by a careful reading of the facts in *Panepinto*, the Court's statement regarding an insurer's need to demonstrate "actual prejudice" is not applicable to a situation such as this, where there was a failure to file a timely notice of claim.

For all of the above reasons, the court finds that defendants' motion for summary judgment is granted for plaintiff's failure to file a timely notice of claim and plaintiff's cross motion is denied. All other arguments not specifically addressed are denied. Plaintiff's complaint is hereby dismissed in its entirety.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint

is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: 11/12/09

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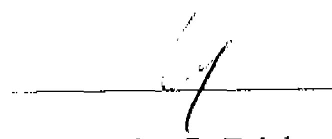

Hon. Walter B. Tolub, J.S.C.

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