SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3160-15T1

ARLENE SHUSTER,

Plaintiff-Appellant,

v.

AXA EQUITABLE LIFE INSURANCE COMPANY,

Defendant-Respondent.

Argued November 13, 2017 – Decided April 17, 2018

Before Judges Messano, Accurso, and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4485-14.

Barbara J. Hart (Lowey Dannenberg Cohen & Hart, PC) of the New York and Connecticut bars, admitted pro hac vice, argued the cause for appellant (Cohn Lifland Pearlman Herrmann & Knopf, LLP, Zucker Steinberg & Wixted, PA, and Barbara Hart, attorneys; Peter S. Pearlman, Audra DePaolo, Sung-Min Lee (Lowey Dannenberg Cohen & Hart, PC), David C. Harrison (Lowey Dannenberg Cohen & Hart, PC) of the New York bar, admitted pro hac vice, and Joshua H. Grabar (Bolognese & Associates, LLC) of the Pennsylvania bar, admitted pro hac vice, on the briefs).

Jay B. Kasner (Skadden, Arps, Slate, Meagher & Flom, LLP) of the New York bar, admitted pro hac vice, argued the cause for respondent (Carl D. Poplar, PA and Jay B. Kasner, attorneys; Carl D. Poplar, Jay B. Kasner and Kurt Wm. Hemr (Skadden, Arps, Slate, Meagher & Flom, LLP) of the New York and Massachusetts bars, admitted pro hac vice, of counsel and on the brief).

PER CURIAM

In 1993, plaintiff Arlene Shuster purchased a Flexible Premium Variable Life Insurance Policy (the Contract) from the predecessor of defendant, AXA Equitable Life Insurance Company (AXA). Plaintiff made two premium payments of $100,000 each in 1993 and 1994.

In November 2014, plaintiff filed a putative class action complaint alleging AXA breached the Contract. Broadly stated, the Contract permitted policyholders to direct the investment of net premium amounts — amounts in excess of insurance costs and expenses — either with the Guaranteed Interest Division (GID), which guaranteed an annual percentage return, or with a "Separate Account" (SA). At the policyholder's direction, funds in the SA would be invested with different investment divisions within AXA, which, by the terms of the Contract, invested "in securities and other investments whose value [wa]s subject to market fluctuations and investment risk." Plaintiff directed investment in particular SA funds.

In the Contract, AXA represented it would comply with all applicable laws, including those of New York. Additionally, the Contract provided, "[w]e will not make any material change in the investment policy of an investment division of our SA without the prior approval of the Superintendent of Insurance of New York State." Plaintiff claimed that beginning in 2009, AXA pursued a "volatility-management strategy" in some of its SA funds, including those in which she had invested.

New York law regulates an insurer's investments in separate accounts, and requires the New York State Department of Financial Services (DFS) to approve an insurer's "statement as to its methods of operation of such separate account."

> If the insurer files an amendment of any such statement with the superintendent that does not change the investment policy of a separate account and the superintendent does not approve or disapprove such amendment within a period of thirty days after such filing, such amendment shall be deemed to be approved as of the end of such thirty day period . . . . An amendment of any such statement that changes the investment policy of a separate account shall be treated as an original filing.
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> [N.Y. Ins. Law § 4240(e) (emphasis added).]

Plaintiff alleged that in its filing with DFS, AXA portrayed the amendment adopting its "volatility-management strategy" as

"routine," permitting implementation of the strategy in due course without review as a new "original" filing.

In March 2014, AXA entered into a consent order with DFS (Consent Order). The Consent Order summarized DFS's findings resulting from an investigation commenced in 2011 into AXA's implementation of changed investment strategies in its "variable annuity products." DFS found AXA violated §4240(e) in 2009, 2010 and 2011 "by filing . . . Plans of Operation . . . without adequately informing and explaining to [DFS] the significance of the changes to the insurance product." AXA's adoption of this investment strategy "limit[ed] the gains that may accrue to a policyholder's account." The consent order required AXA to pay a civil fine, obtain necessary approvals for modifications and communicate with policyholders.

Plaintiff's complaint alleged AXA breached its contractual promise to comply with applicable law and not make material changes in the SA's operating plan without DFS approval. It alleged the breach resulted in AXA's implementation of the volatility-management strategy that "reduced the returns" in funds held by plaintiff and other class members.

The Securities Litigation Uniform Standards Act of 1998 (SLUSA), specifically, 15 U.S.C. § 78bb(f), provides:

> Limitations on remedies.
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> (1) Class action limitations.
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> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging —
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (2) Removal of covered class actions.
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> Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

AXA removed plaintiff's complaint to federal district court and asked that venue be transferred to the Southern District of New York, where another action, Zweiman v. AXA Equitable Life Ins. Co., 146 F. Supp. 3d 536 (S.D.N.Y. 2015), was pending at the time. Before AXA's change of venue motion was heard, AXA moved to dismiss the complaint, arguing it was precluded by SLUSA.

Plaintiff opposed the motions and moved to remand the complaint to the Law Division. She argued her complaint alleged

a breach of the Contract and did not allege AXA made any "misrepresentation or omission" to policyholders "in connection with the purchase or sale of a covered security."[1]

In a comprehensive written decision, the district court judge concluded "AXA's misrepresentation [wa]s an essential predicate for [plaintiff's] breach of contract claim." However, applying four factors relevant to whether the misrepresentation satisfied the "in connection" prong of SLUSA, see Rowinski v. Salomon Smith Barney Inc., 398 F.3d 294, 302 (3d Cir. 2005), the judge concluded AXA failed to make the required showing. He remanded the complaint to the Law Division.

[1] Plaintiff also asserted in a letter to the court that transfer was not appropriate because Zweiman "involves annuity products whereas [this case] involves life insurance policies with substantively different terms." While continuing to assert before us that differences exist between the two investment products, plaintiff acknowledged before the Law Division that "[i]f the [C]onsent [O]rder . . . provides that AXA's violation of [§]42-40(e) is limited solely to annuities, then life insurance policy holders wouldn't have a claim." Furthermore, plaintiff's brief does not attach any significance to the difference between her variable life insurance policy and the annuities that were the subject of Zweiman, except to say that the district court judge in Zweiman recognized that every SLUSA preclusion analysis was fact sensitive and his analysis did not consider the facts alleged in plaintiff's complaint. Zweiman, 146 F. Supp. at 546 n.21.

AXA promptly filed a motion to dismiss.[2] It claimed among other things that plaintiff failed to allege AXA made any misrepresentation to policy holders, or that she suffered consequential damages from any breach of the Contract. AXA also reiterated that SLUSA precluded plaintiff's complaint. AXA supplemented its motion with the recently issued New York federal district court's decision in Zweiman, in which the judge concluded SLUSA precluded class claims in that suit for breach of contract based upon the Consent Order. Zweiman, 146 F. Supp. 3d at 539.

After considering oral argument, the Law Division judge essentially relied on the Zweiman court's analysis, and the United States Supreme Court's decision in Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006). He dismissed plaintiff's complaint with prejudice because SLUSA precluded the action.[3] This appeal ensued.

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[2] Plaintiff has not asserted, nor could she, that AXA's motion in the Law Division was precluded by res judicata, collateral estoppel or other similar doctrines. See Kircher v. Putnam Funds Trust, 547 U.S. 633, 647 (2006) ("Collateral estoppel should be no bar to such a revisitation of the preclusion issue, given that [28 U.S.C.] § 1447(d) prevents the funds from appealing the District Court's decision.").

[3] The judge's order also dismissed the complaint for other reasons, including failure to state a cause of action, Rule 4:6-2(e), failure to plead fraud with particularity, Rule 4:5-8(a), and forum non conveniens. Although AXA asserts they provide alternate reasons to affirm the judgment, we need not consider these issues.

Plaintiff contends the success of her breach of contract claim did not require she prove "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C. § 78bb(f)(1)(A) (emphasis added), and therefore the complaint was not precluded by SLUSA. We disagree and affirm.

"Our review, accepting the facts alleged in the complaint as true and drawing all reasonable inferences in favor of the plaintiff, is plenary." Rowinski, 398 F.3d 298 (citing In re Adams Golf, Inc. Secs. Litig., 381 F.3d 267, 273 (3d Cir. 2004)). In this area, one maxim is clear:

> [C]ourts have noted that plaintiffs should not be permitted to escape SLUSA by artfully characterizing a claim as dependent on a theory other than falsity when falsity nonetheless is essential to the claim, such as by characterizing a claim of falsity as a breach of the contractual duty of fair dealing.
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> [In re Kingate Mgmt. Litig., 784 F.3d 128, 140 (2nd. Cir. 2015).]

The Supreme Court has broadly interpreted the "in connection with" element of SLUSA "and held the requisite connection is established where a 'fraudulent scheme' and a securities transaction 'coincide.'" Rowinski, 398 F.3d at 300 (quoting SEC v. Zandford, 535 U.S. 813, 825 (2002)). And, while "Zandford's 'broad' interpretation is not boundless[,] . . . courts have . . .

scrutinized the pleadings to arrive at the 'essence' of a state law claim, in order to prevent artful drafting from circumventing SLUSA preemption." Id. at 301 (citations omitted).

In Rowinski, the court identified four factors relevant "in distinguishing between preempted claims and those remaining within the province of state law." Id. at 302.

> [F]irst, whether the covered class action alleges a "fraudulent scheme" that "coincides" with the purchase or sale of securities; second, whether the complaint alleges a material misrepresentation or omission "disseminated to the public in a medium upon which a reasonable investor would rely"; third, whether the nature of the parties' relationship is such that it necessarily involves the purchase or sale of securities; and fourth, whether the prayer for relief "connects" the state law claims to the purchase or sale of securities.
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> [Ibid. (citations omitted).]

However, the court cautioned these "non-inclusive four factors . . . are not requirements, but rather guideposts in a flexible preemption inquiry[,]" and "[i]n a SLUSA case involving different facts or allegations, other considerations also may be relevant." Id. at 302 n.7.

We need not detail the Supreme Court's explication of the "in connection" prong of SLUSA since Rowinski. Citing Dabit, and the Court's own refinement of Dabit in Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058 (2014), the judge in Zweiman wrote:

> In light of Troice and Dabit, the "in connection with" doctrine can be articulated as follows: the fraud must be of the type that is material to someone other than the fraudster to buy, sell, or hold a covered security; and, if so, any claim involving that transaction (or lack thereof) — regardless of whether the plaintiff herself was induced to take a position — is precluded.
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> [Zweiman, 146 F. Supp. 3d at 550.]

We agree with this synthesis of the controlling case law. When applied to the facts alleged in plaintiff's complaint, SLUSA precludes her breach of contract claim.

It is undisputed that plaintiff alleged AXA breached the Contract by misrepresenting the nature and scope of its volatility management strategy in order to secure DFS approval without the review compelled by an "initial" filing. This misrepresentation to DFS resulted in AXA initiating the particular trading strategy and trading securities within the SA accounts, allegedly to the detriment of plaintiff and putative class members.

Plaintiff contends AXA's non-public DPS filings did not induce her to make any investment decision and therefore the misrepresentation cannot be "in connection" with the purchase or sale of covered securities as required by SLUSA. However, the Supreme Court has rejected such a cramped construction. See Dabit, 547 U.S. at 85 (quoting United States v. O'Hagan, 521 U.S. 642, 658 (1997) ("The requisite showing . . . is 'deception "in

connection with the purchase or sale of any security," not deception of an identifiable purchaser or seller.'")) Under the terms of the Contract, plaintiff retained the ability to transfer her shares in the SA account to "one or more other divisions of [the] SA or to [the] GID" upon her written request. Plaintiff's claim for damages relies wholly upon the assertion that AXA's misrepresentation to DFS resulted in AXA implementing a trading strategy for the investments she maintained in the SA accounts that inured to her detriment. The broad interpretation of the "in connection" prong applied by the Supreme Court and other courts means that SLUSA precludes plaintiff's titular breach of contract claim.

Affirmed.