

Nocella v Fort Dearborn Life Ins. Co. of N.Y.
2010 NY Slip Op 32941(U)
October 8, 2010
Sup Ct, Nassau County
Docket Number: 000437-08
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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BRIAN NOCELLA,

Plaintiff,

-against-

**FORT DEARBORN LIFE INSURANCE COMPANY
OF NEW YORK, NORTHSTAR LIFE INSURANCE
COMPANY, UNION SECURITY LIFE INSURANCE
COMPANY OF NEW YORK, BANKERS AMERICAN
LIFE INSURANCE COMPANY, EMIGRANT MORTGAGE
COMPANY INC.,**

Defendants,

-----x

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 000437-08

MOTION SEQ. NO: 5

SUBMIT DATE: 7/29/10

The following papers having been read on this motion:

- Notice of Motion1**
- Memorandum of Law.....2**
- Opposition.....3**
- Reply.....4**

Motion by defendant Emigrant Mortgage Company Inc. for an order pursuant to CPLR §3211(a)(7) awarding summary judgment dismissing the complaint on the grounds that the complaint fails to state a cause of action, pursuant to CPLR§ 3211(a)(1) awarding summary judgment on the grounds that documentary evidence establishes that Emigrant is not liable to plaintiff, pursuant to CPLR §3212 awarding summary judgment on the grounds that there are no triable issues of fact, and in the event the forgoing are denied then pursuant to CPLR §2221 resetting this court's order dated 5/7/10, is granted with respect to dismissal and summary judgment and the complaint is dismissed as against Emigrant Mortgage Company, Inc.

This action arises out the denial of coverage by defendant insurance companies regarding a claim for benefits asserted by plaintiff Brian Nocella on behalf of his deceased wife, who died

from cancer and a pyogenic infection. The policies issued first by defendant Bankers American Life Assurance Company, and later succeeded by NorthStar Life Insurance Company provided accidental death coverage.

Emigrant asserts that it is entitled to summary judgment as it owed no duty to plaintiff. The complaint alleges:

On or about October 1, 1998, defendant Bankers American Life Assurance Company through its agent Emigrant Mortgage Company Inc. issued a certificate of insurance . . . covering the lives of Brian Nocella and his wife Kathleen Nocella....coverage was subsequently assumed by defendant[s] NorthStar Life Insurance Company . . .

Plaintiff here seeks to change its allegation to assert that Emigrant owed a fiduciary duty to the Nocellas rather than to its alleged principals Bankers American and NorthStar.

In support of its motion for summary judgment Emigrant submits the affidavit of Morgan Sheahan, vice president of Emigrant. Sheahan asserts that the within action is simply a breach of contract action between plaintiff and NorthStar, as to whether the cause for plaintiff's wife death came under the Accidental Death and Dismemberment policy issued by NorthStar and whether NorthStar properly rejected coverage of plaintiff's claim. Emigrant avers that it was merely a conduit between Plaintiff and Bankers and then between plaintiff and NorthStar.

Sheahan avers that Emigrant was never in privity with plaintiff, and that "Emigrant's sole material obligation was to bill, collect, and then forward to Bankers and then to NorthStar the monthly insurance premiums that were included in plaintiff's escrow portion of plaintiff's monthly mortgage payment, which Emigrant duly performed. In return, Emigrant received a nominal fee for each policy purchased . . ."

The following background statements are also offered by Sheahan. Emigrant offers residential mortgage loans in the State of New York, and as part of that service, Emigrant offers its mortgagors the option of purchasing insurance known as mortgage insurance. Effective June 1, 1996 Emigrant entered into an agreement with Bankers wherein Emigrant offered its customers, including plaintiff, the ability to purchase three types of insurance from Bankers: Life, Disability, or Accidental Death and Dismemberment (AD&D). On or about October 1, 1998 plaintiff purchased

an AD&D policy from Bankers. Emigrant acted “solely as a conduit or clearing house and duly billed Plaintiff the monthly premium as part of the monthly mortgage escrow payment and then Emigrant duly remitted the premium payment to Bankers.” Emigrant notified plaintiff that effective April 1, 2000 the AD&D policy that plaintiff had with Bankers was cancelled but that Emigrant had made arrangements with NorthStar for “an alternative accidental death insurance plan similar to . . . previous coverage without any additional obligations.”

Assuming *arguendo* for purposes of this motion that Emigrant was an agent for American and NorthStar, the allegations of the complaint fail to state a cause of action against Emigrant. Not only does the complaint not allege an agency relation between plaintiff and Emigrant with respect to the mortgage insurance, there are no allegations or indicia of an agency relationship between them, and thus no grounds to assert a fiduciary relation. Thus Emigrant is entitled to dismissal pursuant to CPLR 3211.

Moreover, even under summary judgment standards, plaintiff has failed to raise a factual issue with regard to Emigrant’s fiduciary duty or breach of any duty to plaintiff, and plaintiff is awarded summary judgment.

In general, the legal relationship between a borrower and a bank is “a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower” (*Bank Leumi Trust Co. of New York v. Block 3102 Corp.*, 180 AD2d 588, 589 [1st Dept 1992], *lv appeal denied* 80 NY2d 754 [1992]). A fiduciary relationship may arise between a bank and a customer “if there is either ‘a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding’ * * * or an assumption of control and responsibility” (*Bauer v. Mellon Mortg. Co.*, 178 Misc2d 234, 240, *affd* in part by *Walts v. First Union Mortg. Corp.*, 259 AD 2d 322 [1st Dept 1999], *leave to appeal dismissed* in part, *denied* in part 94 NY2d 795 [1999]).

The complaint does not allege, nor does plaintiff submit evidence of, facts indicating that defendant’s actions were designed to instill a special relationship apart from the ordinary debtor/creditor relationship and plaintiffs’ attempt “to create a fiduciary duty based upon the existence of an escrow account is unpersuasive” (*supra*).

It is well established that the agent of a disclosed principal cannot be held liable for the

principal's breach or tortious behavior (*Ell Dee Clothing Co. v. Marsh*, 247 NY 392, 397 (1928). Here plaintiff was aware that he was purchasing insurance not from Emigrant but from American and subsequently from NorthStar. There are no allegations that Emigrant was aware of plaintiff's insurance needs, had any expertise, engaged in any consultation, was charged with specifics of coverage, or made any representations that the coverage offered by NorthStar to replace that cancelled by American was identical to that issued by American. Indeed no negligent acts or omissions are identified as against Emigrant.

Plaintiff's reliance upon *Bohlinger v. Zanger* (306 NY 228 [1954]), for the proposition that Emigrant maintained a dual agency is misplaced. As stated in *Bohlinger v. Mayville Realty Co.*, n.o.r., 135 NYS2d 865, *aff'd* 285 App Div 1045 [1st Dept 1955] *Zanger* is distinguishable for *Zanger* involved a broker with an allegiance to the insured. *Mayville* involved an insurance agent with allegiance only to the company, as here, and thus owed no fiduciary duty to insured (see, also *McDonough Caperton Shepherd Group, Inc. v. Academy of Medicine*, 888 F.2d 1392 [6th Cir.(Ohio) 1989][*Mayville* involved an insurance agent with allegiance only to the company and thus is distinguishable from *Zanger*]).

Accordingly, as Emigrant did not have a fiduciary duty to plaintiff, and if it acted as an agent to any party, it would be to American and NorthStar, and it would have acted as agent of a disclosed principal and not held liable except for its own negligent acts. As plaintiff has failed to allege or support any claim of negligence against Emigrant, the complaint is dismissed as against it.

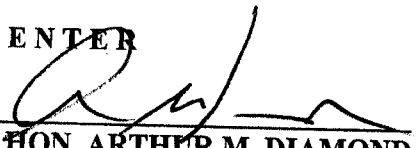
This constitutes the decision and order of this Court.

DATED: October 8, 2010

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HON. ARTHUR M. DIAMOND
J. S.C.

To:

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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