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| <b>Florio v Penn Mut. Life Ins. Co.</b>                                                                                                                                                                                          |
| 2012 NY Slip Op 31744(U)                                                                                                                                                                                                         |
| June 29, 2012                                                                                                                                                                                                                    |
| Sup Ct, Richmond County                                                                                                                                                                                                          |
| Docket Number: 104265/2011                                                                                                                                                                                                       |
| Judge: Philip G. Minardo                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

FRANCES FLORIO,

Plaintiff(s),

-against-

THE PENN MUTUAL LIFE INSURANCE COMPANY,  
 MICHAEL BRUNO, HORNER, TOWNSEND & KENT,  
 INC., RICHARD PRINZI, and PRINZI AND COMPANY,  
 CPA, PLLC,

Defendant(s).

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 104265/2011

Motion Nos.: 270-001  
 494-002

The following papers numbered 1 to 6 were fully submitted on the 12<sup>th</sup> day of April, 2012.

Papers Numbered

Defendant THE PENN MUTUAL LIFE INSURANCE COMPANY's  
 and Defendant HORNER, TOWNSEND & KENT, INC.'s Motion,  
 pursuant to CPLR 3211(a)(1) and (7), to dismiss Plaintiff FRANCES  
 FLORIO's Amended Verified Complaint, with Exhibits and Supporting  
 Papers \_\_\_\_\_ 1

Plaintiff FRANCES FLORIO's Affirmation in Opposition, dated March 20,  
 2012, with Exhibits and Supporting Papers \_\_\_\_\_ 2

Defendant THE PENN MUTUAL LIFE INSURANCE COMPANY's  
 and Defendant HORNER, TOWNSEND & KENT, INC.'s Memorandum of Law  
 in Further Support of Motion, dated April 2, 2012 \_\_\_\_\_ 3

Defendants RICHARD PRINZI's, and PRINZI AND COMPANY, CPA, PLLC's  
 Notice of Motion to Dismiss, dated February 13, 2012, with Supporting Papers  
 and Exhibits \_\_\_\_\_ 4

Plaintiff FRANCES FLORIO's Affirmation in Opposition, dated March 20, 2012,  
 with Exhibit \_\_\_\_\_ 5

Plaintiff FRANCES FLORIO ("FLORIO") commenced this action against defendants THE PENN MUTUAL LIFE INSURANCE COMPANY ("PENN MUTUAL") and HORNER, TOWNSEND & KENT, INC. ("HTK") alleging breach of contract, fraud, suitability, breach of fiduciary duty, breach of the New York State General Business Law, and violation of the New York Insurance Law. FLORIO has also commenced this action against defendants RICHARD PRINZI and PRINZI and COMPANY CPA, PLLC ("PRINZI") for fraud and an alleged violation of the New York Insurance Law.

FLORIO alleges, among other things, that defendants PENN MUTUAL, HTK, and PRINZI fraudulently induced him to purchase an insurance policy and annuity which he claims were unsuitable for him. PENN MUTUAL, HTK, and PRINZI have each filed motions, pursuant to CPLR 3211, to dismiss FLORIO's Amended Verified Complaint. For the reasons set forth below, the motions to dismiss are granted.

As with any motion to dismiss pursuant to CPLR 3211, FLORIO's Amended Verified Complaint must be afforded a liberal construction, the facts therein must be accepted as true, and FLORIO must be accorded the benefit of every favorable inference (*see Hauff v. Listemann*, 60 AD3d 994 [2009] quoting *Leon v. Martinez*, 84 NY2d 83, 87-88).

FLORIO's claims are primarily based on his allegations that the defendants knew that he would be unable to afford the premiums for the insurance policy and annuity; that the defendants knew beforehand that the products were unsuitable for him; and that the defendants failed to apprise FLORIO

on the penalties for early withdrawals.

FLORIO signed two Account Agreements with defendant HTK which provides for mandatory arbitration in the event of a dispute. Defendant HTK contends that the Account Agreements “provide irrefutable documentary evidence that Plaintiff entered into a valid agreement to arbitrate”. Although FLORIO, a physician, acknowledges that he signed the Account Agreements, he claims that he did not know what the letters “HTK” “meant” and that he should not be bound by the arbitration clause. There is abundant case law which provides that a party will be bound by a written contract whether or not the party understood or read the contract [see, *Scott v. Fields*, 85 AD3d 756 (2011)]. Accordingly, FLORIO’s claims against HTK must be dismissed as the Account Agreements contain a valid arbitration clause which is a “favored method of dispute resolution in New York” (*166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp.*, 78 NY2d 88). Nevertheless, FLORIO’s claims against defendant HTK based on allegations of fraud and breach of contract would also be dismissed in the event that the arbitration provision was found to be invalid.

Although “every contract contains an implied covenant of fair dealing”, FLORIO must establish that the defendants acted in a manner which prevented performance of the contract or deprived FLORIO from the “right to receive the benefits under their agreement” in order to maintain his breach of contract claim [*P.T. & L. Contracting Corp. v. Tratoros Construction, Inc.*, 29 AD3d 763 (2006)]. FLORIO’s Amended Verified Complaint fails to allege any specific actions by any of the defendants which prevented performance of the contract or precluded his right to receive any of the benefits that were bargained for. FLORIO simply states that the defendants failed to act in good faith in selling the products to him although they “explicitly and implicitly agreed” to do so. In addition, FLORIO’s

Affirmation in Opposition sets forth that the defendants failed to inform FLORIO that he would lose his guaranteed return if he withdrew funds from the annuity and that defendants knew that FLORIO had insufficient assets to make the necessary annual required payments. All of these allegations, even if accepted as true, are merely conclusory and are insufficient to support a breach of contract claim. Accordingly, FLORIO's claims for breach of contract are dismissed.

In order to adequately plead an action for fraud, FLORIO is required to establish that (1) that the defendants made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendants, (5) that the representation was made for the purpose of inducing FLORIO to rely upon it, and (6) that FLORIO rightfully did so rely (7) in ignorance of its falsity (8) to FLORIO's injury [see, *Chung v. Wang*, 79 AD3d 693 92010)]. FLORIO contends that "[D]efendants knowingly made false and fraudulent representations to Plaintiff relating to the Policy and Annuity purchased by Plaintiff by advising Plaintiff that said products were suitable for his age, financial status and needs, and that they were the best financial solutions for his financial position". At the time he purchased the investment products from the defendants, FLORIO claimed that his liquid net worth (excluding home) to be \$2,000,000 and that he had an annual income of \$240,000. In addition, FLORIO claimed that his investment experience was "[A]bove average-invests in securities on a frequent basis". Plaintiff also alleges that the "defendants disregarded their client's best interests and sold him down the river so someone could make a large commission".

FLORIO fails to satisfy the requirements to properly assert a fraud cause of action as he neglects to identify a specific material fact which was false and known to be false by the defendants at the time they made the representation to him. FLORIO does not identify the alleged misrepresentations that were

made by the defendants in order to induce FLORIO to purchase the products. Accordingly, FLORIO's claims for fraud are dismissed.

FLORIO presented no opposition to defendants PENN MUTUAL's and HTK's motion to dismiss FLORIO's causes of action for bad faith, breach of fiduciary duty, violation of the General Business Law, violation of New York Insurance Law, and punitive damages. FLORIO also failed to provide any opposition to defendant PRINZI's motion to dismiss FLORIO's claim for breach of fiduciary duty. Accordingly, all of these claims are dismissed.

Accordingly, it is

ORDERED that defendant THE PENN MUTUAL LIFE INSURANCE COMPANY's and defendant HORNER, TOWNSEND & KENT, INC.'s Motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss Plaintiff FRANCES FLORIO's Amended Verified Complaint is granted in its entirety; and it is further

ORDERED that defendants RICHARD PRINZI's, and PRINZI AND COMPANY, CPA, PLLC's Motion to Dismiss, pursuant to CPLR 3211(a) and (7), to dismiss Plaintiff FRANCES FLORIO's Amended Verified Complaint is granted in its entirety

ORDERED that the Clerk enter judgment accordingly.

This shall constitute the decision and order of the Court.

E N T E R,

/s/ Philip G. Minardo  
HON. PHILIP G. MINARDO

Dated: June 29, 2012