

Farrell v Allianz Life Ins. Co. of N. Am.

2011 NY Slip Op 30962(U)

April 1, 2011

Sup Ct, Nassau County

Docket Number: 14720/10

Judge: Karen V. Murphy

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.

Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

JOHN FARRELL, JR.,

Plaintiff(s),

Index No. 14720/10

-against-

Motion Submitted: 12/15/10

Motion Sequence: 001

**ALLIANZ LIFE INSURANCE COMPANY OF
NORTH AMERICA, HORNER TOWNSEND &
KENT INC., PATRICIA HUFF, KEVIN FARRELL
and EILEEN QUESENBERRY,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....XX
- Defendant's/Respondent's.....

Defendant Hornor Townsend & Kent, Inc. ("HTK") moves this Court for an Order dismissing all claims against it, with prejudice, pursuant to CPLR § 3211(a)(1) and (a)(7). Plaintiff opposes the requested relief.

This action arises as the result of the death of plaintiff's father, and the distribution of an annuity to plaintiff's siblings. Defendants Huff, Quesenberry and Kevin Farrell are plaintiff's siblings. The decedent held an annuity with defendant Allianz Life Insurance Company of North America ("Allianz"). The annuity was purchased through HTK, an

investment brokerage firm, and its agent, Paul Fogarty, in September 2004. A change of beneficiary form was executed on July 19, 2008, which excluded plaintiff from entitlement to any portion of the annuity. Decedent died at a hospital on August 2, 2008. According to the complaint, plaintiff's siblings have been paid the full amount of the annuity, each in 1/3 shares.¹

Plaintiff commenced this action on or about August 3, 2010, alleging seven causes of action. HTK is identified in three causes of action as follows: (1) in the second cause of action for fraud, by assisting defendants Huff and Quesenberry; (2) in the fourth cause of action for conversion, by assisting defendants Huff and Quesenberry; and, (3) in the fifth cause of action for negligence, claiming that HTK breached its duty of care to plaintiff, and failed to act with reasonable care in processing the distribution of the annuity.

Plaintiff's sixth cause of action merely claims that the change of beneficiary form is "defective," void on its face, and should never have been relied on as evidence that decedent wanted to change his beneficiaries. This cause of action does not identify HTK.

HTK moves to dismiss those causes of action sounding in fraud, conversion and negligence for failure to state a cause of action pursuant to CPLR § 3211(a)(7), and further seeks to dismiss the negligence cause of action on the additional ground of documentary evidence pursuant to CPLR § 3211(a)(1).

The Court notes that plaintiff has failed to address HTK's assertions that plaintiff has failed to state causes of action against HTK for fraud, conversion and negligence, within the parameters of CPLR § 3211(a)(7). Plaintiff instead opposes HTK's dismissal motion on the ground that the documentary evidence relied upon by HTK in its CPLR § 3211(a)(1) claim is "defective" and inconclusive, and, therefore, by implication, HTK is liable for fraud, conversion and negligence.

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiffs the benefit of every favorable inference (*see Marcantonio v. Picozzi III*, 70 A.D.3d 655, 893 N.Y.S.2d 623 [2d Dept., 2010]).

"Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (*CPLR § 3016(b)*). In order to allege a cause of action sounding in

¹There is currently an action pending before the Nassau County Surrogate's Court involving plaintiff and his siblings.

fraud, the complaint must allege the following: the defendant made a material representation; the material representation was false; the defendant knew it was false and made it with the intention of deceiving the plaintiff; the plaintiff believed the representation to be true and justifiably acted in reliance thereon; and the plaintiff is damaged as a result thereof (*Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 (1999); see also *Regina v. Marotta*, 67 A.D.3d 766, 887 N.Y.S.2d 861 [2d Dept., 2009]).

In order to plead a claim for aiding and abetting fraud, the complaint must first allege the existence of the underlying fraud, defendant abettor's knowledge of the underlying fraud, and defendant abettor's providing of substantial assistance in achieving the fraud (*Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Insurance Company*, 64 A.D.3d 472, 476, 883 N.Y.S.2d 486 [1st Dept., 2009]).

In support of the instant application, HTK argues that plaintiff has failed to allege that HTK made any representations to him at all, let alone that plaintiff justifiably relied upon any such representation to his detriment. The Court's review of the complaint establishes the persuasiveness of HTK's argument.

Plaintiff alleges that defendants Huff and Quesenberry exerted undue influence over the decedent at the time the beneficiary change form was signed, claiming that they had a confidential relationship with decedent, and presented the beneficiary change form to the decedent when he was in a "vulnerable condition" in the hospital. Plaintiff repeats and re-alleges those claims in all subsequent causes of action, but nowhere in the complaint does plaintiff allege that HTK, or its representative, were present when the form was signed by decedent, or that HTK committed any act in an attempt to unduly influence the decedent to change his beneficiary designations, or that HTK was even aware of any alleged undue influence exerted by defendants Huff and Quesenberry.

Plaintiff baldly asserts in paragraph 22 that, "[t]he defendants Patricia Huff and Eileen Quesenberry, with the assistance of defendant Hornor, submitted the change in beneficiary forms to defendant Allianz, despite them being clearly defective, thereby misrepresenting material facts about decedent's desire to exclude plaintiff"

Plaintiff does not state how HTK "assisted" Huff and Quesenberry, or that HTK made any material misrepresentation to plaintiff upon which he reasonably relied to his detriment. Plaintiff also fails to allege that HTK had any knowledge of alleged undue influence perpetrated by defendants Huff and Quesenberry. Simply put, the Court finds that plaintiff has not alleged a single element of fraud, or aiding and abetting fraud, against HTK. Thus, the second cause of action alleging fraud committed by HTK is dismissed.

In order to state a cause of action sounding in conversion, the plaintiff is required to establish “legal ownership of a specific identifiable piece of property and [defendants] exercise of dominion over or interference with the property in defiance of plaintiff’s rights” (*Gilman v. Abagnale*, 235 A.D.2d 989, 653 N.Y.S.2d 176 (3d Dept., 1997); quoting *Ahles v. Aztec Enterprises, Inc.*, 120 A.D.2d 903, 502 N.Y.S.2d 821 [3d Dept., 1986]).

As with aiding and abetting fraud, in order to plead a cause of action for aiding and abetting conversion, the complaint must allege that the aider and abettor knowingly aided in the conversion of the property (*Weisman, Celler, Spett & Modlin v. Chadbourne & Parke*, 271 A.D.2d 329, 706 N.Y.S.2d 414 [1st Dept., 2000]).

In this case, plaintiff makes a bare assertion in paragraph 28 that the “defendants . . . Huff and . . . Quesenberry, with the assistance of defendants [HTK] and Allianz, unlawfully excluded plaintiff from his entitlement to his share in the annuity.” Other than that single assertion, plaintiff has not specified how HTK accomplished the alleged conversion. Plaintiff utterly fails to allege even one required element of conversion, or aiding and abetting conversion, by HTK. Thus, plaintiff’s fourth cause of action alleging conversion committed by HTK is dismissed.

Plaintiff’s fifth cause of action against HTK sounding in negligence, and based on a purported “duty of care” owed to him, is likewise dismissed pursuant to CPLR § 3211(a)(7). “To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (citations omitted)” (*Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, 489 N.E.2d 1294, 499 N.Y.S.2d 392 [1985]).

Aside from plaintiff’s assertion that HTK owed him a “duty of care,” which claim is made in the complaint, and in conclusory fashion in plaintiff’s opposition papers, plaintiff cites no authority for that proposition. While HTK undoubtedly owed some duty of care to the owner of the annuity, who is the decedent, plaintiff has failed to identify what duty was owed to him by HTK. Because plaintiff has failed to demonstrate a duty of care owed to him by HTK, the fifth cause of action sounding in negligence is dismissed as against HTK (see *Solomon, supra*).

Plaintiff also alleges negligence against HTK by its forwarding to Allianz an allegedly unsigned beneficiary form naming defendants Kevin Farrell and Huff as beneficiaries, and forwarding a second form naming only defendant Quesenberry as a beneficiary, which contained a signature “purporting to be that of the decedent, which does not match the handwriting . . . used to complete the form” (Complaint, paragraph 31). Plaintiff characterizes the aforementioned forms as containing “glaring errors” which HTK should never have forwarded to Allianz for processing (Complaint, paragraph 33).

Plaintiff also claims in the complaint that notes in the claim file indicate that the beneficiary forms were never properly executed or clarified prior to decedent's death (Complaint, paragraph 32).

HTK moves to dismiss this claim of negligence pursuant to CPLR § 3211(a)(1), based on the documentary evidence, which is a copy of the beneficiary form (HTK's Exhibit B).

In determining a dismissal motion based on documentary evidence, a court must determine whether the proponent of the pleading has a cause of action, not merely whether he/she has stated one (*Kantrowitz & Goldhamer, P.C. v. Geller*, 265 A.D.2d 529, 697 N.Y.S.2d 137 [2d Dept., 1999]).

In support of the instant application, HTK has submitted the beneficiary forms, consisting of two pages. It is clear to the Court that three beneficiaries were named, none of which was the plaintiff. It is also equally clear that the form contains only two spaces for primary beneficiaries. In order to name the third beneficiary (defendant Quesenberry), a second, identical "Client Contract Update Request Form" had to be used. In addition, the beneficiaries were designated with the numerals "1," "2," and "3." The signature of the decedent appears at the bottom of the second page, and the form is dated July 19, 2008.² Accordingly, the logical interpretation of HTK's Exhibit B is that the document is, in essence, a single form designating three beneficiaries of decedent's annuity. In view of this determination, the Court finds that it is immaterial whether decedent checked the authorization box (#5) on the first or the second page of the form, as the authorization boxes are identical to one another.

In his opposition papers, plaintiff submits the same two beneficiary forms, medical reports regarding the decedent's state of health and alertness while in the hospital, and two documents from Allianz indicating that the page designating the third beneficiary (defendant Quesenberry) was not included by HTK's agent when he sent it to Allianz.

The Court will not consider any of the medical reports submitted by plaintiff, as there is no evidence presented that HTK had any knowledge of decedent's hospitalization and/or his medical condition. Thus, this Court finds plaintiff's attempt to question the decedent's ability to execute the beneficiary change form because of an alleged medical incapacity to be irrelevant to the determination of HTK's dismissal application based on documentary evidence (*see JP Morgan Chase Bank National Assoc. v. Haedrich*, 29 Misc.3d 1215A, 2010 N.Y. Slip Op. 51838U [Sup. Ct., Nassau County 2010]).

²Plaintiff does not alleged that decedent's signature was forged.

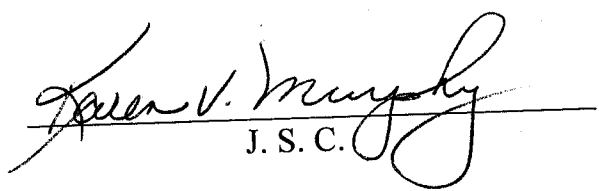
The Allianz documents supplied by plaintiff as his Exhibits 5, 6, and 7 indicate nothing more than the fact that the beneficiary change form contains space for two primary beneficiaries, and that another page had to be added to include the third beneficiary. Apparently, the page designating the Quesenberry defendant was not forwarded by HTK to Allianz. When the confirmation of beneficiary form was received, the omission was discovered and remedied. In any event, none of these communications between Allianz and HTK involved plaintiff. Thus, whether there was a ministerial error and/or omission as to the Quesenberry defendant is irrelevant to plaintiff's claim of negligence against HTK.

Furthermore, plaintiff agrees with HTK "that it is not mandatory that the person who signs a form must also be the person who completes the form" (Plaintiff's Affirmation in Opposition, paragraph 13).

Accordingly, the Court finds that the documentary evidence submitted by HTK constitutes a complete defense to plaintiff's claim that HTK was negligent in forwarding "defective" forms to Allianz, which resulted in the distribution of the annuity to plaintiff's siblings. Thus, plaintiff does not have a cause of action in negligence on this basis, and the fifth cause of action against HTK is dismissed, with prejudice, pursuant to CPLR § 3211(a)(1).

The foregoing constitutes the Order of this Court.

Dated: April 1, 2011
Mineola, N.Y.


J. S. C.

ENTERED
APR 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE