

Agrawal v Metropolitan Life Ins. Co.

2010 NY Slip Op 31874(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 114736/05

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART _____

Noted

INDEX NO. _____

MOTION DATE _____

11/15/09

MOTION SEQ. NO. 34

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/15/10 _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x

GOPAL AGRAWAL, SURESH AGRAWAL, DINESH
AGRAWAL, and RAMESH AGRAWAL,

Plaintiffs,

Index No.
114736/05

-against-

Motion Sequence No.
-007

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

-----x

LOUIS B. YORK, J.:

FILED
JUL 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

In this action to recover monetary damages for a breach of contract involving a life insurance claim, defendant moves for summary judgment (1) dismissing plaintiffs' complaint and (2) on its counterclaim. Defendant also seeks to strike plaintiffs' jury demand.

For the reasons stated below, defendant's motion is granted and the plaintiffs' complaint is dismissed.

Background

Plaintiffs' mother, Kanta Devi (the decedent), applied for \$1 million and \$500,000 in life insurance from the defendant on November 11, 2002 (the application). In the application, plaintiff stated that she was not diagnosed with diabetes within the last 10 years, that she had no visits to the doctor nor laboratory tests within five years of the application, that her

personal net worth was \$500,000 and that there was only one other insurance policy on her life (which had been previously issued by defendant in the amount of \$195,000). See Barbara E. Olk Affirmation in Opposition, Exh. U. In an undated letter that was allegedly used in the underwriting process, the decedent's son, Gopal Agrawal (Agrawal), stated that his mother's net worth was actually between \$5 million and \$6 million. See Affidavit of Joseph Mateo (Mateo), Exh. B.

As the result of the application, and allegedly Agrawal's letter, the defendant issued two preferred life insurance policies, numbered 202 399 510 PR and 202 383 835 PR (the policies), totaling \$1.5 million, effective as of December 27, 2002. See Mateo Affidavit, Exhs. I and J.

Each policy had an incontestability clause, which stated as follows: "We will not contest the validity of your policy after it has been in force during the insured's lifetime for 2 years from the date of the policy, except for nonpayment of premiums."

Agrawal was the owner of the policies at the time of their issuance. However, on January 29, 2003, Agrawal filled out a Change of Ownership with Reversion to Insured form and named all the plaintiffs as owners. Additionally, on March 31, Agrawal completed an absolute Assignment form as to the other policy, transferring ownership to the plaintiffs herein. See Mateo Affidavit, Exh. K.

Following the insured's death on July 22, 2004, each of the plaintiffs filed an Individual Life Death Claim Form, listing all

three of the life insurance policies issued by defendant under which they were claiming benefits.

According to defendant, plaintiffs' claims were received on September 2, 2004. Pursuant to the proffered evidence, defendant declined coverage under the policies in letters to defendants dated August 25, 2005 (declination letter). In that declination letter, defendant asserts that the policies were void ab initio based upon "the usual inquiries in claims of this nature," i.e., those that arise within the period of incontestability. See Agrawal Affidavit in Opposition, Exh. D.

The declination letter further states, "in addition to other relevant facts that [the decedent] did not disclose the true and complete facts concerning her financial income. ... The documents provided to us during the claim investigation do not support the net worth figures provided in the application."

In their amended verified complaint, plaintiffs seek monetary damages for breach of contract; in its second verified amended answer, defendant counterclaims for a declaration that the policies are rescinded due to material misrepresentations by the decedent.

Discussion

To obtain summary judgment, a movant must make a prima facie showing of entitlement to a court's directing judgment in its

favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003). The motion may only be granted where it "clearly appear[s] that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when an issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Defendant seeks summary judgment dismissing the complaint, as well as on its counterclaim for a declaration that the policies are void ab initio. Defendant contends that decedent had a history of diabetes mellitus at the time of the application, which she did not reveal to defendant. Additionally, defendant maintains that the vast majority of the assets listed as the decedents were not in her name. Finally, the defendant asserts that, despite the fact that at the time of her application, plaintiff was aware of several other life insurance policies, when the application requested detailed information regarding "All Insurance and Annuities on Proposed Insured," she only revealed the one other life insurance policy written through defendant.

Defendant avers that all of these misrepresentations on the application were material, and void the policies.

Plaintiffs, however, urge this court to deny defendant's motion, because defendant waived any other grounds to contest the validity of the policy, except those grounds that were contained in the Declination Letter. Additionally, plaintiffs contend that, because defendant had actual or constructive notice of other grounds on which to decline the claims at the time of the Declination, those other grounds were waived.

Further, as respects the decedent's finances, plaintiffs aver that there was no material misrepresentation regarding the decedent's finances, in that her assets were held in a Hindi Undivided Family (HUF) and that she was the owner/karta of the HUF.

Finally, plaintiffs assert that they are entitled to a jury trial of the issues in this action.

Material Misrepresentation

Pursuant to Insurance Law 3105 (a), "[a] representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof." A material misrepresentation is one, which, had the insurer known, it would have caused that insurer to "either not have issued the policy or would have only at a higher premium." *Feldman v Friedman*, 241

AD2d 433, 434 (1st Dept 1997) (internal quote omitted); *see also* *Zilkha v Mutual Life Ins. Co. of New York*, 287 AD2d 713, 714 (2d Dept 2001). "The major question is whether the company has been induced to accept an application which it might have otherwise refused." *Process Plants Corp. v Beneficial Natl. Ins. Co.*, 53 AD2d 214, 217 (1st Dept 1976), *aff'd* 42 NY2d 928 (1977); *see also* *Koloski v Metropolitan Life Ins. Co.*, 5 Misc 3d 1028(A) (Sup Ct, NY County 2004).

Generally, whether or not a misrepresentation is material is a question of fact (*see Kroski v Long Island Sav. Bank FSB*, 261 AD2d 136 [1st Dept 1999]), but "where the evidence concerning materiality is clear and substantially uncontradicted, it is for the court to decide as a matter of law." *Aguilar v U.S. Life Ins. Co. in the City of New York*, 162 AD2d 209, 210 (1st Dept 1990).

To establish its right to rescind a policy on the grounds of material misrepresentation, an insurer must demonstrate that the insured made such a material misrepresentation through the proffer of documents regarding its underwriting practices. *See Schirmer v Penkert*, 41 AD3d 688 (2d Dept 2007); *see also Precision Auto Accessories, Inc. v Utica First Ins. Co.*, 52 AD3d 1198 (4th Dept), *lv denied* 11 NY3d 709 (2008). This may include the proffer of a copy of the insurer's underwriting guidelines, however, mere conclusory statements by an insurer's employees about such underwriting policies are insufficient to serve as the basis for establishing a material misrepresentation. *See*

Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435 (3d Dept 2003).

Here, defendant provides both an affidavit from its Associate Chief Underwriter, as well as exhibits of defendant's underwriting guidelines and industry rating tables. See Affidavit of Eileen Kosiner (Kosiner), Exhs. A-F. Kosiner explains at length in her affidavit why each of the decedent's alleged misrepresentations would have either resulted in either the issuance of the policies in a different class or would have caused defendant to decline to write the requested insurance in any rate class.

The Declination Letter stated that "in addition to other relevant facts that [the decedent] did not disclose the true and complete facts concerning her financial income. ... The documents provided to us during the claim investigation do not support the net worth figures provided in the application."

Plaintiffs assert that, because the Declination Letter did not contain any other alleged material misrepresentations, any other alleged material misrepresentations are waived.

"[T]he general rule is that an insurer which denies liability on a specified ground may not thereafter shift the basis for its disclaimer to another ground known to it at the time of its original repudiation." *Guberman v William Penn Life Ins. Co. of New York*, 146 AD2d 8, 11 (2d Dept 1989). However, the general rule "is limited to those instances in which the

insured has been prejudiced by the insurer's conduct." *Sulner v G.A. Ins. Co. of New York*, 224 AD2d 205, 206 (1st Dept), lv denied 88 NY2d 805 (1996).

Plaintiffs have failed to show any prejudice on the part of defendant as respects the instant claims. They have failed to proffer any evidence of either abandoning any defense or any "actual conduct by the insurer affirmatively lulling plaintiff[s] into inaction." *Chester v Mutual Life Ins. Co. of New York*, 290 AD2d 317, 318 (1st Dept 2002).

Therefore, defendant has not waived nor is it estopped from relying on additional bases for rescission beyond the decedent's alleged misrepresentation regarding her financial income and net worth.

Whether or not the evidence regarding the materiality of any alleged misrepresentation made by the decedent is clear and substantially uncontradicted, such that the alleged misrepresentations may be determined as a matter of law, each alleged misrepresentation must be analyzed separately.

Income/Net Worth

Although the decedent originally stated that her net worth was \$500,000, this was understood by all parties to be a clerical error and that the policies were issued with the understanding that the decedent's net worth was between \$5 million and \$6 million. Defendant, however, asserts that, based on the property in her own name, the decedent's worth was much less than this amount, and had it known that the decedent's net worth

significantly less, it would not have written the policies.

Plaintiffs, however, maintain that the decedent was the owner/karta of the HUF, which had a value of \$5 million to \$6 million at the time of the decedent's death. In his June 12, 2008 Decision and Order, Justice Walter B. Tolub requested a copy of such Indian law. Plaintiffs have proffered this in the form of the affidavit of Vijay M. Mehta (Mehta), an accountant in India, and the attached exhibits. Mehta maintains that, as the HUF karta, the decedent was "the absolute owner and in exclusive possession of joint family property. ... The karta or owner can borrow money, enter into contracts, and spend or mismanage money without being accountable to the family." See Mehta Affidavit, at ¶ 4; see also Mehta Affidavit, Exh. C. Additionally, Mehta proffers an official Indian document, indicating that the decedent was the owner as karta of the HUF at the time of her application. See Mehta Affidavit, Exh. E. Finally, plaintiffs have proffered letters from Indian consultants valuing the HUF in Indian currency and a conversion table to US dollars. See Agrawal Affidavit, Exhs. G & H.

Reviewing all the proffered evidence, this court holds, as a matter of law, that the decedent did not materially misrepresent her net worth in the application.

Diabetes

The decedent stated on the application that she did not have Diabetes Mellitus. It is uncontested that she was afflicted with the disease at the time of her death; what is at issue is whether

the insured was aware of her diagnosis at the time she completed the application, and if so, whether the medical records indicating that she had been previously diagnosed are admissible herein.

At the time of the application, the decedent submitted an attending physician's statement, signed by Dr. Krishna Jajoo on November 22, 2002, that the examination of the decedent resulted in normal findings (with no treatment required). See Mateo Affidavit, Exh. E. However, according to her son, Agrawal, Jajoo was never the decedent's doctor, and that the decedent's treating doctors were in India. See Mateo Affidavit, Exh. H.

Defendant has proffered the treatment notes and reports of a Dr. Ajay Solanki (Solanki), who was the decedent's physician in India. See Mateo Affidavit, Exh. Q. The earliest of those notes, dated April 27, 2002, indicates that the decedent had both Diabetes Mellitus and hypothyroidism.

Plaintiffs incorrectly aver that all of Solanki's records are unsworn, and, therefore, proffered in an inadmissible form, which should not be considered by this court. However, a defendant may rely upon the opposition's own doctor's unsworn reports. See *Newton v Drayton* 305 AD2d 303 (1st Dept 2003); see also *Arbour v Commercial Life Ins. Co.*, 240 AD2d 1001 (3d Dept 1997).

It is clear from the proffered reports by Solanki that the decedent knew about the fact that she had Diabetes Mellitus prior to her filing the application for defendant's life insurance

policy.

This court holds that the decedent's misrepresentation regarding her health status was material. As defendant's underwriting guidelines and rating tables show, defendant would not have written the policies within the same category, and in fact may not have written the policies at all. Therefore, defendant is entitled to a declaration that the policies are rescinded based upon the decedent's material misrepresentation on the application.

Other Life Insurance Policies

Although this court has already held that the policies were void ab initio for a material misrepresentation on the application, if this court was to consider the issue of whether the decedent made a material misrepresentation on the application regarding other insurance policies on her life, it would hold, as a matter of law, that the decedent's statement regarding other insurance policies was a material misrepresentation. The decedent was the insured under several other life insurance policies at the time of the application, including those issued by New York Life, the Insurance Company of India, and John Hancock. None of those policies were revealed to defendant either at the time of the application or at any time prior to the decedent's death. Decedent's failure to advise the defendant of all or a significant portion of the life insurance she already had was a sufficiently material misrepresentation to void the policy, even if the decedent had not made a material

misrepresentation regarding her health.

Order

Accordingly, it is hereby

ORDERED that Metropolitan Life Insurance Company's motion for summary judgment is granted; and it is further

ORDERED that the plaintiffs' complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 7/9/19

ENTER:

[Signature]
J.S.C.

LOUIS E. YORK
J.S.C.

FILED

JUL 15 2019

COUNTY CLERK'S OFFICE
NEW YORK