

<b>Riccio v Genworth Fin.</b>
2015 NY Slip Op 31235(U)
May 8, 2015
Supreme Court, Nassau County
Docket Number: 011790/2014
Judge: Julianne T. Capetola
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At a Term of the Supreme Court  
of the State of New York held in  
and for the County of Nassau,  
100 Supreme Court Drive,  
Mineola, New York, on the 8<sup>th</sup>  
day of May 2015

P R E S E N T:

HON. JULIANNE T. CAPETOLA  
Acting Justice of the Supreme Court

-----X

MARY P. RICCIO,  
Plaintiff,

**DECISION AND  
ORDER ON MOTION**  
Index No: 011790/2014  
Motion Sequence: 001

- against -

GENWORTH FINANCIAL,  
GENWORTH LIFE & ANNUITY,  
GENWORTH LIFE,  
GENWORTH LIFE OF NEW YORK,  
CAPITAL ONE, NA,  
PATRICIA A. RICCIO  
Defendant.

-----X

The following papers were read on this Motion:

1. Notice of Motion and Supporting Documents filed by  
Defendants Genworth Financial, Genworth Life & Annuity, Genworth Life, and  
Genworth Life of New York
2. Plaintiff's Affirmation in Opposition

Defendants Genworth Financial, Genworth Life & Annuity, Genworth Life, and  
Genworth Life of New York (hereinafter collectively referred to as "Genworth  
Defendants") in this action have moved by notice of motion for an order pursuant to  
CPLR §3211(a)(7) dismissing the complaint against them. Plaintiff has opposed this  
motion. No responsive papers were received remaining defendants. The motion was  
deemed submitted on April 27, 2015.

In determining a motion for dismissal pursuant to CPLR §3211(a)(7), “the court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated”. *Board of Education v. County of Westchester*, 282 A.D.2d 561 (2d. Dept. 2001). A motion to dismiss for failure to state a cause of action “cannot be sustained simply by showing that facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that material facts are only argumentatively averred. The pleading may be deficient in technical language or in logical statement, but, as against a demurrer or a motion of this character at the trial, the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment”. *Kain v. Larkin*, 141 N.Y. 144 (N.Y.C.A. 1894).

Plaintiff in the instant matter has alleged four causes of action, to wit, a cause of action for conversion against Defendant Patricia A. Riccio, a cause of action for unjust enrichment against Defendant Patricia A. Riccio, a cause of action for breach of fiduciary duty against Defendants Genworth and Defendant Capital One NA, and a cause of action for negligence against Defendants Genworth and Defendant Capital One NA.

As a preliminary matter, inasmuch as the first two causes of action are not alleged as against Defendants Genworth, the complaint clearly must be dismissed against Defendants Genworth as it relates to the first and second causes of action. Plaintiff does not dispute this in their opposition papers.

Plaintiff’s third cause of action for breach of fiduciary duty against Defendants Genworth first requires some showing by Plaintiff of the existence of a fiduciary duty between Defendants Genworth and Plaintiff. “The law has been settled in New York for more than a century that there is no fiduciary relationship between a life insurer and its policyholder ( *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421 [1888]; *Rabouin v Metropolitan Life Ins. Co.*, 182 Misc.2d 632, 699 N.Y.S.2d 655 [Sup Ct, NY County 1999], *affd* 282 A.D.2d 381 [1st Dept 2001]). Rather, the relationship between an insurer and insured is contractual, and the rights and duties of the contracting parties are determined by the terms of the insurance policy”. *Wilmington Trust Co. v. Metropolitan Life Ins. Co.*, 2008 N.Y. Slip Op. 32239 (N.Y. Sup. Ct. 2008). Defendants Genworth, as stated in the complaint, are a life insurance company and annuity company operating in the state of New York.

Plaintiff argues, in opposition as it relates to the cause of action for breach of fiduciary duty, that Defendants Genworth became aware of alleged fraudulent activity related to Plaintiff's account and failed to put a stop to ongoing fraudulent withdrawals from the account, however the wrongdoing and/or inaction Plaintiff alleges against Defendants Genworth does not address the threshold standard of the existence of a fiduciary duty. Plaintiff has failed to demonstrate the existence of such a duty, regardless of the repercussions of whatever action or inaction undertaken by Defendants Genworth. Plaintiff's remedies lie within the contract. Accordingly, the third cause of action must be dismissed against Defendants Genworth as no fiduciary duty existed between the parties.

With respect to the fourth cause of action for negligence, "To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of duty owed by the defendant to the plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach". *Bluth v. Bias Yaakov Academy for Girls*, 123 A.D.3d 866, (2d. Dept. 2014).

Plaintiff in the instant matter must first demonstrate the existence of a duty owed by, in the instant matter, Defendants Genworth, to Plaintiff. As discussed above, the relationship between an insurer and an insured is strictly contractual. *Wilminton Trust, supra*. Inasmuch as the Plaintiff has only shown that Defendants Genworth had a duty to comply with the terms of their contractual relationship as insurer and insured, Plaintiff has failed to sufficiently demonstrate the existence of a duty recognizable in tort to sustain a cause of action for negligence against Defendants Genworth. *See, Freeman v. MBL Life Assur. Corp.*, 60 F.Supp.2d 269 (S.D.N.Y. 1999).

Plaintiff has argued in opposition simply by outlining the standards for consideration of a motion to dismiss pursuant to CPLR §3211(a)(7). At no time in their papers, or the underlying complaint, does Plaintiff provide any statement or evidence to support their allegation that a duty cognizable in tort existed between the parties. Accordingly, the fourth cause of action must be dismissed as against Defendants Genworth as Plaintiff has failed to demonstrate the existence of a duty between the parties.

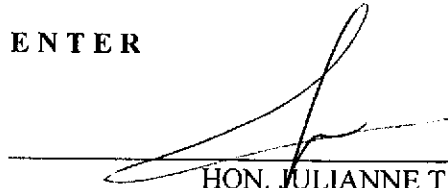
In accordance with the foregoing, it is hereby:

ORDERED, that the motion of Defendants Genworth is hereby granted, and the complaint as against Defendants Genworth Financial, Genworth Life & Annuity, Genworth Life, and Genworth Life of New York is hereby dismissed.

This constitutes the decision and order of the Court.

Dated: 5/8/15

ENTER

  
\_\_\_\_\_  
HON. JULIANNE T. CAPETOLA  
A.J.S.C.

Check applicable box:

**ENTERED**

\_\_\_\_\_ Order mailed on \_\_\_\_\_ and to whom mailed \_\_\_\_\_  
MAY 11 2015

\_\_\_\_\_ Order received in Court on \_\_\_\_\_ and to whom given \_\_\_\_\_  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

Drinker Biddle & Reath, LLP  
1177 Avenue of the Americas, 41<sup>st</sup> Floor  
New York, NY 10036-2714