

Bialik v AXA Equit. Life Ins. Co.

2014 NY Slip Op 32250(U)

August 20, 2014

Supreme Court, New York County

Docket Number: 156898/13

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice PART 13

DAVID BIALIK, Plaintiff, -against- AXA EQUITABLE LIFE INSURANCE COMPANY, f/k/a THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

INDEX NO. 156898/13 MOTION DATE 08-13-14 MOTION SEQ. NO. 001 MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for Compel Discovery:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant's motion pursuant to CPLR §3124 and CPLR §3126 to compel plaintiff to respond to the Document Demands and Interrogatories, is granted only to the extent that plaintiff is directed to respond to defendant's Document Demands 21, 27-29, 31, 35, 36, 63 and 64, and Interrogatories Nos. 27, 38, 55 and 56. The remainder of the motion is denied.

Plaintiff brought this action seeking to recover damages for breach of contract derived from defendants failure to provide disability benefits pursuant to disability income provisions of his life insurance policies. Plaintiff alleges that he was not required to submit his claim information to defendant's third-party administrator, and that he complied with the policy by submitting timely notice and proof of his permanent condition directly to the defendant.

Defendant seeks an Order pursuant to CPLR §3124 and §3126, dismiss this action for failure to provide discovery, alternatively to compel plaintiff to respond to its Document Demands Nos. 21, 26 -31, 35, 36, 44-46, 49-60, 62-65, and plaintiff's

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

Interrogatories Nos. 23, 27, 38, 40, 55 and 56. Defendant contends that discovery sought related to plaintiff's employment, travel, internet access and income, both before and after the alleged loss of sight in one eye, is material and necessary to contradict plaintiff's claimed loss of sight resulting in the inability to perform his occupational duties. Defendant also claims that the language of the policy under "Proportionate Loss of Income Rider" requires he provide the information sought.

Defendant has failed to state a basis to dismiss this action pursuant to CPLR §3126, which requires a showing of a willful violation of a prior Order for discovery. The failure to provide discovery must be willful, contumacious, or due to bad faith, which can be established by a showing of predicate failure to provide the discovery sought (*Weissman v. 20 East 9th Street Corporation*, 48 A.D. 3d 242, 852 N.Y.S. 2d 67 [N.Y.A.D. 1st Dept., 2008]; *Siegman v. Rosen*, 270 A.D. 2d 14, 704 N.Y.S. 2d 40 [N.Y.A.D. 1st Dept. 2000]). There were only two discovery orders a preliminary conference order, and a compliance conference order. There was no language in the Orders related to plaintiff's discovery responses that would provide a basis to either dismiss or preclude testimony. The plaintiff provided responses to defendant's discovery requests and complied with this Court's Orders, all parties are disputing the adequacy of the responses.

Plaintiff opposes that part of defendant's motion seeking to compel discovery contending that defendant's demands are unduly burdensome, not reasonably calculated to lead to discovery, not relevant to the insurance coverage sought, or to claims in the complaint for breach of contract. Plaintiff argues that the terms of the policy do not restrict his ability to remain employed and there is no basis for the employment, travel, internet access and income discovery sought.

Pursuant to CPLR §3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [N.Y.A.D. 1st Dept., 1994]).

The language in insurance contracts, "must be given its ordinary meaning," and "common words" in a policy should not be "used as words of art with legalistic implications" (*Lexington Park Realty, LLC v. National Union Fire Ins. Company of Pittsburgh, P.A.*, 2014 N.Y. Slip Op. 05817, 2014 WL 3953150 [1st Dept., 2014]). Any language in a policy subject to conflicting interpretation, will be construed against the insurer, as the drafter of the policy (*Scalia v. Equitable Life Assurance Society of the United States*, 263 A.D. 2d 537, 693 N.Y.S. 2d 218 [2nd Dept., 1999]).

Defendant established that the language of the insurance policy under the "Proportionate Loss of Income Rider" requires income related discovery. The income discovery sought is not overbroad because the time periods involved are specifically stated in the "Monthly Earnings" and "Prior Monthly Earnings" provisions of the insurance policy which are used to calculate the "Monthly Income." There are exclusions related to calculation of monthly earnings that are stated as, "(1) dividends; (2) rents; (3) investment; (4) royalties; (5) annuities; (6) deferred profit sharing or deferred compensation; (7) payments under a deferred compensation plan; (8) income from government plans; or (9) any other unearned income."

Defendant's Document Demand No. 26, is overbroad because employment is not a factor to consider income under the insurance policy. Document Demand 30 seeks documents related to retirement and profit sharing plans, excluded under the policy from the calculation of income. Document Demands 49-57, are overbroad, they seek documentation that is excluded from the calculations of monthly earnings.

A discovery request using the term "all" is generally deemed overbroad, unless it can be determined by examination that the items sought are limited to the specific subject matter of the action and can be identified with "reasonable particularity" so that it can be readily identified (*Mendelowitz v. Xerox Corp.*, 169 A.D. 2d 300, 573 N.Y.S. 2d 548 [N.Y.A.D. 1st Dept., 1991]).

Document Demand 21, is overbroad, it is not specific and seeks information from individuals that are not parties to this action. Document Demands 44- 46, seek evidence of missing time from work and the names and addresses of individuals that are not parties to this action, defendant has not established that this information is relevant. Defendant seeks copies of "any and all" documents evidencing damages, without specificity, in Document Demand 58, which is overbroad and burdensome. Document Demand 59 is duplicative of other demands and is overbroad in seeking "all" documentation related to occupational duties prior to disability. Document Demands 60 and 62 are excessive and over broad in seeking "all" documentation, videotapes and audiotapes, related to vacations or trips from the date of disability. Defendant's Document Demand 65, is also overbroad in seeking "all documents" related to use of social media, the lack of specificity for the time frame indicated, with no explanation provided for the extent of documentation sought requires this demand be stricken.

Courts generally avoid pruning overbroad interrogatories, however they may be limited where the majority of the questions are germane to the action. To the extent that interrogatories only remotely relate to the issues in the action and when taken as a whole are patently overbroad, vague and burdensome, they should be stricken (*Albert v. Time Warner Cable*, 255 A.D. 2d 248, 680 N.Y.S. 2d 499 [N.Y.A.D. 1st Dept., 1998] and *Lerner v. 300 West 17th Street Housing Development Fund Corp.*, 232 A.D. 2d 249, 648 N.Y.S. 2d 439 [N.Y.A.D. 1st Dept., 1996]).

Interrogatory 14 has five subsections and in addition to relevant information seeks information related to defendant's employers which is not required pursuant to the policy, it is overbroad and unduly burdensome. Interrogatory 23, specifically seeks information related to loans, leases and mortgages which are excluded in the monthly earnings calculations and income as stated in the insurance contract, this information is not relevant and overbroad. Interrogatory 32 is overbroad because it seeks information related to unidentified employees. Defendant has not stated a basis for Interrogatory 40, which is overbroad in seeking client lists since there is no restriction on employment under the policy. Defendant is entitled to financial information related to income, there is no stated basis or relevance to Interrogatory 43, seeking the name and address, "of each and every accountant, bookkeeper, financial consultant" related to plaintiff's finances, this demand is overbroad and burdensome.

Plaintiff's motion filed under motion sequence 002, seeks to compel defendant to provide responses to his First Demand for Interrogatories, specifically Interrogatories 2-6, 19, 21, 22, 24 and 26; and first Demand for Discovery and Inspection, particularly the Demand to Produce, and documents withheld as stated in Defendant's Privilege log. Plaintiff contends that he is entitled to the discovery sought because the

relationship of the defendant to its third -party claims administrator, Disability Management Services ("DMS"), is not privileged because of fiduciary exception.

The plaintiff's Demand for Discovery and Inspection, and the Demand to Produce do not need to be supplemented. Although plaintiff is entitled to documentation related to defendant's relationship with DMS, the discovery as sought is overbroad and not specific. Plaintiff has not established that it is entitled to the four pages of documents defendant claims are privileged based on attorney client privilege.

Interrogatories that are contradictory or seek documentation without, "reasonable particularity" of identification are improper (Nankof v. Ara Services Inc., 96 A.D. 2d 493, 465 N.Y.S. 2d 515 [N.Y.A.D. 1st Dept., 1983]). Interrogatories consisting of, "multiple subparts and references to other documents," are patently overbroad and improper (Botsas v. Grossman, 7 A.D. 3d 654, 776 N.Y.S. 2d 519 [N.Y.A.D. 2nd Dept., 2004]).

The interrogatories plaintiff seeks to supplement are overbroad and not stated with reasonable particularity. Plaintiff has misconstrued the terms of the insurance policy related to income, and in part seeks discovery that is in his possession.

Accordingly, it is ORDERED that defendant's motion pursuant to CPLR §3124 and CPLR §3126 to compel plaintiff to respond to the Document Demands and Interrogatories, is granted only to the extent that plaintiff is directed to provide supplemental responses to defendant's Document Demands 21, 27-29, 31, 35, 36, 63 and 64, and Interrogatories Nos. 27, 38, 55 and 56, within thirty days from the date of this Order, and it is further,

ORDERED, that the remainder of defendant's motion is denied, and it is further,

ORDERED, that plaintiff's motion filed under Motion Sequence 002, to compel defendant pursuant to CPLR §3124, to respond to plaintiff's First Demand for Interrogatories, and first Demand for Discovery and Inspection, specifically the Demand to Produce, and documents withheld as stated in Defendant's Privilege log is denied; and it is further,

ORDERED, that counsel are directed to appear for a status conference in IAS Part 13, at 71 Thomas Street, Room 210 on October 1, 2014, at 9:30 a.m.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ,
J.S.C.

Dated: August 20, 2014

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE