

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

MICHAEL WOLFE, individually, and CAROL
WOLFE, as Trustee of the GOODMAN
1993 TRUST,

Plaintiffs,

-against-

TANNENBAUM, DUBIN & ROBINSON,
LLP, ALAN I. BROWN, JOSEPH J.
ISRAEL ASSOCIATES, INC., and
WILLIAM PENN LIFE INSURANCE
COMPANY OF NEW YORK,

Defendants.

TRIAL/IAS, PART 48
NASSAU COUNTY

INDEX NO.: 014600-01

MOTION SUBMISSION
DATE: 2/22/06

MOTION SEQUENCE
NO. 005, 006, 007

The following papers read on this motion:

Notice of Motion, Exhibits & Affirmation	X
Reply Affirmation in Support to Motion for Summary	
Judgment by Deft. Joseph J. Israel Associates	X
Notice of Cross-Motion	X
Reply Affirmation in Further Support of Cross-Motion	X
Notice of Motion by Defts. Tannenbaum, Dubin, etc.	X
Reply Affirmation in Support of Motion for	
Summary Judgment & in Opposition to Cross Motion	X

Defendant Joseph J. Israel Associates, Inc. ("Israel") motion and co-defendants
Tannenbaum, Dubin & Robinson, LLP and Alan I. Brown (collectively referred to as
"TDR") cross-motion for summary judgment are both determined as set forth below. In
support of the motion Israel submits an attorney affirmation and deposition testimony.

TDR submits an attorney affirmation, an affidavit by an employee, Davie Sterling, exhibits and deposition testimony.

Plaintiffs, Michael Wolfe and Carol Wolfe, cross-motion to amend the caption of the proceeding herein pursuant to CPLR 2001 and/or CPLR 3025(b)(c) is denied for the reasons set forth below. In opposition to defendant's motion for summary judgment plaintiffs offer the affidavits of Michael and Carol Wolfe, an affidavit of Paul Cohen, Esq., (an expert in tax and estate planning), an attorney affirmation, and deposition testimony.

Plaintiffs commenced this action for wrongful lapse of an insurance policy due to defendants' alleged negligence and failure to fulfill their fiduciary duties to plaintiffs.

In September, 1989, defendant William Penn Life Insurance Company of New York ("William Penn") issued a life insurance policy for \$700,000 ("the policy") on the life of plaintiff Michael Wolfe. Israel acted as an insurance agent on behalf of plaintiff Wolfe to obtain this policy. In 1993, the policy was placed into the Goodman 1993 Trust Two, which was created by Michael Wolfe as the grantor and Alan Brown and Marvin Robinson as trustees. Mr. Goodman and Wolfe had a buyout agreement funded by life insurance, which was the purpose of the Goodman 1993 Trust. In May, 1999, Wolfe bought out the interest of Goodman in Channel Fabrics, Inc. and an "Appointment of Successor Trustees and Resignation of Trustees" was prepared and executed by the trustees. Carole Wolfe and Tracy Isaacs were appointed as successor trustees of the Goodman Trust for Brown and Robinson. In December, 1999, in connection with Wolfe's purchase of the interest of Mr. Goodman in Channel, all assets of the Goodman 1993 Trust, including the life insurance policy, were apparently

transferred to the Wolfe 1993 Trust. Joseph Israel was an original Trustee of the Wolfe 1993 Trust until July 1, 1999. Carol Wolfe remains a co-trustee of said Trust, although it is not clear if either Joseph Salomon or Tracy Isaacs remain as co-trustees.

The policy lapsed in September 2, 2000. TDR alleges it forwarded premium notices to Wolfe for the policy by memo on August 31, 1999 with copies to Israel. Wolfe was aware of the premium notices and stated that at least five times he asked Israel to change the address and trustees with William Penn. Wolfe denies receipt of the notice of lapse due to non-payment. The record is devoid of any evidence that any notice was sent by anyone to the successor trustees, Carol Wolfe and Joseph Salomon.

TDR submits deposition testimony of Lincoln Briggs, an attorney employed at TDR, stating that several premium notices were mailed (with copies to Israel) to Wolfe. TDR also contends, by the affidavit of Dave Sterling, that the March 9, 2000 premium notice and other documents were hand delivered to Wolfe, but could not confirm that the lapse notice was delivered. Significantly, by affidavit of Marvin Robinson, submitted in support of TDR's motion, he states that "I am aware that (a) a thorough search of Tannenbaum Dubin & Robinson, LLP's office was conducted and neither the lapse notices nor any indication that they were ever received were found and (b) an inquiry of the entire staff was performed and no member of the staff recalled ever seeing a lapse notice". (See Exhibit T) TDR argues that plaintiffs did not timely fill out the form required by William Penn Life to have the address changed (see Exhibits O and P annexed to TDR's cross motion).

The premiums for the policy were apparently paid by Channel Fabrics. It was not until the form was sent to Wolfe's attorney in early 2001 that Carole Wolfe and Tracy Isaacs signed the change of ownership and beneficiary form.

In their first cause of action for breach of contract, plaintiffs allege William Penn was directed to change its records as to policy ownership and address for premium notices. Plaintiffs allege William Penn did not do so and the policy lapsed in September, 2000, for non-payment of premiums. This cause of action is not the subject of any of the pending motions.

In their second cause of action, plaintiffs allege negligence, breach of contract and legal malpractice against defendants TDR and Alan I. Brown, a member of TDR and a former trustee of the Goodman 1993 Trust. Plaintiffs allege that Brown received the premium notices in June, August and September 2000 as trustee of the Goodman 1993 Trust and the law firm of TDR, but Brown failed to forward same to the plaintiff or respond to the notices and the policy lapsed due to Brown's alleged negligence or malpractice.

Plaintiffs' third and fourth causes of action are against Israel, an insurance agent for plaintiffs, the Goodman 1993 Trust, and the non-party Wolfe Trust. Plaintiffs allege that in 1999 Israel failed to properly advise William Penn to change the address of the premium notices, and in September of 2000 failed to forward and advise plaintiffs that the policy was about to lapse due to non-payment of premiums. Plaintiffs seek the value of the policy on the lapse date plus interest. It is alleged that the plaintiff could only obtain a new policy on Mr. Wolfe's life at a prohibitive cost due to his poor health.

Plaintiffs allege that a special relationship existed with Israel because Joseph Israel was a close personal friend of both Mr. and Mrs. Wolfe for 40 years and was also Mr. Wolfe's estate advisor and insurance broker. Plaintiffs allege that Brown and Marvin Robinson, members of TDR, resigned as trustees of the Goodman 1993 Trust on May 21, 1999, however, they never notified William Penn of the change of trustees or change in addresses of the successor trustees. Plaintiffs allege that TDR continued to act as attorneys for plaintiffs Michael Wolfe, Carole Wolfe, and the Trust, during all relevant times herein. Plaintiffs further allege that since defendants failed to effect change of ownership, Carole Wolfe has standing to sue in her capacity as Trustee of the Goodman 1993 Trust and Wolfe 1993 Trust and as a beneficiary under both trusts.

Israel denied it ever received any notices from William Penn regarding the lapse of the policy (see Exhibit F, pgs. 30-32, 64, annexed to Israel's motion). Also, Israel notes Wolfe failed to timely complete the necessary forms (which had to be completed by plaintiffs) informing William Penn of the change of address until December, 2001 (the address was to be changed from TDR's firm address to that of Channel). Israel further states that the parties, while friends, did not have a "special relationship".

Israel contends it sent the forms to Wolfe many times prior to December, 2001 (see Exhibit F, pg. 22 annexed to Israel's exhibit). Israel states it was merely the insurance agent and owed no fiduciary duty to plaintiff. Israel further contends that the policy was cancelled due to non-payment of premiums which was the responsibility of either the Trust or grantor. Israel contends it had no knowledge of the lapse of September, 2000, until the policy had already lapsed. Israel notes the lapse notices

(see Exhibit H annexed to Israel's motion) contain no indication that William Penn ever notified Israel.

TDR concurs with Israel and states the lapse of the policy was caused by Wolfe failure to pay the premium and therefore TDR did not breach its standard of care as a law firm to plaintiffs. TDR also asserts that Brown had no obligation to pay the premiums or to forward premium notices as per the Trust agreement. Paragraph 2-B of the Goodman 93 Trust states:

"The Trustees shall be under no obligation to pay the premiums or other charges which may become due and payable on any of the Policies, or to make certain that such premiums are paid by the Grantor or others, or to notify any persons of the non-payment of such premiums..."

Paragraph 2.B of the Goodman Trust Agreement also contained an exoneration clause, which provided that the trustees "shall be under **no responsibility or liability of any kind in case such premiums are not paid.**"

TDR argues Brown had no duty to the plaintiffs after he resigned from the Goodman 1993 Trust in May, 1999 (see Exhibit D annexed to TDR's cross motion) and the ownership of the policy was transferred from the Goodman 1993 Trust to the Wolfe 1993 Trust (see Exhibit E annexed to TDR's cross motion). Both TDR and Israel contend the plaintiffs herein lack standing since Wolfe was not and is not a trustee of either the now defunct Goodman 1993 Trust or the Wolfe 1993 Trust and Mrs. Wolfe is suing on behalf of the wrong trust, i.e., the Goodman 1993 Trust.

SUMMARY JUDGMENT AS TO ISRAEL

As to Israel, in New York, the duty owed by an insurance agent to an insurance customer is ordinarily defined by the nature of the request a customer makes to the agent; an insurance agent has a duty to the customer to obtain the requisite coverage within a reasonable time after the request or to inform the customer of her agent's inability to do so, but the agent owes no continuing duty to advise, guide or direct the customer to obtain additional coverage (*Murphy v Kuhn*, 90 NY2d 266; *Wied v New York Central Mutual Fire Insurance Co.*, 208 AD2d 1132). Ordinarily, insureds are in a better position to know both their own assets and their ability to protect themselves more so than agents or brokers (*Murphy v Kuhn, supra*). None of the cases cited by the plaintiffs found the broker responsible for plaintiffs' non-payment of a premium where plaintiff received the notice.

The purchase of an insurance policy through a broker does not give rise to a fiduciary relationship between the agent or broker and the customer (*Paull v First UNUM Life Ins. Co.*, 295 AD2d 982). The relationship between an insurance agent and an insured is not a generally recognized professional relationship in which a continuing obligation to advise might exist, rather it is an ordinary commercial relationship which does not ordinarily give rise to a duty to provide such ongoing guidance (*M & E Manufacturing Co., Inc. v Frank H. Reis, Inc.*, 258 AD2d 9).

Joseph Israel and the Wolfes were friends and the record reflects that employees of Israel's firm did everything to facilitate the change of address (including obtaining the correct form from William Penn). However, the issue is whether triable

issues of fact exist as to whether Israel had a greater duty than an insurance agent to either plaintiff therefore is responsible for the lapse of the policy.

Liability has been imposed only on those insurance agents who possess unique or specialized expertise or who are in such a special position of confidence and trust with the injured party that such reliance is justified (*Kimmell v Schaefer*, 89 NY2d 257). Here, there are no factual issues left for resolution. Plaintiffs raise no substantial facts suggesting that Israel was instrumental in Wolfe's acquisition of the property, Channel Fabrics, or its buyout, the change in trustees, etc. Israel merely sold the policy (and others) to Wolfe. While Israel was close to Wolfe, plaintiff has failed to adduce evidentiary facts that Isaacs had special expertise or that plaintiff relied on Israel to pay the premium. Although Wolfe requested a change of address form, he was aware that premium notices were going to TDR and that he had to arrange for payment of the premiums (in the absence of any claim the trustees were advised by Wolfe to pay the premium). Thus, plaintiffs were responsible to pay the premiums on the policy in a timely manner, not Israel. The ultimate cause of the lapse being plaintiff's non-payment of the insurance premium.

Furthermore, the record is devoid of any evidence that the successor trustees had a special relationship or contacted Isaacs. Furthermore, no new policy of insurance was issued when the trust was transferred and Isaacs continued to deal with Wolfe as the grantor of the Trust. Accordingly, the motion for summary judgment is granted dismissing the complaint against Israel since there are no facts upon which to find Israel had a duty to plaintiffs.

SUMMARY JUDGMENT AS TO TDR AND BROWN

As to TDR and Brown, formality is not essential to create a legal services contract, and therefore, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed (*Talansky v Schulman*, 2 AD3d 355; *Chang v Pi*, 288 AD2d 378). If TDR represented Wolfe or the Wolfe 1993 Trust, it might have believed it appropriate to receive the information from William Penn as to the policy, while at the same time communicating to plaintiff that an address change was needed.

Plaintiffs allege a single cause of action against TDR and Alan Brown for legal malpractice and breach of Brown's fiduciary duty as a trustee of the Goodman 1993 Trust. Since the uncontradicted proof establishes that Brown ceased being a trustee in May, 1999, and the relevant events took place thereafter, the complaint must be dismissed as to him and TDR insofar as it alleges breach of fiduciary duty.

Under New York law, the relationship of an attorney and client is contractual, express or implied, and the rules governing contract formation determine whether such a relationship has been created (*Heine v Colton, Hartnick, Yamin & Sheresky*, 786 F Supp. 360). A requisite element of a legal malpractice action is the existence of an attorney-client relationship and the failure to perform, or the breach of, that duty (*Hashemi v Shack*, 609 F. Supp. 391). Here, at the time of the allegations, TDR claims it represented Channel Fabrics and Wolfe, but not the Wolfe 1993 Trust nor its trustees. Plaintiffs claim to the contrary and produced invoices and worksheets that show services relating to insurance in 2000 as well as in 1999.

Assuming a contractual relationship existed between TDR and plaintiffs, to succeed on a claim alleging legal malpractice, a plaintiff must next establish that the defendant attorney failed to exercise the degree of care, skill, and diligence commonly possessed by a member of the legal community and that such negligence was the proximate cause of damages, and that, but for such negligence, the plaintiff would have prevailed in the action (*Dimond v Kazmierczuk & McGrath*, 15 AD3d 526; *Fillippo v Russo*, 296 AD2d 374). A party cannot succeed on legal malpractice claim where the damages sustained by the plaintiff/client were caused by the client's own conduct (*Senise v Mackasek*, 227 AD2d 184; *Voyce v Bucaria*, 198 AD2d 273).

Plaintiffs have presented an affidavit of their expert, Paul Cohen (see the affidavit annexed to plaintiffs' cross motion). Mr. Cohen, an attorney and licensed insurance agent, opines that TDR and Israel were negligent in handling the insurance policy as to the change of trusts, trustees, and the change of address.

An expert affidavit should delineate the appropriate standard of professional care and skill to which the defendants were required to adhere under the circumstances (*Natale v Jeffrey Samel and Associates*, 308 AD2d 568). An expert may not be utilized to offer his opinion as to the legal standard which he believes should have governed a party's conduct (*Marx & Co., Inc. v The Divers' Club*, 550 F.2d 505, *cert den.* 434 U.S. 861).

Expert witnesses should not offer opinion as to the legal obligations of the parties as in that it is an issue to be determined by the trial court; an expert opinion as

to a legal conclusion is impermissible (*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63).

An expert's affidavit regarding the customs and standards of practice in the insurance industry must include competent foundational data to be entitled to any weight (*Guldy v Pyramid Corp*, 222 AD2d 815). Here, there is no "foundational data." Mr. Cohen merely set forth how he would have handled the matter if he had been in Israel's and TDR's situation. Mr. Cohen's affidavit does not raise any legitimate issues of fact that are relevant herein.

The Court finds, however, that material issues of fact exist as to the nature of the relationship among Wolfe, the Wolfe Trust, and TDR. In addition, the Court cannot find as a matter of law that plaintiffs proximately caused their damages without determining issues of credibility. It appears that TDR billed Wolfe for their services in forwarding notices to plaintiffs. If so, it is plausible that TDR believed it was acting in its capacity as attorneys for plaintiffs. Since the Court should draw all reasonable inferences in favor of the non-moving party and not determine credibility on a summary judgment motion, the claim against TDR insofar as it alleges legal malpractice must go to trial. *Torres v. Jeremias*, 283 AD2d 484 (2d Dept. 2001).

Finally, the court will consider plaintiffs' cross motion. Plaintiffs in their cross motion seek to amend the complaint's caption to reflect Carol Wolfe's capacity as trustee of the Goodman 1993 Trust, as trustee of the Wolfe 1993 Trust and as beneficiary of both the Goodman 1993 Trust and the Wolfe 1993 Trust with no other changes (see Exhibit I annexed to plaintiffs' cross motion).

The decision as to whether to grant leave is generally left to the sound discretion of the trial court (*Sidor v Zuhoski*, 257 AD2d 564). Of course, a court must examine the underlying merit of the proposed amendment since to do otherwise would be wasteful of judicial resources (*Morgan v Prospect Park Associates Holdings, L.P.*, 251 AD2d 306).

Motions for leave to amend pleadings are liberally granted in the absence of prejudice or surprise, but leave will be denied where the proposed amendment is palpably insufficient as a matter of law or is devoid of merit (*Breco Environmental Contractors, Inc. v Town of Smithtown*, 307 AD2d 330; *Silvin v Karwoski*, 242 AD2d 945). Leave to amend will not be granted upon the mere request of a party without a proper basis (*Morgan v Prospect Park Associates Holdings, L.P.*, 251 AD2d 306).

Where life insurance policies are owned by a trust, only the trustee, as plaintiff may seek damages attributable to the issuance of the policies (*Orentreich v Prudential Insurance Company of America*, 275 AD2d 685). Wolfe is not an owner of the policy. The Wolfe 1993 Trust is the owner and Michael Wolfe has no standing to sue on behalf of the Trust (see *Berardino v Ochlan*, 2 AD3d 556; *Orentreich v Prudential Insurance Co. of America, supra*). Further, it is not clear to the Court if Carol Wolfe is the sole trustee of the Wolfe 1993 Trust or why Joseph Salomon is not a co-plaintiff in this action.

Also, based on its determination, this court has concluded that Alan I. Brown and Joseph J. Israel Associates, Inc. should not be party defendants herein (leaving only

defendants, William Penn Life Insurance and TDR). Thus proper amended pleadings should reflect these changes.

Thus, it would be inappropriate for the court to grant the plaintiff's request to amend without the above noted changes. Carol Wolfe may renew her request to amend her complaint upon submission of proper papers.

Summary judgment is hereby granted dismissing this action as to defendant Joseph J. Israel Associates, Inc. The cause of action against defendant TDR and Alan I. Brown is dismissed only insofar as it alleges breach of fiduciary duty and denied insofar as it alleges legal malpractice.

This shall constitute the Decision and Order of the Court.

Dated: April 17, 2006

ENTERED

APR 19 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE


STEVEN M. JAEGER, A.J.S.C.