

Nicoletta v Berkshire Life Ins. Co.

2010 NY Slip Op 30210(U)

January 27, 2010

Supreme Court, New York County

Docket Number: 115987/2007

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 115987/2007

NICOLETTA, VITO

vs

BERKSHIRE LIFE INSURANCE CO

Sequence Number : 003

AMEND

INDEX NO. _____

MOTION DATE 1/27/10

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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
JAN 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants Berkshire Life Insurance Company and the Guardian Life Insurance Company of America's pursuant to CPLR §3025 to amend their answer to add a counterclaim is denied; and it is further

ORDERED that defendants Berkshire Life Insurance Company and the Guardian Life Insurance Company of America shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/27/10

HON. CAROL EDMEAD *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 35

-----X
VITO NICOLETTA,

Plaintiff,

-against-

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

Defendants.
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 115987/2007

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff, Vito Nicoletta (plaintiff), commenced this action against Berkshire Life Insurance Company and Guardian Life Insurance Company of America (Guardian) (collectively, defendants) demanding (a) a judgment in the amount of the disability benefits denied by defendants and (b) that premiums be waived as a result of his alleged disability.

Defendants filed their answer on or about January 8, 2008, and now move pursuant to CPLR §3025 (b) for leave to amend their answer to add a counterclaim for rescission due to plaintiff's fraudulent misstatements in the application.

For the reasons set forth below, defendants' motion to amend is denied.

Background

In 1999, defendant Guardian issued disability income policy No. G-785822 (policy) to plaintiff.¹ In his policy application, plaintiff stated his occupation as "business management," his job title as "president" and the nature of the business as "aviation structural repair." He answered

¹ Effective July 1, 2007, defendant Berkshire is a wholly owned subsidiary of Guardian.

“no” to the question “Have you ever had a professional license suspended, revoked, or is such license under review or have you been disbarred?”² The policy contains a provision that, after two years of the issuance, it cannot be void for any misstatements in it, unless such misstatements were fraudulent (Exhibit A).

Plaintiff and his partner Michael Grasso (Grasso) were the owners of AOG Sheetmetal, Inc. and AOG Maintenance Corporation (AOG Maintenance) (collectively, AOG) from about 1995 until May 31, 2003, when plaintiff sold his shares of AOG to Grasso.

On February 21, 2006, plaintiff submitted a notice of claim to defendants claiming that he was disabled as of November 23, 2005. Defendants denied plaintiff’s claim on the ground that, at the time of the plaintiff’s claimed disability, plaintiff could not be disabled from that occupation because he had not worked since the time he sold his interest in AOG. Additionally, he failed to timely comply with the 30-day notice of a claim requirement.

On November 26, 2007, plaintiff filed the instant complaint against defendants.

On or about August 3, 2007, the United States Attorney for Eastern District of New York filed a criminal information against plaintiff (the Information), charging him with conspiracy to defraud Polar Air Cargo, Inc., a client of AOG Sheetmetal, Inc. According to the Information, plaintiff and Grasso paid cash kickbacks to a Polar Air employee responsible for assigning Polar Air’s repair work, from 2000 to 2003 (Hayes affirmation, exhibit C). Plaintiff pleaded guilty to the Information on August 3, 2007.

On July 2, 2008, Grasso was indicted in the Eastern District of New York for mail fraud and conspiracy to commit mail fraud (Hayes’s affirmation, exhibit E). The indictment indicates

² The application is annexed to notice of motion as part of exhibit A.

that between approximately 1996 and May 2003, AOG Maintenance was jointly owned and operated by Grasso and "John Doe Number One"; that at that time, AOG operated at LaGuardia, John F. Kennedy and Newark Airports without Port Authority permits and, while charging the customers permit fees, did not pay those fees to Port Authority and provided false records to the Port Authority auditors. On December 1, 2008, Grasso pleaded guilty to conspiracy to commit mail fraud against Port Authority and five airlines. The defendants assert that, upon information and belief, plaintiff was a cooperating witness against Grasso (proposed counterclaim ¶ 28).

In their moving papers, defendants assert that the court should allow them to add a counterclaim on the ground that plaintiff made fraudulent misstatements on his disability policy application. It is alleged that, at the time defendants filed their answer, they did not know of the criminal actions of the plaintiff and his former business partner, and have learned of them only during the course of this litigation. Defendants contend that plaintiff's employment history is an issue in this case since the denial of the claim is based on plaintiff's not being employed at the time of the alleged disability.

