

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35741
G/hu

_____AD3d_____

Argued - April 11, 2012

ANITA R. FLORIO, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
LEONARD B. AUSTIN, JJ.

2010-11778
2010-11779

Mass OP, LLC, et al., appellants, v Principal Life
Insurance Company, respondent, et al., defendants.

(Index No. 4457/09)

June Diamant, Cedarhurst, N.Y., and Lazer, Aptheker, Rosella & Yedid, P.C.,
Melville, N.Y. (Steven Aptheker, Russell L. Penzer, and Giuseppe Franzella of
counsel), for appellants (one brief filed).

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York, N.Y. (Jay Katz and
Joshua A. Zielinski of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract and fraud, the
plaintiffs appeal, as limited by their brief, (1) from so much of an order of the Supreme Court,
Nassau County (Warshawsky, J.), entered October 7, 2010, as granted the motion of the defendant
Principal Life Insurance Company pursuant to CPLR 3211(a) to dismiss the amended complaint
insofar as asserted against it, and (2) from so much of a judgment of the same court entered October
22, 2010, as, upon the order entered October 7, 2010, is in favor of that defendant and against it,
dismissing the amended complaint.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed insofar as appealed from; and it is
further,

ORDERED that one bill of costs is awarded to the defendant Principal Life
Insurance Company.

The appeal from the intermediate order must be dismissed because the right of

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direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

Contrary to the plaintiffs' contention, the Supreme Court properly granted that branch of the motion of the defendant Principal Life Insurance Company (hereinafter Principal Life) which was pursuant to CPLR 3211(a)(1) to dismiss the causes of action in the amended complaint alleging breach of fiduciary duty insofar as asserted against it. In this regard, the documentary evidence in the record conclusively establishes defenses to those causes of action asserted against Principal Life as a matter of law. Thus, the evidence "utterly refute[d] [the plaintiffs'] factual allegations [and] conclusively establish[ed] . . . defense[s] as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326).

Furthermore, the plaintiffs contend that the Supreme Court erred in granting those branches of Principal Life's motion which were to dismiss the causes of action alleging breach of contract and fraud insofar as asserted against it in the amended complaint. The plaintiffs had asserted the same causes of action in the original complaint. In an order entered July 8, 2009, the Supreme Court granted that branch of Principal Life's motion which was to dismiss those causes of action insofar as asserted against it, and this Court is affirming that order (*see Mass OP, LLC v Principal Life Ins. Co.*, _____AD3d_____ [Appellate Division Docket No. 2009-07836] [decided herewith]). The plaintiffs' motion for leave to replead those causes of action in the amended complaint was denied by the Supreme Court in an order that is not the subject of an appeal. Under these circumstances, pursuant to the law of the case doctrine, the Supreme Court correctly dismissed the causes of action alleging breach of contract and fraud insofar as asserted against Principal Life in the amended complaint (*see generally EDP Hosp. Computer Sys., Inc. v Bronx-Lebanon Hosp. Ctr.*, 63 AD3d 665, 666; *Rainbow v Rosenberg*, 54 AD2d 1121).

In light of our determination, we need not reach the plaintiffs' remaining contentions.

FLORIO, J.P., BALKIN, LEVENTHAL and AUSTIN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court