

DiMartino v Cave & Cheney

2010 NY Slip Op 33015(U)

October 8, 2010

Sup Ct, Suffolk County

Docket Number: 44357/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 44357/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 DIANE DIMARTINO,

Plaintiff,

-against-

CAVE & CHENEY,

Defendant.

ORIG. RETURN DATE: MARCH 19, 2010
 FINAL SUBMISSION DATE: APRIL 8, 2010
 MTN. SEQ. #: 001
 MOTION: MOT D

PLTF'S/PET'S ATTORNEY:

KAREN KERR, ESQ.
 191 NEW YORK AVENUE
 HUNTINGTON, NEW YORK 11743
 631-271-7560

DEFT'S/RESP ATTORNEY:

WINGET, SPADAFORA
 & SCHWARTZBERG, LLP
 45 BROADWAY - 19TH FLOOR
 NEW YORK, NEW YORK 10006
 212-221-6900

Upon the following papers numbered 1 to 7 read on this motion _____
 TO DISMISS _____

Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affirmation in Opposition and supporting papers 5, 6; Affirmation in Further Support 7; it is,

ORDERED that this motion by defendant CAVE & CHENEY ("defendant") for an Order, pursuant to CPLR 3211 (a) (7), dismissing all claims asserted herein by plaintiff DIANE DIMARTINO ("plaintiff") against defendant for failure to state a cause of action, is hereby **GRANTED** to the extent set forth hereinafter. The Court has received an affirmation in opposition to the instant application from counsel for plaintiff.

Plaintiff commenced this action with the filing of a summons with notice and verified complaint on or about November 12, 2009, asserting causes of action for breach of contract and negligence against defendant in connection with the procurement of a life insurance policy insuring the life of plaintiff's deceased husband, James DiMartino. According to the complaint, on or about

March 8, 2001, the decedent engaged the services of defendant, an insurance brokerage firm, to procure a life insurance policy for him. In return for these services, the defendant was paid a commission.

Specifically, the decedent originally requested a life insurance policy with a death benefit of \$650,000 and a distribution of sixty-two (62%) percent to his wife, the plaintiff herein, and thirty-eight (38%) percent to his mother. Said policy was allegedly issued on or about June 8, 2001 by U.S. Life Insurance Company. Thereafter, the decedent allegedly requested a life insurance policy with a death benefit of \$750,000 and a distribution of eighty-five (85%) percent to his wife and fifteen (15%) percent to his mother. This policy was issued on or about July 4, 2001, also by U.S. Life. Plaintiff alleges that on or about July 12, 2001, the decedent was notified by defendant that the requested insurance had been obtained and the amendment regarding the beneficiaries had been made. Plaintiff contends that on or about that date, defendant forwarded to the decedent the original application, a copy of the written amendment increasing the death benefit to \$750,000, and a "Client Information Sheet" indicating the specifications of the policy, including the change in distribution to the beneficiaries of eighty-five (85%) percent to plaintiff and fifteen (15%) percent to the decedent's mother upon the decedent's death.

The decedent was murdered on October 20, 2008. Shortly thereafter, plaintiff contacted defendant to confirm the specifications of the life insurance policy. Plaintiff claims that defendant confirmed that its records reflected that plaintiff was designated to receive eighty-five (85%) percent, and the decedent's mother was to receive fifteen (15%) percent, of the \$750,000 death benefit. Notwithstanding the foregoing, plaintiff alleges that on or about November 11, 2008, U.S. Life issued a check to plaintiff in the amount of \$452,882.52, which represented only sixty-two (62%) percent of the \$750,000 policy, less funeral expenses plus interest. As such, plaintiff commenced this action for breach of contract and negligence, seeking judgment against defendant for damages in the amount of \$172,500, representing the additional amount allegedly owed to plaintiff if the beneficiary designation had been changed.

Defendant has now filed the instant motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Defendant argues that plaintiff has not pled the existence or breach of any contract between plaintiff and defendant, but rather a breach of a contract between defendant and the decedent

for the procurement of a life insurance policy. Defendant contends that plaintiff was a party to neither the contract to procure life insurance nor the life insurance policy itself. Further, defendant argues that plaintiff's negligence cause of action must be dismissed as plaintiff failed to allege a separate duty owed by defendant to plaintiff, and a subsequent breach of that duty by defendant. Thus, defendant seeks dismissal of plaintiff's complaint in its entirety.

In opposition, plaintiff alleges that as a foreseeable beneficiary to the life insurance policy, plaintiff has standing to bring a cause of action for breach of contract against defendant. Plaintiff argues that as a third-party beneficiary to the contract entered into between the decedent and defendant for the procurement of life insurance, the relationship between plaintiff and defendant rose to a level of "near privity" or the functional equivalent of privity, which would sustain a cause of action for breach of contract. In addition, plaintiff alleges that an insurance broker may be held liable in negligence for failing to exercise due care in procuring requested coverage for their clients, and that plaintiff, as third-party beneficiary, has standing to assert such a negligence cause of action against defendant. As noted, plaintiff asserts that defendant negligently failed to procure the terms of the life insurance policy as specified by the decedent, and then sent the decedent a "Client Information Sheet" misleading him into believing that the requested beneficiary change had been made. Accordingly, plaintiff argues that she has asserted valid causes of action for breach of contract and negligence.

On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

With respect to the first cause of action, the elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (see e.g. *Flomenbaum v New York University*, 71 AD3d 80 [2009]; *Hecht v Components Intern., Inc.*, 22 Misc 3d 360 [Sup Ct, Nassau County 2008]). In order to survive a motion to dismiss for failure to state a cause of action, a complaint alleging breach of contract need only contain statements sufficiently particular to give the court and parties notice of the transactions,

occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action; such complaint is not required to meet any heightened level of particularity in its allegations (see CPLR 3013, 3016, 3211 (a) (7); *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2009]).

Moreover, a party asserting third-party beneficiary rights under a contract must establish: (1) the existence of a valid and binding contract between the other parties; (2) that the contract was intended for [her] benefit; and (3) that the benefit to [her] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [her] if the benefit is lost (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314 [1983]).

In view of the foregoing, the Court finds that at this pre-answer juncture the complaint makes out a claim for breach of contract based upon the near-privity relationship between plaintiff, as third-party beneficiary, and defendant, with respect to the contract between the decedent and defendant for the procurement of life insurance.

Next, with respect to the second cause of action sounding in negligence, the elements of common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty constituted a proximate cause of the injury. In the absence of a duty, there is no breach and without a breach there is no liability (see *Ruiz v Griffin*, 71 AD3d 1112 [2010]; *Petrosky v Brasner*, 181 Misc 2d 897 [Sup Ct, New York County 1999]). It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (*Meyers v Waverly Fabrics*, 65 NY2d 75 [1985]; *Logan v Empire Blue Cross & Blue Shield*, 275 AD2d 187 [2000]). This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract (see *Rich v New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382 [1882]; *Riffat v Continental Ins. Co.*, 104 AD2d 301 [1984]). Here, the Court finds that plaintiff has not alleged the violation of a legal duty independent of the contract between the decedent and defendant to support a cause of action for negligence against defendant.

Although plaintiff argues that "insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or

inform the client of their inability to do so" (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; see *Chaim v Benedict*, 216 AD2d 347 [1995]), and an agent may be held liable for neglect in failing to procure the requested insurance (see *Island Cycle Sales v Khlopin*, 126 AD2d 516 [1987]), the Court finds that such a duty is owed to the agent's client, the insured. Indeed, an insured "must establish that [the agent] failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction" (*Associates Commercial Corp. v White*, 80 AD2d 570, 571 [1981]). As such, defendant owed a duty to the decedent to procure the requested insurance, not to plaintiff.

Accordingly, even upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submission (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that plaintiff failed to state a cause of action for negligence against defendant.

Accordingly, this motion by defendant to dismiss the instant action is **GRANTED** solely to the extent that plaintiff's second cause of action sounding in negligence is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: October 8, 2010


HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION