

**Denenberg v Rosen**

2008 NY Slip Op 30469(U)

February 19, 2008

Supreme Court, New York County

Docket Number: 0110441/2006

Judge: Walter Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 110441/2006  
DENENBERG, ROBERT A.  
vs.  
ROSEN, WARREN  
SEQUENCE NUMBER : 004  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 7.24.07  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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 is consolidated with motion sequences 005, 006, 007 and 008 and

IS DECIDED  
IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION  
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
FEB 21 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/9/08

*WBT*  
**WALTER B. TOLUB**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 15

-----X  
ROBERT A. DENENBERG in his capacity and as  
Administrator of the ROBERT A. DENENBERG, A  
SOLE PROPRIETORSHIP DEFINED BENEFIT  
PENSION PLAN,

Plaintiff,

-against-

Index No. 110441/06  
**DECISION AND ORDER**

WARREN ROSEN, WARREN ROSEN & CO.,  
BANKERS LIFE OF NEW YORK a/k/a BANKERS  
LIFE INSURANCE COMPANY OF NEW YORK,  
INDIANAPOLIS LIFE INSURANCE COMPANY,  
KENNETH R. HARTSTEIN, ECI PENSION  
SERVICES, LLC, ECONOMIC CONCEPTS, INC.,  
GARY L. THORNHILL, THE PRIVATE  
CONSULTING GROUP, RICHARD C. SMITH, ESQ.,  
BRYAN CAVE, LLP, JOHN REPETTI and GRAF  
REPETTI & CO., LLP,

Defendants.

**FILED**  
FEB 21 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X

**WALTER TOLUB, J:**

Motion sequence numbers 004, 005, 006, 007 and 008 are consolidated for disposition and resolved in this memorandum decision.

By motion sequence 004, defendants Kenneth R. Hartstein, ECI Pension Services, LLC (ECI) and Economic Concepts, Inc. (together, the Hartstein ECI defendants) move, pursuant to CPLR 3211 (a) (5) and (7), and 3016 (b), to dismiss the complaint. By motion sequence 005, defendants Bankers Life Insurance Company of New York (Bankers Life) and Indianapolis Life Insurance Company (Indianapolis Life)(together, the Bankers Life defendants) move, pursuant to CPLR 3211 (a) (5) and (7) and 3016 (b), to dismiss the complaint. By motion sequence 006, defendants Richard C. Smith and Bryan Cave LLP (together, the Bryan Cave defendants) move,

pursuant to CPLR 3211 (a) (5) and (7) and 3016 (b) to dismiss the complaint. By motion sequence 007, defendants John Repetti and Graf Repetti & Co., LLP (together the Graf Repetti defendants) move, pursuant to CPLR 3211 (a) (5) and (7), to dismiss the complaint. By motion sequence 008, defendants Gary L. Thornhill and The Private Consulting Group (together, the Thornhill defendants) move, pursuant to CPLR 214 (4) and (6), 3013, 3016 (b), and 3211 (a) (1), (3), (5), and (7), to dismiss the complaint. Plaintiff Robert A. Denenberg cross-moves, pursuant to CPLR 3025, to amend the complaint.

This action arises out of plaintiff's claim that he incurred damages of over \$1.5 million dollars as a result of the defendants' deceptive practices and misrepresentations in selling him a pension plan designed by the defendants, and known as the Pendulum Plan (the Plan). Plaintiff claims that the Plan was based on the purchase of excessive amounts of high-priced whole life insurance policies and was marketed by promising that the very large premiums used to purchase the policies were "100% tax deductible," and would serve to lower the participant's income. Plaintiff further asserts that the defendants knew, or should have known, that the Internal Revenue Service would regard the excessive amounts of life insurance as a tax shelter scheme and not permit those deductions. Plaintiff claims that this information was concealed by defendants because the defendants are all interrelated in their business dealings, and each had a financial interest in selling the Plan, through either direct commissions, volume bonuses, or business referrals.

Plaintiff, at the time he purchased the Plan, was a commodities trader on the New York Mercantile Exchange and operated his business in New York as a sole proprietor. Plaintiff alleges that in mid 2001, he met defendant Warren Rosen (Rosen), an insurance broker/agent,

who sold life insurance, annuities, and pension plans. After a number of meetings with Rosen, plaintiff established a defined benefit pension plan, effective as of October 2001, which was funded largely with life insurance issued by the Guardian Life Insurance Company. In late 2001, Rosen contacted plaintiff again and informed him that he had a better retirement plan, known as the Pendulum Plan, available through Bankers Life, which would give plaintiff a larger tax deduction than the one he currently had. Rosen claimed that he was offering the Plan to all of his best clients.

Rosen introduced plaintiff to defendant John Repetti of Graf Repetti & Co. LLP, a Manhattan-based accounting firm. Repetti indicated to plaintiff that, based on the promotional materials, and his own special knowledge, he was recommending the Plan to his high-end clients, and he strongly recommended it to plaintiff.

Rosen provided plaintiff promotional materials which are annexed to plaintiff's moving papers (Fiscella Aff., Exhibit B). These materials include a brochure entitled "PENDulum Overview," published by defendant ECI. The brochure names defendant Richard C. Smith, Esq. of the law offices of Bryan Cave, LLP, as legal counsel. That brochure states, in part, as follows:

**Marketing**

The PENdulum Plan can create contributions of 3 to 5 times higher than those available through traditional defined benefit plans, *including other 412 (i) programs!* (Emphasis in original) . . .

Another application where the PENdulum Plan performs well is when a business owner wishes to minimize his/her salary and maximize deductible contributions. As shown by the chart to the right, the PENdulum Plan allows the business owner to put 90% of a fixed amount into the plan, versus approximately 50% allowed with a traditional defined benefit plan.

Another informational brochure, published by defendant The Private Consulting Group, which names defendant Gary Thornhill as its managing director, states in part, as follows:

**412(i) NNOVATION**

The PENDulum Plan is a fully insured qualified plan as defined under Section 412 (i) of the Internal Revenue Code. It is designed to accumulate sufficient assets based on insurance policy guarantees to provide the retirement benefits shown on the Census and Plan Benefits page of this proposal.

A qualified plan must meet several basic requirements in order to qualify as an IRC Section 412 (i) pension plan. The PENDulum Plan satisfies each of these requirements . . .

**Employer Advantages:**

- Contributions are tax deductible.
- Rewards long term employees with a substantial retirement benefit.
- Large contributions will help reduce corporate tax problems (excess accumulated earnings, high tax bracket current earnings, etc.) . . . .

Repetti, working with Rosen, engaged the services of defendant Kenneth R. Hartstein, a principal of ECI Pension Services, LLC and Economic Concepts, Inc., a product marketing firm. Plaintiff states that, according to their promotional materials, the Hartstein ECI defendants concentrated principally in the qualified pension plan market “in order to provide tax planning for business owners and professionals with substantial profits” (Denenberg Affidavit, ¶ 9). The whole life insurance policies were available exclusively through Bankers Life. Defendant Gary Thornhill and his company, Private Consulting Group, was the agent/broker for Bankers Life. Thornhill obtained the insurance policies.

Plaintiff alleges that Rosen also recommended that he retain the services of the Bryan Cave law firm to represent him in submitting the Plan to the IRS. Plaintiff further asserts that he

was told by Rosen and Repetti that Bryan Cave had helped create the Plan, and that Richard Smith, an attorney with Bryan Cave, had written an opinion letter on the validity of the Plan.

Plaintiff alleges that defendants Rosen, Hartstein, Thornhill and Repetti also advised him that his wife, Kimberly Denenberg, should be made an employee of Denenberg's company and should be a participant in the Plan. Relying on the collective advice and marketing materials of the defendants, plaintiff claims that he authorized Rosen to cancel the Guardian policies retroactively, and replace them with Bankers Life policies in accordance with the Plan design.

In May 2002, Bankers Life sent plaintiff a copy of the whole life insurance policies which listed the Plan as the beneficiary in an amount of \$8,720,954 on Denenberg's life, and a second whole life insurance policy on the life of Kimberly Denenberg in the amount of \$7,609,363.

By letter dated March 28, 2003, the IRS approved the form of the Plan, indicating that "[c]ontinued qualification of the plan under its present form will depend on its effect in operation" (Fiscella Aff., Exhibit C). Plaintiff alleges that he was never informed by Smith that it was the "operation" of the Plan that was the most important hurdle that needed to be cleared by the IRS.

In October 2003, plaintiff filed his 2002 tax returns, taking deductions for the life insurance premiums. In April 2004, plaintiff was informed by the IRS that he was being audited.<sup>1</sup> Plaintiff hired Smith as his legal counsel for the audit, at which time he was informed by Bryan Cave that the law firm also represented the ECI defendants. Plaintiff alleges that Smith's approach to the audit was a "stay the course" approach, as opposed to a compromise

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<sup>1</sup> The court notes that although plaintiff's complaint alleges that the audit is ongoing, the parties informed the court at oral argument that the IRS disallowed the deductions in March 2007.

approach, which, plaintiff now believes, was not in his best interests. The strategy was, however, in Smith's best interests because of Bryan Cave's continuing relationship with the ECI defendants and the profits derived from the Plan. In October 2005, plaintiff retained new counsel to replace Bryan Cave.

This action was commenced in July, 2006. The original verified complaint contained 12 causes of action. An amended complaint was served in December comprised of 10 causes of action, including claims for breach of contract (first cause of action), breach of implied duty of good faith and fair dealing (second cause of action), unjust enrichment (third cause of action), professional malpractice (fourth cause of action), legal malpractice (fifth cause of action), negligence (sixth cause of action), gross negligence (seventh cause of action), negligent misrepresentation (eighth cause of action), fraudulent misrepresentation (ninth cause of action), and fraud (tenth cause of action). The motions to dismiss presently before this court effectively seek dismissal of the causes of action set forth in both the original, amended, and, as explained below, the proposed second amended verified complaint.

Plaintiff, in motion sequence 008, cross-moves for leave to serve a second amended verified complaint. Plaintiff claims that the proposed second amended verified complaint does not raise any new facts, but only clarifies the causes of action sounding in breach of contract and fraud so as to satisfy the proscriptions of CPLR 3016 (b). The proposed second amended complaint also adds a cause of action for declaratory judgment seeking a determination that the defendants acted in concert as a joint venture with respect to the sale, marketing and promotion of both the Plan, as well as the whole life insurance policies used to fund the Plan. The proposed amended complaint also seeks to add a cause of action for rescission of contract based on

mistake of law, and two causes of action based on claimed violations of General Business Law §§ 340 and 350. The causes of action asserted in the proposed second amended complaint are breach of contract (first cause of action), declaratory judgment (second cause of action), unjust enrichment (third cause of action), fraud in the inducement (fourth cause of action), fraud (fifth cause of action), accounting malpractice (sixth cause of action), legal malpractice (seventh cause of action), professional negligence (eighth cause of action), fraud (ninth cause of action), negligent misrepresentation (tenth cause of action), fraud (eleventh cause of action), deceptive practices (General Business Law § 349) (twelfth cause of action), deceptive practices (General Business Law § 350) (thirteenth cause of action), and rescission (fourteenth cause of action). Inasmuch as the causes of action contained within the original, first amended, and proposed second amended verified complaints are largely similar, for the sake of both brevity and clarity, this decision refers only to the proposed second amended verified complaint.

**The First and Second Causes of Action for  
Breach of Contract and Declaratory Judgment, Respectively**

In his second cause of action, plaintiff seeks a declaratory judgment that the defendants acted in concert as joint venturers to promote, market, and sell their combined services with respect to the Plan. Plaintiff's allegations with respect to defendants' participation in a joint venture are that: (1) the defendants agreed upon a financial arrangement to share fees generated as a result of the insurance commissions paid by Bankers Life; (2) the defendants jointly and severally profited from the sale of the Plan; and (3) the defendants combined their skills, knowledge, and services for the purpose of the sale of the Plan.

A joint venture or enterprise is analogous to a partnership; it is a relationship whereby

each member makes concerted efforts to effect the purpose of the joint enterprise, and each has an equal right to direct or control the other. Liability will not be imputed under a joint venture theory when the elements of joint control and purposes are lacking (14 NY Prac., New York Law of Torts § 9.9 “vicarious liability of joint venturer”).

“The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit . . .”

(Matter of Steinbeck v Gerosa, 4 NY2d 302, 317, appeal dismissed 358 US 39 [1958], quoting Hasday v Barocas, 10 Misc 2d 22, 28 [Sup Ct, NY County 1952]). “An agreement to distribute the proceeds of an enterprise upon a percentage basis does not give rise to a joint venture if the enterprise does not represent a joinder of property, skills and risks” (Steinbeck v Gerosa, 4 NY2s at 317, citing Gordon Co. v Garcia Sugars Corp., 241 App Div 155, 156 [1<sup>st</sup> Dept 1934]). Here, plaintiff does not allege that the defendants had a joint proprietary business, that they shared an interest in partnership assets, or that there was any agreement to share losses and profits. Rather, defendants either shared commissions or referred business to each other. This is an insufficient basis to support finding the existence of a joint venture. This claim is, therefore, dismissed as to all defendants.

As to plaintiff’s claim for breach of contract, he alleges that the purpose of the various contracts entered into as part of the Plan was to obtain the tax deductions that defendants’ promised he would be entitled to. Plaintiff alleges that defendants represented that the Plan was a recognized, qualified pension plan under § 401 (a) of the Internal Revenue Code, and that it also

satisfied the requirements of section 412 (i) of the Internal Revenue Code of 1986, which allowed for 100% tax deductions for plan contributions (Complaint ¶ 145). Denenberg asserts that since the deductions were not allowed, he did not realize the benefit of his bargain, and that defendants breached their promise.

None of the financial, accounting, pension planning or legal services which defendants undertook provided that any one of them had an obligation to ensure that the premiums paid pursuant to the Plan were, in fact, deductible. Nor could any of the defendants have undertaken that obligation, since the tax deductibility of the premiums did not depend upon defendants' efforts, but rather upon an IRS determination, over which defendants had no control. Although defendants represented to Denenberg that the premiums paid pursuant to the Plan were tax deductible, these representations were outside the scope of the services provided. A misrepresentation as to an existing fact that is outside the scope of the contract may support a fraud claim, but not a claim for breach of contract (see e.g., Century 21, Inc. v Woolworth Co., 181 AD2d 620 [1<sup>st</sup> Dept 1992]). The breach of contract claim is, therefore, dismissed as to all defendants.

### **The Third Cause of Action for Unjust Enrichment**

Plaintiff's third cause of action for unjust enrichment is asserted against all of the defendants. As to this cause of action, Plaintiff alleges that he paid fees, premiums, and commissions in excess of \$1.5 million to defendants, either directly or indirectly, for their services; that defendants shared the fees and commissions generated by the Plan; and that he (plaintiff), did not receive the intended benefits of the Plan. "A cause of action for unjust enrichment is stated where 'plaintiffs have properly asserted that a benefit was bestowed . . . by

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plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor” (Wiener v Lazard Freres & Co., 241 AD2d 114, 119 [1<sup>st</sup> Dept 1998], quoting Tarrytown House Condominiums, Inc., v Hainje, 161 AD2d 310, 313 [1<sup>st</sup> Dept 1990]).

The Hartstein ECI defendants move to dismiss all causes of action against them on the grounds that Kenneth Hartstein, the principal of ECI Pension Services and Economic Concepts, never met, corresponded with, spoke to, or contracted with the plaintiff. Hartstein alleges that he merely drafted the Plan and requested opinion letters from a reputable tax attorney and an actuarial firm. Thereafter, with respect to the plaintiff, Hartstein states he was hired by defendant Gary Thornhill to provide certain projections. These projections were prepared by utilizing information received from Thornhill or others. Later, Hartstein acknowledges that he prepared a closing packet.

Plaintiff alleges that the Hartstein ECI defendants published certain promotional material upon which he relied, and which states that “The PENDulum Plan can create contributions of 3 to 5 times higher than those available through traditional defined benefit plans, including other 412 (i) programs!” (Fiscella Aff., Ex. B). Moreover, Hartstein’s firm, Economic Concepts, Inc. profited from plaintiff’s purchase of insurance pursuant to the Plan, including 20% of the insurance commissions paid by Bankers Life. Accordingly, plaintiff has sufficiently alleged the Hartstein ECI defendants were involved in the sale of the Plan, and received a benefit from it. It does not matter, for purposes of a claim of unjust enrichment whether the benefit was directly or indirectly conveyed (Cox v Microsoft Corp., 8 AD3d 39 [1<sup>st</sup> Dept 2004]). Plaintiff has, therefore, sufficiently alleged a cause of action for unjust enrichment against these defendants.

Bankers Life and Indianapolis Life Insurance Company also move to dismiss this cause of

action, as well as all other causes of action asserted against them, on the ground that Bankers Life merely issued the insurance policies purchased by Plaintiff and had nothing to do with Plaintiff's adoption or implementation of the Plan. These defendants assert that Plaintiff does not allege that he ever had any contact or communications whatsoever with the Bankers Life defendants concerning adoption of the Plan.

Plaintiff does allege, however, that Gary Thornhill is a field representative and an insurance agent /broker of Bankers Life (Complaint, ¶¶ 33 - 34) and that Plaintiff purchased the Bankers Life insurance policies based, in part, upon Thornhill's representations (Complaint, ¶ 88). An insurance company is liable to a third person for the wrongful or negligent acts and misrepresentations of its agent when made within the general or apparent scope of the agent's authority (Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc., 45 AD3d 792 [2d Dept 2007]). Moreover, Bankers Life received a benefit from these representations, in that Plaintiff purchased its policy. The motion is, therefore, denied as to defendant Bankers Life.

On the other hand, Plaintiff does not allege that he purchased an Indianapolis Life policy, and has merely alleged that it is the parent corporation of Bankers Life. A parent corporation will not be held liable for the torts or obligations of a subsidiary unless it can be shown that the parent exercised complete dominion and control over the subsidiary (Mitchell v Tam Equities, Inc., 27 AD3d 703 [2d Dept 2006]). Plaintiff has not alleged that this is the case here. Accordingly, Plaintiff has sufficiently stated a cause of action for unjust enrichment against each of the defendants except Indianapolis Life Insurance Company.

**The Fraud Claims**

**The Fourth Cause of Action for Fraud in the Inducement**

Plaintiff's claims for fraud and fraud in the inducement are asserted against all of the defendants. In his fourth cause of action, Plaintiff alleges that defendants, acting in concert, jointly marketed an allegedly "qualified" pension product, which, they promised, offered "100% tax deductibility of contributions" thanks, in part to a "specially designed policy" offered through the Bankers Life defendants. Plaintiff further alleges that he reasonably and detrimentally relied on these false statements and purchased the policies, which caused his damages.

"The essential elements of an action for fraudulent inducement are the representation of a material existing fact, falsity, scienter, deception and injury" (Century 21, Inc. v Woolworth Co., 181 AD2d at 625). "To state a claim for fraudulent inducement in an insurance context, plaintiffs must allege a 'misrepresentation or material omission' by defendants that induced plaintiffs to purchase the policies, as well as scienter, reliance and injury" (Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 348 [1999])

Here, several factors undermine plaintiff's fraudulent inducement claim. Plaintiff alleges that defendants, "acting in concert," misrepresented that "100% of the Contributions" would be "tax deductible." However, these misrepresentations are attributed only to the Hartstein ECI defendants and the Thornhill defendants in their published literature. The Thornhill literature contained a disclaimer stating "We recommend that you consult with your own tax advisors with respect to obtaining appropriate advice regarding the applicability and tax consequences of this plan" (Fiscella Aff., Ex. B). The Hartstein ECI defendants had Plaintiff sign a "Disclosure and Acknowledgment," prepared by the ECI defendants, which states, in relevant part that:

The undersigned Employer hereby acknowledges its understanding of life insurance and/or annuities as appropriate funding vehicles for a proposed PENDulum Plan, a fully insured defined benefit plan

pursuant to Internal Revenue Code section 412 (i) offered by Economic Concepts Inc. (hereinafter ECI) . . . .

The Employer further acknowledges its understanding that any sales presentations, **tax strategies** and/or planning concepts **that may have been provided by ECI**, its employees, agents and/or representatives **demonstrating potential benefits** of using life insurance and/or annuities in connection with the plan **should not be relied upon as tax advice** regarding the application of the tax laws to the transaction. **It is the responsibility of the Employer to seek the advice of the Employer's own tax and/or legal advisor** in assessing the tax consequences that may accompany participation in the Plan. The Employer acknowledges that any tax benefits that may be available following the implementation of the Plan may be modified by the future passage of legislation or changes in the tax law.

By executing this Disclosure and Acknowledgement [sic] form, the Employer hereby confirms the representations made herein and disclaims forever, on behalf of itself, its successors and assignees, any reliance on any tax information it may have received from ECI, its employees, agents and/or representatives before, during, or after adoption by the Employer of the Plan.

(Thornhill Affidavit, Ex. B). These disclaimers sufficiently undermine Plaintiff's claim of reliance against the Hartstein ECI defendants and the Thornhill defendants (see Capital Z Fin. Servs. Fund II v Health Net, Inc., 43 AD3d 100 [1<sup>st</sup> Dept 2007]).

As to the remaining defendants, Plaintiff alleges only that: "Repetti and Rosen repeatedly assured me that the promotional materials claimed tax benefits to the Pendulum Plan, were in their opinion true" (Denenberg Aff., ¶ 8). The mere statement of opinion is insufficient to support a fraud claim. The Bryan Cave literature provided information on the Plan and merely concluded, inter alia, that: "[i]t is more likely than not that the Policy and a substantially similar policy can meet the requirements of section 4312(i) of the Code provided limitations are

adequately placed in the Plan document and the Company agrees to such limitations . . . .”

(Whitnew Aff., Ex. A [A]). This cause of action is, therefore, dismissed as to all defendants.

### **The Fifth and Ninth Causes of Action for Fraudulent Concealment**

Plaintiff’s fifth and ninth causes of action are both for fraudulent concealment, and are asserted against Graf Repetti and the Bryan Cave defendants, respectively. Both causes of action are based on these defendants’ failure to inform Plaintiff first, of any potential risk in adopting and maintaining the Plan; and second, in actively concealing their negligent tax and legal advice “by failing to advise Denenberg of IRS rulings and pronouncements deeming the Pendulum Plan to be an ‘abusive tax shelter’ and by discouraging Denenberg from seeking independent objective advice concerning the advisability of maintaining the Pendulum Plan” (Complaint, ¶¶ 210, 281).

Under New York law, to state a claim for fraud, a plaintiff must demonstrate: (1) misrepresentation of a material fact made by the defendants; (2) that the defendants knew of its falsity and intended to defraud the plaintiff; (3) the plaintiff’s justifiable reliance on such misrepresentation; and (4) resulting damages to the plaintiff (see Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996]). A cause of action for fraudulent concealment requires, in addition to the four elements for fraud, an allegation that the defendants had a duty to disclose material information and that they failed to do so (P.T. Bank Cen. Asia, NY Branch v ABN AMRO Bank, 301 AD2d 373, 376 [1<sup>st</sup> Dept 2003]; Strasser v Prudential Sec., Inc., 218 AD2d 526, 527 [1<sup>st</sup> Dept 1995]). In addition, when a claim is based upon fraud or misrepresentation, “the circumstances constituting the wrong shall be stated in detail” (CPLR 3016 [b]).

As an initial matter, the complaint does not comply with the specificity requirements of CPLR 3016, in that it merely states that both the Graf Repetti defendants and the Bryan Cave

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defendants concealed unspecified IRS rulings and pronouncements. In his affidavit in support of the cross motion, Plaintiff specifies that these defendants knew *or should have known*, that IRS ruling 2004-20, in early 2004, indicated that pensions *such as the Pendulum Plan* were considered “tax shelter schemes” by the IRS (Denenberg Aff., ¶ 17). These allegations, although more specific, do not allege conduct that rises to the level of fraud and/or fraudulent concealment, since plaintiff does not allege that the defendants actually knew of any IRS rulings, only that they should have, or that any rulings specifically involved the Pendulum Plan. These allegations are in the nature of malpractice claims, not fraud claims. Accordingly, the fifth and ninth causes of action are dismissed.

#### **The Eleventh Cause of Action For Fraud**

In his eleventh cause of action for fraud, Plaintiff alleges that each of the defendants acted as Plaintiff’s financial, tax, pension and legal advisors and, therefore, had a duty not to make material misrepresentations or to conceal material facts. Plaintiff alleges that, despite this duty, defendants did not advise Plaintiff of any fee-sharing arrangements; that they intentionally recommended each other for the express purpose of discouraging Plaintiff from seeking independent, objective advice; that they recommended that Plaintiff assume additional risk by having him list his wife as an employee and by failing to advise Plaintiff of formal and informal IRS pronouncements classifying the Plan as an “abusive tax shelter”; and, in the case of Smith and Bryan Cave, intentionally advised him that the law firms’ concurrent representation of the Hartstein ECI defendants presented no serious problem and continued to advise him to maintain the Plan with the knowledge that it was receiving continued objections by the IRS as an illegal tax scheme.

As to the Hartstein ECI defendants, and the Thornhill defendants, these defendants did not have a duty to disclose their fee sharing arrangements (see e.g. Hersch v DeWitt Stern Group, Inc., 43 AD3d 644 [1<sup>st</sup> Dept 2007]). Further, as already noted, as to the Hartstein ECI defendants and the Thornhill defendants, the disclaimers preclude Plaintiff's claimed reliance on their representations regarding the tax advantages of the Plan (see Capital Z Fin. Servs. Fund II v Health Net, Inc., 43 AD3d 100, supra). Finally, plaintiff's allegations as to the way in which defendants conducted their respective business dealings, and their allegedly deceptive practices, do not indicate fraud. "Not every misrepresentation or omission rises to the level of fraud" (Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d at 350). "A practice may carry the capacity to mislead or deceive a reasonable person but not be fraudulent" (id. at 348). Here, although potentially deceptive, none of the alleged misrepresentations rose to the level of fraud. This cause of action is, therefore, dismissed as to these defendants. As to the Graf Repetti defendants and the Bryan Cave defendants, since the alleged misrepresentations do not rise to the level of fraud, and are more in the nature of negligence, this cause of action is dismissed as to these defendants as well. As to Bankers Life, Deneneberg has not alleged any misrepresentations regarding this defendant other than through Thornhill. This cause of action is, therefore, dismissed as to Bankers Life.

### **The Malpractice Claims**

#### **The Sixth Cause of Action for Accounting Malpractice**

Plaintiff asserts a cause of action for accounting malpractice against the Graf Repetti defendants, based upon their advice regarding the design of the Plan, which was rendered during the later part of 2001, and with respect to their preparation of Plaintiff's 2002 tax return. The

Graf Repetti defendants move to dismiss the sixth cause of action on the ground that it is time-barred.

CPLR 214 (6) provides a statute of limitations of three years for claims based on professional malpractice. In a malpractice action against an accountant, the three-year statute of limitations begins to run on the date the accountant's work product is received by the client (Williamson v PricewaterhouseCoopers LLP, 9 NY3d 1 [2007]; Ackerman v Price Waterhouse, 84 NY2d 535, 538 [1994]). Here, the 2002 tax returns were prepared and signed by Graf Repetti on October 10, 2003, which is within three years of the commencement of this action in July 2006. Plaintiff's claim of malpractice is, therefore, timely as to those returns. In addition, the preparation of the 2002 tax returns was a continuation of Graf Repetti's 2001 services to Plaintiff, wherein it advised him that the premiums paid, pursuant to the Plan, were tax deductible, since that advice was made in anticipation of taking the deductions which were eventually on the 2002 tax returns (see e.g. Mitschele v Schultz, 36 AD3d 249, 253 [1<sup>st</sup> Dept 2006], citing Zaref v Berk & Michaels, P.C., 192 AD2d 346, 347 [1<sup>st</sup> Dept 1993]). Accordingly, Plaintiff may include that advice in his malpractice claim against Graf Repetti. This cause of action is, therefore, timely.

#### **The Seventh Cause of Action for Legal Malpractice**

Plaintiff's seventh cause of action is asserted against defendants Smith and Bryan Cave for legal malpractice. Plaintiff's basis for his claim of malpractice is that Smith and Bryan Cave were his attorneys with respect to the design, establishment, and implementation of the Plan (Complaint, ¶ 234) and that they represented him from 2002 through October 25, 2005 (Complaint, ¶ 237). According to Plaintiff, despite owing him a duty of loyalty, the Bryan Cave

defendants committed the following acts of malpractice: they did not disclose that they also represented the Hartstein ECI defendants, until May 2004; they failed to properly review the propriety of the Plan; they failed to protect Plaintiff from the intentional and negligent misconduct of the other defendants; they failed to provide any advice or warnings at the time that the IRS issued its preliminary approval of the Plan; they failed to advise him, in early 2004, that the IRS rejected the Plan as a tax scheme; and they misled him by asking him to sign an engagement letter which incorrectly stated that their conflict of interest with defendant ECI, presented no serious ethical or legal questions. Finally, Plaintiff alleges that the Bryan Cave defendants improperly handled his IRS audit. Plaintiff contends that his damages include the payment of additional fees, expenses and costs under the Plan, the loss of legitimate tax deductions, interest, penalties, excise taxes, tax saving opportunities and legal and other professional fees (Complaint, ¶ 262).

In evaluating a motion to dismiss for failure to state a claim under CPLR 3211 (a) (7), the court must accept the allegations of the complaint as true, and accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory (Sapphire Estate Ltd. v Sun Shan Lee Realty, Inc., 293 AD2d 339, 339 [1<sup>st</sup> Dept 2002]). However, where “legal conclusions and factual allegations are ‘flatly contradicted by documentary evidence,’ they are not presumed to be true or accorded every favorable inference, and the criterion becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’” (Rivietz v Wolohojian, 38 AD3d 301, 301 [1<sup>st</sup> Dept 2007] [citations omitted]; Leder v Spiegel, 31 AD3d 266 [1<sup>st</sup> Dept 2006] affd 9 NY3d 836 [2007]).

As a threshold matter, in order to establish a cause of action for legal malpractice, the plaintiff must demonstrate the existence of an attorney-client relationship (AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 595 [2005]). Here, although Plaintiff sets forth the conclusory allegations that Smith and Bryan Cave “acted as his attorneys” with respect to the “design, establishment and implementation” of the Plan, and that Smith represented him as his attorney commencing in 2002, Plaintiff does not allege that he consulted with, or even contacted Smith or the Bryan Cave firm prior to retaining them in May 2004. Plaintiff’s conclusion that Smith acted as his attorney for the design and establishment phase of the Plan is based solely on Smith’s alleged design of the Plan and his opinion letter, written to Hartstein in 1999. His allegation that he hired Smith in 2002 is based upon a Power of Attorney form, which he states that he signed in 2002. That form is a limited Power of Attorney, which authorizes Smith to submit an “Application for Determination for Adopters of Master or Prototype or Volume Submitter Plan” (IRS Form 5307) to the IRS. Form 5307 is signed and dated October 25, 2002 (Whitney Aff., Ex. 2).

“To determine whether an attorney-client relationship exists, a court must consider the parties’ actions” (Pellegrino v Oppenheimer & Co., \_\_\_ AD2d \_\_\_ [1<sup>st</sup> Dept 2008], 2008 WL 170568\*3, citing Wei Cheng Chang v Pi, 288 AD2d 378, 380 [2d Dept 2001], lv denied 99 NY2d 501 [2002]). While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions (Jane St. Co. v Rosenberg & Estis, 192 AD2d 451 [1<sup>st</sup> Dept], lv denied 82 NY2d 654 [1993]). Although formality is not essential to the formation of an attorney-client contract, there must nonetheless be some sort of contact between the two to form the relationship

[\* 21 ]  
(C.K. Indus. Corp. v C.M. Indus. Corp., 213 AD2d 846, 847-848 [3d Dept 1995]).

Smith's authorship of the 1999 opinion letter, addressed to Hartstein, clearly does not make him the Plaintiff's attorney. Nor does the limited Power of Attorney, standing alone, indicate the existence of an attorney-client relationship. A limited Power of Attorney may authorize a non-attorney to perform on behalf of the principal signing the document. Nonetheless, at this stage of the proceedings, it is sufficient to sustain the pleading pending discovery. It is unclear, for example, whether Plaintiff's statement that he "retained" the services of Bryan Cave in 2001 (Denenberg Aff., ¶ 13) is merely a conclusory statement or whether Plaintiff paid a fee for his legal representation. If Plaintiff is successful in proving that an attorney-client relationship existed as of 2002, he has sufficiently alleged facts to support a claim that the Bryan Cave defendants' failure to advise him concerning the propriety of the funding of his plan was malpractice. The motion to dismiss this cause of action is therefore denied.

#### **Eighth Cause of Action for Professional Negligence**

Plaintiff's eighth cause of action for professional negligence is asserted against all defendants. This cause of action is, however, duplicative of the causes of action for professional malpractice asserted against the Graf Repetti defendants and the Bryan Cave defendants, and is dismissed as to those parties. As to the remaining defendants, insurance brokers have been determined not to be "professionals" within the ambit of CPLR 214 (6) (Chase Scientific Research, Inc. v NIA Group, 96 NY2d 20, 30-31 [2001]). This cause of action is, therefore, not maintainable against the insurance broker and pension planner defendants, including Rosen, the Hartstein ECI defendants, and the Thornhill defendants. Nor is it applicable to Bankers Life, since Plaintiff does not allege that it offered any professional advice to him.

Finally, the claim for professional negligence is also untimely. A claim of professional negligence is subject to a three-year statute of limitations (CPLR 214 [6]). The action accrues, for limitations purposes, when the malpractice is committed, not when the client discovers it (Williamson v PricewaterhouseCoopers, LLP, 9 NY3d 1, supra). For purposes of this cause of action, the accrual date would be the date on which Plaintiff adopted the Plan, which was on December 26, 2002. Accordingly, this cause of action is dismissed as to all moving defendants.

### **The Tenth Cause of Action for Negligent Misrepresentation**

In his tenth cause of action for negligent misrepresentation, which is asserted against all of the defendants, Plaintiff alleges that each of the defendants had a duty to represent and accurately provide advice to him regarding the propriety of the design of the Plan and purchase of the insurance policies. He further alleges that they had a duty to disclose the nature of their business relationship and referral arrangements so that he would know that each of them had a pecuniary interest in the sale of the insurance policies. Further, they had a duty to monitor the use of their marketing materials and opinion letters.

To establish liability for negligent misrepresentation arising out of a commercial transaction, the defendant must possess unique or specialized expertise, or be in a special position of confidence and trust with the injured party, such that reliance on the negligent misrepresentation is justified (Kimmell v Schaefer, 89 NY2d 257 [1996]). I have already noted that defendants did not have a duty to disclose their fee arrangements, and that the disclaimers by the Hartstein ECI defendants and the Thornhill defendants preclude Plaintiff's alleged reliance on their tax advice. Accordingly this cause of action is dismissed as to the Hartstein ECI defendants, the Thornhill defendants and Bankers Life.

As to the Graf Repetti defendants and the Bryan Cave defendants, this cause of action is duplicative of the malpractice causes of action and is, therefore, dismissed.

### **The General Business Law Claims**

Plaintiff's twelfth and thirteenth causes of action are brought pursuant to General Business Law (GBL) §§ 349 and 350, respectively. These statutes prohibit deceptive acts and practices and false advertising in the conduct of any business. Plaintiff asserts that defendants' representations that the premiums of the life insurance policies were "100% tax deductible," as contained in their promotional materials and their direct communications, were deceptive and misleading, and were designed to lure Plaintiff and others into purchasing whole life insurance policies which they would otherwise not have purchased. Each of the moving defendants seeks to dismiss these causes of action on the grounds that the deceptive acts complained of were not consumer-oriented, or, that they are time-barred.

Section 349 (h) of the GBL provides a private cause of action for any person injured by deceptive acts and practices in the conduct of any business or trade. Section 350 makes false advertising illegal. "To establish prima facie violation of General Business Law § 349, a plaintiff must demonstrate that the defendant is engaging in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it" (St. Patrick's Home for the Aged and Infirm v Laticrete Intl., Inc., 264 AD2d 652, 655 [1<sup>st</sup> Dept 1999] citing Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 [1995]). "Consumer-oriented" conduct is conduct that has an impact on "consumers at large" as opposed to a private contract dispute (Oswego Laborers' Local, at 25). Plaintiffs may be individuals or entities (*id.*). Here, plaintiff has produced printed material, including a brochure

and a proposal, tending to indicate that defendants engaged in a marketing campaign designed to sell the Plan to himself as well as other consumers. Defendants' conduct was thus sufficiently consumer-oriented (See Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330 supra) (Gaidon I).

As to whether these causes of action are time barred, claims brought under GBL §§ 349 and 350 are governed by the three-year statute of limitations provided in CPLR 214 (2) (Gaidon v Guardian Life Ins. Co. of Am., 96 NY2d 201 [2001]) (Gaidon II). The accrual of a section 349 (h) private right of action first occurs when the plaintiff has been injured by a deceptive act or practice violating section 349 (id., at 210). In Gaidon I, the Court of Appeals held that the plaintiffs had stated claims under GBL § 349, where the defendant life insurance company had engaged in deceptive marketing and sales practices in promoting sales of "vanishing premium" life insurance policies. The defendant allegedly created unrealistic expectations that the policy's dividends would, at some specified time, cover the premium costs, resulting in a "vanishing date" in the future. In Gaidon II, the Court held that plaintiffs' right of action under GBL § 349 accrued when the plaintiffs were first called upon to pay additional premiums beyond the date by which they had been led to believe that policy dividends would be sufficient to cover all premium costs. Applying that rule to the instant case, Plaintiff's right of action accrued when the IRS disallowed the deduction for premiums paid on the insurance policies purchased pursuant to the Plan, which was March 2007, making these claims timely.

Inasmuch as each of the moving defendants, except Indianapolis Life, is alleged to have played a part in the marketing and sale of the Pendulum Plan, plaintiff has sufficiently stated a cause of action against each of them. The motions to dismiss the twelfth and thirteenth causes of

action are, therefore, denied.

#### **The Fourteenth Cause of Action for Mistake of Law**

In his fourteenth cause of action, which is asserted against all of the defendants, Plaintiff asserts that defendants collectively promised that the Plan offered 100% tax deductibility of contributions, and that it was a recognized qualified pension plan under the Internal Revenue Code. He further asserts that, at the time Plaintiff purchased the insurance policies under the Plan, the parties acted with the understanding that the purpose of the Plan was to provide tax benefits. Thereafter, pursuant to Internal Revenue Service Ruling 2004-20, the Plan was found to be a tax shelter scheme. As a result, the contract entered into between the plaintiff and defendants was entered into by reason of mutual mistake with regard to the law applying to the contract and should therefore be rescinded.

“[A] contract entered into under a mutual mistake of fact is voidable and subject to rescission. [However], the mutual mistake must exist at the time the contract is entered into and must be substantial” (Weissman v Bondy & Schloss, 230 AD2d 465, 468 [1<sup>st</sup> Dept 1997] [citation omitted] lv dismissed 91 NY2d 887 [1998]). “The idea is that the agreement as expressed, in some material respect, does not represent the ‘meeting of the minds’ of the parties” (*id.* at 468, quoting Matter of Gould v Board of Educ., 81 NY2d 446 [1993]).

Here, Plaintiff seeks to rescind two insurance contracts because both he and defendants mistakenly believed the premiums would be tax deductible. The doctrine of mutual mistake is inapplicable on two grounds. First, a substantial purpose of the insurance contracts, *as expressed*, was not the tax deductibility of the premiums. That was a benefit anticipated by the plaintiff, but not one of the primary purposes of the insurance contract itself. Second, by

plaintiff's own statements, the IRS determined that the premiums were not deductible sometime after the policies were purchased. Thus, the mutual mistake did not exist at the time the contract was entered into. For these reasons this cause of action is dismissed.

Accordingly, based upon the foregoing, it is

ORDERED that as to motion sequence 004, the motion to dismiss by defendants Kenneth R. Hartstein, ECI Pension Services, LLC and Economic Concepts, Inc. is granted to the extent that the first, second, fourth, fifth, eighth, tenth, eleventh, and fourteenth causes of action are severed and dismissed as to these defendants; and it is further

ORDERED that as to motion sequence 005, the motion to dismiss by Bankers Life Insurance Company of New York and Indianapolis Life Insurance Company is granted to the extent that the complaint is severed and dismissed in its entirety as to Indianapolis Life Insurance Company, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the first, second, fourth, eighth, tenth, eleventh and fourteenth causes of action are severed and dismissed as to defendant Bankers Life; and it is further

ORDERED that as to motion sequence 006, the motion by defendants Richard C. Smith and Bryan Cave LLP to dismiss is granted to the extent that the first, second, fourth eighth, ninth, tenth, eleventh and fourteenth causes of action are severed and dismissed as to these defendants; and it is further

ORDERED that as to motion sequence 007, the motion by defendants John Repetti and Graf Repetti & Co., LLP to dismiss is granted to the extent that the first, second, fourth, fifth,

eighth, tenth, eleventh and fourteenth causes of action are severed and dismissed as to these defendants; and it is further

ORDERED that as to motion sequence 008, the motion by defendants Gary L. Thornhill and The Private Consulting Group to dismiss the complaint is granted to the extent that the first, second, fourth, eighth, tenth, eleventh and fourteenth causes of action are severed and dismissed as to these defendants; and it is further

ORDERED that plaintiff's cross-motion for leave to serve and file a proposed second amended complaint is granted only to the extent that plaintiff may serve the third, sixth, seventh, twelfth and thirteenth causes of action in the proposed second amended complaint, and it is further

ORDERED that defendants answer the proposed amended causes of action within twenty days of service of a copy of the third, sixth, seventh, twelfth and thirteenth causes of action in the proposed second amended complaint.

Counsel for the parties are directed to appear for a preliminary conference in IA Part 15, Room 335, 60 Centre Street on May 2, 2008 at 11:00 a.m.

This constitutes the decision and order of the Court.

Dated: February 19, 2008

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Hon. Walter B. Tolub, J.S.C.

**FILED**  
FEB 21 2008  
NEW YORK  
COUNTY CLERKS OFFICE