

O'Kelly v North Fork Bank

2008 NY Slip Op 32153(U)

July 21, 2008

Supreme Court, Nassau County

Docket Number: 6005-06/

Judge: Arthur M. Diamond

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
John L. O'Kelly, Christine M. O' Kelly,
Utility Audit Group and Morna Lebron

Plaintiffs,

-against-

North Fork Bank, Massachusetts Mutual Life
Insurance Company, MML Investors Services, Inc.,
Pointe Benefit Consultants, LLC., and
Designs for Finance, Inc.

Defendant.

-----x

TRIAL PART: 21

NASSAU COUNTY

INDEX NO: ~~035565/97~~ 016005100

MOTION SEQ. NO: 5,6,7

SUBMIT DATE: 5/23/08

The following papers having been read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Memorandum.....	3
Opposition.....	4,5
Reply	6,7
Notice of Motion.....	8
Opposition.....	9
Reply.....	10

The motion by defendant, Pointe Benefit Consultants, LLC ("Pointe Benefit"), pursuant to CPLR §2221(d), for an Order, *inter alia*, granting it reargument of its prior motion which resulted in an Order of this Court dated December 31, 2007 (to be referred herein as the "December Order"), is denied as moot.

The cross motion by plaintiffs, John L. O'Kelly ("O'Kelly"), Christine M. O' Kelly, Utility Audit Group ("UAG") and Morna Lebron, for an Order, *inter alia*, pursuant to CPLR §2221(d)

and/or CPLR 2221(e), granting reargument and/or renewal of their motion dated October 29, 2007, which resulted in this Court's December Order, is denied.

The motion by defendant, North Fork Bank, (motion sequence 007) for summary judgment, pursuant to CPLR §3212, dismissing the plaintiffs' Complaint as to this moving defendant is granted.

This action involves the provisions of a benefit plan and trust under which plaintiff UAG was a participating employer. Plaintiffs bring this action for breach of fiduciary duties, contractual and statutory obligations by the defendants acting as trustees, administrators, investment advisors and/or sponsors of the trust assets and life insurance policies of the plaintiffs including tortious conduct. On October 28, 2004, plaintiff, John O'Kelly, commenced an action (the "Original Action") against Massachusetts Mutual Life Insurance Company ("Mass Mutual") [Index Number 14961/04]. Defendant Mass Mutual subsequently moved to dismiss the action, arguing that only the trustee North Fork Bank, had standing to bring the action. This Court (Ayres, J.) agreed and in a decision dated June 9, 2005 dismissed John O'Kelly's action against Mass Mutual for lack of standing. The Court opined that only the defendant, North Fork Bank, as trustee, or a beneficiary under the O'Kelly policy had standing to maintain a suit against the defendant Mass Mutual. Specifically, this Court, stated, in pertinent part, as follows:

In matters involving a trust, "only the trustee has standing to bring actions regarding policies for which he is the designated owner and beneficiary" * * * The trustee, who purchased the policy and who has title to the trust property is charged with the fiduciary obligations of assuring the rights and terms pursuant to the applicable policy * * * In instances where a trustee improperly refuses to act or neglects to bring an action, a beneficiary may maintain a suit in equity against the trustee and the third party * * * Thus, while this case may present facts which would support the Trustee's improper refusal to act, plaintiff, as neither the Trustee nor the beneficiary, is still not entitled to bring this action (Citations Omitted).

Thereafter, plaintiff, John O'Kelly, together with his wife, Christine M. O'Kelly, their company, Utility Audit Group, and their employee, Morna Lebron, commenced this action (the

“Second Action”) against Mass Mutual, North Fork Bank, MML Investors Services, Inc., Pointe Benefit Consultants, LLC. and Designs for Finance, Inc.

Defendant Mass Mutual moved to dismiss the Second Action. Plaintiffs subsequently filed an Amended Complaint claiming, *inter alia*, that the defendants did not have the authority to alter the nature of the selected investment of excess funds, in name or substance, without the authorization of one or more of the plaintiffs.

