

**American Med. and Life Ins. Co. v Crosssummit
Enters., Inc.**

2011 NY Slip Op 32034(U)

July 7, 2011

Supreme Court, Nassau County

Docket Number: 018059-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**AMERICAN MEDICAL AND LIFE
INSURANCE COMPANY,**
Plaintiff,

TRIAL/IAS PART: 20
NASSAU COUNTY

-against-

Index No: 018059-08

Motion Seq. No: 7

CROSSSUMMIT ENTERPRISES, INC., et al.,

Submission Date: 5/13/11

Defendants.
-----x

Papers Read on this Motion:

- Notice of Motion, Memorandum of Law,**
- Affidavits (2), Affirmation in Support and Exhibits.....x**
- Affidavit in Opposition and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**
- Reply Memorandum of Law in Support.....x**

This matter is before the court on the motion by Plaintiff American Medical and Life Insurance Company ("Plaintiff" or "AML") filed January 14, 2011 and submitted on May 13, 2011, following oral argument before the Court. For the reasons set forth below, the Court grants Plaintiff's motion, and directs Plaintiff to file an amended complaint in the form of its Proposed Amended Complaint, with the addition discussed at oral argument before the Court on April 28, 2011, with the Nassau County Clerk, and serve the amended complaint on Defendants, within thirty (30) days of the date of this decision. Defendants shall file their response to the Amended Complaint within thirty days (30) days of service of the Amended Complaint on Defendants.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3025(b), for an Order granting Plaintiff's motion for leave to file an Amended Complaint in the form provided.¹

Defendants oppose Plaintiff's motion.

B. The Parties History

This action has been the subject of three prior decisions by the Court, dated May 18, 2009 ("2009 Decision"), April 1, 2010 ("April 2010 Decision") and November 18, 2010 ("November 2010 Decision"). In the 2009 Decision, the Court denied Plaintiff's motion for injunctive relief. In the April 2010 Decision, the Court 1) granted the motion by the Third-Party Defendants to dismiss the Third-Party Complaint against them; 2) granted the motion by Richard J. Dunn and Kevin Dunn to dismiss the verified complaint as against them; and 3) denied the application of Defendants/Third Party Plaintiffs for leave to replead. In the November 2010 Decision, the Court denied Defendants' motion for summary judgment, and Plaintiff's cross-motion for partial summary judgment, and directed that certain funds be maintained in an escrow account pending the resolution of this litigation. In these Decisions, the Court provided a detailed background of this litigation, and the Court incorporates the Decisions herein by reference.

In support of the motion *sub judice* ("Instant Motion"), Susan Donato ("Donato") affirms that, between March of 2006 and May 2010, she was associated with Crosswalk, Richard J. Dunn ("Richard"), Kevin Dunn ("Kevin") (collectively "Dunns") and other businesses managed and/or owned by the Dunns. Donato, who has a degree in accounting and was licensed as an insurance broker, began working with Crosswalk in March of 2006 as a consultant. In or about July of 2006, she signed an employment contract with Crosswalk. From July 2006 to May of 2008, she was the Director of Business Operations and Vice President of Finance of Crosswalk and CrossSummit (collectively "CSE"), and had extensive dealings with AMLI. Her duties in this position included financial record keeping, human resource support and AMLI premium billing.

¹ At oral argument on this motion, Plaintiff advised the Court that the proposed amended complaint inadvertently does not include count seven (7) from the original complaint, which Plaintiff intended to include in the proposed amended complaint (Oral Arg. Transcript at pp. 4-5).

In October of 2007, with the assistance of counsel, Donato prepared an e-mail, of which she provides a copy, to the Dunns pursuant to the Conscientious Employee Protection Act (“CEPA”), to express her concern over what she believed was “blatant unlawful conduct in the operations of Cross America Healthplans, Crosswalk Holdings, Inc. and Cross Summit Enterprises, Inc.” In the e-mail (“CEPA Complaint”), Donato described documentation she came across that reflected that these entities were “marketing, selling and performing administration” for insurance programs in states for which they were not licensed, and in which AMLI was not authorized to sell insurance. Subsequently, Donato’s counsel engaged in additional communication with the Dunns regarding the issues raised in the CEPA Complaint.

In or about May of 2008, to settle the CEPA Complaint, CSE hired a new Vice President of Finance named Joe Moynihan (“Moynihan”) and transferred Donato to a new business acquired by the Dunns called the Metropolitan Business Alliance, LLC d/b/a National Association of Business Leadership, LLC (“NABL”). From June through August of 2008, Donato assisted Moynihan in preparation for his new position, which included numerous visits to the Dunns’ office in New Jersey. Donato continued to visit the Dunns’ Office in her new position, and continued to receive paychecks from Crosswalk. Donato affirms that she is considering a lawsuit against CSE, NABL and the Dunns, to collect unpaid compensation allegedly due to her.

Donato admits that she was prosecuted for her participation in an embezzlement scheme unrelated to her duties for CSE, and pled guilty in 2005 to embezzlement (“Prior Conviction”). She was sentenced to five (5) years probation and ordered to pay almost \$50,000 in restitution. She disclosed the Prior Conviction to the Dunns before beginning her employment, and entering into an employment contract, with Crosswalk.

Donato was not involved in preparing the MGU, but received a copy of the MGU after CrossSummit assumed Crosswalk’s duties under the MGU. Donato affirms that she “now understand[s]” (Donato Aff. at ¶ 16) that the MGU Agreement required CSE promptly to deposit net premium funds it collected on AMLI’s behalf (“Premiums”) into an account maintained by CSE with Merrill Lynch (“Merrill Lynch Account”). CSE and the Dunns, however, did not promptly remit these Premiums into the Merrill Lynch Account and, shortly after the MGU was

signed, Richard advised Donato and other CSE employees that the AMLI Premiums were “ours” for up to the first 45 days after CSE’s collection of the Premium, or “words to that effect” (*id.* at ¶ 19). Donato affirms that she understood Richard to mean that he intended to use the Premiums as he wished for the first 45 days after its collection, and that CSI would not deposit the Premiums into the Merrill Lynch Account until up to 45 days after CSE’s receipt of those Premiums. Donato affirms that, to the best of her knowledge, during the effective period of the MGU, CSE and the Dunns acted in accordance with Richard’s statement. Specifically, at the direction of the Dunns, CSE and/or the Dunns used the Premiums for several purposes, including the payment of CSE’s bills and the purchase of equipment for use by CSE employees. Kevin stated that CSE would “catch up” (*id.* at ¶ 22) on the Premiums through the acquisition of new business but, Donato avers, CSE consistently operated at a deficit with respect to its obligation to deposit the Premiums.

Donato also affirms that, while the MGU was in effect, CSE and/or the Dunns did not report to AMLI all the “lives” they enrolled in an AMLI limited medical program (Donato Aff. at ¶ 24). With respect to the unreported lives, CSE and/or the Dunns retained the premium paid and either issued, or allowed the Associations to issue, AMLI certificates of insurance to the unreported lives purporting to show coverage in an AMLI program. Donato estimates that, at the peak of CSE’s enrollment of AMLI lives, 30 to 50% of all lives that CSE enrolled and provided with AMLI certificates were not reported to AMLI. She affirms that CSE and the Dunns paid any claims on these unreported lives, to ensure that AMLI did not become aware of them and to create the impression to the insureds that AMLI was processing and paying their claims, even though the MGU did not authorize CSE to pay claims.

Donato also affirms that the Dunns served as the managing members of NABL which was not yet receiving revenue in 2008. The Dunns, however, provided NABL with funds that Donato used to purchase office equipment and make other payments. Donato surmises that the Dunns used the Premiums to fund these purchases.

In or about October 2008, following AMLI’s termination of the MGU, NABL was evicted from its office for failure to pay rent. In or about September of 2009, the Dunns “rolled over” lives associated with a former AMLI Association known as the Association of Independent

Managers to NABL (Donato Aff. at ¶ 46), without Donato's knowledge. The lives rolled into NABL were placed into an allegedly fraudulent insurance program in which its operators issued insurance certificates from a particular insurance company to NABL members, and received premiums from NABL members, but never enrolled those members into an insurance program that provided limited medical coverage. This program, in which the Dunns were allegedly involved, is now being investigated by several state insurance departments.

Donato avers, further, that in late 2008, the Dunns created an entity known as Hudson Valley Consultants, LLC d/b/a CEO Club Benefits ("HVC"), of which their wives were the titular managing members but which the Dunns controlled. To the best of Donato's knowledge, HVC engages in many of the same business operations conducted by CSE prior to its termination by AMLI. HVC operates out of the same offices maintained by CSE, uses CSE's equipment and employs many individuals formerly associated with CSE. The Dunns allegedly transferred their business operations from CSE to HVC because CSE's reputation was adversely affected by its dispute with AMLI.

Finally, Donato affirms that, after the instant action was commenced and it became apparent that documents would be sought from Donato, the Dunns called her into their office, advised her of the status of the litigation and "ordered me 'to hide'" (Donato Aff. at ¶ 57). Kevin, who knew that Donato planned to move from Pennsylvania to New York, said that he would keep her Pennsylvania address in their file to make it difficult for AMLI to locate her. Kevin allegedly said that if Donato spoke with AMLI, "CSE's case against AMLI would be 'sunk,' or words to that effect" (*id.* at ¶ 58).

John Ollis ("Ollis"), the Chief Executive Officer of AMLI since 2006, affirms that counsel for AMLI recently obtained a copy of the CEPA Complaint, which Ollis had never seen previously, and of which he was not aware. He affirms, further, that CSE never produced the CEPA Complaint during discovery regarding the instant action.

In his Affidavit in Opposition, Richard submits that the Donato Affidavit is "fraught with inconsistencies, misstatements and allegations devoid of any merit, truth or accuracy" (Richard Aff. in Opp. at ¶ 3) and suggests that Donato has "a grudge" against Defendants (*id.*). Richard notes that in 2009, Plaintiff named Donato as a "person with knowledge" in answers to

interrogatories, and questions why it took her so long to come forward with the information she now provides.

With respect to Plaintiff's claim that Defendants did not disclose the CEPA Complaint² in response to discovery requests, Defendants submit that Plaintiff's discovery requests (Ex. D to Goodgold Aff. in Opp.) did not request that documentation. In addition, in support of their argument that Donato's claims do not constitute new information warranting the requested amendment, Defendants provide Plaintiff's Response to Defendants' First Set of Interrogatories, dated in October of 2009 (Ex. E to Goodgold Aff. in Opp.). Interrogatory Number 2 asked Plaintiff to identify "all persons whom you contend have knowledge of relevant facts relating to this case" (*id.* at p. 3). Plaintiff's response, in addition to noting certain objections, contains a list of 14 people, one of whom is "Susan D'Anato" [sic] (*id.* at p. 4).

Richard disputes Donato's allegations and affirms, *inter alia*, that 1) at all times during the contractual relationship between CSE and AMLI, AMLI interacted with Donato on a regular basis; 2) although they were aware of the Prior Conviction, Defendants hired Donato as a favor to a business acquaintance which proved to be "an awful mistake," because Donato was incapable of handling the AMLI project (Richard Aff. in Opp. at ¶ 4(b)); 3) due to Donato's incompetence, there were errors regarding who was eligible for coverage and delays in providing invoices to vendors and processing premiums; 4) the CEPA Complaint is irrelevant to the Instant Motion, and raises issues that Donato knows lack merit; 5) Donato pursued the CEPA Complaint "to extort more money out of CSE" (*id.* at p. 7); 6) Moynihan, a certified public and forensic accountant, was hired "to clean up the financial situation left in a mess by Donato" (*id.*), and Moynihan learned that Donato had failed to file certain tax forms which subjected CSE to significant tax liability; 7) the concerns that Donato raised in the CEPA Complaint were caused, and undertaken, by Donato; and 8) the Court should disregard Donato's assertions as to what she "now" knows, given that she had access to that information during her employment with CSE;

Kevin also submits that Donato's claim that CSE ran a deficit in depositing premiums is unsupported by documentary evidence and, as reflected by e-mails and other documentation

² Defendants, while adopting the terminology used by Donato in the interests of consistency, submit that the characterization of the relevant e-mail as a "CEPA Complaint" is inaccurate.

provided (Ex. A to Richard Aff. in Opp.), it was Donato who deposited Premiums and followed AMLI's instructions regarding those deposits. Exhibit A, to which Richard refers, contains numerous e-mails from 2006 that were sent to individuals including Donato, or by Donato. The subject lines of those e-mails read "Proposed Draft Flow of Cash" and some of the e-mails make reference to a flow chart ("Flow Chart"), also included in Exhibit A, titled "AMLI- Limited Medical Cash Flow." The Flow Chart provided contains numerous boxes, including boxes containing the words "Disbursements by Crosswalk," "AMLI, Carrier Fee, Premium Tax, To be Swept by AMLI, To be accounted for by Crosswalk," and "AMLI, Risk Premium, To be Swept by AMLI."

