

**Bankers Conseco Life Ins. Co. v Wilmington Trust,
N.A.**

2020 NY Slip Op 31330(U)

March 25, 2020

Supreme Court, New York County

Docket Number: 652057/2019

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**BANKERS CONSECO LIFE INSURANCE
COMPANY and WASHINGTON NATIONAL
INSURANCE COMPANY,**

Plaintiffs,

-against-

WILMINGTON TRUST, NATIONAL ASSOCIATION,

Defendant.

**DECISION AND ORDER
Index No.: 652057/2019**

Motion Sequence No.: 002

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O. PETER SHERWOOD, J.:

Under motion sequence 002, defendant Wilmington Trust, N. A. (“Wilmington”) moves to dismiss the complaint for failure to state a claim. As this is a motion to dismiss, the facts are taken from the amended complaint and are assumed to be true.

I. BACKGROUND

Plaintiffs Bankers Conseco Life Insurance Company (“Bankers”) and Washington National Insurance Company (“Washington”) are insurance companies domiciled in New York and Indiana respectively. Both are indirect subsidiaries of CNO Financial Group, Inc. (“CNO”) (Complaint ¶¶17–19 [Doc. No. 21]). Defendant Wilmington is a federally chartered banking institution based in Wilmington, Delaware (*id.* ¶20).

In 2013, Bankers and Washington turned to the reinsurance marketplace to explore ceding long-term care liabilities to a qualified reinsurer (*id.* ¶24). At that time, Beechwood Re (“Beechwood”) was a new reinsurance company with no existing business that plaintiffs would not have dealt with without a belief that it would make conservative and prudent investments with plaintiffs’ assets (*id.* ¶25–26). In February 2014, Bankers and Washington each entered into reinsurance agreements with Beechwood (Reinsurance Agreements) under which Beechwood assumed control over claims administration under ceded policies, and Bankers and Washington transferred over \$550 million into the trusts to be managed by beechwood and its affiliated agent B Asset Manager (*id.* ¶27). The trusts were essential conditions to the plaintiffs’ agreement with Beechwood as the trust assets were intended to serve as reliable collateral for Beechwood’s obligations to reimburse plaintiffs for claims on the transferred liabilities and for plaintiffs to obtain reserve credits (*id.* ¶28). Wilmington was hired to serve as trustee of four reinsurance trusts,

each governed by a separate Trust Agreement (TA) and was obligated to determine that trust assets were in proper negotiable form so as to ensure that the Trusts would satisfy obligations to policyholders as they became due (*id.* ¶¶2, 28). On September 29, 2016, the New York State Department of Financial Services (“NYSDFS”) and the Indiana Department of Insurance (“IDOI”) sent letters concerning plaintiffs declaring that “a substantial portion of the current assets held within the Trusts are not in compliance” with state law and directing that action be taken immediately (*id.* ¶31). The directives effectively required plaintiffs to terminate the Reinsurance Agreements and recapture business ceded to Beechwood or face disciplinary action (*id.* ¶32). When terminating the Reinsurance Agreements, plaintiff issued a notice to Wilmington to transfer all Trust assets back to plaintiffs which defendant was unable to do, to plaintiffs’ detriment (*id.* ¶33).

As part of the reinsurance transactions, Bankers and Washington, as beneficiaries, individually entered into two contracts each with Beechwood, as grantor, and Wilmington, as trustee, to create four new trusts (*id.* ¶¶34–79). Bankers entered into the New York Trust Agreement and the New York Supplemental Trust Agreement to create the Beechwood-Bankers Primary Trust and the Beechwood-Bankers Sub Trust (respectively, “NY Trust” and “NY Sub Trust”) (*id.* ¶¶34–56). Similarly, Washington entered into the Indiana Trust Agreement and the Indiana Supplemental Trust Agreement to create the Beechwood-Washington Primary Trust and the Beechwood-Washington Sub Trust (respectively, “IN Trust” and “IN Sub Trust”) (*id.* ¶¶57–79). Each agreement contains provisions stating that: (i) the [Trust] may only contain assets that can be “negotiate[d]... without the consent or signature from [Beechwood] or any other person or entity,” and that “[a]ny Assets received by [Wilmington] which are not in such proper negotiable form, as determined by [Wilmington] shall not be accepted by [Wilmington] and shall be returned to [Beechwood] as unacceptable” (*id.* ¶¶35, 48, 58, 71); (ii) Wilmington shall have no responsibility to determine whether Assets transferred to the Trust Account constitute Eligible Assets, but does state that Wilmington will be liable for its own negligence, willful misconduct, or lack of good faith in connection to its performance (*id.* ¶¶41–42, 51–52, 64–65, 74–75); and (iii) Beechwood has the power to appoint an “Asset Manager” with the power to make investment decisions regarding the Assets held in the Trust Account and instruct Wilmington to invest Assets in the Trust Account in other Eligible Assets (*id.* ¶¶43–44, 53–54, 66–67, 76–77). The Asset

Manager in each agreement was B Asset Manager, an affiliate of Beechwood (*id.* ¶¶45, 55, 68, 78).

Upon plaintiff's termination of the Reinsurance Agreements on September 29, 2016, and recapture of the Trust assets, Wilmington, in breach of the Trust Agreements, was unable to freely transfer numerous trust assets to plaintiffs because they were non-transferable (*id.* ¶80). Plaintiffs allege that they have identified at least thirty-three Trust assets that should not have been in the Trusts because they were not freely assignable on their face (*id.* ¶83). Plaintiffs enumerate these losses as totaling \$24,041,760 (*id.* ¶¶84–100). Plaintiffs further allege that Wilmington has demonstrated a willingness to cooperate with or willfully ignore Beechwood's misconduct by: (i) failing to disclose that Beechwood asked Wilmington about setting up sub-brokerage accounts in the name of the Trustee, and (ii) drafting a letter to the Chinese Ministry of Finance stating that Beechwood had the ability to make over \$100 million in investments despite knowing that Beechwood did not have such funds liquid (*id.* ¶¶101–108). Plaintiffs further allege that Wilmington knew that B Asset Manager directed the Trusts to invest in high-risk investments that were non-compliant with the Trust Agreements and took no action to stop these investments or warn plaintiffs (*id.* ¶¶109–116).

Plaintiffs assert three claims against Wilmington: (i) breach of contract (negotiability claim), (ii) breach of fiduciary duty, and (iii) breach of contract (eligibility claim) (*id.* ¶¶120–139).

II. LEGAL STANDARD

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe I*, 73 AD3d 78, 84 [2nd Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ ” (*id.* at 84-85).

On a motion to dismiss a plaintiff’s claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

III. DISCUSSION

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff’s performance; (3) defendant’s breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a

contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

As to the breach of contract action dealing with eligibility of assets for placement in the Trust, this claim must be dismissed because sections 3.2(b) and 2.2(d) of the Trust Agreements shield Wilmington from responsibility for policing which assets may be added to the Trust Account. Section 3.2(b) states that Wilmington is contractually obligated to obey Beechwood's investment instructions, may rely on those instructions, and, in the absence of such instructions, has no duty to take action with respect to trust asset investments (TA § 3.2(b)). Section 2.2(d) states that Wilmington has no responsibility to determine whether assets transferred to the Trust Account constitute "Eligible Assets" (TA § 2.2(d)). Plaintiffs' counterargument, that defendant acted negligently or in bad faith by not informing plaintiffs of such transfer activity, is insufficient as defendant's conduct here is fully consistent with its contractual obligations. If plaintiffs intended for defendant to inform them of such transfer of assets, it should have been written into the Trust Agreements.

As to the breach of contract action based on acceptance of assets not in negotiable form, the claim shall be dismissed because under the terms of the Trust Agreement, damages for breach by Wilmington is limited to direct damages. The parties agreed to waive consequential damages (*see, e.g., New York Trust Agreement, Doc. No. 38, § 4.2[c]* "Trustee shall only be liable for its own negligence, willful misconduct or lack of good faith in connection with its performance under this . . . Agreement" and section 4.8 [a] "in no event shall Trustee be liable . . . for indirect, special, incidental, punitive or consequential . . . damages.")).

None of the three categories of damages that plaintiffs identify flows directly from the alleged breach itself. Rather each flows from attenuated consequences of the breach, specifically Beechwood's breaches of its obligations (*see Connaughton v Chipotle Grill, Inc.*, 29 NY3d 137, 144 [2017] [affirming dismissal under CPLR 3211 where the plaintiff sought types of damages to which he was not entitled]). General or direct damages are the natural and probable consequence of the breach of the contract such as the "money that the breaching party agreed to pay" *Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 80 (2014) (quotation marks omitted). Such damages have also been described as "the value of the very performance" whereas consequential damages are "one step removed from the naked performance promised by the defendant" and seek to compensate a plaintiff for additional losses . . . that are incurred as a result of the defendant's

breach” *Schonfeld v Hillard*, 218 F3d 164, 175-77 (2d Cir 2000) (quotation marks omitted; *see also Direct TV Latin Am, LLC v RCTV Int’l Corp.*, 2013 WL 203397 at 5 (Sup Ct, NY County, January 5, 2013) (holding that a waiver of consequential damages bars recovery beyond “the value of the promised performance”), *aff’d* 115 AD3d 539 (1st Dept 2014); *Metropolitan Life Ins. Co. v Noble Lorondes Int’s, Inc.*, 84 NY2d 430 (1994) (limiting award of fee paid to the seller of software as direct damages, and excluding lost savings resulting from software failure and holding that “the parties agreed to shift to plaintiff the substantial risk of a portion of any economic loss caused by defendant’s nonperformance by excluding plaintiff’s right to recovery of consequential damages such as those it now claims, *id.*, at 436; and *PNC Bank, N.A. v Wolters Kluwer Fin. Svs., Inc.*, 73 F. Supp 3d 358, 372 (SDNY 2014) holding software licensing fee constituted direct damages but legal and auditing costs incurred in determining how to respond to a software malfunction and refunds paid to affected customers of plaintiff were consequential damages which plaintiff was barred from recovering.

The investment losses plaintiffs suffered were caused by Beechwood’s violations of the eligibility rules of which plaintiffs were aware beginning shortly after entering the Agreements (see ¶ 24, 86 of plaintiffs’ complaint in *Bankers Conseco Life Ins. Co. v Feuer*, No. 16-cv-7646 [SDNY] [*Feuer Compl.*] which is Ex. 2 to the Lane Affm, Doc No. 34 “[i]n mid-to-late 2014 Plaintiffs learned Beechwood had invested trust assets in ... investments [that] were not suitable” ¶ 24); *see also* ¶¶ 86-89 discussing plaintiffs’ objections addressed to Beechwood concerning multiple unsuitable investments). The amounts paid to clear encumbrances and the associated professional fees paid are all results of ineligible purchases made by Beechwood. They too are consequential damages and are steps removed from the breaches alleged against Wilmington (*see DirectTV* [denying damages for diminished value of asset flowing from breach] and *PNC Bank* [legal and audit expenses incurred were consequential damages]).

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant’s misconduct (*see Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*see Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is “held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive” (*Meinhard v Salmon*, 249 NY 458 [1928]).

The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*see Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]).

The determination of whether a fiduciary duty exists is “necessarily fact-specific” and looks to whether the relationship is “grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions” (*Oddo Asset Mgt.*, 19 NY3d at 593 [internal quotation marks and citation omitted]). A fiduciary relationship may be found where a party “is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation,” or “when confidence is reposed on one side and there is resulting superiority and influence on the other” (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). Although “a contractual relationship is not required for a fiduciary relationship, ‘if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them’” (*Oddo Asset Mgt.*, 19 NY3d at 593, quoting *Northeast Gen. Corp.*, 82 NY2d at 162).

The breach of fiduciary duty must be dismissed as this claim is duplicative of the breach of contract claims. Although plaintiffs’ motion papers put forth an argument that defendant’s fiduciary duty arises from extra-contractual circumstances, the allegations supporting this cause of action concern the defendant’s alleged breach of sections 2.1(b) and 4.2(c) of the Agreements, the same basis asserted for the two breach of contract causes of action.

Accordingly, it is hereby

ORDERED that the motion to dismiss (Motion Sequence Number 002) of defendant Wilmington Trust, National Association, is GRANTED in its entirety; and it is further

ORDERED that the action is hereby DISMISSED and the Clerk of the court is directed to enter judgment against plaintiffs Bankers Conesco Life Insurance Company and Washington National Insurance Company and in favor of defendant Wilmington Trust, National Association, together with costs in an amount to be fixed by the Clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: March 25, 2020

E N T E R,

Hon. O. Peter Sherwood
O. PETER SHERWOOD J.S.C.