

**Roumi v Guardian Life Ins. Co. of Am.**

2018 NY Slip Op 33987(U)

April 27, 2018

Supreme Court, Kings County

Docket Number: 517655/2016

Judge: Dawn M. Jimenez-Salta

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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27<sup>th</sup> day of April, 2018.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,  
Justice.

-----X  
NESSIM ROUMI and CLAUDINE ROUMI,

Plaintiffs,

- against -

GUARDIAN LIFE INSURANCE COMPANY OF AMERICA  
and ARON ZELCER,

Defendants.  
-----X

**DECISION/ORDER**

Index No. 517655/16

Mot. Seq. No. 2-4

Recitation, as required by *CPLR 2219 (a)*, of the papers considered in the review of:

- 1) Motion, Dated February 8, 2017, of Defendants Guardian Life Insurance Company of America and Aron Zelcer (“Defendants”) to Dismiss the Amended Complaint of Plaintiffs Nessim Roumi and Claudine Roumi (“Plaintiffs”), Dated January 19, 2017 (the “First Amended Complaint”), as Time Barred by the Statute of Limitations Pursuant to CPLR 3211 (a) (5) and for Failure to State a Cause of Action Pursuant to CPLR 3211 (a) (7), together with the supporting Memorandum of Law.
- 2) Plaintiffs’ Memorandum of Law in Opposition, Undated but Filed on March 13, 2017 (the “Memorandum in Opposition”).
- 3) Defendants’ Reply Memorandum of Law, Dated March 31, 2017.
- 4) Plaintiffs’ Motion, Dated January 18, 2018, for Leave Pursuant to CPLR 3025 (b) to File and Serve Their Proposed Second Amended Complaint, Dated January 18, 2018 (the “Second Amended Complaint”).
- 5) Defendants’ Cross Motion, Dated February 7, 2018, for an Order Dismissing the First Amended Complaint or, to the Extent Permitted to Be Filed and Served, the Proposed Second Amended Complaint, and for an Order Pursuant to CPLR 3024 (b) Striking Exhibits C, G, H, J, K, and L to the First Amended Complaint or, to the Extent Permitted to Be Filed and Served, the Proposed Second Amended Complaint, and Further Striking any References Therein to Such Exhibits, together with the accompanying Memorandum of Law in Support of Defendants’ Cross Motion and in Opposition to Plaintiffs’ Motion.

- 6) Plaintiffs’ Reply Memorandum of Law, Dated February 13, 2018, in Support of Their Motion and in Opposition to Defendants’ Cross Motion, together with Affirmation of Plaintiffs’ Co-Counsel.

Papers Considered:

NYSCEF No.:

Notice of Motion/Cross Motion, Affirmations,  
Memorandum of Law, and Exhibits Annexed .....

Defendants 27,  
28-32, 33  
Plaintiffs 55-75  
Defendants 78, 79,  
80-86

Memorandum of Law in Opposition and  
Exhibits Annexed .....

Plaintiffs 37-39, 40-42

Reply Memorandum of Law, Affirmations, and  
Exhibit Annexed .....

Defendants 43  
Plaintiffs 88-92, 93

***Facts and Allegations***<sup>1</sup>

This action concerns two life-insurance policies issued by Defendant Guardian Life Insurance Company of America (“Guardian”). On October 6, 2010, Guardian issued to Plaintiff Nessim Roumi (“Nessim”), a trained physician who was then 60 years old, Policy No. xxx1132 in the face amount of \$1 million (the “Nessim Policy”). Earlier in the same year, May 12, 2010, Guardian issued to Plaintiff Claudine Roumi (“Claudine”), a homemaker who was then 55 years old, Policy No. xxx3270 in the face amount of \$1.1 million (the “Claudine Policy”). Prior to the issuance of his or her policy, each Plaintiff signed a separate application for insurance and underwent a medical examination.

Nessim asserts that he purchased his policy based on the representations made to him by Guardian’s insurance salesman, Defendant Aron Zelcer (“Zelcer”), that, in consideration of his surrender to Guardian of his preexisting life-insurance policies with other insurers, his policy would be “premium-free,” that is, he would never be required to pay any premium under his Guardian policy. Nessim further asserts that on May 10, 2011 (or approximately eight months after his Policy was issued), he paid Guardian \$118,000 based on Zelcer’s representation that such payment would be used to make a guaranteed and refundable investment under a rider to his Policy. In fact, the Nessim Policy, as delivered to him, explicitly requires payment of annual premiums, and the \$118,000 investment was applied towards the then-outstanding premiums thereunder.

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<sup>1</sup> The background section is based on Plaintiffs’ allegations in their proposed Second Amended Complaint (NYSCEF #57).

Turning to the other policy at issue, Claudine asserts that she purchased her policy, based on the representations made to her by Zelcer that, in consideration of her surrender of her then-existing life-insurance policy with Guardian in the face amount of \$500,000, and in further consideration of her making to Guardian three annual payments of \$75,000 each and another payment of \$28,545, she would obtain a \$1.1 million “premium-free” policy from Guardian. In fact, the Claudine Policy, as delivered to her, explicitly requires payment of annual premiums.

The Nessim Policy and Claudine Policy (the “Policies”) have remained in force. Guardian denied Plaintiffs’ prior requests to rescind the Policies.

On October 6, 2016, Plaintiffs commenced the instant action by filing the summons and complaint with the Kings County Clerk. The operative pleading for purposes of this Decision/Order is the proposed Second Amended Complaint, as more fully set forth in the margin.<sup>2</sup> The proposed Second Amended Complaint, after making general allegations regarding the parties, their status and relationship, alleges four causes of action; namely, violation of Insurance Law §§ 2123 and 4226 (first cause of action against each Defendant), breach of fiduciary duty (second cause of action against each Defendant), fraud (third cause of action solely against Zelcer), and aiding and abetting fraud (fourth cause of action solely against Guardian). All of the causes of action are based on the underlying premise that the Policies were not the premium-free investments as Zelcer allegedly misrepresented to Plaintiffs, that he allegedly failed to deliver to Plaintiffs the Policies or illustrations of payments, and that he allegedly forged Plaintiffs’ signatures on the policy receipts. Plaintiffs seek to recover at least \$1.6 million in compensatory damages, plus unspecified punitive damages.

Neither the proposed Second Amended Complaint nor either of its predecessors (*i.e.*, the original complaint and the First Amended Complaint) is verified by either Plaintiffs or their counsel. Plaintiffs have submitted no affidavits in support of their motion or in opposition to Defendants’ motion or cross motion. Plaintiffs’ allegations are conveyed solely by their counsel who lack any first-hand knowledge of the underlying facts.

Defendants move to dismiss this action, asserting initially that Plaintiffs’ claims are time-barred under the applicable statutes of limitations under CPLR 3211 (a) (5) and fail to set forth a cause of action under CPLR 3211 (a) (7). Plaintiffs, in response, move for leave to serve the proposed Second Amended Complaint. Defendants, in reply, cross-move to dismiss this action, irrespective of whether it is pleaded by way of the First Amended Complaint or the proposed Second Amended Complaint, and further for an order striking certain exhibits to the complaint.

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<sup>2</sup> After Plaintiffs amended their original complaint, Defendants moved to dismiss it, whereas Plaintiffs moved for leave to serve the proposed Second Amended Complaint. Defendants objected and cross-moved for, inter alia, dismissal of the proposed Second Amended Complaint on the assumption that leave to amend all or part of the proposed Second Amended Complaint would be granted. As Defendants’ cross motion is broadly drafted to encompass a request for dismissal of all or part of the proposed Second Amended Complaint, the Court will treat the proposed Second Amended Complaint as the operative pleading and will apply the more strict standard of review under CPLR 3211 (a), rather than the less exacting standard of review under CPLR 3025 (b). Since, as explained herein, the proposed Second Amended Complaint fails to meet the more strict standard of review under CPLR 3211 (a), it likewise fails to meet the less exacting standard of review under CPLR 3025 (b).

## DISCUSSION

### ***Insurance Law §§ 2123 and 4226 (First Cause of Action Against Each Defendant)***

Insurance Law §§ 2123 and 4226 prohibit misrepresentations by insurance agents and insurance companies, respectively, in connection with policy issuance. CPLR 214 (2), in relevant part, imposes a three year statute of limitations on “an action to recover upon a liability . . . imposed by statute.” “As a general principle, the statute of limitations begins to run when a cause of action accrues (*see* CPLR 203 [a]), that is, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court” (*County of Suffolk v Suburban Hous. Dev. & Research, Inc.*, \_\_\_ AD3d \_\_\_, 2018 NY Slip Op 02311, \*2 [2d Dept 2018] [internal quotation marks omitted]).

In this case, the obligation to provide the materials required by Insurance Law §§ 2123 and 4226 arose, and therefore accrued, before October 6, 2010 as to the Nessim Policy and before May 12, 2010 as to the Claudine Policy.

An action is commenced when the summons with notice or the summons and complaint is filed with the County Clerk (*see* CPLR 304). The summons and the original complaint in this action were filed on October 6, 2016. Inasmuch as more than three years have elapsed between the time that this cause of action accrued and this action was commenced, the first cause of action which asserts a claim under Insurance Law §§ 2123 and 4226 is time barred by the applicable statute of limitations and must be dismissed (*see Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1047 [2d Dept 2010]; *Dolce v Northwestern Mut. Life Ins. Co.*, 272 AD2d 432 [2d Dept 2000], *lv denied* 95 NY2d 761 [2000]; *but see Catanzano v Warren Rosen & Co.*, 19 AD3d 250 [1st Dept 2005]).

### ***Breach of Fiduciary Duty (Second Cause of Action Against Each Defendant)***

Plaintiffs allege (in ¶ 78 of the proposed Second Amended Complaint) that Defendants “owed a duty to Plaintiffs to act responsibly and [in] Plaintiffs’ best interests” because they have “undertaken to advise Plaintiffs as to life insurance.” The established law is to the contrary, however, because the relationship between a life-insurance company and a policyholder is generally one in contract – no fiduciary relationship exists between a life-insurance company and its policyholder (*see Uhlman v New York Life Ins. Co.*, 109 NY 421, 429 [1888]; *Rabouin v Metropolitan Life Ins. Co.*, 182 Misc 2d 632, 634 [Sup Ct, NY County 1999], *affd without opinion* 282 AD2d 381 [1st Dept 2001]). Inasmuch as no fiduciary relationship existed between Plaintiffs and Guardian, the second cause of action as against Guardian fails to state a claim on which relief can be granted under CPLR 3211 (a) (7) and must be dismissed.

Nor does the purchase of an insurance policy from an agent or broker give rise to a fiduciary relationship (*see Paull v First UNUM Life Ins. Co.*, 295 AD2d 982, 984 [4th Dept 2002]). An insurance agent has the obligation to obtain the coverage requested by the customer within a reasonable period of time or to inform the customer of the agent’s inability to obtain such coverage (*see Barco Auto Leasing Corp. v Montano*, 215 AD2d 617, 618 [2d Dept 1995]). As the relationship between Plaintiffs and Zelcer was one of

agent-customer, a fiduciary relationship did not exist. Therefore, the second cause of action as against Zelcer fails to state a claim on which relief can be granted under CPLR 3211 (a) (7) and must be dismissed.

Even if one were to assume that a fiduciary relationship did exist between Plaintiffs and Zelcer (or between Plaintiffs and Guardian), a cause of action for breach of that fiduciary duty would be barred by the applicable statute of limitations. The statute of limitations for a cause of action for breach of fiduciary duty depends on the nature of relief requested. If a plaintiff alleges an *equitable* claim, the applicable statute of limitation is six years (*see* CPLR 213 [1]; *Loengard v Santa Fe Indus., Inc.*, 70 NY2d 262, 266 [1987]). If, on the other hand, a plaintiff seeks *legal* relief or money damages, the applicable statute of limitations is three years (*see* CPLR 214 [4]; *Yatter v William Morris Agency, Inc.*, 256 AD2d 260, 261 [1st Dept 1998]). This cause of action accrued, at the latest, on October 6, 2010 as to the Nessim Policy, and on May 12, 2010 as to the Claudine Policy. This action was not commenced until October 6, 2016. As the only relief sought for breach of fiduciary duty herein is money damages, the applicable statute of limitations is three years. Given that this action was not commenced within three years of its accrual, the second cause of action against each Defendant is barred by the statute of limitations under CPLR 3211 (a) (5) and must be dismissed.

### ***Fraud (Third Cause of Action Solely Against Zelcer)***

“The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995] [internal quotation marks omitted]). “To state a claim for fraudulent inducement in an insurance context, plaintiffs must allege a misrepresentation or material omission by defendants that induced plaintiffs to purchase the policies, as well as scienter, reliance and injury” (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 348 [1999] [internal quotation marks omitted]). If the facts represented are not matters peculiarly within the party’s knowledge, and the other party has the means available to him or her of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the representation, he or she must make use of those means, or he or she will not be heard to complain that he or she was induced to enter into the transaction by misrepresentations (*see Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]; *Cohen v Cerier*, 243 AD2d 670, 672 [2d Dept 1997]).

Assuming, as the proposed Second Amended Complaint alleges (in ¶ 84), that “[t]o induce Plaintiffs to purchase [the Policies], Zelcer misrepresented the costs of such policies, did not deliver the policies or illustrations of payments required, and forged their signatures on [the receipts] that were required to be signed upon the delivery of the policies,” Plaintiffs fail to state a claim for fraudulent inducement. Plaintiffs never asked Zelcer or Guardian to provide them with their Policies and accompanying documentation until after Nessim “discovered” the Policies and accompanying documentation in their own home in their insurance file, without any reasonable explanation for why the Policies and accompanying documentation were not discovered at an earlier date. It was unreasonable for Nessim, a trained physician who handled negotiations with Zelcer on Plaintiffs’ behalf and who, in

addition, was selectively tape recording his conversations with Zelcer, to rely exclusively on Zelcer's alleged oral misrepresentations without requesting and reviewing copies of the Policies and/or locating copies of the Policies that later mysteriously appeared in Plaintiffs' own insurance file. Under the circumstances, Plaintiffs cannot credibly claim that they had no available means of verification of Zelcer's oral representations, as such information would have been available to them from Guardian had Plaintiffs requested it and, in fact, Guardian did provide it to them upon their request (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]; *Orlando*, 40 AD3d at 831-832).<sup>3</sup> Therefore, the third cause of action for fraud against Zelcer fails to state a claim on which relief can be granted under CPLR 3211 (a) (7) and must be dismissed.<sup>4</sup>

#### ***Aiding and Abetting Fraud (Fourth Cause of Action Solely Against Guardian)***

Inasmuch as the Court has dismissed the underlying fraud claim against Zelcer, the fourth cause of action against Guardian for aiding and abetting his alleged fraud may not be maintained under CPLR 3211 (a) (7) (*see Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 [1999]; *Patterson v Calogero*, 150 AD3d 1131, 1133 [2d Dept 2017]).

### **CONCLUSION**

In Seq. No. 4, Defendants' cross motion to dismiss the First Amended Complaint or, to the extent permitted to be filed and served, the proposed Second Amended Complaint, and to strike certain exhibits thereto is *granted to the extent* that, as pleaded in the proposed Second Amended Complaint, the first cause of action against each Defendant under Insurance Law §§ 2123 and 4226 is dismissed as time-barred, the second cause of action against each Defendant is dismissed as both time-barred and for failure to state a claim, the third cause of action of action against Zelcer for fraud is dismissed for failure to state a claim, and the fourth cause of action against Guardian for aiding and abetting fraud is also dismissed for failure to state a claim; and the *remainder* of Defendants' cross motion which is to strike certain exhibits to the complaint is *denied* as moot.

In Seq. No. 2, Defendants' motion to dismiss the First Amended Complaint and to strike certain exhibits thereto is *denied* as moot.

In Seq. No. 3, Plaintiffs' motion for leave to amend and serve their proposed Second Amended Complaint is *denied* as moot.

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<sup>3</sup> Nessim's allegation that he did not know that his preexisting policies with other insurers would be replaced by the newly issued Guardian policy is belied by his explicit request in his application for insurance for replacement of his preexisting policies (*see* Nessim's Application for Life Insurance with Guardian, Part 1, Section 11 [Replacement], dated July 28, 2010).

<sup>4</sup> In light of the dismissal of the fraud claim for failure to state a claim, the Court need not address Defendants' alternative argument that the fraud claim is time-barred.

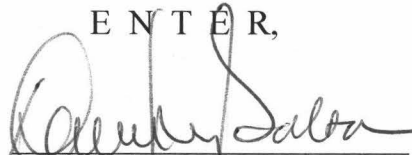
This action is dismissed in its entirety without costs or disbursements. The Clerk is directed to enter judgment accordingly.

This constitutes the Decision/Order and Judgment of the Court.

Dated: April 27, 2018  
Brooklyn, NY

*Roumi, et ano. v Guardian Life Ins. Co. of Am., et ano.*  
Index No. 517655/16

E N T E R,

  
Dawn Jimenez-Salta, J.S.C.  
Hon. Dawn Jimenez-Salta



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