SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x

JUDY FRIEDMAN and the BG 2005E ILIT, the BG 2005L ILIT, the BG 2005K ILIT, the BG 2005G ILIT, through their trustee JUDY FRIEDMAN, and the BG 2010C ILIT, the BG 2010B ILIT, the BG 2009 TRUST, through their trustee DAVID BLAU,

Plaintiffs,

Index No: 501268/11

-against-

DECISION AND ORDER

NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION,

Defendant,

x

Recitation as required by CPLR 2219(a), of the papers considered in defendant's motion to dismiss.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1, 2-7
Answering Affidavits.....	
Reply Papers.....	
Memorandum of Law.....	8, 9, 10

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In the instant action, *inter alia*, for a declaratory judgment, defendant moves to dismiss the plaintiffs' amended complaint pursuant to CPLR 3211(a)(2) and (7).

Plaintiffs, the owners of eight (8) life insurance policies issued upon the life of non-party Blanka Grunbaum, each in the amount of one million ($1,000,000) dollars, bring this action against the defendant due to an alleged wrongful lapse of the policies. In their original complaint, plaintiffs alleged in their first and second causes of action that defendants wrongfully lapsed the policies despite all premiums having been paid and without serving the grace notices required by the policies and by law. Plaintiffs allege in their third cause of action that defendants failed to extend Access Plus loans to plaintiffs in violation of the policies or other agreements between the parties and that had the Access Plus loans been offered to plaintiffs the subject policies would not have lapsed. Plaintiffs claim that

defendants failure to offer the Access Plus loans was a material breach of the terms of the insurance agreements. In their amended complaint plaintiffs include a fourth cause of action alleging that defendants violated New York Insurance Law §4224 by offering and extending the Access Plus loans to some policyholders but not others within the same class. The amended complaint seeks a judgment declaring that the policies are in full force and effect, and that defendant is required to reinstate the policies as if they had never lapsed with no gap in coverage; a declaration that the denial of coverage is null and void; a declaration that the plaintiffs are entitled to Access Plus loans; or in the alternative a declaration that the policies are void from inception and judgment against defendant for the amount of premiums paid on the policies together with interest since the date of payment, as well as costs and attorneys fees.

Defendants now move to dismiss the plaintiffs' amended complaint on the grounds that plaintiffs' first, second and third causes of action are moot because it has offered to reinstate the policies as if they never lapsed upon plaintiffs' payment of all back premiums owed. Defendant also moves, in the alternative, to dismiss defendants third cause of action on the grounds that it had no contractual obligation to offer the Access loan program to the plaintiffs as such program was not in existence at the time the policies were issued and nothing in the policy provided for such offering. Lastly, defendant moves to dismiss the plaintiffs' fourth cause of action based upon Insurance Law §4224(a)(1) on the ground that the statute is inapplicable to the Access Plus program as it is an extra-contractual opportunity not subject to the provisions of said statute. Alternatively, defendant seeks dismissal of plaintiffs' fourth cause of action arguing that plaintiffs fail to allege any "unfair discrimination" as required by the statute and that, in any event, the decision to extend the Access Plus program rests entirely within defendant's discretion.

In opposition, plaintiff acknowledges that defendant has offered to restore the policies but argues that their complaint should not be dismissed as moot because defendant has still refused to offer plaintiffs the Access Plus loans. In regard to their third cause of action, plaintiffs argue that the policies were sold based upon a material misrepresentation in that the defendant marketed and sold the policies to plaintiffs with the promise to offer the Access Plus loans and that by wrongfully denying the loans, they are entitled to (1) void the policies and (2) recover damages for the breach, if a judgment is not made declaring that defendant is required to offer the Access Plus loans to plaintiffs. Further, plaintiffs argue that their fourth cause of action should not be dismissed because New York Insurance Law §4224 applies to extra-contractual benefits such as the Access Plus loans and that by extending the loans to some policyholders within the class and denying the loans to others, defendant has violated the statute.

Firstly, in regard to the eight (8) life insurance policies, as defendant has offered to reinstate the policies without any lapse in coverage upon payment of all owed premiums, and plaintiffs have stated in the complaint their willingness to pay the outstanding premiums to

keep such policies in full force and effect, plaintiffs' causes of action seeking a declaration that defendant is required to reinstate the policies, and that any denial of coverage is deemed null and void, is now rendered moot as there is no issue in controversy, defendant having agreed to provide plaintiff with the relief sought in the complaint relating to such policies (*see generally Boyle v Lowe*, 225 AD2d 950 [225 AD2d 950 [3rd Dept 1996]). Upon plaintiffs payment of all premiums due and owing for each of the eight (8) life insurance policies within sixty-one (61) days of the date of this order, defendant shall reinstate/reactivate the life insurance policies as if such policies never lapsed.

As to plaintiffs' third cause of action based upon breach of contract, defendants motion to dismiss is granted pursuant to CPLR 3211(a)(7). Initially, upon a motion to dismiss a cause of action pursuant to CPLR 3211(a)(7) the sole criterion is whether the pleading states a cause of action (*see Guggenheimer v Ginzburg*, 43 NY 2d 268, 275 [1977]). "The pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference..." (*Jacobs v Macy's East, Inc.*, 262 AD2d 607 [2005]). However, "allegation consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." (*Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]). When evidentiary proof is offered on a CPLR 3211(a)(7) motion, the focus of the inquiry turns from whether the complaint states a cause of action to whether the plaintiff actually has one (*see Guggenheimer v Ginzburg*, 43 NY 2d 268, 275 [1977]). If the defendant's documentary evidence establishes that the plaintiff has no cause of action, dismissal is warranted (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]).

In support of its motion, defendant submits a copy of one of the policies, whose terms defendant claims are identical in each of the subject policies [1], to show that the policies do not make any reference to the Access Plus program and that the policies, including any attached riders or endorsements, constitutes the entire contract. Moreover, defendant submits the affidavit of Kathleen Navarro, a Vice President of New York Life Insurance Company, the parent company of defendant, in the life products department, whose area of responsibilities include the Access Plus policy preservation program. Ms. Navarro states in her affidavit that each of the eight (8) life insurance policies were issued on July 28, 2005, prior to the existence of Access Plus; such program having been offered for the first time during the week of December 25, 2006.

The evidence establishes that defendant did not have a contractual obligation under the policies or by other agreement requiring it to offer plaintiffs loans under the Access Plus

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[1] Plaintiffs do not dispute defendant's assertion that the terms of each of the eight (8) life insurance policies herein are identical.

program; a program, defendant demonstrates, that did not event exist until some 17 months after the policies were issued. Moreover, although plaintiffs claim that defendant "presented a material misrepresentation - that when eligible the premiums for the policies would be paid through the Access Plus loans - and that representation was false", the argument is supported only by conclusory allegations contained in their counsel's memorandum of law *(see Marks v Radmin,* 163 AD2d 368 [2d Dept 1990] and without any specific factual allegations made in the pleadings. A cause of action based upon misrepresentation must be pleaded with particularity (see CPLR 3016[b]) and will be dismissed if not supported by specific and detailed allegations of fact in their pleadings (see CPLR 3016[b]; *Brown v State Farm Ins. Co.*, 237 AD2d 476 [2d Dept 1997]), *Callas v. Eisenberg*, 192 A.D.2d 349, 350 [1st Dept 1993]). In light thereof, plaintiffs' third cause of action is dismissed pursuant to CPLR 3211(a)(7).

Lastly, plaintiffs fail to state a cause of action against defendant under Insurance Law §4224(a)(1). The claim under Insurance Law §4224(a)(1), which prohibits an insurer from unfairly discriminating between individuals of the same class in the amount of premiums charged for life insurance or "in any of the terms and conditions thereof", must fail because there is no express private right of action under Insurance Law §4224, and none can be implied (*see Sparkes v Morrison & Foerster Long-Term Disability Ins. Plan*, 129 F. Supp. 2d 182 [NDNY 2001]).

In view of the above, defendant's motion to dismiss plaintiffs' amended complaint is granted in its entirety.

This constitutes the decision/order of the court.

Dated: May 21, 2014

Enter,

Karen B. Rothenberg
J.S.C.