

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID FINKELSTEIN,  
Plaintiff,  
v.  
AXA EQUITABLE LIFE INSURANCE  
COMPANY, et al.,  
Defendants.

Case No. 17-cv-01089-JSW

**ORDER DENYING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE  
MOTION FOR RECONSIDERATION**

Re: Dkt. No. 36

This matter comes before the Court upon consideration of the motion for remand filed by Plaintiff David Finkelstein, M.D. ("Plaintiff"). Plaintiff seeks reconsideration of this Court's Order dated June 21, 2017, denying Plaintiff's motion for remand. The Court denied Plaintiff's motion for remand on the basis that Richard J. Boyer ("Boyer") was a fraudulently joined defendant whose citizenship should not be considered for purposes of jurisdiction. The Court found that Boyer was a fraudulently joined defendant on the grounds that the statute of limitations barred claims against Boyer, Boyer's representations were mere puffery, and Boyer's representation of policy terms was accurate.

Under Northern District Local Rule 7-9, a party may seek leave to file a motion for reconsideration any time before judgment. N.D. Civ. L.R. 7-9(a). A motion for reconsideration may be made on one of three grounds: (1) a material difference in fact or law exists from that which was presented to the Court, which, in the exercise of reasonable diligence, the party applying for reconsideration did not know at the time of the order; (2) the emergence of new material facts or a change of law; or (3) a manifest failure by the Court to consider material facts

1 or dispositive legal arguments presented before entry of judgment. N.D. Civ. L.R. 7-9(b)(1)-(3).  
2 The moving party may not reargue any written or oral argument previously asserted to the Court.  
3 *Id.*, 7-9(c).

4 Plaintiff seeks leave to file a motion for reconsideration on the basis that the Court failed to  
5 consider material facts and dispositive legal arguments. In support of this motion, Plaintiff  
6 primarily presents arguments that were previously presented to the Court. The moving party may  
7 not reargue any written or oral argument previously asserted to the Court. N.D. Civ. L.R. 7-  
8 9(b)(1)-(3). The Court did consider each of the arguments raised by Plaintiff in support of his  
9 motion for remand. However, it found and continues to find those arguments unpersuasive.

10 Plaintiff asks that the Court reconsider its ruling on the statute of limitations issue,  
11 specifically the subissues of waiver of premium (“WOP”) and cost of living adjustment (“COLA”)  
12 benefits. To substantiate his arguments, Plaintiff introduces new evidence, which he had not  
13 previously presented to the Court. (Declaration of Rebecca Grey in Support of Motion for Leave  
14 to Seek Reconsideration (“Grey Decl.”), ¶¶ 1-5, Exs. 1-5.) To support a motion for  
15 reconsideration based upon new evidence, the moving party must show not only that the evidence  
16 was newly discovered or unknown until after the order, but also that it could not with reasonable  
17 diligence have been discovered and produced at the time of the order. *Frederick S. Wyle Prof'l*  
18 *Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985).

19 Here, Plaintiff makes no attempt to argue that he did not know or have access to the newly  
20 presented evidence at the time the Court considered Plaintiff’s motion to remand. Plaintiff fails to  
21 demonstrate that he could not with reasonable diligence have discovered and produced the  
22 evidence at the time of his earlier filings. Thus, Plaintiff may not rely on the newly submitted  
23 evidence to support his current motion to reconsider.

24 Even if Plaintiff had demonstrated that he could not with reasonable diligence have  
25 discovered and earlier produced the evidence he now seeks to introduce, the Court is not  
26 persuaded that the new evidence affects the outcome of its decision. The new evidence does not  
27 present any material difference in fact from what was previously presented to the Court.  
28 Moreover, Plaintiff already presented similar arguments regarding the issues of WOP and COLA

1 benefits, on which the Court has already ruled. Plaintiff’s claims are time-barred against Boyer  
2 based on these factual predicates by the running of the two-year statute of limitations governing  
3 negligence actions. A professional negligence claim does not accrue until the plaintiff (1) sustains  
4 damage and (2) discovers, or should discover, the negligence. *Hydro-Mill Company, Inc. v.*  
5 *Hayward, Tilton and Rolapp Ins. Assoc., Inc.*, 115 Cal. App. 4th 1145, 1161 (2004).

