Ziv v Tellkamp
2013 NY Slip Op 33860(U)
January 15, 2013
Sup Ct, Nassau County
Docket Number: 009506-11
Judge: Timothy S. Driscoll
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[* 1]

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

---x

AVRAHAM ISAAC ZIV,

Plaintiff,

-against-

DAVID f. TELLKAMP, TELLKAMP ASSOCIATES, INC. and ALAN TELLKAMP,

Defendants.

---x

TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 009506-11
Motion Seq. Nos: 1 and 2
Submission Date: 11/21/11

Papers Read on these Motions:

Notice of Motion, Affidavit in Support and Exhibits..x
Defendants' Rule 19-a Statement..x
Affidavit of R. Brenner...x
A Tellkamp Affidavit in Support...x
Affirmation in Support and Exhibits..x
Defendants' Memorandum of Law in Support..x
Notice of Cross Motion, Affirmation in Opposition/Support,
Affidavit in Opposition and Exhibits...x
Plaintiff's Response to Defendants' Rule 19-a Statement...........................x
Plaintiff's Memorandum of Law in Opposition/Support................................x
A. Tellkamp Affidavit in Further Support/Opposition and Exhibits.................x
D. Tellkamp Affidavit in Further Support/Opposition and Exhibits.................x
Affirmation in Further Support/Opposition and Exhibits.............................x
Defendants' Memorandum of Law in Further Support/Opposition..................x

This matter is before the court on 1) the motion by Defendants David F. Tellkamp ("David"), Tellkamp Associates, Inc. ("Tellkamp") and Alan Tellkamp ("Alan") ("Defendants") filed October 19, 2012, and 2) the cross motion by Plaintiff Avraham Isaac Ziv ("Ziv" or ("Plaintiff") filed November 21, 2012, both of which were submitted December 18, 2012. For the reasons set forth below, the Court denies the motion and cross motion in their entirety.

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BACKGROUND

A. Relief Sought

Defendants move for an Order 1) pursuant to CPLR § 3212, granting Defendants' motion for summary judgment dismissing the Amended Complaint in its entirety; and 2) assessing sanctions against Plaintiff and his counsel, pursuant to 22 NYCRR § 130-1.1 in favor of Defendants equal in amount to the attorney's fees incurred by Defendants in defending themselves in this action based on the assertion that Plaintiff and his counsel knowingly asserted, in the Amended Complaint, statements of material fact that are false.

Plaintiff cross moves for an Order 1) striking the errata sheet submitted by David with his deposition transcript; 2) sanctioning Defendants for submitting false and perjurious affidavits; and 3) scheduling this matter for a hearing to determine sanctions to be imposed against non-party Robert Brenner ("Brenner").

B. The Parties' History

The Amended Complaint (Ex. B to McGowan Aff. in Supp.) alleges as follows:

Amended Complaint as Asserted Against David

Plaintiff alleges that he is a licensed insurance broker and seeks to recover damages suffered as a result of David's failure to include Plaintiff's name on applications for insurance that David submitted to two insurance companies which sold seven (7) insurance policies to a client ("Client") and otherwise to pay him 50% of the commissions that David received on account of insurance sold to the Client.[1]

Plaintiff alleges that in or about 2006, he and David agreed that they would work together to sell insurance and insurance products to prospective clients ("Prospective Clients") whom Plaintiff describes as "high net worth individuals who could benefit from life insurance and/or other insurance products" (Am. Compl. at ¶ 10). Plaintiff and David also allegedly agreed that 1) Plaintiff would receive a co-equal share of any commissions paid by insurance companies to David on account of insurance sold to the Client and that both of their names would be included on all applications submitted to insurance companies for Prospective Clients, identifying Plaintiff and David as co-brokers and informing the insurance companies that Plaintiff and David were to receive an equal percentage of commissions paid on account of insurance sold to such Prospective Clients; 2) they would share, equally, any commissions paid by third parties if

[1] The motion papers establish that the Client referred to in the Amended Complaint is Robert Brenner ("Brenner").

and when such Prospective Clients sold an insurance policy; and 3) the sole compensation for their efforts would be derived from a) commissions paid by insurance companies if and when a Prospective Client purchased insurance, and b) commissions paid by third parties if and when a Prospective Client sold an insurance policy to a third party.

In or about 2006, Plaintiff introduced the Client to David, and subsequently introduced several additional Prospective Clients to David. Through the efforts of Plaintiff and David, the Client purchased seven (7) insurance policies from two different insurance companies, and other Prospective Clients purchased insurance policies. Plaintiff alleges that, without Plaintiff's knowledge or consent, David failed to identify Plaintiff as a co-broker on the applications that David submitted to insurance companies that sold insurance to the Client, and failed to pay Plaintiff an amount equal to the amount received by David. Plaintiff alleges that the insurance carriers that sold insurance to the Client paid David commissions of not less than $1,493,131.00 and, had David identified Plaintiff as a co-broker on the applications submitted by David, the insurance companies would have paid Plaintiff his share of the commissions totaling $746,565.50.

The Amended Complaint contains three (3) causes of action: 1) breach of contract, 2) unjust enrichment, and 3) breach of contract/forgery based on the allegations that Plaintiff did not receive the commissions promised for insurance sold to Moshe-Hhaim Ostadt ("Ostadt") and that Defendant forged, or caused someone else to forge, Plaintiff's signature on an application that contained inaccurate information regarding the percentage of commissions that Plaintiff was to be paid.

Amended Complaint as Asserted against Tellkamp and Alan

Plaintiff asserts his belief that Tellkamp and Alan have received monies which they knew, or should have known, were due to the Plaintiff and participated in a scheme to deprive Plaintiff of monies due to him. Plaintiff reaffirms the truth of the allegations asserted against David, including the nature of the agreement between Plaintiff and David.

Plaintiff alleges, upon information and belief, that David identified Alan and/or Tellkamp as broker on the applications submitted to insurance companies which sold insurance to the Client. The insurance carrier that sold insurance to the Client paid commissions of not less than $1,493,131.00 to David, Alan and/or Tellkamp. When Plaintiff learned of David's failure to include Plaintiff's name on the applications, he demanded that David pay him the full 50% of the commissions due to Plaintiff. David, acting through Tellkamp, paid Plaintiff the sum of

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$202,489.28, falsely asserting that this represented 50% of the monies received from the insurance companies, less certain deductions.

Plaintiff asserts a single cause of action against Tellkamp and Allan for unjust enrichment. Plaintiff alleges that David used Alan and/or Tellkamp as "straw men" (Am. Compl. at ¶ 104) to receive commissions from insurance carriers to avoid David's obligations to Plaintiff. Plaintiff alleges that Alan and Tellkamp should not be permitted to retain any monies they received.

In their Answer and Counterclaim (Ex. C to McGowan Aff. in Opp.), Defendants deny many of the allegations in the Amended Complaint and assert seven (7) affirmative defenses. Defendants also interpose a Counterclaim in which they assert that the Amended Complaint contains several material factual statements that are false, and known to be false. Those statements allegedly include, but are not limited to, the allegations that 1) Plaintiff was licensed to sell life insurance at all relevant times; 2) insurance companies would have paid Plaintiff commissions on life insurance policies issued on the life of the "Client" if Plaintiff had been listed as a co-broker on the applications for those policies; 3) Plaintiff had "substantial experience with respect to the sale of life insurance policies" (Am. Compl. at ¶ 11); [2] 4) Plaintiff introduced the Client to David; 5) Plaintiff met with the Client and his counsel on numerous occasions; and 6) David prepared the document attached as Exhibit A to earlier versions of the Amended Complaint. [3] Defendants further allege, in the Counterclaim, that Plaintiff admitted at his deposition that these allegations were false, and that documentary evidence marked as exhibits at deposition and/or produced by Plaintiff and his counsel establish that these statements are false. Defendants allege that Plaintiff's claims are frivolous and seek dismissal of the Amended Complaint, reasonable costs and attorney's fees, and the imposition of sanctions against Plaintiff and his counsel.

In support of Defendants' motion, David describes the difference between selling non-recourse premium financed life insurance and selling regular life insurance and affirms that the former is far more complicated and requires, *inter alia*, good ongoing relationships with insurance carriers handling these policies and a complex computer software system. David

[2] In paragraph 11 of the Amended Complaint, Plaintiff alleges that he had "substantial experience with respect to the sale of life insurance policies, but it was not his principal area of business."

[3] In paragraph 32 of the Amended Complaint, Plaintiff alleges that "Attached hereto as Exhibit A is a document defendant [David] prepared in which the defendant [David] purports to calculate the fifty (50%) percent due to the plaintiff."

explains that non-recourse premium financing is based on an investor willing to provide money for a two year period with no money paid by the client and the policy serving as the collateral. Thus, the lender must believe that the policy has substantial value.

David affirms that the only agreement that he had with Plaintiff at the time that the Brenner policies were sold was that David would pay Plaintiff 15% of the commissions that David was paid on any sale of insurance policies to Brenner as a finder's fee or referral fee. David provides copies of checks dated December 11, 2006 and January 11, 2007 totaling $202,489.28 (Exs. 8 and 9 to David Aff. in Supp.) based on David's receipt of commissions totaling $1,382,750.

David disputes that Plaintiff introduced David to Brenner and affirms that Plaintiff did "virtually nothing" (David Aff. in Supp. at ¶ 7) regarding the sale of the policies at issue. David affirms that he has known Brenner for more than thirty years, both personally and professionally, and had been discussing the sale of non-recourse premium financed life insurance with Brenner prior to Plaintiff's involvement with that type of policy. Plaintiff attended only one meeting with Brenner which occurred in or around May of 2006. Plaintiff refers to page 125 of Plaintiff's deposition (Ex. D to McGowan Aff. in Supp.) which reflects Plaintiff's testimony that Rabbi Paltiel, from the synagogue of which Brenner was a member, arranged the meeting to be attended by Plaintiff, Brenner and David. David also disputes Plaintiff's testimony (*id.* at pp. 60-61) that he brought paperwork relating to the life insurance polices to Brenner's wife for signature.

David also submits that the alleged oral agreement, whose existence David denies, would be unenforceable. At his deposition, in response to the question of how long his agreement with David was to last, Plaintiff testified "As long as the people that I introduced – there was no limit" (Ex. G to McGowan Aff. in Supp. at p. 236). Moreover, Plaintiff alleges that the purported agreement included Prospective Clients without any limitation on the duration of the agreement (see., e.g., Am. Compl. at ¶ 15). David submits that such an agreement would be unenforceable under the Statute of Frauds.

David affirms that Plaintiff obtained a license to sell life insurance from the New York State Insurance Department on October 27, 2006 (*see* Ex. E to McGowan Aff. in Supp.), from the New Jersey Department of Banking and Insurance on November 22, 2006 (*see* Ex. F to McGowan Aff. in Supp.), was appointed by Pacific Life to act as a life insurance broker on January 23, 2007 (*see* Ex. 11 to David Aff. in Supp.), and was appointed by Phoenix Life to act

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as a life insurance broker on April 24, 2007 (*see* Ex. 12 to David Aff. in Supp.). David affirms that the policies at issue were solicited beginning prior to May of 2006 and during the meeting attended by Plaintiff at Brenner's house in or about May of 2006. Applications for the policies at issue were submitted to the insurance companies no later than August or September of 2006 (*see* Exs. 13 and 14 to David Aff. in Supp. The Pacific Life policies were issued on October 1, 2006 and the Phoenix Life policies were issued on October 9, 2006 (*see* Exs. 1 through 7 to David Aff. in Supp.).

David submits that this documentation establishes that Plaintiff was not licensed to sell life insurance, and/or appointed by Pacific Life and Phoenix Life to sell their policies, on the date that the policies were solicited and/or applications were submitted and/or policies were issued. Thus, David contends, Plaintiff's claims for commissions are barred as a matter of law.

Brenner disputes Plaintiff's allegation that Plaintiff introduced Brenner to David and affirms that he has known David for more than thirty years on both a personal and professional basis. Brenner affirms that he recalls meeting Ziv, other than at temple, on only one prior occasion which was at a meeting in or around May of 2006 which David and Rabbi Paltiel also attended. That was the only occasion at which Brenner discussed life insurance in the presence of Ziv.

Brenner affirms that, at the meeting in 2006, David and Brenner advised Ziv and Rabbi Paltiel about their prior business and personal dealings. They also discussed the life insurance that David had previously suggested to Brenner. Brenner affirms that, prior to this meeting, he and David had engaged in conversations over the telephone regarding life insurance policies that would be appropriate for Brenner and his wife. Brenner affirms that he never met with Ziv after the 2006 meeting and, to his knowledge, Ziv never met with David's attorney Robert Cooperman regarding the life insurance policies that Brenner and David discussed prior to the meeting. Brenner and his wife obtained a number of life insurance policies through David, first from Pacific Life and then from Phoenix Life.

Brenner affirms that he and his wife met Alan several times at a rest stop in New Jersey so that Alan could explain the Pacific Life policies to them and Brenner and his wife could sign the applications for these policies. They selected this rest stop because it is located in New Jersey where, Brenner affirms, he was advised the applications had to be explained to him and signed, and because it was located near Brenner's vacation home.

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Alan affirms that, while commissions were paid to him as the broker listed on the life insurance policies sold to Brenner, Alan paid to Tellkamp all of the commissions that he received on the sale of those policies. Alan describes as "absurd" (Alan Aff. in Supp. at ¶ 5) Plaintiff's allegation that Alan was unjustly enriched and affirms that he performed significantly more work than Plaintiff in connection with the sale of policies to Brenner. Alan affirms that the work he performed included, but was not limited to, the overseeing and obtaining of medical records, obtaining offers from multiple insurance carriers and submitting or obtaining life expectancy reports. Alan also traveled on several occasions to meet with Brenner and his wife in New Jersey to explain Pacific Life policies and related documents, and to obtain their signatures on documents relating to the Pacific Life policies that were issued in New Jersey.

In support of Plaintiff's cross motion, and in opposition to Defendants' motion, Plaintiff reaffirms the truth of the allegations in the Amended Complaint regarding the agreement between David and Plaintiff. Plaintiff affirms that David "reaffirmed" the agreement (Ziv Aff. in Opp./Supp. at ¶ 13) when he provided Plaintiff with a check in the amount of $114,126.53, which David said represented 50% of the commission he received from Pacific Life, less certain expenses. Plaintiff provides a copy of a document prepared by Gina Picchione ("Picchione"), an employee of David, during their meeting (*id.* at Ex. G). That document reflects that David calculated as $180,253.06 the net amount that he received from Pacific Life, then divided that number by two to determine the amount due to Plaintiff and David.

Plaintiff affirms that he was aware, when he had his initial discussion with David, that Plaintiff could not be identified on applications submitted to New York insurance carriers unless he was licensed to sell insurance in the State of New York. Accordingly, soon after Plaintiff and David reached their agreement, Plaintiff began the process of obtaining his insurance license in New York.

Plaintiff completed the required training course on September 18, 2006, took the required test shortly thereafter and obtained his license to sell insurance in New York State on October 27, 2006. During one of their discussions, David offered to have his office staff assist Plaintiff with the licensing process and David's office staff obtained and submitted paperwork to New York State on Plaintiff's behalf. David also offered to have his office staff process the paperwork needed for Plaintiff to obtain his license in other states, as necessary, and to be appointed by the insurance carriers as a "producer" (Ziv Aff. in Supp./Opp. at ¶ 18).

Plaintiff affirms that in July of 2006, he arranged for a meeting involving Rabbi Shalom

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Paltiel, Brenner, David and Plaintiff. Plaintiff disputes David's assertion that David had known Brenner for more than thirty years on both a personal and professional basis and submits that it was "clear that [David] and [Brenner] did not have any ongoing relationship and it was clear that they had not previously discussed the sale of non-recourse insurance policies" (Ziv Aff. in Opp./Supp. at ¶ 19). Ziv affirms that, at the beginning of the meeting, David asked Brenner whether he remembered him and Brenner initially denied any such recollection but subsequently stated that he recalled meeting David, briefly, many years earlier. Subsequently, Plaintiff attended several meetings with David and Brenner, including one meeting attended by Robert Cooperman, Brenner's attorney. Ziv denies that he solicited the sale of insurance to Brenner and affirms that David and Brenner spoke directly regarding specific types of insurance and policies.

Ziv also disputes Defendants' claim that the insurance policies at issue were issued by Phoenix and Pacific Life in October of 2006, before Ziv was licensed. Ziv affirms that the purchaser/owner of the 9 insurance policies at issue was The Robert Brenner Irrevocable Trust ("Brenner Trust"). The Brenner Trust was created on November 7, 2006 as reflected by the Phoenix Application for Life Insurance dated December 8, 2006 (Ex. E to Bolton Aff. in Opp./Supp.). Ziv submits that, as the Brenner Trust did not exist until November 7, 2006, no applications for insurance issued to the Brenner Trust could have been submitted, and no insurance policies could have been issued, prior to that date. Moreover, as this application was submitted to Phoenix Life after Plaintiff obtained his license to sell life insurance in New York State, David was authorized to include Plaintiff's name as co-broker for the Phoenix policies and to pay Plaintiff 50% of the monies received from Phoenix.

With respect to the Pacific Life Policies, Ziv affirms that the application submitted to Pacific Life for the insurance policies purchased by the Brenner Trust is dated November 8, 2006, as reflected by the copy of the application provided (Ex. F to Bolton Aff. in Supp./Opp.). Thus, the policies could not have been issued until after November 8, 2006 and, in light of the fact that Ziv obtained his license in New Jersey on November 22, 2006, David could have included Plaintiff's name as a co-broker for these policies after that date, and paid Plaintiff 50% of the monies received from Pacific Life.

Ziv affirms, further, that the policies would not have been issued by Phoenix or Pacific Life until after November 22, 2006 because, as of November 22, 2006, Brenner had not yet decided whether he would purchase insurance. In support, Ziv provides a chain of emails between David and Brenner, which David forwarded to Plaintiff (Ex. H to Ziv Aff. in

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Supp./Opp.). That chain includes an email dated November 21, 2006 from David to Brenner advising him that he has been approved for $50 million in coverage, and a responsive email from Brenner dated November 22, 2006 which read as follows:

> DAVID: If you sent the package to Robert Cooperman as you promised, that is the next step. I have met with my children, and they are in agreement that the insurance is needed at this time. Even my wife Carol has softened her stand. The meeting with Cooperman will probably take place no later than Monday the 27th, and at this point seems only to be a formality. If Cooperman finds no problem with the papers you sent, perhaps the meeting with my family might take place sooner on a conference call. Things are not dark at all...BOB...Feel free to call me at any time tomorrow after 9am. BOB

Ziv also affirms that the face page of the policies attached to the motion papers reflect a "Policy Date" of October 1, 2006 and October 9, 2006, respectively. Ziv avers, however, that the policy date is not the same as the date on which the insurance policy is "placed" or "effective" (Ziv Aff. in Opp./Supp. at ¶ 28). Insurance policies can be, and often are, given an issuance date that is earlier than the placement date for the purpose of keeping a lower premium, *e.g.*, based on age. Ziv notes that the Pacific Life Policy Delivery Receipt submitted by Defendants (Ex. 15 to David Aff. in Supp.) includes language asking the policy owner, specifically the Brenner Trust, whether it wants the "policy to be re-dated to the date of delivery."

Ziv affirms that, in addition to being a licensed insurance broker, he was appointed as a "producer" in connection with the sale of the Brenner policies he obtained (Ziv Aff. in Supp./Opp.). David's office staff performed all of the work required in connection with these appointments. In support, Ziv provides an email dated December 7, 2006 with the subject line "RE: NJ license" in which he asked David's employee Nicole Martin "how we doing with getting Appointment with Pacific Life and Phoenix in the 3 state's [sic] that I am now license[d] (did you get the form's [sic])?" and a responsive email in which Ms. Martin stated "I just made the phone call. You should be getting them shortly." Ziv affirms that he sent the email to Ms. Martin because he was surprised that she had not yet obtained the appointments with Pacific Life and Phoenix. The process of being appointed with a carrier is not difficult and, if David had advised Plaintiff that he needed to expedite that process, Ziv would have done so.

With respect to the Ostadt Policy, Ziv provides an application submitted by David for insurance sold to Ostadt (Ex. J to Ziv Aff. in Supp./Opp.). In accordance with the agreement between David and Plaintiff, David and Plaintiff are listed as having a 25% interest in the

commissions paid. Plaintiff affirms that he learned for the first time during discovery in this action that the application listing David and Plaintiff as equals was not submitted to the insurance carrier. Instead, an altered application (*id.* at Ex. K) was allegedly forwarded to the carrier which lists David as being entitled to 40% of the commissions. Plaintiff affirms that his signature on the altered application is forged.

In reply, David cites deposition testimony of Plaintiff that, he submits, refutes Plaintiff's assertion that he did not solicit Brenner to buy life insurance prior to the date on which Plaintiff received his New York and New Jersey licenses to sell life insurance. David also notes that Picchione testified that she did not recall preparing the document annexed as Exhibit G to the Ziv Affirmation and normally did not prepare documents like it (Ex. Q to McGowan Aff. in Further Supp. at p. 17). Picchione also testified that the document contained her handwriting but "I don't remember a lot of things I did a long time ago" (*id* at pp. 17 and 20.)

Also in reply, in a submission titled "Affidavit in Further Support of Motion and in Opposition to Frivolous Cross-Motion," Alan submits that the Pacific Life policies are controlled by New Jersey Law. He notes *inter alia* that 1) the Pacific Life New York Verification form signed by Brenner on September 11, 2006 states that Pacific Life is not licensed to conduct the business of insurance in New York state; 2) Pacific Life's website states that it is licensed to sell insurance in all states except New York; and 3) the Pacific Life policy annexed as Exhibit F to Plaintiff's motion papers contains an "NJ" stamp on the bottom of certain policy pages. Alan submits that Defendants have established that the Pacific Life policies are New Jersey issued policies controlled by New Jersey Insurance Law.

C. <u>The Parties' Positions</u>

Defendants submit *inter alia* that 1) in light of Plaintiff's testimony at his deposition that "there was no limit" to the duration of his agreement with David, the purported agreement violates the Statute of Frauds and the cause of action for breach of contract is not viable; 2) assuming *arguendo* the existence of a valid agreement between Plaintiff and David, the Court should dismiss the Amended Complaint because New York and New Jersey law prohibit the payment of commissions to a broker who was not licensed and Plaintiff obtained his license from New York and New Jersey in October and November of 2006, respectively, and therefore was not licensed as a broker when a) the life insurance policies for Brenner were solicited at the meeting that Plaintiff attended in or around May of 2006; b) applications for the life insurance policies for Brenner were submitted to Pacific Life and Phoenix Life; and c) the policies were

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issued; 3) the Court should dismiss Plaintiff's unjust enrichment claims because those claims are covered by the alleged agreements on which Plaintiff's contract causes of action are based; 4) Plaintiff admitted at his deposition that he had no evidence supporting his allegation that David forged, or caused someone to forge, Plaintiff's signature on the Ostad application; and 5) the Court should sanction Plaintiff and his counsel for asserting knowingly false statements in the Amended Complaint.

Plaintiff submits *inter alia* that 1) the allegations in the Amended Complaint and the facts sworn to by Ziv state a *prima facie* case for breach of contract; 2) the Statute of Frauds is inapplicable to the alleged agreement, in part because David has admitted the existence of an agreement; 3) Defendants' assertion that they could not share commissions with Plaintiff because he was not appointed by two insurance carriers as a producer until after the commissions were paid is unsupported by legal authority and incorrect; 4) in light of the fact that Plaintiff was licensed when the applications were submitted, or within days thereof with respect to the Pacific Life policies, and was licensed when Defendants received payments from the insurance companies, there was no legal impediment to David's compliance with his alleged contractual obligation; 5) New Jersey law is applicable because the Pacific Life policy was not sold in New Jersey; 6) Defendants' claims that events occurred in New Jersey is false and the Court should schedule this matter for an evidentiary hearing regarding the impositions of sanctions and to determine whether perjury has been committed; 7) assuming *arguendo* that New Jersey law applies, New Jersey Statute § 17:22A-29, cited by Defendants, does not prohibit the payments sought by Plaintiff in light of the fact that Plaintiff did not sell, solicit or negotiated the Pacific Life policies in New Jersey; 8) New York Insurance Law does not prohibit a person who is licensed when applications are submitted, and when the commissions is paid by the carrier, from recovering a portion of that commissions from the other broker; 9) the claims against Alan and Tellkamp are viable in light of David's admissions that a) he received $1,382,750 on account of insurance sold to Brenner; and b) it did not matter whether the insurance company check was paid to David, Alan or Tellkamp; and 10) the Court should deny Defendants' motion for sanctions which rests on the incorrect premise that the allegations in the Amended Complaint, which Defendants dispute, are knowingly false.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Frivolous Conduct

Conduct is frivolous within the meaning of 22 NYCRR § 130-1.1 where, *inter alia*, it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, or undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another. *Miller v. Miller*, 96 A.D.3d 943, 944 (2d Dept. 2012), citing 22 NYCRR §§ 130-1.1(c)(1) and (2) and citing, *inter alia*, *Dank v. Sears Holding Mgt. Corp.*, 69 A.D.3d 557, 558 (2d Dept. 2010). A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR § 130-1.1(c) has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule, or that the action or proceeding was commenced or continued in bad faith. *Id.*

C. Statute of Frauds

New York law is clear that the statute of frauds is not a bar where the party raising it has admitted the agreement. *Oorah, Inc. v. Schick*, 2011 U.S. Dist. LEXIS 37981 (E.D. N.Y. 2011), quoting *Sutter v. Lane*, 61 A.D.3d 1310 (3d Dept. 2009) citing *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997), and citing *Stone Capital Advisors, LLC v. Fortrend Intern.*, LLC, 15 A.D.3d 300 (1st Dept. 2005). In *Stone Capital*, the First Department held that, although oral finder's agreements are barred by the statute of frauds, citing General Obligations Law § 5-701(a)(10), the agreement

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alleged was enforceable because defendant admitted its existence. *Id.* at 301, citing *Matisoff, supra*, at 134. The First Department held that the defendant's claims that the alleged oral agreement was modified to reduce the finder's fees plaintiff sought to recover, and that the payments plaintiff admitted receiving were made pursuant to that modification and not as part performance of the original agreement, were issues of fact for trial. *Id.*

D. Payment of Commissions

Defendants cite New York and New Jersey law in support of their position that, assuming *arguendo* the existence of a valid agreement, the Court should dismiss the Amended Complaint because of statutory restrictions on the payments of commissions. Those arguments are set forth at pages 13-16 of Defendants' Memorandum of Law in Support.

Plaintiff disputes Defendants' assertion and provides an opinion issued by the Office of General Counsel to the New York State Insurance Department dated May 6, 2004 (Ex. D to Bolton Aff. in Opp./Supp.). That opinion contains the conclusion that New York Insurance Law §§ 2114, 2115 and 2116 permit licensed insurance agents and brokers to share commissions for the referral of business on the placement of an insurance policy, if both the agent and broker are licensed to sell that kind of insurance, and the agent is a licensed agent of the insurer that wrote the policy. If not, the referring agent or broker must be treated as any other unlicensed person under §§

E. Application of these Principles to the Instant Action

The Court denies Defendants' motion and Plaintiff's cross-motion in their entirety. In light of David's admission that there was an agreement between Plaintiff and him, and the fact that the dispute centers on the terms rather than the existence of that agreement, the Statute of Frauds does not bar this action. Moreover, even assuming *arguendo* that New Jersey law is applicable to some or all of the policies at issue and would bar Plaintiff's recovery if Defendants' factual assertions were credited, there exist issues of fact regarding when the policies were solicited, when the applications for the policies were submitted, and/or when the policies were issued (*see* Ds' Memo. of Law in Supp. at p. 19) that make summary judgment inappropriate.

The Court also concludes that the causes of action against Alan and Tellkamp may proceed. Plaintiff has make a legally sufficient showing that these Defendants obtained a benefit which in good conscience should be paid to the Plaintiff. *See Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading*

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Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973).

The Court denies Defendant's application for sanctions and Plaintiff's motion to strike the errata sheet, to sanction Defendants for submitting false and perjurious affidavits and to schedule this matter for a hearing to determine sanctions to be imposed against non-party Brenner based on the Court's conclusion that the parties have not met their burden with respect to these applications.

The Court notes the numerous *ad hominem* statements set forth in the submissions of the parties and their counsel in these motion papers. The facts are obviously heatedly disputed, and those disputes will be resolved at the trial of this matter. Nevertheless, the *ad hominem* attacks are both unpersuasive and beneath the dignity of the Court and the legal profession. Such attacks will not be tolerated, much less countenanced, at any time by the Court.

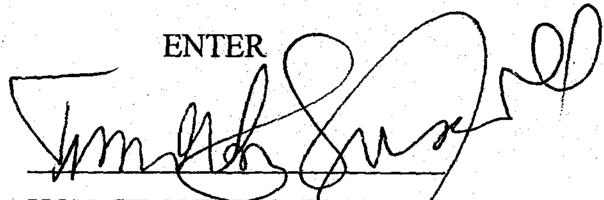
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on February 1, 2013 at 9:30 a.m. for a Pretrial Conference.

ENTER

DATED: Mineola, NY
January 15, 2013



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 23 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE