

Bialik v Axa Equit. Life Ins. Co.
2015 NY Slip Op 30346(U)
March 12, 2015
Supreme Court, New York County
Docket Number: 156898/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

DAVID BIALIK,

Plaintiff,

-against-

INDEX NO. 156898/2013
MOTION DATE 03-04-2015
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

AXA EQUITABLE LIFE INSURANCE COMPANY, f/k/a
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE
UNITED STATES,

Defendant.

The following papers, numbered 1 to 11 were read on this motion to dismiss complaint, sanctions, and to compel discovery, cross-motion to compel discovery.

PAPERS NUMBERED

- 1- 4
- 5-7, 8-9,
- 10-11

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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

Upon a reading of the foregoing cited papers, it is Ordered that defendant’s motion by Order to Show Cause to dismissing the complaint, for sanctions, and alternatively to compel discovery is denied, plaintiff’s cross-motion to compel discovery is conditionally granted upon the parties entering into a confidentiality agreement.

David Bialik entered into a Disability Income Insurance Policy (herein “Policy”) with The Equitable Life Assurance Society of the United States (herein “Equitable”) in 1991. On August 11, 2010, Bialik was advised by his physician that he was permanently “rendered functionally blind in the left eye due to complications arising from aberrant regeneration of the facial never on the left side of his face” (see Complaint PP 13). Thereafter, Bialik filed a claim with Equitable by letter dated September 8, 2010 in which he states that “[p]ursuant to the terms of the subject policy, noting the provision of presumptive total disability, by this communication I give notice of claim for (1) benefits under the policy’s loss of life, limbs, or sight rider and (2) for disability benefits” (see Complaint Exhibit C). Bialik alleges that Equitable failed to provide disability benefits pursuant to the Policy.

Bialik brought this action seeking to recover damages for breach of contract. Equitable alleged that pursuant to the disability income provision of the Policy, Equitable did not have to provide disability benefits due to Bialik’s failure to provide notice to Equitable’s third-party administrator. Bialik argued that he was not required to submit his claim information to Equitable’s third-party administrator and that he complied with the Policy by submitting timely notice and proof of his permanent condition directly to Equitable. Bialik contends that the Policy’s provisions for presumptive total disability coverage are defined as “the entire and irrecoverable loss, while this policy is in force, of: (1) sight;..., applies to his total disability and loss of vision in one eye and complete loss

of vision in both eyes does not apply (Mot. Exhibit 2, DI- 127, Pg. 5). Bialik also contends that the language in the policy that “[i]t will be presumed to be disability even if you engage in any occupation” means that he does not have to provide proof of his financial records in order to recover under the Policy.

Equitable moved for an Order dismissing this action for failure to provide discovery, alternatively to compel Bialik to respond to document demands and interrogatories. Equitable argued that the discovery sought related to Bialik’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 Bialik’s claimed loss of sight resulting in the inability to perform his occupational duties. Equitable also claimed that the language of the Policy under the Proportionate Loss of Income Rider (herein “PILR”) requires he provide the information sought.

In an Order dated August 20, 2014, this Court granted Equitable’s motion to the extent of compelling Bialik to respond to the document demands and interrogatories, and denied the portion of the motion seeking dismissal of the action. This Court also denied Bialik’s cross-motion to compel the responses and production of documents by Equitable as to their third-party claims administrator reasoning that: “[a]lthough [Bialik] is entitled to documentation related to [Equitable’s] relationship with DMS, the discovery is overbroad and not specific,” and that up to that point, Bialik had “not established that it was entitled to the four pages of documents defendant claims are privileged based on attorney client privilege.”

Bialik moved by Order to Show Cause for leave to renew and reargue its original motion, and upon renewal and reargument, Bialik sought an Order denying Equitable’s motion for supplemental responses to interrogatories and document demands. In an Order dated November 10, 2014. The Court granted reargument reasoning that:

The claim for breach of contract as asserted in the Complaint is based on a breach of the Presumptive Total Disability section of the Policy. The Policy states that “Presumptive Total Disability means the entire and irrevocable loss, occurring while this policy is in force, of: (1) sight ...,” and “[i]t will be presumed to be disability even if you engage in any occupation” (see Policy DI 127 pg. 5). The Complaint alleges that the “Defendant breached and continues to breach its duty under the Policy by wrongfully failing and refusing to pay benefits due to Plaintiff under the Policy’s Presumptive Total Disability provision” (see Complaint PP 70).

Further, the court held that “[t]he language in the Presumptive Total Disability clause allows for presumed disability even if Bialik is engaged in any occupation,” and that “Bialik’s financial records are not relevant to his breach of contract claim as asserted in the Complaint, and compelling him to produce his financial records is improper.”

Equitable now moves by Order to Show Cause for an order dismissing Bialik’s Complaint and a protective order as to the documents sought by Bialik in regards to the

relationship between Equitable and DMS. Alternatively Equitable seeks an order compelling Bialik to provide full and complete responses to document demands and interrogatories served by Equitable requesting information regarding his occupational duties, travel, and other activities.

Bialik opposes and cross-moves for an order compelling Equitable to respond to Bialik's Second Notice for Discovery and Inspection. Specifically Bialik seeks responses to requests numbers 1, 2, 3, 5, and 9 through 14, which seek documentation relating to DMS and the DMS employees and their licenses who worked on Bialik's claim.

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 (see *Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]). "The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Kapon v. Koch*, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]).

Bialik's Complaint asserts one cause of action for breach of contract premised on a breach of the Presumptive Total Disability section of the Policy which presumes disability "even if you engage in any occupation" (See Policy DI 127, Pg. 5). Whether or not Bialik undertakes an occupation, or information pertaining to his duties, travel or other activities are not relevant to the presumption of disability as defined in the Presumptive Total Disability section of the Policy. Accordingly, Equitable's motion is denied in its entirety.

After this Court's prior Order, Equitable presented Bialik with a confidentiality agreement in which Equitable would provide the agreement and other confidential information between DMS and Equitable (see Moving Papers, Exhibit 17). Equitable contends that the agreement contains proprietary information including pricing and structure. Bialik has not entered into the confidentiality agreement.

Bialik's cross-motion for responses as to DMS and their employees is conditionally granted. Bialik is entitled to information regarding the denial of his September 8, 2010 claim from DMS and Equitable in order to prosecute his breach of contract claim. However, the Court, in its discretion, will allow Bialik to receive this proprietary and confidential information upon the parties entering into a confidentiality agreement. Once the parties have entered into a confidentiality agreement, Equitable is ordered to provide responses to Bialik's Second Notice for Discovery and Inspection, demands numbered 1, 2, 3, 5, and 9 through 14.

Accordingly, it is ORDERED that defendant's motion by Order to Show Cause for an order striking the complaint, for sanctions, alternatively to compel discovery is denied,

and it is further,

ORDERED, that plaintiff's cross-motion to compel discovery is conditionally granted upon the parties entering into a confidentiality agreement in relation to the discovery sought in plaintiff's Notice of Cross-Motion, and it is further,

ORDERED, that if the parties enter into a confidentiality agreement, that defendant provide the discovery sought within 20 days from entering into the confidentiality agreement, and it is further,

ORDERED, that the parties shall appear for a Conference at IAS Part 13 located at 71 Thomas Street, Room 210, New York, New York on May 13, 2015 at 9:30AM.

Enter: **MANUEL J. MENDEZ**
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: March 12, 2015

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE