IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Theodore Troski, Jr.,

Plaintiff,

v. Case No. 2:09-cv-599

MTL Insurance Company,
et al.,

Defendants.

OPINION AND ORDER

This is a diversity action filed by Theodore Troski, Jr. ("Troski Jr."), as attorney in fact for Theodore Troski, Sr. ("Troski Sr."), a resident of Toronto, Ohio, against MTL Insurance Company ("MTL"), an Illinois corporation, and Henry V. Snyder, an insurance agent who is a resident of Weirton, West Virginia.[1] According to the amended complaint, Troski Sr. purchased, through Snyder, a life insurance policy with New York Life Insurance, which was issued on May 13, 1999, and valued at $32,000. Am. Compl. ¶ 13. Less than a month later, Snyder advised Troski Sr., who was then eighty years of age, to purchase a $50,000 Flexible Premium Adjustable Life insurance Policy with MTL to replace a $60,000 life insurance policy which was obtained by Troski Sr. through another agent from Prudential Life Insurance Company in 1993. Am. Compl. ¶¶ 10-12, 14, 16. Snyder allegedly represented that the MTL policy was safer than the Prudential and New York Life policies. Am. Compl. ¶ 15. It is alleged that less than two months after

[1]Also named as defendants are ABC Inc. and XYZ Inc., pseudonyms for unidentified insurance and financial services agencies allegedly owned or operated by Snyder. However, Snyder testified in his deposition that he has always run his business as a sole proprietorship with no employees, not as a corporate entity. Snyder Dep. p. 13.

acquiring the $50,000 MTL policy, Snyder advised Troski Sr. to sign an application to reissue the policy for $95,000, as a replacement for the MTL and New York Life policies previously issued. Am. Compl. ¶ 17. The complaint also alleges that based on Snyder's advice, Troski Sr. cancelled the Prudential and New York Life policies and used the proceeds to pay $46,500 in premiums for the MTL replacement policy. Am. Compl. ¶ 20.

According to the amended complaint, Troski Sr. believed that the policy would retain its face value until his death or his reaching ninety-five years of age, with no further premium payments. Am. Compl. ¶ 21. It is alleged that in June of 2008, MTL notified Troski Sr. that the face value of the replacement policy had been reduced to $32,045. Am. Compl. ¶ 22. Troski Sr. was later advised that the value had been reduced to $25,000. Am. Compl. ¶ 23.

Count One of the amended complaint is a claim for breach of contract against Snyder and MTL. Count Two is a claim for fraud against Snyder and MTL. Count Three alleges a claim for negligent misrepresentation against Snyder and MTL. Count Four is a claim for negligent training and supervision against MTL, alleging that MTL failed to adequately train or supervise Snyder. Count Five is a claim for breach of the duty of good faith and fair dealing in the performance of the insurance contract which is asserted against Snyder and MTL.

This matter is before the court on the motions for summary judgment filed by Snyder (Doc. No. 40) and MTL (Doc. No. 41).

I. Summary Judgment Standards

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J. C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). The court in Street identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. Id. at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Id. (quoting Liberty

Lobby, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. Id. It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" Id. (quoting Matsushita, 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Id. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

A federal court sitting in diversity jurisdiction applies the choice of law rules of the forum state. Miller v. State Farm Mut. Auto. Ins. Co., 87 F.3d 822, 825 (6th Cir. 1996). For claims grounded in contract, under Ohio law, the law of ths state where the contract was made usually governs the interpretation of the contract. Nationwide Mut. Ins. Co. v. Ferrin, 21 Ohio St.3d 43, 44, 487 N.E.2d 568 (1986). For claims sounding in tort, the law of the state where the injury occurred presumptively controls. Miller, 87 F.3d at 824 (citing Morgan v. Biro Mfg. Co., 15 Ohio St.3d 339, 340, 474 N.E.2d 286 (1984)). In their motions for summary judgment, the defendants rely on Ohio law, and plaintiff has not disputed the application of Ohio law in his response. Therefore, the court will apply Ohio law in considering the motions for summary judgment.

II. Factual Background

The evidence presented consists primarily of documentary evidence and Snyder’s deposition testimony. Although Troski Sr. and his wife Beatrice were deposed, they essentially had no recollection of the transactions at issue in this case. Troski Jr.

and his wife, Gayle Troski, also testified by deposition. However, they were not present in 1999 when Troski Sr. discussed purchasing insurance policies from MTL, and Troski Jr.'s testimony concerning his father's statements about those policies is mostly hearsay. See Sperle v. Michigan Dept. of Corrections, 297 F.3d 483, 495 (6th Cir. 2002)(party opposing a motion for summary judgment cannot use hearsay or other inadmissible evidence to create a genuine issue of fact).

Snyder testified in his deposition that he first met Troski Sr. in 1999. Snyder Dep. p. 40. Troski Sr. contacted Snyder and told him that he was having problems with a Prudential policy issued on January 1, 1993, which was about to lapse. Snyder Dep. p. 41. Upon examining the Prudential variable universal life policy,[2] Snyder determined that there were approximately two years of benefits remaining. The cash value remaining under the policy was approximately $10,000, and the death benefits were $60,000. Snyder Dep. pp. 42-43. Troski Sr. was concerned about the policy lapsing because he wanted to make sure that his wife was taken care of when he died. Snyder Dep. p. 43. Snyder wrote to Prudential on Troski Sr.'s behalf, and Troski Sr. eventually received substantially more from Prudential than the $10,000 cash surrender value, including all of the premium payments Troski Sr. had made, plus the prime rate of interest since the issuance of the policy. Snyder Dep. p. 45.

[2]A variable universal life policy permits the insured to allocate premiums to various sub-accounts with different investment options, whereas a universal life policy provides a fixed interest rate. Snyder Dep. pp. 43-44. Snyder explained during his deposition that many seniors prefer universal life policies because they are more flexible in that the premium payments can be adjusted and the death benefit can be lowered, whereas whole life policies require the payment of a set premium to maintain coverage. Snyder Dep. p. 22.

On April 3, 1999, Troski Sr. signed an application for a $32,000 life insurance policy from New York Life. Snyder Dep. p. 47. This policy was issued on May 12, 1999, as Policy No. 62778680. Doc. No. 44, Ex. 1. This policy was intended to replace the Prudential policy if Troski Sr. was successful in obtaining a settlement from Prudential. Snyder Dep. p. 48. However, they were unable to obtain a policy from New York Life in the amount of $60,000 to equal the death benefits provided under the Prudential policy because Troski Sr. told him that he could only afford to pay an annual premium of $4,000. Troski paid the first annual premium in the amount of $4,000. The Prudential policy was still in effect at that time. Snyder Dep. pp. 52, 62, 64.

On May 29, 1999, Snyder provided Troski Sr. with illustrations for a universal life insurance policy from MTL. Doc. 40, Ex. 1. He provided these illustrations because Troski Sr. was upset because he wanted $60,000 in coverage but they could only get $32,000 in coverage with New York Life based on the premium payment Troski Sr. indicated he could afford. Snyder Dep. pp. 53, 60. Snyder provided Troski Sr. with illustrations showing initial lump sum premium payments in different amounts because they did not know at that time how much Troski Sr. could put into the policy, as they did not know how much he would obtain from Prudential. Snyder Dep. p. 55, 62. One of the illustrations showed a policy which featured an initial lump sum premium payment of $51,000 at age eighty-one to purchase the policy, and a death benefit of $95,000. The illustration showed that with no further premium payments, the cash surrender value of the policy dropped from an initial value of $46,555 at age eighty-one to a cash surrender value of $17,781 at age ninety-five, with death benefits remaining constant at $95,000.

The illustrations also contained the following language:

> This Supplemental Illustration contains non-guaranteed values which are subject to change. The actual values, developed over time, may be more or less favorable than those illustrated. This Supplemental Illustration is not a contract and is not valid unless accompanied by the Basic illustration which shows the guaranteed values and any rider information.

At the time these illustrations were run, Snyder and Troski Sr. anticipated that the Prudential policy could be cancelled, and that Troski Sr. could get the coverage he wanted with the MTL policy. Snyder Dep. 66. Although the application indicated that this coverage was intended to replace the Prudential policy, Snyder was not a Prudential agent, and he had no involvement in the cancellation of that policy. Snyder Dep. pp. 85-86.

On May 29, 1999, Troski Sr. signed an application for a $50,000 life insurance policy from MTL. Complaint, Ex. A. The application stated that the parties agreed that "the company shall incur no liability under this application until it has been received, approved, a policy issued and delivered and the full first premium has actually been paid to and accepted by the company[.]" Ex. A, p. 7.

MTL issued a flexible premium adjustable life insurance policy as Policy No. 1081941. Doc. 40, Ex. 2. The policy was issued in the face amount of $50,000, with a planned annual premium of $4,800 and a maturity date of February 28, 2014. Ex. 2, p. 3. The guaranteed interest rate was four percent, although MTL was permitted to "apply an interest rate in excess of the guaranteed rate [.]" Ex. 2, pp. 3, 11. However, the policy contained the following language:

> Note: It is possible that coverage will expire prior to

> the maturity date where either no premiums are paid after the first, or subsequent premiums are insufficient to continue coverage to such date. The date coverage will expire can be affected by any loans, partial surrenders, and changes in the mortality and interest rates actually applied to the policy.

Ex. 2, p. 3.

The policy described a monthly administration charge, and included a chart setting forth the rates, based on age, for the guaranteed maximum monthly cost of insurance. Ex. 2, pp. 4, 6. The policy specified that any premiums paid during the policy year would be credited, up to the amount of the annual regular premium specified in the policy, to an account for regular premiums, and any monies paid in excess of the annual regular premium would be credited to an account for excess premiums. Ex. 2, p. 8. The policy provided for a monthly deduction which included the monthly cost of insurance and the monthly administration charge. Ex. 2, p. 10. The policy stated, "This policy and any attached riders will continue in force as long as the cash surrender value is large enough to cover the monthly deduction." Ex. 2, p. 12. However, the policy further stated that "this policy will not lapse during the first 7 policy years if the sum of all premiums paid" less any loans or partial surrenders "equals or exceeds the sum of the Minimum Monthly Premiums on each monthly anniversary day from the Date of Issue to and including the current monthly anniversary day ... even if the cash surrender value is less than the monthly deduction." Ex. 2, p. 9. Finally, the policy provides that the "policy, the attached application and any supplemental applications attached to this policy when changes in insurance coverage become effective are the entire contract." Ex. 2, p. 13.

Snyder did not anticipate that Troski Sr. would cancel the New

York Life policy; they both expected that Troski Sr. would keep that policy in effect. Snyder Dep. p. 67-68. The MTL policy was not intended to replace the New York Life policy. Snyder Dep. p. 68. According to Snyder, he did not advise Troski Sr. to cancel the New York Life policy, but Troski Sr. did cancel the policy, and Snyder was paid no commission on that policy. Snyder Dep. pp. 78, 112. Troski Sr. kept the $1,400 he obtained upon cancelling that policy. Snyder Dep. pp. 113-116.

Snyder testified that approximately two months after purchasing the MTL policy, Troski Sr. told him that he wanted to combine the two policies because he was tired of having two policies. Snyder Dep. pp. 71-72. On July 20, 1999, Troski Sr. signed an application to reissue Policy No. 001081941 in the face amount of $95,000. Complaint, Ex. B. This application stated that "[t]his requested policy reissue shall not be effective until the application is approved, and any necessary payment has been received, by the Company at its Home Office."

The record includes a life insurance illustration presented by Snyder to Troski Sr. on August 3, 1999. Doc. 40, Ex. 3. The illustration was based upon a face value of $95,000, and the death benefit was to be determined "by the Face Amount, the Death Benefit Option, the level of premium payments, and any additional insurance benefits." Ex. 3, p. 2. The stipulated semiannual premium was $7,000. Ex. 3, p. 2. The illustration further stated:

> The policy you are considering is a flexible premium and adjustable death benefit life insurance policy, commonly referred to as Universal Life Insurance. You may increase and decrease the premiums and the Face Amount within the limits in the policy. These flexible premiums are payable to age 95. The values in your life insurance contract change based on the amount of your premium payments, the level of the death benefit, monthly

> deductions and the interest rate credited to the policy. The Company will declare a Current Interest Rate which can change, however, it will never be less than the Guaranteed Interest Rate of 4.00%.

Ex. 3, p. 2.

The illustration further explained that "[i]f you pay an annual premium of $13,116.60 each year until age 95, and make no loans or partial surrenders, the policy will remain in force and the Death Benefit Payment will be at least $95,000." Ex. 2, p. 3. The illustration provided that the cost of insurance would be deducted each month. Ex. 2, p. 2. During the first seven years of the policy, the policy would not be terminated as long as the total amount of premiums received, less any loans or any partial surrenders, was at least equal to the minimum monthly premium of $715.35 multiplied by the number of months since the issue date. Ex. 3, p. 3.

The illustration also set forth guaranteed and non-guaranteed cash surrender values for the policy at five and ten years based on an annual premium of $14,000, with no loans or partial surrenders, see Ex. 3, p. 5, as well as a chart showing cash surrender values over a fifteen-year period with annual premiums above $13,000, based on the current interest rate of 6.1 percent. Ex. 3, p. 6. The illustration stated that the "non-guaranteed columns in this illustration provide snapshots of your policy assuming a higher interest rate and lower Monthly Deductions than those that are guaranteed" and that "interest rates and monthly deductions cannot be predicted with absolute certainty[.]" Ex. 3, p. 3. The illustration further provided, that "[t]he calculations in this illustration assume that premiums are received at the beginning of each premium period[.]" Ex. 3, p. 4.

On August 3, 1999, Troski Sr. signed the illustration, which contained the following certification: "I have received a copy of this illustration and understand that any non-guaranteed elements illustrated are subject to change and could be either higher or lower. The agent has told me they are not guaranteed." Ex. 3, p. 5. Snyder also signed the document, certifying "that this illustration has been presented to the applicant and that I have explained that any non-guaranteed elements illustrated are subject to change. I have made no statements that are inconsistent with the illustration." Ex. 3, p. 5.

The reissued policy was assigned Policy No. 001081941A, and incorporated the pages from the original policy. The face page of the policy stated, "Flexible premiums are payable for the period shown in the policy specifications. Ex. 2, p. 1. The face page further advised, "Please examine this policy carefully. If you are not satisfied with it for any reason, YOU HAVE A RIGHT TO CANCEL THIS POLICY WITHIN TWENTY DAYS after you receive it." Ex. 2, p. 1.

Snyder testified that as of August 3, 1999, he and Troski Sr. had not discussed a policy with a semi-annual premium of $7,000. Snyder Dep. p. 88. The August 3, 1999, illustration used the amount of $7,000 as the semi-annual premium because that was the amount which Troski Sr. agreed to pay as the first premium payment, and the illustration had to match the amount of money going in at the time of the sale. Snyder Dep. pp. 91, 93. If they had used the figure of $50,000 as an approximation of what Troski Sr. wanted to put into the policy, the home office would have wanted the illustration to match that amount of money. Snyder Dep. p. 92.

Snyder testified that he told Troski Sr. that if he paid a lump sum initial premium of approximately $51,000, the policy would

remain in effect until age ninety-five with no further premium payment based on the current interest rate. Snyder Dep. p. 105. He further explained to Troski Sr. that if interest rates went down, putting in a lump sum premium at the beginning would not guarantee that the policy would remain in effect through its maturity date. Snyder Dep. p. 99. Troski Sr. understood that he would have to put more money into the policy, although not necessarily the $14,000 annual premium specified in the policy. Snyder Dep. p. 118. Troski Sr. also understood that the death benefit might have to be lowered. Snyder Dep. p. 94. Troski Sr. opened an account with the American Funds with a payment of $5,000 towards a bond fund and $5,000 towards a growth fund, thus putting aside this money in case the interest rates dropped and additional funds had to be added to the MTL policy to maintain it. Snyder Dep. pp. 57-59, 65-66, 93-94, 99, 124-126.

According to the records of MTL, Troski Sr. made a premium payment on Policy No. 001081941A on August 10, 1999, in the amount of $7,000. He made further payments in the amount of $18,500 on September 1, 1999, $17,000 on November 12, 1999, and $4,000 on August 6, 2001, for a total payment of $46,500. Doc. 44, Ex. 5. This amount, together with the $5,000 placed in the American Funds, yielded approximately the figure of $51,000 which Snyder used in his illustrations. Snyder Dep. p. 101. On September 25, 2000, Troski Sr. came to Snyder's office with a premium bill for $14,000, and he told Snyder that he did not want to receive any more bills. Snyder drafted a letter to that effect which Troski Sr. signed, and the letter was sent to MTL. Snyder Dep. pp. 117-118.

Snyder testified that in 2005 or 2006, he started calling Troski Sr. because the value of the policy was dropping due to the

falling interest rates. Snyder Dep. pp. 105, 126. When Troski Sr. stated that his health was fine, Snyder told him that he should put the $5,000 from the American Funds into the policy or drop the death benefit. Snyder Dep. p. 106, 126. Troski Sr. stated that he did not want to move the money over. Snyder Dep. p. 126.

At some point in 2008, MTL notified Troski Sr. that the MTL policy was about to lapse. The record includes an illustration dated June 24, 2008, which showed a reduced death benefit of $32,045 with no further premium payments. Doc. 44, Ex. 6. Troski Sr. was still adamant about not wanting to move money out of the American Funds, so Snyder proposed options which did not involve any additional payments. Snyder Dep. pp. 137-138. By e-mail dated August 5, 2008, MTL sent illustrations to Snyder which showed that adding $5,000 to the policy on that date would extend the policy to age 91 with no future premium payments, and that keeping the face value of $95,000 to age 95 would require a payment of $33,950. Doc. 44, Ex. 6. At that point, Troski Sr. had not indicated that he wanted to add $5,000 to the policy, but Snyder wanted to see what effect that would have. Snyder Dep. p. 139. Snyder stated that he would have called Troski Sr. to provide him with this information. Snyder Dep. p. 140.

Troski Jr. testified in his deposition that when he spoke with Snyder on the phone, Snyder informed him that the best they could to was to drop the policy down to $71,000. Troski Jr. Dep. p. 18. Gayle Troski, the wife of Troski Jr., testified that she met with Snyder, Troski Sr., and his wife Beatrice late in 2008, and Snyder stated they might have to put some money back in the policy or drop it to $81,000. Gayle Troski Dep., p. 21. Snyder did not recall the exact date he met with Troski Sr. and his family. Snyder Dep.

p. 144. Snyder testified that he informed them that the policy would have to be dropped to $32,000, although it was later dropped to $25,000 as a safety net to ensure that the policy would remain in effect. Snyder Dep., pp. 144, 153. Snyder again brought up the subject of putting more money into the policy, but Troski Sr. stated that he did not want to do that. Snyder Dep. pp. 144-145. Snyder testified that prior to the meeting, he mailed a change application to Troski Sr. and informed him that he would have to reduce the policy to $25,000. Snyder Dep. p. 143, 146. The forms reducing the death benefit to $25,000 were completed at the meeting. Snyder Dep. pp. 146-153. Troski Jr. claimed that he mailed the form signed by Troski Sr. back to Snyder, although Troski Jr. did not recall what was on the form. Troski Jr. Dep., p. 23. Troski Sr. later received a letter from MTL stating that the face amount of the policy had been reduced to $25,000. Gayle Troski Dep., p. 27.

III. Breach of Contract

The complaint alleges that the defendants breached the insurance agreement by failing to provide Troski Sr. with any benefit for the funds he used to purchase the reissued policy from MTL. The essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff. Winner Brothers, L.L.C. v. Seitz Electric, Inc., 182 Ohio App.3d 388, 396, 912 N.E.2d 1180 (2009).

"It is well established that the application for an insurance policy does not constitute the contract, but is a mere offer or proposal for a contract of insurance." Slezak v. Westfield Ins. Co., No. 35474 (8th Dist. unreported), 1977 WL 201155 at *2 (Ohio

App. July 14, 1977). "A contract of insurance is consummated upon the unconditional acceptance of the application of the insured by the insurer." Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 320, 79 N.E. 459 (1906). A written insurance proposal does not constitute a contract; rather, such a "document merely summarizes the terms and price of a proposed insurance contract and does not contain promises of any kind by anyone." Barnett v. Connecticut Mutual Life Ins. Co., No. 69253 (8th Dist. unreported), 1996 WL 284878 at *2 (Ohio App. May 30, 1996)(citing Cleveland Builders Supply Co. v. Farmers Ins. Group of Cos., 102 Ohio App.3d 708, 657 N.E.2d 851 (1995)). Likewise, the oral statements of an insurance agent do not constitute a contract where the application form clearly states that the completion of the application form did not bind coverage. Cleveland Builders Supply Co., 102 Ohio App.3d at 712-13.

The application for the reissued policy stated that "[t]his requested policy reissue shall not be effective until the application is approved, and any necessary payment has been received, by the Company at its Home Office." Complaint, Ex. B. In providing Troski Sr. with the insurance illustrations and application forms, Snyder did not enter into any contract with Troski Sr. to provide insurance. Rather, the contracts at issue were between Troski Sr. and MTL, and the terms of the contracts were contained in the original policy and reissued policy of insurance.

Prior to the issuance of the policy, Troski Sr. was provided an illustration which stated that although he could increase and decrease the premiums and the face amount within the limits in the policy, the values of the life insurance contract would change

based on the amount of premium payments, the level of the death benefit, monthly deductions and the interest rate credited to the policy. The illustration and policy clearly informed him that the cost of insurance and a service fee would be deducted each month from the premium account. The initial illustration dated May 29, 1999, showed a death benefit of $95,000 with an initial premium outlay of $51,000. See Doc. 40, Ex. 1. However, Troski Sr. did not put $51,000 into the policy. His premium payments totaled $46,500. The illustration also demonstrated that the value of the account would decrease over the years with no additional premium payments. It warned that it was "not a contract", that it "contains non-guaranteed values which are subject to change" and that the "actual values, developed over time, may be more or less favorable than those illustrated." Ex. 1.

The illustration provided with the reissued policy stated that the "non-guaranteed columns in this illustration provide snapshots of your policy assuming a higher interest rate and lower Monthly Deductions than those that are guaranteed" and that "interest rates and monthly deductions cannot be predicted with absolute certainty[.]" Ex. 3, p. 3. The illustration further provided, that "[t]he calculations in this illustration assume that premiums are received at the beginning of each premium period [.]" Ex. 3, p. 4. On August 3, 1999, Troski Sr. signed the illustration, which contained the following certification: "I have received a copy of this illustration and understand that any non-guaranteed elements illustrated are subject to change and could be either higher or lower. The agent has told me they are not guaranteed." Ex. 3, p. 5. In addition, Snyder testified that he told Troski Sr. that he might have to put additional money into the policy if interest

rates declined, and that Troski put money into the American Funds against that eventuality.

MTL provided Troski Sr. with the benefits of his bargain by affording him life insurance coverage during the years the policy was in effect. No language in the policy promised or guaranteed that the policy would remain in effect through age ninety-five if no further premium payments beyond the initial payment were made. No trier of fact could reasonably find that the defendants breached any contract of insurance with Troski Sr., and defendants are entitled to summary judgment on this claim.

IV. Fraud

In Count Two of the amended complaint, it is alleged that Troski Sr. was misled by Snyder's representations that MTL was a better company and that his premium payments would be limited to his initial payment. It is further alleged that defendants failed to disclose the charges, fees and commissions associated with the issuance of the policy, and that MTL authorized, participated in, or ratified Snyder's fraudulent acts.

Defendants argue that summary judgment is warranted because fraud is not pleaded with particularity in the amended complaint as required under Fed.R.Civ.P. 9(b). Although this court agrees that fraud was not pleaded with particularity in the amended complaint, the Sixth circuit has noted that "in the absence of [a] motion for more definite statement under [Fed.R.Civ.P. 12(e)], dismissal on this basis alone would not be appropriate." Coffey v. Foamex L.P., 2 F.3d 157, 162 (6th Cir. 1993). Therefore, this court will address defendants' other arguments regarding the fraud claim.

The elements of fraud are: (1) a representation, or, where there is a duty to disclose, concealment of a fact; (2) which is

material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. Burr v. Board of County Commissioners of Stark Cty., 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986).

There is no evidence that Snyder made false statements to Troski Sr. in selling him the insurance policies in this case. Snyder testified that he thought that MTL offered a better quality product than New York Life, since the cost of coverage from MTL was cheaper than the cost of the New York Life policy, and MTL did not charge a premium load, whereas New York Life and other companies charged a premium load of ten to fifteen percent. Snyder Dep. p. 54-55, 79. There is no evidence that Snyder made any false statements to Troski Sr. in regard to the quality of MTL's insurance products.

There is also no evidence that Snyder made any false statements to Troski Sr. regarding the need to pay premiums beyond the initial money Troski Sr. put into the policy. Snyder showed Troski Sr. an illustration which showed the policy continuing through age ninety-five with no further payment beyond $51,000 based on the current interest rate. However, as noted above, the illustration itself included language warning that the illustration contained non-guaranteed values which were subject to change. Snyder explained to Troski Sr. that he might have to put more money into the MTL policy to maintain the policy, or that the face amount (death benefit) might have to be lowered. In applying for

the reissued policy, Troski Sr. signed a form acknowledging that he understood that the policy values were not guaranteed, were subject to change, and could be higher or lower, and that Snyder had explained this to him. The fact that the possibility of additional payments was discussed is further evidenced by the fact that Troski Sr. also invested $10,000 in the American Funds as a source for additional money if a further premium payment became necessary.

Defendants further argue that Troski Sr. cannot show how he could reasonably have relied on any statements made by Snyder in light of the language of the policy, the actual contract in this case. The policy warned that the date coverage expires could be affected by changes in the mortality and interest rates. The illustration attached to the reissued policy stated that the non-guaranteed forecasts assumed an interest rate higher than the guaranteed four percent, specifically 6.10 percent, and that interest rates and monthly deductions could not be predicted with absolute certainty. The calculations also assumed that premiums were paid each premium year. Although it is alleged that Snyder failed to explain the costs associated with the policy, the policy itself set forth the amount of the monthly deduction, which included the cost of insurance and a monthly administration charge, and described how those amounts would be calculated and deducted from the insured's premium accounts. The illustration signed by Troski Sr. also included an explanation of monthly deductions, which included a deduction each month for the cost of insurance.

Plaintiff argues that the defendants "rely upon language contained in small print in the policy[.] Doc. 44, p. 4. However, the front page of the reissued policy cautions the insured to "examine this policy carefully" and notifies the insured of the

right to cancel the policy within twenty days. Doc. 40, Ex. 2, p. 1. Under Ohio law, an insured has a "duty to examine the coverage provided and is charged with knowledge of the contents of his or her own insurance policies." Fry v. Walters & Peck Agency, Inc., 141 Ohio App.3d 303, 310, 750 N.E.2d 1194 (2001); see also Craggett v. Adell Ins. Agency, 92 Ohio App.3d 443, 453, 635 N.E.2d 1326 (1993).

In regard to the later reduction in the amount of the death benefit, there is conflicting evidence concerning Snyder's representations. Troski Jr. testified in his deposition that when he spoke with Snyder on the phone, Snyder informed him that the best they could do was to drop the policy down to $71,000. Troski Jr. Dep. p. 18. Gayle Troski, the wife of Troski Jr., testified that she met with Snyder, Troski Sr., and his wife Beatrice late in 2008, and Snyder stated they might have to put some money back in the policy or drop it to $81,000. Gayle Troski Dep., p. 21. Snyder testified that he informed Troski Sr. and his family that the policy would have to be dropped to $32,000, although it was later agreed that it would be dropped to $25,000 as a safety net to ensure that the policy would remain in effect. Snyder Dep., pp. 144, 153.

Even assuming that Snyder at some point made more optimistic predictions concerning the degree to which the death benefit had to be lowered to keep the policy in effect, there is no evidence that Troski Sr. relied on these representations, or that he was harmed by them in any way. There is no evidence that Troski Sr. put any additional money into the policy in reliance on Snyder's statements. Troski Sr. wanted to prevent the policy from lapsing but was unwilling to pay any additional premiums, and the only way

to accomplish this was to lower the death benefit. Keeping the policy in effect with no additional premiums by lowering the death benefit was preferable to having the policy lapse entirely. The extent to which the benefit was lowered was dictated by the premium account balance, the future cost of insurance and the current interest rates. The fact that Snyder was ultimately unable to secure a more favorable death benefit did not amount to fraud.

The documents and deposition testimony in the record fails to show the existence of a genuine issue of material fact in regard to the fraud claim, and defendants are entitled to summary judgment on that claim.[3]

V. Negligent Misrepresentation

In Count Three of the amended complaint, it is alleged that Snyder and MTL made negligent misrepresentations to Troski Sr. The complaint alleges that in purchasing the replacement policy, Troski Sr. relied on Snyder's expertise and the recommendations of MTL that the policy would provide him with the death benefits set forth in the policy. Defendants argue that this claim is barred by the applicable statute of limitations. However, the court need not resolve this issue because, based on the evidence in the record, no trier of fact could reasonably find in plaintiff's favor on this claim.

The elements of the tort of negligent misrepresentation are as follows:

[3]The court notes that attached to the memorandum contra is a check on the account of Ted and Beatrice Troski dated June 7, 2002, made payable to Rose Bud Pictures. Snyder was asked during his deposition whether he solicited this money as an investment in a motion picture from Troski Sr., and he denied having any knowledge of the transaction. Snyder Dep., pp. 128-29. The amended complaint contains no reference to this check or transaction, and thus any fraud claim based on this check is beyond the scope of this action.

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Delman v. City of Cleveland Heights, 41 Ohio St.3d 1, 4, 534 N.E.2d 835 (1989)(quoting Section 552(1) of 3 Restatement of the Law 2d, Torts 126-127 (1965)).

There is no evidence that MTL made any recommendations to Troski Sr. concerning the purchase of the life insurance policies. As to the statements made by Snyder, the evidence shows that Snyder informed Troski Sr. that a lump sum payment for the initial purchase of the policy might not be sufficient to fund the policy through age ninety-five, and that Troski Sr. might have to pay additional premiums or lower the death benefit if the interest rates dropped. In addition, the policy itself informed Troski Sr. that "[i]t is possible that coverage will expire prior to the maturity date where either no premiums are paid after the first, or subsequent premiums are insufficient to continue coverage to such date. The date coverage will expire can be affected by any loans, partial surrenders, and changes in the mortality and interest rates actually applied to the policy." Ex. 2, p. 3. The illustration provided to Troski Sr. also indicated that the value of the insurance contract was subject to change based on the amount of premium payments, the level of the death benefit, the monthly deductions and the interest rate, and that the "interest rates and monthly deductions cannot be predicted with absolute certainty[.]" Ex. 3, p. 3. Troski Sr. signed the August 3, 1999, illustration,

thereby certifying: “I have received a copy of this illustration and understand that any non-guaranteed elements illustrated are subject to change and could be either higher or lower. The agent has told me they are not guaranteed.” Ex. 3, p. 5. Since the policy itself clearly advised Troski Sr. that the future value of the policy was not guaranteed, he could not have justifiably relied on Snyder’s statements even assuming any negligence on Snyder’s part. See Brown v. Woodmen Accident and Life Co., 84 Ohio App.3d 52, 56, 616 N.E.2d 278 (1992)(finding no genuine issue of fact as to negligent misrepresentation where plaintiffs would have been able to ascertain the amount of coverage provided by looking at the documentation evidencing the insurance coverage).

Defendants are entitled to summary judgment on the negligent misrepresentation claim.

VI. Breach of Duty of Good Faith and Fair Dealing

Count Five alleges that by agreeing to provide life insurance to Troski Sr., defendants were obligated to exercise good faith in performing the contracts so as not to deny him his bargained-for benefits.

The claim for breach of the duty of good faith asserted against MTL is subsumed by the breach of contract claim. “There can be no implied covenants in a contract in relation to any matter specifically covered by the written terms of the contract itself.” Hamilton Ins. Services, Inc. v. Nationwide Ins. Cos., 86 Ohio St.3d 270, 274, 714 N.E.2d 898 (1999). Under Ohio law, a breach of contract does not create a tort claim. 425 Beecher, L.L.C. v. Unizan Bank, National Association, 186 Ohio App.3d 214, 229, 927 N.E.2d 46 (2010). Rather, “good faith is part of a contract claim and does not stand alone.” Lakota Local School Dist. v. Brickner,

108 Ohio App.3d 637, 646, 671 N.E.2d 578 (1996). A tort claim based upon the same actions as those upon which a breach-of-contract- claim is based will exist independently of the contract action "only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed." Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 115 Ohio App.3d 137, 151, 684 N.E.2d 1261 (1996); Unizan Bank, 186 Ohio App.3d at 230. Since there is no evidence in the record which would support a finding that MTL owed any duty to Troski Sr. other than the duties established by the terms of the policy, MTL is entitled to summary judgment on the claim for breach of the duty of good faith.

As noted above, the contracts of insurance in this case were between Troski Sr. and MTL. There was no contract of insurance between Troski Sr. and Snyder. A duty to exercise good faith may arise from a fiduciary relationship. However, "Ohio courts have held that the relationship between an insurance agent and his client is generally not a fiduciary relationship, but, rather, an ordinary business relationship." Nichols v. Schwendeman, No. 07AP-433 (10th Dist. unreported), 2007 WL 4305718 at *3 (Ohio App. Dec. 11, 2007); see also Slovak v. Adams, 141 Ohio App.3d 838, 846, 753 N.E.2d 910 (2001)("Ordinarily, the relationship between an insured and the agent that sells the insurance is, without proof of more, an ordinary business relationship, not a fiduciary one."). Further, "an insured's reliance on his insurance agent is not sufficient, by itself, to establish a fiduciary relationship." Id. 2007 WL 4305718 at *4.

There is no evidence in this case that any "special confidence and trust" was reposed, resulting in a "position of superiority or

influence, acquired by virtue of this special trust." Stone v. Davis, 66 Ohio St.2d 74, 78, 419 N.E.2d 1094 (1981). There is no evidence indicating that the relationship between Snyder and Troski Sr. was anything other than an ordinary business relationship. Troski Jr. testified in his deposition of July 1, 2010, that up until the past three years, his father was "sharp, numbers" and that "he was aware of what was going on when he bought this policy." Troski Jr. Dep. p. 16. He further testified that he still permits Troski Sr. to handle his financial affairs and to maintain his accounts. Troski Jr. Dep. p. 36. Troski Sr. made his own independent decisions concerning his policies. For example, he cancelled the Prudential and New York Life policies, and declined to put more money into the MTL policy even after Snyder advised him in 2008 that this might be necessary to avoid cancellation.

Absent a fiduciary relationship, an insurance sales agency has a duty to exercise good faith in obtaining only those policies of insurance which its customer requests. Craggett, 92 Ohio App.3d at 453; see also Fry, 141 Ohio App.3d at 310 ("An insurance agency has a duty to exercise good faith and reasonable diligence in obtaining insurance that its customer requests."). When the agency knows that the customer is relying upon its expertise, the agency may have a further duty to exercise reasonable care in advising the customer. Island House Inn, Inc. v. State Auto Ins. Cos., 150 Ohio App.3d 522, 526, 782 N.E.2d 156 (2002); First Catholic Slovak Union of U.S. and Canada v. Buckeye Union Ins. Co., 27 Ohio App.3d 169, 170, 399 N.E.2d 1303 (1986). However, the customer has a corresponding duty to examine the coverage provided and is charged with knowledge of the contents of his or her own insurance policies. Craggett, 92 Ohio App.3d at 453; Fry, 141 Ohio App.3d at

310.

There is no evidence from which a reasonable jury could find that Snyder failed to exercise reasonable care in advising Troski Sr. concerning the nature of the insurance coverage provided by MTL. Snyder told Troski Sr. that the policy he was purchasing could potentially remain into effect until he reached age ninety-five with no further premium payments beyond an initial payment of $51,000, as indicated in the illustration (although Troski Sr. actually paid only $46,500 in premiums), provided the interest rates did not fall. He also advised Troski Sr. that he might have to put more money into the policy or reduce the amount of the death benefit to maintain the policy. The policy documents also informed Troski Sr. that the non-guaranteed projections were subject to change in the event of a change in the monthly deductions, including the cost of insurance, and the interest rates. No guarantees were made, either by Snyder or by MTL in the policy, that coverage would continue to age ninety-five with no further premium payments. Troski Sr. had a copy of the policy. Troski Jr. Dep., p. 32. The policy advised him of his right to cancel the policy. There is no evidence that Troski Sr. ever complained to Snyder or MTL that the coverage provided was other than what he had requested. The evidence is insufficient to create a genuine issue of fact in regard to whether Snyder exercised good faith and reasonable diligence in securing the insurance coverage Troski Sr. requested.

Defendants are entitled to summary judgment on Count Four.

VII. Negligent Training and Supervision

In Count Four, plaintiff asserts a claim of negligent training

and supervision, alleging that the injuries alleged in this case were caused by MTL's failure to adequately train and supervise Snyder. To prove a claim of negligent training and supervision, plaintiff must show : (1) the existence of an employment relationship between MTL and Snyder; (2) that Snyder was incompetent; (3) that MTL had actual or constructive knowledge of Snyder's incompetence; (4) that Snyder's act or omission caused the alleged injuries; and (5) that MEL's negligence in training and supervising Snyder was the proximate cause of those injuries. See Burns v. Rudolph, No. 22780 (9th Dist. unreported), 2005 WL 3536477 at *6 (Ohio App. Dec. 28, 2005); Peterson v. Buckeye Steel Casings, 133 Ohio App.3d 715, 729, 729 N.E.2d 813 (1999).

MTL argues that this claim fails because the evidence shows that Snyder was not an employee of MTL, but rather was an independent contractor. The key issue to be determined in deciding whether someone is an employee or an independent contractor is who had the right to control the manner or means of doing the work. Bostic v. Connor, 37 Ohio St.3d 144, 146, 524 N.E.2d 881 (1988). Factors to be considered include such indicia as who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools, and personnel used; who selects the routes traveled; the length of employment; and type of business, and method of payment; and any pertinent agreements or contracts. Id.

The General Agent Contract between Snyder and MTL, dated May 1, 1999, contains the following language: "You are an independent contractor. Nothing in this Contract creates a relationship of employer and employee between You and the Company." Contract, ¶ 2. The Contract provides for compensation in the form of commissions,

fees and bonuses, not in the form of a salary. Contract, ¶ 3. The General Agent's Agreement between Snyder and MTL, dated May 1, 1999, states:

> The General Agent will be free to determine the time, place and manner for the solicitation of applications and the general conduct of business. The General Agent will abide by the rules and regulations of the Managing Agency, but such rules and regulations will not interfere with the freedom of action as stated in this section. Nothing contained in this agreement will be construed to create the relationship of employer and employee.

Agreement, ¶ 3. The Agreement also provides for the payment of compensation in the form of overwriting commissions and service fees. Agreement, ¶ 2.

Snyder maintained his own office in Weirton, West Virginia, and has worked from his home since 2005. Snyder Dep. pp. 8-9. Another indication of Snyder's status as an independent contractor is the fact that he did not sell insurance solely for MTL, but was also selling life insurance for other companies, including Jackson National, New York Life, Continental General Mutual of Omaha, and Mass Mutual. Snyder Dep. p. 159. See Burns, 2005 WL 3536477 at *3-4 (noting that the insurance industry lends itself to an independent contractor market as agents often sell insurance for multiple companies). Snyder also sold health and long-term care insurance for other companies. Snyder Dep., p. 159. Since plaintiff has failed to produce evidence indicating that Snyder was an employee of MTL, the negligent training and supervision claim fails. See Burns, 2005 WL 3536477 at *7.

Another "'underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong

against'" the plaintiff. National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 944-45, 913 N.E.2d 939 (2009)(quoting Strock v. Pressnell, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988)). Since this court has determined that Snyder is entitled to summary judgment on all of plaintiff's claims, the claim of negligent training and supervision fails as well.

The court notes that Count Four does not specifically allege that MTL was negligent in entering into an agent's agreement with Snyder. However, even if Count Four is broadly construed to include such a claim, there is no evidence to support such a claim. To prove a negligent-credentialing claim, a plaintiff injured by the negligence of an independent contractor must show that but for the lack of care in the selection or retention of the independent contractor, the principal would not have entered into an agreement with the independent contractor and the plaintiff would not have been injured. Cf. Schelling v. Humphrey, 123 Ohio St.3d 387, 390, 916 N.E.2d 1029 (2009)(discussing claim against hospital for negligence in granting a physician staff privileges).

There is no evidence that MTL was negligent in entering into an agent's agreement with Snyder. The record shows that Snyder obtained a B.S. degree in accounting in 1986, that he obtained his CLU (charted life underwriter) certificate in 1991, and that he has had additional training and continuing education in the insurance field. Snyder Dep. pp. 9-10. Snyder has worked in the insurance industry since 1986, and he became an independent insurance agent in 1991. Snyder Dep. pp. 11-12. Snyder has been licensed to sell insurance by the States of Ohio and West Virginia since 1986, and his licenses have never been suspended. Snyder Dep. pp. 17-18. Prior to signing a general agent, MTL obtains a background check to

verify that the person is who he claims to be. The background investigation also checks the applicant's finances and licenses and determines whether any complaints have been filed against the applicant with any state agency. Johnson Dep. pp. 20-21. There is no evidence Snyder was unqualified to be an insurance agent, or that the background investigation in Snyder's case uncovered any problems with his credentials. Further, the fact that Snyder is entitled to summary judgment on plaintiff's claims also precludes liability on the part of MTL on this claim.

No genuine issues of material fact have been shown to exist in regard to the claim of negligent training and supervision, and MTL is entitled to summary judgment on this claim.

VIII. Conclusion

In accordance with the foregoing, the motions for summary judgment of defendants Snyder (Doc. No. 40) and MTL Insurance Company (Doc. No. 41) are hereby granted. The clerk will enter judgment in favor of the defendants and against plaintiff on plaintiff's claims. Since the evidence reveals that defendants ABC Inc. and XYZ Inc. do not exist, they are hereby dismissed as defendants.

Date: October 29, 2010

s/James L. Graham
James L. Graham
United States District Judge