Jonas v National Life Ins. Co.
2015 NY Slip Op 30673(U)
April 24, 2015
Supreme Court, New York County
Docket Number: 651733/2013
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

STANLEY JONAS and AXIOM MANAGEMENT PARTNERS, LLC,

Index No.: 651733/2013

DECISION & ORDER

Plaintiffs,

-against-

NATIONAL LIFE INSURANCE COMPANY; NATIONAL LIFE GROUP; RONALD HOUSLEY; CHRISTIAN BUZZANCA; EQUITY SERVICES, INC d/b/a INTEGRE BROKERAGE; INTEGRE, LLC; CERTAIN UNDERWRITERS at LLOYD'S OF LONDON subscribing to otherwise liable for Certificate Number 0721963, otherwise known as Risks PE 08/07 and PE 0620/09, including Syndicate 5000 and Syndicate 510 and DOES #1-20, including but not limited to KILN (UK) HOLDINGS LIMITED; R.J. KILN & CO., LTD; TOKIO MARINE and NICHIDO FIRE INSURANCE COMPANY; MILLEA HOLDINGS, INC.; AMLIN, PLC; WELLINGTON UNDERWRITING, PLC; BERKSHIRE HATHAWAY; CATLIN INSURANCE COMPANY, INC.; CATLIN SPECIALTY INSURANCE COMPANY; FIDELITY GUARANTEE AND INSURANCE COMPANY; HISCOX INSURANCE COMPANY, INC.; TRAVELERS CASUALTY AND SURETY COMPANY d/b/a TRAVELERS GROUP; PETERSEN INTERNATIONAL UNDERWRITERS; THOMAS PETERSEN Individually and d/b/a PETERSEN INTERNATIONAL INSURANCE BROKERS; and CARNEY & CARNEY, INC. d/b/a INTERNATIONAL RISK MANAGEMENT GROUP,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Before the court are six motions (Seq. Nos. 1-6) to dismiss the Amended Complaint (AC), which are consolidated for disposition. The motions were filed by defendant Christian Buzzanca (Seq. 001); defendants Certain Interested Underwriters at Lloyd's London (CIU), Petersen International Underwriters (PIU), Thomas Petersen (Petersen), and Carney & Carney,

Inc. d/b/a International Risk Management Group (IRMG) (Seq. 002); defendant Equity Services, Inc. (ESI) (Seq. 003); defendants National Life Insurance Company (NLIC) and National Life Group (NLG) (Seq. 004); defendant Ronald Housley (Seq. 005); and defendant Integre, LLC (Integre) (Seq. 006). Defendants' motions are granted in part and denied in part for the reasons that follow.[1]

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC and the documentary evidence.

A. The Parties

Plaintiff Stanley Jonas is the former principal executive officer of plaintiff Axiom Management Partners, LLC (Axiom), a brokerage firm, and non-party Dutch Book Partners LLC, a wholly owned subsidiary of Axiom. AC ¶ 3. Defendant NLIC is a foreign corporation that sells disability income and life insurance policies to New York residents (¶ 4), defendant ESI is an investment advisory firm (¶ 6), and defendant Integre, an insurance brokerage firm, is a subsidiary of NLIC. ¶ 7. Defendants Housley and Buzzanca are brokers employed by Integre, ESI, and NLIC. ¶ 8. The AC collectively refers to Housley, Buzzanca, NLIC and NLG as the "National Life Defendants." NLG is a merely a trade name of NLIC and thus is not amenable to suit. *See* Dkt. 43. Plaintiffs concede this point.

Defendant PIU is a disability insurance underwriter and an excess and surplus lines brokerage firm based in California. AC ¶ 10. PIU is licensed to place excess line insurance in

[1] Plaintiffs discontinued this action without prejudice against the following defendants: Berkshire Hathaway, Hiscox Insurance Company, Kiln (UK) Holdings Limited, R.J. Kiln & Co. Ltd., Tokio Marine and Nichido Fire Insurance Company, Millea Holdings, Inc., Amlin, PLC., Wellington Underwriting, PLC, Catlin Insurance Company, Inc., Catlin Specialty Insurance Company, and Travelers Casualty and Surety Company.

New York through Petersen Institutional Insurance Brokerage (PIIB). ¶ 12. Defendant Petersen is a Vice President of PIU, and assists in excess line disability placement. ¶ 11. He is licensed through PIIB as an excess line broker in New York (¶ 12) and does business as PIIB. Defendant CIU consists of syndicates operating under Lloyd's who assume percentages of risks on insurance policies. ¶ 14. CIU appointed PIU to act as its surplus line broker in New York to market and solicit insurance, negotiate disability insurance, and administer billing and premium payments. ¶ 15. Defendant IRMG is an insurance processor and collects data related to insurance claims for PIU. ¶ 16.

B. Jonas' Disability Insurance Applications

In 2007, Jonas approached defendant Housley, an insurance broker at Integre, to obtain salary protection, disability, and life insurance. ¶¶ 7, 8, 36. Housley and Jonas were former colleagues at FIMAT,[2] and Jonas believed Housley would be familiar with Jonas' coverage requirements based on their prior personal and professional relationship. *See* Jonas Aff., dated May 8, 2014 (Dkt. 123) ¶ 27. Jonas informed Housley that he sought coverage with the following specifications:

(1) an insurer rated "AM best A" or higher;

(2) benefits within the framework of New York State law;

(3) benefits for each month Jonas suffered more than a 50% income loss due to disability, for an annual total of $13.4 million;

(4) monthly benefits until the age of 80 for continued disability;

(5) a residual or supplemental disability benefit;

(6) an additional lump sum for employee recruitment expenses in the event of permanent disability;

[2] FIMAT is a registered broker dealer and futures commission merchant. Jonas worked at FIMAT from 1991 to 2005 as a Managing Director and co-headed its derivative products group. *See Jonas v Newedge Financial, Inc.*, Index No. 600585/2008 (Sup Ct, NY County).

(7) waiver of payment for disability policy and key person life insurance premiums in the event of disability; and

(8) salary protection for any excess coverage not provided under Jonas' Northwestern policy,[3] and an increase in salary protection to reflect Jonas' annual compensation of $13.4 million.

AC ¶ 38.

Housley secured key person life coverage for Jonas through NLIC, but was unable to obtain key person disability coverage. ¶ 39. Housley referred Jonas to Buzzanca, another broker at NLIC. ¶ 40. Buzzanca informed Jonas that he could not provide the scope of disability coverage Jonas requested and recommended that he seek such coverage from an excess line broker. ¶ 44. Housley and Buzzanca referred Jonas to the website of PIU, a brokerage firm specializing in procuring excess line coverage. *See* Dkt. 130. PIU places excess line policies with CIU. ¶ 44.

On March 23, 2007, PIU generated four disability insurance proposals for Housley to present to Jonas – a temporary total disability (Temporary Total Disability or TTD) policy paying monthly benefits, a permanent total disability (Permanent Total Disability or PTD) policy paying a lump sum benefit, and two policies covering TTD with periodic benefits and PTD with a lump sum benefit. *See* Dkt. 67. On April 10, 2007, PIU generated two additional proposals for Jonas, including a PTD lump sum benefit policy and a combination of both TTD and PTD coverage. *See* Dkt. 68. The proposals that included a "monthly benefit amount" and "lump sum benefit" required higher premium payments than proposals that included just a monthly benefit or lump sum payment.

[3] Jonas had salary protection coverage at FIMAT. When Jonas left FIMAT, his Northwestern policy was assigned to him. Jonas wanted salary protection in excess of the Northwestern policy to cover his allegedly higher annual compensation of $13.4 million at Axiom.

On April 9, 2007, Housley and Buzzanca assisted Jonas with filling out an application (the Initial Application) for CIU's Key Person High Limit Disability Policy (Key Person Policy), in which Jonas applied for the following coverage:

(1) accident and sickness Permanent Total Disability (PTD);

(2) a 12-month elimination period;[4]

(3) a $5 million principal sum benefit subject to the elimination period; and

(4) 100% of the loss of revenue associated with Jonas' disability, payable to Axiom, the policyholder and beneficiary.

AC ¶¶ 44, 49; *see* Dkt. 70 at 23-24 (Initial Application).[5] Jonas signed the Initial Application.

On April 10, 2007, PIU entered into a Producer Agreement with Housley. Pursuant to this agreement, PIU would pay Housley a percentage of the net premium if Jonas were to obtain a disability policy through PIU.[6] *See* Dkt. 66 at 6.

On May 9, 2007, after receipt of the Initial Application, PIU sent Integre a Disability Insurance Offer for Jonas (the Offer). The Offer states:

UNDERWRITERS HAVE AGREED TO THE FOLLOWING TERMS:

1. PLEASE READ THIS CAREFULLY TERMS AND CONDITIONS **MAY HAVE BEEN CHANGED** DURING UNDERWRITING.
2. ACCIDENT/SICKNESS **(PTD) PERSONAL DISABILITY COVERAGE**

[4] "Elimination Period means the number of consecutive days You [Jonas] are Totally Disabled ... the Elimination Period begins on the first day You [Jonas] are attended by a Physician who determines You to be Totally Disabled and/or Residually Disabled." *See* Dkt. 30.

[5] In the AC, Jonas claims that his Initial Application included a request for (1) $413,000 in monthly benefits in the event of his disability; (2) a 12-month elimination period; (3) a $5 million lump sum benefit subject to the elimination period; (4) and 100% of the loss of revenue associated with Jonas' disability, payable to Axiom. In the Initial Application, question 15, the "monthly benefit requested" was left blank.

[6] Net premiums is gross premiums (including deposits and assessments) written or received on insurance contracts during the taxable year less return premiums and premiums paid or incurred for reinsurance. 26 USC § 834 (c)(1). The agent's commission is deducted from the total amount received before losses are paid.

> 3. TERM OF INSURANCE: 3 YEARS
> 7. $5,000,000 LUMP SUM BENEFIT
> 8. 12 MONTH ELIMINATION PERIOD
> 16. THIS OFFER AND THE TERMS ARE ACCEPTABLE. PLEASE ISSUE COVERAGE. I FULLY UNDERSTAND THAT I WILL HAVE A **FREE 10 DAY LOOK AT THE CERTIFICATE THE DATE IT IS RECEIVED TO READ AND REVIEW ALL TERMS AND CONDITIONS** INCLUDING BUT NOT LIMITED TO EXCLUSIONS WHICH MAY BE DIFFERENT FROM ANY OF MY OTHER DISABILITY COVERAGES AND IF DISSATISFIED, I WILL BE ABLE TO GET A FULL CANCELLATION AND REFUND.

See Dkt. 69 (capitalization in original; emphasis added). Jonas signed the Offer, dated June 8, 2007 (the same day he wrote a check for the High Limit Personal Disability Policy, discussed below).[7]

In May 2007, Buzzanca allegedly advised Jonas that he could gain a tax benefit by changing the policy owner and beneficiary from Axiom to Jonas and by switching the Key Person Policy to a High Limit Personal Disability Policy (High Limit Policy). ¶ 52. Buzzanca allegedly told Jonas that the High Limit Policy was identical to the Key Person Policy in their coverage except, with a High Limit Policy, the benefits would be payable directly to the individual (as opposed to the company) and would not be not subject to tax withholding. *Id.* Jonas further alleges that he only agreed to amend his Initial Application to seek a High Limit Policy after Buzzanca confirmed that "such a change would in no way effect [sic] or modify the actual insurance coverage, its terms or the insured risk." *Id.*

After allegedly being provided with this advice, on May 14, 2007, Jonas filled out an "Application Amendment Endorsement" (the Endorsement) for the purpose of amending his application to be a High Limit Policy instead of a Key Person Policy. ¶ 55. The Endorsement provides:

---

[7] Jonas claims: "I believe the signatures on these documents [the Offer] are not genuine." *See* Dkt. 123. ¶ 71. He does not expressly deny that he signed the Offer.

APPLICATION AMENDMENT ENDORSEMENT
Certificate Issued To:
Owner: STANLEY R. JONAS
Insured: STANLEY R. JONAS

This certificate of insurance to which this endorsement is attached is amended as follows:

Question #15: PTD Accident & Sickness Permanent Total Disability.
Key/Person requested hereby changed and corrected to Personal Disability.

See Dkt. 30 at 17 (capitalization in original; emphasis added). The Application Amendment Endorsement was signed by Jonas on June 8, 2007 and became effective on June 13, 2007.[8] *See* Dkt. 30 at 17. The Endorsement was sent to Petersen who, in turn, provided it to CIU, who wrote a High Limit Policy to include the Endorsement and sent the complete policy (the Certificate) back to Petersen.

On June 8, 2007, Jonas met with Housley and Buzzanca to seek additional assurances about the scope of coverage under a High Limit Policy. *See* Dkt. 123, ¶ 44. Jonas insisted on these assurances before he was willing to make his first premium payment and commence coverage under the High Limit Policy. *See id.* Housley and Buzzanca reassured Jonas that his business and family would be fully covered if he were to become imminently disabled. *See id.* Jonas then asked Housley and Buzzanca to provide him with a copy of his High Limit Policy so he and his wife "would have access to it should he become disabled." *Id.* ¶ 45. Jonas alleges that Housley and Buzzanca informed him that underwriters never provide full copies of their policies. *Id.* Jonas also requested that Housley and Buzzanca confirm his coverage for the High Limit Policy with Petersen. Jonas, with Housley and Buzzanca present and Petersen on the phone, reviewed descriptions of different insurance coverage from PIU's website. *See* Dkt. 111;

[8] Jonas contends that this document was forged ("The June 8, 2007 document bears a clearly cut and pasted signature and date…[and] also bears reference to Certificate No: 0721963 whereas the May 14, 2007 was blank in that regard."). AC ¶ 56.

Dkt. 123, ¶¶ 46, 49. Although Jonas states he asked Buzzanca, Housley, and Petersen to explain the meaning of "High Limit Disability Declaration of Insurance" (*see* Dkt. 123, ¶ 50), he does not provide the answer he received. Jonas wrote a check, dated June 8, 2007, for the first premium for the High Limit Policy, allegedly believing that the policy coverage was the same as under the Key Person Policy. *See* Dkt. 123, ¶¶ 41-42. He also signed the Offer (*see* Dkt. 69) and subsequently wrote another check, dated July 25, 2007, to PIU to satisfy the missing portion of the first premium installment. *See* Dkt. 74.

C. Jonas' Life Insurance Coverage

On April 9, 2007, Jonas submitted to NLIC a life insurance application for the Term Life Policy. *See* Dkt. 49 at 20-25. Jonas did not select the waiver of premium benefit option entitled "Additional Benefits and Amount," under Section 5(a) of the Term Life Application. *Id.* at 20. On June 13, 2007, NLIC issued Jonas the Term Life Policy. *Id.* at 3-18.

Without confirming which defendants he was referring to, Jonas alleges that the National Life Defendants confirmed that his disability policy would cover his life insurance premiums if he were to become disabled. AC ¶ 57. Jonas paid a one-year premium in advance on his Term Life Policy. The Term Life Policy does not contain a waiver of premium benefit rider. On June 18, 2007, NLIC forwarded to Jonas an amendment for his life insurance application to incorporate reference to the High Limit Policy. ¶ 59 ("Petersen International (Lloyds of London) $5,000,000 yearly benefit."). *See* Dkt. 49 at 19. Jonas signed the amendment, dated July 25, 2007.

D. Jonas' Disability Policy

On June 20, 2007, PIU sent Integre a "Notice of Excess Line Placement" (the Notice), for Jonas to sign and return. On July 27, 2007, PIU received a returned copy of the Notice with

Jonas' signature. *See* Dkt. 71. Jonas alleges that PIU "confirmed to Jonas, in writing that he had obtained the coverage he sought, namely Key Person High Limit Disability Insurance for 75% of Jonas' annual earned income."[9] ¶ 66. On July 2, 2007, Petersen filed an affidavit dated June 28, 2007 (the Petersen Affidavit) and a document titled "High Limit Disability Declaration of Insurance" (the actual High Limit Policy, defined earlier as the Certificate) with the Excess Lines Association of New York (ELANY). ¶¶ 60, 61; *See* Dkt. 72. The Certificate provides:

> We, [CIU], in consideration of the statements made in Your [Jonas'] application for this insurance and the timely payment of premiums, agree to insure You [Jonas] against the perils shown in the Schedule of Benefits, subject to the terms and provisions of this certificate, from the effective date to the expiry date. We will, subject to the terms of this certificate, pay the benefits shown in the Schedule of Benefits. This **certificate is a legal contract between You [Jonas] and us [CIU].**

AC ¶ 63; *See* Dkt. 134 (emphasis added).

Jonas claims that until he (allegedly) became disabled, he had only received the Notice, the Petersen Affidavit, and an incomplete Certificate. He contends that the Certificate was not the entire disability policy and did not include a schedule of benefits or other documentation limiting his coverage or benefits. ¶¶ 64-65 & 113-115.

On July 12, 2007, PIU sent a complete copy of the Certificate to Integre by Federal Express Mail. *See* Dkt. 70 (FedEx receipt). The Certificate provides:

> SECTION 1:
>
> Total Disability Benefits Coverage (Not Included)

[9] The written confirmation Jonas refers to is a code in the Petersen Affidavit. According to plaintiffs, the code "7100" denotes excess liability/salary protection coverage. Plaintiffs claim that the Petersen Affidavit and the Notice establish that Jonas had salary protection insurance, a type of coverage which, according to plaintiffs, cannot provide for a single lump sum benefit under New York Insurance Law § 1113(a)(31). According to Jonas, if "7100" cannot provide solely for a single lump sum benefit, then the insurance must be for a combination of periodic and lump sum benefits. This argument is wrong because it inaccurately interprets New York Insurance Law §1113(a)(31), which allows salary protection coverage to be for a single lump sum so long as the sum does not exceed 75% of an individual's annual earned income (see the discussion section in this decision for a more detailed analysis).

SECTION 2:

Permanent Total Disability Benefits Coverage

A) Principal Sum Amount	$5,000,000 – PERSONAL
B) Elimination Period	12 MONTHS
C) Optional War Rider	NOT INCLUDED

DEFINITIONS

THE TERMS:

Elimination Period means the number of consecutive days You are Totally Disabled or Residually Disabled if the Residual Disability Rider was purchased, before a benefit is payable. The Elimination Period begins on the first day You are attended by a Physician who determines You to be Totally Disabled and/or Residually Disabled.

Permanent Total Disability means that in the opinion of Competent Medical Authority You will not recover from the effect of a Sickness or Injury to the extent that You will **ever** be able to resume the Material and Substantial duties of Your occupation.

Principal Sum means the **lump sum** benefit payable in the event of a loss that stipulates a Principal Sum amount.

BENEFIT PROVISIONS

SECTION 1
ACCIDENT AND SICKNESS TOTAL DISABILITY COVERAGE

Total Disability:
We will pay **Monthly Benefits** up to the amount shown in **Schedule of Benefits** during periods of **Total Disability**. We will begin paying such benefits following the **Elimination Period**....

We will pay the **Principal Sum Benefit** shown in the Schedule of Benefits if **Competent Medical Authority** determines you to be **Permanently Totally Disabled** as to being able to perform the Substantial and Material Duties of Your Occupation.

Benefits will be paid if it is determined by the Physician providing Your Regular Care that You are Permanently Totally Disabled. We reserve the right to have You

examined by a Physician of Our choice. Should Your Physician and Our Physician not be able to agree that You are Totally Disabled, Your Physician and Our Physician shall name a **third Physician to make a decision on the matter which shall be final and binding**.

GENERAL PROVISIONS

PREMIUMS: Premiums must be paid in advance and are fully earned to the expiry date of this certificate. You are responsible for the full premium payment due between the effective date and the expiry date. If the premium is being paid in any mode other than a single premium, premium payments are subject to a **grace period** when due.

GRACE PERIOD: A grace period may apply to any premium payments made in any mode other than a single premium. Premium payments after the initial premium payment may be paid within the grace period. The grace period will last for **31 days** after the due date of the premium payment. During this time, the certificate will remain in force. If premium payments are not made by the end of the grace period, this certificate will immediately cease to be in force.

NOTICES: All notices, proofs and other communication must be sent to the Coverholder:

PETERSEN INTERNATIONAL UNDERWRITERS

GRIEVANCE PROCEDURES:

4. **Legal Action**. No legal action may be brought to recover under the insurance described in this certificate until **after the response of a Formal Review**. No action may be brought **more than one year after the date of the original claim or administrative decision**. Legal Action **shall not take place prior to a Formal Review**.

See Dkt. 30 at 4-8 & 10-12 (emphasis added). Jonas claims the Petersen Defendants never provided him with a copy of the May 14, 2007 Endorsement or the complete Certificate. AC ¶ 55. On July 27, 2007, PIU received the Notice signed by Jonas. *See* Dkt. 71.

E. Jonas' Claim Under the Permanent Disability Policy

In January 2008, Jonas suffered from pneumonia, followed by shingles, which resulted in Post Herpetic Neuropathy (PHN) and necessitated pain medication. AC ¶ 75. In March 2008,

Jonas notified Housley of his condition and loss of personal and business income. ¶ 76. Housley and Buzzanca subsequently informed Jonas that he could not file a claim until after the end of the first year of coverage, pursuant to the policy's elimination period.[10] ¶ 79.

On June 20, 2008, pursuant to the instructions of the National Life Defendants, Jonas provided PIU with a "Proof of Loss" letter that he was suffering from illness, was under the care of a physician, was unable to perform his occupational duties, was disabled, and was providing additional notice of his disability for purposes of his claim under the terms of the Certificate (the First Claim). *See* Dkt. 75. He requested "monthly benefits" under the Certificate. AC ¶ 83.

On July 21, 2008, defendant IRMG sent a letter to Jonas advising him that it was authorized by CIU to handle his disability claim. IRMG requested additional information and documentation from Jonas.[11] ¶ 84. Jonas complied with IRMG's requests and submitted a completed statement of claim, which included statements from his physician, Dr. Kraft, attesting to Jonas' total disability (from January 16, 2008), and an explanation of duties that Jonas could not perform at Axiom. ¶ 86. On August 14, 2008, IRMG acknowledged receipt of the statement of claim and on September 11, 2008, informed Jonas that it had received his complete medical file. ¶ 87. Jonas was advised that his claims were still being processed on November 6, 2008, December 3, 2008, and January 29, 2009. ¶ 94.

---

[10] Jonas alleges that the National Life and the Petersen Defendants had represented to Jonas that the twelve month elimination period meant that payment of the lump sum benefits would be deferred for 12 months following the onset of disability, not that Jonas had to wait a year to file a claim for disability. ¶ 77.

[11] Jonas alleges that PIU's failure to respond until July 21, 2008 violates New York Insurance Law. As discussed below, under 11 NYCCR 216, if a carrier does not agree to pay or deny a claim within 15 days, it must assert in writing that it requires additional time to investigate the matter and provide an explanation for the requested additional time.

On November 15, 2008, the National Life Defendants and CIU advised Jonas that his disability insurance had lapsed. ¶ 96. In December 2008, Dr. Freedman, CIU's physician, reviewed Jonas' records and concluded that he was not completely disabled. ¶ 100. Jonas was not informed that his file was under medical review until December 2009, a year after Dr. Freedman's review was conducted. ¶ 101. Jonas alleges that Dr. Freedman never personally examined him or contacted his physicians and did not reference integral tasks that Jonas was unable to perform as head of Axiom in the review. *Id.*

On June 4, 2009, Dr. Mintz, CIU's physician, met with Jonas to review his disability. Jonas alleges that Dr. Mintz performed a cursory examination and made no real effort to investigate his disability or how it had affected his job duties. ¶ 102. Furthermore, Jonas also claims that Dr. Mintz's review violated the policy. Under the [Benefit Provisions] of the Certificate, if there was disagreement between CIU and Jonas' physicians' disability determination, the two physicians were to consult and select a third physician to assess Jonas' disability. *See* Dkt. 30 at 8. That assessment would be binding. ¶ 101. No third physician was selected.

On June 29, 2009, Jonas ruptured his quadriceps tendon and underwent an operation. ¶¶ 29, 105. He subsequently filed another insurance claim (the Second Claim). On June 29, 2009, defendant Wilson Elser Moskowitz Edelman & Dicker LLP (Wilson Elser), a law firm hired to serve as CIU's claims examiner, advised Jonas that his First Claim was denied.[12] ¶ 107.

In April 2010, Wilson Elser delivered to Jonas a copy of his Certificate. Jonas alleges that this policy was materially different from the one filed with ELANY. ¶ 112. Specifically, he

[12] Jonas claims that this delay was grossly untimely, since it was issued 9 months after defendants acknowledged receipt of Jonas' records.

contends that the new document included a page with Harold Petersen's signature dated June 20, 2007, a copy of Jonas' signature dated June 20, 2007, and a document entitled "Schedule of Benefits" with Harold Petersen's signature dated June 20, 2007, none of which, Jonas claims, had ever been provided to him. ¶ 114. Wilson Elser further acknowledged Jonas' quadriceps injury and explained that the injury would be addressed separately. Jonas' Second Claim was never addressed. Wilson Elser explained to Jonas that the Certificate limits benefits to a onetime $5 million payment rather than a $5 million per year lump sum benefit plus monthly salary protection payments. ¶ 117. Jonas claims that Housley, Buzzanca, and the Petersen Defendants failed to address how they determined that a single lump sum payment of $5 million would amply protect a business with revenues of $13.4 million per annum. Aff, Dkt. 123, ¶ 37. Jonas contends that excess salary protection cannot be limited to a lump sum payment, and thus, the $5 million lump sum payment was incompatible with excess line coverage in New York. AC ¶ 61.

On June 11, 2009, CIU filed an action against Jonas seeking a declaratory judgment concerning "the rights and obligations under the Policy." *See* Dkt. 136. The complaint alleges that Jonas engaged in insurance fraud. See *id.* The complaint was never served on Jonas (Aff, Dkt. 123. ¶ 60), and Jonas claims to have been denied employment for a position that would pay an annual salary of $300,000 plus a share of all profits derived from his trading strategies as a result of the complaint filed, which suggested that he engaged in insurance fraud. *Id.*, ¶ 62.

The AC alleges that defendants wrongfully denied Jonas' claims under the disability policy and that their failure to make a timely determination of liability and benefits caused Axiom to go out of business. The AC, filed on October 21, 2013, asserts eight causes of action numbered here as in the complaint: (1) declaratory judgment (i.e., declaring their rights, reformation of the policy); (2) breach of contract (failure to pay under the Certificate and failure

to procure sufficient coverage); (3) anticipatory breach of contract (lack of intent to pay under the Certificate); (4) fraud in the inducement; (5) fraud; (6) prima facie tort (illegal evasion of an insurance claim); (7) breach of fiduciary duty; and (8) violation of General Business Law (GBL) § 349. All eight causes of action are asserted against all defendants.

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 NY3d 491 (2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

A. Contract, Fraud, Fiduciary Duty and Declaratory Judgment Claims Against CIU

1. Breach of Contract & Anticipatory Breach of Contract

Plaintiffs assert a breach of contract claim against CIU, seeking coverage under the Certificate. To plead a claim for breach of contract, a plaintiff must allege the existence of a contract, performance under the contract, defendant's breach of the contract, and resulting damages. *US Bank Nat'l Ass'n v Lieberman*, 98 AD3d 422, 423 (1st Dept 2012), citing *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 (2d Dept 2010).

Jonas does not deny that the Certificate only provides coverage for Permanent Total Disability. *See* Dkt. 30 at 5. As defined in the contract, "Permanent Total Disability means that in the opinion of Competent Medical Authority You [Jonas] will not recover from the effect of a Sickness or Injury to the extent that You [Jonas] will ever be able to resume the Material and Substantial duties of Your occupation." Jonas does not allege that he suffers from a Permanent Total Disability, as defined by the Certificate. Indeed, Jonas admits he had the capacity to resume his occupation. *See* Dkt. 123 at 21 ("The position would have compensated me at a rate of $300,000 per year plus a share of all profits derived from my trading strategies."). Jonas' concession that he does not suffer from Permanent Total Disability precludes coverage under the Certificate.

Plaintiffs also assert anticipatory breach of contract against CIU.[13] Plaintiffs contend that CIU never intended to pay under the Certificate. The doctrine of anticipatory repudiation entitles the nonrepudiating party to immediately claim damages for a breach of contract where there is a renunciation of the contract in which the repudiating party has indicated an unqualified and clear

[13] Plaintiffs assert an anticipatory breach of contract claim against all defendants. However, the National Life Defendants, Integre, ESI, and IRMG were not a party to the Certificate, and thus, could not repudiate the Certificate.

refusal to perform with respect to the entire contract. *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266 (1st Dept 1995); *De Lorenzo v Bac Agency Inc.*, 256 AD2d 906, 907 (3d Dept 1998). "An anticipatory breach of a contract precedes the time prescribed for its performance, or at least the time when tender of performance has been proffered. If it does not precede the time of performance or actual tender, it is not anticipatory." *Wester v Casein Co. of Am.*, 206 NY 506, 514 (1912). Here, there is no showing in the AC of a repudiation or abandonment of the contract by CIU or the Petersen Defendants.[14] While CIU and the Petersen Defendants may have violated New York Insurance Law – for failure to make a timely determination of Jonas' claim – they did not breach the contract with plaintiffs, since Jonas did not suffer from PTD.

2. Fraud & Fraud in the Inducement

Jonas' claims he was defrauded. He claims CIU committed fraud by selling insurance without intending to ever pay benefits thereunder. "The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Pursuant to CPLR 3016(b), "the circumstances constituting the wrong shall be stated in detail." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008).

At the outset, the court notes that the AC suffers from serious specificity deficiencies, particular due to plaintiffs' failure to identify which defendant made each of the alleged

[14] CIU's refusal to pay did not constitute a repudiation since it had no obligation to pay unless Jonas suffered a permanent loss covered under the policy. Similarly, CIU's or PIU's failure to timely examine Jonas' disability had no effect on his disability. The delay did not change Jonas' injury status – if Jonas had suffered from a PTD from the onset, he would have suffered from that same disability a few months later, entitling him to a lump sum payment under the Certificate.

fraudulent misrepresentations. Regardless, plaintiffs' claim that defendants did not intend to perform their contractual obligations is not a viable cause of action for fraud. *MP Innovations, Inc. v Atlantic Horizon Int'l, Inc.*, 72 AD3d 571, 573 (1st Dept 2010); *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988). To state that "a contracting party intends when he enters into an agreement not to be bound by it is not to state 'fraud' in an actionable area, but to state a willingness to risk paying damages for breach of contract." *Briefstein v P.J. Rotondo Const. Co.*, 8 AD2d 349, 351 (1st Dept 1959). The claim, essentially, is duplicative of the contract claim. *Beta Holdings, Inc. v Goldsmith*, 120 AD3d 1022, 1022-23 (1st Dept 2014); *see Makuch v N.Y. Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111 (4th Dept 2004).

Plaintiffs also failed to adequately allege the element of scienter by simply stating that "defendants had a pecuniary incentive to maximize premium income." *See* AC ¶ 178. The "desire for higher compensation ... is found in virtually all commercial transactions, making it an ill-suited motive from which to draw an inference of intent to defraud." *Zutty v Rye Select Broad Mkt. Prime Fund, L.P.*, 33 Misc3d 1226[A]*11 (Sup Ct, New York County 2011), citing *Tech. Support Servs., Inc. v Int'l. Bus. Machs. Corp.*, 18 Misc3d 1106[A], at *30 (Sup Ct, Westchester County 2007). CIU's intent to earn premium income does not demonstrate its intent to defraud plaintiffs absent other facts. The fraud claims, therefore, are dismissed against CIU.

3. Declaratory Judgment

Plaintiffs, *inter alia*, seek a declaratory judgment as a mechanism for reforming the Certificate from a High Limit Policy to a Key Man Policy. New York courts have sharply limited the remedy of reformation both procedurally and substantively to prevent the false claim of a different, more advantageous contract. To reform a contract based on mistake, a plaintiff must establish that the contract was executed under a mutual mistake or a unilateral mistake

induced by the defendant's fraudulent misrepresentation. *Chimart Associates v Paul*, 66 NY2d 570, 574 (1986); *Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 (1st Dept 1998). "[T]he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 (1st Dept 2007).

Jonas asserts a unilateral mistake based on his misunderstanding of the scope of coverage under the Certificate. Again, and as discussed earlier, it is undisputed that the Certificate unambiguously covers only PTD, a defined type of disability which Jonas does not claim. A signatory to a contract has the responsibility to read and understand the contract he signs and is bound by the terms that are in the executed contract. *Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785 (2d Dept 2009) (noting that "[a] party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents") (internal quotations marks omitted). Jonas had the opportunity to review the Initial Application, the Application Amendment Endorsement, and the Offer, as reflected by his signature on each document. Thus, he is presumed to have read the High Limit Policy. Regardless, as discussed earlier, even assuming plaintiffs could maintain a unilateral mistake claim, they do not have a viable fraud claim against CIU and, thus, cannot reform the contract.

4. Breach of Fiduciary Duty

Plaintiffs allege CIU breached its fiduciary duty to procure disability insurance sufficient to meet plaintiffs' needs. As recognized in *Murphy v Kuhn*, 90 NY2d 266, 270 (1997), "[g]enerally, the law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or

inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client." The *Murphy* Court went on to note that "[i]nsurance agents and brokers are not personal financial counselors and risk managers," since [i]nsureds are in a better position to know their personal assets and abilities to protect themselves ... unless the latter are informed and asked to advise and act." *Id.* at 273. Instead, "the relationship between the parties to a contract of insurance is strictly contractual in nature. No special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer; the relationship is legal rather than equitable." *Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 (1st Dept 2001).

CIU had limited, indirect communication with Jonas. Jonas filled out his disability application with Housley and Buzzanca, who sent it to Petersen. Petersen then sent the Initial Application and Application Amendment Endorsement to CIU, who wrote a High Limit Policy and sent the Certificate back to Petersen. CIU did not advise Jonas about disability coverage. Its relationship with Jonas was strictly contractual. Therefore, CIU owed no fiduciary duty to Jonas. Nor is plaintiffs' claim that CIU is vicariously liable for the Petersen Defendants' breach of fiduciary duty viable. As discussed below, this claim fails because plaintiffs have not stated a claim for breach of fiduciary duty against the Petersen Defendants.

B. Contract, Fraud, Fiduciary Duty and Declaratory Judgment Claims Against Housley, Buzzanca & the Petersen Defendants

1. Breach of Contract & Breach of Fiduciary Duty

Plaintiffs argue that the Housley, Buzzanca, and the Petersen Defendants breached their contractual and fiduciary duties by failing to procure the coverage requested by Jonas.

a. Housley & Buzzanca

As noted above, insurance agents do "have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so." *Murphy*, 90 NY2d 270. "To set forth a case for breach of contract or negligence against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy." *Am. Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 (2012). "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage." *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158 (2006); *Hersch v DeWitt Stern Grp., Inc.*, 43 AD3d 644, 647 (1st Dept 2007); *Radford v Peerless Ins. Co.*, 93 AD3d 1354, 1355 (4th Dept 2012); *Empire Indus. Corp. v Ins. Cos. of N. Am.*, 226 AD2d 580, 581 (2d Dept 1996).

Jonas alleges that he gave Housley and Buzzanca a specific list of coverage requirements that included "benefits for each month Jonas suffered more than a 50% income loss due to disability, for an annual total of $13.4 million." AC ¶ 38. Housley and Buzzanca told Jonas that they were unable to obtain a disability insurance policy to meet his specifications and advised him to solicit an excess line broker to obtain coverage to meet his needs. ¶ 39. At this stage, Housley and Buzzanca fulfilled their common-law duty to "inform the client of the inability to [procure the requested coverage]" and had no "continuing duty to advise, guide, or direct a client to obtain additional coverage." *Murphy*, 90 NY2d at 273.

Nevertheless, "particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law." *Id.* at 272. In the absence of common law liability, a broker can still be liable for failure to obtain additional coverage if a special relationship exists. *See Voss v Netherlands Ins. Co.*, 22 NY3d 728, 735 (2014). Special

relationships will give rise to a broker-client fiduciary relationship when (1) the agent receives compensation for consultation apart from payment of premiums, (2) there is interaction between the agent and the insured regarding specific questions of coverage, or (3) there existed an extended period of dealings between the agent and the insured. *Id.*

Here, Jonas alleges that Housley and Buzzanca helped him fill out the Initial Application and told him that he could get a tax benefit by switching from the Key Person Policy to the High Limit Policy. AC ¶ 55. Housley and Buzzanca spoke with Petersen on the phone to review documents and information on PIU's website and reassured Jonas that his business and family would be fully covered if he were to become imminently disabled. *See* Dkt. 111; Dkt. 123, ¶¶ 46, 49. Housley entered into a Producer Agreement with PIU where he received a commission, a percentage of the net premium for Jonas' Certificate. *See* Dkt. 66. After Jonas suffered from PHN and notified Housley of his condition and loss of personal and business income, Housley and Buzzanca informed Jonas that he could not file a claim until after the end of the first year of coverage, pursuant to the policy's elimination period. AC ¶ 79.

Jonas claims that Housley and Buzzanca had a special relationship with plaintiffs and failed to obtain sufficient coverage to meet Jonas' requirements. ("Buzzanca fails to address in any way how he determined that an annual lump sum payment of $5 million, much less a single lump sum payment of $5 million, would amply protect business with revenue of $13.4 million per annum."). *See* Dkt. 118. Housley and Buzzanca contend that they were not plaintiffs' brokers and had no duty to advise Jonas to obtain additional coverage because they did not sign a contract with plaintiffs to procure disability insurance, their names do not appear in the documents attached to the Petersen affidavit, and they are not listed as the broker of record on the Certificate. Housley and Buzzanca also claim that there was no reasonable reliance on their

expertise to procure disability insurance. Housley and Buzzanca argue they specifically referred Jonas to the PIU website and Jonas could not have relied on their expertise in excess line placement for disability coverage. Housley further claims that Jonas is a sophisticated party – the head of a broker-dealer – and could not have reasonable relied on Housley to procure additional coverage.[15] *See* Dkt. 123, ¶ 28. Moreover, Housley and Buzzanca claim that Jonas is presumed to have understood and assented to the Certificate and, accordingly, has no action against his insurance brokers for breach of contract or fiduciary duty even if the coverage was not entirely in accord with what he had requested. *See Busker on The Roof P'ship Co. v Warrington*, 283 AD2d 376, 377 (1st Dept 2001).[16]

Plaintiffs refute this argument by correctly arguing that while Jonas signed the Initial Application and Offer, Housley and Buzzanca still owed a fiduciary duty to plaintiffs. "While it is certainly the better practice for an insured to read its policy, an insured should have a right to look to the expertise of its broker with respect to insurance matters." *Am. Bldg.*, 19 NY3d at 736, citing *Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 82 (1st Dept 2002). "The failure to read the policy, at most, may give rise to a defense of comparative negligence but

---

[15] "Housley, Buzzanca, despite knowing exactly what coverage was required, never told me that they could not obtain the necessary coverage, but directly to the contrary, asserted not only that they could obtain such coverage, and took credit for legalizing such coverage in New York State, but demanded payment for the same, and asserted to me upon payment that I was covered sufficiently to provide full coverage for all the protections sought, namely my Key Person High Limit/Salary Protection Disability Insurance Policy." *See* Dkt. 123 ¶ 35.

[16] Jonas signed the Initial Application for Permanent Total Disability, subsequently reviewed that his policy provided for Permanent Total Disability, and signed the Offer. *See* Dkt. 69 ("Underwriters Have Agreed To The Following Terms: Accident/Sickness (PTD) Personal Total Disability Coverage"). "[H]e who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them." *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 (1920).

does not bar, altogether, an action against a broker." *Id.* Under the circumstances alleged, while plaintiffs' reliance on the advice supposedly provided by Housley and Buzzanca may not have been reasonable, this determination is predicated on myriad questions of fact, such as the specifics of the coverage Jonas requested and the context of the advice provided to him. Since the AC and affidavits do not clearly set forth the advice and the circumstances and timing of the alleged advice, plaintiffs are given leave to replead this cause of action as against Housley and Buzzanca.

b. The Petersen Defendants

Plaintiffs also allege that the Petersen Defendants breached their contractual and fiduciary duties by failing to procure disability insurance sufficient to meet plaintiffs' needs. Jonas claims he expected the Petersen Defendants to determine an adequate level of coverage to protect his and Axiom's $13.4 million annual revenue.

As noted earlier, "[t]o set forth a case for breach of contract or negligence against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy." *Am. Bldg.*, 19 NY3d at 735. Jonas alleges he made specific coverage requests to Housley and Buzzanca, who then relayed them to the Petersen Defendants, who, in turn, generated multiple policy proposals for Jonas and Axiom. Plaintiffs contend that without the specific information about his coverage requests, PIU would not have had sufficient detail to generate these proposals. *See* Dkt. 67. It is unclear, however, what specific information Housley actually relayed to the Petersen Defendants. For instance, Jonas' Initial Application, which he signed, reflects a $5 million annual salary, not a $13.4 million annual salary. Jonas overlooks that the Petersen Defendants offered varying types of coverage at different prices. Jonas paid a lower premium for Permanent Total Disability with

lump sum benefits than he would have paid for Temporary Total Disability with lump sum and monthly benefits. Consequently, regardless of the specific information relayed to the Petersen Defendants, Jonas does not allege that the Petersen Defendants provided advice. Rather, the Peterson Defendants provided Jonas with numerous types of coverage options at various price points. Jonas made the decision to purchase a Permanent Total Disability policy, which was less expensive than a Temporary Total Disability policy. In seeking coverage beyond Permanent Total Disability in this action, Jonas seeks broader and more expensive coverage than he chose to purchase from the Peterson Defendants at the time.

In addition, as noted earlier, purchasing insurance coverage from a broker does not give rise to fiduciary duties absent a special relationship. *Murphy,* 90 NY2d at 270. In contrast to Housley and Buzzanca, the Petersen Defendants did not have a special relationship with plaintiffs. Jonas did not pay the Petersen Defendants additional money. Jonas did not directly ask the Petersen Defendants specific questions about coverage. Rather, Jonas had Buzzanca call Petersen. Jonas reviewed PIU's website and allegedly asked Petersen the meaning of "High Limit Disability Declaration of Insurance." *See* Dkt. 123, ¶ 50. Jonas does not set forth the answer he received. Throughout the AC, Jonas does not state the advice Petersen Defendants provided to him, or the type of coverage the Petersen Defendants recommended. Finally, Jonas had no extended dealings with the Petersen Defendants. In sum, these allegations are insufficient to state a cause of action for breach of fiduciary duty against the Petersen Defendants, and plaintiffs claim for breach of contract and breach of fiduciary duty is dismissed against them.

2. Fraud & Fraud in the Inducement

a. Housley & Buzzanca

Plaintiffs allege that Housley and Buzzanca made material misrepresentations to induce Jonas to purchase the Certificate. Assuming the fraud claim falls within the statute of limitations, the fraud alleged is not a viable claim.[17] To maintain a claim for fraudulent inducement, a complaint must allege "a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged." *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011), citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996).

Plaintiffs allege that Housley and Buzzanca intentionally misrepresented coverage under the Certificate to obtain a percentage of the net premium for Jonas' disability policy pursuant to the Producer Agreement. *See* Dkt. 66. Jonas claims that he believed the policy provided for Temporary Total Disability with periodic payments instead of Permanent Total Disability with a lump sum payment. Jonas allegedly asked what would happen "if tomorrow I was struck down by lightning both my business and my family would be provided for"; Housley and Buzzanca said "yes." Jonas interpreted Housley and Buzzanca's statement to reflect coverage for temporary total disability. However, the example refutes any alleged misrepresentation. If Jonas were to get struck by lightning, he likely would have qualified for Permanent Total Disability and would be compensated under the Certificate.[18] Even if "defendants had a pecuniary

---

[17] A cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period. *Kaufman v Cohen*, 307 AD2d 113, 119 (1st Dept 2003), citing *Goldberg v Schuman*, 289 AD2d 8 (1st Dept 2001); *see Unibell Anesthesia, P.C. v Guardian Life Ins. Co.*, 239 AD2d 248, 658 (1st Dept 1997) (court correctly applied six-year limitations period, instead of three-year period, to breach of fiduciary duty claim where complaint also made out cause of action for fraud by insurer). Plaintiffs' claim for breach of fiduciary falls within the six-year statute of limitations and is timely.

[18] It is also important to note that Housley and Buzzanca procured Jonas' life insurance policy in conjunction with assisting in the placement of the Certificate. Jonas may have conflated Housley and Buzzanca's statements for the Term Life Policy with the Certificate.

incentive to maximize premium income" [AC ¶ 178], this claim fails because plaintiffs have not properly pleaded scienter, the requisite intent to defraud. *SSR II, LLC.*, 37 Misc3d 1204(A), at *5-7 (Sup Ct, NY County 2012). As mentioned earlier, the desire to earn higher compensation is not a valid basis to infer scienter because the "desire for higher compensation ... is found in virtually all commercial transactions, making it an ill-suited motive from which to draw an inference of intent to defraud." *Id.*, citing *Tech. Support Servs., Inc.*, 18 Misc3d 1106[A] at *30.

Jonas also alleges that Housley and Buzzanca made a series of misrepresentations with the intent to deceive him and induce plaintiffs to purchase the Certificate. For instance, when Jonas asked Housley and Buzzanca to provide him with a copy of his High Limit Policy they informed him that underwriters never provide full copies of their policies. ¶ 45. In addition, Housley and Buzzanca allegedly misrepresented that Jonas could not file a claim for loss of personal and business income due to an injury until after the end of the first year of coverage, pursuant to the elimination period in the policy. ¶ 79. Assuming Housley and Buzzanca made such false statements with the intent to deceive, Jonas could not have reasonably relied on the alleged misrepresentations since he read and signed the Offer.

As previously noted, reasonable reliance on the alleged misrepresentations is a necessary element of both fraudulent and negligent misrepresentation. *See Hoffend & Sons, Inc.*, 19 AD3d at 1058. Jonas was on notice that he was to receive the entire Certificate via the Offer he signed. Housley and Buzzanca were not a party to the Offer or Certificate. Consequently, Jonas had no reason to rely on Housley's and Buzzanca's alleged misrepresentations. Furthermore, Jonas did not suffer damages since he did not suffer from Permanent Total Disability. Plaintiffs claim for fraud is dismissed against Housley and Buzzanca.

b. The Petersen Defendants

Plaintiffs allege that the Petersen Defendants made misrepresentations on their website, and provided verbal assurances (on June 8, 2007) that plaintiffs were fully protected in order to induce plaintiffs to make premium payments on the High Limit Policy. *See* Dkt. 201 at 35. Jonas contends that but for the Petersen Defendants misrepresentations, plaintiffs would be fully protected in that plaintiffs would have sought coverage from a different source or taken additional steps to ensure that the coverage required was implemented. Plaintiffs claim that the Petersen Defendants' written assurances in the Notice of Excess Line Placement induced them not to seek additional coverage.

Plaintiffs fail to plead the statements made and relied upon with the required specificity. They also fail to adequately allege the element of scienter since they merely allege that "defendants had a pecuniary incentive to maximize premium income." *See* AC ¶ 178. *Zutty, supra*, 33 Misc3d 1226[A], at *11. Plaintiffs' claim for fraud is dismissed against the Petersen Defendants.

3. Vicarious Liability

Plaintiffs seek to impute liability from Housley and Buzzanca to NLIC, Integre and ESI, their employers, as well as the Petersen Defendants. "Respondeat superior is a theory of vicarious liability that originally developed under the assumption that a master could control the conduct of an agent. ... the law limits the employer's liability to acts 'done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions.'" *Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 486-87 (2014) (citations omitted). The determination of whether a particular act was within the scope of the servant's employment is heavily dependent on factual considerations, depending on the facts and circumstances of the particular case. *Riviello v Waldron*, 47 NY2d 297, 302-03 (1979). "Among the factors to be weighed are: the

connection between the time, place and occasion of the act, the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated." *Id.* at 303.

NLIC, Integre and ESI argue that Housley and Buzzanca did not have authority to procure excess line disability coverage and that they told plaintiffs they could not provide the scope of coverage plaintiffs requested. On this motion to dismiss, questions of fact foreclose dismissal. Nonetheless, liability cannot be imputed to NLIC, Integre and ESI on the underlying claims being dismissed, which are discussed further herein. *See Karaduman v Newsday, Inc.*, 51 NY2d 531, 546 (1980).

On the other hand, vicarious liability cannot be imputed to the Peterson Defendants. Plaintiffs argue that the Peterson Defendants are liable under the theory of apparent authority. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority." *Hallock v State*, 64 NY2d 224, 231 (1984). "An insurance company is liable to a third person for the wrongful or negligent acts and misrepresentations of its agent when made within the general or apparent scope of the agent's authority." *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792, 795 (2d Dept 2007), citing *Gleason v Temple Hill Assocs.*, 159 AD2d 682, 683 (2d Dept 1990).

Housley and Buzzanca were not the employees or agents of the Petersen Defendants. The Petersen Defendants were CIU's agents, not the agents of NLIC, Integre, or ESI. No facts

alleged in the complaint communicated otherwise to plaintiffs. Hence, the Peterson Defendants are not vicariously liable for Housley's and Buzzanca's alleged conduct.

C. Claims Against All Defendants

1. Prima Facie Tort

Plaintiffs assert a cause of action for prima facie tort against all defendants for illegal evasion of Jonas' disability claim. According to the AC, defendants intentionally engaged in "deceit, concealment and/or the making of material misrepresentations" [AC ¶ 188] "in an illegal attempt to avoid payment of Jonas' valid insurance claim." ¶ 189.

The statute of limitations for prima facie tort based on injury to the plaintiffs' economic interests is three years. *Stacom v Wunsch*, 173 AD2d 401, 401 (1st Dept 1991). It begins to run from the date of the tort. *Barrett v Huff*, 6 AD3d 1164, 1166 (4th Dept 2004). In their opposition brief, plaintiffs lump the defendants together, and fail to specify the date at which each defendant engaged in the alleged deceit, concealment and/or the making of material misrepresentations. The statute of limitations might apply differently to each defendant.

Nevertheless, assuming plaintiffs' prima facie claim falls within the statute of limitations for all defendants, it is not viable. Prima facie tort affords a remedy for "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful." *ATI, Inc. v Ruder & Finn, Inc.*, 42 NY2d 454, 458 (1977); *Ruza v Ruza*, 286 AD 767, 769 (1st Dept 1955). "Prima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its own legs." *Belsky v Lowenthal*, 62 AD2d 319, 323 (1st Dept 1978). Where relief may be afforded under traditional tort concepts, prima facie tort should not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort. *Id.* at 70.

"The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Freihofer v Hearst Corp.*, 65 NY2d 135, 142-43 (1985) (citations omitted). "[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act." *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 (1983). Here, the claim fails because plaintiffs cannot establish special damages. Plaintiffs fail to allege with sufficient particularity actual losses related to the alleged tortious acts of each defendant, since Jonas was not permanently disabled. *See Howard v Block*, 90 AD2d 455 (1st Dept 1982); *Luciano v Handcock*, 78 AD2d 943, 943 (3d Dept 1980). Moreover, plaintiffs did not plead that defendants' alleged conduct was motivated solely by malevolence. *See Burns Jackson, supra*. The prima facie tort claim is dismissed against all defendants.

2. GBL § 349

Plaintiffs next argue that defendants are subject to a GBL § 349 claim because they (1) advertise, promote and sell salary protection insurance to consumers in New York, and (2) engage in deceptive practices which include issuing certificates of coverage without delivering a policy of insurance and delaying and failing to pay on claims in contravention of New York Insurance Law.

GBL § 349 is subject to a three year statute of limitations. CPLR 214(2). The date at which defendants engaged in deceptive consumer conduct, triggers the statute of limitations. *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 211 (2001). Plaintiffs allege that the statute of limitations did not accrue until CIU denied Jonas' disability claim on December 2, 2010. Additionally, they argue Jonas' Second Claim for his knee injury has yet to be

determined, making the GBL § 349 claim timely. Again, plaintiffs' opposition briefs do not distinguish between the defendants, failing to address the statute of limitations application to the different defendants. The AC alleges that defendants engaged in deceptive conduct at different times.[19]

Whether the claim is time-barred, however, is of no import since plaintiffs' GBL § 349 is lacking. To prevail on a claim under GBL § 349, a plaintiff must demonstrate that "(1) the challenged transaction was 'consumer-oriented'; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct." *Denenberg v Rosen*, 71 AD3d 187, 194 (1st Dept 2010). Plaintiff "must demonstrate that the acts or practice have a broader impact on consumers at large" and are not "private contract disputes, unique to the parties." *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 (1995).

Plaintiffs have failed to allege that defendants' acts or practices have a broad impact on consumers at large and are not a private contract action. In addition, there is no indication that defendants' alleged deceptive practices or delays caused injury to plaintiffs. *Ovitz v Bloomberg L.P.*, 18 NY3d 753, 759 (2012). Jonas did not suffer from Permanent Total Disability.

3. Declaratory Judgment

Plaintiffs seek a declaration of their rights under the policy. As noted earlier, Jonas was not disabled under the terms of his policy, and the High Limit Policy will not be reformed to Key Man protection with monthly benefits. Furthermore, since Jonas failed to make his second and third premium payments on the High Limit Policy and did not suffer from Permanent Total

[19] Buzzanca correctly argues that his allegedly deceptive conduct would have accrued earlier than CIU's denial of Jonas' claims. Similarly, NLIC, Integre, and ESI did not handle Jonas' disability claims.

Disability, the disability policy lapsed. ("If premium payments are not made by the end of the grace period, this certificate will immediately cease to be in force."). *See* Dkt. 30 at 11.

Plaintiffs claim that the Petersen Affidavit and the Notice establish that Jonas had salary protection insurance, a type of coverage which, according to plaintiffs, cannot provide for a single lump sum benefit under New York Insurance Law § 1113(a)(31). Jonas refers to the code "7100" in the Petersen Affidavit as evidence that plaintiffs had a different type of coverage from Permanent Total Disability. According to Jonas, "7100" cannot provide solely for a single lump sum benefit [AC ¶ 61] and therefore, must reflect a combination of periodic and lump sum benefits. Jonas misinterprets §1113(a)(31), which *does* allow for a single lump sum benefit for salary protection coverage so long as the benefits do not exceed 75% of an individual's annual earned income. New York Insurance Law § 1113(a)(31) provides:

> Salary protection insurance "means insurance against financial loss caused by the cessation of earned income due to disability from sickness, ailment or bodily injury, in an amount up to: (a) that portion of an individual's annual earned income which is in excess of the amount of in force disability insurance as defined in paragraph three of this subsection in an amount not to exceed seventy-five percent of the individual's annual earned income in total based upon the sum of the in force disability insurance and salary protection insurance when the benefits are payable to the individual or the individual's beneficiary; or (b) where such underlying disability insurance cannot be obtained by an individual from an authorized insurer, in an amount **not to exceed seventy-five percent of the individual's annual earned income when the benefits are payable to the individual or the individual's beneficiary**. Any insurer licensed to write disability insurance as defined in paragraph three of this subsection may also write salary protection insurance as defined in this paragraph." See New York Insurance Law § 1113(a)(31)

See New York Insurance Law § 1113(a)(31) (emphasis added). A $5 million lump sum benefit does not exceed 75% of Jonas' annual income. Plaintiffs' request for a declaration that the coverage provided under the Certificate did not conform to New York Insurance Law and that

they are entitled to coverage under a Temporary Total Disability policy with periodic and lump sum benefits, is denied.

4. Violation of NY Insurance Law and Regulations

Jonas asserts violations of New York Insurance Law§§ 1113, 1213, 2105, 2601, 3204, 3216(d)(1)(h), 3221(a)(12), 3272, 3426, 11 NYCRR §§ 27 & 216.4;[20] and California Insurance Law § 1764.2. Plaintiffs do not explain why California Insurance Law applies. Defendants claim that Jonas does not have a private right of action to sue under the cited New York Insurance Law sections. Plaintiffs do not oppose defendants' position, and thereby concede that Jonas has no private right of action for the statutory and regulatory violations asserted in the AC. Accordingly, it is

ORDERED that the motions to dismiss the Amended Complaint by defendants Christian Buzzanca, Certain Interested Underwriters at Lloyd's London, Petersen International Underwriters, Thomas Petersen, Carney & Carney, Inc., d/b/a, International Risk Management Group, Equity Services, Inc., National Life Insurance Company, National Life Group, Ronald Housley, and Integre, LLC are granted as to all causes of action apart from plaintiffs' breach of

---

[20] In the AC, Jonas claims that no documents were attached to the Notice, in violation of New York Insurance Law § 3204 ("nothing shall be incorporated therein by reference to any writing, unless a copy thereof is endorsed upon or attached to the policy or contract when issued.") AC ¶ 24. Jonas alleges that PIU failed to respond to the "Proof of Loss" letter dated June 20, 2008 until July 21, 2008. in violation of 11 NYCRR §§ 216.4 & 216.6 ("Every insurer, upon notification of a claim, shall, within 15 working days, acknowledge the receipt of such notice … An appropriate reply shall be made within 15 business days on all other pertinent … If the insurer needs more time to determine whether the claim should be accepted or rejected, it shall so notify the claimant, or the claimant's authorized representative, within 15 business days after receipt of such proof of loss, or requested information."). Jonas also claims that defendants failed to: timely disclose the determination of their physician, allow a third-party physician to review the file as specifically require by the policy terms, and disclose the names or identities of the individuals or entities who made the decision to deny the claim, failed to identify the insurers of the policy. ¶ 30. Lastly, Jonas claims that the appointment of IRMG to handle claims breached the Petersen Defendants duties prescribed by the statute as an excess line brokers. ¶ 85.

fiduciary duty claims asserted against Christian Buzzanca, Ronald Housley, Equity Services, Inc., National Life Insurance Company, and Integre, LLC on condition that those fiduciary duty claims are repleaded in a second amended complaint within 21 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that the action against National Life Grp., Certain Underwriters at Lloyds of London subscribing to otherwise liable for Certificate Number 0721963, otherwise known as Risks PE 08/07 and PE 0620/09, including Syndicate 5000 and Syndicate 510 and DOES #1-20, including but not limited to Kiln (UK) Holdings Ltd.; R.J. Kiln & Co., Ltd.; Tokia Marine and Nichido Fire Ins. Co.; Millea Holding, Inc.; Amlin, PLC; Wellington Underwriting, PLC; Berkshire Hathaway; Catlin Ins. Co., Inc.; Catlin Specialty Ins. Co.; Fidelity Guar. & Ins. Co.; Hiscox Ins. Co., Inc.; Travelers Cas. & Surety Co., d/b/a, Travelers Grp.; Peterson International Underwriters; Thomas Petersen, Individually and d/b/a, Petersen Int'l. Ins. Brokers; and Carney & Carney, Inc., d/b/a, International Risk Management Grp., is dismissed and the Clerk shall enter judgment accordingly; it is further

ORDERED that the caption is amended as follows:

STANLEY JONAS and AXIOM MANAGEMENT PARTNERS, LLC,

Plaintiffs,

-against-

NATIONAL LIFE INSURANCE COMPANY; RONALD HOUSLEY; CHRISTIAN BUZZANCA; EQUITY SERVICES, INC d/b/a INEGRE BROKERAGE; INTEGRE, LLC,

Defendants;

and all further papers, if any, in this action shall bear the amended caption; it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerks of the Court and the Trial Support Office, who shall note the amended caption in their respective records; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on June 9, 2015 at 9:30 in the forenoon.

Dated: April 24, 2015

ENTER:

J.S.C.