

Finkelstein v Lincoln Natl. Corp.

2009 NY Slip Op 32838(U)

November 18, 2009

Supreme Court, Nassau County

Docket Number: 005372/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

HAROLD FINKELSTEIN, MARILYN
FINKELSTEIN and RONALD FINKELSTEIN as
Trustee of and on behalf of the H. Finkelstein
Family Trust,

Plaintiff,

INDEX NO.: 005372/2009
MOTION DATE: 09/11/2009
MOTION SEQUENCE: 001

-against-

LINCOLN NATIONAL CORPORATION,
LINCOLN LIFE & ANNUITY COMPANY OF
NEW YORK, LINCOLN FINANCIAL ADVISORS
CORP., LINCOLN FINANCIAL ADVISORS
CORP. d/b/a SILLER & COHEN and SAGEMARK
CONSULTING, and SILLER & COHEN,

Defendants.

The following papers read on this motion:

Notice of Motion	1
Affidavit of Jonathan J. Myers dated 5/21/09 & Exhibits Annexed	2
Affidavit of Gregory J. Thompson dated 5/21/09 & Exhibits Annexed	3
Memorandum of Law in Support of Defendants' Motion to Dismiss	4
Affidavit in Opposition of Harold Finkelstein, Affidavit of Lawrence M. Rosenstock & Exhibits Annexed	5
Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss the Complaint	6
Affidavit of Gregory J. Thompson dated 9/8/09	7
Affidavit of Jonathan J. Myers dated 9/10/09	8
Reply Memorandum of Law in Support of Defendants' Motion to Dismiss	9

Motion pursuant to CPLR 3211(a)(1), (7) and (8) by defendants Lincoln National Corporation [Lincoln National], Lincoln Life & Annuity Company of New York [Lincoln Life], Lincoln Financial Advisors Corp. [Lincoln Financial], Sagemark Consulting and Siller & Cohen [collectively the Lincoln Group] is granted to the extent that the third, fourth and fifth causes of action of the complaint are hereby dismissed.¹

FACTUAL BACKGROUND

In this action plaintiffs sue to recover \$1,645,000 in damages, including life insurance premiums and advisory fees, arising from the defendants' alleged breach of contractual and fiduciary obligations to provide estate planning services pursuant to a financial planning services contract dated September 5, 2006² signed by Harold Finkelstein and Jeffrey Cohen as a representative of Sagemark Consulting, a division of Lincoln Financial Advisors and member of Lincoln Financial Group. The contract provides, *inter alia*, that

“[t]he services of Advisor under this contract are limited to recommending strategies for you to consider. In all matters, our services are analytical and advisory only, and do not include any legal, accounting or other professional services. Where appropriate we will also recommend other actions, which you should take. We may also provide advice on general categories of investments and insurance which may help you to achieve your financial objectives.

Implementation of your plan is not part of this financial planning contract. However, if you specifically request, Sagemark Consulting, and its affiliates, acting in a sales capacity, will recommend specific investment, insurance and other products through which your financial plan can be implemented. In addition,

¹Lincoln National, a foreign corporation, is a publically traded financial services holding company; Lincoln Life, a New York State domiciled insurance company, is a subsidiary of Lincoln National; Lincoln Financial is a registered investment advisor and broker/dealer licensed to sell life insurance products; Sagemark Consulting, a division of Lincoln Financial, provides financial planning advice; and Randy Siller and Jeffrey Cohen are registered representatives of Lincoln Financial who provide investment/financial planning services through Sagemark and under the personal marketing name Siller & Cohen.

²Upon signing the contract in 2006, Mr. Finkelstein paid a \$25,000 fee to Sagemark Consulting. In 2007 he paid a renewal fee of \$22,500 for continuation of services.

if you purchase the recommended financial products, we will, if you desire, facilitate and coordinate this implementation with your attorney, accountant and other pertinent advisors. The purchase of any products may result in the payment of commissions and/or fees.”

The contract references a disclosure brochure as follows:

“[y]ou acknowledge receipt of Advisor’s Disclosure Brochure or Part II of Form ADV for Lincoln Financial Advisors Corp. These have been prepared and delivered in accordance with the Investment Advisers Act of 1940 and the rules thereunder. They contain important information concerning the background and organization of Advisor and its key people. They also describe possible conflicts of interest. You should be aware of the multiple roles which Lincoln Financial Advisors Corp. and its affiliates play as financial advisor and as issuer, investment manager and/or broker-dealer with respect to various financial products.”³

In accordance with the plan, Harold Finkelstein set up Intentionally Defective Income Trusts [IDITS] to which he transferred certain assets and property. Income generated by the IDITs was to be paid into a separate insurance trust, i.e., the H. Finkelstein Family Trust—which was established for the express purpose of purchasing/owning one or more second to die life insurance policies on the lives of Harold and Marilyn Finkelstein. The proceeds of the policies were to be used to fund the estate taxes upon their deaths.