Richard also disputes Donato's claim that the Dunns told her "to hide," and suggests that Donato sought contact with people because she was undergoing a divorce, owed back taxes to the Internal Revenue Service and owed money to numerous creditors and vendors. Richard submits, further, that Plaintiff has failed to provide any documentary evidence in support of its claim that CSE and the Dunns diverted AMLI funds and premiums. Moreover, Plaintiff has previously made allegations regarding Defendants' use of unapproved lives, and the Court has ruled that those allegations did not support the causes of action against the Dunns personally.

C. The Parties' Positions

Plaintiff submits that it recently uncovered new evidence, including the CEPA Complaint, that establishes that CSE has "perpetrated a massive fraud on AMLI, with the knowledge, cooperation and assistance of [the Dunns], along with [NABL and HVC]" (P's Memorandum of Law at p. 1). Plaintiff argues that the Court should permit them to amend their Verified Complaint (Ex. B to Vales Aff. in Supp.) "to supplement its claims against CSE with additional facts, transactions and occurrences, as well as to assert new claims against the Dunns, NABL and HVC based on these additional facts, transactions and occurrences" (*id.*).³

Plaintiff contends that it possesses other new evidence that warrants the requested amendment. Specifically, Plaintiff learned in December of 2010 that CSE was unable to comply

³ Plaintiff provides a copy of its proposed amended complaint (Ex. A to Vales Aff. in Supp.). At oral argument, however, counsel for Plaintiff advised the Court that the proposed amended complaint inadvertently fails to include count 7 from the original complaint, which Plaintiff intended to include in the proposed amended complaint.

with that portion of the Court's November 2010 Decision that directed CSE to deposit certain funds into an escrow account, which funds CSE had admitted withholding from AMLI. Plaintiff submits that in light of this new evidence, and the lack of surprise or prejudice to Defendants, the Court should permit the requested amendment.

In opposition, Defendants submit, *inter alia*, that 1) Plaintiff's motion is, in effect, an improper effort to reargue and/or renew the Court's April 2010 Decision; 2) Plaintiff has not alleged additional or subsequent transactions or occurrences warranting amendment pursuant to CPLR § 3025(b); 3) Defendants will be prejudiced by the requested amendment in light of Plaintiff's delay in requesting the amendment, which delay is unreasonable in light of the fact that Plaintiff, in 2009, identified Donato as a person with relevant knowledge regarding this action; and 4) even if the Court finds that there is no prejudice by the proposed amendment, the Court should nonetheless deny Plaintiff's motion because the new facts on which Plaintiff relies are devoid of merit and palpably insufficient

RULING OF THE COURT

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CLR § 3025(b) and *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

The Court grants Plaintiff's motion in light of the new information on which Plaintiff relies in support of its motion, specifically the CEPA Complaint and Defendants' concession that they are not in possession of the funds that they previously admitted withholding, which funds the Court previously directed shall be held in escrow. The Court concludes that Plaintiff should be given the opportunity to amend its complaint in light of this new information, in consideration of the liberal amendment policy of the CPLR and the Court's conclusion that the proposed amendment is not palpably insufficient or devoid of merit. The Court permits Plaintiff to file an amended complaint in the form of its Proposed Amended Complaint, with the addition regarding count seven discussed at oral argument before the Court on April 28, 2011. The Court directs Plaintiff to file its amended complaint with the Nassau County Clerk, and serve the amended complaint on Defendants, within thirty (30) days of the date of this decision. Defendants shall

file their response to the Amended Complaint within thirty days (30) days of service of the Amended Complaint on Defendants.

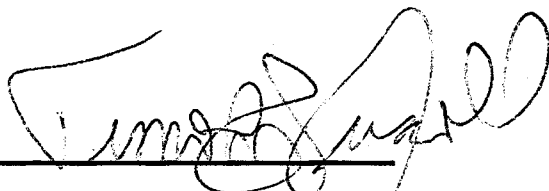
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on July 12, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
July 7, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUL 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE