

Klenosky v David Lerner Assoc., Inc.

2010 NY Slip Op 33112(U)

October 28, 2010

Nassau County

Docket Number: 007367/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

ROBERT KLENOSKY,

Plaintiff,

INDEX No. 007367/10

MOTION DATE: Sept. 10, 2010
Motion Sequence # 001, 002, 003

-against-

DAVID LERNER ASSOCIATES, INC.,
MARTIN LERNER and RUSSELL MOSS,

Defendants.

The following papers read on this motion:

- Notice of Motion..... XX
- Cross-Motion..... X
- Affirmation/Affidavit in Opposition..... XX
- Affidavit in Support..... X
- Reply Affirmation..... X
- Memorandum of Law..... X

Motion by defendants David Lerner Associates, Inc. and Martin Lerner to dismiss the complaint based upon the statute of limitations is **granted** as to plaintiff's claims for breach of contract and conversion and **denied** as to plaintiff's fraud and misrepresentation claims. Motion by defendants David Lerner Associates, Inc. and Martin Lerner to dismiss the complaint for failure to state a cause of action is **granted** as to plaintiff's claims for forgery, collusion, and violation of Insurance Department Regulation 60 and NASD rules and **denied** as to plaintiff's fraud and misrepresentation claims. Motion by defendant Russell Moss to

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dismiss the complaint based upon the statute of limitations and failure to state a cause of action is similarly **granted** and **denied**. Cross-motion by plaintiff Robert Klenosky pursuant to CPLR 3212 for an order awarding summary judgment is **denied**.

This action arises from plaintiff Robert Klenosky's exchange of a whole life insurance policy issued by United States Life Insurance Company for a Flexible Premium Variable Universal Life insurance policy issued by Nationwide Insurance on November 29, 2001. While the death benefit under the United States Life policy was fixed at \$125,000, the death benefit for the Nationwide policy varies with the investment experience of the policy. The exchange of the policies was handled by defendant Russell Moss, who was at the time an insurance agent with defendant David Lerner Associates.

Klenosky avers that he requested a whole life policy from defendants with a \$125,000 death benefit equivalent to the one he then had with United States Life. He avers that he simply wanted a replacement whole life policy with a different company. He alleges that defendants made the change to a variable premium life insurance policy without his knowledge or consent and he did not learn of the change until March 18, 2009.

The complaint was filed on or about May 31, 2010. Plaintiff asserts causes of action sounding in fraud, forgery, misrepresentation, breach of contract, conversion, collusion, and violation of the disclosure requirements of Insurance Department Regulation 60 and the National Association of Securities Dealers, Inc. (NASD) regulations.

Defendants deny plaintiff's contentions and aver that they provided full disclosure to plaintiff. Defendants move to dismiss the complaint for statute of limitations pursuant to CPLR 3211(a)(5), and failure to state a cause of action pursuant to CPLR 3211(a)(7). Plaintiff cross moves for summary judgment pursuant to CPLR 3212.

REGULATION 60

The Nationwide Variable Premium Universal Life Policy was subject to certain disclosure requirements under New York Insurance Law and Insurance Department Regulation 60, as it was a replacement life policy. The purpose of Regulation 60 is to "protect the interests of the public by establishing minimum standards of conduct to be observed in the replacement . . . of life insurance policies" and to make available "full and clear information on which an applicant for life insurance or annuities can make a decision

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in his or her own best interest” (11 NYCRR § 51.1[b]).

According to the press release dated 3/2/06 regarding defendants on the NASD website, Regulation 60 requires two separate interactions with a customer before a replacement life insurance policy can be completed.

In step one, the customer is informed in writing - through a Definition of Replacement form - that a replacement is being considered. The customer must complete a Client Authorization form to allow the firm to collect information about the customer's existing life insurance policy or annuity contract, so that the customer will be able to make a meaningful comparison. Both forms must be signed and dated by the customer.

