

**Lynn v AXA Equit. Life Ins. Co.**

2014 NY Slip Op 31229(U)

May 12, 2014

Supreme Court, New York County

Docket Number: 102732/2012

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY

PART 8

*Justice*

Index Number : 102732/2012  
LYNN, CHRISTOPHER R.  
vs.  
AXA EQUITABLE LIFE INSURANCE  
SEQUENCE NUMBER : 005  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

**FILED**

MAY 13 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: May 13, 2014

*JMK*

*JMK*

J.S.C.

**JOAN M. KENNEY**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**FILED**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8

MAY 13 2014

-----X

Christopher R. Lynn  
Plaintiff,

COUNTY CLERK'S OFFICE  
NEW YORK

-against-

**DECISION AND ORDER**  
Index Number: 102732/2012  
Motion Seq. No.: 005, 006

AXA Equitable Life Insurance Co.,  
Defendant.

-----X

**KENNEY, JOAN M., J.**

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for partial summary judgment.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion (005), Affirmation, Exhibits, and Memo of Law	1-13
Opposition Affirmation and Exhibits	14-27
Reply Affirmation, Memo of Law	28-29
Notice of Motion (006), Affirmation, Exhibits, and Memo of Law	30-52
Opposition Affirmation and Exhibits	53-58
Reply Affirmation, Memo of Law	59-63

In motion sequence number 005, plaintiff Christopher R. Lynn (Lynn), moves for an Order, pursuant to CPLR 3212, seeking partial summary judgment against defendant for failing to pay disability benefits pursuant to an insurance policy, numbered 85701855 (the Policy).

In motion sequence number 006, defendant AXA Equitable Life Insurance Company (AXA), moves for an order pursuant to CPLR 3212, seeking a judicial declaration that AXA is entitled to restitution and recovery for over payment of disability benefits in the amount of \$33,000.00; dismissing Lynn's second cause of action for an injunction; and dismissing all claims for punitive damages.

Motion sequence numbers 005 and 006 are consolidated herein for disposition.

### Factual Background

Since 1993, plaintiff Lynn was employed as an Executive Director for the City of New York under the Giuliani Administration, with an official job title of M-4 Administrative Manager. Plaintiff was required to work a minimum of 35 hours per week, and he was required to be physically and mentally alert, “constantly making decisions, on the move, taking subways, buses, taxis, walking, running, standing, sitting at the various meetings and conferences, taking orders from the Mayor and giving orders to other City workers, writing and generating reports, papers, plans as well as physically carrying files, folders and managing and supervising the staff.” (See Plaintiff’s Exhibit A, Lynn’s Affirmation).

Lynn underwent lower back surgery on or about October 12, 2001, which he claims left him totally disabled. On April 2, 2002, and October 29, 2007, respectively, Lynn underwent two more surgeries. On January 11, 2010, Lynn’s treating physician opined that plaintiff was unable to work given his condition.

In December 2001, plaintiff Lynn applied for disability benefits from AXA Equitable Life Insurance Company (AXA), stating total disability due to a back condition which rendered him unable to work as an Administrative Manager for the City of New York. At this time, Lynn submitted an Occupational Duties Form, describing his occupational duties and activities as walking, standing, sitting during the day, traveling to other locations, and research. Lynn also submitted an affidavit to supplement his application for disability benefits from AXA, stating that he was an admitted attorney, whose work regularly included practicing in all City, State, and Federal courts in New York and New Jersey, as well as local and Federal Courts in Washington, D.C. In this affidavit, Lynn further stated that his work assignment for the City of New York

ended on December 31, 2001, at which time he expected to return to private practice as an attorney.

AXA began paying disability benefits to Lynn pursuant to the Policy and continued payment through May 10, 2012. At that time, AXA's Senior Claim Consultant, Thomas Fidalgo, notified Lynn by letter that he did not meet the definition of "Total Disability" for various reasons. The Policy issued to Lynn defines "Total Disability" as the "inability due to injury or sickness to engage in the substantial and material duties of your regular occupation." Regular occupation is defined as "the occupation (or occupations, if more than one) in which you are regularly engaged for gain or profit at the time you become disabled." (See Defendant's Exhibit 1, AXA Equitable Disability Income Policy). In support of its decision to terminate Lynn's disability benefits, AXA relied upon documentation received throughout the course of the claim which contradicted Lynn's claimed inability to perform the "substantial and material duties" of his pre-disability occupation. The documentation revealed that Lynn has been working both as an attorney and as an administrator. Lynn had accepted a position with the New York State Senate Committee on Aging in or around 2009. He had also appeared as a lawyer in numerous court conferences and prepared various legal documents in the representation of several individuals in legal matters.

Lynn never reported his work with the New York State Senate Committee on Aging or his work as an attorney to AXA. To the contrary, he submitted forms to AXA stating that he had performed no work at all throughout the course of his claim.

Lynn underwent an Independent Medical Examination on December 21, 2011, performed by Dr. Cash. Dr. Cash's examination found no physical or objective finding that would preclude

Lynn from working. Dr. Cash further found no limitation in sitting, standing, walking, squatting, bending, kneeling, pushing, pulling, grasping, or reaching at any level above or below the shoulders.(See Defendant's Exhibit 7, IME Report of Dr. Cash). Dr. Cash also noted that while Lynn claimed an inability to do those activities, he "clearly demonstrated his ability with his vigorous workout routines."

### **Arguments**

Plaintiff alleges that since defendant wrongfully terminated plaintiff's disability benefits, plaintiff is entitled to judgment as a matter of law on its third cause of action for breach of contract.

Defendant argues that summary judgment in favor of the plaintiff is not warranted because plaintiff has failed to prove that no triable issues of fact exist with regard to whether he was totally disabled preventing his from engaging in the "substantial and material duties" of his regular occupation. Furthermore, defendant maintains that plaintiff was never entitled to receive any disability benefits because plaintiff was working during that period, and now seeks restitution of the benefits paid. Defendant also seeks dismissal of plaintiff's second cause of action seeking an injunction as well as dismissal of all claims for punitive damages.

### **Discussion**

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof

submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1<sup>st</sup> Dept 1999]).

Here, plaintiff failed to establish that he is unable to perform the substantial and material duties of his regular occupation so as to award him total disability benefits pursuant to his insurance policy. Plaintiff argues that his disability prevents him from working as a city administrator, thus entitling him to disability benefits. However, plaintiff has not eliminated all material issues as to whether working as a city administrator is to be considered his regular occupation and whether he is able to perform the substantial and material duties of that occupation.

Although plaintiff argues that his regular occupation is that of city administrator, he represented himself as an attorney on the insurance forms submitted to AXA. Furthermore, plaintiff claims that he left his law practice in 1993 to work as a city administrator, however, in an affidavit submitted to AXA, plaintiff specifically stated that his work as a city administrator ended on December 31, 2001, at which time he "expected to return to private practice."

Additionally, plaintiff argues that he cannot perform the substantial and material duties of his occupation which include walking, standing, sitting, traveling, and research. However, defendant AXA has submitted evidence in admissible form that since his claimed disability, regardless of whether his regular occupation is that of a city administrator or that of an attorney, plaintiff has been working as both in some capacity performing exactly those types of pre-disability occupational duties he now claims he is unable to perform.

While defendant has shown that plaintiff has been engaged in some work as counsel for the Chairman of the New York State Senate Committee on Aging and as an attorney, defendant has not eliminated all material issues as to whether this constitutes “material and substantial duties” of plaintiff’s regular occupation. “Total disability in particular occupations occurs when the insured is found to be incapacitated from performing any substantial part of his ordinary duties, notwithstanding that he can still perform some of the duties pertinent to his profession.” (*Shapiro v. Berkshire Life Ins. Co.*, 212 F.3d 121 [2d Cir. 2000] citing *Niccoli v. Monarch Life Ins. Co.*, 332 N.Y.S.2d 803, 806 [1972]). Here, there is a dispute as to what constitutes plaintiff’s regular occupation and whether plaintiff is so disabled so as to prevent him from engaging in the “substantial and material duties” of his regular occupation. Admittedly, plaintiff has engaged in work as counsel and attorney since his disability, however, there remains a question of whether he was able to perform the substantial and material duties that were required of his pre-disability occupation. Accordingly, at this juncture it is premature to award defendant restitution of the disability benefits paid to plaintiff.

Defendant seeks to dismiss plaintiff’s second cause of action, which seeks an injunction as against AXA pursuant to CPLR 6301, enjoining AXA from closing or terminating Lynn’s

total disability benefits. The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor. (See CPLR 6301; see generally *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 32 N.E.2d 1272 [1988]). Plaintiff has not set forth any arguments in support of an injunction, nor has plaintiff opposed that part of defendant's motion to dismiss the second cause of action seeking an injunction. Accordingly, plaintiff's second cause of action is dismissed.

Defendant seeks to dismiss all claims for punitive damages as against AXA. It is well settled that a "claim for punitive damages against an insurer is cognizable in New York only in circumstances where a plaintiff has made sufficient evidentiary allegations of ultimate facts of a fraudulent and deceitful scheme in dealing with the general public as to imply a criminal indifference to civil obligations." (*Holiness Realty Corp. v. New York Prop. Ins. Underwriting Assn.*, 75 A.D.2d 569, 570, 427 N.Y.S.2d 264; *Philips v. Republic Ins. Co.*, 108 A.D.2d 845, 485 N.Y.S.2d 566, aff'd 65 N.Y.2d 1000, 494 N.Y.S.2d 301, 484 N.E.2d 664; *Catalogue Serv. Of Westchester v. Insurance Co. Of North Amer.*, 74 A.D.2d 837, 425 N.Y.S.2d 635; *Granato v. Allstate Ins. Co.*, 70 A.D.2d 948, 418 N.Y.S.2d 108; *Royal Globe Ins. Co. v. Chock Full O'Nuts Corp.*, 86 A.D.2d 315, 321, 449 N.Y.S.2d 740). Here, plaintiff's allegations for breach of contract in failing to pay total disability benefits does not rise to allegations of fraud or deceit. AXA's decision to terminate benefits after a thorough investigation after receiving documentation that plaintiff was engaged in work as counsel and an attorney after his claimed disability cannot be said to constitute a "bad faith" decision. Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment is denied; and it is

further

ORDERED, that the part of defendant's motion seeking a judicial declaration that AXA is entitled to restitution and recovery for over payment of disability benefits in the amount of \$33,000.00 is denied; and it is further

ORDERED, that the part of defendant's motion to dismiss plaintiff's second cause of action and all claims for punitive damages is granted; and it is further

ORDERED, that the parties proceed to mediation/trial forthwith

Dated: May 12, 2014

ENTER:



\_\_\_\_\_  
Joan M. Kenney, J.S.C.

**FILED**

MAY 13 2014

COUNTY CLERK'S OFFICE  
NEW YORK