SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

Index Number : 650718/2019
HUNT III, MD, JOHN
vs.
METROPOLITAN LIFE INSURANCE
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered ~~1~~ 24 to 31, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 24-28
Answering Affidavits — Exhibits _____ | No(s). 29
Replying Affidavits _____ | No(s). 31

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants defendant's motion to dismiss plaintiff's claims in part and denies its motion in part pursuant to the accompanying decision. C.P.L.R. § 3211(a)(7).

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

Dated: 6/15/20

LUCY BILLINGS, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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JOHN HUNT, M.D., Index No. 650718/2019

Plaintiff

- against - DECISION AND ORDER

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant

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LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Plaintiff sues to recover damages due to defendant's nonpayment of disability insurance benefits when he became disabled in October 2016, pursuant to an insurance policy that defendant issued to plaintiff. Defendant moves to dismiss plaintiff's fifth, sixth, and seventh claims in his amended complaint, based on their failure to state a claim. C.P.L.R. § 3211(a)(7). The parties' stipulation dated December 5, 2019, resolved the remainder of defendant's motion.

Plaintiff's fifth and sixth claims respectively allege consumer fraud in violation of New York General Business Law (GBL) § 349 and breach of the covenant of good faith and fair dealing. His seventh claim seeks attorneys' fees. For the reasons explained below, the court grants defendant's motion to the extent set forth.

II. APPLICABLE STANDARDS

In evaluating defendant's motion to dismiss the complaint under C.P.L.R. § 3211(a)(7), the court must accept plaintiff's allegations as true, liberally construe them, and draw all reasonable inferences in his favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). The court will not give such consideration, however, to allegations that consist of only bare legal conclusions. Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); David v. Hack, 97 A.D.3d 437, 438 (1st Dep't 2012). Dismissal is warranted if the complaint fails to allege facts that fit within any cognizable legal theory. Faison v. Lewis, 25 N.Y.3d 220, 224 (2015); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007).

III. BACKGROUND FACTUAL ALLEGATIONS

Plaintiff is a physician whose regular occupation was as an Emergency Room Physician until October 2016, when he claims he became disabled from that regular occupation due to Post-Traumatic Stress Disorder (PTSD). In 2009, plaintiff purchased an individual disability income insurance standard form policy with three standard form riders marketed by defendant. The standard policy's definition of total disability does not provide

coverage if the insured is gainfully employed, but one of the riders provides coverage even if the insured is gainfully employed, as long as he is totally disabled from his regular occupation.

Plaintiff alleges that, when he filed his claim of total disability from his regular occupation as an Emergency Room Physician, defendant only reviewed documents and did not conduct any physical or mental examination of him or investigate his regular or current occupation. Plaintiff claims that defendant ignored his detailed explanations of his responsibilities as an Emergency Room Physician and their disabling effects, versus his current responsibilities as an Urgent Care Physician, which do not disable him, reported by his treating psychiatrist and psychologist and his neuropsychological, forensic psychological, and vocational consultants. He, his treatment providers, and his consulting evaluators have explained how his former responsibilities triggered his PTSD and affected his mental and physical health, but his current responsibilities do not trigger those symptoms, and how his PTSD prevents him from being able to perform an Emergency Room Physician's responsibilities. His PTSD prevents him from synthesizing data and making complex decisions quickly, treating critically ill or injured patients, communicating their critical status or death to their families, and working overnight with minimal support: responsibilities that he does not carry as an Urgent Care Physician.

IV. DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLAIMS

A. Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff's sixth claim alleges that defendant breached the covenant of good faith and fair dealing in failing to pay the benefits due him under the policy and riders that he purchased from defendant. A duty of good faith and fair dealing is implied in every contract. Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 194 (2008); New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318 (1995). When the contract is an insurance policy, the duty requires insurers to investigate and settle claims in good faith. Panasia Estates, Inc. v. Hudson Ins. Co., 10 N.Y.3d 200, 203 (2008); Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d at 194; New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 318.

Plaintiff's allegations that defendant conducted a sham investigation of his disability claim and delayed and avoided payment of his claim in bad faith, however, are the same allegations that establish his breach of contract claim. They do not demonstrate breach of a duty separate from that insurance contract or damages different from his alleged damages from defendant's breach of its policy. New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 319; Rosetti v. Ambulatory Surgery Ctr. of Brooklyn, LLC, 125 A.D.3d 548, 549 (1st Dep't 2015). His allegations that defendant's sham investigation forced him to incur fees for physicians, psychologists, a vocational consultant, and attorneys to support his claim are part of the

damages he claims from defendant's breach of contract. Similarly, because his breach of contract claim seeks disability insurance benefits retroactive to his application for them, this relief will compensate him for defendant's alleged delay in processing his claim.

Finally, plaintiff claims that, despite his requests, defendant refused to provide him its consulting psychiatrist's and neuropsychologist's reports, depriving plaintiff of the opportunity to respond. He does not indicate whether the policy entitles him to those reports, in which case defendant's refusal would constitute a breach of the policy. To the extent that the claimed duty to provide him those reports is not a duty under the policy, but is a separate duty of good faith and fair dealing, plaintiff does not articulate how his nonreceipt of these reports hindered his presentation of support for his claim or otherwise damaged him. While the very nonreceipt of the reports may impede his ability to articulate how he would have responded and better supported his claim, if defendant relies on them to support its denial of benefits in this action, defendant will need to disclose them. Plaintiff then will receive the opportunity to respond and to show that defendant's reliance on these reports breached the policy.

Plaintiff's sixth claim thus duplicates his breach of contract claim. Both claims arise from a dispute over the policy's obligations and defendant's satisfaction of them. New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 320; Rosetti v.

Ambulatory Surgery Ctr. of Brooklyn, LLC, 125 A.D.3d at 549; Mill Fin., LLC v. Gillett, 122 A.D.3d 98, 104-105 (1st Dep't 2014); Netologic, Inc. v. Goldman Sachs Group, Inc., 110 A.D.3d 433, 434 (1st Dep't 2013).

B. Consumer Fraud

Plaintiff's fifth claim alleges that defendant committed consumer fraud in violation of GBL § 349. To establish a consumer fraud claim under GBL § 349(h), plaintiff must show a deceptive act (1) that is consumer oriented, (2) that defendants engaged in to mislead a reasonable consumer, and (3) that caused plaintiff's injury. City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 621 (2009); Stutman v. Chemical Bank, 95 N.Y.2d 24, 29 (2000). Harm merely to the community of consumers or to the public is not the direct injury to which the Legislature intended to limit GBL § 349(h) claims, to avoid the "tidal wave of litigation" over derivative injuries that the Legislature intended to exclude from the statutory remedies. City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d at 623; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 26 (1995). Plaintiff must plead an actual injury to himself from deceptive or misleading practices that also impact consumers at large. City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d at 623; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 25; Arthur v. Carver Fed. Sav. Bank, 150 A.D.3d 447, 448 (1st Dep't 2017). The statute does not cover purely private contract disputes. GBL §

349(h); City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d at 624; New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 321; Shou Fong Tam v. Metropolitan Life Ins. Co., 79 A.D.3d 484, 486 (1st Dep't 2010); Security Mut. Life Ins. Co. of N.Y. v. DiPasquale, 283 A.D.2d 182 (1st Dep't 2001).

Defendant's misapplication of its policy and rider terms to avoid paying plaintiff total disability benefits and its failure to investigate his claims in isolation are not consumer oriented. New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 321. He sufficiently pleads a GBL § 349(h) claim, however, by alleging that the policy and riders were standard forms issued to similarly situated consumers, Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 26-27; Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 83 (1st Dep't 2001); Makuch v. New York Cent. Mut. Fire Ins. Co., 12 A.D.3d 1110, 1111 (4th Dep't 2004), and defendant made a practice of misapplying the policy and rider terms to consumers in the same way to delay and deny covered claims under the policy. Acquista v. New York Life Ins. Co., 285 A.D.2d at 82. See Shou Fong Tam v. Metropolitan Life Ins. Co., 79 A.D.3d at 486; Batas v. Prudential Ins. Co. of Am., 37 A.D.3d 320, 323 (1st Dep't 2007). Consumer oriented conduct need not be recurring or constitute a pattern, but need only impact consumers broadly, as well as plaintiff directly. New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 320; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 25; Arthur v. Carver Fed. Sav. Bank, 150 A.D.3d at 448.

Since plaintiff alleges that defendant lured him and other consumers into purchasing its standard form policy and riders that defendant never intended to honor and conducted a sham evaluation of claims and fraudulent scheme of delaying and denying policyholders' indemnification, the amended complaint pleads consumer fraud.

Moreover, even though plaintiff may obtain and respond to defendant's consulting psychiatrist's and neuropsychologist's reports in litigating his breach of contract claim, defendant's concealment of these bases for its denial of benefits, depriving plaintiff of the opportunity to respond until this litigation, constitutes a deceptive practice. Defendant's continual requests for additional information, while refusing to divulge what is needed to support total disability from a regular occupation, is similarly misleading and deceptive. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 25; Arthur v. Carver Fed. Sav. Bank, 150 A.D.3d at 448; Gomez-Jimenez v. New York Law Sch., 103 A.D.3d 13, 16-17 (1st Dep't 2012). Defendant justifies this concealment as a standard practice that defendant applies to all similar claimants.

C. Attorneys' Fees

Plaintiff's seventh claim seeks his attorneys' fees incurred in this action. Even if successful in the action, plaintiff may recover his attorneys' fees only if authorized by the parties' contract, a statute, or a court rule. Mt. Vernon City School Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39 (2012); Fleming v.

Barnwell Home & Health Facilities, Inc., 15 N.Y.3d 375, 379 (2010); Reif v. Nagy, 175 A.D.3d 107, 131 (1st Dep't 2019); URS Corp.-N.Y. v. Expert Elec., Inc., 151 A.D.3d 520, 521 (1st Dep't 2017). Although plaintiff may not recover his expenses in bringing an action to enforce his rights under his policy with defendant, New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 324; Mighty Midgets v. Centennial Ins. Co., 47 N.Y.2d 12, 21 (1979); Chase Manhattan Bank v. Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005, 258 A.D.2d 1, 4-5 (1st Dep't 1999), plaintiff's claim under GBL § 349(h) provides an independent statutory authorization for attorneys' fees if plaintiff establishes defendant's liability under that statute. Karlin v. IVF Am., 93 N.Y.2d 282, 291 (1999); New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 320; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d at 24. See Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 381-82 (1st Dep't 2005); Busbee v. Ken-Rob Co., 280 A.D.2d 406, 407 (1st Dep't 2001).

Consequently, the court grants defendant's motion to dismiss plaintiff's seventh claim to the extent that it is limited to any claim for attorneys' fees arising from defendant's breach of contract. Any claim for attorneys' fees arising from defendant's violation of GBL § 349, however, survives.

V. CONCLUSION

For the reasons delineated above, the court denies defendant's motion insofar as it seeks to dismiss plaintiff's

sixth claim for consumer fraud, GBL § 349(h), including attorneys' fees arising from the consumer fraud. The court otherwise grants defendant's motion and dismisses plaintiff's fifth claim for breach of the covenant of good faith and fair dealing and any claims for attorneys' fees caused by defendant's breach of contract. C.P.L.R. § 3211(a)(7). This decision constitutes the court's order and judgment dismissing those discrete claims.

DATED: June 15, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C