6 Plaintiff contends that he did not sustain damage until his disability benefits were  
7 terminated in 2016 because he received WOP and COLA total disability benefits despite his  
8 residual disability classification. (Pl.’s Mot. for Leave to File Mot. for Recons. (“Mot. for Leave”)  
9 at 5:17-19, 23-26.) With regard to the WOP issue, Plaintiff argues that he was granted WOP  
10 benefits from the outset of his claim in 1998, even though he was classified as residually disabled  
11 at that time, as opposed to totally disabled. (*Id.* at 5:23-26, 6:2-5; Notice of Mot. for Remand at  
12 9:12-15.) Plaintiff now submits monthly notices from Equitable dated September 1998 through  
13 November 11, 1998 indicating that Plaintiff was eligible for and would begin to receive WOP  
14 benefits. (Grey Decl., ¶¶ 1-3, Exs. 1-3.) Plaintiff also submits a letter Boyer sent to Equitable to  
15 confirm that no further premiums were due. (*Id.* at ¶ 4, Ex. 4.) However, the record indicates that  
16 these notices were sent mistakenly. The notices are contradicted by the terms of the subject  
17 insurance policy itself, by a subsequent letter dated December 10, 1998 which expressly notes that  
18 the policy provides WOP benefits for total disability only, and by another subsequent letter dated  
19 March 16, 2005 which indicates that in 2005, Plaintiff became eligible for WOP benefits, and that  
20 those benefits would continue so long as Plaintiff was totally disabled. (Declaration of Robert F.  
21 Mills, Jr. (“Mills Decl.”), ¶¶ 5-6, Exs. 3-4, Docket No. 3.) Thus, the Court finds that there is  
22 sufficient evidence to conclude that Equitable had adequately resolved the issue regarding  
23 Plaintiff’s eligibility for WOP benefits.

24 With regard to the COLA issue, Plaintiff contends that Equitable awarded him total  
25 disability COLA benefits for most of the purported residual disability period between 1999 and  
26 2003. (Mot. for Leave at 5:17-19.) Plaintiff submits a letter dated July 6, 2001, in which  
27 Equitable explained that it had erroneously applied the residual disability COLA in lieu of the total  
28 disability COLA to his claim from 1999 to 2001. (Grey Decl., ¶ 5, Ex. 5.) Equitable enclosed

1 with the letter a check payable to Plaintiff in the amount of \$13,581.00 to compensate Plaintiff for  
2 the difference. When Equitable realized its mistake, it initiated measures to settle the overpayment  
3 issue. (Mills Decl., ¶ 4, Ex. 2.) Plaintiff contends that the record lacks evidence demonstrating  
4 that this overpayment issue was resolved. However, the Court finds this argument to be  
5 unpersuasive. In a letter dated August 6, 2003, Equitable referenced a conversation with Plaintiff  
6 regarding the overpayment issue, and wrote “[A]s we agreed, we will further discuss the  
7 repayment options following your accountants [sic] review of the policy.” (*Id.*) In a subsequent  
8 letter dated August 28, 2003, Equitable referenced a conversation with Plaintiff’s accountant  
9 regarding the overpayment issue, and wrote “[W]e look forward to discussing the overpayment  
10 issue once you and your advisors have reviewed your policy.” (*Id.*) Thus, the Court finds that  
11 there is sufficient evidence to conclude that Equitable resolved the COLA overpayment issue with  
12 Plaintiff.

13 The Court finds there is sufficient evidence to conclude that Equitable resolved the WOP  
14 benefits and COLA overpayment issues with Plaintiff. Contrary to Plaintiff’s assertion, he  
15 sustained damage as a result of his residually disabled classification as early as December 10,  
16 1998, when he was notified that the policy provided WOP benefits for total disability only.  
17 Alternatively, Plaintiff suffered damage in the form of lesser COLA benefits as early as August  
18 2003, when Equitable commenced measures to settle the erroneous overpayment of COLA  
19 benefits to Plaintiff. Therefore, Plaintiff’s claims for relief against Boyer accrued as early as 1998.  
20 At the latest, Plaintiff’s claims for relief against Boyer accrued by 2009 when Plaintiff complained  
21 to Equitable that he should have been considered totally disabled at the inception of his claim, as  
22 previously addressed in this Court’s Order dated June 21, 2017 denying Plaintiff’s motion for  
23 remand. Thus, the two-year statutory period governing negligent misrepresentation and  
24 professional negligence actions bars Plaintiff’s claims against Boyer.

25 In addition to the statute of limitations issue, the Court finds that the alternative bases for  
26 denial of remand with respect to Boyer’s representations as accurate or mere puffery, remain well-  
27 taken. The Court finds that there is no material difference in fact from that which was presented to  
28 the Court, which, in the reasonable exercise of diligence, Plaintiff could have submitted. The


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Court also finds that it did not fail to consider material facts or dispositive legal arguments presented at the time it considered the motion to remand.

Accordingly, the Court DENIES Plaintiff's motion for leave to file a motion for reconsideration.

**IT IS SO ORDERED.**

Dated: July 21, 2017

  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE