

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

PRESENT: _____

PART 27

Justice

LPC Holdings I LP

INDEX NO.

650830/10

MOTION DATE

- v -

MOTION SEQ. NO.

001

Gillman, Robert

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 is decided

in accordance with the accompanying memo decision.

It is so ordered.
Enter.

RECEIVED

JAN 04 2011

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

IRA GAMMERMAN

Dated: 1/3/11

J.S.C. JHO

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

THIS MOTION IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 27

-----X

LPC HOLDINGS I LP,

Plaintiff,

– against –

ROBERT GILLMAN,

Defendant.

-----X

DECISION & ORDER

Index No. 650830/10
PC No. 26666

IRA GAMMERMAN, J.H.O.:

Defendant Robert Gillman moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (7), and (8). Gillman contends that the court lacks personal jurisdiction over him, a Florida domiciliary, and that documentary evidence conclusively establishes that he is not contractually obligated to return the \$265,834 paid to him by plaintiff LPC Holdings I LP (“LPC”) for the purchase of Gillman’s beneficial interest in a trust, which in turn owned a life insurance policy insuring Gillman’s life.

The complaint alleges a single claim for breach of contract. On May 15, 2006, Lincoln Life & Annuity Company of New York (“Lincoln Life”), a New York life insurance company, issued a life insurance policy in the face amount of \$7,500,000 insuring Gillman’s life (the “Policy”). Previously, on April 17, 2006, the “Trust Agreement of Robert Gillman Insurance Trust” was executed by Gillman, as both depositor and beneficiary, and Jonathan S. Berck, Esq., a New York attorney, as trustee (the “Trust Agreement”). The Trust Agreement provides that the trust is being established pursuant to the laws of the State of New York.

On June 15, 2006, Gillman signed a “Beneficial Interest Transfer Agreement” (the

“Transfer Agreement”) by which he sold and assigned his beneficial interest in the trust to LPC. The cash consideration for the sale and assignment was a single payment of \$265,834. In connection with this Transfer Agreement, Gillman also signed certain “Acknowledgments and Consents Relating to Sale of Beneficial Interest.” Paragraph 15 of this document provides, in pertinent part:

Gillman agrees that he (or his estate) shall be required to return the Cash Consideration to the Purchaser if the Policy is voided by the insurance company during the 24-month incontestability period.

The complaint alleges that Lincoln Life voided the Policy on May 14, 2008, and that because the Policy was voided within two years of its issuance on May 15, 2006, Gillman is contractually required to return the \$265,834 paid by LPC.

In support of his motion to dismiss the complaint, Gillman contends that he was solicited by telephone at his Florida residence by Steven Lockwood of Lockwood Pension Services, Inc., a company located in New York City, to do this transaction. Gillman states that, “[d]uring this call, Mr. Lockwood proposed a transaction in which I would apply for a life insurance policy owned by a life insurance trust and then I would sell my interest in the trust to a third party selected by him immediately upon issuance of [the Policy],” Gillman Aff., ¶ 7. Gillman agreed to Lockwood’s proposal, and all the necessary documentation was prepared by Lockwood and mailed or faxed by him in New York to Gillman in Florida. Lockwood arranged for a medical examination at Gillman’s residence in Florida. At no time did Gillman travel to New York in connection with this transaction, nor did he engage an attorney to review any of the documents, including the Trust Agreement.

On May 14, 2008, Lincoln Life commenced an action regarding the Policy entitled

Lincoln Life and Annuity Company of New York v Robert Gillman and Jonathan S. Berck, as Trustee of the Robert Gillman Insurance Trust dated April 17, 2006, brought in the Circuit Court of the Fifteenth Circuit of Florida, in and for Palm Beach County, Case No. 50-2008-CA-013927. In that lawsuit, Lincoln Life sought a declaratory judgment that the Policy be declared void ab initio or rescinded on the ground that, contrary to the application, the Policy was not for estate planning purposes, but was, instead, intended for use in a secondary market.

On December 10, 2008, Lincoln Life voluntarily dismissed Gillman as a defendant from the Florida lawsuit. On November 18, 2009, Lincoln Life settled with the remaining defendant, Jonathan S. Berck, as trustee. The settlement agreement provides, in relevant part:

1. Payment by Lincoln. Within 15 days of execution of this Agreement by all Parties, Lincoln will wire transfer the amount of \$272,162.17 ("Payment") to Susman Godfrey L.L.P. [Trustee's counsel].
2. Cancellation/ Rescission of Policy. Effective when the payment provided for under Section I of this Agreement has been made, the Gillman Policy shall be deemed canceled, rescinded and of no further force and effect.

Gillman Aff., Ex. G at 2.

The first ground for dismissal of the complaint is that the court lacks personal jurisdiction over Gillman. LPC contends that Gillman consented in writing to the "exclusive jurisdiction" of New York courts. LPC bases this claim on the fact that the Trust Agreement Gillman signed has both a New York choice of law and consent to jurisdiction in New York clause. Indeed, section 5.8 of the Trust Agreement provides, in pertinent part, as follows:

Each of the parties hereto hereby consents and agrees that the State or Federal courts located in the Borough of Manhattan, in New York City, New York, shall have exclusive jurisdiction to hear and determine any claims or disputes between the parties pertaining to this Agreement or to any matter arising out of or relating to this

Agreement. Each of the parties hereto expressly submits and consents in advance to such jurisdiction in any action or suit commenced in any such court, and hereby waives any objection it may have based upon lack of personal jurisdiction, improper venue or forum non conveniens.

