Mujica v Hovakimian
2011 NY Slip Op 33932(U)
November 7, 2011
Sup Ct, NY County
Docket Number: 108970/10
Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 108970/2010

MUJICA, AZITA

vs

HOVAKIMIAN, ARMEN

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE 09/09/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	3,5
Answering Affidavits — Exhibits	7,34-42
Replying Affidavits	43-44

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 11/7/11

JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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AZITA MUJICA,

Plaintiff,

-against-

Index No. 108970/10
Decision & Order

ARMEN HOVAKIMIAN,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

This action involves plaintiff Azita Mujica's claim that defendant Armen Hovakimian, an insurance broker, allowed a life insurance policy, which covered the life of plaintiff's ex-husband (the Policy), to lapse, and then concealed this fact from plaintiff. Defendant here moves for an order dismissing the complaint, or, in the alternative, to compel plaintiff to provide a more definite statement of her claims. Plaintiff cross-moves to amend her complaint to clarify her original complaint as one for breach of fiduciary duty, and to add causes of action for fraudulent misrepresentation, fraudulent concealment and negligent misrepresentation.

I. Background

The facts as here set forth are taken from plaintiff's original and proposed amended complaints. Plaintiff claims that she and defendant have been close family friends since childhood, growing up together in Iran, and that defendant went to school with plaintiff's brother. She claims that her friendship with defendant "has spanned a lifetime" and that her family's connection with defendant's "spanned generations." Aff. of Laura Sulem, Ex. B, Amended Complaint, ¶ 14. Plaintiff further claims that defendant was a close family friend of plaintiff's

now ex-husband, Itadj Mesbahzadeh, whom plaintiff married in 1974. She maintains that she and defendant "are members of the same close-knit Persian Community in the United States." *Id.* at 3.

Plaintiff immigrated to the United States from Iran in 1980. In 1986, plaintiff purchased through defendant, as broker, a life insurance policy on the life of Mesbahzadeh, in the sum of $500,000 (Policy). Defendant allegedly told plaintiff that she would only have to pay the premiums on the policy for a few years, before the interest and dividends earned by the policy would cover all future premiums and keep the policy paid up.

Plaintiff moved to Mexico City in 1986, where she lived until 2008. She claims that she informed defendant of the move and that she was concerned she would have difficulty getting her mail in Mexico. Moreover, she claims that she kept in constant touch with defendant by telephone and fax, approximately five or six times a year. Plaintiff describes these communications as "close, professional and personal." Amended Complaint, ¶ 14. She also alleges that she and defendant visited each other at least twice a year and continued to do business with defendant, claiming to have purchased $2.75 million worth of life insurance through him after 1986.

Plaintiff maintains that she paid premiums on the Policy through 1993. At that point, defendant allegedly told her that the sums she had paid to date were sufficient to cover all future premiums and that no more monthly payments would be necessary. Plaintiff contends that, over the next few years, defendant repeatedly assured her, in response to her inquiries, that the policy was paying for itself and that she need not make any further payments. Hence, at defendant's instruction, plaintiff ceased paying premiums on the policy in 1993.

Apparently, the policy lapsed in November 2004. However, according to plaintiff, defendant, who knew of the lapse, never informed plaintiff of this event, even while she was still inquiring about the policy from time to time.

Plaintiff learned of the lapse in May 2008. She claims to have then made many attempts to contact defendant, to no avail. Eventually, defendant responded to plaintiff, allegedly promising her that he would act to have the policy reinstated, or that he would pay back her premiums himself. Plaintiff maintains that defendant again ignored her calls, or responded to them belatedly, until October 2009, when defendant arranged to have a physician examine Mesbahzadeh, as part of an attempt to have the policy reinstated. In December 2009, the insurer refused to reinstate the policy.

Plaintiff filed the original complaint on June 8, 2010, demanding damages of at least the face amount of the policy, $500,000. Although the original complaint is not a model of clarity, containing but a single all-encompassing cause of action, defendant was sufficiently able to discern potential causes of action for negligence and breach of fiduciary duty, and to bring his motion accordingly.

Defendant argues in his motion that the claims as set forth above are time-barred, as the date from which any claim should arise would be in: 1986, when plaintiff purchased the Policy; 1993, when defendant allegedly misled plaintiff into ceasing to pay premiums; or 2004, when the Policy lapsed. Whichever date was chosen, he argues, is barred by a three-year statute of limitations. He also argues that the claims fail to state a cause of action, and that, at the very least, he is entitled to a more definite statement, pursuant to CPLR 405 (a).

Plaintiff responds with the proposed amended complaint, alleging causes of action for

breach of fiduciary duty (purportedly, her original claim), along with claims for fraudulent misrepresentation, fraudulent concealment and negligent misrepresentation. Plaintiff maintains that all the claims are now adequately pled and timely, and that if there is any question about the timeliness of the matters, defendant should be barred by equitable estoppel from mounting a defense of statute of limitations.

II. Discussion

Defendant's motion to dismiss and plaintiff's motion to amend overlap.

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994). On the other hand, "leave to amend a pleading 'shall be freely given' ... in the absence of prejudice or surprise." *Thompson v Cooper*, 24 AD3d 203, 205 (1st Dept 2005), with reference to CPLR 3025 (b). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law." *Id.*; *Ancrum v St. Barnabas Hospital*, 301 AD2d 474 (1st Dept 2003). In both instances, the factual sufficiency of the claims is addressed.

This court finds that the proposed amended complaint does not offer surprise or prejudice to defendant, as he was able to discern a claim for breach of fiduciary duty out of the original complaint, and the additional causes of action can be gleaned from the same factual underpinnings as the claim for breach of fiduciary duty. The motion to dismiss, thus, will be addressed in the context of the sufficiency of the proposed amended complaint. The issues then

are limited to the application of the statue of limitations to the claims and the sufficiency of the claims, to determine that they are not "palpably insufficient as a matter of law." *Thompson v Cooper*, 24 AD3d at 205. Since defendant can discern what claims plaintiff is making, whether or not they have merit, the motion for a more definite statement is denied as moot.

A. Breach of Fiduciary Duty

Plaintiff alleges breach of fiduciary duty and fraudulent concealment and negligent misrepresentation, causes of action whose elements comprise breach of fiduciary duty. *See Mandarin Trading Ltd. v Wildenstein*, 16 NY3d173, 179-180 (2011). This court finds that, under the unique circumstances of this case, plaintiff has stated a cause of action for breach of fiduciary duty.

> A fiduciary relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another. *The term is a very broad one. It is said that the relation exists, and that relief is granted in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial.* The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another [interior quotation marks and citation omitted].

Northeast General Corp. v Wellington Advertising, Inc., 82 NY2d 158, 172 (1993); *see also Penato v George*, 52 AD2d 939 (2d Dept 1976). "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation [internal quotation marks and citation omitted]." *Northeast General Corp. v Wellington Advertising, Inc.*, 82 NY2d at 172-173.

It is settled that "a conventional business relationship, *without more*, is insufficient to create a fiduciary relationship [emphasis added]." *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 21 (2d Dept 2008). Specifically, the Court of Appeals has stated that there is no

fiduciary relationship between an insurance broker and the insured when it comes to advice concerning the need for additional coverage. *Murphy v Kuhn*, 90 NY2d 266 (1997); *see also Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 19 AD3d 1056, 1057 (4th Dept 2005), *affd* 7 NY3d 152 (2006)("as a general rule there is no fiduciary relationship between a broker and its customer"). However, even the Court of Appeals has considered the possibility of a special relationship approaching privity in a commercial context, raising a duty to speak or act, "when the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information [internal quotation marks and citation omitted]." *Kimmell v Schaefer*, 89 NY2d 257, 263 (1996).

In *Kimmell*, a case involving a party soliciting investment in a limited partnership, the Court held that the "vast majority of commercial transactions are comprised of ... 'casual' statements and contacts," such that a fiduciary relationship "has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on" the misrepresentation is justified. *Id.*

The Court in *Murphy*, discussing *Kimmell*, acknowledged that "[e]xceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those affixed by common law," but that "whether such additional responsibilities should be recognized and given legal effect is governed by the particular relationship between the parties and is best determined on a case-by-case basis." *Murphy v Kuhn*, 90 NY2d at 272; *see also Philadelphia Indemnity Insurance Co. v Horowitz, Greener & Stengel, LLP*, 379 F Supp 2d 442 (SD NY

2005). Courts have clarified the situation somewhat by explaining that "an extended course of dealing sufficient to put objectively reasonable agents on notice that their advice was being specially relied upon" might impart a fiduciary relationship on a broker. *Curanovic v New York Central Mutual Fire Insurance Co.*, 307 AD3d 435, 438 (3d Dept 2003).

It has been recognized that a fiduciary relationship may result from dealings between close friends "'or even where confidence is based upon prior business dealings.'" *See AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d at 21, quoting *Apple Records v Capital Records*, 137 AD2d 50, 57 (1st Dept 1988); *Doe v Holy See (State of Vatican City)*, 17 AD3d 793 (3d Dept 2005); *Penato v George*, 52 AD2d 939, *supra*. In the present case, there is allegedly a combination of what is presumed to be a professional broker-client relationship and a relationship based on a long-standing friendship. It is conceivable, under the circumstances herein, that the parties' alleged long-standing relationship, coupled with defendant's role as broker, created in defendant that "special position of confidence and trust" which might create a fiduciary duty. *Murphy v Kuhn,* 90 NY2d at 270; *Kimmell v Shaefer*, 89 NY2d 257, *supra*.

The court notes that the cases which state in an unequivocal manner that there is no fiduciary relationship between a broker and his or her client do so in a situation where the wrong alleged is the broker's failure to advise the client to get more, or a different type of, insurance coverage. *See Murphy v Kuhn*, 90 NY2d 266, *supra*; *Hoffend & Sons, Inc. v Rose & Kierman, Inc.* 19 AD3d 1056, *supra*; *Philadelphia Indemnification Insurance Co. v Horowitz, Greener & Stengel, LLC*, 379 F Supp 2d 442, *supra*. The present case involves a broker with a close relationship with a client who fails to tell the client that an existing policy of insurance is in peril of lapsing, a wholly different situation, wherein the broker was in possession of knowledge of

events which were unknown, and unknowable, to plaintiff.

Since the existence of a fiduciary duty between parties in such circumstances is generally a jury question (*Murphy v Kuhn*, 90 NY2d 266, *supra*), this court finds that plaintiff has stated a timely and valid cause of action for breach of fiduciary duty on the part of defendant in failing to inform her that her policy was in danger of lapsing, due to plaintiff's failure, on defendant's advice, from paying premiums on the policy.

B. Statute of Limitations

Originally, defendant assumed, based on plaintiff's dubiously-written original complaint, that negligence was being alleged, thus raising the applicability of a three-year statute of limitations. Arguing that the statute accrued at the time of the wrong, not the discovery of the wrong, defendant suggested, as possible accrual dates: 1986, when the policy was purchased; 1996, when plaintiff was allegedly advised to cease payment on the policy; or 2004, at the outside, as the date the policy lapsed. Thus, negligence would be barred by any of the suggested accrual dates.

Defendant, assuming correctly, that plaintiff was attempting to allege a cause of action for breach of fiduciary duty, also suggested the application of a three-year statute to that claim, which would bar a breach of fiduciary duty claim based on any of the above accrual dates. It now is clear that, on plaintiff's proposed amended complaint, plaintiff is not seeking recovery in mere negligence.

As defendant concedes, a claim for breach of fiduciary duty which is coupled, as here, with claims based on fraud, is equitable in nature and governed by a six-year statute of limitations. *See Klein v Gutman*, 12 AD3d 417, 419 (2d Dept 2004)(cause of action alleging

breach of fiduciary duty based on allegations of actual fraud subject to six-year statute); *see also Kaufman v Cohen*, 307 AD2d 113, 118 (1st Dept 2003)(same). Additionally, the claim for breach of fiduciary duty accrues "'when all elements of the tort can be truthfully alleged in a complaint.'" *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 (2009), quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 (1993). That is, the claim accrues when the plaintiff has sustained damages, an "essential element" of the tort. *IDT Corp v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 140.

Accrual of a cause of action based on fraud is governed by the date of the fraudulent act [*Kaufman v Cohen*, 307 AD2d 113, (*supra*)] and is either six years from that date, or two years from the date upon which the fraud is discovered, or could have been discovered, by reasonable means. *Id.* Negligent misrepresentation also is governed by a six-year statute, accruing on the date upon which plaintiff first relied on the misrepresentation. *See Enzinna v D'Youville College*, 84 AD3d 1744 (4th Dept 2011). Negligent misrepresentation too allows for a discovery rule, to give a plaintiff two years to discover the misrepresentation. *See 14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp.*, 78 AD3d 431 (1st Dept 2010).

Defendant offers that the date of the alleged fraud must be in 1986, when the policy was sold to plaintiff. Alternately, defendant offers the date upon which defendant advised plaintiff to stop paying premiums, in 1993. Both dates would extinguish any claim brought in 2010. Defendant further argues that, even if the 2008 date were to be considered as the date upon which plaintiff could have reasonably discovered the alleged fraud, more than two years elapsed from that date until the commencement of this action in 2010.

This court determines that the fraud-based claims accrued in 1993, when plaintiff was

incorrectly told to stop paying premiums. It is the secession of the payment of premiums which caused the lapse of the policy. Plaintiff's discovery of the alleged fraud and/or negligent misrepresentation in 2008 does not suffice to save the fraud-based claims.

The breach of fiduciary duty claim, if it is validly fraud-based so as to be governed by a six-year statute of limitations, accrued in 2004, when plaintiff suffered damages, regardless of the timeliness of the fraud claims. As such, her action for breach of fiduciary duty, commenced in 2010, may be timely if it is proven to be fraud-based. The question becomes: does a breach of fiduciary duty claim, grounded on a validly alleged, though untimely, cause of action for fraud, allow for the application of a six-year statute of limitations, rather than a three-year statute?

Fraudulent misrepresentation requires a showing of a "representation of a material existing fact, falsity, *scienter*, deception and injury [internal quotation marks and citation omitted]." *New York University v Continental Insurance Company*, 87 NY2d 308, 318 (1995); *see also Serino v Lipper*, 47 AD3d 70 (1st Dept 2007). Each of these elements must be pled with particularity. CPLR 3016 (b); *Papp v Debbane*, 16 AD3d 128 (1st Dept 2005); *LaSalle National Bank v Ernst & Young LLP*, 285 AD2d 101 (1st Dept 2001).

Plaintiff, in her proposed amended complaint, alleges that defendant committed fraud by representing to her in the years from 1993 to 2008 that the policy was paid up, even when he knew that it was not, because he "did not want to admit that his original advice was incorrect" (Amended Complaint, ¶ 24), and that he "intentionally concealed from Plaintiff the fact that the Insurance Policy had lapsed in order to cover up his own wrongdoing and to avoid jeopardizing his relationship with Plaintiff and any future business he may receive from Plaintiff and her family members." *Id.* Thus, plaintiff is alleging *scienter*.

Although plaintiff does not offer exact dates upon which the alleged misrepresentations were made, the particularity required by CPLR 3016 (b) is here satisfied because "the facts are sufficient to permit a reasonable inference of the alleged conduct [interior quotation marks and citation omitted]." *Sargiss v Magarelli*, 12 NY3d 527, 531 (2009). Therefore, it would be a jury question whether the amount of contacts, and the statements allegedly made to plaintiff to keep her from finding out that the policy had lapsed, were sufficient to allege a claim for fraud; at this point, plaintiff has sufficiently alleged sufficient material misrepresentations to maintain the claim, had it been timely brought.

The upshot of the above discussion is that, had plaintiff brought her fraudulent misrepresentation claim in a timely manner, it would have been a viable cause of action, allied with a breach of fiduciary duty claim. Therefore, the claim for breach of fiduciary duty is governed by a six-year statute of limitations, and, as it accrued in at least 1993, is not barred by the statute of limitations.

B. Equitable Estoppel

Plaintiff maintains that all her claims are timely, as she was allegedly lulled into inaction by defendant's actions after the policy lapsed, and into believing that the policy could be reinstated, even years after the lapse. This court finds that equitable estoppel does not apply.

Equitable estoppel is "rooted in the principle that one may not take advantage of one's own wrongdoing" when "that party's own wrongful concealment has engendered the delay in prosecution." *Matter of Steyer*, 70 NY2d 990, 993 (1988); *see also Simcuski v Saeli,* 44 NY2d 442 (1978). Courts "apply the doctrine of estoppel to prevent an inequitable use of the statute [of limitations] by defendant as a defense." *Arbutina v Bahuleyan*, 75 AD2d 84, 86 (4th Dept 1980).

Thus,

> equitable estoppel will apply "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations. [citations omitted]

Zumpano v Quinn, 6 NY2d 666, 673 (2006). A plaintiff's reliance on the defendant's wrongdoing must be reasonable [*Dombroski v Samaritan Hospital*, 47 AD3d 80 (3d Dept 2007)], and the plaintiff must act with "due diligence" in ascertaining the truth. *Id.* at 83.

This court finds that plaintiff's reliance on defendant's promise to try to have the policy reinstated was unreasonable. She herself admits that defendant did not promise that he could get the policy reinstated because he offered to pay Plaintiff back the premiums she had paid on the policy should he fail. It was not reasonable under these circumstances to refrain from commencing an action against defendant while he allegedly attempted to accomplish a dubious goal. Therefore, equitable estoppel does not apply. Accordingly, it is

ORDERED that defendant Armen Hovakimian's motion to dismiss the complaint, and for a more definite statement is denied; and it is further

ORDERED that plaintiff's cross motion to amend her complaint is granted solely to plead a cause of action for breach of fiduciary duty; and it is further

ORDERED that plaintiff is to efile her amended complaint, as limited, within 10 days of receipt of this order and defendant is directed to serve his answer to the amended complaint, within 10 days of efiling of the amended complaint.

Dated: November 7, 2011

ENTER:

J.S.C.