Barone v Haskins
2014 NY Slip Op 33911(U)
August 14, 2014
Supreme Court, Erie County
Docket Number: 801466-2013
Judge: Henry J. Nowak

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

ANTONIA BARONE,

Plaintiff,

vs.

JAMES D. HASKINS,
COMMONWEALTH EQUITY SERVICES, INC.
d/b/a COMMONWEALTH FINANCIAL NETWORK,
LINCOLN NATIONAL CORPORATION,
LINCOLN LIFE AND ANNUITY COMPANY OF
NEW YORK, and
LINCOLN FINANCIAL DISTRIBUTORS, INC.

Defendants.

AMENDED

DECISION AND ORDER

INDEX NO. 801466-2013

HON. HENRY NOWAK, J.S.C.
Justice Presiding

Defendants move to dismiss plaintiff's complaint, which seeks monetary damages for causes of action based in fraud, negligence, breach of contract, breach of fiduciary duty, and an alleged violation of New York State General Business Law § 349. Defendants James D. Haskins and Commonwealth Equity Services, Inc. d/b/a Commonwealth Financial Network move to dismiss all of plaintiff's causes of action or, in the alternative, seek an order compelling arbitration pursuant to CPLR § 3503 (a) and §§ 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 1, et. seq. Defendants Lincoln National Corporation, Lincoln Life and Annuity Company of New York, and Lincoln Financial Distributors, Inc. (collectively "Lincoln defendants") move to

dismiss the complaint against Lincoln National Corporation for lack of personal jurisdiction; and against all Lincoln defendants based upon applicable statutes of limitations and for failure to state a cause of action.

In deciding this motion, the court considered the following documents: the October 23, 2013 Notice of Motion, with affirmations of Janene Marasciullo, Esq. and Rebecca A. Borgese, Esq., with attachments thereto, in support of the Lincoln defendants' motion to dismiss; the October 23, 2013 Notice of Motion and affidavit of James D. Haskins, with exhibits attached, in support of defendants Haskins and Commonwealth's motion to dismiss; the affirmation of Joanne A. Schultz, Esq., filed on December 31, 2013, with exhibits attached thereto, in opposition to defendants Haskins and Commonwealth's motion to dismiss; the affirmation of Joanne A. Schultz, filed on December 31, 2013, with exhibits attached, in opposition to the Lincoln defendants' motion to dismiss; the January 7, 2014 affirmations of Janene Marasciullo, Esq. and Rebecca A. Borgese, Esq., with exhibits attached thereto, in reply to plaintiff's papers in opposition; the January 15, 2014 supplemental authority submitted by Janene Marasciullo, Esq., with exhibits attached thereto, in further support of Lincoln's motion; and the February 5, 2014 correspondence submitted by Joanne A. Schultz, Esq., in further opposition to defendants Haskins and Commonwealth's motion.

Defendants' Motions to Dismiss on Statute of Limitations Grounds

Plaintiff alleges causes of action based in fraud, negligence, breach of contract, breach of fiduciary duty and a violation of New York General Business Law § 349. The claims of fraud, negligence, breach of fiduciary duty and violation of the General Business Law are governed by a three year statute of limitations. It is undisputed that plaintiff's relationship with defendants Haskins and Commonwealth began with the signing of agreements in 2007. Defendants assert

that all causes of action accrued in 2007 at the commencement of the relationship between plaintiff and the Haskins and Commonwealth defendants, thereby barring the above causes of action as of 2010, three years before the commencement of this action in 2013.

Plaintiff does not dispute that the contracts at issue were signed in 2007. However, plaintiff asserts that the causes of action did not accrue until actual financial losses were incurred. In support of her position, plaintiff cites *Kronos, Inc. v AVX Corporation, et al.*, 81 NY2d 90, 94 (1993), where the court held:

> [A]s a general proposition, a tort cause of action cannot accrue until an injury is sustained. That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual. The statute of limitations does not run until there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint.

