UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-80151-CIV-DIMITROULEAS

DOUGLAS KUBER,

Plaintiff,

v.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,

Defendant.
_____/

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court on Defendant Prudential's Motion to Dismiss [DE 8]. The Court has carefully considered the Motion [DE 8], the Response [DE 14], the Reply [DE 15], and is otherwise fully advised in the premises.

I. Background[1]

On December 28, 2018, Plaintiff Douglas Kuber ("Kuber" or "Plaintiff") initiated this action against Defendant The Prudential Insurance Company of America ("Defendant" or "Prudential") for failure to issue insurance under the terms of a Long Term Disability insurance policy (the "Policy"). Plaintiff brought this action for breach of contract (Count I) for failure to pay him disability benefits under the Policy, breach of covenant of good faith and fair dealing (Count II), and violation of New Jersey Consumer Fraud Act ("CFA") under N.J.S.A. 56:8-2 (Count III), which prohibits those doing business in New Jersey from acting unconscionably in their business practices.

1 Facts in the Background section are taken from the Complaint. [DE 1-1].

On February 1, 2019, this action was removed to this Court. *See* [DE 1].[2] Plaintiff alleges that he suffers from serious mental health issues that required him to stop working as a trial attorney on September 18, 2012. Plaintiff notified Defendant of his disability and inability to work. From March 18, 2013 through March 17, 2015, Defendant paid Plaintiff disability benefits under the Policy, due to a determination that Plaintiff was unable to work with his symptoms of depression. By letter dated January 13, 2015, Defendant advised Plaintiff that it was terminating benefit payments as of March 17, 2015, explaining that it had paid the full 24-month maximum benefits for a mental disorder. Defendant determined that Plaintiff was no longer disabled under the Policy. By letter dated July 8, 2015, Plaintiff appealed Defendant's determination of benefits and furnished additional medical records to demonstrate disability under various physical conditions. By letter dated November 6, 2015, Defendant upheld its decision to terminate benefits.

Defendant filed the instant Motion to Dismiss, arguing the Plaintiff's claims fail as a matter of law because Plaintiff had to stop working due to a criminal conviction and his disbarment, not due to depression or any other ailment. Defendant also argues that Plaintiff's claims are time-barred under the applicable statute of limitations.

II. Standard of Review

To adequately plead a claim for relief, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is

2 The Policy is not subject to the Federal Employment Retirement Income Security Act ("ERISA") 29 U.S.C. § 1001.

unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley*, 355 U.S. at 41). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). The allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. *See Linder v. Portocarrero*, 963 F. 2d 332, 334-36 (11th Cir. 1992) (citing *Robertson v. Johnston*, 376 F. 2d 43 (5th Cir. 1967)).

The Court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. In sum, "a district court weighing a motion to dismiss asks 'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Twombly*, 550 U.S. at n.8 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984)).

III. Discussion

Defendant advances two principal arguments in support of dismissal: (1) Plaintiff's claims fail as a matter of law because Plaintiff had to stop working due to his criminal conviction and disbarment, not due to disability; and (2) Plaintiff's claims are time-barred by the applicable statute of limitations.

A. Plaintiff's Criminal Conviction and Disbarment

Defendant argues that before Plaintiff stopped working due to his disability, he signed a plea agreement with the U.S. Attorney for the District of Maryland agreeing to plead guilty to a felony for which he was disbarred. Plaintiff then pleaded guilty on October 11, 2012, more than

two months before he filed a claim for benefits, and more than five months before he was eligible under the Policy to receive benefits. In sum, Defendant argues that Plaintiff was unable to work due to his criminal conviction and disbarment, not due to his depression or any other ailment. Defendant paid Plaintiff long term disability benefits for two years, the maximum allowed for mental illness. Plaintiff sues to recover more benefits for other ailments, but Defendant argues that Plaintiff cannot establish that he was unable to perform the material and substantial duties of his regular occupation *due to* illness or injury, a requirement of the Policy. Instead, Defendant argues, Plaintiff was unable to perform his work as an attorney because he was convicted of crimes and disbarred. Therefore, Defendant argues, Plaintiff did not meet the definition of disability in the Policy, and his claims fail as a matter of law.

Defendant argues that Plaintiff signed a plea agreement on August 27, 2012, entered a guilty plea on October 11, 2012, and filed his claim for benefits on December 12, 2012, with disability beginning on September 18, 2012.

These facts do not exist within the four corners of the Complaint. Even if the Court were to accept those facts, there is no showing, at this stage of the proceedings, that the guilty plea necessarily prevented Plaintiff from working as a trial lawyer.[3] It appears that Plaintiff was sentenced to four (4) years in prison on August 9, 2016. Apparently, he has recently been released on supervised release. The California disbarment did not happen until 2018. It has not been shown, at this juncture, that Plaintiff was ineligible to perform the material and substantial duties of his regular occupation. Certainly it would have been difficult for Plaintiff to be a trial lawyer while in federal prison. Additionally, there would be an issue whether imprisonment

3 The plea letter indicated that Plaintiff was told that a felony conviction would alter his ability to be licensed to practice law. [DE 8-5, p. 3].

during the disability also cuts off benefits. At this stage in the proceedings, the Court does not reach a determination on the issues concerning Plaintiff's conviction and disbarment and how those circumstances impacted his eligibility to receive benefits under the Policy.

B. Statute of Limitations

Defendant argues that Plaintiff's claim for benefits was terminated more than three years before he filed suit, and under the applicable three-year-limitations period his claims are time-barred. The contractual limitations period in the Policy is three years; the applicable state law statute of limitations is three years. Defendant argues that Delaware law, not New Jersey or Florida, governs pursuant to a choice-of-law provision in the insurance contract.

Plaintiff argues that Florida law, not Delaware law, controls. Plaintiff avers that the provision in the contract is a choice of jurisdiction provision, not a choice-of-law provision, and even if construed as a choice-of-law provision, it is unenforceable as it is contained only in the group contract between Defendant and Trustee of the Prudential Long Term Disability Conversion Insurance Trust "A", and is not in the Certificate of Insurance issued to Plaintiff. Plaintiff argues that the statute of limitations of the forum state, Florida, should apply in this diversity case. Florida's statute of limitations for breach of contract is five years. *See* Fla. Stat. § 95.11(2).

The Court can consider the insurance contract and Policy documents, which certainly apply to Plaintiff in this action. In deciding a motion to dismiss, the Court must accept a complaint's well-pled allegations as true. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). Such allegations must be construed in the light most favorable to the Plaintiff. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir.2010). "In analyzing

the sufficiency of the complaint, [the Court] limit[s] [its] consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir.2004). The Court may also consult documents that are attached to the motion to dismiss under the "incorporation by reference" doctrine. The Eleventh Circuit has defined the incorporation by reference doctrine to mean:

> [A] document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is: (1) central to the plaintiffs claim; and (2) undisputed.... "Undisputed" in this context means that the authenticity of the document is not challenged.

Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir.2002) (internal citations omitted); *see also Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir.2005).

The Policy documents and insurance contract are central to Plaintiff's claims and undisputed, so the Court considers them for purposes of determining this Motion to Dismiss. The Group Insurance Contract states that "[a]ll provisions of the Group Insurance Certificate(s), attached to and made a part of the Group Contract, apply to the Group Contract as if fully set forth in the Group Contract." [DE 8-2 at p. 1]. Further, it states that the "Group Contract is delivered in and is governed by the laws of the Governing Jurisdiction." *Id.* The "Governing Jurisdiction" is identified as "State of Delaware[.]" [DE 8-2 at p. 2].

The Policy further states, in all caps, in bold "FOR FLORIDA RESIDENTS" and then in bold, red type "The benefits of the policy providing your coverage are governed by the law of a state other than Florida." [DE 8-3 at p. 3]. The Policy states, in bold: "What are the Time Limits for Legal Proceedings?" [DE 8-3 at p. 20]. The Policy states: "You can start legal action

regarding your claim 60 days after proof of claim has been given and up to 3 years from the time proof of claim is required, unless otherwise provided under federal law." *Id.* Proof of claim is due 90 days after the elimination period. *Id.* at p. 18 ("you must send Prudential written proof of your claim no later than 90 days after your elimination period ends."). The elimination period is 180 days. *Id.* at p. 7. Plaintiff stopped working on September 18, 2012. The elimination period is 180 days, which extended to March 17, 2013. Therefore, proof of claim was due June 15, 2013. Three years after June 15, 2013 is June 15, 2016. Plaintiff filed suit on December 28, 2018, thirty (30) months after the June 15, 2016 deadline.

The Policy contains a three-year contractual limitations period, which the Court will enforce. *See Fetterhoff v. Liberty Life Assur. Co.*, 282 F. App'x 740, 744 (11th Cir. 2008) (applying the insurance policy's one-year statute of limitations where the applicable statute, ERISA, did not provide a limitation period for this type of suit and the policy's limitations period did not conflict with the state statute, stating "where the parties have contractually agreed upon a limitations period, borrowing a state's statute of limitations is unnecessary.").

As noted, Delaware law is applicable in this action. The Group Contract specifies that Delaware law controls. *See Capone v. Aetna Life Ins. Co.*, 592 F.3d 1189, 1197 (11th Cir. 2010) (insurance policy designating Georgia as governing jurisdiction had valid choice of law provision). Under Delaware law, the statute of limitations for both breach of contract and breach of duty of good faith and fair dealing is three years. *See* Del. Code Ann. Tit. 10, § 8106(a).

Contrary to Plaintiff's arguments, the Group Contract, which incorporates the certificate of insurance delivered to Plaintiff and binds Plaintiff, identifies Delaware law as controlling. "When it exercises jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, a federal

court must apply the choice of law rules of the forum state to determine which substantive law governs the action." *U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, 550 F.3d 1031, 1033 (11th Cir.2008) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). "Although contractual choice-of-law provisions are presumptively valid under Florida law, this presumption recedes when the law of the chosen forum effects a result in contravention of a strong public policy of the State." *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1365 (S.D. Fla. 2009) (citing *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So.2d 1166, 1168 (Fla.1985)). "The mere fact that Florida law would effect a different result does not render a choice-of-law clause invalid; rather, the law of the alternative forum must conflict with a Florida policy interest of 'paramount' importance." *Id.* (citing *State Farm Mut. Auto Ins. Co. v. Roach*, 945 So.2d 1160, 1165 (Fla. 2006)). There is no policy interest that would require the Court to disregard this valid choice of law provision.

In this action, the Policy specifies a three-year limitations period. Plaintiff is bound by that contractual provision, and even if that provision was somehow unenforceable, the Delaware statute of limitations would also bar the claim.

Plaintiff's cause of action accrued when Defendant stopped making disability payments, on March 17, 2015, and the Delaware statute of limitations expired three years later, in March 2018. At the latest, Plaintiff's claims accrued on November 6, 2015, when Defendant denied Plaintiff's appeal; three years after the denial of appeal (based on the Delaware statute of limitations) is November 6, 2018. Plaintiff did not file suit until December 28, 2018, so this action is time barred.

Defendant has moved to dismiss Plaintiff's New Jersey Consumer Fraud claim (Count

III), yet Plaintiff makes no argument supporting the claim's viability. The Court considers this claim abandoned by Plaintiff. *GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, 277 F. Supp. 3d 1301, 1311 (S.D. Fla. 2017), reconsideration denied, No. 16-24431-CIV, 2017 WL 5188350 (S.D. Fla. Oct. 18, 2017)("When a party fails to respond to an argument or address a claim in a responsive brief, such argument or claim can be deemed abandoned.").

Plaintiff's claims are dismissed as time-barred. In an abundance of caution, Plaintiff's Complaint is dismissed without prejudice for Plaintiff to allege how this claim may proceed under the time limits set forth in the contract.

A. Conclusion

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [DE 8] is **GRANTED** as set forth above;
2. This action is **DISMISSED without prejudice**;
3. On or before **June 14, 2019**, Plaintiff will either file an amended complaint or a notice indicating that he does not intend to file an amended complaint, at which point the Court will close this case.

DONE AND ORDERED in Chambers in Ft. Lauderdale, Broward County, Florida this 31st day of May, 2019.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record