IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN M. WARTELLA,	:	
	:	
Plaintiff	:	
	:	
v.	:	**3:15-CV-0614**
	:	**(JUDGE MARIANI)**
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA	:	
	:	
	:	
Defendant	:	

MEMORANDUM OPINION

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge Martin Carlson (Doc. 16) in which Judge Carlson recommends that the Defendant's motion to dismiss Counts I, II and III of the Plaintiff's complaint be granted as time-barred.

Plaintiff, John M. Wartella, filed objections to the R&R on June 9, 2016. (Doc. 17).

The R&R describes the dispute before the Court as one "concerning the timeliness of Wartella's complaint," noting that it "plays out against a factual background where it is undisputed that Mr. Wartella's employment with Guardian came to an end in May 2007, yet the plaintiff did not bring this lawsuit until some seven years later, in May 2014." (Doc. 16, at 1).

The Magistrate Judge, in determining that Counts I, II and III of Plaintiff's Complaint should be dismissed as barred by the applicable 4-year statute of limitations, correctly enunciated the rule in this Circuit with respect to the dismissal of a complaint as barred by the statute of limitations when that defense is raised in a motion to dismiss:

> ["]In this circuit, . . ., we permit a limitations defense to be raised by a motion under Rule 12(b)(6) 'only if "the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations."' Id. (quoting Hanna v. U.S. Veterans' Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975)). However, "'[i]f the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6).'" Id. (quoting Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978))." Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014).

(*Id.* at 8-9).

After careful review of the Plaintiff's Complaint, the R&R and the briefs submitted in support of and in opposition to Plaintiff's objections, this Court cannot say with the requisite certainty needed for the issuance of an order dismissing Counts I, II and III of Plaintiff's Complaint with prejudice that the bar of the statute of limitations clearly appears on the face of Plaintiff's complaint. At the same time, the Plaintiff's complaint lacks the necessary allegations to allow it to proceed into the discovery phase of this litigation. Accordingly, Counts I, II and III of Plaintiff's complaint will be dismissed but such dismissal shall be without prejudice and with the right afforded to Plaintiff to amend his complaint in an attempt to state a cause of action not subject to dismissal as having been filed beyond the statute of limitations.

The Allegations of Plaintiff's Complaint

Mr. Wartella alleges he was hired by Guardian as a field representative on or about January 1, 1986. (Doc. 1-3, at ¶ 6). He alleges he entered into an employment agreement with Guardian (*id.* at ¶ 8), but in a footnote states that he is "no longer in possession of the

employment agreement" and that "Guardian has been unable to provide any such agreement executed by Mr. Wartella". (*Id.* at n.1).

Wartella then alleges that pursuant to the employment agreement he was "to be paid a monthly, fixed salary by Guardian," and against this fixed salary, Wartella alleges he was "entitled to a commission on each new policy sold and each policy renewed." (*Id.* at ¶¶ 9, 10).

Wartella then asserts that, again pursuant to the employment agreement which is referred to but produced by neither party to this action, "Wartella was entitled to continue to receive his commission for all policy renewals throughout his employment and ten (10) years afterward, regardless of the reason his employment with Guardian ended." (*Id.* at ¶ 11).

Wartella further alleges that he was provided another benefit by Guardian, specifically the option to purchase a group disability insurance plan, which "could be purchased with either pre-tax or post-tax dollars." (*Id.* at ¶¶ 12, 13).

Plaintiff then alleges that he "elected to purchase a group long-term disability insurance plan (the 'Disability Insurance') with post-tax dollars." (Doc. 1-3, at ¶ 14).

Mr. Wartella recites in his complaint the medical issues which led to his placement on short-term disability with Guardian for a period of five months, his return to work thereafter and his inability to perform his duties for Guardian, which resulted in him again being placed on short term disability. (*Id.* at ¶¶ 17-22).

Mr. Wartella alleges he remained on short term disability "until in or about 2007, when his six (6) months of short-term disability was exhausted." (*Id.* at ¶ 23).