Further, defendants contend that, since their decision under the policy is the major dispute in this matter, it is directly related to the factual issues in the proposed counterclaim.³ They contend that the counterclaim does not introduce any new factual issues and will not change the course of discovery, which is being currently conducted, with a cut-off date of February 26, 2010, and the note of issue date of July 20, 2010.

³ While plaintiff was provided with defendants' proposed amended answer which includes the counterclaim, it was not presented to the court in defendants' original moving papers but has been attached as an exhibit to their reply.

[* 5]

Defendants' main contentions are that plaintiff made "fraudulent misstatements" on his 1999 application by indicating that the nature of business was "aviation structure repair" and by responding "No" to the question "Have you ever had a professional license suspended, revoked, or is such license under review, or have you been disbarred?" (defendants' motion, Hayes's affirmation ¶6). And, according to one of the policy's provisions, such "fraudulent misstatements" can be used to either void the policy or to deny a claim (defendants' motion, exhibit A). Defendants assert that plaintiff's statements were fraudulent because the "true nature of the business was criminal enterprise," considering that plaintiff and his business partner were allegedly involved in the criminal activity related to their business. Defendants further allege that, had Guardian known of this criminal activity, it would not have issued the policy to plaintiff. Plaintiff knew of such activity at the time of the application and purposely did not disclose it and, in providing only partial answers, plaintiff omitted the information that would be relevant to the determination of his insurable risk.

Plaintiff opposes the amendment by asserting that the proposed counterclaim plainly lacks merit. To begin with, plaintiff asserts that a cause of action for fraud must be pleaded with a heightened degree of specificity as mandated by CPLR §3016(b).

Further, turning to the merits of the counterclaim, plaintiff contends that none of the answers to the five application questions identified by defendants in their motion are false, as alleged by defendants, by virtue of plaintiff's guilty plea to the criminal conduct. First, such conduct occurred after the time of the policy application; second, the facts outlined in the criminal information do not contradict any of plaintiff's representations. For instance, while plaintiff may have paid kickbacks, he did serve as president of the company; he was involved in

business management; the company's business was "aviation structural repair," and he did not have any professional license suspended or revoked.

Most importantly, plaintiff argues, even if he did disclose the facts about his criminal activity, there is no connection between plaintiff's criminal conduct and his representations to the insurer. Therefore, plaintiff requests that defendants' motion be denied.

In their reply, defendants argue that the counterclaim has merit as it properly alleges all of the elements of fraud and that plaintiff's misrepresentations or concealment of a material fact are sufficiently alleged in paragraphs 31 and 32 of the proposed counterclaim. Defendants acknowledge that the criminal acts for which plaintiff entered a guilty plea, occurred between 2000 and 2003, subsequent to the date of the application. However, defendants allege, according to the indictment of plaintiff's former partner Grasso, plaintiff's companies, jointly owned by plaintiff and Grasso, were involved in criminal conduct as early as 1996 (Hayes's affirmation, exhibit E). Defendants further contend that, since the indictment alleges that Grasso acted "together with others" (id. ¶ 25), it is inconceivable that plaintiff was not one of those alleged to have acted together with Grasso.

Further, defendants reiterate that plaintiff did not truthfully and completely answer the question about the nature of his business since the true nature of his business was "a criminal enterprise" (reply, at 4). Defendants acknowledge that there is no specific question in the policy application as to whether an applicant is involved in a criminal enterprise and therefore, plaintiff has not specifically stated that he was not involved in criminal activities. However, defendants argue, that AOG was involved in the alleged criminal activities materially changes the nature of the business. Thus, plaintiff's response to the application question is a misstatement and

concealment. Moreover, the information about plaintiff's criminal conduct was relevant to the determination of the insurable risk and was deliberately withheld by plaintiff, who knew that the answers were false.

Finally, defendants allege that they justifiably relied on plaintiff's statements when they were making the underwriting decisions; plaintiff's answers were "directly material to whether the long-term disability policy would be issued" and that the resulting injury is alleged in paragraph 37 and 38 of the counterclaim. Thus, defendants contend, since all the elements of a fraud claim are sufficiently alleged pursuant to CPLR §3016(b), the counterclaim has merit and their motion should be granted.

Discussion

It is well settled that leave to amend an answer pursuant to CLR § 3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers*

Trust Co. v Cusumano, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993];
Stroock & Stroock & Lavan v Beltramini, 157 AD2d 590 [1st Dept 1990]).

Further, leave to amend “may not be granted upon mere request, without appropriate substantiation. There must be compliance with the required procedure to permit the court to pass upon the merits of the leave for amendment” (*Brennan v City of New York*, 99 AD2d 445, 446 [1st Dept 1984], citing *East Asiatic Co. v Corash*, 34 AD2d 432 [1st Dept 1970]).

The party “opposing a motion to amend a pleading must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Leave to amend should not be granted where, as here, proponent of the amendment fails, as a matter of law, to set forth the essential elements required to sustain a cause of action for fraud (*Mobile Oil Corporation v Joshi*, 202 AD2d 318 [1st Dept 1994]; *Megarix Furs v Gimbel Brothers, Inc.*, 172 AD2d 209 [1st Dept 1991]).

To state a cause of action for fraud, plaintiff must allege a misrepresentation or omission of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and the resulting injury (*Rather v CBS Corporation*, 886 NYS2d 121 [1st Dept 2009]; *Waggoner v Caruso*, 886 NYS2d 368 [1st Dept 2009] (affirming dismissal of fraud claim where plaintiff did not plead reliance and causation with the required detail); *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006], quoting *Kaufman v Cohen*, 307 AD2d 113, 119 [2003]; *Mobile Oil*

Corporation v Joshi, 202 AD2d 318 [1st Dept 1994]; *Megarlis Furs v Gimbel Brothers, Inc.*, 172 AD2d at 214 (holding that leave to amend was granted in error where allegations of fraud were insufficient)).

Moreover, a cause of action for fraud will be dismissed unless each of these elements is supported by evidence sufficient to satisfy CPLR § 3016 (b) which requires that, in the case of a cause of action based on fraud, “the circumstances constituting the wrong shall be stated in detail” (*Waggoner v Caruso; Megarlis Furs*).

While an insurer may be entitled to rescind a policy *ab initio*, if it identifies that the applicant made a material misrepresentation with an intent to defraud (*Insurance Law* §3105(b); *Kiss Construction NY Inc. v Rutgers Casualty Ins. Co.*, 61 AD3d 412, 413, 877 NYS2d 253 [1st Dept 2009]), the question in the application must have unambiguously required the disclosure (*H.B. Singer v Mission National Ins. Co.*, 223 AD2d 372 [1st Dept 1996] (nondisclosure of a fact concerning which the applicant has not been asked does not ordinarily void an insurance policy absent intent to defraud)). In the absence of the duty to disclose, mere silence, without identifying some act of deception, does not constitute concealment actionable as fraud (*see Stecker v American Home Fire Assur.*, 299 NY1, 84 NE2d 797 [1949]; *H.B. Singer v Mission National Insurance Company*, 223 AD2d 372 [1st Dept 1996] (in suit by insured for coverage for fire loss, the court held that insured was under no duty to disclose information and prior history regarding premises as to which insurer did not inquire); *First Financial Ins. Co. v Allstate Interior Demolition Corp.*, 193 F3d 109 [2d Cir 1999] (“[A]n applicant is ordinarily permitted to remain silent on matters concerning which he is not questioned. His insurance policy may be voided for concealment only when he conceals matters material to the risk and he does so in bad

faith with intent to deceive the insurer”), citing *Vella v Equitable Life Assurance Soc’y*, 887 F2d 388, 393 [2d Cir1989] (an insured has no obligation to volunteer information which is not directly asked for by the insurance company, nor can the answer to an ambiguous question be the basis for a claim of misrepresentation against the insured)).

In *Mobil Oil Corporation*, plaintiff sought to assert a cause of action against defendant, the parties’ alleged escrow agent, for fraudulent misrepresentation and concealment of the material facts that the second defendant’s check was uncollectible and that he never signed the escrow agreement. The court denied the plaintiff’s leave to amend the complaint to assert a cause of action for fraud, stating that “the information plaintiff claims was either misrepresented or concealed by the escrow agent, was ... not of the character requiring a duty to disclose” and without such duty to disclose, “defendant’s mere silence without some act which deceived plaintiff cannot constitute a concealment actionable on fraud” (*Mobile Oil Corp. v Joshi*, at 318).

Here, defendants failed, as a matter of law, to set forth the essential elements required to sustain a cause of action for fraud. The fundamental flaw in the proposed counterclaim concerns the element of falsity. Specifically, defendants failed to allege with sufficient detail, as required by CPLR §3016 (b), that the questions in the application regarding the plaintiff’s job title, the nature of his business and professional licenses’ revocations, required plaintiff to disclose his alleged criminal acts. The plain reading of the insurance policy questions establishes that all that was asked in the application was: plaintiff’s occupation, his job title, the nature of the business, his specific duties and whether he had ever had his professional license revoked. These specific questions, framed by defendants, required nothing else but specific answers by plaintiff in his application. Had Guardian meant to foreclose the possibility of issuing a policy to persons who

committed crimes or other wrongs, it should have included that question in the application. In other words, defendants want to impose on plaintiff the obligation to answer a question that was never asked.

Further, contrary to defendants' assertion, the evidence of plaintiff's alleged criminal acts does not render his statements regarding the nature of his business as "aviation structural repair" fraudulent. Significantly, defendants do not allege that plaintiff's companies were not engaged in the business of aircraft repair and maintenance work or that plaintiff did not perform the stated in the application technical management or planning. Rather, defendants' assertions, based on plaintiff's and his partner's criminal records, relate to the manner in which the business was allegedly conducted by paying kickbacks to the clients' companies, etc., during the relevant period of time.

This is not the case where the insured misrepresented his occupation or the kind of work performed, like, for example, in *Kiss Construction NY Inc. v Rutgers Casualty Insurance Company*.⁴ There, plaintiff indicated in the application that the nature of his business was "painting." Later, plaintiff submitted a claim under the policy for injuries that allegedly occurred during the *construction of a three-family building*, where plaintiff was the general contractor in work involving *excavation and paving*. The insurer disclaimed coverage based on an alleged material misrepresentation in the application for insurance. Having found that plaintiff's answer was a fraudulent misrepresentation, the court went on to address the element of materiality. The court held that the insurer satisfied his burden of demonstrating the materiality of the misrepresentation by offering affidavits of two of its vice presidents, who each averred that the

⁴ *Kiss Construction NY Inc. v Rutgers Casualty Ins. Co.*, 61 AD3d 412, 877 NYS2d 253 [1st 2009].

company did not write policies for such construction work, and by the company's underwriting guidelines, copies of e-mails declining coverage to similarly situated applicants, and by copies of disclaimer letters sent to similarly situated insureds making similar claims.

The case of *Dwyer v First Unum Life Ins. Co.*, cited by defendants in support of rescinding the policy on the basis of fraudulent misrepresentations, is distinguishable. In *Dwyer*, plaintiff concealed his history of chronic back pain at the time of the application, *i.e.*, the condition he had a duty to disclose by reason of the questions in the application regarding his illnesses and medical treatments. The court affirmed the policy rescission because the defendants sufficiently pleaded that plaintiff's answers were false and the misrepresentations were material. This was evidenced by the affidavit of their chief underwriter, as well as the company guidelines, both of which establish that if defendants had known of plaintiff's history of chronic back pain, they would not have issued the policy to plaintiff in its present form (*Dwyer v First Unum Life Ins. Co.*, 41 AD3d 115 [1st 2007]).

Here, the court finds that, unlike in *Kliss Construction* or *Dwyer*, defendants failed to allege with sufficient detail that any questions in the application that required plaintiff to disclose his alleged criminal acts and that plaintiff's statements in the application were false. Thus, since the element of falsity has not been established, defendants failed to state a cause of action for fraud. Consequently, the Court does not reach the remaining elements of the fraud claim.

Therefore, defendants' leave to amend their answer to add a counterclaim for rescission due to plaintiff's alleged fraudulent misstatements in the application is denied.

Conclusion

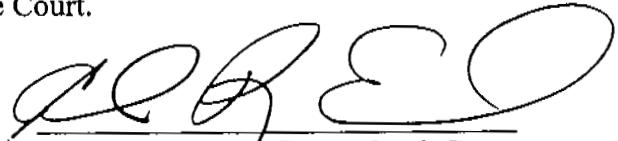
Accordingly, it is hereby

ORDERED that the motion by defendants Berkshire Life Insurance Company and the Guardian Life Insurance Company of America's pursuant to CPLR §3025 to amend their answer to add a counterclaim is denied; and it is further

ORDERED that defendants Berkshire Life Insurance Company and the Guardian Life Insurance Company of America shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 27, 2010



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

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