SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice

PART 39

Index Number : 600313/2008
CILENTE, ROSEANN
vs.
PHOENIX LIFE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/7/14

BARBARA R. KAPNICK, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

----------X

ROSEANN CILENTE, as Trustee of the ALFONSO N. FIGLIOLIA FAMILY TRUST and ALFONSO N. FIGLIOLIA,

Plaintiffs,

- against -

PHOENIX LIFE INSURANCE COMPANY, WINSTON NESFIELD, NESFIELD & ASSOCIATES and A.I. CREDIT CORP.,

Defendants.

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DECISION/ORDER
Index No. 600313/08
Motion Seq. Nos. 002, 003 and 004

BARBARA R. KAPNICK, J.:

Motion sequence numbers 002, 003, and 004 are consolidated for disposition herein.

In this action, plaintiffs claim that they were defrauded into purchasing a life insurance policy from defendant Phoenix Life Insurance Company ("Phoenix"). The Complaint asserts causes of action for fraud, fraudulent inducement, violations of section 349 of New York's General Business Law ("GBL") and sections 4226 and 2123 of the Insurance Law, and negligence.

Plaintiffs now move (in motion sequence number 002) for summary judgment on their causes of action for violations of the Insurance Law, and their causes of action for fraud and fraudulent inducement. In motion sequence number 003, defendant Phoenix moves

for summary judgment dismissing all of the causes of action asserted against it (i.e., the first, fifth, ninth, thirteenth, sixteenth and nineteenth causes of action). In motion sequence number 004, defendants Winston Nesfield ("Nesfield") and Nesfield & Associates (together, the "Nesfield Defendants") move for summary judgment dismissing all of the causes of action asserted against them (i.e., the second, third, sixth, seventh, tenth, eleventh, fourteenth, fifteenth, seventeenth, eighteenth, twentieth and twenty-first causes of action).

By Stipulation dated September 18, 2009, this action was discontinued against defendant A.I. Credit Corp. ("AIC"). The claims that were asserted solely against AIC, which are now dismissed, are the fourth cause of action for fraud, the eighth cause of action for fraudulent inducement, the twelfth cause of action for violation of section 349 of the GBL, and the twenty-second cause of action for negligence.

Background

Plaintiff Alfonso Figliolia ("Figliolia") is a self-described multi-millionaire, with a net worth of $25 million in 2002, increasing to approximately $47 million in 2005. (Figliolia Dep. 122:10-21, 128:14-20, Nov. 10, 2010.) On September 30, 2002, Figliolia created The Alfonso N. Figliolia Family Trust (the

"Trust") and appointed his friend Roseann Cilente ("Cilente") as Trustee. (Corbett Jan. 12, 2012 Aff. Ex. F.) On February 21, 2003, the Trust purchased Phoenix Life Insurance Policy Number 97300896 (the "896 Policy"), insuring the life of Figliolia, who at that time was 63 years old. (*Id.* Ex. G.) The face amount of the 896 Policy was $15 million and had an annual premium of $1,407,543. (*Id.*) The premium was financed through AIC, which loaned the premium funds in exchange for a "Master Promissory Note" (the "Note"), dated March 14, 2003 and issued by the Trust. (*Id.* Ex. H.) On the same day, Figliolia executed a Personal Guaranty, whereby he guaranteed the Note (the "Figliolia Guaranty"). (*Id.* Ex. I.) The premium loan was also secured by the cash surrender value of the 896 Policy and a $1 million annuity assigned to AIC (Corbett Aff. ¶ 14), pursuant to an "Assignment of Deferred Annuity," dated March 14, 2003. (*Id.* Ex. J.)

On March 19, 2003, Nesfield, the broker, sent two faxes to plaintiffs concerning the premium financing (the "3/19/03 Faxes"), which will be discussed at length, *infra*. (Karagheuzoff Aff. Ex. 8.)

By letter dated November 5, 2004, AIC informed the Trust that Figliolia's life insurance premium financing was scheduled for renewal on December 30, 2004. (*Id.* Ex. 10.) Plaintiffs claim that by letter dated February 7, 2005, AIC informed plaintiffs that they

were in default on the loan and had to post additional collateral in the amount of approximately $215,000. (Corbett Aff. ¶ 15.) Plaintiffs allegedly informed Nesfield that they did not want to post additional collateral and requested that Nesfield obtain a policy that would not require them to post additional collateral or make any further payments. (*Id.*) According to plaintiffs, Nesfield responded that plaintiffs would lose the policy if they did not post the additional collateral, and, as a result, Figliolia posted a $215,000 Certificate of Deposit as additional collateral at that time. (*Id.* ¶ 15, *Id.* Ex. K; Karagheuzoff Aff. Ex. 12.)

In the Fall of 2005, plaintiffs submitted another life insurance application to Phoenix. (*Id.* Ex. 13.) On September 23, 2005, Cilente signed Phoenix's "Insurance Department of the State of New York Disclosure Statement," and, on November 17, 2005, Cilente signed Phoenix's "Insurance Department of the State of New York Definition of Replacement" form. (*Id.* Exs. 14 and 15.) This replacement policy allegedly would have involved a surrender charge of $600,000 from the account value of the 896 Policy, but it is undisputed that this contemplated replacement policy never went into effect. (Cilente Dep. 208:15-209:2, Oct. 28, 2010.)

In early 2006, plaintiffs entered into a series of transactions allegedly recommended by Nesfield and Phoenix whereby

the face value of the 896 Policy was reduced from $15 million to $5,567,000, and the Trust purchased Phoenix Policy Number 97304027, which had a face amount of $909,091 and a flexible term insurance rider in the amount of $9,090,909 (the "027 Policy"). (Corbett Aff. ¶ 17, Ex. L.) The annual premium for the 027 Policy was $1,072,035, and the policy issue date was January 6, 2006. (*Id.*) The reduction of the face amount of the 896 Policy resulted in a premium reduction for that policy from $1,407,543 to $335,508 (*id.* Ex. M), and plaintiffs claim that this transaction caused a partial surrender of the 896 Policy and triggered a surrender charge of $400,041. (Corbett Aff. ¶ 17.) This transaction caused the 896 Policy to become a modified endowment contract ("MEC"), which defendants claim was disclosed to plaintiffs in various documents. (Karagheuzoff Aff. Ex. 17, at 3 n. 4; Ex. 19.) In February of 2006, the Trust assigned the 027 Policy to AIC as collateral. (*Id.* Ex. 22.) Plaintiffs refer to these transactions collectively as the "2006 transaction." (Corbett Aff. ¶ 17.)

In 2007, AIC demanded additional collateral. According to defendants, Figliolia then defaulted on his loan obligations and the premium financing ended. Thereafter, plaintiffs commenced this action.

Discussion

I. Fraud and Fraudulent Inducement

Phoenix and the Nesfield Defendants move for summary judgment dismissing the fraud and fraudulent inducement causes of action, arguing that plaintiffs fail to allege any misrepresentation or reasonable reliance. The fraud claims (the first, second and third causes of action) are based upon Phoenix and the Nesfield Defendants' alleged misrepresentations that the "true story" of the premium financing for the 896 Policy was set forth in the ten-year funding program attached to the 3/19/03 Faxes. According to plaintiffs, the ten year funding program indicated that AIC would fund the premium payments for 10 years without any further premium payments required, that AIC would loan interest payments to plaintiffs to pay the loan to AIC for 37 years, and that plaintiffs would not be required to post additional collateral. (Complaint, ¶¶ 144, 152, 160.) The fraudulent inducement claims (the fifth, sixth and seventh causes of action) are based upon Phoenix and the Nesfield Defendants' alleged concealment of material facts and misrepresentation of the essential risks of the premium financing and the 896 Policy. (Complaint, ¶¶ 176, 182, 188.) According to the Complaint, plaintiffs' purchase of the 896 Policy was induced by sales presentations and illustrations prepared by defendants, and the performance of the premium financing depended upon numerous

undisclosed calculations and assumptions employed in these illustrations. (*Id.* ¶¶ 179, 185, 191.)

A fraud claim must allege "'representation of a material existing fact, falsity, *scienter*, deception and injury [citation omitted].'" *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995). In addition to these elements, a claim for fraudulent concealment requires a showing "that the defendant had a duty to disclose material information and that it failed to do so." *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003).

Here, the 896 Policy was signed on February 21, 2003 and the Note was signed on March 14, 2003. Therefore, plaintiffs could not have relied upon the 3/19/03 Faxes, sent after the 896 Policy and Note were executed, when they purchased the 896 Policy and signed the Note.

In substance, the 3/19/03 Faxes did not contain any misrepresentations or omissions. According to plaintiffs, the 3/19/03 Faxes presented "Capital Maximization Strategy illustrations" ("CMS illustrations"), which were intended to show how the premium financing would operate. (Corbett Aff. ¶ 65.) The CMS illustrations presented to plaintiffs prior to purchasing the

896 Policy contained a column entitled "Policy Surrender Value Net of Loan," and this column contained "0" values for the first 10 years of the policy. (Corbett Aff. Ex. U.) Plaintiffs claim that in reality, these values were negative amounts, equal to the amount of additional collateral plaintiffs would be required to post in these years. (Corbett Aff. ¶ 67.) Plaintiffs claim that as a result, Phoenix and the Nesfield Defendants concealed from plaintiffs the amounts of additional collateral requirements associated with the premium financing arrangement. (*Id.* ¶ 70.)

The CMS illustrations, however, are just that, illustrations, projections, and hypothetical performance examples. *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 408 (1958) (fraud is "'not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future'"). Plaintiffs fail to explain how "Policy Surrender Value Net of Loan" could be construed as a collateral requirement. The word "collateral" is never mentioned in that column, or anywhere on the page. Rather, the plain meaning of this column in the CMS illustration was to indicate the surrender value of the insurance policy for certain years, after deducting amounts owed under the premium finance loan from AIC. The CMS illustrations show that in the early years of the policy, the loan balance exceeded cash surrender value. As a

result, the surrender value of the policy was "0," reflecting that there was no surrender value.

Plaintiffs also claim that the 3/19/03 Faxes represented that AIC would provide 10 years of financing and deferred interest for 37 years. While the first line of one fax transmittal stated that it "represents the 10 Year Financing Program with loan interest borrowed for 37 Years," two sentences later it stated: "However keep in mind the funding from AI Credit is for 5 Years initially with a re-evaluation at the end of 5 years." The first line of the other fax transmittal stated that it "represents *actual 5 year financing program that is in place.*" (emphasis added). This fax transmittal also stated that the CMS illustration "which shows premium being advanced for 5 years also assumes that the premium interest is borrowed for 5 years, thereafter the interest is paid from another source." It advised plaintiffs to "keep in mind this is only a snapshot of the initial funding." The last line of the transmittal stated that "the ten year funding which was sent separately represents the true story," referring to the hypothetical, 10-year financing program contained in the initial fax. While the 3/19/03 Faxes contained cross-references, perhaps requiring them to be read together to fully appreciate their meaning, nothing contained in these documents constitutes a representation that AIC agreed to provide premium and interest

loans for more than five years. In fact, when asked where in the 3/19/03 Faxes AIC represented that it would provide funding or defer interest for more than five years, Figliolia testified: "It does not say that." (Figliolia Dep. 335:9-17.) Figliolia also testified that he did not recall any document guaranteeing that the collateral obligation would be capped at $1 million. (*Id.* at 339:22 - 340:4.) Even interpreting the 3/19/03 Faxes as potential terms of AIC's renewal of the financing arrangement, or its future conversion to a 10-year financing program, they are "statements of prediction or expectation, and as such are not actionable." *Naturopathic Labs. Intl., Inc. v SSL Ams., Inc.*, 18 AD3d 404, 404 (1st Dept 2005).

Moreover, plaintiffs' interpretation of the 3/19/03 Faxes is contradicted by the plain language of the Note and AIC's premium financing proposal. The Note expressly provided:

> DISCLAIMERS. LENDER SHALL NOT BE REQUIRED TO EXTEND ANY AMOUNTS DUE HEREUNDER (OTHER THAN THE ORIGINAL PRINCIPAL AMOUNT HEREOF) TO BORROWER OR ANY OTHER PERSON OR ENTITY, INCLUDING BUT NOT LIMITED TO ANY ADDITIONAL AMOUNTS NECESSARY TO FUND PREMIUMS DUE IN RESPECT OF THE INSURANCE POLICY. *AS A CONDITION TO MAKING ADDITIONAL LOANS HEREUNDER, LENDER MAY REQUIRE A PLEDGE OF ADDITIONAL COLLATERAL IN A TYPE AND AMOUNT DETERMINED AT THE SOLE DISCRETION OF LENDER.*
>
> ...

> THE UNDERSIGNED BORROWER ACKNOWLEDGES THAT NEITHER THE INSURANCE AGENT/BROKER NOR THE INSURANCE COMPANY IS LENDER'S AGENT AND NEITHER CAN LEGALLY BIND LENDER IN ANY WAY OR MAKE ANY COMMITMENT ON LENDER'S BEHALF.

(Corbett Aff. Ex. H at 6.) (emphasis added). The Note also expressly allowed AIC to defer interest payments, but only "during the first five (5) years of the loan." (*Id.* at 1.) The Note expressly required plaintiffs to post additional collateral if the cash surrender value of the policy became less than the loan (*id.* at 3-4) and prohibited any modification or limitation of its terms "except by a written agreement signed by Lender [AIC] and Borrower [the Trust]." (*Id.* at 5.)

These Note terms were also consistent with AIC's premium financing proposal signed by Figliolia on February 21, 2003, the same day he executed the 896 Policy (the "2/21/03 Proposal"). The 2/21/03 Proposal outlined the terms of the premium financing agreement, and in a section titled "Collateral Requirements," the proposal stated that "AIC may require additional collateral in the event Borrower wishes to finance additional premium(s) using this loan program or upon the occurrence of a collateral default." (Karagheuzoff Aff. Ex. 6, at 2.) The 2/21/03 Proposal expressly stated that "[t]he amount of collateral required will vary based on AIC's projected loan exposure and the volatility and/or performance

of the assets pledged." (*Id.*) Figliolia was required to "post the required collateral prior to any additional fundings being made," and the proposal stated that, "[b]ased on current illustrations, collateral is projected to be required for at least the first 11 years of the loan." (*Id.*) The 2/21/03 Proposal included a hypothetical illustration, as follows: "assuming a . . . rising interest rate environment the collateral requirement is currently projected to be $2,051,611.00 in cash or cash equivalents in year 5 of the Loan but may ultimately be greater based on the factors listed above." (*Id.*)

At his deposition, Figliolia conceded that the 2/21/03 Proposal disclosed in writing that he could have considerably more collateral obligations under the premium financing arrangement, and that this document set forth "a five year program," but that he nevertheless signed the document. (Figliolia Dep. 270:2-274:24, 275:18-277:19, 279:3-280:23.) Given the hypothetical nature of the CMS illustrations, the express statements in the cover transmittal letters sent with the 3/19/03 Faxes, and the express terms of the Note and the 2/21/03 Proposal, it is clear that defendants made no misrepresentations.

For the same reasons, plaintiffs' reliance upon Nesfield's alleged oral assurances that he would change the premium financing

collateral requirements, or that plaintiffs would not be required to post additional collateral, are not actionable, because they constitute "statements of prediction or expectation." *Naturopathic Labs. Intl., Inc.*, 18 AD3d at 404. Given the express terms of the parties' premium financing arrangement, it was unreasonable as a matter of law for plaintiffs to rely on any alleged oral assurances. *Daily News v Rockwell Intl. Corp.*, 256 AD2d 13, 14 (1st Dept 1998), *lv denied* 93 NY2d 803 (1999) (fraud claim dismissed where "premised upon no more than an alleged conflict between oral representations and the subsequent written terms of the parties' agreement, [which] 'negates a claim of a reasonable reliance upon the oral representation'") (citation omitted).

Plaintiffs claim that Figliolia was subject to "high pressure sales pitches" designed to force him to sign the insurance application quickly, but plaintiffs fail to link this alleged conduct to any cause of action or legal theory. Plaintiffs also argue that Nesfield was Figliolia's insurance broker for 40 years, thereby establishing a relationship of trust that entitled Figliolia to rely upon Nesfield's alleged misrepresentations. However, Figliolia was, in fact, involved in all decision-making for the Trust. (Figliolia Dep. 236:20-237:3, 239:10-14, 604:2-8; Cilente Dep. 71:15-74:6.) Figliolia is admittedly a "sophisticated businessman" (Figliolia Dep. 275:8-11) who "do[es] a lot of

financing" (*id.* at 105:9-11), and he had "an advisory team" that included lawyers and accountants who advised him on estate planning issues (*id.* at 170:20-171:8). Figliolia concedes that he understood that Nesfield's alleged oral assurances were contrary to the terms of the written agreements. (*Id.* 275:18-277:23, 291:17-292:22.)

Under these facts, plaintiffs cannot reasonably claim to have been defrauded when they "fail[ed] to make further inquiry or insert appropriate language in the agreement for [plaintiffs'] protection"; instead they "willingly assumed the business risk that the facts may not be as represented." *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 (1st Dept 2006), *lv denied* 8 NY3d 804 (2007); *see also Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 (1st Dept 1997) ("[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations"); *Orlando v Kukielka*, 40 AD3d 829, 832 (2d Dept 2007) (no reasonable reliance where "sophisticated businesspersons, in assuming a major proprietary interest in a commercial enterprise, and incurring a heavy financial obligation, did so on information that the broker provided to them despite their own evidence to the contrary").

Plaintiffs also refer to a March 20, 2003 letter from Nesfield to plaintiffs' accountant, Jeffrey Etzin, CPA stating: "Al asked me to send you something on the Premium Financing Program that I did for him . . . The accompanying CMS Spread Sheet gives a bird's eye view of the program." (Corbett Feb. 8, 2012 Aff. Ex. R.) The letter further stated that "there is an Annuity for $1,000,000 that's being used as collateral. There are no additional cash outlays on Al's part." (*Id.*) The spreadsheet attached to the letter showed the 10-year financing program sent with the 3/19/03 Faxes.

Plaintiffs claim that although this letter and the 3/19/03 Faxes were sent after they entered into the premium financing arrangement, had the true terms of the transaction been disclosed, they would have discontinued the arrangement and suffered less damages. However, nothing submitted by plaintiffs suggests that the statement, "[t]here are no additional cash outlays," was false at the time it was made, in the first year of the 896 Policy. According to plaintiffs, additional capital was not required until 2005, when AIC requested additional collateral of $215,000. In any event, as discussed above, the express terms of the Note and the 2/21/03 Proposal identified potential additional collateral requirements in subsequent years, thereby undermining any reliance upon Nesfield's letter.

Plaintiffs also claim that prior drafts of the 2/21/03 Proposal were "soften[ed]" to enable Nesfield to convince plaintiffs that no additional collateral would be required. As discussed, *supra*, however, plaintiffs' argument is undermined by the 2/21/03 Proposal that was actually signed by Figliolia, disclosing that "AIC may require additional collateral" and the circumstances under which such additional collateral would be necessary. (Karagheuzoff Aff. Ex. 6, at 2.)

Plaintiffs further argue that Phoenix misrepresented Figliolia's insurance rating as standard rather than substandard, and then obtained reinsurance to absorb the risk of the faulty rating. This allegation, however, is irrelevant to plaintiffs' fraud claims against any of the defendants in this action.

To the extent that the fraud claims are based upon the generalized and conclusory allegations that defendants "made numerous other misrepresentations and omissions pertaining to [the 896 Policy] and the premium financing" (Complaint ¶¶, 145, 153, 161), and that defendants "knowingly issued false and misleading oral and written representations to induce Trustee Cilente to purchase [the 896 Policy]" (*id.*, ¶¶ 177, 183, 189), they are dismissed for failure to state "the circumstances constituting the wrong . . . in detail." CPLR 3016(b).

The Court notes that plaintiffs appear to be arguing that it was their understanding that the AIC "loan would finance all costs associated with the policy" (Plaintiffs' Opp. Brief, at 8), and that they were led "to believe they would not have to make any out of pocket payments." (*Id.* at 10.) A sophisticated businessman like Figliolia could not have reasonably relied on such an arrangement, especially when it is not supported by the parties' written agreement contained in the Note or any other document presented to plaintiffs. *Orlando*, 40 AD3d at 832.

For the foregoing reasons, Phoenix and the Nesfield Defendants have shown, prima facie, that there were no material misrepresentations or concealment; nor was there reasonable reliance with respect to plaintiffs' fraud and fraudulent inducement causes of action. Plaintiffs fail to raise a factual issue to rebut defendants' prima facie showing. Accordingly, defendants' motions for summary judgment dismissing the first, second, third, fifth, sixth, and seventh causes of action are granted.

II. GBL § 349

Defendants next move for summary judgment dismissing plaintiffs' ninth, tenth and eleventh causes of action asserting violations of GBL 349, arguing that they made no material

misrepresentations, that plaintiffs cannot show any injury caused by the 3/19/03 Faxes and that the alleged conduct was not consumer-oriented. Phoenix also argues (in a footnote) that the claim is barred by the statute of limitations.

"A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v Chemical Bank*, 95 NY2d 24, 29 (2000). The alleged deceptive act or practice is subject to an "objective definition," whether it relates to representations or omissions, and is limited to deceptive acts and practices "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 (1995). This objective standard "may be determined as a matter of law or fact (as individual cases require)." *Id.* To be "consumer-oriented," plaintiffs "must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." *Id.* at 25.

A cause of action under section 349 of the GBL "is subject to the three-year limitations period imposed by CPLR 214 (2)."

Corsello v Verizon N.Y., Inc., 18 NY3d 777, 789 (2012). Accrual of a private right of action under section 349 "occurs when plaintiff has been injured by a deceptive act or practice violating section 349." *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 (2001).

Plaintiffs' section 349 causes of action are based upon allegations that the software used by defendants to generate the CMS illustrations "was capable of providing comprehensive illustrations that included a column for additional collateral," and that defendants could have obtained such illustrations from AIC, but failed to do so. (Complaint, ¶¶ 200-201, 215-216, 229-230.) Plaintiffs also claim that the defendants manipulated the CMS illustrations provided with the 3/19/03 Faxes, by not including in the 5-year financing illustration "a column for withdrawal from retain [sic] capital account to pay interest on the loan," and, as a result, defendants failed to disclose that plaintiffs would be obligated to pay millions of dollars in interest to AIC. (*Id.* ¶¶ 204, 219, 234.)

For the same reasons discussed above with respect to plaintiffs' fraud claims, defendants made no misrepresentations to plaintiffs. Moreover, none of plaintiffs' allegations, and none of the evidence submitted by the parties, suggests that defendants'

"acts or practices have a broader impact on consumers at large." *Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25. Rather, plaintiffs' action involves a "[p]rivate contract dispute[], unique to the parties," which does "not fall within the ambit of the statute." *Id.*; *see also New York Univ.*, 87 NY2d at 321 (the Court there finding that the case involved "complex insurance coverage and proof of loss in which each side was knowledgeable and received expert representation and advice," and thus holding it constituted a "'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large"). Accordingly, defendants' motions for summary judgment are granted and plaintiffs' ninth, tenth, and eleventh causes of action are dismissed.[1]

III. Insurance Law § 4226 and § 2123

Phoenix and the Nesfield Defendants next seek summary judgment dismissing plaintiffs' Insurance Law claims, arguing that plaintiffs suffered no injury as a result of the 2006 transaction or as a result of any violation of Regulation No. 60 issued by the New York State Insurance Department and codified in 11 NYCRR 51.1

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[1] In addition, plaintiffs did not respond to Phoenix's argument concerning the timeliness of this claim, rendering it unopposed. Therefore, plaintiffs' claims under section 349 of the GBL must be dismissed for the additional reason that they are time-barred.

et seq. ("Reg. 60"). In opposition, and in support of their summary judgment motion, plaintiffs argue that Phoenix and the Nesfield Defendants failed to present plaintiffs any Disclosure Statement for the 2006 transaction and failed to have plaintiffs complete an application for the 027 Policy. Plaintiffs claim that as a result, they were unable to compare the 896 Policy with the proposed 2006 transaction, including a comparison of the cash surrender values which were the basis for determining future additional collateral requirements.

Section 4226 of the Insurance Law (Misrepresentations, misleading statements and incomplete comparisons by insurers) provides, in relevant part, as follows:

> (a) No insurer authorized to do in this state the business of life, . . . insurance, . . . shall:
>
> ***
>
> (6) replace the individual life insurance policies . . . of an insurer by the same or different insurer without conforming to the standards promulgated by regulation by the superintendent.
>
> ***
>
> (c) In any determination, judicial or otherwise, of the incompleteness or misleading character of any such comparison or of representation, it shall not be presumed that the insured knew or knows of any of the provisions or benefits contained in any insurance policy or contract.

> (d) Any such insurer that knowingly violates any provision of this section, or knowingly receives any premium or other compensation in consequence of such violation shall, in addition to any other penalty provided in this chapter, be liable to a penalty in the amount of such premium or compensation, which penalty may be sued for and recovered by any person aggrieved for his own use and benefit, in accordance with the provisions of the civil practice law and rules.

Reg. 60, in turn, implements the Insurance Law. Among other things, Reg. 60 requires that an insurer replacing an insurance policy provide the applicant with the "'IMPORTANT Notice Regarding Replacement or Change of Life Insurance Policies or Annuity Contracts' and the completed 'Disclosure Statement.'" 11 NYCRR § 51.6(b)(2). The insurer must also "examine any proposal used, including the sales material used in the sale of the proposed life insurance policy or annuity contract, and the 'Disclosure Statement,' and ascertain that they are accurate and meet the requirements of the Insurance Law and this Part." § 51.6(b)(3). Under Reg. 60, "where the required forms are not received with the application, or if the forms do not meet the requirements of this Part or are not accurate," the insurer is required to "either have any deficiencies corrected or reject the application and so notify the applicant of such rejection and the reason therefor." § 51.6(b)(7). Under section 51.6(b)(9), "in the event the life insurance policy . . . issued differs from the life insurance policy . . . applied for," the insurer is required to

"ensure that the requirements of this Part are met with respect to the information relating to the life insurance policy . . . as issued, including but not limited to the revised 'Disclosure Statement,' any revised or additional sales material used and acknowledgment by the applicant of receipt of such revised material."

Here, the parties do not dispute that the 027 Policy was a replacement policy.

On September 23, 2005, Cilente signed Phoenix's Disclosure Statement. (Karagheuzoff Aff. Ex. 14.) On November 17, 2005, Figliolia, Cilente, and Nesfield signed a "Simplified Life Insurance Application" for a replacement to the 896 Policy. (Corbett 1/12/12 Aff. Ex. L.) However, as previously noted, there is no dispute that the replacement policy never materialized. In fact, Nesfield testified that he did not recall preparing a Disclosure Statement comparing the 896 Policy and the 027 Policy. (Nesfield Dep. 255:11-15, March 14, 2011.) Nesfield also did not know whether plaintiffs ever signed an application for the 027 Policy, and testified that he did not go over policy illustrations or the 027 Policy with plaintiffs because he was in Australia when that policy was issued or finalized. (*Id.* at 294:10-23.) Cynthia Bazzano, an assistant vice president at Phoenix, also testified

that she did not recall any Disclosure Statements concerning the 2006 transaction. (Bazzano Dep. 88:2-17, Jan. 31, 2011.)

In fact, plaintiffs submit evidence suggesting that Phoenix provided illustrations that misrepresented the cash surrender value for the 027 Policy. (Corbett 2/8/12 Aff., Ex. A, at PHX_001953 (internal Phoenix email), stating that "[t]he CSV is not calculated properly if the face has been reduced"). In one email, a Phoenix employee, Steve Huebner, stated:

> The discrepancy in produced in force policy and that which was sold rests in the policies [sic] cash value. The current in force reflects substantially lower cash values then [sic] illustration signed and sent in and was basis of sale. This results not only in substantially more required collateral posted by client for this funding but as well from AI Credits [sic] view compounds collateral estimates going forward. . . . [A] substantial portion of the discrepancy has to do with the exclusion of a rider in the in-force illustration which was included in the sold illustration.

(*Id.* at PHX_003384.) Another email stated that "the death benefit projected is incorrect and [sic] due to the premiums presented. It appears you are utilizing an illustration that at one time was being considered for the policy and not the one this case was written and based on." (*Id.* at PHX_004306; *see also* PHX_003812 and PHX_003892.) In fact, Phoenix concedes, for purposes of this motion, to "a technical violation" of Reg. 60 in failing to provide

the Disclosure Statement. (Phoenix Opp. Brief, at 9.) Phoenix also concedes for purposes of this motion that it received premiums in 2006. (*Id.*) For these reasons, plaintiffs have established, prima facie, violations of Reg. 60 sections 51.6(b)(2), (b)(3), (b)(7), and (b)(9).

However, plaintiffs fail to make a prima facie showing with respect to section 4226(d) of the Insurance Law, because they fail to show that Phoenix "knowingly" violated Reg. 60; thus Phoenix's knowledge raises a triable issue of fact. *P.T. Bank Cent. Asia v Chinese Am. Bank*, 229 AD2d 224, 226 (1st Dept 1997) ("plaintiff's knowledge of the contents of the financing statement" presented issue of fact).

Notwithstanding these findings, Phoenix argues that it is irrelevant because it did not benefit from any violation of Reg. 60. Phoenix claims that plaintiffs would have proceeded with the 2006 transaction even if a revised Disclosure Statement had been presented, and that, therefore, plaintiffs sustained no injury. This argument, which essentially attacks the causal link between any "technical" violation of Reg. 60 and any injury to plaintiffs, raises additional factual issues that preclude summary judgment. *See Sweeney v Bruckner Plaza Assoc.*, 57 AD3d 347, 348 (1st Dept 2008), *app dism* 12 NY3d 832 (2009)("[t]he issue of '[p]roximate

cause is a question of fact for the jury where varying inferences are possible [citation omitted]'"). Here, the factual issues are further highlighted by plaintiffs' contention that had they received the proper Disclosure Statement, they would have surrendered the 896 Policy and purchased no further insurance, or rolled the cash surrender value of the 896 Policy into a paid up policy. (Figliolia Dep. 397:14-398:14, 549:11-550:3; Cilente Dep. 204:9-205:23, 212:6-213:25.) Either scenario could have affected the premium paid by plaintiffs and, therefore, the benefit received by Phoenix. *Brenkus v Metropolitan Life Ins. Co.*, 309 AD2d 1260, 1263 (4th Dept 2003) (cause of action under Insurance Law § 4226[d] "viable to the extent that plaintiff seeks '[d]amages in an amount equal to the difference between the premiums paid . . . for coverage . . . and the . . . monthly premium which was represented to them as being the premium for coverage . . . .' Such recovery of premiums paid is expressly authorized as a civil penalty for the violation of the insurer's statutory duties").

Plaintiffs also may have sustained injury as a result of the 896 Policy becoming an MEC. To the extent that Phoenix presents testimony suggesting that plaintiffs would have proceeded with the 2006 transaction regardless of the Disclosures, such evidence also presents issues of credibility, which are not properly resolved by this Court. *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70

AD3d 508, 510-11 (1st Dept 2010) ("[t]he court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues, or to assess credibility [internal citations omitted]").

For the foregoing reasons, plaintiffs' motion for summary judgment on their thirteenth cause of action is denied, and Phoenix's motion for summary judgment dismissing this claim is also denied.

Plaintiffs also seek summary judgment against the Nesfield Defendants, arguing that they violated section 2123 of the Insurance Law by failing to comply with Reg. 60 in connection with the 2006 transaction. The Nesfield Defendants move for summary judgment dismissing these Insurance Law § 2123 claims.

Section 2123 of the Insurance Law regulates the conduct of insurance agents and brokers and, like section 4226, requires that "[a]ny replacement of individual life insurance policies" conform to the standards set forth in Reg. 60. Under section 2123(d):

> Any agent . . . [or] insurance broker . . . who . . . shall violate any of the provisions of this section and shall knowingly receive any compensation or commission for the sale of any insurance policy . . . induced by a violation of this section shall also be liable

> for a civil penalty in the amount received by such violator as compensation or commission, which penalty may be sued for and recovered for his own use and benefit by any person induced to purchase an insurance policy . . . by such violation.

Section 51.5 of Reg. 60 pertains to duties of agents.

For the same reasons discussed above, plaintiffs have shown, prima facie, the Nesfield Defendants' violations of Reg. 60 sections 51.5(c)(3), (c)(4), and (c)(5), all of which require the agent to present the Disclosures to the insured. Whether the 2006 transaction was "induced by a violation of" these Reg. 60 sections, constituting a violation of Insurance Law § 2123(d), is a factual issue that cannot be resolved on the papers before the Court. Accordingly, plaintiffs' motion for summary judgment on their section 2123 Insurance Law claims is denied, and the Nesfield Defendants' motion for summary judgment dismissing these claims is also denied.

IV. Fraud and Negligence Relating to the 2006 Transaction

Plaintiffs' fraud claims relating to the 2006 transaction (the sixteenth, seventeenth and eighteenth causes of action) are based upon defendants' alleged failure to disclose that the 2006 transaction would result in a $400,000 surrender charge for the 896 Policy, and the conversion of that policy into an MEC. (Complaint

[* 30]

¶¶ 274-275, 280-281, 286-287.) Based upon the same facts, plaintiffs assert negligence causes of action against both Phoenix and the Nesfield Defendants (the nineteenth, twentieth and twenty-first causes of action.) (*Id.* ¶¶ 293, 299, 305.)

As a preliminary matter, to the extent that plaintiffs' fraud and negligence causes of action are based upon the same failure to provide the Disclosures as their claims under sections 4226 and 2123 of the Insurance Law and Reg. 60, these provisions "may not be read as creating a private right of action in favor of an insured to recover damages in tort." *Brenkus*, 309 AD2d at 1261.

In any event, the 896 Policy, issued in 2003, expressly disclosed the events that could trigger a surrender charge, stating:

> [u]pon a decrease in face amount, a partial surrender charge will be deducted from the Policy Value based on the amount of the decrease. The charge will equal the applicable surrender charge that would then apply to a full surrender multiplied by the result of dividing the decrease in face amount by the face amount of the policy before the decrease.

(896 Policy at 16.) Moreover, illustrations provided to plaintiffs in connection with the 2006 transaction, dated February 1, 2006, disclosed that the 896 Policy "becomes a Modified Endowment

Contract," and one illustration was entitled "Policy Values - Possible Modified Endowment Contract In Year 4." (Karagheuzoff Aff. Ex. 17, at 2 and 3 n. 4.) Cilente admits that on February 2, 2006, she signed an illustration disclosing that the policy could become an MEC. (Cilente Dep. 340:9-343:22.) In addition, in a March 6, 2006 letter from Phoenix to Nesfield, Phoenix confirmed that the "Face" of the 896 Policy "has been reduced effective January 30, 2006." (Karagheuzoff Aff. Ex. 19.) This letter attached a "Notice Regarding Tax Treatment of Modified Endowment Contract," stating that "[t]he policy that you have applied for will be treated as a Modified Endowment Contract under current tax law," and went on to describe the MEC. (*Id.* at 6.) Cilente admitted that she received this letter with the notice concerning MECs and added it to her file. (Cilente Dep. 344:18-346:4.) Plaintiffs do not dispute that they accepted the 027 Policy on March 10, 2006 (back-dated to January 6, 2006).[2] This evidence makes a prima facie showing that the surrender charge and change to an MEC were disclosed to plaintiffs prior to entering into the 2006 transaction.

In opposition, plaintiffs do not respond to those portions of defendants' motions that seek summary judgment dismissing their

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[2] According to Phoenix, "[i]t is not unusual for a policy to be back-dated." Phoenix Reply Brief, at 11 n 5.

fraud and negligence causes of action with respect to the 2006 transaction. As a result, plaintiffs fail to raise a factual issue, and defendants' motions for summary judgment dismissing the sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first causes of action are granted.

The sole causes of action remaining in this action are the thirteenth cause of action asserted against Phoenix for violations of Insurance Law § 4226, and the fourteenth and fifteenth causes of action asserted against the Nesfield Defendants for violations of Insurance Law § 2123. These causes of action are severed and continued. All the other causes of action are dismissed with prejudice.

Counsel shall appear for a conference in IAS Part 39, 60 Centre Street, Room 208 on February 11,2014 at 10:00 a.m. to discuss how to proceed with the remaining causes of action.

This constitutes the decision and order of this Court.

Dated: January 7, 2014

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.