Defendants, Pointe Benefit and North Fork Bank, separately served their Answers to plaintiffs’ Amended Complaint on or about April 10, 2007 and April 19, 2007, respectively. Defendants, Mass Mutual and MML, on the other hand, moved [Sequence 002], pre-answer, pursuant to CPLR 3211(a)(1), (3) and (7) and pursuant to the doctrines of res judicata and collateral estoppel, for an Order, dismissing plaintiffs’ Amended Complaint. This Court granted the motion and plaintiffs’ Complaint as against Mass Mutual and MML was dismissed in its entirety. The Decision and Order of this Court (McCormack, J.) was dated June 18, 2007 and a judgment was entered upon it on July 30, 2007.

Thereafter, defendant Pointe Benefit, also moved, albeit, post-answer [Sequence 003], pursuant to CPLR §3211(a)(7) and/or CPLR 3212, to dismiss plaintiffs’ Complaint and any cross claims in their entirety for failing to state a cause of action. Concurrently, plaintiffs cross moved [Sequence 004] for an Order: (1) compelling Pointe Benefit and North Fork Bank, to provide documents pursuant to various prior Orders of this Court; (2) striking North Fork’s Answer to plaintiff’s Amended Complaint; and, (3) granting them leave to reargue/renew their opposition to Mass Mutual and MML’s prior motion to dismiss the plaintiff’s action which resulted in an Order dated June 18, 2007.

The motion by Pointe Benefit [Sequence 003] and plaintiffs’ cross motion [Sequence 004]

were both resolved by the December Order. Specifically, Pointe Benefit's motion was granted and plaintiffs' claims as against it were dismissed in their entirety. Admittedly, however, this Court overlooked Pointe Benefit's application for dismissal of North Fork's cross claims against Pointe Benefit. Thus, upon the instant motion [Sequence 005], Pointe Benefit seeks reargument with respect to its request to dismiss North Fork's cross-claims since that request for relief was not addressed in this Court's December Order. Said motion is herewith denied as moot, *infra*.

Having dismissed plaintiffs' claims against Pointe Benefit in the December Order, this Court (in the same Order), denied as moot plaintiffs' cross motion to compel Pointe Benefit to provide the plaintiffs with documents. Plaintiffs' cross motion for an Order granting them reargument and/or renewal of the Court's June 18, 2007 Order, and their application to strike North Fork's Answer were also denied.

With respect to motion sequence 007, based upon all the papers submitted to this Court and the Court's prior determinations herein, this Court makes the following findings of fact:

1. The MML Blend Fund was established, maintained and administered by the defendant, Massachusetts Mutual Life Insurance Company;
2. No claim with respect to the MML Blend Fund exists because there was no change thereto.
3. The MML Blend Fund was not altered;
4. The MML Blend Fund was part of an insurance policy and not subject to the management of the defendant, North Fork Bank;
5. The defendant, North Fork Bank, had no involvement with the MML Blend Fund;
6. The premiums paid on the Lebron policy were made as a consequence of the plaintiffs' non-payment of same;
7. If, in fact, there was any change from the MML Blend Fund to the MML Equity Index Fund

- such change was not made or initiated by the defendant, North Fork Bank;
8. The defendant, North Fork Bank, had no duty or responsibility to pay the premiums or the Lebron policy;
 9. With respect to the aforesaid premium payments, the defendant, North Fork Bank, was only a conduit and acted at the Record Keeper's instructions; and
 10. The defendant, North Fork Bank, did not take or initiate any action with respect to the MML Blend Fund or the MML Equity Index Fund related to the plaintiffs herein.

Therefore, this Court finds and determines, as a matter of law, that there exists no liability to the plaintiffs herein on the part of the defendant, North Fork Bank.

Upon the instant motions [Sequences 005 and 006], Pointe Benefit and the plaintiffs, both, seek reargument and/or renewal of this Court's December Order.

To the extent that Pointe Benefit moves for reargument of the December Order for having failed to address its request for dismissal of the cross-claims asserted by North Fork in this action, this Court, in light of the subsequent April Order, herewith denies Pointe Benefit's motion [Sequence 005] as moot.

Plaintiffs' motion to reargue and/or renew their motion to strike North Fork's Answer is also denied as moot. Once again, North Fork's motion for summary judgment is herewith granted. Accordingly, North Fork is no longer a defendant.

Plaintiffs' cross motion to reargue and/or renew their prior motion to: compel Pointe Benefit to provide documents in compliance with various Court Orders; and granting them leave to reargue/renew their opposition to Mass Mutual and MML's prior motion to dismiss the plaintiffs' action which resulted in an Order of this Court dated June 18, 2007 is denied.

A motion to reargue is addressed to the discretion of the court and is designed to afford a

party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR 2221[d][2]). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2nd Dept. 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2nd Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept. 2004]; *Frisenda v. XLarge Enterprises, Inc.*, 280 AD2d 514, 515 [2nd Dept. 2001]). A motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the court (*James v. Nestor*, 120 AD2d 442 [1st Dept. 1986]; *Philips v. Village of Oriskany*, 57 AD2d 110 [4th Dept. 1997]).

A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known to the party seeking renewal and, therefore, were not known to the court (CPLR 2221[e][2], [3]; *Shapiro v. State*, 259 AD2d 753 [2nd Dept. 1999]). Leave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion (*Orange and Rockland Utilities, Inc. v. Assessor of Town of Haverstraw*, 304 AD2d 668, 669 [2nd Dept. 2003]). Although leave to renew may be granted at the trial court's discretion, even where the additional facts were known to the party seeking renewal at the time of the original motion (*Daniel Perla Assoc. v. Ginsberg*, 256 AD2d 303 [2nd Dept. 1998]), leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application (*Governmental Employees Ins. Co. v. Woney*, 293 AD2d 539 [2nd Dept. 2002]).

Having dismissed plaintiffs' claims against Pointe Benefit, this Court, in the December Order, denied plaintiffs' cross motion compelling Pointe Benefit to provide documents as moot. At this point, plaintiffs have failed to show that reargument and/or renewal of this determination is warranted. Similarly, having denied plaintiffs' cross motion granting them leave to renew and/or reargue their opposition to Mass Mutual and MML's motion to dismiss which resulted in a Decision and Order on June 18, 2007. Plaintiffs fail at this juncture to show that reargument and/or renewal of the reargument/renewal is warranted. Here, the same arguments advanced in support of reargument were made by the plaintiffs in support of their original cross motion, considered by the Court and rejected in a detailed decision. Plaintiffs have failed to demonstrate facts which the Court overlooked or law it misapplied. Plaintiffs' request to reargue must, therefore, be denied (*Carrillo v. PM Realty Group*, 16 AD3d 611 [2nd Dept. 2005]; *Hoey-Kennedy v. Kennedy*, 294 AD2d 573 [2nd Dept. 2003]). Similarly, plaintiffs' motion, for leave to renew, is also denied. Plaintiffs' motion to renew is not based on new facts which were unavailable at the time it submitted its opposition to defendants' dismissal motion or in support of their own cross motion (*Kaufman v. Kunis*, 14 AD3d 542 [2nd Dept. 2005]; *Yarde v. New York City Transit Auth.*, 4 AD3d 352 [2nd Dept. 2004]). Moreover, plaintiffs have failed to offer a valid excuse as to why any additional evidence upon which they rely was not previously submitted.

Plaintiffs argue that in granting Pointe Benefit's motion, pursuant to CPLR §3211(a)(7) and/or CPLR §3212, this Court overlooked and/or misapprehended defendant, North Fork Bank's opposition papers by its attorney, Eric Bressler dated December 6, 2007, which plaintiffs submit established that defendants other than the Trustee, North Fork Bank, had roles in the administration of the trust, including responsibility for the investment of plaintiffs' funds for the unauthorized termination of the BMET and for the keeping of records and that the Trustee itself had disclaimed

responsibility in these areas, alleging that responsibility lies with other defendants.

However, this Court granted Pointe Benefit's motion to dismiss plaintiffs' complaint based upon the documentary evidence, namely the Policy Activity Reports issued by Mass Mutual which showed that the investments of the premiums for the variable life insurance policy issued on the life of John O'Kelly for the full period from February 26, 1999 when the policy was purchased through February 26, 2007. These reports in connection with the O'Kelly policy, indicated that the premiums are still being allocated to the MML Blend Fund on said O'Kelly policy. These reports also showed that the cash insurance policy issued on the life of John O'Kelly was *always* invested 100% in the MML Blend Fund. Further, this Court held that as to the Lebron policy, the managing partner of Pointe Benefit, Jack Broesamle, Jr., stated in his affidavit that, "upon information and belief...was cancelled on or about September 30, 2003 due to the plaintiff's non-payment of premiums" (*Id.*, ¶10). In his affidavit, he stated that he was not aware of any requests by the plaintiffs to have the Lebron policy reinstated. Broesamle confirmed that "[o]n a prior occasion, when the Lebron policy was cancelled due to the plaintiffs' non-payment of premiums, they requested reinstatement from Mass Mutual and the policy was reinstated as requested" (*Id.*). Based upon this evidence, this Court held that there was no evidence that Pointe Benefit, ever directed a change in plaintiffs' investment or that any change was ever in fact made in the investment.

Thus, even assuming arguendo that plaintiffs' argument that "defendants other than the Trustee North Fork Bank, had roles in the administration of the trust," based upon the evidence submitted by Pointe Benefit including the affidavit of its managing partner and more importantly, the Policy Activity Reports issued by Mass Mutual, this Court is not persuaded that *Pointe Benefit* had a role in managing and administering the subject trust.

Moreover, in opposition to Pointe Benefit's underlying motion to dismiss, plaintiff, John

O'Kelly, an attorney representing himself as well as the remaining plaintiffs, submitted his affirmation, in which he baldly asserted that Pointe Benefit is the prime player in all of the events complained of by the plaintiffs. Yet, this Court held that plaintiffs failed to sufficiently allege the elements of a claim for breach of contract, particularly an allegation of Pointe Benefit's breach. The elements of a breach of contract are: the existence of a contract; plaintiff's performance under the contract; defendants' breach of that contract; and resulting damages (*Furia v. Furia*, 116 AD2d 694 [2nd Dept. 1986]; *Ross v. FSG PrivatAir Inc.*, 2004 WL 1837366 [SDNY 2004]). Plaintiffs' claims of Pointe Benefit's breach were flatly contradicted by the documentary evidence presented by Pointe Benefit, and thus were not accepted herein as true (*Greene v. Doral Conference Center Assocs.*, *supra*).

At this juncture, plaintiffs have failed to show that reargument and/or renewal is warranted and further, that upon reconsideration, a reversal of this Court's prior decision is in order. Accordingly, plaintiffs' cross-motion to renew and/or reargue their motion resulting in the December Order of this Court is denied.

As there are no defendants remaining in this action, plaintiffs' Amended Complaint is dismissed in its entirety.

Settle Judgment on Notice.

This constitutes the decision and order of this Court.

DATED: JULY 21, 2008

ENTER



HON. ARTHUR M. DIAMOND
J. S.C.

To:

Plaintiff, pro se
JOHN L. O'KELLY., ESQ.
127 Benegayfield Drive
East Williston, New York 11596

Attorney for Defendant/North Fork Bank
WICHMAN, BRESSLER, GORDON
275 Broadhollow Road, Suite 111
Melville, new York 11747

Attorney for Defendant/Mass. Mutual
Life
RIVKIN RADLER LLP
926 EAB Plaza
Uniondale, N.Y. 11556

Attorney for Defendant/ Pointe Benefit
DEBRA MILLER KREBS
1000 Woodbury Road, Suite 402
Woodbury, New York 11797