**Orlinsky v GEICO Ins. Co.**

2011 NY Slip Op 30905(U)

February 25, 2011

Supreme Court, Nassau County

Docket Number: 017262/10

Judge: F. Dana Winslow

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 4**
**NASSAU COUNTY**

**MOSHE ORLINSKY,**

**Plaintiff,**

**-against-**

**MOTION SEQ. NO.: 001**
**MOTION DATE: 11/27/10**

**GEICO INSURANCE COMPANY,**

**INDEX NO.: 017262/10**

**Defendant.**

**The following papers having been read on the motion (numbered 1-4):**

**Notice of Motion.....1**
**Attorneys Affirmation in Opposition to Motion to Dismiss.....2**
**Affirmation in Support of Request for Assignment to Commercial Division.....3**
**Reply Affirmation.....4**

Motion by the attorneys for the defendant for an order dismissing the complaint in its entirety pursuant to CPLR 3211(a)(1) and (7) is determined as follows.

Plaintiff, Moshe Orlinsky and defendant GEICO's insured, Cara Chamorro, were involved in a motor vehicle accident on December 31, 2009. GEICO paid its insured, Cara Chamorro, for damages sustained in the amount of $1,160.55, and sought subrogation against the plaintiff based on its determination of plaintiff's liability.

On February 8, 2010, GEICO mailed plaintiff a letter indicating that it had made payment to its insured and had the legal right to recover $1,160.55 from plaintiff. On February 23, 2010, plaintiff's counsel, Brett Schatz, Esq., advised GEICO that he represented plaintiff with respect to GEICO's subrogation claim and was "contesting any demands for [subrogation] as [GEICO's] insured's vehicle hit my client's vehicle in the rear." (A copy of the plaintiff's counsel's February 23, 2010 letter is annexed as Exhibit "B" to the moving papers.)

Schatz's letter further stated that "your client is wholly liable for any property damage that occurred . . . [and plaintiff] would like to pursue a property damage claim against your insured." *Id.* On March 26, 2010, GEICO mailed a letter to the plaintiff indicating that plaintiff had yet to reply to GEICO's subrogation demand. The March 26th letter stated that if plaintiff did not respond within 10 days, the matter would be referred to GEICO's "legal representatives for collection." Plaintiff alleges that GEICO never referred the matter to its legal representative, but rather, sent the claim to an independent company. Plaintiff further alleges that the above letters were mailed by GEICO before any judicial determination of liability and based solely on GEICO's independent determination of liability. Further, plaintiff alleges that he contacted GEICO's subrogation department by telephone and was advised that he was required to pay for GEICO's insured's damages.

On April 8, 2010, plaintiff's counsel sent another letter to GEICO stating that he represented plaintiff with respect to GEICO's subrogation claim and advising that "your insured struck my client's vehicle in the rear as your insured was entering Route 4." (A copy of plaintiff's counsel's April 8, 2010 letter is annexed hereto as Exhibit "C" to moving papers.) Plaintiff's counsel's letter again stated that plaintiff was making a claim for property damages.

By letter dated May 5, 2010, plaintiff advised GEICO that he had "discontinued the use of [his] lawyer," and that Schatz was no longer representing him. (A copy of plaintiff's May 5, 2010 letter is annexed hereto as Exhibit "D" to moving papers.) Plaintiff also advised that he had decided to pay the $1,160.55 that GEICO demanded from him because GEICO had advised that it was "going to hire a lawyer to collect the money," and that he was "afraid that [GEICO] will ruin [his] credit rating." *Id.* Plaintiff also stated that he did "not accept any liability for this accident" and that the "payment of this money [was] not an admission of liability . . . [as] [i]t is very clear even from the police report that the other driver hit me in the rear". Included with the May 5th letter was a check issued by plaintiff to GEICO in the amount of $1,160.55.

Plaintiff's complaint contains two causes of action: (1) common law fraud;

and (2) violation of General Business Law § 349. With respect to the fraud cause of action, the complaint alleges that GEICO's letters and telephone calls with regard to its legal power to collect an alleged debt were knowingly false since no judicial determination had been made. Also, plaintiff alleges that GEICO's representation that it would refer the matter to any attorney was knowingly false since it never did, nor did it have any intention of doing so. Plaintiff further alleges that he relied on the letters and verbal communications and made payment to GEICO as a result, and that, had he been informed that no judicial determination had been made as to liability, he would not have made payment to GEICO. Plaintiff alleges that he has been damaged by making payment to GEICO based on its alleged misrepresentations.

Plaintiff's General Business Law § 349 claim is based on essentially the same allegations as the fraud claim. Plaintiff alleges that deceptive and misleading letters were sent to him in regard to his liability without a judicial determination having first been made. Plaintiff also alleges that GEICO represented that it would refer the matter to a "legal representative, which is generally understood to be an attorney, when in fact it turns the claim over to an independent company and since no lawyer ever contacted the plaintiff, this is misleading and deceptive." Further, plaintiff alleges that based on the letters, he believed that he was obligated to pay the demanded sum and was unaware that he could challenge GEICO's subrogation determination. As a result, plaintiff made payment to GEICO.

In response to the Summons and Complaint, defendant served the within motion to dismiss pursuant to CPLR 3211(a)(1) and (7).

A motion to dismiss pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law (*Sheroff v Dreyfus Corp.*, 50 AD3d 877, *B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; *see, AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591; *Leon v Martinez*, 84 NY2d 83, 87-88).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *(Manfro v McGivney*, 11 AD3d 662; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314; *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300.)

On a motion to dismiss, the plaintiff is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see, Stuart Realty Co. v Rye Country Store, Inc.*, 296 AD2d 455; *Paulsen v Paulsen*, 148 AD2d 685; *Palmisano v Modernismo Pub.*, 98 AD2d 953), and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs &* Co., 5 NY3d 11, 19). "However, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration' " (*Morris v Morris*, 306 AD2d 449; *see, Maas v Cornell University*, 94 NY2d 87, quoting from *Gertler v Goodgold*, 107 AD2d 481, 485, *aff'd*, 66 NY2d 946; *see also, Godfrey v Spano*, 13 NY3d 358; *Daub v Future Tech Enterprise, Inc.*, 65 AD3d 1004; *Salvatore v Kumar*, 45 AD3d 560; *Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833; *Tal v Malekan*, 305 AD2d 281; *Doria v Masucci*, 230 AD2d 764; *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233).

Factual allegations which are flatly contradicted by the record are not presumed to be true. If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530; *see, Deutsche Bank Nat. Trust Co. v Sinclair*, 68 AD3d 914.

Defendant argues that the complaint fails to state a cause of action sounding in fraud. Defendant asserts that the plaintiff could never prove that he detrimentally relied on GEICO's alleged misrepresentations since the documentary evidence demonstrates that the plaintiff was represented by counsel while

contesting GEICO's subrogation claim.

The Court finds that there was nothing deceptive about GEICO's conduct. If anything, it may be the plaintiff and his counsel who are being disingenuous. For example, plaintiff's counsel's assertion that he was not retained to represent plaintiff with regard to GEICO's subrogation is refuted by the documentary evidence in this case. In opposition, Mr. Schatz specifically affirms that "defendant never mailed any of the alleged deceptive correspondence to my office and I was simply unaware of the contents of the allegedly deceptive correspondence until his lawsuit was brought." Affirmation in Opposition of Brett Schatz dated October 27, 2010, at ¶ 54. Further, Mr. Schatz affirms that: "I was hired by the plaintiff in order to pursue a property damage claim against the defendants insured and at no time was I responsible for defending the plaintiff from a subrogation claim against him." *Id.*, at ¶ 55. Mr. Schatz's feigned ignorance of the contents of GEICO's correspondence to plaintiff is contradicted by Mr. Schatz's own correspondence to GEICO, dated February 23, 2010, which was addressed to GEICO's "Payment Recovery Unit," and stated:

> Please be advised I represent Moshe Orlinsky in the above mentioned claim. Mr. Orlinsky has received a letter from your office demanding subrogation of a payment paid to repair your insured's vehicle.
>
> We are contesting any demands for payment as your insured's vehicle hit my client's vehicle in the rear. Therefore, your client is wholly liable for any property damage that occurred.
>
> In addition, we would like to pursue a property damage claim against your insured. (Motion, Exhibit "B" to the moving papers).

In direct contradiction of Mr. Schatz's affirmation, his letter of February 23,

2010 specifically demonstrates: (i) that it was addressed to the Payment Recovery Unit (i.e., GEICO's subrogation unit); (ii) that plaintiff had a subrogation letter demanding payment (presumably the February 8, 2010 letter annexed as Exhibit "B" to plaintiff's opposition); (iii) that counsel was fully aware of the contents of the letter, since he made specific reference to it in his response to GEICO; (iv) that plaintiff and his counsel were contesting demand for payment (i.e., contesting subrogation liability); (v) that "in addition" to contesting subrogation liability, counsel and his client also advised that plaintiff wanted to make a property damage claim; and (vi) that counsel's representation of plaintiff extended not merely to plaintiff's property damage claim but also to contesting GEICO's subrogation demand.

In the affirmation in opposition, plaintiff's counsel recognizes that the defendant had the absolute right to subrogation.

Evidentiary material such as the letters from Mr. Schatz to GEICO and those from GEICO to plaintiff may be considered on a motion to dismiss made pursuant to CPLR 3211(a)(7) to weigh the viability of a complaint where such evidence, as in the within action, demonstrates that a material fact alleged by the plaintiff to be true is "not a fact at all" and that "no significant dispute exists regarding it." *Guggenheimer v Ginzburg,* 43 NY2d 268, 275 cited in *Oliver v Garris*, 298 AD2d 509; *see also, Mayerhoff v Timenides*, 269 AD2d 369.

Plaintiff's attorney refers to *Elacqua v Physicians' Reciprocal Insurers*, 52 AD3d 886 [incorrectly named and incomplete citation, Schatz affirmation in opposition, par. 27 and 28] for the proposition that General Business Law § 349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state, and one injured by such conduct may bring an action to recover damages (General Business Law § 349 [a], [h]). A claim brought under this statute must be predicated on an act or practice which is "consumer-oriented," that is, an act having the potential to affect the public at large, as distinguished from merely a private contractual dispute. A plaintiff must further demonstrate that such act or practice was deceptive or misleading in a material way and that plaintiff has been injured by reason thereof

[internal citations omitted, *Elacqua*, pg. 387].

There was nothing deceptive about defendant or his agent communicating with an alleged tortfeasor, when GEICO had the right to subrogation and demand payment of a specific sum. Plaintiff knew he could contest liability from the outset and retained Mr. Schatz to do so. GEICO was entitled to pursue subrogation after making payment to its insured without a prior judicial determination of liability as incredulously suggested by plaintiff's counsel. Plaintiff's counsel knew or should have known that the plaintiff was free to contest GEICO's subrogation demand and apparently chose not to do so. The Court has considered plaintiff's other arguments alleging General Business Law § 349 claims and finds them to be baseless and without merit.

Although the Court considers the bringing of this action to be frivolous and the conduct of the plaintiff's attorney close to egregious, sanctions shall not be imposed against the plaintiff and his attorney at this time. See 22 NYCRR 103-1.1.

Based on the foregoing, it is

ORDERED, that defendant's motion for summary judgment dismissing the complaint is **granted,** with prejudice.

This constitutes the Order of the Court.

Dated: February 25, 2011

J.S.C.

ENTERED
APR 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE