

Kong Qin Wang v Yuan Xiong (Jason) Lin

2011 NY Slip Op 30216(U)

January 19, 2011

Sup Ct, New York County

Docket Number: 600916/10

Judge: Joan A. Madden

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

PRESENT: Hon Josc A. Madden

PART 11

Index Number : 600916/2010

WANG, KONG QIN

INDEX NO. _____

vs

XIONG, YUANG 'JASON' LIN

MOTION DATE 10/14/10

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

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 attached Memorandum Decision + Order

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

FILED

JAN 31 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: January 19, 2011

[Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

FILED

JAN 31 2011

-----X
KONG QIN WANG, KONG SONG WANG and
KONG XIU WANG, beneficiaries of the
policy held by SHAN HUANG WANG,

Plaintiffs,

-against-

NEW YORK
COUNTY CLERK'S OFFICE
Index No. 600916/10

YUAN XIONG (JASON) LIN, agent of the
following, and NEW YORK LIFE INSURANCE
COMPANY, Issuer of the policy,
Defendants.

-----X
JOAN A. MADDEN, J.S.C.:

Defendant Yuan Xiong (Jason) Lin moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint, as to him (motion seq. no. 001). Defendant New York Life Insurance and Annuity Corporation (NYLIAC) s/h/a New York Life Insurance Company, moves, pursuant to CPLR 3211 (a) (7), to dismiss the third and fourth causes of action alleged in the complaint, and to strike plaintiffs' demands for punitive damages and attorney's fees (motion seq. no. 002).¹

Background

This action arises out of allegations that defendants wrongfully refused to pay benefits under a life insurance policy issued by NYLIAC, and misled the late Shan Huang Wang (the Deceased), who only spoke Mandarin, regarding the terms of the application for the policy.

The first cause of action in the complaint seeks a declaratory judgment that NYLIAC life insurance policy No. 61 034 480 (the Policy), effective as of July 28, 2008, and issued on or about August 1, 2008 to the Deceased is in full force and effect. The

¹Motion sequence nos. 001 and 002 are consolidated for disposition.

second, third, and fourth causes of action allege, respectively, breach of contract, fraud, and unjust enrichment, against both defendants. The fifth cause of action alleges negligent supervision on the part of NYLIAC. NYLIAC has answered the complaint and asserted a counterclaim for rescission of the Policy.

The complaint alleges that, without asking the Deceased any questions about his health, or explaining that his health could be an issue in regard to the approval of the Policy, Lin persuaded the Deceased, with whom he spoke in Mandarin, to purchase the Policy, telling him only that, if he agreed to do so and if he paid the premiums, his beneficiaries would receive \$100,000 upon his death. It is further alleged that since the Deceased neither spoke, nor read, English, Lin filled in the application for the Policy, and the Deceased signed it. The Deceased paid premiums totaling \$3,367.04.

The Deceased died on January 2, 2009, as the result of hypertensive cardiovascular disease. NYLIAC refused to pay on the Policy, on the grounds that the application that Lin had filled in contained inaccurate information about the health of the applicant. However, on or about October 27, 2009, after plaintiffs' attorney had contacted it, NYLIAC refunded the premiums paid by sending a check to each of the plaintiffs in the amount of one third of the total premiums that the Deceased had paid.

Discussion

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be terminated liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true . *Guggenheim v.*

Ginzburg, 43 NY2d 268 (1977); *Morone v. Morone*, 50 NY2d 481 (1980). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" *Morgenthau & Latham v. Bank of New York Company, Inc.*, 305 AD2d 74, 78 (1st Dept 2003), quoting, *Biondi v. Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *aff'd*, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" *Id.*, quoting, *Guggenheimer v. Ginzburg*, 43 NY2d at 275.

Under this standard, the breach of contract claim must be dismissed as against Lin, as the complaint fails to allege any contract between Lin and the plaintiffs, or between Lin and the Deceased. Next, plaintiffs' request for a declaratory judgment must be dismissed as to Lin as the claim seeks no relief against him.

The fraud claim must be dismissed as against both defendants. First, the fraud claim complaint fails to plead fraud with sufficient particularity. To plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. *Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)." *Euryclei Partners*,

L.P. v. Seward & Kissel, L.P., 12 NY3d 553, 559 (2009). CPLR 3016 (b) requires that claims for fraud set forth "the circumstances constituting the wrong...in detail." Thus, "[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action." *Euryclei Partners, L.P. v. Seward & Kissel, L.P.*, 12 NY3d at 559.

Here, the complaint fails to allege any specific misrepresentations made by defendants to either plaintiffs or the Decedent. Instead, it merely alleges that Lin "falsified the life insurance application," that was provided to NYLIAC. In any event, the fraud claim must also fail as it does not claim "any special damages proximately caused by the false representation, not recoverable under the contract measure of damages." *Tesoro Petroleum Corp. v. Holborn Oil Limited*, 108 AD2d 607, 608 (1st Dept), appeal dismissed, 65 NY2d 637 (1985); see also, *Rivas v. Amerimed USA, Inc.*, 34 AD2d 250 (1st Dept 2006), lv dismissed in part and denied in part, 8 NY3d 908 (2007). Specifically, the fraud claim, like the breach of contract claim, seeks \$100,000 in benefits under the Policy.

In addition, insofar as the fraud claim seeks the return of premiums, plaintiffs acknowledge that NYLIAC returned those premiums to them.

Next, the unjust enrichment claim must also be dismissed. A claim of unjust enrichment must allege that the plaintiff conferred a benefit upon the defendant and was not adequately compensated therefor. *Nakamura v Fujii*, 253 AD2d 387 (1st Dept 1998).

Plaintiffs' unjust enrichment claim is not viable as against Lin, as the enrichment that the complaint alleges is the payment that Lin allegedly received for selling the Policy to the Deceased. That payment was not a benefit that was conferred by plaintiffs, and plaintiffs have no colorable claim to that payment. Nor is that claim viable as against NYLIAC. To the extent that the claim is predicated upon the payment of premiums by the Deceased, it fails since, as already stated, NYLIAC returned the premiums to plaintiffs. To the extent that the claim rests upon NYLIAC's failure to pay on the Policy, it is not viable as unjust enrichment is "an obligation the law creates in the absence of any agreement." *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005). A claim for unjust enrichment does not lie where an enforceable contract governs the same subject matter. *Id.*; *Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274 (1st Dept 2008).

The claim for attorney's fees must be dismissed since attorney's fees are generally not recoverable except as provided for by statute, court rule, or agreement between the parties (*Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528 [1st Dept 2010]), and none of these exceptions are alleged to apply here.

The claim for punitive damages must also be dismissed as such damages may be recovered only where the plaintiff has suffered "egregious tortious conduct ... that ... was part of a pattern of similar conduct directed at the public generally." *Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 (1st Dept 2005), quoting *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 (1994). Here, as the fraud claim has been dismissed, there is no

tortious conduct on which to predicate a request for punitive damages, and the conduct described in the complaint is not the type of "egregious conduct" on which a claim for punitive damages in connection with a breach of contract claim may be predicated. *New York University v. Continental Ins Co.*, 87 NY2d 308, 315-316 (1995) (noting that punitive damages in breach of contract cases "are only available in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as gross and morally reprehensible and of such wanton dishonesty as to imply criminal indifference to civil obligations.") (internal citations and quotations omitted). Accordingly, the request for punitive damages must be dismissed.

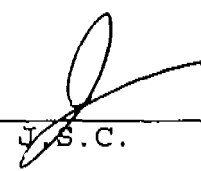
In view of the above, it is hereby

ORDERED that in motion sequence no. 001, the motion to dismiss is granted and the complaint is severed and dismissed as against defendant Yuan Xiong (Jason) Lin; and it is further

ORDERED that in motion sequence no. 002, the motion to dismiss is granted, and the third and fourth causes of action in the complaint are dismissed as against defendant New York Life Insurance and Annuity Corporation s/h/a New York Life Insurance Company, and the requests for attorney's fees and punitive damages are stricken; and it is further

ORDERED that the remaining parties shall appear on February 10, 2011 for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 19, 2011


J.S.C.

FILED

JAN 31 2011

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