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

PART 11

Index Number : 106330/2005

WENDOL, EDWARD J.

VS

GUARDIAN LIFE INSURANCE

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 1/5/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

FILED

FEB 17 2006

COUNTY CLERK'S OFFICE

Dated: February 8, 2006

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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EDWARD J. WENDOL,

Plaintiff, Index No. 106330/05

-against-

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA and BERKSHIRE LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

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Joan A. Madden, J,:

Defendants Guardian Life Insurance Company of America ("Guardian") and Berkshire Life Insurance Company of America ("Berkshire") move to dismiss the third cause of action alleging deceptive business practices under Section 349(a) of the General Business Law based on documentary evidence and for failure to state a cause of action. Plaintiff opposes the motion, which is denied in part and granted in part.

Background

The following facts are based on the allegations in the amended complaint, which for the purposes of this motion must be accepted as true, and the documentary evidence submitted on the motion.

Guardian is a New York business organization which is authorized to conduct the business of insurance in the State of New York. Berkshire is a wholly owned stock subsidiary of Guardian and administrator for Guardian. Guardian issued to plaintiff a Disability Income Insurance Policy with an effective date of February 26, 1998 (hereinafter "the Policy"), which by its terms provides for monthly payments during periods of disability in the base amount of $5,000, as increased by the Policy's Cost of Living Adjustment ("COLA") Rider. The Policy is a standard New York State Insurance Form, similar to those issued to other New York consumers.

Under the Policy, "Total Disability means that, because of sickness or injury, you are not able to perform the major duties of your occupation...you will totally disabled even if you are able to work at some other occupation so long as you are not able to work in your occupation." The Policy also contains a Residual Disability Benefit Rider, which provides a benefit to the claimant when he is working in his own occupation, but has reduced earnings due to sickness or injury. The Maximum Benefit Period under the Policy is for until plaintiff's 65th birthday if such disability begins before the insured turns sixty years-old, and benefits commence after a three month elimination period.[1]

Plaintiff specifically selected Guardian as his disability insurance carrier based on its reputation. His decision to chose Guardian was also based on the affirmative representations made by David Tellkamp, an insurance agent selling Guardian policies, that Guardian administers its own claims. There is no provision in the Policy permitting Guardian to transfer administration of policyholders' claims to any third party.

Prior to his disability, plaintiff was a stockbroker who sold financial products to clients for investment purposes. This was a high pressure and competitive occupation. Beginning in 2002 and early 2003, plaintiff began to experience anxiety and depression and began to receive treatment from his primary care physician, Martin Ehrlich, M.D. Due to plaintiff's anxiety and depression, Dr. Ehrlich instructed plaintiff not to work as a stockbroker as of March 1, 2003. On March 19, 2003, Dr. Ehrlich completed an Attending Physicians Statement in which he advised Guardian that plaintiff had discontinued work as a stockbroker on March 1, 2003. Plaintiff subsequently moved to Florida as he could no longer afford to live in New York. In Florida,

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[1]Plaintiff was born in May 1967 and thus was under the age of sixty during the relevant period.

plaintiff began work as an insurance agent. As a result of his medical condition, plaintiff filed a claim with Guardian for disability benefits.

In response to his claim, plaintiff received letters from Guardian through its claim administrator, Berkshire, advising that plaintiff's claim had been approved under a "reservation of rights" with a disability onset of January 7, 2004, which is more than ten months after plaintiff allegedly stopped working as stockbroker. The January 7, 2004 date was when plaintiff obtained his first psychiatric assessment. Defendants also improperly treated plaintiffs claim as a Residual Disability instead of a Total Disability. By letter dated September 20, 2004, defendants notified plaintiff that he would not receive any further benefits under the Policy.

The complaint contains three causes of action. The first cause of action alleges that Guardian breached the terms of the Policy by terminating benefits plaintiff's benefits in September 2004. The second cause of action seeks a declaration that "[plaintiff] is disabled within the meaning of the Policy's Premium Waiver provision..." The third cause of action, which is the subject of the motion, alleges that defendants violated section 349 of the General Business Law.

Wit respect to the third cause of action, plaintiff alleges that defendants engaged in a deceptive business practice by representing to plaintiff and its other policyholders that Guardian would administer its own claims when, in fact, the claims were administered by Berkshire, and defendants failed to disclose this change to policyholders, including plaintiff. Plaintiff also alleges that in the instant matter and as a general business practice defendants (i) "wrongfully conspired to misinterpret Policy terms to avoid or minimize payment of Total Disability and Residual Disability benefits," (ii) "wrongfully conspired to claim a delayed disability onset date," (iii)"wrongfully conspired to deny and refuse to pay disability income insurance policy claims

and waiver of premium claims under disability policies," and (iv) wrongfully advise[d] their customers that benefits have been approved under 'reservation of rights,' even though the policies issued by defendants do not contain any provisions allowing for such reservation."

Discussion

Section 349(a) of the General Business Law makes it unlawful to perform "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." General Business Law § 349 was enacted in 1970 as part of General Business Law article 22-A for the purpose of giving the consumer "an honest market place where trust prevails between buyer and seller" Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank N.A., 85 NY2d 20, 25 (1995)(citation omitted).[2]

For section 349 to apply, a plaintiff "must charge conduct of the defendant which is consumer-oriented" Oswego Laborers' Local 214 Pension Fund, 85 ny2d at 25. A transaction is consumer-oriented when the complained of "acts and practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example would not fall within the ambit of the statute" Id. However, "[c]onsumer-oriented conduct does not require a repetition or pattern of deceptive behavior." Id. Thus, a plaintiff "need not show that the defendant committed the complained-of-acts repeatedly--either to the same plaintiff or to other consumers--but instead must demonstrate that the acts or practices have a broader impact on consumers at large." Id

In addition to showing consumer oriented conduct, to state a claim under GBL section

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[2] As originally enacted, the statute could only be enforced by the Attorney General. However, in 1980, a private right of action was added for "any person who has been injured by reason of violation of this section" (General Business Law § 349 [g]). A private plaintiff may recover compensatory damages, limited punitive damages and attorneys' fees (id.).

349, it must be shown that a defendant's allegedly wrongful conduct constitutes "an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." Oswego Laborers' Local 214 Pension Fund, supra at 25. Actionable conduct under GBL section 349 does not have to rise to the level of fraud (Gaidon v Guardian Life Ins., 96 NY2d 201, 209 (2001)), and a plaintiff does not have to establish intent to defraud or justifiable reliance. See, Small v Lorilland Tobacco Co., Inc., 94 NY2d 43, 55 (1999).

It has been held that an insurer who makes a practice of delaying and denying claims under standard-insurance policies issued to consumers is engaged in consumer-oriented conduct for the purposes of GBL § 349. Acquista v New York Life Ins Co. , 285 AD2d at 82 (citations omitted); see also,Riordan v Nationwide Mut Fire Ins. Co., 977 F2d 47 (2d Cir 1992).

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheimer v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). Moreover, "while factual claims contradicted by indisputable documentary evidence are not entitled to such consideration... where the pleaded facts state a cause of action, documentary evidence may result in dismissal only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and...no significant dispute exists regarding it.'"Acquista v New York Life Ins Co. , 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

Here, allegations that defendants engaged in a deceptive business practice by using Berkshire instead of Guardian to administer the claims of its policyholders are insufficient to state a claim under General Business Law section 349, in the absence of any allegation or proof that any misrepresentation regarding the entity administrating the claims caused any actual injury.

To recover under that statute, a plaintiff must show that "a materially deceptive act or practice caused actual, although not necessarily pecuniary harm."Small v Lorilland Tobacco Co., Inc., 94 NY2d at 56 (citation omitted). In this case, while plaintiff alleges that he was deceived as a result of the change in administrators, there is no allegation connecting this purported deception with any harm caused to him. Under these circumstances, that part of the third cause of action related to Berkshire's administration of Policy must be dismissed. See Small v. Lorilland Tobacco Co., Inc., 94 NY2d at 56 (upholding the dismissal of claim for deceptive practices under the General Business Law where theory of "injury" contains no manifestation of either pecuniary or actual harm but is based on the deception itself being an injury); Riso v. Synergy USA, 6 AD3d 152 (1st Dept 2004)(action properly dismissed on the ground that the alleged violations of the General Business Law did not cause plaintiff any actual loss).

However, the remaining allegations relating to purported deceptive practices in violation of GBL § 349(a) are sufficient to survive this dismissal motion. These allegations include that defendants (i) "wrongfully conspired to misinterpret Policy terms to avoid or minimize payment of Total Disability and Residual Disability benefits," (ii) "wrongfully conspired to claim a delayed disability onset date," (iii)"wrongfully conspired to deny and refuse to pay disability income insurance policy claims and waiver of premium claims under disability policies," and (iv) wrongfully advise[d] their customers that benefits have been approved under 'reservation of rights,' even though the policies issued by defendants do not contain any provisions allowing for such reservation."

Insofar as the underlying dispute involves a standard-form insurance contract, and the amended complaint alleges that the defendants' purported deceptive conduct affected not only the plaintiff but other policyholders as well, at this juncture, it cannot be said that the alleged

conduct was not consumer-oriented for the purposes of GBL §349. See, Acquista v New York Life Ins Co. , 285 AD2d at 82 (allegations that insurer makes a practice of inordinately delaying and then denying claims without reference to its viability sufficient to avoid dismissal of General Business Law claim); Joannou v Blue Ridge Ins. Co., 289 AD2d 531 (2d Dept 2001)("[a]n insurance carrier's failure to pay benefits allegedly due its insured under the terms of a standard insurance policy can constitute a violation of GBL § 349"); compare, New York University v Continental Ins. Co., 87 NY2d 308, 321 (1995)(holding that dispute over coverage under a non-standard insurance coverage the terms of which were negotiated between a major university through its director insurance was not consumer- oriented).

Conclusion

In view of the above, it is

ORDERED that defendants motion to dismiss is granted only to the extent of dismissing those allegations in the third cause of action which relate to the purported deceptive practice of using Berkshire instead of Guardian to administer the claims of its policyholders, and is otherwise denied.

Dated: February 8, 2006

J.S.C.