

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

-----X
ALMA BEST, individually and as guardian for
Anber Griffin, a minor, and beneficiary of Jodi Gideon,
Plaintiff,

Index No.: 19638/05
Motion Date: 10/8/08
Motion Cal. No.: 4

-against-

THE UNITED STATES LIFE INSURANCE COMPANY
IN THE CITY OF NEW YORK,
Defendant.

-----X
The following papers numbered 1 to 16 read on this motion by defendant for summary judgment, pursuant to CPLR § 3212, in its favor dismissing the First, Second, Third, and Fourth causes of Action the plaintiff's complaint.

**PAPERS
NUMBERED**

Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Statement of Material Facts.....	6
Affirmation in Opposition-Exhibits.....	7-9
Affidavit-Exhibits.....	10-11
Statement of Material Facts.....	12
Memorandum of Law.....	13
Reply Affirmation-Exhibits.....	14-15
Memorandum of Law.....	16

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment, pursuant to CPLR § 3212, in its favor dismissing the First, Second, Third, and Fourth causes of Action is decided as follows:

This action arises out of defendant's denial of a death benefit claimed under life insurance policy number UH018311N (the "Policy") after defendant discovered alleged material misrepresentations that the insured, Jodi Gideon (hereinafter, "Gideon"), made in applying for the Policy regarding her driving record and other in force life insurance coverage. These misrepresentations involved Gideon not disclosing the fact that in the two years prior to completing her July 17, 2001 application for life insurance with U.S. Life (the "Application") Gideon had her driver's license restricted, revoked, or suspended at least five times, was convicted of multiple motor

vehicle violations, was involved in at least one personal injury accident, and surrendered her driver's license. Additionally, Gideon stated that she had no other life insurance policies in force at the time she applied for the Policy when, in fact, on the date of application, Gideon had a \$100,000 life insurance policy in force with SBLI USA Mutual Life Insurance Company, Inc. According to defendant, had Gideon given true and complete responses to the questions asked during the application process, U.S. Life would have refused to issue the Policy.

In response to the denial by defendant, Plaintiff, Alma Best, individually and as guardian for the beneficiary of the Policy, Anber Griffin, a minor (the "Beneficiary"), commenced the instant action which contains four causes of action: The first cause of action, breach of contract in U.S. Life's failure to pay the benefits of the Policy; The second cause of action, a deceptive business practice in violation of New York General Business Law ("GBL") § 349; The third cause of action seeks a declaration that U.S. Life must pay the proceeds of the Policy to plaintiff; and the fourth cause of action, a breach of the implied covenant of good faith and fair dealing.

Defendant now seeks summary judgment dismissing plaintiff's first and third causes of action as barred as a matter of law since plaintiff cannot recover under the Policy because the application contained material misrepresentations. Thus, the causes of action for breach of contract and for a declaratory judgment on the contract must be dismissed. Defendant also claims that the second cause of action, related to defendant's deceptive business practices in violation of GBL § 349, must be dismissed due to lack of standing and there being no allegations of defendant's conduct not being directed at consumers at large. Defendant also claims the fourth cause of action, concerning defendant's breach of its implied covenant of good faith and fair dealing by not investigating decedent's application for insurance, must be dismissed as duplicative of the breach of contract action.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

In support of its motion, defendant has submitted, *inter alia*, the correspondence and records concerning Jodi Gideon's Policy, defendant's policy writing guidelines, and an affidavit and deposition transcripts of Kent Major, defendant's Vice-President of underwriting. This evidence shows that on July 17, 2001, Gideon completed the Application for a U.S. Life insurance policy with a \$250,000.00 death benefit. The Application had several questions regarding Gideon's

background and health status to which Gideon was required to give true and complete answers with the acknowledgment that such answers would be the basis for any policy issued on the Application. Question 5(b) of Part A of the Application asked whether Gideon had ever "had [her] driver's license restricted, revoked or suspended?" Gideon responded to this question by checking the box marked "no." Question 7 of Part A of the Application asked whether Gideon had any "life insurance in force on proposed insured." Gideon answered, "none." By signing the Application, Gideon represented that "all statements and answers in this application are true, full and complete, and bind all parties in interest under any policy applied for."

As part of the application process, Gideon also completed a Clinical Reference Laboratory Form. In completing that form, Gideon was again asked whether, "[i]n the past 5 years, [she] had a moving violation or [her] driver's license restricted, suspended or revoked?" Gideon responded to this question by checking the box marked "no."

On December 20, 2001, U.S. Life issued the Policy to Gideon with the underwriting class of preferred tobacco. The Policy explicitly stated that "the original application" is part of the contract for life insurance. Gideon was killed on October 5, 2002, less than one year after the Policy was issued. Because Gideon's death occurred within two years of the Policy's December 20, 2001, issue date, U.S. Life conducted a routine claim investigation under the Incontestability provision of the Policy. As part of its investigation, U.S. Life obtained various records regarding Gideon's medical history and driving record.

Gideon's New York Department of Motor Vehicles record showed that in the months before Gideon submitted the Application, she was convicted of numerous traffic infractions, involved in at least one personal injury car accident, and received at least 5 driving license suspensions. The records also showed that from May 19, 1999 to November 19, 1999, Gideon's license was on probation for an unknown reason. On February 13, 2000, Gideon was issued a traffic citation for speeding. Less than two months later, Gideon's license was suspended on April 1, 2000. Three days later, and while her license was still suspended, Gideon was again issued a citation for speeding on April 4, 2000. About three months after that, on July 11, 2000, Gideon was issued her third traffic citation in less than five months, this time for disobeying a traffic device. Based on the information received during the investigation, U.S. Life determined that Gideon misrepresented her driving history and concluded that "had the correct and complete information been known" the Policy would not have been issued as applied for. Consequently, U.S. Life advised Plaintiff of its decision to rescind the Policy and that the Policy proceeds were not payable due to the material misrepresentation of her driving record made by Gideon on the Application.

Furthermore, the Underwriting Class Guidelines further specify that an individual with greater than four motor vehicle violations in the three years prior to applying for a policy, or with a DUI or reckless driving charge or a license revocation or suspension in the three years preceding the application will not be issued a policy at standard tobacco class. The motor vehicle underwriting guidelines used by U.S. Life in assessing an applicant's driving record at the time of Policy issuance

require that an applicant like Gideon with at least two speeding violations, one violation for disobeying a traffic device, one accident (even assuming the accident was not the fault of the applicant and not considering Gideon's additional undisclosed accident between the dates of Application and Policy issuance), and a violation for driving while the applicant's license was suspended, receive, at a minimum, an increased premium rating if approved for coverage. Accordingly, defendant claims that the Policy is void *ab initio* due to Gideon's material misrepresentations and the first and third causes of action must be dismissed.

Moreover, during the course of discovery in this proceeding, U.S. Life discovered an additional misrepresentation on the Application. In particular, Gideon indicated on the Application, in response to question 7 of Part A, that, at the time of completing the Application, no other life insurance policies on Gideon were in force. In fact, at the time of application Gideon had a simple term life insurance policy in force with SBLI USA Mutual Life Insurance Company, Inc., insuring Gideon's life for \$100,000. Defendant claims that such information would have been important in conducting the financial underwriting of the Policy to determine whether or not the amount of coverage being requested by Gideon was reasonable.

Plaintiff opposes this motion by claiming that the misrepresentations were not material, there is standing to sue under the GBL and the conduct was consumer oriented and directed to consumers at large, and defendant breached its implied covenant for good faith and fair dealing. Plaintiff also claims that defendant did not follow its own and industry guidelines in underwriting policies in issuing decedent's policy, and should not be able to rescind the policy. In support of its opposition, plaintiff has submitted, *inter alia*, an affidavit of Jerry Warshaw, a consultant with over 40 years of experience and expertise in the a life insurance business, and particularly in underwriting.

Mr. Warshaw states that given the pressure of market competition to issue a large volume of life insurance policies, any misrepresentations on Miss Gideon's application could not be considered material. He notes that Life insurance applications are supposed to undergo rigorous review by underwriting professionals; to review and assess the accuracy of the information provided by the applicant, correct the information and even amend the application as necessary, and assess the impact of the information on the life expectancy of the applicant. If the information has no impact on mortality, the information is not material to assessing life expectancy. Underwriters rely on an underwriting manual, and it usually contains various subjects, medical and non-medical, that impact life expectancy. To ensure thoroughness and consistency in risk evaluation, companies adhere to the guidelines within the manuals.

At the time Ms. Gideon applied for life insurance, U.S. Life was using Lincoln Re manual, a highly respected and widely used underwriting manual. Mr. Warshaw stated that US Life completely ignored the representation as to Miss Gideon's tobacco use before issuing her a "preferred tobacco" policy. It failed to amend her application to reflect that information. This despite US Life's contact with Miss Gideon and getting the correct information as to her tobacco use. According to him this was a "gross violation of the underwriting process", and discredits its claims to any material

misrepresentation. Additionally, US Life ignored the critical portion of its underwriting guideline, with respect to Miss Gideon's application, concerning the fact that, "[m]otor vehicle accidents are the single most common cause of violent death among all individuals and are the leading cause of death among those ages 16-24. Thus, it is very important for underwriters to give adequate attention to driving history during the workup and the appraisal process. . . . For young proposed insureds of driving age, an MVR (motor vehicle record or report) should be requested for all but very small amounts of insurance." . . . "Since expected mortality is low for ages 16-30, it is very important to investigate driving history."

According to Mr. Warshaw, defendant's own underwriting guideline clearly calls for the mandatory ordering of an MVR "for all" applicants in Miss Gideon's age group. Mr. Warshaw concludes this disregard showed the absence of materiality of the representations as to the MVR to US Life for this particular applicant. Moreover, standard life insurance applications indeed ask the question about driver's license suspensions to determine if there is a history of driving under the influence, reckless driving, or other factors that do impact life expectancy. Furthermore, according to Mr. Warshaw, there was no question on US Life's application whatsoever as to any traffic violations or accidents, again despite a clear mandate to have such a question in its guidelines. As such, Miss Gideon made no representation as to violations or accidents whatsoever on her application, the document which becomes part of the Policy.

He also states that the industry practice is for the underwriter to ask the relationship between annual income, net worth, and the total amount of life insurance in force and applied for. However, defendant's application did not ask questions concerning income or net worth. In fact, according to Warshaw, had defendant obtained complete information about the additional \$100,000.00 of life insurance coverage for Miss Gideon, it would have deemed this information not material because Miss Gideon's earnings, \$75,000.00, were sufficient to warrant two policies totaling \$350,000.00. Finally, Warshaw states, that defendant had an indication that decedent had another policy, as was indicated in the Medical Information Bureau Report. According to Warshaw, defendant failed to seek clarification from the proposed insured about the amount of the other company's application, the purpose of the additional policy, and the total amount that would be placed into force.

To establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a false statement of fact as an inducement to making the contract and the misrepresentation was material (see Insurance Law §3105 [a], [b]). Insurance Law §3105(a) defines a representation as a "statement as to past or present fact, made to the insurer...at or before the making of the insurance contract as an inducement to the making thereof," and "a misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false." "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (Zilkha v. Mutual Life Ins. Co. of N.Y., 287 AD2d 713,[2001]; see Insurance Law §3105[b]) (Schirmer v. Penkert, 41 AD3d 688, 690, [2007]). "Rescission is available even if the material misrepresentation was innocently or

unintentionally made (Nationwide Mut. Fire Ins. Co. v. Pascarella, 993 F Supp 134, 136 [1998] [citation omitted]; see Holloway v. Sacks & Sacks, 275 AD2d 625, 713 N.Y.S.2d 162 [2000], *lv denied* 95 NY2d 770,[2000]).

