SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ESTHER BRAHVER, individually and as Trustee of the BRAHVER CHARITABLE LEAD ANNUITY TRUST and BARRY BRAHVER,

INDEX No. 019616/07

MOTION DATE: May 12, 2008
Motion Sequence # 001

Plaintiffs,

-against-

YALE FISHMAN, FISHMAN ASSOCIATES, FISHMAN CAPITAL, INC. and SECURITY LIFE OF DENVER INSURANCE CO.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation/Affidavit in Opposition..... XXX
Affirmation in Support..... X
Reply Affirmation/Affidavit..... XX
Sur-Reply Affirmation..... X
Sur-Sur Reply Affirmation..... X

This motion, by defendants Yale Fishman, Fishman Associates and Fishman Capital, Inc. (hereinafter referred to as "the Fishman defendants"), for an order: (i) dismissing all causes of action asserted against them in the verified amended complaint pursuant to CPLR 3211(a)(1), (3), (5) and (7); (ii) assessing sanctions against plaintiffs and their counsel pursuant to 22 NYCRR § 130-1.1 for frivolously refusing to withdraw the complaint and filing an amended complaint; and (iii) awarding attorneys' fees and

costs incurred in making this motion pursuant to 22 NYCRR § 130-1.1(a) and/or pursuant to the bad faith exception to the American Rule on attorneys' fees is **granted** in part and **denied** in part.

Plaintiffs commenced this action to recover damages against the Fishman defendants based upon fraud, misrepresentation, breach of fiduciary duty, negligence and breach of contract. Plaintiffs contend that Mr. Fishman misrepresented or failed to disclose the risks associated with entering into a premium financing transaction and that he acted as their attorney in connection with such transaction. Specifically, Barry Brahver claims that defendants made misleading representations that the payment of insurance premiums for the subject policy through the premium financing agreement would pose no financial risk to Barry Brahver.

FACTS

The undisputed facts consist of the following:

Yale Fishman is a licensed insurance broker in the State of New York and has been so for approximately 20 years. Mr. Fishman is also admitted in the State of New Jersey as an attorney. On or about October 15, 2005, Mr. Fishman received a one-year suspension to practice law in the State of New York. Although Mr. Fishman has been entitled to apply for reinstatement since October 2006, he has not done so. Mr. Fishman has devoted all of his career energies to the insurance industry.

Plaintiffs are sophisticated real estate developers. In 2003-2004, the Brahvers' income was allegedly $4,000,000.00 and their net worth was approximately $50,000,000.

The parties hereto have known each other for approximately eight years. In 2003, the parties discussed the procurement of life insurance policies as part of plaintiffs' financial and estate planning needs. In connection therewith, Mr. Fishman suggested the formation of a charitable lead annuity trust. On or about December 24, 2003 the Brahvers signed an engagement letter which provided that the law firm of Lewis, Rice & Fingersh, P.C. would provide legal services to the Brahvers in connection with their estate planning including "making recommendations with respect to creation of a charitable lead annuity trust and drafting the trust instrument." By letter dated December 22, 2003, Mr. Oesch of Lewis, Rice & Fingersh, P.C. advised plaintiffs of the following:

> I understand that you will make a gift this year of $2.5 million in cash to the Trust. The Trust will make a 5% annual distribution to qualified charities throughout the Trust term (i.e., until the death of the survivor of you). The tax consequences of these terms are projected to be as follows. The Trust will distribute $125,000 to qualified charities each year at the end of the year. The value of the interest deductible for charitable purposes on your income taxes would be $2,154,654.35, subject to the 30% deduction limitations and the carryover rules. There will be a gift to your descendants resulting from the transfer in the amount of $345,345.65. This gift amount will require use of some of your applicable credit amount, or "unified credit" in order to avoid gift tax. While the Trust terms could be adjusted to reduce the gift amount, even to a point where no taxable gift would result, I understand that the higher annuity payments that would be required to accomplish this are not acceptable to you, and that you have available unified credit that you would prefer to use in order to use the annuity payment schedule explained above.
>
> While you will be entitled to an income tax deduction for the year of your contribution to the Trust, as noted above, in subsequent years you will be taxed on all of the income of the Trust, with no deduction for Trust distributions to charity. The Trust assets should be excluded from your estates for estate tax purposes.

On or about April 23, 2004, defendant Fishman procured a flexible single life insurance policy on Mr. Brahver from Security Life of Denver Insurance Co. On or about June 30, 2004, plaintiffs procured a line of credit from HSBC Bank N.A. to finance the insurance premiums. Simultaneously therewith, Barry Brahver and Esther Brahver signed a "Financed Life Insurance Issues" document. This document provided, in pertinent part, as follows:

"In situations where client is contemplating the use of a third party or 'bank financed' insurance premium financing ('premium financing') sources, clients must bear in mind the additional significant risks that may be relevant that could impact their insurance and/or estate plan.

> These risks include, and are not limited to, the effect of borrowing interest rate movements, borrowing and funding period, effect of changes in insurance policy interest crediting rates, breakage fees, specific loan terms, changes in collateral valuation or collateral requirements, termination, modification, and non renewal of the loan, surrender charges, loss of pledged collateral or the forced surrender of the insurance policy in the event of a default, loan spreads, arrangement fees, and loan renewals.

The proposed insurance contract owner acknowledges and agrees that:

> Neither the insurance company or its agents or brokers, can guarantee the accuracy of the premium financing calculations or presentation materials and assumes no liability for any damages arising from the use of the presentation software system used.
>
> Premium financing methods are generally only appropriate for sophisticated high net worth clients, and the use of such methods should be evaluated carefully with client's counsel to determine if appropriate given the client's unique financial circumstances, time horizon, risk tolerance and goals.

Client acknowledges that he has had the opportunity to consult with counsel on all aspects of the contemplated transaction including the effect of interest rate movements, and the effect of interest rate movements on the collateral required, the nature of the collateral that is acceptable, selection of insurance product and loan structure, and the need to provide ongoing monitoring of policy performance and loan requirements.

Owner is relying solely on the advice and recommendations of his legal advisors in entering into any premium finance arrangement. Fishman associates nor any of its affiliated agents or brokers does not provide lending, tax, or legal advice and does not express any opinion or endorse any specific premium financing arrangement or lender.

Client acknowledges that Fishman Associates and all agents and individuals associated thereof 'Fishman,' are not a party to such third party financing methods, and sources, is not a lender, or loan broker and further acknowledges that the insurance agent/agency makes no representations as to the economics or any other aspect of such premium financed transaction or as to any aspect of policy performance and is not responsible for monitoring policy features and loan provisions.

Owner releases and holds Fishman harmless from and against any and all claims, losses, liabilities, damages, and expenses directly related to any premium financing arrangement entered into.

Client acknowledges and understands the risks of losing all the collateral posted and the risks of

> losing the benefits of the insurance policy in the event of a failure to post necessary collateral when due or the fulfillment of any other loan obligations. (emphasis added)."

Subsequently, the plaintiffs approached Mr. Fishman with their concerns about the rate of return on the policy being less than the interest rate charged on the line of credit. On February 6, 2007, Yale Fishman on behalf of both Fishman Capital, Inc. and Fishman Associates executed an Agreement and Release (hereinafter referred to as "the Release"). The release provided that the Company would pay the Brahvers the sum of $100,000.00 in exchange for a general release of "any and all claims, debts, demands, accounts, rights, actions, causes of action, suits, dues, sums of money, reckonings, bonds, bills, specialties, equitable relief, damages, costs, charges, complaints, obligations, promises, agreements, controversies, suits, expenses, compensation, covenants, contracts, damages, judgment, executions, responsibility and liability of every kind and character whatsoever (including attorneys' fees and costs), and claims of any kind that may be brought in any court, administrative agency or arbitration proceeding, whether in law, admiralty or equity, known or unknown, anticipated or uncontemplated, asserted or unasserted, direct or indirect, fixed or contingent, suspected or unsuspected, based on any events or circumstances arising or occurring on or prior to the date hereof . . ." that they had as against myself, Fishman Capital, Inc. and/or Fishman Associates. Mr. Fishman allegedly signed the release in the interest of maintaining good client relations and avoiding further damage to his reputation. While Esther Brahver admits that she signed the release and that she received the $100,000.00 payment, Barry Brahver claims that he did not sign the release. Mr. Brahver asserts that his signature is a forgery. Mr. Brahver even retained a certified graphologist, Steven Hellinger, to support such contention.

LEGAL ANALYSIS

Initially, this court notes that plaintiff Barry Brahver concedes that only Esther Brahver as Trustee of the Brahver Charitable Lead Annuity Trust has standing to sue defendants with regard to the purchase of the policy, and the Trust has already executed a stipulation agreeing to discontinue its claims against defendants for its broker negligence, as well as broker fraud, broker misrepresentation, broker breach of fiduciary duty and broker breach of contract. Plaintiffs are asserting that the amended complaint states valid causes of action based upon the following: a) defendants as insurance brokers made

intentional misrepresentations to induce plaintiffs to purchase a life insurance policy; and b) Yale Fishman engaged in legal malpractice in representing them in the premium financing agreement.

In deciding a motion to dismiss directed as to the sufficiency of the pleadings [CPLR 3211(a)(7)], a court must accept their allegations as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory (***Parsippany Const. Co., Inc. v Clark Patterson Associates, P.C.***, 41 AD3d 805, 806, 2nd Dept., 2007). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in reaching a decision under this provision (***EBC I Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 2005), although bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion (***Riback v Margulis***, 43 AD3d 1023, 2nd Dept., 2007). If the plaintiff can succeed on any reasonable view of the allegations, the cause of action may not be dismissed.

On a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence forming the basis of the defense must resolve all factual issues as a matter of law and conclusively dispose of the cause of action (***Weinstein v Hotel Acquisitions Corp.***, 43 AD3d 917, 1998; see also, ***Held v Kaufman***, 91 NY2d 425, 430-431, 2nd Dept., 2007).

In order to sustain a claim for legal malpractice, a plaintiff must establish that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, resulting in actual damages, and that the plaintiff would have succeeded on the merits of the underlying action "but for" the attorney's negligence (***Ambase Corp. v Davis, Polk & Wardwell***, 8 NY3d 428, 434, 2007). Furthermore, a plaintiff must establish, **inter alia**, the existence of an attorney-client relationship (***Nelson v Kalathara***, 48 AD3d 528, 2nd Dept., 2008). "Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee, a court must look to the words and actions of the parties to ascertain the existence of such a relationship (citations omitted)." *Id.* To establish an attorney-client relationship, there must be an explicit undertaking to perform a specified task (see ***Volpe v Canfield***, 237 AD2d 282, 3rd Dept., 1997, *lv to app den.* 90 NY2d 802 [1997]; ***Sucese v Kirsh***, 199 AD2d 718, 719, 3rd Dept., 1993). "A plaintiff's unilateral belief does not confer upon him the status of client" (***Volpe v Canfield***, ***supra***; see ***Jane St. Co. v Rosenberg & Estis***, 192 AD2d 451, 1st Dept., 1993).

Mr. Fishman concedes that he was admitted to practice law within the State of New York at the time that he met the plaintiffs, the life insurance policy was procured, and the premium financing transaction occurred. Mr. Fishman, however, unequivocally states that he never had an attorney-client relationship with the plaintiffs or with the Trust. Mr. Fishman notes that no retainer agreement was executed since he was solely acting as an insurance broker. In fact, Mr. Fishman further states that he referred plaintiffs to Lewis, Rice & Fingersh, PC, the firm that represented plaintiffs in connection with their estate planning and the creation of the Trust, and to Max Marcus Katz, the attorney that prepared the opinion letter on behalf of the Trust.

The documentary evidence indicates that the law firm of Lewis, Rice & Fingersh, L.C. drafted the Brahver Charitable Lead Annuity Trust (the "Trust") and was paid a fee for their services and that the law firm of Marx Marcus Katz, P.C. represented the Brahvers in connection with the loan from HSBC Bank USA. In his opinion letter to HSBC Bank USA, Mr. Katz expressly states that he was acting as counsel in connection with that transaction, for which he was paid a fee. Additionally, in the Finance Life Insurance Issues documents executed by the Brahvers, they acknowledge that Mr. Fishman rendered no legal advice to them.

Simply because defendant Yale Fishman had legal training does not mean he was acting as plaintiff's attorney. Here, the documentary evidence establishes that defendant Yale Fishman was operating through Fishman Associates and Fishman Capital, Inc. as plaintiffs' "insurance broker and wealth manager" (¶ 28 of complaint) in connection with the procurement of a "Rich-Man's" life insurance policy on the life of Barry Brahver (¶ ¶ 20, 22, 26 and 28 of the complaint). Further, as noted above, plaintiffs were represented by counsel in the legal aspects of the transaction at issue.

Assuming, *arguendo*, that the first five causes of action relate to the premium financing transaction agreement, these causes of action must be dismissed because the allegations contained in those causes of action are definitively contradicted by documentary evidence (See, e.g., ***M. Fund Inc. v Carter***, 31 AD3d 620, 621, 2nd Dept., 2006). Barry Brahver admits that he signed the document entitled "Financed Life Insurance Issues". In said document, Barry Brahver acknowledges the risks of the transaction, and fully releases the Fishman defendants from all claims and liability.

It is well settled that a party that signs a document is conclusively bound by its

terms absent a valid excuse for having failed to read it (***DaSilva v Musso***, 53 NY2d 533, 550, 1981; ***Guerra v Astoria Generating Co., L.P.***, 8 AD3d 617, 618, 2nd Dept., 2004; ***Daniel Gale Associates, Inc. v Hillcrest EstateLtd.***, 283 AD2d 386, 387-388, 2nd Dept., 2001). Furthermore, "[w]here, as here, the language of a release is clear and unambiguous, the signing of a release is a 'jural' act binding on the parties" (***Booth v 3669 Delaware, Inc.***, 92 NY2d 934, 1998).

While it is true that a release obtained through fraud may be rendered invalid, plaintiffs have failed to raise a triable issue of fact as to the validity of the release. Consistent with the public policy favoring enforcement of settlement, the release signed by plaintiff should be enforced according to its terms and the claim dismissed (***Booth v 3669 Delaware***, ***supra***).

Turning to the breach of contract claim, plaintiffs must show: 1) the existence of an agreement; 2) performance of the agreement by the plaintiffs' 3) breach of the agreement by defendant; and 4) damages (***Furia v Furia***, 116 AD2d 694, 695, 2nd Dept., 1986). In order to have a legally enforceable agreement, there must be a meeting of the minds or mutual assent to the material terms of the agreement (***Joseph Martin, Jr., Delicatessen, Inc. v Schumacher***, 52 NY2d 105, 109, 1981). Plaintiffs have made an adequate showing.

Further, it is well settled that a claim for fraud will not lie for a breach of contract. An action for breach of contract cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations. A present intent to deceive must be alleged and a misrepresentation of an intention to perform under the contract is sufficient to allege fraud (***Ross v DiLorenzo***, 28 AD3d 631, 636, 2nd Dept., 2006).

The breach of contract claim is asserted only by Barry Brahver. However, the sole entity for which Mr. Fishman procured insurance was the Trust, not Barry Brahver personally. To the extent that Barry Brahver refers to any alleged failure to obtain the proper insurance for the trust (i.e., second to the insurance as opposed to whole life insurance), this claim must fail as he has no standing to assert such claim on behalf of the Trust.

Dismissal of the cause of action for fraud is also warranted. The essential elements

of a cause of action for fraud are a misrepresentation or a 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 on it, justifiable reliance of that party on the misrepresentation or material omission and injury (***Fredriksen v Fredriksen***, 30 AD3d 370, 372, 2nd Dept., 2006). Each of these elements must be supported by factual allegations containing details constituting the wrong sufficient to satisfy the statute requiring particularity in pleading fraud, i.e., the specific circumstances constituting the fraud (CPLR 3016[b]; ***Cohen v Houseconnect Realty Corp.***, 289 AD2d 277, 278, 2nd Dept., 2001). At the very threshold, plaintiffs must allege a material misrepresentation or material omission by defendant on which plaintiffs relied.

It is well settled that representations of opinion or predictions of something which it is hoped or expected will occur in the future will not sustain an action for fraud (***LaBate v Urban Foundation Engineering LLC.***, 2008 WL 552887 [Sup. Ct., Nassau County]; ***Chase Investments, Ltd. v Kent***, 256 AD2d 298, 299, 2nd Dept., 1998). "Fraud is 'not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future' " (*Id.;* see also ***Channel Master Corp. v Aluminum Limited Sales, Inc.***, 4 NY2d 403, 408, 1958).

The alleged misrepresentations of defendants to the effect that the plaintiff would never have to make any insurance premium payments or that the policy would never cost the Brahvers any money is nothing more than an opinion or prediction of something which is hoped to occur in the future, and cannot sustain a claim for fraud (see ***Chase Investments v Kent***, ***supra***).

Further, the Financed Life Insurance Issues document discloses the rules of the premium financing transaction. Hence, plaintiff's claim that he justifiably relied upon oral representations to the contrary is belied by the documentary evidence.

This court will now address the branch of Fishman defendants' motion to compel sanctions for, **inter alia**, falsely contending that defendant Yale Fishman acted as their counsel when plaintiffs and their counsel were in possession of the opinion letter evidencing plaintiffs' actual counsel in the transaction at issue was Max Marcus Katz, Esq.

Defendants also argue that plaintiffs' counsel violated his duty of candor pursuant to NYCRR § 1200.33(a)(3) & (5).

In his letter dated June 30, 2004, Mr. Katz expressly states that:

> I have acted as counsel to the Brahver Charitable Lead Annuity Trust, Barry Brahver and Esther Brahver (collectively referred to herein as the "Obligors") in connection with a certain Credit Agreement dated as of the date set forth therein (the "Credit Agreement") as well as other Credit Documents between the Obligors and HSBC Bank USA, N.A. (the "Bank").

Pursuant to 22 NYCRR 130-1.1, this court has the discretion to render an award of costs or sanctions for frivolous conduct (***One Beacon Insurance Co. v Bloch***, 298 AD2d 522, 2nd Dept., 2002). Frivolous conduct has been defined in any of the following three ways: "the conduct is without legal merit; is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false" (22 NYCRR § 130-1.1[c]; ***Levy v Carol Management Corp.***, 260 AD2d 27, 34, 1st Dept., 1999).

In ***Levy v Carol Managements Corporation***, ***supra*** at 33, the Court stated that in determining if sanctions are appropriate the Court must look at the broad pattern of conduct by the offending attorneys or parties. "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large" (*Id* at p. 34).

The Court, in ***Kernisan, M.D. v Taylor*** (171 AD2d 869 [2nd Dept. 1991]), noted that the intent of the Part 130 Rules "is to *prevent the waste of judicial resources* and to deter vexatious litigation and dilatory or malicious litigation tactics (***cf. Minister, Elders & Deacons of Refm. Prot. Church of City of New York v 198 Broadway***, 76 NY2d 411; see ***Steiner v Bonhamer***, 146 Misc2d 10) [Emphasis added]" (***Nomura Credit & Capital, Inc. v Washington***, 19 Misc3d 1126, 2008).

Under the circumstances extant, defendants have not sufficiently established that the imposition of costs and sanctions are applicable here. Hence, defendants' motion for sanctions, costs and attorneys fees is **denied**.

In view of the foregoing, defendants' motion is **granted** and the complaint is **dismissed** pursuant to CPLR 3211(a)(1) based upon the documentary evidence (i.e., the financial life insurance issues document and the release).

This constitutes the order and judgment of this court.

The action against the remaining defendants is **severed** and **continued**.

A Preliminary Conference has been scheduled for July 28, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JUN 19 2008

J.S.C.

ENTERED

JUN 20 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE