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

----------X

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.

---------- X

Index No. 600550/07
Motion Sequence 016

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to rescind five insurance policies, defendants Lazar Grunhut, Trustee of Piri Grunhut 2004 B Irrevocable Life Insurance Trust and Piri Grunhut ("Grunhut") (collectively "defendants") move for summary judgment dismissing the action, and for attorneys' fees.

Factual Background

In April 2005, plaintiff, The United States Life Insurance Company in the City of New York ("plaintiff") issued five $2 million face value insurance policies insuring the life of Grunhut (the "policies"). Almost two years later, plaintiff commenced this action in February 2007 to rescind the policies on the ground that they contained material misrepresentations concerning Grunhut's net worth.

In or about April 2007, defendants then moved to dismiss the Complaint on the ground that the premiums charged on the policies prior to the commencement of the action ("past premiums") were not tendered. In response, plaintiff amended its Complaint to tender the past premiums, with interest, to the Court. By Notice of Motion dated in May 2007, plaintiff filed an

"Unopposed Motion to Deposit Funds" with the Clerk. In that motion, plaintiff asserted that

> [*a*]*s part of its efforts to rescind the policies, U.S. Life has offered to tender all of the premiums paid on the policies*, plus interest, to Lazar Grunhut, Trustee for the Trust ("Trustee") and has disclaimed any right, title or interest in or to said premiums or any part thereof. However, because Defendants oppose the rescission of the policies, *the Trustee did not accept the return of premiums* and interest. (Emphasis added).

By Notice of Motion dated in June 2007, defendants then sought to dismiss the First Amended Complaint, arguing, *inter alia*, that plaintiffs failed to tender to defendants millions of dollars in premiums and only wanted to deposit the money as security in the event it is awarded fees and costs. Defendants pointed out that plaintiff has not and was not offering to tender the money to defendants without qualification or conditions. Plaintiff argued that it had pleaded a tender of the premiums and has in fact tendered premiums to defendants on several occasions, only to have its offer rejected.

By Order dated August 24, 2007, the Court granted plaintiff's motion without opposition, and directed that plaintiff deposit the premiums paid on the five policies at issue, plus interest, with the Clerk of New York County, until the final disposition of this matter. The Order noted that "notwithstanding their [defendants'] non opposition to the request to deposit said funds, said deposit should not be considered a 'tender' of the premiums."

By Order dated August 24, 2007, the Court denied defendants' motion, stating that plaintiff timely asserted a claim for rescission in the Complaint and Amended Complaint, and properly sought that the funds be deposited in the court until the close of evidence. The Court further held that defendants' argument that plaintiff waived its contractual rights by initiating a declaratory judgment action without first returning the premiums was unsupported by caselaw.

Defendants did not seek renewal or reargument of either Order.

On September 25, 2007, plaintiff deposited approximately $1.7 million with the Court, representing premiums paid *through September 24, 2007*, and interest at three percent, in accordance with the Court's order.

Thereafter, on October 10, 2007, the parties entered into a Stipulation, agreeing that "premiums are not to be paid as they become due on the policies at issue in this lawsuit until the Court enters an order denying" plaintiff's request to rescind the policies as *void ab initio*.

Now, after two years, and after the First Department's recent decision in *Security Mut. Life Ins. Co. of New York v Rodriguez* (65 AD3d 1, 880 NYS2d 619 [May 2009]) (*infra* at p. 8, 10, 11, 13), defendants seek dismissal based on plaintiff's failure to tender premiums paid after this action was commenced.

Motion

Defendants argue that in their present motion, which concerns the premium payments made after the action was commenced, that plaintiff is estopped from voiding the policies due to plaintiff's acceptance of premiums after learning of an event which it believes entitles it to rescind the policies. Even if plaintiff claims that it billed and accepted premiums for seven months as a result of inadvertence, it is estopped from voiding the policies. Under the most recent First Department decision, where an insurer accepts a premium after commencement of an action to rescind, it is barred from rescinding the subject policy.

Defendants contend that following the commencement of this action, plaintiff accepted and collected 23 premium payments over a seven month period, amounting to almost $274,000. Plaintiff's basis for denying coverage has to have been known for some period prior to the filing of the Complaint, and therefore, it has probably wrongfully collected premiums for more than

seven months. In any event, plaintiff pursued this action for two and a half years, collected additional premiums for seven months, and has not refunded any amount. Even if plaintiff never intended to keep the policies in force, caselaw holds that plaintiff is estopped nonetheless. Plaintiff had the choice of refunding the premiums and cease billing the insured, or keep the policy in force.

Further, the Stipulation did not waive any rights of defendants to challenge plaintiff's right to charge the premiums in the first place. Defendants maintain that plaintiff did not "refund those ill gotten premiums but deposited them with the court instead."

Opposition

Plaintiff argues that this is the third time defendants have sought dismissal by arguing estoppel due to plaintiff's alleged receipt of premiums during the pendency of this action and failure to tender those premiums to the Court. Defendants' June 2007 motion argued that plaintiff waived its right to rescind because when "an insurer believes a policy should be voided based upon a false application it has the right to return the premiums and rescind the policy, or retain the premiums. It does not have the right to 'both accept premiums and reserve its right to rescind.'" Plaintiff contends that to the extent defendants may argue that their previous motions were based on plaintiff's failure to *tender* premiums, and that this motion is based on plaintiff's *receipt* of premiums during the lawsuit, this is a distinction without a difference. There is only a semantic difference between failure to tender and the receipt/acceptance/retention of premiums.

Plaintiff has deposited with the Court approximately $1.75 million in premiums received from defendants through September 2007. Further, defendants' payment of premiums after September is subject to the Stipulation.

Plaintiff contends that the Court's order and the Stipulation demonstrate that defendants merely filed this motion in order to avoid the depositions of their clients. Defendants' depositions were scheduled for mid-July, but were adjourned in order to accommodate the schedules of defense witnesses. Yet, on July 29, 2009, defendants served this motion, and took the position that discovery was stayed, even though the Court directed that depositions continue as scheduled. Given that the motion was based on an argument already rejected by this Court, that defendants offer no explanation for waiting two years after the last premium was made and one week before scheduled depositions to make this motion, and that defendants' invoked the stay provision of Rule 3214, this motion was filed to delay discovery.

Moreover, plaintiff is not entitled to summary judgment. The question of whether plaintiff is estopped from rescinding the policies is a question of fact. Until the Court rules otherwise, the policies remain in force and must be handled accordingly unless the parties contract otherwise. Under caselaw, an insurer wishing to rescind an in-force life insurance policy based on material misrepresentation must initiate a lawsuit within two years from the date of issue, in order to properly contest a policy. Further, the policies at issue are Flexible Premium Adjustable Universal Life polices, in which premiums paid are partially used to create cash value under the policies. Plaintiff must administer the policies as long as the policies are in force. To continue accepting the premiums protects the rights of all parties, in that if the policies are ultimately rescinded, the premiums are returned to defendants. CPLR 3004 also supports the position that plaintiff cannot be denied the relief it seeks for failing to tender.

In any event, defendants cannot establish reasonable and justified detrimental reliance to support their estoppel claim. Defendants cannot show that they justifiably relied on plaintiff's

receipt of premium payments in 2007, and that they prejudicially changed their position as a result of such reliance, a position contrary to this case and the Stipulation. Further, the caselaw cited by defendants is inapplicable, as none involves a factually similar situation where an insurer accepts premiums after it filed a rescission action, and plaintiff here has not retained any premiums. Courts have found that the receipt of payments during a rescission action does not estop a party from seeking rescission. Defendants have not cited a single case in which a court awarded summary judgment to an insured based on an estoppel defense to a rescission action when the insurer had timely asserted the action and deposited the received from the insured with court.

Reply

Defendants' motion has not been presented to this Court twice before. Defendants moved to dismiss the Complaint for failure to tender past premiums, and after plaintiff amended its Complaint offering to so tender, defendant moved to dismiss again arguing that plaintiffs are required to actually tender the funds, not offer to do so. This was cured when plaintiff tendered the funds. However, the instant motion is not based on a failure to tender past premiums, but premiums paid after plaintiff had knowledge of the alleged misrepresentation. While plaintiff's failure to tender was cured, its continued acceptance cannot be. When an insurer seeks to rescind a contract *ab initio* based on an insured's misrepresentations, it must promptly disaffirm the contract upon learning of the misrepresentations, and certainly it may not continue to derive benefit under the contract.

Further, plaintiff fails to cite any support for its position that defendants must prove there was detrimental reliance; no court has required a finding of detrimental reliance, for the reason

that the payment of the premium itself is detrimental reliance.

Since plaintiff accepted the premiums after learning of the alleged financial misrepresentations, and those funds (which were never returned to defendants) were not promptly returned to defendants but held onto for eight months before being deposited with the Court, plaintiff is barred from maintaining this action.

Analysis

At the outset, the Court notes that defendants' previous motions addressed whether plaintiff's failure to tender the past premiums estopped plaintiff from rescinding the policies. Defendants pointed out that plaintiff was not permitted to both rescind the policies *and* retain the premium payments made by defendants. However here, defendants argue, that plaintiff's acceptance and retention of defendants' premiums (for seven months) after learning of Grunhut's alleged financial misrepresentations, and after the action was commenced, without returning such premiums to defendants bars plaintiff from maintaining this action. This latter issue, though bearing similarities to defendants' previous motion by virtue of the caselaw cited and the theory of estoppel relied upon for dismissal, is based on a different factual scenario in that the premiums at issue were allegedly accepted and collected after the commencement of this rescission action. Therefore, the Court proceeds to address the narrow issue presented by defendants, *to wit*: whether plaintiff is estopped from rescinding the policies in light of plaintiff's knowledge of the alleged basis for rescinding the policies, and failure to tender to defendants premiums paid after commencement of this action.

"It is well settled that 'the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact'" (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A failure to meet this burden requires that the motion be denied, regardless of the sufficiency of the opposing papers (*id.*). If the proponent makes a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the party opposing the motion, giving it the benefit of every reasonable inference (*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 869 NYS2d 465, 467 [1st Dept 2008]).

As recently established by the Appellate Division, First Department, "[w]here an insurer accepts premiums after learning of an event allowing for cancellation of the policy, the insurer has waived the right to cancel or rescind" (*Security Mut. Life Ins. Co. of New York v Rodriguez*, 65 AD3d 1, 880 NY2d 619 [1st Dept 2009] *citing Continental Ins. Co. v Helmsley Enters.*, 211 AD2d 589, 622 NYS2d 20 [1st Dept 1995], *Bible v John Hancock Mut. Life Ins. Co.*, 256 NY 458 [Cardozo, Ch. J. 1931], *Johnson v Mutual Benefit Health & Acc. Assn. of Omaha*, Neb., 5 AD2d 103, 107, 168 NYS2d 879 [3d Dept 1957], mod. on other grounds 5 NY2d 1031, 185 NYS2d 552 [1959]). As noted in *Bible* (*supra*), "the delivery of the policies by the insurer, and the keeping of the premiums with knowledge of a then existing breach of the conditions" gives rise to a waiver "or, more properly, an estoppel" (*see* 256 NY at 462). The basis of this rule is that an insurer's claimed attempt to both accept premiums and reserve its right to rescind is unenforceable for lack of mutuality and timeliness (*Continental Ins. Co.* at 589 citing *McNaught*

v Equitable Life Assur. Socy., 136 AD 774, 121 NYS 447 [1910]).

In determining whether the insurers's acceptance of a premium gives rise to a waiver or estoppel, the following factors have been considered: whether the insured was billed by the insurer or merely its general agent; whether the insurer had served notice of its election to rescind the policy at the time it accepted the premium; whether the insurer's receipt of the premium was inadvertent or intentional; whether retention of the premium was permanent or temporary; and whether the premium was returned within a reasonable time after the payment came to the attention of responsible officials of the insurer (*Sielski v Commercial Ins. Co. of Newark, New Jersey*, 199 AD2d 974, 605 NYS2d 599 [4th Dept 1993] *citing Amrep Corp. v American Home Assurance Co.*, 81 AD2d 325, 329, 440 NYS2d 244 [1st Dept 1993]). The Court observes that contrary to plaintiff's contention, whether defendants can demonstrate reasonable and justifiable reliance upon plaintiff's receipt of premium payments in 2007 and that they prejudicially changed their position as a result of such reliance *(see Town of Hempstead v Incorporated Village of Freeport*, 15 AD3d 567, 790 NYS2d 518 [2d Dept 2005] [waste facility's failure to enforce Minimum Commitment provisions for first 10 years of 25-year agreement with village did not estop facility from enforcing provisions]), are not factors in any of the cases discussing whether an insurer is estopped from rescinding a policy after accepting premium payments with knowledge of a ground for the rescission, including the cases cited by plaintiff.[1]

---

[1] The Court also notes that defendants do not address plaintiff's contention under CPLR 3004, which provides, in pertinent part, that:

> A party who has received benefits by reason of a transaction that is void or voidable because of fraud, [and] misrepresentation . . . and who, in an action . . . seeks rescission . . . a declaration or judgment that such transaction is void, or other relief, whether formerly denominated legal or equitable, dependent upon a determination that such transaction was void or voidable, shall not be denied relief because of a failure to tender before judgment restoration of such benefits; but the court may make a tender of restoration a condition of its judgment, and may otherwise in its judgment so adjust the equities between the parties that

In *Garbin v Mutual Life Ins. Co. of New York* (77 Misc 2d 689, 356 NYS2d 741 [Sup Ct, App Term 1974]), the insurer became aware of its insured's material misrepresentations on his application for a health insurance policy in or before July 19, 1968, and rescinded the health insurance policy. For 13 months after insurer "became actively aware of its insured's misrepresentations and until his death, it nevertheless, *without notice of rescission*," inadvertently continued to demand, accept and retain four separate quarterly premium payments from plaintiff (emphasis added). The Court held that "[t]he collection *and retention* of four payments over a full year cannot be overlooked as mere inadvertent and temporary acceptance of a premium such as excused the insurance company in Travelers Ins. Co. v. Pomerantz (246 N.Y. 63)."[2] The Court continued, "the acceptance of premiums for one year, after knowledge of the facts claimed to be the basis for rescission, constitutes a waiver of the right to rescind" (*see also, Johnson* at 107 [stating that it "would be difficult to envisage more cogent evidence of an intent to abandon rescission" where insurer "actually billed respondent for the premium, after full knowledge of the fact that the latter had only one eye when he applied for a policy, *and retained the premium after*

---

footnote 1 cont'd.

unjust enrichment is avoided.

CPLR 3004 has been considered an exception to the general rule that a party seeking rescission of a contract must tender the return of consideration it received pursuant to the voidable contract (Ferguson v Lion Holdings, Inc., 312 F Supp2d 484 [SDNY 2004]). However, plaintiff does not cite, and this Court did not uncover any cases applying CPLR 3004 under the circumstances herein.

[2] In *Travelers Ins. Co.*, at the time of the insurer's receipt of the second premium, the insurer, whose main office is located in Connecticut, was seeking to effect service of process in this action upon defendants. On the day upon which the summons in this action had been delivered to the sheriff for service, defendant paid the premium to a clerk in the office of the agents in Williamsburg and received a 'temporary receipt' therefor. The check was deposited by the agents to their own account in their own bank and the amount transmitted to plaintiff, which returned it to its agents. The last of June or early in July the agents tendered the amount to defendant, who refused it. The court held that a mere temporary retention of the second premium "does not, *under the circumstances*, constitute any evidence of an intention to abandon the claim of rescission and to ratify the policy," and thus, insurer was not estopped from contesting this policy.

it was paid"]).

Most recently in *Security*, plaintiff, the insurer brought an action for fraud and to rescind three life insurance policies issued on the life of Lucy Rodriguez, whereby her son, Esmail Mobarak ("Mobarak") was the beneficiary under each policy. The action was commenced in October 2005. However, from October 2005 through June 2006, plaintiff collected nine $5,000 premium payments from Mobarak, which were debited monthly from Mobarak's checking account. None of the premiums from Mobarak had been refunded. The First Department rejected plaintiff's argument "that it did not waive the right to rescind the policies because it accepted the premium payments after it commenced the action" as contrary to the case law, *i.e.*, *Scalia v Equitable Life Assur. Soc. of U.S.*, 251 AD2d 315, 673 NYS2d 730 [2d Dept 1998] [insurer waived right to rescind policy where it accepted premium payments for several months after it asserted counterclaim to rescind that policy] and *Continental Ins. Co., supra* [insurer waived right to rescind policy where it accepted premium payments for "several months" following discovery of alleged misrepresentations]). The Court then noted that plaintiff did not retain temporarily a payment (or a couple of payments) from Mobarak before refunding the payment. "Rather . . . plaintiff collected . . . nine $5,000 premium payments over a nine-month period and plaintiff has not refunded any of those payments. The collection and retention of those payments compel the conclusion that plaintiff cannot now seek to rescind the policies."[3]

---

[3] The Court in *Security* expressly declined to follow *Prudential Ins. Co. of Am. v BMC Indus.* (630 F Supp 1298 [SDNY1986]), a case cited by plaintiff for the proposition that the receipt of payments during a rescission action does not estop a party from seeking rescission, on the ground that it is inconsistent with *Continental Ins. Co., supra* and *Scalia, supra*. The First Department stated that *Prudential* did not address the situation where an insurer accepted premium payments from the insured after the insurer asserted a claim to rescind the policies. Such issue is controlled by New York case law, including *Continental Ins. Co., supra* and *Scalia, supra*. The Court further noted that *Prudential* was decided before *Continental Ins. Co.* and *Scalia*.

The cases appear to hold that an insurer is estopped from rescinding a policy where it collects, retains and fails to tender premiums after it has knowledge of the basis for rescinding the policy.

Here however, unlike the insurer in *Security*, and all the other insurers in the cases cited by the First Department in *Security*, plaintiff allegedly attempted to return the premiums made by defendants, to no avail. According to plaintiff's Unopposed Motion to Deposit Funds, plaintiff had previously attempted to tender the premiums paid, *but the defendants refused to accept plaintiff's tender*. Thus, by Notice of Motion dated May 16, 2007, shortly after this action was commenced in February 2007, plaintiff sought permission by this Court to deposit the premiums it received into the Clerk of the Court; by the time plaintiff filed its motion in May, defendant had made ten payments over a mere three month period after the commencement of the action (in March, April and May). While defendants maintain that plaintiff is not permitted to both rescind the policies and, simultaneously, collect and retain premium payments after commencement of this action since it was aware, at least by then, of the basis for the rescission, again, defendants had already rejected plaintiff's attempts to return the premiums. And, the premiums paid by defendants subsequent to plaintiff's knowledge of the basis of its rescission, and subsequent to the commencement of this action, were in fact deposited to the Clerk and not retained by plaintiff (*see also, Boyd v Allstate Life Ins. Co. of N.Y.*, 267 AD2d 1038, 1039, 700 NYS2d 332 [4th Dept 1999] [continued deduction of the premium payments following decedent's death was an error that was promptly corrected by defendant]). Thus, while defendants are correct that plaintiff has not refunded the premiums paid to defendants, plaintiff has not retained them, since the Court directed such premiums be deposited with the Clerk's office. And, in none of the cases cited by

the First Department did the insurer attempt to deposit the premiums to the Clerk *(see Continental, supra* [plaintiff's "attempt to both accept premiums and reserve its right to rescind is unenforceable]; *Bible, supra* [insurer's agent secured application, received first premium payment, and collected three additional payments from the insured at the hospital, and was therefore, estopped from disclaiming liability upon ground that insured breached condition requiring she be in sound health on the date of the policy, and had not attended any hospital within two years]; *Johnson, supra* [insurer billed respondent for the premium, after full knowledge of the fact that the latter had only one eye when he applied for a policy, and retained the premium after it was paid]; *Scalia, supra* [insurer estopped from disclaiming "by continuing to accept premium payments after it gained sufficient knowledge of the alleged misrepresentations upon which it claims to have relied when issuing the policy]; *Weiner v Government Emp. Ins. Co. of Washington, D.C.*, 52 AD2d 844, 382 NYS2d 814 [2d Dept 1976] [holding that insurer, by accepting the premium following the first notice of cancellation, conveyed an assurance to plaintiff that future late payments would likewise be accepted; cancellation notice indicated that the insurer would entertain a late premium payment and would waive any forfeiture by its assured; thus, insurer estopped from raising the defense of cancellation]). Notably, the acceptance of premiums for seven months, after knowledge of the facts claimed to be the basis for rescission, was undertaken during the period of the determination of plaintiff's motion to place them in the Clerk's office, and after plaintiff's stated attempt to return the premiums, and thus, cannot be considered a waiver or estoppel of plaintiff' s right to rescind.

Also unlike the insurers in *Security* and the cases cited by the Court in *Security*, plaintiff

and defendants agreed that defendants' premiums were no longer "to be paid as they become due on the policies at issue in this lawsuit until the Court enters an order denying" plaintiff's claim to rescind and declare the policies void *ab initio*. The Court of Appeals has indicated that an express waiver rests upon intention, *whereas an estoppel rests upon misleading conduct* (*Weiner, supra citing Kiernan v Dutchess County Mut. Ins. Co.*, 150 NY 190). Under these particular and unique circumstances, it cannot be said that the plaintiff demonstrated any misleading conduct, or an intent to abandon its right to rescind the policies, as a matter of law (*Sielski v Commercial Ins. Co. of Newark, New Jersey*, 199 AD2d 974, 605 NYS2d 599 [4th Dept 1993] [finding question of fact concerning plaintiff's assertion that defendant either waived or is estopped from asserting its right to rescind the policy as a result of its acceptance of premiums after learning of the alleged grounds for rescission]).

Therefore, defendants' motion for summary judgment dismissing the Complaint on the ground that plaintiff is estopped from rescinding the policies at issue due to plaintiff's acceptance of premiums after learning of an event which it believes entitles it to rescind the policies, is unwarranted under the circumstances.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the action is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 25, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD