National Health Care Assoc., Inc. v Liberty Mut. Ins. Co.
2020 NY Slip Op 30149(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 650272/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **Part IAS MOTION 48EFM**

Justice

---X

NATIONAL HEALTH CARE ASSOCIATES, INC., *et al.*

Plaintiff,

- v -

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,

Defendant.

---X

INDEX NO. 650272/2018

MOTION DATE _____

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 68, 69, 70, 71, 72, 73, 74, 100, 101, 102

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 75, 76, 77, 78, 79, 80, 81, 99, 105, 107

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 50, 51, 52, 53, 54, 55, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 103, 104

were read on this motion to/for DISMISS.

In this action, plaintiffs National Health Care Associates, Inc. (NHA), a health care management company, and its 26 corporate nursing home affiliates allege that defendants Liberty Mutual Insurance Company (Liberty), Arch Insurance Company (Arch), Prism Consultants, LLC (Prism), Asher Schoor and Ettie Schoor (Schoors; principals of Prism), Arlington Insurance Company, Ltd. (Arlington), Woodbury CC, LLC (Woodbury), Comp Control Insurance Company SPC (CCIC) and Comp Control, LLC (Comp Control) orchestrated an elaborate, unlawful and fraudulent insurance scheme against plaintiffs. Plaintiffs asset in the complaint nine causes of action, including fraudulent inducement, negligent representation, breach of contract, as well as violations of New York, New Jersey, Connecticut and Vermont insurance and consumer fraud statutes.

In motion sequence number 002, Liberty and Arlington seek to dismiss the claims against them pursuant to CPLR 3211 (a) (5) and (7). In motion sequence number 003, Arch seeks to dismiss the claims against it pursuant to CPLR 3211 (a) (1), (5) and (7). In motion sequence number 004, Prism, Woodbury, CCIC, Comp Control and the Schoors (Prism Group) seek to dismiss the claims against them pursuant to CPLR 3211 (a) (5), (7) and (8).

I. Background and Procedural History

Plaintiffs allege the following facts in the complaint and, for the purposes of these motions to dismiss, are accepted as true.

Plaintiffs allege that defendants engaged in a willful scheme to subvert the insurance laws of New York, Connecticut, Vermont and New Jersey by requiring plaintiffs to enter into unapproved agreements and letters of credit that substantially altered the rates in plaintiffs' regulator-approved insurance policies (NYSCEF Doc. No. [NYSCEF] 2, ¶ 47). Plaintiffs allege that defendants sold to plaintiffs unapproved workers' compensation insurance policies[1] masquerading as approved guaranteed cost policies (GC policies)[2] (*id.*).

In 2003, plaintiffs engaged defendant Prism as an insurance intermediary to assist plaintiffs with their search for workers' compensation insurance (id., ¶ 117). Defendants "Asher Schoor and

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[1] "Workers' compensation insurance covers employers for medical costs and a portion of lost wages for an employee who becomes injured or ill as a result of their employment. Pursuant to Workers' Compensation law ("WCL") §§ 10 and 50, all employers in New York State must secure the payment of workers' compensation benefits for their employees" (NYSCEF 1, Complaint, ¶ 48).

[2] "Workers' Workers compensation insurance sold by insurance carriers and approved by the [New York Department of Financial Services] for sale in New York, are often sold to employers through so-called 'guaranteed cost' ('GC') policies. GC policies transfer underwriting risk to the insurer, such that in the event an employer's workers' compensation claims exceed the amount of premium paid, the difference is borne by the insurer. If the amount of premiums paid is less than the claims, the insurer keeps the difference" (NYSCEF 1, Complaint, ¶ 52).

Ettie Schoor (respectively CEO and President of Prism) were the primary correspondents for the Defendants" (*id.*, ¶ 118). The Schoors informed plaintiffs about programs that "utilized a potentially beneficial captive reinsurance structure" (Programs), saving plaintiffs money as plaintiffs "would acquire profit-sharing interests in the captive and its underlying segregated cells"[3] (*id.*, ¶ 119). Plaintiffs informed the Schoors that they "would only be interested in the Programs if Plaintiffs were the only insured policyholders, so that Plaintiffs would not be paying for losses at facilities they did not own or manage" (*id.*, ¶ 120).

In November 2004, the Schoors presented NHA with Liberty's Programs, which included Liberty's GC policies and the captive reinsurance program (*id.*, ¶ 122). Specifically, the Schoors emailed NHA a proposal that described Liberty's Programs which included the establishment of defendant Comp Control, purportedly to be owned solely by NHA's affiliates, to serve as the participant in a "segregated cell" in defendant Arlington, a captive offshore reinsurer (*id.*, ¶¶ 122-130). Relying on the Schoors representations, plaintiffs agreed to enter the Liberty Programs (*id.*, ¶ 136).

That same month, Liberty issued GC Policies to plaintiffs under which they paid at least $18 million in premiums to Liberty (2004 to 2008) and at least $59 million in premiums to Arch (2008 to 2015) (*id.*, ¶¶ 58-63). Liberty conditioned the sale of the GC Policies upon plaintiffs' entry into the

[3] Liberty's counsel explains in Liberty's opposition brief what a captive reinsurance structure and what a "segregated cell" is within the context in a captive reinsurance structure, and the explanation is not disputed by plaintiffs. Specifically, a captive reinsurance structure "allows a business to participate in the reinsurance of its liability insurance, thereby sharing in underwriting profits or losses. This structure may involve the creation of a reinsurance company or of a cell in an existing reinsurer . . . in which the insured business has an ownership interest" (NYSCEF 30 at 3, n 2). Counsel also explains that a captive cell, often referred to as a "segregated cell" or "segregated account," agrees to "reinsure a portion of the liability assumed by the business' insurance. If the insurance is profitable, the business shares in those profits. If not, the business shares in the losses" (*id.*). Counsel further explains that "the assets and liabilities of the captive cell are legally separated from those in the reinsurer's general account and other cells" (*id.*).

Programs whereby a portion of the risks and premiums were ceded to offshore reinsurers, defendants Arlington (Bermuda) and CCIC (Cayman Island), to write insurance policies without being subject to regulatory review and approval (*see id.*, ¶¶ 70-90). In turn, defendants Woodbury and Comp Control, the participants of "segregated cells" in Arlington and CCIC, would become responsible to pay workers' compensation claims up to the final aggregate premium (*id.*). To ensure that Woodbury and Comp Control -- purportedly to be owned by plaintiffs (as fully explained below) -- would have enough funds to pay such claims, Liberty required plaintiffs to (1) sign extrinsic documents (Liberty Extrinsic Agreements) by which they agreed to Arlington and CCIC reinsuring Liberty's liabilities, and (2) provide letters of credit (Liberty LOC) as collateral for the liabilities of Arlington and CCIC (*id.*). Plaintiffs have posted at least $2.5 million in the Liberty LOC (*id.*). Starting in 2016, at least $1.09 million has been drawn from the Liberty LOC *(id.*, ¶¶ 80; NYSCEF Doc. No. 102, Ostreicher aff., ¶ 16, and exhibit C).

On November 24, 2004, the Schoors emailed plaintiffs a draft of the operating and collateral agreement for Comp Control (Comp Control Operating Agreement) and represented that plaintiffs would be the sole members in the final agreement (*id.*, ¶¶ 131-133). The Schoors also created defendants Woodbury and Comp Control to serve as participants of the segregated cells in defendants Arlington and CCIC, respectively, and executed reinsurance agreements with Liberty on behalf of Comp Control, CCIC, Arlington or Woodbury (*id.*, ¶¶ 137-139). However, the Schoors never implemented plaintiffs' membership in these entities, and never provided plaintiffs with a fully-executed copy of the Comp Control Operating Agreement (*id.*, ¶¶ 134, 139-142).

In late 2008, the Schoors presented the Arch's Programs to plaintiffs and stated that the Arch Programs would mirror the Liberty Programs, including the "reinsurance structure, ownership

interests and profitability" (*id.*, ¶¶ 143-145). Like Liberty, Arch conditioned the sale of the GC Policies upon plaintiffs' entry into the Programs whereby a portion of the risks and premiums were ceded to Arlington and CCIC to write insurance policies without being subject to regulatory review and approval (*see id.*, ¶¶ 70-90). Woodbury and Comp Control would become responsible to pay workers' compensation claims up to the final aggregate premium (*id.*). Again, to ensure that Woodbury and Comp Control would have enough funds to pay such claims, Arch required plaintiffs to enter into (1) terms and conditions documents (Arch TC Agreements), (2) provide letters of credit (Arch LOC), and (3) corporate guarantees (Arch Guarantees) (*id.*). Plaintiffs have posted at least $ $7.4 million in the Arch LOC (*id.*). Starting in 2017, Arch has drawn at least $3.09 million from the Arch LOC (*id.*, ¶ 93; NYSCEF Doc. No. 102, Ostreicher aff., ¶ 16, and exhibit D).

On behalf of Arch, the Schoors presented the Arch TC Agreements to plaintiffs, which set forth the details and requirements of the Arch Programs, including the Arch LOC and Arch Guarantees (*id.*, ¶¶ 146-150). Based on the Schoors' representations, plaintiffs entered into the Arch Programs, and the Schoors executed reinsurance agreements with Arch on behalf of Comp Control and CCIC (*id.*, ¶¶ 151-155).

On behalf of defendants, the Schoors met annually with plaintiffs to discuss the Programs' performance, representing to plaintiffs that due to the Programs' complexities, the Schoors would administer them without plaintiffs' active involvement (*id.*, ¶¶ 156-163). Based on the Schoors' knowledge in workers' compensation and reinsurance and their trusted relationship with plaintiffs, plaintiffs were lulled into a false sense of security to continue to participate in the Programs (*id.*).

The Liberty LOC and the Arch LOC were automatically renewed and extended each year, by increasing the face value, though no draws on the LOCs were made at that point (*id.*; *id.* at 256).

However, in October 2015, on behalf of Liberty and Comp Control, Prism demanded additional monies from plaintiffs to pay for losses under the Liberty Programs and threatened to draw on the Liberty LOC, which led plaintiffs to make additional payments to prevent drawing on the Liberty LOC (*id.*, ¶¶ 164-166). In November 2015, plaintiffs obtained "loss runs," which suggested that the Liberty LOC might be used to pay claims at unaffiliated facilities, and when the Schoors were inquired about such loss runs, Asher Schoor denied that Prism billed plaintiffs to pay claims by unaffiliated facilities and told plaintiffs that "National is paying for their own claims" (*id.*, ¶¶ 168-169).

On March 15, 2016, plaintiffs were informed "for the first time" that they neither hold any equity/right to receive any net profits in Woodbury and Comp Control, nor in Arlington and CCIC (*id.*, ¶ 170). The Liberty LOC and Arch LOC have been drawn down, and Arch has threatened plaintiffs that it would demand payment under the Arch Guarantees, despite that plaintiffs were "never made participants of the relevant segregated cells" of the reinsurance captives" (*id.*, ¶¶ 174-176). Thus, plaintiffs filed the Summons with Notice on January 18, 2018 and the Complaint on April 27, 2018, seeking recovery from defendants based upon their alleged breach of contract, fraudulent representations and violations of state insurance and consumer fraud statutes. Defendants now move to dismiss the claims against them pursuant to CPLR 3211 (a) (1), (5), (7) and (8).

Prior to bringing this action, on September 7, 2017, NHA filed a similar complaint against Liberty, Arch, Prism and the Schoors in the United States District Court, Southern District (Federal Action) (*National Healthcare Assoc., Inc. v Liberty Mutual Ins. Co.*, 2017 WL 3947904 [SD NY 2017]). Defendants moved to dismiss that complaint for failure to state a claim upon which relief could be granted. On January 8, 2018, plaintiffs voluntarily dismissed the Federal Action.

II. Applicable Legal Standards

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether the pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are afforded a liberal construction, and the court is to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). While factual allegations are given a favorable inference, "bare legal conclusions" and "inherently incredible facts" are not entitled to a preferential treatment (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). However, when the movant seeks dismissal pursuant to CPLR 3211 (a) (1), and offers evidentiary or documentary material, the court must determine whether the complaint has a cause of action, not whether it has stated one (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]). When a complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001]).

On the other hand, on a motion to dismiss based on the statute of limitations defense of CPLR 3211 (a) (5), the defendant must establish a prima facie case that the plaintiff's time to commence an action has expired; then the burden shifts to the plaintiff to raise a question of fact as to whether it commenced the action within the applicable limitations period, or whether an exception or tolling applies (*Williams v City of Yonkers*, 160 AD3d 1017, 1019 [2d Dept 2018]). Furthermore, CPLR 3211 (a) (8) provides that an asserted cause of action may be dismissed against a defendant, if the court does not have the requisite jurisdiction over it.

III. Discussion and Analysis

A. Statute of Limitations - Fraudulent Inducement (Count VI) and Negligent Misrepresentation (Count VII)

The statute of limitations for a fraudulent inducement claim is the greater of (a) six years from the date when the cause of action accrued or (b) two years from the time plaintiff discovered the fraud or could with reasonable diligence have discovered the fraud (CPLR 213 [8]). The two-year discovery rule requires an inquiry into "whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred" (*Kaufman v Cohen*, 307 AD2d 113, 123 [1st Dept 2003] [internal quotation marks and citation omitted]). The same statute of limitations applies to a claim for negligent misrepresentation (*14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp.*, 78 AD3d 431 [1st Dept 2010]). Notably, in this case, plaintiffs' claims for fraudulent inducement and negligent misrepresentation are essentially based on the same factual allegations but advance different legal theories (NYSCEF 2, Complaint, ¶¶ 241-250; ¶¶ 251-261).

1. The Liberty/Arlington Transactions and Related Issues

Because plaintiffs bought the Liberty GC Policies and entered into the Liberty Extrinsic Agreements and Liberty LOC from 2004 to 2008, Liberty/Arlington (hereinafter, simply Liberty, unless otherwise specified) argues that the fraudulent inducement claim accrued in 2004-2008 and became time-barred six years later in 2010-2014. Liberty also argues that, because Prism demanded more money in October 2015 to pay for losses on the Liberty Program, conflicting with Prism's representation in 2003-2004 that plaintiffs were profitable under the Program, the demand triggered the running of the two-year discovery period. Liberty also argues that, because plaintiffs obtained loss runs in November 2015, which revealed that they were held responsible for workers' compensation claims at unaffiliated facilities, this discovery directly contradicts the allegation that the Prism/Schoors represented that plaintiffs and their affiliates would be the only insureds participating in the segregated cells, and their risks would not be pooled with others. Thus, Liberty

argues that, because plaintiffs possessed information of the alleged fraud in November 2015, the fraud claim became time-barred no later than November 2017 under the two-year discovery rule.

As to the negligent representation claim, Liberty argues that, because plaintiffs allege that defendants made the representations negligently, as opposed to intentionally, it is a claim of constructive rather than actual fraud, and thus, the six-year statute of limitations, without the two-year discovery rule applies. Accordingly, Liberty asserts that this claim accrued when the contract induced by the negligent representation was entered, and since the Liberty agreements were entered in 2004 through 2008, this claim became time-barred in 2010 through 2014.

In response, plaintiffs contend that the events that transpired in October and November 2015 amounted to a "mere suspicion" of Liberty's fraud, which did not suffice as a ground for imputing knowledge of fraud. Plaintiffs also contend that it was not until March 2016, after they completed an investigation, that they learned "for the first time" that they neither own an equity interest in the segregated cells nor have a right to receive profits therefrom. They argue that the information previously available to them could be interpreted in a myriad of ways, such that they did not have an obligation to further investigate.

Plaintiffs' contentions are insufficient to overcome Liberty's argument. First, the Complaint specifically states that, in November 2015, the loss runs showed that, "as of August 2015, Comp Control had paid at least $766,000 related to more than $1,278,000 of incurred losses related to inquires in 2007 and 2008 of 18 employees at three facilities not affiliated with Plaintiffs . . . ." (NYSCEF 2, Complaint, ¶ 168). Thus, by November 2015, plaintiffs possessed definitive and sufficient knowledge of the fraud or misrepresentation, which constituted more than a "mere suspicion." Further, in the Federal Action, Marvin J. Ostreicher, NHA's president, submitted an affidavit which states, in relevant part, "[a]fter NHA confronted Prism and the Schoors with the LMIC loss runs on November 23, 2015, Asher Schoor continued to incorrectly insist – in spite of this

glaring evidence to the contrary – that 'National is paying for their own claims.'" (NYSCEF 102, Ostreicher Fed. Aff., ¶ 59 [emphasis added]). This statement contradicts plaintiffs' current assertions.

In an attempt to bring their claims within in the applicable limitations period, plaintiffs argue that the fraud and misrepresentation claims did not accrue until the last extension prior to when plaintiffs learned of the fraud because the irrevocable Liberty LOCs are deemed to be automatically extended each year unless the issuing bank chooses not to renew. They also argue that, irrespective of when they discovered or should have discovered the fraud, these claims are timely under the "continuing wrong" doctrine, because a claim for fraud accrued "each time" when the Schoors, on behalf of Liberty, repeated the misrepresentations in each of their annual meetings with plaintiffs, and when additional premiums were paid in the form of Liberty LOC drawdowns as recently as August 2018. Plaintiffs further argue that Liberty should be equitably estopped from invoking the statute of limitations defense because plaintiffs were fraudulently induced by the Schoors (who acted as Liberty's agent) to refrain from filing a timely action.

The above arguments are unavailing. The continuing wrong doctrine is inapplicable here, because it is "predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct," and the "distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [citations omitted]). The automatic renewal of the Liberty LOCs is not a continuing unlawful act; rather, the renewal is a continuing effect of the alleged early conduct of the Schoors. Further, the LOC drawdowns in 2015-2018 were also the consequence of the alleged fraud or misrepresentation committed in 2004-2008. The limitations period begins to run "when all the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (*Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175 [1986]). Thus, the subsequent drawdowns on the LOCs in

2015-2018 also did not constitute new or independent wrongs that would have restarted the running of the statute (*Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1048 [2d Dept 2010] [holding that, with respect the fraudulent inducement claim, "any wrong accrued at the time of purchase of the policies, not at the time of payment of each premium," because "the continuing wrong doctrine does not apply to toll the statute of limitations"]).

Further, plaintiffs do not allege that Liberty, on its own, committed fraud or misrepresentation after 2008 so as to invoke the continuing wrong doctrine. Instead, they allege that the Schoors committed such acts "on behalf of Liberty," without establishing that the Schoors acted within the scope of authority granted by Liberty. Also, the argument made by plaintiffs' counsel, that "Prism, the broker, provided to plaintiffs the logo and a page from Liberty's website" (NYSCEF 107, Oral Argument Tr. [Tr.] at 22:12-14), is legally insufficient to establish apparent authority. Indeed, plaintiffs concede that they "engaged Prism as an insurance intermediary to assist [in the] search for workers' compensation insurance coverage;" that "the Schoors held themselves out as representing Plaintiffs' interests;" that "relying on the Schoors' representations, Plaintiffs agreed to enter into the Liberty Programs;" and that because "the Schoors touted themselves as trusted experts in alternative insurance plans and were longtime friends of the Plaintiffs' principals, Plaintiffs had no reason to suspect any wrongdoing on the part of Defendants." (NYSCEF 2, Complaint, ¶¶ 117, 135, 136 and 163).

Moreover, the equitable estoppel argument, raised by plaintiffs in a footnote, is without merit. The cases relied on by plaintiffs for this argument are inapplicable because the defendants in such cases were disloyal fiduciaries or made affirmative misrepresentation of facts directly to plaintiff. Here, plaintiffs only assert that the Schoors had a lengthy trusting relationship with plaintiffs' principals, but do not allege any such direct relationship with Liberty. Accordingly, the statute of

limitations bars both the fraudulent inducement and the negligent representation claims as against Liberty.

2. The Arch Transactions and Related Issues

Arch makes substantially the same legal arguments as those asserted by Liberty, that the statute of limitations bars the fraud and misrepresentation claims. Specifically, Arch argues that despite plaintiffs' admitted suspicion of fraud in mid-2015, they pushed the discovery date back by almost a year to March 2016 by alleging that is when they learned that they did not have the promised ownership interest. Arch asserts that because plaintiffs did not commence this action until January 2018, more than two years after they should have reasonably discovered the alleged fraud, and more than six years after the alleged fraud, these fraud and misrepresentation claims are untimely.

Plaintiffs argue that the Arch Programs began after the Liberty Programs ended, and that these fraud and misrepresentations claims are timely. They argue that the Arch Programs that started in November 2012, November 2013 and November 2014 are timely because each year was predicated on separate misrepresentations made in the Arch TC Agreements and the Arch Guarantees specific to that year's Arch GC Policies. As for those Arch Program years that predated November 2012, plaintiffs repeat the same arguments they made in opposing Liberty's motion to dismiss (as discussed above), arguing that they did not discover the fraud until March 2016 and that the "continuing wrong" doctrine tolls the running of the statute of limitations.

For the same reasons above, these claims are time barred.

3. The Prism Group Transactions and Related Issues

Plaintiffs assert that the motion to dismiss by Woodbury, Comp Control and CCIC is untimely because these defendants failed to answer the Complaint within the 30-day period for service of a responsive pleading. At oral argument, this court ruled that these defendants showed a reasonable excuse for their tardy response (NYSCEF 107, Tr. at 58-59).

Prism, the Schoors, Woodbury, CCIC and Comp Control (together, Prism Group) argue that the fraud and misrepresentation claims are time barred against them because the alleged misconduct took place in 2004, and the two-year discovery rule does not save these claims because plaintiffs should have discovered the misconduct by 2015. Plaintiffs contend that their claims as to the Prism Group's inducement of plaintiffs into the Arch Programs for the years 2012-2014 are timely because each year was based on a separate fraud or misrepresentation for the specific year of the Arch GC Policies. They also contend that, for the Liberty and Arch Programs between 2008-2011 that were entered into due to the Prism Group's fraud and misrepresentation, these claims are also timely based on the "continuing wrong" and "equitable estoppel" doctrines.

Again, for the reasons stated above, these claims are time barred.

Plaintiffs assert that the Prism Group should be estopped from raising a statute of limitations defense because plaintiffs have sufficiently alleged a special relationship with the Schoors and their continuing nondisclosure.

> "In order to make a prima facie showing that defendant should be estopped from asserting the Statute of limitations, plaintiff must establish an allegation that the defendant made an actual misrepresentation or committed some other affirmative wrongdoing that induced plaintiff to delay bringing the action in a timely manner. In other words, as the cases make clear, the doctrine of equitable estoppel requires proof that the defendant made an actual misrepresentation or committed some other affirmative wrongdoing, that the plaintiff relied on the misrepresentation, and that the reliance caused him to delay bringing a timely action. Further: due diligence on the part of a plaintiff in bringing the action is an essential element of equitable estoppel. If a plaintiff possesses sufficient knowledge of the possible existence of a claim, he or she is under a duty to make inquiry and ascertain all the relevant facts before the statute of limitations expires"

(*Escava v Escava*, 9 Misc 3d 1101[A], 2005 NY Slip Op 51358[U], *61-62 [Sup Ct, Kings County 2005]). Again, as discussed above, plaintiffs possessed sufficient knowledge of the Schoors' alleged fraud and misrepresentations in 2015.

B. Statute of Limitations Defense Relating to Breach of the GC Policies (Count VIII) and Breach of the Customer Agreements (Count IX)

While plaintiffs allege in Count VIII that Liberty and Arch breached their GC Policies with plaintiffs, Count IX alleges that Prism and the Schoors breached the "Customer Agreements" with certain plaintiffs. With respect to the GC Policies, plaintiffs allege that Liberty and Arch changed the terms of these policies by requiring plaintiffs to enter into captive reinsurance programs which included, among other documents, the Liberty Extrinsic Agreements, the Liberty and Arch Reinsurance Agreements, the Liberty and the Arch LOCs as well as the Arch Guarantees, and that pursuant to these documents, plaintiffs were caused to post millions of dollars of additional premiums for the benefit of Liberty and Arch. As to the Customer Agreements, plaintiffs allege that Prism and the Schoors breached these agreements by failing to provide comprehensive claims management services on a regular basis and failing to help plaintiffs decrease the premium cost, which again caused plaintiffs to post millions of dollars of additional premiums in connection with the GC Policies.

The statute of limitations for a breach of contract clam is six years (CPLR 213 [2]). The "statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury" (*ACE Sec. Corp. v DB Structured Prods., Inc.*, 25 NY3d 581, 594 [2015]). Because the Program documents (which allegedly altered the premium rates) were executed in 2004 through 2008, Liberty argues that the breach of contract claim expired no later than 2010 through 2014 and is now time barred. Notably, Arch does not raise the statute of limitations defense as to the breach of contract claim against it.

Adopting the same arguments that the fraud and misrepresentation claims are not time barred, plaintiffs contend that the breach of contract claim is also not time barred because (1) a new breach accrued when the Liberty LOCs were automatically extended; (2) Liberty's continuing wrong delayed the accrued of this claim until their final wrong in August 2018 (the recent drawdown on the

Liberty LOCs); and (3) Liberty is equitably estopped from asserting a statute of limitations defense. Alternatively, plaintiffs argue that the "continuing wrong" doctrine applies to a contract that requires continuing performance and that each successive breach may begin the statute of limitations running anew. They further argue that because the Liberty GC Policies required continuing performance, Liberty was bound to continue paying any new claims covered under the 2004-2008 Liberty GC Policies.

These arguments are unpersuasive. As discussed above, the automatic renewal/extension of the irrevocable Liberty LOCs and their drawdowns in 2015-2018 did not renew the running of the statute because neither the extension/renewal nor the subsequent drawdowns constituted new or independent wrongs that would restart the running of the statute. Significantly, in *ACE*, 25 NY3d at 594, the Court of Appeals rejected plaintiff's argument that the defendant's contractual repurchase obligation of non-conforming loans was a "distinct and continuing obligation that [defendant] breached each time it refused to cure or repurchase [such loans]," explaining that "New York does not apply the 'discovery' rule to statutes of limitations in contract actions." The Court emphasized that, even though its ruling might be "harsh and manifestly unfair," a contrary rule would depend on the "subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules that have long governed this aspect of commercial repose" (*id.* [internal quotation marks and citation omitted]).

Thus, the subsequent drawdowns on the Liberty LOCs, which were posted in 2004-2008 and then extended, did not constitute distinct and independent breaches that would restart the running of the statute. Also, as pointed out by Liberty, the alternative continuing performance theory espoused by plaintiffs is equally invalid because "Liberty is not being sued for breach of its continuing obligation to cover long-term injuries suffered [by workers that gave rise to workers' compensation

claims] back in 2004-2008" (NYSCEF 100, Liberty Reply at 8). Accordingly, the breach of contract claim against Liberty is time barred.

With respect to the breach of the customer agreements claim (Count IX) against Prism and the Schoors, plaintiffs argue that this claim is timely because (1) a new breach accrued each year when the Customers Agreements were automatically extended; (2) defendants' continuing wrong delayed the accrual of this claim; and (3) defendants are equitably estopped from pleading a statute of limitations defense. For the reasons state above, this claim is time barred.

C. Statute of Limitations Defense Relating to Counts I, II, III, IV and V

Plaintiffs allege in Count I violation of New York Insurance Law (NYIL) § 2314 (against all defendants); Count II alleges violation of NYIL § 2339 (against Liberty and Arch); Count III alleges violation of Connecticut Unfair Insurance Practices Act (CUIPA; Conn. Gen. Stat. § 381-815) and Connecticut Unfair Trade Practices Act (CUTPA; Conn. Gen. Stat. § 42-110g) (against all defendants); Count IV alleges violation of Vermont Consumer Fraud Act (VCFA; Vt. Stat. § 2453) (against all defendants); and Count V alleges violation of New Jersey Consumer Fraud Act (NJCFA; N.J. Stat. § 56:8-2) (against all defendants).

1. Statutory Claims Against Liberty (New York and Connecticut only)[3]

In Counts I and II, plaintiffs allege that Liberty violated these NYIL statutes by charging rates not approved by the New York Department of Financial Services (DFS). Liberty asserts that, where a private right of action is permitted by NYIL, the limitations period is three years under CPLR 214 (2), which applies to claims that would not exist but for a statute. Liberty also argues that, assuming the NYIL statutes provide a private right of action, the Liberty GC Polices with approved rates were

[3] At oral argument, Liberty counsel's statement that plaintiffs have agreed to withdraw Counts IV and V against Liberty was unopposed. (NYSCEF 107, Tr. at 42; *see also* Plf. Opp. at 14, n 10 [unless new information became available, plaintiffs agree not to address Counts IV and V against Liberty, as to the statute of limitations and the "failure to state a claim" defenses]).

issued in 2004-2008, and the transactions on which the policies allegedly were conditioned and that allegedly modified the rates also occurred in 2004- 2008; thus, these statutory claims became time-barred in 2007-2011.

While agreeing that the three-year limitations period applies, plaintiffs contend that these claims did not accrue in 2004-2008, but instead accrued when Liberty received additional premium payments in the form of drawdowns on the Liberty LOCs which began in 2015 and continued through 2018.

In *Gaidon v Guardian Life Ins. Co. of Am.,* 96 NY2d 201(2001), the defendant insurer sold "vanishing premium" life insurance policies to consumers, and the insurer was sued by the plaintiffs for violation of section 349 of New York's General Business Law for deceptive practices. The Court of Appeals noted that the lawsuit was brought eight years after the plaintiffs purchased the policies (*id.*). The Court stated that the plaintiffs' injuries occurred "when they were first called upon to pay additional premiums beyond the date by which they were led to believe that policy dividends would be sufficient to cover the premium costs" (*id.* at 211). The Court concluded that "the date when those additional premiums were demanded triggered the Statute of Limitations," and because the action was commenced within three years of those dates, the action was timely (*id.* at 212). The facts in *Gaidon* are identical to this case in that the drawdowns on the Liberty LOCs were additional premiums for the Liberty GC Policies, plaintiffs assert that these statutory claims are timely with respect to those drawdowns that were made within three years of the commencement of this action. Thus, Liberty's motion to dismiss Counts I and II based on the statute of limitations defense is denied. Liberty's argument that only certain plaintiffs made drawdowns was first raised on reply, and thus, will not be considered at this time as plaintiffs have not had an opportunity to respond.

Count III alleges violations of CUTPA and CUIPA, which proscribe unfair and deceptive practices in the insurance business. Liberty asserts that a plaintiff may bring a CUTPA claim based

on a violation of CUIPA, and the limitations period for a CUTPA claim is three years after the occurrence of a violation, with no extension based on discovery or equitable tolling. Liberty argues that in New York, the limitations period for a CUTPA/CUIPA claim is three years under CPLR 214 (2), and because the alleged violation in this case occurred in 2004-2008 with respect to the Liberty Program, Count III is time barred.

In *Fichera v Mine Hill Corp.*, 207 Conn 204 (1988), the Supreme Court of Connecticut held that the three-year limitations period for CUTPA claims was not tolled by a "continuing course of conduct" where the plaintiff failed to allege that the defendant, as the alleged perpetrator of fraud, had a fiduciary duty to disclose the fraud after its occurrence (*id.* at 208). Indeed, the Connecticut Court observed that a simple vendor-vendee relationship did not "give rise to obligations equivalent to those of a fiduciary" to trigger the tolling of the statute (*id.* at 210). Here, plaintiffs do not allege that Liberty is their fiduciary.

As also noted by Liberty, an action under CUTPA may not be brought more than three years after the occurrence of a violation (*see* Conn. Gen. Stat. § 42-110g[f]), and that the accrual occurs when the deceptive act is committed regardless of when the damages are suffered. Liberty also persuasively distinguishes the *Gaidon* holding in that *Gaidon* addressed a claim under GBL § 349, which accrues upon the injury caused by a deceptive practice, but the CUTPA claim in this case accrues upon the deceptive practice. Therefore, Count III is time barred.

2. Statutory Claims Against Arch

As to Counts I and II, Arch argues that these New York statutory claims are time barred because (1) the limitations period is three years under CPLR 214 (2); (2) claims arising from the Arch GC Policies issued in 2008-2014 accrued in the respective issue years and expired in 2011-2017; and (3) the instant action was commenced on January 18, 2018. Arch also argues that under *Gaidon*, a

claim under CPLR 214 (2) accrues when all elements of the claim are present, and that these claims became time-barred as of November 1, 2017.

Arch's arguments are unavailing because the court explained in *Gaidon* explained the plaintiffs' injuries occurred (i.e. the cause of action accrued) when they were "first called upon to pay additional premiums beyond the date by which they were led to believe that policy dividends would be sufficient to cover the premium costs" (96 NY2d at 211). Also, even though Arch claims that it had the ability to drawdown on the LOCs at any time, it does not refute the factual allegation that no drawdowns were made until plaintiffs, in 2017, were first required to pay additional premiums for the reinsurance obligations of Comp Control. Therefore, Counts I and II survive as against Arch.

As to Counts III, IV and V that allege violations of Connecticut, Vermont and New Jersey statutes proscribing deceptive insurance practices and consumer fraud, respectively, Arch asserts that the limitations periods for these claims are three years under the borrowing statutes of CPLR 202, because where a nonresident sues on a cause of action that accrues outside of New York, the cause of action must be timely under both New York and the jurisdiction where the cause of action occurred. In effect, Arch argues that, even though the Vermont and New Jersey statutes have a six-year limitations period,[4] the borrowing statute applies the same three-year period to all, making these claims untimely, as they accrued as of the effective date of each year of the Arch Policies, beginning November 1, 2008, and the statute of limitations for such claims then expired annually from November 1, 2011 through November 1, 2017, months before the instant action was commenced. Arch relies on *Gaidon* in support.

For the reasons discussed above in connection with Counts I and II, Arch's reliance on *Gaidon* is misplaced because there the court stated that the cause of action for a statutory violation accrued on the date when the plaintiffs were "first call upon to pay additional premiums" on their

[4] Arch agrees that Connecticut has a three-year limitations period.

insurance policies (96 NY2d at 211). Also, for the reasons stated above, Count III is dismissed (see *Timmons v City of Hartford*, 283 F Supp 2d 712, 719 [D Conn 2003] ["A CUTPA violation occurs when the misrepresentation is made and the statute of limitations commences running the moment the act or omission complained of occurs"]).

3. Statutory Claims Against the Prism Group

The Prism Group asserts that Count I is untimely because the three-year statute of limitations operates as a complete bar to plaintiffs' claim for alleged rate violations. They also assert, without discussing the basis and applicable facts, that Counts II, III, IV and V are also untimely, and simply stated that the borrowing statute under the CPLR applies a three-year limitations period, which operates to bar these claims.

Relying on *Gaidon*, plaintiffs contend that these claims are timely because they accrued when the Prism Group defendants received premiums (on behalf of the insurers) that departed from the rates, which were in the form of additional premiums resulting from the drawdowns on the Liberty and Arch LOCs that began in 2016, within three years of the commencement of this action.

In reply, the Prism Group argues that Count I, IV and V accrued when the premium was billed and not when the additional premiums were paid in the form of LOC drawdowns. For the reasons stated above, this argument is unavailing under *Gaidon,* and Counts I, IV and V survive. However, also for the reasons stated above, as to Count III is time barred (see *Timmons v City of Hartford*, 283 F Supp 2d at 719).

D. Dismissal Pursuant to CPLR 3211 (a) (7)

Besides seeking dismissal of the various Counts based upon the statute of limitations defense under CPLR 3211 (a) (5), defendants also seek to dismiss these Counts pursuant to CPLR 3211 (a) (7) for failure to plead the causes of action, as discussed below.

1. Claims Against Liberty (Counts I and II)

With respect to Counts I and II (violation of NYIL §§ 2314 and 2339), plaintiffs assert that Liberty violated these statutes by using the captive reinsurance program to modify the regulator-approved premium rates in the Liberty GC Policies. Plaintiffs also seek rescission of the Liberty Extrinsic Agreements and the Liberty LOCs.

Liberty argues that plaintiffs failed to plead sufficient facts to suggest that Arlington, the offshore reinsurer, is Liberty's "representative" within the meaning of section 2314, which states that "no authorized issuer ... and no employee or other representative of an authorized issuer" shall "charge or demand a rate or receive a premium that departs from the [approved] rates." Liberty also argues that the remedy of rescission must be exercised promptly after the party learned of the wrong, and even assuming that plaintiffs first discovered the fraud in March 2016, which was more than one-and-a-half years before the filing of this action, the relief was not promptly sought. Liberty further argues that, because plaintiffs seek rescission of only the Liberty Extrinsic Agreements and Liberty LOCs, but not the Liberty GC Policies, it is impossible to restore the status quo.

These arguments are unpersuasive based on a recent decision rendered in *National Convention Servs. LLC v Applied Underwriters Captive Risk Assur. Co., Inc.*, 239 F Supp 3d 761, 770 (SD NY 2017) (*Applied Underwriters*), a case with facts substantially similar to this case. In *Applied Underwriters*, the plaintiffs alleged that the defendant insurers and reinsurers (corporate affiliates alleged to have devised a complicated scheme to circumvent the insurance laws of the various states) violated, *inter alia*, NYIL §§ 2312 and 2339, and the federal court denied a motion to dismiss the various statutory claims against the defendants because each defendant allegedly played a role in effecting the scheme. Thus, alleging Arlington is a "representative" of Liberty is permissible under the circumstances of this case. In any event, whether Arlington is a "representative" is a

disputed fact that is not suitable for determination in the context of this pre-answer, pre-discovery motion to dismiss.

Moreover, the "rule of promptness," as articulated by Liberty, is not applicable to situations where "plaintiffs would have to return nothing to defendants in the event of rescission" (*Barefoot v West Point-Pepperell, Inc.*, 222 AD2d 281, 282 [1st Dept 1995]). Here, plaintiffs only seek rescission of the Liberty External Agreements and Liberty LOCs because they seek the return of funds that were "improperly" drawn down from the LOCs, and because they undisputedly "received nothing of value" from "the promised benefits of ownership of the captives," there is nothing for them to return to Liberty/Arlington. Accordingly, Counts I and II are viable.

2. Claims Against Arch (Counts I, II, IV, V and VIII)

For Counts I and II, Arch argues that there is no private right of action under NYIL §§ 2314 and 2339 and that only the DFS has the authority to enforce violations of the statute, including the imposition of penalties. However, Arch acknowledges that, in the absence of statutory authorization, a private right of action may be implied if the three factors outlined in *Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629 (1989), are present. Those three factors are: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (73 NY2d at 633). Arch also argues that, claims for declaratory or injunctive relief, like those sought herein, are unavailable in the absence of an express private right of action.

Arch's arguments are unavailing. In *Applied Underwriters*, the plaintiffs claimed that they were entitled to rescissory damages, for amounts charged by the defendants (insurers and reinsurers) for premiums paid above the GC policies, based on violation of sections 2314 and 2339. 239 F Supp 3d at 780. The federal court noted that the legislative history showed "the legislature intended that

private enforcement would 'augment' any administrative remedies for these sections" (*id.* at 781 citing *Maimonides Med. Ctr. v First United Am. Life Ins. Co.*, 116 AD3d 207, 216 [2d Dept 2014] [implied right of action consistent with NYIL's administrative enforcement scheme]). Ruling that the plaintiffs have an implied right of action under these statutory sections, which "impose affirmative duties on parties to insurance contracts to adhere to filed rates," and that the plaintiffs are employers purchasing workers' compensation policies who are "plainly members of a class designed to benefit from these sections of the NYIL," the Court denied the defendants' motion to dismiss these claims (*id.* at 782-783). Notably, the Court also considered and applied the three *Sheehy* factors before reaching its conclusion (*id.* at 778-779). Moreover, as noted by plaintiffs, Arch's assertion that declaratory relief is unavailable in the absence of "an express private right of action" is flawed, because the case it relied on actually dealt with the issue of whether relief is available in the absence of an express or implied private right of action (*see Schlesinger v Valspar Corp.*, 21 NY3d 166 [2013]).

Alternatively, Arch argues that, even if plaintiffs could have an implied right of action, the Arch TC Agreements and Binder establish that Arch did not violate the statute. More specifically, Arch argues that the Arch LOCs and Arch Guarantees are collateral for the reinsurance agreements to which plaintiffs are not parties (but are for the reinsurance obligations of CCIC), and the Binder shows that the premiums to be paid for the Arch GC Policies are separate from the collateral obligations. Arch also argues that, if plaintiffs allege that the reinsurance structure violates the statute, the allegation is rebutted by the section in the Binder which states, in relevant part, "[b]y binding coverage with Arch, Named Insured acknowledges that it has reviewed this program, including the Comp Control SPC #400 component [*i.e.* the captive cell] with its counsel . . . to determine appropriate disclosure and handling of the transaction." (NYSCEF 48, Binder at 5, § 5 [ix]). In sum, Arch argues that, by accepting coverage, plaintiffs represented to Arch, via this

section, that the transaction was appropriate, that Arch did not alter the approved rates and did not violate insurance law.

Plaintiffs contend that the Arch LOCs and Arch Guarantees, which Arch characterizes as collateral obligations, were part of the additional premium paid to Arch, because the First Department has determined that, the premium paid by an insured was the consideration paid an insurer for undertaking to indemnify the insured against a specific peril (*Medical Malpractice Ins. Assn. v Community Gen. Hosp. of Sullivan County*, 73 AD2d 867, 868 [1st Dept 1980]). Plaintiffs also contend that, under NYIL, premium is defined as "all amounts received as consideration for insurance contracts or reinsurance contracts . . . and includes premium deposits . . . and every other compensation for such contract" (31 *N.Y. Prac. New York Ins. Law* § 2.61 [2017-2018 ed.]). Plaintiffs further contend that in the Binder, including the misrepresentation that the "Named Insured" would have an interest in the captive, was drafted by Arch (not by Plaintiffs), and that they never represented to Arch that the "transaction was appropriate," but instead relied on the misrepresentations (by Arch and Prism) in the Binder, when entering into the fraudulent scheme.

Arch does not dispute the legal definition of premium, as recited by plaintiffs. Instead, it baldly asserts that the Binder supports its position that there was no violation of the Insurance Law, and the Binder confirms that plaintiffs had their own counsel review the reinsurance structure and assented to its appropriateness. Arch also asserts, without citing contrary and applicable authority, that *Applied Underwriters* is a "non-binding case." Its attempt to distinguish the decision's analysis on section 2324 is unpersuasive, given the court's observation that such section "broadly prohibits offering inducements to enter into insurance contracts" (239 F Supp 3d at 780). Accordingly, Arch's motion to dismiss Counts I and II based on CPLR 3211 (a) (7) is denied.

As to Count V, which allege violations of the insurance laws of New Jersey, Arch argues that these claims should be dismissed because the Complaint does not allege the misrepresentations were

made by Arch; this statutory claim is based upon the same conduct that alleges common law fraud and misrepresentation; that the alleged misstatements as to plaintiffs' ownership of the captive were made by the Prism Group; and the Binder disproves any fraud or misrepresentation on the part of Arch. While plaintiffs do not dispute that the elements for these statutory claims are the same as those for their common law fraud and misrepresentation claims (Counts VI and VII), they insist that the claims are adequate. Notably, however, Arch does not seek to dismiss these statutory claims on the basis that they are duplicative of the common law claims. More importantly, because the Binder does not entirely or conclusively disprove any fraud or misrepresentation on Arch's part, for the reasons stated above and despite Arch's assertion to the contrary, this statutory claim survives the motion to dismiss.

With respect to Count IV, in which plaintiffs allege violation of Vermont's insurance laws, Arch argues, in addition to those arguments made in support of dismissal of Counts III and V, that the applicable statute, VCFA, does not apply to the insurance industry (*see Wilder v Aetna Life & Cas. Ins. Co.*, 140 Vt 16 [1981]). Arch argues that, although the statute was amended in 1985 to include intangibles and services of any kind, the Supreme Court of Vermont never overruled *Wilder* (*see Greene v Stevens Gas Serv.*, 177 Vt 90 [2004] [did not overrule *Wilder* and acknowledged statutory amendment]).

Plaintiffs contend that multiple Vermont courts have since held that VCFA applies to insurance despite *Wilder* and rely on *Blake v Progressive N. Ins. Co.*, 2016 WL 1167746 (Vt Super Ct., Feb. 2016). Plaintiffs' contention is unpersuasive because *Blake* was issued by a Vermont lower court, which stated that it "believes that the CFA now covers transactions involving the sale of insurance" (*id.* at *2). More importantly, because *Wilder* remains the pronouncement of Vermont's highest court in 1981, and it was unaltered by *Greene* in 2004 even though the highest court was

aware of the statute's amendment in 1985, *Wilder* is the controlling precedent that must be followed by this court. Accordingly, Count IV is dismissed.

In Count VIII (breach of contract), plaintiffs allege that Arch breached the Arch GC Policies by changing the policy terms in requiring plaintiffs to enter into the captive reinsurance program, which caused them to incur millions of dollars of additional premium in the form of Arch LOCs and Arch Guarantees. Responding to Arch's contention that plaintiffs are not parties to the "Reinsurance Agreements," plaintiffs argue that this claim has nothing to do with such agreements, but rather that Arch breached the GC Policies by requiring them to enter into the Arch Programs via the Binder and related documents, as conditions for issuing the GC Polices. In reply, Arch contends that plaintiffs failed to identify a provision in the GC Policies that was breached and asserts that plaintiffs are re-packaging their infirm fraud claim as a breach of contract claim.

Because plaintiffs allege that Arch breached the Arch GC Polices (which are cost-guaranteed) by requiring plaintiffs to enter into the captive programs (which alter the GC Polices and require the payment of additional premium), it states a breach of contract claim.

3. Claims Against the Prism Group (Counts I, IV, and V)

The Prism Group argues that plaintiffs lack standing to sue for violation of NYIL § 2314 (Count I) because the reinsurance agreements which plaintiffs allege violate the statute mandate the plaintiff having privity to the subset of insurance contracts that require rate filing. (*see Applied Underwriters*, 239 F Supp 3d at 783 [only parties with privity to such subset of contracts may sue to vindicate their statutory rights]).

As an initial matter and as discussed above, the *Applied Underwriters* court held that the plaintiffs in that case have an "implied right of action" to sue the defendants for violation of the New York insurance statute. Here, as noted by plaintiffs, this statutory claim is not based on the reinsurance agreements, but rather on defendants' conditioning the issuance of the GC Policies with

plaintiffs' entry into the reinsurance captives that involved the execution of documents that are substantively and integrally related to (albeit physically separated from) the GC Policies, as to which plaintiffs do have privity. Accordingly, Count I survives.

As to Count IV where plaintiffs allege violation of VCFA, the Prism Group argues that under *Wilder*, the Vermont Supreme Court has rejected the application of VCFA to insurance. As explained above, *Wilder* remains good law reflecting the interpretation of this statute by Vermont's highest court, and there is an absence of specific intent by the Vermont legislature to abrogate or modify *Wilder* despite the statute's subsequent amendment. Thus, Count IV is dismissed pursuant to CPLR 3211 (a) (7).

As to Count V where plaintiffs allege violation of New Jersey's consumer fraud statute, the Prism Group argues that the allegations in Complaint are insufficient to plead the requisite elements that constitute a violation of NJCFA. They also argue that because plaintiffs, in essence, allege a breach of contract claim, Count V should also be dismissed because the breach of an enforceable contract does not constitute a violation of the CFA. The court rejects the argument that plaintiffs fail to plead the requisite elements of a NJCFA violation because the complaint includes allegations that the Prism Group had engaged in deceptive acts to induce plaintiffs into entering the Liberty and Arch Programs, including the captive programs that are interrelated with the Liberty and Arch GC Policies. Plaintiffs also point out that this statutory claim has nothing to do with their Customer Agreements with Prism, but is based on the Prism Group's deceit and misrepresentation in connection with the Liberty and Arch Programs, and that the New Jersey court has denied a motion to dismiss this statutory claim where the defendant contended that it was in essence a breach of contract claim (*see Ryan v Liberty Mutual Ins. Co.*, 2015 WL 4138990 at *3 [D NJ July 8, 2015] [denied motion to dismiss NJCFA claim based on the complaint's alleged failure to state a claim for relief where the plaintiffs not only claimed that the defendant underpaid benefits, which would amount to breach of

contract, but also claimed that the defendant acted deceptively]).[6] The *Ryan* Court's holding, which was not addressed by the Prism Group, is persuasive in the context of this motion to dismiss based on CPLR 3211 (a) (7). Thus, Count V survives.

Finally, pursuant to CPLR 3211 (a) (8), the Prism Group seeks to dismiss the claims in the Complaint against CCIC, a Caymans Islands segregated portfolio company, arguing that this court has no jurisdiction over CCIC because it has no contractual relationship with plaintiffs, and it has not transacted business in New York to satisfy the jurisdictional requirements of CPLR 301 or CPLR 302. Plaintiffs contend that this court has jurisdiction over CCIC because (1) it is controlled by New York defendants, Prism and/or the Schoors, and benefitted from their New York tortious conduct; and (2) it is the grantor of the trust that is the New York beneficiary of the Liberty LOC and benefitted therefrom (*see Capital One Equip. Fin. Corp. v Tsitiridis,* 2017 WL 4818415 at *1 [Sup Ct, NY County 2017] [denying motion to dismiss because court found sufficient jurisdiction based upon "out-of-state trust's acquisition of New York property"]). Plaintiffs also assert that the Complaint contains adequate allegations to warrant further discovery to determine if Prism or the Schoors is an agent of CCIC for jurisdictional purposes. The conduct of an agent may be attributed to its principal for jurisdictional purposes where the agent engaged in activities in New York for the benefit of and with the knowledge and consent of principal (*Morgan v A Better Chance, Inc.*, 70 AD3d 481, 482 [1st Dept 2010]). Thus, the Prism Group's jurisdictional challenge is rejected.

[6] Upon defendant-insurer's subsequent motion for summary judgment, the New Jersey district court, based on the ultimate facts, held that the NJCFA claim was indistinguishable from the breach of contract claim, and was also barred by the statute of limitations (*Ryan*, 234 F Supp 3d 612 [D NJ, Jan. 18, 2017], *reconsideration denied*, 2017 WL 4404566 [D NJ, Oct. 4, 2017]).

IV. Conclusion

Accordingly, it is

ORDERED that the motion to dismiss by defendants Liberty Mutual Insurance Company and Arlington Insurance Company, Ltd. (sequence number 002) is granted, in part, to the extent that Count III (violation of Connecticut insurance statute), Count IV (violation of Vermont consumer fraud statute), VI (fraudulent inducement), VII (negligent misrepresentation) and VIII (breach of contract) of the complaint are dismissed and Count V (violation of New Jersey consumer fraud statute) of the complaint is deemed withdrawn by plaintiffs and dismissed; and it is further

ORDERED that the motion to dismiss by defendant Arch Insurance Company (sequence number 003) is granted, in part, to the extent that Count III (violation of Connecticut insurance statute), Count IV (violation of Vermont consumer fraud statute), VI (fraudulent inducement), and VII (negligent misrepresentation) are dismissed; and it is further

ORDERED that the motion to dismiss by defendants Prism Consultants LLC, Asher Schoor, Ettie Schoor, Woodbury CC, LLC, Comp Control Insurance Company SPC and Comp Control, LLC (sequence number 004) Count III (violation of Connecticut insurance statute), Count IV (violation of Vermont consumer fraud statute), VI (fraudulent inducement), VII (negligent misrepresentation) and Count IX (breach of customer agreement) are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the parties are directed to appear for a ~~status~~ Preliminary conference before this court on February 18, 20~~19~~20 at 9:30.

Motion Seq. No. 02:

January 6, 2020
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

Motion Seq. No. 03:

January 6, 2020
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

Motion Seq. No. 04:

January 6, 2020
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
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