

Pike v New York Life Ins. Co.

2008 NY Slip Op 30839(U)

March 13, 2008

Supreme Court, Suffolk County

Docket Number: 0012823/2006

Judge: William B. Rebolini

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Gary M. Pike, Kelly Ann Pike, Gary C. Pike,
Chad Pike, Kayla L. Pike and Garrett John Pike,

Plaintiffs,

-against-

New York Life Insurance Company, New York
Life Insurance and Annuity Corporation, Alfonso
Meneses and Douglas W. Brown,

Defendants.

Index No.: 12823/2006

Motion Sequence No.: 001; Mot. D

Motion Date: 6/8/07

Submitted: 12/5/07

Motion Sequence No.: 002; Mot. D

Motion Date: 6/27/07

Submitted: 12/5/07

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In an action for damages for, *inter alia*, breach of contract, the defendants Douglas

Brown and Alfonso Meneses move (by notice of motion dated March 30, 2007) for an order pursuant to CPLR §§ 3211(a)(1), (a)(5), (a)(7) and 3016(b) dismissing the complaint. By notice of motion dated May 31, 2007, the defendants New York Life Insurance Company (hereinafter “NY Life”) and New York Life Insurance and Annuity Corporation (hereinafter “NY Annuity”) separately move for an order (a) pursuant to CPLR §3025(b), permitting amendment of their answer to assert affirmative defenses, specifically, the statute of limitations, voluntary payment doctrine, waiver, res judicata and lack of standing, and (b) dismissing the complaint pursuant to CPLR §3211(a)(7). The plaintiffs interposed opposition to the defendants’ motions through the affidavit of plaintiff Gary M. Pike sworn to August 20, 2007.

The summons and complaint in this action was filed on May 9, 2006. Defendants NY Life and NY Annuity interposed their answer containing general denials on or about June 30, 2006. The instant pre-answer motion to dismiss by defendants Brown and Meneses was interposed March 30, 2007. The instant motion by defendants NY Life and NY Annuity to amend the answer and for dismissal pursuant to CPLR §3211(a)(7) and, alternatively, summary judgment, was interposed on May 31, 2007. Plaintiffs’ opposition papers were interposed on September 4, 2007. The motions were deemed submitted on December 5, 2007.

Certain essential facts do not appear to be in dispute. Plaintiff Gary M. Pike is married to plaintiff Kelly Ann Pike and they have four children, plaintiffs Gary C. Pike, Chad Pike, Kayla L. Pike and Garrett John Pike. The Pikes reside in Suffolk County. Starting in 1993 and at various times until 2002, certain policies, including whole life insurance policies, variable universal insurance policies, and other financial products such as variable annuities and securities (hereinafter referred to as the “products”) were purchased by or on behalf of the various plaintiffs. The products were issued by the defendant companies. The complaint refers to sixteen product numbers (8 universal life policies, 6 whole life policies and 2 variable annuity policies) as those purchased by plaintiffs from “the respondents [defendants]”. The purchase of the products (excluding two 1993 policies purchased by plaintiffs Gary M. Pike and Kelly Ann Pike through another agent, who is not a party herein, Jeannette Steward) was through the defendant Brown, who was an agent for the defendant companies in the period of 1997 through 2000 when fourteen of the sixteen products were purchased. Defendant Meneses became servicing agent in 2002 after Brown left the defendant companies.

Four of the total of sixteen products are owned by Kathleen Pike (plaintiff Gary M. Pike’s mother), who is not a party to this action; these four policies, respectively, insure the lives of each of the plaintiff children. Kathleen Pike is the custodian of each of these four policies, which were issued in September and December 2000.

Although the instant complaint identifies (*inter alia*) certain product numbers, to wit, 45 045822 and 45 045824 which were purchased in 1993 (that is, as two of the total sixteen purchased), these two 1993 products, whole life policies, must be deemed withdrawn as a basis of plaintiffs’ claims in light of the plaintiff Gary M. Pike’s affidavit upon these motions, specifically, his statement that “[t]hese two policies remain in effect and are not the basis for the claims in this lawsuit” (Pike affidavit sworn to August 20, 2007, at ¶9).

The gravamen of the complaint is that the plaintiffs purchased the products in question in reliance upon the advice of and in consultation with the defendant Brown, that plaintiffs were not knowledgeable or experienced in purchasing such products and relied on the advice of defendants Brown and Meneses in doing so, that “defendants knew” plaintiffs could not afford to maintain the premiums for the products and that defendants took advantage of plaintiffs’ lack of knowledge and fraudulently induced them to purchase unsuitable products resulting in financial loss to plaintiffs alleged to exceed \$800,000. The complaint herein sets forth seven enumerated claims against all defendants which plaintiffs denominate follows: first, breach of contract; second, fraudulent misrepresentation; third, fraudulent inducement; fourth, suitability; fifth, breach of fiduciary duty; sixth, breach of General Business Law; and seventh, breach of New York Insurance Law §§2120 and 2123.

The Motion by NY Life and NY Annuity

By their request to amend the answer previously interposed, the defendants NY Life and NY Annuity seek to raise as affirmative defenses the statute of limitations, waiver (as to one policy), *res judicata* (as to 2 policies), lack of standing and the voluntary payment doctrine (affidavit of Christopher S. Rooney sworn to May 31, 2007, at ¶7). Pursuant to CPLR 3211(e), certain objections are waived unless raised in the responsive pleading. Section 3211(e) states, in relevant part, as follows: “[a]ny objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading.” The subdivisions of §3211(a) within the ambit of §3211(e)’s waiver are as follows: §3211(a)(1) - “a defense founded upon documentary evidence;” §3211(a)(3) - “the party asserting the cause of action has not legal capacity to sue;” §3211(a)(5) - “the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds” (emphasis added).

In this case, the lack of standing issue which defendants seek to inject is related to capacity (see, Wells Fargo Bank Minnesota, Nat. Assoc. v. Mastropaolo, 42 AD3d 239 [Second Dept., 2007]); Gilman v. Abagnale, 235 AD2d 989 [Third Dept., 1997]) and is waivable (*ibid.*). Accordingly, as the request for amendment is one to add defenses which defendants NY Life and NY Annuity have waived by failing to assert them in their answer dated June 29, 2006, it is denied.

There remains the defendants NY Life and NY Annuity’s request for dismissal pursuant to 3211(a)(7) - failure to state a cause of action - which can be raised at any time (see, Chuqui v. Church of St. Margaret Mary, 39 AD3d 397 [First Dept., 2007]). As an answer has been interposed, the question to be considered upon the defendants NY Life and NY Annuity’s motion is whether the drastic relief (see, Pomiclase v. Smith, 21 AD3d 1173 [Fourth Dept., 2006]) of summary judgment is warranted. The proponents must demonstrate entitlement to judgment as a matter of law and the absence of any material issue of fact warranting a trial (see, Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The Court finds and concludes that, considering the opposing proof adduced by plaintiffs, clear, material issues of fact appear

requiring a denial of summary judgment as requested by the defendants NY Life and NY Annuity.

The Motion by Brown and Meneses

All of the plaintiffs' claims to the extent they are predicated on products numbered 63652948, 63652120, 63652972 and 63658547 are dismissed for failure to join a necessary party. Such products are owned by Kathleen Pike, a non-party to this action (see, generally Gaidon v. Guardian Life Ins. Co. Of America, 272 AD2d 60 [First Dept., 2000], affirmed 96 NY2d 201 [2001]). The present plaintiffs do not have standing as to claims based on said four products.

To the extent that plaintiffs' claim for breach of contract (first cause of action) is predicated on policies issued in 1997 and 1999 (product nos. 46174607, 46178509, 46178510, 57106312, 63561157, 63561062 and 46450225), it is barred by the six year statute of limitations (see, CPLR §213(2); Ely-Cruikshank Co., Inc. v. Bank of Montreal, 81 NY2d 399 [1993]). The remainder of plaintiffs' first cause of action, to wit, the portion not dismissed on the aforesated grounds, fails to state a cause of action as presently pled and is dismissed on that basis with leave to replead to the extent predicated on products numbered 57219192, 63653267 and 63653295 (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633 [1976]; CPLR §3211(e)).

To the extent that plaintiffs' claim for purported fraudulent misrepresentation (second cause of action) is predicated on the policies owned by non-party Kathleen Pike (product nos. 63652948, 63652120, 63652972 and 63658547), it must be dismissed. This claim as presently stated, to the extent it is predicated on all products in dispute, also must be dismissed for failure to state a cause of action under CPLR §3016(b) which requires greater specificity as to claims sounding in fraud (see, Gervasio v. DiNapoli, 126 AD2d 514 [Second Dept., 1987]; Non-Linear Trading Co., Inc. v. Braddis Associates Inc., 243 AD2d 107 [First Dept., 1998]; Thaler & Gertler, LL v. Weitzman, 282 AD2d 522 [Second Dept., 2001]) than the instant complaint contains.

Similarly, the third cause of action for damages for fraudulent inducement as to the selling and issuing of the products, to the extent predicated on the products owned by Kathleen Pike, must be dismissed and, as to all other product numbers which remain in dispute, must be dismissed for failure to state a cause of action under §3016(b).

Plaintiffs' fourth cause of action rests on a theory of unsuitability. To the extent predicated on the Kathleen Pike owned products, this claim is dismissed. To the extent predicated on the remaining products, the plaintiffs' fourth cause of action is barred by the statute of limitations (see, 28 USCS §1658(b); Dodds v. Cigna Securities, Inc., 12 F3d 346 [CA2, 1993]; Norniella v. Kidder Peabody & Co., 752 F.Supp 624 [S.D.N.Y., 1990]).

The claim denominated by plaintiffs as one for breach of fiduciary duty (fifth cause of action), to such extent as predicated on the Kathleen Pike owned products, is dismissed. To the

extent predicated on the remaining products in dispute, as the relief sought is for money damages the governing statute of limitations is three years and this claim must be dismissed in toto on the basis of the bar of the statute (see, Geren v. Quantum Chemical Corp., 832 F.Supp 728 [S.D.N.Y., 1993] cited subsequently by the Second Circuit Court of Appeals in Grace v. Bank Leumi Trust Co. Of NY, 443 F3d 180 [CA2, 2006]).

The sixth cause of action is denominated as one for "breach" of the General Business Law "including but not limited to, §349" (complaint ¶50). As indicated, to such extent that this claim rests on Kathleen Pike owned products, it must be dismissed. Furthermore, this claim is barred by the three year statute of limitations (see, CPLR §214(2); Gaidon v. Guardian Life Ins. Co. Of America, 272 AD2d 60 [First Dept., 2000], affirmed 96 NY2d 201 [2001]; Wender v. Gilberg, 276 AD2d 311 [First Dept., 2000]; Fine v. State of New York, 10 Misc3d 1075A [Court of Claims, 2005]).

The claim for violations of the Insurance Law §§2120 and 2123, to the extent predicated on Kathleen Pike owned products, is dismissed (see, supra); additionally, it is barred by the three years statute of limitations (see, Dolce v. Northwestern Mut. Life Ins. Co., 272 AD2d 432 [Second Dept., 2000]; Goldberg v. Manufacturers Life Ins. Co., 242 AD2d 175 [First Dept. 1998]).

The parties' remaining counterclaims are academic or without merit.

The defendants Alfonso Meneses and Douglas W. Brown shall submit a judgment in accordance herewith (see, 22 NYCRR §202.48).

Dated: March 13, 2008


HON. WILLIAM B. REBOLINI, J.S.C.