

Jackson v Ffriend

2019 NY Slip Op 31386(U)

May 16, 2019

Supreme Court, New York County

Docket Number: 157838/2017

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

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JANE JACKSON, SUSANE K. BERG and LEWIS E.
DUCKETT AS CO-EXECUTORS OF THE ESTATE
OF PHYLLIS HARRISON-ROSS, deceased,

Index No. 157838/2017

Plaintiffs,

-against-

IVANHOE V. FFRIEND, FFRIEND ENTERPRISES,
LTD., and SECURITY MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

DECISION/ORDER

Defendants.

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

Defendants Ivanhoe V. Ffriend (“Ffriend”), Ffriend Enterprises, Ltd. (“Ffriend Enterprises”), and Security Mutual Life Insurance Company of New York (“Security Mutual”) move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the complaint in its entirety.

Background

In the complaint, plaintiffs Jane Jackson, Susane K. Berg (“Berg”), and Lewis E. Duckett (“Duckett”), as co-executors of the Estate of Phyllis Harrison-Ross (“Estate”), deceased, allege that, in 2016, defendants fraudulently induced Phyllis Harrison-Ross, M.D. (“Harrison-Ross” or “Decedent”) to purchase a \$1 million "life only" annuity, with the knowledge that she was elderly at eighty years old, in poor physical and mental health, and residing in an assisted living facility. Plaintiffs further allege that the annuity terms

were unsuitable and unreasonable, given Harrison-Ross's age, inability to handle her personal financial affairs, state of health, reduced life expectancy, and financial circumstances, and that other investment strategies would have better suited her needs.

In 2016, Harrison-Ross was a psychiatrist and employed by the New York State Commission of Corrections as Commissioner and Chair of the Commission's Medical Review Board.

On August 24, 2016, Harrison-Ross purchased a single premium immediate life annuity from Security Mutual. Ffriend and Ffriend Enterprises acted as the producing agents for Security Mutual on the transaction.

The annuity contract obligated Security Mutual to pay Harrison-Ross the amount of \$8,637.87 each month for the remainder of her life. Upon Harrison-Ross' death, Security Mutual's payment obligation would end.

On September 24, 2016, the annuity went into effect and Harrison-Ross began receiving the contractual monthly payments. On January 16, 2017, Harrison-Ross, at the age of 80, died of lung cancer and Security Mutual ceased the annuity monthly payments. Security Mutual had made four payments to Harrison-Ross, before its payment obligation ended.

Upon Security Mutual's refusal to pay the unpaid balance of the \$1 million annuity purchase price to her Estate, plaintiffs commenced this action. In the complaint, plaintiffs assert causes of action for fraud, fraudulent inducement, rescission, breach of fiduciary

duty, aiding and abetting breach of fiduciary duty, unjust enrichment, negligence, and violations of the Insurance Law, Insurance Regulations (New York Codes, Rules and Regulations [NYCRR], Title 11, Part 224) and General Business Law (GBL) § 349. On those claims, plaintiffs seek to recover compensatory damages in the amount of \$1 million and punitive damages, and to rescind the annuity contract.

Defendants now seek to dismiss the complaint, contending that Harrison-Ross was fully aware of, and understood, the terms of the annuity and their consequences, when she negotiated and executed the annuity contract. In opposition, plaintiffs contend that the motion should be denied as premature and plaintiffs should be permitted to conduct discovery regarding Harrison-Ross' state of mind, comprehension of the annuity terms, and ability to handle her financial affairs in 2016.

Standard for Motion to Dismiss

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88).

However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and [are not] accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000])

[internal quotation marks and citation omitted]; *see* CPLR 3211 [a] [1]). "[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

Fraud Claims

The parties dispute whether the first and second causes of action for fraud and fraudulent inducement to contract are pleaded with sufficient particularity, as required by CPLR 3016 (b).

CPLR 3016 (b) requires that, "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." The allegations must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (*see Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assoc. L.L.C.*, 72 AD3d 456, 456 [1st Dept 2010]; *Foley v D'Agostino*, 21 AD2d 60, 63-64 [1st Dept 1964]). Mere conclusory language is insufficient to state a fraud claim (*see Daly v Kochanowicz*, 67 AD3d 78 [2d Dept 2009]).

To plead a legally cognizable claim of fraud, a plaintiff must allege "a 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

and citation omitted]; *Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]).

Similarly, to plead a valid claim for fraudulent inducement to contract, a plaintiff must allege facts demonstrating "the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury" (*Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009]).

In the complaint, plaintiffs fail to plead any actionable misrepresentation or material omission of fact by defendants. Instead, plaintiffs merely allege that defendants "falsely and fraudulently represented to Phyllis Harrison-Ross that the subject annuity would serve her financial interests given her health, life expectancy and financial needs" (Complaint ¶ 34) and that Harrison-Ross's "purchase of the subject annuity was induced by sales presentations and materials and techniques, created, approved, and allowed by each of the Defendants" (*id.* ¶ 37).

Plaintiffs do not identify any sales presentations, materials, or marketing techniques. Plaintiffs neither specify the substance of the alleged misrepresentations, nor when, where, and by whom, other than Ffriend, the alleged misrepresentations were made. Plaintiffs do not specify what other annuities or investment strategies were available and better suited to Harrison-Ross' needs.

The record includes documentation that demonstrates Harrison-Ross' understanding of the annuity's terms. In an email dated September 3, 2016, without

dispute written by Harrison-Ross to Ffriend, Harrison-Ross stated that *"I have had a very hectic week and a half, including two very complicated work-related cases and two board meetings, one of my medical review board and the other of the Commission itself with the governor"* [Italics Added] Exhibit "B" to the motion, Harrison-Ross September 3, 2016 email to Ffriend at nonparty North Ridge Securities). Harrison-Ross then discussed her transfer of the \$1 million purchase price to her checking account in order to pay the annuity premium, and her understanding of the annuity terms (*see id.*). Significantly, Harrison-Ross also unequivocally stated that *"[a]lso, [Security Mutual] will get to keep the funds if I die early"* [Italics Added] (*id.*).

In a letter dated September 16, 2016, without dispute edited and executed by Harrison-Ross, although admittedly drafted by Ffriend (*see* Sichenzia Ross Ference Kesner by Richard J. Babnick, Jr., Esq. Jul.18, 2017 letter to Costello, Shea & Gaffney LLP at 3-4), Harrison-Ross wrote that she was a psychiatrist currently employed by New York State as a Commissioner and Chair of the Commission's Medical Review Board. (Exhibit "A" to the motion, Harrison-Ross Sept. 16, 2016 letter to Security Mutual).

In that same letter, Harrison-Ross reiterated that she had no family, and that she wished to be financially secure and *"independent for the rest of my lifetime, however long I may live"* [Italics Added] (*id.*). Harrison-Ross also stated that she wished to invest the funds that she received from the sale of her Upper East Side apartment, and repeated the annuity terms regarding the monthly payout amount, the need to live an additional 9.65 years to recover her initial investment, and the terms of an early withdrawal benefit rider and an

annuity income advance rider (*see id.*). Harrison-Ross also stated that "[m]y additional resources will be placed in other risk averse investments which will allow me greater flexibility and access as needed" (*see id.*). Indeed, the first page of annuity itself openly provided that the "*Annuity Income shall be paid during the lifetime of the Annuitant, and will terminate with the last payment preceding the death of the Annuitant.*" [Italics Added] (Exhibit "C" to the motion, the Single Premium Immediate Annuity).

As pointed out by defendants' counsel, this case is analogous to the facts in *Muller-Paisner v TIAA*, 289 Fed. Appx. 461 (2d Cir 2008). In *Muller-Paisner*, a seventy-year old professor, not in good health, purchased a fixed annuity from defendants for more than one million dollars, which was the bulk of all her accumulated assets. The professor needed to live about twelve more years to recover the purchase price. The annuity was to pay the professor \$8,000 per month for life, and all payments would terminate at her death. The professor wrote letters to defendants acknowledging the terms of the annuity including the lack of a guaranteed period and did include any beneficiaries. Unfortunately, the professor died six months after purchasing the annuity, having collected only \$48,000, and the remainder of the payments inured to the benefit of the defendants. The estate of the professor commenced an action in federal court alleging, in part, fraud and breach of fiduciary duty claims. The Second Circuit affirmed the dismissal of the fraud claims as they were not plead with particularity, and there were no material misrepresentations or omissions by the defendants. Significantly, the fraud claims could not survive because the professor acknowledged that all payments would

cease after her death and the annuity plainly contained language that provided for no inclusion of beneficiaries and a guarantee period.

In this case, as in *Muller-Paisner v TIAA*, the fraud claims do not state a cause of action as Harrison-Ross duly acknowledged that all payments would terminate subsequent to her demise, and the subject annuity neither included beneficiaries nor a guarantee period. Simply stated, Harrison-Ross' own words and the terms of the annuity demonstrate the unsustainability of the fraud claims.

For the foregoing reasons, the branches of the motion to dismiss the first cause of action for fraud and the second cause of action for fraudulent inducement to contract are granted and those claims are dismissed.

Rescission

The parties next dispute whether the third cause of action for rescission of the annuity is legally cognizable.

Since rescission is based upon the dismissed fraudulent inducement claim, the rescission claim does not state a cause of action. Notwithstanding the above, a monetary award is also available that would fully compensate plaintiffs. Rescission is an equitable remedy and "is to be invoked only when there is lacking complete and adequate remedy at law" (*Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *Loreley Fin. (Jersey) No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 468 [1st Dept 2014]). Therefore, the branch of the motion to dismiss the claim for rescission is granted, and the third cause of action is dismissed.

Breach of Fiduciary Duty

Defendants contend that the fourth cause of action for breach of fiduciary duty is fatally defective on the ground that no fiduciary relationship can have existed between Harrison-Ross and the defendants.

In opposition, plaintiffs contend that Ffriend acted as Harrison-Ross's personal financial advisor regarding her retirement, that his wife, nonparty Ms. Magett, acted as Harrison-Ross' attorney for purposes of estate planning, and that Ffriend represented Security Mutual in the annuity transaction.

It is long established that no fiduciary relationship exists between an insurance company and the insured (*Rabouin v Metropolitan Life Ins. Co.*, 182 Misc 2d 632, 634 [Sup Ct, NY County 1999], *affd* 282 AD2d 381 [1st Dept 2001], citing *Uhlman v New York Life Ins. Co.*, 109 NY 421 [1888]). "Except as required by statute, insurance companies deal with insureds at arm's length. No relation involving trust or confidence is present" (*New York Hotel Trades Council & Assn. Ins. Fund v Prudential Ins. Co. of Am.*, 1 Misc 2d 245, 250 [Sup Ct, NY County 1955], *affd* 1 AD2d 952 [1st Dept 1956]). Thus, the branch of the claim asserted against Security Mutual is fatally defective as a matter of law.

However, the breach of fiduciary duty claim against Ffriend and Ffriend Enterprises is sufficient to state a cause of action at this early stage of this litigation and discovery is necessary to glean additional information from defendants who may exclusively have such information under their control as Harrison-Ross is deceased.

"In the absence of a special relationship, a claim against an insurance agent or broker for breach of fiduciary duty does not lie" (*Cathy Daniels, Ltd. v Weingast*, 91 AD3d 431, 433 [1st Dept 2012]). Furthermore, an insurance broker or financial advisor who does not have discretionary authority over a client's assets or investments does not owe a fiduciary duty to the client (*see Barrett v Grenda*, 154 AD3d 1275, 1278 [4th Dept 2017]).

Notwithstanding the above, where the insured can "establish the existence of a legally cognizable special relationship with their insurance agent[s]", a duty may arise in the insurance context upon the showing of the requisite trust and confidence (*Murphy v Kuhn*, 90 NY2d 266, 272 [1997]). Under somewhat similar facts, the Second Circuit denied the insurance agent's motions to dismiss the breach of fiduciary duty claim and then for summary judgment on the ground that there were sufficient facts that the insurance agent "sold her [an "ill" insured who was 70 years old] an annuity that it knew was against "normal logic." 528 Fed. Appx. 37, 42 (2d Cir 2013), and *Muller-Paisner v TIAA*, 289 Fed. Appx. 461 (2d Cir 2008).

Here, there is sufficient basis on this limited record that Ffriend or Ffriend Enterprises may have had discretionary authority over Harrison-Ross' financial accounts or investments. Indeed, defendants admit that "Mr. Ffriend had been Dr. Harrison-Ross' friend and financial advisor for twenty-five years, and as a result, he knew his customer and her financial situation very well." (Letter dated July 18, 2018, from defendants' counsel to plaintiff's counsel, Exhibit "G" to the Affirmation in Opposition). As such, Mr. Ffriend "recommended the product [the annuity]" to Harrison-Ross (*id.*). The

relationship between Ffriend and Harrison-Ross reached beyond the typical professional procurement of insurance products to even extending a personal loan to her as well as Ffriend's wife acting as Harrison-Ross' attorney for estate planning purposes (*see* Affidavit of Shaw-Jackson , sworn to on January 19, 2018, at ¶¶ 2, 5, Exhibit "B" to the Affirmation in Opposition). Accepting the above facts as true, plaintiffs' have alleged the requisite trust and confidence to create a special relationship between Ffriend and Harrison-Ross.

For those reasons, the branch of the motion to dismiss the fourth cause of action for breach of fiduciary duty is granted as to defendant Security Mutual only, and is otherwise denied.

Aiding and Abetting a Breach of Fiduciary Duty

The fifth cause of action for aiding and abetting a breach of fiduciary duty is fatally defective on the ground that plaintiffs failed to assert factual allegations in support with sufficient particularity. To set forth a viable claim for aiding and abetting a breach of fiduciary duty, the plaintiff must allege "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

Plaintiffs merely allege that Ffriend Enterprises and Security Mutual "provided substantial assistance or encouragement in the primary actor's commission of the tortious

acts" (Complaint ¶ 71) and that Security Mutual aided the breach by issuing the annuity (*see id.* ¶ 21).

Contrary to plaintiffs' contention, the report on a 2015 examination of Security Mutual issued by the New York State Department of Financial Services on May 12, 2017 does not mandate discovery concerning whether Ffriend Enterprises and Security Mutual participated in or induced a breach of fiduciary duty by Ffriend. The report was issued prior to Harrison-Ross' application for and purchase of the annuity, and does not mention Ffriend or Ffriend Enterprises. Therefore, it is not relevant to the issues raised here.

For the foregoing reasons, that the branch of the motion to dismiss the fifth cause of action for aiding and abetting a breach of fiduciary duty is granted, and that claim is dismissed.

Unjust Enrichment

Defendants contend that the sixth cause of action for unjust enrichment is fatally defective on its face on the ground that a written contract governing the underlying dispute exists.

In opposition, plaintiffs contend that defendants were unjustly enriched by the \$1 million paid to them by Harrison-Ross to purchase an annuity that provided her with little or no benefit.

A claim of unjust enrichment sounds in quasi contract. To assert a legally cognizable claim, a plaintiff must allege that the plaintiff bestowed a benefit upon the defendant, that the benefit remains with the defendant, and that the defendant has not

adequately compensated the plaintiff for that benefit (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1st Dept 1998]). Significantly, "[t]he existence of an express agreement, whether oral or written, governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter" (*Morales v Grand Cru Assoc.*, 305 AD2d 647 [2d Dept 2003], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Here, the underlying dispute arises out of the annuity contract issued by Security Mutual to Harrison-Ross. Therefore, the unjust enrichment claim is not legally viable.

For that reason, the branch of the motion to dismiss the sixth cause of action for unjust enrichment is granted, and that claim is dismissed.

Negligence/Negligent Misrepresentation

The parties next dispute whether the seventh cause of action for negligence or negligent misrepresentation is properly pleaded.

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

In the negligence claim, plaintiffs contend that defendants breached the duty of care that they owed to her by "unreasonably failing to consider factors such as . . . Harrison-Ross' . . . age, health and life expectancy and financial needs in recommending

she purchase an extremely large annuity which was unreasonable and unsuitable for her needs" (Complaint ¶ 82).

As held above, no fiduciary relationship existed between Security Mutual and Harrison-Ross; a fiduciary relationship may have existed between Ffriend or Ffriend Enterprises and Harrison-Ross. As previously discussed, the Second Circuit in *Muller-Paisner v TIAA*, 289 Fed. Appx. 461 (2d Cir 2008), and 528 Fed. Appx. 37 (2d Cir 2013), denied the insurance agent's motions to dismiss negligence/negligent misrepresentation claims under somewhat similar circumstances.

Specifically, the Second Circuit rejected the argument that since the decedent applicant "received sufficient or accurate information regarding the [non-guaranteed] payment option," that alone would insulate the insurance agents from liability (528 Fed. Appx. at 40). It framed the issue as to whether the insurance agent, "given the facts known or available to it, exercised the level of care in its dealings with [the decedent applicant] consistent with whatever fiduciary duty it might have assumed (*id.*)."

Ultimately, the Second Circuit concluded that the "record supports an inference that [the insurance agent] exercised some input into the [decedent applicant's] choice of a retirement investment option, and that they did so recognizing that she was ill, that she was having difficulty comprehending their conversations, and that the Annuity at issue was not a prudent choice in her circumstances (*id.* at 41)."

In this case, as in *Muller-Paisner*, plaintiffs are alleging in their amplified papers that Harrison-Ross was elderly (80 years old v. 70 years old), severely ill (allegedly

unable to take care of her activities of daily living and financial affairs; decreased mobility, unable to see and relied upon others to read to her, had difficulty breathing v. hard of hearing, unable to travel, suffering from uncontrollable emphysema), had difficulty understanding (allegedly unable to effectively communicate her needs and relied upon others to communicate for her, decreased and/or loss of memory function v. unable to understand conversations with counselors), and the annuity was not a prudent choice under the circumstances (both were allegedly elderly, ill and had difficulty understanding).

It is simply premature to dismiss the negligence [and breach of fiduciary of duty] claims because plaintiffs have demonstrated a “sufficient start” and facts “may exist” to justify discovery under CPLR 3211(d) (*Herzog v Town of Thompson*, 216 AD2d 801 [3rd Dept 1995]; *Ramsay v Mary Imogene Bassett Hosp.*, 113 AD2d 149 [3rd Dept 1985]).

For those reasons, the branch of the motion to dismiss the seventh cause of action for negligence is granted as to defendant Security Mutual only, and is otherwise denied.

Violations of Insurance Law and Regulations

The parties dispute whether the eighth cause of action for violations of the Insurance Law and Regulations is fatally defective on the grounds that no private cause of action exists and that the violations alleged are either directly contradicted by the documentary evidence or not sufficiently supported by plaintiffs' allegations.

In the complaint, plaintiffs allege that defendants "falsely and fraudulently misrepresented to . . . Harrison-Ross that the subject annuity would serve her financial

interests[,] given her health condition, life expectancy and financial needs" (Complaint ¶ 86). Plaintiffs further allege that defendants' misconduct constitutes violations of Insurance Law § 2123, which prohibits misrepresentations, misleading statements, and incomplete comparisons by brokers, § 3209, which requires disclosure of material terms of annuity contracts by brokers, and § 4226, which prohibits misrepresentations, misleading statements, and incomplete comparisons by insurers (*see id.* ¶ 89). Plaintiffs also allege that defendants violated Insurance Regulation 187 (11 NYCRR § 224, *et seq.*) by failing to consider Harrison-Ross's advanced age, annual income, financial needs, financial assets, tax status, and risk tolerance, when recommending the annuity to her (*see id.* ¶ 90).

However, in the complaint, plaintiffs do not identify any misrepresentations, misleading statements, or details concerning comparisons, incomplete or otherwise, by defendants that were fraudulent (*see* CPLR 3016 [b]). Plaintiffs do not cite to any written materials supplied by any of the defendants to Harrison-Ross during her inquiry into an annuity or during the annuity negotiations. Plaintiffs' allegation that defendants failed to disclose the material terms of the annuity contract (*see* Complaint ¶ 89; Insurance Law § 3209) is contradicted by the existence of the annuity contract supplied by defendants to Harrison-Ross. Therefore, the claim is not sufficiently pleaded.

In addition, the branches of the claim for violations of Insurance Law § 3209 and Insurance Regulation 187 are also fatally defective because no private right of action is expressly mandated by either section. No private right of action exists, unless one is

expressly authorized by the legislation or implied by the court (*see Friedman v New York Life Ins. & Annuity Corp.*, 143 AD3d 939, 941 [2d Dept 2016]).

In the circumstances presented here, no private right of action may be implied. To determine whether a private right of action should be implied, the courts apply a three-part inquiry (*see Sparkes v Morrison & Foerster Long-Term Disability Ins. Plan*, 129 F Supp 2d 182, 187 [ND NY 2001] [applying New York law]). The three-part inquiry is whether "(1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose; and (3) creation of such a right would be consistent with the legislative scheme" (*id.*; *Uhr v East Greenbush Central Sch. Dist.*, 94 NY2d 32, 38 [1999]).

An implied private right of action is not consistent with the legislative scheme, where, as here, the Insurance Law established procedures for enforcement of its various provisions by the Superintendent of Insurance (*see Sparkes* at 187-188, citing Insurance Law § 109; *Walts v First Union Mtge. Corp.*, 259 AD2d 322, 322 [1st Dept 1999]). Insurance Regulation 187 provides that the exclusive remedy for a violation is available under Insurance Law § 2403, which provides for administrative review by the Superintendent of Insurance and does not provide for a private right of action (11 NYCRR §§ 224.5, 224.7).

The branch of the claim for violations of Insurance Law § 3209 is also fatally defective on the ground that the specific violations alleged in the motion papers regarding defendants' failure to include information about the equity index are not relevant. The

subject annuity is not an "equity index" annuity, or, one that guarantees an interest rate combined with an interest rate linked to a market index (*see generally* FINRA [Financial Industry Regulatory Authority], Investor Alerts, Equity-Indexed Annuities – A Complex Choice, updated Sept. 13, 2010).

For those reasons, that branch of the motion to dismiss the eighth cause of action for Insurance Law and regulations violations is granted, and that claim is dismissed.

Consumer Business Deception

The parties dispute whether the ninth cause of action for violations of GBL § 349 sets forth a legally viable claim.

Plaintiffs' claim for GBL § 349 violations is not legally cognizable, as a matter of law. GBL § 349 provides, in relevant part, that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful" (GBL § 349 [a]). To state a claim for relief under that statute, a plaintiff must allege "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). The statute's "threshold requirement of consumer-oriented conduct is met by showing that acts or practices have a broader impact on consumers at large in that they are directed to consumers or potentially affect similarly situated consumers" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000] [internal quotation marks

and citations omitted]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321 [1995]; *see* GBL § 349).

Here, plaintiffs merely allege that defendants engaged in misconduct in the sale of annuities to members of the general public (*see* Complaint ¶ 95) and to Harrison-Ross, by failing to advise her that the annuity was inherently unsuitable and that she was unlikely to recoup the \$1 million purchase price, in view of her extremely poor health, medical and physical conditions, and life expectancy (Complaint ¶¶ 94, 96, 97).

They do not allege any facts tending to demonstrate that defendants engaged in a consumer-oriented transaction that was deceptive or misleading to the general public. The GBL § 349 claim, here, is not based on a transaction that affects the consuming public at large, but instead, arises out of an alleged fraudulent inducement to contract or breach of an annuity contract unique to Harrison-Ross. A private contract dispute, such as the dispute here, does not come within the scope of GBL § 349 (*see Cathy Daniels, Ltd. v Weingast*, 91 AD3d at 435).

For that reason, that branch of the motion to dismiss the ninth cause of action for GBL § 349 violations is granted, and that claim is dismissed.

Conclusion

Accordingly, it is

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing the first, second, third, fifth, sixth, eighth, and ninth causes of action in the

complaint as against defendants Ivanhoe V. Ffriend, Ffriend Enterprises, Ltd., and Security Mutual Life Insurance Company of New York; and it is further

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing the fourth and seventh causes of action in the complaint as against defendant Security Mutual Life Insurance Company of New York only, and it is otherwise denied; and it is further

ORDERED, that defendants Ivanhoe V. Ffriend, and Ffriend Enterprises, Ltd. shall interpose an answer to the remaining causes of action of the complaint within thirty (30) days of service of this decision/order with notice of entry; and it is further

ORDERED, that the clerk shall enter a judgment accordingly.

Dated: May 16, 2019

ENTER:

~~SO ORDERED~~
J.S.C.
SHLOMO HAGLER
J.S.C.