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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 7

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

Plaintiffs,

- against -

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

Defendants.

INDEX NO.: 005372/2009
MOTION DATE: 7/22/2011
SEQUENCE NO.: 002

The following documents were read on this Motion:

Notice of Motion to Amend Summons and Complaint ..... 1.
Exhibit Folder to Plaintiffs' Motion to Amend Summons and Complaint 2.
Memorandum of Law in Support of Motion to Amend ..... 3.
Affirmation of Todd D. Dremin, Esq. in Opposition to Motion ..... 4.
Defendants' Memorandum of Law in Opposition to Motion ..... 5.
Reply Affidavit of Lawrence M. Rosenstock in Further Support of Motion 6.
Reply Memorandum of Law in Further Support of Motion ..... 7.

PRELIMINARY STATEMENT

Plaintiff moves for leave to serve an Amended Summons and Complaint. The proposed amended complaint alleges statutory violations of Insurance Law §§ 4226 and 2123, which plaintiff claims provide for the recovery of insurance premiums paid to an

insurer, and commissions and compensation paid to the agents of the insurer when there has been misrepresentations of the "term, benefits or advantages" of a policy of insurance. In that vein, plaintiff also seeks to name Randy P. Siller as an individual defendant in view of the position taken by defendants that Siller & Cohen is not an actual entity, but only a marketing name by which Lincoln Financial Advisors Corp. holds itself out to the public.

Defendants oppose the motion on the grounds that the alleged violations of the Insurance Law are palpably insufficient and are barred by the Statute of Limitations. In reply, plaintiffs claim that defendants' reliance on the particularity requirements of CPLR § 3016 are inapplicable and, in any event, the Court has already sustained the sufficiency of the claim for breach of fiduciary duty, which is required to meet the specificity requirements of § 3016. With respect to the Statute of Limitations assertion, plaintiffs contend that the claims sought to be made in the amended complaint all relate back to, and arise out of the same transactions alleged in the initial complaint.

BACKGROUND

Plaintiffs seek to recover insurance premiums of $1,645,000, paid over two years, for second to die life insurance premiums and advisory fees. Plaintiffs contend that defendants breached a financial planning services contract, and a fiduciary duty owed by them to plaintiffs. Plaintiffs created the H. Finkelstein Family Trust for the express purpose of purchasing and owning one or more second to die life insurance policies on the lives of Harold and Marilyn Finkelstein.

Plaintiffs assert that defendants failed to render proper estate planning advice, including price-competitive second to die life insurance policies. Instead of presenting an array of such policies, plaintiffs contend that defendants recommended only one policy, issued by Lincoln Life and Annuity Company (Policy # 7316080). The policy provided a death benefit of $34,634,630, and required an annual premium of $800,000. According to the complaint, defendants did not diligently seek out a more cost effective policy, such as one offered by General Life Insurance Company, a subsidiary of AIG. To the contrary,

defendants allegedly provided plaintiffs with a chart which favorably compared the Lincoln Life policy with those offered by Sun Life, Met Life, ING, Prudential and John Hancock.

After paying premiums for two years, plaintiffs surrendered the Lincoln Life policy on December 11, 2008, and purchased policies from General Life Insurance. They now seek to recover the premiums and consulting fees.

DISCUSSION

Plaintiffs seek to amend the complaint by asserting claims under Insurance Law §§ 4226 and 2123. The former statute provides in pertinent part as follows:

> (a) No insurer authorized to do in this state the business of life, or accident and health insurance, or to make annuity contracts shall:
>
> (1) issue or circulate, or cause or permit to be issued or circulated on its behalf, an illustration, circular, statement or memorandum misrepresenting the terms, benefits or advantages of any of its policies or contracts;
>
> * * *
>
> (5) make or deliver to any person or persons any incomplete comparison of any such policies or contracts for the purpose of inducing, or tending to induce, such person or persons to lapse, forfeit or surrender any insurance policy or contract.

§ 2123 provides in part as follows:

> (2) No such person, firm, association or corporation shall make to any person or persons any incomplete comparison of any such policies or contracts of any insurer, insurers, or health maintenance organization, for the purpose of inducing, or tending to induce, such person or persons to lapse, forfeit or surrender any insurance policy or health maintenance organization contract.

Amendment of Pleadings

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

> **Rule 3025. Amended and supplemental pleadings**
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> **(a) Amendments without leave.** A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.
>
> **(b) Amendments and supplemental pleadings by leave.** A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.
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> **(c) Amendment to conform to the evidence.** The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.
>
> **(d) Responses to amended or supplemental pleadings.** Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed. [1]

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[1] *Lucido v. Mancuso*, 49 A.D.3d 220, 230 (2d Dept. 2008).

Defendants contend that the proposed amendments to allege violations of §§ 2123 and 4226 "palpably insufficient because Plaintiffs have not identified any misrepresentations that any Defendant made regarding any insurance policy". Citing CPLR § 3016(b), they assert that plaintiff is bound by the stringent pleading requirements and that when bringing a cause of action "for misrepresentation, fraud, mistake . . . or breach of trust, the circumstances constituting the wrong shall be stated in detail".[2]

In *LoPresti,* Second Department dismissed the claim under Insurance Law § 2123, concluding that plaintiff's claims were impermissibly vague and conclusory, and failed to identify any alleged misstatements with the required particularity. [3] This case is factually distinguishyable from the facts in *LoPresti.* In rather clear and unambiguous terms, plaintiff has asserted that defendants misrepresented that the Lincoln Life policy was the most economical policy available, and, when confronted with the lower premium for substantially identical coverage of the AIG policy, defendants asserted defects in the AIG policy, which assertions were, in fact, untrue.[4]

The motion by plaintiff to amend the complaint to include a claim of violation of Insurance Law § 2123 is granted. The Court's role is not to determine the truth of the allegations of the complaint. Assuming the truth of the allegations for the purpose of this motion, plaintiffs have adequately stated a cause of action for violation of that statute.

The motion to amend the complaint to assert violations of Insurance Law § 4226 is denied. The statute, in subdivision (a)(1), prohibits an insurer from issuing or circulating "any illustration, circular, statment or memorandum misrepresenting the terms, benefits or advantages of any of its policies or contracts". There is no allegation that defendants misrepresented the terms, benefits, or advantages of its own policy; rather, the claim is that defendants failed to include in their representation such information with respect to an allegedly more affordable policy offering substantially similar benefits.

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[2] *LoPresti v. Mass. Mut. Life Ins. Co.,* 30 A.D.3d 474, 475 (2d Dept. 2006).

[3] *Id.*

[4] Exh. "A" to Motion at ¶ 5.

Subdivision (a)(5) prohibits an insurer from making or delivering "to any persons any incomplete comparison of such policies or contracts for the purpose of inducing, or tending to induce, such person or persons to lapse, forfeit or surrender any insurance policy or contract". The complaint does not allege that plaintiffs allowed another policy to lapse, or that they forfeited or surrendered any other policy or contract as a result of defendants' conduct. What they allege is that defendants provided them an inaccurate comparison in order to induce them to purchase a policy with Lincoln Life. These allegations do not fall within the language of the statute. [5]

The provisions of the insurance law are creatures of statute, and are subject to a three year statute of limitations. [6] Defendants assert that the claims under the Insurance Law are barred by the Statute of Limitations, in that the policy was purchased on January 27, 2007, more than three years prior to the motion to amend to include statutory claims. Plaintiffs contend that the "relation back" doctrine preserves their claims, since they arise out of the same allegations contained in their original complaint of March 19, 2009.

CPLR § 203(f) deals with the interposition of a claim in an amended pleading. It provides as follows:

> **(f) Claim in amended pleading.** A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

The original complaint, [7] makes the same assertions which plaintiff contends are prohibited conduct under the Insurance Law. The purpose of the statute of limitations is to

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[5] *Gaidon v. Guardian Life Ins. Co. of America,* 255 A.D.2d 101 (1st Dept. 1998); affd. as modified 96 N.Y.2d 201 (2001); *Heslin v. Metropolitan Life Ins. Co.,* 287 A.D.2d 113 (3d Dept.2001).

[6] *Gaidon v. Guardian Life Ins. Co. of America,* 96 N.Y.2d at 207 (2001). The Court of Appeals held that the statute only began to run when the carrier demanded additional premiums beyond the period when the company represented that dividends would be sufficient to offset premiums. Such is not the issue in this case.

[7] Exh. "B" to Exhibit Folder to Motion.

prevent a party from being confronted with allegations beyond the time when they may have preserved the ability to defend against them. There is nothing in the proposed amended complaint that defendants were not apprised of in the original. The amendment of the complaint to include a claim for violation of Insurance Law § 2123 is not barred by the three-year statute of limitations.

Plaintiff also seeks to name Randy P. Siller as an individual defendant in light of the claimed position of defendants that Siller & Cohen, presently named as a defendant, is not a legal entity, but only a marketing name employed by Lincoln Financial Advisors Corp. Plaintiff points to deposition testimony of Siller[8] to the effect that he and Cohen have worked together over a period of 23 years, sharing income and expenses according to a set formula. Siller is already a defendant, either as a member of a partnership or of a joint venture.

The relation-back doctrine permits claims against a party added after the expiration of the statute of limitations where three conditions are met:

(1) both claims arose out of the same conduct, transaction or occurrence;

(2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejuciced in maintaining a defense on the merits; and

(3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have initially been brought against the new party as well. [9]

Parties are united in interest only where the interest of the parties in the subject matter is such that they will stand or fall together and that a judgment against one will similarly affect the other.[10] Defendants Siller and Siller & Cohen are united in interest.

It is only by virtue of the defendants' contention that Siller and Cohen is not a partnership that plaintiff now seeks to name Siller individually. Siller, while not denying the existence of a

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[8] Exh. "J" pp. 9 — 23 to Exhibit Folder to Motion.

[9] *Buran v. Coupal,* 87 N.Y.2d 173 (1995); *Cuelo v. Patel,* 257 A.D.2d 499 (1st Dept 1999).

[10] *Cuelo v. Patel,* supra; *L & L Plumbing & Heating v. DePaolo,* 253 A.D.2d 157 (2d Dept. 1998).

partnership or joint venture relationship with Cohen, certainly knew, or should have known, that if there were no such entity, he would have been named individually in the original complaint.

The motion for leave to add Randy P. Siller as an individual defendant is granted.

The motion for leave to serve an amended complaint to include a claimed violation of Insurance Law § 2123.

The motion for leave to serve an amended complaint to include a claimed violation of Insurance Law § 4226 is denied for the reasons stated.

This constitutes the Decision and Order of the Court.

Dated: September 30, 2011

J.S.C.

ENTERED
OCT 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE