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.

_____/

DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S 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"), pursuant to Federal Rule of Civil Procedure 12(b)(6), respectfully

move to dismiss the Second Amended Complaint ("SAC"), filed by Plaintiff, Lujerio Cordero ("Plaintiff"), with prejudice.[1]

I. INTRODUCTION

On April 6, 2020, this Court entered an Order [Doc. No. 105] ("Order") granting Defendants' motion to dismiss the first Amended Complaint and dismissing ***all*** of Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). Of relevance, this Court found that Plaintiff did not adequately plead a claim for: (1) breach of contract because the anti-assignment provisions allegedly breached were for Defendants' benefit, the implied duty of good faith could not be used to re-write the express provisions to impose new duties on Defendants, and Plaintiff did not allege a "malevolent" execution of Defendants' contractual obligations required by applicable law for a breach of the duty of good faith; and (2) violation of the Florida Adult Protective Services Act ("FAPSA") because Plaintiff failed to adequately allege an affirmative source of a fiduciary duty owed by Defendants, that Cordero depended on Defendants, or that Defendants undertook an obligation to advise, counsel, or protect Plaintiff.[2] *See* April 6, 2020 Order at pp 8-10, 12-13.

In the SAC, Plaintiff abandons all of his claims but breach of contract and violation of FAPSA. The SAC, however, fails to cure the deficiencies that resulted in the Court's previous dismissal of those claims.

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[1]In support hereof, Defendants hereby resubmit and incorporate by reference the Request for Judicial Notice ("RJN"), filed contemporaneously herewith, pursuant to Federal Rule of Evidence 201. Because the SAC references the court proceedings, filings, and orders entered in the transfer petition matters at issue but does not attach them (*see* SAC ¶¶ 42-52), these documents may be considered without converting this motion to dismiss into a motion for summary judgment. *See, e.g., Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005); *Horsley v. Feldt*, 304 F.3d 1125 (11th Cir. 2002).

[2] This Court also dismissed Plaintiff's claims for constructive fraud and RICO. *Id.*

The breach of contract claim fails because the SAC is devoid of factual allegations warranting a conclusion different from this Court's holding that the anti-assignment language in the underlying settlement contracts was for Defendants' benefit only, and that the agreements did not impose a duty on Defendants to analyze and investigate each transfer. Instead, the SAC merely invokes the word "malevolent" to describe Defendants' actions and includes pages of background information regarding structured settlements, factoring company overreaching, and the enactment of state Structured Settlement Protection Acts ("SSPAs") and Section 5891 of the Internal Revenue Code. *See* SAC ¶¶ 8-32. None of these new allegations salvage Plaintiff's claims.

Regarding the FAPSA claim, like the prior complaint, the SAC fails to allege any factual basis for finding the requisite fiduciary relationship between Plaintiff and Defendants. The SAC also fails to allege facts showing that Defendants engaged in any abuse or exploitation, which is also essential to state such a claim.

The inescapable conclusion here is that Defendants simply do not owe Plaintiff a duty to investigate or thwart his decisions to enter into transactions with factoring companies. Allowing the Florida courts to perform their obligation to decide whether or not to approve those transactions is not actionable conduct. The SAC should be dismissed with prejudice.

II. THE SECOND AMENDED COMPLAINT

A. The Underlying Settlement

In 1996, when Plaintiff was a minor, his mother settled a personal injury negligence action by entering into a court-approved structured settlement agreement (the "Settlement Agreement") with the tort defendant and its insurer, Continental Insurance Company ("Continental"), a true and correct copy of which is attached hereto as Exhibit A. SAC ¶ 34. The Settlement Agreement provided for Plaintiff to receive monthly payments of $3,183.94 beginning at age 18 (on December 20, 2008) and continuing for thirty years guaranteed (the "Periodic Payments"). *Id.*; Settlement

Agreement ¶ 2.b. The Settlement Agreement, which specifies that it is governed by New York law, states that the Periodic Payments "cannot be accelerated, deferred, increased or decreased by the Plaintiff(s) or any Payee . . . nor shall the Plaintiff(s) have the power to sell, mortgage, encumber or anticipate same, or any part thereof, by assignment or otherwise." SAC ¶ 37; Settlement Agreement ¶ 4. Transamerica Life and Transamerica Annuity were not parties to the Settlement Agreement.

Rather, pursuant to a "Transamerica Qualified Assignment and Release" (the "Qualified Assignment"), a true and correct copy of which is attached as Exhibit A to the SAC, Continental assigned to Transamerica Annuity the obligation to make the Periodic Payments. SAC ¶ 38; Qualified Assignment, ¶ 6. Transamerica Annuity then purchased from Transamerica Life an annuity (the "Annuity"), a true and correct copy of which is attached hereto as Exhibit B, that generated a periodic payment stream identical to Transamerica Annuity's payment obligation. SAC ¶ 36. The Settlement Agreement, Qualified Assignment, and Annuity make clear that Transamerica Annuity is nothing more than a payment obligor; Transamerica Annuity owns the Annuity; Transamerica Life issued the Annuity and its only obligation is to issue the payments to the annuitant designated by Transamerica Annuity; the Annuity is for Transamerica Annuity's "convenience;" Plaintiff has no rights in or control over the Annuity; and Plaintiff "has no rights against Transamerica Annuity greater than a ***general creditor***." *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).

B. Plaintiff's Factoring Transactions

1. The Allegations

Starting in July 2012, when Plaintiff's mother first made contact with a factoring company, Plaintiff elected to enter into a series of four transfer agreements with factoring company Singer Asset Finance Company ("Singer") to sell portions of his periodic payment rights. SAC. ¶¶ 42-47.[3] In accordance with the Florida Structured Settlement Protection Act, Fla. Stat. § 626.99296 (2011) ("Florida SSPA"), in 2012 and 2013, these transfers were approved by the Circuit Court of the 5th Judicial Circuit in and for Sumter County, Florida (the "Sumter County Court"). SAC ¶¶ 44-47. In October 2013 and May 2014, Plaintiff entered into two transfer agreements with another, unrelated factoring company, Liberty Settlement Solutions ("Liberty"), which were approved, by the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (the "Broward County Court"). SAC ¶¶ 48-49.

Plaintiff alleges that he suffered from lead paint poisoning as a child and that, as a result, he continues to suffer from "mental handicaps." SAC ¶¶ 33, 35. However, the Settlement Agreement and related contracts do not disclose the nature of the underlying injury, and the SAC does not (and cannot truthfully) allege facts showing that Defendants knew Plaintiff had any alleged mental impairments. Nor does Plaintiff allege that he is incapacitated or that he does not conduct his own affairs. *Indeed, Plaintiff brought the instant lawsuit on his own behalf.*

At most, Plaintiff alleges that he did not pass the GED exam, has only been able to secure "low-grade jobs," and lacks the capacity to understand (and did not read) the contracts and documents he signed when he entered into deals with Singer and Liberty. SAC ¶¶ 35, 43. Nevertheless, Plaintiff did manage to effectuate all of these transactions and collect from the

[3]Singer assigned its interest in the first transfer agreement to Alliance Asset Funding, LLC ("Alliance"). SAC ¶ 42.

factoring companies present value lump sums in the amount of $50,230 in July 2012, $15,000 in November 2012, $50,000 in April 2013, $70,900 in August 2013, $60,000 in October 2013, and $22,000 in May 2014. *See* SAC ¶¶ 42, 45-49.

2. The Transfer Petitions, Notices of Hearing, and Court Orders[4]

The Florida SSPA requires the factoring companies to serve their petitions and notices of hearings on settlement obligors and annuity issuers like Transamerica Annuity and Transamerica Life, respectively. That statute provides that these entities "may" file written objections to the proposed transfer. *See* Fla. Stat. §§ 626.9929(2)(i)(j)(o) and (4). The Florida SSPA also provides that if the transfer contravenes the underlying settlement agreement, "the court *may grant, deny, or impose conditions upon* the proposed transfer . . . ." Fla. Stat. § 626.9929(3)(b) (emphasis added).

Each of the subject transfer petitions states that Plaintiff was advised of his right to obtain independent professional advice but elected to waive that right; all requirements of the Florida SSPA have been satisfied; and a notice of hearing was provided to all interested parties. *See* RJN Exs. A, B, C, D, E, and F. The waivers filed with the petitions, which bear Plaintiff's notarized signature, indicate that the relevant factoring company (i.e., Singer or Liberty) recommended that Plaintiff seek "advice from an attorney, certified public accountant, actuary or other licensed professional advisor" and that Plaintiff "waived" such advice. *See id.* (waivers). Affidavits signed by Plaintiff attached to each of the petitions state "I am of sound mind, sane and not under the influence of alcohol or drugs, and I am not suffering from any physical or mental impairment affecting my judgment." *See id.* (affidavits). Finally, the notice of hearing filed in each of the

[4] *See* RJN (ECF No. 13).

subject transfer cases indicates that a notice of hearing was served on Plaintiff. *See* RJN Exs. A-1, B-1, C-1, D-1, E-1, and F-1.

Each of the final court orders approving the subject transfer petitions:

- specifically references all of the prior court orders approving transfers by Plaintiff;
- expressly finds, as required by the Florida SSPA, that the transfer complies with all of the requirements of the Florida SSPA; all required disclosures were made to Plaintiff; the transfer is in Plaintiff's "best interest"; Plaintiff has received, or waived his right to receive, the requisite independent professional advice; and the "Court has determined that the net amount payable to the [Plaintiff] is fair, just, and reasonable under the circumstances then existing;" and
- notes that Transamerica Annuity (the settlement obligor) and Transamerica Life (the annuity issuer), the factoring company, and Plaintiff have entered into a stipulation (the "Stipulation"), a copy of which is attached and incorporated in the Order, and approved by the Court.

See RJN Exs. A-2, B-2, C-2, D-2, E-2, and F-2. Each referenced Stipulation, which Plaintiff signed, states, in relevant, part that:

- "The [factoring company] "shall also pay or cause to be paid a $750.00 administrative fee to [Transamerica Life] in connection with its review and processing of the Petition."[5]
- "Compliance with the requirements and fulfillment of the conditions set forth in the [Florida SSPA] and applicable law shall be ***solely the***

[5]Plaintiff complains about this administrative fee. *See, e.g.*, SAC ¶¶ 56, 60-61. But that fee, which is disclosed and provided for in the Stipulations that Plaintiff signed, was paid by the factoring companies, not Plaintiff, and it was paid to offset the expenses incurred by Transamerica Life in reviewing the petitions and redirecting payments once the transfer is approved. *See* Stipulations; *see also Mercedes-Benz of W. Chester v. Am. Family Ins.*, No. CA2009-09-244, 2010 Ohio App. LEXIS 1898, *21 (Ohio Ct. App. May 24, 2010) ("The threat of facing increased litigation certainly raises the burden and risk under any contract should the anti-assignment [language] be invalidated."). The SAC itself alleges that Transamerica Life had two to four employees working on the processing of payment redirections due to the large volume of transactions entered into by factoring companies and payees like Plaintiff. SAC ¶ 56. Such fees became customary with the explosion of factoring transactions following the enactment of the SSPAs, which transactions impose increasing administrative burdens on annuity issuers and expose them to double liability if they send a payment to the wrong party.

responsibility of [the factoring company and the factoring company's assignee][6] [***whereas Transamerica Annuity and Transamerica Life] shall not bear any responsibility for, or any liability*** arising from, non-compliance with those requirements or failure to fulfill those requirements or conditions. Without limiting the foregoing, [Defendants] may rely on the entry of the Order in making the specified Transferred Payments." (Emphasis added).