Lockwood Aff., Ex. C [emphasis added]. LPC argues that this is a dispute “relating to” the Trust Agreement, while Gillman contends that LPC cannot avail itself of this forum selection clause, because it was not a party to the Trust Agreement at its inception and because this dispute concerns the Transfer Agreement, which does not have its own forum selection clause.

“[P]arties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable,” *Brooke Group v JCH Syndicate* 488, 87 NY2d 530 (1996); see also *Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242 (2006); *Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 (1st Dept 2006).

Section 2.4 (c) of the Trust Agreement deals with transfers of the beneficial interest in the assets of the trust, and provides that all such transfers shall be substantially in the form of the Transfer Agreement, a blank copy of which was annexed as Exhibit B to the Trust Agreement, Lockwood Aff., Ex. C. On June 15, 2006, Gillman signed the Transfer Agreement, by which he sold and assigned his beneficial interest in the trust to LPC. By that document, LPC became bound by the terms of the Trust Agreement. The Transfer Agreement specifies that New York law applies, but does not have its own consent to jurisdiction clause. Since this lawsuit is indisputably a dispute between parties to the Trust Agreement and arises out of, or relates to, that agreement, namely the contemplated transfer of the assets of the trust to a new beneficiary, Gillman consented to the jurisdiction of New York courts to resolve this dispute.

In addition to express consent, the facts sufficiently allege a basis for asserting long-arm jurisdiction over Gillman in New York under CPLR 302 (a) (1). This is a “single act statute [and] . . . proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted,” *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, cert denied 549 US 1095 (2006). “So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not ‘present’ in that State,” *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 (1988); see also *Fischbarg v Doucet*, 9 NY3d 375 (2007).

Here, while Gillman may have been solicited for this transaction by Lockwood by telephone, mail and/or facsimile while Gillman remained, at all times, in Florida, the transaction involved the creation of an insurance trust pursuant to New York law, the naming of a New York trustee, the purchase of a \$7.5 million life insurance policy from a New York insurance company, and the sale of Gillman’s rights as a beneficiary of the trust to a New York company pursuant to an agreement that is to be governed and construed by New York law. Acting through Lockwood and/or Berck, there can be no doubt that Gillman purposefully availed himself of the benefits of New York’s laws, which is the key inquiry under CPLR 302 (a) (1), *Courtroom Tel. Network v Focus Media*, 264 AD2d 351 (1st Dept 1999).

For these reasons, Gillman’s motion to dismiss the complaint for lack of personal jurisdiction is denied.

Gillman also argues for dismissal of the complaint pursuant to CPLR 3211 (a) (1) on the

ground that the Policy was issued on May 15, 2006 and was not voided within two years of that date. Gillman offers the settlement agreement, which resolved the Florida lawsuit between Lincoln Life and the trust, as conclusive documentary evidence that the Policy was only deemed cancelled 15 days after November 18, 2009.

The complaint herein alleges that Lincoln Life voided the policy on May 14, 2008, but LPC concedes, in opposition to this motion, that May 14, 2008 is merely the date that Lincoln Life commenced the Florida lawsuit. Citing *Berkshire Life Ins. Co. v Fernandez*, 71 NY2d 874 (1988), plaintiff's counsel claims that "[u]nder New York law, an insurance contract is properly voided within the incontestability period if the 'insurer avoids, or seeks to avoid, the obligation of the contract by [commencing an] action or defense' within [sic] applicable period," *Ard Affirm.*, ¶ 6.

The actual quote from *Berkshire Life* is such: "An insurance policy is contested 'when the insurer avoids, or seeks to avoid, the obligation of the contract by action or defense,'" 71 NY2d 874, quoting *Killian v Metropolitan Life Ins. Co.*, 251 NY 44 (1929). Thus, the two-year incontestability clause required by law to be included in a life insurance policy is merely a statute of limitations, *Berkshire Life, supra*, 71 NY2d 874; *Killian, supra*, 251 NY 44.

The "Acknowledgments and Consents Relating to Sale of Beneficial Interest" does not, as LPC contends, merely require the commencement of a lawsuit by Lincoln Life within 24 months of the date of the issuance of the Policy. Rather, the language of paragraph 15 clearly and unambiguously states that the cash consideration for the sale shall be returned "if the Policy is voided by the insurance company during the 24-month incontestability period." That period expired in May 2008, and the Policy was not voided until November 2009. Accepting LPC's

argument would mean that the word "voided" is synonymous with "contested," and that is simply not the case.

For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted, based on documentary evidence pursuant to CPLR 3211 (a) (1), and the motion is denied in all other respects; and it is further

ORDERED that the clerk is directed to enter a judgment of dismissal with costs and disbursements to defendant upon submission of an appropriate bill of costs.

Dated: January 3, 2011

ENTER:



J.H.O.

IRA GAMMERMANN