Slip Copy, 42 Misc.3d 1213(A), 2014 WL 223384 (N.Y.Sup.), 2014 N.Y. Slip Op. 50032(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2014 WL 223384 (N.Y.Sup.))

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Kings County, New York.
CLIFFSIDE NURSING HOME INC. d/b/a Cliffside Rehabilitation and Residential Health Care Center, Forest View Nursing Home, Inc. d/b/a Forest View Center for Rehabilitation and Nursing and Woodcrest Rehabilitation and Residential Care Center LLC, Plaintiffs,
v.
The ESTATE OF Hirsch WOLF, Defendant.

No. 4154/2013.
Jan. 14, 2014.

Duane Morris LLP, Kevin P. Potere, Esq., Attorney for Plaintiff.

The Law Office of Sheldon Eisenberger, Sheldon Eisenberger, Esq., Attorney for Defendant.

CAROLYN E. DEMAREST, J.

***1** In this action to recover upon a written guarantee ("Guarantee"), defendant The Estate of Hirsch Wolf ("The Estate") moves to dismiss the complaint on a number of grounds.

BACKGROUND

The following facts are set forth in the complaint. Hirsch Wolf & Co. ("Wolf & Co.") was an **insurance** brokerage that often assisted plaintiffs Cliffside Nursing Home Inc. d/b/a Cliffside Rehabilitation and Residential Health Care Center ("Cliffside"), Forest View Nursing Home, Inc. d/b/a Forest View Center for Rehabilitation and Nursing ("Forest View"), and Woodcrest Rehabilitation and Residential Health Care Center LLC ("Woodcrest") in obtaining **insurance** coverage, including worker's compensation **insurance**. Hirsch Wolf, now deceased, was the chief executive of Wolf & Co. Plaintiffs claim that in early 2003, Jack Deutsch, on behalf of all plaintiffs, was urged by Mr. Wolf to place workmen's compensation coverage with the Health **Insurance** Trust of New York ("HITNY"), described in the complaint as a self-**insured** worker's compensation program. When Deutsch expressed concern that the HITNY program, despite competitive premiums, could be subject to a retroactive adjustment or assessment that would substantially increase the premiums overall, Wolf advised that he did not believe any such adjustments would occur. To further assure plaintiffs, by letter dated February 26, 2003, Wolf guaranteed that if any adjustment occurred, he, or his company, would pay 50% of any retroactive adjustment for the 2003–2004 policy year. As a result of this Guarantee, plaintiffs placed their workmen's compensation coverage with HITNY for the 2003–2004 year and in subsequent years.

Subsequently, HITNY became insolvent and ceased operating. Plaintiffs were notified by the New York State Worker's Compensation Board, which assumed responsibility for managing the affairs of HITNY, of retroactive assessments for the 2003–2004 policy year in the amount of $120,154 for Cliffside, $92,639 for Forest View, and $71,500 for Woodcrest. Additional amounts aggregating over $2,000,000 were assessed against plaintiffs for subsequent years. At the time of filing of the complaint, plaintiffs had paid $554,656.53 in connection with the assessments.

Plaintiffs commenced this action on March 7, 2013, asserting causes of action a) to collect on the Guarantee for the 2003–2004 policy year, and b) for

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negligent misrepresentation to recover the amount paid in connection with assessments from subsequent years. The complaint alleges that the negligent misrepresentation was "Mr. Wolf's repeated representations that the State would make no retroactive adjustment to the HITNY Program," but in opposition to the motion, plaintiffs contend that the negligent misrepresentation is contained in the letter of February 26, 2003, guaranteeing reimbursement that Wolf should have known violated public policy as reflected in the Insurance Law. The invoices addressed to plaintiffs for additional assessments for the years 2003–2007 are dated December 1, 2009. By notice of motion filed April 8, 2013, the Estate moves to dismiss the complaint on the grounds that a) the alleged contract is illegal and against public policy, b) the alleged contract lacked valid consideration, c) the personal Guarantee is void under the State of Frauds because it was not signed by Wolf in his personal capacity, d) plaintiffs failed to name a necessary party, e) the action is not ripe, f) the alleged Guarantee was addressed only to Cliffside, g) the claim is barred by the Dead Man's Statute, h) the complaint fails to plead a negligent misrepresentation cause of action with sufficient particularity, and i) a contract void under the Statute of Frauds cannot be used as a predicate for an action in fraud.

DISCUSSION

***2** Upon a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v. Olinville Realty, LLC,* 54 AD3d 703, 703–04 [2d Dept 2008]). However, the court must base its judgment on factual allegations rather than legal conclusions but can afford no deference to assertions that are "inherently incredible or flatly contradicted by documentary evidence" (*O'Donnell, Fox & Gartner v. R–2000 Corp .,* 198 A.D.2d 154, 154 [1st Dept 1993]).

Defendant first argues that the Guarantee is unenforceable as illegal, because it violates provisions of the New York **Insurance** Law prohibiting an **insurance** broker from selling a policy to a client with the promise that he will refund or rebate a portion of the premium.

A perusal of New York's **Insurance** Law reveals that different categories of **insurance** are treated differently with respect to rebating. For example, section 2324(a), relied upon by defendant, prohibits **insurance** brokers from paying "either as inducement to the making of **insurance** or after **insurance** has been effected, any rebate from the premium which is specified in the policy, or ... any valuable consideration or inducement of any kind, directly or indirectly, which is not specified in such policy or contract ..." in the context of property/casualty **insurance**, but not, inter alia, accident and health **insurance** (*see* **Insurance** Law (hereinafter "Ins. Law") § 2302(a) excluding some forms of **insurance** from the provisions of Article 23, which regulates **insurance** rates so as to avoid discrimination (*see* Ins. Law § 2301). Various other statutes prohibit rebating in the context of other types of **insurance** (*see, e.g.,* § 4224((b)-(c))(accident and health **insurance**); § 6409(d)(title **insurance**); § 6504(b)(1)(mortgage **insurance**); § 6904(g)(financial guaranty **insurance**). The purpose of the anti-rebate statutes is to ensure that **insurance** providers, including brokers, "provide **insurance** in a nondiscriminatory manner to like **insureds** or potential **insureds**, and to prohibit such an insurer or **insurance** producer from providing an **insured** or potential **insured** with any special benefit not afforded to other **insureds** or potential **insureds**" in those areas of **insurance** that are covered by statute (*see* Circular Letter of March 3, 2009, from the State of New York **Insurance** Department, cited by defendant). Defendant has not met its burden to demonstrate that the policy purchased by plaintiffs from HITNY was **insurance** covered by a statute prohibiting rebates.

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Indeed, defendant has failed to even provide a copy of the policy. Without a copy of the policy, the Court is unable to determine what type of **insurance** was being provided and whether it is covered by a statute prohibiting rebates.

***3** Moreover, the statutes relied upon by defendant merely prohibit the payment of rebates which are not provided for in the contract or policy (*see, e.g.,* as noted above, §§ 2324 and 4224(c), prohibiting brokers from paying "any valuable consideration or inducement whatever not specified in such policy or contract").[FN1] Thus, without a copy of the policy, the Court cannot determine whether the Guarantee was reflected within the policy and whether it was statutorily prohibited or not (*cf. McGee v. Felter,* 75 Misc. 349, 356 [County Ct, Kings County 1912])("The vice is not in the giving of a rebate, inducement, or consideration, but the giving of any rebate, inducement, or consideration not specified in the policy."). As copies of the insurance policies have not been produced, the Court is unable to make a determination as to the legality or illegality of the Guarantee.

> FN1. It is possible that § 4224(c) covers the policy at issue, as § 4224 applies to accident **insurance**, which is defined by section 1113(a)(3) as:
>
> > [**I]nsurance** against death or personal injury by accident or by any specified kind or kinds of accident and **insurance** against sickness, ailment or bodily injury, including **insurance** providing disability benefits pursuant to article nine of the workers' compensation law, except as specified in item (ii) hereof; and (ii) noncancellable disability **insurance**, meaning **insurance** against disability resulting from sickness, ailment or bodily injury (but excluding **insurance** solely against accidental injury) under any contract which does not give the insurer the option to cancel or otherwise terminate the contract at or after one year from its effective date or renewal date.
>
> However, without a copy of the policy at issue, the Court cannot determine whether the coverage is implicated in the statute.

Defendant's remaining arguments offered in support of its motion to dismiss the first cause of action are without merit. Defendant argues that the Guarantee lacked consideration and was merely a gratuitous promise as the letter references the fact that plaintiffs had already renewed their policy with HITNY. However, even if the Guarantee was signed after the renewal of the policy, the renewal of the policy would constitute valid consideration, as the signing of the Guarantee and the promise to renew were part of the same transaction (*see Michelin Mgt. Co. v. Mayaud,* 307 A.D.2d 280, 281 [2d Dept 2003])(although guarantee and lease not executed on same day, they were part of same transaction, and no additional consideration needed to render guarantee valid). As plaintiffs have pleaded that the Guarantee was offered as inducement to renewal the policy, they have sufficiently pleaded the presence of adequate consideration.

Defendant's contention, that evidence of the purported Guarantee by Wolf is barred by the Statute of Frauds and that Wolf was not the proper defendant to name because the Guarantee is unenforceable as to Wolf since he did not sign it in his personal capacity, is without merit as a copy of the Guarantee, signed by Wolf, explicitly states that "should there be an assessment for the 2003–2004 policy year, Hirsch Wolf & Company, and/or Hirsch Wolf personally, will contribute 50% of your share." The specific provision stating that Wolf would contribute personally belies plaintiffs' argument that Wolf did not purport to bind

himself to the Guarantee (*see Westminster Constr. Co. v. Sherman,* 160 A.D.2d 867, 868 [2d Dept 1990]).)

Defendant also argues that the action must be dismissed as premature because plaintiffs are parties to a separate proceeding with HITNY, *Healthcare Industry Trust of New York v. Compensation Risk Managers, et al.,* (Sup Ct, Albany County, Index No. 5966/2009), contesting the subject assessment. However, as plaintiffs claim, in the complaint, that they are liable to the Board for the assessments, and indeed have already paid $554,656.53, they have pleaded the existence of damages sufficient to bring an action against defendant.

***4** Finally, defendant argues that the action must be dismissed for failure to state a cause of action as to all plaintiffs except Cliffside because the Guarantee letter was addressed only to Cliffside. A review of the letter, however, reveals that the subject line references "Workers Compensation for Cliffside, Woodcrest, and Forest View." Plaintiff has sufficiently pleaded that the Guarantee was extended to all plaintiffs, and defendant has failed to establish, through documentary evidence, that it was not.

Accordingly, defendant's motion is denied with respect to the first cause of action without prejudice to renewing the argument of illegality in a motion for summary judgment following discovery, if appropriate.

Defendant also moves to dismiss plaintiffs' second cause of action. In its second cause of action, plaintiffs seek to recover for negligent misrepresentation, arguing that, if the Guarantee cannot be enforced as illegal, Wolf was charged with knowledge of that illegality, and by issuing the Guarantee, he misrepresented to plaintiffs that they could recover a portion of any premiums subsequently assessed, thus inducing them to place insurance policies with HITNY for the 2003–2004 policy years and in subsequent years.

Contrary to defendant's contentions, the basis for plaintiffs' negligent misrepresentation claim is not a contract void under the statute of frauds, nor are plaintiffs' assertions about communications with Wolf, now deceased, barred by the Dead Man's Statute, as only testimony at trial is barred by that statute (*see Phillips v. Joseph Kantor & Co.,* 31 N.Y.2d 307, 315 [1972] (permitting consideration of evidence in summary judgment motion that would be barred by Dead Man's Statute at trial). As plaintiff has stated a cause of action for misrepresentation in "sufficient detail to clearly inform [the] defendant with respect to the incidents complained of ..." (*Pike v. New York life Ins. Co.,* 72 AD3d 1043, 1050 [2d Dept 2010]), defendant's motion is denied with respect to plaintiff's second cause of action.

CONCLUSION

Defendant's motion to dismiss the complaint is denied. Defendant is directed to answer within 20 days of service of this Decision and Order.

This constitutes the decision and order of the Court.

N.Y.Sup.,2014.
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