UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2019

(Submitted: May 29, 2020 Decided: October 29, 2020)

Docket No. 19-3383-cv

DALE MILLER AND JOHN F. BARTON, JR., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY, A NEW YORK CORPORATION,

Defendant-Appellee.*

Before:

RAGGI, LOHIER, and MENASHI, *Circuit Judges*.

The Plaintiffs-Appellants enrolled in a Group Variable Universal Life Insurance (GVUL) policy offered by the Metropolitan Life Insurance Company (MetLife). During the enrollment process, neither plaintiff indicated that he smoked tobacco, but MetLife nevertheless designated them as tobacco smokers, thus triggering their payment of higher insurance premiums. When MetLife refused to refund the amount of the overpayments, the plaintiffs filed this action claiming breach of contract and tort violations

* The Clerk of Court is directed to amend the caption as set forth above.

under New York law. The United States District Court for the Southern District of New York (Torres, J.) dismissed the plaintiffs' claims as time-barred under New York's applicable statutes of limitations. For the following reasons, we **AFFIRM**.

Judge Menashi concurs in the judgment in a separate opinion.

Joshua A. Fields, Kirtland & Packard LLP, Redondo Beach, CA, Nicholas Farnolo, Napoli Shkolnik, PLLC, Melville, NY, *for Plaintiffs-Appellants* Dale Miller and John F. Barton, Jr., on Behalf of Themselves and All Others Similarly Situated.

Lee E. Bains, Jr., Edward M. Holt, Caleb C. Wolanek, Maynard Cooper & Gale, P.C., Birmingham, AL *for Defendant-Appellee* Metropolitan Life Insurance Company, a New York Corporation.

LOHIER, *Circuit Judge*:

The Plaintiffs-Appellants are two commercial airline pilots who enrolled in a Group Variable Universal Life Insurance (GVUL) policy offered by the Metropolitan Life Insurance Company (MetLife) twenty years ago. During the enrollment process, MetLife asked the plaintiffs whether they had recently started or stopped using tobacco products. The plaintiffs, who had never used tobacco, declined to answer. MetLife nonetheless designated them as smokers, thus triggering the calculation and payment of higher insurance premiums. The plaintiffs learned of MetLife's erroneous smoker designation sixteen years later. Miller then asked MetLife for a refund to compensate him for the total amount of his premium overpayments. MetLife refused. In response, the plaintiffs filed the instant contract and tort action against MetLife. The United States District Court for the Southern District of New York (Torres, J.) dismissed the plaintiffs' claims, concluding, as relevant here, that they were time-barred under New York's statutes of limitations. We agree that the plaintiffs' claims are time-barred and **AFFIRM** the District Court's judgment.

BACKGROUND

Because the plaintiffs appeal from a judgment "dismissing the complaint on the pleadings, we accept as true the facts alleged in the complaint . . . and we may consider documents incorporated into or integral to the complaint." WC Capital Mgmt., LLC v. UBS Sec., LLC, 711 F.3d 322, 325 (2d Cir. 2013).

I

Dale Miller, a pilot with United Airlines, has received life insurance coverage from MetLife since 1990. In 2000 MetLife informed Miller that it would be changing the type of policy in which Miller was enrolled to the GVUL policy. To join the GVUL policy, Miller had to complete an enrollment form that "require[d] enrollees to select" one of two "status changes," either

"From Smoker to Non-Smoker" or "From Non-Smoker to Smoker." Joint App'x 847. Miller, who never smoked, "left this section blank, as the only two options did not apply to him." Id. at 848. The GVUL policy became effective in June 2000. Among other things, it obligated MetLife to calculate Miller's premiums using a "reasonable method." Id. at 874. Unfortunately, MetLife used a method of calculating Miller's premiums that wrongly assumed that he was a smoker and charged Miller higher premiums as a result.

Miller paid the overcharged premiums for sixteen years, until October 2016, when he discovered MetLife's error. Miller then notified his friend and fellow pilot John F. Barton, Jr. about the error. Barton, who also held a GVUL policy with MetLife, confirmed that he also had been charged higher premiums starting in 2000 based on MetLife's mistaken designation of him as a smoker. Miller thereafter requested that MetLife return his premium overpayments immediately, but MetLife refused.

II

In 2017 both Miller and Barton filed this lawsuit against MetLife seeking largely to recover the total amount of their overpaid premiums. Their operative complaint, filed on January 4, 2019, alleged four causes of action under New York common law: (1) breach of contract; (2) contractual breach of the implied covenant of good faith and fair dealing; (3) tortious breach of the duty of good faith and fair dealing; and (4) negligence. The District Court dismissed each claim, concluding, as relevant here, that they were time-barred under New York's applicable statutes of limitations.

This appeal followed.

DISCUSSION

I

On appeal, Miller and Barton argue that the District Court erred in dismissing their breach of contract claim.[1] "We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Dolan v. Connolly, 794 F.3d 290, 293 (2d Cir. 2015) (quotation marks omitted).

In support of their breach-of-contract claim, the plaintiffs alleged that MetLife failed to use a "reasonable method" to calculate their premiums, in

[1] Miller and Barton do not contest the District Court's dismissal of their second, third, and fourth causes of action. We accordingly affirm the District Court's judgment dismissing those claims. See NRP Holdings LLC v. City of Buffalo, 916 F.3d 177, 189 n.6 (2d Cir. 2019).

violation of the GVUL policy's terms, when it charged them smokers' rates despite their non-smoking status. We conclude, as did the District Court, that this claim is time barred under New York law.

In New York, "an action upon a contractual obligation or liability, express or implied," "must be commenced within six years" of the alleged contractual breach. N.Y. C.P.L.R. 213; see Lehman XS Tr., Series 2006-GP2 by U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc., 916 F.3d 116, 125 (2d Cir. 2019). Miller and Barton do not dispute that MetLife's alleged breach first occurred in 2000 and that the statute of limitations for their breach-of-contract claim would, unless tolled, have expired after 2006. Instead, Miller and Barton rely on New York's continuing-violation doctrine[2] to argue that the statute of limitations was tolled at least through the approximately sixteen-year period of their premium overpayments to MetLife. Under that doctrine, "where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such

[2] New York courts sometimes refer to the doctrine as the continuing-wrong doctrine. See, e.g., Carey v. Trs. of Columbia Univ. in City of N.Y., 113 N.Y.S.3d 32, 33 (1st Dep't 2019); Garron v. Bristol House, Inc., 79 N.Y.S.3d 265, 267 (2d Dep't 2018); Affordable Hous. Assocs., Inc. v. Town of Brookhaven, 54 N.Y.S.3d 122, 126 (2d Dep't 2017).

that accrual occurs continuously." Stalis v. Sugar Creek Stores, Inc., 744 N.Y.S.2d 586, 587 (4th Dep't 2002) (quotation marks omitted).

But the continuing-violation doctrine does not toll the statute of limitations in this case. New York courts have explained that tolling based on the doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct[.]" Salomon v. Town of Wallkill, 107 N.Y.S.3d 420, 422 (2d Dep't 2019) (quotation marks omitted). Even when viewed in the light most favorable to Miller and Barton, the breach-of-contract claim at issue in this case rests on a single allegedly unlawful act in 2000, namely, MetLife's initial designation of both plaintiffs as smokers. Any subsequent premium that MetLife charged Miller and Barton "represent[ed] the consequences of [that allegedly] wrongful act[] in the form of continuing damages, and was not an independent wrong in itself." Id. (quotation marks omitted); see Henry v. Bank of Am., 48 N.Y.S.3d 67, 70 (1st Dep't 2017) (defendants' monthly billings of plaintiff for fees related to a credit-protection program in which plaintiff alleged he never enrolled qualified as "a single breach[] with damages increasing as the breach continued"); Hudson Envelope Corp. v. Klausner, 670 N.Y.S.2d 104, 104 (1st

Dep't 1998) (annual renewals of a health insurance policy "that allegedly duplicated coverage that plaintiff already had . . . constitute[d] only new instances of damage, and [were] therefore irrelevant for limitations analysis").

For this reason, we hold that the continuing-violation doctrine did not toll the limitations period for Miller and Barton's breach-of-contract claim against MetLife. The claim is therefore time barred under New York law. Because the statute of limitations bars the only dismissed claim that is at issue on appeal, we decline to address the District Court's alternative rulings in favor of MetLife.

II

A word on the concurrence. Judge Menashi would affirm the District Court's judgment on the broader ground that the Securities Litigation Uniform Standards Act, Pub. L. No. 105–353, § 101, 112 Stat. 3227 (1998) (SLUSA), precludes our jurisdiction over this action because the plaintiffs' contract claims sound in fraud. See 15 U.S.C. § 78bb(f)(l) (pronouncing that a state law class action for damages cannot be maintained in federal or state court if it alleges "misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security"). But resolving whether SLUSA presents a jurisdictional bar, and whether that bar applies here, is a fraught and unnecessary endeavor. Fraught because of the dueling views that this difficult issue has already inspired, leaving our own caselaw uncertain and sister circuits split.[3] Unnecessary because, as we have repeatedly explained in different statutory contexts, "[s]o long as we are satisfied that we have Article III jurisdiction, we have discretion to decline to resolve difficult jurisdictional questions" like this one. Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C., 467 F.3d 73, 81 (2d Cir.

[3] We have not definitively held that SLUSA preclusion is jurisdictional, and our precedent and decisions of our sister circuits suggest that the issue is not clear-cut. Compare In re Kingate Mgmt. Ltd. Litig., 784 F.3d 128, 135 n.9 (2d Cir. 2015) (suggesting SLUSA preclusion is jurisdictional), with Rayner v. E*TRADE Fin. Corp., 899 F.3d 117, 118–19 (2d Cir. 2018) (affirming district court's merits dismissal under Rule 12(b)(6) of SLUSA-precluded claims). See also Hampton v. Pac. Inv. Mgmt. Co., 869 F.3d 844, 847 (9th Cir. 2017) (SLUSA preclusion is jurisdictional); LaSala v. Bordier et Cie, 519 F.3d 121, 129 n.7 (3d Cir. 2008) (same); Brown v. Calamos, 664 F.3d 123, 127–28 (7th Cir. 2011) ("There is no merit to the suggestion that . . . SLUSA is jurisdictional."). On the merits, moreover, precedent demonstrates how hard it is to determine whether a misrepresentation or omission that is not an "essential element" of a claim nonetheless is necessary to the claim so as to trigger SLUSA's bar. In Kingate, for example, we held that SLUSA did not preclude investors' breach of contract and fiduciary duty claims against "feeder funds" even though the breach was allegedly accompanied and concealed by misrepresentations and omissions. See 784 F.3d at 133–34. We explained that the latter were not necessary to the contract and fiduciary-duty claims, which were premised on defendants' deviation from a promised investment strategy. See id. at 152. In Rayner, by contrast, we held that SLUSA did preclude investors' claims that E*Trade breached its duty of best execution by failing to disclose its partnering with trading venues that paid kickbacks. See 899 F.3d at 118–19. There, we concluded that misrepresentation was central to plaintiffs' claims. See id. at 120–21.

2006). More specifically, as we recently had occasion to reiterate, where a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other more obvious grounds, this Court can assume hypothetical jurisdiction in order to dismiss on those obvious grounds. See Butcher v. Wendt, --- F.3d ---, 2020 WL 5637594, at *5 (2d Cir. Sept. 22, 2020) ("[W]e may assume hypothetical statutory jurisdiction in order to resolve this appeal on the merits because the Rooker-Feldman doctrine does not implicate Article III jurisdiction," and because doing so is "particularly appropriate . . . where the jurisdictional issue is both novel and arguably complex" and plaintiffs' "claims are plainly meritless").[4]

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[4] See also Conyers v. Rossides, 558 F.3d 137, 150 (2d Cir. 2009) (assuming hypothetical statutory jurisdiction); Ajlani v. Chertoff, 545 F.3d 229, 237–38 (2d Cir. 2008) (assuming naturalization jurisdiction pursuant to 8 U.S.C. § 1447(b)); Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 338 n.2 (2d Cir. 2006) (assuming statutory jurisdiction under 8 U.S.C. § 1158(a)(3) "where the jurisdictional issues are complex and the substance of the claim is . . . plainly without merit"); Marquez-Almanzar v. I.N.S., 418 F.3d 210, 216 n.7 (2d Cir. 2005) ("The jurisdictional prerequisites" of 8 U.S.C. § 1252(b)(5) "are not a bar to our assumption of hypothetical jurisdiction."); United States v. Canova, 412 F.3d 331, 348 (2d Cir. 2005) (assuming hypothetical jurisdiction where "the jurisdictional challenge" is statutory); Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 491 (2d Cir. 2002) (assuming jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611, to address question of forum non conveniens); United States v. Miller, 263 F.3d 1, 4 n.2 (2d Cir. 2001) ("exercising a form of hypothetical jurisdiction" in connection with sentencing); Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 & n.11 (2d Cir. 2000) (assuming jurisdiction "as to whether relation back for purposes of Rule 15(c) [of the Federal Rules of Civil Procedure] raises jurisdictional issues"); Oliva v. U.S. Dep't of Justice, 433 F.3d

Miller and Barton's breach-of-contract claim is plainly time-barred under New York law. That is "a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further." PDK Labs. Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

229, 232 (2d Cir. 2005) (exercising hypothetical jurisdiction); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 132 n.10 (2d Cir. 2005) (same); Abimbola v. Ashcroft, 378 F.3d 173, 180 (2d Cir. 2004) (same).