At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of September, 2016.

PRESENT:

HON. LARRY D. MARTIN,
Justice.

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SAMUEL ZEVY GOLDBERG,

PLAINTIFF,

- AGAINST- INDEX NO. 511216/14

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,

DEFENDANT.

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memoranda of Law	5, 6

Upon the foregoing papers, plaintiff Samuel Zevy Goldberg, sometimes known as Shmuel Goldberg (Goldberg or plaintiff) moves, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), to dismiss the counterclaims of defendant The United States Life Insurance Company in the City of New York (US Life or defendant); pursuant to CPLR 3211 (b), to dismiss

defendant's affirmative defenses or, in the alternative, pursuant to CPLR 3212, for summary judgment against defendant; and for relief under General Business Law §349.

Facts and Procedural History

In November, 2008, US Life received an application for a $3,000,000 term life insurance policy seeking to insure "Ricky Nicholas." The application indicated that Mr. Nicholas lived on Staten Island, earned $450,000 a year, had a net worth of $1,500,000, and was in "grt [sic] health," with no heart problems. With the application, US Life received a health report summarizing Mr. Nicholas' paramedical examination conducted on November 18, 2008, which confirmed his good health, including the absence of heart disease.

Based upon the application and the medical examination, on February 1, 2009, US Life issued Mr. Nicholas a life insurance policy in the amount of $3,000,000 naming Mr. Nicholas as the insured and Mr. Nicholas' son, Joshua Nicholas Quick, as the beneficiary. The policy contained the statutorily-required incontestability clause under Insurance Law 3203 (a) (3), namely that: "[e]xcept for non-payment of premiums, We will not contest this Policy after it has been in force during the lifetime of the insured for two years from the Date of Issue."

Approximately one year later, on December 29, 2009, US Life received a telephone call from an individual identifying himself as Ricky Nicholas, requesting that it change Mr. Nicholas' mailing address to 1206 Coney Island Avenue, in Brooklyn, New York. Thereafter, on February 2, 2011, two years and one day after US Life had issued the policy,

and the day when the policy's incontestability clause became operative, US Life received a telephone call from an individual identifying himself as Ricky Nicholas, requesting that it email him a change of beneficiary form at zevy@ leaseinc.com.[1]

On or about June 16, 2011, US Life received a change of beneficiary form purportedly signed by Mr. Nicholas requesting the removal of Mr. Nicholas's son as the beneficiary in favor of defendant. About one year later, on June 23, 2012, Ricky Nicholas died in Texas at the age of 43 from "cardiogenic arrest" caused by, among other things, "myocardial infarction." On or about July 1, 2014, US Life received a "Proof of Death Claimant's Statement" (the claim form), along with Mr. Nicholas' death certificate reflecting that he had died two years earlier. On the claim form, defendant stated that he and Mr. Nicholas were "business partners" and requested that the death benefit be overnighted to his home located at 1206 Coney Island Avenue in Brooklyn, New York - the same address where the individual who, in December, 2009, had identified himself as Mr. Nicholas and asked US Life to direct all mail related to the policy.

Thereafter, plaintiff received various correspondence from US Life regarding the policy. In this regard, in March, 2014, US Life's administrator, American General Life Companies (AGLI), sent plaintiff a letter stating that the policy had lapsed because the premium payment had not been received, but that the policy would be reinstated upon payment. In April, 2014, AGLI notified plaintiff that the policy had been reinstated

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[1]Plaintiff's middle name is Zevy.

retroactively, the correspondence indicating that Ricky Nicholas was the insured and that plaintiff was the owner of the policy. In further correspondence dated May, 2014, AGLI acknowledged that Ricky Nicholas was the insured and that plaintiff was the owner of the policy, and in additional correspondence on June, 2014, AGLI acknowledged that Ricky Nicholas was the insured and that plaintiff was the beneficiary of the policy. Finally, in July, 2014, AIG sent plaintiff a letter asking defendant to verify that he and "Shmeul Goldberg," the name contained on the change of beneficiary form, were the same persons. The letter also asked plaintiff to send a copy of the business agreement he had with Mr. Nicholas whereby they mutually agreed to carry life insurance policies on each other's lives.

Subsequently, frustrated regarding delay in payment of the death benefits on the policy, by summons and complaint, plaintiff commenced the instant action on or about November 26, 2014, alleging breach of contract and breach of the covenant of fair dealing based upon the failure of US Life to pay him the proceeds of the policy as beneficiary.

Thereafter, US Life investigated the claim and learned that the policy had been procured by fraudulent means, and that an imposter had secured the policy in the name of Ricky Nicholas. Accordingly, on December 8, 2014, US Life declined plaintiff's claim on this ground.

From January, 2015 through March, 2015, plaintiff received correspondence from AIG asking for the premium payment, confirming that Ricky Nicholas was the insured and that plaintiff was the beneficiary, stating that it had not yet received the payment, asking

again for payment, acknowledging that plaintiff had scheduled an on-line payment, and finally acknowledging that plaintiff had made the payment.

On February 16, 2015, plaintiff's attorney took a video of Joshua Nicholas Quick, who acknowledged that his father had procured the policy and that his father had told him that he had sold the policy to defendant just prior to his death. Mr. Quick also executed an "Unconditional Assignment of Interest" in which he acknowledged that his father had sold the policy to plaintiff, and that to the extent plaintiff was not deemed the beneficiary of the policy, Mr. Quick transferred any and all rights with respect to the policy to plaintiff.

On or about February 2, 2015, US Life joined issue and interposed an answer generally denying the allegations of the complaint. In addition, the answer contains several affirmative defenses, namely that the complaint failed to state a cause of action; that any damages sustained were the result of plaintiff's own acts or omissions, or the acts or omissions of a third-party or parties over whom US Life had no control; that there was never a legally binding contract between the parties; that plaintiff's claims were barred by the doctrines of waiver, estoppel, and unclean hands; that the alleged damages were the result of plaintiff's own fraudulent conduct; and that it reserved the right to interpose any additional affirmative defenses available to it based on facts revealed in discovery.

The answer also contains two counterclaims. Under the general heading of "Counterclaims," defendant alleges that plaintiff was involved in the scheme to defraud it, as explained above, namely that plaintiff had submitted the forged application, had an

imposter sit for the medical exam and/or forged the medical report, and forged the change of address form and the change of beneficiary form, as follows:

> "upon information and belief, Mr. Nicholas had absolutely no involvement with the procurement of the Policy, his signature on the Application and change of beneficiary form was forged, and the contents of the Application contained materially false medical and financial information;
>
> upon information and belief, Mr. Nicholas never sat for a paramedical examination and Mr. Nicholas never knew . . . [Goldberg];"
>
> *Upon information and belief, Samuel Goldberg submitted a forged application to US Life, and either had an imposter sit for the paramedical exam in place of Mr. Nicholas, and/or forged the ExamOne paramedical report. Mr. Goldberg then posed as Mr. Nicholas to have the Policy address changed to his home, and then changed the beneficiary on the Policy to himself, having forged Mr. Nicholas' signature (once again) on the change of beneficiary form* (emphasis added)."

The first counterclaim seeking a declaration to declare the policy void *ab initio* and that defendant properly denied plaintiff the death benefits alleges somewhat different allegations from above, namely that *at plaintiff's behest*, an imposter or multiple imposters perpetrated the fraud, to wit: that plaintiff had an imposter procure the policy in Mr. Nicholas' name, that Mr. Nicholas' signature was forged on the application and change of beneficiary form, that plaintiff had an imposter sit for the medical exam and/or forge the medical report, and that had defendant known that Mr. Nicholas was not the actual applicant, that the information on the application and in the medical report was false, and that an imposter sat for the medical exam, it would not have issued the policy. The counterclaim

further alleges that there was never a binding contract between the parties, and that Mr. Nicholas was a stranger to the policy.

The second counterclaim for fraud contains allegations like those in the general section first described, although it does not indicate who sat for the medical examination. In any event, it alleges that plaintiff procured the policy by forging Mr. Nicholas' name on the application and submitting documents falsifying that Mr. Nicholas had undergone the necessary paramedical exam, and that plaintiff posed as Mr. Nicholas to change the policy address and forged the change of beneficiary form. This counterclaim seeks damages incurred in connection with the costs incurred in underwriting and issuing the "fraudulently-procured policy."

Plaintiff now moves, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), and CPLR 3211(b), to dismiss the counterclaims and affirmative defenses, respectively, of US Life and in the alternative, for an order awarding him summary judgment, and for damages under General Business Law §349. In support of his motion, plaintiff mainly relies upon the protection of the incontestability clause for the relief he seeks, arguing that under *New England Mut. Life Ins. Co. v Caruso* (73 NY2d 74 [1989]), the policy is incontestible as a matter of law. In his related incontestability arguments, plaintiff contends that US Life's "fraud claim" is barred by the expiration of the incontestability period; that New York law does not recognize a separate "imposter exception" after the expiration of the incontestability period; that under New York caselaw, insurance policies lacking an insurable interest and/or the consent and knowledge of the insured as to the policy's application and issuance may not

be adjudicated void *ab initio*, but may only be challenged within the two-year incontestability period (*id.* at 80-81); and that as owner of the policy, under *Kramer v Phoenix Life Ins. Co.* (15 NY3d 539 [2010]), he has standing to enforce the policy.

Plaintiff also argues that by failing to investigate the purported fraud sooner, US Life waived its rights and is estopped from raising its affirmative defenses and counterclaims; that US Life ratified his interest in the policy because it continued to bill for and collect premiums after he commenced this action; and that he is entitled to attorney's fees and actual, punitive and treble damages under General Business Law § 349 because US Life is, among other things, harming the public at large by failing to respect the incontestability clauses in their insurance policies.

In opposition, defendant argues that its affirmative defenses and counterclaims are not premised upon the policy's incontestability clause, but instead upon its challenge to: (1) the identity of the individual which the policy insures and, separately, (2) plaintiff's standing to invoke the protection of the clause because he was not a bona fide assignee, namely he claims to have obtained an interest in the policy from an individual (Ricky Nicholas), whom allegedly did not have an interest to convey. With respect to its first argument - that there is a material issue of fact regarding the identify of the insured - defendant relies upon *Maslin v Columbian Nat. Life Ins. Co.* (3 F Supp 368 [SD NY 1932]), for the proposition that "that where a man, pretending to be someone else, goes in person to another and induces him to make a contract, *the resulting contract is with the person actually seen and dealt with and not with the person whose name was used*" (*id.* at 370 [emphasis added]; *see also American*

Mayflower Life Insurance Company of New York v Moskowitz, 2003 WL 25668226 [Sup Ct, NY County, September 26, 2003, Diamond, J., index No. 103440/02], *modified on other grounds* 17 AD3d 289 [2005] [Supreme Court denied defendants' motion to dismiss insurer's first cause of action seeking rescission of insurance policy and declaration that it was void *ab initio* on grounds that there was no meeting of the minds based upon allegations that the insured was allegedly an imposter, i.e. not the person who appeared for the medical examination and who signed the requisite medical history form, and thus its defense was not barred by the incontestability clause]). As such, defendant argues that accepting as true its allegations that an imposter completed the insurance application and sat for the medical examination, under *Maslin,* the insurance contract was between it and the imposter, not it and Ricky Nicholas; that the beneficiary of the policy could only be paid the death benefit upon proof of the imposter-insured's death; and that its defense "is not barred by the incontestability clause" (*Maslin*, 3 F Supp at 369).

Defendant also argues that as a stranger to the insurance contract, plaintiff does not have standing to invoke the protections of the policy's incontestability clause. In this regard, an incontestability clause only inures "to the benefit of the insured and his beneficiary, or to the benefit of a bona fide assignee, but not a stranger" (*American Mayflower Life Ins. Co*, 17 AD3d at 292). Defendant contends that accepting as true its "multiple set of facts" permitted by its allegations, namely allegations that different imposters completed the application, sat for the physical examination, requested a change of address, requested a change of beneficiary, and executed the change of beneficiary form, the court must find that the person

who executed the change of beneficiary form had no authority to make an assignment to plaintiff, because that person was a stranger to the policy, and that plaintiff is therefore not a bona fide assignee of the benefits of the insurance contract. Defendant notes that it does not allege that the same imposter undertook each of the above-noted activities and states that different imposters could have been responsible for each of those different actions. In this regard, defendant states that the only way plaintiff would *not* be a stranger to the policy would be if the same individual completed the policy application, sat for the medical examination, and executed the change of beneficiary form. In sum, defendant asserts that since plaintiff is a stranger to the policy, it cannot invoke the incontestability clause.

Defendant also claims that it is not estopped from rescinding the policy because it allegedly issued documentation identifying Ricky Nicholas, and then plaintiff, as the policy owner, and identifying plaintiff as the beneficiary, because it was only able to uncover the alleged subterfuge after this documentation was made. Further, while plaintiff argues that defendant should have uncovered the facts sooner, defendant contends that its failure to do so is immaterial where, as here, that issue is a question of fact to be developed through discovery.

Defendant also argues that all of plaintiff's arguments relating to ratification, waiver, and estoppel are misplaced since it does not seek to rescind the policy - rather it acknowledges that for the purposes of this motion the policy is viable but - consistent with the caselaw concerning incontestability - it challenges the identity of the insured, and whether plaintiff is a bone fide assignee of the policy. In addition, defendant contends that

plaintiff has failed to allege and provide evidence that it engaged in "consumer oriented" conduct that is "misleading in a material respect" to support his claim under General Business Obligations Law § 349, and that plaintiff is not entitled to summary judgment since there has been no discovery.

Discussion

Insurance Law § 3203 (a) (3) provides that all insurance policies "shall be incontestable after being in force during the life of the insured for a period of two years from its date of issue" except for "nonpayment of premiums or violation of policy conditions relating to service in the armed forces" (Insurance Law § 3203 [a] [3]). Accordingly, this clause, which all insurance policies must contain (*Am. Mayflower Life Ins. Co.*, 17 AD3d at 292), "fixes the insurer's promise to pay benefits upon maturity if the policy is in force for a period of two years during the life of the insured and the premiums have been paid" (*New England Mut. Life Ins. Co.*, 73 NY2d at 78). In this regard, in *New England Mut. Life Ins. Co.*, (73 NY2d at 82-83), the Court of Appeals held that an incontestability clause in a life insurance policy precluded the insurer's claim that the policy was unenforceable because the owner and beneficiary of the policy did not have an insurable interest in the life insured under the policy (*id.* at 79, 82-83). The court explained that "after the two-year period of time, 'the insurer's conditional promise to pay benefits shall become absolute . . . The requirement rests on the legislative conviction that a policyholder should not indefinitely pay premiums to an insurer, under the belief that benefits are available, only to have it judicially determined after the death of the insured that the policy is void because of some defect

existing at the time the policy was issued'" (*Krausz v First Central Natl. Life Ins. Co. of N.Y.*, 2014 NY Slip Op 33013 [U], *8 [Sup Ct, NY County 2014], quoting *New England Mut. Life Ins. Co.*, 73 NY2d at 82-83; *see also American Mayflower Life Insurance Company of New York*, 2003 WL 25668226 [Sup Ct, NY County, September 26, 2003, Diamond, J., index No. 103440/02], *modified on other grounds* 17 AD3d 289 [2005] [same]).

Thus, "in New York, as well as in numerous other jurisdictions, it is well settled that an incontestability clause bars an insurer from disputing the validity of a policy after the two-year period has elapsed even though the policy may have been procured by gross fraud, such as a misrepresentation by the insured at the time of the policy about his or her health" (*American Mayflower Life Insurance Company of New York*, 2003 WL 25668226 [Sup Ct, NY County, September 26, 2003, Diamond, J., index No. 103440/02], *modified on other grounds* 17 AD3d 289 [2005], citing, *inter alia, New England Mut. Life Ins. Co. v Doe*, 93 NY2d 122, 130-131 [1999]; *Spear v Guardian Life Ins. Co.*, 112 AD2d 904, 907 [1985], *appeal dismissed without opinion* 67 NY2d 605 [1986]; *Amex Life Assurance Co. v Superior Court*, 930 P2d 1264 [1997]; *see also Krausz*, 2014 NY Slip Op 33013 [U], *7 [Sup Ct, NY County 2014], citing *Johnson v Metropolitan Life Ins. Co.*, 79 AD3d 450 [2010]; *Ilyaich v Bankers Life Ins. Co. of N.Y.*, 47 AD3d 614 [2008]; *New England Mut. Life Ins. Co.*, 93 NY2d 122 [1999] ["Other courts have held that, once the two-year convertibility period has run, an insurer may not avoid paying a claim based upon alleged fraudulent misrepresentations in the policy application."]). "In such cases, the onus is on the insurer to investigate the veracity of the representations in the application during the two-year

contestability period or otherwise protect itself by including a fraudulent misstatement exception within the incontestability clause" (*Krausz,* 2014 NY Slip Op 33013 [U], *7-8 [Sup Ct, NY County 2014]; *see also New England Mut. Life Ins. Co.,* 73 NY2d at 82 ["If (the insurer) doubted defendant's interest, the burden rested on it to investigate in a timely manner or ignore the matter at its peril."]; *American Mayflower Life Insurance Company of New York,* 2003 WL 25668226 [Sup Ct, NY County, September 26, 2003, Diamond, J., index No. 103440/02], *modified on other grounds* 17 AD3d 289 [2005] ["a carrier may protect itself against fraud by including a provision in its incontestability clause creating an exception for fraudulent misstatements in the application process."]).

However, "[n]otwithstanding the general rule that the expiration of the contestability period precludes an insurer from denying a claim, a narrow exception to this rule exists when the policy is taken out by an imposter posing as the named insured since the incontestability clause may not be raised by a party that is a stranger to the policy or by a party that is assigned ownership by a stranger to the policy" (*Krausz,* 2014 NY Slip Op 33013 [U], *8 [Sup Ct, NY County 2014], citing *American Mayflower Life Ins. Co. of New York,* 17 AD3d at 292; *see also Halberstam v United Stated Life Ins. Co. in the City of New York*, 36 Misc 3d 497, 500 [2012]; *Berkshire Settlements, Inc. v Ashkenazi*, 2011 US Dist LEXIS 136663, 2011 WL 5974633 [ED NY, Nov. 29, 2011, No. 09-CV-0006 (FB/JO)]). Specifically, "the provisions for incontestability inure to the benefit of the insured and his beneficiary, or to the benefit of a bona fide assignee, but not a stranger" (*Krausz,* 2014 NY Slip Op 33013 [U], *8 [Sup Ct, NY County 2014], quoting *American Mayflower Life Ins. Co. of New York,* 17

AD3d at 292). Accordingly, "[w]here an imposter signs the application for a policy, the named insured is in fact a stranger to the contract, and does not have the benefit of the incontestability clause contained in the policy" (*Halberstam,* 36 Misc 3d at 500 [2012], citing *American Mayflower Life Ins. of N.Y.*, 17 AD3d 289 [2005] [noting that in *Am. Mayflower*, the court held that when a man pretends to be another and enters into a contract, the contract is formed with the person seen and dealt with, and not the individual whose name was used]; *see also Maslin,* 3 F Supp at 369-371 [same]). In such circumstances, the insurance contract is not void *ab initio* - rather the contract is with the imposter, not with the named insured, because the named insured is a stranger to the contract (*American Mayflower Life Ins. Co. of New York*, 17 AD3d at 292).

Liberally construing defendant's pleadings and giving defendant the benefit of every reasonable inference (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797 [2015], *appeal dismissed* 26 NY3d 1030 [2015]), the counterclaims allege that either an imposter or a series of imposters *or* plaintiff and an imposter or a series of imposters applied for the policy, sat for the medical examination, fraudulently changed Mr. Nicholas' address and forged the change of beneficiary form, and that the policy was not procured by Mr. Nicholas with his consent, participation or knowledge. Based upon these allegations, both counterclaims sufficiently state claims based upon the imposter exception, namely that the insurance contract was between defendant and the imposter, not defendant and the insured (Mr. Nicholas), that the beneficiary is only entitled to the death benefit upon proof of the imposter/insured's death (absent here), and that the both counterclaims, premised upon this exception, are not barred

by the incontestability clause (*Maslin*, 3 F Supp at 369-370; *American Mayflower Life Insurance Company of New York v Moskowitz*, 2003 WL 25668226 [Sup Ct, NY County, September 26, 2003, Diamond, J., index No. 103440/02], *modified on other grounds* 17 AD3d 289 [2005]; *Krausz,* 2014 NY Slip Op 33013 [U], *8 [Sup Ct, Kings County 2014], *rearg granted* Sup Ct, Kings County, Index No. 503318/13, March 23, 2015 [plaintiff's motion for summary judgment dismissing defendant's affirmative defenses granted *except as to defendant's seventh affirmative defense alleging failure of a condition precedent - question of fact exists as to whether plaintiff satisfied a condition precedent under the subject policy, to wit: submission of proof as to the identity and death of policyholder*]) (emphasis added).

In addition, "the provisions for incontestability inure to the benefit of the insured, and his beneficiary, or to the benefit of a bona fide assignee, but not a stranger" (*Am. Mayflower Life Ins. Co.*, 17 AD3d at 292-293). Here, accepting as true defendant's allegations that the person who executed the change of beneficiary form was an imposter, the counterclaims sufficiently allege that defendant is a stranger to the policy and is therefore not entitled to the benefit of the incontestability clause because defendant's status as an assignee was purportedly obtained by forgery, that is, the imposter lacked the authority to assign the death benefits to defendant (*id; see also Krausz,* 2014 NY Slip Op 33013 [U], *8 [Sup Ct, Kings County 2014]; *Halberstam,* 36 Misc 3d at 500 ["Where an imposter signs the application for a policy, the named insured is in fact a stranger to the contract, and does not have the benefit of the incontestability clause contained in the policy"]).

To the extent the first counterclaim alleges that the insurance policy is void *ab initio*, this branch of the counterclaim must be dismissed. [2] As noted above, under circumstances where it is alleged that the insured is a stranger to the policy, the policy is not void *ab initio* - rather the contract is with the imposter, not with the named insured (*American Mayflower Life Ins. Co. of New York*, 17 AD3d at 292). In this regard, defendant acknowledges, for the purpose of this motion, that the policy is viable, and that it only challenges the identity of the insured and whether defendant is a bona fide assignee of the policy.[3]

In sum, the motion to dismiss the counterclaims is granted only to the extent of dismissing that branch of the first counterclaim to the extent it alleges that the policy is void *ab initio*, and is otherwise denied.

That branch of plaintiff's motion to dismiss the affirmative defenses is also denied because plaintiff has failed to demonstrate that they fail to state a claim. In this regard, as he argued with respect to the counterclaims, plaintiff asserts that these affirmative defenses must be dismissed because defendant is barred from asserting the incontestability clause, an argument the court has already rejected. Although defendant contends that this state does not recognize the imposter exception, the cases upon which he relies in fact recognize the exception (*see Krausz,* 2014 NY Slip Op 33013 [U], *8 [Sup Ct, Kings County 2014]; *Halberstam,* 36 Misc 3d at 500; *Maslin*, 3 F Supp at 369-370; *American Mayflower Life*

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[2]US Life withdraws its first counterclaim "only to the very limited extent that it seeks a declaration that the policy is void *ab initio*" (Defendant's Memorandum in Opposition, p. 2, fn 1).

[3]Defendant's Memorandum in Opposition, p. 14.

Insurance Company of New York, 2003 WL 25668226 [Sup Ct, NY County, September 26, 2003, Diamond, J., index No 103440/02], *modified on other grounds* 17 AD3d 289 [2005]).

As to his separate argument that the first affirmative defense (failure to state a claim) must be dismissed because he has standing to enforce the policy as its owner, the court has already determined that defendant has sufficiently alleged that plaintiff lacks standing because an imposter assigned him the death benefits. Plaintiff also contends that defendant's first, second, fourth, fifth and ninth[4] affirmative defenses should be dismissed because plaintiff's fraud claim is barred by the expiration of the incontestability clause. The court has already rejected this argument since it has found that defendant has sufficiently alleged the imposter exception, which would not bar defendant from invoking the incontestability clause. Moreover, plaintiff's reliance upon *Reliastar Life Ins. Co. v Leopold* (192 Misc 2d 385, 387-388] [2002]) is inapposite as it involved allegations of common-law fraud by the insurance company which were "still grounded upon the theory that [the insured's] fraudulent statements justif[ied] rescission, 'tolling' and/or the voiding of the policy, [which] . . . claims . . . [were, unlike here] foreclosed by the elapse of the policy's two-year incontestability period" (*id.*).

Plaintiff next argues that defendant is barred from raising affirmative defenses (and counterclaims) and is estopped from rescinding the policy because it ratified the policy by, *inter alia*, failing to investigate the seemingly fraudulent circumstances surrounding the

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[4]Plaintiff may be referring to either the 6th or 7th affirmative defense because defendant only asserted seven affirmative defenses.

application for the policy, the change of address request, the change of ownership request, and the change of beneficiary request; collecting premiums three years after the expiration of the incontestability period; investigating the matter in 2012 without taking further action; and issuing plaintiff documentation identifying Ricky Nicholas, and then defendant, as the policy owner and identifying defendant as the beneficiary.

"'Where an insurer accepts premiums after learning of an event allowing for cancellation of the policy, the insurer has waived the right to cancel or rescind'" (*Sec. Mut. Life Ins. Co. of N.Y. v Rodriguez*, 65 AD3d 1, 7 [2009], quoting *Continental Ins. Co. v Helmsley Enters.*, 211 AD2d 589 [1995]; *see also Precision Auto Accessories, Inc. v Utica First Ins. Co.*, 52 AD3d 1198, 1201-1202 [2008], *lv denied* 11 NY3d 709 [2008]). "The basis of this rule is that an insurer's claimed attempt to both accept premiums and reserve its right to rescind is unenforceable for lack of mutuality and timeliness" (*Sec. Mut. Life Ins. Co. of N.Y.*, 65 AD3d at 8). Here, plaintiff has failed to make a prima facie showing that defendant learned of the purportedly fraudulent acts involved in obtaining the policy which would have allowed for rescission of the policy. Although plaintiff asserts that defendant investigated a complaint made with respect to the policy from early 2011 to late 2012, and defendant does not deny that it investigated this complaint, plaintiff fails to provide any details regarding the nature of the complaint or the investigation itself. In any event, the question of whether defendant ratified the policy is not subject to resolution on a motion to

dismiss, and is premature at this early stage in the proceedings, where the parties have not yet engaged in discovery.

With respect to the relief plaintiff seeks under General Business Law § 349, while summary judgment may be awarded on an unpleaded cause of action (*E. Tetz & Sons, Inc. v Polo Elec. Corp.*, 129 AD3d 1014, 1015 [2015]), plaintiff has failed to demonstrate that defendant engaged in a deceptive act or practice that was "consumer oriented, i.e., conduct that has a broad impact on consumers at large" (*Nafash v Allstate Ins. Co.*, _ AD3d _, 2016 NY Slip Op 02061 [2d Dept 2016] [internal citations and quotation marks omitted]).

Finally, plaintiff has failed to make a prima facie showing that he is entitled to summary judgment with respect to his remaining claims.

In sum, that branch of plaintiff's motion to dismiss the defendant's counterclaims and affirmative defenses is granted only to the extent of dismissing that branch of the first counterclaim to the extent it alleges that the subject insurance policy is void *ab initio*, and is otherwise denied; that branch of plaintiff's motion for summary judgment is denied; and that branch of plaintiff's motion for relief under General Business Law §349 is denied.

This constitutes the decision and order of the court.

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J. S. C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT