

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BROWARD DIVISION

CASE NO.: 97-6617 CIV-ROETTGER
MAGISTRATE SELTZER

VINCENT BILELLO,

Plaintiff,

v.

THE PAUL REVERE LIFE INSURANCE
COMPANY,

Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Vincent Bilello, by and through undersigned counsel and pursuant to Rule 56, Federal Rules of Civil Procedure, moves for the entry of an Order granting summary judgment in his favor and against Defendant, The Paul Revere Life Insurance Company, and as grounds states:

1. Plaintiff sued Defendant for breach of contract due to Defendant's termination of Plaintiff's individual disability insurance benefits.
2. Plaintiff filed a claim under Defendant's insurance policy due to the fact that he was disabled from his former occupation as a chiropractor.
3. The Defendant paid the Plaintiff under this policy for more than two years before it terminated payment of this claim.
4. Defendant's policy does not define the term occupation.

5. Under Florida law, ambiguities are interpreted liberally in favor of the insured and strictly against the insurer. Prudential Property and Casualty Ins. Co. v. Swindal, 622 So. 2d 467, 470 (Fla. 1993).

6. When the term occupation is not defined in the policy, the policy must be interpreted in favor of coverage for the insured. Berkshire Life Ins. Co. v. Adelberg, 698 So. 2d 828, 830 (Fla. 1997).

7. An insured who is disabled from engaging in most of his previous substantial and material duties is entitled to coverage under the total disability provision even if he can perform an incidental job duty. Giampa v. Trustmark Ins. Co., 1999 U.S. Dist. Lexis 8051 (D. Mass. February 26, 1999).

8. The fact that Plaintiff may be capable of earning a living by means of the continuance of his practice and his functioning as an owner and administrator of that practice does not alter the result that he is totally disabled from the practice of his former occupation of being a chiropractor. Shapiro v. Berkshire Life Ins. Co., 1999 U.S. Dist. Lexis 11789 (S.D. N.Y. August 3, 1999).

9. Once an insurance company begins paying a claim, it has the burden of proof to show that the insured's entitlement to benefits has ceased. Aetna Life Ins. Co., Inc. v. Fruchter, 283 So. 2d 36 (Fla. 1973).

10. In applying the relevant case law to the facts of this case, the only conclusion that can be reached is that Plaintiff is totally disabled from his former occupation as a chiropractor under the terms of the Defendant's policy.

11. Summary Judgment is proper in any case where there is no genuine issue of material fact. Fed. R. Civ. P., Rule 56 (c). A Plaintiff moving for summary judgment may satisfy its

burden by submitting summary judgment proof that establishes all elements of its cause of action as a matter of law. San Pedro v. U.S., 79 F.3d 1065, 1068 (11th Cir. 1996). Plaintiff must show that no reasonable trier of fact can find other than for Plaintiff. Calderone v. U.S., 799 F.2d 254, 259 (6th Cir. 1986).

12. Summary Judgment should be granted in this case because there are no genuine issues of material fact that Plaintiff is totally disabled from his former occupation as a chiropractor and that the Defendant breached its contract by terminating his benefits. This Motion, Memorandum and its attachments establish there is no genuine issue of material fact.

WHEREFORE, Plaintiff, Vincent Bilello, respectfully requests this Court to grant this motion and enter an Order granting summary judgment in his favor and against the Defendant, The Paul Revere Insurance Company and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

By: _____
KIRK W.B. WAGAR
FL Bar No. 994936
The Wagar Law Firm
3250 Mary Street, Suite 207
Coconut Grove, FL 33133
(305) 443-7772 (T)
(305) 443-1969 (F)

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this ____ day of December, 1999 to: Leonor Lagomasino, Esquire, Greenberg & Lagomasino, 799 Brickell Plaza, Suite 700 (Eastern National Bank Bldg.), Miami, FL 33133.

THE WAGAR LAW FIRM
3250 Mary Street, Suite 207
Coconut Grove, FL 33133
(305) 443-7772 (T)
(305) 443-1969 (F)

BY: _____
Kirk W.B. Wagar
Florida Bar No. 994936

and

STEWART GREENBERG
11440 N. Kendall Drive
PH 400
Miami, FL 33176
(305) 595-2400 (T)
(305) 595-5105 (F)