

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STONE STREET SERVICES, INC.,)	
Plaintiff)	CIVIL ACTION
)	
v.)	No. 00-1904
)	
JAMES L. DANIELS, IN HIS CAPACITY)	
AS CURATOR OF THE ESTATE OF)	
JOE P. BREAUX, INTERDICT, a/k/a)	
JOSEPH P. BREAUX)	
Defendant,)	
Third Party Plaintiff)	
)	
v.)	
)	
STONE STREET CAPITAL, INC. and)	
MARK E. FRENCH)	
Third Party Defendants)	

MEMORANDUM

Padova, J.

December , 2000

This matter arises on Third Party Defendant Stone Street Capital, Inc.'s Motion to Dismiss Third Party Complaint Pursuant to Fed. R. Civ. P. 12(b)(6). Defendant and Third Party Plaintiff Joseph Breaux¹ filed a response, and Third Party Defendant filed a Reply. For the reasons that follow, the Court denies the Motion with respect to Counts 7, 8, and 9, and grants the Motion with respect to Count 10. Accordingly, the Court dismisses Count 10 only.

¹Subsequent to the filing of the Response, James L. Daniels was appointed curator of estate for Mr. Breaux, and was substituted in the case caption for this action.

I. Background

Joseph Breaux is a party to a settlement of a personal injury lawsuit, pursuant to which he has been receiving periodic settlement payments since 1985.² (Third Party Compl. ¶ 15.) The settlement is administered through an annuity issued by Metropolitan Life Insurance Company (“MetLife”), which has been named a stakeholder in this action. (Id. ¶ 16.) On or about July 22, 1996, Breaux, then residing in Kansas, allegedly entered into a written agreement (“Annuity Agreement”) with Stone Street Capital (“Capital”), under which Capital purchased from Breaux all of his right, title and interest in the monthly payments of the settlement funds beginning on October 1, 1996, through and including the payment due on September 1, 2000. (Sec. Am. Compl. ¶ 15.) Capital is a Pennsylvania corporation that regularly purchases rights to lottery winnings, structured settlement payments, interests in estates and probate transfers, and other payment streams, in exchange for lump sum payments. (Id. ¶ 9.) On June 3, 1997, and March 11, 1998, the parties allegedly executed amendments to the Agreement, under which Plaintiff purchased additional monthly payments in subsequent years. (Id. ¶¶ 16-17.) The terms of the agreement were executed by Stone Street Services, Inc., a corporation formed under the laws of Maryland, and the agent and assignee of Capital. (Id. ¶¶ 2, 12.)

In 1998, Breaux moved from Kansas to Louisiana. (Third Party Compl. ¶ 31.) After he had stopped receiving his payments, Breaux discovered that the payments were being directed to a post office box in Washington, D.C. associated with Stone Street Services or Capital. (Id. ¶ 33.) Through his attorney, Breaux directed MetLife to redirect payments to him. (Id. ¶ 34.) After Stone Street

²As a result of the accident, Breaux suffered brain injury and has serious and substantial mental deficits. (Third Party Pl.’s Mem., at 5.)

Services ceased receiving the payments pursuant to the Annuity Agreement, it filed this action on March 10, 2000, in the Philadelphia County Court of Common Pleas, alleging breach of contract and other related claims. (Id. ¶ 37.) On April 12, 2000, Defendant removed the action to this Court.

On July 13, 2000, Defendant filed a Third Party Complaint against Capital, the entity with which he purportedly entered into the Annuity Agreement, and Mark French, his brother-in-law.³ Counts 7 through 10 state claims against Capital, and are the subject of the instant Motion to Dismiss.

II. Legal Standard

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.

III. Discussion

Defendant and Third Party Plaintiff James Daniels brings four counts against Stone Street Capital: (7) unjust enrichment; (8) aiding and abetting a breach of fiduciary duty; (9) violation of the Kansas Consumer Protection Act; and (10) violation of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law.⁴ The Court will consider each of these counts in turn.

³Mark French is alleged to have held a limited power of attorney for Mr. Breaux beginning in March 1996, (Third Party Compl. ¶¶ 25-26), and to have negotiated and finalized the agreements with Stone Street Capital. (Id. ¶ 58.) Mr. French also executed a “Consent of Advisor” appended to the Annuity Agreement. (Sec. Am. Compl. ¶ 28.)

⁴Counts 1 through 6 of the Third Party Complaint state claims against Third Party Defendant Mark French.

A. Count 7: Unjust Enrichment⁵

To state a claim for unjust enrichment, a plaintiff must set forth the following elements: (1) benefits conferred on the defendant by the plaintiff; (2) appreciation of such benefits by the defendant; and (3) acceptance and retention of such benefits under circumstances under which it would be inequitable for the defendant to retain the benefit without payment of value. Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 447 (3d Cir. 2000). The most significant requirement is that the enrichment to the defendant be unjust. Thompson v. Glenmede Trust Co., Civ. Act. No. 92-5233, 1996 U.S. Dist. LEXIS 16248, at *29 (E.D. Pa. Oct. 31, 1996) (citing Myers-Macomber Eng'rs v. M.L.W. Constr. Corp., 414 A.2d 357, 360 (Pa. Super. Ct. 1979)).

The Third Party Plaintiff clearly pleads the existence of benefits conferred on Capital by Breaux, and the appreciation of those benefits by Capital. Specifically, he alleges the existence of structured settlement payments worth \$175,500 that are the property of Joseph Breaux, that Capital received those payments without legal right, and that Breaux therefore conferred the benefit upon Capital. (Third Party Compl. ¶¶ 85-86). He further alleges that Capital enjoyed the benefit of receipt of those payments, and that it would be unjust to permit Capital to retain the benefit without compensating Breaux. (Id. ¶ 87).

Capital disputes, however, that the third element – inequity – has been pleaded. Capital contends that Breaux’s allegations against Third Party Co-Defendant Mark French constitute an admission that Stone Street Capital paid for whatever benefit it allegedly received. Thus, the retention of such benefits would not be inequitable. The Court disagrees. First, the crux of Plaintiff’s allegations is that he did not even know about the agreement with Capital to sell his rights to the

⁵Counts 7 and 8 arise under Pennsylvania common law.

settlement payments until two years after it was allegedly executed. (Third Party Compl. ¶¶ 39-42). Second, the mere fact that Capital may or may not have paid for the benefits purchased under the Annuity Agreement does not mean that Breaux could not prove at trial that there was inequity.

Capital further contends that the existence of the written agreement bars the unjust enrichment claim. Generally, an unjust enrichment claim is inapplicable where the relationship between the parties is founded on either a written agreement or an express contract. Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987). However, the central claim with respect to the agreement is that it was somehow invalid. This unjust enrichment claim therefore is not based upon the written agreement, and thus is not barred on the allegations made here.

The Court denies the motion to dismiss Count 7.

B. Count 8: Aiding and Abetting a Breach of Fiduciary Duty

No Pennsylvania state courts have addressed whether a claim for aiding and abetting a breach of fiduciary duty is actionable in Pennsylvania. However, most Pennsylvania federal courts have concluded that the state courts would recognize this tort. See Kaiser v. Stewart, No. 96-6643, 1997 U.S. Dist. LEXIS 12788, at *53 (E.D. Pa. Aug. 20, 1997); Schuylkill Skyport Inn, Inc. v. Rich, No. 95-3128, 1996 U.S. Dist. LEXIS 12655, at *120 (E.D. Pa. Aug. 21, 1996). The elements of the claim would be: (1) a breach of a fiduciary duty owed to another; (2) knowledge of the breach by the aider or abettor; and (3) substantial assistance or encouragement by the aider or abettor in effecting that breach. Pierce v. Rossetta Corp., No. 88-5873, 1992 U.S. Dist. LEXIS 9065, at *28 (E.D. Pa. June 15, 1992). The parties agree that the tort exists in Pennsylvania, and that Pierce states the elements of such a claim. (Third Party Def.'s Mem. at 5-6; Third Party Pl.'s Resp. at 18.)

Capital contends that Breaux has failed to allege that Capital knew of the breach of fiduciary

duty and that Capital provided substantial assistance or encouragement in effecting the breach of the duty. (Third Party Def.'s Mem. at 6). The Court disagrees. The Complaint specifically alleges that Capital knew or should have known that French lacked the authority to negotiate the sale of the payments, and that the dealings constituted breach of French's fiduciary duties to Breaux. (Third Party Compl. ¶¶ 90-91.) Furthermore, Breaux alleges several affirmative acts by Capital which assisted French in breaching his fiduciary duty, including carrying out negotiations, communicating with French instead of Breaux, and forwarding payment to French. Taking these allegations as true, they are sufficient to set forth substantial assistance or encouragement by Capital to aid and abet a breach of a fiduciary duty by French.

The Court denies the motion to dismiss Count 8.

C. Count 9: Kansas Consumer Protection Act

Count 9 brings a claim under the Kansas Consumer Protection Act, which prohibits unconscionable acts or practices in consumer transactions. Specifically, the Act prohibits a party from "tak[ing] advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor." Kan. Stat. Ann. § 50-627(b)(1) (1999). The rights under the Kansas Consumer Protection Act may not be waived. Kan. Stat. Ann. § 50-625(b) (1999). Section 50-634 provides for a private right of action by a consumer for violations of the Act. Kan. Stat. Ann. § 50-634 (1999).

Capital contends that this Court has already determined that Pennsylvania law applies, via

the forum/choice of law selection clause,⁶ and that the Kansas Consumer Protection Act is therefore irrelevant to the action. On June 19, 2000, the Court denied Defendant Breaux's Motion to Dismiss for lack of personal jurisdiction, on the ground that personal jurisdiction existed by virtue of the forum selection clause, which named Pennsylvania as the forum for any actions under the contract. Stone Street Svcs., Inc. v. Breaux, No. Civ. A. 00-1904, 2000 WL 876886, at *3 (E.D. Pa. June 19, 2000). However, in determining that the forum selection clause provides personal jurisdiction over Breaux in Pennsylvania, the Court did not opine as to whether Pennsylvania law governs all or any of the claims asserted. Thus, with respect to the motion to dismiss the Kansas Consumer Protection Act claim, the Court first must examine whether the choice of law clause in the agreement governs the action. Then, if Kansas law applies, the Court must determine if dismissal is appropriate under 12(b)(6).

A federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 497 (1941). Accordingly, Pennsylvania choice of law rules apply in this case. Pennsylvania courts generally honor the intent of contracting parties and enforce choice of law provisions in contracts executed by them. Smith v. Commonwealth Nat'l Bank, 557 A.2d 775, 777 (Pa. Super Ct. 1989), appeal denied, 569 A.2d 1369

⁶The Annuity Agreement contains the following forum/choice of law selection clause:
11.2 Governing Law; Venue. The Purchaser is a corporation incorporated under the laws of the Commonwealth of Pennsylvania. This Agreement, the other Closing Documents, and the obligations of the parties hereunder and thereunder shall be governed, interpreted, construed, and enforced in accordance with the laws of the Commonwealth of Pennsylvania and the United States of America. The parties hereto waive the right to be sued elsewhere and agree and consent to the jurisdiction of any Court of competent jurisdiction located in the Commonwealth of Pennsylvania.
(Compl. Ex. A ¶11.2.)

(Pa. 1990). An express choice of law provision in a contract will be upheld so long as: (1) the contract bears a reasonable relationship to the state whose law is chosen to govern and (2) application of the chosen law does not violate a “strong public policy” that would otherwise protect a party.⁷ Cottman Transmission Sys., Inc. v. Melody, 869 F. Supp. 1180, 1183 (E.D. Pa. 1994). Here, there is no serious question that Pennsylvania bears a reasonable relationship to the parties, insofar as it is both the state of incorporation of Capital and a jurisdiction in which Capital regularly conducts business in Pennsylvania.

However, the Court does conclude that applying Pennsylvania law in lieu of the Kansas consumer protection law under the choice of law provision would violate the strong public policy of Kansas. Therefore, Kansas consumer protection law must apply to the claim here. In performing the public policy inquiry, the district court will uphold a choice of law provision unless the application of that chosen law would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in determination of a particular issue. Id. at 1183 (citing Restatement (Second) of Conflict of Laws § 187). To determine if the application of the chosen law would be contrary to a fundamental policy of the other state, the court examines whether (1) there are “significant differences” between the two states’ laws, and (2) whether the choice of Pennsylvania law would cause a “substantial erosion” of the quality of protection afforded under the other state’s law. See id. at 1186. A choice of law agreement should be upheld unless a “substantial

⁷The Court also concludes that the scope of the choice of law clause here encompasses actions relating to the validity of the contract. Where an agreement does not refer to a matter of contract validity, the selection clause does not govern the action. Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc., 94 F. Supp. 2d 589, 593 (E.D. Pa. 1999). Here, however, the clause provides that the “obligations of the parties . . . shall be governed, interpreted, construed, and enforced” in accordance with Pennsylvania law. The language of the clause thus contemplates actions relating to the validity of the underlying agreement.

erosion of the quality of protection” afforded under a “fundamental state policy” is shown. Id. at 1180 (citing Banek Inc. v. Yogurt Ventures, U.S.A., Inc., 6 F.3d 357 (6th Cir. 1993)).

Applying Pennsylvania law under the circumstances presented here would be contrary to a fundamental public policy of Kansas. See Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 132 (7th Cir. 1990) (concluding that enforcement of a choice of law provision where Indiana franchise law prohibited waiver would be contrary to Indiana’s express public policy). The “diminished capacity” unconscionability provision in the Kansas statute states a fundamental policy of the state of Kansas, particularly in light of the explicit non-waiver provision contained in the law. A fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power. Restatement (Second) of Conflicts of Laws § 187 cmt. g. Furthermore, applying Pennsylvania law would substantially erode the protections available under Kansas law. Pennsylvania’s consumer protection law lacks a “diminished capacity” unconscionability provision comparable to that in the Kansas statute.⁸ While Pennsylvania common law causes of action do provide for somewhat similar remedies of invalidating an unconscionable contract and collecting damages,⁹ these common law

⁸The closest parallel is 13 Pa. Cons. Stat. § 2302 (West 1993), which governs unconscionability in the context of sales of goods. This provision, however, does not apply to service contracts.

⁹“Pennsylvania has long followed the traditional principle that equity does not enforce unconscionable contracts.” In re Elkins-Dell Mfg. Co., 253 F. Supp. 864, 869 (E.D. Pa. 1966); Henderson v. Hays, 2 Watts 148, 152 (Pa. 1834). Unconscionability includes an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Witmer v. Exxon Corp., 434 A.2d 1222 (Pa. 1981). One variety of unconscionable contract is similar to contracts of adhesion, and involves a party whose circumstances, perhaps his unworldliness or ignorance, when compared with the circumstances, make his knowing assent to the contract terms fictional. Peoples Mortg. Co. v. Federal Nat’l Mortg. Ass’n, 856 F. Supp. 910, 927 (E.D. Pa. 1994).

actions do not speak as directly to the instant case as the heightened protections under the Kansas law.

Furthermore, the bargaining power of the contracting entities here is very unequal. In cases in which the courts have been willing to hold that a choice of law provision applies, the equality or lack of equality of bargaining power between the parties has been an important consideration. See Tele-Save Merchandising Co. v. Consumers Distributing, Co., 814 F.2d 1120, 1123 (6th Cir. 1987) (“We think it important to our decision that the parties to this contract were not of unequal bargaining strength.”). This case is therefore distinguishable from those in which the courts have upheld choice of law provisions, particularly where there is a non-waiver provision in the waived state’s statute.

Finally, the Court concludes that Kansas has a materially greater interest than Pennsylvania in seeing that its consumer protection law be applied. The contract was negotiated and executed in Kansas. State consumer protection laws are designed to protect the residents of the states in which the statutes are promulgated. Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 216 (E.D. Pa. 2000). In this case, the contract was negotiated and executed in Kansas, and was allegedly approved by Breaux, then a resident of Kansas. The “diminished capacity” provisions of the Kansas Consumer Protection Act were specifically designed to protect Kansas residents like Breaux.

Given all of these factors, including the purposes of the Kansas consumer protection law, the explicit non-waiver provision, the unequal bargaining power of the parties, and the materially greater interest of Kansas in having its consumer protection law applied in such circumstances, the Court concludes that the Agreement’s choice of law provision cannot and should not be applied in this context. The Court therefore concludes that Kansas law, and not Pennsylvania law, applies to the

claims asserted in Count 9 of the Third Party Complaint. The Court must now turn to the issue of whether the allegations in Count 9 state a claim upon which relief may be granted.

The Court concludes that Count 9 states a claim upon which relief may be granted. Section 50-627 of the Kansas Consumer Protection Act provides, in pertinent part:

(a) No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction. An unconscionable act or practice violates this act whether it occurs before, during or after the transaction.

(b) The unconscionability of an act or practice is a question for the court. In determining whether an act or practice is unconscionable, the court shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following that:

* * *

(1) The supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor.

Kan. Stat. Ann. § 50-627 (1999). Comment 1 explains further that unconscionability involves over-reaching, but not necessarily deception. Kan. Stat. Ann. § 50-627 cmt. 1 (1999).

Third Party Plaintiff has sufficiently alleged an unconscionable act in violation of § 50-627 of the Kansas statute. Specifically, he has alleged that Capital took advantage of Breaux's diminished mental capacity or inability to understand the language and complexities of the Agreement (Third Party Compl. ¶104(a)). He further alleges that Capital dealt exclusively with French even though it knew, or had reason to know, that French was not the appropriate legal representative for purposes of the transaction. (Id. ¶ 104(c-d)). Implicit among the allegations is that Capital knew or should have known that Breaux had diminished mental capacity.

For all the reasons above, the Court denies Capital's motion to dismiss Count 9 of the Third Party Complaint.

D. Count 10: Pennsylvania Unfair Trade Practices and Consumer Protection Law

Count 10 brings a claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. Ann. § 201-1 et seq. (West 1993). As the Court concludes that Kansas, and not Pennsylvania, statutory consumer protection law applies, the Court dismisses Count 10 of the Third Party Complaint.

IV. Conclusion

For the reasons stated, the Court grants Third Party Defendant Stone Street Capital Inc.'s Motion to dismiss with respect to Count 10, but denies the Motion to Dismiss with respect to Counts 7, 8, and 9. An appropriate Order follows.

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MARK E. FRENCH)	
Third Party Defendants)	

ORDER

AND NOW, this day of December, 2000, upon consideration of Third Party Defendant Stone Street Capital, Inc.'s Motion to Dismiss Third Party Complaint (Doc. No. 29), and any responses thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part and **DENIED** in part.

1. Counts 7, 8, and 9 of the Third Party Complaint may proceed.
2. Count 10 of the Third Party Complaint is **DISMISSED**.

BY THE COURT:

John R. Padova, J.