

<b>Warshow v American Progressive Life &amp; Health Ins. Co. of N.Y.</b>
2014 NY Slip Op 31944(U)
May 30, 2014
Supreme Court, Nassau County
Docket Number: 600669/13
Judge: Robert A. Bruno
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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT: HON. ROBERT A. BRUNO**

-----X  
JOHN WARSHOW, as the Executor of the  
ESTATE OF NANCY WARSHOW,

Plaintiff,

TRIAL/IAS PART 19  
INDEX No.: 600669/13  
Submission Date: 04/01/14  
Motion Sequence: 002

- against -

AMERICAN PROGRESSIVE LIFE AND HEALTH  
INSURANCE COMPANY OF NEW YORK,

Defendant.  
-----X

**DECISION and ORDER**

**Papers Numbered**

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Upon the foregoing papers, defendant’s motion pursuant to CPLR §3211(a) for an Order: (a) dismissing plaintiff’s second cause of action for declaratory judgment; (b) dismissing plaintiff’s third cause of action for fraudulent misrepresentation; (c) dismissing plaintiff’s fourth cause of action for a violation of NY General Business Law §349; (d) striking plaintiff’s claim for attorney’s fees; and (e) striking plaintiff’s claim for punitive damages is determined as set forth below.

*Background*

According to Plaintiff’s Verified Complaint, in 1996, Nancy Warshow purchased a Nursing Home and Home Care Insurance Policy from Defendant. In or about May 2009, Nancy Warshow began suffering from late stage multiple sclerosis and began utilizing the assistance of health care aides pursuant to the aforementioned policy. Plaintiff alleges in the complaint that Defendant refused to reimburse Nancy Warshow for the services of health care aides in violation of the terms of the policy. On March 13, 2013, Nancy Warshow commenced this action by filing a summons and verified complaint alleging, *inter alia*, breach of contract, fraud and violation of General Business law §349. Subsequently, on July 3, 2013, Nancy Warshow passed away and her son, John Warshow was appointed as Executor of her estate.

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### *Declaratory Judgment*

CPLR §3001 provides in relevant part, that the court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is... claimed”.

“Where a plaintiff’s cause of action for a declaratory judgment simply parallels a breach of contract claim and merely seeks a declaration of the same rights and obligation as will be determined under the breach of contract claim, dismissal of the cause of action for a declaratory judgment is warranted” *Kings Infiniti, Inc. v. Zurich American Insurance Co.*, 43 Misc.3d 1207(A). However, “an insured may bring a claim against its insurer, seeking a declaration that the loss to its property was covered under the insurance policy issued by the insurer”, or it may be sought for a “declaration as to what version of the policy was in effect at the time of an insured’s loss and whether the policy in effect contained an exclusion, endorsement, and thus, whether coverage for an insured’s loss is excluded under the policy” *Id.*

Here, Defendant seeks to dismiss Plaintiff’s second cause of action seeking a declaratory judgment which declares that “Defendant is obligated to pay, up the maximum daily limit of the Policy, all of Plaintiff’s expenses...” (*Pltf’s Cmplt.*, ¶25). Defendant argues, *inter alia*, that Plaintiff does not present a justiciable controversy because Nancy Warshow is now deceased and no longer requires the services outlined in the policy. Defendant also maintains that to the extent Plaintiff seeks a ruling regarding coverage for past services, same is covered under Plaintiff’s cause of action for breach of contract.

In opposition, Plaintiff contends, *inter alia*, that the policy submitted by Defendant in its moving papers is not the actual policy that was issued to the decedent. Plaintiff argues that the policy issued to decedent did not require decedent’s home health care services to be provided by licensed personnel/agencies and said policy specified that Defendant would not place restrictive Riders on the decedent’s coverage. Plaintiff further argues that Defendant denied coverage based upon an inapplicable Rider which was not part of the decedent’s policy. As such, Plaintiff maintains that a justiciable controversy exists because it is necessary to determine what version of the policy was in effect at the time of Plaintiff’s claims.

Affording liberal construction to Plaintiff’s second cause of action and accepting the alleged facts as true [*Leon v. Martinez*, 84 NY2d 83 (1994)], dismissal must be denied. Although Plaintiff’s Amended Complaint does not specifically allege that a declaration is necessary to determine what version of the policy was in effect, the court “may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” *Ryan v. Cover*, 75 AD3d 502, 503 (2d Dept. 2010).

### *Fraud*

To sustain a cause of action for fraud, Plaintiff must allege the following elements: “representation of a material existing fact, falsity, *scienter*, deception and injury.” (citations omitted) *Selinger Enters., Inc. v. Cassuto*, 50 AD3d 766 (2d Dept. 2008). A fraud claim does not exist where it “is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties’ agreement” *Sforza v. Health Ins. Plan of Greater N.Y.* 210 AD2d 214 (2d Dept. 1994); *Selinger Enters., Inc. v. Cassuto*, *supra.*; and *Gorman v. Fowkes*, 97 AD3d 726 (2d Dept. 2012). In addition, a fraud cause of action cannot be sustained where there is “[a] mere misrepresentation of an intent to perform under the contract” *Gorman v. Fowkes*, 97 AD3d at 727. “Conversely, a misrepresentation of

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material fact, [that] is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud” *Selinger Enters., Inc. v. Cassuto*, 50 AD3d at 768; quoting, *WIT Holding Corp. v. Klein*, 282 AD2d 527 (2d Dept. 2001).

Moreover, “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default ... the circumstances constituting the wrong shall be stated in detail.” CPLR §3106(b). However, “the specificity requirement is not to be so strictly interpreted as to prevent an otherwise valid cause of action” (citation omitted) *Pludeman v. Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008). Accordingly, CPLR §3016(b) “may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (citation omitted) *Pludeman v. Northern Leasing Sys., Inc.*, 10 NY3d at 492. This is particularly true in cases where the material facts are within the exclusive knowledge of the party charged with fraud as “it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings” *Paolucci v. Mauro*, 74 AD3d 1517 (3rd Dept 2010).

At bar, Defendant asserts, *inter alia*, that Plaintiff’s cause of action for fraud must be dismissed because it did not misrepresent the decedent’s entitlement to home care benefits under the policy. Defendant maintains that the terms, conditions, limitations and exclusions to home care services were specifically set forth in the policy, which included a rider. As such, Defendant contends that the decedent was “charged with having knowledge of the contents of the Policy, including all applicable Riders, as a matter of law” (*Def. Memo. of Law*, p. 9).

In contravention to Defendant’s arguments, Plaintiff avers, *inter alia*, that the original policy issued to his late mother was unencumbered by a rider. As such, Plaintiff avers that the decedent was not restricted to licensed healthcare personnel nor was she limited to only three (3) days per week for home care aide. Plaintiff asserts that Defendant intentionally refused to pay the decedent’s just claims in attempt to defraud Plaintiff.

Based upon the foregoing, there remains unresolved issues of fact with respect to said claims, since a determination has not been made as to whether or not the decedent’s policy contained a rider which set forth certain restrictions. Accepting Plaintiff’s allegations as true, it would be an improvident use of the Court’s discretion to grant dismissal of this cause of action at this juncture.

#### *General Business Law §349*

“To successfully assert a claim under General Business Law § 349(h), “. . . plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice” *North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 AD3d 5, 11 (2d Dept. 2012), quoting *City of New York v. Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621.

A plaintiff asserting a claim under GBL §349 must demonstrate that the defendant’s deceptive acts or practices were consumer-orientated, meaning they have a broader impact on consumers at large. *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20. “The ‘single shot transaction’ (*Genesco Entertainment, Div. of Lymutt Indus., Inc. v. Koch*, 593 F.Supp. at 752 [S.D.N.Y.]), which is ‘tailored to meet the purchaser’s wishes and requirements’ (*New York Univ. v. Continental Ins. Co.*, 87 NY2d at 321, 639 N.Y.S.2d 283, 662 N.E.2d 763), does not, without more, constitute consumer-oriented conduct for the purposes of this statute” *North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 AD3d 5 (2d Dept. 2012). “On the other hand, conduct has been held to be sufficiently consumer-oriented to satisfy the statute where it involved

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‘an extensive marketing scheme’ (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d at 344), where it involved the ‘multi-media dissemination of information to the public’ (*Karlin v IVF Am.*, 93 NY2d at 293), and where it constituted a standard or routine practice that was ‘consumer-oriented in the sense that [it] potentially affect[ed] similarly situated consumers’ (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 27; see *Wilner v Allstate Ins. Co.*, 71 AD3d 155, 164 [2010]; *Elacqua v Physicians' Reciprocal Insurers*, 52 AD3d 886, 888 [2008]).” *North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 AD3d at 12.

In the instant matter, Defendant argues that this action is a private contract dispute and does not fall within the scope of General Business Law §349. Defendant also argues that the conduct complained of by the Plaintiff is not “consumer-orientated” since the “terms, conditions, limitations and exclusions of this Policy were the result of the information supplied and choices made by [the decedent] in her Application for Insurance” and not the result of a consumer transaction (*Def. Memo. of Law*, p. 12).

Plaintiff argues in opposition that Defendant engaged in materially deceptive actions by forcing fabricated riders onto policyholders which required policyholders to hire only licensed health care agencies in order to be reimbursed by Defendant. Plaintiff further argues that Defendant fraudulently accepted the premiums paid out by policyholders and intentionally withheld payment of legitimate claims. As such, Plaintiff contends that Defendant’s practice has harmed the public at large.

While granting the benefit of every possible favorable inference to Plaintiff at the early stage of this action, it appears that factual allegations set forth a viable cause of action under General Business Law §349. Plaintiff alleges that Defendant engaged in deceptive conduct which misled similarly situated policy holders into believing that their claims would be covered under the policy. Since this conduct has a broad impact on consumers at large, dismissal pursuant to CPLR §3211 is inappropriate.

All matters not decided herein is denied.

This constitutes the Decision and Order of the Court.

Dated: May 30, 2014  
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

**ENTERED**

**JUN 06 2014**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**