

Jackson v AXA Equitable Life Ins. Co.

2011 NY Slip Op 32461(U)

July 8, 2011

Sup Ct, NY County

Docket Number: 113620/2009

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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RALPH K. JACKSON,

Index No. 113620/2009

Plaintiff

- against -

DECISION AND ORDER

AXA EQUITABLE LIFE INSURANCE COMPANY
f/k/a EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES and DISABILITY
MANAGEMENT SERVICES, INC.,

Defendants

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages due to defendants' nonpayment of disability insurance benefits when he became disabled in June 2006, pursuant to insurance policies that defendant AXA Equitable Life Insurance Company issued to plaintiff and that defendant Disability Management Services, Inc. (DMS), administered. Defendants move to dismiss the following claims in the amended complaint, based on failure to state a claim, C.P.L.R. § 3211(a)(7): plaintiff's third and fourth claims alleging breach of the covenant of good faith and fair dealing and consumer fraud, respectively, and all claims (a) seeking damages for emotional distress, (b) seeking attorneys' fees arising from defendants' breach of contract, and (c) against DMS. For the reasons explained below, the court grants defendants' motion to the extent set forth.

II. APPLICABLE STANDARDS

Upon defendants' motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any material dispute regarding those facts and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

III. DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S CLAIMS

A. Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff's third claim alleges that defendants breached the covenant of good faith and fair dealing by failing to pay the benefits due him under the policies. A duty of good faith and

fair dealing is implied in every contract. Bi-Economy Mkt., Inc. v. Harleystville Ins. Co. of N.Y., 10 N.Y.3d 187, 194 (2008); New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318 (1995).

Plaintiff's allegations that defendants conducted a sham investigation of his disability claims establish only breach of a contract, not breach of a duty separate from that agreement. New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 319.

Plaintiff's third claim thus duplicates plaintiff's breach of contract claim; both claims arise from a dispute over the policy's obligations and defendants' satisfaction of them. Id. at 320; Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423, 426 (1st Dep't 2010); AJW Partners LLC v. Itronics Inc., 68 A.D.3d 567, 568-69 (1st Dep't 2009); Logan Advisors; LLC v. Patriarch Partners, LLC, 63 A.D.3d 440, 443 (1st Dep't 2009). See Citi Mgt. Group, Ltd. v. Highbridge House Ogden, LLC, 45 A.D.3d 487 (1st Dep't 2007).

B. Consumer Fraud

Plaintiff's fourth claim alleges that defendants committed consumer fraud in violation of New York General Business Law (GBL) § 349. To establish a consumer fraud claim under GBL § 349(h), plaintiff must show a deceptive act (1) that is consumer oriented, (2) that defendants engaged in to mislead a reasonable consumer, and (3) that caused plaintiff's injury. City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 621 (2009); Stutman v. Chemical Bank, 95 N.Y.2d 24, 29 (2000). Harm merely to the community of consumers or to the public is not the direct

injury to which the Legislature intended to limit GBL § 349(h) claims, to avoid the "tidal wave of litigation" over derivative injuries that the Legislature intended to exclude from the statutory remedies. City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d at 623; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 26 (1995). Plaintiff must plead his own actual injury from deceptive or misleading practices, which also must impact consumers at large. City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d at 623; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 25. The statute does not cover purely private contract disputes. GBL § 349(h); City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d at 624; New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 321; Shou Fong Tam v. Metropolitan Life Ins. Co., 79 A.D.3d 484, 486 (1st Dep't 2010); Security Mut. Life Ins. Co. of N.Y. v. DiPasquale, 283 A.D.2d 182 (1st Dep't 2001).

Although defendants' sale of policies to plaintiff and investigation of his claims alone are not consumer oriented, New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 321, he sufficiently pleads a GBL § 349(h) claim by alleging that the policies were standard form policies issued to similarly situated consumers, Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 26-27; Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 83 (1st Dep't 2001); Makuch v. New York Cent. Mut. Fire Ins. Co., 12 A.D.3d 1110, 1111 (4th Dep't 2004), and defendants made a practice of misleading consumers in delaying

and denying covered claims under the policies. Acquista v. New York Life Ins. Co., 285 A.D.2d at 82. See Shou Fong Tam v. Metropolitan Life Ins. Co., 79 A.D.3d at 486; Batas v. Prudential Ins. Co. of Am., 37 A.D.3d 320, 323 (1st Dep't 2007). Consumer oriented conduct need not be recurring or constitute a pattern, but need only impact consumers broadly, as well as plaintiff directly. New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 320; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 25. Since plaintiff alleges that both AXA Equitable Life Insurance and DMS participated in the sham evaluation of claims and fraudulent scheme of delaying and denying policyholders' indemnification, the amended complaint pleads consumer fraud against DMS as well.

Insofar as plaintiff claims defendants' failure to investigate his claims and pay him benefits constitutes bad faith dealings with their insured or an unfair insurance settlement in violation of New York Insurance Law § 2601, however, the statute excludes a private right of action for such a claim distinct from nonperformance of the insurance contract. New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 318-19; Rocanova v. Equitable Assur. Socy. of U.S., 83 N.Y.2d 603, 614 (1994); Acquista v. New York Life Ins. Co., 285 A.D.2d at 78; Aetna Cas. & Sur. Co. v. ITT Hartford Ins. Co., 249 A.D.2d 241, 242 (1st Dep't 1998). Therefore the court dismisses any such claim for violation of a duty of care separate from the contractual duties.

C. Breach of Contract Claims Against DMS

Plaintiff alleges defendants' breach of contract in both his first and his second claims. DMS is not a party to the insurance contracts, so the court dismisses any breach of contract claim against this defendant. Bhugra v. Massachusetts Cas. Ins. Co., 80 A.D.3d 489, 490 (1st Dep't 2011). Nor is DMS liable as a disclosed agent, because plaintiff fails to allege that DMS intended to be bound by the contract, id.; or assumed a duty to plaintiff; or was affirmatively negligent toward him. Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1, 11-12 (1st Dep't 2006); Newman v. Upton, Cohen & Slamowitz, 10 A.D.3d 491, 492 (1st Dep't 2004). See Brasseur v. Speranza, 21 A.D.3d 297, 299 (1st Dep't 2005).

D. Emotional Distress

Although not pleaded as a separate claim, plaintiff seeks damages from defendants for causing him emotional distress. The conduct plaintiff alleges is not extreme, outrageous, exceeding bounds of decency, or regarded as atrocious and intolerable in a civilized community, as required to sustain an independent infliction of emotional distress claim. LoPresti v. Florio, 71 A.D.3d 574, 575 (1st Dep't 2010); World City Found., Inc. v. Sachetti, 48 A.D.3d 213, 214 (1st Dep't 2008); Graupner v. Roth, 293 A.D.2d 408, 410 (1st Dep't 2002); Acquista v. New York Life Ins. Co., 285 A.D.2d at 83. Without a separate basis supporting defendants' liability for emotional distress, plaintiff is not entitled to recover damages for mental distress from the breach

of duties under a contract. Johnson v. Jamaica Hosp., 62 N.Y.2d 523, 528 (1984); Wehringer v. Standard Sec. Life Ins. Co. of N.Y., 57 N.Y.2d 757, 759 (1982).

While plaintiff does not claim any relationship with defendants separate from the insurance contracts that would create a duty furnishing a basis of liability for emotional distress, Johnson v. Jamaica Hosp., 62 N.Y.2d at 528; Wehringer v. Standard Sec. Life Ins. Co. of N.Y., 57 N.Y.2d at 758-59; Bettan v. Geico Gen. Ins. Co., 296 A.D.2d 469, 470 (2d Dep't 2002), he does claim their liability based on violations of their statutory duties under GBL § 349. That statute authorizes "actual damages," Stutman v. Chemical Bank, 95 N.Y.2d at 28, based on actual, ascertainable, but "not necessarily pecuniary" injury, from a deceptive business practice. Samiento v. World Yacht Inc., 10 N.Y.3d 70, 81 (2008); Stutman v. Chemical Bank, 95 N.Y.2d at 29; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 26; Solomon v. Bell Atl. Corp., 9 A.D.3d 49, 52 (1st Dep't 2004). See Batas v. Prudential Ins. Co. of Am., 37 A.D.3d at 323; Edelman v. O'Toole-Ewald Art Assoc., Inc., 28 A.D.3d 250, 251 (1st Dep't 2006).

Plaintiff's amended complaint shows that defendants' deceptive practices in willfully failing to conduct a timely and reasonable investigation of his claims caused him to suffer actual emotional distress. Samiento v. World Yacht Inc., 10 N.Y.3d at 81; Edelman v. O'Toole-Ewald Art Assoc., Inc., 28 A.D.3d at 251; Solomon v. Bell Atl. Corp., 9 A.D.3d at 52. He

therefore pleads actual emotional damages recoverable for defendants' violation of GBL § 349.

E. Attorneys' Fees

Also not alleged as a separate claim, plaintiff seeks his attorneys' fees incurred in this action. Even if successful in the action, he may recover his attorneys' fees only if authorized by the parties' contract, a statute, or a court rule. U.S. Underwriters Ins. Co. v. City Club Hotel, LLC, 3 N.Y.3d 592, 597 (2004); Chase Manhattan Bank v. Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005, 258 A.D.2d 1, 4 (1st Dep't 1999). Although plaintiff fails to specify the basis for his recovery of attorneys' fees and may not recover his expenses in bringing an action to enforce his rights under his policies with defendant, New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 324; Mighty Midgets v. Centennial Ins. Co., 47 N.Y.2d 12, 21 (1979); Chase Manhattan Bank v. Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005, 258 A.D.2d at 4-5, plaintiff's claim under GBL § 349(h) provides an independent statutory authorization for attorneys' fees if plaintiff establishes defendants' liability under that statute. Karlin v. IVF Am., 93 N.Y.2d 282, 291 (1999); New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 320; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 24. See Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 381-82 (1st Dep't 2005); Busbee v. Ken-Rob Co., 280 A.D.2d 406, 407 (1st Dep't 2001); Devlin v. 645 First Ave. Manhattan Co., 229 A.D.2d 343, 344 (1st Dep't

1996).

Consequently, the court grants defendants' motion to dismiss insofar as it is limited to any claim for attorneys' fees arising from defendants' breach of contract. Any claim for attorneys' fees arising from defendants' violation of GBL § 349, however, survives.

IV. CONCLUSION

For the reasons delineated above, the court denies defendants' motion insofar as it seeks to dismiss plaintiff's fourth claim for consumer fraud, GBL § 349(h), including damages from emotional distress and attorneys' fees arising from the consumer fraud. The court otherwise grants defendants' motion and dismisses plaintiff's third claim for breach of the covenant of good faith and fair dealing, his first and second claims for breach of contract against defendant Disability Management Services, Inc., and any claims for emotional distress or attorneys' fees caused by either defendant's breach of contract. C.P.L.R. § 3211(a)(7). This decision constitutes the court's order and judgment dismissing those discrete claims.

DATED: July 8, 2011

UNFILED JUDGMENT *Larry Williams*

This judgment has not been entered by the County Clerk, **LUCY BILLINGS, J.S.C.** and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (**Room 141B**).