

Pottorff v Centra Fin. Group, Inc.

2019 NY Slip Op 34071(U)

June 10, 2019

Supreme Court, Wayne County

Docket Number: 82765

Judge: Daniel G. Barrett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At a Term of the Supreme Court held in and for the County of Wayne at the hall of Justice in the Town of Lyons, New York on the 13th day of February, 2019.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

EARL POTTORFF,

Plaintiff,

DECISION
Index No. 82765

-vs-

CENTRA FINANCIAL GROUP, INC.,
HORNOR TOWNSEND & KENT, INC. AND
THE PENN MUTUAL LIFE INSURANCE COMPANY,

Defendants

The Plaintiff served a Complaint to which the Defendants filed a Motion to Dismiss the Complaint. The Motion to Dismiss was withdrawn as the Plaintiff served an Amended Complaint which was designed to clarify the alleged deficiencies in the pleading. The Defendants served a Motion to Dismiss the Amended Complaint which is the subject of this application.

As a starting point, it is well settled that in the context of a Motion to Dismiss a Complaint, we must “accept the facts as alleged in the Complaint as true, accord the Plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 N.Y. 2d 83, 87-88). A motion pursuant to CPLR 3211(a)(7) will be granted if the plaintiff does not have a cause of action (see *id* at 88), any motion pursuant to CPLR 3211(a)(1) will be

granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim(s)". Baumann Realtors, Inc., v First Columbia Century - 30, LLC, 113 A.D. 3d 1091, 1092 [4th Dept 2014]. The court may "freely" consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (Leon, 64 N.Y. 2d at 88,: see Surgis v Magarelli, 12 N.Y. 3d 527, 531.)

The Amended Complaint and the Affidavit of the Plaintiff served in opposition to this Motion allege that the Defendants ascended to the role of trusted advisors and fiduciaries of the Plaintiff. The Plaintiff sold a business and sought the assistance of the Defendants for an investment vehicle which was not subject to the whims of the stock market and would provide the Plaintiff and his wife with a dependable income. The Plaintiff points out that he is not a sophisticated investor and that he placed his trust in the Defendants for a secure investment vehicle. The submitted materials provide the basis for elevating the role of the Defendants to a fiduciary level.

The Defendants recommended an annuity which would pay the Plaintiff and his wife \$8,702.42 a month while they were both alive. The payment decreased to \$4,351.21 upon the death of either one of them. The Defendants sought to provide protection for the Plaintiff should one of them die. Mr. Pottorff was given a physical examination and was found to be uninsurable for life insurance purposes. Mrs. Potorff was insurable up to \$250,000.00 for life insurance purposes. The initial policy premium which was paid on this annuity was \$1,425,000.00. The amount of life insurance the Defendants were able to secure for the Plaintiff and his wife was inadequate to cover the cost of the annuity premium. Despite the inability to cover this shortfall the Defendants recommended this annuity to the Plaintiff and his wife.

APPROPRIATE PARTIES

The first issue is whether the named Defendants are appropriately named in this action or whether the action should be dismissed for lack of contact to the alleged actions of Mr. David Goodfellow and Mr. James Noonan. These two individuals had the personal contact with Plaintiff and were regarded by him as fiduciaries, per the Affidavit of the Plaintiff, these two individuals were employees of Defendant, Centra. Plaintiff alleges Mr. Goodfellow and Mr. Noonan were agents of the Defendants. The Amended Complaint indicates that Mr. Goodfellow was an agent of Defendant, Hornor Townsend & Kent, Inc. (HTK). Both Mr. Goodfellow and Mr. Noonan signed the subject Penn Mutual Life Insurance Annuity Company as producers. The Plaintiff has shown a link between the Defendants in this action and Mr. Goodfellow and Mr. Noonan.

An actionable fraudulent representation need not have been made directly by a defendant. A principal is liable for the fraudulent acts of the agents (Goodfellow and Noonan) committed within the scope of authority, Fairchild v McMahaon, 139 N.Y. 290,; Chase Manhattan Bank N.A. v Perla, 65 A.D. 2d 207, (4th Dept 1978).

At this stage the Defendants are appropriate parties in this action.

ANALYSIS

The Amended Complaint sets forth five causes of action -

1. Fraud in the inducement;
2. Fraud;
3. Constructive fraud;
4. Unjust enrichment;
5. Rescission.

FRAUD IN THE INDUCEMENT

A claim for fraudulent inducement requires a knowing representation of material fact, intent to deceive another party and to induce that party to act on it, causing injury, Dalessio v Kressler, 6 A.D. 3d 57, (2d Dept 2004). Based on the submissions of the Plaintiff the Court denies the Defendants' application to dismiss this cause of action.

FRAUD

Fraud has essentially the same elements of Fraud in the Inducements and therefore the Court denies the application to dismiss this cause of action.

CONSTRUCTIVE FRAUD

Constructive fraud is a distinct cause of action. The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud, except that a cause of action for constructive fraud does not require proof of defendant's knowledge of the falsity of his or her representations, Brown v Lockwood, 76 A.D. 2d 721, (2d Dept. 1980). The scienter element is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose confidence in defendants and therefore to relax the care and vigilance that would ordinarily be exercised in the circumstances, Callahan v Callahan, 127 A.D. 2d 298 (3d Dept 1987); Brown v Lockwood, (supra).

The submissions indicate that a confidential fiduciary relationship existed between the Plaintiff and Mr. Goodfellow and Mr. Noonan and therefore the Court will not dismiss this cause of action

UNJUST ENRICHMENT

An action for unjust enrichment is predicated on an obligation the law creates in the absence of an agreement, Pappos v Tzolis, 20 N.Y. 3d 228, Goldman v Metropolitan Life Insurance, 5 N.Y. 3d 561. In this particular case we do have a written agreement. The Court grants the Defendants' motion to dismiss this cause of action as there is a written agreement between the parties.

RESCISSION

Defendants' application to dismiss the claim for rescission is denied as CPLR 3002(e) provides that it may be brought in the same action:

A claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction, shall not be deemed inconsistent with a claim for rescission or based upon rescission. In an action for rescission or based upon rescission the aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, confirmed by him as a result of the transaction, damages to which he is entitled because of such fraud or misrepresentation; such complete relief shall not include duplication of items of recovery.

DOCUMENTARY EVIDENCE

The Defendants urge the dismissal of the entire action based upon “documentary evidence”. Specifically, the Defendants refer to a letter dated October 5, 2017 addressed to Plaintiff’s counsel and issued by a manager of the Defendant, Penn Mutual Life Insurance Company. This letter is not “documentary evidence” within the purview of CPLR 3211(a)(1). Neither Affidavits, deposition testimony, nor letters are considered “documentary evidence within the intendment of CPLR 3211(a)(1), Granada Condominium III Associates v Palomino, 78 A.D. 3d 996, (2nd Dept. 2010).

This constitutes the Decision of the Court. The application of the Defendants to dismiss the Complaint for failure to state of cause of action is denied. Counsel for Defendants to prepare an Order consistent with this Decision.

Dated: June 10, 2019
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice