Andresen v Guggenheim Partners, LLC
2020 NY Slip Op 32869(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 159478/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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JENSINE ANDRESEN,

Plaintiff,

- v -

GUGGENHEIM PARTNERS, LLC, GUGGENHEIM SECURITIES, LLC, AS SUCCESSOR IN INTEREST TO GUGGENHEIM CAPITAL MARKETS, LLC, SOUTH BLACKTREE AGENCY, LLC, IPEX SERVICES, LLC, GSFI, LLC, JEFFREY LEWIS, OTHER UNKNOWN PERSONS AND/OR ENTITIES,

Defendant.

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INDEX NO. 159478/2019

MOTION DATE 11/21/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS .

Defendants Guggenheim Partners, LLC, Guggenheim Securities, LLC, as successor in interest to Guggenheim Capital Markets, LLC, South Blacktree Agency, LLC (South Blacktree), Ipex Services, LLC, GSFI, LLC (GSFI), and Jeffrey M. Lewis (collectively, Defendants) move for an order, pursuant to CPLR 3211 (a) (1), (5), and (7), dismissing the complaint.

In this action, plaintiff is seeking commissions on life insurance policies which she wrote for Defendants while employed by them as an administrative assistant over 12 years ago. She claims Defendants fraudulently concealed that she was entitled to millions of dollars of commissions, retaining them for themselves. She asserts claims for fraud and other torts seeking damages in the amount of the commissions. Defendants

urge that her claims are all time-barred, since the commissions in dispute relate to policies purchased in 2006 and 2007, and the fraud discovery rule does not apply based on plaintiff's own pleadings. They also contend that her claims fail as a matter of law, because, while she is licensed as an insurance agent, there was no contractual agreement providing her with a right or entitlement to commissions.

BACKGROUND

In September 2006, plaintiff Jensine Andresen was hired by Defendants as an executive assistant to provide administrative support to three managing directors of Guggenheim Specialty Finance Group: Jeffrey Lewis, Jeffrey Lange, and Jonathan Lewis NYSCEF Doc. No. 1, complaint [compl], para. 14). Although she was a licensed insurance agent, she only held her license for three months and was not hired by Defendants in that capacity (*id.*, para. 21; *see* NYSCEF Doc. No. 8, employment contract). During the one year she worked for Defendants, she was responsible for a "substantial amount of administrative work," and was promoted to business manager in September 2007 (NYSCEF Doc. No. 1, compl, para. 15). Under her employment contract, she received an annual salary of $75,000, without any mention of commissions, bonuses, or additional compensation (*id.*; *see* NYSCEF Doc. No. 8, employment contract). In late 2007, plaintiff voluntarily left Defendants (NYSCEF Doc. No. 1, compl, para. 14). She then worked for Morgan Stanley & Co. and Signator Investors, Inc., an affiliate of John Hancock Life Insurance Company, Inc. (Hancock) (NYSCEF Doc. Nos. 9 and 10).

In 2004, Defendants began taking out corporate-owned life insurance policies (COLI policies) on its executives as a tax-advantageous investment (NYSCEF Doc. No. 1, compl, paras. 16-17). Defendants established an internal insurance agency, South Blacktree, and obtained the policies from various insurers (*id.*, paras. 17-19). Defendant GSFI paid the premiums on the COLI policies (*id.*, compl, para. 17). In order for South Blacktree to operate as an insurance agent, it needed one person to be fully licensed in each of the states in which its business was conducted. Plaintiff was a licensed agent in New York and, while employed by Defendants, became licensed in numerous other states (*id.*, compl, paras. 20-22).

Plaintiff alleges that with her assistance Defendants purchased numerous COLI policies totaling “hundreds of millions of dollars” in face value (*id.*, compl, para. 19). Because she was designated as an authorized agent for various insurers, she served as the sole licensed writing agent for Defendants’ COLI policies issued by those insurers (*id.*, compl, paras. 24-25). After she left Defendants’ employ, Defendants told the various insurers that her address was still at South Blacktree (*id.*, compl, para. 35).

During her employment, plaintiff asked Defendants, particularly defendant Jeffrey Lange, whether she was entitled to any compensation, in addition to the salary she earned as an executive assistant/business manager, for writing (signing) the COLI policies, and she was told she was not (*id.*, compl, para. 27; *see* NYSCEF Doc. No. 14, affidavit of Jensine Andresen, dated Dec. 26, 2019 [Andresen aff], para. 8). Defendants, however, “required [her] to execute documents purporting to assign her commissions on certain of the Guggenheim [COLI] policies to South Blacktree (or other Guggenheim entities or

employees), without ever informing [her] that any such assignment was contrary to applicable law" (NYSCEF Doc. No. 1, compl, para. 97). She neither signed nor authorized Defendants to sign these assignments on her behalf (*id.*, compl, para. 99).

In opposition to this motion, plaintiff asserts that in late 2018 she received some misdirected mail from a Hancock-associated entity at her home address. She contacted Hancock who informed her that she was still the insurance agent of record for dozens of COLI policies issued by Hancock to Defendants (NYSCEF Doc. No. 14, Andresen aff, para. 10). She then conducted an investigation of the commissions paid to Defendants on the COLI policies for which she remained the agent of record. In August 2019, she sent a demand for an accounting to Defendants, which they refused (NYSCEF Doc. No. 1, compl, paras. 101-102).

Plaintiff then commenced this action asserting seven causes of action: fraud; money had and received; conversion; unjust enrichment; tortious interference with contract; declaratory judgment; and, alternatively, an accounting. She alleges that Defendants were acting as her agent and made misrepresentations and omissions of fact by failing to ever inform her, and taking affirmative steps to conceal from her, that she was entitled to receive all commissions on Defendants' COLI policies. She was damaged by not receiving millions of dollars in commissions that "she had earned which were lawfully hers" (*id.*, compl, paras. 106-113). She alleges that Defendants' receipt and retention of the commissions was a violation of New York Insurance Law secs. 2114, 2116, and 4224, and, under principles of equity, they should not be permitted to keep the commissions, which they had converted (*id.*, compl, paras. 114-125). In the fifth claim

for tortious interference with contract, plaintiff asserts that, upon information and belief, the insurers agreed to pay her commissions as a licensed insurance agent, Defendants had knowledge of that agreement and intentionally procured a breach by causing the insurers not to pay the commissions to her (*id.*, compl, paras. 126-130). In the sixth claim, plaintiff seeks a declaration that all commissions on the COLI policies to date and in the future are her rightful property (*id.*, compl, paras. 131-134). Finally, in the seventh claim, plaintiff seeks an accounting, asserting that Defendants received the commissions as her agent and never repudiated their obligation or role as her agent (*id.*, compl, paras. 135-143).

In moving to dismiss the complaint, Defendants contend that the entire complaint, which is primarily based on fraud, is untimely because it was commenced over 12 years after Defendants' purported misrepresentation that plaintiff was not entitled to any commissions on the COLI policies. They urge that plaintiff's own allegations demonstrate that she was on notice while she was still employed by Defendants that she was not being paid the commissions. They argue that she knew or at the least should have known of her claim to the commissions as a licensed insurance agent who continued to work as an agent, even for one of the insurers that paid commissions on the subject policies. Her inconsistent allegations that she did not know of her rights, but that she was required by Defendants to sign assignment of commission agreements in 2007, further demonstrate that she had a duty of inquiry. Defendants also argue that plaintiff had no contractual right to the commissions. The only contract she had with Defendants was her employment agreement, which did not mention any commissions.

In opposition, plaintiff contends that the limitations period on her claims were tolled by Defendants' fiduciary duty to her, equitable estoppel, and Defendants' continuing wrongs. She argues that she has a valid right to the commissions and needs discovery of the insurers' agreements to pay her the commissions as the licensed agent.

DISCUSSION

Defendants' motion to dismiss is granted, and the complaint is dismissed, pursuant to CPLR 3211 (a) (5), as time-barred.

A fraud claim must be commenced within six years from the date of the fraud, or within two years from when the fraud should have been discovered with reasonable diligence, whichever is later (CPLR 213 [8]; *see* CPLR 203 [g]; *Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). A claim accrues when the elements necessary to state a cause of action can be alleged in the complaint (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]). For a fraud claim, the period begins to run on the date of the fraudulent act (*Ghandour v Shearson Lehman Bros.*, 213 AD2d 304, 305 [1st Dept 1995]; *see Malone v Bayerische Hypo-Und Vereins Bank, AG*, 2010 WL 391826, at *5 [SDNY 2010] [fraud occurred when the misrepresentations or omissions were made], *affd* 425 Fed Appx 43 [2d Cir 2011]), that is, when the plaintiff had knowledge of facts from which fraud could be reasonably inferred (*Sargiss v Magarelli*, 12 NY3d at 532).

Here, plaintiff alleges that Defendants misrepresented her right to commissions when Defendants purchased and arranged for themselves to receive the commissions on the policies plaintiff signed in 2006 and 2007, and notified her that she was not entitled to receive any commissions (*see Moore v Baumgardner*, 181 AD3d 1043, 1044 [3d Dept

2020] [limitations period begins to run when title to the property was taken inconsistent with the parties' agreement]; *Fava v Kaufman*, 124 AD2d 42, 44-45 [3d Dept 1987] [the fraudulent taking of title in violation of parties' contract triggers accrual of claims]). Thus, her claim accrued no later than 2007. Since this claim is subject to a six-year statute of limitations, the limitations period expired in 2013. This action was commenced in 2019 and, therefore, is untimely unless a tolling provision or the fraud discovery rule of CPLR 213 (8) is applicable.

Plaintiff argues that there are three tolling doctrines that apply to save her claims. First, she urges that the fiduciary tolling doctrine applies to all of the claims. She asserts that Defendants served as her agent and fiduciary since 2006 and never openly repudiated that role. She alleges that they continually misrepresented to the insurers on the various COLI policies that her address was at South Blacktree, Defendants' internal insurance agency, and received and retained the commissions intended for plaintiff as her agent (NYSCEF Doc. No. 1, compl, paras. 36-42).

The fiduciary tolling doctrine tolls the limitations period on a claim until the fiduciary openly repudiates his or her fiduciary obligation or the relationship is terminated (*see Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131-132 [1st Dept 1999]). This tolling rule is applied to breach of fiduciary duty claims arising in cases involving fiduciaries such as estate administrators, trustees, corporate officers, and receivers (*see Access Point Med., LLC v Mandell*, 106 AD3d 40, 45 [1st Dept 2013]; *see also Matter of Clark*, 146 AD3d 495, 497 [1st Dept 2017] [no fiduciary tolling where no fiduciary relationship stated]). Here, plaintiff fails to plead or establish any fiduciary

relationship between her former employer and herself. Indeed, it is implausible under the facts she alleges that her employer would be her agent and that she, the employee, was the principal directing Defendants. To establish a principal-agent relationship, plaintiff must plead "a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act" (*Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 96-97 [1st Dept 2009] [internal quotation marks and citations omitted]). Plaintiff fails to plead such consent or her control. Rather, her allegations, taken as true on this motion, assert that Defendants acted with the insurers on their own behalf and for their own benefit.

In addition, this toll is not applicable to claims for money damages (*Matter of Clark*, 146 AD3d at 497 [toll "does not apply to claims for money damages"]; *Cusimano v Schnurr*, 137 AD3d 527, 530-531 [1st Dept 2016] [toll only applies to claims for accounting or equitable relief]; *Stern v Morgan Stanley Smith Barney*, 129 AD3d 619, 619 [1st Dept 2015]). Plaintiff primarily seeks money damages -- "millions of dollars in commissions," (NYSCEF Doc. No. 1, compl, para. 109), and her claim for an accounting is incidental to that relief (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 139).

Plaintiff's second argument that Defendants' statute of limitations defense is barred by equitable estoppel also is unavailing. Under the doctrine of equitable estoppel, the plaintiff must show that the defendant made fraudulent misrepresentations to induce the plaintiff to refrain from timely commencing an action, the plaintiff reasonably relied on the defendant's alleged misrepresentations and exercised due diligence in ascertaining

the facts and bringing the action (*see MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dept 2017]). The "doctrine of equitable estoppel 'will not toll a limitations statute where plaintiffs possessed timely knowledge sufficient to have placed them under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations'" (*Brean Murray, Carret & Co. v Morrison & Foerster LLP*, 165 AD3d 582, 582 [1st Dept 2018], quoting *Rite Aid Corp. v Grass,* 48 AD3d 363, 364-365 [1st Dept 2008]). Contrary to plaintiff's argument, equitable estoppel may be determined on a motion to dismiss (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 141; *Putter v North Shore Univ. Hosp*., 7 NY3d 548, 553-554 [2006]).

Here, plaintiff fails to plead or demonstrate that any action or inaction by Defendants caused plaintiff's delay in bringing this action. According to the complaint, plaintiff learned in 2006 and 2007 that Defendants were not going to pay her the commissions on the COLI policies and were requiring her to execute assignments of her commissions (NYSCEF Doc. No. 1, compl, paras. 27, 97). Given her awareness that Defendants were not going to pay her those commissions, plaintiff, as a reasonable licensed insurance agent, should have made further inquiry as to her entitlement thereto before the statute of limitations expired (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 141). Her lack of reasonable diligence bars her equitable estoppel argument (*Stern v Morgan Stanley Smith Barney*, 129 AD3d at 620). Further, plaintiff's equitable estoppel claim also improperly relies upon the same alleged wrongdoing as her underlying claims (*Cusimano v Schnurr*, 137 AD3d at 532 ["(w)here the same alleged

wrongdoing that underlies the plaintiffs' equitable estoppel argument is also the basis of their tort claims, equitable estoppel will not lie"]; *see Ross v Louise Wise Servs., Inc*., 8 NY3d 478, 491 [2007]).

Finally, plaintiff contends that the continuing wrong doctrine applies to save her claims. This argument is unpersuasive. The continuing wrong doctrine is used where there is a series of continuing wrongs, and the statute of limitations is tolled until the last wrongful act (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]). It is not applicable where there is a single wrong that has continuing effects, rather than "a series of independent, distinct wrongs" (*id.* at 601; *cf. Ganzi v Ganzi*, 183 AD3d 433, 434 [1st Dept 2020] [executing new license agreements, not mere renewals, were new, overt acts and independent, distinct wrongs]).

Here, plaintiff urges that this doctrine applies because Defendants continued to divert the commissions to themselves, hiding that fact from plaintiff and failing to provide her with an accounting from 2006 to the present (NYSCEF Doc. No. 1, compl, para. 88). Defendants' receipt of commissions, even for the renewals of the policies, did not constitute new, overt acts. Rather, it was merely "continuing consequential damages" from the same wrong committed in 2006 and 2007 in arranging to receive the commissions on the COLI policies and informing plaintiff that she was not entitled to them. There is no series of independent, distinct wrongs alleged, merely the continuing effects of Defendants' allegedly unlawful conduct (*Henry v Bank of Am.*, 147 AD3d at 601; *see Williams v Georgopoulos*, 184 AD3d 608, 608 [2d Dept 2020]; *Matter of Salomon v Town of Wallkill*, 174 AD3d 720, 721-722 [2d Dept 2019] [claim accrued

when plaintiff received first paycheck, and subsequent paycheck with improper deductions were consequences of the initial wrongful act]).

Defendants' omissions in failing to provide an accounting or failing to disclose information are not actionable under plaintiff's allegations (*see e.g., VA Mgt., LP v Valvani*, 2020 NY Slip Op 31535[U], at **5-6 [Sup Ct, NY County 2020] [Cohen, J.]). As discussed above, she fails to allege any fiduciary duty. Plaintiff's reliance on breach of contract cases in which the court found a new breach each time the breaching party failed to pay or overcharged on the contract are factually distinguishable as there was no contract in which Defendants agreed to pay plaintiff commissions (*cf. Meadowbrook Farms Homeowners Assn., Inc. v JZG Resources, Inc.*, 105 AD3d 820, 822 [2d Dept 2013] [defendant's yearly obligation under contract to pay assessments provides for continuing performance, and breach of contract occurs every time it fails to pay]; *Beller v William Penn Life Ins. Co. of N.Y.*, 8 AD3d 310, 314 [2d Dept 2004] [where contract provides for continuing performance over time period, each breach begins the limitations period anew]).

Plaintiff's fraud claim also cannot be saved by the discovery rule. Under that rule, a claim accrues "at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence" (*Marasa v Andrews*, 69 AD3d 584, 584 [2d Dept 2010] [internal quotation marks and citations omitted]; *see Sargiss v Magarelli*, 12 NY3d at 532 [general knowledge of the fraudulent act is sufficient]; *Moses v Dunlop*, 155 AD3d 466, 468 [1st Dept 2017]; *Cusimano v Schnurr*, 137 AD3d at 531). A plaintiff has the duty to make appropriate inquiry and cannot shut

his or her eyes to facts which call for investigation (*see MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d at 114-115; *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc*., 137 AD3d 685, 689 [1st Dept 2016]), and bears the burden of demonstrating that the fraud could not have been discovered prior to two years before the commencement of the action (*Celestin v Simpson*, 153 AD3d 656, 657 [2d Dept 2017]; *see Odierna v RSK, LLC*, 171 AD3d 769, 771 [2d Dept 2019]; *Von Blomberg v Garis,* 44 AD3d 1033, 1034 [2d Dept 2007] [plaintiff bears the burden on the discovery rule]).

Plaintiff's own allegations, which this court must accept as true on this motion, establish that she was apprised of the facts from which fraud could have been reasonably inferred by at least 2007. At that time, during her employment from September 2006 through late 2007, she was told directly by Defendants that they were not paying her any commissions, and then, according to her own pleadings, Defendants required her to execute documents purporting to assign her commissions over to South Blacktree or other Guggenheim entities or employees (NYSCEF Doc. No. 1, compl, paras. 27, 97). Accordingly, by at least 2007, New York law imposed on plaintiff, a licensed insurance agent, a duty to inquire about commissions on these insurance policies she wrote and signed, and triggered the running of the limitations period at that time. Her failure to pursue a reasonable investigation until 2018 did not satisfy her duty under these facts (*see MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d at 115; *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d at 689). It should be noted that plaintiff continued to work as a licensed life insurance agent after leaving Defendants' employ, even for the same insurers, such as Hancock, but never inquired as to her right to

commissions on Defendants' COLI policies. Therefore, the fraud discovery rule fails to extend the statute of limitations, and her fraud claim is dismissed.

The remainder of her claims stem from the same acts that form the basis of her fraud claim, and similarly are time-barred. Her second cause of action for money had and received is treated as a quasi-contract or implied-in-law claim and is governed by the six-year contractual limitations period in CPLR 213 (2) (*see Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991]; *County of Suffolk v Suburban Hous. Dev. & Research, Inc.*, 160 AD3d 607, 610 [2d Dept 2018]). It accrued, at the latest, in 2007 and is untimely. The third cause of action for conversion is subject to a three-year statute of limitations which accrues when the taking occurs (*Sporn v MCA Records*, 58 NY2d 482, 488 [1983]; *Harlem Capital Ctr., LLC v Rosen & Gordon, LLC*, 145 AD3d 579, 580 [1st Dept 2016]). The taking, here, occurred in 2007 when plaintiff failed to receive the commissions, more than three years ago. The fourth claim for unjust enrichment is subject to a six-year limitations period (*see* CPLR 213 [1] and [2]; *Seidenfeld v Zaltz*, 162 AD3d 929, 933 [2d Dept 2018] [CPLR 213 (2)]; *Williams-Guillaume v Bank of Am., N.A.*, 130 AD3d 1016, 1017 [2d Dept 2015] [CPLR 213 (1)]), and, like the fraud claim, is untimely.

The tortious interference with contract claim is subject to a three-year limitations period (CPLR 214 [4]), which accrued when the interference occurred, that is, when Defendants told the insurers to pay the commissions directly to it (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 141; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]), which occurred in 2007. The claim,

here, does not commence anew every time the policies were renewed and the insurers breached their purported agreement with plaintiff to pay commissions (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 141; *see also American Fed. Group v Edelman*, 282 AD2d 279, 279 [1st Dept 2001] [three-year statute of limitations and there is no discovery rule]). The court notes that this claim also fails, because plaintiff fails to allege that she had a valid contract with each of the insurers, and that the insurers breached those contracts (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621-622 [1996] [must show actual breach]).

The claim for a declaratory judgment is subject to the six-year catch-all limitations period in CPLR 213 (1) unless the dispute could have been resolved in an action to which a specific limitations period applies (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 41 [1995]; *Matter of Kassab v Kasab*, 137 AD3d 1135, 1138 [2d Dept 2016]; *Town of Hempstead v AJM Capital II, LLC*, 130 AD3d 607, 608 [2d Dept 2015]). Here, the dispute underlying the declaratory claim is based on fraud, which as discussed above is a six-year limitations period and has expired. Similarly, the claim for an accounting is subject to the six-year statute of limitations in CPLR 213 (1) (*McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562, 562 [1st Dept 2014] [accounting claim is subject to residual six-year limitations period in CPLR 213 [1]), which has expired.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

9/1/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**				**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**