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SHORT FORM ORDER

INDEX No. 22418-11

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/14/11
Calendar DATE 9/14/12
Submit DATE 9/14/12
Mot. Seq. # 003 - MG
CDISP Y X N

AIR & POWER TRANSMISSION, INC., JOHN F. BARONE, RICHARD F. BARONE and KENNETH BARONE,

Plaintiffs,

-against-

ROBIN S. WEINGAST, ROBIN S. WEINGAST & ASSOCIATES, INC., MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and DESIGNS FOR FINANCE, INC.,

Defendants.

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Upon the following papers numbered 1 to 14 read on these motion by defendant Massachusetts Mutual to dismiss the complaint; Notices of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5; 6; Replying Affidavits and supporting papers 7-8; Other 9 (plaintiffs' memorandum); 10 (defendant's memorandum); 11 (Stipulation dated June 28, 2012 so-ordered on August 23, 2012 restoring this motion to calendar); 12 (Short Form Order dated June 25, 2012); 13-14 (affirmation); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#003) by defendant, Massachusetts Mutual Life Insurance Company, for dismissal of the plaintiff's complaint is considered under CPLR 3211(a)(1) and 3211(a)(7) and is granted.

The corporate plaintiff, Air & Power Transmission, Inc. [hereinafter "APT"], is a New York corporation engaged in the business of industrial product distribution. In 2001 and thereafter, the individual plaintiffs were employed by APT. Defendants, Robin S. Weingast and Robin S. Weingast & Associates, Inc. [hereinafter "Weingast"], are insurance agents associated with defendant, Massachusetts Mutual Life Insurance Company [hereinafter "Mass Mutual"] who promote the sale of insurance products used in conjunction with Employer Trust Employee Benefits Plans [hereinafter "BETA Plans"]. Defendant, Designs

for Finance, Inc.[hereinafter "Designs"], was the sponsor of the Plan. These plans were intended to provide life insurance and tax shelters to those participating therein. In 2001, the corporate plaintiff engaged the Weingast defendants for purposes of adopting a Beta Plan for the benefit of the individual plaintiffs. In 2001, the corporate plaintiff adopted its first BETA plan which called for its purchase of life insurance policies on the lives of the individual plaintiffs from defendant, Mass Mutual

The plaintiffs allege that both "prior to and after the adoption of the BETA Plan, Weingast repeatedly represented and warranted that the BETA Plan devised by the defendants constituted a proper, prudent and safe vehicle to obtain life insurance benefits on a tax favored basis, and that such plans were safe and qualified under IRC § 419(e)" (*see* ¶ 21 of the plaintiffs' complaint). Among the various benefits allegedly touted by Weingast defendants, with the knowledge, consent and urging of defendant Mass Mutual, were: 1) that the corporate plaintiff could deduct the insurance premiums payable to Mass Mutual; 2) that the individual plaintiffs could accumulate value in purchased insurance policies that enjoyed a tax deferred basis free of estate taxes; 3) that the plan qualified under IRC § 419(e); and 4) that at a certain future date, the policies could be terminated without any loss of benefit or adverse consequences (*see* ¶ 22 of the plaintiffs' complaint).

Although the corporate plaintiff contributed all insurance premiums payable under the Beta Multiple Employer Variable Death Benefit Plan of December 10, 2001 (effective January 1, 2001), the individual plaintiffs were the beneficial owners and beneficiaries of the policies (*see* ¶¶19-20 of the plaintiffs' complaint). The plaintiffs allege that the policy premiums were very high and that the policies purchased afforded little protection for the individual plaintiffs (*see* ¶¶ 39-43of the plaintiffs' complaint). The promised tax deductions were allegedly non-existent as BETA Plans such as the one adopted by the plaintiff in 2001 were allegedly already disapproved by the IRS at the time of the inception of such plan (*see* ¶ 51of the plaintiffs' complaint). The corporate plaintiff avers that it would never have participated in the plan had it not been for the acts of fraudulent inducement committed by the Weingast defendants individually and as agent of Mass Mutual (*see* ¶ 44 of the plaintiffs' complaint). The Weingast defendants are further charged with fraudulently inducing one or more of the plaintiffs into executing a document entitled "Acknowledgment and Disclosure" dated December 10, 2011 and that such acknowledgment is the product of a fraud (*see* ¶¶ 45-46 of the plaintiffs' complaint). Upon the taxing authorities' disallowance of the BETA Plan in or about 2010, the corporate plaintiff is alleged to have suffered losses in the form of wasted premium payments, while two of the three individual plaintiffs were subject to federal and state income tax adjustments in amounts in excess of $50,000.00 and the other was left without insurance coverage.

The complaint sets forth eight causes of action which relate principally to the 2001 Multiple Employer Variable Death Benefit Plan. The FIRST charges all defendants with liability for fraud, misrepresentation and concealment on the part of the Weingast defendants as aided and abetted by the remaining defendants in connection with APT's adoption of the 2001 BETA plan. In the SECOND cause of action, the Weingast defendants are charged with breaching fiduciary duties owing from them to the plaintiffs while defendants, Mass Mutual and Designs, are charged with aiding and abetting the Weingast defendants with respect to their breaches of such duties. In the THIRD cause of action, the Weingast defendants and Mass Mutual are charged with breaching oral promises to indemnify the plaintiffs for any losses sustained by reason of the loss of tax benefits in the event the plan was disallowed by the IRS. All defendants are charged with violations of § 349 of the General Business Law in the FOURTH cause of action set forth in the complaint. The Weingast defendants are charged with negligence and breach of the standard of care in the FIFTH cause of action. The SIXTH cause of action targets only defendant, Mass Mutual, who is therein charged with vicarious liability for all of the actionable conduct purportedly engaged in by the Weingast defendants. By their SEVENTH cause of action, the plaintiffs demand recision of all

insurance contracts and a return of all premiums paid, while the EIGHTH cause of action that is aimed at all defendants sounds in unjust enrichment.

By the instant motion, defendant, Massachusetts Mutual Life Insurance Company [hereinafter "movant or "Mass Mutual"] seeks dismissal of the plaintiffs' complaint to the extent they assert claims against Mass Mutual. Although the motion recited a return of date of December 14, 2011, it was not calendared on any motion calendar until its loss or misplacement was discovered by the movant following the June 25, 2012 issuance of an order which granted similar motions by the other defendants (*see* June 25, 2012 order granting dismissal motions numbered 001 by the Weingast defendants and 002 by defendant Designs). By stipulation of counsel dated June 28, 2012, so-ordered by the court on August 23, 2012, this motion together with the submissions in opposition and reply was restored to the motion calendar of this court and marked submitted for determination on September 14, 2012.

Those portions of the instant motion (#003) wherein Mass Mutual seeks dismissal of the plaintiff's Sixth cause of action is granted. In that Sixth cause of action, the plaintiff seeks to hold Mass Mutual vicariously liable for purportedly tortious conduct of one or more of its co-defendants. However, the court dismissed the plaintiffs' claims of tortious conduct against the co-defendants in its June 25, 2012 order and it hereby incorporates by reference the analysis and findings with respect to the dismissals set forth into the terms of this order. Defendant Mass Mutual is thus entitled to the dismissal of the plaintiff's Sixth cause of action wherein it is charged with vicarious liability for the purported wrongful conduct of its co-defendants. Likewise dismissed are the plaintiffs' Second and Third causes of action, wherein Mass Mutual is charged with "aiding and abetting" the purportedly tortious acts of the Weingast defendants sounding in fraud, misrepresentation, concealment and breaches of fiduciary duties.

The plaintiffs' THIRD cause of action contains a direct claim against Mass Mutual for breach of purported oral promises to indemnify the plaintiffs for any losses they might incur in the event the Beta Plan came under challenge and the tax deductions were disallowed. However, these alleged oral assurances are flatly contradicted by the terms of existing writings between the parties governing the same subject matter including the Disclosure and Acknowledgments allegedly executed by the corporate plaintiff in favor of Mass Mutual on December 10, 2001 and again on March 26, 2003 relative to the Adoption Agreement for the Beta Multiple Employer Variable Death Benefit Plan of December 10, 2001. To be enforceable, a separate, subsequent, additional agreement must address a scenario that was not anticipated and not covered by the terms of any existing written agreements between the parties (*see* ***Gerard v Cahill***, 66 AD3d 957, 888 NYS2d 104 [2d Dept 2009]). There are no allegations that the alleged oral assurances constituted separate, subsequent, additional agreements that addressed a scenario not anticipated or covered by the terms of the existing written agreements. Moreover, the particulars of the oral promises allegedly made by Mass Mutual agents are not alleged with the sufficient particularity to give rise to claims for breach of the alleged oral agreement was a separate, additional agreement (*cf.*, ***Cathy Daniels, Ltd. v Weingast***, 91 AD3d 431, 936 NYS2d 44 [1st Dept 2012]). To the extent that the plaintiffs claim that statements made by the Weingast defendants are chargeable to Mass Mutual due to agency, such claims are without merit for lack of particularity as to the purported agency relationship (*see* ***Cathy Daniels, Ltd. v Weingast***, 91 AD3d 43, *supra*). The plaintiffs' THIRD cause of action against moving defendant Mass Mutual is thus dismissed pursuant to CPLR 3211(a)(1) and (a)(7).

Also dismissed is the plaintiffs' FOURTH cause of action wherein they charge Mass Mutual and others with violations of GBL § 349. The complaint contains insufficient allegations of a material misrepresentations having a broad impact on consumers at large (*see* ***Cathy Daniels, Ltd. v Weingast***, 91 AD3d 431, *supra*; ***Lum v New Century Mtge. Corp.***, 19 AD3d 558, 559, 800 NYS2d 408 [2d Dept 2005]).

The plaintiffs' SEVENTH cause of action sounds in recision of all insurance contracts entered into under the terms of the subject Beta Plans. Rescission is an equitable remedy, which "is to be invoked only when there is lacking [a] complete and adequate remedy at law and where the status quo may be substantially restored .... [Where] damages appear adequate and it is impracticable to restore the status quo," rescission is inappropriate (***Rudman v Cowles Communications, Inc.***, 30 NY2d 1, 13-14; 330 NYS2d 33 [1972]; ***Adrian Family Partners I, LP v ExxonMobil Corp.***, 61 AD3d 901, 878 NYS2d 140 [2d Dept 2009]). The plaintiffs failed to sufficiently allege the elements of a claim for rescission of the subject insurance policies. To the extent that the plaintiffs' SEVENTH cause of action is premised upon their fraud, their claims for recession are not actionable due to the dismissal of all fraud claims (*see* ***Cherokee Owners Corp. v DNA Contr., LLC***, 96 AD3d 480, 947 NYS2d 59 [1st Dept 2012]). The plaintiffs' Seventh cause of action against moving defendant, Mass Mutual is thus dismissed.

The plaintiffs' EIGHTH cause of action to recover damages which sounds in unjust enrichment are quasi-contractual claims, and therefore are not viable where, as here, it is undisputed that the parties entered into express agreements (*see* ***Clark-Fitzpatrick, Inc. v Long Is. R Co.***, 70 NY2d 382, 388, 521 NYS2d 653 [1987]; *see* ***A. Montilli Plumbing & Heating Corp. v Valentino***, 90 AD3d 961, 935 NYS2d 647 [2d Dept 2011]; ***Weinstein v Natalie Weinstein Design Assoc.***, 86 AD3d 641, 928 NYS2d 305 [2d Dept 2011]; ***Scott v Fields***, 85 AD3d 756, 925 NYS2d 135 [2d Dept 2011]; ***Shovak v Long Is. Commercial Bank***, 50 AD3d 1118, 858 NYS2d 660 [2d Dept 2008]). The plaintiffs' Eighth cause of action, to the extent asserted against the moving defendant, is thus dismissed.

In view of the foregoing, the instant motion by defendant Massachusetts Mutual Life Insurance Company for dismissal of the plaintiff's complaint is granted pursuant to CPLR 3211(a)(1) and 3211(a)(7). Since the record reflects that all claims interposed in this action have been resolved by motion practice, the within action shall be marked "disposed" by the clerk upon receipt of this order for entry in the court's electronic filing system.

DATED: 9/25/12

THOMAS F. WHELAN, J.S.C.