

Riccio v Genworth Fin.
2016 NY Slip Op 32832(U)
August 3, 2016
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 3rd day of August 2016

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PRESENT:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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MARY P. RICCIO,
Plaintiff,

**DECISION AND
ORDER ON MOTION**
Index No: 011790/2014
Motion Sequence: 005

- against -

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

Defendant.

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The following papers were read on this Motion:
Plaintiff's Notice of Motion and Supporting Documents
Defendants Genworth Financial, Genworth Life & Annuity, Genworth Life, and
Genworth Life of New York's Affirmation in Opposition
Plaintiff's Reply Affirmation

Plaintiff has moved by notice of motion for an order granting leave to amend the complaint pursuant to CPLR §3025(b), and to renew/reargue this Court's prior Decision and Order on Motion dated May 8, 2015 and upon renewal/reargument denying the motion by Defendants Genworth Financial, Genworth Life & Annuity, Genworth Life, and Genworth Life of New York (hereinafter collectively referred to as "Genworth Defendants") to dismiss pursuant to CPLR §3211(a)(7). Genworth Defendants have opposed the motion, Plaintiff submitted reply papers and the motion was deemed submitted on July 22, 2016.

"As amended, CPLR 2221 now provides, among other things, that a motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would

change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination' (CPLR 2221[e] [2])". *Greene v. New York City Housing Authority*, 283 A.D.2d 458 (2d. Dept. 2001).

Pursuant to CPLR §3025(b), such "leave shall be freely given upon such terms as may be just". Inasmuch as this case remains at a preliminary stage and discovery has not yet commenced, there is clearly no prejudice to Genworth Defendants to permit the proposed amended complaint at this juncture.

In the instant matter, Plaintiff, through new counsel, argues that the matters of fact newly included in the instant motion papers and proposed amended complaint were not offered in the prior complaint or in the prior motion as Plaintiff failed to provide certain information to counsel which Plaintiff attributes to her advanced age of 78 years, her lack of sophistication and health, financial and family problems resulting in her lack of awareness of the significance of the newly presented facts at the time of the prior complaint and prior motion.

Genworth Defendants argue in opposition that this information was available at the time of the prior complaint and motion and simply not offered, and that, in any event, the proposed amended complaint remains deficient and, pursuant to this Court's May 8, 2015 order, would require dismissal on its face pursuant to CPLR §3211(a)(7).

It is clear from Plaintiff's circumstances that a reasonable excuse has been proffered for Plaintiff's failure to include the newly alleged facts in her prior motion papers and complaint and this Court will permit renewal with respect to the May 8, 2015 Decision and Order on Motion.

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 multiple 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. Plaintiff has added causes of action for breach of contract, gross negligence/willful misconduct, and violation of GBL §349.

With regard to the previously alleged cause of action for breach of fiduciary duty against Defendants Genworth, as previously stated, "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], *aff'd* 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). In their proposed amended complaint, and as argued in the instant moving papers, Plaintiff has now set forth sufficient allegations such that this cause of action is viable and shall not be dismissed pursuant to CPLR §3211(a)(7).

With respect to the previously alleged 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). In the proposed amended complaint and the instant motion papers Plaintiff has set forth sufficient allegations such that the complaint remains viable as to this cause of action.

As it relates to the remaining causes of action, the proposed amended complaint has set forth viable causes of action such that sufficient issues have been raised to survive summary dismissal.

It must also be noted that no opposition was received from either Defendant Capital One, N.A. nor from Defendant Patricia A. Riccio.


In accordance with the foregoing, it is hereby:

ORDERED, that the motion of is hereby granted in its entirety and, accordingly, Plaintiff is granted leave to serve the proposed amended complaint pursuant to CPLR §3025(b). Additionally, inasmuch as the case has remained in a preliminary stage for an extended period of time, this matter is hereby scheduled for a preliminary conference on **September 13, 2016 at 9:30 a.m.** All counsel shall appear in the **preliminary conference part at that time.**

Plaintiff shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

Dated: August 3RD, 2016 ^{ENTER}



HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED
AUG 10 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE