

<b>Abele Tractor &amp; Equip. Co., Inc. v Balfour</b>
2013 NY Slip Op 30922(U)
May 1, 2013
Supreme Court, Albany County
Docket Number: 6752-12
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

ABELE TRACTOR & EQUIPMENT CO., INC.,

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 6752-12**  
**RJI NO. 01-13-109061**

JOHN BALFOUR and SIOBHAN CORNELL a/k/a  
SIOBHAN BALFOUR a/k/a SIOBHAN CORNELL-BALFOUR,

Defendants.

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Supreme Court Albany County All Purpose Term, April 25, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Plaintiff commenced this action to recover the damages it suffered due to Defendants’ alleged fraud. Prior to answering, Defendants move to dismiss Plaintiff’s complaint pursuant to CPLR §§3211(a)(2), (a)(3), and (a)(7). Plaintiff opposes the motion and cross moves to consolidate, pursuant to CPLR §602, this action with another action also pending in Supreme Court - Albany County entitled John Balfour v Abele Tractor and Equipment Co. (Index No.485-11) (hereinafter “Balfour v Abele”). Although defendant John Balfour (hereinafter “John”)

failed to demonstrate his entitlement to dismissal, defendant Siobhan Cornell (hereinafter “Siobhan”) did and Plaintiff’s complaint against her is dismissed. Additionally, Plaintiff failed to establish its entitlement to consolidation.

Accepting the complaint as true and affording Plaintiff every favorable inference for purposes of this motion, it sufficiently set forth a fraud cause of action against John. (*see generally* Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 [2011]; Oxford Health Plans (N.Y.), Inc. v Bettercare Health Care Pain Mgt. & Rehab PC, 305 AD2d 223 [1st Dept 2003]). The complaint alleges that in January 1995 the divorce decree dissolving John’s marriage with Susan Balfour (hereinafter “Susan”) was filed. The complaint assumes, as will this Decision and Order, that John was not divorced from Susan until January 1995. (cf. Handzel v Handzel, 59 AD2d 810 [3d Dept 1977]). Thereafter, Plaintiff hired John in September 1995. When hired, John indicated on his employment forms that he was not married and elected to receive the medical insurance coverage Plaintiff offered as a “single employee plan.” In 1998, John allegedly switched his coverage to a “family plan.” With the switch, the complaint alleges that John began claiming Maureen Cornell (hereinafter “Maureen”) as his wife and Siobhan (Maureen’s daughter from a prior marriage) as his daughter.

Such claims were fraudulent, the complaint alleges, because John and Maureen were never married and John never legally adopted Siobhan. The Complaint also attached John’s 2006 “Enrollment/Change Form” in which he sought “Family” coverage and reported a date of marriage as “November 20, 1993.” Because John and Susan were not divorced until January 1995, the complaint alleges that John’s 2006 date of marriage assertion was necessarily fraudulent. Moreover, the November 20, 1993 marriage date is inconsistent with the allegations

John made on his initial employment forms. The Complaint also attached John's 2007 "Enrollment Application/Change Form," which explicitly claimed Maureen as his wife and Siobhan as his daughter. Again, such assertions were fraudulent because John was allegedly neither married to Maureen nor had adopted Siobhan.

Considering John's motion to dismiss first, it is focused almost exclusively on the federal Employee Retirement Income Security Act's (hereinafter "ERISA") (29 USC §1001 et seq.) alleged preemption of Plaintiff's common law fraud claim.

The starting point in "determining whether federal law preempts state law... is to ascertain the intent of Congress" (People ex rel. Cuomo v First Am. Corp., 18 NY3d 173, 179 [2011] cert denied, 132 S Ct 1929 [2012]), with the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co., 514 US 645, 655 [1995], quoting Rice v Santa Fe El. Corp., 331 US 218 [1947]; Planned Consumer Mktg., Inc. v Coats and Clark, Inc., 71 NY2d 442, 449 [1988]).

Considering ERISA's statutory text to determine legislative purpose, its "relates to" preemption language (29 USC §1144[a]) is exceedingly broad. However, this Court "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." (New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co., supra 656).

In defining its objective, the Supreme Court stated that ERISA was passed "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to

minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government [and to prevent]... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.” (Ingersoll-Rand Co. v McClendon, 498 US 133, 142 [1990]; New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co., supra).

With such objective in mind, John failed to demonstrate that Congress’ clear and manifest purpose in enacting ERISA was to preempt Plaintiff’s common law fraud cause of action. First, a fraud cause of action has no inherent relationship to ERISA’s provisions at all. This cause of action, as alleged here, “neither prohibit[s], nor permit[s] any particular method of administering an ERISA plan or of calculating the benefits to be derived therefrom.” (Planned Consumer Mktg., Inc. v Coats and Clark, Inc., 71 NY2d 442, 450 [1988], citing Alessi v. Raybestos-Manhattan, Inc., 451 US 504 [1981]; Oxford Health Plans (N.Y.), Inc. v Bettercare Health Care Pain Mgt. & Rehab PC, supra). Similarly, this fraud cause of action does not “mandate[] employee benefit structures or their administration.” (New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co., supra 658). It is wholly external to such calculation and administration. Moreover, Plaintiff’s fraud claim is not supplanting ERISA’s enforcement mechanisms. (Trustees of AFTRA Health Fund v Biondi, 303 F3d 765 [7th Cir 2002]; Geller v County Line Auto Sales, Inc., 86 F3d 18 [2d Cir 1996]; Gerosa v Savasta & Co., Inc., 329 F3d 317 [2d Cir 2003]). Rather than “assum[ing] the guise of a plan fiduciary” as alleged by John, Plaintiff seeks to recover the damages John’s alleged fraud caused it to suffer directly.

Simply put, “[t]he plaintiff[’s] common law fraud claim, which seeks to advance the

rights and expectations created by ERISA, is not preempted simply because it may have a tangential impact on employee benefit plans.” (Geller v County Line Auto Sales, Inc., supra 23).

Accordingly, John’s motion to dismiss Plaintiff’s fraud cause of action against him because it is preempted by ERISA is denied.

John’s further argument, that Plaintiff has “no standing to enforce the terms of the Provider’s plans,” is likewise unavailing. Such claim merely misconstrues Plaintiff’s Complaint, which sets forth a common law fraud claim to recover the excessive premium payments John’s fraud allegedly caused it to make. It does not seek to “enforce... the Provider’s plans.” As such, John’s motion to dismiss based upon Plaintiff’s alleged lack of standing is denied.

Turning next to Siobhan’s CPLR §§3211(a)(7) motion to dismiss, she demonstrated her entitlement to dismissal because Plaintiff’s Complaint failed to set forth a fraud cause of action against her. A fraud cause of action is necessarily premised upon the defendant’s purported “misrepresentation or... material omission of fact.” (Mandarin Trading Ltd. v Wildenstein, supra 178, quoting Lama Holding Co. v Smith Barney, 88 NY2d 413 [1996]). The Complaint, however, did not allege that Siobhan made any “misrepresentation or... material omission of fact.” Rather, the Complaint’s allegations focus singularly on John’s assertions and omissions. Moreover, in its opposition papers Plaintiff explicitly states that it “does not dispute that there does not appear to have been any direct fraudulent conduct undertaken by [Siobhan.]” Upon such showing, Siobhan amply demonstrated her entitlement to dismissal of Plaintiff’s fraud claim against her.

While Plaintiff seeks to avoid dismissal by asserting that Siobhan is a necessary party, it failed sufficiently establish that Siobhan “might be inequitably affected by a judgment.” (CPLR

§1001[a]). Plaintiff proffered no legal basis upon which it could obtain a judgment against Siobhan. Instated, it speculates that John could obtain a judgment against Siobhan by cross-claiming against her. Such tenuous and speculative argument, unsupported by any factual showing, is patently insufficient.

Accordingly, Siobhan's motion to dismiss is granted.

Lastly, turning to Plaintiff's motion to consolidate, on this record it failed to establish its entitlement to consolidation.

"Pursuant to CPLR 602(a), a court is vested with the discretion to consolidate actions for trial where they involve common questions of law or fact provided the party opposing consolidation has not demonstrated prejudice to a substantial right." (Guasconi v Pohl, 2 AD3d 1202 [3d Dept 2003]; Powers v de Groodt, 43 AD3d 509 [3d Dept 2007]). However, "[t]he threshold requirement for consolidation is a plain identity between the issues involved in the controversies." (Bradford v John A. Coleman Catholic High School, 110 AD2d 965, 966 [3d Dept 1985], quoting City of Cohoes v Cohoes Police Benev. and Protective Ass'n, 63 AD2d 793 [3d Dept 1978]).

Here, Plaintiff made no showing that there exists a "plain identity" of any law or fact. Plaintiff first impliedly admits that the two actions do not involve common questions of law. Rather, with a single conclusory assertion, its attorney alleges that "[e]ach of the two actions arises out of the employer/employee relationship between Plaintiff and Defendant Balfour and involve common questions of fact and evidence." Plaintiff, however, neither describes the "employer/employee relationship" in Balfour v Abele nor explains how such relationship is material to both actions. Moreover, considering each action's Complaint, there is no identity of

material facts. While this action is based upon the allegedly fraudulent statements John made to obtain a “family health plan,” Balfour v Abele is an action by John to recover the commissions he allegedly earned on the sale, lease, and rental of Plaintiff’s equipment. Such complaints raise dissimilar issues and appear, on this record, to have no material facts in common.

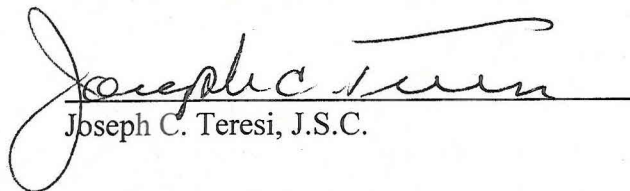
Moreover, “consolidation is properly denied if the actions are at markedly different procedural stages.” (Abrams v. Port Authority Trans-Hudson Corp., 1 AD3d 118 [1<sup>st</sup> Dept. 2003]). While issue has not yet been joined in this action, Balfour v Abele appears to have been pending for over two years (its Summons and Complaint are both dated January 20, 2011) and discovery has been conducted therein.

Accordingly, because this action shares no material facts or law with Balfour v Abele and both actions are at “markedly different procedural stages,” Plaintiff’s motion for consolidation is denied.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May / , 2013  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated January 31, 2013; Affirmation of Daniel Jacobs, dated January 31, 2013, with attached Exhibits A-B.
2. Notice of Cross-Motion, dated April 11, 2013; Affirmation of Linda Mandel Clemente, dated January 28, 2010, with attached Exhibit 1.