UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE No. 18-cv-21665-DPG

LUJERIO CORDERO,

Plaintiff,

vs.

TRANSAMERICA ANNUITY SERVICE CORPORATION, n/k/a WILTON RE ANNUITY SERVICE CORPORATION,

AND

TRANSAMERICA LIFE INSURANCE COMPANY,

Defendants.

_____/

TRANSAMERICA ANNUITY SERVICE CORPORATION, n/k/a WILTON RE ANNUITY SERVICE CORPORATION,

Third-Party Plaintiff,

vs.

ALLIANCE ASSET FUNDING, LLC, SINGER ASSET FINANCE COMPANY, LLC, and LIBERTY SETTLEMENT SOLUTIONS, LLC,

Third-Party Defendants.

_____/

TRANSAMERICA ANNUITY SERVICE CORPORATION n/k/a WILTON RE ANNUITY SERVICE CORPORATION'S AND TRANSAMERICA LIFE INSURANCE COMPANY'S REPLY IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Defendants, Transamerica Annuity Service Corporation n/k/a Wilton Re Annuity Service Corporation ("Transamerica Annuity") and Transamerica Life Insurance Company, successor by merger with Transamerica Occidental Life Insurance Company ("Transamerica Life") (collectively, "Defendants"), respectfully submit this reply in support of the Motion to Dismiss the Second Amended Complaint with Prejudice [ECF No. 108].

I. INTRODUCTION

Plaintiff Lujerio Cordero's ("Plaintiff") response makes clear that the Second Amended Complaint ("SAC") [ECF No. 106] is nothing more than an improper attempt to seek reconsideration of the Court's Order [ECF No. 105] dismissing his claims. Plaintiff is unable to point to any new facts in the SAC that would cure the defects in his breach of contract and Florida Adult Protective Services Act ("FAPSA") claims. Instead, he argues that the Court erred in dismissing these claims, and that the SAC and instant briefing "provide[] extensive additional background on the statutory and economic background of the structured settlement industry and focus[] on the Settlement Agreement and Qualified Assignment contracts…." Response [ECF No. 114] at p. 3, n. 1.

Plaintiff's pleading of additional legislative history and legal conclusions is futile. The Court's prior rulings were correct, and they require dismissal of the SAC with prejudice.

II. ARGUMENT

A. This Court Correctly Held that, under New York Law, the Contractual Anti-Assignment Language is for the Benefit of Defendants and that Defendants had no Obligation to Seek its Enforcement.

As Plaintiff acknowledges, the Court held that, under New York law, the anti-assignment language in the underlying settlement agreement and qualified assignment are for the benefit of Defendants, rather than Plaintiff, and that Defendants may waive those provisions. *See* Response

[ECF No. 114] at p. 3, n. 1; Order [ECF No. 105] at p 9. Rather than pleading any new facts, and unable to cite any cases holding to the contrary, Plaintiff first asserts that "Defendants cannot assign portions of the income stream to random third parties without being subject to a breach of contract action." Response [ECF No. 114] at p. 5. But Defendants are not alleged to have assigned any of Plaintiff's structured settlement payments. The SAC alleges that Plaintiff assigned his payment rights to factoring companies in six separate, court-approved transfers. SAC [ECF No. 106] ¶¶ 42-52.

Plaintiff next asserts that the contractual anti-assignment language derives from Section 130 of the Internal Revenue Code, and that this language was intended to prevent structured settlement payees from dissipating their payments. Response [ECF No. 114] at pp. 6-7. However, as this Court correctly concluded, courts applying New York law have repeatedly held that structured settlement anti-assignment provisions are for the benefit of settlement obligors and annuity issuers like Transamerica Annuity and Transamerica Life, which may waive them. *See Singer Asset Fin. Co. v. Wyner,* 156 N.H. 468, 474–76 (2007) ("*Wyner*"); *Matter of 321 Henderson Receivables Origination LLC (Logan)*, 856 N.Y.S.2d 817, 820 (N.Y. Sup. Ct., Queens Co. 2008) ("*Logan*");[1] *Settlement Capital Corp. v. Pagan*, 649 F. Supp. 2d 545, 555 and n.52 (N.D. Tex.

[1] Plaintiff argues that the Court misinterpreted this case, as well. Response at n. 8. However, the Court accurately stated that *Logan* did not hold that the annuity issuer had an obligation to investigate the transfer. *See* Order [ECF No. 105] at p. 10, citing *Logan*, 856 N.Y.S. 2d at 817. The Court correctly found that the *Logan* court held that the transfer was not in the payee's best interest, and that the annuity issuer must affirmatively waive its interest and that silence and inaction alone did not constitute consent. *Id*. Of course, here, Defendants waived the anti-assignment language by entering into written stipulations.

2009) ("*Pagan*").[2] And all of these cases were decided long after the enactment of Section 130, which became effective in 1983.

Moreover, Section 130 is designed to afford certain tax advantages to assignment companies like Transamerica Annuity that accept assignments of structured settlement payment obligations from settling defendants and/or their insurers. Specifically, Section 130 provides that "[a]ny amount received for agreeing to a qualified assignment shall not be included in the gross income to the extent that such amount does not exceed the aggregate cost of any qualified funding asset." IRC 130(a).

In accordance with Section 130, Transamerica Annuity was entitled to exclude the amount it received in consideration for accepting an assignment of the obligation to make the periodic payments due Plaintiff because the underlying settlement agreement contains the requisite language prohibiting acceleration of those payments. The fact that Section 130 provides a tax incentive to companies like Defendants does not somehow change the fact that New York law provides that anti-assignment language in structured settlement agreements is for the benefit of settlement obligors and annuity issuers, and that these parties have the right to waive such clauses.

In any event, even assuming the anti-assignment language benefits both Plaintiff and Defendants, and even if, as Plaintiff contends, a party may not unilaterally waive a contractual provision that benefits both parties (Response [ECF No. 114] at p. 7), this does not help Plaintiff here. Plaintiff waived the anti-assignment language by entering into transfer agreements with

[2] Plaintiff attempts to distinguish *Wyner* on the ground that the contractual anti-assignment language in that case "explicitly inured to the benefit of the settling insurer, and, by extension [the annuity issuer]." Response [ECF No. 114] at n. 5. But like the settlement agreement in *Wyner*, Plaintiff's settlement agreement expressly provides that it "shall be binding upon and enure [sic] to the benefit of" all of the parties and their "successors and assigns." *See* Settlement Agreement ¶ 11. Plaintiff does not dispute that the anti-assignment at issue in *Logan* and *Pagan* was similar to the language at issue here. *See Logan*, 856 N.Y.S.2d at 505 and *Pagan*, 649 F. Supp. 2d at 549.

factoring companies, and Defendants waived the anti-assignment language by not objecting to the transfer petitions and/or entering into stipulations in connection with each transfer. Therefore, as a matter of law, the parties waived enforcement of that language at the time the transfer proceedings occurred.

Nor is there any merit to Plaintiff's argument that the enactment of state Structured Settlement Protection Acts, like the Florida Structured Settlement Protection Act, somehow creates a contractual obligation on the part of Defendants to object to factoring transactions that *Plaintiff* decided to effectuate. Response [ECF No. 114] at pp. 8-9. To the contrary, as the court explained in *Matter of 321 Henderson Receivables, L.P. v. Martinez*, 11 Misc.3d 892 (N.Y. Sup. Ct. 2006) ("*Martinez*"), which is cited by Plaintiff, in order to protect structured settlement payees from the aggressive practices of factoring companies, SSPAs require *courts* to make express findings before any transfer can be approved. *Id*. at 894. "The legislative history [of the New York Structured Settlement Act] makes clear that to avoid the victimization so prevalent in the [factoring] industry, the *courts* are intended to examine the various statutory criteria and determine whether the proposed sale will truly serve the 'best interest' of the payee." *Id*. at 895 (emphasis added). Thus, the transformation brought about by the enactment of SSPAs was that *courts* were vested with the power and responsibility to determine whether or not to permit a transfer of structured settlement payment rights. *Martinez* is entirely consistent with this Court's ruling that "[w]hile *courts* may take the extra step to determine whether a proposed transfer is in a beneficiary's best interest (and indeed, in Florida, courts are required to do so), the Court has not identified any case

requiring an annuity issuer to do so on its own initiative." *See* Order [ECF No. 105] at pp. 9-10 (Emphasis in the original).[3]

B. This Court Correctly Held that the Implied Duty of Good Faith Could Not be Used to Impose New Duties on Defendants, and Plaintiff has Not Alleged Facts Showing the Requisite Fraudulent or Malevolent Execution of Defendant's Contractual Obligations.

According to Plaintiff, "the silent transformation of the anti-assignment clause prior to the SSPA from an absolute prohibition to a contractual grant of discretion through the SSPA hearing process is what triggers the duty of good faith." Response [ECF No. 114] at p. 12. Despite this Court's ruling to the contrary, Plaintiff continues to insist that Defendants had an obligation to investigate Plaintiff's transfers and make an independent determination as to his capacity and whether or not the transfers were in his best interest. Response [ECF No. 114] at pp. 11-13.

However, the covenant of good faith and fair dealing does not "permit imposing additional obligations on parties or 'creat[ing] independent contractual rights.'" *See* Order [ECF No. 105] at p. 9, *quoting Lehman Bros. Int'l (Europe) v. AG Fin. Prod., Inc.*, No. 653284/2011, 2013 WL 1092888, at *2–3 (N.Y. Sup. Ct. March 12, 2013). Neither the settlement agreement or related contracts, nor the Florida Structured Protection Act, impose any obligation on Defendants to investigate transfers, seek enforcement of contractual anti-assignment language, or protect Plaintiff from the consequences of his own decisions. *See* Order [ECF No. 105] at pp. 9-10 (holding that this is the obligation of the Florida courts, not Defendants).

[3] In fact, Plaintiff readily admits that no annuity issuer has ever been held to owe a duty to seek enforcement of anti-assignment language in a structured settlement agreement to thwart a structured settlement payee's attempt to assign his payment rights. Response [ECF No. 114] at p. 9. The reason for the paucity of cases is that this contention is baseless.

Plaintiff's argument to the contrary does not survive scrutiny. In support of this contention, he cites to the very section of the Florida Structured Settlement Protection Act that requires the *court* to determine whether or not to approve a transfer based on express findings, and to an allegation in the SAC stating that Section 5891 of the Internal Revenue Code imposes an excise tax on *factoring companies* that fail to obtain an order approving a transfer under an applicable state SSPA. Response [ECF No. 114] at pp. 13-14, citing Fla. Stat. 626.99296(3) and SAC [ECF No. 106] ¶ 23.

Like Plaintiff's prior complaint, the SAC alleges nothing more than that Defendants exercised their discretion for their own convenience or financial benefit and "in derogation of Plaintiff's interest." *See* SAC [ECF No. 106] ¶ 72. This is insufficient to state a claim for breach of the duty of good faith and fair dealing, which requires allegations showing that the defendant engaged in a "fraudulent or malevolent scheme to deprive [plaintiff] of the benefits of the contract." *See* Order [ECF No. 105] at p. 9, quoting *Lehman*, 2013 WL 1092888, at *2–3. The mere addition of the word "malevolent" to describe Defendants' conduct does not cure this fatal flaw. The SAC is devoid of facts (as opposed to conclusions) showing that Defendants engaged in the requisite "fraudulent or malevolent scheme."

Indeed, Plaintiff fails to point to a single factual allegation that Defendants knew Plaintiff suffered from lead paint poisoning or any alleged mental impairment. Plaintiff instead argues that this Court should infer that Defendants were willfully blind to Plaintiff's condition. Response [ECF 114] at p. 12. "Willful blindness is a standard that surpasses recklessness and negligence, meaning that a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Iowa Pub. Employee's Ret. Sys. v. Deloitte & Touche LLP*, 919 F. Supp. 2d 321, 345

(S.D.N.Y. 2013) (internal marks omitted). Such an inference cannot reasonably be drawn from the allegations of the SAC or the documents attached to Defendants' request for judicial notice, which show that Defendants relied on Plaintiff's own representations in the transfer agreements, court filings, and stipulations, as well as the state court orders approving the transfers.[4]

Again, all that happened here is that Defendants allowed the Florida courts to decide whether or not to approve the transactions that Plaintiff had decided to enter into with factoring companies. This is precisely what the Florida Structured Settlement Protection Act contemplates. It simply cannot reasonably be said that Defendants breached any duty of good faith and fair dealing by allowing the courts to make that determination.

Accordingly, Plaintiff's breach of contract claim should be dismissed with prejudice.

C. The Court Correctly Held that the Allegations are Insufficient to State a Claim for Violation of the Florida Adult Protective Services Act.

Plaintiff's attempt to salvage his claim under the FAPSA fails as well. In an effort to avoid dismissal of this claim, he now concedes that he did not have a fiduciary relationship with Defendants, and argues that this Court incorrectly held that a fiduciary relationship was required for Plaintiff to state a claim against Defendants for violation of FAPSA. Response [ECF No. 114] at p. 16.

[4] At most, the SAC alleges that Defendants "could have" secured such information, either from the factoring companies or Plaintiff. SAC [ECF No. 106] ¶ 57; Response [ECF 114] at p. 14; *see also* Response [ECF 114] at p. 16, citing SAC [ECF No. 106] ¶¶ 17 and 59. Plaintiff contends that he should be permitted to prove at trial that no "reasonable exercise of discretion" could consider the sale of $90,000 in payments for $50,230 to have been made with informed consent by someone with the requisite mental capacity, or to be "fair, just and reasonable." Response [ECF 114] at p. 2. Yet, the Circuit Court of Sumter County, Florida approved this very transfer under the Florida Structured Settlement Protection Act, and expressly found that it was in Plaintiff's best interest and "fair, just and reasonable." SAC [ECF No. 106] ¶¶ 42-44.

According to Plaintiff, the SAC adequately alleges that Defendants exploited Plaintiff within the meaning of Fla. Stat. ¶ 415.1111 based on the conclusory allegations that Defendants "knew or should have known" that Plaintiff lacked the capacity to consent to the assignment of his periodic payments, and that Defendants allowed the *factoring companies'* "unauthorized taking of his personal assets," and "negligently failed to use his income . . . for his support and maintenance." Response [ECF 114] at pp. 15-16, citing SAC [ECF No. 106] ¶¶ 82-84 (Emphasis added).

However, not only are Defendants not fiduciaries, they do not fall within *any* of the categories of persons against whom a claim for "exploitation" in violation of FAPSA may be stated. They are not (and are not alleged to be) plaintiff's family or household members, caregivers, neighbors, joint tenants or tenants in common, conservators, guardians, attorneys, trustees, or fiduciaries.[5]

The factual allegations of the SAC also belie any claim that Defendants were entrusted with, or assumed responsibility for, the use or management of Plaintiff's funds, assets, or property within the meaning of Fla. Stat. § 415.102(8). Instead, they show that Plaintiff and Defendants have, at most, a creditor-debtor relationship. *See* Settlement Agreement ¶ 6; Qualified Assignment, ¶¶ 3, 6-7; Annuity Policy Data sheet and Schedule of Benefits showing Transamerica Annuity as owner, and General Provisions granting owner all contract rights) (Emphasis added).

In addition, as explained above, the SAC does not allege that Defendants knew Plaintiff lacked the capacity to consent as required by Fla. Stat. § 415.102(8)(a)(2). Again, the gist of Plaintiff's claim is that Defendants should have investigated Plaintiff's transfers, and that if they had done so, they would have discovered Plaintiff had mental impairments and that the deals were

[5] *See* Fla. Stat. § 415.102(8)(a) and (b) (defining "exploitation"); Fla. Stat. § 415.102(19) (defining a "person who stands in a position of trust and confidence"); Fla. Stat. § 415.102(5) (defining "caregiver").

not in his best interest (despite the court orders expressly finding to the contrary). SAC [ECF No. 106] ¶¶ 57, 59. But, as this Court has already correctly ruled, Defendants had no obligation to conduct such an investigation. *See* Order [ECF No. 105] at pp. 9-10.

Further, even assuming Defendants knew or could have known that Plaintiff was exposed to lead paint as a child or suffered from any alleged mental deficiency, Plaintiff's allegations belie any suggestion that Defendants engaged in any "unauthorized taking of [Plaintiff's] personal assets" or "intentionally or negligently" failed "to effectively use [Plaintiff's] income and assets for the necessities required for that person's support or maintenance." Fla. Stat. Fla. Stat. § 415.102(8)(a)(2). Instead, the SAC shows that Plaintiff, with the assistance of his mother, entered into agreements with *factoring companies* (SAC [ECF No. 60] ¶¶ 67, 82), and that those factoring companies acquired his periodic payment rights pursuant to court-approved transfers. *See id.* at ¶¶ 42-52.

Allowing the Florida courts to exercise their statutory obligation to determine whether the transfers were in Plaintiff's best interest and should be approved cannot reasonably be found to constitute "exploitation" within the meaning of FAPSA. Were the law otherwise, settlement obligors and annuity issuers like Defendants would have to investigate every transfer, somehow conduct mental capacity examinations of payees who sought to transfer their payment rights, determine whether the terms offered by factoring companies are "fair and reasonable" and otherwise perform the duties assigned to courts under the Florida Structured Settlement Protection Act and other states' SSPAs. The law precludes such a result.

The cases upon which Plaintiff relies did not involve claims under FAPSA and are inapposite. Response at pp. 16-17, citing *400 West 59th Street Partners, LLC v. Edwards*, 907 N.Y.S.2d 765, 767 (N.Y. App. Div. 2010) (holding, in a landlord's action to resume nuisance

summary proceeding, that the tenant failed to carry her burden of providing that she lacked the mental capacity to enter in to a stipulation with the landlord, which prohibited her from engaging in certain conduct during a probationary period, a violation of which would result in the resumption of the proceedings); *Carter v. Carlis*, 802 N.Y.S.2d 130, 131 (N.Y. App. Div. 2005) (granting the defendant accounting firm's motion to dismiss the plaintiff investors' negligence claim because the plaintiffs had no contact with the accounting firm, and denying the motion as to the fraud claim because the complaint adequately alleged facts supporting an inference of fraud based on the accounting firm's alleged reckless disregard or blindness as to the true nature of its client's financial condition in issuing its audit opinion). Here, of course, Plaintiff is not seeking to invalidate an agreement with Defendants; the SAC alleges that Defendants never spoke to Plaintiff; Plaintiff did not assign the subject payments to Defendants; and this case does not involve a claim that Plaintiff relied on a fraudulent audit opinion issued by Defendants.

Accordingly, the claim under FAPSA should also be dismissed with prejudice.

III. CONCLUSION

For all of the reasons set forth above and in Defendants' opening memorandum of law, the SAC should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF on this 6th day of July, 2020. I also certify that the foregoing document is being served this day on all counsel of record identified on the Service List via transmission of Notice of Electronic Filing generated by CM/ECF.

By: */s/ Matthew N. Horowitz*
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