To commence the statutory time period for appeals as of right (CPLR §5513[a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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GAIL PURCELL and RALPH PURCELL,

Plaintiffs,

- against-

M.L. BRUENN CO., INC. and M.L. BRUENN COMPANY, INC.,

Defendants.

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DECISION & ORDER

Index No. 59029/12

Motion Seq. 002

Hubert, A.J.S.C.

This is an action by Plaintiffs, husband and wife who obtained a personal automobile insurance policy through M.L. Bruenn Company ("Bruenn"),[1] an insurance broker for Progressive Northeastern Insurance Company ("Progressive"). The complaint alleges causes of action for negligence and breach of contract based on Bruenn's alleged failure to procure the "maximum" amount of supplementary uninsured/underinsured ("SUM") motorist coverage that Plaintiffs requested, and for Bruenn's failure to notify Progressive of a claim resulting from a June 8, 2006 three-car accident in which Gail Purcell was injured.

New York Insurance Law § 3420(f)(2)(A) requires insurers to offer optional SUM coverage to all purchasers of motor vehicle liability policies. That section specifically provides that "[a]ny such policy shall, at the option of the insured, also provide supplementary

[1]It appears that M.L. Bruenn Company Inc., is not a separate entity but a different name previously used by the corporation. The corporation is therefore referred to as "Defendant."

uninsured/underinsured motorists insurance for bodily injury, in an amount up to the bodily injury liability insurance limits of coverage provided under such policy, subject to a maximum of two hundred fifty thousand dollars because of bodily injury to or death of one person in any one accident."

In this case, Bruenn procured an automobile liability insurance policy with Progressive on behalf of Plaintiffs under Auto Policy Number 17785024-00 for the period May 14, 2004 to November 14, 2004. The policy contained bodily injury liability limits of $250,000 for each person and $500,000 per accident. The policy also included the "maximum" SUM coverage available under that policy, which was equal to the amount of the liability policy: $250,000 for each person, and $500,000 for each accident. Plaintiffs' application for insurance, signed by Ralph Purcell on or about May 13, 2004, contained the following provision: "I understand that I may purchase Supplementary Uninsured/Underinsured Motorists Coverage ("SUM"), and that I may select SUM limits in an amount equal to but not exceeding the limits of my bodily injury liability coverage."

Plaintiffs renewed the policy with Progressive every six months until the policy was cancelled in March 2011. As far as this Court can determine from the submissions of the parties, each renewal was automatic and there was no further discussion between the plaintiffs the Bruen defendants. The renewal declaration page, sent by Progressive to Plaintiffs every six months, set forth the above SUM limits of the policy. *See* 11 NYCRR § 60-2.3(a) (1) and (2)(providing that the declarations page of every new or renewal motor vehicle liability insurance policy issued, if SUM coverage is purchased, must state the SUM limits, the maximum amount payable under the SUM coverage and that the maximum payable shall be the policy's SUM limits reduced or offset

by motor vehicle bodily injury insurance policy or bond paymentsreceived from or on behalf of any negligent party involved in the accident).

Plaintiffs here allege that they requested that Defendant obtain a policy for SUM benefits "to the maximum amount permitted" but Bruenn failed to do so. They further allege that the day following the accident, they contacted Bruenn, who agreed to report their claim to Progressive. Plaintiffs subsequently sued the drivers of the other vehicles involved in the accident. During the pendency of that lawsuit, Plaintiffs discovered that Bruenn had never notified Progressive of the accident. By letter dated November 16, 2009, Progressive denied coverage based on Plaintiffs' failure to provide timely notice of the accident, noting that it first received notice of Plaintiffs' claim nearly three and one-half years after the accident.

The instant action against Bruenn was commenced on June 5, 2012. Defendant now moves for summary judgment and to dismiss the complaint in its entirety on the grounds that Plaintiffs' claims are barred by the statute of limitations; documentary evidence contradicts their allegations; and the claims fail to state a cause of action.

With respect to Plaintiffs' cause of action for breach of contract for Defendant's alleged failure to procure the SUM policy limits they requested, this claim is barred by the statute of limitations. Claims against insurance agents and brokers for failure to procure adequate insurance are governed by the six-year period for breach of contract actions. *See* CPLR § 213 (2); *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20, 725 N.Y.S.2d 592, 598 (2001). Here, the statue of limitations began to run on June 14, 2004, the date when the insurance policy was issued. *St. George Hotel Assocs. v. Shurkin*, 12 A.D.3d 359, 786 N.Y.S.2d 56 (2d Dep't 2004)(plaintiffs' cause of action to recover damages for breach of contract for

failure to procure sufficient insurance accrued when policy was procured and issued); *see also Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 599 N.Y.S.2d 501 (1993)(in contract actions, the cause of action accrues and the statute of limitations commences at breach even though no damage occurs until later and the "injured party may be ignorant of the existence of the wrong or injury"). The Court therefore finds that Plaintiffs' first cause of action for breach of contract, filed nearly ten years after it accrued, is barred under the applicable statute of limitations.

Moreover, the contractual terms with respect to SUM coverage in Plaintiffs' insurance policy are clear and unambiguous. The description pages of an insurance policy, once received, and particularly when received multiple times in connection with renewals, constitute "conclusive presumptive knowledge" of the terms and limitations of the policy. *Motor Parkway Enter., Inc. v. Loyd Keith Freidlander Partners, Ltd.*, 89 A.D.3d 1069, 1070, 933 N.Y.S.2d 586, 586 (2d Dep't 2011)(application for insurance signed by plaintiff's president and resulting policy conclusively disposed of claim that defendants procured insurance coverage in amount other than that requested by plaintiff); *Portnoy v. Allstate Indemn. Co.*, 82 A.D.3d 1196, 1198, 921 N.Y.S.2d 98 (2d Dep't 2011)(where insured received subject policy years prior to incident for which coverage was sought, and repeatedly renewed the policy as originally written, plaintiff is "conclusively presumed" to have read and assented to its terms); *Maple House Inc. v. Alfred F. Cypes & Co., Inc.*, 80 A.D.3d 672, 914 N.Y.S.2d 912 (2d Dep't 2011)(plaintiff "conclusively presumed to have read and assented to the policy's terms"); *Stilianudakis v Tower Ins. Co. of N.Y.*, 68 A.D.3d 973, 974, 889 N.Y.S.2d 854 (2d Dep't 2009)(to extent that the cause of action can be construed as one alleging negligent procurement of a policy, it must fail because "having

received the policy more than two years prior to the fire, the plaintiff is conclusively presumed to have read and assented to its terms"); *cf. American Bldg. Supply Corp. v. Petrocelli Group, Inc.* 19 N.Y.3d 730, 955 N.Y.S.2d 854, 858 (2012)(issues of fact exist as to whether plaintiff specifically requested insurance coverage for its employees in case of accidental injury and defendant, being aware of such request, failed to procure the requested coverage); *Gagliardi v. Preferred Mut. Ins. Co.*, 102 A.D.3d 741, 958 N.Y.S.2d 427 (2d Dep't 2013)("[w]here an insured makes an explicit request for a specific amount of coverage, the mere fact that the insured had ample time, yet failed to read the policy to discern the actual liability limit under the policy, is not a superseding cause precluding liability as a matter of law"). Here, Plaintiffs did not make a specific request for coverage, but simply requested the "maximum amount" of SUM coverage. Plaintiffs do not dispute that in the two years the policy was in effect prior to the accident, they never requested any changes to their bodily injury liability limits or SUM coverage.

Plaintiffs' second cause of action, sounding in negligence, alleges that after the date of the motor vehicle accident, Ralph Purcell contacted Defendant and requested that it notify Progressive of Plaintiffs' claim for SUM benefits. Plaintiffs further alleges that Defendant agreed to notify Progressive about the accident, but failed to do so, resulting in Progressive's denial of Plaintiffs claim for SUM benefits.

Under CPLR § 214 (4), the applicable statute of limitations for negligence is three years. Where a claim against an insurance agent or broker relating to the failure of insurance coverage sounds in tort, the injury is deemed to have occurred when the carrier disclaims liability. *City Store Gates Mfg. Corp. v Empire Rolling Steel Gates Corp.*, 113 A.D.3d 718, 979 N.Y.S.2d 606

(2d Dep't 2014)(accrual in tort actions occurs when all elements of tort can be alleged in complaint); *Lewiarz v. Travco Ins. Co.*, 82 A.D.3d 1464, 1466, 919 N.Y.S.2d 227, 229 (3d Dep't 2011)(since "damages are a necessary element of a negligence claim which must be pleaded and proven, plaintiffs could not have established any harm until their claim was denied"); *Lavandier v. Landmark Ins. Co.*, 26 A.D.3d 264, 810 N.Y.S.2d 45, 46 (1st Dep't 2006)(negligence claim against insurance broker accrued when insurance company disclaimed coverage). Under this analysis, Plaintiffs' negligence claim did not accrue until November 16, 2009, when Progressive disclaimed coverage. Inasmuch as Plaintiffs commenced this action on June 5, 2012, their negligence claim is timely.

In order to prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986)(citations omitted). Once this showing has been made, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" on which the party rests his or her claim, or must demonstrate an "acceptable excuse" for having failed to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1981); *see also Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. In this case, there is a triable issue of fact as to whether Defendant agreed to report Plaintiffs' claim to Progressive and whether Defendant was negligent in failing to do so. *Tully Constr. Co., Inc. v. Marsh USA, Inc.*, 65 A.D.3d 627, 628 (2d Dep't 2009)(insured raised triable issues of fact as to whether its insurance broker was negligent in failing to notify liability carrier of a claim and whether it breached an oral agreement with plaintiff to notify plaintiff's

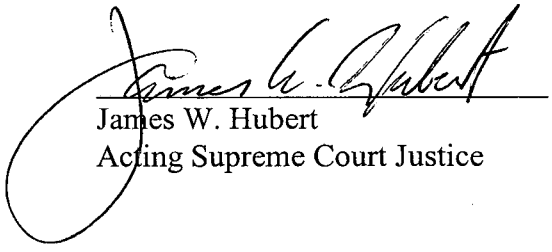
excess carriers when necessary); *also see Prince Seating Corp. v. QBE Ins. Co.*, 99 A.D.3d 881, 882, 952 N.Y.S.2d 606 (2d Dep't 2012).

However, Plaintiffs' third cause of action for loss of consortium is dismissed for failure to state a claim. A claim for loss of consortium or services is a derivative action and does not exist "independent of the injured spouse's right to maintain an action for injuries sustained." *Liff v. Schildkrout*, 49 N.Y.2d 622, 427 N.Y.S.2d 746, 749, 404 N.E.2d 1288, 1291 (1980). A spouse cannot recover for loss of consortium unless the defendant is found to be a tortfeasor in causing damages to the other spouse. *See Maidman v. Stagg*, 82 A.D.2d 299, 441 N.Y.S.2d 711, 713 (2d Dept. 1981). Here, Defendant is not the tortfeasor who caused Ralph Purcell's wife personal injury; Bruenn failed to Plaintiffs' insurance claim to Progressive. "The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more." *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 502, 293 N.Y.S.2d 305, 308 (1968). Defendant's actions were not the proximate cause of the damages for loss of consortium that Ralph Purcell seeks. Accordingly, this cause of action is dismissed. Accordingly it is hereby:

ORDERED, that Defendant's motion is granted only to the extent the Plaintiffs' first and third causes of action are dismissed. The Defendant's motion is denied as to the second cause of action.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 18, 2014



James W. Hubert
Acting Supreme Court Justice