

**NOTIFY**

3/21

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 13-2976-C

PAULA FRUMAN

v.

JAY PABIAN, PABIAN & RUSSELL, LLC, and JOANNE LUNN

v.

MITCHELL DOREN, SECURITAS FINANCIAL GROUP, LLC,  
and JOHN DOE as Special Personal Representative of the  
ESTATE OF JEFFREY FRUMAN

MEMORANDUM OF DECISION AND ORDER ON MOTION  
TO DISMISS PLAINTIFF PAULA FRUMAN'S CLAIMS  
AGAINST MITCHELL DOREN AND SECURITAS

This action arises from the untimely death of Jeffrey Fruman ("Jeffrey"), the late husband of plaintiff Paula Fruman ("Paula"). Shortly before Jeffrey's death, the defendants, life insurance broker Mitchell Doren ("Doren") and his company Securitas Financial Group, LLC ("Securitas"), with the assistance of the Frumans' estate planning attorney, Jay Pabian, and his law firm, Pabian & Russell, LLC (collectively "Pabian"), replaced Jeffrey's uncontestable life insurance with a policy that contained a two-year contestability period that was in effect at the time of Jeffrey's death. Paula has not received benefits under the new life insurance policy.

Doren and Securitas have now moved to dismiss Count Seven (aiding and abetting a breach of fiduciary duty) and Count Eight (negligent misrepresentation) of

Notice Sent 3-21-16

.PCD -PJD -BSP -JLS	.MM -SOB -WBS -SOG	.BG -R -REO	.LIL -JWC	.GSH -JAS .FH -RFD	.HLS -JHC .Tiw -MOS
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Paula's Second Amended Complaint.<sup>1</sup> For the reasons that follow, Doren and Securitas' motion to dismiss is denied.

### BACKGROUND

For purposes of the present motion, the court accepts as true all well-pleaded factual allegations of the complaint. See *Sisson v. Lowe*, 460 Mass. 705, 707 (2011).

In October 2010, Paula and Jeffrey retained Pabian as counsel to provide estate planning services. In 2011, Pabian undertook the task of re-drafting Jeffrey's will and trusts and creating a will and trust for Paula's estate. Pabian designated himself as a Personal Representative of Jeffrey's estate, and as a trustee of trusts that held assets belonging to Jeffrey and as to which Paula was the beneficiary. Pabian also made himself an alternate trustee on a trust he created for Paula's assets. With respect to Jeffrey's assets, Jeffrey and Paula indicated that in the event of Jeffrey's death, they intended for Paula to receive, *inter alia*, at least \$2 million in life insurance benefits.

The complaint alleges that during the course of his representation, Pabian and his firm committed legal malpractice by providing inaccurate advice and representing Paula and Jeffrey as joint clients in a manner that served only the interests of Jeffrey. Of particular relevance to the present motion, in 2011, Pabian recommended that Jeffrey replace his existing life insurance coverage, which had an expired contestability

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<sup>1</sup> These are the only two claims asserted against Doren and Securitas.

period and a policy limit of \$9 million, with a policy that carried a \$15 million limit, but which had a two-year contestability period, during which time the insurance carrier could deny recovery. Pabian never disclosed to Paula that the existing uncontestable life insurance policy would be altogether cancelled in favor of the new contestable insurance, or that Paula might be denied coverage under the new life insurance policy if Jeffrey died during the two-year contestability period.

In the Fall of 2012, Paula, Jeffrey, and Pabian met with Doren to discuss the replacement of Jeffrey's policy. During that meeting, Doren and Pabian told Paula that they were increasing the amount of life insurance coverage so that she would receive \$2 million in benefits instead of \$1 million in the event of Jeffrey's death. Doren assured Paula that the proposed policy recommended by Pabian offered only benefits and no detriments. Doren did not disclose to Paula the risk associated with replacing uncontestable insurance coverage with contestable insurance.

Doren and Securitas paid Pabian a commission of approximately \$27,945 in connection with the sale of Jeffrey's new life insurance policy. Neither Pabian nor Doren disclosed that Pabian had a financial interest in the transaction or that he would receive a commission. After receiving his commission, Pabian failed to make payments on the original uncontestable life insurance policy, causing it to lapse.

During the period of contestability, Jeffrey died suddenly in Hong Kong from adverse effects of illicit drugs. His life insurance carrier denied coverage. Thus, Paula

has not received any benefits under Jeffrey's new life insurance policy.

## DISCUSSION

A party moving to dismiss pursuant to Rule 12(b)(6) must demonstrate that the pleading fails "to state a claim upon which relief can be granted." Mass. R. Civ. P. 12(b)(6). To survive such a motion, "factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . ." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). At the pleading stage, the claimant is required to present "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect the threshold requirement . . . that the plain statement possess enough heft to show that the pleader is entitled to relief." *Iannacchino*, 451 Mass. at 637 (internal quotations omitted).

### **I. Aiding and Abetting Breach of a Fiduciary Duty (Count Seven)**

In Count Seven, the complaint alleges that Doren and Securitas aided and abetted Pabian in breaching his fiduciary duty by making, without adequate and accurate disclosure, kickback payments to Pabian for engaging in the replacement of Jeffrey's life insurance policy.

To hold the defendants liable for aiding and abetting a breach of fiduciary duty, the plaintiff bears the burden of proving that (1) there was a breach of fiduciary

duty; (2) the defendants knew of the breach, and (3) the defendants actively participated or substantially assisted in or encouraged the breach to the degree that the defendants could not reasonably be held to have acted in good faith. *Arcidi v. National Ass'n of Gov't Employees, Inc.*, 447 Mass. 616, 623-624 (2006). Paula's complaint alleges sufficient facts to support a claim that Doren and Securitas aided and abetted a breach of fiduciary duty. It alleges that Pabian breached his fiduciary duty by accepting a commission on the sale of Jeffrey's new life insurance policy. It also alleges that Doren knew Pabian owed a fiduciary duty to Paula in his capacity as her legal counsel and trustee, and that Doren knew that Pabian breached his duty by accepting the commission. The complaint further alleges that Doren and Securitas actively participated in the breach because they paid Pabian the commission and they failed to disclose the fact that Pabian would receive a commission when they met with the Frumans in the Fall of 2012.

Doren and Securitas' reliance upon *Spinner v. Nutt*, 417 Mass. 549 (1994), to argue that they should not be held liable for the acts of Jeffrey or Pabian, is misplaced. In *Spinner*, the Supreme Judicial Court declined to hold the trustees' attorney liable to the trust beneficiaries for aiding and abetting the trustees' breach of fiduciary duty. *Id.* at 556. The Court was concerned that concluding that the trustees' attorney owes a duty to not only the trustees, but also the trust beneficiaries, would result in "conflicting loyalties and impermissibly interfere with

the attorney's task of advising the trustee." *Id.* at 544-545. Such a concern is not present here, where the complaint alleges that both Jeffrey and Paula intended for Paula to receive \$2 million in life insurance benefits in the event of Jeffrey's death. Furthermore, while an attorney representing a trustee owes "a duty only to the trustee" and not the beneficiaries of the trust, see *id.* at 557, it is well settled that an insurance broker may be liable to the potential beneficiary of the insurance policy as well as the insured. See *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 192-193 (1982); see also *Flattery v. Gregory*, 397 Mass. 143, 150-151 (1986).

Finally, unlike in *Spinner*, Paula has asserted sufficient allegations to support her claim that Doren and Securitas actively participated in a breach of Pabian's fiduciary duty by improperly sharing a commission with Pabian, who is not a licensed life insurance producer, and by failing to disclose Pabian's financial interest in the transaction in order to facilitate the purchase of the new life insurance policy. *Contra id.* at 556 ("An allegation that the trustees acted under the legal advice of the defendants, without more, is insufficient to give rise to a claim that an attorney is responsible to third persons for the fraudulent acts of his clients."). Accordingly, Doren and Securitas' motion to dismiss Count Seven must be denied.

## II. Negligent Misrepresentation (Count Eight)

Count Eight alleges that Doren, acting for himself and Securitas, made false statements and omissions of material fact when describing to Paula that the proposed

change in life insurance offered only benefits and no detriments. Doren and Securitas argue that Count Eight should be dismissed because it does not state a cognizable claim and there is no basis under Massachusetts law to hold Doren liable for the consequences of Jeffrey's alleged misrepresentation.

In order to recover for negligent misrepresentation, a plaintiff must prove that the defendant, (1) in the course of his business, or in a transaction in which he had a pecuniary interest, (2) supplied false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by justifiable reliance on the information, and that he (6) failed to exercise reasonable care or competence in obtaining or communicating the information. *DeWolfe v. Hingham Ctr., Ltd.*, 464 Mass. 795, 799-800 (2013); see also *Cumis Ins. Soc'y Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 471 (2009). "A person who makes representations under circumstances in which he knows that the person receiving the representations will be relying on them, has a duty to exercise reasonable care in making the representations." *Golber v. BayBank Valley Trust Co.*, 46 Mass. App. Ct. 256, 258 (1999).

According to Doren and Securitas, Doren's statement that the proposed change in life insurance would offer only benefits and no detriments was not materially false because the replacement coverage offered higher limits at a lower cost, and Doren had no knowledge of Jeffrey's drug use or that it would lead to his

untimely death. Doren certainly did not need to foresee Jeffrey's untimely demise or know of his misrepresentations about his drug use. Indeed, no such duty is imputed upon Doren by the allegations contained within Count Eight. Rather, Count Eight alleges that Doren's statement was materially false because despite the higher policy limit and lower cost, the new policy carried a contestability period. If Jeffrey died during the contestability period and the contract was found voidable for fraud, Paula would forego receipt of any life insurance benefits, let alone the \$2 million that she expected to receive. Thus, the new contestability period clearly might be considered a "detriment," and any assurance by Doren that there was no detriment in replacing the insurance policy was materially false information provided in a business transaction. See *Welch v. Barach*, 84 Mass. App. Ct. 113, 120 n.11 (2013) ("A 'material' fact is one to which a reasonable person would attribute importance for his or her choice of action in the transaction at issue.") (internal citation omitted). The complaint further alleges that Paula justifiably relied upon this information, as Doren had superior knowledge by virtue of his position as a licensed life insurance broker. Paula has suffered pecuniary loss in that she has not received the \$2 million in life insurance benefits to which she believes she is entitled. These allegations, if accepted as true, are sufficient to allow her claim of negligent misrepresentation to survive this stage.

Doren and Securitas' argument that there is no legal basis to hold Doren liable



for the consequences of Jeffrey's alleged misrepresentations is the proverbial red herring. While Jeffrey certainly made misrepresentations of his own, Paula's claim seeks to hold Doren and Securitas liable for Doren's misrepresentation to Paula that there was no detriment to replacing Jeffrey's existing life insurance policy.<sup>2</sup>

Count Eight contains sufficient allegations to raise a right to relief above the speculative level. Accordingly, Doren and Securitas' motion to dismiss Count Eight must be denied.

**ORDER**

For the foregoing reasons, the Motion to Dismiss Plaintiff Paula Fruman's Claims Against Mitchell Doren and Securitas is **DENIED**.



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Peter M. Lauriat  
Justice of the Superior Court

Dated: March 21, 2016

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<sup>2</sup> To the extent Doren and Securitas contend that they owed no duty to Paula because she was not their client, the court does not agree for the reasons discussed above. Furthermore, aside from potentially owing a duty to Paula as the intended beneficiary of the insurance policy, Paula alleges that Doren owes her a duty of reasonable care because he made a representation in circumstances in which he knew that Paula would be relying on it.