Plaintiffs allege that the Lincoln Group defendants violated their fiduciary and contractual obligations to render proper estate planning advice, including the recommendation of a price competitive second to die life insurance policy for him and his wife Marilyn. Instead of presenting a broad array of policies for plaintiffs’ consideration, and advising Mr. Finkelstein of the availability of less expensive competitive policies, defendants allegedly recommended only one life insurance product: Lincoln Life and Annuity Company policy [#7316080]. The policy, which provided a death benefit of \$34, 634,630, required an annual premium of \$800,000 per

³According to Harold Finkelstein, the Disclosure Brochure he received was not the same as the Brochure attached to defendants’ moving papers in that the one he received was shorter in length and did not contain identical language.

year. Plaintiffs allege they were wrongfully induced to purchase the policy based on assurances by Gregory Thompson, a Siller & Cohen principal, that the Lincoln Life policy was the best and most competitively priced policy for their purposes⁴ and that if a better policy became available plaintiffs would be so advised.

After purchasing the Lincoln policy, Mr. Finkelstein became aware of a Joint and Last Survivor Flexible Premiums Adjustable Life Insurance Policy, offered by General Life Insurance Company, a subsidiary of AIG, which would better serve his needs, at substantially more favorable premium payment terms. When plaintiffs questioned Gregory Thompson of Siller & Cohen about the failure to disclose the AIG policy to Mr. Finkelstein, plaintiffs were initially told that there were defects in the policy which made it unsuitable. Upon further inquiry, defendants acknowledged that the AIG policy would adequately satisfy the Finkelsteins' estate planning needs. Eventually, plaintiffs decided to cancel the Lincoln policy⁵ after paying the required \$800,000 premium for two years and replace it with the AIG policy. When defendants refused to return the premiums/fees paid, and advised plaintiffs that a substantial surrender fee would be imposed as a result of the cancellation, plaintiffs commenced this action.

Predicated on allegations, *inter alia*, that the Lincoln Group defendants, rather than providing accurate and complete information, acted in their own self interest in recommending and selling the Lincoln National policy to plaintiffs, plaintiffs allege causes of action for breach of contract, breach of fiduciary duty, fraud, constructive fraud and negligent misrepresentation.

Defendants' first objection to the complaint is a jurisdictional one wherein they contend that:

defendant Lincoln National, a foreign corporation organized under the laws of the State of Indiana, whose principal place of business is Pennsylvania, does not do business in New York and is not

⁴Before purchasing the Lincoln policy, plaintiffs allege they were shown a chart which indicated that, for the same \$800,000 annual premium payment, a much smaller death benefit would be generated under policies issued by Sun Life, Met Life, ING, Prudential and John Hancock. Plaintiffs maintain that defendants failed to disclose that there were other equally competitive and less expensive policies available that would satisfy Mr. Finkelstein's needs.

⁵Policy #7316080 was surrendered on December 11, 2008.

subject to the jurisdiction of this court under either CPLR 301 or CPLR 302, the long arm statute.

They further maintain that:

a breach of contract claim cannot be sustained against defendant Lincoln National, Lincoln Life and Siller & Cohen, non parties to the contract between plaintiffs and defendant Sagemark;

the breach of fiduciary duty, fraud, constructive fraud and negligent misrepresentations causes of action lack merit in that they are duplicative of the breach of contract claim set forth in the first cause of action: moreover, no fiduciary relationship existed between plaintiffs and defendants; and

the fraud claim lacks specificity.

ANALYSIS

Turning first to the jurisdictional defense raised by defendant Lincoln National, the court notes that a foreign corporation is amenable to suit in the courts of New York State under CPLR 301 if it has engaged in such a continuous and systematic course of doing business here that a finding of jurisdictional presence is warranted. *Landoil Resources Corp. v Alexander & Alexander Services, Inc.*, 77 NY2d 28, 33 [1980]. The test for doing business requires a finding that the corporation is present in New York not occasionally or casually, but with a fair degree of permanence and continuity (*Laufer v Ostrow*, 55 NY2d 305, 310 [1982]), and requires a considerably greater showing of contacts with New York than the transacts business standard under the long arm statute. CPLR 302(a)(1). It is the quality and nature of the corporation's contacts within the state which are sufficient to make it reasonable and just, according to traditional notions of fair play and substantial justice, that it be required to defend an action in New York State. *International Shoe Co. v Washington*, 326 U.S. 310, 320 [1945]. The doing business test is, in my view, not satisfied by the evidence before the court.

In order to establish long-arm jurisdiction, a plaintiff must set forth sufficient nexus between the claims asserted in the complaint and a contract which was negotiated in New York or a transaction which occurred in this state. The court will look to the

totality of the circumstances to determine whether a party has transacted business in this state within the meaning of CPLR 302(a)(1). Mere ownership by a parent company of subsidiary that is subject to personal jurisdiction is insufficient to establish jurisdiction over the parent. *Moreau v RPM, Inc.*, 20 AD3d 456, 457 [2nd Dept. 2005]. A finding of agency for jurisdictional purposes will not be inferred from the mere existence of a parent-subsidary relationship. *Porter v LSB Industries, Inc.*, 192 AD2d 205, 213 [4th Dept. 1995]. In order for the subsidiary's activities to warrant the exercise of jurisdiction over the parent, the parent's control over the subsidiary's activities must be so complete that the subsidiary is, in fact, merely a department of the parent. *Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 428 [1972].

Other than the fact that Lincoln National is a foreign corporation which owns Lincoln Financial, the complaint is devoid of any substantive allegations that Lincoln National either engaged in a systematic and regular course of business in New York [CPLR 301] or transacted any business in New York. CPLR 302(a)(1).

Plaintiffs' reliance on the fact that Lincoln Group's website indicates that Lincoln National has an affiliated business office located in Syracuse, New York is insufficient, without more, to confer personal jurisdiction on said defendant especially in light of the unrefuted assertion that the affiliated business office in Syracuse, N.Y., is a reference to the office of Lincoln Life, a party to this action which does not challenge jurisdiction.

Accordingly, the complaint is hereby dismissed as to defendant Lincoln National pursuant to CPLR 3211(a)(8).

In considering the allegations of the complaint, it is well settled that on a CPLR 3211(a)(7) motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. *Morales v Copy Right, Inc.*, 28 AD3d 440, 441 [2nd Dept. 2006], *leave to appeal denied*, 7 NY3d 705 [2006]. The most important consideration on such a motion is whether the pleading states a cause of action. If, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail. *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]. So liberal is the standard that the test is simply whether the proponent of the pleading has a cause of action not whether he has

stated one. *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].

Where a motion to dismiss is premised on documentary evidence, such a motion may be appropriately granted only where the documentary evidence definitively disposes of plaintiff's claim as a matter of law so that a complete defense to the claim is established. *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Levenherz v Povinelli*, 14 AD3d 658, 659 [2nd Dept. 2005]. While factual affidavits submitted by plaintiff may be considered to remedy defects in the complaint (*Leon v Martinez, supra*), affidavits submitted by defendants do not constitute documentary evidence upon which a proponent of dismissal may rely. *Crepin v Fogarty*, 59 AD3d 837, 838 [3rd Dept. 2009]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:10, at 21-22. Here, defendants have failed to offer any documentary evidence which definitively disposes of plaintiffs' claims. The allegation that the AIG policy which plaintiffs eventually purchased, was not approved for sale in New York State does not provide a defense sufficient to support dismissal under CPLR 3211(a)(1).

Accepting the allegations of the complaint as true, and according them the benefit of every favorable inference, plaintiffs have sufficiently stated a cause of action against the Lincoln Group (excluding Lincoln Life) for breach of contract and breach of fiduciary duty. The causes of action for fraud, constructive fraud and negligent misrepresentation are deficient and must be dismissed pursuant to CPLR 3211(a)(7).

To state a cause of action for breach of contract, plaintiffs must allege 1) the existence of an agreement; 2) performance of the agreement by one party; 3) breach by the other party; and 4) damages. *Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303, 306 [1st Dept. 2004]; *Furia v Furia*, 116 AD2d 694, 695 [2nd Dept. 1986]. The gravamen of the complaint is a straight forward breach of contract claim, i.e., plaintiffs purchased a service pursuant to a contract; paid a fee of \$25,000 plus for the service and now allege that, as a result of defendants' failure to fulfill their obligations under the contract, they sustained damages. Plaintiffs further claim that, in the course of providing the contracted for service the defendants breached their fiduciary duty to act in plaintiffs' best interest, committed fraud and constructive fraud and made negligent misrepresentations, all to plaintiffs' detriment.

The analysis relevant to a breach of fiduciary duty cause of action is similar to that

directed toward the fraud and negligent misrepresentation causes of action.

A cause of action for breach of fiduciary duty requires: 1) the existence of a duty based on a relationship of trust and confidence; 2) breach of that duty; and 3) a showing that the breach is the proximate cause and cause in fact of the loss sustained by the plaintiff. *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2nd Dept. 2007]. The court will look to the ongoing relationship between the parties to determine whether a fiduciary relationship exists (*Sergeants Benev. Ass'n. Annuity Fund v Renck*, 19 AD3d 107, 110 [1st Dept. 2005]), i.e., whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge. It is not mandatory that a fiduciary relationship be formalized in writing. *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept. 1998]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005].

While the court is cognizant that a conventional business relationship without more is insufficient to establish a fiduciary relationship (*AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 21 [2nd Dept. 2008]), here, the Lincoln Group defendants held themselves out as experienced estate planning/financial advisors on whose superior knowledge and expertise Mr. Finkelstein attests he relied in making estate planning decisions. A fiduciary duty may be found to exist between two parties where, as here, one party is under a duty to act for or give advice for the benefit of the other upon matters within the scope of the relationship. The existence of a fiduciary duty depends upon the facts of a particular relationship. *Boley v Pineloch Associates, Ltd.*, 700 F.Supp. 673, 681 [S.D.N.Y. 1989].

To state a cognizable cause of action for fraud, plaintiffs must allege that defendants made a misrepresentation which was false, which defendants knew to be false or made an omission of a material fact, for the purpose of inducing plaintiffs' reliance; and that plaintiffs justifiably relied on the misrepresentation or omission and suffered injury as a result. *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Selinger Enterprises, Inc. v Cassuto*, 50 AD3d 766, 768 [2nd Dept. 2008]. Here, the fraud claim arises out of the identical facts and circumstances, and contains the same allegations, as the cause of action alleging breach of contract. Moreover, plaintiffs have not alleged that the fraud arises from representations that are collateral or extraneous to the parties' contract and there are no damages that would not be recoverable under the contract measure of damages. *Town House Stock LLC v Coby Housing*

Corp., 36 AD3d 509 [1st Dept. 2007]. Where, as here, the only fraud alleged relates to the breach of contract, a fraud cause of action may not be maintained. *Halliwell v Gordon*, 61 AD3d 932, 934 [2nd Dept. 2009].

In addition to their fraud claim, plaintiffs allege a cause of action for constructive fraud. The elements of both causes of action are the same except that with respect to a constructive fraud claim, the need to prove knowledge of the falsity of a representation is replaced by the need to establish the existence of a fiduciary/confidential relationship or superior knowledge. The law regards the making of a material misrepresentation by a defendant who possesses a position of influence over the plaintiff by reason of the confidential relationship between them as a breach of duty actionable as constructive fraud. *Brown v Lockwood*, 76 AD2d 721, 731 [2nd Dept. 1980]. Even accepting that a fiduciary duty may be found to exist, the allegations of the complaint are not sufficiently distinct from plaintiffs' claim for breach of contract and are, in my view, insufficient to transform what is essentially a breach of contract claim into a constructive fraud claim.

A cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship between the parties; that the information was false and that the plaintiff reasonably relied on the information. The tort of negligent misrepresentation cannot be independently asserted within the context of a breach of contract action unless a special relationship exists between the parties, and the alleged misrepresentation concerns a matter which is extraneous to the contact itself. *Stewart v Maitland*, 39 AD3d 319 [1st Dept. 2007]. Inasmuch as plaintiffs failed to allege any misrepresentations by defendants that were collateral or extraneous to the contract between the parties, the cause of action for negligent misrepresentation is not viable. *Jorbel v Kopko*, 31 AD3d 611 [2nd Dept. 2006]. Here, the damages plaintiffs seek to recover are the same damages recoverable for breach of contract. *Lee v Matarrese*, 17 AD3d 539, 540 [2nd Dept. 2005].

CONCLUSION

Accordingly, the motion by Lincoln Group defendants is granted to the extent that the complaint is dismissed as to defendant Lincoln National pursuant to CPLR 3211(a)(8) and the third, fourth and fifth causes of action sounding in fraud, constructive fraud and negligent

misrepresentation respectively are dismissed pursuant to CPLR 3211(a)(7).

At this juncture, the status of Siller and Cohen and Sagemark Consulting, and the exact nature of interrelationships among the Lincoln Group defendants is unclear. The court declines to dismiss the claims against Lincoln Financial Advisors Corp. d/b/a Siller & Cohen, Sagemark Consulting and Siller & Cohen pending discovery on this issue.

Dated: November 18, 2009


J.S.C.

ENTERED

NOV 30 2009

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COUNTY CLERK'S OFFICE**