

SUPREME COURT OF THE STATE OF NEW YORK
JUSTICE SHIRLEY WERNER KORNREICH

PRESENT:

PART 54

Index Number : 650801/2011

SONTAG, GERSHON

vs

UNITED LIFE INSURANCE

Sequence Number : 004

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

58, 59, 61
77, 78, 82
88, 95

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied in accordance with the amended decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/6/11

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X
GERSHON SONTAG, as trustee of the
TELLER FAMILY IRREVOCABLE TRUST VI,

Plaintiff,

-against-

Index No. 650801/2011
Decision & Order

THE UNITED STATES LIFE INSURANCE COMPANY
IN THE CITY OF NEW YORK, STAR LIFE PARTNERS,
INC., STAR LITE BROKERAGE, INC. and
SIMON WEINSTOCK,

Defendants.

-----X
Shirley Werner Kornreich, J.:

Motion sequence numbers 004 and 005 are consolidated for purposes of disposition.

In sequence number 004, defendant The United States Life Insurance Company in the City of New York (US Life) moves, pursuant to CPLR 3211 (a) (5) and (7), 3013, and 3016 (b), for an order dismissing the amended complaint as asserted against it. In sequence number 005, defendants Star Lite Brokerage, Inc. (Star Lite) and Simon Weinstock move, pursuant to CPLR 3211 (a) (1), (3), (5), and (7), 3013, and 3016 (b), to dismiss with prejudice the amended complaint and cross-claims as asserted against them, or, in the alternative, pursuant to CPLR 3211 (c), for summary judgment in their favor on the amended complaint and cross-claims.

Facts

The following facts are drawn from the complaint unless otherwise noted.

This action arises out of the purchase in 2005 by plaintiff Gershon Sontag, as trustee of the Teller Family Irrevocable Trust VI (the Trust), of a life insurance policy insuring the life of

nonparty Bluma Teller from nonparty American General Life Insurance Company (American General), a New Jersey insurer (American General Policy No. U10024103L [the policy]). The Trust alleges that, in making the purchase, it relied on defendants' fraudulent representations, conduct, and omissions that led it to believe that it had purchased a life insurance policy issued by US Life, a New York insurer. Both American General and US Life are member companies of nonparty American International Group (AIG).

Specifically, the Trust alleges that, in 2005, Sontag was advised by nonparty David Weber, an insurance agent licensed in New York, that AIG/US Life was about to issue a \$2 million policy on the life of Mrs. Teller, an 80-year-old woman living in Brooklyn, New York, and that Mrs. Teller was looking for investors to pay the policy premiums through a trust. The parties agree that nonparty Yoel Epstein is the insurance broker who sold the policy to the Trust (Oral Arg. Sept. 8, 2011 Tr., at 4:23-26).

The Trust alleges that Weber further advised Sontag that AIG/US Life had a physical examination of Mrs. Teller performed and had verified her financial information, and that the policy had been approved by the AIG/US Life underwriting department. The Trust alleges that Weber advised that he had created the Trust as the owner of the policy, that he instructed Sontag to make the premium payment checks payable to AIG/US Life, and that he delivered the policy insuring Mrs. Teller's life to the Trust in Brooklyn, New York in a folder labeled "AIG." Allegedly in the belief that the Trust had purchased a policy issued under the laws of the state of New York, Sontag, as the Trust trustee and an investor, made all premium payments on the policy, which, by May 2011, totaled more than \$400,000.

The Trust alleges that some \$12 billion were invested in life insurance policies in a

similar manner between 2004 and 2008, and that one of the largest purchasers of life insurance policies in the secondary market is AIG, the parent company of both US Life and American General.

In January 2010, more than two years after the issuance of the policy, American General commenced an action in New Jersey to rescind the policy on the ground that it had been procured by fraud (*see American Gen. Life Ins. Co. v Teller Family Irrevocable Trust VI*, US Dist Ct, D NJ, Case No. 2:10-CV-5604, Wigenton, J. [the New Jersey action]; New Jersey Statutes Annotated [NJSA] 17:33A-2). According to the Trust, as a result of the commencement of the New Jersey action, it learned for the first time that it had purchased a New Jersey life insurance policy from AIG/American General, rather than a New York policy from AIG/US Life. In the New Jersey action, the Trust has filed counterclaims against American General arising out of allegations that, among other things, American General committed fraud and consumer fraud in violation of section 349 of the New York General Business Law (GBL) by conducting a "bait and switch" scheme to induce New York residents to invest in life insurance policies issued in New Jersey.¹

The Trust further alleges that, from discovery obtained in the New Jersey action, it learned for the first time that Star Lite and Weinstock, allegedly as agents for AIG/US Life and defendant Star Life Partners, Inc. (Star Life), received some of the commissions generated by the

¹ In New York, an insurer cannot challenge the viability of a policy after a two year contestability period, even when the insured has failed to disclose facts on an insurance application" (*Johnson v Metropolitan Life Ins. Co.*, 79 AD3d 450, 452 [1st Dept 2010]). In New Jersey, an insurer may deny a claim, even after the contestability period if the insured committed fraud in the policy application (*Ledley v William Penn Life Ins. Co.*, 138 NJ 627, 635 [1995])" (*id.*).

sale of the policy. It also learned that the sale of an AIG/American General policy generates a larger commission than does the sale of an AIG/US Life policy.

In May 2011, the Trust commenced the action at bar against US Life, Star Life,² Star Lite, and Weinstock. In the amended complaint, the Trust asserts claims against AIG/US Life for breach of contract and for a judgment directing AIG/US Life to issue the policy, as promised and for which the Trust has been paying premiums, retroactive to 2005. The Trust also asserts claims against Star Lite and Weinstock for breach of contract, negligently failing to provide a proper policy, and breach of fiduciary duty. Against all defendants, the Trust asserts claims for consumer fraud in violation of GBL § 349, allegedly through a "bait and switch" scheme committed against elderly New York State residents, particularly those living in an Orthodox Jewish community in Brooklyn, New York, to induce them to invest in New Jersey life insurance policies, and unjust enrichment by retention of the premium payments and commissions.

US Life, Star Lite, and Weinstock now seek to dismiss the claims asserted against each of them.

Discussion

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the factual allegations in a light most favorable to the pleading party (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal

²Subsequently, plaintiff voluntarily discontinued its claims asserted against defendant Star Life Partners, Inc.

conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence,' are not presumed to be true and [are not] accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000], quoting *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]; *see* CPLR 3211 [a] [1]).

Star Lite

Star Lite seeks to dismiss all claims asserted against it on the ground that the documentary evidence conclusively demonstrates that it was not incorporated until after AIG/American General's issuance of the policy and the payment of the first premium by check dated September 20, 2005. In support, Star Lite has submitted a copy of its certificate of incorporation under section 402 of the Business Corporation Law dated December 8, 2005, and a document issued by the New York State Department of State, Division of Corporations demonstrating that Star Lite filed for incorporation as a domestic corporation on January 5, 2006. The Trust does not dispute the validity and accuracy of these documents. Therefore, this branch of the motion is granted, and all claims asserted against Star Lite are dismissed.

Breach of Contract (First Cause of Action)

US Life seeks to dismiss the first cause of action for breach of contract on the ground that there was no contract, either express or implied, between the Trust and US Life and that, therefore, no breach could have occurred. In opposition, the Trust contends that the documentary evidence demonstrates that a contract exists between the Trust and AIG/US Life, not AIG/American General.

"Generally, a party alleging a breach of contract must 'demonstrate the existence of a . . .

contract reflecting the terms and conditions of their . . . purported agreement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011], quoting *American-European Art Assoc. v Trend Galleries, Inc.*, 227 AD2d 170, 170 [1st Dept 1996]). A claim for breach of contract "does not lie absent proof of a contractual relationship or privity between the parties" (*Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 104 [2d Dept], *lv denied* 13 NY3d 900 [2009]; *Freeford Ltd. v Pendleton*, 53 AD3d 32, 38 [1st Dept 2008]). The record is devoid of any documentary evidence indicating that a contract to issue a life insurance policy, or the policy itself, ever existed between the Trust and AIG/US Life.

In the amended complaint, the Trust alleges that it applied for a life insurance policy from US Life and that US Life failed to enter into such a policy. The September 20, 2005 life insurance policy application, part A, completed by Sontag in his capacity as trustee of the owner trust, identifies AIG as the insurer, but does not identify either American General or US Life as the AIG-member company to which the application is made. The August 9, 2005 amplified report by nonparty Profile Services regarding Mrs. Teller's finances and health, identifies American General as the insurer. The envelope containing the policy sent to Sontag identifies AIG as the sender of the document. The policy itself clearly and repeatedly identifies the carrier as American General, a New Jersey insurance carrier.

On a motion to dismiss a claim for breach of contract, the provisions of the parties' contract "establish the rights of the parties and prevail over [the] conclusory allegations of the complaint" (*805 Third Ave. Co. v M.W. Realty Assocs.*, 58 NY2d 447, 451 [1983]). Thus, and contrary to the Trust's allegations, the documentary evidence, which was in its possession, establishes the existence of a contract between the Trust and AIG/American General, not US

Life.

Contrary to the Trust's contention, AIG's negotiation of the premium payment checks does not evidence the existence of a contract to issue a US Life policy. US Life and American General are both admittedly AIG member companies. While the first premium payment check identifies "AIG US Life" as the payee, that check, dated September 20, 2005, was written by Sontag and written on a Sontag account, rather than on an account in the name of the Trust. Therefore, the check does not evidence the existence of a contract between the Trust and AIG/US Life. All subsequent premium payment checks are made payable simply to "AIG." For these reasons, that branch of the motion to dismiss the first cause of action is granted, and the claim is dismissed.

Specific Performance (Second Cause of Action)

US Life contends that the second cause of action for a judgment directing US Life to specifically perform its agreement with the Trust and to issue a policy covering Mrs. Teller retroactively to 2005, is fatally defective. US Life argues that it never agreed to issue such a policy and no contractual privity between it and the Trust ever existed. In opposition, the Trust contends that a questions of fact exist regarding whether a contract to issue such a policy existed.

"Specific performance . . . is inapt when the relations between two parties . . . have yet to ripen into a binding contractual agreement" (*Cipriano v Glen Cove Lodge # 1458, B.P.O.E.*, 1 NY3d 53, 61 [2003]). As held above, no such agreement ever existed. Therefore, specific performance is not appropriate here.

Moreover, even assuming that the parties were in contractual privity, specific performance is not appropriate. "In general, specific performance will not be ordered where

money damages 'would be adequate to protect the expectation interest of the injured party'" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001], quoting Restatement [Second] of Contracts § 359 [1]). To the extent that the Trust alleges that it has suffered harm, that harm, if proven, can be redressed with monetary damages equal to, at minimum, the total amount of premium payments made by the Trust pursuant to the terms of the policy. For these reasons, that branch of the motion to dismiss the second cause of action is granted, and the claim is dismissed.

Breach of Contract (Third Cause of Action)

On similar grounds, Star Lite and Weinstock contend that the third cause of action for breach of contract is fatally defective because the documentary evidence demonstrates that no contract ever existed between the Trust and either of them. It also contends that neither of them had any direct contact with either the Trust or Mrs. Teller regarding the procurement of the policy.

Where "the plaintiff failed to establish that it was in privity with the defendant . . . , or that the parties were in a relationship sufficiently approaching privity . . . [the defendant] may not be held liable for its alleged negligent misrepresentations to the plaintiff" (*Sinclair's Deli, Inc. v Associated Mut. Ins. Co.*, 196 AD2d 644, 644 [2d Dept 1993]). The amended complaint is devoid of any factual allegations that might support a finding that a contract existed between the Trust and either Star Lite or Weinstock to process or issue an AIG/US Life policy, or that either Star Lite or Weinstock had any direct contact with the Trust. Instead, in the amended complaint, the Trust alleges that it interacted only with Weber (Amended Complaint, ¶¶ 17, 19-21), an insurance agent licensed in New York. The court notes that the parties admitted in open court

that Epstein is the insurance broker who sold the policy to the Trust (Oral Arg. Sept. 8, 2011 Tr., at 4:23-26). Therefore, that branch of the motion to dismiss the third cause of action is granted, and the claim is dismissed.

Fraud (Fourth Cause of Action)

Next, US Life, Star Lite, and Weinstock contend that the fourth cause of action for fraud is fatally defective on the ground that it is not pleaded with the specificity required by CPLR 3016 (b). In opposition, the Trust contends that the argument is mere boilerplate and that it has adequately alleged that US Life committed fraud by unilaterally switching policies from US Life to American General and cashing a check made payable to AIG/US Life.

The essential elements of a cause of action sounding in fraud are a "misrepresentation or material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). The plaintiff must show that its reliance was reasonable (*Spector v Wendy*, 63 AD3d 820, 821-822 [2d Dept 2009]). Further, the factual allegations in support of these elements must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (*Foley v D'Agostino*, 21 AD2d 60, 63-64 [1st Dept 1964], citing CPLR 3013, 3016 [b]). Section 3016 (b) of the CPLR explicitly requires that, "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail."

In the amended complaint, the Trust alleges that US Life, Star Lite, and Weinstock

entered into a fraudulent scheme to induce New York citizens, including Sontag and the Trust, to purchase life insurance policies by leading them to believe that they are purchasing New York policies, while unilaterally arranging for American General, a carrier licensed in New Jersey, to issue the policy instead (Amended Complaint, ¶¶ 67, 69-74, 79). The Trust further alleges that defendants changed the policy application to reflect New Jersey, rather than New York, addresses for the Trust and Mrs. Teller (¶ 49; Policy Application).

"[W]here allegations of fraud are based on information and belief, the source of such information must be revealed . . . [Although] at this early stage of the litigation, plaintiffs are entitled to the most favorable inferences" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]). Such "allegations are conclusory and without support or probative value" (*Apfelberg v East 56th Plaza, Inc.*, 78 AD2d 606, 607 [1st Dept 1980], *lv dismissed* 54 NY2d 680 [1981]). With respect to US Life, the Trust has failed to reveal its source of information upon which its conclusory allegations of wrongdoing by US Life are based. The Trust has failed to allege any specific misrepresentations by US Life or an individual acting within the scope of his or her employment as its agent, made to the Trust or Sontag. Moreover, as alleged, the scheme does not appear to benefit US Life and, in fact, results in a loss of its business, while permitting AIG/American General, a company which is not a party to this action, to receive the monetary benefits of the scheme.

With respect to Weinstock, the Trust has adequately alleged that Weber and Epstein were acting as employees or agents of Weinstock, when they allegedly advised Sontag and the Trust that the policy would be issued by AIG/US Life under New York law. The documentary evidence, consisting of contemporaneous letters, e-mails, and telephone records issued by, or

about, Weinstock, demonstrate that he was actively seeking the full commission that he believed was owed to him as a result of the sale of the policy. Significantly, Weinstock does not address why he believed that he was entitled to such a commission, while he denies employing Weber and Epstein and denies the existence of any business relationship with either of them (*see* Simon Weinstock May 25, 2011 Aff., ¶¶ 8, 9). Further, he does not adequately address the Trust's allegations that he, acting through Weber and Epstein, modified the Trust's policy application to reflect New Jersey rather than New York addresses for the Trust and Mrs. Teller, and, perhaps, forged Sontag's signature on one page of the application. Therefore, at this early stage of the litigation, the Trust is entitled to discovery regarding these issues. Discovery on these issues is also required before a determination may be made regarding whether the Trust's reliance on the alleged misrepresentations made by Weinstock's employees or agents was reasonable. If the Trust never saw the completed application that was submitted by Weinstock to AIG/American General, then its failure to investigate further may be held to be reasonable.

Last, discovery is required regarding whether the Trust sustained any damage as a result of the alleged scheme perpetrated by Weinstock. "Actual damage or injury to the plaintiff is, of course, an essential element of the action for deceit" (*Hanlon v Macfadden Publ., Inc.*, 302 NY 502, 510 [1951]). The Trust alleges that a policy issued under the laws of New York is more valuable and easier to sell on the secondary market than a policy issued under the laws of New Jersey, because, in New York, a policy's incontestability provision sets forth an enforceable two-year limitations period.

"Both New York and New Jersey have statutes that mandate that all life insurance policies contain a clause making the policy incontestable by the life insurer after the policy is in

force for two years (Ins. Law § 3203 [a] [3]; NJSA § 17B:25-4)" (*Johnson v Metropolitan Life Ins. Co.*, 79 AD3d 450, 452 [1st Dept 2010]). "New York's incontestability statute bars challenges even when the insured has failed to disclose facts on an insurance application" (*id.*). "However, the New Jersey Supreme Court has stated in dictum that '[e]ven after the expiration of the contestability period, an insurer may deny a claim if the insured committed fraud in the policy application' (*Ledley v William Penn Life Ins. Co.*, 138 NJ 627, 635 [1995])" (*id.*). "New Jersey enacted the IFPA [Insurance Fraud Protection Act] 'to confront aggressively the problem of insurance fraud . . . by . . . requiring the restitution of fraudulently obtained insurance benefits' (NJSA § 17:33A-2)" (*id.*).

For the foregoing reasons, the branches of the motions to dismiss the fourth cause of action as asserted against US Life and Star Lite are granted, and the claim is dismissed as against them. The branch of the motion to dismiss the fourth cause of action as asserted against Weinstock is denied.

Consumer Fraud (Fifth Cause of Action)

The moving defendants next seek to dismiss the fifth cause of action for consumer fraud in violation of GBL § 349. They contend the claim is fatally defective on the grounds that it is time-barred and is not pleaded with sufficient particularity. In opposition, the Trust contends that the three-year limitations period is tolled by the doctrine of continuing fraud, inasmuch as the Trust continued to pay premiums to AIG over a five-year period, in the belief that it had purchased a valid New York policy.

The consumer fraud claim is time-barred. Claims brought to recover upon a liability created or imposed by statute are subject to a three-year limitations period (CPLR 214 [2]). The

Trust received the American General policy in the second half of 2005 and did not bring this action until almost six years later, nearly three years after expiration of the limitations period.

Where, as here, the wrong is alleged to have occurred at the time of purchase of the policy, rather than at the time of payment of each premium, the doctrine is not applicable (*see Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1048 [2d Dept 2010]). To the extent that Star Lite and Weinstock may be considered insurance brokers, rather than agents for insurers, the continuous representation doctrine does not apply to toll the limitation period inasmuch as insurance brokers are not considered professionals for statute of limitations purposes (*see id.*).

In addition, the consumer fraud claim is not properly pleaded. GBL § 349 prohibits deceptive business practices that are consumer-oriented and makes actionable conduct that does not rise to the level of the common law fraud (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343 [1999]). To state a viable claim under the statute, the plaintiff must demonstrate that the act or practice was consumer-oriented, that the act or practice was misleading in a material respect, and that the plaintiff was injured as a result of the deceptive practice or act (*id.*, at 343-344). Private contract disputes unique to the parties do not fall within the ambit of the statute (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]), nor do claims arising from transactions where the terms were fully disclosed to the plaintiff (*Sands v Ticketmaster-N.Y., Inc.*, 207 AD2d 687, 687 [1st Dept 1994], *lv denied* 85 NY2d 904 [1995]).

With respect to US Life, the Trust has failed to plead any underlying facts specific to US Life and, instead, alleges merely that "AIG, through its various companies," engaged in consumer fraud (Amended Complaint, ¶ 86). "In the absence of a clear indication of dominion and control, parent, subsidiary or affiliated corporations are treated separately and independently for purposes

of assigning legal responsibility" (*Meshel v Resorts Intl. of N.Y., Inc.*, 160 AD2d 211, 213 [1st Dept 1990]).

Moreover, with respect to the moving defendants, the Trust has failed to plead facts sufficient to demonstrate that the alleged "bait and switch" scheme was one that has been perpetrated against consumers at large. Instead, the Trust's factual allegations demonstrate that this is a private contract dispute. Contrary to the Trust's contention, the documentation that it has produced regarding insurance fraud by American General and AIG (*see e.g. American Gen. Life Ins. Co. v Kirsh*, US Dist Ct, SD TX, civil action No. H-07-3696, Hoyt, J., Jan. 30, 2009; *Scism, Insurers, Investors Fight Over Death Bets*, Wall St. Journal, Jul. 9, 2011) do not demonstrate the existence of a "bait and switch" scheme perpetrated against the public. At most, the documents constitute some evidence of insurance fraud that is not related to the scheme alleged here. For these reasons, those branches of the motions to dismiss the fifth cause of action are granted, and the claim is dismissed.

Unjust Enrichment (Sixth Cause of Action)

The moving defendants contend that the sixth cause of action for unjust enrichment is fatally defective on the ground that no benefit without adequate compensation was bestowed by the Trust to any of them. In opposition, the Trust contends that the premium payment checks were made out to AIG/US Life, that US Life cashed them, and that US Life did not issue a policy, and that, therefore, US Life was unjustly enriched at the Trust's expense. The Trust also contends that Star Lite and Weinstock received commissions to which they were not entitled.

"To plead a claim for unjust enrichment, a plaintiff must show that the defendant was enriched, that such enrichment was at plaintiff's expense, and that the circumstances were such

that in equity and good conscience the defendant should return the money or property to plaintiff' (*Steinmetz v Toyota Motor Credit Corp.*, 963 F Supp 1294, 1307 [ED NY 1997] [internal citations and quotation marks omitted]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1st Dept 1998]).

The documentary evidence demonstrates that US Life could not have obtained any unjust enrichment from the alleged fraudulent scheme. The Trust alleges that it paid AIG premiums, but failed to receive the bargained-for policy (*see* Amended Complaint, ¶¶ 28-30, 33, 92). As discussed above, US Life, or its agents, had no contact with the Trust. However, the Trust's allegations regarding Weinstock's masterminding of the fraud, together with the evidence demonstrating Weinstock's efforts to ensure that he received a commission, are sufficient to render the unjust enrichment claim asserted against Weinstock legally cognizable. For these reasons, the branch of the motion to dismiss the sixth cause of action as asserted against US Life is granted, and that claim is dismissed. The branch of the motion to dismiss the sixth cause of action as asserted against Weinstock is denied.

Negligence and Breach of Fiduciary Duty (Seventh & Eighth Causes of Action)

Star Lite and Weinstock contend that the seventh and eighth causes of action for negligence and breach of fiduciary duty by failing to issue a US Life policy, are fatally defective on the ground that no direct relationship ever existed between either of them and the Trust. In opposition, the Trust admits that no direct contact occurred, but contends that Weber was acting at all times as the agent or representative of Star Lite and Weinstock.

To assert a viable negligence claim, a plaintiff must allege the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and a resulting injury to the plaintiff

(*Rodriquez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007]). "The existence of a duty is a legal issue to be determined by the courts" (*Megally v LaPorta*, 253 AD2d 35, 40-41 [2d Dept 1998] [internal citations omitted]). If no duty of care exists, no breach of duty can be found, and, therefore, no liability can attach (*Engelhart v County of Orange*, 16 AD3d 369, 371 [2d Dept], *lv denied* 5 NY3d 704 [2005]).

A claim for breach of the duty to disclose "facts and circumstances relevant to business contract negotiations may arise when there is a fiduciary relationship between the parties . . . or when defendant possesses superior knowledge, not readily available to the plaintiff, and knows that plaintiff is acting under a mistaken belief with respect to a material fact" (*Beneficial Commercial Corp. v Murray Glick Datsun, Inc.*, 601 F Supp 770, 773 [SDNY 1985] [citing New York law] [citation omitted]). "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]). "A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b)" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]).

The Trust has failed to allege any specific facts from which a duty of due care or a fiduciary duty running to it from either Star Lite or Weinstock might be inferred. The Trust alleges in the amended complaint that Star Lite and Weinstock were general agents for AIG/US Life (*see* Amended Complaint, ¶¶ 9, 11, 13, 14), rather than brokers representing the Trust or Mrs. Teller. Therefore, that branch of the motion to dismiss the seventh and eighth causes of action are granted. Accordingly, it is

ORDERED that motion sequence number 004 is granted in its entirety, and the first, second, fourth, fifth, and sixth causes of action asserted against defendant the United States Life Insurance Company in the City of New York are dismissed; and it is further

ORDERED that motion sequence number 005 is granted to the extent that the third, fourth, fifth, sixth, seventh, and eighth causes of action asserted against defendant Star Lite Brokerage, Inc. and the third, fifth, seventh, and eighth causes of action asserted against defendant Simon Weinstock are dismissed; and it is further

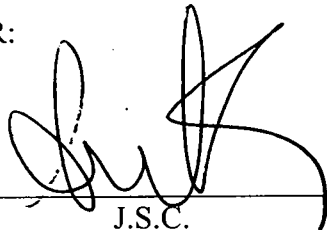
ORDERED that the fourth cause of action for fraud and sixth cause of action for unjust enrichment asserted against defendant Simon Weinstock are severed and shall continue and Mr. Weinstock is directed to serve an answer to the amended complaint in accordance with this order within 20 days; and it is further

ORDERED that counsel for plaintiff and counsel for defendant Simon Weinstock are directed to appear for a preliminary conference in Room 228, 60 Centre Street, on December 22, 2012, at 10:00 AM; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants the United States Life Insurance Company in the City of New York, Starlife Partners, Inc. and Star Lite Brokerage, Inc. dismissing the action, together with costs and disbursements to these defendants, as taxed by the Clerk upon presentation of an appropriate bill of costs.

Dated: December 6, 2011

ENTER:



J.S.C.