

**Pine v New York Life Ins. Co.**

2011 NY Slip Op 31331(U)

May 6, 2011

Supreme Court, Nassau County

Docket Number: 3654/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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JODIE PINE, As Executrix of the Estate of Eliot Finkels,  
  
Plaintiff,  
  
- against -

TRIAL/IAS PART 32  
NASSAU COUNTY  
  
Index No.: 3654/09  
Motion Seq. No.: 01  
Motion Date: 03/04/11

NEW YORK LIFE INSURANCE COMPANY,  
SECURITY MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK and LOUISA XIAOMU JIANG,  
  
Defendants.

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**The following papers have been read on this motion:**

	<u>Papers Numbered</u>
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Co-Defendant's Affirmation in Support of Motion</u>	<u>2</u>
<u>Memorandum of Law in Opposition to Motion</u>	<u>3</u>
<u>Reply Memorandum of Law</u>	<u>4</u>

Defendant New York Life Insurance Company ("New York Life") moves, pursuant to CPLR § 4101 and NYCRR 202.21(e), for an order striking the demand for a jury trial that is contained in the Note of Issue filed by plaintiff in this action. Defendant Louisa Xiaomu Jiang ("Jiang") filed an affirmation in support of the motion. Plaintiff opposes the motion.

Plaintiff commenced the instant action by the filing of a Summons and Complaint on or about February 27, 2009. Defendant New York Life joined issue on or about May 1, 2009. Defendant Jiang joined issue on or about June 8, 2009. A settlement was reached between

plaintiff and defendant Security Mutual Insurance Company of New York (“Security”) prior to defendant Security answering plaintiff’s Complaint. On January 19, 2011, plaintiff filed a Note of Issue that contained a demand for a jury trial.

Defendant New York Life submits that, in the Complaint, plaintiff alleges that defendant New York Life and defendant Security sold annuity contracts to decedent Eliot Finkels (“decedent”) when the decedent purportedly lacked mental capacity to enter into the transactions, and, as to defendant New York Life, seeks an order “setting aside the annuity [contract] and directing the return of all premiums paid therefor, less the total of payments made to decedent under said annuity [contract] prior to his death.” Defendant New York Life argues that plaintiff is therefore effectively seeking to rescind the annuity that defendant New York Life issued to decedent. Defendant New York Life further argues that rescision is an equitable remedy and it is well settled that the joinder of legal and equitable claims in the same action constitute a waiver of the right to a jury trial. Defendant New York Life contends that this action is primarily equitable in nature and that plaintiff therefore has waived her right to a jury trial.

In opposition to defendant New York Life’s motion, plaintiff argues that “[p]laintiff’s complaint sets forth facts which would permit judgment for a sum of money only, such sum representing the return of the premium paid for a lifetime annuity contract, less the annuity payments made prior to the annuitant’s death. A ‘setting aside of the annuity contract,’ while mentioned in the Plaintiff’s prayer for relief, is not necessary to afford Plaintiff full relief. ‘Where a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint’s prayer for relief will not constitute a waiver of the right to a jury trial. (citation omitted).’ Plaintiff claims that it is not seeking a

formal judgment of rescission, but that same is merely incidental to the monetary relief that it is seeking. Plaintiff argues that the subject annuity contract terminated upon the death of decedent and therefore a formal judgment of rescission is not essential to afford it full relief.

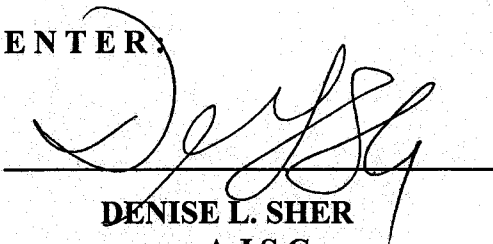
In reply, defendant New York Life argues that plaintiff does not and cannot assert a cause of action for breach of contract, since it is undisputed that defendant New York Life complied with every aspect of the annuity contract that the decedent applied for and purchased. Instead, plaintiff alleges in the Complaint that, due to his age and various infirmities, decedent lacked the mental capacity to enter into the annuity with defendant New York Life, thus rendering said annuity voidable. Defendant New York Life reiterates that these allegation form a cause of action for rescission and, while plaintiff seeks monetary damages, the form of damages does not negate the nature of the cause of action. If the annuity is not voided in equity, no money damages can follow. Plaintiff's only basis for damages is predicated upon equitable relief.

The Court finds that plaintiff's action is indeed one in equity and, as defendant New York Life argues, plaintiff's only basis for monetary damages is predicated upon equitable relief. Plaintiff's allegations that decedent lacked the required mental capacity to enter into the subject annuity contract clearly states a cause of action for rescission. Monetary damages may be awarded only if rescission is granted. Rescission is not merely incidental to the monetary relief that plaintiff is seeking as argued in plaintiff's memorandum in opposition. Plaintiff's Complaint asks the Court to set aside the annuity contract based upon decedent mental condition and then grant an award of monetary damages. The Court therefore finds that this action is clearly equitable rather than legal in nature.

Accordingly, defendant New York Life's motion is hereby granted and it is ordered that plaintiff's demand for a jury trial contained in her Note of Issue is stricken.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on May 11, 2011 at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:  
  
DENISE L. SHER  
A.J.S.C.

Dated: Mineola, New York  
May 6, 2011

**ENTERED**  
**MAY 11 2011**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**