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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-008809 01/29/2018

HON. TERESA SANDERS

CLERK OF THE COURT
A. Durda
Deputy

LINDA KETCHUM

BRIAN J CAMPBELL

v.

AMERICAN GENERAL LIFE INSURANCE COMPANY, et al.

JEFFREY C MATURA

EDWIN A BARKEL
ADAM S POLSON

MINUTE ENTRY

The Court has read and considered the following pleadings:

(1) Defendant Dunhill Marketing and Insurance Services, Inc.'s *Motion to Dismiss or for Summary Judgment* filed October 9, 2017.
(2) Plaintiff Linda Ketchum's response, and *Motion to Strike.*
(3) Defendant's reply.

The Court has also considered the arguments of counsel made during oral argument held on this matter on January 19, 2018.

In its motion, Defendant contends that Plaintiff's complaint must be dismissed pursuant to Rule 12(b)(5) and (6) of the Arizona Rules of Civil Procedure. Specifically, Defendant alleges that Plaintiff failed to properly serve Defendant pursuant to Rules 4.2(b) and 4.2(h), that Count 5 must be dismissed because negligence is not a proper cause of action, that Count 6 must

be dismissed because insurance producers do not owe a fiduciary duty to their clients, and that Counts 4, 5, 6, 7, and 8 are barred by the statute of limitations.

Plaintiff contends that service was properly effectuated, that negligence is a proper cause of action, a claim for breach of fiduciary duty can be established, and that none of the claims are barred by the statute of limitations. Plaintiff further requests that insofar as Defendant's motion is a motion for summary judgment, that it be struck for failure to comply with Rule 56(c)(3).

Service of Process

With respect to Defendant's motion to dismiss based upon improper service, *Safeway Stores, Inc. v. Ramirez*, 1 Ariz. App. 117, 400 P.2d 125 (1965), supports Plaintiff's argument that service of process upon Defendant was sufficient. In *Safeway*, the Court noted:

> As to the validity of the service upon Safeway, this court rejects the contention that Carmona, was not a 'managing agent' of the corporate defendant within the contemplation of Rule 4(d) 6, R.C.P., 16 A.R.S. In Schering Corporation v. Cotlow, 94 Ariz. 365, 385 P.2d 234 (1963), our Supreme Court has adopted the test as to whether or not an employee is a 'managing or general agent' as being whether 'the agent is of such character and rank so that it is reasonably certain the defendant will receive actual notice of the service of process.'

In our case, although the corporate employee served was not its registered agent, or a partner or officer, she was served at Defendant's only office location, and based upon the pleadings, could be interpreted as being "of such character and rank so that it is reasonably certain the defendant will receive actual notice of the service of process". Defendant did receive service of process pursuant to this method of service.

Negligence as a Cause of Action

With respect to Defendant's motion to dismiss Count 5 (Negligence), Defendant contends that the claim must be dismissed as a matter of law because "the proper cause of action against an insurance producer is negligent misrepresentation." Defendant cites *Kuehn v. Stanley*, 208 Ariz. 124, 91 P.3d 346 (2004) in support of its argument.

With regard to this issue, the Court in *Stanley* held as follows:

> When considering the duty of care in a negligence claim resulting from failure to exercise reasonable care in supplying professional information, Arizona courts

follow the law of negligent misrepresentation set forth in Restatement § 552(1), which provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

See Donnelly Constr. Co. v. Oberg/Hunt/Gilleland, 139 Ariz. 184, 188–89, 677 P.2d 1292, 1296–97 (1984); *see also Hoffman*, 159 Ariz. at 379–80, 767 P.2d at 727–28 (applying § 552 to a claim of damage from a negligent real estate appraisal). Under the Restatement, the liability resulting from a claim for negligent misrepresentation is limited to losses suffered:

> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement § 552(2). Comment h to § 552 further notes that a claim would succeed so long as the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the **350 *128 much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.

The drafters of the Restatement justified this limited liability for negligent misrepresentation claims "because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it." Restatement § 552 cmt. a.

> Based on this rationale, the court in *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 30, 945 P.2d 317, 341 (App.1996), held that the gravamen of a claim of negligence against a provider of professional information is negligent misrepresentation and that a party may not pursue a claim for negligence separate and distinct from a negligent misrepresentation claim. The

> court noted that the drafters of the Restatement did not narrow the range of liability for negligent misrepresentation "in the expectation that a plaintiff could escape such limitations merely by attacking the same conduct in an ordinary negligence count." *Id.* at 31, 945 P.2d at 342. Thus, the court said, to allow a plaintiff to pursue a negligence claim separate and distinct from negligent misrepresentation would "sanction an end-run around Restatement (Second) § 552." *Id.* at 30, 945 P.2d at 341. Based on the rule articulated in *Standard Chartered*, the trial court properly concluded that the duty in this situation is limited by Restatement § 552 and did not err when it analyzed the Kuehns' negligence claim as one of negligent misrepresentation.

Applying the rationale set forth in *Kuehn* to our case, the negligence claim may be analyzed as one of negligent misrepresentation, but dismissal of the claim is not appropriate pursuant to Rule 12(b)(6).

Breach of Fiduciary Duty Claim

With respect to Defendant's motion to dismiss Count 6 (Breach of Fiduciary Duty), Defendant contends that the claim must be dismissed as a matter of law because "insurance producers do not owe fiduciary duties to their clients." Defendant cites *Webb v. Gittlen*, 217 Ariz. 363, 174 P.3d 275 (2008), in support of its argument. In *Webb*, the Court noted the following:

> Attorneys are fiduciaries with duties of loyalty, care, and obedience, whose relationship with the client must be one of "utmost trust." *In re Piatt*, 191 Ariz. 24, 26, 951 P.2d 889, 891 (1997). By contrast, insurance agents generally are not fiduciaries, but instead owe only a duty of "reasonable care, skill, and diligence" in dealing with clients. *Darner*, 140 Ariz. at 397, 682 P.2d at 402; *see also Sw. Auto Painting & Body Repair, Inc. v. Binsfeld*, 183 Ariz. 444, 448, 904 P.2d 1268, 1272 (App.1995) (holding that it was a question of breach, not duty, whether an agent's failure to advise a client about additional insurance gave rise to liability).

As noted above, the case law indicates that insurance agents **generally** are not fiduciaries. In our case, Plaintiff has pled facts, that if deemed true, could give rise to this cause of action.

Statute of Limitations

With respect to Defendant's argument that the Statute of Limitations bars Counts 4, 5, 6, 7, and 8, as the "discovery rule" applies, these are matters that are subject to a factual determination.

Motion to Dismiss/Motion for Summary Judgment

With regard to Defendant's motion for dismissal pursuant to Rule 12(b)(6), this rule allows for the dismissal of a claim for "failure to state a claim upon which relief can be granted." Motions to dismiss for failure to state a claim are strongly disfavored. *Acker v. CSO Chevira*, 188 Ariz. 252, 934 P.2d 816 (Ariz. App. Div. 1 1997) (citing *Folk v. City of Phoenix*, 27 Ariz.App. 146, 151, 551 P.2d 595, 600 (1976)). In reviewing a Rule 12(b)(6) Motion, the "[c]ourts must . . . assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). Rule 12(b)(6) requires that the Court look only to the complaint itself to determine whether or not a claim is stated upon which relief can be granted. The court must indulge all reasonable inferences in favor of Plaintiff.

Upon review of the Complaint and assuming the truth of the factual allegations presented, Plaintiff's claims are not legally barred. They are therefore not subject to dismissal pursuant to Rule 12(b)(6).

Alternatively, Defendant moves for summary judgment pursuant to Rule 56(a). Plaintiff moves to strike this motion due to Defendant's failure to comply with Rule 56(c)(3). Defendant contends that this alternate motion was with regard to the statute of limitations issue only. Because Defendant indicates that its *Motion for Summary Judgment* refers only to the Statute of Limitations Issue, the Court will deny the motion to strike, and address the motion on this issue only.

Pursuant to Ariz. R. Civ. P. Rule 56(a), "the court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Evidence is viewed in the light most favorable to the nonmoving party. *Sanchez v. City of Tucson*, 191 Ariz. 128, 953 P.2d 168 (1998). "Motions for . . . summary judgment serve the . . .purpose of expediting the business of the court by removing meritless claims." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (Ariz. 1990). "It is only the existence of uncontroverted competent evidence favorable to a movant, from which only one inference can be drawn, that entitles a party to summary judgment." *Nemec v. Rollo*, 114 Ariz. 589, 592, 562 Pl.2d 1087, 1090 (Ariz. Ct. App. 1977) (*citing Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 469 P.2d 493 (1970)). "Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

As set forth above, the "discovery rule" applies to these causes of action. These are questions of fact that are not appropriate for consideration pursuant to a motion for summary judgment pursuant to Rule 56.

IT IS ORDERED denying Defendant's *Motion to Dismiss* filed October 9, 2017.

IT IS FURTHER ORDERED denying Defendant's *Motion for Summary Judgment* pertaining to the Statute of Limitations issue.