It is important to note that the issue of materiality is ordinarily a question of fact for the jury (see Process Plants Corp. v. Beneficial Nat. Life Ins. Co., 53 AD2d 214, 216[1976], *affd* 42 NY2d 928,[1977]), except where the evidence of materiality is clear and substantially uncontradicted, the issue will be decided by the court as a matter of law (see Feldman v. Friedman, 241 AD2d 433[1997]; Equitable Life Assur. Soc. v. Rocanova, 162 AD2d 265 [1990]. "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application (see Insurance Law §3105[c]; Curanovic v. New York Cent. Mut. Fire Ins. Co., 307 AD2d at 437 [2003]; Tuminelli v. First Unum Life Ins. Co., 232 AD2d 547 [1996]; Evidence of the practice of the insurer, which made the contract, as to the acceptance or rejection of similar risk is also admissible (see Insurance Law §3105[c]).

Under such circumstances, defendant has failed to meet its initial burden of establishing as a matter of law that it would not have issued the life insurance policy to Jodi Gideon if the application had contained accurate information concerning her motor vehicle accident record and her other life insurance policy. Defendant has not adduced sufficient proof as to its underwriting practices with respect to applicants with a history such as Jodi Gideon. See, Sonkin Assocs. v. Columbian Mut. Life Ins. Co., 150 AD2d 764 (1989.) Di Pippo v Prudential Ins. Co., 88 AD2d 631 (1982.) The evidence in the record on this issue is a conclusory statement by one of the defendant's senior underwriters which did not establish, as a matter of law, that the defendant would have rejected the application. *Id.* Moreover, the guidelines are not sufficiently clear for this Court to determine that the policy would not have been written had accurate information been provided. Accordingly, the branch of defendant's motion to dismiss the first, third and fourth causes of action is denied based upon defendant's failure to establish *prima facie* its entitlement to judgment as a matter of law. Tuminelli v. First Unum Life Ins. Co., 232 A.D.2d 547 (2d Dept 1996.) The Court notes that given the facts of the instant case, the fourth cause of action is not duplicative of the first cause of action.

In any event, were this Court to find that defendant has established its burden, plaintiff has raised an issue of fact as to whether or not the decedent made material representations on her application for the subject policy. Plaintiff has submitted sufficient evidence to establish that defendant failed to make reasonable inquiries regarding the decedent's application's answers. Plaintiff has presented evidence that suggests defendant should have made relatively easy and simple inquiries into decedent's driving record. The evidence also suggests defendant was on notice of decedent having another life insurance policy. While this Court does not condone the

providing of false information on a life insurance application, the failure to deem the information worth verifying, suggests a lack of materiality. As such, plaintiff has raised an issue as to whether the misrepresentations were material. Curanovic v New York Cent. Mut. Fire Ins. Co., 307 A.D.2d 435, 437, *supra*. Tuminelli v First Unum Life Ins. Co., 232 A.D.2d 547, *supra*.

However, the second cause of action must be dismissed. General Business Law § 349 is a broad consumer protection statute which declares "deceptive acts or practices in the conduct of any business, trade or commerce" to be unlawful. *See*, Stutman v Chemical Bank, 95 NY2d 24 . "As a threshold matter, in order to satisfy General Business Law § 349 plaintiffs' claims must be predicated on a deceptive act or practice that is 'consumer oriented' " (Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 344, *quoting* Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 24-25. Deceptive acts or practices may be considered "consumer oriented" when they have a broad impact on consumers at large. *See* Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25. In contrast, private contract disputes which are unique to the parties do not fall within the ambit of the statute. *Id.* at 25. Here, the plaintiff does not allege that the defendant engaged in deceptive business practices directed at members of the public generally who purchased similar life insurance policies. *Cf.* Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330. Rather, the plaintiff's claim is predicated upon allegations that the insurance company failed to follow its own and industry guidelines as related only to the issuing of the decedent's policy. Accordingly, the factual allegations set forth in the complaint are insufficient to show that the defendant engaged in consumer oriented conduct, and do not state a cause of action for violation of General Business Law § 349. Flax v. Lincoln Natl. Life Ins. Co., 2008 NY Slip Op 7209 (2d Dept. 2008.)

In sum the branch of the motion to dismiss the first, third, and fourth caused of action is denied, and the branch of the motion to dismiss the second cause of action is granted.

Dated: October 15, 2008

.....
ORIN R. KITZES, J.S.C.