The complaint then alleges in paragraph 24 of his complaint: "Upon exhaustion of his short-term disability, in or about May, 2007, Guardian terminated Mr. Wartella." Mr. Wartella then alleges that at the time of his termination, he was receiving commissions on "life and disability renewals which produced earnings to him in excess of $160,000.00 annually." (*Id.* at ¶¶ 25-26).

After being terminated, Wartella began to collect the disability insurance which he had purchased. (*Id.* at ¶ 28).

Wartella alleges that upon receiving group disability benefits, 55% of those benefits were reported as being paid with pre-tax dollars and were, therefore, taxable. (*Id.* at ¶ 29).

He also alleges that he applied for Social Security as required by Guardian since the Social Security benefits "would serve as an offset of his Disability Insurance benefits, and, therefore, these payments were solely for Guardian's benefit." (*Id.* at ¶¶ 30-31).

Mr. Wartella alleges that he received a payment of $41,102.00 from Social Security at the time of his approval for benefits and that he continued to receive additional monthly payments from Social Security but that, as a consequence of Guardian not collecting these payments until the subsequent taxable year, he was "taxed on the $41,102.00." (*Id.* at ¶¶ 35-38). He further alleges that Guardian instructed him "that all future benefits would be offset by the Social Security benefits, resulting in a reduction of future benefits" and that such "future offsets" were to be "on a pro-rated basis with respect to the pre-tax and post-tax benefits, resulting in substantial excess taxation for Mr. Wartella." (Doc. 1-3, at ¶¶ 40-41).

In Count I of Plaintiff's complaint, he alleges, *inter alia*:

> Since cessation of his employment, Guardian has continually failed to pay Mr. Wartella the renewal commissions he was entitled to pursuant to the Employment Agreement.

(*Id.* at ¶ 46).

Wartella characterizes Guardian's "cessation of payments" as a "continuing breach of the Employment Agreement" (*Id.*, at ¶ 47), and alleges that he suffered "damages and amounts in excess of $160,000.00 annually – the value of his life and disability renewal accounts at the time of his termination." (*Id.* at ¶ 49).

In Count II, the Plaintiff generally alleges that with respect to the disability insurance which he purchased with post-tax dollars, (*id.* at ¶ 54), he "subsequently discovered that Guardian had subsidized a portion of the Disability Insurance with pre-tax dollars," and that as a result of Guardian's actions, his disability benefits were "partially taxed," as were his Social Security benefits (*id.* at ¶¶ 58-60).

Wartella characterizes Guardian's "subsidizing" of his disability insurance with pre-tax dollars as "a continuing breach of the Disability Insurance agreement." (Doc. 1-3, at ¶ 62).

Wartella then alleges harm by virtue of Guardian's actions "in an amount in excess of $100,000.00 in income taxes that Mr. Wartella should not have been obligated to pay." (*Id.* at ¶ 63). He further alleges that this harm "recurred annually with the filing of Mr. Wartella's taxes until age sixty-five (65) as Guardian continued to fail to comply with the Disability Insurance policy." (*Id.* at ¶ 64).

With respect to Count III, Wartella alleges that at the time he purchased the disability insurance from Guardian "it was represented to him by Guardian that the entirety of the policy was being paid for by Mr. Wartella with post-tax dollars." (*Id.* at ¶ 66).

Wartella then alleges that he relied upon this representation in purchasing the disability insurance from Guardian; that Guardian was aware that a portion of Wartella's disability insurance policy was being paid with pre-tax dollars and that its representation to him that the policy was being paid for with post-tax dollars was "false". (*Id.* at ¶¶ 66-68).

Wartella further alleges that at no time before he received benefits from his disability insurance did Guardian inform him that his policy was being paid for in part with pre-tax dollars and that had he been aware the policy was paid for with pre-tax dollars, "he would have purchased a different policy paid with post-tax dollars rather than the Disability Insurance Policy." (*Id.* at ¶¶ 69-70).

Wartella thus has alleged that he was harmed "by needing to pay income taxes on his disability benefits." (*Id.* at ¶ 72).

The Report and Recommendation

In finding that Count I of Wartella's complaint is barred by the 4-year statute of limitations applicable to it, the Magistrate Judge wrote:

> At the outset, turning to Wartella's breach of contract claim based upon the alleged failure to pay contractually obligated commissions to the Plaintiff following his termination, Wartella insists that under his contract with Guardian he was entitled to monthly commissions for ten years from the date of his termination, or until May 2017. Wartella alleges a wholesale failure by Guardian to make these payments following his termination. Thus, this breach

> would have first manifested itself in June of 2007. Yet, Mr. Wartella did not commence this action until May 19, 2014, some seven years after the events which first inspired this lawsuit when Mr. Wartella lodged a writ of summons against Guardian in the Luzerne County Court of Common Pleas.

(Doc. 16, at 11-12).

The Magistrate Judge states that Plaintiff contends that "the failure to pay each monthly commission constituted a new breach of the agreement," and that, therefore, "his breach of contract claims, are only barred in part." (*Id.* at 13) (citing Doc. 6, at 7).[1] The Plaintiff did advance this argument, citing *Total Control, Inc. v. Danaher Corp.*, 359 F.Supp.2d 387, 981 (E.D. Pa. 2005), quoting *Total Control* for the proposition that "under Pennsylvania law, when a contract calls for periodic or installment payments, a separate and distinct cause of action accrues for each failure to make payment."

The Report and Recommendation rejects this argument, stating:

> *Total Control* does not apply when there has been a complete repudiation of the contract by the party who was alleged to have breached the agreement. This complete repudiation caveat to Pennsylvania's rule governing the application of the statute of limitation to installment contracts is recognized by both state, *Andrews v. Cross Atl. Capital Partners, Inc.*, No. 1694 EDA 2014, 2015 WL 6551204, at * 25 (Pa. Super. Ct. September 9, 2015), and federal courts. *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 213 (3d Cir. 2001).

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[1] The Court is mindful of the statement made by Plaintiff in his Brief in Opposition to the Motion to Dismiss that "any payments due to Mr. Wartella within four (4) years of that date, i.e. May 19, 2010, would have accrued within the statute of limitations and are not time-barred" (Doc. 6, at 7). For the reasons explained herein, the Court will not find that Plaintiff has stated a timely cause of action based on this general statement, devoid as it is of any necessary dates identifying when and in what amounts Mr. Wartella was contractually due commission payments. Instead, it is for Plaintiff to properly plead a cause of action for breach of contract for commissions owed which must include far more information than can be gleaned from the statement quoted in Plaintiff's brief.

(Doc. 16, at 14).

The Magistrate Judge then concluded that: "given the well-pleaded facts alleged by Wartella in his complaint we conclude that the plaintiff has alleged a total repudiation of a material term of this alleged contract, a total repudiation which should have triggered a more timely filing of a claim by the plaintiff." (*Id.* at 15).

In this Court's view, the conclusion in the R&R that Wartella has alleged a "total repudiation" of a material term of his employment agreement is a conclusion insufficiently tethered to the allegations of Plaintiff's complaint to be adopted by this Court. In so deciding, we focus on the allegations of the Plaintiff's complaint which appear to be pivotal to the recommendation that the complaint alleges that a complete repudiation of the operative terms of the employment agreement and thus warrants a dismissal of the Plaintiff's complaint with prejudice.

Paragraph 24 of Plaintiff's complaint does allege that Guardian terminated Mr. Wartella on the exhaustion of his short-term disability and did so "in or about May, 2007." (Doc. 1-3, at ¶ 24). However, Plaintiff also alleged in paragraph 11 that "pursuant to the employment agreement," he "was entitled to continue to receive his commission for all policy renewals throughout his employment and ten (10) years afterwards, regardless of the reason his employment with Guardian ended." (*Id.* at ¶ 11). Wartella repeats this critical allegation in paragraph 45 of his complaint where, he alleges again, "[p]ursuant to the

Employment Agreement, [he] was entitled to these renewal commissions even if his employment with Guardian ceased." (*Id.* at ¶ 45).

Plaintiff, however, has not pleaded as stated in the R&R: "[t]hat under his contract with Guardian, he was entitled to *monthly* commission payments for 10 years from the date of his termination, or until May, 2017." (Doc. 16, at 11-12) (emphasis added). Instead, Wartella alleges that he "was entitled to receipt of a commission rate of roughly 14% on the renewal of all insurance policies he originated for a period of employment plus ten (10) years." (Doc. 1-3, at ¶ 44). While the complaint alleges that Wartella was to be paid a "fixed monthly salary by Guardian," under his employment agreement, no allegation appears in the complaint that he was entitled to be paid renewal commissions on a monthly basis.[2]

The R&R thus assumes payments of commission to the Plaintiff were contractually required to be paid monthly based on a statement in the Plaintiff's brief quoted in footnote 2. This Court, however, is reluctant to treat a statement in a brief as a judicial admission that the employment agreement between the Plaintiff and Guardian required monthly payments to the Plaintiff of commissions on renewals of prior policies or as a statement fairly inferred from the allegations of the complaint. To do so would, in this Court's view, run afoul of the

[2] To be sure, Plaintiff in his brief submitted in opposition to Guardian's motion to dismiss (Doc. 6) argues that he "was entitled to monthly commission payments on renewed insurance policies for a period of ten (10) years after his employment, or until May, 2017." (*Id.* at 7). But the face of the complaint does not state this, alleging instead that Plaintiff "was to be paid a monthly, fixed salary by Guardian," against which Wartella "was entitled to a commission on each new policy sold and each policy renewed" and that "[s]ince cessation of hi[s] employment, Guardian has continually failed to pay Mr. Wartella the renewal commissions he was entitled to pursuant to the Employment Agreement." (Doc. 1-3 at ¶¶ 9, 10, 46).

rule that in determining whether a Plaintiff's claims are barred by the applicable statute of limitations, the bar must appear on the face of the Plaintiff's complaint.

Here, Plaintiff's complaint does not allege when any commissions on the renewal of previously issued policies were payable to the Plaintiff. Without such allegations, the Court is unable to identify with certainty when the statute governing actions for breach of contract began to run in this case. It may very well be that a properly pleaded amended complaint will reveal that after Plaintiff's termination from employment by Guardian in May of 2007 (Doc. 1-3, ¶ 24) that Plaintiff, at some point in 2007 or thereafter, discovered, or through the exercise of reasonable diligence should have discovered, the actions by Guardian constituting the alleged violation of his employment agreement. *See Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 260, 261 (3d Cir. 1990) (the limitation period "commences when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." (internal quotation marks omitted). "The relevant statute of limitations question, therefore, is . . . when Vadino knew, or should have known, that the employer breached the contract . . . .").

Paragraph 46 of Plaintiff's complaint, which appears to be the fulcrum for the recommendation for dismissal, while alleging that Guardian "continually failed to pay Mr. Wartella the renewal commissions to which he was entitled . . . ," does not give any indication as to when those commissions became due and were payable to the Plaintiff "pursuant to the Employment Agreement."

Thus, the Court cannot ascertain from the face of the complaint when any commissions allegedly due to the Plaintiff were payable and when the Defendant allegedly failed to pay them or otherwise made clear to the Plaintiff that no such commissions on renewals of policies previously issued were to be paid to him, allegations whose absence preclude a determination that, on the face of the complaint, there was a "complete repudiation" of the agreement between Wartella and Guardian or that all or some of Wartella's claims are barred by the statute of limitations. The fact that the Plaintiff alleges he was terminated in May of 2007 does not allow inferential answers to these questions. Nor is there any allegation in the complaint that the Plaintiff received any communication from Guardian that must be regarded as an unquestionable notice of repudiation of the Plaintiff's alleged right to commissions for 10 years after his termination from employment.

Accordingly, this lack of clarity in the pleadings, together with the absence of any allegation of the issuance by Guardian of a statement that may be viewed as a final and unequivocal statement of a refusal on the part of Guardian to pay the Plaintiff any commissions to which he claims entitlement, does not allow for the dismissal of Plaintiff's complaint with prejudice. This is particularly the case where, as here, no allegation in the complaint serves to identify a triggering event or communication that this Court can say shows that the bar of the statute of limitations appears plainly on the face of the complaint. This, in fact, is what distinguishes this case from those cited by the Defendant and to which reference is made in reliance in the R&R. Thus, in *Caruso v. Life Insurance Company of*

North America, 2000 WL 876581 (E.D. Pa. 2000), the plaintiff sued Life Insurance Company of North America for ceasing to pay monthly disability benefits to him. The District Court granted the motion to dismiss of the defendant "[b]ecause the face of the complaint reveals that the statute of limitations ran before the plaintiff filed his complaint." *Id.* at *1. In that case, the plaintiff brought suit in March of 2000, but the Court noted that "[o]n December 12, 1994, the defendant notified the plaintiff that it no longer considered him totally disabled and that he would receive no more monthly disability benefits under the policy." Thereafter, the defendant made no further payments. *Id.* Thus, the Court found that "[a]ccording to the complaint, the plaintiff knew by January 1995 that his monthly disability benefits had been terminated. . . . Thus, the plaintiff must have filed his complaint by January 1999 in order to avoid running afoul of the statute of limitations." *Id.* at *2 (internal citation omitted). The Court concluded that the "face of the plaintiff's complaint reveals that his suit is barred by the statute of limitations." *Id.* Here, there is no allegation in the Plaintiff's complaint that Guardian notified him that he would receive no more commissions on reissued policies, thus, differentiating this case from that of *Caruso*.[3]

Likewise, in *Ryncavage v. American Family Life Insurance Company of Columbus, Inc.*, 293 F.App'x 122, 2008 WL 4276954 (3d Cir. 2008), the plaintiff, an independent

[3] It is worth noting that the Court in *Caruso* dismissed the plaintiff's complaint without prejudice "because the briefings suggest that circumstances not alleged in the complaint may have either prevented the statute of limitations from beginning to run or tolled the statute of limitations after it began to run." Further, the Court encouraged "the plaintiff to file an amended complaint that gives some explanation of how the four year statute of limitations did not run during the more than five years that elapsed between the plaintiff learning of his loss of benefits and the complaint being filed." 2008 WL 876581, at *2 n.2.

contractor who sold insurance for the defendant insurance company, brought suit seeking commissions to which he claimed entitlement. The plaintiff's amended complaint indicated that he "was notified via a letter on July 30, 2002 . . . confirrning that his new business cornmissions and renewals would cease effective August 29, 2002." *Id.* at * 1. The record also showed that the defendant had "specifically notified Ryncavage that 'effective August 29, 2002, you will not [*sic*] longer receive commissions on new business.'" *Id.*

Ryncavage sued for breach of contract but filed his complaint on August 31, 2006. The Court of Appeals affirmed the Magistrate Judge's determination that the plaintiff's claim was barred by the statute of limitations on the face of his complaint.

The Magistrate Judge in *Ryncavage*, citing *Packer Society Hill Travel Agency, Inc. v. Presbyterian University of Pennsylvania Medical Center*, 635 A.2d 649 (Pa. Super Ct. 1993), found that the aforesaid letter dated July 30, 2002 made clear that the date payments were to cease was August 29, 2002. Thus, the Court wrote:

> The letter dated July 30, 2002 could not be more undisputed: the date payments were to cease was August 29, 2002. (Doc. 1, Ex. C). Second, although the plaintiff argues that the pay period was some time in September, the purpose of the August 29 termination date was effectively to inform the plaintiff that there would be no payments in September. . . . Therefore, the breach in this case occurred on the date the defendants ceased making payments, which was August 29, 2002.

Ryncavage v. Am. Family Life Ins. Co. of Columbus, Inc., Civil No. 06-cv-01711, at 10 (M.D. Pa. Sept. 13, 2007).

Again, in this case, Wartella's complaint, on its face, does not allege written notification of the kind sent by the defendant to Ryncavage, i.e., notifying the plaintiff that he would no longer be paid commissions on policies issued or policies renewed. *See id.*

In *Packer Society,* the case relied upon by the Court in *Ryncavage*, Packer Society Hill Travel Agency brought suit alleging a breach of a written travel agreement pursuant to which Packer was to provide travel services for employees of defendant Presbyterian for a period of two years and to install in Presbyterian's medical center certain computer equipment that was necessary to provide the travel services encompassed by the parties' agreement. 635 A.2d at 648. The Superior Court, in reversing the trial court's denial of Presbyterian's motion for judgment on the pleadings, noted first, that "[a]fter January 13, 1986, . . . Presbyterian stopped making payments." *Id.* at 650. Additionally, the Court noted that "[a] demand for payment failed to produce results." *Id.*

Packer then more than five years later filed suit. The Superior Court held that a cause of action for alleged breach of a written contract is subject to a 4-year statute of limitations in Pennsylvania; that the limitations period "begins to run on a claim from the time the cause of action accrues"; that in general "an action based on contract accrues at the time of breach," and in this case it was not disputed that "Presbyterian ceased making payments under the travel agreement on January 13, 1986." *Id.* at 652. In that case, the plaintiff's demand for payment left no question as to plaintiff's knowledge of the alleged breach, thus again distinguishing this case from the case before this Court.

Finally, the case of *Leporace v. New York Life and Annuity*, 619 F.App'x 172 (3d Cir. 2015), is instructive. There, the plaintiff, an insured of the defendant, brought an action for breach of contract in connection with the termination of benefits to him under an individual disability insurance policy.

Once again, unlike the situation with respect to Plaintiff Wartella, the statute of limitations was triggered by what the Court described as a "clear and unmistakable termination of benefits," set forth in a letter from New York Life which explained the reasons for the termination:

> This case involves a clear and unmistakable termination of benefits effective May 31, 2005. The letter from New York Life explained the reason for the termination and apprised Leporace that he could appeal that decision. Yet Leporace waited almost five years before notifying New York Life that he disagreed with the decision and almost six years before he filed a complaint in federal court.

Id. at 174.

Here, the "clear and unequivocal termination of benefits triggering the statutory limitations period" *id.* at 176, is absent from the allegations of Plaintiff Wartella's complaint. At most, the complaint states only that: "Since cessation of his employment, Guardian has continually failed to pay Mr. Wartella the renewal commissions he was entitled to pursuant to the Employment Agreement." (Doc. 1-3, at ¶ 46).

While there is some basis in the allegations of the complaint to hypothesize that some or all Wartella's claims may well be barred by the statute of limitations, this Court

cannot say that the bar is so clear on the face of the complaint that Wartella's complaint must be dismissed with prejudice.

For the reasons set forth at length in the discussion of Count I, the Court also finds that it does not clearly appear on the face of the corriplaint as to when Wartella knew, or with the exercise of reasonable diligence, should have known that the disability insurance policy in question was being paid for with pre-tax dollars by Guardian, contrary to Wartella's allegation in paragraph 66 of his complaint that "it was represented to him by Guardian that the entirety of the policy was being paid for by Mr. Wartella with post-tax dollars."

To dismiss Counts I, II, and III with prejudice on the basis set forth in the R&R, i.e., that "in both cases the economic consequences of this breach would have been readily apparent to the plaintiff no later than 2008, when he learned of the partial taxation of his disability benefits" (Doc. 16, at 17), takes the decision in this case beyond what may properly be undertaken on a motion to dismiss.

Accordingly, the Court will enter an Order dismissing Plaintiff's complaint without prejudice with the right to file an amended complaint within fourteen (14) days of the date of the Order accompanying this Opinion.

Robert D. Mariani
United States District Judge