Plaintiff asserts that damages were sustained in 2012 when the plaintiff's investments with Commonwealth were allegedly completely depleted. Although a reading of all affidavits and documents submitted therewith imply that financial injury occurred prior to 2012, there is no evidence in the record specifically establishing a date or dates that actual financial injury was sustained. Likewise, the complaint is silent as to the dates of injury. In deciding a pre-answer motion to dismiss, the court must consider the complaint in a light most favorable to the plaintiff to determine whether a cause of action exists. In the absence of undisputed facts concerning the date of injury and accrual, defendants' motions to dismiss on statute of limitations grounds are denied, without prejudice.

Request for Arbitration by Defendants Haskins and Commonwealth

Defendants Haskins and Commonwealth assert that plaintiff's complaint should be dismissed on the basis that the action was brought after the expiration of the applicable statutes of limitations. In the alternative, defendants seek a stay of this action with a referral of the matter to binding arbitration, as set forth in the New Account Contract executed by plaintiff on October 29, 2007 and by defendant Haskins on November 2, 2007. The contract executed by plaintiff and defendant Haskins contains an "Arbitration Disclosure and Agreement" which is the subject of this motion.

Plaintiff does not dispute having signed the contract with defendant Haskins. Rather, she asserts that she was not given an opportunity to review the contract, did not receive an explanation of what arbitration agreement entails, was not advised to seek a separate legal opinion, and did not understand that she was giving up the opportunity to have this matter decided by a jury trial.

Plaintiff does not allege that she was fraudulently induced into executing the contract and concomitant arbitration agreement. Defendants Haskins and Commonwealth cite numerous cases, both state and federal, in support of the requirement that this matter be stayed and referred to binding arbitration pursuant to the contract.

In opposition, plaintiff cites *Matter of O'Donnell v Arrow Elecs*, 294 AD2d 581 (2d Dept 2002) for the proposition that the issue of whether a valid arbitration agreement exists is for the court, and not an arbitrator, to decide. However, in *O'Donnell*, the issue presented was whether petitioner was a party to the arbitration agreement so as to be bound by its terms. The *O'Donnell* court found that the petitioner was not a party to the arbitration agreement, and therefore, it

would be inappropriate to refer the matter to arbitration. Plaintiff also cites *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 10 AD3d 671 (2d Dept 2004). However, the court in *God's Battalion* found that an arbitration agreement was enforceable between the parties even though the agreement was unsigned, because the parties operated under its terms. The remaining New York State cases cited by the plaintiff, *Mionis v Bank Julius Baer and Co.*, 301 AD2d 104 (1st Dept 2002), and *Matter of Waldron*, 61 NY2d 181 (1984), found that arbitration agreements were unenforceable because the parties opposing arbitration were not parties to the agreement.

Plaintiff next seeks to avoid arbitration by invoking General Business Law § 399-c, which prohibits the use of mandatory arbitration clauses in contracts for the sale or purchase of consumer goods, citing *Scalp and Blade, Inc. v Advest, Inc.*, 281 AD2d 882 (4th Dept 2001). In that case, the Appellate Division rejected an attempt to limit General Business Law § 349 to situations involving the sale consumer goods, finding that it applies to claims against investment advisors and security brokers. However, the court did not address General Business Law § 399-c. The plain language of General Business Law § 349, which prohibits deceptive acts and practices, provides that it applies to "any business, trade or commerce or in the furnishing of any services in this state." General Business Law § 399-c is far more narrow, applying only to contracts for the sale or purchase of consumer goods. Plaintiff asserts no authority in support of her position that § 399-c applies to the type of financial transactions at issue in this lawsuit, and therefore, the court declines to so extend it.

Finally, plaintiff alleges that the costs of arbitration create an unreasonable barrier and effectively deny her access to bring her claims, citing *Greentree Financial Corp. v Randolph*,

120 SCt 513 (2000). In reversing a decision of the 11th Circuit Court of Appeals, the Supreme Court in *Greentree* upheld the notion that a plaintiff may make a showing of a prohibited expense of arbitration to justify bringing an action in a local court, but in light of the "liberal federal policy favoring arbitration agreements," plaintiff simply cannot claim that the risk of additional costs and fees justifies invalidation of an arbitration agreement (*id.* at 522).

The Supreme Court did not decide how "detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence" (*id.* at 522-23). Accordingly, various federal district and circuit courts analyzed this issue, as explained by the District Court of the Eastern District of New York in *EEOC v Rappaport, Hertz, Cherson and Rosenthal, P.C.*, 448 F. Supp. 2d 458, 462-464 (EDNY 2006). That court ultimately focused "on whether the cost associated with arbitration are prohibitively expensive without looking at the financial circumstances of each plaintiff" (*id.* at 463).

The New York State Court of Appeals also has addressed the issue of a litigant's financial inability to engage in arbitration in *Matter of Brady v Williams Capital Group, L.P.*, 14 NY3d 359 (2010). In *Brady*, the court acknowledged both the strong state policy favoring arbitration agreements, as well as the "equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum" (*id.* at 467). The court held that the issue of a litigant's financial ability to engage in the arbitration forum is to be resolved on a case by case basis considering, at a minimum, the following questions: (1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and

litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum (*id.*).

Plaintiff has raised the issue of her financial inability to engage in the arbitral forum, but the record is devoid of any of the facts set forth by the *Brady* court. As a result, this court will schedule a hearing, to offer proof regarding the cost sharing provisions of the FINRA arbitration process, the costs associated with the arbitration of this matter in comparison to costs associated with litigation in this court; whether the plaintiff can pay the costs associated with the arbitration process; and whether the cost differential between arbitration and litigation in the Supreme Court is so substantial as to deter the bringing of this claim in the arbitral forum. The court reserves decision on this issue until that hearing is completed.

Motion to Dismiss for Failure to State a Cause of Action

Defendants claim that plaintiff's cause of action for fraud must be dismissed, for failure to plead with required particularity pursuant to CPLR § 3016 (b). The New York Court of Appeals has held:

> The purpose of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that section 3016 (b) should not be so strictly interpreted "as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'." Thus, where concrete facts "are peculiarly within the knowledge of the party" charged with the fraud , it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings.

(*Pludeman v Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 491-492 [2008] [internal citations omitted]).

The Lincoln defendants also assert that defendant Haskins was not their employee or agent, and that they had no contact with plaintiff, making plaintiff's cause of action for fraud

impossible to prove against them. However, on a motion to dismiss, plaintiff's claims are taken as true, and plaintiff has asserted that all defendants committed fraud. If the court was to convert defendants' motion to a motion for summary judgment, "the parties are entitled to notice that the motion will be accorded summary judgment treatment" (*Nowacki v Becker*, 71 AD3d 1496, 1497 [4th Dept 2010]). No such notice has been given. At this pre-answer stage of the litigation, the court declines to dismiss plaintiff's cause of action for fraud.

Motion to Dismiss for Lack of Jurisdiction

Defendant Lincoln National Corporation moves to dismiss the complaint based upon lack of personal jurisdiction. This court agrees that plaintiff's complaint does not allege any facts that Lincoln National Corporation, a non-domiciliary, engaged in any business in New York. Accordingly, plaintiff has failed to make a *prima facie* showing that personal jurisdiction exists pursuant to CPLR 302 (a) (1) (*see Constantine v Stella Maris Ins Co, Ltd*, 97 AD3d 1129 [4th Dept 2012). Simply alleging that defendant Lincoln National Corporation is part of the "Lincoln Family" is insufficient; a "finding of agency for jurisdictional purposes will not be inferred from the mere existence of a parent-subsidiary relationship" (*Rotoli v Domtar, Inc*, 224 AD2d 939, 940 [4th Dept1996]). Therefore the motion to dismiss by defendant Lincoln National Corporation for lack of personal jurisdiction is granted.

This decision constitutes the order of this Court.

ENTER:

HON. HENRY NOWAK, J.S.C.

GRANTED

AUG 14 2014

BY _____
ELAINE J. XENOS
COURT CLERK