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SHORT FORM ORDER

INDEX No. 14-70174

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-20-15
ADJ. DATE 3-26-15
Mot. Seq. # 001 - MG
002 - MotD

DOROTHY H. KREUTZER, Plaintiff, - against - EAST ISLIP UNION FREE SCHOOL DISTRICT; BOARD OF EDUCATION OF EAST ISLIP SCHOOL DISTRICT; and EAST ISLIP ASSOCIATION OF SCHOOL ADMINISTRATORS, Defendants.	MARLIESE FLIS, ESQ. Attorney for Plaintiff 149 East Main Street, Suite 3, P.O. Box 2 East Islip, New York 11730 RUTHERFORD & CHRISTIE, LLP Attorney for East Islip Union Free School District & Board of Education 369 Lexington Avenue, 8th Floor New York, New York 10017 BRAD A. STUHLER, ESQ. Attorney for East Islip Association of School Administrators 490 Wheeler Road, Suite 280 Hauppauge, New York 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion to Dismiss by defendant East Islip Association of School Administrators, dated January 16, 2015, and supporting papers; (2) Affidavit in Opposition by the plaintiff dated March 20, 2015, and supporting papers; (3) Reply Affirmation by defendant East Islip Association of School Administrators dated March 24, 2015, and supporting papers; (4) Notice of Motion to Dismiss by defendants East Islip Union Free School District and Board of Education of East Islip School District dated January 30, 2015, and supporting papers; (5) Affidavit in Opposition by the plaintiff dated March 20, 2015, and supporting papers; and (6) Reply Affirmation by defendants East Islip Union Free School District and Board of Education of East Islip School District dated March 25, 2015, and supporting papers; it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant East Islip Association of School Administrators to dismiss the complaint against it pursuant to CPLR 3211 (a) (7) is granted; and it is further

ORDERED that the motion by defendants East Islip Union Free School District and Board of Education of East Islip School District to dismiss the complaint against them pursuant to CPLR 3211 (a) (7) is granted to the extent of dismissing the second, third, fourth, fifth and sixth causes of action against them, and is otherwise denied.

This is an action to recover damages for, *inter alia*, breach of contract, negligence, fraud and breach of fiduciary duty, relating to an insurance policy on the life of the plaintiff's husband allegedly procured by, and to be administered by, the defendants for the benefit of the plaintiff. The plaintiff's husband, Henry Kreutzer, was employed by the East Islip School District in 1955 as a gym teacher, and subsequently as the school's athletic director, until his retirement in 1989. The plaintiff alleges that by virtue of a written agreement between the defendant East Islip School District ("School District") and the East Islip Association of School Administrators ("Association"), of which her husband was a member, her husband was entitled to a $100,000 split life insurance policy that would pay $80,000 to his named beneficiary, the plaintiff, upon his death. The plaintiff's complaint alleges that the Association was to pay the premiums through a Trust Fund known as the E.I.A.S.A. Welfare Trust Fund, and the School District was to pay into the fund the sums necessary to provide for the additional fringe benefits to members and associate members, including the funds which would be used to pay the insurance premiums on split life policies. The plaintiff believes that in 1994, the School District reduced its contribution to the E.I.A.S.A Welfare Trust Fund and took over administration of the life insurance policies.

According to the complaint, on or about May 2, 1990, Mr. Kreutzer applied for the policy. His application was approved and he was apparently required to turn in a prior policy for $50,000 to which he was entitled pursuant to a collective bargaining agreement between the School District and the Association. The Association paid the first premium of $1,364 by check dated May 2, 1990. The plaintiff believes that upon obtaining this new policy for which the premiums would be paid on his behalf, her husband let lapse another $100,000 policy for which he had been paying out-of-pocket premiums.

Following Mr. Kreutzer's death on December 5, 2013, the plaintiff contacted the insurance company to collect on the $100,000 split life insurance policy and was informed that it had no record of the policy and that the policy had probably lapsed due to unpaid premiums. The plaintiff contacted the defendants and all denied responsibility for the cancellation of the policy due to unpaid premiums. This action followed.

The plaintiff asserts nine causes of action in her complaint–three against the Association only, four against the School District and Board of Education only, and two against all of the defendants. As against the Association, the first cause of action sounds in breach of contract for failing to pay the premiums on the $100,000 split-life policy and thereby causing the policy to lapse, the second sounds in negligence for failing to pay the premiums on the $100,000 split-life policy and thereby causing the policy to lapse, and the third sounds in breach of fiduciary duty for failing to ensure that the premiums were paid and that the policy remained intact. As against the School District and the Board of Education, the first cause of action sounds in breach of contract for failing to pay the premiums on the $100,000 split-life policy or to ensure that the premiums were paid, the second sounds in negligence for failing to pay the premiums on the $100,000 split-life policy or to ensure that the premiums were paid, the third sounds in negligence for failing to investigate whether Mr. Kreutzer's policy had lapsed after becoming aware that other similar policies had lapsed, and the fourth sounding in fraud for falsely representing that it would pay the premiums. The first cause of action against all defendants (which is the fourth cause of action against the Association and the fifth cause of action against the School District and the Board of Education) sounds in negligence for failing to inquire as to the status of all policies when the School District reduced the welfare fund and took over the administration of the policies, and the second (which is the fifth cause of action against the Association and sixth cause of action against the School District and the Board of Education)

sounds in negligence for allowing the policy to lapse and not providing for all of their contractees resulting in the loss of additional contractual benefits to which the plaintiff's spouse may have been entitled.

The defendants now separately move, pre-answer, to dismiss the complaint. The Association moves for an Order dismissing the action against it pursuant to CPLR 3211 (a) (1), (5), (7), and (10), and CPLR 217 (2) (a). The School District and the Board of Education move for an Order dismissing the action against them pursuant to CPLR 3211 (a) (1) and (7), and Education Law § 3813 (2-b).

The Association's motion is granted for failure to state a cause of action (CPLR 3211 [a] [7]). Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference give to plaintiff (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, a court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, a court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, a court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see* ***Leon v Martinez***, *supra*; ***International Oil Field Supply Servs. Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc 2d 491 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

The Court finds the case of ***Martin v Curran*** (303 NY 276 [1951]) dispositive as to all causes of action alleged against the Association. In *Martin*, the Court of Appeals held that because a voluntary, unincorporated membership association has no existence independent of its members, a plaintiff cannot maintain a cause of action against it "unless the debt which he seeks to recover is one upon which he could maintain an action against all the associates by reason of their liability therefor, either jointly or severally" (*id.* at 281, quoting ***McCabe v Goodfellow***, 133 NY 89, 92 [1892]). Through the affidavit of its current president, the defendant has established that it is an unincorporated association. The plaintiff does not allege that the individual, current members of the Association approved, ratified, purchased, discontinued or had any knowledge or involvement with any life insurance policy for Mr. Kreutzer. Through affidavits attached in support of the Association's motion to dismiss, current members of the Association attest that they had no knowledge of, or involvement with, any such insurance policy and that they were never informed that any such insurance policy had lapsed or expired.

In her reply papers, the plaintiff concedes that *Martin* controls as to her claims sounding in breach of contract, but not as to her remaining claims sounding in negligence. Contrary to the plaintiff's contentions, the *Martin* decision makes no distinction between contract and negligence claims. Indeed, the decision itself explicitly states that the line of consistent precedent on this holding beginning with ***McCabe v Goodfellow***, *supra*, includes not only contract but tort cases. Interpreting General Associations Law § 13, the Court of Appeals elaborated, "[s]o, for better or worse, wisely or otherwise, the Legislature has limited such suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven" (***Martin v Curran***, *supra*

at 282). Therefore, even assuming that the plaintiff's negligence claims were otherwise viable, they would fail pursuant to *Martin*.

While the plaintiff seeks to rely on the dissenting opinion in *Martin*, as well as some narrow exceptions that have been carved out with respect to the negligence of agents of a union, the Court finds the plaintiff's arguments unpersuasive. Not only is the case law involving negligence of agents of unions inapplicable here, but the plaintiff's claims are clearly rooted in the breach of alleged contractual obligations.[1]

Additionally, despite criticism, the *Martin* rule has recently been upheld by the Court of Appeals. In ***Palladino v CNY Centro, Inc.***, 23 NY3d 140, 989 NYS2d 438 [2014], a case in which a union member sought damages from his union for breach of the duty of fair representation, the Court of Appeals directly addressed criticism of the *Martin* rule and declined to overrule its precedent (*see also* ***Lahendro v New York State United Teachers Assn.,*** 88 AD3d 1142, 931 NYS2d 724 [3d Dept 2011]; ***Walsh v Torres-Lynch***, 266 AD2d 817, 697 NYS2d 434 [4th Dept 1999]). Accordingly, as *Martin* remains the law in New York, the Association's motion to dismiss the complaint against it is granted.

As to the motion by the School District and the Board of Education, the Court finds that the plaintiff's negligence and fraud claims are not separate and apart from her claim for breach of contract, as they are predicated upon the same purported wrongful conduct of the defendants in failing to pay the premiums on Mr. Kreutzer's life insurance policy (*see* ***Beta Holdings Inc. v Goldsmith***, 120 AD3d 1022, 992 NYS2d 25 [1st Dept 2014]; ***OP Solutions, Inc. v Crowel & Moring, LLP***, 72 AD3d 622, 900 NYS2d 48 [1st Dept 2010]).

A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. "Merely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]). Moreover, "New York does not recognize tort claims arising out of the negligent performance of a contract" (***Inter-Community Mem. Hosp. of Newfane v Hamilton Wharton Group, Inc.,*** 93 AD3d 1176, 1177, 941 NYS2d 360 [4th Dept 2012], quoting ***Verizon New York, Inc. v Barlam Constr. Corp.***, 90 AD3d 1537, 1538, 935 NYS2d 420 [4th Dept 2011]) and, despite using language sounding in tort, the plaintiff has not alleged the breach of a duty separate and apart from that to abide by the terms of the purported contract. Nor is there any allegation that the nature of the alleged economic harm gives rise to a duty of reasonable care independent of the contract itself (*see* ***Verizon New York, Inc. v Optical Communications Group, Inc.***, 91 AD3d 176, 936 NYS2d 86 [1st Dept 2011]).

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[1] While the *Martin* rule and its rationale applies to all of the plaintiff's claims against the Association, the Court further notes that the plaintiff's claims sounding in negligence and breach of fiduciary duty are based on the same facts and theories as their breach of contract claim. Without identifying a legal duty separate and apart from the alleged contract itself that has been violated, these claims are not actionable (*see* ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]; ***Brooks v Key Trust Co. Natl. Assn.***, 26 AD3d 628, 809 NYS2d 270 [3d Dept 2006]).

Here, all of the plaintiff's allegations stem from the same set of facts–the alleged failure of the defendants to pay or otherwise contribute to premiums on a life insurance policy for the plaintiff's spouse. Any duty allegedly owed by the defendants to the plaintiff arises solely as a result of this contractually based agreement. Each of the plaintiff's negligence claims is merely a restatement, in slightly different terms, of the explicit or implied contractual obligations asserted in the cause of action for breach of contract.

Similarly, a fraud claim may coexist with a breach of contract cause of action only where the alleged fraud constitutes the breach of a duty separate and apart from the duty to abide by the terms of the contract (*see* ***Verizon New York, Inc. v Optical Communications Group, Inc.***, *supra*). The essence of the plaintiff's fraud claim is that the defendants represented to the plaintiff's spouse that it would pay the premiums on the $100,000 split-life policy but that such representation was false when made and, as a result, the plaintiff's spouse was induced to turn in another policy for $50,000, harming the plaintiff as beneficiary. The fraud alleged is based on the same set of facts as underlie the contract claim and mere general allegations that a defendant entered into a contract while lacking the intent to perform it are insufficient to support fraud-based claims (*see* ***OP Solutions, Inc. v Crowel & Moring, LLP***, *supra;* ***Mañas v VMS Assoc., LLC***, 53 AD3d 451, 863 NYS2d 4 [1st Dept 2008]; ***J.E. Morgan Knitting Mills v Reeves Bros.***, 243 AD2d 422, 663 NYS2d 211 [1st Dept 1997]). The plaintiff has failed to allege a misrepresentation of present fact, rather that a misrepresentation of future intent to perform under the contract, that is collateral to the contract and would therefore involve a separate breach of duty (***GoSmile, Inc. v Levine***, 81 AD3d 77, 915 NYS2d 521 [1st Dept 2010]).

Thus, the plaintiff has failed to state causes of action for either negligence or fraud.

Turning to the remaining claim, accepting the facts alleged in the complaint as true and providing the plaintiff the benefit of every possible favorable inference, the Court finds that the plaintiff's complaint states a cause of action for breach of contract. Despite the defendants' assertions that they did not have any contractual obligation based on a reading of the collective bargaining agreement, on a motion to dismiss for failure to state a cause of action, the Court is not to determine whether there is evidentiary support for the complaint but, rather, whether the facts as alleged fit within a cognizable legal theory. The Court finds that the complaint adequately alleges all of the essential elements of a cause of action to recover for breach of contract, specifically, the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see* ***JP Morgan Chase v J.H. Electric of New York, Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]).

The documentary evidence submitted by the defendants in their motion to dismiss the complaint does not conclusively dispose of the plaintiff's claims. A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see* ***Flushing Sav. Bank, FSB v Siunykalimi,*** 94 AD3d 807, 941 NYS2d 719 [2d Dept 2012]; ***Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.***, 82 AD3d 1160, 920 NYS2d 166 [2d Dept 2011]). While the defendants seek to rely on the collective bargaining agreement and the universal whole life application to establish that they did not have any role in the administration of the policies, there are not only questions as to Mr. Kreutzer's effective date of retirement and, accordingly, which collective bargaining agreement governed at the time, but also questions of fact as to the School District's role and obligations in

maintaining the policies that turn on differing interpretations of the agreement in force. Moreover, the universal whole life application provided is not the alleged contract itself, and the plaintiff asserts that more discovery is needed to find the relevant documents and establish her claims.

Finally, with respect to the defendants' contention that the plaintiff's claims are barred by the one-year statute of limitations applicable to school districts (Education Law § 3813 [2-b]), the Court finds that defendants have failed to conclusively establish, *prima facie*, the date of the alleged breach. A breach of contract cause of action accrues at the time of the breach (*see* ***Ely-Cruikshank Co., Inc. v Bank of Montreal***, 81 NY2d 399, 599 NYS2d 501 [1993]). The present action is not against an insurer for payment of insurance proceeds, but rather is against an employer for an alleged breach of a collective bargaining agreement to maintain life insurance coverage. Therefore, despite the plaintiff's contentions that the statute of limitations should run from the time of her husband's death, the Court finds that the breach would have occurred at the time the defendants allegedly failed to perform their obligations under the purported contract (by failing to make required contributions to the premiums), and that the statute would thus run from that date (*see* ***LaGreca v City of Niagara Falls***, 244 AD2d 862, 665 NYS2d 229 [4th Dept 1997]). Although the Court is aware of the potentially harsh result of this finding, it is well-established that the statute runs from the time of the breach even if no damage occurs until later, and even though the injured party may be ignorant of the existence of the wrong or injury (*see* ***Ely-Cruikshank Co., Inc. v Bank of Montreal***, *supra*; ***Reid v Incorporated Vil. of Floral Park***, 107 AD3d 777, 967 NYS2d 135 [2d Dept 2013]; ***Chelsea Piers L.P. v Hudson Riv. Park Trust***, 106 AD3d 410, 964 NYS2d 147 [1st Dept 2013]). The Court also finds (and the plaintiff does not contest) that the one-year statute of limitations provided by Education Law § 3813 (2-b) is applicable to the plaintiff's breach of contract claims (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 90 AD3d 821, 935 NYS2d 616 [2d Dept 2011]). However, on this record the Court is unable to discern the exact date of the alleged breach, as there is no claim or document indicating precisely when the defendants allegedly failed to fulfill their contractual obligations, aside from the defendants' mere statement in their motion that the insurance policy lapsed "on or about July 9, 1991." Accordingly, this branch of the motion is denied.

Dated: December 2, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**