In step two, among other disclosures, the customer must be provided with a Disclosure Statement setting forth information comparing the old and new life insurance policies or annuity contracts, including the primary reason(s) for recommending the new policy or contract and the reason(s) why the existing policy or contract can no longer meet the applicant's objectives. The customer must sign and date an acknowledgment stating that the customer received and read the completed Disclosure Statement before signing the application for the new annuity contract or life insurance policy.

DOCUMENTARY EVIDENCE

Plaintiff disputes his signature on three documents which he submits, one an authorization for the release of information from United States Life, the second, a Nationwide Insurance Company Variable Life Supplement, and the third, a document showing investment choices regarding sub accounts for investment under the variable life policy.

Defendant Russell Moss avers that he provided all the required disclosure to plaintiff and submits certain disclosure documents bearing plaintiff's signature. The documents include an Insurance Department "Definition of Replacement," to identify the nature of the transaction taking place, a "Notice Regarding Replacement or Change of Life Insurance

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Policies,” which advises the review of certain criteria including a disclosure statement and consultation with a tax advisor, and an Insurance Department “Disclosure Statement” with side-by-side comparisons of the United States Life policy and the Nationwide policy.

Joseph Picard, General Counsel for David Lerner Associates, Inc., also submits documents bearing Klenosky’s signature. They include an Application to Nationwide (the Application) which includes an acknowledgment which states: “the Death Benefit under a Variable Life Insurance Policy may increase or decrease, depending on the investment return on the Subaccount(s) I select. Regardless of investment return the Death Benefit can never be less than the Specified Amount . . .” The application includes personal and medical information, and is dated 11/29/01. Picard also submits several of the same documents submitted by Ross, as well as a “Request For Transfer of Fund (sub- account) Values or Change of Allocation Factors” dated 3/7/02, which requests changes from a money market to a small cap fund, as well as an additional transfer to a bond fund. He also provides a copy of a power of attorney appointing Moss to act as Klenosky’s limited attorney-in-fact for purposes of allocating future contributions and exchanging among investment options.

Picard also submits a document entitled “Annual Statement Flexible Premium Variable Universal Life February 27, 2003 to February 26, 2004”. The document shows an “initial specified death benefit” of \$125,000, a “total death benefit” of \$125,000, and variable fund values as of the statement date. It shows future allocations, a summary of transactions, and a list of available funds. Picard avers that plaintiff received these types of statements from Nationwide “at least on a quarterly basis since the inception of the New Policy; i.e., from 2002 to 2009.”

Russell Moss also asserts in an affidavit that the Nationwide policy was issued to plaintiff effective February, 2002, and that investment statements were mailed to plaintiff on a monthly basis “commencing on or about March 2002.” The Moss affidavit also includes copies of annual statements.

ANALYSIS

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), “the facts pleaded are presumed to be true and accorded every favorable inference * * * [h]owever, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion (*Palazzolo v. Herrick, Feinstein,*

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LLP., 298 AD2d 372 [2d Dept 2002]).

Turning to the claims for fraud and misrepresentation, a cause of action alleging fraud is timely if it is commenced either within six years from the time of the fraud, or within two years after the plaintiff discovers, or with reasonable diligence could have discovered, the fraud (*Prand Corp. v. County of Suffolk*, 62 AD3d 681, 682 [2d Dept 2009]; CPLR 213 [8]). The reasonable diligence test is an objective one (*supra*).

The cause of action for fraud accrued upon Klenosky's injury by his purchase of the Flexible Premium Variable Universal Life in February of 2002, at the time Klenosky bound himself to the new life policy and allowed his former United States Life Policy to lapse (*see Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex.*, 87 NY2d 36, 43 [1995][“a cause of action does not accrue until an injury is sustained”]; *see also Town of Poughkeepsie v. Espie*, 41 AD3d 701, 705 [2d Dept 2007], *lv app dsmd* 9 NY3d 1003 [2007]).

Defendant argues that plaintiff's receipt of annual statements reporting earnings on his variable life investments over a period of eight years suggests that with reasonable diligence he could have discovered that his death benefit had changed. Because the statements refer to an “initial specified death benefit” and a “total death benefit” of \$125,000, they do not plainly indicate the variable nature of the life policy. Thus, defendants have not established prima facie that plaintiff could have discovered the purported fraud through the exercise of reasonable diligence before the year 2009. Defendants' motion to dismiss plaintiff's fraud and misrepresentation claims based upon the statute of limitations is **denied**.

The provisions of the Insurance Law regulate the insurer's performance of its contractual duties and do not impose a separate duty of reasonable care (*Benkus v Metropolitan Life Ins.*, 309 AD2d 1260, 1262 [4th Dept 2003]). Thus, the provisions of the Insurance Law do not create an implied private cause of action (*Id*). Since Insurance Department Regulation 60 similarly defines contractual duties, it cannot provide the basis of an implied cause of action. The court similarly concludes that there can be no private right of action under the NASD rules when they are applied to an insurance contract. Defendants' motion to dismiss plaintiff's claim based upon Regulation 60 and the NASD rules for failure to state a cause of action is **granted**. Since plaintiff has no cause of action under these regulations, the court need not determine the timeliness of such a cause of action.

With regard to the cause of action asserting forgery, the essence of this claim is the

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allegation of fraud (*Coombs v. Jervier*, 74 AD3d 724 [2 Dept 2010])[“causes of action alleging fraud . . . were time-barred by showing that they accrued on February 8, 1995, the date when the alleged forgery occurred. . . .”]; *Piedra v. Vanover*, 174 AD2d 191, 194 [2d Dept 1992][“It is clear . . . ‘forgery’ is but one species of fraud”]). While plaintiff’s fraud claim is timely, plaintiff’s cause of action for forgery is dismissed as duplicative of his fraud claim. Plaintiff’s claim for collusion is similarly dismissed as duplicative of a fraud claim.

The cause of action alleging breach of contract is subject to a six year statute of limitations and accrued upon breach, i.e., provision of the variable life policy instead of a whole life policy (CPLR 213[2]). Plaintiff has alleged that he told defendants he wanted a whole life policy. Assuming arguendo for purposes of this motion that a contract to provide a whole life policy was entered into, any claim for breach accrued upon the effective date of the Flexible Premium Variable Universal Life policy, i.e., February 2002 (*Pike v. New York Life Ins. Co.*, 72 AD3d 1043, 1048 [2d Dept 2010]). Defendants’ motion to dismiss plaintiff’s cause of action for breach of contract based upon the statute of limitations is **granted**.

Finally, plaintiff’s cause of action for conversion is time barred. Conversion is the “unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” (*Vigilant Ins. Co. v. Housing Authority, supra* at p 44). With regard to the statute of limitations, “an action for conversion . . . [is] subject to a three-year limitation period” and “accrual runs from the date the conversion takes place * * * and not from discovery or the exercise of diligence to discover” (*Vigilant Ins. Co. v. Housing Authority, supra*). Plaintiff’s conversion claim accrued more than three years prior to commencement of this action. Defendants’ motion to dismiss plaintiff’s conversion claim based upon the statute of limitations is **granted**.

To establish a prima facie case for fraud, plaintiff must prove that 1) defendant made a representation as to a material fact, 2) such representation was false, 3) defendant intended to deceive plaintiff, 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct, and 5) as a result of such reliance plaintiff sustained pecuniary loss (*Ross v. Louise Wise Services, Inc.*, 8 NY3d 478, 488 [2007]). Plaintiff has sufficiently alleged that defendants falsely represented that plaintiff would receive the same death benefit of \$125,000 with the Nationwide policy. Plaintiff has alleged that he justifiably relied upon this representation by agreeing to convert his United States Life policy. Defendants’ motion to dismiss plaintiff’s fraud and misrepresentation claim for failure to state a cause of action is **denied**.

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The documents submitted by defendants raise an issue of fact as whether plaintiff reasonably relied upon defendants' representations with respect to the Nationwide policy. Plaintiff's cross-motion for summary judgment with respect to his fraud and misrepresentation claim is **denied**.

So ordered.

Dated 10.28.10

Stephen A. Bucaria

J.S.C.

ENTERED

NOV 01 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE