SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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RICHARD HOBISH AS TRUSTEE OF THE HOBISH TRUST and TOBY HOBISH (dec.),

Plaintiffs,

- v -

AXA EQUITABLE LIFE INSURANCE COMPANY,

Defendant.

INDEX NO. 650315/2017

MOTION DATE N/A

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 138, 178, 179, 180, 181, 182, 184, 187, 236

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 183, 185, 188, 213, 214, 215, 216, 217, 237, 238, 239, 240, 241

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In motion sequence number 003, Richard Hobish, as Trustee of the Hobish Irrevocable Trust, Dated 1/22/96 (Trust), and as the Executor of the Estate of Toby Hobish (Estate) (collectively, plaintiffs), moves pursuant to CPLR 3212(e) for partial summary judgment on the first cause of action for breach of contract against defendant AXA Equitable Life Insurance Company (AXA) on the issue of liability.

In motion sequence number 004, AXA moves pursuant to CPLR 3212 for summary judgment, or partial summary judgment, (i) dismissing the first cause of action for breach of contract or, alternatively, limiting damages; (ii) dismissing the second cause of action under General Business Law (GBL) § 349, or, alternatively, limiting

damages; and (iii) dismissing plaintiffs' demand for punitive damages or, alternatively, limiting those damages.

Background

In 2003, AXA started a design and pricing analysis for a new insurance policy, the Athena Universal Life II Policy, and made it available to the market in 2004. (NYSCEF 111, Joint Statement of Undisputed Facts [JSUF] ¶¶ 3, 4.) AXA continued to issue Athena policies through early 2008. (*Id*. ¶ 6.)

Around 2006, Jared Levy, an AXA insurance agent, was introduced to Toby Hobish (Ms. Hobish) by her accountant to review an insurance policy previously issued to the Trust. (NYSCEF 142, Levy Depo at 74:17-76:5, 77:23-78:2, 82:8-10.) Levy presented Ms. Hobish with other policy options, and ultimately, Ms. Hobish decided that the Trust would purchase a Athena Universal Life II Policy (Policy). (*Id.* at 117:13-120:24; NYSCEF 111, JSUF ¶ 10.) The Policy is a form policy and neither Ms. Hobish, nor the Trust, negotiated any of its terms. (NYSCEF 111, JSUF ¶ 12.)

In April 2007, the Trust applied for the Policy to insure the life of Ms. Hobish. (NYSCEF 111, JSUF ¶ 7.) At the time, Jacqueline Diamond, Ms. Hobish's sister, was the sole Trustee of the Trust. (*Id.* ¶ 10.) On May 3, 2007, AXA prepared a policy illustration with an initial face amount of $1.8 million for Ms. Hobish. (NYSCEF 21, May 3, 2007 Illustration at 2[1].) On June 15, 2007, AXA prepared another policy illustration with an initial face amount of $2 million (NYSCEF 20, June 15, 2007 Illustration at 3), and issued the Policy to the Trust as the Policy's owner and beneficiary. (*See* NYSCEF 111, JSUF ¶¶ 27, 31.) The Policy states that its face amount is $2 million and Ms.

[1] Pages refer to NYSCEF generated pagination.

Hobish's "issue age" was 82 years old. (*Id*. ¶ 13.) Ms. Hobish's three adult children–Mitchell K. Hobish, Amy A. Hobish and plaintiff Richard–were the sole beneficiaries of the Trust. (*Id*. ¶ 32.)

The Policy

The Policy has an insurance component and a savings component. (NYSCEF 54, Policy at 3.) Under this type of policy, the policyholder makes premium payments from which AXA deducts the cost of insurance (COI) and other charges; the balance is placed into a Policy Account. (*Id*.) After making an initial premium payment, the policyholder can decide when and how much to pay in premiums within certain limits. (*Id*. at 12.) As long as the Policy Account contains sufficient funds to cover the monthly deductions, the Policy remains in force, and the policyholder earns interest on any remaining funds. (*Id*.)

The COI is determined as the current monthly COI rate times the net amount at risk divided by $1,000, plus any flat extra charge. (*Id*. at 13.) The COI rate scale is a non-guaranteed element of the Policy, i.e., AXA is entitled to change the COI rate scale, subject to certain restrictions. (*Id*. at 14.) Among these restrictions are: (i) the COI rate can never exceed the contractually guaranteed maximum rate scale (*see id*. at 8, 14), and (ii) any change in the COI rates must comply with the "Changes in Policy Cost Factors" provision of the Policy. (*Id*. at 14.) That provision states:

> "Changes in policy cost factors (interest rates we credit, cost of insurance deductions and expense charges) will be on a basis that is equitable to all policyholders of a given class, and will be determined based on reasonable assumptions as to expenses, mortality, policy and contract claims, taxes, investment income, and lapses. Any change in policy cost factors will never result in an interest crediting rate that is lower than that guaranteed in the policy, or policy changes that exceed the maximum policy charges guaranteed in the policy. Any change in policy cost factors

> will be determined in accordance with procedures and standards on file, if required, with the insurance supervisory official of the jurisdiction in which this policy is delivered."

(*Id*. at 16.)

The policyholder may give up the Policy for its Net Cash Surrender Value (NCSV) anytime while the insured is living. (NYSCEF 54, Policy at 14.) NCSV is the amount in the Policy Account minus any applicable surrender charge, policy loan and accrued loan interest. (*Id.*) A surrender charge applies if the Policy is given up for its NCSV within the first fifteen policy years. (*Id*. at 6.) Upon the insured's death, the Policy beneficiary receives a Death Benefit determined pursuant to "Option A" or "Option B," whichever the policyholder selects. (*See id*. at 3, 11.) The Trust selected Option A (*id*. at 4), under which the Death Benefit is the greater of the base policy face amount or a percentage of the amount in the Policy Account upon the insured's death. (*Id*. at 11.)

2015 COI Adjustment

In October 2015, AXA announced an adjustment to the COI rate scale for certain Policies (COI Adjustment). (NYSCEF 111, JSUF ¶ 47.) The COI Adjustment applied to the policies with issue ages of 70-79 and face amounts of $1 million or greater, and with issue ages of 80-85 and face amounts of $1 million or greater. (*Id.* ¶ 48.)

Because the issue age of Ms. Hobish was 82 years old, and the face amount of the Policy was $2 million, the Trust's Policy was affected by the COI Adjustment. (NYSCEF 111, JSUF ¶ 52.) In a notice dated October 5, 2015, AXA notified the Trust that:

> "[AXA is] adjusting [your policy] in a way that will increase the monthly cost-of-insurance (COI) deductions from your policy and which is likely to

> require payment of additional premium to help ensure that your policy will perform as previously illustrated. . . .[AXA] ha[s] reviewed [its] mortality and investment income expectations for Athena Universal Life II policies and ha[s] determined that they are less favorable than was anticipated when the current schedule of COI rates was established. Based on this review, [AXA] ha[s] determined that an adjustment to COI rates, as permitted under the terms of your policy, is necessary.
>
> This adjustment will result in a significant increase in the current COI rates used to calculate the COI deductions for your policy. In order . . . to keep your policy in force, more premium will likely need to be paid."

(NYSCEF 39, Notice [Oct. 5, 2015].)

Prior to sending the notice, AXA submitted its proposed COI increase to the New York State Department of Financial Services (DFS), including a memorandum stating that "[i]ncreases will vary by issue age and duration: 7.3% to 29% for issue ages 70-79, and 43.5-72.5% for issue ages 80+ subject to maximum guarantees." (NYSCEF 111, JSUF ¶ 19.) On March 8, 2016, the COI Adjustment went into effect. (*Id*. ¶ 20.)

In June and July 2016, the Trust beneficiaries discussed whether to keep or surrender the Policy. (*See* NYSCEF 215, Emails.) On July 15, 2016, the Trust sent a letter to AXA stating that "'due to [AXA's] recent, unlawful, and inequitable increase in premiums, we surrender, under protest, policy number 157 207 079 (Toby Hobish Insured Person).'" (NYSCEF 111, JSUF ¶ 22.)

Procedural History

This action was initially brought on January 19, 2017 by Richard, in his capacity as Trustee of the Trust, and by Ms. Hobish asserting a cause of action for breach of contract and a cause of action under GBL § 349. (NYSCEF 2, Compl.) AXA moved to dismiss the complaint. In May 2018, the court held that Ms. Hobish lacked standing to bring the breach of contract claim but sustained the Trust's claim for breach of contract;

the court also sustained the GBL § 349 cause of action as to both the Trust and Ms. Hobish. (NYSCEF 49, Decision and Order [mot. seq. no. 001] at 16.) After Ms. Hobish's death in September 2019, Richard, as the Executor of the Estate, moved to be substituted as plaintiff for Ms. Hobish, which the court granted. (NYSCEF 95, Order [mot. seq. no. 002] at 1.)

Discussion

Motion Sequence Number 003

Contract Interpretation

> "Insurance contracts are governed by the general rules of contract interpretation. When resolving disputes concerning the scope of coverage, we look to the specific language in the relevant insurance policies. As we have explained, '[i]t is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.' The language of a policy, when clear and unambiguous, must be given its plain and ordinary meaning."

(*Jin Ming Chen v Ins. Co*. *of the State of Pennsylvania*, 36 NY3d 133, 138 [2020] [citations omitted].) "Where the terms of an insurance policy are clear and unambiguous, interpretation of those terms is a matter of law for the court." (*Town of Harrison v Natl. Union Fire Ins. Co*., 89 NY2d 308, 316 [1996] [citation omitted].) "A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." (*Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655 [2016] [internal quotation marks and citation omitted] [brackets in original].) "The existence of ambiguity is determined by examining the 'entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,' with the wording to be considered 'in the light of the obligation as a whole and the intention of the parties as manifested

thereby.'" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66-67 [1st Dept 2008], quoting *Kass v Kass*, 91 NY2d 554, 566 [1998].) "[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech." (*Mostow v State Farm Ins. Cos*., 88 NY2d 321, 326-27 [1996] [citations omitted].)

"[W]hen the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment." (*Ruttenberg v Davidge Data Sys. Corp*., 215 AD2d 191, 193 [1st Dept 1995] [internal quotation marks and citation omitted].) In such a case, "the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact." (*State v Home Indem. Co*., 66 NY2d 669, 671 [1985] [citations omitted].) "[I]f the tendered extrinsic evidence is itself conclusory and will not resolve the equivocality of the language of the contract, the issue remains a question of law for the court. Under those circumstances, the ambiguity must be resolved against the insurer which drafted the contract." (*Id*. [citations omitted]; *see also In re AXA Equit. Life Ins. Co. COI Litig*., 2022 WL 976266, *10, 2022 US Dist LEXIS 60920, *30 [SD NY, Mar. 31, 2022, No. 16-CV-740] ["the rule of *contra proferentem*. . . applies at summary judgment only where there is an ambiguity in the contract and neither side submits extrinsic evidence or a reasonable factfinder could not, as a matter of law, resolve an ambiguity in the drafter's favor by resort to extrinsic evidence"] [internal quotation marks and citations omitted].)

Under the foregoing standard, the court cannot resolve the parties' dispute as a matter of law. The Trust argues that AXA breached the Policy's "Changes in Policy Cost Factors" clause, which provides,

> "Changes in policy cost factors (interest rates we credit, cost of insurance deductions and expense charges) will be on a basis that is equitable to all policyholders of a given class, and will be determined based on reasonable assumptions as to expenses, mortality, policy and contract claims, taxes, investment income, and lapses. Any change in policy cost factors will never result in an interest crediting rate that is lower than that guaranteed in the policy, or policy charges that exceed the maximum policy charges guaranteed in the policy. Any change in policy cost factors will be determined in accordance with procedures and standards on file, if required, with the insurance supervisory official of the jurisdiction in which this policy is delivered."

(NYSCEF 54, Policy at 16 [emphasis added].) Specifically, the Trust asserts that the COI Adjustment was not "equitable to all policyholders of a given class" in violation of this provision. The Trust argues that "a given class" is unambiguous and means the rating class of Standard Non-Smoker. The Trust contends that (i) the only class assigned to Ms. Hobish in the Policy was the "rating class" of "Standard Non-Smoker;" (ii) the plain meaning of "given" is "stated, fixed or specified," relying on Dictionary.com, and the only class that was stated, fixed or specified was the "rating class" of "Standard Non-Smoker;" (iii) the presumption in contract interpretation that the same words used in different parts of a contract have the same meaning; and (iv) *Finest Invs. v. Sec. Tr. Co. of Rochester*, 96 AD2d 227, 230 (4th Dept 1983), *affd* 61 NY2d 897 (1984), which if applied here, requires a determination that the adjective "given," modifying the word class, relates back to the "rating class."

AXA maintains that "a given class" is a broader term, referring to any actuarially reasonable grouping of policies 'considered together for purposes of determining non-guaranteed charge of benefit[.]'." (NYSCEF 113, AXA mem of law in support of

summary judgment at 20, citing NYSCEF 126, Exhibit 12 to Larry Kranz, Esq. aff, Actuarial Standards Board, Actuarial Standards of Practice No. 2:*Nonguaranteed Charges or Benefits for Life Insurance Policies and Annuity Contracts* [§ 2.6].) Opposing the Trust's interpretation, AXA asserts that (i) a "given class" and a "rating class" are different terms used in different sections of the Policy and must be presumed to have different meaning, concluding that if these terms had the same meaning, there would be no reason to use these different terms instead of using only one of them; and (ii) federal precedent, involving similar facts, holds that a COI adjustment must be made "on a class basis," and "class" cannot be interpreted to mean "the Insured's sex, attained age and premium class" based on which the COI had to be calculated.

On the motion to dismiss, the court held that "[a]t best, the Policy's terms regarding insured's class are ambiguous" because (i) the Policy does not define the term "a given class" for which AXA is contractually permitted to raise COI rates; and (ii) as to classifying Ms. Hobish, the Policy only mentions her "rating class" of "Standard Non-Smoker," and does not address whether, when or how she can be classified or reclassified. (NYSCEF 49, Decision and Order [mot. seq. no. 1] at 8.) On this summary judgment motion, the parties have not given the court a reason to depart from its earlier holding as there are two reasonable interpretations of "a given class." The phrase "given class" is ambiguous because it can reasonably be interpreted as a rating class of Standard Non-Smoker or the broader, any other class that will be given. (*See In re Axa Equit. Life Ins. Co. Coi Litig*., 2022 US Dist LEXIS 60920, at *22 ["[g]iven these competing interpretations, the Court concludes that the term "given class" is ambiguous."].)

Both parties present extrinsic evidence to support their interpretation, but neither side's extrinsic evidence concretely demonstrates the equivocality of the Policy's use of "a given class."

In support of its interpretation of "a given class," AXA submits: (i) the "no objection" letter from the New York State Department of Financial Services as to the classes being used for the COI Adjustment (*see* NYSCEF 123, DFS Letter); (ii) New York Insurance Regulation 210 that defines "class of policies" as "all policies with similar expectations as to anticipated experience factors that are grouped together for the purpose of determining non-guaranteed elements" (11 NYCRR 48, § 48.1 [e]); (iii) the Actuarial Standard of Practice (ASOP) that defines a "policy class" as "[a] group of policies considered together for the purposes of determining a nonguaranteed charge or benefit" (ASOP § 2.6); and (iv) two expert opinions supporting that "a given class" refers to any actuarially permissible class of policies. (NYSCEF 216, Mills Report ¶ 36; NYSCEF 197, Pfeifer Report ¶¶ 95-105.) The Trust also submits AXA's May 3, 2007 and June 15, 2007 Illustrations, which state that "[t]he policy charges illustrated have been calculated assuming this policy is issued on the Standard Non-Tobacco User underwriting class." (NYSCEF 21, May 3, 2007 Illustration at 4; NYSCEF 20, June 15, 2007 Illustration at 5.) This extrinsic evidence does not resolve the issue as a matter of law. Summary judgment is therefore inappropriate, and the determination of meaning of "given class" must be left to the trier of fact.

The Trust also argues that AXA's extrinsic evidence is not admissible because the evidence presented were not known to Ms. Hobish and the Trust so they cannot evidence the parties' intent. The Trust relies on *Kenavan v Empire Blue Cross & Blue*

Shield, 248 AD2d 42 (1st Dept 1998); however, *Kenavan* is distinguishable. The *Kenavan* Court found the other policies issued by the insurer inadmissible because such policies "do not reflect the 'meeting of minds' of the two parties to the instant insurance contracts." (*Id.* at 48.) Here, however, AXA does not rely on other policies to ascertain the meaning of "a given class." Instead, AXA offers admissible evidence of custom and usage. (*See Intl. Multifoods Corp. v Commercial Union Ins. Co*., 309 F3d 76, 87 [2d Cir 2002] ["because the contract is facially ambiguous, the District Court may consider any evidence that is probative of the parties' intent, including parol evidence and evidence of custom and usage]; *see also In re Axa Equit. Life Ins. Co. Coi Litig*., 2022 US Dist LEXIS 60920 at *23 ["the Court must treat AXA's evidence of custom and usage as extrinsic evidence"].)

The Trust also cites *Mostow* and *Michaels v City of Buffalo*, 85 NY2d 754 (1995), for the proposition that construction of an ambiguous policy must be based on understanding of an average person. *Mostow*, however, is silent on the question of construction of an ambiguous policy; it only states that "the test to determine whether an insurance contract is ambiguous focuses on reasonable expectations of an average insured." (*Mostow*, 88 NY2d at 327-27.) *Michaels* is distinguishable because it did not involve the review of extrinsic evidence.

Additionally, the Trust cites several cases for the proposition that all ambiguities in an insurance policy must be construed against the insured, but this doctrine "does not entitle them to summary judgment where, as here, there is relevant extrinsic evidence of the parties' intent which must be weighed by the factfinder at trial." (*In re Axa Equit. Life Ins. Co. Coi Litig*., 2022 US Dist LEXIS 60920, at *33.).

Finally, AXA argues that the court must (i) interpret “a given class” in a "neutral manner” because “a given class” is derived from Insurance Law § 4232 (b) (4) and was not drafted by AXA (*Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 804 [2015]), and (ii) based on neutral interpretation, grant summary judgment in its favor. AXA, however, failed to proffer any admissible evidence to show that neutral interpretation is warranted.

“[A] policy provision mandated by statute must be interpreted in a neutral manner consistently with the intent of the legislative and administrative sources of the legislation.” (*Id*.; *see also Fleisher v Phoenix Life Ins. Co*., 18 F Supp 3d 456, 479 [SD NY 2014] [absent any explanation in the policy as to the term used therein, the court is guided by a nearly identical language in New York Insurance Law].)

The pertinent language of the Policy reads as follows: “[c]hanges in policy cost factors (interest rates we credit, cost of insurance deductions and expense charges) will be *on a basis that is equitable to all policyholders of a given class.*” (NYSCEF 54, Policy at 11 [emphasis added].) AXA claims to have derived this Policy language from Insurance Law § 4232 (b) (4), which reads, in pertinent part, as follows: “[a]ny such additional amounts [credited to the policy] shall be credited *on a basis equitable to all policyholders of a given class*.” (Insurance Law § 4232 [b] [4] [emphasis added].)

Although the language of the Policy provision in question and that of Insurance Law § 4232 (b) (4) are seemingly similar, AXA did not proffer any “evidentiary proof in admissible form” showing that AXA in fact derived “a given class” from the statute. (*Wells v Monsen*, 7 AD3d 518, 519 [2d Dept 2004]; *see also* CPLR 3212 [b].) Instead, AXA relies solely upon its motion papers. (*see* NYSCEF 113, AXA Brief at 21; NYSCEF

188, AXA Reply at 8; NYSCEF 178, AXA Opp. at 10), which are "not in admissible form." (*Wells*, 7 AD3d at 519 [citations omitted]; *see also Mastro v Mastro*, 112 AD2d 203, 203 [2d Dept 1985] [stating that motion papers are inadequate where they lack affidavit of party with personal knowledge of underlying facts of action].)

All remaining arguments have been considered and are inapplicable or without merit. Further, the court did not consider any arguments raised for the first time on reply in either motion as they are improper. The motion is denied.

Motion Seq. No. 004

Breach of Contract Claim

AXA moves for summary judgment in its favor, dismissing the Trust's breach of contract cause of action. For the reasons stated above, the court finds summary judgment is inappropriate as an issue of fact exists.

Compensatory and Consequential Damages – Breach of Contract Claim

AXA moves for partial summary judgment dismissing the Trust's claim for compensatory and consequential damages. AXA argues that the claim for damages representing the $2 million value of the Policy minus the surrender payment must fail because (i) the Trust gave up any contractual right to receive the Death Benefit by surrendering the Policy; (ii) the Trust's attempt to avoid this result by claiming that it was forced to surrender the Policy is a legal fiction; (iii) the Policy's value upon surrender is the surrender value, not the face amount; and (iv) this damage theory violates a plaintiff's duty to mitigate damages and the principle that a plaintiff cannot recover damages it has brought upon herself.

"Damages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position as it would have been had the contract been performed." (*Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assoc., P.C*., 91 NY2d 256, 261 [1998].) The non-breaching party's "recovery is limited to the loss it actually suffered by reason of the breach." (*Inchaustegui v 666 5th Ave. LP*, 96 NY2d 111, 116 [2001] [citations omitted].) The court notes that it is procedurally proper to bring a motion for summary judgment "seeking dismissal of claims for specified and distinct categories of damages." (*Koch v Consol. Edison Co*., 62 NY2d 548, 560 [1984] [citations omitted]; *see also* CPLR 3212 [e].)

The Trust's claim for damages fails as a matter of law. As a preliminary matter, the parties conceded that all insurance coverage under the Policy ended as of the date of the Policy surrender in July 2016. (NYSCEF 111, JSUF ¶ 56.) The Trust maintains that it expects evidence to show that the Trust is entitled to compensatory and consequential damages of at least $1,587,311.99, i.e., "the value of the Policy at the time of AXA's breach of the Policy in October 2015, offset by the subsequent return of funds in the Policy Account in July 2016." (NYSCEF 130, Interrogatories at 16.) The Trust states that the Policy was worth the face value of $2 million minus the Policy Account funds returned to plaintiffs and minus any additional payments to AXA that would have had to have been made during the life expectancy of Ms. Hobish. (*See id*.)

Such damages, however, do not relate to any actual harm that resulted from AXA's alleged breach. Instead, the record shows that the Trust's beneficiaries ran financial calculations when considering whether to "Keep the Policy and Pay the Expanses Premium" or "Surrender the Policy and Invest the Funds" (NYSCEF 215,

Emails at 6-7), and voluntarily decided to surrender the Policy and forgo the insurance coverage and the $2 million Death Benefit. (*See* NYSCEF 120, Richard depo at 177-78 [when asked "[t]he Trust didn't have to surrender the policy, correct?" answered "[a]s a matter of law, no"].)

In opposition, the Trust argues that an insured whose policy has been materially breached can elect to treat the policy as terminated and sue for the policy value and cites authority that endorses the method of calculating damages used. However, under the cited authority, recovery of a policy's face value is allowed only where (i) the policy has been wrongfully cancelled by an insurer or foregone by a third party, and (ii) the insured has ceased to be insurable. (*See Conlew, Inc. v Kaufmann*, 269 NY 481, 487-88, 491 [1936] [discussing the measure of damages payable by the third party that breached the obligation to prevent lapsing of the policy through non-payment, and stating that where "the assured has died or is not insurable, the value of the policy lost furnishes the basis for computing actual damage"] [citations omitted]; 17 Rickard A. Lord, Williston on Contracts § 49:139 (4th ed) ["the proper measure of damages for wrongful cancellation of insurance contracts is an amount that will reimburse the insured for the loss. . . . Stated most generally . . . are those cases recognizing that the proper measure is the value of the policy where the insured has ceased to be insurable."]; *Cont. Assur. Co. v Supreme Constr. Corp.*, 375 F2d 378, 384 [5th Cir 1967] [applying Texas law] ["insured whose policy is wrongfully cancelled may . . . sue for damages . . .; the measure is the face value of the policy less interest according to the insured's life expectancy and less the premiums required to keep the policy in effect during the

insured life expectancy."].[2]) Here, the record does not support the proposition that AXA wrongfully cancelled the Policy. Instead, the record shows that the Trust voluntarily surrendered it.

GBL § 349 (h)

AXA moves to dismiss the GBL § 349 cause of action. In particular, AXA argues that plaintiffs cannot establish causation because neither Ms. Hobish nor Diamond, as Trustee, read the Policy, and thus there was no exposure to the alleged misrepresentation.

"To successfully assert a section 349 (h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading, and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." (*City of New York v Smokes-Spirits.Com, Inc*., 12 NY3d 616, 621 [2009].) A plaintiff cannot establish causation absent any exposure to the alleged deceptive act. (*See Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc*., 172 AD3d 405, 406 [1st Dept 2019] [citation omitted].)

Here, plaintiffs allege that Levy made the misrepresentations to Ms. Hobish. Thus, whether Ms. Hobish read the Policy is not relevant to those allegations

Compensatory, Consequential and Restitutionary Damages – GBL Claims

AXA moves for partial summary judgment dismissing the claim for damages above $50. AXA argues that plaintiffs' first claim for damages representing the value of the Policy at the time of the alleged breach, *i.e*., $1,587,311.99, must fail because it is

[2] The second requirement that the insured has ceased to be insurable is not present in *Cont. Assur. Co*., 375 F2d 378.

impermissibly duplicative of, and suffers from the same flaws as the claim for damages on the breach of contract cause of action.

Under GBL § 349 (h), plaintiff may recover actual damages or $50, whichever is greater. (GBL § 349 [h].) For substantially the same reasons as the court articulated as to the claim for compensatory and consequential damages on the breach of contract cause of action, this claim for damages fails as a matter of law.

Further, AXA argues that plaintiffs' second claim for restitutionary damages (i) is speculative; (ii) contradicts the Policy's language; (iii) runs afoul of the principle of double recovery; and (iv) is not viable because restitutionary damages are awarded where there are improper profits, which is not the case here because AXA already paid the Trust the Policy Account balance less the surrender charge.

"[T]here is no actual injury where alleged injuries are solely the result of a perceived and speculative risk of future injury that may never occur." (*Michelo v Natl. Coll. Student Loan Trust 2007-2*, 419 F Supp 3d 668, 709 [SD NY 2019] [internal quotation marks and citation omitted].)

Plaintiffs' claim for restitutionary damages fails as a matter of law. Plaintiffs state that they expect the evidence to show that they are entitled to restitutionary damages of $253,295.38 representing the amount of the Policy Account in November 2015 ($502,640) offset by the amount that would have been withdrawn from the Policy Account during the four years of Ms. Hobish's life expectancy to November 2019 ($249,354.62) (*see* NYSCEF 130, Interrogatories at 18),[3] i.e., a speculative amount that

[3] Ms. Hobish was alive when plaintiffs prepared this calculation. The responses to interrogatories are dated August 16, 2019. (*See* NYSCEF 130, Interrogatories at 19.) Ms. Hobish passed away in September 2019. (*See* NYSCEF 87, Cert. of Appointment.)

would have been left on the Policy Account upon Ms. Hobish's hypothetical death had the Trust not surrendered the Policy. Yet, even if the Trust had kept the Policy, it would not have been entitled to the Policy Account balance because it chose Option A, under which the Policy Account balance was not returned upon insured's death. (*See* NYSCEF 111, JSUF ¶ 37; NYSCEF 54, Policy at 6.) Moreover, the Trust already received the Policy Account balance less the surrender charge upon the Policy's surrender in July 2016. (*See* NYSCEF 111, JSUF ¶ 55.)

Punitive Damages

Plaintiffs seek punitive damages "in an amount to be determined at trial, but reasonably expected to be at least $ 12 million" under each the breach of contract claim and the GBL § 349 (h) claim. (NYSCEF 130, Interrogatories at 17-18.)

Plaintiffs' allegations and submissions are inadequate, as a matter of law, to establish their entitlement to punitive damages on the breach of contract claim. Plaintiffs do not allege, and the record fails to show that AXA's committed an independent tort,[4] *e.g.*, "fraudulently induced the plaintiff[s] to enter into a contract" or "engage[d] in conduct outside the contract but intended to defeat the contract." (*New York Univ.*, 87 NY2d at 316 [citations omitted]; *see also Channel Master Corp. v Aluminium Ltd. Sales, Inc*., 4 NY2d 403, 407 [1958] ["[t]he essential constituents of the action [based on fraudulent representations] are fixed as representation of a material existing fact, falsity, *scienter*, deception and injury.") For instance, while plaintiffs proffered evidence showing that AXA failed to put Ms. Hobish or the Trust on notice that

[4] This court also notes that plaintiffs did not assert any independent causes of action sounding in tort. (*See* NYSCEF 53, Amended Compl.)

it would "raise COIs if future expectations as to mortality materialized" (NYSCEF 160, Katcher depo at 178), any evidence of AXA's *scienter* is absent from the record. Neither does the record contain evidence of AXA's conduct "outside the contract but intended to defeat the contract." (*Channel Master Corp.*, 4 NY2d at 407.)

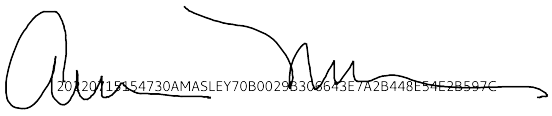
Accordingly, it is

ORDERED that plaintiff Richard Hobish's motion for partial summary judgment, on behalf of the Hobish Irrevocable Trust, Dated 1/22/96, is denied; and it is further

ORDERED that defendant AXA Equitable Life Insurance Company's motion for summary judgment is granted, in part, to the extent that plaintiffs' claims for compensatory, consequential, restitutionary, and punitive damages are dismissed; and it is further

ORDERED that motions in limine shall be filed within 30 days of the date of his decision and order; and it is further

ORDERED that the parties are to appear for a pretrial conference on August 11, 2022 at 3:30PM.



7/15/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**