

**Magee-Boyle v Reliastar Life Ins. Co. of N.Y.**

2016 NY Slip Op 33060(U)

April 4, 2016

Supreme Court, Nassau County

Docket Number: 605983-15

Judge: Timothy S. Driscoll

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**ORIGINAL**

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**LAURIE ANN MAGEE-BOYLE,  
SHARON MAGEE-HARRIS and PATRICK J. MAGEE  
AS CO-TRUSTEES OF PATRICK MAGEE  
IRREV TRUST,**

**Plaintiffs,**

**-against-**

**RELIASTAR LIFE INSURANCE COMPANY OF  
NEW YORK and EASTERN PLANNING, INC.,**

**Defendants.**  
-----X

**TRIAL/IAS PART: 12  
NASSAU COUNTY**

**Index No: 605983-15  
Motion Sequence Nos. 1 and 2  
Submission Date: 3/11/16**

**The following papers have been read on these motions:**

- Notice of Motion.....X**
- Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibit.....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum in Further Support.....X**
- Notice of Motion, Affirmation in Support, Exhibits and  
Memorandum of Law in Support.....X**
- Affirmation in Opposition.....X**
- Memorandum of Law in Opposition.....X**
- Affidavit of B. Blecker, Exhibits and Reply Memorandum of Law.....X**
- Correspondence dated February 1, 2016 and Exhibits.....X**
- Correspondence dated February 11, 2016.....X**
- Reliastar’s Memorandum in Opposition to Plaintiff’s Sur-Reply.....X**

This matter is before the court on 1) the motion filed by Defendant Reliastar Life Insurance Company of New York (“Reliastar”) on October 15, 2015, and 2) the motion filed by Defendant Eastern Planning, Inc. on October 15, 2015, both of which were initially submitted on November 20, 2015. By prior Order (“Prior Order”), the Court directed that these motions would be the subject of oral argument before the Court. The Court held that oral argument and

the motions were subsequently submitted on March 11, 2016. For the reasons set forth below, the Court grants the motions and dismisses the Complaint.

### BACKGROUND

#### A. Relief Sought

Defendant Reliastar moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Complaint as against Reliastar.

Defendant Eastern Planning moves for an Order, pursuant to CPLR §§ 3211(a) and 3016(b), dismissing the Complaint as against Eastern Planning.

Plaintiffs Laurie Ann Magee-Boyle (“Laurie”), Sharon Magee-Harris (“Sharon”) and Patrick J. Magee (“Magee”) as co-trustees of the Patrick Magee Irrevocable Trust (the “Trust”) (“Plaintiffs”) oppose the motions.

#### B. The Parties’ Background

The Complaint (Ex. 1 to Mallin Aff. in Opp.) alleges as follows:

Reliastar is authorized by the Department of Financial Services of the State of New York to issue policies of life insurance, including the policy at issue in this action. Eastern Planning is an insurance brokerage company in the State of New York which is licensed to sell life insurance products in the State of New York.

On or about November 2, 2009, Reliastar issued a variable universal life insurance policy (“Policy”) bearing Policy Number S7-125-216. The Trust is the owner of the Policy. Pursuant to the Policy, which had a face amount of \$2.5 million and an effective date of November 9, 1999, Reliastar insured the life of Patrick. The Trust obtained the Policy through Eastern Planning.

Pursuant to the Policy, the Trust was permitted to take a Policy Loan during Patrick’s lifetime. If the Death Benefit Guarantee is not in effect, the Policy will lapse only if, on any Monthly Anniversary, the Cash Surrender Value plus any Sales Charge refund is less than the Monthly Deduction due. Pursuant to the Policy, the Death Benefit Guarantee Period was five (5) years. The Trust obtained a Policy Loan against the Policy. Eastern Planning was an agent of Reliastar. In or about December 2011, Eastern Planning advised the Trust that 1) the Policy would remain in effect as long as the Trust paid \$425.00 in monthly premiums; and 2) the Policy would remain in effect for nine (9) months if no monthly premium payments were made.

In or about January 2012, the Trust confirmed that monthly payments of \$425.00 would be made. Eastern Planning assisted the Trust by transmitting an Electronic Funds Transfer (“EFT”) form, which would permit Reliastar to pay premiums for the Policy by automatically withdrawing funds from Patrick’s bank account in the amount of \$425.00 per month. On or about January 25, 2012, Patrick transmitted a completed EFT form to Eastern Planning which authorized Reliastar to automatically withdraw \$425.00 per month, to pay the monthly premiums on the Policy. Reliastar issued a quarterly policy summary for the period July 1, 2012 through September 30, 2012 reflecting the planned periodic monthly premium payment to be \$425.00.

On or about October 4, 2012, Eastern Planning, as an agent of Reliastar, advised the Trust that an interest payment must be paid annually on any loan proceeds received from an insurance policy. On or about October 4, 2012, Eastern Planning advised Plaintiffs that a payment of \$1,300.00 would be necessary to keep the Policy active, and that Eastern Planning was communicating with Reliastar to allow the Trust to increase monthly premiums to include the interest. On or about October 6, 2012, the Trust complied with its obligations by furnishing Eastern Planning with a \$1,300.00 payment for the loan interest which was to be transmitted to Reliastar on behalf of the Trust.

On or about November 9, 2012, Reliastar transmitted a First Notice Request for Premium Payment notification which stated that the amount of \$17,803.43 in outstanding premium and \$23,635.73 in outstanding loan interest, for a total of \$41,439.16, was due. Reliastar advised the Trust that payment of \$41,439.16 was due by January 9, 2013 to prevent the Policy from lapsing. On or about December 10, 2012, Reliastar transmitted a Second Notice Request for Premium Payment notification which stated that payment of \$41,439.16 was due by January 9, 2013 to prevent the Policy from lapsing. To resolve this shortfall, on or about December 12, 2012, the Trust agreed to increase monthly premium payments from \$425.00 to \$2,000.00 beginning January 2013. In addition, on December 12, 2012, the Trust, after consulting Eastern Planning, issued payment to Eastern Planning in the amount of \$23,635.73 which was to be transmitted to Reliastar as payment for the outstanding interest owed. Eastern Planning advised the Trust that this payment would prevent the Policy from lapsing. On or about December 20, 2012, Reliastar issued a Confirmation reflecting a “Loan Repayment” and “Loan Capitalization” in the amount of \$23,635.73 (Comp. at ¶ 37).

Beginning in or about January 2013, Reliastar automatically withdrew a monthly payment of \$2,000 from Patrick’s bank account to pay the premium on the Policy. On or about

April 9, 2013, Reliastar transmitted a First Notice Request for Premium Payment to the Trust which stated that a premium payment of \$11,816.00 was due by June 9, 2013 to prevent the Policy from lapsing. On or about April 25, 2013, Reliastar issued a quarterly policy summary for the period January 1 through March 31, 2013 reflecting the planned period premium payment for the Policy to be \$2,000 per month. On or about May 6, 2013, the Trust advised Eastern Planning that Reliastar did not withdraw the automatic premium payment of \$2,000 for April 2013 and, instead, sent a notice claiming a payment of \$11,816.00 was due to prevent the Policy from lapsing and the Trust asked Eastern Planning to investigate the recent notice from Reliastar.

On or about May 9, 2013, Reliastar transmitted a Second Notice Request for Premium Payment to the Trust which stated that a premium payment of \$11,816.00 was due by June 9, 2013 to prevent the Policy from lapsing. On or about May 22, 2013, the Trust sent a second communication to Eastern Planning which advised Eastern Planning that Reliastar did not withdraw the automatic premium payment of \$2,000 for April and May 2013 and asked Eastern Planning to resolve the issue or advise the Trust if it needed to contact Reliastar directly. On or about May 24, 2013, Eastern Planning advised Plaintiffs that it was investigating the matter.

On or about June 5, 2013, the Trust send a third communication to Eastern Planning which advised Eastern Planning that Reliastar had not withdrawn premium payments for April and May 2013 and requested that Eastern Planning resolve the discrepancy. The Trust also reminded Eastern Planning that the sixty (60) day deadline to issue payment was approaching. On or about June 5, 2013, Eastern Planning advised Plaintiffs that it was communicating with Reliastar to resolve this issue. Eastern Planning also advised Plaintiffs that Reliastar was responsible for determining the amount that the Trust needed to pay in interest and premiums to keep the Policy from lapsing.

On or about June 6, 2013, the Trust asked Eastern Planning to ensure that Reliastar would not cancel the Policy. Eastern Planning advised the Trust that it was aware of its responsibility to ensure that the Policy was not cancelled. Eastern Planning, however, failed to re-establish the automatic withdrawals or to prevent the Policy from lapsing. On June 11, 2013, Eastern Planning advised the Trust that Reliastar “had not been helpful” (Comp. at ¶ 52) and that Eastern Planning was securing the assistance of an outside insurance person to ensure that the Policy would not be cancelled.

On or about June 17, 2013, the Trust transmitted to Eastern Planning a copy of Reliastar’s Final Cancellation Notice, dated June 10, 2013, which stated that the Policy had

lapsed as a result of non-payment of premiums and that coverage had terminated as of June 9, 2013. At Eastern Planning's direction, the Trust issued payment to Reliastar in the amount of \$6,000 to cover monthly premiums for April through June of 2013 which had not been electronically deducted, pursuant to the EFT agreement, from Patrick's bank account. On or about June 27, 2013, Eastern Planning transmitted a new life insurance application to the Trust which, Eastern Planning represented, was necessary to reinstate the Policy. On June 28, 2013, the Trust advised Eastern Planning that the Trust had received a check from Reliastar in the amount of \$9,316.95, representing refund loan interest. Eastern Planning advised the Trust not to cash that check and that the Policy would be reinstated when the new life insurance application was submitted to Reliastar. The Trust complied with Defendants' request that Patrick complete an application and other forms.

On or about August 22, 2013, Reliastar advised the Trust that the request for reinstatement of the Policy could not be approved due to a change in Patrick's medical history. Subsequent to the cancellation of the Policy, the Trust was unable to obtain a policy with the same terms as the Policy and, instead, was only able to obtain an adjustable life insurance policy with an initial death benefit of \$1 million and a planned monthly premium of \$6,452.50. As of the date of the filing of the Complaint, Patrick is still alive.

The Complaint contains three (3) causes of action: 1) for specific performance in the form of an Order requiring Reliastar to reinstate the Policy which was terminated on or about June 9, 2013, 2) against Reliastar for breach of the Policy, and 3) against Eastern Planning for Negligence/Negligent Misrepresentation based on its conduct which led to the lapse and cancellation of the Policy.

In support of Reliastar's motion, Brandi Barnard ("Barnard") affirms that she is a Manager of Service Delivery for Voya Financial, Inc. who, in that capacity, is personally familiar with, and has access to, the Policy maintained by Reliastar in the normal course of business. Barnard provides the following documentation, all of which is referred to in the Complaint: 1) the Policy (Ex. A), 2) the EFT form received by Reliastar on or about February 6, 2012 (Ex. B), 3) the Quarterly Policy Summary for July 1, 2012 through September 30, 2012 (Ex. C), 4) the First Notice Request for Premium Payment Policy dated November 9, 2012 which is, more specifically, titled "First Notice, Request for Premium Payment, Policy is in Danger" (Ex. D), 5) the Second Notice Request for Premium Payment dated December 10, 2012 which is, more specifically, titled "Second Notice, Request for Premium Payment, Policy is in Danger"

(Ex. E), 6) the cover letter with check in the amount of \$23,635.73 received to pay loan interest on or about December 18, 2012 (Ex. F), 7) a Confirmation of Reliastar's receipt of payment in the amount of \$23,635.73 (Ex. G), 8) the First Notice Request for Premium Payment dated April 9, 2013 which is, more specifically, titled First Notice Request for Premium Payment, Policy is in Danger" (Ex. H), 9) the Quarterly Policy Summary for Policy for the period January 1 through March 31, 2013 (Ex. I), 10) the Second Notice request for Premium Payment dated May 9, 2013 which is, more specifically, titled Second Notice Request for Premium Payment, Policy is in Danger" (Ex. J), 11) the Final Cancellation Notice dated June 10, 2013 (Ex. K), 12) the letter sent by Linda, along with a copy of the check in the amount of \$6,000, which Reliastar received on or about June 20, 2013 (Ex. L), 13) the request for reinstatement completed by Patrick and faxed to Reliastar on or about July 11, 2013 (Ex. M), 14) a letter from Reliastar to the Trustee dated August 22, 2013, advising the Trust that the Policy could not be reinstated due to the change in Patrick's medical condition (Ex. N), and 15) an October 13, 2013 letter from Patrick's counsel notifying Reliastar that Mitchell L. Klein ("Klein") had resigned as Trustee and that Plaintiffs had been appointed and agreed to serve as successor co-trustees of the Trust effective July 2, 2013.

In support of Eastern Planning's motion, Beth L. Blecker ("Blecker"), the Chief Executive Officer of Eastern Planning, provides copies of 1) an email exchange between Linda and Blecker, including emails dated December 27, 2011, January 6, 2012 and January 10, 2012 (Ex. A to Blecker Aff.), 2) a June 6, 2013 letter that Blecker sent to Patrick and Linda (Ex. B to Blecker Aff.), and 3) a June 17, 2013 letter that Blecker sent to Patrick and Linda (Ex. C to Blecker Aff.).

Subsequent to the issuance of the Prior Order, Plaintiffs, by letter to the Court dated February 1, 2016, sought permission to supplement their opposition to the motions to dismiss. Over the objection of Reliastar, the Court has considered that supplemental submission ("Supplemental Submission") which included the following exhibits: 1) the insurance application submitted to Reliastar by Eastern Planning on behalf of Magee and signed by Alan H. Blecker of Eastern Planning, 2) the Agents Report submitted to Reliastar by Alan H. Blecker of Eastern Planning, 3) the Supplementary Life Application submitted to Reliastar by Eastern Planning on behalf of Magee and executed by Alan H. Blecker of Eastern Planning, 4) the Telephone Authorization for Variable Life Policies submitted to Reliastar and signed by Alan H. Blecker of Eastern Planning, 5) the Life Insurance Illustration of Reliastar Life of New York life



insurance policies, prepared by Alan H. Blecker of Eastern Planning and designed for Magee, and 6) the Resignation of Trustee Klein dated January 7, 2013 and notarized by Blecker on February 16, 2013.

### C. The Parties' Positions

Reliastart submits that the allegations in the Complaint demonstrate that the Policy lapsed for the non-payment of premiums, even though Reliastar provided advance notice and the requisite grace period before terminating the Policy, consistent with its terms. Reliastar contends that Plaintiffs have failed to identify any specific provision of the Policy that Reliastar breached, and that the allegations support the conclusion that it was the Trust that breached the Policy by failing to pay the required premiums, even after it received notice and a 61-day grace period. Moreover, Reliastar had no obligation to reinstate the Policy after it lapsed, particularly given, as alleged in the Complaint, the change in Patrick's insurability status which prevented him from obtaining the same coverage from another carrier. Reliastar also contends that there are no factual allegations that Reliastar had knowledge of, or ratified statements made by, Eastern Planning's employees, and Plaintiffs' conclusory allegation that Eastern Planning was an agent of Reliastar does not establish an agency relationship. Reliastar submits that the allegations, instead, support the conclusion that Eastern Planning was acting as the Trust and/or Patrick's agent when the Policy lapsed in 2013 and when Patrick submitted his request for reinstatement in July 2013. Reliastar also submits that Plaintiffs have failed to cite any contractual or other authority in support of their request for an award of attorney's fees.

Reliastar also submits that the Court should dismiss the Complaint due to the Trust's failure to join Klein, the predecessor trustee, who acted as the sole trustee for the Trust during the relevant time period. Reliastar submits that Plaintiffs' failure to name Klein as a party in this action is "conspicuous" (Reliastar Memo. of Law in Supp. at n. 2) given that Klein has been named as a defendant in an adversary proceeding filed by the bankruptcy trustee for FKF, LLC. In that proceeding, it is alleged that, during the same time period at issue in this action, Klein was part owner and operator of a loan company that allegedly participated in a Ponzi scheme in which money and other property was converted and fraudulently transferred to Klein and other insiders. In that action, titled *In Re Greg Messer, as Trustee for FKF Trust v. John Magee, Mitch Klein et al.*, which is pending in the United States Bankruptcy Court, Southern District of New York, John Magee, brother of Patrick, filed a pleading reflecting that Klein asserted his Fifth Amendment rights against self incrimination to all but 5 of the 755 questions posed by the



bankruptcy trustee. Reliastar submits that the equitable relief sought by Plaintiffs implicates the rights of Klein, an accountant allegedly involved in a fraudulent loan scheme in which property was fraudulently transferred to him and others.

Plaintiffs oppose Reliastar's motion submitting that they have pleaded a viable breach of contract claim by alleging that 1) Reliastar, for good and valuable consideration, issued the Policy; 2) Plaintiffs granted Reliastar authority to withdraw premium payments from Patrick's account; 3) Reliastar's failure to keep the Policy active, despite its authority to withdraw payments, constitutes a breach; and 4) due to the cancellation of the Policy, Plaintiffs sustained a loss believed to exceed \$1 million, representing the difference between the premiums on the Policy and the premiums on a new policy. Plaintiffs contend, further, that they have pleaded sufficient allegations to impute Eastern Planning's conduct to Reliastar on a theory of vicarious liability. Plaintiffs also contend that, even assuming *arguendo* that the Complaint is insufficient, the Court should deny the motion because the parties have not yet exchanged discovery which will reveal information regarding the contractual relationship between Eastern Planning and Reliastar which is relevant to whether there was an agency relationship between Defendants.

Plaintiffs contend, further, that they have sufficiently pleaded a cause of action for specific performance by alleging that 1) Reliance issued the Policy; 2) at all times prior to the cancellation of the Policy, Plaintiffs were willing and able to perform their obligations under the Policy; 3) as of the date of the cancellation of the Policy, Reliastar had either improperly represented, or misrepresented, the amount of premium due to keep the Policy effective, or had the ability to continue to insure Patrick's life; and 4) there is no adequate remedy at law given Patrick's inability to obtain a policy with the same terms as the Policy. Plaintiffs also dispute Reliastar's contention that Plaintiffs have failed to name necessary parties. Plaintiffs contend that judgment in this action will not affect Klein's rights or influence his conduct. Finally, Plaintiffs contend that they have properly asserted a request for counsel fees, in part because New York courts have authorized the recovery of consequential damages resulting from an insurer's breach of a policy's covenant of good faith and fair dealing where those damages were within the reasonable contemplation of the parties at or before the time of contracting.

Eastern Planning submits that the Complaint fails to state a claim for negligence because Plaintiffs have not adequately alleged the existence of a duty owed by Eastern Planning to the Trust, and the Policy was canceled due to the Trust's failure to pay its premium on a timely basis, not due to any breach of duty by Eastern Planning. Moreover, Eastern Planning was not

under a duty to stop Reliastar from canceling the Policy simply because the Trust asked Eastern Planning to do so. Eastern Planning contends, further, that the Complaint fails to state a claim for negligent misrepresentation because Plaintiffs have failed to allege sufficient facts 1) to establish a special relationship between the Trust and Eastern Planning; 2) to demonstrate reasonable reliance on any representations made by Eastern Planning; or 3) to demonstrate that any representations were false. Eastern Planning also argues that Plaintiffs have failed to plead their negligent misrepresentation claim with adequate particularity in light of their failure to identify any specific misrepresentation by Eastern Planning, or to explain how that misrepresentation caused the cancellation of the Policy.

Plaintiffs oppose Eastern Planning's motion submitting that they have adequately alleged the existence of a duty in consideration of case law holding that an insurance broker can be held liable in negligence for his failure to exercise due care in an insurance brokerage transaction. Plaintiffs submit that the claim for negligence/negligent misrepresentation arises out of Eastern Planning's misrepresentation that the Policy would not be cancelled for up to nine (9) months if no premiums were paid, and its representations that it was aware of its responsibility to ensure that the Policy would not be cancelled, notwithstanding the notices issued by Reliastar. Plaintiffs submit that Eastern Planning's failure to discharge its duties renders it liable for the loss sustained by Plaintiffs, which was proximately caused by Eastern Planning's negligence. Plaintiffs also contend that they have pleaded a cause of action for negligent misrepresentation with adequate specificity by alleging that 1) Eastern Planning initially obtained insurance on the Trust's behalf and continuously provided assistance and made representations after the Policy was cancelled in 2013; and 2) Eastern Planning was aware that the Trust would rely on its misrepresentations that a) the Policy would not lapse for a period of nine (9) months even if no premium payments were made; b) Eastern Planning was investigating Reliastar's failure to withdraw monthly payments on behalf of the Trust; and c) Eastern Planning was aware of its responsibility to act to ensure that the Policy did not lapse and that, notwithstanding the notice of cancellation, the Policy would be reinstated.

With respect to their Supplemental Submission, Plaintiffs submit *inter alia* that 1) the documentation submitted are all documents on Reliastar's letterhead which reveal the agency relationship between Eastern Planning and Reliastar; and 2) the documentation establishes that Eastern Planning was aware as of February 16, 2013 that Klein was no longer the trustee of the Insured and said knowledge is imputed onto Reliastar, Eastern Planning's principal, and any

notification sent by Reliastar to Klein as trustee of the insured after February 16, 2013 is faulty and fails as a proper cancellation under New York Banking Law § 576.

Reliastar submits that the Supplemental Submission does not alter the fact that Plaintiffs did not pay the premium due on the Policy notwithstanding repeated warnings that the Policy was in danger of lapsing, and that Plaintiffs, still, do not identify any provision of the Policy that Reliastar breached. Reliastar contends *inter alia* that 1) the Telephone Authorization form signed by Magee in August 1999, authorizing Alan Blecker to call Reliastar to make changes on behalf of Magee, further amplifies that Mr. Blecker was acting as Plaintiffs' agent, not Reliastar's agent; 2) none of the supplemental documents supports the claim that Eastern Planning was acting as Reliastar's authorized agent in connection with the premiums due in 2013 when the Policy lapsed; 3) any purported assurances allegedly provided by Eastern Planning do not alter or amend the express terms and conditions of the Policy which provides, in the section titled "Changes," that "[n]o agent or any other person may alter or change the terms and conditions of this policy;" 4) the Court should reject Plaintiffs' "entirely new argument" in their Supplemental Submission (Reliastar Opp. to Sur-Reply at p. 4), based on Banking Law § 576, on many grounds including the fact that a) there is no allegation in the Complaint that the Policy involves a premium finance agency or that Reliastar had any knowledge of a premium finance agreement, and because the Complaint "expressly concedes" (Reliastar Opp. to Sur-Reply at p. 5) that Plaintiffs received and had actual notices of the cancellation notices sent by Reliastar (see Comp. at ¶¶ 34, 36, 45, 47, 53 and 84).

#### RULING OF THE COURT

##### A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123

A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

#### B. Breach of Contract

The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and resulting damages. *Kausal v. Educational Products Information Exchange Institute*, 105 A.D.3d 909, 910 (2d Dept. 2013), citing, *inter alia*, *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

#### C. Negligent Misrepresentation

A claim for negligent misrepresentation requires the plaintiff to demonstrate 1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, 2) that the information was incorrect; and 3) reasonable reliance on the information. *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007), *rearg. den.*, 8 N.Y.3d 939 (2007). Liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified. *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565, 578 (2011), quoting *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996).

#### D. Obligations of Insurance Brokers

The common law rule is that an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain specifically requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so, but the agent owes no continuing duty to advise, guide or direct the customer insured to obtain additional coverage. *Waters Edge @ Jude Thaddeus Landing, Inc. v. B & G Group, Inc.*, 129 A.D.3d 706, 707 (2d Dept. 2015) quoting *Hjemdahl-Monsen v. Faulkner*, 204 A.D.2d 516 (2d Dept. 1994) (citation and internal quotation marks omitted) and citing *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728 (2014); *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (1997). Situations may arise, however, in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law. *Freundlich v. Pacific Indemnity Company*, 2016 N.Y. App. Div. LEXIS 1795, \* 2-3 (2d Dept. 2016).

Where a special relationship develops between the broker and client, the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage. *Waters Edge @ Jude Thaddeus Landing, Inc. v. B & G Group, Inc.*, 129 A.D.3d at 707, quoting *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d at 735 and citing *Murphy v. Kuhn*, 90 N.Y.2d at 272-73. The Court of Appeals has identified three “exceptional situations” which may give rise to such a special relationship: 1) the agent receives compensation for consultation apart from payment of the premiums; 2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or 3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on. *Waters Edge @ Jude Thaddeus Landing, Inc. v. B & G Group, Inc.*, 129 A.D.3d at 707, citing *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d at 735, quoting *Murphy v. Kuhn*, 90 N.Y.2d at 272.

#### E. Banking Law § 576

Banking Law § 576 provides for a two-step process by which an insurance premium finance agency may cancel a policy of insurance issued to a client when the client defaults. *Matter of Deerbrook Insurance Company v. McGregor*, 19 A.D.3d 417, 418 (2d Dept. 2005). First, the insurance premium finance agency must give both the client and the client’s insurance agent or broker no less than 10 days notice (13 days if the notice is mail) of an intent to cancel the policy if the default is not cured within such time period. *Matter of Deerbrook Insurance Company v. McGregor*, 19 A.D.3d at 418, citing Banking Law § 576(1)(a). If the default is not cured, the insurance premium finance agency may thereafter, in the name of the insured, cancel such insurance contract by mailing to the insurer a notice of cancellation stating when thereafter the policy shall be cancelled. *Matter of Deerbrook Insurance Company v. McGregor*, 19 A.D.3d at 418, quoting Banking Law § 576(1)(d).

#### F. Application of these Principles to the Instant Action

The Court grants the motions and dismisses the Complaint based on its conclusion that 1) the Policy lapsed for the non-payment of premiums, even though Reliastar provided advance notice and the requisite grace period before terminating the Policy, consistent with its terms; 2) Plaintiffs have failed to identify any specific provision of the Policy that Reliastar breached; 3) Reliastar had no obligation to reinstate the Policy after it lapsed, particularly given, as alleged in the Complaint, the change in Patrick’s insurability status which prevented him from obtaining the same coverage from another carrier; 4) there are no factual allegations that Reliastar had


knowledge of, or ratified statements made by, Eastern Planning's employees, and Plaintiffs' conclusory allegation that Eastern Planning was an agent of Reliastar does not establish an agency relationship; 5) the allegations, instead, support the conclusion that Eastern Planning was acting as the Trust and/or Patrick's agent when the Policy lapsed in 2013 and when Patrick submitted his request for reinstatement in July 2013; 6) with respect to the negligence claim, Plaintiffs have not adequately alleged the existence of a duty owed by Eastern Planning to the Trust, and the Policy was canceled due to the Trust's failure to pay its premium on a timely basis, not due to any breach of duty by Eastern Planning; 7) with respect to the negligent misrepresentation claim, Plaintiffs have failed to allege sufficient facts to establish a special relationship between the Trust and Eastern Planning, as well as the other elements of a negligent misrepresentation claim; and 8) Plaintiffs' argument based on Banking Law § 276 is also unavailing because, even assuming *arguendo* that Plaintiffs had alleged the existence of a premium financing agreement/agency to which Banking Law § 276 is applicable, Plaintiffs' own Complaint establishes that Plaintiffs had notice that the Policy would be cancelled if required payments were not made. Under these circumstances, dismissal of the Complaint is appropriate.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
April 4, 2016

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

~~XXXX~~

**ENTERED**

APR 15 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE