

Farokhi v Guardian Life Ins. Co. of Am.

2008 NY Slip Op 32354(U)

August 25, 2008

Supreme Court, New York County

Docket Number: 0603093/2007

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

Favolli

INDEX NO.

603093/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

Guardian Life Ins. Co.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

AUG 25 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 19, 2008



Martin Shulman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
FATMEH FAROKHI,

Plaintiff,

-against-

THE GUARDIAN LIFE INSURANCE COMPANY OF
AMERICA and DANIEL SOLICITO,

Defendants.
-----X

Index No. 603093/07

Decision & Order

FILED

AUG 25 2008

NEW YORK
COUNTY CLERK'S OFFICE

MARTIN SHULMAN, J.:

This is a motion by the defendant Daniel Solicito ("Solcито") for an order pursuant to CPLR 3016(b) and 3211(a)(1), (5) and (7) dismissing the complaint.

Defendant The Guardian Life Insurance Company of America ("Guardian Life"), through its salesman Solicito, sold a life insurance policy to the plaintiff Fatmeh Farokhi ("plaintiff" or "Farokhi"). The complaint alleges that Guardian Life and Solicito (collectively "defendants") sold plaintiff the life insurance policy under the guise of a private pension fund. The complaint sets forth causes of action for fraud, violation of General Business Law ("GBL") §349 and violation of Insurance Law §§ 2123 and 4226.

In support of his motion to dismiss, Solicito argues that the documentary evidence definitively contradicts the plaintiff's factual allegations and that the statutory claims are time-barred. In opposition to the motion, Farokhi argues that the documents do not disprove her claims, and that fraud is adequately pled.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (Arnav Indus., Inc. Ret. Trust v Brown, Raysman, Millstein,

Felder & Steiner, L.L.P., 96 NY2d 300 [2001]; Morone v Morone, 50 NY2d 481 [1980]).

The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference (Leon v Martinez, 84 NY2d 83 [1994]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11 [2005]). Any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence (AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582 [2005]; Rovello v Orofino Realty Co., Inc., 40 NY2d 633 [1976]). The credibility of the parties is not under consideration (S. J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338 [1974]).

On a motion to dismiss pursuant to CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314 [2002]). An insured has an obligation to read the policy issued and is presumed to have consented to its terms (Katz v American Mayflower Life Ins. Co., 14 AD3d 195 [1st Dept 2004] affd sub nom. Goldman v Metropolitan Life Ins. Co., 5 NY3d 561 [2005]).

To state a claim for fraudulent inducement in an insurance context, the plaintiff must allege a misrepresentation or material omission of a material fact by defendant that induced the plaintiff to purchase the policy, as well as scienter, justifiable reliance, and injury or damages (Gaidon v Guardian Life Ins. Co. of America, 94 NY2d 330 [1999]). However, repeatedly asserting that Farokhi's actions make no sense premised upon both the investment vehicles and the life insurance available to her from her employer does not satisfy that standard.

Turning to the statutory claims, GBL §349 provides in relevant part:

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

Insurance Law §2123 prohibits misleading statements or misrepresentations regarding life insurance and annuities. Insurance Law §4226(a)(1) provides that no insurer shall issue any statement that misrepresents the terms, benefits or advantages of any of its policies, reflecting state policy that insurers deal fairly with their insureds and the public at large (New York Univ. v Continental Ins. Co., 87 NY2d 308, 317 [1995]).

The strict pleading requirements imposed by CPLR 3016 with respect to causes of action for common-law fraud are inapplicable to causes of action premised upon violations of GBL §349 (Joannou v Blue Ridge Ins. Co., 289 AD2d 531 [2d Dept 2001]). A GBL §349 claim must be predicated on a deceptive act or practice that is consumer-oriented (Gaidon v Guardian Life Ins. Co. of America, *supra*). In addition, the plaintiff must allege an act or practice that is deceptive or misleading in a material way, and resulting injury to the plaintiff (Blue Cross & Blue Shield of New Jersey, Inc. v Philip Morris USA Inc., 3 NY3d 200 [2004]). Farokhi's claim that GBL §349 and Insurance Law §§ 2123 and 4226(a)(1) were breached must be rejected. The plaintiff has not

properly alleged any "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (GBL §349[a]).

Turning to the statute of limitations issue, actions alleging statutory violations of the Insurance Law and the General Business Law are governed by the three-year limitations period of CPLR §214(2) (Russo v Massachusetts Mut. Life Ins. Co., 274 AD2d 878 [3d Dept] lv granted in part, dismissed in part 95 NY2d 957 [2000], and revd, reinstated in part sub nom. Gaidon v Guardian Life Ins. Co. of America, 96 NY2d 201 [2001]). The causes of action accrue when the plaintiff has been injured by a deceptive trade act or practice in violation of the statute (Beller v William Penn Life Ins. Co. of New York, 8 AD3d 310 [2d Dept 2004]).

Here, the statutory causes of action for damages accrued, and the plaintiff Farokhi was injured by a deceptive trade act or practice in violation of the statute at the time the policy was sold. Therefore, the second, third and fourth causes of action for violations of GBL §349 and Insurance Law §§ 2123 and 4226 were untimely commenced on September 17, 2007, more than three years after the insurance policy was sold in October 2002, and are time-barred. Dolce v Northwestern Mut. Life Ins. Co., 272 AD2d 432 [2d Dept] lv denied 95 NY2d 761 [2000]).

The court rejects Farokhi's unsupported argument that the complaint in this action relates back to the complaint in plaintiff's prior action commenced against defendants under N.Y. County Index No. 114121/05 (the "prior action") for statute of limitations purposes. Plaintiff bases this argument upon the parties' purported

consolidation¹ of this action with the prior action.² However, the relation back doctrine pertains to service of amended pleadings which add a new defendant who is united in interest with the named defendant and whose identity was previously unknown to plaintiff (see Buran v. Coupal, 87 NY2d 173 [1995]). Here, Farokhi has not served an amended pleading but rather has commenced a new action against Solicito. Further, plaintiff cannot claim to have been mistaken as to or to have just learned of Solicito's identity as he was named as a defendant in the prior action.

Finally, as the court has granted Solicito's motion to dismiss, the only remaining causes of action are those against defendant Guardian Life, which are identical to those alleged in the prior action which remains pending. As the claims against Guardian Life in this action are duplicative of those in the prior action, the court *sua sponte* dismisses this action against Guardian Life. Accordingly, it is

ORDERED that the defendant Solicito's motion to dismiss is granted and the complaint is dismissed as against defendant Daniel Solicito, with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the complaint is dismissed against defendant Guardian Life *sua sponte*; and it is further

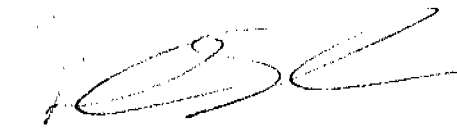
ORDERED that the Clerk is directed to enter judgment accordingly.

¹ While the parties entered into a stipulation to consolidate this action with the prior action, court records do not reflect the consolidation.

² By decision and order dated July 26, 2007, this court dismissed the prior action without prejudice as to Solicito based upon plaintiff's failure to timely serve him with the complaint therein (see Exh. C to motion). Although Solicito raised the issue, this court's decision and order did not address his statute of limitations claims.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
August 19, 2008



Hon. Martin Shulman, J.S.C.

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