- "[Defendants are] entering into this Stipulation strictly and ***solely in reliance upon the Court's approval and upon the representations, warranties and agreements of the [factoring company], Assignee, and [Plaintiff***] . . . , and only for the purpose of reflecting that [Defendants have] no objection to its terms, ***if approved by the Court*** at the hearing set for this matter. Further, each of the parties acknowledges that each has had the opportunity to participate in the preparation of this Stipulation and the Order and, as such, no rule of construction shall apply which might construe this Stipulation and/or the Order in favor of or against any party hereto." (Emphasis added).

- Plaintiff "consents to [Defendants'] making the [assigned payments] payable to the Assignee or its successors and assigns."[7]

See RJN Exs. A-3, B-3, C-3, D-3, E-3, and F-3, ¶¶ 7-9, 11, and 13.

III. LEGAL STANDARD

When reviewing a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., the Court must view the allegations in the light most favorable to the plaintiff and accept the well-pleaded allegations as true. *A.L. v. Shorstein*, No. 3:15-cv-1181-J-32PDB, 2017 U.S. Dist. LEXIS 18244 (M.D. Fla. Feb. 9, 2017). The allegations must be sufficient "to 'state a claim to relief that is plausible on its face' and 'raise a right to relief above the speculative level.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where

[6]As Singer did in the first transfer, in some cases, the factoring company assigns its interest in the transfer agreement to an "Assignee" designated to receive the assigned payments.

[7]Among the representations and warranties made by Plaintiff "to the Court and Companies" in the Stipulations are that (i) Plaintiff has been advised by the factoring company to seek independent professional advice regarding the Transfer and has waived such advice; and (ii) the Transfer is in Plaintiff's best interest. *See* RJN A.4, B.4, C.4, D.4, E.4, and F.4.

the conclusory allegations in the complaint are belied by the exhibits a plaintiff attaches to a pleading, dismissal is appropriate. *See, e.g., Yuetter-Beacham v. Med. Career Inst. of S. Fla., Inc.*, No. 15-80226-CV-Rosenberg/Hopkins, 2017 U.S. Dist. LEXIS 173328, * 21, n.15 (S.D. Fla. Oct. 18, 2017).

IV. ARGUMENT

A. The SAC Fails to State a Breach of Contract Claim.

To state a claim for breach of contract under Florida law, a plaintiff must allege: (1) that a valid contract exists, (2) a material breach, and (3) damages. *Murciano v. Garcia*, 958 So. 2d 423, 424 (Fla. 3d DCA 2007). Here, as in Plaintiff's prior complaint, the alleged breach is Defendants' failure to enforce the anti-assignment language in the Settlement Agreement and the Qualified Assignment. SAC ¶¶ 69-74.

However, this Court has already held that Transamerica Life had no obligation to enforce that anti-assignment language, and therefore, no genuine breach has been alleged. *See* Order at pp 8-10. The same holds true for Transamerica Annuity, which was assigned the Periodic Payment obligation pursuant to the Qualified Assignment.

As the Court also correctly held, "the covenant of good faith and fair dealing does not permit the imposition of additional obligations on parties or 'creat[ing] independent contract rights.'" *See* Order at p. 9, citing *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) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Xerox Corp.*, 25 a.D.3d 309, 310 (N.Y. App. Div. 2006)).

And under New York law, anti-assignment language in a structured settlement agreement is for the benefit of settlement obligors like Transamerica Annuity and annuity issuers like Transamerica Life. *See* Order at p. 9, citing *See Singer Asset Fin. Co. v. Wyner, 156 N.H. 468, 474-76 (2007). See also Matter of 321 Henderson Receivables Origination LLC (Logan)*, 856

N.Y.S.2d 817, 820 (N.Y. Sup. Ct., Queens Co. 2008) ("While a prohibition against assignments or transfers may be waived by the obligor . . . it may not be waived by the payee since the provision is not for his or her benefit."); *Settlement Capital Corp. v. Pagan*, 649 F. Supp. 2d 545, 555 and n.52 (N.D. Tex. 2009) (holding that the structured settlement obligor, which is "the party who under New York law may choose to raise or waive the anti-assignment provision, has effectively waived any objections it could raise regarding the transfer.").[8] The SAC's conclusory allegations to the contrary do not change this result. Consequently, Defendants had the discretion whether or not to seek enforcement of that language.

It was up to the Florida *courts*, not the Defendants, to determine whether or not any particular transfer was in Plaintiff's best interest and "fair, just and reasonable" as required by the Florida SSPA. *See* Order at pp. 9-10. At most, the SSPAs, including the Florida SSPA, preserve the *right* of payment obligors and annuity issuers to oppose factoring transactions; these statutes do not *obligate* those entities to oppose such transactions.

Given the thousands of transfer petitions filed by factoring companies throughout the country, opposing them on the basis of anti-assignment language (which appears in nearly all structured settlements) is not feasible. *See* SAC ¶ 14. Like Defendants in this case, settlement obligors and annuity issuers typically lack information about the payee's original injury and the payee's current condition. These entities are not obligated, equipped, or qualified to conduct mental capacity, "best interest," and/or "fair, just and reasonable" evaluations. The SSPAs are in

[8] Other jurisdictions are in accord. *See, e.g., Johnson v. J.G. Wentworth Originations, LLC*, 391 P.3d 865, 869 (Ore. Ct. App. 2017) (explaining that under applicable California law contractual anti-assignment clauses do not bar court-approved transfers of structured settlement payment rights if no interested party objects to the transfer); *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros.*, 452 F.2d 1346, 1351-1352 (D.C. Cir. 1971) (stating that "[o]rdinarily a contractual prohibition of assignment is for the benefit of the obligor . . . .").

place to govern these transactions. SAC ¶ 22. Consequently, if a factoring company and a payee elect to proceed with a transaction, the payment obligor and annuity issuer are permitted to take the position that they will comply if the court decides to approve the transaction–which is all that is alleged to have happened here.[9]

As this Court correctly concluded, exercising the discretion to waive the anti-assignment language in the Settlement Agreement and related contracts–even assuming *arguendo* that it was done for financial gain (which is not actually the case)[10]–was not a breach of those contracts. April 6, 2020 Order at p. 10. Nothing in the SAC changes this conclusion. Defendants cannot reasonably be found to owe a legal obligation to seek enforcement of a contract provision that Plaintiff had already violated by entering into agreements with factoring companies to sell his payment rights. To hold otherwise would turn the implied covenant of good faith and fair dealing on its head.

Therefore, Defendants respectfully submit this Court should dismiss the breach of contract claim with prejudice.

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[9] The article previously cited by Plaintiff (ECF No. 60, ¶ 19; ECF No. 74, p. 3, n. 3) explains that most structured settlement agreements contain anti-assignment provisions and that their effectiveness was extensively litigated in the context of factoring transactions that predated enactment of statutes like the Florida SSPA. *See* "*Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts*," Daniel W. Hindert and Craig H. Ulman, The Judges' Journal, Spring 2005, p. 26. However, "[t]aking into account the protections available under the SSPAs and IRC section 5891, . . . insurers now do not generally find it necessary to insist on enforcement of antiassignment [sic] provisions . . . [and those provisions are] waived in most cases." *Id*. By Plaintiff's own account, the factoring of structured settlement payment rights was a billion dollar industry as of 2003. (SAC ¶ 19). This belies any suggestion that settlement obligors and annuity issuers routinely seek enforcement of anti-assignment provisions in an attempt to prevent such transactions.

[10] While Plaintiff alleges that Defendants acted "malevolently" in exercising their discretion on the anti-assignment provision, Plaintiff provides no factual allegations to support such a conclusion. Plaintiff merely alleges general information regarding structured settlements, factoring company overreaching, and the history of the SSPA, none of which bear on Defendants' intent.

B. The SAC Fails to State a Claim for Violation of the Florida Adult Protective Services Act.

Section 415.1111 of the FAPSA states, in relevant part, that "[a] vulnerable adult who has been abused, neglected, or exploited as specified in this chapter has a cause of action against any perpetrator and may recover actual and punitive damages for such abuse, neglect, or exploitation." Fla. Stat. § 415.1111. Actionable exploitation under FAPSA is defined to mean when a person who "[*s]tands in a position of trust and confidence with a vulnerable adult* and *knowingly, by deception or intimidation, obtains or uses*" the vulnerable adult's property, or *"[k]nows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses"* the vulnerable adult's property, "with the intent to temporarily or permanently deprive" said person of that property for the benefit of someone other than the vulnerable adult. *See* Fla. Stat. 415.102(8)(a). (Emphasis added). The statute further provides that

> exploitation may include, but is not limited to: (1) Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property; (2) Unauthorized taking of personal assets; (3) Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or (4) Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.

Fla. Stat. § 415.102(8)(b). "Fiduciary relationship," in turn, means "a relationship based upon the trust and confidence of the vulnerable adult in the caregiver, relative, household member, or other person entrusted with the use or management of the property or assets of the vulnerable adult" such as "court-appointed or voluntary guardians, trustees, attorneys, or conservators . . . ." *Id*. at 415.102(11).

1. The SAC Fails to Allege Facts Showing the Existence of the Requisite Fiduciary Relationship.

Once again, Plaintiff alleges that Defendants "allowed exploitation by factoring companies through [their] failure to honor his contractual entitlement under the structured settlement

agreement's anti-assignment provision, resulting in an unauthorized taking of his personal assets . . . ." SAC ¶ 82.

But like Plaintiff's prior complaint, the SAC is devoid of allegations showing any contact whatsoever between Plaintiff and Defendants, much less any that would give rise to the requisite fiduciary relationship. *See* Order at p. 12; SAC ¶ 59 (alleging no contact). Defendants were not Plaintiff's caregivers, relatives, or household members, and they did not manage or use Plaintiff's money.

Instead, Transamerica Annuity merely accepted an assignment from Continental—Plaintiff's adversary in the underlying litigation—of Continental's obligation to make the Periodic Payments under the Settlement Agreement, and Transamerica Annuity then elected to fund that obligation for its "convenience" by buying the Annuity from Transamerica Life. *See* SAC ¶¶ 36, 38; Qualified Assignment ¶ 1 ("1. [Continental] hereby assigns and [Transamerica Annuity] hereby assumes all of [Continental's] liability ***to make the Periodic Payments***. . . .") (Emphasis added).

As the insurer for Plaintiff's adversary, Continental did not have a fiduciary relationship with Plaintiff and neither does Transamerica Annuity, as Continental's assignee, or Transamerica Life, as the issuer of the Annuity owned by Transamerica Annuity. *See, e.g.*, *Macomber v. Travelers Prop. & Cas. Corp.*, 804 A.2d 180 (Conn. 2002) (finding that allegations of a contractual relationship between settling plaintiffs and the defendant structured settlement obligors was insufficient to show the existences of a fiduciary duty); *Yerkes v. Cessna Aircraft Co.*, Civil No. 14-5925, 2016 U.S. Dist. LEXIS 38714, * 17 (D.N.J. March 24, 2016) (holding that the defendant and its insurer, which entered into a structured settlement with the plaintiff, were adversarial to the plaintiff and did not owe the plaintiff a duty of disclosure or any other duty); *Taylor Woodrow*

Homes Fla., Inc. v. 4/46-A.Corp., 850 So. 2d 536, 541 (Fla. 5th DCA 2003) ("[T]he courts have held that, in the usual creditor-debtor relationship, a fiduciary duty does not arise . . . .").

Rather, the relationship between Plaintiff and Defendants was at most one of creditor and debtor as specified in the Qualified Assignment and the Annuity. *See* Qualified Assignment ¶¶ 3, 6-7 ("[Plaintiff] has no rights against [Transamerica Annuity] greater than a ***general creditor***.") (Emphasis added); Settlement Agreement ¶ 6; Annuity Policy Data sheet and Schedule of Benefits (showing Transamerica Annuity as owner, and General Provisions granting owner all contract rights in the Annuity). Such "arms-length" relationships created by contract do not give rise to a fiduciary duty "because there is no duty imposed on either party to protect or benefit the other." *See* April 6, 2020 Order at p. 12, *quoting Am. Honda Motor. Co. v. MotorcycleInfo. Network, Inc.*, 390 F.Supp.2d 1170, 1179 (M.D. Fla. 2005).

In the absence of any fiduciary relationship whatsoever, Plaintiff's claim for violation of FAPSA fails and must be dismissed with prejudice."

2. Leaving It to the Florida Courts to Determine Whether or Not to Approve a Transfer under the Florida SSPA Is Not Abusive or Exploitation.

The SAC also fails to allege facts showing that Defendants engaged in "abuse" or "exploitation" within the scope of the FAPSA. There is no allegation that Defendants (i) used, misappropriated, misused, or transferred Plaintiff's money, income, assets, or property (which property was acquired by the various factoring companies, not Defendants, pursuant to court approval); and/or (ii) engaged in any unauthorized taking of Plaintiff's personal assets. Instead, the SAC alleges that the *factoring companies* exploited Plaintiff. SAC ¶¶ 67, 82.

Rather, all Defendants are alleged to have done is exercise their discretion not to object to the transfers and let the Florida courts make the determinations that the Florida SSPA requires them to make. *See* Fla. Stat. § 626.99296. Defendants had no involvement in Plaintiff's decisions

to enter into agreements with the factoring companies, which occurred before Defendants received the factoring company petitions seeking approval of those transfers. SAC ¶¶ 42-49.

Moreover, the SAC does not (and cannot truthfully) allege any *facts* showing that Defendants ***actually knew*** of Plaintiff's alleged mental impairment. At most, the SAC asserts that Defendants should have conducted an investigation. *See* SAC ¶¶ 63(f), 65. There is nothing in the Settlement Agreement, Qualified Assignment, or Annuity indicating that Plaintiff had lead paint exposure or poisoning, or that he suffered from any mental impairment whatsoever.

As this Court has already correctly held, the Florida SSPA imposes the obligation to determine whether a transfer is in the payee's "best interest" and "fair, just and reasonable" on the Florida courts, not Defendants. *See* Order at pp. 9-10; Fla. Stat. § 626.99296. In fact, the Florida SSPA provides that the court "may grant, deny, or impose conditions" upon the proposed transfer if it would contravene the terms of the structured settlement and an interested party objects. *See* Fla. Stat. § 626.99296(7)(b); *see also Rapid Settlements Ltd. v. Dickerson*, 941 So.3d 1275 (Fla. App. 4th 2006) (noting merely that the Court "is authorized" to deny petitions on the basis of anti-assignment language, and not stating that the Court "must" do so). In other words, the statute makes clear that the decision whether or not to allow a transfer is vested exclusively in the court. Allowing the Florida courts to perform their statutorily mandated duty does not constitute abuse or exploitation.

V. CONCLUSION

For all of the reasons set forth above, the SAC should be dismissed with prejudice.

Dated: May 11, 2020

Respectfully submitted,

COZEN O'CONNOR

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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 11th day of May 2020. I also certify that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

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