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

PAUL M. PRUSKY, Individually and as Trustee, Windsor Retirement Trust, Plaintiff, v. PHOENIX LIFE INSURANCE COMPANY, Defendant.	: : : : : : : : : :	CIVIL ACTION No. 02-6010

MEMORANDUM AND ORDER

J. M. KELLY, J. MARCH , 2003

Presently before the Court is a Motion to Dismiss filed by Defendant Phoenix Life Insurance Company ("Phoenix" or "Defendant"), which seeks dismissal of all counts in the Amended Complaint filed by Plaintiff Paul M. Prusky ("Prusky" or "Plaintiff"), Prusky's Opposition memorandum, Phoenix's Reply, and Prusky's Sur-Reply, which was filed with this Court's permission. A diversity action, Prusky's Amended Complaint alleges that Phoenix failed to fulfill its obligations to him as expressed in a written memorandum from Phoenix and as implied in the parties' course of performance, and asserts claims for injunctive and declaratory relief and damages under various theories, including: breach of contract; equitable estoppel; Pennsylvania's Unfair Trade Practices and Consumer Protection Law violations, 72 Pa. Stat. § 201-1 et seq. ("UTPCPL"); insurance company bad faith within the meaning of 42 Pa. Cons. Stat. Ann. § 8371; fraud; and negligent misrepresentation. For the following reasons, Phoenix's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

Accepting as true the facts alleged in Prusky's Amended Complaint and all reasonable inferences that can be drawn therefrom, the facts of this case follow.

Prusky, a Pennsylvania citizen, is the sole trustee and beneficiary of the Windsor Retirement Trust (the "Trust"). Prusky, as trustee of the Trust, is the owner of a Phoenix Estate Edge Variable Universal Life Insurance Policy (the "Policy") dated February 10, 1999.[1] Prusky and his wife, Susan Prusky, are the insureds under the Policy, which is a "second-to-die" life insurance policy such that the death benefit under the policy becomes payable upon the death of the later to die of the two insureds. The face amount of the Policy is $10 million, and the cash surrender value of the investment is in excess of $100,000.00.

[1] Phoenix is a life insurance company organized under the laws of the State of New York and maintains its headquarters in Hartford, Connecticut. Phoenix is the corporate successor to Phoenix Home Mutual Life Insurance Company, which originally issued the Policy. For ease of reference, "Phoenix" will be used interchangeably throughout this opinion as referring to both Phoenix Life Insurance Company and Phoenix Home Mutual Life Insurance Company.

A. Variable Universal Life Account

A substantial portion of the Policy is held by Phoenix in an account called the Variable Universal Life Account (the “VUL Account”). The VUL Account is a unit investment trust under the Investment Company Act of 1940 (the “Act”) and meets the Act’s definition of a “separate account.” The VUL Account is divided into subaccounts (the “VUL subaccounts” or “subaccounts”), each of which is available for allocation of policy value. Each of these subaccounts invests solely in shares of a corresponding series of mutual funds, which have a designated, distinct investment objectives. Any policy value allocated to the VUL Account will depend on the investment performance of the underlying fund. The Policy permits its owner to transfer invested values between and among the subaccounts.

B. Prusky Pre-Purchase Investigation

Approximately eight months before Prusky purchased the Policy, Prusky asked Joseph A. Darracq (“Darracq”), his broker/agent, to ask a Phoenix representative about certain issues related to the transfer of funds among the subaccounts, including: (1) whether Phoenix would allow unlimited transfers of funds between available subaccounts; (2) whether Phoenix would accept phone and faxed subaccount transfer requests; (3) whether Phoenix would allow an authorized investment advisor to phone or fax subaccount transfer requests on behalf of an insured; and (4) whether Phoenix would accept transfers after 4:00 p.m. E.S.T.

On June 10, 1998, Paula Ingalls (“Ingalls”), Director of Phoenix Variable Products, responded to Darracq’s inquiries by written memorandum (“June 10, 1998 Memorandum” or “Memorandum”). As to inquiry (1), which relates to unlimited transfers of funds, Ingalls responded that “Phoenix will allow unlimited sub-account transfers.” (Memorandum from Ingalls to Darracq dtd. 6/10/98.) On or shortly after June 10, 1998, Darracq forwarded this Memorandum to Prusky. In reliance, in part, on the representations contained in the Memorandum, on or about February 17, 1999, Prusky completed an Application for Life Insurance (“Application”) and purchased the Policy. The form Policy, however, provided that: “[Phoenix] reserve[s] the right to limit the number of transfers You may make . . . .” (Policy at 12.) Nevertheless, Prusky understood Phoenix’s June 10, 1998 Memorandum as becoming a part of the contractual agreement between the parties, superseding any provisions to the contrary contained in the form Policy.

C. Parties’ Performance Under the Policy

Sometime after the Policy issue date of February 10, 1999, one or more unnamed representatives of Phoenix confirmed to Darracq that Phoenix would not restrict Prusky’s subaccount transfer activities. Prusky made one or more premium payments in reliance upon that unnamed representative’s acknowledgment that Phoenix would not restrict subaccount transfers.

The Policy was delivered to Prusky and became effective on or about March 17, 1999. Prusky invested a premium payment into the Policy on March 24, 1999, and another premium payment on or about April 9, 1999. Prusky began making transfers among the subaccounts on or about April 15, 1999. For over the next three years, Phoenix honored Prusky’s transfers among the subaccounts, which occurred, at times, even on a daily basis.

On or about April 15, 2000, approximately one year from the date that Prusky first began trading among the subaccounts, Phoenix notified Prusky, either directly or through Darracq, that it intended to restrict subaccount transfers. Prusky objected, either directly or through Darracq, that Phoenix had committed not to restrict subaccount transfers and submitted a copy of the June 10, 1998 Memorandum to Phoenix. Phoenix appeared to abandon its attempt to restrict Prusky’s transfers among the subaccounts, and Prusky continued to make transfers on a frequent basis.

Almost two years later, in January 2002, Phoenix again notified Prusky, either directly or through Darracq, that it intended to limit his trading activities. Prusky again objected to this limitation and submitted a copy of Phoenix’s June 10, 1998 Memorandum. Phoenix made no further attempt to restrict his subaccount transfers, and Prusky continued thereafter to make transfers on a frequent basis.

On or about July 9, 2002, Phoenix notified Prusky that it intended to limit the number of trades on Prusky's subaccounts. In one or more communications with Phoenix, Prusky again objected and brought to Phoenix's attention the June 10, 1998 Memorandum. On July 15, 2002, Phoenix refused to process a transfer instruction from Prusky, and, by letter, informed Prusky that it would only accept "2 trades in any rolling 30 day period." (Ltr. from James G. Harrigan, Jr., Manager, Variable Universal Life Administration to Prusky dtd. 7/15/02.) Since the July 15, 2002 letter, Phoenix has refused to process transfer requests from Prusky that exceed the limitation of two trades in any rolling 30-day period. In response, Prusky initiated the instant litigation on July 30, 2002.

D. Prusky's Claims Against Phoenix

On September 20, 2002, Prusky filed a seven-count Amended Complaint alleging that he is entitled to relief for the following causes of action. Count I seeks injunctive relief, specific performance or a declaration that Phoenix must allow unlimited transfers. Count II alleges that the refusal to allow unlimited transfers constitutes a breach of contract. Count III raises a claim for equitable estoppel and seeks to estop Phoenix from exercising its contractual right to limit trading. Count IV avers that Phoenix's decision to limit Prusky's trading activity violates Pennsylvania's UTPCPL, 72 Pa. Stat. Ann. § 201-1 et seq. Count V alleges that Phoenix's decision to limit trading amounts to bad faith within the meaning of 42 Pa. Cons. Stat. Ann. § 8371. Counts VI and VII allege that the precontractual statement about permissible trading activity contained in the June 10, 1998 Memorandum constitutes fraud or negligent misrepresentation.

II. STANDARD OF REVIEW

As a federal court sitting in diversity, we must adjudicate the case in accordance with applicable state law. Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938); Nationwide Mut. Ins. Co. v. Cosenza, 258 F.3d 197, 202 (3d Cir. 2001). Both parties agree that Pennsylvania law governs the substance of this dispute. Procedurally, however, this case is governed by federal law. Hanna v. Plumer, 380 U.S. 460, 473-74 (1965).

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of a complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). We therefore accept all factual allegations in the complaint as true and give the pleader the benefit of all reasonable inferences that can be fairly drawn therefrom. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). We are not, however, required to accept legal conclusions either alleged or inferred from the pleaded facts. Kost, 1 F.3d at 183. In considering whether to dismiss a complaint, courts may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to a complaint. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994). A court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

Since Phoenix seeks dismissal of every count contained in Prusky's Amended Complaint, the Court will now address each in turn.

A. Breach of Contract Claim

Phoenix argues that it has an unfettered right to limit transfers among subaccounts because the Policy, on its face, reserves that right to Phoenix,[2] and that the language of the

[2] Phoenix contends that trade restrictions are established to prevent insureds from engaging in a practice known as "market timing." As explained by one district court, "market timing" is "a method of securities trading which involves major transfers into and out of the various investment portfolios sometimes within hours." First Lincoln Holdings, Inc. v. The Equitable Life Assurance Society, 164 F. Supp. 2d 383, 385

Policy and Application exclude any representations outside the form Policy.

Prusky, however, contends that, under Pennsylvania law, the parties may orally or by conduct modify a written agreement, even if it purports to require amendments to be in writing. Prusky also alleges that the parties' consistent course of performance under a contract is admissible to show what the parties intended their contract to mean, and that Phoenix's post-contractual conduct for over three years constituted ratification of its promise to allow unlimited sub-account transfers.

1. Express Policy Provisions

Phoenix asserts that the Policy expressly allows Phoenix to limit trading among subaccounts:

> You may transfer all or a portion of this policy's value among one or more of the Subaccounts of the Separate Account and the unloaned portion of the Guaranteed Interest Account. <u>We reserve the right to limit the number of transfers You may make</u>, however You can make up to six transfers per contract year from Subaccounts of the Separate Account and only one transfer per contract year from the unloaned portion of the Guaranteed Interest Account . . . .

(Policy at 12 (emphasis added).) Phoenix also asserts that the written Policy is the total embodiment of the parties'

(S.D.N.Y. 2001), <u>aff'd</u> 43 Fed. Appx. 462 (2d Cir. 2002). The Third Circuit has also broached the subject of market timing practices in a separate matter that also involved Prusky. <u>See Windsor Securities, Inc. v. Hartford Life Ins. Co.</u>, 986 F.2d 655 (3d Cir. 1993).

entitlements as indicated by the presence of an integration clause:

> This policy and the written application of the policyholder, a copy of which is attached to and made a part of the policy, are <u>the entire contract between You and Us</u>. Any change in the provisions of the contract, to be in effect, must be signed by one of Our executive officers, and countersigned by Our registrar or one of Our executive officers.

(Policy at 3 (emphasis added).) Phoenix further claims that the intent to exclude any precontractual representations is further buttressed by a statement contained in the Application:

> I understand that . . . no statement made to, or information acquired by any producer who takes this application, shall bind the Company unless stated in Part I and/or Part II of this application . . . .

(Application at 5.)[3]

Contracting parties may acknowledge their intent that the written contract serve as the final embodiment of the parties' obligations by including an integration clause. <u>See</u> <u>HCB Contractors v. Liberty Place Hotel Assoc's.</u>, 652 A.2d 1278, 1280 (Pa. 1995). However, it is well-settled Pennsylvania law that where prior fraudulent representations are alleged regarding a

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[3] Since both the Application and Policy were attached to Prusky's Amended Complaint, this Court will consider these exhibits in deciding Phoenix's instant Motion to Dismiss without converting it into one for summary judgment. <u>See</u> Fed. R. Civ. P. 12(b); <u>Rossman v. Fleet Bank Nat'l Ass'n</u>, 280 F.3d 384, 388 n.4 (3d Cir. 2002) ("Exhibits attached to the complaint and upon which one or more claim is based are appropriately incorporated into the record for consideration of a 12(b)(6) motion.") (citation omitted).

subject that was specifically dealt with in a written contract, the party alleging such representations must, under the parol evidence rule, also aver that the representations were fraudulently or by accident or mistake omitted from the integrated written contract. Id. at 1279 (citing Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968)).[4]

In the instant matter, despite the presence of an integration clause in the Policy, Prusky contends that due to

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[4] In the oft-cited case, Gianni v. R. Russell & Co., Inc., the Pennsylvania Supreme Court explained:

> Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract . . . and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence.
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> The writing must be the entire contract between the parties if parol evidence is to be excluded and to determine whether it is or not the writing will be looked at and if it appears to be a contract complete within itself couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing.

Gianni v. R. Russell & Co., Inc., 126 A. 791, 792 (Pa. 1924) (citations omitted); accord Mellon Bank Corp. v. First Union Real Estate Equity and Mortgage Investments, 951 F.2d 1399, 1405 (3d Cir. 1991) ("Pennsylvania courts still rely upon Gianni's definitive statements of Pennsylvania's parol evidence rule.") (citations omitted).

Phoenix’s misrepresentation or fraud, the June 10, 1998 Memorandum did become a part of the subsequent contractual agreement between the parties and supersedes any express provision to the contrary contained in the form Policy. Since Prusky contends that he relied upon the fraudulent statements contained in Phoenix’s Memorandum in purchasing the Policy, he makes out a claim for breach of contract in accordance with Pennsylvania’s parol evidence rule. Moreover, as discussed below, Prusky’s allegations relating to the parties’ course of performance for over three years further belie the express terms of the Policy. Thus, viewing the facts and all reasonable inferences therefrom in the light most favorable to Prusky, dismissal is not proper since he states a claim for breach of contract.[5]

2. Parties’ Course of Performance

Next, Prusky supports his breach of contract claim by demonstrating that, for over three years, Phoenix permitted Prusky to make unlimited transfers, as frequently as daily. Prusky further alleges that Phoenix twice acquiesced when presented with its July 10, 1998 Memorandum permitting unlimited

[5] In accordance with Federal Rule of Civil Procedure 9(b), a claim of fraud must state with particularity the circumstances which give rise to that claim. Fed. R. Civ. P. 9(b). The sufficiency of Prusky’s averments of fraud are addressed below.

transfers among subaccounts. Not until July 15, 2002, at which time Phoenix limited Prusky to two trades in any 30-day period, did Phoenix first refuse to honor Prusky's transfer requests. While Phoenix claims that permitting Prusky's frequent trades, and then restricting them, was within its contractually-prescribed discretion, Phoenix's apparent disparate course of performance for over three years gives this Court pause to follow Phoenix's suggestion that we limit our review to the written Policy only.

Under Pennsylvania law, the parties' course of performance under the contract is relevant in interpreting a writing. Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 n.6 (Pa. 1978). In Atlantic Richfield, the Pennsylvania Supreme Court determined that "[t]he parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 n.6 (Pa. 1978).[6] The Pennsylvania Supreme Court's reasoning is instructive and, applied to the instant matter, we agree that the parties' course of performance under the Policy supports Prusky's breach of contract claim.

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[6] In that case, Pennsylvania's highest court determined that, despite the express terms of the contract indicating that it was a lease agreement, upon review of the parties' course of performance pursuant to that contract, it was apparent that the contract was, indeed, a franchise agreement that afforded the franchisee more rights than those enumerated in the lease agreement. Id. at 740-741.

Phoenix, however, relies largely on the analysis expressed in First Lincoln Holdings, Inc. v. Equitable Life Assurance Soc'y, 164 F. Supp. 2d 383 (S.D.N.Y. 2001), aff'd 43 Fed. Appx. 462 (2d Cir. 2002) in support of its motion to dismiss Prusky's breach of contract claim. In First Lincoln, plaintiff investment company First Lincoln sued defendant insurance company Equitable for, inter alia, breach of contract, and moved for an order to show cause for a preliminary injunction compelling Equitable to accept transfer requests in large amounts from one fund to another via telephone, fax and other electronic means so that it may engage in market timing. First Lincoln, 164 F. Supp. 2d at 385. In accordance with the written prospectus, contract and correspondence, any conduct relating to market-timing was prohibited, such as "round-trip" transfers of funds (investments into and out of the fund taking place within 24 hours), and all trades were subject to the limitations of a "five-day" rule, which prohibited the fund transfers into and out of a particular investment option within a five-day period.[7] Id. at 387. The

[7] Within weeks of Equitable's approval of First Lincoln's application, First Lincoln engaged in round-trip transfers. Id. at 388. Equitable immediately addressed First Lincoln's activity in the form of a letter that was followed a week later by a meeting of the parties. Id. After First Lincoln's transfer privileges were restored, First Lincoln again engaged in large and rapid trades, resulting in multiple, successive letters from Equitable informing him that he was engaging in prohibited trading. Id. When Equitable finally limited First Lincoln's transfer requests to regular mail, First Lincoln filed its lawsuit against Equitable. Id.

court in First Lincoln dismissed the plaintiff's complaint based on the express and unambiguous terms of the parties' contract. Id. at 393.

The instant matter, however, is easily distinguishable from First Lincoln. Decided under New York law, the defendant insurance company in First Lincoln acted swiftly and consistently with its written documents by notifying the plaintiff immediately after it had violated the trading restrictions, which conduct eliminated the need for that court to engage in a course of performance analysis. This is not so in the instant case, viewing the facts in the light most favorable to the non-moving party. It appears from Prusky's allegations that Phoenix's conduct conflicted with the Policy, as Phoenix took over three years to demand Prusky's compliance with the trade restrictions contained therein. Thus, we cannot conclude that no set of facts plead by Prusky states a claim for breach of contract.[8]

B. Equitable Estoppel Claim

Phoenix contends that equitable estoppel is not a viable

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[8] Prusky, in his Opposition, urges this Court to apply the doctrine of necessary implication, which precludes one party to a contract from taking actions to frustrate the purposes of the other party in entering into the contract, to prohibit Phoenix from invoking its right to limit trades under the Policy. See Frickert v. Deiter Bros. Fuel Co., Inc., 347 A.2d 701, 705 (Pa. 1975). As this Court has determined that Prusky has, for the purpose of disposing of this motion, stated a claim for breach of contract, we need not reach this issue.

cause of action, but, instead, should be raised as either an affirmative defense or as grounds to prevent the defendant from raising a particular defense.

Equitable estoppel, as defined by the Pennsylvania Supreme Court, is a doctrine sounding in equity “that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect.” Kreutzer v. Monterey County Herald Co., 747 A.2d 358, 361 (Pa. 2000). However, neither Pennsylvania law nor the United States Court of Appeals for the Third Circuit recognizes equitable estoppel as a separate cause of action. See, e.g., Carlson v. Arnot-Ogden Mem. Hosp., 918 F.2d 411, 416 (3d Cir. 1990) (noting that under Pennsylvania law, “Equitable estoppel is not a separate cause of action.”); Graham v. Pennsylvania State Police, 634 A.2d 849, 850 (Pa. Commw. Ct. 1993) (“. . . equitable estoppel . . . has only been recognized as a defense and not as a cause of action in itself.”); Weiland v. DeFrancisis, 28 Pa. D & C. 4th 129, 133 (Pa. Com. Pl. 1996) (“. . . equitable estoppel is not an independent cause of action . . . .”). Accordingly, this Court must also conclude that Prusky’s equitable estoppel claim, as a matter of law, is not viable as an independent cause of action, and we dismiss Count III of his Amended Complaint.

C. Insurance Bad Faith Claim

Phoenix next argues that it acted appropriately pursuant to the terms of the Policy and that Prusky cannot establish, as a matter of law, that it acted in bad faith. Phoenix also contends that it was acting in good faith towards all of its insureds by limiting the deleterious effects of Prusky's frequent subaccount transfers on the overall performance of a fund. Prusky argues, however, that whether Phoenix acted in bad faith is a question of fact, and that Phoenix cannot point to anything in his Amended Complaint that establishes as a matter of law that it could not have acted in bad faith.

To recover under a bad faith claim pursuant to 42 Pa. Cons. Stat. § 8371,[9] an insured must show: (1) that the insurer did not have a reasonable basis for denying benefits under the policy; and (2) that the insurer knew or recklessly disregarded its lack

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[9] Pennsylvania's insurance company bad faith statute provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
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> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. § 8371.

of reasonable basis in denying the claim. Keefe v. Prudential Property & Cas. Ins. Co., 203 F.3d 218, 225 (3d Cir. 2000), citing Terletsky v. Prudential Property & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994), alloc. denied, 659 A.2d 560 (Pa. 1995).

While Phoenix contends that it is acting in good faith towards all of its insureds by prohibiting market timing trading, we must determine whether Prusky's factual allegations are sufficient to support a cognizable insurance company bad faith claim, as applied to him. As discussed above, however, the very terms of the Policy that Phoenix relies upon in its defense are at issue in the instant matter. When the facts are viewed in the light most favorable to Prusky, we must conclude that his insurance bad faith claim survives Phoenix's instant motion to dismiss.

D. Misrepresentation Claims

1. Statute of Limitations

Phoenix argues that Prusky's misrepresentation claims are time-barred by the applicable two-year statute of limitations because it first communicated to Prusky its intention to limit trading in April 2000 and, at that time, Prusky knew or should have known that its representation that he would have unlimited subaccount transfers was false. Prusky argues that Phoenix's defense fails because the limitations period does not begin to run until a cause of action has accrued, and that, since Phoenix acquiesced in 2000 and did not enforce the express terms of the Policy calling for limited trades, no actionable harm had yet occurred.

A two-year statute of limitations applies to Prusky's claims for fraud and misrepresentation. See 42 Pa. Cons. Stat. § 5524(7). Under Pennsylvania law, the statute of limitations is not triggered until such time as the fraud has been or should have been discovered by the exercise of due diligence. Rothman v. Fillette, 469 A.2d 543, 546 n.3 (Pa. 1983) (citations omitted). This view is consistent with the general rule that a cause of action does not accrue until the time when the plaintiff could have first maintained the cause of action to a successful conclusion. Kapil v. Assoc. of Pennsylvania State College and Univ. Faculties, 470 A.2d 482, 485 (1983) (citing 51 Am. Jur. 2d, Limitations of Actions § 107 (1970)). Thus, this "discovery rule" is an exception that tolls the prescribed statutory period barring suit, and arises when the injured party is unable, "despite the exercise of diligence by the plaintiff, to know of the injury." Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983) (emphasis added). The question of whether a plaintiff has exercised reasonable diligence is usually a jury question. Bohus v. Beloff, 950 F.2d 919, 925 (3d Cir.

1991) (citing Taylor v. Tukanowicz, 435 A.2d 181, 183 (Pa. Super. Ct. 1981)).

Determining whether Prusky exercised reasonable diligence in ascertaining the fact of a cause of action, and when Prusky's injury accrued as result of his reliance on Phoenix's representations, are matters best reserved for the trier of fact. One plausible scenario, for example, and that set forth by Prusky, is that Prusky did not suffer an actionable injury until July 2002, when, for the first time, Phoenix acted upon its assertion that it would restrict Prusky's ability to engage in unlimited subaccount transfers. As such, less than two years have lapsed between Prusky discovering his injury and his filing of the instant suit. Viewing the facts in the light most favorable to Prusky, we cannot conclusively determine that his claims fall outside the statute of limitations and, thus, we are not persuaded that his misrepresentation claims are time-barred.

2. Pleading Fraud

In its Reply, Phoenix attacks Prusky's common law fraud claim as insufficiently plead under Rule 9(b) of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 9(b) requires that in "all averments of fraud or mistake, the circumstances constituting fraud shall be stated with particularity." Fed. R. Civ. P.

9(b).[10] The particularity pleading requirement is designed to place the defendant on notice of the precise misconduct with which it is charged and to safeguard it against spurious charges of fraud. See Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 646 (3d Cir. 1989). However, the Third Circuit has cautioned that "focusing exclusively on [Rule 9(b)'s] particularity language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'" Christidis v. First Pa. Mortgage Trust, 717 F.2d 96, 100 (3d Cir. 1983) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1298, at 407 (1969)). While allegations reciting the date, place or time when the fraud occurred are usually sufficient to satisfy Rule 9(b), "nothing in the rule requires them." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). Accordingly, a plaintiff may use alternative means to inject precision and some measure of substantiation in their allegations of fraud. Id.

While Prusky fails to identify the specific Phoenix representative(s) who affirmed the contents of the June 10, 1998 Memorandum after the Policy effective date, Prusky's Amended Complaint contains other factual allegations plead with sufficient particularity to place Phoenix on notice of the

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[10] Rule 9(b) also applies to fraud claims based on state law. Christidis v. First Pennsylvania Mortgage Trust, 717 F.2d 96, 99 (3d Cir. 1983).

specific misconduct charged. For example, Prusky produces Phoenix’s June 10, 1998 Memorandum, which contains a date, the names of both writer and recipient and the statements Prusky relied upon, in support of his fraud claim. Additionally, Prusky’s Amended Complaint alleges that on two specific occasions, at least one of which has been acknowledged by Phoenix in its Motion to Dismiss, he presented Phoenix with the June 10, 1998 Memorandum in order that he would be permitted to continue his practice of frequent transfers among the subaccounts. While Rule 9(b) does not require the plaintiff to know every detail before he pleading fraud, its purpose was to provide the defendant with fair notice of the charge. It appears that Phoenix is sufficiently aware of at least some of these instances to defend against them in its instant Motion to Dismiss. Presently, Plaintiff has sufficiently identified the bases of his fraud claim – reliance on Phoenix’s June 10, 1998 Memorandum, and the two instances in which he invoked that Memorandum to continue his frequent trading among the subaccounts – and, thus, we do not dismiss that claim as insufficiently plead.

3. Justifiable Reliance

Phoenix also alleges that Prusky’s claims of fraud and misrepresentation are defective since he cannot establish justifiable reliance, an element common to both claims. See Teti

v. Villanova University, Civ. A. No. 01-1720, 2001 U.S. Dist. LEXIS 17004 at *11 (E.D. Pa. Oct. 24, 2001). To establish a claim of fraud or negligent misrepresentation, a plaintiff must prove that he justifiably relied on a false statement that was material to the agreement. See Bortz v. Noon, 729 A.2d 555, 560-62 (Pa. 1999).

Phoenix contends that Prusky is a sophisticated investor and that it is unreasonable, as a matter of law, that he would execute a contract that did not expressly include the contents of the June 10, 1998 Memorandum upon which he relies. However, when we draw reasonable inferences in favor of Prusky, especially in light of the parties' disparate course of performance under the Policy for over three years, it seems plausible that he justifiably relied upon the Memorandum statements in support of his practice of frequent subaccount transfers. Thus, Phoenix's motion to dismiss for the reason that Prusky fails to plead justifiable reliance is denied.[11]

IV. CONCLUSION

Since, on a motion to dismiss, this Court is obligated to view the factual allegations contained in Prusky's Amended Complaint in the light most favorable to him, we have determined

[11] For the same reason, Phoenix's motion to dismiss as to Prusky's UTPCPL claim for failing to show justifiable reliance is denied.

that he pleads facts sufficient to support his claims for relief, with the exception of his claim for equitable estoppel which must must be dismissed. Accordingly, Phoenix's Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED IN PART** and **DENIED IN PART.**

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

PAUL M. PRUSKY, Individually and as Trustee, Windsor Retirement Trust, Plaintiff, v. PHOENIX LIFE INSURANCE COMPANY, Defendant.	: : : : : : : : : :	CIVIL ACTION No. 02-6010

O R D E R

AND NOW, this day of March, 2003, in consideration of the Motion to Dismiss Plaintiff's Amended Complaint filed by Defendant Phoenix Life Insurance Company ("Phoenix") (Doc. No. 6), the Memorandum of Law in Opposition to Phoenix's Motion to Dismiss filed by Plaintiff Paul M. Prusky ("Prusky") (Doc. No. 7), Phoenix's Reply (Doc. No. 8) and Prusky's Sur-Reply thereto (Doc. No. 9), it is **ORDERED** that Phoenix's Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED IN PART** and **DENIED IN PART**.

It is further **ORDERED** that:

1. Phoenix's Motion to Dismiss as to Count III of Prusky's Amended Complaint is **GRANTED** and, therefore, Prusky's claim for equitable estoppel is **DISMISSED**.
2. Phoenix's Motion to Dismiss as to Counts I, II, IV, V, VI and VII of Prusky's Amended Complaint is **DENIED** and,

therefore, those counts remain before this Court.

BY THE COURT:

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JAMES McGIRR KELLY, J.