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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 115034/2007
ASHKENAZI, ALEXANDER
VS.
AXA EQUITABLE LIFE INSURANCE
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/15/09
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the motion by defendant AXA Equitable Insurance Company for summary judgment dismissing the breach of contract claim of the plaintiff, Alexander Ashkenazi as Trustee of the Zablidowsky Life Insurance Trust, is granted; and it is further

ORDERED that the first cause of action for breach of contract is severed and dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED and ADJUDGED that the motion by defendant AXA Equitable Insurance Company for summary judgment on its second counterclaim for rescission, is granted; and it is further

ORDERED that the parties appear for a further discovery conference as to AXA Equitable Insurance Company's remaining claim for violation of General Business Law §349; and it is further

ORDERED that AXA Equitable Insurance Company 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: 12/16/09

J.S.C.
HON. CAROL EDMEAD

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

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

----------X

ALEXANDER ASHKENAZI AS TRUSTEE OF
THE ZABLIDOWSKY LIFE INSURANCE TRUST,

Plaintiffs,

Index No. 115034-2007

-vs-

AXA EQUITABLE INSURANCE COMPANY,

Defendant.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover the death benefits of two life insurance policies, defendant AXA Equitable Insurance Company ("AXA") moves for summary judgment dismissing the breach of contract claim of the plaintiff, Alexander Ashkenazi as Trustee of the Zablidowsky Life Insurance Trust (the "plaintiff" or "Trustee") and granting AXA's second counterclaim for rescission, arguing that discovery establishes that the subject life insurance policies were procured by fraud.

Factual Background

In December 2005, Estelle Zablidowsky (the "Insured") and Trustees Alexander Ashkenazi and Martin Zablidowski ("Martin"), the Insured's son, applied for a $5 million life insurance policy naming the Trustee of the Zablidowsky Life Insurance Trust (the "Trust") as the owner and beneficiary of the policy (the "$5 million policy"). On the application for the $5 million policy, the signatories represented that the Insured had (1) $825,000 of "annual earned income (Income from occupation)," and "10.1 Mil." in "net worth," (2) $4 million in liquid assets and $6 million in real estate assets, (3) annual income for the current year of $825,000,

consisting of $225,000 in dividends/interest, $550,000 in rental income, and $50,000 in pension/social security, and (4) $820,000 in annual income in the previous year, consisting of $220,000 in dividend/interest, $550,000 in rental income, and $50,000 in pension/social security.

AXA argues that AXA's Chief Underwriter, James Godin ("Mr. Godin"), who reviewed and approved the application, applied AXA's Financial Underwriting Guidelines, which provided that the amount of insurance for which an applicant would qualify depended upon her age, income, and/or net worth.

After she was approved for the $5 million policy, the Insured applied for a $7 million policy with another insurer, Lincoln Life & Annuity Company of New York ("Lincoln Life").[1] Lincoln Life issued that policy to the Insured, effective October 8, 2005.

Then, in January 2005, the Insured's insurance broker applied for a $3 million policy from AXA on the Insured's life. Relying on the representations the Insured made before, and the representation that no other life insurance had been applied for or was in force, applying the Financial Underwriting Guidelines, and applying the practice of determining the projected estate tax that would be due of her estate, AXA argues that Mr. Godin concluded that the Insured would qualify for an additional $3 million in insurance. As before, the Insured, and the trustees Alexander Ashkenazi and Martin Zablidowski completed and signed another application.

On both policies, each signatory to the application certified that they understood "that the statements and answers in all parts of this [AXA] application are true and complete to the best of" their knowledge and belief. They further certified that AXA "may rely on them in acting on

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[1] AXA claims that the Lincoln Life application makes financial misrepresentations that the Insured had a net worth of $15.6 million and an annual income of $1.25 million.

this application."

The Insured died in the fall of 2006, within the two-year contestability period. AXA conducted a routine investigation and determined that the applications contained misrepresentations about the Insured's financial status and other insurance coverage. AXA gave notice of rescission and tendered the previous paid premiums to the Trust. This action for breach of contract (first cause of action) and violation of New York General Business Law §349 (second cause of action) ensued. In response, AXA asserts, *inter alia*, counterclaims for declaratory relief, rescission and fraud.

AXA's Motion

In support of its motion to dismiss the breach of contract claim and for judgment on its second counterclaim for rescission, AXA contends that the deposition of the Insured's son and of the plaintiff Trustee, prelitigation interview of the Insured's son, the Insured's application to purchase a cooperative apartment on behalf of her other son Gary Zablidowski ("Gary") in 1987, and the probate papers filed by Martin and Gary, demonstrate that the Insured's net worth was fabricated, and that Social Security benefits were the only source of income. The Insured worked as a factory bookkeeper making $23,000 per year, lived in a rental apartment for $500 per month, and had only $7,100 in the bank and co-op shares worth approximately $225,000 at the time of her death. The Trustee did not recall how these policies came about, why they were taken out, notwithstanding the fact that he signed both applications for insurance.

The Trustee is the trustee of at least seven life insurance trusts that are the beneficiaries of at least 10 life insurance policies, totaling $39 million is life insurance coverage, $12 million of which has already been paid out. While the Trustee claims that the trusts have charitable

purposes, he has no records and cannot recall how the $12 million was distributed. The Trustee is running a stranger-owned life insurance ("STOLI") mill and using a purported charitable entity for his own purposes.

AXA argues that summary judgment is warranted based on the material misrepresentations made in both applications for insurance. The Trustee does not deny that the financial statements made in the applications were false. Additionally, the second application only disclosed the existence of the first $5 million AXA policy, when the Insured had applied for the Lincoln Life policy for $7 million. The misrepresentations were material as a matter of law pursuant to NY Ins. Law §3105(b). Based on AXA's Underwriting Guidelines, AXA would never have issued the policies had the true facts been known. The "charitable" purpose of these policies was also undisclosed, and in any event, would not have resulted in approval of the policies even if disclosed due to the provision in the Underwriting Guidelines about policies payable to a charity. The applications would have been denied because there was no commensurate history of prior giving to the purported charity, and the amount would in any event have far exceeded that for which the Insured would otherwise have qualified based on her modest finances. Further, the false statement about Lincoln Life coverage is material, in that AXA would have refused to issue any more insurance on the Insured's life.

The Trustee's Opposition

The Trustee contends that insurers developed a practice of issuing high value policies to elderly individuals to generate high cash flow from the higher premiums, with the hopes that as the elderly failed to continue paying the premiums, the policies would lapse, thereby permitting the insurers to keep all the past premiums paid. As a result, insurers ignored their underwriting

guidelines and wrote high value policies which were actuarially deficient. The easiest guidelines to ignore were those concerning the net worth because the net worth of the insured does not affect the primary risk incurred by an insurer, *to wit*: longevity. In the last five years, financial institutions purchased these actuarially deficient policies in volume and continued to pay premiums until the death benefits became due, and saw tremendous profits.

The insurers, on other hand, who were counting on these policies to lapse, were now forced to keep their end of the contract, resulting in more payouts over time. Although the insurers did not care about the financial condition of the insured when the policy was written, as that information does not at all increase or decrease the likelihood of death, the insurer began using the financial information in applications as a pretext to rescind policies.

The Trustee argues that AXA failed to establish the Insured's actual net worth and income, and the materiality of financial information. The Trustee also argues that the sole purpose of AXA's motion is to stay their obligation to produce discovery, *to wit*: all applications in policies that it issued to insureds over 80 years old with a face value over $5 million. AXA is required to prove by reference to its past behavior, that it would not have issued the policies had the Insured's true net worth been revealed. The only evidence that AXA can point to is the deposition of the Insured's son Gary, since her other son Martin did not testify and the Trustee did not know the Insured. Gary testified that he did not know of any assets owned by his mother, but also testified that he was estranged from his mother in all respects and did not even know she had any life insurance. A fact finder could find that the Insured did not discuss her financial state with an estranged son. Thus, AXA cannot establish the Insured's financial condition.

Further, the evidence of the Insured's financial condition at the time of her death and in

1987 concerning the cooperative apartment, is irrelevant, as AXA must show her financial condition at the time of the applications.

And, in none of the three affidavits submitted by AXA does AXA explain how the Insured's financial state changes the risk that AXA faces. AXA does not provide any examples of its past behaviors concerning similar risks, as required. For example, in another unrelated case, AIG's discovery production indicated that 82% of the policies issued violated the underwriting guidelines purportedly in use at the time. Thus, AXA cannot rely on the conclusory affidavits of its underwriter to prove materiality.

Thus, the motion is premature since document production and the deposition of AXA concerning AXA's past behavior has not been completed. An insurer attempting to void a policy for material misrepresentations must produce other similar policies containing similar representations. Since the Trustee failed to support its motion with any specific applicants who were denied coverage under similar circumstances, its motion must be denied.

Reply

AXA must only show, and has shown, that (1) the Insured grossly overstated her income and assets on her applications, (2) her second application falsely claimed that she had no other life insurance policies in force or applied for, and (3) these misrepresentations were highly material in AXA's underwriting process.

AXA contends that the discovery issue is a fabrication, as no order or directive exists directing the production sought. When the parties appeared in Court regarding such discovery, the Court denied the Trustee the very discovery sought. When asked to reconsider its denial of the discovery sought by the Trustee, the Court advised that although it granted similar discovery

to another plaintiff in a wholly unrelated matter, AXA should be given an opportunity to review the underlying papers and transcript in the unrelated matter and respond accordingly. The Trustee later provided some of the documents requested, noting that the transcript would later be provided. However, the transcript was never provided. The Trustee never further pursued its reconsideration request with AXA or the Court, until now in response to AXA's motion. Thus, AXA did not violate any order.

Further, the Trustee's opinion of the insurance industry is unsupported, inadmissible, and refuted by the facts of this case. Nor can the Trustee's opinion raise an issue of fact.

The falsity of the financial misrepresentations is clearly proven, and the Trustee failed to identify an issue of fact as to whether the Insured's finances were nowhere near the $10.1 million in assets and $825,000 in income she claimed they were. Evidence from the insured's son, who never testified that he was estranged, and from the Trustee, is highly relevant and telling. Further, both Martin and Gary swore in Probate Court that their mother had limited assets at the time of her death, and neither they nor their siblings inherited any money from his mother's estate. Also, Martin's written statement may be received as a declaration against pecuniary interest because he is unavailable (having asserted his 5th amendment rights) and was a 5% beneficiary of the Trust. It was against Martin's pecuniary interest to provide a written statement during AXA's claims investigation. Further, the Insured's financial misrepresentations were material to AXA's underwriting because the affidavits and Underwriting Guidelines establish that the false representations at issue were actually reviewed and relied upon in the underwriting process and that the policies would not have been issued but for those misrepresentations.

Summary judgment can be granted as issue has been joined, discovery has been underway for well over a year, and AXA has fully responded to the Trustee's interrogatories and document demands. Also, the Trustee failed to establish that additional discovery would yield material evidence. The two highly detailed and first-hand affidavits, coupled with AXA's written underwriting guidelines and contemporaneous underwriting notes, establish that the false representations were relied upon and that the policies would not have been issued but for the misrepresentations.

And, information obtained in another case against another insurer is wholly irrelevant and insufficient to defeat summary judgment. Likewise, other purported AXA insurance applications, lacking in financial statements, do not establish that AXA actually issued such policies without regard to AXA's Underwriting Guidelines.

Finally, the Trustee made no attempt to refute the independent basis for summary judgment on the Insured's $3 million policy that she made a material misrepresentation concerning other life insurance policies pending or in force.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op. 51390 [Sup Ct New York County 2003]). Thus, defendant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to

demonstrate the absence of any material issues of fact (*Winegrad v New York Univ Med. Ctr.*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

To defeat a motion for summary judgment, the opposing party must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212[b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

New York Insurance Law § 3105(b) provides:

> No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was *material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.*
> (Emphasis added).

"A misrepresentation is defined by statute as a false '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" (*Mutual Benefit Life Ins. Co. v JMR Electronics Corp.*, 848 F.2d 30, 32 [2d Cir.

1988] quoting NY Ins. Law § 3105(a)). Here, the representations made by the Insured concerning her financial worth at the time of both of her applications, and the absence of any other pending insurance policies as to the $3 million policy, were false.[2] As indicated in the Petition for Letters of Administration signed by Martin, when the Insured passed away, the only surviving relatives were the Insured's three children, Martin, Gary and Sheryl and the Insured's and the value of any of her real property "is less than $225,000." In his "Affidavit for Dispension of Bond," Martin stated that "based on conversation [he] had with [his] mother *prior to her death*," she "was not engaged in any business." Martin also gave a statement in connection with AXA's investigation in 2007, wherein he stated, that his mother was a bookkeeper but was unemployed since 1983; the Insured's income derived from Social Security, and that Gary went through their mother's apartment and found nothing indicating her assets; "no stocks were found"; "no broker statements (for stocks or bonds), nothing." According to Martin, the Insured "she did not own any property - anywhere"; "had no other residence and no vacation home. She owned no vehicles." In the "Affidavit in Relation to Settlement of Estate Under Article 13, SCPA" Gary stated that Insured had $7,100 in her savings and checking account. Gary testified that he did not know of any assets, including real estate or investment property, held by the Insured, and that he cleaned out his mother's studio apartment after her death. Gary did not recall finding any papers, bank account statements, deeds, evidence of a safe deposit box, or any documents reflecting his mother's financial condition.

Furthermore, the record indicates that the "charitable" purpose of these policies was also

[2] In opposition, the Trustee states "AXA was lied to with regard to [the Insured's] net worth or income, Mr. Ashkenazi was lied to, as well" as Mr. Ashkenazi had no "independent knowledge concerning [the Insured's] net worth or income." (Opp p. 1)

undisclosed. According to the Trustee's deposition, the Trust at issue was one of the beneficiaries of the life insurance policies at issue, and the Trusts have a charitable purpose, *i.e.*, to donate monies to an organization entitled "Mesamche Lev."

None of the statements above are contested. Further, the Trustee, who does not claim that he is unable to obtain the Insured's financial information to challenge AXA's claim of falsity, submitted no documentary evidence or affidavit to corroborate the financial representations made in the applications.

Furthermore, with respect to the $3 million policy, it is uncontested that the representation by the Insured that there were no other policies in force or pending was false. While the second application only disclosed the existence of the $5 million AXA policy, it did not disclose the pending Lincoln Life policy. Therefore, the record demonstrates that the Insured's representations in both applications concerning her financial worth, and the representation in the $3 million policy concerning the existence of other life insurance policies, were false.

The remaining issue is whether AXA established, as a matter of law, that the misrepresentations above were "material" under New York Insurance Law.

A misrepresentation is material if it "seriously interferes with the exercise of the insurance company's right to accept or reject the application," (*New England Life Ins. Co. v Taverna*, 2002 WL 718755 [EDNY 2002] citing *Process Plants Corp.*, 53 AD2d 214, 216 [1st Dept 1976]), and "knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract" (*New England Life Ins. Co.* citing *Mutual Benefit Life Ins. Co.*, 848 F2d at 32 (quoting NY Ins. Law § 3105(b)). Generally, materiality is a

question of fact to be determined at trial; however, "where the evidence concerning materiality is clear and substantially uncontradicted, the matter is one of law for the court to determine" (*New England Life Ins. Co.* citing *Mutual Benefit Life Ins. Co.*, 848 F2d at 32).

The burden is on the insurer, AXA, to establish that it would have rejected the applications if it had known the undisclosed information, and summary judgment cannot be granted unless the insurer comes forward with proof that it would not have issued the policy had it known the undisclosed facts (*First Financial Ins. Co. v Allstate Interior Demolition Corp.*, 193 F3d 109 [2d Cir 1999] citing *Feldman v Friedman*, 241 AD2d 433, 661 NYS2d 9 [1st Dept 1997]). To meet the burden of proof on materiality, an insurer must submit evidence of its underwriting practices with respect to similar applicants (*First Financial Ins. Co.* citing *Sonkin Assocs. v Columbian Mutual Life Ins. Co.*, 150 AD2d 764 [2d Dept 1989] [insurer submitted neither the "underwriting manual" nor any "testimony about its underwriting practices with respect to similar applicants"]; *Cutrone v American Gen. Life Ins. Co.*, 199 AD2d 1032, 606 NYS2d 491, 491 [4th Dept 1993] ["To meet that burden, defendant [insurer] was required to adduce proof concerning its underwriting practices with respect to applicants with similar conditions]).

A "court, in finding a material misrepresentation as a matter of law, generally relies upon two categories of evidence, an affidavit or testimony from the insurer's underwriter who testifies that the insurer would not have issued the particular contract it did had the facts been disclosed and the insurer's underwriting manual, guideline manuals or rules (*New England Life Ins.*; *Kroski v Long Island Sav Bank FSB*, 261 AD2d 136, 689 NYS2d 92 [1st Dept 1999] [underwriter's affidavit and guidelines demonstrated insurer's underwriting practices and were fact specific to

the non-discretionary denial of coverage for persons with non-insulin dependent diabetes mellitus and peripheral vascular disease, the conditions at issue]; *Feldman v Friedman*, 241 AD2d 433, 661 NYS2d 9 [1st Dept 1997]; *Crotty v State Mutual Life Assurance Co. of America*, 80 AD2d 801 [1st Dept 1981] [where underwriting manual specified that where a suicide had been attempted, no life insurance policy was to be issued for at least one year, by reason of the withheld information, the policy was issued less than five months after the recorded suicide attempt. Under these circumstances, materiality is established as a matter of law]). As the court may not rely merely on statements by the insurer that it would not have issued the policy but for the representation (*see Feldman*, at 433; *Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 437 [3d Dept 2003] [conclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient 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, to establish that it would not have issued the same policy if the correct information had been disclosed in the application (*Curanovic* [where insurer had no written underwriting policies on the topic of plaintiff's misrepresentations and the conclusory affidavits by its employees were insufficient as they did not identify a written underwriting policy or any specific applicants with similar histories that were denied coverage] citing Insurance Law § 3105 [c]).

Thus, to establish materiality of misrepresentations in an application for insurance, as would warrant rescission of the policy, the insurer must submit documentation such as the insurer's underwriting manual which pertains to insuring similar risks, and testimony of the insurer's underwriter or other qualified employee (*Precision Auto Accessories, Inc. v Utica First*

Ins. Co., 52 AD3d 1198, 859 NYS2d 799 [4th Dept 2008], citing *Curanovic; Courtney v Nationwide Mut. Fire Ins. Co.*, 179 F Supp2d 8 [NDNY 2001] [Defendant's submission of the affidavit of an underwriting specialist, and the Company's underwriting standards supports defendant's position that if plaintiffs had truthfully disclosed information about the prior judgments rendered against them and their prior losses, plaintiffs would have been denied insurance coverage]; *see also Cohen v Mutual Ben. Life Ins. Co.*, 638 F Supp 695 [EDNY 1986] ["A determination of materiality . . . may be based on evidence of the insurer's practice with respect to similar risks, *as shown by such documents as the insurer's underwriting manuals or rules, and by testimony of a qualified employee of the insurer* that the insurer would not have issued the particular contract it did had the facts been disclosed" [emphasis added]).

Here, AXA has submitted the Underwriting Guidelines, which explain the purpose of financial underwriting, a term which describes the process of evaluating an applicant's financial status. In defining "financially justified," AXA's Underwriting Guidelines state that

> the theory behind financial underwriting is to have a method that screens out . . . speculation . . . . The signs are weakly defined motivation or overinsurance . . . . No matter what the plan or purpose of insurance, as long as there is a death benefit, the underwriter must have some economic-related basis of selection. The process underwriters utilize is called financial underwriting.
> (Exh. A, Peterson Affidavit, AZA 00724)

The Guidelines further provide:

> Special attention should be paid to all circumstances of the application *on older aged individuals, at ages when the need for insurance is usually diminished* . . . . Those who are still self-supporting with dependents or with estate tax problems can be considered for amounts *within the PERSONAL INSURANCE GUIDELINES* when the need for coverage is clear. *Higher amounts may be considered for tax problems with knowledge of the approximate value of the estate.*
> (Emphasis added)
> (AXA 000726)

For non-professionals, the table is as follows:

Ages	Factor x Income
18-45	15
46-55	10
56-60	7
61-65	5
66 and over	IC [Individual Consideration]

As to older applicants, the Guidelines explain:

> Special attention should be paid to all circumstances of the application on older aged individuals, at ages when the need for insurance is usually diminished and the prospect of death is less unpredictible. Those who are still self-supporting with dependents or with estate tax problems can be considered for amounts within the PERSONAL INSURANCE GUIDELINES when the need for coverage is clear. *Higher amounts may be considered for estate tax problems with knowledge of the approximate value of the estate.* (Emphasis added).

AXA has also provided detailed affidavits of two of its underwriting agents, describing the various portions of the Underwriting Guidelines. According to AXA, life insurance is designed to replace or preserve wealth or income that is lost due to an insured's death, rather than create wealth or income.

As explained by AXA underwriter, Barbara Peterson ("Ms. Peterson"), an elderly person would ordinarily qualify for coverage only if the amount applied for was either "(1) . . . an acceptable multiple of his or her stated annual income (income replacement purposes)," or (2) "was consistent with the estate taxes that would be due based on the likely net worth of the insured at the time of death (estate preservation purposes)." Mr. Godin expressly relied upon the Insured's representation that she had a net worth of over $10 million and an annual income of $825,000, and based on that representation, the $5 million policy was issued. According to Ms. Peterson, this approval was well within AXA's Financial Underwriting Guidelines since the

estate tax due would likely have well-exceeded the amount of insurance for which the Insured applied.

In approving the $3 million, Mr. Godin reviewed the representations made in the Insured's application, including her representations that she had no other pending or in force insurance and a net worth of over $10 million, and applying AXA's practice of determining the projected estate tax that would be due on the Insured's estate, and determined that it would be approximately $8,255,500. Thus, the maximum permitted insurance from all companies would be approximately $8 million. Accordingly, Mr. Godin indicated that AXA would not issue another $5 million as requested, but that a $3 million policy was justified.

According to Ms. Peterson, AXA would not have issued these two policies it had known that the Insured "had no material annual income and net worth of less than $250,000." The record adequately demonstrates that in approving the $5 million and $3 million policies, AXA applied its Guidelines, including the estate planning financial underwriting practice of attempting to approximate the amount of estate taxes that would likely be due on the insured's estate (at the time of death), in order to determine the maximum amount of life insurance that would be appropriate. Further, based on AXA's Guidelines, AXA would never had issued the two insurance policies it did with a face value of $5 million and $3 million, had the Insured been truthful about her financial net worth and, as to the $3 million policy, about the existence of other pending Lincoln Life insurance policy. And, as to the $3 million policy, the effect of these misrepresentations especially in combination, must be said to have deprived AXA of freedom of choice in determining whether to accept or reject the risk.

Additionally, Ms. Peterson stated that had the charitable purpose been disclosed, the

subject policies would clearly not have been issued by AXA, since issuance of the policies would have violated AXA's Financial Underwriting Guidelines. The Financial Underwriting Guidelines provide:

> On occasion, one encounters an application payable to charity. This type of case *necessitates a review of the individual's income and net worth, plus the proposed insured's past pattern of charitable giving*, considering such factors as:
>
> 1. The overall involvement of the insured with the charity listed as owner and beneficiary.
> 2. The correlation between the amount of the life insurance application and the loss to the charity if the individual were to die prematurely.
>
> AXA considers reasonable, for purposes of charitable giving, a face amount equal to the applicant's total "personal insurance" in force if this amount is commensurate with past contributions.[3] However, the combination of "regular" personal insurance personal insurance and insurance payable to charity *may not exceed the total line of personal insurance available under normal circumstances* (see personal insurance factor chart). (Emphasis added).

According to Ms. Peterson, applications for policies payable to charity will be issued in very limited circumstances where the insured's net worth, personal insurance in force, and history of giving support the issuance of insurance in an amount commensurate with the insured's past contributions. Further, the amount approved for charitable giving should not in any event exceed the amount of personal insurance for which an applicant would otherwise qualify. Therefore, Ms. Peterson attests that AXA would never have approved issuance of a multi-million dollar policy or her life for the benefit of a charity had AXA known of the Insured's true finances. The applications would have been denied also because there was no

[3] The Trustee testified that the charitable organization, Mesamche Lev, raises millions of dollars every year from contributions and "life insurance."

commensurate history of prior giving to Mesamche Lev, and the amount would in any event have far exceeded that for which the Insured would otherwise have qualified based on the Insured's modest finances.

This is not an instance where the affidavit of the underwriter is conclusory (*cf. Feldman* at 434 [The conclusory, self-serving affidavit of defendant's employee that the insurer would not have issued the policy but for the misrepresentations is not enough, by itself, to support the insurer's burden. . . . Likewise, "portions of the underwriting manual" reveal merely a list of psychiatric disorders without any explanation whatever concerning how these guidelines impacted upon the issuance of the subject life insurance policy]; *Schirmer v Penkert*, 41 AD3d 688, 840 NYS2d 796 [2d Dept 2007] [citing the premise that "Conclusory statements by insurance company employees, *unsupported by documentary evidence*, are insufficient to establish materiality as a matter of law]; *Tuminelli v First Unum Life Ins. Co.*, 232 AD2d 547, 648 NYS2d 967 [2d Dept 1996] [defendant must adduce proof as to its underwriting practices with respect to applicants with a history of hepatitis; the only evidence in the record on this issue is a conclusory statement by one of the defendant's senior underwriters]; *Parmar v Hermitage Ins. Co.*, 21 AD3d 538, 800 NYS2d 726 [2d Dept 2005] ["conclusory statement by the defendant's underwriter to the effect that it would not have issued the Policy had it known that the Premises included a third apartment, located in the basement, was insufficient to establish materiality as a matter of law"]; *Iacovangelo v Allstate Life Ins. Co. of New York, Inc.*, 300 AD2d 1132, 750 NYS2d 920 [4th Dept 2002] [although affidavit was supported by underwriting guidelines, the guidelines concerning tumors of the respiratory system and mediastinum are not probative because there is no evidence that decedent made material misrepresentations with

respect to those conditions; also underwriting guidelines concerning chest pain established only that an application by decedent disclosing his history of chest pain "would have triggered a review by an underwriter, not that the application would have been denied"]).

The Underwriting Guidelines herein, *i.e.*, the economic-related basis and tables, support the affidavits of the underwriters wherein they explain that the policies at issue would not have been approved but for the misrepresentations made by the Insured.

In opposition, the Trustee fails to raise an issue of fact as to the contents of the Underwriting Guidelines or the affidavits of AXA's underwriters. Furthermore, discovery of other "policies AXA issued in the four year period surrounding the Zablidowsky application to insureds over 80 years old and with a face value of over 5 million" is unwarranted and would not, in any event, lead to any material facts that would raise an issue as to whether AXA would have denied the applications if it had knowledge of the Insured's true financial net worth.

First, the Court did not direct the production of such records, but in fact, denied the request and no renewal or reargument motion was made by the Trustee. Upon a letter request for reconsideration of the Court's denial, the Court directed the Trustee to provide AXA with the underlying papers and transcript of another STOLI type case, in order that AXA could address whether the Court should permit the discovery sought by the Trustee. Although the Trustee provided some of the documents, the Trustee never provided AXA with the transcript, or further pursued this opportunity with the Court.

In any event, the discovery sought by the Trustee, *to wit*: any *applications* of 80-year olds for $ 5million policies that AXA in fact issued, would not reveal that AXA did not rely upon or consider the financial net worth of such applicants or even the Insured. The test of materiality "is

not whether the company might have issued the policy even if the information had been furnished; the question in each case is whether the company has been induced to accept an application which it might otherwise have refused" (*New England Life Ins. Co.* quoting *Geer v Union Mutual Life Ins. Co.*, 273 NY 261, 269). While the First Department in *Peterson v New England Mut. Life Ins. Co.* (33 AD2d 547, 304 NYS2d 846 [1st Dept 1969]) directed the production of "any documentary proof . . . whether such proof be in the nature of supporting rules or manuals reflecting underwriting standards, *or references to past experiences involving the same or diseases similar to the one at issue*, to buttress the conclusion that if defendant had known the medical history of the insured the policy would not have been accepted," the applications sought herein are being sought to demonstrate that AXA would have approved the Insured's applications notwithstanding the net worth of the Insured. However, the applications in and of themselves would be inconclusive, as applied to the Trustee's theory of the case. The parties would be required to open every file of such application, determine what AXA relied upon, and to what degree, where such determinations are made on a case by case basis, since policies issued to individuals "66 and over" are given "IC [Individual Consideration]." Such discovery would be warranted if this were a class action, but such is not the case. Notably, this motion concerns dismissal of the Trustee's first cause of action for breach of contract, and *not* dismissal of the General Business Law (deceptive and/or unfair settlement practices) claim. Such discovery would not disclose whether AXA rescinds policies based on falsely reported net worth. The applications would not show or establish that net worth was not a material factor for AXA. Unlike the cases cited by the Trustee, where discovery of other policies was based on a particular illness that was undisclosed, the undisclosed fact at issue is the fact that the net worth

of the Insured was less than $225,000, which, according to AXA, would never support the policies issues. Applications of 80-year old individuals for $5 million policies would not establish that individuals, such as the Insured, having a net worth of *less than $225,000* were still issued policies of $5 or $3 million. The discovery sought is not directly relevant to the breach of contract claim, and is remote to the specific issue at hand.

Therefore, having failed to raise an issue of fact or demonstrate that further discovery warrants denial of the motion, the Trustee failed to overcome AXA's showing of entitlement to summary judgment. Consequently, AXA's motion for summary judgment dismissing the breach of contract claim of the Trustee and granting AXA's second counterclaim for rescission is granted.

Conclusion

Based on the above, it is hereby

ORDERED and ADJUDGED that the motion by defendant AXA Equitable Insurance Company for summary judgment dismissing the breach of contract claim of the plaintiff, Alexander Ashkenazi as Trustee of the Zablidowsky Life Insurance Trust, is granted; and it is further

ORDERED that the first cause of action for breach of contract is severed and dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED and ADJUDGED that the motion by defendant AXA Equitable Insurance Company for summary judgment on its second counterclaim for rescission, is granted; and it is further

ORDERED that the parties appear for a further discovery conference as to AXA

Equitable Insurance Company's remaining claim for violation of General Business Law §349; and it is further

ORDERED that AXA Equitable Insurance Company 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: December 16, 2009

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

HON. CAROL EDMEAD