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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

UNITED STATES LIFE INS. CO.

- v -

GRUNHUT, LAZAR

INDEX NO. 600550/07

MOTION DATE 8/24/07

MOTION SEQ. NO. 005

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
AUG 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendants Lazar Grunhut, Trustee of Piri Grunhut 2004 B Irrevocable Life Insurance Trust and Piri Grunhut for an order dismissing the First Amended Complaint of plaintiff The United States Life Insurance Company in the City of New York, is denied in its entirety. It is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants. It is further

ORDERED that defendants shall answer within 20 days. It is further

ORDERED that plaintiff shall serve discovery demands 30 days thereafter.

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

Dated: 8/24/07

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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

Plaintiff,

-against-

LAZAR GRUNHUT, TRUSTEE OF PIRI GRUNHUT 2004 B IRREVOCABLE LIFE INSURANCE TRUST and PIRI GRUNHUT,

Defendants.

Index No. 600550/07

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Lazar Grunhut, Trustee ("Trustee") of Piri Grunhut 2004 B Irrevocable Life Insurance Trust (the "Trust") and Piri Grunhut ("Grunhut") (collectively "defendants"), move for an order dismissing the First Amended Complaint of plaintiff The United States Life Insurance Company in the City of New York ("plaintiff"): (1) as it fails to state a cause of action; (2) plaintiff has failed to show, and cannot show any monetary damages as a result of the alleged fraud; (3) in the absence of tender of its premium, plaintiff's claim for rescission must fail; and (4) plaintiff's claim for conspiracy fails in the absence of tort liability. Alternatively, defendants seek an order dismissing the cause of action for civil conspiracy.

Background

On December 29, 2004, the Trust by and through its Trustee, applied in writing to plaintiff (the "Application") seeking issuance of life insurance insuring the life of Grunhut. In completing the Application, material information regarding Grunhut's net worth was provided. Grunhut represented on her application that her net worth was in excess of $40 million.

Additionally, during the application process, plaintiff, by way of a third-party, Profile Services ("Profile") sought to verify the financial information Grunhut provided on the Application with regard to her net worth. Profile has reported that Grunhut claimed to have personal assets valued at $40 million, that she did not have any liabilities, and that her annual unearned income was in excess of $400,000, generated from interest, dividends and rental income. Grunhut represented that her assets were all personal, valued at $40 million and consisted of real estate, including her residence and its contents, brokerage, savings, checking, CD and money market accounts. Based on these representations, plaintiff agreed to issue five separate policies, numbered U10019369Y, U10019368Y, U10019367Y, U10029616Y, and U10029617 (the "Policies"). The Policies have death benefits of $2 million each, totaling $10 million in coverage, and are owned by the Trust, which is also the beneficiary of each policy.

Defendants' Contentions

No representation was made by the Trustee or the Trust. The Trustee signed one document, an authorization form. No representation as to the accuracy of the information was made on the authorization form. As plaintiff has failed to plead any specific representation by the Trustee or the Trust, the fraud claims against the Trustee and the Trust should be dismissed.

Further, with respect to the fraud claim, plaintiff has failed to plead any damages with specificity. In the instant matter, plaintiff has lost nothing. Plaintiff received millions of dollars in premiums and has paid zero dollars in claims; the insured in alive and well. If in fact there was a false application, which is denied, plaintiff has had a gain as it has had use of the policy holders money for almost two years.

Plaintiff on the one hand alleges that the Policies should be rescinded, alleging the

Application is false, and on the other hand, has retained millions of dollars in premiums. Further, plaintiff has not tendered the money to the defendants. Plaintiff only wants to deposit the money with the Court and seeks to have these monies available as security in the event it is awarded fees and costs. Plaintiff has not and is not offering to tender the money to defendants without qualification or conditions.

The instant action, based upon the allegations contained in plaintiff's First Amended Complaint, concerns Grunhut's net worth. Plaintiff could have made any inquiry regarding net worth before issuing the Policies. The insurance company's form clearly permitted the insurance company to obtain, *inter alia*, information relating to personal finances for twenty four months from the date of the Application. Plaintiff failed to conduct pre-policy inquiries to the extent it would now like to do so and failed to make inquiries within the 24 month period permitted by the agreement it drafted.

Plaintiff's Contentions

Grunhut and the Trustee knew that they were required to provide truthful, accurate and honest answers to the questions presented on the Application and to individuals assisting plaintiff during the underwriting process. Grunhut and the Trustee also knew that plaintiff would rely upon the answers recorded on the Application as would individuals assisting it in determining whether Grunhut was insurable and qualified for the coverage for which the Trust applied. Defendants' representations with regard to Grunhut's net worth contained in the Application and confirmed to Profile, that plaintiff relied on to its detriment, were materially false. Grunhut, the Trust and the Trustee knowingly and intentionally failed to disclose and omitted material facts with regard to Grunhut's net worth, and otherwise intentionally failed to accurately, honestly

and/or truthfully answer and disclose material information in response to the net worth questions presented on the Application which, if disclosed, would have caused the non-issuance of the Policies.

Additionally, the Trust, through the Trustee, and Grunhut, collectively agreed to participate in the aforementioned fraud and unlawful acts.

In contesting a life insurance policy due to material misrepresentations, New York law requires an insurer bring its claims before a court for adjudication. This is precisely what plaintiff has done.

Defendants seem to take the position that by initiating a lawsuit seeking rescission of the Policies, plaintiff has somehow signaled an intention to waive its right to rescind. New York law authorizes insurers to conduct post-issuance investigations for up to two years after policy issuance and, in the appropriate circumstances, permits insurers to initiate lawsuits to rescind, *ab initio,* a policy based on a material misrepresentation.

In order to satisfy the pleading requirements for a case for rescission, an insurer must simply plead a tender of the premiums. Plaintiff has pleaded a tender of the premiums and has in fact tendered premiums to defendants on several occasions, only to have its offer rejected. Neither statute nor case law supports defendants' proposition that New York law requires an insurer seeking a declaratory judgment that a life insurance policy is void, plead that a tender of premiums was made prior to institution of the action.

With respect to the fraud cause of action, the Amended Complaint clearly informs the defendants of the incidents and misrepresentations of which plaintiff complains. With respect to misrepresentation, and defendant's argument that the Trustee only signed "an authorization

form" that contained "[n]o representation as to the accuracy of the information," the authorization form is actually the signature page to Part A of the Application that contains the following representation:

> I have read the above statements or they have been read to me. They are true and complete to the best of my knowledge and belief...I understand that any misrepresentation contained in this application and relied on by the [plaintiff] may be used to reduce or deny a claim or void the policy.

Plaintiff alleges that the information contained in the Application was false and knowingly false.

As to damages, in this case, plaintiff issued $10 million dollars in life insurance based on material misrepresentations made by defendants. Plaintiff now bears the burden of $10 million in risk it would have never insured had accurate responses been made on the Application. Additionally, in conjunction with the fraudulent procurement of the Policies, plaintiff paid substantial commissions to agents and incurred additional expenses (including attorneys fees) that may or may not have been recoverable by plaintiff.

While defendants are right that there is no recognized independent tort of civil conspiracy in New York, civil conspiracy is actionable based on an underlying tort.

Analysis

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause

of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank,* 301 AD2d 373, 375 [2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

Fraud

Plaintiff's cause of action, as worded, clearly charts a course for fraud in the inducement. To state a viable cause of action for fraud in the inducement, the complaint must allege that the defendants (1) made misrepresentations of material existing fact, (2) which were false and known to be false by the defendants when made, (3) for the purpose of inducing plaintiff's reliance, (4) plaintiff's justifiable reliance on the alleged misrepresentation or omission, and (5) compensable damages (*Lama Holding Co. v Smith Barney, Inc.*, 88 N.Y.2d 413 [1996]; *New York University*

v Continental Ins. Co., 87 N.Y.2d 308, 318 [1995]; *Friedman v Anderson,* 23 AD3d 163, 166 [1st Dept 2005]). CPLR 3016(b) requires that a complaint for fraud articulate the misconduct complained of, in sufficient detail to clearly inform each defendant of what their respective roles were in the incidents complained of (*see P.T. Bank Central Asia v ABN AMRO Bank* N.V., 301 A.D.2d 373, 377 [1st Dept 2003]; *Abrahami v UPC Constr. Co., Inc.,* 176 A.D.2d 180 [1st Dept 1991]; *but cf. Lanzi v Brooks,* 43 N.Y.2d 778, 780 [1977]).

In the instant case, plaintiff points to the Application and the authorization therein as the basis for the fraud and misrepresentation claims. The Amended Complaint sufficiently informs each defendant of plaintiff's claim that in applying for life insurance, that the Trustee, Trust and Grunhut, for the purpose of inducing reliance by plaintiff, made misrepresentations and/or omissions of material facts, known by each to be false, on which plaintiff relied. Such permissible inferences are sufficient to sustain plaintiff's cause of action for fraud and misrepresentation (*see Williams v Sidley Austin Brown & Wood, LLP,* 13 Misc.3d 1213(A), 824 N.Y.S.2d 759 [Sup Ct, N.Y. County 2006], *affd* --- A.D.2d ----, 2007 WL 611248 [1st Dept 2007]; *Knight Securities LP v Fiduciary Trust Co.*, 5 AD3d 172, 173-74 [1st Dept 2004]). And, the damages laid out in opposition to this motion are sufficient to overcome the instant motion to dismiss.

Misrepresentation

An essential element of plaintiff's claims for both fraudulent inducement and misrepresentation is detrimental reliance (*see Water St. Leasehold LLC v Deloitte & Touche LLP,* 19 A.D.3d 183, 796 N.Y.S.2d 598 [2005], *lv. denied* 6 N.Y.3d 706, 812 N.Y.S.2d 35, 845 N.E.2d 467 [2006]; *see generally* 60A N.Y. Jur. 2d, Fraud and Deceit § 138). " 'Plaintiff must

show both that defendants' misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)' " (*Water St. Leasehold, supra,* quoting *Laub v Faessel,* 297 A.D.2d 28, 31, 745 N.Y.S.2d 534 [2002]). In the instant case, the Trustee signed the Application immediately below the statement in the authorization cited above. The Trustee therefore represented that the information contained in the Application was "true and complete to the best of [his] knowledge and belief. Plaintiff has alleged that the information contained in the Application was false and incomplete, that the defendants knew that to be the case, and that the defendants made representations with the knowledge that plaintiff would rely upon such information. That is sufficient to overcome the instant motion to dismiss.

Rescission

For the insurer to be entitled to rescind the policy *ab initio*, after it had been in existence for two years during the insured's lifetime, it must identify a material misrepresentation in the application that was intended to defraud the insurer (Insurance Law § 3105[b], § 3216[d][1][B][I]; *Interested Underwriters at Lloyd's v H.D.I. III Assoc.,* 213 A.D.2d 246, 247, 623 N.Y.S.2d 871 [1995]; *Process Plants Corp. v Beneficial Natl. Life Ins. Co.,* 53 A.D.2d 214, 216-217, 385 N.Y.S.2d 308 [1976], *affd.* 42 N.Y.2d 928, 397 N.Y.S.2d 1007, 366 N.E.2d 1361 [1977]).

As stated in *Gould v Cayuga County Nat. Bank,* 41 Sickels 75, 1881 WL 12960 (N.Y. 1881):

> One who seeks to rescind a compromise of a disputed claim on the ground of fraud must promptly, on the discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of it, if of any value; the tender

> must be without qualifications or conditions. In an action at law upon the original claim, plaintiff must show that he rescinded the fraudulent compromise prior to the commencement of the action; if no rescission is shown a final determination by the court that plaintiff was entitled to more than the sum paid, is no answer to the objection.

More recent cases have expanded on the time frame in which plaintiff must tender premiums when seeking rescission: *Berger v Manhattan Life Ins. Co. And American International Life Assurance Co. Of New York,* 805 F. Supp. 1097, 1110 (S.D.N.Y. 1992)

> Under New York law, where an insurer defends against a claim of coverage on the ground that the company was induced to issue the policy by fraud or on another ground of forfeiture and the policy is therefore void from its inception, the insurer is not required to tender the premium prior to trial on the action. In contrast, where an insurer declares an executed rescission, sues to rescind the contract for fraud or on other grounds, or makes an affirmative demand for rescission in defense of a suit, equity requires that the insurance company tender back the premium prior to trial, or at the time of trial if the insurer acquires knowledge of the ground for rescission after the insured's death. *Perry v Metropolitan Life Ins. Co.,* 168 A.D. 275, 153 N.Y.S. 459 (4th Dep't 1915); *Bavisotto v United States,* 18 F.Supp. 355 (W.D.N.Y.1937). *Panettieri v John Hancock Mut. Life Ins. Co. of Boston,* 266 A.D. 872, 42 N.Y.S.2d 317 (2d Dep't 1943).

In the instant case, plaintiff has timely asserted a claim for rescission in the Complaint and the Amended Complaint. Further, plaintiff has properly sought, and the court has ordered that the funds be deposited in the court until the close of evidence.

Defendants' further argument that plaintiff has waived its contractual rights by initiating a declaratory judgment action without first returning the premiums to defendants is not supported by the case law discussed above.

Civil Conspiracy

With regard to the cause of action for civil conspiracy, New York does not recognize a separate cause of action for civil conspiracy. *Ward v City of New York,* 15 AD3d 592 (2nd Dept.2005). Under New York law, a plaintiff must sufficiently allege an actionable underlying tort in order to support a cause of action for civil conspiracy. *Am. Preferred Prescription, Inc. v Health Mgmt., Inc.,* 252 A.D.2d 414, 416 (1st Dept.1998). "[W]hile there is no cognizable action for a civil conspiracy, a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those actions flow from a common scheme or plan." [*American Preferred Prescription, Inc. v Health Management, Inc.,* 252 A.D.2d 414, 416 (1st Dept.1998)].

The same allegations discussed above, adequately support the independent action, and inference of scienter necessary to sustain plaintiff's cause of action for conspiracy to commit fraud (*see Pope v Rice,* 2005 WL 613085, *13 [SD N.Y.2005], *citing Kashi v Gratsos,* 790 F.2d 1050, 1055 [2d Cir1986]; *Semi-Tech Litigation, LLC v Ting,* 13 AD3d 185, 187 [1st Dept 2004]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a CPLR 3211 motion to dismiss (*EBC I, Inc. v Goldman Sachs & Co.,* 5 NY3d at 19).

Conclusion

Based on the foregoing, the motion of defendants is denied in its entirety. And, it is hereby

ORDERED that the motion of defendants Lazar Grunhut, Trustee of Piri Grunhut 2004 B

Irrevocable Life Insurance Trust and Piri Grunhut for an order dismissing the First Amended Complaint of plaintiff The United States Life Insurance Company in the City of New York, is denied in its entirety. It is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

This constitutes the decision and order of this court.

Dated: August 24, 2007

Carol Robinson Edmead, J.S.C.