SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK PART 39
Justice

Kelly, George

INDEX NO. 104485/10

MOTION DATE

- v -

MOTION SEQ. NO. 001

Legacy Benefits Corporation

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/12/12

BARBARA R. KAPNICK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39

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GEORGE KELLY,

Plaintiff,

- against -

LEGACY BENEFITS CORPORATION, LEGACY CAPITAL CORPORATION, MILLS, POTOCZAK & COMPANY, ABC Companies 1-10, fictitious entities, JOHN DOES 1-20, fictitious persons,

Defendants.

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DECISION/ORDER
Index No. 104485/10
Motions Seq. Nos. 001, 002 and 003

BARBARA R. KAPNICK, J.:

Motion sequences 001, 002 and 003 are consolidated for disposition.

This action involves two viatical settlements entered into on or about September 25, 1998. "A viatical or life settlement contract involves the sale of a life insurance policy by a terminally ill person or senior citizen (known within the industry as a "viator"), at a price discounted from the face value of the policy." (Complaint at 2, ¶ 7).

"[V]iatical settlement providers . . . buy[] HIV patients' life-insurance policies, examin[e] policyholders' medical records, set[] prices based on life expectancies, and pay[] premiums for the duration of settled policies." Eli Martin Lazarus, Note, *Viatical* *and Life Settlement Securitization: Risks and Proposed Regulation*, 29 Yale L. & Pol'y Rev. 253, 261-62 (2010). To calculate the lump-sum payment, the investor discounts the policy's face value based on the viator's life expectancy. The investor pays the policy premiums and collects the benefits when the viator dies.

The investment is financially attractive only if "the value of the death benefits exceeds the purchase price, transaction costs, and continued premiums." *People v Coventry First LLC*, 13 NY3d 108, 111 (2009). In other words, the expected return is largely if not entirely a function of the viator's life expectancy. As all parties acknowledge, "the life expectancy report is the most important aspect of the viatical settlement. It dictates the purchase offer to the viator and the projected return on investment." (Plaintiff's Mem. in Opp at 1).

"Viatical settlements can be risky investments" primarily because no one can predict with absolute certainty the timing of any insured's death. *Sec & Exch Comm'n* ("SEC"), *Viatical Settlements*, (last visited March 5, 2012), *http://www.sec.gov/answers/viaticalsettle.htm.* Once the transaction has been completed, the actual "return depends upon the [viator]'s life expectancy and the actual date he or she dies." *Id.* It will be higher than expected "[i]f the [viator] dies before the estimated life expectancy" and lower than expected "if the [viator] lives longer than expected," and eventually, if the viator lives long enough to require additional premiums to maintain the policy, then investors can lose part of their principal investment. *Id.*

This industry gained traction in the United States during the late 1980s, when the AIDS pandemic peaked. "AIDS patients needed to pay for the high cost of medical care and had, as one of their assets, a life-insurance policy." SEC, *Life Settlements Task Force* at 3 (Jul. 22, 2010), available at *www.sec.gov/news/studies/2010/lifesettlements-report.pdf*. "Sellers received cash on which to subsist; buyers gained an investment with a virtually certain, near-term payout." Lazarus, *supra*, at 255. But the industry declined "[a]s medical advancements in the treatment of AIDS prolonged the life expectancy of AIDS patients." SEC, *Life Settlements Task Force*, *supra*, at 4. Eventually, the market crashed "when protease inhibitors suddenly and radically extended life expectancies of persons with AIDS, substantially delaying payouts for investors." Lazarus, *supra*, at 255.

In this case, plaintiff George Kelly entered into an Agency and Viatical Purchase Agreement (the "Purchase Agreement") with defendant Legacy Capital Corporation ("Legacy").[1] Pursuant to the

[1] The Complaint defines "Legacy" to include both Legacy Capital Corporation and Legacy Benefits Corporation ("LBC"), an affiliate of Legacy Capital Corporation that purchases policies but does not deal with investors and had no dealings with plaintiff.

Purchase Agreement, plaintiff invested $100,000 to purchase an interest in two life insurance policies.[2] Plaintiff also executed a form entitled, "Disclosure of Benefits and Risks Involved in Purchasing a Viatical Settlement" (the "Disclosure of Risks Form"). After the investment was made, plaintiff was provided with a document prepared by defendant Mills Potoczak & Company ("MPC") (then known as Wesley, Mills & Company), the independent escrow agent that collected and disbursed funds in connection with Legacy's viatical transactions, entitled "Responsibilities of the Escrow Agent and What the Escrow Agent Does" (the "Escrow Agent's Responsibilities").

Pursuant to the Purchase Agreement, plaintiff's $100,000 investment was split evenly between two policies, which plaintiff designates as insuring "Viator No. 1" and "Viator No. 2." Plaintiff also received letters from MPC containing details concerning each viator and each policy. At the same time, Legacy sent plaintiff letters attaching life-expectancy reports for Viator No. 1 and Viator No. 2. The life-expectancy reports included each viator's viral load and CD4 count, the two main factors in determining a viator's life expectancy, and indicated life expectancies of 18 to 24 months for Viator No. 1 and 12

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2 As indicated in the Purchase Agreement, a portion of this amount was paid to Legacy for its fee, and funds were escrowed to pay the policy premium for twice the estimated life expectancy of the viators.

months for Viator No. 2. Legacy also provided ownership and beneficiary forms showing transfer of ownership of each policy to Legacy Benefits Trusts, of which plaintiff was a beneficiary.

Plaintiff contacted Legacy by phone in September and December 1999 and in May 2000 for updates on the status of Viators No. 1 and No. 2. In November 2000, plaintiff sent an e-mail to Legacy seeking certain information and complaining that Legacy purchased a policy for Viator No. 1, who had a 23 month life expectancy, "without any authorization from me."[3]

In 2003, plaintiff began to receive form-letter billings for premiums and administrative fees from MPC to keep the Viator No. 1 policy in force. This meant that Viator No. 1 had outlived twice his life expectancy, the period for which premiums had been reserved in escrow at the time of plaintiff's investment. Plaintiff paid these billings in 2003, 2004 and 2005.

According to Legacy, plaintiff became increasingly angry about his investment, and on June 1, 2005, Legacy entered into the June 1, 2005 Letter Agreement with plaintiff, which provided that Legacy would reimburse plaintiff for the premiums and fees he had paid to

[3] Legacy points out that the 18-24 month life expectancy was expressly authorized under the Purchase Agreement, which provided that plaintiff's funds could be used to purchase policies of viators with life expectancies up to 6 months longer than the 18 month life expectancy plaintiff had originally specified.

date and would pay all premiums and fees due on both Viator No. 1's and Viator No. 2's policies for the next three years. In return, plaintiff agreed not to sue Legacy during that time.

Again, in 2007 through 2009, plaintiff threatened Legacy with lawsuits, and finally commenced the instant action in April 2010.

In his Complaint, plaintiff alleges the following fourteen causes of action:

(1) violation of New York General Business Law ("GBL") Sections 349 and 350 (against Legacy and MPC);

(2) common law fraud (against Legacy);

(3) breach of contract (against Legacy and MPC);

(4) breach of implied covenant of good faith and fair dealing (against Legacy and MPC);

(5) unjust enrichment (against Legacy and MPC);

(6) conversion (against Legacy and MPC);

(7) breach of fiduciary duty (against MPC);

(8) negligence (against MPC);

(9) rescission (against Legacy and MPC);

(10) unilateral mistake (against Legacy and MPC);

(11) equitable fraud (against Legacy and MPC);

(12) fraudulent inducement (against Legacy and MPC);

(13) respondeat superior (against all defendants); and

(14) joint and several liability (against all defendants).

Defendants now move for summary judgment, under motion sequence nos. 001, 002, and 003, pursuant to CPLR 3212 for an order dismissing the Complaint on the ground that plaintiff's claims are without merit.[4]

After defendants filed these motions, plaintiff retained the expert services of Dr. Michael Lee Silverman. Dr. Silverman reviewed the life-expectancy reports and opined that, accepting the given viral loads and CD4 counts as accurate, a correct calculation would have given far higher life expectancies. Dr. Silverman based his determination only on information in the life-expectancy reports.

At oral argument held on the record on February 25, 2011, plaintiff withdrew several causes of action and specifically stated that "the . . . counts that we are urging this Court to leave in the case are Counts 1, 2, 7, and 9 through 12. The remaining counts have been withdrawn . . . ." (Trans. of Oral Arg. at 2). Indeed, plaintiff revealed that the only theory under which he intends to pursue his claims is that Legacy misrepresented the life expectancies of the viators through "contrived life expectancy

[4] Legacy moved under motion sequence 001, LBC moved under motion sequence 002, and MPC moved under motion sequence 003.

reports." Specifically, plaintiff contends that "if the life-expectancy reports are falsified or contrived," then:

> (a) Defendants' representations as to Plaintiff's return on investment . . . were grossly misleading at the time they were made;
> (b) Defendants' failure to disclose that the escrowing premiums for two times the life expectanc[ies] of the viators would be woefully insufficient and that Plaintiff could expect to pay premiums for more than 10 years was material and deceptive; ... and
> (c) Defendants' representations in the Purchase Agreement that 'independent' physicians would determine life expectancies based on a review of medical records ... was [*sic*] false at the time they were made."

(Plaintiff's Mem. in Opp. at 21).

To that end, this case now hinges on whether the statute of limitations has expired on the remaining causes of action, which was essentially the only issue discussed at oral argument.

<u>Discussion</u>

When considering the timeliness of a fraud-based claim, summary judgment is appropriate only if it "'conclusively appear[s] that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred.'" *Sargiss v. Magarelli*, 12 NY3d 527, 532 (2009) (quoting *Trepuk v. Frank*, 44 NY2d 723, 725 [1978]). Otherwise, "'a complaint should not be dismissed on motion and the question should be left to the trier of the facts.'" *Id.* (quoting *Trepuk*, *supra* at 725).

I. *First Cause of Action - Violation of GBL Sections 349 and 350*

Plaintiff alleges in his first cause of action that "Legacy and MPC engaged in misleading and deceptive practices [that] . . . induc[ed investors] to invest significant sums in viatical settlements" by, among other acts, "misrepresenting to Plaintiff, through the use of false and/or contrived medical reports . . . the true life expectancies of the viators." (Complaint at 22-24, ¶2[vi]).

CPLR 214(2) sets a three-year statute of limitations for "an action to recover upon a liability . . . created or imposed by statute." The statute applies "only where liability 'would not exist but for a statute.'" *Gaidon v. Guardian Life Ins. Co. of Am.* (*Gaidon II*), 96 NY2d 201, 208 (2001) (quoting *Aetna Life & Cas. Co. v. Nelson*, 67 NY2d 169, 174 [1986]). Thus, it does not apply to statutes merely codifying existing common law. *Id.*

Described as "'a creature of statute,'" GBL 349, though sometimes overlapping with common-law fraud, "encompasses a far greater range of claims that were never legally cognizable before its enactment." *Gaidon II*, 96 NY2d at 209 (quoting *Gaidon v. Guardian Life Ins. Co. of Am.* [*Gaidon I*], 94 NY2d 330, 343 [1999]). "'Although a person's actions may at once implicate both, [GBL] §349 contemplates actionable *conduct that does not necessarily rise* *to the level of fraud.'"* *Gaidon II*, 96 NY2d at 209 (quoting *Gaidon I*, *supra* at 343 [emphasis in original]). Accordingly, "the three-year period of limitations for statutory causes of action under CPLR 214(2) applies to the instant [GBL] §349 claims." *Gaidon II* at 210. Further, "[t]he standard for recovery under [GBL] §350, while specific to false advertising, is otherwise identical to section 349." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 n.1 (2002). Thus, CPLR 214(2) governs both claims.[5]

"In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues." *Gaidon II*, 96 NY2d at 210. GBL Section 349 makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state." GBL 349(a). It also confers a private right of action for both injunctive and monetary relief to "any person who has been injured by reason of any violation of [GBL 349]." GBL 349(h). "Thus, accrual of a section 349(h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice violating section 349." *Gaidon II*, 96 NY2d at 210. The inquiry thus turns on when defendants' allegedly deceptive acts injured plaintiff. *Id.*

[5] For this reason, the Court bases its analysis on Section 349, which has far more interpretive case law, without differentiating between the two.

Where, as here, "the gravamen of the complaints of [GBL] §349 violations [is] . . . deceptive practices inducing unrealistic expectations, . . . plaintiff[] suffered no measurable damage until the point in time when those expectations were actually not met." *Gaidon II*, 96 NY2d at 211-12. Plaintiff alleges unrealistic expectations regarding the viators' life expectancies, and thus he was injured when those expectations went unmet. In other words, plaintiff was injured when the viators exceeded their life expectancies.[6]

In October 1998, "[p]laintiff received two letters from MPC... which contained information about each viatical settlement in which Plaintiff invested." (Defs.' Statement of Undisputed Facts at 5, ¶19). These letters "advis[ed] that . . . [V]iator[No. 1's] life

[6] *Gaidon I* and *II* involved "vanishing-premium" life-insurance policies, which essentially allow policyholders to front-load premiums with the expectation of being "relieved of any further out-of-pocket premium obligations" by a certain date. *Gaidon I*, 94 NY2d at 343. Insurers invest the additional cash, marketing the policies on the premise that premiums will cease by a fixed date. *Id.* at 342-43. The plaintiffs there alleged that defendants misstated interest-rate projections, creating unrealistic expectations of when premium payments would cease. *See Gaidon II*, 96 NY2d at 211-12. The Court of Appeals held that the "plaintiffs suffered no measurable damage until . . . those expectations were actually not met, and they were then called upon either to pay additional premiums or [to] lose coverage and forfeit the premiums they [had] previously paid." *Id.* at 211-12. The language referring to paying additional premiums must be read in context. The expectation there was that payments would stop, and the injury occurred when those expectations went unmet and the payments continued. Not so here: Kelly's expectation was that the viators would die by a given date; it is only indirectly related to the additional premium payments he made beginning in 2003.

expectancy was twenty-three months," (Complaint at 13-14, ¶45), and that Viator No. 2's "life expectancy was twelve (12) months." (Complaint at 14, ¶48). Thus, plaintiff expected Viator No. 1 to die by about October 2000 and Viator No. 2, by about November 1999. The statute began to run, at the latest, in October 2000, when the later of the two injuries occurred. Accordingly, the three-year limitations period had long since run by the time plaintiff commenced this proceeding in 2010.

II. *Second, Ninth, Tenth, Eleventh and Twelfth Causes of Action*

These causes of action sound in fraud[7] and are governed by CPLR 213(8):

> [For] an action based upon fraud[,] the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it.

CPLR 213(8), 203(g).

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[7] The Court assumes, without deciding, that Kelly's rescission and unilateral mistake claims sound in fraud rather than in contract. *Compare Percoco v. Lesnak*, 24 AD3d 427 (2d Dep't 2005) ("Where, as here, 'rescission is sought on the ground of actual fraud, the Statute of Limitations is [governed by CPLR 213(8)].'" (quoting *Hoffman v. Cannone*, 206 AD2d 740, 740-41 [3d Dep't 1994]), *with Foxley v. Sotheby's Inc.*, 893 F Supp 1224, 1234 (SDNY 1995) ("Claims for recision are governed by . . . CPLR 213(6)."). This affords Kelly the longest possible limitations period because there is no discovery provision for contractual claims. If the Court treats these as contract-based claims, then the statute of limitations expired in 2004, six years after the claim accrued. *See* CPLR 213(6), 203(a).

"The cause of action for fraudulent inducement with respect to plaintiff['s] initial investment" in the viatical settlements accrued when plaintiff "entered into the contract to purchase" the viatical settlements, i.e., when he "completed the act that the alleged fraudulent statements had induced." *Prichard v. 164 Ludlow Corp.*, 49 AD3d 408 (1st Dep't 2008). Kelly purchased the viatical settlements in 1998, so he is well beyond the six-year limitations period. He must, therefore, rely on the two-year discovery provision, provided for in CPLR 213(8).

To determine when the two-year discovery provision begins to run, courts use a two-step, objective test that questions whether and when the plaintiff had (1) inquiry notice and (2) constructive knowledge of the alleged fraud:

> '"[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him."'

Gutkin v. Siegal, 85 AD3d 687, 688 (1st Dep't 2011) (quoting *Armstrong v. McAlpin*, 699 F2d 79, 88 [2d Cir 1983]); *see also Addeo v. Braver*, 956 F. Supp. 443, 449 (SDNY 1997).

A. *Notice of Fraud*

The notice requirement prevents the limitations period from running against a plaintiff "who has no reason to suspect that he has been defrauded." *Rosen v. Spanierman*, 894 F.2d 28, 36 n.2 (2d Cir. 1990); *see also Trepuk, supra* at 724-725.

In 2007, Kelly's then-attorney sent several letters to Legacy. On March 13, 2007, counsel wrote, "My review of the documentation from 1998 to the current time indicates flagrant and serious common-law fraud and New Jersey Consumer Fraud." On May 9, 2007, counsel wrote, "Please note that we have serious questions and have reason to believe that: (a) The policy does not exist. (b) The insured does not exist. (c) The doctor does not exist . . . ." Based on these suspicions, plaintiff's attorney requested, among other things, "[p]roof that the doctor who provided the Certification in 1998 for each policy is a real doctor." Thus, it is clear that by May 2007 Kelly "had reason to suspect that" he had been defrauded. *See Piedra v. Vanover*, 174 AD2d 191, 194 (2d Dep't 1992).

Discussing these letters, plaintiff argues that "neither [he] nor his attorney believed, or had reason to believe, that the life expectancy figures were contrary to the medical data in the report." (Plaintiff's Mem. in Opp. at 27, n.10). However, his letters belie this assertion and his questioning as to whether the policy, the insured or the doctor even existed certainly indicates that he had suspicions about the reports and the doctors who had allegedly prepared them. Once plaintiff "had sufficient information to recognize the probability that defendant[s were] misleading them as to . . . material information, it became plaintiff[s] responsibility to investigate the quality and reliability of defendant's overall . . . advice." *Addeo*, 956 F Supp at 450.

B. *Knowledge of the Operative Facts*

Once a plaintiff has been put on notice, the statute of limitations starts to run when he is "'aware of enough operative facts so that, with reasonable diligence, [he] could have discovered the fraud.'" *Lucas-Plaza Hous. Dev. Corp. v. Corey*, 23 AD3d 217, 218 (1st Dep't 2005) (quoting *Watts v. Exxon Corp.*, 188 AD2d 74, 76 [3rd Dep't 1993]). "It is knowledge of facts not legal theories that commences the running of the two-year limitations period." *TMG-II v. Price Waterhouse & Co.*, 175 AD2d 21, 23 (1st Dep't 1991). "[T]he legal rights that stem from certain facts or circumstances need not be known, only the facts or circumstances themselves." *Stone v. Williams*, 970 F2d 1043, 1049 (2d Cir 1993).

Kelly bases his claim entirely on the life-expectancy reports. He does not dispute that the viral loads and CD4 counts were accurate. In essence, he argues that proper calculations based on those numbers would have given life expectancies far higher than the bottom-line numbers that were listed in the reports. In other words, he contends that the life expectancies were fraudulently lowered.

Kelly bases his argument on an opinion letter dated November 1, 2010 from his expert, Dr. Silverman, who based his opinion only on the life-expectancy reports. As such, the operative facts of Kelly's claim are all contained in the life-expectancy reports, which plaintiff had since 1998.

Thus, it "conclusively appear[s] that [Kelly] had knowledge of facts from which the fraud could reasonably be inferred." *Sargiss*, 12 NY3d at 532. That he did not draw the precise inferences or connections is irrelevant because he possessed all the necessary facts upon which he now relies. Once he was on notice of fraud, nothing prevented him from learning exactly what he now claims, which is "confirmed by reasoning backward from what plaintiff[] learned when [he] finally enlisted the help of [Dr. Silverman]." *Addeo*, 956 F Supp at 451. The Court need not impute knowledge where it finds actual knowledge.

Plaintiff asserts that he "<u>first</u> discovered" the inconsistency when "he retained Dr. Silverman." (Plaintiff's Mem. in Opp. at 30). Before that, plaintiff claims "the facts surrounding that issue had not yet come to light." (Plaintiff's Mem. in Opp. at 28). However, "when the plaintiff [has] knowledge of facts suggesting fraud, the discovery of new information about the same fraudulent act [does] not toll the statute of limitations". *CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 158 (1st Dep't 2009).

Kelly also argues that

> the test as to whether Plaintiff should have discovered the fraud is an objective one measured by a person of 'ordinary intelligence'. Thus, while Plaintiff may have possessed the life expectancy reports since 1998, it would be unreasonable and unfair to conclude that a person of 'ordinary intelligence' would have understood the meaning and importance of the purely medical issues and information contained therein, especially when those reports contained a summary sentence which unequivocally states the purported life expectancy figure in terms of months.

(Plaintiff's Mem. in Opp. at 30-31). This argument is misplaced. First, that is the standard for inquiry notice. *See Gutkin*, 85 AD3d at 688. As the Court has already shown, the plaintiff was put on notice of the alleged fraud. Second, the argument assumes that the statute of limitations did not begin to run until plaintiff knew everything necessary to carry the day, which is not true. *See TMG-II*, 175 AD2d at 22. Third, the argument merely begs the question by assuming that this Court must impute knowledge of the alleged fraud, but that is unnecessary where, as here, plaintiff had actual knowledge.

Therefore, by 2007 at the latest, Kelly had been put on notice of the alleged fraud and actually knew all the operative facts upon which he now bases his claim. Because he did not bring this lawsuit until 2010, the statute has run.

C. *Equitable Estoppel*

"Under th[e] doctrine [of equitable estoppel], a defendant is estopped from pleading a statute of limitations defense if the 'plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action.'" *Ross v. Louise Wise Servs., Inc.*, 8 NY3d 478, 491 (2007) (quoting *Simcuski v. Saeli*, 44 NY2d 442, 449 (1978)). "Equitable estoppel does not apply, however, where the misrepresentation or act of concealment underlying the estoppel claim is the same act forming the basis of the underlying substantive cause of action." *Transport Workers Union of Am. Local 100 AFL-CIO v. Schwartz*, 32 AD3d 710, 714 (1st Dep't 2006).

Kelly argues that equitable estoppel applies here "because any delay in filing [the action] was the direct result of Defendants' deliberate and calculated scheme to cover up the truth." (Plaintiff's Mem. in Opp. at 31). He asserts that he

> exercised extreme diligence in investigating his concern that the viators either did not exist or were no longer alive [but] [a]t each

> turn Defendants . . . convinced him that he had no reason to be upset and failed to provide him with pertinent information. What little information Defendants did provide altered Plaintiff's theories but never revealed the real fraud.

(Plaintiff's Mem. in Opp. at 31). This argument fails for two reasons.

First, equitable estoppel "will not toll a limitations statute where plaintiff[] possessed timely knowledge sufficient to have placed [him] under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations." *Rite Aid Corp. v. Grass*, 48 AD3d 363, 364-65 (1st Dep't 2008), as this Court has already found was the case here.

Second, even if plaintiff did not actually know the operative facts and even if he exercised due diligence, equitable estoppel does not breathe life into this claim. The doctrine "'is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient.'" *Ross*, 8 NY3d at 491 (quoting *Zoe G. v. Frederick F.G.*, 208 AD2d 675, 675-76 (2d Dep't 1994)). Plaintiff is not alleging a subsequent and independent fraud. As he says, "Defendants . . . never revealed the real fraud." (Plaintiff's Mem. in Opp. at 31). Of course, "[p]articipants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud." *Oster v. Kirschner*, 77 AD3d 51, 55-56 (1st Dep't 2010). Without this limitation on equitable estoppel, "the mere assertion of an underlying fraudulent act would always trigger equitable estoppel and render the discovery accrual rule for fraud actions superfluous." *Kaufman v. Cohen*, 307 AD2d 113, 122 (1st Dep't 2003).

Kelly had been put on notice of the alleged fraud no later than 2007, when he accused Legacy of fraud, and he knew the operative facts by then, as he now relies only on facts in the life-expectancy reports, which he has had since 1998. The statute of limitations on the fraud claims began to run, therefore, at the latest, in 2007, and expired in 2009, before this action was commenced.

III. *Seventh Cause of Action*

Kelly's seventh cause of action is against MPC for allegedly breaching its fiduciary duty to Kelly by, among other things:

(a) aiding and abetting Legacy in the fraudulent scheme detailed in [the Complaint] . . . ;
(b) releasing and investing Plaintiff's monies in connection with viators and/or life insurance policies that are materially inconsistent with the terms and conditions of the Purchase Agreement;
(c) refusing to return to Plaintiff his investment monies once it was discovered that the funds were invested contrary to the terms and conditions of the Purchase Agreement; and

> (d) failing and refusing to advise, inform, and/or notify Plaintiff of material facts and changes related to the status of the viators and life insurance policies . . . .

(Complaint at p. 42, ¶52). Plaintiff also alleges that MPC retaliated against him by billing him for back premiums and fees when he threatened litigation. (Complaint at 43, ¶52).

As discussed above, while plaintiff maintains the viability of this cause of action, he has withdrawn certain underlying factual allegations. Plaintiff expressly limited his brief to certain sections of Legacy's brief and presumably waived his other arguments and allegations. (Plaintiff's Mem. in Opp. at 13-14). Based on plaintiff's omitted points, the Court concludes that he has waived allegation (d)[9] and the retaliation claim. Certain factual allegations supporting (a), (b), and (c) remain. These are addressed below.

A. *MPC's Fiduciary Duties to Kelly*

"Plaintiff did not have oral communications with MPC prior to the entry of the Purchase Agreement . . . ." (Plaintiff's Response

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[9] Allegation (d) is based on MPC's alleged failure to disclose material facts and changes "related to the status of the viators and life insurance policies at issue, including, but not limited to, the sale of the policy for Viator No. 2 to Met Life, the $500,000.00 increase in the death benefit for the policy issued to Viator No. 1, the significant decrease in Plaintiff's ownership interest in the policy for Viator No. 1, the loan taken against the base policy issued to Viator No. 2, and the change in beneficiaries for Viator No. 2's policy." (Complaint at 42).

to Defendants' Statement of Facts at 2, ¶10). MPC's fiduciary duties are the product of the escrow agreement, which "'is a contract' like any other." *H & H Acquisition Corp. v. Financial Intranet Holdings*, 669 F Supp2d 351, 363 (SDNY 2009) (quoting *Egnotovich v. Katten Muchin Zavis & Roseman LLP*, 18 Misc3d 1120(A) at *6 (Sup Ct, NY Co 2008), *aff'd* 55 AD3d 462 (1st Dep't 2008)).

In this case, the escrow agreement is embedded in the Purchase Agreement and the Escrow Agent's Responsibilities Form. These documents make clear that although MPC is paid by Legacy, its fiduciary responsibility is to the viator and the purchaser-Legacy. As fiduciary, MPC was "obliged to release [the] escrow funds only in compliance with the conditions in the escrow agreement." *Egnotovich*, 55 AD3d at 463.

B. *Applicable Statute of Limitations*

"New York law does not provide a single statute of limitations for breach of fiduciary duty claims." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009). The applicable limitations period depends on the requested remedy and on whether the claim is based on fraud.

"Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4),[10] which has a three-year limitations period." *Id.* When "the relief sought is equitable in nature," on the other hand, "the six-year limitations period of CPLR 213(1)[11] applies." *Id.* Unlike CPLR 213(8), neither CPLR 214(4) nor CPLR 213(1) has a discovery provision.

"Nevertheless, the case law in New York clearly holds that a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period [under CPLR 213(8)]." *Kaufman*, 307 AD2d at 119; *accord IDT Corp.*, 12 NY3d at 139 ("where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213[8].").

For this cause of action, plaintiff prays for judgment awarding compensatory and punitive damages, attorneys' fees, costs and disbursements and "such other and further relief that this Court may deem just and proper." (Complaint at 43). Thus, CPLR 213(1) does not apply because plaintiff does not seek equitable relief. The Court must, therefore, determine whether each claim is

[10] CPLR 214 provides: "The following actions must be commenced within three years: . . . (4) an action to recover damages for an injury to property except as provided in section 214-c;"

[11] CPLR 213 provides: "The following actions must be commenced within six years: (1) an action for which no limitation is specifically prescribed by law;"

based upon fraud. If it is based on fraud, then CPLR 213(8) applies. If not, then CPLR 214(4) applies.

C. *Accrual of Plaintiff's Breach of Fiduciary Duty Causes of Action*

A breach of fiduciary duty claim "accrues as soon as 'the claim becomes enforceable, i.e., when all the elements of the tort can be truthfully alleged in a complaint.'" *IDT Corp.*, 12 NY3d at 140 (quoting *Kronos, Inc. v. AVX Corp.*, 81 NY2d 90, 94 [1993]).

First, plaintiff alleges that MPC "aid[ed] and abet[ed] Legacy in the fraudulent scheme detailed in [the Complaint]." (Complaint at 42, ¶52(a)). "The applicable limitations period for that claim is six years, since plaintiff's fraud cause of action against [Legacy] is not merely 'incidental' to the breach of fiduciary duty cause of action against [MPC]." *Ingham v. Thompson*, 88 AD3d 607, (1st Dep't 2011). "The timeliness of plaintiff['s] breach of fiduciary duty claim, therefore, turns on the viability of [his] fraud cause of action . . . ." *Kaufman*, 307 AD2d at 119.

As discussed above, plaintiff's fraud claims against Legacy must be dismissed because the statute of limitations has expired. Since plaintiff's fraud claim must be dismissed, his cause of action based on aiding and abetting the same fraud similarly fails.

Id.; see also Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804, 809 (2nd Dep't 2011).

Second, plaintiff alleges that MPC "releas[ed] and invest[ed] Plaintiff's monies in connection with viators and/or life insurance policies that are materially inconsistent with the terms and conditions of the Purchase Agreement." (Complaint at 42). MPC released this money in 1998. Even if CPLR 213(8)'s discovery provision applies, Kelly discovered the inconsistency (a fact that he confirmed by demanding his money back) in 1998. Thus, in this case, CPLR 213(8)'s six-year limitations period applies, and the statute of limitations had run by 2004, six years after the cause of action accrued.

Finally, plaintiff alleges that MPC "refus[ed] to return to Plaintiff his investment monies once it was discovered that the funds were invested contrary to the terms and conditions of the Purchase Agreement." Plaintiff demanded his money back "[i]mmediately after receipt of the [life-expectancy reports]," which he had received by October 1998. As with the second allegation, the six-year limitations period applies here. Thus, the statute of limitations for this allegation had also run by 2004, six years after the cause of action accrued.

Conclusion

Kelly bases all his claims on the same factual theory: that proper calculations based on the medical data in the life-expectancy reports would have produced far higher life expectancies than those given and that defendants fraudulently decreased the viators' life expectancies. His cause of action for violations of GBL 349 and 350 expired in 2003, three years after the viators exceeded their life expectancies. Kelly's fraud-based claims expired in 2009, two years after he suspected fraud and knew the operative facts supporting his claims. His breach of fiduciary duty claim tracks his fraud-based claims and expired along with them.

Accordingly, defendants' motions for summary judgment are granted.

The Clerk shall enter judgment for the defendants, dismissing the Complaint in its entirety with prejudice and without costs or disbursements.

This constitutes the decision and order of this court.

Dated: March 12, 2012

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.