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| Habberstad v Revere Sec. LLC |
| 2019 NY Slip Op 31270(U) |
| April 25, 2019 |
| Supreme Court, New York County |
| Docket Number: 655993/2017 |
| Judge: Andrew Borrok |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

SUSAN HABBERSTAD, PATRICIA RICHARD, NANCY RICHARD, PETER RICHARD,

Plaintiff,

- v -

REVERE SECURITIES LLC, KINDER HOLDINGS LLC D/B/A KINDER FINANCIAL SERVICES, JOHN KINDER, PETER NUSSBAUM, MAZARS USA LLP, JOHN HANCOCK LIFE INSURANCE COMPANY OF NEW YORK

Defendant.

INDEX NO. 655993/2017
MOTION DATE 11/15/2018, 11/16/2018, 11/16/2018, 11/19/2018
MOTION SEQ. NO. 006 007 008 009

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 126, 127, 128, 129, 130, 131, 132, 133, 134, 168, 169, 171, 175, 176, 177, 185

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 007) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 170, 172, 178, 179, 184

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 008) 154, 155, 156, 157, 158, 159, 160, 161, 173, 180, 181, 186

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 009) 162, 163, 164, 165, 166, 174, 182, 183, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196

were read on this motion to/for DISMISS

For the reasons set forth on the record and as otherwise set forth below, the defendants' motions to dismiss (mtn. seq. nos. 006 - 009) are granted and the lawsuit is dismissed.

**THE RELEVANT FACTS AND CIRCUMSTANCES AS SET
FORTH IN THE AMENDED COMPLAINT**

Mr. Richard is the former executive vice president of P.C. Richard & Sons (the **Company**), the electronics retail chain. In 1991, the Company purchased two “keyman” whole life insurance policies where Peter and his wife Nancy Richard were the insureds. In the same year, Mr. Richard established the Peter C. Richard Inter Vivos Trust (the **1991 Trust**) to own and hold the policies (Amend. Compl., ¶¶ 24-29, 13, 45-53). Susan A. Habberstad and Patricia M. Richard, the daughters of Peter and Nancy Richard, are the co-trustees of the 1991 Trust’s successor, the Peter Charles Richard Irrevocable Trust III (the **2016 Trust**) (the 2016 Trust, together with Peter and Nancy Richard, collectively, the **Plaintiffs**). The 2016 Trust was funded with the assets of its predecessor, the Peter Charles Richard Irrevocable Trust II which, in turn, was created and funded with the assets of its predecessor, the 1991 Trust.

Between 1992 and 2013, the 1991 Trust acquired eight additional insurance policies where Peter and Nancy Richard were also the insureds (such additional eight policies, together with the original two keyman policies, hereinafter, the **Original Policies**) (Amend. Compl., ¶¶ 54-70 [list of the Original Policies]). During this time, the Company paid the premiums on the Original Policies, which totaled approximately \$1 million per year (*id.*, ¶¶ 55-69).

In 2012, following certain litigation, Mr. Richard and the Company parted ways. As part of the settlement, Mr. Richard sold his shares in the Company, and Mr. Richard assumed the responsibility to pay all future premiums on the life insurance policies (*id.*, ¶¶ 120-22). In connection with the settlement, Mr. Richard retained Peter Nussbaum and his firm Mazars USA LLP (**Mazars**) to provide him with tax advice concerning the settlement. In May of 2013, Mr. Nussbaum and William Moreno (who was the Mr. and Mrs. Richard’s next-door neighbor and securities advisor) became co-trustees of the 1991 Trust (*id.*, ¶ 133). Mr. Moreno is the CEO of

Revere Securities (**Revere**). Mr. Moreno arranged for John Kinder, a licensed insurance agent conducting New York insurance business as a sole proprietor d/b/a Kinder Financial Services (**KFS**), to review the insurance policies then in the 1991 Trust (*id.*, ¶¶ 134, 136). Mr. Kinder is also Revere's senior vice-president for sales and marketing, a fact that Mr. Richard claims was not revealed to him at the time (*id.*, ¶¶ 137-138). Mr. Kinder advised Mr. Richard to replace the Original Policies (*id.*, ¶¶ 141-42). Revere, likewise, advised Mr. Richard to replace the Original Policies (*id.*, ¶ 143).

Throughout early 2014 there were multiple meetings and presentations concerning this issue, at which meetings all the Plaintiffs and Mr. Nussbaum were present (*id.*, ¶¶ 142-52). Mr. Kinder recommended replacement policies with an anti-lapse provision at the same face amount. He advised that the Original Policies could be surrendered and the proceeds of the cash surrender value could be used to pay for the replacement policies (*id.*, ¶¶ 159-65). Mr. Nussbaum "approved of and endorsed" Mr. Kinder's representations and claims without investigating or scrutinizing them (*id.*, ¶¶ 147-55, 156-57, 176-83, 198). The Amended Complaint further alleges that Mr. Nussbaum failed to investigate whether an alternative approach could have saved surrender charges that the 1991 Trust had to pay as a result of surrendering the Original Policies and acquiring the replacement policies (*id.*, ¶¶ 201-02).

According to the Amended Complaint, based on Mr. Kinder's recommendations and representations, the co-trustees – Messrs. Moreno and Nussbaum – replaced all but four of the Original Policies with two new policies (the **Replacement Policies**) issued by the John Hancock Life Insurance Company of New York (**John Hancock**) through a 1035 exchange (*see* Amend. Compl., ¶ 215 [list of Replacement Policies]) whereby the 1991 Trust made a lump sum payment for paid-up Replacement Policies in lieu of paying annual premiums on the Original Policies (*id.*, ¶¶ 207-212). The Replacement Policies had a face value of \$31.4 million, as compared to a \$44

million face value of the Original Policies. The Plaintiffs assert that Mr. Nussbaum allegedly knew or should have known that the Replacement Policies were inferior to the Original Policies (*id.*, ¶ 217).

The Plaintiffs claim that certain representations that Mr. Kinder made regarding the Replacement Policies were not true and that Mr. Kinder made the alleged misrepresentations for the purpose of personal financial gain. They also claim that Mr. Kinder's strategy was not an appropriate strategy for their needs and that Mr. Kinder failed to undertake a thorough investigation in giving his advice, did not shop the Replacement Policies or undertake a competitive analysis before placing the Replacement Policies with John Hancock and did not otherwise advise Mr. Richard about the Policies. The Plaintiffs also allege that certain insurance disclosure forms filled out by Mr. Kinder contained incomplete and/or inaccurate information (*id.*, ¶¶ 258-273) and that the Replacement Policies were applied for and approved in violation of New York State Insurance Department Regulation No. 60 (**Regulation 60**) (11 NYCRR 51) (*id.*, ¶¶ 248-265).

For the avoidance of doubt, Regulation 60 requires an insurance agent to submit a disclosure statement to the insurance company in the form prescribed by the Superintendent of Insurance, signed by the applicant and left with the applicant for his or her records (11 NYCRR 51.5[a]). The applicant must also be provided with certain disclosures and notices (11 NYCRR 55.5[c]). To wit, the Plaintiffs allege that Mr. Kinder failed to complete the portion of the disclosures indicating the primary reasons for recommending the Replacement Policies and/or why the Original Policies were insufficient to meet the applicant's objectives (Amend. Compl., ¶¶ 258-72). Plaintiffs further allege that John Hancock had an obligation to return the application because this information was incomplete (*id.*, ¶¶ 256-257).

The Original Complaint & Prior Motions to Dismiss

The original complaint was filed on September 22, 2017. All of the defendants except Mr. Nussbaum and Mazars moved to dismiss. On April 3, 2018, this court (Ramos, J.S.C.) dismissed the complaint in its entirety with leave to replead (NYSCEF Doc. No. 106). The Plaintiffs filed an Amended Complaint on September 21, 2018. By So-Ordered Stipulation, the caption was amended to add Mr. and Mrs. Richard as Plaintiffs and removed former trustee William Moreno as a defendant (NYSCEF Doc. No. 124). Presumably, Mr. Moreno was removed as a defendant because Justice Ramos found that the claims against him were barred by a release that was provided to him in 2015 (NYSCEF Doc. No. 106, p. 33). By Stipulation dated October 23, 2018, the Plaintiffs also discontinued all claims against Kinder Holdings LLC (but not Mr. Kinder) with prejudice (NYSCEF Doc. No. 125).

The Amended Complaint

The Amended Complaint asserts the following 13 causes of action: (1) fraud by Mr. Kinder; (2) fraud by Revere; (3) negligent misrepresentation by Mr. Kinder and Revere; (4) negligent misrepresentation by Mr. Nussbaum and Mazars; (5) constructive fraud by Mr. Kinder and Revere; (6) constructive fraud by Mr. Nussbaum and Mazars; (7) aiding and abetting fraud by Mazars and Messrs. Kinder and Nussbaum; (8) breach of fiduciary duty by Mr. Kinder; (9) breach of fiduciary duty by Mr. Nussbaum and Mazars; (10) violation of New York Insurance Law by Mr. Kinder and John Hancock; (11) violation of General Business Law § 349 by John Hancock; (12) unjust enrichment as to all of the defendants; and (13) negligence by Messrs. Kinder and Nussbaum, Revere and Mazars.

The Plaintiffs seek relief in the form of rescission and/or reformation of the transactions giving rise to the fraudulent exchanges of the insurance policies, disgorgement of the commissions,

premiums, any other fees paid to the defendants, and/or damages and other equitable and non-equitable relief. All the defendants move to dismiss.

On a motion to dismiss based on documentary evidence (CPLR § 3211[a][1]), dismissal is warranted where the claims are precluded by clear documentary evidence such as a contract between the parties (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). CPLR § 3016 (b) provides that where a cause of action or defense is based upon fraud, “the circumstances constituting the wrong shall be stated in detail.” On a motion to dismiss a cause of action as bared by the statute of limitations (CPLR § 3211[a][5]), the movant must establish, *prima facie*, that the time to commence the action so as to interpose that cause of action has expired (*Ferdico v Pabone*, 125 AD3d 718, 718 [2d Dept 2015]). The burden then shifts to the nonmoving party to assert an issue of fact as to the applicability of an exception to the statute of limitations, whether the statute of limitations was tolled or whether the action was commenced within the applicable limitations period (*id.*). On a motion to dismiss a cause of action for failure to state a cause of action (CPLR § 3211 [a][7]), the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). Determining “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*id.*). “In this procedural posture, the allegations of the complaint ... must be given their most favorable intendment” (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]) and the Court need only determine whether the allegations taken from the “four corners” of the complaint “together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

I. Nussbaum and Mazars' Motion to Dismiss (Mtn. Seq. No. 006) is Granted

Mr. Nussbaum and Mazars argue that the claims against them (negligent misrepresentation, constructive fraud, aiding and abetting fraud, breach of fiduciary duty, unjust enrichment, and negligence) must be dismissed because provisions of the 1991 Trust Agreement bar the negligence-based causes of action asserted against them, because such claims are barred by the statute of limitations or because such claims are otherwise improperly plead.

The 1991 Trust was governed by an Inter Vivos Trust agreement dated February 12, 1991 (the **1991 Trust Agreement**) which was in effect at the time that the Original Policies were replaced (Greenberg Aff., Ex. C). Paragraph 7 of the 1991 Trust Agreement provides that the trustees shall have all powers granted to trustees by New York statutes, “which they may exercise in their sole and absolute discretion ... as to which their judgement [*sic*] shall be final and conclusive upon all interested parties...” Subparagraph 7(u) provides that, “to the extent legally permissible, [the trustees] shall not be in any event be liable or responsible to any person for any loss resulting from any act or omission of their in the administration of the trust created hereby in the absence of willful misconduct...” Subparagraph 7(w) goes on to state that:

The decisions of the Trustees with respect to the exercise or non-exercise of any discretionary power hereunder, or the time or manner of the exercise thereof, made in good faith, shall be conclusive and binding upon all persons interested in, or claiming any interest in, the principal or income of the trust fund.

Finally, subparagraph 7(y) confers on the Trustees:

Power to exercise all rights, elections, options, privileges and other powers, and to receive all payments, in respect of any insurance policy on the life of or relating to the Settlor or any other person, including but not limited to the power to collect dividends, death or other benefits (including disability benefits), surrender payments, and any other payment which may be due or collectible in respect of any such policy; to surrender any such policy for the cash surrender value thereof; ***to convert any such policy into other forms of insurance*** [emphasis added]; and

to borrow upon and pledge any such policy in connection with a loan or loans to the Trustees.

These provisions bar the two causes of action sounding in negligence (negligent misrepresentation [fourth cause of action] and common law negligence [thirteenth cause of action]) as the 1991 Trust Agreement absolved Nussbaum of liability absent bad faith or willful misconduct, which the Amended Complaint does not allege. Trust exculpatory clauses such as the one here in subparagraph 7(u), are enforceable so long as the Trustee does not act in bad faith or in reckless disregard to the interests of the beneficiaries of the trust (*In re Jastrzebki*, 97 AD3d 819 [2d Dept 2012]; *Lange v Kooper*, 28 AD3d 240 [1st Dept 2006]). In any event, the negligence causes of action are barred by the three-year statute of limitations generally applicable to such claims (*Chase Scientific Research, Inc. v NIA Group, Inc.*, 96 NY2d 20, 25 [2001]). The causes of action here accrued on February 25 and March 3, 2014, respectively, the dates when the Replacement Policies were purchased (Greenberg Aff., Exs. E-F). This action was commenced on September 22, 2017 (Greenberg Aff., Ex. B [original complaint]). Thus, the applicable statute of limitations on the negligence claims ran, at latest, on March 3, 2017 – more than six months before the complaint was filed. To the extent that the Plaintiffs argue that the applicable limitations period should be tolled, the doctrine that tolls the statute of limitations against a trustee until the trustee is no longer serving in that capacity applies only in an equitable accounting proceeding and not in action for money damages such as this (*Kaszirer v Kaszirer*, 286 AD2d 598 [1st Dept 2001]). To the extent that the Plaintiffs have equitable claims against Mr. Nussbaum and Mazars they are only pled in the alternative. In any event, as a non-party to the Replacement Policies, neither Mr. Nussbaum nor Mazars has any authority to rescind the Replacement Policies.

To the extent that the Plaintiffs argue that the continuous representation doctrine tolls their claims because in late 2016 Mr. Nussbaum contacted various insurance companies on their behalf in order to change the agent of record for some of the policies and to cooperate in the transfer of the replacement policies to the trust, this doctrine is simply inapplicable here (*see* Amend. Compl., ¶¶ 242-47). The continuous representation doctrine is only applicable to professionals (*e.g.*, doctors, lawyers or accountants) acting in their professional capacity. Here, even crediting all of the Plaintiffs' allegations as the court must on a motion to dismiss, Mr. Nussbaum was not acting in his capacity as an accountant, but rather as a trustee, a position for which no professional expertise is required (*see Chase Scientific Research, supra*, 96 NY2d at 29 [trustees not professionals for purpose of malpractice claims]).

The same three-year statute of limitations bars the Plaintiffs' claim for breach of fiduciary duty (ninth cause of action).

Although a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year statute of limitations period, courts do not apply the fraud statute of limitations if the fraud alleged is only incidental to the claim asserted (*see* CPLR 213; *Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). To do otherwise would permit allegations of fraud to be used as a means to litigate stale claims (*id.*). Although the Plaintiffs attempt to also ground their right to relief in fraud, at most their allegations amount to negligence on the part of the Defendants in discharging their duties.

Turning to the claim for constructive fraud (sixth cause of action), the elements of this cause of action are the same as those to recover for actual fraud (*i.e.*, a material misrepresentation of present existing fact, scienter, reasonable reliance and damages) except that the element of scienter on the part of the defendant is “replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his or her confidence on the defendant and therefore to relax the care and vigilance he or she would ordinarily exercise in the circumstances” (*Levin v Kitsis*, 82 AD3d 1051 [2d Dept 2011] [quotation and citation omitted]). As the Court of Appeals has noted, “We have applied the constructive fraud doctrine in different contexts, but in each one, the pertinent factor present is that the fiduciary stood to benefit from the transaction itself” (*Aoki v Aoki*, 27 NY3d 32, 41 [2016]). Here, there is no allegation that Mr. Nussbaum or Mazars stood to benefit in any way from the change out of the insurance policies. The constructive fraud claim is dismissed.

The claim for aiding and abetting fraud is similarly defective. The elements of such a claim are an underlying fraud, the defendant’s knowledge of said fraud, and the defendant’s substantial assistance in the achievement of the fraud (*Ginsburg Dev. Co., LLC v Carbone*, 134 AD3d 890 [2d Dept 2015]). The Amended Complaint fails to identify whose fraud Mr. Nussbaum and Mazars aided and abetted, but only charges that Mr. Nussbaum “knew or should have known” that this person’s or persons’ representations and omissions concerning the Replacement Policies were false, misleading and incomplete (Amend. Compl., ¶¶ 386-393, 388). This is insufficient to sustain this cause of action. It is dismissed.

Finally, as concerns unjust enrichment, all that the Amended Complaint alleges is that, “Defendants received a benefit in inducement of the trust to modifying their life insurance policies as set forth in this Amended Complaint ... at Plaintiffs’ expense ... [which] is against equity and good conscience to permit Defendants to retain” (*id.*, ¶¶ 419-421). This is entirely conclusory and insufficient to sustain this cause of action. In addition, any claim for unjust enrichment is untimely. The statute of limitations for unjust enrichment typically follows the cause of action that the claim effectively replaces, *e.g.*, when it is pleaded as an alternative theory of recovery for breach of contract, the applicable limitations period is six years (*e.g.*, *Maya NY LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]). Here, although it is unclear based on the sparse pleading what the unjust enrichment claim is supposed to be an alternative for, to the extent that it stands in place of the Plaintiffs’ negligence claim, the applicable limitations period is three years and the claim is, therefore, untimely.

Mr. Kinder’s Motion to Dismiss (Mtn. Seq. No. 007) is Granted

Mr. Kinder argues that the fraud (first cause of action), negligent misrepresentation (third cause of action), constructive fraud (fifth cause of action), aiding and abetting fraud (seventh cause of action), breach of fiduciary duty (eighth cause of action), violation of New York insurance law (tenth cause of action), unjust enrichment (twelfth cause of action), and negligence (thirteenth cause of action) all must be dismissed. The court agrees.

The negligence claims (third and thirteenth cause of action) and the unjust enrichment claim (twelfth cause of action) are barred as untimely for the same reasons as set forth above. The claim for breach of fiduciary duty (eighth cause of action) is also time-barred, but fails for the

additional reason that Mr. Kinder, as an insurance broker, did not owe the Plaintiffs a fiduciary duty absent some kind of exceptional circumstances or special relationship not present here (*People v Wells Fargo Ins. Servs., Inc.*, 62 AD3d 404, 405 [1st Dept 2009]). The claim for violation of Insurance Law § 2123 based on the purported violation of Regulation 60 is likewise governed by a three-year statute of limitation and is, thus, also untimely (CPLR § 214[2]; *Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175 [1st Dept 1998]).¹

The fraud claims asserted against Mr. Kinder likewise fail. As an initial matter, the constructive fraud claim (fifth cause of action) fails because, as noted, there is no fiduciary relationship between the Plaintiffs and Mr. Kinder (*Levin, supra*, 82 AD3d 1051). The claim for aiding and abetting fraud (seventh cause of action) fails for the same reasons as set forth above, *i.e.*, the lack of any specificity whatsoever (CPLR § 3016[b]).

The claim for common law fraud (first cause of action), as noted above, requires the Plaintiffs to set forth, with particularity: (1) a material misrepresentation of fact, (2) knowledge by Mr. Kinder of its falsity; (3) an intent to induce reliance; (4) justifiable reliance; and (5) damages (*Schneiderman v Credit Suisse Securities (USA) LLC*, 31 NY3d 622, 638 [2018]). It is unclear what material misrepresentation of fact the Plaintiffs are alleging, and any reliance thereon could not be reasonable. First, the Plaintiffs allege that Mr. Kinder falsely represented that the cash values of the Original Policies would be sufficient to pay the premiums on the Replacement Policies (Amend. Compl., ¶ 160). However, the premiums on the Replacement Policies were, in

¹ Even if this claim were timely, the documentary evidence submitted by Kinder shows that all required disclosures were made (Bashian Aff., Exs. H, I).

fact, paid from the cash surrender value of the Original Policies in the form of a 1035 exchange (Bashian Aff., Exs. I, J, K). Thus, this alleged “misrepresentation” was actually true for the expected life of Mr. Richard. The Plaintiffs also allege that Mr. Kinder and the other defendants falsely represented that the Replacement Policies would provide the same amount of coverage as the Original Policies (Amend. Compl., ¶ 161). However, the policy materials and presentation charts provided to the Plaintiffs explained exactly how much coverage was provided by the Original Policies and how much would be provided by each of the potential replacement policies (Bashian Aff., Exs. H, I; CPLR § 3211[a][1]). Thus, the Plaintiffs either knew or should have known the amount of coverage they would have with the Replacement Policies. Next, the Plaintiffs allege that Mr. Kinder and the other defendants falsely represented that the Replacement Policies would never lapse (Amend. Compl., ¶ 162). Again, the terms of the Replacement Policies were provided to the Plaintiffs. Any claim of reasonable reliance is, thus, “dispelled” by the provisions of the Replacement Policies (*Abraham v New York Univ. College of Dentistry*, 190 AD2d 567 [1st Dept 1993]). Finally, and fatally, the Plaintiffs do not allege that Mr. Kinder acted with the intent to defraud, a necessary element of the claim. The Plaintiffs only allege that Mr. Kinder sought to generate commissions for himself (Amend. Compl., ¶ 174). However, the fact that someone had a “pecuniary incentive” to maximize their income is generally insufficient to plead scienter (*Jonas v National Life Ins. Co.*, 147 AD3d 610, 612 [1st Dept 2017]).

Revere’s Motion to Dismiss (Mtn. Seq. No. 008) is Granted

Revere argues that the fraud (second cause of action), negligent misrepresentation (third cause of action), constructive fraud (fifth cause of action), unjust enrichment (twelfth cause of action),

and negligence (thirteenth cause of action) all must be dismissed. The court agrees and the claims against Revere fail for all the reasons set forth above.

John Hancock's Motion to Dismiss (Mtn. Seq. No. 009) is Granted

John Hancock argues that the violation of New York insurance law (tenth cause of action), violation of General Business Law § 349 (eleventh cause of action), and unjust enrichment (twelfth cause of action) must all be dismissed. As indicated above, the insurance law claim is untimely and therefore dismissed. The unjust enrichment claim is entirely conclusory and, therefore, also dismissed.

The claim for violation of General Business Law § 349 is also subject to a three-year statute of limitations (CPLR § 214[2]; *Cole v Equitable Life Assur. Socy of U.S.*, 271 AD2d 271 [1st Dept 2000]). Claims for violations of General Business Law § 349 arising out of the purchase of life insurance policies accrue at the time the policy is issued (*Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2d Dept 2010]; *Wender v Gilberg Agency*, 276 AD2d 311 [1st Dept 2000]). Here, the Plaintiffs' claim is time barred as the Replacement Policies were issued more than three years before the Complaint was filed.

Accordingly, it is

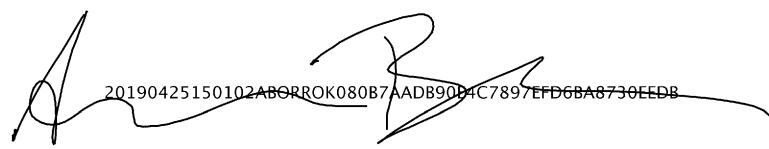
ORDERED that the motion of Peter Nussbaum and Mazars USA (mtn. seq. no. 006) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court,

and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of John Kinder (mtn. seq. no. 007) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendant; and it is further

ORDERED that the motion of Revere Securities LLC (mtn. seq. no. 008) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of John Hancock Life Insurance Company of New York (mtn. seq. no. 009) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.


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DATE

ANDREW BORROK, J.S.C.

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APPLICATION:

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